No. S077166

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CRANDELL MCKINNON,

Defendant and Appellant.

(Riverside County Superior Court No. CR-69302)

APPELLANT'S REPLY BRIEF

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

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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CRANDELL MCKINNON, Defendant and Appellant.	(Riverside County Superior Court No. CR-69302)

APPELLANT'S REPLY BRIEF

INTRODUCTION

As discussed in the opening brief, Crandell McKinnon's trial defense to the capital murder charge was one of evidence fabrication and innocence. Mr. McKinnon was convicted on shockingly weak evidence riddled with contradictions and falsehoods in a trial replete with errors going to the very heart of the pivotal issues that determined his fate. His claim on appeal is that the combination of fundamental trial errors and confabulating witnesses deprived him of the fairness essential to due process, the reliability demanded of death judgments, and resulted in the morally and constitutionally intolerable result of an innocent man having been condemned to death. As the United States Supreme Court has succinctly stated "[t]he quintessential miscarriage of justice is the execution of a person who is entirely innocent." (*Schlup v. Delo* (1995) 513 U.S. 298, 324, fn. omitted.) Avoiding execution of the innocent is of "paramount

importance" in American criminal law. (*Id.* at pp. 325-326; see also *Herrera v. Collins* (1993) 506 U.S. 390, 419, conc. opn. of O'Connor, J. [the execution of a legally and factually innocent person would be a constitutionally intolerable event]: *id.* at pp. 430-431, dis. opn. of Blackmun, J.: *In re Clark* (1993) 5 Cal.4th 750, 796-798.)

In the face of this claim of paramount importance, respondent attempts to defend the judgment based not on an accurate account of the facts nor a reasoned discussion of the law. Instead, and as demonstrated in the arguments below, in urging this Court to affirm a judgment based upon demonstrably false evidence and in the face of grave doubts that Mr. McKinnon committed the crimes, respondent has affirmatively misrepresented critical facts and distorted the holdings of this Court to support the judgment and ignored equally critical evidence and holdings of this Court which undermine the judgment.

For these reasons, and as more fully set forth in the arguments below, the Court should view respondent's points and authorities with a jaundiced eye. A honest view of the facts and a reasoned application of the law to them demand reversal of the judgment.

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ARGUMENT[1]

I

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S DENIAL OF MR. MCKINNON'S MOTION TO SEVER THE MURDER COUNTS AND RELATED FIREARM POSSESSION CHARGES VIOLATED STATE LAW AND HIS RIGHTS TO DUE PROCESS AND RELIABLE VERDICTS, AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

In his opening brief, Mr. McKinnon argued that the trial court committed prejudicial error in denying his motion to sever the two unrelated murder charges, which had been consolidated solely in order for the prosecution to transform the matter into a capital case and allege a single multiple murder special circumstance. (Appellant's Opening Brief ["AOB"] 45-127.) Even if the motion to sever were properly denied at the time it was made, the effect of the consolidation was so prejudicial that it denied Mr. McKinnon his state and federal constitutional rights to due process and reliable jury determinations that he was guilty of a capital offense. (AOB 95-127.) The judgement must be reversed. (AOB 95-127.)

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[1] In this brief, Mr. McKinnon addresses specific contentions made by respondent, that necessitate and answer in order to present the issues fully to this Court. He does not address every claim raised in the opening brief, nor does he reply to every contention made by respondent with regard to the claims he does discuss. Rather Mr. McKinnon focuses only on the most salient points not already covered in the opening brief. The absence of a reply to any particular argument or allegation made by respondent does not constitute a concession, abandonment, waiver of forfeiture of the point by Mr. Mckinnon (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.

Respondent disagrees. (Respondent's Brief ["RB"] 24-41.)[2] Respondent is wrong.

B. The Trial Court's Refusal to Sever the Unrelated Murder Counts was an Abuse of Discretion

1. The Evidence Relating to the Two Murder Charges Was Not Cross-Admissible

In ruling on a motion to sever based on the potential prejudice from consolidation, the trial court must consider several well-established criteria, including whether: "(1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials . . . ." (*People v. Sandoval* (1992) 4 Cal.4th 155, 173; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120; *People v. Kraft* (2000) 23 Cal.4th 978, 1030; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315; *People v. Marshall* (1997) 15 Cal.4th 1, 27-28.) "In assessing the cross-admissibility of evidence for severance purposes, the question is 'whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others.'" (*People v. Bradford, supra*, 15 Cal.4th at pp. 1315-1316, quoting from *People v. Balderas* (1985) 41 Cal.3d 144, 171-172.) As Mr. McKinnon discussed in the opening brief, the evidence supporting one murder charge would not be admissible in a separate trial on the other murder charge; hence, the lack of cross-admissibility created substantial danger of undue prejudice in consolidating the charges and which weighed

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[2] Respondent contends that "McKinnon concedes that the murder counts against him were properly joined under Penal Code section 954." (RB 32.) Not so. While Mr. McKinnon concedes that section 954's *requirements* for joinder were *satisfied* because the crimes were of the "same class" (AOB 50-51), he vigorously disputes that they were "properly joined." (AOB 45-95.)

heavily in favor of severance. (AOB 55-57, citing, inter alia, *People v. Stitely* (2005) 35 Cal.4th 514, 531 and *People v. Smallwood* (1986) 42 Cal.3d 415, 425, 430.)

Respondent concedes that the trial court was correct in ruling that the crimes were not sufficiently similar to render the evidence supporting them relevant and cross-admissible on the disputed issue of identity under Evidence Code section 1101 and *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.[3] (RB 31-32 & fn. 17.) However, according to respondent, the trial court did not rule that *all* of the evidence supporting the charges was cross-admissible. Nor did the court rule that the evidence was cross-admissible under Evidence Code section 1101 at all. (RB 31-32 & fn. 17, 35-36.)

Instead, according to respondent, the court correctly ruled that *only* jailhouse informant Harold Black's testimony regarding both murders was cross-admissible. (RB 29, 32.) And, while Black's testimony was not cross-admissible under Evidence Code section 1101 and *Ewoldt*, *supra*, the trial court correctly ruled that it was cross-admissible as "relevant" evidence under Evidence Code section 210. (RB 32-33 & fn. 17, 35-36.) Both the facts and the law negate respondent's contentions.

a. The Trial Court's Ruling and the Controlling Legal Standards

First, respondent misrepresents the trial court's ruling. The court did not, as respondent contends, rule that *only* Harold Black's testimony was cross-admissible. (RB 29, 32.) In its initial ruling regarding the cross-admissibility of the evidence, the court observed that Black would be

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[3] For ease of reference, Mr. McKinnon's reference to *People v. Ewoldt, supra*, incorporates the authorities cited and discussed in that case, as well as its progeny.

testifying regarding both murders and therefore "that evidence [presumably Black's testimony] is obviously cross-admissible to both charges." (1 RT 111.) The court also initially ruled that "there is some cross-admissibility in that the defendant had access to small handguns within a very relatively brief period of time . . . ." (1 RT 111.)

However, the court later "clarified" its ruling, quite clearly explaining that "*the evidence of both murders* would be admissible at separate trials on" two issues *presented by* Black's claims that Mr. McKinnon admitted having committed both murders: 1) whether Black was telling the truth that McKinnon had admitted to the Martin and Coder murders; and 2) whether McKinnon was telling the truth when he made the admissions. (2 RT 121-122, italics added.) The court explicitly ruled, "if we had separate trials *the evidence of the other murder* would be admissible, I believe as it bears upon the two issues that I just pointed out." (2 RT 122, italics added.) Thus, the court clearly ruled that *all* of the evidence (with the sole exception of the gang evidence) supporting one murder charge would be admissible in a separate trial on the other murder charge. And, indeed, the trial court admitted all of the evidence relating to both murders without limitation to a particular count.

Second, the distinction respondent draws between cross-admissibility "under Evidence Code section 1101" and cross-admissibility under Evidence Code section 210 is one without a difference. Respondent's contention that the evidence was not admissible "under Evidence Code section 1101" but was admissible under section 210 rests on the implicit premise that the two statutes provide separate and independent grounds for the admissibility of evidence to which separate and independent rules apply.

But section 1101 does not codify grounds for admissibility of

evidence at all. Instead, subdivision (a) *prohibits* the admission of other crimes or acts of misconduct to prove bad character or criminal disposition. Subdivisions (b) and (c) merely clarify what subdivision (a) does not necessarily prohibit. Subdivision (b) provides that if the other crimes or act of misconduct are "*relevant* [under Evidence Code section 210] to prove some fact . . . *other than*" disposition, then subdivision (a) *does not prohibit* their admission. Subdivision (c) similarly provides that the statute does not affect the admissibility of a witness's other acts to support or attack his or her credibility.[4] In other words, subdivisions (b) and (c) do not enumerate what *is* admissible; they simply clarify what is *not prohibited* by subdivision (a).

Thus, as this Court has explained, when offered to prove a fact other than criminal disposition, "the evidence of other crimes must still satisfy the rules of admissibility codified in sections 210, 350, and 352." (*People v. Thompson* (1980) 27 Cal.3d 303, 317, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260; accord, e.g., *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 403-404 [if sufficiently similar to be *relevant* to an issue in dispute, such as identity, "section 1101 does not require exclusion," but relevancy alone does not guarantee admission].) And in interpreting all of these statutes – sections 210, 350, 352, and 1101 – and their interplay, this Court has developed a well-established body of law governing the admission of a defendant's other crimes or acts of

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[4] As the Law Revision Comment to Section 1101 explains, character evidence offered on the issue of a witness's credibility is not determined by section 1101, but rather under sections 786-790. Sections 786 through 790 all deal with the admissibility of a witness's *own* specific acts or character evidence.

misconduct, as reflected in *People v. Ewoldt*, *supra*, and its progeny.

That is, evidence of a defendant's other crimes *may* be admissible if they are relevant (under section 210) to prove a particular issue in dispute (other than criminal disposition, prohibited by section 1101, subdivision (a)). But relevancy depends on certain factors, such as the degree of similarity between the charged and uncharged other crimes and the issue to which the other crimes are being offered to prove. (See, e.g., *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 393-403, and authorities cited therein [in order to be relevant, other crime must be sufficiently similar to charged crime to support a reasonable inference regarding the existence of an issue in dispute]; *People v. Williams* (1988) 44 Cal.3d 883, 905.) Further, even if the other crimes are relevant under those standards, their admission is not guaranteed. (See, e.g., *People v. Ewoldt*, *supra*, at pp. 404-405.) Given the extremely inflammatory nature of such evidence, the defendant's other "offenses are *only* admissible if they have *substantial* probative value," are *necessary* to prove a disputed issue, and their admission does "'not contravene other policies limiting admission, such as those contained in Evidence Code section 352.' [Citation.]" (*People v. Ewoldt*, *supra*, at pp. 404-405; see, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 423 [while other crime was sufficiently similar to charged crime to bear some relevance to disputed issue, it was more prejudicial than probative and should have been excluded]; see also, *People v. Avila* (2006) 38 Cal.4th 491, 586, and authorities cited therein; *People v. Williams*, *supra*, at p. 907; *People v. Alcala* (1984) 36 Cal.3d 604, 631; *People v. Smallwood*, *supra*, 42 Cal.3d at p. 429; *People v. Thompson*, *supra*, 27 Cal.3d at p. 318.)

It is to this well established body of law that this Court has referred in repeatedly and consistently holding that, "in assessing the cross-

admissibility of evidence for severance purposes, the question is 'whether evidence on each of the joined charges would have been admissible, *under Evidence Code section 1101*, in separate trials on the others.'" (*People v. Bradford, supra*, 15 Cal.4th at pp. 1315-1316, italics added, quoting from *People v. Balderas* (1985) 41 Cal.3d 144, 171-172; accord, *People v. Rogers* (2006) 39 Cal.4th 826, 851-852; *People v. Carter* (2005) 36 Cal.4th 1114, 1154-1155; *People v. Bean* (1988) 46 Cal.3d 919, 936-938; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 448.)[5]

Hence, in assessing the cross-admissibility of the evidence for severance purposes, the body of law interpreting sections 210, 350, 352, and 1101 controlled. There is nothing in the trial court's ruling to suggest that it concluded otherwise; if the court did conclude otherwise, as respondent contends, it erred in so doing.[6]

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[5] While this Court and others often refer to the admissibility of other crimes evidence "under Evidence Code 1101," the reference is technically a misnomer since, as discussed above, section 1101 does not provide for the admissibility of any evidence. Admissibility of evidence "under Evidence Code section 1101" is more properly understood as a shorthand reference to this body of law interpreting sections 210, 350, 352 and 1101 together and it is this meaning that Mr. McKinnon intends when using the same phrase in this and his opening brief.

[6] In a footnote, respondent cites *People v. Stern* (2003) 111 Cal.App.4th 283 for the proposition that "Evidence Code sections 1101, subdivisions (a) and (b) have nothing to do with the resolution of a case involving the victim's testimony as to an uncharged offense that was received solely on the issue of the *victim's* believability." (RB 32, fn. 17, italics added.) When there is a sufficient degree of similarity to show a common design or plan, it is arguable that a defendant's other crimes may be admissible to corroborate the credibility of a *victim*'s account of the charged crime. (*People v. Thomas* (1978) 20 Cal.3d 457, 468-469; *People v. Balcolm* (1994) 7 Cal.4th 414, 428-431, conc. opn. of Arabian, J.

(continued...)

b. The Evidence of One Crime and its Commission with One Handgun Was Not Relevant and Admissible to Prove That Mr. Mckinnon "Had Access To" a Different Handgun with Which He Allegedly Committed the Other

Respondent contends that the evidence was relevant, and therefore cross-admissible, in three ways. First, respondent contends that Harold Black's testimony that "McKinnon told him he shot Mr. Martin and 'some white boy' [Coder] at the Desert Edge motel . . . . had a tendency to prove, just as the trial court noted, that McKinnon had access to handguns in the brief time period surrounding the two murders." (RB 32.) This was, of course, the trial court's initial reasoning in concluding that the evidence was cross-admissible. (RT 111.)

However, that reasoning is flawed, which is no doubt why the trial court abandoned it upon further consideration. (RT 121-122.) It overlooks that the gun used to kill Martin, and which the prosecution contended that

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[6](...continued)
[discussing at length Supreme Court precedent regarding the admissibility of a defendant's other crimes to corroborate a prosecution witness and concluding that "evidence of other crimes that meets the similarity requirements of a common design or plan is also admissible under Evidence Code section 1101 to corroborate the *complaining* witness"].) Obviously, that principle has no application here. It is true, however, that *People v. Stern*, which involved admission of a defendant's other crimes in order to bolster the credibility of the victim, also broadly observed that Evidence Code section 1101 is not implicated at all when offered on the issue of "any witness['s]" credibility and not to prove disposition and, hence, apart from Evidence Code section 352, there is no legal obstacle to the admission of a defendant's other crimes solely to prove that "a crime victim, or any other witness, for that matter, is telling the truth." (*Id.* at p. 300.) This observation was dictum and, for the reasons explained in the above text, plainly incorrect.

Mr. McKinnon possessed, was *not* the gun used to kill Coder. (4 RT 524-525; 5 RT 721-722; 6 RT 849, 851, 857-858, 883.) Thus, respondent's essential premise is that evidence that Mr. McKinnon possessed one weapon, with which he killed Perry Coder, on one occasion was relevant to prove that he possessed a *different* weapon, with which he killed Gregory Martin, on a different occasion. Of course, this theory of relevance rests on the prohibited inference that if Mr. McKinnon committed one of those criminal acts, it was more likely than not that he committed the other or, put another way, that on the second occasion he acted in conformity with the criminal character he displayed on the first occasion. As this Court has explicitly held, evidence that the defendant possessed a weapon on one occasion is inadmissible to prove his commission of a crime with a *different* weapon on another occasion "for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Riser* (1956) 47 Cal.2d 566, 577; see also *People v. Geier* (2007) 41 Cal.4th 555, 577-578 [fact *a* knife was used in two crimes did not tend to support any legitimate inference and thus evidence was not cross-admissible; but fact the *same* handgun was used in two other crimes did tend to support inference defendant was perpetrator of both and thus that evidence was cross-admissible]; *People v. Smallwood*, *supra*, 42 Cal.3d at p. 428 ["whenever an inference of the accused's criminal disposition forms a 'link in the chain of logic connecting the uncharged offense with a material fact' . . . the uncharged offense is simply inadmissible, no matter what words or phrases are used to 'bestow a respectable label on a disreputable basis for admissibility – the defendant's criminal disposition"].)

c. The Evidence of One Crime Was Not Relevant and Admissible to Prove That Mr. Mckinnon's Alleged Admission to the Other Was Truthful

Second, respondent contends the evidence was relevant and cross-admissible because "the fact that Black said McKinnon told him he shot both victims and that he shot Martin in the head, as turned out to be the case, meant Black's proffered testimony also had a tendency to prove that McKinnon told Black the truth and had not just been bragging." (RB 32-33.) This was the trial court's rationale regarding the cross-admissibility of the evidence, which Mr. McKinnon addressed at length and refuted in his opening brief on several grounds. (AOB 61-67.)

That is, since Mr. McKinnon adamantly denied Black's claims that he made the admissions or statements at all, whether he made the admissions but was only lying or "bragging" simply was not an issue in dispute. (See, e.g., *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406 [issue on which other crimes evidence is offered must genuinely be in dispute]; *People v. Bonin* (1989) 47 Cal.3d 808, 848-849; *People v. Alcala*, *supra*, 36 Cal.3d at pp. 631-632.) Furthermore, respondent's contention that Mr. McKinnon's (purported) knowledge of the bare facts that both victims had been shot, Martin in the head, tended to show that he was being truthful rests on the implicit premise that only the killer could have known those details. But as discussed in the opening brief, the premise is preposterous for several reasons, not the least of which is that one of the few details jailhouse informant Black attributed to Mr. McKinnon's alleged admission was inconsistent with the true facts of the Martin murder. (AOB 65-67.) Finally, even stepping through the looking glass and assuming that Mr. McKinnon admitted to Black that he committed one crime – for instance,

the Coder murder – and that his knowledge that Coder had been shot proved that the admission was truthful, it still does not follow that McKinnon's truthful admission to the Coder murder, along with all of the evidence relating to the Coder murder, would be admissible in a separate trial to prove his guilt *of another and different crime* – the Martin murder. Nor does respondent explain how a truthful admission to the Coder murder would legitimately be relevant or admissible to prove Mr. McKinnon's admission to, or commission of, the Martin murder (and vice versa). (See RB 33.) To the contrary, the only way that Mr. McKinnon's truthful admission to one crime would be relevant to prove his guilt of the other would necessarily rest upon the prohibited inference that if he had committed and confessed to one murder, he was more likely than not to have committed and confessed to another. (See, e.g., *People v. Smallwood*, *supra*, 42 Cal.3d at p. 428; AOB 61.)

d. The Evidence of One Crime Was Not Relevant and Admissible to Prove That Harold Black Was Telling the Truth When He Claimed That Mr. Mckinnon Admitted to the Other

Third and finally, respondent contends that the trial court correctly ruled that the evidence supporting one murder charge was also cross-admissible to bolster the credibility of Black's testimony that Mr. McKinnon admitted to the other murder. Respondent concedes that, "'[a]s a general rule, the courts have interpreted Evidence Code section 1101 as not permitting introduction of uncharged prior acts ***solely*** to corroborate or bolster the credibility of a witness'" who is not a victim. (RB 35, italics and bold in original, quoting from *People v. Brown* (1993) 17 Cal.App.4th 1389; see also *People v. Tassell* (1984) 36 Cal.3d 77, 83-89, overruled on

other grounds in *People v. Ewoldt, supra*, 7 Cal.4th at p. 402 [defendant's other crimes are inadmissible solely to corroborate the testimony of a prosecution witness]; AOB 62, and authorities cited therein.) However, respondent contends that this rule has no application here because the court did not rule that the evidence was cross-admissible "under Evidence Code section 1101." (RB 35-36.) Instead, the trial court correctly ruled that the evidence was cross-admissible because it was *relevant*, under section 210, to bolster or corroborate Black's credibility. (RB 36.) This ruling, according to respondent, "is consistent with Evidence Code section 1101, subdivision (c), which provides that nothing in section 1101 affects the admissibility of evidence offered to support or attack a witness' credibility." (RB 36.)

As discussed in part B-1-a, above, the record does not support respondent's characterization of the court's ruling. Furthermore, respondent's analysis is flawed.

As further discussed in part B-1-a, above, the distinction respondent draws between the cross-admissibility of evidence "under Evidence Code section 210" and "under Evidence Code section 1101" is one without a difference. The legal principles governing the admissibility of a defendant's other crimes "under Evidence Code section 1101" are the same as those governing the admissibility of a defendant's other crimes "under section 210, as well as sections 350 and 352.

Pursuant to those principles, and as discussed in the opening brief, the trial court's ruling was incorrect: as a general rule, a defendant's other crimes are inadmissible solely in order to bolster a non-victim witness's credibility. (See *People v. Tassell* (1984) 36 Cal.3d 77, 83-89, overruled on other grounds in *People v. Ewoldt, supra*, 7 Cal.4th at p. 402; *People v.*

Brown, supra, 17 Cal.App.4th at pp. 1396-1397, and authorities cited therein; *People v. Pitts* (1990) 223 Cal.App.3d 606, 835 and authorities cited therein; *People v. Scott* (1987) 194 Cal.App.3d 550, 552, and authorities cited therein; *People v. Key* (1984) 153 Cal.App.3d 888, 894; *People v. Thompson* (1979) 98 Cal.App.3d 467, 481; AOB 62-67.) Nor does Evidence Code section 1101, subdivision (c), support a contrary rule, as respondent suggests. (RB 36.) As discussed in part B-1-a, above, subdivision (c) simply provides that the statute does not affect the admissibility of a witness's other acts to support or attack his or her credibility. The Law Revision Comment to the statute explains that character evidence offered on the issue of a witness's credibility is not determined by section 1101, but rather by sections 786-790. Those statutes all deal with the admissibility of the witness's *own* specific acts or character evidence on the issue of his or her credibility, *not* the *defendant's* other crimes.

But even if a defendant's other crimes *might* be admissible to prove a prosecution witness's credibility in some case, this was not such a case. As discussed at length in the opening brief (AOB 62-67), and well illustrated by the decision in *People v. Brown, supra*, 17 Cal.App.4th 1389, whatever minimal (assuming any) relevance or probative value the evidence supporting one murder might have had to bolster the credibility of Black's testimony that Mr. McKinnon admitted to a *different* murder was substantially outweighed by its grave potential for prejudice. (Evid. Code, § 352.)

Just as in *Brown*, in separate trials, "the purpose for admitting the [other crime evidence would] involve[] a collateral issue: [it would not be] admitted to prove [the charged crime], but whether [Black] was being

truthful." (*People v. Brown*, *supra*, 17 Cal.App.4th at p. 1397; see also *People v. Wheeler* (1992) 4 Cal.4th 284, 296 [witness credibility collateral issue]; *People v. Lavergne* (1971) 4 Cal.3d 735, 742 [collateral nature of evidence "reduces its probative value and increases the possibility that it may prejudice or confuse the jury"].) Further, in order for the evidence of one murder – the Coder murder, for example – to bolster the credibility of Black's testimony that Mr. McKinnon admitted to the Martin murder, the jurors would have to infer that "if [Black] were being truthful in [his] testimony that [Mr. McKinnon] admitted [killing Perry Coder], [Black was] also being truthful in [his] testimony that [Mr. McKinnon] admitted" killing Gregory Martin. Such an inference, in turn, rested on the premise that the only way Black could have known about the Coder murder was if Mr. McKinnon had made the admission Black attributed to him. (*Id.* at p. 1396.) But, just as in *Brown*, and as discussed at length in the opening brief (AOB 65-67) and above, any such inference would have been grossly unreasonable given the ample evidence that jailhouse informant Black – who did not volunteer Mr. McKinnon's alleged admissions, but instead purported to recount them over two years later under highly suspicious circumstances when Investigator Buchanan approached him – could have learned the most basic facts of the crimes he related (at least one of which was inconsistent with the true facts) from any number of other sources. (*Id.* at pp. 1396-1397) Just as in *Brown*, the evidence supporting one murder bore little, if any, probative value to the collateral issue of the credibility of Black's testimony that Mr. McKinnon admitted to another. (*Id.* at p. 1397.)

Finally, just as in *Brown*, the evidence supporting one murder would have "presented a clear danger of undue prejudice [in a separate trial on the other]. [Both crimes] involved the same conduct . . . . There was a danger

the jury would use the evidence to draw the impermissible inference that [Mr. McKinnon] was criminally disposed towards engaging in that conduct and therefore must have engaged in the charged conduct." (*People v. Brown*, *supra*, 17 Cal.App.4th at pp. 1396-1397.) Moreover, just as in *Brown* and under the trial court's theory of admissibility, in a separate trial on one murder, *all of the evidence* supporting the other, different murder (not just Black's testimony) would have been introduced, effectively resulting in a trial within a trial. (*Ibid.*) Thus, just as in *Brown*, even if a defendant's other crimes might be admissible to bolster a prosecution witness's testimony in some case, this was *not* such a case, where the probative value of the evidence supporting one murder to prove that Black was being truthful when he claimed that Mr. McKinnon admitted to the other was nil while its potential for prejudice and an undue consumption of time in separate trials was great.[7]

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[7] Although respondent does not rely on the Evidence Code section 352 analysis in *People v. Stern*, *supra*, 111 Cal.App.4th 283, which respondent cites once in a footnote (RB 32, fn. 17), it should be noted that the *Stern* court correctly distinguished the case before it from *People v. Brown*, *supra*, 17 Cal.App.4th 1389, in holding that section 352 did not compel exclusion of the defendant's uncharged crime to bolster the testimony of the *victim* where the defendant's admission to the uncharged crime formed a part of the charged crimes (criminal threats and dissuading a witness), the defendant did not dispute that he committed the uncharged crime, the testimony regarding the uncharged crime was "limited" and "brief," the trial court provided a limiting instruction that the uncharged crime was only to be considered on the issue of the victim's credibility in testifying regarding the charged crimes, and there was a no evidence that the victim could have known about the uncharged crime from any source other than the defendant himself. (*People v. Stern*, *supra*, at pp. 286, 292-300.) For all of the reasons discussed in the above text and the opening brief, the *Stern* court's holding in this regard has no application to the facts

(continued...)

Indeed, while respondent repeatedly emphasizes the relevance of the evidence connecting Mr. McKinnon to one murder to corroborate his admission to *the same* murder, respondent has failed to offer *any* explanation as to *how* that evidence was relevant to bolster the credibility of Black's testimony that Mr. McKinnon admitted to *another, different* murder.[8] The omission is telling. For all of these reasons, as well as those set forth in the opening brief, the evidence of one murder simply would not have been admissible in a separate trial on the other. (AOB 62-67.) The trial court erred in concluding otherwise.

2. The Gang Evidence, Offered to Prove Motive as to the Martin Murder Charge, was Irrelevant and Inadmissible as to the Coder Murder Charge, Highly Inflammatory, and Likely to Lead to Prohibited, Prejudicial Inferences of McKinnon's Violent Criminal Disposition to Commit Both of the Charged Murders

The second criterion a trial court must consider in ruling on a motion to sever is whether "(2) certain of the charges are unusually likely to inflame the jury against the defendant . . . ." (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 173; accord, *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1120; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1030; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1315; *People v. Marshall*, *supra*, 15 Cal.4th at pp. 27-28.)

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[7](...continued)
here, which were starkly different from those in *Stern*, and analytically identical to those in *Brown*, which *Stern* distinguished.

[8] Indeed, the fact that the prosecutor ultimately never argued the relevance of the evidence that Mr. McKinnon committed one crime bolstered the credibility of Black's testimony that he had admitted to the other is further proof that the court's theory of cross-admissibility was a hollow one. (See AOB 100-101 and part E-1, below.)

Here, as the trial court ruled and respondent seems to concede, the evidence that Mr. McKinnon claimed membership in the Crips gang, offered to prove the Martin murder charge, was irrelevant and inadmissible to prove any issue relating to the Coder murder charge. (1 RT 102; RB 33.) As Mr. McKinnon argued in the opening brief, the absence of cross-admissibility of this highly inflammatory evidence that Mr. McKinnon was a member of a "notorious street gang" (*People v. Berryman* (1994) 6 Cal.4th 1048, 1066), was a compelling factor weighing heavily against consolidation and in favor of severance due to its substantial danger of undue prejudice on the Coder murder charge. (AOB 67-70, citing, inter alia, *People v. Sandoval*, *supra*, 4 Cal.4th at p. 173 [fact that inflammatory evidence relating to one charge is inadmissible as to other weighs in favor of severance], *People v. Williams* (1997) 16 Cal.4th 153, 193 [evidence of defendant's gang membership highly inflammatory], and *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 452-453 [evidence of a defendant's gang membership weighs in favor of severance due to its potential for prejudice because "the allegation that [defendant] is a gang member might very well lead a jury to cumulate the evidence and conclude that [he] must have participated in some way in the murders or, alternatively, that involvement in one shooting necessarily implies involvement in the other"][9].)

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[9] See also, e.g., *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1321-1322 (trial court committed prejudicial error in refusing to sever counts where inflammatory other misconduct evidence was admissible as to only one count: "There is 'a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes [or gang involvement] to be introduced in a trial of charges with respect to which the evidence would

(continued...)

Respondent perfunctorily asserts that the gang evidence was "not unduly inflammatory" because "it was relatively minimal when it is compared to the most prejudicial aspect of the Coder murder – i.e., its senselessness." (RB 33.) Not surprisingly, respondent fails to support this assertion with argument, citation to the record, or any authority whatsoever. Hence, the Court should pass this assertion without consideration (see, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 793 [court may pass without consideration "argument" made without citation to supporting authority]; *Air Couriers Inter. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, 928 ["it is incumbent upon respondent, in responding to a claim of [error], to provide this court with an accurate summary of the evidence, complete with page citations, that respondent believes supports the trial court's judgment"]; *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768, and authorities cited therein ["any point raised that lacks [record] citation may, in this court's discretion, be deemed waived"]; *Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 101-102 [respondent's "arguments are nothing more than conclusions of counsel made without supporting documentation or any citation to the record and deserve no consideration from this court"]; Cal. Rules of Court, rule 8.204, subd. (a)(1)(C) [former rules 14(a) and 15(a)]) and accept the statements of appellant's opening brief as to the evidence on the subject (*Rosen v. E.C. Losch, Inc.* (1965) 234 Cal.App.2d 324, 326 & fn. 1).

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[9](...continued)
otherwise be inadmissible'"); *Panzavecchia v. United States* (5th Cir. Unit B 1981) 658 F.2d 337, 341 (same); *Davis v. Coyle* (6th Cir. 2007) 475 F.3d 761, 777 ("without question, a risk of undue prejudice exists whenever joinder of counts permits introduction of other crimes (or misconduct) that would otherwise be inadmissible").)

Because respondent does not cite to the record or discuss the facts at all in support of its declaration that the gang evidence was "relatively minimal," it is difficult to respond to that assertion. (RB 33; see *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30, 65 [court refused to consider points made regarding exclusion of evidence without supporting citations to record, which prevented opposing counsel from responding].) To the extent that respondent's assertion rests on the evidence ultimately introduced at trial, its reliance is misplaced. An assessment of whether the trial court abused its discretion in denying the severance motion is limited to "the record before the trial court at the time of the motion . . . ." (*People v. Valdez* (2004) 32 Cal.4th 73, 120; accord, *People v. Cook* (2006) 39 Cal.4th 566, 581, and authorities cited therein; *People v. Davis* (1995) 10 Cal.4th 463, 508.)

At the time of the motion, the prosecutor's proffer was not only that Mr. McKinnon was a member of the Crips, but that he had murdered Gregory Martin, a (supposed) member of the Bloods, as an act of gang retaliation. (RT 102, 111-112.) This evidence – that Mr. McKinnon belonged to a notorious and violent street gang and carried out a *murder* in that gang's name – can hardly be characterized as "minimal."

Equally without merit is respondent's unsupported contention that gang evidence carries no danger of undue prejudice when the facts of the charge crime itself are likely to inflame the jury -- such as when the defendant is charged with a "senseless" murder, as in this case. (RB 33.) Respondent's contention might have some (minimal) degree of force if the defendant's commission of the crime is undisputed and the only issue for the jury to resolve is his level of culpability. For instance, if the defendant concedes that he committed a particularly gruesome or brutal murder, it

might be arguable that evidence of his gang affiliation is unlikely to inflame the jury any more than the circumstances of the crime. But respondent's contention has absolutely no force *here*, where the only disputed issue is the identity of the person who shot and killed the victim and the jury hears inadmissible evidence that the defendant belongs to a notorious gang and indeed shot and killed another victim in his gang's name. The essential and unique danger that arises from gang membership evidence is that it causes the jury to prejudge the defendant as a dangerous and violent man who has committed "senseless" crimes (*People v. Rodriguez* (1993) 21 Cal.App.4th 232, 240 ["Public concern and outrage over the crime and senseless violence of street gangs is understandably strong"]) and thus is predisposed to committing the very violent and "senseless" (RB 33) crimes with which he is charged. (AOB 67-70, citing, *People v. Williams*, *supra*, 16 Cal.4th at p. 193, *People v. Cox*, *supra*, 53 Cal.3d at p. 660, *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905, *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-194, *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 344; see also, *People v. Albarran* (2007) 149 Cal.App.4th 214, 230 [gang evidence created "a real danger" that the jury would infer that defendant "had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general . . . ." and its erroneous admission deprived defendant of fair trial].)

In short, respondent's perfunctory assertion that the gang evidence ostensibly admitted to prove the Martin murder posed no danger of undue prejudice in the jury's determination of Mr. McKinnon's guilt for the Coder murder is lacking in both factual and legal support. This Court should reject it in similarly perfunctory fashion.

3. The Preliminary Hearing Evidence as to Both Cases was Relatively Weak

The third criterion a trial court must consider in ruling on a motion to sever is whether "(3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges . . . ." (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 173; accord, *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1120; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1030; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1315; *People v. Marshall*, *supra*, 15 Cal.4th at pp. 27-28; AOB 70-89.) As discussed at length in the opening brief, the preliminary hearing evidence – on which the motion to sever and its denial were based – supporting both charges was exceptionally weak, thus weighing heavily in favor of severance. (AOB 75-95, citing, inter alia, *Williams v. Superior Court*, 36 Cal.3d at pp. 453-454 [prejudice from joinder may arise from cumulation of evidence where two weak cases have been joined].)

In a single paragraph, respondent asserts that the evidence supporting the charges was not weak. (RB 33-34.) Respondent's only record citation in support of its assertion is to the *trial* record – i.e., the record that was developed *after* the court's denial of the severance motion. (RB 33-34 and fn. 18.) As tempting as it is to follow respondent's lead – since the *trial* revealed that the evidence against Mr. McKinnon was even *weaker* than the preliminary hearing evidence suggested (AOB 77 & fn. 16, 79 & fn. 17, 101) – it must be pointed out that respondent's reliance on the trial record is legally irrelevant. As discussed in the preceding section, in resolving whether the trial court abused its discretion in denying the motion to sever, this Court must "consider the record before the trial court at the time of the

motion . . . ." (*People v. Valdez*, *supra*, 32 Cal.4th at p. 120; accord, *People v. Cook*, *supra*, 39 Cal.4th at p. 581; *People v. Davis*, *supra*, 10 Cal.4th at p. 508.)

As respondent has declined to address the state of "the record before the court at the time of the motion," no further discussion of this aspect of the issue is necessary. For all of the reasons discussed in the opening brief, but completely ignored by respondent, at the time the severance motion was made and denied, the evidence supporting both charges was extremely weak, which weighed in favor of severance and against consolidation. (AOB 70-89.)[10]

In addition, and as further discussed in the opening brief, in the hearing on the severance motion, the prosecutor did not dispute that both of the cases were weak. (AOB 70-72.) Rather, the prosecutor argued at the hearing that the law was not concerned with the effect of joining two weak cases together, but rather was only concerned with the effect of joining an "extremely strong" case with a weak case. (1 RT 103.) Thus, the question of "whether it's two weak cases or it's two strong cases" was irrelevant because the evidence supporting both murder charges was "roughly equal." (1 RT 103-104.) The prosecutor's argument at the hearing was correct as a factual matter – this was not a case where a strong case was joined with a weak one, but rather one where the evidence supporting both charges was "roughly equal" – i.e., they were "roughly equal[ly]" *weak*. The

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[10] In accord with the appropriate standard of review, Mr. McKinnon shall address respondent's characterization (or, more accurately, its mischaracterization) of the trial evidence where it rightfully belongs: in discussing the harm that resulted from the consolidation. (See part E, below.)

prosecutor's argument was incorrect, however, as a legal matter. (*People v. Gutierrez*, *supra*, 28 Cal.4th 1083, 1120 [prejudice from joinder may arise from cumulation of evidence where two weak cases have been joined]; *People v. Kraft*, *supra*, 23 Cal.4th 978, 1030 [same]; *People v. Marshall*, *supra*, 15 Cal.4th at p. 27 [same]; *People v. Sandoval*, *supra*, 4 Cal.4th at p. 173 [same]; *Williams v. Superior Court*, 36 Cal.3d at pp. 453-454 [same]; see also, *United States v. Davis* (8th Cir. 1996) 103 F.3d 660, 676, cert. denied 520 U.S. 1258 [unfairness may result from joinder where there is danger jury will cumulate evidence in two weak cases]; accord, *United States v. Pierce* (11th Cir. 1984) 733 F.2d 1474, 1477; *United States v. Foutz* (4th Cir. 1976) 540 F.2d 733, 736; *Garris v. United States* (D.C. Cir. 1969) 418 F.2d 467, 469.)

Importantly, the court's ruling at the close of the hearing revealed that it was persuaded by the prosecutor's legally incorrect argument. The court carefully described all of the factors it considered in ruling on the severance motion; with respect to the relative weight of the evidence, the court reasoned that there was no danger of undue prejudice from consolidation based on the relative strength of the two cases *solely* because "we don't have a case where there's overwhelming evidence in one case where you're going to bootstrap another case before the jury." (1 RT 111.) As a matter of logic and common sense, from the court's careful specification of all of the factors it considered and weighed, it follows that the court's failure to specify its consideration of the potential prejudice arising from the joinder of two weak cases means that it was persuaded by the prosecutor's legally incorrect argument and did not consider that factor. *Expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another). (*Alcarez v. Block* (9th Cir. 1984) 746, 593-607

[maxim *expressio unius est exclusion alterius* is one of "logic and common sense"]; *cf. People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1162 [trial court's specification of factors it did consider in selecting sentence demonstrated that it failed to consider omitted other factors]; *Craven v. Texas Dept. of Criminal Justice* (N.D. Tex. 2001) 151 F.Supp.2d 757, 770 [applying *expressio unius est exclusio alterius* to party's allegations].) This alone amounted to an abuse of discretion.

The state's only response is that, in its written pleadings, the prosecution briefly contended that these were neither two weak cases nor one weak case combined with a strong case, but rather two strong cases given the evidence (i.e., Harold Black's highly dubious testimony) that Mr. McKinnon admitted to both killings. (3 CT 54; RB 26-27 & fn. 15.) Respondent's observation is correct but irrelevant. Whatever the prosecution may briefly have contended in the written pleadings, his argument at the hearing was clear, legally incorrect, and persuaded the trial court. And, having been so persuaded, the court abused its discretion in denying the motion on that basis. (AOB 71-72, citing, inter alia, *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where fundamental rights are affected by the exercise of discretion of the trial court . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action"]; see also *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 [a discretionary ruling based upon improper criteria or incorrect assumptions must be reversed]; *People v. Lara* (2001) 86 Cal.App.4th 139, 165 ["To exercise the power of judicial discretion, all material facts must be both known and considered, together with legal principles essential to informed, intelligent, and just decision"].)

4. The Joinder Itself Gave Rise to the Multiple Murder Special Circumstance Allegation and thus the Capital Murder Charge

The fourth criterion a trial court must consider and weigh in ruling on a severance motion is whether "(4) any one of the charges carries the death penalty or the joinder of them turns the matter into a capital case." (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 173; accord, *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1120; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1030; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1315; *People v. Marshall*, *supra*, 15 Cal.4th at pp. 27-28.) Respondent does not dispute that it was the joinder of the charges that turned the trial into a capital case, just as the prosecutor acknowledged. (See AOB 89-90; RB 34.) Instead, respondent simply asserts that "the court took that into consideration when it ruled on the severance motion." (RB 34.)

Conspicuously absent from respondent's assertion is any citation to the record. (RB 34.) This is no doubt because there is no record indication that the trial court considered this factor. In any event, even applying the presumption that the trial court did take this factor "into consideration" in denying the motion, it still does not support the court's ruling. Weighing the fact that the joinder itself transformed the cases into a capital matter, along with the lack of cross-admissibility of the evidence, the inflammatory gang evidence admissible as to only one of the charges, and the relatively weak nature of the evidence supporting both charges at the time the motion was denied, against the minimal – if any – weight of the judicial benefits to be gained from consolidation (as discussed below), justice, fairness, and the need for heightened reliability in capital verdicts demanded severance of the charges.

5. The Actual Judicial Benefits to be Gained by Consolidating the Cases were Minimal While Severing the Two Cases Carried the Potential of Conserving Substantial Judicial Resources

As demonstrated above (and in the opening brief), the potential prejudice in joining the cases was enormous given the lack of cross-admissibility of the evidence, the inflammatory gang evidence admissible as to only one of the charges, the weak nature of the evidence supporting both charges at the time the severance motion was made, and the fact that the joinder itself turned the trial into a capital case. In exercising its discretion on a motion to sever, the trial court was required to weigh this potential prejudice against the state's interest in joinder and whether any actual and substantial benefits would be gained from a joint trial. (See, e.g. *People v. Bean*, *supra*, at pp. 935-936; *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 425, 430; *People v. Balderas*, *supra*, 41 Cal.3d at p. 173; *Williams v. Superior Court*, *supra*, 36 Cal 3d. at pp. 448, 451.)

Here, as discussed in the opening brief and as Mr. McKinnon argued below, there were few actual judicial benefits to be gained through joinder because: (1) the evidence would not be cross-admissible in separate trials (see, e.g., *People v. Smallwood*, *supra*. 42 Cal.3d at p. 430 [potential judicial benefits from joinder diminish substantially when evidence is not cross-admissible]; accord *United States v. Foutz*, *supra*, 540 F.2d 733, 738); (2) there would be no duplication of evidence in separate trials and, apart from Harold Black, no common witnesses (2 CT 323-324; see, e.g., *People v. Smallwood*, *supra*, at p. 427 ["where there is little or no duplication of evidence, 'it would be error to permit (judicial economy) to override more important and fundamental issues of justice"]); and (3) there were no duplicative motions that would require substantial re-litigation in separate

trials. (AOB 90-95.)

Moreover, the face of the record reveals that the trial court erroneously believed that severance would require a "novel" and unusually expensive procedure requiring *three* separate trials by *three* separately empaneled juries (1 RT 101-102, 107-110), rather than two, which improperly added weight to concerns of judicial economy and to consolidation's side of the scale and itself amounted to an abuse of discretion. (AOB 90-95, citing inter alia, *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where fundamental rights are affected by the exercise of discretion of the trial court . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action"]; see also *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 [a discretionary ruling based upon improper criteria or incorrect assumptions must be reversed]; *People v. Lara* (2001) 86 Cal.App.4th 139, 165 ["To exercise the power of judicial discretion, all material facts must be both known and considered, together with legal principles essential to informed, intelligent, and just decision"].) At the very least, the court's remarks amply demonstrate that it did not give the severance motion in this case the "heightened scrutiny" demanded in ruling on such motions in a capital case. (See, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 44; *People v. Keenan*, *supra*, 46 Cal.3d at p. 500; *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-431.)

Finally, the trial court failed to take into account that severing the trials presented the very real potential of *conserving* judicial resources because Mr. McKinnon certainly stood a better chance of acquittal had the charges been severed and, in the event of acquittal in the first trial, the second trial would have proceeded as a far less costly non-capital murder

trial. (AOB 92-95, citing, inter alia, *Tabish v. Nevada* (Nev. 2003) 119 Nev. 293, 306, 72 P.3d 584, 592 [where severance of counts actually carried potential to "promote judicial economy in a far less potentially prejudicial manner, . . . considerations of judicial economy were far outweighed by the manifest prejudice resulting from the joinder"].)

The state's only response to this argument is that "[a]lthough people could reasonably quibble over whether severance would have required two or three trials, it is indisputable that the single trial was significantly more efficient than multiple trials would have been." (RB 34.) To the extent that respondent's contention is taken to mean that the court's understanding of the law was not incorrect, and thus the court did not abuse its discretion because "people could reasonably quibble" over whether severance would have required three trials by three separate juries, it is without legal support, as evidenced by respondent's failure to cite any. (RB 34; see, e.g., *People v. Stanley*, *supra*, 10 Cal.4th at p. 793 [court may pass without consideration "argument" made without citation to supporting authority]; *People v. Clair* (1992) 2 Cal.4th 629, 653, fn. 2 [point made in perfunctory fashion is not properly raised].)

As Mr. McKinnon argued in the trial court, as well as in the opening brief, if he were convicted in the first trial, there would only be one more trial in which the prosecutor would allege a *prior murder* special circumstance under Penal Code section 190.2, subdivision (a)(2) – not a *multiple murder* special circumstance, as the trial court believed. (1 RT 108-110; 2 CT 321-322; see also *Williams v. Superior Court* (1984) 36 Cal.3d 441, 449-450, & fn. 7 [severing two murder charges would require, at most, two murder charges wherein the prosecution has the opportunity to seek the death penalty in the second trial under section 190.2, subdivision

(a)].) And Penal Code section 190.1, subdivision (b), clearly sets forth the procedure to be followed where a prior murder special circumstance has been alleged – the truth of the allegation is determined in a proceeding bifurcated from the determination of guilt on the current murder charge, and by the same jury that determines the guilt and penalty phases of the trial. (See, e.g., *People v. Farnham* (2002) 28 Cal.4th 107, 145; *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1301; see also Pen. Code, § 190.4, subd. (c) [same jury which determines guilt shall also determine truth of special circumstances and penalty].)

Thus, there is no authority to support a "reasonable quibble" that three separate trials by three separately empaneled juries are demanded when two murder charges are severed. Penal Code section 190.1 is a statute with which every prosecutor trying, and every judge hearing, a capital case should be well acquainted. It is beyond dispute that it is a statute with which a judge who is called upon to exercise his discretion in ruling on a motion to sever two murder charges in a potential capital case, and who must consider the judicial resources that would be expended in granting that motion, *must* be thoroughly acquainted. This judge clearly was not. Contrary to the judge's understanding, severing the trials would not have required proceedings any more unusual, costly, or logistically difficult than any other trial involving a prior murder special circumstance allegation, for which the procedure is clearly delineated by statute. The trial court's denial of the motion based upon its misunderstanding of the "legal principles essential to informed, intelligent, and just decision" making was error of the most patent, fundamental kind. (*People v. Lara*, *supra*, 86 Cal.App.4th at p. 165.)

As to respondent's brief contention that "it is indisputable that the

single trial was significantly more efficient than multiple trials [*sic*] would have been" (RB 34), it is correct, but legally irrelevant to the issue presented here.

Respondent's assertion that a single trial is "more efficient" than separate trials is *always* true in the sense that impaneling a single jury in a single trial is always "more efficient" than impaneling two juries in two trials. The assertion does nothing more than restate the basic policy underlying Penal Code section 954. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 409 ["because consolidation normally promotes efficiency, the law prefers it"].) But as this Court has recognized, "[n]o longer may a [trial] court merely recite a public policy favoring joinder or presume judicial economy to justify denial of severance." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 425.)

Thus, respondent's observation that a single trial is more efficient than separate trials begs the fundamental question presented here: whether the potential prejudice of consolidation in this *particular capital* case outweighed an "*individualized assessment*" of the potential judicial benefits to be gained from consolidation in this *particular capital* case. (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 426; accord, *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 451.) "[T]he facts of the individual case before the court [must] be reviewed to determine just how weighty those [potential judicial] benefits [are]." (*People v. Smallwood*, *supra*, at p. 426; accord, *Williams v. Superior Court*, *supra*, at p. 451.) And that individualized assessment demands heightened scrutiny where, as here, the joinder turns the matter into a capital case. (*People v. Keenan* (1988) 46 Cal.3d 478, 500; accord, *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-431; *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454.) As respondent has

failed to address the *actual* potential benefits to be gained in this particular capital case, much less dispute Mr. McKinnon's contentions that those potential benefits were entitled to little, if any, weight (AOB 90-95), no further discussion of this issue is necessary. The grave potential for prejudice in joining the unrelated murder charges far outweighed the state's interest in any benefits that would potentially be gained from a joint trial.

In sum, there were few, if any, actual judicial benefits to be gained by joining the unrelated murder charges. At the same time, there was enormous potential for prejudice given the lack of cross-admissibility of the evidence, the inflammatory gang evidence which was inadmissible as to the Coder murder charge but would be heard by a jury jointly considering the Coder and Martin murder charges, the relatively weak nature of the evidence supporting both charges at the time the severance motion was made – which respondent does not dispute – and the fact that the joinder itself turned the trial into a capital case. Finally, the trial court's remarks revealed that it was ignorant of the fundamental legal principles which should have guided its exercise of discretion. On this record, there can be no reasonable dispute that the trial court abused its discretion in denying the severance motion.

C. Joinder of the Murder Counts Was Prejudicial and Violated McKinnon's State and Federal Constitutional Rights to Due Process and Reliable Jury Verdicts on the Murder Charges

As Mr. McKinnon argued in the opening brief, the trial court's denial of his severance motion was prejudicial and deprived him of his state and federal constitutional rights to a fair trial and reliable verdicts that he was guilty of a capital offense. (AOB 95-127.) Indeed, even if the court's ruling were correct at the time it was made, reversal is nevertheless required

because the effect of the consolidation was so prejudicial as to deprive Mr. McKinnon of a fair trial and reliable capital verdicts. (AOB 95-127, citing, inter alia, *People v. Harrison* (2005) 32 Cal.4th 73, 120, *People v. Mendoza* (2000) 24 Cal.4th 130, 162, *People v. Arias* (1996) 13 Cal.4th 92, 127, *People v. Johnson* (1988) 47 Cal.3d 576, 590, *People v. Grant* (2003) 113 Cal.App.4th 579, *Zafiro v. United States* (1993) 506 U.S. 534, 539, and *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083-1086.)

Respondent contends that the consolidation was harmless under both the state and federal standards. (RB 37-41.) Respondent is wrong.

1. The Evidence – Including the Gang Evidence Concededly Irrelevant and Inadmissible to Prove the Coder Murder Charge – Did Not Become Cross-admissible as the Trial Developed Nor Was it Ever Utilized for a Legitimately Cross-admissible Purpose

As discussed in the opening brief, the absence of cross-admissibility apparent at the time the motion was made and denied did not change as the trial progressed; hence, the potential prejudice from joining the two cases was realized at trial. Indeed, the fact that the evidence was not cross-admissible for the purposes the trial court identified is amply demonstrated by the fact that the prosecutor never argued the court's theory that the evidence Mr. McKinnon committed one murder bolstered the credibility of Harold Black's testimony that Mr. McKinnon admitted to the other. (AOB 100-101.)

Respondent counters that the prosecutor *did* rely on the court's *other* theory of cross-admissibility – i.e., that the evidence of both murders was cross-admissible to prove the truth of the admissions themselves based upon the inference that Black could only have known the crime details he recounted if Mr. McKinnon had actually committed and confessed to them.

The prosecutor did so, according to respondent, by arguing "to the effect that Black said McKinnon told him he shot Martin in the head, reflected a fact that Black could only have known if McKinnon did, in fact, tell him. (9 RT 1219-1220.)"

However, as discussed in the opening brief and part B-1, above, this theory of cross-admissibility was bogus for many reasons, not the least of which is that it did not demonstrate *cross*-admissibility at all. As previously discussed, the fact that evidence relating to Crime A tends to show the truthfulness of a defendant's admission to Crime A does not mean that evidence relating to Crime A has any tendency in reason to prove the truthfulness of the defendant's admission to *Crime B*. Thus, as discussed in the opening brief, the evidence was not *cross*-relevant and admissible, as demonstrated by the fact that the prosecutor himself never offered or relied on any *legitimate* theory of the relevance of one crime to prove Mr. McKinnon's commission of the other.[11]

Hence, in deciding Mr. McKinnon's guilt of the Martin murder, the jurors heard a tremendous amount of prejudicial and otherwise inadmissible evidence connecting him to the Coder murder, while in deciding his guilt of the Coder murder, they heard a substantial amount of prejudicial and otherwise inadmissible evidence connecting him to the Martin murder. As this Court has recognized, "joinder under circumstances where the joined offenses are not otherwise cross-admissible has the effect of admitting the most prejudicial evidence imaginable against an accused." (*People v. Smallwood, supra*, 42 Cal.3d at p. 429, and authorities cited therein; see

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[11] Of course, the prosecutor *did* argue *illegitimate* theories of the relevance of one crime to prove the other, as discussed in the opening brief (AOB 122-124) and in part E-3, below.

also, e.g., *People v. Grant*, *supra*, 113 Cal.App.4th at p. 589 [effect of joinder prejudicial and deprived appellant of fair trial where, inter alia, evidence supporting each charge was not cross-admissible]; *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1084-1086 [same].)

The prejudice flowing from the jury's consideration of otherwise inadmissible, yet highly inflammatory evidence relating to the Martin murder as they assessed Mr. McKinnon's liability for the Coder murder was further exacerbated because Mr. McKinnon's gang membership was, as promised, admitted into evidence and heard by the jurors considering both charges. (AOB 101.) The state's only response is to repeat, in a perfunctory fashion and without supporting record citations (see Cal. Rules of Court, rule 8.204, subd. (a)(1)(C) [former rules 14(a) and 15(a)]), that the gang evidence was "relatively minimal, and the most prejudicial feature of the Coder murder was its senselesseness." (RB 38.) As Mr. McKinnon has already addressed and repudiated this incorrect (and inappropriately presented) assertion, no further reply is necessary here.

2. The Trial Evidence Supporting Both Charges Was Exceptionally Weak

Perhaps the most critical factor contributing to the undue prejudice caused by consolidating the Coder and Martin murder cases was the disturbingly weak and incredible nature of the evidence supporting both charges. "[S]uch thin evidence must necessarily have been bolstered by allowing the jury to receive evidence of the unrelated [other] homicide." (*People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-432 [weakness of trial evidence important factor in concluding denial of severance motion prejudicial].) In the opening brief, Mr. McKinnon discussed at length *all of the evidence* supporting both charges and argued at length the extraordinary

harm that resulted from consolidating these two extremely weak cases. (AOB 101-121.)

The state's perfunctory response to this argument is both puzzling and deeply troubling. In large part, the response consists of conclusory statements that the evidence was strong without any supporting analysis or discussion of that evidence or any discussion of the evidence supporting a contrary conclusion. And when respondent actually does point to specific facts or evidence, the evidence is affirmatively misprepresented. (Cf. *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951-952 [party on appeal forfeited claim by failing to fully and accurately summarize the material evidence relevant to question presented and otherwise misrepresenting record].)

a. Respondent's Contention That the Evidence Supporting the Coder Murder Charge Was "Strong" Is Based upon Affirmative Misrepresentations of the Record

As to the Coder murder charge, respondent contends that both cases "had strong evidence supporting the charges, including consistency between the eyewitnesses' testimony and the forensic evidence." (RB 39.) But the specific "consistency between the eyewitnesses' testimony and the forensic evidence" to which respondent points is, in fact, *untrue and deliberately misleading*.

That is, respondent contends that Orlando "Hunt and [Kerry] Scott were consistent on key points, i.e., the gun being level to the ground *and pressed against Coder's head* . . . and Coder falling to the ground immediately after being shot, just as the autopsies confirmed." (RB 38.) Although respondent fails to support this assertion with citation to the record, it has elsewhere cited 4 RT 552-555, 594, 597-598 and 6 RT 796-

797, 832-833, 834 in support of the same contention, repeated throughout respondent's brief, that Hunt and Scott testified, consistent with the medical evidence, that Mr. McKinnon "pressed" the gun "against Coder's head" and fired it once. (RB 1, 3, 5, 34, 38, 89.) This is a blatant, affirmative misrepresentation of the record.

It is certainly true that the medical examiner testified that Perry Coder had been shot once and that the single gunshot wound to his head was a "tight contact wound," meaning that the gun's muzzle had been pressed tightly against his skin when the gun was fired. (5 RT 718-719.) It is certainly *not* true, however, that either drug addict informant Kerry Scott or original suspect Orlando Hunt's testimony was consistent with this evidence.

To the contrary, Kerry Scott testified that Mr. McKinnon shot Mr. Coder while the muzzle of the weapon was *two to three from Coder's head* (6 RT 831-832, 847), and that he fired the weapon *four times* (6 RT 796, 837). Similarly, Orlando Hunt described the gun as being "*two feet from the guy's head*" when Mr. McKinnon fired it. (13 CT 3621.)

Respondent's only oblique reference to the true state of the record in this regard is in a footnote in which respondent observes:

> A point bears mention. McKinnon claims Scott testified that the gun was two to three feet from Coder's head when McKinnon fired it. (AOB 109.) Although McKinnon is correct when he asserts Scott so testified, he fails to mention that Scott later clarified that he meant McKinnon stood two to three feet from Coder, not that the gun was two to three feet from Coder. (6 RT 831.)

(RB 38, fn. 19.) But this representation of Scott's testimony is equally false.

The portion of Scott's recorded testimony to which respondent cites

in fact reads as follows:

Q You told Mr. Davis [the prosecutor] that you saw Popeye stand between two and three feet from the white boy when he shot him; is that your testimony?

A Yes.

Q In fact, that's what you told him, Caldwell, too, isn't it?
When you say two or three feet, does that mean that the end of the gun, that is the end of the barrel of that gun, was to or three feet away from the white boy when he was shot?

A No.

Q Did you see the barrel of the gun any distance away from the white boy when he was shot?

A Two to three feet, meaning as him standing there.

Q You are – I'm not sure that I understand.
Was Popeye two to three feet away from the white boy?

A Yes.

Q How far away was the end of the gun?

A I don't know how far away the end of the gun was.

Q Do you remember Caldwell asking you this question, "How close was the gun from him?" And you said, "It wasn't pointed like right – it was close." And Caldwell said, "How far apart were them, they?" Caldwell said, maybe, about two to three feet?" And you said, "yeah." Is that right so far?

A Yes.

Q Is that what Caldwell asked you and are those the answers that you gave him?

A Yes.

Q And that's what you remember today; is that right?

A Yes.

(6 RT 831-832.)

Shortly thereafter, the matter was clarified still further:

Q How far away from the head of the white guy *was the gun* when the shot was fired?

MR. DAVIS [the prosecutor]: Objection. Asked and answered.

THE COURT: Overruled. You can answer.

THE WITNESS: I don't know.

Q Was that two to three feet?

A That's what I said in my interview, yes.

(RT 847.) Thus, the record establishes precisely the opposite of what respondent contends: Scott did not "clarif[y] that he meant McKinnon stood two to three feet from Coder" but rather "clarified" that *the gun* was two to three from Coder's head when it was fired. (6 RT 831-832, 847.)

At bottom, *not once* did either Scott or Hunt – *or anyone else* – describe Mr. McKinnon as having "pressed" the gun "against Coder's head" and firing it once, as respondent repeatedly represents. (RB 1, 3, 5, 34, 38, 89.) To the contrary, the alleged eyewitness testimony describing the shooting was utterly irreconcilable with the physical evidence and, hence, utterly irreconcilable with the truth.

Innocent mistakes regarding minor facts or parts of the record are certainly not uncommon. And urging the most, or least, favorable *interpretation* of facts is a typical and appropriate tool of advocacy. But *inventing* critical evidence out of thin air and repeatedly representing it as fact to a reviewing court in a capital case cannot be reconciled with innocence, triviality, or mere advocacy. It can only be reconciled with a deliberate attempt to mislead the court and a gross violation of ethical rules and state law. (*In re S.C.* (2006) 138 Cal.App.4th 396, 419-420 [brief that affirmatively misrepresents key facts violates court rules and may be construed as attempt to mislead court in violation of Business & Professions Code section 6068]; *Mammoth Mountain Ski Area v. Graham* (2006) 135 Cal.App.4th 1367, 1375 ["misrepresent[ation] of the record on a crucial point" was attempt to mislead the appellate court, in violation of section 6068, *supra*]; see also *Jackson v. State Bar* (1979) 23 Cal.3d 509, 513 ["the representation to a court of facts known to be false is presumed intentional"].) "These cavalier mischaracterizations of the record must stop." (*Mammoth Mountain Ski Area v. Graham*, *supra*, at p. 1374.)

Respondent's contention that Hunt and Scott were also consistent in their testimony that the gun was "level to the ground" is likewise misleading. In truth, Scott testified with specificity that McKinnon held the gun sideways, or "gangsta style", when he fired it (6 RT 833-834), while Hunt testified with equal specificity that McKinnon pointed the gun in the standard position and indeed was quite certain that it was *not* canted "gangsta style." (13 CT 3611, 3613, 3620-3621.) To the extent that respondent's contention is taken to mean that their accounts were consistent in that both described the gun as being pointed in a level, rather than in an upward or downward, position, that is hardly a remarkable consistency.

Given the circumstances of the shooting in an empty, darkened field littered with debris in the dead of night, it would only be logical to assume that both men were standing – rather than one sitting on the ground, for instance – which would necessarily mean that the shooter's arm was "level to the ground" when it was fired. Similarly, anyone hearing and reading about the shooting in the eight months before addict informant Kerry Scott gave his statement, and the more than two years before original suspect Orlando Hunt gave his, would naturally assume that Mr. Coder would have fallen after being shot *in the head*. Those details, which would be obvious and logical to anyone who had heard or read about the shooting in the months and years that followed, certainly pale in comparison to the many inconsistencies that respondent either blatantly misrepresents, as discussed above, or completely ignores, including that: (1) if Scott and Hunt's accounts were both true, they would necessarily have seen each other in the field that night, but both explicitly testified that they saw no one else in the field (4 RT 553-554, 594-595, 651-652; 6 RT 799, 821, 823; see also People's Trial Exhibit 1 [diagram on scene on which Hunt, Scott, and Gina Lee marked their locations with the first letter of their last names]); (2) Scott described the gun as chrome (6 RT 835), while Hunt described it as black (4 RT 592); (3) Scott was certain that McKinnon *walked*, and did not run, away after the shooting (6 RT 825), while Hunt (and Gina Lee) were equally certain that he *ran* away (4 RT 556; 13 CT 3580, 3587, 3615); and (4) both men described the gun as being fired two to three feet from Mr. Coder's head (6RT 831-832, 847; 13 CT 3621), although the gun had in fact been pressed directly against Mr. Coder's head when it was fired (5RT 718-719); (5) Scott testified that McKinnon fired the gun at Coder's head four times (6 RT 796, 837) although Coder was shot only once (4 RT 520-

521; 5 RT 716, 718), and the ballistics evidence at the scene established that – if the shooter ran or walked away immediately after the shooting without collecting any shells or bullets from the ground, as the witnesses testified – the gun had only been fired once (4 RT 524, 534-537). (See AOB 108-110.)

Significantly, respondent does not support its conclusory statement that the evidence against Mr. McKinnon for the Coder murder was "strong" with any reference to, or discussion of, Gina Lee or Johnetta Hawkins's testimony. (See RB 38-39; see also RB 34.) Mr. McKinnon takes this as a concession that their testimony was incredible and unworthy of belief for all of the reasons discussed in the opening brief. (AOB 102-103, 106-107, 109-114.)

The only time respondent addresses any of the specific evidence regarding the Coder murder witnesses' credibility problems is in a footnote in which respondent briefly acknowledges only the least of those problems – i.e., Hunt, Scott, Black, Lee, and Hawkins's drug use and felony convictions, Scott's status as an informant who received crack cocaine funding from the Banning police, and the mere existence of Harold Black's plea bargain. (RB 33-34 & fn. 18.) Once again, respondent simply ignores *far* too much, including the witnesses' opportunities and compelling motives to fabricate their evidence against Mr. McKinnon, the shocking benefits both promised and received for Harold Black's incredible testimony, both addict informant Scott and original suspect Hunt's admissions to an investigator that they had lied to police about witnessing Mr. McKinnon shoot Perry Coder, the irreconcilable inconsistencies in the alleged eyewitness accounts, and their demonstrably false testimony in other vital respects. (AOB 101-107.)

Rather than address any of this evidence, respondent simply contends: "But the witnesses' motives and inconsistencies were brought out on cross-examination and emphasized during defense counsel's closing argument. . . . [A]ny inconsistencies simply went to Hunt's and Scott's credibility, which was an issue for the jury, and the same situation would have emerged from separate trials. . . ." (RB 38.) Frankly, Mr. McKinnon is not sure what to make of this contention. The issue here is the strength of the evidence supporting both charges. (See, e.g., *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 431-432; *People v. Grant*, *supra*, 113 Cal.App.4th at p. 588; accord, *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1085; *United States v. Lane* (1986) 474 U.S. 438, 450.) It is certainly true that "credibility was the principal issue at trial," that the witnesses' motives and the inconsistencies in their accounts went to that "principal issue," and that these were issues for the jurors to resolve, as respondent observes. But that observation does nothing to answer the issue presented here: for all of the reasons set forth above and in the opening brief but ignored by respondent, the evidence was weak because it rested entirely on the credibility of the prosecution witnesses and the prosecution witnesses were incredible. (AOB 101-115.) "[S]uch thin evidence must necessarily have been bolstered by allowing the jury to receive evidence of the unrelated [other] homicide." (*People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-432.) Indeed, in the face of such weak evidence, the only rational explanation for the jury's resolution of the seemingly insurmountable credibility problems underlying the testimony of the state's witnesses in favor of a guilty verdict on the Coder murder charge – reached after three full days of deliberations following a six-day trial – was the undue prejudice that flowed, individually and collectively, from the joinder of the murder charges and the many other

errors other that occurred throughout the trial. (See AOB 179, 229, 230-235 [Argument VIII].) Certainly, "[i]t is very probable that the weight of the two accusations was a major factor in" Mr. McKinnon's convictions. (*People v. Smallwood*, *supra*, at p. 432; accord, e.g., *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 453-454.)

b. Respondent's Contention That the Evidence Supporting the Martin Murder Evidence Was Strong Is Belied by the Record

As to the Martin murder charge, respondent declares in a single sentence, unsupported by any citation to the record (see Cal. Rules of Court, rule 8.204, subd. (a)(1)(C) [former rules 14(a) and 14(a)]), that the evidence supporting it was strong because Lloyd "Marcus's account to [Sergeant Marshall] Palmer of what he saw was also consistent with the forensic evidence, McKinnon virtually confessed to committing the murder, and the murder weapon was found in McKinnon's car a week after the killing." (RB 40; see also RB 34.)

Respondent's assertion that "Marcus's account to Palmer of what he saw was also consistent with the forensic evidence" is no doubt deliberately ambiguous. (RB 40.) Because respondent does not support this assertion with any record citation, and otherwise fails to specifically address Lloyd Marcus's neutral eyewitness account of the shooting or Palmer's testimony other than in its Statement of Facts (RB 8-9), it is impossible to tell to which of Marcus's "accounts" respondent refers. (See *Marks v. Loral Corp.*, *supra*, 57 Cal.App.4th at p. 65 [because party failed to supporting contentions with citations to record, as required by rules of court, opposing counsel was prevented from adequately responding and appellate court therefore refused to consider them].)

As discussed at length in the opening brief, there were two starkly

inconsistent accounts of Marcus's eyewitness description of the Martin murder. There was Marcus's documented, eyewitness description of Martin's killer as an Hispanic or Asian man, standing six feet, two inches to six, feet three inches tall and weighing about 190 to 220 pounds, whom Marcus did not know. (6 RT 895, 920, 922-924, 947-948; AOB 115-118; see also AOB 22-23.) And there was Sergeant Marshall Palmer's 11th hour claim made for the first time at the preliminary hearing that Marcus also identified Mr. McKinnon by name as the killer. (AOB 26-28, 115-118.) As discussed at length in the opening brief, Marcus's documented account was the true one and consistent *only* with Mr. McKinnon's innocence, while Palmer's 11th hour claim – which was irreconcilable with all other evidence, including the facts that Mr. McKinnon was African-American, stood five feet, ten inches tall and weighed 170 pounds and the time of the crime (unlike the shooter Marcus described), that Marcus apparently did know Mr. McKinnon (unlike the stranger Marcus described), and that Palmer neither documented the alleged identification nor followed up on it in any way despite ample opportunity to do so – was a patent lie. (AOB 115-118 [discussing myriad inconsistencies between Palmer's account and the true evidence].) Respondent's failure to discuss these two inconsistent accounts is telling and par for respondent's course of ignoring what it simply cannot dispute: Marcus's *actual, documented* eyewitness account clearly described someone other than Mr. McKinnon as Martin's killer and provided compelling proof of Mr. McKinnon's innocence.

As to respondent's contention that the Martin murder evidence was strong in light of Mr. McKinnon's "virtual confession," Mr. McKinnon can only assume that it refers to Black's testimony that Mr. McKinnon allegedly admitted the crime to him. But, as discussed at length in the opening brief,

there were numerous and seriously troubling questions about the credibility of Harold Black's testimony, not the least of which was that the admission he attributed to Mr. McKinnon was inconsistent with the true facts of the Martin murder. (AOB 107-108, 118-119; see also AOB 77-79, 85-87.) As respondent has chosen to ignore Mr. McKinnon's points in this regard, and has otherwise declined to engage in any detailed discussion of Black's testimony or the myriad problems with which it was riddled, no further discussion of it is necessary here.

As to the discovery of the alleged Martin murder weapon "in Mr. McKinnon's car a week after the killing" (RB 40), the gun was, in fact, found in Kim Gamble's purse while she was with Mr. McKinnon in his car. (4 RT 637-638, 641.) Mr. McKinnon has already discussed at length why "the fact that the Martin murder weapon was found in Kim Gamble's purse a week after the murder did not transform a paper thin case into one of substance." (AOB 118-121.) As respondent has also chosen to ignore Mr. McKinnon's points in this regard, and has otherwise declined to engage in any detailed discussion of that evidence, no further discussion of it is necessary here.

Finally, respondent ignores the compelling objective indicia that the jurors themselves viewed the Martin murder case to be a close one. (AOB 121-122.) They requested readback of the entirety of both Marshall Palmer and Harold Black's testimony and declared that they were deadlocked on the Martin charges on the fourth day of their deliberations, before reaching their verdicts on the fifth day. (13 CT 3810; 14 CT 4018-4019, 4093-4095, 4098; see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 [requests for readback and expression of deadlock indicate close case]; *United States v. Harbor* (9th Cir. 1995) 53 F.3d 236, 243 [same -

expression of deadlock].)

In sum, in declaring the evidence supporting both charges to be "strong," respondent has made perfunctory assertions unsupported by record citation, misrepresented the few portions of the record to which it has cited, and otherwise ignored the wealth of other record evidence undermining its position. Respondent's "argument" should be taken for what it is worth. (See, e.g., *Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 101-102 [respondent's "arguments are nothing more than conclusions of counsel made without supporting documentation or any citation to the record and deserve no consideration from this court"].) As respondent's briefing amply demonstrates, it is indisputable that the evidence supporting both murder charges was exceptionally weak and that the jury, hearing two unrelated and otherwise weak murder cases, likely "aggregate[d] all of the evidence . . . such that the two cases . . . bec[a]me, in the jurors' minds, one case which [was] considerably stronger than either viewed separately," resulting in convictions on both charges. (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 453-454.)

3. The Prosecutor Exploited the Superficial Similarities Between the Crimes and Improperly Encouraged the Jurors to Consider the Charges in Concert, as Demonstrating a Common Modus Operandi and an Inference of Identity, and the Jurors were Given No Instructions Disabusing Them of the Notion that They Could Do Just That

As Mr. McKinnon argued in the opening brief, the prosecutor's closing argument provides further proof that consolidating the two unrelated and weakly supported murder charges prejudiced Mr. McKinnon and deprived him of a fair trial and reliable jury verdicts. In violation of the court's explicit ruling that the crimes were not sufficiently similar to

support any legitimate inference of identity or common modus operandi, the prosecutor exploited the superficial similarities between the crimes – both involving gunshot wounds to the heads of male victims – to urge the jury to consider the charges in concert and infer from them a common modus operandi and identity. (AOB 122-124, citing, inter alia, *People v. Grant*, *supra*, 113 Cal.App.4th at p. 569-570, 572 [joinder of counts so prejudicial as to result in due process violation where, inter alia, prosecution argued similarities between crimes to urge convictions on both] and *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1083-1086 [same].)

Respondent disagrees. (RB 39.) As to the prosecutor's argument that: "nobody said anything different than the method and the manner that the two murders were done [*sic*], they were done by the same person, they were used by the same manner [*sic*], shot, was even the same part of the body, there was no robberies [*sic*], there was no physical fights [*sic*], there was no – no rape cases . . . *They were basically very similar types of murders*. And the only witnesses that identified people identified Popeye as having done the murder" (9 RT 1228, italics added), respondent contends that what the prosecutor *really* meant was that "the witnesses were relatively consistent in their descriptions of what they saw and heard." (RB 40.)

Similarly, as to the prosecutor's argument, "Did anybody say that it wasn't shots to the head, that it wasn't out in the night, out in the open, *both murders being the same*? No." (9 RT 1207, italics added), respondent contends that what the prosecutor really meant was that "none of the witnesses were discrepant regarding the actual murders vis-a-vis other discrepancies going to collateral matters." (RB 40.)

Tellingly, respondent ignores the prosecutor's further argument:

"Think of all the murders that you know of. How many of them are done with a shot to the head out in the street in the dark, one male shooting another male that's alone? It's not unique, but it's kind of unusual." (9 RT 1229.)

The record speaks for itself. The prosecutor clearly emphasized the similarities between the two crimes, thereby urging the jurors to consider them and evidence as a whole in concert, as revealing a common modus operandi and identity, supporting the inference that the man who killed one victim must have killed the other – contrary to the trial court's explicit ruling (which respondent concedes was correct) that the evidence did *not* support any such inferences.

Mr. McKinnon further argued that the jurors received no instruction limiting their consideration of evidence to any particular count or disabusing them of the notion that they could consider the charges and evidence in concert to support inferences of common modus operandi and identity. (AOB 124-125.) The omission of such instructions compounded further the prejudicial impact of consolidating the cases. (AOB 124-125, citing, inter alia, *Bean v. Calderon*, *supra*, 163 F.3d at p. 1085, *People v. Grant*, *supra*, 113 Cal.App.4th at p. 572, and *Panzavecchia v. United States* (5th Cir. 1981) 658 F.2d 337, 338, 341, & fn. 1.) As respondent does not dispute this point, no further discussion is necessary.

The prosecutor's argument and the omission of any limiting instructions leave little room for doubt that the jurors "consider[ed] the two sets of charges in concert, as reflecting the modus operandi characteristic of [Mr. McKinnon's] activities" and his identity as the killer of both victims and thus "could not 'reasonably [have been] expected to "compartmentalize the evidence" so that evidence of one crime [did] not taint the jury's

consideration of another crime,' *United States v. Johnson*, 820 F.2d 1065, 1071 (9th Cir.1987) . . . ." (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084.)

In sum, given the absence of cross-admissibility of the evidence supporting each unrelated crime, the admission of inflammatory gang evidence which was inadmissible and highly prejudicial as to one of the charges, the weak nature of the evidence supporting the charges, the joinder itself turning the trial into a capital case, the prosecutor's argument exploiting the superficial similarities between the crimes to urge the jurors to consider the charges and evidence in concert, and the absence of instructions prohibiting the jurors from doing just what the prosecutor urged, it is more than reasonably probable that the jurors considered the charges in concert and "aggregate[d] all of the evidence, though presented separately in relation to each charge," and thus it was the joinder itself that prompted the convictions and not the otherwise weak evidence supporting each separate charge. (*Williams v. Superior Court*, *supra*, 36 Cal.3d 453-453; accord, *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 431-432 ; *People v. Grant*, *supra*, 113 Cal.App.4th at pp. 588-594; *Bean v. Calderon*, *supra*, 163 F.3d at p. 1085.) The court's refusal to sever was a prejudicial abuse of discretion. Even if the court did not err in denying the motion at the time it was made, the effect of the joinder was so prejudicial as to deprive Mr. McKinnon of a fair trial and reliable jury determinations that he was guilty of a capital offense. The entire judgment must be reversed.

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II

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S ADMISSION OF GANG EVIDENCE VIOLATED STATE LAW AND MR. MCKINNON'S RIGHTS TO A FAIR TRIAL, CONFRONTATION, AND RELIABLE JURY VERDICTS THAT HE WAS GUILTY OF A CAPITAL OFFENSE, AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

In his opening brief, Mr. McKinnon argued that the admission of gang evidence violated state law, as well as his rights to a fair trial, confrontation, and reliable capital murder verdicts as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. (AOB 129-155.) Specifically, the trial court's *in limine* ruling that the gang evidence was admissible to prove that Mr. McKinnon had motive to kill Gregory Martin, even though inadmissible as to the Coder murder charge, violated Evidence Code section 352 because the probative value of the evidence was substantially outweighed by its prejudicial effect in this consolidated murder trial. (AOB 130-138.) Furthermore, the trial court erred in overruling defense counsel's objection to hearsay evidence offered at trial to prove the gang motive theory. (AOB 138-149.) Finally, because the gang evidence ultimately introduced was irrelevant to any legitimate issue in this case, the only inference the jury would logically draw from it was an impermissible one of criminal disposition. The harm caused by this impermissible inference, as applied to *both* murder charges, was so great as to deny Mr. McKinnon his federal constitutional rights to a fair trial and reliable verdicts that he was guilty of a capital offense. (AOB 149-155, citing, inter alia, *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1383, cert. denied *Olivarez v.*

McKinney (1993) 510 U.S. 1020 [erroneous admission of propensity evidence violated defendant's due process right to fair trial], *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 ["if there are no permissible inferences the jury can may draw" from the other misconduct evidence, its admission can violate due process], and *People v. Partida* (2005) 37 Cal.4th 428, 436-438 [erroneous admission of gang evidence may render trial fundamentally unfair in violation of due process]; see also *People v. Albarran* (2007) 149 Cal.App.4th 214, 228-231 [admission of gang evidence violated defendant's due process right to fair trial where evidence ultimately presented at trial was insufficient to support gang motive theory and since there were "no permissible inferences" to be drawn from that evidence, its "paramount function" was to show defendant's "criminal disposition"].)

Respondent disagrees. (RB 41-52.) Respondent is wrong.

B. The Trial Court Abused Its Discretion By Denying McKinnon's Pre-Trial Motion to Exclude The Gang Evidence

As discussed in the opening brief, the prosecutor's offer of proof (based solely on jailhouse informant Harold Black's preliminary testimony) revealed that the gang evidence bore little if any probative value to proving the Martin murder charge and – as all agreed – *none* to proving the joined Coder murder charge. (AOB 130-138.) At the same time, evidence of Mr. McKinnon's membership in a notoriously violent street gang, the Crips, carried a tremendous potential for prejudice in this consolidated murder trial, particularly since it was – as the trial court correctly ruled – irrelevant and inadmissible as to the Coder murder charge. (AOB 130-138.) Hence, the trial court abused its discretion in denying Mr. McKinnon's pre-trial motion to exclude the gang evidence under Evidence Code section 352.

(AOB 130-138.)

The state's only response to this argument is as follows: "given that the charges were joined, that gang evidence is generally admissible to prove motive [citations], and the gang evidence in this case was narrow and minimal, in light of [*People v.*] *Williams* [1997] 16 Cal.4th 153, it cannot reasonably be said that the trial court abused its discretion under section 352 when it denied the defense's pre-trial motion to exclude evidence of Mr. McKinnon's gang involvement." (RB 45.)

Once again, respondent's assertion that the "gang evidence in this case was narrow and minimal" is made without any citation to the record or any discussion of the offered evidence. (RB 45.) As discussed in the previous argument, the Court should pass it without consideration for this reasons alone (Cal. Rules of Court, rule 8.204, subd. (a)(1)(C) [former rules 14(a) and 15(a)]) and accept the statements of appellant's opening brief as to the evidence on the subject (*Rosen v. E.C. Losch, Inc.* (1965) 234 Cal.App.2d 324, 326 & fn. 1). In any event, respondent's assertion is without merit.

At the time the motion to exclude the gang evidence was made, the prosecution's proffer that it would present evidence that Mr. McKinnon was a member of the Crips and had killed Martin, a member of the Bloods, as an act of gang retaliation for yet another allegedly gang-related murder was hardly "narrow" or "minimal." This was potentially explosive evidence, which carried a substantial danger that the jurors would unfairly prejudge Mr. McKinnon as a violent and dangerous man more likely than not to have

committed *both* of the charged murders.[12]

As to its probative value, respondent does not address the relevance or probative value of the particular gang evidence offered in this particular consolidated murder trial at all. Instead, respondent generally observes that a defendant's gang membership *can* be relevant to motive, then summarily concludes that since the prejudicial effect of gang evidence did not outweigh its probative value in *People v. Williams*, *supra*, 16 Cal.4th 153, the same must be true in this case. (RB 45.) To the extent that this rather curious response implies that the relative weight of the probative value and danger of undue prejudice of the gang evidence in this case is identical to that admitted in *People v. Williams*, *supra*, 16 Cal.4th 153, it is completely devoid of merit.

In *Williams*, the prosecution presented expert testimony and other competent evidence to prove that the defendant was a leader of the Bloods, that he had led a meeting of the Bloods in which they discussed killing Crips in a specific place where the Bloods and Crips' territories overlapped, and that the victim was subsequently killed in that spot while wearing blue

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[12] In another section of its argument, respondent does specifically discuss, with supporting record citations, the gang evidence that was *ultimately presented at trial*. (RB 50.) However, this discussion does not support its summary assertion that the court correctly denied the *pre-trial* motion to exclude the gang evidence since, as previously discussed, in assessing the propriety of a trial court's ruling, "a reviewing court 'focuses on the ruling itself and the record on which it was made. It does not look to subsequent matters . . . .' [Citation]." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070.) Indeed, were Mr. McKinnon permitted to rely on the record as it developed at trial to challenge the court's ruling, it would only provide further support for his argument that the court erred in admitting the evidence, since the evidence ultimately produced at trial was incompetent and insufficient to support the gang motive theory. (See AOB 149-155.)

(traditionally worn by Crips) and appearing to be a Crip. (*People v. Williams*, *supra*, 16 Cal.4th at pp. 192-193.) The probative value of this evidence – that the defendant was the leader of a gang and had planned a killing under the precise circumstances under which the victim was killed – was obvious and significant, as this Court correctly held. (*Id.* at pp. 193-194.)

The proffered evidence in this case did not even approach the probative value of the evidence in *Williams*. In ruling that the gang evidence was relevant and more prejudicial than probative based upon jailhouse informant Harold Black's preliminary hearing testimony, the trial court had nothing more than Black's speculation that Mr. McKinnon's (alleged) reference to "Scotty" was to Scotty Ware, Black's incompetent and inadmissible testimony that Scotty Ware was a member of the Crips and had been killed by a Blood, and the prosecution's proffer that Ware had been killed "some years earlier." (1 RT 111-112; 1 CT 122-124.) In stark contrast to *Williams*, the prosecution did not present, or offer to present, competent evidence that Ware belonged (or appeared to belong) to the Crips, that his death was in any way gang-related, that Mr. McKinnon even knew Ware, much less that he had ever stated his intention to avenge Ware's death, that Mr. McKinnon was particularly involved with the Crips, that he had ever engaged in *any* act of gang violence, or that he had ever expressed any intention to engage in any act of gang violence. Indeed, the trial court had before it affirmative evidence from Black's own mouth that the Bloods and Crips coexisted peacefully in Banning. (AOB 134-138.) Furthermore, because the evidence was entirely admissible in *Williams*, it did not carry the same danger of undue prejudice as it did here, where it was concededly inadmissible as to the Coder murder charge. Thus, apart from

its recognition that gang evidence is highly inflammatory, this Court's decision in *Williams* simply has no bearing on this case.

Given its failure to address the particular facts of this case and its reliance on wholly inapposite authority to defend the trial court's ruling, the state's response to Mr. McKinnon's argument that the trial court abused its discretion under Evidence Code section 352 in denying his pre-trial motion to exclude the gang evidence amounts to a non-response. Hence, no further discussion of this aspect of the issue is necessary. For all of the reasons discussed in the opening brief, yet ignored by respondent, the court erred in denying Mr. McKinnon's pre-trial motion to exclude the gang evidence. (AOB 130-138.)

C. The Trial Court's Admission of Hearsay Evidence Regarding the Alleged Gang-Related Motive for the Martin Murder Violated State Law and McKinnon's Sixth Amendment Right to Confrontation

Mr. McKinnon further argued that the trial court erred in admitting the gang motive evidence ultimately presented at trial – through Kerry Scott and Harold Black – because it was incompetent hearsay. (AOB 138-148.) Because Mr. McKinnon was never given an opportunity to confront the hearsay declarants, the hearsay came from unreliable sources, and it provided "crucial" evidence in a close case, admission of the evidence also violated Mr. McKinnon's state and federal constitutional rights to a fair trial. (AOB 141, 148-149, citing, inter alia, *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1172-1174 [erroneous admission of hearsay evidence regarding defendant's alleged motive to commit charged crime violated Sixth Amendment right to confrontation; even if classified as nonhearsay, the evidence was so unduly prejudicial and the case so close that the jurors could not be expected to so limit it]; see also *Delaware v. Van Arsdall*

(1986) 475 U.S. 673, 678;*Davis v. Alaska* (1974) 415 U.S. 308, 317-318; *People v. Smith* (2005) 135 Cal.App.4th 914, 924 [nontestimonial statements which neither fall within firmly rooted hearsay exception nor otherwise bear particularized guarantees of trustworthiness violate confrontation clause].)

Respondent does not dispute that Kerry Scott's testimony that Scotty Ware was a member of the Crips gang was inadmissible hearsay to the extent that it was offered for its truth. (See RB 48-49.) However, respondent contends that the evidence was not offered for the truth that Ware was, in fact, a Crip, but rather to prove that it was "common knowledge" that Ware was a Crip. (RB 48.) Although it is not entirely clear, respondent apparently reasons that that evidence was admissible for the nonhearsay purpose of proving that Mr. McKinnon *believed* that Ware was a member of his own gang, which was relevant regardless of whether Ware was, in fact, a Crip.

The problem with respondent's argument is that this was *not* the purpose for which the evidence of Ware's alleged membership in Mr. McKinnon's gang was either offered or admitted. The prosecution's proffer was that Ware was, *in fact*, a Crip. (1 RT 102.) On direct examination, the prosecutor asked Kerry Scott to what gang Ware belonged not what gang Ware was *rumored* or *believed* to belong. (6 RT 784.) The trial court overruled defense counsel's hearsay objection to that question by itself eliciting Scott's testimony that he had spoken to Ware on some prior occasion (apparently, though erroneously, concluding that this testimony laid the foundation for admission of the evidence as a declaration against Ware's penal or societal), after which it permitted Scott to answer the question. (6 RT 784; Evid. Code, § 1230.) Scott did so by testifying that

Ware "claimed" the Crips – not that Ware was rumored or believed to claim the Crips. (6 RT 784.)[13] And the court never ruled that this testimony was admitted for *any* nonhearsay purpose, such as showing that it was "commonly," even if mistakenly, believed that Ware was a Crips.[14]

In stark contrast, when defense counsel made *another* hearsay objection to the prosecutor's questions regarding the rumor "on the street" about the *circumstances* of Ware's death (i.e., his alleged murder by a Blood at a party), the trial court interjected and specifically ruled that the evidence was admissible for the nonhearsay purpose of demonstrating that the "common" understanding in the community was that Ware had been killed by a Blood, regardless of whether that was true. (6 RT 786-787.) Thus, the record makes if abundantly clear that Ware's alleged Crips membership was both offered and admitted for its truth. Since respondent essentially concedes that the evidence was hearsay and thus inadmissible for this purpose, no further discussion of this erroneous ruling is necessary.

Respondent further contends that the court was correct in ruling that Scott's testimony that a Blood had killed Ware was admissible for the nonhearsay purpose of showing that this was a matter of "common" – even if incorrect – knowledge in the community, from which it could further be

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[13] As noted in the opening brief (AOB 33, fn. 13), to "claim" a gang is synonymous with belonging, or announcing allegiance, to a gang. (See, e.g., RT 779, 780-784, 881, 958.)

[14] Indeed, it was *not* commonly believed that Ware was a Crip. As respondent recognizes, Charles Neazer, a self-admitted Blood, testified that although Ware did not actually "gang bang," he believed that Ware was affiliated with his own gang, *the Bloods*, *not* the Crips. (8 RT 1082; RB 49.)

inferred that Mr. McKinnon must have known it and believed it to be true. (RB 48-49.) Respondent does not disagree that, in order for Scott's testimony to be relevant and admissible for this purpose, there had to be competent evidence above and beyond Scott's own testimony to prove that Ware's murder by a Blood was a matter so commonly understood and believed in the community that Mr. McKinnon had to know of it and believe it to be true. (See AOB 144-147, citing, inter alia, *People v. Purvis* (1961) 56 Cal.2d 93, 97 and *Alvarado v. Anderson* (1959) 175 Cal.App.2d 166, 178; see RB 49.)

Instead, respondent contends that the prosecution did present sufficient additional competent evidence to lay the necessary foundation with: 1) the testimony of jailhouse informant Harold Black that he had heard the rumor, which was sufficient to prove that the it was a matter of common knowledge in the community; and 2) Black's testimony that Mr. McKinnon said that he had killed Martin "for Scotty," which proved that Mr. McKinnon both knew of the rumor that a Blood had killed Scotty Ware and believed it to be true. (RB 49.) Respondent is mistaken.

As a preliminary matter, respondent ignores that the prosecution did not utilize the evidence for *any* nonhearsay purpose; rather he represented *as truth* to the court in limine and to the jurors in his opening statement that Scotty Ware was, in fact, a member of Mr. McKinnon's own gang, the Crips who had, in fact, been killed by a member of Gregory Martin's gang, the Bloods. (See AOB 146, citing 1 RT 102, 4 RT 505, and *People v. Coleman* (1985) 38 Cal.3d 69, 921-94 [trial court committed prejudicial error under section 352 by admitting inflammatory hearsay evidence even for limited nonhearsay purpose where prosecutor argued and relied on it for its truth].)

Respondent's contention also overlooks that Black had not yet testified to the rumor when defense counsel made his hearsay and lack of foundation objections to Kerry Scott's testimony and the court overruled them. (6 RT 784, 787-788.) Thus, at the time the objections were made, Scott was the only person who claimed that Ware's murder at the hand of a Blood was a matter of common knowledge in the community. As set forth in the opening brief, Scott's testimony alone was not sufficient to demonstrate that the alleged rumor was a matter of common knowledge in the community. Indeed, even considering Black's testimony that he had heard the rumor, the testimony of those two witnesses alone was insufficient to demonstrate that the rumor was so *commonly* believed by so many community members that Mr. McKinnon must not only have known about it, but also believed it to be true. (AOB 144-146.)

Equally without merit is respondent's contention that Black's claim that Mr. McKinnon said that he had killed Gregory Martin "for Scotty" supplied the necessary foundation to show that Mr. McKinnon believed (even if mistakenly) that Scotty Ware was a member of his own gang who had been killed by a Blood. Even setting aside the substantial doubts that Mr. McKinnon made that statement at all, that bare remark simply did not establish the critical foundational facts that: 1) "Scotty" referred to Scotty Ware; 2) Scotty Ware was a Crip; and 3) Mr. McKinnon believed that Scotty Ware had been killed by a Blood. That ambiguous (alleged) statement was only given meaning through other, incompetent hearsay evidence.

Particularly puzzling is respondent's contention that Mr. McKinnon actually benefitted from the erroneous admission of the evidence because the presentation of *competent* evidence to prove that Ware's alleged murder

by a Blood was a matter of common knowledge would only have harmed him. That is, according to respondent, had the prosecutor presented competent evidence to lay the necessary foundation for admission of the evidence with "a parade of expert and lay witnesses marching into the courtroom to testify as to what was common knowledge in Banning about gangs. . . . McKinnon would now be arguing on appeal that admission of so much gang evidence was cumulative and prejudicial." (RB 49.)

Of course, respondent's contention not only assumes, but asks this Court to presume, that the prosecutor *could have* presented competent evidence to prove that the rumor was a matter of common knowledge had he chosen to do so. Such an assumption or presumption is, of course, inappropriate. (See, e.g., *People v. Capps* (1989) 215 Cal.App.3d 1112, 1118 [rejecting People's argument premised on "'possib[ility] that the prosecutor had additional evidence to present'" as speculation unsupported by record].) Further, it is belied by the record. Defense counsel vigorously contested the prosecution's contentions that Ware was a Crip, that he had been killed by a Blood, and that the Martin murder had anything to do with Ware's death, yet the prosecutor failed to present the kind of evidence a party normally offers to prove such facts, such as police field identification cards, information from Cal-Gangs, evidence that Ware bore gang tattoos, police or other reports regarding the circumstances of Ware's death, witnesses to Ware's death, the testimony of Ware's own family regarding his death, or even a death certificate to show *when* he died. It is well recognized that when a party – particularly the party bearing the burden of proof – has the power to call logical witness or present material evidence and fails to do so, it is reasonable to infer that the evidence would have been *adverse* to that party. (See, e.g., *People v. Ford* (1988) 45 Cal.3d 431,

442-443; accord *United States v. Taylor* (9th Cir. 1995) 52 F.3d 207, 211.)[15] The trial court erred in admitting the evidence.

D. The Erroneous Admission of the Gang Evidence was Prejudicial, Violated McKinnon's Due Process Right to a Fair Trial, and Requires That the Judgment Be Reversed

Finally, Mr. McKinnon argued in the opening brief that the gang evidence ultimately introduced was irrelevant to any legitimate issue in this case. Hence, the only logical – albeit impermissible – inference the jury would draw from the evidence of Mr. McKinnon's gang membership was an impermissible one of criminal disposition; the enormous prejudice caused by this impermissible inference, as applied to *both* murder charges, was so great as to deny Mr. McKinnon his due process right to a fair trial. (AOB 149-155, citing, inter alia, *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1383, cert. denied *Olivarez v. McKinney* (1993) 510 U.S. 1020 [erroneous admission of propensity evidence violated defendant's due process right to fair trial], *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 ["if there are no permissible inferences the jury can may draw" from the other misconduct evidence, its admission can violate due process], and *People v. Partida*, *supra*, 37 Cal.4th at pp. 436-438 [erroneous admission of gang evidence may render trial fundamentally unfair in violation of due process]; see also *People v. Albarran* (2007) 149 Cal.App.4th 214, 228-231 [admission of gang evidence violated defendant's due process right to fair trial where evidence ultimately

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[15] Respondent does not dispute that if defense counsel had made the same trial objections to essentially the same testimony offered by Black, they would have been futile and, hence, counsel's failure to make those objections to Black's testimony did not waive his right to challenge it on appeal. (AOB 147-148.) Mr. McKinnon takes this as a concession.

presented at trial was insufficient to support gang motive theory and hence "no permissible inferences" could be drawn from that evidence, but instead its "paramount function" was to show defendant's "criminal disposition"].)

Respondent disagrees. According to respondent, Mr. McKinnon's gang membership was relevant, and highly probative, because it filled an important evidentiary gap in the prosecution's case – Mr. McKinnon's motive for killing Gregory Martin. (RB 50-51.)

The flaw in respondent's contention is that evidence is not relevant simply because it is offered to prove an important issue. Certainly, Mr. McKinnon agrees that motive was a material issue and a significant evidentiary void in the prosecution's Martin murder case. But he disagrees that his membership in the Crips bore any legal relevance to prove that issue. (See, e.g., *People v. Thompson* (1980) 27 Cal.3d 303, 313 & fn. 20 [relevancy of evidence involves the "extent to which it tends to prove an issue by logic and reason"; the importance of the issue to the case goes to materiality, not relevancy].) As discussed at length in the opening brief, and *based on a detailed discussion of the evidence* that is entirely absent from respondent's briefing, given the evidence presented and the lack thereof, McKinnon's membership in the Crips simply did not logically, naturally, and by reasonable inference tend to prove that he was motivated to kill Gregory Martin (a Blood), with whom he amicably socialized as recently as a few days before the murder, in a town in which the Crips and Bloods members typically socialized and got along, over the death of a third party (Ware) that occurred *several years* earlier – a third party whom the evidence failed to show Mr. McKinnon even knew, a third party whom the evidence failed to show belonged to the Crips, and a third party who died under unknown circumstances. (AOB 149-153.) Thus, while motive was

indeed an important factor in this case that the prosecution failed to prove, Mr. McKinnon's gang membership simply did nothing to prove it.

Indeed, respondent ignores that the prosecutor himself clearly seemed to recognize as much. Ultimately, he did *not* argue the gang motive theory in his guilt phase summation. The prosecutor's argument in this regard – or more accurately, the lack thereof – is perhaps the most telling proof of the ultimate irrelevance of Mr. McKinnon's gang membership to any legitimate issue presented in this case. (AOB 152-153.)

The state's *only* response to Mr. McKinnon's argument regarding the logical irrelevance of the gang evidence is that it "overlooks an important piece of testimony" – namely Black's *preliminary hearing* testimony that "Ware had been murdered 'the previous year. . . .' (1 CT 48.) [sic]"[16] (RB 51.) But the *jury never heard this testimony.* The only evidence regarding the date of Ware's death presented to the jurors came from Charles Neazer, who testified that he had heard that Ware died *at least four years* before Martin was killed, near the end of 1989 or the beginning of 1990. (AOB 150-151, citing 8 RT 1083.)[17]

As to respondent's contention that admission of Mr. McKinnon's membership in the Crips was not prejudicial because it was not extensive and therefore did not comprise a significant part of the state's case (RB 50), it misses the point. The point is that the evidence of Mr. McKinnon's gang

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[16] Respondent's record citation is apparently a typographical error. The correct citation to Black's preliminary hearing testimony in this regard is to 1 CT 123-124.

[17] Indeed, the prosecutor himself apparently put no stock in Harold Black's preliminary testimony that Ware had been killed a year earlier. His only offer of proof regarding the timing of Ware's death was that it had occurred "some years earlier." (1 RT 102.)

membership was irrelevant to any legitimate issue in the case. The point is that this irrelevance to any legitimate issue leads to the inevitable conclusion that the jurors must have considered it for its only other logical – albeit highly improper and inflammatory – purpose: to show Mr. McKinnon's violent character and propensity to commit precisely the kind of "senseless" (RB 33, 38, 45, 52, 123, 132) crimes with which he was charged. The prejudice in considering gang membership evidence for such a purpose, particularly in a case such as this where identity is the disputed issue and the prosecution's case is weak at best, is manifest and deprived Mr. McKinnon of his state and federal constitutional rights to a fair trial and reliable verdicts that he was guilty of capital murder. (*People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 228-231 [admission of gang evidence violated defendant's due process right to fair trial where evidence ultimately presented at trial was insufficient to support gang motive theory, "no permissible inferences" could be drawn from that evidence, and hence its "paramount function" was to show defendant's "criminal disposition"]; *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1382-1383, cert. denied *Olivarez v. McKinney* (1993) 510 U.S. 1020 [admission of propensity evidence violated defendant's due process right to fair trial]; *Jammal v. Van de Kamp*, *supra*, 926 F.2d at p. 920 ["if there are no permissible inferences the jury can may draw" from the other misconduct evidence, its admission can violate due process]; *People v. Partida*, *supra*, 37 Cal.4th at pp. 436-438 [erroneous admission of gang evidence may render trial fundamentally unfair in violation of due process].)

Finally, respondent contends that the "ultimate question" of prejudice is reduced to whether admission of the gang evidence was prejudicial as to the Coder murder conviction since, respondent concedes, it

was irrelevant and inadmissible to prove any issue relating to that charge. (RB 52.) It was not, respondent contends, for two reasons: 1) "little, if anything, about these two murders made any sense" and therefore, the gang evidence could not have been prejudicial; and 2) the prosecution "went to great lengths to demonstrate that the Coder murder was without motive, thereby negating any possibility that the jury would let gang membership spill over to the Coder charge." (RB 52.) Nonsense.

As a preliminary matter, Mr. McKinnon agrees that "little, if anything" about the *state's theory that Mr. McKinnon committed the murders* "made any sense," including the fact that Mr. McKinnon had no motive to commit either of them. (RB 52.) But it is the very absence of any motive for Mr. McKinnon to have committed the murders, the absence of any connection or animosity between Mr. McKinnon and the victims, and the absence of any hint of evidence that Mr. McKinnon was some kind of predatory serial killer who murdered strangers and friendly acquaintances for the fun of it, which points so compellingly to his innocence. (See, e.g., *People v. Albertson* (1944) 23 Cal.2d 550, 566 ["startling fact that no motive whatsoever is shown" is a "'fact to be reckoned on the side of innocence'"].) The evidence of Mr. McKinnon's membership in a notorious street gang effectively invited the jurors to fill the otherwise gaping holes in the state's case with prohibited inferences that he was a violent and dangerous man predisposed to commit the kinds of crimes charged against him and hence was more likely than not to have committed the charged crimes. As such, it was tremendously prejudicial.

And because Mr. McKinnon's gang membership was irrelevant to motive in *either* case, as demonstrated by the prosecutor's failure to argue the evidence for that purpose, there is no basis on which to presume that the

jurors properly limited their consideration to motive in either case, much less to motive in *both* cases, as respondent contends. (RB 52.) To the contrary, as established above and in the opening brief, it is precisely because the gang evidence was irrelevant to motive or any other legitimate issue that the jurors undoubtedly considered it for the prohibited purpose of inferring Mr. McKinnon's criminal disposition to commit *both* "senseless" murders.

In any event, even if the evidence bore some minimal degree of relevance to the issue of motive for the Martin murder case, the court still erred in admitting it and, given the inflammatory nature of the evidence as weighed against the closeness of both cases, that error was prejudicial and demands reversal of the entire judgment. (See, e.g., *People v. Avitia* (2005) 127 Cal.App.4th 185, 193-195.) As respondent does not address, much less make any attempt to dispute, the weakness of the evidence supporting both charges against Mr. McKinnon in assessing the harm from the error (see AOB 152-154; compare RB 46-52), no further discussion of this issue is necessary. The admission of the gang evidence was prejudicial, violated Mr. McKinnon's state and federal constitutional rights to a fair trial and reliable verdicts that he was guilty of capital murder, and demands reversal. (AOB 149-155.)

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III

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW AND MR. MCKINNON'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY REFUSING TO ADMIT THE DISTRICT ATTORNEY INVESTIGATOR'S DOCUMENTED INTENTION TO "MAKE" EVIDENCE TO FIT THE STATE'S THEORY THAT MR. MCKINNON WAS GREGORY MARTIN'S KILLER

A. Introduction

In his opening brief, Mr. McKinnon argued that the court erred in excluding a memo written by District Attorney Investigator Buchanan articulating his own theory that, although Mr. "McKinnon did not possess the handgun [identified as the Martin murder weapon] at the time of his arrest," Mr. McKinnon "probably stuck it in the female's [Kim Gamble's] purse at the time of the car stop" and stating his intention to find Ms. Gamble and "make a wit[ness] out of her. Or arrest her for 32 P.C." [accessory after the fact to murder], as well as to locate and interview Harold Black and Johnetta Hawkins. (7SCT 38; AOB 156-179.)[18]

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[18] The memo in whole stated:

> John -
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> As you can tell by this [police] report McKinnon did not possess the handgun at the time of his arrest. However, I think he probably stuck it in the female's purse at the time of the car stop.
>
> I will find this gal (Kimiya Gamble) and make a wit [*sic*] out of her. Or arrest her for 32 P.C. She apparently pled out to the 12025/12031 PC charge and took 36 months probation.

(continued...)

The memo was highly relevant to prove Buchanan's intent, and his conduct in accord with that expressed intent, to threaten Ms. Gamble with criminal charges if she did not recant her police statement that the gun was hers, along with her guilty plea to possessing that weapon, and testify – years later – to his theory. As such, it was admissible as nonhearsay. (AOB 160-170, citing, inter alia, Evid. Code, § 1250[19] and *People v. Griffin* (2004) 33 Cal.4th 536, 578, and authorities cited therein [statement of declarant's intent or mental state is relevant and admissible as circumstantial evidence

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[18](...continued)

> As of now, Steve Gomez and I plan to go to Folsom and interview Harold Black & Las Vegas to locate and interview Johnetta Hawkins on May 1 & 2.
>
> Buck
>
> [P.S.] I'm keeping an envelope for def. discovery. (Def. Ex. B at 7SCT 38, emphasis in original.)

[19] Evidence Code section 1250 provides in relevant part:

> evidence of a statement of the declarant's then existing state of mind . . . (including a statement of intent . . .) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind . . . at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant . . . .

As the Comment to section 1250 explains, when a statement is used to explain the declarant's state of mind, or is relevant to prove his or her subsequent conduct, "the evidence is not hearsay because it is not offered to prove the truth of the matter stated."

tending to show declarant's future conduct in accordance with his or her expressed intent].) The evidence of Buchanan's intent and his conduct in accord with that intent was, in turn, highly relevant to show the effect of his conduct on Kim Gamble -- i.e., that she had compelling motive to falsely recant her prior statements and tailor her testimony to Buchanan's theory, and to support Mr. McKinnon's defense of evidence fabrication on the part of the prosecution. (AOB 165-170, citing, inter alia, *People v. Turner* (1994) 8 Cal.4th 137, 189 and *People v. Burgener* (2003) 29 Cal.4th 833, 868.) Because this evidence was highly relevant to prove the bias of a critical prosecution witness, Kim Gamble, and to support Mr. McKinnon's defense, the court's exclusion of the evidence violated not only state law, but also his rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 160-170, citing, inter alia, Evid. Code, §§ 780, subd. (f) & 1250, Ca. Const., art. I, § 28, subd. (d), *Holmes v. South Carolina* (2006) 547 U.S. 319, 329-331 [exclusion of third party culpability under state court rule allowing exclusion of such evidence in face of strong evidence of guilt violated defendant's constitutional right to "a meaningful opportunity to present a complete defense"], *Kyles v. Whitley* (1995) 514 U.S. 419, 443-454, *Crane v. Kentucky* (1986) 476 U.S. 683, 690, *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678, *Davis v. Alaska* (1974) 415 U.S. 308, 311, 319-320, *Washington v. Texas* (1967) 388 U.S. 14, 23, *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 877-879, cert. denied *Alcala v. California* (1993) 510 U.S. 877, *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062, and *Justice v. Hoke* (2d Cir. 1996) 90 F.3d 43, 49.)

Respondent briefly contends that Mr. McKinnon waived his right to challenge exclusion of the evidence. (RB 56-57.) Alternatively, respondent contends that the court's ruling was correct. (RB 57-59.) As a final

alternative, respondent contends that any error in excluding the memo was harmless. (RB 60-62.) All of respondent's contentions are without merit.

B. Mr. McKinnon Did Not Waive His Right to Challenge the Trial Court's Erroneous Exclusion of the Memo

Respondent contends that Mr. McKinnon waived his right to challenge the trial court's erroneous exclusion of the memo because he "never presented the trial court" with the theories of admissibility that he now offers on appeal. (RB 56-57.) Rather, respondent contends, "counsel limited his theory of admissibility to his request to call Buchanan as a witness and ask him about the letter as it related to Gamble." (RB 56.) Respondent's contentions are specious.

Evidence Code section 354 provides in relevant part:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes on the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears on record that:
>
> (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, the offer of proof, or by other means; [or]
>
> (b) The rulings of the court made compliance with subdivision (a) futile . . . .

Here, contrary to respondent's representation of the record, defense counsel quite clearly moved to "have it [the memo] introduced into evidence" once Mr. Buchanan authenticated it. (8 RT 1099.) *In addition* to admitting the memo itself, defense counsel explained that he also wished to question Buchanan about what its contents revealed – i.e., "did he have an

interview with her [Kim Gamble] and did he attempt to dissuade her, or to change her story, or to pressure her in any way." (8 RT 1099.) In this regard, defense counsel explained, "*this document* is relevant in that *it indicates an intent* on his part, as is said in this letter, to find Kimiya Gamble and to make a witness out of her or to arrest her for 32PC." (8 RT 1099, italics added.) As defense counsel further explained in response to the prosecutor's objection that the first paragraph of the memo was irrelevant and the second paragraph would not constitute impeachment of Buchanan's expected testimony:

> Your honor, we do not believe that this is just merely and should be merely relegated to the theory of impeachment.
>
> We believe *this goes to Buchanan's intent*, that for the first part that Mr. Davis [the prosecutor] indicated he thought the first paragraph was not relevant. We believe it is. Because it shows the reasoning why he needs to, we believe, accomplish this event. And that it indicates he has *documented his intent and it is at least circumstantial evidence of what attempts, perhaps, were made* and these [sic – this is?] circumstantial evidence of that. We believe that it is relevant on more than just the theory and issue of impeachment.

(8 RT 1100-1101, italics added.)

Counsel reiterated his theories of relevance and admissibility when he sought clarification of the court's rather baffling ruling that he could only question Buchanan about the second paragraph of the memo and only if he first called Buchanan as a witness and elicited specific testimony from him, inquiring, "I just want to make sure what the parameters are as outlined by your Honor. If I ask Mr. Buchanan, did you pressure in any way, Gamble, and attempt to try to get her to change her story from the fact that she possessed the gun alone, to the fact that Crandell McKinnon told

her to put it in her purse? And if Mr. Buchanan were to say no to that question, no, I did not do that, would I be able to then say, sir, isn't it true you wrote a memo?" (8 RT 1102.) When the court ruled that he could not, but could *only* introduce the second paragraph of the memo *only* if Buchanan denied that it was his "intention either to make her a witness or arrest her for 32PC," counsel explained that he would not take that course because the court had refused to allow him to "introduce the document in total" (8 RT 1103), and "we wished to introduce that, the documents [*sic*] in toto" (8 RT 1104).

Thus, contrary to respondent's representation of the facts, defense counsel made it abundantly clear he was offering the memo itself into evidence. He also made it abundantly clear that the memo "*in toto*" as relevant in that it showed that Buchanan "documented his intent" in interrogating Ms. Gamble, which was "at least circumstantial evidence" of what he said and did in interrogating her – i.e., through the threat of criminal charges, pressured her into recanting her prior acceptance of responsibility for owning and possessing the gun and shifting blame to Mr. McKinnon. Thus, through defense counsel's explicit words, as well as his cross-examination of Kim Gamble, the trial court was well aware of the "substance" of the offered evidence (the memo), its "purpose" (to illustrate the intimidating and leading manner in which Buchanan conducted his interrogations, particularly his interrogation of Ms. Gamble) and its "relevance" (to show that Gamble's retraction of her prior statements and her testimony that the gun was Mr. McKinnon's were the false products of undue police pressure). (Evid. Code, § 354, subd. (a)). And this is *precisely* what Mr. McKinnon argues on this appeal. (AOB 160-169.) Defense counsel's offer of proof was more than adequate to preserve his

challenge on appeal to the court's erroneous ruling excluding the first two paragraphs of the memo. (*Ibid.*; *People v. McGee*, *supra*, 31 Cal.2d at p. 242; see also 3 Witkin, Cal. Evid. 4th (2000), ch. XI, § 403.)

To be sure, defense counsel's offer was not as clear regarding the relevance and admissibility of the third paragraph of the memo, in which Buchanan also stated his intention to find and interview Harold Black and Johnetta Hawkins – i.e., that the memo as a whole tended to show that Buchanan had a theory in mind and planned to intimidate at least one witness (Gamble) into testifying to that theory, which was circumstantial evidence that he intended to use and did use the same kind of inappropriate methods to extract specific statement and testimony from Black and Hawkins when he found and interviewed them. (See AOB 167-169.) Nevertheless, from the court's ruling regarding the relevance and admissibility of the evidence to show that Buchanan had intimidated Gamble into changing her story and implicating Mr. McKinnon, it was clear that any further argument regarding the same theories of relevance and admissibility of the memo to show that Buchanan had coerced Black and Hawkins into their testimony against Mr. McKinnon would have been futile. (Evid. Code, § 354, subd. (b).) Hence, nothing further was required to preserve the trial court's erroneous exclusion of the memo "*in toto*" (8 RT 1104) for appeal.

C. The Trial Court's Exclusion of the Memo Violated State Law, as Well as Mr. McKinnon's Rights under the Sixth, Eighth, and Fourteenth Amendments

The state defends the court's exclusion of the memo on the ground that "the trial court 'retains discretion to admit or exclude evidence offered for impeachment' . . . . [which] includes the ability to control the 'scope of cross-examination designed to test the credibility or recollection of the

witness.'" (RB 58.)

But Mr. McKinnon was not attempting to impeach Buchanan's testimony – indeed, Buchanan did not testify at all – or to test Buchanan's credibility or recollection on cross-examination. As discussed in the opening brief, the memo was *independently* admissible to prove the manner in which Buchanan interrogated Gamble (as well as other witnesses) and to undermine *Gamble's* trial testimony that the gun found in her purse was Mr. McKinnon's. (AOB 156-158, 164-170.) Given its relevance and the critical nature of Gamble's testimony, the trial court simply had no discretion to exclude this evidence. (AOB 160-170, and authorities cited therein.)

Respondent further contends that although the first paragraph of the memo – in which Buchanan articulated the very theory to which Gamble ultimately testified – "might have demonstrated . . . Buchanan's intent when he interviewed Gamble," the trial court correctly ruled that it was irrelevant because "nothing in the paragraph tended to demonstrate Gamble *knew* anything about Buchanan's alleged intent to have her testify despite her having pled to the firearm possession charge" (and, of course, admitting to the arresting officer that the gun was hers when he discovered it in her purse). (RB 58.)

What respondent's assertion fails to grasp is that a statement of intent (as respondent concedes appears in the first paragraph) *is itself* circumstantial evidence that the declarant (Buchanan) *acted* in conformity with that statement. (See AOB 164-165, citing, *People v. Griffin* (2004) 33 Cal.4th 536, 578, and authorities cited therein [statement of declarant's intent or mental state is relevant and admissible as circumstantial evidence tending to show declarant's future conduct in accordance with his or her

expressed intent]; *People v. Jones* (1996) 13 Cal.4th 535, 547; *People v. Brust* (1957) 47 Cal.2d 776, 784-785; *People v. Peggesse* (1980) 102 Cal.App.3d 415, 419; Evid. Code, § 1250.) In other words, on its face, the first two paragraphs together provided circumstantial evidence that"Gamble knew" (RB 58) about Buchanan's intent because he *told her* that he would arrest and charge her as an accessory to murder if she did not recant her prior statements and testify that the gun was Mr. McKinnon's.

And proof of Buchanan's conduct in conformity with his intent – i.e., that he *did* threaten Gamble with criminal charges unless she testified to his specific theory – was, in turn, highly relevant and admissible for the nonhearsay purpose of showing the *effect* on Ms. Gamble and her motive for to falsely recant her prior admissions that the gun was hers and shift blame for the gun's ownership to Mr. McKinnon for possessing the gun and putting it in her purse. (AOB 166, and authorities cited therein; see also *People v. Mendoza* (2007) 42 Cal.4th 686, 697, and authorities cited therein [non-testifying declarant's out of court statement admissible for nonhearsay purpose of showing effect on hearer, including motive and conduct].)

Nonetheless, respondent contends, in order for the memo to be admissible as evidence of Buchanan's intent and his conduct in conformity thereto, the court was correct in ruling that:

> counsel had to first establish what Buchanan said to Gamble and give Buchanan an opportunity to explain his state of mind. If Buchanan denied pressuring Gamble, the second paragraph would be relevant. In fact, had Mr. McKinnon pursued this approach, *the first paragraph might then have become relevant* as tending to provide a nexus between Buchanan's answers and his state of mind. Of course, McKinnon never established Buchanan's state of mind, because he decided not to call the investigator as a witness. Consequently, the court's ruling was not only correct, but

McKinnon also failed to preserve this aspect of his claim.

(RB 58, italics added.) Respondent's contention in this regard is remarkable in at least two important respects.

First, respondent's novel contention that counsel had to "establish what Buchanan said to Gamble and give Buchanan an opportunity to explain his state of mind" with Buchanan's own testimony before the memo would be admissible is made any without citation to any authority whatsoever. Thus, the Court should pass it without consideration. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 793 [court may pass without consideration "argument" made without citation to supporting authority].)

In fact, there is no authority to support respondent's novel contention. Respondent employs the same flawed reasoning that the trial court employed – that the evidence was offered as a prior inconsistent statement, the only hearsay exception that requires that the statement be inconsistent with the witnesses testimony and that the witness be given an opportunity to explain or deny it (*or* that the witness remains available to be recalled by the opposing party). (Evid. Code, §§ 770, 1235; *People v. Ledesma* (2006) 39 Cal.4th 641, 710.) But, once again, the evidence was not offered as a prior inconsistent statement.

As previously discussed, the memo was offered and relevant for the nonhearsay purposes of proving Buchanan's intent and his conforming conduct when he interrogated Ms. Gamble and that Ms. Gamble's testimony against Mr. McKinnon was the false product of Buchanan's conduct. "Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351). Respondent points to no statute, or any other authority, under which the admissibility of a relevant, nonhearsay

statement is conditioned upon eliciting specific, live testimony from the declarant. (See, e.g., *People v. Fauber* (1992) 2 Cal.4th 792, 854 ["as nonhearsay evidence relevant to a disputed issue . . . it should have been admitted unless some other rule dictated its exclusion. (Evid. Code, § 351.) No such rule is suggested to us"].)[20] Indeed, the authorities are to the contrary. (See, e.g., 1 Witkin, Cal. Evid. 4th (2000), ch. VI, § 199 ["'the sole tests'" for admissibility of extrajudicial declaration evincing state of mind are "'is the intention . . . at the time material to the issues under trial, and, does the declaration indicate what the declarant's intent . . . was'"]; *People v. Sanders* (1995) 11 Cal.4th 475, 518 [evidence of non-testifying declarant's out of court statement relevant and admissible under Evidence Code section 1250 for nonhearsay purpose of proving her intent and conduct in conformity thereto]; *People v. Brust* (1957) 47 Cal.2d 776, 784-785 [evidence of deceased declarant's out of court statement relevant and admissible for nonhearsay purpose of proving declarant's intent and conduct in conformity thereto, which in turn was relevant to explain defendant's reaction to statement and his own mental state].) In other words, Mr. McKinnon was entitled to "establish Buchanan's state of mind" (RB 58) *with the memo*; he was not *required* to attempt to do so with Buchanan's testimony.

Indeed, this Court has consistently recognized the right of counsel to present his case as he chooses, so long as his evidence is admissible. The "manner of presenting evidence to the jury. . . [is] one of trial tactics, properly vested in counsel . . ." (*People v. Ratliff* (1986) 41 Cal.3d 675, 697.) For instance, this Court has repeatedly held that "the prosecution [is]

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[20] The People made no hearsay objection at trial nor do they contend that the evidence was hearsay on appeal.

not required to accept . . . a stipulation or other 'sanitized' method of presenting its case." (*People v. Carter* (2005) 36 Cal.4th 1114, 1169, 1170, and authorities cited therein; accord, *People v. Zambrano* (2007) 41 Cal.4th 1082, 1149, and authorities cited therein [so long as other evidence is relevant and admissible, "we have repeatedly stated, the prosecution need not prove the details of the charges solely from the testimony of live witnesses [citations] nor 'accept antiseptic stipulations in lieu of photographic evidence' [citations"].) "What is sauce for the People's goose is sauce for the defendant's gander." (*Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 92.) Absent any statutory basis for doing so, the court had no authority to control the method by which counsel chose to present the evidence reflected in the memorandum to the jury. If the state wished to give Buchanan an opportunity to explain or deny the contents of the statement, it was certainly free to call him as its own witness. But defense counsel was under no obligation do to so. The trial court erred in ruling otherwise.

Second, respondent's contention that Buchanan's testimony might have made not only the second paragraph of the memo, but also the first paragraph, relevant, is remarkable because it effectively concedes – without admitting as much – that the court was incorrect in ruling otherwise. As discussed in the opening brief and as the record amply demonstrates, the court was very clear that, no matter what testimony defense counsel elicited from Buchanan, the first paragraph of the memo was irrelevant and inadmissible; it was *only* the second paragraph that "might" become relevant, depending on what Buchanan testified to. (AOB 156-159, 170-171; 8 RT 1101-1103.)

For the same reasons, respondent's contention Mr. McKinnon failed

to preserve the court's exclusion of the memo since "McKinnon never established Buchanan's state of mind, because he decided not to call the investigator as a witness," is without merit. (RB 58.) As discussed in the opening brief, because the court made it abundantly clear that the memo itself would be inadmissible because the first and third paragraphs were "totally irrelevant" regardless of Buchanan's testimony, counsel's decision not to call Buchanan as a witness did not forfeit Mr. McKinnon's right to challenge the trial court's erroneous exclusion of the memo on appeal. (AOB 170-171.)

In sum, the memo as a whole tended to show that Buchanan had a theory in mind, expressed his intent to "make" a witness out of Gamble by threatening to charge her as an accessory to murder if she did not testify to that theory, and that Gamble's ultimate testimony to that theory, and the retraction of her prior inconsistent statements, was the false product of undue police pressure. The memo as a whole further tended to show the manner in which Buchanan intended to, and did, build his case against Mr. McKinnon, including the statements and testimony he obtained from Harold Black and Johnetta Hawkin. Thus, the memo as a whole tended to cast doubt on the credibility of prosecution witnesses Gamble, Black, and Hawkins's accounts and to support Mr. McKinnon's defense of evidence fabrication. (See AOB 162-164, 168-169, citing, inter alia, *Kyles v. Whitley* (1995) 514 U.S. 419, 443-454 ["damage to prosecution's case" from evidence of questionable interrogation tactics is not "confined to" undermining that witnesses's testimony, but extends to "the thoroughness and even good faith of the investigation, as well"]. *United States v. Sager* (9th Cir.2000) 227 F.3d 1138, 1145-1146 [officer's questionable interrogation tactics potentially affected not only credibility, but "perhaps

more importantly . . . weight to be given to evidence produced by his investigation"].) Hence, and as discussed in the opening brief, the exclusion of the memo violated not only state law, but also Mr. McKinnon's rights under the Sixth, Eighth, and Fourteenth Amendments. (see AOB 160-170, and authorities cited therein). As respondent does not dispute that any error under state law in excluding the memo also violated Mr. McKinnon's federal constitutional rights, no further discussion of this aspect of the issue is necessary.[21]

D. The Error Requires Reversal of the Martin Murder Conviction, the Multiple Murder Special Circumstance, and the Death Judgment

At the outset, respondent contends that if any error occurred, it was harmless under the *Watson* standard for violations of state law and proceeds to address the question of prejudice under that standard. (RB 60-62, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) In a single sentence at the end of its argument, respondent concludes, without any supporting argument or analysis, "[s]imilarly, assuming arguendo the error implicated McKinnon's rights under the federal Constitution, the error was harmless for the reasons argued above. (*Chapman v. California* (1967) 386 U.S. 18, 23-24 . . . .)" (RB 62.)

Of course, the two standards are very different. Under the state law standard, the appellant bears the burden of proving that, in the absence of the state law violation, it is reasonably probable that the result would have

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[21] Respondent does not dispute that Mr. McKinnon adequately preserved his claims that this and the other errors raised in this brief also violated his federal constitutional rights when the trial court granted defense counsel's unopposed pre-trial motion to consider all of his trial objections and motions to be made under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (1 CT 209-213; 1 RT 9; see AOB 149, fn. 32.)

been different. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Under the federal constitutional standard, *respondent* bears the burden of proving the constitutional violation harmless *beyond a reasonable doubt.* (*Chapman v. California*, *supra*, 386 U.S. at pp. 23-24; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404.) Since respondent does not dispute that, if the court erred under state law in excluding the memo, then it also erred under the federal Constitution, respondent effectively concedes that if any error occurred, it must be reviewed under the *Chapman* standard. Hence, respondent's contention that the error was harmless under the state law standard is, essentially, irrelevant and should be passed by this Court without consideration. In any event, respondent's assertion of harmless error is hollow under any standard.

First, respondent appears to contend that exclusion of the evidence was harmless because it was cumulative of other evidence tending to show that Gamble had been pressured into testifying to Buchanan's theory about the gun. (RB 60.) Specifically, respondent contends that "counsel elicited from Gamble evidence supporting the defense theory that Buchanan pressured Gamble into saying the gun was McKinnon's and that McKinnon told her to put it in her purse. (7 RT 1049-1052.) He also elicited testimony from her admitting that Buchanan told her about Penal Code section 32 and explained that she might be an accessory. (7 RT 1052.)" (RB 60.)

In fact, Gambles testified that although Buchanan had explained liability for being an accessory after the fact and told her that if she had "something to hide," she would "probably" be charged as an accessory after the fact, Buchanan "no way pressure[d] me and I freely gave the statement."

(7 RT 1052.) She specifically denied that Buchanan had "pressure[d] [her] at all to get [her] to say that Crandell McKinnon told [her] to hide that gun" or that she had "felt any pressure from Buchanan to say that." (7 RT 1051, italics added.) And she specifically denied that Buchanan had told her that "if [she] didn't cooperate with him that [she] could be all of a sudden a defendant in this murder case[.]" (*Ibid.*) Obviously, this testimony was very different from what the memo tended to show -- that it was *Buchanan* who decided, contrary to all evidence and before approaching and interrogating the state's witnesses, that the gun was Mr. McKinnon's, that he (Buchanan) intended to "make" Ms. Gamble a witness to that effect or charge her as an accessory after the fact to murder, and that Buchanan told Ms. Gamble precisely that when he interrogated her. In other words, far from being cumulative of Ms. Gamble's testimony, the memo would have *undermined* Ms. Gamble's testimony that Buchanan had not pressured her into testifying in the manner that she had. Even if the memo could be characterized as partly cumulative of other evidence tending to support the defense of evidence fabrication by the prosecution, it is still more than reasonably probable that the memo would have "tipp[ed] the scales" in favor of reasonable doubt. (*Hawkins v. United States* (1958) 358 U.S. 74, 80-81 [erroneously admitted evidence, though "in part cumulative," may have "tipp[ed] the scales against petitioner on [a] close and vital issue"]; accord, *Krulewitch v. United States* (1949) 336 U.S. 440, 444-445; *People v. Gay* (2008) 42 Cal.4th 1195, 1223-1226 [although defendant was permitted to present some evidence in support of lingering doubt defense, trial court's erroneous exclusion of other evidence which "would have substantially bolstered the defense theory" was prejudicial and demanded reversal of penalty verdict].)

Similarly, respondent asserts – without any discussion of the evidence or citation to the record – that evidence undermining Ms. Gamble's testimony that the Martin murder weapon was Mr. McKinnon's was harmless given jailhouse informant Harold Black's testimony that Mr. McKinnon admitted to killing Gregory Martin, along with Lloyd Marcus's alleged statement to Marshall Palmer in which he identified Mr. McKinnon as Gregory Martin's killer. (RB 61.) Respondent's contention is specious.

Respondent's reliance on Black's testimony overlooks that the memo would have cast further doubt on the reliability of that testimony. Otherwise, as respondent has ignored Mr. McKinnon's extensive discussion of the myriad other reasons why both Harold Black and Marshall Palmer's testimony was incredible, as well as the compelling, objective record evidence that the jurors recognized as much based on their requests to have the entirety of Black and Palmer's testimony re-read, their expression of deadlock on the Martin murder charge, and the length of their deliberations, no further reply is necessary to respondent's contention that Black and Palmer's testimony rendered harmless the court's exclusion of the memo. (AOB 22-23, 26-32, 77-81, 85-86, 103-104, 107-108, 115-119, 121; see also Argument I-E-2, above.)

Significantly, respondent does not dispute that, in his summation, the prosecutor argued the absence of the very evidence that the memo, which had been excluded on the prosecutor's own motion, would have provided. (See AOB 173-176, citing, inter alia, *People v. Minifie* (1996) 13 Cal.4th 1055, 1071-1072 [prejudice from trial court's erroneous exclusion of defense evidence established by prosecutor's closing argument emphasizing its absence] and *People v. Daggett* (1990) 225 Cal.App.3d 751, 757-758 [same].) Instead, respondent attempts to distinguish *Minifie* and *Daggett*,

supra, on the ground that the trial court's exclusion of the evidence was erroneous in those cases but here the court's exclusion of the referenced evidence was not. (RB 61-62.) Of course, the issue here is one of prejudicial *error* -- in other words, error is assumed or established. To say that an error was not prejudicial because there was no error is no answer. As Mr. McKinnon has extensively discussed the relevance of the memo as a whole and the effect of its erroneous exclusion, and given that the prosecutor's own closing argument starkly illustrated the relevance of the evidence excluded on its own motion, no further discussion of this contention is necessary. (AOB 168-170, 173-177, citing, inter alia, *Simmons v. South Carolina* (1994) 512 U.S. 154, 161-163 [when the prosecutor's theory or argument makes evidence relevant, its exclusion violates due process] and, in accord, *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, fn. 1, *Green v. Georgia* (1979) 442 U.S. 95, 97 (per curium), *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-623, and *Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, 1217-1218; cf. *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490 [instructional omission that would not have been erroneous standing alone became so, and violated defendant's right to due process, in light of prosecutor's argument exploiting omission in an otherwise weak of the case].)

As this Court has observed:

> The jury argument of the district attorney tips the scales in favor of prejudice . . . . The reason there was 'no evidence' and the 'contrived' defense was 'not supported by the evidence' [as the prosecutor argued] is easily explained. The missing evidence was erroneously excluded. This argument demonstrates that the excluded evidence was not minor, but critical to the jury's proper understanding of the case. It is, therefore, reasonably probable [even under the state law test for harmless error] the error affected the verdict adversely to

defendant.

(*People v. Minifie*, *supra*, 13 Cal.4th at pp. 1071-1072; accord, *People v. Daggett*, supra, 225 Cal.App.3d at p. 757;*People v. Varona* (1983) 143 Cal.App.3d 566, 570; *United States v. Ebens* (6th Cir. 1986) 800 F.2d 1422, 1440-1441; *United States v. Toney* (6th Cir. 1979) 599 F.2d 787, 790-791; see also *Kyles v. Whitley*, *supra*, 514 U.S. at p. 444 ["The likely damage" from an evidentiary omission for which the prosecution is responsible "is best understood by taking the word of the prosecutor . . . during closing arguments. . . ."].) The Martin murder and related firearm possession convictions, multiple murder special circumstance, and death judgment must be reversed.

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IV

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING CIRCUMSTANTIAL EVIDENCE VIOLATED STATE LAW, AS WELL AS MR. MCKINNON'S RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND A RELIABLE DETERMINATION OF HIS GUILT OF A CAPITAL OFFENSE, AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

In his opening brief, Mr. McKinnon argued that the trial court erred in failing to instruct the jurors that if circumstantial evidence was reasonably susceptible of two interpretations, one of which favors guilt and the other innocence, they were obligated to accept the latter interpretation. (AOB 180-188.) The error violated both state law and Mr. McKinnon's rights to due process, trial by jury, and a reliable determination that he was guilty of a capital offense, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. (AOB 180-188.) Because the error cut straight to the heart of the most critical piece of evidence against Mr. McKinnon for the Martin murder – his alleged possession of the Martin murder weapon a week after the killing – respondent cannot prove the error harmless beyond a reasonable doubt. Therefore, the Martin murder and related firearm possession convictions, the multiple murder special circumstance, and the death judgment must be reversed. (AOB 188-190.) At the very least, the cumulative effect of this error, along with the trial court's exclusion of the Buchanan memo (as discussed in Argument III, above, and in the opening brief), was prejudicial and demands reversal. (AOB 190.)

Respondent first contends that Mr. McKinnon invited the error and therefore is barred from raising it on appeal. (RB 63-64.) Alternatively, respondent contends that the trial court had no duty to so instruct or that any

error in failing to so instruct was harmless. (RB 64-68.) Respondent is wrong on all counts.

B. Respondent's Contention that Defense Counsel Invited the Error is Frivolous

Respondent points out that the prosecutor initially included CALJIC No. 2.01, the standard pattern instruction on circumstantial evidence, in his list of requested instructions. When the prosecutor withdrew his request for that instruction, respondent observes, "defense counsel made no comment." (RB 63.) Respondent concludes from this record that defense counsel must have had some unexpressed, but "deliberate tactical purpose for not objecting when the prosecutor withdrew his request," and therefore must be deemed to have invited the error. (RB 64.)

The invited error doctrine "refers to *affirmative acts* leading the court into error . . ." (*Burckhard v. Del Monte Corp.* (1996) 41 Cal.App.4th 1912, 1918, italics added; accord, e.g., *Huffman v. Interstate Brand Companies* (2004) 121 Cal.App.4th 679, 706.) Here, defense counsel simply failed to act when the court violated its sua sponte obligation by omitting the instruction. Of course, since the instruction fell within the court's fundamental sua sponte instructional obligations, defense counsel had no duty to act in order to preserve the error for appeal. (*People v. Wiley* (1976) 18 Cal.3d 162, 174 [sua sponte duty to provide circumstantial evidence instruction].)

Respondent's attempt to shoehorn counsel's failure to act into invited error is unavailing. It is black letter law in this state that the mere failure to object to an instructional error does not amount to invited error. "The invited error doctrine will not preclude appellate review if the record fails to show that counsel had a tactical reason for requesting or

acquiescing" in an instructional error. (*People v. Moon* (2005) 37 Cal.4th 1, 27, and authorities cited therein; accord, *People v. Wilson* (2008) 43 Cal.4th 1, 16 [defense counsel's agreement that court did not need to provide particular instruction was not invited error because he expressed no tactical purpose]: *People v. Dunkle* (2005) 36 Cal.4th 861, 923, and authorities cited therein [rejecting Attorney General's argument that counsel's mere failure to object to instructional error invited the error; "on the record before us, the invited error doctrine is inapplicable as it does not appear that counsel *both* '"intentionally caused the court to err' and clearly did so for tactical reasons"]; *People v. Valdez* (2004) 32 Cal.4th 73, 115, and authorities cited therein ["invited error . . . will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained of instruction"]; *People v. Carrera* (1989) 49 Cal.3d 291, 311 & fn. 8 [counsel's explicit concession to erroneous omission of instruction did not invite error in absence of expression of deliberate tactical purpose].) The record must affirmatively reveal such a tactical reason; a reviewing court will not infer one from a silent record. (See, e.g., *People v Bunyard* (1988) 45 Cal.3d 1189, 1234; *People v. Wickersham* (1982) 32 Cal.3d 307, 330.) Hence, defense counsel's mere failure to object to the omission of (or failure to request) a circumstantial evidence instruction does not bar Mr. McKinnon from challenging its erroneous omission on appeal.

C. The Trial Court Violated Its Sua Sponte Duty To Instruct the Jurors on the Permissible Inferences to be Drawn from Circumstantial Evidence

Respondent acknowledges that a trial court is under a sua sponte obligation to provide a circumstantial evidence instruction when the prosecution "substantially relies" on such evidence to prove the defendant's guilt. (RB 64; see also AOB 180-184, citing, inter alia, *People v. Wiley*

(1976) 18 Cal.3d 162, 174; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Bender* (1945) 27 Cal.2d 164, 174-175; *People v. Fuentes* (1986) 183 Cal.App.3d 444, 454-456.) However, respondent contends, other instructions provided in this case – specifically CALJIC 3.20 [testimony of in-custody informant should be viewed with caution] and 2.90 [proof beyond a reasonable doubt] – adequately conveyed to the jurors the legal principles guiding their consideration of circumstantial evidence. (RB 66.) Not so.

As discussed in the opening brief, but ignored by respondent, providing the mandatory general instruction on the proof beyond a reasonable doubt standard is insufficient to satisfy the court's obligation to instruct on circumstantial evidence. (AOB 182-183, citing *People v. Hatchett* (1944) 63 Cal.App.2d 144, 155, cited with approval in *People v. Bender*, *supra*, 27 Cal.2d at p. 174, *People v. Yrigoyen*, *supra*, 45 Cal.2d at pp. 49-50, *People v. Fuentes*, *supra*,183 Cal.App.3d at pp. 454-456, and 5 Witkin, Cal. Crim. Law.3d (2000) Crim. Trial, § 639, p. 619.) Furthermore, nothing in CALJIC No. 3.20, instructing the jurors to view with caution the testimony of in-custody informants, such as Harold Black, gave any hint that when circumstantial evidence (such as the gun evidence) is equally susceptible of both a guilty and an innocent interpretation, the jurors are bound to accept the innocent interpretation. To the contrary, as respondent itself observes, Harold Black's testimony regarding Mr. McKinnon's alleged admission to the Martin murder did not involve circumstantial evidence at all. (RB 65; cf. *People v. Gould* (1960) 54 Cal.2d 621, 629-630 [while confession is not direct evidence, it is not circumstantial evidence, either].)

Finally, respondent ignores that by providing the jurors with *another*

circumstantial evidence instruction regarding the use of such evidence to prove *mental state* – CALJIC No. 2.02 – the trial court effectively and erroneously instructed the jurors that those principles did *not* apply when circumstantial evidence is used to prove other issues not mentioned in that instruction, such as identity. (AOB 186-188, citing, inter alia, *People v. Vann* (1974) 12 Cal.3d 220, 226-227 [where standard reasonable doubt instruction omitted, provision of instruction applying reasonable doubt standard to circumstantial evidence implied that the standard did *not* apply to direct evidence], *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [instruction that doubts between greater and lesser offenses are to be resolved in favor of lesser mentioned first and second-degree murder but did not mention second-degree murder and manslaughter left "clearly erroneous implication" that rule did not apply to omitted choice], *People v. Salas*, *supra*, 58 Cal.App.3d at p. 474 [instruction on circumstantial evidence specifically directed to intent element of one charge created reasonably probability that jurors understood omission of second charge to be intentional and thus that circumstantial evidence rules did not apply to second charge]; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [instruction specifying factors jurors "may" consider necessarily implied that it "may not" consider factors that were not mentioned].)[22]

In any event, respondent contends, the trial court had no sua sponte duty to provide an instruction on circumstantial evidence because the prosecution did not "substantially rely" on circumstantial evidence to prove

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[22] As further discussed in the opening brief, these decisions implicitly or explicitly applied the maxim *expressio unius est exclusio alterius*, or the expression of one thing is the exclusion of another. (AOB 186-187.)

Mr. McKinnon's guilt. (RT 64-67.) Relying on one appellate decision, *People v. Williams* (1984) 162 Cal.App.3d 869, 875, respondent contends that "substantial" reliance on circumstantial evidence is limited to its quantitative meaning – i.e., when "direct evidence was a small part of the prosecution's case" or "the defendant's guilt is to be inferred from a pattern of incriminating circumstances." (RB 66-67.) Since most of the state's case for the Martin murder was based on Mr. McKinnon's alleged admission to jailhouse informant Black, respondent reasons, the state did not "substantially" rely on circumstantial evidence to prove Mr. McKinnon's guilt. (RB 64-65.) Respondent is incorrect.

As set forth in the opening brief, both logic and this Court's precedents make clear that "substantial" reliance is not limited to a quantitative meaning, but also includes a qualitative meaning. (AOB 182-183, citing, inter alia *People v. Yrigoyen*, *supra*, 45 Cal.2d at p. 50 and *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.) Here, as further discussed in the opening brief, the quality of the direct evidence – i.e., Mr. McKinnon's alleged admission to jailhouse informant Harold Black and Marshall Palmer's patently false testimony – was exceptionally weak. At the same time, the quality of the circumstantial evidence – i.e., Mr. McKinnon's alleged possession or proximity to the murder weapon a week after the killing – was at least seemingly strong. Therefore, the circumstantial gun evidence was the centerpiece of the state's case. (AOB 182-185.) In other words, it was, *qualitatively*, a "substantial" part of the prosecution's case, as amply demonstrated by the prosecutor's "substantial" reliance on the gun evidence in his arguments to the jurors. (4 RT 506; 9 RT 1218-1220, 1224, 1228.) For these and all of the reasons set forth in the opening brief, the trial court erred in failing to instruct the jurors on the use

of circumstantial evidence to prove Mr. McKinnon's guilt.

D. The Instructional Error Violated Mr. McKinnon's Sixth, Eighth, and Fourteenth Amendment Rights and Requires Reversal

1. The Error Was Prejudicial

Once again, respondent contends that any error was harmless given the evidence of Mr. McKinnon's guilt based on jailhouse informant Harold Black's testimony that Mr. McKinnon admitted he had shot Martin, Marshall "Palmer's testimony that [Loyd] Marcus identified the killer by McKinnon's nickname, the gun being in the car McKinnon was riding in, and Gamble's testimony that the gun was McKinnon's." (RB 67.)

Mr. McKinnon has already refuted respondent's contention that Black and Palmer's testimony constituted overwhelming proof of guilt. He incorporates those replies here by reference rather than repeat them. (Arguments I-E-2 and III-D, above; see also AOB 22-23, 26-32, 77-81, 85-86, 103-104, 107-108, 115-119, 121.)

As to respondent's reliance on the discovery of the gun in Kim Gamble's purse while she was with McKinnon, along with her testimony that the weapon was McKinnon's, it simply begs the question of whether the instructional omission, which affected the jury's consideration of that very evidence, was prejudicial. Indeed, even if Ms. Gamble was telling the truth about Mr. McKinnon having given the gun to her, the error was still prejudicial, as discussed in the opening brief. (AOB 188-190.) This is so because, as defense counsel argued to the jurors, there were reasonable explanations for that piece of circumstantial evidence, which were entirely consistent with Mr. McKinnon's innocence. (4 RT 512; 9 RT 1183, 1186.) Ms. Gamble was Mr. McKinnon's girlfriend and she admitted that she had

been attempting to obtain a gun at that time. (7 RT 1042-1043.) As counsel argued and based on the prosecution's own other evidence, Mr. McKinnon could have purchased the gun for her, or bartered it for drugs, in the days following the shooting. (See 5 RT 741-742, 6 RT 811-812, 815, 940, and 13 CT 3583, 3588, 3592, 3613-3614 [to the effect that Mr. McKinnon was a small time drug dealer in a community that commonly bartered goods and other services for drugs].)

Indeed, respondent ignores the fact that in response to defense counsel's argument offering an innocent explanation for Mr. McKinnon's possession of, or proximity to, the gun a week after Martin's murder, *the prosecutor argued that the jurors should reject this explanation because* ***Mr. McKinnon*** *had failed to prove it with direct evidence*. (9 RT 1218-1219.) The omitted circumstantial evidence instruction would have revealed this argument for the fallacy that it was: in order to prove its case with circumstantial evidence, *the prosecution* bore the burden of proving that the *only* reasonable explanation for McKinnon's possession of the gun a week after the shooting was that he had used it to kill Martin, *not* the defendant's burden to affirmatively *prove* with direct evidence that the *only* reasonable explanation was an *innocent* one. Respondent's decision to ignore the prosecutor's argument in this regard is telling of the indisputable fact that it greatly compounded the prejudice from the court's error. (AOB 188-189, citing *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490, *People v. Wims* (1995) 10 Cal.4th 293, 315, *People v. Roder* (1983) 33 Cal.3d 491, 503, 505, & fn. 13, and *Coleman v. Calderon* (9th Cir. 1999) 210 F.3d 1047, 1051.)[23]

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[23] To be sure, absent the instructional error, the prosecutor's

(continued...)

For the same reasons, respondent's contention that the error was harmless because, once the jurors decided that they believed Harold Black, Marshall Palmer, and Kim Gamble, Mr. McKinnon's fate was sealed and the instruction would have made no difference, is based on flawed logic. (RB 67.) It assumes that the jurors believed Black and Palmer's testimony that Mr. McKinnon was Gregory Martin's killer *independent* of finding that the circumstantial gun evidence proved that he was the killer. But the point is that given the *deeply* troubling questions about believability of Harold Black and Marshall Palmer's accounts (which respondent simply ignores), the jury would *not* have believed them had it had not effectively been told – through the combination of the court's instructional error and the prosecutor's argument – that Mr. McKinnon's possession of the gun proved that he was the killer because he had failed to prove, with direct evidence, an innocent explanation for it. Indeed, as previously discussed but ignored by respondent, the fact that the jurors *did* have questions about Black and Palmer's accounts is amply demonstrated by their requests to have the *entirety* of both men's testimony reread, along with their declaration of

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[23](...continued)
argument might have been appropriate. However, in light of the instructional omission, the prosecutor's argument compounded the prejudicial effect of the error and resulted in a violation of Mr. McKinnon's federal constitutional rights not to be convicted absent proof beyond a reasonable doubt. (See AOB 188-189, citing, inter alia, *Taylor v. Kentucky*, *supra*, 486-490 and fn. 14 [prosecutor's argument, combined with instructional omission, violated defendant's right to due process regardless of whether the "prosecutorial comments, standing alone, would rise to the level of reversible error, [because] they are relevant to the need for carefully framed instructions . . . ."]; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1035 & fn. 16 [prosecutor's argument compounded prejudice from instructional error regardless of whether it, standing alone, would amount to misconduct].)

deadlock on the Martin charges on the fourth day of their deliberations, before finally reaching their verdicts on the fifth day.. (13 CT 3810; 14 CT 4018-4019, 4093-4095, 4098; see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 [requests for readback and expression of deadlock indicate close case]; *United States v. Harbor* (9th Cir. 1995) 53 F.3d 236, 243 [same - expression of deadlock].)

Respondent playing ostrich notwithstanding, there is simply no doubt that the gun evidence was the critical component of the prosecution's otherwise highly dubious Martin murder case and hence any error that affected the jury's consideration of it was devastating to Mr. McKinnon. The court's instructional error, compounded by the prosecutor's argument, was just such an error.

In any event, and as Mr. McKinnon argued in the opening brief, even if the instructional error, compounded by the prosecutor's argument, was not prejudicial alone, it was when considered with the court's erroneous exclusion of the Buchanan memo, which would have raised doubt about the believability of Kim Gamble's claim that the gun was Mr. McKinnon's. (AOB 190-191, citing *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883, 893 [cumulative effect of errors more likely to be prejudicial where state's case is weak]; see also AOB 230, citing, inter alia, *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 and *People v. Hill* (1993) 17 Cal.4th 800, 844-847.) Had the jurors doubted Ms. Gamble's claim, the state of the evidence would simply have been that Mr. McKinnon was found to be in proximity to the murder weapon, which was in Gamble's purse and personal possession, a week after the killing. (See, e.g., *People v. Martin* (1973) 9 Cal.3d 687, 696; *United States v. Vasquez-Chan* (9th Cir. 1992) 978 F.2d 546, 550, and authorities cited therein ["defendant's mere

proximity to [item], h[is] presence on the property where it was located, and h[is] association with the person who controls it are insufficient to" prove possession].) And, had they received the appropriate instructions, the jurors would have been *bound* to accept any rational explanation for this piece of evidence that was consistent with Mr. McKinnon's innocence, such as that Ms. Gamble purchased or bartered for the gun for herself, *just as she had told police, and just as her subsequent guilty plea to possessing that gun implied.* (See, e.g., *People v. Bean*, *supra*, 46 Cal.3d at pp. 932-933.) In the face of such findings, it is reasonably probable under any standard of review that the jurors would have acted on the reasonable doubts that any rational human beings would have had – and indeed that the record strongly demonstrates that these jurors did have – about the truth of Harold Black and Marshall Palmer's testimony and returned different verdicts. (AOB 190.) Respondent does not address this contention of cumulative error. (See RB 67-68.) Mr. McKinnon views this as a concession. Even under the state law standard, the error was prejudicial and demands reversal of the Martin murder and related firearm possession convictions, the multiple murder special circumstance, and the death judgment must be reversed.

2. The Error Also Violated Mr. Mckinnon's Federal Constitutional Rights

Finally, because "the federal Constitution does not require courts to instruct on the evaluation of circumstantial evidence where the jury was properly instructed on reasonable doubt," respondent contends that the erroneous instructional omission did not violate Mr. McKinnon's federal constitutional rights to due process. (RB 68, citing *Holland v. United States* (1954) 348 U.S. 121, 140, and *Victor v. Nebraska* (1994) 511 U.S. 1, 7-17 [approving California's pattern instruction on reasonable doubt].) But Mr.

McKinnon's claim is not simply that the court's failure to provide a circumstantial evidence instruction violated his federal constitutional right to due process.

Mr. McKinnon's claim is that the erroneous instructional omission, combined with the provision of an instruction which, under the maxim *expressio unius est exclusio alterius*, effectively told the jurors that the legal principles regarding circumstantial evidence did not apply to any issue other mental state, such as identity, further combined with the prosecutor's closing argument exploiting the instructional error, violated his rights to a fair trial and reliable jury determinations that he was guilty of a capital offense, in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 1, 7, 15, 16, and 17 of the California Constitution. (AOB 180-190, citing, inter alia, *Taylor v. Kentucky*, *supra*, 486 U.S. 478.) In this regard, the Supreme Court's decision *Taylor v. Kentucky*, *supra*, 486 U.S. 478, answers respondent's contention that there was no federal constitutional violation simply because the federal constitution does not always require an instruction on circumstantial evidence.

In *Taylor v. Kentucky*, *supra*, 436 U.S. 478, the trial court refused to provide requested instructions on the presumption of innocence and the lack of an indictment's evidentiary value, but did provide a general instruction on the prosecution's burden of proving guilt beyond a reasonable doubt. The Supreme Court recognized that, in the usual case, the requested instructions are not constitutionally required because instruction on the prosecution's burden of proving guilt beyond a reasonable doubt is ordinarily sufficient to convey the prineiples in the requested instructions. (*Id.* at pp. 484-488.) In that case, however, the prosecutor exploited the trial

court's refusal to provide the requested instructions in closing argument by suggesting that the defendant's status as a defendant demonstrated his guilt. (*Id.* at pp. 486-487.) Furthermore, the case against the defendant, which amounted to a credibility contest, was a close one. (*Id.* at p. 488.) The Supreme Court held that under these circumstances, the trial court's refusal to provide a separate instruction on the presumption of innocence was erroneous and violated the defendant's due process right to a fair trial given the prosecutor's closing argument in an otherwise close case. (*Id.* at pp. 488-490; see also *Kentucky v. Whorton* (1979) 441 U.S. 786, 788-790 (*per curium*) [Due Process does not always demand separate instruction on presumption of innocence when generally adequate instruction on proof beyond a reasonable doubt is provided; *Taylor v. Kentucky*, *supra*, simply held that the refusal to provide such instruction violated Fourteenth Amendment in that particular case given the prosecutor's argument and the close evidence of guilt].)

Here, as in *Taylor v. Kentucky*, *supra*, even if the Fourteenth Amendment does not always mandate circumstantial evidence instructions when the jury otherwise receives correct instructions on the prosecution's burden of proof beyond a reasonable doubt – as respondent contends – the instructional omission and the prosecutor's closing argument exploiting it in an otherwise weak case turning on the dubious credibility of the state's witnesses violated Mr. McKinnon's Fourteenth Amendment right to a fair trial, as well as his right to reliable jury verdicts that he was guilty of a capital offense. Reversal is required.

V

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW, AS WELL AS MR. MCKINNON'S RIGHTS TO A FAIR TRIAL AND RELIABLE JURY DETERMINATIONS THAT HE WAS GUILTY OF A CAPITAL OFFENSE UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BY ADMITTING EVIDENCE THAT ORLANDO HUNT FAILED A POLYGRAPH EXAMINATION WHEN HE DENIED HAVING WITNESSED MR. MCKINNON SHOOT PERRY CODER

A. Introduction

In his opening brief, Mr. McKinnon argued the that the trial court committed prejudicial error in admitting evidence that Orlando Hunt, one of the original suspects in the Coder murder, took a polygraph examination and allegedly failed when he denied that he had witnessed Mr. McKinnon shoot Perry Coder. (AOB 191-203.) The evidence was absolutely inadmissible under Evidence Code section 351.1. (AOB 193-199, citing, inter alia, *People v. Wilkinson* (2004) 33 Cal.4th 821, 827, 845, 848-850, and authorities cited therein [absent stipulation, Evidence Code section 351.1 creates absolute, categorical ban on admission of polygraph evidence and to article I, section 28, subdivision (d) of the California Constitution] and *People v. Lee* (2002) 95 Cal.App.4th 772, 790-791 [the only exception to categorical ban on polygraph-related evidence under section 351.1 is stipulation by all parties; there is no "state of mind" or other exception].) Furthermore, its admission violated not only state law, but also Mr. McKinnon's Sixth, Eighth and Fourteenth Amendment rights to a fair trial by an impartial jury and reliable jury verdicts that he was guilty of a capital offense. (AOB 199-200, citing, inter alia, *United States v. Scheffer* (1989) 523 U.S. 303, 312, *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, *Manson v. Braithwaite* (1977) 402 U.S. 98, 104-107, and *People v. Basuta*

(2001) 94 Cal.App.4th 370, 389-391.)

Respondent does not dispute that admission of the evidence was erroneous under state law as it existed at the time of trial and as it exists today. (See RB 68-76.) Instead, respondent asks the Court to rewrite Evidence Code section 351.1 and, based upon the rewritten statute, hold that the trial court's admission of the evidence was not erroneous. (RB 70-73.) Alternatively, respondent contends that admission of the evidence was harmless. (RB 73-76.) For the reasons explained below, the Court must reject respondent's invitation to rewrite section 351.1, as well as respondent's contention that the erroneous admission of the evidence was harmless.

B. Evidence Code Section 351.1 Prohibits Admission of Polygraph-Related Evidence For Any Purpose, Including Witness Credibility, And This Court Has No Power to Accept Respondent's Invitation to Rewrite the Statute to Allow Admission of Such Evidence

Respondent urges this Court to recognize a "state of mind" exception to Evidence Code section 351.1's absolute prohibition against, inter alia, "any reference to an offer to take, failure to take, or taking of a polygraph examination." (RB 70-73.) The Court should do so, respondent urges, for two reasons.

First, respondent contends that section 351.1 was intended to incorporate this Court's "long standing rule that, since polygraph tests do not scientifically prove the truth or falsity of the answers given during such tests, they are not admissible to show guilt." (RB 71, citing *People v. Wilkinson*, *supra*, 33 Cal.4th at pp. 849-851 and *People v. Espinoza* (1992) 3 Cal.4th 806.) And since the polygraph evidence in this case was not offered to show guilt, or to prove the truth or falsity of its results, but rather

was offered on the issue of a witness's credibility, the rationale for exclusion of polygraph evidence is inapplicable. (RB 72.)

Second, respondent contends that polygraph-related evidence should be admitted when it would correct an otherwise misleading impression. (RB 72-73.) Here, respondent contends, the inference that Hunt changed his story and claimed to have witnessed Mr. McKinnon shoot Perry Coder because the prosecutor and his investigator threatened to charge him with Mr. Coder's murder if he did not was misleading; the polygraph evidence corrected that misleading impression to show that Hunt changed his story because he had failed the polygraph. (RB 72-73.)

As a preliminary matter, respondent's essential premise is incorrect: section 351.1 was not intended to codify only this Court's precedents prohibiting the admission of polygraph *results* to prove a defendant's guilt. The language of section 351.1 is unambiguous and, thus, unambiguously reflects the Legislature's intent to prohibit not only admission of polygraph results, but also "any reference to an offer to take, a failure to take, or taking of a polygraph examination." (See, e.g., *People v. Licas* (2007) 41 Cal.4th 362, 367, and authorities cited therein ["if there is 'no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said'"].) Nor is respondent correct in its suggestion that this Court's pre-section 351.1 precedents prohibited only the admission of polygraph *results* due to their unreliability. To the contrary, evidence regarding the mere taking of a polygraph, without evidence of its results, as well as an offer or refusal to take a polygraph examination, was equally inadmissible. (*People v. Thornton* 11 Cal.3d 738, 763-764 (1974) [evidence defendant willingly took polygraph inadmissible even without results]; *People v. Carter* (1957) 48 Cal.2d 737, 752 [evidence of witness and former suspect's offer to take

polygraph inadmissible, as is evidence of suspect's refusal to take polygraph].)

Thus, section 351.1 is clear on its face that polygraph-related evidence, such as the evidence that Orlando Hunt took a polygraph examination and was told that he had failed when he denied having seen Mr. McKinnon shoot Perry Coder, is absolutely inadmissible absent stipulation. And this Court – along with the lower appellate courts of this state, as in *People v. Lee* (2002) 95 Cal.App.4th 772, cited and discussed in the opening brief (AOB 195-198) – have consistently recognized that section 351.1 means what is says: the ban on polygraph-related evidence is categorical and applies even when offered for some purpose other than proving the truth of the results (see, e.g., *People v. Hinton* (2006) 37 Cal.4th 839, 890 [evidence of offer to take polygraph absolutely inadmissible under section 351.1 absent stipulation]; *People v. Wilkinson*, *supra*, 33 Cal.4th 827, 845, 848-850), when offered solely on the issue of credibility (see, e.g., *People v. Espinoza*, *supra*, 3 Cal.4th at pp. 816-817 [evidence that defendant offered to take polygraph, offered solely on the issue of his credibility in making a police statement in anticipation of polygraph, was inadmissible under section 351.1]; *People v. Lee* (2002) 95 Cal.App.4th 772, 790-791 [evidence that prosecution witness took polygraph and was told he failed, offered to bolster his credibility and explain why he changed his story, inadmissible under section 351.1]; *People v. Basuta*, *supra*, 94 Cal.App.4th at pp. 389-391 [evidence of prosecution witness's offer to take polygraph, offered to bolster her credibility, inadmissible under section 351.1]), and even when exclusion of the evidence might otherwise leave the jurors with a misleading impression (see *People v. Samuels* (2005) 36 Cal.4th 96, 127 [offer to take polygraph, offered solely to rebut prosecution

theory that taker was not cooperative in police investigation, inadmissible under section 351.1]; *People v. Basuta*, 94 Cal.App.4th at pp. 390-391 [while reference to witness's willingness to take polygraph examination in order to bolster her credibility was in clear violation of section 351.1 and suggested that she actually passed, it did not open door to allow defendant to present equally inadmissible evidence that the results were inconclusive, even in order to correct misleading impression left by original error].)

Thus, what respondent asks this Court to do is to rewrite section 351.1 and overrule its prior decisions construing it. This the Court cannot do.[24]

As this Court has recognized, it is fundamental that in construing a statute, "we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. 'Our office . . . "is simply to ascertain and declare" what is in the relevant statutes, "not to insert what has been omitted, or to omit what has been inserted."' (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 573.)" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545; accord, e.g., *People v. Leal* (2004) 33 Cal.4th 999, 1008, and authorities cited therein.)

It is also important to emphasize that respondent's characterization of the polygraph evidence in this case is incorrect. That is, respondent's invitation to the Court to rewrite section 351.1 and recognize a "state of

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[24] As respondent does not contend that Evidence Code section 351.1 offends either the state or federal Constitutions, the Court's power to strike the offending provisions of a statute in order to preserve its constitutionality, or to invalidate the statute as unconstitutional, is not implicated here. (See, e.g., *Kopp v. Fair Political Practices Com.* (1995) 11 Cal.4th 607, 616.)

mind" exception to the statute's prohibition against polygraph-related evidence so long as the results are not offered for their truth assumes that the polygraph evidence in this case was presented, and considered by the jurors, for that limited purpose. This is the same contention respondent made regarding the admission of essentially identical polygraph evidence for the identical purpose, which the appellate court in *People v. Lee, supra*, 94 Cal.App.4th at p. 790 rejected as "disingenuous."

As discussed in the opening brief, the polygraph evidence as a whole, including that to which Hunt testified and the later references in his recorded post-polygraph police statement, showed that Hunt was given a polygraph examination, that the examiner not only asked him if he had witnessed the murder of Perry Coder, but also if he had witnessed *Mr. McKinnon* commit that murder, and when he denied it, Hunt was told that he had failed. (AOB 191-193.) The jurors were *not* prohibited from considering the evidence that Hunt allegedly failed the polygraph in this regard for its truth. To the contrary, the jurors were given free reign "to infer [that the] polygraph caught [Hunt] in a lie and caused him to abandon the lie and tell the truth - that [McKinnon] was the killer. This was tantamount to receiving into evidence the results of the polygraph examination." (*People v. Lee, supra*, at pp. 791-792.) Thus, even if, as respondent proposes, section 351.1 were rewritten to simply prohibit admission of polygraph results, the revision would not aid respondent in this case.

At bottom, under any reading of the statute, the trial court violated section 351.1 by admitting evidence that Orlando Hunt took a polygraph examination and allegedly failed when he denied having witnessed Mr.

McKinnon shoot Perry Coder.[25] Respondent does not dispute Mr. McKinnon's further argument that the erroneous admission of the evidence also violated his Sixth, Eighth, and Fourteenth Amendment rights to a fair trial by an impartial jury and reliable jury verdicts that he was guilty of a capital offense. (See AOB 199-200.) Mr. McKinnon takes this as a concession. Hence, no further discussion of this aspect of the issue is necessary. The admission of the evidence violated state law and the federal constitution.

C. As Respondent Has Failed to Carry its Burden of Proving That the Erroneous Admission of the Evidence Was Harmless Beyond a Reasonable Doubt, Reversal of the Coder Murder and Related Firearm Possession Convictions, the Sole Multiple Murder Special Circumstance, and the Death Judgment Is Required

Finally, without addressing the appropriate standard of review, respondent contends the error was harmless. (RB 73-76.) Respondent's failure to dispute that the erroneous admission of the evidence violated Mr. McKinnon's federal constitutional rights should be treated as a concession that the *Chapman* standard for such violations, which places the burden on respondent to prove the error harmless beyond a reasonable doubt, applies. (See AOB 201-203, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404; *Chapman v. California* (1967) 386 U.S. 18, 24.) In any event, where the state's case rests upon the credibility of its witnesses, any error going to the critical credibility issue ordinarily demands reversal, whether under the harmless-beyond-a-reasonable-doubt

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[25] For the same reasons, respondent's contention that the trial court's ruling admitting the evidence must be reviewed for an abuse of discretion is incorrect. (RB 70-71.) Because the court had absolutely no discretion to admit the evidence, there was no discretion to use or abuse.

standard applicable to violations of the federal Constitution (see, e.g., *People v. Quartermain* (1997) 16 Cal.4th 600, 623; *People v. Taylor* (1972) 8 Cal.3d 174, 186; *People v. Schindler* (1980) 114 Cal.App.3d 178, 190), or under the more stringent state law test for prejudice, which places the burden on the appellant to prove the reasonable probability of a more favorable result in the absence of the error (see, e.g., *People v. Wagner* (1975) 13 Cal.3d 612, 620-621; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757; *People v. Taylor* (1980) 180 Cal.App.3d 622, 626). (AOB 201-202.) This is certainly true in this case and, hence, respondent's contention that admission of the evidence was harmless is without merit under any standard.

Once again, it important to emphasize at the outset what the erroneously admitted polygraph evidence implied to the jurors. The evidence as a whole showed that Hunt was given a polygraph examination, that the examiner not only asked him if he had witnessed the murder of Perry Coder, but also if he had witnessed *Mr. McKinnon* commit that murder, and, when he denied it, failed the test. (AOB 191-193.) Respondent contends that admission of this evidence was harmless for three reasons. (RB 73-76.)

First, respondent again contends that the evidence was important to correct the misleading impression that Hunt had changed his story and claimed to have witnessed Mr. McKinnon shoot Perry Coder due to the prosecutor's threats to charge him with the murder and to rehabilitate his credibility by showing that he really changed his story because he learned he had failed the polygraph when he disavowed any knowledge of the shooting. (RB 74-75.) As a preliminary matter, Mr. McKinnon adamantly disputes that the inference that Hunt changed his account because the

prosecutor threatened to charge him with Coder's murder if he did not was misleading or unreasonable.[26] But even assuming respondent is correct, its contention demonstrates *prejudice*, not harmlessness.

As respondent's argument demonstrates, the erroneously admitted evidence had the effect of rehabilitating or bolstering the credibility of a prosecution witness's alleged eyewitness account that Mr. McKinnon had shot Perry Coder. As respondent essentially concedes, the jury would have viewed the credibility of Hunt's alleged eyewitness account of the shooting with a far more jaundiced eye had the evidence been excluded and concluded that he changed his story and finally implicated Mr. McKinnon only because the prosecution team threatened him with murder charges if he did not. This is the essence of prejudice.

As the appellate court observed in *People v. Lee*, *supra*, 95 Cal.App.4th 772, in finding the admission of nearly identical evidence ostensibly admitted for the very "state of mind" purpose respondent urges here, admission of the evidence led to the inevitable inference that the results "showed [Hunt] lied when he said he did not know who shot [Coder] so that the jury would also believe he was telling the truth when he said [Mr. McKinnon] shot [Coder]." (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 790.) Thus, "the jurors were permitted to infer [that the] polygraph caught

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[26] The inference was amply supported by the prosecutor's own words warning Hunt that unless he changed his story and "admitted" to witnessing Mr. McKinnon shoot Coder: "You're either a defendant or you're an eye witness [*sic*] . . . . [T]hey aren't good choices. There's no good choice. . . . [I]f you're ready now or whatever, to tell me the truth 'cause I know what the truth is but I've gotta be able to hear from you and either use you or do you, one of the two. You understand?" (13 CT 3599.) "I try to protect people that I think are cooperating with me and I try to screw people that don't, you understand?" (13 CT 3610.)

[Hunt] in a lie and caused him to abandon the lie and tell the truth – that [Mr. McKinnon] was the killer. This was tantamount to receiving into evidence the results of the polygraph examination. Its probable impact on the jury was to place the badge of credibility on [Hunt's] postpolygraph statements to the police incriminating [Mr. McKinnon] . . . ." (*People v. Lee*, *supra*, 95 Cal.App.4th at pp. 791-792.) Respondent contends that *Lee* is inapposite, but its attempt to distinguish *Lee* is nonsensical. (RB 74-75.) This case is on all fours with *Lee*.

Next, although it is not entirely clear, respondent appears to contend that admission of the evidence was harmless because Hunt's credibility was already suspect since "at one point in the investigation the prosecution clearly had doubts about his credibility," and "Hunt himself, admitted he previously lied to authorities." (RB 75.) Again, this contention – made without citation to the record – is nonsensical. Since respondent does not support this contention with record citation, Mr. McKinnon can only assume that the "lie" to which Hunt admitted, and the prosecution's "doubts about his credibility" refers to Hunt's ***pre***-polygraph denial of any knowledge about Mr. Coder's murder. (5 RT 574-577, 577-580.) Again, respondent makes Mr. McKinnon's point. What the jurors understood from this evidence was that Hunt was indeed lying – as he admitted and as the prosecutor contended – when he disavowed knowledge of Coder's murder and Mr. McKinnon's role in it, but the "polygraph caught [Hunt] in [that] lie and caused him to abandon the lie and tell the truth – that [Mr. McKinnon] was the killer. This was tantamount to receiving into evidence the results of the polygraph examination. Its probable impact on the jury was to place the badge of credibility on [Hunt's] postpolygraph statements to the police incriminating [Mr. McKinnon] . . . ." (*People v. Lee*, *supra*, 95

Cal.App.4th at pp. 791-792.)

Finally, respondent briefly contends, that the error was harmless in light of the other evidence of Mr. McKinnon's guilt. Specifically:

> Kerry Don Scott also identified McKinnon as the shooter, and Gina Lee's testimony essentially corroborated Scott's, as well as the reasonable inferences that could be drawn from Scott's and Hunt's testimony. Further, the pathologist's testimony was consistent with Hunt's and Scott's accounts of the murder.

(RB 75-76.) Once again, respondent does not support this contention with any citation to the record. (RB 75-76.)

Thus, Mr. McKinnon can only assume respondent's contention that "the pathologist's testimony was consistent with Hunt's and Scott's accounts of the murder" refers to its previous characterizations of the record, made throughout its brief, that Hunt and Scott testified that Mr. McKinnon "pressed the gun against Coder's head" and fired a single shot into his head (RB 1, 3, 5, 34, 38, 89.) Mr. McKinnon can only repeat that this is an affirmative misrepresentation of the record – a violation of legal and ethical cannons that would be troubling coming from any advocate in any case. (See Argument I-E-2, and authorities cited therein, above.) Repeatedly made, as it is here, by the chief law officer of this State (Cal. Const., art. V, § 13), in a *capital* case to support a judgment condemning one of this State's citizens to his death, it is intolerable. This Court should treat it accordingly.

Mr. McKinnon has discussed at length the wealth of evidence calling drug addict informant Kerry Scott's testimony into grave doubt, not the least of which is that he described Mr. McKinnon pointing the gun two to three feet from Mr. Coder's head and firing it four times, when the physical evidence established that the gun had been pressed tightly against Mr.

Coder's head and fired only once. (AOB 101-115; Argument II-E-2, above; 4 RT 520-521, 5 RT 716, 718-710; 6 RT 831-832, 847.) As respondent has either ignored or misrepresented this evidence, no further discussion of its contention in this regard is necessary.

This is the first time in its brief that respondent relies on Gina Lee's testimony in support of its contention that the evidence against Mr. McKinnon for the Coder murder was overwhelming. (RB 75-76.) Respondent's contention that "Gina Lee's testimony essentially corroborated" the other evidence against Mr. McKinnon is also made without citation to the record, without any supporting discussion of her testimony, and without any acknowledgment of, or attempt to dispute, the myriad inconsistencies not only in her trial testimony and between her trial testimony, her prior statements, and her prior testimony, but also between her testimony and that of Kerry Scott and Orlando Hunt, who also claimed to have witnessed the shooting, which were discussed at length in Mr. McKinnon's opening brief. (See AOB 102-103, 106-115; see also Argument I-E-2, above.) In other words, respondent's "arguments are nothing more than conclusions of counsel made without supporting [discussion of the evidence] or any citation to the record and deserve no consideration from this Court." (*Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 101-102.)

At bottom, for all of the reasons discussed in the opening brief and above, absent the bolstering effect of the polygraph evidence (and the joinder of the unrelated charges) and under any standard, the jurors would have concluded that the testimony of Orlando Hunt, Kerry Scott, and Gina Lee was simply unworthy of belief. And, of course, given that the state's case rested entirely on the credibility of those witnesses and the absence of

any physical evidence to connect Mr. McKinnon to the Coder murder, any such conclusion would have mandated acquittal. The Coder murder and related firearm possession convictions, the sole multiple murder special circumstance, and the death judgment must be reversed.

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VI

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW AND MR. MCKINNON'S RIGHTS TO A FAIR TRIAL AND RELIABLE JURY VERDICTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS BY ADMITTING HIGHLY PREJUDICIAL AND INCOMPETENT WITNESS INTIMIDATION EVIDENCE

A. Introduction

As discussed in the opening brief, despite its ruling excluding absolutely critical and admissible *defense evidence* that *the state* had intimidated at least one witness into testifying against Mr. McKinnon as "totally irrelevant" (see Argument III, above, and in AOB), the trial court admitted *prosecution evidence* that *McKinnon and his sister* had allegedly intimidated witnesses in attempts to suppress evidence against him as not only relevant, but more probative than prejudicial. The court erred in admitting this evidence because: 1) it was cumulative and otherwise highly prejudicial and therefore should have been excluded under Evidence Code section 352; 2) the prosecutor failed to provide notice to defense counsel; and 3) the evidence was inadmissible hearsay. The errors were prejudicial, violated Mr. McKinnon's Sixth and Fourteenth Amendment rights to a fair trial and reliable jury verdicts that he was guilty of a capital offense, and demand reversal. (AOB 204-221.)

Respondent disagrees. (RB 76-89.) Respondent is wrong.

B. The Trial Court Erred in Admitting Highly Prejudicial Evidence That Mr. McKinnon's Sister was Involved in Threatening and Assaulting Orlando Hunt Over His Claim That Mr. McKinnon Killed Perry Coder

As discussed in the opening brief, although the prosecutor had admittedly provided no notice of the alleged incident, the trial court admitted, over Mr. McKinnon's objections, Orlando Hunt's testimony that

he had been at a party where Mr. McKinnon's sister threatened and assaulted him over his proposed testimony that her brother had killed Perry Coder. (AOB 204-206; 4 RT 615-618, 620-621, 626-628.) Although there was concededly no proof that Mr. McKinnon had authorized the threat and assault, the jurors would draw the virtually inevitable inference that he must have authorized the attack since it was made by his own sister and, hence, the evidence carried a tremendous danger of undue prejudice. (AOB 204-209, 211-212, citing, inter alia, *People v. Terry* (1962) 57 Cal.2d 538, 565-566 [unauthorized third party threats to witnesses prejudicial], *United States v. Guerrero* (3d Cir. 1986) 803 F.2d 783, 785-786 [threats evidence "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established portions of the case"], *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970, *Ortiz-Sandoval v. Gomez* (9th Cir. 1996) 81 F.3d 891, 897, and *United States v. Dickens* (9th Cir. 1985) 775 F.2d 1056, 1058.)

At the same time, the evidence went to the collateral issue of Hunt's credibility, was cumulative of other evidence that Hunt was afraid that Mr. McKinnon would retaliate against him for implicating him in the murder, was otherwise uncorroborated despite the undeniable fact that such corroboration had to exist if his story were true, and hence, bore little probative value. (AOB 209-210, citing, inter alia, *United States v. Thomas* (7th Cir. 1996) 86 F.3d 647, 654, and authorities cited therein [witness intimidation evidence carries far less probative value when offered to *bolster* a witness' credibility than when offered to *impeach* a recanting witness or otherwise explain witness conduct that could *damage* the proponent's case].) Thus, the trial court erred in refusing to exclude the

evidence under Evidence Code section 352. (AOB 204-212.) Further, the trial court's cautionary instruction, "[t]his evidence was introduced as it bears upon the witness' state of mind and demeanor while testifying. There is no evidence that the defendant assisted or played any role in the alleged assault" did not ameliorate the prejudice. (AOB 211-212.)

Respondent counters that the evidence was more probative than prejudicial because witness intimidation evidence is generally relevant to bolster a witness's credibility, here it was particularly probative because "the defense devoted a substantial amount of time to attacking Hunt's claim that he feared for his safety and his family's safety," the court's cautionary instruction obviated any potential for prejudice, and the jurors' "common sense" undoubtedly prevented them from considering Mr. McKinnon's sister's alleged assault on Hunt as evidence of Mr. McKinnon's guilt. (RB 80-81.) Respondent's contentions are without merit. (RB 80-81.)

Respondent's reference to the "substantial amount of time" defense counsel devoted to attacking Hunt's claim that he was afraid of Mr. McKinnon (RB 80) is made without citation to the record, so it is difficult for Mr. McKinnon to respond. (See Rule Cal. Rules of Court, rule 8.204, subd. (a)(1)(C).) However, in its introduction to this argument, respondent does note that defense counsel asked Hunt about his fear of Mr. McKinnon, citing 4 RT 565-568 (RB 77), and it is to this portion of the record that Mr. McKinnon therefore assumes that respondent otherwise refers.

In the cited portion of the record, it is true that defense counsel confronted Hunt about his explanation that he had failed to come forward and identify Mr. McKinnon as Perry Coder's killer for nearly two years after the murder because he was afraid of Mr. McKinnon. Respondent's (apparent) contention that this examination made any and all evidence that

Hunt was afraid of implicating Mr. McKinnon (either to police or at trial) highly probative and admissible, however, is unavailing.

Whether Hunt was afraid of retaliation for testifying against Mr. McKinnon was an intermediate fact which was irrelevant in and of itself. Certainly, if the assault actually occurred, Hunt no doubt was fearful when he testified.[27] The real issue was whether Hunt's fear *made his testimony against Mr. McKinnon more credible*. (See, e.g., *People v. Warren* (1988) 45 Cal.3d 471, 480-481; Evid. Code, § 780, subd. (j).) So, the question is not merely how probative was the witness intimidation evidence to prove Hunt's fear, but how probative was his fear to bolster the credibility of his testimony against Mr. McKinnon.

In this regard, even accepting that the assault occurred (despite the failure to present any of the corroborating evidence that *had* to exist if Hunt's account were true) and that it caused Hunt to be fearful, that fear simply bore little probative value to the issue of Hunt's credibility in testifying against Mr. McKinnon. To be sure, if a witness were not an original suspect in the charged crime and has nothing gain from testifying against the defendant and nothing to lose from not testifying, his willingness to testify despite fear for his safety would bear a certain degree of probative value to demonstrating the credibility of his testimony against the defendant. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 20.) But where, as here, the witness is one of the original suspects in the charged crime and has much to gain from testifying (i.e., maintaining his freedom and avoiding a murder charge, as the prosecutor promised) and much to lose from not testifying (i.e., being arrested and charged with the murder, as the

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[27] Indeed, even if the assault had not occurred, Hunt was no doubt of afraid of providing *false* testimony against Mr. McKinnon.

prosecutor promised), evidence that his willingness to testify despite his fear for his safety adds little, if any, weight to the credibility of his testimony. (See, e.g., *United States v. Thomas* (7th Cir. 1996) 86 F.3d 647, 654, and authorities cited therein [probative value of family member's threat to witness solely in order to bolster witness's testimony "in the face of such threats" "is extremely limited at best" while such evidence can be "highly prejudicial"].)

And to the extent that Hunt's fear did bear some probative value to the issue of his credibility, the jury had already heard other evidence on that issue. Hunt testified that Mr. McKinnon implicitly threatened him to keep quiet shortly after the shooting. (RT 4 RT 557; see also 13 CT 3623.) Further, the jury also heard the prosecutor himself tell Hunt that Mr. McKinnon was a "connected" and dangerous man who would likely seek vengeance against Hunt and his family for his betrayal. (13 CT 3603, 3605-3606.) Thus, the cumulative nature of the evidence further diminished its probative value. (See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 423; AOB 209-210.)

Finally, while Hunt's credibility was the ultimate issue to which the third party witness intimidation evidence went, his credibility was not an ultimate issue in the trial. It was a collateral issue and, hence, the probative value of evidence to prove that collateral issue was reduced even further. (See, e.g., *People v. Wheeler* (1992) 4 Cal.4th 284, 296 [witness credibility collateral issue]; *People v. Lavergne* (1971) 4 Cal.3d 735, 742 [collateral nature of evidence "reduces its probative value and increases the possibility that it may prejudice or confuse the jury"].) Thus, the probative value of the evidence was virtually nil.

As to respondent's contention that the evidence carried no danger of

prejudice given the court's cautionary instruction (RB 81), the instruction speaks for itself. It did not expressly prohibit the jurors from inferring that Mr. McKinnon had orchestrated the attack; it did not prohibit them from considering the evidence against Mr. McKinnon as proof of his guilt; and it did not clearly explain that the *only* purpose for which the jurors could consider the evidence was first to decide whether the assault actually happened, then to decide if Hunt was actually afraid of testifying against Mr. McKinnon based on that assault, and finally to decide whether that fear actually rendered his testimony more believable. (AOB 211-212.)

Respondent further contends that the jurors' "common sense" would have led them to limit their consideration of the evidence solely to the issue of Hunt's credibility, and not as proof of Mr. McKinnon's guilt, even if the limiting instruction failed to do so. (RB 80-81.) This is so, respondent contends, since "it would come as no great surprise to anyone that a murder defendant's sister, *who socialized in the community's gang scene*, would threaten and assault a witness without any prompting by the defendant himself. Simply stated, that is the culture in some segments of society." (RB 80-81, italics added.) Respondent yet again fails to support a critical factual assertion – that Robin "socialized in the community's gang scene" – with any citation to the record, either here or *anywhere* in its brief. (See Cal. Rules of Court, rule 8.204, subd. (a)(1)(C) [former rules 14(a) and 15(a)].) This is no doubt because there is not a scintilla of evidence to support it. (See, e.g., *Mammoth Mountain Ski Area v. Graham*, *supra*, 135 Cal.App.4th at p. 1375 [construing misrepresentations of the record as attempt to mislead the reviewing court].)

In any event, the prosecutor himself did not have the same "common sense" that respondent attributes to the lay jurors. As the

prosecutor aptly characterized this evidence to the court: "whenever a witness says that a family member of the defendant tried to intimidate them," the jurors can infer that the defendant authorized the intimidation. (11 RT 1107-1108; see also AOB 211, citing, inter alia, *People v. Terry*, *supra*, 57 Cal.2d at p. 567 [People argued that sister-in-law's relationship to defendant was proof that he had authorized her efforts to intimidate witness]; see also *Ebron v. United States* (D.C. 2003) 838 A.2d 1140, 1149 [rejecting government's position that "attributed [to defendant] the threatening actions of [third parties] based solely on their association with him"].)[28]

If the "common sense" of the trial prosecutor – who should have known better – did not prevent him from drawing the inference that Mr. McKinnon's sister's familial relationship with her brother was enough to prove that he had authorized her (alleged) attack on Hunt, it is absurd to assume that the lay jurors' "common sense" would have fared them any better. The minimal probative value of the evidence was far outweighed by its potential for prejudice and hence the court abused its discretion in admitting it.

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[28] The prosecutor argued this inference in asking that the jurors be specifically instructed that they could consider Mr. McKinnon's sister's assault on Hunt as evidence that Mr. McKinnon attempted to suppress evidence against him and, thus, his consciousness of guilt. (RT 1107-1108.). Although the trial court rightfully refused the instruction, this Court has recognized that "the inference of consciousness of guilt from . . . suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction." (*People v. Holloway* (2004) 33 Cal.4th 96, 142.)

C. The Court Erred in Admitting Gina Lee's Hearsay Statement that Mr. McKinnon Allegedly Threatened to Kill Her if She "Said Anything" After the Coder Murder

As Mr. McKinnon argued in the opening brief, the trial court also erred in admitting, through the testimony of Johnetta Hawkins, Gina Lee's hearsay statement that Mr. McKinnon had allegedly threatened to kill her if she "said anything" on the night of Perry Coder's murder. (AOB 212-218; 5 RT 736-737.) Gina Lee's statement was hearsay that did not fall within an exception to the hearsay rule, such as Evidence Code section 1235, and thus was inadmissible. (AOB 212-218.)

Respondent contends that the evidence was inconsistent with Hawkins's evasive testimony and thus properly admitted to impeach *Hawkins*. (RB 85-86.) Respondent is wrong.

As the record makes clear, and as discussed in the opening brief, the prosecutor offered Lee's out-of-court statement for its truth i.e., to prove that Mr. McKinnon *did* threaten to kill her if she "said anything" – as inconsistent with *Lee's* trial testimony, and urged its admissibility under the prior inconsistent statement exception to the hearsay rule. (Evid. Code, § 1235; 5 RT 710-711.) The trial court quite correctly ruled that Lee's prior statement was *not* inconsistent with her trial testimony and therefore was inadmissible for that purpose. (AOB 214-216; 5 RT 710-712.) However, when *Hawkins* became evasive about Lee's *demeanor* on the night of the murder, the court admitted Hawkins's own prior statement in which she not only described Lee's demeanor as seeming frightened, but *also* her statement recounting Lee's hearsay statement that Mr. McKinnon had threatened to kill her for its truth. (AOB 214-216; 5 RT 734-735.)

The error in the court's ruling, and respondent's argument, was that even if *Hawkins's* prior statement that Lee was frightened was inconsistent

with *Hawkins's* (somewhat) evasive trial testimony regarding Lee's *demeanor* that night, and thus was admissible "to impeach Hawkins" as respondent contends, *Lee's* out-of-court *statement* that McKinnon had threatened to kill her was not inconsistent with *Lee's* trial testimony, as the court explicitly ruled, nor was it inconsistent with Hawkin's trial testimony. Hence, the court erred in admitting the substance of Lee's statement for the prohibited hearsay purpose of proving that Mr. McKinnon had, in fact, threatened to kill her. (AOB 214-216; 5 RT 735.) The state acknowledges Mr. McKinnon's argument in this regard, but its response is a difficult one to follow. (RB 85-88.)

As best as Mr. McKinnon can determine, respondent contends: 1) since the court had ruled that Lee's statement to Hawkins was not a prior statement inconsistent with Lee's trial testimony, the court obviously and properly admitted Lee's out-of-court statement to impeach Hawkins; 2) Mr. McKinnon's alleged threat to kill Lee was relevant to prove that she was afraid of testifying; and 3) it is possible that Lee's memory loss while testifying was feigned and therefore "her prior statement to Hawkins was admissible as to her credibility." (RB 86-88.)

As to the first of these contentions, the record speaks for itself. The court admitted Lee's statement on the theory that it was inconsistent with *Hawkins*'s evasive testimony and therefore admissible under the prior inconsistent statement exception to the hearsay rule. (5 RT 710-712, 734-735.) For all of the reasons discussed above and in the opening brief, the court was incorrect. (AOB 214-216.)

As to respondent's second contention that Mr. McKinnon's alleged threat to kill Lee was relevant to her credibility, it is irrelevant. The issue is not the relevancy of the alleged threat, but whether there was competent

evidence to prove the alleged threat. There was not.

As to the last of respondent's contentions – that Lee's statement was, contrary to the trial court's ruling, inconsistent with her own testimony (and, apparently, therefore admissible under Evidence Code section 1235) since Lee's memory lapses could be construed as evasive – the facts and the law negate it. (RB 86-87.) As discussed in the opening brief, while a witness's *honest* memory loss on the witness stand is *not* inconsistent with her prior statements under Evidence Code section 1235, it is certainly true that a witness's *feigned* memory loss may be impliedly inconsistent with her prior statements. (AOB 215-216, citing, inter alia, *People v. Arias* (1996) 13 Cal.4th 92, 152, *People v. Parks* (1971) 4 Cal.3d 955, 960.) However, respondent ignores that in order for the prior statement to be admissible under this theory, *the trial court must first find, on substantial evidence, that the memory loss is feigned and not honest.* (AOB 215-216, citing, inter alia, *People v. Arias*, *supra*, and *People v. Parks*, *supra*.) Here, the trial court not only failed to make such a finding; by ruling that Lee's statement was *not* inconsistent with her trial testimony, the court necessarily found that Lee's memory loss was *not* feigned or evasive. The court's determination was amply supported by the substantial evidence of Lee's long history of crack use and addiction, the fact that she was admittedly high on crack both when the murder occurred and when she provided her police statement implicating Mr. McKinnon eight months later, the five-year interval between the murder and her trial testimony, and her generally cooperative manner in testifying for the prosecution. (See, e.g., *People v. Sam* (1969) 71 Cal.2d 194, 210 [prior statement not inconsistent with trial testimony where witness claimed lack of recollection and a "two-year interval and considerable liquor have intervened between the incident and

trial"]; AOB 215-216.)[29]

For these and all of the other reasons set forth in the opening brief, Lee's statement that Mr. McKinnon had threatened to kill her was hearsay that did no fall within an exception to the hearsay rule. The trial court erred in admitting it.

D. The Errors Require Reversal

Respondent contends that any error in admitting Mr. McKinnon's sister's threat and assault on Hunt was harmless for essentially three reasons. First, "the evidence was not that significant," since the jurors would naturally expect someone like Mr. McKinnon's sister, who "participated in at least the social aspect of Banning's gang community" would threaten and assault a witness against her brother in a capital case, without any prompting from her brother. (RB 88.) Of course, this is simply a restatement of respondent's contention that the probative value of the evidence outweighed its prejudicial effect; as already discussed in section B, above, this contention is based on yet another affirmative misrepresentation of the record and otherwise belied by the prosecutor's own view of the evidence.

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[29] Furthermore, respondent's discussion of Lee's testimony is typically incomplete and one-sided. (RB 86-87.) For instance, respondent points to Lee's testimony that she could not recall certain events, or recall telling police about certain events, following the murder as proof that she was being evasive. (RB 87.) But, respondent ignores that Lee provided *many* wildly inconsistent accounts of the events after the shooting to the police and in her preliminary hearing and trial testimony (AOB 9-13, 110-113) – so many that even a sober, functioning person would be hard pressed to keep them straight. For a crack addict like Gina Lee, accurately recalling her various (and frequently incoherent) accounts would approach the miraculous.

Second, respondent contends, "Hunt's account of the murder was consistent with both Scott's account and the forensic evidence." (RB 89.) As previously discussed in Argument I-F-2, above, this contention is also based on a blatant, egregious, and intentional misrepresentation of the record.

Third, respondent contends, without elaboration or citation to the record, "given the cast of players involved in these murders, it is unlikely that the jury's evaluation of Hunt's credibility was meaningfully influenced by the fact that Hunt was assaulted." (RB 89.) The fundamental flaw in respondent's position is that the harm in admitting this evidence was not limited to the jurors' assessment of Hunt's credibility. As clearly set forth in the opening brief, the harm from the evidence lay in the inevitable (albeit impermissible) inference the jurors would draw – the very inference that the prosecutor in this case drew, and countless others have drawn in other cases – that Mr. McKinnon must have orchestrated his sister's assault on Hunt and her attempt to dissuade him from testifying, which was proof of his consciousness of guilt for the Coder murder and his generally violent character, which was relevant to both murder charges. (AOB 218-220, citing, inter alia, *People v. Hannon*, *supra*, 19 Cal.3d at p. 599, *People v. Terry*, *supra*, 57 Cal.2d at pp. 565-566, *United States v. Guerrero, supra,* 803 F.2d at pp. 785-786, and *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970.)

What is more interesting about respondent's contention regarding the "cast of players involved in these murders," however, is what can be read between the lines. Since respondent makes this contention without any elaboration or citation to the record, it is not immediately apparent to which "cast of players" respondent refers. (RB 89.) However, since the

prosecution contended that Mr. McKinnon acted alone in the murders, the "cast of players involved in these murders" must refer to the prosecution's witnesses. Thus, respondent's contention appears to be that the prosecution's "cast of players," and particularly original suspect Orlando Hunt, were so incredible that the assault would not have persuaded to the jurors believe Hunt. Mr. McKinnon accepts respondent's concession that the prosecution's witnesses were incredible, but maintains that it was precisely the lack of credible prosecution evidence that compels a finding of prejudice from this and the other errors that occurred throughout Mr. McKinnon's capital murder trial.

Similarly, respondent contends that admission of Mr. McKinnon's alleged threat to kill Gina Lee if she did not keep quiet after the Coder murder was harmless for two reasons. First, respondent contends, since Lee "repeatedly conceded that she was afraid to testify," the evidence was simply cumulative, as Mr. McKinnon himself argues. (RB 89.) But, as respondent contends, the fact that Lee was afraid to testify was considerably less damaging than the evidence that Mr. McKinnon allegedly *threatened to kill her* if she testified or spoke to police. As discussed above and in the opening brief, the evidence tended to show Mr. McKinnon's consciousness of guilt and generally violent character, and thus was highly prejudicial as to both murder charges.

Second, respondent contends that the strength of Kerry Scott's testimony against Mr. McKinnon was alone sufficient to render any error harmless as to the Coder murder conviction. (RB 89.) This is, of course, the same Kerry Scott who, among other things: 1) was an admitted crack cocaine addict who routinely sold information about murders to Banning police in exchange for crack money; 2) waited eight months to identify Mr.

McKinnon as Coder's killer, despite his regular habit of selling information about murders to police for crack cocaine funding and who offered no reasonable explanation for the delay; 3) explicitly testified that the muzzle of Mr. McKinnon's gun was three to four feet from Coder's head and fired four times, despite the forensic evidence establishing that the muzzle had been pressed into Coder's flesh and fired only once; 4) recounted details of the shooting that were inconsistent with virtually every other detail provided by virtually every other alleged witness to the crime; and 5) admitted to an investigator that he had lied to police about witnessing the killing. (See AOB 5-8, 102-105, 108-110, 113, and record citations therein.) Kerry Scott's testimony was not worth the paper it was reported on; certainly, it was not so compelling as to render harmless the court's erroneous admission of highly damaging evidence.

For these reasons, as well as those set forth in the opening brief, the court's erroneous admission of the witness intimidation evidence was prejudicial and violated Mr. McKinnon's state and federal constitutional rights to a fair trial and reliable jury determinations that he was guilty of a capital offense. (AOB 218-220; see also AOB 101-122.) At the very least, the cumulative effect of the erroneous admission of this evidence, along with the other guilt phase errors, was prejudicial, and violated Mr. McKinnon's state and federal constitutional rights to a fair trial and reliable verdicts. (See Arguments VII, below, and in AOB; see also *Parles v. Runnell* (9th Cir. 2007) 505 F.3d 922, 933-934 [cumulative effect of state law errors, including erroneous admission of prior threats evidence that portrayed defendant as violent man, violated due process right to fair trial].) The judgment must be reversed.

VII

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW AND MR. MCKINNON'S RIGHTS TO A FAIR TRIAL AND RELIABLE JURY VERDICTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS BY FAILING TO INSTRUCT THE JURY TO VIEW THE EVIDENCE OF HIS ORAL ADMISSIONS WITH CAUTION

A. Introduction

In his opening brief, Mr. McKinnon argued that the trial court violated its sua sponte duty to instruct the jurors to view with caution his oral admissions based upon his alleged statements to Harold Black, Gina Lee, and Orlando Hunt. (AOB 221-224.) Because the alleged admissions were vital parts of the state's case, the evidence that he made the statements attributed to him was weak at best, and the other instructions did not admonish the jurors to view them with caution, the court's failure to provide such an instruction was prejudicial and requires reversal. (AOB 224-229.)

Respondent first contends that Mr. McKinnon is barred from challenging the error on appeal because his trial counsel invited it. (RB 91-92.) Alternatively, respondent contends that there was no error or that any error was harmless. (RB 92-94.) Respondent's contentions are meritless.

B. Defense Counsel Did Not Invite the Error

As discussed in the opening brief, the trial court struck the cautionary language from its provision of CALJIC No. 2.71, defining admissions, after observing that it did not apply to recorded statements. (14 CT 3834; 9 RT 1238.) Both the prosecutor and defense counsel agreed with the court's understanding that the cautionary language did not apply to recorded statements, but defense counsel did not ask the court to fulfill its sua sponte duty to include the cautionary language as it applied to the

unrecorded oral admissions offered in this case. (8 RT 1110-1111.)

Although defense counsel expressed no tactical basis for acceding, or failing to object to, the erroneous instructional omission, respondent speculates that other evidence in the record demonstrates that one existed and therefore defense counsel invited the error. (RB 90-94.) First, according to respondent, the oral statements to Hunt and Lee qualified as efforts to suppress evidence, which "would have been addressed with another instruction, CALJIC No. 2.06," but when CALJIC No. 2.06 was withdrawn, defense counsel remained silent and thus he "impliedly opposed" the giving of CALJIC No. 2.06. (RB 91-92.) Further, CALJIC No. 3.20 "addressed McKinnon's statements to Black." (RB 92.) According to respondent, this proves that defense counsel acceded, or did not object, to the omission of the cautionary instruction because "it did not apply and might have confused the jury." (RB 92.)

As discussed in Argument IV-B, above, respondent's understanding of the invited error doctrine is incorrect. The invited error doctrine only applies where the record shows that "counsel *both* 'intentionally caused the court to err' and clearly did so for tactical reasons" (*People v. Dunkle* (2005) 36 Cal.4th 861, 923, italics added) by "express[ing] a deliberate tactical purpose" for his act or omission (*People v. Valdez* (2004) 32 Cal.4th 73, 115). (Accord, e.g., *People v. Wilson* (2008) 43 Cal.4th 1, 16; *People v. Moon* (2005) 37 Cal.4th 1, 27, and authorities cited therein.) Indeed, this Court has rejected application of the invited error doctrine to facts identical to those presented here. (*People v. Carrera* (1989) 49 Cal.3d 291, 311 & fn. 8 [where prosecutor initially requested instruction, but court did not give it because all parties, including defense counsel, agreed it was inapplicable, defense counsel's "mere agreement that the instruction was irrelevant" did

not invite its erroneous omission in the absence of an expressed deliberate tactical purpose]; accord, *People v. Wilson, supra*, at p. 16 [defense counsel's explicit agreement that court did not need to give instruction was not invited error because counsel expressed no tactical purpose for agreement].)

Here, counsel expressed no *tactical* reason at all for agreeing that the cautionary instruction did not apply. To the contrary, defense counsel's *only* statement was that he agreed with the court's understanding that the cautionary portion of CALJIC No. 2.71 only "applies to a situation where the statement is not tape recorded." (8 RT 1110-1111.) The colloquy clearly suggested that the parties simply forgot that there were alleged oral admissions that were *not* tape recorded and to which the instruction *did* apply. Mistake is not a tactic that induces the court to err. (See, e.g., *People v. Wishersham* (1982) 32 Cal.3d 307, 330 [invited error only applies where "it is clear that counsel acted for tactical reasons and not out of ignorance or mistake"]; *People v. Graham, supra*, 71 Cal.2d at pp. 319, 331 ["if counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find invited error; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the court's obligation to instruct on the cause"].)

Respondent's tortured speculation that counsel had a tactical reason for apparently acceding to the omission of the cautionary portion of CALJIC No. 2.71 because it was inapplicable to the statements to Hunt and Lee, since they were covered by the pattern instruction on suppression of evidence (CALJIC No. 2.06), which was not given either because defense counsel "impliedly opposed" it, is simply nonsensical. (RB 91-92.)

Further, there is no indication in the record at all that defense counsel caused the court to err in omitting the instruction because he believed it would be "confusing" (RB 92), as respondent contends. To the contrary, the instruction would *not* have been confusing; it was *necessary* for the jurors to make an informed and knowing determination of Mr. McKinnon's guilt.

For all of these reasons, respondent's contention of invited error is devoid of merit and must be rejected.

B. The Trial Court Violated Its Sua Sponte Duty to Instruct the Jurors to View Evidence of McKinnon's Unrecorded Oral Statements With Caution

Respondent next contends that the trial court's failure to give the cautionary instruction was not erroneous for two reasons. First, citing this Court's decision in *People v. Sanders* (1995) 11 Cal.4th 475, respondent contends that the alleged threats to Orlando Hunt and Gina Lee were not oral admissions to which the instruction would apply. Rather, they were efforts to suppress evidence to which CALJIC No. 2.06 *would have* applied *had it not been omitted.* (RB 92-93.) Respondent's contention is illogical, frivolous, and in no conceivable way supported by the Court's decision in *Sanders*, which respondent distorts beyond recognition.

In *Sanders*, the defendant argued that the trial court erred in failing to instruct the jury the view with caution his alleged oral admissions, based on evidence that he had made certain out of court statements in attempts to suppress evidence against him. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 536.) This Court rejected the argument because the trial court *did* provide appropriate cautionary instructions. The trial court instructed the jurors *both* on efforts to suppress evidence as consciousness of guilt *and* that "'evidence of an oral statement of a defendant should be received with

caution.'" (*Ibid.*, quoting trial court's instruction.)

Thus, no rational reading supports respondent's interpretation of *Sanders*. To the contrary, implicit in the *Sanders* holding is the acceptance that oral statements which can be considered as evidence of a guilty conscience are oral admissions to which the cautionary instruction applies.[30] Indeed, although respondent ignores it, this Court has explicitly held as much. (AOB 221, citing *People v. Garceau* (1993) 6 Cal.4th 140, 180 [admissions include oral statements that expressly *or implicitly* tend to prove guilt when considered with other evidence, such as statements evidencing a consciousness of guilt]; see also, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 392-393 [given that rationale for cautionary instruction on oral admission is "'to assist the jury in determining whether the statement was in fact made'" it should be given as "to any oral statement of the defendant"]; *People v. Shoals* (1996) 8 Cal.App.4th 475, 497-498 [oral admissions include statements evidencing consciousness of guilt].)

Second, as to Mr. McKinnon's alleged oral admissions to Harold Black, respondent contends that the trial court did not err in failing to instruct the jury to view those statements with caution, since the court did instruct the jury with CALJIC No. 3.20, regarding the testimony of in-custody informants. (RB 93.) As a preliminary matter, respondent's contention in this regard is more appropriately directed to the question of

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[30] CALJIC No. 2.71, as provided in this case, defines an admission as "a statement by the defendant which does not by itself acknowledge his guilt of the crime for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence." (9 RT 1238.)

prejudice, or lack thereof, from the instructional omission and not to the question of error. In any event, Mr. McKinnon has discussed at length why the court's provision of CALJIC No. 3.20 did not render the court's instructional error harmless (or did not render the cautionary instruction unnecessary) as to the statements to Black. (AOB 227-228.) As respondent has chosen to ignore Mr. McKinnon's argument in this regard, no further discussion of this aspect of the issue is necessary. For the foregoing reasons, as well as those set forth in the opening brief, the trial court erred in failing to instruct the jurors to view the evidence of Mr. McKinnon's alleged oral admissions with caution. (AOB 221-224.)

C. The Error Requires Reversal

As Mr. McKinnon predicted in the opening brief (AOB 227-228), respondent contends that the error was harmless as to Mr. McKinnon's alleged admissions to Harold Black because the jurors were provided CALJIC No. 3.20, regarding the testimony of in-custody informants. (RB 94.) Once again, as respondent has chosen to ignore Mr. McKinnon's argument in this regard, has not addressed the effect of the error with regard to the alleged statements to Orlando Hunt and Gina Lee, has ignored the wealth of record evidence demonstrating the closeness of the case and undermining its assertions of harmless error, and otherwise raises no point or authority that Mr. McKinnon has not adequately addressed in the opening brief, no further discussion of this issue is necessary. For the reasons set forth in the opening brief, but ignored by respondent, the error was prejudicial and requires reversal. (AOB 224-229.)

VIII

THE JUDGMENT MUST BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS WAS PREJUDICIAL AND VIOLATED MR. MCKINNON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND RELIABLE JURY VERDICTS THAT HE WAS GUILTY OF A CAPITAL OFFENSE

In his opening brief, Mr. McKinnon argued that the cumulative effect of any and all of the foregoing errors was prejudicial, violated his state and federal constitutional rights to a fair trial and reliable jury determinations that he was guilty of a capital offense, and demands reversal of the judgment. (AOB 230-235.) The state provides no meaningful response this argument.

Respondent first contends that there was no error to accumulate. (RB 95.) In the alternative, respondent perfunctorily concludes, without citation to authority, that Mr. McKinnon's trial was necessarily a fair one because he had an impartial jury drawn from a fair cross-section of the community, the jury was "fully aware" of Mr. McKinnon's defense theory, the trial court's rulings were "fair," and the defense had "ample opportunity" to impeach the prosecution's witnesses. (RB 95.) In an equally perfunctory fashion unsupported by *any* discussion of the trial evidence or the effect of *any* of the specific trial errors on the jury's assessment of that evidence, respondent concludes that the cumulative effect of the errors could not have affected the outcome of the case since "the prosecution's case was supported by eyewitness testimony, Mr. McKinnon's own admissions, and forensic evidence consistent with the eyewitness's accounts." (RB 95.)

Respondent's perfunctory contentions are belied by the record and the law. This Court should reject them in an equally perfunctory fashion.

It is well settled that "the aggregate prejudicial effect of" a series of errors may be "greater than the sum of the prejudice of each error standing alone." (*People v. Hill* (1993) 17 Cal.4th 800, 845, and authorities cited therein.) It is an equally well settled point of state and federal constitutional law that the cumulative effect of a series of errors may so infect a trial with unfairness as to make the resulting conviction a denial of due process. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *People v. Hill*, *supra* at pp. 844-847; *Parles v. Runnells* (9th Cir. 2007) 505 F.3d 922, 927-928, and authorities cited therein.)

Contrary to respondent's perfunctory and unsupported assertion otherwise, the *complete* deprivation of *another* federal constitutional right, such as the Sixth Amendment guarantees to an impartial jury, confrontation, or a defense, is not necessary to establish that a trial failed to comport with fundamental fairness. (See, e.g., *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15 [in close case, combined effect of instructional omission and prosecutor's argument, though not independently erroneous, violated due process guarantee to fundamental fairness]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 290, 302, & fn. 3 [cumulative effect of state court rulings excluding evidence, though not erroneous under state law and in part cumulative of other evidence, denied defendant "a trial in accord with traditional and fundamental standards of due process"]; *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [effect of state law errors may so "infect[a] trial with unfairness as to deny due process of law"]; *People v. Harrison* (2005) 32 Cal.4th 73, 120 [even if court's denial of severance motion is not erroneous, effect of joinder may be so prejudicial as to deprive defendant of a fair trial].)

An assessment of the aggregate effect of a series of errors on the

outcome of a case begins with an examination of the record as a whole and the relative strength or weakness of the state's case. (See, e.g., *Parles v. Runnells*, *supra*, 505 F.3d at pp. 927-928, and authorities cited therein; *People v. Mendoza* (2007) 42 Cal.4th 686, 705.) It is axiomatic that when the state's "case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." (*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883; accord, e.g., *Strickland v. Washington* (1984) 466 U.S. 668, 696 ["a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors"].) But apart from a footnote in which it acknowledges only the least of the prosecution witnesses' credibility problems - their drug addition, felony convictions, Kerry Scott's status as an informant, and the mere existence of Harold Black's plea bargain (RB 33-34 & fn. 18) – not once in its repeated assertions of harmless error does respondent engage in any meaningful discussion of the evidence as a whole. Not once does respondent acknowledge or discuss the significant and numerous inconsistencies in the prosecution witnesses' testimony with each other, with their own prior accounts, with the forensic evidence, and even with physical possibility. (See AOB 101-122.) Not once in its repeated declarations of harmless error does respondent address or discuss the powerful incentives for the witnesses to lie, such as the threats to charge original suspect Orlando Hunt with the murder if he did not say what the prosecution team told him to say, the extraordinary benefits Harold Black did receive, shockingly continued to receive, and still expected to receive in the future, for agreeing with Investigator Buchanan's theory and testifying that Mr. McKinnon was Gregory Martin and Perry Coder's killer, and the additional crack cocaine funding Kerry Scott no doubt expected to receive for identifying Mr. McKinnon as Perry Coder's killer, just as he had

habitually received in exchange for such information in the past. (*Ibid.*) Not once does respondent acknowledge the well recognized, objective indicia that the jurors considered the prosecution's case to be a close one and struggled over their verdicts, such as their expression of deadlock on the Martin murder charge on the fourth day of their deliberations. (See AOB 114-115.) And on the rare occasions that respondent actually does address the specific evidence in this case rather than make broad and sweeping generalizations and conclusions about it, respondent as often as not affirmatively misrepresents that evidence. (See, e.g., Arguments I-E-2 and VI-B, above.)

In addition to evaluating the strength or weakness of the state's case, harmless error analysis also requires an inquiry into the impact of the *particular* errors on the jury's assessment of specific evidence. (See, e.g., *People v. Quartermain* (1997) 16 Cal.4th 600, 623 [particular error that "struck at the heart of [appellant's] defense" was prejudicial]; *People v. Woods* (2006) 146 Cal.App.4th 106, 1187-119 [particular errors going to credibility when "credibility was the crux of the case," were prejudicial].) Here, while respondent summarily declares that the "eyewitnesses' testimony [to the Coder killing and] Mr. McKinnon's own admissions" defy any finding of prejudice, respondent does not discuss how the *specific* errors raised here *affected* the jury's consideration of the "eyewitness testimony" and evidence of Mr. McKinnon's "own admissions." For instance, and as discussed in the opening brief, the jurors' assessment of the credibility of the "eyewitness's testimony" was no doubt profoundly affected by the erroneous admission of the polygraph evidence. (Argument IV, above, and in opening brief.) As further discussed in the opening brief, all of the foregoing errors straight cut straight to the heart of the two

fundamental issues in this case: the credibility of the prosecution's witnesses and Mr. McKinnon's defense of innocence and evidence fabrication. (AOB 230-235; see *Parles v. Runnells*, *supra*, 505 F.3d at pp. 929-930 [where the evidence trial court erroneously excluded supported the defense and the evidence the trial court erroneously admitted supported the prosecution, cumulative effect of state law errors violated federal constitutional right to fair trial; state court's contrary conclusion was unreasonable application of clearly established Supreme Court precedent].)

Thus, respondent's position boils down to this: any or all of the errors were harmless because respondent says so. But, as respondent has demonstrated throughout its brief, this Court cannot rely on what respondent says. Surely the state's response to Mr. McKinnon's claims of fundamental error in a breathtakingly close capital murder trial is far too unreliable (and disingenuous) a basis on which to send a man to his death.

As respondent amply, albeit unintentionally, demonstrates, it is beyond any meaningful, rational, or honest dispute that the cumulative effect of any or all of the errors was prejudicial and violated Mr. McKinnon's fundamental rights to a fair trial and reliable guilt verdicts in this capital case. For the foregoing reasons, as well as those set forth in the opening brief, judgment must be reversed.

IX

THE CUMULATIVE EFFECT OF A SERIES OF INSTRUCTIONAL ERRORS WAS PREJUDICIAL, VIOLATED MR. MCKINNON'S RIGHTS TO A FAIR TRIAL, TRIAL BY JURY, AND RELIABLE VERDICTS, AND REQUIRES REVERSAL OF THE JUDGMENT

In his opening brief, Mr. McKinnon argued that the trial court's provision of CALJIC Nos. 2.02, 2.03, 2.21.2, 2.22, 2.27, 2.51, and 8.20 was erroneous and violated his constitutional rights to due process (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17). (AOB 236-259, citing, inter alia, *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, *Carella v. California* (1989) 491 U.S. 263, 265, *Beck v. Alabama* (1980) 447 U.S. 625, 638.).

Respondent contends at the outset that "the record indicates that the parties made joint requests for 2.02, 2.21.1, 2.22, 2.27, 2.51, and 8.20. (8 RT 1107-1108, 1110, 1114." (RB 96.) Hence, respondent concludes, defense counsel invited any error. (RB 96-97.)

As previously discussed in Arguments IV-B and VII-A, above, "[t]he invited error doctrine will not preclude appellate review if the record fails to show that counsel had a tactical reason for requesting or acquiescing in the instruction." (*People v. Moon* (2005) 37 Cal.4th 1, 27, and authorities cited therein; accord, e.g., *People v. Graham, supra*, 71 Cal.2d at pp. 319, 331 ["if counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find invited error; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the court's obligation to instruct on the

cause"].) Indeed, in *Moon*, *supra*, this Court rejected the very argument respondent makes here – i.e., the parties' "joint request" for a list of standard instructions invited any error in those instructions. (*Ibid.*) As no tactical basis for counsel's conduct appears, and indeed respondent suggests none, the invited error doctrine is inapplicable.

Otherwise, respondent simply contends that this Court should reject Mr. McKinnon's challenges to these instructions because it has done so in other cases. (RB 97-98.) As Mr. McKinnon acknowledged the Court's precedents in this regard, but urged this Court to reconsider them, no further discussion is necessary. (AOB 236-259.) For all of the reasons discussed in the opening brief, the Court should reconsider those decisions and hold that these instructions are erroneous and their provision violated Mr. McKinnon's rights under the state and federal Constitutions. (AOB 236-259.)

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X

THE PROVISION OF CALJIC NO. 17.41.1 VIOLATED MR. MCKINNON'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY AND REQUIRES REVERSAL

In his opening brief, Mr. McKinnon argued that the trial court's provision of CALJIC No. 17.41.1 violated his Sixth and Fourteenth Amendment rights to due process and trial by a fair and impartial jury and requires reversal of the judgment. (AOB 260-268, and authorities cited therein.) Respondent disagrees.

Respondent first contends that defense counsel's failure to object to the instruction waived Mr. McKinnon's right to challenge it on appeal. (RB 98-99.) Respondent acknowledges Mr. McKinnon's argument to the contrary that his counsel's failure to object did not waive his right to challenge the instruction because its provision violated his substantial rights (Pen. Code, § 1259 ["an instruction given, refused, or modified" is reviewable notwithstanding absence of trial court objection if "the substantial rights of the defendant were affected thereby"]), but counters that the instruction did not violate his substantial rights and hence the failure to object amounted to waiver. (RB 99.) For all of the reasons discussed in the opening brief, respondent is incorrect. The instruction violated Mr. McKinnon's rights to due process by a fair and impartial jury, which are substantial rights, and therefore his counsel's failure to object to it did not amount to waiver. (AOB 260-268; see also *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7 [rejecting Attorney General's waiver argument where defendant's claim was that instruction violated his right to due process of law, which "is not of the type that must be preserved by objection"].)

Otherwise, respondent disputes that the instruction was erroneous or violated Mr. McKinnon's rights, but cites no relevant point or authority that has not adequately been addressed in the opening brief. (RB 98-102.) Accordingly, Mr. McKinnon considers this issue to be fully joined by the briefs on file with the Court. The trial court's provision of CALJIC No. 17.41.1 violated Mr. McKinnon's Sixth and Fourteenth Amendment rights to due process and trial by a fair and impartial jury and requires reversal of the judgment.

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XI

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S DISMISSAL OF PROSPECTIVE JURORS FOR CAUSE WITHOUT SUFFICIENT EVIDENCE THAT THEIR PERSONAL FEELINGS ABOUT THE DEATH PENALTY WOULD PREVENT OR SUBSTANTIALLY IMPAIR THEIR ABILITIES TO SERVE AS JURORS VIOLATED MR. MCKINNON'S RIGHTS TO A FAIR AND IMPARTIAL JURY, DUE PROCESS OF LAW, AND A RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

In his opening brief, Mr. McKinnon argued that the trial court violated his rights to a fair and impartial jury, due process, and reliable penalty determinations by improperly dismissing prospective jurors Addington, Smith, Griggs, Fogg, and Harpster for cause under *Wainwright v. Witt* (1985) 469 U.S. 412 based solely on their answers to the jury questionnaires. (AOB 268-293.) Those venirepersons' written answers did not provide sufficient evidence to support the court's rulings that their views about the death penalty "would 'prevent or substantially impair' the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (*Wainwright v. Witt*, *supra*, at pp. 424-426; AOB 270-290; see also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521.) Hence, the court violated Mr. McKinnon's constitutional rights by dismissing those prospective jurors for cause, which mandates reversal of the death judgment. (AOB 270-290, citing, inter alia, *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668 [improper exclusion of even a single qualified jurors requires reversal per se] and *People v. Heard* (2003) 31

Cal.4th 946, 965-966 [same].)[31]

Respondent contends that Mr. McKinnon has waived his right to challenge the trial court's *Witherspoon/Witt* errors on appeal. (RB 103-107.) Alternatively, respondent contends that the five prospective jurors' questionnaire answers supported the court's rulings that they were disqualified to serve as jurors in a capital case. (RB 107-112.) Respondent is wrong on both counts.

B. Defense Counsel's Failure to Object to Or Otherwise Oppose the Court's Dismissal of Prospective Jurors Addington, Smith, Griggs, Fogg, and Harpster Did Not Amount to "Joining In," Inviting, or Waiving The Court's *Witherspoon/Witt* Errors

As Mr. McKinnon predicted in the opening brief (AOB 290-293), respondent contends that he has waived or forfeited his right to challenge the court's erroneous dismissal of prospective jurors Addington, Smith, Griggs, Fogg, and Harpster for three reasons: 1) defense counsel did not object to the court's proposed *procedure* of dismissing jurors based on their questionnaire answers alone if the answers were "very extreme" and made it "obvious" that "they [were] impaired" (1 RT 29; 2 RT 206); 2) defense counsel did not ask the trial court to subject prospective jurors Addington, Smith, Griggs, Fogg, and Harpster to live voir dire; and 3) defense counsel did not object to the trial court's dismissal of those jurors. (RB 103-107.) Respondent's contentions lack legal and factual support.

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[31] For ease of reference, Mr. McKinnon shall hereafter refer to a trial court's erroneous dismissal of a prospective juror for cause on the ground that his or her views about the death penalty "would 'prevent or substantially impair' the performance of [his or her] duties as a juror" as "*Witherspoon/Witt* error."

As discussed in the opening brief, defense counsel's failure to object to the court's *procedure* in dismissing jurors based on very "extreme" questionnaire answers establishing disqualification, without subjecting them to voir dire, is of no moment because Mr. McKinnon's challenge here is not a procedural one. (AOB 290-293.) Mr. McKinnon does not contend that state law or the federal Constitution prohibits a procedure whereby prospective jurors are dismissed for cause based solely on their questionnaire answers or that state law or the federal Constitution requires a procedure whereby jurors must always be subjected to live voir dire. Thus, his claim is not that the trial court's *procedure* in "screening" potential jurors based on their questionnaire answers alone, or that its failure to conduct live voir dire, was in itself erroneous or a violation of his constitutional rights. (Compare, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 87-88 [appellant raised *procedural defect* in failing to conduct live voir dire, which was waived by his trial stipulation to dismissing certain jurors for cause based upon questionnaire answers alone].) To the contrary, he acknowledged that some of the prospective jurors' questionnaire answers alone were unambiguous and made it unmistakably clear that they would automatically vote for or against the death penalty and hence does not challenge the trial court's dismissal of those prospective jurors for cause. (AOB 268, citing *People v. Avila* (2006) 38 Cal.4th 491, 530-533 [jurors may be dismissed for cause based upon their "unambiguous" questionnaire responses alone if those answers state that they will "automatically" vote for one penalty over another] and AOB 285, citing prospective juror Townsend's questionnaire answers as supporting the trial court's determination that he or she was disqualified to serve as a juror.)

Instead, Mr. McKinnon's claim is a *substantive* one. State law and

the federal Constitution *do* prohibit the dismissal of prospective jurors for cause based solely on their personal opposition to the death penalty absent *substantial evidence* that their personal feelings would "'prevent or substantially impair' the performance of his duties as a juror" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424) or their ability or willingness to set aside their personal feelings and "follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law" (*People v. Stewart* (2004) 33 Cal.4th 425, 447). (Accord, *Lockhart v. McCree* (1986) 476 U.S. 162, 176; *Adams v. Texas* (1980) 448 U.S. 38, 45; *People v. Ghent* (1987) 43 Cal.3d 739, 767; *People v. Heard*, *supra*, 31 Cal.4th at p. 963.) Pursuant to these principles, Mr. McKinnon's challenge is that the *evidence* before the trial court was *insufficient* to support its rulings that some of the prospective jurors – Addington, Smith, Griggs, Fogg, and Harpster – were disqualified under *Wainwright v. Witt*. (AOB 290-293, citing, inter alia, *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1270, followed in *People v. Stewart*, *supra*, 33 Cal.4th at pp. 449-450 [declining to resolve *procedural* question of whether court erred in failing to conduct live voir dire and instead reversing on *substantive* ground that information in jurors' written questionnaire responses was insufficient to justify dismissal under *Witt* standard].) And, as further discussed in this opening brief, at the time of voir dire in this case, Mr. McKinnon's substantive challenge to the sufficiency of the evidence to support the court's rulings that prospective jurors Addington, Smith, Griggs, Fogg, and Harpster were disqualified did not require a trial objection or opposition in order to be

raised on appeal. (AOB 290-292, and authorities cited therein).[32]

Respondent counters that defense counsel's conduct here went beyond a mere failure to object or oppose dismissing those prospective jurors for cause: defense counsel's failure to ask for voir dire of the dismissed jurors amounted to "virtual acquiescence" in the court's rulings, such that he "effectively joined" in them. (RB 103-106.) The only authority cites in support of this proposition is *People v. Benavides*, *supra*, 35 Cal.4th 69. (RB 106-107.) *Benadvides* does not support respondent's contention.

As Mr. McKinnon himself noted in the opening brief, in *Benavides*, *supra*, the defendant's challenge was to the alleged *procedural defect* in the court's failure to conduct live voir dire of prospective jurors, not a *substantive* challenge to the sufficiency of the evidence to support the court's rulings that certain jurors were disqualified. This Court held that the defendant had forfeited that defect by *stipulating* to the challenged procedure. (*People v. Benavides*, *supra*, 35 Cal.4th at pp. 86-87.) Clearly, *Benavides* does not support respondent's proposition that the failure to object to the dismissal of certain jurors, or to request live voir dire of those jurors, was required at the time of voir dire in this case in order to challenge

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[32] Respondent acknowledges the distinction Mr. McKinnon draws between such procedural and substantive claims, but dismisses it as merely "semantic." (RB 106.) Respondent is simply incorrect. (See, e.g., *United States v. Chanthadara*, *supra*, 230 F.3d at p. 1269 [recognizing distinction between *procedural* challenge to trial court's failure to conduct live voir dire and dismissing jurors on questionnaires alone and *substantive* challenge to sufficiency of the evidence in the questionnaires to support the court's dismissal of the jurors under the *Witt* standard; declining to resolve procedural question because resolution of substantive question demanded reversal].)

on appeal the *sufficiency of the evidence* to support the trial court's dismissal of those jurors for cause under *Wainwright v. Witt*. To the contrary, *there was no such requirement*. (AOB 290-293, citing, inter alia, *People v. Velasquez* (1980) 26 Cal.3d 425, 443, and authorities cited therein ["*Witherspoon* error is not waived by mere failure to object"], and, in accord, *People v. Cox* (1991) 53 Cal.3d 618, 648, fn. 4, and *People v. Lanphear* (1980) 26 Cal.3d 814, 844.) By dismissing prospective jurors Addington, Smith, Griggs, Fogg, and Harpster for cause on its own motion due to their personal opposition to the death penalty without substantial evidence that their personal feelings would "'prevent or substantially impair' the performance of [their] duties as [] juror[s]" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424), the court erred, period. There was no, and indeed currently is no, requirement that defense counsel must attempt to cure, or even prevent, such an error by requesting voir dire in order to challenge it on appeal.

To the extent that respondent suggests that this Court's decision in *People v. Lewis* (2006) 39 Cal.4th 970, 1007, fn. 8 supports its waiver argument, respondent is mistaken. (See RB 106.) *Lewis* actually supports Mr. McKinnon's contention that his *Witherspoon/Witt* claim was not waived by defense counsel's failure to act below.

In *Lewis*, *supra*, this Court *rejected* the People's argument that the defendant had waived his right to challenge the trial court's dismissal of jurors for cause under *Wainwright* v. *Witt*, *supra*, by failing to object or seeking clarification of the juror's answers on voir dire. (*Ibid.*) It is true, as respondent notes (RB 106), that the Court in *Lewis* observed:

> the law is unclear as to whether a procedural bar applies to defendant's challenge to [the juror's] excusal for cause [under

> *Witherspoon/Witt*]. (Compare *People v. Hill* (1992) 3 Cal.4th 959, 1005 [holding defendant "waived any error" by failing to object "to the prosecutor's challenges"], with *People v. Holt* (1997) 15 Cal.4th 619, 652, fn. 4 [stating "controlling federal precedent holds that *Witherspoon* error is not waived by 'mere' failure to object"].)

(*People v. Lewis*, *supra*, 39 Cal.4th at p. 1007, fn. 8.) However, in the very next sentence, which respondent does *not* note, the Court went on to hold that it was this very uncertainty that *precluded it from applying waiver* in that case: "'Because the question whether defendants have preserved their right to raise this issue on appeal is close and difficult, we assume that defendants have preserved their challenge.' (*People v. Champion* (1995) 5 Cal.4th 879, 908, fn. 6.)" (*People v. Lewis*, *supra*, at p. 1007, fn. 8; see also AOB 292, citing *People v. Collins* (1986) 42 Cal.3d 378, 384-385, 388 [declining, on fundamental fairness grounds, to apply waiver rule that did not exist at time of trial], *People v. Weaver*, *supra*, 26 Cal.4th at pp. 910-911 [where law in state of flux at time of voir dire as to whether expression of dissatisfaction was necessary to preserve erroneous denial of for-cause challenge, absence of expression did not waive error for appeal], *People v. Boyette*, *supra*, 29 Cal.4th at p. 416 [same], and *People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["defendant should not be penalized for failing to object where existing law overwhelmingly said no such objection was required"].)[33]

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[33] Furthermore, the waiver issue was not as "close and difficult" as the Court believed in *Lewis*. Contrary to the *Lewis* Court's citation, the Court in *People v. Hill*, *supra*, 3 Cal.4th at p. 1005, held that the defendant's failure to object to the *prosecutor's* exercise of a *peremptory* challenge at trial had waived his right to challenge it on appeal, *not* that the defendant's failure to object to the *trial court's* dismissal of a juror *for*

(continued...)

For all of the foregoing reasons, as well as those discussed in the opening brief, neither defense counsel's failure to object to the trial court's *Witherspoon/Witt* error in dismissing prospective jurors Addington, Smith, Griggs, Fogg, and Harpster, nor his failure to ask the court to subject them to live voir dire, waived Mr. McKinnon's right to challenge the trial court's dismissal of those jurors on the substantive ground that the evidence was insufficient to support the court's ruling that they were disqualified.[34]

C. The Death Judgment Must Be Reversed Because the Prospective Jurors Addington, Smith, Griggs, Fogg, and Harpster's Questionnaire Answers Did Not Provide Sufficient Evidence to Support the Court's Rulings That They Were Disqualified Under the *Wainwright v. Witt* Standard

At the outset, it is important to emphasize what is not in dispute. First, respondent concedes that the trial court's rulings that prospective jurors Addington, Smith, Griggs, Fogg, and Harpster were disqualified under *Wainwright v. Witt* are not entitled to deference. (RB 108; see AOB 272, citing, *People v. Avila*, *supra*, 38 Cal.4th at p. 529 [where the court does not conduct live voir dire, its rulings dismissing jurors for cause are not entitled to deference, but rather are reviewed de novo], *People v.*

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[33](...continued)
cause waived his right to challenge that error on appeal. (*People v. Hill*, *supra*, 3 Cal.4th at p. 1005.)

[34] To be clear, Mr. McKinnon does *not* – as respondent represents – "concede" that his counsel's failure to object to the trial court's *Witherspoon/Witt* error "might constitute a waiver of the issue on appeal" "under current law." (RB 105-106.) Under the current state of the law, there is no objection requirement in order or preserve *Witherspoon/Witt* error for appeal.

Stewart, *supra*, 33 Cal.4th at pp. 451-452 [same], and *United States v. Chanthadara*, *supra*, 230 F.3d at pp. 1269-1270.)

Nor does respondent dispute that no question in questionnaire "directly address[ed] the pertinent constitutional issue" under *Witt* – i.e., whether the prospective jurors could temporarily set aside their personal feelings about the death penalty and follow the law as stated in the "court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447; see AOB 272-273.)

Nevertheless, respondent contends that prospective jurors Addington, Smith, Griggs, Fogg, and Harpster's questionnaire answers as a whole supported the trial court's rulings that they were disqualified to serve under the *Wainwright v. Witt* standard. (RB 111-112.) Respondent is mistaken. (See *People v. Stewart*, *supra*, 33 Cal.4th at pp. 447, 449-450 [where juror questionnaire did not "directly address the pertinent constitutional issue" under *Witt*, the trial court erred in dismissing juror for cause based upon questionnaire responses alone because they did not provide sufficient evidence of impairment under *Witt*]; accord, *United States v. Chanthadara*, *supra*, 230 F.3d at pp. 1271-1272, & fn. 7, followed by *People v. Stewart*, *supra* ["although we do not wish to foreclose the possibility that some responses to juror questionnaires would sufficiently support excusing a prospective juror for cause," when "none of the questions . . . articulates the proper legal standard under *Witt*," a prospective juror's ambiguous or conflicting answers is not sufficient to justify her dismissal under *Witt*].)

As to prospective jurors Addington (see AOB 275-279) and Smith (see AOB 279-283), respondent notes that their questionnaire responses

revealed "strong feeling against the death penalty." (RB 111.) Respondent acknowledges, as it must, that in response to question 46, both venirepersons nevertheless "indicated a willingness to consider the evidence and impose the penalty they determined was appropriate . . . ." (RB 111.) Nevertheless, respondent contends that their statements of willingness to set aside their personal opposition against the death penalty and fairly consider the evidence *and* both penalties should be discounted because their responses "suggest[] they either misunderstood Question 46 or failed to fairly consider their responses." (RB 111-112.)

As to prospective juror Addington, respondent contends that his misunderstanding, dishonesty, or carelessness in expressing his willingness to consider all of the evidence and both penalties is demonstrated solely by his responses that he would find it "difficult" and "hard" to vote for death. (RB 112.) In other words, according to respondent, a juror whose written statement that it would be difficult or hard to impose the death penalty renders incredible (without live voir dire in which the court can assess that juror's demeanor) his further written statements that he can nevertheless fairly consider all of the evidence and both penalties. Put another way, respondent's essential contention is that a juror's written statements indicating his personal opposition to the death penalty and the "difficulty" he would have in imposing that penalty is disqualified under the *Wainwright v. Witt* standard as a matter of law and no matter what other assurances he gives to set aside those feelings and follow the law. As this Court has recognized, respondent's contention is plainly inconsistent with the law. "[A] prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury, unless his or her personal views actually would prevent or

substantially impair the performance of his or her duties as a juror. . . ." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446, and authorities cited therein; see also, e.g., *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, fn. 8 ["'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man'"; that does not mean that he is unable to perform his duties as a juror].)[35]

As to prospective juror Smith, respondent contends that his similar statements that he would find it "difficult" to impose the death penalty and his written response to a question asking for an explanation of those feelings – "couldn't agree to put another person to death" (8 CT 2077) -- proves that his *other* written statements that: 1) he would follow the law as stated in the court's instructions, even if the law differed from his personal beliefs and opinions (8 CT 2071); 2) he would "follow the rules as stated" (8 CT 2071, 2079); and 3) he would *not* "ALWAYS vote for life without possibility of parole" "no matter what the evidence was" (8 CT 2078), but rather would "consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate" (8 CT 2078) were the products of misunderstanding, dishonesty, or carelessness. (RB 111-112.) For all of the reasons discussed

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[35] Moreover, respondent ignores that prospective juror Addington, like the other prospective jurors, was specifically given the option of stating that, "no matter what the evidence was, ALWAYS vote for life without possibility of parole" and he *rejected it* in favor of (6 CT 1628) in favor of stating, "I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate" (6 CT 1628), that he answered yes when asked "if the judge gives you an instruction on the law that differs from your beliefs and opinions, will you follow the law as the judge instructs you?" (6 CT 1620).

above and in the opening brief, respondent is simply incorrect. (AOB 280-281.)

Further, even if respondent were correct that Smith's questionnaire responses were conflicting or ambiguous in answering the critical *Witt* inquiry (which was omitted from the questionnaire), conflicting or ambiguous *written* responses simply are not *substantial evidence* that a prospective juror's personal feelings about the death penalty would prevent or substantially impair his ability to serve as a juror by setting aside those feelings and following the law. As discussed in the opening brief but ignored by respondent, while a trial judge is entitled to resolve conflicts and ambiguity in favor of disqualification *following live voir dire* in which it assesses demeanor and credibility (see, e.g., *People v. Heard*, *supra*, 31 Cal.4th at p. 958), conflicts or ambiguity in written responses *alone* does *not* present substantial evidence of disqualification under the *Witt* standard to justify dismissing a juror for cause. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 449, 454; *United States v. Chanthadara*, *supra*, 230 F.3d at p. 1271; compare *People v. Avila*, *supra*, 38 Cal.4th at pp. 530-533 [jurors properly dismissed for cause based on "unambiguous" questionnaire answers leaving "no doubt" that they will "automatically" vote for one penalty over the other or are "unwilling to temporarily set aside [their] . . . own beliefs and follow the law"].)

Respondent similarly contends that the trial court was entitled to resolve the ambiguities and conflicts in prospective jurors Griggs, Fogg, and Harpster's written responses in favor of disqualification. (RB 111; compare AOB 283-290.) For the same reasons, respondent's argument must be rejected. Where, as here, no question in the juror questionnaire "directly address[es] the pertinent constitutional issue" under *Witt* (*People*

v. Stewart, *supra*, 33 Cal.4th at pp. 447, 449-450) or "articulates the proper legal standard under *Witt*," (*United States v. Chanthadara*, *supra*, 230 F.3d at pp. 1271-1272, & fn. 7), a prospective jurors's written responses that are conflicting or ambiguous or incomplete with respect to that issue simply do not provide the trial court with "sufficient information regarding the prospective juror's state of mind to permit a reliable determination" as to the impact of his views on his ability to follow the court's instructions and his oath as a juror. (*People v. Stewart*, *supra*, at p. 445, 447 [prospective juror's ambiguous written responses to jury questionnaire that did not directly pose critical *Witt* question were insufficient to justify his dismissal for cause]; accord, *United States v. Chanthadara*, *supra*, at pp. 1271-1272 [same]; AOB 283-290).

Finally, respondent concedes that if the trial court's dismissal of any one of these prospective jurors was erroneous, Mr. McKinnon's death judgment must be reversed. (RB 112; see *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *Davis v. Georgia* (1976) 429 U.S. 122, 123 (per curium); *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-966.) Accordingly, no further discussion of this issue is necessary. The death judgment must be reversed.

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XII

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRONEOUS ADMISSION OF, AND INSTRUCTIONS ON, OTHER "CRIMINAL ACTIVITY" EVIDENCE UNDER FACTOR (b) VIOLATED STATE LAW, AS WELL AS MR. MCKINNON'S RIGHTS UNDER THE FOURTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

In his opening brief, Mr. McKinnon argued that the trial court committed a series of errors in its penalty phase admission of, and instructions on, other "criminal activity" evidence introduced in aggravation under Penal Code section 190.3, subdivision (b). (AOB 294-359.) The cumulative effect of the errors was prejudicial, violated Mr. McKinnon's state and federal constitutional rights to a fair penalty trial and reliable jury determinations that the death penalty was warranted, and requires reversal of the death judgment. (AOB 346-357.)

Respondent contends that the two claims of instructional error were waived or invited by defense counsel's failure to object to them. (RB 123-124, 131.) In any event, respondent contends, there were no errors or any errors were harmless in isolation. (RB 112-132.) For the same reasons, respondent summarily concludes, there was no error or harm to accumulate. (RB 132.) Respondent's contentions are devoid of merit.

B. The Trial Court Erred in Admitting Evidence That Mr. McKinnon Possessed Bullets and Rock Cocaine During a 1988 Arrest

As discussed in the opening brief, the trial court admitted evidence, over Mr. McKinnon's objections, that on a fall afternoon in 1988, Mr. McKinnon was arrested in a public park while in possession of rock cocaine

and .357 caliber bullets, while Orlando Hunt was arrested in the same park carrying a .357 caliber revolver concealed on his person. (AOB 295.) Although there was no evidence to connect the two men at that time other than their common location in a public park with many other members of the public, the court provided instructions permitting the jurors to find that Mr. McKinnon aided and abetted Hunt's possession of a concealed firearm and to consider that evidence in aggravation under Penal Code section 190.3, subdivision (b) (hereafter "factor (b)"). (AOB 311-312.) The court erred in admitting this evidence, and so instructing the jury, because: 1) the rock cocaine and bullets were the products of an unlawful seizure and search; 2) the evidence did not establish the commission of criminal activity involving force or violence or the threat of force or violence, as required under factor (b); and 3) the court erred in failing to provide complete and accurate instructions on this alleged factor (b) event. (AOB 295-318.)

Respondent disagrees. (RB 113-122.) Respondent is wrong.

1. The Evidence Should Have Been Excluded Because the Search That Produced it Was Unlawful

As Mr. McKinnon argued in the opening brief, the anonymous tip and the police observations at the park were insufficient to create reasonable suspicion that he was involved in criminal activity; therefore his initial detention and the ensuing search of his person were unlawful. (AOB 296-307, citing, inter alia, *Florida v. J.L.* (2000) 529 U.S. 266, 269-270 and *Alabama v. White* (1990) 496 U.S. 325; see also *Terry v. Ohio* (1968) 392 U.S. 1, 30 [detention and frisk for weapons must be supported by reasonable suspicion of criminal activity].) Furthermore, Orlando Hunt's act of dropping a gun, which occurred after Mr. McKinnon's unlawful detention, did not justify Mr. McKinnon's detention after the fact or create

the reasonable suspicion necessary to frisk him for weapons. (AOB 304-307, citing, inter alia, *Florida v. J.L, supra*, at p. 271.) Finally, even if the initial detention and weapons frisk were not unlawful, Officer Shubin's discovery of bullets on Mr. McKinnon's person did not provide probable cause either to arrest him or to conduct the further search of the closed Tupperware container in Mr. McKinnon's pocket, which contained the rock cocaine. (AOB 308-312, citing, inter alia, *Minnesota v. Dickerson* (1993) 508 U.S. 366, 372, and *United States v. Robinson* (1978) 414 U.S. 218, 235-236.)

a. Because the Initial Detention of Mr. McKinnon Was Unlawful, the Subsequent Search Was Unlawful and the Evidence it Produced Should Have Been Excluded

Respondent counters that the police officers' initial detention of Mr. McKinnon was supported by reasonable suspicion that he was involved in criminal activity because: 1) the anonymous tipster's description of a black man with a gun, who was wearing all black and a black cap, in the park was corroborated by Mr. McKinnon's appearance in that clothing at that location; 2) the park was a high crime area "known" for armed drug sales; and 3) the tip was further corroborated when Orlando Hunt dropped a gun in the officers' presence after Mr. McKinnon was detained. (RB 119.) Respondent is incorrect.

What respondent's argument overlooks is that it is the *totality* of the circumstances that determine whether an anonymous tip is sufficiently reliable to create the reasonable suspicion necessary to detain a person. Those circumstances include: 1) indicia of the tipster's own reliability, such as evidence that he or she is known to police, has provided information in

the past, or can otherwise be held accountable for making a false report; 2) indicia of the tip's reliability, such as predictive information or information as to how the tipster purports to come by his or her knowledge, and its leval of detail; and 3) the degree to which the tip is corroborated. (*Florida v. J.L.*, *supra*, 529 U.S. at pp. 270-272; *Alabama v. White*, 496 U.S. at p. 329; accord, e.g., *People v. Dolly* (2007) 40 Cal.4th 458, 463-464; *People v. Jordan* (2004) 121 Cal.App.4th 544, 554, 559-560; *United States v. Brown* (3d Cir. 2006) 448 F.3d 239, 246-250, and authorities cited therein.)

Importantly, respondent does not (and indeed cannot) dispute that there were absolutely no indicia that the tipster was a reliable informant nor were there any indicia that the tip itself was reliable, such as predictive information or information as to how the tipster purported to come by his knowledge that the black man wearing black/Mr. McKinnon had a gun, such as whether it was based on the tipster's personal observation of a gun, the tipster inferred the presence of a gun from the fact that he was a black man in a park "known" for armed drug sales, or whether it was based on the account of some unknown third party. (See, e.g., *Florida v. J.L.*, *supra*, 529 U.S. at pp. 270-271; *Alabama v. White*, *supra*, 496 U.S. at pp. 329-330.) The absence of such indicia is critical because where, as here, "a tip on its own carries few indicia of reliability, *much* corroborating information is necessary to demonstrate reasonable suspicion" under *Florida v. J.L.*, *supra*, 529 U.S. 266 and *Alabama v. White*, *supra*, 496 U.S. 325. (*United States v. Nelson* (3d Cir. 2002) 284 F.3d 472, 480, and authorities cited therein; accord, e.g., *People v. Jordan*, *supra*, 121 Cal.App.4th at pp. 558-562; *People v. Pitts* (2004) 117 Cal.App.4th 881, 885-889; *People v. Saldana* (2002) 101 Cal.App.4th 170, 172-176.)

Contrary to respondent's position, a truly anonymous and bare bones

tip which simply provides "an accurate description of a subject's readily observable location and appearance" does not establish sufficient indicia of reliability to justify a detention. (*Florida v. J.L.*, *supra,* 529 U.S. at pp. 270-272 [anonymous tip that young black man, wearing a plaid shirt and standing at a particular bus stop, was carrying a gun, "corroborated" by defendant's appearance and location was not sufficiently reliable to create the reasonable suspicion necessary to justify defendant's detention].) It makes no difference that a tip "corroborated" by the defendant's location and appearance also alleges that the subject is carrying a weapon. (*Ibid.*)[36] Nor, contrary to respondent's argument, does evidence that the reported crime is in a high crime area, or an area where such crimes are otherwise known or suspected to be commonplace, elevate such a tip into reasonable suspicion. (See, e.g., *People v. Pitts*, *supra*, 117 Cal.App.4th at pp. 885-889 [anonymous tip alleging that defendant, by name, was involved in drug sales, but which otherwise bore little indicia of reliability, combined with

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[36] Accord, e.g., *People v. Jordan*, *supra*, 121 Cal.App.4th at pp. 558-562, cited and discussed with approval in *People v. Dolly*, *supra*, 40 Cal.4th at p. 470, fn. 4, (anonymous tip that a black man in a public park had a concealed gun and was wearing black jacket, white shirt, tan pants, and red boots, was insufficient to justify stop and frisk of defendant, whose location and appearance matched tip); *People v. Pitts*, *supra*, 117 Cal.App.4th at pp. 885-889 ("be on the lookout" bulletin identifying defendant by name based on "untested informant's" allegation that he was involved in the sales of methamphetamine that provided "no particularized information," no predictive information, no basis for the informant's asserted knowledge, was "void of any indicia of reliability" and insufficient to justify investigative detention); *People v. Saldana* (2002) 101 Cal.App.4th at pp. 172-176 (anonymous tip corroborated by description and location was insufficiently reliable to justify detention because it contained no internal indicia of reliability, no predictive information, and no corroboration for criminal element of tip).

defendant's location in area where such drug sales were believed to occur, not sufficient to create reasonable suspicion that defendant was engaged in criminal activity sufficient to justify his detention]; *United States v. Roberson* (3d Cir. 1996) 90 F.3d 75, 79-80 [truly anonymous and "fleshless" tip that a heavy-set black man wearing green pants, a brown leather jacket, and a white hooded sweatshirt was selling drugs on a "hot corner" known for drug sales, which was corroborated by defendant's appearance at that location, insufficient to create reasonable suspicion that defendant was involved in criminal activity].)[37]

Finally, the discovery that Orlando Hunt had a gun concealed on his person did not transform the anonymous tip, or the totality of facts known to the detaining officer, into sufficiently reliable information on which to justify the detention of Mr. McKinnon, as respondent contends. (RB 119.) As respondent recognizes, the officers detained Mr. McKinnon *before* Hunt dropped the weapon. (RB 119; see also 11 RT 1335-1336; 7 SCT 55.) Hence, as Mr. McKinnon argued in the opening brief, the officers' discovery of Hunt's weapon cannot be considered in assessing whether the officers had the requisite reasonable suspicion at the time they detained Mr. McKinnon. (See, e.g, *Florida v. J.L.*, *supra*, 529 U.S. at p. 271; *Johnson v. Campbell* (3d Cir. 2003) 332 F.3d 199, 210 [defendant's conduct after

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[37] While respondent correctly observes that the Supreme Court has held that the fact that a subject is in a "high crime area" is one of the "contextual considerations" relevant to assessing the reasonableness of an officer's suspicion (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124), it is typically limited to "lend meaning to the person's behavior," such as the defendant's flight, as in *Wardlow*, *supra*. (*People v. Limon* (1993) 17 Cal.App.4th 524, 532; see also *People v. Souza* (1994) 9 Cal.4th 224.) Here, of course, the officers observed *nothing* even remotely suspicious about McKinnon's behavior prior to his detention. (See 1 CT 55-56.)

detention was irrelevant to assessing lawfulness of detention]; see also AOB 304-305, and authorities cited therein.)[38]

Thus, when the officers detained Mr. McKinnon, and as respondent acknowledges, the only information they had was a truly anonymous tip "corroborated" by nothing more than Mr. McKinnon's appearance and his location on a fall afternoon in a public park – a place where armed drugs sales were "known" to occur (according to Shubin's report), but also a place in which a broad "spectrum of legitimate human behavior occur[ed] every day . . ." (*People v. Loewen* (1983) 35 Cal.3d 117, 124.) Pursuant to the foregoing authorities, as well as those cited in the opening brief, these facts were woefully insufficient to create a reasonable suspicion that Mr. McKinnon was involved in criminal activity.

Thus, Mr. McKinnon's detention was unlawful. Because the search incident to that detention was tainted by its illegality, the search was equally

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[38] In any event, as discussed in the opening brief, the fact that Hunt, who was wearing a shirt and sitting on a bench in a park where no blue Mercedes was parked, provided scant "corroboration" of the tip's description of a shirtless black man standing near a blue Mercedes with a gun. (AOB 305-306; 1 CT 54-55; 11 RT 1324-1325, 1328-1329.) Furthermore, apart from their mutual presence, along with many other members of the public, in a public park on a fall afternoon, there was no evidence linking Mr. McKinnon to Hunt and certainly not to Hunt's criminal activity. To the contrary, according to the prosecution's own guilt phase evidence and Hunt himself, he and Mr. McKinnon did not even know each other in 1988, when the incident occurred. (AOB 306, citing, inter alia, *People v. Pitts*, *supra*, 117 Cal.App.4th at pp. 885-889 [absent evidence linking them, other parties' suspicious or criminal activities in same location where defendant was observed, and where methamphetamine sales were believed to occur, could not support reasonable suspicion that defendant was engaged in criminal activity, even in combination with anonymous tip that defendant was involved in methamphetamine sales].)

unlawful and cannot be justified by subsequent events. (See, e.g., *Florida v. Royer* (1983) 460 U.S. 491, 507-508 [consent to search given after illegal detention was "tainted by the illegality and was ineffective to justify the search].)

b. Even Assuming Arguendo That the Initial Detention and a Frisk for Weapons Were Lawful, the Seizure and Search of the Closed Tupperware Container with Cocaine Was Not and Therefore That Evidence Should Have Been Excluded

Respondent does not dispute that the search of the Tupperware container exceeded the scope of a *Terry* stop and weapons frisk. (*Terry v. Ohio*, *supra*, 392 U.S. 1, 30; RB 119-120; compare AOB 308-309.) Instead, respondent contends - as the trial court ruled - that the search of the Tupperware container was justified as a search incident to Mr. McKinnon's lawful arrest for aiding and abetting Hunt's gun possession. (RB 120.) In making this argument, respondent builds, then knocks down, a straw man.

That is, according to respondent, Mr. McKinnon's argument is that formal arrest must occur *before* a search incident to that arrest in order to be lawful and, since the search of the Tupperware container in Mr. McKinnon's pocket occurred before his otherwise lawful arrest, the search was unlawful. (RB 120-121.) Respondent counters this putative argument on the ground that a police officer with probable cause to arrest is not required to formally arrest the suspect before searching him incident to that arrest. (RB 120, citing *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111.) But Mr. McKinnon has no quarrel with this legal proposition: "An officer with probable cause to arrest can search incident to the arrest before making the

arrest." (*Rawlings v. Kentucky*, *supra*, at p. 111.) However, as respondent otherwise recognizes, the *probable cause* to arrest must exist before the search incident thereto and that is precisely what was lacking in this case. (RB 120, citing *In re Lennie H.* (2005) 126 Cal.App.4th 1232, 1239-1240.)

As argued in the opening brief, the detaining and searching officers simply had no probable cause to arrest Mr. McKinnon for *anything*, including gun possession, before they searched him and the Tupperware container and discovered the cocaine. (AOB 310-311.) Indeed, Mr. McKinnon was *never* in fact arrested for gun possession; he was arrested for possessing the cocaine found in the challenged search of the Tupperware container. (AOB 309-310.) Since there was no probable cause to arrest Mr. McKinnon before the container was searched and the cocaine discovered, that search cannot be justified as one incident to arrest.

As respondent does not address Mr. McKinnon's actual argument that there was no *probable cause* to arrest him for aiding and abetting Hunt's possession of a concealed firearm (or anything else) before searching the container, no further discussion of this issue is necessary. Even if the *Terry* stop and a frisk for weapons were not unlawful, the subsequent search of the Tupperware container was, and therefore the cocaine evidence should have been excluded.[39]

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[39] Although respondent does not address the evidence supporting or negating probable cause to arrest Mr. McKinnon for aiding and abetting Hunt's possession of a concealed firearm, respondent's introduction to this argument does summarize the evidence presented at the hearing. It is important to correct a misleading impression left by respondent's summary of the hearing evidence. Citing Marshall Palmer's testimony, respondent observes that "when the officers arrived, there was a group of Black males in the park, around a Toyota pickup. . . . Two males were on a bench. (11

(continued...)

2. Possession of the Bullets and Suspected Cocaine Did Not Amount to Criminal Activity Involving Force or Violence or the Threat of Force or Violence and Therefore was Inadmissible

Mr. McKinnon further argued that the evidence should have been excluded on the additional ground that it was insufficient to prove the commission of criminal activity involving force or violence or the threat of force or violence under factor (b). (AOB 312-318.) That is, there was insufficient evidence for the jurors to find beyond a reasonable doubt that Mr. McKinnon had any connection to Hunt on that 1988 afternoon in the

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[39](...continued)
RT 1325.) One of the males, McKinnon, was dressed in black and wore a black watch cap. (11 RT 1325-1326.) As the officer approached the group, another male, Orlando Hunt, turned and started to walk away." (RB 114.) Respondent's implication is clear that Mr. McKinnon and Hunt were together, in one group of men, when Hunt was observed to have dropped the gun.

In the cited portion of the record, Palmer refers to one group of men standing around a red Toyota truck (*not* a blue Mercedes, as described by the anonymous informant) and another group of two men sitting on a bench, but (in typical Palmer fashion) does *not* specify who was in what group *or* the distance between the two groups. (11 RT 1325-1327.) The police report, however, filled in those blanks.

According to the report, it was Hunt, not Mr. McKinnon, who was sitting on the bench with another man. (7 SCT 55, 57.) The police report further specified that the men were not all in the same group; Hunt and the other man were sitting 10 to 15 yards away from the larger group of which Mr. McKinnon was a part. (7 SCT 55.) The distinction is a critical one because – as discussed in the opening brief – there was simply no evidence to connect Mr. McKinnon to Hunt at the time, other than their mutual location in separate groups, along with several other men, in a city park where legal activities commonly occur.

park, much less that he aided and abetted Hunt's concealed possession of a gun. (AOB 314-316.) Nor was Mr. McKinnon's own possession of bullets and drugs a crime involving force or violence or the threat thereof. Finally, even if the evidence were sufficient to show that Mr. McKinnon aided Hunt in possessing a concealed weapon, that criminal conduct, even in combination with drug possession, simply did not involve force or violence, or a threat thereof, as required under factor (b). (AOB 316-318.)

Respondent counters that the trial court was correct in ruling that there was sufficient evidence for the jurors to find beyond a reasonable doubt that Mr. McKinnon aided and abetted his "partner's" (Orlando Hunt's) possession of a gun based upon: 1) the anonymous tip describing two men with guns; 2) Officer Shubin's police report representing that the park was "known" for drug sales in which the dealers' accomplices carried guns and Mr. McKinnon's own possession of $168 and six rocks of suspected cocaine was sufficient to prove that he was dealing drugs; and 3) the .357 caliber bullets in Mr. McKinnon's possession were of the same caliber as the gun in Hunt's possession. (RB 122.)

Among the many problems with respondent's contention is that it relies on evidence that was inadmissible at trial and neither offered nor presented to the jurors to prove the factor (b) allegation. First, respondent relies on the content of the anonymous tip for its truth in contending that it was sufficient for the jurors to find that Mr. McKinnon aided and abetted Hunt's possession of a gun. But the anonymous tip was, of course, hearsay and thus inadmissible for this purpose. (Pen. Code § 1200; see, e.g., *Mason v. Hanks* (7th Cir. 1996) 97 F.3d 887, 896-897 [content of anonymous tip to prove defendant dealing drugs was hearsay and inadmissible].) Similarly, respondent relies on the police report, admitted for the limited purpose of

the suppression hearing, that the public park was "known" for drug sales and that it was further "known" that dealers often had accomplices who were armed. (RB 122; 7 SCT 54.) The police report, prepared by Officer Shubin who was unavailable to testify, was also hearsay to prove the truth of the matter respondent urges. (7 SCT 54; 10 RT 1314.) It was no doubt for these very reasons that the prosecutor did not offer either the content of the tip nor the content of the police report to prove the factor (b) allegation. Hence, contrary to respondent's contention, neither the content of the tip nor of the police report provided a basis for the trial court to conclude that the evidence *presented to the jurors* would be legally sufficient to prove beyond reasonable doubt that Mr. McKinnon aided and abetted Hunt's possession of his gun. (See *People v. Clair* (1992) 2 Cal.4th 629, 672-673 [aggravating evidence offered under factor (b) is admissible only if it can support a finding by a rational trier of fact as to its existence beyond a reasonable doubt]; *People v. Boyd* (1985) 38 Cal.3d 762, 778.)

Furthermore, and as more fully discussed in the opening brief, the trial court's statement that Hunt was Mr. McKinnon's "partner" was simply unsupported by the evidence. Apart from the fact that they were both black men in a public park on an autumn afternoon, along with many other members of the public, there was no evidence to connect them. (AOB 315-316.) Indeed, according to the prosecution's own guilt phase evidence and Orlando Hunt himself, he and Mr. McKinnon *did not even know each other until 1989, one year after the incident in the park.* (13 CT 3600.) Nor, apart from the fact that they were all a very common .357 caliber, was there any evidence linking Mr. McKinnon's bullets to Hunt's gun, such as evidence that Mr. McKinnon's bullets were of the same manufacture as those found in Hunt's gun. (AOB 315-316.)

Thus, the evidence came down to the fact that two black men were in a public park on an autumn afternoon, in separate groups of people and among other members of the public, and one of them had bullets and another had a gun. This evidence fell far short of supporting findings by rational triers of fact, beyond a reasonable doubt, that these men were "partners," much less that Mr. McKinnon aided and abetted Hunt's possession of a concealed weapon.

Even assuming arguendo that the evidence were sufficient to support the aiding and abetting theory, however, it was still insufficient for the jurors to find that Mr. McKinnon's criminal conduct involved force or violence or a threat of force or violence, as required under factor (b). (AOB 316-317, citing, inter alia, *People v. Cox* (2003) 30 Cal.4th 916, 973 [simple weapon possession does not involve force or violence or threat thereof and hence does not qualify under factor (b)], *People v. Jackson* (1996) 13 Cal.4th 1164, 1235 [same], *People v. Boyde* (1988) 46 Cal.3d 212, 249 [illegal drug possession does not qualify under factor (b)].) In this regard, respondent does not dispute that (vicarious) simple weapon possession, simple drug possession, or the combination of the two, does not qualify as factor (b) evidence. (See RB 121-122; AOB 316-318.)

Instead, respondent contends that possession of drugs *for sale* combined with weapon possession does qualify as criminal activity involving an implied threat of force or violence. (RB 121-122.) Here, according to respondent, from the evidence that Mr. McKinnon possessed six rocks of suspected crack cocaine, along with $168 and some bullets, the jurors could find beyond a reasonable doubt that he was selling crack while aiding and abetting Orlando Hunt's possession of a gun. Even assuming the correctness of respondent's legal theory that aiding another person's

possession of a concealed gun while selling drugs qualifies under factor (b), the facts presented here do not support it.

Respondent's theory that the evidence was sufficient to prove that Mr. McKinnon was selling drugs, which elevated his conduct into an implied threat of force or violence which was admissible under factor (b), is raised for the first time on appeal. The prosecutor did not advance this theory at trial nor did the court admit the evidence under such a theory. To the contrary, the prosecutor urged only that Mr. McKinnon's (alleged) vicarious gun possession and simple drug possession in and of itself qualified under factor (b): "it was gun with drugs, which is now considered to be a violent felony" under factor (b). (10 RT 1314; see also 10 RT 1317 ["guns and drugs is now considered . . . to be threat of violence" under factor (b)].) Furthermore, the trial court granted the prosecutor's request to provide instructions on its theory that this 1988 event qualified as a factor (b) offense with instructions on the elements of aiding and abetting and Penal Code section 12025 (carrying concealed firearm). (12 RT 1450-1452.) The prosecutor neither requested, nor did the court provide, instructions on possession of drugs for sale. To the contrary, the court specifically ruled that "the *only* criminal act" the evidence supported was aiding and abetting a violation of Penal Code section 12025. (12 RT 1450-1451, italics added.)[40]

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[40] Indeed, since – under respondent's theory – the jurors had to find that Mr. McKinnon possessed the drugs for sale in order to consider this 1988 event under factor (b), and the court otherwise instructed the jury on the elements of the crimes potentially established by the 1988 incident, it would necessarily follow that the court erred in failing to instruct on the elements of possession of crack cocaine for sale. (See, e.g., *People v. Prieto* (continued...)

Indeed, the evidence before the court (both as offered and ultimately admitted) was insufficient for the jurors to find beyond a reasonable doubt that Mr. McKinnon possessed crack cocaine for sale and, thus, insufficient for the jurors to find that Mr. McKinnon was engaged in criminal activity involving force or violence under respondent's theory. There were no indicia of sales, such as individually packaged cocaine, obvious pay/owe sheets, or unusually large quantities of either drugs or money. (See, e.g., *People v. McAlister* (1990) 225 Cal.App.3d 941, 946 ["usual indicia of drug sales" are "significant quantities of contraband, cash, diluting agents, or packaging"].) There was no expert testimony offered or presented that Mr. McKinnon's possession of six rocks of cocaine – totaling only 1.3 grams (7 SCT 47, 50) – was consistent with sales and not possession for personal use. (Compare *People v. Peck* (1996) 52 Cal.App.4th 351, 356-357 [expert testimony that possession of 40 pounds of marijuana is consistent with sales and inconsistent for personal use sufficient to prove possesssion for sales].) Absent such evidence, the mere possession of a small amounts of crack (6 rocks in 1.3 grams) and money (only $168) was insufficient to prove that the possession was for sales and not personal use. (See, e.g., *People v. Glass* (1975) 44 Cal.App.3d 772, 775-776 [defendant's possession of several loose tablets of amphetamine, along with plastic vial and baggie containing 15.8 more grams of amphetamine, insufficient to prove possession with intent to sale based on quantity and packaging].)

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[40](...continued)
(2003) 30 Cal.4th 226, 268, and authorities cited therein [while court under no sua sponte duty to provide instructions on elements of factor (b) offenses, once it does so, the instructions must be accurate and complete].)

In sum, the court neither found that the 1988 episode in the park qualified under factor (b) because Mr. McKinnon possessed cocaine for sale while aiding and abetting Orlando Hunt's possession of a concealed gun nor was there sufficient evidence for the jurors to make such findings beyond a reasonable doubt. For all of the foregoing reasons, the court erred in admitting the 1988 episode in the park and instructing the jurors that they could consider it in aggravation under factor (b).

3. Even If the Evidence Were Legally Sufficient to Support Findings That Mr. Mckinnon Aided and Abetted Hunt's Gun Possession, and Even If That Conduct Did Qualify under Factor (B), the Court Erred in Failing to Provide Complete and Accurate Instructions on the Aiding and Abetting Theory of Liability

Finally with respect to this evidence, the prosecution's theories that Mr. McKinnon aided and abetted Hunt's possession of the gun, and that this gun possession involved a threat of force or violence, rested on circumstantial evidence. Hence, Mr. McKinnon argued in the opening brief, since the trial court otherwise instructed on the elements of Penal Code section 12025 (carrying concealed firearm on the person) and aiding and abetting, the court erred in failing further to provide the jurors with a circumstantial evidence instruction. (AOB 318-320, citing, inter alia, *People v. Prieto* (2003) 30 Cal.4th 226, 268 [while court under no sua sponte duty to provide instructions on elements of factor (b) offenses, once it does so, the instructions must be accurate and complete], *People v. Cummings* (1993) 4 Cal.4th 1233, 1337 [same], and *People v. Wiley* (1976) 18 Cal.3d 162, 174 [where circumstantial evidence is substantially relied upon as proof of guilt, the trial court is under a sua sponte obligation to instruct the jurors on the legal principles controlling their consideration of

such evidence].)

Citing this Court's decision in *People v. Dunkle* (2006) 36 Cal.4th 861, respondent first contends that by failing to request CALJIC No. 2.01 (the pattern circumstantial evidence instruction), Mr. McKinnon invited or waived the error. (RB 123.) Respondent is wrong.

In *Dunkle*, the defendant actually *objected* to the giving of CALJIC No. 2.01 and 2.02 at the penalty phase and *requested* instructions on the elements of the offered factor (b) offenses. (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 927.) Under these circumstances, this Court held the defendant to his trial objection to CALJIC Nos. 2.01 and 2.02, which waived or forfeited his right to challenge their omission on appeal. (*Ibid.*) The facts of this case are the mirror opposite: defense counsel did not object to CALJIC No. 2.01, but simply failed to request it, and defense counsel did not request instructions on the elements of this alleged factor (b) event, but actually *objected* to them. (12 RT 1450-1452.) Obviously, *Dunkle* is inapposite.

To the contrary because the trial court overruled defense counsel's objections and *did* provide instruetions on the elements of section 12025 and aiding and abetting, it was under a sua sponte obligation to provide complete and accurate instructions on this factor (b) event. (See, e.g., *People v. Prieto*, *supra*, 30 Cal.4th at p. 268, and authorities cited therein.) An instruction on circumstantial evidence was just such an instruction.

Again relying on *People v. Dunkle*, *supra*, 36 Cal.4th 861, respondent disagrees. (RB 124.) According to respondent, *Dunkle* stands for the proposition that a trial court's duty to give a circumstantial evidence instruction regarding factor (b) evidence depends on whether *all* of the prosecution's evidence in support of *all* of its offered factor (b) offenses,

and not simply the evidence offered to support one factor (b) offense, is primarily circumstantial rather than direct. (RB 124.) Here, respondent contends, the prosecution's *other* factor (b) offenses were based on direct, not circumstantial, evidence and therefore the court was under no obligation to provide a circumstantial evidence instruction. (RB 124-125.) Once again, respondent misreads *Dunkle*.

Respondent is correct in only one observation: in *Dunkle*, the Court did consider all of the prosecutor's evidence supporting all of the offered factor (b) offenses in determining whether the trial court was required to provide circumstantial evidence instructions. (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 928.) However, the Court did so only in response to the defendant's argument that the instructions were necessary and required as to *all* of the offenses because *all* of the prosecution's proof of the mental state elements of all of the offered factor (b) offenses rested on circumstantial evidence. (*Id.* at pp. 927-928.) And, contrary to respondent's reading, this Court did not ultimately hold that the trial court had no duty to provide circumstantial evidence instructions because the factor (b) evidence was primarily direct, rather than circumstantial. Instead, this Court held that the circumstantial evidence instructions were not required because, even if the mental state elements of the factor (b) offenses rested on circumstantial evidence, that evidence was *not* equally consistent with rational findings of innocence. (*Ibid.*)

Here, the evidence supporting the prosecution's allegation that Mr. McKinnon aided and abetted Hunt's violation of Penal Code section 12025, which was a crime involving a threat of force or violence and thus should be considered in aggravation under factor (b), rested on circumstantial evidence – Mr. McKinnon's possession of bullets while in the same park as

Hunt, who possessed a gun. Respondent does not contend otherwise. Further, this circumstantial evidence was (at the very least) "equally consistent" with a rational finding of Mr. McKinnon's innocence, as discussed at length in the opening brief and above. (See AOB 319-320.)

Respondent further contends the court was under no sua sponte duty to give a circumstantial evidence instruction, like CALJIC 2.01, because it is a pinpoint instruction that must be requested by the defense. (RB 125.) Respondent presents no authority or argument in support of its novel proposition that CALJIC No. 2.01 is a pinpoint instruction. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 793 [court may pass without consideration "argument" made without citation to supporting authority].) This is undoubtedly because CALJIC No. 2.01 is not a pinpoint instruction. (See, e.g., *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [a pinpoint instruction is one that "relate[s] particular facts to a legal issue in the case or 'pinpoint' the crux of defendant's case"].) It is an instruction on a general principle law that the trial court must give sua sponte once it otherwise endeavors to instruct on the elements of an offered factor (b) offense. The trial court here erred in failing to do so.

Finally, respondent contends that any error in admitting this evidence and instructing the jurors that they could consider it in aggravation under factor (b) was harmless by itself because the prosecutor presented other aggravating evidence and Mr. McKinnon was convicted of both of the charged murders. (RB 122-123.) Of course, Mr. McKinnon's position is that *the cumulative* effect of this error, along with the court's other errors in admitting, and instructing the jurors on, the prosecution's other aggravating evidence, was prejudicial. (AOB 346-358.) Hence, the state's contention that this error was harmless in light of the prosecution's other aggravating

evidence amounts to a nonresponse. Accordingly, no further discussion of this issue is necessary.

C. The Trial Court Erred in Admitting Evidence That Mr. McKinnon Broke His Television Set and Later Made a Statement to Police That Could Be Construed as an Implied Threat Against His Sister Because Those Acts Did Not Qualify as Criminal Activity Involving Force or Violence under Factor (b)

Mr. McKinnon further argued that the trial court erred in admitting, and permitting the jurors to consider in aggravation, evidence that, at least half an hour after a disagreement with his sister that became physical, he broke a television set and, much later, made an ambiguous statement to police at the police station which the prosecutor characterized as a threat against his sister. (AOB 320-323.) Because the damage to property did not qualify as force or violence against a person, the later threat was not criminal, and neither act was necessary to give context to the much earlier altercation between Mr. McKinnon and his sister, the evidence was inadmissible under factor (b). (AOB 320-323, citing, inter alia, *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1015 [damage to property does not involve force or violence within meaning of factor (b)], *People v. Stanley* (1995) 10 Cal.4th 764, 823-825 [same], and *People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 569 [threat that does not violate specific penal statute is not "criminal" activity under factor (b)].)

Respondent counters that this Court has held that such evidence is admissible in order to give context to otherwise admissible factor (b) evidence in *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013. (RB 126-127.) *Kirkpatrick* is distinguishable.

In *People v. Kirkpatrick*, *supra*, 7 Cal.4th 998, the prosecution presented evidence that in one telephone conversation, the defendant

threatened to harm a witness's daughter and her dogs. (*Id.* at pp. 1002, 1013-1014.) Thereafter, the witness came home to find her dogs paralyzed. The defendant made another telephone call in which he told the witness that he had "taken care" of her dogs and that she had better watch out for her daughter. (*Id.* at p. 1002.) The defendant conceded that his threats against the daughter were admissible under factor (b), but argued that the evidence that he threatened to, and did, poison the witness's dogs was not. (*Id.* at pp. 1013-1014.) This Court disagreed. The defendant had threatened the dogs and daughter in the same breath and the fact that he made good on one of those threats and admitted as much while simultaneously threatening her daughter again certainly demonstrated the gravity of his threats against the daughter. Thus, this Court quite correctly held that the evidence was not severable but rather gave meaning and context to the properly admitted threats against the daughter. (*Ibid.*)

Here, in contrast, Mr. McKinnon's damage to the television and his alleged, ambiguous "threat" occurred well after his disagreement with (and alleged battery of) his sister (compare *People v. Kipp* (2001) 26 Cal.4th 1100, 1133-1134 [non-criminal "threats made while in custody *immediately after* an otherwise admissible violent incident are themselves admissible under factor (b)"]) and did nothing to give context to the earlier incident, such as explaining it or demonstrating its gravity. (See AOB 320-323.) For these, as well as all of the other reasons discussed in the opening brief, the trial court erred in admitting this evidence.

Finally, respondent contends that this error was harmless in isolation because the jurors heard other aggravating evidence and the "charged crimes were particularly heinous." (RB 127-128.) Once again, this is no response to Mr. McKinnon's claim of cumulative prejudice arising from

this and the other errors underlying admission of virtually all of the aggravating evidence in this case. (AOB 349-358.) Hence, an extended reply is unnecessary.

However, it is important to point out that even in the limited context of assessing the harm from the admission of this evidence alone, respondent's view of the record is misleadingly myopic. In contending that the admission of the evidence was harmless because it merely gave "context to" the alleged battery on Robin, respondent ignores that the prosecutor did not limit his use of the evidence to give "context to" that episode. To the contrary, and as discussed in the opening brief, he encouraged the jurors to consider the battery, the later property damage, and the still later "threat" at the police station as three "*separate* aggravating factors . . . ." (13 RT 1629, italics added; see AOB 321, 355-357, citing, inter alia, *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [prosecutor's reliance in summation on erroneously admitted aggravating evidence critical factor in finding error prejudicial] and *People v. Hernandez*, *supra*, 30 Cal.4th at p. 877 [same].)

D. The Trial Court Erred in Admitting Evidence of a Disagreement in a High School Cafeteria When Mr. McKinnon Was a Teenager

Mr. McKinnon further argued that the trial court erred in admitting, and permitting the jurors to consider in aggravation, a disagreement Mr. McKinnon had with a cashier in his high school cafeteria when he was 17 years old. (AOB 324-339.) First, while the prosecutor offered the incident as a robbery, the evidence was insufficient to prove a robbery, as the trial court later recognized in characterizing the incident as merely a "quasi-robbery." (AOB 324-327.) Second, while Mr. McKinnon's act, when he was a teenager, of putting his hands on a teacher as he exited the cafeteria may have amounted to a technical battery, absent any evidence that the act

caused, threatened to cause, or was likely to cause bodily harm or death, this "trivial incident[]" of "ill temper" typical of teenagers simply did not involve the degree of force or violence required to qualify either under factor (b) or under the state and federal Constitutions as a factor that should "influence a life or death decision." (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 774, 776; AOB 326-339.) Hence, its admission as aggravating evidence violated state law and Mr. McKinnon's Eighth and Fourteenth Amendment rights. (AOB 326-339.)

Significantly, respondent does *not* dispute that if the evidence were insufficient to prove a robbery, the technical battery Mr. McKinnon committed as a teenager was inadmissible under both factor (b) and the federal Constitution. (See RB 128-130.) This Court should treat this as a concession.

Instead, respondent contends *only* that the evidence was properly admitted under factor (b) because it was sufficient to prove robbery. (RB 129-130.) Respondent concedes that Mr. "McKinnon did not use force to take the box" (RB 129) from the cashier, Ms. Miranda, who had told him to "go ahead" and take in the heat of their verbal disagreement (11 RT 1366). Nevertheless, citing Ms. Miranda's testimony at pages 1365 and 1366 of the reporter's transcript, respondent contends that the evidence supported a so-called "*Estes* robbery" because Mr. McKinnon used force against the teacher when he pushed her aside, exited the cafeteria, and escaped with the box. (RB 129-130, *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28 [theft becomes robbery if perpetrator gains possession of property without use of force or fear but subsequently carries it away through the use of force or fear].) Once again, the record does not support respondent's characterization of the facts.

In the cited portion of the record, Ms. Miranda did testify that Mr. McKinnon took the money box from the table in front of her and that when the teacher confronted him at the exit to the cafeteria, "he shoved her [the teacher], her back was toward me, he did shove her *and took the money from her*, the box." (11 RT 1366, italics added.) Obviously, Ms. Miranda misspoke; either Mr. McKinnon took the money box from the table or from the teacher.

Indeed, although respondent ignores it, Ms. Miranda clarified the matter when she later testified that Mr. McKinnon took the box from the table and, after walking away with it and reaching the exit, the teacher "*recovered the box.*" (11 RT 1369, italics added.) Respondent also ignores that the prosecution presented the additional testimony of the juvenile probation officer to whom the incident was reported to the effect that after Mr. McKinnon took the box and encountered the teacher at the exit, the teacher took the box. (12 RT 1477.) Thus, evidence did *not* show that Mr. McKinnon carried the box away through the use of force or fear. (Compare *People v. Estes*, *supra*, 147 Cal.App.3d at p. 27 [store security guard confronted defendant in parking lot after seeing him shoplift merchandise; rather than surrendering merchandise, the defendant pulled a knife, swung it at the guard, and threatened to kill him, upon which the guard retreated and the defendant carried the merchandise away]; *People v. Gomez* (2008) 43 Cal.4th 249, 253, 265 [elements of robbery satisfied where defendant broke into restaurant, took property, and as he carried it away, manager arrived on scene and followed defendant, whereupon defendant fired shots at manager and escaped with the loot].)

"In order to support a robbery conviction, the taking, either the gaining possession or the carrying away, must be accomplished by force of

fear." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [citing *Estes, supra*]; accord, *People v. Gomez*, *supra*, 43 Cal.4th at p. 257.) Here, while the "taking" element of robbery was met when Mr. McKinnon removed the cashbox from Ms. Miranda's presence, it was not accomplished by force or fear; and while force or fear was present when the teacher confronted Mr. McKinnon, it was not used to take or carry away the box. For these and all of the other reasons discussed in the opening brief, there was no robbery, just as the trial court recognized. Mr. McKinnon otherwise considers this issue to be fully joined by the briefs on file with this Court. (AOB 324-327.)

Finally, as noted above, respondent does not dispute that, if the evidence were insufficient to prove a robbery and only sufficient to prove a battery, the battery here did not involve the degree of force or violence required to qualify under factor (b) or as constitutionally relevant evidence sufficient to influence the life and death decision under the state and federal constitutions. (AOB 326-339.) Hence, no further discussion of this issue is necessary. The trial court violated state law, as well as Mr. McKinnon's Eighth and Fourteenth Amendment rights, in admitting, and permitting the jurors to consider, this evidence in aggravation and thus add weight to death's side of the scale.[41]

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[41] Once again, respondent briefly contends – without any supporting discussion of the mitigating evidence or the other indicia of the closeness of the penalty phase case – that this error, standing alone, was harmless given that Mr. McKinnon was convicted of both murders. (RB 130.) As previously discussed, this is a non-response to Mr. McKinnon's argument, based on the entire record, that the cumulative effect of the errors was prejudicial and violated his state and federal constitutional rights. (AOB 349-358.)

E. The Trial Court Erred in Omitting the Essential Knowledge Element from its Instruction on Penal Code Section 4502, as Well as an Instruction on Circumstantial Evidence

As discussed in the opening brief, the trial court also admitted evidence that a "shank" was found in Mr. McKinnon's jail cell under factor (b). Mr. McKinnon's knowledge of the shank's presence in that cell was a close and disputed issue. While the court purported to instruct the jurors on all of the elements of Penal Code section 4502 (possession of sharp instrument in a penal institution), it erred in omitting the essential, contested knowledge element from the instruction. (AOB 339-346.)

Respondent does not dispute that the provided instruction was incomplete and erroneous in that it omitted the element of knowledge. (RB 130-131.) Nevertheless, rather than concede this obvious and indisputable instructional error, respondent disputes it, but does so on authority that has no application here while ignoring controlling authority. That is, according to respondent, while the instruction was incomplete and erroneous, Mr. McKinnon cannot challenge that error on appeal because trial courts have no sua sponte duty to instruct on the elements of offenses offered under factor (b). (RB 131, citing, inter alia, *People v. Barnett* (1988) 17 Cal.4th 1044, 1175.)

However, as clearly set forth in the opening brief, it is well settled that "though there is no sua sponte duty at the penalty phase to instruct on the elements of 'other crimes' introduced in aggravation (citation), *when such instructions are given, they should be accurate and complete*." (*People v. Montiel* (1993) 5 Cal.4th 877, 942, italics added; accord, *People v. Lancaster* (2007) 41 Cal.4th 50, 94, fn. 18; *People v. Prieto* (2003) 30 Cal.4th 226, 268; *People v. Cummings* (1993) 4 Cal.4th 1233, 1337; *People*

v. Malone (1988) 47 Cal.3d 1, 49.) Although Mr. McKinnon cited this authority in the opening brief (AOB 340-343), respondent has inexplicably chosen to ignore it. Once again, respondent's decision to play ostrich to the controlling precedents of this Court does not make them go away. The court erred in omitting the essential knowledge element from its instruction on the elements of Penal Code section 4502.

Mr. McKinnon further argued in the opening brief that because the court did instruct on Penal Code section 4502 and the knowledge element rested entirely on circumstantial evidence, the court also erred in failing to provide the jurors with a circumstantial evidence instruction. (AOB 342-343.) Respondent briefly acknowledges this argument (RB 130), but makes no attempt to dispute or otherwise address it. (See RB 130-132.) The Court should treat this as a concession.

Finally, given the closeness of the evidence that Mr. McKinnon was aware of the instrument's presence in the hidden niche in the ceiling of the cell he occupied, he further argued that respondent could not prove beyond a reasonable doubt that the jurors would have found the knowledge element had they been instructed to do so. (AOB 344-346, citing, inter alia, *People v. Malone*, *supra*, 47 Cal.3d at pp. 49-50 [harmless beyond a reasonable doubt standard applies to instructional error omitting element of other crime offered in aggravation] and, in accord, *People v. Prieto*, *supra*, 30 Cal.4th at p. 268.) While respondent does contend that the error was harmless by itself because it was the "cold-blooded nature and senseless violence of the Coder and Martin murders that sealed Mr. McKinnon's fate," not the shank evidence, respondent does *not* contend that the jurors would have found the knowledge element had been proven beyond a reasonable doubt had they received appropriate instructions. (RB 131-132.) The Court should treat

this as a concession that the jurors *did* erroneously consider Mr. McKinnon's possession of a shank while in jail in aggravation, thus adding weight to death's side of the scale, and that they would *not* have considered it in the absence of the error. (AOB 346.)

F. The Cumulative Effect of the Errors Was Prejudicial, Violated McKinnon's Eighth and Fourteenth Amendment Rights to a Fair Penalty Trial and a Reliable Death Verdict, and Requires Reversal of the Death Judgment

As noted in the previous sections, although Mr. McKinnon's claim is that the cumulative effect of the foregoing errors, or any combination thereof, was prejudicial and violated his rights to a fair trial and reliable penalty verdict (AOB 34-358, citing, inter alia, *People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244), respondent inexplicably contends that each of the foregoing errors was harmless standing alone. (RB 122-123, 127-128, 130, 132.) The state's only response to Mr. McKinnon's claim of cumulative prejudice is found in two sentences: "As discussed above, some of the alleged errors were waived, all are individually meritless, and all are individually harmless. Thus, there is no error to accumulate." (RB 132.)

While this summary conclusion offers little in the way of a meaningful response to Mr. McKinnon's claim of cumulative prejudice, it is clear from respondent's argument as a whole that its position is that *none* of the aggravating evidence made any difference given the circumstances of the crimes. (RB 122-123, 127-128, 130, 132.) In other words, under respondent's reasoning, even if all of the aggravating factor (b) evidence had been erroneously admitted or considered, as Mr. McKinnon argues, it is not reasonably possible that the penalty verdict would have been different because it was the "cold-blooded nature and senseless violence of the Coder and Martin murders [i.e., the circumstances of the crimes] that sealed Mr.

McKinnon's fate," not any of the other aggravating evidence. (RB 132.)

As a preliminary matter, respondent's repeated assertions that the individual errors were harmless because it is not "reasonably *probable*" that the jurors would have returned a different verdict in their absence (RB 128, 130, 132) rests on an incorrect standard of review. "The test for state law error in the penalty phase of a capital trial is whether there is a reasonable *possibility* the error affected the verdict." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961, citing *People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448, italics in original.) This test is not only "more exacting" than the "reasonable probability" standard on which respondent relies (*People v. Brown*, *supra*, at p. 447); it is "the same in substance and effect" as the harmless beyond a reasonable doubt standard applied to violations of the federal constitution. (*People v. Gonzalez*, *supra*, at p. 961, quoting from *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

Otherwise, respondent's contentions of harmless error ignore far too much. In insisting that any and all penalty phase errors were harmless given the circumstances of the crimes, respondent does not address the mitigating evidence *at all* other than to briefly acknowledge in a single sentence that it "painted McKinnon in a somewhat sympathetic light and disclosed his violent childhood . . . ." (RB 132.) But as discussed in the opening brief, the "graphic description of [Mr. McKinnon's] childhood, filled with abuse and privation" was, as the United States Supreme Court and this Court have recognized, strong, compelling mitigating evidence. (*Williams v. Taylor* (2000) 529 U.S. 363, 397-398; accord, e.g., *In re Lucas* (2004) 33 Cal.4th 682, 734; AOB 346-349.)

Similarly, respondent ignores the substantial mitigating weight of the lingering doubts over Mr. McKinnon's guilt of both offenses, which any

rational jurors would have had and which the record of the guilt phase deliberations shows that *these* jurors surely did have. (AOB 349, 350, citing, inter alia, *Tarver v. Hopper* (11th Cir. 1999) 169 F.3d 710, 715-716 [lingering doubt has "'powerful mitigating'" effect, as demonstrated by results of comprehensive studies].) Indeed, in recently reaffirming the continued viability of a lingering doubt defense under California law, this Court recognized the "particular potency" of that defense where, as here, there is "an absence of physical evidence linking defendant to the shooting[s] and . . . inconsistent [accounts] given by the prosecution's []witnesses." (*People v. Gay* (2008) 42 Cal.4th 1195, 1226.)

Thus, respondent's contentions of harmless penalty phase errors which rely solely on its conclusory statements regarding the circumstances of the charged crimes and almost completely ignore the mitigating evidence are of little, if any, assistance to the Court in assessing the impact of the errors. As the United States Supreme Court has recently recognized in this regard, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side . . . ." (*Holmes v. South Carolina* 547 U.S. 319, 331.)

Furthermore, respondent's assertion that the circumstances of the crimes – the shooting deaths of two men – were alone so aggravating that they made the death verdict a foregone conclusion and rendered harmless any error in admitting additional aggravating evidence is a gross overstatement of the evidence and an equally gross oversimplification of the penalty decision the jurors were called upon to make. (AOB 350-354, and

authorities cited therein;[42] see also *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [death verdict not foregone conclusion despite aggravating evidence regarding defendant's series of prior robberies and arson, which were "unusually – and unnecessarily – brutal and cruel," "scant evidence" in mitigation, and defendant convicted of charged crime of murdering peace officer in performance of his duties]; *Lambright v. Schriro* (9th Cir. 2007) 490 F.3d 1103, 1125-1128, and authorities cited therein, cert. denied by *Shriro v. Lambright* (2008) ___ U.S. _, 128 S.Ct. 882 ["we have held consistently that even in cases involving particularly heinous murders, a defendant can be prejudiced" by the erroneous admission or exclusion of penalty phase evidence].)

Similarly, respondent's attempt to minimize the importance of the erroneously admitted or considered aggravating evidence on appeal is a

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[42] E.g., *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1081 (aggravating evidence was "scant" where based on circumstances of underlying crimes – two first degree murders and assault with deadly weapon on third person in two separate incidents – along with prior felony burglary conviction and prior violent assault in which defendant fired gun); *People v. Sturm*, *supra*, 37 Cal.4th at p, 1244 (despite fact defendant murdered three friends, after he bound them and even as they "cried or begged for mercy," in order to rob store in which they worked, "a death sentence in this case was by no means a foregone conclusion"; reversing for cumulative penalty phase error); *People v. Hernandez*, *supra*, 30 Cal.4th at pp. 851-853, 877 (penalty phase errors going to "most important aggravating evidence" under factor (b) required reversal where aggravation was based on circumstances of underlying murder for financial gain, along with prior conviction for robbery in which defendant used and fired a weapon at one of the victims and another prior conviction for burglary and mitigation included evidence of positive childhood and drug addiction); see also *Brown v. Sanders* (2006) 546 U.S. ___ , 126 S.Ct. 884, 892 (recognizing unfair prejudice resulting from admission of evidence that jury would not otherwise have heard in the penalty weighing process).

stark about-face from its position at trial. (AOB 355-357, citing, inter alia, *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [prosecutor's reliance in summation on erroneously admitted aggravating evidence critical factor in finding error prejudicial] and *People v. Hernandez, supra*, 30 Cal.4th at p. 877 [same].) Indeed, the error-tainted evidence not only figured prominently in the prosecutor's penalty phase summation (AOB 356-357); the prosecutor told the jurors to give it even more aggravating weight than that to which it was entitled. (AOB 356-357, citing, inter alia 13 RT 1628-1629 [prosecutor incorrectly telling jurors that they could consider circumstances surrounding alleged battery upon Robin as four "separate aggravating factors"].) The prosecutor intended to have the aggravating evidence he presented and emphasized in his summation to have an effect on the jurors. Given their death verdict in the face of paper thin guilt phase evidence and powerful penalty phase mitigation, there is no doubt that it did.

As the state's response again so compellingly demonstrates, it is beyond any rational or meaningful dispute that the cumulative effect of the penalty phase errors was prejudicial and violated Mr. McKinnon's state and federal constitutional rights to a fair penalty trial and a reliable penalty verdict. For these and all of the other reasons set forth in the opening brief, the death judgment must be reversed.

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XIII

THE CUMULATIVE EFFECT OF ANY OR ALL OF THE GUILT AND PENALTY PHASE ERRORS REQUIRES REVERSAL OF THE DEATH VERDICT

Mr. McKinnon further argued that the cumulative effect of any or all of the guilt and penalty phase errors was prejudicial, violated his state and federal constitutional rights to a fair penalty trial and a reliable penalty verdict, and demands reversal of the death judgment. (AOB 357-365.)

Respondent simply repeats its baseless contentions that there was neither cumulative error nor cumulative prejudice because the claimed errors were forfeited, there were no errors, or any errors were individually harmless. (RB 132-133.) Respondent does not address, or make any effort to refute, Mr. McKinnon's arguments that the guilt phase errors had a profound impact on the penalty deliberations by, for instance, diminishing what should otherwise have been a powerful lingering doubt penalty defense (AOB 360-361), depriving Mr. McKinnon of an essential tool (Investigator Buchanan's memo – Argument III) with which to rebut the prosecutor's penalty phase argument that the jurors should consider *as separate and additional aggravating factors* Mr. McKinnon's supposed possession of a gun when he was arrested with Kim Gamble and later allowing Ms. Gamble to take the fall by pleading guilty to gun possession (AOB 362-363 & fn. 59, citing, inter alia, *Simmons v. South Carolina* (1994) 512 U.S. 154, 161-163), and by putting before the jurors highly inflammatory gang membership evidence (Arguments IV) that would otherwise have been inadmissible at the penalty phase – evidence that the prosecutor emphasized in aggravation during his penalty phase summation and evidence which the trial court later found in aggravation in denying Mr. McKinnon's motion to modify the death verdict (AOB 363-364).

Indeed, with respect to the impact of the guilt phase errors on the penalty phase lingering doubt defense, this Court has recently acknowledged (as noted above) the "particular potency" a lingering doubt defense may have at the penalty phase where, as here, there is "an absence of physical evidence linking defendant to the shooting[s] and . . . inconsistent [accounts] given by the prosecution's []witnesses." (*People v. Gay* (2008) 42 Cal.4th 1195, 1226.) In *Gay*, *supra*, this Court held that errors which undercut the defendant's lingering doubt defense were prejudicial and demanded reversal of the death judgment despite the existence of "significant" aggravating evidence regarding the defendant's series of prior robberies and arson, which were "unusually – and unnecessarily – brutal and cruel," "scant evidence" in mitigation, and the defendant's current conviction for murdering a peace officer in the performance of his duties. (*Id.* at p. 1227.) In light of *Gay*, respondent's repeated assertions that the death verdict was a foregone conclusion in this case, and hence any and all errors were harmless, ring hollow.

Given the absence of any meaningful response from the state, no further reply is necessary. For all of the reasons discussed above and in the opening brief, but ignored by respondent, the cumulative effect of the guilt and penalty errors in this astonishingly close case was prejudicial, deprived Mr. McKinnon of a fair and reliable penalty verdict, and demands reversal of the death judgment.

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XIV

THE SPECIAL CIRCUMSTANCE OF MULTIPLE-MURDER FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY, VIOLATES THE EIGHTH AMENDMENT, AND MUST BE STRICKEN

In his opening brief, Mr. McKinnon argued that the sole special circumstance alleged and found true in this case under Penal Code section 190.2, subdivision (a)(3), the so-called "multiple murder" special circumstance, violates the Eighth Amendment and must be stricken. (AOB 366-370, and authorities cited therein.) He acknowledged that this Court has rejected similar claims, but asked that it reconsider those decisions. (*Ibid.*)

Respondent simply cites one of the same decisions and asserts without argument that it does not warrant reconsideration. (RB 133-134.) Accordingly, no further discussion of this issue is necessary. For all of the reasons set forth in the opening brief, the multiple murder special circumstance must be stricken.

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XV

THE TRIAL COURT'S REFUSAL TO CONDUCT INDIVIDUAL SEQUESTERED DEATH QUALIFICATION VOIR DIRE, AND ITS UNREASONABLE AND UNEQUAL APPLICATION OF CALIFORNIA LAW GOVERNING JUROR VOIR DIRE, VIOLATED MR. MCKINNON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND HIS STATUTORY RIGHT UNDER CODE OF CIVIL PROCEDURE SECTION 223 TO INDIVIDUAL VOIR DIRE WHERE GROUP VOIR DIRE IS NOT PRACTICABLE

In his opening brief, Mr. McKinnon argued that the trial court prejudicially erred in denying his request for individual, sequestered voir dire. (AOB 371-378.) Respondent disagrees. (RB 134-140.)

Mr. McKinnon considers this issue to be fully joined by the briefs on file with this Court. Accordingly no further discussion of it will be made. The court's refusal to conduct individual, sequestered voir dire violated state law, Mr. McKinnon's constitutional rights to due process, an impartial jury, effective assistance of counsel, and reliable penalty determinations, and requires reversal of the death judgment.

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XVI

THE COURT'S REFUSAL TO LIMIT THE VICTIM IMPACT EVIDENCE, AND ITS REFUSAL TO PROVIDE A SPECIAL INSTRUCTION REGARDING THE APPROPRIATE CONSIDERATION OF THAT EVIDENCE, VIOLATED MR. MCKINNON'S RIGHTS TO A FAIR AND RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

In his opening brief, Mr. McKinnon argued that the trial court erred in denying his motion to limit the admission of so-called "victim impact evidence" to evidence about the victims of which Mr. McKinnon was aware or that had been admitted during the guilt phase and in refusing his requested instruction on the appropriate use of the evidence that was admitted. (AOB 379-392.) The errors were prejudicial, violated McKinnon's rights to a fair penalty trial and a reliable penalty verdict, and require reversal of the death judgment. (AOB 379-392.)

Respondent disagrees. (RB 141-151.) Respondent is wrong.

B. The Victim Impact Evidence Admitted in this Case Exceeded its Constitutional and Statutory Limits

Preliminarily, Mr. McKinnon contended that the victim impact evidence should have been limited in three ways: 1) to the testimony of a single witness (AOB 383-384); 2) to testimony describing the effect of the murder on a family member present at the scene during or immediately after the crime (AOB 384); and 3) testimony concerning those effects of the murder which were either known or reasonably apparent to the perpetrator at the time he committed the crimes, or properly introduced to prove the charges at the guilt phase of the trial (AOB 384-387). As to the first two of these limitations, Mr. McKinnon considers this aspect of the issue to be

fully joined by the briefs on file with the Court and accordingly makes no further discussion of them here.

As to the third limitation, respondent agrees that so-called "victim impact evidence" must be limited to the "specific harm caused by the defendant" and, under factor (a), to circumstances that "materially, morally, or logically" surround the crime. (RB 142-146; see also AOB 381, 384-385, citing, inter alia, *Payne v. Tennessee*, *supra*, 501 U.S. at p. 819 [victim impact limited to "specific harm caused by" defendant] and *People v. Edwards*, *supra*, 54 Cal.3d at p. 833; see also *People v. Kelly* (2007) 42 Cal.4th 763, 798, and authorities cited therein [trial courts must be careful to limit impact evidence to evidence relevant to penalty determination].) The only evidence respondent specifically addresses in this regard is the admission of evidence regarding Perry Coder's unique characteristics about which Mr. McKinnon was unaware, and could not reasonably have been aware, such as his deafness and the fact he was a twin. Although it is not entirely clear, respondent *appears* to concede that this evidence exceeded the scope of permissible victim impact evidence and was not a "circumstance of the crime" within the meaning of factor (a), but contends that its admission was harmless because it could not have "diverted the jury from its proper role." (RB 149.)

Otherwise, respondent simply contends that "the specific harm caused when [the perpetrator] murdered Coder and Martin, i.e., the impact of their deaths on the victims'" family members was relevant under the federal Constitution and admissible as a circumstance of the crime under factor (a). For purposes of this argument, Mr. McKinnon agrees – circumstances that "materially, morally, or logically" surrounded the murders and evidence of the specific harm they *logically caused* was

constitutionally relevant and admissible under factor (a).

But this begs the question – was the specific "victim impact" evidence presented in this case *limited* to such evidence? As set forth in the opening brief, the answer is no. (AOB 385-387, and authorities cited therein; see also *People v. Robinson* (2005) 37 Cal.4th 592, 652 ["encourag[ing] trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence"].) Since respondent does not answer this question, Mr. McKinnon considers this aspect of the issue to be fully joined by the briefs on file with the Court. For all of the reasons discussed in the opening brief, the victim impact evidence in this case exceeded the scope of its constitutional and statutory limits and the court erred in admitting it. (AOB 380-388.)

C. Given the Admitted Victim Impact Evidence, the Court Committed Prejudicial Error in Refusing to Instruct the Jurors on the Limited, Appropriate Use of That Evidence

Particularly given that the admitted victim impact evidence included evidence about which there were substantial questions of causation, Mr. McKinnon further argued that the trial court erred in refusing his request to instruct the jurors, inter alia, that the jurors could only consider in aggravation victim impact evidence that related to the "the specific harm caused by Crandell McKinnon's crimes." (AOB 388-392.) Respondent does not dispute that the instruction was a correct statement of the law.

Instead, citing this Court's decisions in *People v. Brown* (2003) 31 Cal.4th 518, and *People v. Ochoa* (2001) 26 Cal.4th 398, respondent counters that where, as here, the trial court provides CALJIC No. 8.84.1, it is not error to refuse instructions regarding the appropriate use of victim impact evidence. (RB 150-151.) *Brown* and *Ochoa* are inapposite.

In *Ochoa*, this Court held that it was not error for the trial court to

refuse a requested instruction on victim impact evidence, essentially identical to the requested instruction in this case, on the ground that the trial court's provision of CALJIC No. 8.84.1 was adequate to address the issues presented by that particular case. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 455.) The only reference found in *People v. Brown*, *supra*, 31 Cal.4th at p. 574, to an instruction on victim impact evidence is the following: "We similarly reject defendant's claims that such evidence is irrelevant and that the court did not instruct the jury how to consider it. On the contrary, victim impact evidence is relevant to section 190.3, factor (a) . . . and the court instructed the jurors with CALJIC No. 8.85, which tells them to 'consider, take into account, and by guided by such factors." The nature of the claimed error in *Brown* is unclear; the opinion does not reveal the instruction the defendant contended should have been given, whether the defendant requested an instruction on victim impact evidence. or whether he argued that the trial court was required to provide one sua sponte.

In any event, it does not appear from the face of either opinion that the defendants contended that the specific evidence in their *particular* cases raised factual and legal issues on which an instruction regarding victim impact evidence was necessary. In contrast, Mr. McKinnon contends that the instruction was necessary because, inter alia, the evidence presented in his case raised substantial questions as to whether the "specific harm" to which some of the witnesses testified was actually caused by the murders. The distinction is a critical one.

A trial court must instruct the jurors on the "general principles of law relevant to the issues *raised by the evidence*." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085, italics added; accord, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 154 [court must instruct on those principles which are

openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case].) Thus, while it may not necessarily be error to refuse an instruction on victim impact evidence in every case, where – as here – the evidence in a particular case raises questions of causation, it is error to refuse to instruct the jurors on the legal principles relevant to that issue.

Furthermore, while CALJIC No. 8.84.1 generally admonished jurors that they were not to be "influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," it said nothing about *causation*, much less that the jurors had to find that a particular difficulty or trauma had actually been caused by the crimes. Hence, it was no substitute for the refused instruction.

Otherwise, Mr. McKinnon considers this issue to be fully joined by the briefs on file with the Court and hence makes no further discussion of it here. For the foregoing reasons, as well as those set forth in the opening brief, the admission of victim impact evidence that exceeded permissible constitutional and statutory limits, along with the court's refusal to instruct the jury regarding those limits, was prejudicial, violated state law and Mr. McKinnon's constitutional rights to a fair penalty trial and a reliable penalty verdict, and requires reversal of the death judgment.

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XVII

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATED MR. MCKINNON'S CONSTITUTIONAL RIGHTS

In his opening brief, Mr. McKinnon argued that California's failure to conduct intercase proportionality review in capital cases violates his Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment. (AOB 393-396, and authorities cited therein.) Respondent disagrees. (RB 152-153.)

Mr. McKinnon considers this issue to be fully joined by the briefs on file with this Court.

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XVIII

PENAL CODE SECTION 190.3, FACTOR (b), BOTH AS WRITTEN AND AS APPLIED TO THIS CASE, VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THE DEATH JUDGMENT

In his opening brief and in the superior court below, Mr. McKinnon argued that the admission of any prior unadjudicated criminal activity, as permitted under Penal Code section 190.3, subdivision (b), violates the Eighth Amendment. (AOB 396-407; 13 CT 3638-3692.) Moreover, that section is unconstitutional on its face and as applied in this case because it does not, and in this case did not, require the jurors' *unanimous* determination that the other activity must be proven beyond a reasonable doubt before it can be considered in aggravation. (AOB 396-407; 13 CT 3733-3734.) Finally, the prosecution's reliance on such unadjudicated criminal activity during the penalty phase deprived Mr. McKinnon of his rights to due process, a fair and speedy trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, the protection of the collateral estoppel rule, the guarantee against double jeopardy, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 396-407.) In making these arguments, Mr. McKinnon acknowledged that this Court has rejected similar arguments, but urged the Court to reconsider those decisions. (AOB 396-407.)

With one exception, respondent simply cites those decisions in support of its contrary position that section 190.3, subdivision (b) is not unconstitutional on its face or as applied here. (RB 153-161.) Mr.

McKinnon considers this aspect of the issue to be fully joined by the briefs on file with this Court and therefore makes no further discussion of it here.

Respondent acknowledges the United State Supreme Court's recent relevant decision in *Cunningham v. California* (2007) 549 U.S. __, 127 S.Ct. 856, issued after the opening brief was filed in this case, but contends that it does not undermine this Court's precedent or support Mr. McKinnon's claim. (RB 159-160.) Respondent is incorrect. *Cunningham v. California, supra*, supports Mr. McKinnon's contention that the aggravating factors necessary for the imposition of a death sentence must be found true by a unanimous jury beyond a reasonable doubt. And in light of that decision, this Court's effort to distinguish *Ring v. Arizona* (2002) 536 U.S. 584 and *Blakely v. Washington* (2004) 542 U.S. 296 should be re-examined. (See *People v. Prieto* (2003) 30 Cal.4th 226, 275-276 [rejecting the argument that *Blakely* requires findings beyond a reasonable doubt] and *People v. Morrison* (2004) 34 Cal.4th 698, 731 [same].)

As Mr. McKinnon argued in his opening brief, the *Blakely* Court held that the trial court's finding of an aggravating factor violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than the maximum otherwise allowable for the underlying offense. In *Blakely*, the United States Supreme Court held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to a jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely v. Washington, supra,* 542 U.S. at pp. 303-304.)

In *Cunningham v. California*, *supra*, 547 U.S. ___, 127 S.Ct. 856, the United States Supreme Court considered whether *Blakely* applied to California's Determinate Sentencing Law, i.e., whether the Sixth Amendment right to a jury trial requires that the aggravating facts used to sentence a non-capital defendant to the upper term (rather than to the presumptive middle-term) be proved beyond a reasonable doubt. The high court held that it did, reiterating its holding that the federal Constitution's jury trial provision requires that *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, including the aggravating facts relied upon by a California trial judge to sentence a defendant to the upper term. In the majority's opinion, Justice Ginsburg rejected California's argument that its sentencing law "simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range" (*id.* at p. 868, citing *People v. Black* (2005) 35 Cal.4th 1238, 1254) so that the upper term (rather than the middle term) is the statutory maximum. The majority also rejected the state's argument that the fact that traditionally a sentencing judge had substantial discretion in deciding which factors would be aggravating took the sentencing law out of the ambit of the Sixth Amendment: "We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." (*Id.* at p. 869.) Justice Ginsburg's majority opinion held that there was a bright-line rule: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the

longer term, the Sixth Amendment requirement is not satisfied. *Blakely*, 542 U.S., at 305, and n. 8, 124 S.Ct. 2531." (*Ibid.*)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (See *People v. Farnam* (2002) 28 Cal.4th 107, 192; *People v. Duncan* (1991) 53 Cal.3d 955, 977-978; see also CALJIC No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in *Cunningham* dictates that California's death penalty statute falls under the purview of *Blakely*, *Ring*, and *Apprendi*.

In *People v. Prieto* (2003) 30 Cal.4th 226, 275, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 462, this Court held that *Ring* and *Apprendi* do not apply to California's death penalty scheme because death penalty sentencing is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." However, as noted above, *Cunningham* held that it made no difference to the constitutional question whether the factfinding was something "traditionally" done by the sentencer. The only question relevant to the Sixth Amendment analysis is whether a fact is essential for increased punishment. (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 869.)

This Court has also held that California's death penalty statute is not within the terms of *Blakely* because a death penalty jury's decision is primarily "moral and normative, not factual" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275), or because a death penalty decision involves the "moral assessment" of facts "as reflects whether defendant should be sentenced to

death." (*People v. Moon* (2005) 37 Cal.4th 1, 41, citing *People v. Brown* (1985) 40 Cal.3d 512, 540.) This Court has also held that *Ring* does not apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn.14.)

None of these holdings are to the point. It does not matter to the Sixth Amendment question that juries, once they have found aggravation, have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be sentenced to death. What matters is that the jury has to find facts – it does not matter what kind of facts or how those facts are ultimately used. *Cunningham* is indisputable on this point.

Once again there is an analogy between capital and non-capital sentencing: a trial judge in a non-capital case does not have to consider factors in aggravation in a defendant's sentence if he or she does not wish to do so. However, if the judge does consider aggravating factors, the factors must be proved in a jury trial beyond a reasonable doubt. Similarly, a capital juror does not have to consider aggravation if in the juror's moral judgement the aggravation does not deserve consideration; however, the juror must find the fact that there is aggravation. *Cunningham* clearly dictates that this fact of aggravation has to found beyond a reasonable doubt.[43] Because California does not require that aggravation be proved

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[43] The United States Supreme Court in *Blakely* said as much that its ruling applied to "normative" decisions, without using that phrase. As

(continued...)

beyond a reasonable doubt, it violates the Sixth Amendment.

A second recent United States Supreme Court case also supports Mr. McKinnon's argument that a sentence must be based on findings by a unanimous jury beyond a reasonable doubt. In *Brown v. Sanders* (2006) 546 U.S. 212, the high court clarified the role of aggravating circumstances in California's death penalty scheme: "Our cases have frequently employed the terms "aggravating circumstance" or "aggravating factor" to refer to those statutory factors which determine death eligibility in satisfaction of *Furman's* narrowing requirement. (See, e.g., *Tuilaepa v. California, supra*, 512 U.S. at p. 972.) This terminology becomes confusing when, as in this case, a State employs the term "aggravating circumstance" to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty." (*Brown v. Sanders, supra*, 546 U.S. at p. 216, fn. 2, italics in original.) There can now be no question that one or more aggravating circumstances above and beyond any findings that make the defendant eligible for death must be found by a

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[43](...continued)
Justice Breyer pointed out, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington, supra*, 159 L.Ed.2d at p. 429) merely to categorize a decision as one involving "normative" judgment does not exempt it from constitutional constraints. Justice Scalia, in his concurring opinion in *Ring v. Arizona, supra*, 536 U.S. at p. 610, emphatically rejected any such semantic attempt to evade the dictates of *Ring* and *Apprendi*: "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt."

California jury before it can consider whether or not to impose a death sentence. (See CALJIC No. 8.88.) As Justice Scalia, the author of *Sanders*, concluded in *Ring*: "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 612.) In light of *Brown*, this Court should re-examine its decisions regarding the applicability of *Ring v. Arizona* to California's death penalty scheme.

Kansas v. Marsh, *supra*, 126 S.Ct. at p. 2516, again deserves mention, if only to show that it has no application to the present issue. The Kansas statute considered in *Marsh* provided: "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise the defendant shall be sentenced as provided by law." (Kan. Stat. Ann. § 21-4624(e) (1995), quoted in *Kansas v. Marsh*, *supra*, 126 S.Ct. at p. 2520.) The Kansas Supreme Court reversed Marsh's death sentence, holding that the statute's weighing equation violated the Eighth and Fourteenth Amendments of the United States Constitution because, in the event of equipoise, i.e., the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required. (*Id.* at p. 2521.)

The United States Supreme Court reversed the Kansas court's ruling. The high court deemed the issue to be governed by its ruling in *Walton v. Arizona* (1990) 497 U.S. 639, overruled on other grounds, *Ring v. Arizona*

(2002) 536 U.S. 584. (*Kansas v. Marsh*, *supra*, 126 S.Ct. at p. 2522.) Mr. McKinnon's present challenge to the absence of a beyond a reasonable doubt burden of proof from the California sentencing formula was not before the high court in *Marsh* because, as that court noted, "the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate. . . ." (*Kansas v. Marsh*, *supra*, 126 S.Ct. at p. 2524.) The only question before the high court in *Marsh* was whether Kansas could require the sentencer to impose a death sentence when it had not found "that the . . . aggravating circumstances [were] not outweighed by any mitigating circumstances." (*Kansas v. Marsh*, *supra*, 126 S.Ct., at p. 2522.) As such, *Marsh* has no bearing on the issue of California's sentencing formula.

Because the sentencing formula that was used to determine that Mr. McKinnon should be put to death did not require that the jury make its sentencing determination unanimously and beyond a reasonable doubt, the sentence of death must be reversed.

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

In his opening brief, Mr. McKinnon argued that California's death penalty statute, Penal Code section 190.3, and the standard pattern instructions mirroring that statute and provided in this case, violate the Sixth, Eighth, and Fourteenth Amendments on their face and as applied here because they fail to require unanimous jury findings on proof beyond a reasonable doubt that aggravating circumstances exist, that they outweigh the mitigating circumstances, that death is the appropriate penalty, and that any doubt over the appropriate penalty had to be resolved in favor of life. (AOB 407-422, and authorities cited therein.)

Respondent disagrees. (RB 156-161.) Mr. McKinnon considers this issue to be fully joined by the briefs on file with this Court; for all of the reasons set forth in the opening brief, respondent is incorrect and the death judgment must be reversed.

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XX

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED MR. MCKINNON'S CONSTITUTIONAL RIGHTS

In his opening brief, Mr. McKinnon argued that the trial court's provision of CALJIC No. 8.88, over his trial objection and requests for modification, did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects and thus violated his fundamental rights to due process (U.S. Const., Amend. 14), a fair trial by jury (U.S. Const., Amends. 6 & 14), and a reliable penalty determination (U.S. Const., Amends. 6, 8 & 14) and requires reversal of his sentence. (AOB 422-434, and authorities cited therein.) Respondent disagrees. (RB 161-165.)

Mr. McKinnon considers this issue to be fully joined by the briefs on file with the Court. For all of the reasons set forth in the opening brief, respondent is correct and provision of the constitutionally flawed instruction demands reversal of the death judgment.

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XXI

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THOSE SENTENCING FACTORS, RENDER MR. MCKINNON'S DEATH SENTENCE UNCONSTITUTIONAL

In his opening brief, Mr. McKinnon argued that the trial court's provision of CALJIC No. 8.85, over his objection and requests for modification, was incorrect, inadequate, misleading and violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights in the following respects: 1) application of Penal Code section 190.3, subdivision (a) (as reflected in CALJIC No. 8.85) resulted in the arbitrary and capricious imposition of the death penalty; 2) the failure to delete inapplicable sentencing factors violated his constitutional rights; 3) the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty; 4) the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence; 5) the failure to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law; and 6) even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. (AOB 435-444, and authorities cited therein.)

Respondent disagrees. (RB 165-168.) Mr. McKinnon considers this issue to be fully joined by the brief on file with the Court. For all of the reasons set forth in the opening brief, respondent is incorrect and the death judgment must be reversed.

XXII

THE COURT'S REFUSAL TO PROVIDE LEGALLY ACCURATE INSTRUCTIONS REGARDING THE SCOPE OF AGGRAVATING AND MITIGATING EVIDENCE THE JURORS COULD CONSIDER, AS WELL AS THE SCOPE OF THEIR SENTENCING DISCRETION VIOLATED STATE LAW AS WELL AS MR. MCKINNON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR PENALTY TRIAL AND RELIABLE PENALTY DETERMINATION AND REQUIRES THAT THE DEATH JUDGMENT BE REVERSED

In his opening brief, Mr. McKinnon argued that the trial court erred in refusing his request to provide the following legally accurate instructions clarifying the nature and scope of the aggravation and mitigation and the jury's discretion in selecting the appropriate penalty: 1) supplement the instruction on factor (a) with an explanation that a special circumstance simply renders the defendant death-eligible and the very different question of the appropriate penalty was entirely up to the jurors (13 CT 3741); 2) prohibit the jurors from "double counting" the same facts as both a circumstance of the crime and a special circumstance finding under factor (a) (13 CT 3745); 3) prohibit the jurors from considering deterrence or the costs of life imprisonment as factors affecting their decision (13 CT 3729-3730); 4) modify the instruction on factor (k) to specify that the mitigating circumstances listed are only examples and the jurors could consider any other circumstances as a reason for not imposing death, that a single mitigating factor alone may be sufficient to reject death as the appropriate penalty, that the jurors need not be unanimous in finding mitigating factors, and that mitigating factors do not need to be proved beyond a reasonable doubt and may be supported by any evidence, no matter how weak (13 CT 3754-3757, 3762); 5) inform the jurors that they could return a life verdict even in the absence of mitigating factors and in the face of aggravating

factors (13 CT 3758); and 6) inform the jurors that they could spare McKinnon's life based on mercy or sympathy alone (13 CT 3756-3758, 3761-3762). (AOB 445-451.) The court's error violated state law as well as Mr. McKinnon's Eighth and Fourteenth Amendment rights to a fair penalty trial and reliable penalty determination and demands reversal of the death judgment. (AOB 445-451, and authorities cited therein.)

Respondent does not dispute that the requested instructions were accurate. (See RB 168-172; compare AOB 446-449, and authorities cited therein.) Nor does respondent contend that the instructions were argumentative. (See RB 168-172; compare AOB 446, and authorities cited therein].) Instead, respondent relies on this Court's prior decisions holding that the other, standard pattern instructions the trial court did provide were adequate to convey the law to the jurors. (RB 168-172, and authorities cited therein.) From this premise, respondent concludes that the trial court did not err in refusing the requested instructions. (RB 168-172.)

Respondent's rationale is the same rationale on which this Court has relied, but which Mr. McKinnon challenged in the opening brief as itself being inconsistent with well settled law regarding a defendant's right to pinpoint instructions. (AOB 446-451.) That is, a criminal defendant is entitled upon request to instructions which pinpoint his theory of defense, so long as they are accurate and not argumentative. (See, e.g., *People v. Kraft*, *supra*, 23 Cal.4th at p. 1068; *People v. Adrian* (1982) 135 Cal.App.3d 335, 338; *People v. Rincon-Pineda*, *supra*, 14 Cal.3d at p. 865; *People v. Sears* (1970) 2 Cal.3d 180, 190; see also Pen. Code, § 1093, subd. (f) [trial court must instruct jury "on any points of law pertinent to the issue if requested by either party. . . ."]; Cal. Stds. of Jud. Admin., § 5 ["in considering instructions to the jury [the judge] shall give no less

consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of . . . CALJIC"].) This right exists notwithstanding the trial court's provision of other, generally adequate instructions. (*People v. Sears*, *supra*, 2 Cal.3d 180, 190; *People v. Kane* (1946) 27 Cal.2d 693, 698, 700; *People v. Mayo* (1961) 194 Cal.App.2d 527, 536-537; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 256-257.) In other words, respondent's contention that the standard instructions were generally correct and adequate simply does not answer Mr. McKinnon's argument that the trial court erred in refusing his legally accurate pinpoint instructions. (AOB 446-451.)

As respondent does not address Mr. McKinnon's argument in this regard, Mr. McKinnon considers this issue to be fully joined by the briefs on file with the Court. The trial court erred in refusing Mr. McKinnon's requested instructions and the death judgment must be reversed.

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XXIII

MR. MCKINNON'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

In his opening brief, Mr. McKinnon argued that California's death penalty scheme, and hence his death judgment, violates international law and the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 452-455, and authorities cited therein.) Respondent disagrees. (RB 172-176.)

Mr. McKinnon considers this issue to be fully joined by the briefs on file with this Court. For all of the reasons set forth in the opening brief, Mr. McKinnon's death judgment violates international law and the federal Constitution and must be reversed.

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CONCLUSION

For the foregoing reasons, as well as those stated in Mr. McKinnon's opening brief, the entire judgment and sentence of death must be reversed.

DATED: August 29, 2008

Respectfully submitted,

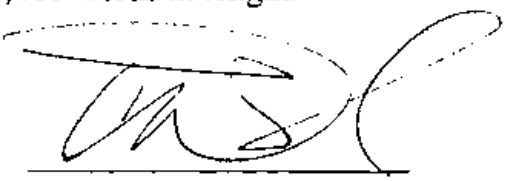
MICHAEL J. HERSEK
State Public Defender

C. DELAINE RENARD
Deputy State Public Defender

Attorneys for Appellant

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

I, C. Delaine Renard, am the Deputy State Public Defender assigned to represent appellant Crandell McKinnon 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 60,468 words in length.



C. DELAINE RENARD
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. McKinnon* No. S077166

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

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
P. O. Box 85266
110 W. "A" Street, Rm. 1100
San Diego, CA 92186-5266

Crandell McKinnon
(Appellant)

Each said envelope was then, on August 29, 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 August 29, 2008, at San Francisco, California.

Glenice Fuller
DECLARANT