IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. GLEN TAYLOR HELZER, Defendant/Appellant.	)	DEATH PENALTY CASE No. S132256 (Contra Costa Superior Court No. 3-196018-6)

APPELLANT'S REPLY BRIEF

On Automatic Appeal From A Sentence Of Death
From The Superior Court Of California, Contra Costa County
The Honorable MARY ANN O'MALLEY, Judge Presiding

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THE PEOPLE OF THE STATE OF CALIFORNIA,	)	**CAPITAL CASE**
	)	
	)	**No. S132256**
Plaintiff/Respondent,	)	
	)	
v.	)	**(Contra Costa Superior Court**
	)	
GLEN TAYLOR HELZER,	)	**No. 3-196018-6)**
	)	
Defendant/Appellant.	)	
	)	

APPELLANT'S REPLY BRIEF

I. APPELLANT'S MOTION TO SUPPRESS ALL EVIDENCE OBTAINED FROM SEARCHES OF HIS HOME SHOULD HAVE BEEN GRANTED DUE TO THE SEARCHING OFFICERS' FLAGRANT DISREGARD FOR THE TERMS OF THE AUTHORIZING WARRANTS AND THE PROSECUTOR'S FAILURE TO SHOW THAT ALL OF THAT EVIDENCE WAS LEGALLY SEIZED

A. Summary of Arguments

Respondent's opening misstatements of appellant's claim present a straw horse in asserting that "appellant argues that the

defendants' motion to suppress . . . should have been granted because officers seized items that were not specifically named in those warrants" and that "[h]e takes issue only with the Marin County officers' seizure of items pursuant to those warrants . . ." – RB 112.) Appellant has attacked not only the seizures, but also the *searches* conducted by the Marin officers as unlawful because those officers disregarded their warrants' particularization, both as to the victims and crimes for which evidence was being sought and as to the nature of the documents they were supposed to be seeking. (AOB 201-208, 293-308.)

The real issues here are doctrinal. Appellant contends that the Fourth Amendment precludes searching inside a suspect's home for items other than the objects described in the search warrant for that home. Respondent believes a police right to search for other items is implicit in the plain view doctrine, and that the purpose police had in mind when searching inside the home is legally irrelevant. (RB 112-114, 116-117.) Thus, respondent claims, a warrant's authorization to search everywhere in a home for a small item or "trace evidence" necessarily means that "the officers were lawfully in a position to

view the other items that were seized and that they had a lawful right of access to those items." (RB 117.) Ergo, the State's inability or unwillingness to show that the officers were searching for items identified in the warrant when they were searching inside the home is of no importance.

Although the State's arguments on that point may have appeared meritorious at the time this case was tried, they were not consistent with federal Fourth Amendment doctrine. It is now clear that, "[t]he scope of a license—express or implied—is limited not only to a particular area but also to *a specific purpose*." (*Florida v. Jardines* (2013) __ U.S. __, 133 S.Ct. 1409, 1416-1417, emphasis added.) In essence, the Court has endorsed Ninth Circuit and earlier high court authority making unlawful a search for one thing under a warrant describing another.

Without conceding that the officers or the trial court were mistaken in any respect, respondent argues that the extraordinary remedy of blanket suppression of all evidence obtained from the search of appellant's home is not required. (RB 134-143.) Respondent does not, however, claim that appellant should be

precluded from withdrawing his guilty plea if this Court finds that only some of the evidence should have been suppressed. (RB 148-149.)

Finally, respondent invokes the inevitable discovery doctrine on the theory that a subsequently-obtained search warrant allowed another county's officers to search and read everything in appellant's home in pursuit of the objects specified in their warrant. Respondent does not and cannot claim that the latter warrant was an "independent source" for exclusionary rule purposes: that latter warrant that Contra Costa county authorities obtained was obtained by presenting an oral affidavit about the fruits of the earlier searches. It was also directed to different objects. Respondent ignores case law requiring proof of relevant historical facts to support a determination that the State would have inevitably discovered the evidence through lawful means. Respondent also ignores law precluding invocation of the inevitable discovery doctrine where, as here, officers could have, but inexplicably failed, to obtain a properly inclusive warrant without exploiting the taint of earlier searches.

B. Synopsis of Undisputed Facts

Aided by a Contra Costa County SWAT team, Marin County Sheriff's detectives forcibly entered appellant's Concord home under a warrant authorizing them to search for evidence related to two shootings and the disappearance of a third person in Marin County. The warrant included only the following clauses authorizing any search and seizure of documents:

> 4. Receipts and documents related to *9mm handguns and ammunition;*
>
> * * *
>
> 7. Indicia of ownership, including but not limited to leasing documents, Department of Motor Vehicles documents *indicating ownership of the vehicle*, letters, credit card gas receipts, keys and warranties.
>
> 8. Indicia of occupancy or ownership; articles of personal property *tending to establish the identity of persons in control of said premises*, storage areas or containers where the above items are found consisting of rent receipts, cancelled checks, telephone records, utility company records, charge card receipts, cancelled mail, keys and warranties." (9SCT 1847-1848, emphasis added)

Once inside the home, upon seeing the outline of a body in a blood stain on a rug, Marin County Sheriff's Detective Steve Nash left to seek a second warrant for trace evidence confirming that the blood was that of the missing Marin woman, Selina Bishop.

Meanwhile, a detective on Nash's team searched what respondent alternately refers to as a "dayplanner" and "day planner" belonging to a resident of the home, co-defendant Dawn Godwin, and other personal document repositories. They found and seized various retail receipts and other evidence linking the residents to the disappearance of an elderly Concord couple, the Stinemans.

Contra Costa County District Attorney's Office representatives arrived at the home during Nash's absence, but did not claim to direct or authorize the Marin officers' activities. That District Attorney's Office later sought their own warrant for the Concord home, using evidence derived from the search conducted by the Marin officers.

Nash did not learn the details of the Contra Costa warrant or of any list of the objects that the warrant authorized officers to seek.

Before the following day, the mutilated bodies of the Stinemans and that of the missing Marin woman emerged in the

Delta. Thereafter, Nash led officers from both jurisdictions in searching the home and all manner of items they deemed useful to the prosecution of the home's residents.

The trial court saw nothing wrong. It accepted the State's claim that there could be no violation of the Fourth Amendment in searching everywhere in the home and reading every writing they encountered because the objects of the Marin warrants included writings and minute items, including trace evidence. The trial court also accepted the State's claim that the Marin warrants authorized searches for all indicia of anyone's occupancy of appellant's home at any time. It also held that seizures of items outside the scope of the warrants were justified by probable cause to believe they were evidence of a crime, and declared that any illegally seized evidence would have been inevitably discovered under an existing or hypothetical Contra Costa warrant.

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C. Marin Detectives Violated Appellant's Fourth Amendment Rights in Conducting Searches and Seizures Beyond the Scope of Their Warrants

1. Deferential Review of Trial Court Factual Findings Does not Aid Respondent Here

The parties agree on the abstract principles of appellate review of an order denying a motion to suppress. Findings of historical fact are reviewed for substantial evidence. Credibility determinations are reviewed deferentially. The trial court's selection of a rule of law, and its application of the law to the facts, are reviewed independently. (RB 106-107.)

Respondent points to the trial court's finding that the testifying officers were credible, and to Detective Nash's testimony that he made a conscious effort to seize only those items either listed in the warrant or those he had *probable cause to seize.* (2RT 532.) But Nash's credibility and his belief that he had probable cause to seize everything he seized are not determinative of the legality of the searches through which the evidence was discovered. Probable cause justifies seizures, not searches. Insofar as the Marin team were

looking for items not listed in the warrant, the case was lost on the "threshold question" of "whether the search was confined to the warrant's terms." (*United States v. Rettig* (9th Cir 1978) 589 F.2d 418, 423.)

Respondent also claims the State need not explain why officers searched and seized everything they seized from appellant's home – even all of the items listed on the list of challenged items the defense filed – because this Court holds that "evidence must be viewed in the light most favorable to order denying suppression motion." (RB 124, citing *People v. Tully* (2012) 54 Ca1.4th 952, 979.) But viewing evidence in a favorable light is not the same as ignoring a complete dearth of evidence on a point that the defense repeatedly raised in the court below. The failure of the prosecutor to shoulder the burden of proving that all of the seized items, or even the subsets presented in the list of challenged items, were described in a warrant or found in plain view while pursuing an item described in a warrant is not something on which any court can look favorably.

"[S]earches and seizures inside a home without a warrant are presumptively unreasonable." (*Payton v. New York* (1980) 445 U.S.

573, 586.) In general, "seizures of personal property are 'unreasonable within the meaning of the Fourth Amendment . . . unless . . . accomplished pursuant to a judicial warrant.'" *Illinois v. McArthur* (2001) 531 U.S. 326, 330, quoting *United States v. Place* (1983) 462 U.S. 696, 701.) The burden of proving that the items not described in the warrant were seizable under the plain view doctrine lies squarely with the prosecution. (*People v. Murray* (1978) 77 Cal. App. 3d 305, 310-312 ["While a search and seizure conducted pursuant to a warrant is presumed to be legal and the burden is on the defendant to show the illegality [citation], the seizure before us was not pursuant to a warrant but was by virtue of the plain view doctrine. The burden therefore in this regard is upon the prosecutor [citation] to show the applicability of the plain view doctrine.].)

As to the trial court's findings of historical facts, the relevant findings must be rejected because they are simply contrary to the evidence.

First, the trial court incorrectly recalled the evidence in finding that the Marin officers saw "imprints on the wet carpet in the shape of two bodies" prior to obtaining their second warrant for the

Saddlewood home. No evidence supporting this finding was adduced. Detective Nash's testimony did not contain any assertions that he saw an outline of a second body, nor that he had any other reason to suspect that more than one person had been killed in the house at that juncture. Nash's affidavit in support of the warrant he sought after the entry states that he saw the shape of one body, not two. (9SCT 1883.)

The importance of that first mistake about what the officers saw when they entered appellant's home is evident in the next thing the court said:

> And that then they gotten [sic] the second warrant which included forensic evidence, trace evidence, which could possibly link the crimes for [sic] the missing persons, the Stinemans,[1] Ms. Bishop or the deaths of them and other evidence that would relate to those crimes." (3RT 716.)

In actuality, the second Marin warrant did not authorize a search for anything related to the Stinemans. The affidavit for that warrant makes no mention of them. Nash testified that he learned

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about their disappearance only after he obtained that warrant and served it. (2RT 622.)

Finally, the trial court was mistaken in finding that all of the evidence discovered in appellant's home would have been inevitably discovered pursuant to what it called "warrant six." No warrant six was before the court. If the court intended to refer to the existing Contra Costa County warrant for appellant's home, the finding lacks evidentiary support if not logical plausibility. As discussed in pages to follow, a finding that illegally obtained evidence would have been inevitably discovered by lawful means requires substantial evidence of historical facts that were never proved.

2. Respondent's dismissal of federal circuit authorities and reliance on this Court's pre-Jardines decisions was mistaken

The Fourth Amendment ensures the "right of the people to be secure in their persons, houses, papers and effect, against unreasonable searches and seizures." (U.S. Const., amend 4.) Thus, "[a]n examination of the books, papers, and personal possessions in a

suspect's residence is an especially sensitive matter, calling for careful exercise of the magistrate's judicial supervision and control. See *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965)." (*United States v. Rettig, supra*, 589 F.2d 418, 422-423 (*Rettig*).)

Written by Justice Anthony Kennedy while a judge on the Court of Appeals for the Ninth Circuit, *Rettig* held the search of a home violative of the Fourth Amendment where undertaken for the purpose of obtaining evidence of a conspiracy to import cocaine under a warrant issued for evidence of marijuana related crimes. Respondent argues that *Rettig* is off point because there is "no evidence on the record that Detective Nash had any motive or intent to search for evidence of crimes other than the Woodacre murders" *when he applied for his warrants*. (RB 131.) But the undisclosed intent of the agents while *obtaining* the warrant in *Rettig* warrant was not the reason the Ninth Circuit found their subsequent search improper. To quote:

> The case before us is to be distinguished from those in which the defendant seeks to attack the factual accuracy of the underlying affidavits in order to establish a

> warrant's improper issuance. See *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), and cases cited therein. Where factual inaccuracy of the affidavit is alleged, a warrant is invalidated only if it is established that the affiant was guilty of deliberate falsehood or reckless disregard for the truth, and if, with the affidavit's false material set to one side, the information remaining in the affidavit is inadequate to support probable cause. Id. 438 U.S. at 156, 171, 98 S. Ct. 2677, 2685. The April 3 warrant was validly issued for the purpose set forth in the affidavit, and there is no contention of an insufficient showing of probable cause to issue the warrant for that purpose. However, the failure to disclose does enlighten our review of the search and seizures that actually took place as we determine whether or not the agents went beyond the confines of the warrant. (*United States v. Rettig*, *supra*, 589 F.2d 418, 422-423.)

Respondent also implies that *Rettig* is inapposite because the opinion does not mention the plain view doctrine, under which the searching officers' discovery of evidence need not be inadvertent. But as *Rettig* and numerous federal and California cases show, the plain view doctrine is inapplicable where the search that brought the evidence into view was not one directed to the objects described in the warrant. California appellate courts have long held:

> The plain view doctrine is limited by the requirement that the search under the warrant be carried out in good faith. (*People v. McGraw* (1981) 119 Cal.App.3d 582, 600 [174 Cal.Rptr. 711].) "The search may not be a general exploration but must be specifically directed to the means and instrumentalities by which the crime charged had been committed and the agents must have conducted their search in good faith for the purpose of discovering the objects specified in the warrant. [Citations.]" (*People v. Miller* (1987) 196 Cal. App. 3d 846, 851-854.)

Respondent's central claim is that the actual purpose of a given search is legally irrelevant if the area searched was one that could have contained an object of the warrant. (RB 112-114, 116-117.) Respondent relies on *People v. Carrington* (2009) 47 Cal.4th 145, and *People v. Bradford* (1997) 15 Cal.4th 1229, 1293-1295.

The *Carrington* decision lends superficial support to respondent's claim where it states:

> Courts must examine the lawfulness of a search under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved. [Citation.] The existence of an ulterior motivation does not invalidate an officer's legal justification to conduct a search. [Citations.] *(People v. Carrington, supra*, 47 Cal. 4th 145, 168.)

The high court's subsequent decision in *Florida v. Jardines, supra,* __ U.S. __ 133 S. Ct. 1409, shows otherwise. In *Jardines*, the Supreme Court held that the government may not enter the curtilage of a home with police dogs trained to detect the scent of marijuana. (133 S.Ct. at pp. 1417-1418.) The court's analysis focused almost entirely on the officers' investigatory purposes in entering the home's curtilage. Indeed, *Jardines* aligns the Court with the Ninth Circuit on the need to consider the actual purpose of the intrusion in determining the reasonableness of a search: As Justice Scalia wrote for the majority:

> The State points to our decisions holding that the subjective intent of the officer is irrelevant. [Citations.] But those cases merely hold that a stop or search that is objectively reasonable is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason. Thus, the defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment. [Citation.] *Here, however, the question before the court is precisely whether the officer's conduct was an objectively reasonable search.* As we have described, that depends upon whether the officers had an implied license to enter the porch, *which in turn depends upon the purpose for which they entered.* (*Florida v. Jardines, supra*, 133 S. Ct. 1409, 1416-1417.)

Here, as in *Jardines*, the question before the court is *whether the officers' conduct was an objectively reasonable search.* Search warrants are licences to enter and search for specified purposes. (*United States v. Sedaghaty* (9th Cir 2013) 728 F.3d 885, 914.) And as Justice Scalia's majority opinion in *Jardines* succinctly stated, "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." (*Jardines, supra*, 133 S.Ct. at p.1416.)

Respondent does not discuss *Jardines*, or indicate how this Court can distinguish it here. Instead, respondent cites *United States v. Sedaghaty, supra*, 728 F.3d 885, 914, for having "correctly noted . . . that the subjective state of mind of the officers executing the warrant was not relevant to their analysis." (RB 132-133.) The context in which those words were written belies respondent's point. The court was explaining why the officer's belief that the warrant covered everything described in his affidavit could not save a search conducted for evidence other than that specified in the warrant. To quote:

> The supervising agent here may well have believed that the affidavit took precedence over the warrant, but the subjective state of mind of the officer executing the warrant is not material to our initial inquiry. *United States v. Ewain*, 88 F.3d 689, 694 (9th Cir. 1996) ("A policeman's pure heart does not entitle him to exceed the scope of a search warrant . . . ."). Any other conclusion would elevate the author of the incorporated probable cause affidavit over the judge issuing the warrant. [Citation.] (*United States v. Sedaghaty, supra*, 728 F.3d 885, 914.)

In *Sedaghaty*, officers executing a search warrant for specified evidence of tax evasion sought and seized evidence of the defendant's support for Chechen mujahideen. The court explained its condemnation of that search in words that are instructive here:

> The Supreme Court has emphasized that "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers" as opposed to physical objects, and that given the danger of coming across papers that are not authorized to be seized, "responsible officials, including judicial officials, must take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy." [Citation.] The search warrant here was properly issued and clearly stated the locations to be searched and the items that could be seized. The government agents responsible did not minimize

> intrusions on privacy, however, but instead seized papers and records beyond those the warrant authorized. See *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (concluding that although the warrant was sufficiently particular, the executing "agents did not confine their search in good faith to the objects of the warrant, and that while purporting to execute it, they substantially exceeded any reasonable interpretation of its provisions"). Unlike cases where the magistrate judge erred in filling out the warrant but the government reasonably relied on the judge's approval, here the magistrate judge properly authorized the warrant but the agents did not follow it. [Citations.](*United States v. Sedaghaty, supra*, 728 F.3d 885, 913-914.)

In 2015, the Ninth Circuit reaffirmed *Rettig* and *Segdaghaty* and described their principles as "well known" in *United States v. Johnston* (9th Cir. 2015) 789 F.3d 934, 941 (*Johnson*). It explained:

> The principles relating to execution of search warrants are well known. To pass constitutional muster, the "search must be one directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed." *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978). When the defendant challenges the manner in which a search was conducted, we examine the language of the search warrant and ask whether "a reasonable officer [would] have interpreted the warrant

to permit the search at issue." *United States v. Gorman*, 104 F.3d 272, 274 (9th Cir. 1996). Thus, a search authorized by a valid warrant may nonetheless be unreasonable if the officers conducting the search exceed the scope of the warrant and, for example, begin looking for files that are not related to the subject of the search warrant. [Citation.] (*United States v. Johnston, supra,* 789 F.3d 934, 941.)

3. No Reasonably Well-trained Officer Would Have Interpreted the Marin Warrants to Authorize the Searches and Seizures at Issue

In the language of *Johnston,* appellant submits that no reasonably well-trained officer would have interpreted the Marin warrants to permit the searches at issue here. As previously noted, the Marin warrants authorized Nash and his team to search and seize evidence of two Marin County murders. His first warrant – the most heavily exploited – included only the following clauses authorizing any search and seizure of documents:

> 4. Receipts and documents related to *9mm handguns and ammunition;*
>
> * * *
>
> 7. Indicia of ownership, including but not limited

to leasing documents, Department of Motor Vehicles documents *indicating ownership of the vehicle*, letters, credit card gas receipts, keys and warranties.

8. Indicia of occupancy or ownership; articles of personal property *tending to establish the identity of persons in control of said premises*, storage areas or containers where the above items are found consisting of rent receipts, cancelled checks, telephone records, utility company records, charge card receipts, cancelled mail, keys and warranties." (9SCT 1847-1848, emphasis added)

The warrant makes no mention of other documents, nor of any need to establish the identity of the individuals who had purchased, owned or controlled *anything other than the specified weapon, the specified house, and the specified motor vehicles*.

Notably, the specified documents are, by nature, stand-alone evidence of long term occupancy and control of the home, ownership of the vehicles, and ownership of the gun used in Woodacre.

No reasonably well-trained officer would assume, as Nash did, that police are free to search for all manner of indicia of occupancy under a warrant containing such specific language. Under long-

established federal constitutional law, a warrant's catch-all phrase is limited in meaning by the words surrounding it. (*Andresen v. Maryland* (1976) 427 U.S. 463, 480-482.) This rule accords with the "commonsense canon of noscitur a sociis . . . which counsels that a word is given more precise content by the neighboring words with which it is associated" (*United States v. Williams* (2008) 553 U.S. 285, 294) and with the commonly-cited canon of ejusdem generis. (*United States v. Pindell* (D.C. Cir. 2003) 336 F.3d 1049, 1053 [canon of ejusdem generis applicable to warrants].) The latter canon "'applies whether specific words follow general words in a statute or vice versa. In either event, the general term or category is "restricted to those things that are similar to those which are enumerated specifically."' [Citation.]" (*People v. Arias* (2008) 45 Cal. 4th 169, 180-181.)

Respondent relies on *People v. Balint* (2006) 138 Cal.App.4th 200, 207, for the proposition that "boilerplate" descriptions of items to be seized as indicia of occupancy may be reasonably interpreted to allow seizure of "different forms of evidence . . . reasonably expected to show dominion and control of the residence." (RB 126.)

Respondent neglects to note that the descriptions of items in the *Balint* warrant were preceded by the word "including" rather than "consisting of."[2] The difference in the wording of the warrants is important. As explained in *Balint*:

> Here, the warrant authorized seizure of "*any* items tending to show dominion and control, including [list of items]." (Italics added.) This language authorizes seizure of unenumerated items "tending to show dominion and control" of the premises. In other words, *the itemized list following the word "including" may reasonably be interpreted as nonexclusive* and merely descriptive of examples of items likely to show who occupied the residence. (Cf. *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101 [17 Cal. Rptr. 2d 594, 847 P.2d 560] [*the word "including" in a statute is "ordinarily a term of enlargement rather than limitation"*].) (*People v. Balint, supra,* 138 Cal. App. 4th 200, 2017.)

Unlike the police in *Balint*, Detective Nash sought and

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8. Indicia of occupancy or ownership; articles of personal property *tending to establish the identity of persons in control of said premises*, storage areas or containers where the above items are found consisting of rent receipts, cancelled checks, telephone records, utility company records, charge card receipts, cancelled mail, keys and warranties." (9SCT 1847-1848, emphasis added)

purported to act under warrants using the term "consisting of" rather than "including" to introduce a list of items obviously capable of showing ownership or dominion of the home.

Also, unlike the seizure and search of the laptop computer challenged in *Balint*, the searches and seizures at issue here targeted "as indicia" retail receipts, all manner of personal writings and other items not capable of establishing dominion of the home.

Much more on point here is the recent decision of the Colorado Supreme Court in *People v. Herrera* (Col. 2015) 2015 CO 60, P17-P32; 357 P.3d 1227; 2015 Colo. LEXIS 1011.) The warrant in that case authorized a search of the defendant's cellphone for text messages between him and "Stazi" as well as for "indicia of ownership." The state contended that the warrant thus permitted a search of the text messages contained in the "Faith Fallout" folder because any message found there would reveal defendant as the owner of the phone. The court wrote:

> We believe this argument proves too much, as it would authorize a general search of the entire contents of the phone. Indeed, the People argue that any piece of data on

> the phone, including any text message on the phone, would have the possibility of revealing Herrera's ownership of the phone. This rationale transforms the warrant into a general warrant that fails to comply with the Fourth Amendment's particularity requirement.
>
> The Warrant Clause of the Fourth Amendment requires that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The particularity requirement is designed to "prevent officers from conducting a 'general, exploratory rummaging in a person's belongings.'" Roccaforte, 919 P.2d at 802 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). As the U.S. Supreme Court recently observed, "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California* [2014] [573] U.S. , 134 S. Ct. 2473, 2494, 189 L. Ed. 2d 430 (2014). In this case, the People's rationale would permit officers to "rummage through" the entirety of an individual's private information contained in his phone, without limitation. (*People v. Herrera* (Col. 2015) 2015 CO 60, P17-P32; 357 P.3d 1227; 2015 Colo. LEXIS 1011.)

The Colorado Supreme Court also noted that it "has sustained some fairly broad searches against particularity challenges" but had to "reject the People's argument that the search of the "Faith Fallout"

folder was authorized by the warrant because such an argument is inconsistent with the particularity requirement."[3] (*People v. Herrera, supra*, 2015 CO 60, P17-P32.

The Indiana Court of Appeal reached a similar conclusion in its 2016 decision in *Ogburn v. State* (Ind. Ct. App. 2016) 53 N.E.3d 464, 473-474. The State claimed that a "key fob could be considered an `[i]ndicia of occupancy, residency or ownership' because `[f]inding which vehicle the key fob opened would lead to evidence of which person or persons occupied [the residence].'" The Court of Appeal had before it a search warrant that "specifically lists `[i]ndicia of occupancy, residency or ownership' as an example of evidence pertaining to the crime of dealing and/or possession of controlled substances because such items "tend to establish ownership and

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[3] A footnote at this juncture states:

> On the same grounds, we reject the People's contention that the search was performed in good faith reliance upon the warrant and that therefore the good faith exception to the warrant requirement applies. See *United States v. Leon*, 468 U.S. 897, 923, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (good faith exception does not apply where warrant "fail[s] to particularize the place to be searched or the things to be seized").

control of the premises." Additionally, the warrant defined "[i]ndicia of occupancy, residency or ownership' as items such as `labels, identification cards, letters, or photographs' or `utility bills and/or rent receipts.'" The court concluded:

> These examples properly limit the scope of "[i]ndicia of occupancy, residency or ownership" to items bearing a person's name or likeness. See id. Without this limitation, the officers could have seized virtually any item in the residence—because an examination of most, if not all, personal possessions would lead to evidence of who occupies a particular place. Because the key fob was not of the same character as "labels, identification cards, letters, or photographs" or "utility bills and/or rent receipts," the officers exceeded the scope of the warrant by seizing it. (*Ogburn v. State* (Ind. Ct. App. 2016) 53 N.E.3d 464, 473-474.)

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4. Respondent errs in denying that there is "objective evidence" that Nash ignored the terms of the Marin warrants he executed

Onward, respondent summarily declares that "[t]here is no *objective* evidence in the record to indicate that Detective Nash ignored the terms of his warrants . . ." (RB 134, emphasis added.) It is not clear what respondent means by "objective evidence." Nash's testimony that all manner of retail receipts constitute indicia of occupancy under the Marin warrants because video of the purchaser is available from retail stores if officers can get to them before they are recorded over appears to be objective, if indirect, evidence that he was inattentive to the terms of his warrants. The testimony that the retail receipts they sought were immediately copied so that their details could be given to officers in the field should also suffice. (2RT 567-568.) Likewise, Nash's testimony that he supervised the search, but was not "familiar with" the Contra Costa County warrant, and did not obtain or create a list of the items he was authorized to search for under it constitutes "objective evidence" that he lacked appreciation for the importance of warrants. The fact that he did not read or

familiarize himself with the Contra Costa warrant is also objective evidence of flagrant disregard for the warrant process, since it was the only warrant authorizing a search for evidence of crimes against the Stinemans. (2RT 592.) Additionally, the nature and numerosity of the papers, personal effects and other items that Nash's team seized is objective evidence that the team disregarded their warrants.

Respondent also claims that there is "no objective evidence" to indicate that Nash "defined terms in the warrant more broadly than constitutionally permitted." (RB 134.) On the contrary, it is objectively evident that Nash and his team operated as if the constitutionally required limiting language from his warrants' definition of indicia of occupancy had been obliterated. (*People v. Herrera, supra,* 2015 CO 60, P17-P32; 357 P.3d 1227; 2015 Colo. LEXIS 1011; *Ogburn v. State, supra,* 53 N.E.3d 464, 473-474..)

Finally, respondent claims that there is "no objective evidence in the record that . . . Nash seized items either outside the scope of the warrants or without probable cause to do so." (RB 134.) The State has long conceded that Nash's team seized many items that were not even arguably described in a warrant. (3SCT 657-662, 2RT 604-

607.) The State contended, and still contends at length, that because the Marin warrants allowed a search for the most minute things, all items were necessarily in plain view when they were seized. (RB 117-123, 133.) But as appellant has shown, the law is not what respondent claims it to be. When the police were looking for things not described in the warrant, they were exceeding the license of the warrant. "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." (*Jardines, supra*, 133 S.Ct at p. 1416.)

5. The conduct of the Marin County detectives was indeed a "general search" of the type the Fourth Amendment was designed to preclude.

Respondent makes several loosely-related arguments under a heading denying that the Marin detectives conducted a prohibited "general search" warranting blanket suppression of all of the evidence. Appellant will attempt to unpack each contention in the order in which they appear.

Although respondent's brief correctly recounts appellant's

claim here, (RB 134-135) it incorrectly posits that appellant's attack on the way the Marin search warrants were executed "attempts to analogize his case to ones involving impermissible general warrants." (RB 135.) No analogy is articulated by respondent or apparent in any of the federal circuit court decisions on which appellant relies. Rather than analogize, appellant and the circuit decisions he cites recognize that respect for the Fourth Amendment's particularity requirement was expected to preclude general searches inside the home, i.e., searches of "every nook and cranny" for all manner of evidence useful in convicting the home's occupant of one or more crimes. As explained by the Tenth Circuit:

> To protect against invasive and arbitrary general searches, the Fourth Amendment mandates that search warrants "particularly describe the place to be searched and the persons or things to be seized." U.S. Const. amend. IV. As the Supreme Court stated in *Marron v. United States*, 275 U.S. 192, 196, 72 L. Ed. 231, 48 S. Ct. 74 (1927),the requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion

of the officer executing the warrant. [4](*United States v. Foster* (10th Cir. 1996) 100 F.3d 846, 849-850.)

Like the present case, the circuit court decisions supporting appellant's claim involved properly narrowed warrants that officers executed in the manner of a "general warrant" in the opinion of the reviewing courts. First, in the seminal decision Justice (then Judge) Anthony Kennedy wrote for the Ninth Circuit in *United States v. Rettig, supra,* 589 F.2d 418, 422-423, the court noted:

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4 A footnote at this juncture adds:

> In *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971), the Supreme Court noted that the Fourth Amendment's particularity requirement served to insure "that those searches deemed necessary [by a magistrate] should be as limited as possible." According to the Court, "the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belonging's. The warrant accomplishes this [] objective by requiring a 'particular description' of the things to be seized." Id. (citations omitted).

> The search warrant issued by the state judge here was not a general warrant on its face. The things to be discovered were described with sufficient particularity. [Citations.] The question is whether or not the search that was conducted was confined to the authorization given by the magistrate. In determining whether or not a search is confined to its lawful scope, it is proper to consider both the purpose disclosed in the application for a warrant's issuance and the manner of its execution." (*Ibid.*)

In *United States v. Medlin* (10th Cir 1988) 842 F.2d 1194, 1198-1199, the Tenth Circuit added: "When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant."

In *United States v. Foster* (10th Cir. 1996) 100 F.3d 846, 850-852, the court found that officers flagrantly disregarded the terms of warrant where officers followed their "standard procedure" for search warrant execution in gathering data from, and seizing, a much broader array of items than those identified in the warrant in order to determine if the occupants were guilty of additional crimes. The Tenth Circuit explained:

> The basis for blanket suppression when a search warrant is executed with flagrant disregard for its terms "is found in our traditional repugnance to 'general searches' which were conducted in the colonies pursuant to writs of assistance." [5]

The Tenth Circuit concluded that "`. . . when law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant.' 842 F.2d at 1199 (emphasis added)." (*United States v. Foster, supra,* 100 F.3d 846, 849-850.)

Moreover, the Supreme Court recently analogized searches conducted with no warrant with the "reviled 'general warrants' and

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[5] At this juncture a footnote adds:

> In *Marron v. United States*, 275 U.S. 192, 195, 72 L. Ed. 231, 48 S. Ct. 74 (1927), the Supreme Court, quoting James Otis, stated that general searches pursuant to writs of assistance were "'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' since they placed 'the liberty of every man in the hands of every petty officer.'"

'writs of assistance'" against which the Fourth Amendment was aimed in a case involving search of a cell phone. (*Riley v. California* (2014) 134 S. Ct. 2473, 2494-9524, 189 L. Ed. 2d 430.)

Onward, respondent next claims that "Marin County officers confined themselves to the locations permitted by the two search warrants, and seized only those items that were either specifically listed in the warrants or those in plain view for which they had probable cause to seize." (RB 135.) But even those minimal facts were never proved. The prosecutor below said it was not "practical" to justify seizure of every item listed on the return to the warrants (1RT 295) and agreed to show probable cause only as to items the defense could list. The prosecutor made no attempt to establish that Nash's team searched only for the items and purposes described in their warrants.

Respondent claims the prosecutor's reticence was proper because Penal Code section 1538.5, subdivision (a)(2) requires that the motion to suppress identify the objects to be suppressed. This argument ignores the fact that the motion specified "those items seized" from appellant's home during the service of the enumerated

warrants the returns to which were attached as exhibits. (8CT 3001.) Respondent cites no authority for the proposition that such references are not sufficient to put the State to its proof.

Next, the State belatedly attempts to address the search of the day planner, for which the prosecutor offered not even an abbreviated opinion on justification, despite inclusion of the day planner on the "list of contested items" the trial court agreed to consider after refusing to demand justification for everything seized in appellant's home. Respondent begins by questioning appellant's "standing" to object to that search because the day planner belonged to codefendant Dawn Godman. The standing of all defendants to object to all the searches within their shared home was stipulated by the prosecutor prior to the hearings on the motion. (1RT 252.)

Onward, the State claims that the day planner "was likely to contain identifying information (as most do) which itself would be indicia of occupancy of the Saddlewood residence" and, therefore, the search "was authorized by the first warrant's `indicia of owner or occupant' clause for the residence" and that additional "search and seizure of the dayplanner and its contents following the second

warrant (see 9SCT 1914) was also authorized under the same clause of that warrant." (RB 125, fn. 76.)

But, as previously shown, that "indicia of owner or occupant clause" did not specify, nor encompass, all manner of "identifying information" but only that of the sort described in the warrant. Also, there is no evidence that the detective who opened that folder did so in search of the documents described in the warrant, rather than the more general category of "identifying information" and investigative leads, e.g., retail receipts, that Nash seized under the "indicia" clause of his warrant.

The State further argues that "once inside the day planner, officers could look through the contents. [Citations.]" Also, "a walk-through of the Saddlewood residence would have provided probable cause to seize the day planner and its contents." (RB 142.) Seizing an item may be justified on probable cause, but any opening or movement in order to examine the contents requires a warrant. (*Arizona v. Hicks* (1987) 480 U.S. 321, 324-325.)

Additionally, respondent claims that "the mere volume of items seized" does not demonstrate "flagrant disregard for the terms of the

warrant" under this Court's decision in *People v. Kraft* (2000) 23 Cal.4th 978, 1049-1050. In *Kraft*, this Court rejected the defendant's claim because he relied solely on the volume or array of items seized, and because the plain view doctrine permitted such seizures "provided the officers are lawfully located in the place from which they view the items and the incriminating character of the items as contraband or evidence of a crime is immediately apparent." *(Id.*, at p. 1041, 1049-1050.)

Unlike Mr. Kraft, appellant does not rely solely on the volume of items seized. Moreover, the aspect of the *Kraft* decision on which respondent relies was undermined by the decision of the high court in *Jardines, supra*. As noted previously, *Jardines* makes clear that the officers' *purpose* in searching the place in which the incriminating items were discovered is critical. Where, as here, there is evidence that the officers were searching for items not described in the warrant when the evidence came into view, they were not lawfully in a position to view that item, and the plain view doctrine does not apply.

Finally, respondent concludes that the Marin officers did not flagrantly disregard the terms of their warrants insofar as the evidence

shows that Nash prepared the warrant applications, "clearly knew and understood the terms of the warrants," briefed his officers prior to searching, and held daily briefings with the Concord Police Department. (RB 143.)

In light of Nash's testimony that he had his team pursuing retail receipts and all types of personal documents as "indicia" under his Marin warrants, it does not help the State to observe that Nash likely knew the full text of the Marin warrants. The critical question is whether his objective behavior, as revealed by his testimony and the nature and numerosity of items seized, was that of a reasonable officer in relation to clearly established federal law on the construction of warrants. Disregard for the stated objects of a search warrant may be "standard procedure" and nevertheless require suppression of all evidence. (*United States v. Foster, supra*, 100 F.3d 846, 850-852 [flagrant disregard of terms of warrant established where officers followed their "standard procedure" for search warrant execution in gathering data from, and seizing, a much broader array of items than those identified in the warrant in order to determine if occupants were guilty of additional crimes]; *United States v. Rettig,*

supra, 589 F.2d 418, 422 [scope of search held to exceed terms of warrant when conducted for a purpose not disclosed to the magistrate].)

To the extent respondent suggests Nash's failure to seek magistrate approval before expanding the focus of the search to include financial crimes and extortion as well as the murder of three additional people (and mutilation of their bodies) was reasonable in light of the Contra Costa County warrant or the discussions Nash had with Concord Police, that suggestion fails. Nash never read the warrant or obtained a list of its objects. An officer who conducts a search of a home without knowledge of the details of the warrant under which he presumes to act violates clearly established law. (*Guerra v. Sutton* (9th Cir. 1986) 783 F.2d 1371, 1375 ["Officers conducting a search should read the warrant or otherwise become fully familiar with its contents, and should carefully review the list of items which may be seized. [Citations.]" as quoted in *Marks v. Clarke* (9th Cir. 1997) 102 F.3d 1012, 1029-1030, emphasis in *Marks*.) "In order for a warrant's limitations to be effective, those conducting the search must have read or been adequately apprised of its terms."

(*United States v. Heldt* (D.C. Cir. 1981) 668 F.2d 1238, 1261.)

Finally, respondent does not contend that it is possible to identify discrete items of evidence that should not be suppressed. Thus, even if the Marin officer's disregard of the terms of their warrants was not flagrant, suppression of all the fruits of the searches inside appellant's home is appropriate for the simple reason stated in *Rettig*: it is not possible for the court "to identify after the fact the discrete items of evidence which would have been discovered had the [officers] kept their search within the bounds permitted by the warrant." (*United States v. Rettig, supra*, 589 F.2d 418, 423, emphasis added.) Moreover, appellant must be permitted to withdraw his plea and proceed to trial on the remaining evidence. *(People v. Rios* (1976) 16 Cal. 3d 351 [guilty plea entered after erroneous denial of motion to suppress under Pen. Code, § 1538.5 not subject to harmless error analysis].)

D. The Inevitable Discovery Doctrine Does Not Aid the State here

Respondent concludes with a claim that any evidence illegally discovered during searches by Nash's team would have inevitably been discovered by Contra Costa County authorities pursuant to their own search warrant. Ergo, the exclusionary rule should not be applied to any of the evidence appellant sought to express. (*Nix v. Williams* (1984) 467 U.S. 431, 444; *People v. Boyer* (1989) 48 Cal. 3d 247, 277-279 & fn. 18.)

To invoke an inevitable discovery exception to the Fourth Amendment exclusionary rule, the state must prove by a preponderance of the evidence that, even without their agent's unlawful activity, the evidence it seeks to admit would have been discovered anyway. (*Nix v. Williams, supra,* 467 U.S. 431, 444, fn.5.) Further, "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings." (*Ibid., United States v.*

Holmes (D.C. Cir. 2007) 505 F.3d 1288, 1393.)

Respondent points to nothing in the record that could show that all of the evidence discovered by reason of the Marin officers' search of appellant's home would inevitably have been discovered by Contra Costa authorities under the warrant they obtained. That Contra Costa warrant, as respondent recalls, "authorized seizure of property that had been stolen from the Stinemans" – and some well-described clothing, identification and account information for Morgan Stanley Dean Witter accounts, and documents showing other specified facts. But it had no general indicia of occupancy clause like that conjured by Nash's team. No one testified that the Contra Costa County officers' protocol for executing their warrant would have led them to all the information and evidence Nash obtained. Indeed, no one testified about how Contra Costa officials would have proceeded without Nash's illegal search. And there was no evidence "'showing that routine procedures that police would have used regardless of the illegal search would have resulted in the discovery of the disputed evidence.'[Citation.]"(*United States v. Doxey* (6th Cir. 2016) 833 F.3d 692, 706, fn. 2.)

That dearth of evidence is fatal. "Would" - not "could" or "might" - is the word the Supreme Court used to define the limits of the inevitable discovery doctrine in *Nix v. Williams*. (*Nix v. Williams*, *supra,* 467 U.S. 431, 442-444.) "Would is, therefore, the 'constitutional standard.'" (*Gore v. United States* (D.C. 2016) 145 A.3d 540, 548, citing Wayne R. LaFave, Search and Seizure § 11.4 (a), at 359-61 (5th ed. 2012).) In determining whether discovery was inevitable, the trial court "must focus exclusively on `demonstrated historical facts capable of ready verification or impeachment.'" *(Gore v. United States, supra*, 2016 D.C. App. LEXIS 313, 18-22, quoting *Nix v. Williams, supra*, 467 U.S. 431, 444.)

Accordingly, the Second Circuit recently emphasized that :

> The government bears the burden of proving inevitable discovery by a preponderance of the evidence. [Citations.] We have made clear, however, that "proof of inevitable discovery 'involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment,'" [Citations.] The focus on demonstrated historical facts keeps speculation to a minimum, by requiring the `district court to determine, viewing affairs as they existed at the instant before the unlawful search occurred, what would have happened had the unlawful search never occurred." [Citation.] *Evidence should not be admitted, therefore,*

> *unless a court "can find, with a high level of confidence, that each of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor.'* [Citations.] *(United States v. Stokes* (2d Cir. 2013) 733 F.3d 438, 443-444.)

In *Stokes*, the Second Circuit rejected application of the inevitable discovery doctrine where the government claimed discovery would have occurred by subpoena in any event. The appellate court "once again note[d] the difference between `proving by a preponderance that something would have happened and proving by a preponderance that something would *inevitably* have happened,'" id., and "reiterate[d] that appellate courts review de novo the district court's application of the inevitable discovery doctrine. [Citations.]" (*United States v. Stokes, supra,* 733 F.3d 438, 443-444.)

The showing needed to invoke the inevitable discovery exception is an evidentiary showing, not a mere argument from the State. (*United States v. Holmes, supra*, 505 F.3d 1288, 1293-1294 [government's inevitable discovery argument citing lack of evidence "only serves to expose the weakness of its evidentiary position."].) And the showing must be appropriately specific, because the trial

court must "for each particular piece of evidence, specifically analyze and explain how, if at all, discovery of that piece of evidence `would have been" more likely than not inevitable" absent the [illegal] search . . .'." (*United States v. Eng* (2nd Cir 1992) 971 F.2d 854, 861-862.)

Here, appellant's trial court summarily declared that all of the seized evidence would have been inevitably discovered under "warrant six" when no "warrant six" was before the court. (3RT 718-719.) Defense counsel had argued that the police "should have gotten another warrant" in response to the court's first mention of inevitable discovery in relation to the emergence of human remains in the delta (2RT 502-503) but there was no evidence that police were in the process of getting one or even that they knew of the law requiring such action. That officers would have acquired probable cause independent of Nash's activities and could have applied for another warrant does not excuse their failure to seek a warrant when required. (*People v. Robles* (2000) 23 Cal.4th 789, 801.) "An officer always can apply for a warrant. His failure to do so when he should is a reason to apply the exclusionary rule, not a reason to withhold its application." (*Gore v. United States*, supra, 145 A.3d 540, 549, fn.

32.)

As observed most recently in *Gore, supra,* " 'the argument that "if we hadn't done it wrong, we would have done it right" is far from compelling.' LaFave § 11.4(a), at 347 (quoting *State v. Topanotes*, 2003 UT 30, 76 P.3d 1159, 1164 (Utah 2003) (quoting *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992).)'" (*Gore v. United States*, supra, 145 A.3d 540, 549, fn. 32.) Accordingly, numerous federal circuit decisions reject the inevitable discovery exception when officers had probable cause to apply for a warrant but failed to do so. (*United States v. Lundin* (9th Cir. 2016) 817 F.3d 1151, 1161-1162; *United States v. Camou* (9th Cir. 2014) 773 F.3d 932, 943-944; *United States v. Mejia* (9th Cir. 1995) 69 F.3d 309, 320; *United States v. Echegoyen* (9th Cir. 1986) 799 F.2d 1271, 1280 n.7.) As most recently stated:

> We do not apply the inevitable discovery doctrine to warrantless searches where probable cause existed and a warrant could therefore have been obtained because "[i]f evidence were admitted notwithstanding the officers' unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be any reason for officers to seek a warrant." *Mejia,* 69 F.3d at

> 320. Thus, "to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment." *United States v. Young*, 573 F.3d 711, 723 (9th Cir. 2009) (citation omitted). Put differently, allowing the government to claim admissibility under the inevitable discovery doctrine when officers have probable cause to obtain a warrant but fail to do so would encourage officers never to bother to obtain a warrant. *(United States v. Lundin*, supra, 817 F.3d 1151, 1161-1162.)

Here, there was no exigency preventing Nash or Contra Costa authorities from applying for a warrant encompassing what police intended to seek and seize when the mutilated remains of the Stinemans emerged with those of Selina Bishop in the Sacramento River. As argued by defense counsel below, and never disputed, one of the agencies "should have gotten another warrant." (2RT 503.) Their failure to do so was unexplained and inexplicable. Appellant's motion to suppress should have been granted.

II. THE COURT'S REMOVAL OF A VENIRE MEMBER MODERATELY OPPOSED TO THE DEATH PENALTY WHOSE ABILITY TO FOLLOW THE OATH AND INSTRUCTIONS WAS NOT IMPAIRED VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND AN IMPARTIAL JURY

Summary of Arguments

Appellant posited that the State's right to exclude death penalty opponents from capital jury service is strictly limited by United States Supreme Court decisions. Those decisions do not allow the State to remove all venire members who are unlikely to impose death, would impose death in no more than one percent of eligible cases, or those who are, in the trial court's words "not very likely" to impose death, unless they cannot or will not *follow the law as stated in the jury instructions* and oath.

Respondent disagrees obliquely, claiming that the trial court properly excused Juror Jeanne Wolf (JW) for cause "because there was substantial evidence in the record that she could not put aside her moral beliefs and vote to impose the death penalty in an appropriate case." (RB 149.) Respondent's argument incorrectly assumes that putting aside one's moral beliefs in making a penalty determination is

required of life-leaning jurors. This assumption cannot be squared with the California law on which juries are instructed. As the prosecutor made clear on voir dire, the law on which JW would be instructed would invite use of her own moral beliefs in determining penalty.[6]

The high court has held that willingness and ability to temporarily put aside a belief that the death penalty is unjust will allow a juror who holds that belief to serve on a capital jury. But it

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The prosecutor explained that our state law "never tells you you have to impose the death penalty. . . The test the judge is going to give at the conclusion of this case is, you can impose the death penalty if, and only if, the evidence in aggravation is so substantial in comparison to the evidence in mitigation that it warrants the death penalty, okay. . . .¶ You're not going to get an instruction from the Court defining aggravation, except something that – something along the line of increasing the enormity. ¶ You're going to get a definition of mitigation. You're surely not going to get a definition of what is warranted. All of those things are up to you. ¶ And you're not going to get an indication from the court that you must abandon your beliefs, okay. . . . . ¶ In fact, there's an instruction that says, `Jurors may consider the moral or sympathetic value of the evidence in making a determination ... in this kind of a trial,' ... ¶So you bring your emotions in here with you. You bring your moral compassion in here with you, and that you use. ¶ the Court tells us you can use your moral compass for purposes of making a decision in that context . . . (12RT 2966-2967.)

has not held that all death-scrupled prospective jurors are unqualified if they are not ready to set aside their beliefs in determining penalty. Respondent's assumption that life-leaning jurors as well as death penalty opponents must be able to put aside their personal moral views to serve on capital juries in California appears to be rooted in the logical "fallacy of the inverse (otherwise known as denying the antecedent): the incorrect assumption that if P implies Q, then not-P implies not-Q." (*NLRB v. Canning* (2014) ___U.S.___ [134 S.Ct. 2550, 2603] Scalia, J., concur.)

Also, respondent's argument does not fit our facts. The trial court said nothing about JW's ability to put aside her moral beliefs or her ability to impose death if she thought it appropriate. The trial court, like the prosecutor, focused on the likelihood that JW would impose death, a likelihood that JW estimated at one percent and the trial court referred to as "not very likely."

As to the deference due to the trial court's findings, the parties are largely in agreement. Respondent does not ask that this Court defer to the trial court's recollection of JW's testimony or deny that the trial court must have misunderstood or mis-recalled JW's

testimony in stating that JW would *consider* death in only one percent of cases. The record shows that what JW actually said was that she thought she would vote to impose it one percent of cases, and vote against death "99 times out of 100." (12RT 2968.) Respondent nevertheless claims there was other evidence that JW could not consider imposing death. But as shown in the body of this argument, these claims are not supported by the record.

As in other cases in which this Court has reversed penalty judgments for *Witt*[7] error, the record before this Court shows that the trial judge did not and could not determine that the juror excused for cause was unable to follow her oath and instructions, despite having engaged in significant voir dire. (See, *People v. Pearson, supra,* 53 Cal.4th 306, 330-333 [removal decision based on finding that venire members views were vague, largely unformed and equivocal]; *People v. Heard* (2003) 31 Cal.4th 946, 967 [removal based on finding that

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Wainright v. Witt (1985) 469 U.S. 412 defined the State's power to exclude jurors opposed to the death penalty to allow exclusion only of those whose views would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath.

panelist would consider mental health issues mitigating and was "clear in [her] declarations that [she] would attempt to fulfill his responsibilities as a juror in accordance with the court's instructions and [her] oath."].)

A. The record respecting JW's readiness to follow capital jury instructions

Respondent offers numerous characterizations of the record coupled with assumptions about the State's power. Appellant will attempt to give each one a brief but clarifying reply.

First, respondent notes that JW "indicated that if the judge's instructions on the law to be applied differed from her beliefs, she would have difficulty applying the law. (lOJQCT 3674.)" (RB 156.) Indeed, JW checked "yes" where asked if she would have any difficulty in applying the law as given by the judge if the judge's instructions differed from her personal views. (10JQCT 3674.) But when the trial court asked JW how she felt about having checked "yes" in her answer to that question, JW said she still thought it would be difficult, but she believed in the system and would have to

follow the law as the court instructed. She denied that she had in mind anything in particular when she marked the "yes" box. (12RT 2948.)

Respondent has not identified any aspect of the capital jury instructions that were given in this case that arguably differed from JW's personal views, and none was apparent after the prosecutor explained the law on which she would be instructed. On the contrary, the dialogue with the prosecutor made clear that California's penalty jury instructions accommodate the views of life-leaning jurors. Accordingly, the trial court did not cite any perceived difficulty JW could have in relation to the jury instructions, and explicitly based its ruling solely on the poor likelihood that JW would impose death.

B. Readiness to Follow the Penalty Jury Instructions As Disclosed to the Excused Juror is Decisive

In a capital case, removal for cause based on a person's views about the death penalty is warranted only where it can be determined that "the juror's views would 'prevent or substantially impair the

performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt, supra,* 469 U.S. at p. 424 (quoting, *Adams v. Texas* (1980) 448 U.S. 38, 45. Cf. *Witherspoon v. Illinois* (1968) 391 U.S. at 522 [opposition to the death penalty is not enough, by itself, to support removal for cause].)

The oath taken by California jurors in death penalty cases promises only that they will "well and truly try the cause now pending before this Court, and a true verdict render according only to the evidence presented to you and to the instructions of the court." (Cal. Civ. Proc. § 232, subd. (b).)

Just as the California oath places singular importance on following the instructions given by the court, the high court places singular importance on how the prospective juror responds to disclosure of those instructions on voir dire. This importance is easily seen in *Uttecht v. Brown* (2007) 551 U.S. 1. Defendant Brown was sentenced to death in Washington state. The Washington scheme, as explained to the venire by the juror questionnaire, did not allow penalty jurors to choose life for a capital offense on any basis other than the presence of mitigating factors warranting leniency.

(*Id.*, at pp. 12-13.) The Court noted the following instructions given during jury voir dire that made clear the strictures of the penalty determination in Washington:

> "In making this determination you would be asked the following question: Having in mind the crime with which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency? If you unanimously answered yes to this question, the sentence would be death . . . . [Otherwise] the sentence would be life imprisonment without the possibility of release or parole." Id., at. 1089-1090. (*Uttecht v. Brown*, supra, 551 U.S. at pp. 12-13.)

As the high court observed, the juror whose removal was at issue in *Uttecht v. Brown* ("Juror Z") was "impaired not by his general outlook on the death penalty, but rather by his position regarding the specific circumstances in which the death penalty would be appropriate." The high court found that the "transcript of Juror Z's questioning reveals that, despite the preceding instructions and information, he had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment

that could have prevented him from returning a death sentence under the facts of this case." (*Uttecht v. Brown, supra*, 551 U.S. at p. 13.)

In light of the Washington death penalty scheme's demand for imposition of the death penalty in circumstances where Juror Z did not believe it would be proper, the high court hardly needed to give deference to either the trial or state reviewing courts in order to conclude that Juror Z was subject to challenge for cause. As the high court explained:

> Juror Z's answers, on their face, could have led the trial court to believe that Juror Z would be substantially impaired in his ability to impose the death penalty in the absence of the possibility that Brown would be released and would reoffend. (*Uttecht v. Brown, supra*, 551 U.S. 1, 17.)

Previously, in *Darden v. Wainright* (1986) 477 U.S. 168, 176-178, the high court briefly addressed a claim of error based on the removal of jurors who said only that they would be unable or unwilling to recommend a death penalty regardless of the evidence. The Florida Death Penalty law on which the case was tried compelled jurors to recommend death if aggravating factors outweighed

mitigating. The trial court so informed the prospective jurors by prefacing its examination of the venire by noting that "under certain circumstances if you find the aggravating circumstances are sufficient they are not outweighed by mitigating then it would be proper under the law your correct verdict would be to recommend the death penalty. (*Darden v. Wainwright* (M.D. Fla. 1981) 513 F. Supp. 947, 960.)

No similar statement of what local law deems proper was made to the venire in appellant's case. On the contrary, JW was truthfully told that the judge would give no instruction stating that death would be the proper punishment. Our jury instructions do not require that jurors impose death absent finding sufficient mitigation or upon any other finding of fact. Rather, they direct jurors to consider all of the aggravating evidence and determine whether it so outweighs the mitigation as to warrant death, and if so, decide if the penalty is appropriate under the law in the case before them. (*People v. Stewart* (2004) 33 Cal.4th 425, 447.)

The direction to consider whether aggravating evidence is sufficient to warrant death in relation to mitigating factors is not a

direction that life-leaning jurors would resist following. The fact that JW thought she would impose it one percent of the time or in one percent of cases shows readiness to engage in the weighing process. Although one percent is a small percentage, there is no right percentage enshrined in state or federal law. Nor is there a logical path to conclude that some violation of the oath or instructions would have to be afoot for a juror to impose the death penalty that rarely. "A direction to a person to consider whether there are `sufficient' reasons to do something does not logically imply that in some circumstance he must find something to be a `reason,' and must find that reason to be `sufficient.'" (*Morgan v. Illinois* (1992) 504 U.S. 719, 744, fn. 2 [Scalia, J., dissenting from decision authorizing removal of capital jurors who will always vote for death, calling the inference that such a juror will not follow Illinois law (which requires a death vote absent sufficient mitigating circumstances) "plainly fallacious."].)

The need to find a conflict between the jury instructions and the death-scrupled juror's belief system is also confirmed at least tacitly by the *Morgan* majority opinion, which declared it "clear" that

a "juror who in no case would vote for capital punishment, *regardless of his or her instructions*, is not an impartial juror and must be removed for cause." (*Morgan v. Illinois, supra*, 504 U.S. 719, 728.) The majority did not say the same with respect to a juror who would in no case vote for capital punishment regardless of the *evidence*. The question of whether jurors who would not vote for death regardless of the evidence should be disqualified in states where the instructions and oath do not call for a death sentence under any circumstances has yet to reach the high court as of the time of this writing. But as noted, the high court has repeatedly held that life-leaning jurors cannot be disqualified if they are able to faithfully follow the actual instructions given.

C. The lack of record supporting respondent's claim that JW morally opposed death sentencing in all cases

To the State's credit, respondent correctly observes that "[t]his was not a situation where the juror could listen to all the evidence, apply the law given, and begrudgingly vote to impose the death

penalty despite their personal views . . . . " (RB 160-161.) Because JW was informed during voir dire that the instructions would not compel or invite any begrudged votes to impose the death penalty, there is no reason to think she could render a death verdict begrudgingly.

Nevertheless, respondent claims that JW's multiple statements that she did not know if she would decide to impose death show that she "was deeply conflicted between her moral beliefs, which were opposed to the death penalty under any circumstances, and the law, which provided the death penalty as an option in an appropriate case." (RB 157.)

JW indeed wrote that she was "not sure" she believed in the death penalty, and believed it was imposed "too often." (10JQCT 3683.) But she checked the boxes indicating she would not always or automatically impose either death or life, and chose "moderately against" as the most accurate reflection of her opinion on the death penalty. (10JQCT 3684-3685.) In the space provided for anything not covered in the questionnaire, she wrote, "I think I lean toward being against the death penalty. I'm just not sure what I would

decide." (10JQCT 3686.) She wrote nothing and said nothing indicating she had an objection to the law providing the death penalty as an option in an appropriate case.

Onward, respondent conflates JW's statements with those of the prosecutor in claiming that JW "stated in response to several questions that she would find it difficult – near impossible – to apply the law allowing her to impose the death penalty in an appropriate case because it conflicted with her moral beliefs against the death penalty" (RB 160) and "expressed that it would be practically impossible for her to vote to impose the death penalty – regardless of the outcome of any weighing process – because the law so conflicted with her personal beliefs." (RB 161.) As respondent acknowledges elsewhere, JW did not give an affirmative response when the prosecutor asked, "would you agree that it would be very difficult, if not impossible for you, given your belief structure, to ever impose the death penalty." Instead JW said, "I would say 1 % chance ... that I would." (l2RT 2967-2968.) The affirmative answer she gave was in response to the prosecutor later asking, "So 99 times out of 100 you would not? Would that be based upon your moral or philosophical

beliefs about the death penalty[?]" (12RT 2968.) To that question, she responded, "Yes." (*Ibid.*)

Respondent cites the fact that JW said "no" when defense counsel asked if she could see herself imposing death in an appropriate case. (RB 161.) Respondent cites no authority for the proposition that a juror who says "no" to that question is unable to follow her oath and instructions. Since this exchange occurred after JW was made aware that the instructions on the law would not require her to impose death, it does not suggest any inability to follow the law or to apply it impartially. As stated by this Court more recently in *People v. Pearson*, *supra*, 53 Cal.4th 306, 332:

> To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from "conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 [36 Cal. Rptr. 2d 235, 885 P.2d 1]), the juror is not disqualified by his or her failure to enthusiastically support capital punishment. (*People v. Pearson*, *supra*, 53 Cal.4th 306, 332.)

Respondent argues that "JW's belief that in one of a hundred cases she may vote to impose death is hardly a resounding affirmation of her willingness to apply a law that was in conflict with her belief system" and "[t]he trial judge was clearly unpersuaded by [JW's] ``1%' response." (RB 162.) Respondent has not shown a conflict between our law and JW's belief system, nor that the trial judge disbelieved anything JW said. While credibility-based findings are accorded deference, the same cannot be said of the trial judge's understanding of the law. The law is settled by the high court, and it does not allow the State to remove all venire members who would impose death in no more than one percent of eligible cases, or those who are, in the trial court's words "not very likely" to impose death, unless they cannot or will not follow their oaths and instructions.

Additionally, respondent characterizes "the trial judge's finding about [JW's] state of mind" as one that JW's "beliefs against the death penalty made it not reasonably likely she would be able to vote for it." (RB 157-158.) But the trial court said nothing about JW being *able* to vote for it. Like the prosecutor, the trial court was focused not on JW's *ability* to return a death verdict if she deemed

one appropriate, but on the likelihood JW would deem death to be the appropriate sentence. Respondent posits a finding that was never made. Like JW, the trial judge said nothing about JW being *unable* to vote to impose death.[8]

The difference between the actual finding articulated by the trial court and the finding respondent wishes to defend is significant. As pointed out in appellant's opening brief, many California cases permit removal of death penalty opponents who state that they are *unable* to return a death verdict. (See AOB 330.) In *People v. Capistrano* (2014) 59 Cal. 4th 830, 859, a five-Justice majority of this Court flatly declared: "If a prospective juror states unequivocally that he or she would be *unable* to impose the death penalty regardless of the evidence, the prospective juror is, by definition, someone whose views `would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." '

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[8] When the trial court granted the challenge, it explained, "I do believe that Ms. Wolf has a bias against the death penalty such that I think she said in one percent she might have been thinking – considering it, but in all reasonable likelihood, not very likely. I will excuse Ms. Wolf for cause." (12RT 3005.)

(*Witt, supra*, 469 U.S. at p. 424.)" *(People v. Capistrano, supra,* 59 Cal. 4th 830, 859, emphasis added.)

Likewise, this Court has long permitted exclusion of jurors who show themselves to be afraid to return a death verdict even when they think it is the appropriate sentence. (See, e.g., *People v. Haley* (2004) 34 Cal. 4th 283, 306-307 [juror stated "that man shouldn't take a life]; *People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1147, fn 51 [juror said I don't think so" when asked if she could vote for death if she thought it was justified]; fn. 52 [juror said "moral views and sleeping at night" would impair her ability to return death verdict she believed to be appropriate]; *People v. Millwee* (1998) 18 Cal.4th 96, 146-147 [juror C said he thought imposing death sentence might haunt him, etc., juror L did not believe the state had the right to take life, juror G said he would not impose death because life imprisonment is worse punishment].)

JW made no such remarks, and the trial court did not express any similar findings. The trial court's explanation for excluding JW ("I do believe that Ms. Wolf has a bias against the death penalty such that I think she said in one percent she might have been thinking –

considering it, but in all reasonable likelihood, not very likely." – 12RT 3005) reports what the trial court thought was a strong bias against the death penalty. Respondent offers no case or other authority equating "bias against the death penalty" with unwillingness, inability, or even substantial impairment of ability, to follow the juror's oath or the trial court's instructions in California. And as noted in Appellant's Opening Brief, and nowhere discounted by respondent, this Court has distinguished bias against the death penalty from grounds for removal under *Witherspoon.* (*In re Tahl* (1970) 1 Cal.3d 122, 137.) And while *Witt* holds that a juror's bias "need not be proved with unmistakable clarity" it does not hold that bias against imposing a particular penalty, even when proved with perfect clarity, is grounds for exclusion in jurisdictions where penalty jurors are allowed to make value-based judgments.

Accordingly, this court's post-*Witt* decisions carefully point out that the removal of jurors who described themselves as "biased against the death penalty" — or were so described by the trial court — had also stated unwillingness to consider, or inability to return, a death verdict. (See, e.g., *People v. Riccardi* (2012) 54 Cal. 4th 758,

781 ["prospective Jurors E.H. and J.F. wrote "yes" in response to question No. 68, which asked whether the prospective juror would automatically and absolutely refuse to vote for the death penalty in any case."]; *People v. Thomas* (2011) 52 Cal. 4th 336, 357-358 [juror answered yes where asked whether her moral, religious, or philosophical beliefs in opposition to the death penalty were so strong that she would be unable to impose the death penalty regardless of the facts]; *People v. Ramos* (2004) 34 Cal.4th 494, 517 [juror indicated "she could never vote to impose the penalty, regardless of the evidence, and repeated similar sentiments when the court's questioning continued."].)

D. The lack of record supporting respondent's claim that JW would not be able to consider imposing death

Respondent also claims that, "[d]uring voir dire, [JW] confirmed to the trial judge that, after thinking about it, she would not be able to consider both penalties and, rather, would vote against the death penalty if she had to vote. (12RT 2953.)" (RB 156.) In truth, no

statement of inability to consider both penalties appears in the record. Although the trial court had asked JW if she would be able to consider both penalties, JW did not answer that question. There was a brief aside, after which JW stated only, "I have to say that if I had to vote on the death penalty, I would vote against it. That being said, could I just – don't know what I would do." (12RT 2953.) The trial judge did not ask the follow-up questions that would have been appropriate if the court understood JW to have just that she would surely "vote against it" if allowed to serve as a juror. JW immediately declared, as she had previously, "I don't know what I would do." (12RT 2953.) The court instead turned to questioning another prospective juror. (12RT 2954.)

The prosecutor soon declined the opportunity to question JW's ability or willingness to consider both penalties. Sharing respondent's assumption that inability to follow California's oath or instructions need not be shown, he took a different tack, one focused on establishing that she would not likely impose death where, as here, the court's instructions call for application of one's personal "moral compass."

In addition to mischaracterizing JW's responses, respondent has ignored and denied support in the record for appellant's claim that JW affirmed her willingness to engage in the weighing process and impose death if she thought it appropriate. Contrary to respondent's claim, JW's written responses affirming that she would not vote automatically for life or death, and that she had no feelings that would prevent her from ever voting for death, were not "clearly contradicted by her responses on voir dire." (RB 160.) Her voir dire did not challenge or even address her written statements on those points. The State made no attempt to make the showing that federal constitutional law requires.

E. Respondent's proposed rule excluding death scrupled jurors based on inability to aside their moral beliefs in making the penalty decision intrudes upon the defendant's Sixth Amendment rights without the single justification accepted by the high court: inability to follow the jurors' oath and instructions

In *Lockhart v. McCree* (1986) 476 U.S. 162, 176, the Court remarked that even "those who firmly believe that the death penalty is

unjust" are qualified if "they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (Emphasis added.)

Accordingly, this Court has suggested that trial courts ask jurors who declare themselves firmly against the death penalty in all cases if they can set aside that belief and follow the law as stated in the jury instructions. (*People v. Leon* (2015) 61 Cal. 4th 569, 591-592.) *Leon* and other decisions of this Court cite the quoted statement from *Lockhart* in allowing state courts to discharge for cause any prospective juror "`solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law.' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 787.)

However, neither this Court nor the high court has held that all life-leaning jurors can be disqualified based on unwillingness or inability to set aside their scruples in making the penalty determination. On the contrary, this Court has written:

Because the California death penalty sentencing process

> contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt, supra*, 469 U.S. 412. ... A juror might find it very difficult to vote to impose the death penalty, and yet such *a juror's performance still would not be substantially impaired under* Witt, *unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (People v. Stewart, supra*, 33 Cal.4th 425, 447; Italics added.)

Unlike the guilt phase determination, and unlike penalty determinations made by juries in some other states, the sentencing function in California "`is inherently moral and normative, not factual; the sentencer's power and discretion is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances.' [Citation.]" *(People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1067, accord *People v. Prieto* (2003) 30 Cal.4th 226, 263, *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.)

"A penalty phase jury performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if death or life is the appropriate penalty for that particular offense and offender." (*People v. Mendoza* (2000) 24 Cal. 4th 130, 192.)

Willingness and ability to keep an open mind, follow the court's instructions, weigh the evidence and conscientiously consider imposing death in the case on trial are the true touchstones of death qualification in California. Such willingness and ability are not inconsistent with moderate opposition to capital punishment like that expressed by JW. In California and states with similar instructions, "it is entirely possible that a person who has `a fixed opinion against' or who does not `believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (*Boulden v. Holman* (1969) 394 U.S. 478, 483-484.)

Additionally, rejection of respondent's argument is compelled

by *Adams v. Texas, supra,* 448 U.S. 38. In *Adams,* Court condemned a Texas statute that provided that a prospective capital juror "'shall be disqualified . . . unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.'" (*Id.*, at p. 42.) Even though Texas law narrowly circumscribed the penalty issues the jury should decide, the high court declared it "apparent that a Texas juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the `guided jury discretion,' [citation] permitted him under Texas law." (*Id.,* at pp. 46-47.) Here, where the law invites jurors to bring their values and moral views to the table, there can be no serious question that a death-scrupled "juror's views about the death penalty might influence the manner in which he performs his role without exceeding the guided discretion permitted him under [state] law." (*Id.*, at p. 46-47.)

Finally, there is no reason to assume that the high court will expand the *Witt* test to allow removal of prospective jurors who are prepared to follow the law on which they will be instructed. As discussed in later arguments in appellant's opening brief, excluding

prospective jurors based on their death penalty views is at odds with the Sixth Amendment right to an impartial jury as understood by the Framers. Respondent's proposed rule is particularly offensive in using "jurors' standards of judgment concerning appropriateness of the death penalty" to establish partiality. (*Morgan, supra*, 504 U.S. at p. 741, dis. opn. of Scalia, J.) Every juror has a "standard of judgment regarding how evidence deserves to be weighed" and even when that standard is least favorable to the defense, "the juror is not therefore 'biased' or 'partial' in the constitutionally forbidden sense." (Ibid.) Banishing from American juries all those who "do not share the strong penological preferences of this Court . . . not only is not required by the Constitution of the United States; it grossly offends it." (Id., at p. 752.)

F. The trial court's ruling was based on its own error of law, denied appellant his constitutional rights, and requires reversal

As previously noted, the trial court did not rely upon respondent's proposed rule in removing JW. The rule or theory that the trial court relied upon is one in which courts should remove for

cause all death-scrupled jurors who are unlikely to impose death under California's instructions. Respondent makes no attempt to defend that theory here.

Accordingly, the deference due to trial court findings of fact does not aid respondent here. The question of whether findings of fact meet a constitutional standard must be reviewed independently. (*People v. Seijas* (2005) 36 Cal. 4th 291, 304-307 [Sixth Amendment]; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597 [Fourth Amendment].) Where, as here, the findings actually made do not meet the constitutional standard for juror disqualification, reversal is required. (*Gray v. Mississippi* (1987) 481 U.S. 648; *People v. Pearson, supra,* 53 Cal.4th 306, 330-333; *People v. Heard, supra,* 31 Cal.4th 946, 967.)

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III. THE DENIAL OF THE RIGHT TO ASK VENIRE MEMBERS IF THEY COULD CONSIDER MITIGATING FACTORS AFTER EXPOSURE TO THE HORRIFYING CORPSE DESECRATION EVIDENCE THE COURT ALLOWED THE PROSECUTOR TO PRESENT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND AN IMPARTIAL JURY

Respondent acknowledges that the trial court precluded appellant from asking prospective jurors "whether the fact of the dismemberment would cause them to automatically vote for death" (RB 174) and from disclosing "the details of the dismemberment evidence" but denies that such preclusion violated *People v. Cash* (2002) 28 Cal.4th 703 (*Cash*).

In *Cash*,[9] this Court recognized that capital defendants should

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[9] The defendant in *Cash* was convicted of murder in the course of robbery and attempted murder. During the penalty phase, the prosecution presented evidence that the defendant killed his elderly grandparents when he was 17 years old. (*Id.*, at pp. 714, 717.) On appeal, the defendant claimed the court erred by refusing to allow defense counsel to ask prospective jurors whether they would automatically vote for death if the defendant had previously committed another murder. This Court agreed and reversed. (*Id.*, at pp. 723-728.)

not be "categorically denied the opportunity to inform prospective jurors of case-specific factors that could invariably cause them to vote for death at the time they answer questions about their views on capital punishment." (*People v. Valdez* (2012) 55 Cal. 4th 82, 165 [internal citations omitted].)

Although *Cash* was decided two years before appellant's trial, and was acknowledged in the prosecutor's filings, the trial court accepted the prosecutor's claim that the defense should not be allowed to inform jurors of the case in aggravation when probing prospective jurors about their ability to impose a life sentence. Instead, only the statutory "special circumstances" that were charged in the pleadings, i.e., robbery, kidnaping, and commission of more than one murder, should be presented in questioning venire members about their ability and willingness to refrain from voting for death automatically.

The trial court and all counsel knew that the case in aggravation would include a vivid account of the defendant's chainsaw dismemberment of three bodies, his feeding of a young woman's flesh to a dog, and his distribution of mutilated body parts

by placing them in multiple bags and throwing them off a jet ski – "evidence that could cause a reasonable juror – i.e., one whose death penalty attitudes otherwise qualified him or her to sit on a capital jury –invariably to vote for the death penalty, regardless of the strength of the mitigating evidence." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1123.)

First, respondent claims "the details of the dismemberment evidence were not of the type to be greatly significant to prospective jurors when deciding penalty." (RB 180.) The claim does not fit our facts.

The gruesomeness of the State's corpse desecration case went far beyond that of the *Zambrano* case, which involved dismemberment of a single corpse. Moreover, our record shows that corpse desecration evidence that the trial court kept counsel from disclosing was precisely the type of evidence that triggers inability to consider the defendant's mitigating evidence. Responses from venire members who recalled the pretrial publicity showed that the aggravating circumstances, particularly the corpse desecration evidence, would cause many otherwise-qualified jurors to invariably

and automatically vote for death, regardless of the mitigation, though they would not vote automatically based on the statutory special circumstances disclosed. (See, e.g., questionnaires of Jose Reyes (10JQCT 3918, 3922), Frank Matulvich (15JQCT 5581- 5582, 5585-5586), Joseph Kehoe (15JQCT 5681-5686), Judy Zenoni (4JQCT 1398, 1402-1403), and Tamila Williams (2JQCT 637, 658-659.)

Second, respondent claims that the trial judge "did not *categorically* prohibit inquiry into the subject matter." (RB 180, emphasis in original.) The paragraphs that follow reveal that the "subject matter" respondent refers to are the facts mentioned in the questionnaire. (RB 180-182.) Those matters were not within the trial court's prohibition. But that does not mean that the trial court's prohibition was not *categorical*. A prohibition is categorical for purposes of the *Cash* rule if it applies to a category of facts or circumstances "likely to be of great significance to prospective jurors" and remains in effect throughout voir dire. *(People v. Vieira* (2005) 35 Cal.4th 264, 286-287.) Respondent does not and cannot claim that the trial court's ruling was, like that in *Vieira*, applicable to only a portion of the voir dire.

Third, respondent mistakenly suggests that only "general facts of the case" need be disclosed under this Court's precedents. (RB 178, 182.) When this Court wrote that the death qualification process must probe "prospective jurors' death penalty views as applied to the general facts of the case, whether or not those facts [have] been expressly charged" (*People v. Zambrano, supra*, at p. 1120, quoting *People v. Earp* (1999) 20 Cal.4th 826, 853, italics added) it did not refer to the "general facts of the case" as a limitation on what should be disclosed, but as the broad category of case facts that are not expressly charged that have to be disclosed if they could cause an otherwise qualified juror to be unwilling or unable to consider mitigating evidence.

Fourth, respondent claims "the facts of the dismemberments by themselves were not so inflammatory as to make a prospective juror, previously willing to consider all the evidence presented on both sides, suddenly unwilling to do so." (RB 186.) The problem with gruesome evidence is not limited to that of provoking juror refusal to consider mitigation. Post-mortem dismemberment evidence produces such disgust as to make jurors *unable* to do so. *(United*

States v. Taveras (E.D.N.Y. 2007) 488 F. Supp. 2d 246, 254.)

Fifth, respondent argues that the feeding of human flesh to a dog "was, in fact, a specific detail of the dismemberments that occurred in this case. To have allowed defense counsel to question prospective jurors about the impact of this fact on their decision would have been to cross the line set out in *Cash*. This fact was `so specific as to require prejudgment based on a summary of potential evidence.' (*People v. Cash, supra*, 28 Ca1.4th at pp. 721-722.)" (RB 186.)

Respondent misquotes *Cash*. *Cash* held that voir dire "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." (*People v. Cash, supra,* (2002) 28 Cal.4th 703, 721-722.) The aggravating fact that appellant fed a victim's skin to a dog in no way resembles a "summary of the mitigating evidence likely to be presented." The defendant's purpose in disclosing aggravating fact is not to induce prejudgment for or against death, but to explore the juror's ability to refrain from prejudgment upon exposure to the case in aggravation.

Sixth, respondent repeatedly misrepresents the record in claiming that the questionnaire "asked prospective jurors whether being required to observe photographs or videos of dismembered remains would affect their ability to consider the rest of the evidence" (RB 188) and that prospective jurors "were even told that they would be required to view graphic photographs of dismembered remains and asked if that would affect their ability consider all the evidence." (RB 191.)

Jurors were told no such thing. The questionnaire stated that jurors would be "required to look at photos or videos of the people who were killed and the scene where it occurred" and asked "Would that influence you so that you would be unable or unwilling to consider other evidence presented?" (1JQCT 17.) Pictures of people who were killed and the scenes at which they were killed are regularly shown in all forms of news media. Pictures of dead body parts are not. Prospective jurors unfamiliar with the publicity surrounding the body parts cannot be expected to decode the permitted question as respondent suggests.

Seventh, respondent argues:

> Allowing the parties to delve into more specific facts of the dismemberments (e.g., feeding flesh to a dog), without allowing for the complete presentation of evidence, would have gone beyond the purpose of voir dire in a capital case. (See *People v. Taylor* (2010) 48 Cal.4th 574, 636 ["The goal of voir dire in a capital case is to disclose whether prospective jurors hold views and attitudes that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath"].) (RB 189.)

Not so. The only purpose of the voir dire that the trial court precluded was that of identifying the prospective jurors who would be prevented or substantially impaired in performing their duty to consider the case in mitigation. Considering the case in mitigation is among the duties of a capital juror under their instructions and oaths.

Respondent goes on to repeat many previous arguments in claiming that *Cash* is factually distinguishable and that no violation of appellant's federal constitutional rights occurred. There is nothing here that appellant has not already answered. (RB 190-192.)

Finally, respondent asks this Court to find that any abuse of discretion was harmless in light of the number of unused peremptory challenges. Respondent offers no logical path to the conclusion that

the trial court's abuse of discretion violated state law but not the federal constitutional law on which it is based. Nor is there any apparent reason to think the error harmless because the defendant accepted the jury with unused peremptory challenges. "When voir dire is inadequate, the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges. . . . [T]he exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire . . . ".(*People v. Bolden* (2002) 29 Cal.4th 515, 537-538 [rejecting state's claim that exhaustion of peremptory challenges is necessary to preserve a claim of error in restricting voir dire].) Reversal is required.

IV. THE ADMISSION OF PHOTOGRAPHIC AND AUDITORY EVIDENCE OF CORPSE DISMEMBERMENT DENIED APPELLANT HIS RIGHT TO A FUNDAMENTALLY FAIR PENALTY TRIAL

The issues raised in connection with the trial court's admission of corpse desecration evidence are fully briefed by the parties' opening briefs.

V. THE PROSECUTOR'S CLOSING ARGUMENT AND THE TRIAL COURT'S REFUSAL TO GIVE THE JURY APPROPRIATELY SPECIFIC INSTRUCTIONS RENDERED OUR DEATH PENALTY STATUTORY SCHEME UNCONSTITUTIONAL AS APPLIED, PREVENTED CONSIDERATION OF MITIGATING FACTORS, AND COMPROMISED CONSIDERATION OF MITIGATING EVIDENCE

Summary of Arguments

Appellant's central claim is that the record shows a reasonable likelihood that his jury was misled by prosecutorial argument denying the applicability of statutory mitigating factors that were actually applicable to appellant's case. Respondent does not dispute that point.

Rather, respondent argues that "a part of" appellant's claim was forfeited, and that the jury was not misled to believe it could not consider all of the instructions and all of the evidence.

Appellant counters that there was no forfeiture for the reasons stated in Appellant's Opening Brief, especially the dearth of authority supporting appellant's objection at the time this case was tried. Also, respondent's claim that the jury was not misled to believe it could not consider all of the evidence and the instructions misses the point.

The question is not whether the jury believed it could not consider all that it had heard, but whether the jury was misled to believe that California's death penalty law did not recognize appellant's mitigation as such.

A. No part of Appellant's Claim was Forfeited

Respondent contends that "[a] portion of this claim is forfeited" (RB 220, Argument Heading) and "[a]ppellant forfeited his claimed error regarding the prosecutor's argument because defense counsel failed to object to it, and an objection would not have been futile." (RB 220, Text.)

Claims that the prosecutor misstated the law respecting aggravating and mitigating factors are not forfeited by failure to object at trial if that trial was completed before this Court recognized the claim as error. (See, e.g. *People v. Whitt* (1990) 51 Cal.3d 620, 655, fn. 27 [prosecutorial argument implying that absence of mitigating factor was aggravating addressed despite lack of objection below where case tried before decision in *People v. Davenport* (1985) 41 Cal.3d 247, 288-289, and objection would have been futile given

view of law manifested by trial judge during sentence modification hearing].)

In 2004, when this case was tried, there was no authority supporting a finding of misconduct or "prosecutorial error" based on erroneously stating that none of the statutory mitigating factors apply to the defendant's case. The high court had yet to hold that a trial court should give a corrective instruction when a prosecutor erroneously argues that the statutory mitigating factors do not apply to the kind of evidence the defendant presented. (*Brown v. Payton* (2005) 544 U.S. 133, 146.) The only authority defense counsel could have cited was the dissenting opinion in *People v. Payton* (1992) 3 Cal.4th 1050, 1069-1071.

This Court does not declare claims forfeited when they are supported by only scant authority at the time of trial. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1215-1216 [failure to object on confrontation clause grounds during 1998 trial "was excusable, since governing law at the time . . . afforded scant grounds for objection.."]; *People v. Whitt, supra,* 51 Cal.3d 620, 655, fn. 27.)

Respondent cites cases declaring prosecutorial misconduct

claims to have been forfeited when not raised at trial. (RB 233, 243.) But as respondent acknowledges elsewhere, appellant is not making a prosecutorial misconduct claim on appeal. Consequently, there is no merit to respondent's assertions that the defense failure to object to the prosecutor's closing argument at trial deprived the State of a complete appellate record on which to resolve appellant's claim.

The proper scope of the sentencing factors the prosecutor allegedly misrepresented at trial is a question of *law,* not of fact. (*People v. Payton, supra,* 3 Cal.4th 1050, 1084, Kennard, J., dissenting.) This Court does not need to know what the prosecutor was thinking in making the misstatements he made. The court's concern "is not with the ethics of the prosecutor or the performance of the defense, but with the impact of the erroneous interpretation of the law on the jury." (*People v. Lucero* (1988) 44 Cal. 3d 1006, 1031, fn 15 [prosecutorial argument effectively eliminated a statutory mitigating factor, yet no misconduct or basis for faulting the defendant's failure to object on misconduct grounds where trial was held prior to appellate decisions disapproving prosecutor's interpretation of death penalty law]; accord *People v. Milner* (1988)

45 Cal. 3d 227, 254-258 [reversing death sentence, without a charge or finding of misconduct, where prosecutor argued that jury did not have final sentencing responsibility and neither trial court's instructions nor defense counsel's argument effectively contradicted the prosecutor's claim].)

Finally, respondent's forfeiture argument ignores appellant's claim that the prosecutor's argument invited arbitrary and capricious imposition of the death penalty so as to make the scheme unconstitutional as applied. (See *Tuilaepa v. California, supra*, 512 U.S. at p.991 [Blackmun, J., dissenting, noting that "lack of guidance to regularize the jurors' application of these factors create a system in which, as a practical matter, improper arguments can be made in the courtroom and credited in the jury room."]; *People v. Foster* (2010) 50 Cal. 4th 1301, 1364; *People v. Hernandez* (2003) 30 Cal.4th 835, 863.) This court has consistently resolved "as applied' challenges to California's death penalty law on their merits "without discussing whether they were raised at trial. [Citations.]" *(People v. Foster, supra,* 50 Cal. 4th 1301, 1364.)

B. Respondent tacitly concedes that the prosecutor misstated the law

Respondent's brief has a subheading claiming that "the prosecutor's closing remarks did not misstate the law." (RB 235.) But the argument that follows does not fit the heading. Instead, respondent argues that the prosecutor's "remarks" did not prevent the jury from *considering* all of the evidence and mitigating factors.

Misstating the law and preventing the jury from considering instructions and evidence are very different things. Appellant has shown that prosecutor misstated California's death penalty law when he declared that factors (b) and (c) apply only if the defendant has a record of prior felony convictions or acts of violence; (d) applies only to transitory conditions and impulsive crimes, and (h) applies only if the defendant lacked any capacity to know the criminality of his conduct at any time during the period he was mentally ill. Respondent can call those declarations "remarks" and "arguing" but they were also misstatements of the law that devalued appellant's defense in contravention of California's death penalty statute, and of appellant's right to due process of law. (*Hicks v. Oklahoma* (1980)

447 U.S. 343, 346.)

C. Respondent does not and cannot deny that the prosecutor's misstatements misled the jury

As to the likelihood that the jury believed the prosecutor, respondent is silent. And the record leaves no room for doubt that the jury believed the prosecutor's claims about the law. Unlike the prosecutorial misstatements in the *Payton* case, the misstatements appellant's prosecutor made were in no sense contradicted by the fact that the trial court allowed the jury to hear the defense evidence, nor by the fact that the prosecutor had attacked its credibility. (See *People v. Payton, supra*, 3 Cal.4th 1050, 1071-1072.)

Here, the prosecutor declared that factors (b) and (c) – presence or absence of a violent criminal history or violent felony convictions – "don't apply" because appellant had neither. (30RT 6647.) Defense counsel remained silent. The prosecutor then claimed that factor (d), whether or not the defendant was under some extreme mental or emotional disturbance, does not apply, either. He claimed

that factor (d) applies only to angry or impulsive killings, to wit:

> "The defense spent all of their time talking about mental illness. No, it doesn't [apply]. Those assertions don't apply. It applies down below, but not here.
>
> What this is talking about are things like ... heat of passion, extreme anger, circumstances under which are not [sic] justifications but a person in a moment operating under some extreme disturbance. Okay?
>
> Another one might be Mr. Tucker's testimony. Interesting, particularly in the context of methamphetamine that you heard about in this case. What did Doctor Tucker talk about? In terms of the effects of methamphetamine? Impaired judgment, impulsivity and anger. Those are very well-known side affects [sic] of the use of methamphetamine.
>
> A jury could say, you know, maybe they acted a little bit impulsive because of the use of methamphetamine. Maybe they were quick to anger because of the use of methamphetamine and would not have been so quick to anger, so impulsive if they hadn't used a drug, and consider this a circumstance in mitigation.
>
> You know what, folks? ***That doesn't apply in this case***. Yes, the defendant was using methamphetamine. First of all, there is no evidence of ever any crashing that Doctor Tucker characterized as a typical result of a binge of methamphetamine. Not only do you not have that,

> this crime in this case is as far removed from impulsivity [sic] and anger as it could be. This is as cold-blooded and premeditated as it could possibly be. This case is not the product of extreme mental or emotional disturbance. Factor D does not apply. (30RT 6647-6648, emphasis added.)

Defense counsel again remained silent.

After correctly observing that factors (e), (f) and (g) were inapplicable, the prosecutor denied the application of factor (h) on the theory that it requires incapacity to appreciate the criminality of the conduct, or impairment of capacity to conform conduct to the requirements of the law throughout all the years of mental illness:

> H, you might think `What about H?" Whether or not at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defects or the effects of intoxication. Doesn't this apply?
>
> I mean, that's what we heard from the defense, mental illness and intoxication, including drugs. Doesn't have to be alcohol, even though that's how we commonly think of it. It's ingestion of any foreign substance that has an impact on a person's central nervous system and clarity of thought.

Doesn't this apply? No. Why not? There's some key language here. Here's one of 'em, right here. Here's another one, right here. Capacity. Agency, free will to make choices is a separate question. Do they have a capacity to what? Appreciate the criminality of their conduct.

What were these for? What are these for? And these are just facsimiles. We spared you the smell. What were they for? To hide the bodies, right? So nobody would find out, right? Obviously the defendant appreciated the criminality of his conduct, when he put the dismembered bodies in gym bags and put them in the river with weights, and also when Jennifer Villarin and James Gamble killed [sic] because they may identify Jordan as the person involved in all of this, including the murder of Selina. Obviously, he appreciates the criminality of his conduct. It's precisely the motive for many of the acts that you see in this case.

What about conforming conduct to the requirements of the law? Well, I've talked about methamphetamine, no evidence of crashing. There he is ... Mr. Berglund. He sees the defendant at the end of July, maybe a little bit hurried, but looked like the normal Taylor. There with his daughters in the Willows Shopping Center – what? – within a week of the time that Children of Thunder jumped off.

If you buy into the defense that the defendant was mentally ill, he was since 1990: right? Is the Defense seriously suggesting that as a result of schizoaffective disorder with bipolar that somehow he was not able, he was not capable – capacity — capable of conforming his

> conduct to the requirements of the law when he was a telemarketer and a stockbroker? Because if you say that as a result of mental illness he couldn't conform his ... conduct to the requirements of the law, you should see all kinds of criminality going on between 1990 and 1998. And you don't. Why? No matter what you say, in the final analysis, whether you accept the premise of mental illness, the fact of the matter is it does not prevent the defendant the capacity to conform to the requirements of the law. This factor does not apply. (30RT 6650-6552.)

After observing (correctly) that factors (i) and (j) were not applicable in this case, the prosecutor told appellant's jury that he could not deny the application of factor (k) because "it's the kitchen sink. `Any other circumstance which extenuates.' Whatever the Defense wants to put in, whatever they want to say extenuates, they get under Factor K." (30RT 6653.)

Defense counsel's argument did not respond to that of the prosecutor on any matter of law, or cite all of the applicable statutory mitigating factors. (30RT 6800-6829.) She relied only on factor (d), telling the jury, "You will be instructed by the judge that if these crimes were committed while the defendant was under the influence

of extreme mental or emotional disturbance, that is mitigation, that is reason not to kill Taylor." (30RT 6822.) She recounted much of the testimony indicating appellant was extremely mentally disturbed, asserted that he struggled with his illness, argued that imposing the death penalty would solve nothing, and asked the jury to exercise mercy. (30RT 6800-6829.) But she did not contradict the prosecutor's claim about the law.

"Argument stating that particular mitigating factors have not been proven is, of course, entirely appropriate. [Citation.]" (People v. Crandell (1988) 46 Cal.3d 833, 884.) A prosecutor may "observe" in closing argument that some of the statutory mitigating factors are inapplicable. (*People v. Ruiz* (1988) 44 Cal. 3d 589, 620.) But a false or misleading presentation of the applicability of statutory mitigating factors by the attorney representing the State is not only assailable as misconduct; it is clearly capable of imposing upon the jury a distorted picture of our scheme and the jury's sentencing discretion, particularly if the court's instructions are ambiguous on the point, and the defense does not join the argument. (*People v. Crandell, supra,* 46 Cal. 3d 833, 883-885.)

Respondent attempts to distinguish *Crandell* as having "began with potentially misleading and incomplete jury instructions *(People v. Crandell, supra*, 46 Ca1.3d at pp. 882-883), whereas here appellant has not argued that CALIJC No. 8.85 was ambiguous or misleading, nor has this Court ever held so." (RB 242.) But in citing to *Crandell* and claiming the instructions given were inadequate, appellant indeed argued that those instructions were ambiguous, particularly with respect to factor (k). And while appellant has not called those instructions "potentially misleading," that is a distinction without a difference. The potential impact of standard instructions in other cases is not at issue here. The question is whether there is a reasonable likelihood that appellant's jury was misled.

Here, the penalty instructions given included a statement directing the jury to consider, under factor (k), any aspect of the defendant's character or record "that the defendant offers as a basis for a sentence less than death . . .". [emphasis added.] Appellant could not and did not prove the negative, i.e., that he had no felony convictions or prior acts of violence. Accordingly, the prosecutor never suggested that appellant's record was mitigating, or could be

considered so, under factor (k). He instead insisted that factors (b) and (c) simply do not apply in this case. Defense counsel did not contradict him. The portion of the record respondent cites in claiming that defense counsel contested that point show that she read testimony from witnesses who knew appellant and thought his capital crimes were an aberration for him (30RT 6812-6814) and declared that appellant was, prior to the capital crimes, "a man who had never committed a crime." (30RT 6826.) But she never came close to telling the jury that appellant's prior record was a statutory mitigating factor.

Respondent pays little mind to the different set of issues surrounding the prosecutor's claims that factors (d) and (h) did not apply in appellant's case, and that the mental illness evidence appellant offered could only be considered in the "kitchen sink" of factor (k). Respondent's summary defense of the prosecutor's denial that factors (d) and (h) encompassed appellant's mental illness evidence is that the argument did not preclude the jury from considering the evidence and the definition of the factors provided by instructions.

Our death penalty law and principles of due process demand that the State do more than refrain from precluding the jury from considering the evidence and the instructions of the court. Factor (d) in section 190.3 promises that the sentencing jury will be directed to consider whether or not the capital crimes were committed under the influence of "any actual extreme mental or emotional disturbance from which the defendant suffered at the time the offense." *(People v. Holt* (1997) 15 Cal. 4th 619, 695.) The terms "under the influence of," "extreme," and "disturbance," are, in this court's experience, "commonly understood and take on no arcane meaning when applied in the context of penalty phase deliberations." (Ibid.) That is, unless the prosecutor gives those terms a special meaning, as did the prosecutor in the case at bar, in telling the jury that factor (d) applies only to transitory conditions associated with impulsivity, and not to premeditated murder. As the prosecutor put it,

> What this is talking about are things like ... heat of passion, extreme anger, circumstances under which are not [sic] justifications but a person in a moment operating under some extreme disturbance. Okay? . . .¶ [T]his crime in this case is as far removed from impulsivity [sic] and anger as it could be. This is as cold-blooded and premeditated as it could possibly be.

This case is not the product of extreme mental or emotional disturbance. Factor D does not apply." (30 RT 6647-6648.)

D. The trial court did not give the instructions necessary to stop the jury from being misled

First, respondent asks this Court to consider the adequacy of the trial court's instructions and the reasonableness of its refusal to give the additional instructions requested by the defense in isolation from the prosecutor's arguments. (RB 221-224, 231-232.) That truncated form of appellate review would delay if not deny appellant a fair determination on the essential question of the likelihood that the jury believed the prosecutor's claim that the applicable statutory mitigating factors did not apply here.

As pointed out previously, the United States Supreme Court has held that the trial court is obliged to give a corrective instruction when a prosecutor erroneously claims that a statutory mitigating factor is inapplicable. (*Brown v. Payton, supra,* 544 U.S. 133, 146 [trial judge should have advised the jury that factor (k) was applicable

to the evidence of post-crime religious conversion after prosecutor argued otherwise because "judge is, after all, the one responsible for instructing the jury on the law, a responsibility that may not be abdicated to counsel"].) This Court has since recognized its duty to reverse a conviction where the prosecutor misstated the law and no corrective instructions was given. (*People v. Morgan* (2007) 42 Cal. 4th 593, 611 [reversing where"[n]othing in the instructions ... disabused the jury of [the] notion" that a distance less than 90 feet could constitute "substantial distance" under the law at the time in question."].)

Respondent does not acknowledge appellant's citation to *Brown v. Payton, supra*, 544 U.S, 133, 146, nor any other high court authority on the responsibility of trial judges to instruct juries on the meaning of the statutory sentencing factors when their meaning is at issue as a result of misstatements of that meaning in prosecutorial argument. Nor does respondent acknowledge the dissent from this Court's decision in that case, which noted that it is "the trial court's duty to explain the law to the jury, not to place upon the jury the impossible burden of deciding which of two inconsistent views of the

law is correct. (*People v. Payton, supra* 3 Cal.4th 1050, 1084 (Kennard, J., dissenting.)

Respondent also ignores appellant's citation to *People v. Morgan* (2007) 42 Cal.4th 593, 611-612. In *Morgan*, this Court reversed a kidnaping conviction because the prosecutor misstated the law and "[n]othing in the instructions ... disabused the jury of [the] notion" that a distance less than 90 feet could constitute "substantial distance" under the law at the time in question."

Respondent acknowledges that appellant requested more specific instructions on factors (d) (h) and (k) prior to closing argument, but denies that they should have been given. The unsuccessfully proposed instruction on factor (d) stated, inter alia, that extreme mental or emotional disturbance is a mitigating factor even if not such as to overcome reason or preclude deliberation. (16CT 6735.) The unsuccessfully proposed instruction on factor (h) would have informed the jury that factor (h) does not require legal insanity and applies to any impairment of capacity to conform conduct to the requirements of the law. (Defense Instruction #21, 16CT 6740.) Like the trial court, respondent focuses on the

argumentative text surrounding the words clarifying an important point of law. But as pointed out by appellant, and nowhere denied by respondent, the trial court could and should have deleted the unnecessary or inappropriate portions of the proposed instructions rather than rejecting them, particularly in light of the prosecutor's misleading closing arguments. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [trial court erred in denying outright rather than modifying and giving defense proposed limiting instruction]; *People v. Cole* (1988) 202 Cal.App.3d 1439, 1445-1447 [trial court should modify or delete incorrect portions of proposed instruction on defense theory].)

E. Reversal is Required

As to prejudice, i.e., the question of whether there is a reasonable likelihood that the verdict was affected by the prosecutor's misstatements and the lack of corrective instruction, respondent does not claim there was any cure in telling the jury that the "mental impairment" referred to in an unspecified instruction includes any degree of mental defect, disease, impairment or intoxication "which

the jury determines is of a nature that death should not be imposed." (30RT 6862, 16CT 6912-6913.)[10] As observed in Appellant's Opening Brief, this instruction did not, and was never intended to, disabuse the jury of the prosecutor's claim that factors (d) and (h) are inapplicable. It did not communicate our death penalty law's demand that jurors consider and determine the influence of any extreme mental or emotional disturbance on any capital crime. It simply told jurors that they could find any mental impairment to be a reason not to impose death if they determine it is indeed "of a nature that death should not be imposed." (16 CT 6913.) Although respondent is correct in claiming that the circular language came from a defense-proposed jury instruction, respondent incorrectly implies that appellant is complaining about that instruction on appeal.

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The trial court read, "You must face your duty with regard to sentencing soberly and rationally, and you may not impose a death sentence as a result of a purely emotional response to evidence and argument regrading the victims" followed by "The mental impairment referred to in this instruction [sic] is not limited to evidence which excuses the crime or reduces the defendant's legal culpability, but includes any degree of mental defect, disease, impairment or intoxication which the jury determines is of a nature that death should not be imposed." (30RT 6862, 16 CT 6912-6913.)

Appellant simply noted that the instructional was circular, and thus not curative of any error.

Respondent's claim that any error was harmless rests on the theory that "jurors could not have been misled into believing they could not consider applicable mitigating circumstances." (RB 246.) To be sure, there is no reasonable likelihood that appellant's jury believed that it could not consider all the evidence and the court's instructions and come to their own conclusions. But that does not mean there is no reasonable likelihood that they were misled to believe that they did not need to consider the portions of the instructions that the prosecutor claimed were inapplicable in this case. Nor does it mean that they did not give weight to the prosecutor's claim that they were inapplicable if they made their own examination of the text. As this Court and the high court have recognized, "[j]urors are not generally equipped to determine whether a particular theory submitted to them is contrary to law ...'". (*People v. Payton, supra*, 3 Cal.4th 1050, 1084 (Kennard, J., dissenting.) The instructions given did not contradict the prosecutor on any point. There is a reasonable likelihood that the jury was misled to

appellant's detriment, and a reasonable possibility of a better outcome for appellant absent the errors. A new penalty trial is necessary.

VI. THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW AND TRIAL BY JURY WHEN IT INSTRUCTED THE JURY THAT THE IMPACT OF AN EXECUTION ON THE DEFENDANT'S FAMILY MEMBERS SHOULD BE DISREGARDED UNLESS IT ILLUMINATES SOME POSITIVE QUALITY OF THE DEFENDANT'S BACKGROUND OR CHARACTER

Respondent's primary argument on this point is that appellant forfeited this claim by failing to object below. Appellant's claim is that a standard instruction that the court gave erroneously precluded consideration of the interests of his family in fixing punishment. Because those interests, if considered, could well have caused a reasonable juror to choose life, the error affected appellant's substantial rights. Respondent's forfeiture theories are not tenable.

The legislature has authorized appellate review of "any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the

defendant were affected thereby." (Pen. Code § 1259; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103, fn. 34.) "[W]hether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim . . .". *(People v. Ngo* (2014) 225 Cal. App. 4th 126, 149, citing *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Accordingly, this Court reviews the merits of claims that an instruction the court gave was incorrect as a matter the law without regard to the failure to object below. (See, e.g., *People v. Landry* (2016) 2 Cal.5th 52, 94-95.)

Respondent's argument cites *People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*), to support a broad proposition that failure to raise an issue at trial forfeits the issue for appeal. In *Scott,* this Court held that defects in the trial court's statement of reasons would be waived unless challenged at the time of sentencing in cases where sentencing followed the finality of the *Scott* decision. It reasoned that prospective "[a]pplication of an objection and waiver rule is fair and reasonable given the nature of the sentencing decisions at issue and the procedural backdrop against which they are made. (*Id.,* at p. 348.)

Apropos respondent's claim, *Scott* noted that "`[D]efendant should not be penalized for failing to object where existing law overwhelmingly said no such objection was required. It would be unfair to effectively bar any review of defendant's claims where the rule requiring their preservation in the trial court was adopted in the context of [this] appeal.' [Citation.]" (*People v. Scott, supra*, 9 Cal.4th 331, 357.)

Respondent also cites *People v. Saunders* (1993) 5 Cal.4th 580, 590, for the broad proposition that failure to raise an issue in the trial court forfeits the issue on appeal. In *Saunders*, the forfeited claim was based solely on discharge of the jury before it determined the truth of prior conviction allegations. The trial court had reasonably believed that the defendant would waive his statutory right to jury trial on the priors. This Court concluded that he did indeed waive that statutory right by failure to object, but not so his claim that he was deprived of his constitutional right not to be placed twice in jeopardy. The latter claim was rejected on the merits. (*Id.*, at pp. 591-592.) *Saunders* is not a precedent for the broad forfeiture rule respondent seeks here.

Respondent also asserts that instructional error claims are generally forfeited by failure to object at trial, citing *People v. Moore* (2011) 51 Cal4th 1104, 1134-1135. *Moore* involved a claim of error based on rendition of an instruction to disregard the fate of unjoined perpetrators in a case where such an individual testified against the defendant. It was subject to the then well-settled rule that a defendant who fails to ask the trial court to give a limiting instruction in that situation may not raise the issue on appeal. (*Ibid.*) *Moore* also forfeited a claim of error in rendering the standard cautionary instruction concerning the jury's consideration of circumstantial evidence without modifying the instruction to inform the jury to apply those same cautionary principles to its consideration of direct evidence. This forfeiture was supported by citation to a case forfeiting similar claims, and was coupled with a rejection on the merits. (*Ibid.*) Respondent cites no such prior ruling that is applicable here.

Even if the broad forfeiture rule that respondent seeks had merit, it would not apply where, as here, any objection would have been futile. At the time this case was tried, this Court's precedents

had squarely held that the language challenged here does not violate any state or federal law. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 1000.)

On the merits, respondent simply notes that this Court has already held that the challenged language does not violate any state or federal law. (RB 250.) Respondent does not and cannot claim that the cited decisions considered and rejected the arguments appellant presents here. Yet it is axiomatic that cases are not authority for propositions not considered. (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

In addition to the grounds urged in other cases, appellant has asserted constitutional rights to a jury trial on the question of whether the imposition of the death penalty was appropriate in light of all the facts. (See Argument VII, AOB 415.) Appellant has also posited that the Constitution, as understood by the Framers, does not allow the government to attack the rights and interests of the defendant's family in its effort to punish the defendant. (AOB 412-413.)

Respondent submits without argument the conclusion that appellant "provides no valid or persuasive basis to reconsider these

holdings." (RB 250.) This position ignores the fact that appellant has submitted arguments that those cases did not consider. No reasoning or argument against the merits of appellant's new arguments has been provided.

Finally, respondent does not claim that the error was harmless, though appellant has pointed out why the challenged language was not harmless here. Such tacit concessions are appropriate. The evidence that two small children would be harmed by appellant's execution was clearly sufficient to create a reasonable possibility of a life verdict no matter how the jury viewed the conventional mitigation appellant offered. The jury had no reason, apart from the erroneous instruction, to disregard the interests of appellant's children as stated in the testimony of their mother. On this record, one cannot say that an erroneous instruction to ignore those interests was harmless beyond a reasonable doubt.

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VII. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT IT COULD DECLINE TO IMPOSE DEATH FOR ANY REASON IT DEEMED APPROPRIATE RENDERED CALIFORNIA'S DEATH PENALTY SCHEME UNCONSTITUTIONAL AS APPLIED

Here, respondent claims that appellant's proposed special instructions misstated the law to the extent that they differed from the standard instructions the court used. Respondent cites, but does not defend, the prosecutor's claim that the Equal Protection guarantee precludes instructing juries that they can sentence the defendant to life for any reason they deem appropriate. (RB 252.) Respondent instead argues that the defense requested instructions were properly rejected "to the extent the instructions sought to advise jurors that they could return a life verdict without weighing the aggravating and mitigating circumstances" and under other unlikely if not bizarre scenarios. (RB 253-255.)

There is no evidence that appellant sought these special instructions for any such reason. The trial court made no remarks suggesting it believed the defense requested those instructions for such purposes. As respondent acknowledges (RB 252-253) the

instructions were rejected as argumentative. (25RT 5666, 5678.) Respondent's arguments are inapposite where, as here, nothing supports a finding that the rejected instructions were sought in order to, or would have the effect of, leading the jury to consider unreasonable or improper criteria or avoid weighing aggravation in fixing the sentence.

Moreover, respondent ignores the history of the Sixth Amendment and the intent of the Framers in asking this Court to approve the instructions given and disapprove the instructions requested. As set out in Appellant's Opening Brief, a jury that could withhold the death penalty for any reason it deemed appropriate was available to all American citizens when the Bill of Rights was adopted. As noted in *McGautha v. California* (1971) 402 U. S. 183, 198, there was almost from the beginning of this country a "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." The first attempted remedy was to restrict the death penalty to defined offenses such as "premeditated" murder. (*Ibid.*) But juries "took the law into their own hands" and refused to convict on the capital offense. (*Id.*, at p. 199.) ¶ "In order

to meet the problem of jury nullification, legislatures . . . adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." (*McGautha v. California*, *supra,* 402 U. S. 183, 198.)

Thus, when the Founders contemplated "due process" in capital cases, they saw the guarantee of trial by a jury with unchecked discretion to spare the defendant's life. They did not contemplate a sentencing scheme in which sentencing bodies are told to consider only factors bearing upon the circumstances of the crime, and the defendant's character or record.

That history is important. In a series of decisions issued over the last 13 years, the Supreme Court has reexamined much of its Sixth Amendment jurisprudence. In those decisions, the Court has consistently explained that the contours of the Sixth Amendment are no longer to be determined by seeking to balance competing interests but instead are to be determined by assessing the intent of the Framers. Indeed, the court's decisions over the last decade show that the court has not hesitated to overrule its prior Sixth Amendment precedents to incorporate into its Sixth Amendment jurisprudence a

fidelity to the Framers' intent. (*See, e.g., Alleyne v. United States* (2013) ___ U.S. ___, 133 S.Ct. 2151 overruling *Harris v. United States* (2002) 536 U.S. 545; *Ring v. Arizona* (2002) 536 U.S. 584 overruling *Walton v. Arizona* (1990) 497 U.S. 639; *Crawford v. Washington* (2004) 541 U.S. 36 overruling *Ohio v. Roberts* (1980) 448 U.S. 56.)

Respondent also ignores the curative relationship between the rejected special instructions at issue here and the language in the standard instruction demanding that jurors ignore the interests of appellant's family. Instead, respondent argues that any error was harmless because "it is not reasonably likely that jurors were misled into believing that they could not consider" any mitigating circumstance of the sort recognized in the instructions given. (RB 256.) That argument does not answer appellant's claim that a reasonable jury could have imposed a life sentence for good reasons that are not what the instructions indicate is mitigation. As noted in Appellant's Opening Brief, those reasons could include the interests of his dependent children, or the what the victim's survivors suffer when a death sentence is imposed and they must wait in vain to see

the sentence executed. If allowed to consider all the facts, reasonable jurors are reasonably likely to decline to impose death if that sentencing choice promises only pain to the people other than the defendant who are directly affected by the jury's choice.

VIII. THE EXCLUSION OF PROSPECTIVE JURORS BECAUSE OF UNWILLINGNESS OR IMPAIRED ABILITY TO IMPOSE DEATH VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL AND REPRESENTATIVE JURY

Under this heading, appellant has posited that all death qualification protocols are on shaky ground. Purging the venire of all whose views are not inclined to impose capital punishment is practice inherently at odds with the right to jury trial protected by the Sixth Amendment.

"`[T]he trial by jury in criminal cases' protected by the Constitution is the same `great privilege' that was `a part of that admirable common law' of England." *(Pena-Rodriguez v. Colorado* (March 6, 2017) __ U.S. __, __ S.Ct. ___, 2017 U.S. LEXIS 1574, Thomas, J., dissenting, quoting 3 J. Story, Commentaries on the

Constitution of the United States §1773, pp. 652–653 (1833).) Accordingly, the high court has begun focusing on the intent of the Framers, as established by the practice at the time the Bill of Rights was adopted.

As explicated at length in Appellant's Opening Brief, the common law of England at the time the Sixth Amendment was adopted did not permit disqualification based on attitudes toward capital punishment, even of those whose objections were so strong that they would refuse to find a defendant guilty if capital punishment would then be imposed. Citizens of all viewpoints on the law participated in jury service, and served as an important check on the executive and legislative power. (AOB 428-435.)

Also, as noted in the opening brief, the plain language of California's only legislative enactment on the point permits no disqualification of jurors based on their conscientious opinions about the death penalty unless they would preclude the juror from finding the defendant guilty. (Code of Civ. Proc. § 229, subd. (h); AOB 437-438.)

Respondent contends that appellant's claim was forfeited by

defense counsel's failure "to raise it below and by willingly participating in the procedure he now condemns." (RB 257.) Not so.

A defendant's failure to object to a ruling or procedure in the trial court does not result in a forfeiture of the defendant's right to pursue the issue on appeal if interposing an objection in the trial court would have been futile. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1215; *People v. Boyette* (2002) 29 Ca1.4th 381, 432; *People v. Hill* (1998) 17 Cal.4th 800, 820.) It is futile for a litigant to object to a procedure in the trial court that the trial court is bound to follow under the principle of stare decisis. (*MT v. Superior Court* (2009) 178 Cal.App 4th 1170, 1177, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Ca1.2d 450, 455.)

Respondent also errs in asserting that appellant's arguments "have been repeatedly rejected." (RB 257.)

Appellant's arguments have never been rejected. They have yet to be addressed in any decision of this Court or the high court available at the time of this writing.

Appellant's arguments, to the extent they rely on history, are

similar to arguments presented in other pending capital appeals. (See *People v. Rices*, Docket No. S175851, AOB 67-83 and *People v. Miles*, Docket No. S086234, AOB 102-119.) To the extent they point to the absence of statutory authority for California courts to excuse prospective jurors from a death penalty trial based on refusal to impose death, and cite the futility exception to the forfeiture rule, they are similar to arguments presented in *People v. Suarez*, Docket No. S105876, AOB 78-79, 108.)

None of appellant's arguments resemble those presented in *Lockhart v. McCree, supra*, 476 U.S. 162, or in the California cases that respondent cites to argue that all constitutionality issues connected with death qualification have been rejected.

Finally, respondent implies that appellant's arguments should be rejected, or relief denied, because appellant's jury "was selected using the death qualification procedure that has been approved both by this Court and by the United States Supreme Court." (RB 259.)

Respondent does not say why the State's asserted compliance with the law as it existed at the time of trial should be dispositive. No reason is apparent. It is settled that "`a new [federal constitutional]

rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)" (*People v. Ashmus* (1991) 54 Cal.3d 932, 991.)

IX. THE DEATH PENALTY AS ADMINISTERED IN CALIFORNIA IS CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT

Appellant submitted that California's death penalty has not been, and cannot be, administered or executed fairly with reasonable consistency. The backlog of over 700 cases in federal and state courts proves that California's death penalty has not been administered with reasonable consistency so far. That backlog also prevents California from achieving fair and reasonably consistent administration of the death penalty going forward. The United States Supreme Court has long insisted that the death penalty be imposed "fairly, and with reasonable consistency, or not at all." (*Eddings v.*

Oklahoma (1982) 455 U.S. 104, 112.) Thus, under existing federal law as determined by the high court, this Court can and should hold that California cannot impose the death penalty at all without violating the Eighth Amendment. (AOB 440-459.)

Respondent's only response is that appellant's "case is not so significantly different from" the many cases in which this Court has rejected claims that California's death penalty is unconstitutional. (RB 260-261.) But appellant never claimed that his *case* was significantly different from others. What matters is that his arguments are significantly different from those raised in previously-decided cases. On that point respondent does not and cannot disagree.

To be sure, appellant's arguments have much in common with those adopted by the federal district court in *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050. That decision was overruled on grounds unique to federal habeas procedure in *Jones v. Davis* (9th Cir 2015) 806 F.3d 538, and distinguished by this Court in *People v. Seumanu* (2015) 61 Cal.4th 1293, 1368-1375.

Seumanu rejected some of the conclusions reached in by the

district court in *Jones*, but it did not address the heart of appellant's claim. Unlike the defendants in *Jones* and *Seumanu*, appellant does not claim that this Court's practices and procedures are the root of the problem. Rather, he claims that the legislature's failure to fund the system is the root of the problem, and that this Court must acknowledge the impossibility of providing due process of law to condemned defendants when the legislature fails to provide necessary funds.

Additionally, appellant's claim draws upon an older and broader body of law than that cited in *Jones* and *Seamanu.* Appellant pointed out that the Cruel and Unusual Punishments clause of the Eighth Amendment has an historic meaning under which a penalty that has not been used in a very long time is barred, *ipso facto*, as "cruel" and "unusual." (AOB 254.) This analysis of the Framer's intent dovetails with 20th century high court pronouncements that the death penalty should be imposed "with reasonable consistency, or not at all." (*Eddings* v. *Oklahoma*, supra, 455 U.S. 104, 112.) Appellant claims that punishments that disturb a large sector of the population, once considered acceptable under the Eighth Amendment,

become violative of the cruel and unusual punishments clause as a result of long disuse. Thus, flogging and other corporal punishments in wide use at the time of the framing of the Eighth Amendment are unconstitutional now because they have not been consistently used in this country for a very long time let alone on a regular basis. In California, where there have been no executions in over 10 years, the same is now true of the death penalty.

Thus, appellant's claim does not depend upon this Court finding, as did the district court in *Jones*, that "systemic delays cause the state to apply an arbitrary and irrational standard for deciding whom to execute" (*People v. Seumanu, supra*, 61 Cal.4th 1293, 1374) in violation of *Furman v. Georgia* (1972) 408 U.S. 238. Although appellant notes that delays and variations in the amount time necessary for counsel and the courts to litigate and resolve individual cases erode any value execution may have as a deterrent and increase the suffering of the decedent's survivors, appellant's claim does not depend on this Court agreeing that those facts alone render our scheme unconstitutional. Appellant's argument demands examination of the delays that are unquestionably attributable to the time lost in

awaiting the appointment of counsel, and to the bottleneck of older capital cases in this Court and in the federal Courts of this state. In *Seumanu*, those perennial causes of delay and denial of access to the courts were classed with the time necessary to complete the record, investigate the case, and prepare pleadings. In appellant's case, this Court is being asked to reconsider that classification.

Also, unlike the claims in *Jones* and the derivative claims in *Seumanu,* appellant's claims rest on judicially-noticeable facts: the number of executions carried out in California since the penalty was reinstated, the lack of executions for the last ten years, the present backlog of California death penalty cases in federal and state courts, the failure of the legislature to fund agencies able to provide legal counsel for the condemned in a timely manner, and appellant's lack of habeas counsel, a matter reflected by this Court's docket in this case.

Altogether, appellant's argument asks this Court to agree with Justice Blackmun: "the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death

penalty cannot be administered in accord with our Constitution." (*Callins v. Collins* (1994) 510 U.S. 1141, 1157 [Blackmun, J., dissenting from denial of certiorari].)

After Appellant's Opening Brief was filed, Justice Breyer expressed his concerns about our system in another California capital case:

> California's costly "administration of the death penalty" likely embodies `three fundamental defects" about which I have previously written: `(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose.' [Citations.]" (*Boyer v. Davis* (2016) __ U.S. ___ [194 L.Ed.2d 840] 136 S. Ct. 1446.)

In his prior dissent in *Glossip v. Gross* (2015) __U.S. ___ [192 L. Ed. 2d 761, 793-794]135 S.Ct. 2726, 2755-2759, Justice Breyer explained the three fundamental defects and the need for the judiciary to reassess death penalty schemes that are not working as expected:

> Nearly 40 years ago, this Court upheld the death penalty under statutes that, in the Court's view, contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily. [Citations.] The

circumstances and the evidence of the death penalty's application have changed radically since then. Given those changes, I believe that it is now time to reopen the question.

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. (*Glossip v. Gross, supra*, __ U.S. __ [192 L. Ed. 2d 761, 793-794]135 S.Ct. 2726, 2755-2759.)

* * *

... It has not proved possible to increase capital defense funding significantly. Smith, *The Supreme Court and the Politics of Death*, 94 Va. L. Rev. 283, 355 (2008) ("Capital defenders are notoriously underfunded, particularly in states . . . that lead the nation in executions"); American Bar Assn. (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 9.1, Commentary* (rev. ed. Feb. 2003), in 31 Hofstra L. Rev. 913, 985 ("[C]ompensation of attorneys for death penalty representation remains notoriously inadequate"). (*Glossip v. Gross, supra*, 135 S. Ct. 2726, 2762.)

* * *

In this world, or at least in this Nation, we can have a death penalty that at least arguably serves

legitimate penological purposes or we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both. And that simple fact, demonstrated convincingly over the past 40 years, strongly supports the claim that the death penalty violates the Eighth Amendment. (*Glossip v. Gross, supra*, __ U.S. __ [192 L. Ed. 2d 761, 812] 135 S. Ct. 2726, 2762.)

* * *

I recognize a strong counterargument that favors constitutionality. We are a court. Why should we not leave the matter up to the people acting democratically through legislatures? . . . ¶ The answer is that the matters I have discussed, such as lack of reliability, the arbitrary application of a serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose are quintessentially judicial matters. They concern the infliction—indeed the unfair, cruel, and unusual infliction—of a serious punishment upon an individual. I recognize that in 1972 this Court, in a sense, turned to Congress and the state legislatures in its search for standards that would increase the fairness and reliability of imposing a death penalty. The legislatures responded. But, in the last four decades, considerable evidence has accumulated that those responses have not worked.

Thus we are left with a judicial responsibility. The Eighth Amendment sets forth the relevant law, and we must interpret that law. [Citations.] *(Glossip v. Gross, supra*, __ U.S. ___[192 L. Ed. 2d 761, 816-817] 135 S.Ct. 2726, 2776.)

Like this Court's analysis in *Seumanu*, Justice Breyer's analysis states that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*People v. Seumanu*, *supra,* 61 Cal. 4th 1293, 1369.) Like appellant, Justice Breyer reasoned that the death penalty violates the Eighth Amendment when it is imposed "arbitrarily, i.e., without the `reasonable consistency' legally necessary to reconcile its use with the Constitution's commands. *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)." *(Glossip v. Gross, supra*, 135 S.Ct. 2726, 2760.) And while appellant focused on how "unusual" executions have become in California, Justice Breyer noted that execution had become "unusual" in the nation generally:

> . . . 30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years. Of the 20 States that have conducted at least one execution in the past eight years, have conducted fewer than five in that time, making an execution in those States a fairly rare event. [Citation.] That leaves 11 States in which it is fair to say that capital punishment is not "unusual." And just three of those States (Texas, Missouri, and Florida) accounted for 80%

> of the executions nationwide (28 of the 35) in 2014. [Citation.] In other words, in 43 States, no one was executed. (*Glossip v. Gross, supra*, 135 S. Ct. 2726, 2773-2774.)

While Justice Breyer doubts *any* state can have both an effective death penalty scheme and a reliable review process, many others doubt that California can do so. The death penalty law adopted by California voters cast a wide net. Over 700 condemned inmates are awaiting completion of the review process. Many of them have no legal counsel or have counsel appointed by this Court only for the direct appeal. Those who do have counsel cannot get their cases heard within a reasonable time because there are too many cases ahead of theirs, caught in a bottleneck in this Court and others. In short, the death penalty scheme wrought by California voters almost 40 years has collapsed under its own weight. This Court cannot fix it, but it can (and should) bring it to an end.

X. CALIFORNIA'S FAILURE TO *TIMELY* PROVIDE CONDEMNED DEFENDANTS WITH HABEAS COUNSEL OFFENDS THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS AND REQUIRES REVERSAL OF APPELLANT'S CAPITAL CONVICTION AND SENTENCE

While acknowledging this Court's rejection of an analogous claim in *People v. Williams* (2013) 56 Cal.4th 165, 202, appellant argued that the state's failure to timely provide appellant with habeas counsel requires reversal of his conviction and sentence. Respondent countered that appellant's claim of suffering prejudice is no less speculative than that in *Williams*. That may be so, but that does not mean that inability to show prejudice at this stage allows the Court to reject appellant's claim. (See AOB 462; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1104 [acknowledging high court precedents requiring reversal "without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."].)

Additionally, respondent offers only an ipse dixit in claiming that "meaningful access to the courts remains intact under

California's system." (RB 262.) California is not offering condemned inmates the access to the courts approved by the high court in *Murray v. Giarratano* (1989) 492 U.S. 1. Unlike Virginia prisons, ours are not "staffed with institutional lawyers to assist in preparing petitions for postconviction relief." (Id., at pp.14-15 [controlling opinion of Justice Kennedy concurring in the judgment].)

Respondent also claims this Court is, like the high court, "not equipped to handle" the policy issues connected with prompt appointment of habeas counsel. Respondent does not say what policy considerations respondent believes this Court is "not equipped to handle" nor acknowledge that this Court is, unlike the high court, empowered to appoint habeas counsel for all condemned state prisoners. Also, as shown in the prior argument, the judicial branch is where the proverbial buck stops. If a lack of funding for counsel to represent the condemned prevents administration of the death penalty fairly and consistently, this Court's options include that of calling the whole thing off. (*Eddings* v. *Oklahoma*, *supra*, 455 U.S. 104, 112.)

XI. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

The specific claims appellant raised under this heading, all of which have been rejected by this Court in the cited cases, are covered in the opening briefs of the parties to the extent suggested by this Court in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.

XII. THE CUMULATIVE EFFECT OF ALL THE ERRORS WAS AN UNFAIR TRIAL AND A DEATH JUDGMENT THAT MUST BE REVERSED UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS

Respondent's answer to appellant's cumulative prejudice claim (RB 270-272) assumes that no error occurred. It does not deny that if a number of errors occurred, this Court should review their cumulative impact rather than conduct "a balkanized, issue-by-issue harmless error review" known to be "far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v.*

Wallace (9th Cir. 1988) 848 F.2d 1464, 1476, AOB 476.) Nor does it deny that the federal constitutional standard of review applies when errors of federal constitutional magnitude combine with non-constitutional errors. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59, AOB 476.) Finally, it does not argue, let alone demonstrate, that the errors, individually or collectively, had no effect on the penalty verdict. (*Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.) Such tacit concessions are understandable. Reversal is required.

CONCLUSION

For all the above reasons, and for the reasons stated in appellant's opening brief,[11] appellant's conviction and sentence must be reversed.

Dated: June __ 2017

Respectfully submitted,

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GLEN TAYLOR HELZER

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This Reply Brief has addressed areas where additional briefing appears likely to be helpful to the Court in deciding the case. The absence of additional briefing on other issues is not intended as a concession of any kind, nor as an expression of lack of confidence in the merits of the arguments made in the Opening Brief. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

CERTIFICATE OF COMPLIANCE

I certify that this reply brief was printed in 14-point Times New Roman font and contains 25,797 words as counted by WordPerfect version X-6.

DATED: June ___, 2017

JEANNE KEEVAN-LYNCH
Attorney for Appellant
Glen Taylor Helzer

PROOF OF SERVICE BY MAIL

RE: People v. Glen Taylor Helzer, California Supreme Court No.132256

I, Jeanne Keevan-Lynch, declare under penalty of perjury as follows: I am over the age of 18 years, and I am not a party to the within action. My business address is P.O. Box 2433, Mendocino, California, 95460. On the date indicated below, I served a copy of the attached **APPELLANT'S REPLY BRIEF** by placing same in a sealed envelope addressed as indicated below, and causing same to be deposited in the mail with postage thereon fully prepaid.

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Executed under penalty of perjury under the laws of the state of California and the United States of America on June __, 2017.

JEANNE KEEVAN-LYNCH