

COPY

SUPREME COURT COPY

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSEPH ANTHONY BARRETT,

Defendant and Appellant.

No. S124131

(Imperial County Sup. Ct.

No. CF5733)

SUPREME COURT
FILED

DEC 18 2015

Frank A. McGuire Clerk
Deputy

APPELLANT'S REPLY BRIEF

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

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DEATH PENALTY

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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSEPH ANTHONY BARRETT,

Defendant and Appellant.

No. S124131

(Imperial County Sup. Ct.
No. CF5733)

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, subargument 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 REFUSAL TO EXCUSE ALL
EMPLOYEES OF THE DEPARTMENT OF CORRECTIONS
AS PROSPECTIVE JURORS DEPRIVED APPELLANT
OF AN IMPARTIAL JURY AND DUE PROCESS**

Appellant has argued that he was deprived of his right to an impartial jury under the federal and state constitutions, as well as under California statutory law. This deprivation resulted from the trial court's erroneous belief that it could only excuse prospective jurors for *actual* bias, as established on a case-by-case basis. The court did not understand that the well-established doctrine of *implied* bias required it to presume bias under extraordinary conditions, and thus never considered whether those conditions were present in appellant's case. As a result of the lower court's misapplication of the law, a correctional officer, from a family of long-time employees of the Department of Corrections (CDC), served on appellant's jury. This juror was impliedly biased by virtue of the prominent role her employer and colleagues played in this case, as well as by the specialized knowledge that such an employee would have about every aspect of an in-prison homicide. (AOB:91-137.)

Respondent argues that the trial court properly denied appellant's repeated requests to excuse all CDC employees because Juror 12 was not impliedly biased. Respondent further argues that appellant's opportunity to raise this issue on appeal was forfeited. (RB:38-51.) Finally, respondent dismisses appellant's claim that his due process rights were also infringed by the trial court's error. (RB:51, fn. 20.) None of these arguments have merit.

A. Appellant Was Deprived of an Impartial Jury.

Respondent contends that this case is governed solely by Code of Civil Procedure section 229, and that it exclusively sets forth the nature of implied bias that applies to trials in the state of California. (RB:48.) Respondent quotes *People v. Ledesma* (2006) 39 Cal.4th 641, 669-670, in which this Court said “Under California law, a juror may be excused for ‘implied bias’ only for one of the reasons listed in Code of Civil Procedure section 229, ‘and for no other.’” Of course appellant argued that CDC employees were impliedly biased under section 229. (See AOB:127-132.) But in any event, *Ledesma* does not say that Sixth Amendment jurisprudence is inapplicable in California. In *Ledesma*, the Court considered, but rejected, the defendant’s claim that notwithstanding Code of Civil Procedure section 229, he was denied an impartial jury under the Sixth Amendment because of implied bias. (39 Cal.4th at p. 670.)

“The doctrine of implied or presumed bias has been recognized from our country’s earliest days” (*Conaway v. Polk* (4th Cir. 2006) 453 F.3d 567, 586.) This rule is “so deeply embedded in the fabric of due process that everyone takes it for granted.” (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 984.)¹ Citing *Clark v. United States* (1933) 289 U.S. 1, the *Dyer* court stated: “The Court there understood – as every court that has dealt with the question has understood – that prejudice must sometimes be inferred from the juror’s relationships, conduct or life experiences, without

¹ Respondent argues that the federal authorities cited by appellant are not binding on this Court. (RB:48.) Decisions of the lower federal courts applying the United States Supreme Court’s doctrine on implied bias should be persuasive to the Court, however. (See *People v. Camacho* (2000) 23 Cal.4th 824, 843 [decisions of lower federal courts are “‘persuasive and entitled to great weight.’”].)

a finding of actual bias.” (151 F.3d at p. 984.)

Respondent nonetheless complains that the United States Supreme Court “has set forth no particular test to determine implied bias.” (RB:48.) Appellant disagrees. The test is an objective one: it asks whether the relationship between the prospective juror and the litigation is such that it is highly unlikely that the average person could remain impartial. (See, e.g., *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1112 [“prejudice is to be presumed where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances”]; *Conaway v. Polk, supra*, 453 F.3d at p. 587, fn. 21 [same]; *Hunley v. Godinez* (7th Cir. 1992) 975 F.2d 316, 319 [“courts have been inclined to presume bias in ‘extreme’ situations where the prospective juror is connected to the litigation at issue in such a way that is highly unlikely that he or she could act impartially during deliberations”]; *United States v. Torres* (2nd Cir. 1997) 128 F.3d 38, 45 [“the issue is whether an average person in the position of the juror in controversy would be prejudiced”]; *United States v. Cerrato-Reyes* (10th Cir. 1999) 176 F.3d 1253, 1260-1261, abrogated on other grounds by *United States v. Duncan* (10th Cir. 2001) 242 F.3d 940 [same]; *United States v. Mitchell* (3rd Cir. 2012) 690 F.3d 137, 142 [same].)²

² In fact, federal courts have found the high court’s pronouncements on the doctrine to be sufficiently unambiguous to constitute “clearly established federal law” as determined by the Supreme Court under the Antiterrorism and Effective Death Penalty Act (AEDPA). (See, e.g., *Brooks v. Dretke* (5th Cir. 2006) 444 F.3d 328, 329 [“We maintain that the doctrine of implied bias is ‘clearly established Federal law as determined by the Supreme Court.’”]; *Conaway v. Polk, supra*, 453 F.3d at p. 588 [“the

(continued...)

Respondent further claims that Juror 12 was not impliedly biased under the federal constitution because there was “no potential here for the type of ‘emotional involvement’” that the cases cited by appellant found to be grounds for finding such partiality. Respondent emphasizes that Juror 12 did not work at the prison in which Richmond was killed, did not know the circumstances of his death or any witnesses to be called at trial, and did not know appellant or evince prejudice toward him. (RB:49.)

Respondent is conflating actual bias with implied bias. If Juror 12 had personally known appellant, the circumstances of the charged offense, or the witnesses, she likely would have been excused for *actual* bias as many of her fellow CDC employees were. (See, e.g., AOB:95-98.) Certainly if Juror 12 had acknowledged prejudice against appellant she would not have sat in judgment of him. But the bias in this case did not arise from Juror 12's conscious feelings towards appellant. Rather, it must be presumed as a matter of law because an average person in Juror 12's circumstances would have been unlikely to remain impartial. Bias is imputed when the juror's connection to the case is one step removed from personal knowledge but close enough that an average person – even with good intentions – would be unlikely to overcome it. “That men will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally is a fundamental fact of human character.” (*United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71-72.) Social science has empirically proved the truth of this observation. (See, e.g., Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L.Rev.

²(...continued)
implied bias principle constitutes clearly established federal law as determined by the Supreme Court”].)

1124, 1126 [“researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects.”]; Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias* (2012) 44 Conn. L.Rev. 827, 830 [implicit bias “affects the most important functions of jurors: evaluation of witnesses and evidence, evaluation of behavior, recall of facts, and judgment of guilt.”].)

Juror 12's employer, the CDC, played an outsized role in this case. Correctional staff investigated Richmond's death and initiated appellant's prosecution by identifying him as the suspect and referring the case to the District Attorney's Office. The Department directly managed litigation throughout the case involving whether appellant should be shackled during trial, where he should be housed and the conditions of his legal visiting. Although the CDC did not supply the prosecuting attorney, it was a critical part of the prosecution team from beginning to end. (See, e.g., AOB:99-101.) Any CDC employee would have had to think twice before voting to acquit an inmate such as appellant or to convict him of a lesser offense, in the face of the Department's extensive involvement in the prosecution.

In addition, an overwhelming number of CDC employees were witnesses in both phases of trial. Of the witnesses called in the state's guilt phase case-in-chief, 21 of 26 were Department employees. Thirty-one of the penalty phase witnesses were. Moreover, some of them would testify that appellant had assaulted or attempted to assault them. (See AOB:108, fn. 54.) It must be presumed that a correctional officer, who depends on fellow staff for her very life, would be unable to remain impartial when it comes to judging the veracity and accuracy of testimony from so many colleagues. To vote favorably for appellant would have necessarily entailed the rejection of the testimony of numerous correctional staff, a betrayal

which could well leave the juror a pariah among her colleagues.

The other side of this coin is the unlikelihood that a CDC employee could remain impartial when assessing the testimony of inmate witnesses. The voir dire in this case made clear that prison staff had reason to fear assault from inmates. (AOB:111-112; see, e.g., *U.S. v. Allsup*, *supra*, 566 F.2d 68 [bank tellers have reason to fear violence from robbers so tellers working at different branch of the bank that was robbed were impliedly biased].) Several inmates testified in this case, including, of course, appellant. And, the prosecution presented evidence at both phases of trial that appellant had assaulted or attempted to assault his jailers.

Although Juror 12 did not work at Calipatria or know appellant or other witnesses, these circumstances do not change the conclusion that bias should be presumed here as a matter of law. Much like the bank tellers in *United States v. Allsup*, *supra*, employees of Centinela prison would – for all the reasons explained above – be substantially similar to employees of its sister prison Calipatria. Any juror employed by the CDC, particularly within the same county, would be constantly wrestling with their self interest and concern for the possible consequences of a verdict that was anything other than pro-prosecution.

Further, a CDC employee, like Juror 12, would likely have had specialized knowledge of, and opinions about, many facts at issue in the guilt phase, including whether inmates were likely to save kites or write incriminating admissions in them, whether inmates lie for each other or against each other, the physical properties of the cells and everything in them, whether talking through vents was feasible, whether fishing was common and whether large items such as knives were able to be fished, whether inmates in a neighboring cell could hear a fight or assault or an

inmate yelling for help, whether staff would be able to hear the same, whether a cell mattress could easily be used as a shield, and what kinds of items could be flushed down a cell toilet.

The rare circumstances which support a legal determination of implied bias are present here. The fact that correctional officers are not categorically exempt from serving on juries under the Code of Civil Procedure is irrelevant. (See RB:46-47.) Appellant is not arguing that CDC staff should *always* be excused from jury duty, but rather that when an in-prison homicide is charged, the facts may be such that bias must be presumed. That is the case here.

As appellant has demonstrated, the record shows that the trial court did not understand the doctrine of implied bias and therefore did not consider whether the circumstances of appellant's case demanded a presumption of partiality. (AOB:113-116.) Respondent does not address this portion of appellant's claim. Indeed respondent claims that *this* Court need not decide whether all CDC employees were impliedly biased because only Juror 12 actually served. (RB:46, citing *People v. Avila* (2006) 38 Cal.4th 491, 538-539.) Appellant's case is unlike *Avila*, however, because it raises a claim of implied bias that applies equally to a large group of prospective jurors. But in any event, respondent does not dispute that if the Court finds that Juror 12 was impliedly biased, appellant is entitled to a new trial.

Appellant has also argued that CDC employees should have been found impliedly biased under California Code of Civil Procedure section 229. Appellant relied on *People v. Terry* (1994) 30 Cal.App.4th 97, which held that employment by the prosecuting agency created implied bias under section 229. (AOB:127-132.) Respondent addressed this argument in a

footnote, arguing that *Terry* is distinguishable because in appellant's case Juror 12 did not work for the agency prosecuting appellant. (RB:49, fn. 19.) But although the CDC was not the "prosecuting agency" in the strictest sense, it was an integral part of the prosecution team. (See *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315, 1317 [prosecution team includes both investigative and prosecutorial agencies and CDC clearly was an investigatory agency in appellant's case].)

B. The Issue Has Not Been Forfeited.

Respondent says appellant has forfeited his ability to challenge the partiality of Juror 12 on appeal because he failed to exhaust his peremptory challenges and express dissatisfaction with the jury after it was selected. (RB:42-45.) Respondent acknowledges that appellant argued that what is now invoked as a forfeiture rule "actually arose as a factor in prejudice assessment" (RB:43; see AOB:120-125.) Yet respondent does not actually contradict this argument; appellant stands by it.

Appellant also asserted that the unique facts of his case present an exception to the forfeiture rule. (RB:43; AOB:125-127.) Respondent disagrees, claiming that appellant had "several options" when he was faced with one impliedly biased juror in the jury box, seven similarly biased prospective jurors left in the dwindling venire, and only six challenges left. (RB:44.) Respondent claims that appellant could have continued to use his remaining peremptories to remove as many of the remaining CDC personnel as possible and, if still dissatisfied, ask the trial court for additional challenges. (RB:44.) First, even if appellant had used all his remaining peremptories against CDC jurors, he could not strike all of them. Second, the trial court had already made it abundantly clear that it would not excuse for cause any jurors who were not *actually* biased. Trial counsel

therefore had no reason to believe the court would afford him additional peremptory challenges if he used all of his remaining challenges to strike CDC jurors.

In short, appellant had used *half* of the fourteen peremptory challenges he exercised in an effort to mitigate the effects of the trial court's failure to understand and apply the doctrine of implied bias. Respondent's position that appellant should have rolled the dice and used his remaining challenges in the hopes of ending up with a jury free of corrections personnel is simply unreasonable.

In *Dyer v. Calderon*, *supra*, 151 F.3d 970, 985, Judge Kozinski emphatically stated: "No opinion in the two centuries of the Republic . . . has suggested that a criminal defendant might lawfully be convicted by a jury tainted by implied bias." Appellant was tried by such a jury.

C. Appellant's Due Process Rights Were Also Violated.

Appellant also argued that his due process rights were violated because the trial court's misunderstanding of implied bias undermined his ability to intelligently exercise his peremptory challenges. (AOB:132-137.) In a footnote, respondent contends this claim should be "summarily rejected" because the trial court did not err in denying the defense motion to exclude all CDC employees from the jury pool. (RB:51, fn. 20.)

Appellant has already explained why the trial court's ruling on appellant's motion was erroneous. This Court has reaffirmed the essential role peremptory challenges play in guaranteeing a defendant's right to a fair trial. In *In re Boyette* (2013) 56 Cal.4th 866, the Court said:

[T]he peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury. . . . The denial of the right to reasonably exercise a peremptory challenge, be it by

either the trial court or a juror through concealing material facts, is not a mere matter of procedure, but the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction.

(56 Cal.4th at p. 889, internal quotation marks and italics omitted.)

Appellant was deprived of his ability to intelligently use this vital safeguard to select an impartial jury by the trial court's failure to understand that bias could be, and in appellant's case should have been, imputed by law. His conviction and sentence should be reversed.

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II.

THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S WHEELER MOTION DENIED HIM OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS

The parties agree that this appeal presents a stage three case under *Batson v. Kentucky* (1986) 476 U.S. 79. (See RB:56; AOB:146.) Thus, the question for this Court is whether appellant has proved, by a preponderance of the evidence, that the removal of prospective juror Lisa B. (hereafter L.B.) was substantially motivated by discriminatory intent. (See AOB:140, 146, citing *Johnson v. California* (2005) 545 U.S. 162, 170-171; *Snyder v. Louisiana* (2008) 552 U.S. 472, 485.) The critical question is the persuasiveness of the prosecutor's justification for the peremptory challenge. (AOB:146, citing *Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339.)

A. The Prosecutor's Failure to Question L.B. About Her Views on Judging Others Is Indicative of Pretext.

As explained in the opening brief, the totality of the circumstances indicates that the prosecutor's stated reason for dismissing L.B. was pretextual. (AOB:147-153.) To justify his strike of the prospective juror, the prosecutor claimed that he was concerned about her questionnaire responses to questions 59 and 68, which reflected some ambivalence about judging others. (AOB:145; 46RT:5626.) Yet he did not bother to ask L.B. about these views during either individual or general voir dire. His failure to do so smacked of pretense. (See AOB:153, citing *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1192; *Miller-El, supra*, 545 U.S. at p. 244.)

Respondent argues that it is understandable that the prosecutor did not ask L.B. about her responses to questions 59 and 68 during individual questioning because the issue they addressed was outside the scope of death

qualification. (RB:57.) Although acknowledging that the parties frequently strayed beyond the confines of *Hovey* voir dire,³ respondent asserts that this occurred only in later proceedings and not during the first day of questioning when L.B. was called. (RB:57-58.)

Respondent's argument must be rejected. The record shows that questions asked of prospective jurors on the first day of individual voir dire (October 9, 2003) covered a gamut of issues.⁴ More importantly, however, asking L.B. about her views on judging others *was* within the scope of death qualification. Respondent avers that the only relevant inquiry during *Hovey* proceedings is to determine a prospective juror's views about the death penalty in the abstract, and whether she or he would vote for life without the possibility of parole (LWOP) regardless of the evidence because of opposition to capital punishment. (RB:57.) Respondent then

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

⁴ For example, Claudia A. was asked by the prosecutor whether she could follow the beyond-a-reasonable-doubt instruction. (28RT:3013-3014.) Alberto A. was asked if his belief that a defendant should testify in his own behalf would impact the death penalty decision. (28RT:3022-3023.) Juror 8, whose questionnaire indicated that she was strongly in favor of the death penalty, was questioned about her qualms about actually imposing it herself. (28RT:3030-3036.) Marcos A. was asked whether being a CDC employee and CCPOA union member would affect his death penalty decision-making. (28RT:3043-3045.) Raul A. was asked about his belief that appellant was guilty. (28RT:3055-3056.) Allen A. was asked whether he would have trouble being fair in light of his work at the prison and the fact he knew so many of the witnesses. (28RT:3066-3069.) Saul A. was asked whether his experience as a correctional officer would influence his decision-making in the case. (28:RT:3073-3075.) Maghen B. was questioned about her experience as a witness in her former husband's murder trial. (28RT 3105-3106.) The prosecutor asked about Marcela B.'s potential hardship. (28 RT 3112-3114.) Clynton J. was asked about his belief that inmates lie. (28 RT 3118-3119.)

reasons that “A prospective juror’s views on judging others is [] not part of a *Hovey* inquiry.” (RB:57.)

In arguing that the scope of *Hovey* voir dire is very narrow, respondent relies on language in *People v. Davenport* (1995) 11 Cal.4th 1171, 1203, which in turn quotes *People v. Clark* (1990) 50 Cal.3d 583, 597, stating that the purpose of *Hovey* proceedings is solely to discern automatic life jurors. (RB:57.) This same language was cited by respondent in *People v. Cash* (2002) 28 Cal.4th 703 in arguing that the trial court did not err in precluding defendant from asking prospective jurors whether they would automatically vote for the death penalty in a case involving more than one murder. In *Cash*, the Court rejected such a narrow view:

Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. . . .

(28 Cal.4th at pp. 721-722.)

While emphasizing that “[q]ualification to serve on a capital jury is not limited to determining whether the person zealously opposes or supports the death penalty in every case,” this Court has declared: “At bottom, capital jurors must be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular

case.” (*People v. DePriest* (2007) 42 Cal.4th 1, 20.) Here, L.B.’s beliefs about passing judgment were indisputably related to her ability to follow the law, weigh sentencing factors, and choose the appropriate penalty in appellant’s case. The prosecutor should have inquired about her responses to questions 59 and 68 during *Hovey* voir dire if he sincerely harbored concerns about her ability to serve.

In this case, the prosecutor not only failed to explore L.B.’s views on judging others in *Hovey* proceedings but also during general voir dire. (See AOB:143-144; 46RT:5616-5618.) Respondent suggests that the prosecutor’s failure to question L.B. about her responses on questions 59 and 68 during general voir dire was not indicative of pretext but rather reflected the limited time the parties had for such questioning. (See RB:58, 62.) Although the time for general voir dire was not unlimited, the prosecutor chose to question L.B. about her written response to a question about self-defense. (AOB:144; 46RT:5617-5618.) If the prosecutor’s professed intention to challenge L.B. for cause based on her answers to questions 59 and 68 was sincere, he would have asked her about her views on judging others rather than on self-defense.

B. Comparative Juror Analysis Supports Appellant’s Claim.

Appellant has shown that although L.B. was struck allegedly because she expressed in her questionnaire some concern about imposing judgment, others who did so as well were permitted to serve. Specifically, Jurors 8 and 12, and Alternate Juror 4, expressed similar qualms but were not challenged by the prosecutor. (See AOB:153-158.)

Respondent disagrees, claiming that these jurors had “significant distinctions” from L.B. (RB:60.) According to respondent, Juror 8 expressed “some reluctance about imposing the death penalty,” but “no

reservation about rendering judgment on someone.” (RB:60.) Respondent claims that Juror 12 gave no indication she would have difficulty in judging someone. (RB:60-61.) Although acknowledging similarities between L.B. and Jurors 8 and 12, respondent contends that L.B. was the only one of them to express reservation about judging others. (RB:61.)

Respondent is incorrect. Although Juror 8 indicated on her questionnaire that she supported the death penalty, during *Hovey* voir dire she also said “I don’t know if I could actually bring myself to decide a person’s life or death.” (28RT:3030.) Thus, her qualms were not about capital punishment but rather about her ability personally to impose the judgment on another. Similarly, Juror 12 expressed reservations about rendering judgment when she stated in her questionnaire that, although neutral on the death penalty, “I always wondered if this was my place to make such a permanent decision.” (See AOB:154; 29CT:8037, 8038.) Again, her reservations were not based on any abstract opposition to capital punishment but rather on her own doubts about whether she herself could impose such a judgment on another human being. These jurors were thus materially similar to L.B., in that they were not opposed to the death penalty as a punishment but wondered if they personally could render a judgment of death.⁵

Of course as to L.B., the record is truncated because the prosecutor did not choose to inquire into whether any hesitancy to judge others would

⁵ Appellant further noted that Alternate Juror 4 was comparable to L.B. (AOB:156, fn. 87.) As with Jurors 8 and 12, respondent asserts that Alternate Juror 4 had no qualms about judging others. (RB:61, fn. 26.) Appellant believes that, as with Jurors 8 and No. 12, the record supports his characterization regarding the alternate.

impair her ability to bring back a sentence of death in an appropriate case. But to the extent she was asked, L.B. firmly declared that she could make the necessary decision. When defense counsel asked whether she would automatically vote for LWOP, L.B. responded, “No, no. I mean, you have to know the full circumstances behind any situation so I can’t honestly sit here and say in the future I would vote one way or the other. No, I can’t say that.” (28RT:3091.) Nothing in this response suggested that L.B. would be unable to bring back either a death or life verdict because of a preference not to be the one responsible for such a decision.

Moreover, like Jurors 8 and 12, L.B.’s initial doubts were nuanced, not categorical. When asked in question 68 whether she had religious or moral feelings that would make it difficult or impossible to sit in judgment of another, L.B. wrote: “Not quite sure. Have not been able to define my own thoughts regarding being able to pass judgment. I know that I wouldn’t like to be responsible in that position.” (7CT:1836.) When asked about her feeling on jury service, L.B. gave a qualified answer: “. . . I would not like the responsibility to have to do that to another person. I have never had to serve on a jury before so this is my unbiased opinion as I see it now.” (7CT:1833.) But certainly her later verbal response during *Hovey* voir dire that she would consider all of the circumstances before voting one way or the other gave the prosecutor no reason to believe that she was less desirable as a juror than Jurors 8 and 12.

C. Substantial Evidence Does Not Support the Trial Court’s Ruling.

In his opening brief, appellant argued that the trial court failed to make a sincere and reasoned evaluation of the prosecutor’s justification for exercising a peremptory challenge against L.B., and that the denial of

appellant's *Wheeler* motion was not supported by substantial evidence. (AOB:158-159; *People v. Wheeler* (1978) 22 Cal.3d. 258.)

Respondent argues otherwise, maintaining that "because the prosecutor's reason for striking L.B. was not 'inherently implausible,' and was, in fact, based on accepted trial strategy, and was supported by the record, the trial court's finding is entitled to deference." (RB:62.)

Respondent is wrong, however, because to the extent that the trial court engaged in *any* analysis of the issue before accepting the prosecutor's justification, that analysis was flawed. As set forth in the opening brief, defense counsel challenged the prosecutor's purported reason for striking L.B. as pretextual because the prosecutor did not raise it during *Hovey* proceedings. (AOB:145-146; 46RT:5627.) By mistakenly concluding that this professed concern about L.B. could not have been raised during death qualification, the trial court failed to consider all of the relevant circumstances in determining whether the prosecutor's justification was discriminatory. The court's decision is therefore entitled to no deference.

Finally, appellant's case bears some significant similarities to the *Crittenden* case, in which the Ninth Circuit Court of Appeals recently affirmed the district court's determination that the prosecutor's peremptory strike of the single African-American prospective juror to be seated in the box was substantially motivated by race. (*Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998.) In *Crittenden*, the prosecutor had challenged prospective juror Casey for cause because she generally opposed the death penalty. However, she had also said her beliefs would not prevent her from following the law and voting for death in the appropriate case. The challenge was denied and the prosecutor later used a peremptory challenge to remove her. The federal district court found purposeful discrimination,

emphasizing that the peremptory challenge against Ms. Casey could not be explained by her death penalty views or other race-neutral factors and that she was very similar to two seated white jurors who also expressed unfavorable views of capital punishment. The court further found that the prosecutor's meritless for-cause challenge of Casey was additional evidence of racial motivation. (*Id.* at pp. 1012-1018.) In appellant's case, similar factors lead to the conclusion that L.B.'s excusal was racially motivated. L.B. had no race-neutral qualities that would explain her removal, and she was very similar to Jurors 8 and 12 – except for her race. (See AOB:153-156.) The prosecutor's professed intention to challenge L.B. for cause was further evidence of discrimination since her unequivocal *Hovey* voir dire responses made it clear that a challenge would be meritless. (See AOB:145.) In appellant's case, as in *Crittenden*, these circumstances compel a finding of purposeful discrimination. Accordingly, appellant's conviction and sentences should be reversed.

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III.

THE PROSECUTOR'S ETHICAL MISCONDUCT DENIED APPELLANT OF A FAIR TRIAL AND OTHER CONSTITUTIONAL RIGHTS

The opening brief demonstrates that the prosecutor improperly engaged appellant in a conversation in front of a reporter in the courtroom during a break in the guilt phase. This contact occurred when defense counsel was not present and led to the publication of an acknowledgment from appellant that he had committed a prior murder, an offense that the defense had assiduously sought to keep out of the guilt phase proceedings. The misconduct violated ethical rules as well as appellant's state and federal constitutional rights. (AOB:160-177.)

Respondent does not dispute appellant's contention that the prosecutor's ex parte communication with him violated rules 2-100 and 5-120 of the California Rules of Professional Conduct. (AOB:168-174; see generally RB:62-68.) Rather, respondent contends that the prosecutor's actions did not constitute a due process violation and, in any event, were nonprejudicial. (RB:62-69.) Respondent's argument is not persuasive, for the reasons set forth below.

In arguing that appellant's due process rights were not violated, respondent relies on *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252. (RB:67-68.) Citing *Rochin v. California* (1952) 342 U.S. 165, 168, the *Morrow* court explained that "[t]he power of a court to dismiss a criminal case for outrageous conduct arises from the due process clause of the United States Constitution." (30 Cal.App.4th at p. 1259.) In *Morrow*, the prosecutor had an investigator listen in for a few minutes on a conversation between the defendant and his attorney in the courtroom

holding area. (30 Cal.App.4th at p. 1255.) The reviewing court found that Morrow's right to due process had been infringed, stating: "[t]he eavesdropping occurred inside a courtroom and was orchestrated by the prosecutor, an officer of the court." (*Id.* at p. 1260.)

Respondent argues that the misconduct in appellant's case is "far removed" from the egregious behavior in *Morrow*. (RB:68.) It is not, however. Hours before the improper conversation occurred, defense counsel had expressed concern that articles were being published with inflammatory and prejudicial information relating to the case; he emphasized reports that appellant had attacked a sleeping man, as he was alleged to have done in the capital case. (AOB:162; 49RT:5956.) Despite this concern, the prosecutor confronted appellant later that day with details of the prior killing in front of a journalist reporting on the case. The prosecutor's provocative statement, sure to elicit a response, was made inside the courtroom during a break in the proceedings when defense counsel were not present and appellant had no ability to leave the room because he was shackled to the floor. The prosecutor also knew that the trial court had issued a "gag" order that prohibited the parties from discussing the case with the press. (See AOB:160-168.) This misconduct is of a piece with that committed in *Morrow*.

Morrow also supports appellant's argument that the misconduct in his case violated other constitutional rights as well. In *Morrow*, the appellate court emphasized that the eavesdropping violated the defendant's Fifth Amendment privilege against self-incrimination, Sixth Amendment right to counsel, and corresponding rights under the California Constitution, in addition to his due process rights. (30 Cal.App.4th at p. 1259.) In appellant's case, the prosecutor's engagement with him while his attorneys

were absent, and the resulting elicitation of a damaging statement, violated his Fifth and Sixth Amendment rights. (See, e.g., *Miranda v. Arizona* (1966) 384 U.S. 436 [5th Amend.]; *Maine v. Moulton* (1985) 474 U.S. 159 [6th Amend.]; *United States v. Morrison* (1981) 449 U.S. 361 [6th Amend.]; *United States v. Danielson* (9th Cir. 2003) 325 F.3d 1054 [6th Amend.])

A defendant's right to counsel must be rigorously guarded. *Moulton* makes clear that the prosecutor has "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." (*Maine v. Moulton, supra*, 474 U.S. at p. 171.) In *Moulton*, the co-defendant met with the defendant ostensibly to discuss trial strategy for their pending charges while wearing a monitoring device for the police. This "knowing exploitation by the State of an opportunity to confront the accused without counsel being present" violated Moulton's Sixth Amendment protection. (*Id.* at p. 176.) In appellant's case, the prosecutor knowingly exploited an opportunity to confront appellant, by making a provocative statement to him when his counsel were not present.

Respondent further relies on *Barber v. Municipal Court* (1979) 24 Cal.3d 742, and *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, to argue that the misconduct in this case was not outrageous. (RB:67-68.) But these cases actually support appellant's claim. In *Barber*, an undercover police officer participated in defense attorney-client meetings. Emphasizing that dismissal of charges was warranted regardless of whether the officer had gleaned confidential information, the Court stated:

Whether or not the prosecution has directly gained any confidential information which may be subject to suppression, the prosecution in this case has been aided by its agent's

conduct. Petitioners have been prejudiced in their ability to prepare their defense. They no longer feel they can freely, candidly, and with complete confidence discuss their case with their attorney. . . . This lack of cooperation, which resulted solely from the intrusion by law enforcement officers in the attorney-client relationship, has resulted in counsel's inability to prepare adequately for trial. . . .

(24 Cal.3d at p. 756.)

In *Boulas*, the defendant hired an investigator without his counsel's knowledge to contact law enforcement about a deal. The police, at the prosecutor's direction, encouraged Boulas to fire his attorney and hire a lawyer acceptable to the district attorney. (188 Cal.App.3d at pp. 425-428.) The appellate court determined that this conduct violated the defendant's right to counsel. It concluded that the prosecution had improperly interfered with Boulas's relationship with his attorney, despite the fact that it was the defendant himself who had approached the police. (*Id.* at pp. 429-430.) It stated:

Our focus in the present case is upon the intentional interference by governmental agents with Boulas's attorney-client relationship. The fact that Boulas and [his investigator] initiated the contact with the authorities is irrelevant to our analysis.

(188 Cal.App.3d at p. 426, fn. 2.)⁶

⁶ Of course appellant does not agree with respondent's claim that he initiated the contact with prosecutor Robinson. Because the trial court denied defense counsel's request to present testimony concerning the

(continued...)

As in *Barber and Boulas*, the prosecutor's conduct in this case infringed upon the attorney-client relationship. The prosecutor's communication with appellant outside the presence of his attorneys violated rule 2-100, which as appellant has explained was written to safeguard the attorney-client relationship. (AOB:168-169.) Significantly, this communication was not harmless banter. Rather, the prosecutor made a provocative statement, which garnered a damaging response, in the courtroom while appellant was chained to the floor. Moreover, the prosecutor chose to engage with appellant in front of a journalist reporting on the case for a newspaper. This misconduct intruded upon appellant's right to counsel no less than that in the cases cited by respondent.

The recently-decided *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, also supports appellant's claim that the misconduct committed in his case infringed on his relationship with counsel. In *Velasco-Palacios*, defense counsel was given a transcript of the defendant's interrogation which contained two lines inserted by the prosecutor that made it appear as though he was acknowledging guilt. Nine days later, the prosecutor admitted what he had done, claiming it was a joke. As a result of this conduct and the ensuing litigation, the public defender replaced the attorney representing the defendant with another lawyer in the office. The trial court found that the prosecutor's actions, even if done in jest, constituted outrageous conduct that diluted the protections afforded by the right to counsel and dismissed the charges against the defendant. (*Id.* at pp. 442-444.) The reviewing court upheld the trial court's ruling, finding that

⁶(...continued)
circumstances of the encounter, the record is inconclusive on this fact.

the misconduct directly interfered with the attorney-client relationship. (*Id.* at pp. 446-447.) The trial court was correct, the appellate court stated, in finding that the prosecutor's actions "were outrageous and conscience shocking in a constitutional sense." (*Id.* at p. 447.)

Similarly, in appellant's case the prosecutor's misconduct interfered with the attorney-client relationship and thereby diluted the protections afforded by the right to counsel. Immediately before the challenged conduct occurred in this case, defense counsel remarked on the inflammatory and prejudicial nature of the press relating to the homicide of Mr. Jackson. He further indicated that the defense would contest the media depiction of the killing. (AOB:162; 49RT:5956.) The prosecutor's elicitation of an uncounseled admission by appellant negatively impacted the attorney-client relationship because it limited defense counsel's ability to challenge the circumstances of Jackson's death.

Although respondent does not seek to justify the prosecutor's conduct in this case, she argues that it did not prejudice appellant. (RB:69-69.) *People v. Velasco-Palacios, supra*, reaffirms that it is the state's burden to prove that there is no substantial threat of prejudice and that sanctions are unnecessary:

A defendant's right to counsel is guaranteed by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) In *United States v. Morrison* [*supra*, 449 U.S. at p. 365], the United States Supreme Court held the dismissal of criminal charges is an appropriate sanction when government misconduct results in "demonstrable prejudice or substantial threat thereof" to a defendant's right to counsel. Similarly, California case law supports dismissal as a remedy

for sufficiently outrageous government misconduct. (See *Morrow v. Superior Court* [*supra*, 30 Cal.App.4th 1252]; *Boulas v. Superior Court* [*supra*, 188 Cal.App.3d 422; *People v. Moore* (1976) 57 Cal.App.3d 437].) “Where it appears that the state has engaged in misconduct, the burden falls upon the People to prove, by a preponderance of the evidence, that sanctions are not warranted because the defendant was not prejudiced by the misconduct. [Citations.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 967 [].)
(235 Cal.App.4th at pp. 444-445.)

Respondent argues that because the exchange between the prosecutor and appellant occurred outside of the jury’s presence, there was no prejudice. (RB:68-69.) The trial court took a similar view of the matter. (See AOB:166-167; 57RT:7393.) However, in all of the cases discussed above, the misconduct also took place outside the jury’s presence. The trial court’s failure to realize that harm may result even when the jurors did not witness the misconduct reflected a fundamental misunderstanding of the law. As a result, its determination that appellant was not prejudiced is not entitled to deference on appeal. (See, e.g., *People v. Brim* (2011) 193 Cal.App.4th 989, 991 [trial court abuses its discretion where it fails to follow applicable law].)

Here respondent cannot prove that there was not a substantial threat of prejudice. The court in *Boulas* recognized that “It is not always easy to compute the effect of governmental tampering with the attorney-client relationship.” (188 Cal.App.3d at p. 431.) Thus, courts have found misconduct prejudicial and dismissed charges although the prosecutor’s interference with the relationship between a defendant and his lawyer did

not result in receipt of confidential or strategic information. (See, e.g., *Barber v. Municipal Court, supra*, 24 Cal.3d at p. 756; *Morrow v. Superior Court, supra*, 30 Cal.App.4th at p. 1258.) There may be prejudice even when the prosecutor is removed from the case (*Morrow, supra*, 30 Cal.App.4th at p. 1256) and where the interference does not deprive defendant of a competent attorney (*Boulas, supra*, 188 Cal.App.3d at p. 430) or counsel of choice (*Velasco-Palacios, supra*, 235 Cal.App.4th at p. 448). Further, the exclusion of any information obtained as a result of the misconduct may not be a sufficient remedy. (*Boulas, supra*, 188 Cal.App.3d at p. 434.) The question is whether the interference has eroded trust between counsel and client or the defense has been prejudiced in its ability to prepare a defense. (*Barber v. Municipal Court, supra*, 24 Cal.3d at p. 756; *Velasco-Palacios, supra*, 235 Cal.App.4th at p. 448.)

In this case, the prosecutor's conduct both negatively impacted the relationship between appellant and his counsel and impaired the preparation of his defense. The record demonstrates that appellant had difficulty trusting the legal system, of which his attorneys were a part. (See 82RT:9827-9828.) He felt that the attorneys on both sides were engaging in "legal manipulations," although he appreciated that defense counsel were motivated by a desire to save his life. (82RT:9827-9828.) The prosecutor's manipulation of appellant in this instance undoubtedly exacerbated his negative perception of the criminal justice system, which included his own lawyers. Further, it likely acted as a wedge between counsel and client: while counsel was trying to keep certain information away from the jurors, appellant had been goaded into making an admission to the prosecutor, thereby eroding trust on both sides. (See AOB:476; 82RT:9865; see also *Velasco-Palacios, supra*, 235 Cal.App.4th at p. 448.)

The misconduct also hindered preparation of the defense. Appellant's attorney stated early on that they planned on disputing the circumstances of the Jackson prior homicide. (See AOB:162; 49RT:5956.) Indeed, counsel sought to keep out evidence of the confession appellant made to this offense years earlier when he was a teenager. (46CT:12959-12962.)⁷ This of course gave the prosecutor an incentive to bait appellant into a fresh admission that would tie defense counsel's hands.

Finally as to prejudice, this Court should not discount the possibility that one or more of the jurors saw the report of appellant's statement about the prior homicide. (See AOB:175-176.) Although the jurors denied to the trial court that they had read the article, such denials are no guarantee that they did not. Empirical evidence tells us that, under questioning by a court, jurors tend to say what they believe the judge wants to hear, rather than "what they truly [think] or [feel] about an issue." (Jones, *Judge-Versus-Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor* (1987) 11 Law & Hum. Behav. 131, 143; see also Balach, et al., *The Socialization of Jurors: The Voir Dire As A Rite Of Passage* (1976) 4 J. Crim. Just. 271, 278 [in a study of over 2,000 actual voir dire responses, researchers found only two instances in which a juror failed to give the response expected].) The jurors in appellant's case knew that to admit they had read the paper was a violation of their oath. Under these circumstances, it is naive to expect that they were all candid in their reply to Judge Zimmerman.

⁷ As argued elsewhere in this brief, there is reason to question the reliability of this confession including the lack of evidence that *Miranda* warnings were properly administered to appellant and the fact that appellant was only sixteen years old at the time. (See Arg. XVI.)

As to remedy in this case, respondent asserts that dismissal of all charges was not warranted under the present circumstances. (RB:68.) However, appellant advanced a variety of appropriate remedies at trial. (See AOB:166, 177.) These included, as an alternative to dismissing all charges, striking all of the death penalty allegations, striking the prior murder special circumstance, and disqualifying prosecutor Robinson and/or the Imperial County District Attorney's Office. (AOB:166; 45CT:12668-12669; 57RT:7395.) As appellant has stated, the sanctions appropriate for such misconduct are sui generis and may be tailored to the particular harm caused. (AOB:171, citing *Morrow, supra*, 30 Cal.App.4th at p. 1263, fn. 4.)

If this Court concludes that dismissing all charges is not necessary, appellant asserts that striking the prior murder special circumstance is a particularly appropriate sanction here. This remedy would provide a powerful deterrent to prosecutors engaging in such conduct in the future. Several courts have emphasized the appropriateness of fashioning consequences that will deter future misconduct. In *Velasco-Palacios, supra*, the court of appeal recognized that such sanctions not only vindicate the rights of a criminal defendant but also "serve[] as a potent deterrent to government misconduct." (235 Cal.App.4th at p. 451; see also *Barber, supra*, 24 Cal.3d at p. 759 [merely excluding evidence obtained by misconduct is "inadequate since there would be no incentive for state agents to refrain from such violations"]; *Morrow, supra*, 30 Cal.App.4th at p.1263 [despite previous warnings against misconduct, "some prosecutors do not seem to be listening"].) In addition to the deterrent value, striking the prior murder special circumstance is a fair and measured response to the misconduct committed in this case because it was directly related to the

validity of this allegation. The prosecutor's conduct limited defense options in challenging the prior murder evidence; appellant's proposed remedy would preclude the state from benefitting from its own wrongdoing.

The misconduct here calls for a meaningful response. In addition to the incident in front of the reporter, the prosecutor engaged in provocative behavior throughout the trial, goading appellant during his testimony at both phases of trial as well as during argument. (See AOB:306-309; 469-477.) Dismissing the prior murder special circumstance and preventing the state from introducing evidence of it in a penalty retrial would both remedy the violation of appellant's constitutional rights and would deter future misbehavior.

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IV.

THE TRIAL COURT'S ERRONEOUS APPLICATION OF EVIDENCE CODE SECTION 1103(B), WHICH PERMITTED THE PROSECUTOR TO ADDUCE MULTIPLE INSTANCES OF WEAPONS POSSESSION AND ASSAULT TO PROVE APPELLANT HAD A VIOLENT CHARACTER, PREJUDICIALLY VIOLATED HIS STATUTORY AND CONSTITUTIONAL RIGHTS

In this case, appellant testified about his personal knowledge of Thomas Richmond's Ad Seg rules violations in order to illuminate his (appellant's) own state of mind. This evidence was critical because it tended to disprove the state's theory of motive, which was that appellant killed Richmond because he knew that his cellmate had cooperated with prison authorities. The testimony supported the defense contention that appellant thought Richmond was a "good wood" and therefore trusted him. It was not offered to prove that appellant believed Richmond was likely to attack him because he had a violent character.

The prosecutor, who did not succeed in getting evidence of appellant's in-prison misconduct admitted directly, finally convinced the judge to switch gears in the middle of appellant's testimony. The trial court indicated that irrespective of the defense purpose in eliciting appellant's personal knowledge of Richmond's in-prison misconduct, the evidence had the effect of showing Richmond's propensity for violence. The court rejected repeated requests by the defense to give the jury a limiting instruction explaining that the evidence could not be used to find that Richmond had a violent character. The prosecutor was then allowed, pursuant to Evidence Code section 1103, subdivision (b) (hereafter section 1103(b)), to cross-examine appellant about eleven incidents of assault and weapons possession occurring both before and after Richmond's death.

The trial court's ruling constituted a fundamental misapplication of section 1103 which violated appellant's statutory and constitutional rights and severely prejudiced him. (AOB:178-235.)

Respondent asserts that any time evidence of a victim's violent conduct is adduced, for whatever purpose, 1103(b) is triggered. (RB:69-89.) This construction of section 1103 is contrary to the plain language of the statute as well as to its legislative history.

A. The Trial Court Erred Because the Defense Did Not Introduce Character Evidence That Could Be Rebutted Under Evidence Code Section 1103, Subdivision (a).

1. This Case Presents a Narrow Question of Law.

Appellant and respondent agree on several important points relating to whether the trial court erroneously admitted evidence of appellant's past misconduct. First, it is undisputed that Evidence Code section 1103 does not prevent litigants from using evidence of past misconduct for non-character purposes. Respondent acknowledges that "enactment of Evidence Code section 1103 did not eliminate a defendant's ability [to] introduce evidence of a victim's past solely to establish the defendant's state of mind. . . ." (RB:75.) Second, the parties largely seem to agree that the defense sought to use evidence of Richmond's prior conduct only to prove appellant's state of mind. In the body of the reply brief, respondent does not assert that appellant actually put forward the evidence in order to demonstrate Richmond's propensity for violence. (See RB:74-77.)⁸ Third, there is agreement that the jury was never instructed that it could consider

⁸ Respondent alludes to such an argument in a footnote, during a discussion of the jury instructions relating to this evidence. As appellant discusses *post*, the portions of the record cited therein do not support respondent's assertion. (See fn. 10, *post*.)

the evidence introduced for the purpose of determining whether Richmond had a violent nature and was therefore acting in conformity with that nature on the night of his death. (See generally RB:81-87.)

Instead, the disagreement between the parties is focused on what “opens the door” to evidence of a defendant’s prior violent conduct under subdivision (b) of section 1103. Respondent argues that 1103(b) was triggered *despite* the fact that the defense did not adduce evidence of past acts by Richmond to prove his propensity for violence. Respondent states: “[N]otwithstanding Barrett’s attempt to use the evidence of Richmond’s prior violent acts to show his state of mind, the evidence was plainly probative of the victim’s propensity for violence under Evidence Code section 1103.” (RB:77.) Respondent contends that “there is no separate right to introduce such evidence *unencumbered* by the provision of Evidence Code section 1103 permitting the prosecution to offer similar evidence in rebuttal.” (RB:75-76.) The question presented here – whether section 1103(b) is triggered by the use of a victim’s misconduct to prove something other than disposition or propensity – is a legal one. This Court reviews questions of law de novo. (*People v. Louis* (1986) 42 Cal.3d 969, 986.)

2. The Plain Language and Legislative History of Section 1103 Support Appellant’s Claim That Subdivision (b) Is Triggered Only When the Defendant Presents Evidence of the Victim’s Character.

The plain language of section 1103 makes clear that subdivision (b) applies only when a defendant has presented evidence of the putative victim’s violent character to prove that he acted in conformity with that character. (See AOB:197.) This common-sense understanding arises from

considering Evidence Code sections 1101 and 1103 in conjunction with each other, as well as 1103(b)'s incorporation of that section's subdivision (a).

Evidence Code section 1101, subdivision (a) generally prohibits the use of character evidence to prove conduct on a particular occasion. Section 1103 is an exception to section 1101(a). (Evid. Code, § 1101, subd. (a); see also *People v. Bryant* (2014) 60 Cal.4th 335, 406.) Section 1103, subdivision (a)(1), permits the admission of evidence of the victim's character, notwithstanding section 1101, if it is "[o]ffered by the defendant to prove conduct of the victim in conformity with" that character. If the defendant chooses to adduce evidence of the victim's character for violence under subdivision (a) of section 1103, however, subdivision (b) then permits the prosecution to rebut that evidence with violent acts committed by the defendant to prove his violent character:

In a criminal action, evidence of the defendant's character for violence or trait of violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant *under paragraph (1) of subdivision (a)*

(Evid. Code, § 1103, subd. (b), italics added.)

Section 1103, subdivision (b)'s reference back to subdivision (a)(1) makes it abundantly clear that (b) applies only when a defendant has used

evidence of the victim's prior violence to prove that he (the victim) acted in conformity with his violent character at the time of the charged offense. Respondent does not explain how the plain language of section 1103 can be read any other way. (See generally RB:74-77.)

Appellant's reading of section 1103, subdivision (b) is also supported by its legislative history. As previously noted, the provision was added in 1991. (AOB:196, citing *People v. Fuiava* (2012) 53 Cal.4th 622, 696.) Although the history of this area of California law is a bit convoluted, the purpose of subdivision (b), as demonstrated below, was to allow the prosecution to counter evidence of a supposed victim's propensity for violence with evidence of the same propensity in the defendant.

Under common law in California, a defendant could use reputation evidence to establish a victim's character for purposes of proving that the victim acted in conformity with that character. But he generally could not adduce evidence of specific instances of the victim's past conduct to prove that character. (Dep. Att. Gen. Eugene Kaster, mem. to Senior Asst. Att. Gen. Allen Sumner re 1990 Proposed Leg.-Victim's Violent Character, Sept. 6, 1989, pp. 1-2 [hereafter Kaster mem.].) An exception to this rule existed where a defendant claimed self-defense. Then, specific acts of violence by the victim were admissible if they "were known to the defendant and the evidence tended to prove the defendant's fear." (*Id.*, at p. 2, fn. 2, emphasis in original.) Also admissible were violent acts or threats directed toward the defendant himself. (*Ibid.*)

In 1965, the Evidence Code was adopted. Section 1103 changed existing law by permitting the introduction of specific instances of the victim's prior conduct to establish his character when his propensity to act in conformity with it was at issue. (Kaster mem., *supra*, at pp. 1-2.) In

cases where self-defense was advanced, that meant that violent acts unknown to the defendant and not directed at him could be adduced as tending to prove that the alleged victim was the aggressor in conformity with his violent character. (See, *ibid.*)

In 1990, then-Assemblyman Quackenbush introduced Assembly Bill 2615 (AB 2615). This legislation was motivated by a concern that the broad ability of a criminal defendant claiming self-defense to present evidence of specific instances of past conduct to prove a victim's violent propensity was hindering drug-related murder prosecutions in which both the victim and the defendant had histories of violence. (Sen. Com. on Judiciary, Rep. on Assem. Bill No. 2615 (1989-1990 Reg. Sess.) as amended April 19, 1990, pp. 1-2 [hereafter Judiciary Rep.].) The original form of AB 2615 read much like today's section 1103, and included subdivision (b). (See Legis. Counsel's Dig., Assem. Bill No. 2615 (1989-1990 Reg. Sess.) p. 2.) AB 2615 was ultimately amended, however, to delete proposed subdivision (b) and instead to prevent a defendant from using specific instances of a victim's prior conduct to prove character. As enacted, it permitted the use of only opinion or reputation evidence "when character evidence is offered by the defendant to prove conduct of the victim conforming to that character evidence" (Judiciary Rep., *supra*, p. 2.)

Shortly after AB 2615 was enacted, revised Evidence Code section 1103 was invoked to prevent a battered woman charged with killing her boyfriend from proving up his many prior instances of violence. This unintended consequence prompted Assemblyman Quackenbush to introduce Assembly Bill 263 (AB 263), which was signed into law in 1991. AB 263 restored the ability of a defendant to introduce evidence of specific

instances of the victim's past conduct in order to prove his character, but it also added subdivision (b). (Off. of Crim. Justice Planning, Enrolled Bill Rep. on Assem. Bill No. 263 (1990-1991 Reg. Sess.) Mar. 6, 1991, pp. 1-2.)

In sum, AB 263 was aimed at leveling the playing field when a defendant tried to convince a jury that the victim's prior violent conduct tended to prove he was the aggressor during the charged offense. Nothing in this history suggests that the legislation was intended to apply to evidence of a victim's misconduct when that evidence was offered to prove something *other* than propensity.

3. Evidence of a Person's Prior Misconduct Is Not Character Evidence Unless It Is Offered to Establish His Conduct on a Particular Occasion.

In essence respondent is arguing that evidence of prior misdeeds or crimes is character evidence regardless of the purpose for which it was admitted. This reflects a fundamental misunderstanding of the nature of character evidence.

"Character evidence" has been defined as "evidence offered solely to prove a person acted in conformity with a trait of character on a given occasion." (2 McCormick, Evidence (7th ed. 2013) Character and Habit, § 186, p. 1014 [hereafter McCormick].) Evidence pertaining to character is generally inadmissible not simply "because it reveals a person's character" but because

it is part of a particular mode of reasoning – a chain of inferences that employs the evidence to establish that the person (1) is more inclined to think or act in a given way than is typical, and (2) is therefore more likely to have acted or thought that way on a particular occasion. Because the

character-evidence rule is directed at reasoning based on inferred behavioral dispositions or propensities, it can be described as a “propensity rule” that only curtails the admission of “propensity evidence.”

(McCormick, *supra*, at pp. 1015-1016.)

The California Evidence Code patently differentiates between the use of other crimes evidence to prove character or propensity and its use to prove a relevant fact *other* than character. Subdivision (a) of Evidence Code section 1101 prohibits the use of character evidence when offered to prove a person’s conduct on a specified occasion. (*People v. Bryant, supra*, 60 Cal.4th at pp. 405-406 [“Section 1101(a) prohibits the admission of character evidence if offered to prove conduct in conformity with that character trait, sometimes described as a propensity to act in a certain way. [Fn.] (See Cal. Law Revision Com. Com., 29B pt. 3B West’s Ann. Evid. Code (2009 ed.) foll. § 1101, p. 221.)”].) Indeed, the comment to section 1101 leaves no doubt on this point, stating: “Section 1101 is concerned with evidence of a person’s character (*i.e.*, his propensity or disposition to engage in a certain type of conduct) that is offered as a basis for an inference that he behaved in conformity with that character on a particular occasion.” (Cal. Law Revision Com. com., 29B pt. 3B West’s Ann. Evid. Code (2009 ed.) foll. § 1101, p. 221 [hereafter Comment].) Section 1103 is also concerned with proving conduct based on character. It permits a defendant “to use evidence of specific acts of the victim of the crime to prove the victim’s character as circumstantial evidence of his conduct.” (Cal. Law Revision Com. com., 29B pt. 3B West’s Ann. Evid. Code (2009 ed) foll. § 1102, p. 311.)

In contrast, section 1101, subdivision (b), permits the use of prior

crimes or misdeeds evidence to prove a fact *other* than the person's disposition to commit such acts. (*People v. Bryant, supra*, 60 Cal.4th at p. 406.) Again the Comment to section 1101 is instructive. It says:

Evidence of misconduct to show fact other than character.

Section 1101 does not prohibit the admission of evidence of misconduct when it is offered as evidence of some other fact in issue, such as motive, common scheme or plan, preparation, intent, knowledge, identity, or absence or mistake or accident. Subdivision (b) of Section 1101 makes this clear.

...

(Comment, *supra*, at p. 222.)

Respondent's reading of section 1103 would undermine the express language of section 1101, subdivision (b). Section 1101(b) states that prior crimes evidence is admissible to prove facts other than disposition. But as respondent construes it, any evidence of violent conduct is treated as if admitted to prove disposition. This would turn section 1101(b) into an exception to 1101(a), which it is not. (See *People v. Bryant, supra*, 60 Cal.4th at p. 406 ["Section 1101(b) is not an exception to section 1101(a). Section 1101(a) prohibits use of character to prove conduct. Section 1101(b) provides for the admission of uncharged acts when relevant to prove some other disputed fact. The true exceptions to section 1101(a) are set out in Evidence Code sections 1102, 1103, 1108, and 1109"].)

In short, whether evidence of an individual's previous misdeeds is character evidence, and thus opens the door to section 1103(b) evidence, depends on *why* it was introduced. The record in this case makes clear that appellant was not trying to persuade the jury that he reasonably, or unreasonably but sincerely, believed that Richmond was going to assault

him because Richmond had previously gassed an officer or taken a knife to the yard. It was the evidence of unshared kites and reception of the unwrapped knife, when combined with evidence that Richmond came off his bunk in an unusual manner in the middle of the night holding the knife, that convinced appellant he was under attack. The evidence of Richmond's in-custody misconduct was instead offered solely to rebut the state's theory of motive. The prosecution asserted that appellant killed his cellmate because appellant believed Richmond was a "snitch." Appellant testified about his personal knowledge of Richmond's rules violations to show that appellant did not have reason to believe Richmond was cooperating with prison authorities but rather that he was in good standing with his peers. (See AOB:181-191.)

It follows that if evidence of Richmond's in-custody misbehavior was not admitted to establish his propensity toward violent conduct, then evidence to establish appellant's propensity for violence was not *rebuttal* evidence. In this case, evidence tending to show that appellant had a propensity to act violently in no way rebutted the evidence he presented to show he had reason to believe Richmond was a "good wood."

In rejecting appellant's argument, respondent faults appellant for not citing cases directly on point. (RB:76.) As explained in the opening brief, there are few cases addressing the parameters of Evidence Code section 1103. (AOB:197.) The cases appellant has discussed, however, demonstrate the importance of examining *why* evidence of the victim's violence has been introduced by the defendant. (See AOB:197-199.) This is consistent with the plain language of section 1103 and the statute's legislative history as set forth above.

In asserting that the purpose for which the evidence was introduced

is not relevant to the application of section 1103, respondent makes the same error as did the court below. The trial court concluded that notwithstanding the reason appellant adduced the evidence, it had the “effect” of tending to prove Richmond’s propensity for violence. (58RT:7553-7554.) As appellant has shown, this reasoning is founded upon a misunderstanding of the relevant statute. Accordingly, the lower court’s ruling constituted an abuse of discretion. (See *People v. Superior Court (Brim)* (2011) 193 Cal.App.4th 989, 991 [trial court abuses its discretion where it fails to follow the applicable law].)

4. The Cases Upon Which Respondent Relies Are Distinguishable.

To support her interpretation of section 1103, respondent relies on *People v. Clark* (1982) 130 Cal.App.3d 371, and *People v. Walton* (1996) 42 Cal.App.4th 1004, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 900. (RB:76.) However, *Clark* and *Walton* are distinguishable, primarily because in both cases the evidence of the victims’s propensity for violence was introduced to prove that they acted in conformity with their violent characters at the time of the charged offenses.

People v. Clark did not involve the admission of the *defendant’s* prior violent conduct under 1103(b). Indeed, this case was decided almost a decade before subdivision (b) was adopted. In *Clark*, the question was whether under section 1103, as it then read, the state could offer evidence of the victim’s good character to rebut evidence presented by the defendant of the victim’s violent character. There, it was uncontested that the victim had initiated the fatal encounter and that the defendant was entitled to defend himself. The issue was whether Clark used unnecessary force, however, when he shot the unarmed victim. (130 Cal.App.3d at pp. 380-381.) To

convince the jury he was justified in using deadly force, the defendant “directed his case at establishing the violent character of the victim.” (*Id.* at p. 384.) In light of this evidence, the trial court permitted the prosecution to present in rebuttal testimony from an acquaintance of the victim that he was friendly and considerate. (*Id.* at p. 383.) The court of appeal found that this evidence was proper rebuttal, under Evidence Code section 1103, subdivision (a)(2), stating: “Where a defendant has introduced character evidence to prove a victim’s conduct then the prosecution may introduce such evidence to rebut the evidence introduced by the defendant.” (*Id.* at p. 384.)

In *Clark*, the defense asserted that the evidence of the victim’s past behavior was not introduced to show his violent character but rather to demonstrate defendant Clark’s personal knowledge of the victim. The appellate court rejected this claim, however, because the victim’s prior violent behavior was introduced for the purpose of proving his conduct at the time he was shot by the defendant. (130 Cal.App.3d at p. 384.) In other words, the reason evidence of the victim’s prior violent conduct was relevant was because it tended to establish he was so violent that Clark was justified in using deadly force against him even though he was unarmed.

Appellant’s case is very different from *Clark*. Although defendant Clark claimed that the evidence of the victim’s prior violence was relevant to his (Clark’s) state of mind rather than to the victim’s propensity for violence, in *Clark* these factors were one and the same. Clark’s claim that he feared lethal violence was based on a belief that because the victim had acted violently toward him in the past, he would act violently at the time of their deadly encounter in conformity with his violent character. In contrast, appellant did *not* use evidence of his cellmate’s prior in-prison misconduct

to prove that Richmond was acting in conformity with a violent disposition on April 9th. Appellant relied on other evidence to explain why he believed his cellmate was launching an attack on him that night, including Richmond's uncustomary failure to share writings from other inmates, his receipt of a knife ready for immediate use, and ultimately his descent from the top bunk in an unorthodox manner with the knife in hand. Here, the evidence of Richmond's past behavior was relevant for a reason completely unrelated to any propensity for violence. It was relevant to rebut the state's claim that appellant killed Richmond because he knew Richmond was an informant. This is because Richmond's rules violations tended to establish, in appellant's mind, that he was a person who had the best interests of the white inmates at heart rather than someone who would turn in weapons to prison staff.

People v. Walton, supra, is similarly distinguishable. On appeal, Walton claimed that he had not offered the victim's prior violent conduct to prove that the victim had acted violently at the time of the charged offense. (42 Cal.App.4th at pp. 1014-1015.) But it appears there was no showing that such evidence was otherwise relevant. In fact, it was offered to support Walton's claim that the victim initiated the confrontation, because he was a violent person.⁹ Again, appellant's case is different because the evidence of Richmond's prison rules violations was used by the defense to establish a fact that had nothing to do with Richmond's propensity for violence.

⁹ Although *Walton* involved the application of subdivision (b) of Evidence Code section 1103, it relied exclusively on *Clark*, which did not. Yet there is no recognition of this difference in *Walton*; in fact there is little meaningful analysis of section 1103(b) at all. Perhaps that is because the reviewing court in *Walton* found that the claim was forfeited by the defendant's failure to raise the issue at trial. (42 Cal.App.4th at p. 1015.)

There is another critical fact that distinguishes both *Clark* and *Walton* from this case. In those cases, there was no indication that the defendants sought any kind of ruling on the relevance of the prior violence evidence before adducing it. Apparently neither Clark nor Walton went forward with a good-faith belief that the use of their victims' prior violent acts would not open the door to rebuttal evidence under section 1103. In contrast, appellant carefully sought to limit the defense case so as not to trigger 1103(b). Before the defense began presenting evidence concerning Richmond's past conduct, it requested a ruling from the trial court that such evidence was relevant to rebutting the state's theory of motive and did not make section 1103(b) applicable. Initially, the trial court signaled agreement with this position. Accordingly, the defense presented a limited snapshot of Richmond's past misconduct as it related to appellant's belief that his cellmate was a trustworthy inmate, rather than a broad picture of Richmond's character for violence. (See AOB:181-191.) When the trial court abruptly changed course and found that section 1103(b) was applicable, the defense was severely damaged. (See AOB:210-213.)

B. The Trial Court Erred in Failing to Conduct an Adequate Section 352 Analysis.

As appellant has explained, the trial court did not adequately weigh the probative value of the section 1103(b) evidence against its prejudicial value as required by Evidence Code section 352. (AOB:205-209.)

Respondent argues, however, that the trial court "explicitly and implicitly found that Evidence Code section 1103, subdivision (b), evidence satisfied Evidence Code section 352." (RB:77-80.) The trial court did neither. Respondent relies on remarks Judge Zimmerman made about excluding evidence of the prior homicide under section 352. (RB:78;

59RT:7553.) But this was prior to the court's final ruling on the section 1103(b) issue. (See 59RT:7644.) Moreover, it hardly qualifies as the kind of closely reasoned analysis of each incident that was required. (See AOB:207.) And, when defense counsel later asked for a section 352 ruling "on each item of evidence [the prosecutor] intends to bring in," neither the prosecutor nor the trial court responded that such a determination had already been made. (59RT:7645.) Instead, the trial judge said, "I will just have to make a call as you go." (59RT:7646.) The trial court did not weigh the probative value of each incident against its prejudicial value as it was introduced, however. Instead, it merely concluded after evidence of eleven separate acts had been adduced that any more would be cumulative. (59RT:7669-7671.)

As appellant has explained, the evidence was marginally probative and highly prejudicial. (AOB:207-209.) Respondent contends that the evidence was "highly probative because it showed Barrett's violent character." (RB:79.) But the other crimes evidence was neither material nor necessary under the facts of this case because appellant never claimed he was not violent. (See AOB:208.) Respondent also argues that "Barrett's prior conduct was no more inflammatory than the current charges" (RB:80.) Appellant has already explained why this claim is incorrect. (See AOB:208-209.) In sum, respondent has succinctly stated the relevant inquiry:

Evidence is substantially more prejudicial than probative if it "poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome'" (*People v. Waidlaw* (2000) 22 Cal.4th 690, 724) and "uniquely tends to evoke an emotional bias against the defendant" without regard to

relevance. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 650.)

(RB:77-78.)

This is precisely what occurred in appellant's case. The copious evidence of appellant's violent misdeeds prior to and after Richmond's death intolerably skewed the guilt phase determination, aroused an emotional bias against appellant, and resulted in an unreliable conviction and sentence.

C. Appellant's Constitutional Rights Were Violated.

Appellant also argued that the trial court's erroneous admission of the section 1103(b) evidence violated several of his constitutional rights, including his right to due process and his privilege against self-incrimination. (AOB:209-216.) In a footnote, respondent disagrees. (RB:80-81, fn. 34.)

As to the due process claim, respondent rejects appellant's argument that the trial court deprived him of a fundamentally fair trial. Respondent states that "any failure by Barrett or his counsel to anticipate the consequences of introducing evidence of Richmond's prior acts of violence does not transform the trial court's adherence to the Evidence Code into a due process violation." (RB:80, fn. 34.) That is not appellant's argument, of course. The due process violation in this case arose from the trial court's misapplication of section 1103, compounded by the unfairness caused by the court's reversal of position on this issue after the defense had begun presenting its case. The court's error put the defense at an extreme disadvantage and created a substantial disparity between the parties in direct contradiction of the statute's intent. (AOB:210-213.)

Respondent also dismisses appellant's claim that his privilege

against self-incrimination under both the federal and state constitutions was violated when the prosecutor was permitted to elicit the prior crimes evidence from appellant himself on cross-examination rather than by establishing them via independent evidence. (RB:80-81, fn. 34.) This Court has made clear that a criminal defendant does not waive his privilege against self-incrimination entirely by taking the witness stand:

“A defendant who elects to testify does not give up his Fifth Amendment rights nor his corresponding California privilege against self-incrimination (Cal. Const., art. I, § 15) except as to matters within the scope of relevant cross-examination.”

(*People v. Tealer* (1975) 48 Cal.App.3d 598, 604)

(*People v. Wilson* (2008) 44 Cal.4th 758, 799.)

The United States Supreme Court similarly recognizes that the breadth of a defendant’s waiver of his Fifth Amendment rights “is determined by the scope of relevant cross-examination.” (*Brown v. United States* (1958) 356 U.S. 148, 154-155.) Although an accused who testifies is subject to impeachment like other witnesses, it is error for the prosecutor to go beyond the scope of direct examination and compel the defendant “to furnish original evidence against himself.” (*Fitzpatrick v. United States* (1900) 178 U.S. 304, 316.) In appellant’s case, the prosecutor did exactly that. (See AOB:215.) Even if it is assumed for the sake of argument that the defense opened the door to evidence of appellant’s violent character under Evidence Code section 1103(b), this evidence was rebuttal evidence, not impeachment, since appellant did not attempt to establish his own non-violent character in his direct testimony.

Respondent’s only response to appellant’s self-incrimination claim is to try to distinguish *People v. Sims* (1958) 165 Cal.App.2d 108, cited by

appellant, because it did not involve the elicitation of testimony under Evidence Code section 1103. This fact does not meaningfully distinguish *Sims*, however. The essential holding in *Sims* is that it violates a defendant's privilege against self-incrimination when the state uses cross-examination to attack the defense if it involves a matter not part of the defendant's direct testimony; the prosecution must establish such matters with affirmative evidence. (AOB:214-216.) In this case, the trial court erred in permitting the prosecution to use cross-examination rather than third party witnesses to establish appellant's custodial offenses.

D. The Trial Court Erroneously Instructed the Jury on the Section 1103(b) Evidence.

In the opening brief, appellant explained how the trial court committed several errors when it instructed the jury on the evidence admitted pursuant to Evidence Code section 1103(b). This included giving CALJIC 2.50, an instruction relevant to evidence admitted pursuant to section 1101(b) rather than 1103(b), and giving confusing instructions on the preponderance standard. (AOB:216-227.) Respondent acknowledges that CALJIC 2.50 is an instruction for section 1101(b) evidence, not 1103(b) evidence. But respondent maintains that giving the instruction was not problematic. Respondent further argues that any other error was harmless. (RB:81-87.) This argument is flawed, however.

First, respondent claims that the 1103(b) evidence was *implicitly* admitted under 1101(b) as well. (RB:83.) This contention is unfounded. Prior to trial, the court *explicitly* ruled that prior crimes evidence would not be admitted pursuant to section 1101(b) in the prosecutor's case-in-chief. (45RT:5446-5448.) Accordingly, the prosecutor presented no such evidence during that phase of trial. Despite this state of affairs, respondent

suggests that the trial court *sub silencio* reversed this ruling. Yet respondent cites no authority for the proposition that a trial court may change or expand the legal basis upon which evidence has been admitted *after* the close of evidence (see 66RT:8527 [both sides rested on Jan. 6, 2003]), without any request by either party, indeed without any notice to the parties, and without any explicit ruling. This claim is extraordinary and must be rejected.

Second, respondent claims that the trial court appropriately instructed on the evidence as it was admitted under section 1103(b). According to respondent, CALJIC No. 2.50 properly informed the jury as to the limited purposes for which the jury could use evidence of appellant's "other crimes." (RB:85.) Appellant agrees that the instruction permitted the jury to consider the other crimes evidence as evidence of appellant's character for violence. It said nothing about Richmond, however. A proper instruction would at a minimum have to apply to both the purported victim and to the defendant, as did the one given by the trial court in *People v. Fuiava* (2012) 53 Cal.4th 622, 694-695. (See AOB:221-222.)

Respondent rejoins that appellant's "argument is untenable because the very basis of Barrett's claim of trial court error is that he did *not* elicit evidence of Richmond's prior acts of violence to demonstrate that Richmond initiated the struggle due to his violent nature." (RB:84.) Of course appellant contends that he did not put Richmond's character for violence at issue.¹⁰ The point, however, is that once the trial court

¹⁰ In a footnote, respondent suggests that defense counsel's argument to the jury "further belies Barrett's claim on appeal that the defense elicited evidence of Richmond's prior violent acts *only* to show Barrett's state of mind in thinking Richmond was [a] 'good wood' and not to demonstrate

(continued...)

concluded appellant inadvertently opened the door to evidence of his own violent character, the court was obligated to explain to the jury that it could consider evidence relating to Richmond's misdeeds as evidence of his violent character. The court's failure to instruct consistently with the evidentiary ruling it had made was unfair to appellant.

Third, respondent asserts that the trial court's failure to give a special defense instruction or CALJIC No. 2.50.1 distinguishing the preponderance standard from the beyond-a-reasonable-doubt standard was harmless in light of the court's improvised oral instructions. (RB:85-87.) According to respondent, "a jury is presumed to have understood and applied all instructions," citing *People v. Mills* (2010) 48 Cal.4th 158, 200-201. (RB:87.) *Mills* is indeed instructive. There, the Court states that when oral and written instructions conflict, it is presumed that the jury follows the written instructions. (48 Cal.4th at pp. 200-201.) As appellant has explained, the written instructions were inadequate. (See AOB:224-227.)

E. The Errors Were Not Harmless.

Appellant has argued that the trial court's misconstruction of Evidence Code section 1103, subdivision (b), and the concomitant errors were not harmless under either *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818. Appellant emphasized, inter

¹⁰(...continued)

that Richmond had a violent nature." (RB:84, fn. 36.) But the passages respondent cites do not support this claim. Arguing that Richmond was not a "rube" and that he may have had a motive for assaulting appellant is not the same as arguing that his prior in-prison misconduct tended to prove that he assaulted appellant in conformity with his violent character. Moreover, even if it could be so construed, such argument would be understandable after the trial court's ruling against the defense on the section 1103(b) issue.

alia, that the defense evidence was compelling, the state's evidence was weak, and the jury did not easily reach a verdict. (AOB:227-235.)

Respondent first argues that harmless error review under *Chapman* is not required because the admission of the other crimes evidence did not offend the federal constitution. (RB:88.) Although respondent cites *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, for this proposition, *Jammal* in fact recognizes that a state law error which renders a trial fundamentally unfair violates the federal constitution's due process clause. The federal court simply concluded that Jammal's trial was not fundamentally unfair. (*Id.* at p. 919.)

Appellant has demonstrated that the trial court's erroneous construction of Evidence Code section 1103, subdivision (b), rendered his trial fundamentally unfair because it resulted in the admission of a huge quantity of highly prejudicial evidence that was marginally relevant to the question of appellant's mental state at the time of Richmond's death. And as has been explained, his Fifth Amendment rights were also violated.

Respondent further asserts that the jury's lengthy deliberations, questions and requests for testimony readbacks were "reflective of a jury carefully doing its job," rather than of a close case. (RB:88.) Respondent cites *People v. Carpenter* (1997) 15 Cal.4th 312, 422, in support of this claim, which in turn cites *People v. Cooper* (1991) 53 Cal.3d 771, 837. (RB:88.) Neither case helps respondent. In *Cooper* and *Carpenter*, this Court explained that such deliberations may not signal a close case in a lengthy trial with complex evidence and issues. (*Cooper, supra*, 53 Cal.4th at p. 837; *Carpenter, supra*, 15 Cal.4th at p. 422.)

Appellant's guilt phase trial was not like those in *Cooper* and *Carpenter*; it involved only one homicide and no question as to who

committed it. The jury's determination boiled down to appellant's mental state at the time of the killing. Given the circumstances of this case, the length of deliberations, the jurors' desire to rehear testimony from several witnesses including appellant, to watch the cell video again and their inquiry about the letter found in the contraband watch cell strongly supports an inference that the guilt phase evidence was closely balanced.

Respondent further asserts that any error was harmless in light of the "overwhelming evidence of Barrett's guilt" (RB:89.) Respondent fails, however, to set forth this overwhelming evidence. In fact, the state's case-in-chief was so weak as to be insufficient. (See Arg. VI.) In essence the guilt verdict rested on the incredible and biased testimony of three inmate informants presented in rebuttal. (See Arg. VII.) Under these circumstances, the inflammatory other crimes evidence undeniably had an impact.

Respondent also insists that the erroneously admitted evidence "did not fundamentally change the nature of the information available to the jury" because it knew appellant had a violent nature. (RB:88.) The critical issue is that while the jury knew that all of the inmates involved in the case had committed some violence, it heard extensive, incident-specific testimony *only* about appellant. Despite the fact that the jurors already generally knew that appellant had engaged in violence, this considerable evidence prejudiced them, both because much of it was similar to the charged offense and because it had continued right up to the time of trial. (AOB:227-235.)

Further, appellant's credibility with the jury was paramount in this case. The eleven other violent acts committed in prison both before and after Richmond's death likely led the jury to doubt appellant's version of

events and conclude instead that he had acted in conformity with his violent character. (AOB:230-232; see, e.g., *People v. Memory* (2010) 182 Cal.App.4th 835, 863-864 [erroneous admission of evidence that defendants were members of a violent motorcycle gang was prejudicial because it damaged their credibility and showed a propensity for violence].)

Even if the prejudice is measured under the *Watson* standard, there is at least a reasonable chance, and more than an abstract possibility, that a result more favorable to appellant would have occurred without the error. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

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V.

**THE TRIAL COURT ERRED WHEN IT REFUSED
TO STRIKE TESTIMONY THAT RICHMOND TURNED
IN WEAPONS AND THE DEFENSE TESTIMONY
RESPONSIVE TO THAT EVIDENCE**

Appellant has contended that the trial court prejudicially erred when it refused to strike testimony by correctional officers that Thomas Richmond had voluntarily given them inmate-manufactured weapons. The prosecution had adduced this evidence in an effort to convince the jury that appellant killed his cellmate because Richmond was a “rat.” However, because the state failed to establish that appellant knew of Richmond’s actions – a necessary foundational fact – the evidence was not relevant and should have been stricken. Appellant further asserted that his testimony about Richmond’s in-prison misconduct should have been stricken as well since it was only introduced to counter the prosecution’s motive evidence. Finally, appellant’s compelled testimony about his own acts of prison misconduct, which the trial court permitted in light of this other evidence, should have been stricken. (AOB:236-242.)¹¹

Respondent seems to agree with appellant that the evidence of Richmond’s relinquishment of weapons was relevant only if the prosecution could establish the preliminary fact that appellant knew Richmond had given them up. Respondent finds it sufficient, however, that evidence to support this preliminary fact was adduced in the state’s rebuttal case. Respondent also asserts that any error was harmless. (RB:89-94.) These arguments are not persuasive, for the reasons that follow.

Respondent disagrees with appellant’s contention that the trial

¹¹ See also AOB:Arg. IV.

court's determination of whether the prosecutor had adequately established the necessary preliminary fact of appellant's knowledge should have been based on the evidence before the court at the time the motions to strike were made. (RB:93; AOB:240-241.) Respondent argues that *People v. Rundle* (2008) 43 Cal.4th 76, cited by appellant, "does not preclude evidence of a preliminary fact being adduced at some point in the trial after the motion is made." (RB:93.) In *Rundle*, the Court stated "we evaluate the trial court's exclusion of the proffered evidence based upon the evidence before the court when it made its decision." (43 Cal.4th at p. 132.) Respondent argues that this language means only that evidence establishing a necessary preliminary fact cannot come from outside of the record. (RB:93.) But the Court's reliance on *Rundle* in *People v. Fuiava* (2012) 53 Cal.4th 622, demonstrates that respondent's interpretation is not correct. In *Fuiava*, the defendant argued that the trial court erred in denying a defense request for a continuance. On appeal, Fuiava relied on events which occurred during trial but after the continuance was denied as proof that counsel was unprepared to go forward. (53 Cal.4th at pp. 650-651.) In rejecting this claim, the Court in *Fuiava* stated that "review of the trial court's ruling on a motion is 'based upon the evidence before the court when it made its decision.'" (*Id.* at p. 651, quoting *People v. Rundle, supra*, 43 Cal.4th at p. 132.) *Fuiava* clearly supports appellant's assertion that this Court must assess the trial court's denial of his motion to strike based on the record extant when the motion was made.

Respondent also claims that "Barrett apparently overlooks the fact that the trial court did not rule on the motions to strike at the time the motions were made, but rather deferred its decision until all of the evidence was in." (RT:93.) Respondent misreads the record. When appellant *first*

moved to strike the testimony of correctional officers Borem and Longcor, the trial court did not defer a ruling but rather denied the motion outright. (59RT:7642; see also AOB:237.) At that time, the prosecution had not introduced any evidence to suggest that appellant knew of Richmond's relinquishment of the knives. Thus, the ruling was erroneous.

Moreover, appellant contends it was improper for the trial court to defer a ruling on his *second* motion to strike the testimony. It is true that appellant has found no case that expressly states the trial court may not defer a ruling on whether the prosecution has sufficiently established a preliminary fact until the rebuttal evidence is received. (See RB:93 [“Barrett sets forth no support for his argument that such a preliminary fact cannot be established, and a relevance determination made, during the prosecution's rebuttal.”].) But that is not surprising, as “proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime.” (*People v. Carter* (1957) 48 Cal.2d 737, 753; see also AOB:240, 268.) In light of this long-established rule, it would be illogical for a court to defer ruling on a motion to strike to see if the prosecutor could prove a material part of his or her case on rebuttal.

Appellant has also asserted that the trial court's erroneous rulings on the two motions to strike deprived him of due process under the federal constitution. (AOB:241-242.) Respondent does not separately and specifically address appellant's federal claim (see generally RB:89-94), and thus apparently agrees that if the trial court did rule erroneously, appellant's federal rights were violated as well as his state rights.

As to the issue of prejudice, respondent argues that “any error was harmless under either the *Watson* or *Chapman* standards.” (RB:94.)

Respondent avers that because the jury heard from three inmates that Richmond was a “rat,” there was “overwhelming evidence” on this issue apart from the testimony of the correctional officers. (RB:94.) But a close look at what these inmate informants actually said demonstrates that the testimony of officers Longcor and Borem was not superfluous.

Inmates Robert Wilson and James Magee both testified that appellant told them Richmond was a “rat” but neither mentioned anything about turning in weapons. (See AOB:51, 60.) By contrast, inmate Michael Hill claimed that appellant said Richmond had given up two weapons, allegedly in order to get sent to Ad Seg and avoid a debt. (AOB:54; 63RT:8056-8057.) However, Hill asserted that this was a story appellant had concocted. (AOB:57; 63RT:8055.) Testimony from the correctional officers that Richmond had actually surrendered two knives provided an aura of veracity to the claims of the inmate informants that did not otherwise exist. And, as appellant has explained, if the informant testimony had been rejected by the jury, the prosecution would have been left with very little. (See AOB:277-279.)

Moreover, respondent fails to recognize the full impact of the trial court’s error. Had the trial court correctly granted the defense motion to strike the testimony of Longcor and Borem, appellant’s testimony about Richmond’s in-custody misconduct and the extensive cross-examination about his violent acts in prison would also have been stricken. (AOB:237.) Respondent does not respond to this part of appellant’s argument.

Thus the prosecution cannot demonstrate beyond a reasonable doubt that the erroneously admitted evidence did not contribute to the guilt verdict. (*Chapman v. California, supra*, 386 U.S. 18.) There is a reasonable probability that a more favorable outcome would have resulted

in absence of the testimony from Longcor and Borem. (*People v. Watson, supra*, 46 Cal.2d 818.) Such probability “does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.’ . . .” (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.) There is more than an abstract possibility that, absent the trial court’s erroneous rulings, appellant’s jury would have delivered a more favorable outcome in either the guilt or penalty phases.

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VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO ACQUIT PURSUANT TO PENAL CODE SECTION 1118.1

As appellant has shown, the evidence presented in the prosecutor's case-in-chief was legally insufficient to sustain a conviction of murder in the first degree and the lying-in-wait special circumstance. The trial court therefore erred in denying appellant's motion to acquit pursuant to Penal Code section 1118.1. (AOB:243-265; see also Arg. VII.)

Respondent argues that the jury could have reasonably found both premeditation and deliberation and lying in wait from the evidence presented by the prosecution. (RB:94-105.) These claims are not persuasive.

A. There Was Insufficient Evidence of Premeditation and Deliberation.

A motion for acquittal must be granted unless the record "contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (AOB:246-247, quoting *People v. Lewis* (2008) 43 Cal.4th 415, 507; see also *People v. Hajek* (2014) 58 Cal.4th 1144, 1182-1183.)

Although premeditation and deliberation may be established by circumstantial evidence, the existence of this element must not be based on conjecture. This point was recently emphasized by the court of appeal in *People v. Boatman* (2013) 221 Cal.App.4th 1253, which quoted *People v. Anderson* (1968) 70 Cal.2d 15, 24:

"Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate

between first and second degree murder, [a reviewing court] must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citation] or whether it ‘leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.’”

(221 Cal.App.4th at p. 1265, italics in *Anderson*.)

In determining whether there is sufficient evidence of premeditation and deliberation, an appellate court looks for the categories of evidence discussed in *People v. Anderson*, including planning activity, motive and the manner of killing. (70 Cal.2d at p. 27; see AOB:248.) In appellant’s opening brief, he argued that the case-in-chief at most established an unjustified homicide, but it was devoid of planning or motive evidence. Further, the manner-of-killing evidence did not establish premeditation and deliberation. (AOB:249-257.)

Respondent concedes the prosecution’s “‘motive’ evidence . . . did not establish that Barrett knew Richmond was a ‘rat’” (RB:99.) Respondent relies instead on the purported evidence of planning, the manner of killing, and appellant’s behavior and demeanor after the killing. (RB:98-102.)

Respondent starts by asserting that the jury could reasonably have seen the time and effort taken to cut the knife from the desk in cell 146 as evidence of planning. (RB:98-99.) This is, in fact, what the trial court relied upon in denying appellant’s motion to acquit. (57RT:7391; see AOB:245.) As explained below, however, to reasonably infer that it would

have taken considerable effort to create the weapon is not the same as reasonably inferring that the knife's manufacture constituted evidence that appellant planned Richmond's death.

It is true that a verdict may not be reversed “‘simply because the circumstances might also reasonably be reconciled with a contrary finding.’ . . .” (*People v. Hajek, supra*, 58 Cal.4th at p. 1183.) But viewing the evidence in the light most favorable to the state does not magically convert a possibility into a reasonable inference or deduction. In *Hajek*, this Court reiterated that a reviewing court presumes true only those facts that the trier of fact “could *reasonably deduce* from the evidence.” (*Ibid.*, italics added.) In *People v. Boatman, supra*, the reviewing court defined an inference as a “‘conclusion reached by considering other facts and deducing a logical consequence from them.’” (221 Cal.App.4th at p. 1265, quoting Black’s Law Dict. (8th ed. 2004) p. 793, col. 2.) Expanding on this definition, the court explained:

“[T]o constitute an inference, the conclusion must to some degree reasonably and logically follow from the preliminary facts. If, upon proof of the preliminary facts, the conclusion is mere guesswork, then we refer to it by such words as speculation, conjecture, surmise, suspicion, and the like; and it cannot rise to the dignity of an inference.”

(221 Cal.App. 4th at pp. 1265-1266, quoting *People v. Massie* (2006) 142 Cal.App.4th 365, 374.)

Years ago another court of appeal similarly observed: “Evidence which merely raises a strong suspicion of the defendant’s guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of

fact.” (*People v. Blakeslee* (1969) 2 Cal.App.3d 831, 837; see also *People v. Hajek, supra*, 58 Cal.4th 1144, 1263 (dis. opn. of Kennard, J.) and cases cited therein [jury’s finding of guilt may not be based on a mere possibility]; *People v. Velazquez* (2011) 201 Cal.App.4th 219, 231 [“A reasonable inference may not be based on suspicion, surmise, conjecture, or guess work. It must logically flow from other facts established in the action” (internal quotation marks and citations omitted)].)

As *People v. Anderson, supra*, explains, planning activity is “facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the [charged] killing” (70 Cal.2d at pp. 26-27, italics in original.) In this case, the evidence presented created a reasonable inference that the knife was cut from the desk in the cell and that doing so must have taken some time and effort. Whether appellant was the one who manufactured the knife, however, was a much less reasonable inference. For example, evidence that Richmond had weapons in his general population cell that he did not make but which had been hidden in his mattress prior to his arrival there (AOB:11-13) demonstrated that it was unreasonable to assume that an inmate in possession of a weapon had necessarily created it himself.

Even if it is assumed, however, that appellant manufactured the knife, this conclusion does not reasonably support an inference that he did so for the purpose of killing Richmond. The evidence was silent as to *why* appellant made the weapon. The fact that weapons were ubiquitous in Calipatria prison (see AOB:250, fn. 126) suggests that they are not always

made with an intent to kill one's cellmate.¹² Moreover, appellant could not have fashioned the knife without Richmond's knowledge. If it can reasonably be assumed that a prisoner who is making a knife is planning to kill his cellmate, then Richmond would have taken action to protect himself from appellant. In fact, Richmond's previous relinquishment of weapons demonstrated that he was not adverse to getting help from prison staff when he needed it. Accordingly, the jury could only have *speculated* that appellant made the knife with a plan to use it on Thomas Richmond.

Appellant's argument that the knife-making without more does not reasonably support an inference of planning is bolstered by the *Anderson* Court's discussion of two cases in which the planning evidence was negligible. In *People v. Granados* (1957) 49 Cal.2d 490, the defendant lived with his 13-year-old victim, her mother, and brother. He took the girl and her brother to an office, sent the boy on an errand, and returned home with the girl where he killed her. The Court in *Anderson* found the evidence ambiguous as to planning because it supported various inferences:

[T]he only evidence of (1) defendant's behavior prior to the killing which could be described as 'planning' activity related to a killing purpose was defendant's sending the victim's brother on an errand and apparently returning home alone with the decedent. Such evidence is highly ambiguous in terms of the various inferences it could support as to defendant's purpose in so behaving.

(*People v. Anderson, supra*, 70 Cal.2d at p. 31.) Similarly, in the instant

¹² In the penalty phase, CDC personnel would explain that in-prison weapons were used for both offensive and defensive purposes. (See AOB:74; 76RT:9163.)

case, the knife-making is highly ambiguous as it supported multiple inferences concerning appellant's intent.

The *Anderson* Court also pointed to *People v. Craig* (1957) 49 Cal.2d 313, as an example of inadequate planning evidence. In *Craig*, the defendant encountered the victim on the street after he left a bar. Earlier he had expressed his interest in finding a woman with whom to have sex. The victim's body was found the next morning, with her clothing ripped open and legs spread apart. (*People v. Anderson, supra*, 70 Cal.2d at pp. 32-33.) Although the evidence in *Craig* supported an inference that the defendant was "looking for a girl with whom to engage in sexual intercourse," it did not lead to a reasonable inference that he had planned to kill her. (*People v. Anderson, supra*, 70 Cal.2d at p. 33.) The *Anderson* Court explained: "Although such conduct may be described as 'purposeful' behavior, it has no bearing as to an *intention to kill* his victim. (*Ibid.*, italics in *Anderson.*) In appellant's case, even if he purposefully cut the knife from the cell desk, that behavior without more did not have any bearing on his intention to kill Richmond.

In short, "[t]hat an event *could* have happened . . . does not by itself support a deduction or inference that it did happen. . . . Jurors should not be invited to build narrative theories of a capital crime on speculation." (*People v. Moore* (2011) 51 Cal.4th 386, 406, italics in original.) Here, the scant facts surrounding the manufacture of the knife do not support a reasonable inference or deduction that appellant engaged in activity prior to Richmond's killing that was "directed toward, and explicable as intended to result in" his murder. (*Anderson, supra*, 70 Cal.2d at pp. 26-27.)

Respondent also relies on the manner-of-killing evidence in asserting that the trial court properly denied appellant's motion to acquit. However,

as respondent acknowledges, the brutality of a homicide cannot without more support a finding of premeditation and deliberation. (RB:100.)

Indeed, the Court has made this point very clearly:

The fact that a slaying was unusually brutal, or involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random “explosion” of violence as with calculated murder.

(*People v. Alcala* (1984) 36 Cal.3d 604, 626, citing *People v. Anderson*, *supra*, 70 Cal.2d at pp. 24-25; *People v. Robertson* (1982) 33 Cal.3d 21, 48; and *People v. Smith* (1973) 33 Cal.App.3d 51, 64, overruled on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324.)

Respondent nonetheless argues that “this Court has held that brutality can be indicative of calculated violence *in context*, particularly where, as here, the brutality itself contradicts the defendant’s version of events, and other evidence, such as the planning activity here, also supports a theory of premeditation for criminal purposes.” (RB:100, italics in original.) Respondent cites *People v. Turner* (1990) 50 Cal.3d 668, 688-689, fn. 4, and *People v. Hughes* (2002) 27 Cal.4th 287, 371, but neither case supports this argument. (See RB:100.) Rather, a comparison of *Turner* and *Hughes* with the instant case serves to highlight the inadequacy of the case-in-chief against appellant.

In *People v. Turner*, this Court found sufficient evidence that the defendant had intended to steal from the victim before killing him. This included evidence, inter alia, that the defendant was armed when he arrived at the victim’s home, forced his way inside, and cut the phone lines. (50 Cal.3d at pp. 688-689.) There was no such planning evidence in the instant

case, as appellant and Richmond in essence lived in the same “home” and the knife was already inside it. In *Turner*, the Court also found that the physical evidence did not support the defendant’s claim that the victim initiated the struggle between them. (*Ibid.*) However, in this case appellant’s motion to acquit was made prior to the presentation of the defense case and the case-in-chief included no evidence relating appellant’s version of what had occurred. Thus, whether or not “the brutality [of the killing] contradicts the defendant’s version of events” (RB:100) is not an issue here.

In *People v. Hughes*, this Court found that evidence of planning and the manner of killing was sufficient to support the jury’s finding of premeditation and deliberation. But again, the facts were materially different from appellant’s case. In *Hughes*, the defendant brought a knife to the victim’s apartment. (27 Cal.4th at p. 371.) As already explained, there was no such planning evidence in appellant’s case. As to manner of killing, in *Hughes* the defendant stabbed the victim over a period of time and when those wounds did not kill her, he strangled her to death with suspenders and his hands. (*Id.* at p. 371.) In contrast, Richmond probably died within minutes of his injuries. (52RT:6606.) In fact, nothing about the manner of killing in this case provided sufficient evidence from which the jury could have rationally concluded, at the time the prosecutor concluded his case, that appellant killed with preexisting reflection rather than on unconsidered or rash impulse.

Also as to the manner-of-killing evidence, respondent further claims that the multiple serious injuries to Richmond, when coupled with the lack of injury to appellant and the relative order of the cell when Richmond’s body was found, indicate that appellant had killed according to a

preconceived plan. (RB:100-101.) That is not correct. The officer who documented the cell found blood all over – with the notable exception of the top bunk where Richmond slept. (See AOB:20-22.) The medical examiner saw several wounds on Richmond’s body but could say nothing about what he was doing when the assault began. The doctor could not say who initiated the struggle or whether Richmond had a weapon at the time. (See AOB:28.) Under these circumstances, evidence that the cell was not in total disarray and that appellant was not bleeding supports a finding of, at most, second degree murder.

Significantly, the court in *People v. Boatman, supra*, recently recognized that “Even when manner of killing evidence is strong, cases in which findings of premeditation and deliberation are upheld typically involve planning and motive evidence as well.” (221 Cal.App.4th at p. 1268, discussing cases.) The *Boatman* court went on to observe that “[c]ases that have found sufficient evidence of premeditation and deliberation in the absence of planning or motive evidence are those in which ‘[t]he manner of killing clearly suggests as execution-style murder.’” (221 Cal.App.4th at p. 1269, quoting *People v. Hawkins* (1995) 10 Cal.4th 920, 956, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

The prosecution did not clearly establish an execution-style murder. The facts that there was no blood on the upper bunk where Richmond slept, that there was blood spattered most everywhere else in the cell, and that Richmond had numerous wounds tend to suggest a struggle. But ultimately the manner-of-killing evidence in the case-in-chief was ambiguous at best. It was simply too slight and equivocal for the jury to reasonably infer that the manner of killing here “was the result of ‘a pre-existing reflection’ and

‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed’ [citation]” (*People v. Anderson, supra*, 70 Cal.2d at p. 27.)

Finally as to premeditation and deliberation, respondent emphasizes evidence relating to appellant’s demeanor *after* Richmond’s body was discovered. (RB:101-102.) The only case respondent cites for the proposition that such evidence is relevant to the issue of premeditation and deliberation is *People v. Perez* (1992) 2 Cal.4th 1117, 1128, which is readily distinguishable from appellant’s case. (See RB:101.) In *Perez*, there was planning activity and manner-of-killing evidence which supported the jury’s finding of premeditation and deliberation. (2 Cal.4th at pp. 1126-1128.) As appellant has explained, neither type of evidence supported a premeditation finding in this case. In *Perez*, the Court also noted that the defendant’s conduct after the homicide seemed inconsistent with a rash, impulsive killing. There, the defendant remained in the victim’s home after her death and ransacked it. (*Id.* at p. 1128.) This hardly equates with appellant’s case, in which the demeanor evidence relied upon by respondent occurred hours after Richmond’s death. This is especially true when the same witnesses who claimed appellant was calm also admitted that in prison inmates often mask their feelings so as not to appear vulnerable to others. (See 50RT:6260; 54RT:7060, 7063-7064; AOB:17-19.)

In sum, as stated in *People v. Boatman, supra*, 221 Cal.App.4th at p. 1270, “the mere fact that a defendant has time to consider his actions is, without more, insufficient to support an inference that the defendant *actually* premeditated and deliberated. . . . [T]here must be some evidence that the defendant actually engaged in such reflection” In this case, there was no evidence that appellant *actually* engaged in the kind of

reflection needed to establish more than intent to kill. The case-in-chief failed to provide solid, credible evidence that supports a finding of premeditation and deliberation beyond a reasonable doubt.

B. There Was Insufficient Evidence to Support the Lying-In-Wait Special Circumstance.

Respondent also disagrees that there was insufficient evidence to support the lying-in-wait special circumstance. (RB:102-105.)

Specifically, respondent claims that “the jury could find that Barrett concealed his purpose by holding his knife in a place where Richmond could not see it, watched and waited a substantial period of time for an opportune time to act by waiting until Richmond fell asleep, and immediately thereafter launched a surprise attack on Richmond from underneath him” (RB:104.) This is all speculation, however.

Even when viewed most favorably for the state, the evidence presented in the case-in-chief does not support a *reasonable* inference that appellant killed while lying in wait. As fully explained in the opening brief, the evidence did not permit an inference that appellant concealed his purpose, watched and waited for an opportune time to act and attacked Richmond by surprise from a position of advantage. (See AOB:258-263.) In fact, the evidence tends to disprove respondent’s proposed scenario since *none* of Richmond’s blood was found in his bunk. And, as discussed above, the knife could not have been made without Richmond’s knowledge.

The ambiguous evidence was susceptible to various inferences and failed to provide the kind of solid, credible evidence from which the jury could find beyond a reasonable doubt that appellant had killed while lying in wait.

C. Federal Constitutional Error and Prejudice.

In his opening brief, appellant also asserted that the trial court's erroneous denial of the section 1118.1 motion violated his federal due process rights. (AOB:263-264.) Respondent has not responded specifically to this claim, however. (See generally RB:94-105.)

Finally, appellant contended that the trial court's error prejudiced him. (AOB:264-265.) Again, respondent has chosen not to respond to this argument. (See generally RB:94-105.)

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VII.

THE INTRODUCTION OF IMPROPER AND EXTREMELY PREJUDICIAL REBUTTAL EVIDENCE DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL

In the state's rebuttal case, the prosecutor called two inmate informants who claimed that appellant had told them, prior to Richmond's death, that he was planning to kill his cellmate because he was a "rat." A third informant claimed that appellant made a similarly incriminating statement to him subsequent to Richmond's death. Appellant argued, in his opening brief, that he was deprived of a fair trial by the prosecutor's decision to hold back these witnesses for rebuttal, in violation of Penal Code section 1093, rather than to present them during the case-in-chief. (AOB:266-279.)

Respondent argues (1) that appellant has forfeited this claim, (2) that the informants were properly called as rebuttal witnesses, and (3) that any error was harmless. (RB:105-113.) None of these arguments withstands scrutiny.

Respondent first claims that appellant has forfeited his ability to raise this claim on appeal. (RB:106-107.) However, appellant's counsel preemptively objected to any attempt by the prosecutor to "sandbag" the defense on rebuttal. (AOB:266-267.) The defense filed an in limine motion entitled "Motion To Limit And Exclude Rebuttal Evidence By The Prosecution." (4CT:973.) It stated: "The prosecution should not be permitted to put on a 'bare bones' case in chief against the Defendant, wait to hear the defenses in evidence in this case, then introduce evidence of Defendant's guilt that could have been presented during the initial phase of the prosecution's case." (4CT:975-976; AOB:267.) It appears, however,

that the motion got lost in the press of business. It was noticed for May 6, 2003, but the motions date was repeatedly trailed. (4CT:971.)¹³ Eventually, the trial court began hearing the numerous defense in limine motions on August 11, 2003. (12RT:2001.) The hearings lasted several days.¹⁴ Although defense counsel did not withdraw the motion to limit rebuttal, it was never heard by the trial court.

Because trial counsel did not secure a ruling on the motion or reobject when the prosecution's rebuttal case began, respondent argues that appellant has failed to preserve the issue for appeal. Appellant has asserted, however, that a trial court's failure to rule on a motion does not always prevent a defendant from raising an issue on appeal, citing *People v. Briggs* (1962) 58 Cal.2d 385, 410, and *People v. Flores* (1979) 92 Cal.App.3d 461, 466-467, as examples. (AOB:276.) Respondent correctly notes that these cases are not identical to appellant's. (RB:107.) Nonetheless they show that when a defendant has raised an issue, the trial court bears some responsibility to respond.

In any event, the Court may reach the merits by finding that appellant's counsel performed deficiently in failing adequately to preserve the issue for appeal. (See AOB:276-277; see also, *People v. Crittenden* (1994) 9 Cal.4th 83, 146 [court addresses merits of a claim where trial counsel's failure to object raises specter of constitutionally inadequate representation]; *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650-1651

¹³ See May 6, 2003 (11RT:1669); May 13 (11RT:1672-1675); July 8 (11RT:1678); July 15 (11RT:1681-1684); August 5 (11RT:1687-1691).

¹⁴ See August 15 (5CT:1257); August 20 (5CT:1260); August 25 (5CT:1265); August 28 (5CT:1283); September 4 (5CT:1286); September 8 (5CT:1289); and September 11, 2003 (5CT:1292).

[where trial court never expressly resolved defendant's request for a limiting instruction and counsel failed to press for a ruling, appellate court considered whether counsel's deficient performance prejudiced defendant].) Significantly, respondent has not disputed appellant's assertion that there could be no tactical reason for counsel's conduct. (See, e.g., *People v. Trujeque* (2015) 61 Cal.4th 227, 249 [no possible tactical reason for counsel's failure to move to strike a prior conviction]; *People v. Centeno* (2014) 60 Cal.4th 659, 675-676 [no reasonable tactical purpose for defense counsel's failure to object to prosecutor's misstatement of reasonable doubt].) Thus, the question before this Court is whether the rebuttal was improper and, if so, whether it prejudiced appellant.

As to the merits of this claim, respondent acknowledges that "it is improper for the prosecution to deliberately withhold evidence that is appropriately part of its case-in-chief, in order to offer it after the defense rests its case and thus perhaps surprise the defense or unduly magnify the importance of the evidence." (RB108; see AOB:267-270.) In fact, this Court recently confirmed that "it is improper for a prosecutor to withhold 'crucial evidence properly belonging to the case-in-chief' [citations], and to present it in rebuttal to take unfair advantage of a defendant." (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 30.) But respondent argues that the informant testimony properly rebutted appellant's testimony that he did not know Richmond had given up weapons to prison staff. (RB:109-111.) This position is incorrect.

Appellant's purported statements that he had planned the killing and was motivated by his belief that Richmond was a "rat" was clearly evidence material to establishing critical elements of the charges against him. (AOB:270-274.) Respondent nonetheless asserts that the testimony of the

three informants “specifically contradicted defense evidence that was *not* implicit in Barrett’s denial of guilt and claim of self-defense . . .”

(RB:111.) Respondent continues, “While this Court has recognized that a defendant’s initial denial of guilt implies a certain level of prosecutorial foresight, this Court has never required the prosecutor to anticipate every specific denial of evidence the defendant may make.” (RB:111.) No such prescience was necessary here. From the beginning, this was a case about *why* appellant had stabbed his cellmate. The prosecutor made it clear early in the proceedings that the state’s theory of the case was that appellant had killed Richmond because he believed his cellmate to be a “snitch” who had given up weapons and incriminated another inmate; in fact, the prosecutor advanced this theory in pretrial pleadings and opening argument. (See AOB:252-253.)

Respondent’s assertion that the testimony was merely impeachment of appellant’s testimony that he did not know Richmond gave up weapons is also undercut by the fact that the prosecutor argued that the hearsay statements of the informants were admissible *because* they were *admissions*, which are not – as explained in the opening brief – properly admitted as rebuttal. (63RT:7993-7994; 63RT:8056-8057; AOB:284-286; RB:114, 116, 120.)

Further, evidence that the prosecutor had at least two of these inmate informants ready to testify prior to the start of the defense case supports appellant’s argument. As he began presenting his guilt phase evidence, the prosecutor signed orders to have several inmates, including Wilson and Hill, transported to court before the conclusion of his case-in-chief. (44CT:12568-12584.) There would have been no purpose in having them present then unless the prosecutor thought their testimony was admissible in

the state's case-in-chief.

Wilson and Hill were not called to testify in the case-in-chief, of course, and on December 15 the prosecutor rested. On that date, appellant's counsel announced they would start presenting evidence on December 18. (45CT:12660.) Before the defense presented its first witness, however, the prosecutor filed additional transportation orders, to have Wilson, Hill and Magee in court on December 22. (45CT:12678-12685.) This timing indicates that the prosecutor concluded the inmates' testimony would be useful to the state irrespective of the defense case. And it belies respondent's assertion that such testimony only became relevant after appellant testified that he did not know that Richmond had voluntarily handed over weapons to prison staff.

In fact, this chain of events suggests that the prosecutor's decision not to present the inmate witnesses until rebuttal was motivated by gamesmanship: If the prosecutor had called these dubious witnesses in his case-in-chief, the jury could have found them incredible, which would have damaged his case. By holding the witnesses back for rebuttal, their testimony about appellant's purported admissions had a greater impact, which diverted attention from their credibility problems. This is precisely the kind of maneuvering section 1093 was designed to prevent.

Appellant has contended that the prosecutor's conduct violated his federal constitutional right to due process, as well as his state law rights, and that his conviction must therefore be reversed unless the state can demonstrate that the error was harmless beyond a reasonable doubt, pursuant to *Chapman v. California* (1967) 386 U.S. 18, 24. (See AOB:274-275, 277.) Respondent does not respond to the claim of federal error but asserts in a footnote that the *Chapman* standard is inapplicable

because under California law “reversal of a judgment or decision by reason of the erroneous admission of evidence is proper only where there has been a miscarriage of justice.” (RB:113, fn. 40.) Respondent misunderstands how the state constitution’s miscarriage of justice provision meshes with the *Chapman* standard. When a federal constitutional error has been made, and the *Chapman* standard applies, nothing in the California Constitution changes that. (See *People v. Cahill* (1993) 5 Cal.4th 478, 509-510 [*Chapman* harmless error standard applied to erroneously admitted confession pursuant to *Arizona v. Fulminante* (1991) 499 U.S. 279].)

In any event, the error was also prejudicial under the *Watson* standard. To prevail, appellant need only show there is a reasonable chance that he would have obtained a more favorable result had the erroneous rebuttal testimony not been admitted. This does not mean more likely than not, but merely more than an abstract possibility. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

Respondent claims the prosecution’s case-in-chief was “compelling.” (RB:112.) The record says otherwise. Even *with* the incendiary informant testimony, the guilt phase presented a close case, with lengthy deliberations, jury questions and testimony readbacks. (See AOB:278, 228-229.) The improper rebuttal provided the only arguably substantial evidence to support premeditation and deliberation, as well as the lying-in-wait special circumstance. (See AOB:247–263.) Moreover, had it been excluded, there is a reasonable chance, certainly more than an abstract possibility, that at least one juror would have been unwilling to convict appellant of murder in any degree and of the Penal Code section 4500 allegation. (See *Wilkins, supra*, 56 Cal.4th at p. 351.)

In arguing harmlessness, respondent points to the rebuttal testimony

of criminalist Elissa Mayo and prison employee Ray Vialpando. This evidence, respondent asserts, “tended to undercut the defense case that Barrett was suddenly attacked by a knife-wielding Richmond and was forced to defend himself with his knife.” (RB:113.) But an examination of the record shows that the testimony of Mayo and Vialpando added little to the prosecution’s case.

Mayo reviewed the evidence in this case, and formulated her conclusions about it, in 1996. At that time, she was a serologist, or someone who types blood. She did not analyze the evidence to determine whether Richmond might have had a weapon. She did not analyze all of the evidence gathered or even personally examine the scene of Richmond’s death. When Mayo testified at appellant’s trial in 2003, she disagreed with the defense forensic expert’s conclusion that there was a second weapon in the cell. But Mayo did so without reexamining the physical evidence or even the video taken of the cell. She simply opined that the scene and evidence were so poorly processed by prison investigators that few conclusions could be drawn from it. (See AOB:61-64.) In short, Mayo’s work paled in comparison to the careful analysis and well-supported conclusions offered by defense expert DiMeo.

Respondent’s reliance on Vialpando’s testimony is similarly misplaced. Respondent states that Vialpando “testified that Richmond had no behavior issues prior to going in to Ad Seg.” (RB:113, citing 64RT:8272-8273.) Not so. Vialpando, who was a records analyst, did not purport to have any personal knowledge about Richmond’s day-to-day behavior in the general population. He merely testified that Richmond had no 115's, or write-ups for misconduct, in his file from his time in Calipatria’s general population. (See 64RT:8272-8273.) His testimony

does not meaningfully undercut appellant's claim of self-defense.

Appellant's convictions and sentences must be reversed.

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VIII.

MULTIPLE EVIDENTIARY ERRORS DURING EXAMINATION OF THE THREE INMATE WITNESSES PRESENTED BY THE PROSECUTION IN REBUTTAL DEPRIVED APPELLANT OF A FAIR TRIAL

In the opening brief, appellant demonstrated how a confluence of evidentiary errors during the testimony of the jailhouse informants in rebuttal combined to deprive him of a fair trial. (AOB:280-293.)

Respondent claims that no errors were made, that appellant's opportunity to challenge some of them was forfeited, and that no harm resulted. (RB:114-124.) Each of these contentions must be rejected.

First, respondent asserts that the Secondary Evidence Rule does not apply because the state offered oral testimony about the conveniently unavailable kites. Respondent contends that as long as the kites were not destroyed with fraudulent intent, a verbal description of their contents was permissible. (RB:117-119.) Appellant agrees that the notes were not fraudulently destroyed, because, he avers, they never existed. The record demonstrates that both Hill and Wilson had reason to save any incriminating notes actually written by appellant – but neither did so. Prior to Richmond's death, Wilson, who was a member of the Nazi Lowrider prison gang, believed that appellant had sent someone to beat him up. (63RT:8001, 8037-803 .) Thus Wilson had a strong motive to preserve any document that could implicate appellant in murder. Similarly, it would have been highly beneficial to Hill, who made clear his desire to get appellant executed, to save such damaging evidence had it existed. (See AOB:53-58.)

As appellant has explained, the crux of this issue is that the informants failed with any reliability to show that the kites ever existed or

that either inmate could have authenticated them if they had. (AOB:281-284.) Appellant's case is similar in this regard to *People v. Lawley* (2002) 27 Cal.4th 102. (See AOB:282.) There, the defendant sought to elicit testimony from Mullin about a letter Seabourn showed him from the Aryan Brotherhood directing Seabourn to commit the murder for which the defendant had been charged. (27 Cal.4th at pp. 151-152.) This Court held that Mullin's oral testimony about the contents of the letter was properly excluded:

[T]he proffered testimony regarding the unauthenticated letter, prepared under unknown circumstances, allegedly by an unidentified writer on behalf of the Aryan Brotherhood, was not shown to be sufficiently reliable to merit admission into evidence.

(27 Cal.4th at p. 154.) Similarly in appellant's case, no oral testimony about the alleged notes should have been permitted.

Second, although respondent concedes that the trial court erred in finding the statements of the jailhouse snitches to be admissible as declarations against interest, she asserts that they were admissible as prior inconsistent statements. (RB:119-122.) But as appellant demonstrated in the opening brief, they were not admissible under that theory either. The prosecutor did not offer them as prior inconsistent statements. Moreover, he failed to set the groundwork for admissibility by asking appellant during cross-examination whether he had made the alleged statements. (AOB:286-287.)

Respondent attempts to shift the fault from the prosecutor to the trial court, but this effort must be rejected. Respondent asserts it was "the trial court who, *without prompting by the prosecutor*, found that these statements

were declarations against penal interest.” (RB:120, italics added.) Respondent then reasons that if the court had ruled correctly in the first instance, the prosecutor would have thought to offer them as prior inconsistent statements. (RB:120.) In fact, the record shows that it was the *prosecutor* who first argued that the statements were declarations against appellant’s penal interest. During Wilson’s testimony, after defense counsel objected on hearsay grounds, the prosecutor stated, “It’s going to be a declaration against interest, I guarantee you.” (63RT:7993.) The trial court accepted this theory of admissibility. (63RT:7993.) When Hill was questioned, the defense interposed a similar hearsay objection. Although the trial court ruled that the testimony was an admission against interest before the prosecutor spoke up, clearly it was understood that the state was proceeding on the same theory as with Wilson. (63RT:8057.)

Of course, even if the prosecutor *had* offered the evidence as prior inconsistent statements, the trial court would have had to reject the theory because the prosecutor had not confronted appellant with the supposed statements to deny or explain them. (See AOB:286-287.) Respondent nonetheless claims that this deficiency should be overlooked by the Court because appellant had not been unconditionally excused after his guilt phase testimony. (RB:122.) The record shows that, at the end of appellant’s testimony, neither party asked that he be subject to recall. The trial court did not specifically excuse appellant unconditionally but neither did he declare him subject to being recalled as a witness. (59RT:7724.) The prosecutor’s failure to indicate, at the time appellant’s testimony ended, that he wanted a later opportunity to confront appellant with the incriminating statements should foreclose the state from arguing on appeal that the prosecution satisfied the foundational requirements clearly set forth in the