IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>ROBERT WESLEY COWAN,<br><br>Defendant and Appellant. | Crim. S055415<br><br>Kern County<br>Superior Court No. 059675A |



# APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Kern

HONORABLE LEE P. FELICE, JUDGE

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| ) | |

**APPELLANT'S REPLY BRIEF**

## I.
## ARGUMENT

### A. APPELLANT'S MOTIONS TO DISMISS BASED ON PREJUDICIAL PRE-ARREST DELAY WERE ERRONEOUSLY DENIED BY THE TRIAL COURT

In its opposition brief, respondent fails to offer any legitimate reason for the 10-year delay between the killings of the Mercks, which occurred between August 31, 1984 and September 4, 1984, and appellant's arrest on August 8, 1994. Such an omission is not surprising given the record established in the trial court. Within six months of the killings, the investigators had gathered evidence indicating that appellant had given away property – a firearm, ring and lighter case – taken from the Mercks during the killings. In addition, when Danny Phinney was interviewed on December 21, 1984, he explained that in early September, 1984, he had seen appellant with: (1) a driver's license that had on it a name that was similar to "Myerck," a three digit address on McClean Street, and a date of birth that was in the early 1900s; and (2) Social Security checks that belonged to

someone who lived on McClean Street.[1] (CT 313-314, RT 1846.) Yet, despite this incriminating evidence, no arrest of appellant was made.

Moreover, law enforcement investigation of the Mercks homicides came to a standstill in the middle of 1987, just before Sergeant Fraley was transferred from the sheriff's homicide unit. (PET, 9/8/94, 34, 70.) After the transfer, no other work was done on the investigation, and no other investigator was assigned to the case, until Detective Christopherson picked up the file almost seven years later in early 1994. (PERT, 9/12/94, 20-21, 24.) Respondent offers no explanation for why the investigation was dormant for so many years. Nor does the record establish that the delay resulted from a shortage of resources in the Sheriff's Department rather than a lack of diligence in pursuing the case.

Significantly, Christopherson's investigation did not lead to the discovery of any new witnesses or physical evidence. Nor did a scientific breakthrough occur prior to the District Attorney's decision to have appellant arrested on August 8, 1994. Instead, the arrest was predicated entirely upon Christopherson's request that Sharon Pierce re-examine evidence that had been in the case file since the time of the killings – the latent fingerprints obtained from the Mercks' house and appellant's known fingerprints.

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[1] The Mercks lived at 713 McClean Street, and law enforcement was aware that the Mercks' Social Security checks and Clifford's wallet were missing from the house after the homicides. (CT 273, 283, 285, 320.)

Respondent offers no explanation for why almost ten years passed before this evidence was re-examined. Indeed, the delay was especially indefensible in light of Quentin Nerida's trial testimony that the technical investigation section had a policy (not followed in this case) that required a second investigator to review the results of all fingerprint comparisons even when no match was found (RT 1515), and the testimony of senior examiner Thomas Jones that there were concerns about examiner Jerry Roper's competence as early as 1984[2] (RT 1999).

Eschewing any claim that the delay in charging appellant was reasonable or justified, respondent argues only that appellant's defense was not prejudiced by the 10-year lag before the filing of charges. (RB, at pp. 66-70.) Respondent's argument is unpersuasive. In asserting that claims of prejudice regarding substantial delay have been repeatedly rejected (RB, at p. 63), respondent ignores this Court's assessment that, "'It is not improbable that under certain circumstances an accused may be deprived of due process of law, if the lapse of time between the alleged commission of the offense and the filing of the accusation makes it difficult or impossible for the accused to prepare his

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[2] These concerns were based on Roper's failure to make an identification of a palm print in another case. As a result of that mistake, Roper's then-supervisor, Jerry Grimes, had Jones re-examine prior comparisons that Roper had done over a particular period of time. These re-examinations occurred prior to Roper's departure from the Technical Investigations Section in 1987. (RT 2107-2108.) The present case was not included in those that were re-examined by Jones at that time. Respondent offers no explanation for the omission.

defense.'" (*People v. Archerd* (1970) 3 Cal.3d 615, 640, quoting *People v. Wilson* (1966) 239 Cal.App.2d 358, 365.) Respondent also fails to recognize several cases in which claims of prejudicial pre-arrest delay were upheld. (See, e.g. *People v. Hartman* (1985) 170 Cal.App.3d 572 [seven-year delay in filing murder charge violated due process]; *People v. Pellegrino* (1978) 86 Cal.App.3d 776 [upholding trial court's dismissal of case after finding substantial prejudice due to 17-24 month delay in filing charges]; *Penney v. Superior Court* (1972) 28 Cal.App.3d 941 [remanded to trial court for further evidentiary hearing after finding appellant was prejudiced by six-year delay in filing murder charge].) Here, as described *infra*, appellant was substantially prejudiced in several ways by the 10-year delay.

### 1. Impaired Ability to Rebut Evidence That Appellant's Fingerprints Were Lifted from the Mercks' Residence

As a result of the passage of time, technical investigator Jerry Roper was unable to remember what factors led him to determine in 1984 that appellant's known prints did not match any of the latent prints lifted from the homicide scene. (PERT, 9/12/94, 94, 96, 107.) In addition, Roper could not recreate his examination of the fingerprint evidence because by the time of appellant's arrest, his eyesight had deteriorated so severely that he could no longer perform fingerprint comparisons. (PERT, 9/12/94, 107.) Appellant was, thus, unable to effectively rebut the prosecution's claim that Roper had made a mistake in finding that appellant's known fingerprints did not match any of the

latent fingerprints lifted from the scene of the homicides.

Respondent argues that appellant could have retained a fingerprint expert to re-examine the fingerprint evidence. (RB, at p. 66.) Such a tactic, however, would not have remedied the prejudice. Another criminalist may have rendered his or her own opinion as to whether the fingerprints from the scene matched those of appellant. The criminalist, however, would not have known what differences were actually observed by Roper that led him to conclude that the latent prints were not left by appellant. Additionally, having the Sheriff Department's own criminalist explain to the jury how the latent fingerprints differed from those of appellant would bolster appellant's defense far more effectively than having a similar opinion given by an expert paid by the defense.

Respondent further contends that appellant was not prejudiced because Roper was not a competent fingerprint examiner and his findings were therefore suspect.[3] (RB, at p.

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[3] Respondent dramatically overstates the record in claiming that Roper specifically admitted that he had problems identifying positive fingerprint matches. (RB, at p. 66.) Roper made no such admission. Instead, when asked by the prosecutor whether he had ever made mistakes when comparing fingerprints, he answered affirmatively but did not explain what mistakes he had made. (RT 1596.) Roper then elaborated on recross-examination that anyone who compared latent and known prints could make a mistake. (RT 1598.) Respondent has incorrectly transformed healthy humility into an admission of continuing deficient performance. Respondent is also incorrect that Roper's problems finding positive fingerprint matches led to his departure from the technical investigations section. (RB, at p. 66.) There was no testimony that Roper was removed from the section because of prior incompetence. Rather, Roper testified that he left the section on his own because he was having eyesight problems and was under a great deal of stress. (RT 1589.)

66.) It would be wrong, however, for this Court to simply assume that Roper's findings were incorrect as respondent suggests. A question as to which of two conflicting experts is more credible is to be resolved by the jury. Here, appellant was denied a fair opportunity to convince the jury that Roper's findings were correct, because ten years later Roper could no longer explain the bases for his conclusions. Roper was qualified as a fingerprint examiner and his fully-explained, contemporaneous opinion may well have been accepted by the jury. At the time that Roper conducted his examination, he had seven years experience as a fingerprint examiner and had qualified as a prosecution expert witness in court on approximately 600-800 occasions. (RT 1591-1592.) In addition, despite having received the complaint about Roper's competence, Grimes did not find it necessary to stop Roper from conducting fingerprint comparisons. (RT 2103.) The department's re-examination of Roper's prior work did not identify any other mistakes made by him. (RT 2107-2108.)

Respondent further contends that even if appellant had been charged earlier, it is unlikely that Roper would have been able to testify effectively about the basis for his negative finding because Roper already had poor eyesight when he left the technical investigations section in 1987. (RB, at p. 67.) Respondent fails to acknowledge that appellant could have been charged as early as 1985 when the Sheriff's Department had finished collecting all of the fingerprint evidence as well as the victims' property appellant allegedly possessed, and had interviewed Danny Phinney. Moreover,

respondent's contention is entirely speculative. Roper's eyesight may still have been good enough to allow him to re-compare appellant's prints with the latent prints. Additionally, even if Roper's eyesight was inadequate, his memory was undoubtedly better then than it was when he testified at the preliminary hearing in 1994. Roper may well have been able to recall his 1984 comparison and explain why he did not find a match at that time.

Respondent's attempt to distinguish *People v. Hartman* (1985) 170 Cal.App.3d 572 from the present case is unavailing. In *Hartman*, as in this case, the prejudice to the defendant resulted from the loss of evidence prior to the filing of the murder charge. The lost evidence included two expert witnesses who had found that the victim's death was due to natural causes but could not testify at the delayed trial due to their own deaths. "As a result, Dr. Carpenter was unable to explain his findings or conclusions at the trial, or to rebut the implication, raised by several witnesses, that he had been negligent. Likewise, Dr. Wisely could not testify why he supported Dr. Carpenter's determination that Langlos' death was due to natural causes." (*Id.*, at pp. 579-580.) Similarly, in the present case, the passage of time resulted in technical investigator Roper being unable to explain his findings or conclusions at trial, or to rebut the implications that he was not a competent examiner. At the time of his testimony, Roper had no recollection of the work he had done in 1984 and could not re-examine the fingerprint evidence due to the deterioration of his eyesight.

Respondent notes that the additional evidence lost in *Hartman* was also found to be part of the prejudice.[4] (RB, at pp. 67-68.) The same is true in the present case. As discussed *infra*, appellant was prejudiced by his own memory loss, the faded memories of other witnesses, and the loss of physical evidence taken from the crime scene and during the arrests of Danny Phinney and Robb Lutts.

### 2. Appellant's Loss of Memory as to Both His Whereabouts at the Time of the Killings and Whether He Ever Possessed Any Property Belonging to the Mercks

Respondent contends that appellant has failed to show prejudice from his own dimmed memory or, alternatively, that any such prejudice was rebutted. (RB, at p. 69.) Again, respondent's claim is without merit. The record concerning appellant's faded memory consisted of a declaration prepared by trial counsel, a declaration executed by appellant, and appellant's interview with Detective Christopherson at the time of his arrest. Appellant denied killing the Mercks, but could not recall where he was, or whom he was with, at the time of the killings. He also could not recall whether he had ever been inside the Mercks' home, which was not far from his family home, or whether he had ever possessed, and if so how he obtained possession of, any property belonging to the Mercks.

This record was more than adequate to establish that appellant was prejudiced by

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[4] Of course, the fact that there was additional lost evidence in *Hartman* does not establish that the unavailability of the medical doctors itself was insufficiently prejudicial to result in the due process violation.

the pre-arrest delay. Respondent inexplicably ignores *People v. Vanderburg* (1973) 32 Cal.App.3d 526, 531, which observed, "Unduly delaying the arrest or indictment of an accused may hinder his ability to recall or reconstruct his whereabouts at the time the alleged offense occurred." Moreover, the Court of Appeal held that "[the defendant]'s statement in his affidavit that because of the 11-month delay (from May 20, 1971 to April 10, 1972) he is unable to account for his whereabouts on May 20, 1971, *is sufficient* to support a finding that he suffered prejudice from the delay in prosecution." (*Ibid.*, italics added.) With the showing of prejudice having been made, "the burden shifts to the People to establish a legitimate justification for the delay." (*Ibid.*)

Respondent engages in hyperbole in claiming that a finding that appellant was prejudiced by his faded memory will result in a statute of limitations for murder that extends only as long as a defendant's memory lasts. (See RB, at p. 68.) That is simply not the case. A finding of prejudice is only the first step in the three-step analysis conducted when a claim is made that due process was violated by a pre-arrest delay. The reviewing court must still consider whether any justification for the delay existed, and then balance the harm to the defendant against the reason for the delay. (*People v. Catlin* (2001) 26 Cal.4th 81, 107.) Therefore, respondent's dire prediction that a finding of prejudice based on an accused's loss of memory will result in a de facto statute of limitations is without foundation.

Respondent also points out that appellant knew that he was a suspect in 1984 and

1985. (See RB, at p. 68.) That fact, however, would be of significance only if appellant had been arrested close to that time period. Here, appellant was not arrested until August 8, 1994. Moreover, when appellant offered to come to the sheriff's department to speak with Sergeant Fraley on February 14, 1985, his offer was refused, and there was no later attempt to interview him. The law enforcement investigation then became inactive from early 1987 until May, 1994, well after appellant could reasonably conclude that he was no longer considered a suspect in the case, and thus that there was no need for him to preserve any alibi evidence, or to keep it fresh in mind.

Finally, respondent notes that "appellant's assertion of memory loss also applies to the prosecution – the passage of time dims the memories of witnesses and police officers and perhaps renders stale some pieces of evidence." (RB, at p. 69.) Respondent's implication is that the passage of time was likely to have benefitted appellant rather than to have prejudiced him. The same argument, however, was rejected by this Court in *People v. Hill* (1984) 37 Cal.3d 491, 498.) In *Hill*, the State objected to the defendant's reliance on the fading memories of two victims as a ground for prejudice, "arguing that any deterioration in their memories redounded to defendant's benefit because it weakened the prosecution's case." (*Ibid.*) This Court disagreed, explaining that "to contend that a faded memory aids the defendant is to assume defendant's guilt; if he is innocent, obviously he would prefer witnesses who forthrightly so testify." (*Ibid.*)

### 3. Faded Memories of Witnesses Regarding Appellant's Possessing Property Allegedly Taken From the Mercks

At trial, the prosecution sought to prove that appellant had given away items of property, including a ring, a lighter case and a firearm, that were allegedly taken from the Mercks. In support of this theory, the prosecution presented witnesses who, according to the prosecution, had been given the various items of property by appellant shortly after the killing of the Mercks. As a result of the passage of time, however, the memories of the prosecution witnesses had faded. Appellant was prejudiced because the witnesses' impaired memories precluded trial counsel from effectively cross-examining them to show that they did not actually receive any property from appellant, or that if they did, the property received was not what was taken from the Mercks.

Respondent contends that appellant has not shown that he was prejudiced because his assertions are speculative, that any uncertainty in the witnesses' ability to more specifically recall appellant's connection to the Mercks' property only benefitted appellant, and that the case cited by appellant to support his claim, *People v. Hill*, *supra*, 37 Cal.3d at pp. 498-499, is distinguishable because it is a post-arrest delay case. (RB, at p. 69.) Respondent's arguments are without merit.

Respondent's attempt to distinguish *Hill* is based on the fact that the delay in *Hill* occurred between the first filing of the criminal complaint and the refiling of the complaint after a dismissal pursuant to Penal Code section 1381. In the present case, the delay occurred between the commission of the offenses and the filing of the criminal

complaint. This difference, however, is without significance here.

In *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505, this Court explained that due process is the appropriate criterion when evaluating delay prior to the defendant's arrest or the filing of a complaint. Once a defendant has been arrested or a complaint has been filed, the right to a speedy trial attaches and any delay is analyzed under that constitutional provision. "But regardless of whether defendant's claim is based on a due process analysis or a right to a speedy trial not defined by statute, the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against justification for the delay." (*Ibid.*) Only when the delay occurs after the filing of an indictment or information and a statutory right to a speedy trial is violated does the test change. Under these circumstances, the defendant's burden of proof is lessened because prejudice is presumed. (*Ibid.*; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 910.)

Neither *Hill* nor the present case involved the violation of a statutory right to a speedy trial. Thus, the balancing test that was properly utilized in *Hill* is the same test that must be used to analyze appellant's due process claim based on pre-arrest delay. *Hill*'s holding that a defendant is prejudiced when faded memories of prosecution witnesses preclude trial counsel from conducting effective cross-examination is applicable to the instant case. Moreover, the defense claim in *Hill* regarding the prosecution witnesses was no less speculative than the claim asserted in the present case.

In *Hill*, the defendant was charged with several counts of robbery, burglary and rape, and the prosecution based its case principally on the eyewitness testimony of two of the three victims. One victim was able to identify the defendant at a lineup within a few months of the crimes, but by the preliminary hearing she had "mentally blocked" much of her memory on the subject and could testify only that the defendant "look[ed] like" the same man. (*People v. Hill*, *supra*, 37 Cal.3d at pp. 498, internal quotations omitted.) She also could not recall many characteristics of the perpetrator's physical appearance. The second victim selected the defendant's photograph from a photo spread, but later could not recall whether the officer who showed her the photo spread told her that the perpetrator's photograph was among them. Then, when asked to participate in a lineup, she circled two numbers on the lineup card, that of the defendant and another person, writing in the margin that "it was difficult to make a positive identification after so much time had passed." (*Ibid.*)

Based on this record, the defense in *Hill* could not prove with certainty that with sharper minds the victims would have excluded the defendant as the person who assaulted them. However, the possibility that the victims "might have" exonerated the defendant was sufficient for this Court to find that the delay resulted in prejudice. (*Ibid.*) Appellant's claim is similar. Had the witnesses' memories not faded, the defense "might have" been able to establish through cross-examination that Lutts and Phinney did not receive Clifford Merck's firearm from appellant, that the ring introduced into evidence

either was not given to Catherine Glass by appellant or did not belong to Alma Merck, or that the lighter case introduced into evidence either was not given to Ronnie Woodin by appellant or did not belong to Clifford Merck.[5] In the opening brief, appellant detailed the many uncertainties in the testimony given by the witnesses. (See AOB, at pp. 103-105.) As in *Hill*, appellant's claim that defense counsel was unable to effectively cross-examine the prosecution witnesses was sufficient to establish prejudice.

Finally, respondent repeats his argument that appellant most likely benefitted from the faded memories of the prosecution witnesses because the failures of recollection weakened the prosecution's case. (RB, at p. 69.) As already explained, *Hill* specifically rejected such a contention since it is based on the unfounded assumption that the defendant is guilty. (*People v. Hill*, *supra*, 37 Cal.3d at p. 498.)

### 4. Faded Memories of Witnesses Regarding Admissions Allegedly Made by Appellant

Respondent disagrees that appellant was prejudiced by the fading memory of Emma Foreman. Respondent's first claim is that Foreman did not appear to have any memory problems during her brief testimony at trial. (RB, at p. 69.) Respondent is technically correct because

Foreman's testimony itself did not discuss appellant's admission to her that he had killed an old couple. However, this does not meet appellant's point. Appellant's

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[5] In the opening brief, appellant detailed the many uncertainties in the testimony given by the witnesses. (See AOB, at pp. 103-105.)

purported admission was introduced when Lieutenant Porter testified about what Foreman had told him in an interview on January 26, 1990, (RT 2391-2392; CT 741), at which time Foreman's memory was uncertain. She was unable to recall if appellant's admission was made one month before or after Jewell Russell's killing.[6] (CT 741, RT 2490.)

Respondent also argues that Foreman's testimony was not crucial to the Mercks prosecution. (RB, at p. 69.) Respondent is incorrect. Foreman was the only witness who claimed to have heard appellant confess to the murder of two old people in Bakersfield. Foreman's failure to recall when appellant made the admission was extremely critical to appellant's defense. If appellant's admission was made one month before the Russell killing, appellant could not have been referring to the Mercks because they were killed no more than seven days before Jewell Russell was found dead.

**5. Loss of Physical Evidence**

Respondent claims that appellant was not prejudiced by the loss of any physical evidence because the evidence was lost before July 1985. Thus, according to respondent, even if appellant had been charged within a year of the killings, the evidence would have

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[6] This interview of Emma Foreman was not part of the investigation of the Mercks killings which was inactive as of 1987. Lieutenant Porter worked for the Shafter Police Department which was investigating the killing of Jewell Russell. When Porter asked Foreman if appellant had said anything more about Russell's killing, she allegedly told him that appellant had admitted killing an old couple in Bakersfield. (CT 741 [supplemental report of Lieutenant Porter].)

been unavailable. (RB, at p. 70.)

Respondent overlooks the fact that only the items taken from the Mercks' home were lost before July 1985. Appellant's claim also includes the evidence seized during the arrest of Phinney and Lutts on October 14, 1984. That evidence was kept for seven years after their arrests. (CT 1146-1147, 1165, 1203-1204.) In addition, appellant could very well have been charged in early 1985 before the items taken from the Mercks' home were lost. By January 1985, law enforcement had obtained appellant's known fingerprints and the latent fingerprints from the Mercks' home (CT 559, 567-568, PERT, 9/7/94, 9); had obtained the gun that belonged to Clifford Merck and allegedly had been given to Phinney and Lutts by appellant (December 19, 1984) (PERT, 9/7/94, 175); had interviewed Phinney about other property allegedly belonging to the Mercks that he claimed to have seen in appellant's possession (December 21, 1984) (PERT, 9/7/94, 179, 184-186); had obtained the lighter case that allegedly belonged to Clifford Merck and allegedly had been given to Ronnie Woodin by appellant (January 24, 1985) (PERT, 9/7/94, 203); and had obtained the ring that allegedly belonged to Alma Merck and allegedly had been given to Cathy Glass by appellant (January 28, 1985) (PERT, 9/8/94, 9-10).

The missing evidence was highly material. Had the property from the Mercks' home not been lost, appellant could have had it examined for the presence of fingerprints. A finding that appellant's prints were not on the evidence, or that the prints

of another suspect were, would have strongly supported appellant's claim that he did not commit the killings. Had the jewelry seized during the arrest of Phinney and Lutts not been destroyed, witnesses may have been able to identify the jewelry as having been taken from the Mercks' home. Such testimony would have corroborated appellant's defense that Phinney and Lutts, rather than appellant and his brother, were the killers.

### 6. Conclusion

For these reasons and those set forth in appellant's opening brief, appellant was prejudiced by the extraordinary 10-year delay prior to his arrest and the filing of a complaint. That prejudice greatly outweighed any justification for the delay. As a result, appellant was denied the fair trial to which he was entitled under the due process clause of both the state and federal constitutions. The trial court erred in denying appellant's motions to dismiss, and appellant's conviction and judgment of death must be reversed.

## B. THE TRIAL JUDGE ERRED BY NOT IMMEDIATELY RECUSING HIMSELF AND BY LATER SUBSTITUTING ANOTHER JUDGE FOR HIMSELF RATHER THAN DECLARING A MISTRIAL

### 1. After Learning That Two of the Prosecution Witnesses Were His Close Friends, the Trial Judge Should Have Immediately Recused Himself Rather than Continue to Preside over the Trial Proceedings for the Rest of the Day

Respondent does not dispute that the trial judge was required to recuse himself after discovering that he was a close friend of prosecution witnesses Jerry and Terry Jones, who were related to victim Alma Merck. Respondent contends, however, that the trial court acted properly in continuing to preside over the trial proceedings until he made up his mind about whether he should be disqualified. (RB, at pp. 75-76.)

In support of its position, respondent advances two arguments. The first is that because the trial judge was surprised to learn that the Jerry and Terry Jones identified on the witness list were his friends, he needed time "to contemplate and research the situation." (RB, at p. 75.) This fact may explain why the trial judge needed until the next morning to make a decision to recuse himself. It does not, however, justify the trial judge's continuing to preside over the trial proceedings while contemplating his decision.

Respondent also argues that witness Danny Phinney had been "'openly hostile'" when being ordered to return to the courtroom after the previous day of trial, and may not have returned to court if the balance of his testimony had been postponed. (RB, at pp. 75-76.) However, any concern that either the trial judge or the prosecution had about Phinney's reappearance could have been resolved without having the trial judge preside

over the remainder of Phinney's testimony that day, in violation of appellant's right to a fair trial under the federal and state constitutions. The trial judge could have ordered Phinney to appear at a future date, a technique that had been successful in previously securing Phinney's attendance. In addition, under Penal Code section 1332, Phinney could have been required to post a bond if there was good cause to believe that he would not appear to testify. Additionally, a law enforcement officer or investigator could have been assigned to monitor Phinney's whereabouts and escort him to the next court proceedings. Respondent's suggestion that the trial court was powerless to secure Phinney's future attendance without compromising appellant's statutory and constitutional rights is untenable.

In any event, any concern about Phinney's reappearance was insufficient to outweigh the need to preserve appellant's constitutional right to a fair trial. Moreover, respondent ignores both Code of Civil Procedure Section 170.3, subdivision (a)(1) and well-established case law that prohibits a trial judge's further participation in trial proceedings once grounds for disqualification are known. (See *People v. Bridges* (1982) 132 Cal.App.3d 234, 238; *Geldermann, Inc. v. Bruner* (1991) 229 Cal.App.3d 662, 665.)

### 2. Appellant Was Denied His Rights to Due Process and Trial by Jury When the Trial Judge Substituted Another Judge for Himself Rather than Grant Appellant's Motion for a Mistrial after Eight Prosecution Witnesses Had Testified

As appellant conceded in his opening brief, this Court has already found that a mid-trial change in the trial judge does not automatically violate the defendant's federal

and state constitutional rights. (See *People v. Espinoza* (1992) 3 Cal.4th 806, 829.) Appellant respectfully maintains, however, that *Espinoza* was wrongly decided. As the Second Circuit Court of Appeals stated in *Freeman v. United States* (2nd Cir. 1915) 227 F. 732, 759-760, the Sixth Amendment to the United States Constitution requires that the same judge preside throughout the whole trial. The rationale for this requirement is that the trial judge must observe the witnesses testify in order to be able to determine their credibility. Only then will the trial judge be able to make informed decisions when ruling on legal issues that relate to witness credibility (e.g., motion for directed verdict, motion for new trial based on insufficiency of the evidence) or when commenting on the evidence to the jury. That is particularly true in a capital case, where the trial judge is also required to rule on the defendant's automatic motion under Penal Code section 190.4, subdivision (e), in which the judge necessarily must pass on the credibility of the witnesses presented at trial.[7]

Even if this Court declines to overrule *Espinoza*, that case should be limited to its facts and found inapplicable to appellant's case. What distinguishes the cases is that in *Espinoza* the new trial judge reviewed the transcripts of the prior proceedings before continuing with the trial and thus was familiar with what had already transpired. (*People*

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[7] Judge Felice's failure to observe Phinney's testimony was especially critical in appellant's case. Phinney was a key prosecution witness whose credibility was very much in doubt due to his criminal background, bipolar disorder, memory impairments and drug use. Only by observing Phinney testify could Judge Felice accurately assess Phinney's truthfulness.

*v. Espinoza*, *supra*, 3 Cal.4th at p. 828.) Here, respondent argues that the original trial judge recessed the trial from Thursday afternoon until the following Monday afternoon, "which provided time for the new trial judge to begin to get familiar with the case." (RB, at p. 78.) The record, however, does not establish that Judge Felice used the recess for that purpose. To the contrary, Judge Felice admitted on Monday, in deciding appellant's motions, that he was "at somewhat of a disadvantage" because he had not yet read the entire record (RT 1767), and that he was "not as swift on the uptake . . . if [he] had been here during the . . . earlier proceedings in this case" (RT 1784). As a result of his unfamiliarity with the prior testimony, Judge Felice had to ask counsel to "fill [him] in" on the content of some of the testimony given by Danny Phinney in deciding whether prior statements made by Phinney were admissible.[8] (RT 1784; see also RT 1785-1786, 1790.)

Other cases cited by respondent in which a substitution of the trial judge was found not to be error also fail to support its position. None of these cases involved a

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[8] Respondent claims that during the hearing, Judge Felice "took a recess to locate the daily transcripts, and to review the record and those transcripts." (RB, at p. 79.) Respondent's description of the record is not accurate. After realizing that he did not have the transcript of the prior proceedings, Judge Felice stated, "Let me take a brief recess and see if I can locate the daily." (RT 1774.) The record does not establish the length of the recess or that Judge Felice actually found and read all of the transcripts during it. Indeed, it would appear that he did not. After the recess, Judge Felice: (1) still acknowledged being unfamiliar with the case (RT 1784); (2) had to ask counsel to fill him in about Phinney's testimony (RT 1784); and (3) after taking another recess (which the judge described as lasting ten minutes) stated that he had only "reviewed certain portions of the transcript of" Phinney's testimony (RT 1809).

substitution of the trial judge during the middle of taking evidence when the defendant objected to the substitution. In *People v. Gonzalez* (1991) 51 Cal.3d 1179, the substitution was only for one day and occurred after the close of evidence. Additionally, the defense did not object to it. (*Id.*, at pp. 1210-1211.) In *People v. Stuller* (1970) 10 Cal.App.3d 582, 591, the defendant stipulated that one judge could conduct the jury voir dire while another judge could preside over the trial. The substitution in *People v. Moreda* (2004) 118 Cal.App.4th 507, 515-516 occurred during the hearing of post-verdict motions. Finally, in *People v. Lichenstein* (1913) 22 Cal.App. 592, 609, the defendant stipulated to the substitution of a new judge after the close of the prosecution's case. *Lichenstein* further noted that had the defendant not stipulated, "there would be no little merit in the argument that the accused had thus been deprived of a substantial right - the right guaranteed at least by the statute, if not by the constitution, to secure the judgment of the judge trying the case upon the question whether the conclusion of the jury, as represented by a verdict of conviction, is or is not legally justified. (*Id.*, at p. 613.) Respondent also cites *People v. Truman* (1992) 6 Cal.App. 4th 1816, 1825-1828, but in that case a substitution during voir dire was found to be error because the original judge was able to proceed.

### 3. The Constitutional Errors Were Not Harmless

Respondent is incorrect that appellant must show prejudice in order to obtain relief. (See RB, at pp. 79-80.) Judge Gildner's continued participation in the trial after

discovering grounds for disqualification requires a per se reversal of the judgment against appellant. A trial before a judge who is not impartial constitutes a "structural defect[] in the constitution of the mechanism which def[ies] analysis by 'harmless error' standards." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) As recognized in *Freeman v. United States*, *supra*, 227 F. 732, 759-760, the constitutional violations that result from the mid-trial substitution of the trial judge constitute reversible error without the need for a showing of prejudice. (See also *Hood v. State* (Md. 1994) 637 A.2d 1208, 1213 [defendant was presumed to be prejudiced by the mid-trial substitution of trial judge who did not certify his familiarity with the record].) Moreover, respondent's contention that the "the evidence against appellant was strong," (RB, at p. 80), is not credible. The prosecution was predicated largely on the porous and inconsistent testimony of Danny Phinney and Robb Lutts, informants who were themselves suspects in the case.

## C. THE TRIAL COURT IMPROPERLY EXCUSED PROSPECTIVE JURORS 041853 AND 045969 FOR CAUSE

Respondent contends that the trial court properly excused Prospective Jurors 041853 and 045969 for cause. (RB, at p. 81.) However, when the prospective jurors' questionnaires and voir dire are examined as a whole, it is clear that their views on the death penalty would not have precluded or substantially impaired them from performing their duties. The erroneous disqualification of Prospective Jurors 041853 and 045969 violated appellant's right to a fair and impartial jury, and to due process of law, under the Sixth and Fourteenth Amendments to the United States Constitution.

### 1. Prospective Juror 041853

In her questionnaire, this prospective juror wrote that she did not have any moral or religious beliefs that would affect her ability to sit in judgment of another person; that she did not have anything to bring to the court's attention that might affect her ability to be fair and impartial (First Supplemental CT 1128); and that she believed that she could be a fair and impartial juror in appellant's case (First Supplemental CT 1129). She also expressed concerns about whether it was right for anyone other than God to decide whether a person should die; and initially stated that she could never vote for the death penalty. (First Supplemental CT 1138-1140.) Her feelings about the death penalty, however, were evolving, as she had not given the issue "deep thought" until the night before filling out the questionnaire. (First Supplemental CT 1139.) Prior to that previous evening, the death penalty had "never really bothered" her (First Supplemental

CT 1138) and she "was pretty much ok with it" (First Supplemental CT 1139).

During voir dire, the trial court observed that the prospective juror was nervous and questioned her about her attitude toward the death penalty. After listening to her responses, the trial court opined that the prospective juror was not opposed to the death penalty but simply did not want to be in a position where she had to make that decision. (RT 1058.) The prospective juror agreed with the trial court's assessment of her state of mind, and later repeated her answer when asked the same question by defense counsel. (RT 1059, 1060.)

Defense counsel then elicited from the prospective juror that her reluctance to deciding penalty would not prevent her from voting for death in appellant's case. Counsel asked, "If the circumstances struck you as justifying the death penalty although with sadness and reluctance, could you do it?" The prospective juror answered unequivocally, "Yes." (RT 1060.) Counsel pointed out to the prospective juror that she had checked the questionnaire box indicating that she could never vote for the death penalty, and asked again if she now felt that she could choose death, albeit reluctantly. The prospective juror responded, "Very – yes." (RT 1060.) She further explained that the alternative statement in the questionnaire – "I might be able to vote to impose the death penalty in the appropriate case depending on the facts and circumstances"– more accurately reflected her present attitude than the statement she had previously endorsed. (RT 1090-1061.)

The prosecutor questioned the prospective juror about why her attitude toward the death penalty had changed since she had answered the questionnaire. The prospective juror explained that it was not defense counsel's questioning that had caused her to change her mind. Rather, she had always been for the death penalty in certain circumstances but after learning that she was a prospective juror in appellant's case, she had a "brief moment one night" in which she realized she might have to make a penalty decision. (RT 1061.) That realization had "bothered her" and made her "conflicted inside." (RT 1061.) However, she later determined that she was not so troubled that she would be unable to vote for death if such a verdict was supported by the evidence.

The prosecutor then aggressively examined the prospective juror with questions that tried to lead her into stating that she would never vote for the death penalty. The questioning failed to obtain such a concession. Before being interrupted by another question from the prosecutor, she responded, "Again, without saying yes or no, just if I can picture these crimes and the people, what they do, I say, 'yes.' It is going to have to be presented in such a way that it is – that's terrible and – ."[9] (RT 1062.)

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[9] The prosecutor asked five consecutive questions to which the prospective juror was unable to complete her answers. Each of the first four answers was interrupted by the prosecutor interjecting another question, a strong indication that the prosecutor was not pleased with her response. (RT 1062-1063.) The fifth answer was interrupted by the trial court dismissing the prospective juror. (RT 1063.) Respondent argues that the prospective juror's partial answers illustrated her reluctance and confusion towards imposing the death penalty. (RB, at p. 87.) This is an incorrect interpretation of the record. The first partial answer, described *supra*, indicated that the prospective juror could vote for the death penalty given the appropriate circumstances. The remaining

Contrary to respondent's contention and the statement of the trial court, the record did not establish that the prospective juror gave conflicting answers or that she would have been substantially impaired in performing her duties as a juror. While she had conflicting feelings about the merits of the death penalty and was bothered about the possibility of having to reach a sentencing decision, she repeatedly made clear that if the evidence showed that appellant's case was "terrible," she would vote for a death sentence. The law requires no more. The prospective juror would have been able to fulfill the role that California law assigns to jurors in death cases.

Respondent fails to recognize that despite her initial responses this juror was rehabilitated and established her qualifications to serve on a jury in a capital case. She was not properly subject to a challenge for cause.

**2. Prospective Juror 045969**

When viewed as a whole, this prospective juror's answers on the questionnaire and during voir dire do not establish that her views on capital punishment would have prevented or substantially impaired her performance of her duties as a juror. She was unequivocal that she was not opposed to the death penalty (First Supplemental CT 1560, RT 945); that her attitude towards the death penalty would not affect her ability to reach verdicts on first degree murder and special circumstances (RT 944-945); and that she

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partial answers were so brief that one cannot determine what she intended to say. The prosecution is not entitled to prevent a prospective juror from answering voir dire questions and then to interpret her truncated responses as indicating her partiality.

would not refuse to vote for the death penalty in every case (RT 945).

Respondent nonetheless insists that the prospective juror would never have voted for the death penalty in this case. (RB, at p. 87.) In support of this argument, respondent points to the prospective juror's comments that there would have to be no doubt (110 percent certainty) in her mind that the defendant was guilty and that the death penalty was appropriate before she would vote for death. (RB, at p. 87.)

Respondent's argument is unpersuasive for several reasons. First, when directly asked whether she would refuse to vote for death if the prosecutor was unable to prove that the defendant was 110 percent guilty, the prospective juror responded, "No, I guess it – I have to hear it." (RT 946.) This answer demonstrated that the prospective juror would not set up a standard of proof that would determine her decision ahead of time, but would wait until she heard all the pertinent evidence before deciding on the appropriate sentence.

Second, respondent misconstrues the record in claiming that the prospective juror believed it would be impossible for the prosecution to prove its case to the level of 110 percent certainty. The juror's answer, as set forth in the transcript is, "I think it is impossible that you prove it to me under 110 percent." (RT 947.) Read literally, the statement means that the prospective juror believed that it would be impossible for the case to be proven to a level of certainty that was less than 110 percent, which does not make sense. Moreover, respondent's interpretation of the transcript is contrary to the

whole of the voir dire, in which the juror clearly foresaw the possibility that she could be convinced that death was the appropriate punishment.. (RT 946, 948.)

Additionally, it is significant that the prospective juror's comments about the prosecution's burden of proof were made before the juror, who had never sat on a jury before, was given any instructions on the applicable law. (RT 947.) In *People v. Heard* (2003) 31 Cal.4th 946, 964, this Court concluded that "in light of the [the juror's] clarification of his views during voir dire . . . [an] earlier juror questionnaire response, *given without the benefit of the trial court's explanation of the governing legal principles*, does not provide an adequate basis to support [the] excusal for cause." (Italics added.) Here, after the trial court explained that "there was no burden of proof at the penalty phase," the court elicited from the prospective juror that her penalty decision would depend on the facts and circumstances of the case. If the facts and circumstance convinced her that death was appropriate, she could return such a verdict. (RT 948.)

Finally, the prospective juror's statement is reasonably construed to mean simply that she would vote for death only if she were very certain that the defendant was guilty, and that death was the appropriate punishment under the circumstances of the case. Her reference to "110 percent" certainty, which does not make literal sense, was only her figure of speech to reflect the high level of certainty she would insist upon before voting for a death sentence. This state of mind did not establish a valid basis for the trial court to excuse the prospective juror for cause. As this Court recently explained in *People v.*

*Stewart* (2004) 33 Cal.4th 425, 447, it is permissible for a juror "to impose a higher threshold before concluding that the death penalty is appropriate." Nor may a prospective juror be excused for cause because the juror's "views would make it difficult for the juror to ever impose the death penalty." (*Ibid.*) "A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Ibid.*)

In addition, "the California death penalty process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted." (*Ibid.*) Those values may include a juror's "concern regarding the risk of error in the criminal justice process." (*Id.*, at p. 449.)

Here, during voir dire, the prospective juror was simply expressing the factors that she would value in deciding the penalty. She needed to be very sure that the defendant was guilty of the capital offense and that the death penalty was appropriate. While these values commendably meant that the juror would exercise great care in returning a death

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verdict, it did not mean that she would have been prevented or substantially impaired from doing so. Accordingly, she should not have been excused for cause.[10]

[10] During the voir dire, the trial court elicited from the prospective juror that even though the law did not place the burden of proof on the prosecution, the juror would require that the prosecution prove that the death penalty was appropriate. (RT 947.) Her response should not be viewed as indicating an intent to not follow the law, but merely as the juror's imprecise way of stating that she would have to be convinced by the evidence to vote for death. Such an interpretation would be consistent with her other answers during voir dire.

## D. THE PROSECUTOR IMPROPERLY EXERCISED PEREMPTORY CHALLENGES BASED ON RACIAL BIAS AGAINST THREE BLACK JURORS

### 1. Appellant Established a Prima Facie Case of Race Discrimination

Respondent contends that appellant did not establish a prima facie case of group bias because "there was no showing of a 'strong likelihood' that the prosecutor's challenge was based on a reasonable inference of group bias." (RB, at p. 95.) In so arguing, respondent utilizes an erroneous standard that is more stringent than that mandated by *Batson v. Kentucky* (1986) 476 U.S. 79. In *Batson*, the United States Supreme Court held that a party alleging discriminatory use of peremptory challenges "may make out a prima facie showing of purposeful discrimination by showing that the totality of the relevant facts gives rise to *an inference of discriminatory purpose*." (*Id.*, at pp. 93-94, italics added.) It has now been conclusively established that "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." (*Johnson v. California* (2005) 125 S.Ct. 2410, 2416.)

Respondent's analysis fails in large part because it does not account for the dramatic impact that the recent decision of the United States Supreme Court has on California law. Respondent relies on the pre-*Johnson v. California* holding of this Court that "strong likelihood" and "reasonable inference" mean the same thing in determining "discriminatory purpose" under *Batson*. (See RB, at p. 92.) *Johnson v. California* makes clear that they do not.

The first step of the *Batson* test was not "intend[ed] to be so onerous that a defendant would have to persuade the judge - on the basis of all the facts, some of which are impossible for the defendant to know with certainty - that the challenge was more likely than not the product of purposeful discrimination." (*Johnson v.* California, *supra*, 125 S.Ct. at p. 2417; see also *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1197; *United States v. Escobar-de Jesus* (1st Cir. 1999) 187 F.3d 148, 164).) This principle is well illustrated in *Johnson* itself. The prosecutor in *Johnson* used three of his 12 peremptory jurors to remove all of the Black prospective jurors. In finding that a prima facie case had not been established, the trial court observed that the issue was "close," and the California Supreme Court commented that "it certainly look[ed] suspicious that all three African-American prospective jurors were removed from the jury." The United States Supreme Court found that an inference of discrimination sufficient to invoke such comments by the state courts was adequate to establish a prima facie case under *Batson*. (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2419.)

Here, contrary to respondent's argument, appellant established an inference of discriminatory purpose in the prosecutor's excusal of the three Black prospective jurors. Appellant established far more than the fact that the peremptory challenges were used against members of a cognizable group, or that the resulting jury contained only a small number of persons from the cognizable group. (See RB, at p. 95.) The prosecutor excused all three Black persons who were seated in the jury box, leaving the jury without

any Black members. Only one Black prospective juror remained in the venire when jury selection was completed. Moreover, one excused prospective juror, 045921, differed from the other two excused prospective jurors, 042519 and 045787, in every characteristic but one – their common race. Otherwise, Prospective Juror 045921 differed from the two others with regard to gender, length of residence in Kern County, length of time in present job, nature of job and supervisory duties, children, educational background, military background, law enforcement background, interest in news stories about crime, and prior witnessing of a crime.

The cases cited by respondent in support of its claim that a prima facie case of group bias was not established are readily distinguishable because none involved the totality of circumstances described above. In *People v. Farnam* (2002) 28 Cal.4th 107, the prosecution used four of his first five peremptory challenges to excuse Black prospective jurors, but, unlike the present case, did not strike most or all of the Black members from the venire. The jury that was selected included four Black jurors, and two of the six alternates were Black persons. (*Id.*, at pp. 134, 136-137.) Similarly, in *People v. Arias* (1996) 13 Cal.4th 92, 136, the jury selected was not devoid of all members of the protected groups, but included two Hispanic jurors, one Black juror, and one Hispanic alternate. (*Id.*, at pp.133-134 & fn. 14.) This Court observed, "In arguing for a prima facie case, defendant merely indicated the number and order of minority excusals and compared the number of such excusals against the representation of such minority

groups in the entire venire. We have suggested that this is not sufficient to establish a prima facie case of discriminatory exclusion, particularly where, as here, the final jury includes members of the same minority groups." (*Id.*, at p. 136, fn. 15.)

Finally, in *People v. Wright* (1990) 52 Cal.3d 367, 399, the defendant's only argument in support of a prima facie case of group bias was that the prosecutor had exercised a peremptory challenge against a Black prospective juror. The defendant pointed to nothing else in the record to support his claim of purposeful discrimination.

Here, the totality of circumstances includes the prosecution's excusal of three Black prospective jurors, the absence of any Black jurors in the jury that was selected, the absence of all but one Black juror in the remaining venire, and the lack of common characteristics other than race amongst the three Black persons excused by the prosecution. These relevant circumstances give rise to a reasonable inference that the prosecutor's excusal of the three Black prospective jurors was based on racial discrimination. Appellant met his burden of showing a prima facie case of group bias.

### 2. The Prosecutor's Explanations for Her Excusal of the Three Black Prospective Jurors Were Not Plausible

Contrary to respondent's argument, the prosecutor did not properly explain her challenges with credible, race-neutral reasons related to appellant's case. Indeed, Prospective Juror 045921 had many characteristics that would typically be viewed with favor by a prosecutor. Most significantly, he had prior experience working as a military police officer while in the Air Force. (First Supplemental CT 1612.) In addition, he had

been the victim of a crime, had never been arrested for any criminal offenses, had previously witnessed a crime and cooperated with law enforcement by reporting the crime to the police and providing a statement, and had never known anyone who was falsely accused of a crime. (First Supplemental CT 1613-16119.)

The sole reason articulated by the prosecutor for her excusal of Prospective Juror 045921 was that he had written in his questionnaire that he did not believe in the death penalty but could vote for it. (RT 1406.) The totality of the prospective juror's questionnaire and voir dire, however, revealed that his attitude towards the death penalty did not render him a juror that the prosecution would properly disfavor. In response to other questions on the questionnaire, the prospective juror indicated that he did not feel that the death penalty was wrong and that he had "no belief" as to whether the death penalty was imposed too often or too seldom. (First Supplemental CT 1621.) During voir dire, the prospective juror repeatedly explained that he would follow the law and that he would vote for a death sentence if the circumstances so warranted. (RT 962, 963, 965.) Thus the record does not establish that Prospective Juror 045921's attitude toward the death penalty, rather than his race, was the basis for the prosecutor to exercise a peremptory challenge.

The prosecutor's use of a pretextual explanation to justify his challenge of Prospective Juror 045921 calls into question the validity of her proffered reasons for excusing Prospective Jurors 042519 and 045787. In addition, it is significant that the

prosecutor did not question Prospective Jurors 042519 and 045787 on all of the subject matters that she claimed to be concerned about when explaining the State's peremptory challenges. "'[T]he States's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" (*Miller-El v. Dretke* (2005) 125 S.Ct. 2317, 2328, quoting *Ex Parte Travis* (Ala. 2000) 776 So.2d 874, 881.) In *Miller-El*, the prosecutor failed to question the prospective juror about whether his brother's prior conviction would influence his decision. This omission suggested to the Supreme Court that the juror's family history did not really matter and that the proffered rationale for the peremptory challenge was pretextual. (*Miller-El v. Dretke*, *supra*, 125 S.Ct. at p. 2328.)

Here, the prosecutor did not question Prospective Juror 045787 about her belief that the police previously had been unkind to her brother, or her knowledge of three persons who had been falsely accused of committing crimes. (RT 1030-1032.) Nor did she question Prospective Juror 042519 about her prior arrest for welfare fraud or her ability to be fair to the prosecution. (RT 1094-1097.) As in *Miller-El*, these omissions suggested that the proffered explanations for the peremptory challenges were not legitimate.

Finally, in defending the challenges, respondent improperly refers to statements made in the questionnaires of the prospective jurors that were not relied upon by the

prosecutor in the trial court.[11] (RB, at pp. 97-98.) Under *Wheeler* and *Batson*, the trial court must review the reasons actually articulated by the prosecutor, not speculative reasons, in order to determine whether the challenges were based on race. (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 97-98; *Miller-El v. Dretke*, *supra*, 125 S.Ct. at p. 2332.)

The prosecutor's discriminatory use of her peremptory challenges violated appellant's right to be tried by a representative jury pursuant to article I, section 16 of the California Constitution, and his right to the equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution.

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[11] Respondent claims that Prospective Juror 045219 admitted in her questionnaire that it would be difficult for her to understand all of the legal proceedings, that she did not wish to be a juror and that she did not believe in the death penalty. (RB, at p. 97.) Prospective Juror 045787, according to respondent, stated in her questionnaire that she did not want to serve as a juror and that she had previously been convicted of driving under the influence. (RB, at p. 98.) None of these responses, however, were articulated by the prosecutor as reasons for exercising peremptory challenges.

## E. APPELLANT DID NOT WAIVE HIS CONSTITUTIONAL CLAIMS REGARDING THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF EMMA FOREMAN'S ALLEGED PRIOR STATEMENT; AND THE TRIAL COURT DID NOT PROPERLY ADMIT THE STATEMENT INTO EVIDENCE

### 1. Appellant Did Not Waive His Constitutional Claims

Respondent initially contends that appellant waived his constitutional claims because trial counsel did not object on those specific grounds below. (RB, at p. 102.) Assuming arguendo the absence of such objections, this Court is not barred from reviewing the constitutional claims. As stated in *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172, "our Supreme Court and other appellate courts have . . . sometimes addressed such constitutional questions in the absence of proper objection below. (See, e.g., *Hale v. Morgan* (1978) 22 Cal.3d 388, 394 ['[A]lthough California authorities on the point are not uniform, our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved [citation]. . . .']; *People v. Allen* (1974) 41 Cal.App.3d 196, 201, fn. 1 [This court (Division Two) reached the merits of a constitutional evidence challenge even though the record showed no objection, because 'the constitutional question can properly be raised for the first time on appeal [citation].']; *People v. Norwood* (1972) 26 Cal.App.3d 148, 153 ['A matter normally not reviewable upon direct appeal, but which is . . . vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal.']; *Bayside Timber Co. v.*

*Board of Supervisors* (1971) 20 Cal.App.3d 1, 5 ['[W]hether the rule shall be applied is largely a question of the appellate court's discretion'].)"

In addition, "[t]he duty to object will be excused when an 'objection or request for admonition would have been futile or would not have cured the [alleged] harm . . . .' [Citation.]" (*People v. Carrillo* (2004) 119 Cal.App.4th 94, 101; see also *People v. Pitts* (1990) 223 Cal.App.3d 606, 692 ["the (contemporaneous objection) rule is not applicable where any objection by defense counsel would almost certainly have been overruled"].)

Application of this exception to the contemporaneous objection rule is found in *People v. Jaspal* (1991) 234 Cal.App.3d 1446. In *Jaspal*, the defendant was charged with murder. He was apprehended in England, and after extradition proceedings returned to the United States. During cross-examination, the prosecution questioned the defendant about his silence when witnesses testified falsely on his behalf at the extradition hearing. Defense counsel objected twice on relevance grounds, but not on the ground that the questioning violated the defendant's constitutional right to remain silent. (*Id.*, at p. 1453.) Defense counsel also did not object during closing argument when the prosecutor commented on the defendant's silence. (*Id.*, at p. 1461.) The Court of Appeal, nonetheless, found that trial counsel's failure to make a timely and specific objection did not preclude review of the defendant's claim that the prosecutor's questioning and comments violated his right to remain silent. (*Id.*, at p. 1455.) The court

explained that the issue was not waived since, in light of the trial court's prior rulings, "a timely objection and request for an admonition would have been futile." (*Ibid.*)

Similarly, in the present case, objections based on appellant's constitutional claims – violations of his rights to due process of law and confrontation of witnesses – would have been futile. The factual basis for the constitutional claims is identical to that of the hearsay objection that was made at trial. Trial counsel claimed that Foreman's prior statement was inadmissible because it was not inconsistent with her testimony. The trial court, however, believed that the there was an inconsistency and overruled the objection. Given the trial court's ruling that Foreman's prior statement was not hearsay, it would have been futile for trial counsel also to argue that the erroneous admission of the prior statement violated appellant's related constitutional rights.

Finally, review on the merits of the constitutional claims is permissible "in order to forestall a possible claim of ineffectiveness of counsel based on failure to object." (*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 693, citing *People v. Lewis* (1990) 50 Cal.3d 262, 282-283.) Appellant is guaranteed the effective assistance of counsel under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

### 2. Emma Foreman's Alleged Prior Statement Was Not Inconsistent with Her Testimony

Respondent's argument that Emma Foreman's prior statement to Lieutenant Porter

was inconsistent with her trial testimony is premised on this distinction: at trial, Foreman testified that appellant had told her daughter about doing harm to some elderly people, but in her interview with Lieutenant Porter, Foreman said that appellant had made the statement to her. (RB, at p. 103.) This inconsistency, however, related only to the identity of the person to whom appellant made the statement: Was it Foreman or was it her daughter? There was no inconsistency, and respondent does not argue otherwise, between Foreman's trial testimony and her extrajudicial statement regarding what appellant said about harming elderly people. At trial, Foreman never testified to the details of the statement that she heard appellant make. Thus, Porter's testimony regarding the content of what Foreman claimed appellant told her was inadmissible hearsay.

Respondent also argues that "[i]f for some reason the trial court believed that Foreman was being evasive in denying that appellant had not 'specifically' made a statement to her about killing an elderly couple in Bakersfield, then the trial court properly admitted Foreman's statement to Porter on that basis." (RB, at p. 103.) Respondent's reasoning is flawed for two reasons. First, Foreman never denied in her testimony that appellant "specifically" made a statement about killing an elderly Bakersfield couple. When asked what appellant said, Foreman simply gave a non-responsive answer. (RT 2247.) Second, respondent is merely speculating that the trial court may have found that Foreman was being deliberately evasive. The prosecutor

advanced no such argument, and the trial court articulated no such finding, when admitting Foreman's prior statement. (RT 2390-2391.) Moreover, there was no indication in the record that Foreman had any reluctance in testifying against appellant, whom she greatly disliked. (RT 2249.)

Finally, respondent argues that use of a prior inconsistent statement for impeachment of a witness satisfies the confrontation clause where the declarant testifies at the trial. (RB, at p. 103.) Respondent's argument incorrectly assumes that Foreman's prior statement was inconsistent with her trial testimony and was thus properly admitted. Respondent also ignores the limiting statement in *California v. Green* (1970) 399 U.S. 149, 164 (italics added), that "the Confrontation Clause does not require excluding from evidence prior [extrajudicial] statements of a witness *who concedes making the statements*" when testifying under oath. A witness's admission that the prior statement was made satisfies the concern of the confrontation clause that evidence against an accused is reliable. Here, Foreman never addressed at trial whether she had made a prior statement to Lieutenant Porter, so the exception identified in *California v. Green* is inapplicable. Consequently, the testimony that Foreman had made such a statement was not reliable, and its admission violated appellant's right to confrontation..

Foreman's extrajudicial statement that appellant admitted killing an elderly couple in Bakersfield was hearsay. Its admission violated appellant's state and federal constitutional rights to due process of law and to confront the witnesses against him. As

set forth in the opening brief, the evidentiary error prejudiced appellant. (AOB, at pp. 156-163.)

## F. THE ERRONEOUS ADMISSION OF PHINNEY'S EXTRAJUDICIAL STATEMENTS TO SGT. DIEDERICH VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS OF CONFRONTATION AND DUE PROCESS

In seeking admission of Phinney's earlier statement to Diederich, the prosecution relied exclusively upon two areas of Phinney's direct and cross-examination as foundation – namely: (1) Phinney's testimony that he did not recall the exact date he ran into appellant; and (2) Phinney's description of jewelry and other personal items allegedly seen in appellant's possession. With respect to the first ground, the trial court ruled that Phinney's statement to Diederich that he met appellant in September 1984 was admissible as a prior inconsistent statement. Neither counsel nor the court suggested that Phinney's memory loss was deliberately evasive.

The trial court also found Phinney's statement to Diederich admissible as a prior consistent statement to establish that Phinney's description of the incriminating property had not varied between the time of the statement and trial. However, defense counsel had not challenged Phinney's description of the property as a recent fabrication, much less one motivated by Laskowski's re-testing of the handgun – the motive conjectured by the trial judge.

No doubt recognizing the deficiencies in the trial court's findings, respondent advances two additional arguments to fill the foundational gaps. Respondent suggests for the first time on appeal that Phinney's lack of recall was feigned due to his fear of reprisal. (RB, at p. 109.) Respondent also makes the novel argument that Phinney's

entire statement to Diederich was admissible under the rule of completeness set forth in Evidence Code section 356. (RB, at p. 111.) Neither contention has merit.

### 1. The Trial Court Improperly Admitted Diederich's Testimony as a Prior Inconsistent Statement

For respondent to prevail on his argument, Phinney must have been both deliberately evasive and very forthcoming. As portrayed by respondent, Phinney was so reluctant to testify against appellant that he feigned memory loss as to one small detail, yet managed to overcome his fear sufficiently to volunteer damaging evidence connecting appellant to the handgun, and hence to the Mercks homicides. Respondent's resort to this untenable argument is an attempt to avoid conceding that the trial court erred in admitting Phinney's statement to Diederich as a prior inconsistent statement under Evidence Code section 1235. (See *People v. Sam* (1969) 71 Cal.2d 194, 208-210 [no inconsistency and, therefore no impeachment value, in statements the witness claims to have forgotten].)

For obvious reasons – most notably, the intervening passage of 12 years – neither counsel nor the trial judge questioned the genuineness of Phinney's lack of recall. Indeed, in anticipation of the problem, the prosecution's first step in preparing Phinney to testify was to provide him with the transcript of his earlier statement with the supporting police reports. It should be noted that Sergeant Diederich also had to refresh his own recollection, and his recall of events was as spotty as Phinney's, even without

Phinney's exacerbating mental impairment. Yet respondent surely would not contend that Diederich was purposefully evasive.

Moreover, there is no evidence that Phinney suffered any suspect sort of "selective amnesia." (Compare, *People v. Green* (1971) 3 Cal.3d 981, 986-989 ["inherently incredible" that witness would clearly remember every inconsequential fact but forget every concurrent material matter].) To the contrary, the testimony offered by Phinney, whose memory had been refreshed before he took the stand, was mostly consistent with what he had said to Diederich, and where it diverged, it was more, not less, incriminating than the earlier statement. Indeed, the two examples respondent gives to show that Phinney's memory worked fairly well prove appellant's point that Phinney was not deliberately assisting the defense.

Phinney's recollection of a silver dollar that he had gotten as a child, although elicited on cross-examination, was helpful to the prosecution in explaining why Phinney remembered a particular silver coin that he had described both in his earlier statement and on direct examination. (RT 1658, 1717.)

Similarly, Phinney was aiding the prosecution, not the defense, when he disavowed his prior statement regarding the acquisition of the gun, which had been far more ambiguous than his trial testimony. (RT 1734-1735.) Thus, the situation here is the opposite of those in which the courts have found implied inconsistency. In such cases, deliberate evasiveness was inferred from a telling discrepancy between the

witness's failure to remember incriminating details while his memory for neutral or exculpatory facts was unimpaired. Here, in contrast, Phinney failed to remember only one incriminating detail, the exact date he met appellant, while purporting to recall numerous other damaging facts, including his revised account of the acquisition of the gun. The suggestion that Phinney was deterred from testifying by a remark made by appellant 11 years earlier is likewise refuted by Phinney's highly incriminating testimony, as well as by commonsense. (RB, at pp. 108-109.) There is not the slightest support in the record or case law for respondent's contention that Phinney was deliberately evasive.

Moreover, such argument is not a proper ground for affirmance. Although, an order or judgment may be affirmed on appeal if it is correct on any theory, regardless of the trial court's reasons (*Green v Superior Court* (1985) 40 Cal.3d 126, 138; *Bailon v. Superior Court* (2002) 98 Cal.App.4th 1331, 1339), a respondent may assert a new theory to establish that an order was correct "*unless*" to do so would unfairly prejudice appellant by depriving him or her of the opportunity to present evidence in opposition. (*Id.*, at p. 1339 [emphasis in original]; *Manning v. Superior Court* (1973) 33 Cal.App.3d 586, 600-601 ["[t]his is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions"].) That exception applies with particular force to this case. The prosecutor did not argue implied inconsistency at trial. Therefore, defense counsel had no

opportunity to litigate the issue, much less marshal and develop the relevant evidence. It thus would be wholly unfair to sustain the trial court's ruling on a theory respondent asserts for the first time on appeal. Accordingly, the trial court's ruling admitting Phinney's statement to Diederich as a prior inconsistent statement cannot be affirmed on any ground.

### 2. The Trial Court Erroneously Admitted Diederich's Testimony as a Prior Consistent Statement

The only portion of Phinney's prior statement which the prosecution sought to introduce under Evidence Code sections 1236 and 791 was Phinney's conforming description of jewelry, coins, a billfold, checks and similar items that he claimed to have seen in appellant's possession. The court admitted that portion of the prior statement. (RT 1846-1847.) That, however, is not the portion of Phinney's trial testimony respondent offers as the foundation for the court's ruling. Rather, just as in its argument regarding the admission of the prior inconsistent statement, respondent focuses on defense counsel's impeachment of Phinney's revised trial testimony that he personally acquired the .25 caliber handgun from appellant. (RB, at p. 109.) Not only is respondent's argument flawed by its misreading of the record, but, more fundamentally, there is no rule of evidence which allows a party to introduce a prior statement – much less an "entire" prior statement – on a subject entirely different from the part of the witness's testimony that had been impeached. (See *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337, 1349 [neither Evidence Code section 1235 nor section 1236

permits the "wholesale admission into evidence of entire works in which a [hearsay] statement appears"].)

Respondent first presents another novel argument under Evidence Code section 356.[12] That section provides generally that where one part of a conversation is put into evidence, the opposing party may ordinarily introduce the remainder of the conversation "to prevent the use of selected aspects of a conversation "so as to create a misleading impression on the subjects addressed." (RB, at p.112; *People v. Arias* (1996) 13 Cal.4th 92, 156.) None of the foundational requirements of section 356 are met here. It was the same party, the prosecution, that, in its direct examination of Phinney, initiated the inquiries into his prior statement to Diederich, and then itself sought to introduce more of the statement to bolster Phinney's credibility. In his cross-examination, defense counsel confined himself to the subject areas of the prior statement that had been introduced on direct. Where the prosecutor thought that the cross-examination had left a misleading impression, she fully and capably probed those areas on re-direct. (RT 1739-1742.) Section 356 simply had no relevance to the normal give-and-take of direct and cross-examination, as occurred in this case.

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[12] Respondent recognizes that the section 356 argument was not raised below and therefore cites to the rule of *People v. Green*, *supra*, 40 Cal.3d at 138-139, that a correct decision of the trial court must be affirmed on appeal even if it is based on erroneous reasons. That said, as discussed above, it would be grossly unfair to affirm the trial court's ruling on the basis of an argument never advanced at trial. Additionally, respondent's section 356 argument is without merit.

The cases cited by respondent are inapposite. In two of them, *People v. Pride* (1992) 3 Cal.4th 195, 235 and *People v. Arias* (1996) 13 Cal.4th 92, 156, the defendants attempted to introduce portions of their own statements under the authority of section 356. In *Pride*, the Court upheld the trial judge's exclusion of the interview tapes defendant sought to play as irrelevant and unduly prejudicial. In *Arias*, the Court did not even address whether error occurred because it concluded that any error was harmless. In *People v. Hamilton* (1989) 48 Cal.3d 1142, 1173-1174, the Court affirmed the trial court's admission of a recording of a confession by one of the defendant's sisters, an accomplice who later testified at his trial, where defense counsel had played a portion of the recorded confession to demonstrate to the jury that the transcript of the confession was incorrect. The Court reasoned that, even if the evidence had been excluded under section 356, the prosecutor could have secured its admission by another route.

Here, the prosecution was not seeking the admission of a complementary, clarifying or contradictory portion of Phinney's statement, as contemplated by section 356. Rather, it was seeking to introduce, through a more credible and coherent witness, the very same statement that was disjointed and manifestly untrustworthy when uttered by Phinney. As such, the statement was either admissible under section 1236, or not at all.

Respondent's argument under sections 1236 and 791 fares no better.

As already noted, the argument below was directed solely to Phinney's statement

and testimony regarding various items of jewelry and other personal property seen in appellant's possession. Because the trial and pre-trial statements were in fact consistent, and there was no intervening inconsistent statement, Phinney's statement to Diederich was not admissible under section 791(a). (Evid. Code § 791(a) [prior consistent statement is inadmissible unless offered after a later inconsistent statement has been admitted for impeachment].) Because, Phinney's earlier statement and trial testimony were basically the same, it would have been both illogical and fruitless for counsel to attack the in-court statement on the basis of recent fabrication or changed motive. To impeach Phinney's trial testimony, defense counsel was forced to challenge the veracity of the earlier statement. Therefore, Phinney's prior consistent statement to Diederich also was not admissible under section 791(b) either. (Evid. Code § 791(b) [prior consistent statement is inadmissible unless an express or implied charge has been made of recent fabrication or of bias or improper motive alleged to have arisen between the earlier statement and the trial testimony].)

Instead of discussing the actual statement and parallel testimony at issue, respondent engages in a diversionary argument regarding a wholly unrelated subject – Phinney's inconsistent statements about his and Lutts's acquisition of the .25 Colt handgun. Phinney made two pretrial statements to the police: the first, the statement to Diederich and Fraley in December, 1984, and the second, the statement to Detective Christopherson in August, 1994 at the time of appellant's preliminary hearing.

During the 1984 interview, Phinney told the police that the Colt belonged to Lutts, who had obtained it in a drug exchange with appellant. (RT 1866.) In the 1994 interview with Christopherson, Phinney completely changed his story about the gun. For the first time, Phinney told Christopherson that he, not Lutts, acquired the Colt from appellant, and that Lutts had altered the rifling in the barrel of the Colt because the "gun had been used in a murder." (RT 1894, 1902-1904.) Based on this new information, the prosecution directed criminalist Gregory Laskowski to re-examine the Colt, resulting in his confirmation that it was the murder weapon.

On direct examination, Phinney repeated his 1994 statement that he personally had obtained the gun from appellant, and that he and Lutts had altered the barrel. There were major discrepancies between his testimony regarding the Colt and his 1984 statement. There were only minor differences between his trial testimony and his 1994 statement. On direct, Phinney was allowed to explain that he had made the earlier, false statements in 1984 to distance himself from the gun. (RT 1660.)

When further queried on cross-examination, Phinney responded that he may have lied or been confused when he told Diederich that it was Lutts who had received the Colt handgun from appellant. (RT 1736.)

Respondent argues that this series of statements – all regarding the acquisition of the handgun – supports the admission under section 791(b) of Phinney's statement to Diederich. Respondent, however, never specifically identifies which "portion of

Phinney's statement" became admissible as a result of his impeachment regarding the trade for the handgun. Such explicitness would have revealed that respondent's argument is, at best, a non sequitur and, at worst, a dangerous and unauthorized expansion of the hearsay exception for prior consistent statements.

If respondent's argument and the trial judge's ruling were correct, a witness who had been inconsistent – indeed, lied – about one subject could be rehabilitated by the admission of a prior consistent statement regarding an entirely different subject to show that the witness was truthful in at least one respect. California has never recognized such a boundless hearsay exception for prior consistent statements.

*People v. Ainsworth* (1988) 45 Cal.3d 984, upon which respondent relies, is not to the contrary. (RB, at p.111.) In that case, two defendants, Ainsworth and Bayles were jointly charged and tried for capital murder with the special circumstances of robbery and kidnap. At their joint trial, co-defendant Bayles testified that Ainsworth alone and without Bayles's knowledge entered the victim's car and shot her. Without knowing that the victim had been shot, Bayles got into the car and then remained for the ride out of fear for his own life. (*Id.*, at p. 999.) Bayles' recollection was refreshed on direct examination by a transcribed version of an earlier statement he made to the police. (*Id.*, at p. 1013.) Both the prosecutor and Ainsworth's counsel used portions of the extrajudicial statement to impeach Bayles and, on redirect, his attorney sought to rehabilitate Bayle's credibility with testimony of several prior consistent statements.

(*Ibid.*) Subsequently, the detective to whom Bayles made the extrajudicial statement was called as a defense witness to relate details of the statement. (*Ibid.*)

At trial, both the prosecutor and Ainsworth's counsel objected to the introduction of Bayles' prior statements as repetitious hearsay. However, on Ainsworth's appeal, the prosecution argued for the admissibility of the detective's testimony.

This Court held that the testimony was not admissible under section 791(a) because the prior consistent and inconsistent statements were made at the same time. (*Id.*, at p. 1014.) Nevertheless, while acknowledging that it was relying on scant authority, the Court upheld the admission of the prior statement under section 791(b) by construing the prosecution's impeachment by use of prior inconsistent statements as "an implied charge of recent fabrication or improper testimonial motive" arising after the original statement. (*Id.*, at p. 1015.) That motive, according to the prosecution's argument, was Bayles' recently acquired awareness and understanding of the legal nuances of some of his earlier admissions. (*Ibid.*)

Because Phinney's prior inconsistent statement, that Lutts obtained the gun from appellant, and the proffered prior consistent statement describing the jewelry and other items seen in appellant's possession were made at the same time, section 791(a) does not apply. As for section 791(b), *Ainsworth* is plainly distinguishable from the case at hand. In *Ainsworth*, the Court rejected defense counsel's contention that the differences between Bayles' trial testimony and his post-arrest statement reflected a mere refinement

of his abiding motive, namely, to place the major blame on his co-perpetrator. Instead, the Court agreed with the prosecution that "whatever story Bayles had earlier concocted," his trial testimony had been altered from his pretrial statements "to explain away" various legal liabilities "unwittingly invoked" by his uncounseled extrajudicial admissions. (*Id.*, at p. 1014.)

There is no analogous motivational change in this case. Following the trial court's lead, respondent argues that "the confirmation of the .25-caliber pistol as the murder weapon changed the calculus of the case and provided a concrete basis for Phinney's motivation or bias." (RB, at p.114.) The most obvious defect in this explanation is that Phinney altered his statement regarding the acquisition of the gun *two years* before Laskowski's "confirmation" of the match.[13]

Phinney's revised statement that it was he – not Lutts, as formerly related – who obtained the gun from appellant was first made in his meeting with Detective Christopherson in August, 1994. At that interview, Phinney also informed Christopherson of the use of the barrel-brush to efface the Colt's rifling marks. (RT 1662, 1894, 1902-1904.) Thus, it makes no sense that Phinney would have altered his testimony at trial to distance himself from the Colt when (1) he had already changed his version of events well before trial; (2) the new version increased, rather than diminished,

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[13]As early as his statement to Diederich and Fraley, Phinney claimed he was motivated by fear that the Colt might have been involved in the murders of the Mercks. (RT 1737-1738.)

his connection to the gun; and (3) he was personally responsible for the retesting that purportedly gave rise to his new motivation. These considerations were ignored by the court and continue to be ignored in respondent's argument.

Moreover, because Phinney had made both consistent and inconsistent prior statements regarding the acquisition of the Colt, the efficacy of his impeachment did not depend on which, if any, of the versions were true. Rather, the inconsistencies themselves, not the order of the statements, supported the inference that Phinney had lied at some point about his contact with the gun. Thus, this case differs from *Ainsworth* in that the "arrow of time," which is the key to admissibility under sections 1236 and 791 was irrelevant to defense counsel's impeachment of Phinney's credibility.

*Ainsworth* also does not support respondent's contention that where one party uses only a portion of a statement to impeach a witness's statement, "the rest" is automatically admissible. (RB, at p. 111.) Although *Ainsworth* states in one place that the "the entire pretrial statement, which was consistent with [the co-defendant's] trial testimony, . . . ." was properly admitted, elsewhere in the decision, the Court makes clear that only "portions of [the] statement " and "several prior consistent statements" had actually been admitted. (*Ainsworth*, *supra*, 45 Cal.3d at pp. 1013-1014.) Because the co-defendant's trial testimony had been broadly impeached by both the prosecution and Ainsworth's attorney – on the theory that the co-defendant had fabricated his trial testimony since his earlier statement – a significant portion of his prior statement was

relevant to rebutting the implied charge of recent fabrication.

Here, in contrast, no portion of the earlier statement could have had a rehabilitative effect with respect to Phinney's inconsistent testimony regarding the Colt, since he admitted that he lied about the Colt when he made the statement to Diederich. (RT 1734-1735.)

In short, Diederich's recitation of Phinney's prior statement did not qualify for admission as a prior consistent statement under Evidence Code sections 1236 and 791, and also cannot qualify for admission as prior recollection recorded under Evidence Code section 1237.

### 3. The Trial Court Erroneously Admitted Phinney's Prior Statement as Prior Recollection Recorded

As with its other arguments, respondent again fails to specify the portions of Phinney's statement that purportedly satisfied the requirements for admissibility under Evidence Code section 1237. Since the requirements for admission under sections 1235, 1236 and 1237 are incompatible, respondent's lack of specificity, whether inadvertent or deliberate, is a serious flaw in its argument. Indeed, under appellant's analysis, Phinney's earlier statement that he ran into appellant in September, 1984 might have been admissible under section 1237, assuming all other criteria of admissibility were met, because Phinney's failure of recollection as to that fact was apparently genuine. Under respondent's contrary approach, Phinney's lapse of memory was feigned and therefore not a proper foundation for admitting his earlier statement as reliable prior recollection

recorded.

Indeed, based upon respondent's argument, no portion of Phinney's prior statement was admissible under section 1237. Respondent acknowledges that Phinney's memory, although occasionally spotty," was otherwise "clear[]," "fairly detailed," and consistent. (RB, at p.115.) Respondent emphasizes Phinney's well-detailed testimony about the various "Mercks' items he allegedly saw in appellant's possession, his ability to "clearly remember[] his arrest, the .25-caliber pistol, and the initial meeting in the courthouse, when he volunteered information about the Mercks murders." (RB, at p.115, citing RT 1653-1669, 1691.) Throughout trial and in its closing argument, the prosecution missed no opportunity to vouch for the truth of Phinney's "fairly detailed" testimony. (See RT 1653-1654, 2662-2665.) Thus, as depicted by respondent, Phinney's present recollection of the facts was sufficient to enable him to testify and no extrinsic evidence of those same facts was needed or permissible

In contrast, appellant argued that Phinney's recollection was so insufficient and unsound that he could not reliably attest to the truthfulness of his earlier statement, as section 1237 requires. At one point, Phinney testified that he could not remember what he had told the officers. Later, he stated that he could not remember what had occurred, and later yet, that he could remember neither what he had said nor what had occurred. (See, e.g., RT 1657, 1734.) Thus, it is not that Phinney failed to utter some "magic words" to lay the foundation under section 1237, but that any words he did utter were

contradicted by his later answers.

Phinney's improper motives and mental infirmities distinguish this case from *People v. Miller* (1996) 46 Cal.App.4th 412. *Miller* involved the gang-related shootings of two police officers. Shortly after the shootings, a resident of the area reported to the police that a few weeks before the shootings she had overheard one of the defendants and other gang members talking about shooting the police. (*Id.*, at p. 420.) At trial, however, she no longer recalled the specifics of the conversation. (*Ibid.*) Over defendants' objections, the trial court admitted the witness's prior, more damaging statement to the police under section 1237.

The Court of Appeal affirmed the ruling, rejecting defendants' arguments based upon the lapse of time between the overhearing of the statement and the report to the police, and upon the concomitant infringement of the defendants' confrontation rights. (*Id.*, at pp. 421-422.)

With respect to the former objection, the court noted the absence of any authority holding that such a lapse rendered the former statement inadmissible. (*Id.*, at p. 421.) As for the latter objection, the court relied on this Court's holding in *People v. Cummings* (1993) 4 Cal.4th 1233, 1292-1293 that "[a]dmission of evidence pursuant to Evidence Code section 1237 does not impermissibly deny defendants their federal Sixth Amendment or state article I, section 15 constitutional rights to confrontation and cross-examination if the record of the witness's past statement is properly authenticated and the

statutorily required foundation for admission is laid." Neither *Miller* nor *Cummings* addressed the foundational deficits present in this case. As the court in *Miller* correctly observed, no case has held that a lapse of time is fatal to admissibility under section 1237. On the other hand, no case has considered a lapse of time greater than a few days or weeks. Phinney waited several months to speak to the police, and did so only after reading a newspaper article describing the crime.

Unlike this case, the witness in *Miller* had no mental impairments or suspect motives which would call into question the reliability of her earlier statement, even if some considerable time had elapsed. The witness in *Cummings*, though in withdrawal and sometimes delusional, reported to the police within a few days of his conversation with the defendant. Although that witness had the typical "jail house" informant's motive for making the report, it paled compared to Phinney's array of aggravated and highly personal motives for implicating appellant in the Mercks homicides.

Under the circumstances here, it was wholly unreasonable for the trial court to admit Phinney's statement to Diederich, when the earlier statement was devoid of any objective indicia of reliability.

Moreover, as noted in appellant's opening brief, *Cummings*' rejection of the Sixth Amendment confrontation clause challenge to section 1237 has been placed in doubt by the United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36. (See also *Bockting v. Bayer* (9th Cir. 2005) 399 F.3d 1010 [applying *Crawford*

retroactively].) This Court has addressed *Crawford*'s impact on the admissibility of dying declarations and statements against penal interest (not admitted for the truth), but not on the prior statements of amnesic or seriously impaired witnesses. (See *People v. Combs* (2004) 34 Cal.4th 821; *People v. Monterroso* (2004) 34 Cal.4th 743.) Since respondent does not address appellant's Sixth Amendment contentions, appellant stands on the argument advanced in his opening brief.

### 4. The Trial Court Committed Prejudicial Error in Admitting Phinney's Prior Statement Through the Testimony of Sgt. Diederich

Respondent contends that any error in admitting Phinney's statement to Diederich was harmless, but fails to explain why that is so. Surely it cannot be argued that Phinney's testimony was unimportant. Without Phinney's connecting the .25-Colt handgun to appellant, Laskowski's confirmation of the gun as the murder weapon would have been of negligible significance. And, without Diederich's implicit vouching for Phinney's truthfulness, the jury likely would have rejected Phinney's revisionist testimony, twelve years after the fact, that he, not Lutts, had obtained the gun from appellant. At least one, and possibly both, of Phinney's stories had to be false, but there was no way for the jury to independently determine which, if either of them, was true. There was no independent corroboration for either of Phinney's stories, and, absent corroboration, there was no way to tell when Phinney was lying and when he, if ever, he was telling the truth.

Thus, in light of the major deficiencies in the government's case – the unreliable

witnesses and the inconsistent forensics – the sanitizing admission of Phinney's prior statement through the testimony of a more credible witness was not harmless error, and certainly not harmless beyond a reasonable doubt.

## G. THE TRIAL COURT ERRED IN ADMITTING LAWSKOWSKI'S TESTIMONY WHICH WAS BASED ON AN UNTESTED SCIENTIFIC TECHNIQUE LACKING GENERAL ACCEPTANCE IN THE FORENSICS COMMUNITY

Respondent contends that Laskowski's use of Mikrosil for ballistics comparisons was not a new scientific technique, and therefore not subject to the *Kelly-Frye* test. (RB, at p. 126.) But respondent cites no case approving the use of Mikrosil in casting gun barrel molds. (Cf., *People v. Leahy* (1994) 8 Cal.4th 587, 605 [HGN test is a "new scientific procedure" because its courtroom use not sufficiently established despite repeated challenges in courtroom].) The Mikrosil casting technique also had not received any scientific recognition beyond that of a single, abstract research paper. (See *People v. King* (1968) 266 Cal.App.2d 437 [prosecution's chief witness supporting the admissibility of voiceprint evidence was a pioneer in that field].)

Respondent attempts to differentiate between a "new technique" and a "new material... using an old technique." (RB, at p. 126.) But this distinction, even if it were valid, begs the question. While "ballistics" itself is a well-established field, the specific technique of Mikrosil barrel casting is a new, unproven and unaccepted method of firearms identification.

The traditional method for firearms identification, long-approved by the community of ballistics experts and accepted by the courts, involves a comparison of the markings on a spent bullet with the markings on a test-fired bullet to determine if they match. The unique markings on a spent bullet are not produced by static contact with the

barrel, but rather by the combination of forces, including rotational forces, that act on the bullet as it actually passes through the gun barrel.

> The forces involved in firing a cartridge push the bullet, which is relatively soft, through the barrel where it comes in contact with rifling and other minute features that leave striation marks on the bullet. The same forces cause the fired cartridge case to slam against the breech face leaving impressed markings from the tooled surface of the breech face on the soft metal of the case base. The fired cartridge case is also marked by the firing pin when it strikes the primer, the extractor when it pulls the fired cartridge case from the chamber and the ejector which it hits to be ejected.

Hawley, Firearms Forensics - Firearms Identification at Trial (updated August 2004) 60 Am.Jur.3d Proof of Facts 1, 24, 28.

No literature in the field confirmed Laskowski's untested assumption that a cast of a stationary gun barrel, and only a portion of the barrel, at that, would produce the distinct pattern of markings created by the bullet traveling the length of the barrel under propulsive forces. There had been no determination of the relative error rate when a Mikrosil barrel casting was used instead of the traditional method of firearms identification. In short, the technique was untested at the time Laskowski used it, and therefore could not have been generally accepted. In *Sexton v. State of Texas* (2002) 93 S.W. 96, cited in Hawley, *supra,* the Texas Court of Criminal Appeals held that firearms identification evidence was erroneously admitted where the state failed to produce evidence of the reliability of the technique used in the case. In *Sexton*, a qualified firearms identification expert testified that cartridge cases from unfired bullets found in the defendant's apartment had distinct marks that matched fired cartridge cases found at

the scene of the offense. (*Id.*, at p. 98.)

The expert explained that the marks left on a cartridge from a magazine are unique to that magazine, like a fingerprint. (*Id.*, at p. 99.) He claimed that if the magazine marks left on the cartridge cases are sufficiently clear, a firearms and toolmark expert could determine with near certainty, using a comparison microscope, whether the shells had been cycled through the same magazine. (*Ibid.*) He further testified that his supervisor had examined the same live shells and cartridge cases and reached the same conclusion that they matched. (*Ibid.*)

Additionally, the intermediate Court of Appeals had noted, in affirming the trial court's decision, that "the toolmark theory for the identification of fired bullets enjoys widespread acceptance and that [the expert], in his testimony, mentioned three sources discussing the identification of fired cartridges from toolmarks." (*Id.*, at 100.)

Taking all this into account, the Criminal Appeals Court nonetheless concluded that the theory that unfired shell casings could be identified by toolmarks was not reliable. Although the court found that the expert was well-qualified in his field, *Sexton*'s was the first case in which he examined magazine marks and testified about the results. (*Id.*, at p. 101.) Moreover, while the literature may have generally supported the theory of using toolmarks for connecting cartridges generally, it did not support the particular application in that case. (*Ibid.*)

The court's sound reasoning in *Sexton* should guide the Court's decision in this

case. Although firearms comparisons fall within the broad category of toolmark identification procedures, there are significant differences between the use of toolmarks to identify the essentially stationary impressions on prying instruments and their adaptation to the markings produced by the dynamic forces that propel a bullet through the length of a gun barrel. This all-important distinction may explain why the literature discussing Mikrosil barrel molds was limited to a single, theoretical article; and why appellant's was the first case in which any criminalist had used the technique to examine firearms markings and testified about the results. Moreover, unlike the criminalist in *Sexton,* Laskowski did not have any other ballistics expert review his results, nor did he perform any tests on known bullets and firearms to determine the comparative error rate of the Mikrosil technique.

Accordingly, the trial court erred in admitting Laskowski's testimony because all methodologies for comparing spent bullets and firearms are not equally reliable or well-accepted by the forensics community and the courts. (See RT 2157-2158 [. . . *it is the comparison of marks that are imparted to a slug that – that is expended from a firearm with the markings of a firearm.* That has been the methodology employed for years." (emphasis added)]; Cf., *People v. Mitchell* (2003) 110 Cal.App.4th 772 [while establishing a person's identity in a canine scent lineup is not new, using a scent transfer unit is a "novel device" used in furtherance of the technique].) The Mikrosil technique used by Laskowski had no proven reliability and was, at best, the subject of peer

curiosity, rather than an accepted methodology. (RT 2150.)

Respondent does not assert that any of the articles or treatises it cites specifically endorse Laskowski's technique, as distinguished from the general principles of firearms identification. (RB, at p. 126.) Respondent also does not cite any apposite case law.

In *United States v. Foster* (D.Md. 2004) 300 F.Supp.2d 375, upon which respondent relies, the district court rejected a sweeping challenge to the entire field of ballistics. (RB, at p. 127, fn. 43.) No separate challenge had been made to the particular technique used in that case, which was well-established.

In *People v. Ayala* (2000) 24 Cal.4th 243, 281-283, the victims were shot with both a .38 and a .22 -caliber guns. The fatal bullet could not be extracted from one of the victims. After an investigator taped two bullets, one a .22-caliber and the other a .38-caliber bullet, to the victim's skin near the lodged bullet, a radiologist took an x-ray, allowing a visual comparison of the size of the bullets. (*Id.*, at p. 280.) The radiologist did not testify as a ballistics expert. Rather, he testified, based on his examination of the x-ray, that the embedded bullet was the same size as the taped .38-caliber projectile. (*Ibid.*)

This Court held that *Kelly-Frye* did not apply because the size difference was obvious to the senses of a layperson. (*Ibid.*) No ballistics or other scientific technique was needed to make the visual comparison. Respondent does not suggest that any layperson would be able to make the microscopic rifling comparisons required for an

accurate firearms match, irrespective of the particular methodology.

Respondent's reliance on *Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893, 901, is equally misplaced. (RB, at p. 127, fn.43.) In *Roberti*, plaintiff's experts based their opinions on research and papers in peer-reviewed journals and used techniques that were generally accepted in the medical community. As the court noted, "they did not rely upon any new scientific technique, device or procedure that had not gained general acceptance in the relevant scientific or medical community." (113 Cal.App.4th at p. 901.) Accordingly, the court held that the *Kelly* test did not apply to the experts' new theory of causation because it was based upon well-established research and methodology.

Here, in contrast, Laskowski's opinion was based on a novel technique that had never been peer-tested or reviewed, or accepted in any court of law. He made no effort to validate his results, using known exemplars, and he improvised techniques to compensate for the acknowledged deficiencies of Mikrosil as a ballistics casting medium. (See AOB, at p. 92.)

Respondent misconstrues appellant's opening argument as one directed to "careless testing" rather than improper scientific methodology. (RB, at p. 129.) But appellant did not "indict" Laskowski for lack of professionalism, diligence or inventiveness. (Cf., *People v. Farmer* (1989) 47 Cal. 3d 888, 913 [challenging footprint examiner as careless and incompetent].) Rather, appellant challenged Laskowski's ad

hoc approach in compensating for Mikrosil's unsuitability as a medium for ballistics comparisons. Such improvisational solutions are the antithesis of sound scientific practice. (AOB, at p.192; see also RT 2203.) The court's error in admitting Laskowski's testimony, with its misleading aura of reliability and expertise, is both plain and prejudicial, as was more fully set forth in the opening brief. (AOB, at pp. 193-195.)

## H. THE TRIAL COURT ERRED IN EXCLUDING PROBATIVE EVIDENCE THAT TENDED TO ESTABLISH APPELLANT'S DEFENSE BASED ON CONSCIOUSNESS OF INNOCENCE

### 1. Appellant's Pre-Arrest Offer to Meet With Fraley was Relevant and Trustworthy State-of-Mind Evidence

Respondent acknowledges that appellant's request to meet with Fraley may have been admissible under the state-of-mind exception to the hearsay rule. (RB, at p.135.) Nevertheless, respondent argues that the statements were properly excluded as irrelevant and also as untrustworthy under Evidence Code section 1252. (RB, at p.135.) Respondent is mistaken on both counts.

First, contrary to respondent's argument, appellant's eagerness to meet with Fraley was probative of appellant's abiding consciousness of innocence, and therefore his state of mind as to the murders. (See *People v. Green* (1980) 27 Cal.3d 1, 40 [recognizing that evidence of lack of consciousness of guilt has probative value]; *People v. Williams* (1997) 55 Cal.App.4th 648, 652 [recognizing trial court's discretion to instruct on the absence of flight when relevant and supported by the evidence]; *People v. Cruz* (1968) 264 Cal.App.2d 350, 358 [where a former state of mind is at issue, declarations of a present state of mind which throw some light on the former state, are also admissible]. Here, appellant's willingness to subject himself to interrogation by Fraley had a significant "tendency in reason" to prove appellant's innocent state of mind, much more so than the mere absence of flight addressed in *Green* and analogous cases.

Respondent also argues that the trial court's exclusion of this evidence was correct

because the statements were untrustworthy under Evidence Code section 1252. (RB, at p.134.) But, the prosecution never mentioned section 1252 at trial, and the court's ruling did not rest upon or even allude to that ground. Rather, the ruling was based upon a very constricted notion of relevancy, which the court applied exclusively to defense evidence.

Moreover, respondent's section 1252 argument fails on the merits. Because appellant's offer to meet with Fraley took place long before his arrest, the record does not support respondent's surmise that appellant's cooperativeness was "clearly motivated" by his desire to deceive and mislead the police. (Cf.; *Smith*, *supra*, 30 Cal.4th at 629 [defendant's expressions of remorse found untrustworthy where made *after* his confession to a brutal murder-rape and in order to placate the wife]; *People v.Cruz* (1968) 254 Cal. App.2d 350, 361 [finding *post*-arrest tape-recorded police interview untrustworthy].) Here, in contrast, appellant offered to speak with the police as soon as he learned he was a suspect in a homicide investigation. Thus, there is no valid reason why the jury was precluded from considering that appellant, as well as Phinney, volunteered to meet with Fraley.

### 2. Appellant's Offer to Meet with Fraley Was Essential to His Defense of Consciousness of Innocence and Third-Party Guilt

Respondent acknowledges that appellant's defense "never varied from the theme that Lutts and Phinney were the murderers." (RB, at p. 136.) Nevertheless, respondent wrongly maintains that the exclusion of appellant's request to meet with Fraley – consistent with his third-party culpability defense – did not infringe on his right to

present a defense. (RB, at p.134.)

The United States Supreme Court has repeatedly held that a state may not use its general rules of evidence to bar material testimony that is crucial to an accused's defense. (See, e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Green v. Georgia* (1979) 442 U.S. 95, 96-97.) As discussed at length in the opening brief, the evidence of appellant's contacting Fraley to clear up suspicions about his involvement in the Mercks' killings was material, and tended to support his third party culpability defense by showing that appellant acted like an innocent person when he believed himself falsely accused of a crime. (AOB, at pp. 196-202.) By barring this evidence, the trial judge left the jury with the misleading and damaging impression that early on Phinney innocently cooperated with the investigators, while appellant guiltily avoided them for many years. Thus, contrary to respondent's assertion, the trial court's disparate application of the rules of evidence in this instance had a concrete and demonstrably prejudicial effect on appellant's defense. (RB, at p. 136.)

Moreover, unlike the cases cited by respondent which concerned only flight and absence of flight, offering to speak to the police has the same "logical or legal footing[]," whether the person making the offer ultimately winds up being charged as a defendant or embraced as a government witness. (RB, at p. 136, citing *Williams, supra*, 55 Cal.App.4th at p. 653 [distinguishing *Wardius v. Oregon* (1973) 412 U.S. 470, "since flight and absence of flight are not on similar logical or legal footings"]; *Green, supra,*

27 Cal.3d at pp. 36-40, fn. 26.)

No significant legal or logical distinction exists between consciousness of innocence and consciousness of guilt. There is no statutory asymmetry such as that created by Penal Code section 1127c, which mandates a flight instruction. There also is no reason to believe that a jury could not rationally assess the evidence of consciousness of innocence if properly instructed on the cautionary model of the consciousness of guilt instructions. (See CALJIC 2.03, 2.04, 2.05, 2.06.) In taking this vital, relevant evidence away from the jury, the court's ruling contravened fundamental principles of parity and fairness as guaranteed by the due process clause of both the state and federal constitutions. As set forth in the opening brief, the evidentiary error prejudiced appellant and resulted in a fundamentally unfair trial. (AOB, at pp. 202.)

## I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ADMITTED GRUESOME, INFLAMMATORY, AND HIGHLY PREJUDICIAL PHOTOGRAPHS OF THE VICTIMS

### 1. The Post-Mortem Photographs and the Photograph of Alma Merck While Alive Were Marginally Relevant and Highly Prejudicial

Respondent acknowledges that the trial court had no inkling as to the prosecutor's intended use of the crime scene photographs, nor even which of them she intended to introduce. (RB, at p. 139.) Nevertheless, respondent advances three post hoc theories of admissibility, none of which establish even minimal relevancy.

Specifically, respondent contends that the admitted post-mortem photographs were relevant to the issues of intent and method of killing, and also as corroboration of "Nerida's testimony about the crime scene." (RB, at p.142.) All three theories fail because the photographs were not probative of any issue disputed at trial. As respondent acknowledges, the only seriously disputed issue at the guilt phase was the identity of the perpetrator. (RB, at p.143, fn. 48.) Respondent does not suggest that the post-mortem photographs had the slightest bearing on the issue of the killer's identity.

The perpetrator's intent and the method of killing were not contested by the defense. Indeed, appellant's counsel offered to stipulate to the factual predicate establishing these very elements of the charged crimes. (*People v. Kitts* (1978) 83 Cal.App.3d 834, 848-849 [photographs of route taken by victim after he was shot, admitted to show victim unarmed, irrelevant where defendant stipulated that victim was not armed].) The several cases cited by respondent are readily distinguishable. In *People v. Taylor* (2001) 26 Cal. 4th 1155, 1167-1169, the admission of photographs and a

videotape showing the handcuffed victims was upheld where they were relevant to the prosecution's theory of a planned robbery and to discredit the defendant's suggestion that the crimes occurred "in the spur of the moment." (See also *People v. Scheid* (1997) 16 Cal.4th 1, 15-19 [related case]; *People v. Kelly* (1990) 51 Cal.3d 931, 963 [photographs of wounds and powder burns relevant to refute defense that killing resulted from a violent outburst]; *People v. Box* (2000) 23 Cal.4th 1153, 1199 [location and arrangement of room relevant to show defendant's knowledge of location of murder weapon and to support witness's testimony regarding her ability to overhear pre-murder conversation]; *People v. Wash* (1993) 6 Cal.4th 215, 246, and *People v. Nye* (1969) 71 Cal. 2d 356, 370 [victim's wounds and disrobed body relevant to show felony murder-rape].)

In each of these cases, the prosecution identified the specific photographs (slides or videotape) it intended to introduce, and for each of them advanced a theory of relevancy directed to an actual disputed fact or to a defense presented at trial. Under such circumstances, this Court has afforded considerable discretion to the trial judge.

Here, in contrast, respondent's proffers of admissibility were constructed after-the-fact and fall far short of demonstrating any relevance to any real issue or defense at the guilt or special circumstances stages of the trial. The prosecution's theories of first degree murder required proof of "deliberation and premeditation" or felony murder in the course of a burglary or robbery. Its theories of special circumstances were multiple murder and felony murder. (Pen. Code § 190.2(a)(3), (a)(17).) The evidence of these aggravating elements went essentially unchallenged, except insofar as the evidence also

bore on the issue of the identity of the perpetrator.

The jury heard detailed testimony regarding the appearance of both the crime scene and the bodies of Alma and Clifford Merck. Criminalist Gregory Laskowski guided the jury through a step-by-step survey of the Mercks home, which included Laskowski's graphic description of the placement and condition of the bodies. (RT 1600, *et seq.*) This was followed by lengthy testimony regarding the room-by-room collection of fingerprint evidence, and then the autopsy testimony. The combined testimony of criminalist Laskowski, technical investigator Nerida and forensic pathologist Dollinger provided more than sufficient cross-corroboration of the circumstances of the killings or the causes of death. The post-mortem photographs were needlessly and prejudicially cumulative, rather than corroborative. (Cf., *Sheid, supra*, 16 Cal.4th at p. 15.) To ratify the trial judge's sweeping finding of relevancy here, would in effect hold that post-mortem photographs are relevant in murder trials as a matter of law, and that no particularized determination of relevancy is required.

It is difficult to conceive of any murder trial in which post-mortem photographs would not be cumulative to some degree of other testimony or evidence. As this Court noted in *Scheid*, the "only ban on cumulative evidence is found in Evidence Code section 352." (*Ibid.*) Thus, a meaningful case-specific and photograph-specific weighing of prejudice against probative value becomes all the more critical in ensuring a reasoned verdict.

Here, the trial court made no individualized determination of prejudice. Rather, it

merely opined that the photographs, although gruesome, were still admissible because they showed no dismembered parts or clinical autopsy procedures. Consequently, no particularized determination of relevancy or prejudice, much less a balancing of the two, was ever performed.

Respondent's reliance on *People v. Crittenden* (1994) 9 Cal.4th 83 is misplaced. (RB, at p. 142.) In *Crittenden*, the record reflected that the trial court actually assessed the probative value of each photograph, listened and rejected counsel's argument, excluded duplicative images, and ordered others "cropped." (*Id.*, at pp.135-136.)

Here, in contrast, the trial court's analysis never progressed beyond the broadest generalities regarding materiality and prejudice. (See *People v. Ford* (1964) 60 Cal.2d 772, 801 [the trial court prima facie abused its discretion as a matter of law where it recognized that the challenged photographs might tend to be prejudicial, but nevertheless ruled that "as long as it is material and shows the deceased after the incident, *it is material and will go in on that basis.*"] (emphasis in original).) The trial court thus effectively abdicated its authority by allowing the prosecution freely to introduce any photograph it wished. The result contravened the requirements of the Evidence Code, and the Eighth and Fourteenth Amendments' guarantee of a fair and reliable determination of guilt and penalty in a capital case.

### 2. The Live Photograph of Alma Merck Served No Legitimate Evidentiary Purpose

It is telling that while it cites a host of cases addressing the admissibility of post-morten photographs, respondent cites not a single case upholding the admission of

photographs of a murder victim while alive. Nor does respondent endeavor to distinguish the cautionary cases cited by appellant. (See, e.g., *People v. DeSantis* (1992) 2 Cal.4th 1210, 1230-1231, citing *People v. Kelly, supra,* 51 Cal.3d, at p. 931; *People v. Edwards* (1991) 54 Cal.3d, 787, 836; *People v. Ramos* (1982) 30 Cal.3d 553, 577-588.). Instead, respondent merely repeats the strained explanation of relevancy adduced at trial, while not addressing prejudice at all. The explanation – that the ring in the photograph was relevant to show that Alma Merck wore a certain ring while alive – was, and remains, untenable. The photograph did not recognizably "illustrate the appearance of the ring" because no details of the ring could be discerned. No witness who was shown this photograph was able to identify the ring in the photo. (RT 1483-1485, 1498, 1499.) However, Alma Merck's daughter, Mary Watts, was able to testify that a recovered ring, and one depicted in enlarged photographs, looked like the ring her mother wore all the time. (RT 1873, 1874, 1880; People's Exhibit Nos. 36-38, 39.)

Thus, the photograph of Alma Merck wearing a ring had, at best, minimal probative value. On the other hand, the extremely sympathetic photograph of the grandmotherly an frail-looking Alma Merck while alive, especially when contrasted with the gruesome post-mortem photographs, was highly prejudicial. Accordingly, the trial judge erred in admitting the photograph of Alma Merck while alive over appellant's meritorious section 352 objection.

### 3. Appellant Did Not Waive His Constitutional Claims

Respondent acknowledges that appellant properly preserved his statutory

objections under Evidence Code section 352, but argues that any constitutional claims were waived. (RB, at p.138.) Appellant initially notes that the Court has discretion to review his constitutional claims even in the absence of specific objection made at trial. (See ARB, at p. 34; *People v. Norwood* (1972) 26 Cal.App.3d 148, 152; *Pitts*, *supra*, 223 Cal.App.3d at p. 693 .) Moreover, a failure to object is excusable when, as in here, an "objection would have been futile or would not have cured the [alleged] harm." (*Carrillo*, *supra*, 119 Cal.App.4th at 101.)

These authorities support the Court's consideration of appellant's Eighth and Fourteenth claims on direct appeal. The factual predicates for appellant's evidentiary and constitutional claims were identical. Given the court's denial of appellant's section 352 argument, any related objections based on constitutional grounds would have been futile. Further, this Court's review of appellant's constitutional claims will not be unfair to the People because defense counsel's repeated objections gave the prosecutor and the court every opportunity to "cure the [constitutional] defect." (Cf., *People v. Rogers* (1978) 21 Cal.3d 542, 548.) Accordingly, this Court should also evaluate the admission of the photographs under constitutional standards.

**4. <u>The Trial Court's Error Was Harmful</u>**

The trial court's erroneous admission of exceedingly gruesome and emotionally-overpowering photographs greatly prejudiced appellant. As noted above, appellant's case was particularly close, and sympathy for the elderly victims could impermissibly have tipped the balance in favor of conviction. (See also AOB, at pp. 157-163.) As

such, it is reasonably probable that the outcome would have been more favorable to appellant if the photographs had been excluded. The trial court's error warrants a reversal on state law grounds. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, inasmuch as the erroneous admission of the photographs undermined the due process and heightened reliability standards required in death penalty cases, the *Chapman* test for constitutional error applies. (See *Beck v. Alabama* (1980) 447 U.S. 635, 637-638; *Chapman v. California* (1967) 336 U.S.18, 24.) In sum, under either the *Watson* or the *Chapman* standard, appellant's murder convictions must be reversed because of the admission of these prejudicial photographs.

## J. APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S ERRONEOUS ADMISSION OF GERRY TAGS'S FORMER TESTIMONY THAT SHE BELIEVED APPELLANT COMMITTED THE CHARGED MURDERS, AND, ALTERNATIVELY, IN FAILING TO INSTRUCT THE JURY THAT THE EVIDENCE WAS ADMITTED FOR A LIMITED PURPOSE

### 1. Under Evidence Code Section 1291, Appellant Is Not Limited to Objections Made at the Time That the Former Testimony Was Given

Respondent initially claims that appellant incorrectly characterized the timing and applicability of the objection made by defense counsel at the preliminary examination. According to respondent, no objection was made when the prosecutor asked Tags to explain the other reasons why she hated appellant. Defense counsel did not make an objection until Tags was later asked if she was bothered by her belief that appellant had committed the killings in both cases. Respondent thus argues that since appellant's objection was untimely at the preliminary examination, his claim is now meritless. (RB, at p. 151.)

Appellant accepts respondent's description of the record regarding the timing of the objection at the preliminary examination. Appellant, however, strongly differs with respondent as to its significance. When former testimony is admitted against a defendant at trial, the defendant is not limited to the objections that were made during the prior proceeding. Evidence Code section 1291, subdivision (b), states that, with two exceptions, "[t]he admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing." The two exceptions are that: (1) a party may not make an objection to the form of the

question which was not made at the time the former testimony was given; and (2) a party may not make an objection based on competency or privilege which did not exist at the time the former testimony was given. (Evid. Code, § 1292, subd. (b).)

Here, neither of these exceptions is applicable. Appellant's trial objections to this portion of Tags's former testimony were not based on the form of the questions asked, lack of witness competency or privilege, but on lack of relevance and Evidence Code section 352. Thus, under section 1291, subdivision (b), it was permissible for appellant to interject these objections to Tags's former testimony concerning her belief that appellant had committed the charged murders even though the same objections were not raised at the preliminary examination.

**2. Tags's Former Testimony Was Erroneously Admitted**

Respondent further claims that Tags's former testimony was correctly admitted. (RB, at pp. 152-153.) Respondent eschews any explanation of why the testimony was relevant, or if relevant, why its relevance was not substantially outweighed by the risk of undue prejudice. Here, the fact that Tags hated appellant was elicited by defense counsel and was relevant to appellant's attempt to impeach her credibility. The prosecution, however, was not trying to show that Tags was biased against appellant, but that she was a credible witness. The prosecutor's eliciting from Tags that she believed appellant had committed the murders did nothing to rebut the claim that she was biased or to bolster the credibility of her testimony. Indeed, the only purpose of the testimony was to prejudice appellant by letting the jury know that even his own girlfriend at the time believed that he

was guilty.

Moreover, the fact that Tags conditioned her testimony about her opinion by stating that she did not witness the killings, and therefore could not "say that he done it," is of little significance. Tags had lived with appellant for years and was the person closest to him at the time of the killings. The jury undoubtedly believed that she was familiar with appellant's propensity for violence and his lifestyle, that she was aware of the word on the street about appellant, and that she had conversations with him about the things he had done. Her opinion that appellant committed the killings was likely to have great influence on the jury, especially when the court did not give the jury an adequate limiting instruction as to its proper use.

### 3. Appellant Did Not Invite Instructional Error

Respondent also argues that the doctrine of invited error defeats appellant's additional claim of instructional error. Respondent's argument is based on the fact that while reading the transcript defense counsel omitted the magistrate's statement limiting the purpose of Tags's testimony regarding her belief that appellant committed the murders. (RB, at p. 152.) This omission, however, does not amount to invited error.

Under the doctrine of invited error, "[i]f defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330; *People v. Cooper* (1991) 53 Cal.3d 771, 830.) Invited error, however, "will be found 'only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction.'" (*People v. Cooper*,

*supra*, 53 Cal.3d at p. 830, quoting *People v. Wickersham*, *supra*, 32 Cal.3d at p.330.) "[B]ecause important rights of the accused are at stake, it must . . . be clear that counsel acted for tactical reasons and not out of ignorance or mistake." (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 330.)

An example of such a deliberate tactical waiver that resulted in the finding of invited error can be found in *People v. Phillips* (1966) 64 Cal.2d 574, where this Court held that the appellant could not raise on appeal the trial court's failure to instruct on the lesser offense of manslaughter. This error was invited because trial "counsel strongly opposed a manslaughter instruction and indicated to the trial court that he considered it 'tactically' to defendant's advantage to confront the jury with the limited choice between murder and acquittal." (*Id.*, at p. 581, fn. 4.)

Here, the record fails to disclose that trial counsel made a "conscious, deliberate tactical choice" not to have a limiting instruction given to the jury. (See *People v. Wader* (1993) 5 Cal.4th 610, 657.) Unlike in *Phillips*, trial counsel did not expressly oppose the limiting instruction or state that omission of the instruction would give appellant a tactical advantage. Rather, trial counsel specifically requested a limiting instruction after his objection to the testimony was overruled. Trial counsel stated, "[I]f the Court is going to overrule that objection, we would request a limiting instruction." (RT 1835.) Given these circumstances, the only reasonable explanation for trial counsel's omission of the magistrate's limiting statement is inadvertence, not deliberate tactical waiver.

### 4. Appellant Was Prejudiced by the Errors

Finally, respondent claims that any error in admitting Tags's testimony was harmless, in light of the strength of the prosecution's case. (RB, at pp. 153-154.) Respondent's assessment of the prosecution's case is erroneous. As discussed in the opening brief, the prosecution's case included no eyewitnesses and no confession. It was based primarily on disputed fingerprint evidence and allegations that appellant possessed property that belonged to the Mercks. The latter evidence was suspect because many of the witnesses who claimed to have seen appellant with the stolen property had criminal records and drug problems. Phinney was also seeking to benefit from his cooperation with the prosecution. Additionally, the lighter case and ring that were allegedly stolen were indistinguishable from many such items that were for sale in stores at that time. (See AOB, at pp. 154-163.)

Appellant was also prejudiced in the penalty phase. Tags expressed her belief that appellant was guilty of murdering Jewell Russell as well as the Mercks. Although the jury was deadlocked as to appellant's guilt of the Russell murder, those jurors who believed that appellant was guilty were allowed to consider that circumstance in the penalty hearing. As explained in the opening brief, the case that appellant murdered Russell was very weak. If the trial court had correctly excluded Tag's opinion that appellant was guilty, there may well have been fewer, or even no jurors who considered the Russell murder as an aggravating circumstance at penalty phase. Absent that aggravating

circumstance, there is at least a reasonable possibility that appellant would not have received a death sentence. (See AOB, at pp. 218-222.)

## K. APPELLANT DID NOT WAIVE HIS CONSTITUTIONAL CLAIMS REGARDING THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF MITZI COWAN'S TESTIMONY THAT GERALD COWAN HAD MORE THAN $200 IN FOLDED U.S. CURRENCY; AND THE TRIAL COURT DID NOT PROPERLY ADMIT THE TESTIMONY INTO EVIDENCE

### 1. Appellant Did Not Waive His Constitutional Claims

Respondent again contends that appellant waived his constitutional claims because trial counsel did not object on those specific grounds below. (RB, at p. 155, 157-158.) For the reasons previously stated, (see ARB, at pp. 34-36), the absence of such objections does not bar this Court from reviewing these constitutional claims.

In the present case objections based on appellant's Eighth Amendment constitutional claims would have been futile. The factual basis for the constitutional claims is identical to that of the relevance objection made at trial. Defense counsel claimed that Mitzi's testimony about the money was inadmissible because it was irrelevant in the absence of a showing that a conspiracy existed between appellant and his brother. The trial court, however, believed that a conspiracy had been established and overruled the objection. Given the trial court's ruling, it would have been futile for trial counsel also to argue that the erroneous admission of Mitzi's testimony violated appellant's constitutional rights.[14]

[14]It should also be noted that appellant's constitutional claims relate to the validity of the death verdict. Mitzi's testimony was proffered during the guilt phase of the trial. An objection that admission of the evidence would have rendered the penalty phase unreliable in violation of the Eighth Amendment would not have been a valid basis for excluding the evidence from the guilt determination. In addition, it was still uncertain whether there would be a penalty phase at that time.

## 2. Mitzi Cowan's Testimony That Gerald Cowan Returned to the Apartment with More than $200 in Folded U.S. Currency Was Not Admissible

Respondent initially argues, "A trial court's evidentiary decisions are not to be disturbed absent a manifest abuse of discretion resulting in a miscarriage of justice." In support of this argument, respondent cites *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, and *People v. Milner* (1988) 45 Cal.3d 227, 239. (RB, at p. 158.) In each of these cases, however, the evidentiary issue was whether evidence was properly admitted under Evidence Code section 352, which expressly grants the trial court the discretion to exclude relevant evidence if the probative value is substantially outweighed by certain other considerations. Here, trial counsel's objection was not based on Evidence Code section 352, but on the ground that Mitzi's testimony was irrelevant. While the trial court has discretion in determining the relevance of evidence, it "lacks discretion to admit irrelevant evidence." (*People v. Benavides* (2005) 35 Cal.4th 69, 90.) The trial court thus had no discretion to admit Mitzi Cowan's irrelevant testimony that Gerald Cowan returned to the apartment with $200 in folded U.S. currency.

Respondent also claims that Mitzi's testimony was admissible because a conspiracy was not required in order for appellant and Gerald to have acted together in murdering Russell. Respondent speculates that appellant and/or Gerald may have seen Russell displaying his cash and then decided to rob him. Once one of the brothers began to act on his decision to take Russell's money, "the other brother could have simply cooperated or helped with the acts that led to the robbery and murder of Russell." (RB,

at p. 159.) Respondent's scenario, however, is far too speculative to provide a relevant basis for admitting Mitzi's testimony. Moreover, the trial court's only rationale, albeit an erroneous one, for admitting the testimony about Gerald's possession of the money was that a conspiracy had been established by the evidence. (RT 2437.)

Finally, respondent appears to argue alternatively that "the circumstantial evidence provided by the remainder of Mitzi's testimony (and corroborated by Tags's testimony about the events that occurred at the apartment that night)" established a conspiracy and thus rendered admissible the evidence concerning Gerald's possession of the U.S. currency.[15] (RB, at p. 159.) Respondent fails to present any analysis of the record to support this conclusion. Such an analysis was conducted by appellant in the opening brief, where appellant explained that the existence of a conspiracy was not proven by a preponderance of the evidence and was at best highly speculative. (AOB, at p. 228.)

### 3. The Error in Admitting Mitzi Cowan's Testimony Was Not Harmless

Respondent argues that any error in admitting Mitzi's testimony was harmless because the jurors who voted for appellant's conviction (either nine jurors or three jurors) were unlikely to have considered Russell's murder as an aggravating circumstance during the penalty phase. According to respondent, these jurors "obviously knew that they had not been able to reach a verdict in that count," and consideration of

[15]While Tags's testimony corroborated Mitzi's testimony that appellant was wearing different clothes when he returned to the apartment, Tags's testimony was impeached with her prior statement to District Attorney Investigator Christopher Hillis. In that interview, Tags said that appellant had changed his clothes before leaving the apartment, and that Mitzi had told Tags that she too thought appellant had changed before leaving. (RT 2495.)

the Russell murder as an aggravating circumstance would have been a "violation of the court's instruction that any crimes of violence considered by the jury during the penalty deliberations had to be proven beyond a reasonable doubt." (RB, at p. 159.)

Respondent's reasoning is flawed. In the penalty phase, the jurors were not required to unanimously agree on the existence of any aggravating circumstance. (*People v. Brown* (2004) 33 Cal.4th 382, 402.) Thus, the jurors who believed beyond a reasonable doubt that appellant had murdered Jewel Russell were free to consider that crime as an aggravating circumstance in determining penalty even though other jurors disagreed with them.

The prosecution's case against appellant in the Russell murder was far from overwhelming. In her closing argument, the prosecutor emphasized Gerald's possession of the folded currency (RT 2676), and that fact may well have been the deciding factor for those jurors who voted to convict in the guilt phase. Had the trial court properly excluded the evidence, there may well have been fewer, or even no jurors who found that appellant's guilt was proven beyond a reasonable doubt and, thus, that the Russell murder was an aggravating circumstance. Given that the penalty decision was made close by appellant introducing mitigating evidence concerning his background and character,[16] there is at least a reasonable possibility that the erroneous admission of Mitzi Cowan's testimony affected the death verdict.

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[16]The jury deliberated approximately 12 hours over three days (CT 1482, 1487, 1573), indicating that the penalty decision was difficult. (See, e.g., *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637 ["the jurors deliberated for over nine hours over three days, which suggests that they did not find the case to be clear-cut"].)

## L. THE TRIAL COURT'S ADMISSION OF IMPERMISSIBLE AND PREJUDICIAL VICTIM IMPACT TESTIMONY, MUCH OF WHICH RESPONDENT CONCEDES WAS ERRONEOUSLY ADMITTED, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

Interspersed among respondent's formulaic waiver and harmlessness arguments are a number of major concessions regarding the erroneous admission of the purported victim impact evidence. Contrary to its own waiver argument, respondent acknowledges that defense counsel made a contemporaneous objection to the challenged testimony that expressly referenced the Supreme Court's limitations on victim impact evidence. Respondent also accepts that the weight of authority prohibits family opinions regarding post-offense lack of remorse. Most importantly, respondent admits that it was error to allow testimony appealing to the jury to return the death penalty and invoking biblical principles of retribution. In combination, these concessions compel reversal of the death verdict.

### 1. Appellant Did Not Waive His Constitutional Objections

Respondent's contention that defense counsel waived his constitutional objections to the victim impact testimony is perfunctory and readily refuted. Defense counsel made every conceivable evidentiary objection to the testimony of Alma Merck's family. In addition, when given leave to do so, he also raised the appropriate constitutional objection, namely, that the testimony of two of the family members was "way beyond that which is permitted by the Supreme Court and [sic] to victim impact testimony." (RT 2861.)

In *Sanders v. Ryder* (9th Cir. 2003) 342 F.3d 991, 1000, the Ninth Circuit held that petitioner's use of the phrase "ineffective assistance of counsel" preserved his federal constitutional claim, in that the Washington courts analyzed "ineffective assistance" claims under the federal *Strickland v. Washington* standard [(1984) 466 U.S. 668] – without specifying whether they were analyzing a state or federal right. (*Ibid.*)

Analogously here, this Court analyzes challenges to "victim impact testimony" under the *Payne v. Tennessee* [(1991) 501 U.S. 808] standard, which the Court has expressly adopted. (See, e.g, *People v. Edwards* (1991) 54 Cal.3d 787, 832-836.) The phrase "victim impact evidence" is a judicial construct found nowhere in the statutory scheme. Rather, this phrase immediately invokes the line of United States Supreme Court cases, as well as parallel decisions of this Court, that have addressed the Eighth and Fourteenth Amendment implications of this special category of evidence. Thus, there can be no doubt that the conjunction of "Supreme Court" and "victim impact testimony" signaled to the trial judge that defense counsel was basing his objection and motion for mistrial on constitutional grounds. Plainly, both the trial judge and the prosecutor understood the constitutional thrust of defense counsel's objection to "victim impact testimony," which counsel elaborated upon in his motion for mistrial.

The cases cited by respondent, in which no timely objection was made, are thus inapposite. (RB, at p.164.) Moreover, in these cases, notwithstanding the failure to object, this Court consistently addressed the merits of the defendants' claims. (See, e.g., *People v. Pollock* (2004) 32 Cal.4th 1153, 1181 [the Court reached the merits of the

issue even though counsel made no objection when the witness testified that the victim had taught bible classes]; *People v. Farnam* (2002) 28 Cal.4th 107, 175; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1153; *People v. Pinholster* (1992) 1 Cal.4th 865, 956 [defendant's claim of insufficient notice of aggravating circumstances addressed despite the absence of objection].)[17] As noted in Argument E, this Court has the discretion to review constitutional claims even in the absence of a specific objection made at trial. (ARB, at p. 34.) (See, *Carrillo, supra*, 119 Cal.App.4th at p. 101; *Pitts, supra,* 223 Cal.App.3d at p. 692.)

Here, defense counsel took all steps necessary to preserve appellant's constitutional, as well as evidentiary objections to the victim impact testimony. Respondent's waiver argument must therefore be rejected.

**2. <u>Respondent Misapplies Controlling Legal Standards</u>**

Respondent fails to acknowledge that *Payne* "left intact that portion of *Booth* which barred admissibility of family characterizations and opinions about the crime, the defendant, and the appropriate punishment." (*Payne v. Tennessee, supra*, at p. 808; *Booth v. Maryland*, (1987) 482 U.S. 496; *People v. Brown* (2004) 33 Cal.4th 382, 396;

[17]*People v. Mickle* (1991) 54 Cal.3d 140 is also inapposite. (RB, at p.164.) In *Mickle*, the Court held that the defendant had waived his objections to testimony regarding his transmission of gonorrhea to various other victims and partners. (*Id.*, at p. 186.) On appeal, the defendant argued for the first time that the testimony was irrelevant absent evidence that he knew he carried the disease before each forcible sexual assault occurred. At trial, his objections had been based solely on the hearsay rule and, in one instance, a lack of temporal connection. Notwithstanding it's finding of waiver, the Court addressed the merits of defendant's appellate claims. (*Id.*, at p. 187.) Here, as discussed above, defense counsel raised all colorable evidentiary and constitutional objections to the victim impact evidence.

*Pollock, supra*, 32 Cal.4th at 1180 ["But victim impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment . . . *and such testimony is not permitted*"] [italics added]; *People v. Smith* (2003) 30 Cal.4th 581, 622; see also *Hain v. Gibson* (10th Cir.2002) 287 F.3d 1224, 1239 [and cases cited therein]; *United States v. Bernard* (8th Cir. 1999) 299 F.3d 467, 480.)

Therefore, contrary to respondent's suggestion, the fact that the Court is disinclined to anticipate or "specifically define" the outer reaches of admissible victim impact evidence in no way undermines the absolute bar against the three kinds of prohibited opinion evidence challenged herein: "opinions about the crime, the defendant, or the appropriate punishment." With respect to these types of victim impact evidence, "the careful balance between the probative and the prejudicial" has been firmly struck in favor of exclusion. (*People v. Edwards* (1991) 54 Cal.3d 787, 836.)

All of the purported victim impact testimony in this case falls within one of these proscribed categories. The conjectures of Cox and Turner regarding what they believed must have been the horror of Alma's last minutes fall squarely within the prohibition against "characterizations and opinions about the crime." Cox's testimony about appellant's hard heart and lack of remorse comes within the prohibited category of "characterizations and opinions . . . about the defendant." Finally, there could be no clearer instance of forbidden opinions about the appropriate punishment than Cox's appeal to the jury to impose the death penalty as a religious duty.[18]

[18] Contrary to respondent's contention, there can be no doubt that every juror understood Cox's reference to an "eye for an eye . . ." as biblical authority for the death penalty. (RB, at pp. 173, 175.)

Contrary to respondent's assertion, appellant has never suggested that only family members who witnessed the crimes could provide relevant victim impact testimony. (RB, at p.171.) Appellant has not challenged any penalty phase testimony permitted by case law. Rather, in keeping with the proscription against opinions or characterization of the crime, he has urged that non-percipient family members were foreclosed from airing their worst imaginings regarding the victim's suffering.

The cases cited by respondent support this distinction. All of them stand for the uncontroversial proposition that non-percipient family members and others may testify about the impact of the victim's death upon themselves or the community, but may not speculate about the circumstances of a killing which they did not observe. (See *Payne*, *supra*, 501 U.S. at pp. 814-815 [victim's mother testified how victim's son "had been affected" by the murders of his mother and sister]; *People v. Marks* (2003) 31 Cal.4th 197, 235-236 [testimony by disabled former employee of victim regarding "impact" of victim's death]; *People v. Taylor* (2001) 26 Cal.4th 1155,1171-1172 [victim's son testified to "impact" of his mother's death on him]; *People v. Clark* (1990) 50 Cal.3d 583, 629 [brief comment by father of surviving victim, the homicide victim's spouse, about the "effect" of defendant's criminal acts on the surviving victim's parents and daughter].)

Strikingly, not one of these cases sanctions family members' conjectures regarding the victim's suffering or other emotionally-charged circumstances of the crime. In *Pollock*, *supra*, this Court drew the precise distinction appellant advocates here between

inadmissible "merely [] personal opinions about the murders" and admissible "testimony limited to how the crimes had directly affected them." (32 Cal.4th at p. 1182.)

Respondent's analogy to cases permitting prosecutorial argument commenting on the victim's suffering is likewise misconceived. In *People v. Cole* (2004) 33 Cal.4th 1158, a capital prosecution for murder by torture, this Court allowed comment on the victim's suffering as relevant to the circumstances of the crime because such suffering was *itself* an element of the torture-murder special circumstance, and because the comment was based solely on the evidence already presented to the jury in the guilt phase. Similarly, in *People v. Farnam* (2002) 28 Cal.4th 107, 200-201, the prosecutor's single remark about "the agony and the terror" of the victim was brief and narrowly confined to the testimonial and photographic evidence regarding the torturous nature of the wounds inflicted upon the victim. (See also *People v. Bradford* (1997) 15 Cal. 4th 1229, 1379 [where defense counsel characterized imposition of the death penalty as "revenge" or "bloodlust," prosecution allowed to describe the victims' plight].)

Respondent cites no case in which a witness has been allowed to speculate about the victim's agony and suffering. Attorneys, in contrast to witnesses, are permitted, within limits, to use inferences, opinions, rhetorical devices and hyperbole in their arguments because jurors are admonished and understand that such arguments are not evidence. (Cal. Jury Instr. – Crim. [CALJIC] 0.50, 1.00, 1.02 [the jury must base its decision on the facts shown by the evidence].) As a corollary, attorneys are also afforded greater leeway than witnesses, because they are not bound by the rule that "the testimony

of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code § 702(a); 2 Witken, Cal. Evid.4th (2000) Witnesses, § 46, p. 297.) Although the moral dimension of the penalty phase determination expands the scope of relevant evidence, it does not abrogate the basic rules of admissibility and testimonial competency. Thus, while witnesses are allowed to testify to the direct impact of the victim's death on themselves, there is no authority exempting them from the evidentiary and constitutional bar against proffering the types of opinions and inferences which are the province of attorney argument.

In short, respondent has failed to establish any constitutional or judicial sanction for the admission of Cox's inflammatory conjectures regarding Alma Merck's suffering.

With respect to appellant's other claims of error, respondent makes several concessions.

Respondent's initial concession relates to Cox's testimony that appellant's heart was hard and he had no remorse – the preamble to her plea, speaking for Alma's family, that the jury return a death verdict. (RB, at pp.172-173.) Respondent acknowledges the validity of the case law cited by appellant that prohibits prosecutorial argument regarding lack of remorse as an aggravating factor. It seeks to distinguish that body of law from the case at hand by noting that *Navarette* and similar cases address prosecutorial argument, not witness testimony. (RB, at p. 173; see, e.g., *People v. Navarette* (2003) 30 Cal.4th 458, 519.) However, none of the cases respondent relies on sanction witnesses' speculation about a defendant's state of remorse. (See, e.g,. *People v. Lewis* (2001) 25

Cal.4th 610, 673 [prosecutor's remarks allowed where they did not invite the jury to consider lack of remorse as a factor in aggravation]; *People v. Mendoza* (2000) 24 Cal.4th 130, 187 [prosecutor allowed to comment on evidence that defendant bragged about killing the victim within hours after burning her alive]; *People v. Bemore* (2000) 22 Cal.4th 809, 855 [prosecutor's brief comment about the defendant's failure to express remorse allowed where the defendant testified]; *People v. Beardslee* (1991) 53 Cal.3d 68, 114 [prosecutor permitted to comment on the defendant's lack of remorse after the defense called three witnesses on that subject].) None of these cases sanctions the admission of witnesses' subjective opinions regarding the defendant's supposed lack of contrition.

Moreover, to the extent a legally significant distinction exists between prosecutorial comment and witness testimony, it works against respondent's position, for two reasons. First, as discussed above, limitations on attorney argument apply with even greater force to witness testimony. Jurors are free to ignore the former; they are compelled to consider the latter in reaching their verdict. Jurors understand that the prosecutor is an advocate and that his or her argument comprises inferences and opinions that are one-sided and shaped by adversarial zeal. On the other hand, contrary to the trial court's comment to counsel that jurors understand that "it is impact-type testimony, and it is not to be considered by the jury," the record establishes no such understanding. (RT 2846.) Jurors were not instructed to disregard all, or any part of, the victim impact testimony, or to treat it any differently from other types of evidence. In the absence of

such instruction, there is no reason to believe that jurors spontaneously grasped the critical distinction. Rather, it must be believed that the jurors gave the same weight to the purported victim impact testimony as they did to other testimony at the penalty phase.

Additionally, a separate line of cases, cited in appellant's opening brief, explicitly proscribes evidence, as opposed to argument, of post-crime remorselessness. (See *People v.* Jones (2002) 29 Cal.4th 1229, 1265; *People v. Boyd* (1985) 38 Cal.3d 762, 771-776, 778; see also *Bernhard, supra*, 299 F.3d at p. 480 [plain error under *Booth* to admit statement by victim's mother, "I'm sorry for you, *for your heart to be so hard*, you couldn't even see the innocence of the two you killed."] [italics added].) It is telling that respondent ignores those cases that effectively negate the very distinction it would have this Court adopt.

There was absolutely no evidence of lack of remorse here. There was no showing at either stage of the trial that appellant had made callous or heartless remarks regarding the victims, boasted of killing them or engaged in any objective behavior that would support an inference of remorselessness. Instead, all the jury had before it were the impressions and opinions of family members, who would understandably feel aggrieved by appellant's failure to take responsibility for the killings and express remorse about them. The erroneous admission of this testimony also makes it likely that the jury, like Alma Merck's family, may have considered appellant's invocation of his federal and state constitutional rights to silence and a jury trial as evidence that he lacked remorse for these crimes. This likelihood underscores the danger of admitting emotionally-affecting,

yet factually unsupported victim impact evidence regarding post-offense remorselessness. Moreover, inasmuch as the characterization of appellant as hard-hearted was integral to Cox's wrenching appeal to the jury to impose the death penalty, the magnitude of the error in admitting this testimony, and the prejudice resulting from it, were immeasurably enhanced. Respondent does not attempt to defend the trial court's erroneous admission of Cox's personal and biblically-based plea for the return of the death penalty. Rather, it notes that this Court has on occasion held that prosecutorial references to the Bible, though improper, were harmless when embedded in a longer argument that specifically focused on the relevant factors in aggravation and mitigation. (See, e.g., *People v. Slaughter* (2002) 27 Cal.4th 1187, 1209-1211; but see *People v. Hill* (1998) 17 Cal.4th 800, 836 [this Court has repeatedly held "that to ask a jury to consider biblical teachings when deliberating is patent misconduct. . . . [A]n appeal to religious authority is improper because it tends to diminish the jury's personal sense of responsibility . . . [and] also carries the potential the jury will believe a higher law should be applied and ignore the court's instructions."]; *Commonwealth v. Chambers* (Penn.Supreme Ct. 1991) 28 Pa. 558, 586 ["We believe that [biblical] argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious principles and commandments to support the imposition of a death penalty."].) No case has held that a family member's conjunction of a biblical maxim and a plea for death could be considered harmless.

Respondent concludes, "Thus, the jury was properly allowed to hear evidence concerning the full impact of appellant's actions." (RB, at p.174.) If that were true, the family's testimony would have comported with the restrictions of *Payne*. But that is emphatically not the full scope of what the jury heard, as respondent's own argument grudgingly acknowledges elsewhere.

### 3. The Erroneous Admission of Highly Prejudicial Victim Impact Testimony Was Not Harmless Beyond A Reasonable Doubt

In the face of the array of categorically inadmissible victim impact testimony, respondent's recourse is to argue harmlessness. That argument is untenable on this record. For if, as respondent contends, the evidence against appellant was strong – in fact, equally strong as to both victims -- respondent cannot reasonably explain why the jury "returned a death verdict only as to Alma's murder." (RB, at p.176.)

Moreover, respondent's assessment of the strength of the prosecution's case is overstated. As discussed at length in the opening brief, pages 242-244, appellant presented strong mitigating evidence, including compelling testimony about his troubled childhood, his abusive alcoholic father who violently beat appellant and his mother for over thirteen years, appellant's history of protracted drug use, and evidence of his good character, kindness to children, and the impact of his execution on others. (RT 2889-2928.) Except for the victim impact testimony of Alma's family members, the prosecution's case at both the guilt and the penalty stages was the same with respect to both Alma and Clifford Merck. Yet, the jury returned a death verdict only with respect to Alma. The unavoidable conclusion is that the emotionally-charged victim impact

testimony accounted for the jury's return of a death verdict for the murder of Alma Merck and a life verdict for the murder of her husband.

Respondent also minimizes the highly prejudicial effect of the victim impact evidence. The victim impact testimony was replete with inflammatory remarks, characterizing appellant as "evil," and his crime as the "brutal" and "senseless" slaughter of "defenseless and helpless" victims. (RT 2846.) Cox was permitted to testify that appellant's crime was "like a disease" that had infected the family and the jury, clearly implying that the only "cure" was a death verdict. (*Id.*) Family members were also allowed to paint a vivid, wholly speculative picture of Alma Merck's extreme suffering prior to her death, to attack appellant for his supposed heartlessness, and to plead with the jury for his death. Without question, this testimony overwhelmed all of the other penalty phase evidence, and exerted considerable pressure on the jury to do the suffering family's bidding, or suffer a large measure of anticipatory guilt if they did not.

Respondent further suggests that the victim's family "presumably" would wish that the death penalty be imposed on the murderer, so their testimony to that effect was harmless. This argument fails to recognize the difference in impact on the jury between actually hearing family members pleading for a defendant's death and jurors speculating that the family might favor a death verdict. It also fails to recognize that the families of many victims actually favor life sentences. (See, e.g., *State v. Trostle* (Ariz. Supreme Ct. 1997) 951 P. 2d 869.

The jury in this case heard the highly emotional pleas of the family of Alma

Merck that appellant be put to death. The jury received no instruction from the court that mitigated the intensely prejudicial impact of this testimony. Respondent twice asserts, without citation to the record, that the court "immediately and specifically instructed the jury that Cox's testimony essentially was not to be considered for its truth – but rather that the testimony was simply how Cox felt or perceived the impact of appellant's crimes." (RB, at pp.171, 176.) There is no citation to the record becauswe no such direct instruction to the jury. In response to defense counsel's initial objections to Cox's testimony, the court observed that the jury understood that it was "impact-type testimony" and that it was "not to be considered by the jury." (RT 2846.) However, this comment was directed to counsel, not the jury. Even if it were overheard by the jury, the comment would not have been enlightening since jurors have no innate understanding of the crucial differences between victim impact testimony and other types of testimony.

The trial judge allowed Cox to plead with the jury for the death penalty, without providing the jurors with any cautionary words. None of the instructions at the end of the penalty phase informed the jury of the law about the use of victim impact testimony. Respondent notes that the jury was instructed not to be swayed by public opinion or public feelings, and not to consider limited purpose evidence for "any purpose" other than that for which it was admitted. (RB, at pp.163-164 [CALJIC Nos. 8.84.1, 2.09].) However, respondent does not explain how these instructions limited the jury's consideration of the erroneously admitted victim impact testimony. Family members are not thought of as the general "public," and the jury was never instructed that the victim

impact evidence had been admitted for a particular purpose.

It cannot seriously be disputed that the trial court's erroneous admission of victim impact testimony severely prejudiced appellant's cause. The verdict of life-without-parole as to Clifford Merck and death as to Alma Merck establishes both the prejudice of admitting this emotionally-charged victim impact testimony and the inefficacy of the court's general instructions to mitigate the harm. Respondent oddly converts the disparity in outcome into an argument for harmlessness, without recognizing that this is precisely the prejudicial result that was visited upon appellant by the impermissible testimony. Such error cannot be deemed harmless beyond a reasonable doubt under *Chapman*, *supra*, 386 U.S. at p. 24. Accordingly, the death verdict as to Alma Merck must be set aside.

## M. APPELLANT DID NOT WAIVE ANY CLAIM REGARDING THE TRIAL COURT'S FAILURE TO INCLUDE RUSSELL'S MURDER IN THE INSTRUCTION THAT OTHER CRIMES EVIDENCE MUST BE PROVEN BEYOND A REASONABLE DOUBT IN THE PENALTY PHASE; AND THE TRIAL COURT'S OMISSION WAS NOT HARMLESS ERROR

### 1. Appellant Did Not Waive His Jury Instruction Claim

Respondent initially contends that appellant waived his claim regarding the omission of Russell's murder from the other crimes instruction because he failed to object in the trial court. (RB, at p. 179.) Under Penal Code section 1259, however, "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." A recent example of the application of section 1259 is found in *People v. Prieto* (2003) 30 Cal.4th 226. In *Prieto*, the defendant alleged numerous instructional errors at the guilt phase. The state contended that the defendant waived the claims "because he either failed to object or failed to raise the specific objections presented on appeal before the trial court." (*Id.*, at p. 247.) Relying on section 1259, this Court held that the instructional errors were "reviewable on appeal to the extent they 'affect[] his substantial rights.'" (See also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199 ["Although defendant did not object in the trial court to this instruction, the propriety of the instruction nonetheless is reviewable on appeal to the extent it affects his substantial rights."]; *People v. Easley* (1983) 34 Cal.3d 858, 875, fn. 2.) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim – at least to

the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Here, as will be discussed below, the trial court's instruction constituted prejudicial error.

In addition to section 1259, other authorities support a finding that appellant did not waive his jury instruction claim. In *People v. Prieto*, *supra*, this Court confronted another instructional error claim analogous to appellant's. The defendant argued on appeal that the trial court had incorrectly defined the elements of an uncharged crime of violence that the prosecutor had introduced as a circumstance in aggravation. The State claimed that the issue had been waived due to the absence of any objection at trial. Nonetheless, this Court decided the instructional claim on the merits, explaining that although the trial court had no sua sponte duty to instruct on the elements of other crimes evidence introduced in aggravation, "when such instructions are given, they should be accurate and complete." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 268.) Similarly, even if the trial court here did not have a sua sponte duty to give an instruction identifying which other crimes the jury could consider if proven beyond a reasonable doubt, once the court gave an applicable instruction, that instruction had to be correct. Thus, here, as in *Prieto*, this Court may review the trial court's instruction for error.

Finally, contrary to respondent's argument, to the extent defense counsel was required to object in order to preserve appellant's claim on appeal, counsel's failure to make such an objection constituted ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article I, section

15 of the California Constitution. Appellant has satisfied his burden under both prongs of the *Strickland* test. There simply is no satisfactory explanation for defense counsel's failure to request that the Russell murder be included in the reasonable doubt instruction, especially in light of the jury's request for read-back of the coroner's testimony, indicating that the jury was considering the other murder in the penalty determination. In addition, as explained in appellant's opening brief and below, had the trial court's instruction included the Russell murder as one of the other crimes of violence that had to be proven beyond a reasonable doubt in order to be considered by the jury, there is a reasonable probability that the penalty verdict would have been different. (See AOB, at pp. 251-252.)

**2. <u>The Trial Court Did Not Properly Instruct the Jury</u>**

According to respondent, the instruction given to the jury was proper. (RB, at p. 183.) Respondent reasons initially, "California law does not require the jury to unanimously agree on which aggravating circumstances are to be considered." (RB, at p. 183.) Respondent's point, however, does not address appellant's claim of error. Appellant alleges error in the instruction's first paragraph, which failed to include the Russell murder as one of the other crimes that had to be proven beyond a reasonable doubt in order to be considered a circumstance in aggravation. Appellant's claim here does not extend to the instruction's second paragraph, which advised the jury that it need not unanimously agree on which other crimes had been proven beyond a reasonable doubt.

Respondent's next argument in support of the jury instruction is that, "[t]he jury instructions specifically permitted those jurors who believed, beyond a reasonable doubt, that appellant murdered Russell, to consider that during the deliberations on the proper penalty." (RB, at pp. 183-184.) The problem with the instruction, however, was that it also allowed those jurors who did not believe beyond a reasonable doubt that appellant murdered Russell to consider that crime as a circumstance in aggravation. When the jury did not hear the Russell murder listed as one of the other crimes that had to be proven beyond a reasonable doubt, the jury was free, and likely, to believe that the limiting instruction did not apply to the Russell murder; and that evidence of that crime was to be considered under a different, and lower, standard than the other crimes evidence that was presented in the penalty phase and included in the reasonable doubt instruction. We cannot expect lay jurors to get such complex matters right without providing them with complete, accurate instructions on how they are to approach their task.

### 3. The Instructional Error Was Not Harmless

In arguing that any error was harmless, respondent misstates the appropriate test for a penalty phase error that does not violate the United States Constitution. Respondent argues that "it is not reasonably probable that the jury would have reached a verdict more favorable to appellant" had the trial court included Russell's murder in the limiting instruction. (RB, at p. 184.) In *People v. Brown* (1988) 46 Cal.3d 432, 448, however, this Court explained that "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a

capital trial." Thus, a death sentence must be reversed if there is a "reasonable (i.e., realistic) possibility" that a misinstruction affected the verdict. (*Ibid.*)

Such a realistic possibility of prejudice is present in appellant's case. As this Court has explained, "[t]he potential for prejudice [is] particularly serious" when an error relates to the jury's consideration of other crimes evidence. (*People v. Robertson* (1982) 33 Cal.3d 21, 54.) That risk is even greater when, as in this case, the other crime that is improperly considered by the jury is another murder.

Absent the misinstruction, appellant's penalty phase was a close one. Apart from the Russell homicide, the other crimes evidence was not especially egregious, and appellant presented substantial evidence in mitigation. That evidence included testimony about childhood beatings inflicted on appellant by his alcoholic father, and good character evidence presented by appellant's girlfriend and three of her children.

Since the jury was unaware that it could consider the Russell murder only if proven beyond a reasonable doubt, a standard that either three or nine jurors found was not met in the guilt phase, it is likely that the improper consideration of the Russell murder tipped the scale in favor of death.

## N. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT RE-INSTRUCTING THE JURY ON THE MEANING OF REASONABLE DOUBT IN THE PENALTY PHASE

Respondent concedes that the term "reasonable doubt" is not commonly understood by lay persons and therefore must be defined for the jury. (RB, at p. 188.) Nonetheless, respondent argues that the trial court did not err when it failed to re-instruct the jury on the meaning of "reasonable doubt" in the penalty phase. (RB, at pp. 187-190.) Respondent's argument is unpersuasive.

Contrary to the assertion in respondent's brief, this Court has not already rejected appellant's claim that the jury should have been re-instructed on the definition of reasonable doubt. (See RB, at p. 187.) In *People v. Holt* (1997) 15 Cal.4th 619, 685, this Court did not expressly reach the question of whether the failure to redefine "reasonable doubt" in the penalty phase was error. Instead, it held only that any possible error in *Holt* was harmless. (*Ibid.*)

Respondent's attempt to distinguish *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1221-1223 is also unconvincing. In *Elguera*, the Court of Appeal found prejudicial error because the trial court failed to instruct on "reasonable doubt" at the conclusion of the case, even though the instruction was read to the jury during voir dire and all of the jurors answered affirmatively when asked if they understood the instruction. The trial in *Elguera* lasted only one day, and the jury began deliberations only five and one-half hours after the "reasonable doubt" requirement was explained during voir dire. (*Ibid.*)

Respondent presents two grounds for distinguishing *Elguera*. First, according to respondent, the jury in appellant's case actually applied the reasonable doubt instruction during the guilt phase. (RB, at p. 188.) Nonetheless, a substantial amount of time passed before the jury deliberated in the penalty phase. The guilt phase instructions were given nine days before, and a guilt verdict was reached six days before, the penalty phase deliberations commenced. As *Elguera* emphasized, the definition of "reasonable doubt" contained in CALJIC 2.90 and Penal Code section 1096 is extremely precise. Even the slightest variation from the language contained in the definition may significantly alter the meaning of "reasonable doubt" and thereby affect the jury's verdict. (*People v. Elguera*, *supra*, 8 Cal.App.4th at p. 1223.) Here, in the absence of the trial court's re-defining "reasonable doubt" and providing the jury with a written instruction, it is inconceivable that all of the jurors would have recalled the exact language of the definition. This is especially true in light of the imperfection of the instruction's construction and the obscurity of some of its language. (See *People v. Brigham* (1979) 25 Cal.3d283, 295-307 (conc. opn. of Mosk, J.).)[19]

Respondent also seeks to distinguish *Elguera* on the ground that in appellant's penalty phase, the jury was instructed to apply the reasonable doubt standard, although that standard was not re-defined. (RB, at p. 188.) While no similar instruction was given in *Elguera*, the appellate court was confident that "in the circumstances of this case, . . . the jurors were not left ignorant of the basic principles that the defendant in a criminal

[19] Although Justice Mosk's opinion addressed the former version of CALJIC 2.90, some of the language he criticized remains in the current version given at appellant's trial.

case is presumed innocent and the prosecutor must prove his guilt beyond a reasonable doubt." (*People v. Elguera*, *supra*, 8 CalApp.4th at p. 1221.) The circumstances relied upon by *Elguera*, included: (1) the jury being instructed that inferences from circumstantial evidence had to be proven beyond a reasonable doubt (when the prosecution's evidence on the crucial disputed issue was entirely circumstantial); (2) the court, reminding the jury, just before argument, that the prosecutor had the burden of proof and that no inference of guilt was to be drawn from defendant's arrest or placement on trial; and (3) the two attorneys referring to the prosecutor's burden of proof beyond a reasonable doubt at least eight times in argument to the jury. (*Ibid.*) Thus, the jury in *Elguera* was situated similarly to the jury in appellant's case. Both juries were very aware that it was the prosecution that had the burden of proof and that beyond a reasonable doubt was the applicable standard. What was omitted in both cases, and what was found to be error in *Elguera*, was an instruction that actually defined proof beyond a reasonable doubt.

Respondent next contends that despite the trial court's admonishing the jury to disregard the guilt phase instructions, the jury would still have understood that the definition of "reasonable doubt" given in the guilt phase was applicable to the penalty phase. (RB, at p. 189.) That is simply not the case. How could the jury understand that the same definition applied, when it was expressly told to disregard the instructions that included that very definition? If the penalty phase definition was to be the same, a reasonable juror would have expected an instruction that excluded the definition of

"reasonable doubt" from the guilt phase instructions to be disregarded. In the absence of such an instruction, the jury was logically led to believe that the standard of proof for other crimes evidence in the penalty phase was somehow different. Moreover, the absence of any questions from the jury regarding the penalty phase standard is of no significance. The jurors may well have believed they could apply a penalty phase definition of proof beyond a reasonable doubt of their own, and did not need to ask for a clarification from the trial court.

Finally, respondent claims that any error in the failure to define "reasonable doubt" in the penalty phase was harmless. (RB, at p. 190.) Again, respondent is incorrect. As discussed in the opening brief and in this reply, the penalty phase decision was a close one. Respondent states that "the jury showed a 'conscientious[ness] in [the] performance of [its] high civic duty' in light of the fact that the jury returned a verdict of death as to only one of the two" Merck murders. (RB, at p. 190, internal citations omitted.) Even if respondent's assertion is correct, however, it does not follow from the jury's conscientiousness that the verdict was unaffected by the trial court's failure to re-instruct on the definition of "reasonable doubt."

Respondent further states that "some of the evidence of appellant's prior criminal activity was introduced to rebut the defense case in mitigation." (RB, at p. 191.) Respondent's argument appears to be that criminal activity that is introduced to rebut good character evidence, rather than to establish a circumstance in aggravation, is not subject to the proof beyond a reasonable doubt requirement. The problem with

respondent's argument is that all of the other crimes evidence, including the disputed allegations that appellant had assaulted both Robert and Michael Hunt, was introduced by the prosecutor in its case-in-chief. The prosecution's only rebuttal witness was Deputy Sheriff Michael Rascoe, who testified about prior statements that Robert and Michael Hunt had made to him concerning the incident in which appellant allegedly assaulted Robert. (RT 2952-2955.)

## O. APPELLANT DID NOT WAIVE HIS CLAIM THAT THE TRIAL COURT ERRED BY LISTING BOTH RESIDENTIAL BURGLARY AND RESIDENTIAL ROBBERY IN THE INSTRUCTION REGARDING OTHER VIOLENT CRIMES; THE JURY WAS NOT PROPERLY INSTRUCTED; AND THE ERROR WAS NOT HARMLESS

### 1. Appellant Did Not Waive His Jury Instruction Claim

Respondent initially contends that appellant waived his claim regarding the inclusion of residential burglary in the other crimes instruction because he failed to make an objection in the trial court. (RB, at pp. 195-196.) For the reasons previously stated (see ARB, at pp. 34-36), the absence of an objection in the trial court does not bar this Court from reviewing the claim of instructional error.

### 2. The Trial Court Did Not Properly Instruct the Jury

Respondent cites decisions of this Court that have approved CALJIC 8.87. (RB, at p. 193.) These cases, however, simply hold that CALJIC 8.87 satisfies the requirement that the jury be instructed that it can consider as aggravating circumstances only other crimes of violence that have been proved beyond a reasonable doubt. This Court has never held that two criminal offenses based on the very same acts of violence may be listed in the instruction as separate crimes, and therefore potentially viewed as separate aggravating circumstances.

Respondent also relies on cases that have held that factor (b) of Penal Code section 190.3 allows for the admission of: (1) any crimes perpetrated in a violent or threatening manner (*People v. Grant* (1988) 45 Cal.3d 829, 851); and (2) nonviolent crimes committed during a continuous course of criminal activity that includes force or

violence (*People v. Cooper* (1991) 53 Cal.3d 771, 840-841). (RB, at pp. 194-195.) Respondent's argument misses the thrust of appellant's claim. Appellant is not contending that evidence of the burglary of James Foster's residence was erroneously admitted at the penalty phase. The burglary was a circumstance of the later robbery and both offenses were part of the same continuous course of criminal activity. Thus, under the authorities cited by respondent, evidence of the burglary was admissible under factor (b) of section 190.3.

That said, the burglary did not involve an act of violence separate from the violence involved in the robbery. Respondent claims that appellant armed himself prior to the burglary, but that claim is not supported by the record. Foster testified that when he returned home, appellant emerged from the closet with a firearm. (RT 2855.) No testimony was elicited regarding whether appellant brought the firearm with him to the residence or whether he found it inside Foster's apartment. The trial court was therefore incorrect to list the burglary as a separate criminal act of violence in CALJIC 8.87. In so doing, the trial court indicated to the jury that the residential burglary constituted a second aggravating circumstance against appellant, rather than a factor included within the robbery aggravating circumstance.

The distinction between admitting evidence of a nonviolent prior crime that is part of a continuous course of violent conduct and instructing the jury on that nonviolent crime was recognized in *People v. Cooper*, *supra*, 53 Cal.3d 771. In *Cooper*, this Court held that the prosecutor properly admitted evidence that in one course of conduct the

defendant burglarized a home, assaulted, kidnaped and raped a girl who interrupted the burglary, attempted to steal one vehicle, and did steal the rape victim's vehicle. At the same time, however, instructing the jury on the elements of the nonviolent crimes of burglary and theft was found to be error. "[T]he court should instruct on the elements of alleged other crimes [citation omitted], but only those that in and of themselves involve violence within the meaning of section 190.3, factor (b)." (*Id.*, at p. 841.)

### 3. The Instructional Error Was Not Harmless

As previously discussed in appellant's opening brief and in this reply, the penalty decision in appellant's case was a close one. Thus, the jury's finding of an additional, but erroneous, aggravating circumstance involving a prior crime may well have tipped the scale in favor of death. At the very least, the error compounded other penalty phase errors that also skewed the penalty determination.

## P. THE TRIAL COURT ERRED IN REJECTING APPELLANT'S PROPOSED INSTRUCTION THAT THE FINDING OF FIRST DEGREE MURDER WITH SPECIAL CIRCUMSTANCES IS NOT IN ITSELF A CIRCUMSTANCE IN AGGRAVATION IN DETERMINING PENALTY

Respondent initially argues that both the United States Supreme Court and this Court have upheld factor (a) of section 190.3 and CALJIC No. 8.85 against constitutional attack. (RB, at pp. 201-202.) The cases cited by respondent, however, considered a constitutional attack that differed from that made by appellant. In *Tuilaepa v. California* (1994) 512 U.S. 967, 976, for example, the United States Supreme Court held only that factor (a) adequately and properly instructed the jury to consider the circumstances of the crime in determining penalty. Respondent's authorities do not address whether it is proper to supplement CALJIC No. 8.85 with a clarifying instruction that the defendant should not be viewed as having an aggravating circumstance against him simply as a result of the jury's finding of first degree murder with special circumstances.

Respondent also relies on authority from this Court that "'the standard instructions do not inherently encourage the double counting of aggravating factors,'" and that "'the absence of an instruction cautioning against double counting does not warrant reversal in the absence of any misleading argument by the prosecutor.'" (RB, at p. 202, quoting *People v. Ayala* (2000) 24 Cal.4th 243, 289.) Again, respondent misinterprets the nature of appellant's claim.

Appellant's concern here is not that the jury might find two circumstances in aggravation from a single fact that was both a circumstance of the murders and the basis

of a special circumstance found to be true. Rather, appellant's proposed instruction would have explained to the jury that the verdicts themselves were neutral factors, and did not weigh one way or the other, in the determination of whether appellant should be sentenced to death or life without possibility of parole. According to the requested instruction, appellant did not start off the penalty phase with an automatic circumstance in aggravation based on the jury's verdicts in the guilt phase. Instead, the jury would have been told to review the evidence presented in support of its verdicts in order to identify any mitigating or aggravating circumstances. Appellant's proposed instruction, therefore, clarified an ambiguity arising from the language of factor (a), i.e., whether the jury's verdicts in themselves were "circumstances of the crime" and established "the existence of any special circumstance."

The trial court's error in rejecting the instruction was not harmless. Given that the decision in the penalty phase was close, the jury's consideration of an additional, erroneous aggravating circumstance may well have influenced the its death verdict.

## Q. THE TRIAL COURT ERRED IN REJECTING APPELLANT'S PROPOSED INSTRUCTIONS THAT THE JURY MUST CONSIDER DEATH AS A MORE SEVERE PUNISHMENT THAN LIFE WITHOUT POSSIBILITY OF PAROLE

Respondent agrees that under California death penalty law death is considered a more severe punishment than life without possibility of parole. (RB, at p. 206.) Respondent is incorrect, however, that the trial court's instructions adequately informed the jury of that legal principle.

As recognized by a number of courts, life without possibility of parole is a punishment that some view to be as severe as death, if not worse. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1223, fn. 7; *Holman v. Page* (7th Cir. 1996) 95 F.3d 481, 487; *Holland v. Donnelly* (S.D.N.Y. 2002) 216 F.Supp.2d 227, 242.) Appellant's proposed instructions would have clarified for the jury that under California law death is deemed to be the more severe punishment.

The trial court's error in rejecting both instructions was not harmless. The jury's verdict of death may not have reflected a unanimous finding that the defendant deserved California's most extreme punishment.

## R. APPELLANT DID NOT WAIVE HIS CONSTITUTIONAL CLAIMS REGRADING THE TRIAL COURT'S ADMISSION OF DEPUTY RASCOE'S TESTIMONY CONCERNING MICHAEL HUNT'S ALLEGED PRIOR STATEMENT; AND THE TRIAL COURT DID NOT PROPERLY ADMIT THE TESTIMONY INTO EVIDENCE

### 1. Appellant Did Not Waive His Constitutional Claims

Respondent's contention that appellant waived his constitutional claims because trial counsel did not object on those specific grounds below (RB, at p. 210), has been previously addressed. (See ARB, at pp. 33-35.) For the reasons there stated, the absence of such objections does not bar this Court from reviewing these constitutional claims.

In the present case objections based on appellant's constitutional claims – violations of his rights to a reliable penalty determination, due process of law and confrontation of witnesses – would have been futile. The factual basis for the constitutional claims is identical to that of the hearsay objection made at trial. Defense counsel claimed that Hunt's prior statement was inadmissible because it was not inconsistent with his testimony. The trial court, however, believed there was an inconsistency and overruled the objection. Given the trial court's ruling that Hunt's prior statement was not hearsay, it would have been futile for trial counsel also to argue that the erroneous admisión of the prior statement violated appellant's constitutional rights.

### 2. Michael Hunt's Alleged Prior Statement Was Not Inconsistent with His Testimony

Contrary to respondent's argument (RB, at p. 211), Michael Hunt's alleged prior statement to Deputy Rascoe was inadmissible because it was not inconsistent with his testimony. Michael did not testify about the incident between appellant and Robert on

April 9, 1993. Nor did he deny that appellant had ever struck Robert. Respondent relies on Michael's testimony that all of Hunt's children liked to call appellant "Dad" because it made appellant feel good and that appellant treated them with respect. (RB, at p. 211.) Michael's alleged statement to Deputy Rascoe, however, did not tend to contradict or disprove this testimony. In that statement, Michael allegedly said that he once observed appellant become mad because Robert was playing on a parked van. Appellant then grabbed Robert by the hair and pushed him to the ground. (RT 2954.) This single, alleged incident of excessive discipline did not rebut Michael's testimony concerning appellant's relationship with the children.

Respondent also argues that any error in admitting Michael's alleged prior statement was not a violation of the right to confrontation because Michael testified at trial and was subject to cross-examination. (RB, at p. 211.) Respondent overlooks *California v. Green*, *supra*, 399 U.S. at p. 164, which stated only that the Confrontation Clause was not violated when the witness conceded making the prior inconsistent statement that was admitted at trial. Here, Michael never admitted at trial that he previously had made a statement to Deputy Rascoe concerning an altercation between appellant and Robert Hunt, so the exception identified in *California v. Green* is inapplicable. Consequently, the testimony that Michael had made such a statement was not reliable, and its admission violated appellant's right to confrontation.

### 3. The Error in Admitting Deputy Rascoe's Testimony about a Prior Statement Allegedly Made by Michael Hunt Was Not Harmless

Respondent's claim that any error in admitting Rascoe's testimony was harmless,

(RB, at pp. 211-212), is unpersuasive. In her closing argument, the prosecutor highlighted appellant's abuse of Robert Hunt as an aggravating factor that supported the death penalty. According to the prosecutor, appellant "ha[d] no respect for anyone, not the elderly, not the middle age[d] or not the young. The people who can't help themselves, the young and the old, he mistreats, he harms." (RT 2983-2984.)

Appellant strongly disputed the allegation that he had abused Robert Hunt. Had the trial court properly excluded Deputy Rascoe's testimony, the jury may well have concluded that the claim of child abuse had not been proven or, at least not proven, beyond a reasonable doubt. The prosecution's argument for death would then have been substantially undermined. Thus, there is at least a reasonable possibility that the jury would have reached a more favorable verdict in the penalty phase.

## S. APPELLANT DID NOT WAIVE HIS CLAIM THAT THE TRIAL COURT FAILED TO ADEQUATELY INVESTIGATE JUROR MISCONDUCT; AND THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO MAKE AN ADEQUATE INQUIRY

### 1. Appellant Did Not Waive His Claim That the Trial Court Failed to Adequately Investigate Juror Misconduct

Respondent contends initially that appellant waived his claim by failing to ask the court to take any additional action on the information provided by the jurors, by not objecting to retaining Juror 045829, and by not including a claim of juror misconduct in his motion for new trial. (RB, at p. 215.) In support of this argument, respondent cites two authorities that set forth the legal principle that a claim of juror misconduct is waived by failure to raise the issue at trial. (See *People v. Lucas* (1995) 12 Cal.4th 415, 487; *People v. Martinez* (1968) 264 Cal.App.2d 906, 912.)

Respondent's argument is flawed because he misidentifies the precise claim being raised by appellant. This is not a case in which appellant is making a claim of juror misconduct for the first time on appeal. In this case, the possibility of juror misconduct was made known to the trial court during the penalty phase deliberations when Jurors 040149 and 045829 were questioned. Appellant's claim is that the trial court failed to conduct an adequate hearing to investigate the possible jury misconduct. Once a trial court is on notice of possible good cause to discharge a juror, it has a sua sponte duty to conduct an inquiry sufficient to determine the facts. (*People v. Burgener* (1986) 41 Cal.3d 505, 519, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753; *People v. Keenan* (1988) 46 Cal.3d 478, 532.)

In *Burgener*, this Court found that the trial court erred in not conducting an adequate investigation into possible juror misconduct even though defense counsel expressly objected to any further investigation. The foreman in *Burgener* advised the trial judge during deliberations that she believed another juror was intoxicated. The trial judge consulted with counsel about how to proceed. Defense counsel expressly objected either to substituting an alternate juror or to questioning the juror about her sobriety. Defense counsel consented only to admonishing the jury as a group against using intoxicants and allowing the jury to continue its deliberations. On appeal, the defendant argued that the trial court erred in failing to conduct a hearing that was adequate to ascertain the juror's sobriety. This Court agreed that the failure was error despite defense counsel's objection to any further inquiry.[20] (*Id.*, at pp. 516-518.)

Additionally, as previously noted (see ARB, at p. 35), review on the merits of appellant's claim is permissible "in order to forestall a possible claim of ineffectiveness of counsel based on failure to object." (*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 693, citing *People v. Lewis* (1990) 50 Cal.3d 262, 282-283.)

### 2. The Trial Court Failed to Adequately Investigate the Possibility of Juror Misconduct

Respondent acknowledges that the trial court must conduct an inquiry sufficient to determine the facts when there is a report of possible juror misconduct. (RB, at p. 217, citing *People v. Pinholster* (1992) 1 Cal.4th 865, 928.) Respondent further claims,

[20] *Burgener* did not find that the error was prejudicial because defense counsel's objection to a hearing prevented the trial court from determining whether the juror was in fact intoxicated. (*Id.*, at p. 521.) Here, by contrast, defense counsel did not object to conducting a more extensive hearing.

however, that "[a]n evidentiary hearing into a claim of juror misconduct is required only where there is a material conflict in the claimed action by the juror which can only be resolved at such a hearing." (RB, at p. 217.) In support of this assertion, respondent cites *People v. Brown* (2003) 31 Cal.4th 518, 581-582 and *People v. Hardy* (1992) 2 Cal.4th 86, 174), which in turn apply the holding of *People v. Hedgecock* (1990) 51 Cal.3d 395, 415.) Respondent's reliance on these authorities is misplaced because the *Hedgecock* rule concerns a claim of misconduct raised in a motion for new trial after the verdict has been returned and the jury discharged. (*People v. Hedgecock*, *supra*, 51 Cal.3d at p. 415.) Where a report of possible jury misconduct arises during trial, *People v. Burgener*, *supra*, 41 Cal.3d at p. 519 and *People v. Keenan* (1988) 46 Cal.3d 478, 532 control. As this Court stated in *Keenan*, if the trial court learns during deliberations of possible misconduct, "the court may and should intervene promptly to nip the problem in the bud." (*Ibid.*) The trial court must conduct an adequate inquiry to determine the facts, and that inquiry is not limited to obtaining affidavits or declarations from jurors. As occurred in *Burgener*, *Keenan* and *People v. McNeal* (1979) 90 Cal.App.3d 830, 839, jurors may be questioned to determine whether misconduct occurred even in the absence of a "material conflict" in the record.

Respondent also argues that the trial court's limited inquiry was appropriate in light of the need to preserve the secrecy of the jury's deliberations. (RB, at pp. 218-219.) "The need to protect the sanctity of jury deliberations, however, does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations."

(*People v. Cleveland* (2001) 25 Cal.4th 466, 476.) Here, the trial court's inquiry was unreasonable in light of the information known to the court. The trial court did not investigate the inconsistency between Juror 045829's claim that Juror 040149 accused her of talking to appellant's relatives and Juror 040149's statement to the court that he did not actually know if Juror 045829 had conversed with them. Nor did the trial court investigate whether Juror 045829 had overhead any conversation between appellant's relatives when sitting alongside them, and if so, whether the juror informed other jurors about what she heard. Finally, the trial court failed to investigate whether Juror 040149's obvious frustration with Juror 045829's "holding up or trying to recant or whatever" was leading jurors to berate Juror 045829 in order to coerce her into voting for death. (RT 3019.)

### 3. The Trial Court's Failure to Adequately Investigate the Possibility of Juror Misconduct Was Not Harmless

Respondent contends that any presumption of prejudice arising from any conceivable misconduct was rebutted by the record. (RB, at p. 219.) His prejudice analysis is misguided. Appellant need not establish that there was juror misconduct when the trial court failed to hold an inquiry that was adequate to uncover any such impropriety.

In *People v. McNeal*, *supra*, 90 Cal.App.3d at p. 839, the Court of Appeal found that the trial court had failed to adequately investigate whether a juror had personal knowledge about the case that would influence her decision. The appellate court then considered whether the error required reversal in the absence of a record establishing

what exactly the juror knew and how that would affect her vote. As *McNeal* explained, "An evaluation of whether the error was prejudicial must have as its foundation the defendant's right to a jury trial by a fair and impartial jury . . . ." (*Id.*, at p. 840.) Additionally, the court noted that the purpose of Penal Code sections 1089, 1120 and 1123 (since repealed) was "to provide a vehicle for the dismissal of a sworn juror when facts are discovered from which it can reasonably be concluded that the juror, originally thought to be unbiased, actually cannot be fair and impartial." (*Ibid.*) These constitutional and statutory provisions led the *McNeal* court to conclude that "where the fact of a sworn juror's impartiality comes into question . . . during the course of the trial or the deliberations, the failure of the court to make at least a preliminary inquiry into facts of such impartiality cannot be said to be error harmless beyond a reasonable doubt." (*Ibid.*) Here, as in *McNeal*, the trial court's "failure to make an appropriate inquiry into the facts in order to determine whether they constituted good cause for discharge of the juror constitutes reversible error." (*Ibid.*) Appellant was deprived of his right to a reliable penalty determination under the Eight and Fourteenth Amendments (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304) to due process of law under the Fourteenth Amendment (*Gardner v. Florida* (1977) 430 U.S. 349, 359), and to a trial by a fair and impartial jury under Sixth and Fourteenth Amendments.

## T. THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

In his opening brief, appellant raised multiple challenges to the constitutionality of the California death penalty statute. Respondent contends that these claims, or related claims, have been previously rejected by this Court. (RB, at pp. 220-229.) For the reasons set forth in the opening brief, however, appellant continues to maintain that these cases were wrongly decided and that the California death penalty statute is unconstitutional.

## U. APPELLANT WAS PREJUDICED BY CUMULATIVE ERROR

Respondent acknowledges that this Court must consider the cumulative effect of any errors. Respondent insists, however, that no errors occurred or, alternatively, that any errors were harmless. (RB, at pp. 230-231.) Respondent's view of the case is extremely inaccurate. As explained in the opening brief, as well as in this reply brief, substantial prejudice flowed from the numerous errors committed, and from their cumulative impact. Appellant's conviction and death sentence must be reversed.

## II.

## CONCLUSION

For the reasons stated in the opening and reply briefs, it is respectfully requested that appellant's conviction for first degree murder and the special circumstance finding be reversed, and that appellant's death sentence be set aside.

Respectfully submitted,

Dated: October 18, 2005

MARK GOLDROSEN

Dated: October 18, 2005

NINA WILDER

Attorneys for Defendant-Appellant
ROBERT WESLEY COWAN

## CERTIFICATE OF COMPLIANCE

I certify with respect to Appellant Robert Cowan's Reply Brief as follows:

Line Spacing: The text is double spaced, except that quotations of more than two lines are indented and single spaced, and headings and footnotes are single spaced, and;

Calculation of Length: The brief uses proportionately spaced typeface of 13 points. It is comprised of 32,013 words.

Dated: October 18, 2005

NINA WILDER

## PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over eighteen years of age and not a party to the within action; that my business address is 523 Octavia Street, San Francisco, California 94102; and that on date set forth below, I served a true copy of **APPELLANT'S REPLY BRIEF** on the parties addressed below by depositing a true copy of the original thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at San Francisco, California as follows:

| | |
|---|---|
| Clerk of the Superior Court<br>Kern County<br>1415 Truxton Avenue<br>Bakersfield, CA 93301<br>ATTN: Hon. Lee P. Felice | California Appellate Project<br>101 Second Street, Suite 600<br>San Francisco, CA 94105 |
| John A. Thawley<br>Deputy Attorney General<br>1300 I Street, Suite 125<br>Sacramento, CA 94424 | James Sorena<br>Attorney at Law<br>200-18th Street<br>Bakersfield, CA 93301 |
| Stephanie A. Leyendecker<br>Assistant District Attorney<br>1215 Truxton Avenue<br>Bakersfield, CA 93301 | Robert Wesley Cowan<br>K-18501<br>California State Prison,<br>at San Quentin<br>San Quentin, CA 94964 |

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

Executed October 18, 2005 at San Francisco, California.

COREY O'CONNOR