No. S064306

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN JOSEPH FAMALARO,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the
County of Orange

HONORABLE JOHN J. RYAN, JUDGE

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

CONSTITUTIONS

TABLE OF AUTHORITIES

Pages

STATUTES

JURY INSTRUCTIONS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S064306
v.	)	(Orange County Super. Ct. No.
JOHN JOSEPH FAMALARO,	)	94ZF0196)
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

- - -

INTRODUCTION

In this brief, appellant does not reply to respondent's arguments which are adequately addressed in his opening brief. The failure to address any particular 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 rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.[1]

[1] In this brief, "AOB" refers to Appellant's Opening Brief and "RB" refers to Respondent's Brief.

ARGUMENT

I

THE TRIAL COURT'S DENIAL OF APPELLANT'S INITIAL AND RENEWED MOTIONS FOR A CHANGE OF VENUE DEPRIVED HIM OF A FAIR TRIAL BY AN IMPARTIAL JURY AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

In his opening brief, appellant argued that the trial court erroneously denied appellant's motions for change of venue, and that retrospective review on appeal clearly demonstrates that appellant did not in fact receive a fair trial due to the court's refusal to order a change of venue. (See AOB 78-208.) Respondent contends that the trial court properly denied appellant's venue motions and that appellant has failed to show otherwise. (See RB 57-80.) Respondent's contentions largely ignore the state of the record and appellant's arguments, and are, in any event, meritless.

Appellant's discussion of this issue in his opening brief was extensive and extremely detailed, and successfully anticipated and forestalled most of respondent's contentions; therefore, it is not necessary to reiterate most of appellant's arguments herein. Nevertheless, appellant will address several of respondent's most erroneous assertions and glaring omissions.

First and foremost, it is critically important to keep in mind that the appellate record in this case includes not only the massive amount of

prejudicial publicity documented by Defense Exhibits B and C,[2] but also the entire voir dire of the jury venire, which demonstrates the *actual* effect of that publicity on the prospective and trial jurors, as well as the predictably damaging comments made by numerous prospective jurors in open court and by family, friends, co-workers and other acquaintances of the prospective and trial jurors. It is undeniable that the jurors would have been exposed to very little, if any, of this damaging publicity and commentary--extending even to the sitting jurors *during trial*--had appellant's case not been tried in Orange County.

Thus, on this Court's retrospective review on appeal, there is no need to engage in the kind of speculation as to the reasonable likelihood of a fair trial that is employed by the trial court *pretrial* and embodied by such minimally-relevant *post*-voir dire considerations as the "five factors," e.g., size of the community and status of the victim and deceased. (See AOB 154-155.) "What had been a matter of speculation at the earlier motion – i.e., the actual extent of exposure of those who are potential jurors – becomes, on a later motion, subject to more precise measurement and evaluation." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 943-944.) Not surprisingly, and quite revealingly, respondent has wholly ignored the record, and appellant's entire extensive discussion, of the voir dire of the venire as a whole (see AOB 95-141), even though "[r]esolution of the venue question [by a reviewing court] requires consideration of the

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[2] Although respondent notes that "[t]he lodged exhibits are not included in the appellate record" (RB 65, fn. 27), they are "deemed part of the record" on appeal since they are exhibits admitted in the trial court. (See Cal. Rules of Court, rule 8.610(a)(3).) Such exhibits "may be transmitted to [this Court] . . . as provided in rule 8.634." (*Ibid.*)

responses of jurors who do not ultimately become members of the trial panel as well as those who do." (*Odle*, *supra*, 32 Cal.3d at p. 944.)

Similarly, respondent completely ignores appellant's showing of the actual effect upon the community, and upon the prospective and trial jurors, of the massive publicity about this case and the community's responses thereto (see, e.g., AOB 191-196), and instead relies solely on the mantra that "'[v]enue changes are seldom granted from counties'" of the size of Orange County (RB 68, quoting *People v. Coffman & Marlowe* (2004) 34 Cal.4th 1, 46).[3]

Respondent has even failed to acknowledge, much less address, the hundreds of newspaper articles, columns, editorials, editorial cartoons and letters to the editor, and the many hours of videotaped excerpts of the television coverage of this case, all of which are indispensable to an intelligent understanding both of the nature of the voir dire responses of the prospective and trial jurors and of the many comments about the case by members of the community to which they were exposed. A thorough perusal of Defense Exhibits B and C, as well as of Defense Exhibits F and G (the log of the newspaper articles, and a content analysis of the publicity materials, respectively) and Dr. Edward Bronson's testimony regarding those matters (see AOB 83-89), is also critical to a full appreciation of the

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[3] As appellant argued in his opening brief (see AOB 170, fn. 43), application of a strong presumption against venue changes from populous counties, in the face of a showing of a reasonable likelihood that appellant could not or did not receive a fair trial, would violate appellant's Sixth and Fourteenth Amendment rights to a fair trial and an impartial jury. (See also *People v. Beames* (2007) 40 Cal.4th 907, 922, citing *Groppi v. Wisconsin* (1971) 400 U.S. 505, 511 ["finding unconstitutional a state law that categorically prevented a change of venue for misdemeanor jury trials, regardless of the extent of local prejudice against the defendant charged"].)

"salience" factor--how people relate the story to their own lives--that was present only in Orange County; of why the impact of the "sympathy for the victim" factor was peculiar to Orange County; and why, despite its size, Orange County acted as a much smaller community in response to the widespread publicity and appeals from and travails of the victim's family regarding her disappearance and the later discovery of her body. Thus, this manifestly is not a case in which this Court can reasonably conclude, with respect to any of the most sensational and prejudicial aspects of the publicity, that "[t]his element of possible prejudice presumably would follow the case to any other venue." (*People v. Prince* (2007) 40 Cal.4th 1179, 1214.)

In short, respondent has failed to deal with any of the record facts and appellant's arguments which establish that a presumption of prejudice from the inflammatory media publicity is warranted in this case. Tellingly, respondent does not even dispute appellant's showing that no case in which this Court has affirmed a trial court's denial of a venue change has had the extraordinarily high levels of recalled media coverage and juror recognition and prejudgment as demonstrated in his case. (See AOB 185-187.) Nor has respondent disputed appellant's assertion that "the Rodney King case" (*Powell v. Superior Court* (1991) 232 Cal.App.3d 785) is apparently the only reported California case, where a change of venue was requested and surveys were conducted, which had higher county rates of both recognition and predisposition than exist in appellant's case. (See AOB 169, fn. 42.)[4]

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[4] These facts remain true following this Court's venue holdings in recent cases such as *People v. Leonard* (2007) 40 Cal.4th 1370, 1393-1397, and *People v. Prince*, *supra*, 40 Cal.4th 1179, 1210-1219 (see pp. 20-21, (continued...)

Secondly, the factual assertions which respondent does affirmatively make in purported support of its contentions are either belied by the record or of little or no legal consequence. For example, respondent makes much of the fact that most of the publicity in this case had occurred by October of 1994, or three years before trial. (See RB 64-66.) While this is mathematically correct, it is of little moment in the *retrospective* analysis of the effect of the publicity on the jury venire and the trial jurors in this case. As appellant has shown in great detail in his opening brief (see, e.g., AOB 81, 94-95, 191-196), the recognition and predisposition rates were consistently at a level of approximately 82-83% in the pretrial surveys and as revealed by the jury questionnaires and voir dire of both the prospective and actual trial jurors. In addition, at the time of trial there were the numerous "fry him," "hang him," and other extremely negative, comments by the jurors and other people in the community (see e.g., AOB 179, 188-191, 195, 204-205), and the numerous comments by the prospective and trial jurors and others in the community identifying with the victim and extremely sympathetic to her and her parents (see, e.g., AOB 179-185, 194-195). As appellant noted in his opening brief (see AOB 185-196), all of these undisputed record facts render the dates of the most massive and prejudicial publicity essentially irrelevant. Given that the recollection and effect of the publicity on the venirepersons was so pervasive *at the time of trial*, most of the publicity may as well have occurred in the weeks and months immediately preceding appellant's trial.

Moreover, the fact--again ignored by respondent--is that substantial

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[4](...continued)
post).

publicity about the case did continue right up to the start of trial, and through jury selection and the entire trial itself. The trial court repeatedly informed the panels of prospective jurors that there had been, and would continue to be, considerable publicity about the case, and acknowledged to counsel that "we are still going to have people who watch tv and look at the paper." (See AOB 97.) These predictions proved prescient when it was revealed that prominent stories about appellant's trial had appeared in both the Orange County Register and the Los Angeles Times two days before the start of jury selection and another article was published in the Register on the first day of jury selection in which a venireperson was described as yelling "hang him" to other prospective jurors. (See AOB 98-99.) It was subsequently revealed that numerous prospective jurors had read such articles (see AOB 100, 102, 104, 105, 106, 120), or had been told about them by acquaintances (see AOB 103-104). Other prospective jurors revealed that they had heard reports about the case on the radio (see AOB 103, 117), or had seen television reports about the case (see AOB 105, 120).

At one point during jury selection, the court told the prospective jurors that "I can promise there will be something someplace in the paper or tv or in the news" during a four-day weekend. (See AOB 121.) Later, immediately after the jury was sworn, the court warned them: "There's going to be publicity, ladies and gentlemen. Absolutely no doubt about it. There will be stuff on radio, on tv. There will be things in the press." (See AOB 142.)

None of this should come as a surprise. As the court informed counsel during jury-selection proceedings, "we have received numerous requests for extended media coverage [for] [e]verything imaginable." (See AOB 134.) In fact, the trial was covered by five local television stations,

three local radio stations, and three local newspapers, as well as a freelance author-journalist, and television cameras were allowed in the courtroom for certain portions of the trial and for sentencing. (See AOB 143.) Indeed, 132 additional pages of newspaper publicity about appellant's case from the start of trial to its conclusion, and including sentencing, were provided to the court by defense counsel and admitted into evidence as part of Exhibit C. (See AOB 147-151 & fns. 30 & 32.) One of these newspaper exhibits was an editorial cartoon, published while the jury was deliberating on penalty, which ridiculed the defense. (See AOB 152.) These addenda have all been ignored by respondent in suggesting that the publicity about the case essentially ended by 1996, and for the most part by 1994. (See RB 65.) And, of course, there were also the declarations by trial jurors which revealed that two of them were told by several people, *during trial*, to "hang 'em"; and that another learned, *during trial*, about flowers being left at the site of Denise Huber's disappearance to mark the sixth anniversary of that event. (See AOB 150.)[5]

Clearly, then, this is neither a case in which "the publicity ha[d] subsided by the time of trial" (RB 66), nor one in which we may properly "presume that potential and seated jurors did not read or watch news reports concerning the case against defendant that may have been disseminated during jury selection and ensuing trial" (*People v. Prince, supra*, 40 Cal.4th at p. 1214)--as the trial court itself repeatedly acknowledged. Quite to the contrary, the record in this case--including the defense exhibits, the actual

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[5] As respondent has correctly noted (see RB 79, fn. 31), the portion of this latter juror declaration asserting that "[t]his incident did not affect me as a juror in any way" (6 CT 2136) was inadmissible under Evidence Code section 1150(a).

voir dire of the prospective and trial jurors, and the declarations of three sitting jurors, not to mention the phone-in poll following the guilt verdict in which 99 percent of the callers to the Orange County Register said that appellant should be sentenced to death (see AOB 149)--shows that "the influence of the news media, [both] in the community at large [and] in the courtroom itself, pervaded the proceedings." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1394.)

Besides the massive quantity of the publicity about appellant's case, and its predictable effect on the prospective and trial jurors, the *quality* of the publicity made this an exceptional case. The "salience" factor described by Dr. Bronson is shown by the record to have been overwhelming in Orange County as a whole, and specifically with respect to both the prospective and trial jurors, and would have been entirely absent in "any other venue." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1214.) As Dr. Bronson noted about the pretrial publicity--and as uncannily confirmed by subsequent events during jury selection and at trial--people in the community from which the jury pool would be derived essentially lived through Denise Huber's disappearance, her parents' valiant efforts to find her, the discovery of her body, the memorial services and funeral, and the parents' tremendous grief. (See AOB 88-89, 170-175, 179-185.) This is far different than simply learning about the case for the first time in court, which would have been the situation had the case been tried in another county. (See AOB 89.)

The existence of this "salience" factor was first expressed in open court when a prospective juror stated that she could not give appellant a fair trial because, inter alia, "I see her [Denise Huber's] face in front of me all the time now, and it is so scary." (See AOB 98.) Obviously, since Denise

Huber's face had not been shown to the venirepersons, this juror had seen her face in the media coverage--exposure which would have been absent in a different county. Indeed, one of the prospective jurors was told by some of her fellows that "I look an awful lot like Denise Huber," and she had been told the same thing back in 1991 and many times thereafter. (See AOB 129-130.)

One prospective juror described having emotional feelings, which included compassion for the victim and her family, from the media coverage of the case (see AOB 110), and another who had two daughters could not "help but consider the terrible suffering the girl's parents have gone through all this time" (see AOB 123-124). The victim's parents were, of course, prominently featured in such coverage for years, but not in other counties. A prospective juror described having an emotional response of compassion for the victim every time he saw the banner. (See AOB 117.) Another recalled when first reading about the case in the newspaper, someone telling him that he was going to get a cell phone for his wife and daughter "just in case that happened," and feeling "I wish I could get ahold of that guy." (See AOB 111.) Yet another said that when he saw an article about the victim being taken from the freeway, he discussed that with his children. (See *ibid.*) Another prospective juror saw the banner almost every day, and felt for the family because she had a daughter the victim's age. (See AOB 118.) Another said that his wife used to go by the banner and tell him about it, having three daughters about the victim's age. (See *ibid.*) Another had a daughter about the same age as the victim and, when she heard about the body being found, thought that "if I were her parents I don't know if I could live." (See AOB 130.) Another put the victim's first name on the questionnaire, having followed the case enough in the media

that she became "Denise" to that juror. (See *ibid.*)

As Dr. Bronson warned, how people relate the story to their own lives--the "salience" factor--impacts their ability to remember it and increases the potential for prejudice. Thus, another prospective juror recalled that her sister had gotten a cell phone for the juror's niece specifically because of this crime (see AOB 121); another talked to his younger daughter after reading media coverage about the case and warned her not to get out of her car, to wait for help, if something like that happened to her; and yet another prospective juror recalled, upon seeing the banner regarding the victim's disappearance, hoping her own car never broke down on the freeway at night (see AOB 124).

Then there were three of the actual trial jurors. One of them revealed that, because of the publicity and seeing the banner, she had had a conversation with her then-boyfriend (now husband)--the one who told her to "fry him [defendant]"--regarding how scary it would be not to have a cell phone if something were to happen, and that thought crossed her mind every time she passed the banner. (See AOB 111-112.)[6] Another trial juror recalled "the desperate search by the parents for their daughter," and "internalized that information" because "I have a daughter about the same age" (see AOB 129); this juror had formed the opinion that appellant was

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[6] Contrary to respondent's suggestion (see RB 77, fn. 30), this trial juror [venireperson no. 411, trial juror no. 8) was *not* the prospective juror who elicited laughter from his fellow venirepersons when he said appellant should "fry." Rather, that was venireperson number 174. (See AOB 120.) Also contrary to respondent's assertion (see RB 77, fn. 30), appellant has never stated or even suggested that "all" of the potential jurors laughed at number 174's "fry him" comment. (See AOB 120, 145-147.) However, the prosecutor conceded that "a significant amount of the people laughed." (17 RT 4500.)

guilty (see AOB 193-194).[7] And the foreperson of the jury acknowledged that she and her daughter underwent lifestyle changes regarding "security things" in specific response to the nature of the events in this case because of the news coverage. (See AOB 125.)[8]

Again, such revelations by even the actual jurors--two of whom were women--tracked and confirmed Dr. Bronson's testimony that the coverage of Denise Huber's disappearance created tension and fear in the community, especially among women, and thus a special ability to remember the case; using the identical terminology later employed by one of the trial jurors, Dr. Bronson described this salience factor as causing one to "internalize" (7 RT 2028)--a psychological reaction of relating this crime to their own lives which would not exist in another county where people had not previously heard of it or lived through the victim's disappearance (see AOB 89, 161).

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[7] Respondent's summary of this trial juror's voir dire (see RB 78) ignores his statement that "having a daughter that age I internalized that information," referring to the publicity about the case (15 RT 4126). Respondent also ignores this juror's publicity-questionnaire recollection of the "desperate search" by the victim's parents (8 CT 2591; see 15 RT 4124) and acknowledgment that he could not aside his knowledge of the case and be impartial (8 CT 2591). (See AOB 196, fn. 56.) Similarly, in respondent's summary of the publicity questionnaire of trial juror number 9 (prospective juror number 228) (see RB 77), respondent ignores her answers that she "maybe" could be impartial as to guilt, but could *not* be impartial as to punishment (see 8 CT 2579).

[8] This juror, the eventual foreperson, revealed a tremendous amount of knowledge about the case in her publicity questionnaire. (See 8 CT 2549.) Respondent ignores the fact that, on voir dire, this juror acknowledged having discussed security precautions with her daughter as a direct result of this case (14 RT 3879-3880), and admitted that it was "absolutely" hard to predict if she could be objective (14 RT 3886). (See AOB 196, fn. 56; compare RB 74.)

Dr. Bronson, who described this case as "very, very high on the salience index" (7 RT 2052), also termed Denise Huber as "the girl next door" in the eyes of the local community (*ibid.*), the precise terminology later employed by the Los Angeles Times in its article published on the first day of jury selection (see AOB 173). Even the *prosecution* expert, Dr. Ebbesen, testified that seeing the banner on the freeway would increase the likelihood of prejudging the defendant's guilt (see *ibid.*); at least three of the trial jurors were familiar with that banner/billboard (see AOB 194-195).

The Orange County media descriptions of this case most articulately and persuasively verify this salience factor which was so unique to their community in this particular case. Thus, for example, they termed this "the most baffling missing person case in Orange County history, in part because so many could identify with the young motorist . . . and the grief-stricken Huber family" (see AOB 173); recalled "the massive publicity campaign" which "turned Denise Huber into a household name," as "Orange County residents would come to think of her as the girl-next-door" (see *ibid.*); described Denise Huber's fate as "A death we shared" because of "This identification with a woman – this uncanny sense of personal connection" and her family's "strength of character throughout the years" as "an inspiration," noting that the effect of her disappearance and death was to make the people of Orange County more cognizant of security and safety issues, and concluding that "the Hubers should know they also have the community's heartfelt consolation and support" (see AOB 174); and opined that "You couldn't help but know of it," "the sensational Famalaro case," "Famalaro, the Freezer Guy," which "generated enormous publicity" (see AOB 174-175).

Similarly, and in direct and obvious contradiction of the trial court's

and respondent's futile efforts to paint this as just another case in a county so large that it could not reasonably impact the jury venire, the local media stated in 1994 that "By now, the poignant tale of Denise Huber has affected the lives of nearly every Newport Beach and Costa Mesa resident"; and "The crime cut deep because it was something everyone could understand" and "For three years Orange County saw Denise Huber's smile on posters and fliers and banners" and "learned to feel the grief of her parents as they launched a high-profile search"; and quoted the Costa Mesa police chief as saying "In the case of Denise Huber, I don't know anybody of sound mind who was not touched." (See AOB 180, fn. 48.) An editorial in the Orange County Register following the death verdict contrasted Denise Huber's case from other murder cases in Orange County in terms of "notoriety," describing "a community drawn to this murder in a singular way," and concluding that "We found Denise; we're not likely to soon forget her." (See AOB 181, fn. 48.)

Then there were the lengthy television reports on Denise Huber's memorial service in Newport Beach--open to the public because, as Denise's father explained, "[t]his whole thing was part of their lives, too" (see AOB 182, fn. 49)--with the eulogy by the crying Newport Beach police chief and by the pastor referring to the "total strangers, brought close together in something so compelling, so overwhelming" (see AOB 183). According to one of those reports, "there was something different, something special about Denise" as compared to other people killed in violent crimes, in part because of the large banner which hung beside the freeway for three years which was "'just compelling'" and "kind of touches you." The strangers at the public memorial "all had something in common: they cared about Denise Huber as much as anyone who didn't know her

can," and gave her family "the reassurance that she won't be forgotten" by the community. (See AOB 183-184.)

According to the trial judge, however, all of those media characterizations were simply erroneous. Instead, he somehow managed to characterize the publicity in this case as "relatively unspectacular" (see RB 67) and not entitled to "as much weight for a change of venue" as some other Orange County cases (see RB 64). These conclusions are contrary to both the record and common sense and are entitled to no deference not only as a matter of law (see *People v. Williams* (1989) 48 Cal.3d 1112, 1115 ["the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable"], but also as a matter of fact. Moreover, it is clear that none of this kind of publicity engaged in and described by the media would have "follow[ed] the case to any other venue." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1214.)

In addition to mechanistically invoking the barely relevant--in this case--size-of-the-county and passage-of-time factors, respondent also relies upon the legally-dubious contention that juror assurances of impartiality are sufficient to overcome all of the record evidence appellant has cited in support of his arguments. (See RB 70-72.) Initially, it should be noted that, contrary to respondent's suggestion (see RB 70), appellant has not relied upon an "actual prejudice" (*ibid.*) argument (see, e.g., AOB 201), nor is such a showing legally required in order to prevail upon a change-of-venue claim. (See, e.g., *People v. Vieira* (2005) 35 Cal.4th 264, 278; *People v. Williams*, *supra*, 48 Cal.3d at p. 1126; *People v. Tidwell* (1970) 3 Cal.3d 62, 69; AOB 153, 207.) Nevertheless, appellant submits that, in addition to the overwhelming showing here of the appropriateness of a *presumption* of prejudice and the reasonable likelihood that a fair trial was not had, he has

in fact demonstrated actual prejudice from the seating of 11 trial jurors familiar with the case from the pretrial publicity (see AOB 192-195)--three of whom (including the foreperson) actually made and/or discussed making lifestyle changes in direct response to this case (see AOB 192-193), and three of whom were directly exposed to prejudicial comments and information about the case during trial (see AOB 149-150).

Furthermore, the unrefuted evidence in this case established that juror assurances of impartiality are unreliable, especially where there has been substantial publicity about the case. (See AOB 90-91, 93-94.)[9] Even the prosecution's own expert witness, Dr. Ebbesen, testified that simply asking prospective jurors if they can set aside their opinions is not an effective way of controlling opinion-bias created by the media. He expressly agreed that there are risks in asking prospective jurors if they can do so, because they want to look fair and do not know how they will respond to the evidence. (See AOB 92.) In fact, the very case cited by respondent in purported support of the notion that juror assurances of impartiality are sufficient to rebut a presumption of prejudice, *People v. Murphy* (1975) 421 U.S. 794 (see RB 70-71), warned that "the juror's assurance that he is equal to the task cannot be dispositive of the accused's rights." (421 U.S. at p. 800; accord, e.g., *Mu'Min v. Virginia* (1991) 500 U.S. 415, 440.) Appellant has previously cited numerous other cases from the high court, this Court and other jurisdictions which have so held or declared. (See AOB 196-201.) Logically, if the rule were otherwise, it

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[9] As appellant noted in his opening brief (see AOB 196, fn. 56), three of the trial jurors either were not specifically asked whether they could be fair and impartial or gave contradictory or ambiguous responses to such questions.

would be impossible for a defendant to ever prevail on a change-of-venue argument before a reviewing court since no responsible trial judge would retain a juror who expressly acknowledges the inability to be fair and impartial.

Respondent also erroneously asserts that appellant "expressed no dissatisfaction with the jury as selected." (RB 80; citation omitted.) In fact, as appellant has shown in his opening brief (see, e.g., AOB 127, 131, 135-136, 142, 146, 202-203), defense counsel affirmatively expressed such dissatisfaction on numerous occasions. For example, after more than two weeks of jury selection, defense counsel told the court that "to be honest, there isn't a juror on here we are happy about." (See AOB 127.) The next day, after appellant had exhausted his peremptory challenges, defense counsel expressed "my dissatisfaction with the current jury . . . based upon publicity," and for that reason requested additional peremptory challenges. (16 RT 4204; see AOB 131.) Later that same day, after appellant had exhausted his peremptory challenges to the alternates, and jury selection had apparently concluded, defense counsel reiterated "my dissatisfaction with not just the first 12 but also the alternates" and again asked for more peremptory challenges for the same reasons. (16 RT 4362-4363; see AOB 135-136.) Then, after jury selection had been reopened (see AOB 136) and concluded at last, defense counsel made "the same request [for] more peremptories based on the same arguments I made in the past." (16 RT 4475; see AOB 142.) And, the next day, just before the start of the guilt phase, defense counsel requested, inter alia, that the court "start over and just quash this jury finding that venue doesn't need to be changed, . . . and just start with the new venire under different rules." (See AOB 146.)

Thus, defense counsel had expressed dissatisfaction with the venire,

the initial jurors and alternates, and the final jury as constituted (see AOB 202-203); it is difficult to understand what else defense counsel could have done to satisfy respondent's apparent need for a greater and sufficient expression of dissatisfaction with the jury to which appellant was forced to submit his fate. Clearly, it cannot be said that appellant "did not exhaust his peremptory challenges" (*People v. Prince, supra*, 40 Cal.4th at p. 1215; *People v. Beames* (2007) 40 Cal.4th 907, 922) or that he "did not object to the jury's final composition" (*Beames, supra*, 40 Cal.4th at p. 922). As a logical corollary of this Court's rule in such cases, counsel's actions must be "deemed to signify a recognition that the jury as selected" was *not* "fair and impartial" (*ibid.*), and "a strong indication that the jurors" were *not* "fair and that the defense so concluded" (*Prince, supra*, 40 Cal.4th at p. 1216; citations and internal quotation marks omitted). (See AOB 201-207.)

Respondent cites numerous venue cases decided by this Court as purported support for its contention that appellant's venue claims should likewise be rejected. (See RB 64-69, 80.) As noted above--and as appellant has shown in his opening brief (see, e.g., AOB 185-187, 191-196, 205-206)--none of the cited cases nor any other cases decided by this Court have had the extraordinary juror recognition and prejudgment as evidenced in appellant's case; nor have the records in any such cases revealed the degree and specificity of recalled facts and the strongly-held and strongly-felt personal beliefs and feelings regarding what should be done to appellant as a result of his crime entertained by the venirepersons and still permeating the prospective jurors at the time of trial just as they had when the pretrial surveys were conducted. Specifically, appellant has already compared the significantly greater and more recent publicity, recognition and predisposition rates, and prejudicial effect on the venirepersons and trial

jurors, in his case with such cases cited by respondent as the following: (*People v. Dennis* (1998) 17 Cal.4th 468 (see RB 64, 66, 69, 80; AOB 185); *People v. Jenkins* (2002) 22 Cal.4th 900 (see RB 65-66, 67; AOB 165, 191, 206); *People v. Proctor* (1992) 4 Cal.4th 499 (see RB 66; AOB 186, 192, 194); *People v. Hamilton* (1989) 48 Cal.3d 1142 (see RB 66, 67; AOB 179, 186, 189, 190); *People v. Jennings* (1991) 53 Cal.3d 334 (see RB 66; AOB 186, 192, 194); *People v. Coleman* (1989) 48 Cal.3d 112 (see RB 66-67; AOB 186); *People v. Edelbacher* (1989) 47 Cal.3d 983 (see RB 67; AOB 160, 206); *People v. Bonin* (1988) 46 Cal.3d 659 (see RB 68; AOB 191, 192); *People v. Coffman & Marlowe, supra*, 34 Cal.4th 1 (see RB 68, 80; AOB 186); *People v. Vieira, supra*, 35 Cal.4th 264 (see RB 68; AOB 186); *People v. Panah* (2005) 35 Cal.4th 395 (see RB 68, 80; AOB 186); *People v. Fauber* (1992) 2 Cal.4th 792 (see RB 71, 80; AOB 166, 186); *People v. Weaver* (2001) 26 Cal.4th 876 (see RB 71; AOB 185, 186, 188); *People v. Hayes* (1999) 21 Cal.4th 1211 (see RB 72; AOB 191, 204); and *People v. Welch* (1999) 20 Cal.4th 701 (see RB 80; AOB 185, 186).

All of the other cases cited and relied upon by respondent likewise suffer by comparison to the case at bench in terms of the quantum of prejudice and other relevant factors apparent from the record. (E.g., *People v. Adcox* (1988) 47 Cal.3d 207, 233-234 (see RB 64) [9 "brief" articles; 7 trial jurors had general knowledge of the case, 2 of whom knew no details]; *People v. Massie* (1998) 19 Cal.4th 550, 579 (see RB 64) [overwhelming majority of prospective jurors knew nothing about the case]; *People v. Gallego* (1990) 52 Cal.3d 115, 168 [see RB 66) [10 of the 12 trial jurors had not been exposed to any pretrial publicity]; *People v. Price* (1991) 1 Cal.4th 324, 393 (see RB 66) [on questionnaire, 76 percent of potential jurors had not heard of defendant; more than 72 percent of venirepersons

questioned on voir dire had no previous knowledge of the case; no actual jurors demonstrated significant recall of the charged offenses]; *People v. Sully* (1991) 53 Cal.3d 1195, 1237 (see RB 66) [193 articles, 300 pages of television scripts, and 8 videotapes; 63-percent recognition rate, 18-percent predisposition rate, in survey]; *People v. Edwards* (1991) 54 Cal.3d 787, 808 (see RB 66, 67, 69) [media coverage "was generally fair, and not inflammatory"; trial began six months after denial of motion to change venue]; *People v. Harris* (1981) 28 Cal.3d 935, 950 (see RB 67, 68, 71) [4 trial jurors had not been exposed to any pretrial publicity, and none of the others knew anything about defendant's background or remembered anything the least bit damaging to him]; *People v. Cooper* (1991) 53 Cal.3d 771, 807 (see RB 67-68, 71, 80 [8 of 100 venirepersons excused for cause because of pretrial publicity; appellant exercised only 4 of his 26 peremptory challenges]; *People v. Webb* (1993) 6 Cal.4th 494, 515 & fn. 14 (see RB 69) [19 printed news stories; relatively few survey participants were aware of information connecting defendant to the crimes or believed he was guilty; most of the actual jurors and alternates knew little or nothing about the crimes; defendant exercised only 16 of his 26 peremptory challenges]; *People v. Sanders* (1995) 11 Cal.4th 475, 506-507 (see RB 67, 72) [only 1 venireperson excused for cause because of exposure to publicity; defendant failed to use 7 available peremptory challenges and expressed no dissatisfaction with the jury as selected].)

The same conclusion can be drawn from more recent venue cases decided by this Court. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322 [20 newspaper articles, during a 22-month period, cited by defendant "cannot be considered 'extensive' coverage; defendant failed to exercise all of her available peremptory challenges]; *People v. Zambrano* (2007) 41

Cal.4th 1082, 1124, 1127-1128 ["vast majority" of prospective jurors did not remember hearing anything about the case; only 4 trial jurors recalled any details; defendant did not exhaust his peremptory challenges and did not renew his venue motion after completion of voir dire]; *People v. Leonard, supra*, 40 Cal.4th at pp. 1396-1397 [85-percent recognition rate, 58-percent predisposition rate among "those familiar with the case," in surveys; 10 trial jurors had either no or minimal recollection of the case; defendant used only 13 of his 20 peremptory challenges]; *People v. Prince, supra*, 40 Cal.4th at pp. 1211, 1215 [74-percent and 77-percent recognition rates, 24-25 percent predisposition rates, in two surveys; most trial jurors "displayed only a vague recollection of past news coverage"; defendant did not exhaust his peremptory challenges and did not renew his venue motion following voir dire]; *People v. Beames, supra*, 40 Cal.4th at pp. 920, 922 [trial court denied defendant's request for continuance to conduct public-opinion survey, but defendant did not actually move for a change of venue; defendant neither exhausted his peremptory challenges nor objected to the jury's final composition].)

In fact, in terms of recognition and predisposition rates, and all of the other record facts appellant has relied upon in this brief and in his opening brief, appellant has made an even stronger showing of a presumption of prejudice, actual prejudice, and a reasonable likelihood that he could not receive a fair trial than did the defendant in *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, cert. den. *sub. nom.* Ayers v. Daniels (2007) ___ U.S. ___ [127 S.Ct. 2876, 167 L.Ed.2d 1152]), in which the Ninth Circuit reversed this Court's holding that defendant's motion for change of venue was properly denied. In *Daniels*, no pretrial survey was conducted (428 F.3d at p. 1210) and no news coverage was included in the appellate record

(*id.* at pp. 1210-1211), but "eighty-seven percent of the jury pool recognized the case from the media coverage" and eight actual trial jurors "remembered the case from the press accounts" (*id.* at pp. 1211-1212). Some of those trial jurors "recalled that the suspect was a Black paraplegic, others recalled that police officers were shot, and two jurors remembered Daniels by name." (*Id.* at p. 1212.) Although "Daniels concede[d] that the record contained no findings that any jurors demonstrated partiality or prejudice that could not be laid aside" (*id.* at p. 1211), the Court of Appeals found "that the venue was saturated with prejudicial and inflammatory media publicity about the crime sufficient for a presumption of prejudice" (*ibid.*; citation and internal quotation marks omitted). Among other things, the Court of Appeals noted that (as is true in appellant's case) defendant "was identified in press accounts as the killer from the very beginning" (*ibid.*); that (apparently more so than in appellant's case), "the publicity diminished after [defendant]'s arrest," but (similarly to appellant's case) "it resumed as trial approached" (*ibid.*; compare *People v. Prince, supra*, 40 Cal.4th at pp. 1218-1219); that (like the victim in appellant's case) the victims "were turned into 'posthumous celebrities'" whose funerals (memorial services for the victim in appellant's case) were heavily attended (*ibid.*); that there were "editorials and letters calling for Daniels's execution" (*id.* at p. 1212) (in appellant's case, not only negative letters, editorials and an editorial cartoon, but the victim's family publicly expressing the hope that appellant "fry" and a poll conducted *during trial* with 99 percent of the callers expressing the desire that appellant be executed); and that (as in appellant's case) the publicity contained "information [that] was highly prejudicial and would not have been admissible at the guilt phase" (*ibid.*; see also *People v. Leonard, supra*, 40

Cal.4th at pp. 1395-1396)--but, in appellant's case, also extremely *erroneous* prejudicial information and the use of inflammatory and "incendiary" descriptions of appellant (see e.g., AOB 84-87, 161-163, 176-179); compare *People v. Prince, supra*, 40 Cal.4th at pp. 1214, 1218).[10] Even more so than in *Daniels*, "[t]he nature and extent of the pretrial publicity, paired with the fact that the majority of the actual and potential jurors remembered the pretrial publicity warranted a change of venue," and "[t]he trial court's denial of [appellant]'s motion for change of venue violated [his] right to a fair and impartial jury and thus, his right to due process." (428 F.3d at p. 1212.)

In this regard, it must be emphasized that all of the trial court's claims which are cited by respondent in support of the court's refusal to change venue are patently erroneous, if not downright absurd. For example, the notion that the defense experts' predisposition survey was "misleading" (RB 63) is impossible to fathom. What could be fairer or more balanced than asking whether one thinks the defendant "is definitely guilty; probably guilty; definitely not guilty; or probably not guilty of murder"? (See Venue Exh. A, Part II, p. 3.) Further, prosecution expert Dr. Ebbesen was simply wrong in asserting that the question "failed to include a 'don't know' answer alternative" (RB 61); the survey specifically lists "Don't know," as

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[10] Respondent cites the trial court's finding "that while there had been a lot of publicity concerning the victim's parents, their statements to the press had not been prejudicial or inflammatory." (RB 67.) Once again, the court was grossly mistaken. As appellant noted in his opening brief (see AOB 88, fn. 18), the victim's father was quoted in the Orange County Register as saying that his daughter "was a beautiful person who was taken away by this animal." He was also quoted in the paper and seen on television reports saying he wanted to see appellant "fry." (See Exhs. B and C; AOB 87, 160, 163, 179, 182-183.)

well as "Refused/NA," as alternatives to the four potential answers listed above (see Venue Exh. A, Part II, p. 3). Moreover, as previously noted in appellant's opening brief (see, e.g., AOB 191-192), the survey was subsequently validated to a remarkable degree by the venirepersons and trial jurors, so Dr. Ebbesen's opinion of the survey is hardly relevant and was firmly refuted in any event.

Similarly, the trial court's claims that this case "does not get as much weight for a change of venue" as some other cases in Orange County (see RB 64), and that the publicity was "relatively benign" (see RB 71), "relatively unspectacular" (see RB 67) and old (see RB 64), is belied and thoroughly undermined by Exhibits B and C (see, e.g., AOB 156-163, 165-166, 171-177, 179-185, 188-190) and, even more importantly, by the record of the publicity questionnaires and actual voir dire of the prospective jurors in this case (see, e.g., AOB 94-142, 163-165, 192-196). It must rhetorically be asked: What is the point of retrospective review if the questionnaires and voir dire of the prospective and trial jurors is simply to be ignored by a trial court engaging in speculation, surmise and conjecture? That the trial judge did not allow himself to be "confused by the facts" is graphically illustrated by his preposterous conclusion which flies directly in the face of the record evidence, i.e., that "not one of the sitting jurors or alternate jurors had any knowledge about this case which would interfere with their ability to render a fair, impartial verdict." (27 RT 6793; RB 72.) Fortunately, a reviewing court must make its own determination of whether a venue change should have been granted. (See, e.g., *People v. Williams, supra*, 48 Cal.3d at p. 1125; AOB 153.) Upon such independent review, this Court must assess the actual record below and reverse the trial court's denial of appellant's motions to change venue.

For all of the reasons argued above and in appellant's opening brief (see AOB 78-208), the entire judgment must be reversed due to the trial court's erroneous denial of appellant's motions for a change of venue.

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II

THE TRIAL COURT'S REFUSAL TO CONDUCT AN INDIVIDUALIZED, SEQUESTERED VOIR DIRE OF THE PROSPECTIVE JURORS REGARDING THEIR EXPOSURE TO PUBLICITY ABOUT THE CASE INDEPENDENTLY DENIED APPELLANT HIS RIGHTS TO TRIAL BY A FAIR AND IMPARTIAL JURY AND TO A RELIABLE PENALTY DETERMINATION, EXACERBATED THE REASONABLE LIKELIHOOD THAT A FAIR TRIAL WAS NOT HAD FROM THE REFUSAL TO CHANGE VENUE ALONE, AND CREATED ACTUAL PREJUDICE TO APPELLANT

In his opening brief, appellant argued that the trial court unconstitutionally and prejudicially denied appellant's request for an individualized, sequestered voir dire of the prospective jurors on their exposure to and the effects of the massive publicity in this case. (See AOB 209-219.) Respondent contends that the court properly denied appellant's request, and did not abuse its discretion in doing so. (See RB 80-86.) Respondent's contentions once again ignore the actual state of the record and the prejudice to appellant from the trial court's stubborn insistence on conducting a collective, non-individualized jury-selection procedure, and are meritless in any event.

Respondent exclusively relies upon the unremarkable general observations that "there is no constitutional right to a particular manner of conducting voir dire" and that "its scope is necessarily left primarily to the sound discretion of [the trial] court." (RB 81; see also RB 83, 86.) Appellant has not suggested that the rule is otherwise, and in fact has acknowledged that he is unaware of any court holding that individualized, sequestered voir dire is constitutionally required. (See AOB 216.) Rather,

appellant has argued that, "[u]nder the peculiar circumstances of this case," the trial court abused its discretion and violated appellant's fundamental constitutional rights by refusing to conduct the requested individualized voir dire of the entire venire. (AOB 212.)

It is beyond dispute that a trial court's discretion regarding the conduct of voir dire is not, and cannot constitutionally be, unbridled. The exercise of such discretion is always "subject to the essential demands of fairness." (*Morgan v. Illinois* (1992) 504 U.S. 719, 730; *Aldridge v. United States* (1931) 283 U.S. 308, 310; see also *Ham v. South Carolina* (1973) 409 U.S. 524, 526-527.) This is especially so in capital cases. (*Morgan v. Illinois, supra*, 504 U.S. at p. 730; see also *Turner v. Murray* (1986) 476 U.S. 28, 35-37.) Here, as noted in appellant's opening brief (see AOB 213-214 & fn. 62), it strongly appears, from a review of the record as a whole, that the trial court did not exercise its discretion at all in denying appellant's request for *Hovey*-type voir dire[11] on the prospective jurors' knowledge of the publicity in this case and its effect upon them. (See *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168.) But even if it can reasonably be said that the court did exercise its discretion in this matter, its rulings did fall "outside the bounds of reason" (*People v. Waidla* (2000) 22 Cal.4th 690, 714; see RB 83) given the extraordinarily-high and undisputed rates of recognition and predisposition toward guilt and death among the venirepersons.

Respondent's citation of the trial court's absurd finding, following the selection of the jury, that "it had not seen '*anything* from *any* of the jurors that would have a negative impact or bias on the other prospective jurors'"

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[11] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

(RB 85; 17 RT 4503 [emphasis added]) only serves to confirm that the trial court not only abused its discretion in refusing the requested individualized, sequestered voir dire, but evidently did not even take appellant's motion seriously, and thus did not even exercise its discretion in purportedly determining that such voir dire was not "practicable." (Code of Civ. Proc, § 223.) Thus, in the trial court's view, there was no "negative impact or bias" (17 RT 4503) from, inter alia, "any" of the following events during jury selection: a prospective juror yelling "hang him" to other prospective jurors (see AOB 99); prospective juror number 138 stating, in the courtroom and in the presence of other venirepersons, "I don't want to sit up front and look at that piece of scum" (see AOB 99, 103); a prospective juror telling others that appellant "is just obviously guilty" and "should fry," and another saying appellant "should definitely be put to death" (see AOB 101); a prospective juror telling others that if something like this were to happen to her daughter, he would "get the ax" (see AOB 102); juror 146 stating in open court that "I feel he is guilty already based upon what I read" and that appellant should get the death penalty (see AOB 106); juror 346 stating in open court that, from reading newspaper articles about the case, she and all of her co-workers were convinced that appellant was guilty (see *ibid.*); juror 102 in open court quoting his girlfriend as telling him that the "Denise Huber" case was "about the girl that was found in the freezer all chopped up" (see AOB 107); juror 347 saying in open court that, from the media coverage, the crime struck him as "very, very bizarre and very heinous" (see AOB 110) and that he felt "I wish I could get ahold of that guy" (see AOB 111), possibly using "a strangling motion" in the process (see AOB 113, 114); juror 411--an eventual trial juror--saying in open court that her husband's reaction to hearing that she was called for appellant's jury was to say "fry him" (see

AOB 111-112); juror 187's open-court recollection of feeling "outrage" about this crime upon reading about it, and stated opinion that the burden of persuasion that appellant should live would probably be on appellant (see AOB 112); juror 212 in open court expressing the belief that appellant should get the death penalty, based on her reading newspaper articles about the case (see *ibid.*); juror 318 in open court recalling, with uncanny accuracy, numerous details about the case, including the fact that the authorities may have dug up appellant's basement "to see if they . . . could find anything else" (see AOB 118; 13 RT 3479); juror 174 stating in open court that "I do believe if the man is found guilty of all charges, like the lady said before, fry him," a comment which produced laughter in the courtroom from "a significant" number of the other prospective jurors (see AOB 120, 145, 146); juror 204 volunteering in open court that "until today I have never heard that some people might have speculated there was [*sic*] additional crimes committed or whatever" (see AOB 120); juror 353--an eventual trial juror--in open court recalling repeatedly seeing the banner and wishing he could find Denise and bring her home, and also in open court quoting friends at work saying to him "fry him" (see AOB 121); juror 165 stating in open court, based on seeing the television coverage of the case, that he/she would have a hard time showing any leniency at all on penalty (see AOB 122); juror 180 in open court saying that his/her supervisor at work had expressed a very strong opinion about what should happen to appellant (see AOB 123); juror 359 in open court stating that, based on articles she had read, she felt they had arrested the guilty person and that she would vote for death if appellant were found guilty as charged (see *ibid.*); juror 324 stating in open court that he was inclined toward the death penalty for appellant based on what little he knew about the case from the newspapers (see *ibid.*); juror 363

stating in open court that, based upon reading and hearing "an awful lot" about the case, he/she would vote for death if appellant were found guilty (see AOB 125); juror 384--the eventual foreperson of the trial jury--stating in open court, inter alia, that from seeing the newspaper and television coverage of the case, she and her daughter "kind of went over the security things," like staying in the car and her daughter having a cell phone (see *ibid.*); juror 186 stating in open court that, based on what he had read in the newspaper and heard on television, he could not be fair to appellant because "the alleged crime deserves the death penalty" (see AOB 129); juror 334 in open court stating that she had read "about everything there was" about the case, accurately describing the facts in great detail, and expressing her opinion that the "defendant has earned the death penalty" (the trial court nevertheless denied appellant's challenge for cause to this juror based on the degree of publicity she had been exposed to (see AOB 131-132); juror 200, upon discovering that she had been selected as an alternate, announcing, in the presence of all of the other jurors, that she did not think she could sit as a juror because "I'm having a hard time even looking at the defendant" (see AOB 136); a prospective juror revealing in open court that another prospective juror had said "I can't believe I was in the same room breathing the same air as him [appellant]" (see AOB 140).

In the face of the foregoing litany of statements which were heard by prospective and trial jurors because the trial court insisted on conducting unsequestered, non-individual voir dire, the court managed to conclude that it had literally heard *nothing* from *any* of the prospective jurors "that would have a negative impact or bias on the other prospective jurors." (17 RT 4503.) This astounding finding is wholly contrary to the record before this Court and therefore is entitled to no deference whatsoever from this or any

other reviewing court. Further, in the face of this record of overwhelming exposure to prejudicial statements by their fellow venirepersons, the mere fact that "in camera questioning was done on several occasions" (RB 85)--mostly on request of the juror himself or herself and/or having nothing to do with the publicity in this case (see, e.g., 15 RT 3980-3981, 4032-4033, 4109-4111, 4137-4138 [5 CT 1829-1830]; 16 RT 4384-4398 [6 CT 1834]; AOB 127-130, 137-139)--only serves to demonstrate the inadequate and constitutionally deficient nature of the jury-selection procedure in this case. Nor does the fact that there were publicity questionnaires filled out by prospective jurors (see RB 85-86) somehow alleviate the prejudicial effect of what such jurors were permitted to say--and predictably did say--in open court in front of their fellows.

Finally, respondent cites three cases in which this Court assertedly "rejected similar claims concerning the denial of sequestered and individual voir dire in capital cases." (RB 86.) In fact, however, none of those cases addressed the issue presented in appellant's case. All of the cited cases involved general attacks on Code of Civil Procedure section 223 based on either equal protection grounds (see *People v. Ramos* (2004) 34 Cal.4th 494, 511-512), or on the grounds that voir dire conducted in the presence of other prospective jurors prevents the defense from obtaining honest answers or uncovering juror bias (see *id.* at pp. 513-514; *People v. Navarette* (2003) 30 Cal.4th 458, 490; *People v. Box* (2000) 23 Cal.4th 1153, 1178-1181). Moreover, in *Navarette*, there was no showing by defendant of any problems with the non-*Hovey* voir dire nor even a claim that such voir dire had biased other prospective jurors (see 30 Cal.4th at p. 490); in *Box*, defendant apparently made no argument as to why non-*Hovey* voir dire was not "practicable" in that case (see 23 Cal.4th at pp. 1178, 1181); and in *Ramos*,

defendant's sole claim was a "general," non-case-specific claim that prospective jurors feel "apprehension . . . when voir dire is conducted in the presence of other prospective jurors" (see 34 Cal.4th at pp. 513-514). Only in *Ramos* is there any mention of possible publicity concerns, but this Court emphasized that although, following the trial court's admonition not to read any newspaper articles about the case, "some jurors did later read accounts of the trial, nothing suggests that the voir dire process was responsible for their actions." (*Id.* at p. 514.) In the present case, by obvious contrast, appellant's primary argument, and showing, is that the non-*Hovey* selection process itself tainted and poisoned the entire jury venire, resulting in actual prejudice to appellant as well as exacerbating the reasonable likelihood that a fair trial was not had from the refusal to change venue. (See Argument I, *ante*, and AOB Arguments I & II.)

The entire judgment must therefore be reversed.

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III

THE TRIAL COURT VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS AND COMMITTED PREJUDICIAL ERROR BY DELIVERING CALJIC NO. 2.06

In his opening brief, appellant argued that the delivery of CALJIC No. 2.06 unfairly, unconstitutionally and prejudicially permitted the jury to draw critically adverse inferences against him with respect to the charged offense of first degree murder and the special-circumstance allegations. (See AOB 220-230.) Respondent's discussion of this issue (see RB 86-91) not only fails to refute appellant's showing that the instruction had no logical application to the facts of this case, but in some respects actually bolsters his claims of manifest unfairness in giving the instruction in question.

Initially, respondent contends that appellant has waived his claim because he "did not object to this instruction or request any modifications below." (RB 86.) This contention is easily disposed of, for the reasons already stated in appellant's opening brief. (See AOB 220-221, fn. 65.) As this Court has recently reiterated, and respondent acknowledges (see RB 86), "section 1259 permits appellate review to the extent any erroneous instruction 'affected [appellant's] substantial rights'; thus, to the extent any claims of instructional error are meritorious and contributed to [appellant's] conviction and death sentence, they are reviewable." (*People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 247.) As appellant has noted, the instant instructional error clearly affected his substantial rights because it unfairly made it easier for the jury to convict him of capital murder. (See AOB 221, fn. 65.) Respondent's assertion that "a failure to request an amplification or

modification of standard jury instructions bars the issue from being heard on appeal" (RB 86) is irrelevant to appellant's instant claim, which is that the instruction should not have been given *at all*. However, the fact that it *is* a "standard jury instruction[]"--one which has repeatedly been approved by this Court (see AOB 224-225)--further excuses appellant's failure to specifically object to its delivery. A defendant's failure to make a "useless and unavailing" objection is legally excusable and therefore cannot constitute a waiver of the issue on appeal. (*People v. Morse* (1964) 60 Cal.2d 631, 653; see *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 ["An objection in the trial court is not required if it would have been futile."]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["The decisions of this court are binding upon and must be followed by all the state courts of California."]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2 ["the failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].)[12]

On the merits of appellant's claim of instructional error, respondent essentially makes appellant's argument for him by referencing the prosecutor's argument to the jury that "one of the reasons why Famalaro

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[12] In any event, even were it assumed that defense counsel should have anticipated a favorable ruling had they objected to the delivery of CALJIC No. 2.06, or at least should not have considered such objection futile, they could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to draw critically adverse inferences against the defendant with respect to the alleged first degree murder and special circumstances. Thus, it would have constituted ineffective assistance of counsel not to object. (U.S. Const., 6th & 14th Amends; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

kept Denise's body in a freezer for more than three years was that he knew his spermatozoa were in her body, so he could not allow her body to be discovered." (RB 88.) It would be difficult to imagine a clearer *lack* of a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction, as is required by the Due Process Clause of the Fourteenth Amendment. (See AOB 221-222 and cases cited.) Even assuming that there *were* spermatozoa in the victim's body (see AOB 14-15) and that appellant would have been thinking about that possibility, the most foolproof way of destroying such "evidence" would be to *not* purchase a freezer to preserve it, and instead let the body continue to decompose entirely. Essentially, then, respondent's contention, reductio ad absurdum, is that *preserving* evidence equals *concealing* evidence. Not only is such a proposition completely illogical in the abstract, but it becomes if possible even more insupportable when, as here, it is used to support the further inference that appellant therefore had a consciousness of guilt of having committed a *first degree* murder rather than a second degree murder. At the very least, there is no "rational connection between the fact proved [keeping the "body in a freezer for more than three years"] and the fact to be inferred [concealment of evidence tending to show a consciousness of guilt of capital murder]." (*People v. Castro* (1985) 38 Cal.3d 301, 313; see AOB 221.) Even more clearly, the connection sought to be made by respondent is not "more likely than not." (*County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 165-167, & fn. 28; see AOB 222.)

The bankruptcy of respondent's position is even more graphically shown by its contention that appellant's act of transporting the victim from the freeway to his warehouse "also demonstrated" his "attempts to conceal

evidence." (RB 89.) This obviously does not constitute the concealment of evidence, but rather is part of the alleged criminality itself; in fact, it *is* one of the alleged special circumstances and one of the alleged theories of felony-murder in this case. Taken to its logical conclusion, respondent's reasoning would mean that all kidnapings ipso facto constitute concealment of evidence. Such a result would, once again, be absurd and irrational.

Similarly illogical is the notion that, by covering the victim's head with plastic bags, appellant "clearly exhibited an attempt to *conceal* and contain the blood and body tissue that would necessarily result from hitting Denise Huber's head with a hammer and nail puller." (RB 89; emphasis added.) Again, this is part and parcel of the crime itself; again, respondent seeks to equate the criminal act with suppression and concealment of evidence--a connection which is not a rational one. Moreover, it is certainly not a connection "more likely than not"; the "contain[ment]" of the blood and body tissue purpose mentioned by respondent is the far more likely inference here. Indeed, that purpose--along with not wanting to actually see the damage being inflicted--are the only "rational" inferences, given the fact that appellant kept all of the items that had blood on them, including the victim's personal possessions. Again, appellant's actual behavior, i.e., *keeping* the victim's body and all of her bloody possessions, is diametrically opposed to any assertedly rational inference of *suppressing* evidence.

Although respondent relegates it to a footnote, the inconsistency of respondent's position is shown by the prosecutor's jury argument that "another reason Famalaro kept Denise's body was that her body, like her possessions and the media reports of her disappearance, were his trophies 'to remind him of the good times he had that night.'" (RB 89, fn. 34, quoting 22 RT 5515.) It must rhetorically be asked of respondent's

competing theories for appellant keeping the victim's body and her possessions: Which is it? To suppress and conceal evidence, or as a trophy? Logically, it cannot be both. Appellant submits that the prosecutor concocted the "trophy" theory because he knew that the "concealment-of-evidence" theory was irrational on the facts of this case--i.e., that appellant "suppressed" evidence by keeping rather than disposing of the victim's body and all of her possessions, and then transporting them to Arizona and leaving them where they could be readily discovered, as in fact they ultimately were. (See AOB 228-229.)

The best explanation the prosecutor could conjure up for appellant's failure to dispose of the body was that:

> "He couldn't have put her in the desert without getting her out there. That is exposure. Somebody might see you loading her up, unloading her, digging the hole. How do you do all that? Yeah, he could have put her in the desert, not without exposure." (22 RT 5705.)

This argument is preposterous, not only as a commonsense matter--because it is not true that someone could not easily and anonymously dump a body (and not even need to dig a hole) in a remote area like the desert without being seen by anybody and thereby forever avoid apprehension--but also because it ignores what appellant actually did do in this case: leave the body inside a stolen rental truck in an open driveway readily observable from the street, where it could be and was discovered. To give a suppression-of-evidence/consciousness-of-guilt instruction in such a factual situation simply because appellant did not, for example, personally deliver the body to the police department (see AOB 228-229) is tantamount to delivering a consciousness-of-guilt instruction because the defendant hid the truth from everyone instead of confessing his guilt to the police. Such a

permissible inference would be no more improper, unfair and unconstitutional than what the instruction accomplished in this case--particularly when it irrationally permitted the jury to essentially use appellant's failure to turn himself into the authorities as evidence of *first degree* murder with special circumstances, as opposed to *second degree* murder. (See AOB 228-230.)

Thus, the two cases cited by respondent where the defendant "disposed of shoes" (RB 90; see *People v. Cooper* (1991) 53 Cal.3d 771, 833) and "attempted to get rid of gun" (RB 90; see *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1296) are inapposite to the instant case, where the defendant *kept* the evidence in question rather than disposing or attempting to get rid of it. *People v. Coddington* (2000) 23 Cal.4th 529, another case cited by respondent, for the proposition that "Famalaro's plea of not guilty put in issue the existence of every element of every offense charged" (RB 90), also is inapposite because there the issue was whether a concession by defense counsel in opening statement rendered prosecution evidence irrelevant. (23 Cal.4th at p. 597.) Here, by contrast, all of the evidence was in, and the issue was the *instructions* to be given based upon that evidence and not some prediction of what the evidence would show. By that time, there was absolutely no question that the only disputed issue was the *degree* of appellant's crime and the truth of the alleged special circumstances--i.e., whether appellant was guilty of capital murder--and *not* identity. (See, e.g., 22 RT 5496-5497 [prosecutor's closing argument to the jury]; AOB 223.) Under these circumstances--and given the uncontested aspects of the prosecution's case--the prosecution could hardly be said to have been in a position of having "to avoid a directed verdict of acquittal."

(*People v. Coddington, supra*, 23 Cal.4th at p. 597; see RB 90.)[13]

Finally, respondent's contention that any error in delivering CALJIC No. 2.06 was harmless (see RB 90-91), in part because the evidence of kidnaping "was overwhelming" (RB 91), would come as a huge surprise to the judge who ruled on appellant's section 995 motion. Reviewing essentially the same evidence later introduced at trial, she repeatedly expressed serious reservations regarding the sufficiency of the evidence of the alleged kidnaping special circumstance to satisfy the minimal standard applicable to such a determination (see 1 RT 57, 59-60, 64-78, 80-81, 85-88, 90-92); she ultimately ruled against appellant on this issue only after taking it under submission (1 RT 92), emphasizing that "it's a bindover standard which is entertaining a strong suspicion, so for that reason the defense motion as to the special circumstance of murder in the course of a kidnapping would be denied" (1 RT 97). The judge's reservations were perfectly justifiable given the complete absence of evidence at the preliminary examination--as well as later at trial (see AOB 3-6)--regarding exactly how the victim got from her disabled car on the freeway to appellant's warehouse. Nor was the trial evidence of sodomy the least bit "overwhelming" (RB 91), as there was conflicting expert testimony regarding whether spermatozoa were actually found in the victim's rectum three years after the crime (see AOB 8-9, 14-15)--the *only* evidence in the whole case conceivably supporting the true finding on the sodomy special-

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[13] Contrary to respondent's apparent suggestion, the prosecutor did not argue "[t]he fact that Famalaro placed the three white plastic trash bags over Denise's head before he killed her" as "support[ing] an inference of his consciousness of guilt" (RB 90); rather, he argued only that this was evidence of premeditation and deliberation (see 22 RT 5701-5703).

circumstance allegation--and the complete absence of any evidence as to the donor of any such spermatozoa (see AOB 9). Plainly, this was a close case on the issues of whether this was a first degree murder and the truth of the two special-circumstance allegations--as opposed to appellant's guilt of second degree murder, i.e., non-capital homicide.

Under any applicable standard of review, therefore, the error in giving CALJIC No. 2.06 requires reversal of the entire judgment. (See AOB 230.)

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IV

A SERIES OF GUILT-PHASE INSTRUCTIONS IMPERMISSIBLY AND UNCONSTITUTIONALLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

In his opening brief, appellant argued that his constitutional rights were violated by various jury instructions which, whether considered individually or, especially, when taken together, diluted the reasonable-doubt standard and lightened the prosecution's burden or proof. (See AOB 231-244.) Besides frivolously asserting that appellant's claims are waived, respondent primarily relies upon previous decisions of this Court rejecting similar challenges. (See RB 92-102.)

Respondent's waiver claims (see, e.g., RB 92-93, 96-97) are easily disposed of because, as respondent recognizes (see RB 92-93) and as this Court has consistently held, "section 1259 permits appellate review to the extent any erroneous instruction 'affected [defendant's] substantial rights.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4,[14] quoting *People v. Prieto* (2003) 30 Cal.4th 226, 247.) "Thus, to the extent any claims of instructional error are meritorious and contributed to [appellant's] conviction and death sentence, they are reviewable." (*Bonilla, supra*, 41

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[14] *Bonilla* applied this holding in rejecting the People's contention that Bonilla's claim of error in giving CALJIC No. 2.03 and "various of Bonilla's other challenges to the jury instructions . . . are forfeited because Bonilla failed to object at trial." (*Ibid.*) At least one of those instructions, CALJIC No. 2.01 (*ibid.*), was among those challenged in the instant case by appellant (see AOB 232-235). (See also *People v. Hillhouse* (2002) 27 Cal.4th 469, 503 [no waiver if appellant were correct in arguing error in giving CALJIC No. 2.51 language that "[m]otive is not an element of the crime charged and need not be shown"]; AOB 239 [same argument made by appellant as by defendant in *Hillhouse*].)

Cal.4th at p. 329, fn. 4.) Despite respondent's pro forma assertion that "none of [appellant's] substantial rights were adversely affected" (RB 92), the instructional errors identified by appellant indisputably affected his "substantial rights" because they involved the most fundamental, "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law.'" (*In re Winship* (1970) 397 U.S. 358, 364; citation omitted.) Respondent's attempt to avoid application of section 1259 by citing *People v. Hillhouse* (2002) 27 Cal.4th 469 (see RB 92) is futile because appellant has argued that the instructions at issue are *not* "'correct in law'"--as well as a violation of due process--rather than that they were "'too general or incomplete'" or "'needed clarification'" (RB 92, quoting *Hillhouse, supra*, 27 Cal.4th at p. 503). In that situation, appellant did not have to seek a clarifying instruction in order to preserve his myriad claims of error. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)[15]

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[15] In addition, since, as respondent contends, this Court has previously and consistently decided similar claims of instructional error adversely to appellant's position (see RB 95-96, 97, 98, 99, 100, 101-102), it would have been futile to object because the trial courts are bound by courts of superior jurisdiction. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; Auto *Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see also Argument XI, p. 82, *post*, and cases there cited.)

Further, even were it assumed that defense counsel should have anticipated a favorable ruling had they objected to the various jury instructions at issue here, or at least should not have considered such objection futile, they could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to receive instructions which diluted the reasonable-doubt standard and lightened the prosecution's burden of proof. Thus, it would have

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Therefore, the only real issue before this Court is whether appellant's "claims of instructional error are meritorious and contributed to [his] conviction and death sentence." (*Bonilla, supra*, 41 Cal.4th at p. 329, fn. 4.) Appellant has acknowledged this Court's previous rejection of similar claims of instructional error, but requested that this Court reconsider its decisions in this area and provided a detailed and logical analysis in support of that request. (See AOB 240-243.)[16] Appellant continues to maintain that the guilt-phase instructions unconstitutionally diluted the reasonable-doubt standard and that, given the closeness of the case on the issues of guilt of first degree murder and the special circumstances, i.e., capital murder (see, e.g., AOB 243-244, and Argument III, pp. 39-40, *ante*), these errors require reversal of the entire judgment.

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[15](...continued)
constituted ineffective assistance of counsel not to object. (U.S. Const., 6th & 14th Amends.; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

[16] With respect to appellant's challenge to the delivery of CALJIC No. 2.51 (see AOB 239), respondent's dissertation on the distinction between the concepts of "motive" and "intent" (see RB 100) ignores the fact that the instruction was given to "lay jurors not versed in the subtle distinctions that attorneys draw" (*People v. Steele* (2002) 27 Cal.4th 1230, 1266).

V

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

In his opening brief, appellant argued that the trial court erroneously and unconstitutionally instructed the jury on first degree murder because the information charged appellant only with second degree malice-murder. (See AOB 245-252.) Respondent disagrees, citing contrary holdings of this Court. (See RB 102-107.)

Appellant has acknowledged this Court's previous rejection of claims similar to appellant's, including one of the cases expressly relied upon by respondent, *People v. Hughes* (2002) 27 Cal.4th 287 (see AOB 247, 248-249), but has detailed why this Court should reconsider its decisions in this area (see AOB 248-251). Appellant would only reiterate, in reply to respondent's contention that appellant was placed "on notice that the prosecution would be attempting to prove such facts," i.e., those purportedly contained in the special-circumstance allegations (RB 106-107), that appellant's claim is that the trial court *lacked jurisdiction* to try him of first degree murder under either theory of that offense, since the information charged only second degree malice-murder in violation of section 187 (see AOB 247). Moreover, as appellant has previously shown (see AOB 246, fn. 77), the special-circumstance allegations neither changed the elements of the charged offense nor alleged all of the facts necessary to

support a conviction for felony-murder.[17]

Because, as argued in the opening brief (see, e.g., AOB 251-252), the jury was improperly permitted to convict appellant of first degree murder, the judgment of conviction for that offense, the special-circumstance findings, and the death judgment must all be reversed.

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[17] To the extent respondent may be claiming that the instructions to the jury cured any notice defect (see RB 106), respondent is mistaken because they are delivered near the end of trial. (See *Gautt v. Lewis* (9th Cir. (2007) 489 F.3d 993, 1010 ["an instruction . . . cannot itself serve as the requisite notice of the charged conduct, coming as it does *after* the defendant has settled on a defense strategy and put on his evidence" (original emphasis)].)

VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY-MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

In his opening brief, appellant argued that the trial court committed reversible error by failing to instruct the jurors that they had to unanimously agree on whether appellant committed a premeditated murder or a felony-murder before they could convict him of first degree murder. (See AOB 253-261.) Respondent relies upon decisions of this Court holding otherwise (see RB 107-111), which appellant has previously recognized but asked this Court to reconsider (see AOB 253-254).[18]

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[18] Respondent preliminarily contends that "this claim of instructional error is not cognizable on appeal as Famalaro failed to present this claim to the trial court." (RB 107.) However, the very fact that, as respondent repeatedly notes, "identical claims" (RB 108) have "consistently" (RB 107, 108) and "repeatedly" (RB 108) been rejected by this Court establishes that it would have been futile to object because the trial courts are bound by law established by courts of superior jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see, e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 ["An objection in the trial court is not required if it would have been futile."]; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6 ["here the trial court was bound by prior appellate decisions . . . and it would have been pointless to raise the issue there"]; *People v. Turner* (1990) 50 Cal.3d 668, 704, fn. 18 [no waiver for failure to object where "[t]hese challenges had consistently been rebuffed"]; *Moradi-Shalal v. Fireman's Funds Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1 ["clearly it was pointless for defendant to ask either the trial court or appellate court to overrule one of our decisions"]; *In re*

(continued...)

This Court has, for example, held that "[t]here is still 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].) At the same time, this Court also has acknowledged that premeditated murder and felony-murder do not have the same elements. (See, e.g., *Carpenter, supra*, 15 Cal.4th at p. 394; *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 malice-murder but not first degree felony-murder. It is the fact that these crimes are not merely separate theories of murder, but have separate *elements*, that is the basis for appellant's argument. (See AOB 254-261.) Respondent ignores the fact that malice-murder and felony-murder have separate elements and simply relies on this Court's cases rejecting this issue

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[18](...continued)
Gladys R. (1970) 1 Cal.3d 855, 861 ["we cannot expect an attorney to anticipate that an appellate court will later interpret [the law] in a manner contrary to the apparently prevalent contemporaneous interpretation"].)

In any event, even were it assumed that defense counsel should have anticipated a favorable ruling had he requested a unanimity instruction, or at least should not have considered such a request futile, he could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to erroneously and unconstitutionally convict appellant of first degree murder. Thus, it would have constituted ineffective assistance of counsel not to object. (U.S. Const., 6th & 14th Amends.; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

without analysis. (See RB 108-109.)[19]

Other, more recent opinions by this Court offer further support for appellant's argument. In *People v. Seel* (2004) 34 Cal.4th 535, the 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 for retrial on that allegation. This Court granted review to decide whether the premeditation allegation could be retried. (34 Cal.4th at p. 540.) In holding that double-jeopardy protections barred retrial on the premeditation allegation under *Apprendi v. New Jersey* (2000) 530 U.S. 466, this Court endorsed the view that "'[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."'" (*Seel, supra*, 34 Cal.4th at p. 549, citing *Apprendi, supra*, 530 U.S. at p. 493.) Intent, of course, is an element which makes malice-murder a different crime than felony-murder.

In *Burris v. Superior Court* (2005) 34 Cal.4th 1012, this Court held

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[19] Appellant has anticipated respondent's reliance on *Schad v. Arizona* (1991) 501 U.S. 624 (see RB 109-110), and has shown the inapplicability of *Schad* to the instant situation (see AOB 258-261). As the United States Supreme Court has elsewhere explained, a different analysis is used for facts which are not elements in themselves but rather theories of the crime, alternative means by which elements may be established. (See *Richardson v. United States* (1990) 526 U.S. 813, 817 [citing *Schad* as an example of a case involving "means," or "brute facts," rather than elements of the crime].)

In any event, as respondent has accurately noted, the holding in *Schad* upon which respondent relies was a "plurality" opinion (RB 110), and thus not binding precedent. (See, e.g., *United States v. Pink* (1942) 315 U.S. 203, 216; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918; *People v. McKinnon* (1972) 7 Cal.3d 899, 911.)

that under section 1387, the dismissal of a misdemeanor prosecution does not bar a subsequent felony prosecution based on the same criminal act when new evidence comes to light that suggests a crime originally charged as a misdemeanor is in fact graver and should be charged as a felony. (*Id.* at p. 1020.) In reaching this conclusion, this Court compared 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." (*Id.* at p. 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].) The negative implication is obvious: when two crimes have different elements, they are *not* the same offense.[20]

Seel and *Burris* thus reaffirm the fact that because premeditated murder and felony-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 a

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[20] Respondent's insistence that *Apprendi* "did not alter, restructure, or redefine the elements of any state-law crime, or require that the states do so themselves" (RB 111; citation and interior quotation marks omitted) runs afoul of Justice Scalia's pointed warning that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona* (2002) 536 U.S. 584, 610 (conc. opn. of Scalia, J.); see AOB 260.)

premeditated (malice) murder under section 187 or felony-murder under section 189. Appellant's first degree murder conviction and the entire judgment must therefore be reversed.[21]

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[21] As appellant has argued (see AOB 261), and respondent has chosen to ignore, the instant instructional error is structural in nature and therefore reversible per se.

VII

THE ADMISSION OF VICTIM-IMPACT EVIDENCE VIOLATED EX POST FACTO PRINCIPLES AND APPELLANT'S RIGHTS TO DUE PROCESS AND A RELIABLE PENALTY DETERMINATION, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT

In his opening brief, appellant argued that the admission, over defense objection, of the penalty-phase testimony of Denise Huber's parents violated his constitutional privileges against ex post facto laws and his constitutional rights to due process, a fair jury trial and a reliable penalty determination, and requires reversal of the death judgment. (See AOB 262-280.) Respondent disagrees, contending that this victim-impact evidence was properly admitted by the trial court and did not violate ex post facto principles. (See RB 111-123.) Respondent's contentions do not adequately rebut appellant's arguments, either legally or factually.

Initially, respondent asserts that "[n]ot only does the prohibition against the ex post facto application of law not apply to such procedural rules of evidence, but both the United States Supreme Court and this Court have approved the admission of victim impact evidence in capital cases." (RB 111.) The second phrase of this statement by respondent, while accurate, is wholly irrelevant to appellant's instant claim. Appellant has never, either in the trial court or on appeal, asserted that victim-impact evidence is legally inadmissible as a general proposition. Rather, his motion below and his appellate claim have consistently relied upon ex post facto/due process principles in arguing that the evidence in question was erroneously admitted in this particular case because such evidence was inadmissible at the time of appellant's crime. (See AOB 263-269, 279-280.) Thus, the purported "relevance to a jury's penalty determination"

(RB 111) of victim-impact evidence simply begs the real question before this Court.

Similarly, respondent's off-hand, introductory phraseology, "[n]ot only does the prohibition against the ex post facto application of law not apply," begs the questions presented by appellant--i.e., whether this is, in fact, a mere "procedural rule[] of evidence" not subject to the ex post facto prohibition; and whether, as a matter of federal constitutional law and upon application of the holding and analysis of the United States Supreme Court in *Carmell v. Texas* (2000) 529 U.S. 513, the introduction of victim-impact evidence at appellant's penalty trial was precluded. Respondent understandably attempts to treat these issues as not only easily resolved, but closed as a matter of law, but they are not. The United States Supreme Court has not decided the constitutional questions presented herein and, as appellant has previously demonstrated (see AOB 265-269), this Court's holdings and analyses in support of respondent's position are flawed and erroneous in light of *Carmell, supra.* (See also *State v. Metz* (Or. 1999) 986 P.2d 714, 721; AOB 268-269.)

Indeed, respondent's basic legal assumption that ex post facto principles do not apply to such "procedural rules of evidence" (RB 111) is mistaken: "[A] change in the law that alters a substantial right can be *ex post facto* 'even if the statute takes a seemingly procedural form.'" (*Miller v. Florida* (1987) 482 U.S. 423, 433, quoting *Weaver v. Graham* (1981) 450 U.S. 24, 29, fn. 12.) Certainly, the introduction of victim-impact evidence which was inadmissible at the time of the instant crime altered appellant's substantial right not to be retrospectively disadvantaged by the prosecution's use of a brand-new aggravating factor at the penalty phase, thereby undeniably making it easier to obtain a death verdict against him

(see AOB 268-269, and fn. 22, *post*). (See also *Carmell v. Texas, supra*, 529 U.S. at p. 522 [a law that "alters the legal rules of evidence, and receives . . . different testimony, than the law required at the time of the commission of the offense" is an ex post facto law].)

Respondent further cites inapposite cases which deal solely with the retroactivity of changes in the law as applied to cases not yet final on appeal (see RB 113; *People v. Catlin* (2001) 26 Cal.4th 81, 175; *People v. Clair* (1992) 2 Cal.4th 629, 672), and *not* with ex post facto arguments. Likewise, in the two other cases cited by respondent in the same paragraph (see RB 113), this Court observed that "[d]uring the pendency of this appeal," the high court, in *Payne v. Tennessee* (1991) 501 U.S. 808, had largely overruled both *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805), but there was no ex post facto claim raised by the defendants nor addressed by this Court. (See *People v. Thomas* (1992) 2 Cal.4th 489, 535-536; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1062-1063.) Thus, the four cases cited by respondent do not stand for the proposition that *Payne* and *People v. Edwards* (1991) 54 Cal.3d 787 "are applicable to the instant matter" (RB 113) as against an *ex post facto* challenge.[22]

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[22] Even if the four cited cases could somehow be deemed apposite to the ex post facto issue here, a due process violation would be present. Just as application of a holding removing a previously-established defense to conduct preceding that holding "would constitute an unforeseeable retroactive expansion of criminal liability, in violation of due process" (*People v. Sakarias* (2000) 22 Cal.4th 596, 622), so too would application of a holding deeming victim-impact evidence an aggravating factor in the penalty determination (see *People v. Edwards, supra*, 54 Cal.3d at p. 835) where the crime preceded that holding. Such an expansion of criminal

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It is true, however, as noted in appellant's opening brief (see AOB 265), that this Court has expressly rejected the type of ex post facto argument advanced by appellant in this case. But it is most certainly *not* true, as apparently suggested by respondent (see RB 113, 114), that the admissibility of victim-impact evidence was somehow the law or at least "foreseeable" in California at the time of appellant's crime. *People v. Haskett* (1982) 30 Cal.3d 841, 863-864, the case primarily relied upon by respondent for this remarkable proposition, involved a prosecutorial invitation to the jurors to imagine suffering the acts inflicted upon the victim herself. This Court held only that "assessment of the offense from the victim's viewpoint would appear germane to sentencing," and that "the prosecution's invitation to the jurors to project themselves into the role of the surviving victim in this case was insufficiently inflammatory to justify reversal." (*Id.* at p. 864.) Thus, *Haskett* did not involve the kind of victim-impact evidence at issue here, and in such cases as *Payne* and *Edwards*, i.e., the personal characteristics of the victim and the effect or emotional impact of the crime upon the victim's family. And, as respondent is forced to acknowledge, the kind of "victim impact evidence" approved by this Court after *Haskett* was "primarily in the context of the suffering of the murder victim" (RB 113), and *not* of the victim's family. Further, despite respondent's valiant efforts to suggest otherwise, it is beyond cavil that, as of the date of appellant's crime, the kind of victim-impact evidence

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[22](...continued)
liability would also constitute an ex post facto violation under the *second* category of ex post facto laws reiterated by the Supreme Court in *Carmell*. (See *Carmell v. Texas, supra*, 529 U.S. at p. 522 ["Every law that *aggravates* a crime, or makes it greater than it was, when committed." (Original emphasis.)]; RB 114.)

approved in *Payne*, and subsequently in *Edwards*, was categorically proscribed in California, by fiat of both the United States Supreme Court and this Court. (*Booth v. Maryland, supra*, 482 U.S. 496; *People v. Gordon* (1990) 50 Cal.3d 1223, 1266-1267.) To say that it was "foreseeable" that this prohibition on victim-impact evidence would be overturned only a year after *Gordon* was decided--and especially based upon pre-*Payne* and pre-*Gordon* cases that did not even address the type of evidence at issue here and in *Payne* and *Gordon*--stretches that concept beyond any rational interpretation.

Respondent's efforts at demonstrating the inapplicability of *Carmell*'s analysis to appellant's case are unavailing. First of all, respondent mentions only in passing, and without discussion, that "[t]he high Court also noted that changes to rules of evidence are usually evenhanded and may benefit the prosecution or the defense." (RB 115.) As appellant has already discussed (see AOB 267-268), the Supreme Court in *Carmell* emphasized the fundamental unfairness where "the government refuses, after the fact, to play by its own rules, altering them in a way that is *advantageous only to the State*." (529 U.S. at p. 533, emphasis added; see *People v. Sandoval* (2007) 41 Cal.4th 825, 853 ["A law violates the ex post facto clause . . . if it is retroactive . . . and if its application disadvantages the offender."].) That is precisely the situation here, since victim-impact evidence inures to the benefit of the prosecution alone, as "factor (a)" (circumstances of the crime) evidence. (See *People v. Edwards, supra*, 54 Cal.3d at p. 835.) In *Neill v. Gibson* (10th Cir. 2001) 278 F.3d 1044, a case cited by respondent (see RB 116), the federal Court of Appeals expressly recognized this glaring disparity with respect to victim-impact evidence, stating that "Oklahoma's victim impact evidence benefits only the State and

would always be detrimental to the capital defendant" (278 F.3d at p. 1052), and grudgingly acknowledging that "[i]n *Carmell*, the Court did discuss this factor" (*ibid.*). Like respondent here, however, the *Neill* court conveniently avoided any analysis of the obvious logical import of this factor discussed in *Carmell*, and, without any analysis, summarily concluded that "that factor alone is not dispositive." (*Ibid.*)[23]

Instead, respondent tries to equate, in terms of ex post facto analysis, the penalty phase of a capital trial to an ordinary "sentencing proceeding *after* the accused has been convicted." (RB 115; respondent's emphasis.) But, of course, this is not true. The penalty phase of a capital proceeding in California is tried to a jury, generally employing the same rules of evidence used at the guilt phase. The fact that "[v]ictim impact evidence is only admissible at the penalty phase" (RB 115)--and only against the defendant and for the prosecution, and, critically, only *to "aggravate[] a crime"* (*Carmell v. Texas, supra*, 529 U.S. at p. 522; original emphasis)--is, inter alia, precisely why a change in the admissibility of victim-impact evidence *is* "a change in the ordinary rules of evidence" which *does* "implicate the concerns identified in *Carmel* [*sic*] *v. Texas*" (RB 115). So, too, does the fact that, as with the situation in *Carmell* where the statutory amendment authorized conviction solely on the victim's uncorroborated testimony, the change in the law at issue here retroactively permits the jury to "rely *solely*

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[23] In quoting from *Thompson v. Missouri* (1898) 171 U.S. 380 (see RB 116), the *Neill* court also deleted the language which states that a law is not ex post facto if it does not "aggravate any crime theretofore committed." (*Thompson,* 171 U.S. at p. 385; see *Neill*, 278 F.3d at p. 1052.) As appellant has noted, that is precisely what victim-impact evidence does in California, i.e., "aggravate" a crime, under factor (a) of section 190.3. (See *People v. Edwards, supra*, 54 Cal.3d at p. 833.)

on" (*Schroeder v. Tilton* (9th Cir. 2007) 493 F.3d 1083, 1088; original emphasis) victim-impact evidence to return a death verdict. Respondent's contrary contention, therefore, rests on the slender rhetorical thread that this change does not alter the rules of evidence "in order to convict" someone. (RB 115.) This is indisputably true: it alters the rules not to convict the defendant, but instead to *kill* him. To reject an ex post facto claim based on such a distinction--which is qualitatively much *worse* for the defendant (see, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 604 ["'the penalty of death is qualitatively different' from any other sentence"]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn.) ["Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."]--would be not only fundamentally unfair (see *Carmell, supra*, 529 U.S. at p. 533), but simply unconscionable because it would be unfairly used to "deprive a person of his . . . life" (*ibid.*).

Respondent's further contention that "the admission of victim impact evidence did not change the requirements for the evidence necessary for the prosecution to obtain a death sentence" (RB 116) would come as quite a surprise to prosecutors who introduce such evidence in capital cases, and particularly to the prosecutor at appellant's penalty phase. If he did not feel that the victim-impact testimony of Denise Huber's parents was "necessary" to obtain a death sentence against appellant, it must rhetorically be asked why he nevertheless used it. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor. . . ."]; *Ghent v.* Woodford (9th Cir. 2002) 279 F.3d 1121, 1131 [the prosecutor's own "actions demonstrate just how critical the State believed the erroneously admitted evidence to be"]; *People v. Roder* (1983)

33 Cal.3d 491, 505 [evidentiary error not harmless because, inter alia, prosecutor relied on the evidence in his closing argument].) The only alternate rationale for a prosecutor's decision to introduce such evidence at the penalty phase would be to inflame the passions of the jury against the defendant--a clearly irrelevant, improper and unconstitutional purpose and result. (See, e.g., *Payne v. Tennessee, supra*, 501 U.S. at p. 825 ["In the event that [victim-impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."]; *People v. Edwards, supra*, 54 Cal.3d at p. 836 ["irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed" (internal quotation marks omitted)].)

Whether or not inflaming the jury's passions and emotions to obtain a death verdict was the prosecutor's real purpose in introducing the victim-impact testimony here, that was most certainly its actual effect. (See AOB 268-280.) It must not be forgotten that the prosecutor strategically, and cleverly, elicited this extremely powerful testimony by Ione and Dennis Huber at the very end of his case-in-chief at the penalty phase, and immediately before the court recessed the trial for a long weekend, thereby enabling the jurors--many of whom were in tears--to be emotionally affected by it for nearly four full days, at least. If this did not "make it possible for [the] jury to impose a harsher sentence than previously could have been imposed based solely on evidence that was [previously] *not relevant* to the inquiry at all" (*State v. Metz, supra*, 986 P.2d at p. 721; original emphasis), it is difficult to imagine what else could have done so.

Respondent cites *People v. Frazer* (1999) 21 Cal.4th 737, for the

undisputed proposition that this Court "has consistently held that the state constitutional provision (Cal. Const., art. I, § 9) provides the same degree of protection as the federal constitution." (RB 116, citing *Frazer, supra*, 21 Cal.4th at p. 754, fn. 15.) But this citation is hardly helpful to respondent's cause, for two reasons: First, appellant has primarily relied upon the federal ex post facto provision (U.S. Const., art. I, § 9) and the United States Supreme Court's interpretation of that constitutional protection in *Carmell v. Texas, supra*. Second, this Court's interpretation of the state and federal ex post facto provisions "as a singular item" in *Frazer* (21 Cal.4th at p. 754, fn. 15) was expressly overruled by the high court in *Stogner v. California* (2003) 539 U.S. 607, 610-611, 632-633 (see RB 116), which held that application of California law, permitting prosecution for sex-related child abuse within one year of the victim's report to the police, to offenses where prosecution was time-barred at the time of the law's enactment, was unconstitutionally ex post facto. In the process of so holding, the Supreme Court emphasized that the new statute "threatens the kind of harm that, in this Court's view, the *Ex Post Facto* Clause seeks to avoid," i.e., the enactment of statutes with "'manifestly *unjust and oppressive*' retroactive effects" (539 U.S. at p. 611, quoting *Calder v. Bull* (1798) 3 Dall. 386, 391; emphasis in *Stogner*) where "the government has refused 'to play by its own rules'" (539 U.S. at p. 611, quoting *Carmell, supra*, 529 U.S. at p. 633).

The Court in *Stogner* concluded that the new California statute fell within the "second category of *ex post facto* laws" described by Justice Chase in *Calder v. Bull, supra* (539 U.S. at p. 632): *"'Every law that aggravates a crime, or makes it greater than it was, when committed.'"* (*Id.* at p. 612, quoting *Calder, supra*, 3 Dall. at p. 390; emphasis in

Stogner.) As noted above, and as respondent recognizes in acknowledging that victim-impact evidence is admissible in California as *aggravation* "under factor (a) of section 190.3" (RB 117), that is precisely what the altered law regarding admissibility of victim-impact evidence did in appellant's case--as well as also falling within the *fourth* category of ex post facto laws delineated in *Calder, Carmell* and *Stogner* (see AOB 266-269)--and, appellant submits, the high court would so hold as it has in those prior ex post facto cases.

Respondent's lengthy discussions regarding the purported relevance and propriety of victim-impact evidence, both in general and in this particular case (see RB 116-120, 122-123), are unremarkable and irrelevant, because appellant has never argued the inadmissibility of the victim-impact evidence aside from his ex post facto argument.

Respondent's characterization of the victim-impact evidence in this case as "not extraordinary at all" (RB 120) not only is contrary to the record as a whole, but is expressly contradicted by the trial court's own stated conclusions at the penalty-modification hearing. Appellant has previously described in considerable detail just how egregious and harmful was the victim-impact evidence at appellant's penalty trial (see AOB 270-273)--especially when considered in combination with the extraordinary publicity about the case generated by the victim-impact witnesses themselves (see AOB 269-270, 276-278)--as well as the cleverly effective timing of that testimony (see AOB 273), its *actual* emotional impact upon the jurors (see AOB 274), and the prosecutor's skillful emphasis on that testimony in his closing argument to the jury (see AOB 274-276), and appellant will not repeat that discussion here. Appellant has also already quoted the trial court's conclusion, from witnessing the testimony of Denise Huber's

parents, that the victim-impact evidence in this case was not only "substantial," but "extraordinary" (see AOB 278-279)--literally contradicting respondent's completely unfounded "not extraordinary at all" assertion.

If this evidence--conceded by respondent to be at least "powerful" (RB 121)--was not "so inflammatory that it diverted the jury from its proper role" (*ibid.*) when considered in conjunction with all that the jurors already knew from the pretrial publicity about the Hubers' extremely lengthy and agonizing ordeal, it is once again difficult to imagine what would be. Moreover, if, as respondent further contends, "the most powerful aggravating evidence against Famalaro had already been heard by the jury" (*ibid.*), it must again rhetorically be asked why the prosecutor obviously found it necessary to also present this powerful and extraordinary victim-impact evidence. Like the trial court's characterization of this evidence as "extraordinary," the prosecutor's decision to present this evidence in addition to what he had already presented about the crime persuasively refutes respondent's contention that this evidence was somehow relatively de minimis (see RB 121-122). (See *Kyles v. Whitley, supra*, 514 U.S. at p. 444; *Ghent v. Woodford,* supra, 279 F.3d at p. 1131; *People v. Roder, supra*, 33 Cal.3d at p. 505.)

In sum, the prosecutor himself undeniably deemed the victim-impact testimony of Denise Huber's parents to be critical to his attempt to obtain a death verdict, or else he would not have called them both to the witness stand; that evidence was both powerful and extraordinary, and dovetailed with and prejudicially enhanced the empathy and internalization already existing in the trial jurors' hearts and minds; and, whatever relevance it might have possessed as a matter of state statutory law, its admission was

improper and unconstitutional because it constituted an ex post facto violation and resulted in a denial of due process, a fair jury trial, and a reliable penalty determination. The death judgment must therefore be reversed. (See AOB 276-280.)

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VIII

THE TRIAL COURT ERRONEOUSLY, UNCONSTITUTIONALLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM-IMPACT EVIDENCE

In his opening brief, appellant argued that the trial court should have instructed sua sponte on the appropriate consideration and use of the prosecution's victim-impact evidence, and that the failure to do so constituted federal constitutional error which requires reversal of the death judgment. (See AOB 281-286.) Respondent contends that appellant's claim has been waived, and that, in any event, no such instruction was required in light of other instructions delivered by the court at the penalty phase. (See RB 124-129.) Respondent is mistaken on both points.

Respondent initially asserts that "this claim is not properly pending before this Court" because it was not presented to the trial court and because "none of appellant's substantial rights were adversely affected by the standard penalty-phase CALJIC instructions given to the jury." (RB 124.) Respondent essentially turns appellant's argument on its head: appellant has not claimed that his substantial rights were denied by the giving of the instructions cited by respondent, but rather that those instructions did not cover the language of appellant's proposed instruction nor adequately convey to the jury the messages contained therein. (See AOB 284-286.) Thus, appellant's "substantial rights" (Pen. Code, § 1259) were adversely affected by the failure to deliver the limiting instruction proposed by appellant.

Respondent similarly misapprehends the nature of appellant's claim of error in contending that "[w]hen a defendant believes a jury instruction

needs amplification, clarification, or explanation, it is incumbent upon him or her to make such a request." (RB 124.) Appellant's instant claim is not that a given instruction required clarification or should not have been given, but rather that his proposed instruction should have been delivered sua sponte under controlling California case law (see AOB 281-282) and to protect his fundamental constitutional rights (see AOB 282, 285-286). Under section 1259, therefore, appellant's claim of instructional error is properly reviewable by this Court because an appellate court may review "any instruction given . . ., even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

With respect to the substance of appellant's claim, appellant has already addressed most of respondent's contentions--especially by acknowledging this Court's treatment of a similar argument, albeit addressing a different proposed limiting instruction, in *People v. Ochoa* (2001) 26 Cal.4th 398, 445. (See AOB 284-285; RB 128-129.) As appellant has shown, neither CALJIC No. 8.84.1 nor any of the other instructions given at appellant's penalty trial covered any of the points made by the instruction proposed by appellant. (See AOB 284-286.) Specifically, the language of CALJIC No. 2.03 italicized by respondent (see RB 125, fn. 36) says nothing about victim-impact evidence, much less its proper use. Appellant has previously demonstrated why the "bias nor prejudice" admonition in CALJIC No. 8.84.1 which is italicized by respondent (see RB 126, fn. 37) was an inadequate substitute for the admonition contained in appellant's proposed instruction (see AOB 285). The language from CALJIC Nos. 8.85 and 8.88 quoted by respondent (see RB 127) likewise says nothing about victim-impact evidence nor covers any

of the points made by the instruction proposed here. The fact that "the victim impact evidence was presented to the jury for its consideration as an aggravating factor" (RB 127) only supports appellant's argument that the failure to tell the jurors how to properly use such evidence in aggravation would have permitted raw emotions and other improper considerations to taint the jury's penalty determination (see AOB 286).

Although it is true that, during their testimony, neither of Denise Huber's parents *expressly* "voiced an opinion as to what they thought the penalty should be" (RB 128), they certainly did not need to do so since it was so obvious. To any rational juror, the prosecution would not have called them to the stand at the *penalty* phase for any purpose other than to support the prosecution effort to obtain a death verdict--especially since, as respondent contends, "it was perfectly clear that the victim impact evidence was presented to the jury for its consideration as an *aggravating* factor" (RB 127; emphasis added)--nor would they have testified for the prosecution and provided such *aggravating* evidence were they not seeking the death sentence for appellant. Moreover, most, if not all, of the trial jurors already knew of the Hubers' strong desire that appellant be "fried" or otherwise executed, from the massive pretrial publicity in this case. (See, e.g., AOB 163-165, 269-270.) Thus, even if the jurors were not expressly told that they could consider "vengeance and emotion" in their penalty determination (RB 128), such feelings inevitably existed in this case, and the jurors therefore needed to be expressly warned not to employ such factors or feelings if there was to be any chance that their penalty determination not be irrational or arbitrary.

Finally, contrary to respondent's apparent position, the applicable standard of review for the prejudicial effect of the instant instructional error

is not "no reasonable likelihood that the jury misunderstood the proper use of victim impact evidence" (RB 129), but rather the *Chapman* test since appellant's federal constitutional rights were violated (*Chapman v. California* (1967) 386 U.S. 18, 24); or, even if deemed only a violation of appellant's state-law rights, any "reasonable possibility" that the error affected the penalty verdict (*People v. Brown* (1988) 46 Cal.3d 432, 448). (See AOB 286.) In this calculation, given the "extraordinary" victim-impact evidence in this case (27 RT 6811-6812 [trial court's characterization]; see AOB 281-282)--especially when considered in conjunction with all of the victim-impact pretrial and in-trial publicity to which the actual trial jurors were exposed--the instant instructional error cannot be deemed harmless and requires reversal of the death judgment.

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IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A RELIABLE PENALTY DETERMINATION, BY ERRONEOUSLY SUSTAINING THE PROSECUTION OBJECTION TO MITIGATING EVIDENCE RELATING TO THE CHILDHOOD MOLESTATION OF APPELLANT BY HIS OLDER BROTHER

In his opening brief, appellant argued that the trial court erroneously, unconstitutionally and prejudicially excluded appellant's proffered evidence that, shortly after his crime, "Mr. Famalaro in a tearful, emotional state told his sister for the first time that his brother, Warren Famalaro, had molested him when they were children." (See AOB 287-305.) Respondent contends that the court's ruling was correct and, in any event, non-prejudicial, and that appellant's federal constitutional claims were waived. (See RB 129-141.) Respondent fails to adequately support any of these contentions.

Initially, with respect to the assertion that appellant waived his claim of constitutional error, respondent overlooks the fact that it was the *prosecution* that was objecting to the evidence in question; thus, the onus was on the prosecution to enunciate a valid basis for the exclusion of the proffered evidence. When appellant explained the clearly relevant, non-hearsay purpose of the evidence, the prosecution's hearsay objection properly should have been overruled. Furthermore, the evidence was sought to be introduced by appellant at the penalty phase of a capital trial. Therefore, a trial judge would have to be "a dithering nincompoop" (*People v. Guiuan* (1998) 18 Cal.4th 558, 576 (conc. opn. of Kennard, J.), quoting *People v. Long* (1974) 38 Cal.App.3d 680, 689) not to realize that the

defense was offering evidence in mitigation, and that the right to present such mitigating evidence is guaranteed by the Eighth Amendment to the United States Constitution. (See AOB 287-288, 300-301.) The same must be said for the due process implications of appellant's right to rebut and present a defense to the prosecution's case in aggravation at the penalty phase. (See, e.g., *Tennard v. Dretke* (2004) 542 U.S. 274, 284-285; *Gardner v. Florida* (1977) 430 U.S. 349, 362; *People v. Frye* (1998) 18 Cal.4th 894, 1017.)

Moreover, "'[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would determine the claim raised on appeal.'" (*People v. Partida* (2005) 37 Cal.4th 428, 436, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 117; accord, *People v. Bonilla* (2007) 41 Cal.4th 313, 353, fn. 18; see also *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17 ["defendant's new constitutional arguments are not forfeited on appeal" if they "do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequences* of violating the Constitution"; original emphasis]; accord, e.g., *People v. Thornton* (2007) 41 Cal.4th 391, 434, fn. 7; *People v. Hoyos* (2007) 41 Cal.4th 872, 889, fn. 8; *People v. DePriest* (2007) 42 Cal.4th 1, 19, fn. 6; *People v. Tafoya* (2007) 42 Cal.4th 147, 183, fn. 5;

People v. Halvorsen (2007) 42 Cal.4th 379, 408, fn. 7.)[24]

In this regard, it is impossible to understand respondent's characterization of the basis for appellant's proffer as "a somewhat strained line of reasoning." (RB 131.) Back in the guilt phase, the prosecutor had already, in his argument to the jury, introduced his theory that appellant had kept the victim's body as a "trophy," and that the whole thing had been an enjoyable experience for him (see AOB 293, fn. 94); had previously presented evidence in purported support of this theory (see AOB 9-11 [testimony re: search of appellant's house], 18-19 [testimony of Cheryl West], 23-24 [testimony of Nancy Gowan Rommel]; and most assuredly would further argue it to the jury in his penalty-phase summation--as the prosecutor in fact did (see AOB 303-304). Defense counsel's explanation of the relevant, non-hearsay purpose of the proffered evidence, as respondent itself accurately summarizes it, to "rebut the prosecution's argument that Famalaro had kept Denise's body as a trophy and had gone about his life as usual" (RB 131), could not have been clearer. Indeed, if

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[24] In light of these more-recently decided cases, appellant submits that *People v. Smithey* (1999) 20 Cal.4th 936, relied upon by respondent in claiming waiver (see RB 133), is no longer good law. *People v. Morrison* (2004) 34 Cal.4th 698, also cited by respondent (see RB 133), is distinguishable because the defendant in that case "did not advance any of the theories he presents now." (34 Cal.4th at p. 712.)

If appellant's constitutional claims are nevertheless deemed waived, this would constitute a clear case of ineffective assistance of trial counsel, since they could have had no legitimate tactical reason for failing to cite a constitutional basis for the admission of evidence which they sought to introduce. (U.S. Const., 6th & 14th Amends.; see, e.g., *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19.)

there *was* "a somewhat strained line of reasoning" in this case, it was in the prosecution's theory that appellant, an extreme "pack rat" who evidently never threw out *anything*--including thousands of pieces of paper and newspapers, and over 100,000 items altogether (see AOB 10-11)--nevertheless only kept the victim's body and personal belongings as some kind of "trophy." According to the prosecutor, this was the only aggravating factor "required [to vote for death] other than the enormity of this crime." (See AOB 303.)

Thus, respondent's assertion that appellant's proffered evidence was not relevant (see RB 135-137) is impossible to fathom, unless respondent is making the novel and astounding contention that a capital defendant has no right to challenge or rebut prosecution evidence in aggravation. Appellant has previously demonstrated, in considerable detail, the relevance of the proffered evidence in connection with his arguments regarding his Sixth, Eighth and Fourteenth Amendment rights to due process and to present mitigating evidence (see, e.g., AOB 287-288, 294-296, 300, 304-305), and he will not repeat that discussion here. It should be noted, however, that the prosecution below never made a relevance objection to the proffered evidence (see AOB 288, 289), and thus the People have waived the right to raise a lack-of-relevance claim on appeal. (See *People v. Hines* (1997) 15 Cal.4th 997, 1034, fn. 4.)

The same is true of respondent's contention that the proffered evidence was somehow "unreliable." (See RB 138-140.) Since the prosecution below raised only a hearsay objection, the People cannot raise an unreliability claim on appeal. (See *Hines, supra*, 15 Cal.4th at p. 1034, fn. 4.) In any event, this claim is meritless in the extreme. Once again, appellant has previously anticipated respondent's claim, persuasively

showing that appellant did not make his statement to his sister for any self-serving purpose, and that, given the timing and circumstances of the statement, substantial reasons existed to assume the reliability of the proffered evidence. (See AOB 298-299.)[25] Appellant's statement was made in a phone conversation with his own sister, shortly after the crime and years before the victim's body was found and charges were filed against him, in such a highly emotional state that it "disturbed" her, and when there could have been no ulterior motive for making it, such as preparing for litigation or manufacturing evidence.

Respondent's citation of evidence supposedly indicating that appellant's claim of molestation by his brother was untruthful (see RB 138-139) ignores the facts (a) that the evidence of appellant's statement was not offered for its *truth*, and (b) that even if (arguendo) it was hearsay, the existence of evidence questioning its truthfulness would go only to the weight of the evidence and not its admissibility. As the very cases cited by respondent show, "reliability" and "trustworthiness" are determined by the circumstances under which a statement was made, which in turn suggest the true motive for making it (see, e.g., *People v. Guerra* (2006) 37 Cal.4th

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[25] In light of this discussion regarding reliability in his opening brief, it is puzzling that respondent would assert that "such a showing is . . . absent from his argument on appeal." (RB 138.) Respondent's corollary claim that "[n]o showing of the reliability of the contents of Famalaro's hearsay statement was ever made to the trial court" (*ibid.*) is belied by defense counsel's offer of proof regarding the timing and emotional nature of appellant's statement--i.e., the "circumstances indicating its trustworthiness" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1114). Again, moreover, no such showing was required to be made by appellant below or on appeal, since respondent never raised an objection on that ground. (See *People v. Hines, supra*, 15 Cal.4th at p. 1034, fn. 4.)

1067, 1114; *People v. Edwards* (1991) 54 Cal.3d 787, 819-820; RB 138)--and *not* by whether the opposing party has introduced evidence disputing the truth of the statement. If the rule were as respondent would have it, no disputed statement would ever be admissible for any purpose--or at least a defendant's statement would not be admissible if it were disputed by the prosecution's evidence. Such a rule would abridge a defendant's Sixth and Fourteenth Amendment rights to due process, to compulsory process, and to present a defense. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 331 ["[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."].) Here, appellant's proffered statement, far from being "inherently untrustworthy" (*People v. Edwards, supra*, 54 Cal.3d at p. 821), was made under circumstances which rendered it highly trustworthy and reliable.

Respondent's attempt to justify the trial court's ruling on the ground that "[a]s the trial court pointed out, the evidence of his emotional distress, and the timing of same, was already before the jury" (RB 136-137), is undermined by respondent's own subsequent assertion that "[a]nother equally plausible explanation was that Famalaro . . . was upset because Nanci Rommel had just broken their engagement" (RB 139). As appellant has previously noted, this is precisely why, inter alia, the court's rationale for excluding appellant's statement was logically flawed--i.e., without hearing the *content* of appellant's statement, the jury would have had no way of knowing *why* appellant was so emotional during the phone conversation with his sister, and might have concluded that he was so upset because his business was failing or because he had been rejected by yet another girlfriend. (See AOB 293.) Again, it should have been up to the

jury to decide whether appellant was so emotional because he felt remorseful and was attempting to understand how he could have done such a thing, but they were never given that opportunity because of the court's misguided reasoning and ruling. Since this primary rationale for the trial court's decision to exclude the proffered evidence was so illogical, the court indeed "exercised its discretion in an arbitrary, capricious, [and] patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Guerra, supra*, 37 Cal.4th at p. 1113; see RB 137.)

Respondent is reduced to desperately grasping at straws in suggesting that "the conversation may just as easily have occurred prior to the crimes." (RB 139.) Aside from the usual problem for respondent that the prosecutor never suggested any such thing to the trial court, and that therefore such a basis for exclusion of appellant's statement is waived (see *People v. Hines, supra*, 15 Cal.4th at p. 1034, fn. 4), Marion Thobe expressly testified that this phone conversation took place "in June of 1991." (24 RT 6156.) Since the crime occurred on the night and morning of June 2 and June 3, 1991, respondent's claim that "the conversation may just as easily have occurred prior to the crimes" (RB 139) is, as a matter of simple arithmetic logic, manifestly untrue. Again, if the People wished to make such a fanciful claim, they should have done so in the trial court and in front of a jury that had the opportunity to hear and weigh the truth of Marion Thobe's testimony. Instead, respondent would have the jury denied the chance to even hear her testimony regarding the timing *and content* of appellant's statement, and to do so on the basis of a highly speculative and logically-flawed theory raised for the first time on appeal.

It is revealing that the only case cited by appellant which respondent discusses is *People v. Brown* (1994) 8 Cal.4th 746 (see RB 135-136)--a case

not even relied upon by appellant on appeal and specifically acknowledged by defense counsel in the trial court as not directly applicable to her argument (see AOB 290)--while respondent ignores all of the cases cited by appellant in his opening brief which directly support his argument that his statement to his sister was admissible as non-hearsay circumstantial state-of-mind evidence (see AOB 292-293). Thus, respondent's assertion that "Famalaro's reliance upon *Brown* was completely misplaced" (RB 136) is a "red herring." So, too, is respondent's concluding remarkable contention--conjured up for the first time on appeal--that an out-of-court statement by a defendant, even if non-hearsay, should not be admissible at the penalty phase if the defendant does not "take the stand or be subject to cross-examination." (RB 140.) To use respondent's own terminology, "[s]uch is not the state of the law." (*Ibid.*) The case respondent cites for its purported rule was, by its very terms, only discussing "the admission of evidence *lacking in trustworthiness*" (*People v. Jurado* (2006) 38 Cal.4th 72, 130, emphasis added; see RB 139-140)--a factor plainly absent in appellant's case.[26] Moreover, *Jurado* actually assists appellant's argument because, in

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[26] The statements at issue in *Jurado*, and found by this Court to be both hearsay and untrustworthy, were the defendant's statements made during a videotaped interview with the police in which he asserted and described his own feelings and other mental states. Such statements, which were made "when he had a compelling motive to minimize his culpability for the murder and to play on the sympathies of his interrogators, indicated a lack of trustworthiness." (38 Cal.4th at pp. 129-130.) The fact that the defendant in *Jurado* "made his statements during a postarrest police interrogation" (*id.* at p. 130) is a far cry from the instant situation, where the defendant made his statement during a phone conversation with his sister at a time when no one other than the defendant knew or suspected that he had killed Denise Huber, and under circumstances which did not even remotely

(continued...)

that case, this Court held that the defendant's emotional displays while being interrogated by the police were non-assertive conduct and therefore not hearsay. (38 Cal.4th at p. 129.)

Finally, respondent contends that appellant was not prejudiced by the exclusion of evidence of his statement to his sister, even if it was error of constitutional magnitude. (See RB 140-141.) However, it is simply not true that "[t]he admission of exactly what it was that he told Marion he was upset about would not have added to the information heard by the jury" (RB 140); they heard nothing about the reason for his highly emotional state and, therefore, could draw no inference that, as defense counsel cogently put it, "he realizes he has committed this horrible act, and he is trying to get in touch with what would cause him to do that" (see AOB 291). Despite respondent's effort to paint evidence of appellant's remorsefulness as insignificant (see RB 140), obviously such a factor can constitute powerful mitigating evidence and give a juror a reason to spare the defendant's life. (See, e.g., *Brown v. Payton* (2005) 544 U.S. 133, 142-143 ["[R]emorse . . . is something commonly thought to lessen or excuse a defendant's culpability."]; *People v. Ghent* (1987) 43 Cal.3d 739, 771 ["The concept of remorse for past offenses sometimes warranting less severe punishment or condemnation is universal."]; see also *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 930 ["Heinous crimes do not make mitigating evidence irrelevant."].)

Furthermore, even if such a consideration as the defendant's remorse could somehow be deemed unimportant in the abstract, here the prosecutor

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[26](...continued)
suggest a motive to fabricate.

in his closing argument to the jury emphasized appellant's supposed lack of remorse, as evidenced by appellant keeping the victim's body as "a trophy" "to remember the good times." (See AOB 303-304.) Preventing appellant from forestalling and rebutting that argument with evidence demonstrating or even suggesting that the opposite was true was devastating to his chances of avoiding a death verdict. (See AOB 300-305; *State v. Northcutt* (S.C. 2007) 641 S.E.2d 873, 880 [trial court erroneously excluded evidence of defendant's letter expressing remorse, received nine days following the murder, to "correct the false impression the State conveyed to the jury" by presenting evidence that defendant never expressed remorse for his actions; error deemed harmless because there was other evidence of defendant's remorse].) The jury was able to hear the facts of the crime and the victim-impact evidence, but nothing about appellant's remorse and attempts to come to grips with what he had done. This improperly gave the jury a one-sided view of the evidence, was fundamentally unfair and, most importantly of all, denied appellant his right to present critical mitigating evidence at his penalty trial. Such an error is reversible per se as to the death sentence (see AOB 301 and cases cited); and, based upon the entire record in this case, reversal is also required under the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24; see AOB 301-304).

Appellant's death judgment must therefore be reversed.

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THE DELIVERY OF CALJIC NO. 2.27 AT THE PENALTY PHASE IMPERMISSIBLY AND UNCONSTITUTIONALLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT AS TO THE ALLEGED FACTOR (B) CRIMINALITY

In his opening brief, appellant argued that instructing his penalty jury with CALJIC No. 2.27 prejudicially violated his due process rights by permitting proof of the alleged "factor (b)" crimes based on a mere "belief" that a single witness was telling the truth, rather than upon the requisite proof beyond a reasonable doubt. (See AOB 306-308.) Respondent mistakenly contends that appellant's claim of error was both waived and meritless. (See RB 141-145.)

Respondent erroneously asserts that appellant "invited" any error because his counsel expressly requested that CALJIC No. 2.27 be given. (See RB 141-143.) Respondent's contention ignores Penal Code section 1259, which "permits appellate review to the extent any erroneous instruction 'affected [the defendant's] substantial rights'; thus, to the extent any claims of instructional error are meritorious and contributed to [the defendant's] . . . death sentence, they are reviewable." (*People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 247.) Moreover, there was no invited error "because important rights of the accused are at stake" and there is absolutely nothing in the record to indicate that defense counsel "acted for tactical reasons" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057) in requesting CALJIC No. 2.27. (See also *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267, fn. 3 ["Based on the record before us we cannot find or imply a clear tactical

purpose to counsel's actions which would amount to invited error."].[27]

In any event, as respondent notes, "this Court has repeatedly held that CALJIC No. 2.27 does not lessen the prosecution's burden when given in conjunction with other standard jury instructions on the burden of proof." (RB 141.) Thus, it is likely that defense counsel "merely acquiesced in" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 508) this Court's opinions approving the delivery of CALJIC No. 2.27 (see, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 941), since the trial courts are bound by principles of stare decisis to follow the law as declared by courts of superior jurisdiction (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Moreover, defense counsel could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to receive an instruction which improperly undermined and diluted the prosecution's burden of proof regarding an alleged aggravating factor and thereby make a death verdict more likely. Thus, even if the instant claim of error is deemed "invited," it would have constituted ineffective assistance of counsel to request such an instruction. (U.S. Const., 6th & 14th Amends.; see

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[27] Although cited by respondent (see RB 143), *People v. Dunkle* (2005) 36 Cal.4th 861 actually assists appellant because it *rejected* the People's waiver claim: "On the record before us, the invited error doctrine is inapplicable, as it does not appear trial counsel both '"intentionally caused the trial court to err"' and clearly did so for tactical reasons." (*Id.* at p. 924; citations omitted.) *People v. Davis* (2005) 36 Cal.4th 510, also cited by respondent (see RB 143), is inapposite because there the appellant complained that the instruction in question "was defective in several respects" (36 Cal.4th at p. 539), not, as here, that the instruction should not have been given at all and that its delivery violated the defendant's fundamental constitutional rights (see § 1259).

Massaro v. United States (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

On the merits, respondent makes no substantive contentions which have not already been addressed. (See RB 143-145.) Appellant would only reiterate his argument that although, as he recognized, the penalty jury was also given reasonable-doubt instructions regarding proof of alleged prior crimes, there is no way of knowing which of the contradictory instructions any of the jurors applied in deciding whether appellant committed such "factor (b)" criminality. (See AOB 306-307.) "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jury applied in reaching their verdict." (*Francis v. Franklin* (1985) 471 U.S. 307, 322; see also *Sarausad v. Porter* (9th Cir. 2007) 479 F.3d 671, 692 [reversal of convictions because "the jury instructions were, at the very least, ambiguous on the question of whether [defendant] could be convicted of murder and attempted murder on a theory of accomplice liability without proof beyond a reasonable doubt that [defendant] knew that [the perpetrator] intended to commit murder"].)[28]

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[28] According to respondent, appellant "ignores all of the single-witness evidence presented on his behalf during the penalty phase of the trial." (RB 144, fn. 40.) However, appellant did not have to prove the truth of the testimony of the cited witnesses beyond a reasonable doubt; there is no penalty-phase burden of proof beyond a reasonable doubt under present California law except for "factor (b)" evidence presented by the prosecution. (See AOB 348 & fn. 116.) Imposing any burden of proof on, or other such restriction on the jury's consideration of, the defendant's mitigating evidence would, of course, violate the Eighth Amendment. (See, (continued...)

For the reasons expressed in appellant's opening brief, the death judgment must be reversed.

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[28](...continued)
e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 375.) Clearly, if a juror simply "believe[s]" (CALJIC No. 2.27) the truth of any mitigating evidence presented by the defendant, it can consider it in making its penalty determination. The same is not true of the prosecution's "factor (b)" aggravating evidence.

XI

THE ADMISSION AND USE OF EVIDENCE OF UNADJUDICATED CRIMINAL ACTIVITY VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THE DEATH JUDGMENT

In his opening brief, appellant argued that the admission and use of "factor (b)" evidence at the penalty phase violated his fundamental constitutional rights, in numerous aspects. (See AOB 309-319.) Although appellant acknowledged in his opening brief that this Court has previously rejected similar claims, respondent merely cites this Court's prior cases in contending that these claims are meritless. (See RB 145-152.) Thus, respondent fails to rebut appellant's arguments and offers no basis, aside from stare decisis, for continuing to follow fundamentally-flawed precedents.[29] (See *Lawrence v. Texas* (2003) 539 U.S. 558, 577 ["The doctrine of *stare decisis* . . . is not . . . an inexorable command."]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [although doctrine of stare decisis serves important values, it "should not shield court-created error from

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[29] Respondent contends that the United States Supreme Court's recent decision and opinion in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] "is essentially an extension of the principles set forth in" the *Apprendi* line of cases (RB 150; see AOB 315-316) and "does not compel a different result than this Court has previously reached in interpreting these same claims" (RB 150). Appellant submits, to the contrary, that *Cunningham* further buttresses appellant's argument that "[t]he application of the *Apprendi* line of cases to California's capital-sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury" (AOB 315). (See also *United States v. Booker* (2005) 543 U.S. 220; RB 148, 149, 150.)

correction"].)

Respondent additionally contends that all of appellant's claims have been waived because "none of these claims were presented to the trial court." (RB 145.) However, the fact that, as respondent contends, these claims have previously and consistently been decided adversely to appellant's position establishes that it would have been futile to object because the trial courts are bound by principles of stare decisis to follow the law as declared by courts of superior jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see, e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 ["An objection in the trial court is not required if it would have been futile."]; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6 ["here the trial court was bound by prior appellate decisions . . . and it would therefore have been pointless to raise the issue there"]; *People v. Turner* (1990) 50 Cal.3d 668, 704, fn. 18 [no waiver for failure to object where "[t]hese challenges had consistently been rebuffed"]; *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1 ["clearly it was pointless for defendant to ask either the trial court or appellate court to overrule one of our decisions"]; *In re Gladys R.* (1970) 1 Cal.3d 855, 861 ["we cannot expect an attorney to anticipate that an appellate court will later interpret [the law] in a manner contrary to the apparently prevalent contemporaneous interpretation"].)[30]

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[30] In any event, even were it assumed that defense counsel should have anticipated a favorable ruling had they objected to the "factor (b)" evidence, or at least should not have considered such objection futile, they could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to hear and use such prejudicial evidence in considering appellant's penalty. Thus, it would have (continued...)

Finally, respondent contends that appellant's argument regarding the expiration of the statute of limitations on the alleged "factor (b)" criminality should be rejected because "Famalaro had no difficultly confronting or cross-examining the two witnesses who provided factor (b) evidence." (RB 151.) However, "[i]t has long been established that the statute of limitations is jurisdictional in nature." (*In re DeMillo* (1975) 14 Cal.3d 598, 601, citing *People v. McGee* (1934) 1 Cal.2d 611, 613.) Thus, "the government cannot overcome the bar of the statute of limitations by demonstrating a lack of prejudice to the defendant." (*People v. Zamora* (1976) 18 Cal.3d 538, 547.) As appellant noted in his opening brief (see AOB 317, 318), "there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced" if the limitation period is exceeded. (*United States v. Marion* (1971) 404 U.S. 307, 322; accord, *Stogner v. California* (2003) 539 U.S. 607, 616 ["conclusive presumption"].)

For all of the reasons delineated in the opening brief, the jury's use of the evidence of unadjudicated criminal activity against appellant requires that his death judgment be reversed.

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[30](...continued)
constituted ineffective assistance of counsel not to object. (U.S. Const., 6th & 14th Amends.; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

XII

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

In his opening brief, appellant argued that the jury instructions regarding the statutory factors to be considered in determining penalty rendered appellant's death sentence unconstitutional, for a number of reasons. (See AOB 320-331.) Respondent once again erroneously contends that appellant's claims are waived, and inconsistently relies upon previous decisions of this Court rejecting similar challenges. (See RB 153-158.)

As usual, respondent's assertions that appellant's claims have been waived for failure to object below (see RB 153-157) are unpersuasive. First of all, as appellant has previously noted, he did request an instruction informing the jurors that factors (d), (h) and (k) could only be mitigating, and that the absence of evidence under these factors could not be used in aggravation, but those requests were denied. (See AOB 323, fn. 107.) Second, as to all of appellant's other claims of instructional error, appellant argues *not* that there should have been "an amplication or modification" (RB 154), but that the instructions should not have been given at all and were unconstitutional because they directly permitted the jury to utilize improper sentencing considerations to reach a death judgment. His claims, therefore, are "not of the type that must be preserved by objection." (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7, citing Pen. Code, § 1259 ["The appellate court may . . . review any instruction given, even though no objection was made thereto in the lower court, if the substantial

rights of the defendant were affected thereby."].) Third, the very fact that, as respondent contends, these claims have "repeatedly" and "consistently" (RB 157-158) been decided adversely to appellant's position again establishes that it would have been futile to object because the trial courts are bound by principles of stare decisis to follow the law as declared by courts of superior jurisdiction. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; Auto *Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see Argument XI, p. 82, *ante*, and cases there cited.)[31]

On the merits of appellant's claims, respondent fails to rebut appellant's arguments and offers no basis, aside from stare decisis, for continuing to follow precedents that are fundamentally flawed. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 577 ["The doctrine of *stare decisis* . . . is not . . . an inexorable command."]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [although doctrine of stare decisis serves important values, it "should not shield court-created error from correction"].) For all of the reasons delineated in appellant's opening brief, appellant respectfully asks this Court to reconsider its prior rulings in this area, hold that the instructions regarding the statutory factors to be considered in determining penalty violated appellant's fundamental constitutional rights, and reverse the death judgment.

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[31] In any event, even were it assumed that defense counsel should have anticipated a favorable ruling had they objected to the instructions in question, or at least should not have considered such objections futile, they could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to receive penalty-phase instructions which violated his fundamental constitutional rights. Thus, it would have constituted ineffective assistance of counsel not to object. (U.S. Const., 6th & 14th Amends.; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

XIII

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION, AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL OF THE DEATH JUDGMENT

In his opening brief, appellant argued that the modified version of CALJIC No. 8.88 which was delivered to appellant's penalty jury was constitutionally flawed in numerous respects. (See AOB 332-346.) Respondent disagrees, relying entirely on decisions of this Court rejecting arguments similar to appellant's herein. (See RB 158-162.) For all of the reasons delineated in appellant's opening brief, appellant respectfully asks this Court to reconsider its prior rulings in this area, hold that instructing the jury pursuant to CALJIC No. 8.88 violated appellant's fundamental constitutional rights, and reverse the death judgment.[32]

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[32] Contrary to respondent's contentions (see RB 159-160), appellant did not waive the instant claims of error in any respect. Since appellant challenges the instruction as legally erroneous and unconstitutional, and because it undeniably affected appellant's "substantial rights" (§ 1259), appellant did not have to object or request any "amplifications or modifications" (RB 160) below. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) Moreover, a defendant is not required to make a timely objection if such an objection would be futile (e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; *People v. Hill* (1998) 17 Cal.4th 800, 830); since, as respondent contends, this Court has "consistently rejected" (RB 160) such challenges to CALJIC No. 8.88, "an objection at the trial level under the existing rulings would have been useless and unavailing" (*People v. Morse* (1964) 60 Cal.2d 631, 653; see also *People v. Sandoval, supra*, 41 Cal.4th at p. 837, fn. 4; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; Arg. XI, p. 82, *ante*, and cases there cited). Thus, the fact that appellant "never presented

(continued...)

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[32](...continued)
them to the trial court" (RB 159) does not waive his claims of instructional error.

In any event, even were it assumed that defense counsel should have anticipated a favorable ruling had they objected to the instructions in question, or at least should not have considered such objections futile, they could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19) for permitting the jury to receive penalty-phase instructions which violated his fundamental constitutional rights. Thus, it would have constituted ineffective assistance of counsel not to object. (U.S. Const., 6th & 14th Amends.; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

XIV

THE CALIFORNIA DEATH-PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

In his opening brief, appellant made a multifaceted attack on the constitutionality of this state's capital-sentencing scheme. (See AOB 347-377.) Respondent answers appellant's 31-page dissection of the faulty California jurisprudence in this area with a pro-forma citation of this Court's rulings disagreeing with many of appellant's arguments. (See RB 162-165.)

Appellant has previously acknowledged this Court's rejection of some or all of appellant's various claims of unconstitutionality of California's death-penalty statute and jury instructions. (See, e.g., AOB 347, 348, 352, 354, 365, 366-367, 371, 372, fn. 126, 377.) Since respondent has not presented any substantive arguments in support of the constitutionality of the statute and instructions, or in contradiction to the arguments contained in the opening brief, no further reply by appellant is required except to request that this Court reconsider its prior rulings in this area and, accordingly, reverse his death judgment.[33]

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[33] Appellant would only add, as to all of his arguments regarding the requirement of a standard of proof beyond a reasonable doubt applying to any findings a jury is required to make as a prerequisite to returning a death-verdict (see AOB 315-316, 348-360), and as to all of his arguments regarding the requirement of jury unanimity in arriving at its penalty determination (see AOB 315-316, 371-376), that appellant's position is further buttressed by the United States Supreme Court's recent opinion and decision in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (see RB 164). (See also *United States v. Booker* (2005) 534 U.S. 220.)

XV

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argued in his opening brief that California's failure to conduct intercase proportionality review of death sentences violated the Eighth and Fourteenth Amendments. (See AOB 378-381.) Respondent counters by citing cases from this Court denying this very claim. (See RB 165.) Appellant has acknowledged this case authority and has further acknowledged that such cases are in turn based upon the United States Supreme Court's holding in *Pulley v. Harris* (1984) 465 U.S. 37. (See AOB 379.) However, *Pulley* was decided 23 years ago. As appellant demonstrated in his opening brief (see AOB 380-381), since *Pulley* was decided, the California sentencing scheme has become one that demands proportionality review in order to ensure its constitutional application. This Court should revisit this issue and, accordingly, reverse appellant's death judgment.

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XVI

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

In his opening brief, appellant argued that capital punishment violates the Eighth Amendment's prohibition because it is contrary to international norms of human decency. Appellant further argued that, even if capital punishment itself does not violate the Eighth Amendment, using it as a regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does. (See AOB 382-387.) Respondent's opposition to appellant's claims primarily rests upon the ground that this Court has previously rejected such arguments. (See RB 166.) Appellant is well aware of this Court's decisions in this area, but respectfully requests this Court to reconsider and disapprove them.

Although respondent also contends that the death judgment in the instant case was not "applied in a freakish manner . . . [g]iven the facts and circumstances of Famalaro's crimes" (RB 166), respondent has not addressed the substance of appellant's argument that the use of death as a regular punishment violates international law as well as the Eighth and Fourteenth Amendments. Appellant asks this Court to reconsider its position on this issue and, accordingly, to reverse the death judgment.

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XVII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

In his opening brief, appellant argued that even if (arguendo) none of the individual errors identified by appellant is deemed prejudicial in itself, the cumulative effect of such errors requires reversal of the death judgment. (See AOB 388-390.) Since respondent simply reiterates its contentions that "the trial court did not commit any errors, so there were no errors to accumulate," and that appellant was not denied due process or a fair trial even if any such errors were committed (see RB 167), no reply is warranted and appellant herein reasserts his arguments in support of his cumulative-error claim. Because of the cumulative effect of all of the errors discussed in Appellant's Opening Brief and in this brief, *ante*, the judgments of conviction and death must be reversed.

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CONCLUSION

For the foregoing reasons, as well as those stated in Appellant's Opening Brief, the entire judgment must be reversed.

DATED: December 18, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

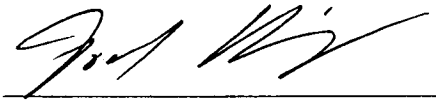
JOEL KIRSHENBAUM
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1)(B))

I, JOEL KIRSHENBAUM, am the Deputy State Public Defender assigned to represent appellant JOHN JOSEPH FAMALARO 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 25,139 words in length.

DATED: December 18, 2007



JOEL KIRSHENBAUM

Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Famalaro No. S064306

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

APPELLANT'S REPLY BRIEF

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

MARILYN L. GEORGE
Deputy Attorney General
P.O. Box 85266
110 W. "A" Street, Ste. 1100
San Diego, CA 92186-5266

Orange County Clerk
(for Delivery to the Trial Judge)
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

John Joseph Famalaro
(Appellant)

Each said envelope was then, December 18, 2007, 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 of perjury that the foregoing is true and correct.

Executed on December 18, 2007, at San Francisco, California.

DECLARANT