Supreme Court of California
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Supreme Court of California
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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALEX DEMOLLE,<br><br>Defendant and Appellant. | No. S159120<br><br>Alameda County Superior Court<br>No. 140729<br><br>Death Penalty Case |

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

Honorable Larry J. Goodman, Judge

# APPELLANT'S REPLY BRIEF

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALEX DEMOLLE,<br><br>Defendant and Appellant. | No. S159120<br><br>Alameda County Superior Court<br>No. 140729<br><br>Death Penalty Case |

# APPELLANT'S REPLY BRIEF

## INTRODUCTION

After a trial marred by evidentiary and constitutional errors at both the guilt and penalty phases, appellant was convicted of the murder of Jaquita Mack with special circumstances, and was sentenced to death. The errors at the guilt phase of the trial included the introduction of evidence only obtained following appellant's unlawful consent, the retention of a juror with a disqualifying bias, and the admission of irrelevant yet prejudicial testimony regarding appellant's relationship with his next door neighbor. At the penalty phase, the court erred in allowing the prosecution to present extenuated victim impact evidence, and evidence of appellant's prior criminal behavior that not only was not established beyond a reasonable doubt, but also that had no relevance to appellant's potential for future harm since he was a juvenile when he allegedly committed the crime. Further, the trial court allowed a racially charged yet wholly irrelevant statement to remain before the jury, needlessly injecting the issue of race directly into the penalty phase of an African-American man facing the imposition of a death sentence by an all-white jury. As set forth in appellant's opening brief (hereafter "AOB") and below, all of

these errors, singularly and cumulatively, require reversal of appellant's conviction and death sentence.

In addressing the arguments in respondent's brief (hereafter "RB"), appellant does not reply to contentions that already are adequately addressed in his AOB. The lack of a response to any particular contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.[1]

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1. For this reason, appellant does not present any reply to Arguments V.C, VI, or VII of the opening brief.

## I.
## APPELLANT'S CONSENT TO PROVIDE A BLOOD SAMPLE WAS OBTAINED DURING HIS UNLAWFUL SEIZURE AND DETENTION IN VIOLATION OF THE FOURTH AMENDMENT, REQUIRING SUPPRESSION OF THE RESULTS OF THE BLOOD TEST AND APPELLANT'S SUBSEQUENT INCRIMINATING STATEMENTS

After appellant was brought to the police station for questioning on August 6, 1999, separated from his young daughter, held in two different locked rooms, and *Mirandized*, he was asked to provide a blood sample. He initially refused, but subsequently agreed to do so. Only after he gave his consent was he told he would be taken home, and even then, was told that would occur *after* he went to the hospital to provide blood. The blood test results established that appellant's DNA profile was consistent with the DNA profile of the donor found on Jaquita Mack's body, which led to appellant's arrest and his confession to law enforcement. At the preliminary hearing, the defense unsuccessfully moved pursuant to Penal Code section 1538.5[2] to suppress the results of the DNA testing and all of appellant's subsequent statements on the grounds that appellant was unlawfully seized when he agreed to give a blood sample. (3ACT 910-945.) Appellant's subsequent section 995 motion also was denied. (4ACT 1260-1262.)

In his opening brief, appellant asserted that his consent to provide blood was obtained during his unlawful seizure and detention, and thus was tainted. He further argued that the blood test and DNA typing, as well as appellant's subsequent arrest and his post-arrest statements, were the fruits of his unlawful detention and their introduction at trial violated his constitutional rights under the Fourth and 14th Amendments to the United States Constitution. (AOB, pp.

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2. All further statutory references are to the Penal Code unless otherwise noted.

39-69.) Respondent contends that appellant was not unlawfully detained and thus, that no violation of appellant's rights occurred. Respondent is incorrect. A reasonable person in appellant's situation would not have believed he or she was free to leave the police station without first consenting to a blood test. Because appellant's conviction could not have been obtained in the absence of the DNA evidence and/or his incriminating statements, his conviction and death sentence must be reversed.

### A. Under the Totality of the Circumstances as They Occurred on August 6, 1999, a Reasonable Person Would Have Believed He Was Not Free to Go Prior to Consenting to a Blood Test

Where, as here, an individual has consented to a search or seizure in the absence of a warrant, the prosecution must show that consent was the product of the individual's free will, rather than submission to an express or implied assertion of authority. (*People v. Zamudio* (2008) 43 Cal.4th 327, 341.) Applying this standard, the court must consider, whether, under the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave, to decline the requests of law enforcement, or to terminate questioning. (*Ibid*.) In reviewing the denial of a section 995 motion following a motion to suppress, the appellate court reviews the determination of the magistrate at the preliminary hearing. (*People v. Superior Court* (*Cooper*) (2003) 114 Cal.App.4th 713, 717; see *People v. Laiwa* (1983) 34 Cal.3d 711, 718, superseded by statute on another ground as stated in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223.)

Each case in which the court is called upon to determine whether, under the totality of the circumstances, a seizure, detention, or custodial interrogation occurred involves a unique constellation of facts. For every case in which this Court has found no unlawful seizure, it is possible to find another case that shares one or more, but not all, of the same factual circumstances in which a Fourth or Fifth Amendment violation was found. (Compare, e.g., *People v.*

*Boyer* (1989) 48 Cal.3d 247, 264-267 [unlawful seizure found where defendant agreed to go police station, was not handcuffed, and was read *Miranda* warnings before questioning] with *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 125, 127 [no unlawful seizure found where defendant agreed to go police station, was not handcuffed, and was read *Miranda* warnings before questioning].) Thus, while the presence or absence of any one individual factor may be significant, no individual factor is determinative of whether consent in a specific case was a product of the defendant's free will or whether it was given due to an express or implied assertion of authority. To the extent respondent has attempted to distinguish from, or equate the circumstances of the present case with, prior cases because the prior cases involved either one or more different or similar facts, its arguments are not persuasive.

As appellant noted in his opening brief (AOB, pp. 56-57), the magistrate's ruling was flawed because she focused on two irrelevant factors: appellant's subjective state of mind and whether the police considered him a suspect when they obtained his consent. Because the reasonable person test is purely objective, neither of these factors should have been considered by the court. (*Ibid*.) While recognizing these principles (RB, pp. 33-34), and that neither the subjective mindsets of the appellant nor of the officers are relevant,[3] respondent nonetheless contends that this Court should uphold the magistrate's ultimate ruling that appellant was not seized when he consented to provide a blood sample (RB, pp. 36-37).

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3. Respondent asserts that an officer's subjective views or beliefs may become relevant if they are somehow communicated or displayed to the individual being interrogated (RB, pp. 37-38), yet makes no showing that the officers in this case conveyed to appellant that he was not a suspect.

### 1. Respondent Has Not Shown That the Magistrate's Findings Were Supported by Substantial Evidence

The magistrate found that the questioning to which appellant was subjected was not "particularly accusatory." (3ACT 944.) Contrary to the magistrate's finding, however, Sergeant Brock's questioning was akin to a human lie-detector test which necessarily was accusatory or would have had an accusatory effect on the mental state of a reasonable person. Respondent disputes appellant's characterization of the questioning. (RB, p. 41.)[4] Although Brock asked both general and crime-specific questions, and repeated them multiple times, respondent contends this is not a significant factor, simply because Brock did not actually "accuse" appellant of the murder. However, as respondent admits (RB, p. 40), Brock asked appellant to purposively lie in response to innocuous questions. These questions were interspersed with repeated questions that were not innocuous, such as: "Did you murder Jaquita Mack?" (Pretrial Exhibit A, pp. 14, 17) and "Have you ever killed anybody? (*id*., at pp. 15, 17).[5] Whether Brock's questioning was "accusatory" or merely

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4. Brock's questioning did occur after appellant gave his consent to a blood test; however, appellant could have decided to revoke that consent prior to going to the hospital and providing a blood sample. While respondent argues that appellant never indicated a desire to revoke his consent (RB, pp. 38-39), that argument misses the point. If appellant had revoked or attempted to revoke his consent, presumably that request would have been honored and there would have been no blood test following the August 6 interrogation, and thus no grounds to suppress its results. If, however, Brock's questioning would have further convinced a reasonable person that he was not free to revoke the consent previously given, then the questioning does have relevance to the issue here.

5. Respondent claims that Brock "almost apologized" for asking appellant if he had committed the crime. (RB, p. 41.) The record does not support respondent's claim, however. The first time Brock asked the question, he prefaced it by saying: "Now some of these . . . I, you know, you have the [*sic*] understand the nature of this investigation." Not only was Brock

*(Footnote continued on next page)*

"adversarial," as defense counsel characterized it at trial (3A CT 942-943; see RB, p. 41, n. 16), a reasonable person, locked in a room with two detectives who had requested to tape-record only that particular portion of the interrogation, would likely believe that he was more than just a potential witness.

Respondent next argues that, even though Brock did directly ask appellant if he had killed Jaquita Mack, the United States Supreme Court's per curiam opinion in *Oregon v. Mathiason* (1977) 429 U.S. 492, instructs that accusatory questioning alone does not convert a non-custodial interview into an unlawful detention. (RB, p. 41.) As noted above, isolating one or two facts from other cases is in fact, not instructive in a "totality of the circumstances" analysis in any given case. Indeed, while the Supreme Court did not find that Mathiason was subject to a custodial interrogation requiring *Miranda* warnings, in that case there were far more dissimilarities to the present case than there were similarities. In *Mathiason,* the defendant returned a detective's phone call, and was asked to come to the station by himself, which he did. He was questioned at the station in a room that was not locked and, importantly, was explicitly told he was not under arrest. He was falsely told there was incriminating evidence against him and admitted involvement. Only after that admission was he *Mirandized*. He subsequently gave a recorded confession, but still was not placed under arrest, and was allowed to leave the station. The Oregon Supreme Court had concluded that Mathiason's confession should have been suppressed because it occurred at a police station, in a room with closed doors, and the questioning falsely suggested the police suspected the defendant's involvement. In reversing, the United States Supreme Court found

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unapologetic, but far from conveying that he was simply asking routine questions, his prefatory statement would have conveyed that appellant himself was in fact the focus of the investigation.

that *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (*Id*. at p. 495.) As such, *Mathiason* has little bearing on this case.

The same is true of *People v. Moore* (2011) 51 Cal.4th 386, 394-404, which respondent cites for the proposition that accusatory questions alone do not render an interview custodial. (RB, p. 41.) Again, the facts there differ significantly from the present case. Although, as in this case, *Moore* was the last person known to have seen the victim alive, and was asked and freely agreed to come to the station to give a statement, Moore also asked and was told that he was just making a statement and, crucially, also asked and was expressly told that he would be given a ride home once his statement was taken. (Id. at pp. 397-398.)[6]

Respondent next expends a considerable amount of time (RB, pp. 42-46) over what it asserts is appellant's attempt "to argue on appeal that a reading of the cold record could be interpreted to mean something else" (RB, p. 46), i.e., something other than what the record actually says. Yet again, respondent misses the significance of appellant's argument.

Appellant alleged in his opening brief that the magistrate's finding that Longmire told appellant that he would be taken to the hospital and then home "shortly" after he discussed a party he hoped to attend, i.e., *prior* to giving his consent, was not supported by substantial evidence. (AOB, pp. 58-60.) While

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6. Subsequently, Moore did ask to be taken home and although the detectives did not honor his request, this Court found that up until that point, he had not been in custody. There was no need to decide whether the situation changed after it was clear he was not free to leave because he did not provide any additional information after that point. (*Id*. at p. 404.)

pointing to the briefing of the parties below and testimony regarding what was conveyed to appellant *after* he consented, respondent has provided no evidence to support the actual finding of the magistrate. Indeed, it is clear from the testimony and the briefing cited by respondent that the parties were referring to statements made by Longmire shortly preceding or during the tape-recorded portion of the interview itself, which occurred only after appellant's consent had been obtained. (See, e.g., 3 CT 694 ["Longmire's indication about completing the taped statement and taking defendant to the hospital and home was made after defendant gave consent at 12:13 p.m. (RT III, 240)"].) As defense counsel argued, "[w]hat Longmire said may be reasonably understood as a conditioned indication that he would take defendant home after he completed the taped statement and gave a blood sample." (3CT 694, fn. 3.) Respondent fails to acknowledge the significance of the conditional statement and appellant's argument that a reasonable person would have construed Longmire's statement that he would take him home, whenever it was made, as being conditioned on appellant's consent to make a taped statement and give a blood sample. Respondent does not refute that no one told appellant that he could go home at any time before he agreed to the blood test. If the magistrate considered it significant that Longmire conveyed to appellant that he could go home after he consented, then the magistrate's ruling was based on an irrelevant fact, and if she concluded he was told he could go home prior to consenting, that finding is not supported by any evidence.

### 2. Multiple Factors Establish the Magistrate's Ruling Was Not Correct

Respondent attempts to discount the other factors that this Court should consider in its analysis of the correctness of the magistrate's ultimate ruling. Respondent's arguments, however, follow neither logic nor the law.

Respondent argues that appellant's separation from his daughter for all or most of the time that he was at the station does not support a finding that he was unlawfully detained because it is based on speculative inferences and not supported by the record. (RB, pp. 47, 48.) Respondent's arguments however are not only illogical, but also are based on the absence of evidence of appellant's subjective beliefs, and not the objective reasonable person test.

Thus, respondent notes that appellant did not ask for, and was not given any assurances that he would not be separated from his daughter, and from this infers that appellant voluntarily went to the station "with the understanding that he and his daughter might be separated." (RB, pp. 47-48.) Appellant's subjective belief, however, is not a relevant consideration. Moreover, there is no indication in the record that appellant understood that he might be separated from his three-year-old daughter when Longmire suggested appellant just bring her to the station. And whether a reasonable person would have known there was a possibility that he would be separated from his daughter at the station when he initially agreed to go has no bearing on whether that person would have continued to believe he was free to go after his young child was in fact taken away from him during his interrogation by the police.

Similarly, respondent asserts appellant's argument is speculative and "factually deficient" as there is "[n]othing in the record" that would have caused a reasonable person to believe his daughter was being "held hostage" until he consented to provide a blood sample. (RB, p. 48.) Again, respondent demands proof of appellant's subjective belief, rather than looking to how a reasonable person would interpret the situation. The record shows that appellant was in fact separated from his daughter until after he consented to the blood test and gave a recorded statement to the police. A reasonable person being held in a locked room away from the child who had accompanied him to the station would believe he would not see his child again until the police were satisfied with his cooperation and brought her back to him. That is precisely

what happened here, which supports, rather than undercuts appellant's argument as respondent contends.

With regard to appellant's argument that the reading of his *Miranda* rights also conveyed to him that he was not free to leave, respondent erroneously asks this Court to consider Sgt. Longmire's testimony as to *his* subjective state of mind in reading appellant his rights. (RB, p. 51.) Unless Longmire's purpose was somehow conveyed to appellant, which it was not, it is irrelevant that Longmire *Mirandized* appellant out of an abundance of caution just in case appellant said something incriminating. Notably, appellant was not read his rights when Longmire questioned him at his home, before he had voluntarily agreed to go to the station, even though the potential for incriminating himself then was just as great as it was after he was at the station. A reasonable person would have seen the reading of admonitions that traditionally accompany a formal arrest as a sign that the circumstances had changed since the time he had first agreed to go to the station,

Moreover, whether appellant waived his right to talk without a lawyer, and thus agreed to cooperate, has little relevance to whether his subsequent consent to an invasive procedure was voluntary. (See RB, p. 49.) Unlike *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 125-127, on which respondent relies, appellant was not "unfailingly cooperative" and did not "appear eager to prove his veracity even after the interrogation began." (*Id*. at p. 127.) In *Ford*, in addition to waiving his rights, the defendant initiated all contact with the police, pointed out evidence at the crime scene, and eagerly agreed to give a blood test in an attempt to prove his innocence. Even assuming the court in *Ford* appropriately relied on the subjective state of mind of the defendant, appellant in this case demonstrated no similar eagerness to cooperate. Unlike the defendant in *Ford*, the police approached and initiated all contact with appellant, appellant did not provide any leads or evidence to the police, did not

assert his innocence until he was interrogated about it and initially opposed providing a blood test.

Respondent also argues that *People v. Boyer* (1989) 48 Ca1.3d 247, does not support appellant's position because the facts are "entirely different" from the present case. (RB, p. 49.) Appellant, however, did not assert that his case was on all fours with *Boyer,* and cited that case as authority for the point that the giving of *Miranda* warnings is one factor that suggests an individual is not free to leave. (AOB, p. 63.)[7]

Respondent also asks this Court to look to the intentions of the officers in administering the warnings, rather than what the officers actually conveyed to appellant. (RB, pp. 50-51.) While the magistrate did find the warnings in this case were "precautionary," there is nothing in the record to show that their precautionary nature was ever communicated to appellant. Further, Longmire's testimony that the admonitions were given "just in case" appellant incriminated himself establishes that, just as in *Boyer*, the officers themselves believed the situation "*might* be tantamount to custody." *People v. Boyer*, *supra*, 48 Cal.3d at p. 267.)

Next, respondent discounts the fact that appellant was detained in two different locked rooms while he was at the station. First, respondent asks this Court to find that a reasonable person would not consider being locked in a room as an indication that he was not free to leave, and that such a person,

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7. To the extent respondent finds it significant that in *Boyer,* the *Miranda* warning included the phrase "the charges against you," it is mistaken. While this Court noted that the warnings in *Boyer* did include that phrase, it also explained that Boyer then asked what the charges were, and was expressly told there were no charges. (People v. *Boyer*, *supra*, 48 Cal.3d at p. 263, fn. 9.) Moreover, in discussing the specific circumstances, this Court did not mention the reference to "charges," but instead merely stated that Boyer "was informed of his *Miranda* rights, an indication that the officers themselves believed the situation might be tantamount to custody." (*Id*. at p. 267.)

instead, would simply assume no one is permitted to move around a police unit unrestricted. (RB, p. 51.) A reasonable person, however, would have expected to be treated like a reasonable person, and be simply asked not to wander around the police station and to wait for the officers to return, rather than actually being restrained. As to respondent's suggestion that the record is not clear whether appellant knew the rooms were locked (RB, pp. 51-52), not only did appellant knock on the door of Room 201, but even assuming the door was partially open while Longmire was in the room and thus he did not have to use his key to get out, respondent concedes that Longmire closed the door when he left (RB, p. 52, citing 2 CT 371) and thus would have had to use his key to unlock it when he returned after appellant knocked on the door (2CT 371-372).

Respondent's citation to *Green v. Superior Court* (1985) 40 Cal.3d 126, at page 51 of its brief, to negate the importance of appellant's placement in rooms with locked doors is equally unpersuasive. *Green* supports appellant's position. Although respondent attempts to distinguish the facts in *Green* from the present case in several regards, respondent's interpretation of the facts is not supported by the record of either case. In *Green*, this Court addressed the defendant's custodial status at two different intervals. During the first time period, the defendant was in a locked room at the police station with two detectives. It was not clear whether the defendant realized the door was locked during the questioning but, at some point later, the officers asked the defendant if he would wait while they left the premises, and the defendant agreed. Had he not agreed, the officers apparently would have let him go. (*Id*. at p. 131.) This Court found it was a close case, but the questioning that occurred prior to the officers' departure was not sufficiently custodial to require *Miranda* warnings. (*Id.* at pp. 135-136.) Because the officers were with him in the locked room, this Court found that "[n]otwithstanding the lock on the interview room door, the evidence does not compel the conclusion that defendant could not have left whenever he had wanted during the interview." (*Id*. at p. 136.)

However, after the officers returned, this Court found the situation had changed and the remainder of the questioning was custodial and required the proper admonitions. Specifically, this Court held:

> The complexion of defendant's stay changed, in our view, when he was left alone in the interview room. It is one thing for him to have been sitting in the locked room talking to two people who had indicated they would take him back to the garage whenever he wanted. But it is an entirely different matter when a person is left alone in that locked room with no apparent or ready means of leaving.

(*Green v. Superior Court, supra*, 40 Cal.3d at p.136.)

Respondent glosses over the fact that, just as in *Green*, appellant was left alone in a locked room with no apparent or ready means of leaving, and instead finds significance in the fact that Longmire did not leave the police station (as in *Green*) but just exited the locked room, and responded "quickly" when appellant knocked on the door. (RB, pp. 51-52.) The record shows, however, that when appellant was left alone in the locked room, Longmire did not tell him where he was going nor how long he would be gone, but testified that "generally" he would tell the subject that he would be back "shortly." (2CT 360.) Moreover, appellant could not open the door himself and so had to knock on the door to get attention, and, contrary to respondent's assertion, the only evidence on the point shows that appellant could have been knocking for as long as *five minutes* before Longmire returned and stood blocking the doorway while they talked. Longmire testified that "[t]here was a period probably four or five minutes before I returned to the room where Mr. Demolle knocked on the door and I came back to answer." (2CT 361.)

Respondent also points to this Court's opinion in *People v. Stansbury* (1995) 9 Cal.4th 824, for the proposition that being interviewed in an area behind locked doors that would have required assistance to leave, "alone" would not cause a reasonable person to believe his or her request to depart would have been denied. (RB, p. 53.) As appellant argued above, no one fact

is determinative in assessing the totality of the circumstances, and appellant has not suggested that the locked interview rooms *alone* conveyed to appellant that he was not free to leave. The facts in *Stansbury* differ in other regards from the present case. There, the defendant, unlike here, was not *Mirandized*, was not separated from his child at the station, was not left alone in the restricted area, did not initially refuse consent, and was not subjected to pointed questioning obviously devised to assess the truthfulness of his responses. Further, as this Court noted, it was particularly significant that *Stansbury*, unlike appellant, was told several times that he was just a witness. (*Stansbury*, at p. 834.)

Respondent concludes its argument with several misguided points. First, it argues that the officers were not required to tell appellant that he was not under arrest. (RB, pp. 53-54.) Appellant did not suggest there was any such requirement, and specifically noted the officers had no such obligation, although he did argue that their failure to do so is another circumstance to be considered when assessing the totality of the circumstances. (AOB, pp. 65-66.) Respondent also contends that because appellant was asked and agreed to go to the station voluntarily, he would have known he was not under arrest. (RB, p. 53.) Appellant, however, has consistently argued that his detention became unlawful *after* he arrived at the station and thus, respondent's argument is not responsive to the issues raised. Finally, respondent argues that the facts clearly show that appellant knew he had the right to refuse consent to provide a blood sample. (RB, p. 54.) The issue for this Court is not whether appellant knew he could refuse consent, but whether a reasonable person would have felt he was not free to leave had he continued to refuse consent. Because respondent has not shown that under the totality of the circumstances a reasonable person in appellant's shoes would have understood he could leave before consenting to the request for blood, his detention and subsequent consent were unlawful.

### B. Appellant's Consent to the Blood Test, Results of the Test, His Subsequent Arrest, and His Confession Should Have Been Suppressed as Fruits of His Unlawful Detention and Because Their Introduction Was Not Harmless Beyond a Reasonable Doubt, Reversal Is Required

Respondent does not assert that there were any intervening circumstances or events to attenuate the taint of the illegal detention that lead up to the blood test. Without appellant's consent to provide blood, and the resulting match of his DNA profile to semen found on Jaquita Mack's body, there would have been insufficient evidence to support his warrantless arrest. Appellant's blood sample, the results of the DNA testing of the blood, which provided the only cause for appellant's arrest two days after he consented, and the statements appellant made following that consent on August 6, 1999, and after his arrest on August 8, 1999, were all fruits of his involuntary consent, and thus should have been suppressed at trial. (See *Wong Sun v. United States* (1963) 371 U.S. 471, 484-487.)

Respondent also has not attempted to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (*Chapman v. California* (1967) 386 U.S. 18, 24) and cannot do so on this record. The failure to suppress here clearly contributed to the verdict and this Court should reverse appellant's conviction and death sentence.

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## II.
## APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED WHEN THE TRIAL COURT ALLOWED THE TRIAL TO PROCEED BEFORE A JUROR WHO COULD NOT FAIRLY DECIDE APPELLANT'S CASE

In his opening brief, appellant argued that after the prosecutor elicited testimony that appellant regularly shot at birds with a BB gun, the trial court abused its discretion by failing to declare a mistrial or dismiss a juror who had indicated an absolute bias in cases involving animals. Appellant also argued that, in the alternative, the trial court had a duty to conduct an inquiry into the juror's ability to remain impartial after she heard this prejudicial testimony. (AOB, pp. 70-92.) Respondent contends there was no abuse of discretion and that the court was not required to conduct any inquiry. As will be shown below, the trial court had an obligation to ensure that appellant's right to an impartial jury was not violated, and yet it took no steps to do so. By failing to declare a mistrial, dismiss Juror No. 7, or, at a minimum, conduct an inquiry to determine whether either a mistrial or dismissal of the juror was required, the court abused its discretion and reversal is required.

### A. The Trial Court Abused Its Discretion By Failing to Grant a Mistrial After the Prosecutor Elicited Prejudicial Testimony That Appellant's Normal Activities Included Shooting at Birds with a BB Gun

Respondent asserts that Delores Hill's testimony about appellant's frequent shooting at birds was not prejudicial and thus that the trial court did not abuse its discretion in denying a mistrial. Respondent argues that the fact that appellant used to shoot at birds with a BB gun on a regular basis did not "transform" this case into one involving animals (RB, p. 61) because the testimony was brief, there was evidence that appellant never hit or physically harmed a bird, and because shooting at birds was "insignificant" when compared to the facts of the crime (RB, p. 62). In making this argument,

respondent overlooks the distinction between the introduction of evidence that is prejudicial in the usual sense — evidence that is irrelevant or needlessly inflammatory and would thus divert a rational fact-finder from the real issues to be decided in a case — and the introduction of evidence that would trigger a specific juror's previously-declared bias and thus impede her ability to be impartial.

The issue here is not whether *any* trier of fact, juror, trial judge or appellate court justice would consider appellant's behavior to constitute animal cruelty, nor whether learning of that behavior might have caused a rational juror to be unable to remain impartial, but rather whether it would have caused such a reaction in Juror No. 7 specifically. Thus, it is insignificant that the testimony was brief, that appellant did not actually hit any birds, or that it was not particularly inflammatory in light of the charged offense, if it would have prevented the juror from deciding the case fairly. Indeed, based on the record, Juror No. 7 considered mistreatment of animals *worse* than mistreatment of people in general or children in particular, and indicated that, while she could be fair judging a case where a child was sexually assaulted and murdered, she would not be able to fairly decide a case if animals were involved. (7RT 1696.)[8] The trial court thus abused its discretion in denying a mistrial.

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8. Juror No. 7 stated:

> I feel that every human life is important. So to me, kid, child, adult, doesn't really matter. If this was an animal case, I absolutely would have a problem with an animal. I volunteer at an animal shelter and I know whether it's right or wrong, it just would really bother me if it was — I mean, not that — you know, but I don't think I could be impartial if it came to an animal.

(7RT 1696.)

The court's abuse of discretion is also demonstrated by its apparent failure to consider the juror's statements on voir dire in making its ruling. While respondent argues the judge was plainly *aware* of the juror's comments (RB, p. 64), there is no indication on the record that the judge reviewed Juror No. 7's actual voir dire or that he considered her own particular bias in denying a mistrial.

In his opening brief, appellant pointed out that the prosecutor intentionally elicited Hill's testimony about shooting at birds, despite his knowledge that Juror No. 7 had indicated a bias in cases of animal cruelty. In response, respondent argues there was no prosecutorial misconduct, and any such claim would be forfeited because defense counsel were aware that the prosecution might introduce evidence about appellant's use of a BB gun to shoot at birds at the penalty phase. (RB, pp. 62-63.) However, as respondent concedes, appellant is not raising any claim of misconduct. (RB, p. 62.) Nonetheless, to the extent that respondent's argument suggests that defense counsel's knowledge that the BB gun evidence might be introduced contradicts appellant's assertion that counsel would not have accepted Juror No. 7 had they known this testimony would be presented (11RT 2733), respondent has misread the record.

Respondent contends that counsel were made aware that evidence that appellant used a BB gun to shoot birds might be introduced by virtue of the prosecution's initial and Amended Notices of Aggravation (5CT 1406, 1410 & 6 CT 1658, 1662, respectively), the latter of which was filed on October 19, 2006, "well before jury selection began in January, 2007" (RB, p. 63). Although the notices of aggravation were filed before jury selection began, respondent overstates their significance considerably. The October 19 notice was accompanied by a "Written Offer of Proof" that indicated the prosecutor would actually seek to introduce only four of the 17 incidents listed in the notice itself, and those four did not include the one regarding appellant's use of

a BB gun. (6CT 1638, 1653.) Indeed, by the time of Juror No. 7's voir dire on February 15, 2007, (7RT 1696-1714), the prosecutor had also informed the court and the parties orally that he only intended to present those four incidents at the penalty phase. (2RT 480, January 23, 2007.) Thus, the defense had no reason to question Juror No. 7's ability to remain impartial in the case at the time they questioned her on voir dire or when they could have exercised any challenge to her participation on the jury.

Respondent also argues that any prejudicial impact Hill's testimony might have had on Juror No. 7 was cured when the trial court granted the defense motion to strike it, and by the court's instructions at the start of the trial and before the guilt and penalty deliberations. (RB, pp. 64-65.) However, neither the motion to strike nor the instructions cured the damage to appellant's right to an impartial jury. First, as set forth in the AOB at pages 79-81, although the court granted the motion to strike in the jury's presence, the judge did not specifically state what testimony it was striking. Second, the court never instructed the jury to disregard Hill's stricken testimony, despite having done so after striking other testimony during the trial. (See, e.g., 10RT 2549.) Thus, while the instruction read before guilt and penalty deliberations generally told the jury not to consider a matter it had been instructed to disregard, no instruction to disregard was given as to the specific testimony at issue here. (11RT 2703-2704.)

Third, and perhaps most importantly, biases that impede a juror's ability to decide a case fairly cannot be dispelled by judicial instructions to disregard the facts that trigger the biases. A juror who entertains a bias that renders them partial to the case or a party is subject disqualification for cause, even though the court could instruct them to disregard such bias. (See e.g., Code Civ. Proc., §§ 225, subds. (b)(1)(B) & (C), 229, subd. (f).)

Respondent cites three cases in support of the general principle that jurors are presumed to follow instructions and admonitions (RB, p. 65), but

none of those cases involve instructions to disregard evidence that a juror had stated under oath would destroy her ability to remain impartial. In *People v. Bradford*, the jury was exposed to physical evidence that it was not meant to see, and, unlike here, the court specifically instructed "that the hair was not relevant, and you're to strike from your mind any reference to that which was made, and you're not to consider it any further." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1336.) In *People v. Osband* (1996) 13 Cal.4th 622, 714), an alternate juror, who was never seated on the jury, questioned a bailiff about a minor matter involving the defendant's jail behavior that had come up during the penalty phase. The defense suggested the alternate might have contaminated one or more of the sitting jurors by sharing what the bailiff told him, and this Court applied the presumption that the jurors followed instructions not to discuss the case with anyone, including other jurors, until deliberations began. Similarly, the situation that arose in *People v. Kemp* (1961) 55 Cal.2d 458 has no bearing on the issue raised here. In *Kemp,* the appellant argued that the trial court should have severed the charges against him *sua sponte*, because evidence of the more serious charge was only circumstantial while the other lesser charges were supported by direct evidence and were particularly brutal. After finding the failure to sever was not prejudicial as a matter of law, this Court also noted that the jury had been instructed that the evidence applicable to each offense had to be considered as if it were the only accusation before it, and the jury was presumed to follow such an instruction. (*Kemp*, at pp. 476-477.) Unlike the present case, neither *Bradford*, *Osband* nor *Kemp* involve jury bias, or partiality, and thus do not address whether a deep-seated bias can be cured by an instruction to simply disregard the triggering information.

This case is closer to *People v. Tatum* (2016) 4 Cal.App.5th 1125, where the court of appeal found an instruction could not have cured the harm caused by comments the trial judge had made about his own bias during voir

dire. In *Tatum*, the trial judge gave, as an example of a disqualifying bias, his personal dislike of plumbers and his belief that all plumbers lack credibility and would lie in court, yet refused to grant a mistrial after he learned that the defendant's alibi witness was a plumber. Even though, unlike here, no juror in *Tatum* admitted to sharing a similar bias, the appellate court nonetheless found that an admonition or instruction could not have cured the prejudice caused by the court's example and held that, "[u]nder these circumstances an instruction would have been as ineffectual as the famous words spoken by the Wizard of Oz, "Pay no attention to that man behind the curtain!" (The Wizard of Oz (Metro–Goldwyn–Mayer Aug. 25, 1939).)" (*Tatum,* at pp. 1131-1132.) Just as in *Tatum*, because of Juror No. 7's stated personal bias, the general instructions to disregard the stricken testimony would have been as ineffectual to "cure" her bias as instructions to Tatum's jury to set aside biases that arose from the judge's comments, or as the Wizard's admonition to Dorothy and her companions to ignore the impact of what they had plainly seen.

Respondent, citing *People v. O'Malley* (2016) 62 Cal.4th 944, 999 (RB, p.65), also argues that it is speculation that Juror No. 7 would not follow the court's instructions and ignore her bias, and that the testimony was not so prejudicial that this Court should set aside the normal presumption. To the extent that any speculation is required to determine whether the juror could be fair despite her bias, the trial court should have conducted an inquiry into the juror's state of mind as discussed in the opening brief and below. Moreover, the circumstances in *O'Malley* did not involve a juror's potentially disqualifying bias, but rather a situation where, during cross-examination, the defendant referred to the fact that several witnesses were unavailable because they had asserted their Fifth Amendment right not to testify, and where the jury was specifically admonished and instructed to "disregard the reference." (*O'Malley*, at p. 999.)

For these reasons, as long as Juror No. 7 remained on the jury, appellant's chances of receiving a fair trial were irreparably damaged and the court abused its discretion by refusing to grant a mistrial.

### B. The Trial Court Abused Its Discretion When It Failed to Discharge Juror No. 7 for Bias

In the alternative to granting a mistrial, defense counsel requested that Juror No. 7 be dismissed. The trial court implicitly denied this request. Respondent contends that the failure to dismiss the juror was not an abuse of discretion because, in its view, the record does not establish a "demonstrable reality" that Juror No. 7 was unable to fulfill her functions as a juror. (RB, p. 67.)

In response to a question regarding her ability to be fair in a case involving a child victim, Juror No. 7 unequivocally stated that she "absolutely" would have a problem in a case involving animals and "I don't think I could be impartial if it came to an animal." (7RT 1696.) It is clear that the juror meant that she would be biased in cases involving cruelty to animals, and therefore would not be able to fulfill her functions as a juror in such a case. Respondent does not dispute that the juror would have been disqualified in certain cases, but insists that Hill's testimony did not "transform" the case against appellant into one on which the juror would not be able to sit. (RB, p. 67.) Respondent again points to the fact that the testimony was stricken by the judge, and that there was no evidence appellant ever hit a bird or hurt another animal. (*Ibid*.)

Bias is unique and personal, however. In discussing her bias, Juror No. 7 did not distinguish between her ability to be fair in cases where the defendant terrorized and potentially hurt an animal from her ability to sit on cases where an animal was physically harmed or killed. In the absence of anything to suggest she drew a distinction between potential and actual harm, or between psychological and physical cruelty, the record demonstrates the reality that

Juror No. 7 was disqualified as a juror in any case involving mistreatment of any kind of animal. Based on the record, the trial court's failure to dismiss the juror was an abuse of discretion.

### C. If the Record Is Not Sufficient to Determine Whether Juror No. 7 Was Biased and Unable to Fulfill Her Duties as a Juror, the Trial Court Committed Reversible Error by Failing to Conduct an Inquiry Before Denying the Defense Request to Dismiss the Juror

The record shows that Juror No. 7 could not be impartial in appellant's case. But should this Court find the record does not contain sufficient information about the juror's state of mind to determine whether there was good cause to dismiss her, then the trial court's failure to conduct an inquiry into the matter plainly was an abuse of discretion. Respondent argues that the court had no duty to inquire because there was no "good cause" for the judge to doubt the juror's ability to perform her duties. (RB, p. 68.) Respondent ignores the plain meaning of the word "doubt," and thus its argument lacks merit.

The trial court knew that Juror No. 7 had stated on voir dire: "If this was an animal case, I absolutely would have a problem with an animal," and "I don't think I could be impartial if it came to an animal." (7RT 1696.) It had no additional information concerning what this juror considered to be "an animal case" or what actions towards an animal might have triggered her bias. While respondent points out that the trial court is not required to act on "mere rumor or innuendo" (RB, p. 68, quoting *People v. Adcox* (1988) 47 Cal.3d 207, 253), a juror's actual statements under oath are neither rumor nor innuendo. In *Adcox*, the case relied upon by respondent, the court learned that, in apparent violation of a gag order, some comments by the prosecutor had been reported in newspaper articles that appeared during the trial. However, there was no evidence or even an allegation that any of the jurors read the articles. Thus, any possible exposure by the jury to the prohibited comments was just rumor or

innuendo. Here, in contrast, there is no doubt that Juror No. 7 was exposed to Hill's testimony about appellant shooting at birds, nor is there any doubt that she *might* have become biased against appellant based on that testimony. Under those circumstances, there was good cause for the trial court to believe the juror may have been unable to remain impartial and thus good cause for further inquiry. Moreover, despite it being mere innuendo that any juror in *Adcox* actually read the questionable article, this Court nonetheless found that the trial court should have conducted an inquiry. (*Ibid.*) It rejected the issue on appeal, however, because, even assuming one or more jurors had read the articles, defense counsel himself characterized the prosecutor's comments as "rather innocuous," which would defeat a finding of prejudice. (*Id*. at p. 254.)

Respondent also argues the trial court need not have conducted an inquiry because, pursuant to *People v. Ray* (1996) 13 Cal.4th 313, 343, there is no duty for the court to investigate "any and all" information obtained about a juror during trial. (RB p. 68.) The context for this Court's statement in *Ray* differs in both form and substance from the potential juror bias in the present case. In *Ray,* a juror came forward during the trial and informed the court that he had just realized he worked at the school that the victim's daughter attended but he had never discussed the case with her. Defense counsel expressly declined an inquiry and stated he was satisfied with the juror's representation regarding his communications with the daughter. In rejecting a claim of error on appeal for the trial court's failure to conduct an inquiry, this Court found that the record "contained no information from which the court could infer that [the juror] was biased against the defense or in favor of the prosecution." (*People v. Ray*, *supra*, 13 Cal.4th at p. 344.) Indeed, there was a clear inference the juror could remain impartial by virtue of his voluntary revelation of the possible connection to the victim's family. In contrast, the record here does contain information from which an inference of Juror No. 7's bias could be drawn, and there is nothing in the record to suggest otherwise.

Under these circumstances, the trial court abused its discretion by failing to conduct any inquiry into Juror No. 7's ability to remain impartial after hearing Hill's testimony and reversal is required. As argued in the AOB at pages 92-97, if this Court finds reversal on the present record is not warranted, the proper remedy would be to order an immediate remand to the trial court, with instructions to conduct the appropriate inquiry, rather than requiring appellant to await for resolution of the matter on habeas corpus. Due to the extraordinary length of time likely to pass before appellant will be appointed habeas corpus counsel, an adequate investigation can be conducted, the matter raised in a habeas corpus petition and finally addressed by this Court on collateral review,[9] this Court should remand rather than make appellant suffer the consequences of delays that are largely outside his control. Respondent has not addressed this argument.

For the reasons set forth above and in the AOB, appellant requests reversal of his conviction, or in the alternative, a remand with instructions for the trial court to resolve whether or not Juror No. 7 was able to perform her duties as a juror.

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9. As noted by Justice Liu in his concurring opinion in *Briggs v. Brown* (2017) 3 Cal.5th 808, 869, despite the passage of Proposition 66, which was promoted as a mechanism to shorten the postconviction death penalty process, it is anything but clear that the new procedures enacted after the filing of the AOB in this case will "appreciably accelerate[] the appointment of appellate or habeas counsel" or "reduce[] the amount of time the fully briefed case [is] pending in this court." (*Ibid*.)

## III.
## THE ADMISSION OF TESTIMONY THAT APPELLANT HAD AN EXTRAMARITAL AFFAIR WITH DELORES HILL WAS ERRONEOUS AND PREJUDICIAL

The prosecution presented, over defense objection, testimony that appellant had a brief extramarital affair with his friend and neighbor, Delores Hill. Hill was a percipient witness regarding the day of the crime who had provided the police with incriminating information against appellant in 1999, but then, eight years later, provided additional damaging information that the prosecution sought to use at trial. The prosecutor elicited from Hill that she had engaged in sexual relations with appellant on several occasions, in an attempt to explain why she had not told the police everything she knew in 1999, when she was interviewed shortly after appellant's arrest. The trial court allowed this testimony to come in, despite appellant's objections on relevancy grounds and his contention that evidence of appellant's affair was more prejudicial than it was probative. As demonstrated in the AOB, the trial court erred in admitting this testimony and thereby permitted irrelevant and prejudicial testimony to impact the jury, particularly regarding its penalty phase verdict. (AOB, pp. 98-115.) Respondent argues that the testimony was relevant and probative, and not prejudicial to the fairness of appellant's trial. (RB, pp. 69-76.) Hill's testimony about the affair, however, had virtually no probative value and, in the context of a death penalty trial involving criminal sexual behavior, was extremely prejudicial.

### A. Evidence of Appellant's Extramarital Affair Lacked Probative Value

In assessing the probative value of challenged evidence against its potential to prejudice the jury, this Court has observed that, while "probative value and prejudice obviously are not commodities subject to quantitative measurement" (*People v. Schader* (1969) 71 Cal. 2d 761, 774), there are some

general guidelines that courts follow in performing the required balancing process. Specifically, "[t]he chief elements of probative value are relevance, materiality and necessity." (*Ibid*; see *People v. Welch* (1972) 8 Cal.3d 106, 116; *People v. Mota* (1981) 115 Cal.App.3d 227, 234.) In deciding whether evidence should be excluded pursuant to Evidence Code section 352, the court must strike a balance between the probative value of the evidence and the danger of prejudice. The court must consider "'the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion.' [Citation.]" (*People v. Harlan* (1990) 222 Cal.App.3d 439, 445, quoting *People v. Wright* (1985) 39 Cal.3d 576, 585.) Here, Hill's testimony that she had a sexual affair with appellant had marginal relevance, was not material to any contested issue at trial, and was not necessary for the prosecution to prove its case.

Respondent argues that the testimony was relevant to establish Hill's credibility by explaining why she did not tell the police everything when she spoke to them early in the development of the prosecution's case. (RB, pp. 75-76.) However, the fact she had an intimate relationship with appellant did nothing to bolster her credibility and, in fact, undercut it. Hill did not proffer *the affair* as her explanation for withholding appellant's incriminating statements from the police. Rather, she proffered that she was afraid the police would think she was involved in the crime if she had told them what appellant said, and if they discovered she and appellant had a sexual relationship. Hill testified on that point as follows:

> Q. Now, when you talked to the police that day, at that time did you tell them about what the defendant said about how long it takes to choke somebody to death?
>
> A. No.

Q. Why not?

A. I didn't want to really be tied into it like that. I didn't want to be, you know, like like I had something to do with it or involved or knew something more and -- because I had contacts, sexual contact, with him, I didn't want that out there. So I just didn't say anything at that time.

Q. You were kind of worried because of your relationship that somebody might think --

A. Uh-huh.

Q. -- That you had involvement in this and you didn't?

A. Yes.

(11RT 2720.) As Hill stated, her reason for not divulging what appellant told her or the nature of her relationship with appellant was because she did not want it to seem that she was "tied into it," "had something to do with it," or "knew something more." (Ibid.) She never indicated that she withheld information from law enforcement because of the relationship itself. Thus, contrary to respondent's argument, her explanation about why she failed to come forward was not "inextricably intertwined with the sexual nature of her relationship" (RB, p. 75), nor did she testify "that her failure to share this information with the police was because she did not want evidence of her affair with [appellant] to come to light" (RB, pp. 75-76).

Respondent also contends that, in addition to providing a "plausible" explanation for Hill's inconsistent statements, the jury would find it easier to believe appellant told her the information she later divulged if they knew she had been intimate with him, and not just friends. (RB, p. 76.) Respondent does not explain why appellant's close friendship with Hill, which involved him spending time with Hill and her daughter during the day (11RT 2697-2699), and was close enough that Hill felt comfortable borrowing a mattress from him (Exhibit 33A, 33F), and lending him her own car, would not have been enough to explain appellant's willingness to confide in her.

Even assuming the sexual nature of Hill's relationship with appellant was minimally relevant, since the affair was not the reason why her statements to the police differed, and her testimony about it did not help establish her credibility, it was not probative of any issue material to the prosecution's case. Indeed, respondent does not address the materiality of the affair itself, but instead argues only the importance to the prosecution of the additional information Hill provided about appellant's statements to her. (RB. p. 75.) In determining the materiality of collateral evidence under section 352, however, the proper focus should be on the challenged evidence itself and whether that evidence was important to a crucial issue in the case. (See, e.g., *People v. Harlan, supra*, 222 Cal.App.3d at p. 445 [allowing introduction of evidence that defendant frequently wore women's underwear to corroborate testimony of four-year-old sex offense victim where victim's credibility was a "critical" issue in the case].)

Here, there was no challenge by the defense to Hill's testimony about appellant's statements, or to her credibility in general, nor was any defense raised to the requisite elements of premeditation or intent to kill. As respondent itself concedes (RB, p. 78), appellant made a full confession and did not contest the evidence of guilt at all. (*People v. Schader*, *supra*, 71 Cal.2d at p. 775 ["In order to assess materiality, the court must consider not merely the elements of the offense, but also the defendant's testimonial admissions."].) Given the facts and the nature of the defense, the evidence was neither material to any issue essential to the prosecution's case, nor was it necessary.

That the prosecution did not need Hill's testimony about appellant's statements is clear from its guilt phase arguments, when it argued that, considering that the method used by appellant was strangulation, evidence of intent to kill was so overwhelming it did not even warrant discussion. (12RT 2812-2813.) The prosecution also pointed to appellant's confession, during which appellant had made clear that he wanted to make sure that Jaquita was

dead. The prosecutor then added: "He's finding out, like he told Delores Hill, that strangling is not like it is on TV. He knows that because he did it." (12RT 2814.) That was the sole reference in the prosecution's guilt phase arguments to the additional statements Hill divulged to the police,[10] statements respondent now contends were important enough to the prosecution to warrant the introduction of prejudicial evidence of appellant's extramarital sexual activity with Hill.

Evidence of Hill's affair with appellant was, at most, marginally relevant, immaterial, and cumulative to the evidence of Hill's close friendship with appellant. As shown below, it was not sufficiently probative to outweigh its prejudicial nature and the court abused its discretion in authorizing its admission.

### B. The Prejudicial Impact of Evidence That Appellant Engaged in Extramarital Sexual Relations Was Much Greater Than Any Probative Value

As appellant argued in the AOB, at pages 108-110, the trial court abused its discretion in determining that Hill's testimony would not be prejudicial. While the court found that evidence of extramarital sexual activity with anyone other than Hill would be prejudicial, with regard to appellant's relations with Hill, it stated:

> but I mean we had a president of the United States who had an extramarital affair. It didn't seem to stop him from continuing to succeed. I think in this day and time a short-term extramarital affair is not going to cast somebody in such a negative light that it's going to inflame or impassion the jury against the defendant.

(1RT 272.)

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10. The prosecutor did not refer to Hill's testimony at all when discussing premeditation and deliberation, relying solely on appellant's confession to establish that element of first-degree murder. (12RT 2817-2821.)

By solely considering whether, in its view, the public *generally* would be inflamed by someone engaging in extramarital sex, the court did not conduct the proper case-specific weighing required for a ruling under Evidence Code section 352.[11] Respondent treats the prejudice analysis in an equally summary fashion and fails to address appellant's specific points in that regard. (RB, p. 77.)

As did the trial court, respondent overlooks that appellant was charged with a capital offense and that all guilt phase evidence would be considered at the penalty phase. '"Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt.' (*People v. Crew* (2003) 31 Cal.4th 822, 842, 3 Cal.Rptr.3d 733, 74 P.3d 820.)" (*People v. Eubanks* (2011) 53 Cal.4th 110, 145.) Regardless of whether the evidence of appellant's sexual relationship with Hill would have evoked an emotional bias that might have impacted the jury's guilt phase verdicts, the court apparently did not consider the impact of this evidence at the penalty phase, where the jury is asked to perform the normative task of assessing the defendant's character and background in determining whether he should live or

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11. As appellant argued in his opening brief, the trial court's belief that public opinion about adultery at the time of trial was no longer particularly negative in light of President Clinton's "continuing" success after the Monica Lewinsky affair came to light had no basis in fact. (AOB, p.110.) Respondent does not address this point in connection with whether the trial court abused its discretion in making the prejudice determination, but merely notes that defense counsel referred to the Clinton matter first in arguing the evidence was prejudicial in its limine motion. Significantly, respondent does not dispute that, contrary to the trial court's belief, even after the Clinton-Lewinsky scandal, an overwhelming majority of Americans considered adultery to be morally unacceptable and nearly universally condemned. (*Id*.)

die. In that context, unnecessary and non-probative evidence that appellant was an adulterer was prejudicial within the meaning of Evidence Code section 352.

For the reasons stated in the AOB, and above, the trial court's admission of this portion of Hill's testimony was an abuse of discretion and violated appellant's rights to due process and a reliable penalty verdict under the federal constitution.

### C. The Admission of Hill's Testimony About the Affair Was Not Harmless Under Either Federal or State Standards

Respondent disputes that the evidence of appellant's affair was not harmless at either the guilt or penalty phases. With regard to the penalty phase, while acknowledging that the standard for reversible error under state law pursuant to *People v. Brown* (1988) 46 Cal.3d 432, 448 (reversal of death sentence required where there is reasonable possibility that error affected the penalty verdict) is the same in substance and effect as for federal constitutional error pursuant to *Chapman v. California* (1967) 386 U.S. 18, 24, respondent nonetheless fails to properly interpret that standard and has not met the state's burden of showing the admission of Hill's testimony was harmless beyond a reasonable doubt.

Mischaracterizing the case in mitigation solely as an attempt to show that appellant was a "good father," respondent contends that, even in the absence of any "serious" other aggravating evidence, the circumstances of the crime itself were so cruel that appellant's affair "would not have overwhelmed the jury with emotion such that they would have been unable to make a rational determination of the penalty." (RB, p. 79.) Appellant's case in mitigation was not limited, however, solely to evidence that he was a good father. The defense presented evidence of appellant's good qualities, his participation in church groups, his excellent relationship with his extended family, and examples of his good nature and character. (See AOB, pp. 31-38.) The defense also argued

that it was not in appellant's character to commit a crime of a sexual nature, and thus it was an aberration. (See, e.g., 15RT 3544; 16RT 3571-3572, 3588.) Evidence that appellant had an adulterous affair cast doubt on the mitigation case, painted appellant in a negative light, and interjected into the penalty decision facts that had nothing to do with whether he should live or die.

Indeed, respondent has not only inaccurately described the mitigating evidence, but also has misapprehended the appropriate standard. The test is not whether the jury would have been so overcome with emotion that, as a whole, it could not make a rational penalty decision, but rather whether there is a reasonable *possibility* that *any one juror* might have considered appellant's affair with Hill in weighing the mitigating evidence against the aggravating evidence, i.e, whether it contributed to the penalty verdict. (*People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

While respondent makes great effort to dispel the notion that this was a close case in terms of penalty (RB, pp. 79-80), even by respondent's own calculations, the jury deliberated over 13 hours and requested that the testimony of guilt and penalty phase witnesses be read back before it was able to reach a decision. Had the circumstances of the crime alone been so "cruel" alone to warrant a death verdict, then the jury presumably would not have needed to deliberate more than a few hours. But regardless of the total amount of time the jury actually spent in deliberations, or whether the decision was "close," respondent has not shown that it is beyond any reasonable possibility that one juror would found have found that appellant's adultery tipped the scales towards a death sentence.

Although the murder and sexual assault of any child is disturbing, contrary to respondent's argument, the facts of this case cannot fairly be described as "exceptionally cruel." (RB, p. 79.) Appellant inflicted no injuries other than those incurred during the act of murder itself; there were no torture or teasing wounds, and no physical evidence of sexual penetration itself, such

as bruising or other indication of the infliction of pain. The victim was not bound or otherwise restrained, nor was she verbally threatened or abused. (10RT 2490-2491, 2513, 2524-2525.) Similarly, there was no evidence she was subjected to psychological cruelty, such as might occur during a prolonged period of captivity or the commission of multiple sexual acts. Compared to other child murder cases, this case does not stand out as particularly brutal or horrific. (See, e.g., *People v. Heard* (2003) 31 Cal.4th 946 [defendant forcefully beat 11-year-old girl's head, dislodging her brain and exposing bone in forehead, bit her nipples, repeatedly stomped on her chest and abdomen, thrust a baseball bat into her vagina and/or anus causing damage to her rectum and internal organs, forced bottle of rubbing alcohol down her throat, and strangled her); *People v. Ashmus* (1991) 54 Cal.3d 932 [defendant sodomized, and raped with foreign object, a seven-year-old girl, made very large tear through her vagina to within a quarter of an inch of rectum; asphyxiated her by shoving plastic bags into her mouth and throat]; *People v. Frank* (1990) 51 Cal.3d 718 [defendant kidnapped two-year-old girl, bound her, struck her in head with powerful blow, raped her, inserted dirt into her vagina and anus, used vise-grip pliers, strangled and killed her].)

Because a death sentence was not a foregone conclusion based on the circumstances of the crime, it cannot be established that the introduction of Hill's testimony about her sexual relationship with appellant was harmless or had no impact on the jury's guilt or penalty decisions. For these reasons, appellant's conviction and/or sentence should be reversed.

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## IV.
## THE TRIAL COURT ERRONEOUSLY ADMITTED VICTIM IMPACT EVIDENCE FROM THE VICTIM'S SCHOOL TEACHER IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

In his opening brief, appellant showed that the victim impact evidence presented exceeded the limits on such evidence required by the United States Constitution and that the trial court specifically erred in admitting the irrelevant and inflammatory testimony of Jaquita Mack's fifth grade teacher, Christine Mohler, and evidence to support that testimony. (AOB, pp. 116-138.) Respondent contends that appellant's claims lack merit, and that his challenges to the court's ruling regarding the admissibility of specific portions of the evidence is forfeited. Respondent is wrong on both points.

### A. Admission of Christine Mohler's Testimony During the Penalty Phase Violated the Eighth Amendment and the Due Process Guarantee of Fundamental Fairness

Appellant demonstrated in his opening brief that this Court has impermissibly broadened the scope of admissible victim impact testimony beyond that authorized by the United States Constitution. (AOB, pp. 124-132.) Respondent contends that this is not the case because this Court has recognized that victim impact evidence must comport with the limits of both state law and the federal constitution. (RB, pp. 85-86.) Regardless of this Court's acknowledgement of both federal and state standards in rejecting challenges to the introduction of victim impact evidence, as argued in the opening brief, it has failed to actually apply the federal constitutional preclusion of such evidence when it is "unduly prejudicial." (AOB, pp 126-129.) Instead of balancing the prejudice from the introduction of victim impact evidence against its probative value to assess the defendant's moral culpability or character, which is required to determine whether evidence is "unduly" prejudicial, this Court, in practice, only considers whether the evidence was so inflammatory as

to "invite a purely irrational response." (AOB, pp. 126-127.) There is a distinction between evidence so minimal in probative value that it is not worth the risk of prejudice that its introduction might engender and thus is "unduly" prejudicial, and evidence that is both so unrelated to the defendant's culpability and so enormously prejudicial that a juror's reaction to it in the context of a given case would be "purely irrational." In the first instance, the response might be rational but nonetheless unwarranted, while in the second instance, the response would have to be completely unreasonable.

Respondent argues that, in this case, the trial court did balance the probative value of Mohler's testimony against its potential for prejudice, because it found the testimony was not inflammatory or outrageous. (RB, p. 86.) Respondent has misconstrued appellant's argument. As appellant acknowledged, the trial court did find that, in general, a teacher is a member of a child victim's community and that the impact of the death of a child on that community is generally relevant to the defendant's culpability. (AOB, p. 128.) Appellant argued, however, that in addressing the specific portions of Mohler's testimony and the exhibits the prosecutor sought to introduce to enhance that testimony, the trial court failed to balance their probative value against their prejudicial nature and thus did not consider whether they were unduly prejudicial as required by the federal constitution. (*Ibid.*)

Respondent asserts that appellant has forfeited any claim that the trial court failed to apply the balancing test required by Evidence Code section 352. Again, respondent misses the point of appellant's argument, which was that this Court and the lower courts, including the trial court in this case, have essentially placed victim impact evidence beyond the reach of usual evidentiary principles. Moreover, appellant's attorneys did object generally to "the scope" of the specific evidence presented (13 RT 3154-3157), and specifically to

portions of Mohler's testimony and the exhibits as they were introduced.[12] It was understood that to avoid making "speaking objections" counsel could simply say "objection," without spelling out the bases, if they felt that evidence was not relevant and "too personal" (12RT 2983).

Counsel's objections thus preserved appellant's contentions for appellate review and the cases respondent relies on to argue forfeiture do not suggest otherwise. In *People v. Wilson* (2005) 36 Cal.4th 309, 355-357, this Court found any challenges to the substance of the victim impact testimony forfeited because the only objection raised by the defense was that it had not been provided sufficient notice of the evidence and, unlike counsel here, the defense did not raise any objection to the scope of the testimony. In *People v. Romero and Self* (2015) 62 Cal.4th 1, 45-46, while the defense did file an in limine motion generally challenging the introduction of all victim impact evidence, it did not make any specific objections when the evidence was introduced, thus forfeiting any claimed error on appeal. In contrast, in this case the defense did raise specific objections to portions of Mohler's testimony and certain exhibits. (See fn. 12, *ante*.)

With regard to appellant's arguments seeking reconsideration of this Court's holdings that victim impact testimony permissibly may extend far beyond the scope of immediate family members, and may include the effects on any friend, loved one and the community as a whole, respondent merely recites that this Court has rejected similar challenges and has repeated that such

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12. During Mohler's testimony, the defense unsuccessfully objected to questions about Mohler's own educational history (13RT 3145); to introduction of two excerpts from Jaquita's journal and Jaquita's final report card (13RT 3152-3155); to Mohler's testimony about telling her husband about her emotional trials and tribulations in teaching Jacquita (13RT 3149); and her descriptions of her other students trying to comfort her when they told her about what had happened (13RT 3151).

testimony is admissible. (RB, pp. 86-87.) For the reasons stated in the opening brief at pages 124-132, this Court should reconsider the prior rulings cited therein and in respondent's brief.

### B. The Trial Court Should Have Limited Mohler's Testimony and the Supporting Evidence to the Reasonably Foreseeable and Immediate Impact of the Crime, and Excluded Evidence That Was Not Materially, Logically or Morally Related to the Crime Itself and Had No Bearing on Appellant's Culpability

Respondent argues that the specific aspects of Mohler's testimony and the exhibits that were objected to at trial were all admissible under this Court's prior case law. (RB, pp. 87-88.) It does not address appellant's contention that this Court should reconsider that prior case law and now hold that Mohler's testimony here was inadmissible in whole or in part because it had no relation to appellant's culpability or the sentencing determination. (AOB, pp. 124-132.)

Thus, as to appellant's specific points, respondent merely asserts that there is no requirement under current California law that victim impact evidence be limited to impact that was known or reasonably should have been known by the defendant. (RB, p. 87.) It further asserts that Mohler's testimony about her special (and entirely unforeseeable) relationship with the victim showed why Mohler continued to be affected by the loss, and is thus admissible under *People v. Brown* (2004) 33 Cal.4th 382, 389, but fails to address how this evidence has any relevance to appellant's culpability. (RB, p. 88.) Respondent also asserts that Mohler's testimony about Jaquita's report cards was proper because "evidence of a victim's character is admissible as such evidence conveys the insight into the victim that the high court has concluded is appropriate. (Citations omitted.)" (*Ibid.*) Respondent has done no more than parrot the general standards and does not address in what way the specific evidence introduced in this case shed any light on appellant's culpability. Because respondent has not provided any response to the gravamen of

appellant's arguments, for the reasons previously stated in the opening brief (AOB, pp. 124-132), this Court should reconsider its prior refusals to limit the scope of victim impact testimony.

Respondent contends that the evidence presented through Mohler was not inflammatory or unduly prejudicial, and that it merely served to "humanize" the victim, and provide "some sense of the loss suffered by society." (RB, p. 89.) However, respondent ignores that Jaquita was "humanized" by the victim impact evidence presented through the testimony of Jaquita's family, and that Mohler's testimony about Jaquita and her hopes and achievements, provided ample sense of the loss suffered, without any need to embellish that picture with irrelevant yet sympathy-generating testimony about Mohler's life and her efforts as an idealistic young teacher.

For all the reasons above, and those set forth in the opening brief, the trial court abused its discretion in admitting Mohler's testimony and the evidence to support it. Further, despite respondent's argument that the penalty case was not close, it has failed to show that there is no reasonable possibility that Mohler's testimony affected the jury's verdict. (RB, p. 89.) Indeed, beyond the circumstances of the crime itself, without the victim impact testimony, the prosecution had little to present in aggravation. Appellant had no prior felony convictions, and his only prior criminal acts were extremely mild. Numerous mitigation witnesses attested to appellant's good qualities, and there also was testimony that he would pose little threat if sentenced to life in state prison. (See AOB, pp. 137-138.) That the jury engaged in lengthy deliberations before determining the sentence (8CT 2172) also indicates that the prosecution's case for a death sentence was weak, and thus, that there is a possibility that Mohler's irrelevant testimony had an impact on the verdict. Accordingly, appellant's death sentence should be reversed.

## V.
## THE TRIAL COURT ERRONEOUSLY ADMITTED AGGRAVATING EVIDENCE OF UNADJUDICATED OTHER CRIMES

Appellant challenges the admission of evidence purporting to prove that he had committed two unadjudicated crimes of force or violence that the prosecution used in its case in aggravation at the penalty phase under section 190.3 (b) [hereafter "factor (b)"]. The trial court abused its discretion in admitting this evidence, and its admission violated appellant's state and federal constitutional rights to confrontation, due process, equal protection, a fair trial, trial by an impartial jury, and a reliable and non-arbitrary determination of penalty. (Cal. Const., art. I, §§ 15, 16, & 17; U.S. Const., 6th, 8th & 14th Amends.)

Respondent contends the trial court did not abuse its discretion and that appellant's rights were not violated by the admission of the factor (b) evidence. Respondent's arguments should be rejected and, because the admission of this improper evidence resulted in the jury's consideration of prejudicial information that contributed to its decision to sentence appellant to death, appellant's death sentenced should be reversed.

### A. Evidence to Prove That Appellant Committed a Battery Against Robert Barnes Should Not Have Been Admitted

In his opening brief, appellant challenged the admission of evidence regarding appellant's alleged battery against Robert Barnes on multiple grounds. Appellant argued that the incident against Barnes should not have been presented because appellant was only 15 at the time it occurred; that the court should have held a foundational hearing to determine whether there was sufficient admissible evidence to warrant evidence of the incident to come before the jury; that the identification evidence was inadmissible hearsay and thus insufficient to support a finding of appellant's guilt of battery beyond a

reasonable doubt; and that the court erred in denying appellant's motion to strike testimony of a racially charged threat allegedly made to a witness after the battery was over. (AOB, pp. 141-180.) Respondent argues none of these grounds have merit. As will be shown below, respondent is mistaken.

### 1. Based on Scientific Research and Developing Case Law Since the Time of Appellant's Trial, Allowing the Jury to Consider Evidence of Juvenile Behavior to Determine Penalty Renders Factor (b), as Interpreted by this Court, Unconstitutional

As argued in the AOB, this Court should reconsider the constitutionality of permitting criminal acts committed while the defendant was a juvenile to be used as aggravating factors at the penalty phase of a capital trial. (AOB, pp. 168-180.) Respondent contends that the argument is forfeited because it was not raised at trial, and that this Court should not reconsider its prior rejections of the issue.

Initially, this Court should not find the issue forfeited despite counsel's failure to object on constitutional grounds. At the time of appellant's trial, there was no basis under state or federal law for an objection to the introduction of unadjudicated juvenile criminal acts under factor (b). Indeed, California law expressly allowed such evidence to be admitted without limitation at the penalty phase of a capital trial. (See, e.g., *People v. Burton* (1989) 48 Cal.3d 843, 862.) Thus, any objection on this specific ground at the time of trial would have been futile. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237-338.) The argument respondent asserts was forfeited is based on legal developments in the courts that occurred years after

appellant's trial,[13] developments appellant could not have been reasonably expected to anticipate. (*People v. Turner* (1990) 50 Cal.3d 668, 703 [pertinent law changed so unforeseeably after trial it is unreasonable to expect defendant to have made anticipatory objection].) Further, because the inclusion of constitutionally irrelevant factors into the jury's sentencing decision rendered appellant's penalty trial fundamentally unfair and violates not only the Eighth Amendment but also principles of due process, "the prerequisite of an objection to appellate review would frustrate rather than subserve the interests of justice." (*Welch*, *supra*, 5 Cal.4th at p. 241 (conc. opn. of Arabian, J.).)

Since the opening brief was filed, this Court has continued to reject claims that the use of juvenile criminality to support imposition of the death penalty must be reconsidered in light of *Roper v. Simmons* (2005) 543 U.S. 551 and its progeny. In its most recent pronouncement, for example, this Court stated that, "[e]ven if . . . *Roper* and *Miller* treat juvenile misconduct as less blameworthy than adult misconduct, evidence of forceful or violent conduct is nevertheless relevant to penalty phase questions about character and future dangerousness [citation omitted]. Arguments about the offender's youth and immaturity go to the weight of the evidence, not its admissibility." *People v. Winbush* (2017) 2 Cal.5th 402, 473.) This Court has not, however, addressed the substance of appellant's argument, which is not that *Roper* and other cases treat juvenile misconduct as less blameworthy, but that there are reasons based in science and neuroscience, as expressed by the United States Supreme Court, the state legislature, and this Court itself, why evidence of juvenile forceful or violent behavior *should be* deemed irrelevant to questions of character and

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13. See, e.g., *Graham v. Florida* (2010) 560 U.S. 48, *Miller v. Alabama* (2012) 567 U.S. 460, *Roper v. Simmons* (2005) 543 U.S. 551, *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1390, *People v. Caballero* (2012) 55 Cal.4th 262, 268.

future dangerousness. To the extent respondent merely points to this Court's prior decisions upholding the use of juvenile criminal activity as an aggravating factor, it similarly has failed to address the basis of appellant's argument.

In his opening brief, appellant set forth the findings made by the United States Supreme and this Court regarding the undeveloped and evolving nature of the human brain prior to adulthood. (AOB, pp. 175-178.) In addition to the authorities cited in appellant's opening brief, just recently the California legislature made the following findings in the context of creating new statutory requirements for custodial interrogations of individuals 15 years of age or younger and establishing guidelines for admission of statements made during interrogations where these requirements were not met:

> (a) Developmental and neurological science concludes that the process of cognitive brain development continues into adulthood, and that the human brain undergoes "dynamic changes throughout adolescence and well into young adulthood" (see Richard J. Bonnie, et al., Reforming Juvenile Justice: A Developmental Approach, National Research Council (2013), page 96, and Chapter 4). As recognized by the United States Supreme Court, children "'generally are less mature and responsible than adults'" (*J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2397, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115); "they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them'" (*J.D.B*., 131 S.Ct. at 2397, quoting *Bellotti v. Baird* (1979) 443 U.S. 622, 635); "they 'are more vulnerable or susceptible to… outside pressures' than adults" (*J.D.B*., 131 S.Ct. at 2397, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 569); they "have limited understandings of the criminal justice system and the roles of the institutional actors within it" (*Graham v. Florida* (2010) 560 U.S. 48, 78); and "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them" (*J.D.B*., 131 S.Ct. at 2397).

(Sen. Bill No. 395, approved by Governor, October 11, 2017 (2017-2018 Reg. Sess.) § 1.) Citing "a large body of research,"[14] the legislature further found that "adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions." (*Ibid.*)

For all these reasons, juvenile criminal activity should not be considered relevant to the jury's assessment of the character or potential for future dangerousness of a criminal defendant, and should not be weighed as factor to determine whether he or she should be sentenced to death. The introduction of juvenile crimes, or threats of force or violence to convince a jury to impose death renders the resulting death sentence unreliable and arbitrary, in violation of the Sixth, Eighth and 14th Amendments.

**2. The Trial Court Did Not Determine Whether the Evidence That Appellant Committed a Battery Against Robert Barnes Was Sufficient to Be Presented to the Jury and the Evidence Was Insufficient to Convince a Rational Trier of Fact of Appellant's Guilt Beyond a Reasonable Doubt**

Defense counsel requested, on two separate occasions, that the trial court hold a foundational hearing pursuant to *People v. Phillips* (1985) 41

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14. See, e.g., Steinberg et al., "Age Differences in Future Orientation and Delay Discounting," Child Development, vol. 80 (2009), pp. 28-44; William Gardner and Janna Herman, "Adolescents' AIDS Risk Taking: A Rational Choice Perspective," in Adolescents in the AIDS Epidemic, ed. William Gardner et al. (San Francisco: Jossey Bass, 1990), pp. 17, 25-26; Marty Beyer, "Recognizing the Child in the Delinquent," Kentucky Children's Rights Journal, vol. 7 (Summer 1999), pp. 16-17; National Juvenile Justice Network, "Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates," September 2012, pp. 1-2; Catherine C. Lewis, "How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications," Child Development, vol. 52 (1981), pp. 538, 541-42).

Cal.3d 29, 72-73, to determine whether the prosecution's assertion that appellant committed a battery against Robert Barnes was sufficiently supported by the evidence to be presented to the jury. (2RT 281; 13RT 2988.) The defense was concerned because the prosecutor had conceded that Barnes would not be able to identify his batterer in court, and it was anticipated that Barnes would testify that he could not and did not see his assailant at the time of the incident. The defense also asserted that any such identification would have been questionable because Barnes was young and particularly susceptible to police pressure at the time he was questioned by the police and purportedly identified appellant. (13RT 2988.) The prosecutor told the court he planned to introduce evidence, under the past recollection recorded exception to the hearsay rule, that Barnes had previously identified his assailant. The court denied the request for a foundational inquiry, finding that the defense concerns went to the weight of the evidence, rather than its admissibility. (13RT 2990-2991.)

Respondent first argues that the trial court did not abuse its discretion in declining to hold a *Phillip*s hearing because such a hearing need not include live testimony and instead can be based on an offer of proof solely. (RB, p. 95.) Because the prosecutor told the court he planned to introduce the identification evidence as past recollection recorded, and neither Barnes nor his attorney had asserted the identification was suggestive, respondent contends the court could rely on this "offer of proof" to make its foundational finding of admissibility without any live testimony. (*Ibid*.)

The problem with this argument is that the trial court made no finding that the evidence was admissible as past recollection recorded pursuant to Evidence Code section 1237, or that, if admissible, it was sufficient for a rational trier of fact to find the elements of a battery had been established beyond a reasonable doubt, i.e., the court made no finding as to whether there was "substantial evidence to prove each element" of the offense. (*People v.*

*Phillips, supra,* 41 Cal.3d at p.72, fn. 25.) Instead, the court summarily discounted appellant's arguments regarding the insufficiency of the evidence as merely going to "the weight" of the evidence, not its admissibility (13 RT 2990), and did not address whether the evidence was sufficient to permit the alleged battery on Barnes to go to the jury. The issue thus is not whether the court had to hear live testimony in making its foundational inquiry and ruling, but whether it had to make an inquiry and ruling as to the sufficiency of the evidence at all before allowing the evidence to be introduced.

Respondent relies on *People v. Jones* (2011) 51 Cal.4th 346, 380 and *People v. Boyer* (2006) 38 Cal.4th 412, 477, footnote 51, to argue the prosecution's offer of proof here was a sufficient substitute for a *Phillips* hearing, but neither case supports its argument. In *Boyer*, the defendant specifically requested that the trial court hold an evidentiary hearing with live testimony to determine whether the factor (b) evidence was admissible. Instead of such a hearing, the court "received the prosecution's offers of proof and heard extensive argument" and, "without taking live evidence," ruled the evidence could be admitted. (*Boyer,* 38 Cal.4th at pp. 476-477.) On appeal, this Court did not decide whether the offers of proof were sufficient to obviate any need for hearing live testimony, but instead determined that no abuse of discretion occurred because the evidence subsequently presented to the jury to prove the unadjudicated offense was legally sufficient. (*Ibid*.) Similarly, in *Jones,* the defendant requested an evidentiary hearing, which the prosecutor opposed. When arguing against the motion for a hearing, the prosecutor made a detailed offer of proof, after which the trial court expressly ruled that the offer satisfied its inquiry into the sufficiency of the evidence, and that no evidentiary hearing was required. (*Jones*, *supra,* 51 Cal.4th at p. 380.)

In contrast to these two cases, the trial court here did not rule that the evidence was legally sufficient to go before the jury, nor did it find that the offer of proof was a valid substitute for a hearing with live testimony. Instead,

it erroneously found that the defense arguments went to the weight of the evidence. Whether or not the trial court considered the prosecutor's bare statement that he would introduce the purported identification of appellant as a past recollection recorded to be an "offer of proof," it did not determine whether the evidence was in fact admissible under the cited hearsay exception or whether, as a whole, the evidence of the incident was legally sufficient to warrant bringing it before the jury. In fact, Barnes's purported out-of-court identification did not meet the requirements for introduction under Evidence Code section 1237, and thus was legally insufficient to demonstrate appellant's guilt.

As set forth in the opening brief, the other identification evidence the prosecution presented regarding the Barnes incident, the testimony of Officer Burnell that Russ Kunzler had identified appellant out of court, also did not meet the requirements for past recollection recorded, as became apparent when Kunzler subsequently testified before the jury. (AOB, pp. 155-158.) Without the hearsay evidence regarding Barnes and Kunzler, there was insufficient evidence for the jury to find that appellant was Barnes's assailant. Further, the court's failure to inquire into the evidence the prosecution intended to present to establish appellant committed a battery against Barnes had another extremely prejudicial consequence as well. Kunzler testified that the person he stopped from assaulting Barnes made a racially-charged, threatening statement to him. (AOB, pp. 158-167.) As a whole, the evidence presented was not sufficient to place the Barnes incident before the jury at all, and resulted in the presentation of irrelevant and prejudicial testimony to the jury. Thus, the trial court abused its discretion when it failed to hold the requested hearing.

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### 3. Barnes Purported Identification of Appellant Was Not Properly Admitted as a Past Recollection Recorded

Respondent argues that the trial court properly admitted Officer Burnell's testimony that, when he interviewed Barnes after his assault, Barnes identified appellant as the person who kicked him. The testimony was admitted pursuant to Evidence Code section 1237, which sets forth a hearsay exception for past recollections recorded and was based on Burnell's report of his contemporaneous interview with Barnes. To be admissible under that section, a prior statement made by a witness must be, inter alia, "offered after the witness testifies that the statement he made was a true statement of such fact." (Evid. Code, § 1237, subd. (a) (4).)[15] Respondent takes issue with appellant's claim that, because Barnes did not testify that the prior statement

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15. Section 1237, subdivision (a) reads in its entirety:

> Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:
>
> > (1) Was made at the time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
> >
> > (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording witness' statement at the time it was made;
> >
> > (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
> >
> > (4) Is offered after the writing is authenticated as an accurate record of the statement.

(Evid. Code, § 1237, subd. (a).)

was true, the foundation for past recollection recorded was not met. Respondent's application of the law to the facts as they appear on the record is skewed.

As appellant set forth in his opening brief (AOB, pp. 143-144), Barnes testified that he was not truthful about many things when he was interviewed by Burnell, and while that testimony suggests that at least some of what he told Burnell was true, Barnes never avowed that his reported statement that he had identified appellant *as his assailant* was true. Instead, Barnes testified that he recalled looking at some photos, and answered "yes," to the following question: "And . . . the folks that you point to in the photographs, did you -- were you truthful about sort of who you were pointing out? In other words, that you recognize that as somebody who was out there?" (13RT 3029.) Thus, Barnes testified that he told the truth when he identified appellant as somebody "who was out there," i.e., someone at the scene during the assault, but he was not asked nor did he ever say that the specific statement the prosecution relied on to establish appellant's identity as the perpetrator of a violent crime was true. Ignoring the general nature of the question asked of Barnes, respondent, however, misleadingly argues that "[Barnes] was honest about his identification of Demolle" (RB, p. 102) and "Barnes testified that he was honest when he identified [appellant]" (RB, p. 103).

Respondent further argues that a declarant need not vouch for the truthfulness of everything in a recorded statement, and that even if some of what Barnes told Burnell was false, the statement was still admissible because his lack of honesty did not render the entire statement unreliable. *People v. Cowan* (2010) 50 Cal.4th 401, 465-67, on which respondent relies, does not support its argument on the facts of this case. In *Cowan*, the defendant had argued that the declarant, Phinney, could not vouch for the truth of his statement because he had admitted to having memory problems and delusions and that his motive for talking was to exonerate himself from a gun transaction.

Unlike here, the declarant in *Cowan* "repeatedly testified that he told [the officer] the truth to the best of his ability" and testified that he might have lied only about the gun transaction, which "was not the subject of the portion of Phinney's statement the prosecutor sough to introduce." (*Cowan*, 50 Cal.4th at. p. 467.) Here, in contrast, Barnes said he had likely lied about many things, and although he said he was truthful when he identified appellant as being present, the prosecution was not seeking to introduce Barnes's statement to prove that appellant was present, but rather to prove that Barnes had pointed to appellant as his assailant, a fact that Barnes did not affirm.

Because the foundation for admission of a past recollection recorded was not met, the trial court abused its discretion and Burnell's testimony should not have been admitted.

### 4. Russ Kunzler's Purported Identification of Appellant Was Not Properly Admitted as a Past Recollection Recorded

Respondent argues that even if Barnes's identification was improperly admitted, there was sufficient evidence to demonstrate appellant's guilt through the introduction of Russ Kunzler's out-of-court identification of appellant. (RB, p. 98.) However, that identification also was presented via Officer Burnell as a past recollection recorded over defense objection, and because it did not meet the foundational requirements, should have been excluded.

For a statement to be admissible under Evidence Code section 1237, it must "concern[] a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately." (See, e.g., *People v. Dennis* (1998) 17 Cal.4th 468, 530-31 [witness was unable to remember the time period during which he had seen a possible suspect]; *People v. Guardado* (1995) 40 Cal.App.4th 757, 761 [sexual assault victim did not remember at trial what part of her body defendant touched].) As argued in the opening brief, Kunzler had sufficient memory to testify about the identification, and thus,

Burnell's report and testimony were not admissible under the hearsay exception in section 1237. (AOB, p. 157.)

Respondent disagrees that Kunzler had sufficient recollection of his selection of appellant, pointing to the following question:

> Q. Now, again this was back in '90. Let me ask you this. Your memory, if you will, about the specifics of these photographs, what you saw, how many photographs you saw, the role that the guy played you may have selected, how is that memory of all those specifics as you sit here today?

(RB, p. 104, quoting 13RT 3046). Kunzler responded to this compound question: "Very vague." (*Ibid.*)[16] Indeed, only one query in the litany went to the question of Kunzler's recollection of his identification of appellant ("the role that the guy played you may have selected"), and as his subsequent testimony demonstrated, he apparently recollected that aspect vividly. Respondent attempts to bolster its argument by quoting and referring to Kunzler's lack of recollection of the actual incident to "now be making identification . . . of [one of] the guys who was there fighting . . ." (*ibid.)*, but whether he was able to identify appellant in court is not pertinent to the admissibility of a witness's out-of-court identification.

Kunzler was never directly asked if he could remember which photograph he selected from the photo display and he later testified he was relatively certain that the person he identified was the person he had pulled off Barnes (13RT 3053-3054), which was the only relevant subject of the recorded recollection. He obviously recalled the identification process sufficiently to remember selecting a photograph, his certainty at the time of selecting it, and the role the person he identified had played in the incident. Respondent

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16. Counsel challenged the trial court's interpretation that this exchange meant that Kunzler had no recollection of "the entire incident," questioning whether Kunzler meant he had no recall of "every single item," but the court overruled the objection. (13RT 3067.)

discounts that testimony as evidence that Kunzler had sufficient recall, calling it "unremarkable," given that the purpose of the photo lineup was to identify the assailant (RB, p. 105), however, Kunzler's memory went beyond a general conclusion that he must have been asked to make an identification and included details demonstrating he did remember it. (Cf. *People v. Cummings* (1993) 4 Cal.4th 1233, 1293 [witness had no recollection of even talking to the detective who recorded his prior statement]; *People v. Miller* (1996) 46 Cal.App.4th 412, 424, disapproved on other grounds by *People v. Cortez* (1998) 18 Cal.4th 1223, 1240 [witness was unable to recall if she told the detective that the defendant was someone she heard making incriminating statements.].) Had he been shown the photo array displayed to him by Burnell, Kunzler may well have been able to recall which photo he had selected, but simply was never asked. As such, it was not established that he could not sufficiently recall the identification he made to warrant admission of it under Evidence Code section 1237.

Respondent also contends that Kunzler's confidence in his selection does not contradict that he was "nevertheless unable to make an identification." (RB, p. 105.) Respondent's argument conflates Kunzler's inability to identify appellant at trial with his ability to recall making an out-of-court identification, which Kunzler plainly did, as shown by his clear recollection of doing so. Without a proper foundation, Burnell's testimony that Kunzler had identified appellant should not have been admitted.

Absent an identification by Kunzler or by Barnes, the alleged victim of the assault, the evidence that appellant committed an act of force or violence against Barnes was not substantial or legally sufficient, and thus, it never should have been presented to the jury.

### 5. The Trial Court Erred When It Denied Appellant's Motion to Strike Kunzler's Irrelevant and Prejudicial Testimony That Appellant Made a Racially-Charged, Threatening Statement to Him Following the Barnes Incident

In testifying about the Robert Barnes incident, Russ Kunzler added that after the assault was over, one of the individuals involved faced Kunzler and said: "I'm going to come back, white boy, come and shoot you. You're dead." (13RT 3043.) After Kunzler's testimony, the defense moved to strike the statement about the threat, arguing that there had been no notice that the prosecution would introduce the threat as aggravation against appellant, that it was hearsay, and that it was irrelevant yet highly inflammatory, and thus more prejudicial then probative. The trial court denied the motion to strike without explanation. (13RT 3080-3082.) Its ruling was error and allowed irrelevant, racially-charged evidence to be considered by the jury in deciding whether appellant should be sentenced to death.

Respondent contends that the prosecution provided adequate notice and that appellant forfeited the other two alleged errors by failing to object. It additionally argues that, even if not forfeited, the threat was admissible as a circumstance of the assault on Barnes, and that its probative value was not outweighed by any risk of undue prejudice. (RB, pp. 107-109.)

Regarding the issue of notice, respondent insists, despite the prosecution's failure to list the threat in its first amended Notice of Aggravation (6CT 1658), that it was sufficient that the accompanying memorandum, and a subsequent "inspector's report (5CT 1567)," indicated that Kunzler had mentioned that someone involved in the altercation had said he was going to come back and shoot him. The information provided to the defense, however, did not contain any indication that the prosecution intended to pin the threatening statement on appellant, and the memorandum, in fact, indicated the contrary. (6CT 1643 ["Kunzler likely could not remember today whether defendant is the assailant who made this threat"].) As is clear from the record,

the defense was taken by surprise by Kunzler's testimony about the threatening statement, and particularly that he stated his belief that it was appellant who made it. (See 13RT 3080-3082.)

Respondent asserts that appellant forfeited his claim that Kunzler's testimony about the threat was hearsay, but does not otherwise address the merits of that claim. (RB, p. 107.) Defense counsel, however, requested the testimony be struck both on hearsay grounds and because it was more prejudicial than probative. (13RT 3080.)[17] Although perhaps inartfully stated, read in context, it appears that counsel raised "not [just a] hearsay" objection but also an objection pursuant to Evidence Code section 352. (*Ibid.*)

As alleged in the opening brief, Kunzler was not sure that appellant was the person who made the threatening statement, as he was 80 percent sure that appellant was the person whom he had pulled off Barnes and only 80 percent sure that the person he had pulled off of Barnes made this statement to him, making him only 64 percent sure appellant was the speaker. (AOB, p. 162.) If appellant did not make the statement, then it was inadmissible hearsay, an evidentiary matter that should have been decided by the trial court before the statement ever was heard by the jury. Evidence Code section 403, subdivisions (a)(1) and (4), expressly provide that proffered evidence is inadmissible unless the proponent establishes, and the court finds, that there is evidence to sustain a finding of the existence of a preliminary fact when "(1) the relevance of the proffered evidence depends on the existence of the preliminary fact; or . . . (4) [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so

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17. Counsel stated: "And secondly, it's just hearsay – not hearsay, but irrelevant to any issue in this case and it could be highly inflammatory and prejudicial so I would ask that the jury -- it be stricken and the jury told to disregard it." (13RT 3080.)

conducted himself." (*Ibid.*; *People v. Charles* (2015) 61 Cal.4th 308, 322 [admissibility of unsigned letter based on preliminary factual determination that defendant wrote the letter].) Conversely, if appellant did not make the statement, it was irrelevant to the issues underlying the admission of evidence pursuant to factor (b), since it said nothing about his character or propensity for violence.

Respondent also contends that appellant forfeited his claim that Kunzler's statement was more prejudicial than probative because of its racial content. While conceding that an objection to the testimony as irrelevant and inflammatory was made, respondent faults counsel for not specifically referencing "the racial component" in articulating his objection. (RB, pp. 107-108.) Respondent cites no authority for its interpretation of the rules of evidence and related principles of forfeiture, and indeed all that is required to preserve an objection for appeal is that the defendant raise a timely objection that "make[s] clear the specific ground of the objection or motion." (*People v. Brooks* (2017) 3 Cal.5th 1, 42, quoting Evid. Code, § 353.) As in *Brooks*, "[respondent's] call for forfeiture is not well taken here, however, because the record indicates that the grounds for exclusion defendant now advances on appeal were before the court at the time of its ruling." (*Ibid.*)

Indeed, the record indicates that counsel began its motion to strike by specifically pointing to both the threat and the reference to race. Defense counsel Horowitz began: "Your honor, we would ask that the court strike the testimony of Mr. Kunzler regarding the alleged threat made by Alex Demolle that he's going to shoot him *and the white race reference*." (13RT 3080, italics added.) The subsequent argument that the statement was "inflammatory" could only have been based on the "white boy" comment, as the remainder of the statement was not inflammatory in any way. To the extent respondent states that "the thrust of his objection was regarding whether evidence of the threat had been disclosed" (RB, p. 107), respondent overlooks that counsel proffered

multiple separate reasons for the objection, the first being the lack of disclosure and notice, the second being hearsay, and the third based on the inflammatory and prejudicial nature of the statement. Although during the ensuing argument the parties focused on the alleged lack of notice, there is no requirement that a party, after stating several bases for an objection, address each ground separately in further arguing the objection to avoid forfeiting each basis on appeal. The court was made aware of the objection to the reference to race and the issue thus is not forfeited.

Respondent has offered no response as to why the trial court did not abuse its discretion in failing to strike at least the racial slur contained in Kunzler's description of the threat. Even if the threat itself was relevant, which appellant does not concede and countered fully in his opening brief at pages 163-164, the inclusion of the "white boy" comment had no place in the penalty phase of this case, and was particularly inflammatory. Because appellant was sentenced to death by a jury containing no African-Americans, and the case in mitigation rested primarily on the testimony of appellant's African-American family and friends, the potential for prejudice from the jury hearing that he may have made a death threat to someone he viewed as a "white boy" was extremely high. (See AOB, pp. 164-166.) Introduction of this evidence thus violated not only state evidentiary rules but also appellant's rights under the equal protection and due process clauses of the 14th Amendment, and his right to a reliable death sentence under the Eighth Amendment.

### 6. The Erroneous Admission of Evidence Regarding the Barnes Incident Was Not Harmless and Requires Reversal of Appellant's Death Sentence

Respondent asserts that introduction of evidence that appellant committed a battery against Barnes when appellant was 15 was harmless because of the circumstances of the capital offense itself and the victim impact testimony. (RB, p. 109.) Respondent's assessment of the evidence is incorrect

and the erroneous admission of the Barnes incident requires reversal of appellant's death sentence under either the harmless error standard for a federal constitutional violation (*Chapman v. California*, *supra*, 386 U.S. at p. 24) or the standard for state law error at the penalty phase (*People v. Brown* (1988) 46 Cal.3d 432, 447-448).

As appellant noted in the opening brief at pages 194-195, evidence that appellant was involved in a group altercation at the age of 15 went directly against the defense case in mitigation, in which appellant was portrayed as a non-violent and caring friend and family member who got along well with young people. (15RT 3545-3550.) Respondent does not address this contention, nor does it address appellant's charge that the prosecution devoted the bulk of its penalty presentation to attempting to prove appellant's guilt of the assault on Barnes. (AOB, p. 195.) Nearly one-third of the prosecution's case in aggravation, or 58 pages of the reporter's transcript, was consumed by its direct examination of the witnesses to the Barnes incident and Officer Burnell (13RT 3017-3034, 3036-3046, 3055-3071) and an additional 25 pages was consumed by its cross-examination of a defense witness (13RT 3193-3218), a witness whose direct testimony lasted less than one full page. The amount of time and effort that the prosecution expended in trying to prove this incident belies respondent's argument that it had no impact on the jury's decision to sentence appellant to death.

Because the erroneous introduction of evidence to establish appellant's guilt of the battery against Barnes was not harmless, and there was a reasonable possibility it had an impact on the jury's sentencing decision, appellant's death sentence should be reversed.

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## B. The Trial Court Erred in Admitting Evidence to Prove Appellant Made an Unadjudicated Criminal Threat Against Jeff Samuel

In addition to the Barnes incident, the prosecutor presented evidence that appellant made a threatening statement to Jeff Samuel, who was working in the parking lot of a Kaiser Hospital. The trial court erred in failing to hold a hearing pursuant to *People v. Phillips*, *supra*, 41 Cal.3d at p.73, to determine if there was sufficient evidence to present the incident to the jury, and the evidence was in fact legally insufficient to establish that appellant committed a criminal act beyond a reasonable doubt. (See AOB, pp. 180-188.)

Respondent argues that the appellate issues concerning the Samuel incident are forfeited and that the evidence was in fact sufficient. As will be shown below, respondent is incorrect on both points.

### 1. Appellant Did Not Forfeit His Claim That the Evidence was Insufficient to Establish He Made a Criminal Threat Against Jeff Samuel

Respondent argues that appellant has forfeited his claims that the trial court failed to hold a *Phillips* hearing and that the evidence ultimately presented to the jury was insufficient to establish the elements of a criminal threat. Appellant, however, did not forfeit either claim.

Appellant requested a *Phillips* hearing on all incidents the prosecutor intended to present pursuant to factor (b), including the Samuel incident. (2RT 481.) The defense inquired if it was "a definite that we'll have a hearing?" and the court responded: "Yes." (*Ibid*.) The trial court then specified, "the quote, 'terrorist threat' at Kaiser Hospital, again, that would have to be subject to a hearing" (*ibid.*) and "[t]hat's the one I wanted to hear what the testimony actually is on that" (2RT 482). The court, however, allowed the testimony to come in without holding a hearing to assess its sufficiency to go before the jury.

Respondent contends that appellant has forfeited any claim that the court should have held a hearing because counsel did not renew their "request."

(RB, p. 111.) In support of this argument respondent cites *People v. Valdez* (2012) 55 Cal.4th 82, 122, but that case does not address respondent's points. In *Valdez*, the court issued an order to which the defense objected, but the court declined to address the objection because another judge would be taking over the case and counsel could make their objection after the reassignment. The defense, however, did not renew its objection to the prior order before the new judge, nor did they request that judge to rule on the validity of the order. In that context, this Court found the defendant's failure to "pursue and obtain a ruling on these objections" precluded him from raising them on appeal. (*Ibid.*) Here, however, in contrast, the defense did obtain a ruling on its request for a hearing, and because that request was granted, there was nothing to which they could object. Respondent has cited no authority for the proposition that an appellate issue is forfeited when counsel fails to remind the court to do what it previously promised to do.

Similarly, respondent has cited no authority to support its contention that, in seeking a *Phillips* hearing, appellant had to specifically object to the sufficiency of the evidence to establish a particular element or elements of the unadjudicated offense in order to preserve an appellate challenge to the proof of those elements. By requesting a *Phillips* hearing, the defense did challenge the sufficiency of the evidence to establish appellant's guilt of the threat to Samuel. No more than that was required. "If the accused thinks evidence on any such discrete [factor b] crime is too insubstantial for jury consideration, he should be obliged *in general terms to object*, or to move to exclude or strike the evidence, on that ground. [Citations.]" (*People v. Montiel* (1993) 5 Cal.4th 877, 928 & fn. 23.) And although respondent also asserts that appellant failed to specifically object to the "admission of evidence" pursuant to Evidence Code section 353, this Court has held that a challenge to the sufficiency of the evidence to establish a factor (b) offense at the penalty phase *is* a challenge to its admission. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1175.) Because a

request for a *Phillips* hearing is tantamount to a general objection that the prosecution's evidence is too "insubstantial for jury consideration," i.e., it asks the court "to determine whether there is substantial evidence to prove each element of the other criminal activity" (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25), it squarely puts the sufficiency issue before the trial court. Accordingly, appellant has not forfeited his challenge to admission of the Samuel incident as aggravating evidence at the penalty phase.

**2. The Evidence Was Insufficient to Establish a Criminal Threat Against Jeff Samuel**

As argued in the opening brief, the evidence to establish the elements of a criminal threat was too insubstantial to warrant its admission to the jury, and was not sufficient to persuade a single juror that all the elements had been satisfied. Appellant allegedly said to the irate Samuel, "If you yell at me one more time, I'll shoot your ass." (13 RT 3095.) Respondent contends that despite the plainly conditional nature of the threat, it still was "sufficiently unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution." (RB, pp. 113.) Respondent's view of the facts, however, is incorrect.

Respondent relies entirely on Samuel's subjective reactions and feelings about appellant's statements. However, as set forth in the opening brief, this Court has set forth five separate elements that constitute a criminal threat.[18]

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18. The elements are:

> (1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat—which may be "made verbally, in writing, or by means of an electronic communication device"—was "on its face and under

*(Footnote continued on next page)*

The victim's reactions to a purported threat are only relevant to the last two of the five elements this Court has deemed must be satisfied: "(4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo*, *supra*, 26 Cal.4th at pp. 227-228.) As will be shown below, even as to those two elements, Samuel's fear was not reasonable under the circumstances, but more importantly, the evidence did not show that the threat was, on its face and under the circumstances, so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.

Although respondent suggests that, to establish that the threat conveyed the requisite gravity of purpose and immediate prospect of execution, all that is required is that the victim felt threatened and acted accordingly (RB, pp. 113, 115), such an interpretation would render the fourth element entirely superfluous and ignores the separate requirement that the victim's fear was reasonable under the circumstances. Indeed, the question is whether *on its face and under the circumstances* the threat was sufficiently "unequivocal, unconditional and immediate" to convey a gravity of purpose and immediate prospect of execution. The circumstances here (appellant was afraid of ruining his car, but did what Samuel asked and was clearly unarmed as he walked away

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> the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.

(*People v. Toledo* (2001) 26 Cal.4th 221, 227-228, citation omitted.)

into the hospital without incident) did not convey any gravity of purpose or prospect of immediacy.

Unlike cases where the evidence was deemed sufficient to establish the elements of a criminal threat, appellant's behavior here would have reasonably been taken as the emotional outburst of someone who was trying to make it to an appointment and was rudely approached by someone wielding a shovel who demanded that he move his car in a manner he felt was unsafe. (Cf., e.g., *People v. Brooks* (1994) 26 Cal.App.4th 142, 149-150 [witness told by gang member "if you go to court and testify, I'll kill you" and repeatedly threatened, including once when defendant put a gun in her mouth and threatened to kill her on the spot]; *People v. Gudger* (1994) 29 Cal.App.4th 310, 322 [repeated threats to shoot a judge if he did not transfer her case to a judge who would rule in defendant's favor, accompanied by dramatic reference to recent shooting by disgruntled postal employee went beyond emotional hyperbole]; *People v. Stanfield* (1995) 32 Cal. App.4th 1152, 1162-1163 [defendant's threat to kill former attorney identified the manner in which it would be carried out, confirmed defendant's possession of the means to accomplish it, was accompanied by package containing a dead cat, and information that defendant was no longer in an institution].)

Under the circumstances here, although Samuel testified he was fearful, that fear was unreasonable, especially in light of his apparent anger at appellant's disruption of his work. Indeed, the record strongly suggests that it was Samuel's annoyance that appellant might have caused damage to the paving of the parking lot, and not any genuine fear of physical harm, that caused him to call the police. (13RT 3097.) The police similarly felt appellant's threat was not serious, as they did not arrest him for any crime. (13RT 3112.)

For all these reasons and those set forth in the opening brief, the evidence was insufficient to prove beyond a reasonable doubt that appellant's words to Samuel constituted a criminal threat.

### C. The Erroneous Admission of the Barnes and Samuel Incidents Was Not Harmless and Requires Reversal of Appellant's Death Sentence

Respondent addresses appellant's argument that there was a reasonable possibility the jury's imposition of the death sentence in this case was influenced by the introduction of the two unadjudicated offenses (see AOB, pp. 193-197) with an assertion that begs the relevant question. Citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1072, respondent claims that the jury was instructed not to place any weight on the two incidents unless the evidence established each element of the alleged crimes beyond a reasonable doubt, and therefore, if the evidence in fact was insufficient, the incidents could have had no bearing on the verdict. Respondent's interpretation of *Barnett*, if followed, would preclude any challenge to the sufficiency of factor (b) evidence in any case, unless it is accompanied by a claim of instructional error. To the extent this Court agrees with this interpretation, its position should be reconsidered. Such a result would deprive a capital defendant of his right to due process and a reliable penalty verdict in that it would forego appellate review of the sufficiency of the evidence used to obtain a death sentence. Indeed, if the introduction of insufficient evidence could always be cured by jury instructions on the reasonable doubt standard at the penalty phase, then there would be no purpose for the court to hold a *Phillips* hearing to determine if the evidence was substantial enough to go before the jury.

Moreover, in *Barnett*, this Court did not rest its finding of harmless error on the jury instructions, but also recounted the extensive case in aggravation presented in *Barnett*, other than the challenged factor (b) rape, which included not only the tortuous circumstances of the capital crime and special

circumstances, but also evidence of other violent sexual crimes by the defendant, various felony convictions, and his assaults upon police officers and other individuals. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1173.) Appellant, in contrast, had no similar history of sexual offenses, felony convictions, or serious assaults.

As set forth in the opening brief at pages 193-197, the admission of the other-crimes evidence in this case, taken singly or together, was not harmless and appellant's death verdict must be reversed.

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## CONCLUSION

For all the reasons argued above, and in appellant's opening brief, supplemental opening brief, and reply brief, the judgment against appellant must be reversed.

Dated: December 15, 2017

MARY K. McCOMB
State Public Defender

/s/
JOLIE LIPSIG
Supervising State Public Defender
Attorneys for Appellant

**CERTIFICATE OF COUNSEL**
**(Cal. Rules of Court, rule 8.630(b)(2))**

I am a Supervising Deputy State Public Defender and represent appellant, ALEX DEMOLLE, in this automatic appeal. I conducted 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, excluding tables and certificates is 19,214 words in length.

Dated: December 15, 2017

/s/
_____
JOLIE LIPSIG
Supervising State Public Defender

## DECLARATION OF SERVICE

Case Name: ***People v. Alex Demolle***

Case Number: **Supreme Court Case No. S159120**
**Alameda County Superior Court No. 140729**

I, **Marsha Gomez**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

**APPELLANT'S REPLY BRIEF**

by enclosing it in envelopes and placing the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **December 15, 2017**, as follows:

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|---|---|
| Alex Demolle, F-98383<br>CSP-SQ<br>San Quentin, CA 94974 | California Appellate Project<br>101 Second Street, Suite 600<br>San Francisco, CA 94105 |
| Alameda County Superior Court<br>Criminal Appeals Division<br>1225 Fallon Street, Room 107<br>Oakland, CA 94612-4293 | |

The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **December 15, 2017**:

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| Lisa Ashley Ott<br>Supervising Attorney General<br>Office of the Attorney General<br>455 Golden Gate Avenue, Suite 11000<br>San Francisco, CA 94102 | |

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **December 15, 2017**, at Sacramento, CA.

/s/

MARSHA GOMEZ

Supreme Court of California
Jorge E. Navarrete, Court Administrator and Clerk
Electronically FILED on 12/15/2017 by April Boelk, Deputy Clerk

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **PEOPLE v. DEMOLLE (ALEX)**
Case Number: **S159120**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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12-15-2017
Date

/s/Jolie Lipsig
Signature

Lipsig, Jolie (104644)
Last Name, First Name (PNum)

Office of the State Public Defender
Law Firm