No. S031641

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. GREGORY O. TATE, Defendant and Appellant	Alameda County Superior Court No. 93308

APPELLANT'S REPLY BRIEF

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

HONORABLE ALFRED A. DELUCCHI, JUDGE

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No. S031641

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In its brief, respondent observes that "[e]ven a capital defendant is entitled to only a fair trial, not a perfect one," and concludes that "[t]he record shows that appellant received a fair trial." (RB 221.) Appellant begs to differ. As he demonstrated in his opening brief, the record in this case reflects that appellant's trial was tainted with error and unfairness, beginning in jury selection, continuing throughout the presentation of evidence in both the guilt and penalty phases, and culminating in the instructions delivered to the jurors both before and during their lengthy deliberations. Respondent has not shown otherwise, as appellant's reply brief will prove.

In this brief, appellant does not reply to respondent's contentions which are adequately addressed in appellant's opening brief. The absence

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

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

I

THE TRIAL COURT VIOLATED APPELLANT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY, RELIABLE PENALTY DETERMINATION AND DUE PROCESS, AND COMMITTED REVERSIBLE ERROR, BY THE RESTRICTIONS IT IMPOSED ON VOIR DIRE

A. Introduction

As appellant argued in his opening brief (AOB 71-92), defense counsel were acutely concerned that evidence of the circumstances of the crime in this case was very likely to predispose members of the venire to vote for death, to not consider the evidence in mitigation, and therefore reject life imprisonment without possibility of parole as a possible penalty.[1] Consequently, defense counsel drafted a script for the trial court to use in *Hovey*[2] voir dire which addressed the specific nature of the charged crime,

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[1]The circumstances of the crime which defense counsel believed might cause a prospective juror to automatically vote for the death penalty without regard to the evidence in mitigation included the fact that (1) someone had kicked in the back door to the victim's home with the intent to commit a burglary or a robbery; (2) that person murdered the victim during the course of the burglary or robbery; (3) the victim died as a result of multiple stab and puncture wounds, as well as multiple blows inflicted with a blunt instrument; (4) the victim's ring finger was severed and her wedding rings were taken; and (5) the victim's body was discovered by her adult son. Of those circumstance, defense counsel articulated that the fact that the victim's ring finger had been severed and her wedding rings removed was the single most aggravating piece of evidence and of a character that it would predispose a potential juror to automatically vote for the death penalty. (1 RT 229.)

[2]*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80.

special circumstances, and enhancements.[3]

The trial court was initially inclined to include the substance of defense counsel's *Fields* question in voir dire. (1 RT 9-10.) However, after hearing extended argument and conducting its own legal research, the trial court observed that "the law was clear" that death-qualification voir dire "should focus on juror attitude toward the death penalty in the abstract and should not be used to seek a prejudgment of the facts to be presented at the trial." (1 RT 246.) Consequently, the trial court believed it was necessary to restrict voir dire to how the charges in this case would relate to the jurors' attitudes toward the death penalty. (1 RT 247.)

In order to implement its view of the law, the trial court ruled that permissible voir dire could only address the question that if (1) the defendant was convicted of first degree murder and the alleged special circumstances, and (2) the murder at issue was committed during the commission of a burglary and/or a robbery in which a deadly weapon was

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[3]The script called for each prospective juror to (1) assume that certain case-specific aggravating facts had been proved beyond a reasonable doubt and (2) not prejudge the case on the basis of these assumed facts. It culminated with a question directed at each prospective juror: Would the prospective juror necessarily impose the death penalty or life imprisonment without possibility of parole on the basis of the facts and circumstances described if it was proved beyond a reasonable doubt that it was the defendant who had committed those acts? (2 CT 504-505.) A question of this type was understood by counsel and the trial court as generally permissible subsequent to this Court's discussion in *People v. Fields* (1983) 35 Cal.3d 329, 357-358, of the scope and nature of permissible voir dire in capital cases. In the ensuing litigation below concerning the parameters of permissible voir dire, both the trial court and counsel referred to such a question as the "*Fields*" question, and for clarity's sake, appellant will also utilize that characterization in the instant discussion.

used, would both of the possible penalties remain open? (1 RT 247.) Thus, because of the nature of the charges as set forth in the information, counsel were only permitted to voir dire on (1) the felony-murder rule, (2) the fact that the victim was a woman, and (3) the fact that a knife was used in the commission of the murder. (1 RT 247.)

The trial court specifically prohibited voir dire on "those specific little details about the case," i.e., the fact that (1) the victim was bludgeoned to death, (2) the victim's "fingers [*sic*]" were cut off, and (3) the victim was found nude from the waist down, as inquiry concerning these matters during voir dire was "condemned" under *Witherspoon v. Illinois* (1968) 391 U.S. 510, even as modified by *Wainwright v. Witt* (1985) 469 U.S. 412. (1 RT 247-248, 252-253, 256-258.)

In his opening brief, appellant argued that the categorical restrictions placed on voir dire by the trial court in this case were utterly incompatible with implementing the guarantee of an impartial jury within the meaning of Sixth and Fourteenth Amendment to the United States Constitution as interpreted in *Morgan v. Illinois* (1992) 504 U.S. 719, and that this Court had recently applied *Morgan* under virtually identical facts to those presented at appellant's trial to reverse a death judgment in *People v. Cash* (2002) 28 Cal.4th 703.[4]

B. Respondent's Contentions

Respondent contends that no *Cash* error was committed, because the

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[4]Appellant also argued that the trial court's ruling violated his Eighth Amendment right to a reliable penalty determination and due process in this capital case, as well as his equivalent rights to an impartial jury and due process under article 1, sections 7, 15, 16, and 17 of the California Constitution.

voir dire permitted by the trial court "adequately covered three of the five subjects appellant wanted covered by his *Fields* question." (RB 64.) While conceding that the trial court prohibited inquiry into the signature aggravating feature of this case, i.e., the fact that the victim's ring finger was cut off and her wedding rings stolen, respondent contends:

> We continue to maintain, however, that this fact is not the sort of horrible or sensational circumstance that could cause a juror to invariably vote for death, regardless of the strength of the mitigating circumstances. (*People v Cash, supra*, 28 Cal.4th at p. 721.) *There is no suggestion from the evidence that appellant severed LaChapelle's finger when she was alive or that he did it to torture her.* It would appear that his action had a practical - although admittedly callous purpose - to gain possession of the victim's rings.

(RB 66, italics added.)

Not only does respondent's effort to distinguish this case from *Cash* lack merit, but in its zeal to persuade this Court otherwise, respondent affirmatively misrepresents the record. As appellant will demonstrate, (1) the prosecutor at trial introduced evidence that the victim was alive at the time her finger was severed; (2) the prosecutor forcefully argued that very point in his penalty-phase summation; (3) when defense counsel objected that such an argument invited the jury to speculate on whether the victim was conscious, the trial court both overruled the objection *and* justified its ruling in the presence of the jury by commenting that there was some testimony that the victim was both alive and conscious at the time and that the prosecutor's argument was a fair comment on that evidence; and (4) immediately after the trial court's ruling, the prosecutor emphasized the abhorrent nature of appellant's conduct in "sawing on [the victim's] left hand" while "[s]he is laying there, the blood flowing out of her body," and

forcefully argued that such behavior was "disgusting beyond belief," capping this point with a derisive attack on defense counsel for having the effrontery to ask for the jury's mercy for someone who acted in this fashion. (43 RT 5712-5713.)

C. The Trial Court's Ruling Was Clearly Erroneous

Death-qualification voir dire must allow for the scrutiny of the death penalty views of prospective jurors as applied to the general facts of the case about to be tried, regardless of whether those facts have been expressly charged, because a prospective penalty-phase juror who would invariably vote for one or the other available punishments as a result of one or more circumstances likely to be present in the case being tried, without regard for the strength of the aggravating and mitigating circumstances, is subject to a challenge for cause. (See, e.g., *People v. Earp* (1999) 20 Cal.4th 826, 853). On the other hand, this Court has also observed that a defendant has no right to ask specific questions during voir dire that invite prospective jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating evidence. (See, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 990-991.)

As appellant explained in his opening brief, this Court, in *People v. Cash*, *supra*, 28 Cal.4th 703, reconciled those competing principles. The *Cash* court explained that while trial courts enjoyed considerable discretion in deciding where to strike the balance between voir dire so abstract that it fails to identify those prospective jurors whose death penalty views would prevent or substantially impair them in the performance of their duties in the case about to be tried and voir dire so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the likely aggravating and mitigating evidence, that discretion has outer limits

which were exceeded by the trial court's ruling. Thus, the court in *Cash* held that a trial court errs when it categorically prohibits defense counsel from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty if faced with a general fact or circumstance present in the case which could cause some jurors to vote for the death penalty regardless of the strength of the mitigating circumstances. (*Id.* at p. 721.)

In *Cash*, the salient general fact or circumstance that defense counsel wished to examine in voir dire, but which the trial court expressly excluded from the voir dire, was the fact that the defendant had committed murder previously:

> Because in this case defendant's guilt of a prior murder (specifically, the prior murders of his grandparents) was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance. In prohibiting voir dire on prior murder, a fact likely to be of great significance to prospective jurors, the trial court erred.

(*Ibid.*)

Cases subsequent to *Cash* have identified other case-specific facts or circumstances that are likely to be of great significance to prospective jurors such that their presence in a given case could cause a prospective juror to vote for the death penalty regardless of the strength of mitigating circumstances. In *People v. Roldan* (2005) 35 Cal.4th 646, this Court observed that cases involving prior murders, sensational sex crimes, child victims, or torture were "comparable in relevance to the prior murders" in *Cash*. (*People v. Roldan, supra*, 35 Cal.4th at p. 694.) In *People v. Vieira*

(2005) 35 Cal.4th 264, this Court found that multiple murder "falls into the category" of aggravating circumstances likely to be of great significance to prospective jurors. (*People v. Vieira*, *supra*, 35 Cal.4th at pp. 286-287.) Most recently, in *People v. Zambrano* (2007) 41 Cal.4th 1082, this Court suggested that evidence that a murder victim was dismembered while alive was a fact or circumstance comparable to prior murder, the murder of a child, or murder with sexual implications, such that "juror emotions might thereby be aroused." (*People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1122-1123.)[5]

In its effort to distinguish *Cash* and thereby salvage the trial court's ruling, respondent resorts to two arguments it used successfully to defeat *Cash*-based claims in *Roldan*, *Vieira*, and *Zambrano*. Neither argument, however, has merit in the instant case.

First, respondent argues that "*none* of the five facts or circumstances appellant wanted to discuss with the prospective jurors here was a fact likely to be of great significance to the jurors." (RB 62, italics added.) This is simply not true.

In the course of the litigation concerning what facts and circumstances concerning the crime could be addressed during voir dire, defense counsel made it very clear to the trial court that their primary concern was that the single most serious piece of aggravating evidence –

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[5]*Zambrano* was a case in which the victim's decapitated and dismembered body was found in an isolated location near a reservoir. There was no forensic evidence of the cause of the victim's death, and there was no evidence that the victim was dismembered while alive. (*People v. Zambrano*, supra, 41 Cal.4th at pp. 1098, 1122, fn. 7.) This Court's opinion in *Zambrano* was filed on July 30, 2007, after respondent filed its brief in this case.

the fact that the victim's ring finger was severed – would cause a prospective juror to automatically choose the death penalty without giving any consideration to the mitigating evidence, as the following colloquy demonstrates:

> THE COURT: Well, that may be a characteristic of this case, but I don't think you can ask anything more inflammatory than this woman was stabbed and bludgeoned to death in her own house.
>
> MR. PINKNEY: The only distinction I would draw, your Honor, is those blows are received as blows, the cause of death, and indirectly causing the death. I think the severance of a finger is perceived as substantially worse and is a so significantly aggravating fact that it's the kind of fact that alone could shape people's position on the question.

(1 RT 229.)

From this exchange between defense counsel and the trial court, it is clear beyond dispute that defense counsel feared that a prospective juror, confronted with such grisly facts, would automatically vote for the death penalty without so much as considering the mitigating evidence. That fear was one this Court recognized as eminently reasonable in *Roldan* and *Zambrano*, when it acknowledged that the circumstance that a victim had been tortured or dismembered while alive was similar to prior or multiple murder, the presence of a child victim, or sensational sex crimes, insofar as those facts could potentially prejudice even a reasonable juror.[6]

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[6]Defense counsel's fear was not merely theoretical. As appellant demonstrated in his opening brief, that fear was borne out during the voir dire of a number of prospective jurors, each of whom mentioned in some fashion that his or her openness to consider both possible penalties depended on how aggravated the assault on the victim was, whether the victim was tortured, or how hideous the crime was and the nature and

(continued...)

Respondent recognizes as much here when it sought to cast the record in a false light by claiming "[t]here is no suggestion from the evidence that appellant severed [the victim's] finger when she was alive or that he did it to torture her." (RB 66.) The essence of such an argument is that if there was such a suggestion, the dismemberment would clearly be a fact bringing the case within the rule of *Cash*.

As appellant demonstrated earlier, the record flatly contradicts respondent's assertions. At trial, the prosecutor introduced the expert testimony of the pathologist to prove that the victim was alive when her ring finger was severed. (26 RT 3543-3544.) The pathologist testified that the victim could have been conscious while her finger was being severed. (26 RT 3577.) In his guilt-phase rebuttal argument, the prosecutor urged the jury to conclude that the amount of time taken and energy used by appellant to cut off the victim's ring finger with a serrated kitchen knife was indicative of a premeditated intent to kill. (34 RT 4551-4553.) Finally, in his penalty-phase argument, the prosecutor placed special emphasis on the dismemberment of the victim's ring finger. After ridiculing defense counsel's guilt-phase defense, the prosecutor's argument proceeded as follows:

> MR. LANDSWICK [the prosecutor]: Well, you rejected all that nonsense. Put yourself into [the victim's] shoes at the time she's dying. Consider that for a moment. *She was conscious, perhaps* –
>
> MS. BROWNE [defense counsel]: Objection. This is outside the scope of the evidence. He's arguing speculation.

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[6](...continued)
extent of the injuries suffered by the victim. (See AOB 88-90.)

THE COURT: *No, there was some testimony that she may have been alive and not dead, in fact to the degree that her mind was still functioning.*

MS. BROWNE: The degree her heart –

THE COURT: She may have been unconscious, but she was still alive.

MS. BROWNE: Her heart –

THE COURT: *That her heart was still functioning, whatever. And I think it's a fair comment. Go ahead. We don't know – We can't tell, but it's a reasonable inference from the evidence. We don't know when this happened as far as when she actually became unconscious.* Go ahead.

MR. LANDSWICK: And that's what we are here for. That's what you are here for, to determine the correct punishment and to be just in your exactment [sic] of punishment. *Think about it. She is laying there, the blood is flowing out of her body, and the defendant is sawing on her left hand. Think about that. How abhorrent can that possibly be? It is disgusting beyond belief. Mercy? They are going to ask you for mercy? What mercy was exhibited to [the victim]? None.*

(43 RT 5711-5713, italics added.)

Thus, contrary to respondent's assertions, the record not only explicitly demonstrates an evidentiary basis for the proposition that the dismemberment occurred when the victim was both alive and conscious, the trial court's comments that the jury could reasonably infer from the evidence that the victim was conscious, made in the jury's presence, only served to emphasize the significance of that evidence. Respondent's argument is all the more disingenuous when one considers that the prosecutor predictably and immediately exploited this evidence (and the trial court's imprimatur) to effectively undermine defense counsel's case in mitigation.

Respondent's second contention as to why this case falls outside the ambit of *Cash* asserts that "notwithstanding the trial court's ruling on appellant's proffered *Fields* question, the prospective jurors were ultimately given many of the facts and circumstances appellant wanted them to know, and they were then asked whether, if those facts were proved true, they could remain open to imposition of both possible penalties in this case." (RB 63.) This argument derives from language in *Cash* in which the Court observed that not all *Cash* error requires reversal; if a "defendant was []able to use the general voir dire to cure the prejudice resulting from the trial court's erroneous limitation on the scope of voir dire," the error can be harmless. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.)

In its effort to demonstrate that defense counsel in this case was able to use both the death-qualification and general voir dire in this fashion, respondent cites the voir dire responses of nine prospective jurors. (RB 63-66, fn. 7.) However, nothing in the voir dire excerpts cited by respondent lends any support to its argument. In every cited instance, the "facts and circumstances" defense counsel were permitted to probe on voir dire were those strictly limited by the four corners of the charging document.[7]

Indeed, respondent utterly fails to address those instances in the voir dire, referenced by appellant in his opening brief, where prospective jurors indicated that their ability to consider both of the available penalties depended on factors variously described as (1) just how aggravated the attack on the victim was; (2) the manner in which the defendant killed the

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[7]These facts and circumstances were that the murder victim was a woman stabbed to death with a knife in the course of a residential burglary and robbery.

victim; and (3) the details of how the crime was committed, i.e., whether the victim was tortured or shot for no reason, how hideous the crime was, and the nature and circumstances of the injuries suffered by the victim. (See AOB 88-90.) Whenever such responses were elicited and defense counsel requested that the trial court reconsider its ruling on the *Fields* question, the trial court refused such requests. Thus, it is clear that defense counsel here labored under the identical restrictions to voir dire which this Court found to be impermissible in *Cash*. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.)

Ultimately, respondent is forced to concede that "[i]t is correct that during the voir dire in this case the court did not ask about, and did not permit defense counsel to ask about, the one fact appellant calls 'the signature feature' of his case, 'that the victim's finger had been severed in the course of the felony murder in order to steal her wedding rings.' (AOB 88, citing 1 RT 228-229.)" (RB 66.) Consequently, this case is easily distinguishable from *Vieira*, where the trial court neither suggested nor ruled that defense counsel could not conduct voir dire on the subject of multiple murder. (*People v. Vieira*, *supra*, 35 Cal.4th at pp. 286-287.)

Nor is this a case like *Zambrano*, where defense counsel was permitted to voir dire the jury on the prospective jurors' exposure to pretrial publicity, an "inquiry [that] touched on the dismemberment issue." (*People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1122-1123.) Here, by way of contrast, and as respondent is forced to concede, defense counsel was expressly and categorically forbidden from inquiring into the dismemberment matter.

D. The Error Requires Reversal of Appellant's Death Judgment

In his opening brief, appellant demonstrated that the trial court's categorical restriction on death-qualification voir dire which confined questioning within the four corners of the charging document was the type of error that calls for automatic reversal of the death judgment. (AOB 90-92.) Although respondent continues to insist that the trial court's restrictions on voir dire were not improper, it presents a fallback argument on the assumption that this Court will find otherwise.

Respondent first contends that the improper restriction of death-qualification voir dire is harmless error if defense counsel was permitted to explore further the jurors' responses to the facts and circumstances of the case in the general voir dire, or if the record otherwise establishes that no juror had a view about the circumstances of the case that would disqualify that juror. (See RB 67, citing *People v. Cash*, *supra*, 28 Cal.4th at p. 722.) Appellant has already demonstrated that defense counsel here were not permitted to conduct such an inquiry in the general voir dire; voir dire in this case was conducted exactly as in *Cash*, and the trial court's ruling was enforced in every phase of voir dire. (See AOB 71, fn. 20.) Because the trial court's restrictions on voir dire were categorical, it is impossible to parse the record and identify any particular juror in this case who held a view about the circumstances of the case that would cause him or her to be disqualified. This Court has recognized that a defendant placed in such a position by the trial court's restrictions on voir dire is absolved of the burden of identifying a biased juror from the panel ultimately chosen:

> A defendant who establishes that "any juror who eventually served was biased against him" is entitled to reversal. (Citations.) Here, defendant cannot identify a particular

> biased juror, but that is because he was denied an adequate voir dire about prior murder, a possibly determinative fact for a juror. By absolutely barring any voir dire beyond facts alleged on the face of the charging document, the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views, thereby violating defendant's due process right to an impartial jury. (Citation.)

(*People v. Cash*, *supra*, 28 Cal.4th at pp. 722-723.) Consequently, the record cannot be read to establish that none of the jurors had a view about the circumstances of the case that would disqualify that juror, as respondent seems to suggest.

As its last line of defense, respondent cites *People v. Coffman and Marlow* (2004) 34 Cal.4th 1 for the proposition that, because appellant failed to express dissatisfaction with the jury on the ground that his voir dire was restricted on the issue of penalty, any error was nonprejudicial. (RB 67.) Respondent's contention is not only devoid of merit, it again misstates the record.

First, *Coffman and Marlow* is factually distinguishable. There, unlike the instant case, the trial court did not make a ruling precluding defense counsel from asking necessary questions or otherwise "categorically prohibit inquiry into the effect on prospective jurors of the other murders, evidence of which was presented in the course of the trial." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 47.) To the contrary, there the trial court itself on at least one occasion asked a prospective juror whether he could weigh all the evidence before reaching a penalty verdict in a case involving multiple murder. (*Ibid.*)

Second, respondent misstates this Court's holding in *Coffman and*

Marlow. There, this Court held:

> Even if counsel believed they were precluded from inquiring into a juror's ability to fairly determine penalty in such a case, Coffman failed to exhaust her peremptory challenges *or* to express dissatisfaction with the jury as sworn on this ground. Any error, therefore, was nonprejudicial. (Citation.)

(*Ibid*, italics added.)

Here, unlike *Coffman and Marlow*, appellant exhausted his peremptory challenges, a fact that respondent neglects to mention. (34 RT 3349.) Furthermore, and contrary to respondent's suggestion, *Coffman and Marlow* does not require that a defendant exhaust all peremptory challenges *and also* express dissatisfaction with the jury as sworn as a result of the restrictions placed on voir dire in order to insulate himself from a claim that the error was harmless.[8] As appellant's exercise of all peremptory challenges made clear, he was dissatisfied with the composition of the jury and powerless to displace jurors seated after the prosecution altered the composition of the panel of 12 jurors.[9]

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[8]Although in a somewhat analogous but more exacting procedural context, this Court has required that a defendant challenging on appeal the denial of a challenge for cause must first have expressed dissatisfaction with the jury as finally constituted (see *People v. Weaver* (2001) 26 Cal.4th 876, 910-911), that rule has not been applied in cases tried at the time of appellant's trial because the law was then still in flux. (*People v. Boyette* (2002) 29 Cal.4th 381, 416.) Of course, a defendant who was denied a challenge for cause could identify a biased juror based upon the voir dire responses and thus was in a position to assess the jury as ultimately constituted and to express dissatisfaction when appropriate. In contrast, when *Cash* error occurs, the restrictions upon voir dire prevent the defendant from identifying whether biased jurors are ultimately empaneled. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.)

[9]In suggesting that appellant failed to express dissatisfaction with

(continued...)

In any event, during the extensive pretrial litigation culminating in the trial court's ruling, the trial court made it crystal clear that defense counsel had made an adequate objection to fully preserve the trial court's ruling for appellate review:

> THE COURT: I think if I ask that question that if this was up on review, I'd get – I'd get torn apart on *Witherspoon* if I permitted that question. It's in the record, and if Tate gets convicted and if – if he ends up with the death penalty and this is up on review, I can imagine the appellate lawyers would salivate over that if I permitted that question. Okay. But that's the ground rules. Okay. And your objection is noted, and that's the guidelines. Okay?
>
> MR. PINKNEY [defense counsel]: And it is clear that we are requesting an opportunity to ask more specific facts, specific questions?
>
> THE COURT: God, I hope the record shows that, because I let you say that twice, and I've invited that comment from you. And — and you've heard my ruling, and that is going to be the ruling. We are not going to go into the specifics. We are going to restrain or restrict our voir dire to the four corners of the Information.
>
> MS. BROWNE [defense counsel]: And your Honor —
>
> THE COURT: Yes.
>
> MS. BROWNE: — this means we do not have to preserve our objection every time, ask a question, and get a ruling from you?

---

[9](...continued)
the jury, respondent cites a portion of the record (24 RT 3352) with no further explanation. (RB 67.) That reference appears to be to the proceedings on December 1, 1992, when defense counsel, having already exhausted all 20 peremptory challenges to the 12 jurors in the jury box, expressed satisfaction with the panel of 4 alternate jurors seated to that point.

> THE COURT: No, you don't have to do that. I've made my ruling. You've made your position clear. If I am wrong in my ruling then it's subject to appellate review accordingly.
>
> MS. BROWNE: Thank you.
>
> THE COURT: But after giving this a lot of thought and reviewing some of the briefs that have been filed with respect to other capital cases I've tried, I think this is — I think this is the best way to do it, the least controversial, and the safest as far as protecting the record. Okay? So that will be the rule.

(1 RT 257-258.)

In sum, defense counsel did everything they could to convince the trial court to allow necessary voir dire on whether the fact that the victim's ring finger was severed was so aggravating a circumstance that a prospective juror would invariably vote for the death penalty without considering the mitigating evidence. The court's categorical rejection of that request, and its ruling confining the permissible voir dire to the four corners of the charging document, made it impossible for appellant to identify such a particular biased juror. Under these circumstances, so markedly at variance with those presented in *Coffman and Marlow*, the conclusion is inescapable that trial court's error was prejudicial per se.

Respondent's contentions and misrepresentations of the record notwithstanding, the penalty judgment must be reversed because, under the compulsion of this Court's holding in *Cash*, the trial court's error denied appellant his due process right to an impartial jury and a reliable penalty determination as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

II

THE ERRONEOUS HARDSHIP EXCLUSION OF PROSPECTIVE JUROR ROBERT WALKER, JR. REQUIRES REVERSAL OF THE CONVICTION, SPECIAL-CIRCUMSTANCE FINDING, AND DEATH JUDGMENT

A. Introduction

After he had been death-qualified and during the course of general voir dire, Robert Walker, Jr., a 19-year old African-American male prospective juror, was excused over defense objection for reasons of undue hardship, although he did not request to be so excused. (8 RT 1117-1145.) As appellant demonstrated in his opening brief, the record does not support the trial court's action in removing Walker from the jury panel, and the trial court's action in wrongly removing a prospective juror violated appellant's state and federal constitutional and statutory rights to a fair and impartial jury, so that reversal of the conviction, special-circumstances finding, and death sentence is required.

Respondent makes three contentions. First, "[w]e submit that both the record and the law support the trial court's decision to excuse [Walker]." (RB 70.) Second, respondent contends that appellant has forfeited a claim in connection with his argument. "At no point at trial did appellant make the argument that the trial court would err in excusing [Walker] on "student hardship" grounds because such grounds are not authorized by law. It is well settled that appellant's [*sic*] may not proffer theories of error for the first time on appeal. (*People v. Thomas* (1992) 2 Cal.4th 489, 519-520.)" (RB 71.) Finally, respondent contends that if this Court were to find that the trial court abused its discretion in excusing Walker for hardship, such error was not and indeed could not be prejudicial

under this Court's jurisprudence as expressed in *People v. Mickey* (1991) 54 Cal.3d 612, 666-667: "Defendants have [*sic*] 'right to jurors who are qualified and competent, not to any particular juror.' (*People v. Holt* (1997) 15 Cal.4th 619, 656.)" (RB 72.) As a result, in respondent's view, "[w]e see no reason for this Court to grant appellant's request (AOB 103) and reconsider *Mickey* and *Holt*." (RB 72.)

Preliminarily, respondent's contention that appellant has made a procedurally-barred claim on appeal cannot be supported, as respondent simply misreads appellant's argument in order to prop up a strawman for gratuitous pummeling, Moreover, and as appellant will show, respondent's contention on the merits of whether the trial court committed error in excusing Walker is also incorrect. Finally, respondent fails to give a reasoned response as to why this Court should continue to maintain that a trial court's abuse of discretion in improperly excusing a prospective juror is a wrong without a remedy, especially where the defendant's life is at stake.

B. No Procedural Bar Forecloses Appellant's Claim

It is useful to recognize exactly what appellant asserts on appeal as well as what transpired in the trial court. In his opening brief, appellant argued that the record did not support the hardship excusal of prospective juror Walker. There, he argued that the trial court failed to follow the procedures and standards for granting excuses from jury service, as set forth in California Rules of Court, rule 860, which rule in turn implemented the mandate of Code of Civil Procedure section 204, subdivision (b). (See AOB 97-101, Argument II.C.)

In the trial court, it was manifestly clear that defense counsel objected to the excusal of Walker on the ground that he was not entitled to

be excused as a result of a hardship, especially one he was not claiming. Defense counsel complained that the trial court was encouraging Walker to seek an excusal as a result of the trial court's concern that jury service in this case would "screw up [Walker's] semester in school." (8 RT 1142-1143.) Certainly, as the following excerpt from the record demonstrates, that is the basis the trial court discerned for the defense objection:

> THE COURT: I think it will. Yeah. All right. *Ms. Browne, over your objection I'm going to excuse Mr. Walker. I don't see any point in having this kid lose two months of school sitting here*. I know you like him as a juror, but, on the other hand, he should be treated like everybody else. He is a full-time student. Seventeen units is a big load to carry. And to sit here for two months *I think would unduly burden him*, and he admitted as much just now.

(8 RT 1144-1145, italics added.)

Indeed, respondent could not fail to recognize that appellant's claim on appeal mirrors defense counsel's objection below:

> The entirety of appellant's objection below to the excusal of [Walker] on full-time student hardship grounds was that [Walker] did not and was not requesting that he be excused. (8 RT 1192-1195.)[10] Appellant reiterates that position in this Court, asserting that Code of Civil Procedure sections 204 and 218, as well as former rule 860 of the California Rules of Court (current rule 2.1008) expressly support his position. (AOB 97-99.) Appellant protests that the "entire issue" of [Walker's] "excusal was initiated by the trial court in what was likely a well-intentioned, but inappropriately personal and paternalistic, effort to shepherd a young African-American student through his college years without the distraction of serving as a juror in a capital case." (AOB 99.)

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[10]This appears to be a typographical error; respondent is referring to 8 RT 1142-45.

(RB 69-70.) However, later in its brief, respondent inexplicably takes appellant to task for allegedly making an argument on appeal that was not made below: "[I]n arguing that the trial court's discharge of [Walker] 'did not comply with applicable statute and rule,' appellant seemingly contends that a 'student hardship' is not authorized by law. (AOB 97-101.)" (RB 70.) Respondent, having propped up this strawman, proceeds to knock it down: "This claim is forfeited. At no point at trial did appellant make the argument that the trial court would err in excusing [Walker] on 'student hardship' grounds because such grounds are not authorized by law." (RB 71.)

Respondent misreads appellant's claim. Contrary to respondent's crabbed reading, appellant does not claim on appeal that the trial court erred in excusing Walker on "student hardship" grounds because such grounds are not specifically enumerated in the applicable statute or court rule. Appellant only argued that excusal for a ground such as student hardship, which is not specifically enumerated in statute or court rule, should be evaluated by its closest analog among the grounds actually enumerated in rule 860 and Code of Civil Procedure section 204, i.e., financial hardship. (AOB 100-101.) Further, as appellant argued in his opening brief, the body of case law concerning whether some potential dimunition of earnings constitutes a valid hardship indicates that the burden and hardship must be "real." (*People v. Kwee* (1995) 39 Cal.App.4th 1, 5-6, fn. 1, quoting *People v. McDowell* (1972) 27 Cal.App.3d 864, 874.)

Appellant's claim here is no different than the argument he made below. The trial court understood the defense to be objecting to Walker's excusal on the basis that he was not claiming an undue hardship and his

status as a student did not amount to an undue hardship on the facts presented. This is assuredly not like *People v. Thomas*, *supra*, 2 Cal.4th at pp. 519-520, the case cited by respondent, where an appellate claim that the trial court had erroneously admitted character evidence was deemed forfeited because an objection on that ground had not been made below and did not form the basis of the trial court's ruling.[11]

Here, by way of contrast, appellant has fully preserved his claim. As this Court has explained in an analogous context:

> In the *Witherspoon* context a challenge for cause puts the question raised by that type of challenge in issue in a timely fashion. *The voir dire in the death qualification process of jury selection in a capital case is necessarily focused on the standard by which that challenge is to be judged.*

(*People v. Holt*, *supra*, 15 Cal.4th at p. 656, italics added.)

Once the trial court interrupted defense counsel's death-qualification voir dire of Walker and began to inquire on the issue of whether Walker ought not serve because of his status as a full-time student, the question raised by appellant's objection below necessarily involved whether the trial court's ruling was authorized by law and the facts. Respondent's attempt to invoke a forfeiture rule here is simply misguided and unwarranted.[12]

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[11]Nor is this case similar to *People v. Mickey*, *supra*, 54 Cal.3d at pp. 664-665, or *People v. Champion* (1995) 9 Cal.4th 879, 906-907, where appellate claims that the trial court erred in excusing jurors for hardship were properly deemed forfeited because the appellants had never objected to any of the hardship excusals in the trial court on any grounds whatsoever.

[12]See also *People v. Lucas* (1995) 12 Cal.4th 415, 487-489 [forfeiture rule would not be invoked in the case of a claim on appeal that a sitting penalty juror's discharge for "trivial" hardship reasons was untimely when that ground was not raised below].

C. The Record Does Not Support the Hardship Excusal of Walker

As respondent correctly notes, a trial court has the authority to excuse a person from jury service for undue hardship, "a determination that is reviewed for abuse of discretion. (See Code Civ.Proc., § 204, subd. (b); *People v. Mickey*, *supra*, 54 Cal.3d at p. 665.)." (*People v. Lucas* (1995) 12 Cal.4th 415, 488.) That being said, respondent's analysis of the record fails to demonstrate that the trial court's ruling amounted to an "exercise[] of legal discretion . . . grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195.)

Respondent justifies the trial court's ruling as follows:

> We submit that both the record and the law support the trial court's decision to excuse [Walker]. Although [Walker] did not first initiate a request that he be excused for hardship, he did state in response to the court's questions that the trial would likely interfere with his school schedule. (8 RT 1144.) That circumstance clearly renders the excusal reasonable.

(RB 70.)

There are two problems with respondent's position. First, it ignores the legal principles and policies governing the granting of excuses from jury service. Second, it misstates the record as to the response actually given by Walker. Consequently, it comes as no surprise that respondent finds no fault with the trial court's ruling.

Although respondent acknowledges that "a criminal defendant has a constitutional right to a trial by jury drawn from a representative cross section of the community," in the same breath it asserts that "the right to a randomly selected jury is purely statutory," as if to say that trial court error in jury selection is somehow disconnected from the constitutional right to a

jury drawn from a representative cross section of the community. (RB 69.) That is simply not true, as California courts have long recognized.

As this Court has long made clear, because the process for excusing potential jurors for hardship is highly discretionary, the courts must be alert to possible abuses that would negatively affect the creating of juries reasonably reflecting a cross section of the community. (*People v. Wheeler* (1978) 22 Cal.3d 258, 273; see also *People v. Basuta* (2001) 94 Cal.App.4th 370, 396 [courts' statutory obligation to maintain record of juror hardship requests provides means to prove that the manner by which potential jurors are excused for hardship improperly results in panels not representative of the community].) Appellant made this very point in his opening brief in arguing that the trial court's conduct in excusing Walker for hardship was inconsistent with the applicable statutes and court rule. (AOB 99-101.) Respondent, however, provides no explanation for how the trial court's failure to comply with statute or court rule in excusing Walker for hardship over objection was consistent with a reasoned and principled exercise of judicial discretion in the implementation of empaneling a jury which reasonably reflected a cross section of the community.

It is axiomatic that a trial court is not authorized to excuse a prospective juror on grounds of undue hardship unless such person claims the exemption. (Code Civ. Proc., §§ 204, subd. (b), 218; California Rules of Court, rule 860, subd. (b)(2).) Yet respondent provides no justification for the trial court's conduct in excusing Walker for hardship in the absence of Walker's request to be excused for that or any other reason. Here, Walker made no claim to an excusal or deferment of his jury service as a result of undue hardship. This is significant, given the circumstances known to Walker and the trial court.

When the trial court first addressed the venire as a group on September 10, 1992, it made a number of points in anticipation of the reality that it would be faced with a large number of requests by prospective jurors seeking to avoid jury service in a lengthy case in which a man's life was at stake. The trial court expressly stated that it would be "a normal feeling" for prospective jurors to want to get out of serving on "the king of all cases." (2 RT 285.) However, the trial court warned: "It's not going to be easy to be excused from this case." (2 RT 286.) It set forth ground rules for jurors seeking to be excused for reasons such as economic hardship, scheduled vacations, medical problems, and student status.[13] Prospective jurors were told to provide written proof verifying their hardship claims. (2 RT 286-288.)

Turning to the actual voir dire of Walker, it must be reiterated that he himself did not raise the issue of hardship or seek to be excused from jury duty in this case. Indeed, he underwent death-qualification questioning from the trial court, the prosecutor, and defense counsel without mentioning that his status as a student would inconvenience him in any manner, much less constitute an undue hardship. (8 RT 1117-1133.) He then underwent general voir dire questioning from the trial court, the prosecutor, and

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[13]It appears that the trial court did not anticipate having any students in the venire:

> THE COURT: And if you're a student, you'll have to let us know then, too, because if you miss a month of school, you may not be able to pick up the time. Chances are we won't have any students here now. This is September. All the students are back in school, and they usually postpone their jury duty to the summer.

(2 RT 287.)

defense counsel before the trial court interrupted defense counsel's voir dire to broach the question of whether Walker was a student and would be burdened by serving on appellant's jury. (8 RT 1133-1142.) Walker's questionnaire did not contain any intimation that his status as a full-time student might affect his ability to serve as a juror in this case.[14] (15 CT 3547-3564.) Under these circumstances, it defies common sense – as well as the experience of anyone who has practiced in the trial courts as an attorney or judge – that if Walker was in fact concerned that jury service in this case would constitute an undue hardship, he would not have mentioned that concern at the first available opportunity.

The record here bears this out. In the only two other instances in which the trial court excused prospective jurors because their status as students constituted an undue hardship, the fact that the prospective juror was seeking to be excused for undue hardship as a result of his or her status as a full-time student was made known to the trial court before any voir dire started. In the case of prospective juror Lisa Shu, her request to be excused was made known in her questionnaire response, where she stated that she could not afford to miss her classes because they had already been paid for. (13 CT 2993.) Thus, her request to be excused for hardship was addressed before any oral voir dire was conducted, and the parties stipulated that she be excused on that ground. (2 RT 349-350.) In the case of prospective juror Adam Kremen, Kremen presented the trial court with a written

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[14]Question No. 61 in the juror questionnaire asked: "Is there any matter that has not been covered by this questionnaire that you feel that you should mention at this time that might affect your ability to be fair and impartial in this case?" (6 CT 1222 [Sample questionnaire], 15 CT 3564 [Walker's questionnaire].)

verification from the University of California attesting to his status as a full-time student and the requirement that he attend all classes. Consequently, the parties stipulated to his excusal on hardship grounds prior to oral voir dire, and the trial court accepted the parties' stipulation. (7 RT 1048-1049; 2 CT 535.)

Respondent is therefore incorrect in asserting that because the trial "court granted similar excusals on the same basis," its ruling with respect to Walker was proper. (RB 71-72.) The two other prospective jurors who were excused for undue hardship on the basis of their status as full-time students were excused because they requested to be excused, the parties stipulated to their excusal, and perhaps most significantly, they presented reasons and proof why they could not reconcile jury service in this case with their school schedules. In comparison, Walker's circumstances differed in every relevant respect.

Respondent also claims that the trial court's ruling was justified notwithstanding the absence of a request from Walker to be excused because "he did state in response to the court's question that the trial would likely interfere with his school schedule," and therefore '[t]hat circumstance clearly renders the excusal reasonable." (RB 70.) Respondent misstates Walker's response. Walker did not say that jury service would interfere with his school schedule. Rather, in response to leading questions from the trial court suggesting that he would be granted an excusal if he were to say that serving on the jury while maintaining a full-time school schedule "was going to be a burden," Walker responded: "Most likely it would probably be a burden." (8 RT 1144.) "Interference" connotes a coming into opposition with a task so as to hamper or hinder its completion, whereas "burden" connotes a weight added to one's responsibilities making them

more difficult to shoulder.

Jury duty is in most cases a burden to those citizens otherwise concerned with earning a living or going to school to obtain an education. It is also a necessary obligation and duty that is part and parcel of citizenship. As Chief Justice George has observed:

> Jury service lies at the heart of our American judicial system. It is the duty and responsibility of all qualified citizens, but it is also an opportunity to contribute to our system of justice and to our communities.

(Admin. Off. of the Courts, Fact Sheet (Jan. 2008) Jury Improvement Program, p. 1, <http://www.courtinfo.ca.gov/reference/documents/factsheets/jurysys.pdf.>.)

Consequently, the burdensome nature of jury service is not the standard by which undue hardship is measured under California law. As appellant explained in his opening brief (see AOB 100-101), because full-time student status is not among the enumerated grounds constituting undue hardship as set forth in the relevant rule of court (Cal. Rules of Court, rule 860, subd. (c)(3)), it is useful to examine the state of the law construing the most analogous grounds, i.e., extreme financial burden.

The cases cited by appellant in his opening brief, none of which respondent has chosen to address, make clear that where the crux of a hardship request is economic, "some potential diminution of earnings" is not a valid hardship excuse. "Only when the financial embarrassment is such to impose a real burden and hardship does a valid excuse of this nature appear." (*People v. Kwee*, *supra*, 39 Cal.App 4th at pp. 5-6, fn. 1, quoting *People v. McDowell*, *supra*, 27 Cal.App.3d at p. 874.) The most that the record in this case presents by way of justification for the trial court's ruling is Walker's statement that jury service "[m]ost likely [] would probably be a

burden." (8 RT 1144.) This highly equivocal statement, extracted from Walker only after a series of leading questions from the trial court suggesting that the trial court thought it was unduly ambitious for Walker to serve as a juror in this case while having to face final examinations in December or January, does not reach the threshold of an extreme or real burden, within the meaning of "undue hardship" as set forth in the statutory scheme.

Respondent points to the trial court's opportunity to assess Walker's demeanor as a further justification for the ruling. (RB 70.) However, contrary to respondent's position, the trial court made no reference whatsoever to Walker's demeanor in arriving at its ruling. Indeed, to the extent demeanor can be considered here, it only tends to support appellant's position that because Walker was willing to serve as a juror in this case notwithstanding his school schedule, his excusal on grounds of undue hardship was improper. It was defense counsel, and not the trial court, who pointed to Walker's long hesitation before he acquiesced in the trial court's suggestion that jury service in this case would be a burden as evidence that Walker did not seek to be excused for undue hardship. (8 RT 1145.) The trial court rejected defense counsel's complaints in this regard, and while doing so, reiterated the actual reasoning for its ruling:

> THE COURT: *I'm not here to have kids flunk out of school by taking two months sitting here as a juror when we have lots of other jurors.* I know he is 19 years old, he is an Afro-American. You probably want to see him as a juror. I understand that. *But I don't want Walker to blow a whole semester at school because of this case.*

(8 RT 1145, italics added.)

Respondent's reliance on the trial court's opportunity to observe

Walker's demeanor is simply misplaced. (See, e.g., *Snyder v. Louisiana* (2008) ___ U.S. ___, 128 S.Ct. 1203, 1209 [Supreme Court declines to accord deference to state court ruling where the record did not demonstrate that trial court relied on demeanor evidence to credit prosecutor's justification for exercising peremptory challenge].)

The bottom line is that no matter how well-intentioned one might characterize the trial court's concern for the educational prospects of a young African-American summoned for jury duty, the discretion afforded to trial court in empaneling a jury did not give it license to remedy that concern by excusing Walker for undue hardship absent facts establishing a real, rather than a speculative, burden. This was especially true when Walker himself did not request to be excused. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) Jury selection, especially in a capital case, is not the proper forum for a judge to utilize to also advance personal beliefs concerning educational or social policy, no matter how benign, especially when those beliefs collide with the legal guidelines and principles governing the empanelment of a jury that reflects a representative cross section of the community. (*People v. Visciotti* (1992) 2 Cal.4th 1, 37-38 [Trial court is not free to forego compliance with statutory procedures designed to further the policy of random selection].) Here, the manner in which the trial court excused Walker belied the admonishment it gave to the prospective jurors at the commencement of the case when they were told it would be difficult to avoid serving on this jury because it was the trial court's responsibility under the law to see that the defendant was tried by a fair and impartial jury. (2 RT 285-286.)

D. The Erroneous Excusal of Prospective Juror Walker Requires Reversal of Both the Guilt and Penalty Judgments

In his opening brief, appellant argued that the improper removal of Walker from the jury panel violated the statutory provisions for removal of jurors for undue hardship (Code Civ. Proc., § 204, subd. (b); Cal. Rules of Court, rule 860), infringed upon appellant's Sixth and Fourteenth Amendment rights to an impartial jury (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149 [Sixth Amendment right to jury trial]; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [due process right to trial by impartial jury]); arbitrarily deprived him of a state-created liberty interest guaranteed by the Due Process Clause (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347); and violated his Eighth Amendment right to reliable sentencing determinations in a capital case. He also argued that although this Court has observed that error of the type committed by the trial court here is neither prejudicial per se nor, as a practical matter can prejudice be demonstrated (see, e.g., *People v. Holt*, *supra*, 15 Cal.4th at p. 656; *People v. Mickey*, *supra*, 54 Cal.3d at pp. 666-667), this Court should reconsider its position that the improper removal of prospective jurors for reasons not related to their views on the death penalty invariably results in harmless error. (AOB 101-107.)

Respondent asserts that appellant's invitation should be declined: "We see no reason for this Court to grant appellant's request (AOB 103) and reconsider *Mickey* and *Holt*." (RB 72.) However, respondent has failed to address any of the reasons or arguments appellant offered in support of his request that this Court reconsider *Mickey* and *Holt*. Accordingly, no reply to respondent's contention is necessary.

In closing, it bears repeating that the unlawful removal of a prospective juror in a capital case should not be an unenforceable violation. On the contrary, because of the constitutional implications of any interference with jury selection procedures, as well as the impossibility of assessing prejudice when it occurs, the error mandates automatic reversal of the guilt conviction and death judgment. Therefore, the erroneous removal of prospective juror Robert Walker, Jr., requires reversal of the entire judgment.

III

THE ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR ALEAN SAUNDERS-PINKNEY REQUIRES REVERSAL OF THE CONVICTION, SPECIAL CIRCUMSTANCE FINDING AND DEATH JUDGMENT

A. Introduction

In his opening brief, appellant argued that the trial court committed reversible error in granting the prosecutor's challenge for cause and ultimately excusing a 52-year-old female African-American prospective juror, Alean Saunders-Pinkney, under the authority of *Wainwright v. Witt* (1985) 469 U.S. 412. Although Saunders-Pinkney had already been death-qualified during sequestered and individual voir dire, three weeks after that voir dire, the prosecutor informed the trial court that because he had a "funny feeling" about Saunders-Pinkney, he made inquiries and was now alleging that she had falsely represented her academic credentials and achievements in her juror questionnaire.[15] Over defense objections that the challenge was both untimely and that excusal of the prospective juror would be unauthorized and improper on the mere representations of the prosecutor without affording Saunders-Pinkney an opportunity to respond to the prosecutor's claims under oath, the court accepted the prosecutor's representations and summarily sustained the challenge, ordering that Saunders-Pinkney be excused for cause without further investigation into

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[15]According to the prosecutor, Saunders-Pinkney stated in her questionnaire that she had obtained a doctorate in education from the University of San Francisco (hereinafter referred to as "USF")when in fact she had not yet submitted her dissertation and had not yet been awarded her doctorate. The prosecutor confirmed that Saunders-Pinkney was in the USF Ph.D program. (13 RT 2090.)

the prosecutor's representations. (AOB 108-137.)

Respondent claims that the excusal of Saunders-Pinkney for cause was not error, and that although the trial court "did invoke *Wainwright v. Witt*, in context the court's citation was not a finding that it was excusing [Saunders-Pinkney] *solely* because of her views on the death penalty." (RB 73, original italics.) Thus, according to respondent, "any error here is not reversible per se," and "if the trial court erred in excusing [Saunders-Pinkney] for cause, any error did not prejudice appellant." (RB 73.)

Respondent's protestations notwithstanding, neither the record nor the law comes close to justifying the trial court's action in removing Saunders-Pinkney from the jury panel. The trial court's action in wrongly removing this prospective juror violated appellant's constitutional and statutory rights and requires reversal of his conviction and death sentence. (*People v. Heard* (2003) 31 Cal.4th 946, 966-967.)

B. The Trial Court's Inquiry in Response to the Prosecutor's Challenge for Cause After Saunders-Pinkney Was Initially Death-Qualified Was Inadequate

When considering respondent's claims, it is important to keep certain facts in mind. First, it was the prosecutor's position below that Saunders-Pinkney should be excused for cause because she had perjured herself when she asserted in her questionnaire that she had received a doctorate in education from USF in 1992, when the true state of affairs, according to the prosecutor, was that Saunders-Pinkney was in the doctorate program, but had not yet received her doctorate. (13 RT 2092.) Second, the trial court did not view the matter as a "question of perjury," but rather as one that caused it to question Saunders-Pinkney's credibility because she "purports to be something she isn't," and "is playing games

with the court."[16] (13 RT 2092, 2150, 2156-2157.) Third, defense counsel requested the opportunity to have Saunders-Pinkney return to court to respond to the prosecutor's accusations because the information received by the prosecutor was not given under oath and might well be mistaken, whereas Saunders-Pinkney's responses were given under oath. (13 RT 2150-2151, 2158-2159.) Fourth, the trial court made it clear upon reflection that the basis for granting the prosecutor's challenge was *Wainwright v. Witt*, and not Code of Civil Procedure section 229.[17] (13 RT 2163.)

Preliminarily, it must be noted that respondent faces an uphill struggle in convincing this Court that the trial court's discharge of Saunders-Pinkney was for grounds other than her substantial impairment under *Wainwright v. Witt*. The trial court expressed in its ultimate ruling that the *sole* basis for excusing Saunders-Pinkney was her impairment under *Witt*. Indeed, the trial court expressly took the opportunity to make the record crystal clear on this very point so there would be no dispute over

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[16]Concluding solely on the basis of the prosecutor's representations that Saunders-Pinkney had not been "forthright" with court and counsel regarding her credentials, the trial court observed:

> THE COURT: Maybe that's one little white lie, and how many others are there in that particular questionnaire. Now she's been caught in perpetrating – I'm not going to say a fraud, but a misconception on this court and on everybody in this courtroom. How can you trust the rest of her answers? How do I know?

(13 RT 2158.)

[17]Code of Civil Procedure section 229 sets forth the bases for challenges for implied bias.

its reasoning.[18] (14 RT 2163.) Consequently, respondent's contention that appellant's attack on the trial court's *Witt* ruling "is both off-base and too narrow" (RB 85) is unavailing.

The essence of respondent's argument can be found in its assertion that "[h]ow the trial court handled the inquiry into the allegation of misconduct was a matter for its discretion, and the court did not abuse that discretion in not re-opening the voir dire of [Saunders-Pinkney] in order to address the prosecutor's assertions about her." (RB 82-83.) In support of this proposition, respondent can only muster a citation to language in a marginally relevant decision of the Court of Appeal, embellished with the observation that the trial court could reasonably conclude that no useful purpose was served in hearing a response from Saunders-Pinkney, as she might be embarrassed by any such inquiry. (RB 83.)

Respondent's reliance on *People v. Stewart* (1985) 171 Cal.App.3d 59 is misplaced. There, the question on appeal was whether the trial court erred in exercising its discretion under Evidence Code section 352 to allow the prosecution to impeach the defendant with evidence of his prior

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[18]The trial court's belief that Saunders-Pinkney's "resumé inflation" did not involve perjury or fraud, but was more in the nature of "a little white lie" (13 RT 2158) or "playing games with the Court" (13 RT 2157), is consistent with its misgivings that Saunders-Pinkney could be relied upon to perform the duties of a juror (as defined by the court's instructions and the juror's oath) in deciding the unique issue of penalty, a fundamentally normative decision. Because it is difficult, if not impossible, to correlate "resumé inflation" with implied bias for or against a party on the factual issue of guilt or innocence, the trial court's finding that Saunders-Pinkney's discharge was justified under *Witt*, and not for any other type of implied bias, is understandable (assuming it can otherwise be justified at all on the record facts). Of course, appellant maintains that the trial court's *Witt* ruling is not supportable by the record.

convictions for robbery. After examining this Court's precedents, the Court of Appeal concluded that "lacking clear direction from the Supreme Court, we turn to settled principles generally applicable when a trial court has discretion to act." (*People v. Stewart*, *supra*, 171 Cal.App.3d at p. 65.) However, as respondent fails to appreciate, even in cases where this Court has not given clear direction, those "settled principles generally applicable" mandate that "[t]o exercise judicial discretion, a court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. (*Ibid.*, citing *In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

The trial judge in this case, unlike his colleague in the context addressed by the Court of Appeal in *Stewart*, did not lack for clear direction from this Court when deciding whether or not to excuse a juror for cause under *Witt*. This Court has recently reiterated that the trial court's duties were explicitly set forth in the *Witt* decision itself:

> Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would "prevent or substantially impair" the performance of his or her duties (as defined by the court's instructions and the juror's oath)
> . . . .

(*People v. Stewart* (2004) 33 Cal.4th 425, 445, quoting *Witt*, *supra*, 469 U.S. at p. 424.)

It also bears repeating that the trial court's task in this regard is a serious one, in which it has the responsibility of protecting the defendant's rights:

[T]he trial court has a serious duty to determine the question

> of actual bias, and a broad discretion in its rulings on challenges therefor. . . . In exercising its discretion, the trial court must be zealous to protect the rights of an accused.

(*Dennis v. United States* (1950) 339 U.S. 162, 168.)

Here, it is evident that the trial court, having accepted the prosecutor's unsupported hearsay allegations concerning Saunders-Pinkney, concluded that it could not trust her ability to perform the duties of a juror in the penalty phase of a capital case. It is equally evident that respondent has pointed to no evidence in the record that would support the conclusion that the trial court had sufficient information regarding Saunders-Pinkney's state of mind to permit it to make a reliable determination of whether she was substantially impaired under *Witt*.

Respondent attempts to make much out of the fact that "one of appellant's defense counsel stated that she had no reason not to accept the prosecutor's recitations as true. (13 RT 2151.)" (RB 82.) Respondent paints with too broad a brush, as defense counsel's remarks only indicated that she did not disbelieve that the prosecutor had accurately conveyed to the court what he had been told. Contrary to respondent's implication, defense counsel's remarks were hardly an endorsement that what the prosecutor had been told about Saunders-Pinkney was either accurate or truthful. As defense counsel's remarks demonstrate, her objection was that the court could not reliably conclude that Saunders-Pinkney had made any misrepresentations under oath on the basis of what the prosecutor had been told on the telephone:

> MS. BROWNE [defense counsel]: One, I under no circumstances in any fashion disbelieve Mr. Landswick [the prosecutor]. I'm sure that he has represented exactly what's happened over the telephone. Two, the woman over the telephone could have been mistaken. She was not answering

> a questionnaire under penalty of perjury. Ms. Saunders-Pinkney was. Three, I don't think that one should assume that the person over the telephone who looked up some records and could have been mistaken should be believed over Ms. Saunders-Pinkney, who came into court and asked to be referred to as doctor. If one is going to challenge a person like – for this reason, one should be sure of the facts, and the way one would be sure of the facts is to bring her in and ask her whether, in fact, this is true or whether the person on the phone was correct. It doesn't make sense to me to sit there and presume that the person over the telephone is correct and the person who has answered the questionnaire under penalty of perjury is lying.

(13 RT 2150-2151.)

Appellant argued in his opening brief that defense counsel's concerns about the reliability of the information conveyed to the trial court by the prosecutor were prescient and not merely unwarranted speculation. (AOB 114-115, fn. 43.) In support of that argument, appellant asked this Court to take judicial notice of a claim in *In re Robert Young*, California Supreme Court Case No. S115318, filed April 23, 2003, where Young alleged prosecutorial misconduct in jury selection proceedings by the same prosecutor who represented the People at appellant's trial, and of three documentary exhibits pertaining to Saunders-Pinkney which were lodged with the petition in that case in support of that claim. (*In re Robert Young*, *supra*, Exhibit Nos. 127, 148, and 153.)

In its brief, respondent opposes the request for judicial notice, arguing that "[o]n appeal, the propriety of a trial court ruling is judged on the record before the trial court at the time of the ruling." (RB 83-84.) Appellant does not quarrel with that proposition, but it has no relevance to the request for judicial notice made in this case. Contrary to respondent's implication, appellant does not ask this Court to take judicial notice of the

truth of the allegations made in *Young* that the prosecutor engaged in a pattern of misconduct in capital jury selection by misrepresenting facts concerning the academic credentials of female African-American prospective jurors in order to justify their removal from the venire.[19]

Instead, appellant's request for judicial notice asks this Court to consider its own records and files in the *Young* case, containing the business records of the University of San Francisco (hereinafter "USF") pertaining to when Saunders-Pinkney received her doctorate, for the limited purpose of showing the inaccuracy of the factual representations made to the trial court by the prosecutor.[20] Respondent claims that under these circumstances, it would be unfair to the People were the Court to grant appellant's request for judicial notice. (RB 84.) However, appellant's claim on appeal is that the trial court's ruling unfairly prevented him from making any factual showing below to rebut the hearsay claims of the prosecutor. It is disingenuous in the extreme for respondent to now claim unfairness, when the People were

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[19]Whether the prosecutor engaged in the type of misconduct described in Young's petition, either in Young's case and/or in appellant's case is, as respondent correctly points out, a matter that can be raised in a petition for writ of habeas corpus. (See RB 84.) That issue is not raised here.

[20]Exhibit No. 127 is a certified copy of the USF "Transcript of Academic Record" for Alean C. Saunders, DOB 09-27-1940, reflecting that she was awarded a Doctor of Education degree from the School of Education on May 21, 1992. Exhibit No. 148 consists of excerpts from Alean Caroline Saunders-Pinkney's " A Dissertation Presented to the Faculty of the School of Education, International Multicultural Education Program," USF, May 1992, presented to and accepted by the Faculty of the School of Education on May 20, 1992. Exhibit No. 153 consists of excerpts from the proceedings at appellant's trial involving the voir dire and subsequent excusal for cause of Saunders-Pinkney; i.e., 10 RT 1569-1598; 13 RT 2090-2091, 2150-2163.

both the instigator and the beneficiary of the trial court's one-sided ruling.

As respondent acknowledges, the rule it invokes here is intended to prevent the unfairness that results when one side is permitted to press a theory on appeal that it did not raise below. (RB 84.) Here, appellant vigorously raised the argument below that it was both unfair and improper for the trial court to excuse a juror for cause on the mere representations of the prosecutor about alleged misstatements the prospective juror made on voir dire. It is hardly unfair to the People for this Court to now refer to its own records to consider that defense counsel's prediction below about the unreliability of the prosecutor's representations was not mere speculation.

Not only does respondent's argument fail to identify evidence in the record supporting the trial court's ruling, it pays no heed whatsoever to the considerable body of law discussing the duties of a trial court when determining whether to discharge a juror upon an accusation that the juror gave false answers during voir dire examination. Respondent's failure in this regard is particularly striking, as many of the cases which it cites for the proposition that juror misconduct occurs when jurors conceal relevant facts or give false answers during voir dire examination also address the procedures necessary to determine whether misconduct sufficient to warrant discharge occurred. These cases uniformly demonstrate that the necessary procedures were not followed at appellant's trial.

In re Hitchings (1993) 6 Cal.4th 97, cited by respondent for the proposition that the giving of false answers during voir dire constitutes juror misconduct, is instructive. There, this Court was faced with a claim of juror misconduct premised on a juror falsely concealing extensive prior knowledge of the facts and circumstances of the case during her voir dire

examination.[21] In resolving the claim, this Court pointed to the fact-finding process engaged in by the referee below:

> The referee was able to view the demeanor of the witnesses and evaluate their veracity. This ability is of *vital importance* when, as here, the critical decision turns on the *credibility* of the witnesses.

(*In re Hitchings*, *supra*, 6 Cal.4th at p. 114; italics added.)

Similarly, in *People v. Diaz*, another case cited by respondent for the proposition that juror concealment on voir dire constitutes misconduct, the concealment bore on a clearly material fact (i.e., that the juror had been the victim of the same type of crime with which the defendant was being charged) and the fact of concealment was determined during a hearing at which the juror testified. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 931.)

Respondent simply cannot provide authority for the proposition that the trial court's treatment of the issue raised by the prosecutor's representation was adequate to permit a reliable determination of whether cause for a juror's discharge was established. Nor has respondent made the effort to respond to any of the cases cited by appellant in his opening brief which underscored the inadequacy and impropriety of the trial court's actions. (AOB 128-133; see, e.g., *People v. Burgener* (1986) 41 Cal.3d

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[21]Such prior knowledge was clearly a material issue in *Hitchings*. "[The juror's] concealment of her knowledge of the case was unquestionably a material issue on voir dire. Indeed, the record shows the prospective jurors' prior knowledge of the case was of critical importance to defense counsel." (*In re Hitchings*, *supra*, 6 Cal.4th at p. 116.) Here, by way of contrast, the prosecutor's allegations concerning Saunders-Pinkney's voir dire responses do not even raise a suggestion of bias. (See *In re Hamilton* (1999) 20 Cal.4th 273, 300-301; *People v. Majors* (1998) 18 Cal.4th 385, 417-418.)

505, 520-521 [juror accused of misconduct not given opportunity to explain; discharge based on foreperson's unsupported assertions and hearsay was improper]; *People v. Compton* (1971) 6 Cal.3d 55, 59-60 [criticizing failure of trial court to question juror concerning alleged misconduct prior to discharging juror]; *People v. Huff* (1967) 255 Cal.App.2d 443, 447-448 [finding trial court abused discretion by summarily declaring a mistrial solely based on representations by an officer that he observed defendant talking to two jurors during a recess without giving defendant an adequate opportunity to explain].)

Respondent also neglects to reconcile the disparate manner in which the trial court handled the excusal of Saunders-Pinkney and the subsequent excusal of alternate juror Jim Amos. Amos was discharged at the penalty phase of the trial after the prosecutor alerted the trial court to the fact that Amos had approached him during a recess concerning a traffic incident in the parking lot involving Amos and the prosecutor's colleague. Although defense counsel requested that Amos be discharged based on the prosecutor's representations alone, the trial court did not do so until it had had an opportunity to hear from the alternate juror himself. (41 RT 5619; see AOB 133-134.)

The simple fact is that the trial court should have heeded defense counsel's repeated requests to re-open the voir dire examination of Saunders-Pinkney in order to address the prosecutor's accusations. (See *People v. McNeal* (1979) 90 Cal.App.3d 830, 839.) The trial court's handling of the matter of Saunders-Pinkney's alleged resumé-inflation was wholly inadequate to constitute a reliable determination of the facts to show that she was substantially impaired in deciding the issue of penalty or that she harbored any kind of bias. Respondent has failed to demonstrate that

the trial court's ruling was proper under *Witt* or any other rubric.

C. The Trial Court's Error Requires That, at Minimum, Appellant's Death Judgment Be Reversed

As appellant demonstrated in his opening brief, the improper removal of a prospective juror on *Witt* grounds necessitates the reversal of the death judgment without inquiry into prejudice. (AOB 134-136; *Gray v. Mississippi* (1987) 481 U.S. 648, 668; *People v. Stewart*, *supra*, 33 Cal.4th at p. 454.) Respondent seeks to avoid this result by arguing that although the trial court explicitly stated that it had discharged Saunders-Pinkney on the authority of *Witt* and for no other reason, it didn't really mean what it said. (RB 85-87.) According to respondent, *Witt*'s automatic reversal rule is rooted in the constitutional right to an impartial jury, and "the excusal of [Saunders-Pinkney] was not about 'impartiality'." (RB 86-87.) Therefore, in respondent's view, "any error [in the excusal of Saunders-Pinkney] was clearly harmless as it did not affect appellant's right to a fair and impartial jury." (RB 87.) However, respondent utterly fails to demonstrate what the excusal of Saunders-Pinkney *was* "about," if not impartiality.

Other than statutory ineligibility or incapacity, as defined in Code of Civil Procedure sections 203 and 228, all other challenges for cause explicitly implicate partiality by requiring the discharge of prospective jurors who harbor an actual or implied bias. (Code of Civ. Proc., § 225.) Respondent's argument appears to suggest that the trial court could properly discharge Saunders-Pinkney for cause absent statutory or constitutional authority. This cannot be correct, and the trial court itself made it clear upon which grounds it was acting, i.e., *Witt*. Under the prevailing federal and state standards, appellant is entitled to an automatic reversal of the death judgment in his case. Consequently, there is no need

to address respondent's superfluous arguments as to why the trial court's error was harmless with respect to the death judgment.

Although appellant argued in his opening brief that the consequence of the trial court's error in excusing Saunders-Pinkney for cause also requires that the guilt-phase judgment be reversed without reference to prejudice (see AOB 135-136), respondent does not address this argument head on. Instead, respondent avoids the thrust of appellant's argument by asserting that appellant could not have suffered any prejudice. (RB 86-88.)

Respondent's arguments are not germane here because they rest on the incorrect premise that the trial court's error is amenable to harmless-error analysis. Appellant has already demonstrated in his opening brief why harmless-error analysis is inadequate to assess the impact of the error. (See AOB 135-147.) As respondent does not undertake to contradict appellant's argument in this regard, no useful purpose is served by repeating the original argument here.

Even so, it still must be observed that what respondent has to offer on the harmlessness of the trial court's error is both self-contradictory, speculative, and confusing. For instance, respondent begins by correctly stating that "if the trial court erred, and [Saunders-Pinkney] gave sincere and credible answers on her questionnaire and orally, she was a juror who could have imposed the death penalty." (RB 87.) However, this assertion is of no benefit to respondent, because the erroneous exclusion of a death-qualified juror requires automatic reversal under *Witt*. The fact that such a juror could have returned a death verdict does not remove the taint of the error.

Having just said that if the trial court erred and Saunders-Pinkney had given sincere and credible answers showing she could have returned a

death verdict, respondent then surmises that the prosecutor would have exercised a peremptory challenge against Saunders-Pinkney if she been asked to return to court for further questioning on her credentials.[22] (RB 87.) In respondent's view, the prosecutor would have been uncomfortable with Saunders-Pinkney on the jury, believing that she would be angry with him for having raised the issue. (RB 87-88.) This argument assumes that the trial court could not have conducted the further questioning of Saunders-Pinkney without indicating to her that the inquiry had been instigated by the prosecutor's allegations. It is far more reasonable to assume that the trial court would have conducted further questioning of Saunders-Pinkney in a scrupulously neutral fashion, so as to insulate both parties from any possible resentment. Given that Saunders-Pinkney's voir dire responses indicated no reluctance whatsoever to impose the death penalty where appropriate, it is sheer speculation for respondent to now assume that the prosecutor would have necessarily exercised a constitutionally-permissible peremptory challenge to excuse her.[23]

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[22]Of course, respondent's speculative argument in this regard is beside the point, even if one could assume the prosecutor would have acted as respondent suggests. Pronouncements of both this Court and the United States Supreme Court demonstrate that automatic reversal of the death judgment is required where a prospective juror has been erroneously discharged under *Witt*, and "the error is not subject to a harmless-error rule, regardless whether the prosecutor may have had remaining peremptory challenges and could have excused [the prospective juror in question]." (*People v. Heard*, *supra*, 31 Cal.4th at p. 966, citing *Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668.)

[23]Indeed, in many respects, Saunders-Pinkney's responses indicated she would be the kind of juror the prosecutor would have welcomed in this case. She entertained a view that the undue length of time between the

(continued...)

D. Conclusion

The record is clear that the trial court improperly excused Saunders-Pinkney on *Witt* grounds on the bare hearsay assertions of the prosecutor, who challenged her for cause three weeks after she was found to be a death-qualified juror. Respondent has not shown otherwise. This error requires, at a minimum, that the death judgment be reversed without inquiry into prejudice. Respondent cites no authority to indicate that any other outcome is permitted. Appellant has also demonstrated that the taint of the trial court's error infringed upon appellant's right to a fair and impartial determination of his guilt. Respondent does not address this claim. Consequently, the entire judgment must be reversed.

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[23](...continued)
time a criminal was caught and punished was troubling to her, as it undermined the deterrent message in the community. (10 RT 1589-1590.) Moreover, it was likely that Saunders-Pinkney would empathize with the plight of the victim in this case, because of similarities in their ethnicity, background, and training. This was a point the trial court underscored in its death-qualification voir dire of Saunders-Pinkney. (10 RT 1587-1588.)

IV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY, AND COMMITTED REVERSIBLE ERROR, BY ERRONEOUSLY EXCUSING FOR CAUSE PROSPECTIVE JURORS BARBARA EDMISTON, ALVIN DEAN, PAUL MERZ, MARIA RAMIREZ AND ROBERTA FINCH

A. Introduction

In his opening brief, appellant argued that, in addition to the excusal of Alean Saunders-Pinkney (see Argument III, *ante*), the trial court also erred in excusing for cause five prospective jurors under the authority of *Wainwright v. Witt* (1985) 469 U.S. 412. (AOB 138- 225.) As to each of these prospective jurors, respondent contends that the trial court acted competently and within its discretion in dismissing them from the venire, claiming that substantial evidence supports each of the trial court's rulings and that deference requires that each ruling be upheld on appeal. (RB 88-112.) As appellant will demonstrate, respondent's contentions can only be credited if this Court were to abdicate meaningful appellate review by according blind deference to the trial court's determinations.

B. Recent Developments in the Law

Subsequent to the filing of appellant's opening brief, the United States Supreme Court in *Uttecht v. Brown* (2007) __ U.S.__ ,127 S.Ct. 2218, had occasion to consider the role of federal habeas courts in reviewing claims of error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt, supra*, 469 U.S. 412.[24] In reversing the

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[24] *Uttecht* was decided 10 days before respondent's brief was filed in this Court, however respondent does not rely on *Uttecht*.

decision of the Ninth Circuit that, under 28 U.S.C. §§ 2254(d)(1)-(2) and *Williams v. Taylor* (2000) 529 U.S. 362, 413, both the trial court and the Supreme Court of the state of Washington had unreasonably applied *Witherspoon* and its progeny, a bare majority of the high court discerned the following relevant principles:

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. [Citation.] Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. [Citation.] Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. [Citation.] Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. [Citation.]

(*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2224.)

Citing *Witt* as well as *Darden v. Wainwright* (1986) 477 U.S. 168, 178, the *Uttecht* majority opined that "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2224.)

This Court views the relevant pronouncements of the *Uttecht* majority as consistent with California's deference rule in reviewing *Witt* claims: "The high court's most recent ruling on this subject reaffirms that deference to the trial court is appropriate when the prospective juror's

remarks are ambiguous or equivocal." (*People v. Lewis* (2008) 43 Cal.4th 415, 483 [citing *Uttecht*]; *People v. Kelly* (2007) 42 Cal.4th 763, 778; *People v. DePriest* (2007) 42 Cal.4th 1, 20-21.) It thus appears that the framework for analyzing appellant's claims has not changed to appellant's detriment in the wake of *Uttecht*. However, the closeness of the decision in *Uttecht*, even in a case where the federal habeas statute required an additional and binding layer of deference to the determinations of the state court (see *Uttecht v. Brown, supra*, 127 S.Ct. at p. 2224), strongly suggests that a close and careful examination of what transpired during voir dire in the trial court is still required in resolving whether the trial court committed *Witt* error in this case.

C. Prospective Jurors Improperly Excused

1. Barbara Edmiston

Edmiston was excused for cause by the trial court after voir dire in which the trial court and counsel for both parties participated. (9 RT 1338-1362.) The trial court excused Edmiston on its own motion, without the prosecutor having tendered a challenge. (9 RT 1361.)

Preliminarily, respondent maintains that from a thorough reading of the record it is evident that the trial court divined the prosecutor's intent to challenge Edmiston for cause, and thus granted a dormant *Witt* challenge soon to emerge from the prosecutor's mouth.[25] (RB 91, fn. 11.) Appellant

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[25]Respondent does not appear to take issue with appellant's assertion that the analysis for assessing excusals for cause under *Witt* is the same regardless of whether the challenge originates from the prosecution, the defense, or on the trial court's own motion. (See AOB 139, fn. 48.)

does not read the record in this fashion.[26] Although *where* the challenge originates has no bearing on the legal standard employed to assess whether the challenge meets constitutional muster, the fact that *the prosecutor* did not make a challenge for cause against Edmiston does inform the analysis of whether the trial court's ruling is sustainable.[27]

Respondent contends that "[t]here exists substantial evidence in the record to support the trial court's excusal of [Edmiston] for cause." (RB 92.) In parsing Edmiston's voir dire responses, respondent points to her statement that she did not have a strong enough sense of herself to vote for the death penalty and that upon hearing a recitation of the charges in this case, she replied that the death penalty would not be an option for her. (RB 92.) As appellant demonstrated in his opening brief, this is not a fair reading of the entire record. At no point did Edmiston state she could not impose the death penalty in this case. At most, when she was first advised

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[26]Indeed, the trial court invited a challenge for cause from the prosecutor at an early point in its own voir dire and before counsel were permitted to ask their own questions, yet the prosecutor did not accept the invitation. (9 RT 1346.) Even after conducting his own voir dire, the prosecutor did not interpose a challenge for cause (9 RT 1351-1357), nor did he do so after defense counsel's voir dire (9 RT 1357-1361).

[27]The fact that the prosecutor did not himself request that Edmiston be excused for cause is relevant insofar as it tends to show that he did not believe she was substantially impaired. Indeed, where the shoe was on the other foot, as it was in *Uttecht*, the majority did not deem it irrelevant that defense counsel had failed to object to the excusal of a juror for cause. The *Uttecht* majority found significance in defense counsel's failure to object to an excusal for cause. It reasoned that defense counsel might well be pleased to have the trial court remove the juror in question for cause rather than having to expend a precious peremptory challenge himself to the death-qualified, but otherwise unwelcome juror. (*Uttecht v. Brown*, *supra*, 127 S.Ct. at pp. 2229-2231.)

of the circumstances of the case by way of the trial court's deficient *Fields*[28] question, Edmiston indicated that her inclination would be to impose life imprisonment without the possibility of parole but she had not foreclosed the possibility of the imposition of the death penalty because she did not yet know enough about the case to make a decision. (9 RT 1346-1347.) A fair reading of her voir dire responses reveals that she believed she could make the difficult choice to impose the death penalty in the appropriate case. (9 RT 1359-1361.) Respondent is simply incorrect in asserting that '[t]he record is thus clear that this prospective juror had an opposition to the death penalty that would have substantially impaired her ability to perform her duties as a juror." (RB 92.)

In making its ruling, the trial court explicitly noted that it was excusing Edmiston because it felt that serving on the jury was "going to be a real problem" for her. Relying on its view that Edmiston had given "inconsistent answers" and that there were "long pauses before she answered," the trial court believed Edmiston to be disqualified under *Witt*. (9 RT 1361-1362.) Predictably, respondent seizes on the trial court's reasons for disqualifying Edmiston and argues that unblinking deference on appeal requires that the trial court's ruling be upheld. (RB 92-94.)

The glaring defect in respondent's argument is that it does not address the trial court's and the prosecutor's role in creating whatever inconsistencies appeared in Edmiston's voir dire responses, nor does it address appellant's argument that the trial court employed the incorrect

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[28]See also Argument I in appellant's opening brief, addressing the trial court's erroneous pretrial ruling under *People v. Cash* (2002) 28 Cal.4th 703, categorically limiting case-specific voir dire to the facts presented by the four corners of the charging document.

legal standard in finding Edmiston to be substantially impaired. (See *People v. Stewart* (2004) 33 Cal.4th 425, 446-447.) In his opening brief, appellant set forth in detail the manner in which the trial court's ill-considered and erroneous restrictions on case-specific references in voir dire influenced Edmiston's responses. (AOB 155-158.) Respondent fails to provide any analysis whatsoever of the adequacy of the trial court's voir dire in this respect.

Additionally, as appellant demonstrated in his opening brief, the parties' voir dire of Edmiston was frequently interrupted by the trial court. The trial court felt itself pressed for time and employed a number of inappropriate questions to disqualify Edmiston. (AOB 150-160.) The best example of this can be found when the trial court utilized the prosecutor's favorite hypothetical question, asking Edmiston whether she could sign her name to the jury's death verdict in this case as its foreperson, assuming that all jurors had reached such a verdict after full consideration of the evidence in aggravation and mitigation and that she were chosen as the foreperson. (9 RT 1356-1357.) While such a question might arguably be proper if put by the prosecutor in aid of his exercise of a peremptory challenge, it was improper for the trial court to ask the question itself and then rely on Edmiston's reply to disqualify her for cause. Again, respondent fails to provide any answer to appellant's argument in this regard. Instead, respondent insists it is still appropriate for this Court to defer to the judgment of the trial court that frankly sought shelter in the safe harbor of this Court's deference.[29]

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[29]In rejecting defense counsel's argument below that Edmiston was both willing and able to vote for the death penalty in this case if the

(continued...)

Appellant submits that it would be singularly inappropriate to accord deference to the trial court's ruling in this instance. This Court has held that when the trial court engages in "awkward," "imprecise" or "unclear inquires" during voir dire, the resulting voir dire is "inadequate" and it is reasonable to expect that a prospective juror's responses will be preceded by appropriate reflection, often resulting in answers that are "less than definitive," or characterized by "vagueness." (*People v. Heard* (2003) 31 Cal.4th 946, 964-968.) Under such circumstances, the voir dire provided by the trial court below is devoid of sufficient substance "to which [this Court] might properly defer." (*People v. Heard, supra*, 31 Cal.4th at p. 968.)

Indeed, even the majority opinion in *Uttecht* suggests that deference is not properly accorded when the trial court conducts an inadequate voir dire:

> The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a

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[29](...continued)
circumstances justified it, the trial court somewhat cynically observed:

> THE COURT: Doesn't the record reflect that? And it's arguable – I'm sure that if your client gets convicted on appeal, some appellate lawyer is going to make that argument. But the case law also says that the reviewing court will defer to the judgment of the trial court. I've said I've observed her demeanor, I listened to her answers, her long pauses, her vacillation. I think under *Wainwright v. Witt* she is disqualified.

(9 RT 1361-1362.)

> prospective juror *and the trial court has supervised a diligent and thoughtful voir dire*, the trial court has broad discretion.

(*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2230; italics added.)

As appellant demonstrated in his opening brief, the voir dire of Edmiston was characterized not only by the problems resulting from the trial court's independent and separate error in inappropriately restricting case-specific voir-dire, in violation of *People v. Cash* (see AOB 142, fn. 51), but by the trial court's appropriation of the prosecutor's hypothetical question relating to whether the prospective juror would be able to sign a death verdict as the jury's foreperson.

Perhaps most significantly, this case demonstrates that the trial court employed an erroneous standard for concluding that Edmiston was substantially impaired under *Witt*:

> The record here, however, suggests that 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. . . .

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.)

In explaining its ruling, the trial court stated that it believed Edmiston would have "a real problem" if she was selected as a juror in this case. (9 RT 1361.) This is no different than saying that she would find it "very difficult" to impose a death sentence.

To sum up, although the trial court's voir dire in this instance was not perfunctory, it was neither diligent nor thoughtful. Nothing respondent has said in its brief proves otherwise. Consequently, according whatever deference might otherwise be due to the trial court's judgment in dismissing Edmiston for cause under *Witt*, the record is still insufficient to

support its ruling. Under the correct legal standard, Edmiston was not substantially impaired to serve as a juror at appellant's trial and her excusal requires that the death judgment be reversed.

2. Alvin Dean

Dean, a 68-year-old African-American Vietnam veteran and retired postal clerk, with previous experience as a teacher, was excused for cause on the prosecutor's motion after the trial court invited the challenge, observing that Dean was disqualified under *Witt*, "[a]s clear as can be." (14 RT 2376-2379.) In making this ruling over what it characterized as "the defense's vigorous objection," the trial court explained its reasons for deeming Dean substantially impaired. It viewed Dean's assurance that he would follow the court's instructions and be able to consider both available penalties as a product of leading questions from defense counsel, and commented it had

> observed the juror's demeanor,[30] the court observed the way the juror answered these questions from the very beginning with respect to the system, and I'm not satisfied that he would be the type of juror that will pass under *Wainwright v. Witt*.

(14 RT 2378-2379.) The trial court also observed that Dean had left blank a question in the questionnaire concerning his feelings about the death penalty. (14 RT 2380.)

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[30]Defense counsel objected that the suggestion that there was something about Dean's demeanor, e.g., some behavior or physical response, that supported the trial court's conclusion was not to be found in the record. He wanted the record to reflect that other observers saw Dean's responses differently. The trial court allowed for that possibility, but without specifically pointing to anything about Dean's demeanor, claimed it was satisfied that its own observations were the only ones that mattered. (14 RT 2379-2380.)

Respondent takes the position that the trial court did not commit error in excusing Dean for cause, claiming that substantial evidence supports the trial court's ruling. (RB 97.) Further, in respondent's view, "to the extent this prospective juror gave conflicting answers the trial court resolved those differences adversely to appellant by granting the challenge." According to respondent, "because the trial court's determination as to [Dean's] true state of mind is supported by substantial evidence, it is binding on this Court." (RB 97.)

As appellant will show, respondent's position is not well taken. Not only does respondent engage in occasional mischaracterization of Dean's voir dire responses, it attempts to support the trial court's ruling that Dean was substantially impaired by reference to Dean's responses which have nothing to do with his beliefs about the death penalty. Perhaps of greatest significance is that respondent entirely neglects to address appellant's argument that Dean's excusal under *Witt* was improper because the trial court's conduct of Dean's voir dire was improper, resulting in a record containing insufficient information to enable it to make a reliable determination of whether Dean was substantially impaired. (See AOB 173-182.)

In claiming that substantial evidence supports the trial court's ruling, respondent begins by noting that in his jury questionnaire, Dean "stated his religious views would affect his services as a juror." (RB 97.) This reference to the questionnaire is misleading, incomplete, and incorrect.[31] It refers to a question in the section of the questionnaire entitled "Political,

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[31]Respondent refers to Dean's response to Question No. 23, but provides an incorrect page citation. (16 CT 3985.)

Religious, and Other Organizational Affiliations."[32] The question reads: "Would any of your religious views in any way affect your service as a juror?" and calls for a "Yes" or "No" response, followed by a space asking the prospective juror to "Please comment." While it is true that Dean placed a check mark next to the "Yes" choice, respondent fails to mention that he wrote "Difficult to say" in the space provided for comment. (16 CT 3985.) More significantly, respondent fails to mention that the questionnaire contained a group of questions specifically designed to address the *Witt* question, entitled "Attitudes Regarding the Death Penalty."[33] This section contained a specific question pertaining to the prospective juror's religious views and whether they would affect the penalty determination.[34] By now, it should come as no surprise that respondent neglects to indicate that Dean did not provide an answer to this question. In any event, if Dean's religious views had any bearing whatsoever on whether he was substantially impaired under *Witt*, one would have expected those views (or Dean's failure to provide a written response to Question No. 57) to be addressed by follow-up questions by the trial court or counsel during the oral voir dire, especially as the trial court had instructed the prospective jurors in Dean's panel accordingly:

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[32]This section contained questions designed to elicit information concerning the prospective jurors' general qualifications to serve, and did not directly relate to the death-qualification issue.

[33]This section of the questionnaire is described in detail in Argument III of appellant's opening brief, at pages 117-118.

[34]Question No. 57 reads: "Do you hold to any religious or philosophical principle that would affect your ability to vote for the death penalty as a judgment in this case? Yes ___ No ___. If yes, please explain."

> THE COURT: If for some reason there is a question which is here that you don't want to answer, *just leave it blank*, and if *we* think it's important, we'll ask it to you when you're here all by yourself.

(10 RT 1515, italics added.)

Respondent's strained efforts notwithstanding, the fact that Dean answered Question No. 23 in the affirmative, but commented that it was difficult for him to say in what way his religious beliefs might affect his service as a juror in general, does not amount to "substantial evidence" that his attitudes toward the two possible punishments rendered him substantially impaired under *Witt*.[35]

Respondent next offers as "substantial evidence" Dean's responses concerning a negative experience he had with the criminal justice system when his daughter was killed, as well as his inclination to empathize with appellant's plight because looking at appellant caused him to think about how his own son might be judged if accused of a similar crime.[36] In

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[35]To the extent it is relevant, Dean noted in his response to Question No. 22 ["Do you have a religious affiliation?"] that he was a member of the Episcopal Church. In response to the subquestion "Are you active?" he responded "Occasionally" and explained: "Attend when I can and feel the need." (16 CT 3985.)

[36]Apparently, Dean's daughter had been killed in an automobile accident and he felt the person responsible had received a very lenient sentence after unduly prolonged legal proceedings. (14 RT 2371-2372.) Dean made it clear that this negative experience with the criminal justice system would not cause him to tilt toward the death penalty for appellant as a kind of "payback" for the wrong his family may have suffered. In doing so, he offered that, if anything, he was inclined to "probably" vote for life imprisonment without possibility of parole. He explained that when he looked at appellant, he was reminded of his own 35-year old son, a quiet and unassuming person who, if "pushed into a corner where he cannot

(continued...)

respondent's view, these responses justify the trial court's ruling. (RB 97.)

In taking this position, respondent again fails to address each and every point appellant made in his opening brief in arguing that this Court could not properly rely on the trial court's assessment that Dean was substantially impaired under *Witt*. For instance, respondent does not address appellant's arguments that the trial court (1) was predisposed to find Dean substantially impaired and unfairly treated his failure to answer the question in the juror's questionnaire calling for his (or his spouse's) feelings about the death penalty as evidence that he was substantially impaired (see AOB 173-175); (2) improperly conflated death-qualification voir dire with general voir dire on the question of implied bias when addressing Dean's negative experience with the criminal justice system in the case of his daughter's death (see AOB 176-177); (3) misinterpreted Dean's comments about how his feelings for his son might influence the performance of his duties as a juror in judging the issue of penalty in appellant's case (see AOB 177-178); and (4) misinstructed Dean concerning the scope of the mitigating evidence he could properly consider at the penalty phase, thereby shading Dean's subsequent voir dire responses in a manner that convinced the trial court that he was substantially impaired (see AOB 178-180).

No useful purpose is served by repeating appellant's various arguments here when respondent has not provided any analysis to rebut those arguments in its brief. Suffice it to say that respondent's circular argument that "because the trial court's determination as to [Dean's] true

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[36](...continued)
retreat," might well do something he would later "regret." (14 RT 2374-2375.)

state of mind is supported by substantial evidence, it is binding on this Court" (see RB 97) has no fair application when the trial court's improper conduct of the voir dire shapes the erroneous *Witt* ruling itself.[37] Neither the authorities cited by respondent[38] nor *Uttecht v.Brown*, *supra*, 127 S.Ct. 2218, can be read to suggest otherwise. As this Court has observed:

> On appeal, we will uphold the trial court's ruling if it is *fairly* supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.

(*People v. Mayfield* (1997) 14 Cal.4th 668, 727, italics added.)

To sum up, the trial court's ruling here is not fairly supported by the record and does not bind this Court. As Dean never expressed a view concerning the death penalty that indicated he would be unable to impose or be substantially impaired in imposing such a punishment, granting the prosecutor's challenge for cause under *Witt* was error requiring the automatic reversal of the death judgment.

3. Paul Merz

The trial court invited and granted the prosecutor's challenge to Merz under *Witt* following a long and contentious voir dire after it appeared certain that he had passed muster under death-qualification questioning . Defense counsel were denied, over their objection, any

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[37]Here too, respondent has chosen to neglect appellant's argument that accepting the trial court's ruling as binding would violate appellant's Eighth and Fourteenth Amendment right to meaningful appellate review, and run afoul of the Supreme Court's reasoning in *Gray v. Mississippi* (1987) 481 U.S. 648. (See AOB 164-167, 180-181.)

[38]*People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115, and *People v. Bradford* (1997) 15 Cal.4th 1229, 1319-1321.

opportunity to rehabilitate Merz. In his opening brief, appellant demonstrated that Merz never expressed any views on the issue of the death penalty so as to justify his excusal under *Witt*. (AOB 182-198.) Respondent contends that the trial court's ruling was proper as it was supported by substantial evidence. (RB 101.) In making this claim, respondent asserts that "[a]ppellant seemingly concedes that [Merz's] statements regarding his views on the death penalty were contradictory or equivocal." (RB 102.) Further, respondent finds no fault with the trial court's decision to completely foreclose any rehabilitative voir dire, weakly suggesting that appellant's objection below was "unclear" or not specific enough. In any event, as respondent would have it, the trial court properly exercised its discretion to foreclose any defense questioning. (RB 103-104.) Finally, respondent charges appellant with forgetting that the trial court "could judge [Merz's] credibility and demeanor and other factors not evident from the cold record" and thereby reasonably determine his true state of mind. (RB 103-104.)

As appellant will demonstrate, respondent conjures up a phantom concession from appellant where none exists, insinuates a forfeiture where the objection below could not be clearer, and utterly fails to justify the trial court's ruling in the face of appellant's argument that the trial court and prosecutor were themselves responsible for any confusion or perceived failings in Merz's voir dire responses. Finally, respondent fails to address appellant's argument that the trial court applied the incorrect legal standard when it decided that Merz was substantially impaired after he said he would have "some difficulty" in deciding penalty.

Respondent takes the view that "[g]iven [Merz's] vacillations and contradictions, the trial court's conclusion as to his true state of mind – that

he was unfit to serve as a juror – must be upheld since it is supported by substantial evidence." (RB 102.) The fundamental problem with this argument is that it finds no support in the record. Merz neither vacillated nor contradicted himself. Contrary to respondent's assertion, Merz never stated that he was "not certain" that he could impose the death penalty. (RB 102.) Indeed, Merz's views were remarkably consistent throughout a lengthy voir dire. He consistently maintained that as long as state law provided two sentencing options, he could make what amounted to be a difficult choice between them in this case after careful consideration of the evidence and the court's instructions. No more was required of Merz under the application of the governing legal standard. (*People v. Stewart, supra*, 33 Cal.4th at p. 446.) Respondent has not shown otherwise.

Respondent attempts to make up for its failure of proof by insinuating that appellant conceded that Merz's statements regarding his views on the death penalty were "contradictory or equivocal." (RB 102.) Here too, respondent misses the target. At no point in appellant's argument does he make such a concession, much less at the page point cited by respondent. Respondent's claim gains no traction whatsoever by reference to the arguments appellant presented in his opening brief.

This Court would have been better served if respondent had answered the actual arguments made by appellant in his opening brief, rather than having respondent conduct an Easter egg hunt for elusive concessions in appellant's argument. For instance, respondent might have addressed appellant's argument that the trial court's misinterpretation of Merz's comment regarding "the question of rehabilitation" and its erroneous instruction in response to that question colored the trial court's ability to reliably ascertain Merz's true state of mind. (See AOB 184-186,

194-195.) Respondent might also have addressed appellant's argument that the trial court's erroneous response to Merz's question as to whether the existence of one or more aggravating factors was required before the jury could vote for a death sentence also undermined the trial court's ability to reliably assess Merz's true state of mind. (See AOB 187-189, 194-195.) In that same vein, respondent might have addressed appellant's argument that both the trial court and prosecutor misdescribed the process by which the jury considered and weighed the evidence in mitigation and aggravation over defense counsel's repeated objections, so that the trial court's ability to reliably determine Merz's true state of mind was tainted. (See AOB 188, 194-195.)

Instead, respondent has elected to sidestep each of appellant's above-referenced arguments in its brief. Consequently, its claims that substantial evidence supports the trial court's ruling and renders the trial court's assessment of Merz's true state of mind binding on this Court are not persuasive. This is not a case where the trial court supervised a "diligent and thoughtful voir dire" of Merz. (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2230.) In the trial court's own words, the voir dire was "contentious" and the prosecutor's questions "confusing." While the discretion afforded the trial court is quite broad, it is not yet so elastic as to absolve the multitude of sins revealed in this record, and respondent has certainly not demonstrated otherwise.[39]

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[39]The two cases cited by respondent are distinguishable if for no other reason that no claim was made in either case that the voir dire under review was fundamentally flawed. (Cf. *People v. Griffin* (2004) 33 Cal.4th 536, 558-561, and *People v. Welch* (1999) 20 Cal.4th 701, 747.) Moreover, none of the jurors challenged in *Griffin* and *Welch* is

(continued...)

Respondent does undertake some effort in its brief, albeit grudgingly, to counter appellant's argument that the trial court improperly restricted defense counsel's voir dire of Merz. Respondent's ultimate contention is that the trial court did not err in restricting defense counsel's voir dire of Merz, because such questioning would have been "futile." (RB 103-104.) First, however, respondent hints at a procedural bar.

Without actually claiming that appellant's argument is not preserved for appeal, respondent implies that this Court should treat the argument as forfeited. (RB 103.) Seizing on appellant's description of the trial court's conduct, respondent faults appellant for not being specific enough in objecting below. In respondent's view, it *might* not have been sufficient for defense counsel to have objected on the grounds that the trial court was about to excuse Merz using an improper legal standard, and then to phrase its objection as follows when the trial court invited and received a challenge for cause under *Witt* from the prosecutor:

> MS. BROWNE [defense counsel]: Your Honor, I'd like to object . I'd like to go ahead and ask a few more questions.

(16 RT 2817.)

Instead, respondent suggests that if appellant wished to argue on appeal that the trial court improperly restricted his voir dire when it "took over" the questioning of Merz and then refused to allow defense counsel to ask any further questions, it was necessary for defense counsel to say in essence: "Objection, Your Honor. You took over my voir dire. I want to ask more questions myself." In this same myopic vein, respondent asserts

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[39](...continued)
comparable to Merz.

that "it is unclear" whether appellant's objection below, coupled with his request for further questioning by defense counsel, "was a specific objection that he was being improperly prevented from attempting to rehabilitate [Merz]." (RB 103.)

Respondent's assertions border on the frivolous. Respondent can cite no authority to permit it to actually claim there is a procedural bar to appellant's argument, so it is reduced to indirectly making the suggestion in the hope that this Court will "take the hint." This Court should emphatically reject respondent's veiled offer.

The objections and requests made below were perfectly clear to apprise the trial court of appellant's position, i.e., that the trial court was assessing Merz's true state of mind under an improper legal standard and that defense counsel was requesting the opportunity to expose Merz's true views through further voir dire. There is no other fair way to read defense counsel's words, and it is certain that the trial court understood them in that fashion.

Turning to the merits, respondent concludes that the trial court "reasonably ended the voir dire of [Merz] when it did because any further questioning of him would have been futile." (RB 103.) According to respondent, this conclusion follows from appellant's so-called concession that "this Court has stated that a trial court has discretion to limit rehabilitation voir dire," alluding to appellant's reference to *People v. Mattson* (1990) 50 Cal.3d 826. (RB 103.)

The flaw with respondent's reasoning is that it is again based on a misreading of appellant's argument. Appellant cited *Mattson* for the proposition that "the trial court is possessed of the discretion to limit rehabilitation voir dire *within reason*," but that "such voir dire may only be

foreclosed when a prospective juror has given unequivocally disqualifying answers," citing *People v. Samayoa* (1997) 15 Cal.4th 795, 824. (See AOB 196-197, italics added.) This is a far cry from conceding that this Court's pronouncement in *Mattson* justifies what the trial court did here. Instead, this Court's reasoning in *Samayoa*, supported by its citation to *Mattson*, seriously calls into question the reasonableness of the trial court's ruling here. Respondent, however, ignores any discussion of *Samayoa* in its brief, underscoring the tenuousness of its argument.[40]

Respondent is thus left to argue that allowing appellant's defense counsel virtually no initial voir dire of Merz, and thereafter no rehabilitation voir dire at all, was reasonable because further voir dire would have been futile. As appellant described at some length in his opening brief, Merz's voir dire responses during the first 40 minutes of voir dire by the trial court and prosecutor revealed nothing whatsoever that even hinted at the notion that he was substantially impaired. (See AOB 182-192.) The trial court explicitly recognized this fact when it told the prosecutor:

> THE COURT: But, you know, we could go on for two hours and still be in the same place. *You are going to have to make a judgment decision based upon your questions and his answers, or we're going to be here all day with this juror.*

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[40]This Court has not addressed the question of the circumstances under which defense counsel has a right to rehabilitate a prospective juror. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 450.) However, consistent with this Court's observations in *People v. Heard*, *supra*, 31 Cal.4th at p. 965 [if trial court or prosecutor remained uncertain whether prospective juror's views on penalty rendered him substantially impaired, both the court and the prosecutor were "free" to ask follow-up questions] it is hard to envision a case more compelling than the one at bar for defense counsel's right to rehabilitate a prospective juror.

(16 RT 2811; italics added.)

It was only after defense counsel's voir dire had just commenced, and the trial court had answered a question from Merz about the permissible scope of mitigating evidence, that Merz asked the trial court a question about whether life imprisonment without parole was "guaranteed." The prosecutor began to answer the question, but was admonished by the trial court for his attempt to usurp its function in explaining the law, an admonishment that seemingly raised the heat in the courtroom.[41]

It was in this context that Merz suggested that he might be wasting the trial court's time. Merz stated that "there are matters on which people cannot decide" and "[t]his may be one of them." He continued by observing that if a life sentence is available without the possibility of release, "that is perhaps insurmountably the way to go." (16 RT 2816.) When the trial court asked Merz if what he meant by those last remarks was that the death penalty would not be an option in this case, Merz replied: "I'm saying that I'm very confused." The trial court then asked a single follow-up question before inviting the prosecutor's challenge for cause:

> THE COURT: Okay. And would you have some difficulty in making this decision?
>
> MR. MERZ: I sure would.

(16 RT 2817.)

Respondent fails to explain how the trial court's mind could change so fundamentally in the space of mere moments so that any rehabilitation questioning would be futile. Merz had not given unequivocally

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[41]As the trial court observed: "It's getting contentious in here, as you can see." (16 RT 2816.)

disqualifying answers. He did not say that any implied preference he might harbor for life imprisonment without parole as a sentencing option would inevitably prevail over the death penalty in a case where the evidence in aggravation substantially outweighed the evidence in mitigation. His answer was entirely consistent with a scenario envisioned within the trial court's earlier flawed and confusing instructions, i.e., the jury has the sole discretion to choose a penalty, the law never requires capital punishment, the existence of one or more aggravating factors is not required for the death penalty to be selected, etc.

Respondent simply has no adequate answer to appellant's argument that it was fundamentally unfair to preclude appellant from asking any questions whatsoever to expose Merz's true state of mind after he expressed his confusion in his last remarks to the trial court, especially when the prosecutor was given substantial time and opportunity to explore Merz's views. This is especially true when the trial court itself had earlier confirmed that the prosecutor's voir dire was confusing.[42] (16 RT 2803-2807.) It is not nearly enough to say, as respondent does, that:

> None of the United States Supreme Court cases cited by appellant hold or suggest that the federal Constitution guarantees defendants the right to ask "rehabilitative" questions of prospective jurors without the trial court having discretion to intervene.

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[42]It does not appear to be mere coincidence that the confusion sowed by the prosecutor concerned the "distinctions" between the respective duties of the prosecution and defense counsel in the proof of the aggravating and mitigating evidence, as well as what the penalty-phase jurors were permitted to consider in that regard. This was the very same topic the trial court was addressing immediately preceding Merz's disqualification.

(RB 104, fn. 12.)

That facile truism entirely misses the point of appellant's argument. Appellant never challenged the discretion of the trial court to intervene in rehabilitative voir dire, as respondent suggests. Nor is there anything in appellant's argument that suggests the trial court must abdicate its role in supervising a diligent and thoughtful voir dire. Instead, appellant argued that he had a right to fairness and evenhanded treatment in judicial proceedings, as this Court and the United States Supreme Court have recognized. (See AOB 197-198; *People v. Champion* (1995) 9 Cal.4th 879, 908-909 [trial court should be evenhanded in death-qualification voir dire]; *Ham v. South Carolina* (1973) 409 U.S. 524, 526 [trial court discretion in the conduct of voir dire is subject to the Fourteenth Amendment's essential demands of fairness]; *Wardius v. Oregon* (1973) 412 U.S. 470, 475 [evenhanded treatment in discovery rights compelled under the Due Process Clause].)

Finally, respondent's brief is mute on the issue of whether the trial court applied the correct legal standard in excusing Merz for cause.[43] In his opening brief, appellant argued that this Court's express holding in *People v. Stewart*, *supra*, 33 Cal.4th 425, demonstrated the fallacy of the trial court's ruling in excusing Merz. In *Stewart*, this Court explained that even

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[43]As appellant demonstrated in his opening brief, the record clearly shows that Merz declined to confirm that his last comment (suggesting a preference for life imprisonment without parole) necessarily meant that he would always reject the death penalty as an option in this case. Instead, Merz said that he was "very confused." The trial court then asked if Merz would have "some difficulty" in making the penalty decision. Merz relied that he "sure would." (16 RT 2816-2817.) Over appellant's objection that the trial court's standard was inappropriate, the trial court excused Merz as "a *Wainright v. Witt* failure." (16 RT 2817.)

prospective jurors who would find it "very difficult" to *ever* impose the death penalty are both entitled and duty bound to serve as jurors in a capital case unless their personal views on capital punishment actually prevent or substantially impair their performance. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446, italics added.) It should come as no surprise that respondent has made no effort to reconcile the trial court's actual words in this case with the correct application of the *Witt* standard as explained in *Stewart.* The two cannot be reconciled. It bears emphasizing that the trial court's ruling reflected a fundamental misunderstanding of the *Witt* standard:

> The record here, however, suggests that 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. . . .

(*Stewart*, *supra*, 33 Cal.4th at p. 446, italics added.)

Respondent conveniently seeks refuge in the trial court's unique ability to observe Merz and "judge his credibility and demeanor and other factors not evident from the cold record." (RB 103-104.) In this regard, respondent points to the trial court's observation that "it was like pulling teeth throughout the whole voir dire." (16 RT 2818.) Contrary to respondent's implication that the trial court's comment somehow supports the trial court's conclusion that Merz was substantially impaired, it is almost certain that the trial court was referring to the length and contentiousness of the voir dire. The record reflects the dogged but futile efforts of the prosecutor to elicit disqualifying responses from Merz, as well as defense counsel's repeated objections to the improper questions and explanations offered by the trial court and prosecutor during Merz's voir

dire . In marked contrast, there is simply nothing in the record to suggest that Merz was anything but direct and forthcoming in providing his answers and in asking clear, thoughtful, and appropriate questions. It would be grossly unfair to attribute the "tooth-pulling" to Merz as a legitimate basis for concluding that he was substantially impaired, and that the trial court's ruling in that regard is deserving of deference. (Cf. *People v. Heard, supra*, 31 Cal.4th at pp. 967-968.)

To summarize, the disqualification of Merz cannot be justified on this record, especially in light of the failings of the trial court's and the prosecutor's voir dire. Moreover, the record demonstrates that the trial court misunderstood and misapplied the appropriate legal standard in concluding that Merz was substantially impaired. (*People v. Stewart, supra*, 33 Cal.4th at p. 446.) Finally, because the defense was completely deprived of an opportunity to rehabilitate Merz, this Court cannot and should not be bound by the trial court's ruling. In each instance, respondent has not shown otherwise. Consequently, appellant's death sentence must be reversed. (See *Gray v. Mississippi* (1987) 481 U.S. 648, 668; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

4. Maria Ramirez

Ramirez, a working mother of three children, indicated in her questionnaire that her household was split on the death penalty. Although her husband was for it, she felt that life imprisonment without the possibility of parole was "better than death." She stated that she held no religious or philosophical beliefs that would affect her ability to vote for the death penalty in this case, but if the matter of whether the state of California should have a death penalty were placed before the electorate, she would vote against such a measure. (14 CT 3346-3347.)

Ramirez's oral voir dire responses, taken as a whole, indicated that she would find it difficult to vote for the death penalty but she could do so if a defendant's conduct justified that extreme penalty. Under the limited description of appellant's case given to her by way of the trial court's *Fields* question, Ramirez stated that she leaned toward life imprisonment, but might impose the death penalty. When Ramirez began to qualify her answer by stating that she guessed she would not impose the death penalty for burglary, the trial court interrupted her and granted the prosecutor's earlier *Witt*-based challenge for cause over appellant's objection. (6 RT 845-853.)

Respondent again contends that the trial court's ruling must be sustained on appeal because substantial evidence supports it, and the trial court's determination of Ramirez's true state of mind is binding on this Court. (RB 106.) As appellant will demonstrate, the trial court's assessment of Ramirez, like its view of Edmiston and Merz before, was fatally flawed by its inability to properly distinguish between nondisqualifying and disqualifying points of view with regard to the issue of penalty. Additionally, because the trial court never undertook to explain to Ramirez the procedures and rules governing a death penalty trial as well as never asking her if she could put aside her personal views on the death penalty in order to follow the trial court's instructions on the law, the trial court could not reliably determine whether Ramirez was qualified to serve as a juror. Finally, as the prosecutor himself pointed out, the trial court's voir dire of Ramirez was confusing to her. Consequently, no deference should be accorded to the trial court's ruling nor should this Court consider itself bound under the circumstances.

Respondent's position might be plausible if the trial court had

conducted a thorough and thoughtful voir dire. However, that did not occur here. (Cf. *People v. Heard*, *supra*, 31 Cal.4th at pp. 966-967, fn. 9 [setting forth compendium of resource materials available to the bench and containing "useful advice" for conducting voir dire in capital cases].) Here, the trial court never undertook to explain to Ramirez the workings of a capital trial, nor did it explain the type of penalty-phase evidence she was likely to hear, much less what the law required before a death penalty could be returned. Therefore, the trial court never reached the point of asking Ramirez whether she could set aside her preference for life imprisonment without parole and follow the trial court's instructions on the law. Respondent's argument does not attempt to justify these deficiencies in the trial court's voir dire despite the fact that these deficiencies were specifically enumerated in appellant's opening brief. (See AOB 204-205.)

Similarly, respondent's argument might have some traction if the trial court here had a clear understanding of how to distinguish a disqualifying viewpoint on penalty from a nondisqualifying one. Unfortunately, the conclusion is unavoidable that the trial court here lacked such necessary discernment, as its own words and questions prove. Inexplicably, as its colloquy with Ramirez demonstrates, the trial court could not grasp that a person like Ramirez could be opposed to the death penalty, yet give due consideration to both penalties if selected as a juror. (6 RT 846-849.) Even the prosecutor noted the problem when it candidly observed that the trial court was consistently confusing Ramirez in its effort to have her explain this false dichotomy, and that Ramirez's responses in

turn were confusing to the trial court.[44] (6 RT 849.)

Again, respondent's blithe defense of the trial court's ruling, as well as its suggestion that such ruling ties this Court's hands, does not take into account the fact that the trial court here, like its counterpart in *Stewart*, "erroneously equated the . . . nondisqualifying concept of a very difficult decision by a juror to impose a death sentence, with . . . the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty." (*People v. Stewart, supra*, 33 Cal.4th at p. 446.) As the proponent of the challenge, the burden rested with the prosecution to establish a record justifying the granting of the challenge. (*People v. Stewart, supra*, 33 Cal.4th at p. 445; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1270.) When the prosecutor himself complained that the trial court's voir dire of Ramirez was consistently confusing, it is impossible to credit respondent's position that substantial evidence supports the trial court's determination of the juror's true state of mind.

As appellant demonstrated in his opening brief, although Ramirez was generally opposed to the death penalty and preferred life imprisonment without possibility of parole as the "better" punishment, she indicated that she could return a death verdict depending upon what the defendant did. The trial court's confusing and inadequate voir dire produced a record from which it cannot reliably or fairly be determined that Ramirez was substantially impaired under *Witt*. This is all the more apparent as the trial

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[44]Respondent ventures no opinion in its brief on the accuracy of the prosecutor's criticism of the trial court's voir dire, nor does it address the impact of the confusion sown by the trial court on the reliability of the trial court's assessment of Ramirez's true state of mind. Given that respondent is asking this Court to defer to the trial court's determinations and be bound thereby, it is curious that respondent is silent in this regard.

court's own words and questions demonstrated an inability to distinguish nondisqualifying from disqualifying positions on the penalty issue. Respondent's efforts to prove otherwise fail. Thus, the error in granting the prosecutor's challenge for cause requires reversal of appellant's death sentence.

5. Roberta Finch

Finch, a 56-year old high school graduate and the divorced mother of three adult children, was excused for cause at the prosecutor's request and over defense objection. Respondent contends that the trial court's ruling must be sustained, as Finch's responses were "unclear and confusing." (RB 111.) As such, respondent reiterates "that where a prospective juror's statements are equivocal, ambiguous, or conflicting, the trial court's determination of the person's true state of mind is binding on appeal." (RB 111.) Respondent thus concludes:

> Put differently, given [Finch's] vacillations and self-contradictions, as well as her apparent moral opposition to the death penalty, the trial court's conclusion that she was unfit as a juror must be upheld since it is supported by substantial evidence.

(RB 111.)

Despite the considerable effort respondent expends in attempting to justify the trial court's ruling, that ruling cannot be sustained on appeal. A fair reading of even the curtailed voir dire permitted by the trial court reveals that respondent's description of Finch's responses and her views on the death penalty are not accurate.[45] Moreover, the very words utilized by

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[45]Appellant's trial counsel were virtually foreclosed from asking questions on oral voir dire and their request for the opportunity to ask (continued...)

the trial court while conducting the voir dire and later, in justifying its ruling for the record, demonstrate the trial court's error. Those words show that the trial court believed that Finch was substantially impaired for nondisqualifying reasons. Respondent's argument takes none of these matters into account, depriving it of whatever persuasive force it might otherwise possess.

Respondent's argument would hold water if the voir dire was such that the trial court could have (a) reliably determined Finch's true state of mind concerning the issue of penalty and (b) appropriately assessed whether that state of mind would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Wainwright v. Witt*, supra, 469 U.S. at p. 424, fn. omitted.) However, as appellant demonstrated in his opening brief, the voir dire of Finch was not of such a nature nor was the trial court's assessment an appropriate one under the governing legal standard. (See AOB 215-224.)

Contrary to respondent's characterization, Finch was not in "apparent moral opposition to the death penalty."[46] (RB 111.) Finch never

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[45](...continued)
additional questions to rehabilitate Finch was denied. (12 RT 1938-1939.) Appellant asserted in his opening brief, and continues to assert here, that the curtailment of defense counsel's voir dire in this respect was itself constitutional error which contributed to the unreliability of the trial court's determination of Finch's true state of mind on the penalty issue. (See AOB 218-219.)

[46]Even if Finch had been morally opposed to the death penalty, that point of view would not necessarily have disqualified her from serving as a juror in this case. "Decisions of the United States Supreme Court and of
(continued...)

intimated that she maintained such a position, nor did the trial court so find, either expressly or by implication. Nor were Finch's responses unclear, confused, or inconsistent, as respondent argues. To the contrary, as soon as Finch understood the questions put to her, she consistently said that she could, or thought she could, select the death penalty if she believed it was the appropriate penalty in this case. This was true regardless of whether the question was asked by the trial court, the prosecutor, or defense counsel. (See AOB 216-217, and fn. 80.) Respondent does not address this glaring inconsistency between the record and the trial court's findings. Likewise, respondent has nothing to say about appellant's argument that the record does not support the trial court's view that Finch was confused about "the process" involved in a death-penalty trial. (See AOB 217.)

When one examines the trial court's own words, it becomes evident that there were three prongs to its ruling, none of which were analyzed in respondent's brief. First, the trial court could not reconcile Finch's statement that she was capable of returning a death verdict in this case with her inability to articulate what benefits society derived from the death penalty.[47] (12 RT 1931-1933.) Second, the trial court believed it was inconsistent for Finch to say she could vote for the death penalty in this

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[46](...continued)
this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt* . . . ." (*People v. Stewart, supra*, 33 Cal.4th at p. 446.)

[47]The trial court prefaced its inquiry by affirmatively stating to Finch that "[i]f you're capable of selecting either the death penalty or life without possibility of parole, you must feel that the death penalty accomplishes something." (12 RT 1931.)

case if it was appropriate but still have reservations about signing the death verdict form if she were chosen to be the jury foreperson. (12 RT 1935-1937.) Third, the trial court believed that Finch would be an indecisive juror. It believed she would be "unable to effectively deliberate in this case and to be a contributor to the deliberative process," and expressed its doubt that Finch knew what she stood for. (12 RT 1938-1941.)

None of the three prongs of the trial court's ruling, either individually or in combination, constitutes a legitimate basis for Finch's disqualification under *Stewart* and *Witt*, as appellant demonstrated in his opening brief. Respondent, however, provides no analysis to justify the trial court's ruling on any of the grounds asserted. For instance, respondent does not answer appellant's contention that this Court's holding in *People v. Chacon* (1968) 69 Cal.2d 765, 772, as well as the reasoning of the Court of Appeals in *Alderman v. Austin* (5th Cir, Unit B Dec. 1981) 663 F.2d 558, 563, forecloses disqualification of a prospective juror who states she could vote for the death penalty where appropriate, yet refuse to act as a foreperson and affix a signature to a death verdict form. Similarly, respondent does not address appellant's argument that there is no inconsistency between being able to follow the court's instructions on the law, yet failing to find any articulable societal benefit in the death penalty. Further, respondent provides no answer to appellant's argument that the trial court's belief that Finch would be an indecisive juror was not an appropriate basis to disqualify her under *Witt*, even if such a belief found some support in the record.[48]

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[48]Appellant maintains that the record does not support the trial court's belief.

Respondent stubbornly maintains that the trial court was able to discern Finch's true state of mind on the penalty issue and that this Court should defer to that assessment. Yet respondent's answer to appellant's claim that the trial court's resolution of that issue was not entitled to deference on appeal relies on a patently misleading account of the record. In response to appellant's argument that the trial court was not possessed of sufficient information to make a reliable determination of Finch's true state of mind because (among other reasons) defense counsel's voir dire was improperly curtailed, respondent asserts that "[i]n the case at bar, the trial court did allow [Finch] to be *extensively questioned by counsel* and posed some questions itself." (RB 112, italics added.) This contention is accurate only if respondent's use of the term "counsel" refers exclusively to the prosecutor. While the prosecutor's voir dire was essentially unhampered, the voir dire by defense counsel was only grudgingly allowed and then quickly shut off, with no rehabilitation questioning permitted.[49] (12 RT 1935-1939.)

Under these circumstances, as with the previous prospective jurors discussed earlier in this argument, the deference normally accorded to the trial court's findings concerning a prospective juror's true state of mind cannot salvage its ruling disqualifying Finch. While the trial court's ability to view the prospective juror's demeanor and make credibility determinations cannot be replicated by a reviewing court, the trial court must still conduct an adequate voir dire and do so in an appropriate

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[49]Respondent does not have the temerity to claim that Finch gave unequivocally disqualifying answers, such that the trial court would be justified in foreclosing all rehabilitation voir dire. (*People v. Jenkins* (2000) 22 Cal.4th 900, 990-991.)

fashion. A juror who is confused or becomes reticent, defensive, or frustrated because of inappropriate and confusing voir dire questioning may well provide responses or display a "body language" susceptible to misinterpretation. "The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2230.)

If deference is due to the findings of a trial court that conducted a "diligent and thoughtful" voir dire, the converse is also true. Such deference will not be accorded to rulings that are the product of a deficient and confusing voir dire or the inability of the trial court to distinguish disqualifying from nondisqualifying responses. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, fn. 10; *People v. Stewart*, *supra*, 33 Cal.4th at p. 447; *People v. Heard*, *supra*, 31 Cal.4th at p. 968.)

To sum up, the voir dire supervised by the trial court did not allow for a reliable determination that Finch was substantially impaired under the prevailing legal standard. Whether the cause of the deficiency of information was the trial court's inappropriate questioning, its inability to discern disqualifying from nondisqualifying responses, or its curtailment of defense counsel's voir dire is less important than the fact that the record itself does not support the disqualification of Finch. Just as respondent failed to show that the disqualification of prospective jurors Edmiston, Dean, Merz and Ramirez was justifiable, so too does it falter in arguing in support of the correctness of the trial court's ruling as to the disqualification of Finch. The error in granting the prosecutor's challenge for cause of Finch requires reversal of appellant's death sentence.

D. Conclusion

In the case of each of the five prospective jurors whose disqualification for cause appellant contends was erroneous under *Witt*, respondent counters by arguing that substantial evidence supports each of the trial court's rulings and therefore they are binding on this Court. However, the record very clearly shows that in each instance, serious deficiencies in the trial court's conduct of the voir dire, and its inability to distinguish nondisqualifying from disqualifying responses, resulted in unreliable and incorrect determinations that any of the five prospective jurors was substantially impaired in serving as jurors in this capital case.

Thus, contrary to respondent's urging, on this record there is "virtually nothing of substance to which [this Court] might properly defer" in order to uphold those rulings. (*People v. Heard*, *supra*, 31 Cal.4th at p. 968.) Error of this magnitude must be considered reversible per se with regard to the ensuing death-penalty judgment.

V

THE PROSECUTOR'S PERVASIVE MISCONDUCT DURING TRIAL VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND RELIABLE GUILT AND PENALTY DETERMINATIONS

In his opening brief, appellant argued that the prosecutor engaged in a continuous course of misconduct so pervasive and prejudicial it infected his trial with unfairness, with the most egregious misconduct occurring at the penalty phase. (See AOB 226-275.) In response, respondent contends that "many of appellant's claims are not cognizable on appeal," that "the record does not support many of appellant's claims," that "[a]ppellant's specifics often take the prosecutor's statements and arguments out of context or mischaracterize them," and finally, "even if appellant could demonstrate that the prosecutor committed misconduct in the manner alleged, he has failed to show prejudice." (RB 113.) As appellant will demonstrate, respondent's contentions lack merit.

A. Prosecutorial Misconduct at the Guilt Phase

Appellant demonstrated in his opening brief that the prosecutor commenced his campaign of misconduct in front of the jury as early as the beginning of his opening statement to the jury in the guilt phase by improperly commenting on appellant's exercise of his Fourth Amendment right to refuse to consent to a search. (AOB 228-234.) The guilt-phase misconduct continued with the improper character assassination of appellant in the prosecutor's direct examination of appellant's aunt, Mamie Jackson (AOB 234-240), as well as improper cross-examination of

appellant in which the prosecutor committed *Doyle*[50] error and later insinuated in closing argument that appellant and his trial counsel had colluded to fabricate his defense (AOB 240-248). Finally, appellant referenced two additional instances of the prosecutor's misconduct of a more general and gratuitous character which contributed to the unfairness of the trial, thereby exacerbating the prejudice suffered by appellant. (AOB 248-252.)

Respondent's position is that "[m]any of these allegations of prejudicial misconduct are forfeited and all are without merit." (RB 115.) Respondent's position regarding possible procedural defaults is not well taken and its position regarding prejudice is equally devoid of merit.

1. Misconduct in the Prosecutor's Opening Statement

In his opening statement to the jury, the prosecutor said he would prove that appellant told the police during his interrogation that he was not involved in the victim's killing and that he stated he was at his girlfriend's house at the time of the crime. The prosecutor went on to say the evidence would show that appellant refused to consent to a search of that house. Appellant's defense counsel objected, claiming the statement was prosecutorial misconduct. The trial court told the jury it could disregard the prosecutor's remark. Defense counsel asked the trial court to assign the reference as prosecutorial misconduct, but the court refused to do so, saying it would "ask" the jury to disregard the prosecutor's comment. (24 RT 3378.)

Respondent claims the trial court "correctly overruled the misconduct objection." It reaches this conclusion in a backdoor fashion,

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[50]*Doyle v. Ohio* (1976) 426 U.S. 610.

reasoning that because there was no reasonable likelihood the jury construed or applied the complained-of remarks in an objectionable fashion, no misconduct occurred. (RB 116.) Remarkably, respondent goes on to claim that "there was no reasonable likelihood the jury would have understood the challenged remark as a comment on appellant's invocation of a Fourth Amendment right," because all the prosecutor did was tell the jury what he expected to prove at trial, and that is what the jury would have understood from his remarks. (RB 116.) "Accordingly, the prosecutor did not commit federal constitutional misconduct. Nor did he commit state-law misconduct because the remark at issue was not a deceptive or reprehensible attempt to persuade." (RB 116.)

Accepting respondent's logic, the only way the prosecutor would have committed misconduct in his opening argument would have been if he argued as follows: "The defendant refused to give consent to search to the police, who wanted to investigate his alibi. We all know what that means. It means he knew they would find incriminating evidence linking him to this murder. His refusal to consent means he had something he wished to hide from the police." As is obvious to this Court, the jury here was not comprised of 12 dullards and they surely would have understood the purpose for which the prosecutor intended to introduce appellant's refusal to consent to a search.

Respondent's argument grudgingly and indirectly concedes that it would be improper for the prosecutor to have made a comment on appellant's invocation of his Fourth Amendment rights. (RB 116-117.) Yet respondent inconsistently argues that the prosecutor was merely telling the jury he would later prove that appellant refused such consent, as if such evidence was ordinarily admissible. Respondent, however, never confronts

appellant's argument that such evidence was inadmissible in the prosecutor's case-in-chief and that this experienced prosecutor must have known as much. (See AOB 229-230.) Additionally, given that respondent argues that the prosecutor was simply informing the jurors "what his evidence would later show," it is telling that it fails to address appellant's point that the prosecutor never actually made an attempt to introduce evidence that appellant refused to consent to a search. (See AOB 229, fn. 84.)

Respondent would have this Court believe that the prosecutor did not commit "state-law misconduct" because his remark was not a deceptive or reprehensible attempt to persuade the jury. (RB 116.) Nothing could be farther from the truth. California courts have held for at least 40 years that misconduct of this ilk is reprehensible.[51] (See, e.g., *People v. Crawford* (1967) 253 Cal.App.2d 524, 535 [prosecutor's indirect comment on defendant's exercise of his Fifth Amendment privilege "not only improper, but reprehensible"].) Consequently, the prosecutor's remarks in his opening statement constituted a deceptive and reprehensible attempt to persuade the jury, and as such, amounted to cognizable prosecutorial misconduct. Respondent makes little effort to show otherwise, including an utter failure to address the authorities cited by appellant which hold that a prosecutor's improper opening statement constitutes reversible

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[51]Appellant demonstrated in his opening brief that neither federal courts nor California courts will permit a criminal defendant to be penalized at trial for having exercised his constitutional rights under the Fourth, Fifth, or Sixth Amendments by adverse prosecutorial comment in argument or by way of the introduction of evidence of such exercise at trial. (See AOB 228-230.) Respondent makes no effort to show otherwise.

misconduct.[52]

Instead, respondent maintains that "[i]n any event, appellant suffered no prejudice from any misconduct" committed by the prosecutor when he commented on appellant's assertion of his Fourth Amendment rights as evidence the jury would hear to show consciousness of guilt.[53] (RB 116.) Relying on this Court's decision in *People v. Wrest* (1992) 3 Cal.4th 1088, 1109, respondent asserts that whatever misconduct might have occurred in the prosecutor's opening statement, it was neither prejudicial nor sufficiently egregious so as to deny appellant a fair trial.

People v. Wrest is distinguishable in virtually all respects. In *Wrest*, the claim on appeal was that the prosecutor had misstated the evidence several times in his penalty-phase opening statement. This Court first noted that at no time during trial did the defendant object to these alleged misstatements or show on appeal that an admonition would have been an ineffective remedy. (*People v. Wrest*, *supra*, 3 Cal.4th at p. 1108.) In contrast, here there was an objection, followed by the trial court's feckless admonition and refusal of defense counsel's request to assign the prosecutor's remark as misconduct. In *Wrest*, this Court noted that even if

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[52]These authorities include holdings by this Court. (See *People v. Purvis* (1963) 60 Cal.2d 323, 343-346, and cases cited therein.)

[53]This type of "divide and conquer" argument asserts that each individual instance of prosecutorial misconduct alleged to have been committed at appellant's trial, when viewed in isolation, was nonprejudicial. By arguing in this fashion, respondent hopes to avoid a finding that the prosecutor engaged in a pattern of misconduct resulting in an unfair trial, the prerequisite for federal constitutional error under the Due Process Clause of the Fourteenth Amendment. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Hill* (1998) 17 Cal.4th 800, 819.)

the claim was preserved, in each instance of alleged misstatement, "the variance between prosecutorial statement and actual proof [was] minor or nonexistent" so that "[i]n no case [could] an inference of misconduct be drawn." (*Ibid.*) In making this observation, the *Wrest* court took pains to distinguish the prosecutor's conduct from cases of actual opening-statement misconduct where the evidence referred to by the prosecutor "was 'so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.'" (*Ibid*, quoting *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1225, fn. 5.) This, of course, is what transpired at appellant's trial when the prosecutor referred to appellant's refusal to consent to a search.

Appellant's case is also distinguishable from *Wrest* insofar as prejudice is concerned. The *Wrest* court observed that even if one were to assume that the prosecutor had committed misconduct in his opening statement, it was not prejudicial because (1) no objection was made to the misconduct, (2) the jury was informed that the opening statements did not amount to evidence, (3) any inconsistency between the opening statement and the actual evidence presented was inconsequential, and (4) the defendant "was permitted to confront all the witnesses and to challenge and rebut all evidence offered against him." (*Wrest, supra*, at pp. 1109-1110.) Appellant here has already addressed the first and third of these enumerated factors. Unlike the circumstances in *Wrest*, appellant objected and was refused an adequate admonition and the inconsistency between the evidence promised in the opening statement and the actual evidence presented was hardly inconsequential. The fourth factor mentioned by the Court only underscores the prejudice to appellant, as he could not effectively rebut or challenge the otherwise inadmissible evidence alluded

to in the prosecutor's opening statement without thereby making the evidence suddenly admissible as impeachment evidence. (See, e.g., *People v. Wood* (2002) 103 Cal.App.4th 803, 809.) Only the third factor mentioned in *Wrest*'s prejudice analysis needs to be addressed here, as it is one that respondent expressly relies upon to shield the prosecutor from his despicable attempt "to poison the jury's mind against the defendant." (*United States v. Brockington* (4th Cir. 1988) 849 F.2d 872, 875.)

While it is true that here, as in *Wrest*, the trial court instructed the jury that the statements of counsel were not themselves evidence, that instruction conflicted with the wan advice the trial court offered the jurors in response to defense counsel's objection, instead of the forceful admonition that was required. Here, the trial court addressed the jury as follows: "The jury *can* disregard that." Defense counsel believed those words were not strong enough to cure the harm and requested that the trial court assign the remark as "prosecutorial misconduct." This the trial court explicitly refused to do, stating in the presence of the jury: "No, I'm not going to assign prosecutorial misconduct. I'm going to *ask* the jury to disregard that." (24 RT 3378, italics added.) The trial court's curious choice of words signaled to the jurors that it was up to them to decide whether or not to take meaning from the prosecutor's words. This unfortunate decision by the trial court deprived the admonition of its necessary backbone. Not only were the jurors left with the choice of deciding for themselves whether to disregard the prosecutor's comment, but they were also left with the clear message that, contrary to defense counsel's accusation, the prosecutor had not committed misconduct when he said that the defendant had refused to consent to a police search. Thus, contrary to respondent's assertion, the trial court did not "instruct" the jury

to disregard the prosecutor's comment. (RB 117.)

Respondent struggles in vain to distinguish *People v. Bolton* (1979) 23 Cal.3d 208, cited by appellant for the proposition that prosecutorial misconduct must be countered with effective countermeasures by the trial court. In *Bolton*, the prosecutor's closing argument hinted that, but for the rules of evidence, the evidence would show that the defendant had a history of prior convictions or a propensity for wrongful acts. Contrary to respondent's view that "[t]he prosecutor's statement here is in no way comparable to the criminal-history insinuation made in *Bolton*" (RB 117), both cases demonstrate an effort to persuade the jury by deceptive and reprehensible means.[54] If it is misconduct to suggest that but for the rules regarding the admissibility of evidence, the jury would learn how truly bad the defendant was, and thus find it easier to accept that he was guilty in the case for which he was on trial, it is equally improper to directly expose the jury to the inadmissible evidence in the opening statement, knowing that the evidence could not be admitted in the first instance.

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[54]Respondent sardonically observes that "it is also interesting to note that even in *Bolton* this Court held the misconduct harmless." (RB 117.) What respondent fails to note is that in *Bolton*, this Court could confidently arrive at that conclusion because "it [was] certain that any reasonable jury would have reached the same verdict even in the absence of the prosecutor's remarks." (*People v. Bolton*, *supra*, 23 Cal.3d at p. 214.) After all, in *Bolton* the defendant admitted to shooting the victim, but claimed it was a matter of self-defense, a defense unavailable to him even if the jury believed his version of the facts in its entirety. (*Id.* at p. 215.) Moreover, as this Court took pains to emphasize in *Bolton*, its refusal to reverse Bolton's conviction "should in no way be taken as condonation for the deputy district attorney's misconduct. A closer case, marred by the same misconduct, might well require reversal." (*Ibid.*) Respondent does not appear to have heeded the Court's message.

Respondent's insinuation that the watery "instruction" given by the trial court was somehow commensurate with the innocuousness of the prosecutor's remarks should be flatly rejected by this Court. The trial court's response to the prosecutor's flagrant misconduct was inadequate to dispel the very real prejudice that flowed from the prosecutor's comments. (Cf. *United States v. Simtob* (9th Cir. 1990) 901 F.2d 799, 806 ["[I]t is very doubtful that the generalized observations of the court really conveyed a sufficient sense of judicial disapproval of both content and circumstances needed to dispell [*sic*] the harm in the core of the prosecutor's statements"]; *United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1053 [general and ineffective admonitions insufficient to cure prejudice from prosecutorial misconduct].)

To summarize, the prosecutor's opening-statement comment on appellant's refusal to consent to a search was flagrant misconduct. It was highly prejudicial to appellant in a case in which his guilt could only be established by circumstantial evidence. Finally, the trial court's response to appellant's objection was woefully inadequate to cure the injury and merely rubbed salt in an open wound. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 216, fn. 5; *United States v. Grayson* (2nd Cir. 1948) 166 F.2d 863, 871 (conc. opn. of Frank, J.).)

2. The Prosecutor Committed Egregious Misconduct by Engaging in Character Assassination of Appellant

As part of his pattern of pervasive misconduct, the prosecutor followed the reprehensible remarks in his opening statement with a campaign of character assassination. He took whatever opportunity he could to insinuate that appellant was a violent and volatile person, apt to

frighten, assault, and injure his family and acquaintances. Although the worst of the prosecutor's transgressions took place at the penalty phase, he also committed misconduct of this type in the guilt phase during the direct examination of Mamie Jackson, appellant's aunt. Under the guise of refreshing her recollection, the prosecutor insinuated that appellant was feared by his family because he was "very violent," and that he had "kicked in the door" to her house on three occasions prior to the victim's death. In his opening brief, appellant argued that the prosecutor's questions to Mamie Jackson were irrelevant and highly prejudicial, as well as in violation of a pretrial ruling made by the trial court, and thus constituted prejudicial prosecutorial misconduct. (See AOB 234-240.)

Respond contends that the prosecutor's questions were proper and that no misconduct occurred. It also asserts that because defense counsel below "only" lodged a relevancy objection, and not a "court order violation" objection, appellant has forfeited his claim of prosecutorial misconduct in this regard. Finally, respondent claims that "absolutely no prejudice could have accrued to appellant at the guilt phase from any misconduct here." (RB 118-121.) As appellant will demonstrate, respondent is incorrect in every respect.

Preliminarily, respondent's attempt to assert a procedural bar, and to thereby avoid a ruling on the merits, fails.[55] Defense counsel objected to the prosecutor's improper questioning of Mamie Jackson specifically and appropriately. The objection to the prosecutor's question as to whether

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[55]Respondent claims that appellant forfeited his claim that the prosecutor improperly introduced evidence of appellant's bad character because he failed to make a "court order violation" objection below. (RB 119-120.)

Jackson had told the police on April 19, 1988, that when appellant came to her home the previous day, everybody inside "ran" because appellant "is very violent," correctly asserted that the question both called for speculation and was prejudicial. Before defense counsel could say more, the trial court overruled the objection and observed that the prosecutor was "only" refreshing the witness's recollection. When counsel objected that the prosecutor was improperly refreshing the witness's recollection, the trial court again disagreed and asked the objected-to question itself. Under these circumstances, defense counsel did all she could without endangering appellant's interests by making further and futile objections. Nothing in this Court's analysis in *People v. Samayoa* (1997) 15 Cal.4th 795, 841, as cited by respondent, indicates otherwise.

Furthermore, by asserting this dubious procedural bar, respondent demonstrates that it misapprehends the state of the record as well as the scope of appellant's argument. First, the record demonstrates that appellant *objected* to the prosecutor's attempts to impugn appellant's character with improper and prejudicial questions to Jackson, *and* asked for an admonition. One such objection was overruled because in the trial court's view, the prosecutor was "only" attempting to refresh the witness's recollection of a statement concerning her family's fear of appellant's violent nature which she gave to the police on the day following the discovery of the victim's body. However, defense counsel's objection to the prosecutor's next question to Jackson asking her if "[a]s a matter of fact, [appellant] has kicked in the door to your house on three occasions" was followed by a request to strike the question and have the jury

admonished.[56] (28 RT 3737-3738.)

Second, appellant referred to the prosecutor's flaunting of the trial court's in limine ruling as evidence that the prosecutor asked his questions of Jackson in deliberate bad faith, and this was evidence of the prosecutor's belief that the "facts" referred to in his improper questions would bolster his circumstantial case for appellant's guilt. (See AOB 236-237.) While it is certainly true, as respondent notes, that the in limine ruling resulted from a *Phillips*[57] hearing where the trial court was called upon to decide the scope and content of evidence the prosecution would be permitted to introduce at a potential penalty phase, the trial court's rulings were intended to be broader than respondent acknowledges. In ruling that the prosecutor would not be permitted to introduce evidence of appellant's alleged violent conduct directed at members of his family, including Jackson, the trial court explicitly indicated what was otherwise obvious – the Penal Code section 190.3, factor (b) evidence was *also necessarily* inadmissible at the guilt phase:

> THE COURT: As I understand it, you want me to conduct this *Phillips* hearing because you want to know who is going to be testifying, and I'm telling you now who these people are going to be. As far as I'm concerned, I have satisfied your problem with respect to calling whatever witnesses you need in the *guilt* phase because now – as of now, you know who I'm going to let testify in this case. *And I'm telling you who I'm going to let testify in this case.* And

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[56]The witness had not answered the question, as defense counsel's prompt objection was lodged while the prosecutor was asking his inflammatory question. The trial court addressed the jury as follows: "The jury may be admonished to disregard the question. All right. Let's keep it in the ballpark, Mr. Landswick." (28 RT 3738.)

[57]*People v. Phillips* (1985) 41 Cal.3d 29.

I'm telling you as of today who the iffy witnesses are in this case, and I can't get any better than that.

MS. BROWNE: Yes, Your Honor, you can't.

THE COURT: *And I told you definitely who is not going to be here.*

MS. BROWNE: Thank you, Your Honor.

THE COURT: So that makes Mr. Landswick's job easier, and that makes your job easier.

(1 RT 219, italics added.)[58]

In any event, the prosecutor's conduct in deliberately asking questions calling for inadmissible and prejudicial answers is misconduct, regardless of whether it violated the trial court's in limine ruling. (*People v. Bell* (1989) 49 Cal.3d 502, 532.) Finally, it is impossible to credit respondent's brash assertion that "absolutely no prejudice could have accrued to appellant at the guilt phase from any misconduct here." (RB 121.) Although the prosecutor's case for guilt was built entirely on circumstantial evidence, respondent would have this Court believe that the

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[58]Contrary to respondent's assertion that the trial court "certainly made no 'ruling' that the prosecutor could not ask Jackson during the guilt phase whether she recalled telling the police she was afraid of appellant and that appellant had kicked down her door in the past" (RB 120-121), the record reflects that these incidents were the ones referenced by the prosecutor in his pleading entitled "People's Notification of Factors and Aggravation Pursuant to Penal Code Section 190.3," to which he attached Oakland Police Department Report Nos. 85-104538, 85-104539, and 85-104633. (2 CT 258-348.) The trial court reviewed these reports in arriving at its in limine ruling. The trial court's subsequent ruling at trial, sustaining appellant's relevance objection to the prosecutor's question concerning these matter, belies respondent's contention and demonstrates that the prosecutor was operating outside the "ballpark," to use the trial court's vernacular.

prosecutor's inflammatory reference to the inadmissible evidence that appellant was prone to kicking in the doors of elderly women to steal had no bearing on the jury's guilt determination in a case in which the victim's back door was kicked in.

Respondent also absolves the prosecutor of blame by referring to appellant's testimony that he stole property from his grandmother, as well as from the victim in this case after he found her dead. Of course, that testimony occurred during the defense case, well after the prosecutor's misconduct had already poisoned the well. Moreover, the true harm the prosecutor sought to inflict upon appellant's cause with his improper questioning was to show appellant's propensity for callous violence, thereby bolstering the circumstantial case for guilt in this case. Thus, it is hardly "inconceivable" that the jury's guilt verdict "had anything to do" with the prosecutor's misconduct, as respondent concludes. (RB 121.) Given the near-universal recognition that the admission of any evidence that involves crimes other than those for which the defendant is being tried produces a compelling tendency to believe the defendant is guilty of the charge, it is instead "inconceivable" that the jury in appellant's case was *not* influenced by the prosecutor's misconduct in reaching its guilt-phase verdicts. (See, e.g., *People v. Thompson* (1980) 27 Cal.3d 303, 314.)

3. The Prosecutor Committed *Doyle* Error during Cross-Examination of Appellant and Exploited That Error in Closing Argument by Disparaging Defense Counsel and Suggesting That Appellant's Post-Arrest Consultations with Counsel Resulted in a Fabricated Defense

During his cross-examination of appellant, the prosecutor aimed to establish that appellant had been coached by defense counsel. Thereafter,

the prosecutor asked a number of questions concerning the nature and substance of pretrial conversations between appellant and his attorneys. The prosecutor's questions focused on whether and when appellant had told his attorneys about seeing two men emerge from the victim's home prior to the time he entered the victim's home and discovered her body. In his guilt-phase closing argument, the prosecutor accused defense counsel of fabricating a defense by creating a "phantom killer" when she argued that a person or persons other than the defendant had killed the victim. In his opening brief, appellant argued that the prosecutor had committed *Doyle* error in his cross-examination of appellant and that this error was exploited in closing argument. (See AOB 240-248.)

Respondent answers by asserting that no *Doyle* error occurred at appellant's trial, and that such a claim is forfeited in any event. (RB 122, 129.) Although conceding that the prosecutor's comments during closing argument about defense counsel having created a "phantom killer" were at times "confusing and inartful" (RB 129), respondent contends that appellant suffered no resulting prejudice. (RB 129-130.) Respondent's arguments lack merit.

Preliminarily, respondent contends that appellant has forfeited his *Doyle* claim because, in essence, his attorney did not mention that case by name in the proceedings below. (RB 124.) In other words, respondent contends that defense counsel's actual objections and requests for admonitions were insufficient to preserve the point for appeal.[59]

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[59]Defense counsel consistently objected on the ground that the prosecutor's questions trenched on the confidentiality of the attorney-client privilege. (32 RT 4284, 4300.) Earlier in his cross-examination, the

(continued...)

Respondent is incorrect. As appellant pointed out in his opening brief, the basis for the *Doyle* rule is that if a defendant has been advised of and exercises the right to remain silent, it would be unfair to permit the prosecutor to use that silence against him at trial. (*People v. Galloway*, (1979), 100 Cal.App.3d at p. 557.) This is precisely what occurred here, and trial counsel's objections, followed by a request that the jury be admonished accordingly, was sufficient to alert the trial court to what was occurring.

In his questions to appellant, the prosecutor explicitly accused appellant of making up the version of events he testified to under oath in front of the jury after trying, without success, to inquire into whether appellant had informed his attorneys of that version after his arrest. Notwithstanding respondent's argument to the contrary, the prosecution was improperly using appellant's silence against him at trial. Appellant's counsel's objections and requests for admonition sufficed to preserve the point even though she did not mention *Doyle* by name.

Respondent does not appreciate that defense counsel were placed in a delicate position as a result of the prosecutor's tactics. Because the prosecutor was suggesting (among other matters) with his questions that appellant had been coached by defense counsel, it is only reasonable to assume they would have to be careful to avoid the appearance that they

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[59](...continued)
prosecutor had sarcastically remarked that the public defender who had counseled appellant shortly after his arrest came from the same office as his current attorneys. Here, the trial court sustained defense counsel's objection without any grounds having been stated, and admonished the jury that it could disregard the prosecutor's comment. (32 RT 4268.)

were concealing information from the jury.[60] "Defendant is not required to bear such a risk." (*People v. Bain* (1971) 5 Cal.3d 839, 847.)

For similar reasons, appellant should not be penalized for failing to object to the prosecutor's exploitation of the *Doyle* error in closing argument, where the prosecutor accused defense counsel of concocting a "phantom killer" defense together with appellant, consistent with appellant's trial testimony. The suggestion implicit in the prosecutor's argument was that appellant's silence until he gave his trial testimony was proof that the trial testimony was a fabrication created for the jury's consumption. The cases cited by respondent in urging that appellant has forfeited his claim that the prosecutor exploited the *Doyle* error in closing argument are easily distinguishable. (RB 128-129, fn. 15.)

Respondent first cites *People v. Sapp* (2003) 31 Cal.4th 240, 279. However, *Sapp* did not involve a claim of *Doyle* error, where counsel must be concerned that her objection will emphasize the prosecutor's improper inference to the jury. Moreover, here defense counsel made timely objections and requests for admonitions during appellant's cross-examination, whereas in *Sapp* there was no claim of prosecutorial misconduct in closing argument.

Next, respondent relies on *People v. Earp* (1999) 20 Cal.4th 826,

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[60]In his opening brief, appellant explained that "[t]he meaning the prosecutor attempted to attribute to appellant's silence in relying on advice from defense counsel was multifaceted, i.e., that (1) appellant had made up his trial testimony; (2) appellant had communicated a false story to defense counsel; (3) defense counsel did not trust appellant's story sufficiently so as to communicate it to the police and the prosecution before trial; and (4) appellant and defense counsel colluded to fabricate a trial defense." (AOB 245-246.)

858. Although *Earp* did involve a claim of *Doyle* error, respondent neglects to mention that the *Doyle* claim was *not* deemed forfeited in *Earp* by the lack of a timely objection.[61] Instead, respondent's citation to *Earp* concerns another type of unspecified prosecutorial misconduct to which neither objections nor requests for admonitions were made.

Finally, respondent's citation to *People v. Thomas* (1992) 2 Cal.4th 489, is for the most part inapposite. That case, like the others cited by respondent, did not involve a claim of forfeited *Doyle* error. However, *Thomas* does have some relevance to the case at bar, albeit not for the purpose for which it was cited by respondent. In *Thomas*, respondent contended that appellant had forfeited his claim of prosecutorial misconduct based on the prosecutor's implication in closing argument that defense counsel was responsible for a witness's contrived testimony. This Court did not reach the claim. Instead, the Court resolved the claim on the merits. "Reading the prosecutor's closing argument as a whole, we find it sufficiently clear that the general thrust of the complained-of remarks was that [the witness] testified as she did at the behest of her boyfriend, Harry Shorman, not that defense counsel concocted a story for [the witness] to tell." (*People v. Thomas*, *supra*, 2 Cal.4th at p. 530.) Here, in contrast, the prosecutor's closing argument explicitly accused appellant and defense counsel of having creating a phantom killer. Under such circumstances, the state should not be permitted to profit from the prosecutor's misconduct by asserting a procedural bar where defense counsel had to walk an exceedingly narrow tightrope between protecting appellant's rights at trial and preserving a claim for appeal.

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[61]The *Doyle* error was found to be harmless on the merits.

Respondent's argument on the merits, i.e., "[t]his isn't *Doyle*" (RB 124), is equally unavailing. Respondent simply wears blinders when it asserts that "[t]he prosecutor was not attempting to draw adverse inferences *from appellant's discussions with his former counsel.*"[62] (RB 124, original italics.) This contention is belied by the prosecutor's closing arguments at both phases of the trial, where he consistently accused appellant of fabricating a defense together with defense counsel. (34 RT 4549-4575 [guilt phase]; 43 RT 5711 [penalty phase].) Certainly, as respondent concedes, the prosecutor's comments were "at times confusing and inartful," but equally clear is that they were calculated to drive home the point that the guilt-phase defense was a collaborative fabrication concocted by defense counsel and appellant.

In contending that the prosecutor's conduct in appellant's case does not make out a *Doyle* violation, respondent fails to address the holding of the Court of Appeal in *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520-1521. As appellant pointed out in his opening brief, *Eshelman* held that the rationale of *Doyle* is applicable in cases where the evidence demonstrates that a defendant chooses not to discuss the facts of his case on the advice of counsel.[63] The bottom line is that the prosecutor's cross-

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[62]Appellant did not have "former counsel." At all stages of his case, he was represented by the Alameda County Public Defender's Office. His deputy public defender from arraignment through preliminary examination and preliminary proceedings in the superior court was James Chaffee. Thereafter, deputy public defenders Judy Browne and J. Dominique Pinkney were assigned to represent appellant and did so through judgment.

[63]Nor does respondent's citation to *Anderson v. Charles* (1980) 447 U.S. 404, 409 answer the question posed by appellant's claim, as *Charles* does not hold that any time a defendant makes a post-*Miranda* statement

(continued...)

examination of appellant constituted *Doyle* error, and that error was exploited in the prosecutor's closing arguments in both phases of appellant's trial.

4. Appellant's Trial Was Permeated With Gratuitous Prosecutorial Misconduct

In addition to the instances of prosecutorial misconduct addressed earlier in his argument, appellant directed this Court's attention to other instances of the prosecutor's misconduct at the guilt phase which also subverted appellant's right to a fair trial. (See AOB 248-252.) Misconduct of this ilk occurred when the prosecutor on more than one occasion made demeaning facial and verbal gestures during the direct and cross-examination of appellant in an attempt to communicate to the jury that he believed appellant's testimony was either false or ridiculous. On another occasion, prior to the guilt phase closing arguments, the prosecutor engaged in self-aggrandizing conduct when, in the jury's presence, he offered to cancel his Christmas vacation in Europe so as not to cause a scheduling problem for the jury during the holiday recess.

Appellant argued that while these instances of misconduct, if viewed in isolation, might not warrant reversal, reversal was compelled when the prosecutor's misconduct is viewed as a whole and in combination with his campaign of character assassination. Respondent brushes the argument aside, contending first that the trial court's admonitions to the jury did not establish that the jurors witnessed the complained-of gestures, "construed them negatively to the defense," or that appellant could have been

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[63](...continued)
the prosecution has a free hand to impeach him with evidence of his silence. (See, e.g., *Pitts v. Anderson* (5th Cir. 1997) 122 F.3d 275, 280.)

prejudiced by such conduct even if the jury observed it. (RB 130.) As for the self-aggrandizing conduct in which the prosecutor engaged, respondent contends that claim is forfeited because appellant's objection and failure to request an admonition was insufficient to preserve the claim for appeal, and "that there is no reasonable likelihood the jurors would have understood the exchange the way appellant is now spinning it." (RB 131-132.) Respondent's efforts to absolve the prosecutor's misconduct are unavailing.

Respondent's contention that the trial court's admonition "does not establish misconduct, i.e., that the jury had been aware of the prosecutor's facial expressions and construed them negatively to the defense" (RB 130) cannot be credited. This Court should not presume that the trial court intervened idly and without basis, or that the prosecutor's transgressions were isolated incidents. The very words the trial court used each time it admonished the jury demonstrate that it was just as concerned as defense counsel that appellant's right to a fair trial was sufficiently endangered by the prosecutor's demeaning and unprofessional conduct to warrant an appropriate admonition to the jurors, lest they rely on the prosecutor's reaction to the veracity of appellant's testimony instead of their own. (32 RT 4254.)

It borders on the specious to imply, as respondent does, that the prosecutor's facial expressions and laughter were innocent. Respondent is correct, however, when it concludes that "[m]ost likely the jury understood the prosecutor as engaging in a type of advocacy." (RB 130.) The problem with respondent's position is that it does not appreciate that this form of "advocacy" is improper, which perhaps explains why respondent neglects to address the authorities cited by appellant in his opening brief which

rightly condemn this kind of lawyering. (See AOB 250.)

Respondent also fails to present a convincing reason why this Court should not reach the merits of appellant's argument that the prosecutor committed misconduct when he offered, in the jury's presence, to sacrifice his Christmas trip to Paris in order to accommodate the jurors' schedules. Defense counsel objected on the appropriate and specific ground that it was inappropriate for this matter to be discussed in the jury's presence. It is not "spinning" for appellant to point out what was obvious to all involved at the trial, i.e., that the prosecutor was seeking to ingratiate himself with the jurors by his offer. Nor does respondent venture to suggest how defense counsel could have sought a better cure. Implicit in respondent's argument is that in order to preserve the point for appeal, defense counsel was required to ask the trial court to inform the jury that they should not take into account the prosecutor's selfless gesture in deciding the case. It is difficult, if not impossible, to see how such a "remedy" would have been worded or how it would have ameliorated the situation. Appellant has not forfeited his right to have this Court take this instance of the prosecutor's misconduct into account, along with all the others, in deciding whether he engaged in a pattern of misconduct so egregious that it infected the trial with such unfairness so as to constitute a denial of due process.

It should come as no surprise that when addressing the merits, respondent can assert that "there is no reasonable likelihood the jurors would have understood the exchange the way appellant is now spinning it" (RB 132), yet offer no other way to understand why the prosecutor would have made his offer in the jury's presence. Moreover, respondent seems to assert that in order for the prosecutor's conduct to rise to reversible misconduct, the *jury* would have to understand the prosecutor's remarks as

"a deceptive or reprehensible attempt by the prosecutor to persuade." (RB 132.) This is simply incorrect. It is the *reviewing court* that must be convinced that the prosecutor acted deceptively or reprehensibly in attempting to persuade the jury or the trial court, not the jury that must be convinced that the prosecutor acted improperly.[64]

To summarize, the prosecutor engaged in misconduct by making demeaning facial and verbal gestures during appellant's testimony and later by his attempt to ingratiate himself with the jurors by offering to cancel his Christmas trip to Paris for their convenience. These matters are properly before this Court both individually and in combination with the other instances of the prosecutor's misconduct.

5. The Guilt-Phase Misconduct Was Prejudicial and Requires Reversal

In his opening brief, appellant argued that the prosecutor's misconduct at the guilt phase impacted upon appellant's federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments, thereby shifting the burden to the state to prove beyond a reasonable doubt that the error did not contribute to the verdict. Additionally, appellant argued that his right to a fair trial as guaranteed by the Due Process Clause

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[64]For instance, a prosecutor who attempts to introduce evidence in front of a jury knowing the evidence is inadmissible is attempting to persuade in a deceptive and reprehensible manner, but the fact that the evidence is inadmissible is obviously not known to the jurors. Thus, the jury will ordinarily not be aware that they were being subjected to a deceptive or reprehensible attempt at persuasion. If respondent's position were correct, only the most inartful and clumsy prosecutors could be said to have committed misconduct. And even in such a case, one must ask how persuasive could such a prosecutor be if his attempts to persuade were easily seen by the jurors as deceptive or reprehensible?

of the Fourteenth Amendment was violated by the prosecutor's pervasive misconduct, again requiring the application of the federal standard for prejudice.[65] (See AOB 252-253.)

In arguing that the state could not meet its heavy burden, appellant pointed to the lengthy jury deliberations in a straightforward case where appellant's credibility was the primary contested issue and where the prosecution's case was entirely circumstantial. Additionally, appellant demonstrated that during the three days of deliberation, the jury communicated frequently with the trial court, making eight separate requests of the court, including requests for further instruction, readback of appellant's testimony, the playing of a tape-recording of appellant's interrogation after his arrest, and a request to examine several evidentiary exhibits. Finally, appellant demonstrated that although the trial court, on numerous occasions, attempted to ameliorate the harm caused by the prosecutor's misconduct, the language employed by the trial court was simply inadequate or far too weak to overcome the taint with which the prosecutor's misconduct infected the trial. (See AOB 253-257.)

Respondent contends that having "established that any misconduct was harmless when viewed singly," the alleged acts of misconduct "are no more prejudicial when viewed cumulatively." (RB 132.) In an attempt to meet its burden under both the state and federal standards, respondent can do no better than point to the supposed strength of the entirely circumstantial case against appellant. (RB 132-134.) It points to supposed concessions made by appellant's counsel during argument, such as "the

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[65]Appellant also argued that he was entitled to reversal even under the less demanding state-law standard applied by this Court.

prosecution has proven that [the victim] was killed during the course of a burglary or a robbery" (RB 132), and the fact that appellant conceded he was guilty of entering the victim's home and stealing her car as well as other personal property (RB 134). Respondent is again incorrect.

Neither appellant nor his attorney conceded his guilt of murder. The trial prosecutor did not proceed on the basis of the assumptions respondent makes here, and neither should this Court. The prosecutor's argument to the jury was simply that the circumstantial evidence was strong, and appellant was a despicable violent person who had lied to the police in his interrogation and whose trial testimony was not worthy of belief. Certainly, such an argument contemplates that if the jury credited appellant's testimony, at least sufficiently to entertain a reasonable doubt concerning the truth of the charge of murder, appellant would be entitled to an acquittal.

Respondent expends no energy in replying to appellant's argument, replete with his citations to the record, that the jury spent a considerable amount of time evaluating appellant's credibility and carefully sifting through the evidence in arriving at its verdict. Certainly, as respondent asserts, the jury's verdict reflects that it ultimately rejected appellant's testimony, but that is the starting point for determining whether the verdict was not tainted by the prosecutor's deceptive and reprehensible conduct, not the destination, as respondent would have it. Indeed, in making its argument here that the prosecutor's misconduct was harmless, respondent itself relies on the improper inferences that flowed from the *Doyle* error to show why the jury discredited appellant's testimony. (RB 134.) Respondent has simply failed to carry its burden of demonstrating that the jury's verdict was not influenced by the prosecutor's pervasive misconduct,

or that the jury's decision in this case was not a miscarriage of justice because it was arrived at in a proceeding where the prosecutor consistently engaged in behavior involving the use of deceptive or reprehensible methods to persuade the jury. For these reasons, the jury's guilt-phase verdicts must be reversed.

B. Misconduct in the Penalty Phase

Appellant demonstrated in his opening brief that as egregious as the prosecutor's misconduct was in the guilt phase, his misconduct in the penalty phase was even more flagrant. There, in conducting his cross-examination of appellant's mother, Rosia (Rose) Carter, he consistently violated the trial court's in limine *Phillips* rulings and otherwise sought to expose the jury to inadmissible evidence by attempting to elicit from Rose whether she was "aware" of a series of incidents in which appellant assaulted various family members, slashed the throat of his cousin's father, and stole and wrecked his grandparents' truck. In this same vein, the prosecutor attempted to expose the jury to otherwise inadmissible aggravation evidence when it attempted to elicit from appellant's mother whether she attended appellant's court proceedings "when he hit a store owner with a rock three times in the head" (37 RT 5061) and whether she had come to the prosecutor's office to pick up gloves appellant "used in a burglary" (37 RT 5048). Finally, the prosecutor on several occasions referred to facts not in evidence and expressed his personal opinion. This pattern of misconduct was so pervasive that it resulted in an unfair trial and an unreliable penalty determination in violation of appellant's rights under the Sixth, Eighth, and Fourteenth Amendments. (See AOB 257-275.)

In reviewing respondent's reply, it appears that respondent generally takes the position that no misconduct warranting reversal occurred during

the penalty phase because the trial court sustained defense counsel's objections and admonished the jury on most of the occasions where an improper inference might otherwise be drawn. (RB 134-145.) However, respondent contends that the prosecutor did not violate any in limine *Phillips* rulings in its cross-examination of appellant's mother. Instead, in respondent's view, the prosecutor was simply conducting appropriate cross-examination once appellant had "opened the door." (RB 138-143.) Concerning appellant's claim that the prosecutor referred to facts not in evidence and offered his personal opinion, respondent concedes that this type of misconduct occurred but that it was not prejudicial because the trial court sustained defense objections and admonished the jury every time the prosecutor crossed the line. (RB 143-144.) Finally, in attempting to dispose of appellant's claim that the cumulative effect of the prosecutor's misconduct in the penalty phase requires that the death judgment be reversed, respondent contends that appellant was never prejudiced by any one act of misconduct, and that adding them all together does not increase the harm. In respondent's view, "[t]he penalty phase case was not close" and "there exists no reasonable possibility appellant would have received a more favorable penalty verdict had the prosecutor committed no acts of misconduct." (RB 144-145.) As appellant will demonstrate, respondent's position is simply untenable.

1. The Misconduct During the Cross-Examination of Rose Carter

a. Improper Questions Suggesting That Appellant Physically Assaulted Family Members, Slashed the Throat of His Cousins' Father, and Stole and Wrecked His Grandparents' Truck in a Fit of Anger

At the penalty phase, the prosecutor resumed his campaign of character assassination begun in his guilt-phase examination of Mamie Jackson. In spite of explicit rulings at the in limine *Phillips* hearing which either categorically precluded the prosecutor from introducing evidence of alleged violent acts appellant committed against members of his own family, or required that he first seek the court's permission to introduce such evidence at a hearing to be held outside the presence of the jury, the prosecutor put a series of questions to Rose Carter during cross-examination seeking to elicit whether she was "aware" that appellant had engaged in such violent conduct.[66] The prejudicial "highlight" of this questioning came when the prosecutor asked whether Carter knew that appellant had cut the throat of Patrick Shields, a member of his family. (37 RT 5072-5073.) Although the trial court sustained defense counsel's objection, the admonishment it delivered to the jury was hardly adequate to remedy the harm caused by the prosecutor's toxic tactics.[67]

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[66]The conduct referred to in this series of questions consisted of a 1985 battery of his cousin, Carla Spencer; a 1985 battery of his aunt, Mamie Jackson; a 1986 battery of Carla Spencer; and an incident in 1986 where appellant stole a truck from his grandparents and wrecked it because he was angry with his grandmother. (37 RT 5071-5073.)

[67]Defense counsel objected that the admonishment was not forceful enough. The trial court immediately rebuked trial counsel in the jury's (continued...)

Respondent seeks to downplay the prosecutor's deceptive and reprehensible tactics when cross-examining Carter by asserting that "here the questions the prosecutor asked regarding appellant's alleged assaults on Carla Spencer, Brenda Jackson, Mamie Spencer,[68] and Patrick Shields were not a prosecutorial attempt to present evidence of prior violent offenses by appellant, but rather an attempt to probe, and place in perspective, the specifics of Rose's direct examination testimony that appellant had had physical fights with family members in the past." (RB 142.) Respondent's argument is utterly without merit, and its theory in justification of the prosecutor's conduct is not properly before this Court, as it was not raised below.

First, respondent presents a theory of relevance which the prosecutor did not urge below, although he had ample opportunity and motive to do so.[69] Respondent argues that appellant "opened the door" for the prosecutor to ask "specific questions about the tension and physical fights

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[67](...continued)
presence for having the temerity to ask for a more forceful admonition. (37 RT 5073.) Shortly thereafter, when the trial court felt obliged to issue a sua sponte warning to the prosecutor to refrain from expressing his personal opinions while questioning Carter, it also used the occasion to again mock defense counsel for having previously insisted upon a more forceful admonition: "The jury may be admonished to disregard that. Is that forceful enough, Ms. Browne?" (37 RT 5078.)

[68]The Mamie Spencer respondent refers to here is in fact Mamie Jackson, appellant's aunt who testified at the guilt phase. (1 RT 207; 28 RT 3733-3738.)

[69]Indeed, the prosecutor offered *no* theory of relevance to justify his questions once rebuffed by the trial court's ruling. He was content to simply "hit and run."

appellant may have had with other family members" so that the prosecutor "could attempt to perhaps show that the evidence was not in fact mitigating." (RB 141.) Respondent may not be heard to offer this after-the-fact justification for the first time on appeal. (*People v. Hines* (1997) 15 Cal.4th 997, 1034, fn. 4 ["Because the prosecutor did not attempt to justify admission of the statement on either of these grounds, the Attorney General may not now assert them as a basis for challenging the trial court's ruling excluding the statement"].)

Even if respondent's claim is not deemed forfeited, it necessarily fails on the merits. In his opening brief, appellant cited *People v. Ramirez* (1990) 50 Cal.3d 1158, for the proposition that the prosecutor's questions on cross-examination were improper. Respondent contends that *Ramirez* is distinguishable, but cannot say why. (RB 141-142.) Indeed, this Court, in its opinion in *Ramirez,* identified the very source of the argument respondent ventures to resurrect here and cogently explained why it has no merit:

> The Attorney General relies on this court's decisions in *People v. Boyd, (1985)* 38 Cal.3d 762, 775-776, and *People v. Rodriguez* (1986) 42 Cal.3d 730, 790-792 [230 Cal.Rptr. 667, 726 P.2d 113], to support the asserted propriety of the cross-examination. . . . The Attorney General suggests that under *Boyd* and *Rodriguez*, when a defendant "opens the door" by presenting any mitigating evidence relating to a defendant's background or character, the prosecution has broad discretion to present other evidence of the defendant's background to give the jury "a more balanced picture of his personality." (*Rodriguez*, *supra*, 42 Cal.3d at p. 791.)
>
> The Attorney General's argument overlooks a significant passage of the *Rodriguez* decision, in which we explained the appropriate limits of our holding in that case.

> After concluding that there was no impropriety in the prosecution's closing argument comment in the *Rodriguez* trial, we emphasized: "Nothing in our discussion is meant to imply that *any* evidence introduced by defendant of his 'good character' will open the door to *any and all* 'bad character' evidence the prosecution can dredge up. As in other cases, the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf.

(*People v. Ramirez*, *supra*, 50 Cal.3d at pp. 1192-1193, original italics.)

Contrary to respondent's assertion, the reference in Rose Carter's testimony to appellant's participation in family disputes involving explosions of anger and physical fighting was not offered as mitigating evidence of a positive character trait. The mitigating point of that testimony was that appellant was raised in an environment in which physical fighting had become acceptable as a means of coping with the vicissitudes of daily life after the tragic death of Chester Jackson, appellant's grandfather and the family patriarch, in March of 1984, and that such behavior shaped appellant's values when he became an adult. The defense did not assert in its case to the jury that appellant had not engaged in such violent conduct, or that he, in contrast to other similarly-situated family members, had remained peaceful and nonviolent until he committed the capital crime.

As this Court pointed out in *Ramirez*, "[b]ecause the defense had presented no evidence to suggest that defendant had not engaged in any such misconduct in his childhood, this evidence was not proper rebuttal evidence and went beyond the scope of permissible cross-examination." (*People v. Ramirez*, *supra*, at 50 Cal.3d at p. 1193; cf. *People v. Rodriguez* (1986) 42 Cal.3d 730, 791-792 [prosecution could properly refer in closing

argument to evidence that defendant had reached for a shotgun in the back seat of his car when stopped by the police to rebut defense evidence suggesting defendant "was a kind, loving, contributive member of his community, regarded with affection by neighbors and family."].)

It is also instructive to contrast the prosecutor's cross-examination at appellant's trial with the type of cross-examination this Court deemed permissible in *Ramirez*. There, the defendant's mother "testified only to a number of adverse circumstances that defendant experienced in his early childhood – e.g., an alcoholic father who did not provide adequately for his family and who beat his mother, a number of serious illnesses leading to some disability, his parents' divorce and the early death of his father." (*People v. Ramirez*, *supra*, 50 Cal.3d at p. 1193.) This Court observed that although it was proper to permit the prosecution to elicit facts on cross-examination that were helpful in placing the mother's testimony in a proper perspective, e.g., that although the defendant's father beat the mother, he never beat the defendant and that the defendant was loved by both his parents, it was impermissible to allow the prosecutor "to introduce evidence of a course of misconduct that defendant had engaged in throughout his teenage years that did not relate to the mitigating evidence presented on direct examination." (*Ibid.*)

Additionally, respondent conveniently ignores that the trial court had already ruled that the prosecutor was specifically precluded from admitting much of this type of evidence as aggravation under factor (b) of Penal Code section 190.3. (1 RT 206-207, 211, 216.) In the case of the Shields throat-slashing incident, the trial court had reserved ruling on the admissibility of such evidence until the prosecutor provided an adequate foundation prior to the evidence coming before the jurors:

THE COURT: That's why I said on Patrick Shields, on one and two and three, if we get to the penalty phase and Mr. Landswick has an opportunity to discuss this with Mr. Shields, and *then he is going to have to come in here and tell me what this man is prepared to testify to, and then at that time I'm going to make a ruling.*

MS. BROWNE: Okay. *So as an officer of the court, it will be presented from the prosecution what it will be testified to?* Fine.

(1 RT 217, italics added.)

. . .

THE COURT: But I would assume now, Mr. Landswick, that if we get to a penalty phase you're going to make an effort to get a hold of Mr. Shields, you are going to interview him if he shows up, and then you are going to at the point know what he is prepared to testify to.

MR. LANDSWICK: *Oh, absolutely.*

THE COURT: And then we'll have that on the record as to two and three.

(1 RT 218-219, italics added.)

Moreover, both the prosecutor and the trial court were aware, from the police reports concerning the Shields incidents attached to the prosecutor's notice of aggravation, that Rose Carter was not a witness to any assault on Shields and therefore had no personal knowledge of these events. (2 CT 261-270.) This circumstance, when combined with the fact that the prosecutor reneged on his pretrial assurances to the trial court and counsel concerning the Shields incidents, demonstrates that the prosecutor was not operating with a good-faith belief that Carter was a competent witness, even assuming his cross-examination was otherwise proper.

b. Improper Questions Suggesting That Appellant Hit a Store Owner Three Times on the Head with a Rock

In further cross-examination of Rose Carter, the prosecutor improperly questioned her regarding another violent incident involving appellant by asking her if she had attended court proceedings in 1983 "when [appellant] hit a store owner with a rock three times in the head." (37 RT 5061.) This incident rivaled the Shields throat-slashing for its prejudicial effect. Defense counsel objected to the question, informing the trial court that appellant had been acquitted of the charge and therefore evidence of the incident was inadmissible. The trial court "changed" the prosecutor's question to one in which Rose was asked whether she went to court proceedings where appellant *was accused* of hitting a store owner in the head three times with a rock. Both defense counsel's objection and his request that the jury be admonished were overruled, and defense counsel was rebuked for "making speeches" while objecting. (37 RT 5061-5062.)

Respondent contends that the prosecutor committed no misconduct because "it is clear from the record . . . that the jury would not have concluded there was any *evidence* appellant actually hit a store owner with a rock." (RB 137, original italics.) According to respondent, "[t]he question was whether Rose had attended court on the occasion that appellant had been accused of hitting a store owner in the head three times with a rock. Jurors understand the difference between 'accusations' and proof." (RB 137.) Further, respondent contends that the topic of Rose's court attendance was relevant cross-examination to rebut the defense's mitigation theory. (RB 138.) Respondent again misses the mark by a wide margin.

If this Court were to credit respondent's theory that the prosecutor engaged in no misconduct here because the jury could distinguish between accusations and evidence, what would have prevented the prosecutor from asking Rose whether she attended court proceedings where appellant had been accused of, e.g., multiple murder, child molestation, or torture and describing the allegations in his questions? "By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*People v. Wagner* (1975) 13 Cal.3d 612, 619.) The rule is well established that the prosecutor may not interrogate witnesses solely for the purpose of getting before the jury the facts inferred in his questions, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 734, and cases there cited.)

Nor should this Court uncritically accept respondent's blandishments concerning how the jury would have treated the prosecutor's underhanded question. As this Court recognizes, the fact that the improper question elicited a negative response from the witness and that admonitions were given may well be insufficient to cure the prejudicial effect of repeated insinuations regarding the defendant's past conduct. (*People v. Wagner*, *supra*, 13 Cal.3d at p. 621.) This is precisely what occurred at appellant's trial. The prosecutor repeatedly insinuated through his questions to Rose that appellant had committed multiple violent acts upon members of his family and others in his community, committed a burglary in which he wore gloves, and that he stole and destroyed his grandparents' property.

Respondent's contention that the prosecutor's cross examination

was relevant to rebut mitigating evidence presented in the direct examination of Rose is not supported by the record and makes no sense as a matter of logic. Respondent attempts to extract a legitimate basis for rebuttal from appellant's so-called concession that "'the defense sought to portray Rose as a parent who considered her son incorrigible and who wanted her son confined within the juvenile justice system,'" and "that the defense also theorized 'that appellant was an unwanted child who was deprived of appropriate maternal affection and supervision.'" (RB 138, citing AOB 261, 269.)

However, respondent simply fails to show how the fact that Rose attended specific juvenile court proceedings in which appellant was at risk of becoming a ward of the court because he committed criminal acts in any way rebuts the defense mitigation theory. Indeed, Rose's attendance at such proceedings was entirely consistent with the defense theory of mitigation, as the defense sought to show that she wanted the juvenile court system to "deal" with her son because she was incapable of doing so herself. Moreover, the prosecutor did not ask Rose what stance, if any, she took at those proceedings, as might be expected if the prosecutor was asking his questions in a bona-fide attempt to rebut the mitigating evidence.

More significantly, respondent utterly fails to explain why it was necessary for the prosecutor to include in his question the unquestionably prejudicial description of the "facts" of the case being litigated at the proceedings at which Rose was allegedly present. Here, as before with the many instances of violent acts appellant supposedly committed on members of his family, the prosecutor was simply trying to expose the jury to evidence through the back door that he was otherwise prohibited from

introducing.[70] In the case of appellant hitting a store owner on the head three times with a rock, this evidence was not included in the catalogue of factor (b) evidence which the prosecutor sought to have admitted when the issue of the admissibility of factor (b) evidence was litigated at the pretrial *Phillips* hearing. This certainly lends credence to defense counsel's representation to the trial court (for which he was rebuked) that appellant was acquitted in connection with such a charge, as Penal Code section 190.3 explicitly provides that "in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted."

The conclusion is inescapable that the prosecutor engaged in egregious misconduct in dredging this matters before the jury. Nothing that respondent asserts in its brief justifies these reprehensible and deceptive attempts by the prosecutor to persuade the jury.

2. Misconduct by Referring to Facts Not in Evidence and Expressing Personal Opinion

This prosecutor's misconduct was not confined to just the way he insinuated highly prejudicial and otherwise inadmissible evidence during cross examination. As appellant demonstrated in his opening brief, the prosecutor referred to facts not in evidence or stated his personal opinion on a number of occasions throughout the trial. (AOB 269-272.)

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[70]Earlier in his cross-examination of Rose, the prosecutor employed another variation on this theme of exposing otherwise inadmissible evidence to the jury through the back door when he asked her if she had gone to the District Attorney's office in February of 1984 to retrieve some gloves appellant had used in a burglary. Such evidence was inadmissible at the penalty phase. (See Pen. Code, § 190.3.) Defense counsel's relevance objection to this deceptive method of persuasion was sustained. (See AOB 258-260.)

Specifically, this occurred on two additional occasions during the penalty phase.[71] First, the prosecutor asked Rose Carter if she blamed herself for appellant's predicament. When she replied that she did not feel responsible, the prosecutor expressed his agreement, observing: "I don't believe you're to blame." This drew a mild rebuke and admonishment from the trial court. (37 RT 5078.) Second, the prosecutor attempted to paint a sympathetic picture of the victim in his penalty-phase closing argument by describing her as a social welfare worker and "a wholesome, sweet grandmother, whose whole life was committed to helping her make poor and disadvantaged people's lives better." However, no evidence had been introduced to support this argument other than that the victim was a grandmother who was loved by her family. Again, the trial court sustained defense counsel's objections and informed the jury that no evidence supported the prosecutor's characterization and that "[t]he jury can disregard that." (43 RT 5692.)

In his opening brief, appellant argued that the prosecutor's behavior in this regard constituted misconduct which violated appellant's federal constitutional right to confrontation, due process of law, and a fair jury trial under the Sixth and Fourteenth Amendment. (AOB 270-272.) Respondent implicitly concedes that the prosecutor's comments were improper, but argues that "[t]here could have been absolutely no prejudice here" from the description of the victim in the prosecutor's closing argument. Similarly,

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[71]In his guilt-phase closing argument, the prosecutor referred to matters outside the record in his attempt to debunk the defense theory as to how the victim's bloodstains got on appellant's clothing. Defense counsel's objection was properly sustained, but the admonition given to the jury was insufficient, as the jury was told it "can" disregard the prosecutor's comment, not that it must do so. (34 RT 4484; see AOB 269.)

in respondent's view any possible harm resulting from the prosecutor's expression of personal belief that Rose Carter was not to blame for how appellant turned out was negated by the trial court's prompt admonishment. (RB 143-144.) Respondent's contentions trivialize the harm caused by the prosecutor's obviously improper conduct.

Respondent's contention does not appreciate that the prosecutor's misconduct took place at the penalty phase of the trial, where the decision the jurors were being called upon to make was a highly individual and normative one. Unlike their task in the guilt phase, where they were engaged in neutral fact-finding, at the penalty phase the jurors could properly take into account feelings of sympathy and empathy. Thus, as appellant pointed out in his opening brief, there was a greater danger that the prosecutor's misconduct at the penalty phase would resonate with the jury to appellant's prejudice. This was especially the case when he expressed his personal belief that appellant's mother was not to blame for the way he turned out, a contention that struck at the very heart of the defense case for mitigation.

Similarly, when the prosecutor referred to facts not in evidence to enhance his characterization of the saintly qualities of the victim, he was making a naked appeal to the emotions of the jurors in hopes that they would emphasize the value of the life taken when contrasting it with the life defense counsel asked them to spare. Of course, this dovetailed neatly with a theme the prosecutor emphasized at the start of his closing argument, i.e., that showing mercy to appellant by giving him anything other than a death sentence was undue enrichment when the jury's duty was to "pay respect" to the victim as well as to punish her killer. (43 RT 5689.) Finally, respondent again makes no effort to address the adequacy of the

tepid admonitions the trial court delivered to the jury.[72] To sum up, respondent has failed to demonstrate beyond a reasonable doubt that the prosecutor's misconduct here did not have an impact on the death verdict.

C. Given the Pervasiveness of the Misconduct, and the Obvious Closeness of This Case As Reflected in the Extensive Nature of Both Guilt and Penalty-Phase Deliberations, Reversal is Required

In his opening brief, appellant demonstrated that based on the objective evidence surrounding the jury's deliberations, the case for which penalty was the appropriate one was exceedingly close and therefore it could confidently be said that the prosecutor's pervasive misconduct throughout the entire trial tipped the scales in favor of the death verdict. (AOB 272-274.) In the face of this accumulation of evidence, respondent retreats into a state of denial, and remarkably asserts that "[t]he penalty phase case was not close."[73] (RB 145.)

Respondent rephrases its harmless-error argument by explaining that "there exists no reasonable possibility appellant would have received a

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[72]To be sure, for the most part the trial court was not blind to the fact that the prosecutor pushed the envelope of propriety throughout the entire trial, but its method for dealing with the prosecutor's excesses was ineffectual. Again, it must be emphasized that telling the jury that it "may" or "can" disregard the prosecutor's improprieties is not the same as making it crystal clear that the jury was obliged to disregard the misconduct. At no time was the prosecutor warned to refrain from repeating his misconduct, or told that if his misconduct persisted the jury would be instructed that it could infer from the misconduct an intent to subvert appellant's right to a fair trial and that the trial court would be obliged to declare a mistrial if appellant was convicted. (*People v. Bolton, supra*, 23 Cal.3d at p. 216.)

[73]Less remarkable is respondent's repetition of the mantra that "[a]ny acts of misconduct did not prejudice appellant singly, and did not prejudice him cumulatively." (RB 145.)

more favorable penalty verdict had the prosecutor committed no acts of misconduct." (RB 145.) In making this argument, respondent contends that "[a]ppellant's case in mitigation paled in comparison to the properly-admitted evidence in aggravation" and then proceeds to catalogue that evidence, heavily relying on the fact that appellant killed the victim "in a particularly vicious and inhumane way." (RB 145.)

Respondent's contention completely ignores a number of highly relevant facts. First, the jury in this case deliberated for *eight days* before returning a death verdict. On the fifth day of deliberations, the trial court had been informed that the jury felt it was *irrevocably deadlocked* and needed help from the court. In fleshing out what was troubling the jury, the trial court was asked which of the two punishments was the more severe.[74] That question was not answered, and the jury deliberated for *three more days* before returning its death verdict. Curiously, respondent has absolutely nothing to say about why the jury would announce that it was hopelessly deadlocked after five days of deliberation, or what took the jurors an additional three days to render their death verdict, given its position that the prosecutor's case for death was a foregone conclusion based on a comparison with the evidence in mitigation. These two circumstances alone conclusively demonstrate that this was a very close case on the issue of penalty. But there was more.

As it did in the guilt phase, the jury made a number of requests to examine evidentiary exhibits during its penalty-phase deliberations, including the defense chart and photographs depicting appellant's "lifeline,"

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[74]See Argument XIII, in which appellant claims that the trial court committed reversible error in responding as it did to this request for further instruction. (AOB 368-389.)

the notes and tape recording of appellant's interrogation, and the photographs and diagram of the exterior of the victim's house. (5 CT 1045-1059.) These requests tend to show that the jurors were paying close attention to the mitigating evidence and were struggling with lingering doubts of appellant's guilt.

The foregoing circumstances also suggest an answer to the question respondent neglects to address, i.e., why the prosecutor would feel compelled to improperly insinuate there was evidence that appellant had committed a multitude of violent and felonious acts against members of his own family as well as other members of the community if the admissible aggravating evidence at his disposal was so compelling. It is far more reasonable to conclude that the prosecutor resorted to these underhanded tactics because he believed that his case for the death penalty was not sufficiently substantial as to overcome the evidence in mitigation in the eyes of this jury.[75] That conclusion is supported not only by the jury's careful review of the evidentiary exhibits, as previously demonstrated, but also by its request for clarification as to the meaning of CALJIC No. 8.85, factors (d) and (g). (5 CT 1050.) The fact that the jurors asked for clarification of these factors tends to show that at least some of them were seriously considering the mitigating evidence presented.

It is simply impossible to credit respondent's position that there is no

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[75]Indeed, the prosecutor explicitly relied on these insinuations in his penalty-phase closing argument, when he reminded the jurors of the questions he asked Rose about whether she knew of the beatings appellant inflicted on his female relatives and converted the questions into evidence over defense objection: "And I asked his mother, did you know that he beat Carolyn Spencer, Carla Spencer? Do you remember those questions, series of questions I asked the mother? *He beat on all his family.*" (43 RT 5715.)

reasonable possibility appellant would have received a more favorable verdict from the jury in this case had the prosecutor committed no misconduct. We already know how long and hard it was for a jury tainted by the barrage of misconduct to arrive at a death verdict. It defies common sense and logic to suppose that there is no reasonable possibility the result for appellant would not have been more favorable at a fair trial where there was no prosecutorial misconduct. Indeed, respondent inadvertently admits as much when it argues that "[w]hat appellant did to [the victim], and how it did it, *and the violence he had perpetrated in the past*, overwhelmed the fact that he had dysfunctional parents and a very difficult childhood." (RB 145, italics added.) Respondent does not argue that the circumstances of the crime, repugnant as they obviously are, were enough to tip the scales in favor of the death penalty. Appellant's violent past, in the opinion of the prosecutor and respondent, was an additional and necessary component in order for the factors in aggravation to substantially outweigh the factors in mitigation. And of course, much of the prosecutor's misconduct was directed at exposing the jury to inadmissible evidence of that very nature.

To conclude, the prosecutorial misconduct in this case deprived appellant of a fair trial on guilt and penalty, and respondent has not shown otherwise. All of the trial court's attempts to address the prosecutor's misconduct were insufficient to dispel the taint planted in the minds of the jurors. Again, respondent cannot show otherwise. Given the record of jury deliberations, which graphically demonstrates the fallacy of respondent's assertion that this was not a close case, reversal of the entire judgment is required under any standard of prejudice.

VI

THE ERRONEOUS ADMISSION OF APPELLANT'S IN-CUSTODY STATEMENTS TO THE POLICE AND TO LISA HENRY, OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, REQUIRES REVERSAL OF THE GUILT AND PENALTY JUDGMENTS

At trial, the prosecution introduced inculpatory statements made by appellant during a lengthy custodial interrogation conducted in a police station holding cell shortly after his arrest. Additionally, the prosecution introduced into evidence statements appellant made to his girlfriend, Lisa Henry, after his police interrogators decided it would be useful to have Lisa enter the holding cell and talk to appellant in an effort to arrive at the truth.

Appellant unsuccessfully sought pretrial to have all such statements suppressed on the grounds that his statements were not freely and voluntarily made. More specifically, he claimed that his statements were the product of deceptive means employed by his interrogators, including (1) minimizing the crime under investigation in order to obtain a waiver of appellant's Fifth Amendment rights, and (2) their subsequent surreptitious use of Lisa as an agent to obtain statements from him once their initial efforts had been, for the most part, frustrated.

In his opening brief, appellant argued that the trial court committed reversible error in allowing the jury to hear the police account of appellant's interrogation, Lisa's testimony, and the tape recording of her statement to the police, all of which were obtained in violation of appellant's Fifth Amendment right against self-incrimination and his Sixth and Fourteenth Amendment rights to counsel and due process. (See AOB 276-310.)

Respondent first contends that no "trickery" was involved in obtaining appellant's waiver of his right to remain silent. "Appellant voluntarily waived *Miranda*."[76] (RB 160.) Next, respondent contends that Lisa Henry was not a police agent, and that substantial evidence supports the trial court's finding to that effect. (RB 162-164.) Finally, respondent maintains that any assumed error in admitting appellant's statements was harmless. "Assuming, for the sake of argument, that the trial court erred in admitting appellant's statements to police and Lisa Henry into evidence, he is not, contrary to his position (AOB 300-310), entitled to reversal of both the guilt and death verdicts. Any error is harmless beyond a reasonable doubt." (RB 165.) As will be demonstrated, respondent's contentions are meritless.

There are a few points upon which appellant and respondent appear to agree. First, as respondent points out, the factual and procedural background is detailed. (RB 147.) Nonetheless, it appears that the parties are, for once, in accord as to what actually transpired in the proceedings below. Second, the parties agree that determinations as to the validity of a waiver of *Miranda* rights are reviewed independently. Third, the parties agree that any error in the admission of the contested statements must be shown to be harmless beyond a reasonable doubt to avoid the necessity of reversal, and that any harmless-error analysis must be conducted without reference to appellant's inculpatory trial testimony. (See RB 165, fn. 20.) Finally, it appears that, for the most part, the parties rely on the same federal and state cases to make their respective points. Consequently, appellant will only address matters raised by respondent's brief which were

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[76]*Miranda v. Arizona* (1966) 384 U.S. 436.

not otherwise covered in the arguments he made in his opening brief.

A. Appellant's Statements to His Police Interrogators Were Obtained in Violation of His Fifth Amendment Right Against Self-Incrimination

Respondent contends that appellant's chief interrogator, Sergeant Paniagua, did not engage in deception when he obtained appellant's *Miranda* waiver by concealing the fact that he was investigating a homicide and instead disclosed only that he was conducting "an investigation on the victim's car that was stolen, and specifically the incident in which the vehicle was taken as a lady had been hurt." (RB 159; 23 RT 3277.) Contrary to respondent's claim that "as a factual matter, appellant could not have believed that the officers only wanted to talk to him about a stolen car" (RB 159), the transcript of the relevant portion of the colloquy between Paniagua and appellant demonstrates otherwise.[77]

Respondent fails to acknowledge that Paniagua employed a well-recognized interrogation technique involving the psychological ploy of minimizing the moral seriousness of the offense to the suspect being questioned, a technique appellant discussed in his opening brief. (See AOB 287-288.) Thus, contrary to respondent's contention, the totality of the circumstances and the uncontradicted evidence before the trial court

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[77]Immediately after receiving Paniagua's assurance that he was not trying to trick him, appellant expressed his understanding that he was being questioned about a stolen car. Paniagua then confirmed that understanding and dropped any reference to a lady being hurt: "I said you were arrested for being in the car stolen and that I'm investigating the incident which the car was taken." (3 CT 627, Def. Exh. D.) Indeed, in his testimony at the hearing to suppress the statement, Paniagua conceded that he intentionally did not mention he was investigating a homicide to appellant, but "instead" phrased the matter as he did. (23 RT 3240-3243, 3277, 3292.)

demonstrated that the officers deceived appellant into waiving his Fifth Amendment rights. Consequently, the trial court's ruling that appellant freely, knowingly, and intelligently waived his rights cannot be sustained upon this Court's independent review. (*People v. Memro* (1995) 11 Cal.4th 786, 827; *People v. Hill* (1992) 3 Cal.4th 959, 979; see also *State v. Denny* (Ariz. 1976) 555 P.2d. 111, 114 [finding that inculpatory statement was untrustworthy and obtained by coercion, having been induced by police deceit in informing suspect that her husband was alive and would recover from gunshot wounds when he had in fact already died as a result of those wounds].)

B. The Admission in Evidence of Lisa Henry's Various Accounts of Her Conversations With Appellant During His Interrogation Violated Appellant's Fifth Amendment Rights

Respondent incorrectly posits that "[a]ppellant does not appear to be renewing his trial argument that he involuntarily made his statement to Lisa Henry." (RB 162.) Properly read and understood, appellant's argument both here and below is that the police interrogators used Lisa Henry as a surreptitious police agent to obtain incriminating evidence from appellant. As such, any statements obtained from appellant were not only involuntary, but were the product of impermissible custodial interrogation insofar as they were not preceded by fresh *Miranda* warnings. In any event, respondent does not suggest that the required analysis upon this Court's independent review would be any different if the claims were not intertwined as they are.

As did the trial court below, respondent relies on *Illinois v. Perkins* (1990) 496 U.S. 292, as dispositive of appellant's argument. (RB 162-163.) However, in his opening brief, appellant distinguished *Illinois v.*

Perkins on its facts, as there the high court held that the defendant had not been subjected to custodial interrogation when the police planted an undercover police agent in the jail setting where the defendant was awaiting trial on unrelated charges. Here, respondent seeks to bring this case under *Perkins*'s umbrella by suggesting that appellant was not being subjected to custodial interrogation at the time that Lisa Henry was placed in appellant's holding cell at the Oakland police station because "[t]here were no police in the room at the time Lisa was there." (RB 163.)

While it is true that no police were present in the small room in which appellant was locked, clad only in his underpants, during the five minutes he conversed with Lisa, it borders on the absurd to suggest that appellant was not being subjected to custodial interrogation or being held virtually incommunicado in a police-dominated atmosphere. The evidence was indisputable that he was being held in a small interrogation room at the homicide section of the Oakland Police Department where he had been closely interrogated for many hours prior to the arrival of Lisa Henry. The fact that no officers were present during appellant's conversation with Lisa did not magically transmogrify the setting so as to allow a reasonable person to conclude that appellant was no longer in a police-dominated atmosphere. Respondent's effort to equate the facts here with those present in *Perkins* thus fails.

The record also undermines respondent's contention that the interrogating officers "never" told Lisa what to ask appellant. (RB 163.) Instead, the record demonstrates there was evidence that Lisa was asked by the police to convince appellant to tell the truth or to tell her what

happened.[78] (23 RT 3257-3259.)

Respondent suggests that because appellant said nothing to indicate he thought Lisa was an agent of law enforcement, his conversation with her did not amount to constructive interrogation. In this regard, respondent cites, but misconstrues, language from *Rhode Island v. Innis* (1980) 446 U.S. 291. (RB 163.) There, the Supreme Court explained:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

(*Rhode Island v. Innis*, *supra*, 446 U.S. at p. 301, footnotes omitted.) When the police insert a murder suspect's girlfriend (who herself was involved in the crime under investigation) into a holding cell (where the virtually naked suspect has been held incommunicado for hours of interrogation) with instructions to speak to the suspect in order to obtain a hopefully truthful account of what happened, they should know that such a tactic is reasonably likely to elicit an incriminating response from the suspect.

Respondent contends that the trial court's determination to give credence to Paniagua's explanation for failing to contradict Lisa Henry's taped statement to him constitutes substantial evidence supporting the trial

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[78]Respondent does not suggest that the police had placed Lisa in the interrogation chamber because appellant had requested an opportunity to speak to her.

court's ruling.[79] (RB 164.) As appellant explained in his opening brief (see AOB 297-298), the trial court's finding that Lisa was not a police agent because she was the one who initiated the request to speak to appellant is constitutionally irrelevant. Lisa was not merely appellant's girlfriend. She was found in possession of the victim's stolen property and had washed his blood-stained clothes. Moreover, she had contradicted his alibi. Appellant's interrogators were well aware that placing Lisa in a room with appellant at the time they did so was very likely to lead to appellant making incriminating statements to her which in turn would be communicated to them.

Appellant continues to submit, as he did in his opening brief, that substantial evidence does not support the trial court's conclusion impliedly accepting the two different explanations offered by Paniagua and Medsker for why they failed to contradict Lisa's account that she acted on their behalf in questioning appellant. Finally, respondent does not venture to answer appellant's alternative claim that the substantial evidence rule may not be legitimately applied under these circumstances to defeat the claim that Lisa acted as a police agent. (See AOB 298-299.)

C. The Error in Admitting Appellant's Statements Has Not Been Shown to Be Harmless Beyond a Reasonable Doubt

Respondent contends that, assuming the trial court erred in admitting appellant's statements, any such error was harmless beyond a reasonable doubt. (RB 165.) Respondent's argument is self-contradictory.

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[79]This is the statement in which she reiterated that Paniagua and Sergeant Medsker asked her to go into the holding cell in order to obtain a statement from appellant.

Respondent concedes, as it must, that the prosecutor *emphasized* appellant's pretrial statements in its summation to the jury in the guilt phase, thus making it indisputable that those statements contributed to the guilt verdict. (RB 165.) Nonetheless, respondent contends that the guilt verdict would have been the same if appellant's statements had not been admitted. Pointing to the fact that (1) appellant had already falsely implicated Fred Bush in his statements to the police officer who detained him in the victim's car, (2) there was evidence showing that appellant was in possession of other items of personal property belonging to the victim, and (3) blood consistent with that of the victim was detected on items of clothing worn by appellant, respondent concludes that "it was manifest from the physical evidence that appellant was involved in the murder of [the victim]." (RB 165.)

Respondent ignores that appellant provided testimony that, if believed by the jury, explained how the evidence set forth by respondent was consistent with his innocence of murder. Citing language from *People v. Cahill* (1994) 22 Cal.App.4th 296, 319, respondent contends there was no "candidate theory and basis for reasonable doubt" as to appellant's guilt of felony murder. (RB 165.) Not so; respondent's contention wholly ignores the defense theory put forth in this case. It also ignores the great lengths the prosecutor went to in order to discredit the defense theory of the case by seeking to undermine appellant's credibility. The method the prosecutor used was to contrast appellant's trial testimony with his pretrial statements to the police and to Lisa Henry. Contrary to respondent's position, this demonstrates that the state has not shown beyond a reasonable doubt that the erroneous admission of appellant's statements did not contribute to his conviction. (*Arizona v. Fulminante* (1991) 499 U.S.

279, 295-296; *People v. Cahill* (1993) 5 Cal.4th 478, 510.)

The same logic applies to the death verdict. Respondent "disagree[s] with appellant that his statements to the police and Lisa Henry comprised an important part of the prosecution's case in aggravation." (RB 166.) Respondent predictably points to the admittedly brutal manner in which the victim met her death as foreclosing any other penalty verdict but death in this case. (RB 166.) However, that facile conclusion does not take into account the circumstances set forth in appellant's opening brief which flatly contradict respondent's position. (See AOB 306-310.) Nor has respondent attempted to analyze how the improperly-admitted evidence could not, beyond a reasonable doubt, have played a part in the death judgment. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 257-258; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.)

Although it would have been appropriate for respondent to concede, as it did with respect to the prosecutor's guilt-phase summation, that the prosecutor also emphasized appellant's pretrial statements in his penalty-phase closing argument, respondent has chosen to ignore how heavily the prosecutor relied on those statements in urging the jury to return a death verdict. Appellant has already pointed out in his opening brief how and to what extent the prosecutor exploited appellant's words in making that argument; there is no need to repeat these instances here. (See AOB 306-308.)

Respondent also neglects to address the fact that the jury examined the transcript of appellant's interrogation by the police on the seventh day of its penalty-phase deliberations, the day before it returned its death verdict and two days after having declared itself hopelessly deadlocked. (44 RT 5883-5888.) This is surely compelling evidence that the jury,

having previously announced its seeming inability to arrive at a penalty verdict, was again focusing on appellant's statements to the police in deciding whether he should live or die. (*People v. Garcia* (2005) 36 Cal.4th 777, 782.) Finally, appellant's case for mitigation was not so insubstantial as to warrant respondent's conclusion that the jury would have rejected it out of hand, as the length and nature of the deliberations demonstrate.

Appellant submits, as he did in his opening brief, that it would defy both logic and common sense to conclude that the People have shouldered their heavy burden of proving beyond a reasonable doubt that the erroneous admission of appellant's statements did not contribute to the resulting death judgment. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965; *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448.) Certainly, nothing respondent has said in its brief suggests otherwise.

D. Conclusion

Respondent's efforts to show that the trial court did not err in admitting as evidence appellant's statements to the police and to Lisa Henry are unconvincing. Additionally, respondent is unable to show that the prosecution did not heavily rely on the statements appellant made to the police in his interrogation and in the staged meeting with Lisa Henry in order to persuade the jury to convict appellant and then sentence him to death. As the state cannot possibly be said to have carried its federal constitutional burden of demonstrating beyond a reasonable doubt that the erroneous admission of those statements did not contribute to the jury's guilt and penalty verdicts, reversal of appellant's convictions and the death judgment is required.

VII

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND COMMITTED REVERSIBLE ERROR BY GIVING A UNANIMITY INSTRUCTION WHICH DIRECTED A GUILTY VERDICT OF FIRST DEGREE MURDER

A. Introduction

Appellant was charged with but a single crime in the Information, and that crime was murder under Penal Code section 187.[80] The only special circumstances alleged were that the murder was committed in the perpetration of, or attempted perpetration of burglary and robbery. Appellant was *not* charged with the substantive crimes of burglary, robbery, or the attempt to commit those crimes.

In his opening brief, appellant argued that the trial court committed reversible error when it instructed the jury at the guilt phase, pursuant to CALJIC No. 14.59, that if they were satisfied beyond a reasonable doubt that appellant made an entry with the specific intent to steal or to commit robbery, they "must" find appellant guilty. Such an instruction directed a verdict in contravention of appellant's Sixth and Fourteenth Amendment rights to trial by jury and due process and their state constitution counterparts under article I, sections 7, 15, and 16.[81] (See AOB 311-324.)

In its brief, respondent ventures two arguments. First, it insists that

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[80]The prosecutor proceeded on dual theories of first-degree murder, arguing that the murder was deliberate and premeditated, as well as felony murder.

[81]The trial court's oral instruction to the jury used the phrase " you must find the defendant guilty" (see 34 RT 4610), whereas the corresponding written instruction used the phrase "you should find the defendant guilty" (see 3 CT 764).

appellant is procedurally barred from complaining of the erroneous instruction in any form. Respondent claims that appellant "cannot currently challenge [the trial court's instruction] because he requested [it] below and therefore he either invited any error or his attacks are forfeited." (RB 168.) Alternatively, respondent contends that the instruction given by the trial court was entirely proper and did not direct the jury to find appellant guilty of murder. (RB 169-172.) As will be shown, respondent's arguments are meritless.

B. Appellant's Claim Is Not Procedurally Barred

Respondent contends that appellant is foreclosed from arguing that the trial court committed error by giving CALJIC No. 14.59, because appellant at one point requested such an instruction and therefore invited the error. (RB 168.) Once one examines what transpired at the December 16, 1992, hearing at which the trial court resolved which instructions were to be given to the jury at the conclusion of the guilt phase, respondent's contention is quickly revealed as meritless.

As appellant candidly explained in his opening brief, his trial counsel submitted a list of requested instructions, including a number of instructions bearing on the crime of burglary. (See AOB 322, fn. 130.) Among these requested instructions were CALJIC Nos. 14.50 [Burglary-Defined], 14.51 [First and Second Degree Burglary-Defined], 14.52 [Burglary-Inhabited Dwelling-Defined], and 14.59 [Burglary-Agreement As To Theft Or Felony Intended Not Necessary]. (3 CT 660-662.)

Conspicuously absent from respondent's discussion is the context in which this preliminary defense request was made. What respondent fails to inform this Court is that appellant tendered these requested instructions in connection with his request that the trial court instruct the jury that

burglary was a lesser-related offense, and therefore the jury was to be told it could find appellant guilty of burglary instead of murder. (See 33 RT 4345-4351.)[82] However, the prosecution vigorously objected to the giving of lesser-related offense instruction, arguing that appellant *was not charged with burglary*, and thus not entitled to the set of burglary instructions requested by the defense. (33 RT 4346.) The trial court sustained the prosecutor's objection and refused to give instructions on burglary as a lesser-related offense. (33 RT 4349-4351.) Thus, any initial request made by appellant for CALJIC No. 14.59 must be seen in the light of defense counsel's request under *People v. Geiger* (1984) 35 Cal.3d. 51. This is assuredly not invited error.

In *People v. Wickersham* (1982) 32 Cal.3d 307, this Court held that the doctrine of invited error serves a narrow purpose:

> The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . . [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.

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[82] At the time of appellant's trial, this Court's holding in *People v. Geiger* (1984) 35 Cal.3d 510 gave a defendant the right to instructions on lesser-related offenses. This Court had held in *Geiger* that due process requires that instructions on lesser, related offenses be given on request of a defendant where there is some basis, other than an unexplainable rejection of prosecution evidence, on which the jury could find the offense to be less than that charged, where the lesser offense is closely related to that charged and shown by the evidence, and where the instructions are justified by the defendant's reliance on a theory of defense that would be consistent with a conviction for the related offense. (*People v. Geiger*, *supra*, 35 Cal.3d at pp. 530-533.) This holding was overruled in *People v. Birks* (1998) 19 Cal.4th 108, 136, long after appellant's guilt-phase trial.

(*People v. Wickersham*, *supra*, 32 Cal.3d at p. 330.)

Here, it cannot be fairly maintained that defense counsel intentionally caused the trial court to err, and there is simply no rational basis for asserting that trial counsel tendered CALJIC No. 14.59 for the tactical purpose of encouraging the jury to convict her client of burglary when that crime was not charged or available as a lesser-related offense as a result of the trial court's ruling. (Cf. *People v. Dunkle* (2005) 36 Cal4th 861, 891 [invited error doctrine inapplicable, as it did not appear that trial counsel both intentionally caused the trial court to err and clearly did so for tactical reasons] with *People v. Valdez* (2004) 32 Cal.4th 73, 115-116 [invited error doctrine will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction].) The record cannot be read to fairly support the proposition that defense counsel wished the jury to be instructed with CALJIC No. 14.59 in the absence of other instructions allowing the jury to return a verdict of guilty to burglary as a lesser related offense to murder. Consequently, appellant did not tender an invitation to the trial court to commit error by giving this instruction, and he is not now procedurally barred from raising a challenge to the instruction in his direct appeal, as respondent would have this Court believe.[83]

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[83]In any event, as Penal Code section 1259 provides, this Court has consistently held that appellate review of instructional error is warranted, even in the face of the lack of objection in the trial court, to the extent that any erroneous instruction affects the substantial rights of a defendant. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4.) Most assuredly, appellant's substantial rights were affected by an instruction telling the jurors that they must convict him and respondent cannot contend otherwise.

C. The Trial Court's Delivery of CALJIC No. 14.59 Was Error In This Case

In his opening brief, appellant argued that the delivery of CALJIC No. 14.59, regardless of the two similar but differing ways it was communicated to the jury, violated his right to trial by jury and due process of law under the Sixth and Fourteenth Amendments, by effectively directing a guilty verdict to the single charged crime of murder. (*Connecticut v. Johnson* (1983) 460 U.S. 73 [directed verdicts prohibited regardless of the overwhelming weight of incriminating evidence]; *Sandstrom v. Montana* (1979) 442 U.S. 510 [rule against directed verdicts includes impermissible mandatory conclusive presumption of guilt upon the finding of certain other fact or facts]; *People v. Figueroa* (1986) 41 Cal.3d 714, 724 ["The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true'"]; see AOB 313-319.)

In connection with his constitutional argument, appellant directed this Court's attention to *People v. Osband* (1996) 13 Cal.4th 622, in which this Court held that the trial court committed error by orally delivering the then applicable version of CALJIC No. 14.59 by omitting the words "of burglary" so that the instruction read that if the jury found the defendant had entered with intent to steal or rape, it "should find the defendant guilty. . . ." (*People v. Osband, supra,* 13 Cal.4th at pp. 686-687.) However, as appellant demonstrated in his opening brief, the critical circumstances which caused this Court to find that error harmless in *Osband* were not

present in appellant's case.[84] (See AOB 319-321.) In response, respondent contends that there was nothing wrong with CALJIC No. 14.59, that appellant misreads *Osband*, and that this Court's holding in *People v. Holt* (1997) 15 Cal.4th 619 is dispositive on the merits. (RB 169-172.) None of respondent's contentions have merit..

As the Use Note to CALJIC No. 14.59 explains, "[t]his instruction [is] to be used if there is evidence of intent to commit some felony or felonies in addition to theft." As this Court held in *People v. Failla* (1966) 64 Cal.2d 560, 567-569, the purpose of the instruction is to inform the jurors that they need not unanimously agree as to what felony was intended at the time entry was made. It bears emphasis that appellant was *not* charged with burglary in this case nor did the prosecution contend that he entered the LaChapelle home with any intent other than to commit theft. This places appellant's case in marked contrast to *Osband* and *Holt*.

In *Osband*, the defendant was charged with two separate substantive counts of burglary, in addition to capital murder and other felonies, including sexual assaults. As to each such count, the prosecution's evidence tended to show that entry was effected with the intent to steal, rob, and/or commit a sexual assault.[85] Thus it was hardly suprising that on

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[84]The Court found the error in *Osband* harmless because (1) the written instructions were not contended to be erroneous, and (2) the jury had six copies of the written instructions before them when they were deliberating, from which the Court could presume they were guided by the "correct" written instructions. (*People v. Osband*, *supra*, 13 Cal.4th at p. 687, citing *People v. Crittendon* (1994) 9 Cal.4th 83, 138.)

[85]Similarly, in *Holt* the defendant was charged with a substantive count of burglary in addition to capital murder and other felonies, including sexual assault. As in *Osband*, the prosecution's evidence suggested that

(continued...)

appeal, Osband did not contend that the trial court's written instruction, which modified the pattern CALJIC No. 14.59 instruction so as to specify burglary as the crime to which the instruction had application, was incorrect. What Osband did contend was that the trial judge's oral instruction, which did not specify burglary as the subject crime in the instruction, but rather instructed the jury that it "should convict" the defendant of an unspecified crime or crimes if all jurors agreed he entered with a felonious intent, was error because such an instruction directed the jurors to find him guilty of all charged offenses, and not just burglary.

Respondent contends that:

> Appellant's claim that this Court, [in *Osband*], held that CALJIC No. 14.59, as given in our case, was error, is not borne out by a close reading of the case. The *Osband* court held only that the trial court's error in giving the jury an oral version of CALJIC No. 14.59 ("guilty") that differed from the written version given the jury ("guilty of burglary") was harmless. *Osband* does not hold that the oral instruction in that case (which was essentially the written and oral instruction in our case) was erroneous on its own.

(RB 170-171, fn. 21.)

Respondent's contention not only mischaracterizes the point that appellant made in his opening brief, but also reads most, if not all, of the meaning out of the actual holding in *Osband*. Contrary to respondent's assertion, appellant did not claim in his opening brief that the *Osband* court held that CALJIC No. 14.59 as given in our case was error. Instead, appellant accurately emphasized the significance in the *Osband* decision of

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[85](...continued)
the defendant entered the victim's home with the intent to steal and/or commit a sexual assault.

this Court's recognition that the trial court committed error when it omitted the words "of burglary" from its oral delivery of CALJIC No. 14.59.

The *Osband* court had no occasion to delve in depth into the argument that CALJIC No. 14.59 as it was given in this case was prejudicial error for simple reasons: the jurors in *Osband* were presented with a correct written instruction, the delivery of which was entirely appropriate to a case in which the substantive crime of burglary was charged, and where the evidence concerning the defendant's intent at the time he made entry pointed to the commission of a felony other than, or in addition to, mere theft. Moreover, in crafting the written instructions in *Osband*, the trial judge modified CALJIC No. 14.59 to make it crystal clear that the instruction only applied to the substantive charge of burglary.

Under those circumstances, which are conspicuously absent in this case, this Court applied the rule of *People v. Crittenden, supra*, and presumed that the jurors were guided by the correct instruction, and not by the trial court's erroneous omission of the words "of burglary" following its oral directive that the jurors should find the defendant "guilty." (*People v. Osband, supra*, 13 Cal.4th at p. 687.) However, the fact that this Court emphasized "the importance of trial judges reading jury instructions with care" (*id.* at p. 688) immediately after noting that the trial court had committed harmless error in misstating CALJIC No. 14.59 strongly suggests that were that same misstated instruction to be given in a case in which it did not apply, the error would be prejudicial. As appellant demonstrated in detail in his opening brief, this is such a case.

Respondent relies heavily on this Court's decision in *People v. Holt, supra*, 15 Cal.4th 619 in an effort to rebut appellant's argument that the trial court's delivery of CALJIC No. 14.59 was constitutional error. (RB

170.) Appellant anticipated this reliance and discussed *Holt* at length in his opening brief, pointing out that *Holt* was inapplicable because it was clearly distinguishable on its facts. (AOB 321-323.) As pertinent, respondent's argument proceeded in this fashion:

> Appellant's claim that the holding in *Holt* does not apply in this case because appellant was not separately charged with burglary (AOB 322) lacks merit. The *Holt* rationale applies here. Just as the burglary instructions there made it clear that the "guilt" language referred only to defendant's guilt of burglary, *here the burglary and burglary-murder special circumstance instructions themselves made it clear that the "guilt" language of CALJIC No. 14.59 applied only to the question of whether appellant committed burglary for purposes of the special circumstance*. (Italics added.)

(RB 170.)

Preliminarily, it should be noted that respondent, after making the above-cited assertion, promptly proves its fallacy by accurately noting that the trial court also instructed the jury with the standard felony-murder instruction, consistent with one of the prosecutor's two theories of guilt *on the charge of first-degree murder*. (RB 171.) Thus, it is simply impossible to give credence to respondent's argument that the jury must have certainly understood that the "guilt" language applied *only* to the question of whether appellant committed burglary for purposes of the special circumstances, as opposed to the charge of murder itself.

Indeed, it is far more likely that the jury understood CALJIC No. 14.59 to apply to the murder charge, as opposed to the special circumstances findings, as the murder charge was accompanied by a verdict form that gave the jury a choice of "guilty" or "not guilty" as possible verdicts, whereas the special circumstance allegation was paired with a verdict form that framed the jury's choice as "true" or "not true."

Additionally, CALJIC No. 8.21, the standard felony-murder instruction, defined first-degree murder as a killing occurring during the commission or attempted commission of burglary or robbery. (3 CT 741.) Immediately preceding the delivery of CALJIC No. 14.59, the trial court here defined burglary and robbery for the purpose of assisting the jury in deciding whether an unlawful killing had occurred during the commission or attempted commission of those two crimes. (34 RT 4608-4610.)

This brings us back to *Holt*. As appellant chronicled in his opening brief (see AOB 321-322), this Court in *Holt* rejected a claim that the delivery of CALJIC No. 14.59 in language substantially similar to the written instruction in appellant's case created a mandatory presumption that he was guilty of all charged crimes:

> Even without consideration of the instructions on the other charged offenses, each of which advised the jury of all of the elements of the crimes and that each element had to be proven, the claim lacks merit. The burglary instructions themselves made it clear that this language referred only to defendant's guilt of burglary.

(*People v. Holt*, *supra*, 15 Cal.4th at p. 680.)

Of course, as appellant also demonstrated in his opening brief, *Holt* is factually distinguishable from the case at bar, because there the defendant was charged with the substantive crime of burglary whereas here, appellant was not. Indeed, not only did the prosecution exercise its charging discretion by not filing such a charge at the outset, but at the conclusion of the guilt phase testimony, the prosecutor vigorously and successfully resisted defense counsel's attempt to have the jury instructed that it could find appellant guilty of burglary instead of murder, as a lesser-related offense under the then valid *Geiger* rule, arguing to the trial court's

satisfaction that it was "impossible" for appellant to be found guilty of burglary. (33 RT 4349.)

The fact that appellant was not charged with burglary, and that is was "impossible" for him to be found guilty of that crime, completely undermines respondent's reliance on *Holt*. Respondent is simply unable to justify why the *Holt* rationale should apply here. There were no burglary instructions given in this case which "themselves made it clear that this language referred only to defendant's guilt of burglary." (*Id.*, at p. 680.)

It is telling that respondent neglects to address appellant's argument that the "should find the defendant guilty" terminology employed in CALJIC No. 14.59 has not been carried over in California's new pattern criminal instruction, the California Judicial Council California Criminal Instructions (CALCRIM), which became effective on January 1, 2006. (See AOB 317-318.) Instead, the new pattern instruction specifically identifies burglary as the charge affected by the instruction, and it even jettisons the language in former CALJIC No. 14.59 directing that the jurors "should find the defendant guilty" if all agree that the defendant intended to commit theft or some other felony at the time of the entry.

To the extent appellant's jury received burglary instructions, those instructions were inextricably concerned with both the felony-murder and special-circumstance instructions. For this reason, consideration of the murder and special-circumstance instructions is of no help whatsoever to respondent's cause, because it is impossible to point to anything in the special-circumstance instruction that demonstrates that the jury would have understood that CALJIC No. 14.59 applied only to the burglary special-circumstance allegation and not to the charge of first-degree felony murder.

It is particularly inappropriate to argue, as respondent does, that the

jury understood CALJIC No. 14.59 to apply to the burglary special circumstance only, as the jury was also specifically instructed that the special-circumstance finding was not applicable until the jury first made a finding that appellant was guilty of first-degree murder. (34 RT 4615-4616.) Finally, the prosecutor's closing arguments demonstrate that he was relying on burglary felony murder as one of the two theories of liability for first-degree murder. (34 RT 4468.) Indeed, the prosecutor argued that the jury need not "worry" about whether the murder was premeditated, because finding that the defendant was liable under the felony-murder theory of liability obviated the need to decide whether appellant intended to kill. Here is what the prosecutor said:

> Did the evidence show that the defendant intended to kill her? If so, it's premeditated murder of the first-degree. Except – except you don't have to even worry about this. If you find that the unlawful killing of Sarah LaChapelle, whether it was intentional, unintentional, or accidental, which occurs during the commission of a robbery or the burglary or both – which it did – then it's murder of the first-degree. What is the specific intent of the underlying felony? For burglary, it's the intent to steal, meaning to commit theft or to rob somebody. When you enter somebody's home by kicking in the back door, breaking through the door, did you have the intent to steal? Did you have the intent to commit theft? And if the person or persons inside were present and were going to try to prevent you, were you going to commit robbery? And the evidence is clear that that happened in this case.

(34 RT 4468-4469.)

The foregoing circumstances thus provide a complete answer to respondent's argument that "it defies commonsense to believe that the jury would have understood, in light of all the instructions given and the arguments of counsel [citations omitted], that it could or had to find

appellant guilty of first degree murder if it found only that appellant entered the LaChapelle home with an intent to steal or commit robbery." (RB 171.)

D. The Error in Giving CALJIC No. 14.59 Requires Reversal

In his opening brief, appellant demonstrated that when a verdict of guilt is directed, the error is automatically reversible. (*Carella v. California* (1989) 491 U.S. 263, 266; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282; see also *People v. Hutchins* (1988) 199 Cal.App.3d 1219, 1223 (conc. opn. of Benke, J.).) Respondent fails, however, to address appellant's argument that the instructional error here is of the type that requires automatic reversal. No useful purpose is served by the needless repetition of the arguments made in appellant's opening brief on the issue of the appropriate standard of review and, given respondent's silence in this regard, the conclusion is all the more compelling that delivery of CALJIC No. 14.59 in this case is a structural error which vitiated all of the jury's findings, thus requiring automatic reversal of the entire judgment.

VIII

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

In his opening brief, appellant argued that the trial court erroneously and unconstitutionally instructed the jury on first degree murder because the information charged appellant only with second-degree malice murder. (See AOB 325-332.) Respondent disagrees, citing contrary holdings of this Court. Additionally, respondent contends that appellant has forfeited the claim for appellate review because he "failed, at trial, to make the arguments about the charging document that he is making in this Court." (See RB 172-177.)

Respondent misreads appellant's claim. Appellant does not argue that the information was defective. (See AOB 325, fn. 131.) Instead, he argues instructional error affected his substantial rights when the trial court delivered instructions permitting the jury to adjudicate appellant's guilt of first-degree murder. Appellant may obtain appellate review of instructional error of this nature without having first objected to the instructions in the trial court. (Pen. Code, § 1259.) None of the authorities cited by respondent (see RB 173) hold otherwise. Additionally, appellant's claim is that the trial court was without jurisdiction to try appellant for first-degree murder. (See AOB 327.) Such a claim, based on a lack of fundamental jurisdiction, may be raised for the first time on appeal. (*People v. Chadd* (1981) 28 Cal.3d 739, 757.)

Appellant has acknowledged this Court's previous rejection of claims similar to the ones appellant makes, including one of the cases expressly relied upon by respondent, *People v. Hughes* (2002) 27 Cal.4th 287 (see AOB 327, 329), but has detailed why this Court should reconsider its decisions in this area (see AOB 328-332). Appellant would only reiterate, in reply to respondent's contention that "under no circumstances can appellant claim he had insufficient notice that the prosecution was going to proceed against him under first degree murder theories" (RB 174), that appellant's claim is that the trial court lacked jurisdiction to try him of first-degree murder under either theory of that offense, since the information charged only second-degree malice murder in violation of section 187 (see AOB 326-327). Moreover, as appellant has previously shown (see AOB 326, fn. 132), the special-circumstance allegations neither changed the elements of the charged offense nor alleged all of the facts necessary to support a conviction for felony murder.

Because, as argued in the opening brief (see, e.g., AOB 331-332), the jury was improperly permitted to convict appellant of first-degree murder, the judgment of conviction for that offense, the special-circumstance findings, and the death judgment must all be reversed.

IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

In his opening brief, appellant argued that the trial court committed reversible error by failing to instruct the jurors that they had to unanimously agree on whether appellant committed a premeditated murder or a felony murder before they could convict him of first-degree murder. (See AOB 333-341.) Respondent relies upon decisions of this Court holding otherwise (see RB 177-179), which appellant has previously recognized but asked this Court to reconsider (see AOB 333-334).[86]

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[86] Respondent initially contends that "this claim of instructional error, including its constitutional components, has been forfeited, because appellant failed to assert the claim in the trial court." (RB 177.) For a number of reasons, respondent is incorrect. First, because appellant's claim is that the instructional error affected his substantial rights, he was not required to object in the trial court in order to preserve the claim for appeal. (See Pen. Code, § 1259.) Moreover, the very fact that, as respondent accurately notes, "identical" claims (RB 177) have "consistently" (RB 179) and "repeatedly" (RB 177) been rejected by this Court demonstrates that it would have been futile to object because the trial courts are bound by law established by courts of superior jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see, e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 ["An objection in the trial court is not required if it would have been futile"]; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6 ["here the trial court was bound by prior appellate decisions . . . and it would have been pointless to raise the issue there"]; *People v. Turner* (1990) 50 Cal.3d 668, 704, fn. 18 [no

(continued...)

This Court has, for example, held that "[t]here is still only a 'single, statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, citing *People v. Pride* (1992) 3 Cal.4th 195, 249; but see *People v. Dillon* (1983) 34 Cal.3d 441, 471-472, 476, fn. 23 [felony murder is a separate and distinct crime from malice murder].) At the same time, this Court also has acknowledged that premeditated murder and felony murder do not have the same elements. (See, e.g., *Carpenter, supra*, 15 Cal.4th at p. 394; *Dillon, supra*, 34 Cal.3d at pp. 465, 475, 477, fn. 24.) Specifically, malice is an element of murder under section 187 (malice murder) and it is not an element of felony murder under section 189. Furthermore, premeditation and deliberation are elements of first-degree malice murder but not first-degree felony murder. It is the fact that these crimes are not merely separate theories of murder, but have separate elements, that is the basis for appellant's argument. (See AOB 334-341.)

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[86](...continued)
waiver for failure to object where "[t]hese challenges had consistently been rebuffed"]; *Moradi-Shalal v. Fireman's Funds Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1 ["clearly it was pointless for defendant to ask either the trial court or appellate court to overrule one of our decisions"]; *In re Gladys R.* (1970) 1 Cal.3d 855, 861 ["we cannot expect an attorney to anticipate that an appellate court will later interpret [the law] in a manner contrary to the apparently prevalent contemporaneous interpretation"].)

In any event, even were one to assume that defense counsel should have anticipated a favorable ruling had he requested a unanimity instruction, or at least should not have considered such a request futile, he could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to erroneously and unconstitutionally convict appellant of first degree murder. Thus, it would have constituted ineffective assistance of counsel not to object. (U.S. Const., 6th & 14th Amends.; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Respondent ignores the fact that malice murder and felony murder have separate elements and simply relies on this Court's prior decisions rejecting this issue without analysis. (See RB 177-179.)

Indeed, other and more recent opinions by this Court offer further support for appellant's argument. In *People v. Seel* (2004) 34 Cal.4th 535, the defendant was convicted of attempted premeditated murder (Pen. Code, §§ 664, subd. (a); 187, subd. (a)). The Court of Appeal reversed the finding of premeditation and deliberation due to insufficient evidence and remanded for retrial on that allegation. This Court granted review to decide whether the premeditation allegation could be retried. (34 Cal.4th at p. 540.) In holding that double-jeopardy protections barred retrial on the premeditation allegation under *Apprendi v. New Jersey* (2000) 530 U.S. 466, this Court endorsed the view that "'[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."'" (*Seel*, *supra*, 34 Cal.4th at p. 549, citing *Apprendi*, *supra*, 530 U.S. at p. 493.) Intent, of course, is an element which makes malice murder a different crime than felony murder.

In *Burris v. Superior Court* (2005) 34 Cal.4th 1012, this Court held that under Penal Code section 1387, the dismissal of a misdemeanor prosecution does not bar a subsequent felony prosecution based on the same criminal act when new evidence comes to light that suggests a crime originally charged as a misdemeanor is in fact graver and should be charged as a felony. (*Id.* at p. 1020.) In reaching this conclusion, this Court compared the elements of the offenses at issue: "When two crimes have the same elements, they are the same offense for purposes of Penal Code section 1387." (*Id.* at p. 1016, fn. 3, citing *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, 1118 [applying "same elements" test to

determine whether new charge is same offense as previously-dismissed one for purposes of section 1387].) The negative implication is clear: when two crimes have different elements, they are not the same offense.

Seel and *Burris* thus reaffirm the fact that because premeditated murder and felony murder have different elements in California, they are different crimes, not merely two theories of the same crime. Thus, the jury should not have been permitted to convict appellant of murder without being required to unanimously determine that the crime was either a premeditated (malice) murder under section 187 or felony murder under section 189. Appellant's first-degree murder conviction and the entire judgment must therefore be reversed.

X

A SERIES OF INSTRUCTIONS UNCONSTITUTIONALLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

In his opening brief, appellant argued that his constitutional rights were violated by various jury instructions which, whether considered individually or, especially, when taken together, diluted the reasonable-doubt standard and lightened the prosecution's burden or proof. (See AOB 342-351.) Respondent counters by saying that all of the challenged instructions pass constitutional muster, and relies upon previous decisions of this Court in which similar challenges have consistently been rejected. (See RB 180-183.)

Appellant acknowledges, as respondent accurately observes, that this Court has previously rejected similar claims of instructional error (see RB 181-183), but requests that this Court reconsider its decisions in this area. In his opening brief, appellant provided a detailed and logical analysis in support of his contention that the challenged instructions were constitutionally infirm. (See AOB 342-351.) Appellant continues to maintain that the guilt-phase instructions unconstitutionally diluted the reasonable-doubt standard and that, given the entirely circumstantial nature of the People's case for guilt on the charge of capital murder, the closeness of the case as reflected by the length of the jury's deliberations (see AOB Argument V, pp. 254-255), and the other instructional error directing a guilty verdict of first degree murder (see AOB Argument VII, pp. 311-324), these errors require reversal of the entire judgment.

XI

THE TRIAL COURT VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS AND COMMITTED PREJUDICIAL ERROR BY DELIVERING, OVER APPELLANT'S OBJECTIONS, CALJIC NOS. 2.03 AND 2.06

In his opening brief, appellant argued that the delivery of CALJIC Nos. 2.03 and 2.06 unfairly, unconstitutionally and prejudicially permitted the jury to draw critically adverse inferences against him with respect to the charged offense of first-degree murder and the special-circumstance allegations. (See AOB 352-361.) In its discussion of this issue, respondent relies on holdings of this Court approving delivery of these instructions which appellant recognized in his opening brief. (See RB 183-187.) However, respondent does not logically refute appellant's demonstration of why such decisions are erroneous and should be reconsidered – and specifically in the evidentiary context of appellant's case.

Preliminarily, in a footnote, respondent contends that "although appellant objected generally to CALJIC Nos. 2.03 and 2.06, he did not invoke any constitutional claims of error." (RB 184, fn. 24.) This assertion is incorrect, although respondent does not appear to claim that appellant has forfeited any constitutional claims as a result of this alleged nonfeasance. Nor could respondent properly make such a claim, as it ignores the fact that appellant successfully moved pretrial that his specific objections be deemed to have made under the applicable provisions of the state and federal Constitutions without further reiteration at trial, and that the prosecutor had no objection to this motion being granted. (2 CT 453-455; 1 RT 179-181.) In any event, respondent concedes that appellant's claims concerning CALJIC Nos. 2.03 and 2.06 are cognizable insofar as

any instructional error had the additional legal consequence of violating the state and federal Constitutions.

At no point in its argument does respondent address the fundamental problem with CALJIC Nos. 2.03 and 2.06 as delivered by the trial court, i.e., that by not affirmatively telling the jurors that the consciousness-of-guilt inference could not be considered on the issue of mental state, any reasonable juror would have used such an inference to resolve the only disputed issue in the case – i.e., whether appellant committed a first-degree murder with special circumstances, "the crime for which he is now being tried" (CALJIC No. 2.03). As appellant explained in his opening brief, the instruction permitted the jury to find a consciousness of guilt of first-degree murder from appellant's false pretrial statements to the police and to Lisa Henry, as well as from his disposal of the socks he wore when he entered the victim's home, despite the fact that there was no rational connection between those matters and an inference that he premeditated and deliberated the homicide or that the victim was killed during the commission of a burglary or robbery in which appellant was a participant. Thus, the instruction embodies a constitutionally-improper permissive inference and should not have been given at all.

Since, as noted above, respondent mainly relies on this Court's previous authorities which appellant has already addressed, there is no need for appellant to reply except to again ask this Court to reconsider its previous holdings on CALJIC Nos. 2.03 and 2.06 in light of the arguments in his opening brief. However, respondent makes certain assertions and neglects to address matters raised in appellant's opening brief which require a brief comment here.

Respondent contends that appellant's failure to inform anyone of his

discovery of the victim's body constitutes a factual basis for the delivery of CALJIC No. 2.06. (See RB 186.) To the extent that this Court's decisions in such cases as *People v. Breaux* (1991) 1 Cal.4th 281, 304, can be read to approve of the inferences found by respondent from appellant's mere "failure to notify anyone of [the victim's] death" (see RB 186), this Court's holdings approving the delivery of CALJIC No. 2.06 are inconsistent with the Due Process Clause of the Fourteenth Amendment because such instructions effectively lower the prosecution's burden of proving first-degree murder and special circumstances (see *Mullaney v. Wilbur* (1975) 421 U.S. 684; *In re Winship* (1970) 397 U.S. 358), and deny appellant his Eighth and Fourteenth Amendment rights to reliable guilt and special-circumstance determinations in a capital case.

It also bears mentioning that respondent neglects to address appellant's requests for reconsideration and the overruling of its previous holdings concerning the constitutionality of CALJIC Nos. 2.03 and 2.06 other than to assert that appellant "has provided no compelling reason for this Court to do so." (RB 184.) Respondent is incorrect. In his opening brief, appellant pointed out that this Court's reasoning in *People v. Prieto* (2003) 30 Cal.4th 226, 248-249, and *People v. Mattson* (1990) 50 Cal.3d 826, 871 concerning impermissible inferences is inconsistent with the line of authority upon which respondent relies.[87] (See AOB 356-358.) Unless it is no longer a "compelling" reason for appellant to request that a

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[87]This Court's holding in *Prieto*, regarding the erroneous language in CALJIC No. 2.15 that the jury can infer a defendant's guilt of the "charged" or "alleged" crimes from his conscious possession of recently-stolen property (see AOB 357), was recently reaffirmed in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101-102.

reviewing court should reexamine its holdings to the extent they are logically inconsistent, one would expect respondent to at least make an effort to address the claim of inconsistency. Respondent fails to do so.

Respondent also fails to address appellant's argument that it was incumbent upon the trial court, at a minimum, to give an instruction which would have expressly limited the jury's consideration of the evidence of appellant's pretrial falsehood and efforts to suppress evidence to the question of the defendant's identity as the killer. (See AOB 358.) Next, respondent neglects to address appellant's argument that the trial court denied appellant the fundamental fairness required by the Due Process Clause of the Fourteenth Amendment when it delivered CALJIC Nos. 2.03 and 2.06 – improperly argumentative pinpoint instructions in the prosecution's favor – while deeming functionally equivalent defense pinpoint instructions to be impermissibly argumentative. (34 RT 4385; see AOB 359-360.) Finally, respondent has no answer to appellant's claim that the prosecutor, in his closing argument, explicitly urged the jury to draw the impermissible inferences sanctioned by CALJIC No. 2.03 to determine the degree of appellant's responsibility in this case. Thus, the instructional error was prejudicial to appellant and respondent does not contend otherwise, as its arguments are limited to claiming that there was no instructional error. The entire judgment must be reversed.

XII

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

In his opening brief, appellant argued that instructing the guilt-phase jury with CALJIC No. 2.51 improperly allowed the jury to determine his guilt based upon the presence of an alleged motive and shifted the burden of proof to him to show an absence of motive to establish his innocence, thereby lessening the prosecution's burden of proof. The instruction therefore violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (See AOB 362-367.) Respondent mistakenly contends that appellant's claim of error was both waived and meritless. (See RB 187-190.)

Respondent erroneously asserts that "appellant's contention is procedurally barred" because "*[h]e requested CALJIC No. 2.51 below.*" (RB 188, original italics.) Without saying so directly, respondent contends that appellant invited the error and for this reason he has forfeited his right to appellate review of the instructional error. Respondent's contention acknowledges, but pays no more than lip service to, Penal Code section 1259, which "permits appellate review to the extent any erroneous instruction 'affected [the defendant's] substantial rights'; thus, to the extent any claims of instructional error are meritorious and contributed to [the defendant's] . . . death sentence, they are reviewable." (*People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 247.) Moreover, there was no invited error here "because important rights of the accused are at stake" and there is absolutely nothing in the record to indicate that defense counsel "acted for tactical reasons"

(*People v. Bradford* (1997) 14 Cal.4th 1005, 1057) in requesting CALJIC No. 2.51.[88] (See also *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267, fn. 3 ["Based on the record before us we cannot find or imply a clear tactical purpose to counsel's actions which would amount to invited error."].

The authorities cited by respondent are either inapplicable or distinguishable. For instance, respondent cites *Miller v. Kennedy* (1987) 196 Cal.App.3d 141, 146, for the proposition that requesting an instruction precludes the argument that the giving of the instruction is a ground for reversal. The holding in *Miller v. Kennedy* is not apposite, as that was a civil case, and there is no "civil-law" equivalent to Penal Code section 1259. *People v. Medina* (1995) 11 Cal.4th 694, 763 is also distinguishable, as it does not appear that the appellant there claimed that the instructional error affected his substantial rights.

In any event, as respondent notes, "[t]his Court has addressed and rejected the argument that CALJIC No. 2.51 somehow shifts the burden of proof from the prosecution to the defense or somehow lessens the prosecution's burden of proof." (RB 189.) Thus, it is likely that defense counsel "merely acquiesced in" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 508) this Court's opinions approving the delivery of CALJIC No. 2.51 (see, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 941), since the trial courts are bound by principles of stare decisis to follow the law as declared by courts of superior jurisdiction (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d

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[88]Defense counsel never argued, directly or indirectly, that appellant had no motive to commit the crime, and therefore the absence of motive tended to establish his innocence.

450, 455). Moreover, defense counsel could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to receive an instruction which improperly undermined and diluted the prosecution's burden of proof. Thus, even if the instant claim of error is deemed "invited," it would have constituted ineffective assistance of counsel to request such an instruction. (U.S. Const., 6th & 14th Amends.; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

On the merits, respondent makes no substantive contentions which have not already been addressed. (See RB 189-190.) Appellant would only note that respondent's citation to language in *People v. Snow* (2003) 30 Cal.4th 43 points out the flaw in its argument that "the correctness of a jury instruction is determined from the entire charge of the court, not from consideration of parts of an instruction or from a single instruction." (RB 189.)

In *Snow*, this Court acknowledged the conditional plausibility of appellant's argument: "If the challenged instruction [i.e., CALJIC No. 2.51] somehow suggested that motive alone was sufficient to established guilt, defendant's point might have merit." (*People v. Snow*, *supra*, 30 Cal.4th at pp. 97-98.) However, in his opening brief, appellant demonstrated that CALJIC No. 2.51, in the context of all the other instructions given at his trial, in fact suggested the very inference this Court found lacking in *Snow*.[89] (See AOB 363-364.) Respondent neglects to

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[89]In his opening brief, appellant pointed out that the motive instruction stood out from the other standard evidentiary instructions given to appellant's jury. Notably, the other instructions that addressed an

(continued...)

address this aspect of appellant's argument.

Finally, it should also be noted that respondent props up a straw man for the mere satisfaction of knocking it down when it cites *People v. Estep* (1996) 42 Cal.App.4th 733, 738, for the proposition that CALJIC No. 2.51 cannot be considered a standard-of-proof instruction. Appellant did not make such an argument in his opening brief, as respondent itself recognized when it attempted to summarize the gist of appellant's claim.[90]

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[89](...continued)
individual circumstance (e.g., CALJIC Nos. 2.03 and 2.06) expressly cautioned the jurors that such circumstance, if found to exist, *was insufficient to establish guilt*. Appellant argued that it was reasonable to assume that the jurors would recognize that the omission of similar cautionary language in CALJIC No. 2.51, when contrasted with the presence of such language in the other instructions, was intentional and that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. It does not appear that this Court was confronted with such an argument in *Snow*.

[90]The Court of Appeals characterized Estep's claim as follows: "Defendant contends the motive instruction given here (CALJIC No. 2.51) erroneously told the jurors they were to decide between guilt and innocence instead of determining if guilt had been proven beyond a reasonable doubt. In this way, defendant argues, the instruction violated the due process guaranty of conviction upon proof beyond a reasonable doubt." (*People v. Estep*, *supra*, 42 Cal.App.4th at p. 738.) In contrast, respondent describes appellant's claim in this fashion: "Appellant contends that the emphasized portion of this instruction [i.e., CALJIC No. 2.51] violates his rights to a fair jury trial, due process, and a reliable verdict in that it shifted the burden of proof because it suggested appellant had the burden of proving his innocence." (RB 188.) Respondent appears to have omitted in its summary of appellant's argument that he also claimed, in context, that the jury would have understood that motive alone could establish guilt, and that such an instruction violates due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See AOB 364.) Nonetheless, and no matter
(continued...)

Thus, nothing discussed by the Court of Appeal in *Estep* is relevant in addressing the merits of appellant's argument

For the reasons expressed in appellant's opening brief, the guilt-phase judgment must be reversed.

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[90](...continued)
how it is described, appellant's argument is different and distinct from the argument presented and rejected in *Estep*.

XIII

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO ANSWER THE DEADLOCKED JURY'S QUESTION AS TO WHETHER THE DEATH PENALTY WAS THE MORE SEVERE OF THE TWO AVAILABLE PUNISHMENTS

A. Introduction

In his opening brief, appellant argued that the trial court's responses, given without prior consultation with defense counsel, to the deadlocked penalty jury's requests for instructional assistance and an answer to its question as to which of the two available penalties was the more severe were incorrect and inadequate. Further, appellant argued that the trial court's subsequent ruling denying defense counsel's request for an instruction informing the jury that they could not properly vote for the death penalty as an act of mercy was also erroneous. (See AOB 368-388.)

Specifically, appellant argued that his right to a determination of penalty by a jury "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," guaranteed by the Eighth and Fourteenth Amendment was violated by the trial court's abdication of its duty to clarify the law, as requested by the jury. (*Godfrey v. Georgia* (1980) 446 U.S. 420; *Lockett v. Ohio* (1978) 438 U.S. 586; *Gregg v. Georgia* (1976) 428 U.S. 153; *Quercia v. United States* (1933) 289 U.S. 466.) This error was further exacerbated when the trial court failed to consult with counsel prior to instructing the jury at this obviously critical stage of deliberations. These errors require that appellant's death judgment be reversed. (See Pen. Code, § 1138; *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613; *Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d

560, 575; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836-841 (en banc), implicitly overruled in part on other grounds, *Calderon v. Coleman* (1998) 525 U.S. 141, 146.)

Respondent attempts to justify the trial court's responses as follows: "We submit that the trial court correctly responded to the question at issue, and that even if the trial court did err, there exists no reasonable possibility that the jury would have rendered a different penalty verdict absent the error." (RB 190.) As appellant will demonstrate, respondent's contentions are without any merit.

B. The Trial Court's Response to the Deadlocked Jury's Request As to Which Penalty Was More Severe

On the fifth day of penalty deliberations, the trial court received a written note from the jurors indicating that they were irrevocably deadlocked and needed to address the court. It soon became apparent that the jurors wanted the court to help them by providing additional instructions. The trial court replied that there were no more instructions it could provide, but instead offered to re-read some of the instructions it had previously given. (44 RT 5872.) When the trial court attempted to ascertain which instructions should be re-read, the foreperson of the jury requested that the trial court clarify which of the two available punishments was the more severe. Without first consulting with counsel, the trial court refused to do so, stating:

> *I can't tell you that.* You have to decide the appropriate penalty based upon the evidence in this case. *It's not an issue of which is the most severe punishment. The issue is which is the most appropriate punishment in this case based upon the evidence, not which is the most severe punishment.* Which is the appropriate punishment based on the evidence.

(44 RT 5872-5873, italics added.)

Thereafter, the trial court then re-read CALJIC No. 8.88 and a portion of CALJIC No. 8.85. However, before the jurors were sent out to resume deliberations, the trial court emphasized that the matter of which penalty is the more severe was not relevant to the jury's task and delivered this instruction:

> *And, remember, I want to advise you again we are not talking about which is the worst penalty.* You are to find which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances; and to return a judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(44 RT 5876, italics added.)

Before the jury left the courtroom, defense counsel requested a sidebar at which defense counsel asked that the jury be instructed, consistent with the trial court's earlier instructions during voir dire, that the death penalty was not to be imposed as an act of mercy. Defense counsel based this request upon the comments made during voir dire by a number of prospective jurors when questioned as to which penalty was the more severe.[91] (44 RT 5877-5878.) The trial court refused this request, making the following observations:

> And I'm of the position that based upon our very careful voir dire of this jury that *I don't think anybody is up there deciding this case based upon executing your client as an act*

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[91]The foreperson, Ms. Somers, was among this group, as were penalty-phase jurors James Robinson, Linda Churchill, David Nielsen, and alternate juror Gary Heider. (See AOB 384, fn. 149; 11 RT 1827-1828.)

> *of mercy. I don't interpret that by what they mean. There may be some dispute up there among themselves which is worse, the death penalty or life without parole, but I don't think they're deciding it on the basis of one being an act of mercy and the other one being more lenient than the other one.* Secondly, I do believe that by instructing the jury that they are to pick the appropriate penalty based on the weighing process that I gave them by considering the aggravating and mitigating factors and they can only return a verdict of death if they are satisfied that the factors in aggravation are so substantial when compared to the factors in mitigation, that that takes care of the problem. I don't like to give extemporaneous, off-the-cuff instructions or comments to the jury. I'd like to stick to the jury instructions. But, in any event, I appreciate your suggestion, Mr. Pinkney. But, I – I decided not to do it. And so your objection to the Court's instruction may be noted accordingly.

(44 RT 5878-5879, italics added.)

Without further inquiry from the trial court, the jurors were sent back to the jury room for further deliberations. After three additional days of deliberation, the jury returned a death verdict.

C. The Trial Court Abdicated Its Mandatory Duty Under Penal Code Section 1138 to Accurately Advise the Deliberating Jury On a Point of Law

Respondent initially claims that because CALJIC No. 8.88 was a proper instruction, the trial court's decision to repeat it as a response to the jury's question fell within the ambit of a discretion provided by Penal Code section 1138, citing *People v. Beardslee* (1991) 53 Cal.3d 68, 97, for that proposition. (RB 192-193.) Even if that were all that the trial court did in response to this jury's question, respondent's claim would still lack merit, in light of *Shafer v. South Carolina* (2001) 532 U.S. 36, 53 [holding that jury's question "left no doubt" that it did not clearly understand from trial court's original instructions what "a life sentence" meant, and trial court's

final instruction was inadequate to provide the jury with the necessary understanding of the law]. However, respondent simply neglects to account for the entirety of the trial court's instructions in response to the jury's question at this critical stage, thereby making its initial claim an idle academic exercise.

As appellant made abundantly clear in his opening brief, the trial court did not limit itself to a mere repetition of CALJIC No. 8.88. Instead, it twice emphasized to the jury that the question at the heart of the juror's impasse, i.e., which of the two available punishments was the more severe, was neither relevant nor germane to their task. *That* instruction, given as a preface to the repetition of CALJIC No. 8.88, was patently erroneous, because the question of which punishment is more severe is central to the penalty phase decision. A jury that does not comprehend that death is the more serious of the two available punishments cannot properly apply the law as it is set forth in CALJIC No. 8.88. As such, the trial court's emphatic and extemporaneous instructions undercut the legal proposition supposedly made explicit in CALJIC No. 8.88, i.e., that under California law, death is considered to be the more severe punishment in comparison to life imprisonment without possibility of parole.

Indeed, in *People v. Harris* (2005) 37 Cal.4th 310, this Court rejected a claim that the trial court erred (by interfering with the jury's deliberative process and thereby increased the risk of an arbitrary and capricious decision on penalty) when it answered the identical question posed by the foreperson here as follows:

> "Under the law . . . and regardless of your personal belief as to what is harder on somebody or what is more severe or what is the tougher penalty, under the law the death penalty is the more severe penalty. Life in prison is not as severe as the

> death penalty. That is the law and that is the law you have to follow . . . . You can't inject your own belief as to what you think is tougher or not."

(*People v. Harris*, *supra*, 37 Cal.4th at p. 361.)

It is telling that respondent provides no answer to this Court's holding in *Harris*. Ironically, the trial court's response here permitted the jurors to do exactly what the trial judge in *Harris* took pains to prevent, i.e., having the jurors inject their personal beliefs as to which penalty was more severe. Thus, the trial court's response to the deliberating jury's question cannot be considered as a proper exercise of whatever discretion inheres in a trial court as it fulfills its mandate under Penal Code section 1138.

In this regard, respondent also attempts to graft an inappropriate standard of review onto the trial court's response. Citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, respondent would have this Court find that a trial court abuses its discretion under Penal Code section 1138 "only when it rules arbitrarily, capriciously, or whimsically; i.e., only when it rules beyond the bounds of reason, all the circumstances before the court considered, resulting in a miscarriage of justice." (RB 193.)

However, the discretion at issue in *Rodrigues* was that which was explicitly vested in the trial court under Evidence Code section 352, a statutory provision governing the admissibility of evidence. In contrast, Penal Code section 1138 contains no reference to the trial court's discretion with respect to the mandatory duties it imposes upon the trial court. (See, e.g., *People v. Ross* (2007) 155 Cal.App.4th 1033, 1047; *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331[under Penal Code section 1138, trial court has a "mandatory duty to help the jury understand the legal principles involved in the case"]; cf. Evid. Code, § 352 ["The court in its discretion

may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury"] with Penal Code section 1138 ["After the jury have retired for deliberation, . . . , if they desire to be informed on any point of law arising in the case, . . . the information required must be given . . ."].)

Even if this Court were to apply the standard of review advanced by respondent, the trial court's response here cannot pass muster as it is well beyond the bounds of reason. Respondent argues that it was not unreasonable for the trial court to believe that rereading CALJIC No. 8.88 would make it clear that death was a more severe punishment than life imprisonment without possibility of parole. There are a number of problems with such an argument.

First, respondent does not address the fact that the jury had a written copy of CALJIC No. 8.88 before it during five days of deliberation, yet still felt compelled to ask the court which punishment was more severe. As the Supreme Court observed in *Shafer v. South Carolina*, "[m]ost plainly contradicting the State's contention, Shafer's jury left no doubt about its failure to gain from . . . the judge's instructions any clear understanding of what a life sentence means." (*Shafer v. South Carolina*, *supra*, 532 U.S. at p. 53.) Similarly apt is Justice O'Connor's observation in *Simmons v. South Carolina*: "[T]hat the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison." (*Simmons v. South Carolina* (1994) 512 U.S. 154, 178.) Thus, it is difficult to believe that simply repeating the instruction would have had the salutary effect on the

jury that respondent attributes to the instruction itself.[92] (RB 193 ["In other words, by requiring a jury to find that the aggravating circumstances are so substantial in comparison to mitigating ones in order for death to [*sic*] the appropriate penalty, a jury could reasonably infer that the death penalty is a more severe penalty than life imprisonment without the possibility of parole"].)

Second, and more significantly, the trial court itself made it very clear to the jurors that not only was the court not permitted to tell them which of the two punishments was the more severe, but that the jury's question itself was not relevant to the penalty decision:

> *I can't tell you that.* You have to decide the appropriate penalty based upon the evidence in this case. *It's not an issue of which is the most severe punishment. The issue is which is the most appropriate punishment in this case based upon the evidence, not which is the most severe punishment.* Which is the appropriate punishment based on the evidence.

(44 RT 5872-5873, italics added.)

As if this were not enough to disconnect the inference which respondent contends the jurors "could reasonably" have drawn from CALJIC No. 8.88 from their ultimate task of deciding whether appellant merited the more severe penalty, the trial court exacerbated that "disconnect" when it prefaced its redelivery of CALJIC No. 8.88 with a reminder that the jurors were not to concern themselves with which penalty was more severe: "*And remember, I want to advise you again we are not talking about which is the worst penalty.*" (44 RT 5876, italics added.)

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[92]As Justice Broussard observed in a closely analogous context, "[t]here is no point in reiterating language which has failed to enlighten the jury" in the first instance. (*People v. McDowell* (1988) 46 Cal.3d 551, 581 (dis. opn. of Broussard, J.).)

Thus, contrary to respondent's argument that the trial court "did not rule unreasonably in believing that a rereading of the instructions would make it clear that death is a more severe punishment than LWOP" (see RB 193), the trial court had no intention of utilizing CALJIC No. 8.88 to make that point. By its very language, the trial court mistakenly believed that the appropriate penalty under the evidence could be decided without reference to which penalty was more severe. More significantly, this mistaken belief was directly conveyed to the jury as an affirmative legal instruction.

Although it is not central to respondent's argument in support of the trial court's ruling, respondent claims that the trial court's refusal to answer the jury's question and to instead offer to re-read CALJIC No. 8.88 was a prudent decision, and that the trial court's stated antipathy to giving "extemporaneous, off-the-cuff instructions or comments to the jury" was reasonable. (See RB 193; 44 RT 5879.) The fundamental problem with this assertion is that the trial court did not act in accordance with its stated intentions.

Preliminarily, it should be noted that the trial court addressed the jury's question without first consulting with counsel as to an appropriate response.[93] Ironically, it gave the very kind of hasty and ill-considered

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[93]Contrary to respondent's implication that trial counsel "seemingly agreed" to the trial court's approach (see RB 193, fn. 25), the trial court gave its extemporaneous and off-the-cuff instruction immediately upon hearing the question posed by the foreperson in open court. The jury's earlier written request for assistance ("[W]e need to talk to you. We seem to be irrevocably deadlocked") gave no prior notice of the basis for that need, and the trial court told counsel it intended to ask the jurors about their request, not that it would provide an answer without first consulting with counsel to hear suggestions or objections. (5 CT 1055; 44 RT 5871-5872.)
(continued...)

response it professed to be at pains to avoid, a response wholly antithetical to the mandatory duty imposed on it by section 1138:

> *The urgency to respond with alacrity must be weighed against the need for precision in drafting replies that are accurate, responsive, and balanced.* When a question shows the jury has focused on a particular issue, or is leaning in a certain direction, *the court must not appear to be an advocate, either endorsing or redirecting the jury's inclination.*

(*People v. Moore*, *supra*, 44 Cal.App.4th at p. 1331, italics added.)

Here, there was no urgency to respond with alacrity, and the response given by the trial court was neither accurate nor balanced.[94]

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[93](...continued)
Under these circumstances, it can hardly be said that defense counsel "agreed" to the trial court's approach, especially given the trial court's candid admonition earlier in the trial that it would proceed with extreme caution in instructing the jury lest "I get in any trouble" (1 RT 108), and that "I slavishly adhere to the CALJIC instructions" (33 RT 4351). The last thing that defense counsel could have anticipated was that the trial court would tell the jury that it could not answer its question because it was neither germane nor relevant to the sentencing decision, a response nowhere to be found in the pattern instructions.

[94]The trial court's expressed reticence to deviate from the pattern instructions in this instance was all the more misplaced, as the jury's question implicated only legal and not factual issues. (Compare *People v. Moore*, *supra*, 44 Cal.App.4th at pp. 1331-1332 [trial court's reply to question posed by jury improperly left jury with the responsibility for deciding a question of law and was a violation of the trial court's mandatory duty to help the jury understand the legal principles involved in the case] with *People v. Briscoe* (2001) 92 Cal.App.4th 568, 588-590 [question concerning whether robbery at gunpoint constituted provocative act in and of itself, properly treated as factual question; hence, trial court did not err by referring jury to applicable instruction rather than answering in the negative].) In any event, despite that reticence, the trial court did
(continued...)

Instead, the response given was mistaken, cryptic, and contradictory.

It also should be noted that the trial court's after-the-fact reasoning for failing to answer the jury's question directly, or to assure itself that the jurors would not mistakenly apply the law by voting for death as an act of mercy, cannot be supported by the record. While it acknowledged that "[t]here may be some dispute up there among themselves which is worse, the death penalty or life without parole," the trial court categorically rejected the high probability – suggested by defense counsel and based upon the voir dire responses of a number of the sitting jurors – that one or more jurors was contemplating returning a death verdict as an expression of mercy, without first asking the jury what was meant by their question. (44 RT 5878-5879.)

Context is important here. Appellant's jury was in the fifth day of penalty deliberations and had just announced an irrevocable deadlock. Surely its question was not an academic or philosophical musing on the metaphysics of crime and punishment, as implied by the trial court's explanation in response to trial counsel's suggestions. One may fairly ask the question now: what else could have been at the core of the jury's question other than the possibility that one or more of their members was either inclined to vote for death as an act of mercy or for life imprisonment without possibility of parole as the ultimate punishment, and that the resolution of whether such a vote was consistent with the law was the source of the irrevocable deadlock? The trial court did not provide a plausible alternative reason for the jury's question, and respondent does not

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[94](...continued)
deviate from the pattern instructions by repeatedly delivering an erroneous explanatory instruction as a preface to the repetition of CALJIC No. 8.88.

even make an attempt to do so.[95]

Finally, respondent faults appellant for his reliance on *McDowell v. Calderon* (9th Cir. 1999) 130 F.3d 833, arguing that *McDowell* was overruled by the high court in *Weeks v. Angelone* (2000) 528 U.S. 225, "as the Ninth Circuit itself has recognized." (RB 194.) However, because *Weeks* is easily distinguishable from the case at bar, it is not particularly helpful to respondent's position. There, the Court only held that in reviewing whether federal habeas relief was available under 28 U.S.C. § 2254(d), the state court's determination that the trial court's instructions in response to the deliberating jurors's request for clarification was not contrary to, or an unreasonable application of clearly established federal law as determined in its prior decisions. (*Weeks v. Angelone*, *supra*, 528 U.S. at p. 237.)

In *Weeks*, the penalty phase jury asked the trial court the following question:

> "If we believe that [the defendant] is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we *decide* (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?"

(*Id.* at p. 229, original italics.)

The trial court in *Weeks* drafted a proposed response (directing the jurors to refer to "Instruction No. 2"), and discussed its merits with counsel as follows:

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[95]It is certainly plausible that at least one juror was swayed by the testimony that appellant tried to commit suicide by hanging himself when he was a teenager (37 RT 5030-5032), and that a death sentence would be an act of mercy, finally putting to a close appellant's tormented life.

> "In instruction number 2 that was given to them, in the second paragraph, it reads, 'If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two alternatives, and as to that alternative, you are unanimous, then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at imprisonment for life, or imprisonment for life with a fine not to exceed $100,000.' "*I don't believe I can answer the question any clearer than the instruction*, so what I have done is referred them to the second paragraph of instruction number 2, and I told them beginning with, 'if you find from,' et cetera, et cetera, for them to reread that paragraph."

(*Ibid*, italics added.)

A bare majority of the Court found that the trial court's response to the jury's request did not run afoul of its holding in *Bollenbach v. United States*, *supra*, 326 U.S. 607, 611, because in contrast to *Bollenbach*, where the trial court gave a "palpably erroneous" instruction, here the trial court's instruction was one the Court had upheld in *Buchanan v. Angelone* (1998) 522 U.S. 269. (*Weeks v. Angelone*, *supra*, 528 U.S. at p. 231.)

> Given that petitioner's jury was adequately instructed, and given that the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry, the question becomes whether the Constitution requires anything more. We hold that it does not.

(*Id.* at p. 234.)

Appellant's case is quite unlike *Weeks*. Putting aside the circumstance that the trial judge here, unlike his counterpart in *Weeks*, did not confer with counsel as to how best to answer the jury's question, the stark fact remains that the instruction he gave the jury was "palpably erroneous." While trained legal professionals might discern that CALJIC

No. 8.88 suggests by inference that the death penalty is the more severe of the two available punishments, lay jurors (and in particular *this* lay jury) had not drawn that inference after a week's worth of deliberations. Moreover, any fair comparison between the jury's question and the trial court's response in *Weeks* and what occurred at appellant's trial only underscores that the trial judge in *Weeks* was accurate when he said that "I don't believe I can answer the question any clearer than the instruction," whereas here, the trial court was not only wrong when it told the jurors it could not answer their question, it was doubly wrong to repeatedly tell them their question was not pertinent to their task under the law. Nothing could be farther from the truth.

Respondent points to the fact that the jury deliberated for an additional three days without repeating its question or otherwise expressing confusion as evidence that the trial court did not err. It is hardly surprising that the jury did not ask further questions on this issue, as the trial court made it abundantly clear that the jury's original question was irrelevant and would not be answered in any event. "[A] jury is presumed to understand a judge's answer to its question. [Citation omitted]." (*Weeks v. Angelone*, *supra*, 528 U.S. at p. 235.) The fact that the jury here did not repeat its question and deliberated for three additional days does not prove that the trial court's contradictory instructions were not erroneous. It is far more reasonable to view the jury's actions and additional prolonged deliberation as a reflection of the difficulty the jurors had in making sense of the trial court's contradictory instructions and a realization that further questions on the point were futile. For all of the above-cited reasons, *Weeks* lends no weight to respondent's argument.

To sum up, the trial court's approach and ultimate response to the

question posed by the jury was manifestly erroneous. Its instructions fell short of the duty to provide correct and accurate instructions, or to answer the jury's question at all. (*Bollenbach v. United States*, *supra*, 326 U.S. at pp. 612-613; *People v. Wickersham* (1982) 32 Cal.3d 307, 330 [trial court "is charged with instructing the jury correctly"].) According to this Court, Penal Code section 1138 "impose[d] on the court the 'primary duty to help the jury understand the legal principles it is asked to apply.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 755, citing *People v. Beardslee, supra,* 53 Cal.3d at p. 97.) Assuredly, the trial court's entire response to the deadlocked jury's question could not help the jury understand the legal principles it was struggling to apply, and respondent has not shown otherwise.

There only remains the issue of determining the consequence of the trial court's instructional error. Respondent spills little ink on this point, having placed all its bets on the proposition that no error occurred:

> This Court need not make any prejudice decision because no error occurred. We submit that the trial court correctly responded to the question at issue, and that even if the trial court did err, there exists no reasonable possibility that the jury would have rendered a different penalty verdict absent the error.

(RB 190.)

Respondent does not amplify on its bare assertion that there was no reasonable possibility the jury would have rendered a different verdict absent the instructional error. In light of the dubiousness of that conclusion, the frailty of respondent's "argument" comes as no surprise.[96]

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[96]Respondent does not even deign to present a rebuttal to appellant's (continued...)

Appellant demonstrated in his opening brief that during the voir dire of four sitting penalty jurors (including the foreperson), as well as one alternate juror, the issue of whether death was the more serious penalty was broached. The foreperson herself volunteered that if she were in appellant's shoes, she might well prefer to be executed rather than endure a life in prison without possibility of parole. (11 RT 1806.) It defies common sense or reason to believe that divergent and deep-rooted beliefs about which penalty was the more severe were not at the root of the jury's deadlock when it asked for guidance from the trial court. (See AOB 383-386.) Respondent provides no answer to this assertion. Nor, contrary to the analysis provided by appellant in his opening brief (see AOB 386-388), does respondent discuss the significance of the length and quality of the jurors' deliberations in this case, which clearly show how agonizingly close and difficult the penalty decision was for the jury. There can be no doubt that the trial court's responses to the jury's question failed to properly guide its deliberations and thus directly impacted its ultimate decision. Respondent has not demonstrated otherwise.

D. Conclusion

Respondent has failed to demonstrate that the trial court did not commit error, both as a matter of state law and federal constitutional law, when it failed to correctly answer the penalty phase jury's question as to

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[96](...continued)
argument that the error was reversible per se because the trial court's response effectively permitted the jurors to ignore the mitigating evidence for its only relevant purpose: as a reason to impose the lesser of the two sentences. (See AOB 382-383.) In light of respondent's silence in this regard, no useful purpose is served here by repeating the argument made in appellant's opening brief.

which of the two penalties was the more severe. Moreover, respondent has also failed to demonstrate that such error is not reversible per se because the trial court's actual response effectively permitted the jurors to ignore the mitigating evidence for its only relevant purpose: as a reason to impose the *lesser* of the two sentences.

Even if the trial court's erroneous response is subject to harmless error analysis, respondent has failed to demonstrate that there is no reasonable possibility (see *People v. Brown* (1988) 46 Cal.3d 432, 446-448) that appellant's jury applied the trial court's instructions in a way that violates the Constitution. This is especially the case here, as the jury's question arose after five days of deliberation when the jury informed the trial court that it was irrevocably deadlocked and needed the court's assistance. The absence of an explicit instruction, responsive to the deadlocked jury's question, that death was the more severe penalty was reversible error under all of the circumstances of this case.

XIV

THE TRIAL COURT ERRONEOUSLY, UNCONSTITUTIONALLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM-IMPACT EVIDENCE

In his opening brief, appellant argued that the trial court breached its obligation to instruct the penalty-phase jury sua sponte on those principles which were openly and closely connected with the evidence presented and were necessary for the jury's proper understanding of the case by failing to instruct the jury on the proper use of victim-impact evidence. (See AOB 390-395.) Because the victim's son expressed his wish that the jury's verdict accomplish what the law forbade him – putting appellant to death – it was of paramount importance that the trial court provide concrete guidance on how the victim-impact evidence should be properly be used. Respondent circuitously argues that the trial court did not err in rejecting defense counsel's proffered victim-impact instruction and therefore the instruction given by the trial court (i.e., CALJIC No. 8.84.1) was sufficient. (See RB 195-197.)

However, respondent neglects to address the main thrust of appellant's argument, which did not claim that the trial court's error consisted of its refusal to deliver the instruction offered by defense counsel. Instead, appellant asserted that CALJIC No. 8.84.1, as delivered by the trial court, was wholly inadequate to guide the jury's consideration of the victim-impact evidence *presented in this case*. Thus, respondent's contentions do not adequately rebut appellant's arguments, either legally or factually, and present no points which have not been addressed previously in appellant's opening brief. It is, however, telling that respondent ignores

the improper victim-impact testimony of the victim's son in which he made an emotional appeal to the jury for the vengeance he was forbidden to personally exact upon appellant when it claims that any arguable error committed by the trial court in not providing a limiting instruction "must be deemed harmless since appellant points to *nothing* that suggests the jury might have used the evidence in an improper manner." (RB 196-197, italics added.)

It is also significant that respondent again generates a "straw man" argument when it chooses to compare the victim-impact instruction given by the court with the alternative instruction proffered by defense counsel below (see 4 CT 1020), rather than with the type of limiting instruction appellant suggested was necessary in his opening brief (see AOB 392). As mentioned earlier, appellant did not contend that the alternative victim-impact instruction proffered by defense counsel was sufficient to properly inform the jurors concerning their consideration of the evidence.

In light of the omission and circumvention presented in respondent's argument, appellant reiterates the position he asserted in his opening brief – that the failure of the trial court to deliver an appropriate limiting instruction on the jury's consideration of the victim-impact evidence violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. For these reasons, the death judgment must be reversed.

XV

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN ITS RESPONSE TO THE DELIBERATING JURY'S REQUEST FOR CLARIFICATION OF THE TERM "DURESS" AS USED IN CALJIC NO. 8.85

During the second day of penalty-phase deliberations, the jury submitted a written request for clarification of CALJIC No. 8.85, factors (d) and (g). In the course of determining how to assist the jurors, the trial court learned that they wanted (1) a good definition of "duress," (2) to know how "direct" or "indirect" the duress had to be in order to give credence to it, and (3) to know how, both physically and in the abstract, one person might place another person under duress. The trial court ultimately gave instructions to which the defense objected. (44 RT 5835-5856.)

In his opening brief, appellant pointed out three defects in the instructions given by the trial court.[97] He argued that the trial court violated state law and committed state and federal constitutional error by failing to adequately address the jury's request for clarification. Finally, he argued that his right to a determination of penalty by a jury "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action,"

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[97]First, appellant argued that the clarifying instructions given were incomplete. Second, he argued that the trial incorrectly instructed the jury that the answer to one of its questions would require the court to provide "testimony and information" that was not in evidence, and that for this reason, the court was not permitted to answer the jury's question. Finally, he argued that the trial court improperly limited the jury's subjective consideration of the mitigating evidence when it instructed the jurors that they would have to decide the issues raised by their question based on the evidence and any "reasonable" inferences they, as factfinders, were to arrive at. (See AOB 403-418.)

as guaranteed by the Eighth and Fourteenth Amendments, and article I, §§ 7, 15, and 17 of the California Constitution, was violated by the trial court's abdication of its duty to clarify the law as requested by the jury, and that such error requires that his death judgment be reversed. (AOB 396-422; see Pen. Code, § 1138; *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613; *Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 575; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836-841.)

Respondent takes the position that the trial court did not err in delivering the clarifying instructions. It claims "[t]here was nothing about the trial court's response that, expressly or implicitly, misled the jury or precluded the jury from considering mitigating evidence." (RB 201.) Next, respondent contends that the trial court gave a complete answer to the jury's question by providing a dictionary definition of duress. "We fail to see how the trial court's dictionary assist to the jury was somehow 'legally incomplete.'" (RB 202.) Respondent also maintains that the trial court correctly interpreted the jury's question of how far back the application of duress could extend as a factual question, thereby justifying the trial court's refusal of defense counsel's request that it be answered with a legal instruction. Finally, respondent submits that, in any event, the instructions actually given and the trial court's explanatory comments could not reasonably be viewed by the jurors "as putting a time frame on duress," or leading them "to believe that the court had told them there existed no evidence from which they could find that appellant had acted under duress from outside," or "that their discretion to view the mitigating evidence subjectively had been limited." (RB 202.) None of respondent's contentions finds support in the record.

Respondent's brief appears to tackle appellant's arguments in

reverse order. It first contends that '[t]here was nothing about the trial court's response that, expressly or implicitly, misled the jury or precluded the jury from considering mitigating evidence. The trial court properly used plain language to answer the jury's question and did not suggest any particular finding."[98] (RB 201.)

First, it should be observed that the jurors asked more than one question, and the trial court gave more than one response. It was obvious to everyone that the trial court's first attempt to answer the jury's question was insufficient. Even giving the jury a dictionary-assisted definition of duress was not enough to "clear away" the jury's difficulties "with concrete accuracy," as the trial court became aware from the jurors' follow-up questions after the definition was given. (*Bollenbach v. United States*, supra, 326 U.S. at pp. 612-613; see also *People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Second, and more significantly, respondent provides no reasoned response to appellant's argument that the trial court made at least two comments which suggested a particular finding and limited the jury from subjectively considering the mitigating evidence. When the jury foreperson asked the trial court "if duress can be directed from the outside," the trial court replied:

> THE COURT: Okay. Now, see, you're asking me to testify and give you information. I can't do that.
>
> THE FOREPERSON: Oh.

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[98]These conclusory contentions, delivered with no analysis of the record or of appellant's argument, appear to constitute the entire response to the second and third defects appellant identified in the trial court's clarifying instructions. (See AOB 404.)

THE COURT: All I can tell you is, is that – that you have to decide that yourself based upon the evidence that you've received in this case and any reasonable inferences that you, as the fact finders, come to. See, I can't tell you stuff that's not in the evidence. Okay?

THE FOREPERSON: I see.

THE COURT: So I hope that helps you with the definition of duress. All right? Okay. We'll send you upstairs.

(44 RT 5854-5855.)

Respondent is unable to explain why the jury would not have understood the trial court's explanation as a comment on the state of the evidence. Certainly, the trial court's explanation was reasonably susceptible of being understood as the court saying in effect that "in my opinion, there's no evidence, or a reasonable inference from the evidence, that the defendant was subjected to duress directed from the outside." Nor can respondent provide a convincing reason why the trial court's explicit instruction to the jurors – "you have to decide that yourself based upon the evidence that you've received in this case and any reasonable inferences that you, as factfinders, come to" – would not be understood by the jury as a limitation on their discretion to view the mitigating evidence subjectively. Appellant discussed these matters exhaustively in his opening brief. (See AOB 409-418.) Respondent, however, simply resorts to ipse dixit in its attempt to justify the trial court's clarifying instructions. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 606-607.) Consequently, no useful purpose will be served by repeating here the relevant analysis appellant undertook in his opening brief; appellant simply directs this Court's attention to his original briefing on the issue.

Respondent's last contention is also easily answered. It claims that

the trial court's clarifying response was not incomplete because the court gave the jury a dictionary definition of duress. (RB 202-203.) This misses the point of appellant's argument entirely. Appellant argued that the dictionary definition alone was inadequate to answer the jury's follow-up questions.

Defense counsel were successful in persuading the trial court to instruct the jury that they were to view duress in a commonsense manner and to construe the term by its common usage, rather than in the inappropriate manner suggested by the prosecutor. They were also content with the dictionary definition utilized by the trial court as far as it went, but asserted that in light of the jurors' additional questions, it was necessary for the trial court to give a more direct response to the question of how long duress could last, and suggested an appropriate response.[99] (44 RT 5851.) The trial court refused that request as an inappropriate comment on the evidence. In doing so, it observed:

> Now whether or not the duress in this case has existed for a long period or a short period of time is a factual issue for them to determine from the evidence in this case and the inferences therefrom.

(44 RT 5851-5852.)

Respondent again states, in a conclusory fashion and without any attempt at analysis, that the trial court "correctly interpreted the issue of 'how far back' the 'application of duress could extend' as a factual issue" and therefore one that did not require an answer. (RB 202.) Respondent goes on to claim that there was no reasonable likelihood that the jury

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[99]Defense counsel asked that the jury be instructed "that the application of duress can extend to as far in time as they deem appropriate." (44 RT 5851.)

ultimately understood the trial court's instructions as putting a time frame on any duress.

Respondent cites no reason or authority to support its contention that the jury's request called upon the trial court to resolve a factual, rather than a legal, issue. As appellant has addressed these matters comprehensively in his opening brief, he will not repeat them here. (See AOB 404-411.) It suffices to say that respondent's contention that the jury's request called upon the trial court to resolve a factual question is both incorrect and not supported by the facts or the law.

Similarly meritless is respondent's conclusion that there was no reasonable likelihood the jury understood the actual instructions given as placing a time frame on any duress. As appellant pointed out in his opening brief (see AOB 407-409), this Court recognizes that factor (k) provides a vehicle by which the jury can properly give mitigating effect to evidence that a defendant was influenced by mental or emotional disturbance, duress or domination by another which was neither so extreme nor so substantial as to be covered by factors (d) or (g). (*People v. Vieira* (2005) 35 Cal.4th at p. 303; *People v. Turner* (1994) 8 Cal.4th 137, 208-209; *People v. Clark* (1992) 3 Cal.4th 41, 163.) The jury's questions to the court demonstrates that it was unaware of the interplay between factors (d), (g), and (k). The jurors did not appear to understand how to determine whether evidence that might be perceived as duress could properly be considered as mitigating under factor (g), and if not under factor (g), then under factor (k). It was incumbent upon the trial court to make this point clear to the jurors, rather than declining to answer their questions and thereafter interjecting inappropriate concluding remarks, especially in light of the questions posed by the foreperson and Juror Number Two. (44 RT

5839-5840.) Thus, contrary to respondent's conclusion, there is a reasonable likelihood that the jurors were left in a position where they were unaware of whether they could properly give mitigating effect to "duress" either under factors (d), (g) or (k).

To sum up, respondent has failed to present any convincing reason to uphold the trial court's instructions in response to the jury's request for clarification. To the contrary, the trial court's incomplete and misleading responses to the deliberating jurors' requests for assistance in understanding CALJIC No. 8.85 denied appellant his rights to due process of law and a reliable penalty determination, and require that the death judgment be reversed. (*Buchanan v. Angelone* (1998) 522 U.S. 269, 276; *Bollenbach v. United States*, *supra*, 326 U.S. at pp. 612-613; *McDowell v. Calderon*, *supra*, 130 F.3d at pp. 836-841.)

XVI

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

In his opening brief, appellant argued that the jury instructions regarding the statutory factors to be considered in determining penalty rendered appellant's death sentence unconstitutional, for a number of reasons. (See AOB 423-435.) Respondent relies upon previous decisions of this Court rejecting similar challenges. (See RB 203-204.)

In attempting to dispose of appellant's claims, respondent fails to rebut his arguments and offers no basis, aside from stare decisis, for continuing to follow precedents that are fundamentally flawed. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 577 ["The doctrine of stare decisis . . . is not . . . an inexorable command."]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [although doctrine of stare decisis serves important values, it "should not shield court-created error from correction"].) For all of the reasons delineated in appellant's opening brief, appellant respectfully requests that this Court reconsider its prior rulings in this area, hold that the instructions regarding the statutory factors to be considered in determining penalty violated appellant's fundamental constitutional rights, and reverse the death judgment.

XVII

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION, AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT

In his opening brief, appellant argued that the modified version of CALJIC No. 8.88 which was delivered to appellant's penalty jury was constitutionally flawed in numerous respects. (See AOB 436-450.) Respondent mistakenly contends that appellant's claim of error was waived and, in any event, is meritless. (See RB 205-208.)

Contrary to respondent's contentions (see RB 206), appellant did not waive the instant claims of error in any respect. Since appellant challenges the instruction as legally erroneous and unconstitutional, and because it undeniably affected appellant's "substantial rights" (Pen. Code, § 1259), appellant did not have to object or seek any "clarifying instructions" (RB 206) below. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) Moreover, a defendant is not required to make a timely objection if such an objection would be futile (e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; *People v. Hill* (1998) 17 Cal.4th 800, 830); since, as respondent contends, this Court has "repeatedly rejected" (RB 206-207) such challenges to CALJIC No. 8.88, "an objection at the trial level under the existing rulings would have been useless and unavailing" (*People v. Morse* (1964) 60 Cal.2d 631, 653; see also *People v. Sandoval, supra*, 41 Cal.4th at p. 837, fn. 4; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Thus, the supposed fact that appellant "neither challenged the instruction nor sought a clarifying instruction" (RB 206),

even if entirely accurate, does not waive his claims of instructional error.[100]

In any event, even were it assumed that defense counsel should have anticipated a favorable ruling had they objected to the instructions in question, or at least should not have considered such objections futile, they could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to receive penalty-phase instructions which violated his fundamental constitutional rights. Thus, it would have constituted ineffective assistance of counsel not to object. (U.S. Const., 6th & 14th Amends.; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

On the merits, and for all of the reasons set forth in appellant's opening brief, appellant respectfully asks this Court to reconsider its prior rulings in this area, hold that instructing the jury pursuant to CALJIC No. 8.88 violated appellant's fundamental constitutional rights, and reverse the death judgment.

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[100]As appellant noted in his opening brief, he tendered proposed instructions which in part sought to clarify principles contained in CALJIC No. 8.88, and those instructions were refused. (See AOB 448, fn. 178; 4 CT 1000, 1002-1003; 42 RT 5640-5641.)

XVIII

THE ADMISSION AND USE OF EVIDENCE OF UNADJUDICATED CRIMINAL ACTIVITY VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THE DEATH JUDGMENT

In his opening brief, appellant argued that the admission and use of "factor (b)" evidence at the penalty phase violated his fundamental constitutional rights, in numerous respects. (See AOB 451-458.) Although appellant acknowledged in his opening brief that this Court has previously rejected similar claims, respondent merely cites this Court's prior cases in contending that these claims are meritless. (See RB 208-213.) Thus, respondent fails to rebut appellant's arguments and offers no basis, aside from stare decisis, for continuing to follow fundamentally-flawed precedents.

For all of the reasons set forth in the opening brief, the jury's use of the evidence of unadjudicated criminal activity against appellant requires that his death judgment be reversed.

XIX

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

In his opening brief, appellant made a multifaceted attack on the constitutionality of California's capital-sentencing scheme. (See AOB 459-490.) Respondent attempts to counter appellant's exposition of the flaws in California jurisprudence in this area with a pro-forma citation of this Court's rulings disagreeing with many of appellant's arguments. (See RB 213-217.)

Appellant has previously acknowledged this Court's rejection of some or all of appellant's various claims of unconstitutionality of California's death-penalty statute and jury instructions. (See, e.g., AOB 428, 431-432, 439, 444, 453-454, 366-367.) Since respondent has not presented any substantive arguments in support of the constitutionality of the statute and instructions, or in contradiction to the arguments contained in the opening brief, no further reply by appellant is required except to request that this Court reconsider its prior rulings in this area and, accordingly, reverse his death judgment.[101]

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[101]Appellant would only add, as to all of his arguments regarding the requirement of a standard of proof beyond a reasonable doubt applying to any findings a jury is required to make as a prerequisite to returning a death verdict (see AOB 457-458, 460-473), and as to all of his arguments regarding the requirement of jury unanimity in arriving at its penalty determination (see AOB 457-458, 483-489), that appellant's position is further buttressed by the United States Supreme Court's recent opinion and decision in *Cunningham v. California* (2007) 549 U.S. 270. (See also *United States v. Booker* (2005) 543 U.S. 220.)

XX

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

Appellant argued in his opening brief that California's failure to conduct intercase proportionality review of death sentences violated the Eighth and Fourteenth Amendments. (See AOB 491-494.) Respondent counters by citing cases from this Court denying this very claim. (See RB 217-218.) Appellant has acknowledged this case authority and has further acknowledged that such cases are in turn based upon the United States Supreme Court's holding in *Pulley v. Harris* (1984) 465 U.S. 37. (See AOB 492.) However, almost a quarter of a century has passed since *Pulley* was decided. As appellant demonstrated in his opening brief (see AOB 492-494), since *Pulley* was decided, the California sentencing scheme has become one that demands proportionality review in order to ensure its constitutional application. This Court should revisit this issue and, accordingly, reverse appellant's death judgment.

XXI

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

In his opening brief, appellant argued that capital punishment violates the Eighth Amendment's prohibition because it is contrary to international norms of human decency. Appellant further argued that, even if capital punishment itself does not violate the Eighth Amendment, using it as a regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does. (See AOB 495-500.) Respondent's opposition to appellant's claims primarily rests upon the ground that this Court has previously rejected such arguments, although it also advances two dubious procedural bars which can easily be answered. (See RB 219-220.) Appellant is well aware of this Court's decisions in this area, but respectfully requests this Court to reconsider and disapprove them.

Preliminarily, respondent contends that "[a]ppellant is precluding from raising this issue because he lacks standing to assert a violation of international law" because "the principles of international law apply to disputes between sovereign governments and not between individuals." For this proposition, respondent only cites *Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547. (RB 218-219.) Respondent misperceives the nature of appellant's claim. Unlike the plaintiffs in *Hanoch*, appellant does not assert that some provision of international law provides him with a private cause of action. Rather, appellant contends that "this Court is bound" by the treaties our nation ratifies, and that among those treaties is the International Covenant of Civil

and Political Rights, which prohibits the "arbitrary deprivation of life." (AOB 496-497.) Appellant has therefore asked the Court to "reconsider its prior stance on this issue and, in the context of this case, find that appellant's death sentence violates international law," and to reverse his death sentence on that basis. (*Id.* at p. 497.) There is no question that appellant has standing to make that request.

Respondent also contends "that appellant should be precluded from claiming violations of international customary laws or treaties for the first time on appeal, since he never raised any such claims in the trial court." (RB 218.) This contention also fails because, as respondent notes, "this Court has previously and repeatedly rejected the notion that California's death penalty statutes somehow violate international law," and any objection that had been made at trial would have been futile. And of course, a defendant is not required to make a timely objection if doing so would be futile. (See, e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; *People v. Hill* (1998) 17 Cal.4th 800, 830; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

As there remains nothing of substance remaining to be addressed in respondent's arguments, appellant asks this Court to reconsider its position on this issue and, accordingly, to reverse the death judgment.

XXII

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

In his opening brief, appellant argued that even if (arguendo) none of the individual errors identified by appellant is deemed prejudicial in itself, the cumulative effect of such errors requires reversal of the death judgment. (See AOB 501-503.) Since respondent simply posits that "there are no multiple errors to accumulate," and "[w]hether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial" (RB 221), no reply is warranted and appellant herein reasserts his arguments in support of his cumulative-error claim. Respondent claims that "[t]he record shows that appellant received a fair trial." (*Ibid.*) To the contrary, appellant has demonstrated that his trial was infected with error, beginning during jury selection, continuing throughout the presentation of evidence in both phases of the trial, and culminating with the trial court's instructions to the jury both before and during the jury's deliberations. Because of the cumulative effect of all of the errors discussed in appellant's opening brief and in this brief, *ante*, the judgments of conviction and death must be reversed.

CONCLUSION

For the foregoing reasons, as well as those stated in Appellant's Opening Brief, the entire judgment must be reversed.

DATED: November 4, 2008

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

HARRY GRUBER
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, rule 8.630(b)(1)(B))

I, HARRY GRUBER, am the Deputy State Public Defender assigned to represent appellant GREGORY O. TATE in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 56,264 words in length.

DATED: November 4, 2008

HARRY GRUBER
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Tate* No. S031641

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

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Attn: Sara Turner, D.A.G.
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102

Alameda County Superior Court
1225 Fallon Street, 9th Floor
Oakland, CA 94612-4218

J. Dominique Pinkney, D.P.D.
Office of the Public Defender
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Oakland, CA 94612-4277

Judith Browne
Office of the Public Defender
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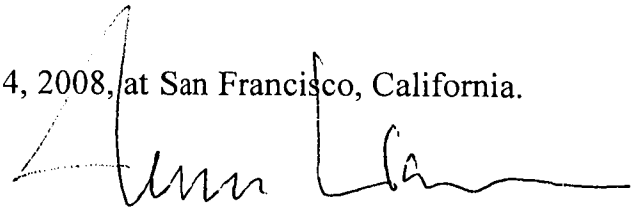
Gregory O. Tate
(Appellant)

Each said envelope was then, on November 4, 2008, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on November 4, 2008, at San Francisco, California.



DECLARANT