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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT COPY

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DEMETRIUS CHARLES HOWARD, Defendant and Appellant.	**CRIM. No. S050583** **Automatic Appeal** **(Capital Case)** **San Bernardino County** **Superior Court** **No. FSB 03736**

APPELLANT'S REPLY BRIEF

Appal from the Judgment of the Superior Court of the State of California for the County of San Bernardino

HONORABLE STANLEY W. HODGE

SUPREME COURT
FILED
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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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APPELLANT'S REPLY BRIEF

Introduction

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

* * * * *

I.

THE RECORD UNEQUIVOCALLY SHOWS THAT APPELLANT WAS FORCED TO WEAR A STUN BELT DURING TRIAL WITHOUT A SHOWING OF MANIFEST NEED AND IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

Respondent claims alternately that: the record is unclear as to whether the trial court forced appellant to wear a stun belt during trial; if appellant did wear a stun belt, the issue has not been preserved for appeal; and even if the issue is preserved, appellant suffered no adverse affect from the belt. (Respondent's Brief, hereinafter "RB" 22-30.) Respondent is wrong on all points.

A. Appellant Was Forced to Wear a Stun Belt Without a Showing of Manifest Need and Over Defense Objection

The trial court's action in forcing a stun belt on appellant without any showing of need is indefensible. "'T*he showing of nonconforming behavior* in support of the court's determination to impose physical restraints *must appear as a matter of record*. . .[citation omitted.]'" (*People v. Mar* (2002) 28 Cal.4th 1201, 1217, emph. in original.) Evidence must support the trial judge's determination to use restraints: "A shackling decision must be based on facts, not mere rumor or innuendo." (Citations omitted.) *(People v. Simmons* (2006) 143 Cal.App.4th 256, 265.) The trial court had a duty to make a full factual record concerning the restraints (*People v. Jackson* (1993) 14 Cal.App.4th 1818, 1826) and to make a finding of "manifest need." (*People v. Mar, supra,* 28 Cal.4th at p. 1215; *Deck v. Missouri* (2005) 544 U.S. 622, 633*; People v. Duran* (1976) 16 Cal.3d 282, 293, fn 12; appellant's opening brief, hereinafter "AOB" 24-

29.)

At trial, neither the trial court nor the prosecutor refuted defense counsel's claims that appellant had "never acted out in any matter" or "been disrespectful to the court or anybody else" when he argued against the stun belt restraint. (2 RT 505.) Respondent never addresses the fact that appellant's courtroom behavior was above reproach in its opposition. Respondent therefore tacitly concedes that the trial court abused its discretion in forcing appellant to wear a stun belt without any showing, let alone a manifest showing of need, in violation of appellant's state and federal Constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and article I, §§ 7, 15 and 17. (AOB 23.) Nor does respondent address the trial court's failure to authorize only "the least obtrusive or restrictive restraint" to provide the necessary security. (*People v. Mar, supra*, 28 Cal.4th at p. 1226; see also Pen.Code § 688; AOB 26-29.) Respondent further fails to address the trial court's failure to consider the distinct features or risks of a stun belt to appellant before compelling its use, including, inter alia, the potential adverse psychological consequences and health risks. (*People v. Mar, supra*, 28 Cal.4th at pp. 1225-1226.) Respondent has not and cannot refute the trial court's abuse of discretion in its failure to meet any of the threshold requirements before forcing appellant to wear a stun belt restraint.

Respondent instead refutes that appellant even wore a stun belt, arguing that the record is unclear on the subject. Not so. The trial court stated its preference for the stun belt as a "prophylactic measure" given "the nature of Mr. Howard's past" and because, unlike shackles, "it can't be seen which is a nice thing about it – it insures everyone that nothing unfortunate is going to happen. And it can't be seen by jurors." (2 RT 504-505.)

A notation in the clerk's transcript on April 4, 1995, states:

> Defense objects to defendants [sic] shackles and electronic device. Motion to have them removed is denied.

(2 CT 123; AOB 22.)

Contrary to respondent's claim, the record is absolutely unequivocal on this point; appellant wore a stun belt during trial.[1]

Respondent also erroneously contends that appellant has waived this issue on appeal for "failure to make an adequate record as to the type of restraint, if any, was used, when a restraint was used, and whether or not the jury viewed the restraint." (RB 24.) Once again, respondent's argument is wholly unsupported by the record. Appellant vigorously and specifically objected to the use of the stun belt:

> I do still object to my client being shackled in the court room for the reason he never caused any outbursts. I understand the Court intends to put on him a [sic] electronic device that can be pressed and give him 50,000 volts if he does anything somebody doesn't like or runs or something like that. ¶ I would object to that for the same reason. He's never – in all of his court appearances through San Bernardino to here, he's never acted out in any manner whatsoever. He's never been disrespectful to the court or anybody else. I would object on those grounds.

(2 RT 504-505; AOB 22-23.)

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[1] Also contrary to respondent's assertions, appellant in no way "confirms the lack of clarity" in the record with regard to the stun belt. (RB 22, fn. 8.) As appellant sets forth in his AOB, he is reserving the issue of shackling for habeas because of the trial court's failure "to make a full factual record of the type of [shackling] restraints used, whether they were visible to the jury, and the number of armed officers in the courtroom." (*People v. Jackson supra*, 14 Ca.App.4th at p. 1826; AOB 23, fn. 24.)

Amazingly, respondent includes this very quote in its opposition but nonetheless argues that appellant has failed to object adequately. (RB 23.) Appellant's objection to the use of the stun belt included a description of the restraint as an "electronic device" having the potential to give "50,000 volts" and set forth his undisputed stellar courtroom behavior as a basis for his objection. (2 RT 504-505.) It is difficult to imagine what further specificity or description "as to the type of restraint" respondent deems necessary. (RB 24.) Appellant is also baffled by respondent's claim that appellant failed to state on the record "when" the restraint was used. (*Ibid.*) Appellant's brought his in-limine motion on the April 4, 1995, the same day his trial commenced. (1 CT 122-125.) Appellant wanted the stun belt removed for trial. (1 CT 123; 5 RT 504-505.) Finally, respondent argues that appellant's objection is inadequate for failing to state whether or not the stun belt could be seen by jurors. (RB 24.) Notwithstanding the fact that the trial court chose the stun belt because of his determination that "it can't be seen", this issue is one which can be further developed on habeas when jurors can respond to the question directly. (2 RT 504-505.) In fact, as this Court has recognized, stun belts are often visible. (*People v. Mar, supra*, 28 Cal.4th at p. 1214.)[2] In any event, as the *Mar* case makes clear,

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[2] As set forth in the AOB, the trial court found the belt could not be seen by jurors while appellant was seated at counsel table (2 RT 505), but the record is silent as to whether it was visible when appellant walked in front of the jury to take the stand and testify on his own behalf. "[I]f the stun belt protrude[d] from the defendant's back to a noticeable degree, it is at least possible that it may be viewed by a jury. If seen the belt 'may be even more prejudicial than handcuffs or leg irons because it implies that unique force is necessary to control the defendant.'[Citation omitted.]" (*United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1305; AOB 34, fn 27.)

there is no requirement to set forth the visibility of the stun belt on the record in order to preserve the claim for appellate purposes. (*Id.* at pp. 1204-1228.) Indeed, appellant could have barely raised any objection whatsoever to preserve this issue. (See, e.g., *People v. Simmons, supra,* 143 Cal.App.4th at p. 265 [where defense counsel did not even object to his client's shackling but merely requested that his client have one arm freed, the court found the issue had been preserved for appeal].)

Moreover, the cases respondent relies upon for its claim of waiver are inapposite because in each of those cases the defendant made no objection to shackling in the trial court and instead "challenged [restraints] for the first time on appeal. (Citations omitted.)" (RB 24; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583; *People v. Walker* (1988) 47 Cal.3d 605, 629 ["defendant never objected below" to the use of restraints].) In contrast, here, the record shows an unequivocal objection in the lower court to the use of this restraint. (2 RT 504-505.)

Respondent is correct in his assertion that the failure to make a record on the need for restraints is error – but it is judicial and not defense error. Here, as in *Simmons,* the record shows that "the trial court failed to make and support its decision on the record, as precedent from our state's high court requires. That failure constitutes error." (*People v. Simmons, supra,* 143 Cal.App.4th at p. 266.)

B. The Belt Prejudicially Impacted Appellant's Ability to Testify in His Own Defense

The harmful psychological impact from wearing a stun belt has been well established by this Court and many other jurisdictions along with international human rights organizations. (*People v. Mar, supra*, 28 Cal.4th at p. 1227.) This Court has recognized that stun belts "may impair

the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury." (*People v. Mar, supra*, 28 Cal.4th at pp. 1226-1227; AOB 33-43.)

The prejudicial impact from wearing a stun belt is most pronounced when, as here, the defendant testifies on his own behalf. This is so because of the prejudicial effect from the restraint on a defendant's testimony and demeanor, and "this demeanor, in turn, impacts a jury's perception of the defendant, thus risking material impairment of and prejudicial affect on the defendant's 'privilege of becoming a competent witness and testifying in his own behalf. [Citations omitted].'" (*Gonzales v. Pliler* (9th Cir. 2003) 341 F.3d 897, 900-902 .) The defendant is thus "occupied by anxiety over the possible triggering of the belt" and " likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial." (*United States v. Durham, supra*, 287 F.3d at p. 1306.)

Respondent argues that there is no evidence the stun belt caused appellant to be nervous or was otherwise prejudicial to his defense. (RB 28-30.) However, as this Court stated in *Mar*, it is "impossible to determine with any degree of precision what effect the presence of the stun belt had on the substance of defendant's testimony or on his demeanor on the witness stand . . . but in view of the nature of a stun belt and the debilitating and humiliating consequence that such a belt can inflict, it is reasonable to believe that many if not most persons would experience an increase in anxiety if compelled to wear such a belt while testifying at trial." (*People v. Mar, supra*, 28 Cal.4th at p. 1224.) In *Mar* the defendant had the presence of mind to attribute his nervousness to the wearing of the stun belt. Here, it

should suffice that appellant objected to wearing the stun belt because the unspoken basis for such an objection had to be the very same and predictable reasons set forth in *Mar*; it made him nervous and hindered his ability to fully participate in his defense. (*People v. Mar, supra*, 28 Cal.4th at p. 1224; see also, *People v. Harrington* (1871) 42 Cal. 165, 168 [restraint inevitably tends to confuse mental faculties particularly where the defendant is testifying in his own behalf]; accord, *Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, 105; AOB 36-37.)

Moreover, this record supports the predictable consequence of nervousness set forth in *Mar* from the wearing of a stun belt. (*Ibid.*) When appellant testified, he openly discussed how nervous he was on the stand. (9 RT 2185; AOB 40-42.) The record also shows the trouble appellant had in following questions while testifying. (9 RT 2228, 2239, 2231, 2242; AOB 42.) Respondent counters that appellant had problems following questions on cross-examination because of the prosecutor's poor phrasing and alternately because appellant had been well-prepped for direct examination but not for cross-examination. (RB 29.) Although respondent offers no examples of the prosecutor's poor phrasing, appellant agrees that at least one of the prosecutor's questions was poorly worded. (9 RT 2228; AOB 42, fn 31.) However, some of defense counsel's questions were likewise poorly worded so that appellant's difficulty or nervousness did not likely result from poorly-phrased questions.[3] Even when the questions

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[3] For example, defense counsel asked:

Q. What, do you guys run around together? What was it?

(9 RT 2187)

Q. Now, going back before you left Flores Street, did you leave there with somebody?

(9 RT 2199)

were unambiguous, appellant became undeniably nervous on the stand, asking for questions to be repeated or for further explanation. (9 RT 2231, 2239, 2242.) And, contrary to respondent's claim, counsel would have logically spent more time prepping appellant for cross rather than direct examination. Respondent is engaging in speculation. Respondent attempts to place the blame for appellant's nervousness on everything but the elephant in the room; in this case that elephant is a 50,000 volt stun belt. Based on this record, where the defense objected and expressed concern about the potential effects of the stun belt, it is reasonably likely that appellant's nervousness stemmed from the stun belt and possible consequences.

Respondent contends that if appellant had any problems with the stun belt, "counsel would have put that information on the record." (RB 28.) Respondent ignores the fact that appellant vigorously objected to the stun belt at the outset – for the very reason that sitting on 50,000 volts of electrical charge is likely to impact negatively on anyone and particularly a defendant testifying on his own behalf. (2 RT 504-505.) Respondent also argues that if appellant had problems with the belt, he would have mentioned it during his personal address to the court at sentencing when he discussed his mental impairment. (RB 28.) Respondent misses the point. Appellant's mental faculties were impaired, he could hardly be expected to set forth all the problems he experienced at trial. Moreover, appellant had already objected to the stun belt. By the time of sentencing the harm had been done; appellant had already been forced to testify while improperly restrained. Appellant objected to the belt precisely when he should have: at the start of trial. At sentencing, appellant raised as yet *unaddressed* issues - his mental condition. (11 RT 2678.) Appellant expressed concern

over displaying an improper demeanor before jurors which he blamed on the anti-psychotic drugs - but as this Court has recognized, at least some of the impact on his demeanor most likely resulted from sitting on 50,000 volts of electricity. (11 RT 2678; (*People v. Mar, supra*, 28 Cal.4th at p. 1224.)

Respondent also attempts to diminish the prejudice from the belt by claiming that even if appellant's testimony were adversely affected, it would not have changed the verdict because this was not a "close" case. (RB 26-28.) Respondent errs. This case was a credibility contest: appellant vs. the prosecution's key witness, Cedric Torrence. (AOB 33-43.) Appellant's defense was one of mistaken identity and his defense rested "completely on the jury's evaluation of [his] credibility" and that evaluation "depended in large part upon [his] demeanor. . ." (*People v. Mar, supra*, 28 Cal.4th at p. 1224.) Knowing that any second appellant could be hit with an electric shock powerful enough to make you "defecate or urinate yourself" would most certainly have had a negative impact on appellant's demeanor before jurors even though it is "impossible to determine with any degree of precision" the exact impact. (*Id.* at pp. 1224, 1227, fn 8.)

Moreover, the prosecution's case was built on shaky ground. Except for some generic fibers, the prosecution lacked any forensic evidence linking appellant to the homicide. (9 RT 2124; AOB 39-40.) The fingerprints and murder weapon linked Funches, not appellant, to the crime. (8 RT 1810-1812, 2064-2067, 2084-2085, 2091-2095.) The prosecution could only place appellant in the general vicinity of the crime and appellant had a plausible and corroborated reason for being there. (9 RT 2206, 2201-2205, 2295.) The prosecution's key witness, Torrence, admitted he had lied to Sgt. Blackwell in earlier interviews, had an axe to grind with appellant

over a custody dispute with appellant's sister, and two witnesses, unrelated to appellant, overheard Torrence admitting that he had lied at trial. (7 RT 1697, 1705.)

The record also shows that jurors were troubled on whom to believe in this case. At the guilt phase, jurors asked for a re-read of appellant's testimony. (1 CT 207; 10 RT 2469.) At the penalty phase jurors requested a re-read of both Sgt. Blackwell's and Torrence's testimony, and deliberated from May 23 to May 31, 1995. (10 RT 2628, 2693, 2746; 2 CT 301-305, 329-331; AOB 40-43.)

Contrary to respondent's assertions, in this close, credibility-laden case, the stun belt's detrimental effect on appellant prejudiced his ability to present a full and fair defense rendering his trial fundamentally unfair. In *Mar*, this Court did not reach the issue of whether such an error is of federal constitutional dimension because it found prejudice even under the *Watson* standard of review. (*People v. Mar, supra*, 28 Cal.4th at p. 1225.)[4] However, in discussing a situation in which the greatest danger of prejudice

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[4] Appellant urges this Court to impose a per se reversal when trial courts force defendants to wear stun belts without any showing of manifest need. "[T]he evolving standards of decency that mark the progress of a maturing society" (*Atkins v. Virginia* (2002) 536 U.S. 304, 311, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 100-101) show widespread rejection of the use of this device as an implement of torture. (See, e.g., U.S.A.: The Stun Belt - Cranking Up the Cruelty," Amnesty International webcite, [www.amnestyusa.org]; U.S.A.: The Stun Belt - Cranking Up the Cruelty," Amnesty International webcite, *supra*; U.S.A.: Use of Electro-Shock Stun Belts; "U.S.A.: Cruelty in Control? The Stun Belt and Other Electro-Shock Equipment in Law Enforcement," Amnesty International webcite, *supra*; see also, Russev, "Restraining U.S. Violations of International Law: An Attempt to Curtail Stun Belt Use and Manufacture in the United States Under the United Nations Convention Against Torture" (2002) 19 Ga.St.U.L.Rev. 603; AOB 33-35.)

arises from the "potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury", this Court recognized *United States v. Durham, supra*, 287 F.2d at p. 1297, noting that "when a trial court without making adequate findings improperly requires a defendant to wear a stun belt, the error is of federal constitutional dimension and 'reversal is required unless the State proves the error was harmless beyond a reasonable doubt.' " [Citation omitted.]) Here, "the possibility of an impact on [appellant's] mental faculties or demeanor cannot be dismissed" because "the resolution of this matter turned [] on the jury's evaluation of the credibility of the witnesses, an evaluation that depended in large part upon the demeanor of each witness on the witness stand. (Citations omitted.)" (*People v. Simmons, supra*, 143 Cal.App.4th at p. 268.) In this case, the judicial error was not harmless beyond a reasonable doubt because of the effect from the stun belt on appellant, particularly while testifying in his own defense. (*Chapman v. California* (1967) 368 U.S. 18, 24; *United States v. Durham, supra*, 287 F.3d at p. 1297.) And, given the jury's requests for read-back of testimony and that the case hinged on credibility, there is a more than reasonable probability that the error could have made the difference between a vote for guilt or innocence or between life and death, thereby affecting the outcome of appellant's trial even under the *Watson* standard of review. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

* * * * *

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S NEW TRIAL MOTION BECAUSE THE NEWLY DISCOVERED MATERIAL EVIDENCE SHOWED THAT THE PROSECUTION'S KEY WITNESS PERJURED HIMSELF

The day that appellant's jury returned a guilty verdict, two independent witnesses, unconnected to anyone in this case, overheard the prosecution's key witness, Cedric Torrence, admit that he lied under oath about appellant's involvement in the homicide. (2 CT 369-371.) Mitchell Funches, appellant's co-defendant who shot Ms. Collins, also confirmed that appellant was not involved in the homicide and named Kevin "Kino" Allen as his real accomplice. (2 CT 372.) Respondent refutes that this newly discovered exculpatory evidence would have affected the verdict and argues that the trial court did not abuse its discretion in denying appellant's meritorious motion for new trial. Respondent errs.

A. The Evidence Was Material, Exculpatory, Not Cumulative, and Would Have Probably Resulted in a Different Verdict

Pursuant to Penal Code section 1181, subdivision (8), the trial court independently weighs whether evidence presented in support of a new trial motion is (1) newly discovered and material; (2) not merely cumulative; (3) such that a different verdict would probably result and that the new evidence could not have been produced at the previous trial; and (4) admissible in a court of law.

1. Material and Newly Discovered

Where the key prosecution witness admits that he lied during the case-in-chief, the evidence is irrefutably material. (*People v. Love* (1959)

51 Cal.2d 751, 756; *People v. Minnick* (1989) 214 Cal.App.3d 1478, 1482; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1209; AOB 46-47.) Respondent attacks the materiality of appellant's evidence in support of his new trial motion calling the affidavits "self-serving declarations". (RB 31.) Not so. There is absolutely nothing "self-serving" about the affidavits from Michael Nunez, David James, or Mitchell Funches. Nunez and James had never even met Howard or Torrence before finding themselves shackled next to them on a prison transport bus. (2 CT 369-371.) In fact, James did not want to become involved in Howard's case and stated as much in his declaration:

> Although I could not help but hear the conversation between these two, I did not want to become involved, and would have preferred to stay out of this type of situation. This was between two black guys (I am not) neither of whom I knew (and I did not want to be in any racial type situation).

(2 CT 370.)

Similarly, Funches's affidavit was not in his best interest and thus hardly "self-serving." As appellant set forth in his AOB, Funches had everything to lose and nothing to gain by his declaration. (AOB 48-49.) By naming his actual accomplice, Funches exposed himself to a "snitch jacket" in prison, something undesirable at best and fatal at worst. (See, e.g., *People v. Carter* (2004) 30 Cal.4th 1166, 1187, fn 3.) Without support or elaboration, respondent claims that the "snitch" exposure did not increase Funches' reliability or trustworthiness. (RB 36, fn 11.) Not so. Funches' willingness to expose himself to a "snitch jacket" shows that his statement was both reliable and worthy of consideration.

Respondent also relies upon the trial court's finding that Torrence

admitted to appellant that he had perjured himself on the stand because Torrence feared being labeled a "snitch." (RB 36.) As appellant set forth in his AOB, the court's reasoning makes no sense. (AOB 49, fn 33.) Torrence had already "snitched," and was not offering to recant to authorities. He was also on his way to Barstow while appellant was being transported to Victorville, so he had no reason to fear appellant. (11 RT 2762.)

Respondent further argues that Funches failed to admit his guilt until after trial thus proving himself a "liar" and his declaration untrustworthy. (RB 36.) Respondent's reasoning fails. Funches could have easily gone on denying his involvement in the homicide and spoken to no one about it notwithstanding his conviction. Instead, he came "clean" and not only admitted his involvement but named his accomplice. By respondent's logic, defendants who accept responsibility for their actions upon conviction are "liars" while those who do not, are more trustworthy.

Respondent also attempts to attack the materiality of appellant's evidence by claiming that the affidavits do "not establish perjury by Torrence" nor that Torrence recanted his trial testimony. (RB 34-35, 38-40.) Respondent supports this untenable position as follows: "James recalled Torrence claimed he 'had to say that' in reference to his testimony against Howard. This statement was entirely consistent with Torrence having told the truth when he testified." (RB 34.) Respondent conveniently omits subsequent critical parts of James's affidavit, such as "It was clear this person [Torrence] way [sic] saying he lied." (2 CT 370.)[5]

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[5] James's affidavit states in relevant part:

3. While en route, the person I was shackled to (Howard) turned toward another black mail [sic] individual who was in

Nunez' affidavit is also consistent with James's statements that Torrence had lied under oath about Howard's involvement out of fear of retaliation - presumably from gang members. Nunez stated that when Howard asked Torrence "Why did you say that," about Howard having a gun, Torrence responded with "excuses about threats or something like that." (2 CT 371.) Contrary to respondent's assertion, when Torrence said "I had to say that," it was clear to James and Nunez and anyone reading their affidavits that Torrence meant "lie" under oath. (2 CT 369.)

Respondent also attacks the credibility of James and Nunez, arguing that given their criminal records they should not be believed. (RB 34-35.) Respondent once again ignores the fact that their criminal histories have nothing to do with the case at hand. James and Nunez had every reason not to want to become involved in what James believed was a "racial type situation" with people they had never met before. (2 CT 370.) As set forth

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> the seat directly behind us. The guy with me (Howard) stated "Cedric, what's up", his tone was not loud, angry nor threatening. He asked the individual "Why did you say that stuff against me?" He then said "I'll show you what you said" as he turned to show the other guy (Cedric) some papers he held in his hands. ¶ 4. The guy behind (Cedric) responded that he was being pressured by some people (possibly gang members) to tell the story that he had been telling, stating "I had to say that" indicating he was being pressured by someone who had been at the scene. ¶ 5. There was some discussion about a football game and a gun. The guy in my seat (Howard) asked "Why did you say it was my gun?" The other guy (Cedric) said he was forced to say it. It was clear this person way [sic] saying he lied. At another point, the guy with me (Howard) said, "Hey we're talking about my life here!" The other guy (Cedric) said "We're talking about my life too, out there." He went on to say they're "still out there and would kill" him.

more fully in the AOB, regardless of their criminal backgrounds, Nunez and James were unwitting bystanders who overheard a conversation and lacked "any motive to falsify the actual happening of events, and it is to be presumed that each was telling the truth. [Citation omitted.]" (*People v. Williams* (1962) 57 Cal.2d 263, 272; AOB 51-54.) Moreover, the trial court's role in deciding a motion for new trial is limited to making a threshold determination of credibility, not to decide whether the proffered testimony is true or false. (*People v. Minnick, supra*, 214 Cal.App.3d at p. 1482; AOB 51-52.) Under respondent's erroneous understanding of admissibility, no witness with a criminal background could ever pass the threshold "credibility" test on a motion for new trial. This proposition is not only unreasonable but it is not the law. (*People v. Minnick, supra*, 214 Cal.App.3d at p. 1482.) Respondent's attack on Funches' credibility due to his conviction and past drug problems fails for the reasons already set forth – Funches had no reason to admit to the crime and name his accomplice and every reason to avoid a "snitch" jacket. [6]

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[6] Respondent also argues that appellant waived this argument on appeal by failing to make a relevancy objection to the prosecution's introduction of the criminal records of Nunez, James and Funches. (RB 37.) However, appellant's argument is based principally on grounds that the trial judge had a duty to "consider the probative force of the [new] evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. (Citations omitted.)" (*People v. Robarge* (1953) 41 Cal.2d 628, 633; AOB 43-54.) Moreover, the waiver rule does not exist simply for its own sake, but instead to ensure that the issue under review was brought to the trial judge's attention such that the judge had ample opportunity to make a considered ruling. (*People v. Brown* (2003) 31 Cal.4th 518, 553.) The record shows that the trial court understood the need to assess the pleadings before it in ruling on the new trial motion and the waiver rule is therefore inapplicable. (See *People v. Scott* (1978) 21 Cal.3d 284, 290.) Respondent's contention that appellant's claim of

The trial court conceded that appellant's evidence was "newly discovered" for the purposes of section 1181, stating that "it could not have been found prior to the time that it was discovered," or before the jury convicted appellant, and respondent concedes as much. (11 RT 2767; RB 37.) Moreover, appellant's evidence in support of his new trial motion was indisputably material as it "contradict[ed] the strongest evidence introduced against the defendant" --Torrence's testimony against appellant at trial. (*People v. Martinez* (1984) 36 Cal.3d 816, 823.)

2. Not Cumulative

Respondent argues that the newly discovered evidence merely amounted to cumulative evidence of Torrence's lack of credibility. (RB 36.) Respondent points to the defense cross-examination of Torrence in which Torrence admitted that he had previously lied to Detective Blackwell about appellant having a gun and other matters. (RB 36; 7 RT 1697-1700.) Appellant did not, however, have an opportunity to cross-examine Torrence about the bus conversation. Moreover, as appellant set forth in his AOB, this new evidence did "more than merely impeach [Torrence] - it

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federal constitutional error in addition to the California statutory violation is waived for failing to raise it at trial likewise fails pursuant to *People v. Partida* (2005) 37 Cal.4th 428, 437, which held that "[i]f the trial objection fairly informs the court of the analysis it is asked to undertake, no purpose is served by formalistically requiring the party also to state every possible legal consequence of error merely to preserve a claim on appeal that error in overruling the objection had that legal consequence. Specifically, no purpose would be served by requiring the objecting party to inform the court that it believes error in overruling the actual objection would violate due process." Here, the improper denial of appellant's new trial motion not only denied appellant his rights to due process and a fundamentally fair trial (U.S. Const., Amends. 5, 14; Cal. Const., art. I, §§ 7, 15, 17), but also his right to a reliable adjudication (U.S. Const., Amend. 8) and his right to present a defense (U.S. Const., Amend. 6). (AOB 45.)

tend[ed] to destroy [his] testimony by raising grave doubts about [his] veracity and credibility," and his credibility was "central to the proof of the crime." (*People v. Randle* (1982) 130 Cal.App.3d 286, 293; AOB 50-51.) And even assuming arguendo that the evidence may be cumulative, if a different result upon a retrial is reasonably probable as the result of such new evidence then the new trial should be granted. (*People v. Shepherd* (1936) 14 Cal.App.2d 513, 518; accord, *People v. Williams, supra*, 57 Cal.2d at pp. 272-273.) As established in the AOB, without Torrence's testimony, the prosecution's case fell apart. Torrence directly linked appellant to the crime and without his testimony, the prosecution had only some generic fiber evidence and circumstantial evidence placing appellant at the scene. And, because the evidence placing appellant in the general vicinity of the crime was capable of competing reasonable interpretations, the jury would have been required to adopt that interpretation pointing to defendant's innocence. (CALJIC No. 2.01.) "The jury's verdict cannot be sustained without [Torrence's] testimony." *(Commonwealth v. Krick* (1994) 538 Pa. 667 A.2d 669; AOB 50-51.)

3. A Different Verdict Would Probably Result

"When false evidence is used, even unwittingly, a new trial is required 'if there is a reasonable probability that [without the evidence] the result of the proceeding would have ben different.'" (*United States v. Young* (9th Cir. 1994) 17 F.3d 1201, 1204.) The best demonstration of the prejudice from Torrence's testimony is Funches' trial. Torrence did not testify at Funches's trial. (See Appellant's Request for Judicial Notice of Mitchell Funches's case, filed with AOB on July 15, 2005; AOB 55, fn 34.) Notwithstanding Torrence's absence, the prosecution's case against

Funches was much stronger than against appellant. The prosecution had an eyewitness (Officer Brock), a murder weapon, and fingerprints, all directly connecting Funches to the crime. (8 RT 1920, 1928, 2001-2005, 2064-2067, 1810-1812.) Yet, without Torrence's testimony, the jury hung on the special circumstance and Funches received life without the possibility of parole even though he shot two people. (10 RT 2773, 2777.) By contrast, in appellant's case, the prosecution had no fingerprints, no eyewitnesses, and no murder weapon to connect appellant to the crime, only a close case held together by some generic fiber evidence and most importantly, Torrence. Torrence portrayed appellant as someone willing to shoot his way out of any problem, when jurors would otherwise know him as someone who had never even fired a gun. (7 RT 1663; AOB 54-57.) Had appellant been given the opportunity to show that Torrence fabricated the entire story, a different result would have been more than a "reasonable probability," it would have been a virtual certainty. (*United States v. Young, supra,* 17 F.3d at p. 1204.) All this new evidence had to do was to raise a reasonable doubt in the jury's mind as to appellant's guilt. If a juror even found "a reasonable possibility that [Torrence's] testimony was [untrue]", it is unlikely that they would have found appellant's guilt proved beyond a reasonable doubt. (*People v. Martinez, supra*, 36 Cal.3d at p. 823.) It necessarily affected appellant's death verdict as well given the jury's request for read back of Torrence's testimony and the depiction by Torrence of appellant as a violent man who would "go out shooting." (7 RT 1663; AOB 56-57.) Respondent's attempt to trivialize the witness affidavits as not affecting the verdict fails for the reasons set forth *ante* and in the AOB. (AOB 44-57.)

4. The Affidavits Were Admissible

Respondent also contends that James's affidavit is filled with "assumptions" and "speculation" which would render his statements inadmissible. (RB 34.) Respondent fails to identify specific instances of such "assumptions" or "speculation," nor can he. James did not "guess" or "speculate" as to the intentions or motivations of either Howard or Torrence, he merely repeated what he heard the parties say. (Cf. *People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 47; *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582 [plaintiff's objections to defense witness questions properly sustained where questions asked witness to speculate on his understanding of what the person had been thinking].) Moreover, the only basis of the prosecutor's objection to James's statements at trial was that they were speculative and assumptive. (2 CT 406.) Any appellate claim of hearsay is therefore waived. (*Rupp v. Summerfield* (1958) 161 C.A.2d 657, 662 [where defendant objected to transcript of criminal proceedings on grounds of relevancy only later appellate claim on hearsay grounds waived]; 3 Witkin Evidence Ch. XI, § 375.)

Torrence's perjured testimony rendered appellant's trial fundamentally unfair. Due process "cannot tolerate" a conviction based upon perjured testimony. (*Miller v. Pate* (1967) 386 U.S. 1, 7.) Appellant's motion for new trial should have been granted and his conviction must be reversed.

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III.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY FAILING TO HOLD A COMPETENCY HEARING DESPITE SUBSTANTIAL EVIDENCE THAT APPELLANT'S MEDICATION HAD RENDERED HIM INCOMPETENT

Appellant personally addressed the trial court at sentencing to express his concern that the anti-psychotic medication he had unwillingly taken during trial had adversely affected his ability to cooperate with his attorney and had also affected his demeanor before jurors, in violation of his state and federal constitutional rights. (11 RT 2767-2769.) Defense counsel did not address the court on this issue. (11 RT 2769.) The trial court queried "would anybody disagree that it is a matter that should be looked into immediately before we proceed further?" (*Ibid.*) Defense counsel agreed with the court but the prosecution objected. (11 RT 2769-2771.) Following the prosecution's comments that in his own observations of appellant during trial, appellant appeared competent, the trial court rejected appellant's motion.[7] The court left open the possibility that appellant's competency might be addressed on a petition for writ of habeas corpus but determined that the present motion had been brought by appellant in "bad faith," given the competency claim by co-defendant Funches. (11 RT 2771-2772; AOB 60.)

Respondent concedes that pursuant to Penal Code section 1367, a trial court is required to conduct a competency hearing when there is substantial evidence of mental competence, but argues that the court lacked

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[7] The trial court treated appellant's claim as an "additional" new trial motion. (11 RT 2767-2772.)

substantial evidence because: (1) appellant coherently presented his claim of incompetency thereby establishing his competence; and (2) defense counsel did not actively support his client's request. (RB 41-47.) Respondent's claims lack merit.

Contrary to respondent's assumption, the fact that appellant was able to convey his concerns about his own mental incompetency, argue the merits of a competency hearing and testify at trial does not establish his competency. Respondent ignores the fact that appellant was on anti-psychotic medication which he said he had not wanted to take. (11 RT 2768.) Under these circumstances, when a defendant has been involuntarily subjected to the administration of anti-psychotic drugs, his incompetence may be masked by the drugs and the court's consideration of appellant's courtroom demeanor may therefore be inappropriate. (*Riggins v. Nevada* (1991) 504 U.S. 127, 128.) Thus, contrary to respondent's contentions, the fact that a medicated appellant appeared coherent and able to make specific requests of the court does not vitiate the court's duty to inquire as to his competency. Nor does the fact that the trial judge's personal observations led him to believe appellant was competent. (RB 46.) Notwithstanding such personal observations and beliefs, a trial court still has a duty to suspend proceedings once it becomes aware of substantial evidence which objectively generates a doubt as to appellant's competency. (*People v. Pennington* (1967) 66 Cal.2d 508, 518; AOB 65.)

Here, the trial court had ample evidence of doubt regarding appellant's competence. Appellant informed the court that the anti-psychotic medication made him drowsy, affected his ability to cooperate with counsel, affected his demeanor, his facial expressions, his emotional responses, his mannerisms, his credibility, his persuasiveness, and the

degree to which he invoked sympathy. (11 RT 2768; AOB 64-68.)

Moreover, the threshold question is *not* whether the defendant is definitely incompetent, but merely whether there is sufficient doubt in that regard. (*Pate v. Robinson* (1966) 383 U.S. 375, 386-387; *Moore v. United States* (9th Cir. 1976) 464 F.2d 663, 666; AOB 62-65.) The trial court's function in applying *Pate*'s substantial evidence test

> is not to determine the ultimate issue: Is the defendant competent to stand trial? It[s] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue.

(*Moore v. United States, supra,* 464 F.2d at p. 666; AOB 62-64.)
In the present facts, the trial court erroneously determined the "ultimate issue" of competency based on its own observations instead of holding a hearing on the matter. (*Ibid.*) The trial court never even inquired as to why appellant's medication had been prescribed in the first place (other than it was generally an anti-psychotic drug according to appellant), the name of the medication, the dosage, the side effects, whether appellant was forced to take it as he indicated, or whether his psychiatrist had considered less intrusive medications which would have served a similar purpose. (AOB 66-67; see also *People v. O'Dell* (2005) 126 Cal.App.4th 562, 571-572 [court's order to involuntary medicate a defendant vacated where the hospital never specified the actual anti-psychotic medication it was proposing to administer to defendant and the appellate court recognized that different kinds of anti-psychotic drugs may produce different side effects.]

Respondent also points to defense counsel's silence on this issue as further evidence that appellant's claim of incompetence lacked merit. (RB

46-47.) Respondent speculates that defense counsel's silence can be attributed to counsel not wanting to "participate in any fraud upon the court." (RB 46-47.) This is pure conjecture and speculation on respondent's part with absolutely no support in the record. In fact, when the trial court asked "would anybody disagree that it is a matter that should be looked into *immediately* before we proceed further?" - defense counsel responded "No." (11 RT 2769, emph. added.) Contrary to respondent's claim, defense counsel agreed with the court that it should immediately proceed to a competency hearing. And competency cannot be waived by defense counsel in any event. (*In re Davis* (1973) 8 Cal.3d 798, 808; AOB 65.)

Respondent also cites to cases in which it claims that this Court upheld a trial court's rejection of a competency hearing "on substantially more evidence" than presented in this record (RB 47.) However, in *People v. Howard* (1992) 1 Cal.4th 1132, 1162, upon which respondent relies, the defendant's claims at trial had to do with his physical condition and nothing "remotely suggested that he was mentally incompetent. Thus, the court was not required to order a hearing." Even where, at first glance, other cases present more "substantial" facts in support of a competency hearing than the present one, there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed" and the Supreme Court has recognized that in some cases many factors may be significant, while in others, just one factor may be enough to require that a competency hearing be held. (*Drope v. Missouri* (1975) 420 U.S. 165, 180; AOB 66-67.) Here, once the judge had notice that appellant had been taking anti-psychotic medication unwillingly which adversely affected his ability to participate in his own defense, he should have followed his initial

inclination and "looked into [it] immediately" – instead of being persuaded not to by the prosecutor. (11 RT 2769)

Given that a bona fide doubt existed regarding appellant's competence to stand trial, the trial court had an obligation to conduct further inquiry. *(Pate v. Robinson, supra*, 383 U.S. at p. 385.) The failure to make further inquiry into petitioner's competence to stand trial denied him, inter alia, his rights to due process, a fair trial, and reliable guilt and penalty verdicts. (U.S. Const., Amends. 5, 6, 8, 14; Cal. Const., art. I, §§ 7, 15, 17; *Drope v. Missouri, supra*, 420 U.S. at pp. 174-179; AOB 58.) The error is structural and requires reversal of appellant's judgment of death. (*Rohan v. Woodford* (9th Cir. 2003) 334 F.3d 803, 818.)

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IV.

THE TRIAL COURT ERRONEOUSLY ADMITTED A HANDGUN, NOT THE MURDER WEAPON, LINKED TO APPELLANT

Over defense objection on relevancy, foundational, and Evidence Code section 352 grounds, the trial court erroneously admitted into evidence a fully-loaded black .357 revolver found six days after the homicide in a common area of the Kendall Street apartment complex. (6 RT 1574, 1577, 1592, 1595, 1580, 7 RT 1601, 8 RT 1894-1895, 1972.) The prosecution theorized that appellant had used the weapon during the attempted robbery. (6 RT 1577-1580.) The sole evidence linking appellant to this weapon was that appellant had been seen in the vicinity where the gun had been found and that prosecution witness Cedric Torrence had seen him earlier in the day with a gun. (6 RT 1580.)

Respondent argues that the trial court properly exercised its discretion in admitting the weapon because Torrence ultimately identified the weapon as the same gun he had seen appellant carrying on the day of the homicide and the gun was found in the vicinity of apartment No. 3 where appellant had been seen the week before. (RB 47-51.) Respondent also contends that even assuming the trial court erred in failing to conduct a section 352 weighing process before admitting the gun, the error is not prejudicial. (RB 52-53.) Respondent argues the gun was relevant and more probative than prejudicial. (RB 52-54.) Respondent errs.

Respondent attempts to dismiss the fact that Torrence could not initially identify the gun at the Evidence Code section 402 hearing until after substantial prompting by the prosecution by stating that "Torrence went on to positively identify Exhibit 3 as the gun Howard had that day."

(RB 49.) Respondent makes no attempt to address the serious credibility problem with Torrence's testimony regarding the gun. (RB 49, 52.) Torrence's testimony was tantamount to a one-gun-fits-all identification. During the section 402 hearing, he openly admitted to having trouble identifying the gun, twice refused to answer whether Exh. 3 was appellant's gun, could only describe the gun as "average," "a black gun," and between "twelve and sixteen inches," changed his testimony over how many times he saw appellant exhibit a weapon and where he saw appellant with the gun. (7 RT 1604-1613; AOB 69-74.) It is clear from the record that Torrence would have identified any gun presented to him and the trial court abused its discretion in admitting the weapon. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167, AOB 73-74.) Moreover, the 402 hearing served as a kind of dress rehearsal, at trial Torrence testified conclusively as to appellant's possession of the gun without any of the jitters, hesitancy or confusion he showed at the earlier hearing. (7 RT 1657, 1664, 1675-1676.)

Respondent also erroneously relies on where the gun was found to support its claim that the trial court properly exercised its discretion. A young boy found the gun in a common area of the apartment complex tossed in some bushes not far from where appellant had been seen. (6 RT 1580.) Respondent ignores the fact that appellant had not been seen where the gun was found but only in the same general vicinity where any number of other residents or guests of the complex had also frequented. Moreover, one would have to believe that a fully loaded gun had been in a common area where children played for a full six days before anyone discovered it. (6 RT 1580, 1895; AOB 74-75.)

Respondent also argues that the lack of fingerprints on the gun and

ammunition, go to the weight of the evidence, not its admissibility. (RB 52.) However, the lack of any forensic evidence linking appellant to the gun is simply one more circumstance showing the lack of reliable evidence to support the gun's admission.

Respondent claims that "[t]he trial court weighed the prejudicial nature of the gun against its probative value and properly exercised its discretion in admitting it into evidence." (RB 52.) Respondent misstates the facts. The trial court never addressed appellant's section 352 objection nor stated its reasoning under section 352 for admitting the gun. (6 RT 1577, 1601-1613.) Contrary to respondent's claim, there is absolutely no indication in the record, nor does respondent cite to any, that the trial court engaged in any weighing of prejudice against probative value as required by law. (*People v. Green* (1980) 27 Cal.3d 1, 25, disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 836, 834, fn 3; AOB 76-78.)

Respondent also claims a lack of prejudice from the gun's admission because jurors knew it was not the murder weapon. (RB 53.) Not so. The prosecutor capitalized on this weapon to blur the line between appellant and the actual shooter, Mitchell Funches. Funches shot two people, killing one and seriously injuring another. Appellant never shot anyone. Notwithstanding, the prosecutor paraded the weapon allegedly belonging to appellant in front of the jury. (7 RT 1675.) No such theatrics were used when Torrence identified Funches' weapon, the actual murder weapon. In fact, Torrence identified the murder weapon from only a photograph. (7 RT 1672.) Moreover, the prosecutor continued to blur any distinction between Funches and appellant during argument by claiming at first that appellant "might as well have" pulled the trigger and then stating "[y]ou better believe he pulled the trigger." (10 RT 2608.) Even though appellant never

shot anyone, the prosecutor had appellant pulling the trigger, calling him a shooter. Regardless of appellant's culpability under the felony-murder theory, he was nonetheless entitled to a fair trial under the facts of *his* case. Unlike Funches, appellant did not shoot two people; he was not arrested while fleeing the scene of the crime; and his fingerprints were not linked to the crime scene or the murder weapon. By placing an inadmissible gun in appellant's hand and calling him a shooter, the prosecutor made appellant indistinguishable from Funches to the jury. Moreover, it eroded appellant's defense that he did not commit the robbery because the gun placed him there. The error made it impossible for appellant to get a fair trial in violation of his constitutional rights to due process. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1379; AOB 76-81.)

Respondent further contends that appellant has waived any claim of prosecutorial misconduct by not objecting to the prosecution's argument at trial. (RB 53.) Respondent misstates appellant's claim. Appellant is not claiming prosecutorial misconduct but rather judicial abuse of discretion in the admission of the weapon. (AOB 69-81.) The prosecutor's exploitation of the gun in his argument highlights the prejudice from this abuse of discretion.

The gun's admission was even more prejudicial to appellant in the penalty phase, where the *sole* mitigating factor offered by his trial counsel was that he was not the actual shooter. (10 RT 2610.) Even if jurors found culpability through the felony murder doctrine, based on their answers during voir dire, they were not inclined to impose a death judgment on the non-shooting defendant. (10 RT 2610-2612; AOB 80.) Once the prosecution capitalized on this gun to create a picture of appellant as a violent and threatening individual, someone both familiar with and inclined

to use firearms, the prosecutor could thus assuage juror concerns about imposing a death sentence on someone who had not killed anyone. (10 RT 2410-2411.)

The prosecution used the gun to create a violent image of appellant for jurors, and make it easier for jurors to impose a death judgment on a non-shooter under a felony-murder theory, rendering appellant's trial fundamentally unfair. (*People v. Partida, supra,* 37 Cal.4th at p. 437.)[8] Thus, the prosecution cannot carry its burden establishing that this error was harmless beyond a reasonable doubt, and the judgment must be reversed. (*Chapman v. California, supra,* 368 U.S. at p. 24.) Even under the more stringent *Watson* standard, there is more than a reasonable probability that the error affected the outcome of appellant's trial given the violent image this inadmissible gun presented to the jury. (*People v. Watson, supra,* 46 Cal.2d at pp. 836-837.

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[8] Respondent's claim that appellant waived his claim of constitutional error is also without merit for the reasons set forth in footnote 6, *ante.* (See also AOB 77.)

V.

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN INSTRUCTING THE JURY IN THE PENALTY PHASE TO DISREGARD THE GUILT PHASE INSTRUCTIONS WHILE OMITTING CRITICAL GUIDELINES FOR HOW THE JURY SHOULD EVALUATE THE EVIDENCE

A. Introduction

As part of the penalty phase instructions the trial court gave CALJIC No. 8.84.1 which included the language: "You must accept and follow the law that I state to you. Disregard all other instructions given to you in other phases of this trial." (2 CT 335; 10 RT 2595.) The court did not re-instruct the jury as to important instructions they should have had for guidance in their determinations. The most significant instruction omitted was that of reasonable doubt, and without that instruction to inform the jurors of the presumption of innocence, the prosecutor's burden of proof, and a definition of reasonable doubt, the jury made an unreliable determination of the appropriate punishment. This error violated appellant's federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, and 17 of the California Constitution. Reversal is required.

B. Argument

Respondent claims alternately that appellant has waived this claim, that no error occurred, and that if error occurred, it was harmless. (RB 54-60.) As to respondent's claim of waiver, as appellant set forth in his AOB, a trial court must instruct sua sponte on those general principles of law which are ". . . closely and openly connected with the facts before the

court, and which are necessary for a jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; see also *People v. Daniels* (1991) 52 Cal.3d 815, 885; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884; AOB 83-85.) Respondent concedes that this is the law but argues waiver nonetheless. (RB 55.) Respondent relies upon *People v. Carpenter* (1997) 15 Cal.4th 312, 391, in support of his waiver claim. (RB 56.) However, in *Carpenter*, CALJIC No. 2.90 was not at issue. The defendant in *Carpenter* contended that the trial court should have instructed that rape requires "that non-consensual intercourse occurred prior to death ...." This Court agreed that was indeed the law, a dead body cannot be raped, but found that the instructions given required intercourse "against the will" of the victim and therefore adequately conveyed the law. (*Ibid.*) *People v. Welsh* (1999) 20 Cal.4th 701, 757, also relied upon by respondent is similarly distinguishable as involving a voluntary intoxication instruction. (RB 57.) (Cf. *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1217-1224 [conviction for possession of a sharp instrument while in prison reversed where trial court, having previously given CALJIC No. 2.90 at outset of trial, failed to repeat it in its final charge to jury].) Because the failure to give a presumption of innocence instruction affected appellant's substantial rights, appellant is not precluded from raising it on appeal even absent an objection in the trial court. (*People v. Benavides* (2005) 35 Cal.4th 69, 111; Pen. Code, § 1259; AOB 85-92.)

The presumption of innocence is a basic component of a fair trial. (*Estelle v. Williams* (1976) 425 U.S. 501, 505.) In the penalty phase of appellant's case, the prosecution introduced in aggravation evidence of other crimes which consisted of appellant's two prior felony assault with a

deadly weapon convictions. (10 RT 2550.)[9] The trial court did inform the jurors in the penalty phase that the "other crimes" evidence must be proved beyond a reasonable doubt, but it did not define that term. This omission left the jury without definitions of some of the most basic and fundamental legal principles in criminal law. (AOB 87-88.)

Respondent further asserts that any instructional error was harmless because the "jury heard the essential instructions which informed them of the critical principles to make their sentencing decision." (RB 59-60.) Not so. Jurors were clearly struggling over penalty as evidenced by their notes to the trial judge during the penalty phase and eight days of deliberations. (2 CT 300, 304, 330; 10 RT 2621-2622; AOB 88-90.) Most noteworthy was the jury's request for a re-read of testimony from Laura Carrol, the victim of one of the alleged assaults. (10 RT 2733.) Any confusion the jury was having with the Carrol prior crime evidence would have certainly been exacerbated by the complete absence of a definition in the penalty phase of reasonable doubt. Under these circumstances, it cannot be assumed that the complete omission of a definition of reasonable doubt and an express instruction to disregard any guilt phase instructions did not have any effect.

It must be presumed that the jury followed the trial court's directive to disregard all instructions given in other phases of this trial. (*Richardson v. March* (1987) 481 U.S. 200, 211; *People v. Bonin* (1988) 46 Cal.3d 659, 699.) There was a "reasonable likelihood" that the jurors evaluated the penalty phase evidence in whatever fashion and for whatever purpose the individual jurors desired. (*Boyde v. California* (1990) 494 U.S. 370, 380

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[9] The assaults were admitted as evidence under both Factor (b) and (c). (1 ACT(D) 501-502.)

[due process violated if reasonable likelihood that jury applied instructions erroneously].) Respondent points to this Court's holding in *People v. Prieto* (2003) 30 Cal.4th 226, 262, which upheld a trial court's similar conduct, and which appellant urges this Court to reconsider. This Court has stated that, in order to avoid confusion, the trial court should provide jurors with a completely new set of instructions for the penalty phase. (*People v. Babbitt* (1988) 45 Cal.3d 660, 719, fn. 26; *People v. Weaver* (2001) 26 Cal.4th 876, 982 [holding that the trial court potentially misled the jury by failing to clarify for the jury which of the previously given instructions at the sanity proceeding applied at the penalty phase].) The trial in appellant's case took place in 1995, seven years after this Court decided the *Babbitt* case and advised the trial courts to inform the jury of instructions given previously that were applicable to the penalty phase case. As a result of the *Babbitt* case, a use note added to CALJIC 8.84.1 quotes footnote number 26 (*People v. Babbitt, supra*, 45 Cal.3d at p. 719, fn. 26) and states that this instruction "should be followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88." The trial court either was unaware of the use note or chose not to follow it, but in either event, the trial court acted contrary to this Court's advisement and erred in not giving applicable guilt phase instructions.[10]

Respondent errs by analyzing the trial court's error under the *Watson* standard. (RB 59-60; *People v. Watson, supra*, 46 Cal.2d at p. 836.) The failure to give the guilt phase instructions, particularly CALJIC 2.90 which

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[10] The Bench Note in the new and comparable CALCRIM No. 761, makes the duty on the trial court mandatory, stating "[b]ecause the introductory instructions for the guilt phase contain concepts that do not apply to the penalty phase, the court must clarify for the jury which instructions apply to the penalty phase. [Citations omitted.]"

instructs the jury on the concepts of the presumption of innocence, the prosecutor's burden of proof, and a definition of reasonable doubt, was structural error. The United States Supreme court has held that the giving of a defective reasonable doubt instruction in a criminal trial is structural error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.) Because the reasonable doubt standard applied to the "other crimes" evidence in appellant's penalty trial, the complete omission of any definition of reasonable doubt must be considered structural error. This Court has recognized that "the potential for prejudice from the failure to give a reasonable doubt instruction as to other crimes is especially serious because that type of evidence 'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.'" (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281, citing *People v. Polk* (1975) 63 Cal.2d 443, 450.) Therefore even under the *Chapman* standard, the state cannot establish that this error was harmless. (*Chapman v. California, supra,* 368 U.S. at p. 24.)

The fact that the trial court gave an instruction informing the jury that the "other crimes" evidence must be proved beyond a reasonable doubt did not cure the problem. Although the court did so inform the jury, it did not offer any definition of reasonable doubt. Nor can defense counsel's argument substitute for instructions by the court as respondent contends. (RB 58; *Carter v. Kentucky* (1981) 450 U.S. 288, 304.)

Appellant was denied the right to a jury deciding beyond a reasonable doubt that he was guilty of the crimes offered as aggravating evidence. The lack of a reasonable doubt instruction was a violation of the Sixth Amendment and a structural error in the trial. The jury had no guidelines for determining appellant's guilt for the other crimes. Even if

the jury remembered the exact definition given in the guilt phase, they were told to ignore it. The jury's penalty phase verdict must be reversed.

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VI.

THE TRIAL COURT PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY INSTRUCTING THE JURY ON FELONY MURDER WHEN THE GRAND JURY INDICTMENT CHARGED APPELLANT ONLY WITH MALICE MURDER

Appellant asserts that because the Indictment in his case charged him with only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 93-100.)

Respondent asserts that this Court has previously rejected this claim, then asserts that it was waived because appellant failed to object at trial. (RB 60-61.) Respondent is mistaken. As explained below, this claim is cognizable on appeal and the cases cited by respondent rely upon faulty analysis.

Appellant's failure to object to the trial court's instructions is of no import. Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel (*People v. Williams* (1999) 21 Cal.4th 335, 340), and since no accusatory pleading charging appellant with first degree murder had been filed, the court lacked subject matter jurisdiction to proceed with that charge. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368.)

According to respondent, and some of the cases on which respondent relies, malice murder and felony murder are not two different crimes but rather merely two theories of the same crime with different elements. However, this position embodies a fundamental misunderstanding of how, for the purpose of constitutional adjudication, the courts determine if they are dealing with one crime or two. Comparison of the act committed by the defendant with the elements of a crime defined

by statute is the way our system of law determines if a crime has been committed and, if so, what crime that is. "A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements." (*Jones v. United States* (1999) 526 U.S. 227, 255 (dis. opn. of Kennedy, J.).)

Moreover, comparison of the elements of two statutory provisions is the traditional method used by the United States Supreme Court to determine if the crimes at issue are different crimes or the same crime. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the appellant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections did describe different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment. (*United States v. Dixon* (1993) 509 U.S. 688, 696-697.)

People v. Dillon (1983) 34 Cal.3d 441, properly applied the *Blockberger* test for determining the "same offense" when it declared that "in this state the two kinds of murder are not the 'same' crimes." (*Id.* at p.

476, fn. 23.) Malice murder and felony murder are two crimes defined by separate statutes, for "each provision requires proof of an additional fact which the other does not." (See *Blockberger v. United States, supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice (Pen. Code § 187), and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not.

Therefore, it is incongruous to say, as this Court did in *People v. Silva* (2001) 25 Cal.4th 345, that the language in *People v. Dillon, supra*, 34 Cal.3d 441, on which appellant relies meant "only that the elements of the two kinds of murder differ; there is but a single statutory offense of murder." (*People v. Silva, supra*, 25 Cal.4th at p. 367.) If the elements of malice murder and felony murder are different, as *Silva* acknowledges they are, then malice murder and felony murder are different crimes. (See *United States v. Dixon, supra*, 509 U.S. at p. 696.)

"Calling a particular kind of fact an 'element' carries certain legal consequences. [Citation.]" (*Richardson v. United States* (1999) 526 U.S. 813, 817.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The same consequence follows in a California criminal case; the right to a unanimous verdict arises from the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

In addition, "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. [Citations.]" (*Jones v. United States, supra*, 526 U.S. at p. 232.) In this case, where appellant was charged with one crime, but the jury was instructed that it could convict him of another, that rule was breached as well, violating appellant's rights to due process, a jury determination of each element of the charged crime, adequate notice of the charges, and a fair and reliable capital guilt trial.

Accordingly, appellant's convictions for first degree murder must be reversed.

* * * * *

VII.

THE INSTRUCTIONS ON CONSCIOUSNESS OF GUILT AND ADMISSIONS WERE IMPERMISSIBLY ARGUMENTATIVE

The trial court instructed jurors with CALJIC No. 2.03 (consciousness of guilt) and CALJIC Nos. 2.71 and 2.72 (admissions) in relation to appellant's statements to police. (1 CT 230-233; 9 RT 2373-2374.) These instructions were argumentative and allowed impermissible inferences about the charged crimes. (AOB 101-114.) Respondent notes, as appellant has acknowledged, that the Court has rejected several challenges to these instructions. (RB 61-67.) However, appellant urges the Court to reconsider its position.

CALJIC No. 2.03 informed jurors that they could consider appellant's statements as evidence of his "consciousness of guilt." It allowed the jury to draw inferences from circumstantial evidence, i.e. that it could infer facts tending to show appellant's guilt – including his state of mind – from the circumstances of the alleged crimes. The trial court did not need to give these instructions because it already instructed jurors on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02, and with CALJIC Nos. 2.23 and 2.24 related to credibility. (1 CT 227-229, 243; 7 RT 1633-1634 AOB 111-112; see *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455 [consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given].)

This instruction, as with the instructions given in *People v. Mincey* (1992) 2 Cal.4th 408, 437, was improperly argumentative. (AOB 104-107.) Both the instruction in this case and the instructions in *Mincey*

"invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*Ibid.*) The instructions in appellant's case therefore should be judged by the same standard as the instruction in *Mincey* and likewise be found impermissibly argumentative.

Respondent attempts to distinguish *Mincey* from the present facts by arguing that "the rejected instruction at issue in *Mincey* did not address consciousness of guilt." (RB 63.) Respondent misses the point. As appellant explained in the AOB, structurally, the instruction given in the present facts is almost identical to the *Mincey* instruction:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated.

(*People v. Mincey, supra*, 2 Cal.4th at p. 437, fn. 5; AOB 104-107.)

Here, the instruction also tells the jury, "[i]f you find" certain facts (false statement), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case). For the same reasons that this Court found the instruction in *Mincey* to be argumentative, it should also should hold CALJIC No. 2.03 to be impermissibly argumentative as well.

In *People v. Sanders* (1995) 11 Cal.4th 475, 560, this Court held that the trial court was "plainly correct" in rejecting an argumentative penalty phase instruction requested by the defense. The instruction told the jurors that they could consider as mitigation certain testimony from defendant's family members, but protected the prosecution by informing the jurors that they could not use the family's testimony as the sole basis for a life sentence unless they believed that the testimony outweighed the factors

in aggravation. That the instruction had minor protective features did not keep it from being argumentative. (*Ibid.*) Consequently, respondent's argument that CALJIC Nos. 2.71 and 2.72 may have some minor protective features is likewise without merit and the instructions are nonetheless impermissibly argumentative. (RB 64-67.)

These instructions violated appellant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment; his rights under the Sixth and Fourteenth Amendments to have his guilt determined beyond a reasonable doubt by a properly instructed jury; and his right under the Eighth and Fourteenth Amendments to a fair and reliable adjudication of the death penalty. Appellant's attempted robbery and murder conviction and the special circumstance finding must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316.) Jurors were given not one, but three unconstitutional instructions, which magnified the argumentative nature of the instructions and their impermissible inferences. Respondent erroneously claims a lack of prejudice from the error. (RB 66-67.) However, the error affected the only contested issue in the case, appellant's involvement in the felony murder. As stated elsewhere in this brief and in the AOB, the evidence against appellant was either weak or closely balanced. If the jurors believed appellant's explanation of events and why he was near the crime scene on the night in question, they could not have convicted him. Yet the combined effect of the instructional errors told jurors that appellant's own conduct showed he was aware of his guilt

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for the very charges he disputed. These instructions were therefore not harmless beyond a reasonable doubt, particularly when considered in combination with the other errors in this case.

* * * * *

VIII.

APPELLANT WAS DENIED A FAIR TRIAL AND RELIABLE PENALTY DETERMINATION WHEN THE TRIAL COURT DENIED HIS REQUESTED JURY INSTRUCTION ON LINGERING DOUBT

Appellant requested at the penalty phase of the trial that the jury be given an instruction on the concept of lingering doubt. (1 ACT Suppl. (B) 314 (Settled Stmt #25) 1 ACT Suppl. (C) 374; 10 RT 2571.) The failure to give this instruction violated his rights under the Sixth, Eight and Fourteenth Amendments of the federal Constitution and California Constitution, art. I, §§ 7, 15, 17. (AOB 116-123.) Respondent believes that neither state nor federal law requires such an instruction and that CALJIC No. 8.85 is sufficient to address the principle encompassed in the requested instruction. (RB 67-70.) Respondent also contends that the proposed instruction was argumentative and legally incorrect. (RB 69-70.)

The problem with respondent's position, as fully explained by appellant in his AOB, is that the underpinning of the cases respondent relies upon is analytically flawed and is undermined by other cases decided by this Court. (AOB 116-123.) The cases relied upon by respondent all rely for their holdings on the logically-insupportable concept that an instruction directing the jury to consider factor (a) and factor (k) "necessarily encompass[es] the concept of lingering doubt, and thus render[s] any special instruction on the concept unnecessary." (*People v. Earp* (1999) 20 Cal.4th 826, 904.) However, as appellant sets forth in his AOB, the gravity of the crime at issue is not extenuated, nor are the circumstances of the crime altered, depending upon who may have committed the crime. Consequently, the requested instruction and the

instruction given by the trial court do not address the same concept.

The validity of this observation has been supported by the United States Supreme Court. In *Franklin v. Lynaugh* (1988) 487 U.S. 164, 174, the Court stated that the concept of lingering doubt does not relate to the circumstances of the offense. Yet, that is what the respondent would have us believe it does when it argues that the instruction given by the trial court embraces the concept of lingering doubt.

Moreover, as appellant points out in his AOB, this Court has itself held that a trial court may be required to give a properly formulated lingering doubt instruction when pertinent to the case and warranted by the evidence. (*People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20; AOB 116-117.) Since this Court has deemed the issue of lingering doubt of guilt to be relevant to the penalty determination (*People v. Cleveland* (2004) 32 Cal.4th 704, 739), it certainly is an issue upon which the jury should be instructed.

The instruction framed by appellant directed the jurors to a proper consideration of a relevant principle of law affecting their consideration of whether to impose a death sentence. Contrary to respondent's assertion, the instruction was properly formulated and should have been given by the trial court. (See *People v. Cox, supra*, 53 Cal.3d at p. 678, fn. 20.)

Although respondent does not discuss this case, appellant's claim is unaffected by the United States Supreme Court's decision in *Oregon v. Guzek* (2006) ___ S.Ct. ___, 126 S.Ct. 1226. As the Supreme Court itself stated: "the federal question before us is a narrow one." (*Id.* at p. 1230.) That question was whether the Eighth and Fourteenth Amendments grant a defendant the right to present additional alibi evidence at penalty that was inconsistent with the evidence presented in his guilt phase. (*Ibid.*) The

majority took great pains to make clear that was the only issue it was addressing in *Guzek*.

The issue before this Court differs from the issue that was before the Court in *Guzek*. Appellant sought to introduce no new evidence, he merely sought to ensure that the jury had a way of giving effect to the evidence it had already heard in a manner that comported with his Eighth and Fourteenth Amendment rights to a fundamentally fair sentencing proceeding. This right is not affected by the opinion in *Guzek*.

The denial of all of appellant's requested instructions combined to deny him a fair penalty determination. Even if the denial of each requested instruction is not considered individually to be harmful error, the denial of all of them removed essential concepts of law from the sentencing jury's consideration. The point appellant is making is that this Court does a disservice to the capital punishment scheme of this state by isolating these instructions and considering them apart from one another, as if they do not have a synergistic effect on the validity of the sentencing proceeding. The reliability of a death verdict cannot withstand scrutiny when a sentencing jury is not provided with all of the concepts and tools necessary to make a fair and just determination of the property penalty to impose in a capital case.

* * * * *

CONCLUSION

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

DATED: December 22, 2006

Respectfully submitted,

MICHAEL J. HERSEK
STATE PUBLIC DEFENDER

KATE JOHNSTON
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I am the Deputy State Public Defender assigned to represent appellant, Demetrius Charles Howard, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 13,165 words in length.

Dated: December 22, 2006

KATE JOHNSTON

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Demetrius C. Howard**
Case Number: **Supreme Ct. SO50583**
Case No.: Superior Ct. FSB03736

I, VERONICA EZECHUKWU, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 801 K Street, Suite 1100, Sacramento, California 95814.

On **December 22, 2006**, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in envelopes addressed to the persons named below at the addresses shown, and by sealing and depositing said envelopes in a United States Postal Service mailbox at Sacramento, California, with postage thereon fully prepaid.

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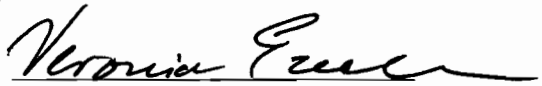
I declare under penalty of perjury that the foregoing is true and correct. Executed on December 22, 2006, at Sacramento, California.



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