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

PEOPLE OF THE STATE OF CALIFORNIA,	No. S161909
PLAINTIFF AND RESPONDENT,	Los Angeles County Sup. Ct. No. BA271293
V.	
THEODORE CHURCHILL SHOVE, III	Death Penalty Case
DEFENDANT AND APPELLANT.	

APPELLANT'S REPLY BRIEF

Appeal from Judgment of
The Superior Court of Los Angeles County
The Honorable Kathleen Kennedy, Presiding

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **PLAINTIFF AND RESPONDENT,** **V.** **THEODORE CHURCHILL SHOVE, III** **DEFENDANT AND APPELLANT.**	No. S161909 Los Angeles County Sup. Ct. No. BA271293 Death Penalty Case

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

I. THE TRIAL COURT'S ERROR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE COMPUTER EVIDENCE SEIZED FROM HIS RESIDENCE REQUIRES REVERSAL OF APPELLANT'S CONVICTION AND DEATH SENTENCE

In the opening brief, appellant demonstrates that the affidavit supporting the search warrant did not establish probable cause to search his home because it failed to state a sufficient nexus between the alleged criminal activity and his home and because the information contained in the affidavit was stale. (AOB:61-84.) Appellant also demonstrates that the search was not saved by the "good faith" doctrine of *United States v. Leon* (1984) 468 U.S. 897 (*Leon*), and that the failure to suppress the evidence seized pursuant to that warrant requires reversal of the judgment in this case. (AOB:84-95.)

Respondent argues that the trial court properly ruled that the warrant provided probable cause and that the officers relied upon it in good faith. (RB:71-80.) Respondent also argues that even if the trial court erred, it was harmless beyond a reasonable doubt. (RB:80-92.) Respondent's claims are without support in the record.

A. The Search Warrant Issued for Appellant's Home Was Issued Without Probable Cause

1. The Search Warrant Failed to Establish a Substantial Probability that Evidence of the Burglary and/or the Extortion Would Be Found at Appellant's Home

Detective Muse's affidavit in support of the search warrant for appellant's home failed to provide a "substantial basis" for the finding that the property sought was "probably present" on the premises. (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239; *People v. Kraft* (2000) 23 Cal.4th 978, 1040-1041; *People v. Bryant* (2014) 60 Cal.4th 335, 369-370

[probable cause requires the supporting affidavit to show that it is "substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the warrant is sought"].) Muse did not explicitly include any facts connecting the burglary or extortion activity to appellant's home. (5CT:1149-1165.) Accordingly, probable cause for the search warrant could only be established through the facts Muse provided regarding appellant's involvement in either the burglary of Cal Aero or the extortion of the Rencks. (See AOB:69-80.) Muse opined that Vann and appellant planned to burglarize the Cal Aero safe and once they discovered that it contained no money, they decided to extort the family instead. (5CT:1161, 1164; AOB:69.) Muse theorized that Vann was involved in the burglary based on his behavior before and after the burglary, his knowledge and opportunity, and his motive. (See 5CT:1158-1159.) Even if there was sufficient probable cause to believe that Vann was involved in the burglary, which appellant does not concede, Muse provided insufficient facts to support that appellant was also involved in the burglary or was involved in the extortion. (See AOB:69-80.)

Respondent argues that the following six facts established probable cause in support of the warrant: "1) at the time of the crimes, appellant was interested in buying Cal Aero; 2) he was in regular contact with Vann, who was a prime suspect in the safe burglary; 3) he had access to the kind of equipment used to cut into the safe; 4) his car was used as part of the extortion scheme; 5) the extortion letters included a copy of Mrs. Souther's will, which had been stolen from the safe; and 6) several computer-generated letters were used in the extortion scheme." (RB:72.) From this list respondent argues there was a substantial basis for the magistrate to find probable cause to believe appellant was involved in the crimes because they show "appellant's knowledge of and financial interest in Cal Aero. . . , his

connection to the burglary, his direct connection to the extortion attempts through his car, and the connection between the extortion scheme and the burglary." (*Ibid.*) Respondent overstates the importance of each fact singularly and in conjunction with each other. (See RB:72-74.) The above facts do not amount to probable cause to believe appellant was involved in the crimes and that evidence of the crimes would be found in his home.

The search warrant affidavit states that appellant represented he was the "Executive Vice-President" of Industrial Salvage and was interested in purchasing Cal Aero. (See 5CT:1161-1162.) Muse did not include any facts in her affidavit to indicate either was untrue or that appellant's communications with Vann were not normal communications made in the course of business by a prospective buyer with the president of the company. (See AOB:70-72.) It is true, as respondent argues, that the above demonstrates appellant's knowledge of, connection to, and interest in Cal Aero and Vann at the time of the crimes. (RB:72.) But the evidence demonstrates nothing beyond a normal business relationship. (See AOB:70-72.)

Respondent next argues that appellant's connection to Vann and access to the kind of tool likely used to cut into the safe "provided initial ties to the burglary." (RB:73; see 5CT:1157, 1161.) This is an unwarranted logical leap. Even assuming there was sufficient evidence of Vann's involvement in the burglary, there was no evidence that appellant was involved in or aware of the burglary. The fact that appellant was connected to a business that "carrie[d]" the equipment needed to cut through the safe (5CT:1161) is not sufficient to establish "initial ties to the burglary." (RB:73; AOB:71-72.) As stated in the opening brief, it is not clear whether Industrial Salvage had this tool in stock around the time of the burglary. (AOB:71; see 5CT:1161.) Moreover, the affidavit failed to establish that this tool was not carried by Cal Aero, and thus accessible to

any Cal Aero employee including Vann. Nor did the affidavit establish that this tool was not readily available to anyone at local hardware stores. Whether appellant had access to, much less possessed, a metal grinding disk to access the safe was pure speculation and no inference can be made here connecting appellant to the burglary. (AOB:71-72.)

Next, regarding appellant's car, respondent argues that appellant's link to the extortion scheme was more direct because "Mike Powers" was seen driving a car registered to appellant at the Rencks' home. (RB:73.) Appellant agrees that the facts in the affidavit support that "Mike Powers" was involved in the extortion scheme and that the extortion scheme was linked to the burglary through the inclusion of Mrs. Souther's will with one of the extortion letters. (RB:73.) Muse's affidavit, however, included no facts to indicate that appellant knowingly loaned his car to Mike Powers for use in the extortion or that he had any idea for what purpose the car registered to him was being used. There was no follow-up by law enforcement to indicate a connection of the car and Mike Power's activities to appellant or his home.

Without some evidence of knowledge on appellant's part of what his car was being used for, the fact that someone else was using his car in connection with the extortion does not supply probable cause for a warrant to search appellant's house. (See AOB:72-75.) Appellant cites *People v. Hernandez* (1994) 30 Cal.App.4th 919 (*Hernandez*) to support this point. (AOB:72-75.) In that case, informants bought heroin from "Chavelo" on two separate occasions. (*Hernandez, supra,* 30 Cal.App.4th at pp. 921-922.) In one instance, he was driving an Oldsmobile and in another instance, he driving a Camaro and parked the Camaro behind Orange Drive. (*Ibid*.) For the next several days police saw the cars previously driven by Chavelo parked behind the Orange Drive residence but did not see Chavelo park the cars there again himself and failed to establish that Chavelo lived

there. (*Id.* at p. 922.) The appellate court held the warrant obtained for Orange Drive invalid where the "presence of the vehicles raised suspicions, but failed to establish a nexus between the criminal activities and the residence." (*Id.* at p. 924.) In *Hernandez,* the court found no nexus between the drug-dealer they sought and the residence they searched. Similarly, here, there was no nexus between the criminal activity conducted by Mike Powers with appellant's car and appellant or appellant's home. The lack of investigative follow-up noted by the court in *Hernandez* is just as lacking here. There was no evidence that appellant knew his car was being used for a crime or that the car was ever at his residence, which supports the conclusion that probable cause was similarly lacking for the warrant here. (AOB:74.)

Respondent draws issue with appellant's reliance on *Hernandez* stating that "appellant was directly tied to both the vehicle that was used in the extortion scheme, and to his home." (RB:76.) Respondent agrees with appellant that the affidavit "indicated only that a vehicle registered to him was used by someone who used the same alias as someone who was extorting the family." (RB:76, citing AOB:75.) Respondent claims that if appellant had no other connection to Cal Aero, the argument would be "well-taken" but relies upon appellant's "strong connections" to Cal Aero as a purchaser and to Vann, the president and "prime suspect in the burglary," to establish the nexus. (RB:76-77.) This is insufficient. As stated, the affidavit failed to establish that appellant had any interest in Cal Aero beyond as a potential buyer. The use of his car by Mike Powers was nothing more than an investigative lead that law enforcement failed to adequately follow-up on to establish probable cause for a search warrant. (See AOB:72-75.)

Respondent argues that taken together, the six facts the warrant included connected appellant to both the extortion and the burglary and

supported the magistrate's decision to find probable cause to search appellant's computers and home. (RB:74.) The facts included by Muse in the affidavit provided nothing more than a hunch that appellant may have been involved in the crimes. There was no evidence that appellant was aware of any of the actions taken by Vann or "Mike Powers" to commit a crime.

Appellant argues that even if there was sufficient evidence to believe appellant was involved in the burglary and/or extortion, the affidavit here still failed to provide probable cause because "[m]ere evidence of a suspect's guilt provides no cause to search his residence." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206 (*Gonzalez*), superseded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 691; see AOB:75-80.) In order for an affidavit to establish probable cause to search a specific location, the affidavit must demonstrate a reasonable probability that specific property subject to seizure is located at that place. (*People v. Cook* (1978) 22 Cal.3d 67, 84, fn. 6; *Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 556 ["The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought"].)

The search warrant authorized the search and seizure from appellant's home for computers, software and hardware, documents created by computer, mail with appellant's name, documents with the Souther's names, Gumbert's name or addressed to Cal Aero, and writings possibly related to the burglary or extortion. (5CT:1150-1151.) In short, Muse was looking for property that was taken from the safe or evidence of the computer-generated extortion letters. The affidavit provided no evidence to suggest that items related to the burglary or extortion would be found in appellant's home. The affidavit provided no evidence that appellant had

authored the computer-generated extortion letters, no evidence he had a computer, no reason to think he would have kept items from the safe at his home more than six months after the burglary, and no reason to think any other evidence of the extortion or burglary would be found at his home. The affidavit is completely silent on the issue and thus provided insufficient evidence to support probable cause. (AOB:76-77.)

As appellant demonstrates in his opening brief, even if there was sufficient evidence to believe appellant was involved in the burglary and/or extortion, there was not probable cause to support a warrant for appellant's home based on the nature of these crimes. (See AOB:77-80.) Both appellant and respondent cite *People v. Carrington* (2009) 47 Cal.4th 145, 161-163 (*Carrington*), for the proposition that a magistrate can reasonably conclude from the nature of crimes committed and items sought that a suspect's residence is a logical place to look, but sharply disagree on the application of this principle to the facts here. (AOB:78-79; RB:77.)

The burglary and extortion here are distinguishable from the types of crimes where courts often find, based on the nature of the crime, that evidence of that crime will likely be found in the person's home. (See AOB:77-80.) Examples of such crimes include narcotics sales and child molestation, but not narcotics use. (Compare *Gonzalez, supra,* 51 Cal.3d at p. 1206 [tip that suspect was selling drugs at his residence and controlled buy in backyard permitted a logical inference that narcotics were probably being kept on the premises]; *People v. Nicholls* (2008) 159 Cal.App.4th 703, 707, 712 [suspect's concern about his computer placed in his parents' garage and the description of child molestation at issue "provided a sufficient link between defendant and the computer habits of child molesters described by affiant" to provide probable cause for warrant]; with *People v. Pressey* (2002) 102 Cal.App.4th 1178, 1181 [probable cause to

believe that a person uses illegal drugs does not automatically provide probable cause for a warrant to search a person's home for those drugs].)

Regarding the crime of burglary, whether it is reasonable to believe evidence may be found in the suspect's home depends on the nature of the items stolen and not the nature of the crime itself. (See *Carrington, supra,* 47 Cal.4th at p. 162.) For example, the outstanding stolen checks that were one of the items included in the search warrant at issue in *Carrington* retained value and were likely to be kept in the home of the suspect for that reason. (*Ibid.*) Here, the will and other documents stolen from the Cal Aero safe were not inherently valuable beyond their use in the attempted extortion of the Rencks and were only a liability as evidence of a crime. (See AOB:78-80.) They were not items that a suspect would keep in their home, especially once it was clear that the extortion plot had failed. Respondent's arguments to the contrary are unavailing. (See RB:74-77.)

First, respondent argues that because the extortion letters were computer generated, it was "highly likely" that evidence of the letters would be found on appellant's computers because "[i]t is common knowledge that computers record a history of their activity and store information even after a document has been 'deleted' by a user." (RB:74.) This assumes that it was reasonable to conclude that appellant had a computer in his home, of which there was no evidence to support provided in Muse's affidavit. Moreover, it is not common knowledge now, nor was it in 2002 when Muse drafted her affidavit, that computers record a history of their activity and store information even after a document has been "deleted." One needs to only recall the panic experienced by students who believe they inadvertently deleted their school papers, or by someone who has experienced a computer crash. Respondent's citations to appellate decisions involving complex computer crimes (RB:74; see *People v. Stipo* (2011) 195 Cal.App.4th 664, 667 (*Stipo*)) and summarizing the testimony

of expert computer examiners (RB:74; see *Tecklenburg v. Appellate Division* (2009) 169 Cal.App.4th 1402, 1407-1408 (*Tecklenburg*), and *United States v. Upham* (1st Cir. 1999) 168 F.3d 532, 537 (*Upham*)) do not demonstrate that such is "common knowledge." Muse failed to provide information from which the magistrate could reasonably believe that appellant's home contained a computer or that computer evidence would be likely to be found there six months after the computer-generated extortion letter was delivered. (See e.g., *Stipo, supra,* 195 Cal.App.4th at pp. 667-668, 672-673.)

As appellant demonstrates in his opening brief (see AOB:77-80), contrary to respondent's claims (see RB:74-75), the nature of the computer-generated letter in this case makes it of the type that it would not be retained in the home. *Stipo*, cited by respondent, aptly illustrates the distinction. (RB:74.) There, a computer hacker unlawfully entered a network and routed data to the hacker's computer which gave the hacker access to employees' confidential information. (*Stipo, supra,* 195 Cal.App.4th at p. 667.) The police were able to use the IP address to get a name and physical address associated with the IP address and obtain a search warrant for the defendant's home. (*Ibid.*) In addressing the defendant's staleness claim, the court noted factors that supported its determination that there were sufficient facts to support probable cause included in the affidavit to believe evidence of a crime would be found at the defendant's home. (*Id.* at pp. 672-673.) These facts included the following: (1) there was reason to believe that the criminal activity was ongoing because it involved valuable identity information that would likely be retained (*id.* at p. 672); (2) it was objectively reasonable for the police to believe that the defendant's computer and evidence would be at his home because the affiant specifically stated that the items sought, computer hardware and software, would be found in his home, and "[c]ourts have

recognized that computer equipment may be the 'instrumentality of the crime,' as well as the device that records the computer offense" (*id.* at pp. 672-673); and (3) the network company verified that the defendant still had the IP address and current subscription, had been a long term customer, and his account was currently active (*id.* at p. 673).

In holding that there was probable cause to believe evidence would be present at his residence, the court concluded that such equipment was essential to a hacker, the defendant demonstrated no reason to dispose of the equipment, the defendant was not aware of the investigation, he had no reason to destroy the evidence, and "Stipo's computer hard drive records the history of his computer activity. [Citations]. A reasonable inference is that traces of the network intrusion would be present because they are automatically entered and very difficult to remove. [Citations.]" (*Stipo, supra,* 195 Cal.App.4th at p. 673, citations omitted.) Finally, the court concluded that the information stolen was a "continual resource for identity theft" and there was "sufficient probable cause to believe that relevant evidence would be present." (*Ibid*.)

By contrast, the extortion letters at issue here were of a completely different nature. They were not part of an ongoing theft requiring the use of a computer. The affidavit included no information to suggest that the extortion attempt was ongoing. There was no information to conclude that appellant had a computer that he was using on an ongoing basis as in *Stipo.* There was no evidence that the letters were generated by a personal computer as opposed to anonymously at a library, computer café, or business. The letters retained no value apart from the abandoned extortion scheme. The letters were evidence of a crime that one would not retain and would actively seek to destroy. Several cases cited by respondent indicate that deleted information can be overwritten on the computer's hard drive

rendering it inaccessible. (See RB:74; *Upham, supra,* 168 F.3d at p. 537; *Tecklenburg, supra,* 169 Cal.App.4th at p. 1407.)

In short, the facts included in the affidavit do not supply a nexus between the criminal activity and appellant's home. Further, the nature of the crimes dictate the conclusion that it was not substantially probable based on the facts supplied in the warrant affidavit that evidence of any crime would be found at appellant's house.

2. The Information in the Affidavit Was Too Stale to Provide the Requisite Probable Cause

In his opening brief appellant argues the information included in Muse's affidavit was too stale to provide probable cause for the warrant. (AOB:80-84.) Proof of probable cause stated in a search warrant affidavit must provide "facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." (*SGRO v. United States* (1932) 287 U.S. 206, 210; see also *Alexander v. Superior Court* (1973) 9 Cal.3d 387, 393; *People v. Hirata* (2009) 175 Cal.App.4th 1499, 1504 (*Hirata*).) The question of staleness turns on the particular facts of the case because there is no agreed upon bright-line rule to determine when information in an affidavit is considered stale. (*Carrington, supra,* 47 Cal.4th at p. 163.)

There was an unexplained, approximately *six-month* gap here between the last date provided in the affidavit describing events associated with the extortion attempts, October 11, 2001, and the date that the warrant was obtained on April 23, 2002. (See AOB:81-82.) The most recent date referenced in the affidavit was October 11, 2001, when investigators met with the Rencks regarding the sighting of "Mike Powers" on their property and a call from someone who identified himself as Powers the previous day. (AOB:81-82; 5CT:1163.) The affidavit did describe several

subsequent events but failed to provide dates. (See 5CT:1163-1164.) For all the magistrate knew, the events took place the same week as October 11, 2001, still leaving a six-month gap before the warrant was obtained. Aside from the activities described for which no dates were provided, there was no information included in the affidavit between October 11, 2001, and April 23, 2002, that indicated ongoing criminal activity related to the burglary or extortion, much less a connection between that activity and appellant's home during this time period.

Respondent attempts to close this six-month gap with citations to testimony from appellant's trial. (See RB:77-78.) This tactic is clearly impermissible. (See *People v. Frank* (1985) 38 Cal.3d 711, 729 ["a court cannot resort to facts outside the affidavit to determine whether it furnishes such reasonable cause"]; *People v. Clark* (2014) 230 Cal. App. 4th 490, 497 [". . . in reviewing the sufficiency of the facts upon which the magistrate or judge based his or her probable cause determination, we consider only the facts that appear within the 'four corners of the warrant affidavit'" (citations omitted)].) It is true that the search warrant refers to events occurring after October 11, 2001, as respondent notes, but the warrant provides no information to allow conclusions to be made about when these events occurred. Moreover, respondent includes an event from trial testimony that was not included in the affidavit at all, much less included without a date. (RB:77-78 [citing Allison Renck's trial testimony regarding meeting with Steves and appellant at Cal Aero in January 2002].) This information from the trial testimony cannot be considered on appellate review before this court.

Respondent does not address the authorities cited by appellant in his opening brief related to staleness. (See AOB:80-84 [citing for example, *Hirata, supra,* 175 Cal.App.4th 1499, 1504].) Instead, it opts to rely on several cases that are distinguishable from the instant one. (RB:78-79.)

First, respondent relies on *People v. Lazarus* (2015) 238 Cal.App.4th 734 (*Lazarus*) for the proposition that courts have recognized "the longevity of information stored on computers." (RB:78.) While this general proposition is true, the cases do not discuss, and respondent cannot rely upon, a quality of computers apart from the nature of the evidence at issue for which a warrant is sought. The cases the *Lazarus* opinion cites all entail search warrants obtained for the homes and computers of suspects whom law enforcement knew had accessed or downloaded child pornography. (See *Lazarus, supra,* 238 Cal.App.4th at p. 765, citing *United States v. Lemon* (8th Cir. 2010) 590 F.3d 612, 614-616 (*Lemon*); *United States v. Newsom* (7th Cir. 2005) 402 F.3d 780, 783 (*Newsom*); *United States v. Johnson* (D.Md. 2012) 865 F.Supp. 2d 702, 704-707 (*Johnson*).) The opinions each note that the affidavits at issue included the information and expert opinions that suspects who view child pornography value the materials and rarely if ever dispose of them, and consider this factor in conjunction with the capacity of computers to store large amounts of such information, even if deleted by the user. (See *Newsom, supra,* 402 F.3d at p. 783; *Lemon, supra,* 590 F.3d at pp. 614-616; *Johnson, supra,* 865 F.Supp.2d at pp. 705-708.)

Likewise, the items sought in *Lazarus* were also different in kind from the materials at issue here. (See *Lazarus, supra,* 238 Cal.App.4th at p. 765.) In *Lazarus,* the defendant was convicted of the first degree murder of the wife of her former lover whom she was still in love with and whose engagement to the victim devastated her. (*Id.* at pp. 741-742.) The 1986 crime was not linked to the defendant through DNA evidence until 2009. (*Id.* at p. 741.) Law enforcement obtained a warrant for the defendant's residence including her computers for items evidencing her relationship with the victim's husband and the probable murder weapon which she had reported stolen. (*Id.* at pp. 764-765.) In denying the defendant's staleness

challenge, the court first noted that there was strong evidence of the defendant's guilt, a fact that the defendant there did not contest. (*Id.* at p. 765.) In the instant case, there was not strong evidence of appellant's guilt. Further, the court in *Lararus* reasoned that "[g]iven the evidence that her obsession was powerful enough to lead her to commit murder, it was probable that she would have continued to retain items evidencing her relationship with the [the victim's husband] and her feelings toward [the victim and her husband], even after all the years that had passed." (*Ibid*.) The court also reasoned that although the defendant had claimed her revolver, the probable murder weapon, had been stolen, the magistrate could reasonably conclude that she had kept it hidden near her instead. (*Ibid.*)

In contrast to the child pornography cases and *Lazarus* cited by respondent, the material at issue here – documents taken in the burglary and the computer-generated extortion letters – are not of a nature that whoever possessed them would want to keep them once they were used as intended. Once it became clear that the extortion did not work and the scheme ended, these were items that would be disposed of. They did not share the same compulsive pull as child pornographic materials have on those who seek to possess them according to the authorities discussed above. They were not related to extreme emotional feelings as the materials related to the relationship of Lazarus to her former lover. They did not share the same value as a weapon. Nor did they retain any inherent value. (Compare *Carrington, supra,* 47 Cal.4th at p. 163 [stolen checks]; see AOB:78-79.) The computer-generated letters were also not like the electronic images or journal entries at issue in the child pornography cases or *Lazarus* which entail the ongoing use of a computer by the possessor. Instead, these letters were of the type that one would print once without saving, much less

viewing again, and were of the type that the possessor would actively seek to destroy once they would no longer serve a purpose.

Respondent attempts to use the difficulty of the investigation, the complexity of the events surrounding the murder of the Souther's, and the lack of a viable lead to argue "it is reasonable for a period of time to pass while the police are investigating other avenues and potential suspects." (RB:78-79.) Respondent's reliance on *Stipo, supra*, to support this argument is inapposite for several reasons. First, the delay in *Stipo* from law enforcement first learning the IP address of the hacker and their ability to seek a warrant for a specific person's home associated with the IP address was fully explained in the affidavit and related to law enforcement's reliance upon the network company to link the IP address to a name and physical address. (*Stipo, supra,* 195 Cal.App.4th at p. 672.) Here, there was no such attempt at an explanation for the delay. Muse provided no information about what investigative steps were taken between October 11, 2001, and April 23, 2002. With no explanation provided, the search warrant application appeared to be a Hail Mary for a stalled investigation. Moreover, respondent's reliance upon *Stipo* is ill-conceived because, as stated, the affidavit there provided substantial information indicating that the criminal activity would be ongoing and that the user of the IP address still had an active account. (*Stipo, supra,* 195 Cal.App.4th at pp. 672-673.)

The warrant affidavit at issue here stands in stark contrast to that discussed in *Stipo* for the lack of *any* information about why anything, computer generated or otherwise, would be found in appellant's house over six months after the last extortion letter was received. The facts of this case do not support a probable cause finding given the lengthy six-month delay between the last criminal activity included in the warrant affidavit and the issuance of the search warrant.

B. The Good Faith Exception to the Exclusionary Rule is Not Applicable to This Case

The good faith exception to the exclusionary rule under *Leon, supra,* 468 U.S. 897, is not applicable here. Appellant argues that the affidavit was so lacking in indicia of probable cause that it was objectively unreasonable for an officer to believe such cause existed. (See AOB:84-88; See *People v. Camarella* (1991) 54 Cal.3d 592, 596 (*Camarella*); *Leon, supra,* 468 U.S. at p. 923.) There was no nexus between the criminal activity and appellant's home and the information included in the affidavit was too stale for a reasonable officer to rely upon. A reasonable and well-trained officer would have known that more was needed to establish a nexus for the search of appellant's home and that even if such nexus existed in October 2001, by April 2002, the information in support of the affidavit had become too stale for a reasonable officer to believe the requisite cause still existed. (See AOB:84-88.)

Respondent does not specifically address appellant's arguments and instead relies on its previous arguments that there was probable cause for the warrant and the information included in the affidavit was not too stale to provide probable cause. (RB:79-80.) Accordingly, appellant will not rehash his arguments and refers this court to his discussion in the opening brief. (AOB:84-88.)

Appellant does, however, note two components of respondent's argument addressing the staleness issue that demonstrate that the affidavit was "so lacking in indicia of probable cause that it would be entirely unreasonable for an officer to believe such cause existed." (*Camarella, supra,* 54 Cal.3d at p. 596, quoting *Leon, supra,* 468 U.S. at p. 923, quotation marks omitted.) First, as addressed *ante*, respondent is compelled to impermissibly bolster Muse's affidavit with citations to trial testimony to provide dates for events that Muse failed to include. (See RB:77-78.) This

is a tacit recognition of the inadequacy of the search warrant affidavit to support probable cause.

Next, respondent suggests that law enforcement was actively "investigating other avenues and potential suspects" between October 11, 2001, and April 23, 2002, when Muse provided no facts from which to conclude this. (RB:78-79.) Moreover, respondent provides no authority in support of its suggestion that the complexity of the case can be used to substitute actual facts explaining the period of time that passed prior to obtaining a search warrant to save the warrant from a staleness claim. (See RB:78-79.) Respondent's reliance upon *Stipo, supra,* 195 Cal.App.4th at p. 672, in which the court held a delay justified where the investigation involved multiple suspects where police did not know the perpetrator's identity, is inapposite. First, law enforcement applied for the warrant shortly after ascertaining the name and physical address of the suspect *and* after verifying that the suspect still had the internet account which he was using to commit identity theft. (*Stipo, supra,* 195 Cal.App.4th at pp. 672-673.) Here, there was no such recently obtained information provided by Muse. Furthermore, Muse provided none of the explanations that respondent impermissibly posits regarding investigative efforts. Again, the absence of such information and respondent's attempt to bolster the affidavit after the fact is a tacit acknowledgment that the affidavit provided insufficient information from which it was reasonable for a magistrate to find it probable that evidence would be found at appellant's home. The lack of current information in the warrant affidavit, as stated, indicates that the investigation had stalled and Muse was grasping at straws.

Accordingly, the affidavit at issue was so lacking in indicia of probable cause as to render Muse's belief in its existence entirely unreasonable and, as such, the *Leon* good faith exception cannot revive the

insufficient affidavit and illegal warrant here. (*Hernandez, supra,* 30 Cal.App.4th at p. 925; *Leon, supra,* 468 U.S. at p. 923.)

C. As A Result of the Fourth Amendment Violation, Appellant's Conviction and Judgment of Death Must Be Reversed

Respondent's argument that suppression of the evidence would have had no effect upon the jury's verdicts is essentially that there was overwhelming evidence of appellant's guilt and that the computer evidence was just one insignificant piece of evidence that was unnecessary to the prosecution's case. (See RB:80-92.) Appellant demonstrates otherwise in the opening brief. (AOB:88-95.)

Appellant argues that the evidence seized from his home, digital drafts of the letter addressed to Detective Martinez included with two of the extortion letters, while small in the context of volume of facts in this case, was a key part of the prosecution's case against him. (AOB:88-95; 17RT:2902-2933; see People's Exhs. 74, 82, 86.) The illegally seized evidence was the only direct evidence uncovered through the entire investigation that put the whole case together for the prosecution. The trial court's error in refusing to suppress the evidence allowed the prosecution to use the letter not only to prove each of the charges against appellant, but to also support its character assignation based arguments that appellant was the kind of man who would commit such crimes. Without the letter, the prosecution would have had no direct evidence linking appellant to the charged crimes, no direct evidence to corroborate Vann's testimony implicating appellant as the orchestrator of each of the charged crimes (see AOB:35-44) and Steves' testimony implicating appellant in the burglary (see AOB:44-46), and no direct evidence to point to appellant's "crazy" or "bizarre" thought process to argue he was the driving force behind the illogical murder and extortion plot. (See 24RT:4144-4146; 25RT:4378.)

The evidence negated any reasonable doubt the jury had based on the circumstantial nature of the state's evidence and bolstered the prosecution's improper character based arguments. (See, e.g., 24RT:4126; 25RT:4327; see Arguments IV and V, *post*.) The error was not harmless.

Respondent's claim that the computer evidence was not important to the prosecution's case should be rejected. (*People v. Cruz* (1964) 61 Cal.2d 861, 868 ["[t]here is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it"].) Respondent states that "[f]inding the Detective Martinez letter on his laptop did not significantly contribute to his guilt of the murders, and indeed was *barely relevant*." (RB:82, emphasis added.) As detailed in the opening brief (AOB:88-95), the prosecution put a lot of weight and emphasis on the computer evidence at closing argument, using it as an integral component to its case. Respondent's attempt to downplay the importance of the letter is belied by the following argument delivered by the prosecution at closing argument:

> Shove had the motive. He wanted the business. And we don't even need to prove motive, but Shove had the motive in this case. [¶] Shove's truck is seen out at the Renck area September 13th, October 9th, October 10th. [¶] Shove did the extortion; it is on his computer. It is on his computer, his laptop computer. Not only is it on his computer; look at the nature of the writing. Look at the bizarre text. "We are from a non-profit, secret organization. We injected Burt Souther the week before." This is Theodore Shoves' fantasy mind coming to life. Shove committed this extortion. [¶] And who do you hire to do your killings? . . . You hire, if anything, your drug dealer.

(25RT:4378.)

Thus, the prosecutor relied upon the letter being found on his computer to argue that appellant was the author, which he in turn used to explain that it must have been appellant who concocted the illogical scheme. These were not "minimal arguments" by the prosecution. (RB:83.) They were

attempts to form a coherent story to support appellant's conviction out of the morass of strange events and untrustworthy characters associated with this case.

Specifically in regards to untrustworthy characters, respondent claims that the prosecution did not mention the Martinez letter or its existence on appellant's laptop as corroboration of Vann's and Steves' testimony regarding the burglary. (RB:84, citing 24RT:4136-4138; 25RT:4371-4374.) Respondent parses the prosecutor's words too finely. The prosecution argued that the letter served to corroborate Vann's and Steves' testimonies when it argued the following:

> [Appellant] gets that will and he uses it. . . . He's trying to get Cal Aero, he's trying to get the contents of the safe, and he's trying to extort from the children and he sees the advantage of having that will and thinks, "I'm going to put that in with the extortion letter and send that to the children," and that's what he did. Again, connecting himself to that burglary further *and corroborating Bill Vann and Stanley Steves* and what they said in terms of Shove doing that burglary.

(24RT:4137, emphasis added; AOB:90.)

Thus, respondent's argument is not supported by the record. The will from the safe was included with the first of three extortion letters which tied the Martinez letter, found on appellant's computer, enclosed with the second and third letters, to the safe burglary.

Respondent acknowledges that "the evidence showed that all of the crimes were connected…" (RB:85.) A fortiori, respondent cannot isolate and thus minimize the prejudicial effect of the direct evidence found on appellant's laptop pursuant to an illegal search on each of the counts of which appellant was convicted. As respondent notes, the prosecution included the fact that the Martinez letter was found on appellant's laptop in

its short list of items it told the jury to demand answers for from the defense. (24RT:4158-4159; AOB:93-94.) Respondent argues:

> Unlike testimony from accomplices and other involved parties, or evidence that required inferences to be drawn, several pieces of evidence irrefutably implicated appellant in the crimes. The laptop evidence directly connected appellant to the crimes, as did the phone records, Hardin's DNA and lack of connection to the Southers' outside of appellant, and the use of appellant's truck to surveille the extortion victims.

(RB:92.)

The computer evidence was the only piece of direct evidence on this list. Contrary to respondent's characterization, each of the other items required the jury to draw inferences and were thus circumstantial evidence. (See 30CT:8427 [CALJIC 2.00, "Circumstantial evidence is evidence that, if found true, proves a fact from which an inference of the existence of another fact may be drawn."].) Each of the other items in the list involve actions taken by someone else about which the jury must infer whether appellant was aware of and/or directed the actions. Thus, the computer evidence was a key piece of evidence against appellant.

The fact that the Martinez letter being found on appellant's computer was "not necessary to support the convictions in this case" (RB:92) is not the legal test applicable here. The test is whether the state can establish beyond a reasonable doubt that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) Respondent has failed under this test and the verdicts and judgment of death must be vacated.

II. CALIFORNIA LAW CREATES AN UNCONSTITUTIONALLY HIGH STANDARD FOR ADMISSIBILIY OF THIRD PARTY CULPABILITY EVIDENCE; THE TRIAL COURT'S EXCLUSION OF RELEVANT EVIDENCE WHICH TENDED TO RAISE A REASONABLE DOUBT ABOUT APPELLANT'S GUILT REQUIRES REVERSAL OF HIS CONVICTION

Appellant argues in his opening brief that evidence relating to two one-time suspects in the homicides of Mr. and Mrs. Souther was improperly excluded even though the evidence was relevant to raising a reasonable doubt about appellant's guilt. (AOB:96-141.) Appellant also argues that *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*) created an improper judicially-enacted special exclusion to the Evidence Code when it comes to third party culpability evidence. (AOB:110-131.) Respondent argues that the trial court properly excluded the evidence and that the *Hall* standard is well-founded, constitutionally sound and was appropriately applied at trial. (RB:92-124.) Appellant will first address the broader contention that *Hall* should be overruled to the extent that it creates a higher standard of relevance for the admission of third party culpability evidence from other types of evidence. Appellant will then show the third party culpability evidence proffered by the defense was improperly and prejudicially excluded.

A. California Law Creates an Unconstitutionally High Standard for Admissibility of Third Party Culpability Evidence

Appellant argues that United States Supreme Court precedent prioritizes a defendant's right to present a defense and the *Hall* test for the admission of third party culpability evidence violates these constitutional precepts. (AOB:111-116.) Appellant relies upon numerous high court cases relating to the right of a criminal defendant to present a defense, most

particularly *Holmes v. South Carolina* (2006) 547 U.S. 319 (*Holmes*), which specifically considered the interaction between state evidentiary rules and third party culpability evidence. (*Ibid*.) In *Holmes*, the high court held that South Carolina's rule, which precluded the admission of third party culpability evidence where the prosecution's case strongly supported a guilty verdict, was impermissibly tilted toward the prosecution. (*Holmes, supra*, 547 U.S. at pp. 330-331.)

Respondent counters that this court has "repeatedly upheld the *Hall* standard and recently refused to revisit the argument that excluding third party culpability evidence violates the constitutional right to present a defense." (RB:102.) In support of this contention, respondent cites to three cases: *People v. Clark* (2016) 63 Cal.4th 522, 597, fn. 54 (*Clark*); *People v. Page* (2008) 44 Cal.4th 1, 39 (*Page*); and *People v. Alcala* (1992) 4 Cal.4th 742, 793 (*Alcala*). However, none of these cases discusses the impact of *Holmes* on the *Hall* test. *Alcala* was decided prior to *Holmes* and neither *Clark* nor *Page* reference *Holmes* in rejecting federal constitutional challenges to the validity of the *Hall* test. More importantly, the appellate claims in these cases were differently based and more general than the claim raised by appellant here. (See *Clark*, *supra,* 63 Cal.4th at p. 597, fn. 54 [appellant makes "general argument that any exclusion of third party evidence violates his federal constitutional right to present a defense"]; *Page*, *supra,* 44 Cal.4th at p. 39 [appellant argues third party culpability evidence may be excluded only if "excessively prejudicial"]; *Alcala*, *supra,* 4 Cal.4th at p. 793 [appellant argues trial court ruling invaded province of jury and denied right to jury trial].) As such, none of these cases controvert appellant's argument that the *Hall* test is unconstitutional under current United States Supreme Court precedent by requiring that third party culpability evidence is only admissible when a defendant proves a

connection between a third party and the commission of the crime. (AOB:111-116.)

Respondent argues that *Hall* is constitutionally sound because, unlike the rule struck down in *Holmes, supra,* 547 U.S. at pp. 324-325, which provided that strong evidence of the defendant's guilt could preclude the admission of third party culpability evidence, *Hall's* "standard does not mechanically and categorically discount third party culpability evidence in the face of a sufficiently strong showing by the prosecution." (RB:103.)[1] However, as argued in appellant's opening brief and below, the constitutional flaw of the *Hall* test is its improper focus on the actual guilt of a third party rather than on whether the evidence tends to raise a reasonable doubt of the defendant's guilt. (AOB:113.)

In *Hall*, this court changed the previous test for admissibility of third party culpability evidence because the old test, that the defendant must show "substantial proof of probability" that a third party committed the crime, created a "distinct and elevated standard." (*Hall, supra*, 41 Cal.3d at pp. 833-834.) *Hall* initially said that third party culpability evidence should be treated "like any other evidence" and need only be capable of raising a reasonable doubt of defendant's guilt and be admissible subject to the application of Evidence Code sections 350 and 352. (*Id.* at p. 834.) However, *Hall* then went on to hold that "evidence of mere motive or opportunity to commit the crime" was insufficient because it did not raise a

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[1] Respondent further argues that the *Holmes* Court in dicta cited the *Hall* rule as one of the many examples of a constitutionally permissible rule. (RB:104.) However, the constitutionality of the *Hall* rule was not before the Court. (*Holmes, supra*, 547 U.S. at pp. 327-328.) Appellant agrees with respondent that the reference in *Holmes* to the *Hall* rule is dicta; thus *Holmes* has no precedential value to the issue here. (AOB:113, fn. 33.)

reasonable doubt about a defendant guilt" and that to be *relevant*, "there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Id*. at p. 833.) Thus, *Hall* literally imposed a higher standard of relevancy for third party culpability evidence as opposed to any other evidence. "'Relevant evidence'" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Thus, under Evidence Code section 210, "relevant evidence" includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred. The test of relevance is whether the evidence tends, logically, naturally, and by *reasonable inference* to establish material facts such as *identity, intent, or motive*. (See, e.g., *People v. Wilson* (2006) 38 Cal.4th 1237, 1245; *People v. Harris* (2005) 37 Cal.4th 310, 337.)

Respondent takes issue with appellant's description of the *Hall* test as a "direct connection test," arguing that *Hall's* requirement of a third party link to the crime "ensures that the evidence is relevant to the question before the jury."[2] (RB:105.) Respondent further argues that *Hall* passes constitutional muster because it held that third party culpability evidence should be treated like any other evidence and that the only requirement for its admission is relevance. (RB:105-106.) These assertions underscore the essential defect of *Hall*: the *Hall* test requires an additional showing beyond mere relevancy to make third party culpability evidence admissible.

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[2] Respondent discusses the *Hall* test as permitting admissibility when there is some generalized link to the crime, but that is not so. *Hall* requires that the evidence connect the third party to the actual perpetration of the crime; a more specific and rigorous test for admissibility. (See *Hall, supra*, 41 Cal.3d at p. 833.)

Labels aside, whether or not one calls the *Hall* test a "direct connection test," the fact remains that *Hall* imposes a sufficiency burden on the defendant with regard to the admission of third party culpability evidence that prevents a defendant from presenting all the facts necessary to present a defense and which results in an unconstitutional reallocation of the burden of proof. (AOB:114-116.)

If analyzed under the relevancy test of Evidence Code section 210, there is no doubt that the evidence relating to Renck and Vann that appellant sought to admit would be relevant. The homicides went unsolved for two years. In those two-plus years, the homicide detectives investigating the case presented sworn affidavits establishing probable cause to believe that several other people were involved in the instant homicides, including Renck and Vann. During this time period, both Renck and Vann refused to take a lie detector test, and Renck and his wife, Allison, became uncooperative with law enforcement. The original homicide detectives asked a friend of Allison's, Lougene Porter, to fax them information relating to Renck's post-homicide actions and statements, as they considered him a major suspect in the homicides. As of September 21, 2004, Renck and Vann remained suspects in the homicides. (7CT:1470-1492.) Yet, applying *Hall's* test of relevancy, the trial court precluded the admission of evidence which law enforcement clearly believed was relevant as to the identity, intent and/or motive of other possible perpetrators of the homicides, finding it irrelevant, and without reaching the question of whether that evidence was admissible under Evidence Code section 352.

Respondent argues that *Hall's* requirement of a link between the third party and the crime is not an additional element, but rather "is a guide to determine whether this specific type of evidence is relevant." (RB:107.) Respondent also argues that "the link requirement is a valid consideration

and admissibility requirement." (RB:108.) However, as appellant argues in his opening brief, there is no specification in the Evidence Code or any other statute that provides that third party culpability evidence, if relevant, should be singled out for special concern regarding admissibility. (AOB:118-120.) It is only by dint of the judicially-created rule set forth in *Hall* that some criteria other than relevance as defined by Evidence Code section 210 is used to assess relevancy. If relevant, the evidence is admissible under Evidence Code section 351, subject to the testing of Evidence Code section 352. This court should directly assess the inconsistency and recognize that the Evidence Code specifically bars judicially-created rules of evidence and hold that relevance is the only test by which the admissibility of third party culpability evidence should be assessed before it becomes admissible subject to Evidence Code section 352.

Respondent also takes issue with appellant's assertion that the Idaho Supreme Court struck down its own judicially-created requirement of a direct link to the crime as a predicate for admissibility of third party culpability evidence on the basis that it violated the state rules of evidence. (See AOB:119.) Respondent proffers that the Idaho court ultimately decided to rely on rules of evidence in the same manner as does *Hall*. (RB:109.) Respondent is mistaken.

In *State v. Meister* (Idaho 2009) 200 P.3d 1055, 1059, the court struck down a judicially-created rule that evidence of an alternate suspect could only be presented when it clearly pointed out someone other than the defendant was the guilty party. After the Idaho Rules of Evidence were enacted, the court held that those rules controlled and relevant evidence was admissible (like our Evidence Code sections 210 and 351), and that such evidence could be precluded only if its probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence" (like our Evidence Code section 352). Thus the test in Idaho is precisely the test that appellant argues should be applied in California.

In addition, respondent argues that *People v. Primo* (N.Y. 2001) 753 N.E.2d 164 (*Primo*) has no applicability to the *Hall* test. (RB:109-110.) In *Primo*, the New York State Court of Appeals, while stating that phrases like "clear link" are "usually shorthand for weighing probative value against prejudice in the context of third party culpability evidence," it nonetheless disposed of such language because it could be misread to suggest that third party culpability evidence "occupies a special or exotic category of proof." (*Primo, supra,* 753 N.E.2d at p. 168.) Respondent attempts to dispose of *Primo* by arguing that "[n]o similar issue exists in California, and appellant has shown none." (RB:110.) Appellant argues at length that under *Hall's* test, to be *relevant*, third party culpability evidence must also show "direct or circumstantial evidence linking the third person to the actual perpetration of the crime" – the same type of test disapproved by *Primo*.

This court should rectify the wrong perpetuated by the *Hall* standard by removing the direct connection test from the requirement for relevancy of third party culpability evidence – Evidence Code sections 210, 351 and 352 should be applied to this evidence just like any other type of evidence. By elevating the test of relevancy beyond what is required for all other types of evidence, the *Hall* test acts to deny jurors all the relevant facts they are entitled to before reaching their verdicts, prevents the defendant from presenting all facts relevant to the defense, and creates an unconstitutional reallocation of the burden of proof. (AOB 111-116.) It also deprives defendants of their constitutional right to present a defense narrative that is comprehensible to the jury. (AOB:128-129; *Old Chief v. United States* (1997) 519 U.S. 172, 183.)

B. *Hall's* Elevated Relevance Test Erroneously Precluded Evidence that Vann and Hardin Were Connected Professionally and Socially, Which Would Have Undermined the Crux of the Prosecution's Case – That Appellant was Guilty Because Only He Was Connected to Hardin

The trial court excluded proffered testimony that Vann lied to the police when he testified that he withheld evidence because he was afraid of appellant and his Mafia connections; the defense witness would have testified that Vann was not easily intimidated and bragged about knowing Hells Angels and men with guns. (22RT:3747-3748.) The court sustained the prosecution's objection that the evidence constituted improper third party culpability evidence. (22RT:3750-3751.) Appellant then moved for a mistrial because the court improperly excluded evidence that would undermine the credibility of the most critical prosecution witness in the case. (22RT:3751-3752.) The court denied the mistrial motion, holding that if there was evidence that Vann really was connected to the Hell's Angels, the evidence would be admissible. (22RT:3752.) However, this evidence was improperly analyzed by the trial court under the rubric of being third party culpability evidence and should have been analyzed under the standard of relevancy – it was relevant to the "credibility of a witness" and "had a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 201.) Certainly, a fact of consequence in this case was the credibility of Vann, who was convicted of burglary with appellant but who protested his innocence of the murders while supplying the prosecution with an alleged admission made by appellant to his guilt in the homicides. Because of *Hall*, this relevant evidence was excluded before the court conducted an Evidence Code section 352 analysis.

Similarly, the trial court excluded the proffered testimony of Mrs. Vann that Vann and Hardin attended the same parties at appellant's house

just prior to the homicides, that the Vanns and Hardin were in the business of selling toys, and that Hardin bought items from Industrial Salvage, a company that did business with Vann's employer, Cal Aero. (23RT:3911-3914.) The court held the evidence of a possible connection between Vann and Hardin was insufficient, ruling "[w]e don't do possibilities. . . ." (23RT:3913-3914.) The proffered evidence had a "tendency in reason" to show a fact hotly in dispute – whether Vann and Hardin knew each other. The prosecution exploited the absence of such evidence when it repeatedly argued during its guilt phase closing argument that there was no connection between Hardin and anyone other than appellant. Had the trial court applied a relevancy test, rather than the heightened *Hall* test of admissibility, the defense would have had evidence to argue a reasonable doubt as to appellant's guilt given the inference that Hardin and Vann were connected through social and business ties because such evidence would have survived a challenge under Evidence Code section 352 – the evidence was simple and would not have taken up much court time.

C. *Hall's* Higher Standard of Relevance Is Evidenced by Respondent's Claim that the Third Party Culpability Evidence Proffered as to Kenneth Renck "Did Not Link Kenneth to the Crimes"

Respondent argues that the trial court ruled correctly by rejecting the defense proffer of third party culpability evidence regarding Kenneth Renck because it did not meet *Hall's* standard of admissibility. (RB:93-95.) However, respondent fails to address the facts contained in the proffer, preferring to summarize and refer to the proffer as reflected in the clerk's transcript. (RB:93.) A determination of the correctness of the trial court's ruling cannot, however, be made without discussing those facts in detail.

Appellant submitted the following offer of proof as to Renck's motive to commit the homicides: his wife, Allison, stood to inherit the

Southers' business and assets; Renck told people he stayed in the marriage only because of the money he would inherit through his wife when the Southers died; he had been accused by Souther of stealing from the business; and shortly before the homicides, Allison told Souther that she no longer wanted financial support from him, contrary to Renck's wishes. (7CT:1458-1459.)

In addition to evidence of motive, appellant proffered the following as evidence linking Renck to the homicides: he did not have an alibi for the time the homicides were committed; Renck showed the police the exact location of the Souther's phone box, which was hidden from view, and reconnected the phone wires; the perpetrator left the alarm system connected in the same box as the phone wires, and Renck knew the alarm was broken; the brutal nature of the homicides indicated the killer was someone who hated Souther, rather than it being a contract killing, and that Souther and Renck were at odds; two sets of footprints were not tied to the Southers, appellant, or Hardin, indicating others were involved in the killings; the perpetrator knew the victims' bedtimes; Renck told witnesses that Souther did not have his hearing aid in when he was killed, something only the perpetrator would know; Renck became uncooperative with police and convinced his wife not to cooperate with law enforcement. (7CT:1459-1461.)

Appellant argued further that there was no evidence of a preexisting plan by appellant and Hardin to carry out the homicides; that Renck had more motive than appellant to commit the crimes; that law enforcement considered Renck a major suspect; and that circumstantial evidence described above connected Renck to the crimes. (7CT:1461.) Appellant argued the evidence should be considered by the trier of fact and requested that the court "deny the wholesale exclusion of third party culpability evidence." (*Ibid*.)

Appellant's moving papers also contained an affidavit for a search warrant by Detective Davis for DNA collection from Renck, among others, sworn on September 21, 2004. (7CT:1470-1492.) The affidavit reflects that Detective Mike Staley of the LASD's Major Crimes Investigation, who had investigated a large number of contract murder for hire cases, was briefed regarding the facts of this case. Regarding the surveillance of the Renck house prior to the homicides, Detective Staley opined that "it would be entirely consistent" for a person contracting with someone to commit murder to collect photographic evidence of the contractor's involvement as "insurance" that final payment is made for the contract killing. Detective Staley therefore opined that the surveillance of the Renck residence may have been by a person assigned to collect such evidence against the Rencks to insure payment. (7CT:1485; see also 7CT:1489-1490.) Detective Davis stated that he believed that Allison and Renck may have been involved in a conspiracy to commit murder because Allison inherited the business with her sister and the extortion letters indicated that the Rencks may have paid someone "who facilitated the commission of the murders." (7CT:1489.) Law enforcement considered Renck a suspect in the homicides, the Rencks stopped cooperating with law enforcement in 2002, and the Rencks refused to take lie detector tests. (7CT:1506-1507.)

Also attached to appellant's motion were statements of Porter, who told investigating officers that Renck told her that he did not love his wife and that he stayed with her only for her money. (7CT:1495-1496, 1500-1501.) Porter also reported to a defense investigator that Allison told her that Renck had threatened a friend of Souther, telling the friend that "the same thing that happened to Burt would happen to him if he didn't keep his mouth shut." (7CT:1544.) Porter became concerned that Renck would hurt Allison when he tried to keep Porter from contacting her. (7CT:1498.) Porter said Renck told her Souther did not hear the burglars because he did

not have his hearing aid in; and when asked how he knew that, he changed the subject. (7CT:1543-1544.) Allison told Porter that Renck was out of town the weekend of the homicides and that Souther knew Renck was stealing from the company. (7CT:1544, 1547.)

The trial court found the proffered evidence "perhaps" established motive and opportunity, but rejected the proffer because there was no evidence connecting Renck to the crime. (4RT:620-621.) Evidence showing Renck's motive to kill and opportunity to kill is certainly relevant to the ultimate fact to be determined by the jury – whether appellant – or someone else – was responsible for the homicides of the Southers. Rather than allow the jury to hear evidence relevant to whether there was a reasonable doubt about appellant's guilt, the *Hall* rule precluded the evidence because the defense failed to establish a direct connection between Renck and the actual perpetration of the crime. A rule that prevents the admission of evidence such as this, which contributes to raising a reasonable doubt regarding a defendant's guilt, cannot stand.

D. The Trial Court Erred Prejudicially in Precluding the Testimony of Lougene Porter Because Her Proffered Testimony Would Have Impeached the Testimony of Renck, Established that Law Enforcement Long Considered Renck a Suspect, and Shown That Law Enforcement Pressured Witnesses Who Did Not Support Their Theory of Appellant's Guilt.

Appellant sought to present the testimony of Lougene Porter to impeach the testimony of Renck that he never possessed a briefcase full of cash. (23RT:3875-3876.) Appellant proffered that Porter would testify that Renck came over to her house after the homicides with a briefcase full of money. (23RT:3876.) The prosecution argued the testimony was irrelevant; appellant countered that the question was asked of Renck and he denied it. (23RT:3877.) The prosecution maintained it was irrelevant and that the evidence constituted third party culpability evidence previously

ruled upon. (23RT:3877-3879.) Appellant said he would be arguing the existence of a reasonable doubt that appellant was involved in the homicides; that money was critical to who had motive to kill the Southers. (23RT:3877-3878.) Appellant also proffered that Porter would be called to establish that the witnesses had been led in a direction consistent with the prosecution's case, that Vann was so influenced, and that Detectives Comstock and Davis told Porter that her information would blow their case and that she would be killed if she testified. (23RT:3880-3881.)

Respondent asserts in its subheading that the trial court properly excluded the Porter evidence "as [i]mproper [i]mpeachment, [i]rrelevant, and [c]onfusing." (RT:96-98.) It follows that subheading with several pages of factual recitations from the record devoid of any argument or authority. The court need not consider this argument as it is a "perfunctory assertion made without supporting argument." (*People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8.) Appellant therefore stands by his argument that the trial court prejudicially erred in this regard as set forth in his opening brief. (AOB:104-106, 110-135.)

E. The Trial Court's Exclusion of Third Party Culpability Evidence Was Prejudicial

Unlike many homicide cases, the case against appellant – not an actual killer here – was entirely circumstantial. The prosecution, rightly, was permitted to introduce evidence of motive and opportunity against appellant to prove its case. The prosecution's case was culled from years during which the case was sporadically investigated but unsolved, and which produced a number of likely suspects. Eventually, law enforcement focused on appellant as the alleged mastermind behind the homicides based on a convoluted theory – a theory the prosecution subsequently argued failed to make sense only because it was conceived by appellant, whom it

posited stood with one foot in reality and one in fantasy. The prosecution was then able to shore up its otherwise incoherent case against appellant by the erroneous admission of evidence that he fancied himself a gangster named "Tony Bonanno" who could kill "if the reason was right." (See AOB:153-178 [Argument IV], 179-199 [Argument V].)

In contrast, appellant was prevented from introducing circumstantial evidence that two other people had the motive and opportunity to commit the homicides – two other people who were themselves former suspects and who had stopped cooperating with police. In short, appellant was prevented from presenting a narrative to the jury from which they could infer a reasonable doubt about his guilt. Reversal is required under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818, 836.)

F. The Exclusion of Third Party Culpability Evidence at the Penalty Phase Requires Reversal of Appellant's Judgment of Death

In addition to the defense evidence that appellant did not commit the homicides, set forth above, the defense was precluded from introducing at the penalty phase that in October, 2004, a Los Angeles County Sheriff detective opined in an affidavit attendant to a search warrant that Renck and Allison were involved in a conspiracy to commit murder, that Jack Reiland and Monte Proulx were involved in that conspiracy and that a witness would testify that Vann was stealing from Cal Aero and Souther. Trial counsel sought to introduce the opinion of the detective regarding his belief that others were involved in the homicides as mitigating evidence. The court denied appellant's request to present this evidence at the penalty phase and denied appellant's request for a mistrial in light of the trial court's denial of the admission of this mitigating evidence. (28RT:4929-4941.)

Appellant argues in his opening brief that the trial court erred prejudicially in excluding this evidence as it would have created a lingering doubt about his guilt of the homicides. (AOB:138-141.) Respondent counters that the detective's opinion about who may have participated in the crime is an inadmissible legal conclusion under Evidence Code section 801 and that the exclusion was proper because "[a]ppellant did not attempt to admit additional underlying evidence supporting [the detective's] opinion within the rules of evidence. Doing so would have appropriately permitted the jury to draw its own conclusions about who was involved and appellant's relative responsibility." (RB:123.)

First, appellant was precluded by the trial court upon objection by the prosecutor from presenting the evidence underlying the detective's opinion, as discussed above. Thus, he cannot be faulted for failing to introduce what he was erroneously forbidden to introduce at trial.

Second, under Evidence Code section 801, subdivision (b), the detective was permitted to render an opinion:

> [b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

In many cases, law enforcement officers offer opinions at the behest of the prosecution. For example, a law enforcement officer who qualifies as an expert in gang culture can opine that the shooting was in retaliation for a prior murder (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175 (*Meraz*)) or that a crime was committed for the "benefit of the gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 63.) In this case, the detective could properly have testified and opined that, based on the material he

reviewed and on his experience and expertise, that there had been a conspiracy to commit the Southers murders among a larger group than just appellant and Hardin. (7CT:1489-1492.) He properly could have testified that in his experience, the vehicles seen in the vicinity of the Renck's house after the homicides were a "surveillance person who was in the process of getting photographic evidence to use as surveillance insurance against them, in case proper payment was not fulfilled in a timely manner for the commission of the murders of the victims." (7CT:1490.) And he could have properly relied on and relayed to the jury facts which he personally gathered during his interview of Clari "Redd" Brush, who told the detective that Vann was uncharacteristically concerned about Mr. Souther's welfare on the morning the bodies were discovered, and that Brush was aware that Vann was stealing from Cal Aero, and that Vann allowed another employee, Billy Ray Holcomb, to steal from the company. (*Meraz, supra*, 6 Cal.App.5th at p. 1176 [testimony regarding information on field identification cards not barred because office was present during contacts and had personal knowledge of the facts]; 7CT:1486-1487.)

Appellant reasserts his federal constitutional rights were violated by the trial court's decision to exclude this evidence at the penalty phase as set forth in appellant's opening brief. (AOB:138-139.) Respondent argues that a detective's opinion about who may have participated in the crime is an inadmissible legal conclusion. (RB:123.) However, consistent with the rules of evidence, the detective could have testified that in a contract murder for hire case it would be consistent for someone hired to commit murder to have a surveillance person watching the parties who are soliciting the murder to collect photographic evidence as 'insurance' that final payment is made, following the initial payment of monies." (7CT:1485; see *People v. Jones* (2013) 57 Cal.4th 899, 950 [expert testimony on the phenomenon of "sexual homicide" properly admitted

under Evidence Code section 801].) Appellant could have argued lingering doubt in closing, in so far that the testimony indicated that the person seen by the Renck's residence may have been the surveillance person hired to collect photographic evidence to blackmail the Rencks after the homicides or to insure final payment from the Rencks for the homicides. The trial court erred in precluding this evidence.

Respondent next asserts than any error was harmless. (RB:123-124.) The error in precluding the opinion testimony of Detective Davis was not harmless. The testimony of a detective investigating the case in 2004 that he believed more perpetrators were involved in the homicides than were proven would have had much more weight with the jury than arguments of defense counsel. (See RB:123-124 [any error harmless because counsel argued others were involved in the homicides].) The jury was instructed that arguments of counsel are not evidence (19RT:4772), so argument failed to fill in the void. Given the circumstantial and attenuated theory of the prosecution's case against appellant, there is a "reasonable possibility" that the exclusion of this evidence affected the penalty phase verdict. (*People v. Lancaster* (2007) 41 Cal.4th 50, 94 (*Lancaster*); see *People v. Guerra* (2006) 37 Cal.4th 1067, 1144-1145, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151-152.) This standard is essentially the same as the harmless beyond a reasonable doubt standard of *Chapman* (*Lancaster, supra*, 41 Cal.4th at p. 94, citations omitted) and the state likewise cannot carry its burden of proving the error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Reversal of the judgment of death is required.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO IMPEACH RENCK WITH THE INCONSISTENT STATEMENT HE MADE TO ALLISON RENCK REGARDING HIS FAMILIARITY WITH MONTE PROULX

Appellant argues the trial court improperly and prejudicially restricted appellant's impeachment of Renck's inconsistent statement to his wife Allison Renck that he had met Monte Proulx, contrary to his testimony that he had never met Proulx. The trial court ruled that his statement to Allison was protected by the marital privilege by her assertion of that privilege, even though Allison had waived the privilege by disclosing the content of the conversation to police officers and testifying about same under oath during an Evidence Code section 402 hearing. (AOB:142-152.)

Respondent argues though the trial court erred in its reason for upholding the privilege, the trial court was correct in excluding the evidence because the marital privilege also belonged to Renck, who was not given an opportunity to assert or waive the privilege. (RB:127-129.) However, that was not the argument made by the prosecution. It was incumbent on the prosecution to make that objection or argument below and give appellant the opportunity to meet it with additional evidence. (See *People v. Morris* (1991) 53 Cal.3d 152, 187-188, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1 [a party desiring to preserve for appeal a challenge to the admission of evidence must make a timely objection on a specific ground].) Having failed to do so, it is unfair for respondent "'to press an issue . . . that was not presented below.' [Citation]." (*People v. Sakarias* (2000) 22 Cal.4th 596, 636.) It is particularly unfair because Renck was available to be brought into court to see if he would assert or waive the privilege. Because of the trial court's incorrect ruling, counsel was not given an opportunity to subpoena Renck to ascertain whether or not he would assert the privilege.

Respondent also asserts that the evidence was excludable as irrelevant because it related to a different time period than to what Renck had testified. Similarly, respondent argues the evidence was excludable because it was "extrinsic impeachment on a collateral matter" because Renck met Proulx after the homicides. (RB:129-130.) Neither point is correct. Renck testified that he did not know Proulx and never *even saw him.* (19RT:3190-3191.) The evidence appellant sought to admit impeached that testimony with Renck's inconsistent statement to his wife that he had in fact met Proulx at an auction and believed Proulx to be a "very strange person." (23RT:3855.) A lie is a lie, and the evidence was admissible to impeach Renck's credibility.

Lastly, respondent maintains the evidence was excludable under Evidence Code section 352 because the testimony of Allison as well as the law enforcement witnesses with whom she spoke would be unduly time-consuming and only "minimally probative." (RB:130.) However, evidence impeaching Renck's credibility was crucial in this weak circumstantial case against appellant and where Renck had been a suspect in the homicides. By restricting appellant from impeaching Renck's credibility, the trial court undercut appellant's defense that someone else orchestrated the homicides. For all the foregoing reasons as well those set forth in appellant's opening brief (AOB:142-152), the trial court prejudicially erred during the guilt phase of appellant's capital trial.

IV. THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S DECADE-OLD RECORDING AS A GENERIC THREAT BECAUSE IT DOES NOT CONTAIN A THREAT

In his opening brief appellant argues that the trial court committed reversible error in admitting his purportedly autobiographical self-recording, made over a decade before the Southers were killed, as a generic threat under Evidence Code section 1250.[3] (AOB:153-178.) The recording was inadmissible because it was irrelevant to any material disputed fact, did not contain a threat to qualify under the state-of-mind exception to the rule against hearsay under section 1250, was unreliable and thus inadmissible under section 1252, was not admissible as a party admission under section 1220, constituted impermissible character evidence, and was more prejudicial than probative. (AOB:153-178.)

Respondent argues that the recording was properly admitted because appellant's description of his talents in the recording was a generic threat that was relevant to appellant's motive and mental state at the time of the charged crimes. (RB:131-143.) Further, respondent argues that even if the recording was admitted in error, the error was harmless. (RB:143-148.) Respondent is wrong because the recording does not contain a threat. The trial court's contrary ruling was a prejudicial abuse of discretion requiring that the judgment be set aside.

A. The Trial Court Erred in Admitting the Recording

1. Appellant's Statements in the Recording Did Not Constitute a Generic Threat Under Evidence Code Section 1250

The trial court admitted the recording under the "generic threat" line of cases relied upon by the prosecution. (3RT:328; 6CT:1355-1356, citing

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[3] All further statutory references in this argument will be to the Evidence Code, unless otherwise noted.

People v. Rodriguez (1986) 42 Cal.3d 730 (*Rodriguez*), *People v. Karis* (1988) 46 Cal.3d 612, 634-638 (*Karis*), and *People v. Crew* (2003) 31 Cal.4th 822, 842 (*Crew*); RB:136.) This court held in *Rodriguez* that evidence of a generic threat is admissible "where other evidence brings the actual victim within the scope of the threat." (*Rodriguez, supra,* 42 Cal.3d at p. 757.) The holding was based on the principle that such a threat "[t]ends to show a design or intent to kill members of a class of persons under certain circumstances." (*Ibid.*) This court in *Karis* held more specifically that "statements of intent of this nature, reflecting intent to kill a particular category of victims in specific circumstances, fall within the state-of-mind exception to the hearsay rule." (*Karis, supra,* 46 Cal.3d at p. 637.)

Appellant argues in part that the trial court's ruling was erroneous because: (1) the statements did not contain a threat; (2) the Southers did not come within the scope of a purported threat; and (3) the statements, made over twelve years before the charged crimes, were too stale to constitute a threat or have other probative value. (AOB:160-166.) Respondent's arguments to the contrary are unavailing.

Appellant's statements in the recording do not constitute a threat. In the recording, appellant is heard with slurred speech, talking about events and thoughts about his past. (See People's Exh. 106; 3RT:283, 287, 321; AOB:153-155; RB:131-132.) The topics included childhood memories, familial and romantic relationships, military service, and his entrepreneurial proclivity as a child. Appellant described his early "knack for making money" and provided examples from his childhood which included enlisting his sisters to help. (People's Exh. 106, pp. 4-8.) Appellant also described giving motivational speeches claiming, "whenever I talk, I can draw a crowd." (*Id.* at p. 7.) Appellant said that he completed two tours of duty in Vietnam where he saw things that he did not like, was made

sergeant, "was a good killer," and learned to survive. (*Id.* at p. 8.) Immediately after stating that by age 20 he had a wife, appellant concluded the narrative with the following:

> I can talk people into anything. You listen to me for five minutes and you follow me for five years. That was my motto. That's what I can do. I can't sing. I can't have no other talents, only that, and the ability to go kill, if the reason was right.[4]

(*Id.* at p. 9.)

Respondent argues that the recording constitutes a threat because appellant discussed "talking people into things, especially in business or money-making schemes, and killing 'if the reason is right,' and the other evidence brought the [Southers] within the scope of the threat." (RB:136-137.) Specifically, respondent argues, the evidence showed appellant talked Vann and others into doing things for him and when appellant was unable to talk Souther into selling Cal Aero, the reason became "right" to kill him, and appellant then got Hardin to do it. (RB:137.) Respondent concludes, "[t]he evidence thus brought 'the actual victim[s] within the scope of the threat'." (RB:137, citing *Rodriguez, supra,* 42 Cal.3d at p.757.)

Respondent contrives, as did the prosecutor, a connection between appellant's summation of his two proclaimed talents to create a threat and a class of victims where neither actually exists in the recording. Considered in the context of the entire recording, the conclusory statement excerpted above is nothing more than appellant's distillation of what he learned about

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[4] In his opening brief, appellant included this same quote from the transcript of the recording. (See AOB:155; People's Exh. 106, p. 9.) Appellant inadvertently converted the "was" in the last sentence to "is." (*Ibid.*) The correct version further strengthens appellant's argument that the statement did not contain a statement of future intent as opposed to a backward looking statement about his prior experiences.

himself from his life experiences previously described. (See People's Exh. 106; see 3RT:317-318 [trial court noted that appellant's description of his "talents" referred back to his experiences in Vietnam and expressed skepticism of the relevance to murderous intent].)

Appellant did not make a statement of intent of future action, much less of committing unlawful homicide. Furthermore, appellant did not link his ability to talk people into things and the ability to kill in the recording. (See People's Exh. 106 at p. 9.) Appellant previously spoke of the ability to kill in terms of his service in Vietnam, as something he was forced to learn to do under the highly specific circumstance of war. (*Id.* at pp. 7-8.) He also spoke of becoming a mercenary for the "United States government" in Vietnam, which is of highly questionable accuracy. (*Id.* at p. 8.) There was also no particular category of victim specified in the recording to bring the Southers within. In fact, the only "category" of victim that can be construed by his statement are enemy combatants. Appellant's recording simply contains no "statement[] of intent . . . , reflecting intent to kill a particular category of victims in specific circumstances" to bring the Southers into the statement. (*Karis, supra,* 46 Cal.3d at p. 637.)

Respondent attempts to obscure this shortcoming in the prosecution's evidence by arguing that the breadth of a threat, the large size of a targeted group, or the failure to specify a victim, does not disqualify it as a generic threat. (RB:137-138, citing *People v. Spector* (2011) 194 Cal.App.4th 1335 (*Spector*), *Rodriguez, supra,* 42 Cal.3d at p. 757, and *Crew, supra,* 31 Cal.4th at p. 842.) The cases respondent relies upon are all distinguishable from the facts here.

First, respondent relies on *Spector, supra,* 194 Cal.App.4th 1335. There, a woman was found dead in Spector's house near the backdoor killed by a single gunshot through her mouth. (*Id.* at pp. 1343-1346.) The issue at trial was whether Spector, who had been drinking, shot the woman

or whether she shot herself. (*Id.* at pp. 1347-1363.) Multiple women testified to occasions when Spector, while intoxicated, threatened them with a gun when they tried to leave his presence. (*Id.* at pp. 1354-1358.) Another witness testified that approximately ten years prior, Spector had been drinking and arguing with a woman at a holiday party. (*Id.* at p. 1393.) On this occasion, Spector "kept saying these fucking cunts, these fucking cunts, over and over again," and then showed a gun to the witness and said, "[t]hese fucking cunts, they all deserve a bullet in their heads." (*Ibid*.) A year later, at the same holiday party, Spector was arguing with the same woman he was arguing with the previous year, yelling the same thing, then saw another woman, and "yelled, 'that fucking cunt, I ought to put a bullet in her head right now.'" (*Ibid.*)

Spector challenged the first statement that "all (cunts) deserve a bullet in their heads," as not a generic threat because it stated what women deserve as opposed to an intent to harm, suggested it was mere hyperbole, and was too wide-ranging. (*Spector, supra,* 194 Cal.App.4th at p. 1396.) The court held that "a hypothetical generic threat need not be that explicit to be admissible under section 1250, and the large size of the targeted group does not necessarily negate the threat's relevance." (*Id.* at p. 1396.) The court pointed to the fact that the witness testified that Spector "absolutely did not appear to be joking" and that the statement was part of Spector's "long history of extremely violent conduct toward women" in rejecting his arguments against admissibility. (*Id.* at p. 1397.) The court concluded that the "evidence gains relevance and reliability from that history, which gave the jury good reason to judge the statement as a serious threat." (*Ibid.*)

Here, there is no such history to provide relevance and reliability for the argument that appellant's statement regarding his talents contained a generic threat. Again, the summary of appellant's talents does not include a forward-looking plan of action and instead was a summary of the topics

discussed earlier in his recording. (AOB:162; see 3RT:317-318.) Moreover, Spector identified a targeted group: women. If he had shot a male in the mouth, the statements would not have qualified as a generic threat. Here, there is no discernible target group – aside from combat enemies – that could be argued was the subject of appellant's statement.

Appellant's recording is likewise distinguishable from Spector's second statement admitted as a generic threat: "That fucking cunt, I ought to put a bullet in her head right now." (*Spector, supra,* 194 Cal.App.4th at p. 1393.) The appellate court rejected the argument that it was not a generic threat because it was targeted to a particular unidentified woman rather than a class of victims. (*Id.* at p. 1397.) The court found the threat similar to that held admissible in *People v. Cruz* (2008) 44 Cal.4th 636 (*Cruz*). There, the defendant's prior threat upon being arrested for public drunkenness, to shoot the arresting officer in the back of the head, was held admissible to show the defendant's state of mind three months later when he shot a different officer, who had arrested him for being drunk in public, in the back of the head. (*Spector, supra,* 194 Cal.App.4th at p. 1397; *Cruz, supra,* 44 Cal.4th at p. 643.)

Appellant's statement summarizing his talents is clearly distinguishable from Spector's second statement as well. In addition to his statement not manifesting an intent to commit a future act, it cannot be considered in isolation from the rest of the recording. Appellant had talked about how he saw things that he did not like in Vietnam, but learned to kill as a soldier. (See People's Exh. 106 at p. 7.) In that context, his statement about his ability to kill when the reason was right, is a clear reference to being able to kill in the context of a soldier in a war. Whatever one's views of the morality of killing as a soldier, it simply cannot be assumed that appellant was talking about having an ability, much less intent, to commit unlawful homicide. Furthermore, this statement, if it could be taken as

intent to commit unlawful homicide, would blow open the requirement of circumscribed "members of a class of persons under certain circumstances" to anyone appellant felt like killing. That does not qualify as a generic threat, it is simply impermissible propensity evidence. (See *Karis, supra,* 46 Cal.3d at p. 636.)

Respondent also cites *Rodriguez, supra,* 42 Cal.3d at p. 757 for the proposition that "a generic threat need not 'specify a victim or victims'." (RB:137.) While the defendant in *Rodriguez* did not specify a victim, he did make a very specific claim to numerous people that he hated the police and would kill any police officer who attempted to arrest him – then he did just what he said he would do. (*Rodriguez, supra,* 42 Cal.3d at p. 757.) In fact, on one prior occasion, a companion had physically prevented the defendant from reaching for a shotgun when an officer stopped his car. (*Ibid.*) This court held that evidence that the defendant stated a generic threat aimed not at a specific victim, but at any police officer who attempted to arrest him, was relevant to the issue of intent and "admissible to show the defendant's homicidal intent where other evidence brings the actual victim within the scope of the threat." (*Id.* at p. 757.) Respondent pulled the quote from *Rodriguez* that the defendant need not identify a specific victim, while ignoring the very specific scenario that the defendant threatened: he would kill any police officer that arrested him. (See RB:137.) Here, even if appellant's statement could be interpreted that he threatened to kill anyone if the reason was right, this leaves the universe of potential victims to everyone under some unspecified circumstance. Again, that does not qualify as a generic threat, it is simply impermissible propensity evidence. (*Karis, supra,* 46 Cal.3d at p. 636)

Respondent's claim that appellant's statement was similar to the statement held admissible as a generic threat in *Crew, supra,* 31 Cal.4th at p. 842, is likewise unavailing. (RB:137.) There, the defendant told his

stepbrother, "I think I would like to kill someone, just to see if I could get away with it," in the months leading up to the murder of the defendant's wife. (*Crew, supra,* 31 Cal.4th at p. 842.) Again, respondent omits the facts of the case that fully distinguishes appellant's recording from that defendant's threat. First, the statement in *Crew* is distinguishable from appellant's recording because it states a clear intent of *future* action. Further, this court found in *Crew* that other evidence brought the victim within the scope of the defendant's threat. Respondent's claim that the threat in *Crew* did not identify a particular class of people or specify a particular scenario under which the defendant would kill (RB:137) is true, but the court did not analyze the statement in a vacuum as respondent does. This court noted that the defendant had talked about killing the specific victim and in specific ways in the months leading to her murder. (*Crew, supra,* 31 Cal.4th at p. 842; see also *Karis, supra,* 46 Cal.3d at pp. 637-638 ["regarding his intent, while not directed toward a specific victim, did contemplate the action he would take in circumstances much like those which preceded the murder of" one victim, and the attempted murder of another]; see also *People v. Case* (2018) 5 Cal.5th 1, 42 (*Case*), as mod. on denial of rehg (Aug. 15, 2018) [holding statements admissible where defendant with history of committing robberies charged with robbery-murder said at meeting of law enforcement personnel three months before crime that he would "take out" or "blow away" a robbery target who resisted].) Nothing comparable qualified appellant's recording as a threat here.

Respondent supports its argument that appellant's statements describing his talents constituted a generic threat of potential action by citing a definition of a talent as a "person's 'special natural ability or aptitude'" that a person possesses into the future. (RB:138.) Respondent concludes that there was no reason that appellant's talents of persuasion

and the ability to kill if the reason was right would not continue indefinitely. (RB:138-139.) That may be true, but a talent is not synonymous with a threat or a state of mind. A threat is "[a] communicated intent to inflict harm or loss on another or on another's property." (Black's Law Dict. (8th ed. 2004) p. 1519.) The recording contains no such declaration of appellant's intent or determination to put his talents to future use. Furthermore, the purported generic threat does not fit the facts of what happened to the Southers. Appellant did not use his ability to kill anyone. The prosecution's theory of the case was that appellant *paid* Hardin to commit the murders. This involves neither of appellant's self-proclaimed talents.

Appellant argues that the passage of approximately twelve years from the time the recording was made until the instant crimes was so extreme as to render the recording too remote to be evidence of appellant's state of mind. (See AOB:164-165.) This court in *Karis* held that generic threats are admissible "unless the circumstances in which the statements were made, the lapse of time, or other evidence suggests that the state of mind was transitory and no longer existed at the time of the charged offense." (*Karis, supra,* 46 Cal.3d at p. 637.) The lapse of twelve years requires the conclusion that whatever intent appellant had at the time of the recording no longer existed at the time of the charged offenses. Respondent's attempts to again rely on the nature of a talent as enduring and then listing simply the facts of the current case (see RB:139) cannot bridge the gap here. Respondent's reliance on *Spector* which held that Spector's 10-year-old statement was properly admitted because of Spector's history of violence toward women showed the state of mind still existed at the time of the murder is inapposite. (*Spector, supra,* 194 Cal.App.4th at p. 1397; RB:139.) The court specifically noted that Spector's statement "was hardly an isolated example of Spector's

misogyny; rather, it was embedded in a long history of extremely violent conduct toward women." (*Ibid.*) Nothing comparable revives the statements here. The remoteness does not affect weight rather than admissibility, as respondent contends (RB:139), because the time lapse stripped the statements completely of any relevance to appellant's state of mind at the time of the crimes.

Finally, respondent disagrees with appellant's conclusion that because the statements contained no generic threat and predated the crimes by well over a decade, the only use to which the jury could have put them was as evidence that appellant had a propensity to kill. (RB:140-141; AOB:165-166.) Appellant supports his argument with this court's cautionary statement that if a defendant's statement regarding possible future criminal conduct does not fit the relevancy criteria for statements of state of mind, its admission violates section 1101. (AOB:165; *Karis, supra,* 46 Cal.3d at p. 636.)

To avoid the inevitable conclusion that the statements in appellant's recording do not fit the relevancy requirement for statements of state of mind and therefore amounted to inadmissible propensity evidence, respondent misrepresents what appellant said. (RB:140.) Respondent claims, "[appellant] states that he was good at getting people to follow him and that he would kill for the 'right' reason." (*Ibid.*) Appellant did not say that he "would kill for the 'right' reason." Appellant said, following a long monologue about getting his sisters to help him make money as a child, making motivational speeches, and learning to kill to survive in Vietnam, that talking people into anything and the *ability* to go kill if the reason was right were his only talents. (See People's Exh. 106, p. 9.) The statement was a summation and a conclusion based on his past experiences with no intimation that he would ever kill again outside of the context of war. Where respondent misrepresents what appellant said, the cases it cites are

not helpful to respondent. Further, in those cases, the threats, although conditional, were spontaneous, unambiguous expressions of a *present intent* to carry out the threatened actions during the commission of future crimes. (See RB:140-141, citing *Karis, supra,* 46 Cal.3d at pp. 634-636 [defendant said he would not hesitate to eliminate witness if he committed a crime admissible in case involving rape-murder]; *People v. Lang* (1989) 49 Cal.3d 991, 1013-1016 (*Lang*) [defendant's statement "I'll waste any mother fucker that screws with me" admissible as circumstantial evidence that robbery victim killed intentionally]; *People v. Thompson* (1988) 45 Cal.3d 86, 109-110 [defendant's generic threat that he would "kill anyone who got in the way of his plan" relevant as circumstantial evidence of motive to kill his rape victim to prevent apprehension which would thwart overseas money-making scheme].) Appellant's statements at issue here are not remotely similar.

In short, the relevance of appellant's statements depended on first meeting the requirements for admission under the generic threats theory of section 1250: that the statements pertained to contemplated future conduct in a hypothetical situation and that other evidence brought the actual victim within the scope of threat. (*Karis*, *supra*, 46 Cal.3d at p. 636; *Rodriguez*, *supra*, 42 Cal.3d at p. 757.) Because the statements did not meet either of these requirements, they did not constitute a generic threat and should have been excluded as impermissible propensity evidence. For this most basic reason, the trial court abused its discretion in admitting this evidence.

2. The Recording Was Inadmissible Under Evidence Code Section 1252

Appellant argues that appellant's recording was inadmissible under section 1252 which provides that "[e]vidence of a statement is inadmissible under this article if the statement was made under circumstances such as to

indicate its lack of trustworthiness." (AOB:166-169.) This court in *Karis*, suggested that circumstances indicating that the speaker had a motive to lie, to exaggerate, or to misrepresent, indicate that statements were not trustworthy and, thus, inadmissible under section 1252. (*Karis, supra,* 46 Cal.3d at p. 635.) Respondent's claim that "nothing about the circumstances indicated a motive to lie, exaggerate, or manufacture evidence" (RB:140) is incongruent with the content and known facts about the recording, and with the prosecution's use of the recording throughout the trial.

The recording was made under circumstances that indicate the statements appellant uttered were not intended as a threat where the recording was made when appellant appeared to be alone speaking into a microphone. While it is unclear what the purpose of the recording was, it cannot be assumed from the circumstances that appellant intended anything that he said as a threat to commit murder. There was no indication that appellant ever intended anyone else to hear the tape; he abandoned it with his ex-wife a decade prior. (3RT:286; 21RT:3505-3506, 3509.) These circumstances are very different from the generic threat cases previously discussed where the defendant made an unequivocal, unprompted statement to a friend or acquaintance under circumstances indicating that the defendant had every intention of making good on his threat. (See, e,g., *Karis, supra,* 46 Cal.3d at p. 625 [nothing in the record suggested that the defendant's statement made during a social conversation at the home of a friend was not trustworthy].) In some of these cases, the defendant was in possession of a weapon when he made the threatening statement or there was other corroboration, without considering the crime itself, that lent concreteness to the threats. (See, e.g., *Rodriguez, supra,* 46 Cal.3d at p. 756; *Lang, supra,* 49 Cal.3d at p. 1013.)

Here, by contrast, the circumstances under which appellant's statements were made were incompatible with an inference of reliability. As the trial court acknowledged, appellant appeared to have been intoxicated as indicated by his slurred speech. (AOB:168; 3RT:321.) Moreover, while respondent argues there is no proof that the recording was "fictitious or intended as part of a book" as defense counsel argued (RB:140), this context is likely given the content of the recording. It is true as respondent states, that the recording was voluntarily, but it appeared to have been made with a motive to at the very least exaggerate. (See RB:140.) In fact, the prosecution constructively conceded that fact by repeatedly using the narrative to describe appellant as living in a "fantasy." (AOB:168; 10RT:1543; 24RT:4126; 25RT:4327, 4341.) It appeared to contain claims that were merely braggadocio with no basis in reality. (See, e.g., People's Exh. 106, p. 8 [appellant claimed to be a mercenary for the "United States government" in Vietnam].)

Where the recording appeared to be the product of appellant talking into a microphone while intoxicated for the purpose of recording a story only loosely based in fact, and where the prosecution essentially admitted as much, it was "made under circumstances such as to indicate its lack of trustworthiness." (§ 1252.) This rendered the recording inadmissible under section 1250.

3. The Recording Was Not Admissible as a Party Admission

Respondent states that "[a]ppellant appears to concede that the statement was admissible under the hearsay exception for a party admission (§ 1220), if it was relevant." (RB:143, citing AOB:169-170.) Respondent then states that the "statement was relevant to show appellant's state of mind, motive, and intent at the time of the crimes" and concludes that it was "thus not made inadmissible under the hearsay rule." (RB:143.)

Appellant does not concede that the statement was admissible under section 1220 if it was relevant. First, the recording was not relevant to any material disputed fact. (See AOB:159-160.) Next, even if the statement was relevant, appellant argues it should not have been admitted nevertheless because it was more prejudicial than probative under section 352. (See AOB:170-172.)

4. The Recording Was More Prejudicial than Probative Under Evidence Code Section 352

Appellant maintains that the minimal, if any, probative value of appellant's recording was substantially outweighed by the risk of prejudice. (AOB:232-234.) Respondent urges the opposite conclusion. Respondent's arguments lack merit.

The trial court originally commented that appellant's statements in the recording were irrelevant on the issue of intent to kill and lacked a statement of future intent (3RT:315, 317-318), were remote (3RT:318), were possibly made under questionable circumstances – inebriation (3RT:321), and that it had misgivings about allowing the evidence (3RT:328). It was only after reading the generic threats line of cases that the court, without explanation, reversed its ruling. (3RT:328.) Appellant has shown here and in the opening brief that appellant's statements in the recording are distinguishable from those cases. Contrary to respondent's claim, the statements simply have no relevance or probative value as to appellant's state of mind at the time of the crimes. (RB:141.)

Respondent suggests that appellant's statements in the recording were also "circumstantial evidence corroborating Vann's testimony that appellant convinced him take part [sic] in the burglary, supporting the purpose of the many phone calls between appellant and Hardin the night of the murder, and supporting his role as the orchestrator of all the charged

crimes." (RB:141.) Where the statements lacked relevance to each of these things as evidence of state of mind, they served only as impermissible character evidence that appellant was the kind of man that would engage in such acts.

Respondent argues that "[o]ther parts of the recorded statement were relevant to show [appellant's] focus on and 'knack' for money-making schemes, even when those schemes were 'crooked' or morally questionable." (RB:141, citing 4Supp.CT 27-31.)[5] If the recording was not used to secure a conviction in a capital murder case involving a murder-for-hire and murder for financial gain, this statement would be laughable. The topics discussed on the pages cited by respondent involve such anecdotes as appellant underpaying his sister in his lawn-mowing business as a child and selling people's discarded items which his father thought was "crooked." (See People's Exh. 106, pp. 4-8.) These statements had no relevance or probative value to the crimes in this case and simply amounted to bad character evidence.

Respondent's arguments regarding the prejudicial impact of the recording are equally specious. First, respondent argues that compared to appellant's purported actions in "hiring someone to bludgeon an innocent couple to death in their bed with a tire iron," appellant's "vague statement that he could talk people into doing things and kill for the right reason was not so emotionally charged as to unduly sway the jury." (RB:142.) Respondent continues, "[t]his is especially true given the context of the statement, which was made after discussing killing during Vietnam, and given the passage of time between the statement and the crimes." (RB:142; see also RB:144 ["The circumstances and context of the statement – its age, appellant's possible inebriation, the talk about killing in Vietnam, etc. –

[5] 4Supp.CT:24-32 is a copy of People's Exhibit 106.

also deprived it of much of its force"].) Respondent's argument precisely demonstrates appellant's argument that the evidence was not probative or reliable: it was vague, taken out of context, made under questionable circumstances, and remote. Where it had no probative value, the recording served only as bad character evidence. This court concluded in *Karis* that, "[t]he highly prejudicial nature of the evidence lay not in the fact that the jury might consider it as reflecting a propensity on defendant's part to commit murder, but in its value in identifying defendant as the perpetrator of the crimes and demonstrating his motive and mental state." (*Karis, supra,* 46 Cal.3d at p. 638.) The exact opposite was true here as evidenced by respondent's own arguments.

Next, respondent argues that the recording "was not unduly prejudicial when compared to appellant's many statements of implied and express threats against witnesses in this case . . . , his recorded jail conversation directing Steves's actions . . . , or testimony from Steves and defense witness Mitchell expressing their fears of appellant . . . ." (RB:142, citations omitted.) As respondent notes, however, under section 352, "'prejudicial' is not synonymous with 'damaging.'" (RB:142, citing *Karis, supra,* 46 Cal.3d at p.638.) Whether there is other evidence presented at a trial that implicates the defendant in the charged crimes is not a component of the section 352 weighing process as respondent suggests.[6] Rather, the

[6] In any event, respondent overstates the force of this evidence. For example, respondent cites testimony by Steves, Hug, Hernandez, and Vann as examples of "appellant's many statements of implied and express threats against witnesses in this case." (RB:142, citing 12RT:1980 [Steves], 1913 [Steves], 2045-2052 [Vann]; 18RT:3045-3046 [Hug]; 21RT:3564-3565 [Hernandez].) Steves, Hug, and Hernandez, all testified that they knew that appellant used the name "Tony Bonanno" at times and claimed to have connections to the mafia, but none of these witnesses testified that appellant impliedly or expressly threatened them. (See Argument V.) Vann was the only witness who testified that he was intimidated by appellant. (See

question in determining whether the trial court erred in admitting evidence following analysis under section 352 is whether the court abused its discretion in determining whether the specific evidence at issue "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*Karis, supra,* 46 Cal.3d at p. 638, quoting *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) Here, the recording should have been excluded under the section 352 balancing test because the prejudicial impact of its use as proof of a homicidal and maniacal predisposition substantially outweighed any probative value as evidence of appellant's intent. In admitting this evidence, without correctly assessing its probative value compared with its inevitable prejudicial effect, the trial court abused its discretion.

B. The Error Was Not Harmless

Appellant argues that the erroneous admission of the recording as a homicidal threat was prejudicial both under state law and the federal due process clause. (See AOB:172-178.) The recording aided the prosecution in securing a conviction in a capital case resting on circumstantial evidence because it allowed the jury to impermissibly infer appellant's guilt based on propensity evidence. (See AOB:172-178.) Given the paucity of direct evidence of appellant's involvement in the murders, burglary, and extortion, the murky motive for the murders, and the plausible explanation that the telephone contact and envelope deliveries between appellant and Hardin related to their narcotics relationship and not to payment for the murder, the facts of the case left room for reasonable doubt. It is

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12RT:2045-2052.) Vann was also the only person who received leniency for his criminal acts in exchange for his testimony. (13RT:2109-2111; People's Exh. 30.)

reasonably probable that had the prosecution not repeatedly invoked the recording as proof that appellant acted in line with his self-proclaimed talents for talking people into doing things and killing when the reason was right in a murder-for-hire case, the result would have been more favorable to appellant. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836; AOB:172-174.) The error also rendered appellant's trial fundamentally unfair and the People have not shown beyond a reasonable doubt that the error did not contribute to the verdict here. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent's arguments to the contrary are unconvincing.[7]

In his opening brief, appellant fully addresses the weaknesses in the proof of his guilt of the murders, burglary, and extortion, and the resulting importance of his statements in filling critical gaps to the prosecution's evidence. (See AOB:172-174; see also AOB:88-95 [Argument I], 134-138 [Argument II].) Appellant demonstrates the pervasive manner in which the prosecution used the recording as bad character or propensity evidence to convince the jury that appellant was the kind of person who would concoct and implement such a plan. (See AOB:173-174; see, e.g., 10RT:1543 [prosecution presented recording in opening statement to leave the jury with a "flavor" of appellant]; 24RT:4121 [prosecution played recording as evidence of "who this man is"]; see also 10RT:1514; 24RT:4126; 25RT:4327, 4341, 4379.) The prosecution itself acknowledged that the recording "hurt Mr. Shove." (25RT:4327.) Respondent's arguments downplaying the prosecution's reliance on the tape to bolster its case against appellant are belied by the record. (RB:144-146.)

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[7] Respondent does not make an independent substantive argument that the error did not also render appellant's trial fundamentally unfair in violation of federal due process. (RB:147.) Thus, appellant respectfully refers this court to appellant's argument in the opening brief. (AOB:174-176.)

Respondent's repeated reliance on the evidence of appellant's purported behavior "persuading, manipulating, and intimidating people into doing what he wanted" (see, e.g., RB:144-145) is just a perpetuation of the prosecution's character-based arguments in light of the lack of other evidence at trial. The evidence of anyone actually doing anything related to the charged crimes because of appellant's persuasion, manipulation, or intimidation, is minimal. The most direct evidence of this was given by Vann's self-serving testimony regarding his participation in the Cal Aero safe burglary. (See AOB:35-43.) Respondent does not cite this evidence, likely because Vann's testimony is not worthy of confidence. What respondent does cite is unconvincing.

Respondent cites the taped telephone conversations between appellant and Steves when appellant was in jail awaiting trial where appellant is purportedly "controlling people" and "pulling strings," but there is no evidence that Steves or anyone else did anything in response. (RB:145.) Respondent also cites Hardin's statement once arrested: "Just know I didn't do it by choice." (RB:145.) This statement is problematic because it is vague and self-serving to explain away why Hardin is being held on murder charges to his relative. (21RT:3543-3544; see People's Exh. 119, pp. 2-5.) More importantly, respondent impermissibly relies on this statement as the court instructed the jury that it was admitted as to Hardin only. (21RT:3543-3544.) Finally, respondent cites the prosecutor's arguments based on the testimony of Steves, Mitchell, Hug, and Hernandez, that appellant "'leads his life by intimidating.'" (RB:146, citing 25RT:4327-4328.) In fact, none of those witnesses testified at the guilt phase that appellant threatened them or did anything to intimidate them to get them "'to do [appellant's] dirty deeds.'" (RB:146; citing 25RT:4327-4328; see, e.g., 12RT:1915, 1931-1932 [Steves]; 22RT:3723 [Mitchell].) Respondent provides no citations to the record to show otherwise.

Further, there can be no question that the jury used the recording in the impermissible manner as propensity evidence to appellant's prejudice because the jury was not given a limiting instruction regarding the recording. (AOB:174.) Respondent's reliance on the court's instructions to the jury to consider oral statements of the defendant with caution and that they must find proof of every element independent of appellant's statements is inapposite. (RB:146; 30CT:8430.) Those instructions do not limit the purpose for which the evidence can be considered. Respondent's pronouncement that "generic threats are not generally subject to limitation as statements admitted under section 1250" is simply not supported by the authority it cites. (RB:147, citing *Spector, supra,* 194 Cal.App.4th at p. 1402 [holding issue waived where limiting instruction regarding generic threat evidence not requested, and no authority provided that such instruction is "required" whenever generic threat evidence is admitted]; see *Case, supra,* 5 Cal.5th at pp. 41-42 [noting trial court instructed the jury that it could consider generic threat evidence "regarding defendant's mental state or intent or premeditation and deliberation," but not "to show defendant's bad character or disposition to commit crime"].)

Finally, appellant argues that the trial court's error in admitting the recording requires reversal of the penalty determination because there is a reasonable possibility that the jury would have rendered a different penalty phase verdict absent the error (see AOB:176-178, citing *People v. Brown* (1988) 46 Cal.3d 432, 447-448); that the erroneously admitted recording skewed the perception of appellant's moral culpability by unfairly portraying him as someone who would kill anyone "if the reason is right" (AOB:176; 29RT:5089); and that it supported the prosecution's theory that appellant was the mastermind behind the Souther's murders (AOB:176; 29RT:5089).

Respondent's argument that appellant's "suggestion that the recording may have affected the jury's penalty determination is unsupportable" is wrong. (RB:147.) First, respondent does not state the correct standard of review. Further, while the prosecutor did not specifically refer to the recording in his penalty phase arguments, the prosecutor reminded the jury that all of the guilt phase evidence was relevant to their penalty phase determination. (29RT:5088.) The prosecutor continued the same arguments from the guilt phase, based in part on the recording, that appellant was manipulative, persuasive, the mastermind, and a schemer. (AOB:177, citing 29RT:5086-5089.) The recording was the most potent evidence of this where appellant's own words were used by the prosecution to argue appellant could get people to do what he wanted and would kill if the reason was right. Indeed, the trial court specifically relied upon the recording in denying appellant's motion under Penal Code section 190.4. (See AOB:177, citing 29RT:5262.) Accordingly, it is reasonable on the facts of the record to infer that the jury relied on the evidence as appellant describes in its penalty determination.

The erroneously admitted recording contributed to a death verdict for appellant while the jury spared Hardin's life because it supported the prosecution argument that appellant was the mastermind and Hardin was merely following appellant's orders or threats despite little actual evidence of this. (See AOB:178.) Where it was shown that Hardin was the actual killer through the presence of his DNA at the crime scene, appellant's argument is logical and supported by the record. Respondent agrees only that the comparable roles of appellant and Hardin may have played a part in the penalty phase decisions. (RB:147.) Respondent states, however, "but the different decisions were more likely based on the substantial differences in mitigating and aggravating evidence admitted regarding each." (*Ibid*.) Respondent then summarizes what it argues amounts to "striking"

differences in the aggravating and mitigating evidence for each defendant, with a clear emphasis on the mitigation evidence presented on Hardin's behalf which is mostly related to his childhood and family. (RB:147-148.) Respondent's argument is based on an improper premise. As required, the jury was instructed that it "must decide separately the question of the penalty as to each of the defendants." (31CT:8628 [CALJIC 8.88].) The jury was not permitted to compare and contrast the mitigating evidence as to each defendant, but was permitted to compare and contrast the relative culpability of the two. (See *People v. Bryant* (2014) 60 Cal.4th 335, 384 ["[The appellant's] speculation that the jury impermissibly compared defendants' backgrounds in reaching its verdicts is unpersuasive. We also observe that some comparison between defendants in terms of their relative *culpability* is proper."].)

Thus, as argued in the opening brief, it is reasonably possible that the erroneous admission of the recording contributed to the judgment of death. As such, the error denied appellant a fair penalty determination and the heightened reliability required by the Eighth Amendment and must be reversed.

V. THE TRIAL COURT IMPROPERLY ADMITTED IRRELEVANT EVIDENCE THAT APPELLANT USED THE ALIAS "TONY BONANNO"

Appellant argues that the trial court abused its discretion by admitting irrelevant and inflammatory evidence that appellant used the alias "Tony Bonanno," which linked him to a notoriously violent mafia family. (AOB:179-199.) Respondent counters that the evidence was relevant to show appellant's strategy to intimidate and manipulate people, which supported the state's case that appellant had a leadership role in the charged crimes, and that any error was harmless. (RB:148-156.) Respondent's contentions are without merit.

A. The "Bonanno" Evidence was Irrelevant to the Charged Offenses

In his opening brief, appellant argues that the evidence that he used the name "Tony Bonanno" was not relevant because it had no tendency to prove or disprove any disputed fact of consequence at his trial. (AOB:181-189; Evid. Code § 210.) At trial, the prosecutor argued to the court that the "Tony Bonanno" alias was relevant because Stanley Steves and Kimberly Hernandez knew appellant used the name, and appellant used the name to create a "mystique" that he was a "Mafia man" to intimidate witnesses. (AOB:179-180; 10RT:1480.) Defense counsel countered that the evidence was irrelevant where the only witness to state that appellant scared them was William Vann, but Vann did not know appellant used the name "Bonanno." (AOB:180; 10RT:1481; see 13RT:2219.) The trial court ruled the evidence was admissible, "[i]f these are things out of his own mouth that he says to people." (10RT:1481; AOB:180.)

The trial court abused its discretion because, while establishing identity via an alias or proving a defendant's use of an alias or nickname to intimidate witnesses may be legitimate grounds for which such evidence

may be relevant, the prosecution's proffer was insufficient on either ground. (AOB:182-189.)

Respondent argues that "evidence of an alias is relevant and admissible when witnesses knew the defendant by that name," citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1133 (*Barnett*). (RB:150.) *Barnett* does not support respondent's pronouncement. The issue of the defendant's aliases was raised in *Barnett* in the context of a prosecutorial misconduct claim. (*Id.* at pp. 1131-1133.) Thus, the issue for the court was whether the prosecution's questioning of the defendant and other witnesses regarding the defendant's use of numerous aliases qualified as use of "deceptive or reprehensible methods of persuasion." (*Ibid.*) This court held it was proper for the trial court to permit questioning of the defendant about one of his aliases because the defendant gave it to officers when he was arrested on the murder at issue there. (*Id.* at pp. 1132-1133.) Regarding the other alias ("Lee Barrett"), this court held, "many of those who testified at the trial, including victims, had known defendant by that name. Defendant has not shown how the prosecutor's clarification of that fact served to persuade the jury in a deceptive or reprehensible way." (*Id.* at p. 1133.)

The holding in *Barnett* that a prosecutor does not commit misconduct by clarifying with witnesses that they knew the defendant by an innocuous name does not support respondent's unqualified pronouncement that when witnesses knew a defendant by a nickname or alias that evidence is relevant to the matter being tried and should be admitted. Generally, because of the potential for undue prejudice, a defendant's use of aliases should not be presented to the jury unless it is necessary to identify the defendant or the alias is otherwise relevant to an issue in the case. (See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1253-1254 (*Pensinger*) [recognizing that informing the jury of a defendant's aliases may be unduly

prejudicial if irrelevant or point to obvious criminal conduct]; (see also *People v. Maroney* (1895) 109 Cal. 277, 280-281); *People v. Brown* (2003) 31 Cal.4th 518, 548-549 (*Brown*) ["The court carefully weighed defendant's concern over the potentially prejudicial effect of the nickname with the prosecutor's assertion that many of the witnesses knew the defendant *only* by that name."]). Here, neither applied.

Each witness who ultimately testified that they were aware that appellant used the name "Tony Bonanno," first identified appellant at trial with reference to his legal name, not the Bonanno alias. (See 12RT:1890-1891 [Stanley Steves]; 18RT:3037-3038 [Rhonda Hug]; 21RT:3558-3559 [Kimberly Hernandez]; 22RT:3695 [John Mitchell].)[8] Respondent argues that Steves and John Mitchell knew appellant as "Tony Bonanno" and may have known appellant "only" by the alias. (RB:150.) Again, *Barnett* and this court's other opinions addressing the issue do not support the proposition that just because witnesses may have known a defendant by some alias at a certain time, the name is relevant and should be admitted at trial. The court's opinion in *Barnett* does not address whether the witnesses *only* knew the defendant by the alias at the time of the crime or how they identified the defendant at his trial, only that it was not prosecutorial misconduct to clarify with the witnesses that they had known the defendant by an alias. (*Barnett*, *supra*, 17 Cal. 4th at p. 1133.)

Further, it is not a fair reading of the record, as respondent suggests, that Steves may have only known appellant as "Tony Bonanno." (RB:150.) Numerous witnesses who knew both Steves and appellant knew appellant's legal name, including Hug and Hernandez, making it unlikely that Steves

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[8] Respondent claims that appellant provided no citation for the fact that the witnesses who knew appellant as "Tony Bonanno" also knew his true name. (RB:150.) The citations were provided on page 184 of Appellant's Opening Brief.

only knew appellant as “Tony Bonanno.” (18RT:3037-3038, 3047-3049 [Hug]; 21RT:3558-3560 [Hernandez].)

Whether Mitchell only knew appellant as “Tony Bonanno” at one point is less clear. However, Mitchell testified on direct that he knew appellant as “Tony.” (22RT:3699.) The prosecution elicited on cross-examination, over defense objection, that Mitchell knew appellant as “Tony Bonanno.” (22RT:3710.) Because of the obvious reason that the name “Tony” alone is innocuous and that the alias only gains the prejudicial nature when paired with Bonanno, the issue would not be a concern if the only testimony was that Mitchell knew appellant as “Tony.” The same applies as to respondent’s reference to Steves’ and Maria Amaya’s references to appellant as “Tony” in the recordings of their conversations with appellant when he was in county jail awaiting trial. (See RB:150.)

In his opening brief, appellant cites *Brown, supra,* 31 Cal.4th 518, 548-549, to demonstrate when a nickname may be properly admitted because it is necessary for witnesses to identify the defendant and to make sense of their testimony. (See RB:150-151; AOB:183.) This court in *Brown* held “several witnesses in the instant case knew defendant *primarily* or *exclusively* by his nickname. Because defendant’s identity was at issue, the trial court did not err in cautioning the prosecutor not to emphasize the nickname, but acquiescing in the inevitability that it would come out before the jury.” (*Brown, supra,* 31 Cal.4th at p. 551, emphasis added.) Respondent argues that *Brown* in fact supports the use of the alias here because, “[b]ased on the number of witnesses who knew appellant as Tony Bonanno and the recording in which he referred to himself that way, it appears that the same is true here.” (RB:151.) *Brown* is distinguishable on several grounds. First, and most importantly, identity was an issue in *Brown* whereas here it was not. (*Brown*, *supra*, 31 Cal. 4th at p. 551.) Second, as stated, the witnesses all initially identified appellant by his legal

name first and only later agreed upon direct questioning from the prosecutor that they knew appellant used the alias "Tony Bonanno." As such, eliciting the nickname was not necessary; it was not inevitable that the witnesses would use the name. (See 12RT:1890-1891 [Steves]; 18RT:3037-3038 [Hug]; 21RT:3558-3559 [Hernandez]; 22RT:3695 [Mitchell].)

Finally, regarding the recording to which respondent refers (see RB:151), without a citation it is unclear to which recording it is referring. Assuming respondent is referring to the jail recordings (see RB:150), only the name "Tony" is mentioned in these recordings, not "Tony Bonanno." (See 1CTSupp.4: 34, 39, 45, 53, 61; 21RT:3537-3538.) Thus, the admission of these recordings does not justify the additional evidence of the much more inflammatory "Bonanno" name. No recording admitted in the case supports a conclusion that it "would be impossible to sanitize the entire trial of any references" to the name "Tony Bonanno." (See RB:150-151, citing *Brown, supra,* 31 Cal.4th at pp. 550-551.)

Respondent relies heavily upon *People v. Leon* (2010) 181 Cal.App.4th 452 (*Leon*) as authority to support her argument that the "Bonanno" evidence was relevant to the charged offenses here. (See RB:151-154.) The defendant in *Leon* was charged with inter alia first degree murder, two counts of willful, premeditated, and deliberate attempted murder, and gang enhancements. (*Leon, supra,* 181 Cal.App.4th at p. 456.) The defendant, a gang member, fired a single shot from a car into another car carrying a rival gang member. (*Id.* at pp. 457-458.) A gang expert opined that the shooting was committed for the benefit of the Rivera 13 gang to avenge a perceived slight and for the defendant to take revenge to maintain and gain status with his gang. (*Id.* at p. 458.) The gang expert explained that the defendant's gang moniker, "Chucky," was derived from a movie about a homicidal doll that killed people. (*Ibid.*)

Evidence was also presented of the defendant's photo album with images of the defendant, Chucky and gang indicia, and a book found in the defendant's cell with a picture of the Chucky doll and the writing "Rivera kills" and "the killer. Rivera." (*Id.* at pp. 458-459.) The appellate court held that the evidence had "a tendency in reason to prove that, when appellant shot at the Camry, he acted with the specific intent to kill and with both premeditation and deliberation," because it was "reasonable to infer that appellant wanted to emulate the Chucky doll's exploits and show his fellow gang members that his moniker was well-warranted since he, like the Chucky doll, was also a killer." (*Id.* at p. 461; see also *Id.* at pp. 461-462 [evidence was relevant and highly probative as to the appellant's motive and intent].)

Specifically, respondent cites *Leon* to support the argument that "the use of an alias or moniker intended to convey the defendant's potential for violence may be relevant to show his state of mind with regard to the charged crimes." (RB:151.) Respondent's claim that the Bonanno evidence was relevant and akin to the killer-doll "Chucky" gang moniker evidence in *Leon*, is untenable. (RB:151-154.) The prosecutor here argued only that appellant used the alias, some witnesses knew that he used the alias, and the evidence related to "[t]his whole mystique that [appellant] tries to create in intimidating witnesses is to say that he's a Mafia man and he's Tony Bonanno." (10RT:1480; AOB:180.) Thus, the prosecutor's proffered theory of admissibility was that appellant used the Bonanno alias to intimidate witnesses. The prosecutor did not argue that the evidence was relevant to prove appellant's state of mind – premeditation and deliberation, motive or intent. As such, this basis for admissibility is not set forth in the record and respondent may not rely on this new theory of admissibility on appeal. (See *People v. Brown* (2004) 33 Cal.4th 892, 901; *People v. Robles*

(2000) 23 Cal.4th 789, 801, fn. 7; see also *Green v. Superior Court* (1985) 40 Cal.3d 126, 136-138.)

Moreover, appellant's use of the name "Tony Bonanno" was unrelated to any material fact in the case, much less a fact that was probative of appellant's mental state or any other element of the charged offenses. Appellant never referred to himself as "Tony Bonanno" in relation to any evidence related to the death of the Southers, the safe burglary, or the extortion of the Rencks. None of the witnesses that testified that appellant used the name "Tony Bonanno" testified that he used the alias or his claim to have Mafia connections to intimidate them in any manner, much less in any manner that related to the charged offenses. The name was simply not relevant and the trial court abused its discretion by admitting it simply because the defendant used it at some time.

B. Assuming, *Arguendo*, the Alias "Tony Bonanno" was Relevant, the Evidence was more Prejudicial than Probative

Appellant argues that evidence of appellant's use of the "Tony Bonanno" alias was far more prejudicial than probative and was thus inadmissible under Evidence Code section 352. (AOB:189-194.) Weighed against the lack of relevance of the Bonanno evidence to any material fact, the introduction of an alias that connected appellant to a mafia family known to commit the same crimes charged here – murder, extortion and theft-related offenses (see AOB:182, fn. 52, 192, fn. 55) – created the likelihood that the evidence would provoke bias in the jury against appellant. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071 [in the context of Evid. Code § 352, unduly prejudicial evidence is evidence that would evoke an emotional bias against one party]; AOB:191-194.) As stated, this court has recognized that informing the jury of a defendant's aliases may be unduly prejudicial if the aliases are irrelevant or point to

obvious criminal conduct by the defendant. (*Pensinger, supra,* 52 Cal.3d at pp. 1253-1254; see also *People v. Maroney, supra,* 109 Cal. at pp. 280-281.) Here, both applied. The risk of prejudice from associating appellant with a violent crime family far outweighed the negligible probative value that the Bonanno evidence had to appellant's case.

Respondent cites to *Leon* and *Brown* to support its argument that the Bonanno evidence was not more prejudicial than probative. (RB:154.) As demonstrated *ante*, the probative value of the respective gang moniker and nickname at issue in those cases is distinguishable from the probative value – which appellant maintains is none – of the Bonanno evidence here. In *Leon*, the "Chucky" gang moniker evidence was integral to proving the defendant's motive and intent in shooting into a car carrying a rival gang member. (*Leon, supra,* 181 Cal.App.4th at pp. 458-463.) In *Brown*, the prosecutor's reference to the defendant's nickname "Bam" or "Bam Bam" was necessary where the witnesses knew the defendant "primarily or exclusively" by that name. (*Brown, supra,* 31 Cal.4th at p. 551.) *Leon* and *Brown* do not advance respondent's argument.

Next, respondent argues that the name "Tony Bonanno" was benign on its face and was only connected to "potential criminality" because of appellant's use of the name and claimed connections with the mafia. (RB:154-155.) Not so. The name was imbued with meaning by the prosecution's repeated use of it in closing argument. (See AOB:196-197.) The prosecution used the alias to describe the kind of man appellant was as a way of explaining how he could commit the charged crimes (see 24RT:4119-4120) and to associate the prejudicial nickname with evidence that was in fact unrelated (see, e.g., 25RT:4338). The prosecution argued to the jury that Vann lied to the police initially because he did not want to cross "Theodore Shove or Tony Bonanno" despite the fact that Vann never knew appellant used the alias. (25RT:4338.) In another instance, the

prosecution argued that appellant wanted Cal Aero and when Souther would not sell, "Bonanno" hired Hardin to kill him, despite any evidence Souther or Hardin knew appellant by that name. (25RT:4377.) The prosecution knew the import of the name, and conveyed that to the jury.

Moreover, the prosecution elicited from Mitchell, over defense objection, that he knew appellant went by "Tony Bonanno" and that appellant claimed that he was going to buy Paramount Studios and would give Mitchell a job. (22RT:3710, 3713.) Mitchell testified that he was not sure that appellant was not a member of the Bonanno family at the time. (22RT:3724.) Mitchell explained that there was an Anthony Bonanno, that there was a whole family of Bonannos that was a Mafia family, and that his father used to work for one of them in the film industry. (22RT:3724.) Added to Hug's testimony that appellant told her that he had worked for the Bonanno family doing legal work, and was "basically their private attorney" (18RT:3046), the jury could infer that appellant was a part of a dangerous crime family.

Respondent contends that "to the extent that people would associate the name with crime, that was precisely appellant's intent in using it and underscores its relevance." (RB:155.) In the same paragraph respondent contradicts itself, arguing that the jury would not use the name to assume appellant's criminal past or propensity because they knew the purpose of the name was to portray a false Mafioso image of himself, that made him look like an "imitator rather than a legitimate and dangerous criminal." (RB:155.) Respondent fails to explain how the same evidence was at the same time relevant and persuasive intimidation for the witnesses but would be a clear ploy to the jurors. The two cannot be reconciled.

The trial court erred in failing to adequately consider the lack of relevance of the Bonanno name to the witnesses' testimony and facts of the

case against the prejudicial impact of inserting the name of a mafia crime family into a case involving murder-for-fire, extortion, and burglary.

C. The Error in Admitting the Alias was Prejudicial and Requires Reversal of Appellant's Convictions and the Judgment of Death

In his opening brief, appellant argues that admission of appellant's use of the alias "Tony Bonanno," a clear reference to the Italian Mafia crime family, would have had a significant impact upon the jurors under the facts of this case. (AOB:195-199.) The guilt phase issue for the jurors to resolve was whether appellant directed others, i.e. Hardin, Proulx, Reiland, and Vann, to commit murder, extortion, and burglary. Contrary to respondent's claim (see RB:155), as described here and in the opening brief (see AOB:88-95 [Argument I]; 134-138 [Argument II]; 172-174 [Argument III]), the case against appellant was not strong. The prosecution's case was largely circumstantial. Testimony that appellant went by the name "Tony Bonanno" likely served to convince the jurors that appellant acted like a Mafia boss with a propensity to order murders and other crimes for financial gain. The testimony would help convince the jury that appellant was the mastermind behind the charged crimes rather than a man who threw barbeques, used cocaine, and had friends of questionable character. (AOB:194-199.)

Respondent fails to address appellant's discussion of the prosecution's numerous and factually unsupported references to the Bonanno evidence before the jury. (See RB:155-156.) Instead, respondent claims the Bonanno evidence was harmless because appellant did not contest the admission of evidence of his claims to be connected to the mafia which "gave the alias any meaning" and which was far more prejudicial than the name. (RB:155.) This, respondent argues, would have allowed the jury to "draw the same inferences based on appellant's purported mafia

connections." (RB:155.) Respondent's conclusion is not supported by the record. The references to appellant's claims to the mafia in the evidence were minimal. (See AOB 33-34.) The prosecution repeatedly attempted to bolster the evidence of appellant's claims of mafia connections with false associations of the Bonanno alias with evidence or testimony. (10RT:1480-1481.) For instance, in its opening statement, the prosecution falsely associated the name with appellant's plans to purchase Cal Aero (10RT:1517), his purported threats to Vann (10RT:1518-1519, 1530), the "dry run" (10RT:1520), the safe burglary (10RT:1520, 1530), the Monte Proulx sightings at the Renck's property (10RT:1537), and tension between Hardin and appellant following the Southers' murders (10RT:1541.) (See also AOB:195-197.) In closing argument, the prosecution argued to the jury that Vann lied to the police initially because he did not want to cross "Theodore Shove or Tony Bonanno" despite the fact that Vann never knew appellant used the alias. (25RT:4338.) In another instance the prosecution argued that appellant wanted Cal Aero and when Souther would not sell, "Bonanno" hired Hardin to kill him, despite any evidence Souther or Hardin knew appellant by that name. (25RT:4377.)

The fact that the prosecution deemed the Bonanno evidence crucial to its case is demonstrated by its heavy reliance on the evidence from start to finish of appellant's trial. (See AOB:194-197; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 ["Evidence matters; closing argument matters; statements from the prosecutor matter a great deal"]; *People v. Diaz* (2014) 227 Cal.App.4th 362, 384 ["A prosecutor's reference to evidence that should not have been presented to the jury increases the potential for prejudice flowing from the error"]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 ["There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor—and so presumably the jury—treated it"]; compare with *People v. Gonzales* (2013) 56 Cal.4th 353, 391

[concluding erroneous admission of evidence was harmless where “in his closing argument, the district attorney did not emphasize the evidence affected by the trial court error”].)

As detailed in the opening brief, the prosecution used the alias to describe the kind of man appellant was as a way of explaining how he could commit the charged crimes (see 24RT:4119-4120), and to associate the prejudicial nickname with evidence that was in fact unrelated (see, e.g., 25RT:4338). The prosecution, in effect, argued defendant’s criminal disposition throughout the trial. The trial court’s error in permitting the “Tony Bonanno” evidence opened the door for the “repeated, gratuitous” invocation of appellant’s alias by the prosecution in opening and closing statements that invited the jurors to convict appellant of the charged offenses based on his proclivity to act as a Mafia boss and order crimes such as murder and extortion. (See *United States v. Farmer* (2d. Cir. 2009) 583 F.3d 131, 146-147; AOB:197.) The erroneous admission of appellant’s alias filled in the evidentiary gaps in the prosecution’s case and ensured a verdict of capital murder. The trial court’s error resulted in a miscarriage of justice, and reversal of appellant’s convictions is required. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836.)

Finally, appellant has also argued that the erroneous admission of the irrelevant and inflammatory evidence also deprived appellant of his federal due process rights to a fair trial at the guilt phase and a fair penalty determination and the heightened reliability required by the Eighth Amendment. (See AOB:198-199.) Respondent does not substantively address these arguments. (See RB:155-156.) Accordingly, appellant refers this court to his opening brief as to those arguments.

VI. THE PROSECUTION COMMITTED PREJUDICIAL *GRIFFIN*[9] ERROR DURING ITS GUILT PHASE CLOSING ARGUMENTS

Appellant has argued that the prosecution violated appellant's constitutional right against self-incrimination by improperly and repeatedly demanding an "answer" to the prosecution's evidence. (AOB:200-207.) Respondent has countered that: (1) the issue is forfeited because there was no objection at trial; (2) the prosecution's argument did not constitute *Griffin* error because the comments were directed at defense counsel's failure to present material evidence; and (3) any error was harmless beyond a reasonable doubt. (RB:156-164.) Respondent's argument fails on all three counts.

A. This Court May Reach the Merits of the Argument Because *Griffin* Error Implicates Appellant's Substantial Rights

As argued in his opening brief and as respondent impliedly concedes, an appellate court may exercise its discretion to review a claim affecting the substantial rights of the defendant despite forfeiture for failure to raise the issue below. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7; *People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1525; see Pen. Code, § 1259 [an "appellate court may, without exception having been taken in the trial court, review any question of law involved . . . at the trial . . . which affected the substantial rights of the defendant"].) Because the *Griffin* error implicates appellant's "substantial rights" in this case, this court may and should exercise its discretion to address the merits of his claim. (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1020.)

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[9] *Griffin v. California* (1965) 380 U.S. 609, 614 (*Griffin*).

B. The Prosecution Violated *Griffin* by Referring to the Absence of Evidence Only Appellant's Testimony Could Have Provided.

On appellate review, where it is "reasonably probable" that the prosecutor's comments misled the jury "into drawing an improper inference regarding defendant's silence," the remarks will be deemed to constitute *Griffin* error. (*People v. Medina* (1995) 11 Cal.4th 694, 756; see *People v. Clair* (1992) 2 Cal.4th 629, 663; *People v. Vargas* (1973) 9 Cal.3d 470, 478 [in determining whether *Griffin* error has occurred, the focus is on extent to which the comment increased the jury's inclination to treat defendant's silence as indication of guilt].)

Respondent argues the prosecution did not violate *Griffin* because its "statements and questions were directed at defense counsel, not appellant." (RB:160.) *Griffin* would be gutted if the state was permitted to circumvent its prohibition against commenting on defendant's silence by using the literary device of metonymy. Despite the prosecution's references to "defense counsel" failure to "provide evidence to support their theories or innocent explanations for incriminating evidence" (RB:160), a layperson would understand the prosecution's arguments to be commentary on appellant's failure to testify and supply the jurors answers only he could give.

Respondent is correct that the prosecution asked (1) why was appellant the only connection between Hardin and the Southers; (2) why appellant was the only one talking to Hardin on the night of the homicides; (3) why was appellant's truck seen by the Renck's house; and (4) why the extortion letter was on his computer. (RB:162.) Respondent then speculates what evidence, other than appellant's testimony, might have answered those questions. (RB:162-163.)

However, when the question "why" is posited, the answer clearly relates to the mental state of appellant, and not other possible, speculative

evidence. In addition, only appellant could provide the answer to the reason he was talking to Hardin on the night of the homicides, why he lent his truck out, and why the letter was on his laptop.

In addition, respondent does not acknowledge that, on the prosecution's motion, appellant was precluded from supplying evidence of a connection between Hardin and Vann, and thus to the Southers. Respondent must not benefit from an evidentiary void the state created. (*People v. Daggett* (1990) 225 Cal.App.3d 751, 758 [improper for state to fault defendant for not presenting evidence that was excluded upon state's own motion]; *People v. Varona* (1983) 143 Cal.App.3d 566, 570 [same]; see also *James v. Illinois* (1990) 493 U.S. 307, 317 [not proper for state to use precluded evidence as a sword]; *Payne v. Arkansas* (1958) 356 U.S. 560, 567 [coerced confessions inadmissible for any purpose in part because it would be fundamentally unfair for state to force defendant to confess and then be able to use forced statement against him at trial]; *United States v. Ebens* (6th Cir. 1986) 800 F.2d 1422, 1440-1441, abrogated on other grounds in *Huddleston v. U.S.* (1988) 485 U.S. 681 [prosecutor took unfair advantage of court's ruling restricting admission of evidence by inviting jury to draw adverse inference from its absence]; *People v. Frohner* (1976) 65 Cal.App.3d 94, 109 [same; such conduct is "grossly improper"].)

For all the above reasons as well as those stated in appellant's opening brief, the prosecution's argument constituted *Griffin* error.

C. The State Cannot Carry Its Burden of Proving the Error Was Harmless Beyond a Reasonable Doubt

The prosecution here had many evidentiary gaps to fill in its circumstantial case against appellant – a case in which it admitted its theory of appellant's guilt "did not make sense" and in which the most incriminating evidence against appellant came in the form of testimony of

William Vann, a witness whose credibility was so suspect that the prosecution argued that the jury could convict appellant without his testimony (24RT:4151) despite the fact that Vann was the only witness who supplied evidence of appellant's involvement in the homicides in the form of alleged admissions.

The prosecution's case for appellant's guilt relied on one other fact: that there was no connection between Hardin, whose DNA was found at the crime scene, and any other possible perpetrator other than appellant. (See Argument II, *ante*.) As noted *ante* and in Argument II of his opening brief, this was improper argument given that the prosecution successfully sought to exclude evidence of a business connection between Hardin and Vann. As respondent noted, "some of the strongest evidence of appellant's involvement was highlighted by the prosecution's questions" objected to herein. (RB:165.) In light of the weak circumstantial nature of the evidence of appellant's alleged role as the mastermind behind the murders in this case, the state cannot carry its burden of proving beyond a reasonable doubt the error complained of did not contribute to the verdict. Accordingly, under *Chapman v. California* (1967) 386 U.S. 18, 24, the *Griffin* error was not harmless and appellant's conviction and sentence of death must be reversed and vacated.

VII. DURING GUILT PHASE CLOSING ARGUMENT THE PROSECUTION IMPROPERLY AND PREJUDICIALLY INVITED JURORS TO PUT THEMSELVES IN THE VICTIM'S POSITION AND IMAGINE WHAT THE VICTIMS EXPERIENCED

During guilt phase closing argument the prosecution argued, inter alia, that the jurors should "[t]hink about how they died. The last few minutes of their life struggling in that bed. Burt defending himself. Burt enduring broken bones. His teeth flying about the room. Their skulls being broken." (AOB:209.) The prosecution also asked the jury to imagine how the victims' daughter felt when she found her parents murdered in their bedroom. (AOB:209-210.) Appellant argues that this was prejudicial misconduct in that it was a blatant appeal to the jury's natural sympathy for the victims which is irrelevant during the guilt phase of a capital trial. (AOB:208-217.)

Respondent argues that this claim is forfeited because trial counsel failed to object to the misconduct. (RB:166-168.) Appellant fully addressed why this court should reach this issue in his opening brief and those arguments will not be repeated here. (AOB:214-217.)

With regard to the merits, respondent agrees that a "prosecutor may not urge the jurors 'to view the crime through the eyes of the victim,' (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 (*Stansbury*), [rev. on other grounds in *Stansbury v. California* (1994) 511 U.S. 318, 319, citation and quotation marks omitted], or appeal to the jury's sympathy by considering the impact of the crime on the victim's family. (*People v. Salcido* (2008) 44 Cal.4th 93, 151 (*Salcido*); *People v. Vance* (2010) 188 Cal.App.4th 1182, 1193 (*Vance*).)" (RB:168.)

But respondent argues that the prosecution's argument in this case was fair comment on the evidence "and not principally aimed at inflaming the jury" and that a prosecutor may present vigorous argument based on

that evidence. (RB:168-172.) However, an examination of the cases respondent cites in support of these contentions shows that the prosecutor's argument is more like that found to be emotional and inflammatory and not mere fair comment on the evidence.

In *Stansbury*, this court found it error for the prosecution to urge the jury, during guilt phase closing argument, to consider what a child victim felt as she died: "Think what she must have been thinking in her last moments of consciousness during the assault. . . . Think of how she might have begged or pleaded or cried." (*Stansbury, supra*, 4 Cal.4th at p. 1057.) The court held that it was well-settled "that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*Ibid*., citations omitted.) Likewise in *Salcido*, this court reiterated that a prosecutor's argument to the jury that appeals to the sympathy for the victim is out of place during an objective determination of guilt. (*Salcido, supra*, 44 Cal.4th at p. 151.) Here, the prosecution also urged the jury to imagine how the victims felt during the last moments of their lives, constituting error under both *Stansbury* and *Salcido*.

In *Vance*, cited in appellant's opening brief, the prosecutor asked the jury to walk in the victim's shoes and imagine what he experienced during the homicides:

> In order for you as jurors to do your job, you have to walk in Dipak Prasad's shoes. You have to literally relive in your mind's eye and in your feelings what Dipak experienced the night he was murdered. You have to do that. You have to do that in order to get a sense of what he went through. Can you imagine thinking about just hanging out with your friends, people who you think are your friends, driving them around in your car from place to place. Being told to drive to Palomares, thinking you're going for one reason, being completely unaware that there's another plan. Being told to

> turn into a dark driveway, no cars in sight. Being told to turn off your car engine, the lights, the music. Getting out of your car with the two people you thought up to that point were your friends, the one you just had met that night and the one you have been with before. And then suddenly, without warning, being jumped, being put into a choke hold, taken down to the ground and choked out. You're trying to gasp for air but the pressure from the choke hold doesn't let up. You don't know what's going on and at first you think it's a nightmare.
>
> We all on one occasion or another have experienced the sense of what it's like to be suffocated to a lesser degree, maybe when we've swallowed some water or beverage and it's gone down the wrong way. Maybe you were held underwater too long while swimming or playing in water as a child. Maybe we suffer from asthma or some other respiratory problem. Maybe we've had the wind knocked out of ourselves before. There's nothing more terrifying than a feeling of not being able to breathe. You're totally trapped. Trapped in darkness without the ability to breathe—

(*Vance, supra*, 188 Cal.App.4th 1182, 1194.)

The Court of Appeal held this to be prejudicial misconduct in the context of that case. (*Id.* at pp. 1203-1207.) Thus, *Vance* further supports appellant's claim that the prosecutor committed misconduct in its guilt phase closing argument.

In contrast, the cases respondent cites in support of its argument that the prosecutor's argument was "fair comment on the evidence" do not contain such inflammatory remarks. In *People v. Redd* (2010) 48 Cal.4th 691 (*Redd*), the defendant complained that the prosecutor appealed to the jurors' passion or prejudice by arguing the defendant's guilt was overwhelming and that the prosecutor stayed awake at night wondering if the jury would understand the defendant's guilt. (*Id*. at p. 743.) The defendant also complained that the prosecutor argued that the defendant killed in a cold and calculating manner. (*Id*. at p. 744.) Lastly, the

defendant complained that the prosecutor remarked that if the jury could not reach a decision in this case, "we are in sad shape." (*Ibid*.) This court found no error, holding that the comments "emphasized the strength of the prosecution's case and did not invite an emotional response from the jury." (*Ibid*.) None of the prosecution's remarks in *Redd* were similar to the blatant appeal to the jury's sympathy that was urged when the prosecution asked appellant's jury to essentially "walk in the shoes" of the victims in this case.

In *People v. Milwee* (1998) 18 Cal.4th 96, 137-138, the defendant complained that the prosecutor inflamed the passions of the jury in opening statement by describing the victim's physical disability and for calling the killing "an execution." This court found no error, holding that the description of the victim was relevant to the charges and that the term "an execution" was "shorthand" for the terms intentional and premeditated murder. (*Ibid*.) The prosecutor's description of what the victims in this case may have experienced had no such relevance to the case for appellant's guilt.

Lastly, respondent relies on *People v. Seumanu* (2016) 61 Cal.4th 1293. In that case, this court held that the prosecutor's remarks during opening statement that defendant took evidence of the upcoming wedding of the victim as a trophy from his crime was not misconduct but rather fair comment on the evidence. (*Id*. at p. 1342.) However, respondent fails to mention that the *Seumanu* court held the prosecutor erred during guilt phase closing argument when it urged the jury to view the crime through the victim's eyes: "Imagine begging for your life, begging to be let go, being held captive at the end of a shotgun by these four frightening men, and they get mad at you because you only have a little cash." (*Id*. at pp. 1343-1344.) Like the prosecutor's argument in this case, the argument was not fair comment on the evidence, but rather "an appeal to the jury to view the

crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*Id*. at p. 1344, citations omitted.)

As shown above and in appellant's opening brief, the prosecutor committed misconduct during appellant's guilt phase closing argument by asking the jury to "walk in the shoes" of the victims, violating both state and federal constitutional law. (AOB:208-212; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [argument that infects the trial with unfairness results in a denial of due process].)

Respondent argues that any error was harmless because appellant denied involvement in the homicides and "[a]ny overwhelming emotion the jury might have felt from these arguments would have been directed at [codefendant] Hardin, who was most immediately responsible for the suffering caused to the victims in their last moments." (RB:172-173.) This reasoning rings false in the face of the prosecution's case against appellant: Hardin's DNA was found at the crime scene and the only connection between Hardin and the victims was appellant. (See AOB:136-137.) Under the prosecution's theory, the jury could not believe Hardin guilty without also believing appellant was the mastermind behind crime.

In addition, this specie of error is particularly inflammatory and prejudicial because there is quite literally no way for a defendant to respond without appearing heartless or as if he is trivializing the pain of the dead victims and their loved ones. The "near-categorical prohibition" on this type of argument exists because of its "unusually potent prejudicial impact . . . in determining guilt." (*People v. Vance*, *supra*, 188 Cal.App.4th at p. 1199.) In addition, contrary to respondent's contention that the remarks in this case were "brief, isolated and non-inflammatory" (RB:173), the comments were part of a dramatic opening segue into the actual evidence presented – the lights were dimmed and the prosecution showed crime

scene photographs of the victims as she dramatically imagined what they experienced in their last moments. The error is clear and, in this circumstantial evidence case, the People cannot carry its burden of proving the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is required.

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VIII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S *BATSON/WHEELER*[10] CLAIM AND REVERSAL OF HIS CONVICTION IS REQUIRED

In his opening brief appellant maintained that the trial court committed reversal error in this third-stage *Batson* case. (AOB:218-240.) Respondent contends that this claim should be treated as a first-stage *Batson* claim and the appellant failed to present a prima facie case; and that even under third-stage review, the denial of appellant's *Batson* motion is entitled to deference under *People v. Reynoso* (2003) 31 Cal.4th 903 (*Reynoso*). (RB:175-194.) Respondent is wrong – appellant must prevail in this third-stage *Batson* claim.

A. This is a Third-Stage *Batson* Claim

After the prosecution used five of its first eight peremptory challenges against African-Americans, the defense made a *Batson* challenge. The trial court asked the prosecution to respond. The prosecution then recounted its strikes against those jurors and offered reasons as to four of those strikes, after which the trial court said, "I am not going to find – I did not find a prima facie case, and I am not finding a prima facie case. However, I did allow the prosecution to state the reasons for the exercise of the challenges . . . [and that those were] race-neutral reasons." (8RT:1298-1299.)

This court has spoken about, whether, where trial courts choose to request and consider a prosecutor's stated reasons for excusing a prospective juror even when they find no prima facie case of discrimination, the request does not convert a first-stage *Batson* case into a

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[10] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled on other grounds in *Johnson v. California* (2005) 545 U.S. 162. In the interest of conciseness, this claim of error will be referred to as "*Batson*" error.

third-stage case. In *People v. Scott* (2015) 61 Cal.4th 363 (*Scott*), this court held:

> We distinguish at the outset the situation . . . where the trial court made independent rulings that no prima facie case existed *and* that no purposeful discrimination occurred, from the situation where a trial court skips over the first stage altogether (e.g., *Hernandez v. New York* (1991) 500 U.S. 352, 359 (*Hernandez*) (plur. opn. of Kennedy, J.); *People v. Elliott* (2012) 53 Cal.4th 535, 560) or purported to rule on the first stage only after the prosecutor had already offered a statement of reasons (e.g. *People v. Chism* (2014) 58 Cal.4th 1266, 1311-1312). When a trial court solicits an explanation of the strike without first declaring its views on the first stage, we infer an "implied prima facie finding" of discrimination and proceed directly to review of the ultimate question of purposeful discrimination. (*People v. Arias* (1996) 13 Cal.4th 92, 135 ["The court cannot undo an implied ruling once made by stating after explanations have been received that it never intended to find a prima facie case"].)

(*Scott, supra,* 61 Cal.4th at p. 387, fn. 1.)

In the instant case, the trial court did not make a determination as to whether appellant had established a prima facie case of discrimination until after the prosecution stated its reasons for four of the five strikes; the court then said it did not find a prima facie case but in any event found the reasons provided for each strike to be race-neutral. (8RT:1298-1299.) Under *Scott* and the cases cited therein, when the trial judge solicited explanations without first declaring her views regarding the first step, an implied prima facie finding is inferred and this Court proceeds directly to the third stage of the *Batson* inquiry despite the lower court's after-the-fact statement regarding appellant's prima facie case.

Respondent argues that "the record suggests that all of the parties believed clarification to be the purpose of the discussion" (RB:183) and that "[t]he context of the discussion shows that the court and all counsel believed this to be a stage one analysis and understood the prosecution's

statements of reasons to be made within the context of clarifying the number, races, and genders of the excused jurors" (RB:184). First, the parties' subjective beliefs, whatever they may have been here, are irrelevant. On this record, the matter became a third stage *Batson* case as a matter of law when the trial court, without ruling as to whether a prima facie case had been established, asked the prosecutor to respond to the *Batson* challenge and the prosecutor provided reasons for those challenges. (8RT:1294-1295; *Scott, supra,* 61 Cal.4th at p. 387, fn. 1, and cases cited therein.)

Second, the prosecution did more than "clarify" the "number, races, and genders of the excused jurors." The prosecution explained the reasons, in detail, for the strikes as to four of the five African-Americans subjected to its peremptory challenges. (AOB:220-222.) This belies respondent's assertion that the discussion was just about clarifying who was struck. And that the prosecution failed to supply reasons for one of the African-Americans struck does not somehow convert this to a first stage case. Rather, once the prosecution failed to provide any explanation for the excusal of prospective juror number 206, the trial court could not properly rewind the clock back to step one and claim there was no inference of discrimination and thus no need to provide credible, race-neutral explanations for the removal of that prospective juror – in fact, the failure to put forward an actual reason is evidence of discrimination. (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692, 702-703 (*Paulino*).)

Respondent asserts that "[e]ven if the trial court had invited the prosecutor to state reasons for excusing the African American prospective jurors, such an invitation would not automatically convert this first-stage case into a third-stage case." (RB:185.) This court has found it proper for trial courts to request and consider a prosecutor's stated reasons for excusing a prospective juror *even when they find no prima facie case of*

discrimination. (*People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13; *People v. Mayfield* (1997) 14 Cal.4th 668, 723-724, italics added.) Again, there was no such finding here until after the prosecution supplied reasons for the strikes; thus this is a third stage case under *Scott, supra*, 61 Cal.4th 387-388.)

For the reasons stated above as well as those in appellant's opening brief, as a matter of law, this is a third stage *Batson* claim.

B. The Trial Court's Conclusions are not Entitled to Deference; Reversal under *Batson* is Required

Respondent argues that this case should not be analyzed as a third-stage *Batson* case because such "analysis would at this point would prove difficult" and that the trial court's "summary denial" is problematic in this context. (RB:188-189.) Respondent is correct in that these facts pose problems for the state.

This court reviews a trial court's determination regarding the sufficiency of tendered justifications with "'great restraint.'" (See *People v. Ervin* (2000) 22 Cal.4th 48, 74-75.) An advocate's use of peremptory challenges is presumed to occur in a constitutional manner. (See *People v. Fuentes* (1991) 54 Cal.3d 707, 721 (conc. opn. of Mosk, J.).) When a reviewing court addresses the trial court's ruling on a *Batson* motion, it ordinarily reviews the issue for substantial evidence. (*People v. McDermott* (2002) 28 Cal.4th 946, 970.) A trial court's conclusions are entitled to deference only when the court made a "sincere and reasoned effort to evaluate the nondiscriminatory justifications offered." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) In this case, since the trial court failed to make a sincere and reasoned effort to evaluate the prosecution's reasons, its

finding is not entitled to deference. (*Ibid*.; *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1159 (*Gutierrez*).)[11]

This court has further held that "[w]hat courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual." (*Gutierrez, supra,* 2 Cal.5th at p. 1159.) "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. . . . [i]f the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." (See *Miller-El v. Dretke* (2005) 545 U.S. 231, 252 (*Miller-El II*).)

Respondent argues that the prosecution's reasons provided for four of the prospective jurors – 218, 202, 215 and 7 – were race-neutral in that the prosecution expressed concern that the jurors would have trouble returning a death verdict. (RB:189-191.) The record belies this reason as to these prospective jurors was "race-neutral."

With regard to prospective juror number 218, respondent cites to Reporter's Transcript page 118 as reflecting her "concerns about the death penalty conflicting with her religious beliefs." (RB:190.) However, that page of the transcript contains a sealed *Pitchess* hearing. (7RT:116.) An examination of the voir dire of number 218 evidences affirmative statements by number 218 that she could be fair to the prosecution and could impose the death penalty. (8RT:1225, 1238, 1264-1266, 1280-1281.)

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[11] Under the authority of *Gutierrez, supra*, 2 Cal.5th at p. 1159, appellant should prevail in this claim without the need for the Court to reconsider *Reynoso* doctrine of granting "great deference" to a trial court's unexplained summary denial of a third step *Batson* claim. (*Reynoso*, *supra*, 31 Cal.4th at pp. 923-929.) Appellant maintains, however, that the *Reynoso* doctrine is inconsistent with federal constitutional law and some of this court's own precedent, as set forth in his opening brief. (AOB:232-240.)

She only expressed concern about the trial when the prosecution led her into stating she did not want to sit for a long trial – an exchange the trial court terminated and warned the prosecution not to continue, since the solicitude for a juror's concerns with the length of the trial can be found to be pretext. (8RT:1295-1297; *Snyder v. Lousiana* (2008) 552 U.S. 472, 479-483 (*Snyder*).)

Prospective juror number 202 had a brother who was executed in Texas in 1995. (8RT:1264; 24CT:6778.) She also said that she believed the criminal justice system was fair and just (24CT:6771), that she believed California should have the death penalty so that people know there is punishment for crimes committed (24CT:6779), that she could vote for death if warranted, and that she believes in the death penalty. (24CT:6780.) She affirmed on voir dire that her brother's conviction and sentence would not affect her ability to be fair to both sides in this case. (8RT:1263-1264.) One of the prosecution's reasons for striking her was that she did not believe "she was going to be able to enforce the death penalty if she thought it was right." (8RT:1296-1297.) Such a demeanor-based reason required an explicit ruling by the trial court as opposed to the unexplained summary denial provided. (See *Snyder, supra*, 552 U.S. at pp. 477-488 [high court acknowledges deference is especially appropriate where trial judge has made finding that attorney credibly relied on demeanor in exercising the strike; however where the record does not show that trial judge actually made determination concerning demeanor, it cannot be presumed that trial judge credited prosecution's assertion regarding demeanor].) The trial judge here made no such ruling, so it cannot be presumed that the judge credited the assertion.

Respondent takes issue with prospective juror number 215 because "he expressed a vague opinion on the death penalty, stating that he 'hop[ed]' it would not be a problem when it came time to vote." (RB:190,

citing 25CT:7081.) Respondent fails to note that during voir dire juror number 215 was never questioned about his ability to impose the death penalty. (8RT:1240-1241, 1260-1262.) Failure to inquire of the challenged juror regarding the allegedly negative qualities later used to justify exclusion constitutes evidence that the stated concerns are pretextual. (*Miller-El II, supra*, 545 U.S. at p. 245; *People v. Huggins* (2006) 38 Cal.4th 175, 235 (*Huggins*).)

Respondent cites to prospective juror number 7's statements in the questionnaire that voting for the death penalty would be "hard" and scoring herself a "three" which suggested she would not be able to vote for death. (RT:190.) Again, this prospective juror was never questioned by the prosecution about her ability to impose a death verdict in this case. The only questions the prosecution asked of her related to a home burglary she had suffered, and she stated that event would not affect her in any way in this case. (8RT:1246-1247.) Such desultory questioning of a minority prospective juror provides some evidence of discrimination (*Wheeler*, *supra*, 22 Cal. 3d. at p. 281) and the failure to inquire regarding the alleged negative qualities is evidence the stated concerns were pretextual. (*Miller-El II, supra*, 545 U.S. at p. 245; *Huggins, supra*, 38 Cal.4th at p. 235.)

Respondent also argues the prosecution expressed concern about potential bias against law enforcement. (RB:191-192.) Respondent enumerates only three prospective jurors as being properly excused because they provided "information that suggested the potential for bias against law enforcement." (RT:191, citing to prospective jurors numbers 218, 215, and 7.)

With regard to prospective juror number 218, the prosecution's reason was suspected law-enforcement bias because of "some of her contacts with police over the years." (8RT:1296-1297.) However, she had no contacts with law enforcement and had only been involved in the

criminal justice system through jury duty. (25CT:7139-7146.) With regard to prospective juror number 215, whom the prosecution recalled because of his Jamaican accent, he stated on voir dire that there was nothing about his son's experience with the criminal justice system that would cause him to be unfair in this case. (8RT:1261.) And with regard to prospective juror number 7, contrary to respondent's assertion, the prosecution did not provide law enforcement bias as a reason for her excusal, but rather only articulated that the prosecution did not believe she would impose the death penalty. (RB:191; 8RT:1298.) Respondent may not substitute its own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. (*Gutierrez, supra,* 2 Cal.5th at p. 1159.)

Lastly, with regard to prospective juror number 206, the prosecution provided no reasons for its excusal of this otherwise qualified juror. (AOB:226-227.) The failure to provide any reasons for this strike is persuasive evidence of discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 171, fn. 6; *United States. ex rel. Vajtauer v. Commission of Immigration at Port of New York* (1927) 273 U.S. 103, 111; see also *Paulino, supra,* 542 F.3d at pp. 702-703.)

The exclusion by peremptory challenge of a single juror on the basis of race violates the federal Constitution. (*Snyder, supra*, 552 U.S. at p. 474; *People v. Silva* (2001) 25 Cal. 4th 345, 385-386.) For all the foregoing reasons as well as those in appellant's opening brief, reversal is required.

IX. APPELLANT HAS BEEN DENIED MEANINGFUL APPELLATE REVIEW BECAUSE HIS REQUEST FOR INFORMATION IDENTIFYING THE RACE OF THE VENIREPERSONS WAS DENIED THUS MAKING COMPARATIVE JUROR ANALYSIS IMPOSSIBLE

Appellant has argued that he has raised a third-step *Batson*[12] claim which requires comparative juror analysis for a full determination of the merits of his claim. (See Argument, VIII, *ante*.) At trial, the prospective jurors were not identified by race. Appellant has further argued that he has been denied his constitutional rights to meaningful appellate review by the denial, by both the trial court and this court, of appellant's motion to augment the record with DMV photographs of the non-sitting jurors so the race of each juror could be determined and a comparative juror analysis undertaken. (AOB:241-248.)

Respondent argues, first and foremost, that appellant's claim should be analyzed as a first-step *Batson* claim for which comparative juror analysis is inappropriate. (RB:194, 197.) Appellant has thoroughly rebutted respondent's assertion that this is a first-stage case in Argument VIII, *ante*, which he incorporates by reference as if fully stated herein.

In addition, even if this court were to deem this a first-stage case, comparative juror analysis is required as a matter of federal constitutional law and inconsistent with this court's own precedent. Appellant acknowledges this court has rejected the need for comparative juror analysis in first-stage *Batson* claims. (See, e.g., *People v. Sánchez* (2016) 63 Cal.4th 411, 439-440 (*Sánchez*); *People v. Taylor* (2010) 48 Cal.4th 574, 616-617.) However, appellant contends that Justice Lui's concurring opinion in *Sánchez* is correct, in which he explained that the court's rule "barring comparative juror analysis at the first stage of the *Batson* inquiry

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

violates *Batson's* directive to consider 'all relevant circumstances' in determining whether the opponent of a strike has established a prima facie case of discrimination." (*Sánchez, supra*, 63 Cal.4th at pp. 489 (conc. opn. of Lui, J.), quoting *Batson v. Kentucky* (1986) 476 U.S. 79, 96 (*Batson*); accord, *Johnson v. California* (2005) 545 U.S. 162, 168-169.)

Justice Lui also questioned this rule in *People v. Harris* (2013) 57 Cal.4th 804, 874 (conc. opn. of Liu, J.) (*Harris*):

> As the high court has explained: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller–El v. Dretke* (2005) 545 U.S. 231, 241 (*Miller–El*).) By the same logic, if a court's hypothesized reason for a prosecutor's strike of a black panelist "applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered" at *Batson's* first step. (*Ibid*.)

In addition, in *Sánchez* Justice Lui explained how the majority's opinion that comparative juror analysis is not required in a first-step *Batson* case is contrary to its own prior rulings in this regard as well as contrary to authority from courts in other jurisdictions. (*Sánchez, supra*, 63 Cal.4th at pp. 491-494 (conc. opn. of Lui, J.).) For all these reasons, should the Court treat this as a first-stage *Batson* claim, a comparative juror analysis is required. However, such an analysis is impossible on this record, thus denying appellant meaningful appellate review.

Respondent next argues that the "record in this case already contains the information needed to make these comparisons" between "the characteristics of the prospective jurors who were struck with the characteristics of those who were impaneled." (RB:197.) This assertion is false.

The racial composition of the sitting jurors is on the record (6/10/2014); however, the race of each sitting juror was not linked to each juror's questionnaire, nor was the racial identity of the rest of the prospective jurors linked to each one's questionnaire. Thus, a comparison of the stricken African-American prospective jurors with non-African American sitting jurors is impossible. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241 [Court conducted side-by-side comparison of black venire panelists who were struck with white panelists allowed to serve].)

California Rules of Court, rule 8.155, sets forth rules governing the augmentation and correction of the record on appeal. California Rules of Court, rule 8.155(c)(2) provides that: "The reviewing court may order the superior court to settle disputes about omissions or errors in the record." Appellant seeks not to use settlement to create an oral proceeding but rather to use the augmentation process to add to the record information that was before the trial court when it denied appellant's *Batson* motion. Appellant requests that this court use its discretionary power to remand the case to the trial court with an order to identify the race of each sitting juror to the juror number in the questionnaire each filled out and to augment the record with the DMV photographs of the non-sitting prospective jurors.

X. THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING SHANNON ABBOTT'S VICTIM IMPACT TESTIMONY REGARDING HER ATTEMPTED SUICIDE WHERE THE PROSECUTION WITHHELD THE INFORMATION FROM APPELLANT IN VIOLATION OF PENAL CODE SECTIONS 1054.1, SUBDIVISION (f) AND 190.3

Appellant argues the trial court erred in permitting Shannon Abbott's victim impact testimony regarding her attempted suicide because the defense did not receive discovery of Abbott's testimony under Penal Code section 1054.1, subdivision (f), and because this court's precedent interpreting the notice requirement regarding victim impact evidence pursuant to Penal Code section 190.3 is unconstitutional under *Payne v. Tennessee* (1991) 501 U.S. 808, 825 (*Payne*). (AOB:249-270.) In sum, appellant argues that under the statutes and *Payne*, the prosecution was required to provide to the defense a report of Abbott's statements prior to her testimony. (*Ibid*.) Respondent disagrees. It argues the notice provided to appellant was sufficient and that the trial court's remedy for late discovery regarding the content of Abbott's testimony was not an abuse of discretion. (RB:198-211.)

Respondent correctly states that this court has "never held that section 1054.1, subdivision (f) applies to the penalty phase," while acknowledging that this court has held that "the reciprocal discovery provisions of 1054 et seq. apply to the penalty phase." (RB:207, citations omitted.) Respondent argues that this court "has never held that the prosecution must provide summaries or reports of victim impact witnesses" and that it should not do so here because "section 190.3 more specifically addresses a prosecutor's obligations regarding penalty phase witnesses compared to section 1054 et seq., and it should therefore prevail" and because "applying the discovery provisions of section 1054.1, subdivision (f) here would render section 190.3's notice requirement obsolete."

(RB:207-208.) On the basis of respondent's argument, respondent would have to agree that the statutes cannot be reconciled.

However, "[w]hen statutes cannot be reconciled, later enactments supersede earlier ones, and more specific provisions take precedence over the more general." (*People v. Adelmann* (2018) 4 Cal.5th 1071, 1079.) Penal Code section 1054.1, subdivision (f) is both more specific and more recent than Penal Code section 190.3, so it must prevail. (See *Department of Fair Employment & Housing v. Mayr* (2011) 192 Cal.App.4th 719, 725 [if statutes cannot be reconciled in a particular application, "later and more specific enactments prevail, pro tanto, over earlier and more general ones," citations omitted].)

In addition, the trials in the cases relied upon by the prosecution in support of its assertion that 190.3 does not require any specific notice regarding victim impact evidence all occurred before the enactment of Penal Code section 1054.1, subdivision (f) on January 1, 2003. (RB:208, citing *People v. Benavides* (2005) 35 Cal.4th 69, 86 [trial in 1993]; *People v. Tully* (2012) 54 Cal.4th 952, 978 [trial in 1992]; *People v. Ledesma* (2006) 39 Cal.4th 641 [judgment of death on February 7, 1990[13]]; *People v. Scott* (1997) 15 Cal.4th 1188 and *People v. Roberts* (1992) 2 Cal.4th 271 [trials as well as opinions predate enactment].) Those cases interpreted the notice required under section 190.3 without consideration of section 1054.1, subdivision (f). Since this court has held that the provisions of section 1054 et seq. apply to the penalty phase of a capital trial (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), all of the cases

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[13] (Judicial Council of California, *Appellate Courts Case Information: Supreme Court* (*People v. Ledesma*), <http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1746193&doc_no=S014394&request_token=NiIwLSIkXkw2W1BdSCJdUEhIUEw0UDxbIiNeSzNSMCAgCg%3D%3D> (as of October 11, 2018).)

respondent cites in support of its position are inapposite. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289 [law governing the conduct of trials is applied 'prospectively' when it is applied to a trial occurring after the law's effective date, regardless of when the underlying crime was committed].)

Penal Code section 1054.1 thus applies to appellant's 2008 trial and the prosecution was required to provide appellant with "[r]elevant written or recorded statements of witnesses or reports of statements of witnesses whom the prosecutor intends to call at trial." (Pen. Code, § 1054.1, subd. (f).)

Respondent further argues that the trial court remedied any error in delay in disclosure by allowing a defense interview of Abbott over the lunch hour. (RB:208-209.) Appellant's counsel did not interview Abbott, arguing the time allotted was insufficient and asked for a continuance to investigate, which the trial court denied. (26RT:4498-4499, 4522, 4524.) The "remedy" did nothing to cure the error.

Lastly, respondent briefly asserts that any error did not result in a fundamentally unfair penalty determination or deprive appellant of due process, and simply cites two cases in support of its assertion. (RB:209-210.) Appellant has fully briefed this issue in his opening brief and no further discussion is required. (AOB:260-270.)

XI. THE TRIAL COURT ERRED PREJUDICIALLY IN ADMITTING VICTIM IMPACT EVIDENCE OUTSIDE THE SCOPE OF THAT PERMITTED BY *PAYNE V. TENNESSEE*

A. The Trial Court Erred in Admitting Evidence of the Personal Characteristics of the Victim Beyond that Contemplated by the United States Supreme Court

Appellant argues that the trial court erred in admitting victim impact evidence that exceeded the scope permitted by *Payne v. Tennessee* (1991) 501 U.S. 808, 827 (*Payne*) when it permitted testimony beyond that of Collette Kingsley during the penalty phase of appellant's trial. (AOB:271-277.) Respondent argues, as appellant recognizes, that this court has upheld the admission of victim impact evidence under the circumstances of the crime factor of Penal Code section 190, factor (a). (RB:211.) However, this court has not considered appellant's argument since the United States Supreme Court recently ruled regarding the scope of *Payne*, and appellant contends that that decision further supports appellants' argument.

Since *Payne*, the high court has taken only one opportunity to provide guidance on the scope of victim impact evidence permitted by the Eighth Amendment. (*Bosse v. Oklahoma* (2016) ___ U.S. ___, 137 S.Ct. 1 (*Bosse*)). The specific issue in *Bosse* was whether *Payne* had implicitly overruled the holding in *Booth v. Maryland* (1987) 482 U.S. 496 (*Booth*), forbidding "'the admission of a victim's family members' characterizations and opinions about the crime.'" (*Id*. at p. 2, citation omitted.) Over Bosse's objection, the state had asked three of the victims' relatives to recommend a sentence to the jury; all three recommended death, and the jury agreed. (*Ibid*.) Bosse appealed, arguing that this testimony about the appropriate sentence violated the Eighth Amendment under *Booth*. (*Ibid*.) The Oklahoma Court of Criminal Appeals affirmed his sentence, concluding that there was "no error." (*Ibid*.) The high court reversed,

ruling "'[i]t is this Court's prerogative alone to overrule one of its precedents' [citations]" (*ibid.*), and holding that the Oklahoma court was wrong that *Payne* overruled *Booth*'s prohibition on opinions about the crime, the defendant, and the appropriate punishment. (*Ibid.*)

Although its specific holding concerned a different aspect of *Booth*, the high court's reasoning in *Bosse* applies with equal force to this case: "Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continued vitality." (*Bosse*, *supra*, 137 S.Ct. at p. 2, quoting *Hohn v. United States* (1998) 524 U.S. 236, 252-253.) Thus, *Booth*'s prohibition against victim impact evidence remains the law to the extent that such evidence falls outside the narrow scope approved by *Payne* – "'a *quick glimpse* of the life petitioner chose to extinguish,' [citation] to *remind* the jury that the person whose life was taken was a unique human being." (*Payne*, *supra*, 501 U.S. at p. 831 (conc. opn. of O'Connor, J.), italics added.) When, as in this case, the use of such potent evidence about the victim exceeds that narrow limit, it runs afoul of *Booth* and violates the Eighth Amendment. As demonstrated in appellant's opening brief (AOB:271-273), aside from the testimony of Collette Kingsley, the victim impact evidence admitted in this case contravened the much narrower limits approved by the United States Supreme Court in *Payne*, which define the outer boundaries of what is constitutionally permissible in this area. (Cf. *Bosse*, *supra*, 137 S.Ct. at p. 2 [*Booth* remains binding precedent except to extent explicitly overruled by *Payne*].) As discussed above and in appellant's opening brief (AOB:272-277), those constitutional boundaries stop at evidence that either displays a "quick glimpse" of the victim's life or demonstrates the impact of the victim's death on individuals who were present at the time of the crime or its immediate aftermath. This court's jurisprudence, broadening those limits in myriad ways, is incompatible with

the Eighth Amendment. Accordingly, appellant urges the court to take this opportunity to revisit that precedent and recognize that – to the extent it allows the admission of evidence not sanctioned by *Payne* – it is constitutionally infirm.

In addition, as appellant also argued in his opening brief, the expansive nature of this court's rulings regarding what constitutes proper victim impact evidence and whether – and to what extent – such evidence is authorized under California's death penalty statute has revealed that the supposed statutory basis for introducing victim impact evidence does not provide sufficient definition to pass muster under the federal Constitution. *Payne* was very clear that state courts may allow the admission of some forms of victim impact evidence only if – and only to the extent to which – doing so is authorized by state law. (See *Payne*, *supra*, 501 U.S. at p. 827.) There is no California statute that even mentions or alludes to victim impact evidence – much less explicitly authorizes its use. In *People v. Edwards* (1991) 54 Cal.3d 787, the Court filled in this lacuna by holding that the use of victim impact evidence is implicitly sanctioned by Penal Code section 190.3, factor (a), which permits the prosecution to present, as evidence in aggravation, the "'circumstances of the crime of which the defendant was convicted in the present proceeding . . . .'" (*Edwards*, *supra*, 54 Cal.3d at pp. 833-834 [quoting the statute].) The extremely expansive approach to victim impact evidence taken by the Court in its jurisprudence since then demonstrates that *Edwards*' holding was misconceived, as factor (a) does not provide any of the defining limitations necessary to render the admission of such evidence constitutionally permissible.

In the decades since it decided *Edwards*, this court has rejected numerous challenges to victim impact evidence based on the argument that the scope exceeds that presented in *Payne*. The seemingly unbounded scope of evidence admitted as "circumstance[s] of the capital crime" under

the authority of Penal Code section 190.3, factor (a), demonstrates that the statute, as interpreted by the court, fails to provide the clarity and definition necessary to pass muster under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Put in constitutional terms, Penal Code section 190.3, factor (a), when employed in this fashion, is unconstitutionally vague and overbroad and deprives capital defendants of their rights to due process of law, a fair jury trial, confrontation and cross-examination and a reliable penalty determination.

Appellant recognizes that this court has rejected similar challenges to Penal Code section 190.3, factor (a), in prior cases (see *People v. Brown* (2003) 31 Cal.4th 518, 573-574; *People v. Boyette* (2002) 29 Cal.4th 381, 443-444 (*Boyette*)), and that the court has expressly recognized that the United States Supreme Court has not resolved this issue (*Boyette*, *supra*, 29 Cal.4th at p. 445, fn. 12). Appellant nonetheless urges the court to take this opportunity to reconsider whether its holding in *Edwards* remains good law in light of the body of post-*Edwards* precedent, which has placed far more weight on Penal Code section 190.3, factor (a), than *Edwards* envisioned and that the statute can constitutionally bear.

The vagaries of inconsistent judicial interpretations of death penalty statutes directing sentencing juries to consider the "circumstances" of the crime are illustrated by the fact that, since this court's decision in *Edwards*, the highest courts of several other states have found victim impact evidence to be completely inadmissible in the absence of statutes expressly authorizing the admission of such evidence. (*State v. Carter* (Utah 1995) 888 P.2d 629, 651 [victim impact evidence not admissible at capital sentencing proceedings because not relevant to any issue under Utah's capital punishment statute]; *Commonwealth v. Fisher* (Pa. 1996) 681 A.2d 130, 145-146 [victim impact evidence not admissible under Pennsylvania's former death penalty statute because not included in the statutory list of

sentencing factors];[14] *Lambert v. State* (Ind. 1996) 675 N.E.2d 1060, 1064-1065 [victim impact evidence inadmissible because not relevant to the only statutory aggravating factor at issue];[15] *Olsen v. State* (Wyo. 2003) 67 P.3d 536, 600 [victim impact evidence not admissible at capital sentencing proceeding because of absence of express statutory authorization for such evidence under Wyoming state law].)

In re-examining whether there is indeed a viable statutory basis for admitting victim impact evidence in California, the court should look to the opinions of those sister courts. As the foregoing decisions import, the admission of victim impact evidence as relevant to the "circumstances of the crime" is so arbitrary and unpredictable that it violates the federal constitutional requirements to due process of law and a reliable penalty determination. Thus, the admission of all victim impact evidence in this case under the auspices of Penal Code section 190.3, factor (a), without any express statutory authorization, constituted constitutional error.

B. The Error in Admitting Victim Impact Evidence in this Case was Prejudicial

Respondent asserts that any error was harmless because "the victim impact testimony was not the most aggravating circumstance offered against petitioner . . . ." (RB:211.) However, victim impact evidence prevents jurors from focusing on their task at the penalty phase, i.e., considering the story of appellant's life and his moral culpability for the instant homicides. "Victim impact statements evoke not merely sympathy,

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[14] The Utah and Pennsylvania statutes have since been amended to expressly authorize the admission of victim impact evidence. (Utah Code Ann. 1953 § 76-3-207, subd. (2)(a)(iii); *Commonwealth v. Tedford* (Pa. 2008) 960 A.2d 1, 40-42.)

[15] The Indiana statute does not include the circumstances of the capital crime as an aggravating factor. (Ind. Code § 35-50-2-9(b).)

pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger. These emotional reactions ". . . deflect the jury from its duty to consider the individual defendant and his moral culpability." (Bandes, *Empathy, Narrative, and Victim Impact Statements* (1996) 63 U.Chi.L.Rev. 361, 395.) Appellant was not the actual killer in this case. Focusing on the lives of the victims prevented the jury from considering appellant's narrative – that he denied involvement in the killings and that at the time of the killings he had turned over a new leaf in his life to be a loving husband and stepfather. The state cannot demonstrate that this federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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

In his opening brief appellant argues the following require reversal when considered individually as well as in the aggregate: the illegal search of his home produced evidence that was admitted in violation of the Fourth Amendment (Argument I); the trial court erroneously denied appellant's requests to admit evidence of third party liability (Argument II); the trial court erred in limiting the cross-examination of a former suspect in the homicides (Argument III); the trial court erred in admitting an irrelevant self-recording appellant made over a decade prior to the homicides (Argument IV); the trial court erred in admitting irrelevant evidence that appellant used the name of an infamous gangster, "Tony Bonanno," as an alias (Argument V); the prosecution improperly commented on appellant's silence (Argument VI) and improperly urged the jury to stand in the shoes of the victims (Argument VII) during guilt phase closing arguments; the trial court erred in denying appellant's *Batson*[16] motion (Argument VIII); appellant was denied meaningful appellate review by the trial court's denial of his request for information identifying the race of the prospective jurors (Argument IX); the trial court erred in admitting victim impact evidence despite insufficient notice to appellant (Argument X); and the trial court erred in admitting victim impact evidence beyond the scope permitted by the United States Supreme Court and without statutory authorization (Argument XI).

Respondent argues there exist no errors made at trial in this case, so there can be no cumulative impact of errors in this case. (RB:212.)

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

Appellant disagrees with regard to respondent's assertion that no error occurred in this case; appellant agrees that the cumulative impact of any errors this court finds must be considered. (*Ibid*.) For all the reasons stated in his opening brief and herein, appellant deserves a new trial. No further comment is warranted.

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XIII. CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

In his opening brief, appellant challenged the California death penalty scheme on grounds that this court has rejected and seeks reconsideration of the court's previous decisions holding that the California law does not violate the federal Constitution. (AOB:286-304.) The State counters that the court's prior decisions are correct and should not be reconsidered. (RB:213-231.) However, *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 624] (*Hurst*) supports appellant's request in Argument XIII.C.1 and XIII.C.3 of his opening brief that this court reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi*[17] (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), does not require factual findings within the meaning of *Ring*[18] (*People v. Merriman* (2014) 60 Cal.4th 1, 106 (*Merriman*)), and therefore does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death. (*People v. Prieto* (2003) 30 Cal.4th 226, 275 (*Prieto*).)

A. Under *Hurst*, Each Fact Necessary to Impose a Death Sentence, Including the Determination That the Aggravating Circumstances Outweigh the Mitigating Circumstances, Must Be Found by a Jury Beyond a Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater

[17] *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*)
[18] *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*)

punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring*, *supra*, 536 U.S. at p. 589; *Apprendi*, *supra*, 530 U.S. at p. 483.) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.)

Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *id*. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Id*. at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Id.* at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these

determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid*.)[19]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but

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[19] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla.Stat. Section 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." section 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst*, *supra*, 136 S.Ct. at p. 622.)

not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Id.* at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[20] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring*, and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional

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[20] See *Hurst*, *supra*, 136 S.Ct. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id*. at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id*. at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

requirement that the finding be made beyond a reasonable doubt. (See *Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi*/*Ring*/*Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[21]

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[21] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings that actually authorize the imposition of the death penalty in the sentencing hearing, and not in the

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

The constitutional question cannot be answered, as this court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

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sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing Pen. Code, §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, section 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Pen. Code, § 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special

circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[22]

C. This Court's Interpretation of the California Death Penalty Statute in *People v. Brown* Supports the Conclusion That the Jury's Weighing Determination Is a Factfinding Necessary to Impose a Sentence of Death

This court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 (*Brown*) (revd. on other grounds *sub nom*. *California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id*. at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id*. at p. 538.)

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[22] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) 571 U.S. 1045 [134 S.Ct. 405, 410-411] (*Woodward*) (dis. opn. from denial of cert., Sotomayor, J.).)

The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id*. at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id*. at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*Brown*, *supra*, 40 Cal.3d at p. 541, footnotes omitted.)[23]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death"

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[23] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown*'s gloss on the sentencing instruction.

language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 (*Whitfield*) [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 (*Woldt*) [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Ibid*.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the

weighing requirement of Penal Code section 190.3, this court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist
>
> . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the
>
> defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) Section 921.141, subd. (2)(b), (c.) The trial judge decides the actual sentence. He *may* impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id*., subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.)

In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[24] The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained

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[24] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating

a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.)

> evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

D. This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not A Factfinding Under *Ring* And Therefore Does Not Require Proof Beyond A Reasonable Doubt

This court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring*, and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to

increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[25] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Florida Supreme Court in *Hurst v. State* (2016) 202 So.3d 40, supports appellant's claim. On remand following the decision of the United States Supreme Court, the Florida court reviewed whether a unanimous jury verdict was required in a capital sentencing. The court began by looking at the terms of the statute, requiring a jury to "find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." (*Id.* at p. 53; Fla. Stat. (2012) § 921.141(1)-(3).)

Each of these considerations, including the weighing process itself, were described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra,* 202 So.3d at p. 53.) The court emphasized:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a

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[25] The *Apprendi*/*Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

> sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

(*Id*. at p. 57.)

There was nothing that separated the capital weighing process from any other finding of fact.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 (*Rauf*) also supports appellant's request that this court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf*, *supra*, 145 A.3d at p. 433 (*per curiam* opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Rauf, supra,* 145 A.3d at p. 416.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violated *Hurst*.[26] One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the

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[26] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf*, *supra*, 145 A.3d at pp. 433-434 (*per curiam* opn.) [addressing Questions 1-2] and 145 A.3d at p. 484 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id*. at p. 434 (*per curiam* opn.) [addressing Question 3] and at pp. 485-487 (conc. opn. of Holland, J.)).

jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id*. at pp. 433-434; see *id*. at pp. 484-485 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Ibid*.)

The Florida and Delaware courts are not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi*/*Ring* rule. (See e.g., *Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward, supra*, 571 U.S. 1045, 134 S.Ct. at pp. 410-411 (dis. opn. from denial of cert., Sotomayor J.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev.

2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made, by a jury and beyond a reasonable doubt.

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CONCLUSION

For the reasons set forth above and in appellant's opening brief, appellant's conviction must be reversed and his judgment of death vacated.

DATED: November 5, 2018

Respectfully submitted,

/s/ *Mary K. McComb*

MARY K. McCOMB

State Public Defender
Attorney for Appellant

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, rule 8.630(b)(2))

I, Mary McComb, am the State Public Defender assigned to represent appellant Theodore Churchill Shove, III, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generate word count, I certify that this brief is 36,679 words in length excluding the tables and this certificate.

DATED: November 5, 2018

/s/ *Mary K. McComb*

MARY K. McCOMB

State Public Defender
Attorney for Appellant

DECLARATION OF SERVICE

Case Name: People v. Theodore Churchill Shove, III
Case Number: S161909 (Los Angeles County Superior Court No. BA271293)

I, the undersigned, declare as follows:

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Honorable Kathleen Kennedy
Attn: Death Penalty Appeals Clerk
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was signed in Oakland, California.

Dated: November 5, 2018

/s/ *Lauren Emerson*
LAUREN EMERSON

Supreme Court of California
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Supreme Court of California

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