IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. KEVIN DARNELL PEARSON, Defendant and Appellant.	No. S212159 (Related Cases, S120750, S191872, and Los Angeles County Superior Court No. NA039436)

APPEAL FROM THE SUPERIOR COURT COUNTY OF LOS ANGELES

Honorable, Thomas T. Ong, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

As noted and detailed in the *Introduction* to Kevin Pearson's *Appellant's Opening Brief*, essentially all of the constitutional Sixth Amendment deficits in Kevin's first trial raised as claims in his petition for writ of habeas corpus, pending in this Court in *In re Kevin Pearson*, S191872, were repeated and unaddressed in this retrial of his penalty phase.

One might well wonder how it was possible upon Kevin's retrial of his penalty phase that after all of the above litigation, service of the briefs on the superior court and the prosecution, upon which trial counsel had notice and access; Kevin's reappointed trial counsel called only three witnesses in mitigation when her predecessor had identified 60, and she failed to introduce the abundant well supported mitigating themes and supporting evidence that had also been identified by her predecessors. (CT 84-85.)

These omissions were facilitated by her reappointment upon retrial in an off the record proceeding without the presence of Kevin or independent counsel familiar with the issues to provide assistance to Kevin and the court making the appointment decision. This is the subject of *Argument I.*

It was also made possible by the trial court's failure to address the multiple indicia of the conflicts of interest of appointed counsel. This is the subject of *Argument II.*

To these arguments, and the concomitant, additional constitutional errors during the retrial itself (*Arguments III,* and *IV*), respondent resounds, "no prejudice." That is certainly false as the following arguments will demonstrate.

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

ARGUMENT

I. APPELLANT WAS DEPRIVED OF DUE PROCESS, HIS RIGHT OF PRESENCE, AND THE EFFECTIVE ASSISTANCE OF COUNSEL BY THE EX PARTE IN CAMERA PROCEDURE EMPLOYED IN HIS ABSENCE BY A JUDGE OR COMMITTEE OF JUDGES THAT REAPPOINTED TRIAL COUNSEL WITHOUT ANY ADVISEMENT TO APPELLANT REGARDING COUNSEL'S CONFLICT OF INTEREST ARISING FROM THE PENDING POST-CONVICTION CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FROM APPELLANT'S FIRST TRIAL PROVIDING THE CONDITIONS FOR A CONFLICT OF INTEREST AT HIS RETRIAL

A. BACKGROUND

Respondent does not dispute any of the background facts raised here in *Appellant's Opening Brief* (AOB.)

B. RESPONDENT'S ARGUMENT

1. Respondent's Procedural Objection To Appellant's Argument Ignores The Flagrant Violation Of Penal Code Section 190.9 By The Superior Court

Respondent argues that appellant's argument fails on the procedural ground that appellant has not provided this Court with a "transcript of the hearing in which trial counsel was reappointed," RB p. 30. The reason appellant has not provided a transcript is that the judges who reappointed trial counsel acted in blatant violation of Penal Code section 190.9 subdivision (a)(1), which provides in pertinent part: "In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers shall be conducted on the record with a court reporter present." It is undisputed that Judges Schnegg, Lomeli

and Tynan met and conferred regarding the appointment of counsel; that the pending habeas corpus petition was referred to in some unspecified manner; and that the judicial act of appointment of counsel resulted from this conference. By any construction of Penal Code section 190.9 subdivision (a)(1) that conference should have been reported. Appellant referred to this violation of that section in the Opening Brief, see AOB, p. 42, but respondent has elected to ignore this statutory violation and instead to fault appellant for failing to provide a transcript that is non-existent due to the failure of the judges involved to comply with the applicable statute. Respondent's position displays a great deal of chutzpah but absolutely no merit.

Appellant believes that the contents of the unreported conference may well be relevant to the resolution of this claim, and therefore seeks to remedy the trial court's error by settling the record as to the conference among the four appointing judges; the evidentiary materials that were relied on, if any; and rationale for re-appointing attorney Sperber notwithstanding the pending habeas writ. (See *People v. Gzikowski* (1982) 32 Cal.3d 580, 584, fn. 2 [approving settled statement procedure to establish the content of an unreported conversation in chambers regarding representation issues in a capital prosecution]. Pursuant to Rule 8.346, Cal. Rules of Court, appellant has separately filed an application to prepare a settled statement as to the proceedings that resulted in the April 2, 2012 appointment of Ms. Sperber. The settled statement is necessary because, as is apparent from a review of the RB, respondent is relying on hearsay statements from Ms. Sperber as to what Judge Keo[1] told her about the conference

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[1] As will be demonstrated in Kevin's petition of writ of habeas corpus to be filed within a reasonable period after the filing of this reply brief, Ms. Sperber misspoke—there is no Judge Keo, but rather she

proceedings to justify the re-appointment. For example, respondent states that "[t]he record indicates that the judges who reappointed trial counsel were aware of the habeas petition alleging ineffective assistance of counsel pending in this Court", RB p. 31, citing 2RT 5-6. However, that citation refers to Ms. Sperber's hearsay representations to Judge Ong on April 5, after she had been appointed. The record is uncertain and unreliable as to whether the appointing judges had actual access to the pending habeas petition and reviewed the IAC claims prior to appointing Sperber, or whether (more likely) they had notice of the fact that the habeas petition was pending, but did not actually examine it in the course of deliberating on the propriety of re-appointing Sperber. That is a crucial fact to establish. In addition, there is nothing in the record whether the appointing judges even considered, much less made determinations about, the conflict of interest issue.

In sum, respondent cannot colorably fault appellant for a putative deficiency in the record that was the fault of the judges whose decision is under scrutiny. Appellant therefore requests that this Court grant the separately filed motion for permission to prepare a settled statement of the unreported proceedings.

2. RESPONDENT'S SUBSTANTIVE ARGUMENT REGARDING THE DENIAL OF APPELLANT'S RIGHT OF PRESENCE IGNORES THE RELEVANT LANGUAGE OF PENAL CODE SECTION 987.05

Respondent argues that "nothing in section 987.05 states a criminal defendant has a right to be present when [the] court appoints counsel," RB 30, adding that "[t]he section's requirement for a hearing involves only the *removal* of an appointed counsel," *ibid*, emphasis in

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likely had contact with Mr. Keo Senesombath, the 987.9 Analyst for the Los Angeles County Superior Court.

original. Respondent ignores the relevant language of section 987.05 that "[i]n assigning defense counsel in felony cases, whether it is the public defender or private counsel, the court shall only assign counsel who represents, *on the record*, that he or she will be ready to proceed with the preliminary hearing or trial... within the time provision prescribed in this code...." (emphasis supplied). The statute requires an *on the record* commitment by counsel as to diligence in preparation, which did not occur in this case, and which clearly qualifies as a critical proceeding under the Sixth Amendment for which the presence of both appellant and counsel is required under the Fifth Amendment.

Respondent's next argument—that "[a]s indigent defendants do not have a right to a counsel of their choice under the federal or state constitution, it follows that appellant'[s presence when the court appoints counsel is not necessary," RB 30, —is patently faulty. A defendant may not have the right to affirmatively select a particular attorney, but does have the right to speak out as to the existence of cause to preclude appointment of a particular attorney. A defendant may object to appointment based on an attorney's prior representation of the defendant himself; prior representation of a codefendant or other witness, or other potential basis for a conflict of interest.

Respondent does not dispute that there is no other statutory, let alone constitutional, authorization that such a hearing be conducted without the defendant's presence, particularly where a conflict of interest may exist, let alone when it is as blatantly clear as it was here.

Respondent attempts to recast this issue as a claim that the "mere existence of a pending habeas petition alleging ineffective assistance of counsel does not establish a conflict of interest. For purportedly analogous support, respondent cites *People v. Horton* (1995) 11 Cal.4th

1068, 1106-1107.) (RB p. 31.) But *Horton* is not analogous. In *Horton*, unlike here, there was a hearing in which the issue was fully aired; the ineffective assistance argument had not been raised on habeas corpus, but rather in a civil malpractice action; trial counsel sought permission to be removed; and the trial court denied the request because "the allegations that gave rise to the alleged conflict already had been examined (at [a] Marsden hearing), had been determined to have no merit, and would not justify the removal of appointed counsel." (*Id.* at p. 1105.) This is vastly different from Kevin's case, where all was done out of public view, off the record, in the absence of Kevin, and in the absence of independent, conflict-free counsel to advise Kevin.

Indeed, respondent acknowledges that "A court abuses its discretion when it acts unreasonably under the circumstance of the particular case." (RB p. 31, citing *People v. Cole* (2004) 33 Cal.4th 1158, 1184-1185.) For the reasons stated in the preceding paragraph, the court certainly abused its discretion under the circumstances of Kevin's case.

Implicit by respondent's silence, there is no dispute that nothing short of a reviewing court's assessment and decision or evidentiary hearing referee's findings can resolve the numerous and substantial ineffective assistance of counsel claims raised on Kevin's behalf prior to again reappointing Kevin the same trial counsel. Thus, there is no question that on this record the potential conflict was substantial and the issue raised, but ignored. Therefore, appellant's reliance on *Holloway v. Arkansas* (1977) 435 U.S. 475, 489 and *People v. Mroczko* (1983) 35 Cal.3d 86, 104-105 in analogous contexts (unchallenged conflicts) is well-placed, respondent's efforts notwithstanding. (RB p. 32)

Here, it has not been disputed that trial counsel was laboring under an actual conflict of interest. "As a general proposition, such conflicts 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his ... own interests.[2] [Citations.]' (*People v. Doolin* (2009) 45 Cal.4th 390, 417; see e.g., *Maples v. Thomas* (2012) ___ U.S. ___, 132 S.Ct. 912, 925, fn. 8, a "significant conflict of interest" arises when an attorney's "interest in avoiding damage to [his] own reputation" is at odds with his client's "strongest argument—i.e., that his attorneys had abandoned him;" accord, *Christeson v. Roper* (2015) ___ U.S. ___, 135 S.Ct. 891, 894-895.)

C. THE APPOINTMENT PROCESS AND THE OUTCOME WERE CONSTITUTIONALLY DEFECTIVE AND PREJUDICIAL

Respondent argues that there was no prejudice because Kevin wanted Ms. Sperber to represent him, RB p. 31. However, the only evidence for that is what occurred in Judge Ong's court after the appointment had been made, and Kevin, by his passive nature, may well have been afraid to rock the boat at that point. (2RT 51-52.) At the time of the initial appointment, the downtown judges could have inquired of Kevin whether he would like Ms. Sperber re-appointed, or

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2 Trial counsel had been advised by post-conviction counsel:

> ... [Y]ou may find yourself as the prosecution's witness during an evidentiary hearing on the habeas petition defending the tactics you employed at Mr. Pearson's first trial while at the same time having the duty to defend Mr. Pearson and represent him at any retrial. You would thus be faced with the potential conflict of interest to defend your tactics taken at the first trial while at the same time planning your defense for the retrial while now aware that others have found those earlier tactics constitutionally deficient.

(CT 63-64.)

whether he would like to consult with independent counsel given the pending ineffective assistance of counsel claims. What is consistent with this far less than clear exchange between the court, Kevin, and Ms. Sperber is that Kevin was trying to please everyone at the post-appointment proceedings (to his own detriment), and Ms. Sperber was trying to hold onto the case. Kevin's statements in that conflicted situation cannot be taken as a cure for defective appointment proceeding where he would not have been under similar pressure.

Here, there is no need to resort to speculation, informed or otherwise, prejudice is abundantly demonstrated in *Argument IV*, below, and incorporated here, in that trial counsel at Kevin's penalty phase retrial failed to introduce 11 compelling mitigating themes and inadequately introduced 5 others. Individually and collectively these raise the unchallenged inference that his trial counsel acted in her own interest at the expense of her client.

Kevin's judgment of death must be reversed.

II. THE TRIAL COURT FAILED TO ADDRESS THE MULTIPLE INDICIA OF CONFLICTS OF INTEREST ON THE PART OF TRIAL COUSNEL

A. BACKGROUND

Both the downtown judges and Trial Judge Ong had sufficient information through post-conviction counsel's intervention to trigger an inquiry–the downtown judges based on their knowledge of the existence of the petition for writ of habeas corpus raising numerous Sixth Amendment claims of the ineffective assistance of counsel [IAC claims] and Judge Ong because of knowledge of the motion for removal of Ms. Sperber premised on her conflict of interest. Each breached their respective judicial duties to inquire.

The court was on notice from the content of the IAC claims in the habeas petition that had been filed in this Court and served on the superior court and prosecution as well as from post-conviction counsel's motion to remove Ms. Sperber as Kevin's counsel, that she had failed to raise 17 well-developed mitigating themes[3] in Kevin's initial penalty

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[3] These were:

(1) intergenerational family history of chronic trauma and neglect;

(2) family history of mental illness;

(3) family history of chronic domestic violence and child abuse;

(4) family history of drug and alcohol abuse;

(5) repeated good acts/behavior by Kevin throughout his young life;[3]

(6) learning difficulties documented by his failure to finish high school and failure to pass the entrance examination to join the Army;

(7) extraordinary poverty;

(8) repeated failures of the child welfare system;

(9) exposure to chronic community violence;

(10) Kevin's own history of marijuana and alcohol abuse;

(11) Kevin's expressions of deep remorse;

(12) Kevin's manifestation of symptoms known to be associated with depression, neuropsychological impairment and chronic complex trauma;:

(13) repeated victim of community violence;

(14) lack of continuity in the schools he attended or in the households in which he was placed;

phase trial supported by approximately 60 witnesses. First, no judge ever asked Ms. Sperber whether she knew the content of the IAC claims, and if not, to review them to be able to address whether they put her in a conflicted position. Only after that kind of review could a judge have a meaningful dialogue with counsel whether a potential conflict existed.

Second, respondent does not dispute any of the background facts raised here in *Appellant's Opening Brief.* Thus, there is no disagreement that the trial court was on notice that the allegations had been made that trial counsel at Kevin's penalty phase retrial failed to introduce 17 compelling mitigating themes and she thereby had a clear conflict of interest—raise the issues, acknowledged her ineffectiveness for whatever fallout she may perceive that it might bring to her, and prepare for the response that she had not believed the issues worthy at the first trial; or not raise the issues to her client's peril in his retrial.

> (15) as a child through adolescence, lack of adequate supervision, nurturing, and protection by adults in his life;
>
> (16) a great sense of defeat and disappointment by not being able to enter the Army with his fiancé, forced by lack of other opportunity to return to his mother's household, and burdened with child caring responsibilities for his younger siblings; and thereby without the freedom of seeking more gainful employment; and
>
> (17) as well as the support for the theme of lingering doubt based upon Kevin's false and involuntary statements.

(*In re Kevin Pearson*, S191872, pp. 293-294, see CT 61-74, 83-89.)

B. RESPONDENT'S ARGUMENT

Within the first paragraph of respondent's argument, respondent in a single sentence addresses the error prong of this issue, with the unsupported conclusion, "The trial court was not required to inquire into a potential conflict of interest as the claim was speculative at best." (RB p. 33.) Respondent makes no effort to explain.

Yet in *People v. Bonin* (1989) 47 Cal.3d 808, authority acknowledged by respondent (RB p. 33), this Court provides the guidance that "[w]hen the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter." (*Id.* at p. 836.) That threshold is crossed when the court has been provided "with *evidence* of the existence of a conflict situation." (*Id.* at p. 838, italics original.) The standard here is evidence of the possibility of a conflict of interest, not proof of a conflict. (*Ibid.*) "[T]he defendant need not demonstrate specific, outcome-determinative prejudice. He need show only that an actual conflict of interest existed and that the conflict adversely affected counsel's performance." (*Id.* at p. 837.)

Respondent has offered no insight on why the 17 claims in mitigation omitted by trial counsel, supported by umpteen pages of exhibits, was not more than adequate to put the conflict of interest question squarely before the court.

Here, the superior court had been served with the habeas petition and accompanying supporting 77 exhibits raising numerous documented and well-supported claims of the ineffective assistance of trial counsel. This overwhelmingly provided "evidence of the existence of a conflict situation," and made reasonably known the possibility of a conflict. (See, *id.* at pp. 836-838.) "The trial court is obligated not

merely to inquire but also to act in response to what its inquiry discovers." (*Id.* at pp. 836-837.)

"[A]t a minimum, the trial court must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right." (*People v. Bonin, supra,* at p. 841, citing *People v. Mroczko, supra,* 35 Cal.3d 86, 110; accord *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1010.) Of course, none of that happened here.

By the trial court's failure to address this conflict of interest, the court also failed to take the requisite steps to ensure that any waiver, if waiver there was, met the constitutional standards that it be made voluntarily, knowingly, and intelligently. (*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1010.) That again did not happen here.

C. CONCLUSION

Finally, respondent proffers the non-sequitur that since Kevin's (initial) habeas petition is still pending in this Court, trial counsel's "dilemma of pursuing her client's multiple defenses that by implication would require the admission of serious omissions in the previous preparation of her client's defense' never came to fruition." (RB p. 35.) The point respondent has missed, is that if Ms. Sperber changed her penalty re-trial strategy to cure the defects alleged in her first penalty trial, she would be tacitly conceding that she had erred in the first trial, at least as to the penalty phase, which could be used as circumstantial evidence that she also erred in the guilt phase as well. Respondent has not addressed this.

Argument IV, is incorporated here where the prejudice from defense counsel's conflict of interest is readily evident. Defense counsel labored under an actual conflict of interest. Kevin's judgment of death must be reversed. (*People v. Doolin, supra,* 45 Cal.4th 390, 417-418 ["a defendant is deprived of his or her constitutional right to the assistance of counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labored under a conflict of interest that compromised his or her loyalty to the defendant"].) Should the *Strickland* v. *Washington* (1984) 466 U.S. 668 prejudice assessment discussed in *Argument IV,* be inadequate to assure vindication of Kevin's Sixth Amendment right to counsel, then here the prophylactic presumption of prejudice must apply and Kevin's judgment of death must still be reversed. (See, *Doolin, supra,* at p. 418.)

III. THE PROSECUTOR WAS PERMITTED TO QUESTION EACH SOCIAL HISTORY MITIGATION WITNESS ABOUT THE FACTS OF APPELLANT'S OFFENSES AND REPEATEDLY DISPLAY TO EACH THE INFLAMATORY AND GRUESOME CRIME SCENE PHOTOGRAPHS OF THE VICTIM'S BODY IN AN EXPRESSED EFFORT TO END THEIR SUPPORT FOR APPELLANT AND THEREBY DENIED KEVIN HIS CONSTITUTIONAL RIGHT OF DUE PROCESS BY THE INTRODUCTION INTO HIS PENALTY PHASE TRIAL IRRELEVANT EVIDENCE AND NONSTATUTORY AGGRAVATING FACTORS

A. BACKGROUND

Respondent does not dispute any of the background facts raised here in *Appellant's Opening Brief* (AOB.)

B. RESPONDENT'S ARGUMENT

1. PRESERVATION OF THE ISSUE

Respondent begins with the assertion that "appellant's claim as to the prosecutor's reiteration of the facts of the crime to the witnesses is forfeited for failure to object." (RB p. 36.) During cross-examination of the defenses' first of three mitigation witnesses, Delisa King, Kevin's surrogate mother, the prosecutor asked her a series of questions, each detailing a single fact from the crime followed with the inquiry whether Kevin had told her about that fact. Trial counsel made no objection. But, when the prosecutor sought to show the witness crime scene photographs including those of the victim, trial counsel asked to be heard outside the hearing of the jury, which was granted. (14RT 2799-2800.)

Defense argued that the witness had nothing to do with the offense; the photos were being shown "to try and get this witness upset, angry, I don't know what. But there is no reason to show her these inflammatory photographs when it has nothing to do with her testimony." At the court's request for the basis of defense counsel's objection, defense counsel specified that she was making an Evidence Code section 352[4] objection. (14RT 2801-2802.) The substance of defense counsel's objection also described the impropriety of the prosecutor's initial probing of Ms. King what Kevin may have told her about the offense. The court denied the objection. (*Ibid.*) In light of the trial court's resolution of the issue, it would have been fruitless to have raised the objection earlier, just as it would have been fruitless to

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[4] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

have repeated the objection when the prosecutor used the same tactics with mitigation witnesses Messrs. Bland and McGee.

In any event, any shortcoming in defense counsel's efforts to preserve this issue provides a further incidence of ineffective assistance of counsel and is cited and addressed in *Argument IV*, below.

2. SUBSTANCE OF THE ISSUE

The evidence sought by the prosecution was irrelevant to any authorized issue for the penalty phase jury. Here, the three mitigation witnesses were only competent to render opinions about the character of the boy that they knew when they knew him. They were not competent to render opinions about the character of one who committed the acts underlying Kevin's convictions that these three witnesses were not witness to. The trial court had no discretion to admit irrelevant evidence. (*People* v. *Turner* (1984) 37 Cal.3d 302, 321, Evid. Code, § 350[5].)

Respondent acknowledges that "'The test of relevance is whether the evidence "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive,"'" citing *People v. Kelly* (1992) 1 Cal.4th 495, 523. (RB p. 42.) Yet, respondent provides no explanation for how the context of the probing of Kevin's three mitigating witnesses from his early adolescence falls under this umbrella. Respondent offers that "the trial court has 'wide discretion in determining relevance under this standard,'" but respondent makes no effort to argue that it is that wide. (RB p. 42.)

Respondent argues that the evidence the prosecutor sought to introduce was authorized to impeach the defense evidence. (RB p. 45.)

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[5] Evidence Code section 350 provides, "No evidence is admissible except relevant evidence."

However, it was not the defense evidence that motivated the prosecutor, it was her own straw man she had setup. On cross-examination, the prosecutor affirmed that Ms. King had told a defense investigator that she thought Kevin was respectful, a point that had not been elicited by the defense in their direct examination of Ms. King. (14RT 2793.) The prosecutor then used this response as a justification to ask Ms. King whether the many acts underlying Kevin's convictions were consistent with that opinion. Ms. King concurred in the obvious, but remained steadfast that she believed Kevin was not disrespectful. (14RT 2793-2796.) Respondent provides no authority that such a ruse would open the door to the highly prejudicial impact employed in Kevin's retrial of the near constant repetition of the gruesome facts underlying the charged offenses serving no rational purpose.

Respondent seeks support in *People v. Siripongs* (1988) 45 Cal.3d 548 where the Court found it proper to impeach the defendant with evidence of his past reputation for truthfulness or veracity in a trial where he had offered in mitigation that he was honest. (*Id.* at p. 578.) There is no support there for the tactic employed by the prosecutor in Kevin's retrial. Here, defense evidence provided from three witnesses in mitigation described what Kevin was like as a boy. That in no way was relevant to or a proper basis for probing these witnesses for how their opinion might change it they heard the specifics of the criminal acts he was convicted of committing as an adult. (RB pp. 43-44.)

Respondent does not dispute that victim impact evidence does not open the door to urging the jurors to subjectively analyze a case from the viewpoint of how *they themselves* would react if the defendant murdered their own loved one. Yet, the implication of respondent's position is that it was proper for the prosecutor to probe how Kevin's mitigating witnesses would react under the same circumstances. (RB

pp. 43-44.) There was certainly no other explanation for the litany of questions from the prosecutor on cross-examination about what elements of the crime Kevin may have told these witnesses and the impact on them from seeing the gruesome crime scene photographs. The prosecutor was attempting to destroy the regard they cherished from their years living with this adolescent boy during one of the few points in time when he had a roof over his head, food on his table, and someone caring for him. Respondent provides no authority for the prosecutor's relentless replay of specific aspects of the offenses upon which Kevin's mitigating witnesses had nothing relevant to provide.

C. CONCLUSION

Respondent offers that this thrice repetition of the heinous elements of the offenses was not prejudicial because these were the acts he had been convicted of. (RB p. 44.) Alternatively, respondent offers, that "in any event, despite having been shown the photographs and described the injuries appellant committed, none of the witnesses said their opinion of appellant had changed." (RB p. 45.)

"In a case such as this where the crime charged is of itself sufficient to inflame the mind of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence and the conduct of the trial." (*People v. Evans* (1952) 39 Cal.2d 242, 251.) Here there was a gross failure to safeguard the process from the prosecutor's obvious concomitant if not primary goal to inflame the jury with this gruesome, highly prejudicial evidence relevant to nothing Kevin's three mitigation witnesses were privy to. A prosecutor's position is such that any improper acts "are apt to carry much more weight against the accused when they properly should carry none." (*Berger v. United States* (1935) 295 U.S. 78, 88; *People v. Talle*

(1952) 111 Cal.App.2d 650, 677.) Here we have that magnified by three.

Kevin's judgment of death must be reversed.

IV. THE PERFORMANCE OF APPELLANT'S COURT-APPOINTED COUNSEL WAS SO FAR BELOW THE STANDARD OF CARE FOR CAPITAL DEFENSE LAWYERS THAT APPELLANT WAS DEPRIVED OF ANY MEANINGFUL REPRESENTATION AT TRIAL, RESULTING IN A BREAKDOWN OF THE ADVERSARY PROCESS AND A VIOLATION OF THE SIXTH AMENDMENT

A. BACKGROUND

Respondent does not dispute any of the background facts or procedural history raised here.

B. RESPONDENT'S ARGUMENT

Respondent acknowledges that the direct appeal may be employed for ineffective assistance of counsel claims where there simply could be no satisfactory explanation for why counsel acted or failed to act in the manner challenged. (RB p. 48, citing *People v. Vines* (2011) 51 Cal.4th 830, 876.)

As a general palliative to all claims here, respondent offers, "the record shows that trial counsel vigorously represented appellant and subjected the prosecution's case to the adversarial process." (RB, p. 49.) Respondent offers as an illustration, "all of the prosecution's witnesses except for Sigler's son ... were cross-examined, and some were subjected to recross-examination as well." (*Ibid.*) Respondent offers no authority that such a low bar is determinative of anything.

1. Rather than Using the Jury Voir Dire to Sensitize the Jury to the Mitigation Case, Trial Counsel Trivialized Her Client's Adversities

During jury selection, rather than sensitizing the jury to the appalling life history Kevin had endured for what empathy it would suggest to a juror or jurors that may be forthcoming in the trial, defense counsel instead peppered her voir dire with facts that trivialized the deprivations the jury may be asked to consider to mitigate his sentence. The result was a missed opportunity for which no benefit was gained. These were illustrated in the AOB. (5RT 879, 6RT 996, 1007.)

First impressions in the mind of the jury may be hard if not impossible, to dispel at a later time. The prosecutor's early efforts to demonize the defendant must be controverted on the spot by the defense at the first opportunity. These first impressions may well become the standard by which the entire proof and evidence in the case will be later be weighed and considered by the jury. (F. Lee Bailey and Henry B. Rothblatt, *Fundamentals of Criminal Advocacy* (1974) The Lawyers Co-operative Publishing Co.), pp. 291-292.)

There can be no satisfactory explanation why defense counsel abandoned this first key opportunity in the trial to suggest to the jury the salvageability of her client and suggest the empathy necessary to achieve an alternative to the death penalty that would be forthcoming.

2. Once Again Trial Counsel Failed to Call as Witnesses the Vast Majority of Witnesses Previously Interviewed on Behalf of Kevin's First Counsel, the Public Defender, and None of the Experts that They Had Retained to Assess Kevin; and Thereby Abandoned Lingering Doubt as a Mitigating Factor

Respondent agrees that "evidence of the circumstances of the offenses, including evidence that may create a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty retrial as a

factor in mitigation ...." (RB pp. 53-54.) Respondent does not dispute the availability of evidence of lingering doubt. Indeed, as respondent suggests, the record sheds no light on why counsel did not call witnesses and experts. But respondent's recitation of the prosecution's facts describing Kevin's role in the offenses provides no insight, and certainly is not dispositive, particularly where defense counsel had repeatedly indicated that evidence of lingering doubt would be forthcoming.

Once again, there can be no satisfactory explanation why defense counsel abandoned lingering doubt as a mitigating defense.

3. Trial Counsel Failed to Object and Cite as Prosecutorial Misconduct the Prosecutor's Assertion in Argument of Totally False and Highly Emotional and Inflammatory Facts

Respondent contends that the prosecutor's assertion to the jury during closing argument that Kevin said he shoved the stake into the victim's vagina four to five times was *a reasonable inference* from the evidence. Yet, there is a vast gorge separating the evidentiary strength of something that provides "a reasonable inference" and a statement of fact: the latter the assertion made here by the prosecutor that Kevin had admitted those facts; shoving the stake into the victim's vagina. Relentlessly she drove home, "He shoved that stake into the victim's vagina four to five times, that's what he said, that's what he said on the tape, that it was shoved in her four to five times." (RB pp. 55-56, 13RT 2740.)

The prosecutor's statement was absolutely false in light of the fact that her witness, the officer that had interviewed Kevin, told the prosecutor on redirect examination that Kevin never told him he used the stake. (13RT 2740.)

So the jury had before it the assertion by the prosecutor that Kevin had committed the most vile, atrocious aspect of these offenses,

second only to the murder itself. Now this could have been ameliorated by some action of defense counsel, like an objection, movement to strike, and citation of judicial misconduct. Even if the defense did not prevail on any of these fronts, the jury would have gotten the point that this was a disputed fact.

But, Kevin's jury was not left with a mere reasonable inference, mollified to some degree by the action of defense counsel. This jury had the lie standing alone with only silence coming from the defense. Thus, along a continuum of prejudicial value, the prosecutor got a pass on the most heinous attribution of this fact; one punctuated by defense counsel's silence.

Respondent offers that defense counsel's objection may have only served to highlight or emphasize the evidence. (RB p. 57.) But, the evidence was already highlighted by its grossly inflammatory character and the defense's affirmation by defense counsel's silence.

Respondent's second effort at amelioration is the assertion that defense counsel's closing argument was a reasonable attempt to diffuse its consequence:

> We have that one horrible day. You can't say what if, what if, what if, what if, he hadn't been drinking, what if he hadn't gone there, what if he had gone with Ganett instead of with No good and June. You can't talk about the what if's. It happened and there is no way to change it. Likewise, there is no way to explain it. He isn't inherently evil. He doesn't have a history of being evil because Janisha Williams is not telling you the truth. He doesn't have a subsequent history of doing bad and doing evil. He had one night of horribly abhorrent behavior. Everything else in his life is a factor in mitigation.

(14RT 2949.) This is not ameliorating. The lie still stands, punctuated, highlighted, by the defense's apparent affirmance through defense counsel's silence.

Respondent's third effort at amelioration is the old standby, "The prosecutor's comment was brief." (RB p. 58.) The statement did not need to be long to have its effect. But, in any event, it was far from brief, as illustrated here:

> Ultimately, he used that wooden stake to satisfy himself because he couldn't come to an orgasm. He said that stake went in real deep, six to seven inches. The sliver was found four inches inside her vagina. He shoved that stake into the victim's vagina four to five times, that's what he said, that's what he said on the tape, that it was shoved in her four to five times."

(14RT 2933-2934.)

Finally, respondent cites the aggravating evidence weighing in favor of the death penalty. But whatever weight it bore was also attributable to the ineffective assistance of counsel addressed elsewhere in this brief. Once again, there can be no satisfactory explanation why defense counsel sat mute while the prosecutor egregiously overstated her case for death.

4. If it Were Found that Defense Counsel Failed to Adequately Preserve Argument III for Appeal, this Provides a Further Instance of Ineffective Assistance of Counsel

Respondent relies on their presentation in *Argument IV, B, 4* (RB p. 59), as does appellant (AOB 104.)

5. Trial Counsel Failed in Closing Argument to Argue to the Jury the Limitations of Their Use of Three Mitigating Witnesses' Feelings for Kevin

Appellant relies on his presentation in *Argument V.*

C. CONCLUSION

Respondent has elected not to address the cumulative prejudicial impact of these errors. This issue was fully briefed in the *Appellant's Opening Brief, Argument IV, D* and appellant reasserts those arguments and incorporates them by reference herein. (AOB pp. 104-106.)

V. THE CUMULATIVE EFFECT OF THE ERRORS COMPELS REVERSAL OF THE DEATH SENTENCE EVEN IF NO SINGLE ISSUE, STANDING ALONE, WOULD DO SO

Respondent has elected to rest here on their contention that there were few or no errors or the errors were harmless. (RB pp. 59-60.)

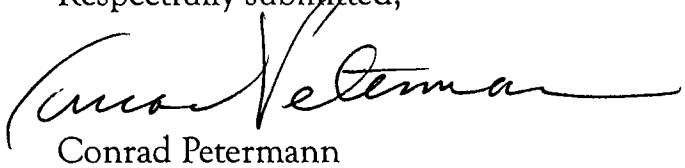
Thus, Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 104-105.)

CONCLUSION

For the foregoing reasons, Kevin's death sentence must be reversed.

Dated January 12, 2016

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Goudy Old Style typeface, point size of 14, and the total word count is 6,369, not including tables, and thus is within the limits (47,600 words) of California Rules of Court, rule 8.630, subdivision (b).

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CASE NUMBER: No. S212159

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served *APPELLANT'S REPLY BRIEF* by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2016, at Ojai, California.

Conrad Petermann