SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Calif. Supreme Court No. S166168
Plaintiff and Respondent,	)	Orange Co. Super. Ct. No. 03CF0441
v.	)	
MICHAEL A. LAMB,	)	AUTOMATIC APPEAL
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

From a Judgment of the Orange County Superior Court
The Honorable Wm. Froeberg, Judge Presiding

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DEATH PENALTY

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ARGUMENT

I. CONDUCTING A SECOND PENALTY PHASE TRIAL AFTER THE FIRST PENALTY PHASE JURY FAILED TO REACH A VERDICT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AMENDMENT

The essence of appellant's argument is that the California statute is vastly at odds with the rule in other states and the federal jurisdictions, which permit only a single penalty phase trial, and thus is out of step with evolving standards of decency, the standard by which Eighth Amendment claims are evaluated. Respondent notes that this Court has rejected similar arguments, most recently in *People v. Trinh* (2014) 59 Cal.4th 216, 237-39 and asserts there is no reason to revisit the claim. (RB 62.) *Trinh* recognizes that "the United States Supreme Court has made clear that the Eighth Amendment embodies collective moral judgments about the standards of decency in a civilized society," and appellant has shown that the collective moral judgment in this

country weighs heavily against a mandatory second penalty trial in a capital case. (AOB 95-98.) Citing *Gregg v. Georgia* (1976) 428 U.S. 153, *Trinh* circumvents these collective judgments on the ground that they "do not constrain state legislatures from arriving at differing conclusions concerning the societal benefits of seeking a death sentence [or] of seeking a death sentence multiple times." (*Id.* at 186.) *Gregg v. Georgia* held that "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." (*Id.* at 186.) However, the case did not speak to t he issue here, which is the mandatory setting of a second penalty trial in a capital case.

Moreover, *Gregg v. Georgia* also held that the Eighth Amendment's evolving standard of decency is measured not only by state legislation, but also by the jury, as "a significant and reliable objective index of contemporary values." (*Id.* at 181.) Appellant contends that when a penalty phase jury is unable to reach a verdict, that lack of consensus is an "objective index" of the community values, and must be considered.

Because *Trinh* does not address the particular points made here, appellant submits that it should be reconsidered.

Respondent argues that appellant's argument that the first jury's split verdict[1] should be considered "in effect" a double jeopardy claim. (RB 62-63.) Appellant does

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[1] At the first penalty trial, the jury reported itself at an impasse with votes of six to five, with one undecided. (28RT 5677-3.) According to the trial court's recounting at the Penal Code section 190.4 hearing, that reporting was six votes for death, five for life, and one undecided. (42RT 8641.)

not claim, directly or in effect, that double jeopardy is in issue. Appellant's claim rests squarely on the evolving standards of decency component of the Eighth Amendment and on the United States Supreme Court's mandate to consider both legislation and the jury as objective indices of the contemporary values that are key to assessing the constitutionality of a sentencing scheme.

Alternatively, appellant argues that in this case the second penalty trial violated appellant's federal due process rights. (AOB 100-103.) The basis for this claim is that after the first jury deadlocked at six for death, five for life, and on undecided, the prosecutor requested that the trial court "reconsider" its ruling excluding evidence of a supposed escape attempt. The trial court then ruled evidence it had considered insufficient to be suddenly admissible under a faulty rationale. (Arg. II, below & AOB 104-123.) Appellant contends that the result was a fundamentally unfair second penalty trial.

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Respondent argues that the due process claim is without merit because many factors could have resulted in different outcomes in the two penalty phase trials. (RB 63.) However, appellant's claim does not rest on the different outcomes of the two trials *per se*. Rather, appellant points out that the mandatory second trial provision allows or even encourages the maneuvering or maneuvering of the evidence that occurred here. That danger is surely the underlying rationale for the majority rule that allows the prosecution only one attempt at a death sentence.

In conclusion, fundamental fairness and the national consensus against retrials in capital cases rendered appellant's second penalty trial invalid in violation of the Eighth Amendment. The error is structural and requires vacating appellant's death sentence and imposing a sentence of life without possibility of parole.

II. THE ERRONEOUS ADMISSION OF EVIDENCE OF APPELLANT'S ALLEGED PARTICIPATION IN A CONSPIRACY TO SMUGGLE WEAPONS AND INSTRUMENTS OF ESCAPE INTO THE JAIL, AND TO ESCAPE FROM JAIL, EVIDENCE DEEMED INADMISSIBLE BY THE SAME JUDGE AT THE FIRST PENALTY TRIAL, VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL BY JURY AND A RELIABLE SENTENCING DETERMINATION

A. The Evidence of Appellant's Alleged Participation in a Conspiracy to Smuggle Weapons into the Jail Was Erroneously Admitted.

Appellant contends that the trial court erred in admitting evidence of the alleged conspiracy at the penalty trial, where the evidence of appellant's participation in a conspiracy to smuggle weapons and escape tools in to the jail was legally insufficient. The result was an unreliable penalty determination requiring reversal of appellant's sentence of death.

After hearing the prosecution's "conspiracy" evidence in the first trial, the trial court struck it on the ground that the "gulf was too large" to "connect the dots" of the supposed conspiracy to appellant. (25RT 5060-61.) After the hung verdict at penalty phase, the trial court changed course and declared that the evidence once considered "insufficient" now "needed to come in." (28RT 5790-96.) Appellant contends that the trial court's initial ruling was correct. An analysis of the evidence proves it so.

The essence of a conspiracy is the agreement; proof of the agreement does not require evidence of a formal agreement but here must be some manifestation of a mutual understanding. (*People v. Johnson* (2003) 57 Cal.4th 250, 264.) This manifestation can be proved through circumstantial evidence, that is, evidence from which a principal fact can be inferred. An inference is a deduction of fact that may "logically and reasonably be drawn from another fact or group of facts." (Evid. Code, section 600(b).) For such an inference to be

drawn the circumstantial facts must so "'so connected with the fact sought, as to tend to produce a persuasion of its truth." (Witkin, 1 *California Evidence* (4th ed.) Circumstantial Evidence, section 1, p. 322.)

Respondent runs afoul of these principles by pointing to circumstantial facts (involving Wolfe and Witak) insufficiently connected with the fact sought to be proven (appellant's agreement to smuggle escape weapons). Respondent claims that there was "powerful circumstantial evidence" in support of a finding that appellant was part of an "ongoing conspiracy" to smuggle weapons and escape tools into the jail. (RB 64, 72.) However, labeling the evidence "powerful" does not make it so.

Respondent relies on these facts as tending to show appellant's participation in a conspiracy:

1. Wolfe (sometimes called "Walsh" by respondent), as appellant's friend and a PENI associate "would have been motivated" to assist appellant. Monika Witak, also a friend, "had a motive to help" appellant. (RB 70.)ver, there was no evidence that Witak and Wolfe knew each other or that they had ever communicated with each other. The fact of their friendship with appellant does not lead logically or reasonably to the conclusion that they entered into a conspiracy, or more to the point, that appellant did.

2. On February 10, 2003, Witak wrote a letter to appellant stating she did what he asked and she could not "force him" to "pack his ass" and that she had the other part ready. (RB 70.) On February 12, 2003, Wolfe was released from custody; two days later a warrant for his arrest issued for a parole violation. (RB 71.)

Because Witak reported this information to appellant *two days before* Wolfe was released from prison, her letter does not lead logically or reasonably to an inference that she had asked Wolfe to assist in a conspiracy to smuggle escape weapons to appellant. As stated, there was no evidence Witak had written to or visited Wolfe in prison at any time.

3. On February 19, 2003, Wolfe was arrested with hacksaw blades, a baggie of marijuana, a syringe and some methamphetamine. (RB 71.) Wolfe was with a woman named Laurice Sloan (and not with Witak). Wolfe's possession of contraband does not lead logically or reasonably to an inference that he was on his way to smuggle those weapons to appellant in jail. There was a warrant out for him, and had he shown up at the jail, he would have been arrested.

4. On February 22, 2003, Witak attempted to visit appellant in jail; she had a note in her possession saying there was a manhunt and she was being

watched. (RB 71.) The note is too vague and general to support an inference that she was being watched because of the alleged conspiracy.

5. In May of 2003, Wolfe wrote a letter to appellant saying that his mother had called "Stell" as he requested; Witak's middle name is Izabella. (RT 71.) Because this letter was written two months after the conspiracy alleged to have occurred "on or about February 19, 2003,"[2] the letter shows nothing other than a possible connection to Witak. The chain of inferences is too long and tenuous to support the inference sought by respondent. First, one would have to conclude that Stell was the same person as Stella, that Stella was the same person as Monika Izabella Witak, and then, if Wolfe's mother called Witak sometime prior to May of 2003, that the mere fact of a phone call logically and reasonably supports an inference that Wolfe, Witak and appellant entered into a conspiracy two months earlier. Even assuming *arguendo* that it did, the letter does not support an inference that the conspiracy was to smuggle escape weapons into jail.

6. Appellant had "constructive possession of a metal shank" on February 19, 2003, and there was "evidence of a tool capable of cutting metal having been used on or before *June 22, 2005*," in appellant's cell, and *on May 30,*

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[2] See 3CT 641 [Notice of Aggravating Evidence]; see also 10CT 2436 [jury instruction alleging conspiracy "on or about February 19, 2003."

2006, appellant had "constructive possession of a copper-colored shank." (RB 72; emphasis supplied.)

Respondent contends that these facts "could be viewed as the ongoing conspiracy's success." (RB 72.) The supposed later or ultimate "success" of a conspiracy not proven does not prove the conspiracy. Appellant's "constructive possession" of a shank on February 19, 2003, the day of Wolfe's arrest, tends to negate an inference that Wolfe was acting in accordance with the alleged conspiracy to smuggle weapons into the jail that day. That the officers found shanks on a regular basis proves only the obvious, i.e., the well-known fact that shanks are routinely found in jails and prisons.

The facts recited by respondent might raise a "strong suspicion" that there was a conspiracy to smuggle something into the jail; but "[s]uspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 324,[3] quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Respondent cites *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 164, which upheld a conviction based on "circumstantial evidence and the reasonable inferences drawn therefrom." (RB 75.) However, the defect in the prosecution's

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[3] *People v. Thompson* was overruled on other grounds in *People v. Scott* (2011) 42 Cal.4th 452, 470.

case here was not that it depended on circumstantial evidence, but *that the reasonable inferences from that circumstantial evidence* did not amount to substantial evidence in support of a conspiracy. To counter appellant's argument that the evidence did not show violent criminal activity in which appellant participated, respondent argues as an *ipse dixit* that the "conspiracy also included a plan to smuggle weapons" into the jail. (RB 75.) However, even assuming *arguendo* that the evidence showed an agreement to smuggle weapons into the jail, there is no evidence from which it can be logically inferred – without speculation – that the plan was to smuggle weapons as opposed to other forms of contraband.

In short, respondent has strung together bits and pieces of circumstantial evidence that can be said to support appellant's participation in the alleged conspiracy "only by arbitrary application of a series of tenuous hypotheses." (*People v. Reyes* (1974) 12 Cal.3d 486, 500 [reversing defendant's conviction because the evidence against him consisted of entirely tenuous circumstantial evidence].) As the trial court explained at the beginning: the "gulf [i]s too large" to "connect the dots." (25RT 5060-61.)

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B. The Erroneous Admission of the Challenged Evidence Prejudiced Appellant.

Respondent submits that any error in admitting the evidence should be viewed as harmless under a state standard for prejudice. (RB 79.) Appellant contends that because the evidence was extremely prejudicial but irrelevant, its admission violated his federal due process rights. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Estelle v. McGuire* (1991) 502 U.S. 62, 70-74 [error rendering trial fundamentally unfair may violate federal due process].) Nonetheless, the error was prejudicial under any standard of review. Even assuming *arguendo* some marginal relevance, the many and tenuous links in the chain of inferences rendered it insufficiently reliable under the Eighth Amendment, which requires a higher degree of scrutiny and an "acute need for reliability" in capital sentencing. (See AOB 99 and cases cited therein.)

Appellant explained in the Opening Brief that the admission of the conspiracy prejudiced him at penalty phase because (1) this Court has acknowledged that erroneous admission of escape evidence may weigh heavily in the penalty determination; (2) the first jury failed to reach a penalty verdict based on the same aggravating evidence as the second jury heard *except* for the evidence of the attempted conspiracy to escape, which was stricken in the first

penalty phase; (3) and the second penalty jury had a difficult time reaching a verdict. (AOB 121-123.)

Respondent agrees that "erroneously admitted escape evidence may 'in some cases' 'weigh heavily in the jury's determination of penalty. (RB 79-80, quoting *People v. Gallego* (1990) 52 Cal.3d 115, 196.) Nonetheless, respondent argues that this "is not such a case" because the conspiracy evidence was "relatively insignificant" compared to the other aggravating evidence, and the prosecutor's argument accounted for only nine pages out of a 149-page closing argument. (RB 80.)

Respondent relies on *People v. Jackson* (1996) 13 Cal.4th 1164, 1233, which is inapposite because in *Jackson*, in contrast to this case, the challenged evidence of an Oregon escape in Oregon was deemed *cumulative* to evidence of the defendant's participation in a Riverside County jail escape in which a guard was restrained and robbed; thus in *Jackson*, the cumulative evidence would not have "'weighed heavily'" in the penalty determination. (RB 81.) This case is very different. The conspiracy evidence was not cumulative, yet it was obviously extremely important and of great significance to the prosecution at trial, given the efforts to seek its admission in the second penalty trial after the trial court had ruled it inadmissible in the first penalty trial. (See e.g., *Yohn v. Love* (3d Cir.

1996) 76 F.3d 508, 523, fn. 28 [rejecting state's harmless error argument because it downplayed the importance of the evidence prosecutor fought so hard to be admitted at trial].) As this Court stated in *People v. Cruz* (1964) 61 Cal.2d 861, 868, "[t]here is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it." (Cf. *Singh v. Prunty* (9th Cir. 1998) 142 F.3d 1157, 1163 ["In the adversarial process, the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case."].)

Here, the prosecutor considered the conspiracy to escape evidence essential at the second penalty trial. Based on the cited authorities, respondent's argument as to the insignificance of the evidence should be rejected.

Appellant points out that the evidence of the alleged conspiracy was the only difference between the evidence presented to the deadlocked jury and the final penalty jury. Respondent labels appellant's claim as "speculation" that "does not demonstrate prejudice," although he cites no authority to support his assertion.[4] (RB 81.) Appellant refers the Court to *People v. Frazier* (2001) 89 Cal. App. 4th 30, 39, which held that "[t]he fact defendant was tried twice before on

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[4] The Court of Appeal refused to accept an argument unsupported by citation to authority in *People v. Beltran* (2000) 82 Cal.App.4th 693, 697, fn. 5 ("Respondent contends, without discussion, citation to authority or citation to the record, that Beltran 'conceded' the issue below and has therefore waived it. As a result, we deem the waiver issue waived."

nearly identical evidence is itself a strong indication the People's evidence was not overwhelming." (See also *People v. Ross* (2007) 155 Cal.App.4th 1033, 1055 [finding it more than reasonably probable, and considerably more than an abstract possibility, that the defendant would have achieved a more favorable results in the absence of the errors, relying first on the fact that the jury in the first trial was unable to reach a verdict].) A prior jury deadlock is especially persuasive evidence of prejudice, where no similar error occurred at the earlier trial. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099-1100 [differing results of the two trials showed substantial and injurious effect on the jury verdict].).

Accordingly, appellant's argument is not speculation but is based on precedent. The fact that the prior deadlocked penalty trial based on the same evidence – other than that relating to the conspiracy -- indicates both that the prosecution's case against appellant for death was not overwhelming, and that the challenged evidence strengthened it.

In sum, the case for death was close, as evidenced by the first jury deadlocking at five votes for one sentence, six for the other, and one juror

undecided,[5] and the trial court's observation that the case was difficult for the jury. Obviously, in a death penalty prosecution, where the only choices are life in prison and death, a prime concern for the jury would be the possibility of escape. The escape evidence was the prosecution's trump card, and the erroneous admission of the evidence should be deemed prejudicial.

C. Assessment of the Cumulative Prejudicial Impact of Multiple Trial Errors Mandates Reversal of Appellant's Sentence of Death.

Finally, even if this error is not deemed prejudicial standing alone, cumulative prejudice analysis should lead to a reversal of the sentence of death. The prejudice from the constitutional-based errors must be considered, in any combination, as to their cumulative prejudice. (*People v. Hill* (1998) 17 Cal.4th 800, 844 [a series of trial errors, though independently harmless may in some circumstances rise by accretion to the level of reversible prejudicial error]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 [cumulative effect of trial errors can violate federal due process].) *United States v. Frederick* (9th Cir. 1995) 78 F.3d 1370, 1381 explained that where there are a number of errors at trial, "'a balkanized,

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[5] The trial court told the jurors to report their "numerical split" without stating "which decision the votes are for," and the foreperson reported: "six, five, one." (28RT 5677-3.) At the section 190.4 hearing, the trial court stated that "the jurors were divided six for death, five for life without possibility of parole, and one undecided." (42RT 8641.)

issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial."

Numerous factors indicate prejudice in addition to the prior deadlocked penalty jury. In a capital case, evidence of escape, and especially a conspiracy with outside co-conspirators, takes on a heightened aspect given the obvious concern that a defendant sentenced to LWOP would attempt an escape. The Fox video that was improperly admitted into evidence at the penalty phase (Arg. III, immediately below) increased the risk that the jurors would give great weight to the unreliable conspiracy evidence, since the Fox video graphically and repeatedly emphasized prison violence.

For example, the Fox news anchor stated that PENI was called an emerging public threat by the Department of Corrections; the reporter said PENI was making a push for power in prison; a Department of Corrections officer declared that the groups were starting to pop up everywhere and were extremely violent; a reporter claimed that an alarming chain of events was launching PENI's power and threatening to beef up their influence in prison yards, and that PENI was positioning itself as a criminal force inside prison walls; a Department of Corrections officer stated that they had a very great potential for violence and were unpredictable as to when that violence might occur and that PENI was

stepping up to take over the main line in prison; a reporter said PENI was modeling into a more seasoned prison gang. (See AOB 9 through 21 [transcript of Fox video].)

The cumulative and synergistic effect of the Fox video and the alleged conspiracy establishes much more than a reasonable probability that the jurors would vote for death rather than LWOP in order to reduce or avoid increasing the threat of criminal violence inside the prison, so bombastically and sensationally portrayed in the Fox video.

Appellant presented a substantial case in mitigation, even though some of his mitigation evidence was wrongfully excluded (Arg. IV, below), and the prosecutor was guilty of repeated improper arguments in favor of death (Arg. V, below). All of these factors together add up to prejudicial reversible error at the penalty phase.

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III. THE EVIDENCE OF THE FOX VIDEO SHOWING INFLAMMATORY IMAGES AND HEARSAY STATEMENTS BY SCOTT MILLER, OTHER GANG MEMBERS, AND POLICE AND CORRECTIONAL OFFICERS DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, AND VIOLATED THE RELIABILITY REQUIREMENT OF THE EIGHTH AMENDMENT, RESULTING IN REVERSIBLE ERROR FOR BOTH THE MARCH 8 AND THE MARCH 11 OFFENSES, AND/OR HIS SENTENCE OF DEATH

A. Under Any Standard of Review for Error or Prejudice, The Fox Video Broadcast Was Wrongly Admitted into Evidence, Resulting in Reversible Error at Both Guilt and Penalty Phases of the Trial.

Respondent contends that appellant "refuses to acknowledge" the abuse of discretion standard of review by arguing that the trial court's ruling was erroneous. (RB 95.) Appellant contends that whether this Court reviews the ruling for "error" or for "abuse of discretion," the ruling was wrong and prejudicial.

Respondent argues that the trial court reviewed the video and weighed the prejudice against the probative value, and thus its ruling was neither arbitrary nor capricious. (RB 95.) Appellant disagrees. After viewing the Fox video the trial court described its extremely prejudicial impact in no uncertain term, stating that it "cinched" the case for the prosecution. (2RT 455-56 "How much more inflammatory could it get? I suppose if we had them lynching some individual it might have been more inflammatory, but I don't know how it could have been

otherwise."].) Yet when the prosecutor insisted that the sensationalism of the broadcast actually made it probative to show that Mazza had a motive to kill Miller and that appellant acted according to an order from Mazza (despite any evidence that Mazza had issued that order or that appellant knew about the video) --- the trial court apparently acquiesced, even while acknowledging the lack of legal authority for the prosecutor's argument that "only by playing the broadcast" could the jury "fully understand" that the prosecutor's motive argument. (3RT 474.)

Appellant contends that these circumstances clearly demonstrate the arbitrary nature of the trial court's ruling. The jury could have understood the prosecutor's motive through live testimony by a gang expert, as in done in scores or hundreds of cases. Therefore, there was no probative value to the visuals in the Fox video, whereas its prejudice, as both the trial court and the prosecutor agreed, was immense.

The Fox video was admitted at the guilt phase, and then again at the penalty phase. Thus, even if the admission of the video at the guilt phase was state error, its admission at the penalty phase implicated appellant's Eighth

Amendment right to a reliable penalty determination, subjecting the error to review under *Chapman v. California* (1967) 386 U.S. 18, 24.[6]

B. The Fox Video Was Irrelevant and Unduly Prejudicial.

Respondent's argument as to the admissibility of the Fox video is premised on his assertion that it was "highly relevant to prove the motive for Miller's murder," because, as the prosecutor said he wanted to argue to the jury it that it was "'what started this whole event.'" (2RT 456.)

Appellant agrees that motive evidence is material, and that a prosecution is entitled to prove its theory of the case. (RB 92.) However, it does not follow from these principles that the prosecutor is entitled to prove his case in any inflammatory and prejudicial manner he chooses.

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[6] The DVDs of the Fox broadcasts, Exhibit 231-232 [guilt exhibits], Exhibits 133-134 [penalty exhibits) and Court Exhibit 6, are no longer in the superior court's file in this case. The prosecutor provided appellate counsel with a DVD of the broadcasts. (See AOB, page 9, fn. 8.) Appellate counsel has learned that the DVDs are physically present in the superior court as exhibits in the trial of Billy Joe Johnson, who was tried for the murder of Scott Miller after appellant was convicted. Appellate counsel has communicated this information to the clerk at this Court, and was informed that the Court does not want exhibits transmitted until the case is set for oral argument. Therefore, unless this Court first directs the superior court to transmit the DVDs, appellate counsel will request permission for their transmission when the case is set for oral argument. The DVD is described in the *Johnson* case as Court Exhibit 1 [1 DVD labeled Office of the District Attorney with the title PENI TV Interview by Fox 11], and also as People's Exhibit (guilt phase) as Exh. 67 [DVD entitled *People v. Johnson,* 07CF2849, 2/20 and 2/20/01 [sic] PENI TV Interview].

Respondent points out the "considerable" and "broad" discretion often accorded to the trial courts in determining relevance, but none of the cases he relies upon are remotely similar to the facts at bar. (RB 91-92.) *People v. Merriman* (2014) 60 Cal.4th 1, 74 held that evidence that earlier on the day of the crime the defendant wanted to get rid of the stolen car he was driving was admissible because it related directly to the defense theory that because he was driving a car he could not have been the suspect seen on a bike. *People v. Carter* (2005) 36 Cal.4th 1114, 1168 and *People v. Heard* (2003) 31 Cal.4th 946, 972-73 both found that photos of the deceased were admissible to corroborate other testimony; *People v. Schied* (1997) 16 Cal.4th 1, 14, held that a photograph of the crime scene would not be considered cumulative where it was admitted to prove facts established by other evidence. *People v. Williams* (2013) 58 Cal.4th 197, 270 and *People v. Brown* (2003) 31 Cal.4th 518, 534 both upheld the admission of evidence relating to the witness' credibility, in the former, evidence of the witness' fear; and in the latter, police officer rebuttal testimony. Finally, *People v. Montes* (2014) 58 Cal.4th 809, 868 upheld the trial court's discretion to *exclude* evidence of co-defendant's direct motive to commit the crime.

Appellant argues that the prosecutor was not entitled to prove his case by presenting and arguing two Fox video broadcasts that included every kind of

prejudicial, frightening and offensive image relating to race-hatred, gangs, guns and murder. The fact that Miller participated in the video was relevant. The inflammatory content, both verbal and visual, which was speculation and hearsay, was not. The cases respondent relies on do not hold otherwise.

1. Respondent's speculative inference argument.

Respondent repeats the arguments made by the prosecutor at trial, arguing that the video was relevant because the "very foundation of the prosecutor's case" was that Miller was killed as "payback" for his appearance on the Fox video, because Mazza and Rizzo the PENI shot callers were scheduled for trial a week after the broadcast, which was *more than a year before Miller was killed*. (RB 92.) This was indeed the prosecutor's theory of the case. The problem is that *apart from the Fox video* there was no evidence that Miller was killed as payback and no evidence that Mazzo and/or Rizzo were incensed by the Fox video (or even that they had seen it); or that they issued an order to kill Miller. (The prosecutor argued at trial that there would be "a lot of testimony" about this, but in fact there was none!)

Respondent acknowledges as much. Nonetheless, he asserts that there was "powerful circumstantial evidence in conjunction with the gang expert testimony from which a reasonable jury could conclude" that appellant knew

about the video and that Mazza issued an order to kill. (RB 93.) The facts are these:

(1) the prosecutor had a "payback" theory that Miller was killed because of the broadcasting of the video more than a year earlier;

(2) but, he had no evidence that appellant knew of the video prior to Miller's death,[7] and no evidence that Mazza ordered Miller killed, even though he said that he would have "a lot" of it.

(2RT 461-62.)

Respondent argues, as did the prosecutor at trial, that inferences from the Fox video are relevant to establish the speculatively inferred facts.

In essence, respondent's argument is that a sensational news program portraying PENI gang members through hearsay, rumor, and speculation news reporters, gang members and prison officials, as murderous hate-filled racist drug dealers, who were fascinated by weapons, intent on taking over white supremacist gangs on the streets and in the prison, and already moving into

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[7] Respondent asserts that there was "evidence that [appellant] had seen the program," citing the record at cites to the record at 12RT 2164-66 and 19RT 3821. The first citation refers to testimony by jailhouse informant Mason, who, in June of 2002, months after Miller was killed, claimed that appellant said he had "stripes coming" for whacking Miller. Respondent asks that the Court look at that statement "in conjunction" with appellant's letter date-stamped February 23, 2003, saying that he was "now charged with homicide. Look for me on the famous Fox 11." (19RT 3820-21; Exh. 178.) The letter refers not to the Fox video but to Fox 11 news. Rizzo obviously cannot "look for" him in a television program broadcast almost one year in the past.

organized crime, was such powerful "circumstantial evidence" that it would lead the jury to infer that Mazza ordered Miller killed and that appellant followed that order. This the same reasoning this Court emphatically rejected in *People v. Babbitt* (1988) 45 Cal.3d 660.)

Babbitt declared that "[s]peculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact." (*Id.* at 681.) Thus, in *People v. Jefferson* (2015) 238 Cal.App.4th 494, 506, the trial court properly excluded evidence of the televised violent movies shown on the night of the murder, because there was no evidence that the television set was turned on before defendant attacked the victim, or that the defendant heard or saw those movies before he entered the victim's apartment. *Jefferson* held that the inference sought to draw from the proffered evidence was clearly speculative and thus irrelevant. Evidence that produces only speculative inferences is irrelevant evidence. (*People v. De La Plane* (1979) 88 Cal. App. 3d 223.)

That the inference the prosecution sought at trial, and respondent now seeks, is speculative is demonstrated by the number of links in the chain of relevancy. The jury would have to infer that all the PENI members, including appellant, saw the video and knew of its contents; then, that the video so

angered Mazza that he issued an order to kill Miller; that other gang members were going to kill Miller and failed, resulting in a year long gap; until, after a year, appellant acted in accordance with Mazza's order and killed Miller as payback. The gaps in this chain of reasoning show that the "inference" sought is a "speculative inference." At trial, the prosecutor filled in those gaps by playing the Fox video in opening statement at both guilt and penalty phases, and then announcing that appellant and Rump carried out a PENI order to kill Miller because of his appearance in the Fox broadcast. (7RT 1365-67; 31RT 6238-40.)

2. Respondent's argument that sensationalism equals relevance.

Respondent also repeats the specious argument made at trial, i.e., that the "very sensationalism" of the Fox video was what "gave it so much relevance." (RB 92.) Respondent cites no authority for the contention that the more sensational a piece of evidence the more relevant it is. Instead, he cites *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007 for the uncontroversial proposition that the prosecution cannot generally be compelled to accept a stipulation but is entitled to prove its case. *Edelbacher* is inapposite, because the issue here is not whether the video should have been replaced by a stipulation. Respondent could have attempted to establish motive and prove his case the presentation of expert testimony as to gang motive for the murder. That testimony, at least, would

have been subject to cross-examination by appellant, as the trial court pointed out. The error here was not in presenting evidence as to motive (as opposed to a stipulation). Rather, the error, and a very prejudicial one, was the presentation of the visual, hyperbolic, sensational video replete with hearsay and inflammatory remarks and images.

Respondent also relies on *People v. Marks* (2003) 31 Cal.4th 197, 227, which upheld the admission of a videotape showing the injured victim receiving physical therapy as proof of the great bodily injury allegation. *Marks* held that the prosecution was entitled to provide visual evidence, but did not condone the admission of the 37- minute video. *Marks* held only that the admission of the video was not *prejudicial* error.

In short, neither case supports respondent's claim that a highly inflammatory and lengthy video presentation is relevant because it is portrayed PENI in such a bad light "that it warranted" the inference that Miller was targeted or "greenlighted" for death "as payback."[8] (RB 92.)

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[8] Respondent misleadingly claims that that "[e]ven defense counsel conceded" that the tapes were coming in "'because that is their motive.'" (RB 92, citing 2RT 449.) By quoting only a few words from a long paragraph, respondent attempts to portray the defense as conceding the admissibility of the Fox video when they actually were arguing for redaction, and objected to the video in its entirety. The passage at 2RT 449 shows no concession whatsoever. Defense counsel was requesting redaction and said that the parties "had talked about the tapes [] coming in because that is their motive. I do think there are a couple areas that aren't really relevant to the motive. . . ." Counsel then

3. Respondent's "case-neutral" argument.

Respondent argues repeatedly that the Fox video was "case- neutral" and thus could not be viewed as unduly prejudicial under Evidence Code section 352, because it "bolstered [appellant's] defense as much as the prosecution's case," because "it had no bearing on which person affiliated with gang committed the murder," and because the defense was that Billy Joe Johnson killed Miller "at least in part due to the Fox video." (RB 83, 93, 94.)

Respondent's argument should be flatly rejected for several reasons. First, although the defense was that Johnson killed Miller, that defense in no way depended on *the playing of Fox video* for the jury; the defense objected to the admission of the video, and therefore did not see it as "helpful" to their defense.

Secondly, respondent's citations to the record do not support his argument. Respondent cites to Johnson's testimony that he knew about the video when it came out; that everyone called each other up to ask "what the hell's up with that?;" and that his own personal feeling about the video was that Miller "was a dead man." (RB 93, citing 18RT 3530-3533, 3603; 35RT 6937-41, 6948-49.) Johnson testified that he killed Miller. The fact that Miller appeared in the video may have been relevant to gang motive, but the many sensational,

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argued for redaction on the ground that the inflammatory portions were not relevant to motive and were "much more for effect." Counsel later objected to the entire video.

bigoted and inflammatory remarks and images in the Fox video were not relevant. Any marginal "relevance" of the video (apart from the fact that Miller appeared in the video) certainly did not outweigh the extreme prejudicial impact of the sensationalism in the images and verbal content of the video, nor did that sensational "prosecution by television" bolster appellant's defense.

Third, where the defense objects to prejudicial evidence, the fact that it later tries to use that adverse evidence to some advantage cannot be held against him. (*People v. Calio* (1986) 42 Cal.3d 639, 643 ["An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."].)

Thus, even assuming *arguendo* that the fact that Miller talked about PENI in the Fox video somehow "bolstered" the defense case, the *playing* of that extremely inflammatory video in no way helped the defense case. Respondent strives to portray the video as either not that prejudicial, or so prejudicial that it mutated into "highly relevant" and even "exceptionally relevant" evidence. As shown above, prejudicial impact is not proportional to relevancy. (See section 2, pages 24-25, immediately above.) In addition, and despite respondent's

rhetorical efforts, the Fox video is on its face extremely and unduly prejudicial. It was designed to be sensational; it includes hearsay of every kind and inflammatory images. The trial court stated that playing the video "would pretty much cinch the case [for the prosecution]," and explained why:[9]

> "We've got cross burnings. We've got swastikas. We've got attack dogs. We've got methamphetamine. We've got people being accused of murder. We've got allegations of association with Nazi Lowriders, with Aryan Brothers. **How much more inflammatory could it get? I suppose if we had them lynching some individual it might have been more inflammatory, but I don't know how it could have been otherwise.**" (2RT 455-56; emphasis provided.)

Under the reasoning of *Calio*, where the defense submits to the authority of the erroneous adverse ruling, the fact that *respondent* can, after the fact, attempt a

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[9] After making this statement, the trial court ruled that only portion of the Fox video showing Miller were admissible. The prosecutor insisted however that the entire video should be admitted because it showed why Mazza and Rizzo ordered him killed, and that he would present "a lot of testimony about that." (11RT 461-62.) In fact, no such testimony was presented. But the following day, the trial court changed its ruling, despite acknowledging that there was no authority for the prosecutor's argument that "only by playing the broadcast will the jurors fully understand" appellant's motive. The trial court relied on case law admitting autopsy and crime scene photos and videotapes because those cases held that such demonstrative evidence could corroborate or clarify testimony by live witnesses. (3RT 474-75.) Appellant has shown why the autopsy photo cases relied on by the trial court do not support the trial court's admission of the Fox video in Appellant's Opening Brief. (See AOB 152-155.) And, of course, the prosecution did not provide any testimony by "live witnesses" that Mazza and Rizzo ordered Miller killed because of his appearance in the Fox video.

theory under which the evidence "helped" the defense does not and cannot render "neutral" an extremely and undeniably prejudicial video.[10]

In sum, respondent's repetition of the "case-neutral" mantra does not make the Fox video "neutral."[11]

4. Respondent's gang criminal activity argument.

Respondent also argues that the Fox video was probative of appellant's "knowledge of PENI's pattern of criminal activity," an element in the substantive gang charge. Respondent notes that the Fox video "discussed prior criminal activities by PENI," including drug and firearm offenses and violent assaults. (RB 93.) It should be obvious, however, that appellant could only "know" of PENI's pattern criminal activity if the hearsay reported on the video by various speakers

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[10] *People v. Riggs* (2008) 44 Cal.4th 248, 289 cited *Calio* with approval. However, it held that the there was no prejudice where, after the prosecution showed the tape, the defense chose to show the jury the entire tape recording again, including portions that the trial court had excluded. This holding in *Riggs* does not defeat appellant's claim. The defense objected to the video and, in contrast to Mr. Riggs, did not present any part of it in defense, and made no use of the Fox video tape itself in closing. Moreover, in *Riggs*, and very unlike here, the majority of the 80-second video was "quite neutral" in content. (*Id.* at 290-92.) Appellant discussed *Riggs* at length in the Opening Brief, pages 153-156.

[11] Appellant pointed out that the Fox video was even less relevant and more prejudicial at penalty phase. (AOB 159.) Respondent claims that appellant attempts to minimize the significance of motive at the penalty phase retrial, because motive was a circumstance of the crime and thus factor (a) evidence, and the defense argued lingering doubt. (RB 94-95.) Appellant does not contend that motive evidence is not admissible under factor (a). Appellant argues instead that the Fox video was improperly admitted to show appellant's motive. (See section 3, pages 26-29 immediately above.)

was admitted for its truth, which it was not. The trial court advised the jury that the broadcast contained "images of bigotry, opinions by certain individuals, inflammatory remarks by purported gang members and sensationalism by newscasters. **You may not consider the recording as proof of the truth of any statements made by anyone during the recording.**" (7CT 1602-04; emphasis added.)

5. The *Diaz* case analysis is useful in measuring the prejudicial impact of the Fox video.

The case most akin to the case at bar is *People v. Diaz* (2014) 227 Cal.App.4th 362. *Diaz* reversed a drunk driver's murder conviction where the prosecution played two videotaped testimonials of tearful relatives who discussed the alcohol-related crashes in which their loved ones were killed. (AOB 144-147.)

Respondent dismisses the detailed prejudice analysis of the *Diaz* court by repeating his claim that, unlike here, the evidence in *Diaz* was not "case-neutral." Respondent suggests that the inflammatory impact of the videos in *Diaz* "only served to unduly prejudice the defendant," whereas here, the video "supported the defense theory of the case as much as the prosecution." (RB 94.)

The trial court's assessment of the Fox video refutes respondent's "case-neutral" theory. After viewing the video, the trial court stated emphatically that

it "would pretty much cinch the case [for the prosecution]," and pointed out the program allowed the prosecutor to present a TV program that would "render all other [prosecution] evidence unnecessary," and yet afford the defense no opportunity for cross-examination." (2RT 455-56.)

Respondent also relies on his faulty "case-neutral" premise to distinguish *Diaz,* and thus does not address the *Diaz* analysis set out in Appellant's Opening Brief. Appellant believes the factors used in *Diaz* provide helpful guidance and thus summarizes them here. (See also AOB 144-147.)

1. As in *Diaz*, the Fox video contained "numerous statements that were entirely irrelevant to the case." (*Diaz*, 227 Cal.App.4th at 381.)
2. The numerous video images served "to heighten the emotional impact of the video," "an impact that one cannot fully appreciate" from the transcripts. (*Id.* at 378-80.)
3. Even under the standard for reviewing state error, and even though there was "strong evidence" of the defendant's guilt, and even though a cautionary jury instruction was given, the video was prejudicial because its impact and influence on the jury was overpowering.

A bell cannot be unrung, but the video was not just a bell but a "constant clang." (*Id.* at 382-83.)

4. Finally, as here, the deliberations, including the fact that a previous trial had resulted in a hung jury, showed the case was close. (*Ibid.*)

In sum, the Fox video had no relevance to the issues at either guilt or penalty phase. *Appellant emphasizes here that appellant does not contend that the prosecution could not have introduced testimony that the Fox video was broadcast and that Miller appeared in it.* But the admission of the sensational images and opinions and speculations and accusations in the video were designed and presented to provoke fear and prejudice in its viewers. That was the result at appellant's trial.

C. The Admission of the Fox Video Into Evidence Was Extremely Prejudicial.

1. Because the erroneous admission of the Fox video was federal constitutional error, respondent has the burden of demonstrating, beyond a reasonable doubt, that the error was not harmful to appellant.

Respondent argues that guilt phase error is reviewable under *People v. Watson* (1956) 46 Cal.2d 818, and penalty phase error under *People v. Brown* (1988) 46 Cal.3d 432. (RB 96.)

Appellant believes that the admission of the Fox video was so egregiously wrong that its admission violated federal due process at both the guilt and penalty phases. (*McKinney v. Rees*, 993 F.2d 1378 [admission of irrelevant prejudicial evidence violated federal due process]; *Estelle v. McGuire*, 502 U.S. at 70-74 [error rendering trial fundamentally unfair may violate federal due process].) Moreover, the admission of the hearsay and sensationalism in the Fox video violated the reliability requirement of the Eighth Amendment. (*Monge v. California* (1998) 524 U.S. 721, 732 [because death penalty is unique in severity and finality, there is an "acute need for reliability" in capital sentencing proceedings].) Because these are substantive errors of federal constitutional dimension, review for prejudice must be conducted under *Chapman v. California* (1967) 386 U.S. 18, 24, a standard that requires this Court to reverse unless respondent can demonstrate the error harmless beyond a reasonable doubt.

As discussed immediately below, respondent cannot and does not meet this burden.

2. Respondent's case-neutral theory of harmlessness.

Respondent revives his theory that the Fox video was "case neutral" in order to argue that any error in admitting it should be deemed harmless.

Appellant has refuted this "case neutral" theory above in Part B, section 3, pages 26-29.)

This argument hinges on respondent's other mantra, that if the Fox video is only viewed "in context," the prejudicial reporting about the Aryan Brotherhood and Nazi Lowriders "would have inured to [appellant's] benefit" because it helped explain the defense theory that Johnson "got out of the hat" with the Aryan Brotherhood by shooting Miller, and that Johnson was a "cold-blooded killer." (RB 97.) Throughout his brief, respondent uses the concept of "context" as a magic wand, sprinkling the fairy dust of relevancy and harmlessness on appellant's claims. (See ARB, Arv. V, p. 55 [addressing respondent's repeated reliance on the argument that appellant has taken something "out of context"].) For respondent, the "proper context" usually involves re-interpreting the record facts in a way advantageous to the prosecution.

However, the defense did not need "help" in explaining its theory, which it was able to explain its theory through admissible evidence. The hearsay and hyperbole and sensationalism in the Fox video that described the Aryan Brothers as murderous, racist, rattle-snake killers precisely matched the kind of evidence this Court described as unduly prejudicial in *People v. Doolin* (2009) 45 Cal.4th

390, 439, that is, evidence "of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point on which it is relevant, but to reward or punish one side because of the jurors' emotional reaction."[12]

Respondent's argument is disingenuous at best. If the Fox video was so beneficial to the defense, defense counsel would not have objected to its admission. Moreover, the trial court would not have described it as "cinching the case" for the prosecution.[13] If it was so beneficial to the defense, the prosecutor would not have presented it as the centerpiece of his prosecution and played the video in full in his opening statement to the jury.

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[12] *Doolin* analyzed "undue prejudice" under Evidence Code section 352, which requires weighing relevancy against prejudice. But the quoted description is also applicable to prejudicial error analysis, especially where, as here, the visual component and most of the hearsay in the Fox video had no relevancy whatsoever.

[13] Appellant believes it is unlikely that respondent viewed the videotape; he does not even mention the Fox video in his Statement of Facts. This would explain why he fails to acknowledge the visceral visual impact that so impressed the trial court, and certainly the jury. For example, respondent argues that the "swastikas, attack dogs, methamphetamine, accusation of murder and references to the Nazi Lowriders and Aryan Brotherhood in the Fox video" must be deemed harmless, since there was other evidence of appellant's methamphetamine use and swastika tattoos, and PENI's pattern of criminal activity. (RB 97.) One look at the video should be sufficient to assess the weakness of respondent's argument.

3. Defense counsel's argument.

Respondent also argues that the Fox video should not be deemed prejudicial because defense counsel "used" the video to argue to the jury at guilt phase that Johnson was a stone-cold killer, and at penalty phase, that Miller was a hard-core gang member who talked about it on television. (RB 98.) Respondent claims that these arguments show how the defense made "good use of the inflammatory effects of the Fox video to benefit the defense in both the guilt and penalty phases. (RB 98.)

Respondent's argument is specious; it is both factually and legally bankrupt. Had defense counsel played for the jury the Fox video with its many sensational claims and images, respondent might be justified in arguing that the defense made some use of it. But the arguments made by defense counsel did not depend on *the presentation of the video* to the jury. The facts referred to by defense counsel at guilt phase were based on Johnson's own testimony; and at penalty phase, *only to the fact that Miller was a gang member who participated in the Fox video*. The defense made no use of the video itself. However, even had the defense done so, that would neither prove the relevance of the video nor diminish its harm. (See Part B, section 3, pages 26-29, above.)

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4. Respondent's argument that the Fox video was cumulative or identical to "other evidence."

Respondent points out that there was other evidence of white supremacist tattoos, methamphetamine use and expert testimony about gangs, and them jumps to the conclusion that "had the Fox video been excluded, the jurors would have heard much of the same evidence which Lamb claims prejudicial." (RB 97.)

This is completely incorrect. The evidence cited by respondent of tattoos, drugs and gang life was admitted under the rules of evidence and was subject to cross-examination by appellant. The "evidence" in the Fox video was anything but admissible relevant evidence. It was rife with hearsay, double and triple hearsay, rumor, second hand reports, opinions, speculations, braggadocio, insults, derogatory remarks, scare tactics, and graphics whose provenance was unknown and/or created by Fox News for prejudicial effect.

If the Fox video had not been admitted, the prosecution would not have been able to call anchor people and reporters to make the claims they did. The prosecution would not have been able to show an unmade man identified only as a "shot caller" demonstrating his "murderous methods" by shooting at targets; the prosecution would not have been able to present evidence of two unnamed tattooed men shooting at a target and yelling "F--- that N---." The numerous

claims made by the reporters would not have been admitted. Even the statements made by the correction officials would not have been admitted if they were not qualified experts, and if they were, they would have to provide reliable bases for their opinions, which would have been subject to cross-examination.

Thus, respondent's conclusion is totally wrong. Had the Fox video been excluded, the jury would not have heard "much of the same evidence." Just as importantly, *it would not have seen the inflammatory images*. Appellant submits that anyone viewing the Fox video would agree that its visual impact far outstrips the evidence presented by live witnesses.

5. Conclusion.

In conclusion, the Fox video prejudiced appellant, in particular at the penalty phase. The negative and powerful emotional impact of the Fox video presented an unacceptable risk that the jurors reached their penalty verdict based on the emotions so engendered and not on the relevant facts.

Moreover, as stated above in Argument II, Part D, pages 15-17 above, prejudice from the various errors, constitutional and otherwise, should be assessed for cumulative prejudice. (*People v. Hill,* 17 Cal.4th at 844; *Taylor v. Kentucky,* 436 U.S. at 487.) An issue-by-issue review is far less effective than

analyzing the overall effect of all the errors. (*United States v. Frederick*, 78 F.3d at 1381.)

Appellant has already demonstrated the highly prejudicial nature of the Fox video as to both its verbal and visual content. And, above, in Argument II, Part D, pages 16-17, appellant showed how the synergistic effect of the Fox video and the improperly admitted evidence of a conspiracy to smuggle escape weapons into jail had an especially pernicious influence on the jury in the penalty determination. The Fox video images and scare tactics about PENI's violence and attempt to take over white prison gangs increased the risk that the jurors would give undue weight to the unreliable conspiracy evidence. Similarly, the conspiracy evidence, which the trial court first considered constitutionally insufficient, added fuel to the fire that was the Fox video. (See Arg. II, Part C, pages 14-17.)

The cumulative and synergistic effect of the Fox video and the alleged conspiracy establishes much more than a reasonable probability that the jurors would vote for death rather than LWOP in order to reduce or avoid increasing the threat of criminal violence inside the prison, so bombastically and sensationally (and unnecessarily) portrayed in the Fox video.

Appellant presented a substantial case in mitigation, even though some of

his mitigation evidence was wrongfully excluded (Arg. IV, below), and the prosecutor was guilty of repeated improper arguments in favor of death (Arg. V, below). All of these factors together add up to prejudicial reversible error at the penalty phase.

IV. THE EXCLUSION OF MITIGATING EVIDENCE OF APPELLANT'S MOTHER'S ABUSE AT THE HANDS OF HER FATHER AND TESTIMONY BY A NEIGHBOR AS TO HOW APPELLANT'S PARENTS BROKE HIS SPIRIT VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, THE RIGHT TO PRESENT A DEFENSE, AND PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT, BECAUSE THE EXCLUDED EVIDENCE WAS DIRECTLY LINKED TO APPELLANT'S OWN CHARACTER AND THUS ADMISSIBLE UNDER UNITED STATES SUPREME COURT PRECEDENTS

Appellant contends that the exclusion of proffered mitigation evidence, including testimony regarding multigenerational dysfunction and testimony from appellant's neighbor, violated his federal constitutional rights, under the Fifth, Sixth, Eighth and Fourteenth Amendments.

A. Appellant's Claim Is Properly Preserved for Appeal.

Respondent incorrectly suggests that appellant "forfeited his multigenerational dysfunction claim" by specifically excluding that ground of admissibility in the trial court. (RB 101.) Respondent cites a single sentence in a lengthy discussion by counsel, which, when viewed in its entirety, shows that counsel's use of the term "multi-generational dysfunction" was meant to refer to

testimony relating to mental illness, institutionalizations and suicides on both sides of the family that were not part of her proffer.

The record shows defense counsel expressly argued for admission of evidence of the family backgrounds of appellant's parents, including (1) testimony that as a child Steve Lamb observed his mother's suicide; and (2) that as a child Cathy Lamb had been sexually molested for years, and became addicted to prescriptions drugs. At the pages cited by respondent in support of his argument, RB 101, defense counsel stated:

> "I am planning on putting on evidence of my client's background and character, *which includes the background and character of his two parents who raised him.* I mean, he lived in their home for his entire life. So putting into context their parenting as it relates to their parenting. [P] This is a family on both sides – and I'm not planning on getting into multi-generational dysfunction, but this is a family who on both sides had extreme mental illness issues, suicides, institutionalizations, et cetera. But I think it is relevant to, for instance, have the father testify that at a certain age his mother committed suicide. This was after a long history of her threatening suicide and attempting suicide." (23RT 4763-64; emphasis supplied.)

Defense counsel also specified that she intended to offer evidence that "mother was pretty brutally molested for about six years of her life contributed to the fact that she was a raging alcoholic through his childhood and young adulthood. And it puts into context [] the fact that she basically drank herself to oblivion to forget the things that had happened to her." (23RT 4762-63.)

Respondent focuses only on counsel's statement that she did not plan on getting "into multi-generational dysfunction." However, this followed counsel's explanation that she did not "intend on calling tons and tons of witnesses" or "put on a mini trial" or get into the "extreme mental illness issues, suicides, institutionalizations, etc." on both sides of the family. Immediately after this statement, counsel specified her intention to present testimony as to the suicide of appellant's father and the molestation suffered by his mother. (23RT 4763-64.) The fact that counsel used the word "multi-generational" to refer to evidence beyond the proffered evidence relating to appellant's mother and father does not "forfeit" the express request to present specified mitigating evidence as to his parents' background as it related to appellant's own background.

In any case, no forfeiture occurred, even assuming *arguendo* that counsel's utterance of a single phrase in the midst of a specific argument in support of the admission of the mitigating evidence at issue was simultaneously intended as "specifically excluding that ground as a ground for admission of the evidence," as respondent suggests. (RB 99.) Appellant made a specific offer of proof making known to the trial court the "substance, purpose, and relevance of the excluded evidence," which is sufficient under Evidence Code section 354.

An objection is sufficient if it fairly alerts the trial court of the issue it is being called upon to decide. "In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented . . . . (*People v. Scott* (1978) 21 Cal.3d 284, 290.) This Court has also held that when assessing the sufficiency of an objection, the "circumstances in which [is] is made should be considered." (*People v. Williams* (1988) 44 Cal.3d 883, 906-907.)[14] The same principles necessarily apply to a detailed and specific offer of proof, clearly informing the trial court of the issue which the trial court just as clearly understood. The offer of proof, viewed in the totality of the circumstances, in no way "excluded" multi-generational testimony (in the sense of appellant's parents' generation) by counsel's misuse or ambiguous use of the term multi-generational (when referring to multiple mental illnesses, suicides and institutionalizations that she did not intend to present).

The bottom line is that the defense made a specific offer of proof as to evidence of appellant's mother's abuse and his father's trauma resulting from his mother's suicide, and the trial court excluded that offer. The claim that the trial

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[14] *Williams* held that where the trial court was informed of nature of "other crimes" evidence, the defense "relevance" objection was sufficient notice to determine admissibility under Evidence Code sections 1101 and 352 standards for other offenses]; see also *People v. Clark* (1992) 3 Cal.4th 41, 123-124 [under totality of circumstances, counsel's relevance and Evidence Code section 352 objections deemed sufficient to raise Evidence Code section 1101 objection].

court improperly excluded this evidence is therefore properly before this Court on appeal.

B. The Trial Court Erred in Excluding Evidence Relating to Appellant's Parents.

Appellant acknowledged in the Opening Brief that this Court has in some cases upheld the exclusion of proffered mitigation evidence relating to the defendant's family background. (AOB 176.) Respondent reiterates that point and argues that only evidence of the defendant's character is admissible in mitigation, and evidence of his parents' background is not. (RB 104.)

Appellant maintains that the United States Supreme Court has consistently held that the Eighth Amendment guarantees admission of any evidence proffered as a basis for a sentence less than death, including evidence tending to humanize him. (*Abdul-Kabir v. Quartermaine* (2007) 500 U.S. 233, 247.) *Lennard v. Dretke* (2004) 524 U.S. 274, 285 held that "virtually no limits are placed" on evidence "concerning [the defendant's] own circumstances." Thus, the question is whether testimony relating to the defendant's parents' background concerns the defendant's own circumstances, i.e. whether his circumstances include the family he was born into. Appellant contends that it does.

Respondent fails to address the United States Supreme Court cases upon which appellant relies: In *Wiggins v. Smith* (2003) 539 U.S. 510, 522, the High

Court described the American Bar Association guidelines for capital defenders as the standard for determining counsel's competence. Those guidelines expressly require counsel to investigate and present multigenerational history, which is often required to understand the defendant's mental state and functioning. (AOB 174-75.) Consequently, the Eighth Amendment requires admission of such evidence when preferred and the trial court wrongly excluded it.

Appellant argued that due process and an even-handed application of the rules of evidence Court required the trial court to allow the multi-generational evidence proffered by the defense. (AOB 177-79.) In a footnote, respondent describes this argument as relying solely on *Gray v. Klauser* (9th Cir. 2002) 282 F.3d 633, which was vacated by the United States Supreme Court in *Klauser v. Gray* (2002) 537 U.S. 1051. (RB 104, fn. 97.) Appellant's argument did not rely only on the outdated *Gray v. Klauser*, however. Appellant cited numerous United States Supreme Court cases condemning uneven application of evidentiary standards that favor the defendant over the prosecution. (AOB 178-79, *Wardius v. Oregon* (1973) 412 U.S. 470; *Washington v. Texas* (1967) 388 U.S. 14, 22; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Webb v. Texas* (1972) 409 U.S. 95, 97-98.) Under these High Court precedents (which respondent fails to address), the trial court's rulings at penalty phase, allowing the presentation of vicarious victim

impact evidence in aggravation but excluding multi-generational mitigation evidence, violated federal due process and the right to present a defense.

C. The Trial Court Erred in Excluding Evidence of Appellant's Character from Neighbor Bernard Cain.[15]

The trial court struck testimony from appellant's childhood neighbor Bernard Cain that he had watched appellant's "spirit get broken." Cain had been asked if appellant had the same excellent behavior as a mid-teen that he had as a younger child. The trial court struck the testimony as "nonresponsive." (40RT 8136-37.)

Respondent argues that the answer was indeed non-responsive since Cain should have been confined to giving a "yes" or "no" answer. (RB 105.) The case law respondent cites does not support his contention that a question that could be answered by yes or no is necessarily "nonresponsive" if answered otherwise.[16]

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[15] Respondent does not contend that appellant forfeited his claim that neighbor Bernard Cain's testimony was wrongfully excluded.

[16] *People v. Crew* (2003) 31 Cal.4th 822, 839 held that the prosecutor did not wrongfully elicit testimony that had been ruled inadmissible when the witness gave an answer that did violate the court's order but was non-responsive to the question posed. *People v. Bolden* (2002) upheld the denial of a motion for mistrial where the witness referred to appellant's parole status when asked for an address; *People v. Barnett* (1988) 17 Cal.4th 1044, 1140 & fn. 67 held that counsel was not incompetent where defense counsel asked a question of a witness who then made the non-responsive but unexpected statement that the defendant had confessed to the crime; *People v. Jennings* (1991) 53 Cal.3d 334, 373 found no prejudice in volunteered nonresponsive answers referring to the defendant's stay in prison.

None of the cases makes such a holding, even in situations where, as here, the answer directly responds to the question, albeit more fully than with a one-word answer.

Cain's statement that he "started to watch [appellant's] spirit get broke because of the fact that ..." directly answered the question posed to him. (40RT 8136-37.) Indeed, *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1026 confirms appellant's claim. In *Lewis & Oliver*, the witness was asked if whether a police officer had spent much time with him at the crime scene (which could have been answered "yes" or "no"), and the witness said "no" and explained that he and his family wanted to leave quickly, because his daughter was shaken by what she had seen. The trial court overruled the objection of nonresponsive and this Court held that the "testimony was responsive and relevant. No error occurred." (*Id.* at 1026.) Respondent fails to address this case, although it is squarely on point.

Respondent also incorrectly describes the stricken testimony as "speculation" and "conjecture," suggesting it was inadmissible on those grounds as well. (RB 105-06.) Respondent cites to cases holding that conjecture and speculation are inadmissible, but does not explain why Cain's testimony should or could be deemed conjecture. The first case respondent cites, *People v. Kraft* (2000) 23 Cal.4th 978, 1035, agreed with the general rule that evidence leading

only to speculative inferences was inadmissible, but rejected the argument that a coded "death list" was speculative, even though to be understood it required decoding or interpretation, because document each of the entries "reflected a sufficient nexus with some aspect or aspects of the particular case to be relevant and admissible." The case supports appellant's position since Cain's response was directly connected to the case in mitigation. Respondent's second case, *People v. Thornton* (2007) 41 Cal.4th 391, 429, upheld the trial court's ruling sustaining an objection to testimony that two occupants of a car acted as if they knew each other, on the ground it was an improper lay opinion. This is distinct from the case at bar. Cain was not giving an opinion but was stating what he had observed after having known and interacted with appellant for a number of years. He described his personal observations. That he saw appellant's spirit or personality being broken was no more "conjecture" than if he had testified he had seen appellant break his leg.

Moreover, although respondent disregards this point, Cain's statement was quintessential mitigating evidence relating directly to appellant character and background, expressly considered admissible by the United States Supreme Court. (*Lockett v. Ohio* (1978) 438 U.S. 104, 115 [Eighth Amendment requires

consideration of "any aspect of a defendant's character or record" as a mitigating factor].)

D. The Erroneous Exclusion of Mitigation Evidence Prejudiced Appellant.

Respondent describes the errors alleged as harmless, noting that the trial court did allow testimony regarding Cathy Lamb's alcoholism and Steve Lamb's abusive treatment of appellant, so that the excluded evidence relating to them should be viewed as cumulative and harmless. (RB 107-08.) Respondent also contends that Cain's stricken testimony as to appellant's spirit being broken would have "contradicted and undermined other mitigation evidence" that when appellant was "a little older" appellant was protective of his brothers. (RB 108; citing 40RT 8193.)

Respondent's argument lacks both record support and logic. Cain's testimony would have related to appellant in his mid-teens. Respondent cites to a question about appellant's protectiveness of his younger brother when appellant "was a little older," but there is no reference to any particular year or age, and no way to know if the incident at issue took place when appellant was "older" than a certain age, or older than whom. As such, testimony as to appellant's spirit being broken in his mid-teens would not and could not be

undermined by testimony as to appellant's protectiveness at an unknown and un-specified age.

Appellant pointed out that having succeeded in striking the more persuasive portion of Cain's testimony, the prosecutor later mocked a less persuasive statement by Cain: the prosecutor told the jury that he "almost fainted when the neighbor [Cain] said [appellant] was nice to [Cain's] dog." (AOB 182, citing 41RT 8376-77.) Respondent argues that the prosecutor's statement did not exploit the erroneous exclusion of testimony relating to appellant's parents. (RB 109.) However, the prosecutor did exploit the error in excluding Cain's testimony when he sarcastically pointed out that Cain had testified that appellant was nice to his dog, and exploitation of evidentiary error is an indicia of prejudice.

Respondent concludes that there was "no reasonable possibility" that the erroneous exclusion of mitigation testimony affected the jury's penalty determination. (RB 109.) Yet this Court has held that prosecutorial argument exploiting evidentiary error "tips the scale in favor of finding prejudice." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071.) Also tipping the scale is the fact that the first penalty jury deadlocked and the second jury deliberated three full days in

making what the trial judge described as obviously "not an easy decision." (42RT 8635.)

Finally, respondent ignores the well-settled principle of cumulative prejudice. *People v. Hill*, 17 Cal.4th at 844 held that " a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (See also *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15.) When this Court views the exclusion of mitigation evidence in conjunction with the wrongful admission of the highly inflammatory Fox video, and the supposed escape attempt, argued above, and the prosecutorial and judicial misconduct at penalty phase, argued below, it is clear that the level of prejudice required for reversal of appellant's death sentence has been reached. Appellant adopts and incorporates by reference the cumulative prejudice arguments made above, in Argument II, Part C, pp. 16-17; Argument III, Part C, pp. 33-41.)

PENALTY PHASE ISSUES RELATING TO PROSECUTORIAL AND JUDICIAL MISCONDUCT

V. PROSECUTORIAL MISCONDUCT AT PENALTY PHASE CROSS-EXAMINATION AND CLOSING ARGUMENT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, AND HIS PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

A. Appellant's Claims of Prosecutorial Misconduct in Cross-Examination of Defense Witness Johnson and in Closing Argument Are Properly Before This Court.

Appellant cites multiple instance of prosecutorial misconduct in cross-examination of defense witness Billy Joe Johnson and in closing argument to the jury. Respondent argues that appellant has forfeited all the claims relating to the prosecutor's cross-examination because although defense counsel objected, he failed to request a curative admonition; he also contends that appellant has forfeited "most" of his claims of improper prosecutorial argument for failure to lodge objections most of the claims relating to the prosecutor's argument. (RB 110-111, 124.)

This Court has held that "a claim of prosecutorial misconduct is preserved for appeal [if the defendant objects or requests an admonition,] or if an admonition would not have cured the prejudice caused by the prosecutor's misconduct." (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) This Court has

found such claims forfeited only where the prosecutor's improper remarks are "fleeting," or "neither egregious nor pervasive." (*Id.* at 728.) However, where, as here the improper conduct is "so pervasive that an objection and admonition would not have cured the harm," the claims of prosecutorial misconduct are properly preserved for appellate review. (*Ibid.*) In this case, the prosecutor committed a wide range of misconduct that permeated both his cross-examination of Johnson and his argument to the jury. He repeatedly attacked defense counsel's integrity, and repeatedly injected his personal beliefs about, and reactions to, the evidence, engaged in improper vouching, misstated the facts, and ignored a trial court ruling. Under these circumstances, and particularly with respect to the attacks on defense counsel's integrity and the improper statements of the prosecutor's own beliefs, a curative admonition would only have highlighted the improper remarks and thus should not be required.

Even assuming *arguendo* that defense counsel failed to perfect all claims of misconduct, the claims are still properly before this Court. *People v. Williams* (1998) 17 Cal.4th 148, 161 fn. 6 emphasized that even if a party did not do enough to prevent or correct an error, that default does not deprive the reviewing court of authority to review the error:

> "Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to 'prevent[]' or 'correct[]' the claimed error in the trial court [citation] does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1072-1076 [passing on a claim of prosecutorial misconduct that was not preserved for review]; *People v. Ashmus* (1991) 54 Cal.3d 932, 975-976 [same].) Indeed, it has the authority to do so. Therefore, it is free to act in the matter. [Citation] Whether or not it should do so is entrusted to its discretion." (Some internal citations omitted.)

Although *Williams* reviewed a sentencing decision in the absence of an objection by the prosecution, *Williams* made clear that the principle applies equally to review of inadequately preserved defense objections and to prosecutorial misconduct by citing to *People v. Berryman* and *People v. Ashmus*, both of which involved claims of prosecutorial misconduct claims not sufficiently preserved. Indeed, the principle is particularly apt in cases of prosecutorial misconduct, given that prosecutors have a special obligation to promote justice and to give the accused a fair trial. (See AOB 185 [prosecutor has special obligation to ensure defendant has a fair trial].) This principle is even more apt in this case, where the prosecutor ignored repeated rulings by the trial court sustaining objections, and repeated improper questions.

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B. This Court Should Consider the Prosecutor's Comments and Arguments Without Resort to Respondent's Re-interpretation of the Prosecutor's Language.

In responding to the merits of appellant's claims of prosecutorial misconduct, respondent repeatedly implores the Court to view the prosecutor's questions, statements, and arguments in "their proper context," and then provides that "context" by ascribing an innocuous description, re-interpretation or meaning to the prosecutor's comments. (See RB 116 [appellant fails to acknowledge the "context" of the challenged phrase]; RB 117 [appellant presents the remark "out of context"]; RB 118 [appellant portrays the quoted excerpt "out of context"]; RB 132 [appellant lifts prosecutor's comments "out of context"]; RB 133 [prosecutor's statements not misconduct when "viewed in proper context"]; RB 134 [the prosecutor's comments, considered "in their proper context," did not violate the court's order]; RB 136 [the prosecutor's reference was proper "when considered in context"]; RB 137 [prosecutor's discussion should be viewed in "the context" of mitigation evidence].)

As set out in more detail below, appellant contends that the comments should be evaluated without benefit of respondent's revisions.

C. The Prosecutor Repeatedly Committed Misconduct In Cross-Examination of Johnson.

1. The prosecutor attacked counsel's integrity, made accusations of collusion, misstated the facts and testified on his own.

Appellant claims three types of misconduct in the prosecutor's cross-examination of Billy Joe Johnson: he attacked defense counsel's integrity; he made accusations and suggestions of collusion; and he provided his own unsworn testimony.

First, the prosecutor accused Johnson of colluding with defense counsel: "you're going to say whatever [defense counsel] tells you to say, aren't you?" and "You have a job in this courtroom, don't you?" "Your job is to stand up for the gang . . . the homeboy, isn't that correct?" (35RT 6990-91.)

Respondent tries to force this colloquy into the framework of *People v. Valencia* (2008) 43 Cal.4th 268, 302, which held: "Asking the witness whether his current testimony, which occurred nearly two years after the crime, was based on his actual memory or on his discussions with the public defender's officer was a proper way to test the witness's credibility." Appellant agrees that it is proper to ask a witness if he is testifying on his independent memory, or on memory refreshed by an attorney. Unfortunately, that is not what the prosecutor here did. Instead, he affirmatively asserted that Johnson was "going to say whatever

[defense counsel] want[ed him] to say." (35RT 6990-91.) He did not "merely ask" Johnson if defense counsel had conferred with him, prepared him for testifying, or refreshed his memory in any way. Instead, he insisted that Johnson was a "bought" witness, brought in to say whatever *defense counsel wanted him to say*. Appellant contends this is a clear accusation of collusion, i.e., an accusation that appellant and defense counsel had entered into a secret agreement to deceive others. (See <www.merriam-webster.com> "Definition of collusion: secret agreement or cooperation especially for an illegal or deceitful purpose.")[17]

Respondent tries to minimize the misconduct by portraying it as a "brief colloquy centered around Johnson's hairstyle," an argument unsupported by the record. The prosecutor asked Johnson if he remembered defense counsel "telling you he likes you better with a Mohawk." (RB 114.) Johnson answered this question. The prosecutor then asked a question about what somebody in the courtroom might have heard him say. An objection was sustained. After that, the prosecutor accused Johnson of saying whatever defense counsel wanted him to say, which had nothing to do with hairstyles, as is demonstrated by the

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[17] The merriam-webster website does not have a more specific link to the definition of "collusion." Instead, at the main website, the word "collusion" must be entered in a search field.

prosecutor then engaging in further accusations that Johnson had "a job in this courtroom." (35RT 6990-91.) Even if the prosecutor had accused Johnson of saying whatever defense counsel wanted him to say about his hairstyle, the question would have been improper. The impropriety inheres in bringing defense counsel's purported desires and implied actions into the matter. The prosecutor was free to test Johnson's credibility with prior statements, with statement contradicting his testimony, with implied bias, or with attempts to refresh his memory. He was not entitled to test Johnson's credibility with an assertion that Johnson's sworn testimony was based on whatever defense counsel wanted him to say.

Respondent also claims that the prosecutor was only inquiring into Johnson's "motivation" to testify consistently with what Johnson believed defense counsel "wanted," and not what counsel told him to say. (RB 113.) The attempted distinction is a slight one, but the fact remains that the prosecutor did not ask the question as re-interpreted by respondent. The question was not, "You are going to testify to what you think defense counsel wants you to say, aren't you?" This Court should not accept respondent's rewriting of the record in an attempt to cleanse the misconduct.

Respondent repeatedly makes the point that the reviewing court should not "lightly infer" that the jury drew the most damaging, rather than the least damaging, inference from a prosecutor's statement. (RB 113, 121, citing *People v. Dykes* (2009) 46 Cal.4th 731, 772 and *People v. Frye* (1998) 18 Cal.4th 894, 970.) For example in *People v. Valencia*, 43 Cal.4th at 302, the prosecutor elicited testimony from a defense witness that he had talked to the defense investigator three times, and then asked if, having talked to the investigator three times, he was certain of his testimony. On appeal, the defendant argued that the questions insinuated that defense counsel had fabricated a defense. This Court rejected the appeal. Respondent argues that the prosecutor's cross-examination in this case was "similar." (RB 114.)

Appellant disagrees. The case law relied upon by respondent has no application here because appellant's claim is not premised on an "inference" embedded in the prosecutor's argument. The prosecutor's remark was emphatic and clear; its meaning was direct. No inference need be drawn; no interpretation or revision is necessary. The prosecutor asserted that Johnson was testifying to what defense counsel wanted him to say.

Appellant's second claim is that the prosecutor committed misconduct when he asserted (and did not ask) "you don't give a damn about the oath you

took," after Johnson said he would not testify about "all that gang stuff." (35RT 7018.) Respondent agrees that it is improper for a prosecutor to offer personal opinions based on his experience or facts outside the record, but argues that appellant fails to acknowledge "the context" in which the phrase was made. Respondent argues that because Johnson refused to answer gang-related questions, the prosecutor's "question" (which actually was *not* a question but an assertion) was "based on the record." (RB 116.)

Respondent's much repeated refrain that appellant does not consider "the context" is ironic here, since the context of not wanting to talk about the gang, as the experienced prosecutor certainly knew, was, as Johnson testified, that his refusal was "because I don't want to get killed. You're trying to get me killed, and I'm not going to allow that." (35RT 7018.) The prosecutor's theory of his case was that Miller was killed for talking about the gang, and thus he certainly knew the reason for Johnson's reluctance. It is also important to note that the prosecutor did not *ask* Johnson why he did not want to answer gang-related questions; he did not question whether his refusal was a fear of retaliation.

Instead, the prosecutor jumped on the opportunity to provide his own "reason" for Johnson's refusal. This was not an argument to the jury based on facts in the record. It was a personal assertion made by the prosecutor, who

interrupted Johnson's testimony to give testimony of his own that Johnson did not give a damn about the truth. The misconduct is clear.

Respondent cites *People v. Stewart* (2004) 33 Cal.4th 425, 498, to argue that appellant "fails to acknowledge" the context in which the challenged phrase was uttered. (RB 116.) *Stewart* is distinct from the facts at bar. First, *Stewart* involved *argument to the jury* that the charges were true based on "the evidence in this case." (*Id.* at 498.) Second, *Stewart* emphasized that the prosecutor's assurances regarding the veracity of a witness must be based on record facts and not "'any purported personal knowledge or belief.'" (*Id.* at 499.) The prosecutor's statement during Johnson's testimony (and not during argument) that Johnson did "not give a damn about his oath" was not based on record facts and was a pure statement based on his own belief.

Respondent makes the uncontroversial statement that a prosecutor is entitled to explore matters relevant to a witness's credibility – but he does not explain how a prosecutor's assertion during examination that a witness "doesn't give a damn about his oath" amounts to such an exploration.[18] Finally, citing

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[18] Respondent argues that the prosecutor's statement was, as in *People v. Garland* (1963) 215 Cal.App.2d 582, 586, "a determined inquiry of a recalcitrant and evasive witness, not misconduct." (RB 117.) The determined inquiry in *Garland* was a series of questions about a betting establishment: "You knew it was a horse parlor, didn't you? "You were there four days all day long [] and you never saw anybody take any bets or bet on horses?" "Did you see anybody say so much on a certain horse?" *Garland* is

People v. Mendoza (2007) 42 Cal.4th 686, 701, respondent concedes that to the extent the "prosecutor's question" was "needlessly sarcastic" it was not misconduct. Appellant must emphasize that the prosecutor did not "question" Johnson about his oath – instead he insisted that Johnson did not give a damn about it. This was not an exploration of Johnson's credibility, but an assertion of the prosecutor's belief. The misconduct was clear.

The prosecutor also stated that Johnson testimony "last year" "didn't work out," which was another prosecutorial assertion of his personal belief. Respondent complains that appellant has presented the remark "out of context," and argues that there was no "expression of a personal opinion" because the prosecutor followed up his statement by questions establishing that Johnson had confessed to the murder last year and that appellant and Rump were convicted. (RB 117.) Appellant suggests that an instance of prosecutorial misconduct or error is not absolved by a subsequent proper question. Here, the damage was done when the prosecutor claimed that Johnson's testimony "did not work out," which sent the clear message that Johnson was not testifying to the truth as the prosecutor saw it, and that Johnson was testifying pursuant to the fabricated defense plan that didn't work out.

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inapposite. The prosecutor in this case was making an assertion, not making an inquiry.

Respondent argues that the prosecutor is entitled to inquire into a subject with a good faith belief in its foundation, by which he apparently means that the prosecutor had a good faith belief in the fact that appellant was convicted after Johnson's previous testimony. (RB 118 [arguing that the prosecutor is entitled to remind the penalty jury not to redetermine guilt].) But the misconduct did not inhere in the questions following the comment that Johnson's testimony last year "didn't work out." It is the "didn't work out" comment that is objectionable – especially given the entire "context" or tenor of the cross-examination, including the prosecutor's earlier assertions that Johnson was testifying to whatever the defense wanted, and that he didn't give a damn about the oath to testify truthfully.

Had the prosecutor asked at that point whether appellant was convicted, instead of saying it "didn't work out," there would be no misconduct, since the prosecutor clearly had a good faith belief in the facts that Johnson testified and that appellant was thereafter convicted. But the prosecutor could have no good faith belief in support of the implied claim actually made – that Johnson's testimony was part of a concocted plan that did not "work out" or succeed. There was no evidence of such a plan and the prosecutor's statement was another improper expression of his personal belief unsupported by record facts.

The prosecutor again provided his own testimony, after misstating the facts, when Johnson testified that he had obtained the gun used to shoot Miller at the house of a drug connection. The prosecutor asked if he got the gun inside the house; Johnson said "No, Outside." The prosecutor then said, "You just said inside a house, didn't you?" (35RT 7069.) Respondent argues that there was no misstating of facts because Johnson had said he got the gun "at a connection's house." (RB 118.) According to respondent, "at" can be used to mean "in, on, or near," and therefore, it was "reasonable" for the prosecutor to interpret Johnson's answer as "within the home." (RB 121.) Respondent repeatedly asks this Court to consider the "context." Here, the context is that Johnson clearly denied that he got the gun inside the house; and then when the prosecutor asked "*At* what location?" Johnson responded in kind, "At a connection's house." There is no reason to interpret "at" as "in or "inside," when Johnson had just said he got the gun "outside" the house.

Had the prosecutor said, "You just said at a house, didn't you?" the question would have been proper. Instead, the prosecutor insisted that Johnson said something he did not say, and then doubled the harm by claiming that Johnson had started to say something different but "caught" himself and changed his testimony. The record reveals no such thing. Respondent cites no

authority for his claim that the prosecutor can make a "reasonable" decision to interpret what a witness said in a manner differently than what the witness actually testified to, and then claim that the witness "caught" himself to fashion his testimony somehow, and assert that the witness's testimony is "ridiculous." The bottom line is that Johnson said he got the gun "outside" a house, to which the prosecutor responded that Johnson said he got the gun "inside." This was a misstatement of the evidence, and vouching. The prosecutor's final statement that Johnson's testimony sounded "ridiculous" – apparently based on the prosecutor's own misstatement of the testimony – was an improper expression of a personal opinion.

Respondent contends that the prosecutor's cross-examination "over the word 'at'" did not suggest that Johnson was colluding with defense counsel. (RB 121.) Appellant disagrees because the prosecutor's course of conduct throughout his cross-examination, to wit, the prosecutor's claims that Johnson was going to say whatever defense counsel wanted him to say, that Johnson didn't give a damn about his oath to tell the truth, and that he "caught himself" when answering questions and changed his testimony, does amount to an accusation of collusion between Johnson and defense counsel. A prosecutor cannot escape a charge of misconduct by making such accusations indirectly.

Prosecutors have an obligation to avoid "improper suggestions, insinuations, and especially assertions of personal knowledge." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

2. The improper cross-examination prejudiced appellant's defense.

Respondent contends that the trial court's rulings sustaining the objections "ameliorates" any possibly prejudice from the improper cross-examination of defense witness Johnson. (RB 122, citing *People v. Fuiava* (2012) 53 Cal.4th622, 686-87.) Respondent asserts that despite the "contentious nature" of the prosecutor's cross-examination, appellant has not shown that the trial court's rulings were inadequate to prevent prejudice. According to respondent, the standard jury instruction that remarks by attorneys are not evidence should be deemed sufficient to prevent any prejudice. (RB 123-124.)[19]

Appellant contends that where, as here, the improper cross-examination is serious, in that it involves casting aspersions on defense counsel and prosecutorial insistence that the witness is lying under oath, the harm is not and

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[19] Respondent also claims appellant offers only "generalizations" about prosecutorial misconduct "in the abstract." (RB 124.) Respondent repeats this claim in support of his argument that the prosecutorial misconduct at penalty phase was not prejudicial, and again in arguing no prejudice from prosecutorial misconduct at guilt phase.). (See RB 138-139; see also RB 177.) Appellant addresses the "only generalizations" argument in detail below, in Part C, pages 82-83, and adopts and incorporates by reference that discussion here.

cannot be absolved by a standard instruction that attorney comments are not evidence. For example, in *People v. Fuiava*, the alleged improper cross-examination was of a less serious nature as it involved objections of "argumentative" and "asked and answered." (*Id.* at 686.) Respondent relies specifically on *People v. Dykes*, 46 Cal.4th 731. (RB 122.) However, in *Dykes*, the defense witness himself admitted that he had lied by omission in his statement to the police, and only after that did the prosecutor say, "You're pretty good at lying with a straight face, are you?" (*Id.* at 764.) Under these circumstances, perhaps the rulings by the trial court could ameliorate any prejudice.

What happened in appellant's case is quite different. Although the prosecutor engaged in argumentative and repeated questioning, the prosecutor's cross-examination challenged here consists of much more egregious misconduct, in particular, the assertions that defense counsel had colluded with Johnson; and that Johnson did not give a damn about the oath to tell the truth, and was testifying to whatever defense counsel wanted him to say. Thus, in *People v. Johnson* (1981) 121 Cal.App.3d 94, 103-104, where the prosecutor told the jury he personally believed the defense witness to be lying under oath, despite the lack of direct evidence that the witness's testimony was an outright lie, the

appellate court reached the merits, holding that neither a timely objection nor a cautionary instruction would have cured the harm.

B. The Prosecutor Continued His Course of Misconduct in Penalty Phase Closing Argument.

1. The claims of prosecutorial error in argument are properly before this Court.

As set out above, and adopted by reference and incorporated here, the lack of specific objections does not prohibit this Court from addressing the claims. (See Part A, pages 52-54, above.) *People v. Williams,* 17 Cal.4th at 161, fn. 6 explicitly stated that an appellate court can reach a claim of prosecutorial misconduct despite that the party did not do enough at trial to prevent or correct the error. Appellant believes this principle should be applied here, where the prosecutor engaged in a steady course of improper argument, from attacking defense counsel's integrity to injecting his personal beliefs to improper vouching.

2. The prosecutor improperly attacked defense counsel's integrity.

The prosecutor repeatedly attacked defense counsel's integrity. Again, respondent claims that appellant has "lift[ed the prosecutor's comments] out of context," and that there were no attacks on defense counsels' integrity. (RB 132.) Appellant believes the plain language of the comments fully demonstrates

that they were intended as, and received as, attacks on the integrity of defense counsel.

Respondent next suggests that because the prosecutor's argument was lengthy, the prosecutor's repeated descriptions of defense counsel's arguments as "not fair," "not right," "intellectually offensive," "not by accident," "all by design," "inappropriate based on the law," "taint[ing] the jurors' evaluation of the facts," "absolutely inappropriate," and "offensive," should be excused, because the prosecutor also once claimed that he did not mean to imply that defense counsel did anything wrong or unethical. (RB 126.)

Appellant explained in the Opening Brief that the prosecutor's single rhetorical denial excuses nothing. Moreover, it operated, as paralipsis, to emphasize his claims that defense counsel was not fair, not right and inappropriate. (See AOB 192.) In fact, immediately after the prosecutor's ironic statement that defense counsel did nothing wrong, he warned the jury to "be careful," because defense counsel's argument was "not fair," "not right," and "intellectually offensive." (AOB 192-93.)

Respondent next argues that the prosecutor attacked the "defense case" and not counsel personally. (RB 127.) Respondent cites *People v Chatman* (2006) 38 Cal.4th 344, 387, which is nothing like the case at bar. In *Chatman*, evidence

was admitted that the prosecution witness took psychological tests, but the results were not in evidence and there was no evidence she suffered from any mental problems. After defense counsel discussed the witness' testimony in detail, he argued to the jury that even though the defense didn't get into all that about "brain function," the witness was confabulating. In rebuttal, the prosecutor argued that there was no evidence of any mental illness and he did not attack defense counsel's integrity in any way.

The cases relied on by respondent do not support his argument. *People v. Hinton* (2006) 37 Cal.4th 839, 908 involved a prosecutor's argument that the defense evidence was "half-truths" presented by "well-intentioned individuals" – and thus a fair comment on the evidence and not an attack on defense counsel. Here, by contrast, the prosecutor repeatedly described as unfair and offensive not evidence by defense witnesses, but defense counsel's arguments, as respondent himself acknowledges. (RB 126 ["the prosecutor labeled defense arguments as 'not fair,' etc."].) In *People v. Linton* (2013) 56 Cal.4th 1146, 1206, this Court upheld a single comment by the prosecutor saying that it was "appalling" and "offensive" for defense counsel to argue that the victim would not have wanted the defendant to be killed. *Linton* held that this comment was not misconduct because it was in direct response to the argument made by the

defense, and thus would not have been understood by the jury as an attack on counsel's integrity.

The record refutes respondent's claim that the prosecutor's "critiques" of the defense arguments in this case were similar to those in *Linton* and thus should not be viewed as attacks on counsels' integrity. (RB 127.) First, to call the defense arguments "not fair and not right," "wrong," "inappropriate," and "offensive" is not a "critique." A critique would entail a detailed examination of the elements or structure of an argument. What the prosecution did was name-calling, which was not based on analysis of the evidence. Instead the challenged remarks were bald assertions based on the prosecutor's own oft-repeated mantra that defense counsel just wanted to get "one juror" to "buy" their argument.[20] That the prosecutor was referring directly to defense counsel in his attacks was made express when he said that "the defense doesn't want 12 people to buy [the defense theory of the case], they just want one." (See immediately below at section 3, pages 72-73.) The prosecutor repeatedly said "they" (and "we" when he purported to speak in their voice), and told the jury what "they" wanted" and what "they're trying to do," and what they were "going

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20 The prosecutor's theme was that defense counsel's argument was unfair and wrong because they were "hoping that someone will get that impression . . . and let that taint your evaluation of the facts," which would "not be fair." (41RT 8463.)

to say," making it crystal clear that his remarks were targeted not at "arguments" (as respondent would have it) but specifically to the defense attorneys. Obviously, a defense *argument* can't "want" or "try" or "let the jury think" or "say" something; only defense *counsel* can do that. This Court should reject respondent's attempt to reinterpret the facts to force the prosecutor's argument into the framework of the case law upon which he relies. Those cases permit the prosecutor to denigrate the "defense *case*" but not defense counsel, as was done here. (See RB 127.)

3. The improper "rule of one" argument.

The prosecutor repeatedly claimed that defense counsel wanted to get at least one juror to take his or her focus away from the law, the jury instructions, and the evidence. Respondent argues once again that if only the objectionable comments are "fairly viewed in context," the prosecutor committed no misconduct. (RB 128.)

Respondent acknowledges that *People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1522-23, 1528, found that the prosecutor committed misconduct by characterizing the defense argument as needing one juror who was "gullible enough" and "naïve enough" to be hoodwinked into believing the defendant's alibi. (RB 131.) However, respondent tries to argue that the prosecutor's

numerous "rule of one" arguments in this case were different and did not amount to misconduct because they "simply asked that no juror be diverted from his or her obligation to focus on the law and evidence." (RB 130.) Respondent also attempts to describe the challenged comments as "imploring the jurors to use common sense." (RB 130.)

Respondent is wrong. The prosecutor did not warn the jurors about diverting their attention from the evidence (as respondent would have it). Instead, the prosecutor expressly told the jurors that defense counsel wanted "just one" juror "to take focus away from law or jury instruction or evidence." (AOB 196-97.) If the prosecutor's ""rule of one" was anything similar to respondent's re-interpretation of it, the prosecutor would not have emphasized over and over again that defense counsel wanted this "rule of one," which he expressly defined for the jurors as "the defense doesn't want 12 people to buy it, they just want one." (41RT 8425-27.) As in *Sanchez*, these arguments were misconduct and this Court should condemn them.

4. The prosecutor improperly injected his personal beliefs into the jury argument.

The prosecutor also committed misconduct by embellishing his jury argument with a litany of statements describing for the jurors his personal impressions, views and beliefs regarding the evidence. (AOB 197-99.) For

example, the prosecutor argued that he almost fainted when one witness gave a favorable description of appellant; that he almost fell out of his chair when defense counsel described another man as his best witness; that defense counsel had very expensive taste in ballistics experts and the prosecutor himself moved heaven and earth to accommodate appellant, who received "every single right he deserves." (See AOB 198.) Respondent describes these comments as "sarcasm based on the evidence," and thus not misconduct. (RB 133.)

Appellant disagrees. The comments were not reasonable inferences based on the evidence: it was not a reasonable inference from positive mitigation testimony that the prosecutor might faint; it was not a reasonable inference from the evidence that the prosecutor almost fell out of his chair in presumable disbelief and disdain during part of defense counsel's argument. These remarks amounted to vivid but improper descriptions of the prosecutor's personal response to, and opinion of, the evidence.

Nor can the objectionable comments be dismissed as harmless "sarcasm." (RB 133-134.) Respondent relies on three cases that do not involve statements of the prosecutor's personal beliefs; these cases are inapposite. (See e.g., *People v. Hamilton* (2009) 45 Cal.4th 863, 952 [finding no misconduct when the defendant said he could not identify a sketch as his own and the prosecutor said "maybe we

can show it" to the prison art teacher"]; *People v. Thornton*, 41 Cal.4th at 456 [finding no misconduct where the prosecutor stated to defense counsel that he had made "a clever objection but that wasn't the point"]; *People v. Roldan* (2005) 35 Cal.4th 646, 720 [gratuitous remarks by the prosecutor showing he was not approaching the trial with sufficient solemnity not misconduct].)

Respondent cites only one case excusing statements of the prosecutor's belief: *People v. Cummings* (1993) 4 Cal.4th 1233, 1303, fn. 48 held that statements about what the prosecutor "believed" or was "willing to bet" were actually sarcastic hyperbole identifying what the prosecutor believed to be weakness in the defense explanation of the events. (RB 128.) However, as respondent acknowledges, there is a significant difference between a single sarcastic statement of belief and, as occurred here, "a constant barrage" of unethical conduct. (RB 128, citing *People v. Hill*, 17 Cal.4th at 821.)

Appellant repeats that the prosecutor has no business telling the jury his individual impressions of the evidence, because such comments may mislead the jury into thinking his conclusions have been validated by extrajudicial sources. (*United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1053; *In re Brian J.* (2007) 150 Cal.App.4th 97, 123.)

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5. The prosecutor's improper vouching.

As to the prosecutor's frequent refrain that the penalty case against appellant was "not even close," respondent argues that "viewed in proper context," these remarks were "clearly comments on the relative weights of the aggravating and mitigating evidence," and were proper because "the prosecutor was not referring to matters outside the record." (RB 133.)

Appellant disagrees. When the prosecutor first insisted to the jury that the case was "not even close," the assurances followed his claim that he had been a prosecutor for a long time, and that he loved and was passionate about his job. Then he said that although it was true that appellant's parents were not the best, the case was "not even close," and that appellant "richly deserved" the death penalty because it "was not even close." (41RT 8356-57.) In short, at the very onset, in making this argument, the prosecutor expressly referred to matters outside the record, to wit, his long experience in the prosecutorial job he loved. In subsequent refrains, the prosecutor's insistence that "it's not even close" did sometimes follow reference to the circumstances of the crime (41RT 8377) or the Helmick offenses (41RT 8442), but the premise of the "it's not even close" argument had already been established, i.e., the case was not close because the experienced and passionate prosecutor insisted it was not. This was misconduct

because the prosecutor explicitly put his personal experience and prestige behind his assertions that the case for the death penalty was not close – even though in fact, the record suggests that the penalty determination was indeed a close one, as the first jury failed to reach a verdict after the last vote of six for death, five for life without possibility of parole, and one undecided.[21]

6. The prosecutor's argument comparing appellant to Nazi war criminals and contrasting him with Nelson Mandela violated the trial court's ruling prohibiting "worst of the worst" arguments.

After arguing successfully to the court that the defense should be prohibited from arguing against the death penalty on the grounds that appellant was not the "worst of the worst," the prosecutor argued to the jury that appellant did deserve the death penalty because he was not the worst of the worst: The prosecutor argued that appellant was like a Nazi war criminal, such as those in the Nuremberg trials who "tried to use that excuse, 'I was just following orders.'" (41RT 8381.) The prosecutor used the opposite tack as well, arguing that appellant's case in mitigation should be discounted because the best of the best, like Mandela, or those caught in a hurricane, "helped others." (42RT 8502.)

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[21] Appellant's citations to the record in the AOB at page 200 should be 41RT 8377-78, instead of 41RT 8376, and 42RT 8518 should not be included.

Respondent concedes that a prosecutor commits misconduct if he argues in violation of a court order, but, as in almost every other instance of misconduct raised by appellant, argues that if the challenged comments are viewed "in their proper context" there was no misconduct. (RB 134.) According to respondent, the prosecutor's reference to Nazi war criminals in the Nuremberg trials was not a "worst of the worst" argument, but rather, "an illustration *based on the record* [] suggested during Lieutenant Epperson's cross-examination." (RB 135.) Or, respondent suggests, the challenged comments were meant "to illustrate the weaknesses of the mitigation suggested" by the defense cross-examination of Epperson that appellant was "forced to kill Miller" or killed him under duress. (RB 136.)

Respondent does not cite to any specific testimony by Epperson, and in fact, Epperson did not testify in his cross-examination that appellant was just following orders like a Nazi war criminal. Epperson was asked if the Aryan Brotherhood told someone to do something, "as we've heard about Billy Joe Johnson," the person would have to do it. (38RT 7718.) There was no evidence that appellant was in the Aryan Brotherhood (as Johnson was); nor was there any

evidence that anyone in appellant's gang told him to "do something."[22] As argued above there was no evidence that appellant killed Miller because he had received a gang order to do so. (See pages 21-23, above; see also AOB 149-51.) Consequently, the prosecutor's Nazi war criminal argument as to appellant is not and cannot be based on a "record suggestion" that Johnson would have to follow an Aryan Brotherhood order. Of course, it was based on the prosecutor's theory of the case that Mazza and Rizzo had ordered Miller killed because of his appearance in the Fox video broadcast more than a year earlier, a theory the prosecutor put forward in opening argument but never supported with evidence.

Respondent also argues that because of appellant's gang affiliation and tattoos, Nazi references were not improper in this case. (RB 136.) Appellant's argument, however, is not that Nazi references in argument were *per se* improper. Rather, appellant maintains that where the prosecutor obtained a trial court order that the defense could not use "worst of the worst" arguments, the same rule necessarily applied to the prosecution. The prosecutor's comparison of appellant to a Nazi war criminal using the excuse that he was just

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[22] Epperson did testify that PENI *did not practice racist ideology,* that some PENI members didn't understand the symbology in their own tattoos, and that he had information that John Gross or Ugly Wyman were possibly the ones who had killed Miller. (38RT 7711-12,7721-24, 7740.)

following orders was a "worst of the worst" argument, and thus in violation of the court order.

Respondent next argues that the prosecutor's reference to Nelson Mandela and other heroic conduct arising out of adversity was proper "when considered in context." (RB 136.) The context respondent provides is that after the argument referencing Mandela and New Orleans hurricane survivors, the prosecutor also discussed appellant's brothers. Respondent cites *People v. Edwards* (2013) 57 Cal.4th 658, 736, in which this Court held that it was not misconduct for the prosecutor to challenge the defendant on cross-examination about not taking responsibility for his choices. (RB 137.) Respondent's argument misses the point entirely. The misconduct inheres not in arguing that appellant "made his own choices" but in comparing appellant to extrajudicial evidence of people behaving heroically under adverse circumstances.

7. The prosecutor misstated the facts.

Appellant contends that the prosecutor misstated the facts when he argued that appellant was "wearing contacts" the day of the Helmick incident and that the optician who examined appellant reported that appellant "likes to wear contacts." (41RT 8449.) The prosecutor then urged the jury not to "fall for" the defense argument, which he phrased as follows: "'He didn't have his glasses,

so [] he couldn't know those were cops.'" (41RT 8440.) The record testimony was that a custodial eye examination of appellant five months prior to the Helmick incident indicated that appellant had 20/200 vision; the examination report also stated "wears contacts," "will wear them." (39RT 7922-23.) There was no evidence that appellant was wearing contacts when he was arrested and booked immediately after the Helmick incident on March 11, 2002.

Respondent first contends that the prosecutor was not arguing "that Lamb was wearing contacts" at the time of the March 11 incident. (RB 138.) Yet the prosecutor did argue exactly that in discussing the Helmick offenses: "He's wearing contacts, remember that?" (41RT 8440.) The jurors certainly understood the prosecutor to be arguing that since he told the jurors that appellant "liked to wear contacts" (although there was no evidence of that) and that they shouldn't "fall for" a defense argument that appellant didn't know Helmick was a police officer because "he didn't have his glasses." There is no need for re-interpretation of the prosecutor's remarks; the meaning is clear.

Nonetheless, respondent asserts that the prosecutor intended to challenge "the defense counsel's position that appellant wore contacts" and did not refer to "the time of the March 11 incident." (RB 138.) This is incorrect. The reference was unmistakably and clearly to the March 11 incident, the date of the

Helmick charges, to which the defense was that appellant, with 20/200 vision, did not see the undercover police officers' jackets or badges identifying them as police. Moreover, "defense counsel's position" was not, as respondent contends, "that Lamb wore contacts."

Thus, as set out in Appellant's Opening Brief, the prosecutor's argument misstated the facts by saying that appellant was reported to "like" wearing contacts, and should therefore be presumed to be wearing them on March 11. The argument also implied that the defense had concocted a fabrication about appellant's eyesight or use of contacts by telling the jury not to "fall for" a claim that he did not see clearly that day.

C. The Prosecutor's Course of Improper Argument Requires Reversal of Appellant's Sentence of Death.

Respondent argues that no prejudice resulted from the prosecutor's many instances of misconduct because appellant failed to rebut the presumption that the jury followed the standard instruction, and that appellant offers only "generalizations about prosecutorial misconduct in the abstract and in other cases," rather than "anything in the record to rebut this presumption." Respondent concludes that "[a]ccordingly, there is no reasonable possibility of prejudice . . . ." (RB 139.)

Respondent repeats this identical statement in addressing prejudice in other of appellant's claims of error,[23] but does not further explain his reasoning. The test for analyzing prejudice from improper prosecutorial argument is to consider how the jury would or could have understood the remarks. (*People v. Dykes*, 46 Cal.4th at 771-72.) Appellant conducted this analysis with reference to the record at penalty phase. (See AOB 204-207.)

Of course, pursuant to our judicial system of precedents, in arguing why the prosecutor's comments in this case should be deemed prejudicial appellant offers the principles and holdings of other cases (which respondent denigrates as "generalizations"). For example, appellant cites *People v. Hill*, 17 Cal.4th at 927 for the principle that prosecutorial statements can "be dynamite to the jury," and then, citing analogous case law, explains the particular reasons why the jury would or could have understood the prosecutor's remarks in a way that was unfair to appellant. The decision for the jury was life or death. The prosecutor repeatedly asserted that defense arguments for life were "offensive" and "inappropriate based on the law" and "not even close." (41RT 8428, 8463, 8477, 8502-03.)

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23 See e.g., RB 123-124 and RB 177-178.

Under the standard enunciated in *Dykes*, these arguments would or could have been understood by the jury– indeed they certainly were considered by the jury – to mean that serious consideration of the mitigation evidence of appellant's background, some of which made the prosecutor almost faint and fall out of his chair, was wrong, unfair, offensive and not right. These comments violated appellant's Eighth Amendment rights because the jury was led to believe it could not consider mitigation evidence that it is required to consider. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [the sentencer is required to consider "as a mitigating factor any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death."].) The arguments were prejudicial because they operated to convince the jury that death was the only appropriate sentence, not based on the evidence but based on the prosecutor's own personal beliefs backed up by his claim of experience and prestige.

Another point must be made: Respondent argues as to each claim of misconduct that if only the misconduct is viewed "in the proper context," any and all misconduct thereby vanishes. In the preceding sections of this Reply Brief, appellant disputes the necessity and/or accuracy of the "contexts" respondent provides, which either amount to his revisionist re-interpretation, or

respondent's assignment of a benign prosecutorial intention, rather than an evaluation of the comments themselves. (See Arg. V, Part B, page 55, above.) But appellant's claims are not based on brief or passing references. The prosecutor's argument in this case was riddled with misconduct of almost every kind, from misstatement of the facts, to attacks on counsel's integrity, to the injection of personal opinions and beliefs. Appellant contends that the "tipping point" was reached, and the prosecutorial argument at penalty phase, viewed in the "context" of the entire argument, prejudiced appellant by convincing the jury that a life sentence was legally inappropriate.

Finally, even if the prosecutor's course of improper cross-examination and argument is not deemed prejudicial standing alone, cumulative prejudice analysis should lead to a reversal of the sentence of death. The prejudice from the constitutional-based errors must be considered, in any combination, as to their cumulative prejudice. (*People v. Hill,* 17 Cal.4th at 844 [a series of trial errors, though independently harmless may in some circumstances rise by accretion to the level of reversible prejudicial error]; *Taylor v. Kentucky*, 436 U.S. at 487 [cumulative effect of trial errors can violate federal due process].)

As argued above and adopted and incorporated by reference here, numerous factors indicate prejudice: the prior deadlocked penalty jury; the

erroneously admitted evidence of escape, and especially a conspiracy with outside co-conspirators; and the sensational Fox video, considered in conjunction with the prosecutorial errors greatly increased the risk that the jurors reached the penalty determination based on passion and fear, rather than on a rational weighing of the evidence. (See Arg. II, Part C, pp. 16-17; Arg. III, Part C, pp. 33-41.)

VI. THE TRIAL JUDGE COMMITTED JUDICIAL MISCONDUCT WHEN HE MADE COMMENTS MINIMIZING THE JURY'S RESPONSIBILITY IN DETERMINING PENALTY BY GIVING MISLEADING AND INCORRECT "STATISTICS" AS TO DEATH ROW INMATES REQUIRES REVERSAL OF APPELLANT'S SENTENCE OF DEATH

A. Appellant's Claim Is Properly Before this Court.

Respondent argues first that this claim is forfeited because defense counsel failed to object at trial. (RB 140-141.) Appellant disagrees. Appellant's argument is that the judge's improper comments amounted to Eighth Amendment error under *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-29. Both the Ninth Circuit and this Court have held that where a jury instruction violates *Caldwell*, no objection on federal constitutional grounds is required to preserve the federal challenge. (*Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047; *People v. Hines* (1997) 15 Cal.4th 997, 1072-74.) The same logic applies to improper judicial remarks.

Most recently, *People v. Banks* (2014) 59 Cal.4th 1113, 1201, held that the trial court's erroneous voir dire description of the weighing process in a penalty trial was properly reviewed on appeal despite the lack of objection at trial. Respondent attempts to distinguish *Banks* and similar cases by saying that appellant's claim is not "instructional-type error" but rather alleged as *Caldwell* error, minimizing the jurors' sense of responsibility for sentencing in a capital case. (RB 141.) But *Banks* disproves respondent's claim: *Banks* held that "a defendant generally cannot forfeit a claim that the trial court erred at voir dire when describing to prospective jurors their penalty phase duties, just as other instructional errors cannot usually be forfeited by a defendant's mere failure to object." (*Id.* at 1201.) In short, the no-forfeiture rule depends not on whether the judge's error was in instructing the jury; the question is whether the judge erred in describing the jury's penalty phase duties. Appellant's *Caldwell* claim thus fits within the parameters of *Banks*.

B. The Judge's Remarks Amounted to Misconduct.

1. Judicial error.

Respondent once again claims that appellant has taken the judge's remarks "out of context." (RB 140.) In reliance on *People v. Elliot* (2012) 53 Cal.4th 535, 554, respondent argues that the trial court did not err in advising the

jury that the majority of death row inmates were white and that it was unusual for an innocent man to be executed. (RB 142-143.) *Elliot* involved a claim of judicial misconduct where the judge and the prosecutor gave prospective jurors incorrect and irrelevant information about the cost of prosecuting a death case. This Court rejected the claim because the jurors were correctly informed that if the case reached the penalty phase, they would not be permitted to consider those costs. (*Id.* at 555.) Respondent contends that *Elliot* requires the same result here because the trial court's remarks were made "in the context" of cautioning the jurors against considering public opinion when making their penalty determination. (RB 143, citing 29RT 5831.)

Elliot is distinguishable. In *Elliot* the judge expressly told the jury not to consider financial costs in any way. By contrast here, the judge took a stand and specifically told the jurors that the media's "selling job" "the death penalty is weighted against minorities" was inaccurate, and that the majority of death row inmates were white. The only "admonition" the judge gave was the offhand comment: "So not that it makes any difference; I just found it curious that a lot of people have bought into that. It's not the case." (29RT 5831-32.) Respondent compares the "not that it makes any difference" remark to the express admonition in *Elliot*, but the two stand in stark contrast. In *Elliot*, "[t]he

court and the prosecutor correctly advised the prospective jurors that in deciding the penalty issue, if the case reached the penalty stage they would not be permitted to consider the respective government costs of the death penalty and life imprisonment without parole." (*Id.* at 555.) Here, the judge repeated that some of the jurors were wrong about information the media had "sold" to them. He never cautioned the jury about "considering public opinion," as respondent claims. Rather, he insisted, that only one version of media or public opinion was inaccurate, and repeated that assertion even after he said "not that that makes any difference."

The judge had the facts wrong. Moreover, again in contrast to *Elliot*, where the judge's final comments that the costs would "even out" only further diminished the possibility that jurors would consider cost in deciding the penalty, the judge's comments here increased the possibility that the jurors would consider appellant, a white man, a more suitable candidate for the death penalty.

2. *Caldwell* error.

Respondent agrees that *Caldwell* occurs when the court's remarks are inaccurate or misleading such that the jury feels less responsible for the sentencing decision than it should, but argues that (1) appellant has failed to show that the challenged comments were inaccurate or misleading; and (2) the

remarks did not allow the jury to feel less responsible. (RB 143-44.) Appellant addresses each point in turn.

First, respondent argues that because the judge's remarks were made in 2008, appellant's statistics from 2014 fail to show the inaccuracy of the judge's 2008 comments. (RB 144.) However, the statistics from 2008 are similar to those cited in Appellant's Opening Brief, but show an even *higher proportion of non-white inmates on death row* than in 2014, and thus do demonstrate the inaccuracy of the judge's remarks at trial: As of January of 2009, the white death row population was 1,475 [compared to 1323 in 2014) while the population of black, Hispanic and other-race death row inmates was 1,822 [compared to 1737 in 2014). (See Death Row Population Figures from NAACP-LDP "Death Row USA" (January 2009).)[24] The judge told the jury that "the majority of people on death row in the country right now are white," which was inaccurate and misleading: statistics show that white death row inmates were in the minority at that time.

Secondly, again relying on the mantra that the challenged remarks are unobjectionable when viewed in their "proper context," respondent contends that the "thrust" of the challenged comment was "to caution prospective jurors against allowing their penalty determination to be affected by public opinion,"

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[24] See <http://deathpenalty.org/article.php?id=54>

and thus did not allow the jurors to feel a lessened sense of responsibility in determining appellant's penalty. (RB 144-45.) Apart from the usual plea of "consider the context," respondent does not provide any further explanation of how the "thrust" of the comments was cautionary. First, the judge did not refer to "public opinion," but rather to the "selling job" of the media that convinced people that the death penalty was weighted against minorities. (29RT 5831-32.) Secondly, neither remark "cautioned" the jurors in any way. Instead, the remarks operated as a "correction" of supposedly inaccurate media information. Because the judge's remarks were themselves inaccurate, they did tend to minimize the jury's role and responsibility at the penalty phase, as explained immediately below. Appellant suggests that this Court look not to respondent's *ipse dixit* claim, but to the record itself.

The judge also incorrectly told the jury that despite the misguided publicity, it was "really unusual" and "so unusual" for an innocent person to be executed or set free, even though 156 people have been exonerated and freed from death row since 1973.[25] (29RT 5832.) Respondent does not address this comment even though the defense made a strong case of lingering doubt at the second penalty trial. Yet the judge told the jury not only that most death inmates

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25 See <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

were white, but that it was unusual for a defendant to be exonerated. (29RT 5831-32.) This remark lessened the jury's sense of responsibility in evaluating the lingering doubt defense as a basis for a penalty other than death; stated otherwise, because the jury had been told it was rare for a death penalty defendant to be "freed" or "wrongfully executed," the jury was allowed to feel less responsibility in weighing the mitigation against the aggravating "circumstances of the crime" evidence. In addition, the "statistics" cited by the judge as to the "majority" of white defendants on death row would have tended to normalize the propriety of a death sentence in this case of a white defendant accused of being a white supremacist.

C. The Judicial Misconduct Was Prejudicial.

Respondent argues that appellant's "reliance" on *People v. Sturm* (2006) 37 Cal.4th 1218, 1233 is misplaced, and that this Court should find no judicial misconduct because (1) the judge's comments were "penalty-neutral" and "not necessarily inaccurate;" and (2) the judge did not disparage defense counsel in his remarks, as was the case in *Sturm*.

Respondent's argument is off base: appellant does not rely on *Sturm* to show the impropriety of the judge's comments, but to show their prejudicial impact. Although appellant made this explicit in his Opening Brief (AOB 214),

respondent fails to recognize the distinction, and thus wrongly claims that appellant's "reliance on *Sturm* is misplaced." (RB 146.) It does not matter that in *Sturm*, the judge disparaged defense counsel and here he did not. Moreover, as discussed in the previous paragraphs, the judge's comments in this case were inaccurate and were not penalty-neutral.

Sturm is important on the issue of prejudice, because in that case, this Court deemed the judicial misconduct prejudicial under any standard, despite the heinousness of the capital crime, where, as here, "a death sentence [] was by no means a foregone conclusion." (*Id.* at 1244.) Respondent does not address this aspect of *Sturm*, and yet it is highly relevant because a death sentence in this case was also "by no means a foregone conclusion," as shown by the split verdict in the first penalty trial.

Because respondent concludes there was no judicial misconduct, he does not address appellant's argument as to prejudice, except to conclude as an *ipse dixit* that because there were "no errors in penalty phase" there can be no prejudice and no cumulative prejudice. (RB 146.) . Appellant refers this Court to the argument showing prejudice and cumulative prejudice in Appellant's Opening Brief at pages 214-216. (See also Arg. II, Part C, pp. 14-16, Arg, III, Part C, pp. 33-41; Arg. V, Part C, pp. 84-87.)

VII. THE TRIAL COURT'S ERRONEOUS GRANT OF A CHALLENGE FOR CAUSE AT THE SECOND PENALTY TRIAL TO A PROSPECTIVE JUROR WHO WAS EQUIVOCAL OR CONFLICTED ABOUT THE DEATH PENALTY BUT WHO WAS ABLE TO CONSIDER ALL THE EVIDENCE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY, DUE PROCESS AND EQUAL PROTECTION AND A RELIABLE SENTENCING DETERMINATION

Appellant argues that the trial court erred in granting the prosecutor's cause challenge to Prospective Juror 144 [PJ 144] who was conflicted about the death penalty and only said she would not impose a death sentence when she was improperly forced to give a yes or no answer to a decision she correctly understood as based on an individualized weighing of the evidence and not a prejudgment. Respondent argues that "a fair and complete reading of the record" demonstrates appellant's claim to be "meritless." (RB 146.)

Appellant acknowledges and even emphasized in the Opening Brief that PJ 144 described herself as "conflicted" with respect to imposing the death penalty. (AOB.) Respondent quotes at length from both PJ 144's questionnaire and her responses in voir dire, in which she repeatedly says she feels "conflicted" about the death penalty, and was philosophically or religiously opposed to it. In that same questionnaire, she stated that she would not vote automatically for either a life or death sentence. When asked if she could be fair, she said she would be, but "would be conflicted if asked to return death penalty." (10 JQ CT 2781.) In

voir dire proceedings, she continued to describe her "conflicted" feelings about the death penalty – not just for religious reasons, but also because of the court's instructions as to weighing different factors. (20RT 6067-069.) When pressed to give a yes or no answer, she acknowledged leaning towards not being able to vote for death, but said that "to be quite honest," she simply did not know in advance. She said she would consider all the testimony and weigh all the factors. Only when the court insisted upon a yes or no answer did PJ 144 say that she could not vote for death. (30RT 6067-69.) PJ 144 described herself as "conflicted" and "on the fence," and explained that she did not see the question "as a yes or no." She repeated that she did not know in advance if she could vote for death: "I truly don't know." (30RT 6082-96.)

Respondent faults appellant for failing to consider PJ 144's questionnaire responses. (RB 156.) Respondent claims that those answers "showed intractable religious-based opposition to the death penalty." (RB 156.) Appellant disagrees. PJ 144 did state in the questionnaire that she agreed with the position of her religion, which was "against the death penalty," and said she could not vote on "either penalty" without regard to her religion's position. Respondent paraphrases this question and answer in a way that seems to interpret the response as an "intractable" statement that she could not vote *for the death*

penalty without regard to her religion's position, when in fact she said she could not vote *for either penalty* without consideration of that religious view. (10 JQ CT 2779.) Appellant submits that the prosecution, as the moving party, bears the burden of demonstrating the juror's substantial impairment.

Both this Court and the United States Supreme Court have declared that considering a religious or philosophical view does not render a prospective juror impaired. *Wainwright v. Witt* (1985) 469 U.S. 412, 424 emphasized that a "prospective juror's personal views concerning the death penalty do not necessarily afford a basis for excusing a juror" in a capital case. *People v. Stewart* (2004) 33 Cal.4th 425, 447 held that a juror finding it very difficult to vote for death cannot be considered substantially impaired "unless [] she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances" and "determining whether death is the appropriate penalty under the law." PJ 144 asserted that she was able to weigh the applicable factors and make an individual moral decision, and said that she could do that "unequivocally." (30RT 6082- 86.)

Respondent claims that PJ 144 stated that she could not vote for death under any circumstances. (30RT 6068-69.) Respondent's citation to the record is the juror's response that she would "lean towards not being able to assess" the

death penalty, that she would consider it, and would consider all the testimony and weigh the factors, and would only say that she could not vote for death if the court was "making [her] say yes or no." (30RT 6068.)

Respondent claims that appellant "misreads the record" by saying that JN 144 said only that she would say "no" if forced to give a yes or no answer prior to the penalty trial. (RB 156, quoting AOB 220.) Respondent interprets PJ 144's response as saying that *if forced to answer the trial court's question* then "she could not vote for the death penalty under any circumstances." (RB 156.)

Immediately before this exchange, PJ 144 had said that she was "conflicted about assessing the death penalty," that she had heard in voir dire the discussion "about placing value and weighing different factors," that she was "conflicted over it," that she "didn't know" if she could ever vote for the death penalty, that she would "lean towards not being able to assess that penalty," and that she would "consider hearing all of the testimony and weighing the factors." The next question was whether she could vote for the death penalty if she found that aggravation outweighed mitigation, she then stated, "If you're making me say yes or no, I would say no, I could not." (30RT 6068.) Appellant reiterates that PJ 144 repeatedly described her conflict and uncertainty about imposing the death penalty. Respondent's interpretation of the exchange does not change

that. PJ 144 was extremely uncertain and only answered the question posed with a categorical no because she understood the court to require her to "say yes or no." Appellant does not believe that a "no" answer after being forced into that position results in a substantially impaired juror, which is one who is unable to follow the law.

Respondent relies on *People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 400-401. In that case, the prospective juror said he was very opposed to the death penalty, then said he could "follow the law" and vote for the death penalty if he had to, and ultimately said that he could not vote for death if he felt it was appropriate. This Court upheld the cause excusal. Although the juror stated he could vote for the death penalty "if he had to," a juror is never required to vote for death. Consequently, the statement did not establish his ability to follow the law. (*Id.* at 400-401.)

The instant case is different. In the first place, PJ 144 never said that she would not follow the law. Because she was not asked that question, the law presumes "that citizens who resolutely support or resolutely oppose the death penalty are capable of setting aside their personal views when serving as jurors." (*People v. Whalen* (2013) 56 Cal.4th 1, 98, Lui, J., conc.opn.) Moreover, PJ 144 did not say she would vote for death only if she "had to," she said that she would

only give a no answer to the question, if she were forced to do so. The distinction is subtle but significant. PJ 144 repeatedly insisted that she "truly did not know" what she do after considering all the evidence and the law, and was coerced into giving the yes or no answer.

Respondent also argues that appellant's reliance on *Stewart* should be disregarded because that case involved "a situation where prospective jurors were excused solely on the basis of their written questionnaire responses." (RB 157.) Respondent is correct but his argument is incomplete and ignores the portions of the case relied on by appellant. *Stewart* did address the situation noted by respondent, but also held a prospective juror who might find it very difficult to vote for the death penalty could not be considered substantially impaired *unless* she was unwilling or unable to follow the judge's instructions.

> "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.'" (33 Cal.4th at 446.)

Stewart cited *Witt*, 469 U.S. at 424: "'A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded,

unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict.'" PJ 144 was such a juror and *Stewart* is entirely applicable. PJ 144 understood that the law allowed her to take into account her own values and beliefs, and she repeatedly said that she was conflicted, on the fence, and unable to give a yes or no answer prior to hearing the evidence. Uncertainty is not the equivalent of inability.

Respondent argues that appellant's claim is "premised on allegedly disparate questioning" of another prospective juror who was the subject of an unsuccessful defense challenge. (RB 157.) Respondent attempts to refute appellant's argument by re-labeling it and then citing a "similar argument" rejected by this Court in *People v. Souza* (2012) 54 Cal.4th 90. This is an inaccurate description of appellant's argument. In *Souza*, the defendant argued that the jury panel was systematically "culled of all those who revealed during voir dire" their conscientious scruples against capital punishment, and urged on the Court a comparative analysis supposedly demonstrating an "arbitrary and capricious standard," resulting in excusing life-inclined jurors more frequently than those in favor of death. (54 Cal.4th at 131.)

However, disparate questioning in voir dire is *not the premise* of appellant's claim. The premise is that PJ 144 was erroneously excused for cause

despite the prosecution's failure to meet its burden of showing that she was unable or unwilling to follow the law. Appellant did not make the argument attributed to him by respondent. Appellant's Opening Brief explicitly stated that "the contrasting treatment of an apparent automatic death-penalty juror demonstrates the efficacy of follow-up questions." (AOB 222-224.) That is, follow-up questions as to the prospective juror's ability to follow the law that were posed to the pro-death prospective juror (PJ 179) but were not posed to PJ 144.

Appellant contrasted the voir dire of PJ 144 with that of an apparent automatic death penalty juror to show that the prosecution had not met its burden with PJ 144. PJ 179 said that any killer should pay and that anyone convicted of first degree murder should be sentenced to death. The judge asked if he would be open to another penalty if he heard mitigating factors and he said anything was possible, and he thought he could consider mitigation. In further voir dire by defense counsel he repeated that his "first response, without seeing more evidence," would be to impose death. He said he would be predisposed to impose death unless he heard something other than the fact that it was an intentional murder. The prosecutor attempted to rehabilitate him and finally asked if he would agree to follow the judge's instructions, and he agreed that he

would. The trial court denied the defense challenge on the basis that PJ 179's position on the death penalty was equivocal. (30RT 6166.) Appellant contends that PJ 144 was just as equivocal, if not more and more explicitly so. (See AOB 224-25.) But the salient point is that made in *Stewart*, pointing out the importance of follow-up questioning that might lead to a conflicted juror's stating her ability to put aside personal opinions and follow the law. (*Stewart*, 33 Cal.4th at 427.)

Respondent misses this point, and argues that "a very different line of questioning" was required to determine the suitability for PJ 179 as a juror, because he had no "religious convictions" and showed no "difficulties setting aside his personal beliefs." (RB 157.) Appellant submits this is an unfair summation of PJ 179's voir dire. He certainly showed some difficulty in accepting mitigation as a basis for a sentence other than death, and in considering a life sentence for an intentional murder. A juror's ability to serve does not hinge on whether her beliefs are based on religion, or some other system of belief or bias. The fact remains that like PJ 179, PJ 144 was equivocal; PJ 144 was excused for cause and PJ 179 was not.

Respondent cites *People v. Rountree* (2013) 56 Cal.4th 823, 848 for the proposition that jurors with "less strenuous religious opposition to the death

penalty" have been deemed properly excused for cause. (RB 156.) Appellant believes that PJ 144's situation is different. She was "conflicted" about the death penalty but her "opposition" was to pre-judging the case.

In sum, the prosecution failed to show that PJ 144 was unable and unwilling to put aside her personal beliefs and opinions and follow the law, and thus did not meet its burden of showing that she was substantially impaired. The erroneous cause excusal requires automatic reversal of appellant's sentence of death without harmless error analysis. (AOB 226-227.)

CLAIMS RELATING TO THE GANG SPECIAL CIRCUMSTANCE FINDING AND GUILT PHASE ERRORS

VIII. THIS COURT MUST STRIKE THE GANG-MURDER SPECIAL CIRCUMSTANCE FINDING AS UNCONSTITUTIONALLY VAGUE AND INSUFFICIENTLY NARROWING, IN VIOLATION OF FEDERAL AND STATE DUE PROCESS AND EQUAL PROTECTION GUARANTEES, AND THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Appellant maintains that there is no meaningful distinction between a first degree murder charge with a substantive gang offense and gang enhancement on the one hand, and a gang special circumstance charge under 190.2(a)(22) on the other. The only difference is that the gang murder special circumstance requires an intentional killing, whereas a gang-related first degree murder charge could be a non-intentional felony murder. However, the prosecutor's only theory of first-degree murder in this case was intentional murder. Consequently, there

were no objective criteria for charging this case as a gang special circumstance murder rather than as an intentional murder (premeditated or lying-in-wait) murder with a gang allegation and/or substantive gang charge. As such, the gang special circumstance as applied in this case is unconstitutionally vague, insufficiently narrowing, and must be struck.

Respondent analogizes the gang special circumstance to the lying-in-wait special circumstance, which requires an intentional killing, whereas the lying-in-wait theory of first degree murder does not. (RB 159.) *People v Stevens* (2007) 41 Cal.4th 182, 204 upheld the lying-in-wait special circumstance as sufficiently narrowing for constitutional purposes, and respondent contends the same must be true for the gang special circumstance murder. The defendant in *Stevens* argued that because the "temporal element" of lying in wait was equivalent to that of first degree murder (on a theory of premeditation or lying in wait), the lying-in-wait special circumstance did not comply with the Eighth Amendment narrowing requirement. This Court rejected the argument because "the lying-in-wait special circumstance requires a [] concealment [] from a position of advantage," but premeditated murder does not, "any overlap between the premeditation element of the first degree murder and the durational element of the the lying-in-wait special circumstance does not undermine the narrowing

function of the special circumstance." (*Id.* at 203.) This holding does not defeat appellant's claim because the gang special circumstance includes no additional elements such as concealment, surprise and advantage, as is the case with the lying-in-wait special circumstance. As Justice Moreno emphasized in *Stevens*, the basic tenets of the United States Supreme Court's modern Eighth Amendment jurisprudence require that to pass constitutional must, the special circumstance must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."'" (*Stevens*, 41 Cal.4th at 222, Moreno, J., conc. & dis.opn., quoting *Romano v. Oklahoma* (1994) 512 U.S. 1, 7.) As stated in *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, and often repeated by the United States Supreme Court, death penalty eligibility requires a *meaningful basis* for distinguishing the few cases in which death is imposed from the many cases in which it is not. Appellant contends that the gang special circumstance includes no meaningful basis for distinguishing this capital case from the many gang-related first degree murders not filed as capital cases. Indeed, the trial court made this precise point, stating that it was aware of many other gang murder cases prosecuted as non-capital cases, and this was the first capital gang murder case. The only basis the trial court articulated for

distinguishing the cases was that the "facts" were different – not a meaningful distinction since the facts in every case differ.

Respondent points out that the prosecutor pursued two theories of first degree murder against appellant, i.e., premeditated murder and lying-in-wait murder; respondent contends that this fact demolishes appellant's argument based on the lack of meaningful difference. (RB 159-160.) However, for the purposes of this argument, the prosecutor's two theories are the same in that both require an intentional murder: the lying-in-wait instruction states that the duration of the waiting "must show a state of mind equivalent to deliberation or premeditation." (7CT 1566.) The guilt phase lying-in-wait theory does not affect appellant's claim that the *gang special circumstance* cannot be meaningfully distinguished from a gang murder (based on either lying in wait or premeditation). This case did not include a lying-in-wait special circumstance. The gang special circumstance was the only one alleged. The question or "premise" is not the theory of first degree murder at guilt (as respondent asserts); appellant's premise is the absence of a meaningful difference between the gang special circumstance murder and first degree murder with a gang allegation.

Respondent also argues that prosecutorial discretion to seek the death penalty doesn't render the law vague or arbitrary. (RB 160-161.) However, appellant does not complain of prosecutorial discretion; thus, the case law cited by respondent is inapposite. Appellant contends that the gang special circumstance allegation does not comply with the Eighth Amendment narrowing requirement.

Respondent also cites to case law rejecting comparative proportionality claims. For example, he quotes *People v. Keenan* (1988) 46 Cal.3d 478, 506, which held that "one sentenced to death under a properly channeled death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty." (RB 161.) The quote proves appellant's point: the death sentence must be "a properly channeled [] scheme." Appellant's claim is not one of proportionality; his claim is that the gang special circumstance is not a properly channeled scheme because it does not fulfill the narrowing requirement required by the United States Supreme Court. Appellant referred to Orange County gang cases in which first degree murder but not a gang special circumstance was alleged, AOB 230-231, but appellant has made no proportionality claim. The citations illustrate appellant's actual claim of insufficient narrowing: there is no

basis for distinguishing the capital prosecution at issue here from other gang murder prosecutions.

Respondent's final contention is that because the prosecution joined the attempted murder of a police officer charge to the capital murder, and none of the Orange County cases cited by appellant included a police officer shooting, appellant's argument should fail. (RB 161-162.) This reasoning is faulty. First, appellant's citation to Orange County cases was illustrative of his insufficient narrowing claim, as explained in the previous paragraph. Secondly, and more significantly, this Court cannot assess the narrowing function of the special circumstance allegation according to the number or nature of other evidence unrelated to the crime to which the special circumstance applies. The narrowing function of the gang special circumstance must be assessed on its own. The supposed "narrowing criteria" in Penal Code section 190.3 do not and cannot migrate over to Penal Code section 190.2 in order to correct a constitutional defect.

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GUILT PHASE CLAIMS

IX. APPELLANT'S CONVICTION FOR CONSPIRACY TO COMMIT MURDER SCOTT MILLER IS UNSUPPORTED BY THE EVIDENCE AND MUST BE VACATED AS VIOLATIVE OF HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS

Appellant maintains that the evidence was constitutionally insufficient to support his conviction for conspiracy to commit murder. Respondent argues that appellant has failed to apply the appropriate standard of review by assessing the facts in the light most favorable to the prosecution and that there was sufficient circumstantial evidence of an agreement.

Respondent cites as the "foremost" evidence of the required conspiratorial agreement the fact that appellant and "his accomplices carried out the crime." (RB 164.) In support of this contention, respondent cites *People v. Vu* (2006) 143 Cal.App.4th 1009, 1025, and *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464. (RB 165.) Although both cases repeat that the elements of conspiracy may be proven with circumstantial evidence, "particularly when those circumstances are the defendant's carrying out the agreed-upon crime," neither case holds that the two people committing a crime is *ipso facto* circumstantial evidence of the conspiratorial agreement. (*People v. Vu*, 143 Cal.App.4th at 1024-25, quoting *People v. Herrera*, 70 Cal.App.4th at 1464.) *People v. Vu* included "very strong evidence" of motive and an agreement to kill the

victim, including gang revenge for the death of Vu's friend who had died in his arms, a threat made by Vu's gang to rival gang members, and a "series of cell phone calls, as evidenced by the cell phone records, (*Id.* at 1024-27.) *People v. Herrera* involved unambiguous evidence including a statement by the defendant that his fellow gang members "were after" the victim and that he intended to "back [them] up." (*Id.* at 1464.)

Respondent repeats the prosecution's unproven but much-argued trial theory that appellant and Rump were acting in accordance with an order from PENI leaders who wanted Miller killed as punishment for his appearance over a year earlier in the Fox video. Respondent contends that "payback" for the Fox video "constituted a powerful motive" for PENI gang members, including appellant, to kill Miller. Respondent states that "after the Fox News segments aired, Miller was targeted by PENI with an understanding about what was supposed to happen to him." (RB 165, citing 12RT 2157.) This argument relies on testimony by jailhouse informant Darryl Mason, who answered in the affirmative when the prosecutor asked: "Just with a yes or no answer, was there an understanding, as far as you knew, within the gang at the time that something was supposed to happen to Scott Miller as a result of going on Fox 11 news." (12RT 2157.) Mason's "understanding" about "something" that was supposed to

happen 13 months earlier is not "powerful" evidence of *appellant's motive;* nor is it solid and credible evidence of appellant's motive to enter a conspiracy to kill Mason.

Appellant repeats – because respondent ignores it – that the prosecution presented no solid or credible evidence at trial (despite the prosecutor's promise in opening statement) that PENI shot callers had put out an order to kill Miller, that appellant was acting on gang orders, or that appellant knew about the Fox broadcast prior to Miller's death. (See pages 22-25 above.)

Respondent also argues that appellant "ignores" the "reasonable inferences" from testimony by gang expert Lieutenant Epperson, but does not refer to the testimony Epperson supposedly provided as to appellant's motive. (RB 166.) Lt. Epperson testified that there was a "recurring rumor" that Miller would be hit because of the Fox video, but emphasized that he had no knowledge that the Fox video was actually a reason for a gang plan to kill Miller. (16RT 3191-92.)

Mason's testimony about his "understanding" that "something was supposed to happen," and Lt. Epperson's testimony about a "recurring rumor" do not constitute solid and credible evidence. Appellant acknowledges that the elements of a conspiracy can be proved by circumstantial evidence. Nonetheless,

that circumstantial evidence must be solid and credible evidence. "A reasonable inference [] 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork.'" (*People v. Morris* (1988) 46 Cal.3d 1, 14-15.) A jailhouse informant's "understanding" about "something" and a gang expert's report of a "recurring rumor" do not amount to solid evidence upon which reasonable inferences can be made.

Respondent refers to appellant's argument as an "attempt[] to dismiss such inferences [] as 'speculation.'" (RB 166.) Appellant believes that respondent's argument constitutes speculation. He does not cite to what part of the expert's testimony should be considered solid circumstantial evidence sufficient to support the inferences he claims. As did the prosecutor at trial, respondent refers to "one of Rump's jailhouse phone calls" in which he told Robin Friewald he should have had sex with her before he left, and then immediately said that he had told "T" that "if we don't do this right now, we're not going to get a chance to." (See AOB 244; Exh. 107A at 11CT 2766.) The phone call made no reference to either appellant or killing Miller, although respondent and the prosecutor and respondent made that connection. Yet respondent claims that appellant "strains to extract" a less incriminating meaning from this phone call. (RB 166.) Appellant believes the words uttered, and the

context in which they were uttered, clearly state their meaning, which was to sex between Rump and Friewald, and not to a conspiracy to murder entered into between Rump and appellant.

This Court should not ignore the fact that the prosecutor argued to the jury that the elements of a conspiracy had been proven by (1) the Fox video, which caused PENI leader Mazza to order a gang hit on Miller, and that appellant and Rump carried out that gang order; and (2) Rump's phone call which he described as appellant's phone call, which was *not admitted* against appellant. (AOB 243-44; 23RT 4631-32; Exh. 107A) Yet there was no solid evidence that the Fox video, which aired ***more than a year*** before Miller was shot and killed, caused Mazza to order a gang hit, or that Mazza did order a hit, or that appellant was ordered to kill Miller; and Rump's phone call, mistakenly argued as appellant's phone call, does not amount to solid evidence, or any evidence at all, as to appellant's supposed participation in a conspiracy.

Respondent also argues that the "evidence" showed a "well-coordinated plan amongst three PENI gang members to have Johnson lure Miller from Raphoon's party to the predesignated execution site near Harris's apartment where Lamb and Rump were waiting, armed and ready with a getaway car." (RB

165-166.)[26] In fact, *the prosecutor presented no evidence* at all that Miller was at Raphoon's party that night, or that there was a "well-coordinated plan" to lure him from that party to any particular place, or that Lamb and Rump were waiting with a getaway car. Although respondent provides no citations to the record for evidence of this supposed "well-coordinated plan," he apparently relies on testimony presented by *defense witness* Billy Joe Johnson, and other *defense witnesses*, who testified about Miller's presence at Raphoon's party that night. (See RB 26-29 ["Lamb's Evidence].) However, where, as here, the defense has made a trial motion for a judgment of acquittal under Penal Code section 1118.1 at the close of the prosecution's case,[27] the sufficiency of the evidence is tested as it stood at that point. That is, defense evidence presented after that point

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[26] Respondent relies on *People v. Jurado* (2006) 38 Cal.4th 72, 121, incorrectly claiming that it held that motive to commit an offense "with an opportunity for discussion and agreement constitutes evidence of an agreement." (RB 165.) *Jurado* did not make such a broad pronouncement. The *Jurado* court found there was sufficient evidence that the defendant and entered into a conspiratorial agreement with Anna Humiston and Denise Shigemura. Shigemura shared the defendant's motive to kill the victim, because she had been part of a plot to kill another man, and would be at risk if the victim revealed that plot. Shigemura and the defendant were together alone shortly before the murder. Morever, Shigemura drove the car at the time of the fatal attack, and later, she and the defendant concocted a false alibi. As to Humiston, the evidence showed that she and the defendant engaged in an intense conversation shortly before the attack and she then allowed Shigemura to drive her car. No similar evidence was present in this case.

[27] See 6CT 1329; 17RT 3271; 20RT 3942-43.

cannot be relied on to provide evidence in support of the prosecution's case. (*People v. Whalen* (2013) 56 Cal. 4th 1, 55.)

In short, respondent is left with an argument that because appellant and Rump were convicted of murdering Miller, who had appeared in a news segment about PENI **more than a year** earlier, there was solid circumstantial evidence to support appellant's conviction for conspiracy.[28] Appellant submits it is insufficient.

X. THE PROSECUTOR'S REPEATED IMPROPER ARGUMENTS TO THE JURY VIOLATED APPELLANT'S FEDERAL DUE PROCESS AND FAIR TRIAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS

A. Appellant's Claims Are Properly Before This Court.

Respondent contends that appellant has forfeited his claims to the improper prosecutorial arguments at guilt phase. (RB 167-68.) This Court has held that it has discretion to consider claims advanced for the first time on

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[28] Respondent also refers to a letter appellant wrote after the fact that he had "done a lot" and testimony from the jailhouse informant Darryl Mason that he "had stripes coming" for shooting Miller. (RB 165.) While this may be direct evidence that he killed Miller, and circumstantial evidence that it was for the benefit of the gang, the after-the-fact statements do not constitute solid evidence he entered into a gang agreement to kill Miller prior to the fact. Not every gang killing committed by two or more gang members is a conspiracy, which requires substantial evidence of the agreement. Gang members, without forming a conspiracy, may know that killing a rival or a snitch is part of gang business. (See *People v. Johnson* (2013) 57 Cal.4th 250, 261-263 [distinguishing traditional conspiracy from a gang conspiracy under Penal Code section 182.5].)

appeal. (*People v. Williams.* 17 Cal.4th at 161, fn.6 [an appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party]; see also *People v. Cummings*, 4 Cal.4th at 1303, fn. 48.) This discretion is particularly apt in capital cases. (See e.g., *People v. Frank* (1985) 38 Cal.3d 711, 729, fn. 3 [in a capital appeal, a technical insufficiency in the form of an objection is disregarded]. In a capital case, the "failure to say the 'magic words' should not result in the affirmance of a death sentence which might not otherwise have been imposed." *(United States v. McCullah* (10th Cir. 1996) 87 F.3d 1136, 1139 [after granting relief on an evidentiary claim, rejecting an argument in government's petition for rehearing that the claim was not properly preserved at trial].)

B. The Prosecutor's Improper Jury Arguments Constituted a Course of Conduct that Deprived Appellant of a Fair Trial.

Respondent correctly points out that the prosecutor has "latitude" in arguing inferences from the evidence. (RB 169.) However, the prosecutor also has a duty to ensure that the law is obeyed. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649.)

In general, and as usual, respondent attempts to minimize or legitimize the prosecutor's remarks by insisting that the challenged prosecutorial

arguments are proper, if they are viewed or interpreted in the "context" respondent supplies. Appellant prefers to analyze the remarks as they stand, without contextualization or interpretation.

1. The prosecutor improperly attacked counsel's integrity by arguing that the defense was "not fair," "not right," and that counsel was trying to fool the jurors.

Respondent acknowledges that prosecutors cannot attack defense counsel's integrity. Nonetheless, respondent argues that the following arguments were permissible: that the defense presentation was "unfair," "not right," and "had no place in the courtroom," that defense counsel wanted the jurors "to buy" stuff that has nothing to do with the case and "were trying to get [the jurors'] focus away" from the job at hand; that they wanted to "fool" at least one juror in order to win, which was "not fair, that defense counsel were trying to "sell" false facts and arguments so they could "win," a tactic which actually induced nausea in the prosecutor, who was doing his job so he could "sleep at night." (AOB 246-50 [detailing the challenged remarks with citations to the record]; RB 169-171.)

Respondent first seems to imply that the longer a prosecutor argues, the more his improprieties can be overlooked: respondent criticizes appellant for "piecing together" various comments from a lengthy prosecutorial argument.

(RB 171.) Appellant believes that the "various segments" challenged by appellant constituted *a course of misconduct.* As appellant made clear in his Opening Brief, the prosecutor's attacks on the defendants and their "baloney story" were acceptable. However, the prosecutor peppered those permissible remarks with impermissible attacks on defense counsel. This improper refrain deprived appellant of a fair trial, and the longer proper sections of prosecutorial argument do not excuse or vindicate the instances of misconduct.

Respondent next parrots his usual refrain that appellant has presented the challenged remarks "out of context," arguing that viewed in "their proper context," the arguments might be considered as attacks on defense arguments rather than attacks on defense counsel. (RB 172.) The cases relied on by respondent are inapposite. *People v. Taylor* (2001) 26 Cal.4th 1155, 1167 and *People v. Medina* (1995) 11 Cal.4th 694, 759 deemed proper prosecutorial arguments referring to defense "tricks" or "moves" in cross-examination used to demonstrate a witness's "confusion or uncertainty." (RB 172-173.) However, the prosecutors in *Taylor* and *Medina* confined their attacks to defense counsel's treatment or version of the facts they tried to elicit in cross-examination of the witnesses.

What happened in this case was distinctly different. Unlike the cases cited by respondent, the prosecutor's argument here did not refer to defense counsel's technique for cross-examining witnesses. Instead, the prosecutor attacked defense counsel, accusing him of unfairly trying to persuade the jury to disregard not only the facts but also the law. The prosecutor explicitly referred to the defense attorneys themselves, who, according to the prosecutor were trying to "fool" at least one jury by "taking his or her focus away from the facts and the law," which was "not fair," because the only "fair" conclusion from the facts and law was that the defendants were guilty beyond a reasonable doubt. (AOB 248-49.) Viewed in any context, an argument that the defense attorneys were doing something "unfair" by trying to get the jurors to take their "focus away from [their] job," and to fool at least "one juror into taking his or her focus away from the facts and the law" is a definitive and straightforward attack on the integrity or fairness of defense counsel themselves.

Respondent asserts as an *ipse dixit* that it was "not reasonably probable" the jurors would have understood these comments as an attack on defense counsel's integrity. (RB 173.) Appellant disagrees. When the judge instructs the jury to weigh the facts and apply the law, and the prosecutor then tells the jury that defense counsel is trying to fool the jurors and get them to disregard the

facts and the law, which he labels as "unfair," the highly probable conclusion the jurors would reach was that defense counsel were acting in an "unfair" manner contrary to the law, i.e., an attack on their integrity. "Fair" is defined as in accordance with the rules, and without cheating; unfair is thus the opposite. "Integrity" is defined as an adherence to ethical principles. The concepts of integrity and unfairness are diametrically opposed. To call defense counsel's actions "unfair" is to attack their integrity. (*People v. Cummings*, 4 Cal.4th at 1301 [prosecutor commits misconduct if there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury].)

Respondent cites other cases rejecting defense claims of prosecutorial misconduct in which prosecutors characterized defense arguments as "red herrings." (RB 173.) These cases do not defeat appellant's claim. In contrast to the case at bar, *none* of those cases involved a prosecutorial argument that characterized defense counsels' actions as "unfair." (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1217-18 [prosecutor referred to well-known quotations as to attorneys being schooled in the art of persuasion and argued that defense counsel's job was to try to "get [defendant] off"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1081 [argument that the defense of PCP was a red herring where

there was no evidence that the defendant had used PCP]; *People v. Breaux* (1991) 1 Cal.4th 281, 305 [prosecutor argued that it was common for defense counsel to focus on areas that tend to confuse because confusion tended to benefit the defense].)

Respondent points out that the prosecutor's argument that he needed to do "his job" and had "to be able to sleep at night" made no direct reference to defense counsel. (RB 172.) Nonetheless, the insinuation is clear – particularly so when viewed in the "context" of the whole of the prosecutor's argument: Defense counsel are trying to fool the jurors unfairly by getting them to disregard both the facts and the law, whereas the prosecutor is doing his job so that he can sleep at night. To be able to sleep at night implies righteousness, a clear conscience, whereas the contrary is the equivalent of the accusation lodged against defense counsel, acting in a wrongful and unfair way. (See <en.wiktionary.org> ["How can you sleep at night?"].)

2. The prosecutor improperly argued his personal impressions and vouched for his case.

The prosecutor told the jurors of his experience, and that his case "got better" after the defense presentation, which was "rare" in his experience. (23RT 4593.) Yet respondent contends that no vouching occurred. Respondent claims

that it was either a matter of "common knowledge" or at least "no surprise" to the jurors that the prosecutor had prior experience trying murder cases and had thus necessarily "cross-examined killers." Respondent adds that "similarly," it was "common sense that a party's case rarely gets better after adverse witnesses testify." (RB 174-175.)

Appellant disagrees. Every prosecutor tries a case, a murder case, and a capital case for the first time, and even many experienced capital prosecutors may never have cross-examined a "killer." The experience of this particular prosecutor was certainly not "common knowledge," and respondent fails to explain why it could be. Moreover, the jurors' presumed lack of "surprise" in hearing about the prosecutor's experience in cross-examining killers does not transform such a reaction into "common knowledge," and again, respondent does not explain why it would. Nor does he explain why the rarity of a case getting better after the defense testifies should be deemed to be "common sense." In fact, cases go sidewise, some win and some lose; some prosecutions may get better or worse, and many stay the same.

Respondent stretches the concept of "common knowledge" and "common sense" beyond reason. The illogical extension of what is "commonly known," and respondent's failure to explain the bases for his assertions, illustrate the

weakness of his argument. The bottom line is that these statements, together with the prosecutor's repeated claims that the case got "better and better" and "was not even close" were as improper as his personal impressions and views of the case.

In addition, the prosecutor's remarks operated as improper vouching because he offered his own unsworn testimony as to his experience, the rarity of the strengthening of his case after the defense presentation, and the closeness of the case. In contrast to respondent's labeling the prosecutor's claims as "common knowledge," this Court has held that it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. (See, e.g., *People v. Ayala* (2000) 24 Cal.4th 243, 288.) Specifically, a prosecutor's reference to his or her own experience, comparing a defendant's case negatively to others the prosecutor knows about or has tried, is improper. (*People v. Medina*, 11 Cal.4th at 758.) Nor may prosecutors offer their personal opinions when they are based solely on their experience or on other facts outside the record. (See *People v. Farnam* (2002) 28 Cal.4th 107, 200.)

Respondent cites cases rejecting claims of vouching but again, they are distinguishable from the facts here. (RB 176-177.) In *People v. Huggins* (2006) 38

Cal.4th 175, 206, the prosecutor argued that the *defendant* "had lied through his teeth" in his testimony, and made other comments that "were explicitly aimed at counsel's closing argument and statement, rather than at him personally." *Huggins* is inapposite here where the prosecutor here explicitly referred to his own experience and not counsel's argument. In *People v. Fierro* (1991) 1 Cal.4th 173, 211, the prosecutor "submitted" to the jury that the "evidence and the facts" were "very clear," and thus it was "an outstanding murder case" and an "outstanding murder investigation." These remarks were immediately followed by a prosecutorial admonition to the jury to "do your own analysis." This was not vouching because it in no way could be deemed a personal endorsement: the argument was explicitly based on the investigation and the facts, rather than on the prosecutor's own prestige and experience. The contrast with this case is clear: the prosecutor told the jury he had a lot of experience in murder cases and repeated at least 12 times that the case was "not even close."

The final cases cited by respondent involve cases in which the prosecutor argued that his *witnesses* were credible and honest. (*People v. Stewart,* 33 Cal.4th at 500-02; *People v. Frye*, 18 Cal.4th at 971-72; and *People v. Medina*, 11 Cal.4th at 776 [not misconduct by where the prosecutor argued that the abundant "other crimes" evidence showed the defendant to be so violent that he could not

"'imagine anyone in our society being more violent and more dangerous.'" *Medina* contrasted that evidence-based argument with cases finding penalty phase error in closing argument where the prosecutors relied "in jury argument on their outside experience or personal beliefs based on facts not in evidence. (See e.g. *People v. Edelbacher*, 47 Cal. 3d at 1030; *People v. Bandhauer* (1967) 66 Cal. 2d 524, 529-530 [reversible penalty phase error for prosecutor to repeatedly argue, without defense objection, that during his many years of public practice he had seen some "'pretty depraved character[s]'" and that defendant was the "'worst'"].) The argument in *Medina* was deemed proper because, unlike *Bandhauer*, the prosecutor did not purport to rely on his own personal experience, his "many, many years" as prosecutor, or any other facts outside the record.

Respondent also argues that defense counsel "exploited his reputation and facts outside the record to bolster Johnson's testimony" and thus the prosecutor was entitled to rely on his own personal experience in argument. (RB 175.) However, the supposed "bolstering" of Johnson's testimony through personal experience was anything but. Defense counsel told the jurors that he had represented "lots of people like Scott Miller," and that sometimes asking a question resulted in an unexpected answer that "ends up hurting you." (22RT

4443-44.) This comment hardly "bolstered" Johnson's testimony, since it was described as "hurting" the defense. Respondent points to defense counsel's argument stating that after Johnson had testified, lawyers and policemen asked him if he "really believed" Johnson. Counsel then said that if all he had in the defense was Johnson's testimony he would "absolutely agree" that Johnson was "lying." (22RT 4455-56). Whatever defense counsel meant or intended by this argument, he did not put forth an argument that because he had represented people like Miller, or guys arrested for DUI's, the prosecution had failed to prove its case. The prosecutor, however, did cite his long experience to claim that the case against appellant was "not even close."

In sum, the cited portions of defense counsel's argument set forth a critique not an affirmation of Johnson's credibility. Thus, the factual premise of respondent's argument is defective. The legal reasoning is faulty as well. Even assuming *arguendo* that defense counsel had vouched for Johnson's credibility, the prosecutor could have rebutted that argument. However, the prosecutor would not be entitled advance his own personal beliefs as to the strength of his case. A defense argument entitles the prosecutor to rebut that argument e.g., in this case, Johnson's credibility. But a defense argument as to a witness' credibility does not permit the prosecutor to vouch for the overall strength of the

case against appellant by assuring them that it was "not even close."

Respondent relies on *People v. Cunningham* (2001) 25 Cal. 4th 926, 1027, which held that where the defense argued in mitigation that the defendant had contributed to society, the prosecutor was permitted to rebut that argument by questioning the significance and value of the defendant's contribution, an argument he might otherwise not have been entitled to make. *Cunningham* in no way holds that if defense counsel refers to his own experience or extrajudicial facts to bolster the credibility of a witness (which in fact did not happen here), the prosecutor can then advertise his own authority and prestige as proving his case. Vouching by the prosecutor is improper because it places the prestige and authority of the prosecution's office behind a witness or witnesses, "offering the impression" that the investigatory apparatus of the government has validated the prosecution's unsworn "testimony." This rationale does not apply to defense counsel, who has neither the power and authority of law enforcement, nor the aura of prestige that surrounds the prosecution.

Respondent ends his argument by asserting that a prosecutor is permitted to use sarcasm based on the evidence. (RB 177.) Appellant does not know which of the challenged instances of misconduct respondent prefers to legitimize by labeling them "sarcasm," so he cannot reply. What the prosecutor did

improperly do, whether sarcastically or not, was to repeatedly inject his own personal opinion and impressions about the case, based on his experience which was not in the record, and used that experience as the basis for vouching for his case, repeatedly describing it as "not even close."

C. The Course of Prosecutorial Misconduct Was Prejudicial.

Respondent makes the pro forma argument that the prosecutorial misconduct was not prejudicial because the trial court gave the jury the standard instruction that attorney's arguments were not evidence. (See RB 177-178.) The argument proves too much. If the standard instruction removes the harm, then prosecutorial misconduct could never be prejudicial, because that standard instruction is given in every case.

Moreover, even presuming the jury did follow the instruction, the probability still exists that the jury was persuaded by the improper argument. That is, the jurors could have accepted that his statements were not evidence *per se*, but still could have been swayed by his personal opinions, misstatements of the facts, and vouching, and emotional appeals based on his expertise and experience. More so than most forms of errors, egregious appeals to passion and prejudice may undermine the jurors' own impartiality. (See e.g., *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727 [reversing where, even though the

"prosecutor presented to the jury a strong case, she needlessly coupled that case with an even stronger appeal to passion and prejudice"].)

Respondent argues harmlessness by asserting that "the jurors would have viewed [the misconduct] as zealous advocacy rather than law or evidence." (RB 177.) But the test for determining prejudice from prosecutorial misconduct under state law is whether the result of the trial would have been more favorable to the defendant in the absence of the misconduct. (*People v. Martinez* (2010) 47 Cal.4th 911, 957.) Appellant claims that because the many instances of varied misconduct amounted to a course of conduct depriving him of a fair trial and federal due process, the federal standard for prejudice must be applied. (*Chapman v. California*, 386 U.S at 24.) Under this standard, the prosecution that must prove the misconduct to be harmless beyond a reasonable doubt.

Respondent also repeats his complaint that appellant's argument "offers generalizations about prosecutorial misconduct in the abstract and in other cases instead of citing to anything in the record rebutting" the presumption that jurors followed the judge's instruction not to consider attorney comments as evidence.[29] (RB 177-178.) However, appellant specified the egregious and

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[29] See also RB 123-124; RB 139. Appellant pointed out the flaws in respondent's argument at ARB 78-79 and refers the Court to that discussion. Of course, appellant cited to "other cases" and general principles. But appellant also made specific record-based arguments in both Appellant's Opening Brief and this brief.

repeated instances of prosecutorial misconduct, with citations to the record; these are precisely the record facts rebutting that presumption. Furthermore, under to our judicial system of precedents, appellant correctly relies on the principles and holdings of other cases. This is legal argument and not a "generalization."

For example, appellant cited *People v. Hill*, 17 Cal.4th at 847 that held that where, as here, the prosecutor repeatedly engages in improper argument, a negative synergistic effect is created. *People v. Vance* (2010) 188 Cal.App.4th 1182, 1206-07 held that numerous improper arguments shifted the jury's attention away from the evidence. (See AOB 257-259.)

Finally, even if this error is not deemed prejudicial standing alone, cumulative prejudice analysis should lead to reversal of appellant's convictions.. (*People v. Hill,* 17 Cal.4th at 844 [a series of trial errors, though independently harmless may in some circumstances rise by accretion to the level of reversible prejudicial error]; *Taylor v. Kentucky*, 436 U.S. at 487 [cumulative effect of trial errors can violate federal due process].)

The Fox video that was improperly admitted into evidence as the

centerpiece of the murder prosecution, the joinder of the police officer shooting to the murder case, and the prosecutorial misconduct worked synergistically to create and increase the risk of a verdict based on bias and emotion rather than the facts.

XI. THE TRIAL COURT'S REFUSAL TO SEVER THE ATTEMPTED MURDER CHARGE FROM THE CAPITAL MURDER CHARGE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

Appellant contends that application of the guidelines used to assess whether joinder of separate offenses prejudiced appellant and denied him his due process and fair trial rights. Respondent counters that appellant fails to show prejudice and that the trial court acted properly in denying the severance request.

Respondent argues first that there was "significant cross-admissible evidence under both the prosecution and defense theories of the case." (RB 182.) Respondent relies on two factors as showing cross-admissibility: (1) the same gun was used in both the March 8 and March 11 offenses; and (2) the prosecutor theorized that the killing of Scott Miller was the motive for the shooting at the police officer. (RB 183.)

Although respondent relies on *People v. Cummings*, 4 Cal. 4th 1233 and *People v. Merriman* (2014) 60 Cal.4th 1, both cases are inapposite. In both cases

the defendant knew that he was being pursued or arrested by the police for a previous crime, and thus the evidence on each joined charge was cross-admissible.

In *Cummings*, 4 Cal.4th at 1264, 1284, robbery and murder charges were joined and this Court found cross-admissibility: the evidence showed that defendant, who was wanted for robbery, was in a stolen car when he was stopped by a motorcycle police officer; when he was asked for identification he shot and killed the officer. The robbery and murder charges were properly joined. In contrast to this case, in *Cummings*, the evidence was undisputed and clear that the shooting was motivated by the prior crimes; the defendant knew that he had been stopped by a law enforcement office. Similarly, in *Merriman*, 60 Cal.4th at 44, charges of assault on an officer and resisting arrest were properly joined and evidence on the two charges were cross-admissible because the evidence showed that the defendant, thinking he was being arrested for murder, fled from the police and resisted arrest by engaging in a dramatic, hours-long standoff.

Here, as argued above, and in contrast to the cases relied on by respondent, there was no evidence that appellant knew his pursuers were law

enforcement officers, other than the inadmissible statement by Rump as to his belief.

Appellant has demonstrated in detail that in this case the two sets of offenses did not share sufficient common features to support cross-admissibility under Evidence Code section 1101. (See AOB 264-266.) Respondent ignores this analysis and asserts that the motive evidence and the same gun should be deemed sufficient. However, respondent's analysis as to motive is flawed, as set out in the preceding paragraph, and appellant submits that the use of the same gun is not a sufficient showing of common features under Evidence Code section 1101.

Respondent also argues that neither incident was unduly inflammatory vis-à-vis the other. (RB 184.) He relies on *People v. Soper* (2009) 45 Cal.4th 759, which held that the murders of two homeless men at nearby campsites, both of whom were killed in their sleep with a single blow by a blunt object, were "similar in nature and equally egregious" and thus neither was more unduly inflammatory than the other. (45 Cal.4th at 765-766, 780.) The similarity of the murders in *Soper* is clear, but respondent's attempts to analogize the facts at bar to those in *Soper* is strained. He claims that because each case involved "a single shot at a single victim," and one resulted in death (to a gang member), and the other was

"directed at a police officer," the two are "thus" "similar in nature and equally egregious," as in *Soper*. (RB 184.) Appellant disagrees. A murder and a missed shot are not similar in nature even though both involve a gunshot. An assault on a police officer is not equally egregious in nature to a fatal shot of a gang member.

Moreover, because the prosecution's evidence of the police shooting was much stronger than the evidence of the capital murder, and because the inflammatory nature of an armed gang member shooting at a police office is extreme, the likelihood is that the Helmick shooting had a prejudicial spillover effect on the capital charge. (See AOB 266-267.) Respondent argues that neither case was a weak case bolstered by joinder, although he acknowledges that the murder case was "proved" through "circumstantial evidence of a gang-related motive." Respondent cites the record but does not identify the circumstantial evidence he describes as "powerful." (RB 184.)

Appellant maintains it was not powerful at all. None of that evidence or any other showed that *appellant* had a gang-related motive to kill Miller. (See pages 22-25 above.) The pages relied on by respondent are as follows: 12RT 2155-56, 2169 [jailhouse informant and PENI gang member Mason testified that "it was known" they were supposed to get Miller]; 16RT 3087-88 [gang expert

testified that for a gang member to go on television is like treason]; 16RT 3177-79 [gang expert testified that luring a man into an alley and shooting him is for a gang purpose]; 18RT 3530-31 [testimony by defense witness Johnson that he knew about the Fox video]; 20RT 4027 [stipulation that Miller appeared in the Fox video]; 7RT 1435-3614RT 2579 [asking to talk to Hinson about something important before Miller was murder]; and 11RT 1989-93; 12RT 2164-66 [his admissions after the murder].)

Testimony that Johnson knew about the video and that Mason believed he and others were supposed to "get" Miller is not powerful evidence that appellant knew about the video or that he had a gang-related motive to kill.

Respondent also argues that because the gang special circumstance made appellant eligible for death, this factor should not be considered as weighing in favor of severance. (RB 185.) Respondent cites *People v. Sandoval* (1992) 4 Cal.4th 155, 172-173, but *Sandoval* does not support this position. *Sandoval* and other cases expressly state the factor weighing in favor of joinder when "*any one of the charges* carries the death penalty *or* joinder of them turns the matter into a capital case." (*Id.* at 173; emphasis supplied.)

Finally, respondent argues that there were "many" benefits of joinder. (RB 185.) Appellant disagrees. Most of the "benefits" cited by respondent are simply

circumstances of joinder, i.e., two juries instead of one, and separate appellate proceedings, rather than "case-specific" benefits as in *Soper*, 45 Cal.4th at 781. Although respondent also claims there was "substantial overlap of evidence and witnesses," this is incorrect. The only overlapping witness was the ballistics expert who testified the same gun was used in both cases. Witnesses and evidence on the Miller murder included, first and most prominently, the Fox video, which was not relevant to the Helmick case. In addition, the Miller witnesses were Mason, Henderson, Harris, Hinson, Amezcua, Officer Adrian and Lt. Epperson, the gang expert. The witnesses on the Helmick case were Sgt. Helmick and Detective Allen, Friewald, Flynn, Pantaleon and Alaghbar. (See RB 4-10, 10-25 [Statement of Facts].)

In short, joinder of the two offenses prejudiced appellant and rendered his trial unfair. Although the evidence of identity in the Helmick case was stronger than that in the Miller case, the proof of intent and premeditation was not. The circumstances of the Miller case were the opposite: identity was in question and intent to kill was not. Each case thus had a prejudicial spillover effect on the other. (AOB 267.)

Respondent contends that under *People v. Soper*, 45 Cal.4th at 781, a "mere imbalance in the evidence" does not necessarily indicate prejudicial

spillover. (RB 187.) However, appellant cites not just to a mere imbalance in the strength of the two cases, but points out specifically how the Miller evidence prejudiced appellant in the Helmick case as to the elements of intent to kill and premeditation, and the Helmick evidence prejudiced appellant in the Miller case as to the element of identity.

Finally, respondent suggests that appellant's argument as to prejudice is "premised on speculation" as to what the jurors were likely to conclude. (RB 187.) Respondent cites *People v. Manriquez* (2005) 37 Cal.4th 547, 575, in which the defendant argued that had there been separate trials, he "probably" would have been acquitted on one count and convicted of a lesser offense on the second. Appellant has done more than merely state a probability of a different result; as set out in the previous paragraph, appellant has shown, through the *evidence* the reasonable probability of specific prejudice to appellant on each count as to the elements of identity and intent.

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CLAIM RELATED TO THE ATTEMPTED MURDER OF A POLICE OFFICER

XII. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY ADMITTING INTO EVIDENCE AGAINST APPELLANT RUMP'S HEARSAY STATEMENT THAT HE THOUGHT THE DRIVER OF THE WHITE CAR WAS A PAROLE OFFICER

Appellant argues that the trial court deprived appellant of his federal constitutional rights by admitting his co-defendant's hearsay statement against him, which the prosecution used for its truth to prove the knowledge element of the attempted murder of a police officer charge. The trial court first ruled that Rump's statement was not to be used against appellant for any purpose, because it was an indication of Rump's belief, and there was no "indication that [appellant] personally shared that belief," as "shown on page two of the transcript." (2RT 416-17.) The trial court later reversed this ruling and admitted Rump's statement against appellant on the theory of "shared or derivative motive," set out in *People v. Hole* (1983) 189 Cal.App.3d 431, 436-37.[30] (20RT 3948.)

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[30] Respondent argues that the shared or derivative motive theory of admissibility relied on by the trial court is "of no moment" because the statement "was relevant and admissible to prove knowledge." (RB 193, fn. 106.) As appellant demonstrates immediately below, respondent's reasoning is circular: he argues that because the statement could tend to prove appellant's knowledge, it is relevant and therefore admissible, without acknowledging that it could only tend to prove appellant's knowledge if it were considered for its truth. If considered for its truth, it is inadmissible hearsay. A theory of relevance is not an exception to the hearsay rule.

Respondent counters that the trial court's ruling was correct because (1) Rump's statement was not testimonial; (2) it was admitted for a nonhearsay purpose and was only incriminating "in the context" of other evidence; and (3) even if erroneously admitted it was harmless.

A. Rump's Hearsay Statement Was Used Against Appellant For Its Truth.

The statement at issue is that of former co-defendant Rump, who said to appellant after their arrest, ""Hey! *I think that white car might have been a parole agent."* (11CT 2724-25; Exh. 105A.) Appellant emphasizes that the trial court initially ruled that the statement was inadmissible against appellant because "the statement itself is an *indication of Mr. Rump's belief,* not Mr. Lamb's." (2RT 416; emphasis supplied.)

Hearsay analysis thus begins with whether the statement is admitted *for the truth of the matter stated.* The matter stated by Rump was, as the trial court pointed out, *Rump's belief* that the driver of the white car was a parole agent. Respondent mischaracterizes the statement as follows: "[Rump] and Lamb were being pursued by a parole agent,"[31] and then concludes that the statement was

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[31] In other portions of his brief, respondent correctly describes the statement as setting forth Rump's belief that the car was a parole agent. (RB 189, 193.) Only when making the argument that it was not admitted for its truth does respondent make the subtle but significant change to characterize the statement as one of fact, not of Rump's belief.

not admitted for its truth: "Quite the opposite, the assertion by Rump was not true since Officer Helmick [in the pursuing white car] was a police officer." (RB 191.) Appellant reiterates that proper legal analysis must assess the statement as it was made, i.e., Rump thought the driver of the white car was a parole agent, and **not** as respondent re-interprets it, as an "assertion" that Rump and appellant were being pursued by a parole agent.

The prosecutor himself made it crystal clear that he intended to use *for its truth* the statement Rump actually made, i.e., the statement of his belief, when he later insisted that if Rump thought the car was driven by a parole agent, Rump must have communicated that thought to appellant, and appellant must have shared the belief. (20RT 3943.)

Rump's statement was admitted against him for its truth, an exception to the hearsay rule. During trial, trial court allowed the prosecutor to use the statement against appellant "only for the purpose of determining, if it does, that such statement is circumstantial evidence that [appellant] had a motive to commit the crime of attempted murder . . . ." (20RT 3949.) In fact and legal effect, Rump's statement was admitted for its truth against appellant, because the jurors could only determine that appellant shared appellant's motive if they

considered Rump's statement for its truth, i.e., that he thought the driver of the white car was law enforcement.

Nonetheless, respondent insists that "Rump's statement had a nonhearsay purpose." (RB 192.) According to respondent "a reasonable juror could infer" that Rump and appellant would have discussed their views during the pursuit. (RB 192.) The inference of a reasonable juror is not the proper test for admissibility, however. If Rump's statement was inadmissible against appellant as hearsay, the jurors would not be permitted to use it to infer anything. The possibility of reaching an inference from inadmissible hearsay does not transform the hearsay into admissible circumstantial evidence. Finally, even assuming a juror could infer that Rump and appellant discussed their views during the pursuit, they could not reasonably infer that appellant shared Rump's knowledge and motive unless they considered Rump's statement for its truth.

Respondent cites to *People v. Jackson* (1989) 49 Cal.3d 1170, 1187 whose holding respondent incorrectly reports as "defendant's statement that he shot the officer was admitted 'as circumstantial evidence to show he had a memory of the shooting' rather [for the truth] of the matter asserted." Based on this misreporting, respondent concludes that "[t]herefore, Rump's statement had a nonhearsay purpose." (RB 192.) The statements at issue in *Jackson* were not

admissions by the defendant "that he shot the officer" (as respondent asserts). Such statements would be admissible as a party admission. Rather, at issue were statements of the defendant, who claimed amnesia, that showed he had some memory of the shooting of a police officer with a shotgun, although neither the police nor the first responders had given him information as to the victim's status or the weapon used. For example, in response to being told he was being held for murder, the defendant said "I killed a policeman?" and later, when asked if he remembered his interrogators, the defendant said, "Yeah. You . . . said I killed that cop with a shotgun." These statements were not offered or used for their truth, but were relevant as circumstantial evidence refuting the defendant's claim of amnesia. (*Id.* at 1185-87.) The fact that a defendant's statements showing his knowledge or memory of an event can be used to show circumstantially to refute his claim of amnesia does not lead to respondent's hasty conclusion that "[t]herefore, Rump's statement had a nonhearsay purpose." (RB 192.) Rump's statement of belief is not circumstantial evidence of appellant's belief.

Respondent reasons as follows: if Rump's jailhouse statement was admissible, then the jury could reasonably infer that Rump made a similar statement of his belief to appellant in the car, and could further infer that

appellant shared that belief. (See RB 192 [Rump's statement had tendency to prove appellant's knowledge, therefore the "nonhearsay purpose for Rump's statement was relevant and admissible"].) Respondent argues that relevancy alone renders the statement admissible against appellant.

The flaw is this: the statement is relevant to show appellant's knowledge *only* if it is considered for its truth. If Rump's belief is not considered for its truth, if the jury could not consider that Rump thought he was being pursued by law enforcement, then what does it prove? It proves only that if Rump said something to appellant at jail, he also said something to appellant in the car. The fact that Rump might have talked during the pursuit (without considering what he might have said) proves nothing about appellant's knowledge and/or motive.

B. The Admission of Rump's Statement Violated Appellant's Rights of Confrontation and Due Process.

Respondent argues that admission of Rump's statement was not in violation of the principles set out in *Crawford v. Washington* (2004) 541 U.S. 36 because it was not "testimonial." Respondent relies on *People v.* Jefferson (2008) 158 Cal.App.4th 830, 842, which held that a taped jailhouse conversation between co-defendants was not testimonial because there was no "government player." (RB 196.) Appellant disagrees. *Davis v. Washington* (2006) 547 U.S. 813, 822

held that where the primary purpose in eliciting the statement is to investigate the crime, the statement is testimonial. The police tape-recorded appellant and Lamb in the jail primarily to elicit incriminating statements, and the admission of Rump's statement therefore violated the Confrontation Clause.

Moreover, admission of Rump's violated appellant's federal due process rights. Rump's jailhouse statement was irrelevant to appellant's state of mind in the car earlier. There was not even any evidence that Rump made such a statement while the two were in the car. Yet the statement was extremely prejudicial in the Helmick shooting, which was charged as premeditated attempted murder. The evidence allowed the prosecutor to argue that appellant *knew* his pursuers were law enforcement officers, thus establishing the element of premeditation.

The admission of irrelevant but prejudicial evidence deprived appellant of his federal due process and fair trial rights. (See AOB 281-282 citing *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 and *Estelle v. McGuire*, 502 U.S. at 70-74.)

C. The Erroneously Admitted Statement Was Prejudicial.

Appellant has shown in detail shown that the erroneous admission of Rump's statement prejudiced appellant's defense to the premeditated attempted murder charge under *Chapman v. California*, 386 U.S. at 24. (AOB 282-285.)

Appellant adds that even if reviewed under the standard of prejudice for state error, the error should be deemed prejudicial.

Appellant has set out in detail how the evidentiary erred worked to his detriment. Because respondent does not address these arguments showing the prejudicial impact, appellant refers this Court to his discussion at pages 282 to 285 of Appellant's Opening Brief.

Respondent argues that the error should be deemed harmless because appellant's "knowledge that [] Helmick was a police officer was proved" by the loud helicopter hovering overhead, the fact that the undercover officers wore "clearly marked" police vests, and testimony from apartment resident Pantaleon that he heard someone yell the word "police" before the gunshot fired. (RB 198.) Respondent's argument fails under any standard of prejudice.

First, the helicopter hovering overhead did not amount to strong evidence that appellant knew his pursuers were police, who had been chasing him and Rump in unmarked cars, swerving and trying to block them, and playing "chicken" by driving straight at them -- in other words, acting more like rival gang members than law enforcement officers. From appellant's point of view, the helicopter could have been called to investigate his seemingly criminal pursuers. Even the gardener Ghassan Alaghbar, who saw the officer close up and who heard the

helicopter did not recognize Helmick and Allen as police officers. (12RT 2313-20, 2329, 2343-44.) Indeed, Helmick testified that he did not identify himself as a police officer because he didn't want appellant and Rump to know there were police officers in the apartment complex. (15RT 2917-18, 2937-38.)

As to the police *vests* cited by respondent, there was no evidence that Sergeant Helmick wore such a vest. Sergeant Helmick testified that Detective Allen wore a vest with the word "police" on the back and on the right side of the front; but that Allen "was wearing plain clothes at the time of the car pursuit." (RB 11, fn. 11, 15RT 2887.) Helmick testified that he was wearing normal clothes to "blend in," and that he tried *not* to look like a police officer.[32] (8RT 1566-67.) In his Statement of Facts, respondent cites to no evidence that Helmick wore a police vest. (RB 12.)

Pantaleon testified that he heard a commotion on the stairs and heard "somebody" say "police" but he was not certain whether that was before or after he heard the shot. Pantaleon believed it was before, but when asked if he was sure, he said, "Well, um, I don't know." (12RT 2300-01.)

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[32] Helmick did testify that he wore his badge on his belt. (8RT 1609-12.)

In short, although respondent points to these bits of evidence as supposedly rendering the error harmless, the cited testimony is actually equivocal at best.

Finally, even if this error is not deemed prejudicial standing alone, cumulative prejudice analysis should lead to reversal of appellant's convictions. (*People v. Hill,* 17 Cal.4th at 844 [a series of trial errors, though independently harmless may in some circumstances rise by accretion to the level of reversible prejudicial error]; *Taylor v. Kentucky*, 436 U.S. at 487 [cumulative effect of trial errors can violate federal due process].) In addition to the use of Rump's statement to prove an element in the Helmick shooting, the Fox video, the joinder of the police officer shooting to the murder case, and the prosecutorial misconduct increases the risk of a verdict based on bias and emotion rather than the facts.

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

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.*

at 303.) This Court acknowledged that it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at 304.)

Accordingly, in the Opening Brief, appellant identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requested the Court to reconsider its decisions rejecting them.

Respondent argues in some length and detail that this Court has rejected these claims in prior cases. Appellant acknowledged the same in his Opening Brief, and raised the claims under *Schmeck* in order to preserve them. (See AOB 286.) Consequently, because the arguments are squarely framed and addressed sufficiently in order to preserve them, appellant makes no reply to respondent's reiteration of the fact that this Court has rejected similar claims in previous cases.

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XIV. THE PROCESS USED IN CALIFORNIA FOR DEATH QUALIFICATION OF JURIES IS UNCONSTITUTIONAL AND WAS UNCONSTITUTIONAL IN THIS CASE

Respondent argues that the California death qualification process is constitutional. (RB 204-205.) Appellant contends that the arguments supporting this claim are squarely framed and sufficiently addressed in Appellant's Opening Brief (AOB 299-320) and therefore makes no reply.

XV. THIS COURT SHOULD NOT MODIFY APPELLANT'S SENTENCE BY ADDING 60 YEARS TO LIFE ON THE ASSUMPTION THAT THE TRIAL COURT INTENDED TO STRIKE THE COUNTS AND ENHANCEMENTS OTHER THAN THE CAPITAL MURDER FOR SENTENCING PURPOSES ONLY, RATHER THAN DISMISSING THEM

The trial court sentenced appellant to death, and then struck all enhancements and other counts, stating it was doing so "for sentencing purposes." (42RT 8649.) Respondent argues that only the striking of the gang enhancements was authorized, and the striking of counts one, three, five, six, seven, eight and nine was unauthorized. (RB 206.) Respondent's argument is premised on the trial court' statement that "all the remaining counts and enhancements are stricken for sentencing purposes." (42RT 8659.) According to respondent, this language demonstrated "a clear intent" to strike only the punishment and not to dismiss the underlying convictions. (RB 207.)

Appellant contends that this Court should take the trial court at its word.

The trial court had authority under Penal Code section 1385 to dismiss the remaining charges with their attendant enhancements, and it did so. Because the dismissal of the non-capital counts was well within the court's statutory authority,[33] there is no basis to modify that disposition to a more limited action (dismissal of selected enhancements only) flatly inconsistent with the court's own explicit statement of its action.

Respondent's proposed revision is based on a parsing of the trial court's ruling, so that the trial court should be deemed to have struck only the enhancements and not the substantive counts.[34] He contends that count seven (the attempted murder charge under Penal Code section 664) should be resurrected, even while conceding that attempted murder is subject to the trial court's discretionary power under section 1385. (RB 206-207.) He asks this Court to impose a consecutive term of 15 years to life under section 664(f), and 20 years, consecutively, for the 12022.53(c)& (d) enhancements attached to count seven and count two, "as mandated by section 12022.53(h)." (RB 209.)

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[33] Respondent agrees that absent a clear legislative direction the courts have authority to dismiss actions under Penal Code section 1385. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 518.) Moreover, even general mandatory language such as "shall" cannot divest trial court of their discretion under section 1385. (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155.)

[34] Respondent acknowledges that sentences on counts one, three, five, six, eight and nine must be stayed under Penal Code section 654. (RB 209.)

Respondent thus suggests that if this Court affirms the sentence of death, it should modify the judgment on appeal to add 60 years to life to the sentence imposed by the trial court. (RB 207, 209.)

As set out above, appellant maintains that the trial court properly exercised its discretion under Penal Code section 1385. Respondent's proposed sentence depends on a theory of "partial dismissals or strikings" that depends on interpreting the trial court's ruling as intended to strike only the enhancements, and not the underlying counts, even though the trial court explicitly struck both the remaining counts and enhancements.

Assuming *arguendo* that this Court accepts respondent's interpretation, the Court should not undertake the trial court's sentencing decision, but should remand the case for resentencing.

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CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions and sentence of death and remand for a fair trial, or in the alternative vacate his sentence of death, or strike the special circumstance allegation, and/or remand for resentencing.

DATED: April 6, 2016

Respectfully submitted,

K Moreno

KATHY R. MORENO
Attorney for Michael A. Lamb

CERTIFICATE PURSUANT TO RULE OF COURT 8.630(b)

I, Kathy R. Moreno, attorney for Michael Lamb, certify that this Appellant's Reply Brief does not exceed 102,000 words pursuant to California Rule of Court, rule 8.630(b). According to the Word word- processing program on which it was produced, the number of words contained herein is 31,990 and the font is Calibri 13.

I hereby declare, under penalty of perjury, that the above is true and correct, this 6th day of April, 2016, in Berkeley, CA.

KATHY R. MORENO

CERTIFICATE OF SERVICE

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 9006, Berkeley, CA 94709-0006. I have made service of the foregoing APPELLANT'S REPLY BRIEF by depositing in the United States mail on April ___, 2016, a true and full copy thereof, to the following:

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I hereby declare that the above is true and correct.
Signed under penalty of perjury this __day of _____, 2016,
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