SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEPHEN REDD, Defendant and Appellant.	S059531 Orange Co. No. 94CF1766

SUPREME COURT
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DEPUTY

APPELLANT'S REPLY BRIEF

After Decision by the Superior Court
of Orange County
Imposing the Judgment of Death
Honorable Francisco Briseño, Judge Presiding

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEPHEN REDD, Defendant and Appellant.	S059531

CORRECTIONS TO STATEMENT OF THE CASE

AND STATEMENT OF FACTS

The date the jury returned with a verdict of death is incorrectly stated in appellant's opening brief. The correct date is November 15, 1997, as stated in Respondent's Brief. (Appellant's Opening Brief, p. 3, hereafter "AOB;" Respondent's Brief, p. 2, hereafter "RB.")

Appellant did not rob a Vons grocery store, as stated by respondent. (RB 3.) No such offense was even charged. (AOB 1-3; CT 1:266-269.)

ARGUMENT

INTRODUCTION

Appellant finds it unnecessary to answer all the arguments in respondent's brief, as they were addressed in the opening brief, and will

therefore respond only to those arguments that raise new issues. Appellant respectfully requests that the failure to specifically address a particular argument should not be considered a concession, abandonment, or forfeiture of the point. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE EVIDENCE

A. The Burden Fell Upon the Prosecution to Present Evidence to Support Every Theory Upon Which It Relied to Justify the Detention, Arrest and Seizure

Respondent initially contends that most of appellant's contentions are forfeited because he failed the assert them below. (Reply Brief, hereafter "RB," p. 30.)

As appellant pointed out in the opening brief (beginning on page 82), once he challenged the government's actions by filing a motion to suppress the evidence pursuant to Penal Code section 1538.5, the burden shifted to the prosecutor to present evidence to support every theory upon which he was relying to justify the actions taken. (Appellant's Opening Brief, hereafter "AOB," pages 82-83.)

The only showing appellant had to make in the trial court was that the detention, arrest and search were conducted without a warrant. This was done. Respondent's assertion that "most of [appellant's] contentions are

forfeited as they were not specifically asserted below," made without citation to authority, is meritless. (See *People v. Turner* (1994) 8 Cal.4th 137, 214 [party which does not develop an argument with citations and analysis has waived it].)

B. The Standard of Review is Non-Deferential

While ordinarily an appellate court may affirm a trial court's ruling on any basis presented by the record, in reviewing a ruling on a motion to suppress, a reviewing court may not affirm on grounds neither urged by the prosecutor nor considered by the trial court. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640 and appellant's argument on pages 82-83 of the opening brief.)

The cases cited by respondent on page 39 are inapposite. *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243 involved an attorney's *quantum meruit* action against a hospital. *People v. Saucedo* (1995) 33 Cal.App.4th 1230 dealt with the question whether the trial court abused its discretion in admitting the preliminary hearing testimony of an eyewitness after a finding of unavailability.

The standard of review of a trial court's *legal* conclusions (as opposed to its factual findings), is reviewed without deference (see AOB 81).

C. The Motion to Suppress Was Improperly Denied

Officer Jansing Was Not Authorized by Penal Code section 830.8, subdivision (a)(1) to Make an Arrest for an Expired Vehicle Registration

Respondent concedes that Officer Jansing was not authorized to arrest appellant for an expired vehicle registration under the authority of Penal Code section 830.8, subdivision (a)(4) because "the offenses for which [appellant] was initially arrested do not fall into" the category of a public offense that involves immediate danger to persons or property. (RB 40, fn. 12.) Instead, respondent argues that Officer Jansing was authorized to act by Penal Code section 830.8 subdivision (a)(1). (RB 40.)

The only authorities cited by respondent are *People v. Hamilton* (2002) 102 Cal.App.4th 1311 and *People v. McKay* (2002) 27 Cal.4th 601, 607. (RB 41.)

The first problem with respondent's argument is that it was not put forth as a justification by the prosecution at the trial. (RT 1:127-132; CT 1:218-219.) In fact, the prosecution contended in its papers that "it would not matter whether [Officer Jansing] had [peace officer] status or not." (CT 218.)

Because the District Attorney did not justify Officer Jansing's actions as being authorized by Penal Code section 830.8, subdivision (a)(1), the

Attorney General may not justify the actions under this theory on appeal. (See *Lorenzana, supra*, 9 Cal.3d at p.640.)

Even if the issue was not forfeited, respondent's arguments fail. Penal Code section 830.8, subdivision (a) states:

> Federal criminal investigators and law enforcement officers are not California peace officers, but may exercise the powers of arrest of a peace officer in any of the following circumstances:
>
> (1) Any circumstances specified in Section 836 or Section 5150 of the Welfare and Institutions Code for violations of state or local laws.
>
> (2) When these investigators and law enforcement officers are engaged in the enforcement of federal criminal laws and exercise the arrest powers only incidental to the performance of these duties.
>
> (3) When requested by a California law enforcement agency to be involved in a joint task force or criminal investigation.
>
> (4) When probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed.

The interpretation given to subsection (a)(1) by respondent cannot be correct, because that subsection would render the remaining subsections in section 830.8 surplusage, especially subsection (a)(4). If federal officers could arrest for any offense committed in their presence anywhere on state land, then there would be no point in the limitations placed by subsections (a)(2) through (a)(4) and subdivision (b). (*Regents of University of*

California v. Public Employment Relations Bd. (1986) 41 Cal.3d 601, 607 [courts must avoid making any language mere surplusage].)

In fact, the Attorney General has already recognized that subsection (a)(1) does not in fact mean what at first blush it appears to mean. In his opinion, then-Attorney General Daniel Lungren stated that the provision only allows federal law enforcement officers to "enforce state or local laws while away from federal property with respect to ... state offenses committed in their presence that pose a serious and immediate threat to persons and property." (80 Ops.Cal.Atty.Gen. (1997) 297.)[1]

The Attorney General specifically opined that they may not make arrests under the purported authority of subdivision (a)(1):

> Subdivision (a)(1) of section 830.8, when read in conjunction with the introductory sentence, appears to give federal officers the right to "exercise the powers of arrest of a peace officer" in "[a]ny circumstances specified in sectio 836 ... for violations of state or local laws." Section 836, in turn, spells out the power of California peace officers to make arrests ... without a warrant when the officer has reasonable cause to believe that the person has committed a felony, or ... a public offense in the officer's presence. (80 Ops.Cal.Atty.Gen., *supra*, 297.)
>
> If so read, subdivision (a)(1) would give to federal officers the same powers as California peace officers in all circumstances where a California peace officer may lawfully

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[1]Appellant's counsel incorrectly cited the date of this opinion in the opening brief. (AOB 83.)

make an arrest. However, that interpretation would render subdivision (a)(2), (a)(3), and (a)(4) surplusage. If a federal officer could make an arrest whenever a California peace officer could do so, there would be no need for a separate authorization to arrest when the federal officer is engaged in enforcing federal laws (sec. 830.8, subd. (a)(2)), or pursuant to a request of a California law enforcement agency (sec. 830.8 subd. (a)(3)), or when probable cause exists to believe that a public offense has been committed involving the immediate danger to persons or property (sec. 830.8, subd. (a)(4)). Indeed, the authorization in subdivision (a)(4) makes virtually no sense if it is taken literally, since it would authorize arrests for public offenses, including misdemeanors or infractions, [fn.om.] without requiring the offense to be committed in the officer's presence. That would afford greater powers to a federal officer than section 836 grants to California peace officers. (80 Ops.Cal.Atty.Gen., *supra*, 297.)

Courts must avoid statutory constructions that render other provisions superfluous. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459; 80 Ops.Cal.Atty.Gen., *supra*, 297.) That is exactly what respondent is attempting to persuade this Court to do.

The Attorney General correctly stated the law when he said:

> We believe the Legislative Counsel's Digest correctly sets forth the Legislature's intent, which was to grant federal law enforcement officers the powers of arrest of a California peace officer in limited circumstances, not in all instances. Section 830.8, subdivision (a)(1) cannot be read to allow federal officers the right to make arrests for violations of California laws whenever a California peace officer may do so. Rather, the federal officers may exercise the powers of arrest granted to California peace officers under section 836 only when the circumstances set forth in Section 830.8, subdivision (a)(2), (a)(3), or (a)(4) exist. (80 Ops. Cal. Atty.Gen., *supra*, 297, *5.)

Even though Attorney General's opinions do not have the same precedential power as court opinions, they are persuasive, particularly when they echo and find support in the legislative intent. (See AOB 93-98.)

The Attorney General's opinion followed the reasoning of the Legislative Counsel:

> This bill would provide that these investigators and law enforcement officers are not California peace officers, but may exercise the powers of arrest of a peace officer under specified circumstances for violations of state or local laws or when these investigators and law enforcement officers are engaged in the enforcement of federal criminal laws and exercise the arrest powers only incidental to the performance of these duties, when requested by a California law enforcement agency to be involved in a joint task force or criminal investigation, or when probable cause exists to believe there is any public offense that involves immediate danger to persons or property. (1994 Cal. Legis. Serv. Ch. 424 (A.B. 1610); Stats 1994, Ch. 424.)

Officer Jansing Had No Authority to Act Because the Location Where He Arrested Appellant Was Not Adjacent to Federal Property

Respondent claims that appellant may not raise the argument that Officer Jansing's arrest took place on land that was not adjacent to federal property because he did not raise it below, citing the general rule that in order to preserve an issue for appeal, there must be an objection on a specific basis, and a single case, *People v. Champion* (1995) 9 Cal.4th 879,

918. (RB 43.)[2]

In *Champion*, trial counsel had objected to the admission of certain exhibits on the grounds of relevance. On appeal, appellant tried to argue that the admission violated Evidence Code section 352, Evidence Code section 1101, and due process. This Court stated the general rule that reviewing courts will not consider a challenge to the admissibility of evidence absent a specific and timely objection made on the same grounds in the trial court as argued on appeal. Because trial counsel had not stated those grounds, appellant could not argue them on appeal. (*Champion, supra*, 9 Cal.4th at p. 918.)

In the case of warrantless searches and seizures, the burden falls upon the government to assert all the justifications in the trial court. (*Lorenzana v. Superior Court, supra,* 9 Cal.3d at p. 640.) In the present case, the prosecution did not assert that the seizure was justified on the grounds that the area where it took place was "adjacent to" federal property. In the document that set forth the justifications (the opposition papers), the prosecution took the position that "Officer Jansing's peace officer status under the California Penal Code is irrelevant to a determination of the

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[2]Disapproved on another point by *People v. Scott* (1997) 15 Cal.4th 1188, 1222-1223, as recognized in *People v. Combs* (2004) 34 Cal.4th 821, 860.)

present motion." (CT 1:218.) In oral argument after the hearing, the prosecutor never mentioned the term "adjacent" or concerned himself with Officer Jansing's jurisdiction. The basic argument was that "there was nothing wrong with what Officer Jansing did ...". (RT 127-128.)

Since the government did not seek to justify Officer Jansing's actions as stemming from a federal officer's statutory power to arrest on land "adjacent to" federal property, there was no need to object on that ground. (*People v. Williams* (1999) 20 Cal.4th 119, 129-130 [law enforcement, having decided to act without a warrant, is in the best position to know what justification if any, it had for taking an action, not defendant].) (See AOB 82-83.)

Despite the failure to justify the seizure on those grounds before the trial court, respondent for the first time on appeal argues that the term "adjacent" should be interpreted to mean "close by," citing to *Sonora Elementary School District v. Tuolomne County Board of Education* (1966) 239 Cal.App.2d 824. (RB 43.)

In that case, the Sonora Elementary School District brought an action requesting the superior court to find that the school district was "adjacent" to Stanislaus National Forest in order to obtain federal funds. Under the relevant statute, the money was to be paid "to school districts lying within

or adjacent to the United States forest reserve." (16 U.S.C. section 500; *Sonora ESD, supra*, 239 Cal.App.2d at p. 825.)

The court concluded that the word "adjacent" had a broader meaning than "contiguous," and was a factual determination to be made by the court or in the absence of litigation by the officials in charge of the funds. (*Id.* at p. 828.) The fact that the families of the forest service employees used the school district's facilities was a factor to be considered. (*Id.* at p. 829.)

The interpretation of "adjacent" in *Sonora ESD* may make sense in a case where the equities favor a broad definition. But penal statutes should be interpreted narrowly and favor the accused. "[S]ettled principles require that [a court] interpret the language in the manner most favorable to the defendant." (*People v. Garfield* (1985) 40 Cal.3d 192, 200.) ["[W]hen language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. [¶] The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute", quoting *People v. Davis* (1981) 29 Cal.3d 814, 828].)

The problem with respondent's interpretation being applied to this case is that if "adjacent" means half a mile away, almost all of San

Francisco would be adjacent to federal property, and in effect, the citizens of San Francisco will have lost their sovereignty and will be at the mercy of the federal police. Such an interpretation is not reasonable and should be rejected. (See *People v. Belleci* (1979) 24 Cal.3d 879, 884 ["We have declined to follow the plain meaning of a statute only when it would inevitably have frustrated the manifest purposes of the legislation as a whole or led to absurd results"].) The purpose of the legislation was not to expand the powers of the federal government over a state's citizens: it was to circumscribe it.

Officer Jansing Was Not Properly Certified

Respondent again argues that appellant has forfeited the issue whether Officer Jansing was properly certified by failing to raise it below, once again citing only to *Champion*. (RB 44.)

Once again, respondent appears to forget that the burden of justifying the seizure fell upon the government, and appellant fulfilled his sole requirement by objecting to the seizure as lacking a warrant.

Respondent accuses appellant of "quibbling" with the facts because appellant correctly points out that the only certification produced by Officer Jansing was a certificate of completion issued by a junior college, in the face of the statute's unambiguous requirement that officers "shall have been

certified *by their agency heads* as having satisfied the training requirements ...". (Penal Code section 830.8, subd. (a).) (RB 45.) Pointing out the correct law does not seem to appellant to constitute "quibbling." (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 933 ["sticking fast" to a legal theory is "not merely quibbling"].)

Officer Jansing Did Not Have Authority to Use a Marked Police Vehicle and Radio to Enforce State Laws on State Land

Respondent contends that the Attorney General's Opinion relied upon by appellant "carries no persuasive weight as it rests with [sic: on] a flawed premise." (RB 45.) The "flawed premise" appears to be that the Attorney General found the officers not to be duly authorized peace officers. (80 Ops. Cal. Atty. Gen., *supra,* at [1997 WL 665475], pp. 6-7.) Respondent relies upon its earlier argument that Officer Jansing was duly authorized under Penal Code section 830.8, subdivision (a)(1) and (b). (RB 46.) As appellant explained above, this contention cannot possibly be correct.

"Opinions of the Attorney General, while not binding, are entitled to great weight. [Citations.] In the absence of controlling authority, these opinions are persuasive." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17; *Coffin v. Department of Alcoholic Beverage Control*

(2006) 139 Cal.App.4th 471, 478.)

In the absence of controlling authority, an Attorney General's opinion may be persuasive because a court may presume the Legislature is "aware of the opinion, and would have amended the statute if it disagreed." (*Life Care Centers of America v. CalOptima* (2005) 133 Cal.App.4th 1169, 1178.)

The Argument that Officer Jansing Was a Private Citizen was Forfeited

On pages 46 and 47, respondent on the one hand concedes that "no such argument [that Officer Jansing was acting as a private citizen] was asserted by the prosecutor at the suppression hearing," then faults appellant for not refuting an argument that was not made, once again citing to *Champion.* Respondent appears to be arguing that in order to preserve a challenge to a search and seizure, a defendant must argue against justifications that were not proffered by the prosecution.[3] Not surprisingly, respondent cites to no authority. That may be because all authority is to the contrary:

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[3]Respondent claims that appellant did not cite to the record. Appellant set forth the factual record supporting his argument in a section labeled "Procedural Facts." (AOB 80.) Since respondent concedes the government did not justify the search as one conducted by a private citizen, there was no other record to cite to but the passing comment in the prosecution's written justification.

> ... we can discern no reason for requiring defendants to guess what justification the prosecution will offer at the risk of forfeiting the right to challenge that justification. Under such a rule, defendants would routinely safeguard their rights by enumerating, and then refuting, every possible justification for a warrantless search or seizure. Motions to suppress would be filled with pages of unnecessary argument about justifications that the prosecution is readily willing to concede are inapplicable. Because law enforcement personnel, not the defendant, made the decision to proceed without a warrant, they, not the defendant, are in the best position to know what justification, if any, they had for doing so. (*People v. Williams, supra,* 20 Cal.4th 119, 129.)

It is only "once the prosecution has offered a justification for a warrantless search or seizure [that] defendants must present any arguments as to why that justification is inadequate." (*Id.* at p. 130.)

Because here, as respondent concedes, the prosecution did not argue to the trial court that Officer Jansing acted as a private citizen, there was no forfeiture in the defense's failure, if it can be called that, to raise and knock down straw men. (See *Third Eye Blind v. Near North Entertainment Insurances Services, LLC* (2005) 127 Cal.App.4th 1311, 1319.)

Then, after making the concession, respondent urges this Court to find, on its own, that Officer Jansing "by default ... necessarily acted as a private citizen." (RB 46.)

While it is true that appellant argued whether Officer Jansing could be considered to have acted as a private citizen in his opening brief, the

argument was made out of an abundance of caution. Now that respondent has conceded that this justification was not proffered below, appellant submits that this justification has been forfeited by the government, and may not be argued on appeal. (See *Busse v. Pacific Employers Ins. Co.* (1974) 43 Cal.App.3d 558, 565 [arguments made out of abundance of caution].)

In any event, for the reasons set forth in appellant's opening brief (AOB 98-106), Officer Jansing was not acting as a private citizen. While it is true that a private citizen may arrest another for a felony actually committed even if not committed in the citizen's presence (Pen. Code sec. 837(2)), here there was no evidence that appellant had altered, forged, counterfeited or falsified any document, as required by Vehicle Code section 4463, subdivision (1), which is the only felony offense that could have been committed. (See *People v. Aldapa* (1971) 17 Cal.App.3d 184, 188 [because there was no evidence of the *corpus delicti* prior to the arrest, "private citizen" arrest is invalid].)

Appellant Did Not Forfeit the Right to Argue Against the the Validity of *People v. McKay* Because the Decision Had Not Been Rendered at the Time of the Trial

Respondent contends that appellant forfeited the right to argue against the validity of *People v. McKay, supra,* 27 Cal.4th 601 by failing to

make the argument below. (RB 47.) Neither *McKay* nor *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, upon which *McKay* relied, had been decided when appellant's case was tried. Respondent cites to no authority, and appellant's counsel knows of none, that requires trial counsel to foretell the future. (See *People v. Van Houten* (1980) 113 Cal.App.3d 280, 292 ["We do not expect trial lawyers to be soothsayers, with the ability to gaze into crystal balls and predict future holdings of the appellate courts; rather, we expect trial lawyers to be reasonably competent attorneys acting as diligent, conscientious advocates..."].)

In any event, even if it had been decided prior to this trial, since *McKay* is a decision of this Court, it would have been binding on the trial court, and therefore futile to argue to the trial court that it should be overruled. (*People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"].)

Respondent offers no argument to contradict appellant's other than to say, without citation to any authority, that appellant "proffers nothing to justify departure from the above authority." (RB 48.) Appellant respectfully submits that his argument in the opening brief is persuasive. (AOB 108-

112.) (See *Turner, supra,* 8 Cal.4th at p. 214 [arguments without authority].)

The Credibility of Officer Jansing was Argued Below, and is Therefore not Forfeited

Respondent contends that the question of Officer Jansing's lack of credibility was not argued below, and was therefore forfeited, once again citing to *People v. Champion, supra*, 9 Cal.4th at p. 918. (RB 48.)

Contrary to respondent's contention, the question of Officer Jansing's credibility was argued by both the prosecution and the defense. Starting on page 124 of Volume 1 of the Reporter's Transcript, defense counsel states:

> It's clear that a very, very short time passes – in fact we time it at 26 seconds, that when Officer Jansing then again goes to 8-Charley-1 and a new conversation begins in which now Officer Jansing knows the defendant's first name is Stephen.
>
> What that means is the officer testified that he received that information after removing defendant's wallet after he had handcuffed him and that he found that out from the California driver's license.
>
> It would seem that 26 seconds is ... contrary to the officer's testimony that after he received the information, approximately 30 seconds passed, then he asked Mr. Redd out of the car, then he would have handcuffed him with the hands behind the back, then he removed the wallet.
>
> In other words, what it does is it corroborates Mr. Redd's version, that the wallet was actually taken from his hand as he sat in the vehicle or stood out of the vehicle, simply because too short a time had passed.

> In other words, the officer, before he had any information about any search warrants, performed an unlawful search and seizure without probable cause. (RT 1:124.)

Obviously understanding that the defense was arguing Officer Jansing was not credible in his testimony regarding the seizure of the wallet, the prosecutor responded,

> With regard to the wallet issue, I submit that Officer Jansing is a heck of a lot more credible than the defendant, first of all.
>
> But secondly, even if the wallet were obtained before the defendant was handcuffed, which doesn't make a lot of sense given all the circumstances and the motivations of the defendant to do something and take off or do whatever he could to avoid being arrested, but even if the wallet was taken before he was handcuffed, it was taken at a time where the officer had probable cause to arrest him because Mr. Redd declined to give any sort of reliable identification.
>
> And when that happens, and when someone's committed a violation of the Vehicle Code, be it a felony or infraction, the officer has the authority to arrest that person.
>
> So that wallet, no matter how you look at it, was searched incident to a proper arrest. And, of course, everything basically flows from there because when the true identity is found, the warrants are discovered, and he's properly arrested based on those warrants. (RT 1:128-129.)

The above seems to appellate counsel to be a very complete argument concerning the seizure of the wallet, and more than enough to preserve the issue for appeal. While trial counsel may not have gone into

detail about the other inconsistencies in the officer's testimony, that was not necessary since the trial court had just heard the testimony.

Respondent dismisses *Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, arguing that in that case the court failed to consider or even acknowledge a witness' highly probative testimony. (RB 48.) Unlike in *Taylor*, where the trial court actually made factual findings, there is nothing in the record in the present case to permit this Court to find that the trial court considered the issue of credibility. (*Taylor, supra*, 366 F.3d at p. 1004; see *Kent v. United States* (1966) 383 U.S. 541, 561 [basis for order must be set forth with sufficient specificity to permit meaningful appellate review].)

Respondent's citation to *In re Arturo D.* (2002) 27 Cal.4th 60, 77 is inapposite. (RB 49.) In that case, this Court approved the warrantless search of areas within a vehicle where registration or personal identification documents might be found after a driver who has been detained for a Vehicle Code infraction fails to produce any documentation. But in that case the trial court had actually *made* a finding:

> At one point during direct examination, the officer testified that when he asked Arturo for his license and registration, Arturo produced neither item. Thereafter, during cross-examination, the officer testified that he could not recall whether Arturo had produced the requested documentation. Still later, following further discussion concerning the

> evidence on this point, and in response to defense counsel's argument that Officer Rowe had no right to be where he was or to search, the trial court interrupted defense counsel and asserted: "There's no suggestion that the officer was doing anything other than looking for *documents of title and driver's identification.*" (Italics added.) To this, defense counsel replied, "That's right." The trial court immediately responded, "That's what he said."
>
> This constitutes a finding by the trial court that when the officer searched the car, he was looking for both registration and driver identification. (*Ibid.*)

In the present case, the trial court made no comments whatsoever to suggest that it had made a factual finding regarding credibility. (See *People v. Rodriguez* (2006) 143 Cal.App.4th 1137, 49 Cal.Rptr.3d 811, 813-814 [cause remanded for trial court to make factual determination whether officers fabricated the grounds for traffic stop].)

Appellant rests upon the arguments made in the opening brief on this point. (AOB 115-118.)

Officer Jansing Had to Follow San Francisco's Inventory Policy in Searching the Car

Respondent contends that Officer Jansing could follow his own agency's inventory policy, and not the City of San Francisco's. even though the arrest took place on City property (RB 49-50), but admits that it found no authority either way. (RT 50.)

It makes sense that if an officer from another jurisdiction is to be

allowed to conduct inventory searches, he should be required to follow the policy of the jurisdiction where he performs the search. If he does not know the policy, then he should be required to turn the vehicle over to the local police, who know the procedure.

The Search of Appellant's Car Could not be Justified as Incident to Arrest

Respondent argues that the search of appellant's car could be justified as incident to his arrest, even though Jansing did not testify that he thought there was contraband in the car. (RB 50-51.) Respondent states that "It is well settled that an arresting officer may make a warrantless search incident to arrest, limited to that area an arrestee might reach to remove weapons and to prevent concealment or destruction of evidence." (RB 50.) The problem with that argument is that Jansing conducted his search after appellant had been arrested, and placed in Jansing's police car. (AOB 72-73; RT 1:47-50.) Respondent does not explain how appellant would have been able to seize a weapon or destroy evidence while in that position. Furthermore, that exception would not encompass the search of the car's trunk. (*New York v. Belton* (1981) 453 U.S. 454, 460, fn. 4 [search incident to arrest does not itself permit search of trunk].)

In any event, respondent forfeited the right to argue this theory for the first time on appeal, as it was not argued to the trial court. (CT 01:220-

221.) (*Williams, supra,* 20 Cal.4th at pp.129-130.)

The Search May Not be Justified as a Parole Search

Once again, respondent contends that appellant forfeited the right to argue that the search of his car could not be justified by his parole status because he did not raise it below. (RB 51.) Once again, respondent cites to *People v. Champion, supra*, 9 Cal.4th at p. 918.)

It is *the government* that is precluded from seeking to justify the search as a product of appellant's parole condition. During oral argument the prosecutor conceded the issue:

> As far as the parole status of the defendant goes, I agree that under the current state of the law it appears that an officer must have knowledge that a person is on parole before the search and seizure terms of parole can be used to exercise a search activity on that person.
>
> I believe that may change, that the supreme court may decide to change *Burgener* and go –
>
> THE COURT: You're not going to ask me to outguess the supreme court?
>
> [PROSECUTOR] MULGREW: I'm not asking you to do that. But I wanted to make a record of that.
>
> But I would point out that there, in terms of the detention, before he knew the defendant was on parole, I would agree, the parole search and seizure is not authority to what he did.
>
> However, once he found out that he had a parole warrant out, the officer did, in fact, know he was on parole.

> And I think at that point that the parole – even though he didn't justify the impound by the authority of parole search and seizure, that parole search and seizure, on review of the activity, can be looked at to determine whether the search was reasonable.
>
> So I think the search of the vehicle is alternatively justified based on the defendant's parole search and seizure terms. (RT 1:130.)

To argue that a defendant must object on a theory which the prosecutor concedes he is not relying upon and cannot rely upon, borders on the frivolous.

In any event, Officer Jansing did not learn of appellant's parole status until *after* he had ordered appellant to step out of his car, handcuffed him, and placed him under arrest for not having identification, for giving Jansing a false name and for the registration violation. (RT 1:46.) It was after he handcuffed appellant (according to Officer Jansing) that he found a wallet while searching him. which contained a driver's license with appellant's true name. Officer Jansing *then* ran a warrant check, and discovered the warrants and the parole status. (RT 1:47-48.)

It is true that under *People v. Reyes* (1998) 19 Cal.4th 743, 751 and *Samson v. California* (2006) __ U.S. __, 126 S.Ct. 2193, if Officer Jansing *had* known that appellant was on parole before detaining and arresting him, he would not have needed further suspicion in order to search the car: "an

officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee." (*Samson, supra*, 126 S.Ct. at p. 2202, fn. 5.) But Jansing did not know. He did not know until after he had illegally detained and arrested appellant.

The Search Warrant Relied Upon the Illegally Seized Evidence and was Therefore Tainted

Respondent argues the claim that the search warrant relied upon illegally seized evidence was forfeited because defense counsel conceded that "there was a search warrant affidavit and a lawfully issued warrant ...." (RB 52.) Respondent completely ignores the arguments made in the motion to suppress the evidence, where defense counsel clearly argued that the search warrant was "predicated upon the unlawful action of Officer Jansing." (CT 01:201-202.)

On the merits, respondent argues that there is no evidence that Brakebill relied on Jansing's report in drafting the warrant affidavit. (RB 53.)

Yet the search warrant affidavit,[4] clearly states that Jansing's report had been read, and in fact was attached to the search warrant affidavit and incorporated by reference. (CT 01:228.) It is safe to assume that the

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[4]Actually executed by Brea Detective C. Michael Carpenter. (CT 01:226.)

magistrate reading the warrant application read all of it, including Jansing's report. (Evid. Code sec. 664 [presumption that official duty properly performed].)

Appellant Calls Upon This Court's Supervisory Powers, Not Those of the Trial Court, and Therefore the Argument Was Not Forfeited

Respondent contends that appellant forfeited the supervisory powers argument (AOB 123-124) by not raising it below. (RB 53.)

What appellant actually argued is that *this Court* should utilize its supervisory powers to exclude the evidence ("this Court should suppress the evidence in order to deter such conduct in the future"). (AOB 124.)

Respondent does not explain how a defendant in a trial court is supposed to call upon the Supreme Court's supervisory powers.

Because respondent does not address appellant's argument regarding this Court's powers on the merits, the validity of the argument should be conceded. (*People v. King* (1991)1 Cal.App.4th 288, 297, fn. 12 [failure to argue matter and cite to authority deemed a waiver].)

The Failure to Argue Prejudice on the Merits Concedes the Issue

Once again, respondent contends that appellant forfeited the argument that the erroneous admission of the illegally seized evidence prejudiced appellant by failing to argue it below. (RB 54.) Once again, the

only citation is to *People v. Champion*, *supra*, 9 Cal.4th at p. 918.

Champion does not stand for the proposition that an appellant waives the right to argue on appeal the prejudicial effect of the admission of illegally seized evidence by failing to object in the trial court, and appellant knows of no case that stands for that proposition. Prejudice is an appellate concept – a showing that a defendant must make *on appeal*, not at the trial level, in order to win a reversal of a conviction. (Cal. Constitution, art. 6, sec. 13;[5] see *People v. Standish* (2006) 38 Cal.4th 858, 885 [right to relief without showing of prejudice limited to pretrial challenges].)

Respondent's argument that the fact the evidence was damaging does not mean it is unfairly prejudicial completely misses the point of appellant's argument. Appellant is not making an Evidence Code section 352 argument. Appellant is saying that the admission of the illegally obtained evidence was itself prejudicial. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 972 [error in admitting illegally seized evidence must be found harmless beyond a reasonable doubt]; *Chapman v. California* (1967) 386 U.S. 18, 24;

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[5]"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

compare, *People v. Edelbacher* (1989) 47 Cal.3d 983, 1014 [appellant argued both that the illegally seized evidence was inadmissible *and* that any relevance it had was outweighed by the risk of prejudice].)

Respondent does not contend that if the evidence was illegally seized, its admission was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681, 108 S.Ct. 1431, 1436.) This failure to counter appellant's argument (AOB 125) concedes the issue. (*People v. King, supra,* 1 Cal.App.4th at p. 297.)

* * *

II. THE LINEUP MOTION WAS ERRONEOUSLY DENIED

Respondent claims that the trial court properly denied appellant's request for a lineup, as it was untimely. (RB 54.) Respondent does not argue that defense counsel made the lineup motion as part of "dilatory or obstructive tactics," which *Evans* teaches is to be "weighed heavily on timeliness grounds against the granting of the motion ...". (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 626.) Respondent also does not dispute appellant's surmise that it appeared that defense counsel was too focused on the capital case to provide effective assistance on the non-capital counts. (See AOB 134.) Additionally, respondent does not argue, nor did the prosecutor below, that anyone would have been burdened or inconvenienced by the lineup. (See AOB 134; RB 54-57.)

It seems clear that the trial court saw timeliness as the *sine qua non* of a lineup motion, and did not bother to balance the rights of appellant against any prejudice to the prosecution. In fact, as became clear later on in the trial (and as the prosecutor surely must have known), Mr. Bugbee, the witness in question, could not identify appellant, and presumably would not have been able to do so at the lineup. Therefore, it seems that all the prosecutor was trying to do by opposing the motion was to strengthen his own case and deprive appellant of the opportunity to secure favorable

evidence, *i.e.,* a failure to identify appellant as the perpetrator of the March 13, 1994 robbery and burglary (counts 1 and 2.) (RT 955-957.) In short, the prosecutor was attempting to prevent appellant from securing exculpatory evidence, and the trial court allowed him to do it. This constituted an abuse of the trial court's discretion. (See generally, *People v. Hill* (1998) 17 Cal.4th 800, 820 [trial court failed to "rein in" prosecutor].)

* * *

III. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE FROM TRIAL COUNSEL WHEN COUNSEL CONCEDED GUILT IN THE OPENING STATEMENT

The gist of respondent's argument that appellant received ineffective assistance of counsel when defense counsel conceded guilt in the opening statement seems to be that appellant's defense counsel did not really say what he said. In other words, when counsel said, "... Mr. Redd is observed walking in front of the Vons store," he did not mean to say that it was Mr. Redd who was there. (RB 58.)

Instead, respondent interprets the statement as a response to the prosecutor's argument that appellant was seen outside the store (see (RT 5, 930), "not an admission that appellant was in fact at the Vons." (RB 59.) Such an admission, respondent argues, would have been "illogical" since appellant's defense to counts 3 and 4 was that he was not the shooter. (RB 59.)

The problem with this argument is that if appellant's counsel had intended to simply respond to the prosecutor's statement, logic dictates that he would have said something like, "the prosecutor would have you believe," or "the prosecutor contends." He would not have said, "Mr. Redd is observed walking in front of the ... store."

Alternatively, respondent argues that "this claim ignores that the jury

was instructed that statements of counsel are [sic] evidence." (RB 59.) Appellant will assume for purposes of this response that respondent meant to say "are not." (RT 8:1689 ["statements made by the attorneys during the trial are not evidence"].)

The problem with this argument is that a concession of guilt is not simply a statement made in argument by an attorney. (See *Wiley v. Sowders* (6th Cir.1981) 647 F.2d 642, 650 ["Although statements made by attorneys in closing arguments are not evidence ... counsel's admission of guilt ... denied to petitioner his constitutional right to have his guilt or innocence decided by the jury"]; *Francis v. Spraggins* (11th Cir.1983) 720 F.2d 1190, 1194 [where capital defendant by plea seeks verdict of not guilty, counsel may not concede guilt even in the face of strong evidence]; *People v. Gurule* (2002) 28 Cal.4th 557, 611 [concession of guilt may be ineffective assistance of counsel]; *United States v. Cronic* (1984) 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, [counsel failed to subject prosecution's case to meaningful adversarial testing].)

A second problem is that the prosecutor used this statement in his closing: "... he started off saying that Mr. Redd was by a karate studio and he came up and was talking to the security guard ... [and then] ... started calling him 'this person'..." (RT 8:1581-1582.)

Respondent does not argue that if the statement was in fact a concession of guilt, it either did not constitute ineffective assistance of counsel or did not result in prejudice. (RB 58-59.) Therefore, respondent by its silence appears to concede that if the statement was a concession, it constituted prejudicial ineffective assistance. (*King, supra,* 1 Cal.App.4th at p. 297, fn. 12.)

In *United States v. Swanson* (9th Cir. 1991) 943 F.2d 1070, cited and distinguished in *People v. Carter* (2005) 36 Cal.4th 1114, "defense counsel effectively abandoned and betrayed his client and aided the prosecution by arguing to the jury that there was no reasonable doubt his client was the person who committed the [offense]." (*Carter, supra*, 36 Cal.4th at p. 1192.)

That is what happened here. By naming Mr. Redd as the person in front of the Vons Market, defense counsel "abandoned and betrayed his client and aided the prosecution." In the words of the Sixth Circuit in *Wiley v. Sowders, supra*, 647 F.2d at p. 649, "the admissions of [counsel] constituted a surrender of the sword."

* * *

IV. THE OUT-OF-COURT IDENTIFICATIONS WERE NOT PROPERLY ADMITTED

Respondent contends that the issue whether the out-of-court identifications were properly admitted under the United States Constitution was forfeited by defense counsel's failure to object on constitutional grounds. (RB 59.)

This case was tried in 1996. At that time, *Ohio v. Roberts* (1980) 448 U.S. 56, was the law of the land, and permitted hearsay statements that bore an "adequate 'indicia of reliability.'" (*Id.,* at p. 66.)

An objection on constitutional grounds would have been futile. As this Court stated in *People v. Kitchens* (1956) 46 Cal.2d 260, 263:

> A contrary holding [requiring an objection] would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. Moreover, in view of the decisions of this court prior to *People v. Cahan, supra*, an objection would have been futile, and "The law neither does nor requires idle acts." (Citing to Civ. Code sec. 3532.)

This Court reiterated this basic rule of law in *People v. Welch, supra,* 5 Cal.4th at pp. 237-238 ("Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence)." Inexplicably, respondent makes no reference to this line of authority,

choosing to rely yet again on *People v. Champion, supra*, 9 Cal.4th at p. 918. (RB 60.)

The cases cited by respondent are completely inapposite. *People v. Boyette* (2002) 29 Cal.4th 381, 424, concerns the failure to object to the introduction of photographs of the dead victim. It has nothing to do with a new rule of law. *People v. Alvarez* (1996) 14 Cal.4th 155, 186, concerns the failure to make an objection on confrontation grounds, without any intervening change in the law after the trial. *People v. Zapien* (1993) 4 Cal.4th 929, 979-980, and *People v. Raley* (1992) 2 Cal.4th 870, 892, hold essentially the same.

Respondent contends that the *Crawford* decision "did not create a new constitutional right which was not in existence at the time of [appellant's] trial." No authority is cited for this proposition. (RB 60.) In fact, contrary authority is disregarded. (See *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400 ["*Crawford* announced a new rule regarding the effect of the confrontation clause on the admission of hearsay statements in criminal prosecutions"]; *People v. Price* (2004) 120 Cal.App.4th 224, 237-238; see *Bockting v. Bayer* (9th Cir. 2005) 399 F.3d 1010, 1015-1016.)

Crawford must be applied to all cases pending on direct review. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)

In any event, the defense filed a motion to have all objections, motions, etc. be treated as resting upon federal as well as state grounds. (CT 624-626.) The prosecution did not object. Thus, the point was preserved for appeal.

Even if it was not properly preserved, this Court has the discretion to consider arguments made for the first time on appeal. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

The purpose of the requirement that an objection be made at trial is so the opposing party and the court may correct the error. (*People v. Saunders* (1993) 5 Cal.4th 580, 590; see generally *Stutson v. United States* (1996) 516 U.S. 193, 196-197, 116 S.Ct. 600, 603 [technicalities that do not prejudice the prosecution should not preclude appellate review].) When the issue is one of law, there is nothing that could have been done had an objection been made, and enforcing the rule serves no purpose. (*United States v. Cretacci* (9th Cir. 1995) 62 F.3d 307, 310.)

On the issue of forfeiture, which respondent raises repeatedly, appellant suggests that this Court adopt the federal practice of reviewing erroneous rulings for plain error when no objection was made. (See Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases, Report of the American Bar Association* (1990) 40

Am.U.L.Rev. 1, 2.)

This Court has said that in every capital case, Penal Code section 1239, subdivision (b) requires the reviewing court to examine the complete record of the proceedings to ascertain whether the defendant received a fair trial. (*People v. Stanworth* (1969) 71 Cal.2d 820, 833, citing to *People v. Perry* (1939) 14 Cal.2d 387, 392.) This duty surely extends to consideration of the merits of issues presented for the first time on appeal.

On the merits, respondent argues that the identifications were "non-testimonial because all three witnesses were present at trial and each was subject to cross-examination," citing to *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 and *California v. Green* (1970) 399 U.S. 149, 162.) (RB 61.) The out-of-court identifications were testimonial, because it was foreseeable that the statements would be used at trial. In fact, that was the sole purpose of obtaining them. It is true that footnote 9 of *Crawford* states in dictum that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." As discussed in the opening brief (pp. 148-149), appellant submits that when the high court re-visits this issue it will have to come to a different conclusion, because the accused cannot subject the identification to "effective scrutiny at trial." (See *United States v. Wade*

(1967) 388 U.S. 218, 234.)

Respondent also argues that the question whether the identifications were admitted in violation of Penal Code section 1238 was forfeited because counsel objected "on other grounds." (RB 59.) In fact, counsel did object on section 1238 grounds, not "1230 and 830," as respondent contends, which is an obvious typographical error later corrected by the reporter. (RT 955:15-16, as corrected.) Therefore, the question whether the identifications were admitted in violation of section 1238 was clearly preserved.

On the merits, respondent contends that because the error did not implicate the federal constitution, the test on appeal is whether there is a reasonable probability of a different outcome absent the admission of the evidence, and "because all three witnesses were present at trial and subject to cross-examination ... this entire claim should be rejected." (RB 63.)

However, if the out-of-court identification had been excluded under Penal Code section 1238, there would have been no identification of appellant as the perpetrator of the crimes. It cannot be said that in the absence of any eyewitness testimony, the remaining evidence would have been sufficient for a jury to convict.

* * *

V. VICTIM-IMPACT EVIDENCE WAS ERRONEOUSLY ADMITTED DURING THE GUILT PHASE

Respondent contends that appellant's claim that victim impact evidence was improperly admitted during the guilt phase was either forfeited, or "in any event it must fail." (RB 63.)

No reference to the record or any authority is cited for the proposition that the argument was forfeited. In fact, when the prosecutor asked whether there had been "any lasting health problems ... or psychological problems that you have as a result of this gunshot wound," the defense objected, objections to the form of the question (compound) and to the relevance of a portion of the question were immediately overruled, the court not requiring the prosecutor to explain the relevance of the question. (RT 5:991.)

The defense later expanded upon the objection in its motion for a new trial, contending that the testimony elicited constituted improper victim impact evidence. (CT 3:1027-1028.) The prosecutor did not specifically refute this argument in his opposition. (CT 3:1036-1038.)

Appellant rests upon the arguments made in the opening brief.

* * *

VI. APPELLANT WAS ENTITLED TO INSTRUCTIONS ON SECOND DEGREE MURDER AND MANSLAUGHTER AS LESSER-INCLUDED OFFENSES

Respondent contends that neither an instruction on second-degree murder nor voluntary manslaughter was supported by the evidence, and that even if they were, the refusal to instruct is harmless under the test for state-law error. (RB 65; 66.) While conceding that it was the prosecutor who requested the instructions, respondent argues that the prosecutor's opinion of the strength of his own case was "quintessential speculation ... insufficient to require" the instructions. (RB 66.)

The prosecutor was in the best position to determine whether the testimony of Brenda Rambo, the sole eyewitness, was credible in the eyes of the jury. He had watched her testify, and his request for the instructions makes clear that he must have had his doubts. If the jury did not believe Rambo's recollection of the robbery because she was in an hysterical state, it "could conclude" that the lesser offenses, and not the greater, occurred. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1227 [prosecutor in the "best position" to know why criminalist was asked to reexamine evidence].)

The *sua sponte* duty to instruct on lesser included offenses in capital cases arises if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Breverman* (1998) 19

Cal.4th 142, 177.) In deciding whether the evidence is substantial, "a court determines only its bare legal sufficiency, not its weight." (*Ibid.*)

"Substantial evidence" is defined as evidence sufficient to deserve consideration by the jury, that is, evidence from which a jury composed of reasonable people could have concluded the particular facts underlying the instruction existed. (*People v. Wickersham* (1982) 32 Cal.3d 307, 324, cited with approval in *People v. Johnson* (1993) 6 Cal.4th 1, 42-43.) The trial court does not make its own assessment of credibility in deciding whether there exists substantial evidence to support the instruction.(*People v. Lemus* (1988) 203 Cal.App.3d 470, 477.)

Respondent then proceeds to argue that if the failure to instruct constituted error, it was state-law error which requires appellant to "show a reasonable probability that the failure to give the lesser included offense instructions 'affected the outcome' of this case," citing to *People v. Sakarias* (2000) 22 Cal.4th 596, 621, and to *Breverman, supra,* 19 Cal.4th at p. 165; RB 66.)

Breverman and *Sakarias* hold that "the failure to instruct sua sponte on a lesser included offense *in a noncapital case* is, at most, an error of California law alone, ... [and] not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error

affected the outcome. (*Breverman, supra*, 19 Cal.4th at p. 165; emphasis added.)

This is a capital case. *Breverman's* standard, by its own terms, does not apply. In *Breverman*, this Court acknowledged that the standard in capital cases had to be set in accordance with federal constitutional requirements:

> Subsequently, the high court acknowledged that in particular circumstances, the denial of instructions on lesser included offenses in a capital case would violate the federal Constitution. However, the court emphasized that it was limiting its holding to the capital context. Moreover, the strict limitations the court has since placed even on the rule for capital trials suggest reluctance to formulate any general constitutional right to instructions on lesser offenses. (*Breverman, supra,* 19 Cal.4th at p. 166.)

This case falls under the rule set forth in *Beck v. Alabama* (1980) 447 U.S. 625, 638, where the United States Supreme Court concluded that the state could not constitutionally impose a death sentence where the jury, by state law, had been prohibited from considering a lesser noncapital offense necessarily included in the capital charge and supported by the evidence. (*Breverman, supra*, 19 Cal.4th at p. 167.)

The subsequent narrowing of *Beck* by *Schad v. Arizona* (1991) 501 U.S. 624, where a five-justice majority held that *Beck* was satisfied if the jury receives a single noncapital third option, and *Hopkins v. Reeves* (1998)

524 U.S. 88, which concluded that *Beck* does not require instructions on lesser non-included offenses, does not affect this case, because here the trial court refused to instruct on a lesser included offense which left the jury with an all-or-nothing choice on the capital charge. This was a direct violation of *Beck.*

Appellant submits that the standard of prejudice for *Beck* error in capital cases is still the near-automatic reversal rule of *People v. Sedeno* (1974) 10 Cal.3d 703. That standard requires reversal when the issues raised by the omitted instructions were not resolved adversely to the defendant under other, proper instructions. (*Sedeno, supra*, 10 Cal.3d at p. 721.)

In the present case, they were not resolved, and respondent does not argue otherwise. (RB 65-67.)

Therefore, under the rule of *Sedeno* reversal of the felony murder conviction is mandated. (See *Breverman, supra*, 19 Cal.4th at p. 175 ["With this limited exception, however, the erroneous failure to instruct on a lesser included offense supported by the evidence has remained subject to the *Modesto* rule of automatic reversal." [Fn.om.]].)

In *Breverman*, this Court explained the difference between appellate review under *People v. Modesto* (1963) 59 Cal.2d 722 and *Sedeno,* and

review under *People v. Watson* (1956) 46 Cal.2d 818:

> Appellate review under *Watson* ... takes an entirely different view of the evidence. Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. (*Breverman, supra*, 19 Cal.4th at p. 178.)

Appellant urges this Court to apply the standard of prejudice set forth in *Modesto* and *Sedeno,* which requires this Court to reverse the felony-murder conviction.

Even if the standard to be applied were that of *Chapman v. California* (1967) 386 U.S. 18, 24, it was the government's burden to prove the error harmless, which it was not done.

* * *

VII. THE COURT ERRED IN REFUSING APPELLANT'S REQUESTED INSTRUCTIONS

Respondent argues "it is well settled" that appellant's contentions that the trial court erred in several respects in denying appellant's requested instructions are without merit. (RB 67.)

Appellant relies upon the arguments made in the opening brief at pages 163-174.

* * *

VIII. THE PROSECUTOR COMMITTED MISCONDUCT AND THIS COURT SHOULD REACH THE MERITS OF THE CONTENTION

In the opening brief, appellant argued that the prosecutor committed numerous acts of misconduct. These acts were set forth in the Procedural Facts portion of the brief, which respondent apparently found confusing. (RB 72.) In this reply, appellant will attempt to make his argument more understandable.

The instances of misconduct consist of:

References to defense counsel as "big boys," and the statement that "we shake hands and go on to our next cases." (AOB 175.) This argument made fun of defense counsel and denigrated their roles as advocates. (AOB 187; *People v. Turner* (2004) 34 Cal.4th 406, 429.)

Waiting to see "what was their defense" (AOB 175), to which an objection was made and overruled. (RT 1583.) This argument shifted the burden of proof to the defense. (AOB 186-187.) (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1340 [prosecutor may not suggest that defendant has burden of proving innocence].)

Commenting that defense counsel were speculating about the evidence and that the jury should "consider the source," to which an objection was overruled. (AOB 175-176.) This constituted a denigration of

counsel. (AOB 187.)

Repeated references to witness Joseph Loya as a "nice young man who did something very important in this case ... deserves our thanks," and "These are the kinds of people we presented to you as witnesses," as well as other words of praise for the witness. (AOB 176.) This constituted vouching. (AOB 188.) (See *United States v. Garza* (5th Cir. 1979) 608 F.2d 659, 662 [misconduct when prosecutor vouched for state witnesses and bolstered their credibility by arguing that they were "professional" and "dedicated" and would not have obtained a job with the Drug Enforcement Administration unless they had integrity].)

In a recent case, *People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1584-1585, the court of appeal found that

> The only reasonable inference from these comments is that (1) the prosecutor would not have charged Alvarado unless he was guilty, (2) the jury should rely on the prosecutor's opinion and therefore convict him, and (3) the jurors should believe Pedraza for the same reason. This argument constituted misconduct.

Similarly here, the prosecutor placed his personal opinion of the witness' credibility before the jury, and by implication asked them to convict appellant on the prosecutor's word.

Referring to defense counsel's examination of Officer King as "patronizing," and praising the officer as someone "willing to sacrifice"

who "believes in what she does." (AOB 176-177.) This constituted both denigration of counsel and vouching for the witness. (AOB 187-188.)

Suggesting that defense counsel was trying to prove that McVeigh "got what he deserved," to which an objection was overruled. (AOB 177.) This argument portrayed defense counsel as personally attacking the victim. (AOB 187; *People v. Pitts* (1990) 223 Cal.App.3d 606, 704.)

Stating that Officer Jansing had been brought down from San Francisco so that the jury could see "the quality of him," and that "a guy like him and ... Mr. Loya are to be given credit," and that "Fortunately for us and law enforcement there are people like Mr. Jansing who are willing to do their jobs properly. (AOB 178.) This again constituted vouching. (AOB 188.)

Asking the jury to perform experiments on the gun. (AOB 178.) (C.f., *People v. Guerra* (2006) 37 Cal.4th 1067, 1120 [prosecutor did not ask jurors to conduct experiment].)

Stating that he would listen to see whether defense counsel would concede that appellant had committed the crimes (AOB 179); that he was "waiting and waiting to hear what the defense was" and was worried that "you people [the jury] will not get it." (AOB 179.) This argument shifted the burden of proof, and engaged the personal pride of the jurors. (AOB

190.) (See *People v. Morales* (1992) 5 Cal.App.4th 917, 928.)

Accusing defense counsel of making up their own reasonable doubt chart, to which an objection was overruled, which constituted denigration of counsel. (AOB 180.)

Stating that he was worried that the jury would think appellant was a "nice guy" (objection overruled), which engaged the jurors' personal pride. (AOB 180.)

Continuing to ask expert witness Morein about future dangerousness after having been warned by the judge not to do it (AOB 180-181); repeatedly arguing with expert witness Mandell despite repeated sustained objections. (AOB 181.) These actions introduced evidence of future dangerousness. (AOB 188-189.) (*Simmons v. North Carolina* (1994) 512 U.S. 154, 168-169, 114 S.Ct. 2187.)

During the penalty phase closing argument, which the court had instructed the jury that it could consider counsel's arguments, characterizing the defense as "ridiculous" and "preposterous," even after having been warned not to comment on counsel's integrity. to which an objection was sustained, but the court refused to admonish the jury. (AOB 181-182.) This was another example of the denigration of counsel.

Stating that appellant was smarter than 95 percent of the population

(AOB 182) and asserting that appellant did not like it when police shot back, to which an objection was sustained. (AOB 182.) These arguments had no foundation in the record. It is misconduct for a prosecutor to misstate the law or the facts. (*People v. Boyette, supra,* 29 Cal.4th at p. 426.)

Accusing appellant's son Michael Redd and witness Rick Lum of exaggerating their testimony, to which objections were sustained. (AOB 182.)

Arguing that Firestone was like a war zone, to which an objection was sustained. (AOB 182.)

Attacking the testimony of Dr. Klein and the fees he had been paid, which the court agreed at sidebar was an attack on defense counsel, but did not instruct the jury (AOB 182-183); continuing to attack Dr. Klein's testimony, which the court once again warned the prosecutor about, but said nothing to the jury (AOB 184-185); accusing Dr. Mantell of accepting $1,200 an hour to read from police files, to which an objection was sustained, and then going back to the subject, saying he was paid $2,500 for two hours, and telling the jury to "do the math." (RT 3200; AOB 183.)[6] The

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[6]The reference to witness Klein on page 183 is incorrect; the witness was Mantell. (RT 3200.)

prosecutor denigrated these experts. (AOB 189-190.)

Arguing the conditions of prison life, to which an objection was sustained. (AOB 183.)

Urging the jury to consider public feeling, to which an objection was sustained. (AOB 184.); arguing that when appellant's life was on the line "he doesn't like it," to which another objection was sustained (AOB 185); and referring to witness Jansing as "the little park officer ranger." (AOB 185.) This argument appealed to the passions of the jury, argued as evidence that which was not presented, and vouched for the witness.

Respondent contends that appellant forfeited the right to argue prosecutorial misconduct by failing to object to each instance, and that in any event, the contentions are without merit. (RB 72-82.)

It is clear from the record that additional objections would have been futile. Even when the court acknowledged, in a sidebar discussion which of course the jury did not hear, that the prosecutor had overstepped his bounds, he refused to admonish the jury, and said nothing to the prosecutor in front of the jury. (RT 1605.) The court did sustain many of the objections, but the sustained objections had no effect on the prosecutor. He blithely disregarded the court's admonitions. As in *Alvarado*, "Viewed in context, the challenged comments were so prejudicial that an admonition would not

have dispelled the harm. Accordingly, defense counsel did not forfeit the issue by failing to object and request an admonition." (*Alvarado, supra*, 141 Cal.App.4th at p. 1586.)

Even if this Court finds that defense counsel should have continued to object, it is well established that a reviewing court may consider a claim raising a pure question of law on undisputed facts. (See *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

* * *

IX. THE FELONY-MURDER SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL

Respondent argues that this Court has repeatedly upheld the felony-murder special circumstance against constitutional challenges. (RB 82-84.) This is true. Appellant invites this Court to reconsider prior rejections because the gradual, almost case-by-case expansion of the felony-murder special circumstance (see *People v. Hayes* (1990) 52 Cal.3d 577, 631-632) has completely eroded what the United States Supreme Court still requires: "a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764.)

Appellant rests upon the arguments made in the opening brief. (AOB 194-211.)

* * *

X. CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES CONSTITUTION

Appellant made a number of challenges to the California death penalty statutory scheme and its application to appellant's case. (AOB 212-281.) Appellant recognizes that this Court has rejected these arguments in the past. (AOB 212.)

Respondent contends that this Court should not re-examine these prior decisions. (RB 84-90.)

Appellant is aware that this Court continues to reject the arguments he made (see *e.g., People v. Lewis* (2006) 39 Cal.4th 970, 1066-1069), but presents them in this brief and in the opening brief to preserve the issues for further review and in the hope that this Court may yet reconsider its prior decisions. (See *In re Jaime P.* (2006) 40 Cal.4th 128, 133 ["We have recognized that reexamination of precedent may become necessary when subsequent developments indicate an earlier decision was unsound, or has become ripe for reconsideration"].)

This Court has dismissed these arguments in prior cases without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This approach is constitutionally inadequate. The United States Supreme Court has said that

"[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) ___ U.S. ___, 126 S.Ct. 2516, 2527, fn. 6; see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (*e.g.*, the fact that the victim

was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. (See *Furman v. Georgia*, *supra,* 408 U.S. at pp. 309-310, Stewart J., concurring.)

In the interests of brevity, appellant will not repeat the arguments

made in the opening brief, but instead urges that recent United States Supreme Court cases require a re-examination of this Court's prior holdings.

In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court stated that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ...." This statement has been squarely rejected by the high court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, and last but certainly not least, *Cunningham v. California* (2007) ___ U.S. ___, 127 S.Ct. 856.

On January 22, 2007, the United States Supreme Court reversed this Court's ruling in *People v. Black* (2005) 35 Cal.4th 1238 in *Cunningham v. California*. *supra,* 127 S.Ct. at pp. 863-864 ["This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt. not merely by a preponderance of the evidence"].)

Cunningham rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury

finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

As this Court was wrong in *Black*, it is equally wrong in *People v. Anderson* (2001) 25 Cal.4th 543, 589, *People v. Prieto* (2003) 30 Cal.4th 226, 275, *People v. Demetroulias* (2006) 39 Cal.4th 1, 41, *People v. Dickey* (2005) 35 Cal.4th 884, 930, and *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32. California's death penalty scheme clearly violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In his opening brief, appellant argued that the California death penalty scheme violated international law. (AOB 272-277.) Recent cases reinforce this argument.

In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court struck down death as a constitutional penalty for juvenile offenders. In holding that execution of juvenile criminals constitutes cruel and unusual punishment, the Court looked to international law standards as informing on the Eighth Amendment:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile

> death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in Trop, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S. at 102-103, 78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"). (*Id.* at p. 575.)

Mindful of this Court's directive in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant will rest upon his arguments in the opening brief at pages 212-282.

* * *

XI. THERE IS ERROR TO BE ACCUMULATED AND IT PREJUDICED APPELLANT

Contrary to respondent's argument, the errors committed in this case, when viewed cumulatively, do require reversal, as appellant argued in the opening brief. (AOB 282-283.)

The cases cited by respondent are distinguishable. In *People v. Manriquez* (2005) 37 Cal.4th 547, 591, this Court found that "none of defendant's assignments of error ha[d] merit," and therefore there was no cumulative error. *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692, held that even if several errors had been committed (this Court found only a "few minor" ones), they were harmless and their combined effect did not deprive the defendant of due process or a fair trial. In *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458, the Court simply states (twice) that "consistent with our review of defendant's individual claims, we find no cumulative error occurred," citing to *People v. Bradford, supra,* 15 Cal.4th at p. 1344, which also disposed of the issue in a similarly summary manner. In *People v. Catlin* (2001) 26 Cal.4th 81, 180, the Court simply stated that the errors, "whether considered singly or together," were non-prejudicial.

The present trial contained numerous errors, and they were serious ones. Even if each one might not be enough to cause reversal, when considered together, they are. (See *People v. Pirwani* (2004) 119

Cal.App.4th 770, 791; *Harris By and Through Ramseyer v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438 ["prejudice may result from the cumulative impact of multiple deficiencies," quoting from *Cooper v. Fitzharris* (9th Cir.1978) (en banc) 586 F.2d 1325, 1333].)

Respondent argues that appellant was "entitled only to a fair trial, not a perfect one." (RB 91.) This trial fell far short of perfection. Appellant was defended weakly and prosecuted without regard to truth and justice. The court erred in many of its rulings, and did not control the prosecutor. The many errors committed rendered the trial an unfair one. Here, there are "errors to accumulate." (C.f., *People v. Cleveland* (2004) 32 Cal.4th 704, 762, fn. 10.)

* * *

CONCLUSION

Appellant respectfully requests that this Court reverse the judgment of the trial court.

Dated: ______________________

Respectfully submitted,

____
GRACE LIDIA SUAREZ
Attorney for Appellant

WORD COUNT CERTIFICATE

I certify that this document contains 14,560 words, as computed by WordPerfect.

____

Grace L. Suarez

PROOF OF SERVICE

I, the undersigned, say that I am over eighteen years of age and not a party to the above action. My business address is 508 Liberty Street, San Francisco, California 94114. On ________________, I served the attached on the following by placing true copies thereof, enclosed in a sealed envelope with postage fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on ___________________________, _______, at San Francisco, California.

____
Grace Lidia Suarez