IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff/Respondent,<br><br>v.<br><br>MORRIS SOLOMON, JR.,<br><br>Defendant/Appellant. | CAPITAL CASE<br><br>Crim. S029011<br><br>(Sacramento Co. No. 84641) |

**Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Sacramento**

**HONORABLE MICHAEL J. VIRGA AND PETER N. MERING, JUDGES**

# APPELLANT'S REPLY BRIEF

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# APPELLANT'S REPLY BRIEF

## I.

## INTRODUCTION

In crafting Respondent's Brief [RB], the state observes three rules: 1) If a fact in the record supports a defense claim or hurts the state's rebuttal, it pretends it does not exist. 2) If a case or holding or legal principle helps appellant or hurts the state, it pretends that it, too, does not exist. 3) If that is not sufficient, it concocts a mock legal history that yields the holdings

and principles it thinks it needs to secure an affirmance of the capital conviction and judgment of death.

The fact that the state has written such a brief reflects its recognition that, were the actual law applied to the actual facts, both the guilt and penalty verdicts would have to be reversed. The state makes this particularly clear in the way it responds to the three jury-selection claims (Args. IX-XI) and the three claims that challenge the validity of the first-degree murder verdicts (Args. I-III).

The most obvious example comes in response to Arg. XI. For all intents and purposes, the state explicitly concedes that the voir dire restrictions imposed on appellant constitute reversible error under *People v. Cash*, 28 Cal.4th 703 (2002). The state cannot distinguish *Cash* and does not try to. It argues, rather, that *Cash* and the Court's earlier holding in *People v. Kirkpatrick*, 7 Cal.4th 988 (1994), "must be rejected and overruled." (RB 159-160.) This Court, the state asserts, simply does not understand "The Law of Death Penalty Qualification." (RB 126-157.) According to the state, the Court stated the law "correctly" in a footnote 24 years ago (in *People v. Fields*, 35 Cal.3d 329 (1983)), but then made "potentially misleading" statements in case after case after *Fields* (RB 129, 136, 139, 143-145), culminating in the "utterly wrong" analysis in *Kirkpatrick*. This horror was trumped only by *Cash*, which, in the state's view, was truly "harmful" because it resulted in a penalty reversal. (RB

147-148.) The state claims that *Cash* and *Kirkpatrick* "misconstrued the law gravely," relied on cases that "directly contradict[ed]" their analyses, and analyzed precedent in a way that "created a false impression," was "misleading," and "distort[ed] the holdings" of its prior cases. (RB 143-146, 149.)

One might think that a party brazen enough to make such accusations could back them up with solid legal exegesis. Not in this case. As shown in Arg. XI below, the "Law of Death Penalty Qualification" is a bogus concoction that distorts the holdings in the cases it discusses (including *Fields*) and ignores other holdings that do not support its analysis. Remarkably, the state does not dispute the validity of *any* of the constitutional principles that comprise the framework of *Cash*'s analysis and appellant's claim. Nor does it dispute a single fact relevant to the claim. Indeed, aside from quoting the trial court's ruling, the state's brief completely *ignores* the relevant factual record. (RB 159-160.) As will be seen, the last thing it wanted to do was draw attention to a record that clearly shows that denial of the requested voir dire was fundamentally unfair. It was precisely such unfairness that led to the reversal in *Cash*.

The state also essentially concedes that the excusals for cause of prospective jurors G. and C. were unconstitutional under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *et al.* (Args. IX and X.) This is not as explicit as the concession of *Cash* error but only because the state buries its

responses to the *Witherspoon* claims in its attack on the Court's "death-qualification" jurisprudence. As will be seen, the latter is really directed only at *Cash*. The state makes no serious response to the *Witherspoon* arguments, offering two one-page responses that fail to make *any* reference to *any* point, factual *or* legal, that is made in the opening brief regarding the excusals. The responses contain no legal analysis, leave out almost all of the material facts, and make no reference either to the principal decisions by this Court and the United States Supreme Court cited in the opening brief or to the directly relevant *People v. Stewart*, 33 Cal.4th 425 (2004), which was decided nine months before Respondent's Brief was filed. (RB 157-159.)

The state's responses to Arguments I-III are much longer but evidence a comparable degree of desperation. In those arguments, appellant contends that the evidence of premeditation and deliberation was constitutionally insufficient and that the prosecutor's response to the insufficiency was to offer the jury a theory of conviction that defined the mens rea for second-degree murder. The state does not defend the verdicts or the prosecutor's theory under the actual case law. Instead, it makes the astonishing claim that the 1981 amendment of Penal Code §189 so shrunk and altered the definition of premeditation and deliberation that 1) "virtually all intentional murders now satisfy the statutory definition of first-degree murder" (RB 89-90), and 2) it is no longer true that

"premeditated deliberation must occur *prior* to formulation of intent to kill" (RB 87, emphasis in original). As will be seen, the state just makes this up, ignoring the actual statutory history as explicated by this Court. The rest of its argument is no better.

Nor is its Statement of Facts. These infractions are very much related. Many arguments in the opening brief rely on this Court having an accurate understanding of the evidence presented a trial. At the top of the list are Arguments I-III, since the Court cannot very well decide the sufficiency of the evidence or the validity or prejudicial impact of the prosecutor's argument without knowing exactly what the jury knew. Yet the state has submitted a Statement of Facts that recites only the testimony it believes supports the verdicts, then relies on that deficient summary in responding to Arguments I-III. These and other equally disturbing omissions from respondent's Statement of the Case and Statement of Facts are the subject of Parts II and III below.

As will be seen, the problems touched on above are representative of those that taint every aspect of Respondent's Brief. It is reassuring to know that the state recognizes that Mr. Solomon's claims are strong and require reversal. It is most distressing that, rather than expressing that recognition directly, it has responded with a brief that employs highly dubious means to try to keep the judgment of death intact.

## II.

## OMISSIONS FROM RESPONDENT'S STATEMENT OF THE CASE

Respondent's Statement of the Case gives the Court no inkling that the first jury deliberated for 10 full days over the course of a month before returning the verdicts it was able to return. Nor does it give the Court any inkling that the first jury's penalty phase deliberations lasted for three full days before it deadlocked, or that five of those first-trial jurors initially voted for life, or that the retrial jury deliberated for three and a half full days before returning its death verdict. (Compare Respondent's Brief [RB], pp. 2-3, with Appellant's Opening Brief [AOB], pp. 14-16, and cites there.) These omissions form a pattern with those that characterize Respondent's Statement of Facts. Their cumulative ramifications are discussed in §III.D, below.

## III.

## RESPONDENT'S STATEMENT OF FACTS IS IMPROPERLY ONE-SIDED, PRECLUDING THE COURT FROM RELYING ON IT IN ITS DETERMINATION OF ANY OF THE MANY ISSUES RAISED IN THE OPENING BRIEF THAT REQUIRE THE COURT TO KNOW *ALL* OF THE RELEVANT FACTS AND NOT JUST THOSE THAT FAVOR THE PROSECUTION

### A. Introduction

The duty of appellate counsel is clear:

> appellate counsel should be vigilant in providing us with effective assistance in ferreting out all of the operative facts that affect the resolution of issues tendered on appeal. They can accomplish this only by summarizing all of the operative facts, not just those favorable to their clients [citation]....

*Lewis v. County of Sacramento*, 93 Cal.App.4th 107, 113-114 (2001).

*Accord,* Rule 14(2)(C), Calif. Rules of Court[1]

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[1] Rule 14(2)(C) states: "An appellant's opening brief must ... provide a summary of the significant facts". See Rule 33(a) ["briefs in criminal cases must comply as nearly as possible with Rule ... 14"]. While the rules do not require the respondent to include a statement of facts, *Lewis*, logic, and fairness dictate that, when it does include one, it cannot simply cite the facts favorable to itself but must provide a summary of all of the "significant facts" the court needs to know to decide the issues presented.

Respondent's Statement of Facts utterly violates the latter proscription. It does not "summariz[e] ... all of the operative facts...." The guilt phase section is blatant in its impropriety. It recites only the testimony it believes supports the verdicts, states it as unequivocal Truth, and repeatedly fails to apprise the Court of the testimony -- *all* of which was given by the prosecution's own witnesses -- that undermines or contradicts the unequivocal assertions it makes. The most significant omissions will be noted in §B below.

The guilt phase omissions, furthermore, also directly taint the penalty phase section of Respondent's Statement of Facts. The entire guilt phase case was reprised for the new jury that was seated for the penalty retrial. Because that evidence was "substantially the same as [that presented] in the guilt phase," Respondent's Statement of Facts does not restate it. (See RB, pp. 42-43.) The state's one-sided guilt phase summary thus doubles as a one-sided summary of the evidence the retrial jury heard regarding "the circumstances of the crime[s]" and related factors. (Pen. Code, §190.3, factors (a), (d), (h), (k).)

Respondent's Statement of Facts goes on to provide a full summary of the rest of the prosecution's case in aggravation -- i.e., the factor (b) and factor (c) evidence. (RB 43-50.) Its summary of the evidence in mitigation, by contrast, is extremely skimpy. (RB 50-60.) The result is a

lopsided summary that bears no relation to the proportion of aggravating and mitigating evidence that the retrial jury actually heard. (See §C below.)

At the very least, the Court should mark its copies of Respondent's Brief: "Caveat Lector: Do Not Rely on Respondent's Statement of Facts for a Fair, Objective, or Complete Understanding of the Evidence Presented at Trial." [2]

The misleading and incomplete Statement of Facts taints the Argument section of the state's brief as well. Many of the issues raised in Appellant's Opening Brief require the weighing of the evidence presented at trial -- e.g., Arguments I-III [taking as their premise the insufficiency of the evidence of premeditation and deliberation] and all of the guilt and penalty arguments that require harmless-error analysis. To the extent the state responds to the latter arguments, it does so based on its unbalanced Statement of Facts, never filling the gaps that the latter leaves.

Without knowing and weighing *all* of the relevant facts, this Court cannot properly evaluate appellant's insufficiency claim,[3] his claims of

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[2] Respondent, it will be noted, has not complained about the accuracy or completeness of the Statement of Facts in Appellant's Opening Brief. The latter contains virtually every fact stated in Respondent's Brief, plus all of the significant facts that the latter leaves out.

[3] See *People v. Johnson*, 26 Cal.3d 557, 576-577 (1980) ["In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court ... does not ... limit its review to the evidence favorable to the respondent.... [W]e must resolve the issue in the light of the whole record - i.e., the entire picture of the defendant put before

guilt phase prejudicial-error,[4] or his claims of penalty phase prejudicial error.[5] Respondent's Brief does not provide the Court with the facts it is required to know.

Respondent's incomplete Statement of Facts is thus not just an abstract concern or a violation of the duty described in *Lewis v. County of Sacramento* and implied in Rule 14(2)(C). It means that, for this Court to engage in a meaningful and proper evaluation of the fact-based arguments in Appellant's Opening Brief, it cannot rely on Respondent's Brief.

The details are set forth below. In §§B and C, appellant describes more specifically the deficiencies in Respondent's Statement of Facts. In §D, he elaborates on the link between those deficiencies and the substantive issues raised in the opening brief.

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the jury - and may not limit our appraisal to isolated bits of evidence selected by the respondent"; emphasis in original]. Accord, *U.S. v. Dingle*, 114 F.3d 307, 310 (D.C. Cir. 1997) ["In assessing the sufficiency of the evidence ... {pursuant to} *Jackson v. Virginia,* 443 U.S. 307, 319 ... (1979) ..., ... on appeal the court look{s} ... to the entire record, and not simply to the evidence in the government's case-in-chief"].

[4] See, e.g., *Rose v. Clark*, 478 U.S. 570, 583 (1986) [*Chapman* analysis "requires consideration of the entire record"]; *People v. Breverman*, 19 Cal.4th 142, 165 (1998) [harmless error analysis under *Watson* requires "examination of the entire record"].

[5] Cf. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) ["In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence"]. Accord, *In re Lucas*, 33 Cal.4th 682, 733 (2004). See *People v. Massie*, 19 Cal.4th 550, 566 (1998) [Penal Code "Section 1239(b) ... 'imposes a duty upon this court "to make an examination of the complete record"'" in capital cases].

## B. The State's Recitation Of The Evidence Presented At The Guilt Phase Leaves Out The Impeachment Evidence And The Evidence Favorable To Mr. Solomon

### *1. Background guilt phase facts omitted from Respondent's Statement of Facts*

Appellant's Opening Brief recounts the testimony of, *inter alia*, six women - four who worked as prostitutes (Mss. Whitfield, Whiteside, Suggs, and Sheppard), one of Mr. Solomon's housemates on 19th Avenue (Ms. Stevens Orizaba-Monroy), and his platonic friend and bookkeeper (Ms. Shavers). All were prosecution witnesses in the guilt phase, believed Mr. Solomon had committed the crimes with which he was charged, and gave testimony helpful to the prosecution. Appellant dutifully cites the latter testimony. (See AOB, pp. 27-72.) In the "Background" section of his guilt phase Statement of Facts, however, appellant *also* summarizes what the women had to say about the *positive* character traits that made Mr. Solomon a distinctive human being in their lives, a "safe spot" in the not-so-safe world they inhabited: e.g., his capacity for friendship, caring, generosity, reliability, and hard work. In addition, three of them (Mss. Whitfield, Whiteside, and Suggs) testified to the gentlemanliness and gentleness he displayed in his sexual relations with them,[6] and two of them

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[6] Ms. Sheppard said the same thing in her retrial testimony. (See AOB 74.)

(Mss. Orizaba-Monroy and Shavers) testified that he displayed similar qualities after they *rejected* his overtures to have such relations with them. (See AOB 19-25 and citations there.)

Respondent's guilt phase Statement of Facts cites a great deal of testimony by the six women named above -- but *only* when that testimony arguably supports the convictions. (See, e.g., RB 6-41.)[7] Respondent even has a special section at the end of its guilt phase facts recounting some of the uglier statements Mr. Solomon allegedly made to Ms. Orizaba-Monroy. (RB 41.) Respondent's guilt phase Statement of Facts makes *no* reference to *any* of the positive testimony recounted at AOB 19-25. [8]

2. *Facts omitted from Respondent's Statement of Facts regarding the first-degree murder convictions*

(a) Count 7: Yolanda Johnson [9]

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[7] Respondent's Statement of Facts hardly ever names the witness who gave the testimony on which an assertion of fact is based. This makes it especially hard for the Court to discern that the state is relying on a witness who Appellant's Statement of Facts shows: 1) gave more favorable testimony than the state reports; or 2) was thoroughly impeached.

[8] The substantive relevance of the omitted testimony is discussed in §D below.

[9] Within each verdict-category (i.e., first-degree, etc.), appellant discusses the counts in the order in which the prosecutor presented the evidence, just as he did in the opening brief. Respondent discusses them in the order in which the counts appear in the Information.

With regard to Yolanda Johnson, the state asserts: "Contemporaneous external examination revealed that very distinctive ligature marks were present on Yolanda's neck and wrists." (RB, 15.) That was Officer Youngblood's testimony. (19 RT 11043.) The state fails to note that his partner, Officer Coyle, was not so presumptuous as to think he knew what caused the indentation he observed. (19 RT 11170, 11172.) More importantly, the state wholly omits the evidence that: 1) the deputy coroner who examined the body, Robert Brian, made no note on the Coroner's Investigative Worksheet or in his Case Supplement of having seen any possible ligature marks or any other marks indicating the possibility that death had been caused by violent means; and 2) the coroner himself, Dr. Robert Anthony, testified that the only kinds of ligatures that could have left the marks in question were soft, wide ones, there was no evidence of foul play or defensive injuries, and the marks could have had many causes having nothing to do with the cause of death. (See AOB 35 and citations there.) Respondent's Statement of Facts thus does not fairly report the facts regarding cause of death.

Nor does it do so with regard to motive. The state asserts: "[A]ppellant remarked to Vernell Dodson that he was 'going to kill that bitch' - referring to Yolanda as she passed by ...." (RB 17.) The state does not name the source of the latter assertion (see earlier footnote). The source is Dodson's own testimony. What the state does *not* report is the

impeachment evidence provided by others that: 1) Dodson had suffered two convictions for assault and three for crimes of dishonesty;

2) Dodson did not report the incriminating statement allegedly made to him by Mr. Solomon when Dodson heard that Ms. Johnson had been found dead, but waited nearly a year until he was in prison on a parole violation and was looking for a deal; 3) Dodson did not contact authorities again until he went back to prison; 4) the story he told the police was inconsistent in several respects with the testimony he gave at trial; 5) Dodson, according to prosecution witness Rose Fuller, had never sat on the steps shooting the bull with appellant but had once tried to kill her sister; and 6) Dodson, according to Pam Suggs, was a "crazy man" who had once hit her. (See AOB 39-40 and citations there.) [10]

(b) Count 9: Maria Apodaca

Similar omissions occur in the state's summary of the other first-degree murder convictions. With regard to Maria Apodaca, for instance, the state reports that Mr. Solomon told detectives he did not know her. The state then asserts as unequivocal fact that "Maria had been in appellant's … Broadway residence several times" and that "Maria had been in appellant's company in his bedroom at the 19th Avenue residence." (RB 32.) Mr.

[10] Dodson's lack of credibility was such that the prosecutor did not recall him at the retrial.

Solomon, the Court is meant to conclude, was both a liar *and* had a prior proven connection to Ms. Apodaca.

The actual record, however, creates reasonable doubt on the subject. The testimony regarding the Broadway residence (by Pam Suggs) was contradicted by three other prosecution witnesses: Ms. Whitfield (Snoopy), Terry Hetrick, and Rose Fuller. (See AOB 47 and citations there.) The state omits their testimony. The testimony regarding the 19th Avenue residence, furthermore, is a gross distortion of the testimony of Ms. (Stevens) Orizaba-Monroy. Ms. Orizaba-Monroy recalled that appellant had come by once with a woman named Chris who had a tattoo like the one Apodaca had. Chris was maybe 9 years older than Apodaca (27, not 18), however, and Ms. Orizaba-Monroy ended up saying that she did *not* think the woman in Exhibit 364 (Apodaca) was the woman she had seen. (See AOB 47-48 and citations there.) The state omits all of these contrary details. Its summary is flat-out misleading.

(c) Count 10: Sharon Massey

That is equally true regarding its summary of the evidence regarding Sharon Massey. The state asserts as unequivocal fact that Mr. Solomon had twice been seen "in appellant's company." Once, allegedly, was "at an establishment [known as The Log] where locals congregated in the parking lot and drank alcoholic beverages." The other was "[o]n or about September 16, 1986, [when] Sharon had smoked rock cocaine at the 19th

Avenue residence … with appellant, Cedric McGowan, Ronnell Birdon, and other women." (RB 32.)

The actual record casts significant doubt on the first claim and shows that the second is simply false.

The "parking lot" claim is based on something Snoopy said to Det. Pane. The alleged sighting, however, occurred before Ms. Massey had even moved to Sacramento. At trial, Snoopy acknowledged that she might have been confusing the person depicted in the photo (of Ms. Massey) that she had been shown with another woman (whom she named). (See AOB 57 and cites there.) That seems highly likely given that Snoopy said the woman she was talking about was a prostitute (25 RT 12850) and Ms. Massey had a full-time job at Sutter Hospital (33 RT 15515). As Snoopy said at trial, furthermore, Mr. Solomon "never went" to the Log, much less hung out there (25 RT 12850), an assessment consistent with the description of Mr. Solomon by the other "working girls" who knew him well (AOB 19-25). The state's brief provides the Court with none of the foregoing details and thus no inkling that a reasonable juror could have doubted that Snoopy saw Mr. Solomon and Ms. Massey hanging out in The Log's parking lot.

The state's assertion that Ms. Massey smoked crack with Mr. Solomon at 19th Avenue is not just weak. The record effectively demonstrates that it's false.

The assertion (judging from its RT cites) rests on the testimony of Cedric McGowan. Mr. McGowan, however, did not say that *Sharon Massey* had smoked crack with Mr. Solomon and himself. What he said was that Mr. Solomon was supposed to bring his new female friend over. Mr. McGowan said her name was "Barbara" and said she was the woman depicted in Trial Exhibits 475-476, which were photographs of Barbara Shavers. (25 RT 13133-13135; 27 RT 13544.) When Mr. Solomon arrived, Mr. McGowan said, there were *three* women with him: Barbara, Barbara's sister (whose name Mr. McGowan he did not recall), and their cousin, "Janice." (25 RT 13132-13135.) Mr. McGowan said the woman depicted in Trial Exh. 454 (a photograph) was "Janice." The photo actually depicted Ms. Massey but Mr. McGowan did not say it was "Sharon." He said it was Barbara's cousin, "Janice." (25 RT 13132.) Subsequently, Ms. Shavers testified. She completely confirmed Mr. McGowan's account. She had just met Mr. Solomon the day before. She would go on to become his platonic friend and bookkeeper. (See AOB 24-25.) On the night in question, Mr. Solomon picked her up, probably at her mother's house. She was with her sister Kaite and their good friend, *Janice* (whom they called "cousin"). Mr. Solomon brought all three of them over to his house on 19th Avenue. No other women were in the house that night. (27 RT 13348-52, 13518-29.) Ms. Shavers was shown Trial Exh. 454 (Ms. Massey's photo). She said she did not know the woman. Whoever it was had not been in the 19th Avenue

house that night. Told that the woman's name was "Sharon Massey," Ms. Shavers said she did not know anyone by that name. (27 RT 13353-13354.) [11]

The full record thus makes clear that the state is quite wrong in asserting that the evidence shows that Ms. Massey smoked rock cocaine with Mr. Solomon at the 19th Avenue house. It is rather distressing, to say the least, that the state makes the assertion knowing that the identification on which it is based was mistaken, and -- most egregiously -- fails to bring to the Court's attention any of the testimony that would allow the *Court* to see the truth. (Cf. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) [prosecutor has affirmative duty under Due Process Clause to divulge any significant potentially impeaching facts]; *accord, Banks v. Dretke*, 540 U.S. 668, 691 (2004).) [12]

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[11] It was defense counsel who showed Ms. Shavers the photo of Ms. Massey. The prosecutor did not even ask her if any women had been present besides herself, Kaite, and Janice. (See 27 RT 13518-29.) He presumably had shown her Ms. Massey's photo before she took the stand and thus knew that Mr. McGowan had confused the latter with Janice. At the penalty retrial, when shown the photographs of Ms. Massey (Tr. Exhs. 454-455), Mr. McGowan said he had never seen her before and that she had never been to the 19th Avenue house. The prosecutor did not attempt to impeach him with his mistaken i.d. at the guilt phase. (57 RT 23194.)

[12] It is particularly distressing that the state would affirmatively assert that "Sharon … smoked rock cocaine … with appellant, Cedric McGowan, … and *other women*" (RB 32; emphasis added), without in any way informing the Court that one of those "other women" testified and unequivocally said that Ms. Massey had not been present.

(d) Count 2: Sheila Jacox

The state asserts that Sheila Jacox "knew appellant, having been introduced to him ... when she and [her boyfriend] Patrick picked up Patrick's aunt ... Snoopy ... at appellant's Broadway residence." (RB 8-9.) The record does not support this assertion. At the transcript pages the state cites, Snoopy testified that she had almost certainly introduced Mr. Solomon only to Patrick because Ms. Jacox had remained in the car. (25 RT 12864, 12940.)

Snoopy had told Det. Pane that the introduction had occurred, but said it occurred when she and Mr. Solomon broke into Patrick's house on 11th Avenue. (27 RT 13582-13584.) The state vaguely alludes to that cockamamie story in a footnote but does *not* try to pass it off as reliable. To the contrary, it minimizes the evidence, stating that Snoopy "once may have" claimed the "introduction took place" somewhere other than the Broadway house. (RB 9, fn. 5.) The "may" in the state's footnote is false. The statement was on tape. (27 RT 13582.) Thus, the assertion the state is promoting as the truth -- that Mr. Solomon was introduced to Ms. Jacox at the Broadway house -- is not supported by the record, whereas the cockamamie story that Snoopy actually told -- which was too weird to help the state's case, apparently -- is falsely characterized in order to play it down.

The state also omits other evidence undermining the "introduction-at-Broadway" assertion, namely, the testimony of Terry Hetrick and Rose Fuller that, as far as they knew, no one who looked like Ms. Jacox had ever been at the Broadway house or had been seen with Mr. Solomon. (See AOB 62 and citations there.) Finally, Snoopy told Detective Pane that Patrick had beaten Ms. Jacox up on occasion. This, too, goes unreported by the state, along with the evidence that Ms. Jacox's family suspected Patrick was the culprit. (See AOB 61-62 and citations there.)

*3. Facts omitted from Respondent's Statement of Facts regarding the second-degree murder convictions*

(a) Count 1: Linda Vitela

Respondent's Brief states that the last time Tammy Zaccardi saw Linda Vitela, Ms. Vitela was picked up by a man whom Ms. Zaccardi thought "looked like appellant." The state makes it appear that Ms. Zaccardi got a pretty good look at the man and also makes it appear that her description of the vehicle he was driving was not very different from one Mr. Solomon owned. (RB, 7-8 and fn. 4.)

Neither inference is accurate. The state fails to note that Ms. Zaccardi said she only looked at the driver "for a second." (AOB 59 and cites there.) It also fails to give enough detail for the Court to understand why the prosecutor conceded in closing argument that no one had ever associated Mr. Solomon with the kind of vehicle Zaccardi saw Vitela drive

away in. (See AOB 59, fn. 29) Finally, Respondent's Brief makes no reference to the testimony of two prosecution witnesses who testified that Ms. Vitela was not familiar to them and that they had never seen her in the vicinity of the Broadway house where Mr. Solomon was living during the relevant time frame. (See AOB 59 and cites there.)

(b) Count 12: Cherie Washington

Respondent's Statement of Facts unequivocally asserts: "Cherie visited [Mr. Solomon's 44th Street] residence multiple times ..., including a time when she and appellant were together in his bedroom at the residence." (RB 40.) The assertion is based on the testimony of three witnesses: 1) a neighbor, Juanita Cannon; 2) another neighbor, Jerry Bell; and 3) an acquaintance, Renee Caldwell. The actual record casts serious doubt on the reliability of the sightings they testified to.

First, Ms. Cannon did not know Ms. Washington. The evidence, when viewed *in toto*, indicated that her one alleged sighting of her on the porch of the 44th Street house was probably a sighting of Stephanie Sheppard (who lived there). Mr. Bell, similarly, only saw someone who "may have been" Ms. Washington. The woman he saw, furthermore, was walking on the street with Michelle Sims (who also lived in the 44th St. house), and Ms. Sims testified that she did not know Ms. Washington. Finally, with regard to Ms. Caldwell's alleged bedroom-sighting, her credibility was impeached generally by three prosecution witnesses who

testified that she had lied about many things in her testimony. All three prosecution witnesses who lived in the house with Mr. Solomon, moreover (Ms. Sheppard, Ms. Sims, and Ronnell Birdon), testified that they had never seen Ms. Washington before, much less in the residence. (See AOB 53-54 and citations there.)

The foregoing testimony raised reasonable doubt whether there was a prior connection between Ms. Washington and Mr. Solomon. The state's Brief omits every single word of the testimony that raised that doubt.

*4. Facts omitted from Respondent's Statement of Facts regarding the non-homicide convictions*

(a) Count 11: Sherry Hall

Respondent's Statement of Facts asserts that "appellant encountered, strangled, and raped Sherry H." (RB 32), then proceeds to recount Ms. Hall's testimony as though it were gospel truth (RB 33-35). Three prosecution witnesses, however -- two of Ms. Hall's boyfriends and a neighbor (Steve Becker, Lee Cook, and Joe Long) -- gave testimony that called Ms. Hall's credibility into question regarding both the details of the assault and her claim -- made only after Mr. Solomon's arrest was broadcast on television -- that her assailant was Mr. Solomon. (See AOB 65-66 and cites there.) Respondent's Statement of Facts does not report a single word that any of the three men testified to.

(b) Counts 3-6: Melissa Hamilton

Respondent's Brief describes "the night appellant sexually assaulted" Ms. Hamilton. (RB 12.) It describes Ms. Hamilton's alleged ordeal in graphic and horrendous detail. (RB 11-14.) It reports Ms. Hamilton's testimony that she had had a number of prior encounters with Mr. Solomon, leaving the impression that she knew very well what he looked like and that the evidence raised no doubt at all whether Mr. Solomon was the perpetrator. (*Ibid.*)

The problem is that the impression is quite false. The state simply leaves out every bit of evidence casting doubt on Ms. Hamilton's identification. The evidence shows, *inter alia*:

1) Ms. Hamilton did not go to the police to report the alleged incident. She only told them the story she told the jury when they sought her out after appellant was arrested. (AOB 68; 33 RT 15309, 15323.)

2) At the preliminary hearing, she said she did not tell her boyfriend, Howard Allen, that the perpetrator was Mr. Solomon because: "I didn't know for sure who it was." (AOB 68; 33 RT 15319, 15323.)

3) Howard Allen testified that he found Ms. Hamilton bound and gagged in bed one morning, but that she had said nothing about having being raped. More importantly, she said that she might have seen the assailant before but could not describe or name him. (AOB 69; 34 RT 15626-15632, 15647.)

4) Contrary to Ms. Hamilton's testimony, Allen said he had never seen Mr. Solomon before coming to court. (AOB 69; 34 RT 15645-46.)

5) Ms. Hamilton never told *any* of the people she was close to that her assailant had been Mr. Solomon. (AOB 68; 33 RT 15322.)

6) Respondent's Brief dutifully reports Ms. Hamilton's claim that she had once smoked cocaine with Mr. Solomon and another prostitute in Mr. Solomon's car, thus purporting to establish her prior knowledge of what he looked like. (RB 12.) But the car she described as Mr. Solomon's was one the prosecutor conceded that no one else had associated him with. (AOB 68, fn. 30; 36 RT 16259.) Further, Ms. Hamilton initially said the cocaine-smoking occurred in the summertime because she was wearing shorts. Subsequently, she said it had been cold and raining the night before (a highly unlikely combination in Sacramento during the summer). (AOB 68; 33 RT 15281-85.)

7) Finally, the state reports Ms. Hamilton's testimony that she had "despised appellant" prior to the assault and had spurned his entreaties for sex because he was black, thus giving him a motive to attack her. (RB 12.) As indicated by the testimony noted in §B.1 above, the prostitutes in Mr. Solomon's and Ms. Hamilton's neighborhood tended to love, not despise, Mr. Solomon. Their testimony cast additional doubt on Ms. Hamilton's veracity and identification. As noted, however, the Court would not know

that from Respondent's Brief, because its Statement of Facts fails to report the favorable testimony.

*5. Facts omitted from Respondent's Statement of Facts regarding the charges on which the jury hung*

(a) Count 8: Angela Polidore

The jury deadlocked 8-4 on Count 8 (alleged murder of Angela Polidore) (19 CT 5527), but the Court would not know that from Respondent's Statement of Facts. Among other things, the latter treats Count 8 no differently than it treats the other counts and gives no indication whatsoever that the jury did not find Mr. Solomon guilty of any crime involving Ms. Polidore.

More importantly, the Statement of Facts leaves out the evidence that makes the jury's deadlock comprehensible -- i.e., the evidence demonstrating reasonable doubt.

Just before Angela Polidore disappeared, Janice Scott saw her with a man. Respondent's Brief states: "Appellant resembles that man." (RB 22.) Judging from the RT pages cited in support of that assertion, the latter is based on Ms. Scott's testimony. Respondent does not quote her testimony, however. That is because, at both the preliminary hearing and at trial, Ms. Scott said she was not sure if Mr. Solomon was the man she saw. She said he resembled the man "a little bit ... around the eyes" but "[t]hat's about it". (See AOB 42-43 and citations there.)

Ms. Scott's initial identification of Mr. Solomon, furthermore, was a photo i.d. that occurred under highly suggestive circumstances: 1) all five photos had been chosen based on their similarity to Mr. Solomon; 2) the photo lineup occurred just a few days after Mr. Solomon's photo was on the front page of the local newspapers and on every local television station; and 3) Ms. Scott was told she could just pick out the photo of any man who looked *familiar* to her. (See AOB 42 and citations there.) There is no mention of any of this is in Respondent's Brief.

Respondent also supports the case against Mr. Solomon on the Polidore count by again citing Melissa Hamilton's testimony that she had once smoked cocaine in Mr. Solomon's car. Ms. Hamilton said that they had been parked in front of the building in which Ms. Polidore's body was found. (RB 26.) As shown in the preceding section, Ms. Hamilton's testimony on that point was of dubious reliability but Respondent's Statement of Facts omits all of the evidence showing that unreliability.

Further, Respondent's Brief describes how Charles Henry saw two men sitting on the steps near the basement where Ms. Polidore was found around the time she disappeared. (RB 26.) Respondent fails to say that Henry could not see their features or that, while he often saw Ms. Polidore in the vicinity of the house, he had *never* seen Mr. Solomon there. (See AOB 43-44 and citations there.)

Finally, Respondent's Brief leaves out the exculpatory evidence that the fingerprints of Mark Chambers were found on a bottle of Colt .45 that was in the basement of 3200 Sacramento. Chambers had suffered a conviction for assault with a deadly weapon for sticking his girlfriend with a screwdriver seven times. Mr. Solomon's prints were found on nothing at 3200 Sacramento. (See AOB 43 and citations there.) [13]

(b) Counts 13 and 14: LaTonya Cooper

The jury deadlocked 8-4 and 5-7 on counts 13 and 14 (attempted murder of and sexual assault on Latonya Cooper). (19 CT 5527.) Again, however, the Court would not know that from Respondent's Statement of Facts. As with the Polidore count, Respondent's Statement of Facts: 1) treats Counts 13 and 14 no differently than it treats the other counts; and 2) leaves out the evidence that gave rise to the reasonable doubt that explains the deadlock. Respondent's Brief treats Ms. Cooper's testimony as the unvarnished truth (RB 36-38) and simply leaves out the testimony of the three prosecution witnesses (Detective Pane, Alane Smith, and Buddy Johnson) who thoroughly impeached Ms. Cooper's story. (See AOB 71-72 and cites there.)

**C. The State's Selective Recitation of the**

[13] The penalty phase section of Respondent's Statement of Facts makes reference to the evidence regarding Mr. Chambers fingerprints, erroneously stating that the evidence had not been presented to the guilt phase jury. (RB 42.)

**Evidence Presented at the Penalty Retrial**

*1. The Guilt Phase Offenses*

The guilt phase case on all 14 counts was reprised for the retrial jury (including the counts on which the guilt phase jury hung). Because the evidence was "substantially the same as [that presented] in the guilt phase," Respondent's Statement of Facts does not restate it. It only recites a few ways in which the penalty phase evidence differed from the guilt phase presentation. (See RB, pp. 42-43.) [14] With very few exceptions, therefore, all of the omissions and overblown assertions noted in §B are essentially incorporated by reference into the "Offenses Shown During the Guilt Phase" section of the state's summary of the retrial evidence. As stated in §A, the state's one-sided guilt phase summary thus doubles as a one-sided summary of the evidence the retrial jury heard regarding "the circumstances of the crime[s]" and related factors. (Pen. Code, §190.3, factors (a), (d), (h), (k).)

In addition, the state does not fairly summarize the new evidence. It makes no reference to all to the evidence adding further doubt that it was Mr. Solomon whom Janice Scott saw with Ms. Polidore. (Compare RB 42 with AOB 75. See §B.5(a) above.) Its summary of the testimony of

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[14] The main difference the state notes is the prosecution's failure to call Vernell Dodson at the retrial. (RB 42. See §B.2(a) above.) It also makes reference to the exculpatory fingerprint evidence noted in §B.5(a) above.

LaTonya Cooper's mother, Sheila LaRue, moreover, is outrageously partial. It devotes six sentences to the ways her retrial testimony was consistent with Ms. Cooper's testimony, then finishes up with one sentence that thoroughly obscures the fact that the story she told the police was completely inconsistent with her own and LaTonya's testimony. (Compare RB 42 with AOB 76-77.)

Finally, the six female prosecution witnesses who spoke of Mr. Solomon's positive attributes at the guilt phase did so again at the retrial. The state reports some but not all of the positive things that Ms. Whitfield (Snoopy) and Ms. Sheppard said at the retrial. (RB 55.) It makes no reference at all to the very positive things that Mss. Suggs, Whiteside, Orizaba-Monroy, and Shavers said. (See AOB 73-74 and citations there. See also 61 RT 24569-70 [Ms. Stevens Orizaba-Monroy]; [15] 61 RT 24611-24625 [Ms. Shavers] [16].)

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[15] Ms. Orizaba-Monroy reiterated her guilt phase testimony, saying that Mr. Solomon was "great, good people, … well-mannered, … [and] courteous," that he would feed her kids and clean the house when she was "smoked out," and that he was trustworthy and responsible. She could give him money for the bills and they would be paid. (61 RT 24569-24570.)

[16] Defense counsel declined to cross-examine Ms. Shavers at the retrial, so she did not reiterate all of the positive things she said at the guilt phase (see AOB 24-25), but even on the prosecutor's direct examination it came out that, from approximately September to December, 1986 -- while and after Mr. Solomon lived in the 19th Avenue house -- he employed her for 3 months as a bookkeeper as he tried to rebuild his construction company. In addition, she testified that he wanted to rent a house in which he and she

*2. Factor (b) Offenses*

The subheadings used by the state to describe the factor (b) offenses are misleading, incorrectly suggesting that Mr. Solomon was convicted of all of the crimes listed in those subheadings. (RB, pp. 43-50.) Mr. Solomon was not convicted of any crimes with regard to two of the five incidents. With regard to the other three, he was convicted of far fewer crimes than the subheadings suggest. (See AOB 84.) The retrial jury, furthermore, was not instructed with regard to any of the crimes listed in the subheadings. (See 21 CT 6273 - 22 CT 6303.) It thus was not asked to find, nor could it have found, that the named crimes had been committed.

*3. Evidence in Mitigation*

Respondent's Statement of Facts devotes 7 pages to the factor (b) evidence presented at the retrial. (RB 43-50.) The evidence fills 46 pages of the Reporter's Transcript. [17]

Testimony by the defense's mitigation witnesses fills 868 pages of the Reporter's Transcript. [18] Their direct examination alone fills 648 of those pages. That's more than 14 times the length of the factor (b)

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and her daughter could live as a family but that she had not wanted a sexual relationship and he did not try "to date" her. (See 61 RT 24620-25.)

[17] See 60 RT 24190-99; 62 RT 24752-77, 24800-07, 24861-73.

[18] See 62 RT 24891 - 63 RT 25038; 63 RT 25049-54, 25077-25165, 25196-25259; 63 RT 25276 - 64 RT 25402; 64 RT 25406-72; 65 RT 25576-96, 25713-79.

testimony. If respondent's summary was at all proportional, its brief would devote 98 pages to describing the mitigating evidence. The state's actual summary of that evidence is 10 pages long. (RB 50-60.) [19]

That differential speaks for itself. Respondent's Brief leaves out a significant percentage of the evidence in mitigation. To itemize the omissions here would require appellant to reiterate his Statement of Facts. There is no point to doing that. Instead, appellant asks the Court to recognize the deficiency of the state's summary and to rely on appellant's summary of the evidence in mitigation. (AOB 85-124.)

### D. Ramifications of the State Having Filed a Highly Misleading Statement of Facts

That the state would file such a highly misleading Statement of Facts suggests a degree of partisanship inappropriate to these proceedings. [20] Both the significance of the evidence that the state has withheld from the Court, along with the inaccuracy of the affirmative assertions it has made as

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[19] Appellant's Opening Brief, by comparison, devotes 6 pages to the factor (b) evidence and 39 pages to the mitigating evidence. (See AOB 79-124.)

[20] "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. [Citation.] As the United States Supreme Court has explained, the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' (*Berger v. United States* 295 U.S. 78, 88 (1935)....)" (*People v. Espinoza*, 3 Cal.4th 806, 820 (1992).)

to what the record shows, invites, if not demands, a commensurate degree of skepticism regarding the accuracy of *everything* presented in Respondent's Brief, including its analysis of case law. That such skepticism is warranted finds additional support in respondent's substantive arguments. (See, e.g., Args. I.B-D, V.B-C, and XI.D below.)

Here, appellant will focus on the ramifications of the factual distortions in the Statement of Facts. They are considerable.

The general effect of those distortions is to artificially inflate the strength of prosecution's guilt and penalty phase cases. Judging from the state's brief, the first jury should have convicted Mr. Solomon of seven first-degree murders, should have convicted him as well on all six non-homicide counts, should have had those verdicts returned after an hour or two, and then should have taken even less time to return a verdict of death. Under the facts as presented by the state's brief, it is incomprehensible that the first jury deliberated for 10 full days over guilt, found that 2 of the killings were not first but second-degree murder, could not reach any verdict on a third murder charge, hung on 2 non-homicide counts as well, then deadlocked on penalty after an additional 3 days of deliberations, and then was followed by a second jury that itself took 3 ½ days before returning a death verdict. (AOB 14-16.) The lengthy periods of deliberation are so incompatible with the state's factual account that they are scrubbed from its version of the record. Neither Respondent's

Statement of the Case (RB 2-3) nor any other part of its brief apprises the Court how long any of the deliberations lasted.

The state's fraudulent enhancement of the strength of its case affects most of the arguments raised in the opening brief.

In Arguments I-III, appellant challenges (in various ways) the sufficiency of the evidence of premeditation and deliberation on Counts 2, 7, 9, or 10 -- the four killings the jury found were first-degree murders (the victims of which were Mss. Jacox, Johnson, Apodaca, and Massey). In Arguments IV-VII, he claims that various guilt phase errors were committed and argues, *inter alia*, that, given the dearth of evidence of premeditation and deliberation, a reasonable juror might not have convicted Mr. Solomon of any first-degree murder if the claimed errors had not occurred. In Arguments XI-XVI, he claims that various penalty phase errors were committed and argues that, given the strength of the evidence in mitigation, a reasonable juror might not have returned a verdict of death in the absence of the errors.

As noted in §A, the law is clear that, in order for this Court to properly evaluate all three types of claims, it must review "the whole record [and not just] … isolated bits of evidence selected by the respondent." (*People v. Johnson*, 26 Cal.3d at 576-577; emphasis in original [insufficiency claim]. Accord, *U.S. v. Dingle*, 114 F.3d at 310 [same required by federal due process on insufficiency claim]; *Rose v. Clark*, 478

U.S. at 583 [*Chapman* prejudicial-error analysis "requires consideration of the entire record"]; *People v. Breverman*, 19 Cal.4th at 165 [*Watson* prejudicial-error analysis requires "examination of the entire record"]; *Wiggins v. Smith*, 539 U.S. at 535 [to determine whether capital-sentencing error requires reversal, court must "reweigh the evidence in aggravation against the *totality* of available mitigating evidence"; emphasis added]; *In re Lucas*, 33 Cal.4th at 733 [same]; *People v. Massie*, 19 Cal.4th at 566 [Pen. Code §1239(b) requires "an examination of the complete record" in capital cases].) [21]

Respondent's Statement of Facts fails to provide the Court with anything approaching an adequate summary of the "whole", "entire", or "complete record." That violates the duty of a party on appeal as described in *Lewis v. County of Sacramento* and implied in Rule 14(2)(C). (See §A above.) More importantly, it means the Court cannot rely on the state's

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[21] Review of the entire record when errors are claimed in the sentencing phase of a capital case is necessary because, pursuant to the 8th Amendment, jurors "may not refuse to consider … any relevant mitigating evidence offered by the defendant…." (*Penry v. Lynaugh*, 492 U.S. 302, 318 (1989).) Consideration of aggravation *and* mitigation is mandated by Penal Code §190.3 [jurors "shall take into account" the enumerated factors] and the instructions capital juries receive. The modified version of CALJIC No. 8.88 given in this case, for instance, instructed that, "having heard all of the evidence," the retrial jury was to "weigh … the totality of the aggravating circumstances with the totality of the mitigating circumstances." (22 CT 6343. Accord, CALCRIM No. 766 [jurors must weigh "all the evidence and the totality of any aggravating and mitigating circumstances"].)

brief to properly evaluate the sufficiency and prejudicial-error claims raised in the opening brief.

It is not just that the state's summary is incomplete, moreover. It is *misleading*, and misleading in ways that bear directly on the sufficiency and prejudicial-error claims.

Both the legal questions raised in Arguments I-III and the prejudicial-error components of Arguments IV-VII are rooted in the fact that the prosecution was not able to establish much of a factual basis on which to pin its premeditation and deliberation argument. As the prosecutor acknowledged to the jurors, the physical evidence did not provide them with "helpful … information." (36 RT 16291.) Because of decomposition, neither cause nor manner of death could be established for any victim. Aside from Mr. Solomon's connection to the places where the bodies were buried, moreover, the evidence was inconclusive or conflicted with regard to the nature of his prior contacts with the victims or whether he even had such contacts. The prosecutor's argument for premeditation and deliberation, therefore, consisted of a chain of inferences he asked the jurors to draw from a very limited quantum of established fact. (See AOB

138-160, and cites there. See also AOB 27-64.) [22] Arguments I-III argue or take as their premise that those inferences were too speculative to establish beyond a reasonable doubt the elements of premeditation and deliberation (as appellant believes the latter are defined). (AOB 138-160.) The prejudicial-error components of Arguments IV-VII rest on the premise that, constitutional insufficiency aside, the inferences were weak and thus, in the absence of the claimed error, a juror reasonably might have decided that the prosecutor had not proved his chain of inferences beyond a reasonable doubt. (See, e.g., AOB 183-185, 195-198, 205-207, 225-226, 228-231.) Given the nature of the foregoing arguments, it is extremely important that the Court understand where the established facts end and where the inferences/speculation begin(s). It is on that very point that the state's assertions and omissions are most misleading.

This occurs in several ways.

First, to the extent Mr. Solomon had a prior connection with a victim, that boosted the potential for premeditation and deliberation. It is critically misleading, therefore, that, with regard to six of the seven women who were killed (Mss. Apodaca, Massey, Jacox, Vitela, Washington, and

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[22] Appellant is not attempting to re-argue Argument I here. He believes that the summary of the record he has just given is indisputably accurate. The questions posed in Argument I *begin* from that indisputable factual record, asking whether those facts have legal consequences favorable to Mr. Solomon. (The Court, of course, will make its own determination whether appellant's summary is as accurate as he says.)

Polidore), Respondent's Statement of Facts asserts a prior connection that either is not borne out or is substantially undermined by the "whole record." (See §B.2(b-d), B.3(a-b), B.5(a) above.) The use of this misleading tactic with regard to the counts on which the jury either found second-degree murder (1 and 12) or hung (8) is misleading with regard to the first-degree murder convictions because it promotes the false *general* notion that Mr. Solomon had prior relations with *all* of the homicide victims.

Second, as noted, there was a dearth of hard facts regarding such things as the manner of or the motive for any of the deaths. It is seriously misleading, therefore, that the state makes it seem as though it was established that Yolanda Johnson had been strangled by a ligature around the neck. (See §B.2(a) above.) It is even more misleading for the state to suggest that it was established that Mr. Solomon had expressed an intention to kill her, parroting the thoroughly impeached testimony of Vernell Dodson without revealing that there had been any impeachment. (*Ibid.*)

The effect of the foregoing distortions is magnified, moreover, by the fact that so little is known regarding the other deaths. The false suggestion that the evidence showed that Mr. Solomon threatened to kill Ms. Johnson, then later strangled her, boosts the otherwise unproven inference that the same was true for one or more of the other victims.

Similar is the effect of the state's misleading summary of the non-homicide offenses (Counts 3-6, 11, 13-14). Each of the alleged victims -- Mss. Hall, Hamilton, and Cooper -- told a rather horrifying tale. If one concludes that Mr. Solomon was their assailant, that would likely produce a visceral repulsion toward him given the sadism described. That, in turn, could provide motivation for finding in the assaults an m.o. consistent with premeditation and deliberation. [23] The "entire record" casts great doubt on whether Mr. Solomon *was* their perpetrator. (See AOB 65-66, 68-69, 71-72.) It is critically misleading, therefore, that the state omits the testimony that seriously undermined the credibility of each woman's claim -- made *after* Mr. Solomon was arrested -- that he was the one who attacked them. (See §§B.4(a-b) and B.5(b) above.)

As discussed in §B.1, furthermore, the state *fails* to report the very positive things said about Mr. Solomon at the guilt phase by six of the prosecution's female witnesses. That, too, falsifies the factual context in which the question of premeditation and deliberation must be considered. The women testified that Mr. Solomon was kind, caring, good with children, a hard worker, responsible, gentle in sex, *and* gentle and gentlemanly when Ms. Orizaba-Monroy and Ms. Shavers rebuffed his

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[23] In actuality, as the prosecutor himself noted, the assaults to which Ms. Hall and Ms. Cooper testified were more consistent with impulsive conduct than premeditation and deliberation. (See AOB 145-146 and cites there.)

overtures. (AOB 19-25.) Assuming that Mr. Solomon killed Mss. Jacox, Johnson, Apodaca, and Massey, the Court must determine how persuasively the evidence shows that they were killed as a result of a cold-blooded mental process rather than an impulsive process borne of deep-seated trauma. The favorable testimony of the six women supports the latter hypothesis. For the state to omit that evidence from its summary -- at the same time it lends unwarranted credence to the evidence of sadism (see preceding paragraph) -- is unconscionable.

The state's summary of the retrial evidence is equally misleading. As noted, the Court cannot rely on that unbalanced summary if it is to properly evaluate appellant's claims that various penalty phase errors were prejudicial. A proper evaluation requires the Court to know the "totality" of the aggravating and mitigating evidence the retrial jury was required to weigh and consider. (See *Wiggins v. Smith,* 539 U.S. at 535; *In re Lucas,* 33 Cal.4th at 733; former CALJIC No. 8.88, at 22 CT 6243.) That "totality" cannot be discerned from Respondent's Brief.

First, Respondent's Statement of Facts gives short shrift to the evidence in mitigation. This is discussed above in §C.1 (regarding the six women discussed above) and §C.3 (regarding the rest of the case in mitigation).

Second, the evidence in aggravation is overblown. This is primarily a function of the fact that, as noted, the state's misleading guilt phase

summary doubles as its summary of the evidence the retrial jury heard regarding "the circumstances of the crime[s]." (See RB, pp. 42-43.) One consequence of that is that the state's summary leaves the impression that the *retrial* jury heard a much stronger case for premeditation and deliberation than it actually did. That, in turn, falsely inflates the degree of moral culpability one might assume the jurors would have assigned under factor (a). [24]

In addition, the fact that the state falsely makes it appear that the credibility of the non-homicide victims was untarnished (see §§B.4(a-b) and B.5(b) above) is particularly misleading in the penalty phase context, since it leaves the misimpression that the retrial jurors undoubtedly concluded that Mr. Solomon was the one who so sadistically attacked them.

In sum, Respondent's Statement of Facts makes it appear that the prosecution's guilt phase case in general, and its case for premeditation and

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[24] The law links mental state and moral culpability and assumes that jurors will as well. See, e.g., *Tison v. Arizona,* 481 U.S. 137, 156 (1987) ["the more purposeful is the criminal conduct, ... the more severely it ought to be punished"]; *Enmund v. Arizona*, 458 U.S. 782, 798-99 (1982) ["it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation"]; *accord Atkins v. Virginia,* 536 U.S. 304, 319 (2000); *People v. Sturm*, 37 Cal.4th 1218, 1232 (2006) ["lack of premeditation was a central theory supporting the defense case in mitigation"]; *People v. Bonillas*, 48 Cal.3d 757, 793 (1989) ["The jury was properly instructed that the absence of deliberation and premeditation was a circumstance in mitigation"]; *People v. Smith*, 30 Cal.4th 581, 638 (2003) [jury could consider the alleged "absence of premeditation and deliberation" as both a "circumstance ... of the crime" and a "circumstance which extenuates the gravity of the crime"].

deliberation in particular, were a lot stronger than they were. It also makes it appear that the aggravating evidence at the retrial was a lot stronger than it was and the mitigating evidence a lot weaker. As a result, the Court cannot rely on the state's brief for the accurate and balanced summary of the "whole", "entire", and "complete record" that it needs in order to properly evaluate either Arguments I-III or the many prejudicial-error claims in Appellant's Opening Brief.

## PART IV: ARGUMENTS

## I.

## THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT ANY OF THE KILLINGS WERE DELIBERATE AND PREMEDITATED

### A. Introduction

Appellant argues that the evidence was not sufficient to support the first-degree murder verdicts on Counts 2, 7, 9, and 10. In particular, he argues that the evidence was insufficient to support a rational inference – as opposed to speculation – that any of the four killings was the product of the kind of "careful thought and weighing of considerations" necessary to constitute deliberation. (*People v. Mayfield*, 14 Cal.4th 668 767 (1997).)

The state's response is that a juror could have found the following scenario proved beyond a reasonable doubt: Mr. Solomon bound and gagged his victims in order to force them to submit to sexual acts against their will; killed them to prevent them from testifying against him; and relied on a method of killing, strangling or suffocation, that required "premeditated deliberation." (RB, 70-73.)

As will be seen, the scenario:

1) relies heavily on speculation;

2) relies as well on the state's one-sided recitation of the evidence;

3) fails when measured by the rational criteria enunciated in *People v. Anderson* that are still deemed "helpful" by this Court; and

4) ultimately rests on a definition of premeditation and deliberation that:

(a) is inconsistent with the definition that has governed for at least 60 years (and, in one significant respect, for 140 years);

(b) is inconsistent with the definition contained in the instructions given to appellant's jury; and

(c) unconstitutionally blurs the distinction between first and second-degree intentional murder.

The state implicitly recognizes that the guilt-scenario it proposes poses such problems. It thus offers up misinterpretations of law that conveniently remove the obstacles. The most serious include:

1) its defense of "speculation and conjecture" as a proper basis for a jury's findings (RB 62);

2) its claim that this Court has implicitly held that the 1981 amendment of Penal Code §189 so shrunk the definition of premeditation and deliberation as to render the *Anderson* factors irrelevant (RB 73); and

3) its related astonishing claim that the 1981 amendment so shrunk and altered the definition of premeditation and deliberation that:

(a) "virtually all intentional murders now satisfy the statutory definition of first-degree murder," reducing "second-degree murder" to a crime of "unintentional murders";

(b) forming the intent to kill need not be the product of premeditated deliberation;

(c) "premeditation and deliberation" can occur during the act of killing and after the intent to kill has already been formed;

(d) the entire mental process needed to establish the requisite mens rea can occur in the few seconds during which the victim is being strangled and loses consciousness; and

(e) can even be proved by the defendant's failure to stop the act of killing once it has begun. (See RB 72-73, 83-84, 87, 89-90.)

As will be seen, the latter are not just misinterpretations of law but further manifestations of the inappropriate degree of partisanship reflected in the one-sided Statement of Facts.

### B. "Speculation And Conjecture" Were Not A Proper Basis For The Jury's Findings

The state's defense of "speculation and conjecture" as a proper basis for a jury's findings is centered in the passage it quotes from *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). (RB 62.) *Lavender v. Kurn* was a civil case. In the 60 years it has been on the books, the "speculation" passage has been cited in hundreds of civil cases but only one criminal case. In that

case, it was relied on by the dissenter. The majority of the military tribunal, finding the evidence *in*sufficient to support the verdict, responded to the dissenter's citation of the *Kurn* standard this way:

> [It] is one thing to "speculate" in a situation of civil private law, and quite another and more serious one to do so in a criminal case with its requirement of proof beyond a reasonable doubt.

(*U.S. v. O'Neal*, 2 C.M.R. 44, 49, 1 C.M.A. 138, 143 (CMA 1952); see *id.*, 2 C.M.R. at 60, 1 C.M.A. at 154 [dissenting opn.].)

*Kurn* does not state the law that governs here. The actual governing principles are summed up in *People v. Coddington*, 23 Cal.4th 529 (2000):

> A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence.

(*Id.* at 599; citations and internal punctuation omitted.) The opening brief also cites four capital cases in which this Court indicated that a finding based on such speculation would violate due process. (AOB 127.) The state ignores them all. [25]

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[25] The federal circuits appear to be unanimous in the view that a verdict based on speculation would violate due process. Representative holdings include: *U.S. v. Truong*, 425 F.3d 1282, 1288 (10th Cir. 2005) ["the jury's inferences must be 'more than speculation and conjecture in order to be reasonable'"]; *Garcia v. Carey*, 395 F.3d 1099, 1103 -1104 (9th Cir. 2005) [state court affirmance of a verdict based on "speculation … is 'an

Why the state feels compelled to defend speculation will become clear when appellant discusses the speculative inferences upon which the state urges the Court to affirm the first-degree murder convictions. (See §F below.)

### C. The Court May "Not ... Limit Its Review To The Evidence Favorable To The Respondent"

While the state makes one cursory reference to the term, "whole record," its discussion, again top heavy with citations of civil cases, makes it appear that affirmance is proper as long as this Court can say the People made a "minimal" evidentiary showing in support of the verdicts returned. (RB 61-62.) The state's discussion fails to note the full and actual standard:

> In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court ... does not ... limit its review to the evidence favorable to the respondent.... [W]e must resolve the issue in the light of the whole record - i.e., the entire picture of the defendant put before the jury - - and may not limit our appraisal to isolated bits of evidence selected by the respondent.

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unreasonable application of ... *Jackson v. Virginia*" and requires granting of writ]; *U.S. v. Walker*, 191 F.3d 326, 333 (2nd Cir. 1999) ["a conviction based on speculation and surmise alone cannot stand"]; *U.S. v. Peters*, 277 F.3d 963, 967 (7th Cir. 2002) ["each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation"].

(*People v. Johnson*, 26 Cal.3d at 576-577; emphasis in original . Accord, *U.S. v. Dingle*, 114 F.3d at 310 ["In assessing the sufficiency of the evidence ... {pursuant to} *Jackson v. Virginia,* ... on appeal the court look{s} ... to the entire record, and not simply to the evidence in the government's case-in-chief"].)

Here, too, the state's inaccurate characterization of the governing standard sets up its legal argument, allowing it to rely on the same selective version of the facts presented in its Statement of Facts. (See Part III above and §F below.)

**D. The State "Declines" To Discuss The *Anderson* Factors, And Subsequently Defends Its Sufficiency-Scenario, On The Mistaken View That The 1981 Amendment To Penal Code Section 189 Radically Altered, Indeed Effectively Abrogated (To The Prosecution's Benefit), This State's Longstanding Definition Of Premeditation And Deliberation**

The Attorney General "declines to engage" in any discussion of any aspect of the evidentiary framework set forth in *People v. Anderson*, 70 Cal.2d 15, 26-27 (1968). (RB, 73.) He claims that this Court has rejected "the so-called *Anderson* factors as "not 'well adapted'" to the new definition of premeditation and deliberation that has prevailed since "the 1981 amendment to section 189." (RB 73.) Subsequently, the state

defends the first-degree murder verdicts on the ground that the 1981 amendment likewise vitiated the definition of premeditation and deliberation articulated by this Court in cases such as *People v. Bender*, 27 Cal.2d 164, 183 (1945) [which held, *inter alia*, that the decision to kill must be "arrived at … as a result of careful thought"). (RB 87, 89-90.)

As will be seen, every aspect of the argument is fallacious: this Court has not rejected the "*Anderson* factors" at all, much less based on the 1981 amendment; the definition of premeditation and deliberation in *People v. Bender et al.* is alive and well; and the state's understanding of the intent and effect of the 1981 amendment is completely wrong.

In 1981, the Legislature simultaneously abolished the diminished capacity defense (see Pen. Code §28) and added this caveat to §189: "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (Stats. 1981, c. 404, pp. 1592-1593, §§4-7.) The state's response to Arguments I-III boils down to this: appellant relies on the definitions of premeditation and deliberation found in cases decided prior to 1981, such as *People v. Bender* and *People v. Anderson*; those definitions, the state claims, were built around a conception of premeditation and deliberation that required "mature and meaningful reflection;" ergo, when the 1981 amendment eliminated "mature and meaningful reflection" as a relevant consideration, "the so-called *Anderson*

factors," along with the definitions in *People v. Bender et al.*, lost their relevance as well. (RB 73, 87, 89-90.)

The Attorney General seems a bit surprised that he cannot find "express reliance" on the latter reasoning in the case law. (RB 73.) There is no mystery. As shown by a quick skim of the case law, his historical analysis -- and his understanding of *Bender's* and *Anderson*'s place in that history -- is completely wrong.

In 1856, the Legislature created a crime of "willful, deliberate, and premeditated" first-degree murder. (Stats. 1856, c. 134, §2, p. 291.) In 1864, this Court made clear that "the intent to kill must be the result of deliberate premeditation," a process it defined as "pre-existing reflection." (*People v. Sanchez*, 24 Cal. 17, 30 (1864).) In 1945, the Court made clear that the process is one that involves "careful thought." (*People v. Thomas*, 25 Cal.2d 880, 898 (1945); *People v. Bender*, 27 Cal.2d at 183).

The latter clarification arose from the need to maintain a clear distinction between the mens rea for intentional second-degree murder (specific intent to kill) and that for premeditated and deliberate first-degree murder, which made one eligible for the death penalty:

> If ... an act is deliberate and premeditated even though it be executed in the very moment it is conceived, with absolutely "no appreciable" time for consideration - then it is difficult to see

wherein there is any field for the classification of second-degree murder.

(*People v. Bender*, 27 Cal.2d at 182 [reversing for insufficient evidence]. Accord, *People v. Thomas*, 25 Cal.2d at 898 [to hold otherwise "would emasculate the statutory difference between first and second degree murder"].)

This is explained at length in the opening brief. (AOB 128-136.) The Attorney General ignores the discussion except to offer up, in his response to Argument III, the astonishing view that this Court's concern for clarity has been moot for 25 years because the 1981 amendment rendered "second-degree murder [a category] ... generally reserved for unintentional murders" and "virtually all intentional murders now satisfy the statutory definition of first-degree murder..." (RB 89-90.)

It is thus important to set the historical record straight. The 1981 amendment was intended to abrogate case law related to the concept of diminished capacity. That case law originated in 1964 -- 19 years after *Thomas, Bender, et al.* -- and was in response to a very different concern.

This Court explained the history in *People v. Dunkle*, 36 Cal.4th 861 (2005). The concept of "mature and meaningful reflection" that was the focus of the 1981 amendment had "its genesis in *People v. Wolff* (1964) 61 Cal.2d 795.... In that case, we reduced from first to second degree a murder judgment entered against a defendant who, when he killed his

mother, was 15 years old and a diagnosed schizophrenic, and who had unsuccessfully defended on the ground of insanity." Under those circumstances, *Wolff* held, whether the boy was guilty of first-degree murder required "consideration of the somewhat limited extent to which this defendant could *maturely and meaningfully reflect* upon the gravity of his contemplated act." (*People v. Dunkle*, 36 Cal.4th at 911-912, quoting *Wolff* at 821; emphasis in *Dunkle*.)

The reference to "mature and meaningful reflection," *Dunkle* explained, was not intended to effect a general expansion of the mens rea for first-degree murder. To the contrary, following *Wolff*, this Court made clear that its holding was relevant only in cases in which the evidence raised "an issue as to legal sanity or diminished capacity stemming from mental illness or intoxication...." "[N]o case," the Court indicated, had ever applied *Wolff* "outside the context of a diminished capacity defense." (*Dunkle*, 36 Cal.4th at 912. See, e.g., *People v. Cruz*, 26 Cal.3d 233, 243 (1980).) [26]

The concept of diminished capacity caused confusion, however. The last straw was the Dan White case, in which Supervisor White avoided a murder conviction in the shooting deaths of Mayor Moscone and

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[26] "Mature and meaningful reflection was clearly the California Supreme Court's shorthand way of applying the concept of diminished capacity to the elements of deliberation and premeditation." (*People v. Stress*, 205 Cal.App.3d 1259, 1270 (1988).)

Supervisor Milk on the basis of a diminished capacity defense dubbed the "Twinkie Defense." The Legislature responded by abolishing the diminished capacity defense. Simultaneously, in the same bill, it added the caveat to §189 that, "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (See Stats. 1981, c. 404, pp. 1592-1593, §§4-7; *People v. Stress*, *supra,* 205 Cal.App.3d at 1270; *People v. White*, 117 Cal.App.3d 270, 277 (1981).) The purpose of the latter amendment was not to tamper with the definitions of premeditation and deliberation articulated by this Court in *Sanchez*, *Thomas,* and *Bender* in 1864 and 1945 but only to abrogate the diminished capacity variant of deliberation adopted in *People v. Wolff.* "[W]ith the removal of the vague requirement for mature and meaningful reflection" by the 1981 amendment, the mens rea for first-degree murder remained what it had long been in non-diminished capacity cases:

> [D]eliberation and premeditation are proved when the trier of facts concludes ... that the defendant harbored an intent to kill ... that ... was the result of forethought and reflection, and when careful thought and a weighing of considerations are demonstrated.

(*People v. Stress* 205 Cal.App.3d at 1270; emphasis added.) [27]

Accordingly, virtually everything the state argues in response to Arguments I-III is wrong. As indicated in *People v. Stress*, the *Sanchez* and *Thomas-Bender* definitions have never been abrogated. To the contrary, they were the progenitor both of CALJIC No. 8.20 -- given to the jury in this case (18 CT 5350-5351) -- and of CALCRIM 521(A) -- being given to juries in murder cases in 2007, twenty-six years after the 1981 amendment.[28]

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[27] See generally, *Admissibility of Psychiatric Testimony in the guilt phase of Bifurcated Trials*, 16 Pac.L.Jour. 305, 323 (1984); S. Morse, *Undiminished Confusion In Diminished Capacity*," 75 J.Crim.L. & Criminology 1 (1984).

[28] The first two cases listed by the CALCRIM Committee in 2007 as the "Authority" for No. 521(A)'s definition of "Premeditation and Deliberation" are: "*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 … [and] *People v. Bender* (1945) 27 Cal.2d 164, 183–184…." The instruction provides, in pertinent part:
"The defendant is guilty of first degree murder if the People have proved that (he/she) acted willfully, deliberately, and with premeditation… The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if (he/she) decided to kill before committing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time." (Emphasis in original.)

Finally, as suggested by the CALCRIM citations in the preceding footnote, the *Anderson* case is strictly in the *Thomas-Bender* line of cases, concerned with same need for clarity they were concerned with. (See *People v. Anderson*, 70 Cal.2d at 26 ["we have repeatedly pointed out that the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill"].) While *Anderson* cited the *Wolff* opinion's reference to the point just quoted, *Anderson* was not a diminished capacity case and never made any reference to the "mature and meaningful reflection" aspect of *Wolff*.

In the next section, appellant shows that *Anderson* retains vitality. He will then show that the state's sufficiency-scenario violates all of the legal concepts discussed thus far.

### E. This Court Still Deems The Factors Delineated In *Anderson* To Be "Helpful" In Determining Whether Sufficient Evidence of Premeditation And Deliberation Was Presented To The Jury

As noted, the state "declines to engage" in a discussion of what it disrespectfully refers to as "the so-called '*Anderson* factors'." It claims the Court has implicitly held that those factors "really are not 'well adapted'" to analyzing the sufficiency of premeditation and deliberation evidence in

the aftermath of the radical change (allegedly) wrought by "the 1981 amendment of section 189." (RB 73, quoting *People v. Mayfield*, 14 Cal.4th 668, 768 (1997).)

In light of the fact that the 1981 amendment effected no such change, the Court would never assert, by implication or otherwise, the view the state attributes to *Mayfield*. Nor does it do so in *Mayfield*. All the Court actually said was: "The *Anderson* factors … are not well adapted to a case like this one in which the defendant's postoffense statements provide substantial insight into the defendant's thought processes in the crucial moments before the act of killing." (14 Cal.4th at 768.) The latter observation has nothing to do with the 1981 amendment. It is a merely commonsense observation that, in the unusual case where direct evidence of mental state exists, the *Anderson* categories, which facilitate review in circumstantial-evidence cases, are less significant.

In the typical case, however, where there is little or no reliable direct evidence regarding mental state (as in this case), the Court still finds the "[t]hree categories of evidence" discussed in *Anderson* to be "helpful." (*People v. San Nicolas*, 34 Cal.4th 614, 658 (2004). Accord, *People v. Koontz*, 27 Cal.4th 1041, 1081 (2002) ["*Anderson* factors" are "helpful for review"].)

The Court continues to hold, furthermore:

> When evidence of all three categories is not present, 'we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.

(*People v. Elliot*, 37 Cal.4th 453, 470 (2005).) Those categories may be "descriptive, not normative," but they still "aid … reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (*Id.* at 471.)

The opening brief recognizes that the *Anderson* factors are not exclusive. (AOB 137-138.) If the state had made an argument for premeditation and deliberation based on relevant evidence that could not be categorized as "planning," "motive," or "manner-of-killing," appellant would have to respond.

Ironically, the state does not even try. Despite its allegation that the categories delineated by Justice Tobriner in *Anderson* have been rejected as irrelevant, the state's own argument is built on two of those categories -- motive and manner. (RB 70-72.) The categories are simply rational ways of attempting to discuss whether a rational juror could have inferred premeditation and deliberation from circumstantial evidence.

When the state -- based on a grossly incorrect historical analysis -- announces that it "declines to engage" in an *Anderson* analysis, this is yet another manifestation of all that has been described above. Consciously or

not, it is tampering with the law -- just as it did with the facts -- to allow it to make an argument that would otherwise be problematic.

Appellant will now discuss the state's defense of the verdicts. When the latter is evaluated in light of the actual law and the actual facts, it does not stand up to scrutiny.

### F. The Scenario The State Claims A Juror Could Have Found True Beyond A Reasonable Doubt Does Not Pass Rational Or Constitutional Muster

The state claims that a juror reasonably could have found the following scenario proved beyond a reasonable doubt: that Mr. Solomon bound and gagged his victims in order to force them to submit to sexual acts against their will; killed them to prevent them from testifying against him; and also relied on a method, strangling or suffocation, which required "premeditated deliberation." (RB, 70-73.)

As appellant will show, the scenario: 1) rests heavily on speculation based on a selective reading of the record; 2) is inadequate when measured against the "helpful" *Anderson* categories; and 3) relies on a conception of premeditation and deliberation that is contrary to: a) California law as defined by this Court; b) the definition of premeditation and deliberation on which the jury was instructed; and c) due process, in that it effectively eliminates any cognizable distinction in the mens rea necessary for the commission of first and second-degree intentional murder.

The foregoing flaws in the state's argument match up precisely with the areas in which, as shown in preceding sections, it has misstated and misconstrued the law.

Appellant will briefly discuss the *Anderson* categories. He will then discuss each of the three conclusions the state claims a juror could have reached beyond a reasonable doubt. He will show that the first (victims bound while alive) is speculative and questionable at best, and that the second and third parts of the scenario (motive and inferences to be drawn from strangling) are devoid of legal or factual merit.

*1. The state's proposed verdict-saving scenario fails when measured by the Anderson categories of planning, motive, and manner-of-killing*

Planning. The state does not attempt to argue that there was any evidence of planning.

There was not simply a dearth of relevant evidence, however. Just as evidence of planning would have tended to support the finding of premeditation and deliberation, so, too, evidence pointing to impulsivity on Mr. Solomon's part tends to undermine the verdict. [29] The state distorts or

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[29] Cf. *People v. Craig*, 49 Cal.2d 313, 318 (Cal. 1957) [reducing conviction to second-degree murder where: "The record shows a killing accomplished with great brutality, but does not show any premeditation. There is nothing to show that the defendant had ever seen the victim before she approached him"].

fails to address such evidence. Among other things: it relies on and/or fails to correct its misleading assertion that Mr. Solomon had had a prior relationship with all of the victims (see Part III.B.2(b-d) above);[30] it fails to acknowledge the impulsivity of the attacks described by Ms. Hall and Ms. Cooper, the spontaneity of which was conceded by the prosecutor and weighed heavily against any unproven inference that any of the women died as the result of some premeditated and deliberate plan by Mr. Solomon (see AOB 145-146 and cites there); and it fails to address the fact that the materials with which the three buried victims were bound were, as the prosecutor conceded at the retrial, the "materials that were at hand" (67 RT 26263), i.e., either came from or very probably came from the Broadway and 19th Avenue houses in which the women presumably died (see AOB 138-139, 155, 158, and cites there), and thus (given their incriminating connection to Mr. Solomon) were also indicative of spontaneous and not preconceived violence.

On the whole, therefore, the evidence regarding planning and impulsivity was not just neutral; it tended to undermine the verdict. (See also §§2-3 below.)

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[30] In this instance, and throughout the analysis that follows, it is apparent why the state has not acknowledged that this Court may not "limit its review to the evidence favorable to the respondent." (*People v. Johnson*, 26 Cal.3d at 577.)

Motive. The state claims that a juror could have found beyond a reasonable doubt that Mr. Solomon killed the women to prevent them from turning him in. (RB 71.) As discussed in §3 below, this claim: (a) rests entirely on speculation; and (b) to the extent the evidence sheds light on the subject, it undermines the validity of the inference the state relies on.

Manner-of-killing. The state claims a juror could have inferred beyond a reasonable doubt: (a) that the women were killed by strangling or suffocation; and (b) that premeditation and deliberation occurred during the act of killing. As discussed in §4 below, the claim rests on speculation and a concept of premeditation and deliberation that is incompatible with state law, the jury's instructions, and due process.

The foregoing outline makes clear why "respondent declines to" give any legitimacy to the *Anderson* categories despite the Court's continued reliance on them. (RB 73.) It cannot make a verdict-saving argument able to withstand serious analysis based on the criteria *Anderson* articulated -- criteria that are both rational and rooted in this state's longstanding definition of premeditation and deliberation. (70 Cal.2d at 24-26.)

The latter conclusion is informed and confirmed by a more detailed review of the three pillars of the state's argument.

*2. In asserting that a juror could have concluded beyond a reasonable doubt that the four victims were bound and brutalized before being killed, the state ignores a great deal of relevant evidence*

The first phase of the state's scenario has Mr. Solomon binding the women and engaging in forcible sex with them. In predicting that a juror would reach this conclusion, the state relies in great measure on its one-sided recitation of the evidence.

To begin with, the state asserts that a juror could have believed that all four women were bound in order that Mr. Solomon could abuse them. The evidence that Yolanda Johnson was *ever* bound, however, was inconclusive. The state's contrary assertion (RB 70) is based on the same one-sided recitation of fact discussed in Part III.B.2(a) above.

With regard to the three victims found bound in their graves, moreover, the state argues that they had to have been bound prior to being killed because "There simply is no reason to bind a body which is already dead." (RB 70.) As the prosecutor conceded in closing argument, however, the bodies could have been bound after they were dead in order to make it easier to carry and bury them. (37 RT 16334.) That was certainly the most reasonable inference to be drawn from the fact that, of the four women in question, only the three who were buried were found in a bound

state. For a juror to have inferred instead that all four women were bound for sexual purposes required speculation.[31]

The scenario also rests on the depiction of Mr. Solomon as someone who "enjoyed victimizing women." (RB 70.) Again, however, the state relies on the partisan factual summary that leaves out all of the favorable testimony regarding Mr. Solomon's gentle and gentlemanly sexual conduct with six of the prosecution witnesses. (See Part III.B.1 above.)

In addition, the state relies on the incidents described by Mss. Hall, Hamilton, and Cooper. (RB 71.) Neither Ms. Hall nor Ms. Cooper said they had been bound, however. (See AOB 64, 70, and cites there.)

As in the Statement of Facts, furthermore, the state, again makes no reference to any of the testimony that undermined the credibility of the three women. (See Part III.B.4 and B.5(b) above.) Ms. Hamilton's claim that Mr. Solomon was her assailant was particularly suspect. (Part III.B.4(b).)

In any event, a juror who took her at her word knew that she had rejected Mr. Solomon's overtures 4-5 times on the ground that she, a white prostitute, would not have sex with him because he was black, a demeaning insult that at least once erupted into a mutually acrimonious verbal

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[31] All of the references to speculation in the analysis that follows makes clear why the state felt the need to cite a 60-year old civil case in order to make the universally rejected claim that speculation was a proper basis for a factual inference in a criminal case. See §B above.

argument between them. (AOB 68 and cites there.) There was no evidence that anything even remotely like that had transpired between Mr. Solomon and any of the other victims. A juror who believed that Mr. Solomon had reacted brutally after Ms. Hamilton had humiliated him in the racist way she did had no rational basis for believing that Mr. Solomon had behaved similarly with any of the other victims.

Indeed, the "whole record," not the "isolated bits" reported by the state, indicated that Mr. Solomon likely had had no prior contacts with Mss. Jacox, Massey, or Apodaca. (See Part III.B.2(b-d) above.) That suggested that whatever happened with those women was more like the incidents Ms. Hall and Ms. Cooper had described -- no prior acquaintance and thus no prior hostile feelings, and an eruption of violence whose spontaneity even the prosecutor found unfathomable. (See AOB 145-146 and cites there.) [32] Again, the fact that the three bound victims were bound with "materials that were at hand" *and* traceable to Mr. Solomon added greatly to the likelihood that whatever happened happened spontaneously. (See AOB 138-139, 155, 158, and cites there.) Such facts are not addressed in the state's analysis.

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[32] The "attack" on Ms. Cooper was "so spontaneous," the prosecutor said, it was hard to fathom. "You leave your car running, doors open, a bunch of people standing on the street, tell a lady, 'Let's go in the house,' you go in the back room, next thing you know you're trying to kill her?" (37 RT 16254-16255.)

If the violence directed at the four women was spontaneous and inexplicable, it was quite possible that their deaths occurred early in the encounters, as well might have happened had Ms. Cooper continued to resist and no one had fortuitously walked in and saved her. (AOB 70 and cites there.) For a juror to reject that scenario and conclude beyond a reasonable doubt that their deaths occurred at the end of the kind of ordeal Ms. Hamilton described, required speculation. The state's argument to the contrary is based on a very partisan presentation of facts.

Even if a juror imagined the scene conjured by the state, furthermore, forcible sex is not premeditated and deliberate murder. A second inference would have been required. Thus the second piece of the state's argument.

*3. A juror could not have concluded beyond a reasonable doubt that the women were killed to prevent them from going to the police*

To get to first-degree murder, the state posits that, having engaged in forcible sex with the women, Mr. Solomon had to kill them to prevent them from being witnesses against him. "There is little reason to doubt" this, the state asserts. (RB 71.)

The state is unable to cite any evidence to support this certainty, however. Speculation described with certainty is still speculation.

To the extent there is evidence on the subject, furthermore, it undermines the conclusion the state is urging. If the prosecution's evidence was believed, Mr. Solomon had committed serious crimes against Mss. Hall, Hamilton, and Cooper. Yet he let Ms. Hall go, he used only verbal persuasion to try to get Ms. Cooper to get back in his car, and there is not an iota of evidence that he ever tried to eliminate any of the three as potential witnesses against him. (See AOB 64-72 and cites there.)

The evidence of impulsivity is relevant here, too. The state is imputing rationality to someone who, according to its own evidence, unfathomably left the engine running when he suddenly attacked Ms. Cooper. (32 RT 15127.) When Mr. Solomon was overtaken by whatever it was in his psyche that led him to commit such acts, rationality and conviction-avoidance were not the operative forces.

The motive the state ascribes to Mr. Solomon, in short, is contrary to the evidence. At best, a juror could not have found such motive beyond a reasonable doubt without engaging in wholesale speculation.

Finally, even if a juror believed that Mr. Solomon had the motive ascribed to him, that by itself would not have permitted a first-degree murder conviction. If Mr. Solomon had been overcome by paranoia just as he let Ms. Hall get dressed, for instance, and, rather than letting her go, had spontaneously killed her for fear she would file a criminal complaint, presumptively that would have been an intentional *second*-degree murder.

(See AOB 129-130 and cases there.) To conclude that killing for such a purpose was premeditated and deliberate murder, a juror would have had to conclude beyond a reasonable doubt that Mr. Solomon had arrived at that purpose only after giving the matter "careful thought." (*People v. Bender*, 27 Cal.2d at 183.) A juror could not have done so without indulging heavily in speculation.

The state itself implicitly recognizes the problem. It thus has to argue that a juror could have inferred the necessary mens rea from the manner in which it suggests the women were killed.

*4. A juror could not have inferred premeditation and deliberation beyond a reasonable doubt from the evidence regarding the manner in which the women were killed*

The state argues that a juror: 1) could have concluded beyond a reasonable doubt that the women were killed by asphyxiation (strangling or suffocation); and 2) could have inferred premeditation and deliberation beyond a reasonable doubt from that method of killing. (RB 72.)

With regard to the first conclusion, the medical experts could not determine the cause of death in any of the four cases. (See AOB 139, 149, 153, 158 and cites there.) No lay juror could have settled beyond a reasonable doubt on any particular cause without engaging in some degree of speculation.

Of greater concern is the suggestion that premeditation and deliberation could be inferred from the manner of killing itself. The state argues as follows. Assuming that Mr. Solomon began to strangle a woman "upon bare impulse" (RB 72) -- i.e., without premeditation and deliberation -- the "violent struggles and perhaps a few guttural sounds ... would [have] impress[ed] upon appellant that the woman in question was fighting for her life -- and [if] despite this knowledge appellant continued to suffocate or strangle the person ... that is a fairly good example of what first-degree murder is all about ... [and constitutes] premeditated deliberation" (RB 83-84). According to the state, once the "attempt to kill" was begun, Mr. Solomon would have realized that he needed to "continue killing ... to ensure the victim's inability to report the matter.... [S]uch a pattern of thought," the state claims, "readily satisfies the criteria of premeditated deliberation." (RB 72-73. Accord, RB 84 [struggle would have reinforced the need to "continue to kill" in order to "avoid capture"].)

A juror could not properly have convicted Mr. Solomon of first-degree murder on the reasoning the state employs.

To begin with, the scenario is built on layers of unproved speculation.

First, the state emphasizes the length of time the process would have taken. (RB 72 ["Killing by asphyxiation does not occur quickly"]; *ibid.* ["the time required for killing by such a method makes it difficult not to

engage in premeditated deliberation"]; RB 83 [referring to the "relatively lengthy process of deprivation of oxygen from a body"].) Respondent's Brief, however, cites no *evidence* regarding how long that process would have taken. Appellant does not believe there was any such evidence.

Further, the state's argument is really based on the "violent struggles" and "few guttural sounds" the women allegedly would have made. (RB 72. Accord, RB 84 ["a guttural sound or two"]). It is thus arguing that premeditation and deliberation could have been inferred from the thoughts Mr. Solomon allegedly would have had in the length of time it would have taken for the victims to *lose consciousness*. Again, there is no *evidence* indicating what the length of time would have been.

It certainly cannot be assumed, as the Attorney General assumes, that the time involved was "lengthy" for either loss of consciousness or death. (Cf. *People v. Danks*, 32 Cal.4th 269, 275 (2004) [pathologist testified that the "cause of death was 'hypoxia leading to asphyxia due to ligature strangulation.' Mr. Holt probably lost consciousness in less than a minute, and died soon thereafter"].) More importantly, a juror could not reasonably have made that assumption, much less believed it beyond a reasonable doubt, in the absence of any relevant evidence.

Further, for the scenario to offer up any semblance of the necessary mens rea, the Attorney General has to impute a particular "pattern of thought" to Mr. Solomon. (RB 73, 84.) This is entirely speculative.

Again, moreover, respondent is imputing a rational "pattern of thought" to an individual whose violence, in the words of the prosecutor, was "so spontaneous" and *ir*rational as to be unfathomable. (37 RT 16254-16255.)

Finally, the mental process the state is equating with premeditation and deliberation is contrary to the mens rea required by state law, the jury's instructions, and Due Process (and, because this is a capital case, the Eighth Amendment).

To begin with, the state is describing a scenario in which Mr. Solomon formed the intent to kill without premeditation and deliberation ("upon a bare impulse"), began to strangle the women, and *then*, before they lost consciousness, engaged in "a pattern of thought [that] readily satisfies the criteria of premeditated deliberation." (RB 72-73. Accord, RB 84.)

Since 1864, the law has been that "the intent to kill must be the *result* of deliberate premeditation." (*People v. Sanchez*, 24 Cal. 17, 30 (1864); emphasis added.) The state acknowledges that the foregoing *was* the law but asserts that, because of the 1981 amendment of §189, it is no longer true that "premeditated deliberation must occur *prior* to formulation of intent to kill...." (RB 87, emphasis in original.) The latter quaint formulation, the state says, "passed into history" along with the requirement of "mature and meaningful reflection." (*Ibid.*)

As demonstrated in §D above, the state is wrong. The 1981 amendment did not in any way modify the definition of premeditation and deliberation in non-diminished capacity cases. (*People v. Dunkle*, 36 Cal.4th at 911-912.) In particular, it did not change the requirement that "intent to kill must be the result of deliberate premeditation." (*Sanchez*, 24 Cal. at 30. See *People v. Stress*, 205 Cal.App.3d at 1270 ["with the removal of the vague requirement of mature and meaningful reflection" in diminished capacity cases by the 1981 amendment, in all murder cases "deliberation and premeditation are proved when the trier of facts concludes not merely that the defendant harbored an intent to kill but when that intent was the *result* of forethought and reflection, and when careful thought and a weighing of considerations are demonstrated"]; emphasis added.)

If any juror voted to convict Mr. Solomon of first-degree murder under the state's theory, s/he did so on a theory that was contrary to state law and reduced the state's burden to prove an element of the crime. That would render the conviction unconstitutional and reversible per se. (See, e.g., *Carella v. California*, 491 U.S. 263, 265 (1989); *Griffin v. U.S.*, 502 U.S. 46, 59, 53 (1991); *Jackson v. Virginia,* 443 U.S. at 314; *People v. Green*, 27 Cal.3d 1, 69 (1980); and additional cases cited at AOB 166-167.)

Further, in accord with the law as it has existed since 1864, the jury in this case was instructed with CALJIC No. 8.20 that, in order to convict

Mr. Solomon of first-degree murder, it had to find, *inter alia*, "that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was *the result of* deliberation and premeditation, so that it must have been formed upon *pre-existing* reflection...." (18 CT 5350; emphasis added. See also *ibid.* [requiring a "period during which the thought must be pondered before it can *ripen into* an intent to kill"; emphasis added].) The state is thus asking the Court to affirm the first-degree murder verdicts on a theory and definition of premeditation and deliberation that the jury was not presented with. Even if the Court believes the state's legal formulation is correct, the Constitution prohibits it from affirming the verdicts on that theory. [33]

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[33] Cf. *McCormick v. U.S.*, 500 U.S. 257, 270, fn. 8 (1991) ["[T]he Court of Appeals affirmed McCormick's conviction on legal and factual theories never tried before the jury.... [F]or that reason alone ... the judgment must be reversed. ... This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury"]; *Dunn v. U. S.*, 442 U.S. 100, 107 (1979) ["appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial"]. See also *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) [the Arkansas Supreme Court affirmed a conviction because the evidence was sufficient to prove guilt under a code section related to the one charged; the Supreme Court reversed: "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made"].

Appellant is not insisting that he benefit from some rigid application of legal principles, moreover. Ultimately, it is not the order in which the state describes the process but the *character* and *speed* of the process that renders it unlawful and unconstitutional (in addition to the speculation it demands).

Thus, the state suggests, a juror could have found that premeditation and deliberation were proven by the fact that Mr. Solomon did not "desist" from strangling when the women struggled or made noise. (RB 72. See also RB 83-84 [where the same argument is made in response to Arg. II].) Under the latter view, if a defendant is in the midst of an act of killing that was *not* the result of premeditation and deliberation, and his mental processes at that time fail to *stop* him from continuing the killing actions that are already in progress, a juror can find beyond a reasonable doubt that the latter mental process is the premeditation and deliberation sufficient for first-degree murder. The state has cited no case that supports such an expansive definition of premeditation and deliberation. Under the scenario it describes, every intentional killing by asphyxiation would constitute first-degree murder. This Court has held otherwise. (*People v. Bradford*, 15 Cal.4th 1229, 1345 (1997) ["The circumstance that the manner of killing, ligature strangulation, might be somewhat more time-consuming than other methods … does not obviate the conclusion that defendant might not have premeditated or deliberated before killing the victims"].)

It would not matter, finally, if one assumes that what the state is proposing is a hypothetical in which, due to the thoughts Mr. Solomon had while strangling the women, his intent to kill was fortified. For one thing, in order for a juror to have reached that conclusion, s/he still would have had to engage in wholesale speculation and impute rationality to an irrational mind. Beyond that, moreover, such a scenario, like the one the state actually hypothesizes, posits a mental process that occurs during the act of killing and leaves "no appreciable time for consideration" (*People v. Bender*, 27 Cal.2d at 182), no time for "careful consideration and examination of the reasons for and against" killing (*id.* at 183; *People v. Thomas*, 25 Cal.2d at 899), and "no considerable space of time devoted to deliberation" (*People v. Carmen*, 36 Cal.2d 768, 777 (1951) ). It allows the "act" of killing to be deemed "deliberate and premeditated even it though it be executed in the very moment it is conceived...." (*Bender*, 27 Cal.2d at 182.) Such a conception "leaves no ground for the classification of murder of the second-degree." (*Carmen,* 36 Cal.2d at 777.) It "would emasculate the statutory difference between first and second degree murder." (*Thomas*, 25 Cal.2d at 898.) By "requiring no more reflection than may be involved in the mere formation of a specific intent to kill," it would render "the legislative classification into two degrees ... meaningless" (*People v. Anderson*, 70 Cal.2d at 26), "destroy ... the statutory distinction between first and second-degree murder" (*Bullock v. U.S.*, 122 F.2d 213, 213-214

(D.C. 1941), and "blur … the critical difference between impulsive and deliberate killings" (*Austin v. U.S.*, 382 f.2d 129, 136-137 (D.C. Cir. 1967)).

Blurring that distinction would violate not just state law but due process, the right to trial-by-jury, and, in a capital case, the Eighth Amendment. (See AOB 131-132, 166-167, and cases there.)

The state disagrees. According to the state, the 1981 amendment to §189 eliminated the problem by shrinking the definition of premeditation and deliberation so drastically that "virtually all intentional murders now satisfy the statutory definition of first-degree murder" and "second-degree murder" now punishes only "unintentional murders." (RB 89-90.) Thus the state feels free to defend the first-degree murder verdicts in this case on the basis of a concept of premeditation and deliberation that bears no resemblance to premeditation and deliberation as it has historically been defined but great resemblance to the *mens rea* for intentional but unpremeditated second-degree murder -- a classification the state believes has "passed into history." (RB 87.)

It has not "passed into history," of course. As demonstrated in §D, the state is wrong. Current case law (e.g., *People v. Dunkle, supra*), the instruction given to all murder juries (including appellant's) in 1991 (CALJIC No. 8.20), and the instructions given to such juries in 2006 (CALCRIM 521(A)), prove unequivocally that the definition of

premeditation and deliberation that has governed for 60 (and in large measure 140) years is still the governing law in this state.

The scenario upon which the state tries to save the verdict is anything but "a fairly good example of what first-degree murder is all about." (RB 84.) It rests on a theory that both demands speculation and is incompatible with state law, the jury's instructions, and fundamental constitutional rights. A juror could not lawfully have voted to convict, and this Court may not affirm, on the basis of such a theory. (See, e.g., *Carella v. California*, *supra*, and cases cited above and at AOB 131-132, 166-167.)

There is no scenario true to the facts and the law that permits the first-degree murder convictions to stand. Under compulsion of *Jackson v. Virginia* and the authorities cited above, the convictions on Counts 2, 7, 9, and 10 must be reversed, along with the special circumstance findings and judgment of death to which they are foundational.

## II.

## IN VIOLATION OF STATE LAW AND DUE PROCESS, THE PROSECUTOR OFFERED JURORS A LEGALLY ERRONEOUS THEORY OF CONVICTION THAT THEY ALMOST CERTAINLY RELIED ON

### A. The Prosecutor Defined Premeditation And Deliberation Out Of Existence

The Attorney General's own proposed verdict-saving scenario (at RB 72-73) is similar to the theory offered the jurors by the prosecutor. (See AOB 162.) Unsurprisingly, therefore, the Attorney General finds the prosecutor's argument unobjectionable. Since the defense he offers is the subject of Argument I above, appellant will not reiterate here all that is said there. He will just offer a few comments.

Appellant construes the prosecutor's argument as defining premeditation and deliberation for the jurors as a mental process that: 1) could and did begin while Mr. Solomon was already engaged in the act of strangling or suffocating the victim; 2) could and did consist solely of the recognition that continuing the conduct would result in the victim's death; and 3) could and did begin and end in a short amount of time. (AOB 163-164.)

The state does not disagree with the first premise. It argues, rather, that, because of the 1981 amendment of §189, it is no longer true that

"premeditated deliberation must occur *prior* to formulation of intent to kill...." (RB 87, emphasis in original.) That formulation, it says, "passed into history" along with the requirement of "mature and meaningful reflection." (*Ibid.*)

As demonstrated in Argument I above, the state is wrong. The 1981 amendment did not modify the definition of premeditation and deliberation in non-diminished capacity cases (*People v. Dunkle*, 36 Cal.4th at 911-912), and in particular did not change the 143-year old requirement that "intent to kill must be the result of deliberate premeditation." (*Sanchez*, 24 Cal. at 30. Accord, *People v. Stress*, 205 Cal.App.3d at 1270; CALCRIM 521(A). See discussion in Arg. I.D and F.4 above.)

Second, the opening brief takes issue with the prosecutor's argument that, beginning with the second killing, premeditation and deliberation were established by the fact that, as appellant strangled a victim, he had to know from having done the same thing previously that his actions would result in the woman's death. (See AOB 162.) The Attorney General thinks such thoughts amount to premeditation and deliberation. (RB 86.) Assuming appellant had such thoughts, however, all he demonstrated by continuing to strangle the victim was that he intended to kill her. The argument makes no distinction between premeditation and deliberation and the "formation of a specific intent to kill." As such, it equates the mens rea required for premeditated and deliberate first-degree murder with that of second-degree

intentional murder and renders "the legislative classification of murder into two degrees … meaningless." (*People v. Anderson*, 70 Cal.2d at 26.) That violates not only state law but due process (among other rights). (See AOB 131-32, 164-167, and cases there.)

As discussed in the preceding argument, the state thinks the problem was eliminated by the 1981 amendment of §189. Ever since, according to the state, the mens rea for premeditated and deliberate first-degree murder has essentially been no more than intent to kill, while second-degree murder is reserved for unintentional killings. (RB 89-90.) As appellant has shown, the state's understanding of the effect of the 1981 amendment is completely wrong. (See Arg. I.D and I.F.4 above.)

The other focus of appellant's claim is on the prosecutor's argument that, since strangling or suffocation lasts more than the "flick of an eye," appellant's mental process while strangling could be deemed premeditation and deliberation. (See AOB 162-164.) Contrary to what the state says, appellant is not arguing that the jurors necessarily would have concluded that any process taking "more than an instant" could constitute premeditation and deliberation. (RB 83.) At the same time, as discussed in Arg. I.F.4, there was no evidence regarding how long it would have taken for a woman to either lose consciousness or die. The prosecutor, moreover, did not suggest the process would last very long. Nor would it have been proper for him to do so. (Cf. *People v. Danks*, 32 Cal.4th at 275 [victim of

"asphyxia due to ligature strangulation ... probably lost consciousness in less than a minute, and died soon thereafter"].) His argument thus invited jurors to conclude that premeditation and deliberation was not a process that required "appreciable time for ... careful consideration." The law is to the contrary. (*People v. Bender*, 27 Cal.2d at 182-183.)

The Attorney General compounds the error by proceeding in his brief on the unproven assumption that the strangling process would have been "relatively lengthy." That allows him to elongate the mental process the prosecutor described for the jury. (RB 83-84.) The additional liberties he takes in that scenario are addressed in Arg. I.F.4.

Finally, the objectionable aspects of the prosecutor's argument are linked and presented to the jury a theory that: 1) was speculative at its core; 2) taken to its logical end, would render every intentional killing by asphyxiation first-degree murder (cf. *People v. Bradford*, 15 Cal.4th at 1345 [holding otherwise]); and 3) impermissibly construed "deliberation and premeditation ... as requiring no more reflection than may be involved in the mere formation of a specific intent to kill" (*People v. Anderson*, 70 Cal.2d at 26), shrank the time frame in which the requisite mental process can take place, and altered the function of premeditation and deliberation as the process by which the intent to kill is arrived at. The prosecutor made and the state is defending a theory incompatible with state law and rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

### B. Because The Trial Court Implicitly "Ratified The Prosecutor's Error," Reversal Is Required Under the *Swain* Standard. It Is Also Required Under The "Reasonable Likelihood" Standard

The opening brief argues that reversal is required under either of two standards. The first is that reversal is required under *People v. Swain* because it cannot be "determined beyond a reasonable doubt that the erroneous" theory presented by the prosecutor "did not contribute to the convictions" on Counts 2, 7, 9, and 10. (12 Cal.4th 593, 607 (1996). Accord, *People v. Green*, 27 Cal.3d 1, 69 (1980).) The state does not respond directly. It asserts, however, that "[a]ppellant offers no argument which purports to explain how" the jury could have followed both: 1) the court's instructions on premeditation and deliberation; and 2) the erroneous theory the prosecutor invited them to rely on. (RB 76. See RB 87.)

The state is wrong. Appellant discusses that very point. The standard instruction was sufficiently ambiguous to permit the jury to reconcile the argument with the instructions. (AOB 170-171.) When, during or following the prosecutor's argument, "the court did nothing to 'disabuse[ ] the jury of [the] notion'" that the prosecutor had correctly described a culpable mens rea for first-degree murder "(a defect it could have cured with a preclusive instruction), it ratified the prosecutor's error." (*People v. Morales*, 25 Cal.4th 34, 43 (2001), quoting *People v. Green,* 27

Cal.3d 1, 68 (1980).) "In these circumstances the governing rule on appeal is both settled and clear: when ... the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Green,* 27 Cal.3d at 69. Accord, *Morales*, 25 Cal.4th at 43; *Swain*, 12 Cal.4th at 607.) That is the case here.

Alternatively, appellant argues that reversal is required even if the Court deems the applicable standard to be that enunciated in *People v. Payton* because there is a "reasonable likelihood" that one or more jurors relied on the prosecutor's conception of premeditation and deliberation. (3 Cal.4th 1050, 1071 (1992).)

In support of that conclusion, appellant argues, *inter alia*, that the pattern of the verdicts supports the conclusion that the jury relied on the prosecutor's theory that, if Mr. Solomon thought about a prior killing while killing another woman, that would constitute premeditation and deliberation. Appellant points to the fact that the jury found Mr. Solomon guilty of only second-degree murder in the death of Linda Vitela, the first woman to disappear, but first-degree murder in the deaths of four of the next five women to disappear. (AOB 170-171.) [34]

The state does not address that point head-on. Rather, it makes the lesser argument that the second-degree murder convictions on the counts

involving Ms. Vitela and Cherie Washington show that the jurors did not think premeditation and deliberation could occur in "a blink (or flick) of an eye." (RB 88.) The inference is only half-true. Those verdicts show that the jurors did not think that a truncated time span was *all* that was required. When the prosecutor added the (speculative) thought-content discussed above, however -- i.e., while strangling a new victim, some thought of a prior killing must have entered Mr. Solomon's mind -- jurors plainly believed that *that* mental process, beginning and ending *during* the act of strangulation or suffocation, satisfied the mens rea for first-degree murder.[35]

Finally, appellant would draw the Court's attention to the facts that Respondent's Brief studiously avoids mentioning: the 10 full days of deliberations over 24 calendar days, as well as the questions the jurors

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[34] The fifth woman was Ms. Polidore, who was not found in or buried behind a house connected to Mr. Solomon. The jury reached no verdict on whether Mr. Solomon was responsible for her death. (19 CT 5527.)

[35] As noted, jurors could not apply that reasoning to the first killing, in which the victim was Ms. Vitela. Ms. Washington was in the reverse position. The last first-degree murder victim to disappear was Ms. Massey. It was five months before the next woman, Ms. Washington, disappeared. (See AOB 52, 55, and citations there.) In the context of this case, that was a long time and could explain a juror's reasonable doubt whether the flashback- rationale applied. In addition, Ms. Washington disappeared around the same time that, if Ms. Cooper was to be believed, Mr. Solomon began to strangle her despite having left the motor of his car still running. (32 RT 15127, 15169.) It would have been most reasonable for a juror to doubt whether Mr. Solomon's thought process in that period of time was rational.

asked during deliberations. (See AOB 183-184 and cites there.) If the Court were to analyze this claim in a way that called for traditional harmless error analysis, that analysis must begin with the recognition that jurors struggled mightily to reach their verdicts and were highly susceptible to the suggestion that a first-degree murder conviction could be based on the prosecutor's erroneous conception of premeditation and deliberation. (See *ibid.* and cases there.)

### C. Appellant Has Not Waived Or Forfeited His Right To Make This Claim. If He Has, It Should Nonetheless Be Reviewed On The Merits

The state claims that appellant waived or forfeited his right to have this argument (Argument II) reviewed on the merits. (RB, 77-82.) That is not correct.

In *People v. Morales*, *supra*, this Court discussed two types of cases involving error by the prosecutor in closing argument. In *Morales* itself, the "prosecutor arguably misstated some law" but it could not be said that the jury was presented with "a case that was premised on a legally incorrect theory." That garden-variety kind of prosecutorial "error," the Court held, is "merely ... prosecutorial misconduct." To preserve such an issue for appeal, the defendant ordinarily has to object in the trial court to the prosecutor's argument. (*Morales*, 25 Cal.4th at 43-44.)

The second type of case, *Morales* held, is exemplified by *People v. Green*, *supra*. *Green* involved several errors but the one most relevant here involved the third theory the prosecutor offered the jury for finding that the asportation element of the kidnapping charge had been proved. In closing argument, the prosecutor offered jurors one proper basis for conviction -- pointing to earlier conduct that had involved forcibly moving the victim 5 miles -- but also stated they could rely on later conduct in which the victim had been forcibly moved only 90 feet. The prosecutor, using the terms of the standard instruction the jury would receive, argued that that was a "substantial distance", i.e. "more than slight or trivial." This Court held that 90 feet was *not* substantial. "Nothing in the instructions ... disabused the jury of [the] notion" that it *was* substantial, however, and "[n]o further guidance was provided on the ... issue, although it is 'the determining factor in the crime of kidnapping' [citation]." [36] Thus, the Court held, the jurors had been offered a "legally incorrect" theory for conviction. Because the Court could not "determine from the record" whether the "general verdict of guilt rested" on a "legally correct" or "legally incorrect" theory, moreover, reversal was required. (*People v. Green*, 27 Cal.3d at 68-69.)

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[36] The Court did not hold the standard instruction, albeit vague, to be incorrect. Indeed, juries in 2007 are still instructed that "substantial distance means more than a slight or trivial distance." (CALCRIM No. 1215.)

The relevance of the latter holding to the present discussion is underscored by the Court's treatment in *Green* of the appellant's challenges to nine other statements by the prosecutor. The Court held that, because trial counsel had not objected to eight of those more commonplace instances of alleged misconduct (e.g., expression of personal belief), those issues had not been preserved for appeal. (27 Cal.3d at 27, 34-35.) Given that trial counsel apparently did not object to the prosecutor's legally incorrect theory of asportation *either*, the fact that the Court not only reviewed the appellate claim on the merits but reversed is of more than passing interest here. (*Id.* at 68-69.) [37]

In *Morales*, the Court explained why the error in *Green* was entitled to different treatment on appeal than that at issue (and held subject to forfeiture) in *Morales*. First, the legally incorrect theory in *Green* had been presented to the jury "in the very trying of the case." (*Morales*, 25 Cal.4th at

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[37] The *Green* opinion makes no reference to there having been any objection to the asportation argument. (Compare 27 Cal.3d at 27, 34-35, where the Court focused explicitly on whether objection had been made at trial to the other more prosaic prosecutorial statements being challenged on appeal.) That there was no objection in *Green* is implicit in the majority opinion in *Morales*, where a principal point of the discussion was to explain why, in contrast to *Green* and *People v. Guiton*, 4 Cal.4th 1116, 1131 (1993), the defendant's failure to object in *Morales* "waived his claim [for] appeal...." (*Morales*, 25 Cal.4th at 42-44.) The failure to object in *Green* and *Guiton* is explicitly noted in the dissenting opinion in *Morales*. (25 Cal.4th at 54, fn. 2 [dissenting opn. of Brown, J.].)

43.) [38] Second, "[t]rial courts have the duty to screen out invalid theories of conviction ... by appropriate instruction." (*Ibid.*, quoting *People v. Guiton*, 4 Cal.4th at 1131.) In *Green,* because the trial "court did nothing to 'disabuse[ ] the jury of [the] notion'" that 90 feet was "substantial" movement, it effectively "ratified the prosecutor's error." (*Morales*, 25 Cal.4th at 43, quoting *Green,* 27 Cal.3d at 68.) [39] In both *Green* and *Guiton*, the court had "presented the state's case to the jury on an erroneous legal theory...." (*Morales*, 25 Cal.4th at 43.)

The error here is comparable to the error in *People v. Green*. Here:

1) The prosecutor's argument embodied the legally erroneous conception of premeditation and deliberation discussed above.

2) It was the *only* theory of premeditation and deliberation offered to the jury (see AOB , 141-147, 162, 169-170, and cites there).

3) Premeditation and deliberation were "the determining factor[s] in the crime of" first-degree murder. (*Green*, 27 Cal.3d at 68.)

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[38] The Court used the quoted phrase to describe the errors in both *Green* and *People v. Guiton*, 4 Cal.4th 1116 (1993). In the latter, the defendant was charged in the alternative with either selling or transporting cocaine. There was insufficient evidence of selling but the jury was instructed on both theories and the prosecutor argued both, although stressed the proper one. (See *id.* at 1130-1131.)

[39] The court in *Guiton* likewise "should have modified the instructions" in that case "in light of" the insufficient evidence that the defendant had sold cocaine. (*Morales*, 25 Cal.4th at 43.)

4) The "erroneous legal theory" was thus "presented … to the jury … in the very trying of the case." (*Morales*, 25 Cal.4th at 43.)

5) The trial court, moreover "did nothing to 'disabuse[ ] the jury of [the] notion'" that the prosecutor had provided a correct interpretation of the mens rea for first-degree murder. (*Ibid.*; *Green* at 68.) It simply gave the jury the standard instruction that left room for the prosecutor's argument. (18 CT 5350-51.) The court thus effectively "ratified the prosecutor's error" and allowed "the state's case" to be presented "to the jury on an erroneous legal theory." (*Morales* at 43.)

The scope of the error raised in Argument II brings it within the precise category of non-garden-variety, non-forfeitable issues exemplified by *Green*. Mr. Solomon may not be penalized by his counsel's failure to object to the erroneous legal theory presented to the jury. The issue is properly presented for review on the merits.

The latter conclusion is consistent with the rule that a "defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera*, 15 Cal.4th 269, 276 (1997).) [40]

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[40] In the opening brief, appellant inadvertently quoted a different sentence in *Vera* to the same effect. It is true, as respondent says, that the latter sentence was describing the holding of the lower court. (See 15 Cal.4th at 279; RB 78, fn. 48.) What is *not* true is respondent's suggestion that the substance of the quoted statement was repudiated by this Court in *Vera*. As forth in the text above and at page 276 of the opinion, the Court stated the

This claim asserts the deprivation of just such a fundamental right: the right

> *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment [- namely, ] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense [as defined by state law].

(*Jackson v. Virginia*, 443 U.S. at 316. See *In re Winship*, 397 U.S. 358, 364 (1970).) For that right to mean anything, the one theory "presented … to the jury on" the critical element in the case cannot be "erroneous." (*People v. Morales*, 25 Cal.4th at 43.) Where that occurs, the failure to object at trial cannot bar review. That is especially true when, as here, it is that element on which the *capital* conviction rests. (*Gardner v. Florida*, 430 U.S. 349, 357 (1977) ["death is different"]; *Kyles v. Whitley*, *supra,* 514 U.S. 419, 422 (1995) [a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

As indicated in the discussion of *People v. Morales* above, furthermore, the error here involves the confluence of the prosecutor's statements *and* the fact that the instructions to the jury effectively "ratified

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quoted principle as an accepted and governing principle of law established in many prior cases. (See 15 Cal.4th at 276-277 and cases there.)

the prosecutor's error." (*Morales*, 25 Cal.4th at 43.) The failure to object to the instructional error was not invited error. [41] Pursuant to Penal Code §1259 furthermore, the failure to object does not preclude raising the issue for the first time on appeal. [42]

In the opening brief, appellant also makes reference to the duty of review imposed in automatic appeals by Penal Code §1239(b), and to the oft-exercised discretionary authority of this state's "appellate court[s to] ... reach ... questions that have not been preserved for review." (*People v. Smith*, 31 Cal.4th 1207, 1215 (2003).) (AOB 173-174.) The Attorney General does not respond to those points.

Instead, he appears to argue that federal constitutional rights cease to exist when attorneys fail to assert them in the trial court and, as a matter of federal constitutional law, are definitively waived by such a failure. (See

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[41] Cf. *People v. Dunkle*, 36 Cal.4th 861, 923-924 (2005) [despite the fact that "trial counsel stated he had no objection to the instructions being given ..., the invited error doctrine is inapplicable, as it does not appear trial counsel both 'intentionally caused the trial court to err' and clearly did so for tactical reasons. [Citation.]"].

[42] Cf. *People v. Dunkle*, 36 Cal.4th at 928 ["Although defendant did not object to this preinstruction or request clarification, we do not deem forfeited *any* claim of instructional error affecting a defendant's substantial rights. (§ 1259...)"; emphasis added]. See also *id.* at 913, 924.) In Arg. V, *post,* appellant will discuss both subjects -- invited error and the scope of §1259 -- in showing that there is no merit in respondent's argument that the state and federal Constitutions *prohibit* this Court from reversing on the basis of unobjected-to instructional error no matter how prejudicial that error was.

RB 78-81.) That is simply untrue. "[A] procedural default, that is, a critical failure to comply with state procedural law, is not a jurisdictional matter." (*Trest v. Cain*, 522 U.S. 87, 89 (1997).) There are many instances in which "a federal court may address" and will address the merits of a constitutional claim even if there was an apparent default of the claim in state court. (*Coleman v. Thompson*, 501 U.S. 722, 735 (1991); accord, *Caldwell v. Mississippi,* 472 U.S. 320, 327 (1985). Cf. *Stark v. Hickman*, 455 F.3d 1070, 1075 -1080 (9th Cir. 2006) [reversing murder conviction despite default noted by state appellate court].) The federal Constitution, furthermore, does not give governments carte blanche to find that constitutional rights have been forfeited. The federal "plain error" rule (Rule 52(b), Federal Rules of Criminal Procedure) rests on principles "of fundamental justice" (*Hormel v. Helvering,* 312 U.S. 552, 557 (1941); accord, *U.S. v. Olano*, 507 U.S. 725, 732 (1993)), and "the adequacy of … a state procedural [default] rule … 'is itself a federal question.' *Douglas v. Alabama,* 380 U.S. 415, 422 … (1965)." (*Melendez v. Pliler*, 288 F.3d 1120, 1125 -1126 (9th Cir. 2002) [where the state relied on a procedural bar that was not " 'clear, consistently applied, and well-established at the time of the petitioner's purported default,'" district ordered "to consider the claim on the merits"].) [43]

[43] Appellant will have more to say on these subjects in response to the more sweeping claim respondent makes in Argument V. (See Arg. V below,

California courts, finally, will also consider a "claim on the merits to forestall an ineffectiveness of counsel contention based on the failure to object at trial." (*People v. Lewis*, 50 Cal.3d 262, 282 (1990). Accord, *People v. Johnson*, 139 Cal.App.4th 1135, 1146 (2006).) [44]

That would be appropriate here.

If appellant's substantive analysis is correct, the only theory offered the jury for finding Mr. Solomon guilty of first-degree murder on any count was erroneous. If appellant's analysis in this argument and Argument I above is correct, furthermore, the Attorney General has not been able to come up with any more proper theory. To the contrary, he cannot defend either his own theory or the prosecutor's without reliance on a radical misinterpretation of the 1981 amendment to §189. If trial counsel had objected to the prosecutor's argument, therefore, it is, at the very least, quite unlikely that the latter was going to be able to come up with any

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§C.3.)

[44] See *People v. Butler*, 31 Cal.4th 1119, 1128 (2003) ["applying a forfeiture rule in this circumstance would likely have the effect of converting an appellate issue into a habeas corpus claim of ineffective assistance of counsel for failure to preserve the question by timely objection.... {W}e would be loath to invoke a rule that would proliferate rather than reduce the nature and scope of legal proceedings.... After all, judicial economy is a principal rationale of the forfeiture doctrine"]; *People v. Pedroza*, 147 Cal.App.4th 784, 791-794 (2007) [after reaching substantive issue in direct appeal and finding evidence admissible, court dismisses as moot the companion habeas petition "alleging ... counsel was ineffective for failing to raise an appropriate objection to the admission of the" evidence].)

better, legally correct, argument. No constitutionally acceptable tactical reason could justify the failure to object to an argument that opened the door to the jury convicting Mr. Solomon of first-degree murder -- a predicate for pursuing the death penalty -- on a conception of premeditation and deliberation inconsistent with state law and due process. This is particularly so in light of the fact that trial counsel did not respond to the prosecutor's argument in his own closing argument. Indeed, he did not address the question of premeditation and deliberation at all. (36 RT 16359 - 37 RT 16466.) Given counsel's especially "mammoth responsibility" to be diligent in capital cases (*In re Jones*, 13 Cal.4th 552, 581-582 (1996)), the failure to make the objection fell "below an objective standard of reasonableness ... under prevailing professional norms." (*Wiggins v. Smith,* 539 U.S. 510, 521 (2003), quoting *Strickland v. Washington,* 466 U.S. 668, 688 (1984).) Substantively, counsel's silence effectively "resulted in the withdrawal of a potentially meritorious defense." (*People v. Pope*, 23 Cal.3d 412, 425 (1979). See generally, *People v. Ledesma*, 43 Cal.3d 171, 224 (1987) [failure to object, *inter alia*, to prosecutor's "comments at trial" constituted ineffective assistance of counsel in violation of Sixth Amendment]; *People v. Fosselman*, 33 Cal.3d 572, 581-82 (1983) [failure to object to improper prosecutorial argument may be raised as ineffective assistance of counsel claim if failure to object not tactical]; U.S. Const., Amends. 6, 14; Calif. Const., art. I, §15.)

The error is that much worse if objection is deemed a prerequisite for raising the issue on appeal. Counsel should have objected to preserve Mr. Solomon's rights and to foreclose any future claims of forfeiture. (*Cf. People v. Stratton*, 205 Cal.App.3d 87, 93 (1988) [trial counsel may not "surrender ... {defendant's} ability to exploit ... {error} on appeal"]; *In re Christina P.*, 175 Cal.App.3d 115, 129-30 (1985) [failure to make adequate record constitutes ineffective assistance of counsel].) Given the substantive merit of the objection that should have been made, it is reasonably probable that making it would have benefited Mr. Solomon in the trial court, or, failing there, on post-conviction review. (See generally, *Wiggins*, 539 U.S. at 534.)

For all of the foregoing reasons, the claim should be reviewed on the merits. [45]

[45] The ineffective assistance discussion in this section is only meant to encourage review of the substantive "claim on the merits to *forestall* an ineffectiveness of counsel contention based on the failure to object at trial" (*People v. Lewis*, 50 Cal.3d at 282; emphasis added), *not* to actually assert the substantive ineffective-assistance contention referred to in *Lewis*. Mr. Solomon will assert the substantive claim either by habeas corpus or, since appellate counsel is no longer habeas counsel, by a supplemental brief in this direct appeal if, after properly noticed motion, the Court permits him to do so.

## III.

## IF MR. SOLOMON'S FIRST-DEGREE MURDER CONVICTIONS ARE PERMITTED TO STAND BASED ON AN INTERPRETATION OF STATE LAW THAT FAILS TO MAINTAIN A MEANINGFUL DISTINCTION BETWEEN FIRST AND SECOND DEGREE INTENTIONAL MURDER, THEN STATE LAW VIOLATES DUE PROCESS

Appellant's concern -- and the concern expressed by this Court in *Thomas, Bender, Anderson, et al.* -- is that a cognizable distinction be maintained in the mens rea for first and second-degree murder intentional murder. (See AOB 130-135.) The state's response is: 1) a state is not required to break murder into first and second-degree; 2) therefore, the fact that the 1981 amendment to §189 has effectively eliminated the crime of intentional second-degree murder renders also eliminates the due process problem appellant raises. (RB 89-90.) Appellant has previously demonstrated that respondent's interpretation of the intent and effect of the 1981 amendment is wrong. (See above, Arg. I.D.)

Respondent is correct, however, in pointing out that the due process concern appellant raises also implicates the Eighth Amendment requirement that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty,' " *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)),

and must do so by "provid[ing] a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not'", *People v. Edelbacher*, 47 Cal.3d 983, 1023 (1989), quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (conc. opn. of White, J.). Respondent is *in*correct, however, in its claim that making all intentional murders death-eligible (which respondent believes the 1981 amendment did) would not violate the latter proscription. (See RB 90-93.) Since the 1981 amendment did not do what respondent thinks it did, its broader argument -- that there is no narrowing requirement -- will not be addressed here. Appellant will address it in Arg. XVIII below, where the state reiterates the assertion in response to appellant's claim that California's *actual* scheme sweeps too many homicides and too many perpetrators into its very broad net. (See AOB, Arg. XVIII.) As will be seen, the cases the state relies on -- and that this Court relied on in making a similar assertion in *People v. Beames*, 40 Cal.4th 907, _, 55 Cal.Rptr. 3d 865, 886-887 (2007) -- do not support the proposition that the Supreme Court has abrogated the requirement that a death penalty scheme, viewed as a whole, must "genuinely narrow."

## IV.

## ALLOWING JURORS TO HEAR MR. SOLOMON'S APPARENT ADMISSION TO HAVING STRANGLED GIRLS TO DEATH RENDERED HIS TRIAL FUNDAMENTALLY UNFAIR

Appellant argues that, on listening to the interrogation tape and reading the transcript of it, one or more jurors were likely to conclude that:

1) when Det. Pane accused Mr. Solomon of having "strangled girls," he was accusing him of murdering girls by strangling them;

2) Det. Pane had statements from a number of people supporting the accusation; and

3) Mr. Solomon's responses showed a consciousness of guilt.

(See AOB 178-181.)

In response, the state asserts: "the jurors were … informed unequivocally [that] … appellant referred to strangling as non-fatal activity." (RB 96.) This is based on the state's inaccurate paraphrase of the interrogation transcript. In the first interrogation, Det. Pane asked, back to back: "How many people have you murdered?" and "How many whores have you strangled?" (30 ACT 8984.) In the second interrogation session, when Det. Pane accused him of having "strangled girls," Mr. Solomon said: "I know you're going to have some girls say I did…." (31 ACT 9127.) Jurors heard both passages. (See Exhs. 545A, 546C, at 30 ACT 8981 - 31 ACT 9147.) In light of Det. Pane's prior equation of murder and

strangling, jurors reasonably could have been understood Mr. Solomon's response to mean: "I know you're going to have some girls say I strangled girls to death." Respondent, however, paraphrases Mr. Solomon's response as saying that he knew the detective had females who were alive who were going to come to court and "attest that he strangled *them*." (RB 96.) The word "them" is not in the transcript. It is inserted by the state. It was not information that was "unequivocally" provided to the jurors.

The state, moreover, fails to note or address the fact that jurors had heard Det. Pane's back-to-back questions equating murder and strangling.

The state also says that jurors would have known that Det. Pane's reference to "And I have the one here" referred to the statement LaTonya Cooper had given earlier that day. It is possible that jurors could have pieced that together, although not from the cites respondent provides. (RB 97, fn. 57.) It would have been *immediately* evident to the jurors, however, that Det. Pane was referring to his sources in the plural ("I have these people saying that ... And I have the one here") and that Mr. Solomon understood him to be saying there would be "girls" (plural) coming in to testify. (31 ACT 9127, 9130-9131.) [46] At most, therefore, a juror might have thought Ms. Cooper was *one* of those "people" Det. Pane was

[46] In fact, while jurors did not specifically know this, Pane had statements from two women besides Ms. Cooper. (See AOB 180 and cites there.)

referring to. Even that was not likely, however, if appellant is correct that jurors would have understood that Det. Pane was equating "strangling" with "murder" (the connection the state ignores) and thus was claiming to have "people" who had given him information that supported his belief that Mr. Solomon had "murdered ... people," not just attacked them.

The state further asserts "[t]here is no reasonable argument that ... jurors could have inferred a confession" from Mr. Solomon's responses to Pane's accusations." (RB 97.) When Pane asked if he was "sure" that he had "never strangled girls," Mr. Solomon responded: "Nothing that I can remember." (31 ACT 9127.) When Pane asked him if he'd "lied" when he said "never strangled girls," Mr. Solomon said "Okay." (31 ACT 9131.) While the state is correct that jurors would have understood that these responses were not intended as confessions, they also undoubtedly noticed that they were not resounding denials either. Given the incomplete version of the interrogation the jury heard, along with the instructions it received, a reasonable juror could have drawn an incriminating inference from Mr. Solomon's responses. [47]

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[47] Jurors were instructed they could infer "a consciousness of guilt" if, prior to trial, "the defendant made a ... deliberately misleading statement concerning a crime for which he is now being tried." (18 CT 5332.) They were also told they could consider any "admissions" by the defendant, i.e., pre-trial statements that did not explicitly "acknowledge his guilt" but "tend ... to prove" it "when considered with the rest of the evidence." (18 CT 5338.)

The state also takes a wholly unfounded swipe at appellate counsel. After concluding that appellant's substantive claim has no merit, respondent writes: "It is perhaps for this reason that appellant attempts to have this Court consider evidence which was not admitted. (See AOB 178, 180.)" (RB 97.) The implication is that appellate counsel tried to sneak some evidence past the Court to bolster his otherwise weak argument.

The snide comment has it completely backwards. At the noted pages, it is true, the opening brief refers to evidence that the jurors did *not* hear. The brief *explicitly* advises the Court of this, however. Further, the clear and stated purpose of supplying the information in question was to advise the Court that, if the jurors *had* heard the entire tape, they would *not* have drawn the prejudicial conclusion they could have drawn from the edited version they heard. (See AOB 178, 180.) The intent was simply to provide the Court with some understanding of the true context in which the argument was being made in order to *avoid* creating any misimpression.

Respondent further asserts that this Court should simply refuse to review this claim because Mr. Solomon's trial attorney, fully aware of "every word" of the interrogation transcript, "elected not to object" to the passages this argument claims were prejudicial. "Appellate counsel," respondent writes, "has no knowledge superior to that of trial counsel...." (RB 94.)

The latter assertion is almost certainly not true. As the opening brief makes clear, trial counsel had moved for the exclusion of prejudicial portions of the tape and transcript like those at issue, the prosecutor promised to remove them, and subsequently announced that he had done so. (See AOB 177; 3 RT 6393; 34 RT 15663.) Since trial counsel undoubtedly did not *want* the passages in question to remain (respondent certainly suggests no *benefit* to Mr. Solomon in keeping them in), it is very, very likely that the prosecutor's promise lulled counsel into not scrutinizing the tape and transcript as carefully as he should have. As the opening brief indicates, the failure to object cannot be deemed the kind of knowing "election" respondent asserts it was, "[b]ecause the prosecutor's promise induced" it. (AOB 183, quoting *People v. Quartermain*, 16 Cal.4th 600, 620 (1997).)

Respondent cries waiver yet makes no reference whatsoever to the prosecutor's promise and his inducement of any waiver. Its failure to acknowledge the facts or to rebut their significance may reasonably be construed as an implicit concession that they fatally undermine its waiver analysis. (*Cf. People v. Bouzas*, 53 Cal.3d 467, 480 (1991) ["People apparently concede ... [defendant's] argument"; "they simply ignored this point in their brief"].)

That said, promise or no, trial counsel should have scrutinized the prosecutor's editing job, noted the presumably inadvertent failure to

remove the prejudicial passages, and taken whatever action was necessary to have them removed. (*People v. Ledesma, supra,* 43 Cal.3d at 224 [counsel's failure to move to exclude prejudicial evidence violates Sixth Amendment]. Considering the "claim on the merits" in the direct appeal would thus "forestall [the] ineffectiveness of counsel contention" that will inevitably be made on habeas corpus (*People v. Lewis*, 50 Cal.3d at 282) and would achieve the very "judicial economy" that "is a principal rationale of the forfeiture doctrine" (*People v. Butler*, 31 Cal.4th at 1128). [48]

Given trial counsel's likely reliance on the prosecutor's promise, the interest in judicial economy, the command of Penal Code §1239 that the Court make "an examination of the complete record" in capital cases (accord, *People v. Massie*, 19 Cal.4th at 566), and the Court's inherent discretionary authority to "reach ... questions that have not been preserved for review" (*People v. Smith*, 31 Cal.4th at 1215), appellant respectfully requests that his claim be reviewed on the merits. [49]

Regarding those merits, finally, appellant argues that the passages that should have been deleted were prejudicial, noting, *inter alia*, the 10

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[48] Here, as with the ineffective assistance discussion at the end of Arg. II, appellant's intent is to encourage review of the substantive claim on the merits and *not* to prematurely assert the ineffective-assistance claim that, in this instance, will be made by way of habeas corpus.

[49] Contrary to respondent's suggestions, there is certainly no state or federal constitutional *bar* to such review. (See Arg. II.C above and Arg. V.C.3 below.)

days of deliberations and the questions the jury asked during deliberations. (AOB 183-185.) The state makes no response.

## V.

## IN VIOLATION OF DUE PROCESS, JURORS WERE INSTRUCTED TO TRUST THEIR RECOLLECTIONS OVER OTHER JURORS' NOTES AND WERE IMPLIEDLY TOLD THAT A REQUEST FOR A READBACK WOULD NOT BE PROPER TO RESOLVE A DISAGREEMENT BETWEEN TWO JURORS

### A. Introduction

In the form given at appellant's trial, CALJIC No. 17.48 (the note-taking instruction) contained two errors likely to mislead jurors about their deliberative process and thus violated both state statutory law and his state and federal constitutional and statutory rights to due process, trial by jury, and a reliable capital guilt verdict. (AOB 186-195.)

The state contends the claim should be considered forfeited but fails to apprise the Court of the true factual context. The instruction was requested by the prosecutor. (18 CT 5300; 19 CT 5398.) Subsequently, at the *in camera* session in which the court indicated which of the prosecutor's instructions he had decided to give (see 35 RT 15865), defense counsel were *silent* when the court said it would be giving 17.48 (35 RT 15879). Under very well-established case law, such silence was not invited error. (See, e.g., *People v. Dunkle,* 36 Cal.4th 861, 923-924 (2005), and §B below.) Nor was it forfeiture. Since appellant is alleging the kind of instructional error that, if committed, violates a defendant's substantial

rights, review is authorized by Penal Code §1259 whether or not there was an objection below. (See, e.g., *People v. Dunkle, supra,* 36 Cal.4th at 913, 928, and § C below.)

In light of the foregoing statutory and case law, the state resorts to desperate measures. Its failure to acknowledge the procedural facts noted above is but one manifestation of that desperation. In order to give its claim of forfeiture some semblance of substance, it launches into a 10-page pseudo-treatise that ignores this Court's §1259 case law, mis-cites other cases, and fabricates a broader and bogus legal universe in which the Court is meant to conclude that the Court's own practice has "little wisdom" compared to that being offered by respondent. (RB 106, fn. 60.)

Boiled down to its essence, the state argues that: 1) the People have a right to due process; 2) it supersedes §1259; and 3) it is violated whenever this or any court: a) reviews on the merits a claim of instructional error that was not made below; b) finds that the instruction was erroneous and violated substantial rights; c) finds that the error was structural or instrumental in producing the conviction or sentence of death; and d) reverses the conviction or sentence on direct appeal.

The argument is devoid of merit. Given the stakes for Mr. Solomon, however, appellant will respond seriously. While the whole exchange is disproportionately long in relation to the particular errors (in CALJIC No. 17.48) that are at issue, the state adverts to its "due process right" in many

arguments in its brief. Appellant will thus address the issue head-on and hopefully demonstrate dispositively that the state is relying on a fallacious construct that has no relevance to any claim raised in this brief.

### B. There Was No Invited Error Here

Before getting to the due process argument directly, it is necessary to respond to the state's misuse of two "invited error" cases. As noted, the state's brief gives no indication that the prosecutor requested 17.48 and that defense counsel were silent when the trial court said it would give the instruction. Nonetheless, the state claims that, even if the instruction was unconstitutionally and prejudicially flawed, Mr. Solomon "freely consented" to its being given. (RB 102.) The state intimates (falsely) that this Court has held that such "consent ... bars appellate review." (RB 105, quoting *People v. Rodrigues*, 8 Cal.4th 1060, 1133-1134 (1994).) *Rodrigues*, however, was an "invited error" case. The "consent" it was referring to arose from the fact that defense counsel in that case had affirmatively *requested* the instruction later complained of. (*Ibid.*) That was also true in the other "invited error" case the state cites. (RB 105, citing *People v. Wader*, 5 Cal.4th 610, 657-658 (1993).) Respondent relies on the holdings without revealing the critical procedural fact that distinguishes them from this case.

There was no invited error here. This Court's discussion of the issue in *People v. Dunkle, supra,* is dispositive:

> The Attorney General contends the contention is forfeited for purposes of this appeal under the invited error doctrine (see *People v. Wader* ...) because trial counsel stated he had no objection to the instructions being given. On the record before us, the invited error doctrine is inapplicable, as it does not appear trial counsel both "'intentionally caused the trial court to err'" and clearly did so for tactical reasons. [Citation.] We therefore address the argument on its merits (see § 1259 ...).

(*People v. Dunkle*, 36 Cal.4th 861, 923-924 (2005).)

In *Dunkle*, the Attorney General at least had a pretext for arguing invited error because trial counsel in that case had "stated on the record that he had no objection to the instructions being given." (*Ibid.*) The Attorney General has no such excuse in this case. In Mr. Solomon's case, there was *no* verbal acquiescence, *no* affirmative request, and certainly no indication in the record that "trial counsel *both* intentionally caused the trial court to err *and* clearly did so for tactical reasons." (*Dunkle* at 924; emphasis added and internal quotes omitted.) It is distressingly misleading that respondent would even intimate that the case law would support finding invited error here.

### C. Neither Review Nor Reversal On The Merits Is Forbidden Here; Adoption of the People's "Right To Due Process" In 1990 Did Not Effect A Silent Repeal Of Penal Code Section 1259

#### *1. Remarkably, Respondent's Brief simply ignores the extensive body of case law in which this Court has interpreted and applied Penal Code §1259*

The case law is clear that defense counsel were not required to affirmatively object to 17.48 in order for Mr. Solomon to argue here that the instruction contained prejudicial errors. In *Dunkle*, after rejecting the state's invited-error claim, this Court concluded: "We therefore address the argument on its merits (see § 1259 ...)." (36 Cal.4th at 924; emphasis added.)

Penal Code §1259 provides:

> Upon an appeal taken by the defendant, ··· the appellate court may ··· review any instruction given, refused or modified, even though no objection was made thereto in the trial court, if the substantial rights of the defendant were affected thereby.

In *Dunkle*, the defendant complained on automatic appeal that an instruction given during voir dire erroneously defined aggravation and mitigation. This Court held:

> Although defendant did not object to this preinstruction or request clarification, we do not deem forfeited *any* claim of instructional error affecting a defendant's substantial rights. (§ 1259…)

(*People v. Dunkle*, 36 Cal.4th at 928; emphasis added. See also *id.* at 913 ["Although he did not object at trial to" CALJIC No. 2.02, "to the extent the asserted instructional error affected his substantial rights, the claim is preserved for appellate review. (§ 1259)"].) The holding in *People v. Benavides*, 35 Cal.4th 69 (2005) is identical:

> Counsel and the court conferred regarding instructions; defense counsel offered no instructions of his own, and agreed with or did not object to the instructions selected by the court. Nevertheless, to the extent defendant asserts instructional error affected his substantial rights, he is not precluded from raising the claim on appeal even absent an objection in the trial court. (§ 1259….)

(*People v. Benavides,* 35 Cal.4th at 99-100.)

This Court has so interpreted and applied §1259 in many, many cases. Respondent's Brief cites *none* of them. [50]

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[50] Recent cases in which the Court, citing §1259, has reviewed claims of unobjected-to instructional error on the merits include, e.g., *People v. Guerra*, 37 Cal.4th 1067, 1134 (2006) ["Defendant … complains the motive instruction shifted the prosecution's burden of proof to imply he had to prove his innocence. Despite his failure to object to this instruction on this basis, the claim is cognizable on appeal because it implicates his substantial rights. (…§ 1259)"]; *id.* at 1135, 1149 [similar holdings re other

When the state does make reference to decisions by this Court that involved the failure to object to instructional error, moreover, it distorts the context in which those decisions were made. The mis-citation of the invited error cases discussed above is one example. Another is the discussion of *People v. Cole*, 33 Cal.4th 1158 (2004). In *Cole*, the trial court failed to instruct on an element. The defendant did not object at trial but on appeal argued, *inter alia*, that the error violated the federal Constitution. This Court reviewed the claim on the merits. (*Id.* at 1207-1209.) The state is horrified that the Court would do such a thing, finding "little wisdom" in ruling on federal constitutional issues just because an element of the crime was involved. The state makes it appear that *Cole* is somehow unique in doing so. (RB 106, fn. 60.)

It is not unique in the least. In every one of the §1259 cases cited above, the defendant, for the first time on appeal, raised a federal constitutional issue regarding instructional error and the Court reviewed it on the merits. Such review was not restricted to the failure to instruct on an

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instructional issues]; *People v. Gray*, 37 Cal.4th 168, 235 (2005) ["Respondent ... contends defendant failed to preserve the constitutional issue because he failed to object on this ground. If, however, defendant is correct ..., the instruction would have affected a substantial right of his, and section 1259 would permit him to raise the issue on appeal despite failure to object.... [T]he issue is properly before this court"]. Accord, *People v. Stitely*, 35 Cal.4th 514, 556 and fn. 20 (2005); *People v. Rogers*, 39 Cal.4th 826, 880-881 and fn. 28 (2006). Earlier cases include: *People v. Hannon*, 19 Cal.3d 588, 600 (1977) [citing §1259 and reversing for unobjected-to instructional error]; *People v. Graham*, 71 Cal.2d 303, 319 (1969) [same].

element, moreover. Merits-review was forthcoming as long as the claimed error potentially implicated the defendant's substantial rights. (See, e.g., *People v. Dunkle*, 36 Cal.4th at 923-924 ["Defendant contends that CALJIC Nos. 8.85 and 8.88, as read to the jury," were "in violation of the Sixth, Eighth and Fourteenth Amendments to the federal Constitution.... We ... address the argument on its merits (see § 1259...)" even though "trial counsel stated he had no objection to the instructions being given"].) [51]

The state's misleading discussion of *Cole* is a manifestation of its failure to give proper due to §1259 and, more importantly, to how this Court has interpreted and applied it for at least the last 30 years.

It is not that the state is unaware of §1259, of course. To the contrary, the state begins from the premise that review on the merits will occur here if the Court follows §1259. (RB 99.) It then proceeds to set forth a 10-page argument designed to convince the Court that its longstanding interpretation of §1259 is wrong. (RB 99-109.) The argument is thoroughly bogus. Its veneer of rationality relies on ignoring this Court's §1259 case law, making misleading assertions regarding a variety of tangentially relevant points, and constructing a false wider legal

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[51] See also, *People v. Benavides,* 35 Cal.4th at 99-100 [consciousness of guilt instruction]; *People v. Guerra*, 37 Cal.4th at 1134, 1135 [motive instruction]; *People v. Gray*, 37 Cal.4th at 234-235 [factor (b) instruction]; *People v. Stitely*, 35 Cal.4th at 556 and fn. 20 [circumstantial evidence instructions]; *People v. Rogers*, 39 Cal.4th at 880-881 and fn. 28 [pinpoint instruction].

universe in which the view it promotes of the People's rights appears to have substance. In the actual legal universe, the argument is utterly without merit.

*2. The state's argument*

The state's argument goes like this:

(a) When an appellate court reviews a claim of instructional error on the merits and finds prejudicial error, the People have to retry the defendant.

(b) In 1990, Proposition 115 was enacted. One of its provisions was Article I, §29. It provides: "In a criminal case, the people of the State of California have the right to due process of law ...."

(c) It is unfair to make the People bear the burden of retrial if the defendant did not object to the instructional error in the trial court. Fairness is the essence of due process. The Court should hold that Art. I, §29, supersedes §1259, and that *reversal* on the merits is barred in the absence of an objection below. (RB 100.)

(d) Only reversal is barred, not review. To the contrary, "when review ... would *not* lead to reversal," the appellate court should reject the claim on the merits. (RB 108, fn. 62; emphasis in original.) Under the state's interpretation of §29, in other words, on direct appeal the defendant would be free to make a claim of previously unobjected-to instructional error. The state would respond and the court would review the claim. If

the court found no error or harmless error, it would deny the claim on the merits, resolving it then and there in favor of the People.

If, however, review yielded the conclusion that a) the instruction was erroneous and affected a substantial right, and b) was structural or so prejudicial (i.e., likely to have affected the verdict) that reversal of the conviction or sentence of death was required, then the claim should be rejected on appeal as forfeited.

(e) This is not unfair to the defendant, the state argues, because the defendant can always file a claim that trial counsel was ineffective for not objecting to the instruction. (RB 100.) [52]

(f) Finally, while the state does not explicitly say so, if the defendant cannot establish ineffective assistance of counsel -- i.e., he has been convicted of a crime and sentenced to prison or death as a result of an erroneous jury instruction, but the failure to object did not fall "below an objective standard of reasonableness … under prevailing professional norms" (*Wiggins v. Smith,* 539 U.S. at 521) -- then, under the law as the state describes it, the defendant must remain convicted, in prison, or be executed.

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[52] Of course, as the state recognizes, such a claim would almost always have to be made by way of habeas corpus in order to succeed. (See §3 below.)

*3. The state's analysis is without merit*

The appellate courts of this state have apparently missed the conflict between Art. I, §29, and §1259. Thus, in the 17 years since Proposition 115 was adopted, many courts, under the authority of §1259, have reviewed on the merits claims of instructional error that had not been objected to at trial. In none of them, as far as appellant can tell, did the Attorney General argue or the court note any conflict between §1259 and §29. To the contrary, as this Court noted in one recent case:

> [T]he Attorney General concedes that defendant has *not* forfeited his ... claim that the trial court erred in giving an unmodified version of CALJIC No. 2.01, even though defendant did not seek a similar modification at trial. In making the latter point, the Attorney General relies on section 1259....

(*People v. Stitely*, 35 Cal.4th 514, 556, fn. 20 (2005); emphasis in original.)

There is good reason no one has made or considered the argument before.

The state's argument rests on the following premises: 1) its right to due process is the equivalent of the defendant's; 2) the burden imposed on the People by §1259 is unfair if the case has to be retried; 3) that unfairness is equal to or greater than the unfairness the defendant would suffer if the Court adopted the proposed interpretation of Art. I, §29; 4) section 29 thus overrides the right conveyed to defendants by §1259.

This Court's cases leave no doubt that the state's analysis is without merit.

With regard to the relative scope of the underlying constitutional rights at issue, Mr. Solomon is claiming infringement of rights guaranteed by the California Constitution since 1849 (see, e.g., Const. 1849, art. I, §8 [no person "shall be deprived of life, liberty or property without due process of law"]) and by the United States Constitution since 1791 (when the 5th, 6th, and 8th Amendments were ratified) and 1868 (when the 14th Amendment was ratified). The right the state is claiming under, by contrast, was adopted in 1990.

The due process right Mr. Solomon is seeking vindication of, moreover, is the right to fundamental fairness in the process by which the state seeks to "deprive ... [him] of life [and] liberty...." (U.S. Const., Amends. 5 and 14; Calif. Const., art. I, §15.) The state argues that art. I, §29 gives the people a right to procedural fairness, too -- but that begs the question. Proposition 115 does not identify any particular rights the people's right to due process is meant to protect. Neither the life nor liberty of the "people," certainly, is at stake in this case.

This Court, accordingly, has explicitly "rejected the notion that 'the [P]eople's right to due process of law must be the exact equivalent to a criminal defendant's right to due process.' (*Miller v. Superior Court*, 21 Cal.4th 883, 896 (1999).)" (*People v. Ault*, 33 Cal.4th 1250, 1269 (2004).)

"Nothing in the language or legislative history of article I, section 29 … [n]or … anything in our case law … supports th[e] view" that any such equivalence exists. (*Miller*, 21 Cal.4th at 896.) To the contrary, the Court pointed out that, traditionally, "the use of the term 'due process of law' in connection with the prosecution was simply another way of formulating the truism that the state has a strong interest in prosecuting criminals, which must be weighed against the criminal defendant's assertion of due process rights." (*Ibid.*) In *Ault*, the Court held: what "the People, and society at large, have {is} a significant interest in preserving *fair* convictions." (33 Cal.4th at 1269; emphasis added.)

The non-equivalence of the People's and defendant's rights are reflected in the Court's holdings. In *Miller*, the Court held that, whereas a defendant's right to due process is paramount to the Shield Law and sometimes requires a reporter to divulge confidential sources, the People's right to due process is not similarly paramount and does not require such disclosure. (21 Cal.4th at 893-897.) In *Menendez v. Superior Court*, the Court held that the People's right to due process does not "trump" a defendant's assertion of the psychotherapist-patient privilege. (3 Cal.4th 435, 456-457 (1992).) In *Ault*, the Court held that, whereas the defendant is entitled to independent review of a trial court ruling denying a new trial on grounds of jury misconduct, the People's right to due process did *not* require that it be given such review when a trial court granted a new trial on

such grounds: "the People{'s} ... claimed due process right to independent review" does not trump defendant's right to a new trial based on "trial court's determination that juror misconduct, the existence of which is conceded on appeal, was prejudicial." (33 Cal.3d at 1269.)

The fundamental premise of the state's argument, therefore, is wrong. The People's right to due process is not the equivalent of, much less superior to, the "substantial" and constitutional rights on which Mr. Solomon's claim is based and cannot be used to circumscribe his ability to obtain relief for violation of those rights. Just as the law provides a defendant with the right to proceed directly to a new trial upon a trial court's finding of juror misconduct, so, too, the sole function of the portion of §1259 at issue is to provide a defendant with a judicial remedy for a violation of his substantial rights caused by an erroneous instruction. In both cases, the People have the right to fully litigate the issue in the designated forum -- the trial court on a motion for new trial and the appellate court on an instructional claim covered by §1259. The People's right to due process entitles it to no more than that.

Further, the specific provision in §1259 that the state thinks was effectively repealed by Art. I, §29 -- authorizing review of instructional claims "even though no objection was made thereto in the trial court" -- was added to §1259 in 1909 (Stats.1909, c. 713, p. 1088, § 1) -- 81 years

before the adoption of §29. [53] In *Miller*, this Court held: "[T]here is no reason to suppose article I, section 29 intended ... [the] prosecution's right to due process" to override "established evidentiary privileges and immunities." (21 Cal.4th at 897. Accord, *Menendez v. Superior Court*, 3 Cal.4th at 456-457 [same re psychotherapist-patient privilege].) There is likewise no reason to suppose that §29 was intended to override the long "established" principle of merits-review embodied in §1259. As the state concedes, the ballot materials supporting Proposition 115 made no reference to the "due process" right accorded by §29. (RB 101, fn. 58. See *Miller*, 21 Cal.4th at 896, fn. 3.)

That §29 was not intended to override §1259 is also supported by the "well settled" principle cited by *Miller*: "[A] general provision is controlled by one that is special, the latter being treated as an exception to

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[53] The amendment appears to have formally codified a principle of review that had been adhered to by this Court in criminal cases since the adoption of the Penal Code. See, e.g., *People v. Valencia*, 43 Cal. 552, 555 - 556 (1872) [reversing for instructional error without noting that objection to it had been made in the trial court]. A similar provision, it should be noted, was added to Code of Civil Procedure §647 in 1907. (Stats. 1907, c. 379, p. 715, §1.) Ever since, that statute has provided, in pertinent part, that the trial court's "giving an instruction, refusing to give an instruction, or modifying an instruction requested ... [are] deemed to have been excepted to." Pursuant to §647, "[i]t is well-settled that there is no waiver for failure to ... 'have objected ... in order to preserve the right to complain of the erroneous instruction on appeal.' [Citation.]" (*Huffman v. Interstate Brands Companies*, 121 Cal.App.4th 679, 705-706 (2004). Accord, *People v. Frazier*, 89 CA4th 30, 35, fn. 3 (2001) [citing §647 to reject state's forfeiture claim in a criminal case].)

the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.' " (21 Cal.4th at 895.) The state has not provided any reason why the "specific provision" of §1259 "relating to [the] particular subject" of non-forfeitable instructional error does "not govern in respect to that subject as against [the] general provision" of Art. I, §29.

While the latter principle of construction would not apply if there was a true conflict between the two provisions, there is no such conflict. This is particularly evident when the state's comparative unfairness argument is examined -- i.e., its claim that the prejudice the People experience under the yoke of §1259 is greater than that defendants would suffer under the interpretation it proposes. The claim bears little relation to either governing law or reality.

To begin with, whatever right to fairness is conferred by §29 is not independent of the fairness owed to the defendant. This Court's analysis in *Ault* in apt. As noted, the state in *Ault* the state argued that its right to due process required that it be given independent review of a trial court ruling granting a new trial on grounds of jury misconduct because the defendant was entitled to such independent review when the trial court denied such a motion. This Court rejected the argument:

As we have explained, when a trial court denies a criminal defendant a new trial because it concludes that no prejudice arose from juror misconduct, one of the most important reasons why an appellate court applies independent review to this mixed law and fact question is to ensure that the defendant's conviction was not obtained in violation of the fundamental right to trial by an impartial jury. The People suffer no equivalent harm to their fundamental rights merely because they are forced to *retry* criminal charges after the court in which the original trial occurred has plausibly determined that juror misconduct gave rise to a substantial likelihood of actual bias against the defendant.

Certainly the People, and society at large, have a significant *interest* in preserving fair convictions. The trial court's discretion to award a new trial must be exercised with due regard to this important interest. Nonetheless, the People fail to persuade us that they have a due process right-equivalent to the defendant's right to be free of conviction by a biased jury-to avoid *retrying* criminal charges before a new jury unless an appellate court comes to an independent conclusion that the trial court's determination of prejudice from juror misconduct was correct. We therefore conclude that article I, section 29 of the California Constitution affords the

People no due process right to independent review of a trial court order granting a new trial on that ground.

(*People v. Ault*, 33 Cal.3d at 1269-1270; emphasis in original.)

*Ault* thus stands for two related propositions of relevance here: 1) the burden on the People of a *retrial* is not comparable to the burden borne by a defendant convicted and sentenced as the result of an *unfair trial*; and 2) the People *share* defendants' interest in "fair convictions." Whatever else may be said about it, in other words, the People's right to due process is not a right to preserve an *unfair* conviction. Yet that is precisely the right the state is demanding in this Court.

To place the state's unfairness claim in context, it is necessary to bear in mind that it welcomes review on the merits that does "*not* lead to reversal." (RB 108, fn. 62; emphasis in original.) It is only seeking an override of §1259 when, after merits-review, the court concludes: a) the defendant is correct that instructional error occurred and violated his substantial rights; *and* b) the error requires reversal. To hold that reversal was required, of course, the court would have to find one of two things: that the error was prejudicial in fact -- i.e., that it was very likely that, if the jury had been properly instructed, the defendant would *not* have been so convicted or sentenced (*Chapman v. California*, 386 U.S. 18, 24 (1967); *People v. Brown*, 46 Cal.3d 432, 488-489 (1988); *People v. Watson*, 46 Cal.2d 818, 836 (1956)) -- or that it was so fundamental as to be structural

and per se reversible (see, e.g., *Sullivan v. Louisiana*, 508 U.S. 275, 276 (1993)).

A conviction or sentence so obtained is not "fair." As such, it cannot be "unfair" to "the People, [who] ... have a significant interest in preserving *fair* convictions" (*Ault*, 33 Cal.3d at 1269; emphasis added) "and 'whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.' (*Berger v. United States* (1935) 295 U.S. 78, 88 ....)" (*People v. Espinoza*, 3 Cal.4th 806, 820 (1992).)

Indeed, in the situation the Attorney General is complaining about, the state should *demand* a retrial. If a conviction or sentence would not have occurred if the jury had been properly instructed, or if the result was tainted by fundamental, structural error, the state's "interest in ... fair convictions" and "justice" cannot be satisfied by leaving the judgment intact.

In this case, regrettably, it is exactly the opposite view that is promoted. The "People," allegedly, have no interest in non-partisan "fairness" or "justice." Their interest in fairness is wholly antagonistic to the defendant's. Respondent not only seeks affirmance in the situation described above, it wants this Court to declare that the People have a *constitutional* right to such affirmance.

Even on its own terms, the argument rests on a series of fallacies.

First, the retrial burden the state complains of is one the People almost never have to bear. Appellant's research has turned up only three criminal cases in the last 22 years (capital *or* non-capital) in which this Court found it necessary to reverse either a death sentence or a principal count of conviction based on instructional error that had not been objected to in the trial court. [54] While such reversals in published Court of Appeal cases are more common, they represent a tiny fraction of all of the criminal appeals resolved by that court in a given year. [55] On the rare occasions that such reversals occur, furthermore, several factors (including the credit the defendant is due for time already served) often militate in favor a bargained resolution rather than a retrial.

Second, the state considerably misstates and understates the unfairness from the defendant's side of the ledger.

To begin with, the state maintains that a defendant's right to a properly instructed jury -- and, more importantly, his right to avoid

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[54] See *People v. Crandell*, 46 Cal.3d 833, 882 (1988) [improper weighing instruction requires penalty reversal; no objection by pro per defendant noted in opinion]; *People v. Croy*, 41 Cal.3d 1, 12, fn. 6, 24 (1985) [capital conviction reversed based on unobjected to error in aiding and abetting instruction]; *People v. Hudson*, 38 Cal.4th 1002, 1011-1012 (2006) [conviction for evading a police car reversed based on misleading instruction regarding element of the offense].

[55] In 95% of the criminal appeals resolved by the Court of Appeal in Fiscal Year 2004-2005, for instance, the judgment was either affirmed in full or modified in some way not constituting a reversal. (Judicial Council of California, *2006 Court Statistics Report*, Table 6, p. 26.)

conviction or a death sentence because the jury was *im*properly instructed -- is co-extensive with and inseparable from his right to counsel. Thus, the state argues, the failure to object to the improper instruction extinguishes any right the defendant has except his right to seek relief for the ineffective assistance of counsel. (RB 100, 103-109.)

That view is not correct. The duty to see that the jury is properly instructed is, first and foremost, the court's, not defense counsel's. It is the "*trial judge's* duty ... to give instructions sufficient to explain the law." (*Kelly v. South Carolina*, 534 U.S. 246, 256 (2002); emphasis added.) "It is the duty of the *trial judge* to charge the jury on all essential questions of law, whether requested or not." (*Ibid.,* quoting C. Wright, Federal Practice and Procedure § 485, p. 375 (3d ed. 2000)]; emphasis added.) The "'*trial court* must instruct on general principles of law that are ... necessary to the jury's understanding of the case.' [Citations.]" (*People v. Hudson*, 38 Cal.4th 1002, 1012 (2006); emphasis added.)

These duties are not dependent on what defense counsel does or does not do. Instruction on general principles is required "[e]ven in the absence of a request." (*Ibid.*) Those instructions must also be correct. If "the trial court gives an instruction that is an incorrect statement of the law," that can and will be grounds for reversal even if there was no objection below. (*Ibid.*) The trial judge is "a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts ...." (*People v.*

*Carlucci,* 23 Cal.3d 249, 256 (1979); citations omitted.) "While it is not a judge's function to substitute for counsel in the trial of a case, ... it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence' ... or ... inept [lawyering] ... on behalf of a criminal defendant...." (*People v. St. Andrew*, 101 Cal.App.3d 450, 456-457 (1980).) "The trial judge has the responsibility for safeguarding *both* the rights of the accused *and* the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial." (*People v. McKenzie*, 34 Cal.3d 616, 627 (1983) [emphasis added; internal citations and quotation marks omitted]; accord, *People v. Ponce*, 44 Cal.App.4th 1380, 1387 (1996). See also, *People v. Barton*, 12 Cal.4th 186, 198, fn. 7 (1995) [trial judge must instruct on lesser included offenses supported by the evidence even if the defendant objects].)

Respondent is simply wrong, in short, in arguing that counsel's failure to object to instructional error means that no error was committed, leaving nothing for an appellate court to review. "'[E]rror is nonetheless error and is no less operative on deliberations of the jury'" just because "defense counsel suggest[ed] or accede[d] to the erroneous instruction because of neglect or mistake.... 'After all, it is the life and liberty of the

defendant ... that is at hazard in the trial and there is a continuing duty upon the part of the trial court to see to it that the jury are properly instructed upon all matters pertinent to their decision of the cause.'" (*People v. Graham*, 71 Cal.2d at 319; citation omitted. See also *U.S. v. Olano*, 507 U.S. 725, 733 (1993) ["Mere forfeiture, as opposed to waiver, does not extinguish an 'error'"].)

Moreover, the prosecutor himself shares in the responsibility of ensuring that the jury is properly instructed. (See *People v. Abbaszadeh*, 106 Cal.App.4th 642, 649 (2003) [failure to object to an improper instruction excused because, *inter alia*, whereas the "prosecutor ... had a duty both as a law enforcement official and as an attorney to object ... [he] remained silent. It ill-behooves the Office of the Attorney General to now assert on appeal that we should find a waiver"].)

Whether the law provides a *remedy* for a breach of the duty to instruct is another question. The general rule, of course, is that an appellate court may refuse to consider an issue raised for the first time on appeal, although it always has the *discretion* to do so. (See, e.g., *People v. Smith*, 31 Cal.4th 1207, 1215 (2003).) With respect to instructional error that affects the defendant's substantial rights, however, §1259 reverses the usual rule. Pursuant to that longstanding statute, a defendant is generally *entitled* to review of such errors even if not objected to unless his trial counsel "intentionally caused the trial court to err and clearly did so for tactical

reasons." (*People v. Dunkle*, 36 Cal.4th at 924. See *id.* at 928 [in light of "§1259," "we do not deem forfeited *any* claim of instructional error affecting a defendant's substantial rights"; emphasis added].) As discussed above, there was no invited error here.

In this argument, as in Arg. II, the state appears to suggest that the federal Constitution *itself* precludes review on the merits when a state defendant fails to object to constitutional error in the trial court, thus serving as some sort of override of §1259. (RB 103-104.) The suggestion is false and misleading.

In federal cases, of course, just as in state cases, procedural rules establish when rights must be asserted to avoid forfeiture. The federal rules are legislative or judicial creations applicable only in federal prosecutions, however: they are not constitutional mandates applicable in state prosecutions. "[A] procedural default, that is, a critical failure to comply with state procedural law, is not a jurisdictional matter." (*Trest v. Cain*, 522 U.S. 87, 89 (1997).) It is true that if a state court "clearly and expressly" denies a constitutional claim on the basis of a state procedural rule that is deemed "independent and adequate," a federal court will generally defer to that ruling. (*Coleman v. Thompson*, 501 U.S. 722, 735 (1991).) Such deference "is grounded in concerns of comity and federalism," however, *not* some constitutionally-mandated principle of default. (*Id.* at 730. Accord, *Trest v. Cain*, 522 U.S. at 89). Thus, if the

state court denied the constitutional claim on the *merits* and *also* found a procedural default, but "did not clearly and expressly" distinguish between the two holdings, or based the default on a ground not deemed an "independent and adequate state ground," in that case "a federal court may address the" merits of the constitutional claim whether the defendant raises it by habeas corpus (*Coleman v. Thompson*, 501 U.S. at 735) or certiorari (*Caldwell v. Mississippi,* 472 U.S. 320, 327 (1985)). (Cf. *Melendez v. Pliler*, 288 F.3d 1120, 1125 -1126 (9th Cir. 2002) [where the state relied on a procedural bar that was not " 'clear, consistently applied, and well-established at the time of the petitioner's purported default,'" district ordered "to consider the claim on the merits"].) *A fortiori*, if a state appellate court reviews a constitutional claim advanced for the first time on appeal, denies it strictly on the merits and not on grounds of procedural default, and does so because state law (§1259) *authorizes* such merits-review (*People v. Dunkle*, 36 Cal.4th at 923-924, 928), the federal Constitution in no way casts aspersions on, much less acts as some sort of override, on that practice. (See, e.g., *Stark v. Hickman*, 455 F.3d 1070, 1075 -1080 (9th Cir. 2006) [reversing murder conviction because of unconstitutional presumption-of-sanity instruction where California Court of Appeal had noted defendant's lack of objection to the instruction but had also denied the claim on the merits].)

Indeed, to the extent the federal Constitution has anything to say about procedural default, it is exactly the opposite of what the state suggests. Rather than overriding a statute such as §1259, it circumscribes the power of courts and legislatures (state and federal) to limit a defendant's ability to raise a constitutional claim. Thus, while one would not know this from reading Respondent's Brief, the federal rules regarding procedural default have a built-in fairness mechanism in the "plain error" rule. (Federal Rule of Criminal Procedure 52(b).) The rule, which allows appellate review of certain claims not made in the trial court, rests on principles "of fundamental justice." (*Hormel v. Helvering,* 312 U.S. 552, 557 (1941); accord, *U.S. v. Olano*, 507 U.S. at 732.) Those principles require "that obvious injustice be promptly redressed" whether or not it was objected to below. (*Johnson v. U.S.*, 520 U.S. 461, 466 (1997), quoting *United States v. Frady,* 456 U.S. 152, 163 (1982).) The rule is a codification of the holding in *Wiborg v. U S*, 163 U.S. 632 (1896), which reversed the convictions of two defendants on the basis of an error that "was not properly raised." (*Id.* at 658.) "[Y]et if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." (*Ibid.*) "A rigid and undeviating judicially declared practice under which courts of review would invariably … decline to consider all questions which had not previously been specifically urged" -- *exactly the kind of practice being urged by respondent* -- "would be out of

harmony with ... the rules of fundamental justice." (*Hormel,* 312 U.S. at 557; *Olano*, 507 U.S. at 732.) Under the federal "plain error" rule, an appellate court will not find forfeiture if the error complained of for the first time on appeal "'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" (*Olano* at 732, quoting *U.S. v. Atkinson,* 297 U.S. 157, 160 (1936).) Similarly, while a state can "bar ... consideration of a federal constitutional claim" on the basis of non-compliance with a "a state procedural rule ..., an inquiry into the adequacy of such a rule ... 'is itself a federal question.' *Douglas v. Alabama,* 380 U.S. 415, 422 ... (1965)." (*Melendez v. Pliler*, 288 F.3d at 1125 -1126.) [56]

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[56] None of the cases cited by respondent in any way support its apparent argument that the federal Constitution requires this Court to interpret §1259 out of existence. It cites a passage in *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977), for instance, that lauds the virtues of contemporaneous objection. (RB 104, fn. 59.) In *Henderson*, however, the state defendant had come to federal court on an instructional claim that he had not made either in the trial court or in his first appeal (it was raised by the dissenting justice sua sponte), and, when he finally raised it in his second appeal, the state high court refused to consider it because it had not been raised in the trial court. Under the current "adequate and independent state ground" rule, the federal courts likely would have deferred to the state court's procedural default ruling. (See *Coleman v. Thompson*, 501 U.S. at 735.) Instead, the Supreme Court, while extolling the virtues of contemporaneous objection, nonetheless reviewed and denied the claim strictly *on the merits*. (431 U.S. at 154-155.) Respondent's Brief fails to note that fact. *Estelle v. Williams*, 425 U.S. 501 (1976) (cited at RB 103-104), was likewise decided before the current "adequate and independent state ground" rule was adopted and is even less relevant to the question of §1259's constitutionality. In *Estelle*, the defendant wore his jail jumpsuit during trial. He did not request civilian clothes. The record established that, if a request for civilian clothes had been made, it would have been granted, and also showed a plausible tactical

In sum, a defendant has a right to a properly instructed jury. That is a right distinct from and not subsumed by his right to the effective assistance of counsel. Since §1259 gives the defendant the right to appeal the instructional error directly, the fact that he might be able to challenge the error indirectly -- by alleging ineffective assistance of counsel -- is irrelevant.

The state is wrong, furthermore, in making it appear that the ineffective assistance remedy is the functional equivalent of the remedy provided by §1259. (RB 100 [§1259 provides "unnecessary" and "extravagant protection" because defendant can bring ineffective-assistance claim].) If that were true, of course, there would be no need for the state to be arguing that §29 supersedes §1259. It plainly believes it will reap some benefit -- at the expense of defendants -- if its proposed interpretation carries the day.

In that regard, it is correct.

In order to prevail on an ineffective assistance claim, a defendant almost always has to raise it in habeas corpus proceedings. (See, e.g., *People v. Mendoza Tello*, 15 Cal.4th 264, 267 (1997); *Massaro v. U.S.*, 538 U.S. 500, 504-505 (2003).) In such proceedings, this Court has held, "there

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reason why the defendant and his attorney might have opted for staying with the jail garb. Under those circumstances, the Supreme Court could not find that the defendant had been *compelled* to stand trial in prison garb. (425 U.S. at 510-513.)

is no … constitutional right to counsel …, not even in a capital case" under either the federal or state constitutions. (*In re Barnett*, 31 Cal.4th 466, 474 (2003).) In non-capital cases, furthermore, defendants have no right to the appointment of counsel under state law unless and until an order to show cause issues. (*In re Clark*, 5 Cal.4th 750, 780 (1993); *People v. Shipman*, 62 Cal.2d 226, 233, fn. 3 (1965).) The "remedy" proposed by respondent, in other words, would effectively require defendants to attack prejudicial unconstitutional instructions without the benefit of counsel.

The reason defendants are compelled to bring ineffective assistance claims in habeas corpus rather than direct appeal, furthermore, is to counter the easily-articulated speculation that trial counsel's omission may have been tactical. [57] To counter such speculation, however, defendants need a declaration from trial counsel that essentially confesses that counsel's performance was deficient. Such declarations are not easy to come by. Trial counsel (especially the less competent among them) are reluctant to admit error for fear of triggering the automatic investigation by the State

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[57] Cf. *People v. Wader*, 5 Cal.4th at 657-658 [finding that trial counsel's request for an admittedly erroneous instruction "was a … conscious and deliberate tactical choice," thus constituting invited error and forfeiture of defendant's right to litigate the error directly; *then* finding, when considering defendant's claim that counsel had been ineffective for requesting the instruction: "we cannot determine on the record alone whether counsel could have had no rational tactical purpose for requesting this instruction. Accordingly, based on this record, we must reject defendant's claim of ineffective assistance of counsel"].)

Bar of California required by Business and Professions Code §6086.6. [58] Even when counsel *do* admit error, moreover, appellate courts are apt to attribute the admission to "the pressures on trial counsel to 'fall on her sword' once her client is convicted." (*People v. Felix*, 23 Cal.App.4th 1385, 1400 (1994).)

In addition, to obtain relief on an ineffective assistance claim, a defendant must show a reasonable *probability* that the error was prejudicial. (*Wiggins v. Smith,* 539 U.S. at 534.) When raising the instructional issue directly, by contrast, the defendant at most has to show a reasonable *possibility* of prejudice if the error violated the federal constitution (*Chapman v. California,* 386 U.S. at 24) or occurred during the penalty phase (*People v. Brown,* 46 Cal.3d at 488-489). Some instructional errors, moreover, require per se reversal if challenged directly. (*Sullivan v. Louisiana*, 508 U.S. 275, 276.)

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[58] Since 1982, appellate courts have been "required to report … reversal of the judgment on the ground of ineffectiveness of counsel to the State Bar of California for investigation of the appropriateness of initiating disciplinary action…." (*In re Jones*, 13 Cal.4th 552, 589, fn. 9 (1996); citing §6086.6.) Since 1990, once the State Bar receives such a report, an investigation is *mandatory*. (See §6086.7(c) ["The State Bar shall investigate any matter reported under this section"]. See also, Legislative Counsel's Digest, Stats. 1990, c. 483, §2.) Appellate opinions reversing for ineffective assistance now explicitly note that the opinion will be sent to the State Bar. (See, e.g., *In re Jones*, 13 Cal.4th at 589, fn. 9; *In re Sixto*, 48 Cal.3d 1247, 1265, fn. 3 (1989); *In re Hernandez*, 143 Cal.App.4th 459, 478 (2006).)

In some situations, finally, the erroneous nature of an instruction is not recognized until after trial. (*Johnson v. U.S.*, 520 U.S. 461, 468 (1997).) In that case, counsel's failure to object would not necessarily be deemed to have fallen below the "prevailing professional norm" and thus would not constitute ineffective assistance. (*Wiggins v. Smith,* 539 U.S. 510, 521 (2003).) Under respondent's reading of Art. I, §29, such a defendant would be out of luck.[59]

Under respondent's interpretation of Art. I, §29, therefore, in a case in which, under this Court's current and longstanding interpretation of §1259, a defendant could challenge unobjected-to but prejudicial instructional error directly and with the assistance of counsel, defendants, to have any realistic hope of prevailing:

1. would have to raise such claims in habeas corpus -- i.e., without the assistance of counsel in non-capital cases;

2. would have to rely on their trial lawyers willingness to sign declarations that would automatically trigger State Bar investigations if the claim resulted in reversal;

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[59] In a federal prosecution, such an error could be remedied under the "plain error" rule (*Johnson v. U.S.*, 520 U.S. at 468), but under respondent's reading of Art. I, §29, if the error occurred in a state trial, a defendant would have no remedy.

3. would have to overcome a more onerous burden of proof if the error violated the federal Constitution or occurred during the penalty phase; and

4. if deficient performance was not demonstrable, would have no cause of action at all.

In short, if §29 is held to supersede §1259 and defendants' only recourse is an ineffective assistance claim, the result, contrary to respondent's contention, would hardly be the functional equivalent of the remedy provided by §1259. The predictable consequence would be that the few reversals that now occur for unobjected-to instructional error would dwindle to close to zero.

Section 1259 embodies the principle that giving proper instructions affecting substantial rights is the duty of the trial court (a duty owed to both the People and the defendant), that it is the state's interest in a fair trial as well as the defendant's that determines what the instructions will be , and that that duty is not waivable by trial counsel. It also may be seen as embodying the principle that the failure to object to an improper and prejudicial instruction is inherently ineffective assistance of counsel -- or at least enough so that it is *not* necessary to require a defendant to do what the state is demanding he do: namely, risk his liberty and possibly his life in having to affirmatively prove ineffective assistance of counsel in a habeas

corpus proceeding in order to void a verdict or sentence that was a direct product of the erroneous instruction.

It cannot be that the People's right to fairness requires such a result. Respondent's Brief certainly has not demonstrated that it does.

**D. Reply to State's Substantive Analysis**

The opening brief argues that the version of CALJIC No. 17.48 (1989 Revision) that was given to the jurors skewed the dynamics of the deliberations they were to engage in, imposing irrational restrictions bound to produce a less than reliable factfinding process. A "reliable factfinding process" is an integral component of the right to a jury trial and a paramount "due process concern," especially "in capital cases." (*People v. Dennis*, 17 Cal.4th 468, 509 (1998).)

The problems were created by three related provisions:

1. Jurors were prohibited from sharing notes (notes were only "for the note-taker's own personal use");

2. Jurors were told to trust the accuracy of their auditory recall if in conflict with another juror's written notes (a "juror who did not take notes should rely on his or her independent recollection of the evidence and not be influenced by the fact that other jurors did take notes"); and

3. Jurors were instructed that "should any discrepancy exist between a juror's recollection of the evidence and his or her notes, he or she may

request that the reporter read back the relevant proceedings." (18 CT 5318.)

The first and second provisions promoted the supremacy of auditory recall over written notes and precluded jurors from benefiting from notes taken by other jurors. The readback provision exacerbated both problems.[60]

Appellant is not alone is believing the foregoing provisions were problematic. As noted in the opening brief, the Sixth Edition of CALJIC ameliorated the readback problem by modifying 17.48 to say that a readback was also appropriate to resolve a discrepancy "between one juror's recollection and that of another." (Accord, CALJIC No. 1.05 (2006).)

The CALCRIM instructions are even better. The relation between written notes and auditory recall is described more rationally. While cautionary comments are made regarding written notes, jurors are told they are an aid to refreshing auditory recall, jurors who did not take notes are *not* told to trust their auditory recall more than the notes of a fellow juror, and there is no unambiguous ban on sharing notes with other jurors. [61]

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[60] The instruction made it appear that only a juror who took notes (as opposed to one who relied strictly on auditory recall) might need and could properly request a readback. It also made no allowance for any juror to request a readback to resolve a dispute *between* two jurors (e.g., one who relied on notes and one who did not).

[61] CALCRIM No. 102 (2006) provides:

"You have been given notebooks and may take notes during the trial. Do not remove them from the courtroom. You may take your notes into the

Nor is there any implied restriction on the kinds of recollection-issues that make a readback-request appropriate. [62]

Respondent's Brief does not take note of the changes in the standard instructions. [63] It does not defend CALJIC No. 17.48 (1989) as a correct instruction, however. It explicitly concedes that the note-sharing ban violated Penal Code §1137. (RB 111.) It fails to address head-on appellant's contention that the readback portion of the instruction was overly restrictive and violated §1138, but implicitly concedes both points. (RB 109-110.) It likewise does not dispute -- and thus implicitly concedes -- that the instruction told jurors to trust their auditory recall over other

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jury room during deliberations. Here are some points to consider if you take notes:

1. Note-taking may tend to distract you. It may affect your ability to listen carefully to all the testimony and to watch the witnesses as they testify; AND

2.You may use your notes only to remind yourself of what happened during the trial, but remember, your notes may be inaccurate or incomplete.

I do not mean to discourage you from taking notes. I believe you may find it helpful."

[62] CALCRIM No. 104 (2006) provides in pertinent part: "The court reporter is making a record of everything said during the trial. If you decide that it is necessary, you may ask that the court reporter's notes be read to you. You must accept the court reporter's notes as accurate."

[63] It could not have discussed the CALCRIM instructions since they were published after Respondent's Brief was filed, but it could have made note of the change made by the CALJIC Committee. (AOB 189, fn. 55.) It does not do so.

jurors' notes. Nor does it argue that auditory recall is in fact more reliable than written notes.

Respondent's entire argument, rather, is that the court's *oral* comment regarding readbacks obviated all three problems. (RB 109-113.) The argument must be rejected.

The court read the following instruction to the jurors: "[S]hould any discrepancy exist between a juror's recollection of the evidence and his or her notes, he or she may request that the reporter read back the relevant proceedings." (35 RT 15938.) The jurors were also given a *written* copy of the latter instruction. The court told them it was for "use during your deliberations." (35 RT 15929; 18 CT 5318.)

Subsequently, just before the prosecutor began his summation, the court advised the jurors that if their recollection of the testimony differed from an attorney's, they should disregard what the attorney said. The court then added: "If you have a serious question as to what the evidence is, you can always request the court reporter to read back any portion of testimony. As I have told you, we have daily transcripts of all of the testimony, so it's not going to be any serious problem for us to read back any testimony that you may need during the course of your deliberations." (35 RT 15973.) The latter comment was not memorialized in the written instructions given to the jurors for their deliberations. (18 CT 5301-5380.)

According to respondent, all jurors would have interpreted the court's oral comment as meaning that *any* of them could request a readback to resolve *any* question regarding the evidence, and that no one would have interpreted the written directive as in any way restrictive. (RB 110.)

Appellant disagrees. The written instruction was specific and implicitly exclusive. [64] It was also not contradicted by the more general oral comment. [65] To the extent they were in conflict, moreover, it must be assumed -- or at least deemed "reasonably likely" -- that one or more jurors followed the instruction they had with them in the jury room. [66]

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[64] Specific references in an instruction or statute will reasonably be taken as meaning that it does *not* cover what is not referred to. (See, e.g., *People v. Flores*, 147 Cal.App.4th 199, 216 (2007) ["The jurors could have considered CALJIC No. 2.01 's reference to the reasonable doubt standard of proof as applicable *only to circumstantial evidence* and *not to ... direct evidence*"; emphasis in original]. Accord, *People v. Vann*, 12 Cal.3d 220, 226-227 (1974); *People v. Dewberry*, 51 Cal.2d 548, 557 (1959). See also, *People v. Castillo,* 16 Cal.4th 1009, 1020 (1997) [conc. opn. of Brown, J.] ["Although the average layperson may not be familiar with the Latin phrase est inclusio unius exclusion alterius, the deductive concept is commonly understood"]; accord, *Creutz v. Superior Court*, 49 Cal.App.4th 822, 829 (1996).)

[65] Cf. *People v. Daniels*, 52 Cal.3d 815, 885 (1991) ["We think the jury would understand the specific instruction ... as qualifying the general instruction"].

[66] In assessing the impact of arguably ambiguous instructions on a juror, the question is whether there is a reasonable likelihood that he or she interpreted or applied the words in a manner adverse to the defendant. (*People v. Clair*, 2 Cal.4th 629, 663 (1992); *Estelle v. McGuire*, 502 U.S. 62, 74, and fn. 4 (1991).)

Such a likelihood follows from: 1) the specificity of 17.48; [67] 2) the fact that it was in writing; [68] and 3) the constitutional nature of the error. [69] In addition, there was the extreme length of the deliberations period. The oral comment the state is relying on was made on July 30, 1991. (35 RT 15973.) The deliberations did not begin until August 4 -- five days later. Further, the deliberations process lasted for an entire *month* after the oral comment. There were hiatuses of six and ten days when no deliberations took place at all, and the deliberations did not end until August 29. (See 19 CT 5472-5494.) Given the foregoing chronology, it is reasonably likely that one or more jurors relied on the specific and restrictive written

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[67] "It has long been held that jury instructions of a specific nature control over instructions containing general provisions." (*People v. Stewart*, 145 Cal.App.3d 967, 975 (1983).) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general. [Citation.] It is where the specific instruction is good, and the general one bad, that an error 'is usually cured.' [Citation.]" (*Buzgheia v. Leasco Sierra Grove*, 60 Cal.App.4th 374, 395 (1997).)

[68] Where there has been a variance in the trial court's oral and written instructions, this Court will "presume that the jury followed the written version." (*People v. McLain*, 46 Cal.3d 97, 111, fn 2 (1988). Accord, *People v. Garceau*, 6 Cal.4th 140, 189 (1993) [erroneous oral instruction held "harmless because jury received the correct version … in its written form"].)

[69] "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin*, 471 US 307, 322 (1985). Accord, *People v. Lee*, 43 Cal.3d 666, 674 (1987).

instruction they had with them in the jury room rather than on the general oral instruction given a month before deliberations concluded. [70]

In any event, the oral readback comment did not eliminate the other crucial restrictions conveyed by 17.48: the ban on note-sharing and telling jurors who did not take notes to rely on their auditory recalls if in conflict with another juror's written note.

Respondent contends otherwise. It argues that written notes are an anachronism now that court reporters can read all the testimony back if requested. Thus, it argues, if one agrees that all jurors would have believed the oral readback comment gave them carte blanche to resolve any and all discrepancies by requesting a readback, then no juror had to take any notes or rely on their auditory recall. If they did not remember something, they just would have requested a readback. Similarly, it is argued, if a discrepancy arose between one juror's auditory recall and another's notes, no problem: they simply would have requested a readback. (RB 110-113.)

The argument must be rejected. First, jurors were explicitly told to trust their auditory recollections over another juror's notes. It must be

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[70] Cf. *Conde v. Henry*, 198 F3d 734, 740 (9th Cir. 1999) [where the "correct statement of the" law "was buried in the 'background definitions'" of the written instructions, court assumes jurors followed the incorrect statement in "the body of the" written instruction that dealt directly with the subject matter at issue]. Here, the correct oral comment "was buried in" the 30 days of proceedings between the comment and the conclusion of deliberations.

presumed that all jurors "faithfully follow[ed]" that instruction. (*People v. Smith*, 40 Cal.4th 483, _, 54 Cal.Rptr.3d 245, 274 (2007); accord, *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).) If a discrepancy arose between one juror's auditory recall and another's notes, therefore, there was no need for the juror who did not take notes to request a readback: the judge had told him to trust his auditory recall in that precise situation. Even if that juror had construed the oral readback comment broadly, therefore, it is reasonably likely that such a juror would have trusted his auditory recall and would have seen no need for a readback.

Most importantly, the state's argument fails to take the length and complexity of the trial into account. The first guilt phase witness testified on May 29, 1991. Exactly 100 witnesses (in 134 separate appearances) testified regarding 14 charged offenses and 10 separate incidents and victims. (See 1 RT, Index B, pp. 32-52.) As noted, furthermore, the deliberations did not begin until August 4 and did not end until August 29. It is only reasonable to assume that a juror who strictly relied on his or her auditory recall was either going to forget many important details over that period of time or remember them incorrectly. At the same time, it is most *un*reasonable to assume that such a juror would have corrected each and every problem by requesting a readback. Among other things, the juror wouldn't have known what s/he had forgotten or which details s/he was remembering incorrectly. This was especially so given that the judge had

told the jurors to trust their auditory recall. Even if a juror doubted the accuracy of his or her recall, however, it would be the extremely rare juror who would feel free to request a readback to resolve all of the fuzzy recollections bound to occur in such a long and complex trial.

Respondent's Brief makes no reference whatsoever to the daunting memory challenge faced by the jurors in this case.

The only solution to the problems created by 17.48 -- and the only scenario in which respondent's argument would have merit -- would have been for the court to allow into the jury room the reporter's transcript for the *entire* trial. The jury made that exact request, however, and it was denied. (19 CT 5475.)

Telling jurors to trust their auditory recall over another juror's notes and forbidding them from sharing notes when they had to remember testimony given one to three months earlier was a prescription for, if not a guarantee of, unreliable factfinding in violation of Mr. Solomon's rights to due process, trial by jury, and a reliable capital guilt verdict. (Calif. Const., art. I, §§7, 15; U.S. Const., Amends. 5, 6, 8, 14. See generally, *Ring v. Arizona*, 536 U.S. 584, 609 (2002) [affirming the critical importance of "the factfinding" demanded by the "right to trial by jury"]; *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Sullivan v. Louisiana*, 508 U.S. 275, 277-281 (1993); *Yates v. Evatt*, 500 U.S. 391 (1991); *People v. Santamaria*, 229 Cal.App.3d 269, 282 (1991).)

The opening brief shows why the error was prejudicial in fact or should be deemed so. (AOB 195-198.) Respondent's Brief does not address the argument. The error requires reversal both on its own and in conjunction with the other errors that have been raised. (*See, e.g., Taylor v. Kentucky*, 436 U.S. 478, 487, and fn. 15 (1978) ["the cumulative effect of potentially damaging" errors "violated the due process guarantee of fundamental fairness"]. *Accord, Kyles v. Whitley*, 514 U.S. 419, 451-454 (1995); *People v. Holt*, 37 Cal.3d 436, 459 (1984).)

## VI.

## IN VIOLATION, *INTER ALIA,* OF MR. SOLOMON'S RIGHTS TO DUE PROCESS AND TRIAL BY JURY, CALJIC NOS. 2.00-2.02 EFFECTIVELY TOLD JURORS THAT DIRECT EVIDENCE COULD SUPPORT A FINDING OF GUILT EVEN IF NOT BELIEVED BEYOND A REASONABLE DOUBT

The opening brief argues that the circumstantial evidence instructions (CALJIC Nos. 2.01-2.02) created the inference that the reasonable doubt principles applicable to circumstantial evidence did not apply to direct evidence. The Court of Appeal recently agreed:

> The jurors could have considered CALJIC No. 2.01 's reference to the reasonable doubt standard of proof as applicable *only to circumstantial evidence* and *not to* the considerable *direct evidence* presented by the prosecutor in this case.

(*People v. Flores*, 147 Cal.App.4th 199, 216 (2007) [emphasis in original].) As *Flores* pointed out, this Court made the same observation 33 years ago in *People v. Vann*, 12 Cal.3d 220 (1974):

> Although [CALJIC No. 2.01] … states, albeit indirectly, that an accused cannot be convicted on circumstantial evidence except where such evidence proves the issue beyond a reasonable doubt, it fails to tell the jurors that a determination of guilt resting on direct testimony must also be resolved beyond a reasonable doubt. [¶] …

> An instruction which requires proof beyond a reasonable doubt only as to circumstantial evidence, rather than importing a need for the same degree of proof where the crime is sought to be established by direct evidence, might with equal logic have been interpreted by the jurors as importing the need of a lesser degree of proof where the evidence is direct and thus of a higher quality.

(12 Cal.3d at 226-227.) [71]

The opening brief goes on to argue that the negative inferences created by 2.01 and 2.02 are contrary to California law, diluted the prosecution's burden to prove guilt beyond a reasonable doubt in violation, *inter alia*, of Mr. Solomon's rights to due process and trial by jury, and, while structural error, were also prejudicial even if traditional harmless error analysis is applied. (AOB 199-208.)

Respondent reiterates its contention that, if the foregoing claims are found to be prejudicial constitutional error, the People's right to due process "precludes reversal" because defense counsel did not object to the instructions at trial. (RB 115-116.) The latter contention must be rejected for the reasons set forth in the preceding argument. (See, e.g., *People v. Stitely*, 35 Cal.4th at 556 and fn. 20 ["[T]he Attorney General concedes that

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[71] The observations in *Flores* and *Vann* were made in response to the Attorney General's contention that the failure of the trial court to give the standard reasonable doubt instruction was cured by the jury having received CALJIC No. 2.01.

defendant has not forfeited his … claim that the trial court erred in giving an unmodified version of CALJIC No. 2.01, even though defendant did not seek a similar modification at trial. In making the latter point, the Attorney General relies on section 1259…. This statute seems to preserve *all* challenges to the circumstantial evidence instructions raised here"]; emphasis in original.)

With respect to the substantive issue, the state does not challenge the theoretical correctness of appellant's claim of error. In particular, it does not dispute that:

1) as captured in the maxim, *est inclusio unius exclusion alterius*, a "commonly understood" principle of construction [72] that is rooted in "logic and common sense", [73] it was reasonably likely that one or more jurors would have concluded that the principles that the instructions said were specifically applicable to circumstantial evidence were not applicable to direct evidence (*People v. Vann*, 12 Cal.3d at 226-227; *People v. Flores*, 147 Cal.App.4th at 216);

2) in particular, jurors would have been misled into thinking that a fact essential to guilt that was based on direct evidence did *not* have to be proved beyond a reasonable doubt, and that a finding of guilt could be

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[72] *People v. Castillo,* 16 Cal.4th at 1020 [conc. opn. of Brown, J.].

[73] *U.S. v. Crane*, 979 F.2d 687, 690 (9th Cir. 1992).

made on the basis of direct evidence that was reasonably reconcilable with innocence (*ibid;* AOB 200-201); [74] and

3) a juror who failed to apply the latter rules would have been determining guilt based on principles contrary to both California and federal constitutional law (AOB 200-204).

Rather than contesting the foregoing, the state makes a harmless error argument. It rests on several intertwined misconceptions.

First, the state appears to argue as follows: 1) jurors had to rely on a circumstantial evidence theory to prove the mens rea of every crime Mr. Solomon was convicted of; 2) the fact that Mr. Solomon was the perpetrator of the physical acts involved in those crimes was circumstantial evidence of the mens rea the jurors had to find; 3) jurors therefore would have applied CALJIC Nos. 2.01 and 2.02 *both* to the question whether Mr. Solomon was the perpetrator of the crime *and* to its mental state element. (RB 116-117.)

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[74] See also, *People v. Dewberry*, 51 Cal.2d 548, 557 (1959) ["The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder"]; *People v. Castillo,* 16 Cal.4th at 1020 [conc. opn. of Brown, J.] [noting danger that juror would construe instruction as limiting voluntary intoxication defense to the elements explicitly referred to in the instruction].)

The argument has many flaws. First, while the prosecutor argued a circumstantial evidence theory to show the mental state required for the homicides, he also relied on Vernell Dodson's direct evidence to show premeditation and deliberation in the Yolanda Johnson case. (The ramifications of that are discussed below and at AOB 205-206.) With regard to the non-homicides, moreover (rape, oral copulation, and sodomy), the argument is simply wrong: the mens rea for those offenses was proved by proving commission of the acts. That proof consisted primarily of the direct evidence supplied by the victims, Mss. Hall and Hamilton. (Here, too, the ramifications of this are discussed below as well as at AOB 206-207.)

With regard to respondent's assertion that the identity of the perpetrator was circumstantial evidence of mental state, it has validity only with regard to the first-degree murder convictions. [75] The point is irrelevant to appellant's argument, however: he is not contending that the false inferences created by CALJIC Nos. 2.01 and 2.02 were instrumental in the jurors' finding that Mr. Solomon was the perpetrator of the first-degree murders.

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[75] The prosecutor's position that the killings after the first one were the product of premeditation and deliberation rested on an inference that took as its essential premise that Mr. Solomon was the perpetrator of each killing. (See AOB 162 and cites there. The prosecutor's argument is the basis of Arg. II. See above, Arg. II.A)

Appellant *is* contending, however, that the erroneous instructions likely influenced the jurors' finding that he was the one who attacked Ms. Hall and Ms. Hamilton. In each case, the evidence that the perpetrator was Mr. Solomon consisted primarily of the direct identification testimony of the victims. Given that their identifications were belated and much-impeached, a juror could have had a reasonable doubt regarding the truth of that aspect of their claims (see AOB 65-66, 69, and cites there), but, misled by CALJIC Nos. 2.01 and 2.02, nonetheless could have relied to some important degree on that testimony to conclude that Mr. Solomon was the perpetrator (see AOB 206-207). Contrary to the state's claim, a juror did not *need* to make that finding in order to find the requisite mens rea. As noted, the mens rea for those offenses was proved simply by proving that the acts were committed, a subject on which the women were more credible. [76] Since the conclusion that Mr. Solomon was the perpetrator was *not* circumstantial evidence essential to evaluating the mens rea of the perpetrator, nothing in CALJIC Nos. 2.01 and 2.02 would have required the juror to go back and do what the state claims s/he would have had to do: i.e., determine if the victims' identification testimony was true beyond a reasonable doubt.

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[76] With both victims, their testimony that an assault had occurred was corroborated by their boyfriends but their testimony that the perpetrator had been Mr. Solomon was undermined by their boyfriends' testimony. (See AOB 65-66, 69, and cites there.)

Another misconception by respondent bears on the foregoing analyses. It appears that respondent questions appellant's claim that a juror could have "believed" or relied on certain testimony without believing it beyond a reasonable doubt. (See AOB 205-206 [regarding Vernell Dodson's testimony].) The argument appears to be: 1) One cannot make a finding of guilt beyond a reasonable doubt if some of the evidence on which that conclusion is based was not found true beyond a reasonable doubt; 2) the general reasonable doubt instruction the jury was given, therefore, renders any error in 2.01 harmless. (RB 117-118.)

Again, the premise is wrong. "Other crimes" evidence, for instance, may be found true by a preponderance and nonetheless be relied on -- in conjunction with other evidence -- to find guilt beyond a reasonable doubt. (See, e.g., *People v. Reliford*, 29 Cal.4th 1007, 1011-1016 (2003); *People v. Carpenter*, 15 Cal.4th 312, 380-382 (1997).) [77]

Respondent says that "nothing in the instructions suggested to jurors that they could "believe" a fact based on some sort of intermediate" standard less demanding than beyond a reasonable doubt. (RB 117-118.) But that is precisely the inference falsely created by 2.01 and 2.02. As held

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[77] Conversely, if an instruction falsely suggests that a critical fact can be found true on a standard lower than beyond a reasonable doubt, such an instruction will not be rendered harmless by the fact that the jury was also given other instructions that correctly stated the reasonable doubt standard. (See, e.g., *People v. Frazier*, 89 Cal.App.4th 30, 34-36 (2001).)

in *People v. Vann* and *People v. Flores*, by explicitly and at length emphasizing that the reasonable doubt standard applied to circumstantial evidence, the logical inference was that some lesser standard of certainty applied to direct evidence. (12 Cal.3d at 226-227; 147 Cal.App.4th at 216.) That is the argument at the heart of this claim. (AOB 200-201.) If there is some flaw in the foregoing reasoning, respondent has not pointed it out.

Yet another misconception seems to underlie respondent's analysis as well. It appears to argue that, if a juror did not believe beyond a reasonable doubt Vernell Dodson's testimony that Mr. Solomon had said he wanted to kill Yolanda Johnson, that juror, based solely on Mr. Dodson's testimony, could not have found beyond a reasonable doubt that the murder was premeditated. (RB 117-118.)

Appellant does not disagree. His argument, rather, is: 1) given the false inference created by CALJIC Nos. 2.01 and 2.02, a juror could have "relied" on Dodson's direct evidence of premeditation even if, in light of all the impeachment of his testimony (see AOB 39-40; 206-207), s/he did not believe it beyond a reasonable doubt; 2) that juror could have combined his or her acceptance of Dodson's testimony with reliance on other evidence to conclude beyond a reasonable doubt that the killing was premeditated; 3) if that juror would not have made that finding without relying on Dodson's testimony -- a substantial likelihood given the negligible evidence in support of premeditation and deliberation (see AOB,

Arg. I) -- the statement Dodson attributed to Mr. Solomon was a "fact necessary to constitute the crime" of first-degree murder and had to be believed "beyond a reasonable doubt" (*In re Winship*, 397 US 358, 364 (1970)); and 4) improper reliance on the testimony tainted the premeditation finding and thus the conviction on that count for first-degree murder.

The same analysis applies to the non-homicide offenses. If a juror relied *strictly* on the much-impeached identification testimony of Ms. Hamilton and Ms. Hall to find that Mr. Solomon had been the perpetrator of the crimes involving them, s/he could not have done so without finding the testimony true beyond a reasonable doubt. In each instance, however, a juror: 1) could have relied on the identification testimony despite reasonable doubt about its credibility; 2) could have used it, along with *other* evidence, to find identity beyond a reasonable doubt; 3) could not have found identity without relying on the impeached testimony, making the truth of the latter "essential … to establish the defendant's guilt;" and 4) the tainted reliance thus tainted the convictions that rested on it.

Finally, the tainted convictions discussed above likely tainted the premeditation and deliberation finding on the first-degree murder counts. Jurors could have used the tainted conclusion that Mr. Solomon was the perpetrator of the attacks on Ms. Hamilton and Ms. Hall to infer that those attacks were a prototype for how the killings occurred (just as respondent

does -- RB 71). Similarly, since the prosecutor focused so heavily on the killing of Ms. Johnson (starting the trial with evidence of that offense), jurors could have used the tainted conclusion that the killing of Ms. Johnson was premeditated to infer the same for the 3 other homicides found to be first-degree murders. While a juror who did so would have been using the Hall, Hamilton, and Johnson verdicts circumstantially, CALJIC Nos. 2.01 and 2.02 would not have caused such a juror to go back and reevaluate those convictions. The juror had found beyond a reasonable doubt that Mr. Solomon had committed the crimes in question and would have had no idea that those conclusions had been tainted by legal error. In light of the paucity of solid, substantial, and credible evidence of premeditation and deliberation on *any* count (see AOB, Arg. I), it is reasonably possible and reasonably probable that, without the false inferences created by CALJIC Nos. 2.01 and 2.02, there would have been no first-degree murder verdicts. (See generally, *Chapman v. California*, 386 U.S. at 24; *Beck v. Alabama*, 447 U.S. at 637; *People v. Watson*, 46 Cal.2d at 836.) Thus, while the kind of error at issue here is structural (AOB 207-208; *Sullivan v. Louisiana*, 508 U.S. at 281), reversal is required under traditional harmless error analysis as well. This is certainly so when the impact of the error is aggregated with that of the other errors that have been or will be raised by Mr. Solomon in this Court. (*Taylor v. Kentucky*, 436 U.S. at 487, and fn. 15.)

## VII.

## VARIOUS INSTRUCTIONS – ALONE AND CUMULATIVELY – BOTH DILUTED THE REASONABLE DOUBT STANDARD AND SHIFTED THE BURDEN OF PROOF TO MR. SOLOMON

Appellant argues that CALJIC Nos. 2.01, 2.02, and 2.51 created false and misleading choices between "guilt" and "innocence", "existence" and "absence" of mental state, and "reasonable" and "unreasonable" theories of guilt, and that CALJIC No. 2.21.2 substituted a probability standard for the reasonable doubt standard. (AOB 209-234.)

Respondent reiterates its contention that the "people's right to due process ... precludes reversal" based on claims not made at trial. (RB 119.) As shown in Argument V above, the latter contention is without merit. (See, e.g., Pen. Code §1259; *People v. Dunkle*, 36 Cal.4th at 913, 924, 928.)

Respondent's only substantive argument is that, in light of the standard reasonable doubt instruction the jury was given, "no juror with basic reading comprehension" could possibly have been misled by the phrases appellant finds problematic. (RB 120-121.)

Appellant is not alone in perceiving a problem, however. Over time, the CALJIC Committee and the Judicial Council (authors of the CALCRIM instructions) have removed the problematic phrases from CALJIC Nos.

2.21.2 [78] and 2.51 [79], as well as similar phrases from other standard instructions. [80] One appellate panel, furthermore, publicly agreed that use of the "guilt/innocence" dichotomy in CALJIC No. 2.01 was "inapt and potentially misleading...." (*People v. Han*, 78 Cal.App.4th 797, 209 (2000).) Appellant noted several of these corroborative views and actions in the opening brief (AOB 220-221) but respondent makes no mention of them.

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[78] Compare the version of CALJIC No. 2.21.2 given appellant's jury ["You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, "unless ... you believe the probability of truth favors his or her testimony in other particulars"] with the current version of CALCRIM 226 (Fall 2006) ["If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest"].

[79] Compare the version of CALJIC No. 2.51 (5th ed.) given appellant's jury ["Absence of motive may tend to establish innocence"] with the current versions of CALJIC No. 2.51 (Fall 2006) ["Absence of motive may tend to show the defendant is not guilty"] and CALCRIM 370 (Fall 2006) ["Not having a motive may be a factor tending to show the defendant is not guilty"].

[80] For example, compare the version of CALJIC No. 1.00 given in *People v. Guerra*, 37 Cal.4th 1067, 1139 (2006) [must not infer from arrest or charge that the defendant is "more likely to be guilty than innocent"] with the current versions of CALJIC No. 1.00 (Fall 2006) ["more likely to be guilty than not guilty"] and CALCRIM No. 103 (Fall 2006) ["The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true"]; and compare the version of CALJIC No. 17.47 given in *People v. Snow*, 30 Cal.4th 43, 97, fn. 19 (2003) [cautioning jurors not to reveal how they were divided "as to guilt or innocence"] with the current version of CALJIC No. 17.47 (Fall 2006) [cautioning jurors not to reveal how they were divided "as to any issue"].

This Court continues to reject claims similar or identical to the ones appellant makes. (See, e.g., *People v. Jurado*, 38 Cal.4th 72, 126-127 (2006); *People v. Guerra*, 37 Cal.4th 1067, 1138-1139 (2006).) Pursuant to *People v. Schmeck*, 37 Cal.4th 240, 303-304 (2005), appellant will therefore not belabor the several points. He will rely on the representation that such claims will be deemed "fairly presented" for purposes of federal review even though not supported by full briefing. (*Ibid.*)

## VIII.

## THE SPECIAL CIRCUMSTANCE OF MULTIPLE-MURDER FAILS TO NARROW IN A CONSTITUTIONALLY ACCEPTABLE MANNER THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

Given the Court's prior and continuing rejection of this and related claims (see, e.g., *People v. Smith*, 40 Cal.4th 483, _, 54 Cal.Rptr.3d 245, 280 (2007)), appellant will forego further briefing on the narrowing issue. He will rely on the representation in *People v. Schmeck*, 37 Cal.4th 240, 303-304 (2005), that such claims will be deemed "fairly presented" for purposes of federal review even though not supported by full briefing.

## IX.

## THIS COURT'S ANALYSIS IN *PEOPLE v. STEWART* CONFIRMS -- AND THE STATE IMPLICITLY CONCEDES -- THAT THE EXCUSAL FOR CAUSE OF PROSPECTIVE JUROR G. BASED ON HER FEELINGS ABOUT THE DEATH PENALTY WAS UNCONSTITUTIONAL

### A. Introduction

Over appellant's objection, the trial judge granted the prosecutor's challenge for cause of prospective juror G. Ms. G was 56 years old and chair of the history department at a local high school. (21 ACT 6213.) The trial judge removed her from the venire because he believed there was only a "remote" chance she would ever "return a verdict of death" and that she was therefore "substantially impaired" under *Wainwright v. Witt*, 469 U.S. 412 (1985). (45 RT 19613-14.) The opening brief argues that the court misinterpreted the *Witt* test, and that, when the proper test is applied to the actual facts, it is clear that Ms. G.'s excusal was unjustified and unconstitutional. (See AOB, pp. 240-294.)

After the opening brief was filed, this Court decided *People v. Stewart*, 33 Cal.4th 425 (2004). As will be seen, the analysis in *Stewart* provides powerful support for the argument made in the opening brief. (See §§C and D below.)

The state's actual response to this argument is less than one page long. (RB 157-158.) It contains: 1) a misleadingly incomplete summary of the voir dire; and 2) a legal analysis that consists of one conclusory sentence. The latter does not mention the principal cases appellant relies on, fails to engage in the requisite constitutional analysis, and does not respond to *any* of the points on which appellant's argument rests. Further, even though *People v. Stewart* was decided nine months before Respondent's Brief was filed and is directly relevant to the claim at hand, respondent fails to make any reference to it.

The state's one-page discussion of the excusal of Ms. G. is preceded by a 34-page dissertation entitled, "The Law of Death-Penalty Qualification." The thesis is that this Court does not understand the law of death-qualification and has been getting it wrong since at least 1994. Respondent purports to set the Court straight on what the law really is. (RB 125-157.)

Nominally, the discussion purports to apply to this argument (Arg. IX), the next one (Arg. X, involving the challenge for cause of another prospective juror), and Arg. XI, in which appellant argues that restrictions on voir dire violated, *inter alia, People v. Cash*, 28 Cal.4th 703 (2002). In actuality, the state makes no effort to apply its 34-page dissertation to this argument or the next one. Its real target is *Cash.* The state more or less explicitly concedes that *Cash* error occurred. (RB 159-160.) Since *Cash*

error is reversible per se, the state is desperate to convince the Court that *Cash* must be reversed.

As will be seen in Arg. XI, *post*, the 34-page dissertation is a one-sided and inaccurate pseudo-historical review that misconstrues both the constitutional premise and reasoning that compelled the *Cash* holding.

There is no point in engaging in the latter analysis here, however, because, as noted, the state makes no effort to apply its 34-page dissertation to either Arg. IX or X. Indeed, there is not a single reference in the 34-page "The Law of Death-Penalty Qualification" to the cases at the heart of Args. IX and X -- *People v. Heard* and *Adams v. Texas* (see §B below). Nor is there any reference to *People v. Stewart*.

The rest of this argument proceeds as follows. §B summarizes the argument made in the opening brief, §C summarizes *People v. Stewart*, and §D shows how *Stewart* dovetails with the analysis in the opening brief. Finally, §E discusses the state's virtual non-response and shows that it can only be understood as an implicit concession of error.

### B. Summary Of The Argument Made In The Opening Brief

The opening brief makes the following points:

1. It was beyond dispute that Ms. G. approached her task as a prospective juror with the utmost integrity and would do the same as an actual juror. The judge complimented her on her "very detailed, complete," and "diligently answered" questionnaire. Following voir dire, he noted her

"candor" and "conscientiousness" and thanked her for the "very honest and thoughtful answers" that she had given. (45 RT 19594-95, 19614-19615.)

2. Nonetheless, the court found that Ms. G. was "substantially impaired" under *Witt*. In applying that test, the judge's exclusive focus, in his voir dire questions, comments, and ruling, was on whether Ms. G. would "actually … return a death penalty." (See, e.g., 45 RT 15913 [justifying Ms. G.'s excusal on the ground that, "on at least one … occasion" during the voir dire, "when asked if she actually could return a death penalty," she said "I don't know"].) That exclusive focus was improper. The actual test demanded by the Sixth Amendment was whether Ms. G.'s views substantially impair her ability to perform the *particular* duties she would have been given in this case "as defined by the court's instructions" (*People v. Heard*, 31 Cal.4th 946, 958 (2003).)

3. Those duties were to determine the facts, to determine which were mitigating and which aggravating, to weigh the totality, and then, allowing for the exercise of mercy permitted by the instructions, to determine which penalty was appropriate. Jurors were to make the latter judgment based on whatever "moral and sympathetic value[s]" they brought to the process. Jurors did not have to vote for death even if they found that aggravation substantially outweighed mitigation. (See AOB 244-47, 279-88, and cites there.) When jurors are given such discretion, it is both predictable and proper that a juror's negative views regarding the

death penalty will affect her penalty determination(s). As the Supreme Court held in *Witherspoon v. Illinois*, 391 U.S. 510, 519-520 (1968), and *Adams v. Texas*, 448 U.S. 38, 43-50 (1980), the Sixth Amendment does not permit removing a prospective juror from a capital venire on that basis. (AOB 283-84, 288-93.)

4. Ms. G. was not an ideologue who was going to "invariably vote ... against the death penalty ... without regard to the strength of aggravating and mitigating circumstances...." (*People v. Heard*, 31 Cal.4th at 959.) To the contrary, she was a woman who had been raped as a child, had lost custody of her children to a man she despised, and had seen one of those children, a daughter, become addicted to crack cocaine. (See AOB 276-77 and cites there.) She was not likely to be sympathetic to a defendant who, earlier in the case, had been convicted of sexually assaulting and/or murdering eight women addicted to cocaine, and against whom five other victims would testify at the retrial. She believed the death penalty was appropriate for people who commit "hideous" crimes; when pressed hard by the prosecutor, she said (four times) that she "probably could" vote for death if she "felt that [Mr. Solomon] really deserved it"; and, when she was told (contrary to the instructions the jury would receive) that the law required her to vote for death in "appropriate" cases, she committed herself to abiding by the law even though she was improperly

allowed to think that that meant voting for an "inhumane" death in the electric chair. (RT 19598; 19606-19612; AOB 248-252, 257-278.)

5. Ms. G.'s electric-chair misconception relates to a collateral but important point. As noted, in removing Ms. G., the trial court placed weight on the fact that, when the prosecutor asked her if she could "impose a death penalty in an appropriate case," Ms. G. said "I don't know" after a "long pause." (RT 19609, 19613.) The response came at the end of an improper line of questioning in which the prosecutor reinforced Ms. G.'s misconception that California used the electric chair, exploited her visceral feelings how the death penalty was carried out, and, along with the judge, erroneously told Ms. G. that voting for death was mandatory in "appropriate" cases. (RT 19608-09.) The response was improperly obtained and irrelevant to the discharge of the actual "duties" Ms. G. would have had as a juror in this case. It should not have been relied on. (See AOB 266-275.)

6. In any event, despite the latter improprieties and subsequent to them, Ms. G. said she "would" and "could" vote for death in an appropriate case. (RT 19612.) The record does not support any conclusion but that Ms. G. would have been a conscientious juror fully capable of performing the duties of a juror in this case. Under *Witt et al.* she could not be removed because of her ambivalent feelings regarding voting for death. Her

excusal violated Mr. Solomon's right's rights to due process, an impartial jury, and a reliable penalty determination. (See AOB 254-293.)

### C. After The Opening Brief Was Filed, This Court, In *People v. Stewart*, Affirmed The Principle At The Heart Of Appellant's Claim: The Fact That A Prospective Juror Has Beliefs Regarding The Death Penalty That Would Affect Her Penalty-Phase Determinations In Ways Favorable To The Defendant -- Indeed, Even If Those "Opinions ... Would Make It Very Difficult For The Juror Ever To Impose The Death Penalty" -- That Does Not Constitute "Substantial Impairment" Under *Witt* And Cannot Justify Excusal Of The Juror From The Venire

In *People v. Stewart*, 33 Cal.4th 425 (2004), five prospective jurors checked a box on their questionnaires that indicated that they held

> a conscientious opinion or belief about the death penalty which would prevent or make it very difficult ... [t]o ever vote to impose the death penalty.

(33 Cal.4th at 442-443.) In addition, each of the five made one of the following written statements:

-- "I do not believe a person should take a person's life. "

-- "I am opposed to the death penalty."

-- "I do not believe in capit[a]l punishment."

-- "In the past, I supported legislation banning the death penalty."

-- "I don't believe in irrevers [i]ble penalties. A prisoner can be released if new information is found."

(33 Cal.4th at 448-449.)

The trial court excused the prospective jurors for cause without further examination. This Court reversed.

First, the Court held, granting a challenge for cause of a prospective juror who has strong reservations regarding capital punishment will require reversal if not based on "a reliable determination" that "the juror's views would prevent or substantially impair the performance of his or her duties." The latter, the Court said, are "defined by the court's instructions and the juror's oath in the case before the juror." (33 Cal.4th at 445, citing *Witt* and other cases; punctuation and quotation marks omitted.)

Second, "[t]he prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors." (*Ibid.*, citing *Witt,* 469 U.S. at 423.) That standard, the Court held, had not been met.

To begin with, "many members of society" share the views held by the prospective jurors: i.e., "their personal and conscientious views concerning the death penalty would make it 'very difficult' ever to vote to impose the death penalty." Such views do not disqualify such a person from jury service. To the contrary, such a person "is entitled--indeed, duty-

bound--to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (33 Cal.4th at 446, citing *Witt* and other cases.)

Applying *Witt's* "prevent or substantially impair" test to the particular duties given to capital jurors under California law, the Court made clear that the test must be applied in a way that serves the overriding constitutional concern -- i.e., not seating a jury "uncommonly willing to condemn a man to die." (*Witt*, 469 U.S. at 418, quoting *Witherspoon*, 391 U.S. at 521.) Thus, the Court explained, a "prospective juror" is not "substantially impair[ed]" within the meaning of *Witt* because his "personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase...." (33 Cal.4th 446; quotes and citation omitted.) Nor does substantial impairment exist "simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty." (33 Cal.4th at 447.)

The latter conclusion, the Court observed, is dictated by the nature of the determination jurors have to make under California law:

> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in

determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*....

(33 Cal.4th at 447.)

The Court continued:

A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(33 Cal.4th at 447.) As long as the juror had the

ability to put aside personal reservations, properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence[, s/he] ... would not be substantially impaired in performing his or her duties as a juror.

(*Ibid.)*

The trial court in *Stewart* had not understood this. Defense counsel had proposed asking prospective jurors whether they had strong views that would make it "very difficult" for them to "*consider* all the evidence and *follow* the Court's instructions to weigh the evidence *before deciding on punishment.*" That was an acceptable "preliminary" question, the Court said, because it "was directed at the *decision-making process.*" (33 Cal.4th at 453, fn. 16; italics in original.) "As revised and employed by the [trial] court, however, the question … inquired … whether the prospective jurors could reach the ultimate decision to impose the death penalty." (*Ibid.*) It appeared to the Court "that the trial court [had] erroneously equated (i) the nondisqualifying concept of a very difficult decision by a juror to impose a death sentence, with (ii) the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty…." (33 Cal.4th at 447.)

"[T]he trial court's excusals for cause" in *Stewart* failed to meet "the governing legal standard (*Witt, supra,* 469 U.S. 412, 424….)" Accordingly, the Court held, "under the compulsion of United States Supreme Court cases this error requires reversal of defendant's death sentence, without inquiry into prejudice." (33 Cal.4th at 447, citing cases.)

### D. The *Stewart* Analysis Strongly Supports The Conclusion That The Excusal Of Ms. G. Was Unconstitutional

The analysis in *Stewart* implicitly affirms that the *Witherspoon-Witt* line of cases defines "a *limitation* on the State's power to exclude"

prospective jurors opposed to the death penalty. (*Adams v. Texas*, 448 U.S. at 47-48; *Wainwright v. Witt*, 469 U.S. at 423; emphasis added.) That limitation is dictated, *inter alia*, by the defendant's Sixth Amendment right to an impartial jury *not* "organized to return a verdict of death." (*Witherspoon,* 391 U.S. at 521.) (See AOB 242-43.)

The limitation is defined as follows: A "prospective juror may be challenged for cause based upon his or her views regarding capital punishment *only if* those views would prevent or substantially impair the performance of the juror's duties as defined by *the court's instructions and the juror's oath*." (*People v. Heard*, 31 Cal.4th at 958 [emphasis added], quoting and citing *Witt*, 469 U.S. at 424 and *Adams*, 448 U.S. at 45.) *People v. Stewart* affirms that a juror's "duties" within the meaning of the "substantial impairment" test are "defined by the court's instructions and the juror's oath *in the case before the juror*." (33 Cal.4th at 445; emphasis added.)

In accord with the latter test, the opening brief examines the instructions given to the jurors in this case. Ms. G.'s duty would have been to determine what the facts were, decide which were relevant to the penalty decision (as laid out in the list of relevant factors), decide which circumstances were mitigating and aggravating, assign whatever moral or sympathetic value she deemed appropriate to each of those factors, consider

the totality of the circumstances, and determine which weighed more. (AOB, pp. 244-47 and cites there.)

Ms. G.'s final duty would have been to "determine … which penalty is justified and appropriate…." She would have been required to vote for life unless she found that aggravation substantially outweighed mitigation. Even if she made that finding, furthermore, she would have been free to extend "mercy" and reject death. After conscientiously performing all the preliminary and intermediate tasks, she would have had guided but extremely broad discretion to decide that Mr. Solomon's life should be spared. (AOB 279-88 and fns. 100-102; 22 CT 6334-35, 6443-44; CALJIC Nos. 8.85 and 8.88.)

The opening brief argues that Ms. G.'s duties would have been comparable to those of the jurors in *Witherspoon*, who effectively had unlimited discretion to choose life or death. In that context, a juror's feelings about imposing the ultimate penalty are *relevant* to the decision to be made and may be grounds for excusal *only* if the juror would automatically reject or wouldn't even consider imposing death. It is only those jurors who would not be able to comply with their instructions. (*Witherspoon,* 391 U.S. at 520; *Adams* 448 U.S. at 43-44.) The opening brief shows that, contrary to popular belief, *Wainwright v. Witt* endorsed the latter holding. (*Witt*, 469 U.S. at 421-422.) (See AOB 283-84 and other cases cited there.)

In *Adams v. Texas*, furthermore, the Court held that the Constitution does not permit excusal of a juror because her "views about the death penalty might influence the manner in which [s]he performs … her role," "invest [her] … deliberations with greater seriousness," or "involve … [her] emotionally." (*Adams v. Texas,* 448 U.S. at 46-47.) The Court went further, holding that a prospective juror could not be dismissed because her antipathy for the death penalty might influence her judgment on *factual* issues: "Nor … would the Constitution permit the exclusion of jurors … who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system…." (448 U.S. at 50.) (See AOB 288-91.)

The opening brief argues that *Witherspoon* and *Adams* are critical to understanding how the Sixth Amendment "limitation" on excusal of prospective jurors affects excusal in a California case. If it violates the Sixth Amendment to exclude would-be jurors whose opposition to the "death penalty may affect what their honest judgment of the *facts* will be or" their assessment whether "*reasonable doubt*" had been proved (*Adams*, 448 U.S. at 50; emphasis added), then, the opening brief argues, it violates the Sixth Amendment to exclude a would-be juror because her views "may affect what [her] … honest judgment … will be" when assigning "*moral* ...

*value*" (CALJIC No. 8.88) to the factors bearing on the penalty decision and deciding whether to exercise mercy. (AOB 283-84, 291-93.)

*People v. Stewart* resoundingly affirms the latter view. California law "contemplates that jurors will take into account their own values in" making the determinations regarding aggravation and mitigation that the law requires. Such "values" include "opposition toward the death penalty." Such values "may predispose [the juror] to assign greater than average weight to the mitigating factors," affect his determination "whether aggravating factors outweigh mitigating factors such that the death penalty is warranted," lead him "to impose a higher threshold before concluding that the death penalty is appropriate," and "make it very difficult for the juror *ever* to impose the death penalty." Since California law contemplates that a juror will have views that will directly affect his or her penalty determination, however, such views are not incompatible with the juror's "duties." The fact that such views emerge during voir dire, accordingly, "is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*...." (33 Cal.4th at 446-447; emphasis added.)

In capital trials in California, the question under *Witt* is whether a prospective juror has the "ability to ... properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence..." If she

does, she "would not be substantially impaired in performing … her duties as a juror" even though her opposition to the death penalty would impact her penalty determinations in the ways described above and would "make it very difficult for the juror *ever* to impose the death penalty." (33 Cal.4th at 447; emphasis added.) Removing such a juror from the venire would violate the Sixth Amendment under "the governing legal standard" established in "*Witt*." (33 Cal.4th at 447.)

As the opening brief argues, and the record unequivocally shows, Ms. G. had the "ability to … properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence…." (*Ibid.*) Neither the trial court nor prosecutor suggested that Ms. G. would have done anything but conscientiously perform those tasks. Indeed, at the beginning of her voir dire, the court observed that Ms. G. had "very diligently answered the questions" put to her on the questionnaire, giving "very detailed, complete" responses, and at the end complimented her on her "candor" and "conscientiousness [in] providing … very honest and thoughtful answers" to the difficult (and often confusingly phrased) questions put to her on voir dire. (45 RT 19594-96, 19614-19615.)

Ms. G. was not removed from the venire because of a perceived inability to engage in the requisite "decision-making *process*" required under California law. (*Stewart*, 33 Cal.4th at 453, fn. 16; italics in

original.) Her excusal, rather, had entirely to do with the trial court's concern that she would not "reach the ultimate decision to *impose* the death penalty." (*Ibid.*; emphasis added.)

> There were long delays in a lot of these answers and particularly when asked if she actually could return a death penalty, when that question was put directly to her, not with things about could you follow the law and could do this, but when it was directly could you return a death penalty, on at least one and probably two occasions, after long hesitation, she said "I don't know. I don't know.

(45 RT 19613. See RT 19614 ["it would be a very, very remote situation in which she … might consider or return a verdict of death"].)

As the opening brief and record show, Ms. G. was a very far cry from being a juror who would *never* "consider [or] … vote for a death sentence" (*Witt*, 469 U.S. at 421-422) or "invariably vote … against the death penalty … without regard to the strength of aggravating and mitigating circumstances…." (*People v. Heard*, 31 Cal.4th at 959.) While she had grown up with hangings, had images of the electric chair in her mind, and had a visceral response to the idea of taking part in inflicting such punishment, she had never been on a capital venire before. When the "shock" of that wore off and she focused on the questions she was being asked, she came to realize that she believed in capital punishment, particularly for those who commit "hideous" crimes. (45 RT 19598-99,

19612.) The record shows that her feelings about actually voting to take someone's life progressed throughout the voir dire. Early on, when the court pressed her about whether she could "return a verdict of death," "could return a death penalty," whether as "a practical matter" she "would really consider imposing it," she said it would be "hard" but left the door open. (45 RT 19598, 19599, 19601. See, e.g., RT 19598 ["I don't really think I could … and then my thoughts turn to a crime that's really hideous and in reality I think … the person should be put to death. But then I don't want to do it"]; RT 19599 ["Yes" "if the crime were really a hideous crime, … that person really should get the death penalty"].) After complicated questions from defense counsel, Ms. G. said she was open-minded enough to "consider" both penalties and that she thought she could vote for death if she relied on her "reason." (RT 19600-01, 19603.) Subsequently, after the prosecutor gave her a hypothetical he was sure would induce her to say she would not really be able to vote for death (RT 19605), she surprised him and said that she "probably could" impose the death penalty if she "felt that [Mr. Solomon] really deserved it." She had to repeat her answer three more times before the court and prosecutor were convinced that they had heard and understood her. (45 RT 19606.) Her voir dire ended, furthermore, with Ms. G. affirming that, "Yes," in a case she "felt was appropriate for

the death penalty," she "would" and "could ... vote for the death penalty...." (45 RT 19612.)[81]

The latter responses cannot be deemed anything but credible. The trial judge found that Ms. G. spoke with "candor" and gave "honest and truthful answers." (45 RT 19614-15.) This was a woman, moreover, who had been raped by her stepfather when she was a child, lost custody of her children to a man she "despised," and, thanks to the latter, had lost a daughter to crack cocaine. (21 ACT 6218, 6220, 6227.) There was every reason to believe that she was not going to be overwhelmed by sympathy for a defendant who had already been convicted of sexually brutalizing and/or killing eight women addicted to cocaine and whom, in the penalty phase, the prosecution would be showing had sexually assaulted five other women as well. (See AOB 79-83 and cites there.)

The trial judge made no reference to any of the foregoing in removing Ms. G. (45 RT 19613-15.) Excusal of a prospective juror under *Witt* requires "a *reliable* determination" that "the juror's views would prevent or substantially impair the performance of his or her duties." (*People v. Stewart*, 33 Cal.4th at 445.) The determination is not reliable

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[81] As the opening brief points out, a similar progression in the views expressed by pro-death jurors has led this court to affirm rulings that rejected challenges for cause of such jurors. (See AOB 260-261, citing *People v. Weaver*, 26 Cal.4th 876, 912 (2001).)

when the court that makes it has ignored critically relevant facts such as those described above.

The progression in Ms. G.'s voir dire was thrown off track by a highly improper examination by the prosecutor in which he reinforced Ms. G.'s misconception that a vote for death in this case would mean a vote for the electric chair, and exploited her visceral feelings on that subject. That examination resulted in the prosecutor asking whether Ms. G. "could participate in that kind of act ... of violence ... and impose a death penalty" and Ms. G., after a "long pause," responding: "I don't know. I would find it extremely difficult to." (45 RT 19608-09.) The trial court alluded to the latter response in granting the challenge for cause. (45 RT 19613.)

The opening brief shows that the questioning was improper and the response an improper basis for excusal. (See below.) Even if the trial court could rely on that response, however, Ms. G.'s excusal was unconstitutional. At most, it showed that Ms. G.'s feelings regarding the physical act of execution "would make it very difficult for the juror ever to impose the death penalty." (*Stewart*, 33 Cal.4th at 447.) "[A] prospective juror may *not* be excluded for cause" on that basis. (*Ibid.*; emphasis added.) Given her "ability to ... properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence," the fact -- assuming arguendo that it was a fact -- that that determination was not

likely "ever to [be] ... a death penalty" verdict was "*not* the equivalent to a determination that" she "would ... be substantially impaired in performing ... her duties as a juror." (*Ibid.*; emphasis added. Accord, *Witt*, 469 U.S. at 421-422; *Witherspoon*, 391 U.S. at 520; *Adams,* 448 U.S. at 43-50.). She was fully capable of conscientiously engaging in the requisite "decision-making *process*" required under California law. (*Stewart*, 33 Cal.4th at 453, fn. 16; italics in original.) Removing her because, in the court's estimation, she was not likely ever to "reach the ultimate decision to *impose* the death penalty" (*ibid.* [emphasis added]; see 45 RT 19614 [predicting the chances were remote that she would "*return* a verdict of death"]) -- or because "on at least one and probably two occasions, after long hesitation, she said "'I don't know'" when asked "directly could you *return* a death penalty" (45 RT 19613) -- was unconstitutional. In violation of "the governing legal standard (*Witt*)," the trial court "erroneously equated (i) the nondisqualifying concept of a very difficult decision by a juror to impose a death sentence, with (ii) the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty...." (33 Cal.4th at 447.)

If excusal was unconstitutional even if the trial court could properly rely on Ms. G.'s response to the electric-chair questioning, *a fortiori* it was unconstitutional if the reliance was improper. That was the case here.

As noted, excusal of a prospective juror under *Witt* requires "a *reliable* determination" that "the juror's views would prevent or

substantially impair the performance of his or her duties." (*Stewart*, 33 Cal.4th at 445.) The response to the electric chair questioning did not provide the court with reliable information relevant to determining whether Ms. G. could discharge the duties of a capital juror.

The improper exchange is described, discussed, and objected to in the opening brief. (AOB 266-275.) It occurred after Ms. G. told the prosecutor that she "probably could" impose the death penalty if she "felt that [Mr. Solomon] really deserved it". (45 RT 19606.) The prosecutor changed tactics at that point and targeted Ms. G.'s strong visceral feelings regarding how executions are physically carried out. In her questionnaire, Ms. G. had made clear that she believed (mistakenly) that California used the electric chair and that she viewed that method of execution as "inhumane." (See ACT 6223, 6229, 6233.) This was incorrect but the trial judge had previously denied the defense request to inform prospective jurors that California relied on "the gas chamber" to carry out the death penalty. (44 RT 19237, 19309.) The prosecutor exploited that ruling. After eliciting that Ms. G. had been exposed to hangings in the state of Washington when she was growing up and that those had been "terrible," the prosecutor reminded her that, "at two or three points in the questionnaire, you voice the written opinion that the electric chair is inhumane in your judgment?" (45 RT 19606.) Rather than correcting Ms. G.'s misconception that Mr. Solomon would die in the electric chair if

sentenced to death, the prosecutor reinforced it, using it to characterize Ms. G. as believing "that the way the death penalty *is* carried out" "*is* not humane, that it *is* cruel...." (RT 19606-07 [note the use of the present tense].) He referred to the "death penalty perpetuat[ing] violence" and the death penalty itself as "an act of violence." (RT 19607-08.) He said, in "an appropriate case ... you're going to have to return a verdict of death, commit an act of violence against another citizen." When defense counsel objected to the mandatory formulation, the judge told Ms. G. that the prosecutor was correct. If she "found this is an appropriate case for the death penalty, ... then it would be her *obligation* to bring back the death penalty...." (RT 19608.) Using this incorrect -- and at least confusing -- statement of the law (see AOB 273-74, 281-283), the prosecutor picked up where he had left off. He asked Ms. G. whether she really could personally "participate in that kind of act ... of violence" by voting to "impose a death penalty." After a "long pause," she said she "would find it extremely difficult to" do so. (RT 19609.)

Read in context, Ms. G. was plainly expressing the feeling that she "would find it extremely difficult to send someone *to the electric chair.*" That feeling was not a proper basis upon which to grant the prosecutor's challenge for cause. The prosecutor's focus on the manner of execution violated state law. (See AOB 270 and cases there [holding manner of execution is irrelevant to the penalty determination].) The references to the

electric chair, moreover, constituted improper exploitation of Ms. G.'s misconception. The prosecution had the burden of demonstrating substantial impairment under *Witt*. (*Stewart,* 33 Cal.4th at 445.) The state could not benefit from a response that was the product of its own double misconduct. (See AOB 268-270 and fn. 88 and cases there.) Most importantly, Ms. G.'s response was an inappropriate measure of her ability to serve in this case. In 1992, when the penalty retrial took place, California did not use the electric chair. The fact that Ms. G. would have found "it extremely difficult to send someone to the electric chair" simply was not going to "prevent or substantially impair [her] performance of [any of] the … duties" that would be required of the jurors in this case. (*Stewart*, 33 Cal.4th at 445.)[82]

Finally, despite the "electric chair" exchange, and subsequent to it, defense counsel elicited from Ms. G. that, "Yes," in a case she "felt was appropriate for the death penalty," she "would" and "could … vote for the

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[82] *Cf. People v. Heard,* 31 Cal.4th at 964 [prospective juror's answers on questionnaire do not undermine conclusion that his discharge was unconstitutional where those answers were given when the prospective juror was laboring under a misconception as to "the governing legal principles"]; *People v. Teale,* 70 Cal.2d 497, 516 (1969) [if "venireman … were correctly made to understand" the context in which the penalty determination would be made, he "might" have responded that he was "able and willing to" vote for death]; *Clemons v. Luebbers*, 212 F.Supp.2d 1105, 1122 (E.D.Mo., 2002) ["[I]f the trial court is going to determine that jurors should be removed for bias against the death penalty, the jurors must be asked the correct questions"].

death penalty...." (45 RT 19612.) Had her misconception about the electric chair been corrected, her certainty undoubtedly would have been even greater. (*People v. Teale*, 70 Cal.2d at 516.)

The opening brief makes other points (see, e.g., AOB 272-275), but no more need be said here. *Stewart* confirms the conclusion put forth in the opening brief. Ms. G. was excluded based on views about capital punishment that would not have impaired her ability to comply with the "instructions and ... oath" ultimately given "in the case before the juror." (33 Cal.4th at 445.) Her "excusal ... for cause" thus failed to meet "the governing legal standard" articulated in *Witherspoon, Witt, Heard, Adams*, and now *Stewart*. The error violated Mr. Solomon's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and "requires reversal of defendant's death sentence, without inquiry into prejudice." (33 Cal.4th at 447.)

### E. The State Offers No Serious Response To Appellant's Argument

As noted, the state's discussion of the excusal of Ms. G. covers less than one page. (RB 157-158.) The state's entire legal analysis of the excusal of Ms. G. consists of this sentence: "The trial judge had a fair basis to infer Ms. G. would have substantial difficulty ever truly considering personally voting to impose the penalty of death." (RB 158.) There is no discussion of the relevant case law. The 1-page discussion is preceded by a

34-page "Law of Death Penalty Disqualification," but the latter is not directed at nor responsive to appellant's argument. It makes no reference at all to *People v. Heard* or *Adams v. Texas*, cases at the heart of appellant's argument. It contains a superficial discussion of *Witherspoon* and *Witt* that makes no attempt to address appellant's contention that, when jurors are given the broad discretion they are given under California law, *Witherspoon, Witt,* and *Adams v. Texas* prohibit the excusal of prospective jurors on the ground that their negative views regarding the death penalty will directly impact their penalty determination(s). (Compare AOB 283-84, 288-93 with RB 125-126, 132-134.) Though filed nine months after *People v. Stewart* was decided, the 34-page discussion contains no reference to *Stewart* despite its agreement with appellant's analysis and its dispositive application to this case.

The 1-page discussion of the excusal of Ms. G. itself makes no reference to *any* of the cases cited in the preceding paragraph. Equally noteworthy, the 1-page discussion makes no reference to or connection with the 34-page "Law" dissertation that precedes it. The only case it cites is *People v. Visciotti*, 2 Cal.4th 1, 45 (1992). (RB 158.) Yet *Visciotti* is *criticized* in the 34-page dissertation. (See RB 138-139.)

*Visciotti* itself has no application here. As the 34-page dissertation notes, *Visciotti* upheld "the excusal of a juror who simply could *never* vote for the penalty of death, in *any* case...." (RB 138.) (See *Visciotti*, 2 Cal.4th

at 45 [excused prospective juror had agreed with the trial judge that "it was 'unmistakably clear that under no circumstance [he] would ever vote for the death penalty'"].) Ms. G., of course, did not have such an absolute position. To the contrary, as discussed above, she said, among other things:

-- "if I felt that he really deserved [the death penalty], I probably could [impose it]" (45 RT 19606); and

-- "Yes," in a case she "felt was appropriate for the death penalty," she "would" and "could ... vote for the death penalty" (45 RT 19612).

Respondent's Brief makes no reference to the latter statements.

The only statement respondent relies on is the one that came at the end of the electric-chair and death-penalty-as-an-"act-of-violence" exchange discussed above. All respondent reports, however, is that the prosecutor asked Ms. G whether she could "really consider and impose the death penalty in an appropriate case," and Ms. G answered: "I don't know. I would find it extremely difficult to." (RB 157-158.) Incredibly, despite the fact that the opening brief describes, discusses, and objects to the entire line questioning, respondent deletes out every improper aspect of it and does not recognize, respond to, or rebut any of appellant's objections. (Compare AOB 263-276 with RB 157-158.)

For that matter, respondent fails to make *any* reference to *any* point, factual *or* legal, that is made in the opening brief regarding the excusal of

Ms. G. (Compare AOB 240-294 with RB 157-158.) The state's "analysis" is worthless. It is worse than worthless. It is misleading.

This is true even of its one-sentence legal conclusion. As noted, the state asserts that the "trial judge had a fair basis to infer Ms. G. would have substantial difficulty ever truly *considering* personally voting to impose the penalty of death." (RB 158; emphasis added.) As discussed in preceding sections, however, the judge did not doubt whether Ms. G. -- whom he recognized was "conscientious" and spoke with "candor" and gave "honest and truthful answers" (RT 19614-15) -- would follow her instructions to "consider" which penalty was appropriate. The entire focus of both the prosecutor and judge, rather, was whether Ms. G. was willing to *vote* for death. (See, e.g., 45 RT 19598 [could she "*return* a verdict of death"]; RT 19599 [could she "*return* a death penalty"]; RT 19608 [ruling it was "her obligation *to bring back the death penalty* in" an appropriate case]; RT 19609 [could she "*participate* in that kind of act ... of violence ... and *impose* a death penalty"]; RT 19513-14 [granting challenge based on her uncertainty "when asked if she actually could *return* a death penalty" and based on prediction she was unlikely to "*return* a verdict of death"].) In light of the state's failure to mention or discuss the latter portions of the record -- or cite a single word from the court's actual ruling -- or to make any reference to the court's comments regarding Ms. G.'s character -- or to take note of the facts in her background that inclined her to be hostile, not

sympathetic, to Mr. Solomon -- or to refer to the statements noted above in which Ms. G explicitly said she would not only consider but "probably could" and then said she absolutely "could" and "would" impose death (RT 19606, 19612) -- it is a mild indictment to call the state's 1-page discussion worthless and misleading and non-responsive.

If the state could have mounted a credible rebuttal to Arg. IX, it would have. If it could have found a way to argue that, when Ms. G.'s actual statements are judged under the test articulated and applied in *Witherspoon, Witt, Heard, Adams,* and *Stewart,* her excusal was proper, it would have discussed her statements and discussed the cases. The fact that it offers up the skeletal non-response that it does gives rise to the inescapable inference that it has no persuasive defense to offer. (*People v. Bouzas, supra,* 53 Cal.3d at 480.)

Indeed, it cannot even defend the excusal of Ms. G. by reference to the 34-page "The Law of Death-Penalty Qualification." The reason is clear. In order to argue that *Cash* was wrongly decided, the state has to take the position that "The Law of Death-Penalty Qualification" does not permit anything but a very abstract voir dire in which jurors are told nothing about the case they will hear and are allowed to sit as long as they are not "inalterably opposed to death or life in every case" or at least in every case involving "the particular statutory criteria which make the defendant eligible for death in that case." (RB 125.) The problem for the

state is that, under that test, Ms. G. was eligible to serve. This is true even when one looks at respondent's highly selective snippet from her statements, and it is certainly true when one looks at the entirety of her statements. Indeed, the trial judge did not find that she would vote for life in every case. To the contrary, he found she was "substantially impaired" under *Witt* and seemed to indicate she probably would have passed muster under "*Witherspoon*" (referring to a belief that *Witt* had narrowed the test set forth in *Witherspoon*, which had permitted the exclusion only of those death penalty opponents who would never vote for death). (RT 19613-19614.) That explains why it is that respondent does not cite a single word from the ruling granting the challenge for cause of Ms. G. (RB 157-158.)

The excusal for cause, in other words, was improper under *both* appellant's *and* the state's views of the law. The state's only recourse (short of conceding error) was to omit from its brief an accurate and complete summary of Ms. G.'s actual statements and the trial court's actual ruling. That is the dubious course it has followed. As will be seen, the state provides a similar non-response to Arg. X.

The foregoing also explains why the state has chosen to lump Args. IX-XI together. Since it is unable to mount a rebuttal based on either appellant's or its own view of the law, the state is simply trying to deflect attention from Args. IX and X. It knows there will be a penalty reversal if it cannot persuade this Court to repudiate *Cash*. Figuring that it would not

promote the latter goal to draw attention to the fact that it *also* has a problem responding to Args. IX and X, the state has chosen to bury its non-responses to those arguments within the long attack on *Cash*.

As implied by the state's non-response, and under both appellant's and the state's views of the law, it was constitutional error for the trial court, over objection, to grant the prosecutor's challenge for cause and to remove prospective juror G. from the retrial venire. The error "requires reversal of defendant's death sentence, without inquiry into prejudice." (*Stewart,* 33 Cal.4th at 447.)

## X.

## THE ANALYSIS IN *PEOPLE v. STEWART* LIKEWISE CONFIRMS -- AND THE STATE LIKEWISE IMPLICITLY CONCEDES -- THAT THE EXCUSAL FOR CAUSE OF PROSPECTIVE JUROR C. WAS UNCONSTITUTIONAL

Much of what is said in the preceding argument is applicable here.

Ms. C. had conflicting feelings. On the one hand, as expressed in both her written and oral responses, she believed in the death penalty (45 RT 19648, 19658), thought it was terrible that Mr. Solomon killed so many people (26 ACT 7523, 7527), and believed that, if a person has taken many lives violently, he should receive the death penalty. (26 ACT 7534. RT 19653.)

On the other hand, she said, it would "bother [her] a lot" to make that kind of decision and that it "would be hard for" her to do so. (RT 19650. See ACT 7528.) It was "the thought of sending someone to death, taking somebody's life that would disturb" her. (RT 19657-58.) She wasn't completely sure she could put those feelings aside but she guessed that if she had to follow the court instructions she would. (RT 19661. See ACT 7524 [if there was a conflict between an instruction from the judge and her personal beliefs, she would do what the judge instructed].) She made clear in her questionnaire that she would not vote for life automatically. (ACT 7527, 7537.) The voir dire ended with the judge

asking Ms. C. if she "would probably vote for a life sentence just because you don't want to face the tough decision of deciding the death penalty and voting for the death penalty?" She said: "Well I might, I don't know. It's hard for me to say, you know." (45 RT 19661-62.)

The trial judge thought the challenge for cause presented a "difficult choice" but excused Ms. C. "because she just would not ever commit … that she could return a death penalty verdict [in] … an appropriate case…." (45 RT 19664.)

In *People v. Stewart*, this Court affirmed that it is "[t]he prosecution" that bears "the burden of demonstrating to the trial court that [the *Witt*] standard was satisfied as to each … challenged juror…." (33 Cal.4th at 445, citing *Witt,* 469 U.S. at 423.) In this case, the trial judge placed the burden of proof on the defense to show that Ms. C. was *not* substantially impaired. (RT 19664 ["I don't feel that I can conclude that she is not substantially impaired"].) That effectively turned the *Witt* standard into an affirmative "ground for *challenging* a … prospective juror." It isn't. The *Witherspoon-Witt* line of cases define a Sixth-Amendment based "*limitation* on the State's power to exclude…." (*Adams v. Texas*, 448 U.S. at 47-48; *Wainwright v. Witt*, 469 U.S. at 423; emphasis added.)

That "limitation" required the prosecution to show that Ms. C.'s "views would 'prevent or substantially impair the performance of h[er] duties," as specifically "defined by the court's instructions and the juror's

oath in the case before the juror." (*People v. Stewart*, 33 Cal.4th at 445, citing and quoting *Witt,* 469 U.S. at 424.) The prosecution did not meet its burden here. The instructions given to the retrial jury made Ms. C.'s pre-trial uncertainty perfectly acceptable. As the trial court recognized, Ms. C. had no trouble identifying genres of cases in which the death penalty was "appropriate." (See RT 19653, 19664.) Given the broad discretion Ms. C. would have had to decide that Mr. Solomon's life should be spared, however, and given the explicit authority she would have had to vote for life because she was moved by merciful feelings (CALJIC Nos. 8.85, 8.88; 22 CT 6334-35, 6343-44), the fact that Ms. C. could not guarantee in advance that such feelings would not prevail in a particular case -- even though she generally thought it was "appropriate" for the death penalty -- was not inconsistent with her duty "as defined by the court's instructions and the juror's oath in the case before the juror." (*People v. Stewart*, 33 Cal.4th at 445. Accord, *People v. Heard*, 31 Cal.4th at 958.) (See AOB 301-302.)

After the voir dire, the court agreed with defense counsel that "the law doesn't dictate that she would have to bring back a death penalty." (RT 19663.) That was consistent with the instructions the jury would receive. (See AOB 244-47, 279-83.) When pressing Ms. C. in voir dire, however, the court wanted to know if Ms. C. "would refuse to *vote* for the death penalty" and "[w]ould ... probably *vote* for life" in a case she found

"appropriate" for death, and, when she said, "I don't know" (RT 19661-62), the court excused her precisely because she "would not … commit" to "return[ing] a death penalty verdict" in that situation (RT 19664). In violation of the Sixth Amendment, Ms. C. was excused for failing to commit to a vote that her "instructions and oath" would not have required. (*Stewart*, 33 Cal.4th at 447, 454.)

Further, given the ambiguity in the way the court used the term, "in an appropriate case," in its questions to Ms. C., it was unfair and improper to demand unambiguous certainty from her. A juror in this case, pursuant to "the court's instructions" (and under the statutory scheme as interpreted by this Court), could find that death was "appropriate" without believing it to be *more* appropriate than life without parole. Indeed, she could decide that "aggravation outweighed mitigation" -- thus making death "appropriate" in both a legal and colloquial sense -- yet was allowed to grant mercy and thus vote for life. (See AOB 274-275, 280-282, 301-302, and cites there.) In this Court's formulation, the latter is a decision that death was "*in*appropriate" in the ultimate, legal-term-of-art sense that "appropriate" is used in the standard instructions derived from this Court's jurisprudence. (See *People v. Murtishaw*, 48 Cal.3d 1001, 1026, 1027 (1988) [holding that "the 1978 statute provides … a 1978-law sentencer with the same range of potential mitigating evidence and the same broad power of leniency and mercy afforded" under "its 1977 counterpart," which

explicitly "allowed the jury to decide death was inappropriate and grant mercy even if aggravation outweighed mitigation"]. See CALCRIM 766 (Fall 2006); CALJIC No. 8.88 (Fall 2006).)

The trial judge did not zero in on these distinctions. Ms. C. was not asked if she could vote for death in a case in which she had decided that death was *more* appropriate – or substantially more appropriate – than life. Nor was she asked whether she could do so in a case in which she decided 1) that the factors in aggravation substantially outweighed the mitigating factors *and* 2) that mercy was not warranted.

A prospective juror may not be excused on the basis of ambiguous answers to ambiguous questions. [83] (*Cf. People v. Heard*, 31 Cal.4th at 967, fn. 10 [pauses following "imprecise questioning" invalid ground for excusal]; *People v. Teale,* 70 Cal.2d at 513-519 [asking prospective jurors if they could vote for death in "a proper case" was ambiguous and misleading; precise questioning "might well" have yielded response from prospective juror that indicated more open mind; excluding venirepersons based on their responses to such questions required reversal under

[83] "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood - or misunderstood - by prospective jurors." (*Witherspoon v. Illinois, supra,* 391 U.S. at 516, fn. 9.)

*Witherspoon*].) [84]

Ms. C.'s unwillingness or inability to say that she would "vote for death" just because she felt it was "appropriate" was not inconsistent with her duty "as defined by the court's instructions and the juror's oath in the case before the juror." (*People v. Stewart*, 33 Cal.4th at 445.) At most, Ms. C.'s statements showed that her feelings "would make it very difficult for [her] ever to impose the death penalty." (*Stewart*, 33 Cal.4th at 447.) "[A] prospective juror may *not* be excluded for cause" on that basis. (*Ibid.*; emphasis added.)

Ms. C. *was* excluded on that basis. She was excluded because it was "hard for [her] to say" in advance whether she would make "the *tough decision* of ... voting for the death penalty." (45 RT 19661-62.) As in *Stewart,* the trial court "erroneously equated (i) the nondisqualifying concept of a *very difficult decision* by a juror to impose a death sentence, with (ii) the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty...." (33 Cal.4th at 447; emphasis added.)

*Witherspoon* is directly on point as well. In that case, reversal was required because the court removed a prospective juror based on the woman's feeling that she "would not 'like to be responsible for * * *

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[84] *Accord, People v. Morse*, 70 Cal.2d 711, 741 -743 (1969); *In re Hillery,* 71 Cal.2d 857 (1969).

deciding somebody should be put to death.'" (391 U.S. at 515. See *id.* at 519-523; AOB 299-300.) That was precisely the source of Ms. C.'s discomfort: it was "the thought of sending someone to death, taking somebody's life that would disturb" her. (RT 19657-58.) The Sixth Amendment did not permit excusal on the ground.

Also relevant is *Adams v. Texas*. *Adams* held that a "juror's views about the death penalty" can properly "influence the manner in which [s]he performs h[er] role," including her "judgment of the facts," and that it was unconstitutional to require would-be capital jurors to swear that the possible consequences of their decisions would "not affect their deliberations." (448 U.S. at 46-47, 50.) In this case, the trial court effectively wanted Ms. C. to swear that, in a case she otherwise thought was "appropriate" for the death penalty, she would not permit her reluctance to personally sentence someone to death to "influence" her "deliberations" and "judgment." Under *Adams,* that was unconstitutional. (See AOB 288-293; 300-301.)

*Certainty* on the part of Ms. C. as to how she would vote was not a prerequisite for sitting on Mr. Solomon's retrial jury when her actual vote would have been the product of the "normative and subjective task of deciding … what penalty is 'appropriate' for the particular offense and offender" (*People v. Murtishaw,* 48 Cal.3d at 1027, fn. 12), and, in deciding which penalty was "appropriate," "mercy" was "allowed" to trump

"aggravation" even when the latter "outweighed mitigation" (*id.* at 1026-27.) (See 22 CT 6334-35, 6343-44; AOB 244-47, 279-83).[85]

In sum, the excusal of Ms. C. based on her uncertainty violated "the governing legal standard" set forth in "*Witt*." (*Stewart*, 33 Cal.4th at 454.)

The state addresses none of this. Its discussion regarding the excusal of Ms. C. suffers from the same major flaws described in the preceding argument. The discussion covers less than one page (RB 158), contains no reference to *Witherspoon, Adams, People v. Heard,* or *People v. Stewart*, and does not address *any* point made in the opening brief. (Compare RB 158 with AOB 295-302.)

Again, the state's entire legal analysis consists of one sentence. In this instance, it conclusorily asserts: "No rational person could have concluded that Ms. C could be 'trusted' to follow the statutory scheme (*Witt, supra,* 469 U.S. 412, 419; see *id.* at pp. 425-426); her excusal was compulsory." (RB 158.) That is the state's entire "analysis."

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[85] *Cf. Gall v. Parker*, 231 F.3d 265, 331 (6th Cir. 2000) [error under *Witt* to excuse juror who, when asked if he could vote for death, said "'it is just one of those things you would have to cross when you got to it'" and "that he would possibly or 'very possibly' feel the death penalty was appropriate in certain factual scenarios"; "Correll's uncertainty as to how the option of a death sentence would affect his decision should not have led to his exclusion"]; *U.S. v. Chanthadara*, 230 F.3d 1237, 1271 -1272 (10th Cir. 2000) [error to excuse prospective juror; uncertainty and ambiguity of her responses did not constitute "substantial impairment"].

To begin with, the conclusion that, under *Witt*, Ms. C.'s "excusal was *compulsory*," is directly contrary to *Witt*'s explicit affirmation that "'*Witherspoon* is *not* a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude ....'" (*Witt,* 469 U.S. at 423, quoting *Adams v. Texas,* 448 U.S. at 447-448; emphasis added.)

As discussed, furthermore, that "limitation" required the prosecution to show that the prospective "juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'" (*Witt,* 469 U.S. at 424), as specifically "defined by the court's instructions and the juror's oath in the case before the juror" (*People v. Stewart*, 33 Cal.4th at 445). Respondent cites *Witt* but misstates the test, substituting "statutory scheme" for "instructions and oath," and it leaves out, "in the case before the juror," altogether. (See RB 158.) Respondent plainly understands that, in light of the very broad discretion given to the retrial jury in this case by the "court's instructions," it has no hope of prevailing under the actual test. As shown above, respondent is correct in that assessment.

In any event, respondent does not argue that the jury's instructions deviated from the statutory scheme, much less that any such deviation would require a different test than articulated in *Witt* and *Stewart* (and myriad other cases). Nor could it have, since neither proposition is correct. (See AOB 281-283 and fns. 100-102.) Nor does it make any attempt to

explain what it was about the "statutory scheme" that Ms. C. could not be "trusted" to obey. As noted, respondent offers no analysis beyond the one sentence quoted above.

If the state could have found a way to argue that Ms. C.'s excusal was proper under the test articulated and applied in *Witherspoon, Witt, Heard, Adams,* and *Stewart,* it would have done so. Its failure to do so speaks for itself. (*People v. Bouzas, supra,* 53 Cal.3d at 480.)

As with Ms. G., furthermore, Ms. C.'s excusal is not defended by the state under the criteria put forward in the state's 34-page "The Law of Death-Penalty Qualification." No such defense was possible. Even the excerpts from the record cited by respondent do not support the conclusion that Ms. C. was "inalterably opposed to death or life in every case" or in every case involving "the particular statutory criteria which make the defendant eligible for death in that case." (RB 125, 158.) The full record, moreover, leaves no doubt on that score, since Ms. C. stated, both in writing and orally, that she believed that death was appropriate in cases with multiple victims. (26 ACT 7534; RT 19653.) The trial judge recognized this. That is precisely why he found excusal a "difficult choice" under *Witt's* "substantial impairment" test. Excusal was based on Ms. C.'s uncertainty, not any "inalterable" opposition to voting for death. (45 RT 19663-64.)

In this instance, too, therefore, granting the challenge for cause was improper not only under appellant's view of the law but the state's as well. That's why it's "analysis" is ¾ of a page long, makes no reference to the relevant cases, misstates the actual Sixth Amendment test, and makes no reference to its own 34-page section on "The Law."

The state's non-response, in short, corroborates appellant's claim. It was constitutional error for the trial court, over objection, to grant the prosecutor's challenge for cause and to remove prospective juror C. from the retrial venire. The error "requires reversal of defendant's death sentence, without inquiry into prejudice." (*Stewart,* 33 Cal.4th at 447.)

## XI.

## THE STATE EFFECTIVELY CONCEDES THAT THE VOIR DIRE RESTRICTIONS IMPOSED ON THE DEFENSE AT THE RETRIAL CONSTITUTED REVERSIBLE ERROR UNDER *PEOPLE V. CASH*. THE STATE'S ATTACK ON *CASH*, MOREOVER, NOT ONLY RESTS ON A DISTORTED AND ERRONEOUS ANALYSIS OF THE CASE LAW BUT IMPLICITLY CONCEDES THE VALIDITY AND TRUTH OF EVERY LEGAL PRINCIPLE AND MATERIAL FACT CITED BY APPELLANT THAT, APPLIED ONE TO THE OTHER, COMPEL THE CONCLUSION THAT THE RESTRICTIONS WERE UNCONSTITUTIONAL

### A. Introduction

The state effectively concedes that the voir dire restrictions appellant complains of constituted reversible error under *People v. Cash*, 28 Cal.4th 703 (2002). After spending 34 pages arguing that the rule articulated in *People v. Kirkpatrick*, 7 Cal.4th 988 (1994), and applied in *Cash* is "utterly wrong" (RB 125-157), the state asserts that the voir dire restrictions in this case were "absolutely correct" and that if "*Kirkpatrick* and *Cash* and their mistaken progeny support a contrary conclusion, they must be rejected and overruled" (RB 159-160).

The state makes no effort to distinguish *Cash*. There is no argument that even if *Cash* is not reversed, the rule it states was not violated by the voir dire restrictions here or that, if there was a violation, the error does not require reversal. It makes an all-or-nothing argument. There is no other inference that can be drawn from Respondent's Brief but that the state has conceded reversible error under *Cash*.

The state thus effectively concedes:

1) that, once jurors heard about Mr. Solomon's criminal history and/or the manner-of-death evidence, there was a good chance that one or more of them would have had such a response to the evidence that they would not have been able to follow the law or their instructions and would have decided that death was the only appropriate penalty before hearing, considering, and weighing Mr. Solomon's evidence in mitigation; and

2) that, under *Cash:*

a) any such prospective juror was "subject to challenge for cause;"

b) Mr. Solomon's lawyers were therefore "entitled to ask prospective jurors questions … specific enough to determine if" any of them were likely to have such a response to the evidence; and

c) the failure to permit such voir dire was constitutional error that "cannot be dismissed as harmless" (*People v. Cash*, 28 Cal.4th at 720-723; emphasis added.)

Believing and conceding all of the above, the state devotes its entire argument to attempting to persuade the Court that it decided *Cash* incorrectly because the Court does not understand "The Law of Death Penalty Qualification." (RB 126-157.) According to the state, the Court "correctly" articulated the law in *People v. Fields*, 35 Cal.3d 329 (1983) (RB 126-131), but it has been downhill ever since. Its review of the case law purports to show how deviancy crept into this Court's analyses "inadvertently," with "curious" and "potentially misleading" statements in case after case (RB 129, 136, 139, 143-145), culminating in what the state believes was the "clearly, positively, … unmistakably," and "utterly wrong" analysis in *Kirkpatrick*, trumped only by *Cash*, which, in the state's view, was truly "harmful" because it resulted in a penalty reversal (RB 147-148.) The state claims that *Cash* and *Kirkpatrick* "misconstrued the law gravely," relied on cases that "directly contradict[ed]" their analyses, and analyzed precedent in a way that "created a false impression," was "misleading," and "distort[ed] the holdings" of its prior cases. (RB 143-146, 149.)

According to the state, *Fields* established that the *only* permissible voir dire when it comes to death penalty qualification is that which 1) informs prospective jurors of "the particular statutory criteria that make the defendant eligible for death in that case" and 2) ascertains whether the juror could vote for death (or life) in such a case. (RB 125.) It is the state's

position that any broader voir dire is forbidden. A defendant, it asserts, has "no right whatsoever" to seek to establish that, because of some aspect of the case (other than the statutory criteria for death-eligibility), a prospective juror would decide that death was warranted before s/he heard and weighed the evidence in mitigation. (See RB 141, 143-144.)

As appellant will show, the "Law of Death Penalty Qualification" as presented by the state is a bogus concoction. In order to make its argument, the state distorts and misreads *Fields*, distorts and misreads the post-*Fields* cases it relies on, and leaves out or ignores the cases and holdings that show that the "law" is not what the state says it is. As will be seen, *Cash* and *Kirkpatrick* are absolutely consistent with both *Fields* and the cases that followed it.

Before demonstrating that the state's attack on *Cash* is utterly devoid of merit, appellant will discuss the *most* remarkable aspects of the state's response. First, the state does not dispute *any* of the constitutional principles that comprise the framework on which appellant's claim is based, principles upon which the holding in *Cash* likewise rests. Thus, while the state attacks *Cash* on the basis of its alleged deviance from *Fields*, it does *not* attack the *actual* analyses that either the *Cash* holding or appellant's somewhat broader argument are based on. As will be seen, the state's silence can only be interpreted as an implicit concession of the merit of those analyses. Further, when that concession is considered in

conjunction with the state's implicit concession of the *factual* core of appellant's claim -- the potential of the criminal-history and manner-of-death evidence to turn jurors into automatic death-voters -- it becomes apparent that the state has, in essence, conceded not just *Cash* error but constitutional error that would stand strong even if *Cash* had not yet been decided.

Finally, there is the remarkable fact that, aside from quoting Judge Mering's ruling, the state's brief does not devote a single sentence to the facts relevant to this claim. (RB 159-160.) That, obviously, is no accident. The state works hard to create a mock legal history from which to try to convince the Court that it has "misconstrued the law gravely." The last thing it wants to do is draw attention to a factual record that so clearly shows that the ruling by the trial court in this case was fundamentally unfair. The state's need to divert attention from that unfairness is particularly great given that it not only wants this Court to endorse the unfair ruling below but wants it to embrace an even *more* restrictive rule, a rule the state claims is constitutionally-required and must be applied in every capital case in this state. Thus it is that, true to the m.o. it employs so frequently in its brief, the state engages in a fanciful legal analysis while treating the factual record as though it does not exist.

This argument will proceed as follows. In §B, appellant will show that, its 34-page attack on *Cash* notwithstanding, the state does not dispute

any of the legal principles or material facts that compel the conclusion 1) that *Cash* is a constitutionally sound decision; and 2) that the voir dire restrictions in this case would have to be found unconstitutional even if *Cash* had not yet been decided. In §C, appellant will highlight the more important facts that the state does not want the Court to focus on. Finally, in §D, appellant will dissect "The Law of Death Penalty Qualification" set forth in Respondent's Brief and show that its analysis of this Court's decisions is distorted and inaccurate, that *Cash* and *Kirkpatrick* are consistent both with *Fields* and the cases that followed it, and that nothing the state says undermines the conclusion that the voir dire restrictions in this case were unconstitutional and require reversal.

### B. The State Does Not Dispute Any Of The Legal Principles Or Material Facts That Compel The Conclusion That The Voir Dire Restrictions Were Unconstitutional

The state does not dispute any material element of appellant's analysis.

1. Under the Eighth and Fourteenth Amendments, Mr. Solomon had a right both to *present* mitigating evidence -- see, e.g., *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) ["virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances"] -- *and* to have his retrial jurors truly *weigh and consider*

that evidence in determining which penalty was most appropriate. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to *consider* and *give effect* to that evidence in imposing sentence." (*Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); emphasis added. Accord, *Abdul-Kabir v. Quarterman*, _ U.S. _ [2007 WL 1201582, *10; 4-24-07] (2007).) The state does not dispute this.

2. Since the "sentencer" in this case was a jury, furthermore, the Sixth and Fourteenth Amendments were applicable and guaranteed Mr. Solomon the right to 12 impartial jurors. (*Morgan v. Illinois*, 504 U.S. 719, 728-729 (1990).) A juror is not impartial unless s/he can "follow the dictates of law" (*id.* at 735) as set forth by "the court's instructions and the juror's oath in the case before the juror" (*People v. Stewart*, 33 Cal.4th 425, 445 (2004); *Morgan* at 728, 729). The state does not dispute this.

The 1978 death penalty statute under which Mr. Solomon was prosecuted explicitly mandated (and mandates) the weighing and considering of mitigation evidence as required by the Eighth Amendment. (Pen. Code, §190.3.) [86] Consistent with that statutory and constitutionally-

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[86] Penal Code §190.3 provides: "After having heard and received all of the evidence and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section..." It then further directs that the trier of fact will choose death or life without the possibility of parole only after determining if "the aggravating circumstances outweigh the mitigating circumstances" or vice versa.

based directive, the retrial jurors were commanded by "the court's instructions" to "consider" and "weigh" the mitigating evidence, and to do so after all the evidence was in and the arguments on both sides had been made. [87] A juror who was unable to heed the latter command -- i.e., a juror who was not going to be able to "give mitigating evidence the consideration that the statute contemplates" (*Morgan v. Illinois*, 504 U.S. at 738) -- who was not going to be able "in good faith ... [to] consider the evidence of ... mitigating circumstances as the instructions require[d]" (*id.* at 729) -- was "not [going to be] an impartial juror" within the meaning of the Sixth and Fourteenth Amendments (*id.* at 728). Such a prospective juror "must be removed for cause." (*Ibid.*) The state does not dispute this.

3. Under the Sixth, Eighth, and Fourteenth Amendments, therefore, Mr. Solomon had a right to 12 jurors capable of following their constitutional and instructional mandate to determine which penalty was most appropriate only *after* listening to the evidence and closing arguments and *after* considering and weighing his mitigating evidence. The state does not dispute this.

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[87] "After having heard and received all of the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.... In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (22 CT 6343.)

4. Based on the first penalty phase, the parties knew that the prosecution's case in aggravation at the retrial would consist of three principal elements: (a) the number of victims; (b) the five violent and sadistic sexual assaults Mr. Solomon committed between 1969 and 1976, ten to seventeen years prior to the charged offenses; and (c) the evidence in support of the prosecutor's contention that the murder victims were bound, gagged, unclothed, asphyxiated, and then buried. (See AOB 312-313, 343-345, and record-citations there.) The state does not dispute this.

5. At the retrial, Judge Mering felt he had to inform the prospective jurors which offenses Mr. Solomon had been convicted of by the first jury. He thus allowed the defense to insert in the questionnaire the following question: "Are your feelings about the death penalty such that regardless of how powerful or impressive the evidence offered in mitigation may be, you would be in favor of the death penalty in <u>every</u> case in which the accused: ... Has been convicted of six murders of women?" (See, e.g., 21 ACT 6020 [Q. 90]; emphasis in original.) *Many* prospective jurors answered affirmatively and were ultimately excused for cause. (See AOB 343 and record-citations there.) The state does not dispute this.

6. Defense counsel wanted the court to permit similar questioning regarding the two other pillars of the case-in-aggravation. (See AOB 314-320.) With regard to the sexual assaults Mr. Solomon had committed in

1969-1976, they proposed adding two sub-parts to the question quoted in ¶5. These converted the actual facts into a more abstract and generalized form. [88] The prosecutor *supported* defense counsel's request. The parties well knew, and the prosecutor told Judge Mering, that Mr. Solomon's criminal history had played a "significant part" in the case-in-aggravation at the first penalty phase. (See AOB 312-313, 317-318, 342-345, and record-citations there.)[89] The same was true with regard to the prosecutor's manner-of-death argument, supported at every turn by his passing around the gruesome photographs of the victims for the jurors to dwell on. (See AOB 312, 351, and record-citations there.) The manner-of-death question asked by Judge Virga in the jury selection prior to the first trial demonstrated that it was possible to provide prospective jurors with a few general details and, without seeking prejudgment, to ascertain who among them would respond to the evidence in a manner incompatible with the patient decisionmaking process required by law. Counsel made very clear, furthermore, that their interest was not in providing prospective jurors with

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[88] See 20 CT 5955, Q. 103 ["Are your feelings about the death penalty such that you would be in favor of the death penalty in every case in which the accused: ... D. Has been convicted of six murders of women plus has been to prison for sexually assaulting women? ... E. Would your answers be the same if one or more murders involved sexual assaults on women?"

[89] How the prosecutor used the evidence in his argument for death is summed up in his comment that the one thing Mr. Solomon learned from his earlier crimes was that, to avoid incarceration, "you kill ... and hide the victims...." (39 RT 17224.)

specific facts but in ascertaining if they had the capacity to engage in the decision-making process mandated by law. (AOB 312-314, 319, 357-358, and record-citations there.) [90] The state does not dispute this.

7. Given the inflammatory power of the criminal-history and manner-of-death evidence, there was a significant risk that, by the end of the prosecutor's penalty phase presentation, and likely before the end of his opening statement -- i.e., before *any* evidence was presented -- one or more jurors would become *incapable* of following the law and the court's instructions. Such a juror would make up his or her mind to vote for death *before* hearing and weighing the evidence in mitigation and would not "give [the] mitigating evidence the consideration that the statute contemplates." Any such juror would not have been impartial within the meaning of the Sixth and Fourteenth Amendments and would have been subject to exclusion for cause. (*Morgan v. Illinois*, 504 U.S. at 728-729, 738. See AOB 336-355, 363.) The state does not dispute this. [91]

8. Mr. Solomon's counsel thus requested that Judge Mering conduct or permit some kind of inquiry to test whether any prospective retrial juror

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[90] Judge Virga's manner-of-death question balanced a few aggravating details with references to specific mitigation. (See AOB 319, fn. 119.) At the retrial, counsel plainly would have accepted whatever Judge Mering would have allowed. (See AOB 312-323 and citations there.)

[91] Section C below elaborates on why the state was estopped from disputing the potency of the criminal-history and manner-of-death evidence.

would have a legally debilitating reaction to the criminal-history and manner-of-death evidence. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. [Citations.] ... Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.' [Citation.]" (*Morgan v. Illinois,* 504 U.S. at 729-730.) The need for an adequate voir dire is particularly "great ... [in] capital" cases given "the qualitative difference of death from all other punishments." (*Turner v. Murray,* 476 U.S. 28, 33 (1986) (lead opinion); *accord*, *id.* at pp. 38-45 (opns. of Brennan and Marshall, JJ., concurring in pertinent part).) The state does not dispute this.

9. The court refused to ask any question that tested how a prospective juror might respond when s/he heard about Mr. Solomon's criminal history. To the contrary, the court gave prospective jurors the *mis*impression that Mr. Solomon might be presenting evidence that he did *not* have a criminal history. The court also refused to ask any question that tested how a prospective juror might respond to the evidence regarding how the women died. He held that Mr. Solomon was not entitled to test in any way whether any prospective juror, on hearing either the criminal-history or manner-of-death evidence, would be incapable of following their

instructions regarding how to make the penalty determination. (AOB 320-328 and record-citations there.) The state does not dispute this.

10. Just as he had done at the first penalty phase, the prosecutor began the substantive portion of his opening statement with a 13-page, detailed description of the five violent sexual offenses Mr. Solomon committed between 1969 and 1976. (51 RT 21574-86.) Later in the same statement, he began his description of the homicides by showing jurors the "gross ... photograph of decedent" Yolanda Johnson (51 RT 21625) and proceeded to do the same with respect to each of the other victims (see 51 RT 21651, 21660, 21668, 21672-73; 52 RT 21685-86), including the one (Ms. Polidore) whom Mr. Solomon had not been convicted of killing (51 RT 21635). The prosecutor's opening statement was the first time the retrial jurors had heard anything at all about the criminal-history and manner-of-death evidence. (See 43 RT 19210 - 51 RT 21574; AOB 323-328 and citations there.) The state does not dispute this.

11. The restrictions on voir dire precluded appellant from ascertaining which prospective jurors, on hearing the criminal-history and the manner-of-death evidence, would be incapable of following the court's instructions to consider and weigh the evidence in mitigation before deciding on penalty. The state does not dispute this.

12. Based on all of the foregoing, the opening brief concludes that the court's ruling violated the Sixth, Eighth, and Fourteenth Amendments.

(See AOB 336-363 [full discussion] and 349-350, 355-356, 362-363 [conclusions].)

The state does not challenge the foregoing analysis. Its "Law of Death Penalty Qualification" claims that the rule of law it extracts from *Fields* is a "constitutional necessity" (RB 141) but, as appellant shows in §D.3 below, the state's interpretation of *Fields*, upon which its entire argument rests, is wrong. The conclusion stated in ¶12 above is based on the constitutional principles set forth in ¶¶1-3 and 7-8 above, as applied to the facts summarized in ¶¶2-10 above, *none* of which the state disputes. Those principles and facts *compel* the conclusion that the restrictions were unconstitutional. By implicitly conceding the validity of the principles and the truth of the facts stated in ¶¶1-11, the state has implicitly conceded the merit of the conclusion stated in ¶12.

13. Further, the state does not dispute that the voir dire restrictions in this case violated *People v. Cash*. (RB 160.) This Court's analysis in *Cash* largely mirrored the analysis set forth above. (28 Cal.4th at 719-721.) To concede error under *Cash* is to concede error under the Sixth, Eighth, and Fourteenth Amendments.

14. In *Cash*, furthermore, the Court recognized that, in prior cases, it had affirmed the *prosecution's* right to engage in the very kind of case-specific voir dire sought by the defense (*id.* at 721), and had also held that the requisite voir dire could occur in the general portion of the voir dire (*id.*

at 722), suggesting that at issue was not just the defendant's constitutional rights but the non-partisan and systemic goal in every criminal case of seating jurors capable of following the court's instructions. (Cf. *People v. Ranney,* 213 Cal. 70, 75-76 (1931); *People v. Chapman*, 15 Cal.App.4th 136, 141 (1993); AOB 339-340.) Holding that the defendant's voir dire rights had been violated was consistent with the Court's belief in the critical role of voir dire in securing an impartial jury. (See, e.g., *People v. Bolden*, 29 Cal.4th 515, 538 (2002) [requiring trial judges to comply with Standard 8.5(2), California Standards of Judicial Administration, which directs that voir dire "include all questions necessary to insure the selection of a fair and impartial jury"].) The state does not contend otherwise.

15. Nor does the state dispute that, unless and until this Court repudiates *Cash*, the following holding applies here:

> [E]ither party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence.

(*People v. Cash*, 28 Cal.4th at 720-721. *See* RB 159-160 [in which the state as much as concedes that "*Kirkpatrick* and *Cash* and their mistaken progeny support a … conclusion … contrary" to the state's assertion that the voir dire restrictions in this case were "absolutely correct"].)

16. Finally, the state does not dispute that because "the trial court's error … created a risk" that Mr. Solomon was not "sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment," the Court has no choice but to "reverse defendant's judgment of death." (*People v. Cash,* 28 Cal.4th at 723, quoting *Morgan v. Illinois,* 504 U.S. at 739; see AOB 364-370.) Nor does it dispute that reversal is also required under standard harmless error analysis. (*Chapman v. California,* 386 U.S. 18, 24 (1967); *People v. Brown,* 46 Cal.3rd 432, 488-89 (1988); AOB 370-372.)

In short, while the state more or less explicitly concedes reversible error if *Cash* remains good law, it also implicitly concedes the validity of every principle on which both *Cash* and appellant's broader constitutional argument are based, and further concedes the truth of every material fact asserted in the opening brief. When the undisputed principles are applied to the undisputed facts, the conclusion is compelled that the voir dire restrictions in this case violated Mr. Solomon's rights pursuant to the Sixth, Eighth, and Fourteenth Amendments and require reversal. Thus, despite the state's claim that *Cash* is "utterly wrong," the state has implicitly conceded that both *Cash*'s and appellant's analyses are correct. It will come as no surprise, accordingly, that, when the state's attack on *Cash* is scrutinized closely in §D, it will turn out to be hollow and fallacious.

First, however, attention must be directed to some of the facts the state has ignored.

### C. The State's Failure To Make Any Reference To The Facts Pertaining To This Claim Should Not Deflect Attention From The Fundamental Unfairness Of The Voir Dire Restrictions Imposed On Mr. Solomon

As noted in §§A and B above, the state does not take issue with the factual cornerstone of appellant's argument: namely, that it was likely that the criminal-history and manner-of-death evidence was going to render one or more jurors incapable of following their instructions to consider and weigh the mitigating evidence before deciding which penalty was most appropriate. (See AOB 305, 336-355, 363.) If the state disagreed, it would have argued in the alternative that: 1) *Cash* was wrongly decided; but 2) the point is moot because the criminal-history and manner-of-death evidence was not likely to turn jurors into ADP voters. (Cf. *People v. Vieira*, 35 Cal.4th 264, 286, and fn. 7 (2005) ["the Attorney General does not dispute ... that denying the opportunity to voir dire" on "whether a prospective juror could vote for life without parole for a defendant convicted of multiple murder would" be "contrary to our holding in Cash and would violate a defendant's Fourteenth Amendment right to an impartial jury," but "argues that defendant was not denied the opportunity to conduct voir dire on the subject of multiple murder"].)

The state does not make any alternative argument. The failure to do so is an implicit concession that it could not credibly do so. (*People v. Bouzas*, 53 Cal.3d at 480.)

Not addressing the subject also allows it to deflect attention from the great potency of the evidence the court would not voir dire on. That potency is dramatically illustrated by the fact that the principal state actors here -- the prosecutor, trial judge, *and* the Attorney General -- have attributed enormous, if not dispositive, weight to the criminal-history and manner-of-death evidence. Thus the record that the state ignores shows:

(a) In both penalty phases the prosecutor devoted major portions of his arguments for death to the criminal-history evidence, passed around the inflammatory photographs of the victims in his opening statement, during trial, and in closing argument, and *supported* the defense request for voir dire, especially on the criminal-history evidence, precisely because of the "significant part" it would play in his case-in-aggravation. (See AOB 312-313, 317-318, 342, 345-346, 351, and record-citations there, and §B, ¶10, above.)

(b) In addition, prior to trial, before Judge Mering experienced firsthand the compelling affect of the case-in-mitigation, he essentially expressed the view that the facts of this case *warranted* an ADP vote (see AOB 321-322, 330-331, 353-354, and record-citations there). Then, following trial, even though he expressed "surprise" at the "power" of the

evidence in mitigation (AOB 335), he again approximated an ADP position in his §190.4 ruling, devoting a huge percentage of his comments to the criminal-history and manner-of-death evidence and virtually ignoring the evidence in mitigation (see AOB 346-349, 354-355, and record-citations there).

In this Court, furthermore, it is the Attorney General himself who, in Respondent's Brief, presents an ADP-like view of the evidence, devoting a hugely disproportionate percentage of his retrial Statement of Facts to the criminal-history evidence relative to the evidence in mitigation. (See Part III.C above ["The State's Selective Recitation Of The Evidence Presented At The Penalty Retrial"], §3 ["Evidence in Mitigation"]; RB 43-60.) Similarly, while the Attorney General greatly exaggerates the inferences of premeditation and deliberation to be drawn from the manner-of-death evidence (compare Arg. I.F above with RB 70-73, 83-84), he studiously avoids making any penalty phase harmless error arguments, allowing him to say nothing about the evidence in mitigation (compare AOB 371-372, 386, 414, 422, 433-436 and Arg. XII.C below, with RB 124-167).

Thus, while the prosecutor, trial judge, and now the Attorney General, have based their endorsements of Mr. Solomon's death sentence in large part on the criminal-history and manner-of-death evidence, the state is attempting to convince this Court to hold that it would have been *unconstitutional* to allow Mr. Solomon to ascertain whether that same

evidence was going to cause any of his jurors, in violation of their *undisputed* constitutional duty, to decide that he should die before they heard and considered his mitigating evidence.

It is a deeply hypocritical position the state is taking, one that 1) mirrors the fundamental unfairness of the trial court's ruling and 2) fails to mirror the integrity of the position taken by the prosecutor. It is most understandable that the state did not wish to invite any scrutiny of a factual record that permits a comparison of the two positions. The state, after all, is claiming that this Court must 1) endorse the fundamentally unfair ruling, 2) reject the prosecutor's position of integrity, and 3) interpret the Constitution as requiring that an even more unfair rule be applied in every capital case (see §D.2 below).

The state's silence with regard to the factual record also allows it to ignore other facts that point up 1) the reasonableness of the request for voir dire, 2) the unreasonableness of the denial, and 3) the aspects of this case that stand it apart from cases in which this Court has affirmed restrictions on voir dire (see §D.4, *post*). Thus, among other omissions, Respondent's Brief makes no reference to the following facts or the inferences to which they give rise:

(a) Judge Mering's ruling did not occur in the usual speculative context. Because there had already been a penalty phase, counsel on both sides knew full well both the nature and inflammatory potential of the

major elements of the prosecution's case-in-aggravation and were able to communicate this to the court. (See AOB 312-313, 317-318, 343-345, and record-citations there.)

(b) The latter context made the prosecutor's *support* of the defense request that much more probative of its soundness and fairness. (See AOB 317-320, 342, 345, 357-358, and record-citations there.) Appellant is aware of no other capital case decided by this Court in which the prosecutor *supported* the defense voir dire request that the trial court denied.

(c) The soundness and fairness of the defense request was confirmed for the court by the number of prospective jurors who indicated on their questionnaires that the number of current victims alone would prevent them from considering the evidence in mitigation. (See AOB 343 and record-citations there, and §B, ¶5, above.)

(d) Many of the cases cited in the state's 34-page treatise stress that asking prospective jurors to prejudge the evidence is forbidden. (See §D.4 below.) It is particularly noteworthy, consequently, that Mr. Solomon's counsel requested a generalized, abstract criminal history question that did not require prejudgment, were able to show that Judge Virga had framed a manner-of-death question that likewise did not require prejudgment, and made clear above all that that their interest was not in imparting specific facts but in ascertaining if prospective jurors had the capacity to follow their instructions and *not* engage in premature prejudgment of the

appropriate penalty. (See AOB 312-319, 341-342, 352, 357-358, and record-citations there, and §B, ¶6 above.)

(e) The restrictions Judge Mering insisted on for the retrial voir dire quite explicitly were a product of three intertwined factors: (i) his own pre-judgment that death was the only appropriate penalty here; (ii) his great underestimation of the power of the case-in-mitigation; and (iii) his mistaken belief -- corrected by the prosecutor -- that the first jury hung on penalty because Judge Virga had excused for cause too many pro-death prospective jurors. (See AOB 331-336, and record-citations there.) It is not in the state's interest to highlight the fact that the legal analysis below was heavily influenced by the foregoing misperceptions when its own brief perpetuates them and uses them as the foundation for the legal analysis at issue here.

(f) It is likewise not in the state's interest to draw any attention to the fact that the ignorant state in which prospective jurors were kept during jury selection regarding the criminal-history and manner-of-death evidence was shattered by the near-instantaneous revelation of those inflammatory facts in the prosecutor's opening statement. (See AOB 345, fn. 135, 351, and record-citations there.)

(g) Finally, the jurors' shock would have been greater still because the court, over objection, had given them the misimpression that Mr. Solomon might be presenting evidence that he did *not* have a criminal

history. (See AOB 326-328, 350, and record-citations there.) The Court will find no reference to this in Respondent's Brief.

The state's failure to make reference to any of the foregoing facts implies more than a concession that they are true. It also implies an awareness by the state that any discussion of the facts here would destroy its legal argument by highlighting the *fairness* of appellant's request for voir dire, the *fairness* of the rule adopted in *Cash*, and the fundamentally *unfair* consequences that would follow adoption of the rule it claims the Court must embrace.

The state thus does not dispute the validity of any of the constitutional principles that underlie both *Cash*'s and appellant's analyses, the potency of the criminal-history and manner-of-death evidence, or the truth of any of the facts set forth above and in the opening brief. The state has thus effectively conceded the merit of: 1) the very *Cash* analysis it purports to attack; and 2) every material aspect of appellant's claim of reversible constitutional error.

As will now be seen, the legal analysis it offers up in no way undermines the latter conclusions.

## D. The State's Claim That "*Kirkpatrick* And *Cash* And Their Mistaken Progeny ... Must Be Rejected And Overruled" Because This Court Has "Gravely ... Misconstrued" The "Law Of Death Penalty Qualification" Is Based On An Inaccurate, Incomplete, And Insulting Analysis Of The Case Law

### *1. Introduction*

The state's argument goes like this:

(a) The law -- when "correctly" understood (RB 139), not as this Court has "gravely ... misconstrued" it (RB 143) -- is as follows:

(i) "[T]his Court long ago properly interpreted the law of death penalty qualification to require *only* that a juror be willing to *participate* in the statutory scheme for death penalty selection once a defendant has been found eligible for death or life without parole ...." (RB 125; emphasis added.)

(ii) "It follows" that the *only* permissible voir dire when it comes to death penalty qualification is that which informs prospective jurors of "the particular statutory criteria that make the defendant eligible for death in that case" and ascertains whether the juror could vote for death (or life) in such a case. (RB 125.)

(iii) Any broader voir dire is forbidden. A defendant has "no right whatsoever" to seek to establish that, because of some aspect of

the case (other than the statutory criteria for death-eligibility), a prospective juror would decide that death was warranted before s/he heard and weighed the evidence in mitigation. (See RB 141, 143-144.) "[A] juror's duty," the state asserts, "is *merely* not to be committed to one penalty merely because the statutory death-eligibility criteria have been established...." (RB 144; emphasis added.) Cause "for excusal has not been shown," the state claims, just because a prospective juror in voir dire "can accurately predict that he will find" a particular aggravating "fact overwhelmingly probative as to the appropriate penalty." (RB 131.)

(b) The latter rule, according to the state, was established in *People v. Fields*, 35 Cal.3d 329 (1983), particularly in footnote 13 (at p. 358) of *Fields*. (RB 126-131.)

(c) According to the state, any deviation from the law allegedly established in *Fields* is error. With great dismay, the state notes that virtually every capital voir dire pronouncement by this Court after *Fields* contained some sort of misstatement of the rule it says *Fields* laid down. (RB 129, 136, 139, 143-145.) The worst offender, the state claims, was the "clearly, positively, and unmistakably ... wrong" holding in *People v. Kirkpatrick*, 7 Cal.4th 988 (1994) (RB 147), topped only by *Cash* which, because it resulted in a penalty reversal, was actively "harmful" (RB 148).

The state's analysis depends on half-truths, distorted case-readings, and silence with regard to anything that does not fit neatly into its schema.

In the subsections that follow, appellant will show:

(a) that the restrictive rule the state proposes is, on its face, deeply and obviously defective;

(b) that the state has badly misread *People v. Fields*, the case on which it banks all; and

(c) that this Court's holding in *Cash* is consistent with both the principal holding of *People v. Fields* and the Court's jurisprudence since then.

*2. The Rule The State Proposes Is In Obvious Conflict Both With §190.3 And Constitutional Principles Whose Validity It Does Not Dispute*

The main problem with the rule the state proposes is its under-inclusiveness. The law does *not* "require *only* that a juror be willing to *participate* in the statutory scheme for death penalty selection once a defendant has been found eligible for death...." (RB 125; emphasis added.) It requires a very particular *kind* of participation. Under the Eighth Amendment, state law (§190.3), the "court's instructions," and therefore the Sixth and Fourteenth Amendments, a juror "must ... be able to *consider* and *give effect* to ... the defendant['s] ... mitigating evidence" (*Penry v. Lynaugh*, 492 U.S. at 319; emphasis added), "in good faith" "give

mitigating evidence the consideration that the statute contemplates" (*Morgan v. Illinois*, 504 U.S. at 729, 738) as set forth by "the court's instructions and the juror's oath in the case before the juror" (*People v. Stewart*, 33 Cal.4th at 445; *Morgan* at 728, 729), and "consider" and "weigh" the "mitigating circumstances" *before* deciding which penalty is most appropriate (§190.3; CALJIC No. 8.88; CALCRIM No. 766 (Fall 2006)). (See §B above, ¶¶1-3.)

Thus, while the state is correct that "a juror's duty" *includes* not deciding which penalty is appropriate based solely on the fact that "the statutory death-eligibility criteria have been established" (RB 144), the duty does not *end* there. The juror's equally important "duty" is not to commit to one penalty until "*after*" hearing and weighing and comparing *all* of the penalty phase evidence. It is not just enforcing the "statutory death-eligibility criteria" that is important. Section 190.3 and the Sixth and Eighth Amendments also demand compliance with the statutory *and* constitutional criteria that govern the deliberative process in the *selection* phase.

The state is completely wrong, therefore, in claiming that "cause for excusal has not been shown" just because a prospective juror in voir dire "can accurately predict that he will find" a particular aggravating "fact overwhelmingly probative as to the appropriate penalty." (RB 131.) As a matter of law, a prospective juror cannot "accurately predict" how s/he will

vote at the end of the penalty phase before hearing and weighing the evidence in mitigation. Any prospective juror who, without having heard and weighed that evidence, insists that his or her pretrial prediction as to how s/he will vote is "accurate," cannot be trusted "in good faith" to "give [the] mitigating evidence the consideration that the statute contemplates." (*Morgan v. Illinois*, 504 U.S. at 729, 738.) Such a prospective juror is not "impartial" within the meaning of the Sixth and Fourteenth Amendments and "must be removed for cause." (*Id.* at 728.)

As discussed in §B, the state does not dispute *any* of the applicable principles. Nor does it dispute that "the … right to an impartial jury" requires "an adequate voir dire to identify and … remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence…." (*Morgan v. Illinois,* 504 U.S. at 729-730.) The foregoing are the principles on which *Cash* and this claim are based.

Despite these controlling principles, the state contends that "the law of death penalty qualification" *forbids* a court from ascertaining whether prospective jurors could engage in the necessary consideration of mitigating evidence. Since the state does not dispute the validity of the controlling principles, it is able to defend the latter only by *ignoring* those principles.

The fixation on the "statutory criteria" of death eligibility has no basis in law or reason. The state speculates at length about the problems the

a *Cash*-compliant voir dire would engender (RB 152-156), but does not point out a single problem in the first voir dire that supports its speculation. It also conveniently ignores the fact that, when Judge Mering attributed the hung jury in the penalty phase to the *Cash*-compliant voir dire conducted by Judge Virga, the *prosecutor* told him this was not correct. (See AOB 332 and fn. 126 and citations there.) In any event, to the extent *Cash*-compliant voir dire is not an exact science, the problem is not avoided by limiting voir dire to the "statutory criteria." Asking a prospective juror prior to trial, "If the jury convicts the defendant of multiple murder, will you be able to defer deciding on penalty until hearing and weighing all of the evidence?," requires the identical degree of educated guessing that the state complains about.

If the state is correct about "The Law," furthermore, it should be complaining that the restrictions in this case did not go far enough. According to the state's construct, the only permissible goal of the death qualification voir dire was ascertaining if jurors could impose death or life without parole on the basis *only* of "the particular *statutory criteria* that ma[d]e [Mr. Solomon] eligible for death." (RB 125.) Those criteria were one first-degree murder to satisfy §190.2 and one second-degree murder to satisfy the multiple murder special circumstance. Pursuant to the state's construct, the questions to the prospective jurors should have been limited to something like: "If you were on a jury and found the defendant guilty of

one count of first-degree murder and one count of second-degree murder, would you be able to consider a sentence of death (or life without parole) in such a case?" Pursuant to the state's rule, the prospective jurors should *not* have been asked if they could consider the evidence in mitigation if the defendant had killed six women and *none* of the many prospective jurors who were excused for cause based on their answers should have been excused for cause. (See §B above, ¶5.)

The state does not make the latter argument. Indeed, because its brief recites none of the relevant facts, one cannot glean from its brief that the restrictive voir dire below was not as restrictive as the state's proposed rule calls for. That relieves the state of having to explain why the not-restrictive-enough voir dire did *not* engender the problems it conjures. It also relieves the state of having to argue that it would have been perfectly fair and lawful to seat a jury that had no idea how many murders and other crimes Mr. Solomon had been convicted of. It wants *Cash* "overruled" but is not willing to confront honestly the harsh consequences of the rule it insists the Court must adopt. [92]

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[92] It must be noted that the state does not routinely insist that *Cash* "be rejected and overruled." (RB 160.) (Cf. *People v. Vieira*, 35 Cal.4th 264, 286, and fn. 7 (2005) ["the Attorney General does not dispute" that if a claimed restriction on voir dire had in fact occurred it would have been "contrary to our holding in Cash.... Rather, the Attorney General argues that defendant was not denied the opportunity to conduct [a] voir dire" that would have been consistent with *Cash*].)

The state's fixation on the statutory criteria of death eligibility is arbitrary. The goal of jury selection is the seating of 12 impartial jurors able to "follow the dictates of law" as set forth by "the court's instructions." (*Morgan v. Illinois*, 504 U.S. at 728-729, 735; *People v. Stewart*, 33 Cal.4th at 445.) Since the law includes the duty to weigh and consider the evidence in mitigation before deciding to sentence a defendant to death, it would be an unjust and irrational justice system that *prohibited* voir dire aimed at ascertaining whether prospective jurors could faithfully discharge that duty. As will be seen, neither *Fields* nor the cases that followed it support, much less demand, the rule the state is pushing.

*3. The state misrepresents both the central holding in Fields and the import of footnote 13*

(a) *Fields* had the same primary concern as *Cash*: seating jurors who could follow instructions not to decide between life and death *before* considering and weighing all of the evidence.

In *Fields*, in response to a written question, 11 prospective jurors said they would refuse to vote for death in the case before them. (See 35 Cal.3d at 354 and fn. 11.) The judge denied defense counsel's request to ask the jurors if they could vote for death if Hitler were the defendant, then excused all 11 for cause. The issue as stated by this Court was whether, under *Witherspoon*,

> the court may dismiss for cause a juror who will automatically vote against death in the case before him, but might consider the death penalty in other cases.

(35 Cal.3d at 354.)

The Court answered the question affirmatively based on the holding in *Adams v. Texas* that it was permissible to exclude jurors whose opposition to the death penalty substantially impaired their ability to "follow their instructions and obey their oaths." Jurors had to be able to "apply the law as charged by the court." (*Fields*, 35 Cal.3d at 357, quoting *Adams*, 448 U.S. at 44-45.)

The law upon which the *Field* jurors had been "charged by the court" was the 1977 death penalty statute. In that statute, the "Legislature had determined that death was a possible punishment for premeditated murder during the commission of robbery, and required the jury in deciding the question [of penalty] to 'consider, take into account, and be guided by' listed aggravating and mitigating facts." Applying *Adams*, this Court held:

> A juror who resolved in advance not to impose the death penalty in the case before him, whatever his views might be in other cases, could not 'conscientiously apply the law as charged by the court' (*Adams v. Texas, supra* ...) because he had already determined the penalty without considering the relevant aggravating and mitigating factors.

(35 Cal.3d at 357.) "[S]uch a juror," this Court held, "may be dismissed for cause without violating the constitutional doctrine expounded in *Witherspoon* and *Adams*." (*Ibid.*)

Contrary to the state's claim, the latter holding did *not* focus on the excused jurors' incapacity to give rein to the statutory mandate that death is a lawful option once the eligibility factors have been established. To the contrary, the incapacity stressed in the quoted paragraph was the inability of the excused jurors to engage in the *selection* process in the open-minded manner demanded by the law -- i.e., their incapacity to defer their penalty determination until they could "consider … the relevant aggravating and mitigating factors."

The latter concern is the very concern that underlay the ruling in *Cash*. In language tracking the *Fields* holding, *Cash* held that voir dire had to be sufficient to identify prospective jurors who, because of "some fact or circumstance" they would soon be hearing about, would not be able "to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." Prospective jurors who "would invariably vote either for or against the death penalty … without regard to the strength of aggravating and mitigating circumstances" are "subject to challenge for cause." (*Cash*, 28 Cal.4th at 720-721.)

*Fields* and *Cash* are thus compatible in a most essential way. One finds no hint of this in respondent's "Law of Death Penalty Qualification."

To the contrary, the state's misreading of *Fields* is essential to its argument that *Fields* and *Cash* are incompatible. Indeed, the misreading is one of the two pillars upon which it builds its entire legal edifice. (See RB 126-150, 159-160.) The pillar is a fake.

So is the second pillar, constructed from the state's egregious misreading of *Fields*'s position regarding case-specific voir dire. That is the subject of the next section.

(b) *Fields* cautions against *all* case-specific *Witherspoon*-type voir dire, *including* the kind the state claims that *Fields* requires. Further, the state fails to acknowledge that this Court has *explicitly* held that *Fields*'s admonition against case-specific voir dire has not been good law since 1985.

In *Fields*, after reiterating its holding that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases" (35 Cal.3d at 357-358), the Court added this footnote:

> When the court excludes a juror on this ground, however, it must take care to avoid violation of *Witherspoon*'s command that a juror can be dismissed for cause only if he would vote against capital

> punishment "without regard to any evidence that might be developed at the trial of the case ...." (391 U.S. at p. 522, fn. 21 ....) If a prospective juror has been informed of the evidence to be presented, his asserted automatic vote may be based upon this information, in which case exclusion of the juror because of his views on the death penalty would violate *Witherspoon*. For example, a juror who announces that he would automatically vote against death in the case before him because he has been told (whether true or not) that the prosecution case rests entirely on circumstantial evidence is not casting a vote without regard to the evidence, and cannot be excluded under the *Witherspoon* formula.

(*Fields*, 35 Cal.3d at 358, fn. 13.)

The footnote plainly interprets *Witherspoon* as prohibiting excusals of prospective jurors based on their case-specific opposition to the death penalty. The state, however, claims that, while the footnote *generally* prohibits case-specific questions, *Fields* as a whole *endorses* the view that the one exception is that prospective jurors must be 1) apprised of the "statutory capital murder criteria" on which "the charges and special circumstances" are based, and 2) excused for cause if they say that, in such a case, they will automatically vote for life or death. (See RB 130-131.)

*Fields* says no such thing. Indeed, it says exactly the *opposite*. In *Fields*, the trial judge asked each prospective juror:

> "Regardless of whatever evidence might be presented at the penalty phase of the trial, should we get that far along, will you automatically and absolutely refuse to vote for the death penalty or a verdict of death in the case *involving these charges and special circumstances*?"

(35 Cal.3d at 354; emphasis in original.) The state quotes the italicized phrase as Exhibit A in support of the second pillar of its argument: namely that, unlike all other case-specific questions, *Fields* approved such questions if they pertain to the statutory criteria for death eligibility. (RB 130.)

Inconveniently for the state, however, this Court's actual holding was exactly to the contrary:

> We do *not* endorse the trial court's standard question. By departing from the language of *Witherspoon*, and emphasizing the charges and special circumstances of the particular case at hand, the court risked misunderstanding and reversible error.

(35 Cal.3d at 355, fn. 11; emphasis added.)

The state makes no reference to the latter holding in its brief. The reason, plainly, is that the holding is incompatible with the state's legal construct. *Fields* was attempting to walk a fine line. On the one hand, prospective jurors who could only vote for death if Hitler were the defendant were not going to be engaging in the deliberative process

required by the death penalty statute. On the other hand, the *Witherspoon* holding was in reaction to the reality that, because death penalty opponents were routinely excluded from capital juries, defendants were being sentenced to death by "hanging" juries. [93]

In footnotes 11 and 13, *Fields* made clear that its no-hypotheticals-regarding-Hitler holding should not be construed as opening the door to excluding life-leaning jurors. If a prospective juror indicated that her opposition was so pervasive that it included the "case before her," that would be cause for excusal. In "*not* endors[ing]" a question making reference to the "charges and special circumstances" in the case, however, *Fields* made clear that exclusion had to be based on the pervasiveness of the prospective juror's antipathy to the death penalty and not by *any* reference to the specifics of the case, *including* references to the "charges and special circumstances." Even the latter degree of specificity "risked … reversible error" by creating the potential that a juror who disfavored the

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[93] *Witherspoon* was decided at a time when localities selected capital juries in the following manner: "a juror who felt it his 'duty' to sentence every convicted murderer to death was allowed to serve …, 'while those who admitted to scruples against capital punishment were dismissed without further interrogation.'" The Supreme Court concurred in the view that "[t]his 'double standard … inevitably resulted in (a) denial of due process.'" (*Witherspoon,* 391 U.S. at 521, fn. 20.) The *Witherspoon* holding was explicitly premised on the need to limit the grounds on which those who disfavored the death penalty could be excused so that a capital defendant was not tried by "a tribunal organized to return a verdict of death," a tribunal that was not impartial within the meaning of the Sixth Amendment. (*Witherspoon,* 391 U.S. at 521.)

death penalty would be excluded on a ground broader than that permitted in *Witherspoon*. (35 Cal.3d at 355, fn. 11.)

The actual import of footnotes 11 and 13 do not help the state. It does not want the Court to embrace the *actual Fields* position, prohibiting *all* case-specific voir dire. It likes the fact that the Court has, in many cases, *affirmed* case-specific voir dire conducted by the prosecution. (See §4 below.) The only thing it does not like is that the analysis relied on in the latter cases was applied to the defendant's benefit in *Cash* and will be applied to the defendant's benefit here unless it persuades the Court that there is some distinguishing principle that makes *Cash* (and *Kirkpatrick*) "utterly wrong" (RB 148) and the other cases right. Since there is no such distinguishing principle, the state invents one. It makes *Fields* the foundation of its argument, the one case that "properly interpreted the law" (RB 125), but *Fields* does not say what the state needs it to say. It *neither* focuses on the eligibility factors *nor* endorses case-specific voir dire with regard to them. The state has to distort both its central and subsidiary holdings to lay the foundation for its argument. The construct from which the state attacks *Cash* is an artifact manufactured from its misreading of *Fields*.

In order to make the Court's decisions fit the fake construct, the state has to misread many of them as well. (See §4 below.) One egregious example will be noted here because it is directly relevant to the state's

distortion of *Fields*'s holding regarding case-specific voir dire. In *People v. Ervin*, 22 Cal.4th 48 (2000), the defendant argued that the voir dire in his case violated *Fields*'s admonition against *all* case-specific voir dire. This Court did not disagree with the defendant's interpretation of *Fields*. It pointed out, however, that *Fields* had been interpreting *Witherspoon*, stated that the *Witherspoon* standard "has been replaced by a different formulation" -- the "substantially-impaired" test of *Wainwright v. Witt* -- and held:

> Exposing prospective jurors to the general facts surrounding the case will not inevitably preclude their disqualification under that formulation.

(*Ervin*, 22 Cal.4th at 70.) This Court then held that the proper rule was that stated in *People v. Kirkpatrick:*

> A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document.

(*Ervin*, 22 Cal.4th at 70, quoting *Kirkpatrick*, 7 Cal.4$^{th}$ at 1005.) The quoted rule, of course, is the one relied on in *Cash*. (28 Cal.4$^{th}$ at 720.)

In *Ervin*, in other words, this Court held that, to the extent *Fields*'s admonition against all case-specific voir dire had ever been controlling precedent, it had ceased to be so in 1985, when *Witt* was decided.

The state cites *Ervin* as *compatible* with its view of the law despite the fact that, in the state's characterization, the opinion "mentioned *Kirkpatrick*." (RB 147.) What the state fails to do is to provide any inkling that *Ervin* also "mentioned" *Fields* -- and overruled its position regarding case-specific voir dire. Thus this Court has *explicitly* knocked out one of the two pillars on which the state's entire argument stands -- or, more accurately, falls -- and the state does not bring that fact to the Court's attention.

One last observation is apt here. As noted, *Field's* admonition against case-specific voir dire was explicitly premised on its interpretation of *Witherspoon*. The latter defined "a *limitation* on the State's power to exclude" prospective jurors opposed to the death penalty. (*Adams v. Texas*, 448 U.S. at 47-48; emphasis added.) The state thus does not merely misrepresent the holding and admonition in *Fields*. It attempts to take a rule whose purpose is to "limit" a prosecutor's ability to pick "a tribunal organized to return a verdict of death," and uses it as the foundation for an argument that this Court was "utterly wrong" in holding that, when the facts so demand, a defendant has the right to use voir dire to avoid being sentenced to death by just such a tribunal. Read accurately, *Fields* does not

stand for the rule of law the state promotes. It is only by misrepresenting its holding that the state can even begin to make the argument it makes.

*4. This Court's Holding In Cash Is Consistent With Its Jurisprudence After Fields; The State's Analysis Is Incomplete, Inaccurate, And Insulting*

The state's running claim is that, from *Fields* to *Cash*, this Court, with the exception of *Kirkpatrick*, consistently followed the "law" the state claims was set forth in *Fields* -- i.e., forbidding all case-specific voir dire except for that which is focused on the statutory-eligibility factors. (See RB 134-142, 147-148.) As shown in the preceding section, *Fields* drew no such distinction. It is equally true that this Court's cases between *Fields* and *Cash* did not hew to the construct the state has erected. To claim otherwise, the state has had to either ignore or distort the holdings that do not fit its argument.

A glaring omission from the state's "The Law of Death-Penalty Qualification" is any reference to *People v. Noguera*, 4 Cal.3d 599 (1992). In that case, the trial court permitted the prosecutor to ask each prospective juror the following questions:

1. would "the fact that a capital defendant was '18 or 19 at the time of the killing ... automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?'"

2. would "'you … be able to consider imposing the death penalty ... if we have one victim as opposed to requiring that the defendant kill two or more people?'" (4 Cal.4th at 645.)

On appeal, this Court rejected the defendant's claim that the questions were improper. "[T]he prosecutor's questions at issue simply inquired whether a juror would *consider* imposing the death penalty in a case in which the defendant was only 18 or 19 at the time of the crime and in which only one victim was killed. If a juror would not even consider the death penalty in such a case, he or she properly would be subject to challenge for cause." (*Id.* at 646; emphasis in original.)

The holding does not fit within the state's construct. The prosecutor's questions made no reference to the statutory-eligibility factors. The questions were directed at *mitigating* circumstances. Could the prospective juror consider the death penalty in light of the defendant's mitigating age (factor (i)) or in light of the relatively mitigating "circumstance of the crime" (factor (a)) or "extenuate[ing] … circumstance" (factor (k)) that "only one victim was killed?" The questions approved by *Noguera* do not conform to the state's rigid formula.

Even worse for the state is the case that *Noguera* relied on for allowing the voir dire – *People v. Fields*:

> Our decision in *People v. Fields* … speaks directly to the point. In discussing the permissible scope of death penalty voir dire, the

> *Fields* court stated: 'A juror who resolved in advance not to impose the death penalty in the case before him, whatever his views might be in other cases, could not "conscientiously apply the law as charged by the court" ( *Adams v. Texas* ...) because he had already determined the penalty without considering the relevant aggravating and mitigating factors....' The *Fields* court ... concluded that although '... a court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him, ... a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him...." (*Id.* at pp. 357-358....)

(*Noguera*, 4 Cal.4th at 646.)

*Noguera* thus interpreted *Fields* as appellant does. (See §3(a) above.) At the heart of the *Fields* holding was not, as the state claims, an obsessive focus on the statutory-eligibility factors; its focus, rather, was on the legitimacy of excluding prospective jurors who, for one reason or another, will "determine ... penalty without" first engaging in the process the law requires: "considering the relevant aggravating and mitigating factors." (*Noguera*, 4 Cal.4th at 646; *Fields*, 35 Cal.4th at 357.)

Applying that understanding of the *Fields* holding, *Noguera* held that a prosecutor may properly ask if a significant fact in *mitigation* will result in an automatic vote for *life*. In *Cash* and *Kirkpatrick*, the Court

applied exactly the same principle, holding that a defendant may ask if a significant fact in *aggravation* will result in an automatic vote for *death*. (28 Cal.4th at 720-721; 7 Cal.4th at 1004-1005.)

The state cannot explain *Noguera* away. The opinion shows that, contrary to the state's argument, *Cash* and *Kirkpatrick* were *faithful* to this Court's jurisprudence. The state thus pretends *Noguera* does not exist.

The state's analysis of the cases it *relies* on is equally wanting. The state claims that three opinions in particular demonstrate this Court's adherence to the rigid rule it extracts from *Fields*: *People v. Livaditis*, 2 Cal.4th 759 (1992); *People v. Clark*, 50 Cal.3d 583 (1990); and *People v. Pinholster*, 1 Cal.4th 865 (1992). The state sharply criticizes this Court for citing the trio as precedent for its holdings in *Cash* and *Kirkpatrick*. (See 28 Cal.4th at 720-722; 7 Cal.4th at 1004-1005.) Those citations, the state alleges, "created a false impression," were "misleading," and "distort[ed] the holdings" of the earlier cases. (RB 144-146, 149.)

The slurs are baseless. The holdings in *Livaditis*, *Clark*, and *Pinholster* are consistent with those in *Cash* and *Kirkpatrick*.

In *Livaditis*, a prospective juror was excused for cause because she indicated that, given the "defendant's age" and given that he had not "previously committed murder," she "could not vote for the death penalty." This Court affirmed. It did not disagree with the claim that the voir dire had focused on the "weight" the prospective juror gave "'to the mitigating

factors of' age and absence of a previous murder." Her responses, however, supported the trial court's conclusion that she "would automatically vote against the death penalty in the case before" her and "that her ability to perform her duty was substantially impaired in *this* case." (2 Cal.4th at 772; emphasis in original.)

As in *Noguera*, the questions and answers at issue in *Livaditis* did not involve statutory-eligibility factors. The fact that the defendant was not "older" and the fact that he had not "previously committed murder" did not make him either statutorily eligible or ineligible for death. They were mitigating circumstances under factors (a), (i), and (k). *Livaditis* effectively held that the prosecutor was entitled to find out if those *mitigating* circumstances would result in the prospective juror's inability to weigh and consider the penalty of *death* and, if so, to have the prospective juror excused for cause. *Cash* and *Kirkpatrick* hold that a defendant is entitled to find out if a significant fact in *aggravation* will result in an inability to weigh and consider the penalty of *life without parole*. (See 28 Cal.4th at 720-722; 7 Cal.4th at 1004-1005.) They were consistent with *Livaditis* and quite correct in citing it as relevant precedent. [94]

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[94] See also *People v. Coleman*, 46 Cal.3d 749, 766, fn. 8 (1988) [suggesting that, where defendant had previously "been convicted ... of child molestation," if prospective juror had said she "would automatically vote for death if the {defendant} had previously been convicted of child molestation," defense challenge for cause would have been meritorious].

*Kirkpatrick* was likewise correct in citing *People v. Clark* as precedent. The state claims *Clark* held that case-specific voir dire is permitted only with regard to the statutory death-eligibility criteria (RB 134) and scolds this Court for "creat[ing] the false impression" that *Clark* allowed for a broader kind of case-specific voir dire. (RB 143-144.) But *Clark* did exactly that.

"In an effort to determine whether the evidence of serious burn injuries suffered by the victims would cause a jur[or] to automatically vote for the death penalty, [the *Clark*] defendant sought to inquire about the prospective jurors' attitudes toward such injuries." This Court held that the trial court was within its discretion to prohibit such questions "during the sequestered *Witherspoon-Witt* voir dire." At the same time, however, the Court recognized "that counsel *must* be permitted to ask questions of prospective jurors that might lead to challenges for cause." The restriction on voir dire during the sequestered voir dire did not violate the "defendant's right to a fair and impartial jury," the Court held, *only* because the trial court had made "no attempt to restrict questioning on the jurors' attitudes about arson and burn injuries" in "the general voir dire conducted after the death qualification of the prospective jurors." That, the Court held, is when defense counsel could have engaged in the case-specific voir dire he wished to conduct. There was no error *only* because the "[d]efendant was not precluded from attempting to show in the subsequent general voir dire that

a juror harbored any specific bias that would cause him to vote for the death penalty without regard to mitigating evidence, and thus should be excused for cause." (50 Cal.3d at 596-597, and fn. 3; emphasis added.)

The defendant in *Clark* did not want to voir dire prospective jurors regarding "the evidence of serious burn injuries suffered by the victims" in order to enforce the legislature's statutory death-eligibility scheme. He wanted to know, rather, whether the aggravating burn evidence would render any prospective jurors incapable of lawfully discharging their duties in the *selection* process by causing them "to vote for the death penalty without regard to mitigating evidence." *Clark* held that, at least in general voir dire, a defendant "*must* be permitted" to engage in such voir dire. The holding is in direct conflict with the state's claim that case-specific voir dire is only permitted for statutory-eligibility factors. Contrary to the state's accusation, *Kirkpatrick* did not "create a false impression" by citing *Clark* as precedent.

At least four cases since *Clark* have affirmed a defendant's right to ask case-specific questions during the general voir dire regarding facts *other* than statutory-eligibility facts that might cause a juror to decide on death before considering the evidence in mitigation. (Cf. *People v. Davenport*, 11 Cal.4th 1171, 1203-1205 (1995) ["defendant was not precluded from attempting to show during general voir dire that a prospective juror," because of "any sexual victimization [s/he] may have

experienced," or because of the "specific facts surrounding the torture murder," would "vote for the death penalty without regard to the evidence presented, and thus should be excused for cause"]; *People v. Cunningham*, 25 Cal.4th 926, 974-975 (2001) ["Defendant was at liberty to use the general voir dire to explore further the prospective jurors' responses to the facts and circumstances of the case" in order to determine whether, "because of one or more" of those "circumstances," any of them "would invariably vote … for … the death penalty … without regard to the strength of … mitigating circumstances" and be "subject to challenge for cause;" internal quotation marks omitted.] Accord, *People v. Kirkpatrick*, 7 Cal.4th at 1005. See *People v. Pinholster*, 1 Cal.4th at 918.)

The state either ignores or vaguely glides past the fact that *Clark, Davenport,* and *Cunningham* hold that a defendant must be permitted to engage in case-specific voir dire regarding facts *other* than statutory-eligibility facts during the general voir dire -- (RB 135, 147) -- as though the holdings are irrelevant. They are hardly irrelevant. They enforce a defendant's right to ascertain if a prospective juror will be able to engage in the "weigh-and-consider-before-deciding-penalty" process required for the life or death determination. The three cases may place a limit on *Witherspoon-Witt* voir, suggesting that that inquiry may be restricted to determining whether the prospective juror's "views about capital punishment" will preclude true adherence to the instructions (*Clark*, 50

Cal.3d at 597), but they place no such restriction on general voir dire. It is in that phase of jury selection, the cases hold, that the defendant, with the identical goal of ferreting out incapacity to follow the penalty phase instructions, may appropriately seek to determine whether a prospective juror will have such a visceral response to a particular fact or circumstance in the case as to produce such incapacity.

The distinction the foregoing cases draw between *Witherspoon-Witt* voir dire and general voir dire might have practical significance in a case where the former is sequestered and the latter is not. [95] Substantively, however, all that is important here is that the cases in question *affirm* that, if a fact or circumstance present in the case could render a juror incapable of following his or her instructions, then case-specific inquiry "*must be permitted.*" (*Clark*, 50 Cal.3d at 596.)

That is exactly what *Cash* holds and what Mr. Solomon requested. The fact that the state cannot deal in a forthright manner with this Court's holdings regarding general voir dire is tantamount to a concession that they are in conflict with the faux-analysis on which "The Law of Death Penalty Qualification" rests. *Clark, Davenport,* and *Cunningham* are consistent with *Cash* and further support the conclusion that the voir dire restrictions in this case were unconstitutional.

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[95] In this case, the entire voir dire of each prospective juror was sequestered so even that distinction is moot. (See 45 RT 19574 - 50 RT 21447.)

The same, finally, is true of *People v. Pinholster*, which both *Cash* and *Kirkpatrick* cited as precedent. (7 Cal.4th at 1005; 28 Cal.4th at 721.) The state alleges that the citations were "misleading," "distort[ed] the holdings in *Pinholster,*" and "created the false impression that" the holdings in *Cash* and *Kirkpatrick* were "consistent with prior law." (RB 145, 146, 149.) Slurs aside, the state is wrong. *Pinholster*'s holdings are quite consistent with those of *Kirkpatrick* and *Cash.*

In *Pinholster*, the prosecutor asked all prospective jurors case-specific "hypotheticals" such as: "If you … have a fact situation … where two people set out to commit a burglary, and … while they are inside the home, the owner of the residence and a friend return to the home, and burglars kill them to avoid detection or avoid the police being called. [¶] Can you envision imposing the death penalty on either one of the burglars in that particular fact situation?" The answers to such questions resulted in: a) the removal by peremptory challenge of 8 prospective jurors opposed to the death penalty; and b) the excusal for *cause* of two prospective jurors. After a series of questions, one of the latter concluded "he could not return a death penalty in a burglary-murder case" and the other "concluded that he would never vote for the death penalty in a burglary-murder case unless the killing were in fact premeditated." (1 Cal.4th at 917.)

This Court affirmed. Contrary to the state's claim, *Pinholster* did *not* hold the specific questions were prohibited except to test juror-fealty to "the statutory criteria establishing death eligibility in the case." (RB 137.)

First, the Court held that, for purposes of exercising peremptory challenges, both parties were entitled to ascertain which prospective "jurors [would] ... prejudge ... the case [for or] against the death penalty ... on the basis of" case-specific facts such as those supplied in the prosecutor's "voir dire questioning." (1 Cal.4th at 914.)

Second, it held that, while "the death qualifying voir dire ... should not be used to seek a prejudgment of the facts to be presented at the trial," "the court *must permit* questioning about legal doctrines that are ... likely to invoke strong feelings and resistance to their application." The case-specific questioning in *Pinholster* passed muster because "the jurors sturdily refused to be drawn into prejudging the case" and the questions focused on "resistance to ... application" of the felony murder rule. (1 Cal.4th at 915; emphasis added.)

Third, the questioning did not violate the defendant's rights under *Witherspoon-Witt*. Prior cases had identified two competing principles. While "we have commented ... that questions directed to jurors' attitudes towards the particular facts of the case are not relevant to the death-qualification process, ... [w]e have also said ... that 'a court may properly excuse a prospective juror who would automatically vote against the death

penalty in the case before him' [citing *Fields*]." The questions asked in *Pinholster* "regarding the prospective jurors' attitudes toward the facts of the case" were true to the latter (*Fields*) principle, the Court held. They also did not violate the first principle because they "led to crucial questions and answers about the jurors' attitudes in the abstract" regarding "vot[ing] for the death penalty" in a "burglary-murder case." (1 Cal.4th at 917-918.)

Finally, the opinion implicitly reaffirmed the holding in *Clark* that, even if case-specific questions do not fall squarely within the *Witherspoon-Witt* inquiry, they may be "appropriate to general voir dire." (1 Cal.4th at 918.)

The foregoing holdings are consistent with the holding in *Cash.* First, *Pinholster* explicitly recognized the need to balance the principle against questions seeking "prejudgment" and "directed to jurors' attitudes towards the particular facts of the case" with the *right* to ask about principles of law "likely to invoke strong feelings and resistance to their application" and to ascertain whether "a prospective juror ... would automatically vote against the death penalty in the case before him." That is precisely the balance explicitly struck in *Cash*. [28 Cal.4th at 721-722 ["Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case

being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented"].)

Second, *Cash* did not hold that, in testing for bias, the voir dire has to involve a detailed recitation of case-specific facts as opposed to translating the question into a more abstract form. Thus the Court did not hold that the trial court there should have specifically informed prospective jurors that the defendant had suffered prior convictions for killing his grandparents. To the contrary, the Court made clear that a more "abstract" inquiry would have been permissible, e.g.: "inquiring … whether prospective jurors would automatically vote for the death penalty if the defendant had previously committed another murder." (28 Cal.4th at 721.) What was not permissible was "strik[ing] the balance by precluding mention of" and flatly "prohibiting voir dire on prior murder, a fact likely to be of great significance to prospective jurors…." (*Id.* at 721-722.)

Third, *Pinholster* was no more or less directed at requiring adherence to the "statutory criteria of death eligibility" than *Cash* was. *Pinholster* affirmed the excusal for cause of Juror Barsugli because he "concluded that he would never vote for the death penalty in a burglary-murder case *unless the killing were in fact premeditated*." (1 Cal.4th at 917; emphasis added.) Lack of premeditation is not a "*statutory criterion*" for burglary-murder or special circumstance burglary murder (and certainly

wasn't when Pinholster was tried). (See Pen. Code §§189, 190.2(a)(17)(G).) [96] Juror Barsugli's "disqualifying" response was a product, not of questioning limited to the "statutory criteria," but of questioning in which the prosecutor zeroed in, "hypothetically," on lack of premeditation because it was a critical aspect of the case "likely to invoke … resistance." (1 Cal.4th at 915.) While lack of premeditation was tied to the statutory criteria in that felony murder does *not* require such *mens rea*, what that really made it was a highly significant factor in *mitigation* under both factor (a) ("circumstances of the crime") and factor (k). (*Cf. People v. Smith*, 30 Cal.4th 581, 638 (2003) [jury could consider the alleged "absence of premeditation and deliberation" as both a "circumstance … of the crime" and a "circumstance which extenuates the gravity of the crime"]; *People v. Sturm*, 37 Cal.4th 1218, 1232 (2006) ["lack of premeditation was a central theory supporting the defense case in mitigation"]; *People v. Bonillas*, 48 Cal.3d 757, 793 (1989) ["The jury was properly instructed that the absence of deliberation and premeditation was a circumstance in mitigation"].) [97]

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[96] Until 1990, §190.2 did not even state that the felony murder special circumstances did not require an intent to kill. (Compare the Briggs Initiative, added 11-7-78, with Proposition 115, §10, added eff. 6-6-90, adding current subd. (b) of §190.2.)

[97] See also, *Enmund v. Florida,* 458 U.S. 782, 798-799 (1982) ["It is fundamental 'that causing harm intentionally must be punished more severely than causing harm unintentionally'"]; *Tison v. Arizona,* 481 U.S. 137, 156 (1987) ["the more purposeful is the criminal conduct, the more

There is no principled difference between asking a prospective juror, "If a particular factor in *mitigation* is present in this case (e.g., lack of premeditation), would that cause you to decide to vote for *life* before weighing and considering the evidence in *aggravation*?" -- the kind of inquiry approved in *Pinholster* -- and asking, "If a particular factor in *aggravation* is present in this case (e.g., a prior conviction for murder or prior convictions and incarceration for sexual assault), would that cause you to decide to vote for *death* before weighing and considering the evidence in *mitigation*?" The latter is the kind of inquiry approved in *Cash* and sought by Mr. Solomon in this case.

Finally, even if there were any difference between *Pinholster* and *Cash* with regard to what is permitted in *Witherspoon-Witt* voir dire, it would be rendered wholly illusory by *Pinholster*'s recognition that, if case-specific questions are necessary to explore whether some aspect of the case could render a juror unable to follow his instructions, such questions would be "appropriate to general voir dire." (1 Cal.4th at 918. See discussion above.)

In short, this Court did not "mislead," "distort," or "create" any "false impression" when it cited *Livaditis, Clark*, and *Pinholster* as relevant

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serious is the offense, and therefore, the more severely it ought to be punished"].)

precedent for the holdings in *Cash* and *Kirkpatrick*. Contrary to the state's claim, the latter cases were "consistent with prior law."

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Nothing the state says undermines the analysis in *Cash*, the opening brief, or §B above. The voir dire restrictions were unreasonable, unnecessary, and prejudicial, likely resulting in the seating of one or more jurors who, on hearing the prosecutor's opening statement, made up their mind to vote for death before even knowing what the evidence in mitigation was going to be. The restrictions violated Penal Code §190.3, Article I, §§7, 15-17, of the California Constitution, and the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. For all of the reasons stated at AOB 364-372 -- none of which the state disputes -- the error requires reversal of the judgment of death.

## XII.

## THE ADMISSION OF GRUESOME PHOTOGRAPHS RENDERED THE PENALTY RETRIAL FUNDAMENTALLY UNFAIR

### A. The Constitutional Claims Are Reviewable On The Merits

Buried in a footnote at the very end of respondent's argument is the assertion that, because, in the trial court, defense counsel objected to admission of the photographs only under Evidence Code §352, he forfeited appellant's right to argue in this Court that their admission was also unconstitutional. (RB 166, fn. 76.) Appellant addressed the issue directly in the opening brief, discussing decisions by this Court that reject forfeiture arguments in comparable circumstances. Chief among the cited cases was *People v. Yeoman*, 31 Cal.4th 93 (2003), whose two no-forfeiture holdings (*id.* at 117-118, 133) were discussed at length. (AOB 382-385.) Respondent ignores all of the cases appellant cites, including *Yeoman*. It makes no reference to, much less attempts to distinguish, any of them.

Instead, without discussion, respondent cites what may be the Court's only capital-case opinion since *Yeoman* that makes a forfeiture ruling without making reference to the latter opinion (which had come down less than 6 weeks earlier). (*People v. Heard*, 31 Cal.4th 946, 972, fn. 12 (2003) [finding forfeiture of constitutional claim re photographic evidence].) *Heard* does not represent the Court's current position on

forfeiture -- or, for that matter, the Court's position at the time Respondent's Brief was filed. In *People v. Benavides*, 35 Cal.4th 69 (2005), the Court was presented with the very situation at issue here -- where trial counsel moved to exclude photographs on statutory grounds and appellant added a constitutional claim in his automatic appeal. The Court "assume[ed] the claim was properly preserved on appeal," citing *Yeoman*. (*Benavides,* 35 Cal.4th at 96.) Respondent fails to cite or distinguish *Benavides*.

Subsequently, in *People v. Partida*, 37 Cal.4th 428, 433-439 (2005), the Court held that making only a §352 objection in the trial court does not bar an additional legal claim on appeal that the error had unconstitutional consequences. Since then, the Court has consistently heard such constitutional claims on the merits and is now doing so with the following explanation:

> Consistent with recent cases [citation], we note that defendants urge that this and almost every other error alleged on appeal infringed their constitutional rights to a fair and reliable trial. Insofar as defendants raised the issue at all below, they failed to articulate some or all of the constitutional arguments now advanced. In each such instance, it appears that either the appellate claim is the kind that required no trial court action to preserve it, or the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the

trial court's act or omission, insofar as each was wrong on grounds actually presented to that court, had the additional *legal consequence* of violating the Constitution. To that extent, defendants' new constitutional arguments are not forfeited on appeal. (See *People v. Partida* ... ; *People v. Yeoman* ....)

(*People v. Lewis*, 39 Cal.4th 970, 990, fn. 5 (2006); emphasis in original.) [98]

Respondent does not contend that anything would have changed in the trial court, factually or legally, had the constitutional objections been made at that time, or that it is in any way prejudiced by having to respond to the constitutional dimension of the argument in this Court. Pursuant to *Yeoman, Partida, Lewis, Benavides, et al.,* as well as the authorities cited in the opening brief, the substantive argument made in the opening brief is reviewable on the merits.

**B. Admission of the Photographs Over Appellant's Objection Was Error**

Respondent asserts that "[a]ppellant offers no authority" for his claim that the admission of gruesome photographs implicates a defendant's right to a fair penalty trial. (RB 160.) This is a rather audacious comment given that the opening brief cites a great many cases in support of the latter

[98] Accord, *People v. Rogers*, 39 Cal.4th 826, 850, fn. 7 (2006); *People v. Ledesma*, 39 Cal.4th 641, 669, fn. 3 (2006); *People v. Avila*, 38 Cal.4th 491, 527, fn. 22 (2006); *People v. Boyer*, 38 Cal.4th 412, 441, fn. 17 (2006); *People v. Guerra*, 37 Cal.4th 1067, 1084, fn. 4 (2006).

position -- by this Court, the United States Supreme Court, and the federal courts of appeal -- as well as one highly relevant jury study -- and respondent acknowledges the existence of exactly *none* of them. (Compare AOB 374-375, 380 with RB 160-166. See also *U.S. v. Sampson*, 335 F.Supp.2d 166, 181-183 (D.Mass. 2004), and cites there.) [99]

Respondent argues generally that, because "sympathy" is a permissible mitigating factor, the prosecution has the equivalent and offsetting right to introduce in aggravation any evidence that might produce "antipathy" and revulsion. (RB 160.) That is a misstatement of the law. The defendant's right to mitigation is rooted in the Eighth Amendment and is not limited to facts related to the capital crimes:

> [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.

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[99] In *Sampson,* filed after appellant's opening brief was filed, the district court in a federal capital case explained why it had excluded certain photographs of the murder victim's body: "The decomposition of the body was not relevant to the especially heinous, cruel, or depraved aggravating factor requiring serious physical abuse or torture at the time of the murder. Moreover, when faced with photographs showing the effects of decay, decomposition, and insects, the jury might well have been led to consider the murders to have been worse or the defendant more deserving of the death penalty. This danger could not have been cured entirely by a limiting instruction." (335 F.Supp.2d at 181.) The photographs, along with other potentially prejudicial evidence, was excluded to protect the defendant's "due process right ... [to] a fundamentally fair trial." (*Id.* at 183.)

(*Tennard v. Dretke*, 542 U.S. 274, 285 (2004) [citation omitted] [reversing 5th Circuit opinion that held that evidence was not mitigating unless it made one less culpable for the capital crime]. [100]

The prosecution, by contrast, has no rights under the Eighth Amendment. To the contrary, the latter (in conjunction with the due process clause of the Fourteenth Amendment) places *limits* on the state's ability to introduce evidence in aggravation that will primarily trigger negative "emotion" and "passion" not directly related to the capital crime. As Justice O'Connor observed in *Eddings*, the Supreme Court "has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of ... *passion* ...." (455 U.S. at 118 [O'Connor, J., concurring; emphasis added].) [101]

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[100] See also, *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) [Mitigation is admissible that touches on "any aspect of a defendant's character ... that the defendant proffers as a basis for a sentence less than death"], quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opn. of Burger, C.J.); *People v. Whitt*, 51 Cal.3d 620, 647 (1990) ["the range of constitutionally pertinent mitigation is so broad"].

[101] Accord, *Monge v. California*, 524 U.S. 721, 732 (1998, quoting *Gardner v. Florida,* 430 U.S. 349, 358 (1977) ["Because the death penalty is unique 'in both its severity and its finality, ... [i]t is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion'"]; *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ["the sentence imposed at the penalty stage should reflect a *reasoned* moral response to the defendant's ... crime"; citation omitted; emphasis added].

In a capital case, accordingly, photographs "that serve[] primarily to inflame the passions of the jurors must … be excluded…." (*People v. Love,* 53 Cal.2d 843, 856 (1960). Accord, *U.S. v. Sampson,* 335 F.Supp.2d at 181-183 ["photographs showing the effects of decomposition" excluded due to likely, unwarranted, and adverse effect on jurors' penalty determination]; *Clark v. Commonwealth,* 833 S.W.2d 793, 794-95 (Ky.1991) [death sentence reversed in part due to admission of photos and video in which the victim's "body … ha[d] been materially altered by … decomposition;" the latter was evidence likely "to arouse passion and appall the viewer"]; *Tobler v. State,* 688 P.2d 350, 355-356 (Okla.Crim.App.1984) [capital conviction reversed in part based on the admission of photographs depicting the "gruesome work of nature" on victims' bodies, including decomposition; such evidence "had the potential, if not certain, effect of unduly prejudicing" the defendant].) [102] The admission of such photographs "so infect[s] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of

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[102] See also *State v. Spreitz,* 945 P.2d 1260, 1271-73 (1997) [finding admission in capital case of photos showing victims' decomposed bodies was error given the "danger of unfair prejudicial effect"]; *Mann v. Oklahoma,* 488 U.S. 877, 877 (1988) (Marshall, J., dissenting from denial of cert.) ["petitioner argues convincingly that the photographic evidence created an impermissible risk that his death sentence was based on considerations that are 'totally irrelevant to the sentencing process,' because it focused the jury's attention on the postmortem decomposition of the victim's body rather than on 'the character of the [defendant] and the circumstances of the crime'"; citations omitted].

due process." (*Spears v. Mullin*, 343 F.3d 1215, 1226 (10th Cir. 2003), quoting and applying the standard enunciated in *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994). Accord, *U.S. v. Sampson,* 335 F.Supp.2d at 183.)

The state downplays the inflammatory potential of the photographs at issue in this case, arguing that the photographs of Ms. Johnson merely "depict[ed] death, which is typically unattractive" (RB 161), and contending that "a normal juror … in a multiple-murder case typically could view such" the other objected-to photographs "rather clinically" (RB 165).

There is nothing "typical" about the photographs counsel objected to -- especially the five that appellant singles out as particularly revolting. (AOB 380-381.) They are *not* "typical" depictions of death but gross depictions of human bodies in an advanced state of *decomposition*. Few if any jurors would have thought them "typical" in any sense. In Exh. 114, as the prosecutor described it, Ms. Apodaca's "features have … sort of melted" (43 RT 19029), and, in Exh. 168-A, he said, Ms. Jacox was "unrecognizable as human" (60 RT 24323). The court similarly acknowledged the "grossness" of Exh. 225, the formless soapy subject of which the jurors had to be told was Ms. Jacox's body (43 RT 19056). Exhibit 298, in Dr. Stuart's words, depicted the "markedly decomposed" body of Ms. Massey. (61 RT 24675.) Respondent itself notes that, in Exh.

23, Ms. Johnson's "face is noticeably bloated from decomposition." (RB 161.)

As indicated in the opening brief, this Court has held photographs admissible precisely because the "victims' bodies were *not* depicted 'in a badly decomposed condition'." (*People v. Heard,* 31 Cal.4th 946, 977, fn. 13 (2003), quoting *People v. Allen,* 42 Cal.3d 1222, 1258 (1986); emphasis added. Accord, *People v. Thompson*, 45 Cal.3d 86, 116 (1988); *People v. Anderson*, 25 Cal.4th 543, 592 (2001).) Unable to explain why the latter holdings do not require the contrary conclusion in this case, respondent does the only thing it can do: it ignores them. (Compare AOB 380 with RB 160-166.)

Respondent offers up no rationale for admitting the photographs -- particularly the most revolting ones -- that comes close to outweighing the inflammatory effect they were bound to have. Under California law, aggravating evidence is admissible only if it falls within Penal Code §190.3, factors (a), (b), (c) or (i). (*People v. Hamilton*, 48 Cal.3d 1142, 1184 (1989).) Only factor (a) is germane here. Within the restrictions imposed by the Eighth and Fourteenth Amendments (as well as Evidence Code §352 and Art. I, §§15 and 17 of the California Constitution), the prosecution was permitted to introduce evidence necessary to enable jurors to understand the "circumstances of the crime[s]." To achieve that understanding, jurors did not need to see the photographs in question.

In particular, to understand "the circumstances of the" first-degree murder of Ms. Johnson, jurors did not have to lay eyes on a "face ... noticeably bloated from decomposition" in order to comprehend that she had been dead for a few days before she was discovered (respondent's argument for the admissibility of Exh. 23 - RB 162). To begin with, that fact -- aside from its relative insignificance to the penalty determination -- was not in dispute. (See 52 RT 21786-87.) Further, it was more than adequately conveyed -- and in less inflammatory but hardly antiseptic fashion -- by the testimony of the pathologist (53 RT 22151) and the officers at the scene (52 RT 21786, 21872-73), [103] as well as by less garish photographs admitted without objection (Tr. Exhs. 12, 17; 1 ACT 104-105, 116-117). Indeed, Officer Coyle identified bloating from one of the latter photographs. (52 RT 21872-21873.)

Respondent's additional claim that other objected-to photographs were necessary to allow jurors to infer that Ms. Johnson had been bound prior to death (RB 161-162) is particularly untenable. First, the officers testified in detail as to the ligature marks they thought they observed. (52 RT 21877-80, 21877.) Second, the prosecutor did not ask them to point out the alleged marks in any of the photographs he moved into evidence.

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[103] While appellant is focusing here on the photographs, his argument should not be taken as an endorsement of inflammatory verbal descriptions by witnesses. (Cf. *Tobler v. State,* 688 P.2d at 355-356 [reversing in part due to such evidence].)

(*Ibid.*) That is because the photographs did not show any such marks. When defense counsel asked Officer Youngblood where in the photographs the furrowing was visible, he could not do so. (52 RT 21787-21788.) Finally, as discussed earlier in this brief, respondent's summary of the ligature evidence is extremely misleading, omitting the testimony from the pathology team that effectively precluded a juror from concluding that Ms. Johnson had been bound. (See Part III.B.2(a) above.)

With regard to the other objected-to photographs appellant focuses on, respondent asserts that they were admissible to convey the manner in which Mss. Apodaca, Jacox, and Massey were bound when their bodies were discovered by police. (RB 162-166.) Those facts, too, however, were conveyed -- clearly and in detail -- by the pathologists and homicide investigators involved, as well as by other photographs and excavation and autopsy videotapes that were played for the jury. [104] To understand the "circumstances of the crime[s]," jurors had no need to see that, because of the time lag between the deaths of the victims and the discovery of their bodies, Ms. Apodaca's "features ha[d] … sort of melted," or to look at a

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[104] Regarding Ms. Apodaca, see, e.g., 56 RT 23086-94 [Dr. Anthony], 56 RT 22943-45 [Det. Murphy, narrating videotape of excavation -- Tr. Exh. 323-a]. Regarding Ms. Massey, see, e.g., 61 RT 24664-69, 24474-75 [Dr. Stuart]; 61 RT 24642-45 [Det. Murphy, narrating videotape showing body unwrapped for autopsy -- Tr. Exh. 328]; Tr. Exhs. 303 and 304 at 3 ACT 763-766. Regarding Ms. Jacox, see, e.g., 60 RT 24160-24166 [Det. Lee, narrating video -- Tr. Exh. 325 -- and also describing body at autopsy]; 60 RT 24327, 24320-46 [Dr. Stuart]; Tr. Exh. 163-A at 2 ACT 469-470.

picture of the body of Ms. Jacox that was "unrecognizable as human," or to see the "markedly decomposed" body of Ms. Massey or the "gross" soapy mess that Ms. Jacox's body had become. They had no need to see, and the prosecution had no right to introduce, evidence that essentially showed merely "the gruesome work of nature." (*Tobler v. State*, 688 P.2d at 355.)

Admission of these exhibits had little probative value, were duplicative, and would have "serve[d] primarily to inflame the passions of the jurors." (*People v. Love,* 53 Cal.2d at 856.) Likely to arouse revulsion to the effects of decomposition and not to the crimes per se, such revulsion had the capacity to turn jurors into ADP votes on the basis of "passion," not "reason." (*U.S. v. Sampson,* 335 F.Supp.2d at 181-183; *Clark v. Commonwealth,* 833 S.W.2d at 794.) It is reasonably likely "if not certain" that the photographs had the "effect of unduly prejudicing" Mr. Solomon. (*Tobler v. State*, 688 P.2d at 356.) Their admission rendered the retrial fundamentally unfair, the penalty verdict unreliable, and "the jury's imposition of the death penalty a denial of due process" in violation of both state law and the Fifth, Eighth, and Fourteenth Amendments. (*Spears v. Mullin*, 343 F.3d at 1226; *Romano v. Oklahoma*, 512 U.S. at 12. Accord, *U.S. v. Sampson,* 335 F.Supp.2d at 181-183, and cases cited there.)

### C. The Error Requires Reversal

Respondent's Brief says nothing in response to the prejudice argument made in the opening brief. (AOB 386.) In particular, throughout

its brief, it assiduously avoids reference to the fact that in the first penalty trial, that jury not only hung but, in its first vote, five jurors voted for life. (41 RT 18609; 43 RT 19077.) In *People v. Sturm*, 37 Cal.4th 1218 (2006), this Court stated: "We look very closely at the question of prejudice … where the death penalty was imposed on a penalty phase retrial after the majority of the prior jury would have voted in favor of a sentence of life in prison without the possibility of parole." (37 Cal.4th at 1243.) In this case it was five jurors who voted for life without parole, not seven, but that can hardly be determinative. The question of prejudice must therefore be looked at "very closely". (See also *People v. Rivera*, 41 Cal.3d 388, 393, fn. 3 (1985) [error prejudicial despite confession because, *inter alia*, the "first trial of defendant ended in a hung jury"]; *id.* at 395 (Grodin, J., concurring). Accord, *People v. Brooks*, 88 Cal.App.3d 180, 188 (1979), *Riggins v. Rees*, 74 F.3d 732, 738 (6th Cir. 1996); *U.S. v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987).)

Given the Attorney General's silence on the prejudice issue, appellant will rely on the argument offered in the opening brief. (AOB 386. See also AOB 370-372.) He would add only that reversal is certainly required when the prejudicial effect of the gruesome evidence at issue here is weighed cumulatively with the effect of the other errors raised by Mr. Solomon. (See *U.S. v. Sampson,* 335 F.Supp.2d at 183 [photos excluded out of fear that "the cumulative effect of" prejudicial evidence "might have

amounted to a denial of due process"]; *Clark v. Commonwealth,* 833 S.W.2d at 794-795, 797 [reversing capital sentence for errors, including the admission of photos showing decomposition, that had "the cumulative effect of tainting a fair trial"]; *Tobler v. State*, 688 P.2d at 355-356 [same]. See generally, *Taylor v. Kentucky*, 436 U.S. at 487, and fn. 15 ["the cumulative effect of potentially damaging" errors "violated the due process guarantee of fundamental fairness"].

## XIII.

## THE FAILURE TO PROPERLY INSTRUCT JURORS WITH RESPECT TO THE BURDENS OF PROOF AND PERSUASION APPLICABLE TO THEIR PENALTY DETERMINATIONS VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The opening brief argues that the principal penalty phase determinations the jurors had to make before they could return a verdict of death required certainty beyond a reasonable doubt. The brief argues that the failure to require such certainty violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 387-422, citing, *inter alia*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002).)

Since the opening brief was filed, the United States Supreme Court has issued four opinions that undermine this Court's reasons for rejecting this claim: *Blakely v. Washington*, 542 U.S. 296 (2004); *U.S. v. Booker*, 543 U.S. 220 (2005); *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006); and *Cunningham v. California*, _ U.S. _, 127 S.Ct. 856 (2007). See also, *U.S. v. Green*, 372 F.Supp.2d 168 (D.Mass. 2005); Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing,* 54 Ala L. Rev. 1091, 1126-1127 (2003).

In *Blakely*, the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of

"substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.) The court reaffirmed the principles set forth in *Apprendi* and *Ring*: 1) other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; and 2) "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, 542 U.S. at 304; italics in original. Accord, *U.S. v. Booker*, 543 U.S. at 244 [Sentencing Guidelines unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence; Sixth Amendment requires that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"].)

The "relevant inquiry" established by the foregoing cases is:

[D]oes the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?

(*Apprendi,* 530 U.S. at 494. *Accord, Ring,* 536 U.S. at 602.) This Court has held that, under California law, the answer is "yes" with regard to special circumstance findings but "no" with regard to penalty phase findings. (See, e.g., *People v. Ochoa*, 26 Cal.4th 398, 454 (2001); *People v. Prieto*, 30 Cal.4th 226, 263 (2003).) In *Brown v. Sanders,* however, the Supreme Court held that, for constitutional purposes, the difference between eligibility factors (our special circumstances) and sentencing factors (our aggravating circumstances) was illusory. If it had been "a sentencing factor and *not* an eligibility factor that [the California Supreme Court had ] … found to be invalid[, t]he weighing process would just as clearly have been prima facie skewed, and skewed for the same basic reason: The sentencer might have given weight to a statutorily or constitutionally invalid aggravator." (126 S.Ct. at 891 [italics in original].) That, Justice Scalia explained, was why *per se* reversal had been appropriate in *Stringer v. Black*, 503 U.S. 222 (1992), when the Court had found a Mississippi *sentencing* factor to be invalid. In a state statutory scheme in which "the jury could not impose a death sentence unless it found" a "specified eligibility factor" *and* "at least one statutory aggravating factor [to be true], … the additional aggravating factors [a]re

converted into *de facto* eligibility factors". (*Brown v. Sanders*, 126 S.Ct. at 891, fn. 5.)

That describes California's scheme precisely. For constitutional purposes, consequently, special circumstances and aggravating factors are not different species. *Each* must be found true before death may be imposed. The explicit equation of special circumstances and aggravating circumstances in *Brown v. Sanders* compels the conclusion that findings regarding *both* special *and* aggravating circumstances in California death cases fall within the sphere of findings governed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Further, this Court has rejected the applicability of *Apprendi* and *Ring* to penalty phase determinations in California trials by comparing the latter to "a sentencing court's traditionally discretionary decision to … impose one prison sentence rather than another." (See, e.g., *People v. Demetroulias*, 39 Cal.4th 1, 41 (2006).) In *People v. Black*, 35 Cal.4th 1238, 1254 (2005), the Court applied precisely the same analysis to DSL sentencing in non-capital cases. The Court held that defendants have no constitutional right to a jury finding regarding the facts relied on to impose the aggravated term: the DSL "simply authorizes 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." (35 Cal.4th at 1254.)

In *Cunningham v. California*, the U.S. Supreme Court rejected *Black's* holding and analysis. The high court found that, under the DSL, findings that circumstances in aggravation existed 1) were factual in nature, and 2) were required for a defendant to receive the upper term. (127 S.Ct. at 860-863, 868.) That definitively resolved the constitutional question in the defendant's favor: "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, … the DSL violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham*, 127 S.Ct. at 868.) The Court rejected this Court's view that "factfinding … that traditionally has been performed by a judge" is exempt from Sixth Amendment constraints (*Black*, 35 Cal.4th at 1253; *Cunningham,* 127 S.Ct. at 868) and that the overall reasonableness of the DSL scheme made *Apprendi* inapplicable:

> The *Black* court's examination of the DSL … satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for

> determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260 … (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham*, 127 S.Ct. at 869.)

In the wake of *Cunningham*, it is clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is: Under California law, did jurors have to make any factual findings in the penalty phase before they could return a verdict of death? The opening brief shows that the answer, unequivocally, is "yes." (See AOB 404-413.)

The state does not respond to the latter portion -- or any portion -- of appellant's argument, relying entirely on this Court's pre-*Cunningham* rejection of the claim. (See RB 166.) The argument in the opening brief, enhanced by the developments summarized above, is correct. The failure to require that the enumerated penalty phase findings be beyond a reasonable doubt violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.

## XIV.

## THE FAILURE TO REQUIRE ANY SORT OF AGREEMENT BY JURORS AS TO WHAT CONSTITUTED AGGRAVATING FACTS VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The opening brief argues that the penalty phase findings on which a death verdict rests must be found by a unanimous jury or at least a super-majority of the jury. The brief relies in large part on the cases and principles cited in Arg. XIII for the proposition that the critical penalty phase findings must be beyond a reasonable doubt. (AOB 423-432.) The developments discussed in the preceding argument are thus fully applicable to this argument as well.

Again, the state does not respond to appellant's argument other than to cite this Court's pre-*Cunningham* rejection of the claim. (RB 166.) Appellant will rely on the argument in the opening brief, enhanced by the developments summarized above. The failure to require any sort of agreement by jurors as to what the aggravating facts and factors were violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.

## XV.

## ALLOWING THE JURY TO IMPOSE THE DEATH PENALTY ON THE BASIS OF PREVIOUSLY UNADJUDICATED OFFENSES WAS UNCONSTITUTIONAL

The state does not respond to appellant's argument other than to cite this Court's rejection of the claim in a prior case. (RB 166.) Appellant will rely on the argument in the opening brief. He would note only that, while Arg. XV refers to the unanimity argument made in Arg. XIV (see AOB 440), it does not explicitly state that appellant is contending that permitting the jury to impose death based on previously unadjudicated offenses violated his Sixth Amendment jury-trial right. He is. As the Supreme Court has made clear, due process violations that potentially affect a jury's determinations implicate *both* the Fifth *and* Sixth Amendments. (*Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).) Appellant submits that the error in question violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

## XVI.

## THE FAILURE TO REQUIRE THE JURY TO MAKE EXPLICIT FINDINGS OF THE FACTORS IT FOUND IN AGGRAVATION VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The state does not respond to appellant's argument other than to cite this Court's rejection of the claim in a prior case. (RB 166-167.) Appellant will rely on the argument made in the opening brief.

## XVII.

## THE FAILURE OF CALIFORNIA'S DEATH PENALTY STATUTE TO PROVIDE FOR INTER-CASE PROPORTIONALITY REVIEW VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The state does not respond to appellant's argument other than to cite this Court's rejection of the claim in a prior case. (RB 167.) Appellant will rely on the argument made in the opening brief.

## XVIII.

## THE VERSION OF THE 1978 CALIFORNIA DEATH PENALTY STATUTE APPLICABLE HERE FAILED TO MEANINGFULLY NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY AS REQUIRED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS

For 35 years, ever since the landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972), both this Court and the United States Supreme Court have admonished that, in order to comply with the Eighth Amendment, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty' " (*Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)), and must do so by "provid[ing] a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not'" (*People v. Edelbacher*, 47 Cal.3d 983, 1023 (1989), quoting *Furman*, 408 U.S. at 313 (conc. opn. of White, J.).

On March 22, 2007, however, as this brief was in its final edit, this Court indicated that, in its view, the United States Supreme Court had abandoned the genuine narrowing requirement. (*People v. Beames*, 40 Cal.4th 907, _, 55 Cal.Rptr. 3d 865, 886-887 (2007).) The pertinent passage in *Beames* begins with this holding:

> California's death penalty statute "does not fail to perform the constitutionally required narrowing function by virtue of the number of special circumstances it provides or the manner in which they have been construed." [Citations.]

(55 Cal.Rptr.3d at 886.) While the latter recognizes that there is a "constitutionally required narrowing function," the Court proceeded to hold as follows:

> [A]lthough at one time the United States Supreme Court suggested that a constitutionally valid death penalty law must exclude most murders from eligibility for the death penalty, that is no longer the case. (*People v. Jurado* (2006) 38 Cal.4th 72, 146… (conc. opn. of Kennard, J., and authorities cited therein).) Because the special circumstances listed in section 190.2 apply only to a subclass of murderers, not to all murderers (*Tuilaepa v. California* (1994) 512 U.S. 967, 971-972 …), there is no merit to defendant's contention, based on a statistical analysis examining appeals from murder convictions, that our death penalty law is impermissibly broad.

(*People v. Beames*, 55 Cal.Rptr.3d at 887.)

The state takes a similar position. (RB 167, citing *Arave v. Creech*, 507 U.S. 463 (2003).) It asserts that a narrowing scheme that has the effect of creating a "broad" and "sizeable" class of death-eligible defendants "*genuinely* … narrow[s] the class of murderers … eligible for the penalty of

death." (RB 167, paraphrasing the rule stated in *Lowenfield v. Phelps*; emphasis added.)

Unlike respondent, this Court cannot be asserting 1) that the Eighth Amendment demands that death statutes "*genuinely* narrow" and 2) that the highest court in the land believes that "*genuine*" narrowing occurs as long as the statute reduces the class of persons eligible for death to any number less than "*all* murderers." (*Beames,* 55 Cal.Rptr.3d at 887.) [105] *Beames* is asserting, rather, that the Supreme Court has effectively abandoned the "genuinely narrow" requirement. Appellant must respectfully disagree.

*Beames* cites *Tuilaepa* and Justice Kennard's concurring opinion in *Jurado*, which, in turn, cites *Tuilaepa* and *Arave v. Creech, supra*. Respondent cites the same two cases. (RB 167.) Neither case, however, abandoned a "genuine" narrowing requirement.

To begin with, in this argument, Mr. Solomon makes a *systemic* challenge. He alleges that the California scheme violates the narrowing requirement because its "eligibility" provisions (which include all of the ways one can commit first-degree murder plus all of the special

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[105] Prior to oral argument in capital appeals, this Court sends counsel a letter requesting that counsel identify the issues s/he intends to argue. The intent is to narrow the number of issues the Court should focus on from, e.g., the 40 issues raised in the opening brief to the 3 counsel intends to argue. If the request was an actual order, and counsel responded with a list of 39 issues, s/he could rightfully be deemed in contempt. No one could reasonably assert that the issues list had been "genuinely narrowed."

circumstances), viewed *cumulatively*, make virtually every murderer death-eligible. (See AOB 457-461.)

Neither *Tuilaepa* nor *Creech* involved a *systemic* narrowing challenge. Indeed, *Tuilaepa* did not involve *any* form of narrowing challenge. The claim there, rather, was that three of §190.3's aggravating factors ("selection" factors) were unconstitutionally *vague*. *No* issue, furthermore, was raised regarding California's special circumstances. Each of the three opinions in *Tuilaepa* made clear -- in varying degrees of explicitness -- that the Court was making no judgment whether California's special circumstances "collectively perform sufficient, meaningful narrowing" to pass muster under the Eighth Amendment. [106]

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[106] The quoted phrase is from Justice Blackmun's dissenting opinion (*Tuilaepa*, 512 U.S. at 994), but both the majority and concurring opinions likewise make clear that *Tuilaepa* is not precedent for the holding in *Beames*. (See *Tuilaepa*, 512 U.S. at 975 [majority opn. of Kennedy, J.: "Petitioners do not argue that the special circumstances found in their cases were insufficient, so we do not address that part of California's scheme save to describe its relation to the selection phase"]; 512 U.S. at 984 [concurring opn. of Stevens. J.: "given the assumption (unchallenged by these petitioners) that California has a statutory "scheme" that complies with the narrowing requirement defined in *Lowenfield v. Phelps,* 484 U.S., at 244 …, I conclude that the sentencing factors at issue in these cases are … constitutional"]; 512 U.S. at pp. 994-995 [dissenting opn. of Blackmun, J.: "the Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is convicted of first-degree murder and the jury finds the existence of one 'special circumstance.' [Footnote.] By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool. Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing.… The Court's treatment today of the relevant

As a prelude to resolving the vagueness claim, Justice Kennedy's majority opinion made a general statement about "two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." The opinion stated that that the "aggravating circumstance" that makes a defendant "eligible for the death penalty" -- which, as the Court recognized, is a "special circumstance" under the California statute -- "must meet two requirements." They are:

> First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. See *Arave v. Creech,* 507 U.S. 463, 474 ... (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm"). Second, the aggravating circumstance may not be unconstitutionally vague.

(*Tuilaepa*, 512 U.S. at 971-972.)

It is the first sentence, and the phrase, "may not apply to every defendant convicted of a murder," that *Beames* interprets as meaning that a *scheme* is constitutional as long as it does not make "all murderers" eligible for death. Appellant does not believe the statement can be so construed.

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factors as 'selection factors' alone rests on the assumption, not tested, that the special circumstances perform all of the constitutionally required narrowing for eligibility. Should that assumption prove false, it would further undermine the Court's approval today of these relevant factors"].)

First, Justice Kennedy was referring to the threshold challenge a defendant may make regarding the *particular* eligibility factor (special circumstance) used to make his case a capital prosecution. As the three opinions in *Tuilaepa* make clear (see above), it was *not* intended as a statement that an *entire statutory scheme* would pass constitutional muster as long as all of the eligibility factors, viewed *cumulatively*, make fewer than "all murderers" death eligible. (512 U.S. at 975, 984, 994-995.)

Second, as authority for the phrase used in *Tuilaepa* -- "may not apply to every defendant convicted of a murder" -- Justice Kennedy quoted the holding in *Arave v. Creech* that, "If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." (507 U.S. at 474.) As the quoted statement indicates, *Creech*, too, involved a challenge to the *single* eligibility factor the defendant was convicted of. (See *Creech,* 507 U.S. at 478 [ "In light of the consistent narrowing definition given the 'utter disregard' circumstance by the Idaho Supreme Court, we are satisfied that the circumstance, on its face, meets constitutional standards"].) *Creech* did not involve the kind of *systemic* challenge posed by Mr. Solomon.

Third, the sentence in *Creech* that Justice Kennedy quotes in *Tuilaepa* comes from the holdings of two Supreme Court cases that struck down single eligibility factors that were *so* vague that a sentencer could interpret them as applying to all or almost all murders. (See *Creech*, 507

U.S. at 474, citing, quoting, and paraphrasing the holdings in *Maynard v. Cartwright,* 486 U.S. 356, 364 (1988), and *Godfrey v. Georgia,* 446 U.S. 420, 428-429 (1980). [107] It is one thing for the Supreme Court, in striking down an eligibility factor, to *describe* just how overbroad the factor is. That was all it was doing in *Cartwright* and *Godfrey*. It is quite another to turn that description into a *limitation* on the "constitutionally required narrowing function" referred to in *Beames*. The Supreme Court did not do so in *Cartwright* or *Godfrey*. [108] Nor did it do so in *Creech*. To the contrary, in *Creech,* the Court found the "utter disregard" eligibility factor at issue there constitutional because, in its construction of the factor, the Idaho Supreme

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[107] *Creech* quoted this statement in *Godfrey* -- "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman' " -- and quoted and paraphrased *Cartwright* as "invalidating [an] aggravating circumstance that 'an ordinary person could honestly believe' described every murder." (*Creech,* 507 U.S. at 474.)

[108] To the contrary, in *Godfrey*, when the Court observed that "an ordinary person could honestly believe" that the "outrageously or wantonly vile" eligibility factor "described every murder," it was by way of expressing just how much the Georgia statute failed to meet the requirement that a "capital sentencing scheme must … provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." (446 U.S. at 427, 429.) In *Cartwright*, the Court was doing the same thing. It quoted the "every murder" phrase in *Godfrey* by way of showing by just how far a margin Oklahoma's "especially heinous, atrocious, or cruel" eligibility factor violated the "fundamental constitutional requirement" and "central tenet of Eighth Amendment law" that "capital punishment statute[s]" must provide a "principled means … to distinguish those that received the penalty from those that did not." (486 U.S. at 362-364.)

Court had "*narrowed in a meaningful way* the category of defendants upon whom capital punishment may be imposed." (*Creech*, 507 U.S. at 476; emphasis added.)

The Supreme Court has thus *not* abandoned the narrowing principle. It has not turned the descriptions in *Cartwright* and *Godfrey* into limitations. To comply with the Eighth Amendment, even single eligibility factors must "narrow … in a meaningful way the category of defendants upon whom capital punishment may be imposed." *A fortiori,* an entire statutory scheme, viewed cumulatively, must do so. Neither *Tuilaepa* or *Creech* supports the contrary conclusion reached in *Beames*.

For the reasons stated in the opening brief, the grounds for first-degree murder and the special circumstances authorized by Penal Code §190.2, as expansively interpreted by this Court, do not "genuinely narrow" or "narrow … in a meaningful way the category of defendants upon whom capital punishment may be imposed." (See AOB 458-459.) [109]

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[109] The fact that the combined effect of the statutes creates such an enormous pool of death-eligible defendants also means, given the reluctance of counties to incur the cost of such prosecutions, that a very small percentage of that pool is actually prosecuted capitally and sentenced to death. Thus narrowing occurs in the form of decisions made behind closed doors by prosecutors and county politicians rather than pursuant to the requisite *published* "clear and objective standards … that make rationally reviewable the process for imposing a sentence of death." (*Arave v. Creech,* 507 U.S. at 575, quoting *Godfrey v. Georgia,* 446 U.S. at 428.) Such a system thus guarantees a high degree of the arbitrariness condemned as unconstitutional by the Supreme Court (see *ibid.,* citing *Furman v. Georgia*) while shielding that arbitrariness from judicial scrutiny.

Finally, the failure to "genuinely narrow" the eligibility factors must not be considered in isolation but in conjunction with the other defects in California's capital sentencing scheme raised in the opening brief. (Args. XIII-XX.) "The constitutionality of a State's death penalty system turns on review of that system *in context*." (*Kansas v. Marsh*, _ U.S. _, 126 S.Ct. 2516, 2527, fn. 6 (2006); emphasis added. See also, *Pulley v. Harris*, 465 U.S. 37, 51 (1984) [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review). [110] As described in Args. XIII-XX, California's death penalty statute makes virtually every murderer death-eligible, allows any conceivable circumstance of a crime to justify returning a verdict of death, and allows the decision to be made without critical reliability-safeguards taken for granted in trials for non-capital offenses. The result is a "wanton

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[110] See also *Tuilaepa*, 512 U.S. at 995 [dissenting opn. of Blackmun, J.: "the Court's consideration of a small slice of one component of the California scheme says nothing about the interaction of the various components-the statutory definition of first-degree murder, the special circumstances, the relevant factors, the statutorily required weighing of aggravating and mitigating factors, and the availability of judicial review, but not appellate proportionality review-and whether their end result satisfies the Eighth Amendment's commands"].

and freakish" system [111] that, because it arbitrarily determines the relatively few offenders subjected to capital punishment, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments.

[111] *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (conc. opn. of Stewart, J.).)

## XIX.

## BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS THAT ARE AFFORDED TO NON-CAPITAL DEFENDANTS, THE CALIFORNIA SENTENCING SCHEME VIOLATES BOTH EQUAL PROTECTION AND THE EIGHTH AMENDMENT

The state does not respond to appellant's argument other than to cite this Court's rejection of the claim in a prior case. (RB 166-167.) Appellant will rely on the argument in the opening brief. [112] In addition, it should be clear that the argument is rooted in the Eighth Amendment as well as the Due Process clauses of the Fifth and Fourteenth Amendments. The explicit premise of Arg. XIX, after all, is that the state is affording lesser protections in the very type of cases -- capital cases -- in which a greater degree of reliability is constitutionally required. (See AOB 462.) The basis of that greater-reliability requirement is both Due Process *and* the Eighth Amendment. (See, e.g., *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ["The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the

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[112] If the state responds to the *Cunningham* decision by requiring that aggravating circumstances in DSL cases be made by a jury unanimously and beyond a reasonable doubt, that of course would add to the discrepancies between capital and non-capital cases.

appropriate punishment' in any capital case"]. See also, *Monge v. California*, 524 U.S. 721, 732 (1998) [discussing same as due process right]; *Beck v. Alabama*, 447 U.S. 625, 637-638, and fn. 13 (1980) [both].)

## XX.

## PENAL CODE § 190.3(a) HAS, IN PRACTICE, LENT ITSELF TO SUCH VARIED AND CONTRADICTORY APPLICATIONS THAT DEATH SENTENCES IN THIS STATE ARE METED OUT IN A MANNER SO ARBITRARY AND CAPRICIOUS AS TO VIOLATE THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The state does not dispute that, given the expansive interpretation of factor (a) by prosecutors and this Court, virtually *any* "circumstance ... of the crime" can be argued as aggravating. [113] Nor does it dispute that factor (a) has allowed prosecutors to make the kind of diametrically inconsistent arguments described in the opening brief. (AOB 466-472.) The state's position, rather, is that there is nothing wrong with a death penalty scheme that permits a prosecutor to argue and a jury to find that every capital homicide is aggravating. (RB 167.)

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[113] Since the opening brief was filed, the problem has been exacerbated by, *inter alia*, decisions finding a broad range of victim impact evidence admissible under factor (a). (See, e.g., *People v. Robinson*, 37 Cal.4th 592, 644-652, 656-657 (2005).)

The two cases the state cites -- *Tuilaepa v. California*, 512 U.S. 967, 976-980 (1994), and *People v. Stitely*, 35 Cal.4th 514, 574 (2005) -- held that factor (a) is "not impermissibly vague" on its face. Neither rejected the "as applied" argument that appellant makes. That argument, it should be noted, rests on the Sixth Amendment in addition to the Fifth, Eighth, and Fourteenth. This is stated in the body of the argument (AOB 472) but not in the argument heading. As noted above, due process violations that potentially impact jury determinations implicate *both* the Fifth *and* Sixth Amendments. (*Sullivan v. Louisiana*, 508 U.S. at 278.)

As discussed in Arg. XVIII, finally, the limitless applicability of factor (a) must be considered "in context" (*Kansas v. Marsh*, 126 S.Ct. at 2527, fn. 6)), i.e., the role it plays in a scheme that first fails to narrow the class of those eligible for death, then eliminates critical procedural safeguards in the penalty phase necessary to guard against the arbitrary selection of the few individuals actually chosen to die. (Args. XIII-XIX.) It is the cumulative effect of the defects described in the opening brief that renders the scheme by which Mr. Solomon was sentenced to death violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

## XXI.

## CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND

**DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS**

The state does not respond to appellant's argument other than to cite this Court's rejection of the claim in a prior case. (RB 167.) Appellant will rely on the argument made in the opening brief. (AOB 473-476.)

Appellant will also note the following developments since the opening brief was filed:

1. The United States Supreme Court affirmed that it has looked and will continue look "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.'" (*Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 1200 (2005) [relying in part on international norms to hold that imposing the death penalty on offenders under 18 violates the Eighth Amendment].)

2. Every nation in greater Europe – Eastern as well as Western -- has now abolished the death penalty in law except for the Russian Federation, which is "abolitionist in practice." (Amnesty International, *Abolitionist and Retentionist Countries* [as updated March 13, 2007], at http://web.amnesty.org.)

3. Nine countries have abolished the death penalty for all crimes since the opening brief was filed in 2004 (*ibid.*) and "over 40" have done so

"since 1990" (*id.*, *Facts and Figures on the Death Penalty* [as updated March 14, 2007].)

4. "In 2005, 94 per cent of all known executions took place in China, Iran, Saudi Arabia and the USA." (*Ibid.*)

The latter is not the company the Founding Fathers expected this nation would keep when they adopted the Eighth Amendment. Whether or not capital punishment *per se* is contrary to international norms of human decency, its use as *regular* punishment -- when measured against the "evolving standards of decency" in the nations whose company we *were* meant to keep -- violates the 8th and 14th Amendments. (*Atkins v. Virginia*, 536 U.S. , 304, 314-16 (2002).)

## XXII.

## APPELLANT'S CONVICTIONS AND PENALTY MUST BE SET ASIDE BECAUSE THE ERRORS IDENTIFIED IN ARGUMENTS I-XX ALSO VIOLATE INTERNATIONAL LAW

The state's only response to appellant's argument is that no errors were committed in appellant's case. (RB 167.) The arguments set forth in the opening brief and this reply brief hopefully demonstrate otherwise.

## CONCLUSION

For all the reasons stated in this brief and the opening brief, the guilt and penalty verdicts must be reversed.

Dated: April 26, 2007.

BRUCE ERIC COHEN

Bruce Eric Cohen
Attorney for Appellant
**MORRIS SOLOMON, JR.**

## WORD COUNT CERTIFICATE

**[Rule 8.630(b)(2)]**

The number of words in this brief is: 69,417.

I swear under penalty of perjury that the foregoing is the number given by the word processing program in which the brief was typed.

Dated: April 26, 2007.

BRUCE ERIC COHEN

Bruce Eric Cohen
Attorney for Appellant
**MORRIS SOLOMON, JR.**

## DECLARATION OF SERVICE

**Re: People v. Morris Solomon, Jr., S029011**

I, Bruce Cohen, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442-A Walnut Street, Berkeley, California 94709. I served a copy of the attached **APPELLANT'S REPLY BRIEF** on each of the following by placing same in an envelope(s) addressed (respectively) as follows:

**DAVID ELDRIDGE**
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**MORRIS SOLOMON, JR.**
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Each said envelope was then, on April 30, 2007, sealed and deposited in the United States mail at Kensington, California, Contra Costa County, 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 this 30th day of April, 2007, in Kensington, California.

BRUCE ERIC COHEN

**Bruce Cohen**