No. S074804

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CISCO HARTSCH, Defendant and Appellant.	(Riverside Co. Super. Ct. No. CR-63743)

APPELLANT'S REPLY BRIEF

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

HONORABLE W. CHARLES MORGAN, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INTRODUCTION

In this brief, appellant does not reply to those of respondent's contentions that are adequately addressed in his opening brief. The failure to reply to any particular contention or allegation made by respondent, or to reassert any particular point made in appellant's 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 his view that the issue has been adequately presented and the positions of the parties fully joined.

In particular, as to many of the separate claims raised in appellant's brief respondent merely cites this Court's prior cases in contending that those claims are meritless. (RB 133-136 [AOB Arg. XII]; 147-148 [Arg.

XVI]; 148-149 [Arg. XVII], 151-152 [Arg. XVIII], 154-156 [Arg. XIX].) Thus, respondent has not rebutted appellant's arguments, and has offered no basis, aside from *stare* decisis, for continuing to follow fundamentally-flawed precedents. (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 [doctrine of *stare* decisis serves important values, but "should not shield court-created error from correction"].) Accordingly, as to those claims (Nos. XII, XVI, XVII, XVIII, and XIX), no further response is provided.

Additionally, no further response is required regarding the claims that the judgment and sentence should be reversed because appellant was (1) tried jointly on unrelated murder charges (Arg. No. III), and (2) deprived of a fair trial by the cumulative effect of the errors at the guilt and penalty phase proceedings. (Args. VI and XXI.) Accordingly, the argument numbers in this brief do not correspond to those in either appellant's or respondent's brief.

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ARGUMENT

I

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN FINDING THAT HE DID NOT ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION UNDER *BATSON*

Appellant has argued that the trial court committed reversible error in overruling his *Batson*[1] challenge on the basis that he had not established a prima facie case that the prosecutor had exercised peremptory challenges in a discriminatory manner. (AOB Arg. I, 30-57.) Appellant's basic argument is that the relevant facts about jury selection at the time his *Batson* challenge was denied – that the prosecutor had struck 71 percent of the African-Americans called for voir dire (5 of 7), but only 27 percent of the Caucasians (9 of 33), without explaining the challenged strikes against African-Americans (*id.* at pp. 30-32) – were more than adequate to establish a "reasonable inference" of discrimination under *Johnson v. California* (2005) 545 U.S. 162. However, in anticipation of the arguments respondent now makes, appellant also argued that: (1) the entire record of jury selection establishes that a prima facie case was established, including the fact that the prosecutor used two of the four peremptory challenges he exercised *after* the *Batson* challenge was denied to strike yet more African-Americans (AOB 49), and (2) that "[n]othing in the questionnaire or voir dire responses of the five African-American prospective jurors at issue 'rebut[ted] the inference of discriminatory purpose based on statistical disparity' that arose in this case." (*Id.* at p. 46, quoting *Williams v. Runnels*

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79.

(9th Cir. 2000) 432 F.3d 1102, 1108.)

As anticipated, respondent now asserts that "a review of the record . . . does not support an inference the prospective [jurors in question] were excused on the basis of race," because it "demonstrates permissible or neutral explanations" for excusing them. (RB 38, 51.) Respondent bases that assertion on the following contentions: (1) in *Batson* cases, like this one, where the claim on appeal is that the trial court improperly found that no prima facie showing was made ("first-stage" claims), the Court must "review the entire record of voir dire to determine whether it supports the trial court's determination" (*id.* at p. 38); (2) no inference of discrimination was raised below, primarily because the prosecutor had only struck "five of the ten African-Americans available to sit as jurors" when the *Batson* motion was made, and "half of the African-American potential jurors [] still remain[ed]" in the venire (*id.* at p. 45); (3) the "record of the entire voir dire proceedings" establishes that the prospective jurors at issue "were permissibly challenged and excused" (*ibid.*); and (4), the questionnaire responses of prospective juror Jacqueline Brown "support[] a permissive challenge." (*Ibid.*) Those contentions fail.

The fundamental premise of respondent's argument – that because the trial court probably applied the wrong standard in ruling on appellant's *Batson* challenge, this Court should scour the record for *any* conjectural grounds upon which the prosecutor *might* have challenged the prospective jurors in question – violates both the letter and the spirit of the United States Supreme Court's decisions in this area.[2] *Johnson v. California*

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[2] In fact, it is almost certain that the trial court applied an improperly stringent standard in ruling on that motion. (AOB 53-56.)

(2005) 545 U.S. 162, 172, directed that first-stage *Batson* claims must be resolved in a manner that "produce[s] actual answers to suspicions and inferences" of discrimination, and avoids "needless and imperfect speculation." (545 U.S. at p. 172.) Under *Batson* and *Johnson*, an appellate court reviewing a first-stage *Batson* claim cannot simply speculate about possible reasons for the challenged strikes (*Johnson v. California*, *supra*, 545 U.S. at p. 173); instead, the court must *only* consider (1) the movant's showing in support of the claim, (2) the prosecutor's response to that showing and/or proffered explanations for the strikes, and (3) any explanation by the trial court of its ruling. For a reviewing court to consider other facts, and particularly to consider completely speculative explanations for the challenged strikes like the ones proffered by respondent, would contradict *Batson* and *Johnson*, and make it effectively impossible to appeal a first-stage *Batson* ruling.[3]

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[3] Appellant recognizes that since *Johnson v. California* was decided this Court has repeatedly decided first-stage *Batson* claims by performing precisely that type of scouring of the record for reasons to support the trial court's ruling. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 349 [although the Court found it "virtually impossible to glean . . . any clues" about prospective juror's opinions from her voir dire or questionnaire, it accepted respondent's argument that she "could" have been struck because fact that murder was for financial gain would not be important to her]; *People v. Hoyos* (2007) 41 Cal.4th 872, 902 [Hispanic juror might have been struck because she had limited language skills]; *People v. Avila* (2006) 38 Cal.4th 491, 554-555 [African-American juror might have been struck because she had "mixed feelings" about prior jury service, and/or because her brother was convicted of manslaughter]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1102-1103 [African-American juror might have been struck because she believed her cousin was treated unfairly by the police, or because she had "strong opinions"].) However, appellant contends that the Court should not continue that practice, because it is clearly inconsistent

(continued...)

Moreover, even assuming arguendo that the Court's preferred method for reviewing first-stage *Batson* claims is permissible in light of *Batson* and *Johnson*, such a speculative scouring of the record would not negate the clear prima facie showing here because no adequate, non-discriminatory reasons exist for the challenged strikes; indeed, respondent has not conjectured even a minimally plausible reason for the strike against Ms. Brown. (See RB 47-48.) Because the lack of any plausible, non-discriminatory reason for even one challenge, by itself, requires reversal of the entire judgment, reversal is required here on that ground alone. (*People v. Montiel* (1993) 5 Cal.4th 877, 909 [*Batson* violation can be based on improper exclusion of "only one of several members" of cognizable group]; *People v. Motton* (1985) 39 Cal.3d 596, 608 [*Batson* violation reversible per se].)

The remainder of respondent's contentions also lack merit. Thus, respondent's assertion that no "inference of purposeful discrimination" existed because the prosecutor had only struck "five of the *ten* African-Americans *available* to sit as jurors" (RB 45, italics added) is misleading, since only seven of those ten African-American prospective jurors *had been called for voir dire* when the *Batson* challenge was made, and the prosecutor later *did* strike two of the other three African-Americans. (AOB 30, 33; 7 RT 1256-1258.) The relevant facts are those in appellant's brief – the prosecutor had struck five of the seven African-Americans *called for voir dire* when the motion was made. (AOB 32; 7 RT 1188-1189.) The fact that the prosecutor had only struck five of the ten African-Americans in the venire when the *Batson* challenge was made was irrelevant to the

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[3](...continued)
with both *Batson* and *Johnson*.

question of whether appellant had made a prima facie showing, because the trial court did not know, and could not have known, whether the prosecutor *would* strike any of the other five African-Americans. (Cf. *People v. Gray* (2005) 37 Cal.4th 168, 188 [that prosecutor later challenged another African-American juror did not support prima facie case as to earlier challenge, because "[t]he trial court did not know whether the prosecutor would remove additional racial minorities from the jury"].) Respondent's other arguments are also unsupported by the record, as demonstrated below, and reversal is clearly required.

A. Respondent Has Asked The Court To Apply An Unconstitutional Mode of Review To Appellant's First-Stage *Batson* Claim – Scouring the Record for Hypothetical Reasons That "Might" Explain the Challenged Strikes

1. The United States Supreme Court has imposed only a minimal burden on the movant in first-stage *Batson* cases

Batson held that to establish a prima facie case of discrimination in jury selection the movant must "*raise an inference* that the prosecutor [used peremptory challenges] to exclude the veniremen from the petit jury on account of their race." (*Batson v. Kentucky, supra*, 476 U.S. at p. 96, italics added.) In setting that threshold burden, *Batson* discarded the "crippling burden of proof" that had been imposed by *Swain v. Alabama* (1965) 380 U.S. 202, 223, on defendants alleging constitutional violations based on the exclusion of prospective jurors on racial grounds. In its place, *Batson* adopted the now familiar three-step process for evaluating such alleged violations. (476 U.S. at p. 96.) That process is as follows:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an

> inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." [Citations.]

(*Williams v. Runnels*, *supra*, 432 F.3d at p. 1106, citing *Johnson v. California*, *supra*, 545 U.S. at p. 168.)

Johnson v. California reaffirmed that three-step process and held that California courts were applying an unduly stringent standard of review to first-stage *Batson* claims. (545 U.S. at pp. 169-170.) Further, *Johnson* held that because the "*Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process," it is improper to "rely[] on judicial speculation" or "engag[e] in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." (*Id.* at pp. 172-173.)

At the first stage of the *Batson* analysis the trial court must consider "all relevant circumstances" that might raise an inference of discrimination, of which *Batson* provided a non-exclusive, illustrative list. (*Batson*, *supra*, 476 U.S. at pp. 96-97; *Johnson*, *supra*, 545 U.S. at p. 169.) Those circumstances include: (1) "a 'pattern' of strikes against black jurors;" (2) "questions and statements" by the prosecutor during voir dire or in exercising his challenges; and (3) the indisputable fact "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (*Batson*, *supra*, 476 U.S. at pp. 96-97; *Johnson*, *supra*, 545 U.S. at p. 169.).

Johnson made plain that *Batson* did not intend the first-stage inquiry

to "be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, *some of which are impossible for the defendant to know with certainty* – that the challenge was more likely than not the product of purposeful discrimination. . . . [A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference" of discrimination. (*Johnson*, *supra*, 545 U.S. at p. 170, italics added.)[4]

Thus, at the first stage, *Batson* only requires the defendant to show that an "inference" of discrimination exists based on a consideration of all the relevant *known* facts and circumstances surrounding the strikes. Because *Batson*'s purpose was to relieve defendants of the "crippling" burden of proof imposed by *Swain*, which had effectively immunized prosecutorial peremptory challenges from judicial scrutiny, the Court *lowered* the threshold showing required in such cases by adopting a framework of analysis intended to facilitate an inquiry into the question of discriminatory intent.

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[4] See, e.g., *Jones v. Plaster* (4th Cir. 1995) 57 F.3d 417, 421, quoting *United State Postal Service v. Aikens* (1983) 460 U.S. 711, 714 (The "sole purpose" of the *Batson* analysis "is to help courts and parties answer, 'not unnecessarily evade[,] the ultimate question of discrimination *vel non*."); *Durant v. Strack* (E.D.N.Y. 2001) 151 F.Supp.2d 226, 237 ("As the Supreme Court has acknowledged, the principle announced in *Aikens* applies with equal force in the *Batson* context. . . . The primary purpose of the *Batson* doctrine is to prevent invidious discrimination in jury selection and resulting jury verdicts, and thus the crux of the issue in *Batson* claims . . . is whether a discriminatory motive exists. . . . The sole purpose of the burden-shifting procedure is to help the fact-finder answer the ultimate question of discrimination.")

2. This Court's decisions that involve a scouring of the entire record for reasons supporting the challenged strikes misapply *Batson* and *Johnson*

As demonstrated above, the United States Supreme Court has made clear that: (1) *Batson* claimants are only required to make a minimal showing at the first stage; and (2) appellate courts should not speculate about possible reasons for challenged strikes in deciding first-stage claims. Yet, notwithstanding that clear direction by the High Court, respondent relies upon a series of decisions by this Court since *Johnson v. California*, *supra*, 545 U.S. 162, was decided that apply a clearly improper mode of review to first-stage *Batson* cases – that of searching through the record for facts that *might* have motivated the prosecutor to strike the jurors in question. (RB 37-38, citing *People v. Avila* (2006) 38 Cal.4th 486, 553-555, *People v. Cornwell* (2005) 37 Cal.4th 50, 67, and *People v. Gray, supra*, 37 Cal.4th at p. 186.) But in light of *Batson* and *Johnson*, the mode of review this Court used in *Avila*, *Cornwell* and *Gray* is clearly improper and contrary to established constitutional law. This Court must reject respondent's invitation to simply speculate about *possible* reasons for the challenged strikes. (See *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 516 [when prosecutor's "starkly disproportionate use" of strikes "raises suspicions of discrimination that were obvious to the trial judge," under *Batson* and *Johnson* an appellate court should not "speculate as to reasons for" that disproportion, but should rather "simply ask the prosecutor" for his reasons].)

That type of speculation is completely improper at the first-stage of the *Batson* process, and "actual answers to suspicions and inferences" that the prosecutor has engaged in the prejudicial exercise of peremptory

challenges can only be obtained at the *second stage*. (*Johnson*, *supra*, 545 U.S. at pp. 172-173.) Because the prosecution did not proffer reasons for the challenged strikes in this case, it is improper to review the trial court's ruling by speculating about circumstances that may, might or could have motivated those strikes, particularly circumstances to which neither the prosecutor nor the trial court ever referred. (See *United States v. Stephens*, *supra*, 421 F.3d at p. 516 [after *Johnson*, only "very narrow review" is permissible on appeal of "apparent" reasons for challenged strikes; "apparent reasons [are] relevant only insofar as the strikes are so clearly attributable to [those reasons] that there is no longer any suspicion, or inference, of discrimination"].)

This Court has acknowledged that *Johnson v. California* "made clear" that the prima facie case standard set out by *People v. Johnson* "is too demanding for federal constitutional purposes." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1105.) Accordingly, this Court should apply the *Johnson* standard in deciding first-stage *Batson* cases; i.e., it should reverse a ruling that no prima facie case was established where the claimant has "produc[ed] evidence sufficient to permit the trial judge to draw an inference that discrimination [had] occurred." (*Johnson v. California*, *supra*, 545 U.S. at p. 170.) Instead, this Court's decisions have reimposed an unduly "onerous" burden in first-stage *Batson* cases while purporting to apply the "reasonable inference" standard, by affirming first-stage rulings where "the record *suggests* grounds upon which the prosecutor *might reasonably have* challenged the jurors in question.'" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1101, italics added.)[5]

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[5] This Court has also expressed the dubious view that *Johnson*'s

(continued...)

Although respondent claims that a review of the entire record establishes that no prima facie showing was made below (RB 46), it apparently does not contend that the bare facts appellant relied upon in making his *Batson* challenge – that the prosecutor had struck five of the seven African-Americans called for voir dire (AOB 40) – would have been insufficient, standing alone, to support an inference of discrimination. Nor could it make such a contention, since similar statistical showings have repeatedly been found to support an inference of discrimination. (See, e.g., *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 [prima facie case established where prosecution struck five of six African-Americans]; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077-1080 [prima facie case established where prosecution struck five of seven Hispanics]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 813 [prima facie case established where five of nine African-Americans were struck]; *United States v. Alvarado* (2nd Cir. 1991) 923 F.2d 253, 255 [prima facie case established where four of seven African-Americans were struck]; *United States v. Hughes* (8th Cir. 1989) 880 F.2d 101, 103 [prima facie case established

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[5](...continued)
direction that trial courts should not "engag[e] in needless and imperfect speculation" about the prosecutor's reasons only applies to "the third step of the [*Batson*] inquiry, . . ." (*People v. Lancaster* (2007) 41 Cal.4th 50, 76, quoting *Johnson v. California*, *supra*, 545 U.S. at p. 172.) However, *Johnson* does not state that the language at issue only applies at the third stage of the *Batson* inquiry, and "[t]he question before" the High Court in *Johnson* was whether California had imposed an unduly high burden of persuasion at the *first stage*. (545 U.S. at p.168.) Moreover, both of the cases cited in *Johnson* on that point are first-stage cases. (*Id.* at p. 172; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090; *Holloway v. Horn* (3rd Cir. 20004) 355 F.3d 707, 725.) Thus, nothing about *Johnson v. California* – not its facts, its express language, or the cases it relies upon – supports th *Lancaster* Court's conclusion.

where three of six African-Americans were struck]; *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1085-1086 [prima facie case established where five of seven African-Americans were struck].) Instead, respondent calls upon this Court to speculate as to possible reasons the prosecutor *might* have had for striking the jurors in question.

Although such speculation about possible reasons for the strikes is clearly improper in light of *Batson* and *Johnson* (see *United States v. Stephens*, *supra*, 421 F.3d at p. 516), this Court has applied precisely that kind of review in first-stage *Batson* cases since *Johnson* was decided. (See, e.g., *People v. Bonilla*, *supra*, 41 Cal.4th at pp. 347-348, italics added [Court speculated that although "it was virtually impossible to glean from (the prospective juror's) voir dire or questionnaire any clues" as to her opinions, "prosecutor *could reasonably have*" struck her because she wrote that fact that a murder was for financial gain was not important]; *People v. Avila*, *supra*, 38 Cal.4th at pp. 554-555 [Court speculated that African-American juror was struck because she had "mixed feelings" about prior jury service and/or because her brother was convicted of manslaughter]; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 902 [Court speculated that Hispanic juror was struck because she had limited language skills]; *People v. Guerra*, *supra*, 37 Cal.4th at pp. 1102-1103 [Court speculated that African-American juror was struck because she thought her cousin had been treated unfairly by the police, and/or because she had "strong opinions"].) The obvious problem with that approach is that with the lengthy questionnaires used in capital cases – e.g., the questionnaire here, which was 29-pages long and included 71 questions, many with multiple subparts (see, e.g., 18 CT 4961-4849) – anyone determined to find *a* "reason" for a challenged strike certainly could, even if not a particularly likely reason.

The Court should reject respondent's invitation to speculate about possible reasons for the challenged strikes here, and rather should take this opportunity to make its jurisprudence consistent with *Batson* and *Johnson* by limiting its review of first-stage *Batson* claims to a consideration of (1) the movant's showing, (2) the prosecution's response to that showing, and (3) any statements by the trial court in ruling on the claim. To continue the mode of review suggested by respondent would be inconsistent with the High Court's decisions, and would cause the lower courts to continue rendering constitutionally-invalid rulings in first-stage *Batson* cases.

B. Respondent's Speculative Assertions About Reasons the Prosecutor Might Have Struck the Jurors At Issue Do Not Support Its Argument

In essence, respondent contends that "a review of the entire voir dire supports the trial court's determination" that appellant did not establish a *Batson* prima facie case. (RB 46.) As set forth above, *Batson* and *Johnson* clearly do not authorize such a scouring of the record for reasons for the challenged strikes in first-stage cases. But even assuming arguendo that respondent's proposed mode of review was appropriate, respondent's argument would still fail. Thus, while respondent claims that "[n]eutral explanations for the prosecutor's peremptory challenges are apparent from the record" (RB 47), the "reasons" it proffers are based on strained, unwarranted and flatly unreasonable interpretations of the record.

Further, because this case was tried prior to *Johnson v. California*, *supra*, 545 U.S. 162, this Court cannot assume that the trial court applied the correct standard in ruling on appellant's motion, and must therefore review this issue de novo. (See, e.g., *People v. Bell*, *supra*, 40 Cal.4th at p. 597, quoting *People v. Cornwell*, *supra*, 37 Cal.4th at p. 73 ["Where it is unclear whether the trial court applied the correct standard, we review the

record independently to 'apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis."].) So, even assuming arguendo that it would be appropriate to defer to the trial court's reasoning in a first-stage *Batson* case where the trial court applied the correct standard, no deference should be paid to the trial court's reasoning here.

1. Respondent has misstated crucial facts about the voir dire proceedings below

As a preliminary matter, respondent's "overview of [the history of] the jury selection process" (RB 38-40) includes significant misstatements of fact.[6] For example, respondent claims that only 21 prospective jurors were excused below – 14 for cause, two for language problems, and five for hardship or health concerns – and that, accordingly, there were 70 "potential jurors." (RB 38-39, fns. 8, 9 and 10.) However, at least *27* of the 92 prospective jurors were excused – 16 for cause,[7] three for language problems,[8] and eight for hardship or health concerns[9] – leaving no more than 65 "potential jurors."

Respondent also states that the prosecution used only a total of 21

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[6] Appellant has also misstated one fact concerning jury selection: there were 92, not 91, prospective jurors in the total venire. (See AOB 42.)

[7] The prospective jurors excused for cause who are not listed in respondent's footnote 8 are Wetzel and Reed. (6 RT 985, 988.)

[8] Punsalan (6 RT 952), Valencia (7 RT 1145) and Lessard. (7 RT 1215.)

[9] Barr (6 RT 965), Sakaguchi (6 RT 969), McQuire (6 RT 1042), Sutter (6 RT 1058), Miller (6 RT 1077), Wunderlich (6 RT 1079-1080), Betancourt (7 RT 1121) and Steele. (7 RT 1195.)

peremptory challenges in selecting the jurors and alternates, and that only six were against African-Americans, and only four were against Hispanics. (RB 42.) In fact, the prosecution used 23 such challenges,[10] including *seven* against African-Americans[11] and five against Hispanics.[12]

Because respondent has understated the total number of peremptory challenges exercised by the prosecution, and the number used against African-Americans and Hispanics, it has also miscalculated the percentage of such challenges used against each racial group. Thus, respondent asserts that of the prosecution's peremptory challenges 29 percent were against African-Americans (6/21), 19 percent were against Hispanics (4/21), 5 percent were against Asians (1/21), and 48 percent were against "non-minority whites" (10/21). (RB 42.) But in fact, 30 percent of those challenges were against African-Americans (7/23), 22 percent were against Hispanics (5/23), 4 percent were against Asians (1/23), and 44 percent were against Caucasians (10/23).

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[10] Beverly Parker (6 RT 1038); Colleen Shermananka (6 RT 1040); Robert Young (6 RT 1085); Cyndi Cordoba (6 RT 1115); Thomas Vaden (6 RT 1115); Steven Steinberg (6 RT 1116); Stephen Presley (6 RT 1117); James Sitton (7 RT 1185); Laurie Hall (7 RT 1186); and Richard Whatley (7 RT 1258) Dwarika Prasad (6 RT 1084). Ms. Prasad is of Asian origin. (16 CT 4531.)

[11] Jacqueline Brown (17 CT 4615; 6 RT 1084), Odie Lee Brown (7 CT 1779; 6 RT 1085), T.J. Anderson (10 CT 2544; 6 RT 1116), George Clarke (18 RT 5003; 7 RT 1185), Katrina Williams (18 CT 5047; 11 RT 1187), Alex Hardy (14 CT 3865; 7 RT 1257) and Robert Clark. (18 CT 5089; 11 RT 1258.)

[12] Angela Garcia Bouman (8 CT 2077; 6 RT 1039), Belinda Marquez (9 CT 2288; 6 RT 1040), Guadalupe Martinez (17 CT 4746; 6 RT 1085), Gregory Perez (10 CT 2755; 6 RT 1116) and Victor Ahumada. (14 CT 3823; 7 RT 1256.)

Finally, respondent asserts that "[n]on-minority whites constituted 70 percent (49/70) of the potential jurors." (RB 39, 42.) But as shown above, there *were* only 65 potential jurors. And since at least 19 of the 62 prospective jurors in the total venire who were identified as non-minority whites[13] were excused,[14] no more than 67 percent of the potential jurors could have been non-minority whites (43/65).

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[13] 62 prospective jurors identified themselves as Caucasian or white: Juror No. 4 (5 CT 1223); Juror No. 7 (6 CT 1352); Juror No. 8 (6 CT 1395); Juror No. 10 (6 CT 1438); Alt. No. 1 (6 CT 1480); Alt. No. 2 (6 CT 1523); Alt. No. 3 (6 CT 1565); Alt. No. 4 (6 CT 1608); Sutter (7 CT 1651); Burton (7 CT 1694); Burgin (7 CT 1737); Anderson (7 CT 1821); Kellenberger (7 CT 1864); Currall (8 CT 1949); Mackie (8 CT 1992); Reed (8 CT 2119); Parker (8 CT 2204); Axelrod (9 CT 2246); Main (9 CT 2373); Vaden (9 CT 2416); O'Rourke (9 CT 2460); Cordoba (9 CT 2503); Roberts (10 CT 2587); Steinberg (10 CT 2629); Lessard (10 CT 2671); Marlar (10 CT 2713); Stanley (10 CT 2798); Garrard (11 CT 2883); McQuire (11 CT 2926); Bottorff (11 CT 3053); Jaffe (11 CT 3095); Hall (12 CT 3138); Sitton (12 CT 3181); Ainsworth (11 CT 3224); Beatty (12 CT 3266); Wasek (12 CT 3355); Dixon (12 CT 3395); Barr (13 CT 3438); Jensen (13 CT 3480); Ingenhouz (13 CT 3523); Juror No. 12 (13 CT 3609); Shermanakana (13 CT 3652); McMullen (13 CT 3695); Presley (14 CT 3738); Nelson (14 CT 3781); Lindstrom (14 CT 3908); Whatley (14 CT 3951); Juror No. 9 (16 CT 4274); Juror No. 11 (16 CT 4317); Miller (16 CT 4359); Ledley (16 CT 4402); Wetzel (16 CT 4488); Young (17 CT 4573); Stolle (17 CT 4659); Flesner (17 CT 4788); Wunderlich (17 CT 4832); Duron (18 CT 4916); Juror No. 1 (18 CT 4961); Trujillo (18 CT 5132); Willis (19 CT 5174); Lindou (19 CT 5218); and Steele. (19 CT 5260.)

[14] 12 non-minority white prospective jurors were excused for cause – Wetzel (6 RT 985), Reed (6 RT 988), Currall (6 RT 1036), Axelrod (6 RT1037), Marlar (6 RT 1083), Main (6 RT 1114), Stanley (6 RT 1114), McMullen (6 RT 1114), Barth (6 RT 1115), Ainsworth (7 RT 1184), Trujillo (7 RT 1185), and Ingenhouz (7 RT 1255); six for hardship – Barr (6 RT 965), McQuire (6 RT 1042), Sutter (6 RT 1058), Miller (6 RT 1077), Wunderlich (6 RT 1079-1080), and Steele (7 RT 1195); and one, Lessard, for language problems. (7 RT 1215.)

2. Respondent's arguments do not undermine appellant's prima facie showing

Respondent contends that the prima facie showing made below – that the prosecutor had struck five of the seven African-Americans called for voir dire – was inadequate, because "half" of the ten African-Americans in the venire "still remain[ed]" after five were struck,[15] and the defense also struck two African-Americans. Respondent also contends that appellant's factual showing was "inadequate" in light of this Court's decision in *People v. Farnam* (2002) 28 Cal.4th 107. (RB 46-47.) However, the facts respondent points to did not undermine the inference of discrimination arising from appellant's prima facie showing. First, the trial court did not know, and could not have known, those facts when it denied the *Batson* challenge. Second, those facts are irrelevant to whether a prima facie case existed. Finally, the *Farnam* decision is both legally irrelevant to the issue before the Court and factually distinguishable from this case.

First, while it is true that half of the ten African-Americans in the venire remained after five were struck, that fact does not undercut the inference of discrimination. Indeed, that fact is meaningless unless the Court assumes that the trial court somehow foresaw that the prosecutor would not strike any of the remaining African-Americans, and, based on that precognition, knew that what appeared on its face to be a "'pattern' of strikes against Black jurors" (*Batson*, *supra*, 476 U.S. at pp. 96-97) – striking five of seven African-Americans called for voir dire – was merely a

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[15] As pointed out previously, the assertion that "[a]t the time [appellant] made his *Wheeler* motion, the prosecutor had exercised peremptory challenges against [only] five of the 10 African-Americans available to sit as jurors" (RB 45) is also misleading. (*Supra*, at p. 6.)

statistical anomaly. At any rate, since the prosecutor ultimately *did* strike two more African-Americans (7 RT 1256-1268), the trial court would have been wrong to rely upon such a premonition.

Moreover, the fact that five African-Americans remained in the venire when the *Batson* motion was denied does not negate the inference of discrimination. Neither

> [t]he final composition of the jury ([n]or even the composition of the jury at the time the *Batson* objection is raised) offers [any] reliable indication of whether the prosecutor intentionally discriminated . . . . 'a *Batson* inquiry focuses on whether or not racial discrimination exists in the striking of a black person from the jury, not on the fact that other blacks may remain on the jury panel.'

(*Holloway v. Horn*, *supra*, 355 F.3d at pp. 728-729, quoting *United States v. Johnson* (8th Cir. 1989) 873 F.2d 1137, 1139, n. 1.)

Respondent seems to argue that the prima facie showing was undermined by the fact that defense counsel also struck two African-American potential jurors *after* the trial court rejected the *Batson* claim (RB 46), but is flatly wrong. That fact is irrelevant, because "the propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges." (*People v. Reynoso* (2003) 31 Cal.4th 903, 927; see *Holloway v. Horn*, *supra*, 355 F.3d at pp. 728,-729 [evidence about "the nature of the defendant's strikes fails the test for relevancy" under *Batson*, because that inquiry focuses "on the prosecutor's actions"]; *Aspen v. Bissonnette* (1st Cir. 2007) 480 F.3d 571, 578, fn. 7, citing *United States v. Stephens*, *supra*, 421 F.3d at p. 514 ["a party may not defend an improper use of peremptory challenges by arguing that the other party engaged in similar conduct]; but see *People v. Gray*, *supra*, 37 Cal.4th at p. 188 [that prosecutor had struck two of six African-Americans in venire

when *Batson* challenge was made, and later struck two more, was insufficient to establish prima facie case because "two more remained"].) Moreover, the trial court had no way of knowing when it denied the *Batson* challenge that defense counsel *would* strike those two African-Americans, so that fact could not have any effect on its determination that a prima facie showing had not been made.[16]

Respondent also claims that *People v. Farnam*, *supra*, 28 Cal.4th at pp. 136-137 – which found that no prima facie showing had been made based on the facts that "four of the first five peremptory challenges were against African-Americans, and [] a small minority of the panel members were African-American" – supports its argument. (RB 46.) But *Farnam* does not assist respondent, for several reasons. First, *Farnam* is legally irrelevant here because it was decided under the incorrect and unduly onerous standard rejected by *Johnson v. California*. (28 Cal.4th at pp. 135-137.) Moreover, *Farnam* is distinguishable, because the prima facie showing in that case was vastly weaker than the one here. Thus, in *Farnam*: (1) the defendant "was unable to show" that the prosecutor had "struck most or all of the" African-American prospective jurors, or had engaged the African-Americans he did strike in only "desultory voir dire;" (2) the prosecutor gave reasons for the challenged strikes which the trial court found to be non-racial; and (3) the jury that was ultimately empaneled

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[16] Further, even if the fact that the defense struck two African Americans after the trial court denied the *Batson* challenge *was* relevant to this issue, "the record shows why" the defense challenged those two jurors and the prosecutor did not. (AOB 43, fn. 21.) One had a job "akin to law enforcement," (7 RT 1189); the other one, who had been unsuccessfully challenged for cause defense counsel, held "strong, pro-prosecution views on the death penalty." (AOB 43, 13 CT 3588.)

included six African-American jurors and/or alternates. (*Id.*, 28 Cal.4th at pp. 134, 137-138.) Here, by contrast: (1) the prosecutor *had* struck "most" of the African-Americans called for voir dire when the *Batson* motion was made (five of seven), and had hardly questioned those jurors at all (6 RT 1075-1076, 1109-1110); (2) the prosecutor offered no reasons for the challenged strikes; and (3) only one of the 16 jurors and alternates was African-American (6 percent), even though 11 percent of the total venire was made up of African-Americans (10 of 92). (AOB 31.) Accordingly, *Farnam* does not assist respondent.

In sum, none of the facts or circumstances relied upon by respondent "rebut the inference of discriminatory purpose based on statistical disparity." (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1108.)

3. The "record of the entire voir dire proceedings" does not rebut appellant's prima facie showing

Respondent's contention that "neutral explanations" for the challenged strikes "are apparent from the record" (RB 47) is also wrong. Respondent has set out its proposed "explanations" in its brief, and those proffered explanations do not, either individually or collectively, support the contention that the record fails to establish "an inference of purposeful discrimination . . . ." (*Id.*)

As the Ninth Circuit recently said, where, as here, the trial court finds that a sufficient *Batson* prima facie showing was not made, and the prosecutor does not indicate why he struck the jurors at issue, the question is *not* "whether the record *could* support race-neutral grounds for the prosecutor's peremptory challenges." (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1108, italics added.) In that situation, the trial court's actions so "limit the scope of appellate review" that a reviewing court "cannot

determine the reasonableness of the prosecutor's challenges, it can only review the record to determine whether 'other relevant circumstances' eroded the premises of [the appellant's] allegations of discrimination based on statistical disparity." (*Ibid.*) Thus, it "does not matter that the prosecutor might have had good reasons" for the challenged strikes, what matters is what his real reasons were. (*Johnson v. California*, *supra*, 545 U.S. at p. 171.) In other words, "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis" for the challenged strikes. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 252.) Yet, respondent has engaged in just such an exercise here, and asks the Court to ratify its speculative second-guessing.

Indeed, as to one of the jurors at issue – Jacqueline Brown – the respondent has suggested an explanation so thoroughly speculative, and implausible, as to illustrate the fecklessness of trying to intuit, on appeal, the "real" reasons for challenged strikes.

a. Respondent has not offered even a plausible explanation for the challenge to Ms. Brown

Respondent hazards a guess that the prosecutor might have struck Ms. Brown because her questionnaire indicated that "she viewed the justice system as inconsistent" in "meting out punishments for the same crime" since she wrote that: (1) "the death penalty [is] imposed 'unevenly;'" and (2) she "only 'moderately' [favored] capital punishment." (RB 51-52.) Respondent further speculates, without citing to the record, that Ms. Brown's "responses regarding inconsistent punishments called into question her ability to be impartial especially in light of the facts of [this] case that implicated [Francisco] Castaneda in the Gorman-Creque double murder and the defense position that Castaneda was responsible for all three murders."

(*Id.* at p. 52.) That analysis appears disingenuous, because it is both a misleading portrayal of Ms. Brown's voir dire responses and unconvincing on its face.

Respondent's suggested explanation that the prosecutor probably struck Ms. Brown – who supported the death penalty, and felt that it was used "too seldom" (17 CT 4639) – because he thought she might not be sufficiently impartial, is both grossly speculative and thoroughly unconvincing. Presumably, any prosecutor trying a capital case would *want* a prospective juror who thought the death penalty was used "too seldom" on the jury, even *if* he thought she might not be completely impartial, because any impartiality she might exhibit would favor the prosecution.

Respondent's suggestion that the prosecutor might have been concerned that Ms. Brown would be not "be impartial . . . in light of the facts of the case that implicated Castaneda" in the Creque-Gorman murders is also grossly speculative, and contradicts claims respondent makes elsewhere in its brief. Thus, while respondent apparently concedes here that the evidence "implicated" Castaneda in the Creque-Gorman murders, it argues elsewhere in its brief that the evidence that appellant committed those murders was so "overwhelming" (RB 100, 105) that it must have been harmless to refuse defense-requested instructions "that would have brought home . . . just how strong the evidence" was against Castaneda. (*Id.* at pp. 104-106.)

Moreover, the claim that *this* prosecutor probably or might have struck Ms. Brown because her questionnaire responses suggested that she might not be impartial is belied by the fact that he declined to question Ms. Brown at all, let alone to ask her about the questionnaire responses that respondent now speculates must have weighed so heavily on his mind.

(AOB 39; see *People v. Wheeler* (1979) 22 Cal.3d 259, 281 [prosecutor's failure to engage the jurors "in more than desultory voir dire, or indeed to ask them any questions at all" weighs in favor of finding discrimination].)

Further, while respondent argues that Ms. Brown was "only 'moderately' in favor of capital punishment" (RB 52), thereby suggesting that her supposedly weak support for the death penalty played some role in the prosecutor's decision to strike her, Ms. Brown was actually *more strongly* supportive of the death penalty than most of the 16 seated jurors and alternates. Only two of those 16 "strongly" favored the death penalty (5 CT 1333, 13 CT 3633); four, like Ms. Brown, moderately favored it (6 CT 1376, 1462, 1633, 18 CT 4957), nine had a "neutral" view on that question (5 CT 1247, 1289, 6 CT 1419, 1504, 1547, 1589, 15 CT 4254, 16 CT 4298, 4341), and one – Juror No. 2 – was "moderately" opposed to the death penalty. (5 CT 1203.)

Further, respondent's analysis of the challenge to Ms. Brown simply ignores the fact that she believed that the death penalty was imposed "too seldom" (17 CT 4639), although most prosecutors would presumably consider such an opinion to be highly desirable in a prospective penalty phase juror. Indeed, only *one* of the 16 seated jurors and alternates clearly expressed a similar support for capital punishment (12 CT 1203), while two others gave less clear answers that may have indicated a similar view. (13 CT 3633, 18 CT 4985.) Of the other 13 jurors and alternates, six responded that the death penalty was *not* used too seldom (5 CT 1289, 1333, 6 CT 1376, 1462, 1589,15 CT 4254), five said they did not know whether it was (5CT 1247, 6 CT 1419, 1504, 1547, 15 CT 4341), and two did not clearly answer the question. (5 CT 1203, 16 CT 4298.)

As respondent acknowledges, under *Batson* the exclusion of "even a

single juror for impermissible reasons . . . requires reversal." (RB 36, citing *People v. Huggins* (2006) 38 Cal.4th 175, 227.) As shown above, a presumption of discrimination arose based on the statistical evidence of jury selection in this case. (Sec. B.) Because none of the facts in the record, or any of the speculative reasons proffered by respondent, negate that presumption as to Ms. Brown, no analysis of the purported explanations for the prosecutor's other strikes is necessary. However, the purported explanations for those strikes are also insufficient.

b. Respondent has not negated the presumption of discrimination as to the other jurors

As with Ms. Brown, respondent's speculative explanations for the strikes against the other African-American prospective jurors at issue are also inadequate to negate the presumption of discrimination arising from the statistical disparity.

i. Mr. Clarke

Respondent speculates that the prosecutor might have struck George Clarke "based upon his stated exposure to the criminal justice system" – i.e., because Clarke reported that he was once falsely accused of battery, and that "his brother, a drunk driving offender, had not been treated well by the criminal justice system." (RB 52-53.) Respondent maintains that view despite the facts that: (1) Mr. Clarke was "strongly in favor" of the death penalty (18 CT 5027), had a "good" opinion of the judicial system (*id.* at p. 5014), and could not think of any reason he could not be impartial (*id.* at pp. 5023, 5025); and (2) his brother's arrest had occurred more than 20 years earlier. (*Id.* at p. 5010.) However, the notion that the prosecutor was concerned about those issues is belied by his failure to question Mr. Clarke about anything, let alone his "exposure to the justice system." (AOB 35.)

ii. Mr. Brown

Respondent speculates that the prosecutor might have struck Odie Brown because he feared that Mr. Brown could or would not be impartial, since he "appeared intent on focusing on the jury as a working group," and had once been harassed by a police officer. (RB 52.) As to the former ground, respondent neither cites to anything in the record supporting such a concern, nor explains *why* the prosecutor would have been alarmed by a juror who "tend[ed] to vote with the group rather than against it." (*Id.*) As to the latter ground, it is hardly surprising that an 80-year-old African-American man would have had such an experience over the course of a lifetime that began in Mississippi in 1917. Few if any older African-Americans would be permitted to serve as jurors if a precondition for such service was that they had never had an unpleasant or oppressive encounter with a police officer. (See Harris, *The Stories, the Statistics, and the Law: Why Driving While Black Matters* (1999) 84 Minn. L.R. 265, 267-268 [African-Americans are far more likely to be stopped by police; "anyone who is African-American is automatically suspect during every drive to work, the store, or a friend's house."].) Finally, while the prosecutor questioned Mr. Brown very briefly, he did not ask about either of the issues respondent now suggests must have been his reasons for striking Mr. Brown. (6 RT 1075-1076.)

iii. Ms. Williams

Respondent speculates that the prosecutor struck Katrina Williams because she wrote in her questionnaire that her third cousin had been convicted of murder, and that "sometimes the [criminal justice] system works – sometimes it does not, but it balances out." (RB 53; 18 CT 5053, 5058.) However, as with both Ms. Brown and Mr. Brown, the prosecutor

did not bother to question Ms. Williams about those or any other issues.

Moreover, while respondent may contend that Ms. Williams's questionnaire responses were so clearly disqualifying that the prosecutor had no need to question her, that contention is wholly unfounded. Thus, Ms. Williams wrote that her cousin was "treated fairly" by the justice system (18 RT 5053), and her statement that the criminal justice system does not always work perfectly hardly indicated that she held biased or irrational views. In fact, her statement that the criminal justice system does not always work perfectly, but that it "balances out," is both straightforward, not "ambiguous" as respondent suggests (RB 53), and eminently reasonable. Accordingly, it is highly unlikely that the prosecutor actually struck her because she made that statement.

c. This Court need not defer to the trial court's ruling

Respondent also contends that the Court should defer to the trial court's ruling because that court had the opportunity to observe the voir dire, hear the jurors' responses, and view the "interaction of the prosecutor with the prospective jurors. . . ." (RB 53.) However, as set forth above, Ms. Brown was not questioned by either the court or counsel, and the prosecutor had only a very limited interaction with Mr. Clarke and none at all with Ms. Williams or Mr. Brown. So little if any "interaction" occurred between the prosecutor and those prospective jurors.

D. Conclusion

As shown in appellant's opening brief, the trial court clearly erred in finding that appellant did not make a sufficient *Batson* prima facie showing. Respondent's argument asks this Court to apply here the same flawed mode of analysis it has recently used in other first-stage cases, in violation of the

precepts of *Batson* and *Johnson v. California*. Moreover, that argument – which amounts to little more than unconvincing speculation about possible non-discriminatory reasons for the challenged strikes – fails on its own terms, because the proffered reasons do not withstand scrutiny.

The Court should not engage in a search for possible reasons for the challenged strikes, but rather should evaluate the relevant facts before the trial court when the *Batson* challenge was made. The only such relevant facts here are those cited by defense counsel in making his prima facie showing – primarily that the prosecutor had struck five of the seven African-Americans called for voir dire – because the prosecutor did not respond to counsel's arguments, and the trial court denied the claim without comment. (7 RT 1188-1189.) Having considered those relevant facts, the Court must conclude that appellant made a sufficient prima facie showing, and that his conviction and sentence must accordingly be reversed.

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II

APPELLANT'S TAPED JAIL CELL STATEMENTS WERE ADMITTED IN VIOLATION OF *MASSIAH*

Appellant has argued that the trial court committed reversible error in denying his motion to exclude evidence of tape-recorded statements he made while in a jail cell with Francisco Castaneda. Appellant contends that the actions of the police – putting Castaneda in the cell with appellant after having told Castaneda that (1) they had evidence that he was involved in the charged murders, and (2) the "door was open" for him to help himself – violated his constitutional rights under *Massiah v. United States* (1964) 377 U.S. 201, and its progeny. (AOB Arg. II, 58-74.)

Respondent contends that the admission of that evidence did not violate *Massiah* because Castaneda was not acting as a police agent, since he: (1) was not "directed" to ask appellant questions that would elicit incriminating responses (RB 57); (2) did not know that the police were recording the conversation (*id.* at p. 59); and (3) was not offered "leniency or any benefit" by the police, either explicitly or implicitly. (*Id.* at pp. 59-60.)[17] Those arguments fail.

First, the fact that the officer who put Castaneda and appellant together in the cell to tape their conversation, Detective Michael Eveland,[18]

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[17] Respondent also contends that the "record clearly establishes" that the police did not tell Castaneda "he was being housed with [appellant] in a jail cell." (RB 59.) Respondent does not cite to any portion of the record establishing that asserted fact, but appellant submits that the police had no need to tell Castaneda he was being housed in a cell, or that appellant was also in the cell.

[18] Respondent incorrectly states that the Detective Eveland's name is

(continued...)

claimed that he did not tell Castaneda either that he should ask any specific questions, or that the conversation would be tape recorded (8 RT 1309), does not establish that Castaneda was not acting as a police agent. This Court must decide whether the trial court's finding on that issue was reasonable (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1247-1248), and while it must review that court's factual findings with deference (*People v. Memro* (1995) 11 Cal.4th 786, 828), it is not required to simply affirm the court's unreasonable finding here.

Detective Eveland's denial that he enlisted Castaneda as a police agent is not dispositive of this issue. First, it is highly unlikely that Eveland would have admitted that Castaneda *was* a police agent, since that admission would have been very damaging to the prosecution's case. Second, the record strongly suggests that Castaneda was indeed a police agent. Thus, Detective Eveland admitted that: (1) he put Castaneda in the cell to "see if [appellant] would make any incriminating statements" (8 RT 1307); and (2) Castaneda was told that the "door was open" for him to save himself by helping convict appellant. (23 RT 3419-3420.) In light of those facts, respondent is either naive or disingenuous in claiming that there "is no basis for [appellant's] claim that Castaneda was acting as an agent of the police . . . ." (RB 59.)

What did the police think would happen if they put Castaneda, who was already cooperating with them, and who claimed that appellant was solely responsible for the murders, in that cell? As this Court has said, "[i]n determining the merits of a *Massiah* claim, the essential inquiry is whether the government intentionally created a situation likely to induce the accused

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[18](...continued)
spelled Everlund. (RB 57.)

to make incriminating statements without the assistance of counsel." (*People v. Frye* (1998) 18 Cal.4th 894, 993.) That is clearly what the police did here, and Detective Eveland's self-serving testimony cannot negate the obvious inference that Castaneda was in fact a police agent.

Respondent's other contention – that, even assuming Castaneda did think he could "help himself" by eliciting incriminating statements from appellant, there is no evidence that Castaneda and the police had a "tacit agreement" that he would receive "leniency or any benefit" for eliciting such statements (RB 59-60) – fails for similar reasons. That argument also ignores the clear import of the facts of this case. As set forth above, those facts show that the police "intentionally created" a situation in which Castaneda would likely try to induce incriminating statements from appellant to gain leniency for himself. (*People v. Frye*, *supra*, 18 Cal.4th at p. 993.)

Respondent's claim that there is "no evidence of any express or implied offer of leniency" disregards, and asks the Court to disregard, what actually happened here: (1) the police told Castaneda it would be in his best interest to help convict appellant; (2) Castaneda then said that appellant was solely responsible for the crimes; (3) Castaneda then showed the police where he and appellant allegedly went on the night of the first two murders, and told them what they allegedly did; (4) Castaneda then led the police to expended cartridges that he claimed appellant had discarded after committing the first two murders; and (5) the police then put Castaneda in appellant's cell to elicit "incriminating statements." (AOB, pp. 58-61.) Contrary to respondent's assertion, that evidence demonstrates at least an implied offer of leniency; indeed, it would be unreasonable to assume that Castaneda did not tacitly understand that the reason the police briefly

reunited him with appellant was to give him a chance to elicit incriminating statements from appellant. That evidence also suggests that Castaneda and Detective Eveland were less than truthful when they testified that no such offer was made.

Respondent's contention that "if Castaneda attempted to elicit incriminating statements from [appellant], he did so on his own initiative" (RB 60), also ignores the factual context of Castaneda's actions, and the clear inferences to be drawn from those facts. Thus, while Castaneda certainly had a strong motivation to obtain incriminating statements from appellant, Castaneda lacked the means to arrange to have himself put in a cell with appellant, or to have a tape recorder record hidden in that cell. That is precisely why Castaneda was a police agent, because both he and the police had a shared goal of obtaining evidence that would incriminate appellant, and they each needed the other's help to achieve that goal.

Respondent also contends that "Castaneda did not even elicit the two most incriminating . . . statements made by" appellant – the direction to Chucky Rushing to tell "Little Mikey" to "get rid of that shit," and the "volunteer[ed]" statement that the police had the wrong shoes because his mother got rid of the "other" ones. (RB 60.) However, as pointed out in the Opening Brief, appellant's statement to Chucky would not have been particularly incriminating but for Castaneda's testimony that the "shit" appellant had referred to was the murder weapon. (AOB 73.) And the "volunteered" statement that the police had the wrong shoes was made in response to Castaneda's statements to appellant that "I just want to hear what you go to say," and "I got evidence in the car . . . ." (15 CT 4148.) Respondent's claim that Castaneda did not elicit that statement is misleading at best.

Finally, respondent cites to a number of Court of Appeal cases which have upheld the use of eavesdropping as a criminal investigation tool. (RB 61.) However, those cases are distinguishable because they all lack the distinctive detail that establishes that what the police did here violated *Massiah* – that the police told Castaneda before putting him in the cell with appellant that (1) they were "'only looking at [him] as a witness,'" and (2) the "door was open" for him to help himself. (17 RT 2445-2447, 23 RT 3419-3420.) The cases respondent cites all involve simple eavesdropping by the police – listening to and/or recording conversations between suspects and/or between suspects and others. (*People v. Lucero* (1987) 190 Cal.App.3d 1065, 1068; *People v. Boulad* (1965) 235 Cal.App.2d 118, 124; *People v. Apodaca* (1967) 252 Cal.App.2d 656, *People v. Califano* (1970) 5 Cal.App.3d 476, 482; *People v. Todd* (1972) 26 Cal.App.3d 15, 17.) In none of those cases was anyone encouraged, either directly or inferentially, to "help" himself by eliciting incriminating statements from a suspect.

Accordingly, because the admission of this evidence was in violation of appellant's rights under the Sixth Amendment, both the guilt and penalty judgments must be reversed.

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III

THE TRIAL COURT IMPROPERLY EXCLUDED TESTIMONY SUGGESTING THAT FRANCISCO CASTANEDA ASSAULTED AND/OR RAPED DIANA DELGADO

Appellant has argued that the trial court committed reversible error in excluding proposed defense testimony from Diana Delgado's mother, Diana Madrid, "which suggested that [Francisco] Castaneda raped and/or assaulted Diana several weeks before she was killed." (AOB Arg. IV, 98.) Ms. Madrid's testimony would have described an incident in which Castaneda argued with Ms. Delgado and then followed her from the house, and Ms. Delgado returned an hour or so later looking "disheveled," then spent the next two hours in the shower. (*Id.* at p. 99; 23 RT 3314-3315, 3317.) Appellant contends that the testimony would have impeached Castaneda's credibility and supported his theory that Castaneda killed Ms. Delgado, and that its exclusion violated his federal constitutional right to present evidence and witnesses in his defense. (AOB 101-103.)

Respondent contends that the trial court properly excluded the testimony because it was irrelevant either to impeach Castaneda's testimony or to support the "defense theory" that he killed Ms. Delgado, and that appellant had "ample opportunit[ies] to impeach Castaneda's credibility and promote his theory of the case" even without the testimony. (RB 77-78.) Further, because appellant was purportedly allowed that "ample opportunity," respondent contends that any error in excluding the testimony was harmless. (*Id.* at p. 78.) Those arguments fail.

As to the first argument, respondent does not clearly explain why the testimony was irrelevant, i.e., why it lacked "any tendency in reason" (Evid. Code, § 210) to prove that Castaneda killed Ms. Delgado, or to impeach

Castaneda's claim that Ms. Delgado was like a sister to him, and had in fact told him the night before she died that she feared she might be pregnant (17 RT 2584, 2587). Respondent's only argument is that because "the incident" in question occurred "a few weeks before" Ms. Delgado was killed, the testimony would have been "highly speculative of Castaneda's conduct [*sic*]" and "any suggestion that [he] assaulted or raped" Ms. Delgado would have been "unreasonable." (RB 77.) Thus, respondent apparently rejects the long-standing view that "evidence is relevant when no matter how weak it may be it tends to prove the issue before the jury" (*People v. Hess* (1951) 104 Cal.App.2d 642, 676; *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843), and suggests that the rule should be that evidence is only relevant when it absolutely establishes a disputed fact. The Court should reject such an unwarranted contraction of the scope of relevancy.

Moreover, it is simply not true that the proposed testimony would have been "highly speculative," and that "any suggestion that Castaneda raped or assaulted [Ms. Delgado would have been] unreasonable." (RB 77.) Thus, while it is of course proper to "exclude evidence that produces *only* speculative inferences" (*People v. Cornwell* (2005) 37 Cal.4th 50, 81, citing *People v. Babbitt* (1988) 45 Cal.3d 660, 684, italics added), the proposed testimony here would have supported far more solid and reasonable inferences than the expert testimony at issue in *Cornwell*. The testimony in that case about the effect of "unconscious transference" on eyewitness identifications would have: (1) suggested that if the defendant had been seen in the neighborhood where the crime occurred "at some earlier time, . . . some of the witnesses may have recognized him on that basis," rather than as the person they saw commit the crime; and (2) involved an expert opinion that the prosecution's witnesses might have been

mislead by that effect. (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 79.) This Court found that the trial court properly excluded that testimony as "entirely speculative," because the "chain of inferences" supported by it was "highly speculative." (*Ibid.*) Here, the inferences that would have been suggested by the testimony were far less speculative.

It is hardly wild speculation to suggest that the proposed testimony supported an inference that Castaneda assaulted and/or raped Ms. Delgado. The testimony – that Castaneda and Ms. Delgado had an argument, that she ran out of the house and he followed her, that she returned "very upset, disheveled, with smeared makeup and grass or weeds . . . on her clothing," and, after threatening to tell her mother what Castaneda had done, took a two-hour shower (23 RT 3317) – provided substantial circumstantial evidence that Castaneda did something which offended and/or hurt Ms. Delgado. And since her clothes were disheveled, her makeup was smeared, and she took a two-hour shower, it was perfectly reasonable for the defense to suggest, and for the jury to infer, that Castaneda assaulted and/or raped her. (See *People v. Meacham* (1984) 152 Cal.App.3d 142, 157 [evidence of children's unusual behavior while attending nursery school where they were allegedly abused was not "highly speculative," but rather relevant circumstantial evidence of defendant's "lustful intent"].) Or at the very least, the jury could reasonably have drawn the inference from that testimony that Castaneda had lied about being close to Ms. Delgado, and might therefore also have lied in other aspects of his testimony.

Respondent's other argument, that it was proper to exclude the testimony, and that any error in doing so was harmless, because the trial court allowed the defense an "ample opportunity to impeach Castaneda's credibility" (RB 77-78), is no more convincing. While it is true that the

trial court allowed appellant to elicit testimony from Ms. Madrid contradicting Castaneda's testimony that he never asked about the value of Ms. Delgado's diamond ring, and to cross-examine Castaneda about numerous contradictions in his testimony (RB 77-78), that did not ameliorate the harm resulting from the exclusion of this testimony. Thus, while the defense was "permitted to question [Ms.] Madrid" about some of the facts of the incident in question (RB 77), the trial court excluded many crucial details of her proposed testimony – especially that Castaneda apparently assaulted or otherwise molested Ms. Delgado – and in doing so drained much of the impact out of the testimony. The account Ms. Madrid was permitted to give suggested merely a spat between two people who had spent too much time together, and did not get along. The account she would have given would have supported the inferences that Castaneda assaulted and/or raped Ms. Delgado, and had a motive to kill her. (AOB 102.)

The erroneous exclusion of this important defense evidence was prejudicial, and requires reversal of the guilt and death judgments.

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IV

THE TRIAL COURT ERRED IN REFUSING DEFENSE-REQUESTED INSTRUCTIONS

The trial court erred in refusing a series of defense-requested jury instructions that would have made clear that the jury needed to view Francisco Castaneda's testimony with extreme suspicion. Respondent's arguments in support of the trial court's rulings on the instructions are unconvincing, and reversal of the guilt and death verdicts is thus required.

A. The Trial Court Improperly Refused to Give CALJIC No. 8.27

Appellant has argued that the trial court erred in refusing CALJIC No. 8.27, the pattern jury instruction on aider and abettor liability for felony murder, because its provision would have helped the jury "understand that Castaneda was potentially liable for the Creque/Gorman killings," and had an "enormous [] incentive" to aid the prosecution by falsely casting blame on appellant. (AOB Arg. V., 110-112.) Respondent argues that the requested instruction was properly refused because it was "inapplicable" since the prosecution did not put Castaneda "on trial" (RB 79), and unnecessary because of other instructions that were given, in particular CALJIC No. 3.19. (RB 84-85.) Respondent also contends that any error in refusing to give the instruction was harmless because Castaneda's testimony was sufficiently corroborated, citing *People v. Brown* (2003) 31 Cal.4th 518. (*Id.* at p. 85.) Those arguments are unpersuasive.

First of all, trial courts are *required* to give defense-requested instructions that are "closely and openly connected with the facts of the case" (*People v. St. Martin* (1970) 1 Cal.3d 524, 531), and *must* resolve in favor of the defense any doubts about the sufficiency of the evidence to support such instructions. (*People v. Flannel* (1979) 25 Cal.3d 668, 685.)

Thus, the question is not whether the prosecution adopted the theory upon which the defense based its request for CALJIC No. 8.27 – that "Castaneda was an accomplice to felony murder" (AOB 108; 25 RT 3620-3621, 3623-3625) – but whether the facts supported that theory. And, as the trial court itself recognized, they clearly did. (25 RT 3622 [trial court: "I agree there is a certain amount of evidence that would possible indicate that [Castaneda was] an accomplice so that [the jury has] to assess his testimony in that light."].)

The trial court's statement that there *was* evidence suggesting that Castaneda was an accomplice is amply supported by the record, including the evidence that appellant told Castaneda when he left to investigate the truck in which Creque and Gorman were sleeping that he intended to "jack 'em," i.e., rob whoever was in the truck. (AOB 107; 23 RT 3376, 24 RT 3532-3534.) Based on that evidence, the jury could have concluded that Castaneda was an accomplice to robbery, and could therefore have been prosecuted for aiding and abetting felony murder. (AOB 110.) Accordingly, appellant was entitled to instructions supporting his theory that Castaneda's testimony was unworthy of belief because he was an accomplice to the Creque/Gorman murders, and therefore had an incentive to falsely implicate appellant. (26 RT 3774-3775; see *People v. Bynum* (1971) 4 Cal.3d 589, 604 ["The court must give any correct instructions on defendant's theory of the case which the evidence justifies, no matter how weak or unconvincing that evidence may be."].)

Second, respondent's claim that "the accomplice aiding and abetting instructions the jury was provided adequately instructed them on evaluating Castaneda's testimony" is simply not true. (RB 84.) Thus, while *People v. Brown*, *supra*, 31 Cal.4th at p. 559, upon which respondent relies, suggests

that CALJIC Nos. 8.27 and 3.19 are inherently "duplicative," appellant respectfully suggests that the cursory analysis of that issue found in *Brown* does not support such a conclusion even in the abstract, and certainly not under these facts.

As given below, CALJIC No. 3.19 simply told the jurors, in very general terms, that they had to determine whether Castaneda "was an accomplice," as that term was defined in CALJIC No. 3.10. (20 CT 5435; 26 RT 3857.)[19] CALJIC No. 8.27, on the other hand, would have told the jurors about the law supporting appellant's theory that Castaneda was or could have been liable as an aider and abetter to felony murder, so that they could have applied that law to the evidence of Castaneda's involvement in the Creque/Gorman murders in *determining* whether he was an accomplice under CALJIC No. 3.19. (20 CT 5500.) The requested instruction was neither duplicative of CALJIC No. 3.19 nor cumulative, and this case is thus distinguishable from others in which this Court has upheld the refusal to give requested instructions. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 152 [where charged crime was poisoning with paraquat, an instruction that prosecution had to prove "beyond a reasonable doubt" that the victim was poisoned with paraquat duplicated standard reasonable doubt instruction]; *People v. Manriquez* (2005) 37 Cal.4th 547, 580 [requested

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[19] The version of CALJIC No. 3.19 given at trial read as follows:

> You must determine whether the witness Frank Castaneda was an accomplice as I have defined that term. The defendant has the burden of proving by a preponderance of the evidence that Frank Castaneda was an accomplice in the crime[s] charged against the defendant. (20 CT 5441.)

instruction to "consider each count separately, as though it were the only count," duplicated CALJIC No. 17.02, which instructs jurors to "decide each count separately"].)

Respondent's contentions that CALJIC No. 8.27 was irrelevant and unnecessary because (1) the prosecution did not "suggest[]" that Castaneda committed the Gorman-Creque murders, and (2) there was substantial evidence that appellant did commit them (RB 83), require only a limited response. The first point is a red herring, because the question is whether the evidence supported the theory that Castaneda was an accomplice, not whether the prosecution endorsed that theory. At any rate, the prosecution had no reason to suggest that Castaneda committed those murders, when doing so would have undermined both Castaneda's credibility as a witness and his incentive to be a witness. The second point relies on an inflated evaluation of the strength of the evidence against appellant, which consisted primarily of Castaneda's largely uncorroborated testimony. Thus, while respondent claims that "the evidence establishes" that appellant "walked up to Gorman's parked truck, and shot Gorman so many times he had to stop and reload" (RB 83), those alleged facts are all based on Castaneda's account of the incident.

Respondent's final contention – that any error in refusing the requested instruction was harmless because Castaneda's testimony was "sufficiently corroborated," like that of the "unjoined perpetrator" in *People v. Brown*, *supra*, 31 Cal.4th at p. 560 – also fails. That "unjoined perpetrator" was a 15-year-old boy who was a passenger in a car from which the defendant jumped out and killed the driver of another car. (*Id.* at pp. 524-525.) But there were other, independent witnesses to that murder, as well as witnesses who heard the defendant boast about committing it

later. (*Id.* at pp. 525-527, 558.) Thus, because the boy's testimony was fully corroborated, this Court held that any error in failing to give CALJIC No. 8.27 was harmless. (*Id.* at pp. 559-560.)

This facts of this case very different, since most of Castaneda's testimony against appellant was uncorroborated. Castaneda was the *only* witness who reported seeing appellant commit any of the charged murders, and Castaneda's damaging testimony that he saw appellant and Diana Delgado together on the night she was murdered, and then saw appellant in possession of Delgado's jewelry several hours later, was also uncorroborated.

Thus, while it may be harmless to refuse to give CALJIC No. 8.27 where the purported accomplice to felony murder is a teenager who did not know that the defendant intended to commit the crime in question (31 Cal.4th at p. 557), and whose testimony was essentially duplicated by that of other witnesses, this is a completely different situation. Castaneda was clearly a viable suspect in these crimes because of his long history of violent crimes, including at least one conviction for being a felon in possession of a firearm and at least three incidents in which he shot people (17 RT 2600-2601), and his largely uncorroborated testimony was crucial to the prosecution's case.[20]

B. The Trial Court Erred in Refusing Requested Special Instructions Supporting Appellant's Defense Theory

Appellant has argued that the trial court erred in refusing to give 11 special jury instructions that were "designed to focus the jurors'

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[20] Respondent has not responded to appellant's contention that the trial court's refusal to give CALJIC No. 8.27 constituted reversible penalty phase error. (AOB 114.)

attention on the extensive evidence that Francisco Castaneda committed the charged crimes." (AOB 115.) Respondent contends that those instructions were properly refused because they were "argumentative," and/or "attempted to convey concepts . . . covered in the standard CALJIC instructions." (RB 85.) Respondent's claims are unfounded.

Special Instructions Nos. F, G, H and Z would have told the jury that, in deciding appellant's guilt, it *could* consider evidence that (1) a witness made "false or misleading statements," attempted to dissuade witnesses, or attempted to fabricate or suppress evidence, as proof of his/her consciousness of guilt (Nos. F-H), or (2) someone else committed the charged crimes (No. Z), in deciding whether appellant was guilty. Respondent contends that the substance of those instructions was "adequately covered by CALJIC No. 2.90." (RB 91.) However, respondent does not cite any authority for that proposition, which does not withstand scrutiny.

A defendant has a right to tailored instructions relating the standard of reasonable doubt to evidence in the case from which such a doubt could be engendered. (*People v. Pierce* (1979) 24 Cal.3d 199, 211; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) That includes a right to "pinpoint" instructions that relate particular facts in the case to either a legal issue or the defense theory. (*People v. Sears* (1970) 2 Cal. 3d 180, 190; *People v. Earp* (1999) 20 Cal.4th 826, 887.) CALJIC No. 2.90 does not address the significance of any particular types of evidence; it merely states "that the defendant is presumed innocent and the prosecution bears the burden of proving him guilty beyond a reasonable doubt." (See *People v. Woods* (2006) 146 Cal.App.4th 106, 119.) Nothing in CALJIC No. 2.90 told the jurors they could consider

the evidence of *Castaneda's* guilt in determining whether there was a reasonable doubt as to *appellant's* guilt, e.g., that they could treat the fact that Castaneda fled to Texas immediately after the murders as evidence that he was conscious of his guilt of the charged murders, and that he, not appellant, committed the murders. (17 RT 2563.) Thus, the substance of Special Instructions Nos. F, G, H and Z was not "covered" by CALJIC No. 2.90.

Moreover, Special Instructions Nos. F, G and H are modeled directly after pattern instructions (CALJIC Nos. 2.03, 2.04 and 2.06) which this Court has repeatedly upheld against claims that they are improper "pinpoint" instructions. (See AOB 122-123, citing *People v. Kelly* (1991) 1 Cal.4th 495, 531-532 [CALJIC No. 2.03]; *People v. Arias* (1996) 13 Cal.4th 92, 141 [same]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224 [CALJIC Nos. 2.03, 2.04]; *People v. Bolin* (1998) 18 Cal.4th 297, 326-327 [CALJIC Nos. 2.06].) If those instructions, which benefit the prosecution, are proper, then so were the special instructions requested by appellant.

Respondent also contends that Special Instruction No. Z was improperly argumentative "because it directed the jury to consider evidence that another person had the motive and opportunity to commit the murders in determining" appellant's guilt. (RB 91, citing *People v. Ledesma* (2006) 39 Cal.4th 641, 720.) However, unlike the instruction found to be argumentative in *Ledesma*, the requested instruction would not have "direct[ed]" the jury to consider any particular evidence; it would have simply pointed out to the jury that evidence had been presented which "indicat[ed] or tend[ed] to prove that someone else committed the murder," and that the "weight and significance" of that

evidence were "matters for [its] determination." (20 CT 5536.) That was an entirely proper, non-argumentative instruction because it would have directed the jury's attention "not [to] specific evidence as such, but [to] the theory of the defendant's case." (*People v. Wright* (1988) 45 Cal.3d 1126, 1135-1136.)

Respondent also contends that Special Instruction No. J was improperly argumentative because it would have: (1) focused the jury's "attention on specific evidence;" and (2) "'invited the jury to draw inferences favorable to one party'" from that evidence. (RB 92, quoting *People v. Earp*, *supra*, 20 Cal.4th at p. 886.) However, the form and content of Special Instruction No. J – which would have told the jury that it could infer that "an individual" had stolen property from evidence that the individual was in conscious possession of the property, "together with corroborating evidence tending to prove he committed the theft" (20 CT 5518) – are taken directly from CALJIC No. 2.15. The latter instruction – which tells the jury that it can infer the *defendant's* guilt of theft from the fact that he was "in possession of recently stolen property when coupled with slight corroboration by other inculpatory circumstances" – has been approved by this Court as a correct statement of law. (*People v. Prieto* (2003) 30 Cal.4th 226, 249.) If it is proper to instruct the jury that it can rely on such evidence in inferring the guilt of the defendant, who stands before them cloaked in the presumption of innocence, it cannot be improperly argumentative to instruct the jury that it may draw the same inference about an uncharged witness.

A similar analysis applies as to Special Instructions Nos. M, N and O, which would have told the jury that it *could* consider evidence of: (1)

the "presence of a motive in the defendant or another person" (No. M; 20 CT 5521); (2) "[t]he flight of a person immediately after the commission of a crime" (No. N; 20 CT 5522); and/or 3) the failure of a witness "to deny or explain any evidence" tending to incriminate him. (No. O; 20 CT 5523.) Respondent contends that those instructions are argumentative because they ask the jury to "'consider' certain evidence" (RB 92-93, quoting *People v. Ledesma*, *supra*, 39 Cal.4th at p. 720 [Nos. M and N]), or to draw inferences favorable to appellant. (*Id.* at p. 93 [No. O].) However, like Special Instructions Nos. F, G and H, those instructions are also modeled directly after pattern instructions this Court considers unobjectionable – CALJIC Nos. 2.51, 2.52 and 2.62, respectively. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1156 [CALJIC No. 2.51 is a "standard general instruction"], 1160 [noting the Court's repeated rejection of challenges to CALJIC No. 2.52]; see also Bolinsky, *New Jersey's Medical Malpractice Model Jury Instruction* (1996) 28 Rutgers L. J. 261, 268 ["Pattern jury instructions were designed in part to eliminate argumentative instructions"].)

Thus, if a trial court can properly instruct the jury that it "may consider" evidence that "a person" fled "immediately after the commission of a crime . . . in deciding whether a defendant is guilty" (CALJIC No. 2.52), it cannot be argumentative to instruct the jury that it may consider the same type of evidence in "judging the testimony, credibility, and culpability of [a] witness." (Spec. Inst. No. N.) Similarly, if the jury can properly draw unfavorable inferences against the *defendant* based on his failure to "explain or deny any evidence against him . . . which he [could have] reasonably [been] expected to deny or explain" (CALJIC 2.62), it can also draw unfavorable inferences

as to a *witness's* "testimony, credibility, and culpability" based on similar conduct. (Spec. Inst. No. O.)

Finally, respondent argues, citing *People v. Earp*, *supra*, 20 Cal.4th at p. 887, and *People v. Ledesma*, *supra*, 39 Cal.4th at p. 721, that any error in refusing the requested instructions was harmless, because the jury was instructed on reasonable doubt, and on accomplice liability and aiding and abetting, and was "well aware of the defense theory" that Castaneda was the real perpetrator of the charged murders. (RB 93-94.) That argument fails for several reasons.

First, the primary premise underlying that argument – that giving CALJIC No. 2.90 cures any error in refusing the requested instructions (RB 93) – is unfounded. An instruction setting out the reasonable doubt standard is no substitute for instructions which detail the types of evidence the jury may consider in deciding whether the prosecution has met its burden under that standard.

Next, *Earp* and *Ledesma* are factually distinguishable because they do not involve facts like the ones in this case, where the prosecution's guilt case rested primarily on the testimony of a witness who may have actually committed the charged crimes. In *Earp*, *supra*, 20 Cal.4th at pp. 848-849, the defendant claimed that a man named Morgan killed the child victim, but Morgan denied that charge on the stand, and several other witnesses testified that the defendant had said immediately after the child's death that she fell down the stairs. (*Id.* at pp. 845, 847.) In *Ledesma*, *supra*, 39 Cal.4th at pp. 656-658, the defense "offered evidence" that an uncharged, non-testifying co-perpetrator actually committed the charged murder, but several witnesses testified that the defendant had admitted that he committed that crime. (*Id.* at pp.

658-659.)

Further, *Earp* and *Ledesma* only analyzed whether it was prejudicial to refuse to instruct on the impact of evidence of third party culpability on the determination of the defendant's guilt. (*People v. Earp*, *supra*, 20 Cal.4th at p. 886-887; *People v. Ledesma*, 39 Cal.4th at pp. 720-721.) Here, the trial court refused a series of requested instructions on a variety of subjects related to Castaneda's culpability and credibility. Accordingly, the determination in *Earp* and *Ledesma* that it was harmless error to refuse a single instruction on the consideration of third party culpability provides scant guidance in resolving the far more complex question of whether it was prejudicial to refuse *all* the special instructions at issue here, particularly since those instructions related to concepts essential to a full understanding of the defense theory of the case.

Ultimately, the question is whether the jury might have reached a different conclusion if it had known that it could consider the impact of Castaneda's misleading statements to the police, flight from the jurisdiction after the murders, false testimony at trial, possession of stolen property, and, most crucially, motive to falsely implicate appellant, in evaluating his crucial testimony. Given that Castaneda was the heart of the prosecution's case, the answer is yes.

C. Conclusion

Because the trial court committed prejudicial error in refusing each and all of the above-referenced jury instructions, the guilt and penalty judgments must be reversed.

V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE THAT APPELLANT SHAVED "187" INTO HIS HAIR WHILE IN CUSTODY AWAITING TRIAL

Appellant has argued that the trial court committed reversible error in denying his Evidence Code section 352 objection to the admission, as an "implicit admission" of guilt, of Deputy John Wilson's testimony that appellant had the numbers "187" shaved into his hair while incarcerated on these charges. (AOB Arg. VII, 138-141; 19 RT 2789.) Respondent contends that the evidence was properly admitted because: (1) the testimony was "relevant and probative" on the issue of appellant's guilt (RB 97); (2) the testimony was not "overly prejudicial" because appellant "was on trial for three murders" (*id.* at p. 98); (3) that the testimony may have been speculative goes only to its weight, not to its admissibility (*ibid*); and (4) this case is controlled by *People v. Ochoa* (2001) 26 Cal.4th 398, 438, which upheld the admission of evidence that the defendant had the same numbers tattooed on his forehead. Respondent also contends that even if the testimony was improperly admitted, the error was harmless given the "overwhelming evidence" of guilt. (RB 100.) All of respondent's contentions fail, as demonstrated below.

A. The Evidence Was Improperly Admitted

First, it is simply not true that Deputy Wilson's testimony was relevant. Moreover, even if had been relevant, that testimony still would have been excessively prejudicial and subject to exclusion under section 352. (See *People v. Scheid* (1997) 6 Cal.4th 1, 13 [under section 352, trial courts weigh the probative value of relevant evidence against its

prejudicial effect].) Indeed, it was the fact that the testimony seemed to be relevant and incriminating that made it so prejudicial.

First, while respondent argues that the evidence was "relevant and probative on the issue of [appellant's] guilt" (RB 97), it does not explain why, under these circumstances, shaving 187 into his hair was an admission by appellant that he was guilty of homicide, rather than merely a statement that he was *charged* with that crime. (See AOB 136, 138; 19 RT 2789.)

Second, respondent's apparent assertion that a defendant who is *charged* with murder cannot be prejudiced by the improper admission of evidence purportedly supporting that charge (RB 98) is also misconceived. It was *because* appellant was charged with murder that this evidence was so prejudicial. Thus, if appellant had been awaiting trial on charges of, e.g., possessing marijuana for sale, the admission of Deputy Wilson's testimony about his hair style might arguably have been less problematic.

Also unfounded is respondent's contention that it was not error to admit the testimony on the basis that it was "speculative," and lacked substantial probative value, because the fact that the evidence was speculative only goes to its "weight . . . , not its admissibility." (RB 98.) Appellant recognizes that this Court relied on that same axiom in holding that testimony about the meaning of the "187" tattoo sported by the defendant in *People v. Ochoa*, *supra*, 26 Cal.4th at p. 438, was not improperly ambiguous, but respectfully contends that the Court should reconsider whether that principle has any proper application in this context.

Because the trial court cannot decide whether to exclude evidence

under section 352 *without* considering its weight (see, e.g., *People v. Mickey* (1991) 54 Cal.3d 612, 656 [section 352 requires the trial court to affirmatively weigh evidence's probative value against its prejudicial effect]; *People v. Raley* (1992) 2 Cal.4th 870, 895 [same]), the amount of weight evidence has is a factor in determining its admissibility. And evidence that is ambiguous – i.e., which opens the door to speculation as to its meaning – has less weight, and is less probative. Moreover, this Court has itself relied on the conclusion that a challenged item of evidence was "speculative" in nature in finding that it was proper to exclude that evidence under section 352. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 81 [citing the "speculative" nature of expert testimony on "'unconscious transference'" as a basis for upholding its exclusion under section 352]; *People v. Babbitt* (1985) 45 Cal.3d 660, 684 ["exclusion of evidence that produces only speculative inferences is not an abuse of discretion"].) Accordingly, it was error to admit the evidence on the basis that its speculative nature only impacted the weight to be given to it.

Finally, as appellant has argued, even assuming arguendo that *People v. Ochoa*, *supra*, 26 Cal.4th at p. 438, was properly decided, this situation is distinguishable because appellant did not commit so "unlikely" an act as tattooing what was arguably an admission of guilt onto his forehead. (AOB 140-141.) Thus, while respondent is probably correct that both the defendant's tattoo in *Ochoa* and appellant's haircut "appear to be based upon bravado" (RB 98), those acts involved very different *levels* of bravado. What appellant did could have been nothing more than an ephemeral, and ill-advised, attempt at humor (19 RT 2791), while the tattoo sported by the defendant in *Ochoa* was a permanent and

boastful avowal of guilt. Thus, contrary to respondent's argument (RB 98-99), the fact that a tattoo is more "relative[ly] permanen[t]" than a haircut is a meaningful distinction precisely *because* the former has more weight, and is less speculative, as evidence of an implicit admission of guilt.

B. The Error Was Prejudicial

Respondent contends that any error in admitting this evidence was harmless in light of the "overwhelming evidence of [appellant's] guilt." (RB 100.) However, that claim ignores the fact that the prosecution's guilt phase case relied primarily on the testimony of Francisco Castaneda, the other prime suspect in the murders. It is misleading to describe that evidence as "overwhelming." As appellant has argued, "if [the jurors] had not heard this testimony about appellant's supposed 'admission,' it is reasonably probable that [they] would have concluded that Castaneda was the killer, or that they could not find appellant guilty beyond a reasonable doubt based on his testimony." (AOB 142-143.)

C. Conclusion

The erroneous admission of this highly prejudicial evidence requires that both the guilt and penalty verdicts be set aside.

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VI

APPELLANT WAS PREJUDICED WHEN THE TRIAL COURT INSTRUCTED THE JURY PURSUANT TO CALJIC NOS. 2.03 AND 2.06

Appellant has argued that the consciousness of guilt instructions given by the trial court were improper, both as a general matter and as applied to the circumstances of his case. (AOB Arg. VIII, 133-141.) Respondent argues that the instructions were proper, and if improper for some reason, that giving them was harmless error in this case. (RB 101-106.)

Appellant's initial contention was that the trial court erred in giving the instructions because they improperly duplicated the general instructions on circumstantial evidence (CALJIC Nos. 2.00, 2.01 and 2.02), and therefore unduly emphasized the supposed inference of guilt arising from appellant's conduct. (AOB 145-146.) Respondent contends that the instructions did not duplicate the circumstantial evidence instructions because they "specifically referred" to the acts of making false statements and destroying evidence as types of conduct that show a consciousness of guilt, and that even if they *did* duplicate the circumstantial evidence instructions, their provision to the jury cannot have been prejudicial. (RB 102-103.)

However, appellant does not claim that the consciousness of guilt instructions were not more specific than the general circumstantial evidence instructions in identifying what evidence the jury could consider in deciding whether he had manifested a consciousness of guilt. Rather, appellant has argued that the general instructions "amply informed the jury that it could draw inferences from the circumstantial evidence," and that it was accordingly both unnecessary and unduly

prejudicial to give additional instructions which pointed to specific alleged facts from which the jury could draw permissive inferences that appellant was conscious of his guilt. (AOB 145-146.) Since respondent does not directly address appellant's argument, no further reply is required.

Appellant has also argued that the consciousness of guilt instructions: (1) were partisan and argumentative; and (2) permitted the jury to draw an irrational permissive inference about his guilt. (AOB 146-156.) Those arguments are based upon an analysis of this Court's cases delineating why those instructions are proper. As to the first of those contentions, appellant has argued that this Court has drawn illusory distinctions in those cases in which it has upheld these instructions, and needs to re-examine those principles in light of its acknowledgment in *People v. Seaton* (2001) 26 Cal.4th 598, 673, that consciousness of guilt instructions benefit the prosecution. (AOB 146-151.) As to the second contention, appellant has similarly argued that this Court should reconsider its holdings rejecting the claim that consciousness of guilt instructions permit the jury to draw irrational inferences concerning the defendant's mental state. (*Id.* at p. 154-155.)

In addressing the foregoing contentions, respondent merely recites cases that have upheld this instruction and asserts that appellant's arguments are not persuasive. (RB 103-104.) Perhaps most glaringly, respondent ignores appellant's argument that "at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence." (AOB 149-150.) Again, since respondent does not directly address appellant's arguments, there is nothing to which appellant need reply.

Finally, respondent asserts that any error in giving the consciousness of guilt instructions was harmless because even if they "had not been given, the jury still would have rejected the defense theory of the case and convicted" appellant because there was "overwhelming" evidence of his guilt. (RB 105.) However, as appellant has argued, it is misleading to describe the guilt phase evidence as overwhelming, since the prosecution's case relied so heavily on the testimony of the other prime suspect in the murders – Francisco Castaneda. (Arg. V, *supra*, p. 52.)

Thus, most of the purportedly "overwhelming" evidence of guilt respondent cites – that appellant shot multiple times through the truck window at Mr. Gorman, that appellant reloaded the gun and shot Ms. Creque, that appellant "was last seen with Ms. Delgado, and that appellant "had [Ms. Delgado's] jewelry" after the murder (RB 105) –*came* from Castaneda. The remainder of the evidence to which respondent points – that appellant owned a .22 caliber gun, that a particular .22 caliber gun was used to kill all three victims, that appellant's semen was in Ms. Delgado's body, etc (*ibid.*) – primarily serves to prove that appellant *could* have committed the murders, not, like Castaneda's testimony, to prove that he *did* commit them. Accordingly, reversal of the guilt verdicts and special circumstances finding is required.

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VII

THE INSTRUCTIONS GIVEN AT TRIAL IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant has argued that his constitutional rights were violated by various jury instructions given at trial that diluted the reasonable-doubt standard and lightened the prosecution's burden of proof. (AOB Arg. IX., 158-170.) Respondent does not directly address appellant's arguments, but instead relies upon this Court's previous decisions rejecting similar challenges. (See RB 108-112.) Since respondent does not directly address appellant's arguments, there is little to which appellant need reply.

However, respondent does make one argument that requires a response – that "[b]ecause these instructions are correct in law, [appellant's] substantial rights are not affected and he has forfeited any claim that these instructions either standing alone or in combination, were erroneous." (RB 107, citing *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) Appellant assumes, based on the citation to *Hillhouse*, that respondent has misconstrued appellant's claim as being that the instructions at issue were "correct in law . . . [but] needed clarification . . . ." (*Ibid.*) However, appellant asserts that the instructions were legally *incorrect*, and, indeed, that they "violated the federal Constitution," because they suggested that the jury could convict appellant based on proof amounting to less than beyond a reasonable doubt. (AOB 158, 162-164.) Accordingly, because the trial court had a sua sponte duty to give correct instructions on all "general principles closely and openly connected with the facts" of the case (*People v. Sedeno* (1974) 10 Cal.3d

703, 716), respondent's claim that appellant forfeited the claim by failing to object to the instructions at trial is unfounded.

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VIII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE OF APPELLANT'S ALLEGED INVOLVEMENT IN A SHOOTING AT AN APARTMENT COMPLEX, AND BY FAILING TO PROPERLY INSTRUCT THE JURY CONCERNING THAT EVIDENCE

Appellant has argued that the trial court committed reversible error by (1) admitting penalty phase evidence under section 190.3, factor (b),[21] concerning an incident in which the then-14-year-old appellant allegedly rode around an apartment complex with his father and older brother, and someone yelled and fired shots, and (2) failing to properly instruct the jury concerning the mental state required for conviction of the crime allegedly committed in that incident, assault with a deadly weapon. (AOB Arg. X, 171-191.) As to the first claim, appellant argued that the evidence was insufficient to establish that he committed an assault with a deadly weapon because it "failed to prove the required act; [] failed to prove the required mental state; and [] failed to prove accomplice liability." (*Id.* at pp. 176-177.) As to the second claim, appellant argued that the trial court was required to instruct the jury that he could not have committed an assault unless he was aware of facts that "would have lead a reasonable person to realize that a direct natural and probable result of his act would be that physical force would be applied to another person." (*Id.* at pp. 187-188, quoting *People v. Williams* (2001) 26 Cal.4th 779, 788.)

As to the first of those arguments, respondent contends that it was proper to admit the evidence, without specifying what crime appellant

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[21] Hereafter, "factor (b)."

had purportedly committed, because the evidence demonstrated that appellant had committed "other criminal activity involving the threat of force or violence," and, alternatively, that any error in admitting the evidence was harmless. (RB 115-117.) In response to the second argument, respondent essentially concedes that the trial court erred in failing to instruct the jury that appellant could not be found to have committed an assault unless he knew his actions were likely to cause a battery, but claims that the error was harmless because it would have been "irrational" for the jury to conclude otherwise. (AOB 119-121.) Those arguments fail for several reasons.

The fundamental problem with respondent's argument that this evidence was correctly admitted is that it rests upon the incorrect premise that a death judgment can properly be based, even in part, on evidence which fails to prove that the defendant committed an "actual crime" involving the use or threatened use of force or violence – here, evidence that appellant rode around with his father and older brother in a truck while someone yelled threats, and someone *other than* appellant fired a gun. That premise must be rejected because it is clearly contrary to this Court's precedents. (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 148; *People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Jurado* (2006) 38 Cal.4th 72, 136.) As this Court has said, factor (b) only authorizes the admission of "evidence that demonstrates the commission of an actual crime," not "nonoffenses for which the defendant could not even be tried." (*Phillips*, *supra*, 41 Cal.3d at p. 72.)

The improper admission of that testimony, and the failure to properly instruct the jury as to the required mental state for assault with a deadly weapon, violated appellant's rights under the federal Constitution,

and require reversal of his death sentence.

A. The Improper Admission of the Evidence Was Prejudicial, Requiring Reversal of the Death Judgment

1. The court erred in admitting the evidence

While respondent contends that the evidence in question was properly admitted, it does not attempt to counter appellant's contention that the evidence "was insufficient to prove the assault with a deadly weapon alleged as an aggravating factor. . . ." (AOB 178.) Thus, respondent tacitly concedes that the evidence *was* insufficient for the purpose for which it was admitted. Notwithstanding that concession, respondent argues that the evidence was properly admitted because: (1) the evidence demonstrated that appellant had committed "other criminal activity involving the threat or force or violence" (RB 115); (2) appellant "aided and abetted his father and/or brother in the incident" (*id.* at p. 116); and (3) the trial court was "not required" to determine whether the prosecution's proffer concerning the incident "presented substantial evidence of every element" of assault with a deadly weapon. (*Id.* at p. 117, citing *People v. Clair* (1992) 2 Cal.4th 629, 678, and *People v. Tahl* (1967) 65 Cal.2d 719, 738.) Those arguments fail because they were not advanced by the prosecution in support of the admission of the evidence, and thus cannot now be asserted as a basis for upholding its admission. (*People v. Hines* (1997) 15 Cal.4th 997, 1034, fn. 4.) Moreover, those arguments are unpersuasive.

Clearly, the prosecution did not rely below on the arguments respondent now advances concerning the admissibility of this evidence. Instead, the prosecution offered the evidence to show that appellant had committed an assault with a deadly weapon, and argued that it was

sufficient for that purpose. (2 CT 341 [Amended Notice of Intention to Produce Evidence in Aggravation describes the incident as "an assault with a firearm"]; 27 RT 3957 [prosecutor refers to the incident as an "assault with a deadly weapon"].) The prosecutor did not argue that the evidence demonstrated appellant's commission of some "other criminal activity involving the threat or force or violence," or that appellant was liable as an aider and abettor, or that the prosecution was "not required" to "present[] substantial evidence of every element" of assault with a deadly weapon. (RB 115-117.) Since "the prosecutor did not attempt to justify admission" of the evidence on those grounds, respondent "may not now assert them as a basis for [upholding] the trial court's ruling" admitting the evidence. (*People v. Hines*, *supra*, 15 Cal.4th at p. 1034, fn. 4; *People v. Fauber* (1992) 2 Cal.4th 792, 831; *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.)

Moreover, since this evidence was admitted to establish that appellant had committed an assault with a deadly weapon, the pertinent question is whether it was sufficient for that purpose. Evidence of prior "criminal activity" is only admissible under factor (b) if it demonstrates the commission of an "actual crime." (*People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 148; *People v. Phillips*, *supra*, 41 Cal.3d at p. 72; *People v. Jurado*, *supra*, 38 Cal.4th at p. 136.) Accordingly, when the trial court holds a preliminary inquiry into the admissibility of such evidence, as in this case, the issue is whether the prosecution's proffer contains "substantial evidence to prove each element" of the actual crime at issue. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25; *People v. Boyer* (2006) 38 Cal.4th 412, 476, fn. 48; see *People v. Griffin* (2004) 33 Cal.4th 536, 584 ["Substantial evidence of other violent criminal activity

is evidence that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt."].)

The actual crime in question here was assault with a deadly weapon (2 CT 341; 26 RT 3957), and the jury was instructed on that crime after the evidence was admitted. (21 CT 5729; 29 RT 4365.) Respondent's contention that the evidence was properly admitted under factor (b) because it indicated that the defendant had engaged in *some* unspecified "other criminal activity involving the threat of force or violence" (RB 115), though not the actual crime the evidence was offered to prove, conflicts with both this Court's holdings regarding the admissibility of evidence under factor (b), and basic fairness and due process concerns.

Also unfounded is respondent's cursorily argued contention that the evidence was properly admitted because it supported a finding that appellant "aided and abetted his father and/or brother." (RB 115-116.) First, respondent does not even attempt to specify *any particular crime* of which appellant's father and/or brother could purportedly have been convicted based on that evidence. Moreover, as appellant has argued, the evidence was clearly insufficient to show that *anyone* committed an assault, and accordingly appellant could not have been liable as an accomplice to *that* crime. (AOB 182-183.) Further, even if appellant's father and/or brother did commit an assault, there "was no evidence, let alone substantial evidence" that appellant: (1) "had actual knowledge that a battery would probably and directly result" from the acts that constituted that assault; (2) "intended to assist" his father and/or brother in committing those acts; and (3) actually did assist either or both of them. (AOB 182; see *People v. Jurado*, *supra*, 38 Cal.4th at p. 136 [to

be admissible under factor (b) to prove aiding and abetting, evidence must show defendant acted with knowledge of principal's unlawful purpose, intended to commit, encourage or facilitate offense, and aided, promoted or instigated offense].)

Respondent's final argument – that the trial court "was not required" to find that the evidence involved "substantial evidence of every element" of assault with a deadly weapon (RB 117) – also fails. *People v. Clair*, *supra*, 2 Cal.4th at p. 678, the only case respondent cites in support of that argument, is inapposite.[22] Thus, while *Clair* holds that a trial court is not required to hold a "preliminary inquiry" before admitting evidence under factor (b), it also expressly states that such evidence is only admissible "if it can support a finding by a rational trier of fact as to the existence of such [violent criminal] activity beyond a reasonable doubt." (*Id.* at p. 673.) Admittedly, the trial court did conduct an inquiry before admitting this evidence, but the court erred in *admitting* the evidence; *Clair* has no bearing on this issue.

Thus, while respondent contends that the "facts offered by the prosecution" were sufficient to permit "[a]ny rational juror [to] make a determination of criminal activity beyond a reasonable doubt" (RB 115-116), those facts did not establish any of the elements of the crime at issue – assault with a deadly weapon. A conviction for that offense

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[22] Respondent also asks the Court to "see" *People v. Tahl* (1967) 65 Cal.2d 719, 738, on this point. However, because *Tahl* involved the construction of a now-superceded death penalty statute, and because this Court subsequently held in *Phillips* that under the current statute the prosecution is required to present "substantial evidence to prove each element" of any crime charged under factor (b) (41 Cal.3d at p. 72, fn. 25), *Tahl* has no bearing on this issue.

requires proof that the defendant used a deadly weapon while "knowing facts that would lead a reasonable person to realize a battery [would] probably and directly result" from his actions. (*People v. Wright* (2002) 100 Cal.App.4th 703, 706; *People v. Williams*, *supra*, 26 Cal.4th at p. 788.) The alleged facts cited by respondent – that appellant was in the truck, that someone in the truck pointed a gun at Ms. Palacio, that Ms. Palacio later heard gunshots, that a .22 caliber pistol was under the truck seat, and that appellant had .22 caliber ammunition in his pocket (RB 115-116) – fall far short of meeting that standard. As appellant has argued, that evidence "failed to establish [either] the actus reus" or "the mens rea" for assault with a deadly weapon; as to the former because "there is no evidence that appellant handled or fired the gun," and as to the latter because "[w]ithout an assaultive act there [is] a fortiori no assaultive intent." (AOB 179-180.)

Finally, the erroneous admission of this evidence under factor (b) violated the Eighth Amendment. As the High Court held in *Brown v. Sanders* (2006) 546 U.S. 212, 222-223, the penalty jury's consideration of an invalid sentencing factor renders a subsequent death sentence unconstitutional because an improper element has been added to the aggravation scale in the weighing process, unless the sentencer could have given aggravating weight to the same facts and circumstances under another sentencing factor. (See *State v. McFadden* (Mo. 2007) 216 S.W.3d 673, 677-678 [under *Sanders*, death sentence based in part on invalidated prior murder conviction "cannot stand"].) Because this evidence could not have been considered under any other sentencing factor, its admission was federal constitutional error.

2. The error was prejudicial

Respondent also contends that any error in admitting this evidence was harmless because "the incident was marginally significant in light of the 'whole picture presented of the murder[s] and the murderer.'" (RB 117, quoting *People v. Clair*, *supra*, 2 Cal.4th at p. 678, fn 11.) Appellant disagrees.

As noted in the Opening Brief, the prosecutor apparently considered this evidence sufficiently weighty to emphasize it in arguing that appellant had "involve[d] himself in the gang lifestyle at a very early age," and would continue to live that lifestyle if sentenced to life imprisonment (30 RT 4578); accordingly, the prosecutor argued, appellant had to be sentenced to die because otherwise he would not "suffer all that much." (*Id.* at pp. 4587-4599; AOB 185.) Thus, the prosecutor's own "actions demonstrate just how critical the State believed the erroneously admitted evidence to be." (*Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131; *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments. . . ."].)

Had appellant's jury not heard this highly prejudicial evidence supporting the prosecution's theory that he had spent so many years entrenched in "the gang activity and lifestyle" that prison would be merely a continuation of the life he found so congenial on the outside, there is a reasonable possibility the jury would have returned a verdict of life without the possibility of parole instead of death. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Further, under the harmless error standard for federal constitutional error set out in *Chapman v. California* (1967) 386 U.S. 18, 24, respondent has failed to show beyond a reasonable

doubt that the federal constitutional errors here did not contribute to the jury's death verdict. Accordingly, appellant's death sentence must be reversed.

B. It Was Reversible Error Not to Instruct That Appellant Did Not Commit An Assault Unless He Reasonably Should Have Known That His Actions Might Cause a Battery

Respondent apparently concedes that it was error not to instruct that appellant could not have committed an assault with a deadly weapon unless he was aware of facts that would have lead a reasonable person to realize that his acts would probably result in the application of physical force against another person. (RB 119-120.) However, respondent contends that the error was harmless because it would have been "irrational" for the jury "to conclude" that appellant lacked such knowledge. (*Id.* at p. 120-121.)

That argument fails for several reasons. In the first place, the trial court's failure to correctly instruct the jury on that actual knowledge requirement violated appellant's rights under the federal Constitution, and reversal is therefore required unless the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.)[23] The error clearly was not harmless beyond a reasonable doubt because the effect of it was that the jury considered an invalid sentencing factor, thus "add[ing] an improper element to the aggravation scale in the weighing process" that

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[23] Appellant's opening brief incorrectly suggests that the impact of this penalty phase instructional error could be subject to review under the state-law *Watson* standard. (AOB 190; *People v. Watson* (1956) 46 Cal.2d 818, 823.)

could not have come in under any other sentencing factor. (*Brown v. Sanders*, *supra*, 546 U.S. at pp. 222-223.) Moreover, contrary to respondent's contention, there are no facts from which the jury could have inferred that appellant must have been "aware of [] facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct" (*People v. Williams*, *supra*, 26 Cal.4th at p. 788), even if he either fired the shots himself or aided and abetted the shooter.

As a preliminary matter, respondent cites two legally and factually distinguishable cases which hold that, on their particular facts, it was "clearly harmless" not to "instruct on the *Williams* actual knowledge requirement." (RB 120-121.) The first of those cases, *People v. Williams* – the same case that set out the actual knowledge requirement at issue – is completely distinguishable; both because it does not involve a penalty phase error, and because the defendant there "undoubtedly knew" that his actions might cause a battery since he intentionally fired a "warning shot" from a shotgun toward an area where he knew the victim was hiding. (26 Cal.4th at pp. 782, 790.) The other case, *People v. Prieto* (2003) 30 Cal.4th 226, 269, also does not involve a penalty phase error, and moreover concerns the interpretation of a completely different crime, with a completely different mental state requirement – possession of a deadly weapon in jail. There was also far stronger evidence in *Prieto* that the defendant had the mental state required for that offense – that he knew the weapons at issue were deadly in nature and present in his cell – since the "shanks" were "six to seven inches long" with "sharpened ends and cloth handles," and were "hidden under [the defendant's] bunk in a cell accessible only to" him and to corrections

officers. (*Ibid.*) Neither of those cases has any application to the issue at hand.

Moreover, contrary to respondent's contention, the alleged facts respondent points to do not establish that appellant had the actual knowledge required under *Williams*. Those facts are as follows: (1) the person in the passenger side of the truck pointed a gun at Ms. Palacio, who heard shots a short time later; (2) when the police stopped the truck, appellant was seated on the passenger side, and had ammunition in his pocket; (3) there was a gun under the seat of the truck, and appellant's father and brother did not have any ammunition; (4) there is no evidence appellant "did not know" the gun was there, and that it was "a deadly weapon;" and (5) "the incident was in retaliation of [*sic*] an incident [in which] a resident of the complex" shot at appellant. (RB 120.)

Respondent (1) does not specify *why* or *how* those alleged facts were sufficient to establish that appellant had the required actual knowledge that his actions "by [their] nature [would] probably and directly result in the application of physical force against another" (*People v. Williams*, *supra*, 26 Cal.4th at p. 790), and (2) ignores the fact that the only testimony about the incident indicated that appellant did not fire the gun, and that the shots were fired into the air. (27 4063-4064, 4066, 4069-4071.) Based on that evidence, no reasonable jury could have found that appellant knew or should have known that his actions were likely to cause a battery, because there simply was no reasonable likelihood that one would occur.

Thus, even assuming arguendo that there was sufficient evidence to establish that appellant fired the shots, the jury could still have reasonably found that he lacked the actual knowledge required under

Williams. Since the only evidence was that the shots were fired into the air (27 RT 4071), and there was *no* evidence that anyone else was present or likely to be hit when the shots were fired, whoever shot the gun must have known that the likelihood of causing a battery was remote.

Finally, appellant cannot be deemed to have had the knowledge required under *Williams* based on the theory that he aided and abetted the commission of an assault. (RB 116.) On these facts, appellant could not possibly have (1) known that his father and/or brother intended to commit an assault, (2) intended to assist either of them in committing that assault, and (3) engaged in conduct which assisted in the commission of that crime. (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) Because the shots were fired into the air, and there was apparently no one around to be hit, *no one* could have been convicted of assault under *Williams*.

The likely effect of the trial court's failure to instruct on the actual knowledge requirement set out in *Williams* was that the jury (1) concluded that this evidence *did* suffice to show the commission of an assault with a deadly weapon, and (2) considered the purported fact that appellant had committed such an assault in making the "uniquely moral" determination that appellant deserved to be sentenced to death. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Accordingly, reversal of the sentence is required.

C. Conclusion

The trial court erred both in admitting this penalty phase evidence, and in instructing the jury concerning it. Accordingly, appellant's death sentence must be reversed.

IX

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ADMITTED EXCESSIVE AND HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE

Appellant has argued that the trial court committed reversible error by overruling his objection to the admission of inflammatory and prejudicial victim impact evidence, and denying his request to limit both the number of victim impact witnesses and the extent of their testimony. (AOB Arg. XI, 192-201.) Specifically, appellant has argued that the trial court erred by: (1) permitting the testimony of more than one victim impact witness per victim; (2) failing to limit the victim impact testimony to a description by a "family member present at the scene" of effects of the crime that "were either known or reasonably apparent to the defendant" or "properly introduced to prove the charges" at trial; and (3) allowing the presentation of wholly improper victim impact evidence about subjects like the sexual abuse Mr. Gorman allegedly suffered as a child (28 RT 4334-4335). (AOB 196-199.) Failing to impose those restrictions on the prosecution's presentation of victim impact evidence was particularly prejudicial because much of the testimony at issue was wholly improper – e.g., Curtis Grant's testimony about sexual abuse that he and his brother Mr. Gorman allegedly suffered as children (28 RT 4334-4335), and Jerry Gower's testimony that the death of his sister Ms. Creque caused him to relapse into alcoholism (*id.* at pp. 4350-4351). (AOB 198-199.) Respondent contends that the trial court did not err in admitting victim impact evidence, and that if any such error did occur, it was harmless. (RB 121-130.)

At the outset, appellant contends that respondent's primary

argument – that prior decisions of this Court contradict most of the claims of error advanced by appellant – does not fully answer his claim. The underlying premise of appellant's argument is that California prosecutors have been permitted to exceed the proper limits on victim impact evidence that can be derived from *Payne v. Tennessee* (1991) 501 U.S. 808. Thus, that this Court's decisions may support the trial court's rulings at issue is not decisive, because those decisions are erroneous since they conflict with *Payne*. (AOB 195-200.) Moreover, respondent's specific contentions also fail.

Thus as to appellant's first claim, respondent contends that the number of witnesses offered by the state was appropriate in light of this Court's prior decisions approving the use of the testimony of "multiple witnesses." (RB 122-123.) Appellant acknowledges that this Court has upheld the introduction of evidence from more than one witness per victim. (See, e.g., *People v. Pollock* (2004) 32 Cal.4th 1153, 1183; *People v. Boyette* (2002) 29 Cal.4th 381, 440-441, 444.) However, appellant's claim addresses principles more fundamental than the mere number of witnesses called by the prosecution.

Appellant contends that the trial court abused its discretion because it failed both to understand the role of victim impact evidence and to exercise its discretion in a manner comporting with the constitutional principles underlying that role. It is important to bear this in mind when approaching these issues. For example, appellant's point in showing that other states have limited victim impact evidence to the strictures he suggests, either by statute or judicial decision (AOB 196), is not rebutted by respondent's citation to cases where this Court has failed to approve such restrictions. (RB 122-123.) Appellant acknowledges

those cases, but does not believe they reflect an accurate assessment of federal constitutional principles in this area. (AOB 195-198.)

The same is true regarding the expansive nature of the testimony this Court now permits under the rubric of victim impact testimony. Thus, while appellant recognizes that this Court's decisions have allowed prosecutors enormous latitude in presenting victim impact evidence (e.g., *People v. Lewis*, *supra*, 39 Cal.4th at p. 1057; *People v. Pollock*, *supra*, 32 Cal.4th at p. 1183), he asks the Court to reconsider its position. Appellant contends that if it is the Court's view that the type of victim impact evidence offered in this case falls within the "circumstances of the crime" factor in aggravation, the Court is interpreting that factor in a manner that renders it unconstitutionally overbroad and vague. (AOB 199.)

Finally, respondent contends that any error in the admission of the challenged testimony was harmless beyond a reasonable doubt because "the harm caused by [appellant] was great," the jury was instructed "not to be swayed by prejudice," and the aggravating factors "overwhelmingly supported death as an appropriate penalty . . . ." (RB 127-130.) However, the only authority respondent cites in support of that assertion, *People v. Jones* (2003) 29 Cal.4th 1229, 1264, does not involve the admission of victim impact evidence. Moreover, this Court simply cannot determine, based on this record, that the admission of this emotional and highly prejudicial evidence did not play at least some role in the jury's penalty determination.

Respondent's analysis of the impact of the victim impact evidence presented below totally overlooks the fundamental reality of this case: that appellant was only a teenager when the charged murders occurred,

and his conduct was obviously the product of a grossly deprived upbringing which normalized violent crime. (AOB 186, 201.) Thus, for example, respondent argues that appellant's participation in a "drive-by shooting" was a particularly weighty factor in aggravation (RB 130), but fails to mention that appellant was only 14 at the time, and had been brought along by his father and his older brother. (AOB 171.)

Thus, while respondent correctly states that the charged crimes in this case were "vicious" and "senseless" (RB 129), that is true in almost every capital case. (See Gross, *Lost Lives: Miscarriages of Justice in Capital Cases* (1998) 61 Law & Contemp. Probs. 125, 128 ["The archetypal capital case is a highly publicized prosecution for a brutal and gory murder"].) The question is whether it is clear beyond a reasonable doubt that the added prejudice resulting from the admission of testimony that, e.g., Curtis Grant and his brother were sexually abused as children, and Grant became depressed and suicidal after his brother was murdered (28 RT 4334-4335, 4338-4339), or that Ellen Creque's murder broke up her family, and caused her brother to relapse into alcoholism and ruin his life (*id.* at pp. 4350-4351), did not play a role in the jury's decision to impose death. Because that is not clear beyond a reasonable doubt, appellant's death sentence must be reversed.

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THE TRIAL COURT ERRED IN REFUSING APPELLANT'S PROPOSED INSTRUCTION REGARDING THE PROPER USE OF VICTIM IMPACT EVIDENCE

Appellant has argued that the trial court committed reversible error in rejecting his proposed Special Instruction No. F, which would have informed the jury about the appropriate use of victim impact evidence. (AOB Arg. XII, 202-203.) Only a few of the points raised by respondent require reply.

First, respondent relies heavily on *People v. Ochoa* (1998) 19 Cal.4th 353, 455, which purportedly "addressed an instruction identical to" the one at issue here. (RB 132.) Appellant assumes that respondent intended to cite a different case – *People v. Ochoa* (2001) 26 Cal.4th 398, 455 – in which this Court held that a different proposed limiting instruction was properly refused because its content was covered by the language of CALJIC No. 8.84.1 (*ibid.*), which was also given here. (21 CT 5696; 30 RT 4619).[24] However, CALJIC No. 8.84.1 does not cover the message that would have been conveyed by Special Instruction No. F: that the victim impact evidence could not be considered in a way that would divert the jury from a sober, rational and objective penalty

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[24] CALJIC No. 8.84.1 reads, in relevant part:

> You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

determination.

In fact, CALJIC No. 8.84.1 does not directly address the question of how to consider victim impact evidence at all. And while that instruction does admonish the jury not to "be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow victim impact evidence is likely to produce. The jurors would not have recognized those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they have understood that the admonition not to be swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victims' relatives.

Respondent also relies on *People v. Harris* (2005) 37 Cal.4th 310, 359, which held that an instruction purportedly "identical" to Special Instruction No. F was confusing because it did not make it clear "whose emotional reaction" the jurors were "to consider with caution – that of the victim's family or [their] own." (RB 132.) However, while *Harris* does involve the exact instruction at issue here, the case is distinguishable because the trial court there, unlike the one here, gave a special instruction which this Court said "properly informed the jury of the law regarding victim impact evidence." (37 Cal.4th at pp. 358-359.)

Further, appellant respectfully suggests that the Court should reconsider its conclusion in *Harris* that the rejected instruction is confusing. A reasonable juror who is instructed, as set out in Special Instruction No. F, to make the penalty "decision soberly and rationally," and not to "impose the ultimate punishment of death" as an "irrational, purely subjective response to emotional evidence and argument," would

understand that it is his or her own emotional responses that must be considered cautiously. (37 Cal.4th at pp. 358-359.) Moreover, as appellant has argued, if Special Instruction No. F "was somehow deficient, the trial court [] should have given a properly-revised version" of that instruction. (AOB 204-205.)

Finally, respondent contends that any error in refusing Special Instruction No. F was harmless because "there is no indication that the jury misapplied CALJIC No. 8.84.1, . . .in deciding the penalty." (RB 133.) However, as argued above, CALJIC No. 8.84.1 is not an adequate substitute for an instruction on victim impact like the one refused in this case. So even if the jury did apply CALJIC No. 8.84.1 correctly, the erroneous refusal of Special Instruction No. F probably still led the jury to "consider raw emotions and other improper considerations" in a way that tainted their verdict. Appellant's death sentence must therefore be reversed.

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XI

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT ON LINGERING DOUBT

Appellant has argued that the trial court committed reversible error by refusing to give the penalty phase jury his requested instruction on the concept of lingering doubt, and that the failure to give that instruction violated his rights under the state and federal constitutions. (AOB Arg. XIV, 219-226.) Respondent contends that: (1) capital defendants have no "federal or state constitutional right" to lingering doubt instructions, citing *People v. Panah* (2005) 35 Cal.4th 395, 497, et al, and *Oregon v. Guzek* (2006) 546 U.S. 517; and (2) the standard CALJIC instructions that were given below, in particular CALJIC Nos. 8.85 and 8.88, are "sufficiently broad to encompass any residual doubt any jurors may have entertained," citing *People v. Sanchez* (1995) 12 Cal.4th 1, 77-78, and *People v. Hughes* (2002) 27 Cal.4th 287, 405. (RB 147.)

As to the first of those contentions, as appellant has pointed out (AOB 220), this Court has itself held that a trial court may be required to give a properly formulated lingering doubt instruction that is pertinent to the case and warranted by the evidence. (*People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20.) Since this Court has deemed the issue of lingering doubt of guilt to be relevant to the penalty determination (*People v. Cleveland* (2004) 32 Cal.4th 704, 739), it certainly is an issue upon which the jury should be instructed.

As to the second contention, the basic problem with respondent's position is, as fully explicated in appellant's opening brief, that the decisions by this Court that respondent relies upon are both analytically

flawed and undermined by other decisions by the Court. (AOB 222-223.) Thus, the cases respondent relies upon themselves rely on the logically-insupportable concept that an instruction which directs the jury to consider factor (a) and factor (k) "necessarily encompass[es] the concept of lingering doubt, and thus render[s] any special instruction on the concept unnecessary." (*People v. Earp* (1999) 20 Cal.4th 826, 904.) However, CALJIC No. 8.85 does not make it clear to the jurors that the mitigating "circumstance[s]" of the crime they are entitled to consider include any lingering doubts as to the defendant's guilt.

The instruction framed by appellant directed the jurors to a proper consideration of a relevant principle of law affecting their consideration of whether to impose a death sentence. Moreover, the instruction was properly formulated, and thus should have been given by the trial court. (See *People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 20.) Respondent never directly addresses this concept, although it was advanced in detail by appellant in his opening brief. (AOB 220-224.)

Finally, contrary to respondent's suggestion, appellant's claim is unaffected by the United States Supreme Court's decision in *Oregon v. Guzek* (2006) 546 U.S. 517. As appellant has argued (AOB 224-225), *Guzek* decided only a "narrow" question: whether the Eighth and Fourteenth Amendments grant a defendant the right to present new evidence to a penalty jury that is inconsistent with his prior conviction of the crime charged. (*Id.* at p. 523.) The issue here is very different, since appellant did not seek to introduce new evidence, but rather to have the jury properly instructed on how to consider the evidence it had already heard in order to protect his Eighth and Fourteenth Amendment rights to a fundamentally fair sentencing proceeding. That right is not affected by

the opinion in *Guzek*. In any event, appellant has a state law right to have the jury instructed on lingering doubt under *People v. Terry* (1969) 70 Cal.3d 137. (AOB 220.)

Appellant is entitled to reversal of his death sentence.

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XII

REMAND IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO STATE REASONS FOR DENYING APPELLANT'S MOTION TO MODIFY THE VERDICT UNDER SECTION 190.4 (e)

The trial court treated appellant's automatic motion to modify his sentence pursuant to section 190.4, subdivision (e), (the "modification motion"), as less than an afterthought. As set forth in the Opening Brief, the trial court did not expressly rule on appellant's modification motion in pronouncing sentence. Years later, the court explained that it had done nothing more in response to that motion than read from a "script," which consisted primarily of the ambiguous statement that the motion "was denied,"[25] in order to "go through all the [required] machinations." (AOB Arg. XV, 229-239; 31 RT 4661; RT for 6/25/05 31.) Respondent seems to concede that the trial court erred in failing to state any reasons for denying the modification motion (RB 140), but contends that: (1) the claim is not cognizable because appellant failed to make a contemporaneous objection (RB 139-140); and (2) remand for reconsideration is not required because the error is harmless beyond a reasonable doubt. (RB 140-141; see *People v. Mincey* (1992) 2 Cal.4th 408, 478.)[26] Those arguments fail, and the case must accordingly be

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[25] That the trial court said "the motion *was* denied," rather than, as one would expect, "the motion *is* denied," added to the uncertainty of its ruling.

[26] Respondent cites *People v. Risenhoover* (1968) 70 Cal.2d 39, 58, in support of the proposition that "no judge may disregard the verdict or decide what result he or she would have reached if the case had been tried without a jury." (RB 139.) However, because *Risenhoover* predates the (continued...)

remanded to the trial court for a new hearing on the modification motion.

Preliminarily, it should be noted that the requirement that the trial court state its reasons for denying a modification motion is not merely a trivial or technical rule. That requirement is based on the recognition that a complete record is necessary to assure that sentences of death are not "wantonly" or "freakishly" imposed in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia* (1976) 428 U.S. 153, 206-207; *Proffitt v. Florida* (1976) 428 U.S. 242, 260; see *People v. Jackson* (1980) 28 Cal.3d 264, 316-317.) The trial court's statement of reasons provides the appellate court with a sufficient record upon which to

> determine whether the evidence supported the jury's finding of aggravated circumstances. If the judge and the appellate court conclude that the jury verdict is supported by the evidence, the danger that the jury acted under the influence of undue passion or prejudice is negligible.

(*Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196.) The trial court's failure to provide any such statement of reasons here requires the Court to remand this case for a rehearing on the modification motion.

A. Appellant's Claim Is Cognizable

Contrary to respondent's contention, appellant did not forfeit this claim by failing to object below. (See RB 139-140.) This Court has never required an objection when the trial court fails to create a record adequate to review its denial of a modification motion, and the cases cited by respondent on this point are inapposite.

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[26](...continued)
enactment of California's current death penalty scheme, and because it involved the application of the standard of review for ruling on a "motion for a new trial" (*id.* at pp. 57-58, citing *People v. Robarge* (1953) 41 Cal.2d 628, 633), not a modification motion, *Risenhoover* is clearly inapposite.

Thus, in *People v. Hill* (1992) 3 Cal.4th 959, 1014, the first case in which this Court applied the contemporaneous objection rule to errors arising out of the denial of a modification motion, the claim was that the trial judge had read the probation report before ruling. Similarly, in *People v. Martinez* (2003) 31 Cal.4th 673, 701, the claim that this Court found to have been "waived" by the failure to object was that the trial court had relied on inadmissible or irrelevant evidence in denying the modification motion. (See also *People v. Tafoya* (2007) 42 Cal.4th 147, 196 [finding that failure to object waived trial court's alleged failure to independently review the evidence]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1160 [finding that failure to object waived trial court's error in "speculat[ing] that [defendant] planned the crime"].) Those cases are inapposite because they involve a type of error – the trial court's consideration of improper evidence in ruling on the modification motion – which does not impair this Court's ability to review the trial court's ruling.

On the other hand, when the trial court completely fails to state its reasons for denying a modification motion, as in this case, it is almost impossible for this Court to evaluate the propriety of that ruling. As this Court has said, while a modification motion may

> appear[] to be an exercise in futility, there is one aspect of [it] that is significant even when the penalty issue has been determined by a court rather than a jury: the requirement [] that the trial court "state on the record the reasons for his [or her] findings." [That is because such a statement of reasons] enables [the Court] to review the propriety of the penalty determination made by the trial court . . . .

(*People v. Diaz* (1992) 3 Cal.4th 495, 575, fn. 35; *People v. Horning*

and "gave a detailed statement of reasons" for doing so. (*Id.* at pp. 911-912.) Accordingly, *Horning* does not support respondent's claim that appellant forfeited his claim of error by failing to object here, where counsel did not affirm the trial court's failure to state its reasons, and such a statement of reasons would not have been superfluous.

Moreover, in *Horning* and the other cases cited by respondent the record on appeal both showed that the trial court understood and complied with its duties to independently review the evidence and state reasons for denying the modification motion, and was "adequate 'to insure thoughtful and effective appellate review.'" (*People v. Arias* (1996) 13 Cal.4th 92, 191-192, quoting *People v. Rodriquez* (1986) 42 Cal.3d 730, 794.) There is no such record here, where the trial court simply read a "script" to go through the required "machinations." (31 RT 466; RT for 6/25/05 31.) Accordingly, the Court should find that appellant's claim has not been waived.

Additionally, appellant's claim presents a pure question of law based on undisputed facts, and is thus cognizable on appeal under "the well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts. [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 118, 133; accord, *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) That is particularly true because the claim implicates appellant's constitutional rights under the Eighth and Fourteenth Amendments, and, under the above-stated principle, "our courts have several times examined constitutional issues raised for the first time on appeal, especially when the asserted error fundamentally affects the validity of the judgment [citation], or important issues of public policy are at issue

[citation]." (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 394; see, e.g., *People v. Hines*, *supra*, 15 Cal.4th at p. 1061; *Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1476-1477, and cases there cited, disapproved on other grounds in *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 320-321; *Conservatorship of Delay* (1988) 199 Cal.App.3d 1031, 1036, fn. 3.) The Court should follow that principle here, and decide appellant's claim on its merits.

B. Remand Is Necessary In This Case

Respondent next argues that a "remand for reconsideration is unnecessary" because: (1) the trial court should be "presumed to have properly followed established law," and "there is no indication" the court "was unaware of or failed to discharge its duty to independently determine" whether the evidence supported the death verdict; and (2) although this Court has previously remanded similar cases when "the trial judge who failed to state his reasons [was] still living," it should not do so here because the "aggravating circumstances so outweighed the mitigating circumstances. . . ." (RB 140-141.) However, the record does not support those contentions.

Thus, the only evidence of the trial judge's thought processes concerning the modification motion that can be gleaned from the record is his statement to appellate counsel that everything he said at the hearing on that motion came from "a script [he used] so [as to] go through all the machinations." (AOB 230-231; RT for 6/25/05 31.) Contrary to respondent's argument (RB 140), that evidence does indeed suggest either that the judge was unaware of his obligations under section 190.4, subdivision (e), or that he simply chose not to "discharge" those obligations. Where, as here, the record does not show that the judge

understood his duty and authority, applying a presumption that he must nonetheless have followed the law does not satisfy constitutional concerns about due process, equal protection and reliable verdicts.

Respondent's contention that a remand is unnecessary because the aggravating circumstances proven at trial so outweighed the mitigating ones also fails, as demonstrated *infra*.

C. Harmless Error Review Is Not Appropriate Here, and, Moreover, The Error Was Not Harmless

Finally, respondent argues that harmless error review is appropriate in this case, and that any error was necessarily harmless "because the evidence that the aggravating circumstances outweighed the mitigating circumstances was so overwhelming there is no reasonable possibility a statement of reasons would have altered the trial court's conclusions or revealed reversible error." (RB 140-141.) Those arguments fail.

Respondent's first contention is belied by the fact that this Court has held that "a limited remand is appropriate" where the trial judge who failed to state his reasons for denying the motion to modify the verdict "is alive and apparently available to hear the" motion. (*People v. Sheldon* (1989) 48 Cal.3d 935, 963.) Further, the very cases respondent cites in arguing for the application of harmless error review (RB 140) demonstrate that a remand *is* required here.

In the most recent of those cases, *People v. Mincey* (1992) 2 Cal.4th 408, unlike this case, "the record show[ed] that the trial judge *did* independently review the evidence and *did* determine that the jury's decision was appropriate." (*Id.* at p. 477, italics added.) Yet even with such a complete record, this Court said that "[o]rdinarily, out of an

abundance of caution, we would remand for a new hearing on the verdict modification application because of the trial judge's familiarity with the record." (*Id.* at p. 478.) The determining factor in *Mincey* was that, unlike in this case, the trial judge was dead, and it was thus impossible to remand the case for a hearing that would comply with section 190.4, subdivision (e). (*Ibid.*)

The same is true of the other two cases respondent cites – *People v. Allison* (1989) 48 Cal.3d 879, 918, and *People v. Heishman* (1988) 45 Cal.3d 147, 206. In both cases the trial judge had died during the pendency of the appeal, but had created a record at trial sufficient to show that he had both independently reviewed the evidence, and determined that the death verdict was appropriate. (*People v. Allison, supra*, 48 Cal.3d at p. 910; *People v. Heishman, supra*, 45 Cal.3d at p. 200.) This Court made clear in both cases that the prejudice determinations were only appropriate because the trial judges were dead: "Were the trial judge still alive 'we would remand for a new hearing on the verdict-modification application simply out of an abundance of caution, . . .'" (*People v. Allison, supra*, at p. 911, quoting *People v. Heishman, supra,* at p. 200.)

The trial judge in this case is still alive, and did not make a record from which this Court can determine whether he understood or discharged his duties. Moreover, that judge's familiarity with the record would enable him to review the modification motion and state the reasons for his determination with relatively little delay and expenditure of judicial resources. Accordingly, the case should be remanded to the trial court for a new hearing, because that is the only way to assure that thoughtful and effective appellate review can take place. (*People v.*

Arias, *supra*, 13 Cal.4th at pp. 190 -192.)

Finally, respondent apparently contends that the trial court's failure to state reasons for denying the modification motion was harmless because the evidence about the charged crimes and appellant's "violent criminal history" was so horrific that no reasonable judge would have granted that motion. (RB 141-144.) However, as set forth above, this case must be remanded for rehearing by the trial court in any event, so that claim is beside the point. But moreover, even assuming that harmless error review is appropriate for some types of trial court error that occur in connection with the denial of a modification motion, this is not that type of error.

A problem that inevitably arises when the trial court improperly fails to state its reasons for denying a modification motion – that the court's ruling is not "adequate 'to insure thoughtful and effective appellate review'" (*People v. Arias*, *supra*, 13 Cal.4th at 191-192, quoting *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 794) – directly impedes a reviewing court's ability to assess whether that error was harmless. This Court, like any reviewing court, cannot weigh the relative strength and/or veracity of the testimony of the witnesses at trial on the cold record before it, and without the benefit of the trial court's assessment of that testimony it simply cannot determine the effect of the trial court's error.

Moreover, respondent's claim that the trial court's failure to state its reason was harmless here because the evidence supporting a death verdict was "overwhelming" is a gross exaggeration. Thus, while respondent argues that there was extensive aggravating evidence, it only begrudgingly acknowledges that appellant's mitigating evidence clearly showed that his criminal conduct "was a product of his environment." (RB 143.) In effect, respondent contends that the sad reality of appellant's life – that he grew up

in a family where gang-related violence was a way of life, and was only 18 when he allegedly committed the capital crimes, that both his older brothers and his father were in gangs and were repeatedly convicted of violent felonies (11 RT 1670), that he was taught by his father as a child that drive-by shootings were an appropriate response to disputes (27 RT 4004-4005), and that his criminal conduct, including the commission of the charged crimes, was clearly the product of that abusive and depraved upbringing – could not have had any substantial weight with any trial court. That is a skewed and unfairly straitened view of the process whereby California courts determine whether a death sentence is appropriate.

The decision whether to impose the death penalty "rests on not a legal but an ethical judgment - an assessment of what [the United States Supreme Court] called in *Enmund* the 'moral guilt' of the defendant." (*Spaziano v. Florida* (1984) 468 U.S. 447, 481 (conc. & dis. opn. of Stevens, J.), quoting *Enmund v. Florida* (1982) 458 U.S. 782, 800; see *Trop v. Dulles* (1958) 356 U.S. 86, 101 [the Eighth Amendment's prohibition of cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society"].) In California, that determination "is inherently moral and normative, not factual . . . ." (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 779; *People v. Prieto* (2003) 30 Cal.4th 226, 263.)

It is because there is such a stark difference between the normative, moral and "value-based" nature of the penalty phase determination and the strictly factual determination made at the guilt phase that commentators have questioned whether it is ever proper to apply harmless error review to penalty phase errors. (See Carter, *Harmless Error in the Penalty Phase of a Capital Case* (1993) 28 Ga. L. R. 125, 149-150; Mitchell, *The Wizardry of*

Harmless Error (1994) Kan. J. L. & Pub. Plcy. 51, 55.) Harmless error review is particularly inappropriate here, because the issue at stake is so intensely normative, moral and value-based – did the jury properly weigh the significance of appellant's blighted upbringing, which made it almost certain that he would become a violent criminal, against the harm he caused because of that upbringing? Remand for a rehearing on the modification motion is required to decide that issue.

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XIII

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

Appellant has argued that California's use of capital punishment as a regular punishment violates both international law and the Eighth Amendment's prohibition of cruel and unusual punishment because it is contrary to international norms of human decency. (AOB Arg. XX, 274-277.) Respondent's opposition to appellant's claims primarily rests upon the ground that this Court has previously rejected such arguments. (RB 157.) Appellant is well aware of this Court's decisions in this area, but respectfully requests this Court to reconsider and disapprove them.

Additionally, respondent contends that appellant forfeited any claims based on "violations of international customary law or treaties" by failing to raise them in the trial court, and/or that appellant lacks "standing to invoke the jurisdiction of international law in this proceeding, because the principles of international apply to disputes between sovereign governments" only. (RB 165-157.) The first of those contentions fails because, as respondent notes, this Court has on numerous occasions "specifically rejected" this claim, and any objection that had been made at trial would clearly have been futile. And of course, a defendant is not required to make a timely objection if doing so would be futile. (See, e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; *People v. Hill* (1998) 17 Cal.4th 800, 830; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Respondent's second contention also fails, because respondent misperceives the nature of appellant's claim. Unlike the plaintiffs in the sole case cited by respondent on this point (RB 156-157), appellant does not assert that some provision of international law provides him with a private

cause of action. (*Hanoch Tel-Oren v. Libyan Arab Republic* (D.C.D.C., 1981) 517 F.Supp. 542, 545-547.) Rather, appellant contends that "this Court is bound" by the treaties our nation ratifies, and that among those treaties is the International Covenant of Civil and Political Rights, which prohibits the "arbitrary deprivation of life." (AOB 274-275.) Appellant has therefore asked the Court to "reconsider its prior rejection of international law claims concerning the death penalty," and to reverse his death sentence on that basis. (*Id.* at p. 275.) There is no question that appellant has standing to make that request.

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CONCLUSION

For all of the reasons stated above, as well as for the reasons stated in Appellant's Opening Brief, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: February 28, 2008

Respectfully submitted,

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State Public Defender

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Deputy State Public Defender

Attorneys for Appellant

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

I, WILLIAM HASSLER, am the Deputy State Public Defender assigned to represent appellant CISCO HARTSCH 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 24,729 words in length.

DATED: February 28, 2008

WILLIAM HASSLER
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Cisco Hartsch* No. S074804

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. 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:

Office of the Attorney General
ATTN: FELICITY SENOSKI
110 West A Street, Suite 1100
San Diego, CA 92101

Riverside County Superior Court
4050 Main St.
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Cisco James Hartsch
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Tamal, CA 94964

Riverside County District Attorney
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Riverside, CA 92201

John Acquilina, Esq.
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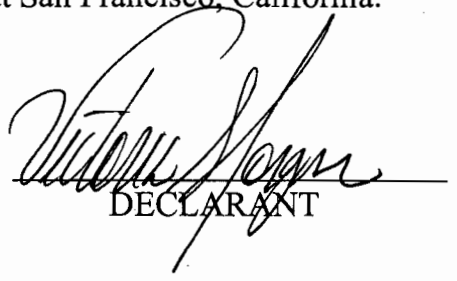
Riverside, CA 92501

Each said envelope was then, on February 28, 2008, 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 February 28, 2008, at San Francisco, California.



DECLARANT