IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	Court of Appeal No. SO85348
v.	
GABRIEL CASTANEDA,	Superior Court No. FWV-15543
Defendant and Appellant.	

Appeal from the Superior Court of the State of California

In and For the County of San Bernardino

Honorable Mary E. Fuller, Judge

APPELLANT'S REPLY BRIEF

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GUILT PHASE ISSUES

I

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT DENIED APPELLANT'S RIGHT TO BE PRESENT DURING THE TRIAL, WHICH WAS GUARANTEED BY: (1) THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION; (2) ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND; (3) PENAL CODE SECTIONS 977, SUBDIVISION (B) AND 1043, SUBDIVISION (A).

Respondent argues appellant's federal and state law right to be present at trial was not violated by his absence from the bench conferences during jury voir-dire because those conferences involved only issues of law, at which appellant's presence would not have contributed to the fairness of the proceedings.

The first bench conference when appellant was not present occurred the morning of September 20. The attorneys and the trial court discussed the erroneous rumor that videotaping was occurring. (3 RT pp. 487-488.) The attorneys and the trial court agreed to not worry about the videotaping issue for the time being. (3 RT p. 488.) Respondent argues appellant's presence during this bench conference had no "relation, reasonably substantial, to the fullness of [appellant's] opportunity to defend against the charge[s]," (*Snyder v. Commonwealth* (1934) 291 U.S. 97, 105-106, 54 S.Ct. 330, 78 L.Ed.2d 674), because: (1) the attorneys and the trial court did not know which juror had expressed concern about videotaping; (2) it would have been imprudent to raise the issue of the videotaping in front of the entire jury because the identity of the juror concerned about videotaping was unknown; and (3) there was no way the attorneys, or the trial court, could have known prospective juror Powell would later make remarks about gang retaliation during jury selection.

Respondent's argument is flawed because the assessment of whether a hearing had a substantial relationship to the defendant's ability to defend himself is made by examining the nature of the hearing. The bench conference about the videotaping occurred during jury selection. Jury selection and voir-dire were obviously a critical component of the trial process. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188, 101 S.Ct. 1629, 68

L.Ed.2d 22.) Indeed, respondent's argument demonstrates the bench conference about the videotaping had a substantial relationship to appellant's ability to defend himself. The defense counsel had to make a strategic choice whether to request the trial court to raise the videotaping issue in front of the entire jury, let the matter rest for the time being, or take some other intermediate step. The uncertainty about how the trial court, and the parties, would have addressed the videotaping issue had appellant been present cannot be used as a basis for finding the bench conference did not have a substantial relationship to appellant's ability to defend himself. Accepting this argument would result in no proceeding having a substantial relationship to appellant's ability to defend himself.

The cases cited by respondent are distinguishable or should not be followed. In *People v. Morris* (1991) 53 Cal.3d 152, the trial court held an informal, unreported conference with the attorneys regarding jury instructions. The next day, the trial court held a formal conference on the record regarding jury instructions, which defendant attended. The Court concluded an informal conference off the record concerning jury instructions, or a bench discussion on a question of law, was not a proceeding where a defendant's presence was constitutionally necessary. (*People v. Morris, supra*, 53 Cal.3d at p. 210.) *People v. Morris* did not deal with jury selection and is therefore distinguishable. Furthermore, the unreported bench conference without the defendant simply repeated on the record the next day with the defendant present. There were no strategic decisions made about the case where the defendant was absent. Conversely, the decision how to handle the videotaping issue was a strategic decision that ultimately greatly impacted the remaining prospective jurors because of the subsequent blowup with juror Powell.

In *People v. Hardy* (1992) 2 Cal.4th 86, the defendant was absent from two brief sessions of preliminary jury voir-dire concerning hardship excuses from jury service. He was also absent from two days of conferences between the attorneys and the trial court regarding guilt phase instructions. The Court concluded the defendant failed to demonstrate prejudice from his absence during the jury voir-dire concerning hardship excuses. The discussion of jury instructions concerned only legal issues and had no impact on the ability of the defendant to defend himself. (*People v. Hardy, supra*, 2 Cal.4th at p. 178.)

The tactical decision about how to handle the videotaping issues did not concern only legal issues. There was at a minimum a factual issue about whether anyone was videotaping any portion of the proceedings. Furthermore, the record demonstrates prejudice from appellant's absence during the bench conference concerning the videotaping issue. Appellant did not have the opportunity to inform his defense counsel, or the trial court, that nobody was videotaping any portion of the proceedings on his behalf. Appellant also did not have the opportunity to communicate with his defense attorney that additional steps should have been taken to resolve the videotaping issue rather than simply doing nothing.

In *People v. Bradford* (1997) 15 Cal.4th 1229, the defendant was absent from hearings: (1) in which the defense counsel stated his intention to rest without calling the defendant to testify; (2) concerning a juror who was absent because of a death in the family and trial court's options; (3) in which the defense counsel informed the trial court he intended to present mitigating evidence over the defendant's objection; (4) concerning the testimony of certain witnesses during the penalty phase; (5) concerning a continuance because a juror was ill; (6) concerning penalty phase instructions; and (7) when the defense

attorney informed the trial court appellant wanted to represent himself. The Court found no constitutional error from the defendant's absence from the in-chamber conferences because the defendant had waived his right to be present for those hearings. The Court also concluded those matters did not have a substantial relationship to the defendant's ability to represent himself. (*People v. Bradford, supra*, 15 Cal.4th at p. 1357.) The Court found no error from the defendant's absences during the testimony of witnesses because the defendant requested to be absent during that testimony for his own benefit. (*Id.*, at p. 1358.)

Appellant did not waive his absence from any of the hearings. *People v. Bradford* is distinguishable because the hearings where the defendant was absent concerned routine scheduling issues when no strategic decisions were made, or hearing where the defendant expressly consented to be absent for his own benefit.

The second bench conference concerned the prosecutor's objection to the defense counsel's attempt to explain to the prospective jurors, during jury voir-dire, the concept of mitigating evidence. (3 RT p. 598.) Respondent argues this hearing had no relation to appellant's ability to defend himself because there was no way to know if appellant could have added to the fund of knowledge his defense attorney had about the mitigating facts in his life. Appellant's presence during this bench conference would have benefitted appellant because he would have had the opportunity to remind his defense counsel of the mitigating factors in his life even if the defense counsel had previous knowledge of those facts. The permissible scope of voir-dire by an attorney during jury selection may be a pure issue of law. However, the specific information the defense attorney attempts to elicit from the jurors in response to information he provides them involves factual issues or inquiry.

Respondent also argues that any error regarding appellant's absence from the bench conferences was harmless because: (1) appellant has failed to establish that any of the prospective jurors who were contaminated by juror Powell's ranting and raving about gang members and retaliation actually sat on the jury; (2) the trial court informed the jury that the videotaping had nothing to with the case; (3) the concept of aggravating and mitigating factors was eventually explained to the jury; and (4) the evidence of appellant's guilt was overwhelming.

Appellant's absence from the two bench conferences should be prejudicial per se for the reasons asserted in the Opening Brief. Reversal, however, is still required if the errors are tested for prejudice. Contrary to the Attorney General's argument, at least one sworn and seated juror was present when Mr. Powell engaged in his ranting and raving about gangs.

The trial court resumed jury selection during the morning of September 20, 1999. (3 RT p. 478.) The clerk took roll call of the jurors who were present. (3 RT pp. 486-507.) Jurors 17, 43, 56, 67, 68, 74, 138, 140, 166, 167, 169, 174, 189, 191, and 192 were present. (3 RT pp. 489, 491-493, 497, 499-501, 503.) All the aforementioned jurors were sworn as jurors or alternates. (Jury Questionnaires, 1 CT pp. 1-419.)[1] The trial court instructed the jurors who believed they could spend the time to sit as jurors to leave and return at a later time. (3 RT p. 508.) The trial court did not list by name the jurors who remained in the courtroom. Prospective juror Powell complained about gang retaliation at pages 538 and 539 of the reporter's transcript. (3 RT pp. 538-539.) The defense counsel then commented, "We

[1] The first two pages of the table of contents in the clerk's transcript for the jury questionnaires lists by juror number the sworn jurors and alternates.

have now an entire panel here that I think is under a total misperception as to what is involved with filming and so forth and perhaps the Court would like to tell this group of the panel that there is no filming and that there is no taping going on." (3 RT p. 539.) It was clear from the defense counsel's comment the prospective jurors in the courtroom heard Mr. Powell's comments. Juror number 17 was questioned at page 543 of the reporter's transcript. (3 RT pp. 543-544.) Juror number 17 was sworn as a juror. (Jury Questionnaires, 1 CT pp. 45–66.) Hence, at least one sworn juror was aware of Mr. Powell's ranting and raving about gangs.

The trial court's informing of the jury the videotaping had nothing to do with the trial did not mitigate the prejudice from juror Powell's ranting and raving. The idea that appellant was a gang member who had associates who would retaliate against the jury was clearly communicated. Appellant had been a gang member in his youth, but there was no evidence this was a gang case. Mr. Powell's ranting and raving only poisoned the jury pool. At least one sitting juror heard his comments.

The Opening Brief argued that appellant's presence during the second sidebar had a substantial relationship to appellant's ability to defend himself because he could have assisted his defense counsel in explaining to the court why he had to voir-dire the jury about aggravating and mitigating factors. Respondent argues there was no prejudice from appellant's absence because the jury later had the concept of aggravating and mitigating evidence explained to them. This did not cure the prejudice from the limitation placed on the defense counsel's questioning of the jurors during voir-dire. It was imperative the defense counsel have the opportunity to remind the jurors that mitigating factors can exist

prior to the jury hearing the horrible details of the murder during the guilt phase of the trial. At a minimum, the penalty should be reversed. The allegedly overwhelming nature of the evidence is irrelevant with regard to assessing prejudice for the penalty. Assuming the errors are prejudicial per-se, the "purported" overwhelming nature of the evidence is also irrelevant with regard to the guilt phase.

For the reasons above and in the Opening Brief, the judgment must be reversed.

II

THE JUDGMENT OF GUILT TO COUNT ONE SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF SECOND-DEGREE MURDER, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND IN VIOLATION OF THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I SECTION 17 OF THE CALIFORNIA CONSTITUTION

Respondent argues that the trial court properly refused to give second-degree murder instructions because: (1) there was no substantial evidence from which a jury could conclude appellant was not guilty of first degree murder but guilty only of second degree murder; (2) even if the jury concluded appellant formed the intent to kill Kennedy after he entered the clinic, the jury could only have concluded the murder was deliberate and premeditated based upon the manner of its commission; (3) second-degree murder is not a lesser included offense of felony murder; (4) the evidence did not raise a question of fact of second-degree murder as a lesser included offense of felony murder because there was strong evidence of burglary, sodomy, rape, and robbery; and (5) any error by the trial court in failing to give second-degree murder instructions was harmless because the factual issues presented by a second-degree murder instruction were resolved adversely to appellant by the other instructions.

Respondent argues appellant drove to the clinic with the intent to attack, rob, and

sexually assault Kennedy, and was therefore guilty of first-degree murder. Respondent's argument is flawed because respondent is applying the substantial evidence rule—which requires the appellate court to construe the facts to support the judgment below—to the issue of whether the trial court should have instructed the jury on a lesser included offense. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Even if appellant's parking of the Nissan Sentra in the Long John Silver parking lot suggested nefarious intent, it was not conclusive evidence appellant intended to commit a crime in the medical clinic or what crime he intended to commit. The record is too sparse to know what occurred prior to the assault of Kennedy. Instructions on lesser included offenses are required "when the evidence raises a question as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.)

The standard applied under the substantial evidence rule is essentially the opposite of the standard applied in determining whether instructions should be given on lesser included offenses. Respondent argues appellant must have had the intent to kill Kennedy because she would have been able to identify him because he had been a patient at the medical clinic. However, there are many cases where the victim of a vicious assault is left alive. Respondent is resorting to speculation about appellant's state of mind to infer that he must have intended to kill the victim.

Respondent argues the manner in which Kennedy was killed conclusively demonstrated an intent to kill. The fact appellant blocked the window only demonstrated that he did not want anyone to witness the assault. It does not prove appellant intended to

kill Kennedy. Virtually all individuals who commit sexual assaults do so in a concealed manner. The manner Kennedy was killed was not sufficient by itself to conclude appellant must have intended to kill her. The vast majority of the stab wounds—27 out of 29—were not fatal. Dr. Sheridan testified appellant was attempting to obtain Kennedy's compliance when he inflicted the wounds with the screwdriver. (5 RT p. 1193.) That may well have remained appellant's motive when he inflicted the fatal blows. The fact that Kennedy's death resulted from the assault cannot, by itself, be the basis to conclude appellant intended to kill her.

In *People v. Halvorsen* (2007) 42 Cal.4th 379, the defendant was convicted of two counts of first degree murder, one count of attempted murder, and one count of assault with a firearm. The defendant's life was in a state of decline. The defendant claimed he suffered from mental disorders which precipitated his actions. The defendant did not know the first victim he shot. The defendant drove by the victim in his truck and shot him in the head without any apparent reason. The defendant drove his vehicle a few feet away. The next victim drove his vehicle next to the defendant's vehicle and stopped. The defendant then pulled out a gun and shot that victim in the head. The defendant argued the evidence was insufficient to prove he committed the murders with premeditation and deliberation. This Court first stated, "[a] verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. Deliberation refers to careful weighing of considerations in forming a course of action; premeditation means thought over in advance." (*People v. Halvorsen, supra*, 42 Cal.4th at p. 419.) This Court noted the three elements from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, for a finding of premeditation and

deliberation; planning, motive, and manner of killing. (*Id.*, at p. 420.) The Court concluded the evidence was sufficient to demonstrate premeditation and deliberation:

> Defendant's purposive actions in driving to seek out various persons and then killing them, viewed in a light favorable to the judgment, indicate defendant had some motive for his killings-a method to his madness-and that is enough. The record suggests the motive may have been related to defendant's feelings about his desperate financial state, as each of the locations where defendant committed the shootings . . . conceivably had some connection, in defendant's mind, to his financial troubles. With respect to the murders, neither Ferguson nor Perez in any way provoked the shooting or struggled with defendant, whose demeanor at the time was described as "cold." (Citation omitted.) The jury was free to accept Delton Ferguson's testimony that defendant "hollered" from the intersection, which suggested defendant had some purpose in drawing Calvin Ferguson toward him, and within moments fatally shot him. . . . The evidence of defendant's planning activity and evident deliberation in the Layton shooting could support an inference that his mental illness did not interfere with his ability to deliberate less than an hour earlier, when he killed Ferguson and Perez. Moreover, Ferguson and Perez were shot in the head or neck from within a few feet, a method of killing sufficiently "particular and exacting" to permit an inference that defendant was "acting according to a preconceived design" (citations omitted), and defendant's testimony showed he was well aware that shooting a person in the face or neck would kill him. We conclude the jury's verdict of first degree murder is supported by sufficient evidence.

(*People v. Halvorsen, supra*, 42 Cal.4th at p. 421.)

The instant case stands in stark contrast to *People v. Halvorsen*. *People v. Halvorsen* found sufficient evidence of premeditation based on the presence of motive, planning, purposeful conduct at the time of the shootings, and the manner in which the defendant shot the victims. Appellant's comment the "bitch made me mad," (7 RT pp. 1550-1551), suggests he exploded in a fit of rage rather than having planned the murder. Appellant had no

apparent preexisting motive to kill Ms. Kennedy. Despite the brutality of the assault, the manner in which it occurred did not guarantee Ms. Kennedy was dead in the same manner as shooting someone in the head. The abundance of evidence of premeditation in *People v. Halvorsen* demonstrates the lack of premeditation in this case.

Respondent argues *People v. Haley* (2004) 34 Cal.4th 283, does not apply because: (1) the defendant testified he strangled the victim only to keep her from screaming; and (2) the autopsy finding supported the defendant's testimony. The victim in *People v. Haley* suffered severe injuries around the neck causing death. Ms. Kennedy also suffered severe injuries around the neck causing death. The injuries to the victim in *People v. Haley*, and in the instant case, could have been the basis by the jury to infer an intent to kill. However, the testimony from the coroner in this case, that appellant was attempting to obtain compliance by Kennedy when he inflicted the stab wounds, was comparable to the testimony of the defendant in *People v. Haley*, that he strangled the victim to keep her quiet. In each case, the evidence raised a question whether the assailant intended to kill the victim.

Respondent argues *Vickers v. Rickett* (9th Cir. 1986) 798 F.2d 369, is of no value because it was a Ninth Circuit case application of Arizona law. The issue in *Vickers v. Rickett* was whether the evidence so conclusively demonstrated an intent to kill that second degree murder instructions were not required. That is the same issue before the Court in this case, i.e., whether the manner in which Kennedy was killed so conclusively demonstrated an intent to kill by appellant that no other conclusion could be reached. The evidence in this case did not conclusively demonstrate an intent to kill by appellant. Hence, second-degree murder instructions were required.

Respondent argues second-degree murder is not a lesser included offense of felony murder as a matter of law. There are two types of felony murder; first degree felony murder and second degree felony murder. The commission of a murder during the course of one of the felonies listed in Penal Code section 189, subdivision (a), constitutes first degree felony murder. (Pen. Code, §189, subd. (a).) The commission of a felony inherently dangerous to human life, but not specifically listed in section 189, subdivision (a), constitutes second degree felony murder. (*People v. Robertson* (2004) 34 Cal.4th 156, 164-166; See CALJIC 8.32 and Use Note discussion.) Respondent argues appellant has not explained how second-degree felony murder constitutes a lesser included offense of first-degree felony murder. It is not necessary for this Court to conclude second-degree felony murder is a lesser included offense of first degree felony murder in order for the trial court to have had a duty to give an instruction on second degree murder as a lesser included offense.

The evidence raised a question of fact with regard to whether appellant committed each of the felonies alleged as the basis for the felony murder conviction. If the jury was uncertain appellant committed each of the four felonies supporting the felony murder conviction, it could have convicted appellant of second degree murder based on the theories in CALJIC 8.30 [second degree murder is the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation], or CALJIC 8.31 [second degree murder is the unlawful killing of a human being resulting from an intentional act, the natural consequences of the act are dangerous to human life, and the act was performed with knowledge of the danger and conscious disregard for human life].

Second degree felony murder, furthermore, is a lesser included offense of first degree felony murder. The four felonies supporting the felony murder conviction in this case were kidnaping, burglary, sodomy, and robbery. Second degree felony murder instructions should have been given if the evidence: (1) raised a question of fact with regard to appellant's commission of each of these felonies; and (2) raised a question about whether appellant committed a felony inherently dangerous to human life that was not one of these four felonies. For instance, false imprisonment is a lesser included offense of kidnaping. If the jury was not convinced appellant kidnaped the victim, it could have found appellant guilty of second degree felony murder if it concluded appellant's false imprisonment of the victim was inherently dangerous to human life. *People v. Blair* (2006) 36 Cal.4th 686, applied this reasoning when it determined whether second degree felony murder instructions were required. The defendant in that case was charged with felony murder based on poisoning the victim. Penal Code section 347 makes it a felony to mingle a poison with a food or drink. The Court concluded the defendant would have been entitled to second degree felony murder instructions based on killing the victim while violating section 347 if the evidence raised a doubt about whether he acted with express or implied malice. (*People v. Blair, supra*, 36 Cal.4th at p. 745-746.) Similar reasoning applies to the instant case. Second degree felony murder instructions should have been given to the extent the evidence raised a doubt regarding appellant's guilt of any of the four felonies forming the basis of the felony murder conviction.

The Court of Appeal, the First Appellate District, Division One, recently issued an opinion dealing with felony murder and the lesser included offense of second degree murder.

In *People v. Anderson* (2006) 141 Cal.App.4th 430, the defendant took the victim's wallet while her boyfriend strangled him to death. The trial court instructed the jury only on the crime of first degree felony murder. The defendant argued the trial court had a duty to instruct the jury with the lesser included offenses of second degree murder and voluntary manslaughter. The prosecution argued there was no duty to instruct the jury with those crimes because they were not lesser included offenses of felony murder. The Court found it unnecessary to resolve this argument because the defendant had not been charged in the information with felony murder but simply murder. The information was amended at the close of the evidence to add the felony allegation. The Court concluded the defendant's right to instructions on lesser included offenses had to be determined based on the pleading and not the amendment of the information after the close of the evidence. The Court then addressed whether there was substantial evidence the crime did not constitute felony murder. The Attorney General argued "California law has consistently held that when a homicide is committed in the course of a felony listed in Penal Code section 189, the trial judge may instruct the jury that the defendant is guilty of first degree murder or nothing, and may properly decline to give instructions on second degree murder and manslaughter . . . ." (*People v. Anderson, supra*, 141 Cal.App.4th at pp. 447-448.) The Court concluded the correct rule was, "When the evidence points indisputedly to a homicide committed in the course of a felony listed in section 189 of the Penal Code, the court is justified in advising the jury that the defendant is either innocent or guilty of first degree murder." (*People v. Anderson, supra*, 141 Cal.App.4th at p. 448, quoting *People v. Turner* (1984) 37 Cal.3d 302, 327.)

Similar reasoning applies in this case. As argued in issues V, VIII, IX, and X, of the Opening Brief, the evidence was insufficient as a matter of law to prove each of these felonies. Even if the evidence was sufficient to prove these felonies, the evidence did not establish beyond dispute the commission of the felonies of sodomy, burglary, kidnaping, and robbery. Hence, the trial court should have instructed the jury on second degree felony murder and second degree murder.

Respondent also argues any factual issues posed by second-degree murder instructions were resolved adversely to appellant by the trial court's remaining instructions because the jury found appellant guilty of felony murder. This reasoning is flawed because the felony murder instructions did not pose the factual questions that would have been presented to the jury in second degree murder instructions. The felony murder instructions posed the factual question of whether appellant committed certain felonies, i.e., kidnaping, burglary, sodomy, and robbery, during the course of murdering Kennedy. Second degree felony murder instructions would have presented the question whether appellant murdered Kennedy while committing a dangerous felony other than kidnaping, burglary, sodomy, and robbery. Second degree murder instructions would have posed the question whether appellant killed the victim with malice, but without deliberation and premeditation, (CALJIC 8.30), or killed the victim by committing an intentional act which was dangerous to human life. (CALJIC 8.31.) There was no overlap whatsoever between the factual issues posed by felony murder instructions and second degree murder instructions.

Respondent argues the failure to give second degree murder instructions was harmless because, "If the jury had any doubt this was a felony murder, it could have simply

convicted Castaneda of first degree murder (under the premeditation theory) without special circumstances." (Respondent's Brief at p. 68.) Respondent's argument does not explain how the felony murder conviction resolved the factual questions posed by second degree felony murder instructions or second degree murder instructions. The argument is also flawed because there was a question of fact with regard to appellant's guilt of second degree murder as a lesser included offense of felony murder and premeditated murder. The jury may well have found appellant did not commit a premeditated murder had it been given that option. Appellant also argued in the Opening Brief that lesser included offense instructions should have been given for each of the felonies found true as a special circumstance. If the jury had found appellant guilty of a lesser included offense of a felony alleged as a special circumstance, appellant would not have been eligible for the death penalty based on that felony.

Respondent cites *People v. Horning* (2005) 34 Cal.4th 871, in support of his harmless error argument. In that case, the defendant brought the murder weapon with him to the scene of the crime, bound and blindfolded the victim, and shot him in the head from a distance of about two inches. The jury found true the special circumstances of robbery and burglary. The trial court instructed the jury on both premeditated and deliberate first degree murder and first degree felony murder. The defendant argued the trial court erred by not giving second degree murder instructions. This Court found this argument waived because the defendant expressly requested the trial court to not give second degree murder instructions. The Court also found the error harmless because the evidence established beyond dispute the commission of the felonies during the murder; "In addition to finding

defendant guilty of first degree murder, the jury found both special circumstances true. If the jury had any doubt that this was a felony murder, it did not have to acquit but could have simply convicted defendant of first degree murder without special circumstances. Instead, it found that defendant killed the victim in the perpetration of robbery and burglary, which means it necessarily found the killing was first degree felony murder." (*People v. Horning, supra*, 34 Cal.4th at p. 906.)

The observation in *People v. Horning* that the jury could have convicted the defendant of first degree premeditated murder if it had doubt regarding the defendant's guilt of felony murder does not mean that the trial court's failure to give second degree murder instructions is always harmless when the jury finds the defendant guilty of felony murder and premeditated murder. Instructions on lesser included offenses is required to prevent the jury from reaching an erroneous decision when confronted with an all or nothing choice. (*People v. Majors* (1998) 18 Cal.4th 384, 410.) *People v. Horning* simply observed the all or nothing pressure is not present with regard to finding the defendant guilty of felony murder when the jury may also find the defendant guilty of first degree premeditated murder. *People v. Horning* merely found the trial court's failure to give second degree murder instructions harmless based on the facts of the case.

The evidence in *People v. Horning* indisputably established the commission of two felonies during the murder of the victim. In the instant case, the evidence did not indisputably establish the commission of the felonies which formed the basis for the felony murder finding. Harmless error cannot be found based on *People v. Horning*.

For the reasons above and in the Opening Brief, the trial court erred by failing to

instruct the jury on the lesser included offense of second degree felony murder and second degree murder. Because this error was prejudicial, the judgment of guilt must be reversed.

III

THE JUDGMENT OF GUILT TO COUNT ONE MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND IN VIOLATION OF THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I SECTION 17 OF THE CALIFORNIA CONSTITUTION

Respondent argues the trial court properly failed to give voluntary manslaughter instructions because: (1) any error in failing to give such instructions was invited by the defense counsel; and (2) there was no substantial evidence appellant committed voluntary manslaughter.

The record does not establish the defense counsel invited the trial court's error in failing to give voluntary manslaughter instructions. The exchange between the trial court and the defense counsel at page 2,484 of the record may have been in reference to lesser included offenses for the five felony counts other than murder. The exchange is too cryptic to conclude the defense counsel made a strategic decision to not request voluntary manslaughter instructions. When the defense counsel was asked by the trial court if there were other lesser included offenses, he responded, "No, I don't believe so, your Honor." (10 RT p. 2484.) This comment does not reflect a strategic decision by the defense counsel to not request jury instructions on voluntary manslaughter, but a lack of knowledge by him

about whether other lesser included offenses were applicable. The defense counsel's lack of knowledge regarding the applicability of lesser included offenses did not vitiate the trial court's sua sponte duty to instruct the jury on all lesser included offenses raised by the evidence. The prosecutor then volunteered that the defense attorney had made a tactical decision to not request instructions on lesser included offenses. (10 RT p. 2484.) The prosecutor did not make any reference voluntary manslaughter. Because of the lack of any specific reference to voluntary manslaughter in the above exchange, it is not possible to conclude the defense attorney made a tactical decision to not request jury instructions on voluntary manslaughter.

The invited error doctrine precludes appellate review of a trial court's erroneous failure to instruct on a lesser included offense when that failure was the result of an objection by the defendant. (*People v. Barton* (1995) 12 Cal.4th 186, 198.) Here, the defense counsel did not object to the giving of voluntary manslaughter instructions. Finally, the defense counsel neither agreed nor disagreed when the prosecutor referred to a tactical decision being made by the defense counsel. Absent the defense counsel specifically agreeing with the statement from the prosecutor, this Court should not conclude the defense counsel made a tactical decision to not request jury instructions on voluntary manslaughter.

Respondent also argues there was no evidence of any provocation by Kennedy. Appellant's comment the, "bitch got me mad . . ." (7 RT pp. 1550-1551), referred to some act by Kennedy which triggered his anger. It was a question of fact for the jury whether the provocation would have caused a reasonable person to act rashly and without deliberation. (*People v. Thomas* (1945) 25 Cal.2d 880, 894.)

Respondent also argues the trial court's failure to give voluntary manslaughter instructions was harmless error because the factual question posed by a voluntary manslaughter instruction was resolved adversely to appellant under the trial court's remaining instructions. Respondent is wrong. The felony murder instructions did not require an intent to kill. Those instructions presented the factual issue to the jury of whether appellant killed Kennedy while committing specific felonies. The felony murder instructions did not require the jury to resolve whether appellant killed Kennedy because of provocation. The first degree murder instruction presented the factual question whether appellant intentionally killed the victim. A voluntary manslaughter instruction would also have required the jury to determine whether appellant intentionally killed the victim. The first degree murder instructions did not require the jury to determine whether appellant killed Kennedy as the result of provocation. Hence, the factual issue presented by a voluntary manslaughter instruction, i.e., whether appellant killed Kennedy as the result of provocation, was not resolved by the trial court's remaining instructions.

For the reasons above and in the Opening Brief, the judgment of guilt to count one must be reversed.

IV

THE JUDGMENT OF GUILT TO COUNT ONE SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY GAVE AN IMPLIED MALICE INSTRUCTION IN VIOLATION OF APPELLANT'S: (1) RIGHT TO DUE PROCESS OF LAW UNDER FEDERAL AND STATE LAW; (2) RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION, AND (3) RIGHT TO BE FREE FROM THE IMPOSITION CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION

Respondent argues the giving of implied malice instructions was harmless error because: (1) CALJIC 8.20 told the jury a deliberate intent to kill and express malice were required to find premeditated first degree murder; (2) CALJIC 8.11 told the jury express malice meant a manifested intention to kill; and (3) the evidence of express malice was overwhelming. Respondent concedes the giving of an implied malice instruction was error. The only issue is whether the giving of the instruction was prejudicial.

The giving of CALJIC 8.11 and CALJIC 8.20 did not prevent the jury from finding appellant guilty of first degree murder based on implied malice. A plain reading of the definition of murder given to the jury establishes the confusion caused by the giving of the implied malice instruction. The jury was told in CALJIC 8.10, "Every person who unlawfully kills a human being with malice aforethought . . . is guilty of the crime of murder in violation of section 187 of the Penal Code." (1 CT p. 291; 11 RT p. 2698.) Malice aforethought was defined in CALJIC 8.11as express malice and implied malice. (1 CT p. 292; 11 RT p. 2699.) These instructions clearly conveyed to the jury the understanding that

a murder conviction could be based on either express malice or implied malice. Respondent's incorrectly argues CALJIC 8.20 and 8.11 clarified this ambiguity.

The version of CALJIC 8.20 given in this case appears at pages 2,700 and 2,701 of the reporter's transcript and pages 293 and 294 of the clerk's transcript. The instruction merely sets forth one theory of first degree murder. CALJIC 8.20 did not prevent the jury from finding appellant guilty of first degree murder based on implied malice. Respondent argues, "CALJIC 8.20 unequivocally told the jury that a deliberate intent to kill and express malice were required to find premeditated first degree murder." (Respondent's Brief at pp. 79-80.) This argument is a misstatement of the record. The following table breaks down the language from CALJIC 8.20 and explains why it did not prevent the jury from finding appellant guilty of first degree murder based on implied malice:

All murder which is perpetrated by any kind of any kind of willful, deliberate, and premeditated killing with express malice aforethought is murder of the first degree. (11 RT p. 2700; 1 CT p. 293.)	The words "All" and "any" are broad and inclusive and mean every type of murder described is first degree murder; The phrasing does not prevent other types of murder from constituting first degree murder; the use of the word, "Only" instead of "All" would have limited the jury to finding appellant guilty of first degree murder based only on express malice

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. (11 CT pp. 2700-2701; 1 CT pp. 293-394.)	This portion of the instruction up through the word "premeditation" describes the circumstances under which a killing may be found to be first degree murder but it does not exclude other possible ways for first degree murder to be committed; The portion of the instruction, "so that . . . precluding the idea of deliberation . . ." allowed the jury to find appellant guilty of first degree murder based on implied malice. The reason is that an element of implied malice is an "intentional act." A reasonable juror would believe an intentional act includes an act not under sudden heat of passion or other condition precluding the idea of deliberation.
To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and having in mind the consequences, he decides to and does the killing.	A reasonable juror could understand this requirement to be met by the "intentional act" element of implied malice.

CALJIC 8.11 did not prevent the jury from finding appellant guilty of first degree murder based on implied malice. That instruction simply defined express and implied malice. (11 RT p. 2699; 1 CT p. 292.) CALJIC 8.11 did not explain how the concepts of express and implied malice intersected with first degree murder.

The prosecutor's closing argument did not remedy the confusion created by the giving of implied malice instructions. Arguments of counsel are not an adequate substitute for correction jury instructions. (*Carter v. Kentucky* (1981) 450 U.S. 288, 304, 101 S.Ct. 1112, 67 L.Ed.2d 241.) The prosecutor's brief references to the requirement that appellant had to intend to kill Kennedy were not sufficient to clarify complex, confusing, and

contradictory jury instructions. According to respondent, the prosecutor clarified any confusion because he argued appellant had to intend to kill Kennedy and malice aforethought was defined as an intent to kill. (1 RT pp. 2726, 2728.) The prosecutor, however, did not distinguish between express and implied malice or explain the murder conviction could not be based on implied malice.

Respondent also argues there was no reasonable likelihood the jury applied the implied malice instruction to the first degree felony murder conviction. The word "or" appears in CALJIC No. 8.10 between the description of a killing committed with malice aforethought and a killing committed during the commission of specified felonies. (11 RT p. 2698 ["Every person who unlawfully kills a human being with malice aforethought or during the commission or attempted commission of burglary, kidnaping, rape, sodomy by use of force or robbery . . . is guilty of the crime of murder . . . ."].) According to respondent, the use of the word "or" prevented the jury from applying the implied malice instruction to the felony murder conviction. Appellant argued in the Opening Brief the true findings to the felony special circumstance allegations must be reversed for insufficiency of the evidence and the trial court's failure to give jury instructions for lesser included offenses for the felonies. Assuming the first degree murder conviction cannot stand for those reasons, the issue of how the implied malice instruction impacted the jury's felony murder finding becomes moot.

V

THE JUDGMENT OF GUILT TO COUNT 3, THE SPECIAL CIRCUMSTANCE FINDING OF KIDNAPING, AND THE FELONY-MURDER FINDING BASED ON KIDNAPING, SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT KIDNAPED THE VICTIM

Respondent has conceded in Issue VI that the kidnaping conviction, and the kidnaping special circumstance finding, must be reversed because the trial court erroneously defined the element of asportation. The issue of the sufficiency of the evidence to prove the kidnaping conviction and the kidnaping special circumstance finding is therefore moot.

VI

THE JUDGMENT OF GUILT TO COUNT 3, THE SPECIAL CIRCUMSTANCES FINDING OF KIDNAPING, AND THE FELONY-MURDER FINDING BASED ON A KIDNAPING, SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF ASPORTATION

Respondent has conceded that the kidnaping conviction and the kidnaping special circumstance finding must be reversed because the trial court erroneously defined the element of asportation. Appellant urges the Court to accept the Attorney General's concession and will therefore submit on the arguments in the Opening Brief.

VII

THE JUDGMENT OF GUILT TO COUNT 3, THE SPECIAL CIRCUMSTANCES FINDING OF KIDNAPING, AND THE FELONY-MURDER FINDING BASED ON A KIDNAPING, SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FALSE IMPRISONMENT, IN VIOLATION OF: (1) APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS; (2) APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND (3) THE FEDERAL AND STATE PROHIBITIONS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT

Respondent has conceded in Issue VI that the kidnaping conviction and the kidnaping special circumstance finding must be reversed because the trial court erroneously defined the element of asportation. The issue of the sufficiency of whether the trial court erred by failing to instruct the jury with false imprisonment as a lesser included offense of kidnaping and the special circumstance finding of kidnaping is therefore moot.

VIII

THE JUDGMENT OF GUILT TO COUNT 2, THE PORTION OF THE FELONY-MURDER CONVICTION BASED ON THE COMMISSION OF BURGLARY, AND THE SPECIAL CIRCUMSTANCE FINDING OF BURGLARY DURING THE COMMISSION OF A MURDER, SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT INTENDED TO COMMIT A FELONY AT THE TIME HE ENTERED THE MEDICAL BUILDING OR WHEN HE ENTERED THE ROOM WHERE THE MURDER OCCURRED.

Respondent argues the evidence was sufficient to prove the burglary charge and the burglary special circumstance finding because the circumstances of appellant's entry into the medical building suggests he intended to commit robbery, kidnaping, sodomy, and murder when he entered. Respondent points to the following evidence to support this argument: (1) appellant parked in the Long John Silver parking lot in order to avoid detection; (2) appellant had no reason to come to the medical clinic because he did not have an appointment and he must have known the clinic was not open when he parked in the Long John Silver parking lot; and (3) appellant must have immediately assaulted Kennedy because the evidence established he entered the building after 9:30 a.m. and departed before 10:30 a.m. (Respondent's Brief at pp. 94-96.)

The flaw in respondent's argument is the conclusion appellant must have formed the intent to commit a felony prior to entry into the building rather than after he entered the building. The presence of the Nissan Sentra in the Long John Silver parking lot is not sufficient by itself to show appellant intended to commit a felony when he entered the building. Appellant easily could have intended to eat at the restaurant after receiving

medical attention and parked there for that reason. He may have missed the turn into the parking lot of the medical building. The significance of the presence of the Nissan Sentra in the parking lot is ultimately a matter of speculation.

The remaining evidence does not establish whether appellant entered the building with the intent to assault Kennedy or identify what events transpired after he did so. Appellant's comment, "the bitch made me mad," (Vol. 7, R.T. pp. 1550-1151), suggests appellant's reason for assaulting Kennedy formed only after he had entered the medical clinic. Appellant had one appointment which was on a Monday. (5 RT pp. 1142-1143; 9 RT p. 2290.) There was no evidence appellant knew Kennedy would be alone in the medical clinic on Monday mornings as a matter of routine. There was no evidence that when appellant had his Monday morning appointment, he saw Kennedy alone at the medical clinic. Because Dr. Vassanchart saw Kennedy with appellant during his Monday morning appointment, the reasonable inference was that appellant did not know Kennedy would be alone in the clinic on Monday mornings. The fact appellant entered the medical clinic sometime around 9:30 a.m. and left around 10:30 a.m. does not prove he intended to assault Kennedy when he entered the building. Appellant could have decided to assault Kennedy very shortly after entering the medical clinic. The time required for appellant to commit the assault remained the same once it commenced, regardless of whether appellant intended to commit an assault before or after entry into the medical clinic.

Respondent cites *People v. Osband* (1996) 13 Cal.4th 622, for the proposition that the evidence was sufficient to sustain the burglary charge in this case. The victim in that case was the subject of a brutal sexual assault and murder. Forensic evidence placed the

defendant in the apartment and also established he sexually assaulted her. The defendant testified he entered the apartment, but was directed to do so by two other individuals whom the defendant apparently claimed committed the murder. The defendant argued the evidence was insufficient to establish he killed the victim or the special circumstance findings of rape, robbery, or burglary. The Court rejected the defendant's argument in light of the overwhelming evidence establishing his identity as the killer and the circumstances of the victim's murder.

People v. Osband is distinguishable from the instant case. In that case, the victim was the victim of a vicious sexual assault and murdered. The defendant had no prior connection to the premises where the murder occurred or the victim. The forensic evidence established the defendant's presence in the apartment where the assault occurred and that he sexually assaulted the victim. The defendant argued the evidence was insufficient to prove he murdered the victim or the special circumstances of rape, robbery, and burglary. At trial, the defendant testified to an implausible explanation for why he was in the apartment and suggested two other individuals who had directed him to the apartment committed the crimes. This Court's rejected the defendant's sufficiency argument because of the evidence placing the defendant in the apartment and the circumstances of the murder.

In the instant case, appellant had received medical treatment at the medical clinic where the murder occurred. Appellant had a legitimate reason to go there in the event he wanted medical treatment. The evidence in *People v. Osband* did not suggest any non-felonious reason for the defendant to enter the victim's residence. The possibility appellant had a legitimate reason to go to the medical clinic precludes inferring he must have intended

to commit a felony when he entered it. Respondent argues a person is guilty of burglary if he enters a building with felonious intent even if he enters with the consent of the owner or occupier. (Respondent's Brief at p. 95, citing *People v. Frye* (1998) 18 Cal.4th 894, 954.) The prosecution in this case failed to prove appellant intended to commit a felony when he entered the medical clinic.

Respondent's argues appellant's comment, "the bitch made me mad," does not shed any light on appellant's intent when he entered the medical clinic because "there is no way of knowing if Castaneda formed his opinion of Kennedy before, during, or after attacking her that morning." (Respondent's Brief at p. 96.) Respondent's argument is not a reasonable interpretation of the facts. The nature of appellant's comment clearly suggests that he assaulted Kennedy because she did something to make him angry. It would not make any sense for appellant to claim that "the bitch" made him mad if he was already in the process of committing the murder when Kennedy did something to make him angry. Respondent's speculation that appellant was simply rationalizing his assault on Kennedy after the fact is insupportable. It was unlikely appellant felt any need to rationalize anything to Gloria Salazar. She was completely unaware of the events that had transpired at the medical clinic.

Respondent also argues appellant was guilty of burglary even if the evidence failed to prove he had a felonious intent because he entered the procedure room with felonious intent. This argument suffers from the same infirmity as respondent's argument appellant entered the medical building with felonious intent. There was no evidence appellant intended to commit a felony prior to entering the procedure room. A book Kennedy was

reading was on the floor of her office. Absent evidence of a struggle outside the procedure room, the presence of the book on the floor was not sufficient to prove appellant intended any felonious conduct prior to entering the procedure room. The complete lack of evidence regarding how the incident occurred requires resort to speculation to conclude appellant had felonious intent when he entered the medical building or the procedure room.

For the reasons above and in the Opening Brief, the burglary conviction, and the true finding of the special circumstance of burglary, must be reversed.

IX

THE JUDGMENT OF GUILT TO COUNT 5, THE PORTION OF THE FELONY-MURDER CONVICTION BASED ON THE COMMISSION OF SODOMY, AND THE SPECIAL CIRCUMSTANCE FINDING OF SODOMY DURING THE COMMISSION OF A MURDER, SHOULD BE REVERSED BECAUSE: (1) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT ENGAGED IN SODOMY WITH THE VICTIM; AND (2) EVEN ASSUMING THE EVIDENCE WAS SUFFICIENT TO PROVE THAT APPELLANT COMMITTED SODOMY WITH THE VICTIM, THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT IT OCCURRED WHILE THE VICTIM WAS ALIVE

Appellant argued in Issues IX and X the evidence was insufficient to prove him guilty of sodomy and robbery and the special circumstance findings corresponding with those convictions. Appellant argued in Issue XII the evidence was insufficient to prove he acted with an independent felonious intent when he committed the felonies and the true findings to all the special circumstances had to be reversed. Appellant is not arguing the felonies found true by the jury could not have happened. Appellant's argument is simply that the evidence is inadequate to prove the felonies because of the sparse facts in this record about how the crimes occurred. Neither the jury nor this Court can guess about how the crimes occurred and resort to speculation to fill in the evidentiary gaps. Appellant commented after the murder that "the bitch made me mad." (7 RT pp. 1550-1551.) What is clear based on appellant's comment, and the crime scene, is that appellant exploded in a fit of rage. What occurred in connection with Ms. Kennedy's death beyond appellant exploding in a fit of rage is conjecture.

Respondent argues the evidence was sufficient to prove the sodomy conviction and

the sodomy special circumstance because: (1) the manner in which the victim had been tied and bent over the examination table with her pants pulled down established that appellant committed sodomy; (2) the lack of evidence appellant intended to have sexual relations with a corpse allowed the jury to conclude appellant committed sodomy while Kennedy was alive; and (3) the evidence proved appellant committed attempted sodomy even if it failed to prove he committed sodomy.

The facts and circumstances in which Kennedy's body was found did not prove appellant committed sodomy when the forensic evidence is considered. Kennedy could have been placed on the examination table and had her hands tied behind her for the purpose of committing rape or murder. Dr. Sheridan concluded from his autopsy that he had no grounds to believe Kennedy had been the victim of sodomy or rape. (5 RT pp. 1227-1228.) The rectal smear from Kennedy's body did not reveal the presence of any spermatoza. (6 RT pp. 1414-1415.) There was simply no evidence appellant had penetrated Kenney's anus with his penis. The presence of fecal matter in the socks and Kennedy' anus failed to prove sodomy occurred. She could have defecated during the ordeal. The presence of appellant's sperm could have been the result of masturbation.

There was no direct evidence appellant committed sodomy. Hence, the prosecution had to rely on circumstantial evidence to prove this allegation. Assuming sodomy and masturbation were equally likely explanations for the presence of the sperm on the sock, then the trier of fact could not reasonably have concluded beyond a reasonable doubt sodomy occurred. (CALJIC 2.01 [if the circumstantial evidence permits two reasonable interpretations, one which points to the defendant's guilt and the other to the defendant's

innocence, the trier of fact must adopt that interpretation which points to the defendant's innocence].)

Even assuming appellant committed sodomy on Kennedy, the evidence failed to prove she was alive when it occurred. Respondent argues the lack of evidence appellant was a necrophiliac proved he committed sodomy while Kennedy was alive. Kennedy died within a matter of minutes after the fatal blows were inflicted on the carotid artery and the jugular vein. (5 RT p. 1219.) Appellant could have committed sodomy without even knowing Kennedy had deceased. The lack of evidence appellant was a necrophiliac is irrelevant to whether appellant committed sodomy after Kennedy had expired. There was no way appellant had the medical knowledge to know when Kennedy had expired.

Respondent argues the evidence proved appellant committed at least attempted sodomy. Respondent bases this argument on the same evidence he relied upon to prove appellant committed sodomy. This argument fails for the same reason the evidence failed to prove appellant committed sodomy. The fact appellant engaged in sodomy in his relationship with Virginia Castaneda did not mean he would commit that act during an assault that led to murder. The physical evidence suggests appellant did not engage in completed sodomy with Kennedy. If the evidence failed to prove appellant engaged in a completed act of sodomy, it is speculation that he must have intended to do so. Kennedy could have been tied up in the manner she was found in order to facilitate a rape or murder. The logical inferences from the evidence do not ineluctably lead to sodomy or attempted sodomy. The possibility of equally likely alternatives other than sodomy or attempted sodomy precludes finding beyond a reasonable doubt appellant committed sodomy or

attempted sodomy.

For the reasons above, the conviction for sodomy, and the true finding to the sodomy special circumstances, must be reversed.

X

THE JUDGMENT OF GUILT TO COUNT 6, ROBBERY, SHOULD BE REVERSED, AND THE SPECIAL CIRCUMSTANCE FINDING OF A ROBBERY DURING THE COMMISSION OF A MURDER, SHOULD BE VACATED, BECAUSE: (1) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT TOOK THE VICTIM'S PROPERTY, OR; (2) THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE VICTIM WAS ALIVE WHEN THE PROPERTY WAS TAKEN

Respondent argues the evidence was sufficient to sustain the robbery conviction, and the true finding to the robbery special circumstance, because: (1) the evidence was sufficient for the jury to conclude appellant took Kennedy's watch, which had been marked Exhibit 19; (2) the evidence was sufficient for the jury to conclude appellant had stolen Kennedy's gold ring with the green stone; and (3) the jury could have concluded Kennedy was alive when her watch and ring were taken because her hands were tied behind her back.

The jury could not reasonably have concluded beyond a reasonable doubt Exhibit 19 was Kennedy's missing watch because her husband testified her watch had different physical characteristics than Exhibit 19. Mr. Kennedy used the word bezel to describe the round portion of the watch that came up around the crystal. The bezel on Exhibit 19 was silver. The bezel on the watch worn by Kennedy was gold. (4 RT p. 877.) Respondent cites a series of facts on pages 107 and 108 of the Respondent's Brief from which the jury could allegedly have inferred Exhibit 19 was the watch taken from Kennedy. However, the strength of the circumstantial evidence that Exhibit 19 was the watch taken from Kennedy was undermined by the direct evidence from Mr. Kennedy that the bezel on Exhibit 19 did not match the bezel on the watch worn by his wife. The prosecutor even conceded during his closing

argument, "By the way, the watch, think about —we had a great deal of difficulty identifying the watch. It is not even absolute in terms of the identity of the watch." (11 RT p. 2754.)

Respondent also cites on page 108 of the Respondent's Brief a series of facts to support the argument appellant took Kennedy's gold ring with a green stone. There were no witnesses who were able to testify Kennedy wore a gold ring with a green stone the day of the incident. The gold ring was not recovered; hence there was obviously no in-court identification of Kennedy's ring. Absent such evidence, it is speculation that appellant handed Kennedy's ring to Gloria Salazar.

Respondent also argues the jury could have inferred Kennedy was alive when appellant took her watch and ring because: (1) he tied her hands behind her back which caused swelling in the hands and wrist area; and (2) there would have been no reason for appellant to have tied Kennedy's hands if he took the ring and watch after she died.

The issue is when appellant formed the intent to take Ms. Kennedy's property. There was nothing in the record to establish appellant formed that intent until after Ms. Kennedy died. Respondent's inferences do not flow logically from one another. Appellant could have tied Kennedy up and assaulted her, inflicted the fatal blows which caused her death, and then removed the watch and ring. Appellant had a reason for tying Kennedy up, i.e., to maintain control over her, that was independent of any desire to rob her. Kennedy died within minutes of the fatal blows being inflicted to the carotid artery and jugular vein. (5 RT p. 1219.) Appellant could easily have slipped the ring off of her finger and removed the watch from her wrist after she had expired. There is simply no way to know. There was no evidence Kennedy's hands had swelled to the point in which the ring could not have been removed

after she had expired.

For the reasons above and in the Opening Brief, the robbery conviction, and the true finding to the robbery special circumstance finding, should be reversed.

XI

THE JUDGMENT OF GUILT TO COUNT 6, ROBBERY, THE SPECIAL CIRCUMSTANCE FINDING OF THE COMMISSION OF ROBBERY DURING A MURDER, THE FIRST-DEGREE MURDER CONVICTION, AND THE JUDGMENT OF DEATH SHOULD BE VACATED, BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF GRAND THEFT, IN VIOLATION OF: (1) APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS; (2) APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND (3) THE FEDERAL AND STATE PROHIBITIONS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT

Respondent argues that any error pertaining to the trial court's failure to instruct the jury with grand theft as a lesser included offense of robbery was invited by the defense counsel. The record does not support this assertion. The defense counsel was asked by the trial court if he knew of any other lesser included offenses other than attempted rape and attempted sodomy. He said no. (10 RT p. 2484.) This exchange simply established the defense counsel was unaware of any other potential lesser included offenses. It did not establish that the defense counsel made a strategic decision to not request a jury instruction on grand theft as a lesser included offense of robbery. The prosecutor then volunteered that the defense counsel had made a strategic decision regarding lesser included offenses but did not specify to which offenses that decision pertained. The invited error doctrine precludes appellate review of a trial court's erroneous ruling when that error was the result of an objection by the defendant. (*People v. Barton* (1995) 12 Cal.4th 186, 198.) Here, the defense counsel did not object to the trial court giving jury instructions on grand theft as a

lesser included of robbery. Hence, the invited error doctrine does not preclude appellant from arguing the trial court erred by failing to instruct the jury with grand theft as a lesser included offense of robbery.

Penal Code section 487, subdivision (c), defines the crime of grand theft from the person. It is a lesser included offense of robbery. Penal Code section 642 defines the crime of grand or petty theft from a dead body. It is not a lesser included offense of robbery. (*People v. Yeoman* (2003) 31 Cal.4th 93, 129.) *People v. Green* (1980) 27 Cal.3d 1, explained the circumstances under which the taking of property from an unconscious or dead person constitutes grand theft rather than robbery:

> Defendant first posits the rule that a conviction of robbery cannot be sustained in the absence of evidence that the accused conceived his intent to steal either *before* committing the act of force against the victim (and the intent remained operative until the time of the taking) or *during* the commission of that act; if the intent arose only *after* he used force against the victim - i.e., for a nonlarcenous purpose - the taking will at most constitute a theft. The latter scenario will occur, for example, when an individual kills or renders another unconscious for reasons wholly unrelated to larceny - e.g., because of anger, fear, jealousy, or revenge - and then, seeing that his victim has been rendered defenseless, decides to take advantage of the situation by appropriating some item of value from his person.

(*People v. Green, supra*, 27 Cal.3d at p. 53.) The Court then stated in a footnote, "If the victim is alive at the time of the taking, that offense will be grand theft from the person (§487, subd. (2)); if he is not, it will be grand or petty theft from a dead body (§642). The defendant will also be guilty, of course, of any crime constituted by the act of force itself, e.g., assault, battery, or homicide." (*People v. Green, supra*, 27 Cal.3d at p. 53, fn. 42.)

Under *People v. Green*, appellant was guilty of grand theft from the person if he

assaulted Kennedy for reasons unrelated to the desire to obtain her property, and then took her property after she had been rendered unconscious but before she died. The trial court was required to give jury instructions on all lesser included offenses raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) Instructions on lesser included offenses should be given "when the evidence raises a question of as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged." (*People v. Breverman, supra*, 18 Cal.4th at pp. 154-155.) Substantial evidence to support an instruction on a lesser included offense exists when a jury composed of reasonable persons could conclude the lesser offense, but not the greater, was committed. (*People v. Breverman, supra*, 19 Cal.4th at p. 162.)

In the instant case, a reasonable jury could have concluded appellant assaulted Kennedy for reasons unrelated to the desire to take her property, and then took her property after she had been rendered unconscious but before she died.[2] Dr. Sheridan testified Kennedy probably became unconscious within five minutes after the injuries to the carotid artery and the jugular vein and probably died within 10 to 15 minutes after those blows were inflicted. (5 RT pp. 1198-1200.) Hence, there was a substantial period of time in which Kennedy was unconscious but alive and appellant could have taken her property during that time period.

It was unlikely appellant committed murder to obtain a few pieces of Kennedy's

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[2] Appellant's argument that a jury instruction on grand theft as a lesser included offense of robbery should have been given is made in the alternative to appellant's argument that the evidence was insufficient as a matter of law to prove appellant committed robbery. Appellant's first position is that the evidence was insufficient as a matter of law to prove he committed robbery.

property. Appellant gave away any property he obtained from Kennedy to Gloria Salazar a few hours after the murder. He obtained nothing for her property. There was no evidence appellant used any of Kennedy's other property, such as credit cards, for financial gain. Appellant's comment to Gloria Salazar, that "the bitch" made him mad, when he gave Kennedy's property to her suggests the taking of the property was an afterthought to the murder. Because Kennedy died within a few minutes after the wounds to the carotid artery and the jugular vein, (5 RT p. 1219), there was a period of time she was unconscious prior to death during which appellant could have taken her property.

Respondent argues the evidence established appellant drove to the medical clinic with the intent to attack, rob, sexually assault and kill Kennedy. Even if it could be inferred appellant drove to the medical clinic and parked in the Long John Silver parking lot with some nefarious intent, the evidence does not establish beyond a reasonable doubt one of appellant's motives for doing so was robbery. Appellant could have had some other criminal purpose in mind. Respondent also argues the evidence Kennedy's hands were tied behind her back provided circumstantial evidence that appellant removed her ring and watch before tying her hands. (Respondent's Brief at p. 113.) This argument is flawed. Kennedy's hands were tied behind her back with shoestrings. The shoestrings went around the lower wrist area. (5 RT pp. 1171-1172; Exhibit 15, Photo D.) Kennedy's ring could have been removed from her finger even with her hands tied behind her back. Most watches are connected to bands having buckles or expandable, elastic-like bands. The buckle can be opened and the watch removed from the wrist without having to slide the watch and buckle over the hands or by stretching the band.

In *People v. McGrath* (1976) 62 Cal.App.3d 82, the defendant shot the victim three times. He then buried the body. The defendant took the victim's clothing and identification. The defendant argued the evidence was insufficient to prove he committed grand theft from the person, but proved at most theft of articles from a dead body because the victim was dead when he took the property. The court reviewed a number of foreign authorities and two California appellate court cases affirming convictions for robbery and grand theft from the person when the defendant murdered the victim and then took his property in one continuous transaction. (*People v. Mcgrath, supra*, 62 Cal.App.3d at pp. 86-87.) *People v. McGrath* thus concluded as follows:

> The factual sequence of events developed at trial is conclusive that the death of Markell and the theft of money from his person were so connected as to form but one continuous transaction. It is the invasion of personal rights and not the defilement of a corpse that occurs when a theft is perpetrated immediately after killing the victim. The fortuity that the victim may be dead rather than simply unconscious or unaware of the theft does not make the crime any less personal. The killing of a human being is the ultimate personal invasion; one who kills and then steals from the victim cannot reasonably be said to be stealing from a corpse.

(*People v. McGrath, supra*, 62 Cal.App.3d at pp. 87-88.)

The "continuous transaction" analysis above cannot be reconciled with the language from *People v. Green* describing when a defendant commits grand theft from the person or theft from a dead body. Under *People v. Green*, the issue is not whether the sequence of events were continuous in nature, but when the defendant formed the intent to take the victim's property. If appellant formed the intent to take Kennedy's property prior to the time she became unconscious, then he was guilty of robbery. The evidence, however, failed to

conclusively establish when appellant formed the intent to take Kennedy's property. Because the jury could have concluded appellant formed the intent to take Kennedy's property after she became unconscious, but was still alive, the trial court should have instructed the jury on the lesser included offense of grand theft from the person.

Respondent argues the trial court's failure to give jury instructions on grand theft from the person as a lesser included offense of robbery was harmless error because the jury found the robbery special circumstance to be true. This argument is wrong because a lesser included offense instruction for grand theft from the person was not given for the robbery special circumstance allegation. Hence, it cannot be determined from the true finding to the robbery special circumstance whether the jury would have found appellant guilty of grand theft from the person had it been given that opportunity.

The jury instructions did not resolve the factual issue that would have been presented to the jury had the trial court given an instruction on grand theft from the person as a lesser included offense for robbery. CALJIC 9.40 instructed the jury on the elements of robbery. (11 RT pp. 2711-2712; 1 CT pp. 310-313.) That instruction simply told the jury the property had to be taken from the victim's person or immediate presence. There was nothing in the language of CALJIC 9.40 which directed the jury to determine whether appellant formed the intent to take Kennedy's property after she became unconscious. CALJIC 9.40 was worded so broadly that the jury would have concluded a taking of property from Kennedy at any point during the incident constituted robbery. CALJIC 8.21 was the felony murder instruction. It instructed the jury that the killing of a human being during the commission of a felony constitutes first degree murder. (11 RT p. 2701; 1 CT p.

295.) This language was to broad and vague to present to the jury the question of whether appellant formed the intent to take Kennedy's property after she became unconscious but was still alive.

Respondent cites *People v. Valdez* (2004) 32 Cal.4th 73, in support of his argument that the giving of CALJIC 8.21 and CALJIC 9.40 made harmless the trial court's failure to instruct on grand theft from the person. The defendant in *People v. Valdez* argued the trial court had a sua sponte duty to instruct the jury on after-acquired intent, which would have informed the jury the defendant could not be guilty of robbery if he formed the intent to steal after killing or applying force against the victim. The Court rejected this argument because: (1) it was a pinpoint instruction the defendant was required to request; and (2) CALJIC 8.21 and CALJIC 9.40 adequately covered the issue of the time of the formation of the intent to steal.

People v. Valdez does not apply to the instant case for several reasons. That case was not dealing with the issue of whether the trial court should have given a lesser included offense instruction. Furthermore, CALJIC 8.21 and CALJIC 9.40 were not adequate in this case because of the unique set of facts concerning when Kennedy became unconscious and then died and the lack of any evidence concerning why appellant assaulted her. The issue of whether CALJIC 8.21 and CALJIC 9.40 made harmless the trial court's failure to instruct the jury with grand theft from the person ultimately depends on the particular facts of the case.

For the reasons above and in the Opening Brief, the trial court's failure to instruct the jury with grand theft from the person as a lesser included offense of robbery was prejudicial

error. Appellant's conviction for robbery, and the true finding to the special circumstance of robbery, must be reversed.

XII

THE TRUE FINDINGS TO THE SPECIAL CIRCUMSTANCES SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT HAD AN INDEPENDENT FELONIOUS PURPOSE FOR COMMITTING THE FELONIES FOUND TRUE AS SPECIAL CIRCUMSTANCES, AS REQUIRED BY *PEOPLE V. GREEN* (1980) 27 CAL.3D 1, AND THE REQUIREMENTS OF STATE AND FEDERAL DUE PROCESS OF LAW

Respondent argues the true findings to the felony-murder special circumstances should be upheld because the evidence was sufficient to prove appellant had an independent felonious purpose when he committed the felonies of burglary, kidnaping, sodomy, and robbery. A concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance. (Respondent's Brief at p. 117, quoting *People v. Bolden* (2002) 29 Cal.4th 515, 554.) The felony-murder special circumstance findings cannot be sustained where the defendant's goal was to kill. (*People v. Riel* (2000) 22 Cal.4th 1153, 1201.) The prosecution had the burden of proving beyond a reasonable doubt appellant acted with an independent felonious purpose. (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476; *People v. Green, supra*, 27 Cal.3d at p. 62.)

The theory relied upon by respondent to support the argument appellant acted with an independent felonious is speculative. It is also contradictory. Respondent argues appellant must have planned to kill Kennedy because he left his place of employment early, drove to the medical clinic when he knew it was closed, and parked in the Long John Silver parking lot. Respondent then argues appellant committed burglary when he obtained entry

into the medical clinic and then must have immediately assaulted Kennedy because of the short time period (9:30 a.m. to 10:30 a.m.) appellant was in the building. Respondent posits a scenario in which appellant planned to kill Kennedy from the time he left Toyo Tires. If this scenario is true, then appellant's commission of the felonies was incidental to Kennedy's murder because appellant's goal was murder. *People v. Bolden* stated, "[c]oncurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance," and "[i]t is only when the underlying felony is merely incidental to the murder that the felony-murder special circumstance does not apply." (*People v. Bolden*, *supra*, 29 Cal.4th at p. 554, citing *People v. Raley* (1992) 2 Cal.4th 870, 903.)

If appellant planned to murder Kennedy from the time he left Toyo Tires, or arrived at the Long John Silver parking lot, then he did not have a concurrent intent to commit felonies. He intended to commit murder, and committed felonies, only as a part of the plan to commit a murder.

Respondent argues, "[t]here was substantial evidence to support the burglary, kidnaping, sodomy and robbery special circumstance true findings because the jury could reasonably conclude that Castaneda, before entering the clinic, had a concurrent intent to attack, sodomize, rob and kill Kennedy." (Respondent's Brief at p. 116.) The first flaw with this argument is the lack of evidence appellant committed any of the felonies. However, even if the evidence was sufficient to prove any of the four felonies, there was no evidence appellant intended to commit the felonies independent of committing a murder. There was no evidence about how this event transpired into a murder. Because of the lack of forced entry, the only reasonable conclusion is Kennedy voluntarily allowed appellant to enter the

clinic. Appellant could have gone to the clinic to obtain drugs, for a legitimate medical reason, or to murder the victim. The prosecution had the burden of proving appellant acted with an independent felonious purpose, and the lack of evidence regarding how or why this tragic episode ended in a murder precludes a finding appellant acted with an independent felonious purpose.

Respondent also argues, "[e]ven if a jury believed that Castaneda got angry at Kennedy while inside the clinic and then decided to take her valuables, then the jury could still reasonably conclude that Castaneda, as a patient known to Kennedy, facilitated the taking by killing Kennedy so she could not identify him." (Respondent's Brief at p. 119.) This argument is speculation. The jury could not reasonably have distinguished whether Kennedy was murdered to prevent her from identifying appellant or because appellant acted in a fit of rage.

People v. Bolden demonstrates why the felony-murder special circumstances cannot be upheld because of the lack of evidence appellant had an independent felonious intent when he committed the felonies. The defendant in *People v. Bolden* was convicted of murder with the special circumstance of robbery. The defendant advertised himself as a model and escort in the gay community in San Francisco. The victim apparently met the defendant through the advertisement. The defendant and the victim met in a bar and returned to the victim's apartment. The victim was later found stabbed to death. Property stolen from the victim's apartment was found in the possession of the defendant following his arrest. This Court concluded the evidence established the defendant acted with an independent felonious intent:

> We find here no evidence suggesting, or requiring the jury to conclude, that defendant took Pedersen's property merely to obtain a reminder or token of the incident (see *People v. Marshall* (1997) 15 Cal.4th 1, 41), to give a false impression about his actual motive for the murder, or in some other way to facilitate or conceal the killing (see *People v. Zapien* (1993) 4 Cal.4th 929, 984). Nor was there substantial evidence of any motive for the murder apart from accomplishing the robbery. Rather, the jury could reasonably infer from the evidence that defendant killed Pedersen primarily and perhaps solely to facilitate the robbery, by preventing him from resisting or from alarming neighbors or others. (See *People v. Turner, supra,* 50 Cal.3d at p. 688.) Accordingly, we conclude that the evidence is sufficient to support the robbery-murder special circumstances.

(*People v. Bolden, supra*, 29 Cal.4th at p. 554.) *People v. Bolden* affirmed the robbery special circumstance finding because the evidence established robbery as the reason for the defendant murdering the victim.

A similar conclusion about the felonies committed by appellant cannot be reached. It was not known whether appellant intended to commit a murder all along or whether he intended to commit certain felonies and events transpired into a murder.

People v. Marshall (1997) 15 Cal.4th 1, demonstrates why the true findings to the felony murder special circumstances must be reversed. The defendant was convicted of the robbery, attempted rape, and murder of a prostitute named Sharon Rawls.[3] Robbery was found true as a special circumstance. The defendant strangled the victim in an abandoned building. He was apprehended shortly thereafter outside the building. The defendant had in his possession a letter from a grocery store to the victim responding to her request for a

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[3] The defendant was also convicted of offenses involving another female victim, but that is not relevant to this discussion.

check-cashing card. There was no evidence the defendant killed the victim to obtain the letter. The prosecutor argued during his closing argument the defendant obtained the letter as a token or souvenir from his victim. The Court concluded the evidence was insufficient to support the robbery conviction. Hence, the robbery-murder special circumstance finding had to be reversed. This Court also concluded the robbery-murder special circumstance finding had to be reversed even if the robbery conviction could have been upheld:

> Such a reversal would be necessary even if the evidence were sufficient to support defendant's robbery conviction. At trial the prosecution theorized that defendant took from the person of Rawls a letter written to her by a grocery store because he wanted the letter as a token of the rape and killing. Even if supported by the evidence, this theory would not form a proper basis for upholding the robbery-murder special circumstance, because the robbery would merely be incidental to the murder. The robbery-murder special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder. (Citations omitted.)

(*People v. Marshall, supra*, 15 Cal.4th at p. 41.)

Similar reasoning applies to the instant case. Appellant took the victim's jewelry. He gave the jewelry away a few hours after the murder and commented that he was going to throw it away. (7 RT p. 1550.) *People v. Marshall* found the evidence insufficient to sustain the robbery-murder special circumstance because obtaining the letter written to the victim from the grocery store was not the motive for the murder. Similarly, appellant did not commit murder during the commission of a robbery. He committed robbery, as well as the other felonies, during the course of a murder.

For the reasons above and in the Opening Brief, the true findings to the felony special circumstances must be reversed. The judgment of death must also be reversed.

XIII

THE GUILTY VERDICTS, AND THE JUDGMENT OF DEATH, MUST BE REVERSED BECAUSE: (1) THE PROSECUTOR COMMENTED ON APPELLANT'S FAILURE TO TESTIFY AT TRIAL IN VIOLATION OF *GRIFFIN V. CALIFORNIA* (1965) 380 U.S. 609, 613-615, 14 L. Ed. 2d 106, 85 S. Ct. 1229; ALTERNATIVELY, THE DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONAL GUARANTEES OF THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE PROSECUTOR'S COMMENTS DURING HIS GUILT PHASE AND PENALTY PHASE CLOSING ARGUMENTS

Respondent argues the prosecutor's comments closing argument regarding the evidence not being contradicted, and appellant's lack of remorse, did not constitute *Griffin* error. The first *Griffin* error deals with the prosecutor's comment during his guilt phase closing argument that the evidence in the case was not contradicted by any other evidence in this case. (11 RT pp. 2759-2760.) Respondent argues this comment was not *Griffin* error because the prosecutor was only commenting on the state of the evidence and not referring to appellant's failure to testify. *Griffin* error includes indirectly commenting on the defendant's failure to testify. (*People v. Hughes* (2002) 27 Cal.4th 287, 372.)

There were only two witnesses to Kennedy's murder-- Kennedy and the person who murdered her. The argument the defense had not contradicted the prosecution evidence could only lead the jury to focus on appellant's failure to testify because the defense did present evidence in opposition to the prosecution case. The major piece of evidence the defense could have presented to contradict the prosecution case was appellant's testimony.

The prosecutor's comment during his penalty phase closing argument on appellant's

lack of remorse was a direct comment on appellant's failure to testify. Respondent argues the comment was not directed towards appellant's failure to testify because a friend or relative could have testified to appellant's lack of remorse. This argument is wrong for several reasons. The prosecutor knew appellant had denied committing the crime. The jury also knew appellant had denied committing the crime. Hence, there was no person who had any knowledge about whether appellant was remorseful other than appellant. The assessment of whether *Griffin* error occurred should be made in a practical and realistic way. The jury would have understood the prosecutor's reference to appellant's lack of remorse only as a comment on his failure to testify and express remorse.

Respondent argues the defense attorney was not ineffective despite his failure to object to the *Griffin* error because an objection would have drawn attention to the fact appellant did not testify. This argument is precisely why the *Griffin* error should be reviewed on the merits despite the lack of an objection in the trial court. The prosecution should not, in effect, be given free rein to comment directly and indirectly on the defendant's failure to testify because the defense did not want to object and aggravate the prejudice from the prosecutor's misconduct.

Appellant will rest on the prejudice arguments in the Opening Brief regarding the *Griffin* error during the prosecutor's guilt phase closing argument. The *Griffin* error committed during the prosecutor's penalty phase closing argument was not harmless error under *Strickland v. Washington* (1984) 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, or the standard applicable to *Griffin* error. (*People v. Brown* (2003) 31 Cal.4th 518, 553 [the prejudice standard for *Griffin* error is whether it was reasonably likely that the jury

understood or applied the disputed comments in an improper or erroneous way].)

The jury struggled with the decision to impose the death penalty because it asked what would happen if it did not reach a verdict. (2 CT p. 508.) Whether appellant had any remorse must have been a significant factor during the jury penalty phase deliberations. Dr. Baca, the prosecution psychiatric expert during the penalty phase, testified appellant had an antisocial personality disorder. (15 RT p. 3712.) The prejudice from the prosecutor's comment about appellant's lack of remorse was significantly increased by Dr. Baca's opinion appellant was a sociopath. Appellant's alleged lack of remorse must have confirmed for the jury the accuracy of Dr. Baca's opinion appellant was a sociopath. Dr. Baca testified individuals with antisocial personality disorders cannot be treated through medication or therapy. (15 RT p. 3733.) The jury must have been moved to impose death because appellant was a sociopath who could not be treated and lacked remorse for such a heinous crime. The prosecutor's penalty phase *Griffin* error was prejudicial.

For the reasons above and in the Opening Brief, the judgment of guilt must be reversed. Alternatively, the penalty of death must be reversed.

PENALTY PHASE ISSUES

XIV

THE DUE PROCESS CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS, AND THE FEDERAL AND STATE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT, REQUIRES REVERSAL OF THE JUDGMENT OF DEATH BECAUSE OF THE REVERSAL OF THE TRUE FINDINGS TO THE AGGRAVATING CIRCUMSTANCES

Appellant argued in the Opening Brief that *Brown v. Sanders* (2006) 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723, required reversal of the death sentence if one or more of the special circumstance findings were reversed for any reason.[4] Respondent argues the judgment of death can be affirmed if the jury properly found at least one special circumstance because the circumstances of the crime was also the evidence pertaining to the special circumstances. Respondent reaches this conclusion because the jury was instructed with CALJIC 8.85, which told them to consider, in deciding the penalty, "the circumstances of the crimes committed by appellant and the existence of any special circumstances found to be true." (12 RT p. 2934; 3 CT p. 807.)[5]

Respondent has conceded that the conviction for kidnaping, felony murder based on kidnaping, and the special circumstance finding of kidnaping must be reversed for

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[4] Respondent notes, and appellant obviously agrees, that appellant is not eligible for the death penalty if all the special circumstance findings were reversed. The issue herein is whether the judgment of death must be reversed if one or more special circumstance finding were reversed but at least one was upheld.

[5] The identical instruction was given in *Brown v. Sanders*. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 214.)

instructional error. A careful reading of *Brown v. Sanders* establishes that reversal of the kidnaping special circumstance finding requires reversal of the judgment of death.

Respondent argues that because all the aggravating circumstances (i.e., the burglary, robbery, kidnaping, and sodomy) occurred during a continuous course of conduct, the jury would have considered evidence pertaining to those special circumstances as "circumstances of the crime" under CALJIC 8.85. *Brown v. Sanders* stated, "[i]f the presence of an invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) *Brown v. Sanders* was not dealing with a situation when the jury improperly received evidence. "The issue we confront is the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty. . . . As we have explained, such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*Brown v. Sanders, supra*, 546 U.S. at p. 221.) In this case, the kidnaping special circumstance was based on appellant's alleged movement of the victim from the front office to the procedure room in the rear of the clinic. The jury obviously was aware of evidence suggesting Kennedy had been moved from her front office to the procedure room. This case falls in the category of cases described in *Brown v. Sanders* where the jury considered as aggravation properly admitted evidence that should not have weighed in favor of the death penalty. In *Brown v. Sanders*, this Court reversed the burglary special circumstance finding under the state merger law and reversed

the "especially heinous, atrocious, or cruel," special circumstance finding because it was unconstitutionally vague. The Court nevertheless affirmed the death sentence because the facts and circumstances admissible to establish the heinous nature of the crime and the burglary were properly admitted as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. (*Brown v. Sanders, supra*, 546 U.S. at p. 894.)

Unlike the outcome in *Brown v. Sanders*, the "circumstances of the crime" language in CALJIC 8.85 cannot be relied upon to uphold the death sentence in this case if the kidnaping special circumstance finding is reversed. The reversal of the two special circumstance findings in *Brown v. Sanders* did not require reversal of the death sentence for several reasons. The reversal of the burglary special circumstance because of the merger doctrine did not constitute a finding the jury should not have found the defendant guilty of that crime. The reversal based on the merger doctrine did not mean the jury considered as aggravating a crime that had not been properly proved. The "especially heinous, atrocious, or cruel," special finding did not add anything to the jury's consideration of aggravating factors because it in effect told the jury to consider nothing more than the facts of the case. The jury would presumably consider the heinous nature of the case in deciding whether to impose the death penalty even if it was not specifically told to do so.

The reversal of the kidnaping special circumstance, for either instructional error or insufficiency of the evidence, means the jury should not have found appellant guilty of that crime. If appellant should not have been found guilty of kidnaping, that crime should not have had any influence whatsoever on the jury determination of the appropriate penalty. The jury's erroneous belief the defendant committed a kidnaping must have influenced its

sentencing decision. The jury believed the kidnaping of Kennedy was an aggravating factor because CALJIC 8.85 expressly told the jury to consider "the existence of any special circumstances found to be true." (12 RT p. 2934.) The reversal of the special circumstances in *Brown v. Sanders* for reasons not impacting the accuracy of those findings of fact is what distinguishes that case from the instant case. Reversal of the kidnaping special circumstance finding for insufficiency of the evidence, or instructional error, means the accuracy of the jury's findings regarding factors in aggravation was undermined. The error requires reversal of the judgment of death.

Respondent conceded the kidnaping special circumstance finding had to be reversed for instructional error. Respondent has not made a similar concession regarding the robbery, burglary, and sodomy special circumstances findings. Assuming any of those findings are reversed for instructional error or insufficiency of the evidence, the same reasoning above applies. The jury will have considered as aggravation a fact–appellant's commission of a crime–that appellant did not commit. The reliability of the jury's fact finding regarding factors in aggravation will have been distorted in an constitutionally unacceptable way.

For the reasons above and in the Opening Brief, the judgment of guilt must be reversed.

XV

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY FAILED TO INSTRUCT THE JURY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND APPELLANT'S RIGHT TO DUE PROCESS OF LAW, THAT THERE WOULD NOT BE A RETRIAL ON THE CRIMES OF WHICH APPELLANT HAD BEEN FOUND GUILTY, IF IT COULD NOT REACH A VERDICT ON THE APPROPRIATE PENALTY

Respondent argues reversal of the death sentence is not warranted because of the trial court's response to the jury's question about what happens if a verdict is not reached because: (1) appellant failed to preserve this issue for appeal; and (2) courts have repeatedly held the trial court is not required to instruct the jury on the consequences of a hung jury.

Appellant argued in his Opening Brief that the above issue was not waived by the defense counsel's failure to make an objection because: (1) the defense counsel did not make a knowing waiver of any objection he could have made because he had not reviewed the applicable cases; (2) Penal Code section 1259 authorized appellate review of this issue; and (3) the invited doctrine error did not apply. Respondent did not respond to any of appellant's arguments. The failure to directly address these arguments should be deemed a concession the issue can be reviewed on the merits. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [noting an apparent concession by the People regarding a point of law because they failed to respond to the argument in the respondent's brief or at oral argument]; *California School Employees Assn. v. Santee School District* (1982) 129 Cal.App.3d 785, 787 [noting an apparent concession by respondent on a point of law because of the failure

to discuss it in the respondent's brief].)

The defense counsel did not object to the trial court's proposed answer to the jury's question about a deadlock. The cases cited by respondent do not require a finding of waiver. Penal Code section 1259 allows this Court to review any error of law occurring in the trial court. The correct response to the jury's question was an issue of law. The invited error doctrine may preclude appellate review of an issue of law. In *People v. Hughes* (2002) 27 Cal.4th 287, the jury sent a question to the trial court asking what would happen if they could not reach a verdict. The trial court, when it discussed with the attorneys how to respond, commented that a new jury would have to be impaneled for the penalty phase, but it was not sure if the jury should know that information. The defense counsel objected to the jury being told that a new jury would be impaneled because he believed it would be tantamount to giving the dynamite instruction. The trial court told the jury it could not answer the question. The defendant argued on appeal the trial court erred by not informing the jury of the consequences of a deadlock. This Court concluded the defendant had waived any objection to the trial court's response to the jury's question.

People v. Hughes is distinguishable from the instant case. The defense counsel in *People v. Hughes* affirmatively objected to the trial court providing the jury with any information about the consequences of a deadlock. The defense counsel in this case merely acquiesced to the trial court's decision not to inform the jury of the consequences of a deadlock. Appellant, furthermore, is not arguing the jury should have been informed of the consequences of a deadlock with the exception of correcting the jury's erroneous impression that a guilt phase retrial could occur.

People v. Rodrigues (1994) 8 Cal.4th 1060, is also distinguishable. During penalty phase deliberations, the jury asked what happened if it was not unanimous. The defense counsel suggested telling the jury not to speculate about what would happen if it did not reach a unanimous decision. The prosecutor agreed with this suggestion. The trial court so informed the jury. The defendant argued on appeal the trial court should have told the the penalty phase would be retried by another jury if a decision was not reached, but such a matter was not to concern them. This Court concluded, "[i]nasmuch as defendant both suggested and consented to the responses given by the court, the claim of error has been waived." (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1193.)

The defendant's claim of error in *People v. Rodrigues* was barred by the invited error doctrine. The defense counsel suggested the very response he argued on appeal was erroneous. The defense counsel in the instant case did not invite error. He did not suggest the jury be told its question could not be answered. He merely went along with the trial court's decision not to respond to the question. The invited error doctrine, therefore, does not bar review of appellant's claim of error.

Respondent cites numerous cases holding the jury does not have to be told of the consequences of a deadlock during penalty phase deliberations. (Respondent's Brief at p. 130.) Respondent then argues, "[t]he fact the note in this actually spelled out the possible results from a deadlock, including `retrial/entirely,' is not distinct from the cases above from this Court that hold a possible deadlock instruction should not be given." (Respondent's Brief at p. 131.) Respondent's argument is simply wrong.

In all of the cases cited by respondent, there was no evidence the jury believed a guilt

phase retrial would occur if it did not reach a penalty. In *People v. Kimble* (1988) 44 Cal.3d 480, 511, the jury's question was, "[i]f the jury feels the possibility at this time that we will not be able to find a unanimous decision, what will then be the court's decision?" In *People v. Belmontes* (1988) 45 Cal.3d 744, 813, the jury asked, "what happens if we can't agree (2) can the majority rule on life imprisonment? and (3) how long do we deliberate today and what happens if we don't reach a decision by then?" In *People v. Thomas* (1992) 2 Cal.4th 489, 539, the jury asked, "[w]hat would be the action taken by the court in the event that the jury is unable to reach a unanimous decision?" In *People v. Hines* (1997) 15 Cal.4th 997, 1071, the jury asked, "[w]hat happens if the jury becomes hopelessly deadlocked? [¶] a) Does the judge make the penalty decision? [¶] b) Is a mistrial declared? (And what will happen if a mistrial is declared) [¶] c) Other possibility?" The jury in the above cases did not suggest it believed a guilty phase retrial would occur if it did not decide on a penalty. The question from the jury in this case was affirmative evidence at least some jurors believed a guilt phase retrial would occur.

Respondent fails to address appellant's argument the jurors felt improper pressure to decide a penalty because of the erroneous belief appellant would receive a guilt phase retrial if it failed to decide the penalty. Respondent simply concludes the jury's erroneous belief about a guilt phase retrial does not distinguish this case from the cases cited on page 130 of Respondent's Brief without explaining why that conclusion can be reached.

Respondent attempts to distinguish *Simmons v. South Carolina* (1994) 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, and *Morris v. Woodford* (9th Cir. 2001) 273 F.3d 826, on several grounds. *Simmons v. South Carolina* found a due process violation when the

prosecutor was allowed to argue the defendant's future dangerousness, but the defendant was not allowed to admit evidence that a sentence of life without the possibility of parole would be imposed if he were not executed. (*Morris v. Woodford, supra*, 512 U.S. at pp. 157-158.) Respondent argues *Simmons v. South Carolina* does not apply to the instant case because the prosecutor did not argue appellant's future dangerousness. *Simmons v. South Carolina*, however, stands for the broader proposition that the jury should not be misled about the consequences of its penalty phase decision. *Simmons v. South Carolina* found a due process violation because the jury's misunderstanding created for them the false choice of a death sentence or a limited period of incarceration. (*Simmons v. South Carolina, supra*, 512 U.S. at pp. 161-162.) At least some jurors in appellant's case similarly had the false understanding a deadlock would result in appellant receiving a new guilt phase trial. This misunderstanding needed to be corrected.

Respondent distinguishes *Morris v. Woodford* on the basis the jury was not told appellant could receive life in prison with the possibility of parole if he was not given the death penalty. *Morris v. Woodford* also stands for the broader the jury should not be misled regarding the consequences of its penalty phase decision. Respondent attempts to narrowly construe the holdings of *Simmons v. South Carolina* and *Morris v. Woodford*. Respondent's narrow reading of the holdings of those cases should be rejected.

Respondent also argues any error in responding to the jury's question about a deadlock was harmless error. The jury obviously struggled with the decision to impose the death penalty despite the aggravation listed on pages 134 and 145 of respondent's brief. Respondent argues the mitigating evidence regarding appellant's dysfunctional youth carried

little weight with the jury because appellant had a sister who did not lead a life of crime and a brother who had rehabilitated himself. This argument is flawed for several reasons. The length of jury deliberations, and the jury's questions, demonstrated the choice of death was not easy for the jury despite the heinous nature of the crime. The fact appellant had two siblings who avoided his fate did not undermine the impact appellant's dysfunctional childhood must have had on the jury. Furthermore, the prosecution expert witness on psychology, Dr. Baca, testified appellant had developed into a sociopath by the age of five. (15 RT p. 3749.) Not every individual who is raised in the same household ends up with an antisocial personality disorder, or experiencing a similar fate, as his or her siblings. Appellant's brother George was the one brother who managed to avoid a life of crime. George, however, still had a criminal record. All five males in appellant's family had a criminal record and a history of drug abuse. (13 RT p. 3143.) It is simply disingenuous to minimize the dysfunctional nature of appellant's youth and the impact it made on his choices as an adult.

At least some jurors sentenced appellant to death while erroneously believing a deadlock would result in a new guilt phase trial. This erroneous belief needed to be corrected by the trial court. The failure to do so resulted in an unreliable verdict. The death sentence must therefore be vacated.

XVI

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, AND THE STATE AND FEDERAL DUE PROCESS CLAUSE, TO PRESENT MITIGATING EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL

Respondent argues the trial court properly excluded the testimony of Dr. Morales about the role genetics played in his opinions because he had no training in genetics and had not performed any genetic testing on appellant or his family members.

Dr. Morales was not required to hold a doctorate in genetics in order to incorporate information about genetics in his opinions. A wide variety of social science disciplines are multi-disciplinary in nature. Dr. Morales held a doctorate in social work as a Professor of Psychiatry and Behavioral Sciences at the University of California at Los Angeles Medical School. (13 RT pp. 3089-3090.) Respondent attempts to characterize the issue solely as the reasonableness of the trial court's ruling. The issue is whether the trial court correctly interpreted the Rule of Evidence governing expert witness testimony. The trial court clearly did not.

Evidence Code section 801, subdivision (b), provides that an expert opinion must be "[b]ased on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion . . . ." An expert witness himself or herself may establish whether he is relying upon matter that is of a type an expert may reasonably rely upon. (See *Sanchez v. Hillerich & Bradsby Co.* (2003) 104 Cal.App.4th 703, 718.) Dr. Morales testified social scientists in his discipline commonly rely upon family background and genetics to form

opinions about individuals they are studying. (13 RT pp. 3122, 3126.) This was sufficient foundation for Dr. Morales to incorporate into his testimony an opinion about the role of genetics in appellant's development. Dr. Morales did not need to hold a doctorate in genetics, or perform a genetic study of appellant and his relatives, to incorporate into his opinions the proposition genes influenced appellant's behavior. It was unreasonable for the trial court to conclude Dr. Morales could not incorporate genetics into his opinions when he testified social scientists in his profession routinely did so and there was no evidence to the contrary.

Respondent argues the exclusion of Dr. Morales' opinions about genetics was harmless error because: (1) Dr. Morales was allowed to testify about appellant's family history, including their history of alcohol and substance abuse; and (2) the jury heard Dr. Baca's opinion appellant developed an antisocial personality disorder at a young age and genetics could have played a role in the development of that disorder.

Respondent's arguments should be rejected for several reasons. Dr. Morales was allowed to describe to the jury appellant's dysfunctional background and the family's history of alcohol and drug abuse. (13 RT pp. 3137, 3139-3140, 3141, 3143, 3145-3146.) The impact of Dr. Morales's testimony, however, was significantly undermined because he was not able to testify to the genetic link between appellant's problems and his family's problems. The genetic link between appellant's behavior and his family's many problems was the key piece of mitigating evidence offered through Dr. Morales. The jury was not allowed to hear this opinion. An individual obviously has no control over his genes. It was the influence of appellant's genes on his behavior that may have convinced the jury

appellant had limited control over his conduct and thus should be spared death.

Dr. Baca's testimony did not render harmless the exclusion of Dr. Morales's opinion about the role of genetics in appellant's behavior. Respondent argues Dr. Baca conceded the genes appellant acquired from his father and mother were to blame for his mental state. This is not an accurate summary of Dr. Baca's testimony. During cross-examination, the following exchange occurred:

> Q. What makes an antisocial personality disorder?
>
> A. What makes them?
>
> Q. What creates this type of personality?
>
> A. Well, I guess we could blame his mother and his father and, you know, genetics, but he also had free will to make different choices.
>
> Q. All right. That's not what I am asking you. I am asking you, what factors enter into making an antisocial personality? Are they born that way?
>
> A. Some people believe that they are?
>
> Q. Do you believe in part they are?
>
> A. I believe in part, yes.

(15 RT pp. 3739-3740.) Dr. Baca's response about blaming appellant's mother and father was sarcastic rather than serious. When the defense counsel pressed Dr. Baca, she grudgingly conceded that some individuals may be born, "in part," with an antisocial personality disorder. (15 RT p. 3740.)

The rest of Dr. Baca's testimony was totally at variance with any conclusion appellant's genetics predisposed him to antisocial behavior. The entire theme of her

testimony was appellant exercised free will and was not therefore influenced by any factors beyond his control. Dr. Baca testified as follows during direct examination:

> There is many, many people that live in drug-infested areas, gang areas, yet they have managed to lead productive lives. If thee is a matter of choice. I mean it seems that somewhere along the way Mr. Castaneda came to a fork in the road and he could have taken this road which he could have kept going to school. In spite of his brothers all missing school, not going to school, using drugs, being involved in gangs, he could have continued to go the route of authorities. He had that choice available to him.
>
> On the other side, he had this life of excitement, acceptance, fun, and when it came right down to it, he made a choice and he made a choice to go this way. He had a choice. Because many people are in that situation and they are not sitting here with these charges against them like Mr. Castaneda is.

(15 RT p. 3736.) Dr. Baca believed appellant reached a "fork in the road" at the age of 10 when he could have chosen to learn from his behavior or continue with antisocial behavior. (15 RT pp. 3736-3737.) She continued to emphasize the theme of choice:

> I think Mr. Castaneda had—could have made choices all the way up until the day that Mrs. ----Miss Kennedy died. I think he had choices. He had a choice to let her live or to let her die. He had choices up until then. He had choices up until he was arrested on April 20th, 1998. He had choices up until then. He still has choices today. Unfortunately he has chosen to exercise the wrong choices from reports that I have read. He still continues to make wrong choices, but he's had ample opportunities. He's just not chosen to take advantage of them.

(15 RT pp. 3737-2738.)

Given Dr. Baca's theme of free will and choice during her testimony, and her discounting the role of genetics on appellant's conduct, her testimony was not an adequate substitute for Dr. Morales's opinion about the role of genetics on appellant's behavior.

Appellant will rest on the arguments in the Opening Brief regarding the admissibility of Exhibit 61.

XVII

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, PROHIBITS APPELLANT'S EXECUTION

Respondent argues appellant's sentence of death is not cruel and unusual because: (1) this Court has rejected the argument the death penalty is per se in violation of the Eighth Amendment; (2) *Atkins v. Virginia* (2002) 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 does not apply because there was no evidence appellant was mentally retarded; and (3) *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, does not apply because appellant was not a juvenile when he committed the crimes.[6]

A logical extension of the reasoning of *Atkins v. Virginia*, and *Roper v. Simmons*, establishes that execution of an individual with appellant's mental and emotional deficits violates the ban on cruel and unusual punishment in the Eight Amendment and Article I, Section 17, of the California Constitution. Accepting Dr. Baca's description of appellant's emotional deficits as true, appellant developed as early as age five a personality disorder, which impaired his relationships with other individuals, deprived him of "true feelings," and prevented him from feeling "subjective stress." (15 RT pp. 3725-3726, 3740.) Even as an adult appellant had no ability to alter this condition because it could not be treated with

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[6] Appellant is raising this issue pertaining to appellant's mental state in the direct appeal in order to makes sure it is preserved in the event the record is adequate to warrant reversal. A more complete argument regarding appellant's mental state will be raised in the habeas corpus petition.

drugs or through therapy. (15 RT p. 3733.)

Respondent argues *Atkins v. Virginia* and *Roper v. Simmons* do not apply to this case, but makes no effort to explain why the reasoning of those decisions should not be applied to an individual with appellant's mental and intellectual deficits. The facts are construed to support the judgment below. (*People v. Guerrera* (2006) 37 Cal.4th 1067, 1129.) The trier of fact is the judge of credibility. Appellant is not making an argument requiring this Court to make a credibility determination in his favor. The prosecution expert testified appellant developed mental and emotional deficits as a child, which he carried with him into adulthood, and which could not be treated with drugs or therapy. Respondent notes Dr. Baca also testified appellant was an adult who exercised free will when he committed the crimes in this case and the other acts admitted as aggravating evidence. (15 RT pp. 3735-3740, 3754.)

The notion of "free will" is vague, cannot be precisely measured, and is subject to sharp debate and conflict among scholars and the mental health community. No person can truly know what is "free will," and how biological and environmental factors impact the choices and behavior of a specific individual. What was clear, however, was Dr. Baca's opinion appellant developed, through no fault of his own, a personality disorder which substantially impaired his ability to interact with other individuals in an emotionally healthy way and generally succeed. Where is the morality in executing an individual who was either born with, or developed by the age of five, mental and emotional deficits that predestined that person to antisocial behavior and impaired social interaction with other individuals?

Respondent emphasizes the heinous nature of the crime in arguing appellant's

sentence is not cruel and unusual. The United States Supreme Court, however, banned execution of mentally retarded individuals, and individuals who were juveniles when the crime was committed, regardless of the heinous nature of their crimes. Similar reasoning applies to the instant case. No rational person could conclude appellant had a chance of leading a successful life given the emotional and mental deficits attributed to appellant by Dr. Baca, notwithstanding her conclusion appellant exercised "free will."

Atkins v. Virginia and *Roper v. Simmons* stand for the proposition that certain mental qualities or status act as a blanket prohibition against imposition of the death penalty. *Atkins v. Virginia* concluded execution of mentally retarded defendants was cruel and unusual punishment because of their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." (*Atkins v. Virginia, supra*, 536 U.S. at p. 318.) *Roper v. Simmons* concluded execution of juvenile offenders was cruel and unusual because they lack maturity and have an underdeveloped sense of responsibility, are vulnerable to peer pressure, and their character is not as well formed as an adult. (*Roper v. Simmons, supra*, 543 U.S. at pp. 569-570.)

Because appellant suffered from an antisocial personality disorder, he shared many of the same characteristics of a mentally retarded individual or a juvenile. Appellant did not have a developed sense of responsibility, an ability to emphasize with others, and the capacity to feel "subjective stress." (15 RT pp. 3725-3726, 3740.) Appellant's sentence of death is cruel and unusual under the federal and state constitutions. The judgment of death must therefore be reversed.

XVIII

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS, AND THE CALIFORNIA CONSTITUTION, BECAUSE THE JURY WAS ALLOWED TO CONSIDER APPELLANT'S ESCAPES FROM CUSTODY AS EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL

Respondent argues the defense counsel's failure to object the admission of appellant's non-violent escapes from custody was not ineffective assistance of counsel because: (1) appellant opened the door to the admission of that evidence by offering good character evidence; (2) Dr. Hall's opinion appellant could function in a prison setting made admissible evidence of appellant's non-violent escapes; and (3) Dr. Gawin's testimony that appellant led a productive life between the ages of 19 and 24 made admissible evidence of appellant's non-law abiding conduct during that time period.

The character evidence offered by appellant did not warrant the admission of evidence he had escaped from custody. Respondent cites four cases, *People v. Burgener* (2003) 29 Cal.4th 833, *People v. Farnam* (2002) 28 Cal.4th 107, *People v. Fierro* (1991) 1 Cal.4th 173, and *People v. Rodriguez* (1986) 42 Cal.3d 730, in support of his argument appellant's escapes were admissible because appellant offered good character evidence.

In *People v. Farnam*, the defendant testified he spent four to seven days at a prison camp and got along well with the staff and inmates. The defendant also testified he had spent time at the county jail and other juvenile camps and facilities and nothing improper or unusual occurred. The prosecutor asked the defendant during cross-examination about his escape from the prison camps several days after he arrived. This Court held the cross-

examination was proper because of the impression left by the defendant's testimony about his behavior while at the camp. (*People v. Farnam, supra*, 28 Cal.4th at p. 187.) *People v. Farnam* concluded the evidence of the defendant's escape from custody was admissible because it directly rebutted facts offered by the defendant during his direct examination.

In *People v. Burgener*, the trial court and the attorneys agreed the defendant's escape, and attempted escape, from custody were not admissible as aggravation. The defendant's sister testified the defendant had gone through a spiritual conversion while in custody, had let go of his hostility towards the prison, and had a "peacefulness" about him. On cross-examination, the district attorney asked the defendant's sister if she was aware the defendant had attempted to escape from custody. She said she was. The defense counsel objected and moved for a mistrial. This Court also concluded, "the fact the escape was inadmissible as an aggravating factor did not render it inadmissible on cross-examination to rebut good character evidence offered by the defendant." (*People v. Burgener, supra*, 29 Cal.4th at p. 874, citing *People v. Fierro* (1991) 1 Cal.4th 173, 237.)

In *People v. Fierro*, the defendant's mother testified to his good character, help to neighbors by doing yard work, and the love of his family members. Over defense objection, the prosecutor was allowed to question the defendant's mother about his participation in youth gangs. This Court affirmed the admissibility of the prosecutor's questions about the defendant's gang affiliation because it rebutted the good character evidence offered by the defendant.

In *People v. Rodriguez*, the defendant offered evidence he was a kind, loving, and contributive member of the community who was held in affection by neighbors and family.

The prosecutor admitted evidence the defendant had a shotgun in the back seat of his vehicle when stopped by law enforcement. This Court held the evidence admissible because, "[o]nce appellant placed his general character in issue, the prosecutor was entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 791.)

The above cases did not warrant the admission of appellant's non-violent escapes from custody under the facts of this case. *People v. Rodriguez* and *People v. Fierro* dealt with the admission of specific instances of bad conduct to rebut good character evidence offered by the defendant. Neither case addressed the admissibility of a non-violent escape from custody in response to character evidence offered by the defendant. Furthermore, the specific instances of bad conduct offered by the prosecutor directly contradicted the evidence offered by the defendants portraying them as generally good citizens and peaceful individuals.

People v. Farnam and *People v. Burgener* both dealt with the admissibility of a non-violent escapes from custody. The evidence of the defendant's escape from custody in *People v. Farnam* was admissible because it directly contradicted the defendant's characterization of his conduct while in custody. In *People v. Burgener*, the evidence of the defendant's non-violent escapes from custody was admissible because it directly rebutted the claim the defendant had acquired "peacefulness" while in custody.

The mitigation evidence offered by appellant did not make admissible appellant's non-violent escapes from custody. The following witnesses testified during the defense penalty phase of the trial: (1) Dr. Hall; (2) Dr. Gawin; (3) Dr. Morales; (4) Jamie Phillips;

(5) Leo Moreno; (6) Elvira Castaneda; (7) John Gabriel Castaneda; (8) Lucia Gonzalez; (9) Gabriel Castaneda Jr.; (10) Henry Arroyo; (11) Louie Arroyo; (12) Veronica Arroyo; (13) Yvonne Tovar; and (14) Dianne Castaneda.

Dr. Hall described the conditions in prison, the applicable custody level for appellant, and offered the opinion appellant could function successfully in prison. He also testified about the results of the psychological tests offered to appellant. (12 RT pp. 2942-2983.) This testimony was not good character evidence. It did not seek to portray appellant as a good citizen or a peaceful person. The opinion appellant could function successfully in prison addressed appellant's future conduct in a maximum security facility. Appellant's non-violent escapes from custody was evidence of appellant's past behavior. Hence, evidence of appellant's non-violent escapes from custody did not rebut Dr. Hall's opinion appellant could function successfully in maximum security prison. Respondent quotes the portion of the prosecutor's cross-examination of Dr. Hall in which the prosecutor summarized appellant's custodial history and asked Dr. Hall if that would qualify him as a special risk prisoner. Dr. Hall responded yes. (12 RT p. 2994.) The prosecutor could have elicited from Dr. Hall the fact appellant would have been a special risk prisoner without eliciting evidence of appellant's non-violent escapes from custody. Respondent argues, "[g]iven Dr. Hall's opinion that Castaneda could function in a prison setting for the rest of his life, it was permissible for the prosecutor to inquire on cross-examination about Castaneda's non-violent escapes from custody to rebut Dr. Hall's good character evidence." (Respondent's Brief at p. 157.) Appellant's non-violent escapes from camps many years in the past had little if any relevance to how appellant would function in a maximum security

setting in which escape was not a realistic possibility.

Respondent also argues Dr. Gawin's opinion appellant led the most productive years of his life between the ages of 19 and 24 did not make admissible evidence of appellant's non-violent escapes from custody. Dr. Gawin's opinion was based only on appellant's behavior while he was out of custody. Dr. Gawin testified this time period was the most productive years of appellant's life because he held two jobs and was in a stable relationship. (12 RT p. 3049.) Furthermore, because appellant had spent most of his adult life in custody, the opinion that appellant led the most productive years of his life between the age of 19 and 24 did not constitute a claim to good citizenship. The remaining defense witnesses during the penalty phase testified about specific time periods of appellant's life. The testimony of those witnesses did not open the door to admission of appellant's non-violent escapes from custody and respondent has not made that argument.

The jury should not have received evidence of appellant's non-violent escapes from custody either through testimony or the admission of documentary evidence. *People v. Boyd* (1985) 38 Cal.3d 762, established the rule a non-violent escape from custody is not admissible aggravation in a death penalty case. This rule was well established prior to the start of appellant's trial. The defense attorney should have been alert to excluding this evidence.

The admission of appellant's non-violent escapes from custody was not harmless beyond a reasonable doubt. Respondent argues there was no reason to assume the jury improperly considered the escape evidence in aggravation. The jury received the evidence of appellant's non-violent escapes from custody. It should not have heard this evidence.

This Court cannot simply assume the jury did not consider evidence that was admitted. The jury received evidence of appellant's non-violent escapes from custody via testimony and documentary evidence. The jury struggled with the decision to impose the death sentence. Evidence appellant had escaped from custody prejudiced appellant in two ways: (1) the jury decided to impose the death penalty to make sure appellant never escaped–a serious concern given the nature of the crime charged in this case; and (2) the jury concluded appellant's proclivity to escape posed a danger to correctional officers even if appellant had no chance of successfully escaping. This Court cannot conclude beyond a reasonable doubt the evidence of appellant's non-violent escapes from custody did not tip the balance for the jury in deciding between life and death. The judgment of death must be reversed.

IXX

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE: (1) THE TRIAL COURT FAILED TO SUA SPONTE MODIFY CALJIC 8.85 TO DELETE INAPPLICABLE MITIGATING FACTORS; (2) THE PROSECUTOR USED THE INAPPLICABILITY OF THE MITIGATING FACTORS AS FACTORS IN AGGRAVATION; AND (3) ALTERNATIVELY, THE DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST MODIFICATION OF CALJIC 8.85 TO DELETE INAPPLICABLE MITIGATING FACTORS AND FAILING TO OBJECT TO THE PROSECUTOR'S ARGUMENT THAT THE ABSENCE OF MITIGATING FACTORS CONSTITUTED FACTORS IN AGGRAVATION

Respondent argues the inclusion of the inapplicable mitigating factors in CALJIC 8.85 does not require reversal of the sentence because: (1) appellant waived the issue by failing to request a modification of the instruction in the trial court; (2) it is proper for the trial court to give CALJIC 8.85 without deleting the inapplicable mitigating factors; (3) the defense counsel's failure to object to the prosecutor's argument regarding the inapplicable mitigating factors waived the issue; and (4) the defense counsel did not provide ineffective assistance of counsel by failing to request a modification of CALJIC 8.85 or failing to object to the prosecutor's closing argument regarding the inapplicable mitigating factors.

The failure of the defense counsel to request a modification of CALJIC 8.85 did not waive the issue on appeal. Penal Code section 1259 provides for appellate review of any prejudicial jury instruction. Respondent cites a series of cases in support the argument appellant waived an objection to the deficiencies in CALJIC 8.85. None of the cases applied the waiver doctrine to CALJIC 8.85. In *People v. Hudson* (2006) 38 Cal.4th 1002, the trial

court erroneously defined the term, "distinctively marked," in a prosecution for evading a peace officer. This Court noted a party may not complain on appeal an instruction correct in the law and responsive to the evidence was too general or incomplete unless an objection was made in the trial court. The Court refused, however, to apply the waiver doctrine because "that rule does not apply when, as here, the trial court gave an instruction that is an incorrect statement of the law." (*People v. Hudson, supra*, 38 Cal.4th at p. 1012.) The trial court's failure to modify CALJIC 8.85 to delete the inapplicable mitigating factors was tantamount to an incorrect statement of the law because of the risk the jury misapplied the instruction to use the absence of mitigation as aggravating factors.

In *People v. Hart* (1999) 20 Cal.4th 546, the defendant argued the jury instructions defining murder were ambiguous. The Court found this issue waived because of the lack of an objection in the trial court. The Court also concluded the instructions were not ambiguous. (*People v. Hart, supra*, 20 Cal.4th at p. 622.) *People v. Hart* did not address deficiencies to CALJIC 8.85. *People v. Hart* did not address how section 1259 impacted its waiver analysis because there was no ambiguity in the instructions. Similarly, in *People v. Bolin* (1998) 18 Cal.4th 297, the defendant argued the jury instructions for the lesser included offenses of second degree murder and voluntary manslaughter were ambiguous. The Court found the issue waived by the lack of an instruction. The Court also concluded the defendant could not have been prejudiced by an ambiguity because he was found guilty of first degree murder. Because *People v. Bolin* found no prejudice even if the instructions were ambiguous, it did not address how section 1259 impacted its waiver analysis.

People v. Cook (2006) 39 Cal.4th 566, 610, and *People v. Kipp* (2001) 26 Cal.4th

1100, 1138, both stated the trial court did not have a duty to omit inapplicable factors from the jury instructions. Because section 1259 permits appellate review of any prejudicial jury instruction regardless of the lack of an objection in the trial court, the issue of whether the inclusion of inapplicable mitigating factors in CALJIC 8.85 requires reversal of the judgment of death is ultimately a matter of prejudice.

Respondent argues the trial defense attorney did not provide ineffective assistance of counsel by failing to object to the prosecutor's comments during closing argument regarding the inapplicable mitigating factors because the prosecutor may explain the inapplicable mitigating factors or argue the evidence lacks mitigating force. The prosecutor's comments in this case went beyond explaining the inapplicable mitigating factors. The defense presented no evidence regarding factors E, D, F, G, and I. There was no need for the prosecutor to explain why those factors did not apply. The cases cited by Respondent are all distinguishable. In *People v. Hines* (1997) 15 Cal.4th 997, the prosecutor argued the jury should not view the testimony of the defense witnesses as mitigating. The prosecutor's argument obviously addressed facts in evidence rather than addressing mitigating factors for which no evidence had been presented.

In *People v. Clark* (1993) 5 Cal.4th 950, the defendant made two claims of Davenport error. The prosecutor noted the absence of certain mitigating factors and stated the defendant could not claim mitigation from those factors. He did not argue the absence of mitigation was aggravation. This Court found no error. In the second passage, the prosecutor, using moral justification as an example, commented about how the intent of the law could be discerned from the listing of a mitigating factor even if it did not apply in that

case. The Court found no error because: (1) the prosecutor did not suggest the absence of a mitigating factor was aggravating; and (2) the prosecutor properly argued the absence of a mitigating factor meant the defendant was less deserving of leniency rather than more deserving of death.

This portion of *People v. Clark* should be overruled. The law should be that the prosecutor cannot comment on the inapplicability of a mitigating factor when the defense has not presented any evidence pertaining to that factor. A prosecutor's argument about the inapplicability of a mitigating factor for which the defense has not presented any evidence could only result in the jury viewing it as an aggravating factor. *People v. Clark* stated the prosecutor's argument about the inapplicability of a mitigating factor suggested to the jury the defendant was less deserving of leniency rather than more deserving of death. This is a distinction without a meaning. When the jury's only choices are between life and death, any impulse by the jury to believe the defendant is less deserving of leniency could only push them towards choosing death. The prosecutor's arguments in this case about the inapplicability of mitigating factors cannot be sustained based on *People v. Clark.*

In *People v. Raley* (1992) 2 Cal.4th 870, the defendant claimed Davenport error because the prosecutor argued the defendant's confession did not demonstrate remorse as claimed by him. This Court found the argument proper because it was responding to an argument raised by the defense. There was no Davenport error in *People v. Raley* because the prosecutor was properly commenting on facts in evidence. The prosecutor, in the instant case, committed Davenport error because he was not arguing about facts in evidence. The prosecutor used the absence of facts in evidence, i.e., the absence of evidence pertaining to

a mitigating factor, as a fact in aggravation.

The doctrine of Davenport error was well established when this trial occurred. The prosecutor's argument from pages 3805 through 3809 constituted Davenport error.[7] The Daveport error was not a brief reference. The defense attorney should have been alert to Davenport error and objected.

Respondent also argues any Davenport error was harmless. This Court cannot reach that conclusion. Even if the jury followed the instructions, the Davenport error was prejudicial. CALJICs 8.85 and 8.88 told the jury to only consider the applicable mitigating factors. There was nothing in the language of the instructions that told the jury the absence of mitigating evidence pertaining to a mitigating factor could not weigh in favor of imposition of death. Respondent argues any Davenport error was harmless because the aggravating evidence greatly outweighed the mitigating evidence. Even if Respondent's characterization of the evidence is true, the jury nevertheless struggled with the decision to impose the death penalty. This Court cannot conclude beyond a reasonable doubt the prosecutor's argument regarding the inapplicable mitigating factors did not tip the jury over the edge towards death. The judgment of death must be reversed.

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[7] The specific portions of the prosecutor's closing argument constituting *Davenport* error was set forth on pages 323 through 326 of Appellant's Opening Brief.

XX

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT'S INSTRUCTION TO THE JURY ON HOW TO WEIGH AGGRAVATING AND MITIGATING FACTORS FAILED TO CONVEY TO THE JURY, IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS, THAT: (1) A SINGLE MITIGATING FACTOR WAS SUFFICIENT TO CONCLUDE THAT APPELLANT SHOULD BE SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE; AND (2) A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE COULD STILL BE IMPOSED IN THE ABSENCE OF ANY MITIGATING FACTS

Appellant will rest on the arguments in the Opening Brief.

XXI

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO SUA SPONTE INSTRUCT THE JURY ON THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT AND THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT

Appellant will rest on the arguments in the Opening Brief.

XXII

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE APPELLANT DID NOT VALIDLY WAIVE HIS RIGHT TO BE PRESENT DURING A DISCUSSION OF THE PENALTY PHASE JURY INSTRUCTIONS IN VIOLATION OF HIS RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW AND SIXTH AND FOURTEENTH AMENDMENTS RIGHT OF CONFRONTATION

Respondent argues appellant's constitutional right to be present during the trial was not violated because: (1) the discussion of the penalty phase instructions did not involve the taking of evidence and cross-examination and did not therefore implicate the Sixth Amendment right of confrontation; (2) the discussion of jury instructions between the attorneys and the trial court did not bear a substantial relationship to appellant's ability to defend himself; (3) appellant validly waived his right to be present during those discussions; and (4) any error was harmless.

This Court has held, "under the Sixth Amendment's confrontation clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless his appearance is necessary to prevent interference with [his] opportunity for effective cross-examination." (*People v. Cole* (2004) 33 Cal.4th 1158, 1231, quoting *People v. Waidla* (2000) 22 Cal.4th 690, 741.) Appellant will rest on the arguments in the Opening Brief regarding his absence during the discussion of the penalty phase jury instructions violating his Sixth Amendment right of confrontation.

Respondent cites *People v. Holt* (1997) 15 Cal.4th 619, and *People v. Morris* (1991) 53 Cal.3d 152, in support of his argument that appellant's due process right to be present during the trial was not violated because he was excluded from the discussion of the penalty

phase jury instructions. In *People v. Holt*, the defendant was excluded from a variety of hearings, including discussion of jury selection procedures, in limine motions, and in-chambers discussions of guilt phase instructions. The Court reviewed what occurred at the proceedings from which the defendant was absent and made fact specific conclusions the defendant's presence could not have assisted his defense in any manner. (*People v. Holt*, *supra*, 15 Cal.4th at p. 707.) It is necessary to examine what occurred at the hearing when the defendant was absent to conclude his presence could not have assisted his defense. Respondent seems to suggests the defendant's absence from certain proceedings, such as discussion of penalty phase jury instructions, as a matter of law bore no relationship to his ability to defend himself. *People v. Holt* does not support such a broad conclusion.

In *People v. Morris* (1991) 53 Cal.3d 152, the defendant was absent from informal, unreported conferences between the trial court and the attorneys concerning jury instructions. This Court found no error because the informal conferences did not bear a substantial relationship to the defendant's ability to defend himself. There was also no evidence of the actual contents of the discussion during the unreported conferences. The defendant could not, therefore, carry his burden of demonstrating prejudice.

People v. Morris is distinguishable because the hearing where appellant was absent was the on-the-record discussion of penalty phase jury instructions when the instructions were finalized. *People v. Morris* also found no prejudice because the defendant was present at the bench conference the next day when jury instructions were finally settled. Appellant, conversely, was not present at that hearing.

Appellant's absence from the on-the-record discussion of the penalty phase

instructions bore a substantial relationship to his ability to defend himself. Appellant could have clarified the escape issue discussed by the trial court and the attorneys. Had appellant been present for the discussion of the penalty phase jury instructions, it was unlikely the jury would have been allowed to improperly consider appellant's non-violent escapes from custody as aggravation.

Respondent states on pages 169 and 172 of his brief that appellant validly waived his right to be present during the discussion of the penalty phase jury instructions. Respondent offers no analysis to support this conclusion. Penal Code sections 977 and 1043, subdivision (b), collectively restrict the defendant's absence from proceedings in capital cases and requires a written waiver when the defendant is absent. It is undisputed appellant did not waive in writing his right to be present during the discussion of the penalty phase jury instructions. Hence, respondent's waiver argument should be rejected.

Respondent argues appellant's absence from the discussion of the penalty phase jury instructions was harmless error because there was nothing appellant's presence could have added to the discussion. However, as argued above and in the Opening Brief, appellant's presence would have materially aided his defense attorney in addressing how the escape issue should addressed. Appellant's presence also would have alerted his defense attorney that the evidence pertaining to appellant's escapes from custody should have been stricken from the record.

For the reasons above and in the Opening Brief, the sentence of death must be reversed.

XXIII

THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS

Appellant will rest on the arguments in the Opening Brief.

Dated: 12/6/01

John L. Staley

I declare under penalty of perjury that this Reply Brief contains 23,886 words.

John L. Staley

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO
(People v. Castaneda, Superior Court
case No. FWV-15543; Supreme Court
Case No. SO85348)

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action; My business address is 11770 Bernardo Plaza Court, Suite 305, San Diego, CA 92128. On December 26, 2007, I served the foregoing document described as: APPELLANT'S REPLY BRIEF--on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Diego, California. Executed on December 26, 2007, in San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

John L. Staley