No. S053228

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANDRE STEPHEN ALEXANDER Defendant and Appellant.	(Los Angeles County Sup. Ct. No. BA065313)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

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INTRODUCTION

In this reply to respondent's brief on direct appeal, appellant has limited argument to those issues on which additional briefing will be helpful to the court, in the interests of brevity and to avoid redundancy. Appellant's omission of a discussion or refutation of any particular argument, subargument or allegation made by respondent does not constitute a concession or waiver by appellant. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn.3.) Appellant expressly maintains that reversal or alternative relief is required for each and all of the reasons explained in his opening brief and does not concede or waive any issue, or any ground for the relief sought and raised therein.

Insofar as appellant has not directly responded to each of the allegations that trial counsel failed to preserve errors raised in appellant's opening brief, appellant maintains that the error was preserved, and if it was not, that the result was an unreliable and unconstitutional conviction and death sentence resulting from defense counsel's ineffectiveness.

Respondent has made numerous claims that appellant waived or otherwise failed to preserve in the trial court issues which have been raised in this appeal. (See, e.g., RB 89 [Arg. III- voir dire references]; 115-116 [Arg.VII - constitutional errors], 130 [Arg. IX - constitutional errors], 162-163 [Arg. XIV - constitutional errors], 183-184 [Arg. XVI - constitutional errors], 201 [Arg. XVIII - new trial motion by court], 209 [Arg. XIX - constitutional errors], 214 [Arg. XX - constitutional errors] .)[1]

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[1] Throughout appellant's reply brief, the following abbreviations are utilized: "RB" refers to respondent's brief; "AOB" refers to appellant's opening brief; "CT" refers to the Clerk's Transcript; "SUPP CT I" refers to

(continued...)

Appellant contends that all his claims are properly before this Court. Rather than repetitively addressing similar waiver claims in the context of his reply on individual issues, appellant has set out below some of the general principles applicable to such claims. Additional issue-specific arguments may also be made in the body of each reply.

A. Respondent has Failed to Meet its Burden of Establishing the Affirmative Defense of "Waiver"

Procedural default arguments such as the waiver arguments set forth by respondent are "affirmative defenses" (cf. *Gray v. Netherland* (1996) 518 U.S. 152, 165-166 [procedural default is an affirmative defense]; *People v. Bruner* (1995) 9 Cal.4th 1178, 1182, fn. 5 [noting that the state failed to raise the procedural bar]) which respondent has the burden to raise and prove. That burden has not been met in any of the instances raised by respondent.

As an initial matter, by claiming "waiver," respondent has asserted the wrong affirmative defense: a waiver is the intentional relinquishment of a known right. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *United States v. Perez* (9th Cir. 1997) 116 F.3d 840, 844.) Respondent has not attempted to show the intent or knowledge necessary to establish waiver on the part of either appellant Alexander or his counsel. Courts indulge every presumption against waiver of fundamental rights (see, e.g., *United States v. Martinez* (9th Cir. 1998)

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[1] (...continued)
Supplemental Clerk's Transcript I; "SUPP CT II;" refers to the Supplemental Clerk's Transcript II;" "SUPP CT III;" refers to the Supplemental Clerk's Transcript III; "SUPP CT IV" refers to the Supplemental Clerk's Transcript IV; and "RT" refers to the reporter's transcript.

143 F.3d 1266, 1269; *Isbell v. Sonoma* (1978) 21 Cal.3d 61); respondent has failed in each case to rebut that presumption.

Unlike waiver, the affirmative defense of "forfeiture" involves an unintentional and unknowing relinquishment. (See *Cowan v. Superior Court*, *supra*, 14 Cal.4th at 371.) Respondent, however, does not expressly raise that affirmative defense. The Court has often defaulted claims raised by death-sentenced inmates for failure to make the right objection. Having failed to raise the correct affirmative defense, respondent has likewise waived reliance on that defense. (*In re Moser* (1993) 6 Cal.4th 342, 350, fn. 7; see *People v. Hobbs* (1994) 7 Cal.4th 948, 957.)

Moreover, respondent's references to allegedly unpreserved claims are devoid of any assertion that the reasons for the forfeiture rule would be advanced by its application in these circumstances. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 211, fn. 3.) The contemporaneous objection rule is not an end in itself. It exists so that the opposing party and the trial court can cure error before it becomes prejudicial. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, and cases cited therein [setting forth the reasons for the contemporaneous objection rule]; see also *Stutson v. United States* (1996) 516 U.S. 193, 196-197 [inappropriate to "allow technicalities which caused no prejudice to the prosecution" to preclude appellate review of a criminal defendant's claims].) When there is nothing that the opposing party or the trial court could have or would have done differently had the objection been made, enforcing the contemporaneous objection rule serves no valid purpose. (See *United States v. Cretacci* (9th Cir. 1995) 62 F.3d 307, 310.) It is also sometimes asserted that the rule protects respondent from unfairness; yet, where the errors are substantial or constitutionally fundamental, no unfairness results from depriving respondent of a judgment

to which it was not entitled.

Accordingly, the Court should reject respondent's assertions of "waiver" and address each and every claim on its merits.

B. Even if Certain Claims Are Deemed "Waived" or Forfeited, the Court Should Review Those Claims on the Merits

1. The General Rule and the Plain Error Exception

As a general rule, an appellate court will not reach an issue that was not raised in the trial court. (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1; Witkin, *California Criminal Law* (1989) § 3288, 4068.) However, the rigidness of this general rule may inappropriately shield from correction miscarriages of justice and fundamental unfairness in trials. Firm adherence to the general rule can result in a "monstrous sacrifice of justice on the altar of a common law procedural tradition. . . ." (Sunderland, *The Problem of Appellate Review* (1927) 5 Tex.L.Rev. 126, 141.)

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

(*Hormel v. Helvering* (1941) 312 U.S. 552, 557.)

To "temper the blow of a rigid application of the contemporaneous objection" rule, courts apply a plain error rule exception. (*United States v. Frady* (1982) 456 U.S. 152, 163.) Plain error review provides "a means for the prompt redress of miscarriages of justice." (*Ibid.*) In addition, where the law at the time of trial was settled and yet contrary to the law at the time

of appeal, plain error review removes the requirement that trial counsel make a "long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." (*Johnson v. United States* (1997) 520 U.S. 461, 468.)

Plain error review is especially warranted in a death penalty case, where the inmate's very life hangs in the balance.[2] Accordingly, nearly every state with capital punishment maintains some sort of similar "plain error" or fundamental error review in capital cases. (See Blume & Wilkins, *Death by Default: State Procedural Default Doctrine in Capital Cases* (1998) 50 S.C. L.Rev. 1.)

South Carolina and California may be the only states that do not provide systematic plain error review in capital cases. (See Blume & Wilkins, *supra*; Meltzer, *State Court Forfeitures of Federal Rights* (1986) 99 Harv. L.Rev. 1128, 1155, fn. 133 ["virtually all states have plain error rules excusing some procedural defaults"]; *Sawyer v. Whitley* (1992) 505 U.S. 333, 365 [conc. opn. of Stevens, J.].) Here follows a review of potential sources in California law of plain error review.

Penal Code section 1258 provides that the court must give judgment "without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." While this provision has been cited as a reason for upholding convictions even in the face of error,

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[2] The American Bar Association recommends that in capital cases "State appellate courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly raised at trial and on appeal and should have a *plain error rule* and apply it liberally with respect to errors of state law." (American Bar Ass'n., *Toward a More Just and Effective System of Review in State Death Penalty Cases* (1990) at 2, emphasis added.)

there is no reason, from the face of this statute, why it could not support disregarding a procedural forfeiture and establishing plain error review.

The second clause of Penal Code section 1259[3] provides for a plain error type of review only with regard to instructions. Most other matters are covered by the first clause of Penal Code section 1259; facially, that clause applies only where an objection has been raised.

Penal Code section 1239, subdivision (b) provides: "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her or his or her counsel." This statute "imposes a duty upon this court 'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.'" (*People v. Stanworth* (1969) 71 Cal.2d 820, 833, quoting *People v. Perry* (1939) 14 Cal.2d 387, 392.) Further, "[i]t is manifest that the state in its solicitude for a defendant under sentence of death has not only invoked on his behalf a right to review the conviction by means of an automatic appeal but has also imposed a duty upon this court to make such review." (*Ibid.*) If overall

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[3] Penal Code section 1259 provides:

> "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done *after objection made* in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." [Emphasis added.]

review cannot be waived on appeal by the defendant, then it would be incongruous to permit piecemeal waiver or forfeiture at trial by acts or omissions of trial counsel.

Notwithstanding the holding in *Stanworth*, the Court has not interpreted Penal Code section 1239, subdivision (b), as establishing plain error review. (Cf. *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1306 [Pen. Code, § 1239, subd. (b), does not appear to prescribe a content based review].)

This Court's practice in capital cases over the last few decades has been inconsistent with regard to reaching the merits of a defaulted claim. The general rule of forfeiture has often been followed; exceptions to that rule have sometimes been applied; but the Court has not formulated or exercised a regular and rational scheme of plain error review.

The Court announced a limited sort of plain error review in capital cases in *People v. Bob* (1946) 29 Cal.2d 321, 324-328, and *People v. Frank* (1985) 16 Cal.3d 153, 208. The holdings in those cases, however, were limited in *People v. Anderson* (1987) 43 Cal.3d 1104, 1129, fn. 3, and cases following *Anderson*. "*Frank* was never signed by a majority of the court, and although later cases from this court have never disapproved its language, they have cited it only for the purpose of distinguishing it. [Citations.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 527.) *Bob* and *Frank* were distinguished from later cases because in the former, some sort of objection had been made, whereas in many of the latter cases, no objection had been made. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 208.)

More recently, the Court has stated that where "the question whether defendant has preserved his right to raise this issue on appeal is close and difficult, we assume he has preserved his right, and proceed to the merits.

We have done the same in similar situations in the past." (*People v. Bruner*, *supra*, 9 Cal.4th at 1183, fn. 5 [citing numerous capital cases].) Evidently, for the question to be close and difficult, there must have been some sort of objection; plain error review, by contrast, reaches issues for which no objection was lodged.

There are other cases where the California courts have held that "it is the policy of the appellate courts to hear appeals on the merits, and avoid, wherever possible, forfeitures of substantial rights on technical grounds." (*People v. Chapman* (1971) 5 Cal.3d 218, 224; *People v. Casillas* (1964) 61 Cal.2d 344, 346.) "The interest of the state that justice be done in criminal cases reinforces an appellant's claim that his appeal be considered on the merits." (*People v. Acosta* (1969) 71 Cal.2d 683, 685; see also *People v. Menchaca* (1983) 146 Cal.App.3d 1019, 1025 [failure to raise issue at trial regarding right to interpreter did not waive issue because defect was "so fundamental as to result in a denial of due process"].) Yet, these cases have not adopted a regular and rational system of plain error review.

2. Plain Error Review, Whether Constitutionally Required or as Part of a System of Humane Justice, Should be Applied Here

The failure to provide for "plain error" review potentially allows a conviction and death sentence to stand despite the presence in the case of fundamental, prejudicial error, or even a miscarriage of justice. Such a system violates the Sixth, Eighth and Fourteenth Amendments, as well as the parallel provisions of the state charter and state statutory law. The risk of an unwarranted conviction – or execution – cannot be tolerated in a case in which the defendant's life is at stake. (Cal. Const., art. I, §§ 7, 15, 17; see also *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Gardner v. Florida* (1977) 430 U.S. 349.)

Gregg and its companion cases stressed the fact that all of the approved statues required *meaningful* appellate review. (See *Gregg v. Georgia* (1976) 428 U.S. 153.) The purpose of appellate review is to provide "a means to promote the evenhanded, rational, and consistent imposition of death sentences. . . ." (*Jurek v. Texas* (1976) 428 U.S. 262, 276.) "Searching appellate review of death sentences and their underlying convictions [are] indispensable components of a constitutional death penalty scheme." (*Gardner v. Florida*, *supra*, 430 U.S. at 357.) More recently, the Court has reiterated the constitutional importance of meaningful appellate review (see, e.g., *Sochor v. Florida* (1992) 504 U.S. 527, 531-538; cf. *People v. Frye* (1998) 18 Cal.4th 894, 940) to ensure "that the death penalty is not imposed arbitrarily or irrationally" (*Parker v. Dugger* (1991) 498 U.S. 308, 321.) It is a "crucial protection." (*Ibid.*)

However, appellate review in a capital case which fails to address on the merits fundamental constitutional error or a miscarriage of justice simply cannot be "meaningful" as that term is commonly understood. Plain error review is necessary to ensure that appellate review is meaningful in such cases.

The state and federal constitutions also require "certain procedures to ensure reliability in the fact-finding process." (*People v. Mincey* (1992) 2 Cal.4th 408, 445, citing *Ford v. Wainwright* (1986) 477 U.S. 399, 411, and *People v. Geiger* (1984) 35 Cal.3d 510, 520.) Appellate review is part of that process. It cannot be seriously argued that a death sentence is reliable where fundamental, constitutional errors contributed to the judgment or where a miscarriage of justice has occurred. Therefore, plain error review is one of the required procedures in this capital case.

Plain error review is also required under the Eighth Amendment

because the Framers intended the Eighth Amendment draw its meaning from the evolving standards of decency that mark the progress of a maturing society. (*Gregg v. Georgia*, *supra*, 428 U.S. at 173.) In ascertaining the content of the Eighth Amendment, and presumably the parallel provision of the California Constitution, courts look to contemporary state practice for guidance. As noted above, every state that permits capital punishment appears to maintain plain error review, except for South Carolina and California. Under the evolving standards of decency analysis, plain error review is required by the Eighth and Fourteenth Amendments, and the parallel provisions of the state charter.

Moreover, plain error review in capital cases makes good sense. The rule promotes judicial economy. (Blume & Wilkins, *supra*, at 37-41.) It would also aid in implementing the Court's duty under section 1239, subdivision (b).

Finally, plain error review is necessary as a matter of humane justice in capital cases where life hangs in the balance. As Justice Jackson stated in *Stein v. New York* (1953) 346 U.S. 156, 196: "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance." Similarly, Justice Harlan offered his view: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death." (*Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.].) The Court should adopt such review as part of its supervisory power. (See, e.g., *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80.) Accordingly, each of appellant's supposedly forfeited claims which

involve fundamental constitutional rights or a miscarriage of justice should be reviewed on the merits.

C. The Court Should Apply an Exception from Forfeiture for Pure Questions of Law and for Constitutional Questions

Apart from and in addition to the necessity and desirability of plain error review, the Court should apply an exception from forfeiture in this case in two other situations. (See, e.g., *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 [appellate court has discretion to reach a question that has not been preserved for review].)

1. Pure Questions of Law

First, this Court should apply the exception for claims or issues turning on pure questions of law. (See, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1061; *People v. Mattson* (1990) 54 Cal.3d 826, 854; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

> "Where [a] newly advanced theory presents only a question of law arising from facts which are undisputed, appellate review is authorized. The Evidence Code section 353 requirement of timely and specific objection before appellate review is available is not a universal prohibition. As pointed out by the Assembly Judiciary Committee comment following Evidence Code section 353: 'Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law.' [Citations.]" (*People v. Mills* (1978) 81 Cal.App.3d 171, 175-176; see also *Waller v. Truck Insurance Exchange, Inc.* (1995) 11 Cal.4th 1, 24.)

There is no "unfairness" to respondent because it has not been deprived of the opportunity to litigate disputed factual issues. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742; see *People v. Kipp* (2001) 26 Cal.4th 1100, 1125 [counsel not ineffective where appellant did not allege that constitutional standards were more exacting

than statutory admission standards raised below].)

2. Constitutional Questions

This Court should also exercise its discretion to consider constitutional questions raised for the first time on appeal. (See, e.g., *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173, and cases there cited; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 618, fn. 29.)

> "Although California authorities on the point are not uniform, our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved, the asserted error fundamentally affects the validity of the judgment, or important issues of public policy are at issue. . . ." (*Hale v. Morgan*, *supra*, 22 Cal.3d at 394, citations omitted.)

More recently, this Court has noted that "[n]ot all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.)

Yet, there are decisions from this Court and the lower courts declaiming the opposite, even in capital cases. (See, e.g., *People v. Kipp*, *supra*, 26 Cal.4th at 1124-1125; *People v. Williams, supra*, 16 Cal.4th at 250; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10.) The decisions are inconsistent with the Eighth and Fourteenth Amendment requirements of meaningful appellate review in capital cases and with the demands of fundamental justice. Therefore, the Court should review on the merits all claims involving fundamental constitutional rights even where raised for the first time on appeal.

D. If the Court Does Conclude That Any Claim Was Waived or Forfeited, Appellant Intends to Litigate Such Claims in an Accompanying Petition for a Writ of Habeas Corpus

Should the Court nevertheless fail to address any issue or claim on its merits due in whole or in part to acts or omissions by trial counsel, then appellant intends to raise state and federal claims of ineffective assistance of counsel relating to those deficiencies and the underlying substantive claims. (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, § 15; *Wiggins v. Smith* (2003) 539 U.S. 510; *Strickland v. Washington* (1984) 466 U.S. 668; *People v. Ledesma* (1987) 43 Cal.3d 171.) Pursuant to this Court's holding in *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267, such claims shall be raised in an accompanying petition for a writ of habeas corpus.

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BULMAN'S IDENTIFICATION OF PHOTOGRAPHS OF APPELLANT WAS THE RESULT OF AN IMPERMISSIBLY SUGGESTIVE SHOW-UP PROCEDURE AND, UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE IDENTIFICATION WAS UNRELIABLE

Appellant argued in his opening brief that the identification of appellant's photographs by Lloyd Bulman which occurred the night before he was to testify at trial was the result of an impermissibly suggestive show-up procedure. Appellant also argued that the procedure, under the totality of the circumstances, created a substantial risk of irreparable misidentification by Bulman and that admission of the identification violated his constitutional right to due process of law. (U.S. Const., Amends. 5 and 14; Cal. Const., art. 1, secs. 7, 15.) (AOB 182-209.) Respondent alleges that there was nothing improper about the photo array shown to Bulman, that his identification of the appellant's photographs was reliable and that any error from admitting evidence of the identification was harmless. (RB 51-62.) Respondent's claims are each without merit and must be rejected.

In his opening brief, appellant has extensively set forth points and authorities regarding the erroneous and prejudicial admission of Bulman's identification of appellant's photographs, and many of the allegations raised by respondent have already been addressed in the opening brief. To the extent that there are allegations which warrant further comment, appellant will address them below.

A. The Identification Procedure Was Impermissibly Suggestive

Contrary to respondent's assertion, appellant has demonstrated "the threshold requirement that the photographic identification procedure was

'unduly suggestive and unnecessary'" and that the risk of irreparable misidentification by Bulman was substantial. (See AOB 194-197, RB 57.) The record shows that in a last ditch effort to obtain an identification of appellant as the perpetrator who shot Cross, 15 ½ years after the homicide, four years after appellant had been in custody for the offense and on the night before Bulman was to testify at trial, prosecutors showed him a photo array which included photographs of appellant. Respondent's assertion that the lineup was merely "an array of photographs of different individuals taken at different time periods" (RB 57) does not rebut the fact that the lineup was so impermissibly suggestive such that a misidentification of appellant was likely.

While it is correct that the photo lineup consisted of five photographs, respondent inexplicably ignores critical details about it which support a determination that it was unduly suggestive: (1) the lineup was actually composed of only three different individuals; (2) two of the photos were of Terry Brock, who Bulman had previously identified as being the person who originally approached his side of the car (driver's side and not the man with the shotgun); and (3) there was not one, but two, photos of appellant.

The photo array at issue consisted of People's Exhibit No. 18 through People's Exhibit No. 22. (RT 4851.) Bulman identified People's Exhibit No. 18, one of the two photographs of Terry Brock, as the same or similar to the photograph which had been shown to him in 1991, and which he had identified as looking like the person who initially approached his

side of the car with a handgun. (RT 4848-4850, 5916-5918.)[4] People's Exhibit No. 19 is a 1984 booking photo of appellant; People's Exhibit No. 20 is a photograph of appellant from his 1983 driver's license; People's Exhibit No. 21 is a 1980 booking photo of Terry Brock and People's Exhibit No. 22 is a 1980 booking photo of Charles Brock. (RT 4852-4853.)[5]

In *Simmons v. United States* (1968) 390 U.S. 377, 383-384, the United States Supreme Court discussed the hazards of using photographs for identification purposes, and that the danger of an incorrect identification is greater if the police show a witness only the picture of a single individual who generally resembles the person he saw, or if they show him pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. Courts have routinely found that the display of a single photograph is one of the most suggestive, and objectionable, methods of identification. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 111; *Foster v. California* (1969) 394 U.S. 440, 443; *Stovall v. Denno* (1967) 388 U.S. 292, 302; *Wray v. Johnson* (2nd Cir. 2000) 202 F.3d 515; *Robinson v. Clarke* (8th Cir. 1991) 939 F.2d 573, 576; *Williams v. Armontrout* (8th Cir. 1989) 877 F.2d 1376, 1380-1381; *United States v. Givens* (9th Cir. 1985) 767 F.2d 574, 581; *In re Hill* (1967) 72 Cal.2d 997,

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[4] Bulman had already identified Terry Brock during a live lineup conducted on June 27, 1980 (just weeks after the homicide) as the man who initially approached his side of the car. (RT 5916-5918, CT 2191.)

[5] Pursuant to California Rules of Court, Rule 18, appellant will request permission for People's Exhibit Nos. 18 through 22 to be transmitted to this Court for review.

1004-1005.)[6] Similarly, courts have generally found procedures in which multiple photographs of the defendant appearing in a single array to be impermissibly suggestive. (*United States v. Myers* (7th Cir. 1990) 892 F.2d 642, 647 [procedure unnecessarily suggestive where array included only three photographs, two of which were defendant]; *Dobbs v. Kemp* (11th Cir. 1986) 790 F.2d 1499, 1506 ["Showing witnesses a series of pictures of which several are the same person can only be a calculated method at narrowing the witnesses' choice with regard to identification."]; *United States v. Mears* (8th Cir. 1980) 614 F.2d 1175, 1177 [two photographs of defendant appeared in a single array of seven photographs].) Social science research confirms that the use of multiple photographs of the same individual in a photo lineup increases the probability that the individual will be selected and may also lead the witness to think that the individual looks familiar because of the crime when in fact the familiarity of the individual is based on the repeat images. (See Loftus, Eyewitness Testimony (1979) p. 144.)

Respondent does not dispute that a corporeal lineup is the preferable and more reliable method of identification.[7] Respondent also does not

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[6] Social science research has demonstrated the unreliability of an identification based on a single photo display. Wells et al., *Guidelines for Empirically Assessing the Fairness of a Lineup* (1979) 3 L. & Hum. Behav. at 285, 286.)

[7] "Even if the police . . . follow the most correct photographic identification procedures and show [the witness] the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification." (*Simmons v. United States*, *supra*, 390 U.S. at p. 383; see *People v. Gould* (1960) 54 Cal.2d 621, 631[identification from still photograph is substantially less reliable than

(continued...)

dispute that the number of photographs in an array has bearing on the reliability of a photographic identification. Nonetheless, respondent contends that the prosecutors in this case did not rely upon an impermissibly suggestive photo array to obtain the identification of appellant which was necessary to bolster their otherwise weak case.

In an attempt to obscure the impermissibly suggestive nature of the photo array at issue, and that it not amount to a single person show-up, respondent erroneously contends that the inclusion of photographs of Terry and Charles Brock lessened "any impact of Agent Bulman being shown a single booking photo of appellant." (RB 58.) The record shows, however, that upon review of the five photos presented to him Bulman readily "eliminated" the two photos of Terry Brock, as the prosecutors likely knew he would because Bulman had already identified Terry on multiple occasions as the suspect who initially approached his side of the car. On June 27, 1980, about three weeks after the homicide, Bulman picked Terry out in a live lineup. (RT 5915-5916, CT 2191.) Moreover, as noted above, in 1991 Bulman identified one of the photographs of Terry which was actually used in the 1996 array as being the non-shooter suspect. (RT 4859-4862, 5916-5919.)[8] As such, the array was effectively reduced to only *three* photos – *two* of which were of appellant.

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[7] (...continued)
identification of an individual seen in person], overruled on other grounds in *People v. Cuevas* (1995) 12 Cal.4th 252, 257.)

[8] People's Exhibit No. 18 is an enlargement of the head area of the snapshot of Terry Brock which Bulman had identified in 1991. (RT 4849-4850, 5917-5918.) Bulman testified that when he was shown the photo array at issue he noted that People's Exhibit No. 18 and People's Exhibit No. 21 were the same person. (RT 4930.)

The prosecutors were also aware that Bulman had previously not recognized Charles Brock as one of the perpetrators. (See CT 2606; RT 7085.)[9] In addition, Bulman testified that neither perpetrator had a scar or tattoo on his face; the photograph of Charles Brock contained in the array showed him having both of these unique characteristics. (RT 4852, People's Exh. No. 22.) In light of these factors, the single photo of Charles would have also been easily "eliminated" by Bulman.

With the photos of Terry and Charles Brock thus removed from consideration, the only choices left for Bulman to identify as the man with the shotgun were the two photos of appellant. Consequently, the resulting photo array was tantamount to a single person show-up. In addition to the suggestive nature of the array itself is the fact that prior to the eve-of-trial identification Bulman saw appellant in court at least once during the preliminary hearing. That prior observation no doubt helped encode appellant's appearance in Bulman's mind.

There were no exigent circumstances that justified the single show-up identification procedure that occurred in this case. In 1996, when Bulman was shown the photo spread at issue, appellant had been in custody charged with the instant offense for four years and the prosecution had ample time to prepare a non-suggestive photo array. It was not lost on the prosecutors that up to the time of trial, Bulman had been unable to identify appellant despite the prior opportunities he had to do so.[10] The only apparent "exigency" that existed was the need for the surviving victim to

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[9] Nina Miller told the police in July, 1980, that Charles had said Bulman did not identify him at a lineup conducted at the jail. (CT 2606.)

[10] E.g., April 19, 1990 (corporeal lineup); RT 4845-4846; July 13, 1993 (preliminary hearing), CT 181.

make some identification of appellant, which is precisely what the suggestive photo array was supposed to do and which in fact Bulman did.

Even assuming, and which appellant does not concede, that the 1996 photo array did not amount to a single person show-up, it was nonetheless unduly suggestive for a number of reasons. First, one of the photographs of appellant, People's Exhibit No. 20, was the only photo of the group of five where the person depicted did not have a mustache, or at least one that was easily discernable. This fact alone would have likely caused that particular photograph to be impermissibly singled out. Moreover, two of the five photographs were of appellant. That appellant was impermissibly singled out because of the duplication of his photograph in the lineup was even more apparent because, as noted above, Bulman discounted the photos of Terry Brock because Terry had already been identified as the suspect without the shotgun.[11] Bulman was thus faced with a photo spread where *two* of the total of *three* photographs were of appellant. Such a lineup "would naturally steer" Bulman towards appellant (*United States v. Myers*, *supra*, 892 F.2d at p. 647, citing *Dobbs v. Kemp*, *supra*, 790 F.2d at p. 1506; *United States v. Bagley* (9th Cir. 1985) 772 F.2d 482, 493 ["repeated showing of the picture of an individual, for example, reinforces the image of the photograph in the mind of the viewer"]) and the misidentification of him was inevitable (see *Simmons v. United States*, *supra*, 390 U.S. at pp. 383-384; *Foster v. California*, *supra*, 394 U.S. at p. 443; *In re Hill*, *supra*, 72 Cal.2d at pp. 1004-1005).

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[11] Bulman testified that he noted that People's Exhibit Nos. 18 and 21 were the same person, Terry Brock. (RT 4930.)

B. Under the Totality of the Circumstances, Bulman's Identification Was Not Reliable

Respondent's further contention that the totality of the circumstances show that Bulman's identification was reliable is likewise not supported by the record. (RB 58-65.) Bulman did not have "ample opportunity" to observe appellant so as to render his identification reliable. (RB 59-60.) Although he testified he was able to see both suspects as they drove in their car past the secret service vehicle, his observation of them was brief, occurred just before or at dusk, and was through the window of his car. (RT 4774, 4778-4779, 4781-4782.) (See *United States v. Field* (9th Cir. 1980) 625 F.2d 862, 868 [questioning reliability of identification because witness viewed the robber only twice "both times for only a few seconds and from a distance of 20 feet"].) At the time that one of the suspects approached Bulman's side of the car, Bulman was unable to see what was going on with Cross and the second suspect. (RT 4795.) When the second suspect moved from the passenger's side of agents' car to the driver's side it had become dark and Bulman was unable to see him clearly. (RT 4797.) At the point that the second suspect reached into the driver's side of the car, knocked the microphone out of Bulman's hand and removed the keys and shotgun, Bulman was bent over to his right side and facing down towards the seat of the car. (RT 4797-4800, 4802.)

Bulman testified that he became aware of, and at times saw, the suspect with the shotgun as he (Bulman) wrestled with man who had initially approached the driver's side. Nonetheless, he testified that when either of the suspects came close to him the lighting was not good and because it was dark, he was unable to see them very well. (RT 4897.) It is clear that during the struggle with the suspect who originally approached

the driver's side of the car Bulman's focus was on not getting shot and using the man with whom he was fighting as a shield against the other suspect. (See RT 4803-4808.) Similarly, even though Bulman later saw the second suspect pointing the shotgun close to his head, this observation was made when Bulman was on the ground trying to push himself up, looking back over his shoulder (RT 4809-4810) and at a time when his focus was undoubtedly on the shotgun itself and whether he would be killed. Bulman's ability to accurately recall facial characteristics and other details regarding the suspect with the shotgun would have necessarily been affected by his limited view of the suspect as well as the stress and fear he felt at that particular moment along with his focus on the shotgun. (See Cutler et al., *The Reliability of Eyewitness Identification* (1987) 11 L. & Hum. Behav. 233, 240, 244 [weapon visibility significantly lowers identification accuracy]; Loftus, *Some Facts About Weapon Focus* (1987) 11 L. & Hum. Behav. 55, 58-62 [experiments showed that the presence of a weapon significantly lowers identification accuracy of an eyewitness].)

In addition to the limited opportunity Bulman had to observe the suspect with the shotgun, this was a cross-racial identification which likely affected its accuracy. Studies demonstrate that there is an increased rate of error when an individual attempts to identify someone from a different race. (Luce, *Blacks, Whites and Yellows: They All Look Alike to Me* (1974) Vol. 8, No. 6 Psychol. Today, at pp. 105-108; Malpass & Kravitz, *Recognition for Faces of Own and Other Race* (1969) 13 J. Personality and Soc. Psychol., 330-334.)

Respondent claims that the description of the shooter Bulman provided to the police was "accurate." (RB 60.) This characterization, however, does not take into account the fact that the description provided

was by most part general, and could have applied to any number of black men.[12] Respondent makes much of the fact that Bulman's failure to make an in-court identification of appellant is attributable to a "change" in appellant's appearance which would have occurred over the 15 year gap between the homicide and the trial proceedings. (RB 60-61.) As noted previously, it is significant that Bulman not only failed to identify appellant during any of the numerous court hearings held below, but that he also failed to identify appellant at the April, 1990, corporeal lineup which was held approximately six years after the 1984 photograph Bulman identified. (RT 5896-5897.) Equally significant is that not long after the homicide, in August, 1980, Bulman identified someone else as resembling the shooter. (RT 2671.)

Contrary to respondent's assertion, the composite drawing of the suspect who Bulman designated as the shooter does not look like the photographs of appellant, which consisted of his 1983 driver's license (People's Exh. No. 20) and a booking photo from 1984 (People's Exh. No. 20). (RB 66.) The photographs speak for themselves, and a review of them supports the argument that they are dissimilar to the composite drawing at issue.[13]

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[12] Detective Thies recorded Bulman's description of the suspect who shot Cross as: "male, Negro, 30/35, 5'11"/6'0", 185, black, brn, wearing a dark stocking cap, not rolled up. Possible dark clothes. NFD." (CT 2117.)

Detective Renzi recorded Bulman's description of the shooter as: "male Negro; early 30's [,] 5'11" to 6'; 185 lbs; Black hair, brn eyes. Suspect was wearing a dark jacket and stocking/watch cap." (CT 2180.)

[13] See fn. [#2 of this argument]***, *supra*. In addition, pursuant to Rule 18 of the Cal. Rules of Court, appellant will request permission to

(continued...)

The fact that Bulman was trained in law enforcement, rather than merely a civilian witness, does not conclusively support a determination that the identification of appellant's photos was reliable. (RB 60.) His failure to identify appellant at the corporeal lineup in April, 1990, and the identification of someone else as the suspect at that lineup and before, illustrate this point. Nevertheless, "both common sense and scholarly study indicate that while a trained observer such as a police officer 'is somewhat less likely to make an erroneous identification than the average untrained observer, the mere fact that he has been so trained is no guarantee that he is correct in a specific case. His identification testimony should be scrutinized just as carefully as that of the normal witness.'" (*Manson v. Brathwaite*, *supra*, 432 U.S. at p. 130, Marshall, J. dissenting, quoting Wall, Eye-Witness Identification in Criminal Cases (1965) p. 14, n. 1.) Moreover, social science research demonstrates that police officers are no more accurate than other witnesses and that a police officer can perform more poorly than a civilian due to the officer's biased interpretation of events. (Loftus, *Eyewitnesses: Essential But Unreliable* (1984) Vol. 18, No. 2 Psychol. Today at pp. 22-26.)

Respondent is mistaken in claiming that the "certainty" of Bulman's identification of appellant's photographs supports a determination that the identification was independently reliable. (RB 60.) As respondent fails to address, the record is silent as to the level of certainty Bulman attributed to the identification of appellant when prosecutors showed him the photo array at issue. Bulman arguably demonstrated no uncertainty as to the

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[13] (...continued)
transmit to this Court People's Exhibit No. 12.

identification of appellant's photos when he testified at trial. However, any certainty he had with regard to that identification must be considered in light of the unduly suggestive identification procedure that occurred when prosecutors showed him the photo spread as well as the level of uncertainty he expressed at other times when asked to make an identification of the man who had the shotgun.

It is undisputed that Bulman had not previously identified appellant as one of the suspects even though appellant was included in the April 19, 1990, corporeal lineup which Bulman had viewed. (RT 4846.) It is also undisputed that Bulman was unable to make an in-court identification of appellant at trial or during pre-trial hearings. (RT 4845, 4850.) This history of being unable to identify appellant undermined the reliability of the identification he did make. (See *Cossel v. Miller* (7th Cir. 2000) 229 F.3d 649, 656 [witness twice unable to identify defendant as the assailant during three year delay between crime and identification, thus making her identification less reliable].) In addition, as noted above, Bulman had already identified two other individuals on separate occasions as looking like the shotgun wielding suspect. (RT 4846, CT 2671.) (See *Grant v. City of Long Beach* (9th Cir. 2002) 315 F.3d 1081, 1088 [a witness identification of a particular defendant becomes less reliable because she had identified another plausible suspect]; *Solomon v. Smith* (2nd Cir. 1981) 645 F.2d 1179, 1186 [same].) In light of these factors, any certainty of Bulman's identification of appellant's photographs is just as likely to have been a product of the unduly suggestive identification procedure utilized as it was a product of his independent recollection of the crime. (*Cossel v. Miller*, *supra*, 229 F.3d at p. 656, fn. 4; *Rodriguez v. Young* (7th Cir. 1990) 906

F.2d 1153, 1163.)[14]

The long period of time - over 15 ½ years - that had elapsed between the homicide and the eve-of-trial identification also indicates the unreliability of Bulman's identification. (*Manson v. Brathwaite*, *supra*, 432 U.S. at pp. 115-116; *Neil v. Biggers* (1972) 409 U.S. 188, 201]; *Cossel v. Miller*, *supra*, 229 F.3d at p. 656; Cutler, et al. *The Reliability of Eyewitness Identification, supra,* 11 L. & Hum. Behav. 240, 244 [shorter time interval between the crime and the initial identification enhances the reliability of the identification].)

The indica of Bulman's ability to make an accurate identification of appellant's photographs establish that his identification was not independently reliable. (*Grant v. City of Long Beach*, *supra*, 315 F.3d at p. 1088; *Cossel v. Miller*, *supra*, 229 F.3d at pp. 655-656; *United States v. Field*, *supra*, 625 F.2d at pp. 868-869.) Moreover, the corrupting effect of the unduly suggestive procedure utilized in this case outweighs any reliability of Bulman's identification. (See *Manson v. Brathwaite*, *supra*, 432 U.S. at p. 114 [In assessing the reliability of the identification, the Court mandates weighing "the corrupting effect of the suggestive identification itself" against the "indicators of (a witness') ability to make an accurate identification."].) "[A]n examination of the totality of the surrounding circumstances reveals that the photographic identification

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[14] In *Rodriguez*, the Seventh Circuit Court of Appeals expressed skepticism at equating certainty of an identification with reliability. In so doing, the court recognized that "'[d]eterminations of the reliability suggested by a witness's certainty after the use of suggestive procedures are complicated by the possibility that the certainty may reflect the corrupting effect of the suggestive procedures [themselves].'" (*Ibid.*, quoting *Kozik v. Napoli* (7th Cir. 1987) 814 F.2d 1151, 1159.)

procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States*, *supra*, 390 U.S. at p. 384; *Foster v. California*, *supra*, 394 U.S. at p. 443 ["procedure so undermined the reliability of the eyewitness identification as to violate due process"].) Accordingly, it was error to admit the identification.

C. Admission of Evidence of Bulman's Identification of the Photographs Was Not Harmless Beyond a Reasonable Doubt

The issue to which Bulman's identification of appellant's photographs was relevant was a crucial one: identification of appellant as the man with the shotgun. Respondent's contention that there was "strong evidence" of guilt regardless of Bulman's identification (RB 65) is belied by the record.

As respondent notes, without Bulman's identification the prosecution's case rested primarily on the testimony of Jessica Brock. (RB 65.) The record shows, however, that she was not a credible witness, and her story about appellant's visit to her apartment hours after Cross was killed with what appeared to be blood on his shirt and items in his possession consistent with the murder was simply implausible.

Jessica had more than ample motive to lie about appellant's involvement in the Cross murder. Moreover, the timing and circumstances under which the information was revealed reinforces her lack of credibility. Jessica waited until 1990 – ten years after the Cross murder – to tell her brother Terry's lawyer, the district attorney and the police about the circumstances which implicated appellant. (RT 6052-6055.) Even though she had been questioned by the police in 1980, and knew at that time that her brothers Terry and Charles had been suspected for the murder and held

for questioning, she failed to provide the information about appellant earlier. (RT 6072, 6107-6108, 6109-6110.)

It was no coincidence that just before Jessica told the police about appellant's involvement in the Cross murder, appellant had been convicted in a separate triple homicide case for which her brother Terry was awaiting trial. (RT 6245-6246.) Jessica, in fact, confirmed that Terry had told her to tell the police about appellant. (RT 6122-6123.) Jessica's information about appellant apparently paid off. Not long after Jessica told the police about appellant, a plea bargain was struck between the prosecution and her brother Terry. (RT 6315, 6317-6318.) Terry pled guilty to second degree murder for the triple homicide, and received a 12 year prison sentence for it plus a gun enhancement. (RT 6246-6048.) Terry was never charged with the Cross murder in spite of the fact that Bulman had unequivocally identified him as the man who had first approached the driver's side of the car. (See RT 4848-4850, 5915-5918, 6035.)

The record also reveals that Jessica likely had her own motives for assisting the prosecution make their case against appellant. Following her trial testimony Jessica was to enter the witness relocation program whereby the prosecution would subsidize her rent. (RT 6092, 6102.) Her criminal history, as well as the timing of her cases, suggests that she had additional incentive to be less than truthful. In 1982, she was convicted for selling marijuana as a felony (RT 6071), and in 1983 she served time in prison for selling cocaine (RT 6162-6163). In 1989, she was convicted for selling cocaine. (RT 6097.) The following year, when she initiated contact with the prosecution and the police, there was a warrant for her arrest. Jessica admitted that at the time she met with the prosecution she wanted help with her case (RT 6098), that she did not want to go to prison and that she was

afraid the prosecution and the police would report her as an unfit mother (RT 6127-6129). In 1992, Jessica was convicted for selling heroin. (RT 6071.)

That Jessica later effectively recanted the story she had told the prosecution when she talked with defense counsel, or contradicted her initial story to the prosecution during trial, is hardly surprising. (E.g., RT 6055-6056, 6058-6059, 6066, 6077-6078, 6080-6082, 6109-6110, 6119, 6121, 6124, 6142, 6147-6148, 6153, 6160, 6162, 6183, 6185-6186, 6369.) Apart from her own interests, it is obvious that her trial testimony reflected her divided loyalty between appellant, who is the father of her son (RT 6051, 6071), and her brother Terry. The record also shows that Jessica was under the influence of a sleeping pill or another drug/illegal substance when she testified during trial; not only was her speech slurred, but she also was unwilling or unable to follow the trial court's admonition not to mention the triple homicide case which involved appellant and her brother Terry. (RT 6285, 6288, 6289, 6290, 6292; see Args. XV, XVI, *infra*.) Any information about appellant's involvement in the Cross homicide by Jessica Brock was simply insufficient to support a guilty verdict in the absence of Bulman's identification. (See Arg. XXII, *infra*.).

Contrary to respondent's contention, appellant's refusal to stand in a lineup did not substantiate consciousness of guilt. (RB 66.) Instead, the record shows that at the time the request for the lineup was made appellant was represented by counsel in another matter, and that it was on the advice of his attorney that appellant not comply with the request. (RT 5732, 5791, 5820.) Accordingly, evidence of any failure to participate by appellant should not have admitted as evidence to support the prosecution's theory of guilt. (See Arg. XI, *infra*.)

Similarly, evidence regarding a letter written by Darcel Taylor to find out what Terry Brock had told the police did not show a consciousness of guilt on appellant's part. (RB 66.) The evidence presented was that Taylor had written the letter on her own and the inquiry was directed to what if anything Terry had said to the police regarding the separate homicide case in which he and appellant were charged as codefendants. (See Arg. XIII, *infra.*) Likewise, Watson's statement to Terry Brock to "stay strong," which purportedly was made on appellant's request, did not support a consciousness of guilt on appellant's part. As with Darcel Taylor's letter, the evidence presented showed that the comment by appellant was directed to the separate homicide case in which both he and Terry Brock were codefendants and which was pending against Brock at the time the request was made. (See, Arg. X, *infra.*)

Any "pressure" by appellant's parents on Jessica Brock not to testify does not establish consciousness of guilt by appellant. (RB 66.) Jessica is the mother of their grandson, and it is reasonable to expect that appellant's parents would urge her to not assist the prosecution. As noted above, the composite drawing of the suspect who Bulman identified as the shooter did not resemble appellant's earlier photographs.

The prosecution's case against appellant was not open and shut as is evidenced by the jury's deliberations which lasted for over three days. (RT 7488, 7496, 7557, 7633, 7634-7635.) That the jury was in fact troubled by the "strength" of the prosecution's case is demonstrated by their notice to the court during deliberations that they had "problem areas" surrounding the evidence regarding main prosecution witnesses Jessica Brock and Lloyd Bulman. Not only did the jury want read back of the testimony of those witnesses, but the jury also requested additional testimony and clarification

regarding evidence relating to Bulman. That the jury in fact considered the show-up identification by Bulman is demonstrated by their request for testimony about when People's Exhibits 18 and 19 (photographs of Terry Brock and appellant) were taken and whether Bulman actually identified appellant from the composites and photos. (RT 7522-7525, 7536.) Moreover, the foreman later reported that one juror refused to join the discussion during deliberations because no positive identification of appellant by Bulman had occurred and his concerns about the credibility of Jessica Brock's testimony and circumstantial evidence. (CT 3852; RT 7563.) This prompted the trial court to reinstruct the jury on circumstantial evidence, eyewitness identification and reasonable doubt. (RT 7559-7563, 7585-7598.) Acknowledging that the jury was having difficulty with Bulman's identification of appellant in court, the trial court emphasized that no particular kind of evidence is required and made specific reference to eyewitnesses. Notwithstanding the additional instructions provided on circumstantial evidence, one of the jurors requested clarification on the jury's "use" of it. Specifically, this juror wanted guidance on how facts are to be assessed and on their duty when there are reasonable and unreasonable interpretations of the facts. (RT 7603-7604, 7618-7619; CT 3853.)

There is no doubt that Bulman's identification of appellant's photographs as looking like the man with the shotgun was key to the jury's determination of guilt. The record is undisputed that Bulman was unable to identify appellant in court as the man with the shotgun. Without the identification of appellant's photos as looking like that man, the prosecution's case rested on the incredible and implausible testimony of Jessica Brock as well as other weak circumstantial evidence. As set forth in appellant's opening brief and above, the admission of the eve-of-trial photo

identification of appellant by Bulman was error. It cannot be concluded that such error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *United States v. Stubblefield* (9th Cir. 1980) 621 F.2d 980, 983; *Green v. Loggins* (9th Cir. 1980) 614 F.2d 219, 225.)

Accordingly, reversal of the judgment of conviction and sentence is required.

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II

THE TRIAL COURT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS WHEN IT FAILED TO APPOINT COUNSEL WHO HAD REPRESENTED HIM IN MUNICIPAL COURT AND WAS FAMILIAR WITH HIS CASE

Appellant has argued in his opening brief that his constitutional rights, including his right to counsel and to equal protection of the law, were violated when the trial court failed to appoint defense counsel Madeline Kopple to represent him after his arraignment. (U.S. Const., Amends. 6, 14; Cal. Const., Art. I, sec. 7, subd. (a).). Appellant also argued that this claim is not barred by the doctrine of the law of the case because there were exceptional circumstances which rendered the Court of Appeal's determination rejecting appellant's claim as a "manifestly unjust decision." (AOB 210-234.) Respondent disagrees, and instead contends that review of the claim is precluded by the doctrine of law of the case, any error was harmless and there was no deprivation of appellant's equal protection rights. (RB 68-85.) Respondent's claims are without merit and must be rejected.

A. The Trial Court Should Have Appointed Counsel Who Represented Appellant in Municipal Court and Who Was Familiar With His Case

The record shows there were exceptional circumstances to justify the appointment of Kopple, and that the Court of Appeal's decision affirming the trial court's refusal to appoint her was unjust. Contrary to respondent's assertion (RB 77-78), *Harris v. Superior Court* (1977) 19 Cal.3d 786 is controlling. As with the lawyers who sought to be appointed in *Harris*, the record establishes that the weight of subjective and objective factors warranted Kopple's appointment in the post-arraignment proceedings. (See *Harris v. Superior Court, supra*, 19 Cal. 3d at pp.797-799.) The subjective

factors included: (1) Kopple's willingness to be appointed, (2) appellant's trust and confidence in her representation, (3) appellant's clear and justifiable distrust of appointed counsel Penelope Watson, (4) his lack of confidence in Watson's representation and (5) the concomitant breakdown of appellant's relationship with Watson as demonstrated by the extensive litigation to relieve her as counsel, including his numerous *Marsden*[15] and *Faretta*[16] motions. (See *Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166 [abuse of discretion when trial court appointed public defender with whom an indigent defendant had lost confidence].) Moreover, objective factors favoring Kopple's appointment included: (1) her previous representation of appellant in the instant offense (as advisory counsel and as counsel at the preliminary hearing), (2) her verified familiarity with the issues and witnesses in the instant case as well as appellant's prior murder case which was alleged as a special circumstance, (3) the duplication of time and expense which would result from the appointment of another attorney and (4) the fact that the request was not untimely or for the purpose of delay. (See AOB 214-227.)

Drumgo v. Superior Court (1973) 8 Cal. 3d 930, upon which respondent relies in his attempt to defeat appellant's claim (RB 78-79), is inapposite. In *Drumgo*, denial of the defendant's request to appoint counsel of choice was upheld because there was no basis for his lack of confidence in appointed counsel other than they had not had a prior relationship and there had been no showing that any abuse of discretion was based on the incompetency of appointed counsel. (*Drumgo v. Superior Court*, *supra*, 8

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[15] *People v. Marsden* (1970) 2 Cal.3d 118.

[16] *Faretta v. California* (1975) 422 U.S. 806.

Cal.3d at p. 935.) In this case, however, appellant's repeated attempts to have Kopple appointed because of his dissatisfaction with Watson as well as Watson's apparent lack of competence were not without legitimate basis.

Appellant first expressed dissatisfaction with Watson because of the conflict that arose with her evaluation of the case at a lower payment level than merited. (CT 895-896.) Appellant's lack of confidence in Watson continued with her refusal to raise a number of issues in appellant's motion to dismiss the information pursuant to Penal Code Section 995; the fact that he smelled alcohol on Watson's breath during court proceedings; the fact that she had told his family there would be two trials, thus inferring her belief that a guilt verdict would occur; and the fact that she had agreed to accept a flat fee much lower than that which was authorized for the category of appellant's case. (RT 283-284; CT 972-975.) Appellant later asserted that Watson labored under additional conflicts of interest because she had been a Deputy District Attorney in Riverside County at the time the instant offense was committed and because she had only been appointed to represent appellant following collusion with the appointment judge with regard to the negotiated fee (RT 288, 321-322; CT 1016-1026).

Finally, appellant made clear his concerns about Watson's competency and her apparent conflict of interest in remaining to be counsel on his case because: (1) she had not raised the issue of the identity of the perpetrator as a ground to grant appellant's Penal Code Section 995 motion; (2) she had not argued in the 995 motion that the special circumstance allegation of murder of a California peace officer (Pen. Code §190.2, subd.(7)), did not apply to the facts of this case; (3) she had not argued in the 995 motion that the gun use allegation (Pen. Code §12022.5) had not been enacted until 1982, and thus did not apply to the facts of this case; (4)

she had not made a motion to suppress the search of appellant's residence; and (5) she accepted to be paid only $93,000, which was lower than the rate authorized for the level of appellant's case. (RT 315-322, 766-778; CT 1480-1489; see also AOB 214-220.).

Even assuming, arguendo, that appellant's lack of confidence in Watson and her competence to represent him was not justified by the record, the fact remains that the relationship between Watson and appellant had irretrievably broken down such that in addition to the other subjective factors listed above, substitution of counsel was necessary. As this Court has noted, the attorney-client relationship contemplates trust and mutual cooperation. This is especially so when a defendant's liberty is at stake and independent of the source of compensation. (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 561.)

Contrary to respondent's assertion otherwise (RB 79), Kopple had extensive knowledge of the instant case based on her prior relationship with appellant, and as counsel for appellant she pursued numerous avenues of defense. In her capacity as advisory counsel and counsel of record for the preliminary hearing, Kopple had reviewed the extensive discovery provided, prepared motions on appellant's behalf, and assisted with appellant's appeal of his prior murder conviction. Accordingly, not only did Kopple possess intimate knowledge of the evidence relating to the Cross homicide, but she was also familiar with appellant's prior murder case which was alleged as the basis for one of the special circumstances and as aggravation. Knowledge of the latter case was essential to defending the prosecution's claim that appellant was eligible for the death penalty. Review of the preliminary hearing transcript, confirms Kopple's command of the facts of appellant's case. Contrary to respondent's claim, the record

clearly shows that appellant's trust and confidence in Kopple was not merely based on a prior relationship unrelated to his capital case. (See AOB 223-226.)

Respondent's reliance on *People v. Daniels* (1991) 52 Cal.3d 815, is also misplaced. In *Daniels*, counsel who sought to be appointed had only previously represented defendant Daniels in an unrelated robbery appeal and in minor traffic offense proceedings, and thus had no intimate knowledge of the murder case at issue. (*People v. Daniels*, *supra*, 52 Cal.3d at p. 845.) Moreover, unlike the instant case, there had been no showing in *Daniels* other than distrust of other attorneys that appointed counsel were not competent. (*Id.*, at p. 848.)

Respondent's claim that Kopple's knowledge of the case from her appointment as advisory counsel and as counsel at the preliminary hearing "did not constitute the type of knowledge that another appointed attorney could not easily acquire" (RB 79) must also fail. Respondent acknowledges that Kopple spent significant time on appellant's prior murder case. (RB 80.) However, rather than this fact being demonstrative of "exceptional circumstances" warranting her continuation as counsel for appellant, respondent erroneously alleges that Kopple spent an "inordinate amount of time on work that put her in no better position to defend appellant than any other appointed lawyer." (RB 80.) In making this assertion, respondent apparently fails to recognize that competent representation in this case required knowledge of the facts of the Cross homicide as well as knowledge of the facts relating to the prior triple homicide, which was alleged as a special circumstance and as a factor in aggravation.

As noted above, Kopple had command of the facts of both cases. The effort required of new counsel to achieve the level of familiarity with

appellant's case as well as the prior murder special circumstance allegation would have entailed considerable duplicative time and expense which would have been avoided by the reappointment of former counsel Kopple. *People v. Horton* (1995) 11 Cal.4th 1068, 1100, upon which respondent relies to support his claim (RB 80), is inapposite because the record in the instant case shows that newly appointed counsel could only achieve a similar level of preparation with considerable duplication of time and effort.

B. Appellant's Claim Is Not Barred by the Law of the Case Doctrine

Respondent alleges that the exception to the law of the case doctrine, that its application would result in a manifestly unjust decision, does not apply in this case. (RB 76.) In support of this claim, respondent erroneously asserts that the Court of Appeal's decision in *Alexander v. Superior Court* (1994) 22 Cal. App.4th 901, did not result in a "manifest misapplication of existing principles resulting in substantial injustice." Respondent also erroneously allges that appellant's argument that Kopple should have been appointed due to her knowledge of the case, appellant's trust and confidence in her, and the quality of her prior performance did not constitute "exceptional circumstances." (RB 77-78.)

As this Court has stated, "the doctrine of the law of the case, which is merely a rule of procedure and does not go to the power of the court, has been recognized as being harsh, and will not be adhered to where its application will result in an unjust decision." (*People v. Medina* (1972) 6 Cal.3d 484, 492; accord, *People v. Scott* (1976) 16 Cal.3d 242, 246.) As set forth above, the record demonstrates that the trial court's failure to appoint Kopple in spite of the "exceptional circumstances" in favor of doing so was erroneous. As such, an "unjust decision," or "manifest misapplication of

existing principles resulting in substantial injustice," occurred in *Alexander v. Superior Court*, *supra*, 22 Cal.App.4th 901, and appellant's claim is not barred by the doctrine of the law of the case. (*People v. Scott*, *supra*, 16 Cal.3d at p. 246; *England v. Hospital of Good Samaritan* (1939) 14 Cal.2d 791, 795.)

C. The Failure to Appoint Kopple Deprived Appellant of His Right to Counsel

The trial court's refusal to appoint Kopple is reversible per se error. As has been recognized by this Court, reversal is automatic when a defendant has been deprived of his right to defend with the counsel of his choice. (*People v. Ortiz* (1990) 51 Cal.3d 975, 988, citing *People v. Gzikowski* (1982) 32 Cal.3d 580, 589) In particular, this Court has explicitly stated that "[t]he right to counsel of choice is one of the constitutional rights most basic to a fair trial." (*People v. Ortiz* (1990) 51 Cal.3d at 988; see *Powell v. Alabama* (1932) 287 U.S. 45; *Gideon v. Wainright* (1963) 372 U.S. 335, *Tehan v. Shott* (1966) 382 U.S. 406.)

Appellant acknowledges that this Court has held that an indigent defendant does not have the right to choose a particular attorney to be appointed at public expense (*People v. Drumgo*, *supra*, 8 Cal.3d at p. 934). However, as Justice Mosk recognized in his dissent in *Drumgo*, *supra*, at p. 940, where he quoted Justice Bray's conclusion in the lower court opinion in that case as well as this Court's earlier opinion in *People v. Crovedi* (1966) 65 Cal.2d 199, 208:

> "'[A]n indigent defendant is not entitled as a matter of law to the appointment of a willing attorney of defendant's own choice, nor as a matter of law may such appointment be denied. The totality of the circumstances applicable to the situation at the time of the defendant's request is the criterion upon which the court's discretion should rest.' One caveat

> might be added. As we said in *People v. Crovedi* [citations omitted], the cases 'demonstrate a conviction that the state should keep to necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best . . . [yielding] only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.'"

Just as this Court has held that the right of a nonindigent defendant to discharge his retained counsel extend to all criminal defendants, regardless of their economic status (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 984), the same principals of equal protection mandate that an indigent defendant be able to have counsel of choice appointed, where as in this case, the totality of the circumstances warrant it.

> "The relationship between an indigent criminal defendant and his retained attorney are no less delicate and confidential than that between a non-indigent defendant and his retained attorney, nor is the evil engendered by friction or distrust between an indigent criminal defendant and his attorney any less fatal to an effective attorney-client relationship. Moreover, we must be just as concerned about the effectiveness of counsel when the client whose life or liberty is at stake is indigent as when he is not: an indigent criminal defendant who is required to undergo a trial with an attorney from whom he believes he is receiving inadequate representation, or with whom he is locked in an unreconcilable conflict, is just as certainly deprived of the effective assistance of counsel as his nonindigent counterpart."

(*People v. Ortiz, supra*, 8 Cal. 3d at p. 984.)

The totality of the circumstances establish that Kopple should have been appointed to represent appellant in the post-arraignment proceedings: appellant distrusted appointed counsel Watson, there was evidence Watson did not provide competent representation, there was a breakdown in the

relationship between appellant and Watson. Appellant's financial status should not have precluded appointment of Kopple who demonstrated she was intimately familiar with his case and provided competent representation, whose continued representation would have avoided duplication of effort and expense of any subsequent counsel and there would have been no disruption to the orderly administration of justice. Accordingly, the judgment of conviction and sentence of death must be reversed.

D. The Failure to Appoint Kopple Was Prejudicial

Even assuming, that the trial court's failure to appoint Kopple was not reversible per se error, the error was not harmless and reversal is required.

Had she been appointed, Kopple would have successfully moved under Penal Code section 995 to set aside the information on three grounds: (1) insufficient evidence of the California Peace Officer special circumstance allegation (Pen. Code § 190.2, subd.(a)(7)), (2) insufficient evidence of appellant's identity as a participant in the crime, and (3) Bulman's testimony should have been stricken under *People v. Shirley* (1982) 31 Cal.3d 18. Respondent erroneously contends appellant would not have prevailed on these grounds. (RB 81.)

The record demonstrates that there was insufficient evidence of the murder of a peace officer special circumstance as defined by the statute (Pen. Code §190.2(a)(7)). This fact was made clear when following the conclusion of the guilt phase the prosecution sought and was permitted to amend the information to dismiss the murder of a peace office special circumstance and to allege instead that the murder was of a federal law enforcement officer. (RT 7643-7644.) Contrary to respondent's allegation

(RB 81), appellant would have prevailed on this point in his 995 motion even with the information as amended: the trial court subsequently dismissed the murder of a federal law enforcement special circumstance allegation pursuant to appellant's motion under Penal Code Section 1118 because there was no evidence appellant had known or reasonably should have known that the victim was a federal officer. (RT 7660-7661.)

Respondent is arguably correct that voir dire would have likely included questioning for bias based on the fact that the homicide victim was a law enforcement officer. (RB 82.) However, the fact that the jury may have been asked to express their thoughts about serving on a case where the victim was a peace or law enforcement officer is not determinative of the issue whether appellant would have prevailed on his 995 motion had a challenge been made to the special circumstance allegation in question. Instead, the issue is that the special circumstance of murder of a peace officer was not properly stricken prior to jury selection. Here, the prosecutor sought to prove that appellant's crime was death-worthy because of the special circumstance of killing a peace officer. It cannot be disputed that this fact alone would have had a significantly different impact on the jury than the mere fact that the victim was a peace officer. (See Arg. III, *infra*.)

The record shows that appellant would have similarly prevailed on his Penal Code section 995 motion due to insufficient evidence of his identity as a perpetrator of the crime. It is undisputed that appellant was never identified by surviving victim Lloyd Bulman as being one of the perpetrators.

Although Jessica Brock presented testimony at the preliminary hearing about appellant's visit to her house where he washed off a crow-bar

like object and made statements which implicated him in the Cross incident, she was not credible. This was especially so in light of the fact that although Jessica testified she knew Detective Henry well, she did not tell the police about appellant's visit until over 10 years after the homicide, and she and her brothers (who the police suspected were involved) had been questioned by the police not long after it occurred. (CT 205-206, 219, 223-224, 240, 271.) In 1990, when she told the police about appellant's visit, Jessica had an outstanding warrant for her arrest. Although she said she had not been worried she would be taken into custody on the warrant when she talked to the police, she admitted being motivated to provide information implicating appellant in the Cross homicide in order to obtain assistance with her own case. (CT 213-214, 231.) Even though Jessica purportedly had minimal contact with her brother Terry Brock at the time she spoke to the police in 1990 and "knew very little about his case," there is no dispute that arrangements for Jessica to talk to the police were set up by Terry's lawyer for the triple murder case. It was no coincidence that Terry Brock accepted a deal for 12 years for the triple murder in which appellant (his codefendant) had been convicted in 1990. (CT 214.) Also, Jessica's memory of events during her preliminary hearing testimony was remarkably selective, and her testimony was inconsistent as to facts and details of the evening appellant allegedly visited and what she had observed. (See e.g., CT 229, 246, 257-258, 277, 292, 301-306.)

Finally, contrary to respondent's allegation, appellant would have prevailed in his 995 motion that Bulman's testimony was inadmissible because his statements about the incident had been tainted by hypnosis. (RB 82.) Respondent's allegation that Kopple was unsuccessful in suppressing Bulman's testimony prior to the preliminary hearing on this

basis is misleading because the trial court's ruling with regard to the suppression motion was that witnesses could testify as to matters that occurred prior to hypnosis. (CT 42.) Moreover, whether or not Kopple was successful in suppressing Bulman's testimony *prior to* the preliminary hearing is rendered moot because composite artist Fernando Ponce's testimony *during* the preliminary hearing was that (1) appellant had in fact been hypnotized and (2) the original composite drawings he prepared were altered when Bulman was under hypnosis. (CT 431-432, 439.) As such, Bulman's statements made after he had undergone hypnosis were inadmissible. (See Args. V, VI, VII, VIII, *infra*.)

Respondent does not dispute the fact that the failure to appoint Kopple for the post-arraignment proceedings caused almost a three year delay in bringing the case to trial. (RB 82.) Regardless of the delay, however, respondent claims that "there is nothing in the record demonstrating that attorney Kopple, appellant acting in pro per, or any other defense attorney, could somehow have predicted the demise of [potential defense witness] Ellis and made an effort to preserve his testimony in admissible form." (RB 83.) This argument misses the point. If Kopple been appointed the case would have no doubt proceeded to trial prior to Ellis' death in August, 1995.[17] Information which Ellis could have

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[17] Appellant was arraigned in Superior Court on August 2, 1993. (CT 879.) Litigation concerning appellant's efforts to appoint Kopple occurred from that point through June 9, 1994, when the Superior Court denied appellant's motion for reconsideration to appoint her following the issuance of the Court of Appeal's opinion affirming its prior decision. (CT 1702.) Following the March 30, 1994, grant of appellant's *Faretta* motion (CT 1502), new defense counsel, Rowan Klein, was appointed to represent appellant on September 19, 1994 (CT 1737).

provided was critical to support appellant's defense that he was not the shooter, including the fact that one of the perpetrators had a large scar on his left cheek, and that the shooter wore a jacket which was ripped at the shoulder. (See AOB 230, 247.)

The trial court's failure to appoint Kopple to represent appellant in the Superior Court proceedings cannot be determined to be harmless beyond a reasonable doubt. Accordingly, reversal of the judgment and sentence are required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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III

APPELLANT WAS PREJUDICED BY THE REPEATED REFERENCES DURING VOIR DIRE TO THE INVALID SPECIAL CIRCUMSTANCE ALLEGATION OF MURDER OF A PEACE OFFICER

Appellant has argued in his opening brief that the numerous references to the invalid special circumstance of murder of a peace officer (Pen. Code § 190.2 (a)(7)) by the trial court during voir dire unduly prejudiced the jury such that he was deprived of his right to a fair trial and reversal of his conviction is required. (AOB 234-237.) Respondent contends that the doctrines of waiver and invited error preclude appellant from raising the issue on appeal, and that the court's references to the invalid special circumstance were not prejudicial. (RB 86-89.) Respondent's allegations are without merit.

A. Appellate Review of Appellant's Claim Is Not Precluded

Respondent does not dispute that there were numerous references to the invalid special circumstance made during voir dire. Instead, respondent erroneously alleges that appellant has waived any claim of error or that the error was invited because defense counsel Klein proposed and was permitted to include a question on the final juror questionnaire as to whether the death penalty should be imposed on someone who murdered a peace officer. Respondent also alleges that waiver applies because defense counsel failed to object to two "similar" questions relating to the alleged special circumstance of murder of a peace officer and imposition of the death penalty during voir dire. (RB 87.)

Contrary to respondent's allegations, appellant did not waive appellate review of his claim on the merits. The issue of insufficient evidence of the special circumstance allegation of murder of a peace officer

was raised and rejected at appellant's pretrial motion to dismiss pursuant to Penal Code Section 995 motion. (RT 299-315; CT 990-999.)[18] Accordingly, any subsequent objection to the numerous references to that special circumstance allegation during voir dire would have been futile, and the doctrine of waiver does not apply here. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [failure to object and request admonition regarding prosecutorial misconduct excused because to do so would have been futile]; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649 [any objection to court conducted voir dire inviting prospective jurors to do "whatever" necessary to get off the jury other than admitting racist beliefs would have been futile and thus doctrine of waiver does not apply]; *United States v. Palmer* (9th Cir. 1993) 3 F.3d 300, 304 [defendant sufficiently preserved the issue of the admissibility of his post-arraignment statement for appeal by both objecting and moving for its exclusion on this basis before the commencement of trial]; *United States v. Varela-Rivera* (9th Cir. 2001) 279 F.3d 1174, 1177 [in limine objection to evidence need not be renewed to preserve issue on appeal where substance of objection has been thoroughly explored and trial court's ruling explicit and definitive].)

Similarly, the fact that defense counsel requested, and the trial court

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[18] In his 995 motion appellant argued that there was insufficient evidence of the special circumstance of murder of a peace officer. In so doing, appellant argued that there was no showing that the suspects, and in particular the suspect alleged to be the shooter, knew or should have known that Cross was a peace officer. (RT 303-305, 309, 310-311; CT 993-994.) At the conclusion of the guilt phase, the trial court ruled there was no showing that the suspects possessed the requisite knowledge of the law enforcement status of Cross to support the special circumstance allegation of murder of a federal law enforcement officer which was set forth in the amended information. (RT 7654-7660.)

included, a question in the questionnaire which sought to elicit any bias with regard to the victim's law enforcement status does not constitute "invited error." In light of the trial court's ruling on the 995 motion confirming the prosecution's charge of the murder of a peace officer special circumstance, it was incumbent upon defense counsel to insure that the views of prospective jurors concerning the murder victim's law enforcement status in the context of imposition of the death penalty were properly elicited in order to ascertain whether any jurors were biased unfavorably toward appellant and/or was unable to perform his or her duties.

Moreover, there was no waiver and the error was not invited because the defense counsel failed to object to "similar questions that sought to determine whether prospective jurors thought that a person who murdered a law enforcement officer should automatically receive the death penalty, or under that circumstance, the juror would refuse to find the person guilty to avoid imposing the death penalty."[19] (RB 87.) As noted above, had appellant objected to these "similar" questions because they concerned the special circumstance allegation of murder of a peace officer as it related to imposition of the death penalty, such objections would have been futile. (*People v. Abbaszadeh*, *supra*, 106 Cal.App.4th at p. 649.)[20]

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[19] As will be discussed in Section B., *infra*, voir dire questions by the trial court regarding whether a person who murdered a law enforcement officer should automatically receive the death penalty, or whether under that circumstance the juror would refuse to vote for guilt in order to avoid imposition of the death penalty, were *not similar* to the inquiry proposed by appellant.

[20] Because any objection to questions on the special circumstance of (continued...)

People v. Cooper (1991) 53 Cal.3d 771, upon which respondent relies, is inapplicable. In *Cooper*, the trial court's failure to give jury instructions on second degree murder was the result of an explicit objection to the instructions by the defense and the record showed that there was a deliberate choice by defense counsel and the defendant to utilize an "all-or-nothing" tactical strategy. This Court held that invited error foreclosed any complaint by appellant that second degree murder instructions were not given. (*People v. Cooper*, *supra*, 53 Cal.3d at pp. 827-828.) As with the failure by defense counsel to object to references to the invalid special circumstance during voir dire, appellant is not prevented from raising this issue on appeal. Defense counsel's request for inclusion of a question on the peace officer murder special circumstance was not a "tactical decision" for which the doctrine of invited error would apply.

B. Numerous References to the Invalid Special Circumstance of Murder of a Peace Officer by the Trial Court During Voir Dire Were Inherently Prejudicial

The specific inquiry defense counsel requested in the questionnaire relating to murder of a peace officer and imposition of the death penalty (Question. No. 50) did not have the same effect as the references to the special circumstance allegation regarding the murder of a peace officer made by the trial court during voir dire. The inquiry requested by defense counsel merely asked prospective jurors "whether a person convicted of murdering a law enforcement officer should receive the death penalty" and to explain their answer. (E.g., CT 3013.) Although this inquiry was

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[20] (...continued)
murder of a peace officer during voir dire would have been fruitless, respondent's reliance on *People v. Walker* (1988) 47 Cal.3d 605, 626 [failure to object to voir dire questions constitutes waiver], is misplaced.

included in the section of the questionnaire devoted to questions which were intended to elicit prospective jurors' beliefs on the death penalty, it was benign and did not have the effect of emphasizing the status of the victim as the *reason* to impose the death penalty. In contrast, the trial court's numerous references to the invalid murder of a peace officer special circumstance during voir dire were inherently prejudicial in that they effectively conveyed the message to prospective jurors that the death penalty was justified solely because the victim was a peace officer.

Respondent is wrong that no prejudice occurred from the trial court's voir dire because it was inevitable that the jury would have known that Cross was a law enforcement officer. (RB 87-88.) Instead, the prejudice to appellant from the trial court's voir dire references to the peace officer special circumstance turns on the substance and manner of the trial court's inquiry regarding it. Even assuming the court's voir dire on the law enforcement status of the victim was intended to determine whether prospective jurors would automatically be influenced toward death regardless of the special circumstances alleged (RB 88), review of the record shows that the voir dire on this subject had the opposite effect.

Here, the trial court attempted to elicit the beliefs of prospective jurors on the alleged special circumstances as they related to imposition of the death penalty. Although prospective jurors were initially informed there were *two* special circumstance allegations, robbery-murder and murder of a peace officer, the trial court inexplicably emphasized the latter special circumstance allegation by referring only to it during the majority of its voir dire with regard to the "factors" which would result in a penalty phase. (E.g., RT 3988-3989; 3992-3993; 4038-4039; 4177-4178; 4208; 4325; 4337; 4368-4369; 4399-4400; 4469.)

Similarly, the trial court's line of questioning focused on the fact that appellant was eligible for the death penalty only if the murder of a peace officer special circumstance allegation was found true. (*Id.*) This "method" of inquiry served to inform prospective jurors that appellant faced the additional charge of having murdered a peace officer, and that if true, the charge rendered him death-worthy. There was no dispute that the victim was a law enforcement officer. Accordingly, the trial court's undue focus on the invalid special circumstance of murder of a peace officer during voir dire likely resulted in the jury automatically believing the status of the victim alone justified imposition of the death penalty. It was also inherently prejudicial and ultimately deprived appellant of his right to a fair trial. (See *United States v. Bland* (9th Cir. 1990) 908 F.2d 471, 473 [judge's prejudicial comments during voir dire regarding an unrelated charge against the defendant for molestation, torture and murder of a seven year old girl warranted reversal].)

Respondent further contends no prejudice to appellant occurred because rather than resulting in a dismissal due to insufficient evidence, the special circumstance allegation of murder of a peace officer (Pen. Code § 190.2(a)(7)) could have been amended to murder of a federal law enforcement officer (Pen. Code § 190.2(a)(8)). According to respondent, in spite of the invalidity of the murder of a peace office special circumstance, the jury would have been presented the special circumstance allegation relating to Cross' status as a federal law enforcement officer. (RB 88-89.) In making this erroneous allegation, respondent fails to acknowledge that at the end of the guilt phase the trial court ultimately dismissed the special circumstance as amended because there was no evidence of knowledge by the shooter that Cross was a federal law enforcement agent. As set forth in

Argument II, *supra*, had Madeline Kopple been appointed to represent appellant for the post-arraignment proceedings, a special circumstance allegation relating to Cross' law enforcement status (as either a peace officer or federal law enforcement agent) would have been dismissed pursuant to appellant's 995 motion. As such, the jury in this case would not have been unduly tainted with the numerous voir dire references on the invalid special circumstance allegation.

Accordingly, reversal of appellant's conviction and sentence are required.

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IV

THE TRIAL COURT'S FAILURE TO GRANT APPELLANT'S *WHEELER/BATSON* MOTION COMPELS REVERSAL OF THE JUDGMENT AND SENTENCE OF DEATH

Appellant argued in his opening brief that the judgment of conviction and death sentence must be reversed because the trial court erred in denying his *Wheeler/Batson* motion. Appellant argued that: (1) he established a prima facie case that the prosecutor improperly excused Black prospective jurors on the basis of their race, and (2) the prosecutor's justifications for excusing Black prospective jurors were inadequate to rebut the prima facie showing. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) (AOB 238-243.)[21] Respondent erroneously claims there was no error. (RB 90.)[22]

A. The Question Whether There Was A Prima Facie Case Is Moot

Respondent first contends that appellant failed to establish a prima facie case for relief. Respondent alleges that there is nothing in the record to justify a conclusion that the trial court explicitly or implicitly found a

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[21] In his opening brief, appellant addresses only four of the nine peremptory challenges to Black prospective jurors (Juror Nos. 11, 42, 76 and 89; see AOB 240-243). Respondent has addressed those four challenges in his brief. Appellant does not concede that the record demonstrates the prosecutor's peremptory challenges were justified against all but four Black women of the nine Black prospective jurors identified below in appellant's *Wheeler/Batson* motion. (See RB 94.) Appellant will address additional Black prospective jurors for whom a peremptory challenge by the prosecutor was not justified under *Wheeler/Batson* in a supplemental opening brief to be filed with this Court.

[22] Respondent correctly acknowledges that a motion made pursuant to *People v. Wheeler*, *supra*, 22 Cal.3d 258, preserves a claim under *Batson v. Kentucky*, *supra*, 476 U.S. 79. (RB 92.)

prima facie case of group bias by the request for the prosecutor to give his reasons for removing Black prospective jurors. (RB 92-93.) Because the prosecutor offered his reasons for removing each of the nine Black prospective jurors who were seated, plus one Black prospective alternate juror, the question of whether appellant has established a prima facie case is moot.[23] This Court should simply address whether the prosecutor's reasons were race and/or gender-neutral and whether appellant has established purposeful discrimination. (See, *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-98; *Hernandez v. New York* (1991) 500 U.S. 352, 359 [preliminary issues of whether the defendant has made a prima facie case showing become moot once the prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination]; *Holloway v. Horn* (3rd Cir. 2004) 355 F.3d 707, 723-724; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-282.) As will be discussed in detail below, a review of the prosecutor's remarks in light of the entire record shows purposeful discrimination and requires reversal of the death judgment.

Appellant is aware that in *People v. Farnam* (2002) 28 Cal.4th 107, 133, and more recently in *People v. Boyette* (2002) 29 Cal.4th 381, 422-423, this Court denied *Wheeler/Batson* claims based on the defendant's

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[23] As will be discussed further, *infra*, defense counsel initially made the *Wheeler/Batson* motion after the prosecutor had excused five Black women from the jury box. (RT 4321-4322.) Defense counsel broadened the motion to include subsequent challenges by the prosecutor to four Black men. (RT 4371.) After the prosecutor stated his reasons for removing the nine Black prospective jurors, defense counsel renewed the *Wheeler/Batson* motion based on the prosecutor's challenge to a Black prospective alternate juror. (RT 4496.)

failure to make a prima facie showing despite the proffer of explanations by the prosecutor for peremptory challenges of prospective minority jurors. Appellant, however, urges this Court to reconsider this issue in light of the dissent in *Boyette* by Associate Justice Kennard and based on authorities from both federal and other state jurisdictions cited in that dissent. (See *id.* at pp. 468-472 (dis. opn. of Kennard, J.).)

In *Boyette*, Justice Kennard noted the "overwhelming weight of authority in other jurisdictions" on this issue. (*Id.*, at p. 469 (dis. opn. of Kennard, J.), citing *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1104; *United States v. Sneed* (10th Cir. 1994) 34 F.3d 1570, 1579-1580; *Smith v. State* (Ala.Crim.App. 2000) 797 So.2d 503, 522; *People v. Davis* (Colo.Ct.App.1996) 935 P.2d 79, 82; *People v. Martinez* (1998) 696 N.E.2d 771, 775-776; *Koo v. State* (Ind.Ct.App. 1994) 640 N.E.2d 95, 99; *State v. Durham* (La.Ct.App. 1996) 673 So.2d 1103, 1111; *Manning v. State* (Miss. 1998) 726 So.2d 1152, 1182-1183; *State v. White* (Mo.Ct.App. 1992) 835 S.W.2d 942, 950; *People v. Dalhouse* (1997) 658 N.Y.S.2d 408, 410; *State v. Williams* (2002) 565 S.E.2d 609, 638-639; *Neill v. State* (Okla.Crim.App.1994) 896 P.2d 537, 546, fn. 4; *State v. Ruiz-Martinez* (2001) 21 P.3d 147, 148; *Malone v. State* (Tex.Crim.App. 1996) 919 S.W.2d 410, 412.) The fact that the trial court stated appellant had not made a prima facie case and denied the *Wheeler* motion after the prosecutor gave his explanations as to each challenged prospective juror (RT 4497-4498), shows that the court in fact considered the reasons offered in making a final ruling on the matter. Accordingly, there was no need to assess whether appellant established a prima facie case, and this Court should assess whether the prosecution has provided race and/or gender-neutral and genuine reasons for his challenges of Black prospective jurors. (See

Hernandez v. New York, *supra*, 500 U.S. at p. 359.)

B. The Record Demonstrates A Prima Facie Case of Systematic Exclusion

Assuming this Court reviews the trial court's finding that appellant did not make a prima facie showing, it should determine that finding was erroneous. Under *Batson v. Kentucky*, *supra*, 476 U.S. 79, a prima facie case is established by showing that: (1) the defendant is a member of a cognizable group; (2) the prosecution has removed members of such a group; and (3) circumstances raise an "inference" that the challenges were motivated by race. (*Id.*, 476 U.S. at p. 96.) The burden then shifts to the prosecutor to articulate a race-neutral basis for the peremptory challenges. (*Id.* at p. 97.) Finally, the trial court must determine, in light of the prima facie case and the prosecutor's explanation, whether the defendant has proven purposeful discrimination. (*Id.* at p.98; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077; *Wade v. Terhune* (2000) 202 F.3d 1190, 1195.) The test for the racially discriminatory exercise of peremptory challenges is substantially the same under *Batson v. Kentucky*, *supra*, 476 U.S. 79 and *People v. Wheeler*, *supra*, 22 Cal.3d 258. (*People v. Alvarez* (1996) 14 Cal.4th 155, 193.)

Contrary to respondent's allegation, the record shows appellant has met his burden of establishing a prima facie case of group bias. Respondent is mistaken in alleging that no prima facie case may be found because the objections stated by defense counsel were inadequate. (RB 94.) Review of the record shows that the objections by defense counsel and the circumstances of the prosecutor's challenges against the minority jurors at issue substantiate an inference of group bias. (See, *Fernandez v. Roe*, *supra*, 286 F.3d 1073,1079-1080.)

Respondent claims that "appellant failed to meet his burden of establishing a prima facie case of group bias by arguing only that some Black prospective jurors had been the subject of peremptory challenges, that some of the excused jurors may have favored the prosecution and that only three Blacks were ultimately impaneled on the jury." (RB 94.) This claim ignores the fact that the circumstances of the prosecutor's challenges, including defense counsel's arguments and the prosecutor's responses, show that there was a inference of bias so as to require reasons from the prosecutor for the peremptory challenges. The cases cited by respondent on this point are distinguishable from the instant case and are not dispositive.[24]

As was noted by the trial court and the parties below, when appellant first made the *Wheeler/Batson* motion, the prosecutor had exercised five out of his 12 peremptory challenges against Black women. Defense counsel argued that a prima facie showing of group bias had been established because the prosecutor had challenged all of the Black women who had been thus far seated in the jury box. Defense counsel noted that there may

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[24] *People v. Farnum*, *supra*, 28 Cal.4th at pp. 135-136 [defendant only asserted that the prosecutor had exercised four of his five peremptory challenges against Black jurors, six of the eleven remaining jurors in the box were Black; defendant was White and not a member of the cognizable class excluded]; *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189 [only basis for establishing a prima facie case cited by defense counsel was that the prospective jurors, like defendant, were Black; it was questionable whether one of the challenged jurors was Black]; *People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 15 [defendant merely indicated the number and order of minority excusals and compared the number of such excusals against the representation of minority groups in the venire]; *People v. Turner* (1994) 8 Cal.4th 137, 167 [defense counsel only stated that the excused jurors were Black, that they could be fair and impartial or responses given were appropriate; five Blacks on the jury and one Black juror excused by the defense but would have been retained by the prosecutor].)

have been a basis as to some of the Black women challenged, but that as to the others it appeared that the challenges were based on group bias. In response to defense counsel's assertion that a prima facie case had been made, the prosecutor recited for the record each of his 12 peremptory challenges, which confirmed that he had struck all five Black women prospective jurors who had been seated. (RT 4321-4322.)[25] After the

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[25] As to the defense counsel's initial *Wheeler/Batson* motion regarding the prosecutor's peremptory strikes against all Black jurors seated in the jury box, the following colloquy occurred:

> "The Court: We are at side bar with counsel.
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> Mr. Klein: I would like to make a motion based on *Wheeler* because the prosecution has challenged all Black females. ¶ There are five challenges that were directed toward Black females. They are the only Black females on the jury. ¶ And some of them there may have been [sic] basis but others it would appear that I would have been the one to challenge them. ¶ So it seems to me that it is – that there is a prima facie showing at this point.
>
> The Court: People wish to be heard?
>
> Mr. Kuriyama: I have not been making challenges. I have not been making challenges based on race. I have reason for every one of them.
>
> The Court: I think the reason is whether or not there has been a prima facie showing made by counsel. ¶ And do you wish to address that issue?
>
> Mr. Kuriyama: In going over the challenges that I have made, first one is a male White. Second one, male White. Third one, female Black. Fourth one, male White. Sixth one, male Hispanic. Seventh one, female Black. Eighth one, female Black. Ninth one, female White. Tenth one, male White. Eleventh one, female Black. And twelfth one, female Black.

(continued...)

prosecutor removed three more Black prospective jurors, each of whom was a man, appellant expanded appellant's *Wheeler/Batson* motion to cover not only the five Black women previously struck by the prosecutor, but also the four Black men who had been similarly challenged. (RT 4371.)[26]

The record establishes that the person or persons excluded were members of a cognizable group. Black persons undeniably constitute a cognizable group for purposes of *Wheeler* and *Batson* (*People v. Howard* (1992) 1 Cal.4th 1132, 1154). Appellant is a Black man and was a member of the cognizable group excluded. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 115 [defendant may support a prima facie showing of group bias by showing that he himself is a member of the excluded group].)[27] Moreover, "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the

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[25] (...continued)

> The Court: Anything else on the issue? ¶ Your motion will be taken under submission. We will discuss it after we take our break."

(RT 4321-4322.)

[26] Black prospective Juror No. 10, who had been removed during the prosecutor's first 12 peremptory strikes was one of the "four Black men" against whom the prosecutor exercised peremptory challenges. (RT 4322, 4390.)

[27] Appellant's initial *Wheeler/Batson* motion relied on the prosecutor's exclusion of all *Black women* prospective jurors seated in the jury box. At the time appellant made his motion, the prosecutor had excused all but one of the women prospective jurors who had been seated. Appellant's second motion was an objection to the exclusion of five Black jurors as well as five women jurors. (See RT 4321.)

person happens to be a woman or happens to be a man. As with race, the 'core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . , would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender].'" (*J.E.B. v. Alabama* (1994) 511 U.S. 127, 146, quoting *Batson v. Kentucky*, *supra*, 476 U.S., at pp. 97-98.)

The circumstances of the prosecutor's challenges "raise an inference" of exclusion based on race. As noted above, the record shows that when the *Wheeler/Batson* motion was first made, the prosecutor had eliminated all five Black women prospective jurors who had made it to the jury box. At the time the fifth Black woman had been challenged, the prosecutor had exercised only 12 of his peremptory strikes. Accordingly, the prosecutor's challenges against the Black women jurors constituted 41% of his peremptory strikes (5 out of 12 peremptory challenges). The record also shows that when appellant later expanded the *Wheeler/Batson* motion to include the four Black male prospective jurors also removed by the prosecution, the prosecutor had used a total of 9 of his 16 (56%) peremptory challenges to strike Black jurors. (RT 4371.) Although there were three Black jurors who ultimately served on appellant's jury (RT 4384), when the trial court made its final determination that no prima facie case had been made the prosecutor had exercised peremptory challenges against 10 of the 13 total Black persons (76%) in the venire.[28]

The "pattern of exclusion of minority venire persons provides

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[28] Appellant renewed the *Wheeler/Batson* motion in light of the prosecutor's subsequent and last peremptory challenge to the one remaining Black person in the venire – prospective alternate Juror No. 162. (RT 4496.)

support for an inference of discrimination" (*Turner v. Marshall* (9th Cir.1995) 63 F.3d 807, 812 [prima facie case where the prosecution exercised peremptory challenges to exclude five out of a possible nine (56%)] Black jurors], overruled on other grounds by *Tolbert v. Page* (9th Cir.1999) 182 F.3d 677 (en banc)), and the statistical disparities in this case support a prima facie case (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 342 ["statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors;" prosecutor used 10 of 14 peremptory challenges against Black jurors and one Black juror served on jury]; *Hernandez v. New York*, *supra*, 500 U.S. at p. 362 [demonstration of "disparate impact should be given appropriate weight whether the prosecutor has acted with forbidden intent"]; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083 [prosecutor's exercise of five of six peremptory challenges against Black prospective jurors constituted prima facie showing even though the prosecutor did not attempt to remove all Black jurors and one Black was ultimately seated]; *Fernandez v. Roe*, *supra*, 286 F.3d at pp. 1077-1080 [inference of discrimination found where prosecutor struck four out of seven (57%) Hispanics; in light of peremptory challenges made against Hispanics, prosecutor's subsequent strikes against the only two Black venirepersons support an inference of racial discrimination]; *United States v. Bishop* (9th Cir.1992) 959 F.2d 820, 822 [two of four (50%) Black jurors stricken]; *United States v. Chalan* (10th Cir. 1987) 812 F.2d 1302, 1313-1314 [removal of *only* minority juror constitutes a prima facie case of discrimination];[29] accord, *United States v. Roan Eagle*

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[29] In *Chalan*, the Court of Appeals explained that "[i]f all the jurors of defendant's race are excluded from the jury . . . there is a substantial risk (continued...)

(8th Cir. 1989) 867 F.2d 436, 441; *United States v. Iron Moccasin* (8th Cir. 1989) 878 F.2d 226, 229; *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1085-1087 [government's use of five of its six allowable peremptory challenges to strike five of the seven Black jurors from the panel sufficient to establish a prima facie case]; see also, *People v. Allen* (2004) 115 Cal.App.4th 542 , 546 [prima facie case where prosecutor exercised third and sixth peremptory challenges against the only two Black prospective jurors seated in the jury box]; *Holley v. J.S. Sweeping Co.* (1983) 143 Cal.App.3d 588, 590 [prima facie case where three of six peremptory challenges were used by respondents to remove three out of four Black jurors]; *People v. Fuller* (1982) 136 Cal.App.3d 403 [prima facie case had been established where prosecutor had used three of his eight peremptory challenges to remove Black prospective jurors].)

Further, like the Black jurors excused by the prosecutor in *People v. Turner*, *supra*, 42 Cal.3d at p. 719, the excluded Black prospective jurors in this case "apparently only had their race in common." Besides the division of gender, all nine challenged prospective jurors differed in other respects:

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[29] (...continued)
that the Government excluded the jurors because of their race."

they were of different ages,[30] they had different occupations,[31] they resided in different areas of the county,[32] the length of time at their city of residence varied,[33] and they each had a different number of children.[34] Moreover, at

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[30] At the time of trial juror 11 was 35 years old (SUPP CT II 3179); juror No. 42 was 33 years old (SUPP CT II 3349); Juror No. 76 was 54 years old (SUPP CT II 3519); Juror No. 89 was 31 years old (SUPP CT II 3625); Juror No. 143 was 47 years old (SUPP CT II 3925); Juror No. 145 was 52 years old (SUPP CT II 3951); Juror No. 154 was 64 years old (SUPP CT II 4016); Juror No. 162 was 43 years old (SUPP CT II 4068); Juror No. 184 was 37 years old (SUPP CT II 4172); Juror No. 196 was 56 years old (SUPP CT II 4224)

[31] Juror No. 11 was an insurance agent (SUPP CT II 3179); Juror No. 42 was an assistant manager at Walden Books (SUPP CT II 3349); Juror No. 76 was a management secretary for Los Angeles County Department of Beaches and Harbors (SUPP CT II 3519); Juror No. 89 was an office technician for the California Department of Fish and Game (SUPP CT II 3625); Juror No. 143 was a medical center safety director (SUPP CT II 3925); Juror No. 145 was a pharmacy technical (SUPP CT II 3951); Juror No. 154 was a retired repair man for the Department of Water and Power (SUPP CT II 4016); Juror No. 162 was a public health nurse (SUPP CT II 4068); Juror No. 184 was a computer programer for the County of Los Angeles (SUPP CT II 4172); Juror No. 196 was a retired assistant payroll manager for the Department of Water and Power (SUPP CT II 4224).

[32] Juror No. 11 resided in South Central Los Angeles (SUPP CT II 3179); Juror No. 42 resided in Hawthorne (SUPP CT II 3349); Juror No. 76 resided in Lynwood (SUPP CT II 3519); Juror No. 89 resided in Culver City (SUPP CT II 3625); Juror No. 143 resided Altadena (SUPP CT II 3925); Juror No. 145 resided in South Central Los Angeles (SUPP CT II 3951); Juror No. 154 resided in Compton (SUPP CT II 4016); Juror No. 162 resided in Compton (SUPP CT II 4068); Juror No. 184 resided in Bellflower (SUPP CT II 4172); Juror No. 196 resided in Altadena (SUPP CT II 4224).

[33] Juror No. 11 had lived in her city of residence for 5 years (SUPP CT II 3179); Juror No. 42 had lived in her city of residence for 11 ½

(continued...)

least one of the excluded jurors, No. 89, had a background that appeared strongly pro-prosecution in every respect except for her race. (See *People v. Williams* (1997) 16 Cal.4th 635, 663-664 [experiences or contacts that normally would be considered favorable to the prosecution demonstrate "a strong likelihood that they were challenged because of their group association"].)[35] The foregoing factors and the trial court's "finding" clearly add up to a prima facie case of group discrimination against these

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[33] (...continued)
months (SUPP CT II 3349); Juror No. 76 had lived in her city of residence for18 years (SUPP CT II 3519); Juror No. 89 had lived in her city of residence for 7 months (SUPP CT II 3625); Juror No. 143 lived in his city of residence for 15 years (SUPP CT II 3925); Juror No. 145 lived in his city of residence for 18 years (SUPP CT II 3951); Juror No. 154 lived in his city of residence for 40 years (SUPP CT II 4016); Juror No. 162 lived in her city of residence for 40 years (SUPP CT II 4068); Juror No. 184 had lived in his city of residence for 4 years (SUPP CT II 4172); Juror No. 196 had lived in her city of residence for 35 years (SUPP CT II 4224).

[34] Juror No. 11 had a 17 year old son, a five year old daughter and a 13 year old stepson (SUPP CT II 3179); Juror No. 42 had no children (SUPP CT II 3349); Juror No. 76 had a 31 year old daughter and a 25 year old son (SUPP CT II 3519); Juror No. 89 had a six year old son and four year old nephew; Juror No. 143 had a 27 year old son and a 20 year old daughter (SUPP CT II 3925); Juror No. 145 had no children (SUPP CT II 3951); Juror No. 154 had two daughters, ages 32 and 24 (SUPP CT II 4016); Juror No. 162 had no children (SUPP CT II 4068); Juror No. 184 had no children (SUPP CT II 4172); Juror No. 196 had two sons, ages 37 and 36 and two daughters, ages 34 and 32 (SUPP CT II 4224).

[35] Juror No. 89 had worked previously for the California Department of Corrections; her partner was a Parole Agent/peace officer with the California Department of Corrections; she not only supported the death penalty but believed that because "Californians (society) have decided that we must take a stand and determine that death must be the penalty that comes with certain crimes." (SUPP CT II 3627, 3633; RT 4125-4131.)

otherwise "largely heterogeneous" jurors. (See, *People v. Turner*, *supra*, 42 Cal.3d at p. 719, *People v. Motton* (1985) 39 Cal.3d 595, 607, fn. 3 ["the Black jurors struck by the prosecution come from a variety of backgrounds, with varied family and employment histories"].)

C. The Prosecution Did Not Sustain Its Burden of Justification

With regard to its contention that the prosecutor's reasons for challenging the Black prospective jurors were race and/or gender-neutral, respondent completely fails to advance the proper analysis as it merely repeats the remarks made by the prosecutor at trial and suggests that this Court defer to the trial court's finding. (See RB at 96-99.) Respondent does not rebut appellant's argument that: (1) the prosecutor's stated reasons failed to comport with the jurors' actual remarks during voir dire, or (2) the prosecutor's justifications were insufficient as a matter of law. Respondent also fails to adequately rebut appellant's argument that the prosecutor allowed to remain on the jury non-Black jurors with backgrounds and who had provided responses similar to the Black jurors he excused. Contrary to respondent's contention, comparative analysis of the backgrounds and responses of the seated jurors against that of minority jurors the prosecutor removed by peremptory challenge may be conducted for the first time on appeal to determine whether the proffered reasons for the challenges were pre-textual. (*Miller-El v. Dreke* (2005) ___ U.S. ___ [125 S.Ct. 2317, 2326, fn. 2].)

1. Juror No. 11

Respondent contends that the bases alleged by the prosecutor for challenging prospective Juror No. 11, that she "had visited an ex-boyfriend in jail, had a sister who was arrested for a theft offense, had an ex-sister in-

law who served time in prison, who also felt defense lawyers had done a better job in the high-profile *Menendez* case, who also felt that the Los Angeles Police Department needed to do a better job handling evidence and that some police treated African-Americans differently" (RT 4488-4489), were valid grounds for demonstrating potential bias. (RB 96.)

In so alleging, respondent takes Juror No. 11's questionnaire responses out of their proper context and basically ignores the substance of them as a whole. Respondent also completely ignores the voir dire comments Juror No. 11 provided which not only clarified responses she had given in the questionnaire, but also demonstrated that the prosecutor's reasons for excusing her were invalid and pre-textual. Review of Juror No. 11's questionnaire responses and her voir dire show that not only were the prosecutor's reasons unjustified, but also that, if anything, she was a juror who would more likely favor the prosecution.

Although Juror No. 11 had relatives and a close friend who had some prior contact with law enforcement, not one of those contacts would have given rise to any bias against the prosecution or police such that she was properly removed because of it. Any contention that Juror No. 11 would likely be unsympathetic to the prosecution or to the police because of any "negative" law enforcement contacts which those close to her had suffered is simply unsubstantiated and contradicted by the record.

The record shows that Juror No. 11 had visited an ex-boyfriend in the downtown jail after his arrest. Juror No. 11 made clear, however, the arrest had been for joyriding, that the police had simply released him, and that the arrest had occurred 15-16 years previously. (RT 4006-4007.) Similarly, the shoplifting incident involving Juror No. 11's sister occurred 23 years prior to the instant trial proceedings, when her sister was about 10

years old. (RT 4008.) Finally, Juror No. 11 denied knowing anything about the nature or circumstances of the offense for which her sister-in-law had been convicted; that the offense, conviction and prison time occurred before they had become related by marriage; and that she had no opinion about whether any part of the legal system regarding that incident had been unfair. (RT 4008, SUPP CT II 3182.)[36]

Any contention that Juror No. 11 was biased against, or would be unsympathetic to, the prosecution or the police because of the experiences of her relatives and friend is belied by her own contacts with law enforcement. Juror No. 11 herself had been the victim of crimes, at least one of which was violent: her purse had been snatched and her car had been stolen. (RT 4008-4010, SUPP CT II 3182.) In both instances, Juror No. 11 contacted the police or other law enforcement. In addition, Juror No. 11's husband had a cousin who was an officer with the Los Angeles Police Department. (RT 4005; SUPP CT II 3181.)

Even assuming her contact with law enforcement demonstrated a bias against the prosecution or the police, Juror No. 11 was not the only one who had such a background. The record shows that a non-Black woman juror who the prosecutor left on the jury as an alternate had also been the victim of a crime. (Juror No. 171, SUPP CT II 4110.)

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[36] *People v. Arias*, *supra*, 13 Cal.4th 92 does not support respondent's contention that the peremptory challenge against Juror No. 11 was valid due to the law enforcement contacts sustained by her relatives and friend. In *Arias*, the juror at issue had a daughter with a pending criminal case which was being prosecuted by the same prosecutor's office, the juror had been admonished against discussing her daughter's case by the public defender representing her daughter, and the juror testified for her daughter against the prosecution. (*Id.*, at pp. 137-138.)

Respondent also ignores the nature and extent of Juror No. 11's responses to the questionnaire inquiries about the *Simpson* and *Menendez* cases. The questionnaire asked jurors whether they had any opinions about law enforcement agencies or defense attorneys based on any current publicity including that regarding the *Simpson* case. (Question No. 35, see e.g, SUPP CT II 3184.) The response given by Juror No. 11 was simply: "Just better handling of the evidence." (Question No. 35, SUPP CT II 3184.) Without any qualification as to what she meant by this statement, it is impossible to tell whether Juror No. 11 was merely stating an opinion based on facts highlighted in the media accounts of the *Simpson* case, or whether the statement was actually indicative of a general bias against law enforcement or the Los Angeles Police Department and/or its crime lab.

Similarly, Juror No. 11's response about the "better" performance of defense attorneys versus the prosecutors in the *Menendez* case does not support specific bias against the prosecution in general. Without qualification about what she meant by this response, it is impossible to tell whether Juror No. 11 was merely stating an observation based on the specific facts of the *Menendez* case, or whether or not she harbored a negative opinion about prosecutors in general or even the Los Angeles Co. District Attorney's Office. That Juror No. 11 was in fact not biased against prosecutors in general is evidenced by the response she gave with regard to the *Simpson* case where she made it clear that "[b]oth prosecutors and defense attorneys did an excellent job in presenting their case." (SUPP CT II 3184.)

Finally, respondent takes Juror No. 11's response to Question No. 39 that some Los Angeles Police Department officers treat African-Americans differently out of context, and ignores other responses she provided which

were related to questions concerning situations where there were racial differences between a defendant and investigating officers. Review of Juror No. 11's actual response to Question No. 39 of the questionnaire shows that she not only stated that "some not all" LAPD officers treated African-Americans differently, but also that she made clear that the African-Americans who were treated differently were "those who look like they may belong to some sort of gang." (SUPP CT II 3184.)[37] That Juror No. 11 was in fact not biased against the prosecution because of the racial difference between an African American defendant and Caucasian investigating officers, is evidenced by her response to Question 40A that she could not side with either the defendant or the prosecution without first hearing or seeing the evidence as well as her response to Question 40B that any evaluation of the case would be on the evidence presented and "not the color of skin." (SUPP CT II 3184-3185.)[38]

Even assuming Juror No. 11's response to Question 39 that some

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[37] Question No. 39 asked: "Do you think LAPD officers treat African Americans differently from Caucasians? If so, how? (Please explain)" The response given by Juror No. 11 was: "Some not all. Those who look like they may belong to a gang." (SUPP CT II 3184.)

[38] Question No. 40 stated: "In this case the Defendant is African American. The Victim was a female Caucasian Secret Service Agent. The investigating Officer is a Caucasian detective from the Los Angeles Police Depart, Robbery Homicide Division." (SUPP CT II 3184.) Part A asked: "Do you believe you will be tempted to side with either the prosecution or the defense based on these factors? Why?" The response given to Part A by Juror No. 11 was: "I cannot side with either until I hear the evidence or see the evidence." (SUPP CT II 3185.) Part B asked: "Do you feel you would evaluate the case in the same manner if the Defendant was Caucasian and the Victim and Investigating Officer were African American? Why?" The response given to Part B by Juror No. 11 was: "Yes, I need to review the evidence *not the color of skin*." (SUPP CT II 3185, emphasis added.)

Los Angeles Police officers treat African-Americans differently demonstrates that she would be biased against the LAPD, other law enforcement or the prosecution, a non-Black woman juror who was seated provided a similar response. (Juror No. 187, SUPP CT II 4268.)

As is demonstrated above, review of the voir dire and questionnaire responses by Juror No. 11 show that she was more likely to favor the prosecution. In addition, her views on the death penalty support this proposition. As to her general feelings about the death penalty, Juror No. 11 responded: "If that person committed the crimes of Murder of another Human Being why should his/her life be saved." (SUPP CT II 3187.) Besides her belief that the death penalty is too seldomly used (SUPP CT II 3187), Juror No. 11 saw the purpose of the death penalty as "Ceasing and/or Eliminating the party of took the life of another party." (SUPP CT II 3188).

Without addressing the genuineness of the reasons proffered for removing Juror No. 11, respondent alleges that this Court should not compare Juror No. 11's responses with other jurors by engaging in comparative juror analysis for the first time on appeal. (RB 96-97.) In its assessment whether the prosecutor's reasons for removing Black jurors in this case were genuine and not impermissibly pre-textural, this Court may engage in comparative juror analysis despite the fact that such analysis was not made below. (*Miller-El v. Dreke*, *supra*, ___ U.S. ___ [125 S.Ct. at p. 2326, fn.2].)

In *Miller-El,* comparisons of black and non-black prospective jurors, as well as defendant's arguments of the prosecutor's disparate questioning of jurors based on race, had been not raised in the trial court. Nonetheless, the United States Supreme Court conducted its own comparative juror analysis based on the entire record before the state court, including the

totality of the voir dire. (*Miller-El v. Dretke*, *supra*, ___ U.S. ___ [125 S.Ct. at pp. 2326, fn. 2; 2329, 2332].) In its use of comparative juror analysis to determine that the prosecutor's reasons for challenging two black jurors were pre-textural, the Supreme Court noted:

> "More powerful than these bare statistics [relating to the numbers describing the prosecutor's use of peremptory challenges against black jurors], however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step."

(*Miller-El v. Dretke*, *supra*, ___ U.S. ___ [125 S.Ct. at p. 2325].)

2. Juror No. 42

Respondent next incorrectly alleges that the grounds articulated by the prosecutor for removing Juror No. 42, that in the *Simpson* trial there had been reasonable doubt and prosecution had not proved its case, the Los Angeles Police Department "need to clean up the crime lab," the Los Angeles Police Department treats minorities differently than Caucasians, and that she could impose the death penalty only "if there was no doubt" (RT 4489), were valid grounds for a challenge based on implied bias. (RB 97.)

As with Juror No. 11, respondent's assertion takes the questionnaire responses by Juror No. 42 out of context, and ignores responses provided which were relevant to any bias she may have had against the prosecution or the Los Angeles Police Department. Respondent also ignores comments Juror No. 42 made during voir dire which were relevant to the prosecutor's stated reasons for exercising a peremptory challenge against her, and which

demonstrated that she did not harbor bias for which she could be properly excused.

The fact that Juror No. 42 was of the opinion that the prosecution had not proved its case in the *Simpson* matter, or had an opinion *based* on the *Simpson* case that law enforcement needed to clean up the crime lab, does not indicate specific bias against either prosecutors in general or the Los Angeles Police Department. That Juror No. 42 was in fact *sympathetic* to the prosecution or the police with regard to the criminal justice system is evidenced by her response to Question No. 32 in the questionnaire where she stated her belief that the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes "[b]ecause they are not allowed to bring up other instances of the same nature of the accused [sic] background for a similar crime. (SUPP CT II 3353.)

The genuineness of the prosecutor's reason for challenging Juror No. 42 which was based on her response that the prosecution had not met their burden of proof in the *Simpson* trial, is called into question by the similar response given by Juror No. 107, who served as an alternate, on this issue. (SUPP CT II 3708.)

Even though Juror No. 42 expressed a belief that Los Angeles Police Department officers treat African Americans differently than Caucasians, she qualified her belief by explaining that she has seen officers stop African Americans who were sitting on curbs but has not seen officers stop Caucasian kids. (SUPP CT II 3354.)[39] Notwithstanding Juror No. 42's

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[39] With regard to Question No. 39 about whether Los Angeles Police officers treated African Americans differently than Caucasians, Juror No. 42's response was: "Yes. I have seen people sitting on curbs when stopped (continued...)

belief about unequal treatment of African Americans by Los Angeles Police officers in this regard, she made clear in her earlier responses that she had never had a pleasant/unpleasant experience with police officials (Question No. 36, SUPP CT II 3354) and that she would not believe/disbelieve the testimony of a law enforcement officer simply because he/she is a law enforcement officer (Question No. 37, SUPP CT II 3354). With regard to the racial disparity in this case, where the defendant is African American and the Los Angeles Police Officer and victim are Caucasian, Juror No. 42 stated that she would not be tempted to side with either the prosecution or the defense, and qualified her response that her decision in this case would be based on the evidence. (Question No. 40A, SUPP CT II 3355.) Furthermore, Juror No. 42 stated she would evaluate the case in the same way if the defendant was Caucasian and the victim and investigating officer were African American. In so doing Juror No. 42 wrote: "The crime was committed [sic] it doesn't matter what color you are." (Question 40B, SUPP CT II 3355.)

That the reason for exercising a peremptory challenge against Juror No. 42 because she was of the opinion that LAPD treated Blacks differently was pre-textural is shown by the fact that the prosecutor permitted a non-black woman juror to remain on the jury who said the same thing. (Juror No. 187, SUPP CT II 4268.)

Respondent's contention that Juror No. 42 was biased against the prosecution because she would impose the death penalty only "if there was no doubt" is also without merit. Any suggestion that her response to

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[39] (...continued)
by officers. I have never seen any Caucasian kids sitting on a curb when stopped by police." (SUPP CT II 3354.)

Question 54 of the questionnaire was indicative of a reluctance to impose the death penalty is belied by her clear favor of it and stated willingness to impose it if appropriate. Review of Juror No. 42's responses to related questions in the questionnaire show that not only did she favor the death penalty for someone who is found guilty, but that the death penalty is imposed "too seldom" and that she believed if it was "used more our state would not be as crime ridden [sic] as it is now." (Question Nos. 48, 50, 53; SUPP CT II 3357.) Moreover, during voir dire Juror No. 42 confirmed her support for the death penalty (RT 4208), and made it clear that if the aggravating factors outweighed the mitigating factors, and she felt death was appropriate, she would impose the death penalty (RT 4210).

3. Juror No. 76

The reasons the prosecutor articulated as the basis of his challenge for Juror No. 76 were that she had been in court for a bankruptcy, she had visited friends and relatives in prison, her brother was in prison for robbery and kidnaping, her nephews had been imprisoned for drug possession and that she did not want to be a juror in this case. (RT 4491-4492.) Respondent's claim that those reasons were race and/or gender-neutral is erroneous. (RB 97-98.)

The record does not support the determination that Juror No. 76 was biased against the prosecution or sympathetic towards the defense because she had been in court for a bankruptcy. Neither her responses to the questionnaire nor her voir dire explain just what Juror No. 76's involvement was in a bankruptcy matter or why she had been in that court. (SUPP CT II 3521, RT 4086-4100.) Without details about the circumstances of her presence in bankruptcy court, any implied bias on her part because of it is pure conjecture. On this record, it was just as likely

that Juror No. 76 had been in bankruptcy court because she was a creditor as it was because she had filed a personal bankruptcy action. Assuming the prosecution intended to put on evidence that appellant had filed for bankruptcy, there is nothing on the record to show that Juror No. 76 would have been biased in his favor or sympathetic towards him because of it.

Respondent's claim that Juror No. 76 was biased against the prosecution because she had relatives who had been arrested and/or found guilty of criminal offenses ignores the record which substantiates otherwise.

The record shows that Juror No.76 had previously been employed by the Phoenix Police Department (Question No. 14, SUPP CT II 3520), and that she also had numerous friends and co-workers who were employed by various law enforcement agencies (Question No. 20, SUPP CT II 3520-3521; RT 4091-4094). Moreover, a close friend had been the victim of rape in which a knife had been used and Juror No. 76 had been a witness in the prosecution of that incident which resulted in a conviction. (Question Nos. 22 and 25, SUPP CT II 3521-3522; RT 4094, 4096.) With regard to the criminal matters involving her relatives, Juror No. 76 stated that she felt the outcomes of their cases had been fair. (Question No. 24A, SUPP CT II 3522.) She also indicated that she did not feel that any part of the legal system with regard to those cases, including the police, courts, prosecutors or defense, had been unfair. (Question No. 24H, SUPP CT II 3522.)[40] When the trial court specifically questioned Juror No. 76 about whether her feelings about her relatives or her close friend would influence a verdict in the instant matter, she was clear that because of her ability to "see the law

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[40] As with Juror No. 11, *People v. Arias*, *supra*, 13 Cal.4th at p. 138, is not dispositive with regard to this juror and the fact that her relatives had trouble with the law. See fn [reference to Arias***, *supra*.

from both sides,"she would be able to make a determination based only on the evidence presented and the applicable law. (RT 4095-4096.)[41]

Juror No. 76's response that she did not want to be a juror in this case if given the choice because "it is a very serious business to make decisions on life or death" (Question No. 65, SUPP CT II 3529) does not demonstrate that she was a "death penalty skeptic" or that there was potential bias on her part because of it. (RB 98.) When an inquiry was made about her response to Question No. 65, Juror No. 76 unequivocally informed the trial court that she was willing to undertake the task of serving

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[41] The exchange between the trial court and Juror No. 76 in this regard is as follows:

> "The Court: Anything about any of those cases, the one where you were the witness or the one involving your brother or the nephews that makes you think that you will use those cases at all in guiding you to a verdict here?
>
> Prospective Juror No. 76: It just makes one stop and think but not influencing.
>
> The Court: How so when you say stop and think?
>
> Prospective Juror No. 76: Because I have been able to see the law from both sides and also see people close to me who have been involved in close shaves as well as – so I know that these things do occur. They're real and that no matter how we might feel about somebody or how close they are to us that crimes are committed.
>
> The Court: Do you think you can confine yourself in this case to that which the law allows you access, that is, the facts as brought forth by the evidence and the witnesses and the law that applies to the case?
>
> Prospective Juror No. 76: Yes, sir, I do."

(RT 4095-4096.)

in this case in spite of its serious nature. (RT 4100).[42] In addition, her responses in the questionnaire show that she was in favor of the death penalty. Some of the responses she gave regarding her feelings on the death penalty were that "it is not the worst way to die for a crime committed," it was used "about right," it was a deterrent to the crime rate in California, and that she could impose it after hearing all the evidence if appropriate. (Question Nos. 48, 51, 53, 54, 56; SUPP CT II 3527-3528.)

The prosecutor's reason for exercising a challenge against Juror No. 76 – that she "did not want to be a juror if given the choice" – was apparently pre-textural. A non-Black woman juror who gave the same or similar response was permitted to remain on the jury. (Juror No. 187, SUPP CT II 4273.)

No. 89

Respondent also erroneously contends that the prosecutor's reasons for removing Juror No. 89 were valid. (RB 98.) The prosecutor's reasons for removing Juror No. 89 were that she believed O.J. Simpson had not been proved guilty beyond a reasonable doubt, that some Los Angeles Police Officers treat African Americans as "lesser human beings," that "it is

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[42] Concerning Question No. 65, and the trial court's inquiry regarding it, the following voir dire discussion occurred:

> "The Court: All right. The last one. No. 65. You were asked 'All thing considered, would you rather be in the juror on the case or not.' 'No. I think it is a serious business to make decisions concerning life and death.' ¶ And I don't disagree that it is serious to both sides. Nonetheless, are you willing to undertake that task with us?
>
> Prospective Juror No. 76: Yes. I think the question basically asks did you – would you want to do this so I think I understand that. Yes, I believe I could do it."

(RT 4100.)

a big job to determine if someone should be put to death," that the types of killers who should receive the death penalty are killers of children and that her step-sister had been employed by prominent defense attorney Johnnie Cochran. (RT 4489.)

As with Juror No. 11, the fact that Juror No. 89 believed Simpson had not been proven guilty beyond a reasonable doubt does not substantiate bias for which a peremptory challenge was properly exercised. Without anything more, this belief merely stated what the jury found to be true in the *Simpson* case. Even if her opinion regarding the *Simpson* case were to be construed to as being based on race and bias in favor of Black persons, the responses Juror No. 89 provided to the race-related questions in the questionnaire show otherwise. In response to Question No. 40A, which asked if she would tend to favor either the prosecution or the defense in a situation where the defendant was African American and the victim as well as investigating officers were Caucasian, Juror No. 42 made clear that based on those factors alone she would not favor either side. (SUPP CT II 3631.)[43] Similarly, when asked if she would evaluate the case in the same manner if the defendant was Caucasian and the victim as well as investigating officer African American, she maintained that she "would still need more facts or evidence other than race or gender." (SUPP CT II 3631.)

Any conclusion that Juror No. 89 was biased against the prosecution or Los Angeles Police Department officers because of the *Simpson* case is controverted by the record. As noted above, her race did not affect her

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[43] Juror No. 89's specific response to Question 40A was: "No. These factors would not be enough to side w/either [sic]." (SUPP CT II 3631.)

opinion about law enforcement. Moreover, review of Juror No. 89's questionnaire responses and voir dire reveal that she was more favorably disposed towards the prosecution and law enforcement. Juror No. 89 had previously worked for the Parole Division of the California Department of Corrections and the boyfriend with whom she lived was a parole agent with the Department of Corrections. (SUPP CT II 3625, 3627, RT 4126-4127.) Respondent's contention that bias against Los Angeles Police Department was demonstrated by Juror No. 89's comment that some Los Angeles Police Officers believe that "African Americans are less than human beings than others" takes the comment out of its proper context and ignores her qualification of it. Question 39A of the questionnaire and Juror 89's entire response to it are as follows:

> "39. Do you think LAPD officers treat African Americans differently from Caucasians? If yes, how? (Please explain.) [Juror No. 89:] Yes, not always though. I believe that there are LAPD officers who believe that African Americans as less as human being [sic] than others. LAPD officers are people w/prejudices [sic], likes and dislikes just like everybody else."

(SUPP CT II 3630.)

Finally, as with Juror No. 11, the prosecutor's reason for exercising a peremptory challenge against Juror No. 89 based on her belief that Simpson had not been proven guilty beyond a reasonable doubt was not genuine. This fact is shown by the prosecutor's failure to challenge a non-Black woman alternate juror who provided almost the same assessment of the Simpson case. (Juror No. 102, SUPP CT II 3708.)

That Juror No. 89 thought "it is a big job to determine that someone should be put to death" (Question No. 48, SUPP CT II 3633) does not establish bias on her part, or a disfavor of the death penalty. Juror No. 89's

comment in this regard was merely stating the obvious and confirming her belief and understanding that a determination to impose the death is not to be taken lightly. Review of the questionnaire responses Juror No. 89 provided reveals that she thought the death penalty was used "about right," that Californians had decided to take a stand and determine that death must be the penalty for certain crimes and that she could impose such penalty if she believed after hearing all the evidence that it was appropriate. (SUPP CT II 3634.)

Respondent's assertion that Juror No. 89 was biased against the prosecution, or not in favor of the death penalty for anything but specific circumstances, because she stated in her questionnaire that murder of children cases are appropriate for the death penalty, is without merit. No where in her responses to the questionnaire or during voir dire did Juror No. 89 make clear that murderers of children were the *only* people deserving of the death penalty. Moreover, Juror No. 89's response to the Question 50, which was about whether a person convicted of killing a law enforcement officer should receive the death penalty, demonstrates that she in fact did not believe that murderers of children were the only persons "qualified" to receive the death penalty.

> "50. Do you think a person convicted of murdering a law enforcement officer should receive the death penalty? [Juror 89:] It would depend on the facts and evidence presented."

(SUPP CT II 3633.)

Even assuming that Juror No. 89's belief that only those who murder children deserve the death penalty reveals that she would not impose death in a case where no child was murdered, the prosecutor permitted a non-black woman juror who felt the same to remain on the jury as an alternate.

(Juror No. 102, SUPP CT II 3708.) Similarly, even assuming that Juror No. 89's "qualification" that it would depend on the facts and evidence whether or not conviction for murder of a law enforcement officer warranted the death penalty is indicative of a bias against the prosecution, non-Black woman jurors were permitted to remain on the jury as alternates who expressed similar thoughts. (Juror No. 102, SUPP CT II 3711; Juror No. 111, SUPP CT II 3776.)

Finally, any claim that Juror No. 89 was biased against the prosecution because her *step*-sister was an attorney and worked for a "famous criminal defense attorney" is unfounded and not a valid justification to remove her from the jury. The record shows that Juror No. 89 and her step-sister were not close, they only saw each other about two times a year, and Juror No. 89's mother had married her step-sister's dad only four years previously. (SUPP CT II 3627, RT 4128.) Based on these facts, it can hardly be said that Juror No. 89 would be influenced by her step-sister or affected by their relationship such that she would be biased towards the defense or against the prosecution.

D. Because the Prosecutor's Reasons for Challenging At Least One Black Juror Was Pre-textual, Reversal Is Required

As appellant has demonstrated, the prosecutor's justifications were insufficient as a matter of law (see *People v. Turner*, *supra*, 42 Cal.3d at p. 721); moreover, in significant respects they did not comport with the jurors' actual remarks during voir dire or the responses given in their questionnaires; and finally, the prosecutor allowed jurors with similar backgrounds to remain challenged (*Miller-El v. Dretke*, *supra*, ___ U.S. ___ [125 S.Ct. at pp. 2325-2332).

While the passing of certain jurors may be an indication of the opposing party's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection, it is not conclusive. (*People v. Snow* (1987) 44 Cal.3d 216, 225.) Moreover, the opposing party's explanation regarding a peremptory challenge must be rejected if it is unsupported by the record (see, e.g., *People v. Turner*, *supra*, 42 Cal.3d at p. 723 [juror allegedly had trouble answering questions – no such trouble appeared in the transcript]), or if it is too vague (*id.*, at p. 725 ["something in her work" described as "so lacking in content as to amount virtually to no explanation"]), or if it is conclusory (*People v. Trevino* (1985) 39 Cal.3d 667, 725), or if like-situated non-Black jurors were not also challenged (*Miller-El v. Dretke*, *supra*, ___ U.S. ___ [125 S.Ct. at pp. 2325-2332]; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1309, 1320 ["A prosecutor's motives may be revealed as pre-textual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge"]; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698-699 [appellate court may overturn the finding of the trial court where a comparison between the answers given by prospective jurors who were challenged and those who were not fatally undermines the prosecutor's credibility]; *Coulter v. Gilmore* (7th Cir. 1998) 155 F.2d 912, 921 ["crucial and determinative inquiry in a Batson claim is whether the state has treated similarly situated venirepersons differently based on race"]).

The exercise of one improper challenge is sufficient to establish a violation. "[U]nder *Batson,* the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some

black jurors." (*United States v. Battle*, (8th Cir. 1987) 836 F.2d 1084, 1085-1086; see also *United States v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1541; *United States v. Iron Moccasin*, *supra*, 878 F.2d 226, 229; *United States v. Chalan*, *supra*, 812 F.2d 1302, 1313-1314; *People v. Fuentes*, *supra*, 54 Cal.3d at p. 715, 716, fn. 4.)

As set forth above, the prosecutor's explanations were simply implausible, unsupported by the record and suggestive of bias. Because the prosecutor failed to sustain its burden of showing that the challenged jurors were not excluded because of group bias, the judgment of conviction and sentence must be reversed. (*Miller-El v. Dretke*, *supra*, ___ U.S. ___ [125 S.Ct. at p. 2340]; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 100; *Holloway v. Horn*, *supra*, 355 F.3d at pp. 725, 729-730; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d at p. 1255; *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 720-721; *People v. Turner*, *supra*, 42 Cal.3d at p.728; *People v. Allen*, *supra*, 115 Cal.App. 4th 542, 553; *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202.)

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V

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TWELVE YEAR DELAY BETWEEN THE CRIME AND HIS ARREST

Appellant has argued that his state and federal constitutional rights to due process and fair trial were violated by the twelve year delay that occurred between the crime and his arrest. (U.S. Const., Amends. 5 and 6; Cal. Const., Art. I, §§ 7, 15.) In support of his claim, appellant alleged he was prejudiced by the delay because during that time witnesses relevant to his defense became unavailable, memories had faded and evidence was destroyed. (AOB 243-253.) Respondent erroneously contends that appellant was not prejudiced by the delay and the resulting loss of evidence. (RB 100-107.)

A. Substantial Evidence Supports A Determination That Appellant Was Prejudiced By the Delay

The record establishes that the pre-accusation delay that occurred in this case resulted in a showing of actual prejudice to appellant. As respondent acknowledges, prejudice may be shown by the loss of material witnesses due to lapse of time or the loss of evidence because of fading memory attributable to the delay (RB 102). (*People v. Morris* (1988) 46 Cal.3d 1, 37; *People v. Hill* (1985) 37 Cal.3d 491, 498; *Garcia v. Superior Court* (1984) 163 Cal.App.3d 148, 151; *People v. Cave* (1978) 81 Cal.App.3d 957, 965; *Howell v. Barker* (4th Cir. 1990) 904 F.2d 889, 893-894.) Similarly, the loss of evidence which would provide potentially exculpatory evidence has been found to support a prima facie showing of prejudice. (*Fowler v. Superior Court* (1984) 162 Cal.App.3d 215, 218.)

1. Loss of Tape Recordings of Police Interviews With Various Witnesses

The record shows that appellant was prejudiced by the loss of tape recordings of police interviews with Lloyd Bulman, Terry Torrey, Nina Miller, William Ellis and Mary Bush. Respondent does not dispute that the audio record of interviews of these witnesses did not exist at the time appellant was charged. Even assuming, and which appellant does not concede, that respondent is correct that a tape recording of the June 19, 1980, interview of Bulman[44] and the July 25, 1980, interview of Mary Bush never existed because neither were properly recorded (RB 103), the fact remains that due to the prosecution's actions the actual record of their hypnosis sessions and the statements made therein was lost to appellant.

a. Lloyd Bulman

Respondent asserts that the remainder of the lost tapes regarding Bulman would not have been useful to appellant because Bulman was "competent to testify" and testified he did not add anything to the composite drawing after the June 6, 1980, hypnosis session/interview. In support of this claim, respondent alleges that: (1) Detective Thies and Special Agent Renzi noted that Bulman provided no new evidence from the June 6th hypnosis session, (2) Captain King, who conducted the June 6th session, described it as "futile," and (3) Captain Nielson authorized destruction of the tapes because the files "indicated there was no new information." (RB 104.) Review of the record, however, shows that these allegations are erroneous.

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[44] The pretrial testimony of Captain Nielson, however, suggests that a tape of the June 19, 1980, hypnosis session/interview of Lloyd Bulman may have existed. (RT 2555-2557.)

Although Thies' one line "report" of the June 6, 1980, hypnosis session/interview of Bulman states that no significant details of the events of the homicide were added subsequent to the session (CT 2175), the questionnaire Thies completed on that session provides contradictory information (CT 2159-2161). In the questionnaire, Thies documented that "some additional information" had been elicited when Bulman was in the state of hypnosis. Moreover, with regard to the section of the evaluation concerning "new information obtained through the hypnosis session," Thies indicated that the new information's "accuracy was unable to be determined." (CT 2159.) Notably, Thies' report of the earlier June 5, 1980, interview with Bulman did *not* include the fact that the suspect who shot Cross had a mustache. According to that report, Bulman described the shooter as: "male, Negro, 30/35, 5'11"/6'0", 185, black, brn, wearing a dark stocking cap, not rolled up. Possible dark clothes. NFD." (CT 2117.)

At the pretrial hearing on the motion to exclude Bulman's testimony due to hypnosis, Thies confirmed that during the June 5th interview Bulman did not say that the shooter had a mustache. Thies testified that if Bulman had provided this information he would have included this "important fact" in his report. Thies further admitted that if Bulman had said the shooter had a mustache during the June 6th hypnosis session/interview such information would be "new." (RT 2578, 2580-2581.) At trial, Thies changed Bulman's June 5th description of the shooter to include the mustache. Notwithstanding this change, Thies reiterated his previous admission that he had not included the fact that the shooter had a mustache in his report of the June 5th interview, in his notes of that interview, or in the all-points bulletin he prepared immediately following the earlier interview. (RT 6858-6859, 6863-6864.) Thies also acknowledged that the first time it was documented

in writing that the shooter had a mustache was *after* the June 6th session. (RT 6869.)

Similarly, Renzi's report of the June 6th hypnosis session/interview states that no "additional" information had been provided by Bulman. Renzi's report of the June 5th interview with Bulman, however, shows otherwise and establishes that Bulman had not told officers before the June 6th hypnosis session that the suspect who shot Cross had a mustache. In his report about Bulman's June 5th interview, Renzi recorded the description of the suspect who shot Cross as: "male Negro; early 30's [,] 5'11" to 6'; 185 lbs; Black hair, brn eyes. Suspect was wearing a dark jacket and stocking/watch cap." (CT 2180.) Like Thies, Renzi later confirmed at trial that his report of the June 5th interview with Bulman did not contain information that the shooter had a mustache. Renzi's attempts to correct his "omission" by alleging that Bulman may have told Thies that the suspect had a mustache or he didn't hear it, and that he might have included such fact in the transcribed section of his notes which had been destroyed (RT 6878-6979, 6885), were nonetheless incredible.

That Bulman in fact provided new and additional information during the June 6th hypnosis session/interview, which supported a conclusion that he had been hypnotized, is likewise corroborated by the description of the suspects broadcast contained in the all-points bulletin about the homicide. The bulletin, which was prepared as a result of information Bulman provided during his June 5th interview, made no mention of the fact that the suspect alleged to be the shooter had a mustache. (RT 2592, 6852-6858, CT 3353.)

The Investigative Hypnosis Report prepared by Captain King of the June 6, 1980, hypnosis session also supports a conclusion that Bulman had

undergone hypnosis. According to it, although Bulman had "poor concentration" during the session, his "level of trance was poor" which was indicative of some hypnosis, if only slight. (*Schall v. Lockheed Missiles and Space Company* (1995) 37 Cal.App.4th 1485, 1492-1493 ["light hypnosis" constitutes "hypnosis" and is the equivalent of being under hypnosis for purposes of *People v. Shirley* (1982) 31 Cal.3d 18].) Moreover, the report noted that additional information was obtained. (CT 2162, 2164-2165.)

Respondent erroneously relies on the fact that Captain Nielson authorized the destruction of the June 6th and July 10th taped interviews of Bulman because the files indicated no new information had been provided as further support that no hypnosis occurred. (RB 104.) As noted above, the accuracy of any such files is contradicted by the written reports prepared by Thies and Renzi as to their interviews with Bulman on June 5th and June 6th, the hypnosis questionnaire completed by Thies regarding the June 6th hypnosis session/interview, the all-points bulletin, King's report of the June 6th hypnosis session and the hypnosis questionnaire completed by Thies regarding the July 10, 1980, hypnosis session.[45] There is no evidence that Nielson listened to the tapes of those sessions prior to issuing the order to destroy them to confirm that no new information had in fact occurred as a result of the sessions, or that there was no indication on them that Bulman had been under hypnosis. (RT 2534, 2550.)

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[45] In the hypnosis questionnaire completed by Detective Thies regarding the July 10, 1980, hypnosis session with Bulman, Thies indicated that a "light state" of hypnosis occurred and that any information obtained as a result of the hypnosis was "of no value" to the case investigator. (CT 2196-2197.)

Similarly, the fact that composite artist Fernando Ponce was available to testify as to the events of June 6th does not support a finding that Bulman was not hypnotized. Ponce's preliminary hearing testimony was that any modification to the original composite drawing of the suspect who was the shooter after the June 6th hypnosis session/interview of Bulman was "minimal" and that the original drawing had included a mustache. (CT 422, 439.) The record shows, however, that Ponce's recollection of what occurred during and after the session should be discounted because of his complete lack of any other recall about making the composite drawing and of the hypnosis session/interview that immediately followed it. For instance, Ponce was unable to recall whether that session occurred on the same day as when the composites were made or later, and he was unable to recall the names of the people who conducted the hypnosis and interview. Similarly, Ponce did not recall Bulman's behavior or responses when the composites were made, and he could not recall where the composites were made. Finally, Ponce had not taken notes of the interview with Bulman in making the composite drawings or of the later hypnosis session/interview by King, and he had not prepared a report concerning either event. (CT 390-408.)

Had the tape recordings of Bulman's June 6th and July 10th hypnosis session/interviews not been erased, they might have substantiated that Bulman had undergone hypnosis which was critical to appellant's motion to exclude his testimony.[46] Moreover, the record of those sessions might have otherwise provided potentially exculpatory evidence regarding Bulman's

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[46] See also Arguments VI and VII, *infra*, regarding fact that Bulman had undergone hypnosis during the June 6, 1980 session.

recollection of the events. (*Fowler v. Superior Court*, *supra*, 162 Cal.App.3d at p. 220 [prima facie case of prejudice established by proving loss of dispatcher's tape and plausible explanation of what defendant might have been able to prove from it].) The fact that the audio record of those sessions was destroyed was prejudicial to appellant.

b. Terry Torrey

Appellant was prejudiced by the loss of the tape recording of the hypnosis session/interview of Agent Torrey. Contrary to respondent's claim, Torrey's testimony was relevant to the shooter's identity (RB 104-105) as it corroborated Bulman's description of the suspect vehicle. In addition, it supported the prosecution's theory that it was appellant's car because Torrey's description of observing a large dark car which was similar to a Grand Prix leaving the scene was consistent with a car appellant used to drive. (RT 5193-5193, 5196; 5206-5208.) To the extent that the tape recording of Torrey's hypnosis session/interview provided additional and/or different details of the car he had observed, such information was potentially exculpatory for appellant and may have undermined any corroborating effect with regard to the prosecution's theory that the suspect vehicle belonged to appellant. (See *People v. Hill*, *supra*, 37 Cal.3d at p. 498 [identity of perpetrator was at issue, memories of eyewitnesses had faded over period of time of delay, and had their memories been sharper they may have excluded defendant as the perpetrator]; *Fowler v. Superior Court*, *supra*, 162 Cal.App.3d at p.220.)

c. Nina Miller

The destruction of the tape recording of Nina Miller's June 20, 1980, hypnosis session/interview was prejudicial to appellant's defense that he was not one of the perpetrators of the homicide. According to Miller's

statements to the police Terry Brock had admitted shooting Cross, she (Miller) had seen Terry and Charles Brock in the possession of a shotgun which they had sawed off or was sawed off the night of the homicide, and Terry had demonstrated for others how the shotgun forced him back when he had shot it. In addition, Miller told police that she had heard Charles tell Terry that Bulman must have played dead because he was at the lineup and did not identify Charles and that Charles had said he had disposed of a gun not long after the time of the murder. (See CT 2602-2607; 2794-2795.)

At trial, however, Miller was effectively a hostile witness for the defense. She testified either she had never provided certain information to the police incriminating Terry or Charles in the Cross murder or that she was "unable to remember" any such information. Defense counsel attempted to impeach Miller with her prior statements to the contrary, which demonstrated the involvement of Terry and Charles in the Cross murder. (RT 6407-6412; 6421-6124.) The prosecutor's examination of Miller, however, served to undermine any credibility the jury would have given to her prior statements. Not only did the prosecutor reinforce Miller's "lack" of memory as to what she had told the police, but the prosecutor succeeded in eliciting from Miller the denial that neither Terry nor Charles had admitted that they had killed Cross, that the incident with the shotgun was sometime different than the evening Cross was killed, and that Miller was using PCP in 1980 and may have been using it on the night of the murder. (RT 6412-6414; 6419-6422; 6425-6429.)

Miller testified that she tried to tell the police the truth when she was interviewed in June and July, 1980, and that her memory was much better in 1980 than it was at trial. (RT 6431-6432.) In light of Miller's inconsistent testimony about the involvement of Terry and Charles in the Cross murder,

or about the shotgun she observed to be in their possession afterwards, the tape recording of Miller's June 20th hypnosis session/interview was critical to appellant's defense. Because of the time period the tape recording was made it was likely an accurate record of what Miller had heard and seen with regard to the Cross murder. Had the tape not been erased by the police, it would have assisted the jury in evaluating her testimony and to assess the credibility of her prior statements which supported Terry and Charles Brock's culpability for the murder. (See *People v. Hill*, *supra*, 37 Cal.3d at p. 498.)

d. William Ellis and Mary Bush

Respondent claims that the loss of tape recordings of the hypnosis sessions of William Ellis and Mary Bush was not prejudicial to appellant.[47] In support of this conclusion respondent erroneously contends that the recordings would not be admissible for their truth at trial and that both witnesses had provided the police information which was favorable to appellant. (RB 105.) Respondent's contention in this regard is meritless.

First, the fact that the tape recordings would not have been "admissible in and of themselves for the truth at trial" (RB 105) is not dispositive on the issue of prejudice to appellant because of the destruction of the them by the police. Instead, the determinative factor is whether the substance of the information on the tapes would have been potentially exculpatory. The issue in this case was the identity of the shooter. The record shows that both Ellis and Bush were witnesses who had been present

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[47] As noted above, respondent contends that no tape of the hypnosis session of Mary Bush ever "existed" due to malfunction when it was supposed to be recorded. Appellant does not concede that the tape was never made.

near the scene when the homicide occurred and had observed one or both of the suspects. To the extent that the tape recorded hypnosis sessions of either was the potential source of exculpatory information for appellant, destruction of them was prejudicial. (See *People v. Hill*, *supra*, 37 Cal.3d at p. 498; *People v. Fowler*, *supra*, 162 Cal.App.3d at p. 220.)

Ellis provided information to the police that one of the suspects wore a black jacket which was torn and had a scar on his face. As was noted by appellant at the hearing on the motion to dismiss, Ellis' statement did not indicate that he knew which suspect had worn the black leather jacket. It is possible, however, that during his June 13, 1980, hypnosis session/interview, of which the tape recording had been erased, Ellis provided additional details regarding the shooter which were exculpatory to appellant and which would have contradicted Bulman's description of the suspects. (See *People v. Cave* (1978) 81 Cal.App.3d 957, 965 [inability to locate material witness who could have provided evidence to contest or substantiate undercover officer's version of events was prejudicial]; *Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 951 [prejudice resulting from delay in prosecution found due to deaths of witnesses who could have proved defendant's whereabouts at time of crime, death of key prosecution witness interviewed by District Attorney investigator, and inability to locate other witnesses].)

Similarly, Bush provided information to the police that she had observed a suspicious car nearby the scene of the homicide which generally matched the description of the "getaway" car. The man she had seen exit the car did not match either of the descriptions Bulman had provided. Bush was also shown a photo lineup containing a picture of Terry Brock, but Bush did not identify him (CT 1944) which leads to an inference that she

may have observed the man who was the shooter. The July 25, 1980, tape recording of Bush's hypnosis session/interview, which has been erased, may have contained additional information regarding her description of the suspect vehicle and its occupants which was potentially exculpatory to appellant.

2. Glasses/Medical Records

Respondent incorrectly alleges that even if appellant's 1982 optometry records stated it was his "first prescription," the loss of such records was not prejudicial. In support of this claim, respondent relies on the fact that Yvette Curtis had testified appellant had worn glasses while driving at night in 1978, appellant had presented witnesses who said he had not worn glasses at night, and that a defense expert had examined and tested remnants of glass found at the scene. (RB 105-106.)

Notwithstanding the fact that appellant did present some evidence that witnesses had not seen him with glasses prior to 1981, the prosecution presented witnesses both in its case in chief and during rebuttal that appellant had worn glasses during a period which included the time of the Cross murder. (RT 5241-5243, 6389, 6402-6403, 6519, 6916-6917.) The prosecution also presented evidence of appellant's prescription in 1987 from which it was estimated that appellant might have had a prescription matching the glasses found at the scene. (RT 5541-5542, 5555.) Thus, there was a credibility contest on this issue, which was non-trivial due to the fact that there was very weak circumstantial evidence linking appellant to the homicide.[48] Appellant's 1982 optometry records may have provided

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[48] That evidence of the glasses was not trivial is indicated by the note sent to the court by the jury stating that there was concern about the (continued...)

objective verification that appellant in fact received his first pair of prescription glasses in 1982. Moreover, the records would have likely provided information as to the strength of appellant's prescription and type of frames he had been provided from a period close in time to the homicide. This information would have potentially substantiated that the glass remnants and frames from the scene did not belong to appellant. (See *Jones v. Superior Court* (1970) 3 Cal.3d 734, 740-741 [delay in indictment prejudiced defendant by impairing his ability to recall and to obtain evidence of his activities as of the time of the alleged offense].)

3. Blood Test/Swabs

Respondent contends that there was no prejudice to appellant resulting from the destruction of the swabs utilized in the presumptive phenolphthalein testing because they had no value for future testing, appellant's jacket was available for retesting and defense experts had examined the jacket. (RB 106-107.) Respondent's contention in this regard is without merit. Even assuming that the actual swabs had no future retesting value, then visual documentation of the test results should have been maintained. Just as the police understood their duty to document the visual results of the luminol testing of the front of the jacket, a photograph of the alleged positive result of the swabs used in the presumptive phenolphthalein testing on the cuff lining of the jacket should have been made.

Moreover, respondent is mistaken that appellant could have retested the jacket to contradict the test results contained on the swabs. The record

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[48] (...continued)
glasses during guilt deliberations. (CT 3852.)

shows that by the time of the preliminary hearing, the stain from which the "positive" phenolphthalein test result that was obtained had been completely consumed:

> "Q [Ms. Kopple]: Looking at this follow-up report, if you even need it to refresh your memory, you're aware that the Analytical Genetic Testing Center in Denver was unable to duplicate the phenolphthalein test that Mr. Matheson had done, correct?
>
> A [Detective Henry]: Unable to duplicate the same results. The same phenol test was run.
>
> Q: They were unable to get a positive result for blood?
>
> A: I think at best what happened was – and I was present when Thomas Wall [sic] had run this test – and he had rubbed the phenolphthalein solution very vigorously over the stain and he got a very, very faint to no response on the phenol which, I might add, was the third rubbing of this stain that occurred. There was [sic] two at S.I.D. and then by the time it got to there, the stain was basically no longer existent.
>
> Q: So they were unable to corroborate the results that Mr. Matheson testified to?
>
> A: Yes, that would be accurate.
>
> Q: And they did some other tests which all turned out to be negative or inconclusive of the present [sic] of blood on the leather jacket?
>
> A: Yes. By the time they had run their test whatever was left on that stain had been removed on the previous testing."

(CT 541-542.)

Accordingly, destruction of the swabs and failure to document the visual results of the presumptive phenolphthalein testing resulted in the loss of the only way appellant could contradict the prosecution evidence and/or present potentially exculpatory evidence in his defense. (See *People v. Hill*, *supra*, 37 Cal.3d at p. 498; *People v. Fowler*, *supra*, 162 Cal.App.3d at p. 220.)

B. Remand is Required to Weigh the Prejudicial Effect of the Delay Against the Justification for the Delay

The trial court found that there was no prejudice to the majority of the evidence that appellant alleged was lost by the delay. However, the court found there was a "colorable claim of non-trivial prejudice" as to the loss of appellant's employment records which could have established an alibi defense. (RT 2814-2815.) In denying appellant's motion to dismiss, however, the trial court ultimately ruled that the prejudice to appellant, was "slight if best." (RT 2987-1.)

The loss of appellant's employment records combined with the additional loss of evidence set forth above supports a determination that there was substantial evidence of prejudice to appellant resulting from the twelve year delay between the crime and the complaint being filed. Having erroneously concluded that there was merely a slight showing of prejudice from the delay, the trial court in this case denied appellant's motion to dismiss without conducting a proper analysis of the prejudice to appellant against the justification proffered by the prosecution.

The test for determining whether a defendant has been denied the right to due process arising from a pre-indictment delay is to weigh the prejudicial effect of the delay against the justification for the delay. (*Jones v. Superior Court*, *supra*, 3 Cal.3d at p. 741, fn. 1; *Penney v. Superior Court*, *supra*, 28 Cal.App.3d at pp. 951-952.) Where, as here, there is prejudice from the delay and a proffered justification, the court must balance the public's interest in the administration of justice against the defendant's right to a fair trial. (See *United States v. Marion* (1971) 404 U.S. 307, 324; *Jones v. Superior Court*, *supra*, 3 Cal.3d at p. 741, fn.1.) Accordingly, this case should be remanded to the trial court to rehear

appellant's motion to dismiss and to weigh the prejudicial effect of the delay against any justification offered by the prosecution. (*Fowler v. Superior Court*, *supra*, 162 Cal.App. 3d at p. 220.)

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VI

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE STATE'S FAILURE TO PRESERVE CERTAIN EVIDENCE

Appellant has argued that he was denied fundamental constitutional rights when agents of the state improperly failed to preserve important evidence of apparent exculpatory value and which could not be replaced by comparable evidence. (*Arizona v. Youngblood* (1988) 488 U.S. 51, *California v. Trombetta* (1984) 467 U.S. 479.) (AOB 254-257.) Respondent's argument to the contrary is without merit. (RB 108-114.)

The due process clauses of the federal and state constitutions require that the state's conduct in a criminal prosecution be governed by "prevailing norms of fundamental fairness." (*California v. Trombetta*, *supra*, 467 U.S. at p. 485; see also Cal. Const., art. I §§ 7, 15.) This obligation includes what "might loosely be called the area of constitutionally guaranteed access to evidence." (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867.) This right of access not only encompasses the obligation to turn over to the accused any exculpatory evidence (*Brady v. Maryland* (1963) 373 U.S. 83, 87), but also, in certain circumstances, imposes upon the prosecution an obligation to preserve material evidence (*California v. Trombetta*, *supra,* 467 U.S. 479, 489; *People v. Johnson* (1989) 47 Cal.3d 1192, 1233.) The constitutional right to due process is violated when there is a showing of bad faith on the part of the state for its failure to preserve potentially exculpatory evidence. (*Arizona v. Youngblood*, *supra*, 488 U.S. at pp. 57-58.)

The evidence which the state failed to preserve in this case consisted of: the audiotape of the June 6, 1980, hypnosis session/interview of surviving victim Lloyd Bulman; the original composite drawings based on

Bulman's initial description of the suspects; forensic evidence pertaining to the presumptive phenolphthalein testing of appellant's leather jacket; and the photographs of the presumptive luminol testing of the jacket. Because appellant had no other means to obtain the evidence which had not been properly preserved, he was improperly denied of its exculpatory value to demonstrate that he was not the perpetrator. As appellant has set forth in his opening brief, and which will be discussed further below, each item of evidence that was destroyed by the state was material. (*California v. Trombetta*, *supra*, 467 U.S. at p. 489, relying on *United States v. Agurs* (1976) 427 U.S. 97, 109-110 [constitutional materiality is met when evidence possesses an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means].) Moreover, the record shows that destruction of the evidence at issue was done in bad faith which deprived appellant of his right to due process. (See *Arizona v. Youngblood*, *supra*, 488 U.S. at pp. 57-58.)

A. The June 6, 1980, Audiotape of Hypnosis Session/Interview of Lloyd Bulman

Respondent erroneously claims that the destruction of the audiotape of the June 6, 1980, hypnosis session and interview of Lloyd Bulman was not material. The record is undisputed that Bulman was the surviving victim of the Cross homicide and was a critical eyewitness to the actual killing. The exculpatory value of the audiotape of Bulman's June 6th interview/hypnosis session was thus apparent to the state regardless of whether a suspect had been identified at the time it was erased. Any statement Bulman had made concerning the circumstances of the homicide was important in and of itself, and was clearly relevant to the credibility of

any identification of the perpetrators as well as his testimony about the events. In addition, whether or not Bulman was hypnotized at the time the June 6th statement was given was also important to assess whether his description of the perpetrators was accurate and whether his recollection about the circumstances of the homicide was based on an independent recollection or on suggestive questioning that took place during the hypnosis session/interview right after the homicide had occurred.

Contrary to respondent's assertion, the record is not clear that Bulman did not make any changes or add anything to his initial June 5, 1980, statement about the homicide following the hypnosis session/interview of June 6th conducted by Captain Richard King. (RB 110.) Even though prosecution witnesses, including Bulman himself, testified that no additional information was provided in the June 6th session, the reports of Detective Michael Thies and Special Agent Frank Renzi regarding the initial interview of June 5th, the reports relating to the June 6th hypnosis session/interview, the all-points-bulletin prepared by Thies and other information reflecting Bulman's initial description of the suspects made on June 5th, show otherwise. (See Argument V, section A., *supra*.)

The fact that Bulman added information to his original description of the suspects supports a conclusion that he had undergone hypnosis during the June 6th hypnosis session/interview. Just as he should have been provided the actual audiotape to evaluate the accuracy of the substantive information Bulman had allegedly provided during the June 6th session, appellant should have had the audiotape to evaluate whether Bulman had in fact undergone hypnosis during that session and to evaluate the effect of the hypnosis procedure on his subsequent statements and later trial testimony. Contrary to respondent's assertion otherwise, it appears from the

Investigative Hypnosis Report of the June 6th session prepared by Captain King that Bulman in fact had undergone hypnosis, even if only slightly. (*Schall v. Lockheed Missiles and Space Company, supra*, 37 Cal.App. 3d at p. 1493; see also Argument V, *supra*.) In that report King noted that although Bulman had "poor concentration," his "level of trance was poor." (CT 2165.)

Respondent is incorrect that there was other evidence comparable to the actual audiotape of the June 6th hypnosis session/interview available to appellant. (RB 111.) The only alleged comparable evidence available was that which was by or through law enforcement personnel which, as noted above, incorrectly determined that Bulman had not provided additional information during the June 6th hypnosis session/interview or that he had not undergone hypnosis.

Based on the foregoing, the audiotape of the June 6th hypnosis session/interview of Bulman was material and it should have been preserved. This is an instance where the police had an audiotape recording of a statement of the surviving victim of a murder made within days of the homicide and during an interview where hypnosis was conducted. In this regard, the audiotape was useful to both the prosecution and the defense. The actual substantive record of the June 6th audiotape of the hypnosis session/interview might have shown that what had transpired was not as law enforcement witnesses alleged, and the exculpatory value of the audiotape to a defendant charged as a suspect was apparent when it was destroyed.

Respondent contends that because appellant was not a suspect at the time the tape was erased, the tape had no apparent exculpatory value. (RB 111.) Whether or not appellant had been ascertained as a suspect at the time the tape was destroyed, however, is not dispositive on the issue of the

exculpatory value of this evidence. The critical issue with regard to the tape was that it was known at the time it was destroyed that it was a statement of the surviving victim of the homicide and, as such, had apparent exculpatory value to a future criminal prosecution. Just as it was probative to any investigation and prosecution of the homicide, the tape was probative to the defense of any defendant charged with the Cross homicide. (*United States v. Elliott* (1999 E.D. Va.) 83 F.Supp.2d 637, 641; compare *People v. Webb* (1993) 6 Cal.4th 494, 519-520 [failure to preserve a revolver did not violate the defendant's due process rights because when it was mishandled there was no known connection of it to the capital charges against defendant, and the seizure of the revolver was due to the defendant's ex-felon status and only relevant to an ex-felon in possession of a gun charge].)

As set forth above, there was no comparable evidence available to appellant. Moreover, failure to preserve the audiotape of the surviving victim of a murder of a law enforcement agent demonstrates bad faith on the part of the police within the meaning of *Youngblood v. Arizona*, *supra*, 488 U.S. 51 and *California v. Trombetta*, *supra*, 467 U.S. 479 because the audiotape had exculpatory as well as inculpatory value. (*United States v. Elliot, supra*, 83 F.Supp.2d at pp. 647-649.) That the police acted in bad faith by their failure to preserve the audiotape is further demonstrated by the fact that police procedure is to maintain audiotapes in open homicide cases (see RT 2783) and that the tapes of hypnosis sessions/interviews of witnesses in this case were erased in 1984, two years after *People v. Shirley* (1982) 31 Cal.3d 18. Although appellant's instant motion to dismiss was ultimately denied, the suspicion that the police acted in bad faith in erasing the tapes relating to this case, including that of Bulman's hypnosis/interview session, was later highlighted by the trial court:

> "The court notes also that a single person might find it quite suspicious that memorialization of tape-recorded sessions in a murder case involving a secret service agent would be destroyed under any circumstances, much less, you know, two years after [People v.] Shirley comes down, there go the tapes."

(RT 2981.)[49]

B. The Original Composite Drawings of the Suspects

Just as the record does not show that Bulman's initial statement about the homicide was unchanged as a result of the June 6th hypnosis session/interview, the record does not demonstrate that the composite drawing of the suspect was unaltered by that same session. As set forth in Section A above, the accounts by law enforcement witnesses that Bulman did not add the new detail of a mustache to the description of the shooter during the June 6th hypnosis session/interview are belied by the record. Even though law enforcement witnesses alleged that the original composite drawing made from Bulman's description was unchanged after the June 6th hypnosis session/interview, the lack of a mustache on the shooter prior to that session is evident from the contemporaneous reports prepared by both Thies and Renzi, noted above, regarding the description of the suspects Bulman provided in his June 5th interview with them as well as the all-points bulletin prepared by Thies the same day.

Moreover, a comparison of a photocopy of the original composite drawing of the suspect Bulman described as the shooter and the post-hypnosis photograph of the drawing supports the conclusion that the

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[49] The trial court made this statement at the conclusion of the hearing to exclude Bulman's testimony because he had undergone hypnosis and pursuant to Evidence Code section 795. (See Argument VIII, *infra.*)

mustache on the shooter was added after the June 6th hypnosis session/interview. Contrary to respondent's assertion, the copy of the original composite drawing is not merely a "bad photocopy." (RB 111.) Review of the photocopy shows that any shading under the nose of the suspect who was the shooter was completely missing. In contrast, on the photograph of the post-hypnosis drawing the mustache was sufficiently shaded and, as such, it was evident that some or all of it would have showed up even on a bad photocopy. (CT 2124, 2171.)[50]

As set forth in Argument V, section A, *supra*, the testimony of Fernando Ponce that the original composite of the shooter contained a mustache was not credible and should be discounted because of his significant lack of recall about preparing the composite or other details surrounding the June 6th hypnosis session/interview of Bulman.

The fact that a mustache was added to the June 6, 1980, post-hypnosis drawing of the shooter was relevant to impeach the credibility of: (1) the description of the suspects Bulman provided, (2) any identification by Bulman, and (3) any evidence that Bulman had not undergone hypnosis. The original composite drawing was thus of apparent exculpatory value when it was destroyed and, as set forth above, there was no comparable alternative available regarding the pre-hypnosis state of the drawing. Moreover, as with the destruction of the audiotape of Bulman's June 6,

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[50] Ponce's testimony that the shading and "gray tones" of a mustache on the original composite drawing of the suspect who was alleged to be the shooter would not show up on a photocopy is implausible since other similar shading of the eyebrows and head hair were easily apparent on the copy. This fact is confirmed by comparison of the photocopy of the original composite drawing to the photograph of the post-hypnosis version. (CT 422, 2124, 2171.)

1980, hypnosis session/interview, bad faith is demonstrated by loss or destruction of the original composite drawing which had exculpatory as well as inculpatory value. (*United States v. Elliot*, *supra*, 83 F.Supp.2d at pp. 647-649.)[51]

C. Forensic Evidence Pertaining to the Presumptive Phenolphthalein Testing of Appellant's Leather Jacket and the Photographs of the Presumptive Luminol Testing of the Jacket

Respondent claims that the failure to preserve the swabs used in the presumptive phenolphthalein testing of the appellant's leather jacket and the photographs of the presumptive luminol testing of the jacket did not violate the due process rights of appellant because the evidence never existed and had no exculpatory value. (RB 113-114). Respondent is wrong in both respects.

First, the state had a duty to preserve the swabs utilized in the presumptive phenolphthalein test so that the alleged positive result could potentially be countered with a negative result obtained from retesting by the defense. Even assuming that the evidence of the results of the phenolphthalein test would "disappear" from the swabs shortly after the test was concluded, the police had a duty to preserve a visual record of the test results. Specifically, a color photograph of the positive result could have, and should have, been made.

The state apparently understood its duty to preserve any positive results it obtained from the luminol testing conducted on appellant's jacket,

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[51] An original composite drawing of a suspect by Fernando Ponce was similarly "lost" by the Los Angeles Police Department in another capital case where the eyewitness had undergone hypnosis. (See *People v. Miller* (1990) 50 Cal.3d 954, 983.)

and in fact took photos of the jacket after luminescence supposedly appeared on the front of the it. (CT 558-459, RT 5692-5693.)

Respondent's contention that the photographs of the results of the testing of the jacket "never existed" is contradicted by the record. Criminalist Greg Matheson testified that he thought he had seen copies of the photos that were taken. (CT 468-469.) The testimony of photographer Steven Ohanesian was that there were no photographs of the luminol result on the jacket because there had been a "base fog reaction" and "graying" with regard to the film that had been used. (RT 5689.) That the photos of the jacket did not come out because of a base fog reaction, or other interference with the developing process, is suspicious since the photos of the sweater, which had been taken by Ohanesian just 10-20 minutes prior to the luminol testing of the jacket, inexplicably turned out fine. (CT 468, 470; RT 5657; Exh. 72.) Notwithstanding the fact that the photographs of the jacket may have been "dark" or "did not turn out" (CT 468, RT 5671), any photographs that were taken may have been potentially exculpatory to the extent that they showed that state's determination of the positive results was not valid. The negatives of the photographs at issue may have been potentially exculpatory as well. Although Ohanesian believed he put the negatives in the photograph file of the case DR # (CT 2742), they were apparently also destroyed or lost by the police. (RT 5697).

Respondent's claim that the positive presumptive blood testing evidence was inherently inculpatory, so it had no apparent exculpatory value (RB 114), misses the point. Appellant's claim here is that the state failed to preserve evidence which could have proved that the positive presumptive blood test results were incorrect. If defense examination and/or testing of the evidence resulted in negative presumptive blood test

results, then those results would constitute exculpatory evidence which could be used to counter the inculpatory effect of the tests alleged by the state.

"A corollary principle to due process is that the defendant is entitled to made aware of, and to use, all evidence which tends to exculpate him of guilt of the charges against him." (*United States v. Elliott*, *supra*, 83 F.Supp.2d at p. 641, citing *Kyles v. Whitley* (1985) 514 U.S. 419, 432; *United States v. Bagley* (1985) 473 U.S. 667, 674; *Brady v. Maryland*, *supra*, 373 U.S. 83, 86.)

In this case, the state had evidence in its possession, a stain found on the inside lining of the sleeve of appellant's leather jacket and photos documenting positive luminol testing, which it alleged to be probative of appellant's guilt. Due process required that the state make the evidence available for examination by appellant so that an attack on the inculpatory value of the evidence could be made and/or so that any exculpatory value of the same evidence could be used in his defense. The record shows, however, that the state failed to preserve a portion of the stain for examination and testing by the defense (CT 541-542.),[52] and that the destruction was done in bad faith within the meaning of *Youngblood/Trombetta* (*United States v. Elliott*, *supra*, 83 F.Supp.2d at pp. 647-649.) The same can be said for the photographs and negatives of the alleged positive luminol test results. (RT 5697.) Without the destroyed evidence, there was no way appellant could challenge the alleged inculpatory value of the evidence, nor could he utilize any exculpatory

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[52] See Argument V, section A, *supra*, where the colloquy on this topic that occurred during the preliminary hearing is set forth.

value it potentially had in his defense.

Contrary to respondent's claim, the exculpatory value of the stain from which a positive presumptive phenolphthalein test for blood resulted and the photographs and the related negatives of a positive luminol test was apparent at the time those items were destroyed. Once the state obtained the "positive" result of the presumptive phenolphthalein testing from a portion of the stain found on the lining of appellant's jacket, it was apparent that the stain had potential exculpatory value. The same is true with regard to the "positive" luminol test result the state alleged it had obtained and had documented by photograph.

United States v. Elliott, *supra*, 83 F.Supp.2d at p. 647, is instructive on this point. In that case, a Drug Enforcement Administration Agent destroyed glassware containing a fingerprint of a defendant charged with manufacturing methamphetamine and unidentified chemical residue before the residue could be tested by the defense. In assessing the materiality of the destroyed glassware (the threshold question set forth by *California v. Trombetta*, *supra*), the court in *Elliott* noted that the exculpatory value of the residue appearing on the glassware would be apparent to a reasonable law enforcement officer. In so doing, the court stated:

> "A reasonable law enforcement officer, vested with the knowledge that the glassware could be used in making methamphetamine, would be warranted in concluding that the residue on the inside of some of the glassware might be residue of methamphetamine or the chemical components from which it is manufactured, or both. Likewise, a reasonable agent would recognize that the fingerprints of a defendant found on glassware containing the residue of such substances would inculpate a defendant in the crime of conspiracy to manufacture methamphetamine and perhaps other related offenses. On the other hand, a reasonable law

> enforcement agent would recognize that, if the residue was not that of methamphetamine or its chemical constituents, that evidence would be of exculpatory value for it would suggest a use other than an illegal one. In like fashion, the presence of fingerprints on glassware containing the residue of a lawful substance would be exculpatory or certainly lacking in the inculpatory value which would follow if the residue were of an unlawful substance. [Footnote omitted.] And, if some of the glassware had the residue of the lawful substances and some had residue of unlawful substances, the evidentiary value would be inculpatory and exculpatory."

(*United States v. Elliott, supra*, 83 F.Supp.2d at p. 641.)

With regard to the presumptive phenolphthalein test result, appellant could not obtain comparable potentially exculpatory evidence from any other source. Contrary to respondent's assertion, the lining of appellant's jacket was not available for testing by the defense. As noted above, the stain which had been discovered on the lining inside the sleeve of appellant's jacket had been destroyed by the state. Moreover, the destruction of the stain was done in bad faith as the exculpatory value of the evidence had been apparent to the state and yet, without retaining a control sample for future testing, the stain on the lining had been completely consumed. (*United States v. Elliot, supra*, 83 F.Supp.2d at pp. 647-649.) With regard to the photographs and/or negatives of the positive presumptive luminol testing of the jacket, appellant could also not obtain comparable potentially exculpatory evidence from any other source. Subsequent examination of the jacket failed to yield any usable sample for retesting. (RT 7132-7134.)

D. Conclusion

The audiotape of the June 6, 1980, hypnosis session/interview of Bulman, the original composite drawing, forensic evidence pertaining to the

presumptive phenolphthalein testing of appellant's leather jacket and the photographs of the presumptive luminol testing of the jacket constituted material evidence and should have been preserved by the state. The failure to do so violated appellant's constitutional rights to due process and a fair trial. (U.S. Const. Amends. 5 and 6; Cal. Const., Art. I, §§ 1, 7, 13.)

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VII

THE FAILURE TO APPLY EVIDENCE CODE SECTION 795 TO THIS CASE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION

Appellant has argued in his opening brief that his state and federal constitutional right to equal protection was violated by the failure to apply Evidence Code section 795 to the hypnosis sessions that occurred in 1980. Appellant argued that the resulting admission of Bulman's testimony, and his post-hypnosis "identification" of appellant's photographs as resembling the perpetrator who shot Cross, were prejudicial. (AOB 263-264). Respondent contends that any error in the failure to apply Evidence Code section 795 to the 1980 hypnosis sessions did not prejudice appellant and that appellant's claim that he was deprived of equal protection has been waived. (RB 115-116.)

The merits of appellant's claim have been addressed fully in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent regarding the merits of this issue, 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*, *supra*, 3 Cal.4th at p. 995, fn. 3).

Moreover, and contrary to respondent's assertion, this issue has not been waived by the failure to object on equal protection grounds below. "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. [Citations.]" (*People v. Vera*, *supra*, 15 Cal.4th at pp. 276-277; accord, *People v. Valladoli* (1996) 13 Cal.4th 590, 606; *People v. Saunders* (1993) 5 Cal.4th 580, 589 fn. 5, 592; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Where, as here, "the wrong is so fundamental that it makes the whole

proceeding a mere pretense of a trial," the state cannot maintain an unfair result by using a procedural rule to prevent the defendant from raising the issue on appeal. (*People v. Millum* (1954) 42 Cal.2d 524, 526.) A mere procedural rule of waiver should not preclude appellant from now raising violation of his fundamental right.

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VIII

THE TRIAL COURT'S FAILURE TO EXCLUDE BULMAN'S TESTIMONY UNDER EVIDENCE CODE SECTION 795 VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant has argued in his opening brief that the trial court committed prejudicial error when it failed to exclude Bulman's testimony under Evidence Code section 795. Specifically, appellant argued that the 1987 hypnosis sessions of Bulman came within the meaning of section 795 and that the statute was violated by the presence and participation of a law enforcement officer during that session. Appellant also argued that the facts of this case substantiate that Bulman had in fact "undergone" hypnosis. (AOB 264-268.)

Respondent contends that the trial court correctly determined that the statute did not apply in this case because Bulman was never "successfully" hypnotized. Respondent further contends that any error in failing to apply section 795 was not prejudicial. (RB 122-128.) Respondent's contentions are without merit and must be rejected.

A. The Trial Court Used the Incorrect Standard to Determine That Evidence Code Section 795 Did Not Apply to the 1987 Hypnosis Sessions of Agent Bulman

Contrary to respondent's assertion, the trial court incorrectly concluded that "successful" hypnosis was a prerequisite to application of Evidence Code section 795. (RB 123.) In making this determination, the trial court ignored the express language of the statute and utilized the wrong standard. Under section 795, a witness who has "undergone" a hypnosis procedure for the purpose of recalling events which are the subject of the witness' testimony is not barred from testifying if certain procedures have

been followed.[53]

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[53] Evidence Code Section 795 provides that:

(a) The testimony of a witness is not inadmissible in a criminal proceeding by reason of the fact that the witness has previously undergone hypnosis for the purpose of recalling events which are the subject of the witness' testimony, if all of the following conditions are met:

(1) The testimony is limited to those matters which the witness recalled and related prior to the hypnosis.

(2) The substance of the prehypnotic memory was preserved in written, audiotape, or videotape form prior to the hypnosis.

(3) The hypnosis was conducted in accordance with all of the following procedures:

(A) A written record was made prior to hypnosis documenting the subject's description of the event, and information which was provided to the hypnotist concerning the subject matter of the hypnosis.

(B) The subject gave informed consent to the hypnosis.

© The hypnosis session, including the pre-and post-hypnosis interviews, was videotape recorded for subsequent review.

(D) The hypnosis was performed by a licensed medical doctor, psychologist, licensed clinical social worker, or a licensed marriage and family therapist experienced in the use of hypnosis and independent of and not in the presence of law enforcement, the prosecution or the

(continued...)

Respondent cites no authority that supports the conclusion that "successful" hypnosis is the standard for Evidence Code section 795 to apply. Neither *People v. Caro* (1988) 46 Cal.3d 1035 nor *People v. Johnson* (1989) 47 Cal.3d 1194, upon which respondent relies (RB 123), support this conclusion. While those cases involved the application of *People v. Shirley* (1982) 31 Cal.3d 18, the hypnosis procedures at issue in *Caro* and *Johnson* predated, and therefore did not involve, Evidence Code section 795. In Evidence Code section 795 the legislature articulated a new and different standard to be utilized in determining its applicability.

Respondent is incorrect in his assertion that the "express language of Evidence Code section 795 demonstrates that . . . this code section was intended to apply only to actually hypnotized witnesses." (RB 124.) The express language of Evidence Code section 795 refers to a witness who has "undergone" hypnosis. The statute is thus unambiguous as to its meaning.

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[53] (...continued)
defense.

> (4) Prior to admission of the testimony, the court holds a hearing pursuant to Section 402 of the Evidence Code at which the proponent of the evidence proves by clear and convincing evidence that the hypnosis did not so affect the witness as to render the witness' prehypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness' prehypnosis recollection. At the hearing, each side shall have the right to present expert testimony and to cross-examine witnesses.
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> (b) Nothing in this section shall be construed to limit the ability of a party to attack the credibility of a witness who has undergone hypnosis, or to limit other legal grounds to admit or exclude the testimony of the witness.

Nowhere does the statute refer to "successful" hypnosis. In addition, the staff comments to the Assembly Committee on Criminal Law and Public Safety, Analysis of Assembly Bill 2669 (which became Evidence Code §795) do not support the conclusion that "successful" hypnosis is required for the application of section 795. (RB 124-125.) The portion of the comments upon which respondent relies, "after having been hypnotized," is ambiguous. It is impossible to tell what this phrase means, as it has two possible meanings: (1) after having *undergone* a hypnosis procedure or (2) after having been *successfully* hypnotized. The question, therefore, is whether Evidence Code section 795 requires *successful* hypnosis; the answer is that it does not. Neither the staff comments of the Analysis of Assembly Bill 2669, nor the actual language of the Evidence Code section 795, include the word "successful" when referring to hypnosis. Notably, however, the language of the statute as enacted makes reference to when a witness has "undergone" hypnosis.

In *People v. Shirley*, *supra*, 31 Cal.3d at p. 66, this Court recognized that hypnotism is not a science which is recognized as reliable. (See also *People v. Miller* (1990) 50 Cal.3d 954, 1303.) Moreover, as set forth by the expert witness testimony presented in the instant case, it is difficult to reliably determine whether someone is in a hypnotic state. (E.g., RT 2389, 2611-2612, 2647-2648; 2894, 2938; see also Annot.; *Sufficiency of Evidence That Witness in Criminal Case Was Hypnotized For Purposes of Determining Admissibility of Testimony Given Under Hypnosis or of Hypnotically Enhanced Testimony* (1993) 16 A.L.R. 5th 841 §2 [experts cannot consistently distinguish between actual and pretended hypnosis, since no reliable and truly objective criteria for detecting the state of hypnosis have been discovered, in finding that a witness in a criminal case

had not in fact been hypnotized].)

As respondent notes, legislative history on Evidence Code section 795 indicates that one purpose of the statute is to insure an adequate record upon which to judge whether a hypnosis procedure has improperly contaminated the witness. (RB 125.) Studies indicate that even someone for whom hypnosis has been attempted is prone to suggestion, even if not to the same extent as someone in a "full" hypnotic state, assuming that the latter can be measured accurately. (See Orne, et al., *Hypnotically refreshed testimony: Enhanced memory or tampering with evidence?* In National Institute of Justice Issues and Practices in Criminal Justice (January, 1985) 1, 6, fn. 4;[54] *Commonwealth v. Kater* (Mass. 1988) 447 N.E.2d 1190, 1200 [defendant may present evidence bearing on effect of hypnosis witness, including evidence "tending to show that each hypnotic session, and any attempted hypnotic session, was conducted in a manner likely to affect both a witness's present memory of events and a witness's degree of confidence in his or her memory"].) It is not surprising, therefore, that the Legislature chose to use the term "undergone hypnosis" instead of "successful hypnosis"in enacting Evidence Code section 795. Moreover, it is apparent that section 795 of the Evidence Code was intended to cover situations like that which occurred in this case.

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[54] Orne, et al. notes that "[w]hile less than 10% of subjects do not report subjective changes in perception, memory, or mood, following a hypnotic induction, the remaining 90% are able to experience hypnosis at least to a moderate degree. Therefore, in order to avoid extreme litigation about whether a witness or victim had actually been hypnotized, it is heuristically useful to assume that a subject was hypnotized if he was cooperative and appeared to respond to suggestions in a forensic context."

B. The Record Shows That Bulman Had Undergone Hypnosis Within the Meaning of Evidence Code Section 795; The Prosecution Did Not Meet Its Burden of Proof That Bulman's Testimony Was Reliable; The Sessions Violated Evidence Code Section 795 Because Agent Banner Was Present

Respondent implicitly acknowledges that the statutory requirements of Evidence Code section 795, which safeguards against contamination that occurs with a hypnotic procedure, were not met. Moreover, respondent's substantive defense is limited to the claim that appellant had not been "successfully" hypnotized. The record shows that Bulman had "undergone" hypnosis during the May, 1987, hypnotic procedure sessions within the meaning of section 795 of the Evidence Code. Because Secret Service Agent Banner was present during the 1987 sessions, the requirements of the statute were violated.

Evidence that Bulman had "undergone" hypnosis during the May, 1987, sessions is amply substantiated by the record and in particular by the prosecution experts, Dr. David Spiegel and Dr. Harley Stock.

Although Dr. Spiegel concluded that Bulman "had not been hypnotized," he testified that Bulman had been in a hypnotic state during the induction stage of the May, 1987, hypnosis sessions. (RT 2349, 2360-2361.) Spiegel conceded that Bulman's arm levitation during the first session indicated that he was under hypnosis. He also conceded that Bulman's explanation regarding the levitation and that he had wondered if he could put his arm down was credible evidence Bulman was under hypnosis at the time. (RT 2384-2386.)[55] Bulman's arm levitation that

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[55] The examination of Dr. Spiegel in this regard is as follows:

(continued...)

occurred during the second session was similar to that which had occurred during the previous session, and was likewise consistent with him being under hypnosis. (RT 2387.) Moreover, as noted above, Spiegel testified that an individual can go in and out of a hypnotic state and that it is difficult to tell when a transition occurs. (RT 2389.)

Prosecution witness Dr. Harley Stock conducted the May, 1987 hypnotic sessions of Bulman. He concluded that there was no doubt in his

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[55] (...continued)

"Q. [Defense Counsel] And at what point did Agent Bulman express his opinion about whether or not he was hypnotized in the first session with Dr. Stock?

A. [Dr. Spiegel] Well, he was de-briefed by Dr. Stock in a videotape after the first session. And the part of what he said that I found compelling and led me to focus on the hand levitation was that he did feel the fact that his hand went up and that he was surprised by it and he said it felt weird, I think, and wondered if he could put it down is the response of somebody who is experiencing a hypnotic phenomenon and that seemed quite credible to me.

. . . .

Q. [Defense Counsel] But do you concede that the arm levitation that occurred is indicative that he was under hypnosis?

A. [Dr. Spiegel] For that period of time when his arm was up to a mild degree, yes.

Q. And you do concede that his explanation at the end of the hypnosis session of the description of the arm levitation is very realistically describing somebody who was under hypnosis at that time?

A. To a mild degree, yes. At that time that his hand was up, yes."

(RT 2386.)

mind that Bulman had undergone hypnosis during the May, 1987 sessions and that he had observed objective factors which confirmed his conclusion. (RT 2632, 2635, 2654.)[56] He testified that during the induction stage of each session Bulman was under hypnosis. (RT 2612.) Stock also testified that the induction phase of the hypnotic procedure was the same for both sessions and each time Bulman's arm levitated. (RT 2616, 2641.) According to Stock, Bulman's initial response to the arm levitation as well as his relaxed facial muscles and relaxed body indicated that he was in an altered state of consciousness or hypnotic state. (RT 2615.) Bulman's time distortion and his losing track of time during the sessions were also possible indications of his altered state. (RT 2650.)

Like Spiegel, Stock testified that someone could go in and out of an altered state of consciousness (RT 2616), and that it was difficult to determine when Bulman was under hypnosis and when he was not because of the fluctuation in his level of consciousness. (RT 2633, 2642.) Stock thought that the abreaction Bulman experienced during the second session was a good indicator he had experienced an altered state of consciousness. (RT 2639.) Stock observed fluctuation in Busman's state of consciousness during both sessions, however. (RT 2617-2618, 2642-2643.) Stock testified that although Busman came out of his altered state when the abreaction occurred, Stock was again able to induce the altered state of

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[56] The following is Dr. Stock's testimony on this point:

"[Defense Counsel]: And there is no question in your mind that during portions of that period of time he was clearly in a hypnotic state?

[Dr. Stock]: He was in an altered state of consciousness, yes."

(RT 2635.)

consciousness. (RT 2642-2643.)

Finally, defense expert Dr. Robert Karlin testified that Busman had undergone hypnosis during both sessions in May, 1987. (RT 2902.) According to Karlin, Busman was "definitely involved in a hypnotic procedure" when he experienced a flashback at the age regression stage at the second hypnosis session. (RT 2878, 2902.)[57] Karlin noted that there were markers to indicate hypnosis at both sessions, including Bulman's response to the arm levitation which was both of surprise and the sense that it was involuntary. (RT 2902.) Karlin testified that a flashback is a response to a suggestion in the context of hypnosis. Busman clearly responded to a suggestion made to him during the hypnosis procedure when the difficult flashback he experienced occurred. (RT 2879.) According to Karlin, Busman had a strong negative response which is exactly what he was told could happen before the hypnosis procedure started. (RT 2879, 2903.) Karlin testified that there were times during the sessions that Busman was clearly visualizing and imagining things. It was during those times that he was vulnerable to additional information coming in. (RT 2903.) As Stock and Spiegel, Karlin stated, one cannot definitely tell when

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[57] Dr. Karlin's testimony on this point was:

> "Q [By Mr. Klein] We will get to that age regression, but what does that tell you as to whether or not Agent Busman was hypnotized when he experienced the age regression on May 3 [sic], 1987?
>
> A. [Dr. Karlin] He is definitely involved in a hypnotic procedure at this point. Again we do not use the hypnotic statement in a casual way and say it caused this to happen, but he is clearly involved in a hypnotic procedure."

(RT 2878-2879.)

someone goes in and out of hypnosis; Karlin also testified that one can go in and out of hypnosis quickly. (RT 2920.)

Even assuming, which appellant does not concede, that it may be determined that Busman had only undergone hypnosis to a "mild degree," he had nonetheless undergone hypnosis within the meaning of *People v. Shirley*, *supra*, 31 Cal.3d 18. (*Schall v. Lockheed Missiles and Space Co.*, *supra*, 37 Cal.App.4th at p. 1492 ["light hypnosis," or "being a little bit hypnotized is the equivalent of being hypnotized for the purpose of *Shirley*"].) That Busman in fact was subjected to the dangerous effects of hypnosis recognized by *People v. Shirley*, *supra*, is also made clear by the fact that the record clearly shows that the induction stage of the hypnosis procedures in this case were not brief. (E.g., RT 2313, 2315, 2634.) Moreover, as set forth above, during each session Busman demonstrably responded to suggestion by the person conducting the hypnosis procedure.

Respondent does not dispute that Agent Banner, a law enforcement officer, was present during the May, 1987 hypnosis sessions of Lloyd Busman. As the trial court recognized, Agent Banner's presence would violate Evidence Code section 795 if Busman had undergone hypnosis during those sessions. (RT 2974-2975.) The record establishes that Banner was present during both sessions and that Busman in fact had undergone hypnosis within the meaning of Evidence Code section 795. Bulman's post-hypnotic procedure statements should have been excluded, and admission of them violated appellant's statutory rights and his right to due process as guaranteed by the Fourteenth Amendment. The trial court erred in its failure to exclude Bulman's testimony. (*People v. Hayes* (1989) 1989) 49 Cal.3d 1260, 1268-1270; see *People v. Shirley*, *supra*, 31 Cal.3d at pp. 66-68.)

C. Prejudice

The trial court's error in permitting Busman to testify to post-hypnotic procedure statements was prejudicial. As set forth in Argument I, *supra*, Busman identified photographs of appellant the night before he was to testify after viewing a highly suggestive photo array. Had the trial court applied the proper standard in evaluating the evidence presented with regard to the May, 1987, hypnosis sessions, the jury would not have heard evidence of Bulman's statements made after he had undergone hypnosis, including his identification of appellant's photographs. Admission of Bulman's post-hypnosis statements and the identification was prejudicial, especially when no identification of appellant had occurred and the circumstantial evidence of appellant's guilt was weak. (Appellant incorporates by reference, Arg. I, sec. C, as if fully set forth herein.) It cannot be said, therefore, that admission of Bulman's post-hypnotic procedure testimony was harmless. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) In the alternative, it is reasonably probable that a more favorable result for appellant would have occured had the evidence not been admitted. Accordingly, reversal of the judgment and conviction is required. (*People v. Hayes*, *supra*, 49 Cal.3d at p. 1269; *People v. Shirley*, *supra*, 31 Cal.3d at p. 70.)

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IX

THE ADMISSION OF IMPROPER AND PREJUDICIAL EXPERT WITNESS TESTIMONY REGARDING PRESUMPTIVE BLOOD TESTS ON APPELLANT'S JACKET VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A RELIABLE DETERMINATION OF GUILT

Appellant has argued that expert witness testimony regarding presumptive luminol and phenolphthalein blood tests conducted on appellant's jacket should have been excluded because it was irrelevant and prejudicial. Appellant also argued that the improper admission of this testimony violated his federal constitutional right to due process and a reliable determination of guilt. (U.S. Const. Amends. 8 and 14; AOB 268-273.) Respondent erroneously contends that the trial court did not abuse its discretion in admitting the evidence because it was relevant and the probative value of the evidence outweighed any prejudice, that admission of the evidence was not prejudicial, and that appellant waived his claim of constitutional error by failing to object on such grounds below. (RB 131-135.)

A. Evidence Regarding the Presumptive Blood Tests Was Irrelevant and Therefore Should Have Been Excluded

According to respondent, appellant's ownership of a jacket that resembled that which the shooter had been wearing and on which "positive" presumptive blood test results were found on areas consistent with being blood spatter from the shooting, had "a tendency in reason to prove appellant's participation in the crime." (RB 132.) As respondent concedes, however, the substance which was "discovered" on appellant's jacket was never confirmed to be blood, much less human blood or blood belonging to the victim. (*Id.*) As such, any testimony regarding the presumptive blood tests and their "positive" result was not relevant to the issues in this case,

was not reliable evidence that appellant committed the crime, and should have been excluded. (*People v. Sloan* (1978) 76 Cal.App.3d 611, 631; Evid. Code §§ 210, 350, 352.)

In *People v. Sloan*, *supra*, 76 Cal.App.3d 611, a prosecution expert testified that a stain found on the seat of the defendant's car contained blood, but that he was unable to determine whether or not it was human blood or how long it had been there. As in the present case, the prosecutor in *Sloan* claimed that the presence of blood in the defendant's car was a piece of the circumstantial evidence substantiating the defendant's involvement in the crime and was therefore relevant. Determining that the trial court erred in denying the defendant's motion to strike the reference to the blood stain on the defendant's car, the appellate court in *Sloan* held that the evidence had no tendency to prove that the defendant killed the victim and that it "failed to meet the definition of relevant evidence set forth in Evidence Code section 210." Because the evidence was found to be irrelevant, the Court of Appeal held that the trial court had no discretion to admit it. (Evid. Code § 350.) Moreover, because the prosecutor argued that the blood stain contained human blood and the blood of the victim in spite of the fact that there was "not a scintilla of evidence to justify such a inference," admission of the blood stain evidence was found to be "devastatingly prejudicial." (*People v. Sloan*, *supra*, 76 Cal.App.3d at 631.)

Courts in other jurisdictions have similarly held that absent confirmatory tests, evidence of "positive" presumptive blood tests are not relevant to a determination of guilt and that the prejudicial effect of the evidence is not outweighed by any probative value.

In *State v. Fukusako* (Hawaii 1997) 946 P.2d 32, the Hawaii Supreme Court upheld the exclusion of expert testimony on luminol and

phenolphthalein test results which the prosecution sought to introduce into evidence. At the pre-trial hearing on the admissibility of the presumptive blood test results the prosecution expert testified that luminol and phenolphthalein tests can generate false positive reactions; the tests react to metal surfaces and cleansers containing iron-based substances and rust; neither test can distinguish between human and animal blood and that it cannot be determined how long the substance has been on the item tested. Additionally, testimony was presented that a confirmatory test is required to determine if the test sample is human blood. (*Id.*, at p. 66.) The trial court ultimately determined that the test results were inadmissible because: (1) the presumption of the presence of blood was relevant only to the extent that it could be supported by confirmatory tests and (2) absent confirmatory tests the prejudicial effect of the presumptive test results outweighed any probative value. In concluding there was no abuse of discretion by the trial court in reaching those conclusions, the Hawaii Supreme Court applied the same analysis which is required in California under Evidence Code Sections 210 and 352 regarding the admissibility of expert testimony; i.e., whether the testimony was relevant and reliable and whether the probative value of the evidence outweighed the prejudicial effect. (See, *State v. Fukusako*, *supra*, at pp. 66-67.)

Equally instructive is the Arkansas Supreme Court decision in *Young v. State of Arkansas* (Ark. 1994) 871 S.W. 2d 373. There, the admission of luminol evidence without confirmatory testing for the presence of blood was found not to be harmless error. In *Young,* the prosecution presented expert testimony as to the positive results for blood which were found on the interior and exterior of the defendant's pick-up truck. The expert also testified that luminol reacts with blood and other substances such as nickel,

copper, and hydrochloride bleach and that it reacts with any kind of blood including that of animals. The only evidence presented by the defense were reports from the Arkansas State Crime Laboratory showing that follow-up tests did not confirm the presence of human blood on appellant's truck. (*Id.*, at pp. 377-378.) Relying on its earlier decisions where evidence of presumptive blood tests results was similarly sought to be introduced, *Brenk v. State* (Ark. 1993) 847 S.W.2d 1 and *Palmer v. State* (Ark. 1994) 870 S.W.2d 385, the Arkansas Supreme Court in *Young* reiterated that luminol tests without follow-up procedures are unreliable to prove the presence of human blood or that the substance causing the reaction was related to the alleged crime. In ruling that the expert testimony about the presumptive blood testing should have been excluded, the court specifically stated that "when positive luminol tests cannot be confirmed by other evidence, the luminol tests results become irrelevant and their admission confuses the jury." (*Young v. State of Arkansas*, *supra*, 871 S.W. 2d at pp. 377- 378.)

In this case, prosecution expert witness Matheson testified that luminol and phenolophthalein presumptive blood tests conducted on appellant were not conclusive regarding the presence of blood, and that confirmatory tests were needed. (RT 2753, 5668.) Matheson conceded that both luminol and phenolphthalein can react to other substances besides blood, that they will react to non-human blood and that there is no way to tell when the blood had been deposited on the jacket. (RT 2756-2757, 5658, 5671-5672.) Although Matheson stated that only blood will result in a positive reaction from both luminol and phenolphthalein tests, criminalist Thomas Wahl made clear that the tests will also react positively to copper, salt and copper ions. (RT 5633-5634.) Ultimately, a confirmatory test was conducted on the substance thought to be blood on the jacket; the result of

such testing, however, was negative. (RT 7132-7133)[58]

Here, there was no confirmation that the substance on appellant's jacket was in fact blood, human blood or blood belonging to the victim. In spite of his argument to the contrary, respondent apparently concedes that the blood evidence was not conclusively inculpatory. (RB 165 [Argument XIV].) Moreover, and as so noted by the trial court, the length of time between the crime and the removal of the jacket from appellant's parents' home made the inference that appellant had worn the jacket during the

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[58] It was stipulated by the parties that:

> In December 1991 Senior Forensic Geneticist Tom Wahl of the Analytical Genetic Testing Center in Denver, Colorado analyzed the brown leather jacket, Ex. F, and the sweater removed from Julie Cross. The presence of blood on the jacket could not be confirmed. Human blood was confirmed on the sweater. Visual examination of the inside left arm cuff area of Ex. F exhibited some discolorations. Presumptive tests for the presence of blood were conducted on several swabbings of this area. The results were negative. A vigorous swabbing of this area yielded one positive result. A cutting of the lining was removed from the area cited above and extracted. The extract was concentrated and confirmatory tests for the presence of blood were conducted on the extract. Confirmatory tests for blood were negative. Human species origin tests were conducted on the concentrated extract. The results were negative. ABO blood typing of the extract was inconclusive. According to Mr. Wahl, confirmatory blood tests are not as sensitive as presumptive tests and require more blood to yield a result. Negative results on confirmatory bloods tests could mean: (1) There was only a trace amount of blood which was insufficient to yield a confirmatory result; (2) There was blood, but it was not of human origin; or (3) There was no blood.

(See RT 7131-7133.)

Cross homicide remote and speculative. As set forth in appellant's opening brief, the passage of time was "troubling" to the trial court and no doubt led to the court's characterization of the evidence as being of "little relevance." (RT 5642-5643.) Accordingly, expert testimony on the presumptive testing was simply not relevant to the issues before the jury. (Evid. Code § 210.) Because the evidence was not relevant, it should have been excluded. (Evid. Code § 350.) Moreover, admission of the irrelevant blood evidence would have clearly confused and misled the jury. (See *Young v. State of Arkansas*, *supra*, 871 S.W. 2d at pp. 377-378.)

Without conceding that there was any probative value to the evidence, it is noteworthy that the trial court itself remarked that the presumptive blood test evidence did not have overwhelming relevance. (RT 5643-5644.)[59] The record establishes nonetheless that any probative value of the evidence was outweighed by the undue prejudice to appellant by its admission. Moreover, admission of the evidence had the detrimental impact of confusing the issues and misleading the jury. As demonstrated by the numerous and repeated references to the blood evidence by the prosecutor during closing argument, it is clear she wanted the jury to draw the inference that appellant's jacket was the one worn by the shooter at the time of the homicide and that blood of the victim was on the jacket. (See RT 7271-7272, 7282, 7388-7392, 7416, 7430.) Without confirmatory tests, however, this inference was simply not supported by the presumptive blood

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[59] At the conclusion of the guilt phase the trial court reiterated its opinion regarding the tenuous probative value of the presumptive blood test evidence "discovered" on appellant's jacket by stating: "[w]ere I a juror, I would have less than total confidence in that blood evidence given the circumstances." (RT 7168.)

test evidence. (*People v. Sloan*, *supra*, 76 Cal.App. 3d at pp. 631-632.)

B. The Constitutional Violation Resulting From This Error Has Not Been Waived

Contrary to respondent's allegation, appellant's claim that his constitutional right to a reliable determination of guilt was violated by the improper admission of the presumptive blood test evidence was not waived by the failure to specify that right below.

As previously set forth, appellant "is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera, supra,* 15 Cal.4th at pp. 276-277.) Moreover, the record shows appellant objected to admission of the evidence because it was not relevant and did not constitute reliable evidence on this issue of his participation in the crime. Appellant also objected to the evidence because any probative value was clearly outweighed by the prejudicial impact. (RT 5635, 5639-5640.) Appellant's objection based on state law grounds – Evidence Code Sections 210, 350 and 352 — was substantively the same as an objection based on the federal constitution because admission of the evidence led to an unreliable determination of guilt.

In *People v. Yeoman* (2003) 31 Cal.4th 93, 117, this Court stated that:

> "As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial judge to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal."

Here, the factual inquiry required for a determination of appellant's claim of

federal constitutional error is identical to that which was utilized below to resolve appellant's objection to the presumptive blood test evidence. It is a "well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 118, citing *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan*, *supra*, 22 Cal.3d at 394; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742; see also Introduction, *supra*.)

Accordingly, this Court may properly consider appellant's claim of federal constitutional error on the merits.

C. Admission of Evidence of the Presumptive Blood Tests Was Prejudicial

Respondent's contention that the result would have been the same had evidence of the presumptive blood tests not been admitted (RB 134-135) is belied by the paucity of evidence supporting appellant's guilt. It is obvious that the prosecution relied upon the prejudicial impact of the presumptive blood test evidence to bolster its otherwise weak circumstantial evidence case. The state of the record was that absent the "blood" evidence allegedly found on appellant's jacket there was no physical evidence connecting appellant with the crime.

The prosecution's case was based on weak circumstantial evidence. (Appellant incorporates by reference, as if fully set forth herein, Arg. I, sec. C.) Respondent's attempt to minimize the prejudicial impact of the improperly admitted and irrelevant presumptive blood test evidence focuses on factors which were not persuasive to a finding of guilt. (RB 135.)

Jessica Brock, the "key" prosecution witness, was unbelievable as to any alleged inculpatory statements made by appellant or as to her observations of appellant on the night of the homicide. Contrary to

respondent's assertion, the fact that Jessica Brock's brother, Terry Brock, was identified by Busman as the assailant who first accosted him reinforces the bias and untrustworthiness of Jessica's testimony. Moreover, appellant's "association" with Terry Brock does not substantiate a conclusion that appellant committed this crime with him. (*People v. Chambers* (1964) 231 Cal.App.2d 23, 28-29 [conviction based on association rather than personal guilt violates due process]; *U.S. v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1246 ["[T]here can be no conviction for guilt by association. . . ."], quoting *United States v. Melchor-Lopez* (9th Cir. 1980) 627 F.2d 886, 891.)

Similarly, the evidence does not support a conclusion that appellant could not have been working on the night of the homicide. At best, the evidence of appellant's whereabouts on the night in question is not conclusive as his employment records from the relevant period of time did not exist at the time of trial and the testimony presented as to appellant's general schedule is not dispositive. Any evidence that appellant wore glasses similar to that found at the scene or even wore prescription glasses during the period of time at issue was tenuous. Moreover, information provided by Nina Miller supported appellant's defense that he was not the perpetrator. Although defense counsel was precluded from presenting evidence that Charles had admitted his involvement in the murder to Jacqueline Sherow (see Arg. XII, *infra.*), evidence based on statements Miller had made to the police implicated Charles. In particular, evidence was presented that Miller had heard Charles say that the surviving victim (Busman) must have been playing dead and did not identify him at a lineup. (RT 7085-7087.)

It cannot be said, therefore, that admission of the irrelevant

presumptive blood test evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Accordingly, reversal of the judgment and sentence of death is required.

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THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHICH VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS WHEN IT ADMITTED IRRELEVANT TESTIMONY BY APRIL WATSON WHICH WAS THEN FOLLOWED WITH IMPROPER HEARSAY TESTIMONY BY DETECTIVE HENRY

Appellant argued in his opening brief that the trial court erred when it admitted testimony regarding a phone call appellant made to April Jones Watson. Specifically, appellant argued that Watson's testimony was irrelevant because it was not clear whether the substance of the call related to the present case or the triple homicide. The error in admitting Watson's testimony was compounded by the admission of improper hearsay testimony by Detective Henry regarding what she had told him about that call. Appellant argued the erroneous admission of the testimony of both witnesses was prejudicial, improperly contributed to the jury's determination of guilt, and violated his federal constitutional right to due process under the Fourteenth Amendment. (AOB 273-278.) Respondent disagrees, alleging first that Watson's testimony was relevant. Respondent next alleges that appellant has waived any objection to Henry's testimony on hearsay grounds, and that even if not waived, Henry's testimony as to what Watson relayed to him about what appellant had said was properly admissible. Respondent also alleges that any error resulting from the admission of the testimony of either witness was not prejudicial. (RB 136-144.) Respondent's contentions are each without merit and must be rejected.

A. April Watson's Testimony Regarding a Phone Call From Appellant Was Not Relevant to This Case

Contrary to respondent's assertion, Watson's testimony about the

phone call from appellant making an inquiry about Terry Brock was not relevant to the issues in the present case. (RB 136-138.) Respondent has presented no evidence, nor is there any, to establish that the statements by appellant to Watson during their phone conversation related to the Cross homicide. In fact, the record shows the opposite. As established by the notes of Henry's interview with Watson about the phone call, and which the prosecutor confirmed was in fact contained therein, appellant asked Watson about "Terry Brock's murder case." (RT 5839.)[60] The record shows that Terry Brock did not have a murder case other than the prior triple homicide in which he was charged as appellant's co-defendant. Respondent cannot claim otherwise. Because the statements by appellant to Watson could not have related to the present offense, they were irrelevant and should have been excluded. (Evid. Code § 350.)

Even assuming, arguendo, that Henry's notes about what Watson

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[60] During the hearing, the prosecutor read statements by April Jones Watson which were memorialized in Henry's report of an interview he conducted with her on September 27, 1990 which, in relevant part, is as follows:

> "Mr. Kuriyama: '. . . April Jones advised Detective Henry that Andre Alexander advised [sic] her by telephone and wanted to know what was going on with Terry, that Terry was seen being taken out of county jail by Buck Henry and guys wearing suits. ¶ Alexander questioned April Jones regarding what was going on with Terry Brock'
>
> Mr. Klein: Excuse me. But the statement says with *'Terry Brock's murder case'* is [sic] what the statement says.
>
> Mr. Kuriyama: *It does say that*, but counsel has asked me not to bring that out."

(RT 5839, emphasis added.)

told him did not mean what was *actually* memorialized, respondent's interpretation of appellant's statement that he was referring to the Cross homicide is purely speculative. As such, the statements appellant made to Watson did not come within the meaning of relevant evidence as defined by Evidence Code section 210 and should have been excluded. Although the trial court has wide discretion in determining the relevancy of proffered evidence, the court has no discretion to admit evidence that is based on speculative inferences. As this Court has recognized, "'[s]peculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose.'" (*People v. Babbitt* (1988) 45 Cal.3d 660, 662-663, quoting *People v. De La Plane* (1979) 88 Cal.App.3d 223, 244, disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 39, fn. 25.)

On the facts of this record, it was purely speculative that appellant's inquiry to Watson about Terry concerned the Cross homicide. As set forth in appellant's opening brief, although appellant had been convicted for the triple homicide not long before he spoke with Watson, his appeal of that case was pending. Moreover, at the time the calls at issue were made, Terry had either not yet entered his guilty plea to the triple murder or had not yet been sentenced for it.[61] (AOB 275-276.)

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[61] Terry Brock pled guilty to the triple murder case on October 12, 1990, and he later was sentenced for that case in November, 1990. (RT 5838.)

B. The Erroneous Admission of April Jones Watson's Testimony Was Prejudicial

Contrary to respondent's assertion, the erroneous admission of Watson's irrelevant testimony about appellant's statements to her was prejudicial. Respondent is correct that it was Jessica Brock, not April Watson, who testified that appellant had committed a triple murder in 1978 (RB 138).[62] However, as the prosecutor intended, the detrimental impact of Watson's testimony was that it impermissibly allowed the jury to believe that appellant had contacted Watson because of his consciousness of guilt with regard to the Cross homicide. Therefore, not only would the jury have believed that appellant wanted to know whether Terry was providing incriminating information about appellant regarding the Cross murder, but they also would have believed appellant was attempting to stop Terry from doing so or to continuing doing so. The inference the jury would have reasonably obtained impermissibly lightened the prosecution's burden of proof.[63] Moreover, during the course of Watson's testimony the prosecutor was able to improperly suggest to the jury that appellant was being investigated for a murder other than that involving Cross. (RT 5854.)[64]

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[62] Former appellate counsel apparently confused Jessica Brock's testimony with that of April Jones Watson when he stated in appellant's opening brief that "Watson" testified about appellant's 1978 prior offense and his triple murder case. (AOB 276.) That appellate counsel confused the two witnesses is demonstrated because, in support of the point argued, counsel cited "RT 6288" which is a reference to a portion of Jessica Brock's testimony.

[63] See also Arguments XI, XIII, *infra*.

[64] During Watson's direct examination the following colloquy occurred:

(continued...)

Because the jurors were later presented evidence with Jessica Brock's testimony that appellant had previously committed a serious offense with Terry Brock, they likely put the two facts together and concluded that the unspecified prior serious offense that the prosecutor elicited during Watson's examination was the other murder.

Although not directly prejudicial, but detrimental to appellant nonetheless, is the fact that appellant had no way to effectively defend against the consciousness of guilt inference which would inevitably result from Watson's testimony. As the trial court noted, appellant was faced with a "Hobson's choice" because in order to show that he had not been referring to the Cross homicide, he was "entitled" to present evidence that his

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[64] (...continued)

"[District Attorney Kuriyama]: And you remember going to Wilshire Division of L.A.P.D. and speaking to Detectives Henry and Kwoch who were investigating the murder of Julie Cross. ¶ Is that correct?

A. The murder of who?

Q. Julie Cross. A murder case.

The Court: Secret Service Agent.

The Witness: I don't know if that is what they were working on at the time.

By Mr. Kuriyama: They didn't tell you what murder case it was?

A. I don't remember that.

Q. But they did indicate this was a murder investigation that they were talking about?

A. Possibly.

(RT 5854-5855.)

statements to Watson were instead made in reference to the triple murder. (See RT 5839.) Thus, once the trial court ruled to admit Watson's testimony about the phone calls appellant had made to her, appellant was stuck with a no-win situation, and effectively one which would only make his situation worse.

These factors combined, the prejudicial impact of Watson's testimony was substantial. Moreover, the detrimental effect of this testimony was underscored when considered with other alleged consciousness-of-guilt evidence which was improperly presented to the jury and the fact that the prosecution's case was based on weak circumstantial evidence. (Appellant incorporates by reference as if fully set forth herein, Args. I, sec. C, *supra*; Args. XI, XIII, XXII, *infra*.) It cannot be said that the error in admitting Watson's testimony was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*. 386 U.S. at p. 24.) Even assuming a lesser standard of prejudice applies, but for Watson's testimony a more favorable result for appellant would have occurred. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

C. The Trial Court Erroneously Admitted Improper Hearsay Testimony by Detective Henry Regarding What Appellant Had Said to April Jones Watson

1. Multiple Hearsay

As respondent recognizes, multiple hearsay is only admissible if each "level" of hearsay is properly admissible. (RB 140; Evid. Code §1201.) Here, Henry's testimony about what Watson told him appellant had said constitutes double hearsay. As noted above, Watson's testimony about what appellant had said to her was irrelevant and therefore inadmissible. Even assuming it was relevant, however, and appellant's statements to Watson were properly admissible as statements of a party, there was no

exception to the hearsay rule for Watson's statements to Henry. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1292, fn. 31.) Each of the exceptions to the hearsay rule to which respondent erroneously asserts permit the testimony by Henry about appellant's statements to Watson will be discussed below.

2. Past Recollection Recorded Exception

Contrary to respondent's assertion, Henry could not properly relate Watson's statements under Evidence Code section 1237, the hearsay exception for past recollection recorded. (RB 140.) In order for evidence of Watson's past statements to Henry to be admissible under Evidence Code section 1237, certain foundational facts set forth in the statute must be met.[65] Here, not all of the foundational facts were proven. Watson could

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[65] Evidence Code section 1237 provides that:

"(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in writing which:

(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(2) Was made (I) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

(3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(continued...)

not and did not testify that her statements to Henry were true. (Evid. Code § 1237, subd. ©.) Similarly, she could not and did not testify that the statements were made when they were fresh in her mind. (Evid. Code §1237, subd. (a).)

The record shows that although Watson recalled being interviewed by the police, she did not recall the substance of her statement. (E.g., RT 5849-5852.) Because Watson could not remember her statement, she could not reliably testify that it was true. (*People v. Simmons* (1981) 123 Cal.App.3d 677, at pp. 682-683 [amnesic could not recall events in statement or circumstances of statement]; cf. *People v. Cummings*, *supra*, 4 Cal.4th at p. 1294 [witness had sufficient recall of the events and circumstances of statements made to the police].) Even assuming that Watson's recall of the statement was sufficient to establish that she could reliably testify whether it was true, her response to the prosecutor's specific inquiry, whether she recalled giving the police a statement and at that time she was being truthful, was merely "I believe so." (RT 5855.) It is unclear as to which portion of the prosecutor's compound question Watson was responding. Even assuming that her response applied to both portions, her clearly equivocal response does not meet the requirement that the witness affirm that the statement was true as required by Evidence Code section

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[65] (...continued)

(4) Is offered after the writing is authenticated as an accurate record of the statement.

(b) The writing may be read into evidence, but the writing itself may not be received into evidence unless offered by the adverse party."

1237, subdivision ©.[66]

Similar to her inability to attest that her statement to the police was true, Watson's lack of recall of the statement demonstrates that she would not have been able to reliably testify that it was made when her conversations with appellant were fresh in her mind. (Evid. Code § 1237, subd. (a); see *People v. Simmons*, *supra*, 134 Cal.App.4th at p. 1293.) Indeed, respondent concedes that Watson did not testify that her statement to the police was made when what appellant had said to her was fresh in her mind. Respondent nonetheless erroneously contends that the facts of the record show otherwise. (RB 141-142.) The record shows that Watson's conversations with appellant were made at least weeks, and possibly as much as a month before she gave her statement to the police; the lapse of time alone demonstrates that her conversations with appellant were not fresh in her mind when she spoke to the police.[67] (Cf. *People v. Cummings*, *supra*, 4 Cal.4th at p. 1293 [witness spoke to police a few days after a conversation with the declarant and said that the conversation was fresh in his mind].)

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[66] Respondent's contention that the facts of this case are the same as those in *People v. Cummings*, *supra*, 4 Cal.4th 1233, is erroneous. (RB 141.) In *Cummings*, the witness said the statement regarding a conversation with the defendant was truthful when reported; the statement was reported a few days after the conversation and was thus fresh in the witness' mind; and the witness had sufficient recall of the events so that the trial court had a sufficient basis for concluding that the witness was reliable. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1293-1294.)

[67] Watson's phone conversations with appellant were in late August and September, 1990. Her interview with the police was on September 27, 1990. (RT 5849.)

3. Inconsistent Statement Exception

The foundational requirements of the inconsistent statements hearsay exception, as provided under Evidence Code section 1235, were also not met in the present case. Under Evidence Code section 1235, "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Evidence Code section 770." Evidence Code section 770 provides in relevant part that "extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: (a) the witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or (b) The witness has not been excused from giving further testimony in the action."

As stated above, Watson testified that she did not remember the substance of her statement to the police. This being the case, her lack of recollection was not inconsistent with her prior statement, and was thus not admissible under the prior inconsistent statement exception. (*People v. Sam* (1969) 71 Cal.2d 194, 208-210; *People v. Simmons*, *supra*, 123 Cal.App.4th 677, 679-681; *People v. Levesque* (1995) 35 Cal.App.4th 530, 544-545.) Because Watson's answers were primarily of the "I don't remember" variety, her prior statement to Henry was inadmissible for impeachment. (*People v. Fierro* (1991) 1 Cal.4th 173, 222.)

Contrary to respondent's allegation, the record does not show that Watson was being "deliberately evasive" when she testified that she did not recall the substance of her statement to the police such that "inconsistency is implied." (RB 142.)

Watson's testimony was that she "believed" she met appellant

through her boyfriend Terry's sister, Jessica Brock. (RT 5846.) Watson's statement that she did not know if she had "formally met" appellant neither substantiates that she was contradicting her earlier testimony nor does it substantiate that she was being untruthful about her lack of recall. (RB 143.) At best, her statement was that she and appellant had not been formally introduced but that they knew each other. Consistent with the latter interpretation is the fact that Watson testified she had seen appellant with Jessica once. (RT 5848.)

Similarly, the fact that Watson verified she had gone to the police station to make a statement, but did not remember from whom she received calls at the time she testified, does not show that she was being untruthful about her memory. Also, even though she recalled that appellant had made calls to her, this fact does not demonstrate she could remember any other calls she may have mentioned to the police or that she was in fact being deliberately evasive. (RB 143.) The fact that Watson remembered making a statement to the police, but did not recall the details, does not show she was being deliberately evasive so as to imply an inconsistency. (See *People v. Levesque*, *supra*, 35 Cal.App.4th, at pp. 544-545 [witness not found to be evasive even though she recalled having conversation with someone but did not remember the person with whom she spoke or details of conversation].) Respondent fails to explain how an admission that Watson's memory would have been fresher in 1990, or how a response of "it was possible" to the read back of portions of the statement which she gave to Henry substantiates deliberate evasiveness. (RB 143.)[68] In light of the length of

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[68] The cases upon which respondent relies to support the claim that Watson's lack of memory amounted to deliberate evasion are

(continued...)

time between Watson's statement to the police and her trial testimony (approximately five years), it was reasonable for Watson not to have in mind the facts which she had reported to the police or of her conversation with appellant. (See *People v. Green* (1971) 3 Cal.3d 981, 1003, fn. 6.)

4. Appellant Did Not Waive An Objection to Henry's Testimony Based On Hearsay Grounds

Appellant did not waive a hearsay objection to Detective Henry's testimony about what Watson said appellant had said to Watson during their phone conversations. As appellant has set forth fully in his opening brief, the discussion regarding appellant's hearsay objection to Henry's testimony in its entirety shows that it was to encompass all phone calls Watson had talked about, including ones from appellant. (AOB 278 .)

Even assuming appellant's objection to the hearsay testimony of Henry was limited to phone calls by Eileen, a subsequent hearsay objection

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[68] (...continued)
distinguishable from the present case, and are therefore not dispositive. In *People v. Ervin* (2000) 22 Cal.4th 48, 84-85, a finding that the witness' claimed memory loss was a deliberate evasion was based on multiple factors, including: (1) she recalled none of her preliminary hearing testimony and none of the events surrounding the offenses; (2) she claimed inability to identify the defendant or the man she acknowledged as the father of her son; (3) she denied certain facts outright such as whether she had been told how the victim's body was disposed, whether codefendants said they received money and whether she saw one of the perpetrators with an extension cord. In *People v. Green* (1971) 3 Cal.3d 981, 988, a witness admitted remembering events leading up to and following the moment when marijuana came into his possession, but as to that crucial moment he became equivocal. Finally, in *People v. Arias* (1996) 13 Cal.4th 92, 152, a witness initially stated that she did not recall conversations with the defendant, but later recollected facts which were consistent to her prior statement with the exception of one significant fact. Impeachment as to the one inconsistent fact was permitted under the exception to the hearsay rule.

as to phone calls by appellant would have been futile. This fact was demonstrated by the trial court's immediate response to defense counsel's stated assumption that the prosecutor would be eliciting information from Henry about all phone calls Watson had talked about. The court's ruling effectively made clear that any hearsay objection made with regard to Henry's testimony as to what appellant had said to Watson would be overruled. (RT 5900.)[69] As such, the rule on waiver does not apply here. (See Introduction, *supra*.)

Similarly, appellant has not waived his objection to admission of testimony regarding what appellant had told Watson by failing to allege the constitutional basis for the objection below. As set forth in the Introduction to this reply brief, *supra*, where as here, a claim that defendant's fundamental constitutional rights have been violated may be raised for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276.)

D. The Erroneous Admission of Detective Henry's Testimony Regarding Appellant's Phone Calls to Watson Was Prejudicial

In support of the claim that any error resulting from the admission of

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[69] At the conclusion of the discussion on appellant's hearsay objection to testimony by Henry regarding phone calls Watson had told him about, and whether Watson had earlier testified about calls from Eileen, the following colloquy occurred:

> "Mr. Klein: All right. I assume that the people are going to bring out information relating to the telephone calls that she talked about."
>
> Ms. Peterson: That's right.
>
> The Court: All I know is your objection is overruled."

(RT 5900.)

Henry's testimony recapitulating Watson's prior statement to him was harmless, respondent alleges that the evidence was of little importance to affect the verdict. (RB 144.) In so doing, however, respondent ignores the dual impact Henry's testimony likely had on the jury. Not only did it reinforce irrelevant evidence that impermissibly implied that appellant had contacted Watson due to a consciousness of guilt regarding the Cross homicide, but it also had the effect of implying that Watson was being less-than-truthful about her lack of recollection to help appellant. The improper inferences the jury would have reasonably obtained from Henry's testimony impermissibly lightened the prosecution's burden of proof.

Respondent lists a number of factors to show that admission of Henry's testimony about Watson's statement about appellant's phone calls was harmless. (RB 144.) Each of these factors have been demonstrated elsewhere in appellant's briefing as not supported by the record and meritless.

Jessica Brock's version of events that allegedly occurred the night of the Cross murder, including any admission of participation by appellant, was incredible and not worthy of belief. (See Arg. I, sec. C, *supra*, and Args. XV, XVI, XXII, *infra*.) Notably, the trial court implicitly expressed concern about the credibility of Jessica Brock when it allowed the prosecutor to impermissibly elicit the fact that appellant had committed a prior serious offense, the triple murder, with Terry Brock in 1978 to bolster her veracity as to her recollection of appellant's visit being on the night of the Cross homicide. (See Args. XV and XVI, *infra*.) Not surprisingly, the jury expressed that they had "problem areas" with regard to the testimony of these key prosecution witnesses as evidenced by their notes and requests for readback and clarification during deliberations. (See Arg. I, sec. C, *supra*.)

As discussed elsewhere in related claims set forth in this appeal, other purported evidence of a consciousness of guilt on appellant's part was not supported by the evidence and should not have been considered by the jury to impermissibly lighten the prosecution's burden of proof. (Appellant incorporates by reference, as if fully set forth herein, Art. I, sec. C, *supra*; Args. XI, XIII, XXII, *infra*.)

Here, the error in admitting testimony regarding appellant's phone calls to Watson violated basic state evidentiary rules which deprived appellant of his federal constitutional right to due process under the Fourteenth Amendment. The weight of the prosecution's case was insubstantial, and the improper consciousness of guilt inference the evidence supported cannot be said to have been harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Moreover, it was reasonably probable that a more favorable result would have occurred had the evidence at issue been properly excluded. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

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XI

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOWED THE PROSECUTOR TO INTRODUCE EVIDENCE THAT APPELLANT REFUSED TO STAND IN A LINEUP EVEN THOUGH THE EVIDENCE DID NOT PROPERLY SUPPORT A CONSCIOUSNESS OF GUILT

Appellant argued in his opening brief that the trial court erroneously permitted the prosecutor to introduce evidence appellant had refused to stand in a lineup even though appellant's refusal was based on the advice of counsel who was representing him in the pending triple homicide case. Specifically, appellant argued that the evidence did not support an inference of a consciousness of guilt on appellant's part because his attorney told him not to stand in the lineup and that evidence of the refusal could not be used against him. Appellant also argued that the prejudice resulting from evidence of his refusal outweighed any probative value. (AOB 279-281.) Respondent erroneously argues that the evidence was properly admissible, that appellant waived an objection based on Evidence Code section 352, and that any error in admitting the evidence was harmless. (RB 145-147.)

The merits of appellant's claim have been addressed fully in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent regarding the merits of this issue, 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*, *supra*, 3 Cal.4th at 995, fn. 3). Here, appellant will only address points which warrant further comment.

First, the trial court's ruling permitting evidence of appellant's refusal to stand in the lineup was based on unsound reasoning. Instead of assessing whether or not the evidence *properly* supported the consciousness

of guilt inference sought by the prosecutor, the court made its determination of relevancy merely on whether appellant had been informed that the lineup related to the Cross murder. In so doing, the court noted that there were two competing inferences to be gained from the evidence: (1) whether appellant refused because his lawyer told him not to participate, or (2) whether he refused because his lawyer did not want him identified. (RT 5716.) The first inference supported appellant's claim that there was no consciousness of guilt. Notwithstanding the fact that there was no evidence to support the latter inference, the trial court stated it was up to the jury to decide the competing inferences. (RT 5716.)[70]

This was not the proper test for the court to determine whether the

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[70] The trial court's ruling and reasoning therefore is as follows:

> "The Court: I understand what he's saying. I don't think that would bar the evidence coming in. There are two competing inferences. One inference was that he was waiting for somebody to order him to do it because up to then he thought he had nothing to lose by refusing and nothing to gain for that matter for complying, I suppose. ¶ That's something that the defense could argue. ¶ But I think with or without the advice of counsel that the person is asked to stand in a lineup, assuming he is told somehow as to what the nature of the lineup is, what the case is about, I think absent that there is no relevance. ¶ But if the people can demonstrate that somehow information got to Mr. Alexander and that they were interested in him on his pending case, the Cross case, and if he was asked to get into a lineup and refused, I think it is relevant and admissible. ¶ As to whether or not the jury will draw inferences adverse to them, that is up to them. They will have competing inferences. One is that he stayed out because his lawyer told him to stay out. One is he stayed out because his lawyer didn't want him identified."

(RT 5716.)

evidence should be admitted to show a consciousness of guilt. Under Evidence Code section 210, the court was required to analyze whether the proffered evidence logically, naturally and by reasonable inference tended to establish a material fact. Here, appellant presented credible facts which showed that his refusal would not have been indicative of a consciousness of guilt. The court was required to determine whether or not the evidence the prosecutor sought to introduce properly supported an inference of a consciousness of guilt. If it did not, as appellant argued, then it should have been excluded. Notably, respondent does not defend the basis for the trial court's ruling, and instead merely argues that the evidence was relevant and properly admitted. (RB 146.)

Moreover, and contrary to respondent's assertion, appellant did not waive an objection to Deputy Hartwell's testimony under section 352 of the Evidence Code. (RB 147.) Respondent's contention that appellant's section 352 objection *only* related to the lineup refusal form (RB 281) takes counsel's objection and the discussion about the form out of the proper context. The lineup refusal form and what was memorialized on it, was integral to the discussion regarding admissibility of the fact of appellant's refusal as well as defense counsel's arguments to why any evidence of it should be excluded. The record shows that: (1) Deputy Hartwell was the officer who informed appellant that he was to participate in the lineup; (2) Deputy Hartwell read the form to appellant where it stated appellant did not have a right to refuse and that any refusal could be used to indicate a knowledge of guilt; (3) it was on this form appellant wrote that his reason for refusing to participate was based on the advice of counsel. (See RT 5712-5722.) Accordingly, appellant's claim that the trial court erred in overruling appellant's objection to admission of evidence relating to his

refusal in the lineup under Evidence Code section 352 is properly before this Court.

As appellant has set forth in his opening brief, admission of the consciousness-of-guilt evidence that appellant had refused to stand in the lineup was prejudicial. This is especially so when considered in combination with other improper evidence erroneously admitted to show a consciousness-of-guilt which served to lighten the prosecutor's burden of proof as well as the weakness of the prosecution's case. Appellant incorporates by reference, as if fully set forth herein, Arguments I, sec. C, *supra*; Argument X, *supra*; and Arguments XIII and XXII, *infra*. It cannot be said that the error in admitting the evidence at issue was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Accordingly, the judgment of conviction and sentence should be reversed.

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XII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND DENIED APPELLANT HIS RIGHT TO PRESENT A DEFENSE BY EXCLUDING TESTIMONY BY JACQUELINE SHEROW WHICH INCULPATED CHARLES BROCK AS TO THE MURDER OF JULIE CROSS

In his opening brief appellant contended that the trial court erroneously sustained the prosecutor's objection to defense counsel's attempt to elicit testimony from Jacqueline Sherow ("Sherow") that Charles Brock ("Charles"), Terry Brock's brother, had made inculpatory statements regarding his culpability in the Julie Cross homicide. Appellant argued that the evidence was admissible under Evidence Code section 1230. Appellant also argued that the exclusion of this evidence violated appellant's constitutional rights to due process and to present witnesses, and to present a defense. (U.S. Const., Amends. 6 and 14; AOB 282-286.) Respondent disagrees and contends that Sherow's testimony was not admissible under Evidence Code section 1230, the exclusion of the testimony was harmless, and that appellant waived any constitutional objection to the exclusion of Sherow's testimony. (RB 148-154.) Respondent's contentions are without merit.

A. The Statements by Charles Brock to Jacqueline Sherow Were Admissible Under Evidence Code Section 1230

Contrary to respondent's claim that Evidence Code section 1230 requirements were not met with regard to statements made by Charles Brock to Jacqueline Sherow about the Cross homicide, the statements constituted declarations against penal interest and were reliable. First, it is undisputed that Charles was unavailable at the time the statements were sought to be admitted. Moreover, review of the circumstances under which the statements were made, the possible motivation of the declarant and the

declarant's relationship to appellant establishes that the statements were against Charles' interests, and that the statements were trustworthy. (See *People v. Brown* (2003) 31 Cal.4th 518; *People v. Wheeler* (2003) 105 Cal.App.4th 1423; *Luna v. Cambra* (9th Cir. 2002) 311 F. 3d 928; *Cheung v. Maddock* (N.D. Cal. 1998) 32 F.Supp.2d 1150.)

The record reveals that Sherow told Jessica Brock and Detective Richard Henry that Charles had said: "I had something to do with the killing of Julie Cross" or said "I'm involved in the murder of Julie Cross." (RT 6631-6632, 6637.) Contrary to respondent's assertion, the record does not substantiate that Sherow believed that Charles Brock merely "knew" about the murder. (RB 152.) Instead, the record shows that based on what he said about the murder Sherow believed that Charles knew about the murder because he may have been involved. (RT 6635-6636.)[71]

Respondent's contention that these statements were "vague expressions" and not self-inculpatory (RB 151) are belied by the simple fact that a statement by someone that they are *involved in a murder* or had *something to do with a killing* cannot be anything but a declaration against penal interest. (See *Luna v. Cambra*, (9th Cir. 2002) 306 F.2d 954 [under

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[71] During the Evidence Code section 402 hearing, the following colloquy occurred:

> "Q. [Deputy District Attorney Kuriyama]: . . . Okay. So you never asked him 'exactly what was your involvement?'
>
> A. [Jacqueline Sherow]: No.
>
> Q. But you believed based on what he said that he knew about it, that he may have been involved.
>
> A. Yes."

(RT 6635-6636.)

California law, out of court statement confessing one's guilt to a serious crime is, on its face, a statement against penal interest]; *People v. Gordon* (1990) 50 Cal.3d 1223 [statement of defendant's uncle regarding his surreptitious medical care of defendant after robbery in which defendant was wounded admissible as statement against uncle's penal interest].) Moreover, when the statements are viewed in the context in which they were made it is evident that they were in fact self-inculpatory for purposes of the penal interest hearsay exception set forth by Evidence Code section 1230. (See *People v. Hawley* (2002) 27 Cal.4th 102.)

Immediately following his unequivocal admission that he was involved with or had something to do with the murder, Charles told Sherow he needed to get away from the area. (RT 6631-6632.) Absent Charles' actual involvement in the murder, his articulated need to get away makes no sense. Respondent erroneously asserts that for Charles' statements to be inculpatory it was necessary that Charles provide details or specifics as to the role he played in the murder. (RB 151.) Charles' statements to Sherow were in fact reliable as well as contrary to his penal interests. This conclusion is demonstrated by Nina Miller's 1980 statement to police officer William H. Williams, which was provided not long after the Cross homicide, that Charles had made inculpatory statements to her regarding the incident. Miller's statement about what Charles had told her included the fact that the male officer must have played dead and did not identify him. (CT 2606; RT 7085.) Miller also told officer Williams that Charles described the Secret Service shotgun to her, that he indicated how the shotgun stock could be folded up and concealed under his jacket, and that he had gotten rid of the shotgun. (CT 2607.) Years later, Miller gave a similar statement to defense investigator Richard Lonsford in which she

remembered the conversation where Charles had said that the man must have been faking because he was on the ground but he was alive and that when he (Charles) was at the jail the man didn't recognize him. Miller also told Lonsford that Charles had described what the secret service shotgun had looked like that had been used and said he had tossed the gun in the sea. (RT 2505-2506.)

Even assuming that possible drug use was the reason Charles was "shaky and perspiring" when he made the inculpatory statements to Sherow about his involvement in the Cross murder (RB 152), additional circumstances under which the statements were made establish that they were nonetheless against his penal interest and trustworthy. The record shows that it is likely that Charles was afraid or nervous when he made the statements to Sherow because he was worried the police would determine that he was involved in the murder. Even though the police had released him from their custodial investigation for the Cross murder, Charles was under their surveillance and they were trying to contact him after his release. (RT 6639-6640.)

If, as respondent contends, Charles was only "involved" as a suspect, instead of having any actual involvement in the homicide (RB 152), then he had nothing to fear from surveillance by the police, being subjected to further questioning and/or arrest. As noted above, Charles would not have told Sherow "I have to get away from here" (RT 6632) if his statements to her were not meant to convey actual involvement in the murder, and fear that his culpability with regard to it would be ascertained. As further evidence of the reliability of the statements, the record shows that Charles brought up the subject of his involvement in the Cross murder on his own (RT 6631), the statements were spontaneous in nature and made at a time

when he had no apparent reason to lie. (*People v. Fructos* (1984) 158 Cal.App.3d 979, 985.)

Charles Brock had no motivation to make inculpatory statements about the murder. There is no evidence to suggest that he made the statement in an attempt to "shift blame or curry favor." (*Williamson v. United States* (1994) 512 U.S. 594, 603.) It was not to his benefit to be making any statements to anyone admitting his involvement in the Cross murder. Charles and appellant were not friends, so any statements of culpability could not be construed as beneficial to appellant. (Cf. *People v. Frierson* (1992) 53 Cal.3d 730.) Contrary to respondent's assertion otherwise, because Sherow and Charles Brock were long time friends, and their relationship was such that he took it upon himself to care for her children while she was in jail, it is unlikely that he would have lied to her about being involved in the Cross murder. It is more likely than not that Charles would truthfully tell Sherow he was involved in the Cross murder because he would not have to worry that she would report him to the police. (See *Chambers v. Mississippi* (1973) 410 US 284, 300-301.)

Given the circumstances of Charles' statements to Sherow that he was involved in the Cross murder, it must be concluded that those statements were against his penal interest and sufficiently trustworthy because "no reasonable man in his position would have made the statement unless he believed it to be true." (Evid. Code § 1230; *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446; see *Williamson v. United States*, *supra*, 512 U.S. at pp. 598, 603-604 [discussing similar requirement in Fed. Rules Evid., rule 904(b)(3), 28 U.S.C.].) As set forth in appellant's opening brief, the statements made by Charles were more self-inculpatory and reliable than the hearsay statements which were determined to be declarations against

interest in *People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678, and *People v. Gardner* (1989) 207 Cal.App.2d 935, 937. (AOB 283-284.) Respondent's contention that *Jackson* and *Gardner* are distinguishable (RB 151) must be rejected.

The erroneous exclusion of Sherow's testimony regarding the inculpatory statements by Charles Brock violated appellant's constitutional rights to due process, to present witnesses and to present a defense. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.) In *Chambers v. Mississippi*, the trial court excluded defense evidence relating to a witness' out-of-court confessions because Mississippi law excluded hearsay without any exception for statements against penal interest. State law also precluded cross-examination of non-adverse witnesses, so the defendant was unable to cross-examine the witness regarding his prior confession when the witness denied complicity on the stand. The United States Supreme Court explained that evidence of the out-of-court confessions was critical to the defense but was excluded despite overwhelming indicia of reliability. (*Id.*, at pp. 302-303.)[72] It declared that the exclusion of this evidence, along with the limitations on the defendant's ability to cross-examine the witness, were a denial of due process in that

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[72] The Supreme Court cited the facts that the declarant made confessions spontaneously to close acquaintances shortly after the murder, each confession was corroborated by other evidence, and the confessions were self-incriminatory as key indications of the reliability of the confessions. (*Id.*, 410 U.S. at pp. 300-301.) In this case, Charles' statements were reliable as they were made spontaneously to Sherow, they were corroborated by other evidence, and they were self-incriminatory.

they deprived defendant of his right to present a defense. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294, 297-298, 302; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 56 [interpreting *Chambers* as holding, in the particular circumstances of the case that combined effect of state rules of evidence violated defendant's right to present defense by "exclud[ing] potentially exculpatory evidence crucial to the defense"]; *Green v. Georgia* (1979) 442 U.S. 95, 97, quoting *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302 ["In these unique circumstances, the 'hearsay rule may not be applied mechanistically to defeat the ends of justice.'"].)

Under the circumstances of this case, "mechanical" reliance on Evidence Code section 1230 or Evidence Code section 352 to exclude testimony by Sherow regarding Charles Brock's responsibility for Cross' murder denied appellant his fundamental constitutional rights to due process and to present a defense. (*Franklin v. Duncan* (N.D. Cal. 1995) 884 F.Supp. 1435, 1453, 1455, quoting *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56 ["The Sixth Amendment requires 'at a minimum, that criminal defendants have . . . the right to present evidence before a jury that might influence the determination of guilt.'"].)

Here, the authority granted to the trial court under Evidence Code section 352 to exclude evidence which is unduly prejudicial, cumulative, confusing or misleading, must yield to a defendant's constitutional right "to present all relevant evidence of significant probative value to the defense." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684, citing *Washington v. Texas* (1967) 388 U.S. 14, 23 and *Chambers v. Mississippi*, *supra*, 410 U.S. 302.) Similarly, if the trial court's determination that Sherow's testimony about what Charles had said was "weak" was a reference the court's assessment of Sherow's *credibility*, exclusion of the statements based on this ground

was improper under Evidence Code section 352. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609-610; *Vorse v. Sarasay* (1997) 53 Cal.App.4th 998, 1012-1013.)

B. Waiver

Respondent bases his claim of waiver on the fact appellant did not argue at trial that the exclusion of Sherow's testimony about what Charles had said to her violated his due process right to present a defense. (RB 149.) Respondent's reliance on Evidence Code section 353 is misplaced as this is a case where evidence was *excluded* and Evidence Code section 354 is controlling. Similarly, the cases cited by respondent to support the contention of waiver are not dispositive. (RB 149-150.) Unlike the authority upon which respondent relies, the substance and purpose of the excluded evidence was made clear to the trial court through defense counsel's offer of proof and the argument presented with regard to Sherow's testimony. (RT 6624-6644.) Although no constitutional authorities were cited by appellant, they were not required in order to overcome any alleged default.[73]

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[73] The cases upon which respondent relies to support the contention that the constitutional basis was waived are distinguishable from the instant case because in them: (1) no offer of proof was made as required by Evidence Code section 354, or (2) there was no specific objection to the admission of evidence as required by Evidence Code section 353, or (3) there was some non-evidentiary situation where no constitutional authorities were cited. (*People v. Williams* (1997) 16 Cal.4th 153, 250 [defendant objected to admission of the gang paraphernalia solely on relevance grounds and any objection on Evidence Code section 352 grounds was waived]; *People v. Padilla* (1995) 11 Cal.4th 891, 971 [instruction that sentence of life without possibility of parole means just that was not requested by defendant]; *People v. Sanders* (1995) 11 Cal.4th 475, 539, fn.

(continued...)

Pursuant to Evidence Code section 354, an offer of proof must show that "the substance, purpose and relevance of the excluded evidence was made known to the court. . . ." (*People v. Whitt* (1990) 51 Cal.3d 620, 648.) Section 354 does not say that the offer of proof must advise the trial court of the legal bases for admissibility, the rights that would be violated by the exclusion of evidence, or anything similar. Instead, section 354 provides:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears on record that:
>
> > (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, the offer of proof, or by other means;
> >
> > (b) The rulings of the court made compliance with subdivision (a) futile; or
> >
> > © The evidence was sought by questions asked during cross-examination or recross-examination."

(Evid. Code § 354.) Accordingly, the failure of appellant to cite any, or all applicable, legal authorities in this instance is not a default.

Notwithstanding the offer of proof which was made with regard to

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[73] (...continued)
27 [general assertion that failure to state objection at trial results in waiver on appeal; defendant's claim that trial court's restrictions on voir dire was premised on unsupported assertion that the restriction operated to eviscerate the entire death qualification process and rejection of premise defeats constitutional claims]; *People v. Rodrigues* (1998) 8 Cal.4th 1060, 1116, fn. 20 [general assertion that failure to state objection at trial results in waiver on appeal; appellant contended that witness' recollection was influenced by videotape; because there was no basis in the record for the contention, appellate court did not engage in speculation].)

Sherow's testimony and compliance with Evidence Code section 354, trial counsel's failure to specifically articulate constitutional due process to present a defense as a partial basis for objecting to the exclusion of the testimony does not constitute a waiver on that ground for purposes of appeal.

The record shows that the trial court excluded the evidence because it did not meet the requirements of Evidence Code section 1230, and under Evidence Code section 352 the probative value of admitting the evidence was outweighed by its prejudicial effect. (RT 6641- 6644.) Accordingly, any additional objection based on a violation of due process and the right to present a defense would have been futile and would not have changed the trial court's decision. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123 [rejection of ineffectiveness of counsel claim based on failure to federalize because "Defendant does not argue here that there are constitutional standards of admissibility more exacting than the statutory standards imposed by the Evidence Code"].)

C. The Exclusion of Jacqueline Sherow's Testimony Was Not Harmless

Exclusion of Jacqueline Sherow's testimony about what Charles had told her about the Cross murder was prejudicial. Contrary to respondent's assertion, Sherow's testimony was not of "minimal probative value," thus making its exclusion harmless. (RB 153-154.) The excluded evidence was relevant to, and would have bolstered, appellant's defense that he was not responsible for the murder of Julie Cross, and the perpetrators were Terry and Charles Brock.

This is a case where identity was at issue, and the circumstantial evidence that appellant was one of the perpetrators was weak. Although

Bulman identified photographs of appellant during the trial proceedings, this identification was made after an unduly suggestive identification procedure and after he had been unable to identify appellant at the April 19, 1990, lineup or in court. (See Argument I, *supra*.) Moreover, the circumstantial evidence of appellant's guilt rested primarily on statements Jessica Brock provided to the police implicating appellant as the shooter in the Cross murder. These statements were provided at the request of her brother Terry, and contact with the police was facilitated by Terry's attorney, Marcia Morrissey.[74]

As set forth in Argument I, *supra*, there were numerous grounds to find that Jessica's statements to the police in 1990 and her subsequent testimony against appellant were not credible, including: (1) she failed to reveal information about appellant to the police until over 10 years after the Cross murder and after questioning by the police about her brothers Terry and Charles being responsible for the murder; (2) providing the police information about appellant was motivated by a desire to help Terry who was awaiting trial for a separate triple murder case of which appellant had just been convicted; (3) she had a prior criminal history and warrant for her arrest and admitted she wanted the prosecution to help her with her case and to keep her children; (5) the prosecution promised to help her relocate and pay her rent after she testified; and (6) when she testified she was under the influence of a sleeping pill or another drug. In addition, Jessica's trial testimony was fraught with contradictions not only as to her direct and cross-examination, but also as to her earlier statements to the police and the

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[74] Bulman had identified Terry Brock as one of the perpetrators. (RT 4841.)

interview with defense counsel. (See Argument I, sec. C, *supra*.)

That the prosecution's case for guilt was weak is demonstrated by the length and circumstances of the deliberations. The substance of the notes sent to the court from the jury show that they did not believe the testimony of Bulman or of Jessica Brock to be compelling. Not only did the jury request readback of testimony of both witnesses, but they also made clear by their notes that they were concerned about the lack of an identification by Bulman and whether Bulman had actually identified appellant from the composites and photos. The jury also sought clarification about the photos of appellant and Terry Brock contained in the photo array shown to Bulman on the eve of his testimony, and the meaning of "circumstantial evidence." At one point at least one juror was unwilling to render a conviction because there had been no positive actual identification of appellant by Bulman and Jessica's lack of credibility. Because of these questions, the court reinstructed the jury on circumstantial evidence, eyewitness testimony and reasonable doubt. (See Argument I, sec. C.)

Sherow's testimony about what Charles had said to her about his involvement in the Cross murder was virtually the only evidence available to defendant which established that Charles was directly involved in the Cross murder. As such, it was necessary to corroborate appellant's third party culpability defense. (See *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997, 1008.) Equally important is the fact that Sherow's testimony would have undermined the credibility of key prosecution witness Jessica Brock, whose testimony, if believed, supported the prosecution's theory that appellant was the shooter. (See *Franklin v. Duncan*, *supra*, 884 F.Supp. at 1455 [exclusion of evidence had a critical effect on the jury as it served to

make the credibility of the key prosecution witness irrefutable].)[75] The constitutional right to present relevant evidence that disproves a key prosecutorial contention is well recognized. (*Franklin v. Duncan*, *supra*, 884 F.Supp. at 1454, citing *United States v. Begay* (10th Cir. 1991) 937 F.2d 515, 523.)

The excluded testimony about what Charles had said to Sherow regarding the Cross murder was not cumulative (cf. *People v. Lucas* (1995) 12 Cal.4th 415, 465), nor was it "tangential" or speculative (cf. *People v. Hawthorne*, *supra*, 4 Cal.4th 43, 56). Nina Miller, who was Charles Brock's girlfriend, was interviewed by the police numerous times about the Cross murder. (RT 6406-6407; 6413; 6422; 7084.) At trial, defense counsel attempted to introduce evidence of the inculpatory statements Charles had made to Miller about the murder and the fact that she had seen Charles and Terry Brock with a shotgun. Miller, however, denied she knew of, or had even provided certain information to the police, which implicated Charles as one of the perpetrators in the murder. (RT 6410, 6412, 6419-6424.)[76]

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[75] The trial court recognized that the credibility of Jessica Brock was critical to the jury's determination regarding appellant's guilt, and if her earlier statements to the police were believed, appellant would be found guilty. (RT 6237.)

[76] On direct examination Miller repeatedly stated she *did not remember* telling the police certain information concerning the Cross murder and Charles' involvement in it. The following is an example of the interchange that occurred between Miller and defense counsel Klein on this topic:

"Q. [Defense counsel Klein]: Did Terry ever say to Chino [Charles Brock] 'Did you hear about the special agent lady

(continued...)

[76] (...continued)
that got killed' and then laugh?

A. [Nina Miller]: Not that I can remember.

Q. Did you ever tell that to the police?

A. Not that I remember.

Q. Did you ever hear Chino tell Terry that 'the other agent, the male, was away from the car and on the ground when he was shot and there was gun powder all over him'?

. . . .

A. No, I don't.

Q. Do you remember telling that to the police?

A. I don't remember saying anything like that or hearing anything like that.

Q. Did you ever hear Chino say in your presence and Terry's presence that the other agent must have played dead because he was at a lineup but didn't identify him?

. . . .

A. No. I don't remember.

Q. Did you ever tell that to a police officer?

A. Not that I remember.

Q. And did Terry ever say to Chino in response to that 'What are you worried about if he didn't identify you?'

A. No.

Q. Did you ever tell that to a police officer?

A. No

Q. Did Chino ever describe the shotgun that was used to kill the secret service woman to you?

A. Not that I can remember.

(continued...)

Similarly, defense counsel later attempted to present evidence of inculpatory statements Charles had made to Miller through the testimony of Officer Williams, who had conducted a series of interviews of Nina Miller in June and July, 1980. However, like the testimony of Miller, Williams' testimony did not directly link Charles to the Cross murder. Even though Miller told Williams that Charles had said the surviving agent must have been playing dead and did not identify Charles at the lineup, Miller also told Williams that it was when she and Charles were on their way to pick up a friend from jail that Charles informed her that he had heard earlier on the radio that there had been a police shooting in the Venice area (RT 7085-7091). Thus, Williams' testimony about the statements Charles had made to Miller also had the overall effect of implying to the jury that Charles was not responsible or directly involved in the Cross murder.

As previously noted, the statements by Charles Brock to Jacqueline Sherow had a high degree of trustworthiness. "It is a matter of common observation that in instances where there are few eyewitnesses and

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[76] (...continued)

Q. Did you ever tell that to a police officer?

A. Not that I can remember.

Q. Did he ever describe to you how the stock of the shotgun folded up to make it small and showed you how he could hide it under his jacket?

A. No.

Q: Did you ever tell that to a police officer?

A: Not that I remember.

(RT 6422-6424.)

divergent evidence concerning the commission of a crime, an admission by one of the persons involved that certain things occurred, or were absent, may go to the essence of the question of guilt." (*People v. Parriera* (1965) 237 Cal.App.2d 275, 283.) Such is the case here. The reliability of Charles' statements is established by the fact that they were spontaneous, were corroborated by other evidence, and they were self-incriminatory. (See *Chambers v. Mississippi*, *supra*, 410 U.S. 284 at pp. 300-301; fn. 72, *supra*.)

Fundamental fairness and due process required that Sherow be allowed to testify that Charles Brock made unequivocal and inculpatory statements demonstrating his culpability in the Cross murder. Exclusion of relevant and exculpatory evidence which would have resulted from Sherow's testimony regarding statements Charles had made about the Cross murder and his involvement in it violated appellant's constitutional rights to present a defense, confrontation and due process. (*Washington v. Texas*, *supra*, 388 U.S. at p. 23; *Franklin v. Duncan*, *supra*, 884 F.Supp. at 1453; *People v. Babbitt* (1988) 45 Cal.3d 660, 684.) The erroneous exclusion of Sherow's testimony had a critical effect on the jury as it served to make Jessica Brock's testimony irrefutable and, when combined with the violation of appellant's constitutional rights to due process and to present a defense resulting from the exclusion of the evidence, the cumulative error was prejudicial. (*Franklin v. Duncan*, *supra*, 884 F.Supp. at p. 1455.) This is especially so in light of the weakness of the prosecution's case. (Appellant incorporates by reference as if fully set forth herein Arg. I, sec. C, *supra*. It cannot be said that the exclusion of Sherow's testimony about admissions Charles had made about the Cross murder was harmless beyond a reasonable doubt. (*Washington v. Texas*, *supra*, 388 U.S. at p. 23.)

D. Conclusion

Sherow's testimony regarding inculpatory statements Charles had made to her was properly admissible under Evidence Code section 1230. Exclusion of her testimony violated appellant's fundamental constitutional rights to present a defense and to due process. The exclusion of the evidence was not harmless beyond a reasonable doubt, and reversal of the judgment of conviction and sentence are required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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XIII

THE TRIAL COURT VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS AND COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY WITH CALJIC NOS. 2.04 AND 2.05

Appellant has argued the trial court committed prejudicial constitutional error when it instructed the jury with two consciousness-of-guilt instructions, CALJIC Nos. 2.04 and 2.05, which were not supported by the facts presented at trial. Specifically, appellant alleged that the consciousness-of-guilt instructions violated due process because they lessened the prosecution's burden of proof and permitted the jury to convict him on less than proof beyond a reasonable doubt. (AOB 286-289.) Respondent argues that the evidence was sufficient to justify the instructions. Respondent also alleges that any constitutional due process violation for giving the instructions was waived by a failure to raise the claim below. (RB 155-158.) Respondent's contentions are contrary to the record and without merit.

A. The Evidence Did Not Justify Giving CALJIC No. 2.04

With respect to CALJIC No. 2.04, respondent makes the broad assertion that "Brock's statements about appellant telling her what to say prior to her interview with appellant's defense attorney, if believed by the jury, supports an inference that appellant was attempting to influence Jessica Brock's testimony." (RB 156-157). As respondent notes, when Jessica was interviewed by defense counsel she told him that appellant had asked her to tell counsel about the day his car was wrecked and to show counsel the apartment where she used to live. (RT 7122-7123, Exh. 90A at p. 14.) However, these facts do not warrant the permissive inference, contained in the challenged instruction, that appellant "attempted to or did

persuade a witness to testify falsely." The mere contact of Jessica by appellant prior to her interview with defense counsel, or a specific request by appellant that Jessica provide counsel certain information about his car or her former apartment, does not constitute an attempt or directive by appellant for her to testify falsely. Similarly, appellant's request was not a directive for Jessica to alter her story about when appellant visited her or to lie about appellant's visit.

It is pure speculation by respondent, and contrary to the appellate record, that the evidence supports the inference that appellant had attempted to persuade or did persuade Jessica to testify falsely, which is required for CALJIC No. 2.04 to be given. (See *People v. Pride* (1992) 3 Cal.4th 195.) Although it ultimately ruled otherwise, the trial court apparently also determined the prosecution's justification for giving 2.04 was merely speculative by its assessment that appellant's statement to Jessica to tell defense counsel about his car being hit did not support an inference that appellant had told her to lie or to testify falsely. (RT 7143-7144.) The initial colloquy between the trial court and counsel concerning whether or not CALJIC No. 2.04 should be given is as follows:

> "The Court: 2.04. Efforts by defendant to persuade a witness to testify falsely or fabricate.
>
> Defense Counsel Klein: I don't think there is any evidence of that.
>
> District Attorney Kuriyama: There is the statement in the 9-14-95 taped interview by the defense in which Jessica Brock refers to the defendant contacting her in [sic] telling her what to say. That's in the tape at the very end.
>
> The Court: When she says the 'off the record' thing?
>
> Defense Counsel Klein: To bring up another subject. That's not telling her to lie or make something up.

The Court: I thought the statement just said 'he,' meaning the defendant, 'wants me to tell you about the guy who hit his car.

Defense Counsel Klein: Exactly.

District Attorney Kuriyama: Right.

The Court: *That would not cut it.*"

(RT 7143-7144, emphasis added.)

The issue in this case was whether Jessica was telling the truth about appellant and circumstantial facts about his involvement in the Cross murder. By informing the jury that they could inferentially find appellant guilty just because he had spoken to Jessica Brock about telling defense counsel about when his car was wrecked or to show him her former apartment, the trial court further violated appellant's due process rights. (U.S. Const., Amend. 14; Cal. Const. art. 1, §§ 7, 15, 24.)

B. The Evidence Did Not Justify Giving CALJIC No. 2.05

Respondent alleges that CALJIC No. 2.05 was warranted because the evidence showed that appellant authorized another person to procure false testimony on for his benefit. This contention is also without merit, for as with CALJIC No. 2.04 there was insufficient evidence to support the suggested inference to justify the additional consciousness of guilt instruction under CALJIC No. 2.05. (*People v. Hannon* (1977) 19 Cal.3d 588, 597.)

"While evidence of efforts by a defendant himself to prevent a witness from testifying are admissible against him, in order to make evidence of such efforts by another person admissible it must be established that this was done by the authorization of the defendant. [Citations.]" (*People v. Terry* (1962) 57 Cal.2d 538, 565-566.) The defendant's authorization may, and usually must, be proved by circumstantial evidence.

(*People v. Kendall* (1952) 111 Cal.App.2d 204, 213.) Proof of a "mere opportunity" for a defendant to authorize a third person to attempt to influence a witness is insufficient. (*Terry, supra*, 57 Cal.2d at p. 566.)

Respondent first contends that CALJIC No. 2.05 was warranted because appellant urged Darcel Taylor to dissuade Terry Brock from talking to the police and to find out whether he had made any statements to them. (RB 157.) This contention fails for a number of reasons. The evidence shows that when Darcel wrote the letter in February, 1991, she did not know appellant was a suspect in the Cross murder. (RT 5886.) Respondent cannot, and does not, offer any evidence otherwise. The evidence is also uncontradicted that Darcel acted on her own initiative, rather than at appellant's request or authorization, when she wrote a letter to Terry. (RT 5879, 5885.) Even assuming that it was at appellant's request that Darcel contact Terry, there is nothing in her letter which suggests that Terry falsify or fabricate evidence. (People's Exh. 90A.) Although Darcel's letter inquired whether Terry had talked with the police (*ibid.*), this fact cannot be determined as constituting a request from appellant that Terry lie or falsify testimony.

Respondent next contends that CALJIC No. 2.05 was justified because appellant wanted April Jones Watson to find out if Terry Brock was talking to the police and to dissuade him from talking. (RB 157.) There is no evidence, nor does respondent present any, that appellant's call to Watson concerned the Cross murder. As set forth in appellant's opening brief, it is evident that appellant's call was about the triple homicide case where Terry was charged as a co-perpetrator with appellant. The record establishes that in August, 1990, when the call was made to Watson, the triple homicide case against Terry was still pending and it was not until

October 12, 1990, that Terry pled guilty. (RT 5838.)[77] Notwithstanding the fact that there was no evidence that appellant's call to Watson was about the Cross murder, the record shows that even if it was, which appellant does not concede, there was no attempt by appellant to get her to dissuade Terry from testifying. At best, the record shows that appellant made inquiries to Watson as to whether or not Terry was talking to the police. (RT 5851-5852.) Apart from respondent's misrepresentation of the record, appellant's inquiry about Terry does not support the inference that appellant wanted Terry to fabricate evidence in the Cross case.

Similarly, any request by appellant for his mother to inform Eileen Smith of his motion to exclude drug evidence and of information in Eileen's possession which would be favorable to such motion (RB 157) does not amount to a request by appellant for Eileen to fabricate evidence. Respondent cites no facts, nor are there any, which undermine Eileen's credibility on this issue. For respondent's assertion to be valid, the mere fact that a defendant reminds a witness that they have favorable and relevant evidence in their possession in order to insure that such evidence is presented on the defendant's behalf constitutes sufficient justification for giving an instruction pursuant to CALJIC No. 2.05.

Finally, the fact that appellant wanted his mother to tell Jessica Brock that there was no case against him but for her testimony does not support giving CALJIC No. 2.05. (RB 157.) Even assuming, arguendo, that this can be construed as an attempt by appellant to dissuade Jessica

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[77] Appellant incorporates by reference, as if fully set forth herein, Arg. X, *supra.*, where it is argued, *inter alia*, that the trial court erroneously and prejudicially admitted Watson's testimony about the phone call appellant made to her.

from testifying, it cannot properly be considered a request that Jessica give false testimony.

C. The Constitutional Violation Resulting From This Error Has Not Been Waived

Contrary to respondent's allegation, appellant's claim that his federal constitutional right to due process was violated by instructing the jury with CALJIC Nos. 2.04 and 2.05 was not waived by the failure to assert that right below. (RB 158.) Appellant knows of no case in which this Court has held that a defendant must explain to the trial court the adverse federal constitutional implications of giving an instruction to which he objects. Certainly respondent has cited none.

The decisions of this Court upon which respondent relies to support his claim of waiver are not dispositive. (RB 158.) In *People v. Williams*, *supra*, 16 Cal.4th at p. 250 [admission of gang evidence], *People v. Sanders*, *supra*, 11 Cal.4th at p. 539, fn.27 [restriction of voir dire], and *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1116 [admission of videotape], there was a failure below to allege a federal constitutional basis for the evidentiary objection. The one instructional error case, *People v. Padilla*, *supra*, 11 Cal.4th at p. 971, involves the instance where the defendant did not request the instruction at issue. Such was not the case here.

Even assuming a explicit objection based on constitutional grounds is required with regard to the instructions at issue, this Court has held that a defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (*People v. Vera*, *supra*, 15 Cal.4th at p. 276.) Moreover, appellant may properly raise an objection to the instruction on constitutional grounds for the first time on appeal under Penal Code section 1259 because his

substantial rights were affected thereby. (See *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.) Accordingly, this Court should review the merits of appellant's constitutional claim. (See also Introduction, *supra*.)

D. Prejudice

Respondent incorrectly alleges that any error from instructing the jury with CALJIC Nos. 2.04 and 2.05 was not prejudicial. Respondent claims that: (1) the cautionary nature of consciousness of guilt instructions "'benefits the defense by admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory'" and (2) consciousness of guilt instructions such as CALJIC No. 2.05 do not improperly endorse the prosecution's theory or lessen its burden of proof. (RB 157-158; citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) The rationale on this issue employed by this Court in *People v. Kelly* (1992) 1 Cal.4th, 495, 531-532, and *People v. Jackson*, *supra*, 13 Cal.4th at p. 1224, is flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, 1 Cal.4th at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in *not* giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the allegedly protective aspect of these instructions is weak at best and often entirely illusory. The instructions do not specify what else is required

before the jury can find that guilt has been established beyond a reasonable doubt. They thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that in combination with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

In *People v. Pride*, *supra*, 3 Cal.4th 195, this Court assumed that CALJIC No. 2.04 was erroneously given there, but found the error harmless. (3 Cal.4th at pp. 248-249.) Unlike the defendant in *Pride*, however, appellant does not "concede that . . . the instruction . . . was superfluous." (*Id.*, at p. 249.) While this Court in *Pride* noted that "evidence of defendant's guilt was strong" and concluded that "reversal on such a minor, tangential point is not warranted" (*ibid.*), the factual context and resulting harm in appellant's case are far different. As appellant has shown, the instant instructional error especially implicated a major issue on which the prosecution evidence was insufficient, i.e., whether appellant was one of the perpetrators. Moreover, the prejudice resulting from the jury being instructed with CALJIC No. 2.05 was compounded by the prejudicial effect of the also erroneous admission of April Jones Watson's testimony regarding appellant's phone call to her as well as the inadmissible hearsay testimony of Detective Richard Henry about that same call. (See, Arg. X, *supra*.)

In this case, the consciousness-of-guilt instructions invaded the province of the jury and were impermissibly argumentative, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case, and lessening the prosecution's burden of proof. As such, the instructions permitted the jury to consider appellant's alleged efforts to fabricate evidence and cause

others to do so as circumstances in deciding his guilt.

In *People v. Wright* (1988) 45 Cal.3d 1126, 1137, this Court defined the parameters of a defense pinpoint instruction as a non-repetitious statement of law that "pinpoints the theory of the case." (*Id.*, at p. 1137, quoting *People v. Granados* 1957) 49 Cal.2d 490, 496.) The defendant in *Wright* requested an instruction itemizing particular evidence and advising the jury it could consider this evidence in determining guilt. Distinguishing between an instruction that pinpoints a theory of defense and one that implies specific evidentiary conclusions, this Court explained the evil of the latter is that it is a partisan judicial comment upon evidence masquerading as a neutral jury instruction on the law. (*Id.*, at pp. 1136-1137.) Because such comments invite the jury to draw biased inferences from isolated items of evidence on a contested fact, they are impermissibly argumentative and therefore belong in the arguments of counsel to the jury, not in the instructions issued by the trial court. (*Id.*, at p. 1135.)

"[T]he defendant's right to 'pinpoint' instructions is to instructions directed to the theory of the defense, not those aimed at specific evidence. As to the latter, the defendant is free to argue the import of the evidence, but does not have a right to an instruction that would improperly imply the conclusion to be drawn from that evidence." (*People v. Harris* (1989) 47 Cal.3d 1047, 1098, fn. 31.) Accordingly, the trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.)[78]

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[78] Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider

(continued...)

As this phenomenon of pinpoint instructions is not confined to the defense,[79] the limitations apply equally to those instructions pinpointing the prosecution's theory of the case. "There should be absolute impartiality as between the People and defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord, *Regan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties deprives the defendant of his due process right to a fair trial. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 474 ["[T]he Due Process Clause . . . speak[s] to the balance of forces between the accused and his accuser."]; see also *Washington v. Texas* (1967) 388 U.S. 14, 24 (conc. opn. by Harlan, J.).)

CALJIC Nos. 2.04 and 2.05, respectively, tell jurors that they may consider evidence of a defendant's efforts to persuade others to testify falsely or to cause others to do the same as tending to prove consciousness-of-guilt and, hence, as tending to show that he or she is guilty of the offense charged. As was determined in *Wright*, a defendant does not have a right to an instruction that directs attention to evidence from which a finding of reasonable doubt can be drawn by the jury. (*People v. Wright*, *supra*, 45 Cal.3d at pp. 1137-1138.) By a parity of reasoning and consistent with due process, the prosecution is similarly not entitled to an instruction

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[78] (...continued)
the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

[79] See, e.g., *People v. Atwood* (1963) 223 Cal.App.2d 316, 333-334.

pinpointing facts from which an inference of guilt can be reached. Because CALJIC Nos. 2.04 and 2.05 violate the rule against argumentative pinpoint instructions enunciated in *Wright*, it was error to give them.

"There should be absolute impartiality as between the People and defendant in the matter of instructions, . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett*, *supra*, 63 Cal.App.2d at p. 144, 158; *accord*, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon*, *supra*, 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet*, *supra*, 405 U.S. at p. 77). Moreover, the prosecution-slanted instructions given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship*, *supra*, 397 U.S. at p. 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC Nos. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]), and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence" (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137).

In this case, the jury was given not one, but two unconstitutional instructions which magnified the argumentative nature and impermissible

inferences of the instructions. The combined effect of the consciousness-of-guilt instructions was to tell the jury that appellant's conduct or that which he authorized showed he was aware of his guilt. Appellant incorporates by reference as if fully set forth herein Args. X, XI, *supra*; Arg. XXII, *infra*.) In the context of this case, giving the consciousness-of-guilt instructions was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's murder conviction, the special circumstance finding and the death judgment 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*, *supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].) This the prosecution cannot do.

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XIV

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY GIVING INSTRUCTIONS ON AIDING AND ABETTING DURING THE GUILT AND SPECIAL CIRCUMSTANCE PHASES OF THE TRIAL

Appellant has argued that the trial court improperly gave the jury instructions on aiding and abetting during the guilt and special circumstance phases. Specifically, appellant argued that none of the instructions were relevant to issues raised by the evidence and that giving them not only confused and mislead the jury, but they were also prejudicial. Moreover, the instructions violated appellant's constitutional right to due process. (U.S. Const., Amend. 14; AOB 289-300.) Respondent erroneously alleges that there was substantial evidence to warrant the instructions, that any error in giving the instructions was harmless, and that appellant waived his objection on constitutional grounds. (RB 159-168.)

A. Instructions on Aiding and Abetting Were Inapplicable

Contrary to respondent's characterization, appellant's argument is not that jury instructions should only be limited to the prosecution's theory of the case. (RB 164.) Instead, and as appellant has demonstrated in his opening brief, there was insufficient evidence to warrant instructions on aiding and abetting.

It is well established that the trial court must instruct on the general principles of law applicable to the case. (*People v. Young* (2005) 34 Cal.4th 1149, 1201; *People v. Saddler* (1979) 24 Cal.3d 671, 681.) Although the trial court must give instructions on every theory of the case which is supported by *substantial* evidence (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047), the trial court is not required to give instructions based solely

on conjecture and speculation (*People v. Young*, *supra*, 34 Cal.4th at p. 1201; *People v. Perry* (1972) 7 Cal.3d 756, 788; *People v. Day* (1981) 117 Cal.App.3d 932, 936). "Evidence is 'substantial' only if a reasonable jury could find it persuasive." (*People v. Young*, *supra*, 34 Cal.4th at p. 1201, citing *People v. Hagen* (1998) 19 Cal.4th 652, 672.) Indeed, trial courts are required to avoid instructions which are not justified by the facts of the case, since they have a natural tendency to overburden and confuse the jury. (*People v. Wade* (1959) 53 Cal.2d 322, 333.) Moreover, instructions on aiding and abetting are not necessary where "[t]he defendant was not tried as an aider and abettor, [and] there was no evidence to support such a theory." (*People v. Young*, *supra*, 34 Cal.4th at p. 1202, citing *People v. Sassounian* (1986) 182 Cal.App.3d 361, 404.)

Respondent's contention that there was substantial evidence to support aiding and abetting instructions (RB 163) is contradicted by the record. Here, the prosecution tried appellant as the direct and active perpetrator of the homicide. Consistent with the evidence presented by the prosecution regarding the homicide and events leading up to the shooting, and despite the fact that the trial court said it would give aiding and abetting instructions, the district attorney unwaveringly argued that appellant was the suspect who fired the shotgun at Cross. (See RT 7261-7277; 7282-7283; 7414 -7417; 7432-7433.) At no time was an alternative theory of liability that appellant was merely an aider and abettor alleged. In fact, during her rebuttal closing argument the prosecutor made clear that there was "absolutely no evidence" that Terry Brock, who Bulman had identified as one was the suspects, was the shooter. (RT 7414-7416.) This being the case, respondent should be estopped from arguing to the contrary now.

Appellant's defense was that he was not one of the perpetrators.

(See RT 7323, 7355, 7357-7359). Like the prosecution, the defense never alleged that an alternative aider and abettor theory of liability existed in the event that the jury determined appellant was involved but not the shooter. The facts of this record clearly demonstrate that aiding and abetting instructions were inapplicable. (*People v. Young*, *supra*, 34 Cal.4th at p. 1201; *People v. Singleton* (1987) 196 Cal.App.3d 488, 492.)

Respondent also contends that there was evidence from which the jury could infer that appellant aided and abetted a robbery which served as the basis for first degree felony murder and felony murder robbery special circumstance. (RB 165.) This contention fails for two reasons. First, the evidence established, and the prosecution consistently maintained, that the shooter was also the man who reached into the car and removed the car ignition keys and shotgun. Second, the record shows there was insufficient evidence that a robbery occurred. As set forth more fully in appellant's opening brief, there was no basis for a rational jury to conclude beyond a reasonable doubt that any force or fear used in the taking of the property was accompanied with the intent to rob. Instead, the evidence shows that the car key and the shotgun, the items of property taken which belonged to Bulman or Cross, were simply obtained in the course of the physical altercation that ensued between the agents and the two men the instant they encountered one another, and that the removal of the items from the scene was at best an afterthought to the homicide. (See AOB 295-296; see also Argument XVII, *infra*,)

Even assuming there was evidence to support a robbery, any evidence upon which to determine that appellant was merely an aider and abettor under that scenario was speculative, conjectural and unpersuasive. (*People v. Young*, *supra*, 34 Cal.4th at p. 1201.) No reasonable juror would

have concluded that appellant was the man who first approached Bulman, and not the one who removed the shotgun from the car and who shot Cross. Under the facts presented, appellant was either the direct perpetrator/shooter or he was not present.

Respondent's stated reliance on certain "facts" allegedly supporting an "alternative" aider and abettor theory of liability (RB 165) is disingenuous. This is because respondent has maintained that the same or related facts support the conclusion that appellant was the shooter. (See, e.g., RB 66, 127 [appellant's admission to Jessica Brock regarding his involvement in the homicide]; RB 135 [shotgun Miller saw in Terry Brock's possession could not have been the murder weapon because it was much larger and would not have needed to be sawed off]; RB 128 [Bulman identified Terry Brock as the man who initially approached his side of the car and identified 1980 photographs of appellant as the shooter], RB 132 [positive presumptive blood test results found in certain areas of appellant's jacket were consistent with appellant firing the shotgun at Cross].) Respondent's veiled attempt to have it both ways, however, fails because any evidence that appellant was an aider and abettor to a robbery and/or the shooting is unpersuasive.

B. Waiver

With regard to the aiding and abetting instructions that were given in the guilt phase, respondent contends that appellant did not object to CALJIC Nos. 3.00 and 3.01, thus implying that appellant has waived any objection to them. (RB 159-160.) In so doing, respondent apparently ignores Penal Code Section 1259 and established case law that instructional errors can be raised on appeal even though there was no objection below if appellant's substantial rights were affected. (See *People v. Brown*, *supra*,

31 Cal.4th at p. 539, fn. 7.) Here, appellant's substantial right to due process and to have a jury determination based on proof beyond a reasonable doubt was affected by the aiding and abetting instructions which were erroneously given in this case.

Appellant's objection to all of the aiding and abetting instructions on federal constitutional grounds has not been waived. (RB 162-163.) As set forth in Argument XIII, *supra*, there is no requirement that a defendant explain the adverse constitutional implication of giving an instruction to which he has lodged an objection. Even assuming that a separate objection on federal constitutional grounds is required, appellant has alleged that the error in giving the instructions violated his due process right to have a jury base its determination of guilt on proof beyond a reasonable doubt. Appellant is therefore not precluded from raising the deprivation of this fundamental constitutional right for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277.)

C. Prejudice

The trial court's error in providing the irrelevant aiding and abetting instructions was prejudicial. The instructions would have confused the issues for the jury and improperly provided a way to convict appellant of murder, as well as find the robbery murder special circumstance allegation true, even if the jury did not believe he was the actual shooter. Based on the weak circumstantial evidence upon which the prosecution's case rested, a determination by the jury on such grounds was not improbable. (Appellant incorporates by reference, as if fully set forth herein, Arg. I, sec. C.) Because there was insufficient evidence to support an aiding and abetting theory of liability as to the murder and felony murder special circumstance, providing the instructions violated appellant's fundamental constitutional

right to due process and to have a jury determination based on proof beyond a reasonable doubt. (AOB 298-299.)

The fact that the jury found the firearm use enhancement true (Pen. Code §12022.5) is not dispositive (RB 168) because it is not implicit from such a finding that appellant was the person who fired the shotgun. "Although use of a firearm [under 12022.5] connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which actually produces a fear of harm by means or display of a firearm in aiding the commission of [a felony]." (*People v. Chambers* (1970) 7 Cal.3d 605, 635.)

Under the instruction for the enhancement given, the term "used a firearm" was defined as "to display a firearm in a menacing manner, intentionally to fire it, or intentionally to strike or hit a human being with it. (CALJIC No. 17.19; RT 7477-7479; CT 3969.) While the "use" enhancement under Section 12022.5 applies only to those who personally use a firearm in the commission of a charged offense, the enhancement is not applicable to those who aid or abet the crime in which the gun was allegedly employed. (*People v. Walker* (1976) 18 Cal.3d 232, 242.) The jury in this case was never expressly told that, however. Thus, if they found that appellant was culpable for the killing as an aider and abettor, it cannot be said beyond a reasonable doubt that under the instructions given they would not have found him liable for the firearm use enhancement.

Appellant recognizes that this Court has stated that a reasonable juror would not construe CALJIC 17.19 to include vicarious liability in *People v. Jackson* (1996) 13 Cal.4th 1164, 1221, fn. 11. However, the facts of *Jackson* are distinguishable and the reasoning of this Court regarding Penal Code section 12022.5 do not apply in this case. In *Jackson*, there was only

one gun which either defendant Jackson or his co-defendant Niles used. In this case it was undisputed that there were at least two guns and both suspects had used a gun in the commission of a felony or attempted felony within the meaning of Penal Code section 12022.5. Even if the jury believed appellant was the suspect who first approached Bulman and not the one who shot Cross under the facts of this case, the record shows that the suspect who initially approached Bulman used a gun pursuant to Penal Code section 12022.5. Thus, a reasonable juror could have believed that the "use" enhancement could have applied to the person who was the aider and abettor in this case. It cannot be said that the error in giving the improper instruction as harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Accordingly, reversal of the judgment and conviction is required.

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XV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT PERMITTED THE PROSECUTOR TO ELICIT HIGHLY PREJUDICIAL EVIDENCE THAT APPELLANT HAD COMMITTED A PRIOR SERIOUS CRIMINAL OFFENSE WITH TERRY BROCK

In his opening brief, appellant argued that the trial court committed prejudicial error when it permitted the prosecutor to elicit evidence from Jessica Brock that appellant had committed a prior serious criminal offense with Terry Brock that resulted in criminal charges. Specifically, appellant argued that Evidence Code section 1101, subdivision (b), does not permit prior bad act evidence to bolster or attack a witness' credibility, and that in so doing, the trial court violated appellant's constitutional rights requiring reversal of the judgment and conviction. (AOB 300-307.) Respondent argues that the evidence was properly admitted under Evidence Code section 1101, that its probative value outweighed any prejudice, and that the federal constitutional basis for appellant's objection was waived below. (ARB 169-179.) Respondent's contentions are without merit.

A. The Trial Court Abused Its Discretion By Permitting the Other Crimes Evidence

Contrary to respondent's assertion, a manifest abuse of discretion occurred when the trial court permitted the prosecutor to elicit inflammatory evidence of appellant having committed a prior serious crime with Terry Brock. (See *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396; *United States v. Bradley* (9th Cir. 1993) 5 F.3d 1317, 1320-1322; *United States v. Brown* (9th Cir. 1989) 880 F.2d 1012, 1014, 1016.)[80] The propensity

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[80] The analysis regarding admission of evidence under Federal Rules (continued...)

evidence at issue was admitted solely to bolster or attack the credibility of Jessica Brock, and as such, was not a permissible use under Evidence Code section 1101, subdivision (b). (*People v. Brown*, *supra*, 17 Cal.App.4th at pp. 1395, 1397 [evidence of other crimes not admissible to bolster the credibility of detective's testimony that defendant admitted molesting the victim]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 835; *People v. Thompson* (1979) 98 Cal.App.3d 467, 470; see *People v. Bunyard* (1988) 45 Cal.3d 1189, 1207, fn. 7; AOB 304-306.)

Even assuming that there was an "admissible" purpose other than disposition for the other crimes evidence, the assertion of such a purpose does not mean that the evidence is automatically admissible under Evidence Code section 1101, subdivision (b). Evidence of other crimes must satisfy the rules of admissibility set forth in Evidence Code sections 210, 350 and 352.[81] (*People v. Thompson* (1980) 27 Cal.3d 303, 317, fn. 17.)

"'Regardless of its probative value, evidence of other crimes always involves the risk of serious prejudice. . . . '" (*People v. Thompson*, *supra*, 27

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[80] (...continued)
of Evidence, Rule 403 is similar to that of Evidence Code section 352.

[81] Under Evidence Code section 210, "[r]elevant evidence means evidence, including evidence relevant to the credibility of a witness or hearsay declarant having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Evidence Code section 350 provides that "no evidence is admissible except relevant evidence."

Evidence Code section 352 provides in relevant part that 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."

Cal.3d at p. 318, quoting *People v. Griffin* (1967) 66 Cal.2d 459, 466.) Accordingly, other restrictions on admissibility are: (1) the rule of necessity – if the evidence is merely cumulative to other evidence which the prosecution may use to prove the same issue, then it should be excluded and (2) under Evidence Code section 352 the probative value of the evidence outweighs its prejudicial effect. (*People v. Thompson*, *supra*, 27 Cal.3d at p. 818.) "The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp* (1998) 18 Cal.4th 349, 371, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405.)

As respondent correctly points out, there was other evidence available that established the fact that the incident referenced by defense counsel was a separate incident from the night of the Cross homicide when appellant visited Jessica Brock by himself. (RB 178-179.) The record shows that Jessica Brock was definite about a separate visit from appellant and Terry Brock in 1978 which she distinctly associated with her son (with appellant) and which had occurred four to five months after her son was born. (E.g., RT 6185-6186, 6201-6202, 6220, 6351-6353.) Thus, the serious other crimes evidence admitted relating to the 1978 triple homicide appellant committed with Terry Brock should have been excluded under the rule of necessity. (See *People v. Schrader* (1969) 71 Cal.2d 761, 775.)[82]

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[82] The trial's "reasoning," that Jessica Brock's association of the birth/age of her son with the separate time that appellant visited her apartment in 1978 was not sufficient to establish the fact that another visit would stand out in her mind (RT 6254), is contrary to the evidence and underscores the court's abuse of discretion in weighing the probative value (continued...)

Moreover, the trial court's own analysis of the probative value of the other crimes evidence versus its prejudicial effect under Evidence Code section 352 reveals that the court abused its discretion. As the trial court noted before it issued its incorrect ruling permitting the "limited" prior crimes evidence, the evidence relating to the 1978 triple murder case constituted "double barrel" prejudice. (RT 6269-6270.) Stating that there was evidence that Terry Brock was involved in the Cross homicide, the trial court acknowledged that the other crimes evidence it intended to permit was highly prejudicial because: (1) once the jury found out appellant committed other murders, they would be apt to feel he was an individual prone to commit crimes of the type charged in this case, and (2) the jury would learn that appellant's crime partner in the other incident was the same person "strongly" suspected as being involved in the Cross murder, which would thus lead to the logical conclusion that appellant was the other perpetrator in the present case. (See RT 6270.)

Even though the trial court ultimately "sanitized" the other crimes evidence by permitting only the fact that appellant and Terry Brock had committed a serious crime together in 1978 which led to charges against

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[82] (...continued)
of the evidence against its prejudicial impact. The test is not whether the trial court thought that the 1978 murder was a fact which would better support Jessica's recollection of a separate visit. Jessica testified that she remembered the date of appellant's separate visit because she associated it with *both* facts. As will be discussed more fully below, evidence that appellant committed a serious crime in 1978 with Terry Brock that led to the filing of charges and a trial was highly prejudicial and outweighed its probative value. This is especially so in light of the less prejudicial method of demonstrating Jessica's recall of a separate visit from appellant and Terry in 1978 that was available.

them and a trial (RT 6271), the prejudicial impact of the evidence was not lessened such that the probative value outweighed its prejudicial effect. As presented, the jury would have believed that appellant had committed a prior serious offense which led to charges being filed against him and a trial, thus lending an aura of truth to the *serious* nature of the offense as well as validity of the charged offense. The jury would have also believed that appellant had committed the prior serious crime with Terry Brock, the very person who Bulman had repeatedly identified as being one of the two perpetrators of the Cross murder, thus leading to the conclusion that appellant was the second perpetrator in the instant murder. Moreover, the jury would have undoubtedly speculated as to what this "serious offense" was and would have thought the worse – that appellant was a murderer or other violent felon. This is the very conclusion the court was attempting to avoid by permitting the "sanitized" evidence at issue.

The trial court characterized the probative value of the other crimes evidence it would permit the prosecution to present as "extreme." Even assuming that this characterization meant that the court believed the evidence would tend to show that a separate visit was highlighted in Jessica's mind, it was clear that any "extreme" probative value of the evidence was related to propensity and bad character. (See *People v. Thompson*, *supra*, 27 Cal.3d at p. 317.)[83] Although the court also noted

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[83] In *Thompson*, *supra*, this Court recognized the "grave danger" resulting from the admission of other crimes evidence: admission of this evidence produces an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.' [citation omitted] (1 Wigmore, Evidence, s 194, p. 650.) It breeds a 'tendency to condemn, not because he is believed guilty of the present charge, but

(continued...)

that the prejudice of the evidence was "not insubstantial," the court erroneously ruled that "probative value [would] greatly outweigh the prejudicial effect." (RT 6270.) In this case, the danger of undue prejudice from the other crimes evidence clearly outweighed its probative value. This is especially so in light of the other available means of proving that Jessica Brock had a separate incident in mind where appellant had visited her. (See *United States v. Bradley*, *supra*, 5 F.3d at pp. 1320-1322.) Accordingly, even assuming that the evidence was admissible under Evidence Code section 1101, subdivision (b), it was an abuse of discretion not to exclude it under Evidence Code section 352. (*People v. Brown*, *supra*, 17 Cal.App.4th at p. 1397.)

Respondent erroneously alleges that appellant has waived the federal constitutional basis for his claim by failing to object on those grounds below. (RB 177.) Where, as here, the error at issue violates appellant's fundamental constitutional rights, then the claim may be raised for the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; see Introduction, *supra*.)

B. Admission of the Other Crimes Evidence Was Not Harmless

Respondent erroneously contends that the other crimes evidence was harmless, relying on the fact that the prosecutor would have been able to establish that the incident referenced by defense counsel was a separate

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[83] (...continued)
because he has escaped unpunished from other offenses . . . .' [citation omitted] Moreover, 'the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor.'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 317, quoting Note (1964) 78 Harv.L.Rev. 426, 436.)

incident from the night of the Cross murder based on Jessica's recollection that appellant and Terry Brock visited her four to five months after her son was born. (RB 178-179.) As appellant has set forth above, the fact that the jury learned that Jessica remembered a visit by appellant and Terry Brock separate from the night of the Cross murder underscores the minimal, if any, probative value of the other crimes evidence presented and the abuse of discretion by the trial court in allowing it to be presented. The fact that Jessica remembered Terry and appellant visiting her in 1978 is significantly different than the scenario which was permitted by the trial court. The prejudice from the jury learning that appellant *committed a serious crime in 1978 with Terry Brock that led to a trial on the charges* cannot be equated with the mere fact of a visit by the two men, even if there was evidence that the men appeared to have been in a fight.[84] The record shows that the jury knew that Terry and appellant were associates; the only difference between evidence presented by the defense and that which the prosecution sought to have the jury believe in this regard is that appellant and Terry associated with one another at the time of the Cross homicide. The fact that Terry and appellant associated with one another in 1978 was not in issue.

The trial court noted that the statement Jessica Brock gave to the police regarding appellant's visit to her on the night of the Cross murder was critical to the finding of guilt. It is, therefore, not surprising that the trial court characterized Jessica as being the "most important witness to hit the witness stand in this case." (RT 6260-6261.) The trial court's obvious intention in allowing the other crimes evidence to be presented was to

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[84] Jessica Brock testified when appellant and her brother Terry visited her apartment in 1978 it appeared as though they had been in a fight. (RT 6154.)

bolster the credibility of Jessica that she had in mind two separate visits from appellant – one in 1978 and the other the night Cross was murdered. However, the evidence it admitted to serve that purpose was so prejudicial that its admission cannot be found to be harmless, and without it the jury would have not have found appellant guilty. As is set forth more fully in Argument XVI, the erroneous admission of the other crimes evidence led to the admission of the very evidence the court was well aware was inadmissible under Evidence Code section 1101 and tried to prevent – the fact that in 1978 appellant had committed a triple homicide with Terry Brock. (See Argument XVI, *infra*.)

The impact of the admission of the other crimes evidence is especially prejudicial when it is considered against the prosecution's far from compelling case. The record shows that evidence of guilt was insufficient without Jessica Brock's testimony that appellant had visited her house the night of the Cross incident and had in his possession items consistent with his involvement in the murder. That this was a close case is demonstrated by the specific events surrounding deliberations, including: the length of the deliberations, the request for read back of key prosecution witnesses (Bulman and Jessica Brock), multiple notes from the jury requesting clarification of evidence and instructions as well as guidance when a deadlock occurred. Appellant incorporates by reference as if fully set forth herein, Arg. I, sec. C, *supra*.

Even assuming that the standard of review advanced by respondent applies where a trial, such as that in this case, was rendered so fundamentally unfair by the admission of highly prejudicial disposition evidence, it cannot be said that it is reasonably probable that a result more favorable would have occurred if the evidence had not been admitted.

(*People v. Watson* (1956) 46 Cal.2d 818, 836.) Admission of the other crimes evidence violated Evidence Code section 1101. Because admission of the other crimes evidence constituted a manifest abuse of discretion, appellant was deprived of his state-created liberty rights as provided by the Due Process Clause. Moreover, admission of the evidence violated appellant's fundamental constitutional rights to due process and a fair trial. (U.S. Const. Amend. 14.) It cannot be said that the error in permitting the other crime evidence was harmless beyond a reasonable doubt. (*United States v. Brown*, *supra*, 880 F.2d at p. 1016; *Chapman v. California* (1966) 386 U.S. 18, 24.) Accordingly, reversal of the judgment of conviction and sentence is required.

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XVI

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT DENIED THE MOTION FOR MISTRIAL BASED ON INFLAMMATORY EVIDENCE THAT WAS PRESENTED REGARDING A TRIPLE MURDER APPELLANT COMMITTED WITH TERRY BROCK IN 1978

Appellant argued in his opening brief that his constitutional rights to due process and a reliable determination of guilt were violated when the trial court denied his motion for mistrial which was based on the improper admission of other crimes evidence relating to a prior triple murder appellant had committed with Terry Brock in 1978. (U.S. Const., Amends. 8 and 14.) Appellant has argued that a mistrial should have been granted because the prejudicial impact from the jury learning that appellant had previously committed a triple murder with Terry Brock was so great that no admonition or instruction by the court could have cured the harm. (AOB 307-311.) Respondent erroneously alleges that the trial court did not abuse its discretion when it denied the motion, that federal constitutional error has been waived, and that any constitutional violation claimed by appellant is without merit. (RB 180-185.)

A. The Trial Court Improperly Denied Appellant's Motion for Mistrial

Respondent contends that the motion for mistrial was properly denied because appellant suffered no harm from Jessica Brock's "reference" to the triple murder. In support of this claim, respondent relies on the fact that only two jurors heard the "remark" and that they were admonished not only to disregard the remark, but also not to discuss it with the remaining jurors. Respondent also contends that any harm resulting from the triple murder evidence was cured by the court's admonitions and

instructions. Finally, respondent claims that appellant could have requested to remove the two jurors who heard this portion of Jessica's testimony, but he choose not to do so. (RB 183.)

As appellant has set forth more fully in his opening brief, the impact of Jessica's "remark" which clearly conveyed to the jury the fact that appellant had previously committed a triple murder with Terry Brock, was devastating to appellant's case. Once the jury learned appellant was someone who had killed before, it was likely they would have believed he committed the murder in the present case. (See *People v. Thompson* (1980) 27 Cal.3d 303, 317; Evid. Code § 1101, subd. (a); Arg. XV, *supra*.) Moreover, there is a strong likelihood that a juror having legitimate doubts that appellant was one of the two men responsible for the Cross murder would have those doubts resolved by the fact that appellant's crime partner in the 1978 murder, Terry Brock, had been identified by Bulman as being one of the perpetrators in the instant case. (AOB 309-310.)

Even assuming, and which appellant does not concede, that only Juror Nos. 68 and 192 heard the portion of Jessica's testimony referencing the triple homicide, the fact remains that two out of the twelve jurors serving in this case were tainted. Respondent offers no evidence, nor is there any, to support a conclusion that these jurors did not make a determination of guilt based on the improper belief that appellant had a propensity to kill.

Respondent's claim that the admonition and instruction by the court to disregard the triple murder evidence would have cured the harm resulting from its admission minimizes the very nature of the propensity evidence that is at issue and ignores as well the significant weakness of the prosecution's case against which the inflammatory evidence was

juxtaposed.[85] "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453 (concurring opn. J. Jackson).)

This Court has recognized that "[t]he admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson supra*, 27 Cal.3d at p. 314 [citation omitted].) As set forth by the United States Supreme Court,

> "[e]vidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him."

(*Spencer v. Texas* (1967) 385 U.S.554, 575.)

The trial court here was well aware that evidence appellant had committed a separate murder, much less one involving three victims, constituted inflammatory propensity evidence. In fact the court explicitly stated that evidence of the 1978 triple murder constituted "double barrel" prejudice. (RT 6269-6270; see Arg. XV, *supra*.) Accordingly, the court

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[85] The trial court recognized the weakness of the prosecution's case and that the jury's belief in the credibility of Jessica Brock's testimony was critical for a finding of guilt. (See Argument XV, *supra*.) As set forth throughout appellant's arguments raised in this appeal, Jessica Brock's testimony about appellant's visit to her the night of the Cross homicide was highly incredible.

went through great lengths to prevent the jury from learning about it when it erroneously allowed the prosecution to elicit a "sanitized" version of prior criminal activity committed by appellant from Jessica Brock under the theory that it would validate her recollection of a visit by appellant which was separate from his visit to her on the night of the Cross homicide. (See RT 6187-6275, 6279-6282; Argument XV, *supra*.)

Because of the trial court's ruling regarding appellant's separate visit to Jessica, all of the jurors should have been aware that appellant had committed a prior serious offense with Terry Brock in 1978. Thus, with regard to at least Juror Nos. 68 and 192, it is in all likelihood that they were unable to perform the "mental gymnastics" which would have been required to follow the trial court's instruction to disregard the 1978 prior triple murder evidence, yet at the same time keep in mind evidence that appellant had previously committed a serious offense the same year. (See *United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 901 [striking statement entirely more effective means of eliminating prejudice rather than expecting jurors to consider statement for a limited purpose expecting them to "compartmentalize" their consideration].)

During cross-examination Jessica provided testimony suggesting that the visit by appellant that she recalled occurred on a night other than that of the Cross murder. The fact that the prosecutor was intent on shoring up Jessica's credibility about the fact that she recalled two separate visits by appellant, including one the night the Cross murder occurred, demonstrates in large part the weakness of the prosecution's case against appellant and the relative prejudicial impact of the triple murder evidence. As the trial court correctly noted, because the prosecution's case was hardly compelling, appellant's guilt turned on the jury believing Jessica's story that

appellant visited her the night of the Cross murder and description of what she observed. That the prosecution's case was weak is also demonstrated by the length of deliberations as well as the number and substance of the requests the jury sent to the court during their guilt deliberations (See Argument I, sec. C, *supra*.)

Appellant was entitled to a trial by twelve unbiased jurors. (*Parker v. Gladden* (1966) 385 U.S. 363, 366 ["petitioner entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1111 [1 juror contaminated by knowledge of what had been judicially determined to be inadmissible prejudicial information].) Based on record in the instant case, however, it cannot be said that the admission of evidence that appellant had previously committed a triple homicide did not have an inflammatory and unduly prejudicial effect on at least two jurors. Accordingly, the trial court was obligated to grant appellant's motion for a mistrial and its failure to do so constituted an abuse of discretion.

B. Invited Error and Waiver

Respondent's "invited error" allegation is limited to any error resulting from the failure to excuse the two jurors who acknowledged hearing the testimony regarding the 1978 triple murder. (RB 183.) The error appellant complains of here, however, is the denial of a mistrial motion based on inadmissible evidence being presented. Appellant has not argued that it was error to dismiss the two jurors. Therefore, the defense did not "invite the error." Invited error estopps a party from asserting an error when the party's own conduct has induced the error. (*People v. Lang* (1989) 49 Cal.3d 991, 1031.) The defense in this case moved for a mistrial; accordingly, the error was the trial court's in failing to grant the motion.

Respondent also erroneously contends that appellant has waived the constitutional basis for the trial court's error. (RB 183-184.) Appellant has alleged that his due process right to a fair trial and right to a reliable determination of guilt were violated by the improper admission of the highly prejudicial triple murder evidence. (U.S. Const., Amends. 8 and 14.) Moreover, because evidence of the triple murder committed by appellant was revealed in contravention of Evidence Code section 1101, subdivision (a), appellant's state-created liberty rights were violated. (U.S. Const., Amend. 14.) As set forth fully in the Introduction to this reply brief, a deprivation of fundamental constitutional rights may be raised for the first time on appeal. This Court, therefore, may determine the merits of appellant's constitutional claim as set forth above.

C. Reversal of the Judgment and Sentence is Required

Because the prosecution's case for guilt was so weak and insubstantial, it cannot be said that the prejudicial effect of the triple murder evidence did not unduly tip the scales to a determination of guilt. Appellant incorporates by reference as if fully set forth herein, Arg. I, sec. C, *supra*; Arg. XV, *supra*; Arg. XXII, *infra*.) The trial court's failure to grant the mistrial motion because the jury learned of the improper and highly inflammatory propensity evidence constitutes error which cannot be said to be harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) In the alternative, it was reasonably probable that but for the denial of the motion, a more favorable verdict for appellant would have occurred. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

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XVII

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE ROBBERY MURDER SPECIAL CIRCUMSTANCE

In his opening brief, appellant argued that the evidence is insufficient to support the robbery murder special circumstance finding in violation of his constitutional right to due process. (U.S. Const. Amend. 14.) Specially, appellant argued that any taking of property belonging to agents Bulman and Cross was incidental to the murder. (AOB 311-315.) Respondent contends otherwise, and alleges that the facts and circumstances of the incident show that the two men approached the agents with the intent to rob as well as to kill them to eliminate witnesses and to affect their escape. (RB 187-188.) By advancing this interpretation of the events, respondent ignores the fact that any alleged intent to commit a robbery by the men or the allegation that the homicide occurred in the course of a robbery, is based on speculative assumptions rather than on solid and credible evidence. Accordingly, respondent's contentions must be rejected.

The governing standard of review for a sufficiency of the evidence claim is to "determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) This does not mean that the reviewing court itself must be satisfied that the evidence cannot reasonably be reconciled with innocence, but the court must be satisfied that a reasonable trier of fact could have reached such a conclusion. (*Id.*, 443 U.S. at pp. 318-319.)

In order for the jury to find appellant death-eligible under the charged felony murder robbery special circumstance, they were required to find the murder occurred during the commission of the robbery. (Pen. Code § 190.2(c)(3)(I).) In order for a murder to have been committed in the

course of a robbery, the jury was required to find appellant guilty of the underlying felony - robbery - as well as murder. (Pen. Code § 190.4; *Phillips v. Woodford* (9th Cir. 2001) 267 F. 3d 966, 981-982, quoting *People v. Morris* (1988) 46 Cal.3d 1, 19 ["The inescapable inference [of Pen. Code § 190.4] is that the legislature fully intended that the elements of the special circumstance felony must be formally proved"].)

Robbery is defined as the "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code § 211.) Under Penal Code section 211, in order for the offense of robbery to be committed, the force or fear used to commit the taking must be accompanied by an intent to rob. Where, as in this case, the larcenous purpose does not arise until the force has been used against the victim, there is no joint operation of act and intent which is required for a robbery determination. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Green* (1980) 27 Cal.3d 1, 59; *Phillips v. Woodford*, *supra*, 267 F. 3d at p. 982.)

In a case such as this one, where the ultimate issues must be resolved on the basis of circumstantial evidence, the jury is instructed that "to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Bender* (1945) 27 Cal.2d 164, 174-177; CALJIC No. 2.01.) The reviewing court must, therefore, determine whether any reasonable trier of fact, adhering to this principle, could conclude that guilt was established beyond a reasonable doubt. In this case, there is no evidence making the jury's finding that the homicide of Cross

occurred in the course of a robbery the only reasonable conclusion.

The prosecution in this case based its theory of the robbery-murder special circumstance on the unlawful taking of property which belonged to Cross and Bulman by the two men and the resulting homicide. According to the prosecution, the two men intended to commit a robbery when they approached the agents, and that in the course of the robbery, Cross was killed. However, there was no basis for a rational jury to conclude beyond a reasonable doubt that any force or fear used in the taking of the property belonging to the agents was accompanied with the intent to rob. Instead, the evidence shows that the car ignition key and the shotgun were simply obtained in the course of the physical altercation that ensued between the agents and the two men the instant they encountered one another. Moreover, the subsequent removal of the items from the scene was, at best, an afterthought to the homicide. (AOB 306-307.)

There is no solid or credible evidence that the two men intended to rob the agents when they approached the car or even when physical contact with the agents began. Respondent does not provide contradictory evidence, nor is there any, that at the moment of contact between the two men and the agents, a standoff erupted with one member of each group holding a gun on the other; i.e., the armed man pointing a gun at Bulman and Cross pointing a gun on the other man. (RT 4795.) That standoff set off a chain of events resulting in Cross' death and the incidental removal of the car key and shotgun from the scene.

To support the theory there was substantial evidence the two men possessed an intent to commit a robbery when they approached the agents, respondent speculates that the men "cased" the scene and "checked out" the agents twice before approaching from behind and then one of the men

pointed his gun at Bulman instead of shooting him right away. (RB 188.) What respondent ignores in making this allegation is that there were other plausible reasons for the men to have taken notice of the agents and to have approached them. Moreover, in light of the indisputable stand off that occurred between the parties immediately upon contact with one another, the fact that a gun was pointed at Bulman by one of the men does not constitute solid or credible evidence of an intent to rob.

The record shows that on the evening Cross was killed the agents were on a stakeout of the residence of a suspected counterfeiter. (RT 4751.) Apparently, the two men who approached Bulman and Cross either lived in or had some business in the neighborhood, as evidenced by their entry into a garage area not far from where the agents were staked out. (RT 4783-4784.) Because two people sitting in a parked car for an extended period of time was not likely a normal occurrence for that particular area, it cannot hardly be said that Bulman and Cross' presence would have evoked curiosity by those living in or familiar with the neighborhood. The jury could have reasonably believed that when the two men approached the agents they were suspicious as to who and why the occupants were sitting in their car in the neighborhood for an extended period of time.

Respondent next alleges that an intent to commit a robbery was established by the fact that upon reaching the driver's side door the armed man pulled out his gun, pointed it at Bulman's head and ordered him to put his hands up. (RB 187-188.) Again, respondent bases this allegation on mere speculation and conjecture.

The record shows that upon hearing something suspicious outside their car, Bulman and Cross each took out their .357 Magnum pistols, and Cross exited the car with her gun drawn. (RT 4763, 4789-4790.)

Immediately thereafter Cross held her .357 Magnum on the man on her side of the car, and the man's partner, who was on the other side of the car, pointed his gun at Bulman. There is no evidence which reveals who had their gun on whom first. It is not implausible to conclude that the reason the man on the driver's side of the car pointed his gun at Bulman and told him to put his hands up was because by that time Cross had her .357 Magnum trained on the man on her side of the car. Under this scenario, any intent to rob cannot be conclusively inferred by actions of the armed man with regard to Bulman. Because Cross had her .357 Magnum drawn on his partner, it was entirely reasonable for the armed man to suspect that Bulman had a gun as well and to tell Bulman to hold his hands up where he could see them. In fact, Bulman testified he placed his gun on the seat beside him so that the armed man would not see that he had a weapon. (RT 4793.) That there was no intent to commit robbery on the part of the men is further demonstrated by the fact that neither man made any demand for property at the time of initial contact with the agents or at any time following.

Similarly, the fact the ignition keys and the shotgun were taken before Cross was shot does not constitute evidence that the men intended to commit robbery when they approached the agents or upon contact. (RB 188.) It is uncontroverted that as soon as the agents and men encountered one another a standoff between the parties occurred. It was not implausible that a struggle for control between the parties would result. (RT 4795.) Because of the standoff, Bulman, as well as the man against whom Cross held her gun, had an interest in gaining control of the situation. In an attempt to do just that, Bulman picked up the radio microphone. It was only when Bulman announced to the men he had a radio that the man who Cross had her gun on removed the car ignition key which generated the radio and

seized the shotgun in the obvious opportunity to defend himself against Cross. (RT 4800.)

Contrary to the contentions of respondent, this Court's opinions in *People v. Marshall*, *supra*, 15 Cal.4th 1, *People v. Thompson* (1980) 27 Cal.3d 303 and *People v. Green*, *supra*, 27 Cal.3d 1, are applicable and support appellant's argument that the evidence was insufficient to support the robbery-murder special circumstance determination. Respondent's attempts to distinguish the authority to show that the homicide occurred in the course of a robbery are unsuccessful. (RB 188-189.)

Even though the ignition key and the shotgun were taken *before* the actual shooting, there is no evidence that at the time they were removed from the car they were taken for a larcenous purpose. (*People v. Marshall*, *supra*, 15 Cal.4th at p.34 ["To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force."].) The record establishes that the standoff between the parties occurred immediately upon contact with one another. No demand for property was ever made by either man. It was only because Bulman announced that he had a microphone that the second man reached in the car, took out the ignition key which would facilitate the radio, and saw the shotgun which he seized to defend himself against the gun which Cross was holding on him. As this Court determined in *People v. Marshall*, *supra*, 15 Cal.4th at pp. 40-41, there is absolutely no evidence, and respondent does not argue, that the second man killed Cross in order to acquire the victims' property.

Respondent mistakenly alleges that, unlike *People v. Thompson*, *supra*, 27 Cal.3d at p. 324, where intent to kill was expressly stated by the defendant and the defendant refused the property offered by the victims, the

evidence in this case that the second man was unarmed also establishes that there was no attempt to commit murder when the two men approached the victims. (RB 189.) Contrary to the speculative inference suggested by respondent, the fact that the second man was unarmed does not substantiate a conclusion that the men had an intent to rob. The fact that the second man was not armed suggests that there was no intent to commit any felony – robbery or murder – upon approaching the agents. Here, as in *Thompson*, the robbery-murder special circumstance was not supported by the sufficient evidence because the intent to steal the ignition key and shotgun was not formed prior to the killing.

The nature of the evidence in this case is similar to that presented in *People v. Morris*, *supra*, 46 Cal.3d 1, because there was no evidence that the second man killed Cross in order to take property from the agents. There is no evidence that there was a concomitant intent to rob at the time any force or fear was used to take the ignition key and shotgun from the agents. Respondent's claim that the men intended to commit a robbery when they approached the agents and that Cross was killed in the course of that robbery is simply not supported by substantial record evidence. As this Court has aptly stated:

> "We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work . . . . In the absence of any substantial evidence that the taking was accomplished either before or during the killing by means of force or fear, we must conclude that the evidence will not support a conviction of robbery."

(*People v. Morris*, *supra*, 46 Cal.3d at p. 21.)

Accordingly, the robbery-murder special circumstance determination must be reversed.

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XVIII

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE THE TRIAL COURT IMPROPERLY DENIED DEFENSE COUNSEL'S REQUEST FOR A CONTINUANCE TO PREPARE A MOTION FOR NEW TRIAL AND BECAUSE THE TRIAL COURT LACKED THE POWER TO MAKE A MOTION FOR NEW TRIAL ON APPELLANT'S "BEHALF"

In his opening brief appellant argued that his constitutional rights were violated because the trial court improperly denied defense counsel's request for a continuance to adequately prepare and file a motion for new trial and then, without any authority to do so, went on to make a motion for new trial on appellant's behalf which was summarily denied. Appellant has argued that the improper actions of the trial court resulted in depriving appellant of his statutory right to file a motion for new trial and that the cumulative impact of the court's actions mandate reversal of the judgment. (AOB 316-330.) Respondent contends that the trial court did not abuse its discretion in denying the motion to continue. Respondent does not dispute that the trial court lacked the authority to make a motion for new trial on appellant's behalf. Instead, respondent contends that the court merely made a record of how it would have ruled had appellant filed such a motion. Finally, respondent alleges that any error by the trial court was harmless. (RB 191-204.) Respondent's contentions are without merit and must be rejected.

A. The Trial Court Improperly Denied The Request To Continue So That Defense Counsel Could Adequately Prepare a Motion for New Trial

To support his claim that the continuance motion was properly denied, respondent alleges that defense counsel had five weeks from the time of judgment to prepare the motion for new trial, counsel had not

previously indicated he was unprepared to pursue other issues when he made his motion for juror information on March 22, 1996[86], and that counsel had worked on another case exclusively from March 29, 1996 through the time of the motion. (RB 197.) Respondent's reliance on these factors is misguided because whether defense counsel had time to prepare the motion for new trial is irrelevant to a determination whether in fact counsel was prepared, or whether there was good cause for the continuance. Appellant was entitled to a prepared counsel, "not merely to a counsel who had time to prepare." (*People v. Fortuna* (1982) 139 Cal.App.3d 326, 333.)

The Sixth Amendment right to counsel guarantees criminal defendants the effective assistance of counsel at all critical stages of the proceedings. (*Coleman v. Alabama* (1970) 399 U.S. 1, 9-10.) Sentencing and the pronouncement of judgment is a critical stage of the proceedings to which the right to counsel attaches. (*Mempa v. Rhay* (1967) 389 U.S. 128, 133-134; *In re Cortez* (1971) 6 Cal.3d 78, 88.) The importance of a motion for a new trial is undisputed, as the "[h]earing and disposition of a motion for new trial is an integral part of the criminal trial. The failure to allow counsel adequate time to prepare for this part in effect deprives a defendant of his right to counsel." (*People v. Ketchel* (1963) 59 Cal.2d 503, 545-546, disapproved on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 637.)

While the determination of whether in any given case a continuance should be granted normally rests in the discretion of the trial court, "that discretion may not be exercised in such a manner as to deprive the

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[86] Appellant's motion for juror identifying information was filed four days after the jury reached its penalty verdict on March 18, 1996. (CT 3985, 3990-3993.)

defendant of a reasonable opportunity to prepare his defense. That counsel for a defendant has a right to reasonable opportunity to prepare for a trial is as fundamental as is the right to counsel." (*Jennings v. Superior Court* (1967) 66 Cal.2d 867, 872 [citation and internal quotation marks omitted]; Moreover, "it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel." (*White v. Ragen* (1945) 324 U.S. 760, 764; see also *Powell v. Alabama* (1932) 287 U.S.45, 49.) "[W]hen a denial of a continuance impairs the fundamental rights of an accused, the trial court abuses its discretion." (*People v. Fontana*, *supra*, 139 Cal.App.3d at p. 333; *People v. Locklar* (1978) 84 Cal.App. 3d 224, 230.)

Here, defense counsel articulated good cause for the continuance. He had not completed all the work necessary to adequately prepare appellant's motion for new trial in this capital case in part because: (1) he had been denied access to jury contact information which would facilitate investigation related to specific unique events of the trial proceedings, (2) he intended to prepare a motion for reconsideration to obtain that information, and (3) because of his conflicting obligations to another pending serious case where the evidentiary hearing ordered in that case was scheduled the day after the motion for new trial.[87] (RT 8432-8438.) Although a fair amount of defense counsel's time had been devoted to his other case, when the continuance was requested in the instant matter only 29 days had elapsed from the penalty verdict and only five days had elapsed

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[87] The hearing for the motion for new trial was set for April 23, 1996, and the evidentiary hearing for the other serious case in which defense counsel was attorney of record was to begin April 22, 1996. (RT 8432-8433.)

from the denial of appellant's request for personal jury identifying information. In light of the denial of appellant's jury information motion and the work necessary for counsel's conflicting case, the amount of time that had passed and which counsel had not devoted to appellant's case was not significant. In addition, this was defense counsel's first request for continuance, appellant concurred with the request, and the continuance would not have prejudiced the state or disrupted the orderly administration of justice. (See AOB 318-324.)

In spite of defense counsel's other case obligations, and request that he not be forced to proceed with the motion for new trial because he was not prepared, the trial court erroneously found that there was insufficient reason or excuse for counsel not to have submitted a written motion or to otherwise make a new trial motion on appellant's behalf. *Hughes v. Superior Court* (1980) 106 Cal.App.3d 1, describes a similar situation. In *Hughes,* defense counsel who had two conflicting complex cases set for trial refused to participate in jury selection on one case because he had devoted his time to the other case and was unprepared. After his motion for continuance was denied, defense counsel was held in contempt for his refusal to participate in the trial for which he was unprepared. Issuing a writ of prohibition regarding the contempt order, the Court of Appeal in *Hughes* stated that "[t]he trial court's error was in finding that there was insufficient reason or excuse for petitioner's refusal to obey the court's order to proceed with trial. The sufficient reason was protection of his client's constitutional right to adequate representation irrespective of the reason for inadequacy." (*People v. Hughes*, *supra*, 106 Cal.App.3d at p. 5.) By his request for the continuance defense counsel here sought to protect appellant's constitutional right to effective representation. (See *People v.*

Fortuna, *supra*, 139 Cal.App.3d at p. 334.)

Contrary to respondent's assertion, a continuance could have resulted in appellant being able to prepare additional arguments based on juror interviews. (RB 197.) The jurors may have spoken to defense counsel about the trial even though they did not stop to talk to him at the conclusion of the penalty trial. A juror may be reticent to talk with defense counsel outside the courtroom just after he or she has voted for death; yet, when contacted later, the same juror may be willing to do so.

Respondent is likewise mistaken in concluding that questioning of the jurors would not have resulted in admissible evidence for purposes of a motion for new trial. (RB 198.) The record shows defense counsel wanted to interview jurors in order to ascertain *objective facts* pertaining to the trial proceedings which might substantiate grounds for a new trial, including whether the jurors followed the court's admonitions and whether any juror misconduct had occurred during the trial or their deliberations. In particular, counsel sought to interview jurors to: (1) ascertain if the court's admonitions were followed with regard to evidence of the triple murder which was presented during the guilt phase, (2) obtain facts about the discussion of penalty during the guilt deliberations, and (3) ascertain if the jurors followed the further instructions provided at the end of the penalty phase. (CT 3992.) In light of the specific events that occurred at trial, it was not unreasonable for defense counsel to seek reconsideration of the denial of appellant's request to obtain jury contact information, and attempt to interview jurors. (See Arg. I, sec. C, *supra*.)

The necessity of juror interviews, and that information which could be used in a motion for new trial would likely result from them, is particularly supported by the fact that significant events occurred during the

trial and deliberations in both phases of the case which resulted in either an admonition, clarification or additional instructions by the trial court. For instance, during the guilt phase testimony of Jessica Brock the jury heard inadmissible evidence of a prior triple murder appellant had committed. In an attempt to mitigate the obvious prejudicial impact of the improper other crimes evidence, the trial court admonished the jurors to disregard the statement by Jessica and questioned each juror and the alternates as to what they had heard. (See RT 6296, 6473-6476; see also Arg. XV, XVI, *infra*.) The record shows that at least two of the jurors heard the prejudicial other crimes evidence. (RT 6442, 6456.) The jury also sent the court a number of notes during both phases of deliberation, some of which requested read back of key prosecution witnesses Jessica Brock and Lloyd Bulman, as well as clarification as to evidence and the instructions given. (CT 3852-3854. See Arg. I, sec. C, *supra*.) Moreover, during both phases of the trial the jury informed the court of significant disagreement or heated debate which required assistance from the court or necessitated that the jury take a recess from deliberations in order for tempers to subside. (CT 3852, 3880-3881. See Arg. I, sec. C, *supra*.)

During the guilt deliberations, a note was submitted to the court requesting assistance with a "jury room problem" involving one juror who would not "listen to reason" and refused to deliberate because there was "no I.D. of the killer" and "no proof the glasses are the defendants [sic]." (CT 3852.)[88] At the follow-up discussion in open court, the foreman elaborated

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[88] The note submitted to the court during the guilt phase proceedings of February 29, 1996, is as follows:

"Your Honor: As a first time juror, I find myself foreman of a

(continued...)

on the note and stated that the "problem" consisted of the refusal of a juror to deliberate based on his/her disagreement with the other jurors which included the lack of a positive identification and whether Jessica Brock's earlier testimony or her later testimony was correct. (RT 7563.) According to the foreman, this juror stated, "'If we could positively identify him, I would *fry* his ass just like the rest of you.'" (RT 7564, emphasis added.)

To the extent that interviews with jurors may have revealed that improper consideration of penalty during the guilt phase or other objective facts of misconduct had occurred – e.g., consideration of extraneous evidence, any re-enactments, any threats or coercion by other jurors, communications with others about the case, or concealment of bias – such facts would be properly admissible to support of a motion for new trial.

Penal Code section 1181 sets forth the grounds for which a motion for new trial may be made which includes juror misconduct or when a verdict has improperly been determined by lot. (Pen. Code §1181, subds. 2-4.) Evidence Code section 1150, subdivision (a), provides in relevant part:

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[88] (...continued)

> jury on a major crime case and in need of your help on a jury room problem. We have one juror that will not listen to reason regarding circumstantial evidence and has stated from the start of deliberations that since we have no ID of the killer and their [sic] is no proof the glasses are defendants [sic], he is not guilty. I feel very strong about our obligation and responsibility, but feel our efforts are in vain. The other eleven jurors are willing to openly discuss the case and try to reach a unanimous decision. How can we convince this juror that this case depends on circumstantial evidence. I will formally poll the jury this morning and am prepared to stay with it as long as the discussions are productive."

(CT 3852.)

> "Upon inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly."

(See e.g., *People v. Ault* (2004) 33 Cal.4th 1250, 1270 [new trial motion granted based on evidence juror spoke with non-juror about case and relayed information to other jurors]; *People v. Nesler* (1997) 16 Cal.4th 561, 587-590 [new sanity phase required due to misconduct resulting from a juror's repeated references to extraneous information concerning defendant, defendant's family and friends to other jurors during deliberations]; *Sassounian v. Roe* (9th Cir. 2000) 230 F.3d 1097, 1109 [testimony about the consideration of evidence admissible at hearing on juror misconduct but testimony about the subjective effect of evidence on juror inadmissible]; *United States v. Bagnariol* (9th Cir. 1981) 665 F.2d 877, 884-885 ["Jurors may testify regarding extraneous prejudicial information or improper outside influences. They may not be questioned about the deliberative process or subjective effects of extraneous information, nor can such information be considered by the trial or appellate courts"].)

With regard to the penalty phase, the jurors sent the court two notes which indicated that there was disagreement and contentious discussions between the jurors during deliberations. The first note informed the court that the jury wanted to recess deliberations early "to allow feelings to cool off" and that "tomorrow should be a much better day." (CT 3880.)[89] The

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[89] The note of March 14, 1996, prepared during penalty deliberations, is as follows:

> "We would like to take the balance of the day off to allow

(continued...)

second note informed the court that the jurors were divided eleven to one, and that the "holdout will not listen to reason." The jurors requested guidance as to how to continue, and specified that the "holdout is based on the children." (CT 3881.)[90] Pursuant to the jury's request, the court provided the jurors with instructions which resulted in a penalty verdict shortly thereafter.

Post-trial interviews of jurors could have established whether any coercion occurred prior to or during penalty deliberations. An attempt by defense counsel to conduct some investigation about the reason the jurors requested time to "cool off" during their deliberations on penalty, about the divided vote for penalty, and whether there were any facts indicative of misconduct by the jurors during the penalty deliberations was necessary in order to adequately assess grounds to be included in the motion for new trial.

The cases upon which respondent relies to support his claim that no abuse of discretion occurred in this case with regard to the trial court's denial of appellant's request for a continuance (RB 198-199) are distinguishable from the case at hand and are not dispositive. In *People v.*

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[89] (...continued)
feelings to cool down. We feel this time off will be well spent. Tomorrow should be a much better day."

(CT 3880.)

[90] The note of March 15, 1996, prepared during penalty deliberations is as follows:

"We have a split eleven to one and the holdout will not listen to any reason. Please let us know how to continue. The holdout is based on the children."

(CT 3881.)

Sakaris (2000) 22 Cal.4th 596 defense counsel was on vacation for two weeks of the 31 days he had to prepare for the sentencing hearing. Defense counsel never complained about needing more time to prepare prior to his vacation, did not file a motion for continuance prior to the scheduled sentencing date, and did not set forth good cause as to why he had been unable to prepare in the time preceding his vacation or why he did not spend the time during/instead of his vacation to prepare. Moreover, defense counsel apparently informed the court that he would be ready to proceed with sentencing on the date scheduled. (*Id.*, at pp. 646-647.)

In *People v. Snow* (2003) 30 Cal.4th 43, defense counsel had been granted one continuance to prepare a motion for new trial. Defense counsel requested a second continuance of the new trial motion and sentencing, but failed to make the request two days prior to the hearing. The trial court determined counsel's explanation that he had difficulty obtaining police reports and hospital records mentioned in police dispatch tapes to corroborate the conspiracy defense raised at trial did not constitute good cause. This was because counsel failed to explain why the records he sought had not been investigated in preparation of the first trial or during the 2 1/ 2 years since counsel was reappointed for the second trial. (*Id.*, at pp. 76-77.)

Finally, in *People v. Smithey* (1999) 20 Cal.4th 936, defense counsel was granted one continuance to prepare the motion for new trial. Defense counsel requested a second continuance but failed to provide two days notice for the request as required by the statute. Defense counsel provided no explanation for his failure to comply with notice requirements. Moreover, the trial court determined counsel had not stated good cause because he did not provide an account of investigation that had occurred as

a result of the initial continuance or why jurors could not be interviewed or affidavits prepared during the time allotted by the continuance. (*Id.*, at pp. 1011-1012.)

In the instant case, this was appellant's first motion to continue, and defense counsel made clear that the press of his conflicting commitment to an evidentiary hearing in another murder case had prevented him from adequately preparing appellant's new trial motion. Notwithstanding his time commitment to his other case, defense counsel filed a motion for jury contact information, the denial of which was issued shortly before the date scheduled for the new trial motion. Defense counsel also filed a timely request for continuance of the new trial motion. In light of defense counsel's other case obligations, as well as the need to obtain contact information in order to conduct necessary juror investigation, good cause existed for the motion to continue to be granted.

B. In Spite of the Lack of Authority To Do So, The Trial Court Made a Motion for New Trial on Appellant's Behalf

Respondent does not dispute that the trial court lacked the power to make a motion for new trial on appellant's behalf. (RB 201.) However, respondent mistakenly contends that the trial court did not make such motion, but instead merely made a record of how it would have ruled had defense counsel made the motion. (RB 201.) This interpretation of facts is not supported by the record.

The record shows that defense counsel had not prepared or filed a written motion for a new trial on appellant's behalf, and was not prepared to make such a motion on the date set for the hearing. Unwilling to grant defense counsel's request for a continuance so that counsel could adequately prepare and file the motion, the trial court took matters in its

own hands and, without any authority to do so, made a motion for new trial on appellant's behalf. After setting forth numerous grounds for a motion for new trial, the court then issued its determination of the motion which was required by Penal Code Section 1202 prior to sentencing.[91] (RT 8552-8557.)

That the trial court in fact made the motion on appellant's behalf is demonstrated by the court's explicit statements and subsequent actions. Noting that defense counsel had "not seen fit" to make a motion for new trial, the court stated that the defense "*is deemed to have made a motion for new trial* based on each and every objection lodged by the defense throughout the trial, including a request for a mistrial made and including objections to any and all instructions given to the jury by the court, including those given pursuant to the request of the jury." (RT 8552-8553, emphasis added.) After setting forth numerous other grounds for a new trial relating to the rulings of the court which were not in appellant's favor,[92] the

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[91] Under Penal Code Section 1202, "[i]f the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment . . . then the defendant shall be entitled to a new trial." (See *People v. Braxton* (2004) 34 Cal.4th 798, 809 [by its terms Pen. Code sec. 1202 entitles criminal defendant to a new trial when the trial court refuses to hear or determine the defendant's new trial motion before sentencing].)

[92] The other grounds for the motion for mistrial made by the trial court on appellant's behalf were based on the admission or exclusion of evidence sought by the defense, the preclusion of appellant's testimony during the guilt phase due to impeachment by his prior homicide conviction, denial of his motion for mistrial due to Jessica Brock's improper testimony, ineffective assistance of counsel, appellant's motion to dismiss because of interference with the attorney client privilege, denial of the motion for continuance to prepare the motion for new trial, denial of the motion for

(continued...)

trial court summarily denied the motion for mistrial and then "properly" proceeded with sentencing. (RT 8553-8557.)

C. Waiver

Respondent's contention that appellant has waived an objection to the motion for new trial made by the trial court on his behalf is without merit. (RB 201.) The record shows that defense counsel never agreed to or supported the motion that was articulated by the court. In fact, following the denial of the motion for new trial counsel reiterated his objection to the failure of the court to grant the request for a continuance so that defense counsel could prepare a motion for mistrial. (RT 8557.)

Even assuming, and appellant does not concede, that defense counsel supported the court's motion for new trial by alleging an additional ground when pressed by the court to do so, any such "participation" does not constitute a waiver to the improper action of the court. At the time the motion for new trial was called, defense counsel made it clear that he was unprepared to proceed with the motion and restated the need for a continuance in order to adequately prepare the motion on appellant's behalf so as to protect appellant's constitutional right to effective representation. The record shows that trial counsel had every intent to file a motion for new trial on appellant's behalf, but needed more time to do so. Counsel's remarks reinforce his objection to proceeding with the motion absent adequate preparation, and any objection to the court's motion would have been futile. Moreover, because appellant's fundamental constitutional

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[92] (...continued)
jury identifying information and ineffective assistance of counsel for not filing a writ of mandate following denial of the motion to excuse the trial judge. (RT 8552-8554.)

rights to due process and effective assistance of counsel are at issue, no waiver may be established. (See Introduction, *supra.*)

D. The Violation of Appellant's Statutory and Constitutional Rights Requires Reversal of The Judgment

As set forth in the opening brief, the trial court's error in denying the continuance and making the motion for new trial for appellant precluded defense counsel from submitting a proper motion on appellant's behalf prior to imposition of sentence. Such actions by the trial court constituted a refusal to hear or determine a motion for new trial before sentencing. Not only did the error violate basic statutory law (Pen. Code §§ 1181, 1202), but it resulted in the deprivation of appellant's fundamental constitutional rights to due process, a fair trial, effective assistance of counsel and his state protected liberty interests. (U.S. Const., Amends. 6 and 14.) (AOB 326-329.)

The continuance requested by defense counsel would not have prejudiced the prosecution or disrupted the orderly administration of justice. This was a sentencing, not a trial. The jury's penalty verdict had been reached only five weeks earlier, this was the first request to continue the hearing and appellant had no objection to defense counsel's request. To appellant, the consequences for denying the motion to continue were substantial: at the motion for new trial, his last chance to present facts and obtain a review of them unconstrained by the principles of appellate review, he would be represented by an unprepared attorney.

When, as here, the actions of a trial court cause defense counsel's conduct to be ineffective, reversal is required. (*Bradbury v. Wainwright* (5th Cir. 1981) 658 F.2d 1083; *Hintz v. Beto* (5th Cir. 1967) 379 F.2d 937.) In *Hintz*, the defendant was charged with murder. Before trial, defense

counsel requested the court to appoint a psychiatrist. The court did so, but the psychiatrist did not file his report until the first day of trial. At this point defense counsel asked for a continuance to evaluate the report. The trial court denied the request, and defense counsel presented no mental defense at trial. On these facts the Fifth Circuit Court of Appeals reversed the ensuing murder conviction because the trial court's refusal to grant the continuance deprived the defendant of effective assistance of counsel. (*Hintz v. Beto*, *supra*, 379 F.2d at pp. 942-943; accord, *Bradbury v. Wainwright*, *supra*, 658 F.2d at p. 1087 ["The actions of the trial court may cause the ineffectiveness of counsel's assistance."].)

In this case, the trial court's refusal to permit defense counsel adequate time to prepare and present the motion for new trial prevented counsel from assisting appellant at a critical stage of the proceedings. The court's denial of the motion for new trial without providing counsel a reasonable continuance by its very nature denied appellant of his right to file a motion for new trial and a fair hearing. Unprepared counsel is tantamount to the complete denial of representation. (*United States v. Cronic* (1984) 466 U.S. 648, 653-655.) As the Eleventh Circuit Court of Appeals has concluded, a harmless error test does not "apply to situations where the state, the court, or the criminal justice system denies a defendant the effective assistance of counsel." (*Crutchfield v. Wainwright* (11th Cir. 1986) 803 F.2d 1103, 1108; see *Geders v. United States* (1976) 425 U.S. 80 [state court ruling which caused counsel to render ineffective assistance of counsel required reversal without a showing of prejudice]; *Herring v. New York* (1975) 422 U.S. 853 [same].)

As set forth in appellant's opening brief, the trial court's action in making the motion for new trial on appellant's "behalf" as well as its

perfunctory denial of the motion, deprived appellant of the benefit of the court's independent judgment in assessing the evidence and rulings of the court with regard to the trial proceedings and verdicts. Moreover, the trial court's arbitrary denial of appellant's statutory right to make a motion for new trial deprived appellant of his state-created liberty rights in violation of the Due Process Clause of the Fourteenth Amendment.

In sum, the cumulative impact of the trial court's actions rendered this capital proceeding so fundamentally unfair that actual prejudice to appellant occurred which resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) Reversal of the judgment and conviction are therefore required.

E. If This Court Determines That Actual Prejudice to Appellant is Not Demonstrated by the Record, Then Remand to the Trial Court for a Hearing on the Motion for New Trial is Required

In his opening brief appellant relied in part on this Court's holding in *People v. Sarazzawski* (1945) 27 Cal.2d 7 as authority mandating per se reversal when a trial court, as it did in the present case, refuses to hear appellant's motion for new trial. This Court's recent decision in *People v. Braxton*, *supra*, 34 Cal.4th 798 has determined that "*Sarazzawski* is unsound to the extent that it suggests a new trial is required whenever a trial court has refused to entertain a criminal defendant's motion for new trial." (*Id.*, at p. 819.) Notwithstanding this determination, this Court has held that Penal Code section 1202 entitles a defendant to a new trial where a reviewing court has determined actual prejudice has occurred from the refusal to hear or determine a new trial motion which results in a miscarriage of justice within the meaning of article VI, section 13, of the California Constitution. (*People v. Braxton*, *supra*, 34 Cal.4th at p. 817.)

Actual prejudice amounting to a miscarriage of justice may be shown when the record demonstrates that the defendant's new trial motion was meritorious as a matter of law or that the trial court would have granted the new trial motion. (*Id.*)

As set forth above and in appellant's opening brief, the trial court's refusal to hear or rule on his motion for new trial resulted in actual prejudice to appellant that amounted to a miscarriage of justice. If this Court determines that actual prejudice is not demonstrated by the present record, then a remand for a hearing on appellant's motion for new trial is required. (*People v. Braxton*, *supra*, 34 Cal.4th at p. 820.)

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XIX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO GIVE APPELLANT'S SPECIAL INSTRUCTION ON THE SCOPE AND PROOF OF MITIGATING EVIDENCE

In his opening brief appellant argued that his death judgment must be reversed because the trial court refused to give a special instruction which clarified for the jury that they could reject death as a penalty on sympathy or compassion alone, that a mitigating factor does not have to be proved beyond a reasonable doubt and that mitigating circumstances can be found no matter how weak the evidence is. (CT 3870.) Appellant argued that the failure to so instruct the jury on the scope and proof of mitigating evidence violated his constitutional right to a reliable and individualized sentencing determination as provided by the Eighth Amendment of the United States Constitution. (AOB 330-332.) Respondent disagrees, relying on previous decisions by this Court where the failure to give the instruction has not been found to be error. Respondent also incorrectly alleges that any error was harmless and that appellant has waived any objection to the court's refusal to give the instruction based on constitutional grounds. (RB 205-210.)

A. The Denial Of The Requested Instruction On Mitigating Circumstances Denied Appellant A Fair, Individualized And Reliable Penalty Determination

Appellant recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Kraft* (2000) 23 Cal.4th 978, 1077; *People v. Welch* (1999) 20 Cal.4th 701, 768), but he requests reconsideration for the reasons set forth in the opening brief as well as those given below. In addition, appellant raises the issue to preserve it for federal review.

Appellant's proposed instruction read as follows:

"If the mitigating evidence gives rise to sympathy or

> compassion for the defendant, the jury may, based upon sympathy or compassion alone, reject death as a penalty. A mitigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is."

(CT 3870.)

The requested instruction should have been given because it comprised a proper statement of law. Rejecting it denied appellant his Eighth Amendment rights to a fair, non-arbitrary and reliable sentencing determination, to have the jury consider all mitigating circumstances (*see, e.g., Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604), and to make an individualized determination whether he should be executed, under all the circumstances (see *Zant v. Stephens* (1983) 462 U.S. 862, 879).

All non-trivial aspects of a defendant's character or circumstances of the crime constitute relevant mitigating evidence. (*Tennard v. Dretke* (2004) 542 U.S. 274, ___ [124 S.Ct. 2562, 2571].) Furthermore, a capital jury has the right to reject the death penalty based solely on sympathy for the accused. (See *People v. Robertson* (1982) 33 Cal.3d 21, 57-58 [*Lockett v. Ohio* (1978) 438 U.S. 586 and *Eddings v. Oklahoma* (1982) 455 U.S. 104 "make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it"]; see also *People v. Easley* (1983) 34 Cal.3d 858, 876; *People v. Brown* (1985) 40 Cal.3d 512, 536 ["The jury must be free to reject death ... on the basis of any constitutionally relevant evidence ..."].)

This Court explained in *People v. Haskett* (1982) 30 Cal.3d 841,

863, why the jury must be allowed to consider such sympathetic factors:

> "Although appeals to the sympathy or passions of the jury are inappropriate at the guilt phase [citation], at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on [its] moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience."

(*Id.* See also *People v. Easley*, *supra*, 34 Cal.3d at p. 876.)

Further, excluding considerations of sympathy from the penalty determination process restricts the range of evidence the defendant is entitled to have the jury consider. Thus, it is impermissible to "[exclude] from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. . . ." (*People v. Lanphear* (1984) 36 Cal.3d 163, 167, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 304).

The general "factor (k)" instructions, included in CALJIC No. 8.85, and given at appellant's trial, clearly did not suffice to inform the jurors they had the power to return a verdict of life without the possibility of parole based solely on considerations of sympathy or compassion. Those instructions merely informed the jurors they shall "consider" any "sympathetic . . . aspect of [appellant's] character or record" (CT 3893), but did not tell them that any feelings of sympathy engendered by those aspects of appellant's character were, in and of themselves, a sufficient basis for rejecting a death sentence.

The court also improperly refused to inform the jurors that a mitigating factor need not be proved beyond a reasonable doubt in order to be considered. However, in view of the instructions the jurors were given,

it was likely that they would believe that the defendant bore some burden with regard to proving the existence of mitigating factors. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 10.)

Contrary to respondent's contention, the failure to give the special instruction which clarified the scope and proof of mitigating circumstances was not harmless. As previously set forth in his opening brief and above, the jury would not have understood that sympathy or compassion alone could be a reason not to impose the death penalty, that mitigating circumstances were not required to be proven beyond a reasonable doubt or that the jury could find mitigating circumstances even when the evidence of such was weak. Respondent's claim that there was "overwhelming evidence of aggravation" so as to render the failure to give the requested instruction harmless (RB 209-210) misses the point, and is precisely the reason that the clarifying instruction was necessary.

B. Waiver

By requesting the instruction which would have clarified the scope and proof of mitigating circumstances, appellant sought to insure fair, reliable and individualized determination of penalty which is guaranteed by the United States Constitution. Respondent's claim that appellant has waived the federal constitutional basis for the trial court's failure to give the requested instruction at issue (RB 209) is meritless as well as inconsistent with the Eighth and Fourteenth Amendment requirements of meaningful appellate review in capital cases and with the demands of fundamental justice. Appellant knows of no case in which this Court has held that a defendant must explain to the trial court the adverse federal constitutional implications of the court's refusal to grant the defendant's proposed jury

instruction. Certainly respondent has cited none.

The decisions of this Court upon which respondent relies to support his claim of waiver are not dispositive. (RB 209.) In *People v. Williams* (1997) 16 Cal.4th 153, 250 [admission of gang evidence]; *People v. Sanders* (1995) 11 Cal.4th 475, 539, fn.27 [restriction of voir dire] and *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116 [admission of videotape] there was a failure below to allege a federal constitutional basis for the evidentiary objection. The one instructional error case, *People v. Padilla* (1995) 11 Cal.4th 891, 971, involves the instance where the defendant did not even propose an instruction on the issue. Such was not the case here.

Even assuming a explicit objection based on constitutional grounds is required for the failure to give a proposed instruction, this Court has held that a defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.) Therefore, the Court should review on the merits of appellant's constitutional claim. (See Introduction, *supra*.)

C. Conclusion

The refusal to give the requested instruction violated appellant's Eighth Amendment rights under the United States Constitution because it prevented the jury from considering and giving full effect to the mitigating circumstances offered by appellant, and deprived appellant of his rights to a fair trial and a reliable penalty determination.

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XX

IT WAS PREJUDICIAL ERROR NOT TO INSTRUCT THE JURY THAT A SINGLE MITIGATING FACTOR, INCLUDING ONE NOT LISTED BY THE COURT, COULD SUPPORT A PENALTY LESS THAN DEATH

Appellant has argued that the trial court violated his constitutional right to a reliable, fair and individualized penalty determination by refusing an instruction on mitigating circumstances proposed by appellant which would have informed the jury that a single mitigating circumstance, even one not enumerated by the court, may be sufficient to support a decision that death is not the appropriate punishment. (AOB 332-334.) Respondent contends otherwise, alleging that the substance of the requested instructions was contained in other instructions given, any error was harmless and that appellant has waived any constitutional basis for the court's failure to give the instruction. (RB 211-215.) Each of respondent's contentions is without merit.

A. The Proposed Instruction Would Have Provided the Jury Guidance as to How to Properly Weigh Mitigating and Aggravating Circumstances Which Was Not Contained in the Instructions Given

Appellant requested that the trial court instruct the jury with the following instruction on mitigating circumstances:

> "The mitigating circumstances that I have read for your consideration are merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors."

(CT 3871.)

The proposed instruction was an accurate statement of law which pinpointed a crucial fact in mitigation, and should have been given. (*People v. Sears* (1970) 2 Cal.3d 180,190.) Appellant recognizes that this court has previously held that the refusal of an instruction on mitigating circumstances such as the one proposed by appellant is not erroneous (see, e.g., *People v. Lucero* (2000) 23 Cal.4th 692, 731). Appellant, however, respectfully urges this court to reconsider those decisions and raises the issue here to preserve it for federal consideration.

"The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate penalty." (*People v. Brown*, *supra*, 40 Cal.3d at p. 540.) The jury must be given that freedom, because the penalty determination is a "moral assessment of [the] facts as they reflect on whether defendant should be put to death." (*People v. Easley*, *supra*, 34 Cal.3d at p. 889; *People v. Haskett*, (1982) 30 Cal.3d 841, 863.) Since that assessment is "an essentially normative task," no juror is required to vote for death "unless, as a result of the weighing process, [he or she] personally determines that death is the appropriate penalty under all the circumstances." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035.)

The proposed instruction would have clarified for the jury the nature of the process of moral weighing in which they were to engage by demonstrating that any single factor in mitigation might provide a sufficient reason for imposing a sentence other than death.

In *People v. Sanders*, *supra*, 11Cal.4th at p. 557, this Court noted with approval an instruction that "expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that *a single factor*

could outweigh all other factors." (*Id.*, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 845 (emphasis added).) This Court indicated that such an instruction helps eliminate the possibility that the jury will "misapprehend[] the nature of the penalty determination process or the scope of their discretion to determine [the appropriate penalty] through the weighing process . . . . " (*Id.*; see also *People v. Anderson* (2001) 25 Cal.4th 543, 599-600 [approving an instruction that "any one mitigating factor, standing alone," can suffice as a basis for rejecting death].)

Contrary to respondent's assertion, the substance of this proposed instruction was not contained in other instructions given during the penalty phase, and the court's refusal to give the instruction was not harmless. Even assuming, arguendo, that the jury would have understood that they could consider "any" mitigating circumstance in making their penalty determination, the instructions given did not make clear that any *single* mitigating circumstance could result in a penalty less than death.

Although CALIC No. 8.88 specifically told the jury not to engage in "a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them, it is difficult to believe that the jury would have interpreted the instruction to consider "the totality of the aggravating circumstances with the totality of the mitigating circumstances," also set forth in No. 8.88, as anything other than a specific direction to mechanically sum up these factors and weigh them against each other in the aggregate. The term "totality" plainly implies a quantitative weighing process rather than a qualitative analysis. In addition, the last sentence of CALJIC No. 8.88 as provided to the jury states that "[t]o 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." This language further implies a mechanical, quantitative weighing process and undermines the concept that *one* mitigating factor can outweigh all of the aggravating factors and warrant a sentence of life without the possibility of parole.

People v. Williams (1988) 45 Cal.3d 1268, 1322, upon which respondent relies to support his contention that the trial court did not err in refusing an instruction that a single mitigating circumstance may be sufficient to support a penalty determination, is not dispositive. Unlike *Williams*, the arguments of counsel did not serve to clarify for the jury that their penalty determination was to be a qualitative process when evaluating aggravating and mitigating circumstances. Indeed, the prosecutor in this case urged that death was the appropriate verdict based on a *quantitative* weighing of factors when he argued that "aggravating factors greatly, greatly outweigh the mitigating factors" and that the "only mitigation appears to be this so-called sympathy factor (k)." (RT 8334.)

Even though defense counsel attempted to undo the impact of the prosecutor's argument that there was only one mitigating factor in this case, and to remind the jury that they were not to engage in a mechanical weighing process, such attempt was unsuccessful. To compound the prejudicial impact of the prosecutor's argument regarding the "single" mitigating factor in this case is the fact that when defense counsel tried to clarify that the jury was not mandated to vote for the death penalty and make clear to the jury under what circumstances life without possibility of parole would be the appropriate penalty, the prosecutor's objection that counsel was misstating the law was sustained. (RT 8347, 8350-8352.) The arguments of counsel therefore did not make clear that a single mitigating

factor could result in a penalty less than death. In fact, they did otherwise.

The record shows that the jury was apparently concerned with a single mitigating factor during deliberations as is evidenced by a note they sent to the court indicating a deadlock. In that note the jury requested guidance as to how to continue deliberations with a divided vote on penalty which was "based on [appellant's] children":

> "We have a split eleven to one and the holdout will not listen to any reason. Please let us know how to continue. The holdout is based on the children."

(CT 3881.)

In response to the jury's request, the trial court provided a special instruction. (RT 8411-8416.) This instruction, however, did not make clear that a single mitigating factor could outweigh any aggravating factor. In fact, the instruction likely did the opposite because, among other things, it told the jurors that it would be improper to "single out one aggravating or mitigating factor, and refuse or fail to weigh it against all of the other aggravating and mitigating factors shown by the evidence." (RT 8412.)[93]

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[93] Over defense counsel's objection, the following instruction was given in response to the jury's note:

> "'By these instructions the court is not suggesting what result would be proper, or that I have or am expressing any opinion on the eventual penalty phase determination.
>
> The following provisions are, however, the law:
>
> It would be inappropriate for any juror, whether one favoring a sentence of death or one favoring a sentence of life without parole, to single out one piece of evidence or one instruction and ignore the others. This case must be decided -- the case must be decided based on a totality of all the evidence and law that applies.

(continued...)

[93] (...continued)

It would be improper for any juror, whether favoring a sentence of death or a sentence of life without parole, to single out one aggravating or mitigating factor, and refuse or fail to weigh it against all of the other aggravating and mitigating factors shown by the evidence.

The facts and the law are there to guide you to a decision. The facts and the law are not there to justify any preformed or preexisting determination to stand for a certain verdict, whether it be for the death penalty or for a sentence of life without parole.

In terms of the evidence relating to the defendant's family, such evidence was received as it may bear upon that portion of factor (k) relating to 'any sympathetic or other aspect of the defendant's character or record'. Bear in mind that this 'sympathy' related to sympathy for the defendant, not solely for any other person or persons. And bear in mind that the 'character' in issue is a character of the defendant. Insofar as this evidence evinces sympathy for the defendant or is seen as being evidence relating to the character or record of the defendant, the jury may consider it under factor (k), assign it whatever weight you believe is appropriate, and then weigh it along with all other aggravating and mitigating evidence and factors. Insofar as this evidence raises sympathy only for third parties, it is not appropriate factor (k) evidence. The focus, in other words, is on the defendant's personal moral culpability, and it is the defendant's character and background that is the focus of the inquiry, not the effect that your verdict will or may have on any third party or parties.

Do not hesitate to change your position if you are convinced that it is wrong. Do not change your position simply because a majority of the jurors, or any of them, favor such a change.

It is important that all jurors both understand as well as follow the law. If a juror or jurors do not understand the law,

(continued...)

[93] (...continued)
the court will continue to attempt to clarify it. If a juror or jurors refuses or fails to follow the law, the court should be notified of that fact. If any juror, whether they are in the majority or minority, cannot, in good conscience, follow the law, it is the duty of that juror or jurors to notify the court of that fact.

Each juror should recognize a penalty phase determination is not an unguided arbitrary exercise in raw emotion whether the juror favors one penalty or the other. This decision must be based on a calm, rational assessment of the evidence and a weighing of aggravating and mitigating factors set forth in the law, and shown by the evidence. This requires that each juror render an honest, unbiased assessment of these factors without bias, without fear and without a desire to favor one side over the other. Jurors are not advocates for either side, but must be impartial judges of penalty.

All of these additional instructions are directed at all twelve trial jurors, not those favoring one verdict or the other. Further, please keep in mind as I instructed you at the outset of these instructions, these latest instructions, that these instructions are not to be interpreted by the jury as suggesting an outcome, or as suggesting that the court is expressing an opinion as to the propriety of one outcome or the other.'"

That's the instruction.

Let me add to it the following:

The court in no way, shape or form is suggesting to you the weight any juror or combination of jurors should place on any aggravating factor, any mitigating factor or any combination thereof.

That is a jury determination, not a determination for the court.

(continued...)

As with appellant's other proposed instruction on mitigating circumstances which the trial court refused to give, an objection on constitutional grounds was not waived. (See Argument XIX, *supra*; Introduction, *supra*.)

Because the jury did not receive proper guidance on how to weigh aggravating and mitigating circumstances, it was unlikely they realized that just one mitigating factor could outweigh all the aggravating factors. The refusal of the trial court to give appellant's proposed instruction constituted error which cannot be said to be harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

B. Conclusion

The failure to give the requested instruction left the jury without the guidance necessary for it to properly make its penalty assessment. As a result, appellant was denied a reliable penalty determination, the right to be free from the arbitrary and capricious imposition of the death penalty, and the right to the heightened protections of due process that are required in the penalty phase of a capital case. (See *Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

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[93] (...continued)

It is simply a hope that the instruction that I read to you will assist you in following the law in this case and as I have outlined it in earlier instructions.'"

(RT 8411-8416.)

XXI

THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED IN THIS CASE UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Appellant argued that assuming none of the errors in this case is prejudicial by itself, the cumulative effect of the numerous errors undermines the integrity of the guilt and penalty phase proceedings and requires reversal of the judgment and sentence. (AOB 334-336.) Respondent erroneously contends otherwise. (RB 216.)

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[94] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying

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[94] In this case respondent has repeatedly alleged that any errors that may have been committed were harmless. (See, e.g., RB 65-66, 81-83, 120-121, 128, 134-135, 144, 147, 158, 167-168, 178-179, 184-185, 203-204, 209-210, 215, 216.) Where, as here, there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude are combined with other errors].)

Appellant has argued that per se reversal of the judgment of conviction is required because of the prosecutor's improper race-based peremptory challenges of minority prospective jurors and insufficient evidence of the charged offenses. (Argument IV and Argument XXII). Appellant has also argued that additional guilt phase errors in this case were prejudicial, including: admission of an unreliable identification of photographs of appellant by the surviving victim (who had been unable to identify appellant in court) which was the result of impermissibly suggestive identification procedures (Argument I); failure to appoint counsel of appellant's choice, which, among other things, resulted in prejudicial voir dire questioning on the murder of a peace officer special circumstance allegation which was eventually dismissed for insufficient evidence during jury deliberations on guilt (Argument II and Argument III); violation of appellant's right to due process as the result of delay and the prejudicial loss of evidence (Argument V); the prosecution's bad faith destruction and/or loss of evidence that was of apparent exculpatory value (Argument VI); admission of the testimony of the surviving victim who had been hypnotized when he made statements to the police (Argument VII and Argument VIII); admission of testimony regarding forensic evidence which was speculative, remote, conjectural and had no evidentiary value (Argument IX); admission of prejudicial and irrelevant testimony about a phone call appellant had made and prejudicial hearsay about that same call (Argument X); admission of appellant's refusal to stand in a lineup to demonstrate consciousness of guilt when his refusal was made on the advice of counsel (Argument XI); exclusion of evidence which would have

supported appellant's defense that he was not one of the perpetrators (Argument XII); improperly instructing the jury with CALJIC Nos. 2.04 and 2.05 regarding consciousness of guilt (Argument XIII); improperly instructing the jury with CALJIC Nos 3.00 and 3.01 regarding aiding and abetting when the prosecution's theory was that appellant was the shooter (Argument XIV); allowing the prosecutor to question key prosecution witness Jessica Brock regarding inflammatory other-crimes evidence to bolster her credibility (Argument XV); denial of appellant's motion for mistrial based on inflammatory and prejudicial testimony by Jessica Brock regarding a triple homicide committed by appellant (Argument XVI); insufficient evidence of the robbery-murder special circumstance allegation (Argument XVII); and denial of appellant's request for a continuance to file a motion for a new trial and the issuance of a ruling on the motion for new trial without such motion being filed (Argument XVIII)

The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643). Accordingly, appellant's conviction and the special circumstance allegation must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at pp. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845

[reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [reversing attempted murder, attempted robbery convictions for cumulative error].)

In addition, the sentence of death itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

The errors committed at the penalty phase of appellant's trial include: refusal to instruct the jurors that mitigating circumstances do not need to be proven beyond a reasonable doubt (Argument XIX); refusal to instruct the jurors that any one mitigating factor, even one not listed in the instructions, could support a determination that death was not the appropriate sentence (Argument XX); and the improper consideration by the trial court of violent acts and incorrect inflammatory information about appellant's background which had not been presented to the jury prior to its ruling on the automatic motion to modify the verdict (Argument XXIII).

Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

The combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence. Contrary to respondent's assertion otherwise (RB 216), the numerous evidentiary errors that occurred in this case deprived appellant of his constitutional rights to due process, a fair trial and to reliable determinations of guilt, special circumstances and penalty. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Caldwell v. Mississippi*, *supra*, 472 U.S. at 340.) Even assuming, arguendo, that the standard of review advocated by respondent (RB 216) is dispositive, it is reasonably probable that the jury would have reached a result more favorable to appellant. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.)[95]

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[95] Respondent's additional contention that substantial evidence supports appellant's guilt is also without merit. (See Arg. XXII, *infra*.)

XXII

THE JUDGMENT OF CONVICTION IS NOT SUPPORTED BY SUFFICIENT OR RELIABLE EVIDENCE AND AS A MATTER OF LAW THE PROSECUTION HAS NOT SUSTAINED ITS BURDEN OF PROVING APPELLANT GUILTY BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS

Appellant argued in his opening brief that the judgment of conviction is not supported by sufficient or credible evidence and that reversal is required because as a matter of law the prosecution has not sustained its burden of proving appellant guilty beyond a reasonable doubt, in violation of appellant's constitutional right to due process. In so doing appellant has argued that evidence upon which the prosecution relied to achieve the conviction should have been excluded for numerous reasons or, even if admissible, the evidence was unreliable or of weak and speculative value. (AOB 337-341.) Respondent incorrectly alleges that substantial evidence supports appellant's conviction. (RB 217-221.)

Respondent contends that Bulman's identification of appellant's photographs (People's Exhibits 19 and 20) and evidence of positive presumptive blood tests found on appellant's jacket should not have been excluded, referring to the points set forth in his response to Arguments I, V, VI, and IX (RB 217) and to which appellant has responded, *supra*. However, in addressing appellant's further argument that the prosecution's evidence was insufficient because it was also unreliable, speculative and of little probative value, respondent misconstrues important facts and focuses only on isolated evidence which is arguably in his favor. Moreover, respondent fails to engage in an analysis of the entire record as is required when, as here, insufficiency of the evidence to prove a defendant's guilt beyond a reasonable doubt and appellant's fundamental due process rights

are at issue. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *In re Winship* (1970) 397 U.S. 358, 364 ["the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt"].) Appellant's reply to allegations made by respondent below are limited to that which has not already been set forth in his opening brief.

Appellant has set forth substantial grounds as why the identification evidence presented was unreliable and should not have been admitted. (Arguments I, V, VI, *supra*.) Respondent apparently misunderstands appellant's point that Bulman's August 20, 1980, identification of someone else being the shooter corroborates *other* evidence of unreliability rather than standing on its own. Respondent's focus on the fact that the jury never heard evidence of Bulman's August, 1980, identification of someone else incorrectly suggests that the 1980 identification was the *only* basis on which Bulman's identification was unreliable or insufficient. (RB 218.) This was certainly not the case. As set forth in appellant's opening brief and above, there was substantial evidence that Bulman's identification of the appellant's photos was unreliable and that it did not lend support to the sufficiency of the judgment and conviction.

To counter the fact that Bulman was unable to identify appellant in a 1990 lineup, or in court in 1995, respondent alleges that the failure to make such an identification is "readily explained by natural changes in [appellant's] appearance caused by the passage of time." (RB 219.) Remarkably, respondent fails to enumerate just what changes in appellant's appearance had occurred due to the passage of time and how those changes would have precluded identifications of appellant in spite of at least two opportunities to do so. Accordingly, any purported support for the reliability of the photo identification on this basis must be rejected.

Equally unpersuasive is respondent's contention that the identification was not inherently unreliable because Bulman's refusal to identify appellant previously showed he was not willing to identify someone "just because he was supposed to." (RB 219.) It is apparent, however, that the prosecution wanted Bulman to make an identification the night before his trial testimony, and it is just as probable that he did so at that point "because he was supposed to," and because the procedures utilized for that identification were inherently suggestive and unreliable. (See Argument I, *supra*.)

Respondent's reliance on blood purportedly found on appellant's jacket to support the contention that there was sufficient evidence of appellant's guilt is likewise misguided. The record shows that although presumptive tests for blood performed on the jacket were positive, the presence of human blood on it was not confirmed. (RT 5669-5670, 7131-7133.) Moreover, it was not conclusive that blood was actually on the jacket. (See RT 7132-7133.) Expert testimony was presented that the positive Luminol test result obtained with regard to the front of the jacket was not specific to blood and was also indicative of other substances. (RT 5658.) Similarly, the fact that a presumptive Phenolphthalein test was positive on one or two spots on the jacket was not conclusive of the presence of blood because Phenolphthalein would react to some plants. (RT 5673. See Arg. IX, *supra*.)

The evidence of his guilt for the Cross homicide was insufficient and "not credible." (AOB 339-340.) By arguing thus, appellant is not requesting that this Court *reweigh* the testimony of either Lloyd Bulman or Jessica Brock. Instead, appellant urges this court to conduct an independent review of the *entire record* to determine whether there is sufficient evidence

of solid, reasonable and credible value to establish that as a matter of law the prosecution has met its burden of proving appellant guilty beyond a reasonable doubt. (See *Napue v. Illinois* (1959) 360 U.S.264, 271 [duty of appellate courts to make own independent examination of the record when federal constitutional deprivations are alleged].)

Review of the record, including the inherently improbable and incredible version of the events of the night of June 4, 1980, proffered by Jessica Brock (see *People v. Headlee* (1941) 18 Cal.2d 266), establishes that as a matter of law the prosecution did not meet its burden of proof. (AOB 339-340.) That key evidence upon which the prosecution relied was not of solid, reasonable or credible value is demonstrated by the fact that during deliberations the jury made known to the court that it had "problem areas." To assist with these "problem areas," the jury requested read-back of the testimony of main prosecution witnesses Jessica Brock and Lloyd Bulman, testimony about when People's Exhibits 18 and 19 (photographs of Terry Brock and appellant) were taken, and whether Bulman actually identified appellant from the composites and photos. (RT 7522-7525, 7536-7539.) In addition, a report by the foreman that a juror refused to join the discussion during deliberations because no positive identification of appellant by Bulman had occurred prompted the trial court to reread to the jury instructions on circumstantial evidence, eyewitness identification and reasonable doubt. In so doing, the court emphasized that no particular kind of evidence is required and made specific reference to eyewitnesses. (RT 7559, 7585-7598.) That the case for guilt was not open and shut is demonstrated by the fact that the jury deliberated on the murder charge and related arming enhancements for over three days. (RT 7488, 7496, 7557, 7633-7635.) Appellant incorporates by reference as if fully set forth herein,

Arg. I, sec. C, *supra*.

Because the judgment of conviction rests on insufficient evidence in violation of appellant's fundamental constitutional right to due process (U.S. Const., Amends. 5 and 14; Cal. Const, Art. I, sec. 7), reversal is required.

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XXIII

THE TRIAL COURT, IN DENYING APPELLANT'S MOTION TO REDUCE HIS SENTENCE, IMPROPERLY CONSIDERED THE PROBATION REPORT AND THE PREJUDICIAL INFORMATION INCLUDED THEREIN WHICH HAD NOT BEEN PROPERLY BEFORE THE JURY

In his opening brief, appellant argued that following a denial of appellant's motion to continue its motion for new trial and a determination affecting sentencing, the trial court improperly read and considered the probation officer's report prior to denying appellant's automatic motion to reduce his sentence in violation of Penal Code section 190.4, subdivision (e). Appellant also argued that the trial court violated its statutory charge with respect to appellant's modification motion when it relied on impermissible considerations contained in the probation report in arriving at its decision not to disturb the jury's death verdict. (AOB 341-343.)

Respondent concedes that the record establishes the trial court improperly read appellant's probation report prior to its ruling on the application to modify the sentence. Respondent also does not dispute appellant's claim that the probation report contains prejudicial other crimes information, which was both extraneous to that which was properly before the jury and partly incorrect. Even though the record is clear that the trial court "*read and considered*" the probation report prior to the modification of sentence hearing (RT 8557), respondent nonetheless alleges otherwise. Respondent further contends that even if error occurred by the court's reading the probation report prior to ruling on the motion to modify the sentence, it was harmless. (RB 222-224.) Respondent's contentions are incorrect, and must be rejected.

The probation report refers to a number of criminal acts supposedly

committed by appellant which were not only prejudicial, but also were extraneous to the evidence properly presented to the jury. The extraneous prior bad acts by appellant which involved violence or suggested violence were: (1) arrest for obstruction of or resisting a public officer; (2) arrest and conviction of possession for sale of a switchblade knife; (3) arrest for assault, conviction for two counts of battery; (4) arrest for obstructing/resisting a public officer; and (5) membership in the Black Guerilla Family gang. (CT 4091-4092, 4095-4096.) Even though the trial court ultimately determined that the statement regarding appellant's membership in the Black Guerrilla Family gang was not true and ordered the information stricken from the probation report, the record shows that at the time the court issued its ruling on the modification motion, the gang information was undisputed. (RT 8582.)

The record demonstrates that the trial court failed in its statutory obligation and did in fact reach its decision denying appellant's application to modify the sentence by impermissible consideration of the extraneous information contained in the probation report. Even in the face of defense counsel's objection that the court was precluded by law to have read and considered the probation report prior to the modification hearing, the court explicitly stated that its review and consideration of the probation report had already occurred.

> "The Court: All right. Court has read and *considered* the probation report in the matter.
>
> Mr. Klein: I think the law is that the court shouldn't read and consider the probation report prior to –
>
> The Court: The court has now done so."

(RT 8557, emphasis added.)

Respondent's contention that the trial court had read the probation report in "anticipation of sentencing," but had not considered the probation report in ruling on the application to modify the verdict (RB 223), is simply implausible. (*People v. Lewis* (1990) 50 Cal.3d 262, 286-287.) Moreover, respondent's contention that the trial court based its determination as to the motion to modify the sentence only on "evidence produced at both the guilt and penalty phases, the testimony of all of the prosecution and defense witnesses, and the arguments made by appellant's counsel for a lesser penalty than death" (RB 223) is belied by the record.

Prior to issuing its denial of the motion to modify the sentence, the court expressly stated that it had "further searched the record on [its] own to determine if there were *any circumstances* or factors in mitigation that might have been argued *but that were omitted from consideration by the jury*." (RT 8561, emphasis added.) The record demonstrates that the trial court "searched the record" for, and was influenced by, both aggravating and mitigating factors which were not presented to the jury. Among the factors the court cited it was relying upon was appellant's background of violence, including prior acts of violence and convictions involving violence:

> "under factor (b) and ©, the background of the defendant includes prior acts of violence and includes convictions for crimes of violence. His convictions and activities involving violence include prior offenses of robbery, felonious assaults involving a shooting of an acquaintance and, obviously, a triple murder."

(RT 8561.)

While the jury was presented evidence of prior violent acts committed by appellant, the probation report, as noted above, referred to

additional prior violent acts and convictions involving violence. (CT 4091-4092.) The probation report also incorrectly stated that appellant was a member of the Black Guerrilla Family gang, which was no doubt considered by the trial court as further evidence of appellant's violent background. (CT 4095-4096.)[96] That the trial court in fact improperly considered and was influenced by the extraneous prior violent activity is further shown by the court's statement when it issued its ruling on the motion:

> "The Court has looked for any additional mitigating evidence and I find now in the *entire record of the case*, I find, in fact that the aggravating factors and evidence are so substantial in comparison with the mitigation that the appropriate penalty and the only appropriate penalty is the death penalty."

(RT 8563.)[97]

Unlike the trial court in *People v. Navarette* (2003) 30 Cal.4th 458, 526, upon which respondent relies (RB 223), the court's comments in this case demonstrate that it reached its ruling after consideration of the prejudicial materials contained in the probation report which had not been properly before the jury. Respondent's reliance on *People v. Scott* (1997) 15 Cal.4th 1188, 1225-1226, is also misplaced. In *Scott*, the trial court

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[96] As noted above, that appellant's membership in the Black Guerrilla Family gang was determined to be incorrect, and in fact stricken from the probation report, occurred *after* the trial court had denied appellant's motion to modify the sentence of death.

[97] In the Commitment [and] Judgment of Death the trial court again set forth reasoning for its denial of the modification of sentence imposed by the jury: "I have *considered the entire record.* I find that the aggravating factors are so substantial in comparison with the mitigating factors that the appropriate penalty is death." (CT 4083, emphasis added; *accord*, CT 4061.)

expressly stated that it would not consider the probation report except for anything favorable to the defendant. No such expression occurred in this case. In fact, the trial court in the present matter explicitly stated that it had read and considered the probation report (RT 8557), and the record shows that the trial court did not restrict its consideration only to information favorable to appellant.

Accordingly, this case must be remanded for a new section 190.4, subdivision (e), hearing.

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XXIV

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

Appellant's opening brief sets forth numerous grounds that California's death penalty statute violates the federal constitution both on its face and as applied, while acknowledging that this Court has already rejected these claims of error. (AOB 344-361.) Respondent simply relies on this Court's earlier decisions and asserts there is no compelling reason this Court should reconsider them. (RB 225-231.) Accordingly, the issues are joined and no reply is necessary.

XXV

CONCLUSION

For all the reasons stated above and in his opening brief, the judgment of conviction and sentence of death in this case should be reversed.

Dated: August 31, 2005.

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender

SUSAN TEN KWAN
Deputy State Public Defender

Attorneys for Appellant

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

I, Susan Ten Kwan, am the Senior Deputy State Public Defender assigned to represent appellant, Andre S. Alexander, 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 is 71,888 words in length excluding the tables and certificates..

Dated: August 31, 2005

Susan Ten Kwan

Susan Ten Kwan

DECLARATION OF SERVICE

Re: *People v. Alexander* No. S053228

I, Jeffrey McPherson, 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 true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Attn: Richard Breen, D.A.G.
300 South Spring Street, 5th Floor
Los Angeles, CA 90013

Office of the Los Angeles County
District Attorney
Attn: Lester Kuriyama
210 W. Temple St., Ste. 18000
Los Angeles, CA 90012

Addie Lovelace
Death Penalty Appeals Clerk
210 W. Temple St., Rm. M-3
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Rowan K. Klein, Esq.
10537 West Pico Blvd., Ste. 854
Los Angeles, CA 90064

Mr. Andre S. Alexander
(Appellant)
[BY HAND]

Each said envelope was then, on August 31, 2005, 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 that the foregoing is true and correct.

Executed on August 31, 2005, at San Francisco, California.

DECLARANT