ORIGINAL

No. S058537

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
FEB 17 2005
Frederick K. Ohlrich Clerk
DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

SCOTT FORREST COLLINS

Defendant and Appellant.

Los Angeles County
Superior Court No. LA009810

APPELLANT'S REPLY BRIEF

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

HONORABLE LEON KAPLAN, JUDGE
HONORABLE HOWARD SCHWAB, JUDGE

MICHAEL J. HERSEK
California State Public Defender

KENT BARKHURST
Deputy State Public Defender
California Bar No. 87832

221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Appellant

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SCOTT FORREST COLLINS, Defendant and Appellant.	)	No. S058537 (Los Angeles Sup. Ct. No. LA009810)

APPELLANT'S REPLY BRIEF

- - -

INTRODUCTION

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

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief ("AOB").

//

THE TRIAL COURT CORRECTLY ORDERED A NEW TRIAL BECAUSE OF PREJUDICIAL JURY MISCONDUCT

Appellant's trial was tainted by juror misconduct. The prosecutor had argued at the penalty phase that the victim was shot either execution-style while begging for his life, or while running away from appellant. Whether or not the killing was execution-style became a point of contention during jury deliberations. One juror used his computer at home one evening to create a model to figure out, under his interpretation of the evidence, the relative positions of the shooter and the victim. His experiment confirmed his belief that the shooting was an execution-style shooting. He then used that information to back up his position in the jury room, leading a re-enactment of the shooting based on the model he created on his computer. The misconduct was discovered shortly after the jury returned its verdict of death. Appellant filed a motion for new trial under Penal Code section 1181[1] based in part on allegations of jury misconduct. The trial court found this to be prejudicial misconduct and ordered a new penalty phase trial. The Court of Appeal reversed that order following the People's appeal. This Court denied review without prejudice to considering the issue on automatic appeal following judgment. In the opening brief, appellant argued that the trial court correctly ordered a new penalty trial because of the misconduct. Respondent contends no prejudicial misconduct occurred. Only a few of respondent's points require answering in this reply.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

A. The Standard of Review

In *People v. Ault* (2004) 33 Cal.4th 1250, 1265, this Court reaffirmed the long-established deferential standard of review the appellate court use when the prosecution appeals from the grant of a new trial based on juror misconduct: "We need not depart from the long-established principle of broad deference to trial court orders granting new trials." This standard of review is set forth in *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 (*Jiminez*), and *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 748. *(People v. Ault, supra*, 33 Cal.4th at p. 1261 fn. 3.) Under *Jiminez*, so long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside. (4 Cal.3d at p. 387.)

In his opening brief, appellant urged that this Court rely on the *Jiminez* test in reviewing the present matter. After the Court of Appeal reversed the court's order granting a new penalty trial, this Court denied review "without prejudice to subsequent consideration after judgment." (11/13/96 Order.) Had the Court granted review, the *Jiminez* test would have been applied in determining whether the new trial order would stand. Respondent, on the other hand, asserts that deferential review is not warranted, but does not offer an alternative standard.[2] (RB 72.) Appellant submits that to give effect to the words "without prejudice" in the Court's Order, the deferential standard of review must be used.

Even if the Court does not apply the broad deference standard of

---

[2] Respondent cites *People v. Barragan* (2004) 32 Cal.4th 236, 246 regarding law of the case without explaining how that doctrine applies in light of this Court's Order. Appellant submits it has no applicability to the procedural posture of this case.

Jiminez, it must at least defer to the credibility determinations and findings on questions of historical fact where they are supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) Those facts amply support the trial court's decision as discussed below.

B. The Trial Court's Factual Findings Are Supported by the Record

Respondent takes the position that the re-enactment or experiment in the jury room, which was orchestrated by juror Greg Beckman, was not influenced by any extrinsic evidence and was separate from the experiment conducted earlier by Beckman on his home computer. (RB 67.) This position is contrary to the evidence and contrary to the factual findings of the trial court.

The prosecutor had argued at the penalty phase that the victim was shot either execution-style while begging for his life, or while running away from appellant. Beckman argued to the other jurors that the killing was execution-style. Other jurors expressed disagreement or a lack of understanding of the issue. (RT 6485-6486, 6494-6495.) According to juror Charles Collingwood, there were unsuccessful attempts to draw on the board: "Things was [sic] drawn on the board and people were showing things but they couldn't understand." (RT 6494.) Beckman acknowledged that at least one juror expressed skepticism of his theory. He said that during deliberations "the term 'executed' was used on numerous occasions." (RT 6480.) At least one of the jurors asked Beckman how he knew the victim was executed. (RT 6480.) Beckman's response was to work out the answer on his computer at home:

> "Well, *on my computer, I worked out height patterns and came up with the fact that anyone standing six feet away from another*

> *person would have to just about be standing on a stool two and a half feet high to get a downward trajectory through the back of the skull of an individual, and I used that reference to back up the statements that were made in the deliberation room about an execution instead of a murder.*"

(RT 6480-6481, emphasis added.)

In short, the "fact" Beckman "came up with" through his improper use of his home computer supported his expressed position that the victim was on his knees when shot. He used this "fact" to "back up" his statements during deliberations that the killing was an execution rather than a simple murder. The experiment in the jury room was thus a re-enactment of Beckman's experiment at home, not an independent re-enactment of the actual shooting. Beckman brought his misconduct into the jury room.

The trial court's findings were completely consistent with this scenario:

> ". . . the juror went home and sat down at his computer screen at home and performed what can only be described as a simulation model from which he concluded that his preconceptions were in fact correct and that a person standing 6 feet away from a victim would have to be standing on a stool 2 feet higher than the other person in order to create the type of downward trajectory that was testified to by the medical examiner in this case.
>
> "Inferentially, since there's not likely to have been a stool at the scene of the experiment and therefore the victim had to be kneeling down. Having gathered and developed this information outside the jury room, this juror then went into the jury room, proceeded to duplicate this experiment inside the jury room

> by posing different jurors in the role of victim and executioner."

(RT 6743-6744.)

Respondent's characterization of the experiment in the jury room as unaffected by Beckman's misconduct at home is therefore untrue.

C. The Court Did Not Rely on Evidence of the Mental Processes of the Jurors in Finding Prejudicial Jury Misconduct.

Respondent argues that the trial court's decision is due no deference because it was based on improper evidence of the mental processes of the jury. Respondent is incorrect. Evidence Code section 1150 states in relevant part:

> (a) "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

Jurors may testify to overt acts which took place within the jury room, but not to the subjective reasoning processes of any individual juror. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397-398.) Statements made by jurors during deliberations are admitted with caution because they have a greater tendency to implicate a juror's reasoning. (*Ibid.*; *People v. Perez* (1992) 4 Cal.App.4th 893, 906-908.) The section distinguishes "between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror which can be neither

corroborated nor disproved. . . ." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350.)

The trial court made quite clear that its decision was not based on the mental processes of the jurors:

> "I just want to state very briefly number 1, number 1, the thought processes of the jurors indeed cannot be looked at. The standard is an objective one. I've found that information was gathered outside the courtroom, taken into the jury room, then, an experiment was performed in the jury room all of which raised the presumption of prejudice. The People then have the duty to overcome that presumption of prejudice. The People argued that it's not conceivable, in fact remotely conceivable that the jurors' conclusions would have been affected by this improper conduct. My recitation of the jurors[']' testimony and other circumstances, is simply a way of illustrating that it's indeed extremely conceivable and indeed very logical under a law that bases the constitutionality of the death penalty on the fundamental and ultimate ability of every juror to give each and every one of the pertinent factors in aggravation and mitigation the weight that that juror feels is appropriate. In that light, it's entirely conceivable that jurors would be looking at the particular circumstances referred to by the witnesses during their testimony, specifically whether or not the victim was given any chance at all. This was an issue that according to the jurors was a subject of concern just before they conducted this experiment. They were unable to reach a verdict before. I've read portions which substantiate the fact that number 1, it was not only one juror that was concerned about it but instead some of the women or alternatively, not some of the women

but some of the men et cetera. I will not reiterate that."

(RT 6760-6761.)

The court did not rely on improper mental process evidence.[3] This Court should defer to the trial court's findings.

D. Conclusion

The trial court correctly determined that the penalty verdict was tainted by jury misconduct and that there was a substantial likelihood that the misconduct affected the verdict. Whether this Court reviews this issue under the broad deference standard of *Jiminez* or under the independent review standard of *People v. Nesler* , *supra*, 16 Cal.4th 561 the trial court's decision to grant a new penalty trial must be upheld. Accordingly, the sentence and judgment of death must be reversed.

//

//

---

[3] Furthermore, respondent has cited to statements which are not mental process evidence. (See e.g., RB 73 ["The point being as of that particular Friday the jury had not yet made a decision."].)

2

THE TRIAL COURT PROPERLY ORDERED A NEW PENALTY TRIAL BASED ON PROSECUTORIAL MISCONDUCT

As set forth in appellant's opening brief, the trial court granted appellant a new penalty trial based on three grounds: jury misconduct, prosecutorial misconduct, and the erroneous admission of aggravating evidence under section 190.3, factor (b) without notice. The prosecutorial misconduct cited by the court was counsel's penalty phase argument that informed the jurors that the family of the victim wanted appellant sentenced to death in violation of *Booth v. Maryland* (1987) 482 U.S. 496, 508-509. The Court of Appeal reversed the new trial order and this Court denied review "without prejudice to subsequent consideration after judgment." (11/13/96 Order.) In his opening brief appellant argued that to give effect to this order the court should review the trial court's order granting a new trial with the deference ordinarily accorded the trial court decision when the prosecution appeals the grant of a new trial. A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1260-1261.) This is particularly true when the discretion is exercised in favor of awarding a new trial. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside. (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.)

Respondent argues that the trial court had no authority to grant a new trial and that the issue is not meritorious. Appellant now replies to each of

these arguments.[4]

A. The Trial Court Properly Granted a New Penalty Trial on the Basis of Prosecutorial Misconduct.

Appellant's filed a timely new trial motion on November 23, 1993, alleging jury misconduct. (CT 1120.) Following the examination of three jurors, and before the motion was heard, the court granted appellant's request to file a new trial motion based on the information provided by the testimony of the three jurors. The prosecutor, who had not yet filed a pleading responsive to appellant's new trial motion, agreed with this procedure. (RT 6512-6514.) February 17, 1994, appellant filed his revised new trial motion which was based on jury misconduct as well as prosecutorial misconduct. (CT 1199.) The motion was heard on March 30 and April 7, 1994. The court granted a new penalty trial in part based on the prosecutor's misconduct during argument to the jury.

Respondent claims that the trial court had no power to grant a new trial for the prosecutor's misconduct in committing *Booth* error. Respondent first relies on the proposition that a new trial may only be granted upon application of the defendant. (RB 84, citing *People v. Bangeneaur* (1871) 40 Cal. 613, 614.) But appellant did file a new trial motion, and the trial court granted that motion. Respondent claims that it is error for a court to grant a new trial based on a ground not specified in the new trial motion. (RB 84, citing *People v. Skoff* (1933) 131 Cal.App.235,

---

[4] In his opening brief appellant indicated that to the extent this issue is not considered as part of the granting of the motion for new trial, that it be considered as an independent claim of prosecutorial misconduct. That claim was not waived for lack of an objection due to the continuous course of misconduct by the prosecutor. (See *People v. Hill*, *supra*, 17 Cal.4th 800.)

239.) Section 1181 specifies nine statutory grounds for granting a new trial, one of which is "5. ". . . when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury;. . . ." (§ 1181.) Appellant specified several acts of prosecutorial misconduct in his motion for new trial. (CT 1199-1244.)

Furthermore, the trial court has broader powers to grant a new trial motion than respondent contends. Although section 1181 enumerates specific grounds for the grant of a new trial, the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants are accorded due process of law. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582 [grant of new trial based on ineffectiveness of counsel upheld].) "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." (*Glasser v. United States* (1942) 315 U.S. 60, 71; see also *Powell v. Alabama* (1932) 287 U.S. 45, 52.) The power to grant a new trial on nonstatutory grounds obviously is derived from the trial court's constitutional duty to insure an accused a fair trial. (*People v. Davis* (1973) 31 Cal.App.3d 106, 110; see also *People v. Knutte* (1896) 111 Cal. 453 [affirming a new trial order based on the trial court's own motion]; *People v. Salgado* (2001) 88 Cal.App.4th 5, 9 [noting that "ordinarily, a trial court has no authority to grant a new trial on its own motion" but allowing the order to stand where the order would have been proper under section 1385].)

In *People v. Oliver* (1995) 46 Cal.App.3d 747, 749-753, defendant moved for a new trial on the grounds of insufficient evidence and misdirection of the jury. (§ 1181, subds. (5) & (6).) The court ordered polygraph and sodium amytal testing, the result of which convinced the court to order a new trial "in the interest of justice." (*Id.* at p. 751.) The

Court of Appeal affirmed the trial court's order, interpreting it as expressing a belief that the defendant had not received a fair trial. (*Id.* at p. 752.) "The duty of a trial court to afford every defendant in a criminal case a fair and impartial trial is of constitutional dimension. Where the procedure has fallen short of that standard, an accused has been denied due process, and the inherent power of the court to correct matters by granting a new trial transcends statutory limitations." (*Id.* at p. 751; see also *People v. Sherrod* (1997) 59 Cal.App.4th 1168, 1175 [affirming order granting new trial based on erroneous failure to grant defense request to continue trial].)

The misconduct appellant cited in his motion for new trial was the prosecutor's argument that the jury in determining its penalty verdict should show appellant the same mercy he showed Fred Rose; that she argued facts not in evidence; and that she possibly made inappropriate gestures and sounds during the defense argument. (CT 1199-1239.) Respondent apparently contends that this is the only misconduct upon which the court could have granted a new trial. Respondent cites no authority for that proposition. To the contrary is *People v. Andrade* (2000) 79 Cal.App.4th 651, 657-662. In *Andrade*, defendant moved for a new trial claiming ineffective assistance of counsel, and citing various shortcomings by trial counsel. The trial court ordered a new trial based on ineffectiveness of counsel which was due to the failure of counsel to call the defendant as a witness, which was a basis not mentioned in defendant's motion. The Court of Appeal affirmed the order, noting that "the trial court is obligated to grant a new trial if it finds the result of the first trial to have been unfair. (*Id.* at p. 661.) The trial court in the present case was clearly concerned about the fairness of the penalty trial, and his order granting a new trial based on the misconduct of the prosecutor communicating to the jury the

wishes of the victim's family for a death verdict was well within his authority.

B. The Trial Court Properly Found *Booth* Error

Respondent agrees with appellant that under *Booth v. Maryland*, *supra*, 482 U.S. at pp. 508-509 it is improper the prosecution to present evidence of a victim's family members-opinions about the proper sentence for the defendant. (RB 86.) There can be no question that it is misconduct for a prosecutor to argue facts not in evidence during closing argument (*People v. Hill* (1998) 17 Cal.4th 800, 827-828) and to imply the existence of evidence known to the prosecutor but not to the jury (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213). It necessarily follows that it is misconduct for a prosecutor to express or imply in the penalty phase argument to the jury that a victim's family wants the defendant to receive the death penalty.

In his opening brief, appellant set out at length the prosecutor's argument on vengeance which conveys explicitly and implicitly that Fred Rose's family wanted the jury to return a death verdict. (AOB 76-78.) Respondent disagrees that the jury would understand the prosecutor's argument in this manner, relying entirely on *People v. Montiel* (1993) 5 Cal.4th 877.

In *Montiel* the prosecutor reminded the jury that the victim's family had been "robbed of a beloved relative." The prosecutor concluded this portion of his argument "by 'implor[ing]' the jury to return the death penalty, not only for the victim, his 'children and his family,' but also for the People of the State of California." (5 Cal.4th at p. 934.) This Court found the prosecutor's asking the jury to impose death "for" the victim's family was not communicating the families preferred verdict; rather, "a reasonable jury would interpret the prosecutor's plea for death 'for' the

victim's 'children and family' as merely a claim that the supreme penalty was the only appropriate means of redressing the injury." (*Id.* at p. 935.)

In contrast to *Montiel*, the prosecutor here made abundantly clear what the family wanted. After a lengthy discussion extolling the value of vengeance in the criminal justice system, and how individuals give up their right to personal vengeance as part of the social contract underlying our civilization, she focused specifically on the victim's family:

> "Now, the Rose family, is part of this social contract. They have given up their right to take personal vengeance on the defendant because they're law abiding. In return, they're entitled to action of the state that serves the same purpose. They're entitled to vengeance, plain and simple. They're not allowed to get him themselves. They're not allowed to take this defendant to Clybourn and Chandler in North Hollywood and shoot a bullet into his head. They gave up their right to vengeance like we all did because we are law abiding, but we owe them something in return and something that they are not entitled to get on their own."

(RT 6286.)

The message to the jury was unmistakable: the family is "entitled to vengeance, plain and simple;" they are "not allowed to take [appellant] to Clybourn and Chandler in North Hollywood and shoot a bullet into his head;" and "we owe them something in return and something that they are not entitled to on their own." This argument simply makes no sense unless the jurors accept the fact that the victim's family wants a verdict of death. It cannot be dismissed as "merely a claim that the supreme penalty was the only appropriate means of redressing the injury." (RB 88.) Making matters

even clearer, the prosecutor let the jurors know from the beginning of her penalty phase argument that she was, in fact, advocating on behalf of the victim's family, rather than simply as a representative of the state: She thanked the jury, telling them, "So from me, on behalf of Detective Castillo *and on behalf of Fred Rose's entire family and friends*, we thank you from the bottom of our hearts for all of your considerations and for all the time that you have spent." (RT 6217, emphasis added.)

The trial judge assessed this argument correctly: "Any objective observer could not but conclude beyond a reasonable doubt that the Rose family clamored for the imposition of the death penalty. This was prejudicial." (RT 6752.)

The penalty phase verdict and judgment of death must therefore be reversed.

//

//

3

THE TRIAL COURT CORRECTLY ORDERED A NEW TRIAL BASED ON THE ERRONEOUS ADMISSION OF UNCHARGED CRIMES ALLEGED TO HAVE BEEN COMMITTED BY APPELLANT

In the opening brief appellant argued that the trial court had correctly ordered a new penalty phase trial based on the erroneous admission of evidence, volunteered by prosecution witness Fred Joseph, that appellant had committed crimes of violence at age 16. Joseph was a witness to appellant's purported possession of a Molotov cocktail which the prosecution introduced as aggravating evidence under section 190.3, factor (b). (See Argument 9.) But Joseph was an uncontrollable witness and offered evidence that appellant was involved in at least three other serious offenses – an attempt to kill Joseph, attempts to intimidate customers at the liquor store Joseph owned, and threats to a superior court judge who was handling a juvenile case of appellant's. None of these uncharged acts of violence had been noticed by the prosecution as part of its penalty phase case. The trial court found the evidence of these other crimes to be "powerful" and ordered a new trial.

Respondent first reiterates the contention in Argument 2 that the trial court had no authority to grant a new trial based on the erroneous admission of Joseph's testimony. (RB 105-106.) The contention that the court made its own motion for new trial is not true. Appellant made a motion for new trial, but did not specify these particular evidentiary errors as grounds for relief. (CT 1199-1240.) Appellant has shown in Argument 2 of this Reply that the trial court has the power, and even the obligation, to grant a new trial where appellant has been deprived of a fair trial, even where the grounds upon which the new trial is granted differs from those pleaded by

the defendant. (See Argument 2. A.) The introduction of inadmissible uncharged crimes under section 190.3, factor (b) conflicts with objective criteria guide the imposition of the death penalty (*Maynard v. Cartwright* (1988) 486 U.S. 356; *McCleskey v. Kemp* (187) 481 U.S. 279, 299-306) and the heightened need for reliability in capital trial and sentencing procedures (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9 (plur. opn.); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.) The court had authority to order a new penalty trial.

Respondent also claims the evidence of the other crimes was admissible as "facts surrounding the Molotov Cocktail incident" under *People v. Melton* (1988) 44 Cal.3d 713-754. The other crimes here were not even on the same day as the alleged Molotov cocktail incident. (See e.g., RT 5342-5345.) They cannot possibly be seen as admissible as part of the evidence relating to the incident Joseph was called to testify about.

As appellant has shown in the opening brief and in Argument 2, a court's determination to grant a new trial should not be disturbed absent a manifest and unmistakable abuse of discretion. (*People v. Lewis* (2001) 26 Ca.4th 334, 364.) There was no abuse of discretion here. The death judgment should therefore be set aside.

//

//

4

APPELLANT'S MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED

The defense moved for a mistrial after the prosecution improperly elicited testimony that appellant had recently been released from prison at the time of Fred Rose's homicide. (AOB 92-97.) Appellant previously had sought an order to have the prosecutor instruct her witness, Salo Gutierrez, not to mention appellant's prior incarceration while testifying. Appellant was particularly concerned about the prejudice that could result from the jury hearing that appellant had only been out of prison for about a month when the homicide for which he was on trial occurred. (CT 501-502.) The court did not require the prosecutor to so instruct the witness after the prosecutor represented she had no intention of asking the witness about appellant's incarceration. (RT 2314-2315.) Despite this assurance from the prosecutor, Gutierrez revealed in front of the jury that appellant had just been released from prison in Susanville in December, 1991, about a month before Fred Rose was killed. Respondent claims there was no improper questioning, the mistrial motion was properly denied, and any issue was waived by appellant. (RB 110-124.)

The prosecutor defended her questioning of Gutierrez as proper because defense counsel had brought up the subject of the phone bill during cross-examination. (RT 2945-2946.) Respondent's continued reliance on this theory is misplaced. "The so-called 'open the gates' argument is a popular fallacy." (*People v. Arends* (1957) 155 Cal.App.2d 496, 508-509.) Even where opposing counsel has been allowed to introduce evidence on a subject, questions designed to elicit testimony which is irrelevant to the case should be excluded. (*Id.*, at p. 509.) The relevant testimony as set forth

below demonstrates how the prosecutor's questions were impermissible.

During redirect examination the prosecutor elicited from Salo Gutierrez, appellant's girlfriend, information that appellant had been trying to call her after his arrest in this case.

This exchange then took place:

"Q Did you also tell him that you wouldn't accept his calls?

A Yes, because I didn't have money to pay for them and my mom wouldn't let me accept them." (RT 2941.)

Shortly thereafter, defense counsel followed up on this during recross examination:

"Q With regard to the telephone contact, isn't it true while you were living with Olga and Tony Munoz you built up a $1200 phone bill talking to Mr. Collins?

A Yes.

Q So the subject matter of telephone calls was a little sensitive around the house; is that a fair statement?

A Yes." (RT 2942.)

The prosecution on further redirect examination asked:

"Q Salo, this $1200 bill that you ran up, how did you run up a $1200 phone bill?

A He would call every night collect and he was in Susanville.

Q So now how much would each one of these calls be?

A A lot. I would tell him to call me back or that I needed to get off the phone and I would stay on. I would get another call and he would stay on

the line and hold.

Q This was in a period of one month that you built up a $1200 collect phone bill?

A No. This was when he was still in Susanville before he got out in December." (RT 2944.)

The apparent reason for defense counsel's inquiry into the phone bill was Gutierrez's explanation for refusing appellant's calls: she said it was "because I didn't have money to pay for them and my mom wouldn't let me accept them." (RT 2941.) Defense counsel's questions about the phone bill clarified that the reason Gutierrez's mother would not let her accept calls from appellant was financial, not hostility toward appellant. This did not create an opening for the prosecutor to elicit testimony that appellant was calling her from prison.[5] Evidence of exactly when and how Gutierrez accumulated a large phone bill, and the length of the calls that led to the large bill, was irrelevant.

Respondent claims the prosecutor's questions were not likely to elicit inadmissible evidence. In fact, the prosecutor knew appellant had been released from prison only a month before the crimes in this case occurred. She knew that Gutierrez was appellant's girlfriend while appellant was in prison. As an experienced prosecutor, she had to know that inmates can only make collect phone calls from prison. Given that Gutierrez had already testified that she had recently accumulated a $1200 telephone bill

---

[5] Respondent theorizes that appellant's questions about the phone bill might have been intended to discredit another part of Gutierrez's testimony by showing that she was no longer accepting appellant's phone calls. (RB 118.) This makes no sense because Gutierrez had already testified on redirect examination that her mother did not let her accept calls from appellant. (RT 2941.)

based on calls from appellant, it was entirely foreseeable that asking Gutierrez how she came to have such a bill would elicit the fact that appellant had been calling from prison. The result was foreseeable regardless of whether the prosecutor brought out these facts inadvertently or intentionally. It was misconduct to ask questions calling for inadmissible answers (*People v. Bell* (1989) 49 Cal.3d 502, 532; *People v. Bonin* (1988) 46 Cal.3d 659, 680), and to fail to guard against her witness testifying to inadmissible evidence (*People v. Warren* (1988) 45 Cal.3d 471, 481; see also AOB 94 and cases cited there.)

The issue was properly preserved. First, the motion was timely. After asking the improper questions, the prosecutor completed her examination almost immediately. (RT 2944.) As soon as the witness was excused, appellant made his mistrial motion in chambers. (RT 2945.) The court ruled on the merits, implicitly finding the motion timely. (RT 2947.) Second, there was no need for counsel to request that the jury be admonished. By making the motion in chambers rather than in open court, and by explaining to the court that he was not requesting an instruction admonishing the jury on this point for fear that an admonition "would simply underline the reference" (RT 3275), counsel took the consistent position that this was an error which could not be cured by instruction or admonition. The issue was not waived or forfeited.

The motion for mistrial should have been granted. Respondent claims the information in Gutierrez's testimony was inconsequential, expounding at length on other evidence that subsequently came in regarding appellant's prior criminal behavior. But all that evidence came in after Gutierrez's testimony. Respondent cannot show how the trial would have proceeded had this evidence not come out. The court had previously made

rulings to exclude evidence that appellant was on parole and had sought to collect a $50 check from his parole agent shortly before Fred Rose disappeared. (RT 2342-2349.) Appellant had also successfully moved to have the issue of appellant's charged priors bifurcated. (RT 345.) The information revealed by Gutierrez, therefore, was not inconsequential. In light of its previous rulings to keep the jury from hearing that appellant was on parole and that he had recently been released from prison, the denial of the mistrial motion was an abuse of discretion. The prejudicial impact of evidence of appellant's recent imprisonment and parole status is discussed fully in appellant's opening brief. (See AOB 94-97.) The motion for mistrial should have been granted; the convictions and sentence must therefore be reversed.

//

//

5

THE PROSECUTION COMMITTED ERROR UNDER *DOYLE V. OHIO*

In his opening brief appellant contended that the prosecution committed egregious *Doyle*[6] error by repeatedly questioning him on cross-examination, and arguing to the jury, about why appellant had remained silent as to his alibi for the time period in which Fred Rose was shot. The prosecutor's examination and argument on appellant's silence was not limited to questioning why he did not explain his alibi to the police during the initial interrogations. She also asked why he did not come forward with his alibi to tell the police and the prosecutor about it at the preliminary hearing, and why he did not enlist his alibi witness, Sylvia Gomez, and his mother to contact the authorities to request that his alibi be investigated. Respondent claims this cross-examination and argument were proper and that any issue was waived for failure of appellant to object. Respondent is incorrect.

Under *Doyle*, it is a violation of due process for a prosecutor to use a defendant's silence following *Miranda*[7] warnings to impeach his explanations subsequently offered at trial. In *Anderson v. Charles* (1980) 447 U.S. 404, 408 (*Charles*), the Supreme Court held that *Doyle* did not apply to cross-examination that "merely inquires into prior inconsistent statements." Respondent's argument that there was no *Doyle* error relies principally on *Charles*. That reliance is misplaced. In *Charles*, defendant was arrested in the stolen car of a man he was subsequently accused of

---

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

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

murdering. Defendant was read his *Miranda* rights and gave a statement to the police that he stole the car in Ann Arbor at a location about two miles from the local bus station. At trial, however, defendant changed his story and said he stole the car from a tire store parking lot immediately next to the bus stop. Questioning on such inconsistency is proper because the defendant has not been induced to remain silent: "As to the subject matter of his statements, the defendant has not remained silent at all." (*Ibid.*) The Supreme Court concluded in *Charles* that the prosecutor's cross-examination, taken as a whole, did not refer to defendant's right to remain silent; instead, it focused on why defendant did not tell the investigating officer the *same* story about how he acquired the car as he did at trial. But *Charles* does not mean that anytime a defendant makes a post-*Miranda* statement the prosecution has carte blanche to use the defendant's silence to impeach him. (*Anderson v. Pitt* (5th Cir. 1997) 122 F.3d 275, 280; see *U.S. v. Laury* (5th Cir.1993) 985 F.2d 1293, 1303-1304 [That the defendant "did not remain completely silent following his arrest did not give the prosecutor unbridled freedom to impeach (him) by commenting on what he did not say following his arrest."].) Where prosecutorial comments are "designed to draw meaning from silence" they remain subject to the rule in *Doyle*. (*Charles*, 447 U.S. at p. 409.)

Charles does not support respondent's argument. Both in cross-examination and in argument about appellant's alibi, the prosecutor *did* focus on the fact that appellant remained silent, did so repeatedly, and clearly intended to draw meaning from appellant's silence. The relevant portions of the cross-examination demonstrating this fact are set forth in appellant's opening brief (AOB 100-105) and need not be repeated here; the prosecutor's argument to the jury effectively summarized the thrust of this

part of her cross-examination:

> "What about his explanations to you right here on the witness stand about why he didn't tell the police about his alibi. That hasn't been that long ago and I don't think you could have forgotten that.
>
> "First he says they wouldn't believe him because he is an ex-con. Then he says, 'Well, let them do their own God damn work. I wasn't going to help them. I would have told them the moon was blue.'
>
> "He's got an 'alibi'? And he doesn't say a word about it?
>
> "So he's an ex-con. Okay. 'So why not have Silvia? She is not an ex-con. Why not have Silvia tell the cops about your alibi?'
>
> "Well, maybe Silvia is not the world's most credible witness either.
>
> "Okay. 'How about your mother? How about your mother who wants to help you, who's been helping you right along?' Doesn't even ask his mother?
>
> "No, he doesn't mind staying in jail because he figured he was going to do a year on his parole violation anyway, et cetera, et cetera, et cetera.
>
> "This is so unbelievably ludicrous it is preposterous. And I can't believe that any one of you buy it for one moment.
>
> "*If you have got a righteous alibi, ladies and gentlemen, you tell it. And you keep telling it until somebody believes you because you know it's true.*
>
> "The reason he didn't discuss his alibi was because at that point it hadn't been

formulated yet. It hadn't been totally organized."

(RT 5108-5109, emphasis added.)

The prosecutor was not focusing on inconsistencies in appellant's statements. She was using against appellant the fact he did not reveal his alibi to the prosecution – using his silence on this point to impeach his testimony at trial. This was clear *Doyle* error which was unaffected by the holding in *Charles*. Prosecutorial statements that are either intended to or have the necessary effect of raising a negative inference simply because of the defendant's exercise of his right to remain silent are prohibited. (*Anderson v. Pitt, supra*, 122 F.3d at p. 280.) Respondent inexplicably characterizes the prosecutor's argument as "merely a reference to the fact that appellant had chosen to lie to the police repeatedly about his whereabouts. . . rather than tell the police about his alibi." (RB 148.) The plain language of the prosecutor set forth above shows this is simply not true.

Respondent sets out at length various inconsistencies in appellant's statements to the police. Appellant does not dispute the propriety of cross-examining on such inconsistencies. But respondent also attempts to show that appellant had previously given the police information inconsistent with his alibi to bring the prosecutor's cross-examination within the *Charles* rule. That attempt fails. Respondent's position is contrary to that of the prosecutor and appellant at trial. While cross-examining appellant, she asked him,

"Q Isn't it true, sir, you had many opportunities – Detective Castillo gave you opportunity after opportunity after opportunity to tell him where you were that entire day?

"A Yes.

"Q You never did, did you?

"A No, I did not.

"Q And in the year and eight months since this murder you have been in jail, correct?

"A Yes, I have.

"Q How many times have you seen him in the courtroom?

"A Numerous.

"Q Have you ever once tried to say, 'Detective Castillo, it wasn't me'? [¶] I mean, by now you have got the time of the murder, right?

"A Yes.

"Q 'It wasn't me. Just check with Silvia Gomez. She will tell you where I was.'

"A I didn't figure that would do any good at that point. Especially after the prelim.

"Q Well, how about before the prelim? You knew what time the murder was by then, didn't you?

"A Yes, but I don't believe I had seen Detective Castillo on numerous occasions before the prelim.

"Q You saw him at the prelim and it lasted several days, didn't it?

"A Yes.

"Q You got the police reports. Certainly police reports were available to you starting January 28th in the afternoon after you got arraigned in municipal court; isn't that true?

"A I don't believe they became available to me."

(RT 4740-4742.)

Even if appellant had made statements that could have been understood as inconsistent with his alibi, the prosecutor did not cross-examine on the inconsistency. Instead, she cross-examined on appellant's silence. In fact, she went well beyond simply using appellant's silence for impeachment, she used his failure to affirmatively come forward and seek out the prosecution's help in investigating his alibi. Besides asking why appellant did not seek out Detective Castillo at the preliminary hearing, she asked why appellant did not bring his alibi to *her* attention. She then asked why appellant did not solicit his alibi witness, Sylvia Gomez, or his mother to approach the prosecution with his alibi evidence. All of this constituted improper use of appellant's silence as to his alibi in violation of *Doyle*.

The parties agree that the prejudice arising from *Doyle* error is assessed under the *Chapman*[8] test. Respondent cannot show beyond a reasonable doubt that the error did not effect the verdict. Appellant has argued how the error was prejudicial in the opening brief. (AOB 112.) Respondent's argument that there was no prejudice relies heavily on evidence adduced from the juvenile gang members in Bakersfield – witnesses of extraordinarily dubious credibility.[9] There were no eyewitnesses to the killing and appellant presented an alibi for the time period in which the victim was shot. The prosecutor's attack on that alibi as

---

[8] *Chapman v. California* (1967) 386 U.S. 18

[9] Respondent exaggerates some of this evidence: she claims "appellant bragged to juvenile gang members in Bakersfield about shooting a man." (RB 149.) In fact, only one juvenile – Lorenzo Santana – testified to overhearing appellant say he shot a man. (RT 3408; see also Argument 13, *post*.) Respondent also claims appellant threw an incriminating watch out the car window during the police chase, but the only evidence of that was highly equivocal. (RT 3312; see also Argument 7, *post*.)

shown in this argument and in the opening brief cannot be dismissed as harmless.

Respondent contends the *Doyle* issue was waived for lack of an objection. Appellant has shown why the issue was not waived in the opening brief. (AOB 110-111.)[10] Appellant has argued in the alternative that defense counsel was ineffective in failing to object to the prosecutor's improper questioning and argument. There could not have been any conceivable tactical reason for failing to object and, for the reasons stated above and in the opening brief, there is a reasonable probability that appellant would have achieved a more favorable result but for the unprofessional error on counsel's part. (*Strickland v. Washington* (1984) 466 U.S. 668.) Whether analyzed under either the *Chapman* or *Strickland* standard, the prejudice from the prosecutor's improper cross-examination and argument is clear. The convictions and judgment of death must therefore be reversed.

//

//

---

[10] Appellant relies in part on *People v. Jacobs* (1984) 158 Cal.App.3d 740, 745, to show the issue was not waived. Appellant's citation to *Jacobs* in the opening brief contained an incorrect page reference.

6

THE PROSECUTOR COMMITTED MULTIPLE ACTS OF MISCONDUCT WHILE CROSS-EXAMINING APPELLANT

In his opening brief appellant argued that, besides the *Doyle* error argued in Argument 5, the prosecutor committed multiple acts of misconduct while cross-examining appellant. (AOB 113-122.) Respondent argues that none of the claims are preserved and that no prejudicial misconduct occurred. (RB 150-172.) Appellant has argued in the opening brief how these issues are all preserved for appeal, despite the fact that no objection was interposed to some of the prosecutor's improper remarks. (AOB 121.) This reply is limited to addressing respondent's defense of the prosecutor's conduct.

1. *The Reference to Appellant's Purported Pattern of Quickly Reoffending after Release.* Appellant acknowledged that he had only been out of prison for a month when he stole Fred Rose's car. While cross-examining appellant, the prosecutor asked: "Q And you lasted a month before you got in this car, right? [¶] A Yes. [¶] Q That's [a] pretty good record for you, isn't it?" (RT 4557.) Appellant argued in the opening brief that this gratuitous question improperly conveyed the information to the jury that appellant had a history of criminality in which he re-offended shortly after being released.

Respondent argues that the remark was proper when considered in context. (RB 156.) But regardless of how broad or narrow a context in which the question is considered, any reasonable juror would understand the prosecutor was asking about appellant's pattern of re-offending, which was not proper. Respondent suggests that appellant's other references to his past behavior "entitled the prosecutor to explore these topics on cross-

examination." (RB 157.) Appellant submits that the prosecutor did not try to legitimately cross-examine appellant on his juvenile record because she knew she would not be permitted to do so, and therefore chose to make her point improperly. Her question was misconduct.

2. *The Prosecutor's Statement to Appellant That Fred Rose's Life Was on the Line.* The prosecutor's acrimonious cross-examination degenerated to the point where she asked appellant whether he remembered every word that went on during the trial. Appellant said he hoped so, and noted, "My life is on the line." The prosecutor retorted, "Q You have said that a few times, sir. I think the jury is aware of that already. [¶] A I would hope so. [¶] Q Yes. So was Mr. Rose's. [¶] Now – [¶] A Not in conjunction with myself. [¶] Q Sir, there is no question pending." (RT 4570.)

Respondent never even suggests that these remarks by the prosecutor were proper, and this Court should find they constituted misconduct. Respondent contends the prejudice is de minimis. Appellant has argued the prejudice resulting from all these improprieties in the opening brief.

3. *The Prosecutor's Referring to Appellant as Scott Rockefeller.* When appellant testified that his mother had at one time given him an ATM card that did not have a cash withdrawal limit, the prosecutor ridiculed him by asking, "Was the account in the name of Scott Rockefeller?" (RT 4578.) Respondent says this is not misconduct and that any prejudice was de minimis. Appellant submits that ridiculing witnesses is unprofessional and misconduct. (See *People v. Hill*, *supra*, 17 Cal.4th at pp. 819-820, 823.) The significance of this incident is discussed in the opening brief.

4. *The Prosecutor's Comments That Appellant's Thinking Was "Sharp" and "Pretty Smooth."* The prosecutor tried to get appellant to

acknowledge that he had demonstrated quick thinking during his interrogation by the police. When appellant did not give the answer the prosecutor wanted, she provided it in the form of an improper comment on the evidence: "Pretty sharp thinking, pretty smooth." (RT 4657.) Respondent contends "the prosecutor's questions served to highlight the ease with which appellant had lied in the past." (RB 162.) Respondent misses the point. The prosecutor did not ask a question; she made an improper comment on the evidence. That comment was to attempt to highlight the prosecutor's characterization of appellant as a clever liar and thereby undermine his credibility with the jury.

5. *The Prosecutor's Comment That Appellant Returned to the Murder Scene.* The prosecutor questioned appellant at length regarding where he drove the stolen car after his visit to Sylvia Gomez and before he drove to Bakersfield. She questioned him about why he stopped at a gas station in Moorpark rather than one across the street from a McDonald's at Hollywood and Highland where he stopped to eat. When appellant offered that he did not remember what his thinking was on that point, the prosecutor offered her own answer: "Or maybe you wanted to go right by the murder scene to be sure the cops had found the body, yes?" (RT 4698.) Defense counsel objected that there was no question pending, and the court sustained the objection. (RT 4698.) Respondent contends that the prosecutor had a factual basis for her remark. (RB 165.) But the court sustained defense counsel's objection that no question was pending, recognizing that what the prosecutor said was not a question at all, but an improper comment on the evidence. The prosecutor simply chose to inject improper argument into her cross-examination.

6. *The Prosecutor's Comment That Appellant Was a "Quick Thinker."* The prosecutor asked appellant about why he used construction work as an excuse when lying to his mother and Salo Gutierrez about where he obtained money. After appellant responded, the prosecutor commented, "A real quick thinker aren't you, Mr. Collins?" (RT 4699.) Appellant's objection that the question was argumentative was sustained. Contrary to respondent's claim that this was a fair question that highlighted the ease with which appellant lied, in fact it was simply another example of the prosecutor arguing her case through gratuitous remarks rather than evidence. The comment was misconduct.

7. *The Prosecutor's Improper Request That Appellant Comment on the Veracity of Another Witness and Her Comment on the Evidence about the Murderer's Knowledge of the Time of the Shooting.* The prosecutor asked appellant about the testimony of Sylvia Gomez that appellant had told Gomez on January 26, 1992, that he had been arrested for the murder of a man who had been killed while appellant was at Gomez's house. Appellant disagreed that he said that to Gomez on that particular date. The prosecutor responded: "Q Then she is lying also, right? [¶] A I believe she is mistaken of what telephone call she actually got the information from me. [¶] Q Mr. Collins, only the murderer would have known that the murder occurred sometime between 5:00 and 6:30 or 5:00 and 7:00. Only the murderer and people who heard the shots." (RT 4735.)

First, appellant contends that it is prosecutorial misconduct to force a defendant to comment on the veracity of another witness's testimony, citing *U.S. v. Henke* (9th Cir.2000) 222 F.3d 633, 643, and *U.S. v. Sanchez-Lima* (9th Cir.1998) 161 F.3d 545, 548- 549. While noting that opinions of the lower federal courts are not binding authority (RB 168), respondent offers

no contrary authority. Other federal Circuit Court of Appeals agree with the Ninth Circuit. (See *U.S. v. Sullivan* (1st Cir. 1996) 85 F.3d 743; *U.S. v. Boyd* (D.C. Cir. 1995) 54 F.3d 868; *U.S. v. Richter* (2d Cir. 1987) 826 F.2d 206.) The opinions of the lower federal courts are "persuasive" and entitled to "great weight" in this Court. *(People v. Bradley* (1969) 1 Cal.3d 80, 86.) Furthermore, California case law supports this proposition as well. In *People v. Zamora* (2004) 124 Cal.App.4th 228, 241-242, the Fourth District Court of Appeal held that it is prosecutorial misconduct to ask appellant whether other witnesses were lying. (See also *People v. Melton* (1988) 44 Cal.3d 713, 744 [lay witness's opinion about the veracity of another person's particular statements is inadmissible and irrelevant on the issue of the statements' credibility].) The prosecutor's question was misconduct.

Second, respondent ignores the prosecutor's final statement to appellant about how only the murderer would have known what time the murder occurred. The court struck this statement following appellant's objection that there was no question pending. This was clearly improper argument in the form of cross-examination, and as such was misconduct. The prosecutor used this exchange to undercut both appellant's alibi and his credibility.

The standards of prejudice for prosecutorial misconduct are discussed in the opening brief. The prosecutor's course of conduct during her cross-examination of appellant as set out above and in the opening brief deprived appellant of a fair trial as well as a reliable determination of guilt, and requires reversal of the convictions and sentence of death.

//

//

7

THE PROSECUTOR COMMITTED MISCONDUCT DURING HER GUILT PHASE ARGUMENT TO THE JURY

In his opening brief appellant cited three instances of the prosecutor committing misconduct by making improper arguments to the jury during her guilt phase argument. Respondent, while implicitly acknowledging one of the three arguments was improper, claims no prejudice occurred and that any claim of error has been waived. Respondent is incorrect.

1. *The Prosecutor's Reference to Michael Hernandez Changing Clothes.* Appellant argued that the following statement by the prosecutor was not supported by the record:

> "Was there any doubt in your mind this man was afraid. You heard him testify he was wearing a tee shirt when he came to court that had the name of the institution that he is in on it and he asked for another shirt. We didn't have one and he put the shirt on inside out hoping that would hide the name of where he was. You heard him testify how scared he was and how when he was in custody, 'It's even easier to put a hit out on you.'"

(RT 5085.)

Respondent has correctly identified the following exchange during Hernandez's testimony regarding his fear of appellant which is relevant to this issue:

> Q BY MS. D'AGOSTINO: Do you believe it's easier to get to you because you are in custody?
>
> A Yes, ma'am.
>
> Q Just before you took the witness stand did you ask if you could change clothes so that he wouldn't know where you are now?

A Yes, ma'am."

Q Do you believe that he has the ability to have a contract taken out on you?

MR. HILL: Objection. Speculation.

THE COURT: Your may answer.

THE WITNESS: Yes, ma'am."

(RT 3523.)

While the statement about changing clothes may provide some evidentiary support for the prosecutor's argument, it is substantially different from what the prosecutor told the jury. Asking to change clothes so appellant would not know where he was is, by itself, not a particularly meaningful or even logical statement. The prosecutor might have elicited further details to support her interpretation, but she did not. Instead, she embellished on the testimony during her argument, providing her own details to make a colorful portrait of a witness so fearful that he was willing to take unusual steps to avoid appellant knowing how to find him. The prosecutor's argument went well beyond the evidence.[11]

Respondent agrees with appellant that the prosecutor sought to use Hernandez's purported fear of appellant to excuse his prior lies to the police and his erratic, reluctant testimony (see e.g., AOB, Statement of Facts, pp. 11-13) which would otherwise lack credibility (see RB 176; AOB 133). That fear was Hernandez's own explanation for his lies and inconsistencies as well. The significance of the prosecutor's story about Hernandez

---

[11] The embellishment includes creating a quote by Hernandez that "It's even easier to put a hit out on you." Hernandez did not make that statement.

changing his clothes was that it provided jurors with independent corroboration of that fear, so they would not have to rely solely on Hernandez himself – his own statements and demeanor – to accept the evidence of his subjective feelings. The prosecution's embellished story about Hernandez changing his clothes out of fear served that purpose.[12]

2. *Sergio Zamora's Testimony about Seeing Appellant Throw a Watch out of the Car.* Respondent effectively concedes that the prosecutor argued facts not in evidence regarding Sergio Zamora's testimony about seeing appellant possibly dispose of a watch prior to his arrest. There is no question that when Zamora testified to the items that he saw appellant throw out of the window during the police chase he said, "Credit cards and I think a watch." (RT 3312.) Defense counsel, in his argument to the jury, correctly noted that Zamora remembered appellant threw "out the window of the car, a wallet credit card and I think a watch." (RT 5188.) In her rebuttal argument, the prosecutor attacked counsel's argument about the watch as "totally utterly false." She then referred to Zamora's statement purportedly from a police interview from January 25th, 1992, that she claimed was part of the record: "And Sergio then says at line 10, 'and a watch.' Not, 'I think,' but, 'and a watch.'" (RT 5234.) She emphasized the same point shortly thereafter: "He didn't say he thought it was a watch. He said 'a watch.'" (RT 5235.)

The only evidence on this point was the equivocal testimony of Zamora. The police report relied on by the prosecutor had not been admitted. The prosecutor had referred to the contents of that report when

---

[12] Appellant did not object to this portion of the prosecutor's argument. Appellant has argued in the opening brief why the issue was not waived or forfeited. (AOB 132-133.)

unsuccessfully attempting to impeach appellant on the issue of the watch, but neither the report nor its contents were introduced into evidence.

Respondent claims that any error was non-prejudicial beyond a reasonable doubt. Appellant disagrees. Whether or not appellant threw Fred Rose's watch out the window was a significant piece of evidence because if he did, it would be inconsistent with his testimony that he stole Rose's car and wallet, but did not kill Rose. Appellant testified that Rose's wallet was in the car when he stole it. But he denied that the watch was in the car and denied throwing a watch out of the car during the police chase. Furthermore, no watch was recovered despite police searches of the chase route which yielded the gun and credit cards. Therefore, contrary to respondent's assertion (RB 182), whether or not a watch was thrown out by appellant was a significant point of disagreement between the prosecution and defense cases. The prosecutor's misconduct in flatly denying that Zamora's testimony was equivocal on this point, and her bald-faced assertion that he was actually unequivocal about seeing the watch, could have affected the jury's consideration of the case.[13]

3. *The Improper Use of Appellant's Robbery Prior.* Appellant's prior robbery conviction was admitted for the limited purpose of impeachment. Despite that limitation, and despite defense counsel pointing out the impropriety of using the prior conviction for any other purpose (RT 5196), the prosecutor argued to the jury in rebuttal that it could consider appellant's prior criminality as evidence of a motive to kill Fred Rose: "If you were a young man and you had just gotten out of prison for an armed

---

[13] Appellant did not object to this misconduct, but the issue was not waived or forfeited for the reasons stated in the opening brief. (AOB 132-133.)

robbery and you had just robbed someone else and kidnaped them, would you want to leave that person alive to identify you so you could go back to prison? [¶] Not this man. He's too fond of his freedom and partying. No way is he going to leave someone alive this time. [¶] Obviously, the way he went to prison the first time someone must have identified him. He is not going to take that risk again." (RT 5258-5259.)

When appellant objected that this was an improper use of appellant's prior conviction, the prosecutor explained to the court, "I think counsel opened this up by indicating that I overreached by implying that because he had this prior conviction he had a motive to murder Mr. Rose. [¶] That's what counsel said this morning. And my argument is as logical as an argument could be. I'm not saying that he was identified before. I'm just saying it is obvious that that was his motive. A jury can reach a contrary conclusion, but I don't think there was anything impermissible in that argument whatsoever." (RT 5259-5260.)

The argument was impermissible because appellant's prior robbery was introduced for the limited purpose of appellant's credibility, not his motive. For the prosecutor to argue otherwise was improper.

Respondent attempts to show how this evidence could have been relevant to show motive under Evidence Code section 1101, subdivision (b). (RB 188.) But this argument is irrelevant because the evidence was not admitted for that purpose. The prosecutor even told the court during the conference on jury instructions that she was not using the robbery prior as evidence under Evidence Code section 1101, subdivision (b). (RT 4860.)

Moreover, evidence of the robbery prior could not have properly been admitted to show motive. As appellant argued in the opening brief, if having a prior felony conviction is a motive to avoid apprehension, then

everyone with a prior has such a motive and the propensity of such felons to act on that motive means that the prior becomes evidence of a propensity to commit crimes to avoid apprehension. (See AOB 131.) Prosecutors should not be allowed to circumvent the established limitations on the use of prior crimes in this manner.

Respondent's authorities do not support her position. In *People v. Heishman* (1988) 45 Cal.3d 147, 168, the prosecution had a witness who testified that defendant had expressed fear of going back to prison because he had previously been "set up on a rape charge" and had served time in jail on a rape charge. The defense disputed the veracity of this witness, and the prosecution introduced the abstract of judgment of the conviction simply to corroborate the substance of the witness's statement. In the present case the prosecutor had no evidence other than the prior criminality itself to show appellant was motivated by a fear of returning to prison. In *People v. Durham* (1969) 70 Cal.2d 171, 189, two parolees in a vehicle were stopped by police. One co-defendant shot and killed an officer. The prosecution properly introduced evidence of recent criminal activity of the two defendants to show the state of mind and motive of co-defendant Durham, who was not the shooter. The fear of apprehension was therefore uniquely relevant to show Durham's complicity in the homicide. There was nothing similar in the present case. In *People v. De La Plane* (1979) 88 Cal.App.3d 223, 245-247, the prosecution was permitted to introduce prior statements of a murder victim to the police implicating the defendant in robberies on theory that defendant found out about the statement to the police and killed the victim to stop him from being convicted of those other uncharged crimes. Here, the prosecution is attempting to use appellant's prior conviction to show a motive for killing in the present case. The prosecutor

here had no independent evidence of appellant's purported motive to avoid returning to prison. The prosecutor's argument was improper and constituted misconduct.

The prejudice resulting from this incident is adequately set forth in appellant's opening brief. (AOB 133-134.)

Respondent, while acknowledging that appellant objected to the prosecutor's argument, nevertheless claims that the issue has been waived for failure to do so on grounds of prosecutorial misconduct. Appellant's objection was as follows:

> "I think counsel is now saying what may have been implied yesterday and that is that because of his prior episode of criminality, that he had a predisposition to repeat that criminality. And that somehow would cause him to commit a murder as a consequence of it. [¶] I think that's in direct contravention of the instructions and the law. I think it is an impermissible use of the prior conviction. And I would ask that the jury be admonished in that regard."

(RT 5259.)

Respondent's apparent position is that appellant must actually invoke the words "prosecutorial misconduct" to preserve such a claim, but cites no authority for such hypertechnicality. Respondent's reliance on *People v. Gionis* (1995) 9 Cal.4th 1196, 1215, for the proposition that an ordinary evidentiary objection will not preserve a claim of prosecutorial misconduct is irrelevant; the objection here is to the prosecutor's improper argument, not the admission of evidence.

Respondent next claims that despite the objection, the issue is waived because appellant did not interpose another objection after the prosecutor failed to follow the court's ruling regarding the use of the prior

conviction. A pervasive and continuing course of misconduct by the prosecutor will excuse the failure to object. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 683.) Furthermore, the prosecutor had already argued three times her improper point. Any further admonition would have been ineffective in removing the taint of the misconduct.

The prosecution used improper argument to bolster three weaknesses in her guilt phase case. The convictions and sentence of death must therefore be reversed.

//

//

8

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURORS THAT THEY COULD CONVICT APPELLANT OF MURDER WITHOUT AGREEING WHETHER HE HAD COMMITTED MALICE MURDER OR FELONY MURDER

The trial court instructed the jury at the guilt phase on both malice-murder and felony murder. In his opening brief appellant argued that these instructions were incorrect in that they allowed the jury to convict appellant of murder without deciding unanimously that the crime was either malice-murder or felony-murder. (AOB 135-144.)

Appellant acknowledged in his opening brief that this Court has rejected similar arguments, and has held, for example, that "[t]here is only a 'single, statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, citing *People v. Pride* (1992) 3 Cal.4th 195, 249; but see *People v. Dillon* (1983) 34 Cal.3d 441, 471-472, 476, fn. 23 [felony-murder is a separate and distinct crime from malice-murder].) But the Court has also acknowledged that malice-murder and felony-murder do not have the same elements. (See e.g., *People v. Carpenter*, *supra*, 15 Cal.4th at p. 394; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 465, 475, 477, fn. 24.) Specifically, malice is an element of murder under section 187 (malice-murder) and it is not an element of felony-murder under section 189. Furthermore, premeditation and deliberation are elements of first-degree murder but not felony-murder. It is the fact that these crimes are not simply separate theories of murder, but have separate elements, that is the basis for appellant's argument. (See AOB 138-144.)

Respondent ignores the fact that malice-murder and felony-murder have separate elements and simply relies on this Court's cases rejecting this

issue without analysis. (RB 190-191.) Respondent's argument also relies on *Schad v. Arizona* (1991) 501 U.S. 624, 631-632, which is distinguished in the opening brief from California cases by the fact that felony-murder and malice-murder do not have separate elements in Arizona as they do in California. (AOB 138-140.)

Recent opinions by this Court offer further support for appellant's argument. In *People v. Seel* (2004) 34 Cal.4th 535 defendant was convicted of attempted premeditated murder (§§ 664, subd. (a); 187, subd. (a)). The Court of Appeal reversed the finding of premeditation and deliberation due to insufficient evidence and remanded the matter for retrial on that allegation. This Court, in holding that double jeopardy barred retrial on the premeditation allegation under *Apprendi v. New Jersey* (2000) 530 U.S. 466, noted that "'The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."'" (*People v. Seel*, *supra*, 34 Cal.4th at p. 549, citing *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 493.) Intent, of course, is an element which makes malice-murder a different crime from felony-murder.

In the context of determining whether future prosecution of a crime is barred under section 1387, this Court has also relied on comparing the elements of the offenses at issue. "When two crimes have the same elements, they are the same offense for purposes of Penal Code section 1387." (*Burris v. Superior Court (People)* (2005) 34 Cal.4th 1012, 1016, fn.3, citing *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, 1118 [applying "same elements" test to determine whether new charge is same offense as previously dismissed one for purposes of section 1387].)

Seel and *Burris* serve to reaffirm the fact that because felony-murder and malice-murder have different elements in California, they are different

crimes, not merely two theories of the same crime. The jury should not have been permitted to convict appellant of murder without being required to unanimously determine that the crime was either malice-murder under section 187 or felony-murder under section 189. The conviction and judgment must therefore be reversed.

//

//

9

THE AGGRAVATING EVIDENCE INVOLVING A MOLOTOV COCKTAIL WAS IMPROPERLY ADMITTED

The prosecution led off its penalty phase case with evidence that appellant was involved in an incident in which a Molotov cocktail was ignited in the parking lot behind Fred Joseph's liquor store. In the opening brief, appellant asserted why evidence of this incident should not have been admitted: there was insufficient evidence to establish a violation of possession of a destructive device within the meaning of section 12303.3 as claimed by the prosecution; and that even if proved, the act of possessing the device did not constitute an implied threat of criminal violence under section 190.3, factor (b). (AOB 145-158.) Appellant also showed that the court's instructions on this evidence were inadequate. Respondent erroneously claims no errors occurred.

A. The Liquid-filled Glass Bottle Was Not a Destructive Device

The evidence did not establish that the device in question was a destructive device within the meaning of section 12303.3, and as defined in section 12301. A destructive device under section 12301, subdivision (a)(5) includes:

> "(5) Any breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination."

There is little doubt that this section described some devices commonly called Molotov cocktails. (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [device defined by section 12301, subdivision (a)(5) is

"apparently a 'Molotov cocktail'"].) Appellant argued in the opening brief, however, that there was no evidence that the flashpoint of the liquid in the bottle in this case was less than 150 degrees Fahrenheit. Because of this insufficiency, the evidence was insufficient to prove the bottle was a destructive device under section 12303.3, and therefore insufficient to prove appellant's possession of it was illegal under section 12303.3. In short, whether or not the device in question could properly be called a Molotov cocktail, it was not a destructive device as defined by the statute. Respondent recognizes that there was no direct testimony establishing the flashpoint of the liquid in the bottle, but apparently believes the fact that the ambient air temperature that evening was less than 150 degrees was evidence that the flashpoint of the liquid was also less than 150 degree. (RB 199.) This claim makes no sense. There is no suggestion that the liquid spontaneously combusted – respondent accepts that the wick on the device was lit. (RB 199.) The question is how hot a flame needed to be to ignite the liquid's vapor, and there was no evidence at all on this point.[14] Without evidence of the flashpoint of the liquid or even what the liquid was, the evidence was insufficient to prove the liquid-filled bottle was a destructive device under section 12301, subdivision (a)(5), and accordingly insufficient to show appellant possessed such a device under section 12303.3.

Respondent claims that regardless of the flashpoint evidence, the liquid-filled glass bottle also qualified as a destructive device as a

---

[14] Respondent also states several times, without any citation to the record, that the liquid in the bottle was gasoline. As appellant pointed out in the opening brief, there is no evidence of any characteristics of the liquid other than the fact that ultimately it burned. (AOB 150-151.)

"projectile" or a "bomb" under section 12301, subdivisions (a)(1) and (a)(2). (RB 196-198.) This argument ignores two basic rules of statutory construction.

Subdivision (a)(5) makes a clear distinction between devices containing liquid with a flashpoint under 150 degrees, and those containing liquid with a flashpoint 150 degrees or over. The former are destructive devices and the latter are not. Applying of the rule of statutory construction *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) leads to the conclusion that the Legislature chose to exclude Molotov cocktail devices which contain liquids with flashpoints 150 degrees or over. This rule of construction "'expresses the learning of common experience that when people say one thing they do not mean something else.'" (*Arden Carmichael, Inc. v. County of Sacramento* (2001) 93 Cal.App.4th 507, 515-516, quoting 2A Singer, Sutherland Statutes and Satutory Construction (6th ed. 2000) Intrinsic Aids, section 47.24, pp. 319-320; see also *People v. Nichols* (1970) 3 Cal.3d 150, 161 [expressly defining the burning of trailer coaches as arson implies burning of motor vehicles is not arson].)

Second, if Molotov cocktails were either projectiles or bombs under subdivisions (a)(1) and (a)(2), it would be unnecessary to distinguish in subdivision (a)(5) between such devices based on the flashpoint of the liquid they contained. Such a construction would mean subdivision (a)(5) serves no purpose, violating the maxim of statutory construction that courts should give meaning to every word of a statute and should avoid a construction making any portion of a statute surplusage. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249; see also *Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 ["An interpretation that renders statutory

language a nullity is obviously to be avoided"]; *Brown v. Superior Court* (1984) 37 Cal.3d 477, 484; *People v. Gilbert* (1969) 1 Cal.3d 475, 480.)

Furthermore, the device in this case was neither a projectile nor a bomb. Section 12301, subdivision (a)(1) includes as a destructive device the following:

> (1) Any projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns.

Respondent's argument depends on an unjustifiably broad interpretation of the word "projectile." Statutes must be read in conformity with their plain language and in such a way as to give effect wherever possible to every word. (*People v. Harris* (1989) 47 Cal.3d 1047, 1082.) While subdivision (a)(1) refers to "[a]ny projectile," it specifically refers to tracer or incendiary ammunition, and these terms cannot be ignored. The canon of *ejusdem generis* applies: "It is presumed that if a term were intended to be used in its unrestricted sense, the provision as a whole would not also offer as examples peculiar things or classes of things since those would then be surplusage." (*Pacific Gas & Electric Co. v. City of Oakland* (2003) 103 Cal.App.4th 364, 368.) "Projectile" in this subdivision means projectiles similar to tracer ammunition, not glass bottles filled with liquid or other objects which can be thrown.

Furthermore, the word "projectile" when used in California statutes most often means ammunition (see e.g., § 171b [unauthorized possession of weapons in public buildings includes "[a]ny instrument that expels a metallic projectile, such as a BB or pellet. . ."]; § 171.5 [unauthorized

possession of weapons in sterile area of airport includes "[a]ny instrument that expels a metallic projectile, such as a BB or pellet. . ."]; § 417.2 [unlawful sale of imitation weapons includes "[a]n instrument that expels a projectile, such as a BB or pellet. . ."; § 626.10 [unlawful possession of weapons on school grounds includes "any instrument that expels a metallic projectile such as a BB or pellet"]; § 11460 [firearm for purposes of this statute means "any device designed to be used as a weapon, or which may readily be converted to a weapon, from which is expelled a projectile by the force of any explosion or other form of combustion. . . ."]; § 12323 [defining handgun ammunition as having "projectile or projectile core constructed entirely, excluding the presence of traces of other substances, from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness"]); and, occasionally means other objects fired from weapons or other devices (see Health & Safety Code § 12689 [re unlawful sale of "rocket propelled projectile launcher"]; Labor Code § 6710 [defining "explosives" to include "charges or projectiles used in the control of avalanches"]; §12020 [defining a "ballistic knife" as a device that propels a knifelike blade as a projectile by means of a coil spring, elastic material, or compressed gas]; and § 12403.7 [describing statutory exemptions from unlawful possession of weapons statute to include possession or use of "any tear gas weapon that expels a projectile"]).

Appellant has found no use of the word projectile in any California statute which would include the glass bottle in this case. When the Legislature uses the same word in different statutes, it will be accorded the same meaning if the statutes involved have the same or similar designs and objectives. (See *Johnson v. Superior Court* (2002) 101 Cal.App.4th 869,

877.) The statutes involving projectiles are generally controlling weapons and the ammunition used in those weapons. Section 12303.3 is no exception and the meaning of "projectile" in subdivision (a)(1) should be understood as limited to ammunition or other items which are launched from a weapon or similar device.

The mere fact that a bottle can be thrown should not make it a projectile for purposes of this statute. This subdivision includes as a destructive device any projectile which contains (1) any explosive or (2) incendiary material or (3) any other chemical substance. Common butane lighters and even a book of matches contain incendiary materials and would come within such an expansive definition. "Chemical substance" is so broad a term that common household items – even a bar of soap – could be a destructive device under respondent's theory. Statutes should not be construed in a manner that achieves absurd results. The device in this case was not a projectile under section 12303.3

The device was also not a bomb under subdivision (a)(2), which includes:

> (2) Any bomb, grenade, explosive missile, or similar device or any launching device therefor.

A Molotov cocktail is an incendiary device, not a bomb. (See *People v. Andrade* (2000) 85 Cal.App.4th 579, 585 [Molotov cocktail is a device designed to accelerate fire under section 451.1, subd. (a)(5)]; *People v. Morse* (2004) 116 Cal.App.4th 1160, 1161 [possession of Molotov cocktail results in conviction of possessing an incendiary device under section 453]; see also *People v. Clark* (1990) 50 Cal.3d 583,604 [assuming a gasoline "firebomb" is a destructive device under section 12301, subdivision (a)(5)].) A bomb, on the other hand, is "a projectile or other

device carrying an explosive charge fused to detonate under certain conditions. . . ." (Webster's 3d Internat. Dict. (1976), p. 249.) A flammable liquid is not an explosive charge; the bottle in this case was not a bomb.

B. The Court Failed to Instruct the Jury on the Applicable Definition of a Destructive Device

Appellant has also argued that the court erred by failing to instruct the penalty jury on the definition of a "destructive device." The court has a sua sponte duty to instruct the jury on terms having a technical meaning peculiar to the law. (See AOB 151-152.) Respondent offers no disagreement that "destructive device" has such a technical meaning. Instead, respondent argues the court had no sua sponte duty to instruct on the elements of uncharged crimes of violence under section 190.3, factor (b). But the rationale for instructing on technical terms peculiar to the law is different than that for instructing on the elements of factor (b) crimes, even when one or more element of the crime may be the technical term in question. Here, the parties agreed simply that the court did not need to give instructions with respect to defining the elements of the crimes or criminal activity under section 190.3, factor (b). (RT 6149.) As the prosecutor had explained earlier, "when you are talking about a crime like an assault, I think most everybody has in their mind an idea of what constitutes an assault without weighing them down with the legal definition of assault." (RT 6147.) The parties general agreement that the trial court did not have to give instructions as to all the elements of all the factor (b) offenses did not relieve the court of its independent duty to instruct on a technical term, even though that term related to an element of one of the factor (b) offenses. The failure to define destructive devices deprived the jury of the critical

legal framework it needed to properly assess the evidence in this incident and was, therefore, error.

C. Possession of a Destructive Device in this Case Was Not a Crime of Violence

Appellant also argued in the opening brief that possession of the liquid-filled bottle was not inherently a crime of violence under section 190.3, factor (b) – a Molotov cocktail is used to start fires, and as such is a tool of the vandal or arsonist – and that nothing about the facts of the incident elevated it to a crime of express or implied violence under factor (b). Respondent makes no argument that the possession alone made this a crime of violence; instead, respondent claims that the other evidence surrounding the incident made possession of the device an implied crime of violence, citing *People v. Stanley* (1995) 10 Cal.4th 764, 824. Appellant distinguished *Stanley* in his opening brief. (AOB 155-156.) In *Stanley* the defendant burned a vehicle belonging to someone he had previously threatened with physical violence. (*Id.*, at pp. 823-825.) Under these circumstances, the burning of the car could be understood not simply as a property crime, but an implied threat of violence. Here, respondent cites no similar evidence of a violent history between appellant and Joseph which would allow the inference that any crime in this incident was one of an implied threat of physical violence rather simply a threat to property.

Appellant argued in the opening brief that the error was prejudicial. (AOB 157-158.) Respondent's argument on prejudice needs no response. The penalty verdict and judgment of death must therefore be reversed.

//

//

10

RESPONDENT HAS FAILED TO JUSTIFY THE ADMISSION OF EVIDENCE THAT APPELLANT POSSESSED A CONCEALED POCKETKNIFE IN 1989

Appellant argued in the opening brief that the trial court erred in allowing the penalty jury to hear the prosecution's section 190.3, factor (b) evidence in aggravation that appellant possessed a concealed knife in 1989. (AOB 159-167.) This argument had three parts: First, the evidence was insufficient to establish possession of a concealed weapon within the meaning of section 12020 (AOB 161-164); second, regardless of the sufficiency of the evidence, the trial court erred in failing sua sponte to instruct the jury adequately on the definition of a concealed weapon (AOB 164-165); and third, that possession of a concealed weapon was not a crime of violence under section 190.3, factor (b) (AOB 165-167). Respondent admits that the evidence was insufficient to establish a violation of the concealed weapon statute, but claims that appellant failed to preserve the issue for appeal. She makes no response to appellant's other two arguments, claiming instead that the evidence was sufficient to prove a violation of section 415 – unlawful fighting, making noise or using offensive language. (RB 205-207.) Respondent's arguments do not have merit.

Respondent's argument that the evidence was sufficient to establish a violation of section 415 is irrelevant because the evidence of this incident was submitted to the jury on the theory that it established the crime of possession of a concealed weapon. The court instructed the jury in the language of CALJIC No. 8.87, listing each of the alleged crimes under section 190.3, factor (b) on which the prosecution presented evidence. Of the seven alleged criminal incidents described in the court's instruction, the

incident in question was described as "1/13/89, possession of a concealed weapon." (RT 6206; CT 1106.) The jury was told that it could not consider evidence of criminal activity other than that which was identified in the instruction: "A juror may not consider any evidence of any other criminal activity as an aggravating circumstance." (RT 6206; CT 1106.) The only question presented to the jury on this incident was whether or not appellant violated section 12020 by possessing a concealed weapon, not whether he violated section 415 by challenging someone to fight or using offensive words in public. Therefore, whether the evidence showed a violation of section 415 is irrelevant to this issue.

Furthermore, the evidence was insufficient evidence of a violation of section 415 even if it had been admitted for that purpose. Under this section, the following people are guilty of a misdemeanor:

> "(1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.
>
> "(2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.
>
> "(3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction." (§ 415.)

Respondent is apparently relying on the second alternative of subdivision (1), contending there was evidence that appellant challenged another person in a public place to fight. (RB 206.) Officer Dattola stated that appellant "appeared, in our opinion, to be challenging another subject to fight." (RT 5392.) But that opinion was based only on the facts that Dattola saw appellant "waving his arms at the other subject and he [was] also yelling and screaming." (RT 5393.) Dattola could not describe what appellant was yelling other than that he was "just yelling profanities at the

other subject." (RT 5393.) Appellant submits that evidence of yelling profanities and waving arms is insufficient to establish a challenge to fight within the meaning of section 415. Indeed, in light of the fact that appellant appeared to be alone against a group of up to nine hostile gang members (RT 5399-5401), it is more likely that he was preparing to defend himself rather than challenging another to fight.

The prosecution did not even to establish that the alleged challenge to fight occurred in a public place – there is nothing to show whether the school grounds in question were public or private. Whether a particular location is a public place depends upon the facts of the individual case. (*In re Danny H.* (2002) 104 Cal.App.4th 92, 104- 105.) Given the sketchy evidence of this incident presented by the prosecution, no reasonable juror could have found beyond a reasonable doubt on this evidence that appellant violated section 415.

Respondent next seeks to excuse the error by claiming that the prosecution merely used "the wrong label for the criminal activity" alleged. (RB 207.) Respondent is again incorrect. The difference between possessing a concealed weapon (§ 12020) and breaching the peace (§ 415) is not simply one of labeling. Respondent's claim that appellant violated section 415 is based on Dattola's purported observation of appellant waving his arms and yelling profanities at another person (RB 206; RT 5392-5393) whereas the evidence that appellant possessed a concealed weapon was testimony that Dattola later followed appellant down the street, detained him and discovered a knife in appellant's pocket while patting him down. (RT 5394-5398.) The two alleged offenses were therefore based on different activity, unlike *People v. Hughes* (2002) 27 Cal.4th 287, 383-384, upon which respondent relies. In *Hughes*, the factor (b) evidence included

appellant's possession a metal pin in jail. This Court found harmless the error in instructing the penalty jury on the elements of section 4502 (possession of a sharp instrument in jail) rather than section 4574 (possession of a deadly weapon in jail), reasoning that the underlying criminal behavior – possession of a weapon – was the same regardless of how the offense was labeled. But in the present case the behavior underlying the offense on which the jury was instructed (possession of a concealed weapon) was different than the behavior underlying the offense on which respondent claims the jury should have been instructed (breach of the peace).

Each issue in this argument is properly preserved, despite respondent's claim that an objection to the admission of the evidence of the incident was waived at trial by a failure to object.[15] An objection should be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. (*People v. Scott* (1978) 21 Cal.3d 284, 290.) California courts construe broadly the sufficiency of objections that preserve appellate review, focusing on whether the trial court has a reasonable opportunity to rule on the merits of the objection before the evidence was introduced. (*Melendez v. Pliler* (9th Cir. 2002) 288 F.3d 1120, 1125.)

The court here understood the issue presented. In fact, after a lengthy hearing on whether the Mototov cocktail incident (see Argument 9) was admissible, it was the court that directly inquired whether there were problems with the admissibility of the evidence supporting any of the other

---

[15] Respondent's claim of waiver is limited to the admission of evidence of this incident and does not affect the instructional issue in Argument 10, section C.

uncharged acts of violence. (RT 5385.) Defense counsel specifically raised the "episode in which a CRASH unit or CRASH officer makes contact with the defendant and he is in possession of a knife. That is es[s]entially the sum total and substance of this one individual witness." (RT 5385.) The court then noted that "possession of a knife alone is not enough as I understand *Mason* and *Boyd*."[16] (RT 5385.) After further discussion of the prosecution's evidence supporting this incident, the court stated, "You leave that also until you can brief it. I've asked if there were any objections last week and everything was settled and all of a sudden I mean serious issues that require at least for me to do some research because I haven't." (RT 5386.) The court acknowledged the existence of the issue, and it was therefore properly presented to the court for decision. The court recessed for the day almost immediately after its last remark on the issue. (RT 5387.) The following morning Dattola was the first witness, and there was no further discussion of the admissibility of this incident, despite the discussion of the previous afternoon. (RT 5390.)

Respondent also claims appellant "failed to renew his objection at the time the evidence was offered." (RB 205.) No new objection is necessary where (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context. (*People v. Morris* (1991) 53 Cal.3d 152, 190, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824.)

---

[16] *People v. Mason* (1991) 52 Cal.3d 909; *People v. Boyd* (1985) 38 Cal.3d 762.

The court understood that the issue was whether the evidence was sufficient to establish a crime of violence under factor (b), and it was aware of the nature of the evidence involved. Furthermore, the objection was made at the end of the day on October 12, 1993, and the evidence was presented at the beginning of the session the following morning with only minor procedural matters intervening. There is no question that the court had the opportunity to determine the issue in its appropriate context. The issue was not waived.

Respondent perfunctorily claims any error was non-prejudicial. Appellant's opening brief explains why the error was harmful. Accordingly, the sentence of death must be reversed.

//

//

11

THE PROSECUTOR COMMITTED MISCONDUCT BY QUESTIONING A DEFENSE WITNESS ABOUT A 30-YEAR REVIEW PROCESS FOR INMATES SERVING SENTENCES OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

The prosecutor committed misconduct through her cross-examination of appellant's expert witness, James Park, by asking a series of questions about an obscure Board of Prison Terms (BPT) regulation (former Cal. Code Regs., tit.15, §2817) which required periodic reviews of certain prisoners serving sentences of life without the possibility of parole (LWOP). Through her questions the prosecutor improperly and inaccurately informed the jurors that such inmates have a 30-year review date set upon entering prison and thereafter are reviewed every five years. Appellant argued in the opening brief that the improper questioning constituted prejudicial misconduct: suggesting facts harmful to a defendant absent a good faith belief that such facts exist (*People v Warren* (1988) 45 Cal.3d 471, 480); eliciting inadmissible evidence through the guise of a question (*People v. Pitts* (1990) 223 Cal.App.3d 606, 722); and interrogating a witness solely for the purpose of getting before the jury the facts inferred therein, rather than for the answers which might be given (*People v Wagner* (1975) 13 Cal.3d 612, 619). The information improperly communicated to the jurors allowed them to consider the possibility that appellant would be released someday even if they sentenced him to LWOP in violation of appellant's state and federal constitutional rights (*People v. Ramos* (1984) 37 Cal.3d 136, 153-159; see AOB 168-179).

Respondent's defense of the prosecutor's examination of Park appears to be the narrow assertion that the prosecutor did not specifically "elicit testimony regarding the governor's power to commute a sentence of

life without the possibility of parole." (RB 221.) But this does not respond to appellant's argument. First, it was the prosecutor's questions themselves which contained improper information about the 30-year review procedure for LWOP inmates. (RT 5844.) Second, it is equally improper to create through inference as through direct testimony the impression that a defendant serving an LWOP sentence could be released (see e.g., *People v. Keenan* (1988) 46 Cal.3d 478, 507), which the prosecutor did here. Third, *Ramos* and its progeny recognize the impropriety of creating the impression that appellant could be released by any means, whether by parole, pardon or gubernatorial commutation (see e.g., *People v. Hovey* (1985) 44 Cal.3d 543, 581) – again consistent with the inferences created by the prosecutor's questioning. These points, all made in the opening brief are consistent with the trial court's observation that the prosecutor had introduced to the jurors the fact that there was such a thing as a 30-year review, and that this implied it was "a review for something like release." (RT 5848.) Therefore, respondent has not addressed the substance of appellant's argument that the prosecutor committed misconduct.

Respondent seems to acknowledge that the BPT regulation in question (1) required review of prisoners cases for the purpose of forwarding them to the governor for consideration of commutation, and (2) did not apply to appellant because he had a prior felony conviction. (RB 222, fn.31 discussing former Cal. Code Regs., tit.15, §2817.) Appellant argued in the opening brief that because the prosecutor claimed familiarity with the regulation on which she was questioning the defense expert witness (RT 5849), she therefore knowingly implied facts harmful to appellant without a good faith belief in their truth. (See AOB 176-177.)

Respondent does not directly respond to this argument.[17]

The issue was not waived. Respondent erroneously relies on *People v. Williams* (1997) 16 Cal.4th 153, 254, for the proposition that a mistrial motion is insufficient to preserve an issue of prosecutorial misconduct. *Williams* held only that a *motion for new trial*, filed after the verdict, was insufficient to preserve an objection which was not otherwise made during trial. *Williams* is inapplicable to a timely mistrial motion during trial. Appellant made his mistrial motion out of the presence of the jury during the discussion regarding the propriety of the prosecutor's questioning the witness about the 30-year review process. The issue was properly preserved.

In his opening brief, appellant noted that the court's admonition was inadequate to cure the prejudice because it focused only on the fact that under a sentence of LWOP he could never be paroled. The admonition given by the court was, "Life without possibility of parole means exactly that, and for purposes of determining the sentence in this case, you must assume the defendant will never be paroled." (RT 5876.) Respondent argues this admonition cured any harm from the prosecution's misconduct. But the admonition addresses only the possibility of parole, not all avenues of possible release from prison. Without more, the jury would still have the

---

[17] Respondent's only defense of the prosecutor's unbelievable claim that she was merely testing the expertise of the witness through questioning about the 30-year review was that because Park testified on direct examination regarding security measures in level four prison, his knowledge of the 30-year review process was "highly relevant." (RB 222.) Appellant submits that knowledge of this review process was of no relevance, much less "high" relevance to security measures in level four prisons.

impression that the 30-year review was a process through which appellant might be released from prison, and the admonition was therefore ineffective.

Respondent also claims that, despite the fact that the 30-year review related to the governor's commutation power, there was no evidence of that before the jury.[18] But as appellant has pointed out, the prosecutor's questions created the inference that the 30-year review was a possible means of release from prison. Commutation, along with parole and pardon, is one such means of being released. The prosecutor's misconduct created an inference that appellant could some day be released, and the court's admonition did not dispel that inference. *Ramos* error is generally reversible. (*People v. Ramos*, *supra*, 37 Cal.3d at p. 154.) The prosecutor attempted to portray appellant as incorrigible; by deliberately creating the inference that such a person might some day be released from prison, she gave the jury an improper basis on which to render a verdict of death. The sentence and judgment of death must therefore be reversed.

//

//

---

[18] Respondent claims defense counsel agreed that the 30-year review process had nothing to do with commutation of sentences. (RB 222, fn. 31, citing RT 5856-5859.) This is incorrect; the discussion at this portion of the reporter's transcript refers to the possibility of parole, not commutation. Furthermore, respondent's point is not significant. Defense counsel's remarks were not in front of the jury; his remarks did nothing to affect how the jury understood the evidence of a 30-year review process. As shown in the opening brief, the jury would have understood that the 30-year review could lead to appellant's release.

12

THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING LACK OF REMORSE AS AN AGGRAVATING FACTOR

During her penalty phase argument to the jury, the prosecutor twice told the jurors that they could consider as evidence in aggravation appellant's purported lack of remorse after the crime. While discussing what the jury could consider under factor (a), the circumstances of the crime, she argued, "You are allowed [to] consider whether the defendant expressed any remorse or not." (RT 6219.) After being told by the court that this was an erroneous argument, she nevertheless returned to the subject of remorse in her argument and told the jury that "Lack of remorse, I can express to you is not, not, I repeat a *separate* aggravating factor. *But it's an indicator of character.* It's something you can consider." (RT 6284, emphasis added.) Appellant asserted in the opening brief that because lack of remorse is not an aggravating factor, the prosecutor committed prejudicial misconduct in making these statements. (AOB 182, citing *People v. Davenport* (1985) 41 Cal.3d 247, 288-290.)

When the court asked the prosecutor to justify the first statement, the prosecutor replied, "Factors relating to the circumstances of the crime whether the defendant right after the crime may have gone to someone and said 'I'm sorry' are all things a jury can consider. [¶] You are precluding me from telling them that. And that is not correct." (RT 6222.) On appeal, respondent does not even attempt to support this reasoning. Instead, respondent's position now is that the argument was proper because there was evidence of "overt remorselessness" within the meaning of *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232, and *People v. Cain* (1995) 10 Cal.4th 1, 76-79. (RB 228-230.)

A defendant's attitude toward his actions and the victims *at the time of the offense* is a circumstance of the crime which can be either aggravating or mitigating. (*People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1231-1232.) Post-crime evidence of remorselessness does not fit within any statutory sentencing factor and therefore cannot be used as aggravating evidence. (*Id.*, at p. 1232; *People v. Boyd*, *supra*, 38 Cal.3d at pp. 771-776.) In *People v. Cain*, *supra*, 10 Cal.4th at pp. 77, where defendant, still bloody from the killings returned to his friends and boasted of what he had just done, "the jury could infer his attitude during the crimes was one of callousness towards the victims." In *Gonzalez*, there was evidence that defendant after his arrest boasted to a jail inmate about "bagging a cop" who "had it coming. . . ." This Court held that the prosecution's argument of these facts as aggravating evidence was proper "[i]nsofar as the prosecutor was urging defendant's *overt* remorselessness *at the immediate scene of the crime.*" (*People . Gonzalez*, *supra*, 51 Cal.3d at pp. 1231-1232; emphasis in original.) "For the most part, the prosecutor's arguments focused on *overt* evidence of defendant's defiance, not his mere failure to confess guilt or express remorse." (*Id.*, at p. 1233.)

Cain and *Gonzalez* recognize that there are times when a defendant's post-crime actions and statements are so brazen and defiant that jurors can properly infer from them an attitude of overt remorselessness at the time the crime was committed. That is not the case here, and the prosecutor's explanation to the trial court of her own argument showed she was not trying to create such an inference. Instead, she wanted appellant's post-offense failure to apologize itself to be considered by the jury as an aggravating circumstance under section 190.3, factor (a). Moreover, such an inference would have been completely improper and inconsistent with

the reasoning in *Cain* and *Gonzalez*: no reasonable juror could infer that a defendant had an attitude of overt remorselessness at the time of the offense based on a defendant's failure to affirmatively seek out and apologize to someone post-offense.

Respondent ignores the prosecutor's explanation and offers certain post-crime acts and statements of appellant to try to bring the facts within the ambit of *Gonzalez* and *Cain*. First, respondent claims the fact that appellant kept the victim alive for several hours after the kidnaping and used his credit cards and belongings was evidence of overt remorselessness. But appellant was convicted of robbery and kidnaping, and kidnap-murder and robbery-murder special circumstance allegations were found true. An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 77-78.) The evidence cited by respondent did little more than support the existence of the elements of these crimes and special allegations; it did not reveal an attitude by appellant toward the crime that was more remorseless than may be inherent in robbery-murder or kidnap-murder.

Second, respondent claims that appellant bragged about killing the victim the next day. (RB 230.) In fact, most of appellant's actions and statements when he was in Bakersfield January 24, 1992 – the day after the shooting – were exculpatory or pointed to a limited participation by appellant in any criminal activity. When appellant arrived in Bakersfield, he hid the fact that he had a stolen car from his girlfriend, Salo Gutierrez, and lied to her about how he got to Bakersfield. (RT 2861, 4443-4445.) Appellant spent the evening of January 24 attending a party at "Drifter"

Amaya's house, but according to Drifter, appellant never said anything to him about killing anyone. (RT 3030.) When the car with appellant and four juvenile gang members crashed later that evening, several of the juveniles claimed appellant revealed for the first time that the car had a murder rap on it, but without acknowledging he had any involvement in the crime. (RT 3517, 3394.) After being arrested, appellant was repeatedly questioned by the police and consistently denied being involved in the shooting in Los Angeles. (RT 4522.) The source of respondent's claim of appellant bragging about the killing comes from one person: the recalcitrant juvenile gang member Lorenzo Santana, who testified that at the party on January 24, he overheard appellant say to Larry "Soldier Boy" Castro that "he had killed somebody." (RT 3408.) Santana did not "know exactly what he said but I overheard him saying something." (RT 3408.) When Santana was later asked on redirect examination by the prosecutor "what kind of voice appellant was using" when he spoke to Castro, Santana said appellant was "bragging." (RT 3468.) None of this reflects the kind of defiant post-crime posturing which this Court indicated in *Cain* and *Gonzalez* could be evidence from which an attitude of overt remorselessness at the time of the crime could be inferred.

Regarding the second statement, respondent claims that the prosecutor was simply saying lack or remorse was a lack of mitigation. (RB 230-231.) The prosecutor did indicate remorse could be a powerful mitigator, and that it was absent in this case. But she also stated that it was evidence of character – implying bad character, which is a non-statutory aggravating factor. (RT 6284.) By making that statement the prosecutor committed misconduct.

Respondent contends the issue was waived by appellant's failure to

object at trial. The contemporaneous objection rule is not an end in itself. It exists so that the opposing party and the trial court can cure error before it becomes prejudicial. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) Here the court interrupted the prosecutor immediately after she made the first improper remark in her argument to the jury, and addressed the problem at length in chambers, ultimately determining that the prosecutor's argument was "an incorrect argument at this point." (RT 6222.) No objection was necessary because the court and the parties had the opportunity to address the merits of the issue.

Appellant has argued in the opening brief that the error was prejudicial (AOB 184-185); respondent's perfunctory argument to the contrary needs no response. For the foregoing reasons, the judgment of death must be reversed.

//

//

13

THE PROSECUTOR COMMITTED MISCONDUCT BY URGING THE JURY TO RENDER A VERDICT BASED ON VENGEANCE

The prosecutor exhorted the jury to impose the death penalty as an act of vengeance. (RT 6282-6286.) Appellant argued in the opening brief that this was prejudicial prosecutorial misconduct. (AOB 186-192.) Nowhere in its 10 pages of briefing on this issue does respondent contend the prosecutor's argument was actually proper. Rather, respondent claims the issue was waived and that appellant suffered no prejudice from the prosecutor's remarks.

The parties agree on the general rule this Court has applied when assessing whether a prosecutor's call for vengeance is misconduct in a capital case. This Court has stated that "[i]solated, brief references to retribution or community vengeance. . . , although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty." (*People v. Ghent* (1987) 43 Cal.3d 739, 771; see also e.g., *People v. Wash* (1993) 6 Cal.4th 215, 262; *People v Floyd* (1970) 1 Cal.3d 694, 721-722.)

The prosecutor's remarks, set out more fully in the opening brief (AOB 186-188), show how inapplicable this rule is here. Among her lengthy remarks on the subject, the prosecutor told the jury that vengeance was "not only appropriate but in fact quite healthy. It has a legitimate place in our society and has a legitimate role within our criminal justice system. Don't let me kid you, when any prosecutor gets up in front of a jury or any court and asks that jury to come back with a verdict of death, that vengeance isn't involved." She said, "The idea of punishment is unintelligible if severed from the idea of retribution, which is inseparable

from the concept of vengeance which is an expression of society's anger. If you have no anger, you have no justice."

She continued by telling the jury that she wanted to talk to the jury "about the social impact of your decision." She told them that "by being part of civilization. . . we surrender our right to individual justice. When man gave up this right to personal vengeance, he may have given up a great deal psychologically and the state's efforts can never ever give you the same feeling you get by exacting personal vengeance, but in return the state did give man two things. One, it lends us its powers so even the weak may have revenge, and secondly it does impose reason and order on its process of vengeance." (RT 6282-6286.)

Respondent's position regarding these remarks is that "far from being the principal basis of the prosecutor's argument, vengeance was merely a concept the prosecutor briefly discussed in relation to the remainder of her argument." (RB 239.) Appellant submits that the remarks speak for themselves: they cannot reasonably be characterized as brief or isolated and, accordingly, cannot be dismissed as being non-prejudicial.

As to the second part of the general rule, the prosecutor did make vengeance a significant basis for imposing the death penalty, although it was not the principle basis. Respondent claims that because vengeance was not the principle basis for the prosecutor's argument, there was no prejudicial error.

The reasoning behind this part of the rule pre-dates California's adoption of the guided discretion law that is the basis for our modern death penalty scheme. In *People v. Love* (1961) 53 Cal.2d 843, 856-857, fn. 3, this Court held that "Whatever may have been the fact historically, retribution in no longer considered the primary objective of the criminal law

and is thought by many not even to be a proper consideration. Granted, however, that retribution may be a proper consideration, it is doubtful that the penalty should be adjusted to the evil done without reference to the intent of the evildoer. Modern penology focuses on the criminal, not merely on the crime." Essentially, this Court expressed doubt as to the legitimacy of arguing vengeance as a reason for imposing a sentence of death, but would not find prejudicial misconduct unless the vengeance argument completely usurped the position of the individual as the center of the sentencing decision. Theoretically, the prosecutor could argue vigorously and at length exhorting the jury to act out of vengeance without risking reversal as long as vengeance was not the principle basis of the argument. Such an argument is inconsistent with the principles of California's guided discretion death penalty scheme which must be followed in order to be consistent with the requirements of the Eighth and Fourteenth Amendments. If arguing vengeance is wrong, the prejudice should be assessed under the reasonable possibility test (*People v. Brown* (1988) 46 Cal.3d 432, 447), not by a determination of whether the argument was the principle basis for the prosecutor's call for a death verdict.

Respondent's claims of waiver and lack of prejudice should be rejected for the reasons stated in appellant's opening brief. (AOB 192.) The sentence and judgment of death should therefore be reversed.

//

//

14

THE PROSECUTOR COMMITTED MISCONDUCT BY URGING THE JURY TO SHOW APPELLANT THE SAME MERCY HE SHOWED THE VICTIM

In the opening brief (AOB 193-200) appellant showed how the prosecutor committed misconduct by arguing to the jury,

> "I as a representative of the People of the State of California will be satisfied if you extend to this defendant the same sympathy and the same mercy that he extended to Fred Rose. And the same sympathy and the same mercy that he extended to everyone throughout his life. I will be satisfied if you do that." (RT 6230.)

Appellant contended that this argument violated both state law and the federal constitution, relying in the opening brief on both federal and state law cases which have held similar arguments are improper appeals to vengeance and to the passions and prejudices of the jury. (See AOB 193-200.)

Respondent does not mention any cases from other jurisdictions, relying entirely on two of this Court's decisions – *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465, and *People v. Hughes* (2002) 27 Cal.4th 287, 395 – and apparently contending that the prosecutor was simply arguing appellant was not entitled to sympathy or mercy. (RB 244-245.)[19] Even if the argument in *Ochoa* can be properly interpreted in this manner (but see

---

[19] Respondent characterizes defense counsel's objection as "belated" (RB 243) but never suggests the claim has been forfeited or waived. In the absence of a claim or forfeiture or waiver, the court should address the case on the merits. Moreover, defense counsel made the objection at the first break in the prosecutor's argument. (RT 6260.) The objection was therefore timely.

AOB 197-198), here it cannot. Rather than relying on reasoning for rejecting mercy, the prosecutor chose to personalize her appeal, asking the jury to show appellant the same mercy he showed the victim to satisfy her as a representative of the State. For all the reasons stated in Argument 14 of the opening brief, the prosecutor's argument was improper and the death sentence must be set aside.

//

//

15

THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING TO THE PENALTY JURY THAT THE VICTIM WAS KILLED WHILE BEGGING FOR HIS LIFE OR RUNNING AWAY

In her penalty phase argument, the prosecutor painted a vivid portrait of the death of Fred Rose: "Based on the evidence Mr. Rose was either on his knees begging for mercy or running away in fear" when he was shot by appellant. (RT 6237.) This portrait, however, was the invention of the prosecutor rather than a reflection of the evidence admitted at trial. In the opening brief appellant asserted that by arguing aggravating facts not in evidence the prosecutor committed misconduct. Respondent claims the issue was waived and that no misconduct occurred.

Respondent contends that the prosecutor's statements were "reasonable inferences based on the evidence presented at trial." (RB 249.) In fact, even the evidence supporting the prosecution's theory that the killing was "execution-style" was at best tenuous – the angle of entry of the bullet and the fact of small abrasions on the victim's knee was the basis of the prosecutor's claim that Rose was on his knees. The additional "facts" that the victim was begging for his life or attempting to run away were pure embellishment, not "common sense" as respondent claims (RB 250).[20] Even the assumption the victim knew or believed he was going to be shot is simply rank speculation. The evidence showed that the gun was not fired at

---

[20] Appellant submits that a survey of reported cases involving homicides characterized as "execution-style" does not support respondent's assumptions about the behavior of the victims in such crimes. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704; *In re Rosenkrantz* (2002) 29 Cal.4th 616; *People v. Mason* (2002) 96 Cal.App.4th 1.)

point blank range, and may have been fired from as far as 100 feet. (RT 3887.) Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, it is misconduct to mischaracterize that evidence. (*People v. Hill*, *supra*, 17 Cal.4th at p. 823.) The prosecutor's embellishments on the evidence were not reasonable inferences; her argument was misconduct.

Respondent does not dispute the plain language of the prosecutor's statement was that the evidence showed that the victim was either on his knees or running away when he was shot. Respondent also acknowledges that the coroner testified that there were "probably millions of different" positions the victim could have been in at the time of the shooting. (RB 250.) Respondent claims, however, that because of this evidence from the coroner, there was no reasonable likelihood the jury would take the prosecutor's argument at face value. (RB 250.) In essence, respondent claims that juries never believe prosecutors when the prosecutor's arguments stray from the evidence. This reasoning defies logic and is contrary to established case law. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 828.)

The issue was not waived. Defense counsel interrupted the prosecutor mid-sentence when she said, "When, based on the evidence Mr. Rose was either on his knees pleading for mercy or running away in fear from this defendant –." Defense counsel stated, "To which there is an objection, your honor." (RT 6237.) The court immediately responded that "The jury has heard previously that statements of counsel are not evidence." (RT 6237.) The contemporaneous objection rule exists so that the opposing party and the trial court can cure error before it becomes prejudicial. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) The court's response to

appellant's objection clearly indicates that the court understood appellant was objecting that the prosecutor was arguing facts not in evidence. The objection should be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. (*People v. Scott* (1978) 21 Cal.3d 284, 290; see also *Stutson v. United States* (1996) 516 U.S. 193, 196-197 [inappropriate to "allow technicalities which caused no prejudice to the prosecution" to preclude appellate review of a criminal defendant's claims].) Respondent also contends that appellant failed to request that the jury be admonished and thereby waived any claim of prosecutorial misconduct. But the court did not sustain appellant's objection, so there was no basis for requesting an admonition. There is no requirement that a defendant engage in futile acts in order to preserve an issue for appeal. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Arias* (1996) 13 Cal.4th 92, 159.)

In dismissing the possibility these comments could have influenced the jury, respondent ignores the fact that for at least one juror, the possibility that the killing was execution-style was his "big point." (RT 6507.) Appellant showed in the opening brief that the circumstances of the shooting were a point of considerable contention during jury deliberations, and resulted in one juror committing misconduct by conducting an experiment on his home computer trying to recreate the manner in which the shooting occurred. (See AOB 48-74.) Rather than being an innocuous comment, the prosecutor's misstatement of evidence became a central part of the decision to impose death on appellant. The sentence and judgment of death must be reversed.

//

//

16

THE PROSECUTOR COMMITTED MISCONDUCT BY REFERRING TO AGGRAVATING EVIDENCE OUTSIDE THE RECORD IN HER PENALTY PHASE ARGUMENT

The prosecutor said to the jury during her penalty phase argument, "I cannot bring in every single bad thing this defendant has done throughout his entire life to convince you to give him the death penalty." (RT 6219.) Appellant contends that through this statement the prosecutor improperly informed the jury that there were other bad things appellant had done which were worthy of the jury's consideration, but which were inadmissible. (AOB 206-210.)

Aside from claiming waiver,[21] respondent's defense of the prosecutor is that she was merely "attempting to focus the jury on the jury instructions, and in particular factors (a), (b) and (c). . . ." (RB 256.) But the prosecutor's words speak for themselves. The very plain implication is that the prosecutor knew of "bad thing[s]" appellant had done which the jury might find convincing in making the decision to sentence appellant to death. From the jury's perspective, there would be no reason for the prosecutor to make the statement unless such evidence existed.

Respondent suggests that the prosecutor may have been referring to appellant's trouble in school and his involvement with drugs and gangs which were mentioned by a defense witness. (RB 256.) But the prosecutor spoke about what she could not "bring in" rather than incidental information which the defense had presented.

---

[21] Appellant addressed in his opening brief the fact that the defense made no objection. (AOB 209-210.) No further response is necessary to respondent's claim of waiver.

Respondent attempts to distinguish *People v. Bolton* (1979) 23 Cal.3d 208, 212-213, and *People v. Taylor* (1961) 197 Cal.App.2d 372, 381-382, on the grounds that what the prosecutor said in the present case accurately stated the law. (RB 255.) But the statements of the prosecutors in both *Taylor* and *Bolton* were also accurate. The impropriety is not in the statement of the law, but in the facts implied by the statement. The three cases are similar in that each prosecutor told their juries that they knew of additional relevant evidence supporting their case which they could not present because of how the law was structured. In fact, the prosecutor's statement here was completely consistent with her other statements and behavior throughout this trial which indicated that she believed her ability to present her case was suffering from legal restrictions imposed by the court. This is simply another example of the prosecutor using improper means to impart information and her opinions to the jury. Making the statement was misconduct; the sentence and judgment of death must be reversed.

//

//

17

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY WITH APPLICABLE INSTRUCTIONS FROM THE GUILT PHASE

In his opening brief appellant argued that the trial court had erred in failing to instruct the penalty phase jury on applicable general principles of law which had been given at the guilt phase. Respondent claims the failure to re-instruct with applicable guilt phase instructions was not error. Appellant disagrees. In *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26, this Court stated that trial court's should "expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." The CALJIC Committee went further than *Babbitt*, suggesting that rather than expressly informing the jurors of the previous instructions, the trial court should give "all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88." (Use Note to CALJIC No. 8.84.1 (6th ed. 1996).) Subsequently, this Court has moved toward the position of the CALJIC Committee, at least as to general evidentiary instructions from the guilt phase. In *People v. Carter* (2003) 30 Cal.4th 1166, 1222, the Court stated, "we strongly urge trial courts not to dispense with penalty phase evidentiary instructions in the future" while declining to determine whether a sua sponte duty to do so existed. Appellant recognizes that the Court has frequently failed to find prejudicial error where the trial court has not re-instructed the jury because there is a general assumption that jurors would still have the guilt phase instructions in mind and would follow them unless told to do otherwise. (See e.g., *People v. Wharton* (1991) 53 Cal.3d 522, 600.) In short, the Court has recognized that a penalty jury needs to have the guidance of proper instructions on evidentiary issues at the penalty phase and that the best way to insure that guidance is by re-instructing the

jury with the relevant law; but that the absence of such re-instruction alone will not be sufficient to establish the jury had not been properly instructed.

A. The Court Erred in Failing to Reinstruct the Jury with Applicable Guilt Phase Instructions

In the present case, the trial court neither expressly informed the jury of which instructions applied, as suggested in *Babbitt*, nor actually gave all the instructions to the jury, as urged in *Carter*. Respondent's argument that no error occurred is necessarily based only on the assumption that, in the absence of evidence to the contrary, it can be presumed that the jury correctly applied all the guilt phase instructions during penalty phase deliberations. (RB 260-261.) But here the confusing instruction given by the trial court provides that evidence: rather than not telling the jurors anything about the guilt instructions, the court told the jurors they were to be "guided by the previous instructions given in the first phase of this case which are applicable and pertinent to the determination of penalty" (RT 6198). The clear implication of this instruction was that some of the instructions from the guilt phase were applicable and some were not. Moreover, it is unclear if jurors would understand being "guided by" an instruction was the same as following it. Making even more difficult the jury's decisions about which instructions applied, and which did not, was the fact the some guilt phase instructions make specific reference to guilt or innocence. This Court has assumed that jurors would reasonably understand that guilt phase instructions which made reference to guilt or innocence would *not* apply to the penalty phase. (*People v. Babbitt*, *supra*, 45 Cal.3d at pp. 717-718.) Under these circumstances, it is simply not believable that a month after hearing the guilt phase instructions, the jurors would remember each of them sufficiently well both to make a correct legal

assessment as to which were applicable, and then actually to follow and apply them to the case.[22]

In the opening brief, appellant pointed out that jurors would likely ignore the circumstantial evidence rule to appellant's detriment as one example of how the failure to reinstruct would prejudice appellant. (AOB 213-215.) Respondent has not responded to this argument.

B. The Error Was Not Invited

Respondent also contends any error was invited by appellant. (RB 259-260.) Although appellant did not object to the absence of applicable guilt phase instructions at the penalty phase, neither did he invite the error. Invited error estops a party from asserting an error when the party's own conduct has induced the error. (*People v. Lang* (1989) 49 Cal.3d 991, 1031.) Invited error occurs only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332; *People v. Graham* (1969) 71 Cal.2d 303, 319.) Appellant did not express a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction here.

Respondent claims appellant invited error when he "expressly declined the offer" made by the court to reread the applicable guilt phase instructions. (RB 259.) But simply declining the court's offer of an

---

[22] Respondent states that the court told the jurors that the guilt phase instructions "would be available in the jury room," implying the instructions were provided to the jurors. (RB 259.) That implication is incorrect. The instructions were not in the jury room; the court told the jurors "those instructions will be available to you if you request them." (RT 6197.) No such request was made. Therefore, any assessment the jury made of the applicability of the guilt phase instruction to the penalty phase was done without the benefit of actually having the instructions before them.

instruction is not invited error. (See *People v. Graham*, *supra*, 71 Cal.2d at p. 319.) Furthermore, the court here was not even offering a specific instruction. Rather, the court was asking "some preliminary questions to help me focus on how to go about organizing the instructions." (RT 6063.) The court described two different models purportedly used by other judges – one by Judge Schwab and the other by Judge Pounders – for addressing the guilt phase instructions, and simply paraphrased those approaches for the attorneys. (RT 6063-6064.) Defense counsel voiced a "preference" for an approach which did not repeat all the guilt phase instructions, but did not give a tactical basis for such preference. Rather, he said he did not think it was "adviseable to go into a lengthy dissertation with respect to instructions already given." (RT 6065.) He indicated he previously had a concern about having CALJIC No. 2.11 given, but had "no lingering concern." (RT 6065.) Counsel was not presented with a specific instruction to approve or disapprove, and did not express a deliberate tactical purpose in declining such an instruction.

Respondent relies on cases in which the defendant specifically proposed the erroneous instruction (*People v. Wader* (1993) 5 Cal.4th 610, 657-658; *People v. Caitlin* (2001) 26 Cal.4th 81, 149), or convinced the court not to give a proper instruction (*People v. Cooper* (1991) 53 Cal.3d 771, 827 ["The record is clear that the court would have given the instruction but for defendant's repeated objections."]). Appellant did not propose any instruction in question and his answers to the court's preliminary questions did not determine the court's course of action. There was no invited error.

In conclusion, the court erred in failing to give relevant instructions from the guilt phase on general evidentiary issues, and the error was not

invited. For all the foregoing reasons, the penalty phase verdict and judgment must be reversed.

//

//

18

THE TRIAL COURT FAILED TO INSTRUCT THE PENALTY JURY PROPERLY ON MENTAL AND EMOTIONAL DISTURBANCE AS A MITIGATING FACTOR

Appellant argued in his opening brief that the trial court erred in denying appellant's requested modification of the standard penalty phase instruction CALJIC No. 8.85 to delete the word "extreme" modifying "mental and emotional disturbance" in paragraph (d). (AOB 217-220.)

Appellant acknowledged that this Court has previously rejected similar claims of error. Respondent relies on this Court's previous rejection of these issues without additional analysis. Accordingly, no reply to respondent's argument is necessary.

//

//

19

THE COURT'S PENALTY PHASE INSTRUCTION PURSUANT TO CALJIC NO. 8.88 WAS UNCONSTITUTIONAL

Appellant argued in his opening brief that the standard penalty phase instruction – CALJIC No. 8.88 – as given by the trial court in this case violated appellant's federal and state constitutional rights in numerous ways, while recognizing that this Court has rejected the same or similar arguments in other cases. (AOB 221-230.) Respondent largely relies on this Court's previous rejection of these issues without additional analysis. Accordingly, no reply to respondent's argument is necessary.

//

//

20

NUMEROUS FEDERAL CONSTITUTIONAL DEFICIENCIES IN CALIFORNIA'S DEATH PENALTY STATUTE REQUIRE REVERSAL OF THE DEATH JUDGMENT

Appellant's opening brief sets forth numerous bases on which California's death penalty statute violates the federal constitution, while acknowledging that this Court has already rejected these claims of error. Respondent simply relies on this Court's prior decisions without adding new arguments. Accordingly, the issues are joined and no reply is necessary.

//

//

21

THE CUMULATIVE EFFECT OF ALL THE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

No reply is necessary to respondent's argument against appellant's claim of cumulative error (AOB 258-260). Respondent simply contends no errors occurred. Therefore, should this Court find errors which it deems non-prejudicial when considered individually, it should reverse based on the cumulative effect of the errors.

//

//

22

APPELLANT IS ENTITLED TO A NEW HEARING ON THE AUTOMATIC MOTION TO MODIFY THE DEATH VERDICT

The trial judge, Honorable Leon Kaplan, did not preside over appellant's automatic motion for modification of the penalty verdict under section 190.4, subdivision (e). After granting appellant a new penalty trial, Judge Kaplan recused himself from any retrial in the case:

> "I have one last statement to make and that is that in light of the personal attacks against the court, I feel that justice would be best served if I would recuse myself from further hearings in this case. The People may wish to consider reassigning this case but that is something that is entirely and exclusively within their province. As for myself, I am going to recuse myself from presiding over further proceedings, however I do not recuse myself from availability to making any supplemental or additional findings that may be required by any reviewing court."

(RT 6763.)

Appellant argued in the opening brief that the limited recusal did not cover the section 190.4, subdivision (e) hearing which followed the District Court of Appeal's reversal of the new trial order, and that any statutory limitation on a court's ability to limit recusal is superceded by the constitutional underpinning of California's death penalty scheme which mandates that the trial judge hear the automatic motion to modify if available. (AOB 261-277.) Only a few of respondent's points need a response.

The parties agree that Judge Kaplan intended only a limited recusal, and that he did not intend to preside over the penalty retrial he had ordered. Respondent, however, argues Kaplan intended to recuse himself for

purposes of the automatic motion to modify. Appellant disagrees. Judge Kaplan knew it was likely the prosecution would appeal his order granting appellant a new penalty trial. His statement that he did not recuse himself "from availability to making any supplemental or additional findings" that might be "required by any reviewing court" anticipated the possibility that his order would be reversed and the matter would be returned to his court for a section 190.4, subdivision (e) review. This statement is consistent with a trial court's role in that review: the court reviews the evidence independently (*People v. Rodriguez* (1986) 42 Cal.3d 730, 793), determines whether the jury's findings are contrary to the law or the evidence presented, and states "on the record the reasons for his *findings*." (§ 190.4, subd. (e), emphasis added.)

Respondent finds particular significance in the court's use of the word "presiding" when recusing himself "from presiding over further proceedings." (RB 277, fn. 37.) But Judge Kaplan was apparently prepared to preside over record correction proceedings relevant to the People's appeal of his new trial order until he determined limited recusals were not permitted. (See RT 6810-6812.) The most logical interpretation of the judge's intent was that he was recusing himself from a penalty retrial which could provide a forum for further personal attacks from the prosecutor. To the extent there is any ambiguity, the matter can be remanded to Judge Kaplan for a new section 190.4, subdivision (e) hearing, and he can either make the findings required by the statute, or clarify that he had recused himself from conducting such a hearing.

Respondent also questions appellant's contention that Judge Kaplan's recusal was based on his intent to "further the interests of justice" (Code of Civ. Proc § 170.1, subd. (a)(6)(A)), and suggests that "recusal was

appropriate" based on doubts as to the judge's bias or because a reasonable person might doubt the judge's ability to be impartial (Code of Civ. Proc. §170.1, subds. (a)(6)(B) and (a)(6)(C). (RB 280-281.) But the judge's own words – "justice would best be served" – is language consistent with subdivision (a)(6)(A) rather than the subdivisions relating to bias or the appearance of bias. On the other hand, the court said nothing about being biased or appearing biased.

Respondent theorizes that Judge Kaplan's recusal could have been a response to letters written by family and friends of the victim and attached to the prosecution's pleading opposing appellant's new trial motion. (RB 281.) Kaplan recused himself "in light of the personal attacks against the court" (RT 6763). Minutes earlier the prosecutor had in fact attacked the court: "I don't think anyone can doubt that what this court is doing is twisting and torturing out of all shape what has occurred in this case in order to reach this court's decision not to impose the death penalty on this defendant because of this court's personal beliefs." (RT 6760.) The court's lengthy response, which ultimately included his recusal remarks, began:

> "Well, I will refrain myself from succumbing to the temptation to respond to personal attacks on this court which have been ongoing and are relentless. I have on numerous occasions asked and actually ple[]d with the People to please address legal arguments on their merits and instead of by prefacing them with personal attacks on the court. I've not been successful in doing that."

(RT 6760.)

This leaves no doubt that the personal attacks the court referred to in recusing itself were those perpetrated by the prosecutor. Moreover, the

contents of the letters from the victim's family and friends alleging Judge Kaplan's bias did not truly amount to personal attacks and would not be a legitimate reason for recusal. Under Code of Civil Procedure, section 170.1, subdivision (a)(6)(C), a judge may be disqualified if a reasonable person would entertain doubts concerning the judge's impartiality. This "suggests that the litigants' necessarily partisan views not provide the applicable frame of reference." (*United Farm Workers v. Superior Court* (1985) 170 Cal.App.3d 97, 104.) The letters from family and friends of the victim reflect the opinions of partisans, not a neutral reasonable person, and contain no substantial evidence of bias. (See CT 1279-1285.) Furthermore, the fact that the letters were attached to the prosecutor's pleading suggests they were orchestrated by the prosecutor as another part of her relentless attack on the court.

Finally, appellant argued that the provisions of section 190.4, subdivision (e), are an integral part of California's death penalty scheme and that he was deprived of his state and federal rights to due process by the unnecessary substitution of a new judge to hear the automatic motion to modify the judgment. Respondent says only that there is no state liberty interest at stake and therefore no due process violation occurred. Appellant's position is fully set forth in the opening brief.

Appellant also argued in the opening brief that the court should provide relief because any unavailability of Judge Kaplan was provoked by the deliberate action of the prosecutor, analogizing to *Oregon v. Kennedy* (1982) 456 U.S. 667, 676, and *People v. Hathcock* (1973) 8 Cal.3d 599, 614 fn. 14. Respondent distinguishes these cases, but the distinctions are of little significance. Appellant submits that these cases support the general proposition that this Court can fashion an appropriate remedy when the

prosecutor's deliberate unprofessional behavior deprived appellant of a critical right in a capital case. The death judgment should be set aside and the case should be remanded for a new section 190.4(e) hearing before Judge Kaplan.

//

//

23

APPELLANT'S PENALTY TRIAL VIOLATED INTERNATIONAL LAW

In his opening brief, appellant argued California's sentencing procedures violate international law and fundamental precepts of international human rights. Appellant requested that this Court reconsider its decisions rejecting similar claims (see e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 511). (AOB 278-280.) Respondent's principle argument is to rely on this Court's previous decisions without substantial further analysis. Accordingly, no reply is necessary to that part of respondent's argument.

Respondent makes two additional procedural arguments: first, respondent asserts that appellant has no right to assert his claims under international law because treaties are intended to protect sovereign, not individual interests. Respondent simply ignores *U.S. v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, cited in appellant's opening brief, which held in part that a defendant may assert protections provided by the International Covenant of Civil and Political Rights ("ICCPR") in a criminal case:

> "The clear language of the ICCPR manifests that its provisions are to govern the relationship between an individual and his state, and, not as appellant argues, the relationship between sovereigns. In other words, the ICCPR is concerned with conduct that takes place within a state part; its provisions do 'not purport to regulate affairs between nations.'"

(*Id.* at p. 1286; citation omitted.)

Second, respondent claims appellant waived his right to assert this claim by failing to raise it in the trial court. Appellant's claim, however, is a pure question of law which can be raised for the first time on appeal. (See

e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1061.) There is no unfairness when the Court reviews pure questions of law because the opposing party has not been deprived of the opportunity to litigate disputed factual issues. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) Furthermore, when "the wrong is so fundamental that it makes the whole proceeding a mere pretense of a trial," the state cannot maintain an unfair result by using a procedural rule to prevent the defendant from raising the issue on appeal. (*People v. Millum* (1954) 42 Cal.2d 524, 526.) At the penalty phase, appellant was denied his rights under the state and federal constitutions and under international law. A mere procedural rule of waiver should not preclude appellant from now raising violations of these fundamental rights.

Relief is appropriate under international law and appellant's death sentence should therefore be reversed.

//

//

CONCLUSION

For all the aforementioned reasons, appellant's convictions and his sentence of death must be vacated.

DATED: February 17, 2005

Respectfully submitted,

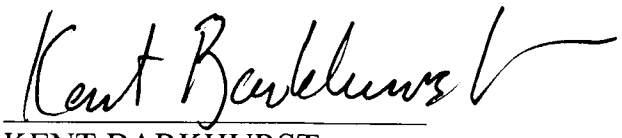
MICHAEL J. HERSEK
State Public Defender

KENT BARKHURST
Deputy State Public Defender

Attorneys for Appellant

Certificate of Counsel (Cal. Rules of Court, rule 36(b)(2))

I, Kent Barkhurst, am the Deputy State Public Defender assigned to represent appellant Scott Collins in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 23, 391 words in length.



KENT BARKHURST
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Collins* No.: S058537

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

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Attn: Theresa A. Patterson
300 S. Spring Street, Ste. 1700
Los Angeles, CA 90013

Bruce C. Hill, Esq.
6400 Canoga Ave., Ste. 151
Woodland Hills, CA 91367-2437

Los Angeles County Superior Court
HON. HOWARD SCHWAB
Chatsworth Courthouse, Div. F48
9425 Penfield Ave.
Chatsworth, CA 91311

Los Angeles County Superior Court
HON. LEON S. KAPLAN
Northwest District, Dept. B
6230 Sylmar Avenue
Van Nuys, CA 91401

Mr. Terry J. Amdur
Attorney at Law
1939 Rose Villa Street
Pasadena, CA 91107-5076

Los Angeles County District Attorney
Attn: Lea Purwin D'Agostino
6230 Sylmar Ave., Rm. 201
Van Nuys, CA 91401

Mr. Scott F. Collins
(Appellant)

Each said envelope was then, on February 17, 2005, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on February 17, 2005, at San Francisco, California.

DECLARANT