SUPREME COURT COPY

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff / Respondent, vs. RICHARD C. TULLY, Defendant/Appellant.	)	California Supreme Court Case No. S030402

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda
(Superior Court No. H9798)

Honorable William R. McGuiness

JAMES S. THOMSON
Attorney & Counselor at Law
819 Delaware Street
Berkeley, California 94710
Telephone: (510) 525-9123
Facsimile: (510) 525-9124

Attorney for Appellant,
RICHARD C. TULLY

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

FEDERAL CASES

PERSUASIVE STATE CASES

PERSUASIVE FEDERAL CASES

PERSUASIVE RESOURCES

CALIFORNIA STATUTES

FEDERAL STATUTES

I. THE MISSING PORTIONS OF THE RECORD DEPRIVE APPELLANT OF MEANINGFUL APPELLATE REVIEW.

A. Introduction.

Meaningful appellate or post-conviction habeas corpus review of a capital trial cannot be conducted without a complete and accurate record.[1] Meaningful appellate review is essential to assure the constitutionality and fairness of the death penalty. (See *Zant v. Stephens* (1983) 462 U.S. 862, 876). When a state provides a first appeal of right, the Fourteenth Amendment requires the state to provide "adequate and effective appellate review to indigent defendants." (*Smith v. Robbins* (2000) 528 U.S. 259, 276 (quoting *Griffin v. Illinois* (1956) 351 U.S. 12, 20)). A state must provide the defendant "a sufficiently complete record of the trial proceedings" (*Draper v. Washington* (1963) 372 U.S. 487, 500), to "assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the [s]tate's appellate process." (*Ross v. Moffitt* (1974) 417 U.S. 600, 616).

The Eighth Amendment requires the states to conduct "meaningful appellate review," an instrument crucial "in ensuring that the death penalty is not imposed arbitrarily or irrationally." (*Parker v. Dugger* (1991) 498 U.S. 308, 321; see also *Gregg v. Georgia* (1976) 428 U.S. 153, 195; and *Clemons v. Mississippi* (1990) 494 U.S. 738, 749). To do so requires the full and accurate record of the proceedings in capital cases. (See *Dobbs v. Zant* (1993) 506 U.S. 357, 358; *Gregg, supra,* 428 U.S. at 167; and *Gardner v. Florida* (1977) 430 U.S. 349, 361).

---

[1] (See, e.g., *People v. Frye* (1998) 18 Cal.4th 894, 941; *People v. Seaton* (2001) 26 Cal.4th 598, 701; *People v. Scott* (1997) 15 Cal.4th 1188, 1203-1204; *People v. Arias* (1996) 13 Cal.4th 92, 158, Cal.Rptr.2d 770; *People v. Hawthorne* (1992) 4 Cal.4th 43, 66; *People v. Rundle* (2008) 43 Cal.4th 76, 111; and *People v. Letner* (2010)50 Cal.4th 99).

In this case, sixty (60) hearings, proceedings or conferences were not fully recorded.[2] This deficient record prevents "meaningful appellate review" of the state and federal claims of error infecting Appellant's capital trial, and will also have adverse effects on him post-conviction if he needs to pursue those avenues. Errors stemming from an incomplete trial record are structural by nature, and because of the heightened need for reliability imposed by the Eighth and Fourteenth Amendment in capital prosecutions, no showing of prejudice.[3] In any event, Petitioner shows prejudice herein.

B. Respondent Fails to Account for All the Unrecorded Hearings, Conferences, And Proceedings in Appellant's Case.

Here, "forty-four (44)" court hearings, proceedings, or conferences were not transcribed in this case. (I AOB 19).[4] Additionally, on (17) other

---

[2] The reporters' notes of hearings on January 19, 1988, April 15, 1988, and June 17, 1988 were lost or destroyed and apparently were never transcribed. (ART 2, 6, 7). Proceedings on December 15, 1987, June 17, 1991, September 23, 1991, November 25, 1991, January 30, 1992, February 11, 1992 and May 26, 1992 were not reported at all. (ART 3-5, 9). The court reporter deleted her notes from August 11, 1987, August 19, 1987, September 10, 1987, November 17. 1987, November 18, 1987, November 24, 1987, and May 26, 1987, but she believes they were "probably transcribed." (ART 8).

[3] (Compare *Seaton, supra*, 26 Cal.4th at 700; *People v. Alvarez* (1996) 14 Cal.4th 155, 196 n. 8; and *Hawthorne, supra,* 4 Cal.4th at 66; *with Payne v. Arkansas* (1958) 356 U.S. 560, 578; and *Gideon v. Wainwright* (1963) 372 U.S. 335, 383).

[4] The missing hearings, proceedings, and conferences were held in front of the following courts on the following dates:

Livermore Municipal Court Hearings: August 11, 1987 (CT 1122); August 19, 1987 (CT 1124, 1126); and September 10, 1987 (CT 1128).

Livermore Municipal Court Preliminary Hearings: November 17, 1987 (CT 488, 514); November 18, 1987 (CT 526:24, 538, 564:12); November 19, 1987 (CT 586:14, 709:15, 1151, 746:15); November 24,

occasions there is "no reporter's transcript" of a hearing. (*Id.* at 16 n. 6). Moreover, the trial court failed to preserve its trial notes, which were used in ruling upon Appellant's motion for modification of his death sentence. (I AOB 19). In short, a total of sixty (60) proceedings are missing from the record.[5]

Of the sixty (60) proceedings, Respondent concedes that eleven (11) separate proceedings in Appellant's case were not recorded and that "[w]hat occurred on those dates has not been definitively reconstructed."

1987 (CT 1043:5, 1046:3, 1078:8, 1079:22); and December 1, 1987 (CT 1105:20).

Alameda Superior Court Pretrial and In Limine Proceedings: December 15, 1987 (CT 1543); April 15, 1988 (CT 1584); April 18, 1988 (CT 1593); June 6, 1988 (CT 1626); June 17, 1988 (CT 1631); June 17, 1991 (CT 1665); September 23 (CT 1666); November 25, 1991 (CT 1668); January 27, 1992 (CT 1737); January 30, 1992 (CT 1738); February 11, 1992 (CT 1739); March 10, 1992 (CT 1744); March 20, 1992 (CT 1745); April 17, 1992 (CT 1750); May 6, 1992 (CT 1751); and June 9, 1992 (CT 1825).

Alameda Superior Court Trial Proceedings: August 13, 1992 (In chambers conference regarding guilt phase instructions and exhibits) (CT 1975); August 14, 1992 (CT 1974); September 10, 1992 (In chambers conference regarding penalty phase jury instructions) (CT 2018); and November 2, 1992 (CT 2144).

Alameda Superior Court Trial: June 11, 1992 (RT 110); June 25, 1992 (CT 1887); July 1, 1992 (CT 1908); July 24, 1992 (RT 190); August 4, 1992 (RT 2522); August 11, 1992 (RT 2903); August 12, 1992 (RT 2977); August 20, 1992 (RT 3261); August 27, 1992 (RT 3335); September 3, 1992 (RT 3404); September 9, 1992 (RT 3601); September 9, 1992 (RT 3611); September 15, 1992 (RT 3731); September 15, 1992 (RT 3816); September 15, 1992 (RT 3727); and September 16, 1992 (RT 3890).

[5] Respondent says that "two of the transcripts appellant claims are missing are not." (RB 53). Respondent incorrectly quotes Appellant's brief in regards to the January 27, 1992 hearing. (See CT 1737). Respondent is correct in noting that the conference on August 14, 1992 was recorded. Appellant retracts his prior assertion to the contrary.

(RB 73).[6] Respondent says that the failure to record fifteen (15) other proceedings should be ignored, claiming that the proceedings were "routine scheduling and procedural matters." (*Id.* at 70). For twenty (20) additional unrecorded conferences, respondent attempts a secondary reconstruction of the proceedings; deems the substance of these proceedings routine and procedural; and then argues that they should be dismissed out of hand.

Respondent fails to address fourteen (14) unrecorded proceedings asserted as missing by Appellant. Respondent's analysis fails to cure the error stemming from deficiencies in the appellate record. Respondent fails to show that Appellant has not been prejudiced by the lack of a full and fair record in his capital case.

1. Meaningful Appellate Review of Eleven of Appellant's Claims Cannot Be Accomplished Based on Respondent's Reconstructive Methodology.

In Respondent's view, "the existing record reconstructs many of the missing reporter's transcripts...." (RB 72). To the contrary, it is Respondent who "reconstructs" whole transcripts through speculation as to what occurred during forty-six (46) unrecorded proceedings. However, Respondent merely cross references documents pertaining to the unrecorded hearings and concludes that the subject of each hearing is either immaterial an "scheduling and procedural matter[]," (*Id.* at 70), or that the record sufficiently establishes what occurred during the unrecorded hearing.

---

[6] Respondent erroneously argues that any prejudice stemming from the lack of record for these eleven dates maybe imputed to Appellant's trial counsel, since he allegedly waived the court reporter's presence for seven of the proceedings. (See RB 74 (citing proceedings on February 11, March 20, March 20, April 17, May 6, May 26, and June 9, 1992)). Respondent has not established that trial counsel waived the reporter's presence prior to the hearing. Whether trial counsel is at fault for allegedly waiving the reporter's presence is an issue for post-conviction review of counsel's assistance. Here, the question is whether there is a sufficient record for this Court to conduct meaningful appellate review on direct appeal.

Cross-referencing various textual sources does not recreate the objections stated or detail the arguments made by the parties. Nor does it recreate any court references to the case law cited, or the reasoning behind conclusions reached by the court during the unrecorded proceedings. The missing transcripts involve proceedings throughout the case and will affect the resolution of whole claims and many sub-issues. Moreover, it will affect any subsequent litigation in Appellant's case, if this Court were not to order a new trial.

An appellant challenging the adequacy of the record must show that the lack of record materially affects the resolution of issues on appeal. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 921). Here, eleven (11) of Appellant' claims are directly and materially affected by the lack of record due to the trial court's failure to transcribe a conference, proceeding or entire hearing:

1. The missing November 19, 1987 conference concerned information requested by Appellant's counsel regarding his initial detention and interrogation on March 7, 1987. The matters discussed during the proceeding affect the resolution of Appellant's Claim II - The Trial Court Improperly Denied Appellant's Suppression Motion;

2. The missing record for hearings on April 18th, 1988 and June 6, 1988 concerned the defense suppression motion regarding Appellant's subsequent detention and interrogations on March 27th and 30th, 1987. The matters discussed thus affect the resolution of Appellant's Claim III - The Trial Court Improperly Denied Appellant's Motion to Suppress Statements That Were Unlawfully and Involuntarily Obtained by Livermore Law Enforcement;

3. The missing June 25, 1992 and July 1, 1992 conferences concerned jury questionnaires and juror responses and the excusal of several jurors. The matters discussed thus affect the resolution of Appellant's Claim IV- The Trial Court Erred by Improperly Dismissing for Cause Capital Jurors Qualified to Sit on Appellant's Jury;

4. The missing June 11, 1992 conference concerned the excusal of the state's witnesses from the guilt phase proceedings. The matters discussed during the conference thus affect resolution of Appellant's Claim V - The Trial Court Improperly Denied the Defense Motion to Exclude All Witnesses From the Guilt Phase;

5. The missing April 15, 1988 hearing concerned evidence supporting the prosecution's theory of the case and arguments regarding the Penal Code section 995 Motion. The matters discussed during the proceeding thus affect the resolution of Appellant's Claim VI - Insufficient Evidence Supports Appellant's Convictions of Capital Murder, the Burglary-murder Special Circumstance, or His Conviction for Assault with Intent to Commit Rape;

6. The unrecorded conference on August 4, 1992, concerned prosecutorial efforts to admit evidence of Appellant's poverty as probative of his motive. (See RT 2522). The matters raised during the discussion affect the resolution of Appellant's Claim VII - The Trial Court Erred in Admitting Evidence of Appellant's Unemployment as Facts Probative of His Intent to Steal;

7. The unrecorded in chambers proceeding on August 13, 1992 concerned the guilt phase jury instructions. The matters discussed during the hearing are relevant to resolution of Appellant's Claim XI - Errors in the Guilt Phase Jury Instructions Require Reversal of Appellant's Convictions and the Special Circumstance;

8. The unrecorded conference on September 1, 1992 concerned the prosecution's victim impact evidence. The matters discussed are material to Appellant's Claim XIV - The Trial Court Erred in Admitting Victim Impact Evidence at the Penalty Phase;

9. On September 9 and September 15, 1992 four unrecorded conferences were held regarding defense objections to prosecutorial misconduct during the admission of the state's penalty phase case and closing argument. The matters discussed during the in chambers and unrecorded conferences are relevant to Appellant's Claim XVI - The Prosecutor Committed Prejudicial Misconduct During the Penalty Phase Arguments;

10. On September 14, 1992, the court and the parties held a discussion off the record concerning Appellant's objections to the five charts displayed by the prosecution during the opening morning of its penalty phase closing arguments. (See RT 3670). The matters that were discussed are relative to Appellant's Claim XIX - The Trial Court Erred by Allowing the Prosecutor to Display Inflammatory Charts to the Jury; and

11. On September 16, 1992, the parties and the trial court held an unrecorded in chambers conference concerning the proper response to the jury's deliberation question in the penalty phase. The unrecorded conference is relevant to the disposition of Appellant's Claim XX - The Trial Court Erred by Failing to Answer the Jury's Request for "The Legal Definition of Life Without the Possibility of Parole;"

Lastly, although not an unrecorded hearing, the trial court's notes, which were used when it ruled on Appellant's motion for modification, are missing. This deficiency in the record affects the disposition of Appellant's Claim XXV - The Trial Court Failed When Performing its Duties in Reviewing the Jury's Death Verdict.

Significantly, the missing record also contains potentially *exculpatory* evidence indicating that a person other than Appellant may have committed the Olsson homicide. As Respondent concedes, (See RB 60), at the November 24, 1987 hearing the unrecorded discussion concerned a request by defense counsel for "certain information the prosecutor had developed on potential suspects." (*Ibid.*). Similarly, on August 11, 1992, an unreported hearing concerned questions to Detective Scott Robertson about "Thomas Pillard, a.k.a. 'Doubting Thomas' a potential suspect in the murder investigation." (See RB 68). The lack of record has prevented Appellant's appellate and habeas corpus counsel from fully pursuing this evidence.

Respondent tries to exploit the lack of record in this case by arguing that several of Appellant's claims, which are dependent on missing transcripts, should be procedurally barred. Respondent does so despite the

state's inability to prove what arguments and objections were made during the relative unrecorded proceeding. Appellant's claims cannot be forfeited because the record does not demonstrate whether or not a contemporaneous objection was properly lodged by counsel. The contemporaneous objection rule maybe waived when deficiencies in the record impede meaningful review of a claim and a determination as to whether Appellant's counsel made the requisite objection. (Cf. *People v. Young* (2005) 34 Cal.4th 1149, 1203 ("because it cannot be ascertained whether defense counsel specifically requested clarification [of an instruction], we shall give defendant the benefit of the doubt and find the issue preserved for appeal")).

2. Respondent Fails to Demonstrate that Any of the Unrecorded Hearings Involved "Routine Scheduling and Procedural Matters."

In fifteen (15) instances, Respondent asserts that the missing portion of transcript involved only "routine scheduling and procedural matters." (RB 70).[7] Respondent's assertion covers missing transcripts for entire hearings and individual bench conferences, during pretrial and trial proceedings. Respondent's citations to the settled statement do not prove the content of the unrecorded hearings. In all fifteen instances, Respondent fails to offer any evidence, beyond its conclusory assertions, that the unreported proceedings dealt solely with "routine scheduling and procedural matters."

---

[7] The fifteen (15) proceedings were held on: September 10, 1987 (RB 54); November, 18, 1987 (RB 54); November 24, 1987 (RB 70); December 1, 1987 (RB 55); December 15, 1987 (RB 55); January 19, 1988 (RB 56); April 15, 1988 (RB 56); April 18, 1988 (RB 56); June 6, 1988 (RB 56); June 17, 1988 (RB 57); June 11, 1992 (RB 70); August 20, 1992 (RB 71); August 27, 1992 (RB 71); September 9, 1992 (RB 57); and November 2, 1992 (RB 57).

1. Respondent concedes that the September 10, 1987 hearing was not reported, but argues that the entire hearing may be summed up in one sentence. (See RB 54).

> The clerk's transcript indicates that on September 10, 1987, Detective Jensen did not appear with compliance discovery materials; the prosecutor reported that there would be a substitution of counsel; and the court vacated the date set for the preliminary hearing and maintained that date for a compliance hearing.

(RB 54). However, since there is no transcript, Respondent cannot describe what materials Detective Jensen failed to deliver; cannot describe the Court's order(s) concerning the non-compliance; and cannot describe why counsel for the state was substituted. The hearing also involved discovery matters not reported.

2. Respondent concedes that the November 18, 1987 hearing was not recorded. (RB 54). Respondent calls the hearing "routine," dealing with "Detective Jensen['s] request [for] an in camera hearing to claim his privilege to refuse to disclose certain police records." (RB 54). Respondent argues that the proceeding is "procedural" since it dealt with "Detective Newton['s] claim [of] privilege not to disclose police-file information regarding work that [Thomas] Marshall had done for the Livermore police department." (RB 54-55). Again, because there is no transcript, Respondent cannot describe the ground(s) on which Detective Jensen claimed one or more privileges, the content of the police-file information at issue, the ground(s) on which Detective Newton claimed one or more privileges, the subject matter of Thomas Marshall's testimony, any objections raised, or the content of the police-file information.

3. Respondent concedes that on November, 24, 1987, several conferences during a preliminary hearing were not recorded. (RB 70). Respondent argues that the conferences concerned only "routine scheduling

and procedural matters." (*Ibid.*). Respondent argues that defense counsel requested that the court read several newspaper articles into the record prior to argument. (*Ibid.*). Without addressing the court's resolution as to defense counsel's request, Respondent then calls the conference "routine" because the court would later change the date for argument. (*Ibid.*). There is no record of the substance of the newspaper articles in question, no discussion of the reasons for reading them in to the record, no description of any objections or arguments made, the basis for the court's reasoning, or whether the court acquiesced to the defense's request.

4. Respondent concedes that the December 1, 1987 hearing was not recorded. (See RB 55). Respondent says that Appellant was held to answer; the Court ordered him to appear for arraignment, and the prosecutor discussed biological evidence during the hearing. (*Id.* at 70). Because there is no transcript, Respondent cannot describe the content of defense counsel's objections, what officer was charged with carrying the biological evidence, the exact nature of the biological evidence, and what, if any, orders were issued by the court concerning the preservation of the evidence.

5 & 6. Respondent concedes that Appellant's December 15, 1987 arraignment was not recorded and that the record does not contain a reporter's transcript for the event. (See RB 55). Respondent nevertheless contends that the hearing was inconsequential, arguing that that "the clerk's transcript indicates that [the] December 15, 1987 [hearing] was continued to January 19, 1988" because "the reporter's transcript for the preliminary hearing had not yet been prepared at the time of the appearance." (*Ibid.*). According to Respondent, this same problem occurred on January 19, 1988, a hearing which Respondent also says concerned a continuance. (*Ibid.*).

The fact that, at some point, the hearing was continued is in no way dispositive of whether anything of significance was discussed on those

dates. Neither Respondent nor Appellant can determine whether statements or arguments made during this proceeding shed light on any of Appellant's arguments. Rather the absence of a record should not be used to deny any of Appellant's claims or arguments.

7. Respondent concedes that the April 15, 1988 hearing was not reported, but argues that the hearing addressed another "continuance." (RB 56). Respondent reaches this conclusion by citing to the settled statement, alleging that defense counsel believed that "the Penal Code section 995 motion was filed that same day," and concluding that "the motion hearing was continued." (*Ibid.*). As noted by Respondent, since the motion was filed that day, it is very likely that Appellant's counsel expressed his reasoning for setting aside the indictment. Of particular concern, would be counsel's consideration of the charges that related to the state's theory of the case and basis for special circumstances that were inadequately supported by the evidence. Respondent cannot verify that the matters discussed on record on April 15, 1988 were inconsequential.

8 & 9. Respondent agrees that the *in limine* proceedings held on April 18, 1988 and June 6, 1988 were not recorded. (RB 56) Respondent asserts that the hearings were inconsequential because the "clerk's transcript indicates that on both dates Appellant was not present and the court dropped the defense suppression motion without prejudice." (*Ibid.*). Respondent argues that the fact that "the court reporter has certified ...[in] her shorthand notes...that the pending matters were dropped from calendar" ameliorates any concerns about the missing reporter's transcripts. (*Ibid.*). However, certified notes are not an adequate substitute for substantive text of the hearing that led to the court's decision to "drop" the defense's suppression motion. On both April 18, and June 6, 1988, the Court and counsel conducted pretrial and in limine proceedings, which were [likely] discussed before continuing the matter. The reporter's certified notes are

based on memory and do not contain the parties word-by-word arguments, cases cited in support, or objections made during either the April 18 or June 6, 1988 hearings. They do not contain summaries of the court's conclusions and reasoning.

10. Respondent concedes that the transcript for the June 17, 1988 proceeding is missing. Respondent insists that the hearing was immaterial since the clerk's transcript indicates that on that date the "court continued a motion to correct the record." (RB 57). Because there is no transcript, Respondent cannot show that the errors in the record were corrected. Respondent cannot outline the party's contentions, nor describe the court's holdings.

11. Respondent concedes that a June 11, 1992 conference was not recorded during the trial proceedings. Respondent asserts that the conference dealt with "marking several exhibits," and therefore concerned "routine scheduling or procedural matters." (RB 70-71). Respondent cites to the clerk's transcript for evidence that several exhibits were marked during the conference. Respondent then argues that the conference must have dealt only with the exhibits, (*Id.* at 71), but fails to note the additional reason - the recording of objections made by defense counsel and prosecution to those exhibits. Moreover, just prior to the unreported conference on June 11, 1992, defense counsel requested to be heard by the trial court just after it had ordered the testifying witnesses out of the courtroom. (*Id.* at 70). The trial court's order regarding witness presence in the courtroom is the subject of one of Appellant's claims in this appeal. (See Claim V – The Trial Court Improperly Denied the Defense Motion to Exclude All Witnesses From the Guilt Phase). Respondent's argument tries to divert this Court's focus from why the conference was held in the first instance and what actually occurred during the conference. While exhibits may have been marked, the reason for the conference was undoubtedly also

to discuss the court's witness exclusion order.

12. Respondent acknowledges that on August 13, 1992 an unrecorded conference and proceeding occurred during the jury's deliberation. (RB 60). Respondent argues that "undoubtedly th[e] discussion[s] concerned [] insignificant procedural matters," since previously, and on the record, the court and counsel had reviewed the jury verdict forms, exhibits, and discussed how to accommodate requests for photos and videos. (*Id.* at 71). Respondent puts forth no evidence to support its argument. The state's "undoubted" belief that the unrecorded hearing was immaterial is insufficient. The hearing in question occurred at a critical time in Appellant's case and the party's discussion of the jury verdict forms assuredly involved more than "procedural matters." The conference likely included discussion of jury questions or other significant juror actions, prejudicial actions of the media, or objections to exhibits or media participation. It also could have addressed anticipated juror questions regarding the verdict form or a mistrial.

13. Respondent concedes that a conference during the hearing on August 27, 1992 was not recorded. (RB 71). Respondent argues that the conference was immaterial and cites to the reporter's transcript, which indicates that the court "conducted an unreported 'brief scheduling conference' with counsel." (*Ibid.*). This citation does nothing to illuminate what occurred during the unreported conference. It also does nothing to describe the court's briefing schedule, the subject of the briefs, the topic of the briefs, and why they were necessary at that moment.

14. Respondent concedes that the September 9, 1992 conferences before the court and in chambers were not recorded. Respondent argues that the conference is immaterial since it dealt with whether the Court could excuse Appellant's brother, Roger Tully, from the proceedings. (RB 57). Respondent does not offer any proof as to what actually occurred during the

proceedings or that the conferences dealt solely with excusing the witness. Nor does Respondent offer any evidence to document the positions taken by the parties, nor the reasoning behind the court's decision.

15. Respondent concedes that the November 2, 1992 hearing was not recorded. Respondent says the hearing is inconsequential because the clerk's transcript indicates that the court continued the "report and sentence" calendared for that day. (RB 57). Respondent argues that though the settled statement indicates that counsel could not remember what occurred at the November 2, 1992 hearing, "the majority of court appearances following [Defense Counsel] Wagner's appointment related to scheduling matters." (*Ibid.*). Here, nothing in the record indicates what occurred at the November 2, 1992 hearing. The fact that defense counsel cannot remember what occurred - does not mean the content of these proceedings should be dismissed as "routine" and dealing solely with "scheduling and procedural matters."

3. Respondent Fails to Define What Constitutes a "Routine Scheduling and Procedural Matter" and Fails to Justify Why "Routine Scheduling and Procedural Matters" Should be Dismissed as "Unimportant."

According to Respondent, "routine matters" include those proceedings involving witness privileges, non-compliance with discovery orders by state witnesses, and the preservation of biological evidence. (See RB 70). According to Respondent, "scheduling and procedural matters" include rulings on a defense motion to suppress evidence, the correction of errors in the record, and defense objections to the dismissal of a witness. These matters cover a broad array of subjects and Respondent has fashioned a definition for "routine scheduling or procedural matters" that would encompass almost all relative substantive proceedings and objections.

Even if some of these hearings constitute "scheduling and procedural matters," Respondent has failed to show why they should be considered "unimportant," "inconsequential," and "immaterial." Procedural matters structure an entire trial and errors dealing with the structure require separate analysis on appellate review. (See e.g., *Payne*, *supra,* 356 U.S. at 78 (coerced confession); *Gideon*, *supra,* 372 U.S. at 83 (right to counsel); and *Tumey v. Ohio* (1927) 273 U.S. 510 (biased judge)). Mere assertions that the missing records for fifteen hearings addressed solely with "immaterial" subjects, does nothing to assure that the procedural matters discussed and resolved at those hearings did not infect Appellant's trial with error. Likewise, such assertions do nothing to prove that the lack of record will not infect this Court's appellate review with similar error.

C. Respondent's "Reconstruction" of the Unrecorded Hearings, Conferences and Proceedings Fails to Provide Meaningful Appellate Review.

For twenty (20) incidents involving unrecorded conferences, hearings, and proceedings, Respondent attempts to reconstruct a transcript through cross-reference to the Settled Statement, "court summaries made on the record," and the clerk's transcript.[8] Respondent says "that during these unreported conferences nothing could have resulted in reversal of the judgment." (RB 72). Respondent's conclusion and reconstructive methodology is not a substitute for the transcript of these unrecorded proceedings. For many hearings, Respondent does [nothing] more than repeat what is stated in the settled statement or court summaries. (See RB

[8] Respondent "reconstructs" what happened at hearings or conferences on August 11, 1987; August 19, 1987; November 17, 1987; November 19, 1987; August 13, 1992; September 10, 1992; September 9, 1992; November 24, 1987; June 25, 1992; July 1, 1992; August 12, 1992; September 3, 1992; September 15, 1992; September 16, 1992; July 24, 1992; August 4, 1992, August 11, 1992; and September 15, 1992.

62, 63, 67, 68, 69). In no instance does Respondent actually recreate what occurred during the unreported hearing or conference, let alone, meaningfully review the objections stated, arguments held and orders issued by the trial court, if any.

1. The Settled Statement Does not Recreate the Objections, Arguments and Holdings that Occurred During Each of the Unrecorded Hearings, Conferences, and Proceedings in Appellant's Case.

The settled statement in Appellant's case was composed on September 3, 1999. It was made twelve (12) years after the first hearing in Appellant's case in 1987 and seven years after his conviction in 1992. It was created from the memories of trial participants.

Respondent believes that review of the settled statement "makes clear...an absence of prejudice from the missing transcript." (RB 54). Yet the state's only reference to the settled statement is brief quotations of Appellant's trial counsel in 1999. Respondent's arguments are primarily based on the clerk's transcript or "court summaries." (See *Id.* at 53-61). Respondent fails to support its conclusion that the "The Settlement Statement Reconstructs Many Unreported Proceedings and Discussions." (*Id.* at 53).

Respondent's citation to the settled statement sheds no light on the content of the unrecorded hearing in question. For instance, Respondent concedes that the August 11, 1987 pretrial discovery hearing was not recorded, but argues that the "clerk's transcript provides a detailed account of the hearing" by citing to the settled statement which "indicates that 'all the information Byron Brown recalls concerning this hearing is contained in the Municipal Court Clerk's Docket and Minutes for this date." (RB 58). The settled statement cannot provide meaningful guidance to this Court as it was recreated twelve (12) years after the hearing in question. Quite

simply, none of the parties' could remember what occurred on the date in question. This is why the settled statement indicates that the parties agreed that all information they could *recall* was listed in the Court Clerk's minutes.

Respondent utilizes the same logic to "reconstruct" what occurred during the August 19, 1987 hearing claiming that the clerk's transcript established that "the court heard argument and ruled on a discovery motion." (RB 58). Respondent cites to the settled statement, which reads that "all the information Byron Brown recalls concerning this hearing is contained in the Municipal Court Clerk's Docket and Minutes for this date." (*Ibid.*). Respondent merely repeats what the minute order states and what counsel recalled at the settled statement proceedings.

Respondent concedes that the Court conducted a preliminary hearing and held an unrecorded bench conference and other unrecorded proceedings on November 17, 1987. (RB 58-59). Respondent believes that the conference concerned "exclud[ing] testimony of prosecution witness Marshall regarding admissions made by Appellant while Marshall and Appellant were in jail together." (RB 58-59). However, as before, the settled statement sheds no light on the issue since it does not indicate that a break was taken to discuss Marshall's testimony. Moreover, there is no record of the objections made by the parties during the bench conference. Instead, the settled statement simply states that "Defense Counsel Brown recalls that the discussion was about 'the time frames Thomas Marshall was working with the Livermore Police Department." (RB 59).

Respondent next concedes that an unrecorded bench conference was held on November 19, 1987 concerning the court's examination of "Officer Newton about certain information the defense had requested." (RB 59). Respondent cites to the settled statement as establishing that the discussion concerned the time frame during which compensation was given to the

witness Thomas Marshall by the Livermore Police Department. (RB 59). Respondent's arguments do not, however, show how the information from the settled statement adequately reconstructs what happened during the conference. The settled statement fails to reveal arguments and objections raised by defense counsel or the court's holding.

Respondent concedes that during the same hearing on November 19, 1987, an in-chambers discussion and a sidebar discussion were not recorded. (RB 59-60). These conferences were called in response to prosecutorial objections made during Appellant's cross-examination of Thomas Marshall. Respondent argues that nothing material occurred during the conferences by citing to the settled statement, which indicates that "Defense Counsel Brown believed that the 'discussion concerned simplifying the questions for the witness, Thomas Marshall." (RB 60). Respondent's citation to the settled statement does inform as to what actually happened during the sidebar and in-chambers hearing, and defense counsel's brief statement does nothing to evince the Court's ruling or defense and prosecutorial arguments during the conferences.

Respondent concedes that a discussion off the record occurred over the span of a "30-minute recess" on November 24, 1987. (RB 60). According to Respondent, the discussion concerned a request by defense counsel for "certain information the prosecutor had developed on potential suspects." (*Ibid.*). Respondent argues that the hearing did not deal with anything material, by citing to the settled statement, which indicates that the "discussion concerned what leeway (defense counsel)...would be given in questioning the witness, Scott Robertson, about the focus of the police and the other leads and suspects that the police had in the case." The settled statement conflicts with Respondent's reasoning and explanation for the "30 minute recess" by referencing highly material issues related to the scope of a witness' testimony. It also fails to document the critical

discussion between the parties and the court concerning possible exculpatory evidence.

Respondent concedes that both "in-trial and in chambers conferences regarding guilt phase instructions and exhibits" were not recorded on August 13, 1992. (RB 60). Respondent argues that the record for the next day, August 14, 1992, "memorializes" the discussion. (*Id.* at 61). Respondent thus cites to Defense Counsel Wagner's recollection, as provided in the settled statement, that "the results of [the August 13, 1992] discussions were later put on the record." (*Ibid.*). However, the parties' memories, a day after the hearing cannot substitute for a reporter's transcript that fully documented the objections and arguments lodged, and the holdings reached. Moreover, both in trial and in camera conferences were not recorded. Respondent's citation to the settled statement, however, while indicating that the *results* were memorialized a day later, fails to recreate what arguments and objections led to the trial court's decisions. The existing record thus fails to show what exhibits and instructions were objected to and on what grounds the exhibits and instructions were admitted.

Respondent concedes that in trial bench conferences and proceeding were held off the record on September 9, 1992. (RB 61). Respondent believes that the bench conference concerned objections raised by the defense during the cross-examination of Appellant's son during the penalty phase. (*Ibid.*). Respondent also believes that the settled statement sufficiently reconstructs the conference since the court's ultimate rulings are in the reporter's transcript. (*Ibid.*). Respondent cites to the settled statement, which indicates that the conference concerned Appellant's "beyond the scope of direct examination objection to Kenneth Burr's cross examination question of Richard Anthony Tully...." (*Ibid.*). However, while the court recorded its ultimate rulings in the record, the settled

statement and Respondent's arguments fail to describe the arguments made, the support cited, and any court response given during the off the record conversation. Here, during a critical part of Appellant's case and in regards to a critical matter, the existing record fails to sufficiently detail what occurred during the September 9, 1992 unrecorded conference.

Finally, Respondent concedes that an "in trial and in-chambers conference regarding penalty phase jury instructions..." was not recorded on September 10, 1992. (RB 61). Respondent asserts that the court later memorialized the results of the hearing and cites to the settled statement, which "indicates that Defense Counsel Wagner recalled 'conferring on penalty phase instructions and believed the results of these discussions were later put on the record.'" (*Ibid.*). Respondent's assertion fails to illuminate what arguments and objections were made off record and instead, in a conclusory manner, cites to the record as evidence of the *results* of the unrecorded conference. Counsel's belief that the discussion was later put on record is not sufficient factual basis for meaningful appellate review of what transpired on September 10, 1992.

2. "Court Summaries" Do not Recreate the Objections, Arguments and Holdings that Occurred During Each of the Unrecorded Hearings, Conferences, and Proceedings.

Respondent next asserts that in several incidents "court summaries" alone "reconstruct" many unreported proceedings and discussions. However, Respondent goes on to undermine this assertion, by again cross-referencing the clerk's transcript, the reporter's transcript, and the settled statement to build its "reconstruction" of the unrecorded hearings. Respondent's efforts again fail to illuminate what occurred during the unrecorded proceedings and, instead, prove the inadequacy of the existing record.

Respondent concedes that an unreported bench conference and hearing occurred during Appellant's trial on July 24, 1992. Respondent believes that the hearing concerned the admission of photos and videos into evidence. (RB 67). Respondent tries to discount the settled statement, by claiming it does not matter that "Defense Counsel Wagner ...did not recall this review of the exhibits." (*Ibid.*). In Respondent's view, the record provides "a detailed account of their requests and objections...." (*Ibid.*). However, Respondent fails to offer any substantive proof of what happened during the unrecorded proceeding.

Respondent concedes that another unreported bench conference occurred on August 4, 1992. Respondent believes that the conference concerned defense objections to the prosecutor's questioning of John Chandler, and that it was called after the defense requested an offer of proof. (See RB 67). Respondent cites to the court summary of the discussion where the court overrules defense counsel's objections. (*Id.* at 67-68). However, while the court's summary indicates that off the record, the court and counsel discussed at least three separate issues relative to the court's determination, (drug use, Appellant's appearance, and relativity of the employment evidence), the court's summary fails to include what, if any, offer of proof was made by the prosecution. (*Ibid.* (citing 13 RT 2536-37)). Instead, it merely reiterates the party's positions and the court's holding, thus wholly missing an essential part of the defense's objection and why the in-chambers hearing was called in the first instance.

Respondent concedes that an unrecorded bench conference occurred during Appellant's trial on August 11, 1992. (RB 68). Respondent believes that the hearing concerned defense objections to the prosecutor's questions to Scott Robertson about "Thomas Pillard, a.k.a. 'Doubting Thomas' a potential suspect in the murder investigation." (RB 68). Respondent argues the court's summary, which was limited to the judge's

recollection at the end of the day after the jury had been excused, provides sufficient detail to substitute for a record of the unrecorded conference. (*Ibid.* (citing 14 CT 2924-25)). However, the court's summary fails to summarize defense and prosecution arguments, or the court's reasoning.

Next, Respondent concedes that two unrecorded conferences occurred off the record during the prosecution's penalty phase opening summation on September 15, 1992. (See RB 69). These conferences were called in response to defense objections to the prosecution's arguments concerning victim impact evidence. (*Ibid.*). In both unrecorded instances, arguments were halted and conferences occurred in chambers. (*Ibid.*). Respondent argues that the court's summary, a total of two paragraphs, sufficiently reconstructs what occurred during both unrecorded conferences. (*Ibid.*). However, the objections deal with misconduct raised as grounds for reversal in Appellant's brief. (See Claim XVI - Prosecutorial Misconduct at the Penalty Phase Requires Reversal of Appellant's Death Sentence). Thus, it was critical that defense counsel's and the prosecutor's arguments be preserved for review. The trial court's brief summary of counsel's objections does nothing to cure the lack of evidence indicating the positions taken by each party, the support offered by each party, and the court's reasons for sustaining and denying the parties' requests.

3. The Existing Record Cannot Adequately be Reconstructed From the Settled Statement and "Court Summaries."

Respondent next attempts to reconstruct what occurred in six unrecorded hearings and conferences using only the settled statement and "court summaries." (RB 70). However, like before, Respondent's efforts fail to fully reconstruct what occurred during the unreported hearings. In each instance, Respondent's arguments offer nothing more than conclusory

assertions as to what occurred during the unrecorded hearing. In no instance does Respondent establish any substantive aspects of the unreported hearing in question.

Respondent concedes that a conference concerning defense witness Sergeant Robinson's testimony was held off the record on November 24, 1987. (RB 62). Respondent asserts that the arguments held during the conference can be reconstructed based on the court's explanation that the conference "addressed the 'possible problems in light of this line of questioning." (*Ibid.*). Respondent cites to the settled statement as evidence that "the 'discussion concerned what leeway [defense counsel] would be given in questioning the witness..." (*Ibid.*). Respondent's references to the court's summary and the settled statement fail to develop what arguments, objections and delimitations were made during the unrecorded conference. Respondent's citations fail to describe the context of Sgt. Robinson's testimony, and do not establish the parties' contentions or the court's justifications. Yet again, Respondent's patchwork use of the settled statement and "court summaries" to fill significant gaps in the record fails to adequately "reconstruct" the record.

Respondent acknowledges yet another unrecorded proceeding in Appellant's case; this time regarding jury questionnaires, held on June 25, 1992. (RB 62-63). Respondent makes a similar argument as to the unrecorded proceeding held on July 1, 1992, which also referenced the jury questionnaires, and resulted in the dismissal of several jurors by stipulation. (RB 63). Respondent argues that the "memorialized transcript" indicates that on June 25, 1992, after 160 jurors completed the questionnaires, "counsel conferred so that they could excuse certain prospective jurors for cause by way of stipulation." (*Id.* at 62). The settled statement reiterates the memorialized transcript. But together, the documents fail to provide any substantive description of what occurred during the unrecorded

proceeding on June 25, 1992. Neither document describes the parties' contentions, what matters were set for calendar, and what matters were settled by the parties through agreement. Moreover, the lack of record impedes Appellant from determining whether the trial court adequately clarified ambiguities inherent in the questionnaire prior to dismissal of the jurors. (See *People v. Stewart* (2004) 33 Cal.4th 425, 454).

Respondent next concedes that on August 12, 1992 an unrecorded in camera discussion occurred resulting in a stipulation between the parties as to possible exculpatory DNA evidence in Appellant's case. (RB 64). The record indicates the stipulation, which told the jury that the unidentified hair found in Olsson's room "remain[ed] unidentified, that is, it doesn't belong to Sandy Olsson, does not belong to the defendant." (*Ibid.* (citing RT 2979)). The parties reached this stipulation after Appellant's counsel withdrew his final question to Criminalist Brinkley regarding the hair. The stipulation, evidence and counsel's examination of Criminalist Brinkley are relevant both to the issue of defendant's innocence and the effectiveness of his defense strategy. Thus, while the unreported hearing on August 12, 1992 resulted in a stipulation between the parties, the content of the hearing is of significant importance to Appellant's appeal. Counsel's decision to reach a stipulation, instead of questioning Criminalist Brinkley, remains a vital and unresolved issue in the absence of a reporter's transcript.

Respondent agrees that the trial court and counsel had an unrecorded conference concerning the judge's ruling on victim impact evidence on September 1, 1992. (RB 65).[9] Respondent argues that the judge ultimately granted the defense request for a written ruling, which obviates the need to recreate what arguments and objections were raised

[9] Appellant recognizes that the citations in his opening brief inadvertently referenced this date as September 3, 1992. Accordingly, Appellant amends that assertion to September 1, 1992.

during the unrecorded conference. However, given that the judge's ruling was adverse to the defense's position, Respondent's assumption provides no evidence of the positions taken, and objections made by defense counsel during the unrecorded hearing. Likewise, Respondent's arguments impede effective review of the trial court's reasoning for admitting the victim impact evidence in question.

Respondent concedes that three unrecorded bench conferences occurred regarding the prosecutor's closing argument in the penalty phase on September 15, 1992. (RB 65-66). The state's penalty phase closing summation is the subject of several challenges for misconduct in this appeal. (See Claim XVI - Prosecutorial Misconduct at the Penalty Phase Requires Reversal of Appellant's Death Sentence). Respondent argues that the unrecorded hearings dealt solely with the scheduling of defense counsel's arguments because the next time the parties appeared on record, the Court concluded that the arguments would continue the next day. (RB 65). This conclusion, however, ignores the two previous unrecorded conferences and the objections raised therein. (See I AOB 20 (citing 18 RT 3727, 3731, 3816)). Moreover, it ignores the misconduct committed during the state's penalty phase summation and the importance of the objections lodged throughout. The lack of record wholly impedes this Court's ability to conduct meaningful review of the record for evidence of misconduct by the prosecutor during his penalty phase summations.

Finally, Respondent concedes that the court and counsel conducted an unrecorded bench conference concerning a question lodged by the jury during their penalty deliberations on September 16, 1992. (RB 65-66).[10]

---

[10] Respondent asserts that the conference actually occurred on September 17, 1992. (RB 66). Appellant recognizes that the citations in his opening brief referenced this date as September 16, 1992. While the conference was discussed on the record on September 17, 1992, that

Respondent argues that the Court's summary on the following day, September 17, 1992, creates a sufficient record of what occurred during the unrecorded conference on September 16, 1992. (*Ibid.*). However, like the unrecorded conferences during the penalty phase closing arguments, the answer ultimately given by the court has been challenged on appeal. (See Claim XX - The Trial Court Failed to Answer the Jury's Request for "The Legal Definition of Life Without the Possibility of Parole). Thus, a full record is critical to evaluating the party's objections, arguments and positions, as well as, the Court's reasoning and ultimate holding.

D. Appellant has Established Prejudice and Reversible Error Resulting From the Missing Transcripts and Appellant's Judgment and Convictions Must be Reversed.

In a capital case, the preparation and transmittal of an accurate and complete record is critical to the integrity of appellate review. Without an adequate record for appellate review, Appellant cannot enforce compliance with the constitutional mandate that the state's capital sentencing process narrow the class of death eligible offenders, limit the risk of wholly arbitrary actions, or satisfy heightened standards of reliability as imposed by the Eighth Amendment. (See I AOB 18). Likewise, without an adequate record for appellate review, current counsel cannot present Appellant's appeal and, therefore, cannot fulfill Appellant's Sixth Amendment right to effective counsel. Similarly, without an adequate record for appeal, the state of California cannot assure that Appellant's trial was fair and conformed with due process and equal protection requirements imposed by the Fourteenth Amendment and Article I of the California Constitution.

---

discussion referenced the unrecorded discussion which occurred the day before, September 16, 1992.

Respondent's reliance on to *Pinholster, supra*, 1 Cal.4th at 920-22 is unavailing, (see RB 75-76), since the case is distinguishable on several bases. First, in *Pinholster,* this Court recognized in the language immediately following the text quoted by Respondent, that "it was only the[] sidebar arguments the court refused to order reported in every instance." (*Ibid.*). Here, Appellant complains that sixty (60) *hearings,* entire *proceedings,* and *conferences* went unrecorded. Second, in *Pinholster*, this Court found that the unrecorded side bar conferences did not pertain to any issues on appeal. (*Ibid.*). Here, Appellant has shown that eleven (11) of his claims are materially affected by the lack of record. It is for these reasons that Appellant's case is more comparable to cases in which a large or crucial portion of the record is missing. (See *People v. Apalatequi* (1978) 82 Cal.App.3d 970, 973). Finally, the situation in Appellant's case affects more material than in *Pinholster.* Not only did the trial court fail to require transcription of every hearing in this capital case, it also failed to preserve its trial notes. The importance of these notes cannot be understated as they were used by the court in denying Appellant's motion for new trial. (See Claim XXV - The Trial Court Failed in Performing its Duties in Reviewing the Jury's Death Verdict)).

Since Appellant submitted his Opening Brief in 2006, this Court has not had the opportunity to address a case where deficiencies in the appellate record presented significant reliability and due process concerns. This Court has, however, found in three cases that deficiencies in the record did not impede its ability to conduct meaningful review on direct appeal. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1037; *People v. Rundle* (2008) 43 Cal.4th 76; and *Letner, supra*, 50 Cal.4th at 195). In truth, in neither *Richardson, Rundle* or *Letner*, was this Court confronted with a record as depleted as in Appellant's case. Two of those cases involved only minimal deficiencies in the record. (See *Richardson, supra*, 43 Cal.4th at 1037

(Defendant alleges that nine unreported bench conferences prevented meaningful appellate review); and *Rundle*, *supra,* 43 Cal.4th at 76 (trial court failed to record two hearings, including a jury instruction hearing)).

Letner is distinguishable based on the material impact that the deficiencies in the record have on eleven (11) of Appellant's claims. In *Letner,* the trial court failed to have transcribed sixty-two (62) "discussions" off the record during the trial. (See *Letner, supra,* 50 Cal.4th at 195) This Court found that, in doing so, the trial court had committed error under section 190.9(a)(1). (*Ibid.*). This Court, however, found, that the defendant had failed to show that the error manifested prejudice. Appellant's case is distinguishable. First, Appellant's case involves trial court error in failing to record *whole proceedings and hearings* in addition to several material conferences held during the course of the trial. Second, Appellant has demonstrated that deficiencies in the record affect the resolution of eleven (11) of his claims on appeal. Third, Appellant has demonstrated that deficiencies in the record have prohibited him from pursuing exculpatory evidence indicating that another person committed the crime for which he has been convicted. In sum, *Letner* is not applicable to Appellant's case.

Such is not the case here, where the sheer breadth of hearings that were not recorded impedes meaningful review *in toto*. Similarly, in several instances where Respondent alleges that a claim or argument has been forfeited on appeal, there is no Appellate record by which to verify the state's assertion that no contemporaneous objection was raised. Finally, in many instances where Appellant alleges violation of his constitutional rights there exists no record to verify the arguments raised before the court, the objections lodged, and the court's reasoning justifying its order. The missing portions of the record in Appellant's case present reliability and due process concerns at both state and federal constitutional levels that

cannot be remedied by ruling on the claims presented in Appellant's Opening Brief and procedural arguments lodged in Respondent's Answering Brief. Indeed, here, because this Court cannot issue adequate rulings on several claims and arguments raised by both parties, Appellant has carried his burden of demonstrating that the appellate record is not adequate to permit meaningful appellate review. (Contra *People v. Arias* (1996) 13 Cal.4th 42, 58).

E. Conclusion.

Appellant is constitutionally entitled to an appellate record "adequate to permit [him or her] to argue' the points raised in the appeal." (*People v. Rogers* (2006) 39 Cal.4th 826, 857). The Fourteenth Amendment requires the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review and the Eighth Amendment requires reversal when deficiencies in the record create a substantial risk that the death penalty is being imposed in an arbitrary and capricious manner. (*Ibid.*). Appellant has carried his burden of showing the record is inadequate to permit meaningful appellate review.

On sixty (60) occasions the trial court failed to fully record hearings, proceedings, and conferences that occurred during Appellant's capital trial. The gaps in the record effect claims of error raised in Appellant's Opening Brief and violate Appellant's right to due process and equal protection. In a capital case, it is unacceptable for Appellant to fight for his life with an inadequate record that prohibits counsel from fully and fairly presenting his appeal for review.

Here, the lack of record in this case impedes this Court from conducting meaningful appellate review and also challenges the test for prejudice enunciated in *People v. Frye* (1998) 18 Cal.4th 894. Errors in preservation of the appellate record implicate the fairness and reliability of the proceedings, as well as rights so essential that the errors necessarily

render this proceeding fundamentally unfair. In a capital case where sixty (60) hearings, proceedings and conferences were not adequately recorded, no showing of prejudice should be required since the trial court's errors have structurally affected Appellant's chances of earning meaningful appellate review. (See e.g. *Payne, supra,* 356 U.S. at 560; *Gideon, supra,* 372 U.S. at 335; and *Tumey, supra,* 273 U.S. at 510).

II. THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S SUPPRESSION MOTION.

A. Introduction.

Appellant's convictions are based on evidence that was the fruit of an illegal detention, search, arrest, and interrogation instituted by officers from the Livermore Police Department on March 7, 1987. Livermore Police detained Appellant without reasonable suspicion. He was then seized without probable cause, forced to consent to a search of his person, and coerced, by false promises from law enforcement officers, into making incriminating statements.

Ultimately, as a result of their unlawful conduct, Livermore Police would gain incriminating fingerprint evidence and Appellant would provide statements that were used against him at trial. As a result of the introduction of the fingerprints and incriminating statements, Alameda County prosecutors would secure a capital conviction and death sentence against Appellant.

B. The Facts.

Respondent acknowledges that prior to March 1987, Livermore Police did not have any viable suspects in the Sandra Olsson homicide. (RB 79). Respondent concedes that prior to March 1987, the Livermore Police and California Department of Justice had compared Appellant's fingerprints to the print found on the murder weapon and no match had been made. (*Ibid.* (citing RT 130 and 140-41)). Respondent tries to explain away this exculpatory fact by arguing that only Appellant's right index finger was analyzed. (*Ibid.*). Respondent's explanation is not convincing.

Nine months after the Olsson homicide, Appellant was detained for driving with a suspended license in different neighborhood. He was not considered a suspect in the Olsson homicide at that time. Police officers

Trudeau, Painter and Schweib had been watching Kenneth Perry's residence. (RB 79). Appellant and Ed Snyder appeared at Perry's house. Mr. Snyder was a known narcotics user with an outstanding arrest warrant. Officer Painter identified Appellant, based on an incident "about a week earlier...in which Appellant was suspected of vandalizing a truck with a knife." (*Ibid.*). Painter heard, through double hearsay, that Appellant was a "heavy narcotics user who was normally armed." (*Ibid.*). After Appellant and Snyder left Perry's residence, the Livermore police officers stopped Appellant's car.

Respondent concedes that Appellant was detained for driving with a suspended license. (RB 80). Respondent concedes that Officer Trudeau detained Appellant, removing him from his car, while the other officers arrested his passenger, Snyder, based on an outstanding warrant. (*Ibid.*). Respondent acknowledges that Officer Painter took control of Appellant while Officer Trudeau completed a citation for Appellant's violation of driving with a suspended license. (*Ibid.*). Respondent concedes that Officer Painter told Appellant about the reported vandalism incident, and that he had heard that Appellant was "'heavily' armed with a knife." (*Ibid.*).

In this context, Appellant consented to a search of his person for *weapons*, not *drugs*. Respondent concedes that Officer Painter used a flashlight to conduct a visual inspection of Appellant's person, which did not reveal any weapons, and that the officer did not conduct a frisk of Appellant. (RB 81). Respondent argues that the officer "looked inside Appellant's belt line and pockets" and found a "bindle containing white powder from one of Appellant's front pants' pockets." (*Id.* at 81). Following this impermissible search, the officers in turn searched Appellant's car, arrested Appellant and took him to the Livermore Police Station. While at the station, the officers searched his person again, recovering drug paraphernalia and suspected narcotics.

Respondent fails to acknowledge several critical facts underlying Appellant's claim:

1) That the Livermore Police seized Appellant for a substantial amount of time;

2) That Officer Trudeau retained Appellant's driver's license for seven days;

3) That Livermore Police had completed the citation for driving with a suspended license prior to any discussions with Appellant regarding a search of his person or car;

4) That Officer Trudeau had only asked for consent to search for a knife; and

5) That at no point during the investigative detention was Appellant advised of his *Miranda* rights.

(See I AOB 41 (citing ART 254, 261; Defense Suppression Hearing Exhibit D, at 54)). Instead, Respondent attempts to make it appear as if Officer Painter gained consent to search Appellant's person for narcotics, not weapons, outside Officer Trudeau's presence and based on suspicion of narcotics, not weapons, offenses. (See RB 81). Respondent fails in this attempt.

Appellant was not read his *Miranda* rights until after he was interrogated, following a custodial arrest, and after he was transported to the Livermore Police Station. At that time, having been given his rights, Appellant expressly refused to talk about the crimes underlying his detention, although he indicated that he did not want to go to jail. In response, as Respondent concedes, Officer Trudeau initiated negotiations with Appellant. (RB 81). In exchange for Appellant's work as an informant for the Livermore Police, Officer Trudeau promised that Appellant would not go to jail and that "nothing he said would be used

against him." (*Id.* at 82 (citing RT 81)). Respondent acknowledges that, while waiting for Narcotics Detective Jensen to arrive, Trudeau questioned Appellant about his life history and social background. (RB 81-82).[11] That night, Appellant was released.

On March 17, having retained Appellant's license for ten (10) days, Officer Trudeau visited the listed residence. (RB 82-83). He then broke his promise to Appellant, by contacting Officer Robertson of the homicide unit, and describing Appellant's statements, as well as, the proximity of Appellant's prior residence to the scene of the Olsson homicide. (*Id.* at 83).[12] Officer Trudeau also contacted the officer who took the statement regarding the vandalism incident involving Appellant and relayed this

---

[11] During the interrogations, Officer Trudeau cajoled Appellant into revealing much about his life history. Later, well after Officer Trudeau broke his promise not to reveal this information, many of these facts would be used by the prosecution to incriminate Appellant at his capital trial. This included the facts that Appellant used methamphetamine, had been a Marine, and had been treated at the Veteran's Administration Hospital. (See I AOB 29 (citing RT 190-91)). Thus, Appellant's involuntary statements in response to Officer Trudeau's false promise were used to his material prejudice. This was fundamentally unfair because Officer Trudeau never intended to keep Appellant's confidences private.

[12] Trudeau's realization that Appellant had previously lived near the scene of the Olsson homicide was only ascertained via his extended seizure of Appellant's license. There was no legal reason for Trudeau to keep Appellant's license. It should have been given back to Appellant after the citation was written or when he was released from the police station that night. Thus, this seizure itself was illegal under the Fourth Amendment and a "fruit" of the illegal arrest. In determining whether evidence is the "fruit of the poisonous tree" for a Fourth, Fifth, or Fourteenth Amendment violation, and therefore inadmissible, this Court must ask "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (*Krauss v. Superior Court* (1971) 5 Cal.3d 418, 422; see also *Wong Sun v. United States* (1963) 371 U.S. 471, 488).

information to Officer Robertson. (RB 84). Based on these facts, Officer Robertson "hand carried Appellant's 1973 prints to Sacramento" for analysis by the Department of Justice (DOJ). (*Ibid.* (citing RT 191-93)).[13] At that time, a match was purportedly made between Appellant's right ring finger and a fingerprint left on the knife used in the Olsson homicide. (*Id.* at 133).[14]

On March 27, 1987, Livermore police arrested Appellant pursuant to two outstanding warrants unrelated to the Olsson homicide. Appellant was then taken to the Livermore Police Station where he was arrested for the murder of Olsson. On March 27, 1987, Appellant made a statement to law enforcement officers after several hours of interrogation. On March 30, 1987, Appellant made two additional statements. (RB 83).

---

[13] The fingerprint evidence is the fruit of the poisonous tree as it was gained based on the illegal seizure of Appellant. Immediately upon Appellant's detention, and for 10 days after his release, Officer Trudeau illegally seized Appellant's driver's license. But for this seizure, Officer Trudeau would not have returned to Appellant's listed address and, indeed, there was no other basis for re-submitting the fingerprints to the DOJ beyond the illegal evidence. (See *United States v. Taheri* (9th Cir. 1981) 648 F.2d 598, 600). It was, therefore, Officer Trudeau's illegal and extended seizure of the license that prompted investigation into Appellant and ultimately led to Appellant's arrest, conviction and death sentence.

[14] Additionally, it was Appellant's involuntary and coerced statements, stemming from his unlawful detention on March 7, 1987, which led Officers Trudeau and Robertson to resubmit Appellant's fingerprints for analysis. Thus, this Court should also suppress the fingerprint evidence based on the taint of Appellant's involuntary statements and violations of his due process and *Miranda* rights. (See *People v. Vasila* (1995) 38 Cal. App. 4th 865, 877).

C. The Violations of Appellant's Constitutional Rights are not Forfeited.

Initially, Respondent argues that many of the claims raised in this argument are "procedurally defaulted." (RB 88). Respondent bases this assertion on its conclusion that Appellant has raised his federal constitutional arguments for the first time on appeal. (*Ibid.*). The contested claims are:

1. That the excessive duration of Appellant's detention violated his rights under the Fourth Amendment (RB 89);

2. That Appellant's detention was not justified by "reasonable suspicion" in violation of his rights under the Fourth Amendment. (*Id.* at 91);

3. That Appellant's rights under the Fifth Amendment were violated when he was seized and interrogated without having been given his *Miranda* warnings (*Ibid.*);

4. That Appellant's rights under the Fourth and Fifth Amendment were violated when his person was searched prior to *Miranda* warnings. (*Id.* at 92);

5. That Appellant's consent to search was involuntary and coerced by an unlawful investigative detention in violation of his rights under the Fourteenth Amendment (*Id.* at 94);

6. The use at trial of statements made by Appellant in response to Officer Trudeau's false promises were fundamentally unfair in violation of his rights under the Fourteenth Amendment (*Id.* at 102); and

7. Appellant's statements were involuntary and their admission at his capital trial violated his rights under the Fourteenth Amendment (*Id.* at 108).

Respondent is wrong to argue that violations of Appellant's fundamental constitutional rights have been waived. Respondent is also wrong to argue that the objections lodged by Appellant's trial counsel did

not include or subsume objections based on the violation of federal constitutional rights. This Court permits the use of new legal arguments on appeal where they involve the same facts or legal standard as those asserted at trial. (See *People v. Avila* (2006) 38 Cal. 4th 491, 527 n.22). In that situation, this Court is not barred from reviewing collateral violations of the federal constitutional stemming from the trial court's errors. (See *Ibid.*).

While Respondent acknowledges the holding in *People v. Avila*, the state nonetheless argues that violations of Appellant's fundamental constitutional rights have been waived. (See RB 88 n. 10). Respondent is wrong because under *Avila*, an appellate claim is not forfeited if the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply. (*Avila, supra,* 38 Cal.4th at 547 n.22). This is true so long as the trial court's act in admitting the evidence, which was erroneous, had the additional *legal consequence* of violating the federal Constitution. (*Ibid.* (emphasis added)). Each of Appellant's claims fall squarely under the rule set forth in *Avila* and his allegations of trial court error and resulting constitutional violations must therefore be reviewed on the merits. (*Ibid.*).

Additionally, "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain, fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal. 4th 269, 276). Although the Court has not set forth exactly what it deems to be a "fundamental" right, it has listed some examples. (See *People v. Saunders* (1993) 5 Cal. 4th 580, 592; and *People v. Holmes* (1960) 54 Cal. 2d 442, 443-444). Only rights grounded in the California or federal Constitutions maybe considered "fundamental" and exempt from the general rules of forfeiture. Appellant's claim involves two rights based on the Fourth Amendment and one based on the Fourteenth Amendment. All are fundamental constitutional rights in nature.

Despite the standards adopted in *Avila* and *Vera,* Respondent argues that Appellant's claims are barred for failure to object with specificity at trial. In their effort to gain dismissal of Appellant's claims, Respondent too narrowly limits Appellant's objections at trial. According to Respondent, Appellant moved to suppress the methamphetamine and syringes seized from his person and car solely because: 1) his consent was based on an un-Mirandized interrogation; 2) the search exceeded the scope of Appellant's consent; 3) his consent to search his car was obtained by the unconstitutional search of his person; and 4) the search incident to his arrest was based on an illegal seizure. (RB 86).

Respondent then argues that, at trial, Appellant moved to suppress his statements on March 7, 1987 because: 1) the statements were elicited in violation of *Miranda*; and 2) the statements were made involuntary based on false promises. (*Ibid.*). Respondent tries to frame Appellant's objections to the March 27, 1987 statements as limited to suppression because the arrest preceding the statements was illegal due to a violation of the "knock-notice" rule. (*Id.* at 86-87). Respondent's construction of Appellant's argument is undermined by the state's concession that Appellant moved to suppress the fingerprint evidence and statements on March 27 and March 30, 1987 based on the totality of the constitutional violations incurred during his detentions, interrogations, and arrests. (See RB 88 ("Appellant's bottom-line is that all of the constitutional violations he suffered compelled suppression of the fingerprint evidence against him and the inculpatory statements he made....")). Accordingly, Appellant has preserved all of his arguments. [15]

---

[15] Moreover, on November 19, 1987, April 18, 1988 and June 6, 1988 three hearings concerning Appellant's suppression claims were not recorded. Appellant's arguments here cannot be forfeited, due to the incomplete record, whether or not he lodged all relevant objections to the admission of the evidence. (Cf. *Young, supra*, 34 Cal.4th at 1203).

At the suppression hearing, Appellant correctly challenged the basis for his seizure and the police officers' failure to explain his *Miranda* rights before initiating an interrogation. The officer's failure to Mirandize Appellant had the additional affect of causing his involuntary consent to search and the waiver of his Fourth Amendment rights in response to police coercion. The admission of the evidence by the trial court thus had the "additional legal consequence" of violating Appellant's rights under the Fourth Amendment. (See *Avila, supra,* 38 Cal. 4th at 527 n.22). Likewise, in his motion to suppress, Appellant argued that Officer Trudeau's statements were an unlawful "promise of leniency" under *People v. Brommel* (1961) 56 Cal. 2d 629, 632. Appellant can argue on appeal his "fundamental fairness" claim under the Fourteenth Amendment since the trial court's admission of evidence stemming from Officer Trudeau's actions had the *additional legal consequence* of violating Appellant's Fourteenth Amendment rights. (See *Avila, supra,* 38 Cal. 4th at 527 n.22).

This Court may review all of Appellant's assignments of error on appeal and Appellant's arguments have been properly preserved under this exception. The indefensible nature of the police misconduct at hand, Appellant's involuntary and coerced waiver of his rights and Respondent's unpersuasive arguments fail to prove that Appellant's fundamental rights under the Fourth and Fourteenth Amendments were not violated by the trial court's admission of illegally seized evidence. The clear violations of Appellant's constitutional rights would perpetrate a grave injustice if not remedied by this Court.

D. On March 7, 1987 Appellant's Constitutional Rights were Violated When He was Unlawfully Detained, Interrogated, and Custodially Seized Without Notice of his Right Under *Miranda* and the Fifth Amendment.

Respondent aims to undermine Appellant's assertion that "the...numerous violations of his constitutional rights [occurred] when [Livermore Police] stopped him in the Fiat on March 7, 1987." (RB 89). Respondent argues that: 1) the police did not unduly detain Appellant. (*Id.* at 89-90); 2) the police did not need reasonable suspicion to engage Appellant in an investigative detention. (*Id.* at 91); 3) Appellant gave valid consent to the search of his person. (*Id.* at 92); 4) the police did not exceed the scope of that consent. (*Id.* at 95); and 5) that the above constitutional violations did not taint any searches incident to arrest. (*Id.* at 98). Respondent's contentions are taken up in turn.

1. Appellant was Unreasonably Seized by the Police in Light of the Facts Known at the Time of the Traffic Stop.

Appellant was not free to leave while the police issued a citation to him. At all times, he was under the independent detention of an officer while Appellant's passenger was being arrested in his presence. The police had taken Appellant driver's license and did not return it at the time. Appellant was therefore seized while Livermore Police issued a citation for driving without a suspended license. (RT 215-16). The police did not have reasonable suspicion that Appellant had committed any crime greater than driving with a suspended license.

Throughout the detention, the police engaged Appellant in investigatory questioning. He was, however, never given his *Miranda* rights as required by the Fifth Amendment. Thus, during this time, any consent to search and all resulting evidence obtained from Appellant was involuntarily obtained by the police and tainted by the unreasonable

detention and seizure of Appellant. Therefore, the admission of all evidence resulting from Appellant's unlawful detention, search, arrest, and interrogations on March 7 and March 27, 1987, violated his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, as well as, Article I of the California Constitution.

2. The Livermore Police Detained Appellant Past the Time It took to Write a Citation for Driving With a Suspended License and Without Reasonable Suspicion.

Respondent agrees that the "[p]olice must carry out detentions in a manner, 'reasonably related in scope to the circumstances which justified the interference in the first place.'" (RB 90). Respondent argues that Appellant was not subject to an "unreasonably prolonged detention that rendered invalid the consent to search he gave during that detention." (RB 90 (quotations omitted)). Respondent argues that the officers were allowed to interrogate Appellant about incidents unrelated to the crimes justifying the underlying detention because they had "reasonable suspicion" that Appellant was involved in the other crimes. (*Id.* at 91). To support this argument, Respondent mischaracterizes facts in the record, aggrandizes hearsay evidence and minimizes the length of Appellant's detention. Respondent also misapprehends relevant law by insisting that the police officers did not need more than reasonable suspicion to unduly seize Appellant and engage in investigative interrogations.

Livermore Police justified their detention of Appellant because he had violated the law by driving with a suspended license. (ART 260). The duration of that detention can only be justified by the time it took for the Livermore police to write Appellant a citation for the criminal infraction. (See *Knowles v. Iowa* (1998) 525 U.S. 113, 118). Beyond driving with a suspended license, the Livermore police had no separate and reasonable

justification for the continuing detention of Appellant once the citation was complete. At the completion of the citation, "all evidence necessary to prosecute that offense had been obtained." (*Ibid.*; see also *People v. McGaughran* (1979) 25 Cal.3d 577, 587).

This Court's decision in *McGaughran* is particularly instructive. There, the defendant was legally stopped for a traffic violation, driving the wrong way down a one-way street. (*McGaughran, supra,* 25 Cal.3d at 587). After giving a warning for the traffic stop, the police continued to detain the defendant for the purpose of running a warrant check. (*Ibid.*). This Court declared that such an "additional period of detention" was not "'reasonably necessary'" for the original stop, and thus "'exceeded constitutional limitations.'" (*Ibid.* (quoting *Willett v. Superior Court* (1969) 2 Cal.App.3d 555, 559)). Similarly, Appellant was legally stopped for a traffic violation and the police continued to unlawfully detain him after the citation was written, for the purpose of questioning and searching him for unrelated crimes. Here, as in *McGaughran*, the continued detention of Appellant exceeded constitutional limitations because it was not "reasonably necessary," (*McGaughran, supra,* 25 Cal.3d at 587), to address the original violation. Thus, all evidence that was the "product of exploitation of the unlawful detention...should have been suppressed." (*Id.* at 591).

Detentions instigated in "the hopes that something might turn up," are unlawful and constitute an unreasonable interference with the detainee's personal liberty. (*Brown v. Illinois* (1975) 422 U.S. 590, 605; see also *United States v. Thomas* (9th Cir. 1988) 863 F.2d 622, 628). Since, by engaging in investigative detentions, the police are conducting unlawful fishing expeditions for *any* incriminating evidence, the use of such detentions also defeats claims that later evidence was earned by fortuity. (See *United States v. Bacall* (9th Cir. 1971) 3 F.2d 1057; and *People v.*

Rodriguez (1993) 21 Cal.App.4th 232). [16]

Respondent is thus wrong to argue that the detention of Appellant was reasonably related in scope to the circumstances that justified the offense. (See RB 90). After being pulled over, Appellant was interrogated long enough for his passenger to be arrested and for the officers to complete a citation for driving with a suspended license. Officer Trudeau testified that he had finished writing the citation and returned to Appellant's car by the time Officer Painter asked Appellant for consent to search. (RT 215-19). Officer Painter testified that he was trying to solicit incriminating evidence and/or consent for a search from Appellant related to a crime other than driving with a suspended license. (ART 263). Officer Painter did not have reasonable suspicion to believe that Appellant had committed a separate crime. He barely had a "hunch," based on circumstantial hearsay statements from a unreliable source that Appellant was a heavy narcotics user and might have a knife in his possession. Officer Painter's "fishing expedition" was thus not based upon articulable justifications that would support a finding of reasonable suspicion for the commission of separate offenses. Appellant's continuing detention was therefore unreasonable in light of the original purpose of the stop.

Respondent wrongly argues that reasonable suspicion is not needed to continue a detention of a person so that police may question him about an incident unrelated to the basis for detention. (RB 91). Indeed,

---

[16] The Ninth Circuit Court of Appeals has identified criteria for determining whether tainted evidence has been sufficiently "purged" to be admissible. (See *Bacall, supra,* 443 F.2d at 1056-1057). It asks what "direction" and "impetus" the illegal seizure gave to the investigation, and whether anything seized illegally or any leads gained from the illegal seizure "tended significantly to direct" the investigation toward the evidence – that is, whether the police had after the illegal seizure "a substantially greater reason to seek those specific items than they had had before" the illegal seizure. (*Ibid.*).

Respondent concedes that "During a traffic stop an officer...may [] request consent to search, *where such actions do not prolong the detention beyond the time it would otherwise taken.*" (*Ibid.* (emphasis added)). Respondent tries to defend the unreasonable duration of Appellant's detention in an effort to support the invalid consent to search later given by Appellant. (*Id.* at 92). This argument fails. At the time that Officer Trudeau completed the citation and gave Appellant receipt of the infraction, all purpose justifying the detention had ceased. At that time, the continuing detention of Appellant had become an illegal seizure in light of the lack of probable cause or reasonable suspicion justifying the detention of Appellant for the commission of offenses other than a suspended license. Therefore, any evidence gained from Appellant's detention after the issuance of the citation violated Appellant's right against "unreasonable search and seizures" under the Fourth Amendment to the U.S. Constitution and Article I of the California Constitution.

3. Appellant's Alleged Consent to Search his Person was Invalid and Involuntarily Coerced.

Appellant's "freedom of movement" had been effectively restrained by the police to a "degree associated with a formal arrest," after the officer completed the citation, failed to return Appellant's driver's license, and refused to grant his release. (*California v. Beheler* (1983) 463 U.S. 1121, 1125). However, before interrogating Appellant about separate criminal incidents and cajoling Appellant into involuntarily consenting to a search of his person, the police never advised Appellant of his rights under the Fifth Amendment in accordance with *Miranda v. Arizona* (1966) 384 U.S. 436. Under such conditions, the continued questioning of Appellant, and ultimately the involuntary consent to search earned by the police, violated Appellant's rights under the Fifth Amendment to the U.S. Constitution and Article I of the California Constitution.

a. Appellant was Seized and Custodially Interrogated Before He was Notified of his *Miranda* Rights.

Apparently, Respondent believes that a custodial arrest only occurs if the police draw their guns, handcuff the defendant and place him in their patrol car. (RB 94). According to Respondent's theory, only at that point would a reasonable person feel unable to walk away from the police and the detention would coincide with the test for "custody for *Miranda* purposes." (*Id.* at 93). Respondent's requirements ignore the differences between detentions and seizures, as well as the effect of unlawful detentions perpetrated without reasonable suspicion. Respondent's proposition would prevent any detention stemming from a traffic stop from rising to the level of a custodial seizure, absent the use of guns and handcuffs, a theory not founded in the law. (See *Berkemer v. McCarty* (1984) 468 U.S. 420, 440). Here, based on a misperception of facts and applicable law, Respondent wrongly concludes that there was "no suggestion that at the traffic stop there was restraint on appellant's freedom of movement of the degree associated with a formal arrest." (RB 93).

To be sure, the police officers did more than engage in a "brief and casual" interrogation of Appellant for a "few minutes." (See RB 93-94). Appellant was detained by several officers under the pretext of issuing a citation for a suspended license. The officer's true intent, however, was discovering incriminating information regarding an unrelated crime (or crimes). Appellant was detained long enough to give the officer his license, be removed from his car, answer questions about his suspended license, and witness the arrest of his passenger. During the same course of time, the officer completed his citation, gave Appellant the citation, listened to Officer Painter's rendition of the suspected vandalism incident and answered several of Officer Painter's questions. (ART 254-267). At no

time in this sequence of events was Appellant informed of his *Miranda* rights. (RT 251).

A reasonable person in Appellant's position would not believe that they were free to leave, and would have conceded to any demands made by the police. Appellant could not have driven away without his license. He believed that the subject of the police interrogation -- the vandalism incident -- was the basis for his arrest. In such restrictive custody, police are required to give *Miranda* warnings. Without such warnings, Appellant's consent was merely an appeasement to an implied assertion of police authority and was not a knowing and voluntary waiver of his Fifth Amendment protections against self-incrimination. (Contra *People v. Fierro* (1991) 1 Cal.4th 173, 217).

b. The Police Illegally Restrained Appellant's Freedom of Movement and Any Subsequent Consent was Involuntarily Earned.

Voluntary consent cannot be given by a person whose freedom of movement is being unlawfully restrained. (See e.g. *People v. James* (1977) 19 Cal.3d 99, 109; *Florida v. Royer* (1983) 460 U.S. 491, 507). Here, Appellant consented to a search of his person based on false statements by the officers and unlawful restraint of his person. Respondent's arguments to the contrary are wrongheaded.

Respondent believes that at no point could Officer Painter's questions become sustained and coercive since he "asked appellant if he 'would mind' being searched." (RB 94). The test for coercion does not turn upon an officer's statements as much as the officer's actions in restraining the suspect's freedom of movement and failing to give a *Miranda* warning. Here, Appellant submitted to the demands of an officer who was unlawfully detaining and interrogating him and "his assent is not voluntary because it is inseparable from the unlawful conduct of the

officers." (*James, supra,* 19 Cal.3d at 109).

As a result, Appellant's consent was tainted by the illegality of the police misconduct and was ineffective to justify the ultimate search of his person. (See *United States v. Cortez* (1981) 449 U.S. 411, 417). No intervening circumstances occurred between Appellant's illegal detention and involuntary consent. (*Ibid.*). No particularized and objective suspicious factors had arisen to continue justifying his detention. (*Ibid.*).

c. Substantial Evidence Does not Support the Trial Court's Finding that Appellant Gave Valid Consent.

Respondent wrongly asserts that "[s]ubstantial evidence supports the trial court's rejection of appellant's argument that he was the victim of a *Miranda* violation." (RB 94). In fact the inverse is true; only scant evidence supported the trial court's determination that Appellant's consent was voluntary and was not made in violation of his *Miranda* rights. This evidence was insufficient to fulfill the prosecution's burden of showing that "the consent was, in fact, freely and voluntarily given." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222). Instead, at trial and in Respondent's brief, all the state has shown or argued is that Appellant "submit[ted] to a claim of lawful authority," (*Royer, supra*, 460 U.S. at 497), in appeasement of coercive means instituted by police officers. Here, the police seized and interrogated Appellant without notifying him of his rights. The police misconduct constituted a clear violation of Appellant's rights under the Fifth Amendment. No substantial evidence to the contrary exists that can support the trial court's ruling.

In recent years, this Court has only infrequently been presented with allegations of Fourth Amendment violations in capital cases. (See *People v. Zamudio* (2008) 43 Cal.4th 327). In contrast to *Zamudio*, Appellant was seized by police during a traffic stop. He was removed from his car. He

was forced to forfeit his license. He waited while his passenger was arrested for an outstanding warrant. He was told not to leave. Unlike the defendant in *Zamudio*, Appellant had no reasonable expectation that he could terminate the encounter or not consent to police demands. In contrast to *Zamudio*, police had no reason to suspect Appellant of murder or any violent crime at the time of his arrest. There was thus no reason to detain Appellant, beyond a warrant check, and certainly no reason to frisk him. Finally, in contrast to *Zamudio*, Appellant did not consent to speak to the police voluntarily. Instead, Appellant consented to police requests to search him because he had did not believe that he had the liberty of saying no. In sum, significant differences between Appellant's case and *Zamudio* prove that Appellant's rights, under the Fourth and Fourteenth Amendments were violated by the Livermore police officer's unreasonable search and seizure of his person.

4. The Search of Appellant Exceeded the Scope of his Consent.

The scope of the police search, whether earned pursuant to coerced or voluntary consent, must nevertheless be limited to the scope to which the suspect has assented. (*People v. Superior Court* (*Arketa*) (1970) 10 Cal.App.3d 122, 127). When a search is conducted pursuant to a coerced or invalid consent, or the search exceeds the scope of the consent given, the Fourth Amendment is violated. (*People v. Bravo*, (1987) 43 Cal.3d 600, 605; *People v. Crenshaw,* (1992) 9 Cal.App.4th 1403, 1408). Here, the trial court's ruling, and Respondent's contention, that "the search did not exceed the scope of the consent given" (RB 95), are not supported by substantial evidence. Respondent's arguments simply fail to provide any substantive support for the trial court's arbitrary ruling.

Respondent's arguments fail against the well-recognized restrictions that the Fourth Amendment places upon searches based on consent. (See

RB 98). According to Respondent, police suspicions of crimes concerning weapons, which are vocalized to the defendant, suffice to inform a reasonable person of the police's intent to search "any pocket" for drugs. This reasoning strains credulity and diminishes the protections against unreasonable searches and seizures provided by the Fourth Amendment.

Under *Florida v. Jimeno* (1991) 500 U.S. 248, the standard for measuring the scope of a suspect's consent is objective reasonableness. Here, a reasonable person would not have understood Officer's Painter's vocalized suspicions that Appellant was "'heavily armed,'" (RB 96), as a request to search for drugs. Thus, Officer Painter was required to confine his search to a *Terry* frisk, and thereby limit the search's "scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instrument[s] for the assault of the police officer." (*Terry v. Ohio* (1968) 392 U.S. 1, 29, 30-31). Instead, the Officer's thorough search of Appellant's beltline, pockets, and coin pockets violated Appellant's Fourth Amendment rights.

Respondent argues "because Officer Painter explicitly told Appellant that he had been informed that Appellant was a heavy narcotics user and heavily armed with a knife...it is reasonable for the officer and Appellant to have understood that the search was to encompass any pockets..." (RB 97). Respondent makes this argument, despite the officer's admission that he had requested to search Appellant only for a knife and could not "recall [] narrowing [the] scope of my search...." (*Id.* at 96). Likewise, Respondent admits that Officer Trudeau "was sure Painter did not mention drugs when Painter obtained [Appellant's] consent to search," (*Id.* at 97 (quotations omitted)), and that neither officer could fully recall where they had seized the drugs allegedly found on Appellant. (*Id.* at 98). Respondent's arguments do nothing to prove the context of Appellant's search, or cure the dearth of evidence supporting the trial court's erroneous

ruling.

a. Within the Scope of Appellant's Consent to A *Terry* Frisk for Weapons it was Objectively Unreasonable for the Livermore Police to Search Appellant's Coin Pocket for a Weapon.

Appellant ultimately acquiesced to Officer Painter's pressure to search his person for a knife. The circumstances surrounding Appellant's consent were proved at the preliminary hearing, which occurred five years before the officer's testimony at trial and the same year as the alleged offenses. At that time, Officer Painter repeatedly testified that he expressly requested only to search Appellant for weapons. (ART 253-255, 261). Officer Painter's testimony was later corroborated by Officer Trudeau who testified that he was *sure* that Officer Painter had not mentioned drugs when he obtained Appellant's consent. (RT 197). In light of these facts, Respondent tries to attack the credibility of Officer Painter's testimony at the preliminary hearing. (*Id.* at 98).

The evidence, based on the officers' testimony, establishes that it was objectively unreasonable for Officer Painter to search Appellant's coin pocket for a knife. Respondent's arguments stretch too far. The state insists that the officer's actions were reasonable since Appellant "could easily fit a small fold-up knife" within a "coin pocket [that] was two inches deep." (RB 98). Effectively, according to Respondent's description, such a knife would have resembled a nail clipper, been innocuous at best, and would not have warranted the label "heavily armed with a knife." (*Id.* at 96). Similarly, officers utilizing their flashlight would have assuredly noticed a bulge in such a small pocket. Perhaps, most tellingly is that Officer Painter testified that he did not expect to find a weapon in the pocket. (RT 133).

In sum, the officer's search of the coin pocket was not related to the

sole justification for the *Terry* search. The officers had originally requested to search Appellant for weapons. He had understood the request for a pat down for weapons. The police officer's canvas, however, exceeded the scope of Appellant's consent when he searched a pocket where a weapon could not reasonably be hidden. (See *Arketa, supra*, 10 Cal.App.3d at 467). A reasonable person would have understood the officer's requests to search as a request to search for weapons only. Likewise, a reasonable person would not believe that a weapon could be hidden in a two-inch deep coin pocket. Substantial evidence does not support the trial court's finding that Officer Painter's search did not exceed the scope of Appellant's consent.

b. The Livermore Police Unconstitutionally Searched Appellant's Car and his Person at the Police Station.

Immediately after Appellant was searched, Officer Trudeau searched Appellant's car. Since this search occurred contemporaneously with the unlawful search of Appellant's person, it was illegal for the same reasons as discussed above. Respondent wrongly contends that because the "police constitutionally searched his person at the traffic stop," there was "nothing wrong with the subsequent consent [to the] search of Appellant's car...the arrest, and the search incident to the arrest." (RB 99).

First, Respondent has failed to establish that Appellant's consent to search his person was voluntary or that the search did not exceed the scope of his consent. Appellant's assent to the searches was involuntary and is inseparable from the officers' unlawful conduct. Second, because of these two unlawful searches, Appellant was arrested on the basis of illegally seized evidence. Thus, since the arrest was not supported by any independent factual basis establishing probable cause, Appellant's seizure was illegal and all resulting "fruits" of the illegal seizure should have been suppressed. Third, at the police station Appellant was searched again. This

search was illegal as it was the direct result of the illegal arrest and all tainted evidence subsequently procured should have been suppressed.

c. Substantial Evidence Does not Support the Trial Court's Finding that the Livermore Police Did not Exceed the Scope of Appellant's Consent.

The trial court found that Officer Painter's search of Appellant did not exceed the scope of the consent given. (RT 220). The trial court's factual findings are not supported by substantial evidence. Here, based on the evidence, arguments and authorities presented in Appellant's Opening Brief, this Court, using its independent judgment, should find that his search and seizure was unreasonable in violation of the Fourth Amendment and Article I, sections 1, 2, 7, 13, 17, and 24 of the California Constitution.

Respondent's arguments to the contrary are baseless and hinge upon the reasoning that because trial courts have the power to judge the credibility of witnesses, this Court "must presume the trial court found that Painter asked Appellant if he could search him for narcotics and weapons." (RB 97). This Court should not base its holdings on presumptions inferred by Respondent, especially when these presumptions directly contradict the officer's plain testimony at the suppression and trial hearings. (ART 253-55 and 261). Respondent's arguments fail to counter Appellant's showing that the trial Court's factual findings are not supported by substantial evidence.

5. On March 7, 1987, Appellant was Coerced by the Livermore Police into Making Involuntary Statements.

The trial court correctly found that Appellant's right to fundamental fairness under the Fourteenth Amendment's Due Process Clause was violated by Officer Trudeau's false and broken promises. (ART 348). However, having found that Appellant's subsequent statements were

involuntary and worthy of suppression, the trial court wrongly refused to suppress all fruits derived from the involuntary statements. Instead, it dismissed Appellant's right to *fundamental fairness* as "technical." The trial court did not correctly evaluate the prejudicial effect of the introduction of the fingerprint evidence and Appellant's later incriminating statements on March 27 and 30, 1987, upon Appellant's constitutional rights.

Respondent challenges "[t]he trial court['s] erroneous[] hold[ing] that Appellant's March 7 statements to Officer Trudeau were involuntary." (RB 101).[17] Respondent attempts to detach the causal link between the constitutional violations suffered by Appellant on March 7 and the inculpatory evidence gained by the Livermore Police, through those violations, on March 27 and 30, 1987. Respondent fails to provide persuasive arguments or any evidence that would defeat the trial court's ruling on the involuntariness of the evidence. Similarly, Respondent fails to defend against Appellant's claim that the false promises used by police were so coercive that they violated fundamental fairness under the Fifth and Fourteenth Amendments.

---

[17] Respondent claims that the state has the ability to attack the trial court's ruling here, though the Court ultimately ruled in Respondent's favor by refusing to suppress evidence obtained through the fruit of the poisonous tree. Respondent claims this power through the "People's right" on an appeal "by the defendant and pursuant to the provisions of section 1252, to obtain review of allegedly erroneous rulings by the trial court in order to secure an affirmance of the judgment of conviction." (RB 101 (citing *People v. Braeske* (1979) 25 Cal.3d 691, 700-01)). While the People may have a right to challenge the trial court's determination on appeal, Respondent has not shown that the prosecution properly objected to the ruling at trial. It is manifestly unfair for Respondent to argue for the forfeiture of Appellant's claims for failure to object at trial, when Respondent cannot demonstrate that the prosecution has complied with the same rules of preservation.

a. Appellant's Arrest was Unlawful.

Prior to the Livermore Police Department's custodial interrogation of Appellant, he had been unlawfully detained, interrogated and seized without adequate and particularized reasonable suspicion, probable cause or *Miranda* warnings. The Livermore Police had also coerced Appellant into involuntarily consenting to a search of his car and person. During the custodial interrogation that followed, Officer Trudeau used false promises to coerce Appellant into revoking his assertion of Fifth Amendment rights and making involuntary and incriminating statements that would later be used by police to perpetrate his arrest and develop inculpating evidence on March 27 and 30, 1987.

Respondent contends that the false promises used by Officer Trudeau could not have induced Appellant to make involuntary statements since, "Trudeau made the promise after appellant made the incriminating statements." (RB 101 (emphasis omitted)). This argument is in error. Officer Trudeau made the false promises *while* Appellant was making incriminating statements and in order to induce Appellant into making *more* incriminating statements; particularly about his personal background. Moreover, statements made following the false promises, were later introduced against Appellant at his capital trial. Appellant was coerced into violating his constitutional rights under the Fourth and Fifth Amendment.

b. Appellant's Statements were Obtained in Violation of *Miranda*.

Following his arrest for narcotics possession, Appellant was taken to the police station and read his *Miranda* rights. Immediately thereafter, he expressly refused to talk to Trudeau about the items seized from him and invoked, as Officer Trudeau understood, his right to remain silent. (RT 202). Later that night, Trudeau promised that, if Appellant did not really

want to go to jail, Appellant could assist police. (*Id.* (citing RT 203)). Trudeau also promised that nothing Appellant said to law enforcement would be used against him. (*Ibid.*). Officer Trudeau used Appellant's concerns and false promises to cajole him into incriminating himself after he had invoked his *Miranda* rights.

In determining whether a statement based on a promise is voluntary, this Court in *People v. Vasila* asked two questions: "Was a promise of leniency either expressly made or implied, and if so, did that promise motivate the subject to speak?" (*Vasila, supra*, 38 Cal. App. 4th at 873 (citing *People v. Boyde* (1988) 46 Cal. 3d 212, 238)). In answering the second question, the Court in *Vasila* found that "the promises clearly motivated defendant's decision to lead investigators to the weapons. The turning point in the interrogation appears to have been [the investigator's] promise that defendant would be released on his own recognizance that day." (*Id.* at 876).

Respondent argues that because Appellant "reinitiated the conversation with Trudeau after he had invoked his right to silence earlier," the subsequent statements made by Appellant in response to a false promise, "could not have violated his *Miranda* rights. (RB 192). Respondent ignores the extremely coercive nature of false promises and ignores the lessons from *Vasila, supra*, 38 Cal.App.4th at 873. Officer Trudeau expressly made the false promise to Appellant. The promise motivated Appellant to speak because "the turning point in the interrogation appears to have been [the investigator's] promise that defendant would be released on his own recognizance that day." (*Id.* at 876). Respondent cannot rebut the fact that - but for Officer Trudeau's false promise - Appellant would not have relinquished his right to remain silent, offered to work as an informant, and related the involuntary statements. Appellant's *Miranda* rights were violated when Officer Trudeau failed to "scrupulously

honor" his promises, which had coerced Appellant into waiving his constitutional rights.

c. Appellant was Involuntarily Coerced into Incriminating Himself by False Promises of Leniency that Violated his Right to Fundamental Fairness Under the Due Process Clause of the Fourteenth Amendment.

The trial court found that Appellant's constitutional rights under the Due Process clause were violated by his involuntary and incriminating responses to coercive false promises by law enforcement. (ART 347). The trial court, however, wrongly found that the violation of Appellant's fundamental right to fairness did not warrant the suppression of evidence later obtained in violation of the fruit of the poisonous tree doctrine. (See *Wong Sun, supra,* 371 U.S. at 471). The trial court's conclusion was wrong. But for the involuntary statements made by Appellant in response to fundamentally unfair tactics by law enforcement, the Livermore Police would have never collected the fingerprint evidence and incriminating statements on March 27 and 30, 1987. Thus, the fruit of the poisonous tree grows from the violation of Appellant's constitutional rights perpetrated by Officer Trudeau when he illegally detained, seized, and interrogated Appellant, and used false promises to coerce Appellant into making involuntary statements.

Respondent attempts to defeat the characterization of Officer Trudeau's statements as false promises. Respondent does so knowing full well that because Appellant "reasonably expect[ed] benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement" use of false promises "is deemed to render the statement involuntary and inadmissible." (*Vasila, supra,* 38 Cal.App.4th at 874 (citations omitted)). In this effort, Respondent

characterizes the officer's promise not to use Appellant's statements as actually meaning "[they] would not be used in a court of law to prosecute him for the drug charges for which the police had arrested him." (RB 103). This strained interpretation incredulously defines "law enforcement" by excluding police and limiting the term to include only the prosecutor. This is assuredly not what Appellant understood the promise to mean Respondent's argument also fail to prove that the trial court wrongly determined that the statements were involuntary based on substantial evidence.

6. The Illegality of the Detention, Search, Arrest, and Interrogation of Appellant Requires Suppression of all Evidence Obtained on March 7, 27, and 30, 1987.

By unlawfully detaining, searching, and arresting Appellant, the police violated his rights under the Fourth Amendment to the U.S. Constitution and Article I, sections 7 and 24 of the California Constitution. By inducing Appellant, through false promises, to make involuntary and incriminating statements despite having invoked his right to silence, the police violated his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article I, sections 1, 7, 13, and 24 of the California Constitution. By using the tainted evidence at trial to obtain a death sentence, the state violated the "heightened reliability" requirement imposed by the Eighth Amendment and Article I, section 17 of the California Constitution. The only remedy that may redress these constitutional violations is suppression of all the tainted evidence earned by the police through these coercive and illegal tactics, and later used by the state prosecutor to convict Appellant of a capital crime and sentence him to death. The exclusionary rule is the principal means of discouraging lawless conduct by law enforcement agents. (See *Weeks v. United States* (1914)

232 U.S. 383, 391-93).

Respondent fails to support its assertion that "the fingerprint evidence did not come by exploitation of that illegality, but by means sufficiently distinguishable to be purged of the primary taint." (RB 106). Respondent cannot rebut the fact that, without the incriminating evidence, which includes Appellant's driver's license and his coerced statements to Officer Trudeau on March 7, 27, and 30, the police would have never become suspicious of Appellant. Moreover, Respondent's arguments do not disprove Appellant's allegations that the trial court's determination was not supported by substantial evidence.

a. Suppression of Fingerprint Evidence and Inculpatory Statements Given by Appellant On March 27 And March 30, 1987 Flows From the Violations of Appellant's Rights Under the Fourth and Fifth Amendment on March 7, 1987.

Appellant's unlawful detention, interrogation, and search led directly and immediately to his narcotics arrest. In turn, the illegal arrest led directly and immediately to the seizure of Appellant's driver's license and the coercion of incriminating statements from Appellant. No attenuation or independent bases separate these events. Thus, Respondent wrongly concludes that, "even if appellant suffered constitutional violations on March 7, 1987, in addition to the elicitation...of involuntary statements, suppression of the fingerprint evidence remains out of order." (RB 106).

When Officer Trudeau broke his promise to Appellant by disclosing Appellant's involuntary statements to Officer Robertson, those statements and the unlawful seizure of Appellant's driver's license were the only reason that the Livermore Police resubmitted Appellant's fingerprints to the DOJ laboratory. The fruits of the illegal detention, interrogation, search and arrest of Appellant on March 7, 1987 thus include the evidence from

the second comparison of Appellant's fingerprints. Every event in this chain is connected to the illegal acts by Livermore Police and each piece of evidence subsequently gained is poisonous fruit. (*Wong Sun, supra,* 371 U.S. at 471).

Likewise, the taint runs to Appellant's arrest on March 27, 1987, and the resulting involuntary and incriminating statements he made on March 27 and 30. If the fingerprints had not been resubmitted, based on the unlawful detention of Appellant and unlawful seizure of his driver's license, Appellant would not have been arrested on March 27 and would not have been questioned about the Olsson homicide. Likewise, without the tainted fingerprint evidence, Appellant would not have been confronted with the allegation that his fingerprints were found on the knife and he would not have given three separate incriminating statements to law enforcement. The "fruits" of the misconduct by Livermore Police on March 7 thus include the three statements Appellant made following his March 27 arrest.

Respondent wrongly argues that Appellant is not "due suppression of the fingerprint evidence the police later uncovered against him, or the inculpatory statements he gave police on March 27 and 30." (RB 104). Without suppression, the lawless conduct exhibited by the police would go without redress and there would be no deterrence to future constitutional violations by the Livermore police department. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655). The fingerprint evidence and involuntary statements were the direct and immediate result of the chain of illegal events and nothing happened to purge the taint. (*Brown, supra,* 422 U.S. at 602). All the evidence was garnered by exploitation of illegal actions by the Livermore Police. (See *Lockridge v. Superior Court* (1970) 3 Cal. 3d 166, 170).

b. Substantial Evidence does not Support the Trial Court's Finding that the Discovery of Evidence Was the Result of Investigative Serendipity.

The trial court's determination and Respondent's argument that "the fingerprint evidence sought to be suppressed was not tainted by the illegally obtained statements and is admissible" is not supported by substantial evidence. (RB 104 (citing RT 221)). Likewise, the trial court's ruling that "police would inevitably have again compared [appellant's] prints with those found on the knife found at the murder scene" is not supported by even a preponderance of the evidence. (RB 106 (citing RT 222)). Respondent's arguments to the contrary do not remedy the constitutional violations suffered by Appellant, or support the trial court's rulings.

Respondent argues that the exclusionary rule should not apply here because, "deterrence can have its effect only when it can be said that an object of the illegal conduct was the securing of the evidence sought to be suppressed." (RB 105). In Respondent's view, the Livermore Police had "no intention or expectation that evidence related to the Olsson investigation would surface from his March 7 conversation with Appellant." (*Ibid.*). Respondent's arguments miss the mark.

The illegality of Appellant's detention, interrogation, search and arrest was based on an "investigatory detention" and fishing expedition embarked upon by Livermore Police. At the time, Livermore Police sought to obtain *any* incriminating evidence and the particularity of the search matters not as much as the particularity of the tainted evidence they later obtained. Thus, because Livermore Police were seeking to obtain any incriminating evidence, it can be said that "an object of the illegal conduct was the securing of the evidence," which Appellant now seeks to suppress. (*Brown, supra,* 422 U.S. at 605 (footnote omitted)). Thus, the proper

question is not whether the police were seeking the evidence they later found, but whether the police's intent to make "something turn up" extended to the evidence later discovered.[18] (*Bacall, supra*, 443 F.2d at 1056; see also *Rodriguez, supra*, 21 Cal.App.4th at 232).

Respondent argues that Officer Trudeau "serendipitously" connected Appellant to the Olsson homicide after "forgetting" to give Appellant his driver's license back.[19] Respondent characterizes the officer's possession of Appellant's driver's license as "serendipitous" or "forgetful." (RB 105). The fact that discovery may have been "unexpected," (See *People v. Neely* (1999) 70 Cal.App.4th 767, 789), does not change the fact that Officer

---

[18] In *Bacall*, the evidence learned through what the court termed "investigative serendipity" was "obtained without resort to any clue or knowledge gained from the items unlawfully seized" or, at most, "any such leads as may have been obtained were *de minimis*." (*Bacall, supra,* 443 F.3d at 1057, 1059). Here, in contrast, the fingerprint evidence was discovered based entirely upon the unlawful seizure of Appellant on March 7, 1987 and the unlawful seizure of his driver's license from March 7 to March 17, 1987.

[19] This case is distinguishable from those in which the police commit misconduct during the course of investigating a specific crime and serendipitously discover evidence regarding another crime altogether. (See *United States v. Williams* (9th Cir. 1971) 436 F.2d 1170-72). In *Williams*, after an illegal arrest, the police asked a neighbor to care for the defendant's cat when the neighbor blurted out damning information. The Ninth Circuit held that this act purged the taint of the illegal arrest because the officer's had no investigative intent whatsoever when they sought out the neighbor. (*Ibid.*). In this case, it was not "serendipity" that Appellant's unlawful detention for questioning led, by way of an unlawful search, to his narcotics arrest and the subsequent making of involuntary statements that linked him to another crime altogether. It was instead exactly what Painter and Trudeau intended from their misconduct in the first instance, a plan to gather evidence for other crimes.

Trudeau had illegally seized the license.[20] Thus, whether or not Appellant came to be viewed as a suspect in the Olsson murder fortuitously or by "circumstance," these characterizations do not change the fact that the police officer's objective in illegally detaining Appellant was securing tainted and incriminating evidence. Respondent has wholly failed to show that the evidence was secured by "happenstance" free of illegal and unconstitutional taint. (Contra *People v. Griffin* (1976) 59 Cal.App.3d 532, 537).

Likewise, Respondent fails to support the trial court's determination that the Livermore Police would have "inevitably discovered" the fingerprint evidence. (RT 347-349). Respondent's arguments are based on the "possibility" that Livermore Police could have inevitably discovered the evidence. Prior to Appellant's seizure, no fingerprint match had been made, no investigatory leads to Appellant through neighborhood canvassing had been obtained, and there were no definite plans by Livermore Police to recheck houses in the neighborhood. In fact, since Livermore Police did not re-canvass the neighborhood until after Appellant's arrest, but for Appellant's unlawful detention and seizure on March 7, 1987 no investigation would have revealed that Appellant once lived in proximity of Ms. Olsson and, ultimately, no evidence would have been introduced in support of the fingerprint evidence match.

Respondent argues that because Sergeant Stewart *wanted* his officers to re-canvass the neighborhood this fact suffices to prove that they would have "inevitably discovered" that Appellant lived in the neighborhood.

---

[20] As the Court of Appeal has explained: "We concede that an illegal act by a peace officer may yield *unexpected* evidence subject to exclusion. Illegal entry into a bordello may reveal a narcotics laboratory, or beating a rape suspect may yield a confession to murder, all quite unexpectedly. But in such examples, there is present an intention *to get something*." (*Neely, supra,* 70 Cal. App. 4th at 789 (emphasis in original)).

This reasoning is attenuated at best, and ludicrous when Respondent uses it to argue that because Sergeant Stewart wanted a second canvassing the police would have "inevitably" re-compared Appellant's fingerprints. This is especially true in light of the fact that the police had previously searched the neighborhood without identifying Appellant, and had previously submitted his fingerprints, which did not return a match. (RT 130 and 140-1). Respondent's arguments that if the Livermore Police "had a chance to carry out [their] plans..." they would have identified Appellant's residence and resubmitted his fingerprints, is entirely speculative.

The trial court's "investigative serendipity" and "inevitable discovery" rulings are not supported, respectively, by substantial evidence or a preponderance of the evidence. Testimony submitted at the suppression hearing proved that the Livermore Police were on an investigatory "fishing expedition" for any evidence at the time of Appellant's arrest on March 7. Their later suspicions, stemming from the unlawful seizure of Appellant's driver's license, could hardly be characterized as "fortuitous" as they were based on conduct aimed at illegally obtaining evidence in violation of Appellant's rights. Likewise, at the suppression hearing, no testimony established a definitive *likelihood* that Livermore Police would have resubmitted the fingerprint evidence or obtained any evidence on their own accord that would have corroborated suspicions of Appellant. In sum, Respondent's and the trial court's conclusion that the evidence was "fortuitously discovered," but would have been "inevitably discovered" is only supported by speculative reasoning and scant evidence.

E. Conclusion.

The Livermore Police Department's misconduct should not be sanctioned and the fruits of their illegality should be suppressed. Fingerprint evidence and incriminating statements obtained by the Livermore Police from Appellant's unlawful seizure on March 7, 1987 should have been suppressed. The trial court's admission of the evidence violated Appellant's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I of the California Constitution.

The only evidence used by the prosecution to prove Appellant's guilt were allegations that Appellant's "fingerprints" matched the fingerprints on the knife; and the statements made by Appellant on March 27 and 30, 1987, all of which was obtained illegally as the result of a fishing expedition for incriminating evidence conducted by police. Had this evidence been properly excluded, Appellant would not have been convicted and sentenced to death. Likewise, had this evidence been excluded, Appellant's rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution, as well as, under Article I, sections 1, 4, 13, 15, 17, and 24 of the California Constitution, would not have been violated. Neither substantial evidence nor a preponderance of the evidence supports the trial court's determinations that this evidence was admissible. Moreover, the resulting errors were not harmless beyond a reasonable doubt and created a fundamentally unfair trial that led to Appellant's convictions and death sentence.

III. THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS THAT WERE UNLAWFULLY AND INVOLUNTARILY OBTAINED BY LIVERMORE LAW ENFORCEMENT.

A. Introduction.

On March 27 and 30, 1987, members of the Livermore Police Department and Alameda County District Attorney's Office coerced Mr. Tully into making involuntary statements and waivers of his constitutional rights. The statements were erroneously and prejudicially admitted by the trial court and exploited by the prosecutor. The statements were obtained in violation of Appellant's Fifth Amendment right against self-incrimination, his Fourteenth Amendment due process rights, as well as Article I sections 7, 15, and 24 of the California Constitution. The trial court's failure to suppress the statements violated Appellant's Eighth Amendment and Article I right to "heightened reliability" at all phases of a capital case. (See e.g. *Sumner v. Shuman* (1987) 483 U.S. 66, 72; *Beck v. Alabama* (1980) 447 U.S. 625, 638; and *People v. Hernandez* (2003) 30 Cal. 4th 835, 878).

When a statement obtained in violation of the Fifth or Fourteenth Amendments is erroneously admitted into evidence, the conviction may only be affirmed if the state can establish that the error is harmless beyond a reasonable doubt. (See *People v. Johnson* (1993) 6 Cal.4th 1, 30-32; and *People v. Cahill* (1993) 5 Cal.4th 478, 509-510). Applying the standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24, admission of Appellant's statements of March 27 and March 30 was anything but harmless. His convictions must be reversed.

B. The Facts

1. March 27, 1987.

Respondent concedes that Appellant was arrested on March 27, 1987 on two narcotics warrants. Following his arrest, Appellant, without shoes or shirt, was taken to the Livermore Police Station for interrogation. He spent the next six hours waiting to be interrogated, and then was interrogated for the next six hours. Respondent concedes that Appellant's detention and interrogation stretched over twelve (12) hours from the morning of March 27 to the early morning of March 28. (See RB 110 and 115).

Respondent agrees that the Livermore Police told Appellant's wife, Vicky Tully, to go to the Livermore Police Station on March 27. (RT 65-69). At the time, she was under investigation for the commission of check fraud. Respondent argues that the police did not "arrest her on the check fraud but referred it to the District Attorney's Office for a determination on possible prosecution." (RB 111). Respondent neglects to mention that the police questioned Vicky at length about the check fraud and surreptitiously taped the interview. During this interview, several times, Vicky was told that police were arranging a meeting between her and Appellant. Based on this pressure, Vicky ultimately confessed to the check fraud allegations. (See I AOB 85-87).

Six hours after his arrest, Appellant was interrogated by Livermore police officers. Respondent concedes that the opening two hours of the interview were not taped. (RB 111). Respondent acknowledges that, prior to the interrogation - Appellant was given candy bars, a coke and cigarettes – gratuitous gestures that would be repeated throughout the interrogation. (*Ibid.*). Respondent acknowledges that the police spoke to Appellant about booking information and his residential history before advising Appellant of his *Miranda* rights. (*Ibid.*). Respondent neglects, however, to

acknowledge that during the two hour span when the interrogation was not recorded, the exchanges were heated. Respondent fails to mention that Officer Robertson falsely told Appellant that five DOJ fingerprint analysts had matched his fingerprints to the Olsson homicide. (I AOB 67 (citing People's Trial Exhibit 4)). Respondent fails to mention that the officers informed Appellant of the check fraud charges pending against his wife. Respondent fails to mention that Appellant was never given a shirt or shoes during the 12 plus hour period.

Two hours before midnight, Officer Robinson began questioning Appellant about taking a polygraph examination. At that point, Appellant requested the presence of counsel three times. (People's Trial Exhibit 5D at 73 ("I think it would behoove me to consult a lawyer.") ("I think it would be best if I consult a lawyer.") ("That's right. I don't know, that's why I'd like to talk to somebody who does.")).

Respondent concedes that the Livermore Police took a fifteen-minute break after Appellant requested counsel. (RB 113-14). Respondent concedes that at this time, Officers Robertson, Newton and Trudeau discussed the interrogation proceedings and decided to substitute Officer Trudeau for Officer Newton. (*Ibid.*). Officer Robertson and Trudeau reinitiated the interrogation, despite having heard Appellant's three prior requests for counsel. Moreover, it was only after being reintroduced to Officer Trudeau, a person he trusted, that Appellant indicated that he may not need counsel and was "all right." (See RB 115).

The interrogation continued for the next two hours. Appellant did not make any admissions about the homicide, but did make statements regarding news he had heard about the homicide that would be used by the prosecution during his capital trial. (RB 115 (citing to RB 25-26)). Respondent wrongly claims that during this time Vicky was waiting in the police lobby. (*Ibid.*). In fact, sometime after 10:30 PM, Officer Trudeau

had been sent to retrieve Vicky from her home and return her to the station. (See I AOB 70 n. 18).

After midnight, and following the end of Appellant's interrogation, Vicky was brought into the interrogation room to speak with her husband, while Officer Robertson stood by. Mr. and Mrs. Tully briefly spoke, and Vicky related police threats against her and the Tully family. After their meeting, Appellant was sent to the Santa Rita Jail and Vicky went home.

2. March 30, 1987.

On March 30, 1987 Officers Robertson and Newton contacted Vicky and interviewed her again. She informed the officers about the details of her conversation with Appellant on March 27, 1987. She told them that Appellant had been a percipient witness to the homicide. She recited Appellant's account and the fact that a man named Thomas "Doubting Thomas" Pillard, a Hells Angels member, had raped and killed Ms. Olsson. Vicky told investigators that she feared retaliation by Doubting Thomas and the Hells Angels motorcycle gang.

Respondent acknowledges that to ameliorate Vicky's fears, Officers Robertson and Trudeau discussed enrolling both her and Appellant in the state's Witness protection program. (See RB 116). Respondent dodges the fact that Officer Robertson analogized Vicky and Appellant's situation to a case where a participant in a murder "turned state's evidence" and is "out in his own business right now." (People's Trial Exhibit 8B at p. 10-11). Later that day, the officers used Vicky's request for witness protection to induce Appellant to speak based on his wife's fears. (I AOB 71 (citing RT 73, 219-21)).

Thereafter, the officers went to talk with Appellant at the Santa Rita

Jail. Vicky Tully was escorted to the jail and drove her own car.[21] Respondent admits that the first thirty minutes of the officer's interrogation of Appellant on March 30 were not recorded. (RB 117). During this critical portion of the interrogation, Officers Newton and Robertson discussed with Appellant the chances of enrolling the Tully family in the state's Witness protection program. (RT 130-131 and 203-04). They also told Appellant that his wife was likely to be charged and incarcerated for the check fraud charges and that she could also be charged as an accessory to the Olsson homicide. (See I AOB 71-72 (citing RT 70, 130, 203-204, 220-21)).

Respondent concedes that when police "asked him if he wanted to give an additional statement, Appellant did not respond." (RB 117 (citation omitted)). Respondent also concedes that in response to Appellant's silence, the officers discussed his potential enrollment in the state's Witness protection program as a means of alleviating any fears about Doubting Thomas. (*Ibid.*). They also discussed Vicky's concerns and her request for enrollment in the program. Induced by the information, Respondent concedes that Appellant then asked about "what he would receive from [the] program." (*Ibid.*). The officers also told Appellant that Vicky said he

[21]According to the testimony of the police, Vicky Tully voluntarily contacted them. She then told Robertson and Newton the substance of the conversation she had with her husband on March 27, 1987. (RT 64-69). During the recorded portion of the interview, Vicky expressed reluctance to provide any information or to help the police to get her husband to talk to them. Newton responded by telling her about a 1981 homicide case he had worked where two drug dealers testified in court. (People's Trial Exhibit 8B at 2-3, 10-12). Later, the police asked Vicky if she would stay to talk to the district attorney, "who is on his way over here to talk to us about something else." (*Id.* at 13). Her meeting with the district attorney was not recorded. After the interview, Newton and Robertson drove out to the jail to interview Appellant about Vicky's statements and also escorted Vicky to the jail. According to Newton, he told Vicky that he would see if her meeting with Appellant "was possible." (RT 214). Vicky was thus directed or encouraged to accompany the police officers to the jail.

wanted to "change his story." (*Ibid.*). They then allowed Appellant to speak with Vicky before continuing the interrogation.

During this short unrecorded conversation, Respondent concedes that Vicky relayed to Appellant her fears for herself and the Tully children. These fears stemmed from Appellant's arrest for capital murder and because the "police 'were holding the check issue' over her head...[and] were threatening her with charges as an accessory to murder." (RB 119). Respondent also concedes that the prospect of the Witness protection program "played the "key" part in appellant's decision to talk to the police." (*Id.* at 120). Shortly thereafter, police then had "Mrs. Tully leave the room." (*Id.* at 118).

At 8:08 p.m., officers began recording their second interrogation of Appellant on March 30th. Appellant was given his *Miranda* rights, waived them and immediately asked the police to record information about "the Witness protection program. (RB 118). In exchange, Appellant gave the statement detailing Thomas Doubting's murder of Ms. Olsson. (See I AOB 73). This statement was later presented to the jury by the prosecution. (*See* People's Trial Exhibit 6C)). Officer Robertson then called Deputy District Attorney Fraser and played Appellant's statements for him. Dep. District Attorney Fraser then interviewed Appellant at the jail. A tape of that interview was also played for the jury by the prosecution. (See People's Trial Exhibit 9c)).

C. Appellant's Arguments are not Procedurally Barred.

Respondent contends that many of Appellant's claims are procedurally barred. In Respondent's view, Appellant's arguments and objections at trial in support of suppressing his March 27 and March 30 statements are limited to six claims: 1) his March 27 statements must be suppressed because they were given in violation of his right to counsel

under *Miranda*; 2) his March 30 statements must be suppressed because they were given in violation of his right to counsel under *Miranda*; 3) his March 30 statement must be suppressed because, during the untaped portion of the March 30 interview, police had denied his right to remain silent under *Miranda*; 4) his March 30 statements were made involuntarily because he had been coerced into speaking based on promises that he would be enrolled in the Witness protection program; 5) police had unconstitutionally used his wife as an "agent" to induce Appellant to speak; and 6) his second statement to Deputy District Attorney Fraser was involuntary and should have been excluded as fruit of the poisonous tree. (See RB 124).

Respondent then argues that five grounds in Appellant's Opening Brief have been waived, including challenges to: 1) the validity of Appellant's waiver of his *Miranda* rights on March 27. (RB 124); 2) the voluntariness of Appellant's statements on March 27 based on the use of Officer Trudeau. (*Ibid.*); 3) the voluntariness of Appellant's statements on March 27 in response to promises concerning his enrollment in the Witness protection program. (*Id.* at 127-29); 4) the validity of Appellant's waiver of his *Miranda* rights on March 30. (*Id.* at 130); and 5) the voluntary nature of Appellant's statements on March 30, 1987. (*Id.* at 137).[22]

---

[22] Respondent claims that this argument is also procedurally barred because Appellant did not present evidence of a past relationship with Officer Trudeau at the suppression hearing. However, Respondent ignores the "past relationship" Appellant and Officer Trudeau had from their contact on March 7, 1987. (RT 1928-29). There, Officer Trudeau had released Appellant in exchange for future cooperation. Officer Trudeau had promised Appellant that he would not reveal any personal information revealed by Appellant, and then interrogated him about his life history and current social circumstances. Undoubtedly, Officer Trudeau had developed a relationship based on trust with Appellant. This was proved on March 27, 1987, when Appellant stated, just as

None of Respondent's procedural arguments hold merit. Appellant's trial counsel effectively pled the arguments and objections that are raised in Appellant's Opening Brief and further explained herein. Appellant recognizes that "objections and claims must be initiated in the trial court so that the court can take steps to prevent error from infecting the remainder of the trial, so that an adequate record may be developed, and so that the court, acting as a finder of fact that has observed the participants, may reach conclusions on matters such as credibility and intent." (*Williams*, *supra,* 43 Cal.4th at 624). Appellant however, adequately objected on all available constitutional bases before the trial court and his arguments are now preserved on appeal.

As Respondent previously conceded, Appellant challenged the validity of the waiver of his right to counsel given prior to the March 27 statements. (RB 120). Likewise, this challenge was based on the violations of his *Miranda* rights that had occurred after Appellant invoked his right to counsel and Officer Trudeau reinitiated a new round of interrogation. (*Id.*

Officer Trudeau joined the interrogation, "I trust you and believe you." (People's Trial Exhibit 5D at 103).

Here, reliance on *In Re Arturo D.* (2002) 27 Cal 4th 60, 77 n. 18, is misplaced because Appellant's statements, in reference to the sudden appearance of Officer Trudeau, reflect a prior relationship. Appellant expressly confirmed this prior relationship in response to Officer Robertson's question that, "Do You Know Officer Trudeau?" (RB 114-15 (citing RT 140-41; People's Exhibit 5D at 74)). It is fallacious for Respondent to argue that the trial court was unaware, At the time Appellant's motion to suppress was decided, of Officer Trudeau and Appellant's prior relationship. This is especially true given the context of Officer Robertson's decision to introduce Officer Trudeau into the interrogation. (RT 140-41, 149-51, 170). Appellant is not therefore barred from arguing that the trial court's decision, that Appellant's statements were not involuntary or coerced, was erroneous and arbitrary in light of its knowledge that Livermore police used Officer Trudeau's false repertoire with Appellant to coerce him into making incriminating statements.

at 115). Finally, Respondent concedes that at trial, Appellant argued that his statements on March 30 were made in continuing violation of his *Miranda* rights. (*Id.* at 121).

While Respondent may "feel [ ] obliged to defend [the trial court's ruling] on all available grounds," the state is wrong to insist that "[t]his Court has no obligation to address the merits of waived claims [ ] and should instead reject assignments on error for procedural failure to object grounds." (RB 124 n. 15 (quotations omitted)).[23] This argument makes no sense because Appellant's arguments should not be waived. Appellant's trial counsel challenged the March 27 and 30 statements on all available grounds under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution.[24]

---

[23] Respondent errors in arguing that this Court should procedurally bar Appellant's claim because federal courts will not later review this Court's decision. (RB 124 n. 15). First, Respondent must incorrectly believe that it is this Court's duty to predict what the federal courts will do with Appellant's case on collateral review, instead of reviewing the record of Appellant's arguments on direct appeal. Second, Respondent's citation to *People v. Green* (1980) 27 Cal.3d 1 and *People v. Milner* (1988) 45 Cal. 3d 236, for the proposition that this Court is foreclosed from hearing Appellant's arguments ignores the exceptions to the contemporaneous objection rule laid out in Claim II and rediscussed here. (See *Vera, supra,* 15 Cal.4th at 276-277). Third, Respondent's argument that the federal courts are precluded from reviewing claims dismissed for want of contemporaneous objection is also erroneous.

[24] Additionally, on November, 19, 1987, April 18, 1988 and June 6, 1988 three hearings concerned with information relevant to Appellant's suppression claims were not recorded. Appellant's claims cannot be forfeited because the record does not demonstrate that Appellant failed to lodge the relevant objections to the admission of the evidence. (*Cf. Young, supra,* 34 Cal.4th at 1203).

D. Appellant's Coerced and Involuntary Statements on March 27, 1987 Should have been Suppressed Since they were Gained in Violation of his Rights Under the Fifth, Sixth, Eighth And Fourteenth Amendments and Article I Section 1, 7, 15, and 24 of the California Constitution.

During his Mach 27, 1987 tape recorded interview, Appellant unequivocally invoked his right to counsel on three separate occasions. Instead of honoring these requests, Livermore Police officers continued the interrogation and then took a break, switched tactics, and reinitiated the interrogation. The officers also used false promises of leniency concerning Appellant's enrollment in the state's Witness protection program in order to induce Appellant to speak. Likewise, the officers leveraged criminal charges against Appellant's wife to coerce Appellant into waiving his *Miranda* rights and incriminating himself in the Olsson homicide. The record and facts establish a violation of Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

In the last four years, this Court has issued twelve (12) opinions in capital cases denying claims premised on motions to suppress.[25] In not one of these cases did this Court find a violation of the petitioner's constitutional rights. Appellant's case is factually distinguishable from the cases this Court has been presented with in the last four years. Appellant's case involves a mixture of police techniques that induced and coerced Appellant into making incriminating statements. Livermore police officers: 1) made promises of leniency and enrollment in witness protection; 2) utilized threats of a lie-detector; 3) failed to respect Appellant's invocation

---

[25] (See *People v. Martinez* (2010) 47 Cal.4th 911; *People v. Carrington* (2009) 47 Cal.4th 145; *People v. Dykes* (2009) 46 Cal.4th 731; *People v. Davis* (2009) 46 Cal.4th 539; *People v. Hawthorne* (2009) 46 Cal.4th 67; *People v. DePriest* (2007) 42 Cal.4th 1; *People v. Leonard* (2007) 40 Cal.4th 1370; *People v. Smith* (2007) 40 Cal.4th 483; *Zamudio, supra,* 43 Cal.4th 327; *People v. Rundle* (2008) 43 Cal.4th 76,; *People v. Tate* (2010) 49 Cal.4th 635; and *People v. Williams* (2010) 49 Cal.4th 405).

of his right to counsel; 4) lied to Appellant concerning material evidence; 5) used Appellant's wife as a police decoy; and 6) interviewed Appellant over for nearly twelve (12) hours. As will be shown, these idiosyncratic facts render Appellant's case distinguishable from other capital cases that have come before this court and prove that Appellant's state and federal constitutional rights were violated by Livermore police officers.

1. Appellant Properly Invoked his Rights Under *Miranda* and the Fifth Amendment by Unequivocally Requesting the Presence of Counsel.

Under both state and federal constitutional law, when a suspect is in custody and indicates that he wishes to consult with an attorney, the interrogation must cease. (*Miranda, supra,* 384 U.S. at 444-45; and *People v. Johnson* (1993) 6 Cal.4th 1, 27). In fact, it is a "bright-line" rule that once the right to counsel has been invoked, all questioning must cease. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-85). This protection is guaranteed by the Constitution in order to protect criminal suspects from "badgering" by law enforcement, which is intended to "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsels' assistance." (*Smith v. Illinois* (1984) 469 U.S. 91, 98).

As Respondent recognizes, the standard to determine the invocation of Fifth Amendment rights is whether a suspect's requests for counsel would lead a "reasonable police officer in the circumstances [to] understand the statement to be a request for an attorney." (RB 125 (citing *Davis v. United States* (1994) 512 U.S. 452)). Respondent fails to recognize that this Court has held that, in order to invoke the defendants Fifth and Sixth Amendment rights, "no particular form of words or conduct is necessary. A suspect may indicate such a wish in many ways." (*People v. Randall* (1970) 1 Cal.3d 948, 955). Here, Respondent's misguided analysis would

have this Court contradict its prior rulings by holding that a criminal suspect must assert his rights "with unmistakable clarity" and resolving any ambiguity against the defendant. (Contra *Cahill, supra,* 5 Cal.4th at 510 n. 17). In effect, Respondent would have this Court "subvert *Miranda*'s prophylactic intent." (*Ibid.*).

Appellant unequivocally asserted his rights by requesting counsel's assistance. Appellant stated: 1) "I think it would behoove me to consult a lawyer;" 2) "I think it would be best if I consult a lawyer;" and 3) "That's right. I don't know, that's why I'd like to talk to somebody who does [now]." (People's Trial Exhibit 5D, at 73). There is no trace of ambiguity in these three successive and polite requests for the assistance of counsel. Based on Appellant's words and conduct, a reasonable officer would have recognized the "bright-line" invocation of his rights under the Fifth, Sixth Eighth and Fourteenth Amendments.

Moreover, the Livermore Police officers' response to Appellant's requests for counsel exhibited recognition that he had invoked his constitutional rights. They no longer threatened Appellant with the lie-detector test.[26] They halted the interrogation and took a fifteen minute

---

[26] In the past four years, this Court has not been presented with a case involving similarly threatening use of polygraphs or other lie-detector tests. In *Smith, supra,* 40 Cal.4th 483 the defendant alleged that incriminating statements were coerced and resulted from police threats to use a fake "Neutron - Proton Negligence Intelligence Test." (*Id.* at 501). This Court denied his claims that his *Miranda* rights were violated and that his confession was involuntary due to the questionable police tactics. In *Martinez, supra,* 47 Cal.4th 911, the defendant claimed a violation of his *Miranda* rights resulting from threats by police officers to use a polygraph machine during the interrogation. In response, the defendant had stated that "I think I should talk to a lawyer before I decide to take a polygraph." (*Id.* at 946). Nevertheless, this Court found that the Defendant failed to fully invoke his right to counsel. (*Ibid.*).

Neither case is controlling here. First, the threat of a lie detector test was used by Alameda county officials to coerce Appellant into confessing

break. (RT 117; see also Trial Exhibit 5D at 74). They made a substitution and inserted Officer Trudeau into the interrogation lineup. They utilized the false rapport Officer Trudeau had established with Appellant when previously, on March 7, 1987, Officer Trudeau had spuriously promised to keep confidential personal information about Appellant (a promise that he had never intended to keep). After the short break they reinitiated the interrogation knowing that Appellant had previously invoked his rights. In no way did the officers respect the invocation of Appellant's rights.

In a failed effort to defeat Appellant's unequivocal requests for counsel, Respondent mischaracterizes Appellant's statements. According to Respondent, "context [] shows that Appellant meant he wanted counsel before submitting to any polygraph questions." (RB 126 (quotations and emphasis omitted)). Respondent puts words in Appellant's mouth and diverts from the clear language in the record. Appellant said, "I think it would be best if I consult a lawyer." Appellant did not say "I think it would be best if I consult a lawyer (concerning polygraph questions)." Appellant said: "I think it would behoove me to consult a lawyer," without adding "about taking a polygraph exam." Appellant did explain that he "didn't know (about polygraph)" and again invoked his right to counsel and by expressing "I'd like to talk to somebody who does." (People's Trial Exhibit 5D at 73).

---

to the Olsson homicide. This is dissimilar to *Martinez* where, as this Court found, the detectives respected the defendant's invocation for over a day and "did not ask defendant about the case again until the following morning, December 6, 1996, about 9:00 a.m." (*Martinez, supra,* 47 Cal.4th at 946). Second, Appellant was peppered by questionable police tactics. When Appellant invoked his right to an attorney, in response to threats of the use of polygraph machine, the Alameda county officers took a brief break before reinitiating the interrogation moments later with new interrogators. Third, Appellant's repeated requests for counsel cannot be characterized as ambiguous or conditional. Indeed, unlike in *Martinez*, in three successive statements Appellant invoked his right to counsel.

Following the break, Livermore Police officers reinitiated the interrogation around 10 p.m. By this time, Appellant had been detained for ten (10) hours and had been interrogated for over four hours - without shirt or shoes. He knew that the same officers had previously interrogated his wife. A reasonable person in Appellant's position would have believed that their invocation of rights did not matter, or was meaningless in light of the continued and persistent "badgering" by law enforcement. With no prospect of end in sight, Appellant gave in because the officers had badgered him to his limit.

Respondent claims that the officers' continuing violations of *Miranda* occurred because the context surrounding Appellant's invocations of his rights was ambiguous. The Supreme Court has stressed that it is the statement requesting counsel itself that must be ambiguous or equivocal for any "clarifying" questioning to continue.

> Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, *all questioning must cease.* In these circumstances, an accused's *subsequent* statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.

(*Smith, supra*, 469 U.S. at 98 (emphasis added)).

Appellant clearly invoked his right to counsel prior to the break. When the officers came back and again began the interrogation, they were constitutionally required to limit their inquiry to Appellant's invocation. Instead, the officers, using Officer Trudeau's relationship, cajoled Appellant into reversing his prior invocations and continue talking. Respondent's arguments attempt to blur Appellant's invocations with his later waiver, and neglect to mention or adequately defend the police tactics

used to start all over in the interrogation of Appellant.

This Court has recently decided several capital cases where California police officers persisted in interrogations after the defendant invoked his right to counsel or silence. In *Dykes, supra,* 46 Cal.4th at 751, this Court denied the Appellant's claim that, in response to police interrogation, he invoked his rights under the Fifth Amendment by unequivocally requesting an attorney. This Court recognized that it was not presented with plausible evidence that the defendant had invoked his right to counsel. In *People v. Williams,* this Court was presented with a claim that Los Angeles police officers failed to respect the defendant's invocation of counsel or silence on four occasions. (See *Williams, supra,* 49 Cal.4th at 429). As to each incident, this Court found that the post-interrogation invocations would not have led a reasonable officer to conclude that the defendant had invoked his rights. (*Ibid.*). This Court also found that the police had not actively "badgered" the defendant into waiving his rights. (*Ibid.* (citing *Michigan v. Harvey* (1990) 494 U.S. 344, 350)).

The circumstances in *Dykes* and *Williams* are quite different than those in Appellant's case. Here, Appellant explicitly referred to his need for counsel, three times, and, in order to circumvent his invocation. Livermore Police officers responded by momentarily halting the interrogation before beginning again with new interrogators. Similarly, Livermore Police officers sought to cajole the defendant into not asserting his rights by diverting the focus of the interrogation following defendant's invocation, and by failing to immediately readvise Appellant of his rights following the momentary timeout. Likewise, and unlike in *Williams,* the evidence indicates that a reasonable officer would have clearly understood Appellant's repeated assertions for counsel as invoking his rights under the Fifth Amendment.

Substantial evidence does not support the trial court's determination

that Appellant failed to unequivocally invoke his constitutional rights and Respondent's arguments fail. Appellant clearly expressed his desire to speak with counsel - three times - and the Livermore Police blatantly disregarded those requests. All statements made after Appellant's invocation on March 27 violated *Miranda* and were involuntary. Their admission at trial violated Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as, under Article I, sections 7, 15, and 24 of the California constitution.

2. Appellant's Statements on March 27, 1987 were Involuntarily Coerced and his Purported Waiver was Invalid.

Even if Appellant did not invoke his right to counsel on March 27, under the totality of circumstances, Appellant's statements were not the product of free will. They were coerced by the offensive interrogation techniques of the Livermore Police. Appellant's requests for counsel were ignored. Without providing access to counsel, police interrogation tactics coerced Appellant into making involuntary statements. By responding to offensive interrogation tactics, Appellant did not knowingly, intelligently and voluntarily waive his right to counsel. Instead, he was involuntarily forced to speak based on coercive police tactics used during an interrogation that appeared to have no end in sight.

Respondent contradicts its arguments that Appellant's waiver was voluntary by conceding that Livermore Police used several coercive and unlawful interrogation tactics. As Respondent acknowledges, during Appellant's interrogation on March 27, the police used threats (against Appellant and his wife), unlawful inducements (related to Appellant's enrollment in the state's Witness protection program) and coercive conduct that included keeping Appellant in custody for twelve (12) hours; and conducting a six hour interrogation. (RB 110-120). Throughout the twelve

(12) hours Appellant was detained by the Livermore police, he was never given a shirt or shoes.

Livermore Police purposefully deceived Appellant by arresting him on narcotics charges and questioning him before revealing the basis for the arrest - suspicion of homicide - two to three hours into the interrogation. Officer Robertson lied to Appellant by telling him that five Department of Justice experts had traced his fingerprints to the murder weapon.[27] Livermore police officers implied that his wife Vicky would be arrested for check fraud if he did not cooperate. The officers gave Appellant cigarettes, pizza, coca-cola, water and candy, but did not immediately offer him clothes to cover his body. When Appellant clearly invoked his rights, they substituted in Officer Trudeau who had developed a false rapport with Appellant. Later, Appellant was shackled with ankle chains and Vicky was used as an agent by Livermore police. An interrogation based on these tactics can only yield an involuntary statement.

This Court has recently denied a case involving the use of the defendant's family by police officers in order to obtain a confession. (See *Tate, supra*, 49 Cal.4th at 635). In *Tate*, the Alameda Police Department was also involved and the defendant alleged that the police used his girlfriend as a police agent. (*Id.* at 726). This Court rejected the contention because the police did not plan to use the defendant's girlfriend to speak with the defendant and did not suggest a subject matter for the girlfriend to discuss with the defendant. (*Ibid.*).

---

[27] In *DePriest, supra,* 42 Cal.4th at 35, this Court rejected the claim that misleading statements by detectives, concerning the scope and operation of the exclusionary rule, were material enough to constitute a violation of the defendant's constitutional rights Here, in contrast, the detectives misleading and false statements to Appellant concerned evidence material to the Olsson homicide and the offender's identity. The statements by Livermore Police officers not only contaminated the interrogation, but also served to misdirect and mislead Appellant.

Here, in contrast, Livermore detectives repeatedly utilized Vicky Tully, Appellant's wife, to get Appellant to speak to detectives and speak about the crime. In fact, the officers went as far as to transport her, twice, to the jail in order to speak with Appellant, a tactic strategically planned by the police. Furthermore, they also informed Vicky about the nature of her husband's prior statements. These tactics were calculated to get Appellant to further incriminate himself, and were not designed to conduct an interrogation in line with the protections against compelled and involuntary statements mandated by the Constitution.

Respondent tries to explain away these circumstances as being innocuous. According to Respondent, no relief is warranted despite the constitutional violations, since Appellant's statements do not show "a beaten-down man speaking against his will." (RB 130). Respondent argues that in order to create a coercive environment, Livermore Police officers would have to use "the traditional methods of intimidation which result in involuntary statements or confessions," including: "promises," "yell[ing]," "display[ing] a weapon," "threaten[ing] in any other way," "over[] aggressi[on]," or a "confrontational [style]." (RB 129-30).

Respondent's "beaten-down man" test is not the standard for determining voluntariness.[28] Instead, this Court must look to the totality of circumstances, as laid out above, to determine the voluntariness of Appellant's waiver and statements. Undoubtedly, a reasonable man would have been compelled to incriminate himself after: 1) having been detained without shoes or shirt for twelve (12) hours; 2) having been interrogated for

[28] This Court has held that the test for involuntariness is whether the totality of influences on the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." (*People v. Hogan* (1982) 31 Cal.3d 815, 841 (citations omitted)). A confession maybe found involuntary if extracted by coercive threats, inducements, promises or conduct. (See *People v. Benson* (1990) 52 Cal.3d 754, 778).

six of those twelve (12) hours; 3) having been interrogated by three officers; 4) having been interrogated in three separate sessions; 5) having threats lodged against his wife; 6) having been implicitly offered enrollment in the witness protection program; 7) having attempted to invoke his right to counsel three times; and 8) having the police ignore each invocation of counsel. Appellant's statements sought to deflect the continuous stream of questions and to terminate a never-ending interrogation. As a result, Appellant made incriminating statements, based on lies told to him by Livermore police officers and in counsel's absence.

This Court has not recently been presented with a case involving the length and breadth of the interrogation seen in Appellant's case. In *Rundle, supra,* 43 Cal.4th at 122, the defendant claimed that "a series of relatively short interviews by various officers about different crimes, often with significant breaks in between," rendered his subsequent confessions involuntary because, in the cumulative, they totaled twelve (12) hours. This Court rejected the claim finding that it was procedurally defaulted and that the defendant failed to proffer any indicia of evidence "suggesting that the authorities exploited the 'slowly mounting fatigue' resulting from prolonged questioning, or that such fatigue occurred or played any role in defendant's decision to confess." (*Id.* at 123). Here, in contrast, Appellant was extensively interrogated and detained for over twelve (12) hours on his first night in custody, as Respondent concedes. (See RB 110 and 115). Livermore Police tactics sought to wear down Appellant, including the substitution of interrogators after the invocation of his right to an attorney; the refusal to give him shoes or shirt; and chaining Appellant to the floor.

Nevertheless, Appellant has shown that his coercive interrogation actually included several of Respondent's "coercive" factors (false promises of membership in the Witness protection program, yelling, threats to harm Appellant's family). Respondent cannot deny that Appellant was

held for twelve (12) hours, without shirt and shoes, and was subject to a barrage of interrogative questions. During this time, Appellant's will to resist was overborne by these impermissible tactics. Moreover, the Livermore police officer's unlawful interrogation techniques also overbore Appellant's rights under the Fifth and Fourteenth Amendments.

E. The Trial Court Erred in Failing to Suppress Appellant's Coerced and Involuntary Statements on March 30, 1987 Since they were Gained in Violation of his Rights Under the Fifth, Sixth, and Fourteenth Amendments and Article I of the California Constitution.

The **second** interrogation of Appellant on March 30, 1987, and the resulting incriminating statements were as coercive, unlawful and involuntary as his March 27 interrogation and statements. This time, Livermore Police officers failed to tape record their initial meeting with Appellant. During these critical thirty (30) minutes, where Appellant was not provided *Miranda* warnings, he was induced to waive his constitutional rights. During this time, the officers induced Appellant to speak by offering the state's Witness protection program and making false promises of leniency. (RT 226-27). But perhaps most offensively, the officers utilized Vicky Tully as their agent. They allowed her and Appellant to speak, after he had elected to enforce his constitutional right to silence. They took her away after he had become convinced of his need to speak with police to protect her and his family, by providing a statement to police and enrolling in the state's witness protection program.

1. Appellant Unequivocally Invoked his Rights under the Fifth and Fourteenth Amendments.

Prior to interrogating Appellant on March 30, Livermore police officers failed to recommunicate *Miranda* warnings to him. Nevertheless, when confronted by the interrogative situation, Appellant again invoked his Fifth Amendment rights. (RT 70, 130). This time, having previously failed

to gain the assistance of counsel despite his unequivocal requests, Appellant continued to honor his invocation of his right to remain silent by refusing to answer questions during the initial and unrecorded meeting with Livermore police officers on March 30, 1987. However, like the previous encounter, instead of honoring Appellant's silence, Livermore police officers cajoled, badgered, and induced Appellant to impliedly waive his rights and talk further about Doubting Thomas' role in the Olsson homicide.

2. Appellant Unequivocally Invoked his Right to Remain Silent.

Appellant's invoked his right to right to remain silent by refusing to answer questions asked Livermore Police officers. Appellant maintained his constitutional right to silence even after discussing with the officers his and his family's enrollment in the witness protection program. (See *Miranda, supra,* 384 U.S. at 445 ("[the suspect] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.")). Appellant's discussion of topics did not voluntarily waive his *Miranda* rights. (See *Miranda, supra,* 384 U.S. at 445 ("The mere fact that [a criminal defendant] may have answered some questions ... does not deprive him of the right to refrain from answering any further inquiries.")). As a result, the trial court was required to prohibit the introduction of testimony or arguments detailing Appellant's invocation of his right to remain silent. (See *Hurd v. Terhune* (9th Cir. 2010) -- F.3d --, *6). Prosecutor Burr violated this duty when he urged the jury to consider Appellant's out of court statements, and silence, as if he had testified. (RT 3194-95).

"If an individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must

cease." (*Miranda, supra,* 384 U.S. at 473). In *Berghuis v. Thompkins* the High Court recently noted that for a criminal defendant to invoke his right to remain silent, the suspect must affirmatively and unambiguously invoke his right. (See *Thompkins,* (2010) 130 S.Ct. 2250, 2260). Though, the Court also noted that the right to silence may also be invoked if the suspect refuses to answer a question. (*Ibid.*).

Importantly, however, "[t]he Supreme Court's decision in *Thompkins* does not alter its holding in *Miranda.*" (*Hurd, supra,* -- F.3d at *6). "It is enough if the suspect says that he wants to remain silent or that he does not want to answer that question." (*Ibid.*). *Thompkins* merely stands for the proposition that "a voluntary confession should not be suppressed just because a defendant has refrained from answering other questions," and "does not alter the fundamental principle that a suspect's silence in the face of questioning cannot be used as evidence against him at trial, whether that silence would constitute a valid invocation of the "right to cut off questioning" or not." (*Ibid.*).

Here, documentary evidence does not fully establish how Appellant invoked his right to remain silent.[29] All the witnesses, however, are in agreement that on March 30, Appellant initially invoked the right to remain silent by electing to remain silent and by not answering many of the

---

[29] Unlike in *Thompkins* or *Hurd*, here, Appellant's interrogators failed to document how Appellant invoked his right to remain silent by failing to record the first thirty (30) minutes of the March 30 interrogation. (RT 70-71, 103-104, 125). However, the officers agree that Appellant invoked his right to remain silent. (*Ibid.*). In Appellant's case, then, it should be assumed that Appellant clearly and unambiguously invoked his right to silence It was thus misconduct and error for the trial court to allow the prosecutor to urge the jury to consider Appellant's out of court statements as if he had testified and for the trial court to admit the officer's testimony regarding Appellant's initial refusal to answer questions on March 30, 1987. (*See Hurd, supra,* -- F.3d at *6).

officers' questions. When the officers asked if his wife's incriminating statements were true, Appellant responded with silence. In response, as Respondent concedes, the Livermore police persisted and upped the ante by offering Appellant placement in the Witness protection program. (RB 131). In the face of Appellant's silence, officers asked several questions concerned with *why* Appellant had elected silence. (RT 130, 203-04). The officers insinuated that they had heard about "Doubting Thomas's" role in the crime. They cajoled and induced Appellant to speak by promising leniency and favors. And they were able to do so with impunity, since they had refused to record the first 30 minutes of the March 30 interrogation.[30] All this was brought forth at trial during the officer's testimony, which detailed Appellant's prior statements and initial silence. (*See* RT 70-71, 103-104, 125). As a result, the trial court's failure to suppress the statements, as well as Appellant's invocation of his right to remain silent, violated Appellant's rights under the Fifth Amendment and *Miranda*. Moreover, the prosecutor's comments on Appellant's silence during closing argument urged the jury to infer Appellant's guilt from invocation of his constitutional rights. (See Claim IX - The Prosecutor Committed

---

[30] In *Thompkins*, the Supreme Court held that a suspect must expressly state that they are adhering to their right to remain silent in order to invoke the right under the Fifth Amendment, and may implicitly waive the right by later speaking. The Supreme Court noted that the situation in *Thompkins* was not inherently coercive. (*Thompkins, supra,* 120 S.Ct. at 2263). In contrast, in Appellant's case, the March 30 interrogation was inherently coercive. (Cf. *Colorado v. Connelly* (1986) 479 U.S. 157, 163-64 n. 1). First, the officers had already interrogated Appellant for over six hours on March 27. Second, the officers had already interrogated Appellant's wife. Third, the Officers had threatened prosecution of Appellant's wife. Fourth, the officer's had promised Appellant enrollment in the witness protection program if he cooperated. Fifth, the officers refused to recognize Appellant's silence, for at least up to the initial thirty (30) minute unrecorded portion of the interrogation. In sum, the factual situation in Appellant's case is distinguishable from *Thompkins*.

Misconduct During the Guilt Phase Closing Arguments; and Claim XXII - Appellant Was Sentenced to Death Based on The Non-Statutory, Improper and Materially Inaccurate Aggravating Factor of Absence of Remorse).[31]

Respondent argues that Appellant's silence was "a pause to think and to strategize about his next statement, and was not an invocation of his right to remain silent." (RB 131-32). Respondent's allegations are wild speculation as there is no record of the actual interview. And, a 30 minute silence is too long to be a "pause."[32] Likewise, Respondent is wrong since all sides conceded during the suppression hearing that Appellant had invoked his right to silence before ultimately discussing the state's Witness protection program. (See I AOB 72 (citing RT 122)).

Even if Appellant's invocation of the right to remain silent could be deemed ambiguous, the police could continue to question him only for the limited purpose of clarifying whether he was waiving or invoking his rights. (See *People v. Box* (2000) 23 Cal.4th 1153, 1194; *People v. Wash*

---

[31] By impermissibly commenting on Appellant's failure to testify, and urging the jury to review Appellant's out of court statements *as if he had testified*, the prosecutor violated the Fifth and Fourteenth Amendments stressing "an inference of guilt to the jury" based on Appellant's invocation of his right to remain silent. (See *Hurd, supra,* – F.3d at *9). In *Hurd,* the defendant moved to suppress statements made at his interrogation as involuntary based upon the detective's false promises of leniency and threats regarding the use of a polygraph machine. (*Id.* at *2). The trial court incorrectly failed to suppress the statements, and as a result, the prosecutor used the statements, and the defendant's refusal to take a polygraph or reenact the shooting, "as affirmative evidence of his guilt." (*Ibid.*). Like in *Hurd*, hereto the trial court improperly denied Appellant's motion to suppress the involuntary and incriminating statements he made in response to false promises and threats regarding the use of a polygraph machine by police. Similarly, like in *Hurd*, hereto the prosecutor stressed Appellant's silence, and failure to testify, during his opening and closing arguments. (See *Id.* at *9).

[32] Webster's defines pause as "[a] temporary stop or rest in speech or action." (*Webster's New World Dictionary* (3rd College Ed. 1988)).

(1993) 6 Cal.4th 215, 239; *Johnson*, *supra*, 6 Cal.4th at 27). They could not persist "in repeated efforts to wear down his resistance and make him change his mind." (*Michigan v. Mosley* (1975) 423 U.S. 96, 105-106). Continuing to question Appellant about Doubting Thomas's involvement did exactly that and the officers' use of Vicky, to cajole Appellant into speaking, contributed to the wearing down of his resistance. (I AOB 72 (citing RT 220-21)).

Respondent spends the bulk of its time attempting to distinguish the cases relied upon by Appellant in his Opening Brief. (I AOB 82 (citing *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475; *United States v. Hernandez* (5th Cir. 1978) 574 F.2d 1362, 1368 n. 9; and *Watson v. state* (Tex. Crim. 1988) 762 S.W.2d 591, 598)). However, Respondent's interpretation of these cases is untenable. According to Respondent, *Wallace* is not controlling. Respondent believes that in *Wallace* there was no evidence that the "defendant expressly waived her rights" and because "she remained silent for perhaps as many as ten minutes." (RB 132). Respondent does not include the more significant similarities between Appellant's case and *Wallace*.

In both cases, police obtained an implied waiver by cajoling the suspect through the use of false promises of leniency and enrollment in witness protection. (See *Wallace, supra,* 848 F.2d at 1475) The misconduct in Appellant's case is worse however. Here, law enforcement utilized Vicky and her fear of criminal prosecution, as well as false promises of enrollment in the witness protection program for Appellant and his wife, to leverage incriminating statements... Respondent's arguments to the contrary fail to distinguish *Wallace* and run against *Miranda*'s principle that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." (*Wallace*, *supra*, 848 F.2d at 1475 (citing

Miranda, supra, 384 U.S. at 475)).

Respondent's attempts to distinguish *Hernandez* are unavailing even if there were seven separate interrogations in that case. (See RB 132). In *Hernandez*, as in Appellant's case, both defendants were given their rights and invoked their right to remain silent through refusals to cooperate. (*Hernandez, supra*, 574 F.2d at 1368). In both instances, the inculpatory statements were secured without the benefit of assistance of counsel in a room with more than two officers present. (*Ibid.*).

In addition, the identity of the interrogating officer or officers was also significant in each case. Two of the officers in *Hernandez* had on several prior occasions interrogated the defendant. (*Hernandez, supra*, 574 F.2d at 1369-70). In Appellant's case, Officer Trudeau had had prior interactions with Appellant; a fact used by the Livermore police officers to induce Appellant to speak through a false trust in the officer. As the Court in *Hernandez* recognized, "such police conduct is tantamount to coercive pressure applied to the accused to force him to reconsider his invocation of his right to silence." (*Ibid.*).

In both cases, "it is patently obvious that the police ignored Hernandez's [the defendant's] repeated invocation of his right to remain silent." (*Hernandez, supra*, 574 F.2d at 1368-69). In both instances the police attempted to induce their suspects to speak through the use of promises of leniency. Respondent thus fails to rebut the Fifth Circuit's finding, in a case with facts analogous to this case - that promises of leniency "further aggravate the compulsive atmosphere of this situation." (*Id.* at 1370). Appellant's facts are worse than the facts in *Hernandez*. Here, the police used false promises of leniency, as well as threats of prosecution against Appellant and his wife, to leverage their suspect into waiving his constitutional rights.

Finally, Respondent argues that *Watson* is distinguishable because

Watson was interrogated four separate times, and remained silent for up to twenty (20) minutes. (RB 132-33 (citing *Watson, supra*, 762 S.W.2d at 599)). Respondent argues that here, "Appellant was not peppered with questions on multiple occasions nor did he remain silent on multiple occasions. He remained silent for a very short period while thinking of the best way to ask the officers what Witness protection program promises they could make him and his family." (RB 133). In truth though, and as Respondent cites elsewhere in contradiction, it was Officer "Newton [who] told Appellant that they knew he might be frightened of 'Doubting Thomas' and that he might need assistance from the witness protection program if he (appellant), was telling the truth." (RB 117 (citing RT 130)).

Respondent, in attempting to aggrandize the misconduct in *Watson*, loses track of the Court's basic points and the clear analogies to Appellant's case. Here, as in *Watson*, Appellant gave a clear indication to police officers of his intent to remain silent, over the course of a 30 minute interview, where he did not answer any questions about the *crime the officer's were investigating*. Under both "circumstances[,] appellant was not cooperating with the police and had demonstrated to them that he wished to remain silent in accordance with the particular and express Miranda warnings...by not answering questions." (*Watson, supra,* 762 S.W.2d at 599). In both situations:

> the officers were under no impression that Appellant wanted to speak to them. They were not misled. There is nothing to show the officer considered his action ambiguous. They were put on notice their questioning should cease. To fault the Appellant for not explicitly stating his objection to further interrogation would be illogical when he responded in the manner he was warned he could employ in exercising his right to silence...and the record shows the officers had gotten the message and understood it.

(*Watson, supra*, 762 S.W.2d at 598).

Under Respondent's analysis, the right to remain silent can only be invoked and violated if a criminal defendant refused to answer questions over several separate interrogations that spanned hours. This reading requires too much for the exercise of a suspect's rights under the Fifth Amendment. When Livermore Police officers refused to honor Appellant's persistent silence, and instead opened the discussion, all resulting statements were earned in violation of Appellant's Fifth Amendment rights. Respondent's arguments to the contrary ignore the basic precept of *Miranda*:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

(*Miranda, supra,* 384 U.S. at 473-74).

3. Appellant's Statements, and the Purported Waiver of His Constitutional Rights on March 30, were Involuntary.

Appellant's waiver of his constitutional rights and his subsequent incriminating statements were the product of a coercive interrogation and the termination of Appellant's free will on March 30, 1987. Respondent concedes that "if a defendant is given to understand that he or she might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or the court in consideration of making the statement, even a truthful one, such motivation may render the statement involuntary and inadmissible." (RB 136 (citing *People v. Cahill* (1994) 22

Cal.App.4th 296, 309-17)). Respondent, is in error to argue that Livermore Police officers' promises did not render Appellant's statements involuntary.

During the March 30, 1987 session, the interrogation centered upon the Tully family's enrollment in the state's witness protection program. Indeed, Respondent concedes that Appellant, in response to questions about the witness protection program, was induced to impliedly waive his constitutional rights by electing to speak with the police officers. (RB 131). However, Respondent wrongly feels that "Appellant [] could not have reasonably believed that the police were promising him participation in the Witness protection program for himself and his family if he made a statement." (RB 137). During the thirty (30) minute unrecorded meeting on March 30, Appellant had invoked his right to remain silent. He talked only in consideration of his and his family's enrollment in the witness protection program. The nature of the entire exchange hinged on Appellant's enrollment in the witness protection program. There is no transcript of the interview which would authenticate the testimony of Officer Newton describing what he believed to be a waiver of rights. (RT 70 and 130). Instead, inconsistencies litter the officer's testimony.[33] At the

---

[33] Respondent argues that under *People v. Barnes* (1986) 42 Cal.3d 284, 306, Appellant's testimony at the suppression hearing, namely that he gave his March 30 statements out of fear that Vicky would be prosecuted, cannot be entertained because it was rejected by the trial court. (See RB 135. n.16). Respondent confuses the principles enunciated in *Barnes* and the arguments raised by Appellant. Appellant has argued, and supplied facts within context, that the trial court's determination that Appellant was not coerced into making the March 30 remarks was erroneous. This argument does not rest solely upon Appellant's testimony. Instead, it is based upon an analysis of the totality of facts, which prove that the officers' testimony was inherently improbable and that Appellant was coerced into falsely incriminating himself in the Olsson homicide. Moreover, Respondent is wrong to assert that the only evidence that Vicky Tully had been threatened with criminal charges was based on Appellant's testimony. (*Ibid.*). In truth,

most, the only conclusion that can be reached is that Appellant had invoked his right to remain silent, but exchanged that right based on the prospect of enrollment in the witness protection program, now promised to both him and his wife.

Further, there was never any evidence that such promises were truthful. No one from the Livermore Police Department or the District Attorney's Office ever testified or made any reports that they looked into the witness protection program for Appellant. Thus, like on March 7, Appellant was induced to speak based on a false promise of leniency and protection. Similarly, like before, the promise, this time made in front of an *attorney,* was so attractive it rendered the resulting statement involuntary. (See *Streetman v. Lynaugh* (5th Cir. 1987) 812 F. 2d 950, 957 (citation omitted)). This Court should hold assistant district attorneys to equal or the same ethical standards as other law enforcement officials in making such fundamentally unfair representations,. (See *People v. Andersen* (1980) 101 Cal. App. 3d 563, 576 ("[I]n carrying out their interrogations the police [] must avoid false promises of leniency as a reward for admission or confession.")).

The promises of leniency made to Appellant were misleading, false, and more outrageous than in cases recently presented to this Court. In *Carrington, supra,* 47 Cal.4th 145, the defendant claimed that statements were involuntarily made in response to police inducements and promises of lenience. This Court rejected the claim because the police did not make any promises to the defendant, but instead, urged her to confess based on

---

the officers had testified that during their initial interrogation of Vicky Tully on March 27, 1987 they had threatened her with arrest and prosecution with charges based upon check fraud. (See I AOB 66 (citing RT 85, 87)). Here, the record demonstrates, without inference that Appellant elected to speak with the officers based on knowledge that doing so would protect his wife from a criminal prosecution.

her feelings of religious guilt. (*Id.* at 173). In contrast, here, police officials urged Appellant to incriminate himself by proffering his enrollment in the witness protection program. They then called a meeting with a member of the Alameda County District Attorney's Office who made similar offers to Appellant - though couched in ambiguously conditional language. The officials then made similar offers to his wife. Finally, they offered Appellant, enrollment of his family in the witness protection program. These promises of leniency stand in stark contrast to the persuasive references to religion in *Carrington.*

Worse, law enforcement agents utilized their charging and interrogative powers to induce Appellant to speak based on fear that his refusal to cooperate would result in Vicky's arrest. From the start, Vicky's involvement in the case was engineered to induce Appellant to speak. Twice, during the course of the interrogation, Vicky was allowed to speak with her husband in order to relay fears that she would be arrested if he did not cooperate. So unique was this tactic that Officer Robertson testified that he could not remember a prior occasion where a family relative was allowed to speak to a first-degree murder suspect prior, during and after police interrogations. (RT 98).

Respondent defends the "lies" told by Livermore police officers to Vicky Tully by trying to diminish Appellant's testimony. Respondent thus argues that "if Appellant was telling the truth that "Doubting Thomas" committed the murder while appellant was simply present at the scene, things would have been easier for him than for Thomas." (RB 135). Throughout his interrogation on March 30, Appellant made several references to promises made by Livermore police to Vicky Tully. In fact, Vicky Tully's placement in a witness protection program was his primary concern and he waived his right to remain silent in exchange for discussing her protection by the program. Respondent argues that Appellant would

have understood the "contingencies" placed on Vicky's enrollment in the program. (See RB 136-37). However, this understanding assumes that the officers had fully and clearly explained those contingencies to Vicky Tully and Appellant in a consistent manner. With no evidence in support, and only glaring inconsistencies based on the transcript, Respondent fails to substantiate the state's assertions that Appellant would have reasonably understood the police officer's discussion of his enrollment in the Witness protection program as anything other than a promise of leniency.

F. Substantial Evidence does not Support the Trial Court's Ruling on Appellant's Suppression Motion.

The trial court denied Appellant's motion to suppress "on all grounds promulgated." (RT 1928-29). In particular, the Court found that: 1) the statements were preceded by adequate warning of constitutional rights and that Appellant subsequently made a valid waiver of his rights; 2) that Appellant did not unequivocally invoke his right to counsel on March 27; 3) that Appellant did not invoke his right to remain silent on March 30; and 4) that all of the statements were validly made and that the use of Vicky Tully as an agent of the state did not violate Appellant's rights under the Fifth Amendment. (*Ibid.*).

Respondent argues that "[s]ubstantial evidence supports the trial court's finding that appellant did not unequivocally request counsel during the March 27, 1987 interrogation..." (RB 127), and that "substantial evidence supports the trial court's findings that Appellant did not invoke his right to remain silent during the first March 30, 1987 interrogation, and therefore, the police did not violate his rights by continuing to question him." (*Id.* at 131). Respondent wrongly asserts that "[t]he trial court ruled correctly in refusing to find that Appellant invoked his right to remain silent." (*Id. at* 133).

Respondent believes that "the essence of the trial court's ruling," is that police do not make an "improper inducement to a witness when they tell him or her that they will try to get the witness into a protection program if the witness tells them the truth and the witness otherwise qualifies protection." (RB 137). The assumptions on which Respondent bases its conclusions are not supported by substantial evidence. Livermore Police told Appellant he would be placed in the Witness protection program, not that they would "try" or that other qualifications would impede their ability to place him in the program. It cannot reasonably be said that Appellant understood the hidden contingencies in the Livermore Police officers' offers to enroll the Tully family in the Witness protection program. As on March 7 with Officer Trudeau, Appellant took the officer's promises at face value and exchanged his right to counsel and to remain silent in consideration for his family's protection.

Similarly, the credibility of these promises was bolstered by the presence of a member of the District Attorney's Office. Here, in front of a prosecutor, Appellant was cajoled into repeating the statements by false promises of leniency, which no member of law enforcement intended to keep. The effect of this prejudicial means of interrogation is best seen in Appellant's disclaimer, given just prior to the second set of statements on March 30, 1987:

> I'm gonna believe in what those two told me (Officers Robertson and Trudeau). And uh, I hope like hell that, you know, they're telling me the truth and I'm sure they are so I'll go ahead and go on with what I had said earlier and tell you what I got here.

(People's Trial Exhibit 9C, at 3-4).

Finally, and most dramatically, the trial court's ruling runs in the face of the compulsion applied to Appellant through the officers' threats against his wife, and ultimately, his family. Appellant had been told that

Vicky would be charged with accessory to murder and/or fraud charges. (RT 220-21). When Appellant invoked his right to silence, his wife Vicky was used to scare Appellant into believing that if he did not confess to knowledge about the crime he would not be able to protect his wife from going to jail. The trial court's ruling fails to account for the extremely coercive nature of punitive threats against family members. A reasonable person here would have understood that if he did not cooperate with law enforcement he would remain in jail, and his spouse, would be criminally charged and taken to jail.

Contrary to the trial court's rulings, substantial evidence supports the fact that Appellant was coerced into making involuntary and incriminating statements on March 27 and March 30, 1987. Law enforcement and prosecutorial officials used false promises of leniency and leverage gained through threats of criminal charges against Appellant and his wife in order to get their suspect to waive his constitutional rights and incriminate himself. Here, the reliability of Appellant's statements about the crimes, and of the court orders admitting those statements, are suspect; especially given direct and glaring contradictions between the statements and the physical evidence at the Olsson homicide . (See Claim VI - Insufficient Evidence Supports Appellant's Convictions of Capital Murder, The Burglary-Murder Special Circumstance, or His Conviction for Assault With Intent to Commit Rape). The trial court's decision lack's substantial evidence and stands as a violation of Appellant's constitutional rights.

G. The Trial Court's Ruling was not Harmless Error.

Respondent has failed to establish that the trial court's error in admitting Appellant's prejudicial and incriminating statements was harmless beyond a reasonable doubt. Under *Chapman, supra,* 386 U.S. at 24, the trial court's errors in admitting the statements from March 27 and

March 30, 1987 prejudiced Appellant's ability to receive a fair trial and introduced prejudicial and unreliable evidence indicating Appellant's presence at the crime scene. As the state conceded, the statements were the only evidence available to prove the intent-to-rape element of the burglary-murder, the burglary-murder special circumstances and the separate charge of assault with intent to rape charge. (RT 3069-70).

Respondent wrongly concludes that "[s]imply put, the fingerprint evidence on the murder weapon overwhelmingly established that appellant burglarized victim Olsson's home, and stabbed her to death." (RB 138). First, the fingerprint evidence was gained in violation of Appellant's rights under the Fourth Amendment and thus should have properly been excluded. Nevertheless, Respondent must concede, that the fingerprint evidence would be insufficient for a conviction in itself. (See *People v. Jenkins* (1979) 91 Cal.App.3d 579, 586-88). The admission of the incriminating statements was thus anything but harmless and, instead, violated Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments, as well as, Article I of the California Constitution. As a result, Appellant's conviction and death sentence must be reversed.

Additionally, the prosecution used Appellant's statements in ways that thwarted the interests of justice and made the admission of the involuntary statements more than harmless. Throughout the guilt and penalty phases, the prosecution argued the case through the filter of Appellant's statements. Indeed, there is no way to separate the prosecution theory of the case from those statements because the prosecutor strenuously argued that Appellant was both a murderer *and a* liar, and essentially sought conviction on these grounds.

As a result, the prosecutor treated Appellant's statements, which the prosecution had fought to get admitted, as though they were actually Appellant's testimony under oath. (See Claim IX – The Prosecutor

Committed Misconduct During the Guilt Phase Closing Arguments) The prosecutor told the jury when considering the veracity of Mr. Tully's post-arrest statements, it should consider "his demeanor while testifying, and the "existence of nonexistence of fact testified to by him." (RT 3194)). The prosecutor then proceeded to attack the veracity of the statements, as though the defense had proffered those statements, or as if Appellant had testified in court. This was brought home by the prosecutor's closing argument, which was laced with references to Appellant's statements and attacks on Appellant's veracity. The prosecutor called Appellant "a sucker," and referred to his statements as "lies" or "figments" or "stories," again and again. (Claim IX - Prosecutorial Misconduct at Closing Argument). By doing so, the prosecutor made the statements a crucial piece of the state's theory of the case and the erroneous admission of the statements more than harmless.

H. Conclusion.

Mr. Tully's March 27 and March 30 statements were involuntary and were obtained in violation of the Fifth and Fourteenth Amendments and Article I, sections 7 and 24 of the California Constitution. The use of these improper and unreliable statements by the prosecution to secure a conviction and death sentence in this capital case violated the Eighth Amendment and Article I sections 13, 17, and 24 of the California Constitution. Given the importance of the statements to the prosecution case, the erroneous admission of the statements – individually and collectively – prejudiced Appellant and cannot be deemed harmless beyond a reasonable doubt. Appellant's convictions and sentence must therefore be reversed.

IV. THE TRIAL COURT ERRED BY IMPROPERLY DISMISSING FOR CAUSE CAPITAL JURORS QUALIFIED TO SIT ON APPELLANT'S JURY.

A. Introduction.

In the last four years, this Court has issued opinions in thirty-five (35) capital cases involving claims premised on the erroneous dismissal or retention of a juror.[34] During this four year span, this Court affirmed the

---

[34] See *People v. Mills* (2010) 48 Cal.4th 158 (upholding the refusal to dismiss three jurors for cause based on defendant's motion); *People v. Butler* (2009) 46 Cal.4th 847 (upholding the trial court's refusal to dismiss three jurors for cause based on defendant's motion); *People v. Martinez* (2009) 47 Cal.4th 399 (upholding the trial court's dismissal of two jurors for cause based on the prosecutions motion, and refusal to excuse three jurors for cause based on the defendant's motion); *People v. McWhorter* (2009) 47 Cal.4th 318, (upholding the dismissal of two jurors for cause based on the prosecution's motion); (2009) 47 Cal.4th 1 (upholding the dismissal of nine jurors for cause based on the prosecution's motion); *People v. Bramit* (2009) 46 Cal.4th 1221 (upholding the dismissal of one juror for cause based on the prosecution's motion); *People v. Farley* (2009) 46 Cal.4th 1053 (upholding the dismissal of seven jurors for cause based on the prosecution's motion); *Hawthorne, supra,* 46 Cal.4th at 67 (upholding the dismissal of two jurors for cause based on the prosecution's motion); *People v. Hamilton* (2009) 45 Cal.4th 863 (upholding the dismissal of seven jurors for cause based on the prosecution's motion); *People v. Bunyard* (2009) 45 Cal.4th 836 (upholding the dismissal of one juror for cause based on the prosecution's motion); *DePriest, supra*, 42 Cal.4th 1 (upholding the dismissal of five jurors for cause based on the prosecution's motion); *People v. Hoyos* (2007) 41 Cal.4th 872 (upholding the refusal to excuse five jurors based on the defense's motion and the dismissal of two jurors based on the prosecution's motion); *People v. Thornton* (2007) 41 Cal.4th 391 (upholding the dismissal of four jurors for cause based on the prosecutions motion); *People v. Abilez* (2007) 41 Cal.4th 472 (upholding the excusal of one juror for cause based on the prosecution's motion); *People v. Bonilla* (2007) 41 Cal.4th 313 (upholding the trial court's refusal to strike two jurors based on the defendant's motion); *People v. Carey* (2007) 41 Cal.4th 109 (upholding the dismissal of one juror for cause based on the prosecution's motion); *People v. Lancaster* (2007) 41 Cal.4th 50 (upholding the dismissal of two jurors for cause based on the prosecution's motion); *People v. Beames* (2007) 40 Cal.4th 907 (upholding

dismissal of ninety-four (94) jurors over defense objections and based on prosecutorial motions. Similarly, during the same span, this Court affirmed trial court determinations not to dismiss forty-one (41) jurors based on the defense's motion. Needless to say, these statistics reveal that the *Witt-Witherspoon* standard is being disparately applied between prosecutorial and defense challenges for cause. Similarly, these statistics may reveal

---

the dismissal of six jurors for cause based on the prosecution's motion); *People v. Carasi* (2008) 44 Cal.4th 1263 (upholding the dismissal of two jurors based on the prosecution's motion); *People v. Wallace* (2008) 44 Cal.4th 1032 (upholding the trial court's refusal to excuse seven jurors based on the defense's motion); *People v. Wilson* (2008) 44 Cal.4th 758 (upholding the dismissal of three jurors for cause based on the prosecution's motion); *People v. Cruz* (2008) 44 Cal.4th 636 (upholding the trial court's refusal to excuse eleven jurors, based on the defendant's motion, and excusal of two jurors based on the prosecution's motion); *People v. Riggs* (2008) 44 Cal.4th 248 (upholding the trial court's dismissal of two jurors for cause, based on the prosecution's motion, and refusal to excuse one juror based on the defense's motion); *People v. Salcido* (2008) 44 Cal.4th 93 (upholding the dismissal of two jurors for cause based on the prosecution's motion); *People v. Whisenhunt*, (2008) 44 Cal.4th 174 (upholding the refusal to excuse three jurors based on the defendant's motion); *People v. Harris* (2008) 43 Cal.4th 1269 (upholding the trial court's refusal to excuse a juror on the defense's motion); *Richardson, supra,* 43 Cal.4th 959 (upholding the trial court's excusal of eight jurors for cause, based on the prosecution's motion, and refusal to excuse one juror for cause based on the defendant's motion); *People v. Lewis* (2008) 43 Cal.4th 415 (upholding the trial court's dismissal of two jurors for cause, based on the prosecution's motion, and refusal to excuse one juror for cause based on the defendant's motion); *People v. Zamudio* (2008) 43 Cal.4th 327 (upholding the dismissal of one juror based on the prosecution's motion); *Tate, supra,* 49 Cal.4th 635 (upholding the dismissal of seven jurors based on the prosecution's motion); *Lomax, supra,* 49 Cal.4th 530 (upholding the exclusion of two jurors based on the prosecution's motion); *Solomon, supra,* 49 Cal.4th at 792 (upholding the dismissal of five jurors based on the prosecution's motion); *People v. Cowan* (2010) 50 Cal.4th 401 (upholding the dismissal of two prospective jurors based on the prosecution's motion); and *People v. Lynch* (2010) – Cal.Rptr.3d – (upholding the dismissal of four prospective jurors based on their views about the death penalty and over defense objections).

that, as a matter of course, this Court denies claims premised on the erroneous excusal of jurors, as assuredly, in four years time and cases involving the excusal of eighty-eight (88) jurors, at least one of these dismissals would be found to be erroneous. Yet no such finding of an erroneous dismissal has been made by this Court. This response has earned at least one recent dissent questioning the individual excusal of jurors for cause and the course of this Court's death qualification jurisprudence. (See *People v. Martinez* (2009) 47 Cal.4th 399, 457-67 (concurring and dissenting opn. of Moreno, J)).

B. Respondent Does Not Defend the Trial Court's Systemic Errors during Jury Selection in Appellant's Case.

The prosecution challenged five jurors for cause based on their views on the death penalty. None of the jurors had views or beliefs against capital punishment that would have prevented or impaired their ability to serve as a capital juror. Each expressed that they would be able to set aside any beliefs that might impede their ability to follow the trial court's instructions. Each said they could abide by their oath. The trial court improperly granted the prosecution's challenges for cause; thus violating Appellant's rights to a fair and impartial jury, due process, and to a fair and reliable penalty determination under the Sixth, Eighth, and Fourteenth Amendments and Article I of the California Constitution. The trial court's erroneous decisions resulted in a miscarriage of justice and Appellant's convictions and death sentence must be reversed.

Respondent did not address Appellant's arguments that the jury selection system violated his rights under the United States and California Constitutions. Instead, Respondent discusses the excusal of individual jurors, (See RB 140, 149, 150, 153, and 156), and argues that the trial court's jury selection system was valid based on three very long string quotes, each citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424. (See RB

139-40). Respondent omits any discussion of the unconstitutional jury selection system that leads to the improper removal of the five jurors, and fails to address the six arguments raised by Appellant in his Opening Brief regarding the jury selection system, admonitions, questions, and legal errors committed by the trial court.[35] (Compare I AOB 103-133; with RB 139-40).

Thus, Respondent rests its defense of the trial court's jury selection system without ever actually addressing the flawed system. In truth, it was the trial court's jury selection protocols, admonitions, and questions that led to the systematic exclusion of the five jurors, and others, as raised in the Opening Brief. (I AOB 133, 139, 144, 152, and 157).

C. The Trial Court Improperly Dismissed Five Jurors for Cause.

1. The Trial Court Improperly Dismissed M.D.

Respondent argues that the trial court's dismissal of M.D. was "fairly supported by the record." (RB 143). In his Opening Brief, Appellant raised five arguments to the trial court's dismissal of M.D.

---

[35] Respondent did not address the following arguments: 1) The trial court failed to limit the prosecution's challenges for cause and "granted prosecution challenges for cause without substantial evidence to support the challenge." (See I AOB 108-11); 2) No juror expressed views about capital punishment that could prevent or substantially impair their ability to perform their duties as jurors and "their dismissal was improper under state and federal constitutional law." (See I AOB 111-16); 3) The trial court erred by particularly describing Appellant's case, and then "improperly dismiss[ing] jurors based on their attitudes regarding the particular facts of this case." (See I AOB 116-123); 4) The trial court's limited description of the crime led to the improper dismissal of many jurors. (See I AOB 124-27); 5) The trial court's dismissal of jurors based on their response to particular and case specific facts led to the improper dismissal of many jurors without the court having evaluated their ability, in the abstract, to impose a death sentence. (See I AOB 127-30); and 6) The trial court failed to fulfill its responsibilities and follow constitutional protocols for selecting a jury. (See I AOB 130-33).

Respondent responds to three of the arguments raised by Appellant and fails to address Appellant's allegations that the trial court improperly excused M.D: 1) despite his non-existent views on the death penalty; 2) despite the fact that he requested to hear more facts before making up his mind; and 3) M.D. should not have been excused because, he never "indicate[d] any philosophical, moral, or religious opposition to the death penalty...." (I AOB 135). Respondent says that M.D. possessed "ambivalent views." (RB 143). This argument does not rebut Appellant's claim that M.D.'s lack of views on the death penalty ensured his ability to follow the law, nor does it defeat Appellant's showing that "[M.D.] said that he could reach a death verdict under certain circumstances." (I AOB 134 (citing RT 785-87)).

Respondent does not address Appellant's argument that the trial court improperly dismissed M.D. after stating he would need to hear more evidence before deciding if he could vote for death. (RT 793). Respondent does not counter that M.D. "demonstrated his ability and willingness 'to follow the court's instructions and obey [his] oaths.'" (I AOB 138 (citing *Adams v. Texas* (1980) 448 U.S. 38, 50)). Respondent does not counter the fact that the trial court and prosecutor failed to show that M.D. would "invariably vote [ ] against the death penalty..." or "harbor bias...that would cause him not to follow an instruction directing him to determine the penalty...." (I AOB 138 (citing *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005; and *People v. Cash* (2002) 28 Cal.4th 703, 720-21)). Ultimately, Respondent has failed to rebut Appellant's showing that, as a result of the trial court's failure to properly examine M.D.'s views and biases towards the death penalty, Appellant's federal and state constitutional rights have been violated.

a. Substantial Evidence Doesn't Support the Trial Court's Determination that Juror M.D.'s Views on Capital Punishment Would Have Prevented or Substantially Impaired his Ability to Perform as a Juror in Appellant's Capital Case.

Respondent tries to defend the trial court's decision to dismiss M.D. based on his exhibited "discomfort about the death penalty," and because "M.D. stated that he could be swayed by 'something," [but] he did not know what that might be." (RB 143). Based on these scant points, Respondent concludes that "M.D.'s views on the death penalty would prevent or substantially impair his duty to return a verdict of death in the case before him." (RB 144). This line of reasoning is an unpersuasive justification for M.D.'s excusal for cause because it fails to provide substantial evidence in support of the trial court's erroneous decision. It is just a conclusion, nothing more.

M.D. never exhibited bias against the death penalty. Early on, M.D. described himself as "tend[ing] against the death penalty, but that doesn't mean I would definitely vote against the death penalty." (RT 785). M.D. never said anything to indicate that his normative or moral views would impede him from weighing the aggravating and mitigating circumstances, or abide by existing law which made his challenge for cause unsuitable. (See *Bolden v. Holman* (1969) 394 U.S. 478, 484). Instead, M.D. answered all the trial court's questions in the affirmative and stated, without equivocation, that he could follow the court's instructions. (RT 785-87). This affirmation is all that is required to serve on a capital jury and the trial court's ruling to the contrary is not supported by substantial evidence. Respondent's brief arguments and conclusory reasoning do nothing to prove that there is substantial evidence in support of the trial court's determination.

b. The Court Impermissibly Dismissed M.D. Based on his Evaluation of the Facts of the Case and not his Ability to Impose the Death Penalty.

Respondent concedes that during M.D.'s *voir dire* the trial court questioned the juror about his views on the death penalty based upon a set of facts "hypothetically" taken from the circumstances of Appellant's case. (RB 140). The trial court had M.D. imagine that he had convicted Appellant of burglarizing, assaulting with intent to rape, and "intentionally kill[ing] by way of multiple stab wounds," (M.D. was told that it was 25 stab wounds) "a woman by the name of Shirley Olsson." (*Ibid.*). This line of questioning runs contrary to this Court's holdings and violated Appellant's constitutional rights.

Respondent tries to justify the trial court's "case specific hypothetical" by analogizing to *Pinholster, supra,* 1 Cal.4th at 918. Respondent argues that "the voir dire questions focused on examining M.D.'s views on the applicable legal doctrines and the death penalty in the abstract." (RB 145). Respondent argues that, "[a]s in *Pinholster*, the questions regarding the facts in the case led to the crucial question of whether M.D. could vote for the death penalty in *any* burglary-murder case...where one person was killed during a burglary 'gone awry.'" (RB 145 (citing RT 790-91)).

Respondent does not explain the fact that the jurors in *Pinholster* were asked about their attitudes "toward a case phrased in terms of the facts of this case, but the answer to these questions led to the ultimate and crucial question whether the juror could vote for the death penalty in any burglary-murder case." (*Pinholster*, *supra,* 1 Cal.4th at 918). Here, in contrast, the jurors were told about facts in Appellant's case and asked if they could vote for the death penalty *in Appellant's case*. The prosecutor and trial court

induced the jurors into prejudging the case. It is little wonder then that Respondent does not mention that, in *Pinholster*, this Court recognized that:

> [c]ertainly, we have cautioned that the trial court may limit voir dire couched in terms of the facts expected to be proved, in order to avoid the danger of indoctrinating the jury on a particular view of the facts. We have also commented that *the death-qualifying voir dire should focus on juror attitudes toward the death penalty in the abstract, and should not be used to seek a prejudgment of the facts to be presented* at *the trial.*

(*Pinholster, supra,* 1 Cal.4th at 915 (emphasis added) (citations omitted)).

Respondent's argument - that M.D.'s views on the death penalty in the abstract were explored by the trial court and prosecutor's questions - is not based on substantial evidence in the record. M.D. was primarily questioned on facts specific to Appellant's case. (RT 790-91). In response to the prosecutor's brief questions about the death penalty in the abstract, M.D. stated he was "moderately" in favor of the use of the punishment and though, "I would tend against the death penalty...that doesn't mean I would definitely vote against the death penalty." (I AOB 134 (citing RT 785)). M.D. did not state that he could *never* impose the death penalty, in the abstract, or in a case involving a burglary-murder special circumstance.

The bulk of the prosecutor and court's voir dire focused on the hypothetical set of facts that mirrored Appellant's case. (RT 789-94). In response to these questions, M.D. repeatedly stated that he could not decide how he would vote based on the hypothetical homicide described thus far and asked for more information. (*Id.* at 793). However, "based only on the information [he had] gotten today" (*Id.* at 792), M.D. stated he could not impose the death penalty in the hypothetical "burglary gone awry...and [where] a single person [was] killed" proposed by the trial court and prosecutor. (*Id.* at 793). The prosecutor's case specific focus during voir dire in this case is distinguishable from the examination at question in

Pinholster. The prosecutor's focus here, in asking case-specific questions, was not to evaluate M.D.'s views in the abstract. Instead, he was attempting to indoctrinate the otherwise qualified juror and to get M.D. to prejudge the facts to be presented at the trial in violation of *People v. Clark* (1990) 50 Cal.3d 597. Worse, many of the facts told to M.D. would not resemble the full picture, known by and, later presented by the prosecutor at trial in violation of *People v. Mason* (1991) 52 Cal.3d 909, 940. The trial court and prosecutor should have provided more information to the juror - consistent with what was presented at trial - or simply evaluated, on its face, M.D.'s view on the death penalty in the abstract. Respondent offers no evidence in support of its argument that M.D. could not "vote for the death penalty in *any* burglary-murder case." (RB 145).

c. The Trial Court Unequally Applied the *Witt* Standard Between Jurors M.D. and Alternate Juror D.R.

Alternate juror D.R. and dismissed prospective juror M.D. were virtually identical in the strength of their views, although on different sides of the equation. Since D.R. qualified under *Witt*, the trial court was also required to find M.D. equally qualified. (See I AOB 162). Respondent's arguments do not establish substantial evidence that the trial court treated jurors, challenges for cause, or the parties in an equal manner. Respondent argues that D.R.'s "remarks [show] that he would be able to put aside his personal views and deliberate fairly under the death penalty law." (RB 148). Respondent argues that D.R. "continued to assert that he was open to listening to mitigation evidence." (*Ibid.*). Respondent attempts to back these conclusions with cites to the record that characterize D.R. as holding "strong [] personal beliefs in favor of the death penalty, and that people should be accountable for their acts." (*Ibid.*).

However, Respondent must, and indeed does, concede that the trial

court did not give M.D. specific examples of aggravating and mitigating examples, like it did with D.R. (RB 148). Respondent argues that "M.D.'s answers did not warrant the court explaining things and questioning him in further detail...." (*Ibid.*). Respondent's curt response does not change the fact that an unequal amount of hypothetical information was given to each juror. (See I AOB at 163). Respondent fails to defeat Appellant's argument that D.R. and M.D. gave "very similar responses to the questions put to them," or that "both men demonstrated a willingness to remain open." (I AOB 166). Respondent thus fails to explain why only M.D. was dismissed for cause and its arguments do nothing to redress the disparate treatment the Court exercised between individual jurors, as well as, between the prosecution and the defense.

During the last four years, this Court has been confronted by claims premised on the violation of the Fourteenth Amendment's equal protection clause by the trial court's disparate treatment of jurors in two cases. (See *Mills, supra,* 48 Cal.4th 158; and *Thornton, supra,* 41 Cal.4th 391).[36] In *Mills*, the defendant alleged that "the trial court committed judicial misconduct by conducting its inquiries of prospective jurors in a disparate manner that betrayed a pro-death-penalty bias." (*Id.* at 187). This Court denied the claim because "[t]he exact nature of defendant's claim is unclear" and "because nothing in the record suggests the trial court lacked

---

[36] In *Thornton,* the defendant alleged that "the trial court focused on whether the death penalty adherents were committed to following his instructions regarding aggravating and mitigating evidence and did not examine critically whether they could be fair on the issue of sentence, whereas with death penalty skeptics, the court did the reverse, not concerning itself with whether prospective jurors would commit to following its instructions, but examining critically whether they could be fair to the People." (*Thornton, supra,* 41 Cal.4th at 419). This is not Appellant's contention. Instead, Appellant alleges that his trial court failed to equally apply the *Witt-Witherspoon* standard in challenges brought by the defense and prosecution respectively. (See I AOB 162).

impartiality when it conducted voir dire, the court did not commit misconduct." (*Id.* at 190). In contrast to *Mills*, Appellant's claim of disparate treatment between jurors is premised on the Fourteenth Amendment's guarantee of equal protection, not the violation of judicial ethical canons. Similarly, Appellant's claim is supported by the record which amply demonstrates that "[a]lternate juror da Roza and dismissed prospective juror [M.D.] were virtually identical in the strength of their views, although on different sides of the equation," and that since D.R. qualified under *Witt*, the trial court was also required to find M.D. equally qualified. (I AOB 165).

2. The Trial Court Improperly Dismissed Juror E.H.

In his Opening Brief, Appellant explained why the trial court's determination to excuse E.H. was wrong. E.H. entertained no conscientious objections or views against the death penalty and stated without equivocation that she could follow the trial court's instructions. (I AOB 141 (citing RT 1287-90)). E.H. never indicated an abstract inability to vote for a death sentence in any felony-murder or burglary-murder case. E.H.'s response to the trial court's truncated and misleading description of the crime did not provide sufficient justification for her removal. (I AOB 142). Herein, Appellant demonstrates why Respondent's equally brief arguments in support of the trial court's determination do nothing to address the constitutional claims raised by Appellant in response to E.H.'s erroneous dismissal or support the trial court's determination with substantial evidence.

Respondent premises the state's arguments on the point that E.H. "believed that the death penalty should only be imposed for crimes like mass murder... [and this] view precluded her from following the court's instructions." (RB 150). These arguments both misstate the record and fail

to address Appellant's arguments in his Opening Brief.

First, E.H. never indicated that she could *only* impose the death penalty in a case involving mass murders. Instead, she said that an example of a crime warranting death would be a case "involving a 'mass murderer.'" (See RB 149). She was never asked if she could vote for a death sentence in the type of case that would be portrayed by the prosecution during Appellant's penalty phase. In fact, Respondent concedes that E.H. was fully capable of following the law and was "open to the possibility of imposing the [ ] death penalty or life in prison without possibility of [release]." (*Ibid.*).

In the face of the prosecution's truncated description of the crime, E.H. ultimately answered "right" to the court's question "this is not the type of case in which you feel that the death penalty might be an appropriate penalty, is that right?" (RT 1292-93). Had E.H. actually been exposed to the "type of case" that the prosecution would present, her answer would have undoubtedly been different. E.H. was never asked, and never indicated, if she would "invariably vote for life." If so, her prior answers indicate that she would have answered in the negative and Respondent concedes as much. (RB 149).

E.H. was mislead as to the nature of the prosecution's case and was ultimately excluded without substantial evidence indicating that her views on the death penalty would impede her from fairly and impartially following an instruction directing her to determine the penalty after considering aggravating and mitigating evidence. She was never told what type of penalty phase evidence would be presented; thus, Respondent is wrong to conclude that "her statements validate the trial court's decision to remove her for cause." (RB 150).

3. The Trial Court Improperly Dismissed Juror M.K. (M.K).

a. Respondent Fails to Address Prosecutorial Misconduct Committed during M.K.'s Examination.

In his Opening Brief, Appellant argued that the trial court's dismissal of Juror M.K. was erroneous for seven separate reasons. These grounds included several objections to improper prosecutorial questions asked during her *voir dire*. (I AOB 146-52 (citing RT 521-22)). Appellant also showed that there was not substantial evidence to support the trial court's determination that M.K. could not make an impartial decision as to Appellant's guilt and sentence. Respondent musters a response to only one of Appellant's arguments; though notably, it is that the trial court's determination is substantially supported by the record. (RB 152). However, in neglecting the six other arguments, Respondent exposes the indefensible conduct committed by the prosecutor during Juror M.K.'s examination.[37]

---

[37] Respondent has not responded to these six arguments: 1) The trial court's decision to dismiss M.K. was based on her response to improper prosecutorial questions that misstated the law as to her duty to be a jury foreman. (See I AOB 147); 2) The trial court's determination to dismiss M.K. was based on her response to improper prosecutorial questions concerning the execution of a death sentence that were irrelevant and inadmissible as a matter of law. (See *Id.* at 148); 3) The trial court's determination to dismiss M.K. was based on her response to improper prosecutorial questions that misstated the "Judgment of Death." (See *Id.* at 148-49); 4) The trial court's determination was not based on M.K.'s views of the death penalty in the abstract. (See *Id.* at 149); 5) The trial court's determination to dismiss M.K. was impermissibly based on her reaction to prejudicial descriptions of the gas chamber by the prosecutor. (See *Id.* at 150); and 6) The trial court's determination was based on M.K.'s reaction to prejudicial prosecutorial questions that misstated the use of the gas chamber in California at the time. (See *Id.* at 151).

b. Substantial Evidence Doesn't Support the Trial Court's Determination that Juror M.K.'s Views on Capital Punishment Would Have Prevented or Substantially Impaired his Ability to Perform as a Juror in Appellant's Capital Case.

Respondent concedes that prior to being questioned about the "gas chamber" and methods of execution, M.K. stated that she was "lean[ing] toward the death penalty," and did not have conscientious objections against the death penalty. (RB 151 (citing RT 513)). To create its argument, Respondent picks quotes by Juror M.K. that tend to indicate that she didn't think that "she could [ ] impose the death penalty." (RB 152 (citing RT 523)). Understandably, M.K. made these comments after being scared by the prosecutor who had argued that "the death of that man over there with glasses," will be by "put[ting him] into that gas chamber, strapped into that chair and forced to breath poisonous gas until he['s] dead." (RT 521-522). Respondent characterizes these questions as, "walk[ing] M.K. through the penalty phase...." (RB 152). Nothing could be farther from the legal and factual truth.

Respondent tries to justify the trial court's determination because, "[t]o repeat, [M.K.] stated that it would not 'be an easy thing to do' to vote for the death penalty in this case.'" (RB 152-53). However, Respondent's argument does not prove M.K.'s bias or partiality. This is especially true given the context, created by the prejudicial prosecutorial questions that surrounded M.K.'s answers. Even within that context, M.K. indicated that imposing a death sentence "would not be an easy thing to do," which hardly proves that she was incapable of following the court's instructions. Here, M.K. was fully qualified to serve as a juror because she had demonstrated that she would have a hard time imposing a death sentence on a "real person," but would consider all the evidence fairly, impartially and in

accordance with the court's instructions. (See *Adams*, *supra*, 448 U.S. at 50).

Respondent's citations to *People v. Roldan* are unpersuasive. (RB 153 (citing *Roldan* (2005) 35 Cal.4th 646, 697)). In *Roldan,* this Court noted that the phrase "hard time" does not consist of "magic words." (*Ibid.*). Moreover, this Court was not addressing prosecutorial questions that misstated facts and law and constituted misconduct. Similarly, in *Roldan* this Court cited to *Pinholster*, it was not considering a case, as here, where the prosecutor sought to indoctrinate the juror. (See *Pinholster, supra*, 1 Cal.4th at 918). Also in *Roldan,* this Court was not considering a situation where, as here, a prosecutor sought to use *voir dire* to obtain a prejudgment of the facts to be presented at the trial. Additionally, in Appellant's case, the prosecutor sought to inflame juror passions by using *voir dire* to describe in gory detail the method of Appellant's execution, as if the prospective juror herself were to be doing the executing. The tactic allowed the prosecutor to identify and expel jurors with scruples who understandably reacted to his classless techniques.

Respondent concedes that M.K. admitted that, after hearing the court's hypothetical (including the description of 25 stab wounds), she could be open minded during the penalty phase though she was leaning towards the death penalty. (RB 151). The prosecutor then asked a series of inflammatory and irrelevant questions detailing the methods used to execute an individual, and the pain experienced by that individual. (RT 521-522). Respondent also admits that it was only after these prejudicial questions that M.K. said, "I don't think I could" impose the death penalty. (RB 152 (citing RT 523)). Here, but for this prosecutorial misconduct, M.K. would have been deemed a qualified juror and likely sat on Appellant's trial. Moreover, but for M.K.'s reactions to prosecutorial misconduct, substantial evidence of her impartiality or bias does not exist to

justify the trial court's decision.

4. The Trial Court Improperly Dismissed Juror B.D.

a. Respondent Fails To Address All Claims Raised By Appellant In His Opening Brief.

In his Opening Brief, Appellant raised three arguments regarding the insubstantiality or lack of the evidence that supports the trial court's determination to dismiss Juror B.D. In rebuttal, Respondent offers little or no argument in support of the trial court's determination, but, instead relies upon the state's characterization of the record. Respondent does not provide substantial evidence of B.D.'s partiality and does not provide persuasive arguments to counter the arguments raised in Appellant's Opening Brief.

Appellant challenged the trial court's dismissal of B.D. on the basis that: 1) the trial court's decision was not supported by substantial evidence of B.D.'s inability to be impartial 2) B.D. was dismissed based on her reaction to a series of prejudicial questions by the prosecution which again focused on the gas chamber and 3) the trial court erred by failing to ask a follow up question to an ambiguous answer by B.D. (See I AOB 154-56). In opposition, Respondent addresses one of these arguments, and fails to provide substantial evidence in support of the trial court's ruling. Herein, Appellant demonstrates that no evidence of B.D.'s inability to be impartial exists and that the trial court erred, in violation of Appellant's constitutional rights, by dismissing B.D.

b. Substantial Evidence Doesn't Support the Trial Court's Determination that Juror B.D.'s Views on Capital Punishment Would Have Substantially Impaired her Ability to Perform as a Juror in Appellant's Capital Case.

Respondent concedes that B.D. admitted that she would have an open mind after convicting Appellant and entering the penalty phase, and that she would seriously consider the options of death and life without the possibility of parole. (RB 153 (citing RT 636-57)). Respondent also concedes that B.D. admitted only a "20% doubt" in her ability to impose a death sentence. (RB 154). Respondent further admits that B.D. stated that the "death penalty is appropriate in certain cases - although it is heartbreaking." (RB 153).

However, Respondent, fails to address misconduct committed when the prosecutor questioned B.D. about the gas chamber, which by then was no longer operative, and which made the prospective juror feel "shaky." (See I AOB 153 (citing RT 647)). Respondent does not defend the trial court's error in failing to ask a follow up question to B.D. when she answered "no" to the court's question: "Is the death verdict a verdict you *couldn't* return in this case." (*Id.* at 650-51). Likewise, Respondent does not argue against the fact that the double negative in this colloquy equates to a positive answer by B.D. that she could return a death verdict in this case.

Here, the Court had a duty, which it failed to fulfill, to clarify B.D.'s answer to the court's own confusing question. Instead, the trial court dismissed B.D. because she had "given arguably inconsistent or equivocal answers at some point." (RT 651-52). The trial court's reasoning exhibits an indefensible deviation from the standard for evaluating juror capital eligibility under *Witt* and *Witherspoon*. A juror who states that they would

have a hard time imposing a "death sentence" on a real person, but could consider all the evidence fairly, impartially, and in accordance with the court's instructions, is qualified to serve on a capital jury under *Witt*. (See *Adams*, *supra*, 448 U.S. at 50). Respondent fails to understand that the Constitution does not permit:

> the exclusion of jurors...if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

(*Adams, supra,* 448 U.S. at 50).

Respondent does not offer evidence that B.D. ever stated she could not impartially serve on Appellant's jury or could not impartially adjudicate a death sentence. Moreover, the trial court's determination is not supported by substantial evidence of B.D.'s inability to be impartial. As a result, Appellant's state and constitutional rights were violated by B.D.'s improper dismissal.

5. The Trial Court Improperly Dismissed Juror T.L.

a. Respondent Fails to Address All of Appellant's Arguments and Several Incidents of Trial Court Error.

In his Opening Brief, Appellant challenged the trial court's dismissal of T.L. on five separate grounds. (See I AOB 157-59). In rebuttal, Respondent fails to counter each of the arguments raised by Appellant with the exception of Appellant's challenge to the sufficiency of the evidence

supporting the trial court's determination.[38] Herein, Appellant demonstrates how Respondent's error undermines their argument that "substantial evidence justif[ies] the trial court's decision to excuse [T.L.] for cause." (RB 157).

Particularly significant is Respondent's silence as to the procedural and substantive errors committed by the trial court during T.L.'s examination. Repeatedly, the trial court inappropriately silenced the juror, and failed to resolve ambiguous answers to confusing questions. (I AOB 157 (citing RT 1663-66)). In doing so, the trial court impeded the construction of a complete record of T.L.'s views on the death penalty in the abstract and as applied to Appellant's case. (See *People v. Heard* (2003) 31 Cal.4th 946, 967 n.9). Respondent's failure to address these reversible errors and the violation of Appellant's constitutional rights undermines the state's claim that T.L. was properly excluded from Appellant's capital jury.

b. Substantial Evidence does not Support the Trial Court's Determination that Juror T.L. Could Not Impartially Serve On Appellant's Capital Jury.

Respondent provides only one sentence regarding the trial court's determination to dismiss the juror T.L. "T.L.'s foregoing answers to the court during voir dire provide the substantial evidence justifying the trial court's decision to excuse him for cause." (RB 157). Instead of argument,

---

[38] Respondent fails to counter the following four arguments: 1) The trial court failed to follow proper *voir dire* protocols as required by this Court in *Heard, supra,* 31 Cal.4th at 967 n.9 (See I AOB 158); 2) The trial court asked confusing questions that caused ambiguous answers (See *Id.* at 149); 3) The trial court erred in failing to ask sufficient clarifying questions to clear up ambiguity surrounding T.L.'s final answers (See *Id.* at 159); and 4) The trial court failed to ensure that a complete record was made to support the prosecution's challenge for cause of T.L (See *Id.* at 160).

Respondent hinges their position upon a mischaracterization of T.L.'s answers as indicating an significant degree of equivocation. Respondent also cites a lengthy quote taken from *Roldan*, *supra*, 35 Cal.4th at 697-98, in support of their view that T.L.'s equivocations proved his bias. (See RB 158). Neither Respondent's brief argument nor the state's citation to *Roldan* persuasively justifies the trial court's decision to dismiss T.L.

Respondent concedes that T.L.'s philosophical views regarding the death penalty were neutral and that he admitted to being able to keep an open mind to all sentencing options during the penalty phase. (RB 156). However, Respondent claims that T.L.'s equivocation justified his dismissal. Respondent cannot offer any direct or express proof of T.L.'s partiality and must thus rely on his alleged equivocation. T.L. stated he would keep an open mind. (I AOB 157 (citing RT 163)). He stated his views on the death penalty varied on a "case by case basis." (*Ibid.* (citing RT 157)). Respondent's showing does nothing to prove T.L.'s partiality. This is especially true in light of the fact that Respondent agrees that T.L. had already indicated support for the death penalty and an ability to follow directions. (RB 156 (See RT 164-66)).

Likewise, Respondent's citation to *Roldan*, *supra,* 35 Cal.4th at 697, does nothing to address Appellant's arguments that the trial court failed to create a complete record of T.L.'s examination. In *Roldan,* the trial court repeatedly followed up on the juror's ambiguous responses. (*Id.* at 698). This critical fact allowed this Court to thoroughly review the juror's answers and assess the juror's degree of equivocation. In Appellant's case, based on the lack of record and the trial court's failure to follow up on ambiguous answers, Respondent is wrong to assert that T.L. was not qualified to serve on Appellant's capital jury. In sum, Respondent has failed to show that substantial evidence supports the trial court's ruling that T.L. could not impartially serve on Appellant's jury.

D. Conclusion.

The improper exclusion of even one prospective juror in violation of *Witherspoon* and *Witt* mandates an automatic reversal of Appellant's death sentence. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 962). Here, the trial court improperly dismissed five jurors without substantial evidence in support of its determinations. The trial court's erroneous determinations do not deserve deference as the trial court repeatedly violated this Court's constitutional protocols for voir dire in capital cases, failed to correct prosecutorial misconduct, asked ambiguous questions, failed to ask clarifying questions, and failed to make an adequate record for review of the prosecutor challenges for cause. Instead, the trial court read a boilerplate resolution as to the dismissal of each juror, which did not specifically correspond to the answers and demeanor of each individual that it dismissed. For these reasons, the trial court's decision to institute a prejudicial jury selection system and dismiss the five jurors discussed in this claim violated Appellant's rights to a fair and impartial jury at both guilt and penalty phases as guaranteed by the Sixth, Eighth, and Fourteenth Amendments and Article I of the California Constitution.

V. THE TRIAL COURT IMPROPERLY DENIED THE DEFENSE MOTION TO EXCLUDE ALL WITNESSES FROM THE GUILT PHASE.

A. Introduction.

Prior to the guilt phase opening statements, the trial court denied a defense motion to exclude all witnesses from the courtroom. (RT 1938). The court denied the motion and allowed: 1) penalty phase witnesses to watch the entire proceedings; 2) guilt phase witnesses to watch the proceedings after testifying; and 3) guilt and penalty phase witnesses to testify in the penalty phase to events and memories now distorted and manipulated by the prosecution's guilt phase case in chief. As a result, Ms. Olsson's father, sister, daughter and son witnessed much of the guilt phase testimony.[39]

The trial court "exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316). The trial court abused its discretion because its order: 1) was arbitrary and without reason; 2) did not cite the controlling law or governing standards for analyzing Appellant's request; 3) allowed four members of the victim's family member to watch guilt phase testimony and then testify at the penalty phase; and 4) created a substantial risk of influencing or affecting the content of the witnesses' penalty phase testimony. The trial court's ruling deprived Appellant of his rights to due process under the Fourteenth Amendment, a fair trial and to confront witnesses under the Sixth Amendment, reliable sentencing under the Eighth Amendment, and corresponding parallel rights under Article I of the California Constitution and resulted in a miscarriage of justice.

---

[39] The four witnesses were: 1) Ms. Olsson's Father, Clifford Sandberg; 2) Ms. Olsson's Sister, Jan Dietrich; 3) Ms. Olsson's daughter, Sandra Walters; 4) Ms. Olsson's Son, Elbert Walters.

B. Respondent Fails to Address all the Claims Raised by Appellant in His Opening Brief.

In his Opening Brief, Appellant argued that the trial court's denial of his motion to exclude all witnesses from the courtroom was erroneous for ten reasons. (I AOB 169-83). Appellant proffered evidence of prejudice resulting from the trial court's order. Appellant also proposed that this Court adopt a standard to evaluate the effects of that prejudice in accordance with the standard utilized by the majority of federal circuits and state courts. (I AOB 179).

Respondent argues against four, or half, of the arguments raised by Appellant and fails to argue against the proposed standard for evaluating prejudice under former Evidence Code section 1102.6.[40] Respondent fails to discuss the lack of a legally justifiable rationale cited by the trial court to support the denial of Appellant's motion. Respondent fails to address the trial court's deviation from applicable law. The state's failure to counter all of Appellant's claims exposes the trial court's abuse of discretion and the resulting prejudice.

Appellant's motion to exclude witnesses was based on constitutional and statutory grounds, which the trial court did not address in denying the motion. The trial court failed to identify authorities or articulate any logical

---

[40] Respondent failed to address the following four arguments: 1) The trial court's ruling violated Appellant's rights to a fair and reliable sentencing determination as guaranteed under the Eighth Amendment. (I AOB 179); 2) The trial court issued a deficient ruling that failed to provide articulable legal rationale or cite controlling authorities. (*Id.* at 176); 3) The trial court committed reversible error by violating applicable standards and placing the burden on Appellant to anticipate testimony and resulting prejudice on a "session by session basis." (*Id.* at 177); and 4) The trial court committed reversible error because its denial of the motion was based on misleading information from the prosecutor. (*Ibid.*).

rationale for denying Appellant's motion. In a capital case, where four testifying witnesses heard the entire guilt phase proceedings, detailing the murder of their beloved daughter, sister and mother, the trial court's erroneous ruling violated Appellant's constitutional rights to due process, a fair trial, to confront witnesses in his defense, and to have his sentencing proceedings conducted in a reliable manner as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as, Article I of the California Constitution.[41]

---

[41] Respondent wrongly construes the violations of Appellant's Sixth, Eighth, and Fourteenth Amendments as resulting from the trial court's abuse of discretion. (See RB 162 n. 17). In truth, the constitutional amendments also compelled the trial court to exclude the four witnesses in a capital case where distortion of the witnesses' testimony posed a significant risk. Had the trial court correctly evaluated, not only the substantial risks posed by the witnesses' presence, but also the effect of the witnesses' presence on Appellant's constitutional rights to a fair trial and impartial jury, it would not have issued its arbitrary and erroneous ruling. As a result, the trial court's ruling both violated Appellant's rights and proved arbitrary in failing to consider constitutional standards that justified the exclusion of the witnesses during the capital proceedings.

Respondent believes that the latter arguments have been forfeited on appeal. However, Respondent's citations to *People v. Avila* are misplaced. Under *Avila*, an appellate argument is not forfeited if the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply. (See *Avila, supra,* 38 Cal. 4th at 527 n.22). This is true so long as, the trial court's act in admitting the evidence, insofar as it was wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the federal Constitution. (*Ibid.*). Here, in moving to exclude the witnesses, Appellant's motion specifically included reference to his constitutional rights and the legal consequences of the trial court's arbitrary ruling violated those constitutional rights. Thus, Appellant's arguments have been preserved for review on appeal.

C. Respondent Fails to Show that the Trial Court Didn't Abuse Its Discretion When It Denied Appellant's Motion to Exclude All Witnesses From the Trial Proceedings.

Respondent argues that there was "nothing arbitrary or capricious in the trial court's ruling...," (RB 163) based on two assumptions. Respondent assumes that "there was [ ] no risk of 'tailored' or less-than-candid testimony." And, Respondent assumes that it was "unlikely that [the witnesses] learned anything from sitting through the guilt phase that they did not already know." (RB 163). In sum, Respondent feels that at their "best, Appellant's contrary arguments [ ] evince a reasonable disagreement with the trial court." (RB 170). Respondent is wrong.

Appellant more than "reasonably disagrees" with the violations of his constitutional rights. He raised ten arguments challenging the trial court's errors, and showed that the trial court's ruling was erroneous and not based on any identifiable rationale. (See I AOB 174). The trial court failed to cite applicable law in justification of its order. (*Ibid.*). Appellant has shown that the ruling produced a substantial likelihood of influencing the witnesses' penalty phase testimony. (See I AOB 177).

1. Respondent Fails to Rebut Proof that the state Prosecutor Misled the Trial Court into Denying Appellant's Motion to Exclude All Witnesses.

After filing the motion and prior to the prosecution's opening statement, defense counsel argued for a *per se* exclusion of witnesses from the proceedings because it would be impossible to know what facts at the guilt phase would influence the witnesses' testimony at the penalty phase. He also argued that their current presence in the audience, during the prosecution's opening arguments, posed a substantial risk of influencing their testimony and prejudicing Appellant's constitutional rights. (See RT 1937-38). In response, the court asked the prosecutor whether family

witnesses would testify to the circumstances of the crime. The prosecution incorrectly responded: "No." (*Id.* at 1939). The Court then issued its order denying the defense's motion because it was "not going to issue an omnibus order at this time." (See *Id.* at 1940).[42]

Respondent argues that the prosecutor's reference to "'circumstances of the crime' in the witness exclusion discussion did not include victim impact evidence." (RB 169). To try to justify this idea, Respondent adds words to the record by arguing that the trial court was actually questioning about "circumstances of the *commission* of the crime." (*Id.* at 170). Respondent then argues that "[b]y answering 'no,' the prosecutor was actually and indirectly indicating that these penalty phase witnesses would not testify about the facts of the crime, but would give 'victim impact testimony instead." (*Ibid.*). According to Respondent's parsed definition of "circumstances of the crime," the state's negative response to the Court's request was truthful. (See *Ibid.*). However, in reality, the prosecutor called four testifying witnesses who had witnessed the guilt proceedings to testify to the circumstances of the crime evidence and victim impact evidence in the penalty proceedings. This purpose was constitutionally prohibited as the admission of victim impact evidence through "family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violate the Eighth Amendment." (*Payne v. Tennessee* (1991) 501 U.S.808, 830 n. 2).

In accepting the prosecution's representations, the trial court allowed the witnesses to gain knowledge about the circumstances of the crime since the prosecutor had assured that such knowledge would be irrelevant to their

---

[42] In answering "no" to the Court's question, the prosecutor misled the court as to the evidence and testimony it would introduce during the guilt and penalty phases. (See Claim VIII - The Trial Court's Error and Prosecutorial Misconduct Resulted in the Improper Introduction of Victim Impact Evidence at the Guilt Phase).

victim impact testimony. In reality, the witnesses' detailed knowledge of the crime, gained in the courtroom, was later exploited by the prosecutor who used the witnesses' understandably emotional responses to the proceedings to violate evidentiary rules and the trial court's orders. (See Claim VIII –The Trial Court's Error and Prosecutorial Misconduct Resulted in The Improper Introduction of Victim Impact Evidence at the Guilt Phase). This opportunity was created by the trial court's arbitrary ruling, which allowed the family members to testify in response to the state's evidence and arguments that they had just witnessed in their entirety. Had the statements of the state prosecutor held true, the Court's erroneous ruling would not have so prejudiced Appellant's constitutional rights. Instead, the Court issued a deficient ruling, absent any legal standards, which was ultimately materially used to violate Appellant's state and federal constitutional rights.

2. Respondent Fails to Show that the Trial Court Adequately Considered Controlling Law or the Constitutional Effects that Would Result from the Denial of Appellant's Motion.

Respondent argues that the trial court's ruling is valid because the court "listened to both parties and attempted to accommodate the interests of all. And it did so reasonably." (RB 163). Respondent argues that in ruling on a motion under former Evidence Code section 1102.6, the "trial court need not expressly cite to a specific code section or to particular factors, or expressly state that it is weighing the risks." (*Id.* at 168). Respondent believes the violations of Appellant's constitutional rights were ameliorated by the trial court's "generous" offer "to work with defense counsel 'session by session' to help him determine if any testimony by the upcoming prosecution witnesses would give defense counsel reason...to exclude those two family members or any other particular witnesses during

any particular testimony." (*Id.* at 169).

Respondent does not respond to Appellant's arguments. Respondent does not counter Appellant's assertion that since the trial court did not mention applicable law (Evidence Code § 777 and former § 1102.6), "[i]t cannot be said that the court properly considered application of its discretion under those statutes." (I AOB 174). The record lacks any showing that the trial court considered whether the witnesses' presence "pose[d] a substantial risk of influencing or affecting the content of any testimony," and lacks evidence that the court referenced or considered Appellant's constitutional rights or the effects of its ruling on those rights. The court's order did not demonstrate any knowledge of the witnesses' proposed testimony or cite any rationale whatsoever; the judge only said: "In terms of an omnibus order excluding family members for the duration of the trial, at this point, I would not be inclined to issue such an order." (RT 1940). Thus, the Court did not articulate the proper standard under former Evidence Code section 1102.6. The court's decision accommodated only the prosecution's interest in allowing its witnesses to hear the entire guilt phase proceedings and arguments by the state. The court abused its discretion by considering only the state's interests and ruling without guidance from controlling law.

Respondent attempts to divert the focus from the court's improper ruling by arguing that "[i]f Appellant thought [the court's ruling] posed a problem, he should have made it clear at the time." (RB 163). Appellant did just that. In the clearest of terms, defense counsel filed a motion to exclude all witnesses from the proceedings. Respondent cannot truly argue that Appellant failed to make his argument "clear at the time." (*Ibid.*).

Respondent argues that because the Court offered to work with defense counsel "session by session," the "record clearly supports an *inference* that the trial court was well aware of its obligation pursuant to

Evidence Code section 777 and former section 1102.6, and performed the requisite analysis." (RB 169). The court's method for its ruling ran contrary to controlling standards under former Evidence Code section 1102.6, which required the court to identify the controlling statutes and whether the witnesses' presence would pose a substantial risk of influencing or affecting the content of any testimony. (See I AOB 174). Additionally, the court failed to address other important factors including: 1) when the request was made (prior to opening statement; 2) the relationship between the witnesses (family members); 3) the nature, relevance, and importance of the testimony given by the witnesses to be excluded; and 4) whether there was any likelihood that the witnesses testimony would be shaped by what they heard the other witnesses say. (See *Ibid.*). The trial court did not mention the statutes, and offered no substantive support for its decision that demonstrated how it weighed these factors.

Respondent tries to lay fault on Appellant by arguing that he ultimately failed to utilize the trial court's "offer[] to work with defense counsel." (See RB 169). Respondent argues that the trial court was more than gracious in requiring the prosecution to divulge the testimony of witnesses so "that defense counsel could determine whether he wanted to request the exclusion of any potential witness." (See *Id.* at 164). Respondent argues that it was Appellant's fault that he did not "reasonably anticipate[] what each prosecution witness was going to testify to, and thus [did] not [take] up the trial court's offer to work together on possible witness exclusion." (*Ibid.*).

Respondent can only make these arguments since the trial court violated Evidence Code section 1102.6 by placing a "session by session" burden on defense counsel to request the exclusion of witnesses. (RB 164). Defense counsel had objected to the court's order, and had told the court

that predicting testimony by penalty witnesses at a later date was unreasonable and unworkable. (RT 1938-39). Moreover, it was impossible for the defense to presciently predict the prosecution's evidence since the state did not make an offer of proof concerning the witnesses' penalty phase testimony until two days before the penalty phase. In such a circumstance, no "experienced capital counsel" could predict the discretion of the state's prosecutor and "reasonably anticipate[] what each prosecution witness was going to testify to." (RB 164). Here, the court's unlawful ruling and requirement that Appellant's counsel shoulder this impossible burden disproves Respondent's argument that the trial court was correct to require Appellant's counsel to "work with the Court."

3. Respondent Fails to Show that the Trial Court Considered Whether the Witnesses' Presence Posed a Substantial Risk of Altering or Influencing their Testimony.

Respondent must concede that the trial court failed to acknowledge defense counsel's objection that the presence of the witnesses "pose[s] a substantial risk of influencing or affecting the content of any testimony," and did not cite any controlling legal standard (RB 165 (quoting RT 571-72); see also Cal. Evidence Code § 1102.6).

Respondent argues that the "the court knew it had to factor in whether the presence of the victim's family in the courtroom would pose a substantial risk of influencing or affecting the content of any testimony" because it offered to work with defense counsel on a "session by session basis." (RB 169). Even if Respondent's assumption is true, it is not a clear and express statement and order by the court under Evidence Code Section 1102.6. Moreover, the law did not authorize the court to issue a ruling on a "session by session" basis, doing so did not consider the "substantial risks of influence" that allowing testifying witnesses to attend capital

proceedings posed to the witnesses' testimony.

The record does not support an "inference" that the trial court recognized (and applied) its duties under Evidence Code § 777 and former § 1102.6. (RB 169). Even at its best, the trial court failed to acknowledge any standards, and instead ruled on Appellant's motion without reasoning other than "I am not going to issue an omnibus order at this time." (RT 1940). These facts and reasons distinguish *People v. Bradford* (1997) 15 Cal.4th 1229 and *Griffin, supra,* 33 Cal.4th at 574, cases relied on by the Respondent, where the trial courts properly and expressly considered the motions under section sections 1102.6 and its "substantial risk" standard. (See *Bradford, supra,* 15 Cal.4th at 1321; and *Griffin, supra,* 33 Cal.4th at 574.

Respondent argues that *Griffin* is applicable because it "is not the type of testimony the witness g[ives]...but the factors that showed the reasonableness of the court's ruling." (RB 167). Respondent argues that *Bradshaw* is applicable here due to factual similarities between the cases and because in both cases the witnesses' "testimony would not have been influenced by testimony given during the guilt phase which focused on the circumstances of how the crime was committed." (*Id.* at 168). Respondent's arguments are unconvincing.

Bradford is not factually similar because it involved the presence of witnesses only during opening statements. Here, the witnesses sat throughout the two weeks of guilt phase proceedings; including through the pathologist testimony, several crime scene descriptions, as well as during other family members' testimony, opening statements, the prosecution's case in chief, the defense's case-in-chief, the prosecution's case in rebuttal, and the closing arguments. Likewise, *Griffin* is similarly factually distinguishable from Appellant's case. In *Griffin,* two witnesses were allowed to attend the proceedings, (*Griffin, supra,* 33 Cal.4th at 574);

unlike in Appellant's case, where four witnesses were present throughout the entire trial. Moreover, in neither *Griffin* nor *Bradshaw* did the excludable witnesses improperly testify as to victim-impact testimony during the guilt phase, or circumstances of the crime evidence during the penalty phase

In the last four years, this Court has been presented with only one other case alleging error based on the trial court's abuse of discretion in allowing a victim impact witness to attend guilt phase proceedings. (See *Wallace, supra*, 44 Cal.4th at 1053). In *Wallace*, the defendant alleged that it was error for the trial court to allow one victim impact witness, the victim's "step grandson," to listen to the guilt phase evidence. In evaluating the claim, this Court sought to determine "whether the trial court abused its discretion in concluding that Darlington's presence would not pose a substantial risk that he would tailor his testimony to that of other witnesses, or that he would cause other witnesses to tailor their testimony to his." (*Id.* at 1054). Ultimately, this Court found that "the defendant offers no evidence that would suggest Darlington's presence posed such a risk, and upon our independent review of the relevant portions of the record, we find none." (*Ibid.*).

In contrast to the defendant's claims in *Wallace*, Appellant's claims are premised on the trial court's decision to allow *four* prosecution witnesses to attend court throughout the proceedings. (AOB 174). Unlike in *Wallace*, Appellant has demonstrated that the witnesses' attendance during the proceedings affected their subsequent testimony and tailored [their] testimony to conform to what [they] had learned from being present at trial...." (*Wallace, supra*, 44 Cal.4th at 1054).[43] Specifically, in

---

[43] In *Wallace*, the witness who was allowed to witness the prosecution's case-in-chief only testified, as this Court recognized, to menial issues and facts. (See *Wallace, supra*, 44 Cal.4th at 1054-55).

Appellant's case, the prosecution urged the four witnesses to discuss circumstances of the crime and victim impact testimony. Undoubtedly, the former testimony was influenced by the physical evidence and witness testimony presented by the prosecution in its case in chief, including the medical examiner, criminologists, and other circumstantial and eye-witnesses. This testimony likely disturbed the witnesses and caused emotional distress, which was exhibited in their victim impact testimony. Here, unlike in *Wallace,* Appellant has alleged prosecutorial misconduct in tandem with the trial court's erroneous determination. Here, the prosecution actively sought to goad the four witnesses into reciting emotionally charged testimony by asking them to recall the circumstances of the crime while presenting their victim impact testimony. In sum, the allegations at the root of Appellant's claim are more serious than any case that has come before this court in recent years.

The record does not support Respondent's argument that the trial court reasonably exercised its discretion in denying Appellant's motion to exclude witnesses from the proceedings. The court never identified controlling law and, instead, issued a capricious and whimsical ruling against all "omnibus" motions. Moreover, the trial court's abuse of discretion resulted in a miscarriage of justice in violation of Appellant's state and federal constitutional rights when the excludable witnesses improperly provided victim impact testimony during the guilt phase, and then provided circumstances of the crime testimony during the penalty phase. (See Claim VIII - The Trial Court's Error and Prosecutorial Misconduct Resulted in the Improper Introduction of Victim Impact Evidence at the Guilt Phase).

D. Respondent has failed to Show that the Trial Court's Abuse of Discretion was not Prejudicial.

In his Opening Brief, in the absence of a standard for evaluating prejudice resulting from abuse of discretion under former section 1102.6, Appellant urged this Court to adopt a presumption of prejudice standard. (I AOB 181-83). As outlined by Appellant, numerous circuits and states that apply the presumption of prejudice in witness exclusion situations. (See *Id.* at 180). Here a presumption of prejudice would stand unless the prosecution demonstrated that the error arising from the trial court's abuse of discretion was harmless. Respondent has failed to show that the trial court's abuse of discretion here was harmless. Moreover, Respondent has failed to offer persuasive justifications against adopting Appellant's requested standard since, in their brief, Respondent failed to argue against its application.

E. Conclusion.

Appellant has demonstrated that the trial court's abuse of discretion in denying his motion under former Evidence Code section 1102.6 prejudiced his constitutional rights. Allowing penalty phase witnesses to improperly hear section 190.3(a) aggravating evidence at the guilt phase subjects them to the very harms that section 1102.6 was designed to prevent. The trial court's abuse of discretion, and neglect of controlling authorities, constituted a violation of Appellant's rights to due process, a fair guilt trial, to confront witnesses, and to be reliably sentenced under the Sixth, Eighth and Fourteenth Amendments, as well as, Article I of the California Constitution.

VI. INSUFFICIENT EVIDENCE SUPPORTS APPELLANT'S CONVICTIONS OF CAPITAL MURDER, THE BURGLARY-MURDER SPECIAL CIRCUMSTANCE, OR HIS CONVICTION FOR ASSAULT WITH INTENT TO COMMIT RAPE.

A. Introduction.

The evidence in Appellant's case is not sufficient to support his conviction for capital murder, the burglary-murder special circumstance, or his conviction for assault with intent to commit rape. Appellant's first-degree murder and assault with intent to commit rape convictions rest on two items of evidence: 1) the criminalist's testimony that Appellant's fingerprints matched those left on the murder weapon; and 2) Appellant's coerced and incriminating statements given on March 27, 1987. Respondent admits as much by repeatedly relying on these two items to try to justify the trial court's rulings. (See e.g., RB 173, 174, 177-78, 179, 180, and 181). In the end, but for juror confusion, a Final Information lacking particularization, and prosecutorial misconduct, no rational trier of fact would have found sufficient evidence of premeditation, felony-murder, the burglary-murder special circumstance, or assault with intent to commit rape.

In their Brief, Respondent declares that Appellant's arguments are "unpersuasive" and his convictions are supported by more than "'scant' and 'minimal' evidence." (RB 172). Respondent has erred in summarily arguing that "Appellant's argument 6 is without merit in all respects." (RB 183). Appellant has shown that his convictions must be reversed since they are supported by insufficient evidence. (See *Jackson v. Virginia,* (1979) 443 U.S. 307, 313-324; and *People v. Anderson* (1968) 70 Cal.2d 15, 26-27).

Early on, the prosecution recognized that it had insufficient evidence to convict Appellant of burglary. Before Appellant's trial, the prosecutor decided not to file separate burglary charges. (I AOB 185). Likewise, the court recognized the insufficiency of the evidence supporting a rape or attempted rape charge when it prohibited the prosecution from charging either crime separately. (I AOB 185 (citing CT 1103-04)). The evidence in the state's case against Appellant was not sufficient to establish his convictions. In the absence of the prosecution's proof of every element of his capital offense beyond a reasonable doubt, Appellant's constitutional right, under the due process clause of the Fourteenth Amendment, was violated. (See *Jackson, supra,* 443 U.S. at 313-324; and *People v Staten* (2000) 24 Cal.4th 434, 460)

B. Insufficient Evidence Supports Appellant's Capital Murder Conviction Based on a Premeditation and Deliberation Theory.

In his Opening Brief, Appellant showed that the prosecutor failed to establish premeditation and deliberation. Respondent says that there is "sufficient evidence to support a jury finding that appellant premeditated and deliberated his murder of Olsson." (RB 172). Respondent tries to distinguish *People v. Anderson* as merely "summarizing the types of evidence appellate courts have considered in weighing the sufficiency of a first-degree murder conviction based on premeditation and deliberation," (*Ibid.*). Respondent argues that there was "strong evidence of planning," and that at "for motive evidence, the record reflects a plausible motive." (*Id.* at 174). Respondent argues that "the manner of killing demonstrates willful premeditation and deliberation on Appellant's part." (*Id.* at 175). Finally, Respondent says that "[t]he prosecutor's argument was proper and consistent with the instructions the trial court eventually read to the jury." (*Id.* at 178).

In order to support its position, Respondent must minimize the importance of this Court's precedent under *Anderson.* Respondent thus argues that *People v. Bolin,* (1998) 18 Cal.4th 297;[44] *People v. Pride* (1992) 3 Cal.4th 195;[45] and *People v. Mayfield* (1997) 14 Cal.4th 668, 767,[46] have limited the use of the three factors listed in *Anderson* for a finding of premeditation. In Respondent's view, "the process of premeditation and

---

[44] Each case is factually distinguishable. Each involved multiple murders or murders that are factually dissimilar to Appellant's case. In *Bolin*, two witnesses testified that the defendant shot and killed two persons and then opened fire on two others. (*Bolin, supra,* 18 Cal.4th at 331). From this evidence, this Court found it reasonable to conclude that the defendant had premeditated the murders to protect his marijuana crop, near where the murders occurred, and to prevent the victims from turning him into the authorities. In Appellant's case, however, no witnesses placed Appellant at the scene of the crime. Similarly, Appellant did not know Ms. Olsson and had no reason to attack her.

[45] In *Pride*, the defendant was convicted of murdering two women where he and the victims worked. (*Pride, supra,* 3 Cal.4th at 247-48). The murders occurred while the defendant and the women were the last people known to be in the building. (*Ibid.*). Both bodies had traces of the defendant's semen. (*Ibid.*). This Court found sufficient evidence of premeditation on these facts. Here, however, there is no connection between Appellant and Ms. Olson and thus no showing of premeditation. Similarly, Appellant was never seen near the scene of the Olsson homicide on the night in question. Finally, the only physical evidence found at the scene of the Olsson homicide, a black hair, indicated that a person *other than Appellant* was at the scene of the crime and committed the murder.

[46] In *Mayfield*, this Court found that since the defendant physically attempted to avoid arrest and had killed three police officers, an inference that the killings were premeditated and perpetrated to avoid arrest was proper. (*Mayfield, supra,* 14 Cal.4th at 769). These facts are clearly distinguishable from Appellant's case. In *Mayfield,* there was no issue as to the killer's identity. Here, the prosecution has no direct evidence tying Appellant to the Olsson homicide and thus no proof of premeditation. The prosecution's case rested solely on circumstantial evidence, unlike in *Mayfield* where the evidence directly tied the defendant to three killings.

deliberation does not require any extended time period... [and] the true test is...the extent of the reflection." (RB 172 (citing *Bolin, supra,* 18 Cal.4th at 332)). In Respondent's mind, this Court has substituted the "extent of reflection" test for *Anderson's* factor test, which sought to show premeditation by proof of "careful thought and weighing of the considerations." (*Ibid.* (citing *Anderson, supra,* 70 Cal.2d at 27)). Respondent's is wrong. *Bolin* and *Anderson* endorse the same test to prove the same quantum of *mens rea* establishing premeditation. Respondent's efforts are merely an attempt to divert this Court's attention from the state's weak showing under *Anderson*'s three factors.

Respondent cannot show that Appellant premeditated the murder based on his "extent of reflection" or "weighing of the considerations." (RB 172). Respondent argues that premeditation is proven because: 1) the murder occurred early in the morning;[47] 2) the murderer used a knife;[48] and 3) there are signs of a forced entry into Ms. Olsson's home.[49] This

---

[47] There was no evidence presented by the prosecution that Appellant waited for anything. Respondent's argument amounts to an argument that the time of the crime can establish state of mind. This is faulty and an unreasonable inference as there is no evidence that Appellant decided to commit an act earlier and then waited.

[48] Respondent's argument that premeditation is proven because Appellant carried a buck knife - is specious. (RB 173). The evidence that Appellant bought the knife at the same time as he purchased a hunting license shows an innocent purpose. Moreover, carrying a buck knife is legal and quite common, while carrying a loaded gun, as in *Miranda* and *Williams*, is not. Thus, a showing of premeditation requires more than a showing that the defendant carried a knife. (See *People v. Miranda* (2008) 44 Cal.3d 46, 87; and *People v. Williams* (1995) 40 Cal.App.4th 446, 455).

[49] Respondent asserts that premeditation is also shown by the fact that the screen to Ms. Olsson's window had been removed. (See RB 173). To the contrary, the evidence is irrelevant as to the issue of premeditation and the attacker's identity. There was no evidence

evidence, however, does not prove "premeditation" or the "identity" of the murderer. (*Id.* at 173). Respondent recognizes as much when, just like the prosecutor at trial, it relies on Appellant's involuntary and coerced March 27 statements. (*Ibid.*). Respondent does so even though Appellant's involuntary statements directly conflict with the physical evidence cited by Respondent in support of the state's argument. For example, in the March 27 statement, Appellant denies yielding the knife or forcibly entering the home. (See People's Trial Exhibit 6C; and RT 2900)). However, Respondent asserts that premeditation can be shown by facts indicating that the intruder forcibly entered the home and murdered Ms. Olsson with a knife. The contradictory facts obtained by police through Appellant's involuntary statements provide no support for Respondent's argument.

Likewise, the fingerprint evidence was based on the *second* set of Appellant's fingerprints, which were "hand-delivered" to DOJ by the Livermore police after his March 7 arrest. The fact that fingerprints, purportedly matching Appellant's, were found on the knife does not substantially prove that Appellant harbored premeditation prior to the murder. This is because carrying a buck knife is quite common and proof of premeditation requires more than evidence that a knife was used in a homicide. This Court recognized as much in *People v. Steele.* There, the defendant was convicted of two capital murders. This Court found that:

> As to planning, the jury could infer that defendant carried the fatal knife into the victim's home in his pocket...because the

---

presented by the prosecution that Appellant removed the window screen. There was no evidence presented as to when the screen had been removed. It cannot reasonably be inferred that the perpetrator tried to enter that way and failed after removing the screen. Similarly, it cannot reasonably be inferred that the perpetrator tried to leave that way to avoid being seen in front of the house. Respondent assertions to the contrary are speculative. Additionally, Respondent's assertions contradict the prosecution's theory that the assailant made a force entry through the front door. (*Ibid.*).

> defendant had already stabbed another woman to death. When a person stabs a woman to death, then leads another woman into her apartment with a knife in the pocket, the jury can readily infer that the person possessed the knife for the same purpose. Additionally...Richard Blakeslee testified that...he heard defendant say, 'Put the phone down or I'll kill you.' This evidence suggests a planned killing.

(*People v. Steele* (2002) 27 Cal.4th 1230, 1250).

Here, however, no evidence directly links Appellant to the Olsson homicide let alone another murder involving the same knife. Similarly, Appellant was never heard threatening Ms. Olsson and no evidence shows that they had any prior contact. In the absence of any evidence to the contrary, it is unreasonable to conclude that Appellant premeditated Ms. Olsson's murder, simply because a buck knife, once owned by Appellant, but later stolen from his car, was used in the Olsson homicide.

Respondent argues that the evidence of Appellant's motive is "plausible." (RB 174). Respondent fails to rebut Appellant's argument that the state failed to establish motive by failing to present any evidence of prior contact or relationship between Ms. Olsson and Appellant. Here again, Respondent relies on Appellant's incriminating statements from March 27, the same statements discredited by Respondent in this appeal and the prosecutor during trial. Respondent argues that because Appellant lived near Ms. Olsson "[a] reasonable inference from this is that Olsson knew Appellant from the neighborhood...." (RB 174).[50] Far from Respondent's sense of reasonableness, this evidence merely raises a *suspicion* of motive, which is an insufficient basis to prove premeditation.

---

[50] Respondent's argument that Appellant moved out of the neighborhood four weeks before the murder, contradicts the Statement of Facts, where Respondent states that Appellant lived with Mr. Chandler until a few days before the crime. (Compare RB 6; with RB 174).

(See I AOB 193 (citing CALJIC 2.01; *People v. Redmond* (1969) 71 Cal.2d 745, 755; and *In re Leanna W.* (2004) 120 Cal App.4th 735, 741)). Moreover, under California evidence rules, an inference is not reasonably drawn from a fact if it is based only on speculation. (See Cal. Evidence Code § 600(b); and *People v. Raley* (1992) 2 Cal.4th 870, 891).

Respondent next argues that the manner of killing - twenty-eight (28) stab wounds - demonstrates "willful premeditation." (RB 175). In doing so, Respondent recites some of the more horrific crime circumstances in a failed attempt to justify premeditation by unnecessary gore. However, Respondent bases its argument entirely upon facts that occurred *after* the murder, arguing that a "preconceived design" can be inferred from: 1) the blood stains on the bed sheets; and 2) Appellant's statement that he went to his car to get some gloves after Doubting Thomas murdered Ms. Olsson. (*Ibid.*). These facts fail to prove premeditation -- that is mental state -- *before* the homicide, or that Appellant committed the homicide.

Respondent again utilizes Appellant's unreliable statements, despite the facts that: 1) at other times Respondent, in this appeal, and the prosecutor, during Appellant's trial, attacked the veracity of the statements; 2) if given full credit, Appellant's statements exonerate him of the Olsson homicide; and 3) Appellant's statements materially contradict the physical evidence found at the scene of the Olsson homicide.

Second, Respondent's proposition runs contrary to this Court's precedent, which requires more than a showing of "many stab wounds were randomly inflicted" in order to prove premeditation. (See *People v. Haskett* (1982) 30 Cal.3d 841, 850; and *Anderson, supra*, 70 Cal.2d at 31). Since no additional evidence of planning and motive has been established in this case, the state has failed to sustain a reasonable showing of a preconceived design of murder based Ms. Olsson's wounds alone.

Respondent says that after reviewing the record "in context with the prosecutor's argument pertaining to malice aforethought, premeditation, and deliberation, we find no error." (RB 176). Respondent argues that Appellant is "wrong in claiming that the prosecutor simply argued that 'thinking about it' was sufficient to prove premeditation, deliberation and malice aforethought beyond a reasonable doubt." (*Id.* at 178 (citing I AOB 190)). Respondent cites a lengthy quotation from the prosecutor's argument in the guilt phase where the prosecutor defines "[d]eliberate" by saying "What it basically means is that the person thought about it." (RB 177 (citing RT 3080-3083)). Likewise, within Respondent's lengthy quote, the prosecutor defines "malice aforethought" as having to "do with the idea that this mental state, 'I plan to kill.'" (RB 177). In the same text quoted by Respondent, the prosecution defines "premeditation" as "thinking of it beforehand." (*Id.* at 178). Respondent's quote of the prosecutor does not disprove Appellant's allegations that the prosecutor conflated the meaning of premeditation, malice aforethought and deliberation. Instead, Respondent has proven that the prosecutor committed error and misconduct by defining premeditation, malice aforethought and deliberation based on the identical factual element that Appellant "thought about it."[51] This explains the juror's confusion in returning a first-degree murder conviction without sufficient evidence of premeditation.[52]

---

[51] Moreover, this description of the elements directly conflicts with the instructions given in this case. (See CALJIC Nos. 8.10, 8.11, and 8.20).

[52] Respondent chastises Appellant for assigning the prosecution's misstatement of the law as error, since his trial counsel never objected to the argument. (RB 176-78). In his Opening Brief, Appellant did not assign the arguments as error, but rather, cited the improper argument as evincing the weakness of the evidence the prosecutor was relying on and to explain reasonable juror confusion

In sum, Respondent poses no effective opposition to the arguments raised in Appellant's Opening Brief. Under *Anderson* or *Bolin,* Respondent has failed to show sufficient evidence of the "extent of [Appellant's] reflection" or "weighing of considerations" to justify his first degree murder conviction under a premeditation theory. There was no evidence of planning and the method of killing was not a "preconceived design." Respondent's arguments thus do not "furnish a reasonable foundation for an inference of premeditation and deliberation." (*Anderson*, *supra*, 70 Cal.2d at 25, 27). Under these circumstances, no rational trier of fact could have found that Appellant premeditated or deliberated with malice aforethought and intent to kill beyond a reasonable doubt. The evidence presented by the state was insufficient to support a first-degree murder conviction based on premeditated and deliberated murder. (*See Jackson, supra,* 443 U.S. at 319).

C. Insufficient Evidence Supports the First Degree Murder Conviction on a Felony Murder Theory.

1. Insufficient Evidence Supports Felony-Murder Theory.

In his Opening Brief, Appellant established that state prosecutors failed to provide sufficient evidence to support a finding of first degree murder based on a theory of felony-murder. The state presented no evidence that he had entered Ms. Olsson's house with either the intent to rape or the intent to steal. Moreover, the state's failure to provide specific notice as to their theory of the case in the final information allowed for the jury to return a verdict finding the burglary-murder special circumstance and convicting Appellant of intent to commit rape without the state having presented sufficient evidence of either charge. (See I AOB 185)

---

stemming from the prosecution's erroneous statements of law. (See I AOB 190 and 192).

In response, Respondent merely says that there is sufficient evidence "that appellant entered Olsson's home with [a] specific intent to steal or commit rape." (RB 179). Respondent argues that the prosecution's arguments and information gave Appellant "sufficient notification of what he had to defend against," and did not confuse the jury and that Appellant's challenges to the particularization of the final information are "without basis." (*Id.* at 182). Respondent alleges that "the jury was not confused, given th[e] [prosecution's] arguments and that instruction." (*Ibid.*). Finally, Respondent claims that Appellant "[had] sufficient notification of what he had to defend against," in terms of prosecution's theory of murder and the underlying felonies to be charged, "at the preliminary hearing or the indictment proceedings." (*Ibid.*).

Respondent's arguments are unpersuasive, conclusory, and fail to prove that there was sufficient evidence of Appellant's intent to commit burglary based on intent to commit assault or theft. First, Respondent fails to recognize that the prosecutor and the court found insufficient evidence to charge Appellant with a separate count of rape. Errors created by the state's lack of notice and particularization in its theory of felony-murder prohibited the jury from reasonably adjudging the sufficiency of the evidence. In its final information, the state failed to specify the theory of first-degree murder and thus failed to separately charge premeditated murder and felony murder. The result allowed the prosecutor to forge proof of what underlying felony implicated the theory of felony murder, as well as, the burglary-murder special circumstance.[53]

The final information failed to specify, with any degree of particularization, the charges against Appellant. The final information did

[53] This is especially true since the jury was instructed "you are not required to agree as to which particular crime the defendant intended to commit at the time of his entry into the victim's home." (CALJIC 14.59, CT 2907).

not specify the theory of first-degree murder (i.e. whether it was premeditated or felony-murder), and did not specify the nature of the intended felony for the burglary-murder special circumstance allegation (whether it was based on theft or assault with intent to commit rape). Here, lack of detail in the accusatory pleadings, (see RB 182) allowed the prosecution to utilize insufficient evidence for a finding of felony-murder and the burglary-murder enhancement.

Respondent fails to acknowledge that, according to this Court: "The Sixth Amendment guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges in order to permit adequate preparation of a defense." (*People v. Gallego* (1990) 52 Cal.3d 115, 189 (citing *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1236) (citations and footnote omitted)). This important caveat immediately follows Respondent's short cite to (*People v. Diaz* (1992) 3 Cal.4th 495, 557) ("There are situations in which the United States Constitution may require greater specificity. Generally, the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings."). Moreover, compliance with Penal Code section 952 does not necessarily overcome a due process attack. (See *Choung v. People of state of California* (D.C. Cal. 1970) 320 F.Supp. 625, 629).

Respondent's justification that when sufficient notice is provided at the preliminary hearing, constitutional concerns are obviated, does not fully state the law. California courts have found the violation of constitutional requirements when the prosecution:

1. "Ambush[es]" a defendant by submitting a new theory of the case following the preliminary hearing. (See *Gallego*, *supra*, 52 Cal.3d at 189);

2. When adequate notice of the charges is not provided

within the indictment. (See *People v. Jordan* (1971) 19 Cal.App.3d 362, 369); or

3. If the violation of the charged offense depended upon violation of another statute - both statutes must be set out. (See *People v. Clenney* (1958) 165 Cal.App.2d 241).

Here, the state's final information failed to fully describe the counts within the felony-murder count. Respondent's inability to clearly distinguish between the counts dooms the state's accusatory pleading. (*Jordan, supra*, 19 Cal.App.3d at 368).

The final information provided inadequate notice that the prosecution would be utilizing both allegations of larceny and assault with intent to commit rape to prove the burglary-murder special circumstance. This is especially true in light of the prosecution and trial court's restrictions on using the charges as separate offenses following the preliminary hearing. At trial, the prosecution "ambush[ed]" Appellant with a new theory of felony murder based on a burglary with intent to commit either larceny or assault with intent to commit rape. (See e.g., *Gallego, supra,* 52 Cal.3d at 189). Thus, because Appellant was alleged to have violated up to four statutes in committing the felony-murder, (first-degree murder, burglary, larceny, and assault with intent to commit rape) the state was constitutionally required to plead the offenses with greater specificity than in the final Information. The state's failure to do so violated Appellant's Fifth, Sixth, and Fourteenth Amendment rights and allowed for the prosecutors to earn a capital conviction based on insufficient evidence of felony-murder and the burglary-murder.

Respondent's citation to *People v. Morris* is misplaced. While Respondent correctly notes that the prosecution does not have to charge "the underlying special circumstance felony as a separate offense" (RB

182), it neglects to mention that the above outlined constitutional requirements equally apply to special circumstance allegations. (*People v. Morris* (1988) 46 Cal.3d 1, 18). In practice, *Morris* is more applicable to Appellant's case when evaluating the sufficiency of the evidence, because in both cases, the special circumstance alleged was based on wholly circumstantial evidence. In *Morris*, like here, the defendant was convicted of the special circumstance without any eye-witness testimony. (*Id.* at 21). Similar to *Morris,* based on the scant record in Appellant's case, there is no way of proving that the murder occurred to *advance an independent felonious purpose.* (*Ibid.*). The results, in both cases, are a first-degree murder conviction and special circumstance findings based on a lack of sufficient evidence.

The prosecutor committed misconduct throughout the guilt proceedings, and during closing argument, conflated the meanings of premeditation, deliberation, and intent necessary to commit felony-murder. This misconduct explains the jury's unreasonable findings, in the absence of sufficient and convincing evidence that either underlying felony occurred. The state's failure to specify the charges and present sufficient evidence that Appellant committed capital murder violated Appellant's right to have the prosecution prove every element of his capital offense beyond a reasonable doubt. (See *Jackson, supra*, 443 U.S. at 313-324).

2. Insufficient Evidence Supports the Burglary Murder Special Circumstances.

To prevail on this issue, Respondent must argue that the underlying felony supporting the burglary-murder special circumstance and the theory of felony murder was theft. This is due to the merger doctrine. As articulated by this Court, the merger doctrine prohibits the state from utilizing assault, a lesser included offense of murder, as the intended felony for the burglary-murder special circumstance. (See *People v. Ireland*

(1969) 70 Cal.2d 522, 539-541). However, at trial and in Respondent's brief, insufficient evidence has been produced that Appellant intended to commit larceny upon entering Ms. Olsson's home.

Respondent fails to offer substantial evidence in support of theft as the underlying crime for the burglary-murder special circumstance. Respondent argues that since $3.95 was taken from Ms. Olsson's purse, this fact proves that Appellant burglarized the home with intent to steal. (See RB 180). However, this evidence does not prove: 1) that Appellant took the purse; 2) that the purse was taken as part of a plan that originated before Appellant entered the house; or 3) that the purse was not taken as part of an "afterthought" following the assailant's entry into the home. Furthermore, there were no signs that any other valuables had been taken, or that the house had been searched for valuables, and the evidence only indicated that the purse contained $3.95, not that the money was taken. (See RT 2918 and 3044).

Again, Respondent relies solely upon Appellant's involuntary and incredible statements from March 27 to prove theft as underlying the burglary-murder special circumstance. (RB 179). In doing so, Respondent must reconcile inconsistencies between Appellant's involuntary statements and the physical evidence, a task the state cannot accomplish. Thus, Respondent argues that because Appellant told the police he entered Ms. Olsson's home with Doubting Thomas so Thomas could get drugs, "the jury could have reasonably rejected the 'Doubting Thomas' part of [the] statement, but believed from it that Appellant...broke into [the] home in the early morning with intent to steal money to support his drug habit." (*Ibid.*).

The voluntariness of Appellant's statements is suspect and the trial court's ruling to the contrary has been challenged by Appellant on appeal. (See Claim III – The Trial Court Improperly Denied Appellant's Motion to Suppress Statements That Were Unlawfully and Involuntarily Obtained By

Livermore Law Enforcement). Respondent's efforts to reconcile the statements with the physical evidence and the state's theory of murder further prove the unreliability of the involuntary confession. Moreover, a reasonable jurist could not listen to Appellant's statements and discount the presence of Doubting Thomas while inferring criminal intent on behalf of Appellant. In fact, the scenario Respondent articulates would require the jury to wholly reject Appellant's statements and instead infer, without any factual basis at all, that he entered the house alone, not in pursuit of drugs, in order to commit larceny.

In Appellant's Opening Brief, he provided a more rational, substantial, and plausible explanation for the jury's finding of the burglary-murder special circumstance. During trial, the prosecution had, improperly and prejudicially, asked the jury to infer an intent to steal based on evidence of Appellant's unemployment. (See Claim VII - The Trial Court Erred In Admitting Evidence of Appellant's Unemployment As Facts Probative of His Intent To Steal). This inadmissible evidence worked to prejudice Appellant's right to a fair trial by establishing a false motive for the robbery or theft. (*People v. Wilson* (1992) 3 Cal.4th 926, 939). It was also used by the prosecution to argue for a finding of larceny to support the burglary-murder special circumstance. Respondent failed to address this allegation in its brief.

In sum, Respondent has failed to show that the evidence used to justify the burglary-murder circumstance is solid and credible. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 11). Moreover, Respondent has failed to show that a reasonable juror could have found the existence of the burglary-murder special circumstance based upon the scant evidence presented of Appellant's intent to commit larceny. (*Jackson, supra,* 443 U.S. at 313).

3. Insufficient Evidence Supports Appellant's Conviction Under Count 2, Assault with Intent to Commit Rape.

Prior to trial, the court found that the state's evidence of rape was insufficient to charge Appellant with rape or attempted rape as a separate offense, or to charge him with a rape-murder special circumstance. Indeed, the physical evidence submitted by the prosecution at both the preliminary hearing and at trial includes no direct evidence that a rape occurred. (RT 2689). In absence of any biological, physical, or medical evidence tending to show that a rape occurred, the only piece of evidence submitted by the prosecution to justify the charges was the fact that Ms. Olsson's body was found nude and atop her pajamas. (CT 1005-86). Based on this evidence, the trial court erred in allowing the prosecution to charge a separate offense of assault with intent to commit rape as Count 2.

At trial, the prosecution, failed to produce different, new, or more persuasive evidence that Ms. Olsson had been raped than what had been presented preliminarily. Logically, the evidence was then insufficient to prove the lesser included offense of assault with intent to commit rape. Thus, despite Respondent's protestations, that the evidence that Ms. Olsson was "a single woman [who lived] in his neighborhood" and was "alone and vulnerable," does nothing to prove Appellant's intent to commit rape. (RB 180). Respondent recognizes as much by basing the entirety of its argument on the involuntary and highly unreliable statements made by Appellant on March 27 in response to coercive and unlawful police interrogation tactics.

Respondent, on three separate occasions, tries to counter arguments raised by Appellant in his Opening Brief by referencing Appellant's involuntary statements from March 27. (See RB 180). Respondent argues that "[as] for the evidence of Appellant's intent to commit rape, the

evidence shows that he told police that he had intercourse with Olsson." (*Ibid.*). Respondent argues that it is of no matter that no physical evidence proves that Ms. Olsson was raped, since "Appellant ignores his own statement to police that he had sex with Olsson." (*Ibid.*). Finally, Respondent argues that, in itself, the March 27 statements were sufficient to prove the assault with intent to commit rape charge since they were "corroborated by evidence that Olsson's pajamas had been removed...." (*Id.* at 181).

First, Appellant's statements are not sufficient for a finding of intent to commit sexual assault because they are incredible and were coerced based on two separate days of interrogation and in consideration for false promises of enrollment in the witness protection program. (See Claim III – The Trial Court Improperly Denied Appellant's Motion to Suppress Statements That Were Unlawfully And Involuntarily Obtained by Livermore Law Enforcement). Second, Appellant's statements exonerate him of the Olsson homicide. If given full credit they show that another person killed Ms. Olsson and that any sexual encounter between Ms. Olsson and Appellant was consensual. Third, Respondent has repeatedly attacked the validity of Appellant's statements, but endorses them where needed. Unfortunately for Appellant, this is the same technique that the trial prosecutor used to earn a capital murder verdict based on insufficient evidence. This Court should not rely upon Appellant's coerced statements when evaluating the sufficiency of the evidence. Fourth, contrary to Respondent's assertions, Appellant's statements are not corroborated by physical evidence at the scene of the crime. Instead, the evidence there indicates that a wholly different turn of events took place. Many aspects of Appellant's statement are irreconcilable with the crime scene.[54]

---

[54] Appellant's incriminating statements were made involuntarily and in response to duress, threats against his family, and in reliance

The weakness of Respondent's argument is exposed by its efforts to distinguish *Johnson, supra,* 6 Cal.4th 1; *People v. Craig* (1957) 49 Cal.2d 313; *Anderson, supra,* 70 Cal.2d 15; and *People v. Granados* (1957) 49 Cal.2d 490. Respondent tries to distinguish these cases because in each there was "insufficient evidence that the respective defendants had intended to rape...and thus there existed insufficient evidence to support a finding of felony-murder." (RB 181). Respondent poses that Appellant's case is to the contrary, based entirely upon Appellant's involuntary statements. (*Ibid.*).

However, *Johnson, Anderson, Craig, and Granados*, are distinguishable from this case based on the fact that only circumstantial evidence of rape and *no direct* evidence of rape exists in Appellant's case. Moreover, in each cited case, there was more evidence of a sexual act or interest than in Appellant's case. Specifically, in *Johnson, supra,* 6 Cal.4th at 41, the defendant had earlier raped the victim's daughter, suggesting a sexual motivation. In *Craig, supra,,* 49 Cal.2d at 316, the defendant had

---

upon false promises of leniency. The statements materially conflict with the physical evidence at the Olsson homicide. Nevertheless, Respondent and the prosecutor have utilized the statements to argue and obtain, with *absolutely no physical evidence*, a conviction for assault with intent to commit rape, a capital murder conviction based on a faulty burglary-murder special circumstance, and ultimately a death sentence. The corroborating evidence referred to by Respondent was recognized by the prosecutor, in his closing argument, as insufficient to serve as a separate charge of rape. (RT 3070). The prosecutor ultimately committed misconduct by arguing a charge not included within the final information and confusing the jurors. Respondent failed to rebut Appellant's argument that the state prosecutor's misstated the law by referring, during guilt phase closing arguments, to the doctrine of *corpus delecti* as a "technicality" that prevented him from separately filing rape charges, though "he raped her." (*Ibid.*). This is important because prosecutorial arguments cajoled and confused the jurors into reaching a verdict not supported by sufficient evidence.

earlier in the evening expressed his general desire to "have a little loving," and subsequently quarreled with a woman in a bar where the victim worked who refused to dance with him. Respondent can proffer no argument drawing similarities between Appellant's case and this Court's precedents.

Moreover, this case is readily distinguishable from cases decided after *Johnson* in which an inference of intent to rape was upheld based in part on the state of the victim's clothing. Specifically, evidence has been found sufficient to prove intent to commit sexual assault where the victim's underwear was torn off, or pulled or rolled down around her knees. However, this Court has required that such crime scene evidence be coupled with other *specific evidence* of the defendant's intent to commit sexual assault. In *People v. Marshall* (1997) 15 Cal.4th 1, 36, sufficient evidence of attempted rape included the fact that the victim was found with her underwear and pants pulled down, but only when considered together with a surviving victim's testimony that the defendant had told her he intended to rape her *before* the sexual assault. In *People v. Osband* (1996) 13 Cal.4th 622, 691, the evidence included the defendant's semen on or near the body in addition to the victim's ripped underwear. In *People v. Cain* (1995) 10 Cal.4th 1, 45, hair consistent with the defendant's pubic hair, which was of a rare type, was found, and the victim's pants were pulled down, her legs spread to expose her genitals, and her blouse was pulled up.

In the present case, other than the facts that the victim was on her bed undressed, and her clothes were underneath her, there was no evidence to suggest a sexual assault. Further, there was substantial evidence *inconsistent* with a sexual assault. Evidence showed no genital trauma, and Appellant's pubic hairs were not found. No semen was found linking Appellant to the homicide. Appellant's blood was not found at the scene of the crime. Moreover, unlike the cases discussed above, here, the victim

was completely naked in her bed. Partial undress is more consistent with sexual intent than complete nudity, especially when the victim is in her own bed on a warm July evening in Livermore, and the air conditioning is turned off. (See RT 2123 and 2171).

Additionally, the prosecutor's use of the assault with intent to commit rape as the underlying felony for the burglary-murder special circumstance violated the merger doctrine as enunciated by this Court in *Ireland, supra,* 70 Cal.2d at 522, because assault is a lesser included offense of murder. Respondent argues that the prosecution did not rely on the "'assault' to support the burglary murder special circumstance, but argued that Appellant committed burglary with intent to commit rape and theft." (RB 183). Respondent's effort to parse the prosecutor's argument and the charges included within the Final Information is futile.

Here, the Final Information did not require the jury to specify the theft charge as underlying the burglary-murder special circumstance and felony murder conviction. Instead, because the prosecution was never required to specify the charges with any degree of particularization, the state was permitted to introduce highly inflammatory and prejudicial evidence of a nonexistent rape as the underlying felony for the burglary murder circumstance and felony-murder first degree murder theory. This decision was allowed by the trial court in contravention of the merger doctrine. The results violated *Ireland* and Appellant's right to have the burglary murder-special circumstance and felony-murder theory separately proved beyond a reasonable doubt under the Fourteenth Amendment. (See *Jackson, supra,* 443 U.S. at 313).

D. The Insufficiency of the Facts Supporting Appellant's Guilt Conviction is Demonstrated by this Court's Recent Case Law.

The insufficiency of the evidence supporting Appellant's capital murder conviction and special circumstances findings is demonstrated by comparing it to the evidence underlying capital convictions in this Court's recent precedent. In five recent cases, this Court has been presented with insufficiency of the evidence claims challenging first-degree murder convictions premised on felony-murder and premeditation theories with special circumstance allegations that the murder occurred in the course of rape, attempted rape, or robbery. (See *Prince, supra,* 40 Cal.4th at 1179; *Lewis, supra,* 46 Cal.4th at 1255; *Tafoya, supra,* 42 Cal.4th at 147; *Wallace, supra,* 44 Cal.4th 1032; and *Rundle, supra,* 43 Cal.4th at 76; and *People v. Solomon* (2010) 49 Cal.4th 792). Review of the dissimilarities proves that Appellant's first-degree murder conviction and burglary-murder special circumstance are based on insufficient evidence.

In *Prince*, this Court found that the admission of four knives found in the defendant's car was proper, without evidence that they were the murder weapon, since it was probable "that defendant carried the weapons to the six murders and burglaries he committed." (*Prince, supra,* 40 Cal.4th at 1247). In fact, one of the knives had been stolen from the residence of one of the murder victims. (*Id.* at 1246). This Court found that the evidence was probative of intent and premeditation because the defendant's possession of the knives supported an inference that he "came armed with his own knife, and the subsequently committed burglaries and attempted burglaries bore enough similarities to those murders (and the burglaries related to those murders) to enable the jury to reasonably conclude he was armed with his own knife (perhaps one of the knives discovered in his automobile) when he committed some of the charged

burglaries and attempted burglaries." (*Id.* at 1248). In Appellant's case, however, there was no evidence indicating that Appellant used the murder weapon to kill Ms. Olsson. Unlike in *Prince,* the knife was not found in Appellant's possession. Also unlike in *Prince*, the knife allegedly used by Appellant was not stolen from the victim's home and found in Appellant's possession.[55] (*Ibid.*). Finally, unlike in *Prince*, the fact that Appellant once owned the murder weapon prior to the murder only indicates circumstantial evidence of his guilt and has no bearing on whether or not the killer harbored premeditation by carrying the weapon with him to Ms. Olsson's murder.

In *Rundle,* the defendant argued that the trial court erred by denying his motion to dismiss the charge of attempted forcible rape and the associated attempted-rape felony-murder charge and special circumstance allegation on the ground of insufficiency of the evidence. (*Rundle, supra,* 43 Cal.4th at 139). This Court denied the claim because the defendant had confessed to the crime and the circumstances of the crime indicated defendant's guilt. (See *Id.* at 138-140). Here, however, Appellant neither confessed to the crime nor was seen with the victim. Similarly, the victim was found in her home, alone, and not along the highway that the defendant had driven. Moreover, insufficient evidence existed for the jury to determine that Appellant specifically intended to have vaginal intercourse as part of the felony-murder theory. (See *People v. Holt* (1997) 15 Cal.4th 619, 676,; and *Raley, supra,* 2 Cal.4th at 889-891).

In *Lewis,* the defendant challenged the sufficiency of his rape-murder special circumstance. This Court denied the claim because sperm

---

[55] (See *Prince*, *supra*, 40 Cal.4th at 1248 ("The court noted evidence establishing that defendant sometimes removed kitchen knives from drawers while committing his crimes and that he used kitchen knives "similar to the one taken from the defendant's vehicle in these homicides.")).

was found on the victim. (See *Lewis, supra,* 46 Cal.4th at 1291). In *Lewis*, just prior to the murder, the defendant had made overt sexual remarks to the victim in a public place, and eye-witnesses had identified the defendant as the last person seen with the victim. Further, the defendant's sperm was not inconsistent with that found in the victim. In contrast, no eye-witness identified Appellant at the scene of the crime or in the company of Ms. Olsson, no semen was found at the scene of Ms. Olsson's homicide, and Appellant had **never** been seen in Ms. Olsson's company.

In *Wallace*, the defendant challenged the attempted rape conviction, attempted rape-murder special circumstance and attempted robbery-murder special circumstance as not supported by sufficient evidence. (*Wallace, supra,* 44 Cal.4th at 1077). This Court denied the claim because the defendant was found by police at the scene of the crime at the victim's house with his "belt [] unfastened, and his pants [] buttoned only at the top." (*Id.* at 1078). Here, Appellant was never identified at the scene, nor was his state of dress observed.

In *Tafoya*, the defendant argued that there was insufficient evidence to support his conviction for premeditated murder with a robbery-murder special circumstance: his primary defense was that the robbery was an afterthought of the murder. (*Tafoya, supra,* 42 Cal.4th at 172). This Court denied the claim because eye-witnesses saw the defendant force his way into the home before the murder, and leave the home carrying a canvas bag that he had not been holding upon entry. (See *Tafoya, supra,* 42 Cal.4th at 171). In contrast, in Appellant's case, no witness identified Appellant at the scene of the crime or entering the house. More importantly, no evidence indicated that the murderer robbed Ms. Olsson prior to her murder.

E. Conclusion.

In light of the absence of sufficient evidence of either premeditated or felony murder, this Court must reverse Appellant's first-degree murder conviction. Likewise, because there was insufficient evidence of felonious intent, there was also insufficient evidence of the burglary-murder special circumstance. Upholding these charges, in the face of insufficient evidence, relieves state prosecutors of their duty to prove the existence of each criminal element beyond a reasonable doubt and violates Appellant's constitutional rights to due process, a fair trial, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as, parallel provisions under Article I of the California Constitution.

VII. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF APPELLANT'S UNEMPLOYMENT AS FACTS PROBATIVE OF HIS INTENT TO STEAL.

A. Introduction.

This Court has recognized that evidence of a defendant's poverty or indebtedness is inadmissible to establish motive to commit robbery or theft and should have been excluded as more prejudicial than probative. In the face of this authority, the trial court's arbitrary decision to admit evidence of Appellant's lack of employment to prove "motive" constituted an abuse of discretion. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125). Moreover, in a capital case where the sole special circumstance rested on a finding of larceny, the trial court's decision to admit the unduly prejudicial evidence was a miscarriage of justice and violated Appellant's rights to due process, equal protection, a fair trial, and reliable sentencing under the Sixth, Eighth, and Fourteenth Amendments, as well as, Article I of the California Constitution.[56]

During the guilt phase of Appellant's trial, the prosecution introduced, and exploited, prejudicial evidence of Appellant's unemployment. According to the prosecutor, the evidence was introduced solely to prove "motive." (RT 2522).[57] The trial court overruled defense

---

[56] In recent history, this Court has not addressed an error based on the introduction of the defendant's economic status to prove the intent necessary for a robbery conviction. The last time the Court addressed the matter was in *Wilson, supra,* 3 Cal.4th at 939; and *People v. Edelbacher* (1989) 47 Cal.3d 983, 1024. Appellant thus presents a novel issue to this Court.

[57] Respondent has also impermissibly used this prejudicial evidence to try to establish Appellant's motive and intent to commit larceny in arguing that sufficient evidence supports his capital murder conviction and burglary-murder special circumstance. (See Claim VI – Insufficient Evidence Supports Appellant's Convictions of Capital

objections and admitted the evidence to prove "motive."[58] The trial court's ruling violated this Court's precedent and, given its context within a capital murder case alleging a theft based special circumstance, prejudiced Appellant.

In his Opening Brief, Appellant set forth authorities prohibiting the introduction of evidence of poverty to establish a criminal defendant's motive for theft or robbery based crimes. (I AOB 202-03 (citing *Wilson, supra,* 3 Cal.4th at 926; *Edelbacher, supra,* 47 Cal.3d at 1024; *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109; and *United States v. Bensimon* (9th Cir. 1999) 172 F.3d 1121, 1129)). Appellant also relied on evidentiary treatises to demonstrate the wide- spread ban on evidence of poverty to prove motive in property based crimes. (I AOB 203 (citing 2 Wigmore, Evidence (3d ed. 1940) § 392, at 34)). In opposition, Respondent argues that "no abuse of trial court discretion appears" (RB

Murder, the Burglary Murder Special Circumstance, or His Conviction for Assault With Intent to Commit Rape).

[58] The trial court failed to record the **critical** bench conference called in response to defense objections. (See RT 2522). The prejudicial effects emanating from the trial court's failure to properly record the proceedings in this case is shown by the missing transcript regarding introduction of evidence relative to Appellant's economic status. (See Claim I – The Missing Portions of the Record Deprive Appellant of Meaningful Appellant Review). While the court would later make a *post hoc* record of the conference *inter alia* and state that the discussion was based on issues of relevancy, there is no *actual* record of what objections were lodged by defense counsel. (RT 2536). The lack of record here should defeat Respondent's argument that Appellant failed to raise his constitutional arguments at trial. Deficiencies in the record which impede meaningful review and a determination whether Appellant's counsel made the requisite contemporaneous objection waive the contemporaneous objection rule. (Cf. *Young, supra,* 34 Cal.4th at 1203 ("because it cannot be ascertained whether defense counsel specifically requested clarification [of an instruction], we shall give defendant the benefit of the doubt and find the issue preserved for appeal.")).

187) or that the error alleged by Appellant does not rise "to the level of a federal constitutional violation." (RB 189). Respondent's arguments conflict with the authorities on the subject and Respondent cites no authorities in opposition to those cited by Appellant.

B. Appellant's Claims have not been Procedurally Defaulted.

Respondent insists that "Appellant objected at trial to the unemployment evidence on relevancy grounds only." (RB 187 n. 18). Respondent argues that "[i]f appellant is alleging the state and federal constitutional [grounds] as providing a theory of inadmissibility in addition to relevancy, those arguments are forfeited," (*Ibid.*), as is his claim "that the trial court should have excluded the unemployment evidence under the Evidence Code section 1101." (*Ibid.*).

Previously, Respondent insisted that Appellant failed to show that the missing record for unrecorded hearings, proceedings and conferences in his case, affected or prejudiced his appeal. (See Claim I - An Inadequate Record Exists For Meaningful Review of Appellant's Case on Appeal). Now, Respondent argues that Appellant's claims have been forfeited for failure to object at trial when the bench conference held in response to defense counsel's objections were unrecorded and there is no record of what objections were lodged at that time. (RT 2536). Respondent utilizes that record, and the trial court's *post hoc* summary of the ruling, which does not include the party's objections, to argue that Appellant's claims have been forfeited. In doing so, Respondent shows why this Court cannot conduct a meaningful review of Appellant's case based on the record at hand.[59]

---

[59] If Appellant's Evidence Code section 1101 argument or constitutional arguments are deemed forfeited because the *ad hoc* record does not indicate all the grounds of the objection, then he has demonstrated prejudice to support a reversal of his conviction for an

The record does not prove that Appellant's claims are forfeited and the state's invocation of procedural bars is without merit. (Cf. *Young, supra*, 34 Cal.4th at 1203). The introduction of the inadmissible and prejudicial evidence was prohibited on state and federal constitutional grounds. The constitutional rights served as a measure against the admission of the evidence and the constitutional violations flow from the evidence's admission. Respondent's claims to the contrary are unpersuasive.

Respondent mischaracterizes *People v. Avila*. Pursuant to *Avila*, an appellate argument is not forfeited if:

> the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act [in admitting the evidence], insofar as it was wrong for the reasons actually presented to that court, had the additional legal consequence of violating the federal Constitution.

(*Avila, supra,* 38 Cal. 4th at 527 n.22). Thus, where an objection made on state law grounds was overruled by the trial court, the objection may be raised on appeal arguing both state law and federal constitutional grounds if the initial state law grounds were valid. Here, the trial court's decision was in violation of state law, this Court's authorities and defense counsel's objections. Appellant may thus raise the constitutional objection on appeal as grounds for reversal of the trial court's decision.

---

inadequate record. (See Argument I - An Inadequate Record Exists For Meaningful Review of Appellant's Case on Appeal).

C. The Trial Court Abused Its Discretion by Admitting Evidence of Appellant's Poverty as Indicia of his Motive for the Burglary-Murder Special Circumstance.

The evidence that Appellant was unemployed was not probative of Appellant's mental state under California and federal authorities. (See Cal. Evidence Code § 1101; *Wilson, supra,* 3 Cal.4th at 939; *Bensimon, supra,* 172 F.3d at 1129; and *Edelbacher, supra,* 47 Cal.3d at 1024). Nevertheless, it was used by the prosecutor to establish a motive for the commission of a violent offense and special circumstance. The impermissible use of this evidence substantially prejudiced Appellant's constitutional rights. By ignoring applicable law and issuing an order that ultimately resulted in a miscarriage of justice, the trial court abused its discretion in admitting evidence of Appellant' state of poverty.

Respondent argues that "no abuse of trial court discretion appears" (RB 187), and tries to distinguish this Court's precedent under *Wilson* and *Edelbacher* as meaning that "it is unfair to make poverty *alone* a ground for suspicion or evidence to establish a motive to commit poverty [(sic)] robbery or theft." (*Id.* at 187-88). Respondent argues that the trial court did not abuse its discretion because the "evidence was probative [ ] of Appellant's living status." (*Id.* at 188).

Respondent's citations and arguments are misplaced. In *Wilson*, the Court held that the only acceptable purpose for introducing evidence of a defendant's poverty is to "refute a defendant's claim that he did not commit the robbery because he did not need the money." (*Wilson, supra*, 3 Cal.4th at 939). There, like here, there was no need to present evidence of Appellant's unemployment because he had never testified to the fact that he did not need money. In *Edelbacher*, the state submitted evidence of defendant's indebtedness to establish a creditor-debtor relationship between the victim and the defendant. (*Edelbacher, supra,* 47 Cal.3d at 1024).

Here, there was no such relationship between Appellant and Ms. Olsson.

Instead, the prosecution submitted the evidence of Appellant's poverty **solely** for the impermissible and prejudicial purpose of proving his intent to commit a theft-based crime. (RT 2522). Similarly, Respondent has argued that the evidence proves Appellant's motive for committing the capital homicide and burglary-murder special circumstance. (RB 179). In this argument, however, Respondent cloaks its position by redefining "motive" as "living status." (*Id.* at 188). Respondent fails to show that the jury would have used the evidence for anything else than establishing Appellant's motive during the capital homicide.[60]

Respondent argues that the evidence was admissible because the state had already presented other evidence, in the form of Appellant's drug addiction, establishing that he "had a hard time keeping a job." (RB 188). Respondent's argument is specious. Respondent does not explain how evidence of Appellant's drug addiction cures the improper and prejudicial admission of evidence of Appellant's unemployment. In fact, the prosecutorial arguments cited by Respondent reveal the prejudice resulting from the trial court's error. (*Ibid.* ("'He's using drugs. Well, where do you get money for that if you can't keep a job"....I mean we're not talking about keeping a roof over your head.'") (citing RT 3049)).

---

[60] In fact, the prosecutor urged the jury to consider Appellant's financial state as indicative of his motive when he argued in the guilt phase closing arguments, "Now, why would he go into her home, aside to do that and to steal, whether he thought there might be drugs or just take a few dollars that she had in her purse, thinking that maybe there would be more? Now, John Chandler did tell us a few things about the defendant, *he couldn't keep a job for six months before he moved out of the house in July, couldn't keep a job.* He's living with John Chandler. What else do you know about the defendant? Well, the defendant tells us he's using drugs. *Well, where do you get the money for that if you can't keep a job?* How do you support that? I mean we're not talking about keeping a roof over your head." (RT 3049.)

Respondent argues that the evidence "was probative...of Appellant's living status." (RB 188), and "helped establish that Appellant was living in the immediate vicinity when the murder, burglary, and assault with intent to commit rape occurred." (*Id.* at 189). Respondent argues that the evidence contradicted John Chandler's testimony and Appellant's statements on March 27 and 30, 1987. (*Id.* at 188). Respondent tries to create a material dispute of facts, concerning when Appellant moved out of Mr. Chandler's house, that does not exist in the record.

At trial, there was no real dispute that Appellant had been living with Mr. Chandler some time before the crime, and that Appellant occasionally came back to Mr. Chandler's to get his mail and telephone messages. Accordingly, the unemployment evidence was not necessary to refute any dispute over the timing of Appellant's visits or stays with Mr. Chandler. Moreover, the fact that Appellant was unemployed supports an inference that he was living at Mr. Chandler's house as much as an inference that he was homeless, transient, or lived in a shelter.[61]

Respondent fails to adequately defend the admission of this evidence to prove Appellant's "motives." Respondent's characterization of the evidence as relative to "living status," while novel, is not supported by the record since the prosecutor explicitly stated that the evidence was admitted for "motive." (RT 2522). Respondent's efforts to create a factual dispute to the contrary fail. The state has done nothing to show that the evidence of Appellant's unemployment was admitted for any other purpose than the improper attempt to prove his motive for a theft based capital homicide.

---

[61] Indeed, the prosecution would later argue that a life sentence would be too good for Appellant because he would "always have a house, a roof over his head, food on the table...." (RT 3814-15).

D. Conclusion.

Respondent donates a remarkably small amount of its time trying to rebut Appellant's allegations that the admission of evidence concerning his poverty prejudiced his constitutional rights. Respondent expends only one sentence in reference to Appellant's constitutional rights: "because the evidence was admissible on multiple grounds [this] refutes Appellant's claim that the admission of the evidence rose to the level of a federal constitutional violation." (RB 189).

Respondent wrongly overlooks the prejudice resulting from the trial court's abuse of discretion. The introduction and use of evidence of Appellant's poverty by state prosecutors obliterated his chances of receiving a fair trial for the theft based allegations of capital homicide. Both the discrimination on the basis of poverty and the use of such prejudicial evidence to establish a quantum of Appellant's *mens rea* violated his rights to a fair trial, due process, reliable sentencing and equal protection under the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Estelle v. McGuire*, (1991) 502 U.S. 62; and *Griffin, supra,* 351 U.S. at 17-18). Appellant has shown how the evidence, which served as an element of his burglary-homicide special circumstance, prejudiced his chances of a fair trial. In the absence of this prejudicial evidence Appellant would not have been convicted of capital murder.

Appellant had a "substantial and legitimate expectation" that he would not be convicted or deprived of his life in violation of state rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). Appellant was arbitrarily denied the protections of state law and his constitutional rights as a result of the trial court's abuse of discretion and the manner by which the prosecution used evidence of his poverty. As a result, Appellant's conviction and death sentence must be reversed to remedy the violations of

his rights to due process, a fair trial, reliable sentencing, and equal protection under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as, parallel rights under Article I of the California Constitution.

VIII. THE TRIAL COURT'S ERROR AND PROSECUTORIAL MISCONDUCT RESULTED IN THE IMPROPER INTRODUCTION OF VICTIM IMPACT EVIDENCE AT THE GUILT PHASE.

A. Introduction.

Undue focus on the victim's suffering is generally improper at the guilt phase. Here, the trial court abused its discretion by arbitrarily failing to enforce prior court orders and allowing the guilt phase proceedings to be permeated by victim impact evidence. (See *Rodrigues, supra,* 8 Cal.4th at 1124-25). The prosecutor committed misconduct because, at every stage of the *guilt phase* proceedings, he intentionally violated court orders and urged the jury to base its verdicts on inflammatory and wholly irrelevant evidence concerning Ms. Olsson's professional reputation and the impermissible evidence regarding the impact of her death on family, friends, coworkers, and her community. Appellant's criminal convictions arise from a combination of legal errors by the trial court and misconduct by the state prosecutor. Both allowed for the improper admission of irrelevant and prejudicial victim impact evidence at the guilt phase proceedings. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057; *People v. Kipp* (2001) 26 Cal.4th 1100, 1130; *People v. Millwee* (1998) 18 cal.4th 96, 137; *and Frye, supra,* 18 Cal.4th at 894.

The prosecutor's manipulation of the evidence and misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process" and fundamental fairness. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; and *Darden v. Wainwright* (1986) 477 U.S. 168, 182-83). In the end, the prosecutor earned Appellant's convictions through "deceptive or reprehensible means." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841). Herein, Appellant shows that the prosecutor "intentionally elicit[ed] inadmissible" victim impact testimony

and intentionally failed "to comply with [court orders]." (*People v. Bonin* (1988) 46 Cal.3d 659, 689; see also *People v. Hill* (1998) 17 Cal.4th 800, 832).

The jury was required to objectively evaluate the evidence and the elements of the crime when considering whether the prosecution established, beyond a reasonable doubt, first-degree murder, the burglary-murder special circumstance, and the separate count of assault with intent to commit rape. The law does not permit the jury's determination to be swayed by sympathy for the victim and her family, or coworkers. (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1182). Instead of complying with the law, and despite repeated defense objections, the prosecutor urged the jury to convict Appellant based on sympathy for the victim starting with the very first words uttered in Appellant's case.[62] The trial court failed to correct the resulting prejudice, despite its prior orders, and, ultimately, the prosecutor flouted the court's rulings while introducing impermissible and highly prejudicial evidence.

Respondent says that: "Appellant's multiple claims in argument 8 of prejudicial prosecutorial misconduct and trial court error all fail." (RB 209). Respondent tries to justify the introduction of the prejudicial victim impact testimony because it "was contrary to the wild life of drinking, sex,

---

[62] Intentionality is not required. (See *Hill, supra,* 17 Cal.4th at 822). This Court noted that "injury to Appellant is nonetheless an injury because it was committed inadvertently rather than intentionally." (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214 (quoting Directors of the Columbia Law Review Association, "The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case" (1954) 54 Colum. L.Rev. 946, 975)). Respondent's brief misinterprets *People v. Smithey* when it says that this Court "has also established that it is the prosecutor's intentional elicitation of inadmissible evidence that constitutes misconduct." (RB 263). *People v. Smithey* emphasizes that "it is, of course, misconduct for a prosecutor to intentionally elicit inadmissible testimony," but it does not require a showing of intentionality. (*People v. Smithey* (1990) 20 Cal.4th 936, 960).

and selling drugs that was the lifestyle Appellant gave to Olsson in his statements to police." (*Id.* at 204). This was not a ground proffered at trial by the prosecution for admittance of the evidence. Respondent now argues that because the trial court accepted the prosecutor's explanations and "overruled the defense objection[s] to the challenged remarks [] further demonstrates no prosecutorial misconduct, but [ ] a reasonable ruling...." (*Id.* at 196 (citing I AOB 235-37)). In Respondent's mind, it is "inconceivable" that prosecutorial misconduct and trial court error "could have had any effect on the guilt verdict." (RB 200).

Respondent's defense of the numerous instances of prosecutorial misconduct is unconvincing and further proves the prejudice to Appellant. Respondent's failure to fully or adequately defend the trial court's abuse of discretion, and failure to correct misconduct following defense objections proves the lack of merit in the state's position. Moreover, the introduction of victim impact evidence at the guilt phase of Appellant's trial unduly prejudiced the proceedings and impaired the jury's ability to objectively review the evidence and crime. The result was a trial rendered fundamentally unfair in violation of Appellants rights to due process, a fair trial, an impartial jury, reliable sentencing, and equal protection under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I sections 7, 15, and 24 of the California Constitution.

B. The Trial Court's Errors Facilitated Victim Impact Evidence and Issues to Permeate the Guilt Phase Proceedings.

Respondent concedes that the trial court had a duty and obligation to control the courtroom and assure that the evidence and arguments of counsel were limited to relevant, admissible and non-prejudicial matters. (RB 192 (citing Evidence Code section 1044)). However, Respondent believes Appellant may not challenge the trial court's rulings because, in

most instances, he failed to "interpose[] a timely objection at trial that set forth the same specific grounds for the objection that they wish to raise on appeal." (RB 192).[63] Alternatively, Respondent feels that "[n]o trial court abuse of discretion [has been] established..." (*Id.* at 201).

Respondent reaches these conclusions without actually responding to Appellant's argument of trial court error. Thus, Respondent offers no defense to Appellant's allegations that: 1) the trial court failed to limit the evidence and arguments during the guilt phase to relevant and material matters; or that 2) the trial court erred in allowing the admission of victim impact evidence throughout the guilt phase. (See I AOB 242-46). Respondent only addresses one instance of trial court error, namely, that the trial court erred in admitting an irrelevant and prejudicial photograph of Ms. Olsson when she was alive. (RB 208-09). Respondent tries to defend the misconduct alleged in individual instances, but does not respond to the arguments of systematic errors, perpetrated by the trial court which ultimately failed to restrict the prosecutors' use of victim impact evidence during the guilt phase.

1. The Trial Court Failed to Limit the Evidence and Argument to Relevant and Material Matters.

Respondent offers no rebuttal to Appellant's argument that the trial court failed to limit the evidence and arguments during the guilt phase of Appellant's case to relevant and material matters. These errors allowed for the introduction of prejudicial victim impact evidence in two distinct forms. First, as evidence of the victim's character; and second, as evidence of the

---

[63] Respondent argues that many claims have been procedurally barred for failure to object at trial. (RB 202). However, Appellant did not raise these claims as errors. Instead, they were raised in the factual background part of the claim to show context, the extent of the prosecutorial misconduct, and to show how the prosecutor violated the court's orders regarding notice. (See I AOB 120-29).

effect that the victim's death had on family, friends and coworkers. In neither instance, was the evidence justified, as defense counsel never challenged Ms. Olsson's character or any witnesses' relationship with Ms. Olsson.

Inexplicably, Respondent does not argue against thirteen (13) instances of trial court error challenged by Appellant in his Opening brief.[64] Here, the frequency of the errors reveals the quantitative amount of prejudice suffered by Appellant. The importance of the errors (denying a motion for mistrial, refusing to enforce prior court orders concerning limitations on victim impact) reveals the qualitative magnitude of the prejudice suffered by Appellant at trial. The trial court's repeated errors show a pattern of failing to make a clear record. For example, during the

[64] The thirteen (13) arguments are: 1) The trial court erred in failing to issue firm rulings on many defense objections. (See I AOB 233); 2) The trial court erred in refusing to allow defense counsel to make a full record of their objections. (See *Id.* at 234); 3) The trial court erred by giving inadequate admonishments to the jury. (See *Id.* at 240); 4) The trial court improperly placed the duty of monitoring the proceedings on defense counsel by refusing to exclude witnesses from the courtroom. (See *Ibid.*); 5) The trial court erroneously failed to delimit the scope of prosecutorial discussion of the Ms. Olsson's irrelevant trip to see her father. (See *Id.* at 236); 6) The trial court improperly failed to delineate the scope of admissibility for victim impact evidence; (See *Id.* at 237); 7) the trial court invited the prosecutor to take advantage of its inadequate rulings by asking objectionable questions and eliciting improper testimony before drawing an objection. (See *Ibid.*); 8) The trial court failed to prevent the introduction of inflammatory and prejudicial arguments during the state's closing argument. (See *Id.* at 238); 9) The trial court gave an ineffective admonishment following the prosecution's improper and highly prejudicial closing argument. (See *Id.* at 240); 10) The trial court erred by failing, in response to defense objections, to delimit the scope of the prosecution's arguments regarding Ms. Olsson's character. (See *Ibid.*); 11) The court failed to address defense arguments that the prosecutor had created the "straw man" of the victim's reputation by introducing evidence of Appellant's post arrest statements. (See *Id.* at 240); 12) The court erred in denying defense counsel's motion for mistrial. (See *Ibid.*); and 13) The trial court erred by not enforcing its own notice requirements. (See *Ibid.*).

hearing on defense objections to the prosecutor's opening statements, the trial court cut off defense counsel as he objected to the relevance of victim impact evidence. The court complained that it had already "spent a great deal of time on this issue" and refused to allow counsel to make a "comprehensive argument." (RT 1986-87).

Respondent fails to explain why, despite repeated objections and protestations from defense counsel, the court refused to directly admonish the jury to disregard victim impact argument. Respondent is equally silent as to why the trial court failed to instruct the jury that sympathy or outrage were not appropriate guilt phase considerations. Apparently, Respondent would rather remain silent than draw attention to the numerous instances of trial court error that occurred here and are not mentioned in its brief. However, silence will not remedy the errors committed by the trial court in violation of Appellant's constitutional rights.

2. The Trial Court Erred in Admitting Guilt Phase Victim Impact Testimony.

Respondent fails to address several allegations of error raised by Appellant in response to the timely and meritorious objections overruled by the trial court. Respondent musters a defense on only one argument of trial court error. Respondent argues that the trial court did not err in allowing questions about witness Barbara Green's "flashbacks" to the crime scene. (RB 201). Respondent feels that no abuse of discretion occurred since Appellant had "challenged Green's memory of what she did and how the events unfolded the day she discovered Ms Olsson's body." (*Ibid.*). Respondent's argument is without merit.

Defense counsel never challenged the witness's description of the crime scene. Thus, there was no need to "relive" her prior testimony. Moreover, the witness' description of her "flashbacks" did not add credibility to her account as much as it brought sympathy for her ordeal.

As discussed below, prosecutorial misconduct was committed during Mrs. Green's testimony as the prosecutor exploited the witness's understandably emotional testimony in order to introduce victim impact testimony during the guilt phase. The trial court's failure to sustain defense objections illustrates the compounding effects of trial court error and prosecutorial misconduct, which worked to prejudice Appellant.

3. The Trial Court Erred in Admitting a Photograph of Ms. Olsson While she was Alive.

The trial court erred by admitting a photo of Ms. Olsson in her nursing uniform into evidence over defense objections and in conflict with its own previous rulings. The trial court's error allowed for a photo of the victim, quintessential victim impact evidence, to accompany the jury into the deliberation room while they pondered Appellants' guilt. This critical error severely prejudiced Appellant.

Respondent argues that the trial court's ruling is valid because "the possibility that a photograph of a murder victim while alive will generate sympathy does not compel its exclusion..." (RB 208). Respondent argues that, on the merits of the case, admission of the photo was necessary to assure "the [ ] witness's ability to identify a photograph of Olsson [, which] enhanced their credibility before the jury and helped support that they had no doubt about whom they were testifying." (*Id.* at 209). Respondent argues that the "picture was 'not a photograph particularly calculated to elicit sympathy'" because it did not show "Olsson with her sick patients..." (*Ibid.* (citations omitted)).

Respondent's arguments fail to convince. At no point during the guilt phase proceedings had the prosecution established that the photograph was relevant to any disputed element of the crime or material to a witness' testimony. There was never a factual or material dispute as to Ms. Olsson's identity since her body was discovered by a co-worker, friend, and the

picture was shown to neighbors who knew Ms. Olsson for many years. It was thus unnecessary to admit the photo to resolve a disputed foundational fact. (See *People v. Combs* (2004) 34 Cal.4th 821, 848 n. 4). The prosecutor did not need the photo to assure the jury that there was "no doubt about whom [was] testifying." (RB 209). The photo did not "enhance [witness] credibility;" instead, it generated sympathy for Ms. Olsson, the Livermore community, her coworkers, and her family and while all deserved, should not have been expressed in a capital murder trial.

The photo did not resolve any issues emanating from the appearance of Ms. Olsson's work clothes. Defense counsel had offered to stipulate to the witness' identity to avoid admission of the highly prejudicial victim impact evidence during the guilt proceedings. The prosecutor, however, refused and the trial court did not fashion or compel a stipulation. As a result, improper evidence was admitted. Olsson was not wearing her uniform at the time of the killing and the photo did not depict Ms. Olsson's actual work uniform that she wore while working at the Veteran's Hospital around the time of the killing. The photo of Ms. Olsson in her nurse's uniform, compared to a casual setting, at home or on vacation, was used by the prosecutor to invoke the juror's sympathy.

Respondent does not address Appellant's argument that he offered to stipulate to Ms. Olsson's identity. Respondent's failure to address the defense offers to stipulate dooms Respondent's reliance on *People v. Thompson* for support. (RB 209 (citing *People v. Thompson* (1988) 45 Cal.3d 86, 115)). This Court's decision in *Thompson* that no prejudice or error resulted from the admission of a photo of a victim during the guilt proceedings hinged on the defense refusal to stipulate to the witness' identity. (Compare *Ibid.* ("defense counsel, while contending there was no genuine issue as to the fact that she was a live human being on the night of the crime, apparently did not expressly offer to stipulate to this point.");

with *People v. Kimble* (1988) 44 Cal.3d 480, 499; *with People v. Ramos* (1982) 30 Cal.3d 553, 577, *rev'd. on other grounds sub nom. California v. Ramos* (1983) 463 U.S. 992)). In *Thompson,* the fact that *defense counsel* also used the photo to prove the victim's identity played a significant part in this Court's ruling. (*Thompson,* 45 Cal.3d at 115). Here, Appellant had offered to stipulate to Ms. Olsson's identity and defense counsel never used Ms. Olsson's picture to confirm her identity. Further, the Court in *Thompson* found no error because the photo did not show the victim "with little children or showed her at church or showed her in some type of manner that would be an attempt to arouse the sympathy of the jury." (*Ibid.*). A photo of the victim in a Veterans Hospital nurse uniform likely aroused sympathy.

Respondent fails to address this Court's line of cases warning against the use of photographs of the victim in the guilt phase of capital proceedings. (See e.g., *Osband, supra,* 13 Cal.4th at 677; *People v. Poggi* (1988) 45 Cal.3d 306; 323; and *People v. DeSantis* (1992) 2 Cal.4th 1198, 1230 ("We have repeatedly cautioned against the admission of photographs of murder victims while alive unless the prosecution can establish the relevance of such items. Otherwise, there is a risk that the photograph will merely generate sympathy for the victims.")). These authorities were cited by Appellant in his Opening Brief and Respondent's silence here is telling. The photo of Ms. Olsson was not relative to any of the prosecution's evidence or to their theory of the case. It stretches credibility for Respondent to argue that the photo was necessary for Mr. Sandberg and Ms. Walters to identify their daughter and mother. (RB 209). Simply put, Respondent offers no legal or foundational justification for the admission of the photograph. The trial court had no discretion to admit irrelevant evidence, in contravention of *Poggi, supra,* 45 Cal.3d at 323, and the trial court's decision was thus arbitrary, constituted an abuse of discretion, and

violated Appellant's state and federal rights.

4. Appellant's Constitutional Right to a Fair Trial Was Prejudiced by the Trial Court's Errors.

Under these circumstances, the trial court's repeated errors during the guilt phase prejudiced Appellant's rights under both state and federal law. Respondent has failed to address the bulk of the trial court errors. Likewise, Respondent has also failed to offer any counter to Appellant's assertion that the errors prejudiced his constitutional rights.

In light of the insufficient evidence of guilt, there is a reasonable likelihood that the outcome of Appellant's trial would have been different had the trial court been 'vigilant to guard against any impairment of [Appellant's] right to a verdict based solely upon the evidence and the relevant law." (*Chandler v. Florida* (1981) 449 U.S. 560, 574). Throughout the guilt phase proceedings, trial court errors allowed the prosecutor to freely and willfully interject victim impact evidence and considerations into the mix. The trial court's decision not to enforce prior orders was arbitrary and an abuse of discretion. (See *Rodrigues*, *supra*, 8 Cal.4th at 1124-25). In light of these errors, Appellant's convictions for first-degree murder, with the special circumstance burglary murder, and assault with intent to commit rape should be reversed.

C. The Prosecutor Committed Misconduct by Introducing Victim Impact Evidence during the Guilt Phase Proceedings.

In his Opening Brief, Appellant cited thirty-nine (39) instances of prosecutorial misconduct committed during the guilt phase of his capital trial.[65] These allegations stretched across every stage of the proceedings

[65] In Appellant's Opening Brief, some instances of misconduct were cited as individual examples of error that caused prejudice and claims for legal relief based on properly preserved claims at trial. (See I AOB 120-29). Other examples of flagrant misconduct were lodged as indications of a

and infected the trial with error and prejudice. The misconduct included violated court orders, prosecutorial attestations, defense objections, this Court's precedents, and Appellant's constitutional rights.

Respondent's arguments in support of the misconduct only highlight the powerful influence the prosecutor's impermissible course of conduct had upon Appellant's ability to receive a fair trial. Respondent defends against eighteen (18) allegations of misconduct, but its effort fails to persuasively counter Appellant's arguments. Respondent fails to address twenty-two (22) instances of misconduct by the prosecutor. Most importantly, Respondent fails in its efforts to minimize the misconduct and thereby fails to ameliorate the substantial prejudice suffered by Appellant's.

1. The Prosecutor's Repeated Pattern and Course of Misconduct Obviates the Contemporaneous Objection Rule in Appellant's Case.

A repeated theme of this appeal is the prosecutor's course of misconduct throughout Appellant's trial. Time and again, the prosecutor forced Appellant's counsel to repeatedly object to blatant misconduct. Likewise, time and again, Appellant's counsel objected and requested admonishments, which led to many of the trial court errors. Here, the prosecutor's misconduct was so frequent that objections and admonishments would have been futile. (See *Hill, supra,* 17 Cal.4th at 821). As a result, the contemporaneous objection rule should be excused in Appellant's case.

In recent years, capital defendants have increasingly argued that they should be exempt from the contemporaneous objection rule, under this Court's opinion in *Hill,* due to the prosecutor's repeated course of misconduct. This Court has not accepted these arguments. (See *Leonard,*

---

prosecutorial pattern or habit of misconduct also properly preserved by objections at trial. (See *Id.* at 116).

supra, 40 Cal.4th at 1370; and *Dykes, supra,* 46 Cal.4th at 731). However, in neither *Leonard* nor *Dykes* was this Court presented with facts comparable to those in Appellant's case where the prosecutor deliberately sought to portray Appellant and his counsel as obstructionist.

In contrast, in Appellant's case, the prosecutor, from the guilt phase opening statements to penalty phase surrebuttal sought to undermine the fairness of the proceedings and portray Appellant as obstructionist. The prosecutor subjected Appellant to a constant barrage of misstatements and epithets, demeaned defense counsel, interjected victim impact considerations into the guilt phase, sought to enflame the jury by speculating about the victim's emotions as she died, and prejudiced Appellant's ability to receive a fundamentally fair trial. The pervasive course of the prosecutor's misconduct created a trial based on hostility not objectivity. Worse, the prosecutor forced Appellant to cast ten to twenty objections per witness and over ten objections during each of the prosecution's arguments.

The trial court error in failing to correct the prosecutorial misconduct and erroneously overruling objections entirely failed to correct the prosecutor's pervasive misconduct. In sum, Appellant's case represents an extreme example of pervasive and corrosive prosecutorial misconduct that persisted throughout the trial. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1212). Trial counsel's failure to lodge contemporaneous objections may thus be waived pursuant to *Hill, supra,* 17 Cal.4th at 821.

2. The Prosecutor Committed Misconduct during *Voir Dire*.

Respondent argues that the trial prosecutor did not commit misconduct during *voir dire* even though he repeatedly stated that "it would not be fair to the family members of the woman who was murdered if people can't impose either of the two penalties." (RT 939-40). Respondent

alternatively argues that Appellant has forfeited this argument for failure to make a contemporaneous objection at trial. (RB 193). In yet another argument, Respondent concedes misconduct, but argues that "the impact of the victim's death on her family was an appropriate issue." (*Ibid.*). On the merits, Respondent argues that Appellant "misreads the record," and that the statements were actually made only to "juror Judith B." (*Id.* at 192). Respondent argues that Appellant suffered no prejudice since Judith B. did not serve on his jury. (*Id.* at 193).

Appellant recognizes that the remark was *first* made to Judith B., who did not serve on his jury. Nevertheless, the incident reflects the larger pattern of prosecutorial misconduct since thereafter the prosecutor repeated his remarks and the effectiveness of a contemporaneous objection. Appellant made clear that the prosecutor also made the comment to Juror Williams who ultimately sat on Appellant's jury. (See I AOB 219 n. 63). The record thus clearly demonstrates that the prosecutor sought to infuse victim sympathy into every phase of the proceedings.

Respondent's unpersuasive arguments fail to address the misconduct and prejudice resulting from prosecutorial *statements* during jury selection in Appellant's case. First, Respondent overlooks and diminishes the critical role *voir dire* plays in assuring that a criminal defendant will be tried by an impartial jury in accordance with the Constitution. (See *Rosalez-Lopez v. United States* (1981) 451 U.S. 182). By interjecting sympathy for the victim and her family at this incipient juncture of the case, the prosecutor ensured that the guilt phase would be equally infected by error and prejudice. Moreover, the error primed jurors for the reception of victim impact evidence during the guilt phase proceedings.

Equally as important is the fact that the error went uncorrected by the trial court, despite Appellant's objections. In fact, the trial court further inflamed the prejudice by reassuring that, "I don't think anybody in this

room would dispute the legitimate issue of any family member." (RB 193 (citing RT 940)), thereby framing the defense objections as unfounded. The trial court also primed jurors for reception of victim impact evidence at the guilt phase by condoning "the legitimate issues of any family member" as a consideration of Appellant's guilt. (*Ibid.*).

3. The Prosecutor Committed Misconduct during Opening Statements.

During his opening statement, the prosecutor continued his course of misconduct by intentionally overstepping the bounds of relevancy and interjecting impermissible victim impact evidence into the guilt phase proceedings. Repeatedly, the prosecutor urged the jury to, instead of evaluating Appellant's guilt to consider the fact that Ms. Olsson would not attend her father's 85th birthday and family reunion. (RT 1954-55). He also urged the jury, instead of evaluating Appellant's intent, to consider Ms. Olsson's personal character, life story and the effects of her loss on the community. (*Id.* at 1955-59). Repeatedly, the prosecution sought to disrupt the jury's objective determination of Appellant's criminal liability by interjecting prejudicial and irrelevant evidence into the guilt proceedings. (*Id.* at 1981-2003). Instead of submitting evidence probative of each element of the crimes, and sufficient to remove all reasonable doubt of Appellant's innocence, the prosecutor sought to goad the jury into convicting Appellant based upon their sympathy for the victim and her family and their antipathy towards Appellant.

Respondent argues that no misconduct occurred here because the evidence referenced in the prosecutor's remarks was not "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted." (RB 194 (citations omitted)). According to Respondent and the trial prosecutor the "'type of person that Shirley Olsson was [ ] probative' to prove that the killing was intentional, premeditated, deliberate

and committed by a stranger." (RB 195 (citing RT 1983)). Likewise, Respondent tries to justify the admission of evidence concerning the Olsson family reunion as relative to explaining "the conduct of one of Olsson's co-worker's when Olsson did not report for work on the morning she was found dead, as well as, a neighbor's conduct when Olsson did not drop off her house keys before she left on her trip." (RB 196). None of the explanations proffered by Respondent justify the clear misconduct by the prosecutor or ameliorates the prejudice to Appellant.

The prosecutor's arguments that jurors should consider Ms. Olsson's impending family reunion and life history had nothing to do with "prepar[ing] the jurors to follow the evidence and more readily discern its materiality, force and meaning." (*People v. Gurule* (2002) 28 Cal.4th 557, 610). In fact, the prosecutor's argument had the inverse affect - it led the jury to believe that victim impact was material to their guilt determination. The evidence drew their attention to immaterial and prejudicial facts irrelevant to their duty to objectively view the facts of the crime and of Appellant's criminal intent and liability.

The cases cited by Respondent fail to convince. The arguments in *People v. Davenport*, (1995) 11 Cal.4th 1171, 1213; and *People v. Wrest* (1992) 3 Cal.4th 1088, 1108, involved misconduct of a wholly different nature than the prosecutorial misconduct committed in Appellant's case. Here, the prosecutor's impermissible argument referred to inflammatory victim impact evidence. In *Davenport*, the argument concerned the defendant's character, *Davenport, supra,* 11 Cal.4th at 1212, and in *Wrest,* the misconduct involved numerous misstatements of fact (See *Wrest, supra,* 3 Cal.4th at 1109). The arguments here were patently inadmissible and concerned the victim's personality and habits, as well as impact on her family, in a manner of presentation that must be reserved for the penalty phase, if at all.

Respondent's argument that the prosecutor's statements were relevant to establishing "an intentional killing" are wholly specious. (See RB 195). In no way do the facts that Ms. Olsson "nurs[ed] in the army in 1950 during the Korean War," lived in "Japan" and "Hawaii," "divorced [ ] her husband [when] her children were adults," reflect upon Appellant's mental state at the time of the killing. (See RB 194-95). Likewise, Respondent's argument that the description of Ms. Olsson's lifestyle establishes witness reactions to her brief disappearance is specious. The facts that Ms. Olsson "enjoyed her garden," "maintained [her] yard," and "read [ ] and sunbath[ed]," has nothing to do with her or the witness's conduct on the day in question. (See *Id.* at 195).

Given the trial court's prior orders, the prosecutor knew that the evidence was inadmissible. He repeatedly sought to introduce the evidence anyhow, over defense objection and in knowing violation of Appellant's constitutional rights, in order to procure sympathy for the Olsson family and prejudice the jury against Appellant. The result is a violation of Appellant's constitutional rights to due process, a fair trial, an impartial jury, reliable sentencing and equal protection.

4. The Prosecutor Committed Misconduct during the Presentation of Evidence.

Having already prejudiced Appellant's rights during *voir dire* and opening statement, the prosecutor committed further misconduct by introducing victim impact evidence throughout the guilt phase proceedings. In doing so, the prosecution repeatedly asked objectionable questions, even after defense objections had been sustained. (See I AOB 210-17). The prosecutor flouted the trial court's general orders that limited prosecutorial questions to "contemplation" of the proposed trip to Kansas and prohibited "personality evidence" regarding Ms. Olsson. (RT 202-03). The record demonstrates that the prosecutor harbored the impermissible objective of

"intentionally elicit[ing] inadmissible testimony" and intentionally failing "to comply with [court orders[." (*Bonin, supra,* 46 Cal.3d at 689). For example, the prosecutor never disclosed his intention to examine a witness on prejudicial issues in advance of the examination. (See I AOB 224). This misconduct demonstrates the prosecutor's intentional and "inexcusable" intent to not "specifically and carefully follow[] the court's instructions...." (*People v. Glass* (1975) 44 Cal.App.3d 772, 782). Respondent fails to defend this specific claim of misconduct, and the silence also proves that there is no evidence to rebut the claim that the prosecutor intentionally disobeyed the trial court's notice orders.

Respondent's argument in defense of the prosecutor's misconduct covers the examination of four witnesses and thirteen instances of misconduct. (See RB 197-208). Respondent fails to persuasively rebut Appellant's legal assertions and factual proof of misconduct,[66] as well as the prejudice that resulted from the prosecutor's impermissible course of action. Thus, in rebuttal, Respondent offers only specious arguments that

---

[66] California case law states that "[e]very prosecutor who offers a witness to testify to conversations with an accused should know what the witness will relate if given a free hand. The prosecutor has the duty to see that the witness volunteers no statement that would be inadmissible and to be especially careful to guard against statements that would also be prejudicial." (*People v. Baker* (1956) 147 Cal.App.2d 319, 324). In this case, the judge specifically told the prosecutor to ensure that the state's witnesses did not volunteer inadmissible statements. The witnesses, however, repeatedly made inadmissible statements, evidencing that the prosecutor failed to honor the court's orders. "A claim of ignorance on the part of the prosecutor as to the testimony the witness would give cannot be reconciled with the affirmative duty of fairness in the trial to which prosecutors must be alert at all times." (*Id.* at 324-25). Respondent states that the prosecutor could not have known what his witnesses would say. (See RB 200). This however, is not a valid excuse when a prosecutor's witnesses repeatedly makes inadmissible prejudicial statements. Therefore, regardless of whether the prosecutor intentionally elicited inadmissible testimony, he was responsible for what his witnesses said and his actions constituted misconduct. (See *Baker, supra,* 147 Cal.App.2d at 324).

further reveal the egregious character of the prosecutor's misconduct, as well as, the misconduct's significant effects upon Appellant's constitutional rights.

a. The State's Examination of Barbara Green.

During the state's examination of Barbara Green, the prosecutor repeatedly committed misconduct. Respondent tries to defend ten (10) separate incidents of intentional deviation from court orders where the prosecutor sought to goad prejudicial responses from an understandably emotional witness. Respondent fails in its efforts.

At the outset, Respondent declares that "[a]ll of Appellant's [ten arguments] fail." (RB 197). Respondent argues that the prosecutors did not flaunt the court's ruling in reference to the trip to Kansas or Ms. Olsson's personality because the rulings allowed evidence encompassing all purposes of the trip and aspects of Ms. Olsson's character. (*Ibid.*). Respondent then describes the misconduct as if it were committed in the absence of any palpable court orders, arguing that questions to Green about Ms. Olsson's impending trip to Kansas, "prove[d] why Green went to Olsson's house after Olsson failed to arrive at work." (*Id.* at 198). Respondent then tries to argue that questions about Ms. Olsson's punctuality were "probative of Green's conduct...." (*Ibid.*). Similarly, Respondent tries, but fails, to justify the prosecutor's question: "Please explain the basis of your concern," as a question which ultimately led Mrs. Green into detailing her death pact with Ms. Olsson, as "appropriate [to] background evidence to explain Green's conduct...." (*Id.* at 200). Respondent tries to justify the misconduct as efforts to endorse Mrs. Green's credibility. (See *Id.* at 201). Respondent tries to dismiss allegations of misconduct resulting from prosecutorial questions to Green concerning "her feelings" while at the scene of the crime. Because the

questions were relevant to Mrs. Green's "clinical response" and corroborated Dr. Sharon Van Meter's autopsy testimony. (*Id.* at 202-03).[67] Likewise, Respondent says that it was appropriate for the prosecutor to ask Mrs. Green about her "emotional condition," since the questions were related to her "credibility" and "emotional stability." (*Id.* at 203).

Respondent's arguments are unsupported by the record and fail to prove that the prosecutor did not intentionally seek to goad inadmissible and prejudicial responses from Mrs. Green. Respondent fails to understand that it is plainly misconduct for a prosecutor to "intentionally elicit inadmissible testimony," (*Bonin, supra,* 46 Cal.3d at 689), and not to "comply promptly with all orders and directives of the court." (*Hill, supra,* 17 Cal.4th at 832).

First, Respondent seeks to give the court's orders no effect by narrowly tailoring the limits set by the court. For example, Respondent argues that when the court ordered that all evidence regarding Ms. Olsson's trip to Kansas be limited to "contempla[tion]" of the trip; the court's order actually allowed for the admission of evidence relating to any "purpose" of the trip. (RB 197). This self-serving analysis is not justified by the record or useful for resolving the issue. The court clearly limited any testimony about the vacation plans to the witnesses "contemplation," not "any purpose" of the trip. (RT 2002). This ruling plainly conflicted with the prosecutor's intent to interject victim impact evidence into the guilt phase proceedings through use of the story. The order reflected the trial court's legitimate concerns about prejudice emanating from descriptions of a trip

[67] Respondent also contends that these arguments should be procedurally defaulted for failure to object at trial. (See RB 202). However, Appellant did not refer to this incident as misconduct or a claim of error. Instead, the incident was related as part of the factual background of the misconduct claim to show context, the extent of the prosecutorial misconduct, and how the prosecutor violated court orders regarding notice. (See AOB at 190).

that was to occur in the *future*, and thus was irrelevant at the time of the homicide. "Contemplation" should be relatively defined as thoughts occurring close to the time of the murder, and not include irrelevant and prejudicial thoughts about the trip from anytime following the murder.

Second, Respondent argues that Mrs. Green's thoughts on Mrs. Olsson's character were relevant to explaining Mrs. Green's conduct on the day of the homicide. (RB 198). Respondent's attempt to conflate victim impact evidence and evidence probative of Mrs. Green's conduct is illusory. In the first instance, it is wholly specious for Respondent to insist that because Ms. Olsson was "very reliable," "punctual," "dependable," (*Ibid.*), and possessed hosts of other professional qualities, these qualities justified detailed testimony as to Mrs. Green's feelings and relationship with Ms. Olsson. Personality evidence concerning Ms. Olsson does nothing to explain Mrs. Green's conduct on the day of the killing. The fact that Ms. Olsson was missing conclusively demonstrates sufficient cause for Mrs. Green's concerns. Finally, it was unnecessary to justify Mrs. Green's conduct since it was never challenged by Appellant. There was no reason, other than to invoke sympathy, for the prosecution to submit evidence of Mrs. Olsson's professional and personal reputation to the jury.

Moreover, questions about Mrs. Green's feelings and "emotional state" were not relative to enhancing her credibility. Mrs. Green's testimony went largely unchallenged. Mrs. Green was not called as an expert or clinical witness, and she was not called as a character witness for the deceased. Nor if she was, would such testimony be admissible during the guilt phase of Appellant's capital trial. By purposefully seeking to have Mrs. Green testify as to her "feelings," the prosecutor sought to interject impermissible and emotionally laden victim impact testimony into the guilt

phase proceedings.[68] Respondent's attempts to cloak the prosecutor's efforts fail to demonstrate that the prosecutor did not commit misconduct by intentionally and knowingly seeking to admit inadmissible evidence, in violation of the trial court's orders restrictions on evidence probative of Ms. Olsson's personality, habits as a worker, duties at the hospital, and the planned family reunion. (See RT 1981-2003).

b. The State's Examination of Maxine Gatten.

Respondent also tries to utilize procedural grounds to bar review of other instances of prosecutorial misconduct. However, Respondent's procedural bar arguments only address instances of misconduct listed in Appellant's statement of facts, not those that make up the bulk of Appellant's legal claims. (Compare RB 190-209; with I AOB 208-232). The instances of misconduct in the statement of facts were recited as proof of a prosecutorial habit of misconduct and were properly objected to when Appellant first received the court's orders limiting "personality evidence" and evidence about Ms. Olsson's trip to Kansas. (See I AOB 210-17). Respondent's procedural bar arguments thus do not address the specific

---

[68] Respondent argues that *People v. Farnam* (2002) 28 Cal.4th 107, controls the outcome of this issue. First, Respondent provides an erroneous citation to *Farnam*. (See RB 200). Second, *Farnam* has no relation to this case since it involved challenges to evidence regarding the victim's propensity to wear scarves; an element factually necessary to the case and identifying the victim. (*Id.* at 151). Here, Respondent's attempts to disguise the victim character evidence introduced by the prosecutor at Appellant's trial as corroborating physical evidence fail. Undoubtedly, Mrs. Green's prescient dreams have nothing to do with the physical evidence at the Olsson homicide. Likewise, Mrs. Green and Ms. Olsson's death pact had nothing to do with establishing who killed Ms. Olsson. Respondent is disingenuous in arguing that such evidence helped explain Mrs. Green's role and conduct in the investigation of Olsson's death; since the jury would have obviously understood her role as the first person on the scene with or without the irrelevant and prejudicial information that showed the depths of her personal relationship with Ms. Olsson.

instances of misconduct and arguments which were properly preserved at trial and cited in the prosecutorial misconduct section of Appellant's Opening Brief. (See *Id.* at 217-32).

Appellant has argued that the prosecutor's questions to Maxine Gatten, regarding Ms. Olsson's punctuality, violated the court's proscription on "personality evidence." Respondent says that the argument is barred because Appellant did not object at trial. (RB 198). Likewise, Respondent says that Appellant's argument that prosecutorial questions to Ms. Gatten about the duties of "[Ms.] Olsson [as] an ostomy nurse" violated the court's order against personality evidence should be barred from review. (See *Id.* at 199 n. 19).

First, Respondent tries to confuse this Court by raising arguments regarding procedural bars and the objections made during Ms. Gatten's testimony, with the state's arguments concerning the misconduct committed during Mrs. Green's testimony. (See RB 198, 199 n. 19). The misconduct committed during Mrs. Green's testimony was addressed above and was properly preserved by objections at trial. (RT 2027-2082). Thus, despite Respondent's arguments Appellant's claims have been properly preserved.

Second, defense counsel's failure to object at trial to the questioning of Mrs. Gatten does not automatically bar this Court from reviewing clear constitutional violations. Here, the prosecutor committed egregious misconduct by using Mrs. Gatten as a character witness for the deceased in violation of prior court orders. (See RT 1981-2003). The trial court's failure to enforce its orders resulted in the violation of Appellant's constitutional rights. Thus, in accordance with *Avila*, *supra*, 38 Cal. 4th at 527 n.22, Appellant now seeks to "merely assert that the trial court's act or omission, insofar as it was wrong for the reasons actually presented to that court, had the additional legal consequence of violating the federal

Constitution." (*Id.;* see also *People v. Partida* (2005) 37 Cal.4th 428, 433-439, 35 Cal.Rptr.3d 644, 122 P.3d 765; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6, 17 Cal.Rptr.3d 532, 95 P.3d 811; and *People v. Yeoman* (2003) 31 Cal.4th 93, 117, 2 Cal.Rptr.3d 186, 72 P.3d 1166). Here, the trial court's decision was in violation of state law, this Court's authorities and defense counsel's earlier objections. Appellant may thus raise the federal constitutional objection on appeal as grounds for reversal of his convictions.

Respondent seeks to justify introduction of Mrs. Gatten's statements as necessary to defend against allegations in Appellant's March 27 and 30 statements which "besmirched" Ms. Olsson's character. (RB 198). However, Appellant made these statements involuntarily and they are not accurate measures of the truth. Importantly, it was the state who introduced the "besmirching" evidence. (*Ibid.*). Prosecutors cannot seek to rebut their own evidence by creating a "strawman" of the victim's reputation. In fact, this strategy is evidence of an improper intent to admit inadmissible evidence in violation of Appellant's constitutional rights and prior court orders.

c. The State's Examination of Clifford Sandberg.

Respondent tries to defend several incidents of prosecutorial misconduct during the state's examination of Mrs. Olsson' father - Mr. Sandberg. Respondent says that prosecutorial questions to Mr. Sandberg about Ms. Olsson's pending trip to see him were permissible: "[b]ecause of his age, his testimony, as to when he last saw and when he would next see his daughter and the reasons for those visits, was relevant to test his ability to recollect events." (RB 204). Respondent argues that the questions were relevant to "Ms. Olsson's lifestyle." (*Ibid.*). Respondent argues that questions about the winters Mr. Sandberg spent with his daughter were

relevant to show "[Ms.] Olsson's day-to-day habits." (*Id.* at 205). Respondent tries to defend prosecutorial questions regarding an incident where Ms. Olsson answered the door and helped a neighbor's "sick wife" as probative of Ms. Olsson's character as "a responsible neighbor." (*Id.* at 205-06). Finally, Respondent claims that the evidence proves that Appellant "forced the door open, ripping the chain [from the] mount." (*Id.* at 206).[69]

However, none of the justifications offered by Respondent explain the misconduct or cure the resulting prejudice to Appellant. The state sought to introduce "character evidence" of Ms. Olsson's qualities as "a good neighbor." Clearly, "good neighbor" evidence violated the court's restriction on "personality evidence." Respondent cannot truthfully argue that "lifestyle evidence" is different from "personality evidence," which was proscribed by the Court. (See RB 204). Similarly, the fact that Ms. Olsson chain-locked her door on one occasion does not have any bearing on whether an intruder entered the house at the time the crimes were committed. More importantly, it sheds no light on the identity of the intruder or his criminal intent. Rather, the explanation masks the prosecutor's intent to interpose impermissible and irrelevant victim impact evidence concerning the deceased's character into the guilt phase

---

[69] Respondent says that Appellant's argument concerning prosecutorial misconduct during Mr. Sandberg's testimony should be forfeited. (RB 207). Respondent is wrong. Appellant did not raise each instance of misconduct as claims of error. Rather, some were designated as misconduct while others were related as factual background, and cited to show context, the extent of the prosecutorial misconduct, and how the prosecutor violated court orders regarding notice. (See I AOB 190). Similarly, to the extent that the prosecutor's misconduct resulted from the trial court's prior erroneous rulings and failure to enforce *in limine* orders, Appellant makes these arguments because the misconduct has had the additional legal consequence of violating the federal Constitution. (*Avila, supra*, 38 Cal. 4th at 527 n.22).

proceedings.

d. The State's Examination of Sandra Walters.

Respondent tries to defend questions asked of Ms. Olsson's daughter, Mrs. Walters, regarding her mother's social life and the planned celebration party for her mother's birthday. According to Respondent, this evidence is "probative to show that Olsson led a private and conservative lifestyle." (RB 208).[70] Respondent confuses "personality evidence" and "lifestyle evidence." Evidence detailing Ms. Olsson's "personality" or "lifestyle," constitutes victim impact evidence and was limited by the trial court during *in limine* proceedings. (See RT 1983-2003). Likewise, the description of this evidence, coming from Ms. Olsson's daughter, also constitutes victim impact evidence in the form of testimony to the loss felt by Mrs. Walters in her mother's absence should not have been introduced during the guilt phase. There is no distinction between "lifestyle" and "personality" evidence and both are equally inadmissible during the guilt phase. (*Payne, supra,* 501 U.S. at 830 n. 2).

5. The Prosecutor Committed Misconduct during the Guilt Phase Closing Arguments.

Respondent says that it addresses "misconduct during closing argument...elsewhere." (RB 208). In any event, Respondent does not adequately respond to Appellant's specific argument that the prosecutor committed misconduct by violating court orders and introducing inadmissible victim impact evidence during the guilt phase. The prosecutor exploited prejudicial testimony from Mrs. Green and others during the closing argument by quoting word-for-word the witness's understandably emotional, but inadmissible and highly prejudicial, victim impact statements. (See RT 3478-50). The prosecutor further embellished Ms.

---

[70] See *supra,* note 80.

Olsson's life history and reputation. In reading victim impact statements and, in embellishing Ms. Olsson's character, the prosecutor did not seek to develop the juror's objective evaluation of the circumstances of the crime and/or of Appellant's criminal intent. Instead, the prosecution sought to further inflame the jury's sympathies by presenting argument regarding inadmissible and impermissible victim impact evidence in the guilt phase.

6. Appellant's Constitutional Rights were Prejudiced by the Rampant Prosecutorial Misconduct During the Guilt Phase of his Capital Trial.

From opening statements to closing arguments, the prosecutor committed serious misconduct, under both state and federal law, by repeatedly injecting victim impact evidence into the guilt phase proceedings. Indeed, it was one of the prosecution's themes for Appellant's guilt phase. Prosecutorial misconduct and improper victim impact testimony "so infected the trial with unfairness" that Appellant was deprived his rights to due process, fundamental fairness and a fair trial. (*Darden*, *supra,* 477 U.S. at 182-83). Both the misconduct and prejudice resulting from the numerous individual instances of misconduct, as well as the cumulative effect of the prosecution's pattern of misconduct, require reversal of Appellant's convictions. (*Hill*, *supra*, 17 Cal.4th at 844-47).

Due to Appellant's showing of misconduct, and resulting constitutional prejudice, the burden has shifted to the state "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Bolton, supra,* 23 Cal.3d at 214). Respondent has failed to make the proper showing here. In an effort to create substance where none exists, Respondent misconstrues applicable law and the reality of the misconduct during Appellant's guilt phase proceedings. In Respondent's mind, the required prejudice showing is "an intent to arouse sympathy for a victim Olsson and hatred against appellant..." (RB 199).

This description of "prejudice" wholly misstates and diminishes the legal standard to simple rhetoric. Appellant has shown that the prosecutor intentionally sought to admit inadmissible evidence and violate court orders. (See *Bonin, supra,* 46 Cal.3d at 689; and *Hill, supra,* 17 Cal.4th at 832). These violations impermissibly caused "sympathy for victim Olsson and hatred against appellant." (RB 199), and contributed to the verdict obtained. (See *Bolton, supra,* 23 Cal.3d at 214). Prosecutorial misconduct also "so infected the trial with unfairness" that Appellant was deprived of his rights to due process, fundamental fairness and a fair trial under both the state and federal Constitutions.

In only a handful of instances does Respondent actually attempt to defend against the prejudice resulting from a specific instance of misconduct. For example, in response to Appellant's argument that prosecutors committed misconduct by prompting Mrs. Green to recall more than a page of premonitions she had before the murder, Respondent argues only that the highly prejudicial information "could [not] have had any effect [up]on the guilt verdict." (RB 200).

Respondent "fails to see how" questions to Mrs. Green regarding Olsson's propensity to use swear words "can amount to prosecutorial misconduct, as the prosecutor was trying to show that Olsson was not the type of person Appellant portrayed her as in his statement." (RB 201). Respondent tries to dismiss any resulting prejudice as ameliorated by the fact that the trial court sustained the objection and the witness did not answer the question. (*Ibid.*). Respondent argues that details about Ms. Green's emotional response to the crime and circumstances of the crime scene could not have prejudiced Appellant's rights since such evidence "could not have told the jury something it did not already know." (*Id.* at 203). Respondent's arguments fail in whole.

While Respondent fails to see prejudice to Appellant's rights in

these few specific instances, the state fails to address over thirty (30) other instances of misconduct. Moreover, Respondent fails to recognize the risks of introducing "personality evidence" during a capital guilt phase proceeding. To allow prosecutors to interject impermissible misconduct nearly forty (40) times throughout the guilt phase proceedings assuredly has a deleterious effect on the reliability of those proceedings and on the defendant's constitutional rights. Here, the prosecutorial misconduct so infected Appellant's capital trial as to render the proceedings fundamentally unfair in violation of his constitutional rights to due process, a fair trial, an impartial jury, heightened reliability in capital cases and equal protection under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as parallel provisions of the California Constitution.

In recent history, this Court has decided only one case where the defendant argued that the introduction and exploitation of victim impact evidence during the guilt phase constituted prejudicial error.[71] (See *People v. Redd* (2010) 48 Cal.4th 691). There, this Court found that the "sole aspect of this testimony that was irrelevant at the guilt phase was the statement that "I still see a psychiatrist because of post-traumatic disorder, which is anxiety...." (*Id.* at 732). The Court found the admission of this evidence harmless error because it is not "reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error." (*Ibid.*). In Appellant's case, however, the introduction of victim impact evidence was rampant and prejudicial.

First, the introduction of the evidence stems from the thirteen (13) errors committed by the trial court in admitting the evidence, failing to limit the prosecution's ability to introduce the prejudicial testimony and failing

---

[71] In *Redd,* the alleged victim impact evidence introduced was menial, thus leading to this Court's finding that its erroneous introduction was not prejudicial. (See *Redd, supra,* 48 Cal.4th at 732).

to enforce its own orders. (See I AOB 238-40). Second, unlike in *Redd,* here, the prosecution exploited victim impact witnesses' emotions as they recited the circumstances of the crime as deduced during the prosecution's guilt phase case in chief. In his Opening Brief, Appellant cited to thirty-nine (39) instances of prosecutorial misconduct during the guilt phase testimony. Most of these instances occurred due to the prosecution's efforts to goad witnesses, as they discussed the circumstances of the crime, into also recanting emotionally charged and prejudicial victim impact testimony. Third, unlike in *Redd*, the victim impact testimony in Appellant's case was improperly elicited from four witnesses; not just one. These witnesses included family members and friends who added layer upon layer of prejudicial emotion to the guilt phase proceedings. Finally, because the introduction of victim impact testimony during Appellant's guilt phase proceedings was not limited or *de minimus*, as in *Redd*, this Court must find that the error was not harmless beyond all doubt. (See *Watson, supra*, 46 Cal.2d at 836).

D. Conclusion.

In many instances, trial court error and prosecutorial misconduct worked in combination to violate Appellant's rights under state law, the California Constitution, and the federal Constitution. Together or individually, the trial court's rulings, in failing to wholly exclude the prosecutor's use of personality evidence, habit evidence, and evidence regarding the family reunion, deprived Appellant of his rights to due process and a fair trial. Moreover, the trial court's failure to enforce its *in limine* orders at all, particularly its notice requirement, despite repeated defense objections to impermissible prosecutorial tactics deprived Appellant of his rights to due process and a fair trial. When these errors are combined with the numerous instances of prosecutorial misconduct, taken individually or cumulatively, the prejudice to Appellant is manifest. The

result was the presentation of irrelevant and highly prejudicial victim impact testimony throughout the guilt phase of Appellant's capital trial in ways that so infected the proceeding as to render it fundamentally unfair.

Appellant's convictions were not earned based upon an objective evaluation of each element of the crimes alleged against him, but instead gained out of sympathy for the loss of someone with Ms. Olsson's character and work habits. Similarly, the convictions were not earned based upon an evaluation of Appellant's criminal intent, as much as outrage that Ms. Olsson would not see her father on his 85th birthday. In light of the scant evidence regarding Appellant's criminal intent and culpable conduct, the introduction and exploitation of this impermissibly prejudicial evidence assuredly had a powerful impact on the jury. More assured is the fact that without this prejudicial evidence and these improper prosecutorial arguments, Appellant would not have been found guilty of either first degree murder, the special circumstance of felony-murder, or assault with intent to commit rape. Appellant's convictions and the special circumstances must be reversed due to violations of his constitutional rights to due process, a fair trial, an impartial jury, heightened reliability in capital cases and equal protection under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as, parallel provisions of the California Constitution.

IX. THE PROSECUTOR COMMITTED MISCONDUCT DURING THE GUILT PHASE CLOSING ARGUMENTS.

A. Introduction.

During closing arguments in Appellant's guilt phase proceedings, in accordance with his continuing pattern, the prosecutor committed misconduct from start to finish. He lampooned defense counsel's integrity and challenged Appellant's status as a "man." He improperly commented on the exercise of Appellant's constitutional rights and misstated the facts and the law to gain an impermissible advantage. Moreover, the prosecutor violated his ethical duties by ignoring the ends of justice and undermining Appellant's rights to due process, a fair trial and a reliable sentencing determination.[72]

Respondent argues that Appellant's claims of prosecutorial misconduct during the guilt phase closing arguments can be advanced "only by ignoring essential context." (RB 210). Respondent feels that it "is plain from the foregoing that the overall thrust of the prosecutor's remarks remained squarely focused on the evidence of record and the circumstances affecting the credibility of its sources." (*Id.* at 211). According to Respondent, it "is simply inconceivable that the prosecutor's challenged comments had even the remotest effect on the verdict." (*Id.* at 218).

Respondent attempts to diminish the prosecutorial misconduct and the resulting violations of Appellant's constitutional rights by referencing "essential context." (RB 210). This failed effort should not divert the focus of this Court. "Essential context" did not inoculate the trial against the prosecutor's disparagement of Appellant, his attacks on trial counsel's

---

[72] Respondent argues that Appellant "complains" a lot. (RB 210). Appellant's protestations that he has been wrongfully convicted, sentenced to death, and had his constitutional rights violated are more than complaints and rest upon valid legal theories and facts.

credibility, and his many misstatements of material facts and law made in closing argument. Respondent does not address many of the arguments raised by Appellant, including Appellant's showing of prejudice and harmful error

B. Respondent Fails to Fully or Effectively Address Numerous Acts of Prosecutorial Misconduct During the Guilt Phase Closing Arguments.

1. By Impermissibly Impugning the Integrity of Defense Counsel.

Respondent concedes that the prosecutor rhetorically argued: "Did you ever get the feeling [defense counsel] believed his client was telling the truth?" (RB 210). Respondent argues that this remark was "unfortunate," but characterizes the statements as "focused on the evidence of record and the circumstances affecting the credibility of its sources." (*Id.* at 211). On this basis, Respondent argues that the statements did not constitute misconduct. (*Ibid.*).

A prosecutor who says that defense counsel is lying to the tribunal, is furthering fraud upon the court, or does not believe their client, commits very serious misconduct. At a minimum, these arguments are irrelevant and do not assist "the jury [in] determin[ing] whether, under the evidence presented, the defendant committed the [ ] crime." (*Thompson*, *supra,* 45 Cal.3d at 113). The prejudice resulting from this egregious misconduct warrants reversal of Appellant's convictions because it was contrary to constitutional prosecutorial duties, (*Berger v. United States* (1935) 295 U.S. 78, 88), and was part of a pattern of "serious, blatant and continuous misconduct." (*Hill*, *supra*, 17 Cal.4th at 844).

Utilizing *Thompson*, *supra,* 45 Cal.3d at 112, Respondent argues that the prosecutor's statements were innocuous and not prejudicial. (RB 211). Respondent tries to justify this conclusion by saying that the

comments were made in "passing," and were "incidental." (*Ibid.*). Respondent even accuses Appellant of taking the prosecutor's statements out of context. (*Id.* at 210). Respondent then argues that the jury was not prejudiced by the remarks, since the prosecutor did not imply that "defense counsel ha[d] fabricated evidence [n]or otherwise portray[ed] defense counsel as the villain in the case." (*Id.* at 211 (citing *Thompson, supra,* 45 Cal.3d at 112)). Lastly, Respondent argues that the court's instruction "ensured that no prejudice resulted." (RB at 211). Respondent is wrong on every count.

Respondent wrongly relies upon *Riel, supra,* 22 Cal.4th at 1153 to support its argument that the trial court's admonishment cured any prejudice resulting from the prosecutor's misconduct. Respondent's cite to this Court's holding in *Riel,* a case that involved an admonishment given in response to misconduct during the presentation of evidence is unavailing. (*Id.* at 1198). The Court in *Riel* found that the admonishment cured the prejudice resulting during the examination "because the questioning was terminated early, [thus] what the jury actually heard was rather innocuous." (*Ibid.*). Here, the prosecutor repeatedly violated court orders throughout his closing argument and impermissibly interjected victim impact evidence into the jury's guilt considerations. Impugning the credibility of the defense can hardly be deemed innocuous.

Respondent's reliance on *Francis v. Franklin* (1985) 471 U.S. 307, 325 n. 9 is curious in that there, the Court found the curative instruction constitutionally deficient. (See *Id.* at 325). Moreover, the High Court recognized that some violations, like impugning the credibility of defense counsel, are more serious in scope. The Court held, "[c]ases may arise in which the risk of prejudice inherent in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights." (*Francis, supra,* 471 U.S. at

324 n. 9).

Moreover, Respondent's arguments fly in the face of this Court's proscription against prosecutorial "argu[ments] to the jury that defense counsel does not believe in his client's defense...." (*Thompson, supra*, 45 Cal.3d at 112-13). This Court has recognized that such misconduct is not to be condoned. (*Id.* at 112). Respondent's arguments to the contrary are factually and legally unavailing. While Respondent mentions "essential context," Respondent does not describe the "context," which made the prosecutor's statements relevant and not misconduct. Respondent must mean that the context of the arguments is that they arose in response to defense counsels' arguments. (RB 210). However, the comments were made prior to defense counsel's closing argument and, thus, the context was not rebuttal argument.

The prosecutor's argument was entirely unrelated to the evidence at hand and had no bearing on whether Appellant was criminally liable for the Olsson homicide. Instead, the prosecutor's comments lampooned the demeanor and credibility of both defense counsel and Appellant. The prosecutor interjected his own personal speculations about defense counsel into the jury's considerations. The prosecutor essentially asserted that, throughout the entire guilt phase proceeding, defense counsel had lied to the jury.[73]

Respondent argues that any prejudice was "passing." (RB 211). To the contrary, the prosecutor's remarks were calculated, flagrant and littered the guilt phase. The misconduct was only limited, if at all, when defense counsel objected to the clear misconduct. The trial court failed to ameliorate the prejudice by sustaining objections or providing useful instructions to the jury. "[P]assing" does not correctly describe the

[73] Indeed, later, the prosecutor would assert that defense counsel had lied to the jury and was trying to trick them. (RT 3218-20).

qualitative impact that the statements had upon the jury. Respondent's arguments do not address the effect the prosecutor's statements had upon the jury's perception of defense counsel's credibility and the veracity of Appellant's defense. Even a passing comment can have a powerful impact if poignant, repeated and prejudicial. Indeed, *it is the effect of the prejudicial argument that matters, and not just the brevity.*

The trial court's instruction did not cure the error because the admonishment did not "counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks." (RB 191). The prosecutor's statements were irrelevant, prejudicial, and interjected the prosecutor's personal opinions into the jury's guilt phase considerations. They impugned not only Appellant's defenses, but also, defense counsel's and Appellant's credibility. Worse, during his arguments the prosecutor made denigration of defense counsel a prominent theme. (See RT 3218-20). Under such circumstances, merely telling the jury to "disregard" the prosecutor's misconduct was insufficient to cure the harm caused by the arguments.

The trial court failed to counteract the statements by giving an admonition on point or directly admonishing the prosecutor in front of the jury. Following the misconduct, the trial court never instructed the jury that they were not to consider whether defense counsel believed their client's out of court statements or believed in Appellant's defense. The trial court never instructed the jury that they were not to consider the comments since they were *irrelevant*. With no admonition on point, the prejudice to Appellant's constitutional rights was not cured. It is reasonably probable that a result more favorable to Appellant would have occurred absent the prosecutor's egregious misconduct and, assuredly, the misconduct was not harmless error beyond a reasonable doubt. (See *Watson*, *supra*, 56 Cal.2d 818; and *Chapman*, *supra*, 386 U.S. at 24).

As evident from this Court's recent case law, increasingly, in capital cases, prosecutors are resorting to denigration of capital defense counsel. (See *Lewis, supra,* 46 Cal.4th at 1255;[74] *Mendoza, supra,* 42 Cal.4th at 686;[75] and *Tate, supra,* 49 Cal.4th at 635).[76] The denigration in Appellant's

---

[74] In *Lewis*, the prosecutor commented that "You can conclude from the fact that the defense investigator wasn't presented to you that these insinuations are false, and all they can do possibly is mislead you as to what the evidence is in this case." (*Lewis, supra,* 46 Cal.4th at 1305). This Court held that the statement was not error or prejudicial because it "challenges the insinuations-not the character-of defense counsel." (*Ibid.*). This is not comparable to what defense counsel endured in Appellant case. There the prosecution directly called into question defense counsel's credibility by asserting that he did not believe in his client's story by stating "Did you ever get the feeling [defense counsel] believed his client was telling the truth?" (RB 210). The prosecution's tactic unethically sought to: 1) diminish defense counsel's credibility; 2) diminish Appellant's credibility; 3) insinuate that the defense was lying to the tribunal; and 4) interject the prosecutor's personal opinions into the jury's considerations.

[75] A more serious example of denigration of counsel cannot be conjured than in Appellant's case. In contrast, in *Mendoza*, the prosecutor flippantly remarked, during the examination of a police officer, that in "other words, that defense attorney didn't try to blame the cops for this?" (*Mendoza, supra,* 42 Cal.4th at 701). This Court summarily denied the claim because "this was not a close case." (*Id.* at 704). In contrast, in Appellant's case, which involves a capital conviction based entirely upon circumstantial evidence, this Court should not stand for such unethical and insidious arguments. Here, in contrast to *Mendoza,* the prosecutor's arguments sought to inflame juror passions in the absence of any direct or material evidence of Appellant's guilt.

[76] Finally, in *Tate*, another case from Alameda County, the defendant alleged that prosecutorial efforts to elicit the content of his pretrial conversations with counsel were improper attempts to insinuate that counsel rehearsed the defendant's testimony. (*Tate, supra, supra,* 49 Cal.4th at 704). This court procedurally dismissed the claim and found it without merit since the defense's objections were mostly sustained. (*Id.* at 705). Here in contrast, the prosecutor's comments sought to directly tarnish defense counsel's credibility and were not related to Appellant's testimony, as much as, the theory of the defense's case. In fact, here the

case, however, involved more questionable tactics, prejudice, and disregard for ethics than in this court's recent case law. This repeated pattern of denigration is disconcerting and will certainly continue in the absence of any limitations imposed by this Court. The egregious facts of Appellant's case make it the ideal vehicle to correct prosecutorial misconduct and the denigration of defense counsel.

2. By Using Inflammatory Epithets to Describe Appellant.

During his closing argument, the prosecutor improperly characterized Appellant as "a despicable excuse for a man." (RT 3023). The prosecutor continued the inflammatory name-calling by referring to Appellant as a "despicable individual," "garbage," and "a sucker." (RT 3161, 3173, and 3218). In doing so, the prosecutor committed prejudicial misconduct and violated this Court's and the federal courts' restrictions on "comments calculated to arouse passion or prejudice." (*Mayfield, supra,* 14 Cal.4th at 803; see also *Darden, supra*, 477 U.S. at 179).

Respondent first contends that Appellant's arguments regarding the prosecutor's repeated disparagements are procedurally barred. According to Respondent, "[o]nly the first of these epithets was objected to below." (RB 212). Respondent argues that "even as to th[ose] remark[s] counsel failed to request an admonition that could have cured any conceivable harm, thereby waiving the claim on appeal." (*Ibid.*). Alternatively, Respondent inexplicably argues that the prosecutorial denigrations of Appellant "were entirely warranted by the evidence establishing Appellant's guilt of the charged crimes." (*Id.* at 212-13). Respondent tries to justify this conclusion by citing to *Farnam, supra,* 28 Cal.4th at 168 and

---

prosecutor's comments focused upon the relationship between Appellant and his trial counsel and directly insinuated that trial counsel did not believe Appellant's theory of the case. The misconduct evinced in Appellant's case thus goes far beyond the misconduct evinced in *Tate*.

People v. Pensinger (1991) 52 Cal.3d 1210, 1251.

Respondent's reliance on *Farnam* is misplaced. There, this Court recognized that "there was nothing inappropriate about the prosecutor's use of epithets in describing defendant's actions, or her characterization of the evidence as 'horrifying' and 'more horrifying than your worst nightmare.'" (*Farnam, supra,* 28 Cal.4th at 168 (citations omitted)). In *Farnam,* the prosecutor was commenting on the evidence, while in Appellant's case, the prosecutor had no evidence to back his inflammatory accusations. Unlike the statements in Appellant's case, the prosecutor's statements in *Farnam* described the acts committed rather than who the defendant was as a person. There was no dispute that horrifying acts had been committed in *Farnam*, whereas the prosecutor's statements in Appellant's case went directly to the **main** issue in the case: whether Appellant was the "despicable" person who had committed the crimes. Furthermore, the epithets used in *Farnam* were innocuous when compared to the prosecutor's description of Appellant.

Respondent's citation to *Pensinger*, *supra,* 52 Cal.3d at 1251 is also misplaced. There, the prosecutor argued "that the crime was done by someone who was 'very violent, a maniac,'" and that "Mr. Pensinger, from the evidence, is just a perverted maniac." These descriptions of the evidence are distinguishable from the personality attacks argued by the prosecutor during Appellant's trial. Respondent concedes that the prosecutor called him "garbage," "a despicable excuse for a man," and "a sucker," but argues that the epithets were warranted by the evidence. However, at the guilt phase of the proceeding, no evidence of Appellant's character had been presented to support the prosecutor's inflammatory conclusions. Moreover, during the guilt phase, the only permissible arguments were those relating to the commission of the Olsson homicide, not to the victim and defendant's character.

This Court has recently been presented with several capital cases alleging that the prosecution committed prejudicial error by using epithets to describe the defendant. (See e.g. *Friend, supra,* 47 Cal.4th at 1; *Rundle, supra,* 43 Cal.4th at 76; and *Dykes, supra,* 46 Cal.4th 731). In none of these cases was the Court presented with epithets as egregious as those cast by the prosecution in Appellant's case. The misconduct in *Friend, Rundle,* and *Dykes* does not compare to that suffered by Appellant where the prosecutor repeatedly denigrated Appellant, and defense counsel as part of a course of misconduct intended to prejudice the jury against Appellant through denigration and epithets.

Instead of arguing based upon the evidence, the prosecutor interjected his personal opinions about Appellant to earn a capital conviction. In doing so, the prosecutor turned the guilt phase proceedings into a character contest. In fact, throughout the proceedings, the state introduced victim impact evidence about Ms. Olsson and in argument sought to vilify Appellant's character. These arguments influenced the jury's guilt determination based upon irrelevant factors. Instead of focusing the jury on the elements of the crime, the prosecutor focused the jury on his prejudicial opinions about Appellant's character. These arguments reduced the force of the court's instructions to follow the law, and injected emotion, bias, and caprice into the jury's guilt phase determination in violation of Appellant's constitutional rights. A result more favorable to Appellant would have occurred absent the misconduct, (*Bolton, supra*, 23 Cal. 3d at 214; and *Watson, supra*, 46 Cal.2d at 818), and the error was assuredly not harmless beyond a reasonable doubt. (See *Chapman, supra,* 386 U.S. at 24).

3. By Impermissibly Commenting on the Exercise of Appellant's Constitutional Rights.

During guilt phase closing arguments, the prosecutor also improperly commented on the exercise of Appellant's constitutional right not to testify. The prosecutor told the jury that when considering the veracity of Appellant's post-arrest statements, it should consider "his demeanor while testifying," whether his prior statements were consistent with his testimony, and to consider the existence or non-existence of a fact testified to by Appellant. (RT 3194-95). The prosecutor encouraged the jury to consider Appellant's failure to testify at trial when considering the veracity of his out-of-court statements. The prosecutor's arguments and comments on Appellant's decision not to testify violated state law, state authorities, federal authorities, and Appellant's rights under the Fifth Amendment. (See *Griffin v. California*, (1965) 380 U.S. 609; *United States v. Mayan* (9th Cir. 1994) 17 F.3d 1174, 1185; and *People v. Median* (1995) 11 Cal.4th 694, 755).

Respondent argues that no *Grifffin* error occurred. (RB 214). In Respondent's view, "the prosecutor [ ] did not remotely suggest that the jury draw the inference forbidden by *Griffin*." (*Ibid.*). Respondent believes that the prosecutor's comments "simply urged the jurors to evaluate the credibility of appellant's out-of-court statements" (*Id.* at 214-15), and were "entirely correct legally, and wholly unobjectionable on any basis." (*Id.* at 215). Respondent is wrong as to each point.

Because Appellant ultimately elected not to testify, in accordance with his constitutional rights, the state prosecutor essentially asked the jury to consider his silence as "testimony." The prosecutor thus urged the jury to consider his silence as inconsistent with the facts of the homicide as alleged by the state. This implied that: 1) Appellant did not want to take the stand; 2) Appellant did not want to subject himself to cross-

examination; 3) Appellant did not want to risk a charge of perjury; 4) the jury should not believe Appellant's defense; and 5) the jury should convict Appellant because he never gave the jurors any sworn testimony to consider. The prosecutor's statements were impermissible since they "manifestly intended to call attention to the defendant's failure to testify," or at least were of such a character that the jury "naturally and necessarily [took] it to be a comment on the failure to testify." (*Mayans, supra,* 17 F.3d at 1185).

The state's evidence of Appellant's guilt was not overwhelming. The evidence presented was entirely circumstantial, not direct. In fact, the state's case rested almost entirely upon Appellant's own out-of-court and involuntary statements. To counteract this lack of direct evidence, the prosecutor used Appellant's decision not to testify to explain his post-arrest statements, in exercise of his rights under the Fifth Amendment, to his disadvantage. In reminding the jury that Appellant did not take the stand, the prosecution gave Appellant's taped statements even greater and more prejudicial force. Through its misconduct, the state was able to use its circumstantial evidence and Appellant's involuntarily and unreliable statements to earn a capital conviction.

In the last four years, this Court has been presented by allegations of similar misconduct in several instances. (See *e.g. People v. Bennett* (2009) 45 Cal.4th 577, 589; and *Salcido, supra,* 44 Cal.4th at 152). Each time, this Court has found either that no error occurred or that any error, if existent, was harmless beyond a reasonable doubt. In neither *Salcido* nor *Bennett* was this Court presented with *Griffin* error as outrageous as in Appellant's case.[77] In fact, Prosecutor Burr's comments were tantamount to expressing

[77] Here, the prosecutor told the jury that when considering the veracity of Appellant's post-arrest statements, it should consider "his demeanor while testifying" whether his prior statements were consistent with his

his "opinion of the credibility of defendant's statements about the crime and whether or not defendant was guilty of the crimes charged." (*Riggs*, *supra,* 44 Cal.4th at 299). In *Riggs*, this Court assumed that the prosecutor's questions to a witness sought to prove "(1) that defendant's statements to the police and in his manuscript were untruthful attempts to shift blame away from himself; and (2) that defendant, not Hilda Riggs, shot and killed Jamie Bowie in order to rob her. Even assuming these opinions were improperly admitted this Court nonetheless concluded "that any misconduct in this regard was not prejudicial." (*Id.* at 300).

Here, however, the prosecutor's argument directly did what the prosecutor's questions could not do in *Riggs*. Here, the prosecutor directly commented on Appellant's failure to testify, and explain his earlier statements, as indicative of his guilt. Indeed, Respondent later admits that the prosecutor commented "on the record as it actually stood, ***as Appellant chose not to testify***." (RB 330 (emphasis added)). Thus, the prosecutor's statements directly called into the question the veracity of Appellant's out of court statements by describing his failure to testify. That election is protected by the Fifth and Fourteenth Amendments, as well as Article I of the California Constitution, and the prosecutor committed misconduct by commenting on Appellant's invocation of his constitutional rights.

---

testimony, and the existence or non-existence of facts alleged in Appellant's out of court statements. (RT 3194). In contrast to *Bennett*, the prosecutor's comments told the jury to consider Appellant's failure to testify as probative of his *credibility* when considering the veracity of his *exculpatory* out of court statements. This comment certainly does not discuss the "defense' failure to introduce material evidence," as much as, 1) attempt to impugn the out of court statements introduced by the prosecution; and 2) highlight Appellant's failure to testify and explain his out of court statements. Similarly, in contrast to *Salcido*, the prosecution's statements were not brief or menial. Instead, the prosecutor focused the jury's attention upon Appellant's out of court statements, and highlighted the incriminating portions while impeaching the exculpatory portions by referencing Appellant's failure to testify.

4. By Arguing Facts not in Evidence, Misstating the Trial Court's Instructions, and Circumventing the Trial Court's Orders.

Respondent tries, but fails, to defend several separate instances of misconduct arising from the prosecutor's repeated misstatements of applicable law and assertion of facts not in evidence.

Respondent wrongly concludes that evidence concerning the safety of the neighborhood and the appearance of Ms. Olsson's windows had been presented and justified the prosecutor's arguments that Ms. Olsson felt secure in her home. No such evidence had been introduced, and it was therefore improper to allow the jury to consider the prosecutor's "speculations" concerning Ms. Olsson's sense of security and the "decorative" features of her home. In fact, the prosecutor undertook such efforts not to prove a material fact in evidence, but instead, to imply that Ms. Olsson's neighborhood was safe. Respondent admits as much by arguing that "it is manifest" that "a pool of Alameda County jurors, would have its own appreciation for the extent of relative safety prevailing within the golf course community that was Ms. Olsson's neighborhood..." (RB 218). The prosecutor sought to influence the jury's conception of the crime with facts not in evidence and those statements further prejudiced the jury against Appellant.

Respondent argues that the prosecutor did not misstate facts in the record when he commented on Ms. Olsson's sense of neighborhood safety as evinced by "bars" on her windows. (RB 217). In Respondent's view, Appellant is wrong to claim that there was "[n]o evidence ... concerning the safety of the neighborhood...[and] there was no evidence that Ms. Olsson felt 'secure' in her home." (*Ibid.*). Respondent argues that "[t]he record shows that Barbara Green described one of Olsson's windows as having wrought-iron or metal on it for protection." (*Ibid.* (citing RT 2031, 2062)).

However, in the next sentence, Respondent relents, and states "[w]hether these were true security bars or, as the prosecutor argued 'decorative,' was for the jury to decide...." (*Ibid.*). Respondent's inconsistent arguments fail to rebut Appellant's showing of misconduct and prejudice.

Respondent tries to defend prosecutorial misconduct based on misstatements of the law and "improper[] reference[s to] evidence that had been excluded regarding the victim's reputation at the hospital." (RB 218). In an effort to minimize the prosecutor's violations of court orders, Respondent redefines the trial court's prior holdings as restricted to "evidence that bore on the victim's *professional* reputation..." (RT 2773). Thus, Respondent concludes that the prosecutor's reference was proper rebuttal to Appellant' attempts, in his involuntary and unreliable statements from March 27, 1987, to "smear[]" Ms. Olsson's personality. (RB 218). Under this pretense, Respondent argues that the prosecutor's deviations were "reasonabl[e]." (*Id.* at 219).

The prosecutor violated Appellant's due process rights by improperly referencing evidence that had been excluded by prior court orders. (RT 3037, 3084, 3085, 3219, and 3223). Despite the fact that the trial court had previously held that "personality evidence," and specifically evidence of Ms. Olsson's duties as a nurse, was improper under Evidence Code section 1103 (*Id.* at 2773 and 2790), the prosecutor introduced and argued evidence of both the victim's credibility and good nature. To accomplish this misconduct, the prosecutor claimed that he was responding to Appellant's defense, which, according to the prosecution, hinged on "smearing the good name of Sandy Olsson." (*Id.* at 3086 and 3223). The prosecution thus created a "straw man" of Appellant's defense in order to improperly introduce evidence of the victim's good-natured character as well as evidence disparaging Appellant's character. (*Id.* at 3086). Respondent wholly neglects to rebut Appellant's argument that Ms.

Olsson's "good name" was itself an irrelevant consideration for the jury. In fact, Respondent placed Ms. Olsson's "good name" at issue by introducing [Appellant's] March 27, 1987 statements in their entirety to prove intent under the state's theories for capital murder.

Next, Respondent tries to defend against Appellant's argument that the prosecutor misstated the law when he told jurors that they would not need to unanimously agree on a theory of first-degree murder. (RB 219). Respondent believes that "the law gives jurors more credit than Appellant's argument assumes," (*Id.* at 220), and, argues that, in response to the prosecutor's argument, "no juror would have…'conflate[d]' any elements of the two theories of first degree murder." (*Ibid.*). By arguing evidence not in the record, the trial prosecutor became his own witness. Protected from cross-examination, he introduced irrelevant and irrebutable considerations into the jury's guilt phase considerations. The prosecutor's attestations to facts not in the evidence constituted misconduct, violating Appellant's right to an impartial jury. (See *People. v. Avena* (1996) 13 Cal.4th 394, 420; and *Darden, supra*, 477 U.S. at 182). This conduct also violates fundamental tenets of legal ethics. (See AMERICAN BAR ASSOCIATION, *Code of Professional Responsibility; Ethical Considerations* (2003) available at: http://www.abanet.org/cpr/mrpc/ mcpr.pdf (last visited Sept. 2, 2010); see also NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, *National Prosecution Standards* (2d. ed 1991) std. 85.1). In addition, the prosecutor's manipulation of facts not in evidence violated principles of due process and fundamental fairness. (See *Darden*, *supra*, 477 U.S. at 182-83).

Finally, Respondent fails to show that the prosecutor did not misstate the law, did not mislead the jury by diminishing the importance of the court's jury instructions, and did not conflate the elements of premeditated murder and burglary-murder. Respondent characterizes the prosecutor's

arguments likening premeditated murder to the intent necessary to achieve burglary-murder as an "analogy," and "compar[ison] [of] different things." (RB 220). The prosecutor's argument could not have been an analogy, since Appellant was not charged with the offense of burglary or robbery. Instead, he was charged with a special circumstance that encompassed both offenses and attempted sexual assault, also a charge not independently levied against Appellant. By conflating the elements of burglary-murder and premeditated murder, the prosecutor sought to obtain a special circumstance finding without evidence sufficient to independently charge Appellant with burglary, robbery or attempted sexual assault. Unfortunately, the prosecutor's tactics worked and Appellant has been wrongfully convicted of a capital murder in violation of his state and federal constitutional rights.

The violation of prior court orders is the primary form by which this Court has found prosecutorial misconduct in recent years. (See *Friend, supra,* 47 Cal.4th at 33; and *Wallace, supra,* 44 Cal.4th at 1071). However, this Court has found that none of the errors prejudiced the defendants. The significance of the prosecutor's error and its prejudice cannot be so treated in Appellant's case. Here, like in *Friend* and *Wallace*, the prosecutor actively and intentionally circumvented prior orders by the trial court. However, unlike in *Friend* and *Wallace,* in Appellant's case the error affected a "close call" by interjecting passion into the prosecution's wholly circumstantial case. Undoubtedly, in Appellant's case, by seeking to defy court orders it is reasonably probable that a result more favorable to Appellant would have been reached without the misconduct. (Contra *People v. Crew* (2003) 31 Cal.4th 822). This is especially true when the prosecutor's misconduct during the guilt phase, and throughout the trial, is considered in the aggregate.

Repeatedly, during his closing argument, the prosecutor manipulated

and misstated the evidence in the record and circumvented prior court rulings. Ultimately, he was able to mislead the jury. Such reprehensible misconduct violated prevailing ethical norms and infected Appellant's trial with unfairness. As a result of false and misleading statements by the prosecution that swayed the jury, Appellant was convicted of capital murder and assault with intent to commit rape based on circumstantial evidence. The prosecutorial misconduct rose to the level of a state law violation and there is a reasonable probability that a result more favorable to Appellant would have occurred absent the misconduct. (See *Bolton*, *supra*, 23 Cal. 3d at 214; and *Watson*, *supra*, 46 Cal.2d 818). Moreover, the misconduct also violated the federal constitution because the prosecutorial errors were not harmless beyond a reasonable doubt. (See *Chapman*, *supra,* 386 U.S. at 24).

C. The Cumulative Prejudice Resulting From Prosecutorial Misconduct During Closing Argument in the Guilt Phase Violated Appellant's Constitutional Rights.

Throughout the guilt phase closing arguments, the prosecutor committed numerous acts of misconduct. He disparaged Appellant and maligned defense counsel's veracity. He urged jurors to condemn Appellant for exercising his right to remain silent under the Fifth Amendment. He misstated facts and misrepresented the law which confused the jury. He urged the jury to disregard instructions.[78] In sum, the prosecutor's conduct violated state law, the rules of professional conduct, and the California and United States Constitutions. The misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly*, *supra,* 416 U.S. at 643).

---

[78] For example, instead of using the court's instructions to assist the jury in considering the evidence, the prosecutor referred to the instructions as "confusing" "technicalities" that could be ignored. (RT 3041-43 and 3070).

Respondent spends only one sentence arguing prejudice resulting from the prosecutorial misconduct. "Once again, prejudice to Appellant is inconceivable."[79] (RB 220). Respondent is wrong. First, the evidence establishing Appellant's guilt and the elements of the crimes was circumstantial, and what was presented was insubstantial. The prosecutor recognized as much when he spent a large portion of his argument not describing the evidence, but instead lambasting Appellant, his counsel, and Appellant's exercise of his constitutional rights. Instead of attempting to focus the jury upon the evidence, the prosecutor diverted the jury's attention to irrelevant but prejudicial and emotional factors.

Second, a review of this Court's case law since Appellant submitted his Opening Brief, again shows that Appellant's case does not involve the "worst of the worst" facts or the "worst of the worst" offender to have recently come before this Court. (See e.g., *Mendoza, supra,* 42 Cal.4th at 686 (three murders and four attempted murders); *People v. Barnwell* (2007) 41 Cal.4th 1038 (four murders); *People v. Stevens* (2007) 41 Cal.4th 182 (four murders and six attempted murders); *Prince, supra,* 40 Cal.4th at 1179 (six murders and fourteen burglaries); *Salcido, supra,* 44 Cal.4th at 93 (six murders, one second-degree murder, and two attempted murders); *People v. Page* (2008) 44 Cal.4th 1 (one murder of a child under fourteen

---

[79] In a footnote, Respondent tries to rebut Appellant's argument that the prosecutor conflated the elements of "willful, deliberate, and premeditated murder." (RB 220-21 n. 23). Respondent explains that the prosecutor's arguments stemmed from an "itemized" "graphical display" that referenced the legal terms. (*Ibid.*). Respondent challenges Appellant to present findings to the contrary in a "habeas petition." (*Ibid.*). However, Appellant's arguments here sufficiently prove that the prosecutor sought to mislead the jury, conflate the elements of the crimes charged, and muddle the court's instructions. The matter does not need to be tabled until a petition for writ of habeas corpus is filed. The matter is currently ripe for disposition on this appeal.

and one conviction for a lewd act with a child under fourteen); *Lewis, supra,* 43 Cal.4th at 415 (five murders); *Farley, supra,* 46 Cal.4th at 1053 (seven murders); and *People v. Hartsch* (2010) 49 Cal.4th 472 (three murders and one count of shooting into an inhabited dwelling); *Solomon, supra,* 49 Cal.4th at 792 (defendant convicted of four counts of first degree murder and two counts of second degree murder); and *People v. Jennings* (2010) -- Cal.Rptr.3d – (defendant found guilty of first-degree murder of five year old through torture and the use of poison)). This fact rebuts Respondent's assertions that the facts of Appellant's case are amongst the worst of the worst and that Appellant's chances at a fair trial could not be prejudiced due to the overwhelming strength of the state's capital case. Simply put, in a capital case where proof hinged upon circumstantial evidence there is no room for error. Recognizing as much, the prosecution successfully infused prejudice and emotion into Appellant's trial and the result is the faulty capital conviction and death sentence which he now appeals.

D. Conclusion.

Prosecutor Burr manipulated the evidence concerning the victim's reputation. To inflame the jury, Prosecutor Burr impugned the integrity of defense counsel and denigrated Appellant. He misstated the law and lightened the burden placed upon the prosecution. The prosecutor violated court orders and sought to circumvent Appellant's constitutional rights.

In every conceivable manner, the prosecutor in Appellant's case sought to influence the jury's verdict through the use of impermissible and highly prejudicial statements and arguments. The conduct was reprehensible and pervasive. It violated state law and the rules of ethics. It also subverted the constitutional guarantee of a trial by an impartial jury and "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly, supra,* 416 U.S. at 643). In sum, the

misconduct violated Appellant's right not to testify and his rights to due process, a fair trial, and to fair and reliable penalty verdict, in violation of state law, and Article I of the Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments.

X. THE JURY DID NOT FIND, UNANIMOUSLY AND BEYOND A REASONABLE DOUBT, EACH FACTUAL ELEMENT ESSENTIAL TO APPELLANT'S CONVICTION.

A. Introduction.

The Sixth Amendment to the United States Constitution grants criminal defendants that right to jury trial in all phases of criminal proceedings. (See U.S. Con., VI Amend. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...");and Sanjay Chhablani, *Disentangling the Sixth Amendment* (2009) 11 U. Pa. J. Const. L. 487, 488-89 ("*Disentangling The Sixth Amendment*") ("During the course of this jurisprudential development, the Court has adopted a number of constructions of the Sixth Amendment that plainly contravene its text and are increasingly less protective of individual liberty. For example, contrary to the textual mandate that defendants in "all" criminal prosecutions be provided the seven procedural protections, the Court has held that the rights to jury trial and counsel need to be provided only in a limited subset of criminal prosecutions, and that too in differing subsets.")).

In fact, the Sixth Amendment, as recognized by the common law at its ratification, extends to criminal defendants the right to have all factual elements, necessary to impose criminal liability and sentencing, in all phases of the criminal proceeding found unanimously and beyond a reasonable doubt. In recognition of this constitutional and common law maxim the Supreme Court has crafted a line of cases defining and expanding criminal defendant's right to jury trial. (See e.g. *Jones v. United States* (1999) 526 U.S. 227, 243 n. 6; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476; *Ring v. Arizona* (2002) 536 U.S. 584, 614; *Blakely v. Washington* (2004) 542 U.S. 296; and *United States v. Booker* (2005) 543 U.S. 220).

B. Respondent Fails to Fully Address Appellant's Arguments that the Jury's Findings were Insufficient to Support his Capital Conviction.

Appellant was found guilty of first-degree murder by a jury that failed to unanimously find each and every element of the charges against him to be true beyond a reasonable doubt. (Compare CT 2100-07; with *Apprendi*, *supra,* 530 U.S. at 476). The jury also failed to unanimously find each fact that subjected Appellant to a greater punishment to be true beyond a reasonable doubt. The trial court's refusal to provide constitutionally required instructions constitutes structural error and requires reversal of Appellant's capital conviction. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280). The trial court's omission of elements of the capital offense alleged by Appellant from the verdict form infected the structure of the capital sentencing process and can never be harmless. (See *Cage v. Louisiana* (1990) 498 U.S. 39). The failure to require a unanimous jury verdict on the theory of guilt, or on the target crime underlying felony-murder and the burglary-murder special circumstance violated Appellant's constitutional rights.

In his Opening Brief, Appellant challenged the sufficiency of the jury findings in support of his capital conviction as not reliable or constitutional since the jury was not required to unanimously agree, beyond a reasonable doubt, as to the theory of Appellant's guilt or as to the specific target crime underlying felony-murder and the burglary-murder special circumstance. (See I AOB 278). Appellant argued that the deficient verdicts violated his rights to due process, a trial by jury, equal protection and a reliable sentencing under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution.

Respondent's two page counter argument fails. (See RB 221-22). Respondent argues that this Court, in *People v. Nakahara* (2003) 30 Cal.4th

705, and the United States Supreme Court, in *Schad v. Arizona* (1991) 501 U.S. 630, foreclosed Appellant's claim that jury unanimity is required as to the theory of a defendant's guilt. (RB 221). Respondent argues that the jury does not have to unanimously agree on the precise nature and identity of the target offense for the felony-murder theory or burglary-murder special circumstance. (*Id.* at 222). In Respondent's mind, *Apprendi* and its progeny "'did not alter, restructure or redefine' the elements of any state-law crime, or require that the states do so themselves." (*Ibid.* (citations omitted)). However, Respondent's string cites and brief argument fail to address Appellant's arguments that the jury is constitutionally required to find the theory of guilt and target crime underlying felony murder beyond a reasonable doubt. Here, Respondent failed to address, or rebut, six arguments Appellant raised in his Opening Brief.[80]

Respondent's failure to address these issues undermines its arguments that the trial court did not commit reversible and prejudicial

---

[80] The six arguments not addressed are as follows: 1) California juries are constitutionally required to unanimously agree on a theory of first-degree murder because, under state law and this Court's authority, felony-murder and premeditated murder are different crimes. (See I AOB 276); 2) The trial court was constitutionally required to *sua sponte* instruct the jury to return special verdicts indicating that they had unanimously found all elements of one theory of first-degree murder to be true beyond a reasonable doubt. (See *Id.* at 276 n. 77); 3) The trial court was constitutionally required to *sua sponte* instruct the jury as to their duty to unanimously find the elements of the target offenses, beyond a reasonable doubt, underlying the state's theory of felony-murder and burglary-murder. (See *Ibid.*); 4) This Court's precedents under *People v. Russo* (2001) 25 Cal.4th 1124, 1132-33, and *People v. Failla* (1966) 64 Cal.2d 560, 567, violate Supreme Court authority. (See I AOB 282); 5) The burglary-murder special circumstance was invalid because it was not properly pled in the information. (See *Id.* at 283); and 6) The trial court's omissions and failure to provide instructions infected the structure of Appellant's capital sentencing process and therefore cannot constitute harmless error. (See *Id.* at 287).

error. Respondent has failed to show that the trial court did not have a constitutional duty to instruct the jury to find, unanimously and beyond a reasonable doubt, each separate element of premeditated murder, felony murder and the burglary-murder circumstance. Respondent's failures to argue these material points and contentions undermine its later argument that Appellant was not entitled to have the jury agree upon his guilt unanimously and beyond a reasonable doubt.

C. This Court's Precedent, Supreme Court Precedent, and Persuasive Authorities do not Support Respondent's Conclusions.

Respondent's arguments contradict the bedrock principle of the California and United States Constitutions that - all elements of an offense must be found beyond a reasonable doubt and unanimously by the trier of fact. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *Burch v. Louisiana* (1979) 441 U.S. 13, 139; *People v. Wheeler* (1978) 22 Cal.3d 258, 265; and *People v. Collins* (1976) 17 Cal.3d 687, 693). Likewise, Respondent's two page argument fails to address the importance of Appellant's right to a jury trial under the Sixth Amendment - a right which entitles him to a jury verdict based upon facts pled and determined beyond a reasonable doubt. (See *Apprendi, supra,* 530 U.S. at 490; *In Re Winship* (1970) 397 U.S. 358, 364; *Ring, supra,* 536 U.S. at 589; *Booker, supra,* 125 S.Ct. 738). Finally, Respondent's argument fails to discuss authorities indicating that a unanimity instruction is required when the jurors could disagree as to which act a defendant committed, yet convict him of the crime charged. (See *People v. Gonzales,* (1983) 141 Cal.App.3d 786, 791; and *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300-02).

Respondent's string cites do not address Appellant's contentions either. (RB 222 (citing *Nakahara, supra,* 30 Cal.4th at 705, *People v. McPeters* (1992) 2 Cal.4th 1148, 1185; *Failla, supra,* 64 Cal.2d at 569;

Russo, supra, 25 Cal.4th at 1133; and *People v. Davis* (2005) 36 Cal.4th 510, 564)). This Court has maintained that "the two forms of murder [premeditated murder and felony-murder] have different elements." (*Nakahara, supra,* 30 Cal.4th at 712; see also *Box, supra,* 23 Cal. 4th at 1212). This Court has also stated that felony-murder and premeditated murder "are not distinct crimes" for purposes of unanimity jury instructions. (*Nakahara, supra,* 30 Cal.4th at 712). These holdings are inconsistent in light of the fact that the difference between premeditated murder and felony-murder is not based on "legal theories," but instead is based on facts.[81]

The "relevant inquiry" for determining whether the Constitution has been violated "is one not of form, but of effect." (*Apprendi, supra,* 530 U.S. at 494). The fact that the legislature or the state court may characterize what are really two distinct crimes as one crime is not dispositive. Where, as here, the two crimes have different material elements, the label attached by the state is meaningless. In these situations, the Supreme Court has recognized that basing the right to a jury finding solely on how the state has chosen to characterize a particular fact or particular offense "would leave the state substantially free to manipulate its way out of *Winship*...."" (*Jones, supra,* 526 U.S. at 241). This Court has, in effect, done just that by finding that felony-murder and premeditated murder are but different "legal theories" for first-degree murder. The members of the jury could disagree which acts a defendant committed and yet still convict him of the generic crime charged, i.e. first-degree murder.

---

[81] In the last four years this Court has repeatedly rejected claims alleging that California capital jury's failure to find, unanimously and beyond a reasonable doubt, all elements necessary to impose a capital conviction based on a finding of first-degree murder and special circumstances violates the constitutional right to jury trial afforded by the Sixth and Fourteenth Amendments. (See e.g., *Mendoza, supra,* 42 Cal.4th at 686; and *Wilson, supra,* 44 Cal.4th at 758).

Indeed, generally across California, it is required that *each* special circumstance be plead by the prosecutor, and found true beyond a reasonable doubt. (See CALJIC 8.81.17). The jury may not return a true finding on a special circumstance allegation unless it unanimously agrees that all elements of that special circumstance are true beyond a reasonable doubt. This Court's conclusion that unanimity merely requires the jurors to agree to the same "crime" was committed, (See *Russo*, *supra,* 25 Cal.4th at 1132), contravenes the requirement of unanimity as to a particular special circumstance. If this Court is correct that all the jury need agree on is a "particular crime," but need not agree as to exactly how the crime was committed, (*Id.* at 1134), it follows that, to be subjected to the death penalty, all the jury would need to agree on is that the defendant committed a murder with special circumstances. If there was no requirement of jury unanimity with regard to the facts underlying the special circumstance, then all that would be required to subject a defendant to death would be a finding that all jurors agreed the prosecutor had proven any of the charged special circumstances beyond a reasonable doubt, without any specification as to *which* special circumstance was proven. This result would not meet constitutional requirements and would not satisfy California law.

Prior to *Apprendi* and *Blakely*, a plurality of the Supreme Court had held that it was constitutional for the state of Arizona to require only a general verdict for first-degree murder based on either premeditation or felony-murder without jury unanimity as to which theory applied. (See *Schad, supra,* 501 U.S. at 645). The key to *Schad* was that premeditated murder and the commission of a felony were not independent elements of first-degree murder under Arizona law; rather, they were merely alternative means of satisfying the *mens rea* element of first-degree murder. (See *Id.* at 632, 636-637, and 639). Under Arizona law, premeditated murder and felony-murder were the same crime with the same elements.

Under California law – unlike under the Arizona law in *Schad* - felony-murder and premeditated murder have different elements. They cannot be the same "crime." California courts have characterized malice and premeditation as an element of first degree premeditated murder. (See e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 897 (premeditation and deliberation are essential elements of premeditated first degree murder)). This Court has recognized that it was the intent of the Legislature to make premeditation an element of first-degree murder. (See *People v. Stegner* (1976) 16 Cal.3d 539; *People v. Thomas*, *supra*, 25 Cal.2d at 900) and *People v. Albritton* (1998) 67 Cal.App.4th 647, 654 n. 4). The specific intent to commit the underlying felony likewise has been characterized as an element of first-degree felony-murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-58; 1268 (concurring opn. of Kennard, J.)).

As noted above, *Schad* is not applicable here because the Supreme Court was dealing with Arizona law, which defines premeditated murder and felony murder as the same crime based upon the same factual elements. (*Schad*, *supra*, 501 U.S. at 632, 636-37, and 639). Here, as this Court has repeatedly recognized, and as Respondent failed to acknowledge, under California law felony-murder and premeditated murder have different elements and must be characterized as separate "crimes." (See *Thomas, supra,* 25 Cal.2d at 904; *Stegner*, *supra,* 16 Cal.3d at 539; *Albritton*, *supra*, 67 Cal.App.4th at 654 n.4; *Jones, supra,* 29 Cal.4th at 1257-58; *People v. Dillon* (1983) 34 Cal.3d 441, 476 n. 23, 477; *Box, supra,*23 Cal.4th at 1212).

Similarly, Respondent's citation to persuasive authorities is also unconvincing. (See RB 222 (citing S*tate v. Tucker* (Ariz. 2003) 68 P.3d 110, 120; *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1236 n. 20; *Mansfield v. State* (Fla. 2005) 911 So.2d 1160, 1179; *State v. Lovelace* (Idaho 2004) 90 P.3d 298, 303)). None of these cases address the

constitutional issue as framed by Appellant here: namely, that this Court has impermissibly based the right to a jury finding solely on how the Court has characterized the particular fact for first-degree murder and thus "manipulate[d] its way out of *Winship*..." (*Jones, supra,* 526 U.S. at 241). Thus, none of these cases address the constitutional error arising from a finding that felony-murder and premeditated murder are different "legal theories" for first-degree murder.

Appellant could have been convicted of two factually distinct offenses, premeditated and deliberate murder or felony-murder. The two alternative means by which the jury may have found petitioner guilty are "so disparate as to exemplify two inherently separate offenses." (*Schad, supra*, 501 U.S. at 693). In California, premeditated murder and felony-murder are separate crimes, each containing a separate set of elements from the other. Appellant was entitled to a unanimous jury verdict as to which of those different crimes he committed.

Importantly, because this is a capital case, the Sixth, Eighth, and Fourteenth Amendments required a unanimous verdict. This is first to insure the accuracy and reliability of the verdict. (See *Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; and *People v. Feagley* (1975) 14 Cal.3d 338, 352). It is also necessary to meet the heightened need for reliability in the procedures leading to the conviction of a capital offense. (See *Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; and *Beck, supra,* 447 U.S. at 638).

D. Conclusion.

The failure to require an unanimous and beyond a reasonable doubt jury verdict on the theory of guilt or on the target crime underlying felony-murder and the burglary murder special circumstance violated Appellant's rights to due process, trial by jury, equal protection, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution. (See *Apprendi, supra,* 530 U.S.

at 490; *Blakely, supra,* 542 U.S. at 296; *Ring, supra,* 536 U.S. at 589; *Booker, supra,* 125 S.Ct. at 738). Assuredly, the results were not harmless beyond a reasonable doubt and, in fact, constituted a miscarriage of justice. (See *Cage, supra,* 498 U.S. at 39; and *Sullivan, supra,* 508 U.S. at 275). The jury was never instructed that it must unanimously find, beyond reasonable doubt, that Appellant had intent to kill, steal, or commit rape when he entered Ms. Olsson's home. Under these circumstances, this Court cannot conclude that the jury unanimously found premeditated murder or murder perpetrated in the course of burglary with intent to commit theft or rape. Therefore, Appellant's convictions for capital murder and assault with intent to commit rape must be reversed.

XI. ERRORS IN THE GUILT PHASE JURY INSTRUCTIONS REQUIRE REVERSAL OF APPELLANT'S CONVICTIONS AND THE SPECIAL CIRCUMSTANCE.

A. Introduction.

In recent years, this Court has rejected challenges to many California Jury Instructions.[82] In his Opening Brief and herein, Appellant has presented arguments developed in consideration of this Court's case law. In light of the persuasive value of this claim, this Court should reconsider its prior case law.

B. The Consciousness of Guilt Instruction Given in Appellant's Case was Inherently Contradictory and Misleading.

In the last four years, perhaps more than any other instruction, this Court has repeatedly rejected challenges to Cal. No. 2.03.[83] As Appellant highlighted in his Opening Brief, significant structural deficiencies exist in Cal. No 2.03. The instruction is fundamentally flawed and is unconstitutional due to its misleading language regarding the weight to be given to post-crime evidence of guilt. In Appellant's case, the prosecution's case rested entirely on circumstantial evidence. As a result, and at the state's request, the jury was given three instructions by which to infer Appellant's guilt based on his alleged actions after the crime. (See

---

[82] (See e.g. *Davis, supra,* 46 Cal.4th at 539 (challenging CALJIC No. 2.01-02, 9, 2.50-52); *People v. Morgan* (2007) 42 Cal.4th 593, 170 P.3d 129 (challenging Cal. No 2.03; 2.04; and 2.52); *Zambrano, supra,* 41 Cal.4th at 1082 (challenging Cal. No 2.71; 2.01; 2.02; 2.06); *People v. Geier* (2007) 41 Cal.4th 555 (challenging CALJIC No. 2.03; 2.71; 2.05, 8.21 and unanimity instructions); *Verdugo, supra,* – Cal.Rptr.3d -- (challenging CALJIC 2.01); and *Solomon, supra,* 49 Cal.4th at 792 (challenging CALJIC 2.01)).

[83] (See e.g. *People v. Taylor* (2010) 48 Cal.4th 574, 229 P.3d 12; *Bonilla, supra,* 41 Cal.4th at 313; *Page, supra,* 44 Cal.4th at 1; *Rundle, supra,* 43 Cal.4th at 76; and *People v. Howard* (2008) 42 Cal.4th 1000)).

CALJIC 2.03, CALJIC 2.06; and CALJIC 2.52; and I AOB 289 (citing CT 2071, 2072, 2081)). Each of these instructions utilized similarly misleading language regarding the weight to be given to post-crime evidence of guilt. In this circumstantial evidence case, the instructions tipped the scales towards an improper conviction based wholly on post-crime evidence.

In Respondent's view, the consciousness of guilt instructions given by the trial court are unassailable since, in the past, this Court has upheld them as valid and not "argumentative pinpoint instructions." (RB 224 (citing *People v. Jurado* (2006) 38 Cal.4th 72, 125); and RB 226 (citing *People v. Holloway,* (2004) 33 Cal.4th 96, 142; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224; *People v. Kelly* (1992) 1 Cal.4th 495, 531)). Respondent believes that Appellant's "novel construction" of the trial court's consciousness of guilt instructions, "is [ ] to put it mildly, strained and unnatural." (RB 224). Without further describing why Appellant's claim is "strained and unnatural," Respondent dismisses the entire argument based on the view that Appellant failed to "ask[] the trial court to provide appropriate clarification or amplification." (*Id.* at 224).[84]

---

[84] This is yet another example of the prejudice resulting from the trial court's failure to properly record each hearing, proceeding and bench conference. (See Claim I - The Missing Portions of the Record Deprived Appellant of Meaningful Appellate Review). Respondent concedes that the trial court failed to properly record a conference regarding the jury instructions. (RB 225 n. 24 (citing RT 3017-3019)). Nevertheless, Respondent dismisses Appellant's claim that he properly objected to the above instructions because on August 14, 1992 at a separate hearing on the instructions, Appellant's counsel only objected to CALJIC No. 2.52. (See RB 225 n.4). Respondent plays coy when they argue that "as far as we can tell," the trial court's instructions "provoked no objection whatsoever." (*Ibid.*). However, due to the lack of any trial record one cannot double check the transcript from the unrecorded proceeding to ensure that Appellant did not properly preserve his arguments here challenging the instructions given in his case. Alternatively, if this Court finds that counsel failed to lodge a contemporaneous objection, it may nevertheless review this

Alternatively, Respondent argues that, "no reasonable likelihood exists that the jury would have parsed the instruction so finely as to draw from it the inference Appellant describes." (RB 225).

Moreover, Respondent's conclusion and citations fail to grapple with Appellant's argument that, when instructing the jury, a trial judge may not single out and give undue emphasis to particular evidence, even though the instruction states the correct principle of law. (See *People v. Harris* (1989) 47 Cal. 3d 1047, 1098 n 31; and *People v. Wright* (1988) 45 Cal 3d 1126, 1135). This principle precludes instructions on consciousness of guilt that single out particular evidence. (See *Alberty v. United States* (1896) 162 US 499, 511).

Accordingly, CALJIC 2.03, 2.06 and 2.52 violate the prohibition against argumentative pinpoint instructions. A defendant does not have a right to an instruction that directs attention to particular evidence from which a finding of reasonable doubt can be drawn by the jury. By a parity of reasoning and consistent with state and federal principles of due process and equal protection, the prosecution is similarly not entitled to instructions pinpointing specific facts from which the jury may infer guilt. (See *Wardius v. Oregon* (1973) 412 U.S. 470; *Lindsay v. Normet* (1972) 405 U.S. 56, 77; and *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253).

Respondent's arguments are unavailing. The prosecution's case at trial rested entirely upon circumstantial evidence. In such a case, instructional errors concerning evidentiary inferences produce significant

---

claim on appeal as a pure question of law. This Court has recognized that the contemporaneous objection rule may also be waived for "pure questions of law." (*Williams, supra,* 43 Cal.4th at 624 (citing *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341; and *Yeap v. Leake* (1997) 60 Cal.App.4th 591, 599 n. 6)). While this doctrine has been developed in civil cases, Appellant's pure question of law here also merits disregard of the contemporaneous objection rule.

prejudicial results. Without improper inferences, the evidence of Appellant's guilt was slight and the erroneous instructions filled evidentiary holes in the prosecution's case. The Court should not have given the instruction due to the insufficiency of the evidence. This principle is widely recognized in other jurisdictions. (See *Jackson v. state* (Fla. 1991) 575 So.2d 181, 188-89; *State v. Feeney* (Conn. 1994) 637 A.2d 1088, 1100; *Commonwealth v. Robles* (Mass. 1996) 666 NE.2d 497, 504; *State v. Myers* (N.Car. 1983) 305 SE.2d 506, 511; *State v. Voit* (Ore. 1973) 506 P.2d 734, 739).

Respondent has confused the role of parsing in reaching a common meaning. Here, the jury would not have been required to parse the instructions in order to reach the conclusion that it could convict Appellant based on circumstantial evidence of consciousness of guilt alone. This is true since the trial court never gave an instruction to the contrary indicating that the jury would need to find direct evidence of Appellant's guilt. Instead, the trial court gave pinpoint and argumentative instructions that highlighted the prosecution's circumstantial evidence and failed to reflect that such evidence alone was insufficient for a finding of guilt.

Respondent did not address the trial court's failure to instruct that even if there was evidence of flight, false statements, and concealing evidence, that evidence could still be insufficient to establish guilt. (See I AOB 293). Respondent did not address Appellant's claim that the instructions lightened the prosecution's burden to prove all elements of the crimes beyond a reasonable doubt. (*Id.* at 295) Respondent did not address Appellant's claim that the instructions were so ambiguous and misleading that they violated due process. (*Id.* at 291 (citing *Estelle, supra,* 502 U.S. at 72)). Respondent failed to counteract Appellant's claim that the three consciousnesses of guilt instructions were improperly argumentative because they isolated and illuminated the prosecution's evidence and theory

of the case. (I AOB 292). Respondent failed to address Appellant's claim that the consciousness of guilt instructions were not warranted because they reiterated the principles contained in the general instructions on circumstantial evidence that were also given in his case. (*Id.* at 289). Finally, Respondent failed to address Appellant's claim that the consciousness of guilt instructions separately and cumulatively prejudiced his constitutional rights.

C. The Circumstantial Evidence Instructions Given In Appellant's Case Impermissibly Lightened the Prosecution's Burden of Proof.

In Respondent's view, Appellant's challenge to the circumstantial evidence instruction is "frivolous[]." Respondent accuses Appellant of "ignor[ing] this Court's explicit injunction that the precise phrase he seeks to attack must be 'read in context, not only with the remaining language within each instruction but also together with related instructions, including the reasonable doubt instruction." (RB 227 (citing *People v. Hughes* (2002) 27 Cal.4th 287, 346-47)). Accordingly, Respondent believes that *Hughes* is controlling because "nothing said in *Apprendi* or any other case will support any different conclusion." (*Id.* at 227).

In his Opening Brief, Appellant raised thoughtful challenges to this Court's validation of the circumstantial evidence instructions used in his case. These challenges are distinguishable from those raised in *People v. Hughes.*[85] Appellant's challenges were raised in light of the Supreme

[85] In *Hughes,* the "[d]efendant assert[ed] that the circumstantial evidence instruction "allowed a finding of guilt (or of the truth of a special circumstance allegation) based upon a lesser degree of proof than beyond a reasonable doubt, and that the instructions operated as impermissible mandatory and irrefutable presumptions." (*Hughes, supra,* 27 Cal.4th at 346). Appellant has, however, asserted that the instruction: 1) improperly eroded the presumption of innocence; 2) reduced the prosecution's burden

Court's rulings in *Apprendi v. New Jersey* and *Ring v. Arizona*. Respondent fails in any true measure to address Appellant's challenges to the circumstantial evidence instructions. Instead, Respondent rests its defense entirely upon *People v. Hughes*, and claims that the case foreclosed use of *Apprendi*. However, in *Hughes,* this Court never discussed *Apprendi* and was confronted with a challenge qualitatively different than the arguments presented here.

D. The Trial Court's Failure to Instruct on Voluntary Intoxication as a Defense to the Burglary-Murder Special Circumstance Requires Reversal of the Jury's Special Circumstance Finding.

Though the trial court instructed the jury as to the elements of the burglary-murder special circumstance, it failed to provide an instruction regarding the defense of voluntary intoxication as to the special circumstance. In failing to give this instruction, as requested by the defense, the trial court failed its obligation to instruct the jury on the availability of a mental state defense to the burglary-murder circumstance. (See *People v. Mickey* (1991) 54 Cal.3d 612, 675-77). The trial court thus lightened the prosecution's burden of proof on the intent requirement for the burglary-murder special circumstance in violation of Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Cage, supra*, 498 U.S. at 39; *Taylor v. Kentucky* (1978) 436 U.S. 478; and *In re Winship*, *supra*, 397 U.S. at 358).

Respondent believes that Appellant is "mistaken in every respect" in challenging the trial court's failure to provide a voluntary-intoxication instruction for the burglary-murder special circumstance. (RB 228). Respondent believes that Appellant's challenge "rests on the assumption that the jury understood the court's reference to "the crimes charged," to

---

of proof; 3) casts doubts on the reliability of the jury verdict; and 4) is contrary to constitutional principles enunciated by the Supreme Court.

exclude the special circumstances allegation." (*Id.* at 229 (emphasis in original)). Respondent argues that this conclusion "is exceedingly unlikely," and that the trial court's instruction adequately "embraced conduct and events relating to the special circumstance allegation" and "*all the evidence presented.*" (*Ibid.*). Alternatively, Respondent argues that since the jury did not find voluntary intoxication as to the murder or assault with intent to commit rape charges, they would not "have concluded that this same evidence somehow [ ] negate[d] the mental element for burglary." (*Id.* at 230). Thus, in Respondent's opinion, "any lack of precision in the intoxication instruction was inconsequential to the jury's deliberation and verdict." (*Ibid.*).

The case cited by Respondent, *People v. Reza,* (1981) 121 Cal.App.3d 129, 132-33, is distinguishable. In *Reza*, unlike here, defense counsel did not request an intoxication instruction for the special circumstance. (See *Id.* at 133). Moreover, as Appellant noted in his Opening Brief, with no response by Respondent, juror misdirection was heightened in his case because the jurors had been told by the court and the prosecutor during *voir dire* that the killing was intentional and occurred during a burglary. Effectively, since the jury was never given an instruction to consider an intoxication defense to the underlying intent element of the special circumstance, the jury found the burglary-murder special circumstance without ever determining Appellant's state of mind at the time of the crime.

Respondent errs in asserting that because the jury did not find intoxication as to the murder or assault to commit rape charges, the same evidence could not "negate the mental element for burglary." (RB 230). The only "crimes" charged were murder and assault with intent to rape.

Additionally, by using the term "should" instead of "shall or must" the trial court left the jury free to disregard evidence of intoxication. This is especially true since jurors are presumed to follow instructions and the

absence of a voluntary intoxication instruction would have thus foreclosed their consideration of such evidence in finding the burglary-murder special circumstance. The trial court thus committed a fundamental error by not requiring the jury to consider valid exculpatory evidence. (See *Martin v. Ohio* (1987) 480 U.S. 228).

In the last four years, this Court has decided two challenges to CALJIC No. 4.22 and the intoxication instructions given in all capital cases were such a theory is presented. (See *Friend, supra,* 47 Cal.4th at 1; and *Verdugo, supra,* – Cal.Rptr. 3d --). In *Friend* the defendant contended that CALJIC NO. 4.21 and 4.22 conflicted and, therefore, could not both be given.[86] This Court rejected the claim. (*Ibid.* (citing *Harris, supra*, 43 Cal.4th at 1312-1313; and *Cain, supra,* 10 Cal.4th at 38-40)).

In contrast, Appellant's allegation rests on the trial court's failure to issue CALJIC No. 4.22 as requested by the defense in regarding voluntary intoxication as to the burglary-murder special circumstance. In doing so, the trial court failed its obligation to instruct the jury on the availability of the defense of voluntary intoxication to the mental state required for the burglary-murder circumstance. (See *Mickey, supra*, 54 Cal.3d at 675-77). As a result, the trial court lightened the prosecution's burden of proof on the intent requirement for the burglary-murder special circumstance in violation of Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Cage, supra*, 498 U.S. at 39; *Taylor, supra*, 436 U.S. at 478; and *In re Winship, supra,* 397 U.S. at 358).

E. Conclusion.

The guilt phase of Appellant's trial was marred by prejudicial instructional errors. As a result, the jury did not properly understand and

---

[86] For the defendant's specific argument, as characterized by this Court, see *Friend, supra,* 47 Cal.4th at 52.

apply the correct law in determining whether Appellant was guilty of the offenses and the sole special circumstance. The instructions as a whole were ambiguous, incomplete and improper. These instructions failed to properly describe the law and misled the jury into finding Appellant guilty of the charges and sole special circumstance alleged based upon wholly circumstantial and indirect evidence. But for the instructional errors that occurred at the close of the guilt phase in Appellant's capital trial, there is a reasonable probability that Appellant would have been acquitted or convicted. Similarly, Respondent has failed to show that the instructional errors were not harmless beyond a reasonable doubt.

Under both *People v. Watson* and *Chapman v. California,* Appellant has established constitutional and reversible error. The instructions given during Appellant's guilt phase were prejudicial and argumentative. They allowed for him to be convicted based solely upon circumstantial evidence. They lowered the prosecution's burden of proof. They prevented Appellant from asserting an affirmative defense to the burglary-murder special circumstance.

In sum, if the jury had been properly instructed there is more than a reasonable probability that Appellant would have been acquitted of the crimes charged. (See *Watson, supra,* 46 Cal.2d at 836). Moreover, because the instructional errors resulted in a wrongful conviction and death sentence, they cannot be held as harmless beyond a reasonable doubt. (See *Chapman, supra,* 386 U.S. at 24). Appellant's convictions, and the finding of a special circumstance, must be vacated.

XII. THE CUMULATIVE EFFECT OF ERRORS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS AND THE SPECIAL CIRCUMSTANCE.

The Supreme Court has recognized that the impact of multiple errors that do not individually prejudice a defendant's rights may result in an unfair and unconstitutional trial. (*Taylor*, *supra*, 436 U.S. at 487 n. 15). In assessing cumulative error, this Court must consider the prejudicial impact of the repeated instances of misconduct and error together. (*Hill, supra,* 17 Cal.4th at 844. Indeed, in a capital case, failure to conduct review for the cumulative effect of the errors on Appellant's trial would be an abdication of this Court's duty to conduct meaningful appellate review under the Fifth, Eighth, and Fourteenth Amendments. (See *Parker, supra,* 498 U.S. at 321).

Throughout the entire guilt phase proceeding, Appellant's capital trial was infected by prosecutorial misconduct and trial court errors. The cumulative effect of the resulting prejudice deprived Appellant of his rights to due process, a fair trial, an impartial jury, reliable sentencing, and equal protection under the Fifth, Sixth, Eighth, and Fourteenth Amendments and parallel provisions under Article I of the California Constitution. The combined prejudice resulting from the errors thus rendered Appellant's convictions and the special circumstance finding unconstitutional.

Respondent offers one sentence in rebuttal to Appellants argument. "None of the errors alleged by Appellant, alone or in combination, provide any basis for relief." (RB 231). Respondent's flippant dismissal of the cumulative errors and prejudice effecting Appellant's trial reveals the indefensible nature of the misconduct and error that riddled the proceedings leading to Appellant's convictions for first degree murder and assault with intent to commit rape, and the finding of the burglary-murder special circumstance.

When viewed cumulatively, the repeated errors and misconduct

infecting Appellant's capital trial undermined any confidence in the reliability of Appellant's convictions. The jury was asked to decide the case based on evidence earned through the use of unlawful police tactics and in violation of Appellant's rights to privacy under the Fourth Amendment. The jury was also asked to consider involuntary and highly prejudicial statements extracted from Appellant on March 27 and 30, 1987 through coercive police tactics in violation of his *Miranda* and Fifth Amendment rights.

Jurors were improperly excluded and the jury was selected in violation of Mr. Tully's right to an impartial jury. Prosecution witnesses were improperly and prejudicially allowed to sit and hear evidence throughout the trial. They were thus coached by the state's theory of the case and allowed to react, in their later testimony, to what they had witnessed during the proceedings. Percipient witnesses repeatedly related prejudicial victim impact evidence that violated prior court orders and constitutional restraints on this type of prejudicial evidence.

The prosecution impermissibly utilized evidence of Appellant's state of poverty to prove the motive for the burglary-murder special circumstance because it lacked other evidence. The prosecutor inflamed juror sympathies and used sensational arguments that denigrated Appellant and his counsel, misstated facts and law, and circumvented the trial court's orders, in order to convict Appellant in the absence of direct evidence. Finally, the guilt and special circumstances instructions failed to provide a legal framework by which the jury could properly weigh the evidence to determine Appellant's guilt. Instead, the instructions given spurred the jury to convict Appellant based on suspicions interjected by the prosecution.

The cumulative impact of these errors is compelling. Appellant's convictions rest only on circumstantial evidence. The constitutional errors allowed the prosecutor to fill holes in his case with prejudicial and

inadmissible evidence. There is a reasonable probability, that but for the repeated trial court errors, Appellant would not have been convicted of first degree murder, with a burglary-murder special circumstance, and assault with intent to commit rape. These errors singularly and cumulatively violated Appellant's rights to due process, equal protection, a fair trial, an impartial jury, present a defense, and reliable sentencing, in violation of his rights under California state law, Article I of the California Constitution, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, Appellant's convictions and the special circumstance finding must be reversed.

XIII. THE ADMISSION OF TWO UNCHARGED MISDEMEANOR BATTERIES AS AGGRAVATING FACTORS IN THE PENALTY PHASE VIOLATED STATE LAW AND APPELLANT'S CONSTITUTIONAL RIGHTS.

A. Introduction.

At the penalty phase, the prosecutor introduced minimal evidence of Appellant's involvement in two jailhouse scuffles. The evidence was not substantial to prove each element of the other crime under Penal Code section 190.3(b). (See *People v. Phillips* (1985) 41 Cal. 3d 29, 72 n. 25). Nevertheless, the prosecution used this evidence to argue Appellant's "guilt by association" with another inmate convicted of rape, and to argue, though it was not an aggravating factor, Appellant's future dangerousness. The erroneous result injected irrelevant evidence into the sentencing equation, infected the balancing process crafted by the state statute with prejudice, and violated constitutional mandates. (See e.g., *Barclay v. Florida* (1983) 463 U.S. 939).

Aside from evidence detailing victim impact and circumstances of the crime surrounding the Olsson homicide, this evidence was the only aggravating evidence proffered by the state. Respondent suggests that Appellant's "arguments in support of his assignment of error are either meritless or forfeited." (RB 234). Respondent argues that "Appellant is not entitled to the remedy he requests" because "any error was harmless." (*Ibid.*). Respondent's conclusions are made without reason, unsupported, appear without addressing several of Appellant's arguments, and fail to rebut Appellant's showing that the trial court's admission of the evidence was error under state and federal law, and that prejudice resulted.

Respondent only addresses five of the eight arguments raised in the Opening Brief. (See RB 234 and 237). Respondent claims three arguments are barred based on procedural grounds and fails to substantially address

these arguments in any measure. Respondent does not address three arguments in any manner.[87] Respondent's failure to fully rebut Appellant's arguments undermines the state's conclusion that this ground of appeal lacks merit.

B. The Facts.

Pursuant to *Phillips, supra,* 41 Cal. 3d at 29, the trial court held an evidentiary hearing on the jail incident allegations to determine whether the evidence was sufficient to establish criminal activity by Appellant involving the use of force or violence. Officer Pinkerton and prisoner Mendoca testified as to the January 1988 incident. (See RT 3412 and 3515).[88] Officer Perkins testified as to the September 1991 incident. (RT

---

[87] Respondent fails to address Appellant's arguments that: 1) the prosecutor impermissibly and prejudicially used the Section 190.3(b) evidence to argue Appellant's guilt "by association" and future dangerousness; 2) the prosecution's use of the 190.3(b) evidence violated heightened reliability requirements imposed by the Eighth Amendment in capital cases; and 3) California case law allows for the admission of section 190.3(b) evidence only upon a sufficient showing of acts or threats constituting significant violence. (See II AOB 319-20 (citing *People v. Monterroso* (2004) 34 Cal.4th 743; *People v. Sapp* (2003) 31 Cal.4th 240, 252; and *People v. Prieto* (2003) 30 Cal.4th 226, 269)). Respondent's failure to rebut these arguments further undermines its conclusions that "any *Phillips* error here necessarily did not amount to a due process violation by rendering appellant's penalty phase trial unfair," (RB 240), and that "reversal of [Appellant's] death penalty is not in order." (RB 239).

[88] (See II AOB 307 ("The prosecution introduced the testimony of Robert Pinkerton and Michael Perkins, two jail officers. Pinkerton saw an altercation between Appellant and inmate Derrick Mendoca in January 1988. Pinkerton did not see who started the fight, and could not remember whether he saw any punches land. Appellant was injured and required stitches. Mendoca had no visible injuries. Mendoca testified that he swung the first punch and hit Appellant in the mouth after Appellant wiped mustard or ketchup on his shirt ") (citing RT 3514-3515)).

3416).[89] The trial court found that the jail guards easily stopped the two scuffles and were met without resistance by Appellant. (See notes 89 and 90). All evidence indicated that the scuffles were consensual and did not rise to the level of battery on either participant. Nevertheless, the Court admitted the evidence under section 190.3(b). (See RT 491-92).

Respondent concedes that no testimony adduced during the *Philips* hearing directly showed that Appellant landed any punches during the incidents. (See RB 235). Respondent concedes that there was no evidence showing that Appellant threw the first punch in either case. (*Ibid.*). Respondent admits that Appellant suffered injuries, including "a cut lip" and "bruises and bumps" on his face from the incidents. (RB 235-36). Appellant's injuries required stitches, while Mendoca suffered no injuries and McKinley received a black eye. (RT 248-49). Naturally, Respondent must also concede that Appellant was never criminally charged with either infraction.

To support its conclusion that the foregoing facts constitute "substantial evidence that appellant committed two misdemeanor batteries," Respondent discounts Mendoca's testimony because he "was a defense witness at the penalty phase." (RB 237). Respondent does so because Mendoca supports Appellant's contention that the evidence was insufficient to establish a battery and was wrongfully admitted. Mendoca testified that "he threw the first and only punch hitting [Appellant] in the mouth." (RB 237 (citing RT 3514-15)). Respondent says that "[a] reasonable jury could have viewed the evidence differently, however and found that appellant

---

[89] (See II AOB 307 ("Perkins saw Appellant and another inmate wrestling in September 1991.... Both men tried to throw punches. Perkins did not see any punches land. He did not see who started the incident. When jailers intervened, the inmates stopped fighting. Appellant's opponent was 6' tall and weighed 174 pounds. Appellant was 5'7" and weighed 155 pounds at the time.") (citing RT 3416-23)).

committed batter[y]..." (RB 238). Respondent is wrong; the evidence in both incidents was insufficient to prove that a battery occurred and should not have been admitted.

Mendoca's testimony was a credible account of the January 1988 incident. Both officers testified that Mendoca and Appellant were easily separated and both suffered relatively minor injuries. (RT 248-249). Mendoca's testimony exculpated Appellant of wrongdoing and proves that Appellant was the actual victim of the assault and battery. Officer Perkins testified that he saw inmates Tully and McKinley "clutched in a wrestling match." (RT 257-258). Perkins saw them try to throw punches at each other. Perkins did not see who threw the first punch. He did not actually see any punches land on either inmate. (RT 260-262). The testimony of jail officers Pinkerton and Perkins showed that Appellant did not throw any punches in either incident. Nor did the officers see Appellant start either incident. Nor did the testimony establish that Appellant had the intent, or acted with substantial certainty, that his would result in a battery.

These "aggravators" were so minimal that the prosecutor was forced to acknowledge that the only injury suffered by the "victims" was "hurt feelings." (RT 3650). They were, however, prejudicial. The prosecutor argued that Appellant's act of putting mustard on Mendoca's shirt and engaging in mutual wrestling with McKinley was sufficient to prove battery and that Appellant was a future danger. (See Claim XVIII - The Trial Court Committed Reversible Error in Allowing the Prosecutor to Argue Future Dangerousness). These two matters should not have been admitted as aggravating evidence because they were not evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence." (Cal. Penal Code § 190.3(b)). This is especially true in light of the significant consequences that resulted from use of the highly prejudicial, but minimally relevant and wholly misleading, evidence. (See

Claim XX - The Trial Court Erred by Failing to Answer the Jury's Request for "The Legal Definition of Life Without the Possibility of Parole").

C. Appellant's Arguments are not Procedurally Forfeited.

Respondent argues that Appellant has forfeited three arguments because they "are theories of inadmissibility that appellant did not offer the trial court." (RB 239 (citing RT 419)). Respondent says that the following arguments are forfeited: 1) Penal Code section 190.3(b) is unconstitutional because it permits the jury to punish prior acts of violence that are wholly unrelated to any crimes proven at the guilt phase; and 2) the trial court erred by admitting the evidence because the misdemeanor batteries were irrelevant to any penalty phase issue. (RB 239). In Respondent's view, "it matters not that one is a federal constitutional theory of inadmissibility." (RB 239). Respondent is wrong.

Respondent cites to *People v. Partida* (2005) 37 Cal. 4th 428, 437-38 for support. In *Partida*, this Court held that asserting a "new theory" for exclusion on appeal is not permitted, but arguing a new "legal consequence" of an error asserted at trial is permissible. (*Ibid.*). Appellant's previous argument at trial was that the evidence was inadmissible because it was irrelevant, insufficiently probative, and prejudicial. (RT 491-92). The constitutional errors asserted are additional legal consequences of the prejudice emanating from the trial court's error in denying Appellant's objections to admission of the prejudicial and inadmissible section 190.3(b) evidence. This includes Appellant's constitutional challenge to 190.3(b) as applied to the egregious facts of Appellant's case. The violation of Appellant's constitutional rights directly flowed from the trial court's admission of the evidence. Under *People v. Avila*, an appellate argument is not forfeited if:

> the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act [in admitting the evidence], insofar as it was wrong for the reasons actually presented to that court, had the additional legal consequence of violating the federal Constitution.

(*Avila, supra,* 38 Cal. 4th at 527 n. 22). In other words, where an objection made on state law grounds was erroneously overruled by the trial court, both state law and federal constitutional grounds maybe raised on appeal if: 1) the initial objection was valid; 2) the evidence was improperly admitted; and 3) the admissions of the evidence violated federal constitutional precepts. Here, the trial court's decision was arbitrary and made in violation of state law; this Court's case law, and Appellant's constitutional rights. Appellant may thus raise on appeal the violations of his constitutional rights and his constitutional objection to 190.3(b), as grounds for reversal of his death sentence.

Respondent's argument that *People v. Anderson* (2001) 25 Cal.4th 543, 585, has foreclosed Appellant's arguments addressing the constitutionality of 190.3(b) is unavailing. (RB 239). *Anderson* is factually dissimilar from Appellant's case and does not foreclose the constitutional arguments raised here. In *Anderson,* the unadjudicated prior act was murder. (*Anderson, supra,* 25 Cal.4th at 585). There, the defendant challenged the admission of the unadjudicated murder charge based on a theory of "staleness." (*Ibid.*). This Court ruled, as a matter of law, that evidence of a twelve (12) and a half year old murder offense could be admitted at his trial. (*Id.* at 586). In Appellant's case, the evidence of uncharged misdemeanor assaults used by the prosecution did not result in any significant injuries. The prejudicial evidence was admitted despite its lack of relativity, and evidentiary support. In the aggregate, these theories pose reasonable grounds to constitutionally bar the use of incidents similar

to those in Appellant's case under 190.3(b). Appellant thus challenges the constitutionality of section 190.3(B) as applied to his case.

D. The Trial Court's Admission of the Section 190.3(b) Evidence Violated State Law.

Respondent argues that no state law violation occurred here because "the trial court did not err in finding...substantial evidence that appellant committed two misdemeanor batteries." (RB 236 (citing RT 491-92)).

Regarding the 1988 incident, Respondent argues that there is "a reasonable inference from the evidence that two men engaged in a fist fight and that each man unlawfully applied physical force against the other." (RB 236 (citing RT 247)). Respondent must argue that there is an "inference" that a fist fight occurred because there was no direct evidence existed proving that Appellant committed a battery. Respondent unsuccessfully tries to rely on this absence of proof, arguing that just because "the witness, Deputy Pinkerton, couldn't recall whether any punch landed doesn't mean punches didn't." (RB 236 (citing RT 248)).

Respondent believes that a "jury could reasonably infer it unlikely that only Appellant's punches missed" since "it is clear that Mendoca made contact with Appellant because Appellant ended up with a cut lip." (RB 236 (citing RT 249)). Respondent does not explain how the fact that Appellant ended up with a cut lip shows that Appellant made contact with Mendoca. Because there is no direct evidence that Appellant engaged in a battery, Respondent instead attacks Mendoca's credibility. Respondent faults Appellant and asserts that Mendoca, who acknowledged that Appellant did not commit a battery, "was a defense witness at the penalty phase" (RB 237), thus dismissing Mendoca's testimony as biased. Accordingly, Respondent reasons that no state law violation occurred because the "defense evidence introduced at trial contradicting the prosecutions' evidence [does not] demonstrate[] [that] the trial court erred

in its pretrial ruling." (*Ibid.*).

In truth, Mendoca's testimony did not contradict the prosecution's evidence or Officer Pinkerton's testimony. Mendoca's testimony proved what the officers failed to see - that the incident was started over mustard and that Mendoca was the only participant to commit a battery or land a punch. Mendoca's testimony is corroborated by the physical evidence, since Appellant was the only participant to suffer an injury, a cut lip. Under these circumstances, no jury could infer, beyond a reasonable doubt, that Appellant had committed a battery.

The testimony never showed that Appellant offensively touched Mendoca. Offensive contact is a requisite element of battery. Without that element, no battery was proved. Moreover, its consideration as an aggravating factor was unwarranted even if the incident may have technically satisfied the "unwanted harmful or offensive contact" element of misdemeanor battery, because there was no resulting injury, damage, or loss to Mendoca.[90] Without that loss or harm, no battery occurred. Accordingly, the trial court should have found the evidence inadmissible.

---

[90] Under Cal. Penal Code section 240, elements of assault include: 1) an unlawful attempt; 2) coupled with present ability; 3) to commit a violent injury; and 4) on the person of another. Under Cal. Penal Code Section 242, elements of a battery include: 1) willful; 2) unlawful; 3) use of force or violence; and 4) upon the person of another. Under California law, elements of civil battery are: 1) defendant intentionally did an act which resulted in a harmful or offensive contact with the plaintiff's person; 2) plaintiff did not consent to the contact; and 3) the harmful or offensive contact caused injury, damage, loss or harm to plaintiff. (See *Megargee v. Wittman* (E.D. Cal 2008) 550 F.Supp.2d 119). Since there was no injury, damage, or loss here, no battery was actually committed. In no instance could Appellant's conduct be characterized as a criminal assault, criminal battery or civil battery. This is because: 1) the acts were consensual; 2) there was no offensive bodily contact; 3) insufficient harm was caused to the participants; 4) Appellant did not have the intent of causing a violent injury; and 5) Appellant was acting in self-defense.

In regards to the 1991 incident, Respondent argues that because there was evidence of "wrestling" a "reasonable juror could have [] concluded that the wrestling. . . was unlawful and therefore a battery." (RB 236). Respondent reaches this conclusion based on the evidence that "Appellant had bumps and bruises on his face and McKinley ended up with an injured eye." (*Ibid.*). Respondent thus reasons that whether the wrestling was "unlawful" was a "question for the jury, not a conclusion for the trial court to reach to preclude the admission of the evidence." (*Ibid.*). This is despite the fact that Respondent earlier recognized that a "precondition to admission [of the evidence] is that the conduct amount to a violation of a criminal statute." (RB 234 (citing *Philips, supra,* 41 Cal.3d at 72)).

Respondent errs in arguing that it was not the trial court's duty to determine if the September 1991 "wrestling" match was unlawful before submitting evidence of the incident to the jury. Respondent's proposition runs counter to *Philips, supra,* 41 Cal.3d at 72. Evidence of other criminal activity introduced in the penalty phase pursuant to section 190.3(b), must be limited to evidence of conduct that demonstrates the violation of a penal statute. (*Ibid.*). *Philips* requires that the trial court make the determination, outside the presence and hearing of the jury, following pretrial notice by the prosecution of the evidence that it intends to introduce in aggravation. Whether such other criminal activity has been proven beyond a reasonable doubt is then a question of fact for the jury. The trial court has no *sua sponte* duty to instruct the jury as to the elements of all of the other crimes that have been introduced at the penalty phase, but *Philips* clearly requires the trial court to make the initial determination. (See *Philips, supra,* 41 Cal.3d at 72 n. 25).

In addition, because the September 1991 incident did not constitute battery, the trial court erred by admitting the evidence under section

190.3(b). Officer Perkins testified that he never saw any blows land on either participant. He described it as mutual "wrestling." Mutual wrestling does not rise to the level of battery because the touching is consensual. This incident, like the January 1987 incident did not meet the elements of battery and thus was not "criminal activity" under factor (b). Accordingly, evidence of the McKinley incident should have been excluded.

E. Appellant's State and Federal Constitutional Rights were Violated by the Admission of the Prejudicial and Irrelevant Section 190.3(b) Evidence.

In the last four years, this Court has decided twelve (12) capital cases each time rejecting claims premised on the erroneous admission of uncharged conduct as a sentencing factor under Cal. Penal Code section 190.3(b).[91] The facts in none of these cases are comparable to the facts in Appellant's case. The batteries alleged in Appellant's case are based upon scant, prejudicial, and irrelevant evidence. Indeed, it is the only time 190.3(b) has been used, as the state conceded at trial, in a case involving acts largely resulting in "hurt feelings." (RT 3650).[92]

---

[91] (See *People v. Collins,* (2010) 49 Cal.4th 175, 232 P.3d 32, 110 Cal.Rptr.3d 384 (possession of destructive device (Molotov cocktail) and a concealed weapon (pocketknife)); *Taylor, supra,* 48 Cal.4th 574 (prior rape and assault with a deadly weapon while in prison); *Jackson, supra,* 45 Cal.4th 662 (prior robbery); *Hamilton, supra,* 45 Cal.4th 863 (seven prior assaults and a prior assault on a correctional officer); *Kelly, supra,* 42 Cal.4th 763 (three prior rapes); *Tafoya, supra,* 42 Cal.4th 147 (prior unadjudicated rape); *Barnwell, supra,* 41 Cal.4th 1038 (two unadjudicated rapes); *Cruz, supra,* 44 Cal.4th 636 (commission of death threats); *Whisenhunt, supra,* 44 Cal.4th 174 (unadjudicated acts of violence); and *Harris, supra,* 43 Cal.4th 1269 (threats against public officer)).

[92] In only one case in the last four years has this Court addressed the constitutionality of 190.3(b). (See *Morgan, supra,* 42 Cal.4th at 593). There, this Court rejected the claim by citing to past precedent. (*Id.* at 623 ("We have rejected these interrelated contentions and continue to do so in this case.")). This holding, however, does not address the as applied

Respondent argues that "the admission of the jailhouse-battery evidence violated no constitutional guarantees." (RB 238). Respondent claims that a jury may learn of other incidents involving the use of force or violence, "[s]o long as the penalty phase jurors are not materially misled about the nature and degree of the defendant's individual culpability...." (*Ibid.* (citing *People v. Ray, supra,* 13 Cal.4th 313, 351)). Respondent says that "Appellant's prior criminal batteries fit this bill..." and that a reasonable jury would not have been misled and "could have...found that Appellant committed batteries on two fellow inmates." (RB 238). Respondent feels that "the evidence was not such that it uniquely tended to evoke an emotional bias against Appellant as an individual with little or no effect on the issues." (*Ibid.* (citing *People v. Yu* (1983) 143 Cal.App.3d 358, 377)).

Ray, supra, 13 Cal.4th at 351, does not support Respondent's argument that Appellant's claim is meritless. In *Ray*, this Court addressed unadjudicated 190.3(b) evidence of a prior murder for which the defendant had been convicted. (*Ibid.*). Defense counsel conceded his client's "legal culpability" for the murder. (*Ibid.*). In contrast, in Appellant's case the 190.3(b) evidence was used to materially mislead the jury by implying that because Appellant had been involved in two scuffles in jail: 1) he was a future danger; 2) he had a propensity for violence indicating that he murdered Ms. Olsson; and 3) he liked to keep company with other persons

---

challenge raised in Appellant's Opening Brief and fortified here in his Reply Brief. Appellant's prosecution entered no direct evidence that: 1) he actually committed an offensive touching; 2) that he had the intent to commit offensive touching; 3) that he was not acting in self defense; and 4) that the "victim" had been hurt. Instead, the prosecution's evidence indicated that it was Appellant who had: 1) actually been battered; 2) received the worst injuries; and 3) likely acted in self-defense. It was the prosecution's ability to convert a relatively innocuous act, into a sentencing factor, without proof beyond a reasonable doubt and unanimity as to the crime, which underlies Appellant's constitutional challenge to 190.3(b).

alleged to have committed rape. The prosecution entered no direct evidence that Appellant actually committed battery in either instance. The jury was fundamentally misled as to the nature of the scuffles, when, in all likelihood, Appellant had been acting in self-defense. Moreover, here, unlike in *Ray,* the unadjudicated act of violence had no bearing on the case and defense counsel never conceded that Appellant committed either battery.

Yu, supra, 143 Cal.App.3d at 377, addressed the introduction of other crimes evidence to establish guilt in a non-capital case. *Yu* does not address section 190.3(b). Moreover, in *Yu*, the other crime was murder, which was probative as to the defendants' guilt for the current charge; and the issue did not involve penalty. (*Ibid.*). Here, the evidence was introduced during the penalty phase of a capital trial, and constituted only *de minimus* evidence of battery, and was wholly irrelevant to the Olsson homicide.

Respondent does not counter Appellant's argument that a state evidentiary error violates due process where, as here, a verdict of death was based on inflammatory and inadmissible evidence. (Contra *Estelle, supra,* 502 U.S. at 68). Respondent similarly fails to address Appellant's argument that the failure of a state to abide by its own statutory commands implicates a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state. (See *Hicks, supra,* 447 U.S. at 346; and *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (citing *Ballard v. Estelle* (9th Cir.1991) 937 F.2d 453)). Respondent cannot counter these arguments because there is no legal support for the trial court's abuse of discretion here.

F. The Erroneous Admission of the Section 190.3 Evidence Prejudiced Appellant.

Respondent argues that "reversal of the death judgment is not in order." (RB 239). According to Respondent, "Appellant's case in mitigation paled in comparison to the properly-admitted evidence in aggravation, particularly the circumstances of the crime." (*Ibid.*). Respondent then tries to justify its conclusion by recalling the more lurid details of the Olsson homicide. (*Id.* at 239-40). Respondent says that "any *Phillips* error here necessarily did not amount to a due process violation by rendering Appellant's penalty phase trial unfair." (*Id.* at 240).

Respondent is wrong, because the state's case in aggravation, aside from the guilt phase evidence, consisted entirely of the two jailhouse scuffles and victim impact evidence. The state's penalty phase case was not strong.[93] In contrast, Appellant presented substantial evidence of his childhood abuse, tumultuous upbringing, hereditary predisposition toward substance abuse and mental illness, and his resulting drug addictions. (RT 3572). Similarly, Appellant presented evidence that he struggled socially and was not very "bright," and needed a lot of help to get through school. (RT 3584). Finally, Appellant presented evidence of the impact his execution would have upon his family, primarily his son and daughter, who

---

[93] In Appellant's case, two uncharged misdemeanor batteries *he suffered* in jail were introduced against him as evidence of his death-worthiness in a capital case. This evidence is diametrical to the evidence of violence introduced under 190.3(b) in other cases recently before this Court. (See *Hamilton, supra,* 45 Cal.4th at 863 (seven prior assaults and a prior assault on a correctional officer); and *Kelly, supra,* 42 Cal.4th at 763 (three prior rapes)). Similarly, unlike in both *Hamilton* and *Kelly,* the evidence introduced at Appellant's trial failed to prove that he had actually committed a battery. In this regard, and because the jury could not question whether a battery actually occurred, the evidence introduced under 190.3(b) in Appellant's case proved more prejudicial than in other cases that have come before this Court.

he speaks with frequently. (See RT 3602-10). Thus, in actuality, it was the state's case in aggravation that paled when compared to Appellant's case in mitigation. In these circumstances, the admission of the wholly irrelevant and prejudicial evidence of the jailhouse scuffles unfairly tipped the scale and prejudiced Appellant's ability to receive a fair trial.

Respondent fails to address the additional prejudice stemming from the fact that the prosecutor capitalized on these innocuous acts during closing argument in the penalty phase. First, the prosecutor asked the jury to count the incidents as evidence of the inadmissible and non-statutory aggravating "factor" of future dangerousness. (RT 3696). The prosecutor thus painted a picture for the jury, based on speculation and without any evidence, that this misdemeanor level conduct proved Appellant would be a future danger in prison to "some other prisoner, some other guard, some hospital or some jail prison nurse or social worker." (RT 3696). Second, the prosecutor used Appellant's jailhouse friendship with Mendoca to argue "guilt-by-association" and bolster his argument that Appellant himself was a rapist. The prosecutor rhetorically asked the jury during his argument: "How many of you would have guessed [Mendoca is] a rapist? But he is a *friend* of the defendant's." (RT 3648-49). Since the only reason the defense put Mendoca on the stand was to counter the prosecutor's erroneously admitted jailhouse evidence, this argument was particularly unfair and prejudicial. In a case involving weak evidence in aggravation, the prosecutor created the illusion that Appellant was "the worst of the worst" and a future danger.[94]

---

[94] Contrary to Respondent's assertions, this Court's recent case law demonstrates that Appellant is not a member of the "worst of the worst" of California's death row, or that, the prosecution's case in aggravation against Appellant was strong. For example, Appellant had no prior criminal record introduced at his trial. Appellant's lack of criminal history pales in comparison to the criminality of many of the capital defendants in

G. Conclusion.

While the aggravation evidence here was minor, its introduction as factor (b) evidence was prejudicial and harmful. The two incidents were the only aggravation evidence introduced that were not associated with the victim impact testimony. Appellant had no prior felony convictions, and no evidence of any other unadjudicated violence was presented. Here, this constitutionally infirm evidence of aggravation tipped the scales towards death, and its admission constitutes reversible error.

Penalty phase error is reversible error under state law where there is a reasonable possibility that, absent the error, the jury would not have sentenced the defendant to death. (See *People v. Brown* (1998) 46 Cal.3d 432, 448). However, where, as here, federal constitutional error is involved, then the burden shifts to the state 'to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Chapman, supra,* 386 U.S. at 24; see also *Bolton, supra*, 23 Cal.3d at 214). The error cannot be deemed harmless under either state or federal standards. The two jailhouse scuffles were not evidence of unadjudicated acts of force or violence that rose to the level of an aggravating factor and thus should never have been presented to the jury.

---

cases this Court has recently decided. (See e.g., *DePriest, supra*, 42 Cal.4th 1 (one prior burglary conviction, two prior rape convictions, one prior robbery conviction); *Carey, supra,* 41 Cal.4th 109 (one prior manslaughter conviction and one possession of weapons in prison conviction); *People v. Mungia* (2008) 44 Cal.4th 1101 (one mayhem conviction, one attempted murder conviction, and three robbery convictions); *People v. Loker* (2008) 44 Cal.4th 691 (five robbery convictions, one attempted murder conviction, one rape conviction, one high speed chase conviction); *People v. Parson* (2008) 44 Cal.4th 332 (ten prior bank robbery convictions); *Harris, supra,* 43 Cal.4th 1269 (one burglary conviction; two robbery convictions, two assaults with a deadly weapon convictions, and one escape from prison conviction); and *Williams, supra,* 49 Cal.4th 405 (convicted of murder, robbery, arson, and two counts kidnapping with prior convictions for residential burglary rape, and attempted burglar)).

Moreover, the prejudicial impact was heightened by the prosecutor's use of this inadmissible evidence to argue that Appellant was a rapist because he associated with a rapist in prison, and that Appellant would continue to pose a danger in prison if the jury did impose the death penalty. Accordingly, Appellant's death sentence must be reversed.

XIV. THE TRIAL COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE.

A. Introduction.

Here the jury was allowed to impose a sentence of death based on a non-statutory aggravating factor that had no relation to Appellant's individual culpability or to any circumstance of the crime. Indeed, in a case involving only one statutorily defined aggravating factor beyond the circumstances of the crime, (see Claim XIII - The Admission of Two Uncharged Misdemeanor Batteries as Aggravating Factors in the Penalty Phase Violated state Law and Appellant's Constitutional Rights), it is undeniable that the admission of an invalid aggravating factor had a controlling effect on the individualized sentencing process constitutionally required in Appellant's case. The prosecutor's prejudicial use of the evidence ensured that there was more than a probability that the jury's decision to impose the death penalty rather than life imprisonment turned on the weight of the invalid aggravating factor. (See Claim XV - The Prosecutor Committed Misconduct During the Presentation of Victim Impact Evidence and The Trial Court Erroneously Denied Appellant's Motion for a Mistrial).

The victim impact evidence introduced in Appellant's case had no genuine probative value to the jury's assessment of Appellant's moral culpability or his individual character. As a result, Appellant's state and federal constitutional rights to due process and a fair trial were violated by the admission of the unfairly prejudicial victim impact evidence. (See *People v. Sutton* (1993) 19 Cal.App.4th 795, 799-802; *McGuire v. Estelle* (1991) 502 U.S. 62; and *Ballard, supra,* 937 F.2d at 456). For these reasons, state law, due process, fair trial rights, and as well as Article I sections 1, 17, and 24 of the California Constitution require the exclusion of the victim impact evidence in this case.

Appellant raised several arguments challenging the constitutionality of victim impact evidence in general, and the trial court's admission of the victim impact evidence at his trial. (See I AOB 335-340). In response, Respondent does not offer rebuttal to nine of these arguments.[95] As to the constitutional arguments that Respondent addressed, the state fails to provide justifiable legal analysis for its conclusions, but rather, string citations to legal authorities. (See e.g., RB 246-47). Respondent has failed to effectively counter Appellant's argument that the victim impact evidence introduced at his trial and exploited by the prosecution, rendered his penalty phase proceedings fundamentally unfair and violated his state and federal

[95] Respondent did not address the following arguments raised in Appellant's Opening Brief: 1) In California in 1986, the trial court's admission of victim impact evidence at Appellant's trial was unconstitutional because its decision was not justified by a "victim impact" sentencing factor or supporting legal authorities. (See I AOB 336); 2) The prosecution's introduction and improper use of the victim impact evidence at Appellant's capital trial violated his right to individualized sentencing under the Eighth Amendment. (See *Id.* at 339); 3) This Court wrongly decided *People v. Brown* because *People v. Edwards* changed the "factual ingredients' that establish when the death penalty is appropriate. (See I AOB 344); 4) Victim impact evidence is unconstitutional under the due process clause of the Fourteenth Amendment because it alters the quantum of proof required to impose a sentence of death. (See *Id.* at 346); 5) The trial court's admission of the victim impact evidence was erroneous in the face of controlling authorities and was arbitrary in failing to place effective limits on irrelevant or prejudicial evidence. (See *Id.* at 348); 6) The prosecutor committed prejudicial misconduct by offering irrelevant and inflammatory victim impact evidence and exploiting the evidence during witness examinations and closing arguments. (See *Ibid.*); 7) The admission of the victim impact evidence violated Appellant's due process rights because the evidence was unduly prejudicial and duplicative of victim impact evidence introduced during the guilt phase. (See *Id.* at 353); 8) The trial court committed abuse of discretion by failing to promptly rule on defense motions and arbitrarily failing to enforce its prior orders, including notice requirements, limiting the use of victim impact evidence. (See *Id.* at 353-54); and 9) The admission of the unduly prejudicial victim impact evidence violated Appellant's right to reliable sentencing under the Eighth Amendment. (See *Id.* at 361).

constitutional rights.

B. Appellant's Arguments are not Procedurally Barred.

Respondent tries to argue that several of Appellant's arguments have been waived for failure to object at trial. Respondent argues that Appellant has waived his argument that application of *Payne v. Tennessee* to his case violates his rights against *ex post facto* application of case law decided after his capital trial. (RB 244). Respondent argues that Appellant waived his argument that victim impact evidence must be limited to facts or circumstances known to the defendant at the time he committed the crimes. (*Id.* at 245). In truth, Respondent cannot rebut Appellant's argument that, at the time of the trial court's ruling in 1986, no controlling authorities existed that required Appellant's counsel to object to the victim impact evidence on *ex post facto* grounds. Respondent does not acknowledge that Appellant's objection to the victim impact testimony was based on its lack of *probative value,* and thus subsumed into his constitutional objections based on relevancy. Importantly, Respondent does not acknowledge that defense objections were made, and fails to consider the circumstances leading to the trial courts' erroneous admission of the prejudicial victim impact evidence in Appellant's case.

On June 17, 1992, defense counsel filed a "Motion re: Evidence in Aggravation" raising challenges to the prosecutor's proposed victim impact testimony. (CT 1871). The defense argued that the evidence went beyond the scope of admissible victim impact testimony. (*Ibid.*). The defense argued that admission of the evidence would be unconstitutional and would violate Evidence Code § 352 because it was more prejudicial than probative. (*Ibid.*).

Days later, on July 7, 1992, the court ruled on the defense motion, finding that victim impact evidence is "not limitless," and that in order to

determine whether the proffered evidence was admissible, it would have to engage in "a weighing process pursuant to Evidence Code § 352." (RT 497). The court, however, did not fully rule on the scope of the admissible victim impact evidence until just before the penalty phase started, and in response to Appellant's renewed motion to preclude the introduction of any victim impact evidence. (See I AOB 327-28 (citing RT 3401-02). At the time, Appellant objected to the lack of notice for the proffered evidence, both in terms of time and particularization.[96] (*Id.* at 3402-03). Appellant also objected to the testimony as prejudicial, since three of the witnesses had already testified during the guilt proceedings. (RT 3401). Appellant pointed out that the evidence was thus duplicative and not probative. (*Ibid.*)

In response, the trial court overruled the defense objections and held that the evidence was not cumulative of guilt phase evidence. (RT 3402). The court denied defense objections to the lack of notice. (*Id.* at 3403). The court merely referred back to its pretrial ruling to address questions of prejudice from allowing witnesses who had not been excluded at the guilt phase to testify. (*Id.* at 3403-04). Finally, the court informed counsel that if they needed further clarification of its ruling, the questions should be raised outside the presence of the jury. (*Id.* at 3405).

---

[96] On August 28th, 1992, the prosecutor provided a verbal description of the proposed testimony. (RT 3365-3375). This proffer did not accurately reflect the testimony that was actually introduced at the penalty phase. (See Claim XV - The Prosecutor Committed Misconduct During the Presentation of Victim Impact Evidence and the Trial Court Erroneously Denied Appellant's Motion for a Mistrial). For instance, the prosecutor did not provide prior notice of his intent to examine Trip Walters about his life growing up and moving from Mississippi to Marin County. Likewise the prosecutor did not provide notice that he would elicit from several family members, descriptions about returning to the Olsson home after the homicide and reliving the crime based on the evidence still at the scene.

Respondent did not acknowledge this procedural history, which undermines its assertion that Appellant's arguments have been forfeited. Without understanding the procedural posture through which the prosecution proffered and presented its victim impact evidence, the magnitude of the error is diminished. Here, the prosecutor provided an incomplete proffer, just days before the penalty phase, and the trial court reacted with an improper order that would later be exploited by the prosecution. (See Claim XV - The Prosecutor Committed Misconduct During the Presentation of Victim Impact Evidence and the Trial Court Erroneously Denied Appellant's Motion for a Mistrial). Presumptively then, Respondent does not address the procedural history in an attempt to obfuscate the defense's objections to the victim impact evidence and to inaccurately claim that Appellant's arguments are procedurally defaulted.

Respondent's citations to *People v. Huggins* (2006) 38 Cal.4th 175, 236, for the proposition that Appellant's failure to raise *ex post facto* arguments at trial means he has forfeited those claims on appeal, is misplaced. (RB 244). This Court has held that fundamental constitutional rights are exempt from the general forfeiture rule. (See *Loker, supra,* 44 Cal.4th at 704 n. 7; and *Vera, supra,* 15 Cal. 4th at 276-77). Although this Court has not set forth in exact terms what it deems to be a "fundamental" right in this context, it has listed several examples,[97] which would naturally tend to include the violations of *ex post facto* laws as of fundamental and of constitutional import.[98] Likewise, this Court may also hear Appellant's *ex*

---

[97] (See *Saunders, supra,* 5 Cal. 4th at 592 (right against double jeopardy) and *Holmes*, *supra,* 54 Cal. 2d at 443-44 (right to jury trial); but see *People v. Walker* (1991) 54 Cal. 3d 1013, 1022-23 (right to be advised of consequences of guilty plea was not a constitutional and fundamental right)).

[98] This Court has created a catch-all exemption to the contemporaneous objection rule, that allows it to hear arguments when,

posto facto arguments as pure questions of law.[99]

Finally, Respondent claims that Appellant's arguments challenging the victim impact evidence have been waived for failure to object with specificity, at trial. (RB 246) (citing *People v. Rogers*, *supra,* 21 Cal.3d 542, 547-48). Respondent's claim is meritless. In *People v. Avila*, this Court held that an appellate claim is not forfeited if new arguments assert "additional legal consequences" related to the violation of the federal constitution. (*Avila, supra,* 38 Cal. 4th 491, 527 n.22). In other words, where an objection was improperly overruled by the trial court, argument as to the consequences of the trial court's order may be raised on both state law and federal constitutional grounds. Here, the trial court's decision was in violation of state law, this Court's authorities, defense counsel's objections, and state and federal constitutional guarantees.

---

where as here, the challenge is non-evidentiary. (See *People v. Williamson* (1998) 17 Cal. 4th 148, 161 n.6 (an appellate court is "generally not prohibited from reaching a question that has not been preserved for review by a party. . . Indeed it has the authority to do so.")). Here, Appellant's argument focuses on the applicability of *Payne v. Tennessee*, under the *ex post facto* clause, and not the admission of the victim impact evidence. Indeed, Appellant thoroughly objected to the admission of the victim impact evidence at trial. (CT 1871).

[99] However, even if the contemporaneous objection rule is found to apply here, *ex posto facto* arguments maybe considered by this Court as pure questions of law. (See *Williams, supra,* 43 Cal.4th at 624 (citing *Hale, supra,* 22 Cal.3d at 394; *Panopulos, supra,* 47 Cal.2d at 341; and *Yeap, supra,* 60 Cal.App.4th at 599 n. 6)). While this doctrine has been developed in civil cases, Appellant's pure question of law regarding the *ex posto facto* application of *Payne v. Tennes*see merits exception to the contemporaneous objection rule here.

C. The Trial Court's Admission of Prejudicial Victim Impact Testimony Rendered Appellant's Penalty Phase Proceedings Fundamentally Unfair.

Generally, this Court has upheld the use of victim impact evidence,[100] and greatly expanded the scope of admissible victim impact evidence.[101] This is despite a variety of challenges raised by defendant's as to the particulars of the evidence in their case.[102] In only two cases has this

---

[100] (See generally, *Mills, supra,* 48 Cal.4th at 158 (cases cited therein); and *Burney, supra,* 47 Cal.4th at 203 (cases cited therein)).

[101] This Court has expanded the scope of admissible evidence under its victim impact construction of Cal. Penal Code section 190.3(a). Indeed, under the court's current construction of "circumstances of the crime," relevant factors are not merely limited to the immediate temporal and spatial circumstances of the crime, but extend to that which "logically" is connected to the crime. (See *Edwards, supra*, 54 Cal.3d at 835). Thus, this Court has sanctioned the use of the victim impact videos without requiring or compelling trial courts to craft particular limiting instructions to accompany such evidence. (See *Bramit, supra,* 46 Cal.4th at 1221). The same is done by allowing for the admission of all types of victim impact evidence under the current construction of 190.3(a)). (See *Hawthorne, supra,* 46 Cal.4th at 67 (Upholding the admission a 911 tape as victim impact evidence); *Zamudio, supra,* 43 Cal.4th at 327 (Defendant alleges that use of a picture montage, consisting of 118 photos with music, was prejudicial error); *Verdugo, supra,* -- Cal.Rprt.3d -- (Upholding the admission of songs performed by the victim as part of the prosecution's victim impact evidence) and *Brady, supra,* -- Cal.Rptr.3d at *14 (upholding the admission of two videotapes, one of which depicted the victim's funeral and graveside ceremony, and the testimony of 45 witnesses)). In not one of these cases has this Court found error or prejudicial error. In so ruling, this Court has greatly expanded the parameters of what constitutes victim impact evidence, beyond any resemblance of the "circumstances of the crime" as permitted by Cal. Pen. Code 190.3(a) or anticipated in *Edwards*.

[102] (See *Taylor, supra,* 52 Cal.3d at 719 (defendant alleges that the trial court committed prejudicial error by admitting the testimony of six victim impact witnesses, which included more than just family members); and *Cruz, supra,* 44 Cal.4th at 636 (defendant argues that the use of victim impact evidence was error and unconstitutional due to lack of notice)).

Court found error.[103] In no case has this Court found prejudicial error.

Nevertheless, Appellant's case is distinguishable from the litany of cases where this Court has upheld the use of victim impact evidence. First, the prosecution failed to proffer constitutionally suitable notice as to the victim impact evidence it intended to introduce. Second, the trial court made erroneous rulings. Third, during trial, the court failed to enforce its pretrial rulings. Fourth, the prosecutor repeatedly committed misconduct by goading circumstances of the crime and victim impact testimony from understandably emotional witnesses.[104] Fifth, Appellant's trial and conviction occurred before *Payne* sanctioned the use of victim impact testimony, and while such evidence was unconstitutional under *Booth*.

Respondent believes that "no reversal is required here because no error occurred in the admission of the victim impact testimony." (RB 241-42). Respondent suggests that "Appellant's arguments to the contrary are either forfeited, without merit, or both." (*Id.* at 249). Respondent claims that "the trial court committed no error whatsoever in ruling the victim impact evidence admissible." (*Ibid.*). Respondent fails to address Appellant's assertion that the trial court, by admitting evidence of a non-statutory aggravating factor without supporting legal or statutory authorities, violated state law and the Eighth Amendment. Respondent claims that Appellant has failed to show an "abuse of discretion," which is required under Evidence Code section 352. (*Id.* at 245). However,

---

[103] (See *People v. Ervine* (2009) 47 Cal.4th 745 (error based on victim impact testimony regarding the victim's accomplishments as a police officer and that the victim's inappropriate comments on the potential punishments); *Davis, supra,* 46 Cal.4th at 539 (error based on the victim's comments concerning the defendant's prior crimes)).

[104] (See Claim XV- the Prosecutor Committed Misconduct During the Presentation of Victim Impact Evidence and the Trial Court Erroneously Denied Appellant's Motion for a Mistrial).

Respondent does not acknowledge that an order allowing inflammatory, or highly prejudicial, evidence into a trial may also violate due process under the California and United States Constitutions. (Contra *McGuire, supra,* 502 U.S. at 62; but see *Ballard, supra,* 937 F.2d at 456; and *Sutton, supra,* 19 Cal.App.4th at 802 (quoting *Wainwright v. Greenfield* (1986) 474 U.S. 284, 294)).

Here, the trial court abused its discretion in several ways. First, at the time, the trial court's ruling was not supported by controlling authorities. Indeed, in its ruling, the trial court failed to identify any controlling law or statutes that permitted the admission of the evidence. (See RT 497 and 3401-02). The trial court's decision was thus arbitrary and thereby merits reversal. (See *Rodrigues, supra,* 8 Cal.4th at 1124-25).

Second, the trial court failed to properly account for the significant amount of victim impact testimony already elicited during the guilt phase proceedings. (See *Salcido, supra,* 44 Cal.4th at 151 ("[T]he prosecutor's introduction of victim-impact testimony is impermissible in the guilt phase of a capital trial.")). Prior to the penalty phase, a large quantum of irrelevant and prejudicial victim impact evidence had been introduced. (See Claim VIII - The Trial Court's Error and Prosecutorial Misconduct Resulted in the Improper Introduction of Victim Impact Evidence at the Guilt Phase). Introducing additional victim impact evidence added to the prejudice. Third, the trial court's failure to enforce its limits on the victim impact evidence constituted an arbitrary departure from reason and an abuse of discretion. Respondent errs in asserting that "the trial court did not abuse its discretion, i.e., it did not rule unreasonably in light of the facts and circumstances before it." (RB 245).

The trial court should have excluded all victim impact evidence because it was unduly inflammatory and cumulative, and was so prejudicial that it rendered the penalty phase fundamentally unfair. Instead, the trial court tried to restrict the penalty phase evidence to only allow evidence that had *already been presented* in the guilt phase or what could be reasonably inferred there-from. The court stated that it was limiting the admissible testimony to evidence that was "already adduced at the guilt phase," or that was in the range of testimony that could be reasonably anticipated. (RT 3043). Such evidence was repetitive, prejudicial and minimally probative. However, the trial court never addressed the lack of probative value of the evidence, and instead summarily rejected the defense argument that the prosecution's victim impact evidence was cumulative. (*Id.* at 3093). By failing to correctly address the nature of the evidence already presented, and using that evidence as the yardstick for admission of victim impact in the penalty phase, the trial court issued a ruling that contradicted state law. Moreover, by failing to account for the prejudicial nature of the evidence, the trial court allowed for the introduction of evidence that rendered the penalty phase proceedings fundamentally unfair in violation of the due process clause of the Fourteenth Amendment.

D. The Victim Impact Evidence Should Have Been Excluded Due to the Prosecutor's Failure to Provide Timely and Particularized Notice.

On June 9, 1992, the prosecutor served defense counsel with a notice of evidence to be presented at the penalty phase. (CT 1548). The defense objected that the notice was untimely, and that it was inadequate because it did not contain any information as to the substance of the proposed victim impact testimony. (RT 3-4). The trial court issued a preliminary ruling that the prosecution's notice was timely. (*Id.* at 10-11). On September 1, 1992, just two days before the start of the penalty phase, in response to renewed

defense objections, the trial court ruled that the prosecution had provided sufficient notice of the victim impact evidence it intended to present. (*Id.* at 3401-02).

Respondent believes that Appellant's contention that the notice was insufficient and untimely is "meritless." (RB 248). In Respondent's view, none of the admitted victim impact testimony surprised the defense because Appellant could "have reasonably anticipated based on the prosecution's notice that it was going to provide victim impact evidence from family members." (*Ibid.*). Alternatively, Respondent believes that "general notice of evidence suffices and the prosecutor's failure to specify the precise evidence he intended to present does not render the notice constitutionally or statutorily insufficient." (*Ibid.* (citations omitted)). Respondent is wrong.

First, none of the cases cited by Respondent concern victim impact evidence, but instead, all are concerned with other crimes evidence. (RB 248 (citations omitted)). Victim impact evidence is not truly comparable to other crimes evidence in that it: 1) it has greater potential for prejudice; 2) involves family members describing how the victim's death will impact their life forever; 3) involves family members describing the victim's character; and 4) is wholly irrelevant to describing the defendant's conduct or character in any way. For these reasons, this Court should require a heightened degree of particularity and notice concerning victim impact evidence than other crimes evidence. Nevertheless, even if victim impact evidence was comparable to other crimes evidence, the detail of the prosecution's notice in *Hart,* in comparison to the prosecutor's general description in Appellant's case, proves that the prosecution here failed to meet constitutionally required standards of notice in his victim impact

evidence proffer.[105]

Second, Respondent fails to counter Appellant's argument that, because of the lack of notice, the defense had no opportunity to prepare several aspects of the case. Defense counsel could not adequately conduct *voir dire* of prospective jurors to determine bias concerning the particular victim impact testimony in this case. Defense counsel could not coordinate the guilt phase case to rebut the prejudicial admission of victim impact evidence. Similarly, defense counsel could not predict the nature of the prosecution's penalty phase. Further, the defense had no basis on which to request exclusion of family members from the guilt phase proceedings, despite the trial court's order that they do so if necessary. (See RT 1940).

Third, Respondent does not rebut Appellant's argument that the prosecutor violated both the death penalty statute and the Constitution in failing to give proper notice. The prosecution did not give any notice prior to trial, as explicitly required by section 190.3, and it was not until the eve of the penalty phase itself that the prosecutor even attempted to give notice of the victim impact evidence. Because this evidence was improperly noticed and contained irrelevant prejudicial inferences, the trial court should have excluded it or granted the defense motions for a mistrial.

---

[105] For instance, in *Hart,* the prosecution informed the defense of its intent to call eight witnesses documenting other instances of sexual assault by the defendant. (*Hart, supra,* 20 Cal.4th at 638-39). There, the Court held that the notice was sufficient because the "prosecution's notice informed the defense of the names of each one of the women who had been victimized by defendant's sexual assaults, the specific dates on which those assaults took place, and the counties in which the crimes occurred." (*Id.* at 639). Here, in contrast, the prosecution never fully presented the defense with a list of victim impact witnesses pretrial. It was not until the incipient stages of the penalty phase when Appellant was provided with a full list of victim impact witnesses and a proffer as to the substance of their likely testimony. (See RT 3365-75).

E. Introduction of the Victim Impact Evidence was Unduly Prejudicial.

Where improper aggravating evidence has been admitted in a penalty phase trial, this Court must assess whether the error could have affected the penalty phase verdict. (See *Phillips, supra*, 41 Cal.3d at 83). Eighth Amendment error occurs when, as here, "the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." (*Sochor v. Florida* (1992) 504 U.S. 527, 532). Should this Court find the admission of victim impact evidence to be impermissible, it must remand for resentencing or determine whether the sentencing body's consideration of the invalid aggravating circumstance was "harmless beyond a reasonable doubt." (*Id.* at 540).

Respondent argues that the trial court correctly determined "that the admitted victim impact evidence was more probative than prejudicial," in accordance with *Edwards*, *supra*, 54 Cal.3d at 835-36. Respondent feels that the victim impact testimony at Appellant's capital trial "was not dissimilar from, or significantly more emotion laden than, other victim impact testimony that has been held admissible." (RB 246-47 (discussing *People v. Harris* (2005) 37 Cal.4th 310, 328, 351-52; *People v. Panah* (2005) 35 Cal.4th 395, 495; *People v. Boyette,* (2002) 29 Cal.4th 381, 440-41; and *People v. Jurado,* (2006) 38 Cal.4th 72, 133-34)). Respondent is wrong.

First, particular victim impact evidence introduced in Appellant's case is distinguishable from the evidence presented in the cited cases. In *Panah, supra,* 35 Cal.4th at 395, the defendant challenged, as prejudicial and not supported by the evidence, victim impact testimony from three witnesses relating that the eight year-old victim had been abducted and comments by the victim's mother to the press. (*Id.* at 494). That evidence is wholly different, and much less prejudicial, than victim testimony

detailing the crime scene, as well as, the witnesses' emotions stemming from the loss of a loved one, as presented here.

In *Boyette, supra,* 29 Cal.4th at 381, this Court held that the victim impact evidence "was relevant to show how the killings affected [the witnesses], not whether [the witnesses] were justified in their feelings due to the victims' good nature and sterling character..." (*Id.* at 445). This Court did not find any prejudice resulting from the victim impact evidence in the case because "the several family members who testified did so briefly and relatively dispassionately." (*Ibid.*). Here, the situation is much different because the victim impact testimony was highly emotional, and included testimony about the circumstances of the crime that was prejudicially exploited by the prosecution. (See RT 3424 (testimony from Ms Olsson's daughter that her only guilt in life was not providing Ms. Olsson with grandchildren); RT 3443 (testimony from Ms. Olsson's son concerning reoccurring nightmares involving fingerprint powder over the Olsson house); RT 3470 (testimony from Ms. Olsson's best friend concerning the blood on the floor left in the Olsson house); RT 3475 (prosecutorial questions regarding when Ms. Olsson's "spirit left her body."); RT 3488 (testimony from Ms. Olsson's father describing why Ms. Olsson's death was different because she was "tortured.")). Unlike in Boyette, the powerful evidence presented in Appellant's case repeated the victim impact and circumstances of the crime evidence introduced during the guilt phase. Accordingly, it was repetitive and unduly prejudicial.

In *Jurado, supra*, 38 Cal.4th at 132-34, this Court held that the victim impact evidence at question was not prejudicial because "the testimony of these three witnesses was relatively brief, comprising just twenty-five (25) pages in the reporter's transcript," and because the victim impact testimony wholly dealt with the family members sense of loss in the wake of their daughter's death. Unlike in *Jurado*, in Appellant's case the

prosecution substantially relied upon victim impact evidence during both the guilt and penalty phases. Likewise, in *Jurado*, none of the witnesses' testimony dealt with the circumstances of the crime.

Thus, unlike in *Hill, Jurado*, and *Panah*, here, the victim impact evidence included detailed accounts of: 1) the victim's character; 2) the family member's emotions resulting from their loss of a loved one; 3) the circumstances of the crime; and 4) the effect of the circumstances of the crime on the victim family members. In particular, the testimony related to bloodstains in Ms. Olsson's home, fingerprint dust, and other anomalies at the scene of the crime, which were witnessed by family members and related during the penalty phase, distinguishes Appellant's case from this Court's prior case law. Here, the victim impact witnesses testified that the family all met at Ms. Olsson's house after learning of the murder. (RT 3441) They testified that the house was covered with fingerprint powder, and there was blood on the carpet. (RT 3441-3443; and 3469-3471). All the witnesses expressed experiencing a greater impact from their mother's death from seeing this forensic evidence than they would have endured due to the circumstances of the crime. (RT 3434; 3448-3449; and 3472-3474). This was in addition to the victim impact evidence introduced during the guilt phase, which also incorporated circumstances of the crime evidence.[106]

---

[106] (See Claim VIII - Trial Court Error and Prosecutorial Misconduct Resulted in the Improper Introduction of Victim Impact Evidence at the Guilt Phase). During the guilt phase Barbara Green testified as to Ms. Olsson' character, and the impact the loss of Ms. Olsson has had on her life. Ms. Green also testified concerning the circumstances of the crime. The prosecutor impermissibly asked Ms. Green what she felt when she touched the body. "Death. There's nothing as cold as death." (RT 2048). He kept asking where she touched the body. "I just stroked her. I don't know what [sic] I stroked her, except that it was about the only area that wasn't damaged or had some wounds on it." In response to the

Importantly, the prosecution's penalty phase case was particularly weak. Only one statutory aggravating factor was presented, other than the facts and circumstances of the crime. The prosecution relied upon the circumstances of the crime and the victim impact evidence to argue for a sentence of death. The jurors struggled with the penalty phase deliberations.

At 11:49 a.m. on September 16, 1992, the jurors began penalty phase deliberations in this case. (CT 2024). The deliberations lasted until 3:18 p.m. on September 21, 1992. (CT 2028). During the deliberations, the jury sent a note to the court requesting the legal definition of "life without the possibility of parole." (CT 2026) (see Claim XX - the Trial Court Erred by Failing to Answer the Jury's Request for "The Legal Definition of Life Without the Possibility of Parole."). Based on the extent of juror deliberations, but for the erroneous admission of the highly prejudicial victim impact evidence there is more than a reasonable probability that Appellant would have received a life sentence.

Second, the introduction of the evidence was not harmless. During witness examinations and closing argument, the prosecution committed misconduct by exploiting the most prejudicial aspects of the victim impact evidence. In fact, as he had done in the guilt phase, the prosecutor framed his argument in terms of victim impact to highlight this evidence.[107] The

---

question, "What did you then do?," Green responded, "I was in this room, it was very cold. It had been very hot outside." (RT 2049).

[107] (See II AOB 359 ("He began his opening penalty argument by asking the jurors to imagine they were Ms. Olsson. He began: "You're 59 years old, just celebrated a week ago, ten days ago, 59th birthday; three years and you will be able to retire. You come from a close family, you're looking forward to that family, spend time with your sister, your father, and of course, your kids . . ." He then walked them through each second of the crime as he speculated it had occurred, demanding that the jury put themselves in Ms. Olsson's shoes, imagining they suffered each thing she

prosecutor repeatedly asked the jury to consider the impact of the crime on Ms. Olsson's family.[108] The prosecutor reiterated all the victim impact evidence the jurors had heard at both the guilt and penalty phases. Because the prosecutor devoted the bulk of his penalty presentation and argument to victim impact evidence, the introduction of such evidence in Appellant's case cannot be considered harmless under either the state or federal standards of review.

F. The Use of Victim Impact Evidence is Unconstitutional.

Respondent finds "Appellant's attack on the constitutionality of victim impact evidence [] particularly confusing." (RB 242). Respondent believes that Appellant's attacks are "addressed to the wrong court." (*Ibid.*). Respondent believes that this Court has "previously rejected [Appellant's] arguments." (RB 243 (citing *Boyette, supra,* 29 Cal.4th at 445 n.12)). Respondent is wrong on each point.

In recent years, this Court has denied many constitutional challenges to the use of victim impact evidence.[109] Appellant has, however, set forth

---

did. He returned to this theme again, when he argued: "And you've got to walk in her shoes and place yourself there, the pain, what she felt." He proceeded to provide a blow-by-blow speculative description of every stab wound and injury the victim suffered, consuming a full seven pages of the transcript of his argument.") (citing RT 3630-35 and 3730-37)).

[108] (See II AOB 359-60 ("Justice will weep, just as the family of Sandy Olsson have wept for the last six years. 'I can't let you forget what Sandy Olsson went through....For you to do justice you have to weigh and you have to weigh what he did and the impact that he had on these people. And to ignore that, or to not make it that graphic gives him an advantage that he is not entitled to, because that takes away from the seriousness of what he did, and it does an injustice to Sandy Olsson, and her family, and to us all, if we crowd that away out of our minds.") (citing RT 3635 and 3730-31)).

several arguments challenging this Court's construction of section 190.3(a) as incorporating victim impact evidence. Appellant's arguments differ significantly from past challenges presented to this Court.[110] Appellant's claim respects this Court's prior precedent, but also, presents persuasive evidence and arguments showing that inclusion of victim impact evidence under 190.3(a) has led to the unconstitutional and undue expansion of permissible victim impact evidence, arguments, and witnesses.

This Court is the ultimate arbitrator of the admissibility of victim impact evidence under the California Constitution. While in the past, this Court has upheld the constitutionality of victim impact evidence, those conclusions should be revisited. Respondent's terse and brief rebuttal fails to justify its assertion that this Court should not reconsider *Boyette* and other case law in light of the particularly prejudicial circumstances of Appellant's case.

According to Respondent, *"Payne v. Tennessee* makes clear, that the loss to... the victim's family from the defendant's murder of a unique individual is...something that is related to his or her moral culpability." (RB 243). Respondent, however, does not acknowledge that *Payne v. Tennessee* makes clear that the admission of prejudicial and irrelevant evidence may constitute a due process violation. (See *Payne, supra,* 501 U.S. at 825 (citing *Darden, supra,* 477 U.S. at 179-183)).

Here, the trial court authorized introduction of evidence about Ms.

---

[109] (See *Carrington, supra,* 47 Cal.4th at 145; *People v. Valencia,* (2008) 43 Cal.4th 268; *Dykes, supra,* 46 Cal.4th at 731; *People v. Jackson* (2009) 45 Cal.4th 662; and *Hartsch, supra,* 49 Cal.4th at 472).

[110] In *Hartsch, supra,* 49 Cal.4th at 519, the defendant proposed limiting victim impact evidence to one witness per victim and to circumstances of the crime details. In contrast, Appellant has proposed reformulation of the admissibility of victim impact evidence that adopts this Court's reasoning in cases published before and after *Payne v. Tennessee.*

Olsson's nursing career, her retirement plans, her father's planned birthday party, her caring personality, her desire for, and lack of, grandchildren, and her relationship with her family, that her daughter married and had children after her death, her funeral arrangements, packing her belongings, and of the nature of the death here compared to accidental death or death from other causes. (See RT 3401-3402). In none of these instances could the specific testimony be tied to Appellant's culpability. The use of victim impact evidence for these ends is inherently prejudicial and unconstitutional.

Moreover, Respondent's limited reply fails to rebut several arguments raised by Appellant in his Opening Brief in support of reversing *Edwards, supra,* 54 Cal.3d at 835-836.[111] Respondent's failure to counter

---

[111] These arguments included: 1) This court did not give proper deference under the doctrine of *stare decisis* to *People v. Gordon* when considering *People v. Edwards*. (See II AOB 337-38); 2) This Court has erroneously found that victim impact evidence admitted prior to 1991 *was* relevant despite its inadmissible status under *Gordon* pursuant to *Booth* and *Gathers*. (See *Id.* at 337-38); 3) *Edwards* was wrongly decided because this Court ignored *Gordon's* primary reliance on *People v. Boyd* and its prohibition of the use of non-statutory aggravating factors. (See *Ibid.*); 4) If this Court in *Gordon* misunderstood what factors are relevant to the jury's consideration at the penalty phase, than California's death penalty scheme is unconstitutionally vague. (See *Ibid.*); 5) If this Court reasonably understood victim impact evidence was not included in "the circumstances of the crime," then it cannot be said that the statute has a common meaning sufficient to meet constitutional standards." (See *Id.* at 338); 6) If there is no constitutional limitation on the state's right to include victim impact evidence as a sentencing factor, the Constitution still requires the States to ensure that "the death sentence be, and appear to be, based on reason rather than caprice or emotion." (See *Ibid.*); 7) This Court's reasoning in *Edwards* violates the constitutional maxim that to determine whether an individual defendant should be executed the jury's determination must be based upon "the character of the individual and the circumstances of the crime." (See *Id.* at 338 (citing *Enmund v. Florida* (1982) 458 U.S. 782, 801)); 8) *Edwards* was wrongly decided because this Court failed to consider that unless evidence introduced in aggravation bears on the defendant's

these eleven arguments specifically addressing the propriety of this Court's holding in *Edwards* is telling. Appellant's constitutional challenge has revealed glaring inconsistencies in the precedents which have led to constitutional violations in capital trials. In light of Appellant's persuasive arguments, this Court should reconsider its decision in *People v. Edwards*.

G. Admission of Victim Impact Evidence that is not Limited to the Facts or Circumstances Known to the Defendant When he Committed the Crime is Unconstitutional.

In the alternative to his challenge under *Edwards*, Appellant also offered a separate means by which victim impact evidence could be presented in a constitutionally sound manner, while noting how the failure to do so caused prejudice in Appellant's case. (See II AOB 349). Appellant argued that, in order to address constitutional concerns arising from the use of victim impact evidence, this Court should limit the introduction of victim impact evidence to evidence, which relates to "circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase." (*Ibid.*). This standard was suggested by Justice Kennard in *Fierro, supra,* 1 Cal.4th at 264 (concurring and dissenting opinion).

---

character, its admission creates the risk that a death sentence will be based on considerations that are constitutionally impermissible or totally irrelevant to a proper sentencing process. (See II AOB 342); 9) *Edwards* was wrongly decided because, there, this Court failed to consider whether allowing the jury to impose a death sentence based on the characteristics of the victim, or her place within the family, or community invites the jury to base their sentencing decision on emotion and bias, wholly unrelated to the defendant or the gravity of the offense. (see *Id.* at 343); 10) Recent Supreme Court decisions indicate that the holding in *Edwards* and the use of victim impact evidence is unconstitutional. (See *Id.* at 339 (citing *Atkins v. Virginia* (2002) 536 U.S. 304, overruling *Penry v. Lynaugh* (1989) 492 U.S. 302)); and 11) *Edwards* altered the quantum of proof required to impose a sentence of death and thus violates the due process clause of the Fourteenth Amendment. (See II AOB 343).

Appellant argues that, without these limits, the risk that a death sentence will be based on considerations that are constitutionally impermissible or totally irrelevant to a proper sentencing process is great.

Respondent believes that this argument should be forfeited for failure to raise it at trial. (RB 244-45). In the alternative, Respondent believes that "this Court has previously rejected this argument on multiple occasions." (RB 244 (citing *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1057; and *People v. Pollock* (2004) 32 Cal.4th 1153, 1183)). Though failing to offer any legal analysis of its own, Respondent asserts that "Appellant offers no persuasive reason for this Court to reconsider [its] conclusion." (RB 245). Respondent's case law fails to address the constitutional arguments raised by Appellant in his Opening Brief.

Respondent does not address the challenge to this Court's prior holdings that presumed victim impact evidence is admissible. (See II AOB 335-40). Appellant has argued that the facts of his particular case demonstrate the need to revisit past precedents in light of the significant trial court error and prosecutorial misconduct stemming from the admission of the victim impact evidence. (See *Id.* at 360-61). Appellant has argued that only the characteristics of the victim that the prosecution proves were known to the defendant at the time of the murder should be admissible at the penalty phase. (See e.g., *Edwards, supra,* 54 Cal.3d at 832) (photographs of the victims at the time of the shooting admitted to show their size and stature at the time the defendant saw them); and *Wash, supra,* 6 Cal.4th at 267 (evidence of the victim's plans to join the Army, which she had discussed with the defendant, allowed as relevant to circumstances of the crime)). Because of Appellant's lack of knowledge about the victim, the evidence presented here had no bearing on his moral culpability or his character. Whether an individual defendant should be executed is to be determined on the basis of the character of the individual and the

circumstances of the crime. (See *Zant, supra*, 462 U.S. at 879; see also *Eddings, supra*, 455 U.S. at 112; and *Enmund, supra,* 458 U.S. at 801). Anything less, violates state and federal constitutional guarantees.

H. Application of *Payne v. Tennessee* to Appellant's Case Violates *Ex Post Facto* Considerations.

In 1986, when the crimes occurred in this case, victim impact evidence was not admissible at the penalty phase of a capital trial under California law. (See *Gordon, supra,* 50 Cal.3d at 1266-1267; and *Boyd, supra*, 38 Cal.3d 762). The Supreme Court expressly prohibited the admission of victim impact evidence at the penalty phase in 1987. (See *Booth v. Maryland* (1987) 482 U.S. 496). In 1991, *Booth* was overruled by *Payne v, supra,* 501 U.S. at 808.

Appellant's trial was held in 1992.[112] During the controlling time period - the time of the crime and preliminary stages in this case- victim impact evidence was prohibited. Nevertheless, it was admitted at Appellant's trial.

As discussed earlier, Respondent argues that this argument is barred because it was not raised at trial. (RB 244).[113] In the alternative, Respondent says that Appellant's argument is "meritless" based on this

---

[112] In only one recent case has this Court addressed the retroactive application of *Payne v. Tennessee*. (See *Hamilton, supra*, 45 Cal.4th at 863). This Court found that the defendant had forfeited his victim impact claim due to his failure to object to the retroactive application of law at trial. (*Ibid.*). *Hamilton* is not applicable to Appellant's case because Hamilton's trial occurred after *Hill,* which allowed for the retroactive application of *Payne*. (*Ibid.*). Appellant's conviction became final in 1992 before this Court's opinion in *Hill* was issued.

[113] Appellant's fundamental and constitutional protection from the *ex posto* application of laws cannot be waived by the contemporaneous rule. (See *Vera, supra,* 15 Cal. 4th at 276-277 ("A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain, fundamental, constitutional rights.")).

Court's decisions in *Huggins*, *supra,* 38 Cal.4th at 236; and *Brown, supra,* 33 Cal.4th at 394-95. According to Respondent's interpretation, "*Brown* correctly holds that the case law amending victim impact evidence merely constituted a change in a type of admissible evidence and as such does not implicate the ex post facto doctrine." (RB 244). Respondent provides no other analysis to counter Appellant's analysis.

Respondent does not address Appellant's assertion that the Court's conclusion in *Brown* must be reconsidered because *Edwards* did much more than change the rules of evidence. In *Edwards,* this Court added an additional factor for juror consideration - not already included in the legislative death penalty scheme - negative impact on the victim's family. (See *Edwards, supra,* 54 Cal.3d at 833). The jury could not permissibly consider that fact before *Edwards.* (See *Gordon, supra,* 50 Cal.3d at 1266-67). In *Brown*, this Court acknowledged that victim impact evidence was not admissible via legislative fiat, but rather only by its own "judicial construction" of the death penalty statute. (*Brown, supra,* 33 Cal.4th at 394). Because *Edwards* was a judicially imposed change in the law that altered the quantum of proof and the essential facts that must be determined to impose a greater punishment, a death sentence, it violates the *Ex Post Facto* Clause, the right to due process, and the California Constitution, and it undercuts the reliability of the capital sentence as required by the Eighth Amendment.

I. Conclusion.

In Appellant's case, the aggravating evidence, without the improper victim impact evidence, was not sufficient to outweigh the mitigating evidence. Introduction of victim impact evidence in this case deprived Appellant of his rights to due process and a fair trial under the Fourteenth Amendment. It also violated Appellant's rights to a fair and reliable determination as to whether he should be sentenced to death under the

Eighth Amendment. The state analogues of these same rights, as guaranteed by Article I of the California Constitution, were also violated. This Court cannot find the error in admitting the victim impact evidence harmless beyond a reasonable doubt. Thus, Appellant's death sentence must be reversed.

XV. THE PROSECUTOR COMMITTED MISCONDUCT DURING THE PRESENTATION OF VICTIM IMPACT EVIDENCE AND THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR A MISTRIAL.

A. Introduction.

During the victim impact testimony in the penalty phase, the defense was forced to object to the prosecution's questions thirty-seven (37) times. (See RT 3401-87). Most of these objections were sustained. (*Ibid.*). Despite the clear misconduct, the trial court arbitrarily failed to correct the prosecutor or rule on appellant's motion for mistrial.

The prosecutor engaged in rampant, intentional misconduct throughout the penalty phase. The prosecutor's "intemperate behavior violate[d] the federal Constitution [because] it comprise[d] a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process." (*Hill, supra,* 17 Cal.4th at 819 (quoting *People v. Gionis* (1995) 9 Cal.4th 1196, 1214); see also *People v. Espinoza* (1992) 3 Cal.4th 806, 820; and *Donnelly, supra,* 416 U.S. at 637)). The prosecutor obtained Appellant's convictions and death sentence through "deceptive or reprehensible means" violating state law as well. (Contra *Samayoa, supra,* 15 Cal. 4th at 841-844).

Before admitting the victim impact testimony, and after hearing the prosecution's proffer, the trial court specifically ruled that certain aspects of the evidence would be inadmissible[114] and certain aspects would be

---

[114] The court specifically held the following evidence was *inadmissible*: "[E]vidence as to [Olsson's] military service, leisure time pursuits and financial sacrifices which may have been made toward retirement;" "the specific plan or details of [Olsson's planned retirement travel];" "any opinion about the crime, the defendant, what the appropriate sentence should be or the impact of having to tell a family member of the victim's death," "a family member's difficulties with alcohol abuse," "fear for personal safety or that of another family member," "guilt feeling

admissible. The trial court "expect[ed] that all parties have in mind my specific rulings as to the offer of proof with regard to [the witnesses'] testimony." (RT 3554). The court further told the prosecutor to "proceed, wherever possible, by way of leading question." (*Id.* at 3483). The court ordered the prosecutor "to utilize that form of question [i.e. leading] wherever possible, and be as specific as possible with respect to questions that are articulated." (*Id.* at 3554).

The prosecutor ignored the trial court's order, which was not enforced sua sponte despite repeated and sustained objections by Appellant's defense counsel. Instead, the prosecutor deliberately circumvented the court's order and interjected highly inflammatory and prejudicial evidence in to the penalty phase proceedings. Respondent says that a "review of the record shows that no prejudicial misconduct occurred in the manner in which the prosecutor presented the penalty phase testimony of the victim's family members." (RB 250). Respondent believes that "Appellant overstates what occurred." (*Ibid.*). Respondent feels that "it [is] at least [] arguable that no misconduct of any sort occurred." (*Id.* at 264). Respondent's arguments fail in all respects.

Importantly, Respondent fails to address numerous arguments raised by Appellant under this argument in his Opening Brief.[115] Respondent's

---

because of a failure to contact the victim by phone on the night of the death," "a sense of suspicion as to other people," and "testimony about what the victim's thoughts may have been immediately prior to her death." (RT 3401-02).

[115] The arguments not rebutted by respondent are: 1) The prosecutor committed misconduct and prejudiced Appellant's constitutional rights by forcing defense counsel to repeatedly object to the prosecutor's objections. (See II AOB 386); 2) The prosecutor implied to the jury that the state had relevant information and defense counsel sought to withhold that information from the jury. (See *Id.* at 365); 3) The prosecutor improperly asked questions calling for the witness to engage in speculation about

failure to address these thirteen (13) specific arguments undermines its "conclusion" that the prosecutor did not commit misconduct and Appellant's constitutional rights were not violated. As shown in the Opening Brief and below, the prosecutor asked the witnesses impermissible questions that sought testimony expressly ruled inadmissible by the trial court, including: 1) opinions about the nature of the crime; 2) speculation about the victim's thoughts in the last minutes of her death; 3) expressions of fear about the witnesses' personal safety; and 4) the victim's specific travel plans. The prosecutor continued to delve into these areas even after objections had been sustained and exacerbated the misconduct. The prosecutor was looking for any opportunity to parade these items before the jury regardless of their admissibility.

B. Appellant's Arguments are not Procedurally Defaulted.

Appellant recognizes that as a general rule he "may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the

---

emotional but irrelevant matters. (See *Id.* at 367); 4) The trial court erred by failing to instruct the witnesses to limit the scope of their testimony. (See *Id.* at 371); 5) The prosecutor acted unethically by failing to control his witnesses, through the use of leading questions, despite his affirmative duty to do so. (See II AOB 372); 6) The prosecutor impermissibly asked irrelevant questions that called for hearsay in order to cajole defense objections. (See *Id.* at 375-76); 7) The prosecutor's questions went well beyond their offer of proof regarding the victim impact testimony. (See *Id.* at 376); 8) The prosecutor improperly refused to follow the trial court's requirement that he ask leading questions. (See *Id.* at 378); 9) The defense should not have been penalized because the prosecution failed to control their witnesses. (See *Id.* at 380); 10) The prosecutor improperly engaged in a pattern or course of misconduct, which cumulatively, violated Appellant's right to a fair trial. (See *Id.* at 382); 11) The trial court did not apply the proper standard in denying Appellant's mistrial motions. (See *Id.* at 384); 12) The prosecutor willfully violated court orders by refusing to instruct witnesses as to inadmissible areas of testimony. (See *Id.* at 385); and 13) The prosecutor exacerbated the prejudice resulting from the victim impact testimony by using it during his closing argument in the penalty phase. (See *Id.* at 387).

same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1072 (citations omitted)). However, as this Court noted in *People v. Hill*:

> The foregoing...is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. In addition, failure to request the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct. Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.

(*Hill, supra,* 17 Cal.4th at 820-821 (citations omitted)).

Here, as in *Hill*, there was rampant prosecutorial misconduct aimed at forcing defense counsel into an "obstructionist" position by requiring repeated objections to prosecutorial questions. In Appellant's case, the prosecutor, from guilt phase opening arguments to penalty phase surrebuttal, sought to undermine the fairness of the proceedings and portray Appellant as obstructionist. The prosecutor's intentional course of misconduct forced Appellant to cast tens of objections per witness and tens of objections during each of the prosecution's arguments. In response, the trial court erroneously overruled the objections or failed to respond to Appellant's objections with a ruling. The Court entirely failed to correct the prosecutor's pervasive misconduct. In sum, Appellant's case represents an extreme example of pervasive and corrosive prosecutorial misconduct that persisted throughout the trial. (See *Riel, supra,* 22 Cal.4th at 1212).

Respondent mischaracterizes Appellant's arguments and the importance of *People v. Hill* in this case. Respondent contends that Appellant's arguments are based on the premise "that it matters not that the

prosecutor did not intend to elicit inadmissible evidence." (RB 263 (citing *Hill*, supra, 17 Cal.4th at 822-23 n. 1)). Respondent contends that this Court requires a showing that the prosecutor "intentional[ly] elicit[ed] [] inadmissible evidence" for a showing of prosecutorial misconduct. (RB 263). Respondent is wrong

In actuality, Appellant's assertions of misconduct are based on bad-faith conduct, intentional misconduct, and inadvertent misconduct by the prosecutor. Under *People v. Hill*, 17 Cal.4th 800, 822-23 n. 1, while bad-faith conduct is not required for a showing of prosecutorial misconduct, and this Court made clear that a showing of prosecutorial error, in overstepping prior court orders or constitutional limitations will suffice for a showing of misconduct. (*Ibid.*). Contrary to Respondent's assertions, *People v. Smithey* does nothing to rearrange the required showing for prosecutorial misconduct. (See *Smithey*, *supra*, 20 Cal.4th at 961 (citations omitted)). Respondent is simply wrong to argue that Appellant's claim fails because no showing of prosecutorial intent has been made because: 1) Appellant has proffered sufficient evidence demonstrating malfeasant prosecutorial intent; and 2) only a showing of prosecutorial error is required.

C. The Prosecutor Committed Pervasive and Continuous Misconduct during Presentation of the Victim Impact Witnesses.

This Court has not been presented with a case involving the degree of rampant misconduct as evinced in Appellant's case. (Compare *Riggs, supra,* 44 Cal.4th at 248, and *Leonard*, *supra*, 40 Cal.4th at 1370). In *Riggs* and *Leonard*, the defendants' misconduct claims were based on allegations that the prosecution committed misconduct during the penalty phase by exploiting victim impact evidence. (See *Riggs, supra,* 44 Cal.4th at 322; and *Leonard, supra,* 40 Cal.4th at 1416). Here, in Appellant's case however, the misconduct occurred during the taking of victim impact

testimony and despite contemporaneous objections made by defense counsel.

Respondent argues that Appellant "is simply wrong when he contends the prosecutor 'deliberately' and 'willfully' 'committed pervasive and continuous misconduct' by asking questions of certain of his penalty phase witnesses involving areas expressly ruled inadmissible by the trial court." (RB 252). According to Respondent, "a review of the record refutes Appellant's assertions that the prosecutor 'deliberately,' 'pervasively' and 'continuously' sought to elicit inadmissible victim impact evidence at the penalty phase." (*Id.* at 264). Respondent argues that: (1) the court ameliorated any prejudice by striking the witnesses' answer (2) no prejudice occurred because the court sustained defense objections and the witness did not answer and (3) the prosecution cannot be held responsible for nonresponsive answers. (See *Id.* at 253, 256, 257, 262, and 263).

First, notwithstanding Respondent's penchant for blaming the witnesses for being nonresponsive, the state's arguments do not rebut Appellant's assertion that the prosecutor intended to commit misconduct. Respondent's arguments instead, seek to minimize the prejudice resulting from the prosecutor's inflammatory course of misconduct. Moreover, in a case involving a prosecutor's systematic attempts to prejudice the criminal defendant and earn objections, none of Respondent's arguments have merit.

During the prosecutor's examination of the Olsson family, the defense was forced to object twenty-eight (28) times. Twenty five (25) of the defense's objections were sustained. (See II AOB 382). Under such circumstances, the court's instructions to the jury, indicating that they should ignore the prejudicial answers elicited by the prosecution, failed to ameliorate the prejudice stemming from the prosecution's course of conduct. The testimony that the prosecutor managed to elicit despite the defense objections was extremely prejudicial. Even where objections were

sustained, it would be difficult for the jurors to put the witnesses' testimony out of their minds. By the time of closing argument, it would have been impossible for them to recall which testimony had been stricken out of all that was presented.

Second, the prosecution's actions prejudiced Appellant by requiring defense counsel to take an "obstructionist" position. As recognized by this Court in *Hill*, the prosecutor's conduct thrust Appellant upon "the horns of the dilemma" by requiring him to repeatedly object, and risk provoking the trial court and jury's wrath, or fail to object to the prosecutor's clear misconduct. (*Hill, supra,* 17 Cal.4th at 820-821).

Third, Respondent's argument that every witness presented by the prosecution was "nonresponsive" unfairly blames the witnesses for a situation that the prosecutor created and could have corrected. Either the prosecutor talked to his witnesses beforehand and knew what the witnesses would say, or he did not prepare them adequately to know what they would say and to caution them about the scope of the court's ruling. However, the prosecutor never stated that he had counseled the witnesses about the scope of permissible testimony or cautioned them about impermissible areas of testimony. Thus, as defense counsel correctly argued, Appellant "should not be penalized because [the prosecutor] puts witnesses on and does not control them." (RT 3493). Instead, it is the prosecutor who bears the burden and risk should the state's witnesses fail to comply with the trial court's limiting orders:

> The district attorney knew, or should have known, the testimony the officer was going to give and should have warned him not to make the statement. Every prosecutor who offers a witness to testify to a conversation with an accused should know what the witness will relate if given a free hand. The prosecutor has the duty to see that the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would

also be prejudicial.

(*Baker, supra,* 147 Cal.App.2d at 324 (quoting *People v. Bentley* (1955) 131 Cal.App.2d 687, 690)).

In this case, the trial judge specifically told the prosecutor to make sure that his witnesses would not volunteer inadmissible statements. (RT 3403). The prosecutor did not follow the trial court's orders, and the witnesses made statements that the judge had already ruled inadmissible because they were prejudicial. Respondent says that the prosecutor could not have known what his witnesses would say. This, however, is not a valid excuse when a prosecutor's witness makes inadmissible prejudicial statements. (See *Baker*, *supra*, 147 Cal.App.2d at 324-25 ("A claim of ignorance on the part of the prosecutor as to the testimony the witness would give cannot be reconciled with the affirmative duty of fairness in the trial to which prosecutors must be alert at all times.")). Regardless of whether the prosecutor intentionally elicited inadmissible testimony, he was responsible for what his witness said and his actions constituted misconduct.

1. The Examination of Sandra Walters.

According to Respondent's count, during the prosecution's examination of Sandra Walters, defense counsel lodged eleven (11) objections. Respondent argues that only five of these objections may be heard on appeal because they are related to objections based on prosecutorial misconduct. (See RB 252). In either case, the frequency of these objections proves the prosecutor's pattern of misconduct and intent to circumvent court orders and inflame the jury. (See II AOB 364-67). Moreover, the frequency proves that Appellant has correctly invoked the exception under *Hill* to the contemporaneous objection rule based on the prosecution's repeated course of misconduct. (See *Hill, supra,* 17 Cal.4th at

820-821.

Respondent is wrong to argue that Appellant's objections to four incidents of misconduct have been waived for failure to object at trial. Respondent incorrectly argues that Appellant's challenges to the following prosecutorial questions are barred: 1) "When you say she made you the person you are today, what do you mean by that?;" 2) "Has her murder had an impact on your relationships with people?;" 3) "In what way has the manner of your mother's death had an impact on your relationships with other people?;" and 4) "In what way has your mother's death impacted you even after all these years?" (See *Id.* at 254-55). Respondent's forfeiture argument does not discuss Appellant's citations and reliance upon *People v. Hill.* Throughout the victim impact testimony, the prosecutor sought to make the defense object and appear callous to the family members as well as obstructionist to the court, and most importantly, the jury. Under these circumstances, Appellant is excused from the legal obligation to continually object, state the grounds of his objection, and ask that the jury be admonished. (See *Hill, supra*, 17 Cal.4th at 820-821; *Arias, supra*, 13 Cal.4th at 159; and *Noguera, supra,* 4 Cal.4th at 638).

Respondent argues that prosecutorial questions to Sandra Walters regarding her mother's desire for grandchildren did not constitute misconduct or prejudice based on its belief that "[h]ow Olsson felt about the possibility of grandchildren was not a prohibited victim impact subject." (RB 252 (citing RT 3401-02)). If the evidence was not prohibited, Respondent fails to explain why the trial court sustained a defense objection for relevancy. (RT 3427). Moreover, Respondent fails to rebut Appellant's showing of prejudice resulting from this specific incident, particularly when the prosecutor's later exploitation of the witnesses' feelings of guilt during his closing argument is considered.

Respondent argues that the prosecutor's questions to Walters

regarding her "relationships with others after her mother's death" did not constitute misconduct or cause prejudice based on its view that "the prosecutor was exploring a permissible subject; the impact to a child caused by the loss of a parent," and no prejudice occurred since the witness did not answer the question. (RB 253). Far from exploring a permissible subject of inquiry, the particular question at issue here sought to interject value laden testimony about the witness' sense of safety for herself and her family in violation of the trial court's order. (RT 3401-02). Moreover, Respondent does not address Appellant's argument that the fact that the prosecutor purposefully returned to this prohibited theme in his redirect examination proves his intent to circumvent the court's orders and commit misconduct.[116]

Respondent argues that the prosecutor's questions, seeking to get "any more information about...what had happened to your mother," did not constitute misconduct or prejudice Appellant's constitutional rights because there is no "misconduct in asking Walters to describe the events leading her to the discovery of the circumstances surrounding her mother's death," and no prejudice accrued to Appellant because the trial court struck the answer. (RB 253). Here again, however, Respondent ignores the fact that the question was well beyond the court's orders, since the trial court sustained defense objections (time after time). Respondent also ignores the prosecutor's exploitive use of the inflammatory evidence during the closing arguments in the penalty phase.[117]

---

[116] On redirect, the prosecutor asked: "You indicated that you had some difficulty being intimate. What do you mean by that?" Walter's answered: "It's very hard for me to be close with somebody. I prevent myself to be close enough to love somebody because I'm afraid they're going to go away like my mother did." (RT 3439).

[117] The prosecutor also read Walter's testimony about her fear for her own safety to the jury during his argument, even though it was

Finally, Respondent argues that prosecutorial questions about Ms. Olsson's breast cancer and biopsy were not misconduct and did not prejudice Appellant's constitutional rights because the "context makes clear that the prosecutor had not attempted to elicit inadmissible evidence but merely posed questions concerning, the impact of the nature of the death here as distinguished from accidental death or death from other causes." (RB 254). By asking these questions, the prosecutor elicited inadmissible testimony. The invitation for Walters to speculate about whether she would have preferred to see her mother die of cancer was not designed to elicit the impact of what actually happened. Furthermore, the testimony does not describe the impact the death of Ms. Olsson had on Sandra Walters.

2. The Examination of Trip Walters.

According to Respondent's count, defense counsel lodged nine (9) objections during the direct examination of Trip Walters, six (6) of which included objections on grounds related to misconduct. (RB 255). In truth, all of Appellant's objections may be considered in evaluating the prosecutor's pattern of misconduct and intent to circumvent the trial court's orders whether or not they are preserved for Appellate review. That includes the thirty-seven (37) instances where objections were raised and (the bulk of which were sustained by the trial court) during the presentation of the state's victim impact evidence. (See II AOB 362).

Respondent claims that one of Appellant's objections and arguments on appeal has been forfeited for failure to object on grounds related to misconduct at trial. Respondent thus feels that Appellant cannot argue that the prosecutor committed misconduct when he asked, "Is there any difference if you had lost her as a result of that cancer or some other illness as opposed to the fact that she was murdered?" (RB 257 (citing RT 3448-

---

expressly outside the court's ruling on admissible victim impact testimony. (RT 3745).

49)). Here, as above, Respondent's forfeiture argument wholly fails to discuss *People v. Hill*. Under the circumstances of Appellant's case, the pervasiveness of the prosecutorial misconduct has excused his defense counsel from the legal obligation to continually object, state the grounds of his objection, and ask that the jury be admonished. (See *Hill, supra,* 17 Cal.4th at 820-821).

Respondent says that no misconduct occurred when the prosecutor asked Trip Walters about "how he felt going into his mother's home for the first time after her murder." (RB 256). Walters' testimony in response provided a particularly harrowing description of the circumstances of the crime. Respondent wrongly blames the witness for the prejudicial answer and defense counsel for failure to request that the answer be stricken. (*Ibid.*).

Walters' testimony was unrelated to victim impact evidence or factors unrelated to the impact the loss of Ms. Olsson had on her life or Ms. Olsson's character. Walter's response was duplicative of the prosecution's guilt phase case and unduly prejudicial. More importantly, it did not match the proffer offered by the prosecutor or fit within the trial court's victim impact orders.

Respondent claims that no misconduct occurred when the prosecutor asked Trip Walters about moving from Greenville, Mississippi to Marin, California. (RB 256). Respondent concedes that the answer "touched on the inadmissible area of Olsson's military service." (*Ibid.*).[118] Respondent concedes that the trial court sustained two relevancy objections to related

---

[118] Respondent concedes that, in response to the prosecutor's questions, Mr. Walters testified about several areas of inadmissible evidence before an objection could be voiced. For example, the jury learned that Ms. Olsson collected dolls when she was "stationed over in Japan and Korea in the service," and that Elbert had given her a collection of over 200 turtles throughout his childhood. (RT 3443).

questions here. (*Ibid.*). However, Respondent again wrongly blames defense counsel for not having the irrelevant evidence stricken from the record. (*Ibid.*). The trial court's ruling, sustaining defense objections on grounds of relevancy, validates Appellant's arguments that the prosecutor repeatedly sought to commit misconduct and thus, this case is analogous to *People v. Hill,* where the prosecutor's pattern of misconduct rendered a curative instruction meaningless to cure the prejudice resulting from the prosecutor's questions and the witness's answers. (See *Hill, supra,* 17 Cal.4th at 820-821).

The prosecutor's question sought to elicit testimony regarding several areas of inadmissible evidence before an objection could be voiced. In particular, the question sought to introduce evidence about Ms. Olsson's military service and leisure time. This was despite the trial court's express ruling prohibiting such evidence. (RT 3401). These instances reveal the prosecutor's persistent attempts to place highly prejudicial evidence in front of the jury. This was despite the fact that the prosecutor knew that the subject matter had been expressly excluded by the trial court.

Respondent argues that the prosecutor did not commit misconduct when he asked Trip Walters "is there any difference if you had lost her as a result of that cancer or some other illness as opposed to the fact she was murdered?" (RB 257 (citing RT 3448)). Respondent wrongly asserts that "Appellant is challenging only the answer, not the question. (RB 257). Respondent blames Trip for giving a "nonresponsive answer." (*Ibid.*). The fact that the prosecution repeatedly asked this question of witnesses demonstrates the prosecutor's efforts to have witnesses testify as to the circumstances of Ms. Olsson's death. Here, like above, the prosecutor was responsible for controlling his witnesses and preventing their prejudicial answers. (See *Baker, supra*, 147 Cal.App.2d at 324). This situation could have been cured had the prosecutor communicated the trial court's orders to

the witnesses prior to the examination. Even in the absence of any restrictions, questions seeking to goad the victim impact witnesses into providing emotional responses to the circumstances of the crime are highly prejudicial, inadmissible, and indicative of prosecutorial misconduct.

3. The Examination of Jan Dietrich.

According to Respondent's count, Appellant lodged seventeen (17) objections during the prosecution's examination of Jan Dietrich. (RB 258). Of these objections, Respondent feels that only ten (10) were on grounds related to misconduct. (*Ibid.*). Respondent errs in its count and analysis. Moreover, although not all incidents were alleged as misconduct on appeal, in Appellant's opening brief, twenty-four (24) instances of misconduct were referenced as proof of a pattern or prosecutorial misconduct and prosecutorial intent to circumvent the trial court's orders. (See II AOB 370-76).

Respondent says that Appellant's first arguments of misconduct, which stem from the prosecutor's questions urging Dietrich to "answer that she had been afraid her father would die from shock upon learning of Olsson's murder" should fail due to lack of a contemporaneous objection. (RB 262 (citing RT 3461-63)). Respondent continues to wholly ignore the similarities between Appellant's case and *People v. Hill,* where, as here, the pervasiveness of the prosecutorial misconduct at hand excuses defense counsel from the legal obligation to continually object, state the grounds of his objection, and ask that the jury be admonished. (See *Hill, supra,* 17 Cal.4th at 820-821).

Respondent argues that the prosecutor did not commit misconduct by asking Dietrich: "Did you get a sense of the professional esteem [Ms. Olsson] was held in?" (RB 258). Respondent wrongly claims that the trial court's prior rulings allowed the question. (*Ibid.*). In Respondent's view,

the fact that the trial court sustained the objection is irrelevant and "inexplicable." (*Ibid.*). Moreover, Respondent argues that because the question went unanswered, Appellant did not suffer any prejudice. (*Ibid.*).

Respondent's attacks on the trial court's ruling are unavailing. The prosecutor's question clearly sought to violate the trial court's guilt phase and penalty phase orders. (See Claim VIII - The Trial Court's Error and Prosecutorial Misconduct Resulted in the Improper Introduction of Victim Impact Evidence at the Guilt Phase). Similarly, the fact that the question went unanswered does not cure prejudice to Appellant's constitutional rights. First, the question itself presupposes a positive answer, so the question itself offered evidence regarding a topic already declared outside of the limits of victim impact testimony. Second, defense counsel was still required to object and cause prejudice to his client by appearing obstructionist towards the court and callous towards the victim family members.

Respondent says that the prosecutor did not commit misconduct by asking Dietrich "when you go to your father's home in Topeka, Kansas, the concerns that you had, what was he doing when you saw him?" and "aside from finding a funeral parlor, what else did that entail?" (RB 258 (citing RT 3462)). Respondent tries to justify its conclusion because "no answer was given to the question means no prejudice flowed to Appellant..." (*Ibid.*). Respondent also uses this faulty reasoning to wrongly argue that no misconduct occurred when the prosecutor asked Dietrich about the presence of police at her mother's funeral, and asked: "On Wednesday, following your father's birthday, what transpired at that point?" (RB 259 (citing RT 3467-68)). Not only did misconduct occur in each of these instances, but also the prejudice to Appellant increased. By requiring the defense to make repeated objections in response to each of these questions, the prosecutor caused particular harm to Appellant's constitutional rights. The

prosecution's tactic directed the jury's attention to the objectionable testimony "serv[ing] to impress upon the jury its damaging force." (*People v. Kirkes* (1952) 39 Cal.2d 719, 726; see also *People v. Pitts* (1990) 223 Cal.App.3d 606, 809).

Respondent claims that the prosecutor did not commit misconduct by asking Dietrich: "With regard to your sister, given the manner in which she died, are there any thoughts that constantly reoccur?" (RB 259 (citing RT 3472)). Respondent concedes that the question "referenced matter deemed inadmissible by the trial court." (*Ibid.* (citing RT 3402)). Respondent says that the "question did not ask for the victim's thoughts, but permissibly asked for the *witness's* thoughts on how her sister's murder, as opposed to another type of death, had impacted her." (*Ibid.*). Respondent says that the prosecutor's question is too vague to convey intent. (*Ibid.*).

Respondent's arguments mimic those offered by the prosecutor in response to the defense motion for mistrial. (Compare RB 259; with RT 3480). There, the prosecutor "indignantly" claimed that he had not violated the order because he had asked what "[the witness] thought the thoughts were of the victim," rather than asking what the victim's thoughts were. (*Ibid.*). The prosecutor then attempted to justify asking about the victim's "spirit" leaving her body, arguing that it had "nothing to do with asking for the thoughts of the victim," but rather had to do "with when she could no longer be experiencing what she was experiencing at the hands of this defendant." (*Ibid.*).

These arguments make plain the subterfuge of the trial prosecutor. Whether or not the question addressed the witness' thoughts, it still required impermissible speculation *into* the victim's thoughts. Asking a witness what she thought about someone else's thoughts is even more speculative and objectionable than asking a witness what someone else's

thoughts were at some point in time.[119] Although both questions were objectionable and impermissible, the latter question calls for an opinion or judgment *in addition* to pure speculation. The prosecutor's intent to commit misconduct and violate the trial court's orders is further proven here by the prosecutor's closing argument and exploitation of the highly prejudicial testimony. (See RT 3630-3634).

Respondent says that the prosecutor did not commit misconduct during the conclusion of his examination of Dietrich. (RB 261). Respondent concedes that the witness's answers "ventured into areas foreclosed by the trial court's earlier ruling," but it again wrongly blames the witness for giving nonresponsive answers. (RB 261-62). Respondent's lengthy citation to the record proves the validity of Appellant's arguments. (RB 259-61 (citing RT 3473-76)). There, on four separate occasions, defense counsel objected to the prosecutor's line of questioning. Nevertheless, the prosecutor continued his course of misconduct, attempting to goad the witness into emotional outbursts by repeatedly asking her what she thought Ms. Olsson went through "in the last fifteen minutes of her life." (*Id.* at 3476). The prosecutor sought to interject emotional testimony into the proceedings despite the fact that the trial court had previously and repeatedly found the state's line of questioning irrelevant and beyond the court's orders. Dietrich's emotional response was plainly outside the scope of the court's ruling on admissible testimony

---

[119] Although he could not present evidence about Ms. Olsson's thoughts, the prosecutor argued to the jury: "You have to imagine the terror and pain and the horror and the fear and the anguish and the revulsion, all those emotions she went through; you have to do that. . . . The manner in which she died and what was going through her head, you have a duty to mentally visualize what he put her through. You have a duty to vicariously feel what was going on in those minutes that she was forced to be with him. You have to do that. You have to do that in order to do justice in this case. You absolutely have to . . . ." (RT 3726-27).

and misled the jury into voting on the penalty based on their emotional response to the homicide.

4. The Examination of Clifford Sandberg.

Respondent concedes that all defense objections raised during Mr. Sandberg's testimony incorporated arguments of misconduct and that all of Appellant's assignments of error related to Mr. Sandberg's testimony have been properly preserved. (See RB 262-63). However, Respondent wrongfully argues that none of the objections have merit.

Respondent says that the prosecutor did not commit misconduct by asking Mr. Sandberg: "Basically you were in the stage of - was it a car you were going to buy, or some other, like a van..." (RB 262-63 (citing RT 3486)). Respondent says that because the question was interrupted by an objection, which was sustained by the court, no prejudice resulted to Appellant. (*Id.* at 263). Respondent is wrong. "It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony" (*Bonin, supra*, 46 Cal.3d at 689 (overruled on other grounds in *Hill, supra,* 17 Cal.4th at 823 n. 1) (citations omitted)). It is far worse where the prosecutor continues to attempt to elicit the evidence after defense counsel has successfully objected. (See *Bell, supra,* 49 Cal.3d at 532).

Here, as part of a pattern of ongoing misconduct the prosecutor intentionally sought to elicit inadmissible testimony from Mr. Sandberg. Respondent errs in saying that the prosecutor did not commit misconduct by asking Mr. Sandberg: "With regard to losing [Ms. Olsson] has her death been different in its effect on you, given how she died?" (RB 263 (citing RT 3487)). Respondent concedes that the witness, in response, stated that his daughter had been "tortured" (*Ibid.*), but claims that no prejudice inured to Appellant due to the question because the trial court sustained defense counsel's objections and struck the witness' answer. (*Ibid.*). Respondent

argues that there "is no indication [the prosecutor] purposefully elicited the "torture" answer" and that the prosecutor's "line of inquiry" was justified by the trial court's orders. (*Ibid.*).

The state did not present evidence to show that Ms. Olsson was tortured. Moreover, Appellant had not been charged with torture, the torture special circumstance had not been alleged, and the torture murder theory had not been pled or argued at the guilt phase.[120] Because he had seen no evidence of torture, Sandberg could only have had this idea suggested to him by someone who had information about how the murder was committed. The jurors likely inferred from Sandberg's statements that the police and prosecutor knew that this was what happened and that information about how the crime was committed was being kept from them due to a legal technicality.

D. Appellant's Constitutional Rights were Prejudiced by the Repeated and Flagrant Prosecutorial Misconduct.

The prosecutor's misconduct was reprehensible, violated state law, and "so infected the trial with unfairness as to make the resulting [death sentence] a denial of [federal] due process." (Contra *Donnelly, supra,* 416 U.S. at 643). Prosecutorial misconduct at the penalty phase constitutes reversible error under state law where there is a reasonably possibility that, absent the misconduct, the jury would not have sentenced the defendant to death. (See *Brown, supra*, 46 Cal.3d at 448). Where, as here, federal constitutional error is involved, the burden shifts to the state 'to prove beyond a reasonable doubt that the error complained of did not contribute

[120] Defense counsel also raised several additional objections to Sandberg's testimony: (1) that "torture" has a specific legal meaning; (2) that there was no evidence of torture in the legal sense; and (3) that the witnesses' statement that he "knows" his daughter was "tortured to death" would suggest to the jury that, in the absence of trial evidence, he had learned this information from the police or the prosecutor. (RT 3493 and 3496).

to the verdict obtained." (*Bolton, supra,* 23 Cal.3d at 214 (citing *Chapman, supra*, 386 U.S. at 24)).

Respondent says that Appellant was not "prejudiced, either singly or cumulatively." (RB 264). Respondent feels that "[b]y parity of reason, in no way did the misconduct rise to the level of a due process violation in that the prosecutor's challenged questions rendered Appellant's penalty trial fundamentally unfair." (*Ibid.*). Respondent claims that "many of the prosecutor's questions upon which Appellant focuses yielded no answer. No harm no foul." (RB 264). Respondent believes that the court cured any prejudice by striking witnesses' answers and instructing the jury. (*Id.* at 264-65). Respondent asserts that "there is no merit to Appellant's contention that the prosecutor placed the defense 'in the position of constantly interrupting the already sympathetic and vulnerable family members of the victim." (*Id.* at 265). Respondent concludes that because the "aggravation evidence clearly outweighed the defense case in mitigation," there "exists no reasonable possibility the jury would have reached a different penalty verdict ...." (*Ibid.*). Respondent is wrong in all respects.

First, Respondent wrongly cites to *People v. Valdez* in support of its argument that the "no harm no foul test controls." In *People v. Valdez,* this Court reiterated the holding of *Darden v. Wainwright,* and also stated that "conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Valdez, supra,* 32 Cal.4th at 122). Therefore, whether conduct by a prosecutor rises to the level of misconduct has a twofold analysis. The first is whether the conduct denied the defendant due process. (See *Darden, supra*, 477 U.S. at 181). If the defendant was not denied due process, the second inquiry – under California state law - is whether the

conduct was reprehensible on the part of the prosecutor. (See *Valdez, supra,* 32 Cal.4th at 122).

Here, the misconduct by the prosecutor prohibited Appellant from receiving a fundamentally fair trial and violated the due process clause of the Fifth and Fourteenth Amendments, as well as, Article I of the California Constitution. The trial prosecutor's misconduct infected the penalty phase proceedings with prejudice. The prosecutor utilized inadmissible and damning testimony in argument and further exacerbated the inflammatory nature of the evidence.[121]

Second, the conduct on the part of the prosecutor was malicious. The prosecutor repeatedly disregarded the judge's ruling to ask leading questions. (RT 3424, 3426, 3427, 3428, 3430, 3433, 3434, 3446, 3448, 3449, 3458, 3460, 3462, 3462, 3466, 3469, 3470, 3473, and 3475). The prosecutor expressed a lack of care for the number of times trial counsel had to object. (See II AOB 384). The prosecutor repeatedly sought to introduce inadmissible evidence, including hearsay evidence and evidence the trial court had already excluded, in order to get defense counsel to

---

[121] The prosecutor reinforced the power of this prohibited evidence by expressly and repeatedly bringing it to the jury's attention during his closing argument: 1) Monday is the funeral, a time for family and friends to get together . . . there should at least be a sense of privacy. But the police are there. I mean, even at her funeral, you can't really forget what happened. (RT 3750); 2) And again, can you just group to yourselves and have support? Well you've got the news camera out there on the third tee or third hole . . . The news camera out there with the big telephoto lens, and it's zooming right into the house to see what they can see. Even if it is not filming, the fact that it's there, just is this constant – I mean there is nothing natural about this. And it can't be ignored. (RT 3652); 3) Not only do you start the packing, you clean up. Do you ever think about that? A crime occurs in somebody's home, and the police have to go there; right? . . . You know they put fingerprint powder over everything, everything. (*Ibid.*); and 4) Do you ever think, who cleans up his mess? He's the one that does all this. He's the one that created it. Who cleans up his mess? Not him. It's the family. (RT 3753).

object. Time and time again defense counsel objected and the trial court sustained the objection. (See e.g., II AOB 362-81).

Undaunted, the prosecutor continued asking broad, open-ended questions -- questions that were designed to draw objections and make the defense appear callous, cruel and without regard for the victim and her family.[122] Defense counsel pointed out that "it is extremely destructive" to be in the position of objecting constantly during the testimony of the victim's family. (RT 3483). During the prosecutor's examination of the four Olsson family members, the defense was forced to object no fewer than twenty-eight (28) times. Twenty-five (25) of these defense objections were sustained. (See II AOB 382). The objections were based on both the form of the questions, and the prosecutor's violation of the court's prior orders requiring leading questions, as well as, to the content of the questions and the answers they were designed to elicit. Although virtually all of the defense objections were sustained, the prosecutor put the defense in the extremely prejudicial position of having to constantly interrupt the emotional testimony of Ms. Olsson's family with objections, thereby alienating the jury against Appellant and highlighting the very evidence it sought to exclude.

Significantly, Respondent errs in arguing that the weight of the evidence in aggravation so significantly outweighed the evidence in mitigation that no material prejudice is cognizable. Here, again, Respondent fails to take note of the evident fact that Appellant is not "the worst of the

---

[122] The prosecutor highlighted this point when he referred to the defense during his closing argument. He argued that: "You know, this filth took everything, everything that Sandy Olsson had. He took everything, and he took everything that she ever would have. And you know he's still not finished taking, he still wants more from her. *Through his attorneys, he wants to take away from her, her status as a victim in this case. . . . If you do give him his life, justice will weep, just as the family of Sandy Olsson has wept for the last 6 years."* (RT 3635 (emphasis added)).

worst" on California's death row. In fact, Appellant is not the worst of the worst sentenced to death in Alameda County in cases recently decided by this Court. (See *Zambrano, supra,*, 41 Cal.4th at 1082 (defendant convicted of one murder and two attempted murders); *Bonilla, supra,* 41 Cal.4th at 313 (defendant convicted of one murder for financial gain with lying in wait special circumstance); *Stevens, supra,* 41 Cal.4th at 182 (defendant convicted of four murders and six attempted murders); *Martinez, supra,* 47 Cal.4th at 399 (defendant convicted of two murders and committing a lewd act with a child); *Friend, supra,* 47 Cal.4th at 1 (defendant convicted of one murder with twenty-nine matters in aggravation separately alleged); *Dykes, supra,* 46 Cal.4th at 731 (defendant convicted of one murder and one attempted murder); *Tate, supra,* 49 Cal.4th at 635 (defendant convicted of robbery-murder and two prior incidents of assault on police officers); and *Lynch, supra,*– Cal.Rptr.3d -- (defendant convicted of three counts of first degree murder with special circumstances, five counts of burglary, four counts of robbery based on incidents involving elderly suspects)).

Respondent wholly fails to recognize that the prosecution's entire penalty phase case rested upon the victim impact evidence, the direct examination of which comprises forty-six (46) pages of the fifty-four (54) pages the state's entire direct penalty phase presentation. (See II AOB 364). Victim impact testimony consisted of eighty-five (85%) of the state's penalty phase case. Thus, inflammatory and prejudicial victim impact evidence elicited by the prosecutor served as the strength and basis of the state's penalty phase case.

E. The Trial Court Erred by Denying Appellant's Motion for Mistrial.

After the testimony of the first two victim impact witnesses, the defense requested a conference outside the presence of the jury. The defense complained to the trial court that the prosecutor was forcing them

to make a continuing series of objections to open-ended questions calling for narrative answers. (RT 3483). The defense objected to the cumulative nature of the questions. (RT 3453). Defense counsel requested that the prosecutor ask narrower questions or that he ask leading questions, as previously instructed by the trial court. The trial court concluded with this warning:

> So all I am going to do at this point is reiterate what I already asked you in terms of my ruling where certain areas have been ruled inadmissible, and where a question very naturally and inadvertently, on the part of a witness, could invite a response that would be inconsistent with my rulings, it is in those areas that we have covered at some length that I am requesting that you ask leading questions wherever possible, subject to objection by the other side.

(RT 3457).

Following Dietrich's testimony, the defense moved for a mistrial based on the prosecutor's repeated questions asking for the thoughts of the victim in the last moments of her life. (RT 3478). The defense argued that the court had ruled such testimony inadmissible, and that the questions were so prejudicial that they could not be cured by admonition. The prosecutor argued that the witness was nonresponsive. While the trial court acknowledged they were in a "difficult" situation, it accepted the prosecutor's "explanation" and found that there was no "deliberate disregard" of its rulings. (RT 3481). It noted that the defense had timely objected and that it believed the jury had been admonished to disregard each answer, as reflected on the record. (*Ibid.*). In fact, the court had not instructed the jurors to disregard Dietrich's answers. It then denied the mistrial motion. (*Ibid.*). This ruling was erroneous.

The defense renewed its motion for a mistrial following Sandberg's testimony. (RT 3490). The motion was based on the question that elicited

Sandberg's opinion that his daughter had been tortured before her death, and the cumulative harm caused by the prosecutor's refusal to follow the court's order. (See RT 3490-3491). The defense argued that the prosecutor's conduct "flew in the teeth of the court's ruling." (*Id.* at 3490). Although the court struck Mr. Sandberg's testimony *sua sponte*, defense counsel said he had not requested an admonition because it would not cure the harm. (*Id.* at 3490). He noted that, up until the very conclusion of Sandberg's testimony, the prosecutor had not asked leading questions, and his failure to do so was particularly suspect of intentional misconduct. The trial court denied the defense motion for a mistrial "based on the totality of the circumstances here– your record is certainly clear at this time– I deny the motion for mistrial." (*Id.* at 3498).

First, Respondent tries to justify the trial court's denial of Appellant's motion for mistrial by blaming prosecutorial witnesses for giving "nonresponsive answers." (RB 262). Here, like before, the prosecutor is responsible for those answers, despite Respondent's claim of ignorance. (See *Baker, supra,* 147 Cal.App.2d at 324). Further, Respondent misinterprets *People v. Smithey* in arguing that "it is the prosecutor's intentional elicitation of inadmissible evidence that constitutes misconduct." (RB 263) *Smithey* actually emphasizes that "it is, of course, misconduct for a prosecutor to intentionally elicit inadmissible testimony," but misconduct may come in several forms. (See *Smithey, supra,* 20 Cal.4th at 960). Therefore, the defense does not need to show that the prosecutor acted intentionally in this case, beyond its showing that the prosecutor failed to abide by the trial court's orders or direct the state's witnesses to abide by the trial court's orders.

Second, the trial court did not make a finding regarding the prosecutor's intent, (See RT 3497-3498), and Respondent does not quote any language in the court's mistrial ruling that so indicates. (RB 250-66).

In failing to do so, the trial court did not apply the proper standard in denying the mistrial motions under *People v. Hill* and *People v. Smithey*. The trial court never addressed the defense's argument that the prosecutor had failed to follow its orders to ask narrow or leading questions, or to otherwise control his witnesses. In sum, the trial court failed to hold the prosecution to its prior orders despite the repeated instances of misconduct. In so doing, the trial court's order denying Appellant's motion for mistrial was therefore made in error.

F. Conclusion.

The prosecutor's misconduct played a large part in the jury's verdict. The jury deliberated for three days, a strong sign that, absent the state's misconduct, a life verdict was likely. Viewed alone, or in conjunction with the numerous other acts of misconduct committed by the prosecutor during the penalty phase, the prosecutorial misconduct here was pervasive, egregious, reprehensible, and prejudicial. It violated Appellant's rights to due process, a fair trial, and a fair and reliable penalty verdict, in violation of state law, Article I of the California Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellant's death sentence must be reversed.

XVI. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING THE PENALTY PHASE ARGUMENTS.

A. Introduction.

During the penalty phase arguments, the prosecutor deliberately strayed from his constitutional and ethical duties by repeatedly engaging in misconduct. (See *Kirkes, supra,* 39 Cal.2d at 726; and *Hill, supra,* 17 Cal.4th at 831 n. 3). The misconduct began during his opening statement and extended through the final words of his closing argument. By the end of the prosecutor's argument, the circumstances of the crime as he described them bore no resemblance to the guilt phase evidence, the penalty phase evidence, or the facts as described to the jurors during *voir dire.*

Respondent claims that "many of Appellant's allegations of misconduct are forfeited, without merit, or both." (RB 267). Respondent asserts that "no conduct by the prosecutor prejudiced Appellant under state law or rose to the level of a prejudicial federal constitutional violation." (*Ibid.*). Respondent says that the acts, which occurred during the penalty phase opening argument, penalty phase opening summation, penalty phase closing argument, and penalty phase closing rebuttal were not misconduct. (*Id.* at 271). Respondent tries to argue against fifteen (15) instances of misconduct, and does not mention or defend against numerous other instances of misconduct raised by Appellant raised in his Opening Brief.[123]

---

[123] In support of his assertion that the prosecutorial misconduct during the penalty phase arguments violated his state and federal constitutional rights, Appellant raised thirteen (13) arguments that Respondent did not address: 1) The prosecutor committed prejudicial misconduct by referring to mitigation evidence as "all this garbage about the defendant" and, after the court sustained defense objections, referring to factor (k) evidence as an "open garbage can." (See II AOB 391); 2) The prosecutor violated ethical rules by failing to confine the assertions of fact in his opening Statement to those he intended to prove during the penalty

Respondent's omissions are significant. For example, as to item #5, a rape was never charged, alleged or proven in this case because the evidence was not sufficient to do so. According to the prosecutor, however, it was a fact proven beyond all doubt. The prosecutor graphically

---

phase. (See *Id.* at 393 (citing NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, *National Prosecution Standards* (2d. ed 1991) Commentary, stds. 76.1 & 2)); 3) The prosecutor committed misconduct and prejudiced Appellant's constitutional rights by improperly seeking to force repeated defense objections and make Appellant appear contentious, combative and secretive. (See II AOB 395); 4) The prosecutor committed prejudicial misconduct by arguing that Appellant's "callousness" should be considered as a faux "aggravating factor." (See *Id.* at 398); 5) The prosecutor committed misconduct by repeatedly arguing that Appellant should be sentenced to death for rape, though the allegation was not charged in the Final Information, as a special circumstance, in the notice of aggravation, or supported by *any* direct-physical evidence. (See *Id.* at 406); 6) The prosecutor committed misconduct by repeatedly arguing that Ms. Olsson "bargained" with Appellant even though the court had sustained objections to that theme as listed on the prosecutor's charts. (See *Id.* at 410); 7) The prosecutor committed prejudicial misconduct by arguing future dangerousness and specifically arguing that "You have to keep him on death row where he is isolated because he gets on the main line with all the other prisoners, with his life sentence, he has an American Express Platinum card to do violence at will." (See *Id.* at 415); 8) The prosecutor committed misconduct by arguing *post-crime* evidence of lack of remorse as a faux aggravating factor. (See *Id.* at 425); 9) The prosecutor committed misconduct and misstated the law by stating that remorse was a condition precedent to finding any mitigation. (See *Id.* at 425); 10) The prosecutor committed misconduct and misstated the law by converting the absence of a mitigating factor (lack of remorse) into an aggravating factor; (See *Id.* at 426); 11) The prosecutor's creation of two uncharged aggravating factors (callousness and lack of remorse) violated Appellant's rights to due process and a reliable penalty determination by injecting irrelevant and prejudicial evidence into the sentencing equation. (See *Id.* at 426 (citing *Wainwright v. Goode* (1983) 464 U.S. 78)); 12) The prosecutor committed misconduct by using Appellant's decision not to testify, and express remorse, as a reason to sentence him to death. (See II AOB 426); and 13) The prosecutor committed misconduct by telling the jury that Appellant did not wish to express remorse, when he knew that Appellant had proffered to allocute and to express remorse. (See *Id.* at 427 (citing *Napue v. Illinois* (1959) 360 U.S. 264, 270)).

invoked the "rape" as a factor aggravating the crime, telling the jurors: "You smell him; his body odor; his foul breath. He is on top of you grunting away, and he rams himself inside," and "you have to be conscious of what he is doing as he rams himself inside of you and defiles you" (3632-3633).

As to item #6 Respondent fails to rebut Appellant's showing that throughout the penalty phase, the prosecutor committed serious - and intentional - misconduct, and that the trial court erred by not taking actions to mitigate the prejudice to Appellant. For example, the prosecutor displayed a chart entitled "You Can't Forget Sandy Olsson," and including the caption "Did She Try to Bargain With Him" (Court's Exhibit #5).

As to item #7, the prosecutor's argument on the danger of sentencing Appellant to life was improper for several reasons. First, there was no evidence presented concerning the level of isolation afforded death row prisoners compared to life prisoners. Second, this Court has held that evidence of the conditions of confinement is irrelevant to California's capital sentencing scheme. (See *People v. Coddington* (2000) 23 Cal.4th 529, 636; *Ray, supra,* 13 Cal.4th at 352; *Osband, supra*, 13 Cal.4th at 713; and *People v. Lucas* (1995) 12 Cal.4th 415, 499). Third, it is misconduct to invoke considerations outside the proper weighing of proper statutory factors. (See *Gardner, supra*, 430 U.S. at 349; and *Miranda, supra,* 44 Cal.3d at 110). Fourth, the argument went far beyond any evidence that was presented – which was limited to testimony concerning two minor scuffles in the county jail.

Respondent also failed to address a number of trial court errors during the penalty phase arguments alleged by Appellant. [124] These

---

[124] Respondent failed to address seven arguments raised by Appellant challenging the trial court's erroneous actions: 1) After sustaining an objection to the prosecution's prejudicial statement that "what

arguments challenged overruled defense objections, the trial court's failure to provide constitutionally effective admonishments, and the trial court's failure to enforce its prior orders or impede the prosecutorial misconduct. Respondent's lack of effort to respond to Appellant's arguments undermines its conclusion that this claim lacks merit. It also undermines Respondent's assertion that any misconduct was ameliorated by the trial court's admonitions. In fact, Respondent fails to address Appellant's arguments that the trial court's admonishments were insufficient. This Court requires carefully and sharply worded admonitions to curb prosecutorial misconduct and to avoid the need for reversal. The Court held:

> [W]hen the defense counsel requests cautionary instructions, the trial judge certainly must give them if he agrees misconduct has occurred. He should aim to make a statement

---

brings us here today is for you to decide if this man should die..." the trial court erred by not admonishing the jury, as requested, that the prosecutor's statement of law was incorrect. (See II AOB 393-94); 2) The trial court erred by repeatedly instructing the prosecutor to "proceed in the fashion of opening argument." (See *Id.* at 394); 3) The trial court failed to rule on many objections thereby permitting the prosecutor to commit act after act of misconduct without judicial admonishment in violation of Appellant's rights to due process, a fair trial, and reliable penalty phase determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I of the California Constitution. (See *Id.* at 395); 4) The trial court, after sustaining defense objections, erred by refusing defense requests to admonish the jury after the prosecutor speculated that, at the time of the crime, Appellant stated, "You just take your clothes off, take your clothes off, do what I tell you and you won't get hurt." (See *Id.* at 397 (citing RT 3713)); 5) The trial court erred by denying, without comment, Appellant's motion for mistrial at the first recess, on the basis of prosecutorial misconduct, following the prosecution's closing arguments in the penalty phase. (See II AOB 399); 6) The trial court erred by incorrectly admonishing the jury regarding their consideration of the prosecution's charts (*Id.* at 402-03); and 7) The trial court erred by failing to admonish the jury that the uncharged rape repeatedly alluded to by the prosecutor was not a separate aggravating factor and could not be weighed against the evidence in mitigation. (*Id.* at 423).

> to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks.

(*Bolton, supra,* 23 Cal. 3d at 215 n. 5). The trial court's admonitions in this case fell far below this standard. This Court has held that where improper comments and assertions are interspersed throughout trial and/or closing argument, repeated objections might well serve to impress upon the jury the damaging force of the misconduct, and a series of admonitions will not generally cure the harmful effect of such misconduct. (See *Kirkes, supra,* 39 Cal.2d at 726; and *Hill, supra,* 17 Cal.4th at 831 n. 3).

Respondent's failure to rebut these multiple instances of misconduct and trial court error undermines Respondent's conclusion that the prosecutor did not commit misconduct during the arguments in the penalty phase closing argument. Similarly, Respondent's decision not to defend thirteen (13) instances of misconduct and ten (10) instances of trial court error undermines its conclusion that Appellant's constitutional rights were not materially prejudiced by the prosecutorial misconduct during penalty phase arguments. In sum, Respondent has failed to rebut Appellant's showing that throughout the penalty phase, the prosecutor committed misconduct with impunity, and to the detriment of Appellant's state and federal constitutional rights.

B. Appellant's Claims of Misconduct are not Forfeited.

Respondent is wrong in asserting that Appellant's claims of misconduct are forfeited. (See *Kirkes, supra,* 39 Cal.2d at 726; and *Hill, supra,* 17 Cal.4th at 831 n. 3). Appellant's objections were included in his arguments on appeal, which documented defense counsels repeated objections throughout the proceedings. Defense counsel's objections covered a variety of legal grounds, including: 1) stating facts not in evidence; 2) outright misconduct; 3) speculative arguments; 4) interjecting

personal views of the evidence; 5) use of inflammatory and prejudicial rhetoric; and 6) violation of the trial court's orders.

Respondent has read this Court's requirements too narrowly and failed to acknowledge the unique circumstances of this case, which provide an exception to the requirement that defense counsel must always request an admonition. In this case, such admonitions would have been useless. Respondent argues that on appeal, defendants "may not change the theory behind their trial objections." (RB 268 (citing *Thomas, supra,* 2 Cal.4th at 519-20)). Respondent says that Appellant was thus required to specifically say "attempt to mislead," or "irrelevant matter" when he objected to "facts not in evidence," in order to preserve argument on appeal that the prosecutor committed misconduct. (*Id.* at 268-69). Respondent is wrong. Appellant's objections covered every conceivable basis for error and misconduct. The trial court's failure to enforce its prior rulings, admonish the prosecutor or curb the misconduct exempts Appellant from the demands of the contemporaneous objection rule.

Respondent contends that the prosecutor did not seek to inflame the jury and urge them to engage in speculation when he stated "the stab wounds to the front of the body ... When I say front of the body talking about 1, 2, 3, 4, and 5. 1, 2, 3, 4. 1, 2, 3, and 4 and 5. Which of these occurred first? We don't know." (RB 277 (citing RT 3731)). Respondent argues that no request for admonition was made at trial and Appellant's arguments of misconduct are forfeited for failure to make such a request. (*Ibid.*). Respondent is wrong.

Appellant did raise an objection at trial and the court, though not ruling on the objection, told the prosecutor to move his argument along. (RT 3731). Appellant never had a chance to request an admonition. Even if he had, the admonition would have done little more than the many other admonitions that riddle the prosecutor's closing argument. This is

especially true, as here, when the request of an admonition could have, in fact, damaged the defense, as the prosecutor's repeated misconduct sought to goad defense counsel into repeatedly objecting and made the defense attorneys, and Appellant himself, appear contentious, combative and secretive. (See *Kirkes*, *supra,* 39 Cal.2d at 726; and *Hill, supra,* 17 Cal.4th at 831 n. 3).[125]

Likewise, Respondent's citation to *People v. Montiel* and *People v. Frye* are not helpful on this issue. Neither case addresses the prejudicial circumstances of the crime that the prosecutor speculated about in Appellant's case. Neither case deals with arguments held in the penalty phase of a capital trial. Instead, *Montiel* dealt with arguments during *voir dire* regarding the defendant's appearance and *Frye* dealt with guilt phase closing arguments. (See *Frye, supra,* 18 Cal.4th at 970 and *Montiel, supra,* 5 Cal.4th at 914). In neither case would the defendant have appeared combative or overly aggressive for raising several objections. Thus, the failure to object in those cases, where the prosecutor was not attempting to portray the defendant as obstructionist was inexcusable. However, in cases like Appellant's, and as noted by this Court in *Frye*, Respondent's arguments are obviated since "the record ... disclose[s] grounds for applying [an] exception to the general rule requiring both an objection and a request for a curative instruction." (*Frye, supra,* 18 Cal.4th at 969 (citing *Hill, supra*, 17 Cal.4th at 820-821); see also *Stansbury, supra*, 4 Cal.4th at 1056)). Here, due to the prosecutor's blatant course of misconduct, under *Hill*, grounds for an exception to the normal rule existed, and there was therefore no requirement that counsel request what would have ultimately

---

[125] The defense was forced to interrupt the testimony of the victim impact witnesses time and time again in order to curtail the prosecutor; thus setting themselves up for the prosecutor's later accusations that "*through his attorneys*, Appellant] wants to take away from Ms. Olsson, her status as a victim in this case...." (RT 3635 (emphasis added)).

been a useless admonition.

C. The Prosecutor, in Violation of Court Orders, Sought to Interject Misleading and Irrelevant Arguments, Unsubstantiated by Evidence in the Record, Into the Penalty Phase Proceedings.

The prosecutor committed grave misconduct when he attempted to provide testimony in the form of misleading questions concerning irrelevant evidence. This Court has held that a prosecutor may not refer to facts outside the evidence because such statements "'tend[] to make the prosecutor his own witness - offering unsworn testimony not subject to cross-examination.'" (*Hill, supra,* 17 Cal.4th at 828 (quoting *Bolton, supra*, 23 Cal.3d at 213); see also *Benson*, *supra*, 52 Cal.3d at 794). A prosecutor may not call upon the jury to speculate, nor may he or she argue beyond a reasonable inference. (See *Kirkes*, *supra*, 39 Cal.2d at 724). Nor may a prosecutor use invective or other argument calculated to cause prejudice or to evoke an emotional response from the jury. (See *People v. Love* (1961) 56 Cal.2d 720, 731).

Likewise, it is misconduct for a prosecutor to make an argument "that diverts the jury's attention from its duty," because the prosecutor's role in argument is to assist the jury in assessing the evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence." (*Thomas, supra,* 2 Cal.4th at 537; see also AMERICAN BAR ASSOCIATION, *Standards for Criminal Justice*, Standard 3-5.9; available at: http://new.abanet.org/sections/ criminaljustice /Pages/ Standards.aspx (last visited Sept. 2, 2010)). As noted, such statements "can be dynamite" and "are a highly prejudicial form of misconduct, and a frequent basis for reversal." (*Thomas, supra,* 2 Cal.4th at 537 (quoting 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2901, at 3550)).

In the last four years, this Court has addressed claims of prosecutorial misconduct during the penalty phase closing arguments in several cases. (See e.g., *Jackson, supra,* 45 Cal.4th at 662; and *Alfaro, supra,* 41 Cal.4th at 1277). Appellant's counsel has found twenty-five (25) cases in the last four years with plausible assertions of prosecutorial misconduct that this Court has denied or dismissed.[126] However, the prosecutorial misconduct presented in Appellant's case should not be tolerated or sanctioned.

Respondent claims that the prosecutor did not mislead the jury. (See RB 268). Respondent feels that "nothing the prosecutor said was inappropriate." (*Ibid.*). Respondent characterizes the prosecutor's argument as "colloquial." (*Ibid.*). Rather, in fact, it was misconduct that misled the jury.

The jury's task at the penalty phase is not to simply determine whether the penalty is suited to the charged offense, but to also make an individualized assessment of the defendant and the circumstances of the crime. (See *Eddings*, *supra*, 455 U.S. at 112). By stating that: "what brings us here today is for you to decide whether this man should die for what he did to Sandy Olsson or spend the rest of his life in prison," (RB 268), the prosecutor sought to mislead the jury, and impeded them from considering

---

[126] (See *Gamache*, *supra,* 48 Cal.4th at 347; *Martinez*, *supra,* 47 Cal.4th at 911; *Friend, supra,* 47 Cal.4th at 1; *Bramit, supra,* 46 Cal.4th at 1221; *Dykes, supra,* 46 Cal.4th at 731; *Avila, supra,* 46 Cal.4th at 680; *Hamilton, supra,* 45 Cal.4th at 863; *Jackson, supra,* 45 Cal.4th at 662; *Bennett, supra,* 45 Cal.4th at 577; *Doolin, supra,* 45 Cal.4th at 390; *Mendoza, supra,* 42 Cal.4th at 686; *Tafoya, supra,* 42 Cal.4th at 147; *Alfaro, supra,* 41 Cal.4th at 1277; *Zambrano*, *supra*, 41 Cal.4th at 1082; *Thornton, supra,* 41 Cal.4th at 391; *Stevens, supra,* 41 Cal.4th at 182; *Leonard, supra,* 40 Cal.4th at 1370; *Carasi, supra,* 44 Cal.4th at 1263; *Wallace, supra,* 44 Cal.4th at 1032; *Loker*, *supra,* 44 Cal.4th at 691; *Parson*, *supra,* 44 Cal.4th at 332; *Riggs, supra,* 44 Cal.4th at 248; *Salcido*, *supra,* 44 Cal.4th at 93; *Valencia*, *supra,* 43 Cal.4th at 268; and *Rundle*, *supra,* 43 Cal.4th at 76).

Appellant's individual nature as required by the Eighth Amendment. Respondent's efforts to recharacterize the misconduct as simply "colloquial" does not address Appellant's legitimate objection that the statement misled the jury and was prejudicial in nature. The prosecutor's disregard for these constitutional commands, and his patent disrespect for "the uniqueness" of Appellant's individual characteristics, was reprehensible.

Respondent next claims that the prosecutor did not reference "irrelevant matters" when he told the jury to make the determination as what the penalty should be: "death, in the gas chamber, or now by legal [sic] injection, at the first of the year..." (RB 269). Respondent feels "that the jurors would have understood that the prosecutor was not putting a method-of-execution issue before them...." (*Ibid.*). Respondent characterizes the argument as speaking in "plain terms." (*Ibid.*). These alleged plain terms were plainly improper. The method of execution is irrelevant to the jury's penalty consideration. (See e.g., *Lucas, supra,* 12 Cal.4th at 499; see also *People v. Fudge*(1994) 7 Cal. 4th 1075, 1123-24 (cases cited therein)).

Moreover, the prosecutor would have known that the actual death warrant issued in this, or any, case, does not refer to the method of execution. It reads that the death sentence will be imposed "as prescribed by [state] law." (RT 3918). The jurors would not have understood that the prosecutor was not putting method of execution in front of them, since the prosecutor had also discussed the method of execution during jury selection. (See Claim IV - The Trial Court Erred By Dismissing for Cause Prospective Jurors Qualified to Sit on Appellant's Jury). Respondent's argument that the prosecutor was "speaking in plain terms" does nothing to defend against the prosecutor committing misconduct by urging the jury to consider those inflammatory and irrelevant subjects.

Respondent says the prosecutor did not commit misconduct by repeatedly arguing facts not adduced at the penalty phase and by challenging the integrity of the defense. (RB 269-70). Here, three defense objections were sustained in a row as the prosecutor repeatedly attempted to recall the circumstances of the crime, and then comparatively diminish the evidence in mitigation. Respondent concedes that the prosecutor's arguments were not "technically prop[er]." (*Id.* at 270). However, Respondent feels that no prejudice could have stemmed from the misconduct because the prosecutor did not use deceptive or reprehensible means. (*Ibid.*). Respondent tries to argue that the "jury ultimately knew that it had to decide the case based on the evidence and the law as given to it by the court...." (*Id.* at 271 (citations omitted)).

The prosecutor's duty during opening statements was to inform the jury of the evidence the state intended to present, according to the evidence and based on reasonable inferences related to the prosecution's theory of the case. (See *Millwee, supra,* 18 Cal.4th at 136). Here, the prosecution's theory of the case was based on minimal evidence in aggravation and the impermissible use of victim impact evidence. The prosecutor's arguments thus sought to exploit the inflammatory nature of the crime and victim impact evidence in order cover the lack of evidence in their case in aggravation. The arguments were a smokescreen used to confuse the jurors about the information on which they were permitted to base their decision. The prosecutor's failure to stay within clearly identified boundaries was deliberate misconduct, calculated to bring improper and inflammatory material before the jury.

D. The Prosecutor Prejudicially Argued Facts not in Evidence During the Penalty Phase Closing Arguments.

This Court has limited the jury's penalty determination to a review of the statutory aggravating factors. (See *Boyd, supra*, 38 Cal.3d at 773-

74). Evidence that is not related to the statutory factors is not relevant. Here, the prosecutor violated Appellant's rights to due process of law and a reliable penalty verdict when he injected irrelevant and prejudicial evidence into the sentencing equation. The inflammatory arguments infected the jury's proper balancing process crafted by the state statute, especially in light of the prosecution's weak case in aggravation. (See *Barclay, supra,* 463 U.S. at 939; and *Goode, supra,* 464 U.S. at 78). The prosecutor's misstatement of the law, argument based on facts not in evidence, and the creation of faux aggravators violated the Eighth and Fourteenth Amendments and Article I of the California Constitution.

Respondent argues that the prosecutor did not commit misconduct when he described what "you can do [] with a knife that you couldn't do if you had a baseball bat or even a gun." (RB 271-72). The prosecutor's lurid arguments described using a knife to "run it down the side of face," and "play[] with buttons," and "put[ting] the knife in places that are terribly intimidating and threatening." (RT 3707-08). Respondent feels that no misconduct occurred because the prosecutor was "referenc[ing] matters of common knowledge." (RB 272 (citing *People v. Wharton*, (1991) 53 Cal.3d 522, 567-68)). Respondent claims that it is "unfathomable" that the evidence did not support the prosecutor's argument since Ms. Olsson suffered 28 stab wounds. Respondent then recalls some of the more lurid details of the crime, as portrayed by Prosecutor Burr, to support his argument.[127]

Respondent's argument is illogical: "Here the prosecutor did not argue that Appellant used the knife in these ways, but was making the point that because a knife can be used in that manner - that it has that potential -

---

[127] It is unfortunate that in order to justify its arguments, Respondent feels the need to compare Ms. Olsson's injuries to stabbing a knife through a "three- to four-inch raw steak." (RB 273).

Appellant's resort to it became all the more intimidating." (RB 272). Respondent cannot defend the speculative nature of the prosecutor's arguments so it tries to rely upon the circumstances of the crime. There was no evidence that a knife had been used in any fashion as argued by the prosecutor. Whether or not the prosecutor's argument had "common sense" meaning does not address whether the argument was supported by facts and evidence in the record.

Respondent says that the prosecutor argued facts in evidence when he told the jury that "Appellant told Olsson he was only going to rape her and not kill her, and...You just take your clothes off, take your clothes off, do what I tell you and you won't get hurt." (RB 273-74 (quotations omitted)). Respondent concedes that the prosecutor went on to describe how, in his view, Appellant "h[e]ld up that element of hope that all I want to do is rape you " (*Ibid.*). Respondent, however, feels that the prosecutor's arguments "were based on a reasonable view of the evidence and inferences reasonably drawn therefrom." (*Id.* at 274). In fact, Respondent argues that "the evidence showed a lack of disturbance in the bedroom, a circumstance that suggests the encounter between Appellant and the victim was not initially violent...." (RB 274). Tellingly, this argument contradicts Respondent's premeditation argument. (See Claim VI - Insufficient Evidence Supports Appellant's Convictions of Capital Murder, The Burglary-Murder Special Circumstance, or His Conviction for Assault With Intent to Commit Rape). Rather than support the prosecutor's assumption that a rape had occurred - a crime that was never charged in the case - the evidence indicated there was no such interaction. The prosecutor's statements thus were speculation *not* reasonably based on the evidence.

In the end, the entire case "in aggravation," as *argued* by the prosecutor, was based on speculation and emotional appeal.[128] It was not based on the aggravation evidence presented during the penalty phase, and the prosecution's dedication to describing the crime proves this fact. The prosecutor constructed an inflammatory, and entirely speculative scenario in order to arouse the passions of the jury to sentence Appellant to death for "rape." No rape was charged in the Information, nor alleged as a special circumstance, nor even listed in the prosecutor's notice of aggravation. There was no reasonable inference that Ms. Olsson had been raped, since there was no direct evidence introduced at trial of a rape. Because no evidence supported his improper arguments, the prosecutor dwelt on a collection of speculative details and created a piece of lurid fiction about Ms. Olsson's death. He completed the inflammation with made-up sadistic dialogue and gestures that had no support in the evidence. Respondent's

[128] The degree of speculation utilized by the prosecutor in closing argument in Appellant's case has not been seen by this Court in recent capital cases, or, for that matter, in older cases as surveyed by Appellant in his Opening Brief. In *Martinez, supra,* 47 Cal.4th at 911 the prosecutor speculated as to the victim's and the defendant's hopes, and contrasted the victim's "hopes" against the defendant's "hopes" if sentenced to life in prison without the possibility of parole. (*Id.* at 966). This Court denied the argument. Appellant's argument presents more pressing concerns than in *Martinez*, as evident by the fact that the trial court sustained Appellant's objection to the prosecutor's comments that LWOP was to good for Appellant since he could still "hope." Similarly, unlike in *Martinez*, the prosecutor's comments covered a wide range of "conditions of confinement:" from conjugal visits, to security classifications, to the possession of VCRs, to the conditions of execution. In sum, the facts in *Martinez* are not comparable to Appellant's.

This Court should take the opportunity to resolve the conflict between this Court's holding in *Martinez* and prior precedent where it has held that evidence of the conditions of confinement is irrelevant to a capital sentencing scheme. (See *Coddington, supra,* 23 Cal.4th at 636; *Ray, supra,* 13 Cal.4th at 352; *Osband, supra*, 13 Cal.4th at 713; and *People v. Lucas* (1995) 12 Cal.4th 415, 499).

efforts to defend the prosecutor's misconduct do nothing to show that the prosecutor was not intentionally seeking to inflame the jury by recreating a crime scene simply not reflected by the evidence.

Respondent says that the prosecutor did not seek to "inflame the jury" when he told the jury "You can't forget Sandy Olsson. That's what this is all about, at this phase...That's what you've got to do here, the manner in which she died and what was going through her head during the time she was forced to be with this thing." (RB 275). Respondent attempts to transform the prosecutor's argument as "reasonable inference[s]" from the "evidence of the manner in which he assaulted and killed her." (*Ibid.*). Respondent goes so far as to call the prosecution's argument "part of the aggravation of this crime." (*Ibid.* (citing RT 3632)).

However, this Court has limited the jury's penalty determination to a review of the statutory aggravating factors. (See *Boyd*, *supra*, 38 Cal.3d at 773-74). Here, the prosecutor argued what Ms. Olsson *thought* at her moment of death. No evidence shed light on her hopes and no reasonable inference about them could be drawn from the evidence. Worse, by arguing evidence that is not related to the statutory factors, the prosecutor interjected irrelevant matters into the jury's considerations. In so doing, the prosecutor violated Appellant's right to due process of law and a reliable penalty verdict. Respondent's argument that the prosecutor's statements were supported by the aggravation of the crime masks the impropriety of the prosecutor's conduct, which actually sought to recreate a more lurid reenactment of the crime than the evidence suggested.

Respondent then argues that the prosecutor did not seek to "inflame the passions of the jury" when he called Appellant less than a "man," lacking "manliness," "an insult to the animal kingdom" "because animals, in the animal world, don't do the things that he did...the way he treated Sandy Olsson...I mean the animal world kills, they kill, they kill - see, to

eat." (RB 275-76 (citing RT 3726)). Respondent believes that since the "prosecutor used similar epithets" during the guilt phase, that "[n]o misconduct occurred here." (RB 276).

First, the prosecutor's prior use of epithets and misconduct committed during the guilt phase is not a justification for later misconduct. Put simply, two wrongs do not make a right. This is especially true when the prosecutor's epithets here are compared to those used by other prosecutors in capital cases that have recently come before this Court or addressed in Appellant's Opening Brief. Second, Respondent fails to address or rebut Appellant's allegation of cumulative prejudice resulting from the prosecutor's repeated use of epithets to describe Appellant. Respondent thus wholly fails in arguing that the prosecutor's conduct was not prejudicial.

Proof of the prosecutor's misconduct can be made by distinguishing the cases Respondent erroneously relies on for support of the proposition that "[n]o misconduct occurred here." (RB 276). In *People v. Hawkins* (1995) 10 Cal.4th 920, 961, the defendant had eight felony convictions of violence and the prosecutor's arguments and epithets focused on the defendant's tendency to use violence. (*Ibid.*). This Court made it clear that "we do not condone the use of such terms in argument." (*Ibid.*). However, this Court reasoned that "we have consistently held that it is not misconduct for a prosecutor to argue at the penalty phase that if a defendant were sentenced to prison he might kill another prisoner ... In this case, the prosecutor's argument on future dangerousness was based on defendant's extensive record of violence rather than expert opinion and was fairly supported by the evidence." (*Ibid.* (citations omitted)).

To the contrary, in Appellant's case, the prosecutor's epithets focused on Appellant's moral worth, denigrated Appellant's character and existence, and sought to compel the jury to devalue the ultimate sentencing

decision before them. In *Hawkins,* the prosecutor's argument at least corresponded to evidence that the defendant was violent. Here, there was no support for the argument that Appellant embodied the "less than human" character the prosecutor desperately tried to portray. No evidence had been submitted that Appellant was lesser than a member of the animal kingdom, that he was less than a man, or, for that matter, that animals do not kill for reasons other than to eat. There is no rational basis in the Court's precedents to justify the prosecutor's blatant and shameful misconduct in denigrating a person facing a sentence of death and urging the jury to minimize a sentence of death.[129]

This Court and the federal courts have held that, it is improper for the prosecutor to refer to the defendant as an "animal," or to use other derogatory epithets. (See *Darden, supra*, 477 U.S. at 179; *People v. Fosselman* (1983) 33 Cal.3d 572, 580-81; and *Mayfield, supra,* 14 Cal.4th at 803). As the United States Supreme Court observed, this type of prosecutorial argument "deserves the condemnation it has received from every court to review it...." (*Darden, supra*, 477 U.S. at 179). The prosecutor's comments here were unnecessary, particularly inflammatory, and had nothing to do with any evidence presented at trial. [130]

---

[129] Likewise, *in Thomas, supra,* 2 Cal.4th at 537, the prosecutor referred to the defendant as a "mass murderer, rapist," "perverted murderous cancer," and "walking depraved cancer" during closing arguments. This Court held that the epithets corresponded to the fact that the defendant had been convicted of prior murders and rapes. (*Ibid.*). In this fact alone, *Thomas* is distinguishable from Appellant's case where no evidence of animal behavior or that Appellant was an "animal" and less than a man was submitted at trial. This Court should in line with its more recent discussion in *Hawkins,* repudiate the use of terms such as "perverted murderous cancer," and "walking depraved cancer," by prosecutor's when making closing penalty phase arguments.

[130] The denigration of capital defense counsel, and use of epithets to describe capital defendants, has also consistently arose in this Court's

Respondent further argues that the prosecutor did not seek to inflame the juror's passions by urging the jury to speculate about the extent of Ms. Olsson's "physical[], emotional[], and psychological[]..." suffering. (RB 276 (citing RT 3726-27)). Respondent concedes that the court sustained defense objections and called a bench conference to discuss the use of this language with the prosecutor. (RB 277). Respondent tries to justify the line of argument solely by citation to this Court's decision in *People v. Slaughter* (2002) 27 Cal.4th 1187, 1212.

First, undoubtedly, the prosecutor urged the jury to consider wholly speculative material by asking them to consider Ms. Olsson's "physical, emotional, and psychological" suffering. Second, Respondent's argument that no misconduct occurred is meritless since the misconduct was substantial enough for the trial court to sustain Appellant's objections and call a bench conference in response. (RT 3758). The prosecutor urged the jury to consider wholly speculative material by asking them to consider Ms. Olsson's suffering. The prosecutor cannot properly testify as to what the victim's last thoughts were before she was killed. Third, although this Court has generally held that the prosecutor may suggest that the jury place themselves in the victim's shoes, the misuse of this argument by the prosecutor in this case demonstrates why this type of argument should be prohibited outright. (See *Slaughter, supra,* 7 Cal.4th 1187 (cases cited therein); *Jackson, supra,* 45 Cal.4th at 691; and *Mendoza, supra,* 42 Cal.4th at 704).

Respondent's authorities provide support for Appellant. In at least

---

recent case law. In five cases in the last four years, capital defendants have alleged that the prosecutor's denigrating statements towards counsel or themselves constituted prejudicial and therefore reversible misconduct in five cases. (See *Friend, supra,* 47 Cal.4th at 1; *Hamilton, supra,* 45 Cal.4th at 863; *People v. Doolin* (2009) 45 Cal.4th 390; *Mendoza, supra,* 42 Cal.4th at 686; and *Parson, supra,* 44 Cal.4th at 332). The denigration suffered in these cases does not compare to that suffered by Appellant.

three respects, the prosecutor's arguments in *People v. Slaughter* are simply not analogous to the prosecutor's arguments in Appellant's case. (See *Slaughter, supra*, 27 Cal.4th at 1212). First, in *Slaughter,* the prosecutor's arguments were notably fact- based and involved evidentiary descriptions of the circumstances of the crime. In Appellant's case, the prosecutor urged the jury to speculate as to any "physical, psychological, or emotional" stimulus present at the crime scene without specific reference to any facts presented, such as the circumstance of the crime facts. Second, the prosecutor's argument in *Slaughter* adopted the view of various actors at the scene of the crime. In Appellant's case, the state asked the jurors to rely upon the prosecutor's description of the crime scene (which resembled an omnipotent narrator's view) and demanded that the jury "do justice in this case" based on the prosecution's view of the crime. Third, in Appellant's case, the prosecutor's argument was based on speculation, not evidence submitted at trial, including Appellant's and the victim's psychological states at the time of the crime. To the contrary, in *Slaughter*, the prosecutor's arguments were based on evidence introduced at trial regarding the trajectory of the bullet. Fourth, the prosecutor in *Slaughter* did not demand that the jury "vicariously feel what was going on in those minutes," with the victim. The prosecutor instead urged the jury to relive the moments surrounding the crime in order to understand how the crime occurred, who committed the crime and the defendant's culpability.

Respondent attempts to defend repeated incidents of misconduct during the close of the prosecutor's rebuttal penalty phase summation. First, the prosecutor committed misconduct when he urged the jury to speculate as to "Sandy Olsson's last hopes" and suggested that her last hopes "were [] that all he wanted to do was rape her." (RB 278-79). Respondent concedes that during this line of argument, two defense objections were sustained and that the prosecutor continued "in the same

vein." (*Ibid.*). Respondent, however, argues that the prosecutor's arguments were based on "reasonable inferences" of the evidence and that "common sense tells us that Olsson would have hoped Appellant only wanted money after he broke into her house and pulled a knife on her." (RB 279).

Like before, the prosecutor's arguments were not supported by reasonable inferences gleaned from the evidence. No evidence introduced by the state supported its argument concerning Olsson's last hopes. In fact, the only evidence submitted by the state that shed light on the final moments of the incident, Appellant's March 27 and 30, 1987 statements, directly contradicted the prosecutor's description of the crime and his speculation as to Ms. Olsson's last thoughts. (See I AOB 73 (citing People's Trial Exhibit 6C)). Respondent's resort to "common sense" does nothing to cure the fact that the argument was wholly irrelevant, not supported by the evidence and sought to inflame the jury.

Respondent concedes that the prosecutor urged the jury to speculate when he referenced Appellant's brother's testimony and stated: "It's his responsibility. What is it that was ticking in Roger that he sees in the defendant, that he doesn't say, "spare my brother?" (RT 3694-95). Respondent, however, says that no prejudice resulted from the prosecutor's statements because the remark was "fleeting," "not easily understandable," and the trial court admonished the jury after sustaining defense objections. (RB 280). Respondent's attempt to minimize the prejudice admits that the prosecutor engaged in misconduct. Respondent cannot deny that the prosecutor's argument was a direct call to the jury to engage in speculation as to Roger Tully's mind set. The fact that Respondent characterizes the arguments as "not easily understandable," only further proves the lack of evidentiary foundation supporting the prosecutor's speculative arguments. Moreover, the prosecutor's insinuation that Appellant's own family

supported a death sentence was clearly understood by the jury, and was prejudicial, inflammatory, and irrelevant to the jury's penalty phase determination.

Respondent tries unsuccessfully to contest allegations that the prosecutor argued facts not in evidence, and urged the jury to speculate by arguing that life without the possibility of parole "was too good" for Appellant because he was previously unemployed and, in prison, would "have a house, a roof over his head, food on the table and medical care...." (RB 281-82). Respondent says that it was not misconduct for the prosecutor to argue that life without the possibility of parole was too good for Appellant because he could hope that "there might be an earthquake and the jail falls apart and the prison falls apart." (*Ibid.*). Respondent feels that because Appellant only objected to "improper argument," his arguments of misconduct are waived. Respondent concedes, the trial court recognized the behavior as misconduct, sustained Appellant's objection and admonished the jury "to disregard that last statement." (*Id.* at 281).

In the alternative, Respondent argues that the prosecutor's remarks were based off common sense and "the gist of the prosecutors' argument was that Appellant...deserved death." (RB 282).

The prosecutor's arguments were not supported by "common knowledge," and even "common knowledge" maybe unduly prejudicial. This Court has held that evidence of the conditions of confinement is irrelevant to a capital sentencing scheme. (See *Coddington, supra,* 23 Cal.4th at 636; *Ray, supra,* 13 Cal.4th at 352; *Osband, supra,* 13 Cal.4th at 713; and *Lucas, supra,* 12 Cal.4th at 499). Raising the matter in the setting of a penalty argument, without any factual support, is far worse than admitting evidence on the issue. The argument was factually wrong because there are punishments within the prison system for misconduct by prisoners, from loss of privileges to transfer to a Secured Housing Unit

within a high security facility, like Pelican Bay State Prison. Respondent errs in arguing that Appellant's arguments relative to this point have been forfeited. Appellant's "improper argument" objection included both misconduct and facts not in evidence objections. (See RT 3814-15).

When the prosecutor first spoke about prison conditions during closing arguments, the court admonished the jury, to "disregard that last comment." (RT 3815). The prosecutor then finished his argument.[131] This entire argument was "improper," not just "the last comment." No evidence regarding prison conditions had been presented, nor would any have been permitted. Yet, the prosecution again discussed prison conditions after the admonishment. In addition to again arguing about prison conditions, which there had been no evidence presented, the prosecutor falsely painted prison life. He told the jury that state prisoners have VCR's. He told them Appellant would get conjugal visits, when prisoners serving life without parole do not get such visits or VCRs. In sum, the prosecutor's statements were not supported by reasonable inferences from the evidence in the record and were actually factual misstatements.

The prosecutor committed repeated misconduct when he invoked considerations outside the proper weighing of statutory factors. (See *Gardner, supra*, 430 U.S. at 349; and *Miranda, supra,* 44 Cal.3d at 110). It was improper for the prosecutor to state "facts not in evidence unless such facts were subject to judicial notice or are "matters of common knowledge or illustrations drawn from experience, history, or literature." (*Boyette, supra,* 29 Cal 4th at 463-64 (quotations omitted)). The facts stated by the prosecution did not fall under this exception. The specific prosecutorial misconduct was both reprehensible and "so infected the trial with unfairness as to make the resulting [death sentence] a denial of due

[131] The prosecutor's statements are presented in full to demonstrate the full extent of his behavior in Appellant's trial.

process." (*Donnelly, supra,* 416 U.S. at 637). Under either the standard set forth in *Brown, supra*, 46 Cal.3d at 448, or the *Chapman* harmless error standard, the death sentence cannot stand.

E. The Prosecutor Prejudicially Misstated the Law during the Penalty Phase Closing Arguments.

Throughout his closing arguments, the prosecutor "misstate[d] the law generally . . . , and particularly to attempt to absolve the prosecution from its prima facie obligation" to meet its burden of proof. (See *Marshall, supra,* 13 Cal.4th at 831; and *Hill, supra,* 17 Cal.4th at 829-830). His comments misstated the law regarding mitigation, and also served to lighten the prosecution's burden at the penalty phase. The prosecutor sought to mislead the jury as to their constitutional duties under the Eighth Amendment.

Respondent asserts that the prosecutor did not misstate the law when he told the jury that they could not consider, as a mitigating factor or "aspect of [Appellant's] character," their sympathy for his sister, brother, and children. (RB 283). In support, Respondent only provides a lengthy quote lifted from *Smithey, supra,* 20 Cal.4th at 1000-01. (RB 283-84). Respondent confuses the nature of Appellant's challenge to the prosecutor's misstatement of the law regarding sympathy. The prosecutor's arguments sought to limit the jury's consideration of their sympathy for Appellant by limiting the jury's consideration of their sympathy for his family. This line of argument runs contrary to the Court's holdings in *Smithey* and *Ochoa* as cited by Respondent. Those cases make it clear that the jury may consider sympathy for the defendant's family, and their love for the defendant, as indirect evidence of the defendant's character. (See *Ochoa, supra,* 19 Cal.4th at 456. By lambasting and prohibiting all sympathy the jury may have held for Appellant and his family, the prosecutor misstated the law as to what the juror's may consider in

mitigation and as evidence of Appellant's character. (See *Id.* at 456). The prosecutor's argument in *Smithey* attempted to neatly distinguish between juror sympathy for the defendant and for the defendant's family, (*Smithey, supra,* 20 Cal.4th at 1000-01), while in Appellant's case the prosecutor bludgeoned any distinction between permissible use of all aspects of sympathy during the penalty phase and prohibited considerations. Here, the prosecutor argued:

> [w]hat it really comes down to is this issue of sympathy, the sympathy issue. Sympathetic [for] any aspect of his character or record. And it's not sympathy for his sister. It is not sympathy for his brother. It is not sympathy for his children. It is sympathy for him.

(RT 3659). The prosecutor's attitude that the jury's sympathy for Appellant through his family was "irrelevant" ran afoul of due process and a constitutional death penalty scheme. Respondent's lack of argument to the contrary is revealing. According to the United States Supreme Court, juries must consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605). The Supreme Court stressed that "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." (*Ibid.*). Respondent does not, and cannot, argue that the prosecutor's statements were made in line with these principles.

Respondent contends that the prosecutor did not ask the jury to disregard mitigating evidence when he argued that because "this is a horrendous crime in itself," there is "no justice" in Appellant's background. (RB 284). Respondent contends that the prosecutor did not commit misconduct by arguing that Appellant must prove that there is "anything about his character and background that offsets the crime[.]" (*Ibid.*).

Respondent feels that a reasonable juror would not have understood the prosecutor's remarks as calling for them to disregard the evidence in mitigation. (*Id.* at 285). Respondent says that the prosecutor's remarks were too "fleeting and confusing" to carry "the import Appellant wants to ascribe to them." (*Ibid.*). Respondent argues that any prejudice from the remarks was corrected by the court's admonition. (*Id.* at 285-86). In the alternative, Respondent argues that the claims were forfeited because Appellant did not make an objection below.

Respondent's argument contains several weak points. First, the harm was not cured by trial court admonitions. The jury was not instructed that there is no presumption of death under any circumstances. Nor were they instructed that the mitigating circumstances need not "offset" the aggravating circumstances in order to impose a life sentence. They were told that, in fact, the defendant need not show *any* mitigating circumstances that "offset" the facts of the crime in order to receive a life sentence. (See *Brown, supra,* 40 Cal. 3d at 540). Respondent's arguments to the contrary are baseless.

Second, telling the jurors to just look at the facts of the crime in determining whether death is warranted improperly directs them to disregard the case in mitigation, a direction that is not permitted by the state and federal Constitutions. (See *Easley, supra,* 34 Cal.3d at 875-876). Contrary to the prosecutor's misleading misstatement of law, the penalty phase does not begin with a presumption that, because of the crime itself, death is the appropriate penalty that must be "offset" by mitigating evidence. The jury instructions state just the opposite; a death sentence may only be imposed if the aggravating circumstances so substantially outweigh the mitigating circumstances that death is warranted, and even then, only under certain circumstances. (See CALJIC 8.88). The prosecutor's arguments to the jury completely mischaracterized their duties

in the penalty phase.

Third, Appellant's arguments have not been waived. Appellant raised valid objections throughout the arguments to the prosecutor's mischaracterization of the mitigation evidence. He objected that the prosecutor was asking the jurors to disregard mitigation evidence. (See RT 3803).

Finally, Respondent says that the prosecutor did not attempt to mislead the jury into believing that it could consider Appellant's force and violence against victim Olsson as factor (b) aggravation. (RB 286 (citing RT 36, 44, 3645, 3662)). Respondent argues that the jury would have reasonably understood the remarks as including use of force under "factor (a), not factor (b)." (RB 286). In the alternative, Respondent argues that Appellant's claims are forfeited for failure to interpose any objection at trial. (*Ibid.*).

Here, the prosecutor misstated his burden of proof with regard to Section 190.3 (b). The defense was forced to object on three separate occasions when the prosecutor failed to tell the jury that the acts of violence referred to under 190.3(b) had to be separate from those for which Appellant had been convicted. (RT 3644, 3645, and 3662). The third objection was made when the prosecutor displayed a chart containing the language of 190.3(b) to the jury. (RT 3662 (discussing Court Exhibit 5)). The jury would not have reasonably believed that the prosecutor was referring to factor evidence, since the prosecutor's case rested on an "uncharged" crime of violence, the "rape" of Sandy Olsson.

Throughout both the guilt and penalty phases, the prosecutor lamented that the jury could not convict Appellant of rape due to "a technicality," and an "instruction," despite his assertion that Appellant "actually raped" her. He listed the "rape" on his chart showing what aggravated the crime, and in placing the jury in Ms. Olsson's shoes,

described this "rape" over and over again. But Appellant was not tried for rape. The prosecutor's argument misled the jury into believing the uncharged rape was a separate aggravating factor to weigh against the evidence in mitigation.

F. Conclusion.

Respondent thus feels that Appellant is not entitled to any relief "based on his allegation of penalty phase opening statement and summation prosecutorial misconduct." (RB 286). Respondent argues that though "the prosecutor arguably misstepped, any error was, as demonstrated, harmless." (*Id.* at 287). According to Respondent, the prosecutor did not "engage in deceptive or reprehensible methods of persuading the court or jury." (*Ibid.*). Respondent also feels that the prosecutor's repeated instances of misconduct did not "infect the trial with such unfairness as to render Appellant's death judgment unconstitutional." (*Ibid.*).

These facts show Respondent to be wrong. The specific repetitive and severe prosecutorial misconduct committed during the penalty phase was both reprehensible and "so infected the trial with unfairness as to deny Appellant due process. (*Donnelly, supra,* 416 U.S. at 637). When the defense objected, the trial court often failed to rule on the objection directly, thereby permitting the prosecutor to commit act after act of misconduct without judicial admonition or explanation to the jury, exacerbating the prejudice to Appellant. On the few occasions when the court did address the jury following defense objection, the trial court's comments were insufficient to cure the significant harm that had already been caused.

The prosecutor's rampant misconduct violated the federal Constitution as well as state law and the state Constitution. Whether the misconduct is deemed to be misconduct under state law or federal constitutional law, the penalty verdict must be reversed. Under either the

standard set forth in *Brown, supra*, 46 Cal.3d at 448 (reasonable possibility that, absent the misconduct, the jury would not have sentenced defendant to death), or the *Chapman* harmless error standard, the death sentence cannot stand. Read in the context of the entire prosecution closing argument, the misconduct did not represent brief isolated attempts to inflame the jury. Rather it was part of a calculated strategy to divert the jury's attention from the evidence presented, and urge them to speculate about an uncharged and unproven crime, in order to unfairly persuade the jury to choose a death verdict. In the context of the entire argument, this misconduct had a significant influence on the jury's death verdict. The prosecutor inflamed the jury by stressing an unproven theory of the crime to obtain a death sentence. It is highly probable that, had this misconduct not occurred, Appellant would not have been sentenced to death.

XVII. THE PROSECUTOR'S RELIGIOUS ARGUMENTS PERMEATED THE PENALTY PHASE ARGUMENTS AND PREJUDICED APPELLANT.

A. Introduction.

During penalty phase arguments, the prosecutor repeatedly told the jury that God "sanctioned capital punishment," and used religion to diminish the jury's consideration of "the specific factors [they are] to consider in reaching a verdict." (*Godfrey, supra,* 446 U.S. at 428). The prosecutor's fervent arguments ensured that the jury's deliberations were permeated with religious considerations and violated the Constitution's command that the death penalty may be imposed only when the jury carefully focuses on the specific factors relevant to their sentencing determination. (See *Lockett, supra,* 438 U.S. at 602-605; see also *Zant, supra,* 462 U.S. at 885; and *Brown, supra,* 40 Cal.3d at 540 n. 10). The prosecutor's religious arguments pushed the jury into a role that was fundamentally incompatible with the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment...." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305).

B. Appellant's Claims have not Been Forfeited.

Respondent claims that "Appellant has failed to preserve the current claims of misconduct for review." (RB 290). Respondent bases this assertion on the argument that "at trial Appellant made not a single "religious reference" objection or request for admonition to anything the prosecutor argued." (*Ibid.* (citations omitted)). Respondent's arguments all fail because of the prejudicial nature of the dilemma that the prosecutor foisted upon Appellant by repeatedly calling for his execution based on religious mandates. This Court has recognized that in such situations:

> A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either

> would be futile. In addition, failure to request the jury be admonished does not forfeit the issue for appeal if 'an admonition would not have cured the harm caused by the misconduct.

(*Hill, supra,* 17 Cal.4th at 820-821 (citations omitted)).

Respondent concedes that this Court does not require defense counsel to object and request an admonishment when remedying prosecutorial misconduct would prove futile or prejudicial to the defendant. (RB 290). Respondent, however, argues that *Hill* is not applicable here. According to Respondent, during penalty phase arguments in Appellant's capital trial, "none of the prosecutor's alleged religious reference transgressions involved misconduct so severe that an objection and curative admonition would not have cured the harm." (*Ibid.*). Respondent argues that *Hill* is further distinguishable because there, the trial court committed error by failing "to reign in the prosecutor's excesses when the defense did object and...made comments before the jury suggesting defense counsel was an obstructionist...." (*Ibid.* (citing *Hill, supra,* 17 Cal.4th at 821)).

Respondent's arguments fail to persuade for three reasons. First, undoubtedly the prosecutor's use of a large billboard and arguments to convince the jury that "THE BIBLE SANCTIONS CAPITAL PUNISHMENT" constituted prejudicial misconduct. Worse, the prosecutor went on to repeatedly quote from scripture and analogized Appellant to the bad thief at Christ's crucifixion, who turned his nose at Christ and did not earn salvation. These facts are egregious. Virtually every state and federal court to address the question has held that involving the Bible or religious rhetoric as authority for imposing a death sentence is unconstitutional.[132] Here, the trial court failed to correct the misconduct.

---

[132] (See e.g., *Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 776-777; *Bennett v. Angelone,* (4th Cir.1996) 92 F.3d 1336, 1346;

And, no objection or instruction, especially after completion of the arguments, could have corrected the jurors' religious impressions of whether or not Appellant deserved a sentence of death.

Second, just like in *Hill*, Appellant's counsel was "thrust upon the horns of the dilemma" by the prosecutor's repeated instances of misconduct. (*Hill, supra,* 17 Cal.4th at 821). The record clearly establishes that defense counsel objected time and time again to a "barrage of [the] prosecutor['s] unethical conduct." (*Ibid.*). Like in *Hill*, this misconduct included disparaging remarks towards defense counsel's integrity, misstating the evidence, as well as, sarcastic comments. In response, defense counsel made several objections to the prosecutor's repeated misconduct. (See Claim XVI - The Prosecutor Committed Prejudicial Misconduct During the Penalty Phase Arguments). The trial court, however, had largely refused to acknowledge the objections, enforce its prior orders or sustained objections and explicitly refused to admonish the prosecutor in front of the jury.

Finally, Respondent fails to acknowledge that this Court may review this argument because "a defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights[, including] ... the constitutional right to a jury trial." (*Vera, supra,* 15 Cal.4th at 276). Here, the religious arguments by the prosecution and the defense, as a whole, violated Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and the parallel provisions of the California Constitution. The prosecutor's argument also violated the First Amendment's

---

Cunningham v. Zant (11th Cir.1991) 928 F.2d 1006, 1019-1020; *United States v. Giry* (1st Cir.1987) 818 F.2d 120, 133; *State v. Middlebrooks* (Tenn. 1999) 995 S.W.2d 550, 559; *Commonwealth v. Chambers* (1991) 528 Pa. 558; *People v. Eckles* (1980) 83 Ill.App.3d 292; *State v. Wangberg* (1965) 136 N.W.2d 853, 854-55)).

Establishment Clause and the required separation of church and state as well as the California state Constitution. Thus, because these fundamental and constitutional claims were at issue, Appellant may raise for the first time on appeal, his claims asserting the deprivation of these fundamental and constitutional rights.

C. The Prosecutor Forced Defense Counsel to Respond to the State's Religious References.

Respondent attempts to divert this Court's focus from the prosecutor's wrongdoing by blaming defense counsel for responding to the state's prejudicial religious arguments instead of objecting. (RB 290 and 299). Respondent cites to *Wash, supra,* 6 Cal.4th at 260, arguing that defense counsel's conduct ameliorates any prejudice resulting from the prosecutor's infusion of religious themes into the penalty phase proceedings. (*Ibid.*). Respondent characterizes the prosecutor's religious references as a "response to some of defense counsel's religious references." (RB 295). Respondent believes that this characterization "cuts against a finding of prejudice." (*Id.* at 296). Respondent neglects to mention that the prosecutor opened the discussion by introducing religious themes, through arguments and charts, during its summation in the penalty phase.

The fact that both attorneys engaged in religious arguments, without restraint from the trial court, exacerbated rather than ameliorated the prejudice to Appellant. When counsel engages in a religious debate, instead of relying on the facts and the law, they increased the potential that the jury's deliberations would be focused upon irrelevant and inflammatory religious considerations. Instead of a reasoned response to the crime, or a reasoned weighing of aggravating and mitigating factors, counsel encouraged the jury to return a verdict based upon their consideration of: 1) religious authority; 2) counsel's religious views; and 3) the juror's own

religious views. Counsel's conduct ensured that their religious ideals and the persuasiveness of their Biblical interpretations controlled the fate of Appellant's life.

Respondent also fails to recognize, as this Court has, that prosecutors are held to a higher standard than defense counsel. The prosecutor's improper arguments regarding material not in the record, which "thereby effectively circumvent[ed] the rules of evidence" had the force of "dynamite'" to the jury due to the special regard prosecutor's carry with the jury. (*Hill, supra,* 17 Cal.4th at 828 (quoting *Bolton, supra,* 23 Cal. 3d at 213) (other citations omitted)). When the prosecutor relies on "biblical" or "scriptural" facts outside the evidence, as the prosecutor did here, the jury will hear him - not only as the voice of the governmental authority, but also as the voice of religious authority. Because of this, defense counsel's attempted responses to the initial, improper arguments by the prosecutor were futile, at best, and did not ameliorate any prejudice running to Appellant.

Finally, Respondent's efforts to lambast defense counsel's religious argument mask the state's inability to respond to all of Appellant's arguments under this claim. In what has become a pattern, Respondent has yet again failed to address all of the arguments raised by Appellant in his Opening Brief, this time neglecting sixteen (16) separate arguments.[133]

---

[133] Respondent does not address or rebut the following sixteen (16) arguments raised by Appellant under this ground in his opening brief: 1) The prosecutor committed misconduct and prejudiced Appellant's rights by utilizing a large billboard to quote Biblical passages from Genesis, Numbers, and Exodus in support of the state's argument that "THE BIBLE SANCTIONS CAPITAL PUNISHMENT." (See II AOB 430-31); 2) The trial court erred by allowing religious arguments to permeate the penalty phase proceedings and, by allowing both sides to interpret religious texts, the trial court turned the closing arguments into a battle over who could win in the "ecclesiastical Court." (See *Id.* at 431); 3) The prosecutor committed prejudicial misconduct, in violation of the Eighth Amendment,

by creating a faux aggravating factor out of the fact that Appellant was not religious and urging the jury to consider this fact during their sentencing deliberations. (See *Id.* at 442); 4) By arguing for a death sentence because Appellant was not religious, the prosecutor committed prejudicial misconduct and violated prior court orders prohibiting arguments that Appellant had not "found God and repented." (See *Ibid.*); 5) The prosecutor's religious arguments were irrelevant and constituted prejudicial misconduct because they were not supported by any evidence in the record concerning Biblical interpretations or the views of "world religions'" concerning their take on the propriety of the death penalty. (See *Id.* at 443); 6) The prosecutor falsely told the jury that he was quoting the Bible "on point," when in fact he was quoting two separate parts of the Bible, (See *Id.* at 444 (citing Numbers 35:16; and Genesis 9:6)); 7) The prosecutor misrepresented passages from the bible in support of his argument that "THE BIBLE SANCTIONS CAPITAL PUNISHMENT." (See II AOB 444 (citing Numbers 35:16; Numbers 35:10)); 8) The prosecutor created a religious straw man and utilized the rhetorical device of paraleipsis to reinforce the jury's consideration of religious ideals during their sentencing determination. (See II AOB 446); 9) The inflammatory nature of the prosecutor's arguments forced defense counsel to withhold objections and, instead, engage in equally irrelevant and prejudicial religious discourse. (See *Id.* at 447); 10) The prosecutor improperly and prejudicially implied that he knew more about the New Testament than defense counsel. (See *Id.* at 448); 11) The prosecutor committed prejudicial misconduct by quoting from Romans 13:1-5, which has been expressly condemned, as unduly prejudicial, by this Court and the Court of Appeals for the Ninth Circuit. (See *Id.* at 449); 12) The prosecutor violated the state and federal constitutions by impermissibly stating his own religious beliefs and engaging in improper religious "vouching" during his argument. (See *Id.* at 449-50 (citing *United States v. Potter* (9th Cir. 1979) 616 F.2d 384, 392, *cert. denied* (1980) 449 U.S. 832; *People v. Padilla* (1995) 11 Cal. 4th 891, 946)); 13) By arguing religious references, the prosecutor violated the First Amendment's Establishment Clause, which prohibits the 'imprimatur of state approval' to be conferred on any particular religion or any religion generally. (See II AOB 450-51 (citing *Widemar v. Vincent* (1981) 454 U.S. 263, 274; and *State v. Ceballos* (2003) 832 A.2. 14, 35 n. 36)); 14) The prosecutor committed prejudicial misconduct by urging the jury to exhort vengeance and ignore Appellant's individual characteristics. (See II AOB 454); 15) The trial court's failure to intervene and prevent religious ideals from dominating the penalty phase arguments constituted a miscarriage of justice and allowed the prosecutor to violate Appellant's rights to due

Respondent's failure to do so can be attributed to the indefensible nature of the prosecutor's misconduct here. Far from blaming defense counsel, this Court should not tolerate arguments by the state that seek to earn a death sentence based on religious interpretation and which cannot be adequately or fully defended on appeal.

D. The Prosecutor's Religious References during the State's Opening Penalty Phase Summation Created a Fundamentally Unfair Sentencing Phase.

This Court has held that the prosecutor's invocation of the religious authority is "patent misconduct." (*Roldan, supra,* 35 Cal.4th 646, 743; see also *Hill, supra*, 17 Cal.4th at 836 n. 6). This principle "cannot [be] emphasize[d] too strongly." (*Ibid.*). Additionally, this Court has recognized that when prosecutors use religious arguments, they "create and encourage an intolerable risk that the jury will abandon logic and reason and instead condemn an offender for reasons having no place in our judicial system." (*Roldan, supra,* 35 Cal.4th at 743).

It is improper for a prosecutor to reference religion beliefs as a factor in the sentencing process. (See e.g., *Giry, supra*, 818 F.2d at 133; and *Evans v. Thigpen* (5th Cir.1987) 809 F.2d 239). Whether made by the prosecution or defense, efforts to obtain a death sentence based on biblical or religious doctrine are constitutionally unacceptable. (See *Wash, supra,* 6 Cal. 4th at 283 (conc. & dis. opn. of Kennard, J.) ("[a] religious argument against the death penalty is no more acceptable at the penalty phase of a capital case than a religious argument in favor of the death penalty. Our

---

process, a fair trial, an impartial jury, and reliable sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as, Article I of the California Constitution. (See *Id.* at 455-56); and 16) In a capital case requiring heightened reliability, the trial court failed to fulfill its duties under the Eighth Amendment to control the proceedings, courtroom decorum, and "ensure the most scrupulous regard for fair and correct procedure." (See *Id.* at 456-57).

courts are not ecclesiastical courts, and our juries do not base their decisions on religious law no matter whom such law may be said to favor.") (citations omitted)). This is especially true where, as here, the prosecutor repeatedly invokes religious text to advocate for Appellant's death.

Religious-based arguments have no place in the penalty phase of a capital trial. Neither the prosecutor, defense counsel, nor the trial court can properly instruct the jury as to the meaning of Biblical scripture. Respondent acknowledges that it is "well settled" that "biblical law has no proper role in the sentencing process." (RB 289). Respondent admits that "reference to religious authority in support of the death penalty is 'patent misconduct' and state and federal constitutional error." (*Ibid.*). In Appellant's case, Respondent concedes that the prosecutor repeatedly referenced religious materials and displayed a billboard that demonstratively quoted the Bible as "SANCTION[ING] CAPITAL PUNISHMENT." (*Id.* at 292). Finally, Respondent admits that the prosecutor quoted religious references and interpreted religious sources during both his opening summation and rebuttal summation in the penalty phase. (*Id.* at 290 and 295).

Despite the concessions, Respondent still tries to argue that applicable law does not control this case. In the state's view "Appellant's penalty phase trial took place in the fall of 1992, well before this Court handed down all of the decisions cited above." (RB 289). In the alternative, Respondent believes that Appellant "overstates the problem[s]" resulting from the prosecutor's use of religious references. (*Ibid.*). Respondent tries to argue that "Appellant was not prejudiced by the religious references, and his assignments of prosecutorial misconduct to them are otherwise forfeited." (*Ibid.*). However, Respondent's failure to rebut sixteen (16) arguments raised by Appellant in his Opening Brief supports Appellant's argument that the use of religious references to earn

Appellant's sentence of death was improper and constituted misconduct. Respondent's argument is further weakened by Respondent's incorrect conclusion that the case law is inapplicable here, and by the failure to address all of the issues raised in Appellant's Opening Brief.

Respondent is wrong to conclude that *Wash, Roldan, Roybal, Sandoval* and *Lenart* are not applicable to Appellant's case. Appellant's case has been pending on direct appeal since 1992. Thus, his conviction was not final at the time that the opinions in *Sandoval* (1992), *Wash* (1993), *Roybal*, (1998), *Ervin* (2000), *Lenart* (2004), and *Roldan* (2005) were issued. The cited authorities are binding precedent in Appellant's case. Moreover, in 1992, the same year as petitioner's trial, this Court condemned the consideration of religious authority in sentencing proceedings, explaining:

> *[w]hat is objectionable is reliance on religious authority as supporting or opposing the death penalty.* The penalty determination is to be made by reliance on the legal instructions given by the court, *not by recourse to extraneous authority.*

(*Sandoval, supra,* 4 Cal.4th at 194 (emphasis added) (citing *Jones v. Kemp* (N.D.GA 1989) 706 F.Supp. 1534, 1559)).

Respondent concedes that the prosecutor discussed, at length, Roger Tully's [Appellant's brother] religious conversion during the penalty phase opening argument. Respondent admits that the prosecutor contrasted Roger's religious conversion to Appellant's lifestyle. (RB 290). Respondent concedes that the prosecutor blamed Appellant for not following his brother's religious conversion. (*Id.* at 291). Respondent also concedes that the prosecutor went on to quote at length from his chart, "THE BIBLE SANCTIONS CAPITAL PUNISHMENT." (See Court Exhibit 5). Finally, Respondent admits that these quotes included verbatim readings of Genesis Chapter 9, Verse 6 and Numbers Chapter 35, Verse 16.

(RB 291-92).[134] Respondent, however, tries to argue that the prosecutor's "reference to [] Bible passages that support[] capital punishment" did not prejudice Appellant. (*Id.* at 292). Respondent believes that a reasonable jury would have understood the argument as conveying that "the death penalty [is] not [an] usurpation of God's authority, but a legitimate carrying out of California law." (*Ibid.*). Respondent thus concludes that the prosecutor's "allusions to biblical law" emphasized "that the jurors should instead judge the defendant primarily by his acts." (*Ibid.* (quoting *Roybal, supra,* 19 Cal.4th at 521)). Respondent's arguments are baseless in at least five respects, and its failed arguments highlight the problem.

First, by invoking arguments indicating that "THE BIBLE SANCTIONS CAPITAL PUNISHMENT," the prosecutor sought to show that California law and religious law are synonymous. This had the ultimate prejudicial effect on Appellant's case since the prosecutor argued that *both* the state and religion compelled Appellant's death sentence.

Second, by mustering a defense only as to the prejudicial nature of the prosecutor's statements, and not addressing the ethical nature of the prosecutor's actual conduct, Respondent has conceded that the prosecutor engaged in misconduct. Indeed, given this Court's controlling authorities, Respondent must recognize the prosecutor's conduct as unethical. (See e.g., *Lenart, supra*, 32 Cal.4th at 1129).

Third, Respondent stretches logic in an attempt to ameliorate the

---

[134] Numbers 35; 16-18 reads, "And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death. And if he smite him with throwing a stone, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death. Or if he smite him with a hand weapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death." (The Holy Bible, King James Version. New York: American Bible Society: 1999). Genesis Chapter 9, Verse 6 reads: "Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man." (*Ibid.*).

prejudice resulting from the prosecutor's misconduct. It is incredulous for Respondent to argue that the prosecutor's repeated quotations from Genesis, Numbers and Exodus amounted to "commonplace" remarks that asked the jury to judge the "defendant primarily by his actions." (RB 292). Religious arguments are not to be a guiding force in deciding whether a man should be put to death, or a factor at all, in the jury's decision making process. (*Roldan, supra*, 35 Cal. 4th at 743). The jurors are supposed to follow and apply the law, and make their penalty determination based on that law. They are not to consider higher Christian authority. The Biblical passages quoted by the prosecutor did not urge the jury to judge Appellant by his actions, as much as, condemn him to death for having been convicted of murder.[135]

Fourth, no reasonable juror would have recognized the prosecutions' repeated quotations from the Bible mandating that "THE MURDERER WILL BE PUT TO DEATH," as anything other than a religious mandate to sentence Appellant to death. Respondent errs in arguing that Numbers Chapter 35, Verse 16 does not "mandate a death sentence." (RB 292). The plain terms of the passage unequivocally urge the jury to select death. Moreover, the biblical passage expressly states that a person who commits murder ***must*** be sentenced to death lest "God's authority" be usurped. The prosecutor's religious references indicated that, if the jury did not sentence Appellant to death, they would effectively "usurp God's authority," which coincides with California law. (RT 3728-29).

Fifth, the facts of Appellant's case, and the extent of religious argument that took place, are worse than in *Roybal, Sandoval,* or in any

---

[135] In fact, the prosecutor admitted that his arguments were designed to evoke a response of passion in the jury, rather than reasoned application of the law to the facts when he argued: "*And when we talk about passion, isn't that what we're talking about with the death penalty? Isn't that what it's about?*" (RT 3728-3729 (emphasis added)).

other case that this Court has faced and in which it has found misconduct. In *Roybal,* this Court recognized that the prosecutor's quotations from the Bible were clear misconduct. (See *Roybal, supra*, 19 Cal. 4th at 519-20). However, in *Roybal,* the prosecutor only quoted from the Bible *once* near the end of closing arguments. (*Ibid.*). Here, not only did the prosecutor quote the same passages as the prosecutor in *Roybal*, he also displayed a large placard reading "THE BIBLE SANCTIONS CAPITAL PUNISHMENT;" displayed several quotes from the Bible; discussed several biblical passages spread over ***eight*** pages of transcript[136] quoted directly from the bible eight times, and analogized Appellant's fate and the jury's ultimate decision to the bad thief at Christ's crucifixion. (See RT 3691-93; 3797-98; and 3799-801).

Similarly, in *Sandoval,* the prosecutor's arguments came in rebuttal to defense counsel's allusion that, in order to return a death sentence the jury must "play God." (*Sandoval, supra,* 4 Cal.4th at 1914). Here, the prosecutor initiated the ecclesiastic arguments and made the arguments during his opening summation and rebuttal summation. Moreover, in *Sandoval,* the prosecutor paraphrased Biblical passages, while in Appellant's case; the prosecutor directly quoted passages on seven occasions and also displayed a placard clearly citing biblical passages that "SANCTION[ ] CAPITAL PUNISHMENT."

---

[136] It is clearly disingenuous for Respondent to assert that the prosecutor's religious references here were brief (See RB 292); especially in light of the fact that quotes taken from the prosecutor's religious arguments spread across five pages of the fifteen (15) pages Respondent donates in defense of this claim.

E. The Prosecutor's Religious References in Penalty Phase Rebuttal Prejudiced Appellant's Right to a Fundamentally Fair Trial.

Respondent concedes that during the state's penalty phase rebuttal argument, the prosecutor again quoted biblical passages, focusing in particular on descriptions from the Old Testament. (RB 295 (citing RT 3797-98)). Respondent admits that the prosecutor went through a detailed description of Jesus Christ's crucifixion. Respondent concedes that the prosecutor compared Appellant to the bad thief, who did not earn salvation, because he refused to repent, and, who instead, "cussed at Christ, turned his nose, whatever." (RB 297 (citing RT 3799-801)). Respondent also acknowledges that the prosecutor referenced the Mosaic Law of "*lex talionis*," or an eye for an eye, when he urged the jury that "there are some [crimes] that [are] so heinous, so vicious, so violent that they outrage us and they say this person has forfeited their right not to just live in society, but to live, to live." (RB 298 (citing RT 3808-09)).

Despite these key concessions, Respondent tries to argue that no prejudice inured to Appellant. Respondent bases this conclusion on its view that the prosecution's remarks were "hardly matters of clarity," and as such, "no reasonable juror would have understood them as appeals to extraneous authority or invitations to ignore what occurred in the courtroom." (RB 296). Respondent argues that the prosecutor ameliorated any prejudice by supplying the disclaimer that "he did not want jurors to 'bounce religions back and forth.'" (*Ibid.*).

First, Respondent's lengthy quotations of the prosecutor's religiously infused arguments prove the ineffectiveness of the disclaimer. Moreover, the record demonstrates that the prosecutor's invocation of religion caused defense counsel and the state to "bounce religions back and forth." The prosecutor thus clearly initiated a religious debate that

prejudiced Appellant's ability to receive a fundamentally fair sentencing proceeding.

Second, like above, Respondent's failure to defend the prosecutor's conduct during the state's penalty phase rebuttal is a concession that the prosecutor committed misconduct. Here, no disclaimer could correct the prosecutor's repeated invocations of religious authorities. In fact, the disclaimer directly conflicted with the prosecutor's lengthy religious arguments and billboard arguing that "THE BIBLE SANCTIONS CAPITAL PUNISHMENT." The disclaimer also conflicted with the fact that the prosecutor told the jury, in no uncertain terms, that religion "*has to be* discussed in this type of setting" because it would give the jury fortitude to impose the death penalty. (RT 3692). The fact that the prosecutor's arguments lacked "clarity" only further goes to prove their irrelevant and prejudicial nature. Respondent's efforts to minimize the prejudice emanating from the prosecutor's misconduct wholly fail.

Third, Respondent fails when attempting to defend the prosecutor's "good thief/bad thief" analogy as other than "a biblical reference in support of the death penalty or an invocation to a 'higher law,' but simply expressions of the prosecutor's view that repentance is a precursor to salvation." (RB 297). In either instance, the prosecutor committed misconduct.[137] It is improper for a prosecutor to invoke higher law, which is assuredly accomplished by an analogy comparing Appellant to the bad thief undeserving of salvation. Similarly, it is improper for a prosecutor to inject his own personal beliefs into an argument, (see *Medina, supra*, 11 Cal.4th at 776), and doubly prejudicial when those arguments concern *his*

[137] Additionally, the argument was improper because it relied upon facts not presented to the jury for support. No religious expert was called to verify the prosecutor's interpretation of the Bible. Indeed, Respondent notes that "religious question[s] w[ere] not the issue before the jury." (RB 298).

views of the defendant, of religion, and of the proper punishment. Even if the biblical story only related to the prosecutor's view of the path to salvation, the story functioned as religious instruction, telling the jury that Appellant would not be saved in Heaven and deserved a death sentence. It is irrelevant whether or not the prosecutor was appealing to religious authorities or reciting his own interpretation of religious authorities. In both instances, the prosecutor's religious interpretations or opinions interjected prejudicial, impermissible and irrelevant considerations into the jury's sentencing determination. (See *Sandoval*, *supra*, 241 F.3d at 776).

Fourth, Respondent's arguments in defense of the prosecutor's misconduct stretch the bounds of reason. Respondent argues that the comparison of Appellant to the bad thief, who did not deserve salvation, is a "remind[er] to the jurors to follow and apply the law the court would give them, and make their penalty determination based on the law." (RB 298). However, a comparison of Christ's crucifixion to Appellant's penalty phase could not further stray from applicable law. In truth, the prosecutor could not design a more prejudicial or inflammatory allusion to lead the jury away from their constitutional duties.

Finally, Respondent fails in its attempt to defend the prosecutor's references to the law of "*lex talionis.*" Respondent feels that the prosecutor's arguments were "secular in tone" and reminded the jury of "proportionality in punishment; i.e., that the punishment must fit the crime." (RB 298). Respondent argues that the prosecutor did not tell the jurors that "they could shift their sentencing responsibility somewhere else." (*Ibid.*). Respondent feels that a reasonable juror would not have understood the argument as one "suggesting that religious authority sanctified or compelled imposition of the death penalty for Appellant." (*Ibid.*).

The prosecutor's reference to retribution and "*lex talionis*" was not

merely a reference to the "proportionality in punishment." Instead, the prosecutor clearly intended to appeal to the juror's sense of vengeance when he urged them to sentence Appellant to death based on Mosaic and retributive law, instead of the facts in evidence. The prosecutor's appeal to retribution, as well as to biblical authorities to assure the jury of the righteousness of a death sentence for Appellant constitutes a clear attempt to "shift sentencing responsibility." (See *Caldwell, supra,* 472 U.S. at 328-329). In arguing such religious concepts, the prosecutor intended to impute to the jury that they would not be accountable for Appellant's execution, but instead, would be following God and the state's law. Telling the jurors to turn to religion to find the fortitude to execute Appellant and to find solace in religion for their death verdict served the purpose of "diminish[ing[the jury's personal sense of responsibility for the verdict." (*Hill, supra*, 17 Cal.4th at 836). The jury was thus impermissibly led "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Caldwell, supra,* 472 U.S. at 328-29).

F. Cumulative Prejudice from Counsels' Repeated References to Religion Violated Appellant's Constitutional Rights.

Here, the cumulative effect of the prosecutor's repeated invocations of religious authority caused the jury to rely on religious arguments in their penalty verdict and impose the death penalty. The aggregated prejudice from the sum of the prosecutor's sum course of misconduct rendered Appellant's penalty phase proceedings fundamentally unfair.

Respondent argues that the *Chapman* "harmless beyond a reasonable doubt" test controls review of religious reference misconduct. (RB 300 (citing *Lenart, supra,* 32 Cal.4th at 1130)). Under this standard, Respondent feels that "the religious references, even if viewed "cumulatively, were harmless beyond a reasonable doubt." (RB 301).

Respondent feels that the closing argument comprised "just a small part of the hundreds of pages of closing argument." (*Ibid.*). Respondent characterizes "the overwhelming majority" of the prosecutor's arguments as "detail[ing] recitation of the factors in aggravation in the case, particularly the brutal circumstances of the crime." (*Ibid.*). Respondent argues that "nothing the prosecutor (or defense counsel) said about religion would have led a reasonable juror to believe he or she was not required to follow the court's instructions but could instead follow God's law...." (*Ibid.*). These arguments fail in at least three ways.

First, Respondent has set forth no persuasive justification why this Court should not follow the Pennsylvania Supreme Court's lead and adopt a prejudice per se standard in capital cases involving religious arguments. (See *Chambers, supra*, 528 Pa. at 586). The trial court's error in not preventing the misconduct, and the prosecutor's exploitive and inflammatory use of religious references, constituted a "defect affecting the framework within which the trial proceeds." (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *People v. Flood* (1998) 18 Cal.4th 470, 500; and *People v. Sarazzawski* (1945) 27 Cal.2d 7, 18-19). This Court should adopt the per se standard and find the prosecutor's religious references prejudicial.

Second, Respondent tries to diminish the prosecutor's reliance upon religious arguments in an attempt to diminish the prosecutor's violations of Appellant's constitutional rights. In fact, contrary to Respondent's assertions, the prosecutor's repeated and lengthy references to religion were more intense than the record can reflect. The prosecutor's religious arguments cover eight pages of transcript. (See RT 3691-93; 3797-98; 3799-801). The prosecutor urged Appellant's capital jurors, after having witnessed the guilt phase proceedings in a grisly crime, to select a death sentence because: "THE BIBLE SANCTIONS CAPITAL

PUNISHMENT." The prosecutor's allusion to Appellant as the bad thief, who "cussed out Christ," directly implored the jury not to grant Appellant salvation through a life sentence. Moreover, the fact that the prosecutor, during his closing argument, combined religious analogies with many other forms of misconduct only exacerbated the degree of prejudice in Appellant's case. (See Claim XVI - The Prosecutor Committed Prejudicial Misconduct During the Penalty Phase Arguments). A reasonable juror, in the face of the prosecution's overwhelming religious pressure, would have assumed that God's law required a death sentence and that religious ideals were a permissible consideration when determining Appellant's fate.

In recent years, this Court has increasingly seen a number of capital cases where prosecutor's, during penalty phase summations, have resorted to biblical references in lieu of legal arguments and facts developed at trial. (See *Zambrano*, *supra,* 41 Cal.4th at 1082; *Avila*, *supra,* 46 Cal.4th at 680; *People v. Williams* (2010) 49 Cal.4th 405; and *Brady, supra,* – Cal.4th at *1).[138] This Court has yet to see, however, the all out religious war such as

---

[138] In *Avila,* the prosecutor argued: "You are not here to forgive. That is for some other authority. You are here to impose punishment - the appropriate punishment based on what this defendant deserves by his conduct, by his actions." (*Avila, supra,* 46 Cal.4th at 721). This Court rejected the defendants claim that this argument constituted misconduct and found that "[n]othing in these statements misled the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." (*Ibid.* (quotations omitted)). In *Zambrano,* the prosecutor made several references to the Bible and quoted biblical text. In response, defense counsel rebutted with his own religious allusions. Despite the extensive religious arguments this Court held that the prosecutor's arguments were not erroneous and that the "defendant suffered no prejudice. In this regard, we note that the prosecutor's biblical comments were part of a longer argument that properly focused upon the factors in aggravation and mitigation." (*Zambrano*, *supra,* 41 Cal.4th at 1170). In *Williams* the prosecutor quoted from Genesis and argued that jurors with religious scruples to the death penalty should realize that the Bible unambiguously commands that murderers be put to death. (See *Williams*,

was initiated by the prosecutor in Appellant's case.[139]

This Court's response to prosecutorial use of religious texts for arguments is not unified. This Court's decision in *Zambrano* drew a dissent from Justice Kennard. (See e.g., *Zambrano, supra,* 41 Cal.4th at 1198 (dissenting opn. J., Kennard) ("error occurred when, in closing argument at the penalty phase, the prosecutor quoted passages from the Bible as authority for the death penalty.")). There, Justice Kennard noted

---

supra, 49 Cal.4th at 479). The defense responded with three distinct religious arguments condemning the death penalty. (*Ibid.*). This Court recognized that the prosecutor's arguments were misconduct. (*Id.* at 481). Nevertheless, this Court found that the challenged remarks did not incur any prejudice to the defendant due to their brevity, the court's jury instructions, the defendant's criminal history, and the overwhelming nature of the facts in aggravation. (*Id.* at 481-82). In *Brady* the prosecutor referred to the fact that the victim "died while wearing her cross." (*Brady, supra,* -- Cal.Rptr.3d at *27). This Court rejected the argument because the prosecutor did not appeal to religious authority in urging the jury to return a death verdict.

[139] The prosecutor's comments in Appellant's case are more egregious than the comments in *Avila, Zambrano,* and *Williams*. First, throughout his argument, as Respondent concedes, the prosecutor openly displayed a placard that quoted the Bible as "SANCTIONING CAPITAL PUNISHMENT. (RB 292). Second, the prosecutor in over six instances during his penalty phase closing argument, referred to religious authorities for support in arguing that Appellant's case warranted a death sentence. Third, the prosecutor's religious analogies, particularly his comparison of Appellant to the bad thief at Christ's crucifixion, were tasteless and wholly intended to incite the jury's passions. Fourth, unlike in *Williams,* here the prosecutor's remarks clearly caused prejudice in light of their longevity, the court's ineffective jury instructions, Appellant's lack of a prior criminal record, and the strength of Appellant's evidence in mitigation. Fifth, unlike in *Brady,* in Appellant's case, the prosecutor repeatedly and extensively discussed religious authorities. More prejudicially, in Appellant's case, Prosecutor Burr utilized religious authorities to urge the jury to return a death verdict. Simply put, in neither *Zambrano*, *Avila, Williams,* nor *Brady* did the prosecutor rely on religious authorities are commit prejudicial misconduct as much as Prosecutor did in Appellant's case.

that the prosecutor's argument invariably misled the jury and shifted the responsibility of their sentencing determination. (*Zambrano, supra,* 41 Cal.4th at 1170 (dissenting opn. Kennard, J.). Justice Kennard noted that "counsel's failure to object violated defendant's constitutional right to the effective assistance of counsel. Defense counsel may have decided not to object because he intended to reply to the prosecutor's argument with a biblical argument of his own; however, that is not a legitimate tactical purpose for failing to object." (*Ibid.*). Ultimately, she concluded that:

> [T]he prosecutor's appeal to biblical authority invited the penalty phase jurors to disregard their duty to follow the trial court's instructions to weigh the mitigating and aggravating evidence in deciding penalty, whether death or life without parole. Accordingly, the prosecutor's improper biblical argument may well have permitted one or more jurors to overlook the defense evidence in mitigation, causing the juror or jurors to vote for death without weighing that mitigating evidence against the prosecution's evidence in aggravation. Thus, the prosecutor's improper reliance on biblical authority prejudiced defendant.

(*Zambrano, supra,* 41 Cal.4th at 1203 (dissenting opn. J., Kennard)).

Here, this Court should not sanction the prosecutor's blatant misconduct and invocation of religious authorities during the penalty phase argument in Appellant's case. Unlike other cases where this Court has found religious argument harmless, here the religious references were extensive, rather than brief or undeveloped and the prosecutor returned to religious themes over and over. (See e.g., *Wash, supra,* 6 Cal.4th at 261). Prosecutor Burr's unethical tactics and outrageous arguments were misconduct, prejudiced the jury and incited their passions. Given the weakness of the state's case in aggravation and the length of the jury's penalty deliberations, religion certainly influenced the jury's verdict, and tipped the scales toward the death penalty.

G. Conclusion.

In a capital case, the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty process must be neutral and principled so as to guard against bias or caprice in the sentencing decision and to assure that a sentencer's discretion is informed by "clear and objective standards. (*Gregg, supra,* 428 U.S. at 198 (quoting *Coley v. state* (1974) 231 Ga. 829, 834)). Here, the prosecutor invoked vengeance and improperly exhorted the jury to automatically impose death based on religious considerations, without consideration of an examination of Appellant's individual characteristics. As a matter of constitutional principle, the prosecutor's inflammatory arguments perverted the penalty phase proceedings and the juror's considerations. (See *Godfrey, supra,* 446 U.S. at 428; *Lockett, supra,* 438 U.S. at 602-605; *Jones, supra,* 706 F.Supp. at 1559-60; *Tison, supra,* 481 U.S. at 180-81; and *Coker v. Georgia* (1977) 433 U.S. 584, 620). In sum, the religious arguments of the prosecution and defense, as a whole, violated Appellant's rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendment's and the parallel provisions of the California Constitution.

XVIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE PROSECUTOR TO ARGUE FUTURE DANGEROUSNESS.

A. Introduction.

The evidence submitted by the state to show that Appellant would pose a danger in the future was that Appellant was involved in two scuffles in jail with the other inmates during the five years while he was awaiting trial. Relying solely on this evidence, the prosecutor speculated that Appellant would be a danger if given life in prison. The jailhouse evidence was not probative of Appellant's future dangerousness. It did not support a reasonable inference that Appellant would pose a threat of future danger if sentenced to life without parole instead of death. The trial court's ruling, allowing the admission of the evidence, and the trial court's failure to sustain objections to the prosecutor's future dangerousness arguments were error. (See Claim XVI - The Prosecutor Committed Prejudicial Misconduct During the Penalty Phase Arguments). Respondent has failed to prove the error was not harmless beyond a reasonable doubt.

B. The Trial Court's Determination was not Supported by Substantial Evidence of Appellant's Future Dangerousness.

Respondent concedes that the prosecutor argued: "You have to keep him on death row where he is isolated because he gets on the main line with all the other prisoners...some other prisoner, some other guard, some hospital or some jail prison nurse or social worker does something that he doesn't like, and he acts out violently, hits, maims, hurts, he can do it at will." (RB 303 (citing RT 3696)). Respondent concedes that defense counsel objected to this line of argument as "improper" under "both federal and state" constitutions. (RB 302). Respondent, however, argues that "[n]o misconduct occurred" here. (*Ibid.*).

Respondent says that the prosecutor's arguments were supported by substantial evidence of Appellant's future dangerousness. According to Respondent, "actual violence while in custody, such as Appellant's two fights with other inmates, logically and reasonably supports an inference of future dangerousness." (RB 303). Respondent thus attacks Appellant's assertion that the fights "lacked probative value" because "whether the jailhouse 'scuffles' were 'trivial' or probative of future dangerousness was a jury question." (*Ibid.*). Respondent ultimately feels that "the trial court was correct in ruling 'there can be appropriate arguments on the subject matter of future dangerousness based on the evidence that was presented in this case." (*Id.* at 303-04 (citing RT 3675)). Thus, Respondent deems the prosecutor's arguments permissible. Respondent's arguments are erroneous.

First, the probative value of the jailhouse scuffles, as well as the substantiality of the evidence supporting the incidents, was not only a decision for the jury, but more initially and more importantly, a consideration that the trial court was required to evaluate as a prerequisite in determining whether to admit the evidence and to allow future dangerousness arguments. (See *Phillips, supra,* 41 Cal. 3d at 72 n. 25). The trial court's determination was not supported by substantial evidence and was therefore error. (*Ibid.*). The trial court's decision was arbitrary and contradicted material elements of battery as defined by Cal. Penal Code Section 240. The result injected irrelevant and prejudicial evidence into the sentencing equation violation of constitutional mandates. (See *Barclay, supra,* 463 U.S. at 939).

Second, the trial court's ruling was not "logically and reasonably" justified by evidence of Appellant's future dangerousness. (See Claim XIII - The Admission of Two Uncharged Misdemeanor Batteries as Aggravating Factors in the Penalty Phase Violated state Law and Appellant's

Constitutional Rights). In fact, the prosecutor's argument, by including nurses and social workers, did not even reflect the future dangerousness evidence presented during the penalty phase. There was no evidence Appellant had ever injured a prisoner, a prison guard, a prison nurse or social worker.

Third, the trial court's failure to delineate what constituted "appropriate argument" allowed the prosecutor to exploit the minimal future dangerousness evidence presented during the penalty phase. The prosecutor inflated these incidents into "proof" that Appellant would have to be executed to keep him from committing further acts of violence in prison.

Finally, Respondent fails to address eight arguments raised by Appellant in his Opening Brief.[140] Respondent's failure to address these

---

[140] Respondent does not address or rebut Appellant's arguments: 1) Appellant's due process rights were violated, under the Fourteenth Amendment and Article I of the California Constitution, when the trial court allowed the prosecutor to argue that Appellant posed a future danger when no evidence supported a reasonable inference of future dangerousness. (See II AOB 467); 2) The prosecutor's arguments created an unacceptable risk that the jury voted to execute Appellant "to avoid improbable and speculative danger." (See *Id.* at 468); 3) This Court has incorrectly held that it is less prejudicial for the prosecutor to present himself as an expert and argue their own opinions about future dangerousness, than it would be to present expert testimony on the same topic. (See *Id.* at 469); 4) The prosecutor's arguments were improper because they allowed the state to introduce facts outside the evidence and made the prosecutor his own witness. (See *Ibid.* (citing 5 Witkin & Epstein, *supra,* Trial at 3550)); 5) This Court's requirement that evidence of future dangerousness must be culled from past conduct does not eliminate prejudice from allowing the prosecutor to speculate as to the defendant's future behavior. (See II AOB 470 (citing *People v. Hayes* (1990) 52 Cal.3d 577, 635-36)); 6) The evidence used by the trial court to justify its order did not support a reasonable inference that Appellant would pose a future danger because it did not account for the dissimilarity in conditions and security between county jails and the maximum security prisons in which an inmate serving life without parole would be housed.

arguments undermines its conclusion that the trial court did not commit reversible error and the prosecutor did not commit misconduct. Respondent's failure to address Appellant's arguments addressing this Court's precedents proves the indefensible nature of the problems posed by the current state of the law. Respondent's failure to address prejudice stemming from the trial court's error and the prosecutor's improper arguments means the state has failed to shoulder the burden of showing that the error was harmless beyond a reasonable doubt. (See *Chapman, supra*, 386 U.S. at 23).

C. The Trial Court's Ruling and the Prosecutor's Conduct Violated This Court's Precedents.

Respondent tries to distinguish *Murtishaw, supra*, 29 Cal.3d at 779, as inapplicable to this case. The state argues that this Court has limited the use of "future dangerousness" experts, but has not limited the use of future dangerousness arguments if supported by the evidence. (RB 303 (citing *People v. Michaels* (2002) 28 Cal.4th 486, 540; and *People v. Champion* (1995) 9 Cal.4th 879)). Respondent contends that "Appellant is simply incorrect when he claims the prosecutor violated *Murtishaw*." (RB 303).

First, Respondent confuses many of Appellant's arguments alleging trial court error with arguments alleging prosecutor misconduct. (See RB 303). Respondent focuses on defending the prosecutor's arguments, but only briefly acknowledges the role of the court in permitting the argument. Here, the prosecutor's misconduct stem from the trial court's erroneous ruling allowing argument of future dangerousness based on scant evidence

---

(See II AOB 471); 7) The prosecutor misled the jury and took advantage of the lack of evidence concerning prison security by falsely arguing that prison officials could not "do anything" to Appellant if he was sentenced to life in prison and committed future acts of violence. (See *Id.* at 472); and 8) The prosecutor's arguments were extremely prejudicial and the trial court's error in allowing the future dangerousness arguments was not harmless beyond a reasonable doubt. (See *Id.* at 473).

of two uncharged misdemeanor batteries. Appellant challenges the trial court's decision to allow future dangerousness arguments in the first instance, as well as, the prosecutor's exploitation of the trial court's erroneous ruling.

Second, the prosecutor's "argument" was no more than thinly disguised "expert" opinion testimony of the sort prohibited by *Murtishaw*. The prosecutor "predicted" that Appellant would "act out violently" and hurt or maim nurses or prison social workers if he was placed on the mainline, rather than on death row. The prosecutor's argument thus violated the principles set forth in *Murtishaw* because - just like the expert testimony rejected by this Court in *Murtishaw* - the prosecutor's opinion here was "uncertain and conjectural."

Third, his forecast of Appellant's future violence created an unacceptable risk that the jury voted to execute Appellant "to avoid improbable and speculative danger." (*Murtishaw, supra*, 29 Cal.3d at 770) There was not a sufficient amount of evidence to allow prosecutorial argument on the subject. (See Claim XIII - The Admission of Two Uncharged Misdemeanor Batteries as Aggravating Factors in the Penalty Phase Violated state Law and Appellant's Constitutional Rights). Accordingly, the prosecutor should not have been permitted to argue this point.

D. Conclusion.

The trial court improperly allowed the prosecutor to tell the jury, during his penalty phase argument, that Appellant would pose a danger in the future if sentenced to life in prison. The trial court's ruling was erroneous because there was no evidence that supported a reasonable inference of future dangerousness. It is unconstitutional to allow the prosecutor to argue as fact something that was neither proved nor provable by the evidence. The prosecutor further exploited this erroneous ruling by

making speculative predictions about Appellant's dangerousness if sentenced to life in prison. The trial court's ruling and the prosecutor's argument violated Appellant's rights to due process and a fair trial, and his Eighth Amendment rights.

Because federal constitutional error occurred, pursuant to *Chapman, supra*, 386 U.S. at 23, the state must prove the error was not harmless beyond a reasonable doubt. It cannot do so here. But even applying the standard of prejudice for penalty phase errors of state law errors set forth in *Brown, supra*, 46 Cal.3d at 448, there is a reasonable possibility that the jury would not have sentenced defendant to death if the trial court had prohibited the prosecutor from arguing future dangerousness. The trial court committed error in allowing argument regarding future dangerousness, and the error violated Appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution. His death sentence must be reversed.

XIX. THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO DISPLAY INFLAMMATORY CHARTS TO THE JURY.

A. Introduction.

The prosecutor's chart and arguments, displayed during the opening morning of his penalty phase closing arguments, improperly directed the jury to convert the absence of possible mitigating factors into aggravating factors.[141] (See *Davenport, supra*, 41 Cal.3d at 288-290). Because the absence of mitigators is not a statutory factor in aggravation, any argument relating to the absence of mitigation is irrelevant and prejudicial. (See *Boyd, supra*, 38 Cal.3d at 773-74). A "prosecutor is not permitted to argue that the absence of [a] mitigating factor[] is itself an aggravating factor justifying the death penalty." (*People v. Cox* (1991) 53 Cal.3d 618, 685 (citations and quotations omitted)).

The trial court erred when it permitted the prosecutor to argue about and invoke considerations outside the proper weighing of statutory factors. Both the prosecutor's charts and arguments, and the trial court's errors violated due process principles and the Eighth Amendment's reliability concerns.[142] (See *Gardner, supra*, 430 U.S. at 349; *and Miranda, supra,* 44 Cal.3d at 110).

---

[141] (See Court Exhibit 5 (the six charts were: Chart 1: "Factors for Consideration;" Chart 2: "Battery;" Chart 3: "Aggravating Factor, Increases Guilt/Enormity/Injurious Consequences;" Chart 4: "What Didn't You Hear About Richard Christopher Tully;" Chart 5: "What Have You Heard about Richard Christopher Tully;" and Chart 6: "The Bible Sanctions Capital Punishment.")).

[142] Appellant recognizes that this argument incorporates elements of prosecutorial misconduct and trial court error. (See *Riggs, supra,* 44 Cal.4th at 317 n. 40). For this reason it should be evaluated under the *Darden* materiality standard and reviewed for abused of discretion.

B. Appellant's Arguments Have not been Forfeited.

Respondent concedes that Appellant objected to the prosecutor's failure to show the charts to the defense before displaying them to the jury and to captions on Charts 3 and 4. (RB 306-07).[143] In truth, defense counsel lodged several objections to the charts including: 1) relevance; 2) misconduct; 3) prejudice; 4) misstatement of facts in evidence; and; 5) misstatement of the law. (RT 367-73) Respondent concedes that the trial court sustained many defense objections, (RB 306),[144] and that the trial court ultimately prohibited the continued display of several captions on Chart 4 "What Didn't You Hear About Richard Christopher Tully." (RB

---

[143] The defense objected and the parties discussed the charts off the record. The fact of the unrecorded conference was later noted on the record. (RT 3670). The defense initially objected to the prosecutor having shown the charts to the jury without first showing them to the defense. (RT 3667-3669). The defense then objected to several captions on Chart 4:"What Didn't You Hear About Richard Christopher Tully." The defense argued that the jury would regard the absence of any listed mitigating factor as additional factors in aggravation. Defense counsel argued "you expect to hear this, you didn't, therefore he is a bad man." (RT 3763). The defense explained that this conclusion was improper, and argued that the charts were irrelevant and immaterial for any permissible prosecutorial argument. Finally, the defense argued that the charts misstated the evidence with regard to whether Appellant was "a good provider." (RT 3672).

[144] The trial court correctly prohibited the prosecutor from further showing certain portions of the chart to the jury because: 1) the danger of going beyond any evidence presented regarding future dangerousness; 2) the possibility the jury would conclude that the absence of these factors were aggravating factors, and 3) the danger of misleading the jury regarding to Appellant's decision not to testify. (RT 3674-76). The trial court, however, did not: 1) correctly admonish the jury regarding the previous display of the signs; 2) correctly prohibit the prosecutor from further displaying any portions of the demonstrative evidence; or 3) correctly admonish the prosecutor for the state's flagrant misconduct and lack of notice to the trial court and defense counsel.

306).[145]

However, in Respondent's opinion, "[i]t is unclear whether Appellant now alleges trial court error and prosecutorial misconduct to all of the prosecutor's charts...." (RB 307). Respondent argues that "to the extent Appellant is challenging all of the charts in addition to Chart 4, his assignment of error is forfeited for the failure to object below." (*Ibid.*). Oddly, in support of their argument, Respondent then concedes that Appellant also objected to captions in Chart 3 and that the trial court sustained Appellant's objections. (*Id.* at 307 n. 29).[146]

First, Respondent does not mention that, in response to defense objections to the charts, the trial court held an ***unrecorded*** bench conference to sort out the parties' objections. Here again, the inadequacy of the record threatens forfeiture of Appellant's arguments and constitutional rights. (See Claim I - The Missing Portions of the Record Deprived Appellant of Meaningful Appellate Review). Respondent cannot prove the nature of the arguments or objections raised during this

---

[145] The four prohibited captions read: "He Is Not Violent in a Prison Setting;" "That this Violence Is out of Character for Him;" "That He Is Remorseful, Sorry for What He Did;" and "That He Found God and Repented." (RT 3674-3676).

[146] To the extent Respondent argues that Appellant has forfeited his claims attacking the validity of the court's admonishment, the state's reliance upon *Abbott v. Cavelli* (1931) 114 Cal.App. 379, 383 is misplaced (See RB 307 n. 29). First, the case involved instructions regarding "gross negligence" submitted by an appellant at trial and challenged by appellant on appeal. (*Ibid.*). Second, the case stands for the proposition "that a party must abide by the consequences of his own acts and cannot seek a reversal on appeal for errors which he has committed or invited." (*Ibid.*). Appellant has not invited the error, however, since he is now challenging lack of an instruction by the trial court. Respondent is thus in error to blame Appellant for the trial court's failure to admonish the jury, since it was not Appellant's conduct that incited the commission of error, but rather, the prosecution's failure to seek prior approval and the trial court's discretion.

unrecorded bench conference and, therefore, this Court should consider Appellant's meritorious arguments. Appellant's arguments cannot be forfeited because the record does not demonstrate whether or not a contemporaneous objection was properly lodged. The contemporaneous objection rule is waived when deficiencies in the record impede meaningful review and a determination as to whether the requisite contemporaneous objection was raised. (Cf. *Young*, *supra*, 34 Cal.4th at 1203 ("because it cannot be ascertained whether defense counsel specifically requested clarification [of an instruction], we shall give defendant the benefit of the doubt and find the issue preserved for appeal")).

Second, this Court may review this claim because "a defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights...." (*Vera*, *supra,* 15 Cal.4th at 276). Here, the trial court's error and the prosecution's use of inflammatory charts and related arguments violated Appellant's rights under the Sixth, Eighth and Fourteenth Amendments and the parallel provisions of the California Constitution. Thus, it is possible, if this Court finds that Appellant has raised this claim for the first time on appeal, for Appellant to nevertheless assert this claim based on the deprivation of his fundamental and constitutional rights.

C. The Prosecutor's Use of the Charts and His related Arguments Violated Appellant's Constitutional Rights.

Respondent incorrectly characterizes "Appellant's position [a]s simply that the prosecutor's charts and arguments improperly directed the jury to convert the absence of possible mitigating factors into aggravating factors." (RB 307 (citing II AOB 477-81)). Respondent says that Appellant's claims are obviated because the prosecutor did not "tell the jury that the absence of a mitigating factor was not a factor in aggravation." (RB 308). Respondent argues that Appellant's claims are meritless because

"the trial court instructed the jury to the same effect." (*Id.* at 307-308). Respondent rests its opposition on the presumption that the jury follows the instructions it is given. (See *Jones, supra,* 15 Cal.4th at 168; *Wash, supra,* 6 Cal.4th at 263; and *Yoder, supra,* 100 Cal.App.3d at 338).

First, Respondent's arguments fail to address the fact that the prosecution initially displayed all of the charts to the jury, including subcaptions later stricken. (See RT 3670-76). The charts, and prejudicial subcaptions, were freely displayed throughout the morning of the prosecutor's opening summation and until the lunch recess when defense counsel objected. (*Id.* at 3670). By displaying the charts without prior consent from the court, and without giving defense counsel an opportunity to object, the prosecutor willfully failed to provide notice of his intent to use highly inflammatory demonstrative evidence.

Second, while the prosecutor did not expressly state that the absence of a mitigating factor was a factor in aggravation, he did use the "highly-effective" rhetorical device of paraleipsis - to drive home the point he could not argue directly. (See *Wrest, supra,* 3 Cal.4th at 1107).[147] The prosecutor listed possible mitigating factors that the jury did not hear about, and then told the jury to consider the absence of those factors in weighing the aggravating factors against the mitigating factors. (RT 3682-3697). This is entirely different from simply arguing that no evidence in mitigation had been presented, but is equally as prejudicial and inappropriate.

Third, the use of Chart 4 and the prosecutor's related argument was interpreted by the jury to mean that the absence of each listed mitigating

---

[147] Recently, in *Valencia, supra,* 43 Cal.4th at 268, this Court rejected a claim that the prosecutor committed error by using the rhetorical technique of paraleipsis because defense counsel did not make a paraleipsis objection. Such a requirement is undoubtedly out of line. Any objection, based on prosecutorial misconduct should be sufficient to preserve claims that the prosecutor inappropriately used misleading rhetoric to prejudice the defendant and confuse the jury. (*Wrest, supra,* 3 Cal.4th at 1107).

factor was a factor in aggravation. As a result, at least nine potential mitigating factors were converted into aggravating factors. (See Court Exhibit 5). While a prosecutor may fairly argue *why* the mitigating evidence *that was* presented was not truly mitigating, he may not argue that the absence of other mitigating evidence that was not presented has any relevance. (See *Davenport, supra,* 41 Cal.3d at 288-90). This is because the jury is likely, as they did here, to understand the prosecutor's arguments as inferring that the lack of evidence in support of a possible mitigating factor constitutes evidence in aggravation, or counts against the strength of the mitigation evidence presented by the defendant, and is to be weighed accordingly during the sentencing deliberations.

Fourth, while often this Court presumes that juries follow trial court instructions, (See *Jones, supra,* 15 Cal.4th at 168), the misconduct exhibited here, in Prosecutor Burr's arguments and charts, could not be ameliorated by a simple instruction. In fact, the trial court's failure to provide an instruction on point distinguishes this case from the cases Respondent cites in support of its proposition that any prejudice to Appellant by the prosecutor's misconduct was alleviated by instruction. (See RB 307-08). For example, in *People v. Wash,* this Court found that an instruction concerning the definition of life without the possibility of parole sufficiently ameliorated any prejudice stemming from the prosecutor's misstatements of law concerning the definition of life without the possibility of parole. (See *Wash, supra,* 6 Cal.4th at 265). An identical conclusion was reached in *Yoder, supra,* 100 Cal.App.3d at 338. Here, however, Appellant's claim does not involve misstatements of the meaning of life without the possibility of parole. Instead, the case involves highly prejudicial and inflammatory references to biblical passages, and an implied moral imperative that conflicted with and undermined the jury instructions. This is not a situation where a trial court's instruction

addressed *misstatements of law* by supplying the correct *legal definition.* Instead, this case involves a failure to provide instructions necessary to ameliorate prejudice from overt misconduct. (See RT 3676). Similarly, in Appellant's case no pinpoint instruction was given regarding the prosecutor's placard or whether the jury could consider whether the "BIBLE SANCTIONS CAPITAL PUNISHMENT."

D. The Trial Court Committed Prejudicial Error by Allowing the Prosecutor to Use the Charts and Argue that the Lack of a Mitigating Factor Constituted An Aggravating Factor.

The trial court wrongly held that the other captions on the prosecution's charts were not improper *per se.* The court held: "[I]t can be appropriate to argue the absence of mitigating factors and to comment on the mitigating evidence that has been presented, providing that there be no reference made to the idea that lack of evidence proving statutory mitigating factors does not provide additional aggravating factors." (RT 3676). Following this ruling, during argument, the charts were displayed to the jury by the prosecutor. He argued each item on the charts in detail. (RT 3682-3697).

Respondent fails to muster a defense to Appellant's allegations of trial court error in allowing the prosecutor to use the inflammatory and prejudicial charts. In truth, it was the trial court's error which facilitated the prosecution's misconduct. By failing to strike all of the captions and charts, the trial court permitted the prosecutor to argue that the lack of mitigating factors constituted evidence in aggravation. The trial court effectively failed to heed this Court's holding that:

> 'Aggravation' is by definition a circumstance above and beyond the essential constituents of a crime which increases its guilt or enormity or adds to its injurious consequences. (Citing to Black's Law Dict. (4th rev. ed. 1968)). Mitigating circumstances, on the other hand, are ones which although not

> constituting an excuse for or justification of the crime, may be considered as extenuating or reducing the degree of moral culpability. (*Id.*). Thus, the absence of mitigation would not automatically render the crime more offensive than any other murder of the same general character.

(*Davenport*, supra, 41 Cal.3d at 289). The prosecutor in *Davenport* argued that the absence of certain potential mitigating factors showed that Appellant acted "calmly, deliberately and of his own free will when he committed the murder. The lack of mitigating evidence pertaining to these factors thus rendered each of them an aggravating factor in the Appellant's case." (*Ibid.*). The Court in *Davenport* concluded that the form of the prosecutor's argument was likely to confuse the jury as to the meaning of "aggravation" and "mitigation" under the statute. It was therefore held improper under section 190.3 and this Court declared that "it should not in the future be permitted." (*Ibid.*).

Here, the trial court wrongly held that the other captions in chart 4, as well as Charts 1, 2, 3, and 5, were not improper per se. Respondent's position is simply that since the prosecutor and the trial court told the jury that the absence of a mitigating factor was not a factor in aggravation, then there was no trial error. (RB 307-08). However, the prosecutor's arguments and presentation of the charts: 1) manipulated the meaning of "aggravation" and "mitigation"; 2) misled the jury as to the weight they were to assign the absence of certain mitigating factors; 3) thoroughly outlined the absence of certain mitigating factors not presented to the jury by the defense; and 4) interjected prejudicial considerations into the jury's deliberations as a result of this absence.

In the last four years, this Court has dealt with only two cases where the defendant alleged that the trial court committed error and the prosecutor committed misconduct by admitting and displaying inappropriate charts to the jury. (See e.g., *People v. Cook* (2007) 40 Cal.4th 1334; and *Riggs,*

supra, 44 Cal.4th at 248). In neither of these cases did this Court find error or prejudice. (See *Cook, supra,* 40 Cal.4th at 1340; and *Riggs, supra,* 44 Cal.4th at 335-36). In neither case was this Court presented with the highly inflammatory, prejudicial and egregious charts that were presented in Appellant's case. This Court has thus not previously dealt with the degree of trial court error and prosecutorial misconduct as presented by Appellant's case.[148]

Respondent neglects to mention or rebut several other arguments raised in Appellant's Opening Brief. [149] Respondent's failure to address

---

[148] In contrast to *Cooke* and *Riggs*, Appellant's claim is premised on trial court error and prosecutorial misconduct which prejudiced appellant's chances of receiving a fair trial beyond all reasonable doubt. First, unlike in *Cooke*, the trial court refused to sustain Appellant's objections and allowed the prosecutor to display the charts throughout their argument. This critical abuse of discretion manifested error throughout the prosecutor's arguments which was not corrected by an admonishment. Second, like the religious analogy in *Riggs*, the prosecutor's chart, which contained a biblical allusion, shifted the jury's responsibility in sentencing. Third, here, unlike in either *Cook* or *Riggs*, the prosecutor exploited the inflammatory and prejudicial charts by repeatedly referencing the terms, including the religious arguments. In sum, in Appellant's case, this Court should conclude that the trial court abused its discretion and the prosecutor committed misconduct. Indeed, unlike in *Riggs,* the prosecutor's charts had no "legitimate, probative value." (*Riggs*, *supra,* 44 Cal.4th at 326).

[149] Respondent does not address or rebut the following eight arguments: 1) The prosecutor committed misconduct by failing to notify the defense or seeking court approval before displaying six large charts to the jury during his opening summation in the penalty phase. (See II AOB 475); 2) The trial court wrongly held that all the captions on Chart 4 and the other charts were not improper *per se*. (See *Id.* at 477); 3) The prosecutor's arguments invoked considerations outside the proper weighing of statutory factors and violated Appellant's rights to due process and reliable sentencing under the Eighth and Fourteenth amendments. (See *Id.* at 477); 4) The prosecutor committed misconduct by using the rhetorical device of paraleipsis to convert nine potential mitigating factors into aggravating factors. (See *Id.* at 478); 5) The trial court committed error by allowing the prosecutor to argue the absence of mitigating factors

these arguments undermines its argument that the prosecutor did not commit misconduct. Respondent also fails to address Appellant's assertion that the trial court committed error. Respondent fails to address the prejudice to Appellant's constitutional rights resulting from the prosecutor's misconduct and the trial court's errors. Under these circumstances, Respondent has failed to show, beyond a reasonable doubt, that the prosecutor's use of inflammatory charts constituted harmless error. (See *Chapman, supra,* 386 U.S. at 23).

E. Conclusion.

Appellant's rights to due process, and a fair and reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, of the California Constitution were violated by the use of these charts and the prosecutor's related argument that the jury should consider the absence of particular mitigating factors when sentencing Appellant. In light of the emphasis placed on Chart 4 by the prosecution, and the prosecutor's related arguments regarding the information in the chart, the error was prejudicial under *California, supra*, 386 U.S. at 23, and Appellant's conviction should be reversed.

---

that were not relevant, accompanied by evidence, or guided by the court's instructions. (See *Id.* at 477-78; 6) The prosecutor committed misconduct by inviting the juror's to compare Appellant's life history with other hypothetical capital defendants and contending that they should show him less mercy than other defendants who had been more horribly abused. (See *Id.* at 480); 7) The prejudice from the prosecutor's misconduct was especially pernicious because Appellant could not have countered the illogical syllogism by disproving the absence of terms. (See *Id.* at 481); and 8) The prosecutor's improper use of charts and arguments cannot be deemed harmless within the prosecutor's course of misconduct during the penalty phase arguments. (See *Id.* at 482).

XX. THE TRIAL COURT ERRED BY FAILING TO ANSWER THE JURY'S REQUEST FOR "THE LEGAL DEFINITION OF LIFE WITHOUT THE POSSIBILITY OF PAROLE."

A. Introduction.

During deliberations, the jury asked for the "legal definition of life in prison without possibility of parole." (CT 2172.2E). If at trial a capital defendant's future dangerousness is placed in issue, and the only sentencing alternative to death is life imprisonment without possibility of parole, the Constitution requires that the jury specifically be informed that parole is not available.[150] (See *Simmons v. South Carolina* (1994) 512 U.S. 154; see also *Silva v. Woodford* (9th Cir. 2000) 279 F.3d 825, 850 n. 20). When constitutional requirements are implicated, the trial court's duty is to ensure that the defendant is afforded due process of law as guaranteed by the Fourteenth Amendment. (See *McGuire, supra,* 502 U.S. at 72).

Appellant's capital jury deliberated for three days before requesting the "legal definition of life without the possibility of parole." (CT 2172.2E). The trial court failed to inform the jury that Appellant would not qualify for parole if given a life sentence or that life without the possibility of parole

---

[150] Here, Appellant's future dangerousness was put at issue by the prosecutor. The prosecutor's opening penalty argument vividly and repeatedly described Appellant's criminal behavior as acts of "cruelty, viciousness, [and] vileness. . . ." (See e.g., RT 3632). The prosecutor also presented acts of purported "violence" committed by Appellant while in jail, though these acts lacked sufficient evidentiary basis. (See Claim XIII – The Admission of Two Uncharged Misdemeanor Batteries as Aggravating Factors in the Penalty Phase Violated state Law and Appellant's Constitutional Rights). Later, he inappropriately and prejudicially argued that Appellant posed a future danger, though the argument was not supported by the record. (See Claim XVIII - The Trial Court Committed Reversible Error In Allowing the Prosecutor To Argue Future Dangerousness). There is no doubt that Appellant's future dangerousness was placed at issue. (Cf. *Shafer v. South Carolina* (2001) 532 U.S 36, 55).

did not have a special meaning. Instead, the trial court averted the jury's question and unnecessarily raised the question that a life sentence might not be carried out. (See RT 3891). This distracted the jurors from their constitutional duty to provide Appellant a "reasoned and informed choice between a sentence of life imprisonment without possibility of parole and a sentence of death." (*Calderon v. Coleman* (1998) 525 U.S. 141, 149 n.2 (quoting *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1164); see also *McLain v. Calderon* (9th Cir. 1998) 134 F.3d 1383, 1385-86)).

B. Appellant's Arguments Is Not Forfeited.

Respondent states that "the problem with [Appellant's claims] is that he makes them for the first time on appeal" and argues that Appellant has waived this claim for review on appeal. (RB 312 (citing *Rodrigues, supra,* 8 Cal.4th at 1193; and *People v. Bohana* (2000) 84 Cal.App.4th 360, 372-73)). Respondent is wrong. Appellant's argument has not been forfeited because: 1) deficiencies in the record prevent Respondent from proving that an objection was not raised; 2) errors affecting fundamental constitutional rights may be raised for the first time on appeal; and 3) this Court may hear pure questions of law for the first time on appeal.

First, prior to raising the contemporaneous objection defense, Respondent fails to consider its prior concession that on September 16, 1992, in response to the jury's question, the trial court held an ***unrecorded*** conference and proceeding. (RB 65-66). During this proceeding the court heard argument, sorted out the parties' objections, heard proposed answers to the jury's instructions, and made an order concerning the proper response to the jury. In fact, as Respondent admits, the trial court did not memorialize the discussion in the record until the next day September 17, 1992. (*Ibid.*).

Here again, the inadequacy of the record threatens forfeiture of Appellant's meritorious argument. (See Claim I - The Missing Portions of

the Record Deprived Appellant of Meaningful Appellate Review). Respondent cannot prove the nature of the arguments or objections raised during this unrecorded bench conference on September 16, 1992. Therefore, this Court should not dismiss Appellant's meritorious arguments because the record does not demonstrate whether or not a contemporaneous objection was properly lodged. The contemporaneous objection rule is waived when deficiencies in the record impede meaningful review and a determination as to whether the requisite contemporaneous objection was raised. (Cf. *Young, supra,* 34 Cal.4th at 1203 ("because it cannot be ascertained whether defense counsel specifically requested clarification [of an instruction], we shall give defendant the benefit of the doubt and find the issue preserved for appeal.")).

This is also true in response to Respondent's reliance upon *Bohana, supra,* 84 Cal.App.4th at 372-73, for the proposition that since "Appellant consented to the trial court's response to jury questions during deliberations, any claim of error with respect thereto is waived." (RB 312). In truth, Respondent cannot prove: 1) Appellant's proposed response to the jury's question; 2) the state's proposed response to the jury's question; 3) Appellant's objections to the court's proposed response; and 4) whether Appellant *originally* consented to the trial court's instructions since the discussion of objections went unrecorded during the conference on September 16, 1992.

Second, this Court may hear this argument since "a defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights...." (*Vera, supra,* 15 Cal.4th at 276). Here, the trial court's error violated Appellant's rights to due process, a fundamentally fair penalty proceeding and a reliable sentencing determination under the Eighth and Fourteenth Amendments and the parallel provisions of the California Constitution by failing to

adequately inform and instruct the jury. Thus, even if this Court finds that Appellant failed to preserve this claim at trial, he may still raise for the first time on appeal his claims asserting the deprivation of these fundamental and constitutional rights.

This conclusion is unaffected by Respondent's citation to *Rodrigues, supra,* 8 Cal.4th at 1193, a case which is factually inapplicable to Appellant's situation. There, this Court addressed a trial court's response to an inquiry by the jury about unanimity.[151] Indeed, in Appellant's case, it is because the trial court failed to answer the jury that a "false choice" was created between imposing the death penalty or sentencing Appellant to a limited term of incarceration. (*Simmons, supra,* 512 U.S. at 161). This false choice had the effect of allowing defendant to be sentenced to death

---

[151] In *Rodrigues*, the jury asked: "'Can we please have a clarification on the instructions. [¶] Does the jury have to be unanimous on the penalty no matter which choice is made? And if the jury happens not to be unanimous what would happen then?' The court discussed the matter with both sides outside the presence of the jury, and the prosecutor agreed with defense counsel's suggested responses. Pursuant to the parties' agreement, the court informed the jury that the answer to its first question was "'yes,'" and that the answer to its second question was, "'you are not to speculate on that eventuality. That is a matter which must not in any way affect your decision.'" (*Rodrigues, supra,* 8 Cal.4th at 1193). This Court noted how the situation was dissimilar to cases like *Simmons, supra,* 512 U.S. at 154, which involve the trial court's failure to respond to a jury inquiry about the definition of life without the possibility of parole that could lead to a "false choice" between death and limited incarceration. (See *Rodrigues, supra*, 8 Cal. 4th at 1194). Thus, situations as in Appellant's case, where the trial court fails to provide the jury with the correct meaning of life without the possibility of parole (especially in the presence of a future dangerousness argument) are distinct from situations, as in *Rodrigues,* where a trial court fails to inform the jury that a non-unanimous verdict would require that "the case [] be retried...." (*Ibid.*). Indeed, this Court has stated that in *Simmons* "the United States Supreme Court reversed a death judgment because of the trial court's refusal to instruct that imposition of a life sentence on the defendant would be life without parole. The situation[] [in Rodrigues' case is] not similar." (*Ibid.*).

on the basis of information that he had no opportunity to explain or deny. (*Ibid.*). Thus, this Court may hear this argument because the violations of Appellant's constitutional rights rendered his capital phase proceedings fundamentally unfair. (See *Vera, supra,* 15 Cal.4th at 276).

Third, and finally, this Court has recognized that the contemporaneous objection rule may also be waived for "pure questions of law." (*Williams, supra,* 43 Cal.4th at 624 (citing *Hale, supra,* 22 Cal.3d at 394; *Panopulos, supra,* 47 Cal.2d at 341; and *Yeap, supra,* 60 Cal.App.4th at 599 n. 6)). While this doctrine has been developed in civil cases, here Appellant's criminal case presents a pure question of law that maybe answered simply by reference to the record, the jury's question, and the trial court's response. (See CT 2172.2E; RT 3891; *Simmons, supra,* 512 U.S. 154; and *Silva, supra,* 279 F.3d at 850 n. 20). This Court may thus hear Appellant's claim as a pure question of law despite the contemporaneous objection rule.

C. The Trial Court was Constitutionally Required to Directly and Plainly Instruct the Jury as to the Legal Definition of Life Without the Possibility of Parole.

Even when the death penalty is not at issue, the Constitution requires courts give unambiguous answers to jury inquiries. (*Bollenbach v. United States* (1946) 326 U.S. 607, 612-13). The Supreme Court has explained that "when a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Ibid.*). *Bollenbach* places on the trial court "a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem." (*McDowell v. Calderon* (9th Cir. 1987) 130 F.3d 833, 839 (quoting *Davis v. Greer* (7th Cir. 1982) 675 F.2d 141, 145)). Here, like in *Bollenbach*, the trial court failed to fulfill its duties, and

instead, opted to be "quite cursory"' in its instruction.[152] In doing so, "he was not even 'cursorily' accurate. He was simply wrong." (*Bollenbach, supra*, 326 U.S. at 612-13).

In response to the jury's question, the trial court here was obligated to "give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach, supra,* 326 U.S. at 612). Respondent recognizes Appellant does not suggest that the trial court had to tell the jurors he would *never* be released from prison, or even that he would *never* be paroled. (See RB 312). Instead, the direct, proper, and constitutionally required answer to the question was: "Life without the possibility of parole means that the defendant will not be eligible for parole," or "'Life without the possibility of parole' has no special meaning and therefore you should interpret the terms based on the standard meaning of the words." These instructions would have provided a "lucid" response to the jury's question and "legal criteria" for evaluating the punishment of life without the possibility of parole. (See *Bollenbach, supra,* 326 U.S. at 612). Moreover, had the trial court's instructions conformed to those proffered by Appellant, the instructions would have satisfied the Supreme Court's specificity and "plain meaning" requirements. (*Ibid.*).

Respondent says that "Appellant is entitled to no relief" because "no error occurred." (RB 311). Respondent incorrectly characterizes "the crux of Appellant's argument [as being] that the court's 'response did not answer the question asked by the jurors. The court simply told them to

---

[152] Instead, here, the trial court told the jury that the legal definition of life without the possibility of parole was: "For the purpose of determining the appropriate sentence for this defendant you should assume that either the death penalty or confinement in state prison for life without possibility of parole would be carried out. You are not to consider or speculate as to any other possibility or any circumstance that might preclude either of the two penalties from being carried out." (RT 3891).

assume something that they did not understand.'" (*Ibid.*). In truth, Respondent quotes only one of Appellant's arguments and fails to address six more raised in the Opening Brief.[153] Respondent's failure to address these six arguments undermines its conclusion that the trial court did not commit error.

D. The Trial Court Violated Appellant's Rights By Failing to Provide the Jury with the Legal Definition of Life Without The Possibility of Parole as Constitutionally Required.

When a capital defendant's future dangerousness is placed in issue, and the only sentencing alternative to death is life imprisonment without possibility of parole, the Constitution requires that the jury specifically be informed that parole is not available. (See *Simmons, supra,* 512 U.S. 154; and *Silva, supra,* 279 F.3d at 850 n. 20). This requirement is essential to

---

[153] Respondent does not address or rebut six of Appellants arguments: 1) In light of the fact that California juries are confused about the "plain meaning" of the term "life without possibility of parole," this Court should reconsider its conclusion that the standard instruction given by the trial court sufficiently explains the sentencing options. (See II AOB 486-87 (citing Eisenberg & Garvey *The Deadly Paradox of Capital Jurors* (2001) 74 So. Cal. L. Rev. 371, 373)); 2) The trial court's instruction was made in error since the jurors did not express confusion over the consequences of a verdict, but rather, confusion over the legal definition of the term "life without the possibility of parole." (See II AOB 487 (citing *People v. Kipp* (1998) 18 Cal.4th 349, at 378-79)); 3) The trial court committed error by giving the jury an instruction which increased their confusion and unnecessarily raised irrelevant considerations in the juror's minds. (See II AOB 487); 4) The trial court was required to provide the legal definition of life without the possibility of parole in light of the prosecution's confusing reference to "a life sentence" rather than "life without possibility of parole." (See *Id.* at 488); 5) The trial court committed error by failing to give an instruction with sufficient specificity to clarify and resolve the jury's problems. (See *Id.* at 489); and 6) The trial court's instruction was constitutionally defective given the fact that during voir dire several jurors indicated that they believed it had a special meaning, apart from its plain terms, and believed life without the possibility of parole meant that there would be the possibility of parole. (See *Id.* at 490-91).

ensure that the jury did not base its sentence on "the grievous misperception" that they had a "false choice between sentencing [Appellant] to death and sentencing him to a limited period of incarceration." (*Simmons, supra*, 512 U.S. at 161-162). It is impermissible for the jury to infer that the only way to prevent the defendant's release is to sentence him to death. (See *Coleman, supra,* 210 F.3d at 1050). Accordingly, the Supreme Court has held that a trial judge commits reversible error if he fails to instruct the jury on the meaning of life without parole when the prosecution argues future dangerousness, even where no evidence on future dangerousness is presented. (See *People v. Kelly* (2002) 534 U.S 246; and *Shafer, supra,* 532 U.S. at 39).

Respondent says that "Appellant's contention is [] baseless." (RB 312). Respondent contends that when the jury impliedly raised "the commutation question," the trial court properly addressed the jurors' confusion "by instructing the jury to assume that whatever penalty it selects will be carried out." (*Ibid.* (citing *Smithey, supra,* 20 Cal.4th at 1009)). Respondent believes that the trial court's instruction conveyed the same meaning as Appellant's proffered instructions of that "life without the possibility means that the defendant will not be eligible for parole" or "life without the possibility of parole has no special meaning and therefore you should interpret the terms based on the standard meaning of the words." (RB 311). Respondent feels that Appellant's contentions are foreclosed by the fact that jurors are "presumed to understand and follow the instructions given to them." (*Id.* at 313 (citing *Jones, supra,* 15 Cal.4th at 168; *Wash, supra,* 6 Cal.4th at 263; and *Yoder, supra,* 100 Cal.App.3d at 338)).

In order to advance these arguments, Respondent must distinguish *Simmons v. South Carolina,* in which the Supreme Court found that the state had denied the defendant due process by refusing to instruct the jury that life imprisonment meant no possibility of parole. (See *Simmons, supra,*

512 U.S. 154, 162, 168-71). Respondent cannot do so. Thus, the state oddly relegates this tremendous duty to a footnote; perhaps to hide their inability to distinguish clearly controlling precedent. (See RB 313 n. 30). Respondent argues that *Simmons* is distinguishable since there the jury requested a definition of "life imprisonment," while here the jury requested the definition of "life without the possibility of parole." (*Ibid.*). Respondent's attempt to distinguish *Simmons* and the state's arguments defending the trial court's actions fail in many ways.

First, in response to the jury's question in Appellant's case, the trial court never confirmed whether or not there was a "legal definition" of life without the possibility of parole. The jury thus was led to believe that life without the possibility of parole had a special meaning and that they should not interpret the terms based on the plain meaning of the words. By failing to acknowledge that there was no separate "legal definition" of life without the possibility of parole, the trial court impermissibly opened the door for the jury to conclude that the only way to prevent Appellant's release would be to sentence him to death. (See *Coleman, supra*, 210 F.3d at 1050).

Second, the trial court failed to tell the jury to interpret the phrase life without the possibility of parole based on the standard meaning of the words. In doing so, the court abdicated its duty of providing some guidance in response to the juror's clear state of confusion as to their sentencing options. Respondent is thus wrong to argue that the trial court's instruction "you should assume that either the death penalty or confinement in state prison for life without possibility of parole would be carried out," (RT 3891), conveys the same meaning as "Life without the possibility of parole means that the defendant will not be eligible for parole," or "'Life without the possibility of parole' has no special meaning and therefore you should interpret the terms based on the standard meaning of the words." The trial court's instruction did not provide the jury with any guidance.

The Court's instruction failed to answer whether: 1) there was a distinct legal definition for life in prison without the possibility of parole; 2) the jury should be concerned about the legal, as opposed to general, definition of life without the possibility of parole; 3) the jury should interpret the meaning of life without the possibility of parole according to plain meaning of the term; or 4) life without the possibility of parole meant that Appellant will not be eligible for parole.

Third, this case falls squarely within the holding of *Simmons* and its progeny and Respondent errs in arguing that *Simmons* is distinguishable. As in *Simmons*, here, the jury in a death penalty case had only two sentencing options, a death sentence or life without the possibility of parole. Likewise, as in Appellant's case and *Simmons*, the prosecutor argued future dangerousness during the penalty phase. (See RT 3696 and 3815). Thus, this case clearly falls within the *Simmons* rule.

Fourth, the distinction Respondent attempts to draw between Appellant's case and *Simmons* does not exist. (RB 133 n. 30). During deliberations in Appellant's penalty phase proceedings, the jury asked for the "legal definition of life in prison without possibility of parole;" likely in response to prosecutorial arguments that Appellant was a future danger. The question demonstrates confusion as to the "plain meaning" of the term "life without the possibility of parole." (*Simmons, supra,* 512 U.S. at 161). Just as in *Simmons*, the jurors were not sure what life without parole meant -- that is why thus they asked for a "legal definition." The Court in *Simmons* recognized that, regardless of whether it was called life imprisonment or life without possibility of parole, if the jury understood the "plain meaning" of the term they would have had no reason to inquire about it. (See *Simmons, supra,* 512 U.S. at 170 n. 10). Thus, the California law and South Carolina law are indistinguishable where, as here, the jurors believed that "life without the possibility of parole" had a "special

meaning" different from the plain reading of the words. *Simmons*, therefore, applies to this case and holds that the trial court denied Appellant due process by refusing to instruct the jury that life imprisonment meant that Appellant had no possibility of parole. (See *Id.* at 162 and 168-71).

Fifth, the cases Respondent relies upon to support its proposition that "jurors are presumed to understand and follow the instructions given them" (RB 312), do not support that proposition in the context of juror deliberation questions. In *Jones, supra,* 15 Cal.4th at 168, this Court held that jurors are presumed to follow instructions regarding the propriety of attorney arguments. In *Wash, supra,* 6 Cal.4th at 263, this Court held that jurors are presumed to follow instructions regarding the propriety of witness testimony. In *Yoder, supra,* 100 Cal.App.3d at 338, the Court of Appeals held that jurors are presumed to follow mental capacity instructions. Simply put, none of Respondent's authorities remotely address the factual issue presented here, or the breadth of potential constitutional violations resulting from the trial court's failure to provide the "legal definition of life without the possibility of parole" upon inquiry by a deliberating jury.

Additionally, Respondent's argument that the juror's were presumed to have followed the instruction given makes little sense. Here, the trial court's response told the jury to select one of two sentences and did not answer whether a legal definition for life without the possibility of parole existed, and if so, whether the jury was to consider the special legal definition or the plain meaning of the terms. Of course, the jury followed the court's instructions, since they indeed selected a sentence. Appellant's contention, however, is that the jury was misled in their sentence determination due to the trial court's failure to respond to their question and provide a constitutionally sound instruction. In effect then, Respondent is contending that the jurors in Appellant's case should be presumed to have

followed a constitutionally deficient instruction that failed to give any practical guidance as to the sentencing options at hand. (See *Simmons, supra,* 512 U.S. at 161-162).

Sixth, Respondent's reliance on *Smithey, supra,* 20 Cal.4th at 1009, is misplaced. The jury's question and the trial court's answer in *Smithey*, as well as, this Court's rationale, are distinguishable. In *Smithey* the jury's question focused on the appellate process. (*Id.* at 1007). In Appellant's case, the jury's question focused on the basic meaning and definition of the sentencing options at hand. Additionally, in *Smithey* the trial court's response focused on the juror's consideration of the appellate process. (*Ibid.*). In Appellant's case, the trial court's response failed to address the definition of life without the possibility of parole and was not concerned with subsequent or future considerations. (RT 3891 ("For the purpose of determining the appropriate sentence for this defendant you should assume that either the death penalty or confinement in state prison for life without possibility of parole would be carried out.")). Had Respondent provided the full quotation to *Smithey*, (see RB 312), it would be apparent that the case was limited to situations involving juror speculation as to the appellate process: "indeed, the confusion reflected in the jury's note appears to concern the consequences of a reversal of a death sentence on appeal – not the meaning of life without the possibility of parole." (*Smithey, supra,* 20 Cal.4th at 1009-10). Thus, because it strictly deals with a question related to the appellate process, *Smithey* is inapplicable to Appellant's case.

Finally, in recent years, this Court has been presented with three capital cases alleging *Simmons* error. (See *Wallace, supra,* 44 Cal.4th at 1090; *Williams, supra,* 43 Cal.4th at 646; and *Rundles, supra,* 43 Cal.4th at 187). However, none of these cases involved elements that satisfied the requirements of a *Simmons* claim. In contrast to these cases, in Appellant's case, the jury manifested the requisite confusion to qualify for a

Simmons instruction.

First, unlike in *Wallace*, Appellant is not challenging the definition of life in prison without the possibility of parole as described by CALJIC No. 8.84. Instead, he is challenging the trial court's failure to provide a clear definition of life without the possibility of parole when requested by the jury during their sentencing determination. Second, unlike in *Williams*, Appellant's claim arose during the jury's sentencing determination, not voir dire. The United States Supreme Court has made clear that when a capital defendant's future dangerousness is placed in issue, and the only sentencing alternative to death is life imprisonment without possibility of parole, the jury must specifically be informed that parole is not available. (*Simmons*, *supra*, 512 U.S. at 154). Third, and unlike in *Rundle*, Appellant, upon his own initiative, informed the trial court of its need to inform the jury as to the "plain" meaning of life in prison without the possibility of parole. In sum, unlike in the cases that have recently come before this Court, here the trial court committed error under *Simmons* and in violation of Appellant's state and federal constitutional rights.

Respondent's attempt to defend against Appellant's argument fails. Respondent's authorities neither address the factual scenario presented in Appellant's case nor detract from the constitutional violations at hand under *Simmons*. Here, this Court should find that Appellant's constitutional rights to due process, a fundamentally fair trial, and a reliable sentencing determination, under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as Article I of the California Constitution, were violated by the trial court's deficient instruction on the "legal definition of life without the possibility of parole."

E. Conclusion.

Because the principles of *Simmons* were violated in this case, reversal of the death sentence is required without any showing of prejudice. But even assuming prejudice must be shown, the constitutional error cannot be deemed harmless. The jury directly expressed its inability to understand a crucial term, perhaps the most crucial term, in the sentencing instructions, at the most crucial important time in the proceedings. Whether a life sentence would result in parole was obviously a pivotal issue for the jury. If any juror erroneously believed that Appellant would someday be eligible for parole under a sentence of "life without the possibility of parole," that factor alone would have dictated their vote for death. Since there is a reasonable likelihood that the penalty phase instructions as a whole distracted the jury and prevented it from performing its proper duties, Appellant's capital sentence cannot stand. (See *Boyde, supra,* 494 U.S. at 380).

XXI. THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S REQUEST FOR ALLOCUTION IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

A. Introduction.

A capital defendant's right to address the sentencing body is different from the right to testify, to present evidence or to have a plea for mercy made by an attorney. In fact, the Supreme Court has noted the far-reaching history of the elementary right to allocute. (See *Green v. United States* (1961) 365 U.S. 301, 304; and *United States v. Behrens* (1963) 375 U.S. 162, 167 (conc. opn)). In a case where the prosecution improperly seized upon the denial of Appellant's proffered statement in allocution to note Appellant's failure to testify and argue that Appellant lacked remorse, the trial court's denial of allocution while permitting the prosecutor's argument rendered the penalty phase proceedings in Appellant's case fundamentally unfair.

B. Appellant's Federal Constitutional Right to Allocution Was Improperly Abridged by the Trial Court.

When requesting that Appellant be permitted to allocute, defense counsel stated that Appellant wanted to express his extreme remorse for the death of Ms. Olsson and the terrible shock it caused to her family. (RT 3621). The defense also requested that, if the trial court denied the motion, the prosecutor should be prohibited from arguing that Appellant lacked remorse. (RT 3622). Keyed in, after the trial court denied the motion, the prosecutor then argued to the jury that Appellant's alleged "lack of remorse" was a factor that supported imposition of the death penalty here. The prosecutor juxtaposed Appellant's lack of remorse with the Olsson's family's sorrow; and erroneously commented on Appellant's failure to testify as evidence of his lack of remorse. (See Claim XXII - Appellant

Was Sentenced to Death Based on The Non-Statutory, Improper and Materially Inaccurate Aggravating Factor of Absence of Remorse). In defense, Appellant should have been allowed to express remorse through allocution. Worse, Appellant's jury was deprived of evidence of Appellant's actual remorse and was misled by the prosecutor's argument.

Historically, when a defendant was convicted of a capital offense, the common law doctrine of *allocutus* provided the defendant an opportunity to speak on why the sentence of death should not be imposed. (Halsbury's Laws of England (1st ed. 1909) 734-35; see also *Fielden v. People* (1889) 128 Ill. 595). In fact, "at common law no judgment for corporal punishment could be pronounced against a man in his absence, and in all capital felonies it was essential that it should appear of record that the defendant was asked before sentence if he had anything to say why it should not be pronounced." (*Ball v. United States* (1891) 140 U.S. 118, 129). Respect for this history requires this Court to recognize that Appellant's constitutional right to allocute before the determination of his death sentence was improperly abridged by the trial court and prejudicially misused by the prosecution. (See Claim XXII - Appellant Was Sentenced to Death Based on The Non-Statutory, Improper and Materially Inaccurate Aggravating Factor of Absence of Remorse).

Respondent argues that the United States Supreme Court has not granted Appellant the constitutional right to allocution and that *Green v. United States, supra,* 365 U.S. at 304 is not applicable to Appellant's case. (RB 316). In Respondent's view, *Green* has no import because it involved the federal rules of procedure, and therefore, does not mean that "state capital defendants have a federal constitutional right to present unchallenged statements to their penalty juries, especially when they already have the right to present such statements and evidence in mitigation that the prosecution may challenge." (*Ibid.*).

Respondent's arguments fail in whole. First, allocution is distinct from presenting "statements and evidence in mitigation." While both procedures involve considerations the jury may weigh in its sentencing deliberations, the subject matter of allocutory statements is limited so as to obviate the need for cross-examination or rebuttal arguments. Allocution is akin to direct testimony or the presentation of evidence and has long history in the common law. Indeed, a defendant's response to carefully poised questions by his counsel is not comparable to his own pleas for mercy. The importance of allocution at common law is persuasive authority for this Court to reconsider its holdings regarding a defendant's state right to allocute. (See *Green, supra,* 365 U.S. at 304; Anonymous, 3 Mod. 265, 266, 87 Eng.Rep. 175 (K.B); and J. Sullivan, *The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation* (1987) 15 N.M.L. Rev. 41). In the face of *Green* and the common law history of the right of allocution, this Court should recognize the right to allocution as fundamental to California's power to sentence a person to the punishment of death.

C. This Court Should Reconsider its Denial of the Right to Allocution to Capital Defendants.

Respondent says that "this Court need not engage in any prejudice analysis because the trial court ruled correctly." (RB 315). Respondent claims that this "Court has repeatedly held that a capital defendant has no right to address the penalty phase jury in allocution." (*Ibid.* (citing *People v. Robbins* (1988) 45 Cal.3d 867, 888; *People v. Keenan* (1988) 46 Cal.3d 478, 511; *People v. Nicolaus* (1991) 54 Cal.3d 551, 583; and *Davenport, supra,* 11 Cal.4th at 1209)). Respondent concludes that "the trial court did not err under either state law or the federal constitution in denying Appellant allocution." (RB 318). In his Opening Brief, Appellant recognized that this Court has held that federal principles of due process do

not grant capital defendant's right to allocute. (See II AOB 494). Respondent does not address Appellants argument that this Court's prior decisions are wrong, and that both the state and federal law and constitutions grant capital defendants the right to allocute to their sentencing jury.[154]

Based on Appellant's four uncontested arguments and Equal Protection challenge, no rational reason exists to forbid capital defendants the opportunity to allocute to the jury. Statements in allocution are limited in subject matter. They are not a viable means of "cloaking" deceptive arguments. Without a statement in allocution, the penalty phase procedures fail to ensure that a jury will hear all the evidence in mitigation, which includes a capital defendant's expression of remorse. To facilitate a jury's guided discretion during the penalty phase, as well as a capital defendant's rights under the Fifth Amendment statements in allocution are necessary to ensure that the proceedings comply with the requirements interposed by the Eighth Amendment.[155]

---

[154] Respondent has failed to oppose the following four arguments: 1) This Court has wrongly concluded that other procedural rights provided at the penalty phase, including the defendant's right to present evidence in mitigation and his right to testify, render allocution "unnecessary to a fair trial." (See II AOB 494); 2) The capital defendant's right to make a statement to the jury is necessary to assure the jury has heard all mitigation before rendering its penalty decision. (See *Id.* at 495); 3) This Court's concern that allocution is a means of "cloaking" the right to testify with immunity from cross-examination, is easily addressed where an offer of proof is made by the defendant. Here, there was an offer of proof made by Appellant. (See *Ibid.*); and 4) Expressed remorse is an aspect of the defendant's "character or record" that the jury must be permitted to consider under the Eighth Amendment. (See *Id.* at 496).

[155] Indeed, a capital defendant's right to allocution has been upheld in a number of jurisdictions. (See, e.g., *Tomlinson v. state* (1982) 98 N.M. 213; *Sellman v. State* (1981) 47 Md.App. 510; *State v. Nicoletti* (R.I. 1984) 471 A.2d 613; *Mohn v. State* (Alaska 1978) 584 P.2d 40; and

Respondent says that Appellant is wrong to state that offers of proof, as to a defendant's allocution statement, cure the problem of "cloaking the right to testify with immunity from cross-examination." (RB 316). Respondent alleges that Appellant's claim fails because a "capital defendant can 'cloak' or lie about remorse just as he or she can concerning any other subject." (*Ibid.*). In Respondent's view, "the prosecution has a right to try and prevent fraud on the penalty process." (*Ibid.*). Respondent argues that allocution statements have too great a potential of "confusing the jury, and also might impair their ability to weigh the aggravating and mitigating factors disclosed by the evidence." (*Id.* at 317).

In light of the limited subject matter about which Appellant desired to speak, his remorse and sympathy for the Olsson family, the prosecutor had no need to cross-examine Appellant. Likewise, Appellant made an offer of proof to the trial court and prosecution, such that his statement could have been tailored, or even offered as a declaration, so as to ensure that he was not "cloaking the right to testify with immunity from cross-examination."[156] (RB 316 (citations omitted)).

Respondent's arguments fail to discuss Appellant's proffer at trial.

People v. Emig (1972) 177 Colo. 174). It has been held discretionary in other jurisdictions. (*See e.g.*, *State v. Burkhart* (Tenn. 1976) 541 S.W.2d 365; *Wilson v. State* (1947) 76 Ga.App. 257; *Patterson v. State* (1926) 21 Ala.App. 357; and S*tate v. Townley* (1921) 149 Minn. 5).

[156] Respondent's omissions in failing to address these points are telling. For example, as to item #3, in *Robbins, supra,* 45 Cal.3d at 867, this Court acknowledged that the Maryland Supreme Court found that, under the common law of the state, a capital defendant had the right to speak to the sentencing jury without cross-examination. (*Id.* at 890 (citing *Harris v. state* (1986) 306 Md. 344)). In distinguishing *Harris*, this Court found it significant that the defendant in *Harris*, unlike Robbins, had made an offer of proof before requesting to address the jury. (*Ibid.*). Here, like the defendant in *Harris*, and unlike in *Robbins*, Appellant did make an offer of proof.

This is because, the prosecutor certainly acted inconsistently with the truth - when he deceptively argued to the jury that the defendant lacked remorse - even though he had just witnessed Appellant offer to allocute regarding his remorse for the crimes alleged against him. This Court should not sanction the prosecutor's conduct when it flies directly in the face of the reality *known* to the prosecutor at the time of his arguments.

D. The Denial of a Capital Defendant's Right to Allocution Violates the Equal Protection Clause, and the Denial in the Instant Case Violated Appellant's Equal Protection Rights.

Respondent next attempts to muster a defense to Appellant's contention that since non-capital defendants have a right to allocution, the denial of the same right to capital defendants violates principles of equal protection. (See RB 317). Respondent concedes that Appellant's interpretation of *In re Shannon B.* (1994) 22 Cal.App.4th 1235, supports Appellant's position. (See RB 317). Respondent, however, argues that Appellant has not stated a valid equal protection claim because he has not shown that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*Ibid.* (citing *People v. Massie* (1998) 19 Cal.4th 550, 571; and *People v. Lucero* (2000) 23 Cal.4th 692, 717-18)).

This Court has never fully addressed whether denial of allocution to a capital defendant violates equal protection.[157] The purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person

[157] In *Clark,* this Court summarily rejected an equal protection argument because no authority had been presented to support the claim, and this Court "perceive[d] no merit in it." (*Clark, supra,* 5 Cal. 4th at 1037). In *Robbins, supra,* 45 Cal.3d at 867, this Court acknowledged that the Maryland Supreme Court found that, under the common law of the state, a capital defendant had the right to speak to the sentencing jury without cross-examination. (See *Id.* at 890 (citing *Harris, supra,* 306 Md. at 344)).

against intentional and arbitrary discrimination under the law. (See *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564). The Clause forbids the unequal treatment of individuals and requires, at a minimum, that statutes are "rationally related to a legitimate state interest." (*New Orleans v. Dukes* (1976) 427 U.S. 297, 303). No state interest in denying capital defendants the opportunity to allocute has been presented here. Instead, this Court's precedents and state statutes have classified non-capital and capital defendants in an unequal manner and in violation of the Fourteenth Amendment and Article I of the California Constitution.

Respondent's argument that Appellant has not been subjected to an arbitrary classification fails. Logically, Penal Code section 1200, in granting non-capital defendants the right to allocute, and this Court's precedent, in forbidding capital defendants the opportunity to allocute, classify two similarly situated groups in an unequal manner. In truth, any distinction between a non-capital homicide defendant and a capital homicide defendant is controlled by prosecutorial discretion and the decision to charge a capital crime. (See Claim XXX - Appellant's Death Sentence Was Imposed Through the Arbitrary, Disparate, and Unconstitutional Implementation of California's Capital Sentencing Statutes). Exercise of prosecutorial discretion alone, should not decide whether a criminal defendant will be able to address his sentencing body through allocution. Contrary to Respondent's assertions, Appellant has put forth arguments showing that section 1200 and this Court treat a similarly situated group of defendants in an unequal manner.

E. Section 1200, the Common Law, and the Prosecutor's Improper Comments on Appellant's Lack of Remorse Compelled the Trial Court to Grant Appellant's Request for Allocution to Avoid Violating His Rights to Equal Protection and to Render a Fundamentally Fair Sentencing Proceeding.

Respondent argues that the trial court did not have the statutory discretion to grant Appellant's requested allocution. (RB 318). According to Respondent's interpretation, the "plain language" of section 1200 does not apply to capital defendants. (*Ibid.*). Respondent argues that Appellant has offered no "persuasive reason" to the contrary. (*Ibid.*). Respondent is wrong.

First, section 1200 invests the trial court with discretion to grant or deny a request to allocute. (See *Robbins, supra,* 45 Cal.3d at 890 n. 10; *People v. Sanchez* (1977) 72 Cal.App.3d 356, 359-360; *People v. Wiley* (1976) 57 Cal.App.3d 149, 166; and *People v. Cross* (1963) 213 Cal.App.2d 678, 681-682). There is nothing in the statute to indicate that this discretion does not apply to capital as well as non-capital cases. In fact, this requirement has been prudentially developed by this Court. (See *Robbins, supra,* 45 Cal.3d at 888-91; *Keenan, supra,* 46 Cal.3d at 511; *Nicolaus, supra,* 54 Cal.3d at 583; and *Davenport, supra,* 11 Cal.4th at 1209).

Second, the trial court failed to properly consider its discretion in denying Appellant's request for allocution. If it had done so, following Appellant's objections that the prosecutor had inappropriately turned lack of remorse into a non-statutory aggravating factor, the trial court would have allowed allocution to show the true state of Appellant's *remorse.* Moreover, the trial court, in denying Appellant's request, did not indicate that it has considered any controlling authorities. (See RT 3622). This was plainly wrong, as section 1200 does give the court the authority to allow

allocution. (See *Robbins*, *supra,* 45 Cal.3d at 893 (concurring opn. of Mosk, J.)). Importantly, the trial court wholly failed to recognize the common law as authority bestowing the right of allocution and justifying Appellant's request. (See *Ball, supra,* 140 U.S. at 130). The trial court's determination was unreasonable, an abuse of discretion, and has consequently violated Appellant's rights to due process and equal protection as interposed by the Fourteenth Amendment and Article I of the California Constitution.

In the last four years, this Court has discussed the right to allocute in two cases. (See *Jackson, supra,* 45 Cal.4th at 698; and *Zambrano, supra,* 41 Cal.4th at 1181). Neither case controls the arguments raised by Appellant. First, this Court has not been fully confronted with a claim that discrepancies between capital and non-capital defendants in the right to allocute violate the Fourteenth Amendment. Second, in neither case was this Court's holding, that the right to allocute contravenes the sentencing law's purpose to provide the sentencer with all relevant information bearing on the appropriate penalty challenged. Third, neither case dealt with the denial of a request to allocute and prohibition on a capital defendant's right to allocute that eliminated relevant and material information from the jury's consideration. (See *Keenan, supra*, 46 Cal.3d 478, 511). Fourth, and finally, this Court has not previously been presented with a situation where the prosecution exploited a capital defendant's denial of right to allocute, by arguing that the defendant's lack of remorse was a non-statutory aggravating factor that the jury should consider during their penalty deliberations. (See Claim XXII - Appellant's Death Sentence Rests On The Prosecution's Improper Use of Lack of Remorse As A Non-Statutory Materially Inaccurate Aggravating Factor).

F. Conclusion.

The trial court, in denying Appellant's request to allocute, did not exercise its discretion as required by state law, the California Constitution, or the Fourteenth Amendment. Federal constitutional error occurred and pursuant to *Chapman, supra*, 386 U.S. at 23, the state has failed to justify that the trial court's error was harmless beyond a reasonable doubt. State law error also occurred and, in light of the prosecution's improper lack of remorse arguments, there is a reasonable possibility that the jury would not have sentenced Appellant to death if the trial court had granted his request to allocute. (See *Brown, supra*, 46 Cal.3d at 448). Principles of due process, the right to a fair trial, to a reliable penalty determination, and to equal protection under the Fifth, Eighth and Fourteenth Amendments, as well as state law, required that Appellant be allowed to address the jury before his sentencing.

XXII. APPELLANT'S DEATH SENTENCE RESTS ON THE PROSECUTION'S IMPROPER USE OF LACK OF REMORSE AS A NON-STATUTORY MATERIALLY INACCURAT AGGRAVATING FACTOR.

A. Introduction.

Lack of remorse is not a factor authorized for jury consideration by California's capital sentencing statutes. In Appellant's case, lack of remorse was not supported by the evidence and was materially inaccurate in light of Appellant's efforts to allocate and to express his remorse. The prosecution's use of Appellant's purported lack of remorse as a non-statutory aggravating factor violated the "fundamental conceptions of justice which lie at the base of our civil and political institutions.'" Because of this his death sentence invalid. (See *Lovasco, supra,* 431 U.S. at 790 (quoting *Mooney v. Holohan* (1935) 294 U.S. 103, 112; and *Dowling v. United States* (1990) 493 U.S. 342, 352)). Appellant's death sentence should be vacated.

An overt remorselessness argument is only proper when supported by facts and direct evidence gleaned either from the defendant's statements, physical evidence, or percipient and eyewitnesses. (See *Cox*, *supra*, 53 Cal.3d at 686 n 24, and *Cain* , *supra*, 10 Cal.4th at 77-78). Without evidence on the issue of remorse, arguments concerning Appellant's "absence of remorse" introduced an "extraneous emotional factor," which the prosecutor used to sway the jury against Appellant without any judicial safeguards. Appellant's penalty phase proceedings were rendered unreliable due to the prosecutor's use of lack of remorse. Because the defense did not raise the issue of remorse in either argument or evidence, and there was no overt evidence of remorselessness introduced by the prosecution in this case, the prosecutor should have been prohibited from arguing the issue.

As this Court has explained: "In a death penalty case, we expect the trial court and the attorneys to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure." (*Hernandez, supra,* 30 Cal. 4th at 878). The proceedings here fell well short of this goal when the trial court allowed the prosecutor to argue that the absence of remorse constituted a non-statutory aggravating factor.

Judicial experience, research, and even intuition, show that the evidence bearing on the defendant's absence of remorse, as well as future dangerousness, may determine a jury's sentencing verdict.[158] The prosecutor's inappropriate arguments and the trial court's failure to provide correcting instructions violated Appellant's rights under the Fifth Amendment and Article I of the California Constitution. The error and misconduct also subverted the truth as to Appellant's actual remorse for the crime alleged.

B. Use of Lack of Remorse as a Non-Statutory Aggravating Factor Renders the California Capital Sentencing Statutes Unconstitutional.

In Respondent's view, "Appellant essentially argued [in his Opening Brief] that denial of allocution prevented the presentation of evidence of remorse and that the prosecutor, who objected to allocution, should not be able to take advantage of that and argue lack of remorse." (RB 320-21). Respondent says that Appellant is wrong to urge this Court to reconsider its precedent regarding overt remorselessness because it has not created an

---

[158] (See e.g., *Riggins v. Nevada* (1992) 504 U.S. 127, 143 (concurring opn. Kennedy, J.) ("In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative...."); see also Michael A Simons, *Born Again on Death Row: Retribution, Remorse, and Religion*, 43 Cath. Law 311, 322 (2004); Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, *But Was he sorry? The Role of Remorse in Capital Sentencing* (1998). 83 Cornell L. Rev. 1599, 1633).

additional non-statutory aggravating factor and does not broaden Penal Code section 190.3(a). (RB 328). Respondent argues that this Court's precedent does not turn the absence of remorse into an aggravating factor, and that *People v. Lewis* (1990) 50 Cal.3d 262, 287, forecloses Appellant's claim. (*Id.* at 329).

In arguing that this Court should not revisit its precedent, Respondent omits almost all discussion of the specific constitutional objections and arguments actually raised in Appellant's Opening Brief.[159]

---

[159] Respondent did not address or rebut twelve (12) of Appellants arguments: 1) The principles of this Court's jurisprudence governing absence of remorse instructions and argument is based on precedent from the 1960's and must be revisited in light of substantial changes in the California capital sentencing scheme in 1977 and 1978. (See II AOB 505-507; 529-532 (citing *People v. Talbot* (1966) 64 Cal.2d 69, 712)); 2) The prudential inclusion of the non-statutory aggravating factor of lack of remorse violates requirements interposed by the Eighth Amendment designed to ensure that juror considerations are appropriately guided and are based on reason rather than caprice, emotion, or inaccurate and misleading information. (See II AOB 508); 3) Appellant's liberty interest, protected by the due process clause of the Fourteenth Amendment, in state law requiring capital jury's to base their penalty determination on only relevant sentencing factors was violated when lack of remorse was used as a non-statutory aggravating factor in his case. (See *Id.* at 510); 4) Prosecutorial argument characterizing "absence of remorse" (or any other mitigating factor not raised by the defense) as an aggravating factor is improper and violates state law, the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Id.* at 512-13); 5) Appellant cannot be sentenced to death based on evidence of post-crime lack of remorse or constitutionally protected activity, such as the right to remain silent, without violation of the Fifth, Eighth and Fourteenth Amendments. (See *Id.* at 518); 6) It is unconstitutional for the jury to consider the defendant's "silence" or failure to waive his Fifth Amendment rights against self-incrimination in its penalty decision; therefore arguments of remorselessness must be limited to those cases in which the defendant waived his self-incrimination rights by confessing, admitting to the killing, or by so testifying before the jury. (See *Id.* at 521-22); 7) The heightened standards of reliability imposed by the Eighth Amendment cannot be met in a capital case where the jury considers the non-statutory aggravating factor

Respondent's failure to address these twelve (12) arguments undermines its conclusion that this Court should not revisit its precedent in light of substantial changes in the law and particular problems posed by Appellant's case. In the absence of any opposing text from Respondent, Appellant stands by his assertion, and supporting subarguments, that the use of lack of remorse as a non-statutory aggravating factor renders the entire California capital sentencing statutes unconstitutional.

C. Use of Lack of Remorse as a Non-Statutory Aggravating Factor in Appellant's Case Violated His State and Federal Constitutional Rights.

In recent years, this Court has rejected several claims premised on the prosecution's improper creation of an aggravating factor out of the defendant's absence of remorse. (See e.g. *Zambrano*, *supra,* 41 Cal.4th at 1179; *Riggs*, *supra,* 44 Cal.4th at 302; and *People v. Collins,* (2010) 49

---

of absence of remorse. (See *Id.* at 525); 8) The trial court's failure to prohibit the jury's considerations of lack of remorse precludes meaningful judicial review of Appellant's penalty phase proceedings. (See *Id.* at 526 (citing *Roberts v. Louisiana* (1976) 428 U.S. 325, 335 n. 11)); 9) Prosecutorial arguments concerning the non-statutory aggravating factor of remorse violate capital defendant's right to jury trial under the Sixth and Fourteenth Amendments by introducing evidence that is not developed from testimony and in respect of the defendant's right to confront witnesses, compel the production of evidence, and the right to representation by counsel. (See II AOB 526 (citing *Turner v. Louisiana* (1965) 379 U.S. 466 472-73)); 10) Under the Eighth Amendment, the non-statutory aggravating factor of absence of remorse is vague and creates an unacceptable risk of randomness and fails to sufficiently narrow the class of death eligible defendants or guide the jury's sentencing determination. (See II AOB 529); 11) *Ad hoc* judicial expansion of the aggravating factors a jury may consider during the penalty phase violates the Constitutional requirement that all capital sentencing statutes are structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. (See *Id.* at 534); and 12) This Court's holdings allowing prosecutorial argument but restricting trial court instructions regarding use of lack of remorse evidence may are inconsistent, illogical, and must be overturned. (See *Id.* at 535).

Cal.4th 179, 238). At the same time, this Court also rejected challenges to prosecutorial arguments that convert the absence of mitigation into aggravation and challenging the definition of remorse under CALJIC No 8.85.[160] The absence of remorse arguments made and facts presented in Appellant's case are egregious and call for a reversal of Appellant's death sentence.[161] Similarly, Appellant has raised specific constitutional arguments not previously addressed by this Court.

Respondent's opposition is littered with damning concessions that undermine the state's claim of no prejudicial error. Respondent concedes that during the prosecutor's opening summation, and throughout the morning session, the state displayed a chart captioned: "What You Didn't Hear About Richard Christopher Tully." (See also Claim XIX - the Trial Court Erred by Allowing the Prosecutor to Display Inflammatory Charts to the Jury). The chart included, amongst many prejudicial subcaptions: "That He's Remorseful, Sorry For What He Did" and "That He Has Done One Decent Thing In His Life, That He Found God and Repented." (RB 321

---

[160] (See *Mills, supra,* 48 Cal.4th at158; and *Jackson, supra,* 45 Cal.4th at 662; *Ervine, supra,* 47 Cal.4th at 745; and *Burney, supra,* 47 Cal.4th at 203).

[161] In contrast to *Zambrano* and *Riggs,* in Appellant's case the prosecutor's lack of remorse argument drew vehement objections and prejudiced Appellant's ability to receive a fair trial. Similarly, it was not limited to one line of argument during the state's penalty phase summation. Instead, the prosecutor also displayed three terms in a chart that highlighted Appellant's failure to express remorse. Finally, unlike in *Zambrano* and *Riggs*, in Appellant's case the prosecutor's arguments were fundamentally unfair due to their material inaccuracy. Here, the prosecutor, in arguing that Appellant had failed to demonstrate remorse, knew that Appellant had vigorously sought to assert remorse through allocution but had been denied that right by the prosecutor's objections. (See Claim XXI - the Trial Court Improperly Denied Appellant's Request for Allocution in Violation of His Constitutional Rights). In sum, the prosecution's lack of remorse argument and the trial court's error in overruling defense objections constitute, respectively, misconduct and abuse of discretion.

(citing RT 3667-70)). Respondent concedes that defense counsel objected to the constitutionality of prosecutorial arguments referencing lack of remorse, as well as, the legal propriety of prosecutorial arguments referencing remorse beyond what "happened at the actual crime scene." (RB 321 (citing RT 3671)). Respondent concedes, as the state must, that defense counsel: 1) objected to these charts and subcaptions; 2) incorporated earlier objections and argued that the prosecutor's comments on lack of remorse, by calling attention to the fact that Appellant did not testify, would be improper, unsupported by evidence at the crime scene, and would violate Appellant's rights under the Fifth Amendment; 3) objected to the chart's captions discussed "items in mitigation," which urged that "the absence of these items are, therefore, aggravation; and objected to the prosecutor's charts; and 4) objected to prosecution arguments as improperly conveying that the absence of a mitigating factor was evidence in aggravation. (RT 3667-74).

Respondent counts four allegations of trial court error and prosecutorial misconduct, and argues that "Appellant's contentions are without merit." (RB 319). However, Respondent concedes almost every material point to Appellant. Respondent has thus failed to adequately defend the egregious misconduct and error that permeated the jury's sentencing determination caused by inappropriate attention towards Appellant's lack of remorse and failure to testify. As such, Respondent fails to effectively rebut the allegations of trial court error and prosecutorial misconduct raised in Appellant's Opening Brief.

1. Appellant Has Shown that the Trial Court Committed Prejudicial Error By Allowing the Prosecutor to Argue Lack of Remorse as a Non-Statutory Aggravating Factor.

Respondent concedes that, in response to defense objections, the trial court held that the prosecutor's charts were misleading and ordered the prosecutor not to *further* publish to the jury the caption concerning remorse and repentance. (RB 322 (citing RT 3675-76)). Respondent recognizes that the court warned the prosecutor that he could *no longer* argue that the absence of mitigation was itself a factor in aggravation. (RB 322 (RT 3676)). However, Respondent fails to provide the trial court's ruling, free of misleading paraphrasing, which reads in full:

> as stated (on Chart #4), *it could be misleading* in terms of the appropriate argument and could inadvertently, as stated there, *make reference to a failure to testify* as distinguished from, for example, an appropriate argument on the subject of remorsefulness as it might relate to what occurred in reference to the crime itself or at the scene of the crime.

(RT 3675 (emphasis added)). Respondent argues that the trial court's order allowing argument concerning "lack of remorse," and the prosecutor's argument that Appellant was not remorseful were not fundamentally unfair in light of Appellant's proffer to express remorse for the crime through allocution. (RB 329). Respondent argues that *Keenan, supra,* 46 Cal.3d at 478 is controlling. Respondent characterizes the prosecutor's statements as merely "comment[s] on the record as it actually stood, ***as Appellant chose not to testify.***" (RB 330 (emphasis added)).

First, Respondent argues that the prosecutor's arguments were justified in light of "*Appellant['s] cho[ice] not to testify*" (RB 330). This point admits, in essence, that the prosecutor commented on Appellant's failure to testify in violation of *Griffin, supra,* 380 U.S. at 615. Respondent's argument highlights the fact that Appellant was penalized for

invoking his right to not testify. The prosecutor not only commented on Appellant's silence, or as Respondent puts it his choice "not to testify," but told the jury that because he would not incriminate himself he had not exhibited remorse for the crime. Since Appellant's request to exercise his right to allocute and express remorse was denied, there was only one inference that the jury could draw from the prosecutor's argument that Appellant failed to demonstrate remorse -- that he should have waived his constitutional rights and testified to his remorse during the penalty phase.

Second, Respondent does not address Appellant's contention that he was sentenced to death based on a sentencing factor that was patently inaccurate. (See II AOB 527). Appellant had specifically requested to address the jury and personally "express his extreme remorse for the death of Ms. Olsson and the terrible shock on her family." (RT 3621). On these facts, it cannot be said that Appellant lacked remorse. The trial court should not have permitted the prosecutor's argument, understanding that its decision had precluded the defense from offering any rebuttal evidence to the prosecutor's arguments. To sentence a man to death based on a materially inaccurate sentencing factor is "so extremely unfair" that it "violates 'fundamental conceptions of justice'" under the due process clause and equal protection. (*Dowling, supra,* 493 U.S. at 352 (quoting *Lovasco, supra,* 431 U.S. at 790)).

Third, as the Supreme Court has stated, "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system." (*United States v. Havens* (1980) 446 U.S. 620, 626 (citation omitted)). Here, after hearing Appellant's allocution proffer, the prosecutor could not, in good faith, argue that he lacked remorse. Prosecutor Burr intentionally subverted the fundamental goal of "arriving at the truth," as well as the prosecutorial ethic of maintaining justice by arguing that Appellant lacked remorse despite the fact that he knew to the contrary. The state thus made a

materially false allegation against Appellant. Blatant misrepresentation to a capital jury violates the right to due process, equal protection and a fair trial under the Sixth, Eighth and the Fourteenth Amendments, as well as Article I of the California Constitution.

2. The Court Should Have Instructed the Jury Regarding the Limited Manner in Which it was Permitted to Consider the Evidence of Lack of Remorse.

After improperly allowing the prosecution to argue lack of remorse and prohibiting Appellant from presenting evidence of remorse via allocution - the trial court had a duty to limit argument to the truth as reflected in the record. This necessarily excluded arguments regarding Appellant's lack of remorse, since Appellant had proffered evidence of his remorse in support of his request to allocute. (RT 3621). The trial court thus had a duty to instruct the jury on the limits of lack of remorse in regards to Appellant's decision not testify.

Respondent says that the trial court did not commit prejudicial error by failing to "instruct the jury 'on how to properly assess and consider the absence of remorse." (RB 330). Respondent recognizes that Appellant has alleged six separate instances of trial court instructional error related to this line of argument. (*Ibid.*). Respondent says that the trial court had no *sua sponte* duties, to provide any instructions related to remorse since no general principles of law governing remorse, as connected to the facts of the case, were relevant to the jury's sentencing determination. (*Ibid.* (citing *People v. Hood,* (1969) 1 Cal.3d 444, 449; and *People v. Wilson,* (1967) 66 Cal.2d 749, 759)). Respondent claims that the "common sense" meaning of remorse governed the jury's sentencing determination. (RB 330-31 (citing *People v. Anderson* (1966) 64 Cal.2d 633, 639)). Respondent says that the trial court's instructions ameliorated any prejudice resulting to Appellant,

and that "the jury had been informed of everything Appellant now contends the trial court should have provided instruction on." (RB 331).

First, this Court has acknowledged that the jury will bring its own life experiences to bear when deciding what is relevant at the penalty phase regardless of "what it is told" to them. (*People v. Bemore* (2000) 22 Cal.4th 809, 854-855 (juries will use their "common sense and life experience[s]" concerning remorse "no matter what [they are] told.")). If true, however, this principle demonstrates that California's death penalty scheme is arbitrary and capricious in violation of the Eighth Amendment since neither the arguments of counsel nor the court's instructions can adequately guide the jury's sentencing discretion as required by the Eighth and Fourteenth Amendments.

Second, Respondent concedes that under *People v. Hood* (1969) 1 Cal.3d 444, 449, the trial court is required "to instruct the jury on all general principles of law relevant to the issues raised by the evidence." Yet, Respondent appears to contend that the "general principles of law governing the case" did not require instruction on the definition of remorse here. (RB 330 (citing *Wilson, supra,* 66 Cal.2d at 759)). If no instruction was required, the court created juror confusion by failing to tell the jury to apply a common sense meaning of the term. In either case, the trial court was required to instruct the jury as to how to properly evaluate arguments concerning Appellant's alleged lack of remorse.

Respondent is wrong to argue that arguments concerning remorse do not invoke a constitutionally required instruction under *Anderson, supra,* 64 Cal.2d at 639. Without a specific instruction, the jury is left to their common sense understanding of the term. Lay understanding plainly entails impermissible considerations, like repentance, salvation, guilt, conceit, triteness. The fact that the jury might naturally consider these things as part of their "life experience" does not render them permissible

penalty considerations, nor does it give the prosecutor the right to argue that they are relevant.

Third, Appellant proffered a well-reasoned and acceptable description of instructions that could be easily implemented in cases where overt remorselessness is argued. (See II AOB 535-36). These instructions, or substantially similar ones, should have been given by the trial court in Appellant's case and should be accepted by this Court now.

The trial court's instructions did not ameliorate any prejudice resulting to Appellant because they did not address: 1) how the jury should infer lack of remorse from the evidence; 2) whether the jury could consider Appellant's Fifth Amendment right not to testify; 3) whether the jury's consideration of Appellant's purported lack of remorse was limited to evidence at the scene of the crime; 4) whether the jury could consider lack of remorse for other purposes; and 5) whether a showing of lack of remorse was a prerequisite to a life verdict. Despite Respondent's contentions, Appellant's "jury had [not] been informed of everything Appellant now contends the trial court should have provided instruction on." (RB 331). The trial court failed to discuss eight instructional aspects of remorse that must be given in order to ensure that juror's properly consider this highly inflammatory evidence.[162]

---

[162] (See II AOB 500 ("First, the absence of remorse is a not statutory aggravating factor in California. Second, the current death penalty law does not permit argument as to the "absence of remorse." Third, the prosecutor's argument that remorse was a "condition precedent to mercy" precluded the jury from considering and giving any affect to the mitigating evidence presented in this case. Fourth, because Appellant did not testify or admit the killing, the argument violated his right against self-incrimination. Fifth, because there was no evidence to support an argument of overt remorselessness, the prosecutor's argument was based on impermissible speculation. Sixth, the prosecutor's argument that Appellant was not remorseful was materially inaccurate. Seventh, "absence of remorse" as interpreted by this Court lacks sufficient

3. Respondent Does Not Rebut Appellant's Arguments that the Trial Court Erred in Failing to Sustain Defense Objections or Grant a Defense Motion for Mistrial in Response to the Prosecutor's Improper Arguments About Appellant's Remorse.

The trial court improperly prohibited Appellant from presenting evidence of remorse via allocution and allowed the prosecution to argue lack of remorse. In choosing to do so, the trial court accepted a duty to ensure that the prosecutor's argument was limited to what was actually true. This necessarily excluded arguments regarding Appellant's lack of remorse beyond the crime scene, since Appellant had proffered evidence of his remorse in support of his request to allocute. (RT 3621). The trial court also had an affirmative duty to limit the prosecution's arguments to a discussion of lack of remorse in the context of *what actually occurred* at the scene of the crime. (*Ibid.* (citing RT 3675)). The trial court, in the face of controlling authority, abdicated both of its duties.

The trial court allowed the prosecutor to freely and repeatedly argue Appellant's lack of remorse. The trial court failed to sufficiently correct the prosecution's display of a chart detailing Appellant's lack of remorse. The trial court failed to limit the prosecution's lack of remorse arguments to facts known to be true. The trial court failed to protect Appellant's right under the Fifth Amendment not to testify. Indeed, the trial court failed to limit the prosecutor's lack of remorse arguments at all. Worse, the trial court erroneously prevented Appellant from responding to the prosecutor's arguments and truthfully asserting his remorse through allocution. Under these circumstances the trial court's error and the prejudice incurred from the prosecution's arguments violated Appellant's state and federal

---

definition to be properly considered in the penalty determination. Finally, if such argument was proper, the jury should have been instructed how to properly assess and consider the absence of remorse in deciding the penalty.")).

constitutional rights, warranted a mistrial, and now require reversal of Appellant's death sentence on appeal.

Respondent does not rebut Appellant's arguments that the trial court erred in failing to sustain defense objections to the prosecutor's speculative and improper arguments about Appellant's remorse during the commission of the crime. (See II AOB 524) Respondent does not rebut Appellant's assertion that the trial court erred by denying, without comment, the defense's motion for mistrial based on the prosecutor's repeated speculation as to events at the scene of the crime and his "direct attempt[s] to inflame the jury." (II AOB 524 (citing RT 3718-19)). This is a significant error on Respondent's behalf. The trial court's erroneous denial of Appellant's motion for mistrial, based on the inappropriate use of lack of remorse as a non-statutory aggravating factor, constituted a miscarriage of justice and fundamental error in the proceedings. (Contra *Combs*, *supra*, 34 Cal.4th at 866). Respondent's lack of arguments to the contrary proves the absence of a justification for the trial court's denial of Appellant's motion for mistrial.

4. Appellant Has Shown that the Prosecutor Committed Prejudicial Misconduct by Arguing Lack of Remorse as a Non-Statutory Aggravating Factor.

Respondent states that the "propriety of commenting on lack of remorse" depends on the inferences the prosecutor asks the jury to draw. (RB 319 (citing *Cox, supra,* 53 Cal.3d at 685)). Respondent acknowledges that the prosecutor argued that a showing of remorse was a "condition precedent"[163] for Appellant **to receive** life without the possibility of parole

[163] Although "condition precedent" is a legal term of art, the prosecutor explained it to the jury in common terms. The most common definitions for a "condition" are: 1) "anything called for as a requirement before the performance or completion of something else;" or 2) "anything

(See RB 322). Indeed, Respondent notes that the prosecutor argued that the jury must "see in existence...before you grant mercy, remorse, the presence of remorse, the fact that you're sorry for what you've done...It's not present in this case." (*Ibid.* (citing RT 3693)). The inference that remorse is a condition precedent to a life sentence is undoubtedly an impermissible use of the non-statutory aggravating factor of lack of remorse.

Respondent agrees that it is fundamentally unfair when the prosecutor argues that "a defendant's failure to confess his guilt after he has been found guilty demonstrates his lack of remorse...." (RB 319 (citing *Coleman, supra,* 71 Cal.2d at 1168)). Respondent concedes that prosecutorial references to post-crime evidence of lack of remorse or expressions of innocence are improper and fundamentally unfair. (RB 319-20 (citing *Boyd, supra,* 38 Cal.3d at 771-76; and *Gonzalez, supra,* 51 Cal.3d at 1232)). Respondent thus must concede that remorse is a non-statutory aggravating factor.

Respondent contends that Appellant is wrong to assert that the prosecutor's comments in this case misled the jury and misstated the law. (See RB 323). Respondent argues that the prosecutor sought to explain that "no evidence of remorse had been presented," and did not suggest "that the absence of remorse was itself a specific aggravating factor." (*Ibid.*). Respondent argues that it is not reasonably likely that a juror would have understood the prosecutor's statements as meaning that a showing of mercy was a "condition precedent" to accepting evidence in mitigation. (*Id.* at

---

essential to the existence or occurrence of something else; prerequisite." (*Webster's New World Dictionary* (3rd College Ed. 1988), at 290). "Precedent" is defined as: "an act [] that may serve as an example, reason, or justification for a later one." (*Id.* at 1060). Respondent's use of the term condition precedent here demonstrates that the state agrees with Appellant that the prosecutor argued that the jurors must, in effect, believe that Appellant is remorseful before voting against the death penalty.

324). Respondent credits jurors for realizing that "the prosecutor did not argue that his view was the law the jury was compelled to follow." (*Id.* at 324). Respondent argues that the trial court's instructions obviate Appellant's contentions. Respondent is wrong.

First, the prosecutor told the jury that "in the law," there are "condition precedents;" (sic) a term meaning "something has to happen before another thing follows, a prerequisite." (RT 3693).[164] The prosecutor then characterized evidence of remorse as a condition precedent to granting repentance, mercy, and salvation. (*Ibid.*). Respondent is wrong to argue that the prosecutor merely sought to highlight the lack of evidence submitted on the issue of remorse. (See RB 322 (citing RT 3693)). As recognized by the trial court, when striking the subcaptions from the prosecutor's Chart #4, Prosecutor Burr's arguments fundamentally mislead the jury and sought to illegally convey that the lack of remorse constituted an aggravating factor. (RT 3675; see also *Mendoza, supra,* 24 Cal.4th at 187). Since the jury did not hear evidence as to this "condition precedent," it followed that Appellant had failed to show why he did not "deserve the death penalty." The premise of this "condition precedent" runs contrary to state statutes, the most basic principles of the California death penalty scheme and, consequently, the California and United States Constitutions. (See e.g., *Romine v. Head* (11th Cir. 2001) 253 F.3d 1349, 1368; and *Caldwell, supra,* 472 U.S. at 336-339).

---

[164] Here, the prosecutor argued in entirety "What else didn't you learn about the defendant? That he doesn't deserve the death penalty? You know, what is in the law, we call it a *condition precedent*, something has to happen before another thing follows, a prerequisite, something that you would expect to see in existence before you give sympathy, before you grant mercy, remorse, the presence of remorse, the fact that you're sorry for what you've done can be a mitigating factor, can be a mitigating factor, but it's not present here. It is not present in this case." (RT 3693 (emphasis added)).

Second, Penal Code Section 190.3 does not refer to any "condition precedent." Prosecutor Burr's "condition precedent" was thus artificially created by argument without law or instruction. The use of the non-statutory aggravating factor of remorse thus prevented the jury from granting a capital defendant sympathy or mercy and thus from considering his mitigation evidence as constitutionally required. (See *Lockett, supra,* 438 U.S. at 604-05; *Woodson, supra*, 428 U.S. at 304; and *Eddings*, *supra,* 455 U.S. at 113-15). This is exactly what the prosecutor told the jury here – to disregard Appellant's mitigating evidence because he had not qualified for a life sentence by proving his remorse.

Third, the prosecutor's argument was undoubtedly misleading. The prosecutor invoked an irrelevant and unfounded legal principle that lack of remorse is a "condition precedent." In doing so, he told Appellant's jury that "they should not even consider mercy[,]" and thus misled "the jury about one of its central tasks, which is to decide whether the individual, convicted murderer standing before it should receive mercy." (*Romine, supra,* 253 F.3d at 1368; see also *Easley*, *supra*, 34 Cal 3d at 880). The prosecutor's novel, manipulative, and improper arguments should not stand on appeal.

Fourth, the trial court's instructions could not have possibly cured the error resulting from the prosecutor's arguments, since the trial court had *refused to provide* any instruction relative to the jury's consideration of remorse and had denied Appellant's request to express his remorse. (RT 3623). Moreover, a reasonable juror would believe that a prosecutor, an officer of the court who is held to the highest ethical duties under the law, would not materially misstate the law regarding the permissible consideration of remorse during the sentencing deliberation. This is especially true in the absence of any controlling or competing instruction from the trial court.

Fifth, Respondent contends that the prosecutor did not commit *Griffin* error when he argued that a "condition precedent" for Appellant not to receive the death penalty was "to see in existence...before you grant mercy, remorse, the presence of remorse, the fact that you're sorry for what you've done....It's not present in this case." (RB 322 (citing RT 3693)). Respondent feels that only an unreasonable juror would have understood the prosecutor as referencing Appellant's failure to testify." (RB 324). Again, Respondent tries to argue that the trial court's instructions ameliorated any prejudice. (*Id.* at 324-25 (citing *Wash, supra,* 6 Cal.4th at 263)).

Respondent has already conceded that the prosecutor's arguments sought to penalize Appellant for not testifying. (See RB 330 ("the prosecutor commented on the record as it actually stood, *as Appellant chose not to testify*") (emphasis added)). The record clearly demonstrates that the express meaning of the prosecutor's argument was that the lack of Appellant's testimony and expressions of remorse were reasons to sentence Appellant to death and impediments to sentencing Appellant to life in prison. The direct implication of the prosecutor's argument was that Appellant's decision *not to testify* was indicative of his lack of remorse and warranted a death sentence. A reasonable juror would have associated Appellant's failure to testify with his lack of remorse and understood the prosecutor's argument to mean that Appellant could not earn a life sentence. Similarly, and given the ecclesiastical debate that raged throughout the closing penalty phase arguments, a reasonable juror would have understood the prosecution's chart #4 entitled "What You Haven't Heard About Richard Tully.," and reading "That He Is Remorseful - Sorry - for What He Did" and "That He Has Found God and Repented." (Court Exhibit 5); as meaning that Appellant's failure to testify and express his remorse dooms his chances of salvation or a life sentence. (See Claim VII -

The Prosecutor's Religious Arguments Permeated the Penalty Phase Arguments and Prejudiced Appellant). No instruction, and particularly the lack of any instruction, could cure the prejudice incurred to Appellant's constitutional rights from the prosecution's misleading use of lack of remorse evidence and the trial court's error.[165]

5. The Prosecutor's Lack of Remorse Arguments Strayed far from Comments on Evidence of Overt Remorselessness and were not Factually Supported by Evidence in the Record.

Respondent insists that the prosecutor's arguments were proper. (RB 325). To this end, Respondent contends that the prosecutor argued: "Another aggravating factor is his callousness at the scene and the failure to show any remorse at the scene of that crime. Totally callous. Indifferent to what she was going through, totally and completely." (RB 325-26 (citing RT 3715)). However, in pursuing this line of argument, **before** defense objections, the prosecutor fabricated a story about how the crime occurred based on speculation, without factual support in the record, to argue Appellant's alleged failure to show remorse. Respondent concedes that the prosecutor commented that Appellant failed to act with "humanity" and

---

[165] Respondent does not address Appellant's argument that the trial court committed a grave error in allowing the prosecutor to argue absence of remorse. Absence of remorse is a not an aggravating factor in California. (See *Mendoza, supra,* 24 Cal.4th at 187). Allowing the prosecutor to argue lack of remorse, based on post-crime behavior and Appellant's failure to testify, permitted the jury to consider an additional aggravating factor beyond what was allowed under state law in a manner that was not constitutionally acceptable. Here, the trial court's restrictions on the prosecution's lack of remorse arguments did not have sufficient definition to meet constitutional requirements. Because Appellant did not testify or admit guilt, and the prosecution directly commented on the exercise of Appellant's rights, the trial court's error resulted in the material violation of Appellant's rights against self-incrimination and reliable sentencing under the Fifth and Eighth Amendments. (See *Griffin, supra,* 380 U.S. at 609).

"compassion" while Mrs. Olsson was "laying on her bed crying," and that Appellant failed to "lift one finger to call for help." (RB 325-26 (RT 3715-3716)). But the evidence used by Respondent and by the prosecutor does not prove that Appellant was at the scene of the crime, that Mrs. Olsson cried, or that the assailant did not lift a finger.

Respondent wants to characterize the prosecutor's argument as seeking to describe "overt remorselessness" and detail the circumstances of the crime. (RB 326 (citing *Gonzalez, supra,* 51 Cal.3d at 1231)). This way, Respondent can argue that the prosecution's argumentative creation of the non-statutory aggravating factor of remorse was proper. Respondent, however, cannot provide more than one quote from the record indicating that the prosecution discussed Appellant's lack of remorse in relation to the circumstances of the crime. (See RB 325-26 (RT 3715-3716)). In the absence of support from the record, Respondent is left to argue that the evidence *inferred* that Appellant acted with overt remorselessness at the crime scene." (See RB 327). Respondent analogizes the situation to the inference introduced by the prosecution at Appellant's trial that Appellant had rummaged through Ms. Olsson's purse, since grapes were found on her floor. (*Ibid.*).

Respondent's assertion that the "evidence overwhelmingly supports a finding that Appellant acted with overt remorselessness at the scene" is baseless. An overt remorselessness argument is only proper when focused on the circumstances of the crime and supported by facts and direct evidence gleaned either from the defendant's statements, physical evidence, or percipient and eyewitnesses. (See *Cain, supra,* 10 Cal.4th at 77-78). In his Opening Brief, Appellant proved that in comparison to "overt remorselessness" cases, the prosecutor had failed to support his assertions since there was no direct evidence of remorselessness in the circumstances of the crime. (See II AOB 523).

The state's assertion is not supported by a comparison of the prosecutor's arguments in Appellant's case and other cases where prosecutors argued "overt remorselessness." In fact, the only evidentiary support Respondent can muster is an argument that Appellant rummaged through Ms. Olsson's purse and consequently spilled grapes on the floor. Respondent cannot proffer direct evidentiary support of the prosecutor's arguments because none exists. Instead, Respondent stacks inference upon inference in order to cover such outlandish ***factual assertions*** as "Appellant failed to lift one finger," and "Ms. Olsson was lying on her bed crying."

This is not a case where the prosecutor could argue that the defendant exhibited "overt remorselessness" at the scene of the crime. (Cf. *Gonzalez, supra,* 51 Cal.3d at 1231). Despite that fact, Respondent attempts to justify the prosecutor's behavior by trying to analogize to *Gonzalez*. (RB 319-20). However, the prosecutor's arguments in *Gonzalez* expressly focused on the circumstances of the crime, the defendant's incriminating and boastful statements. *Gonzalez, supra,* 51 Cal.3d at 1231-32. In contrast, in Appellant's case, the prosecutor's comments on the topic of remorse ranged from Appellant's failure to find God (RT 3667); to comparing Appellant to the bad thief at Christ's crucifixion (RT 3704); from characterizations of remorse as a condition precedent for salvation (Court Exhibit #5); to descriptions of remorse as a condition precedent for a life sentence. (RT 3693). Prosecutor Burr's arguments thus strayed far from the scene of the Olsson homicide and "overt remorselessness" arguments sanctioned by *Gonzalez.*

Respondent concedes that, in closing, the prosecutor again returned to the subject of remorse and repentance during his lurid description of Christ's crucifixion. (RB 327-38). Respondent concedes that the prosecutor compared Appellant to the bad thief who did not earn salvation because he failed to repent and instead "cussed at Christ, turned his nose."

(*Id.* at 327). Here, Respondent argues that Appellant's contentions of prosecutorial misconduct during closing argument were forfeited due to failure to object at trial. In the alternative, Respondent argues that no prejudice resulted to Appellant from the prosecutor's comparisons of Appellant to the bad thief who cussed at Christ, or the lurid description of Christ's crucifixion, due to the trial court's instructions. (*Id.* at 328).

Respondent's arguments of procedural default are taken up elsewhere; but reiterated here for clarity.[166] (See Claim XVII - The Prosecutor's Religious Arguments Permeated the Penalty Phase Arguments and Prejudiced Appellant). Respondent cannot truthfully argue that no prejudice stems from the prosecutor's analogy of Appellant, and his capital trial, to the bad thief at Christ's crucifixion. The argument was egregious beyond any precedent. In closing arguments of the penalty phase of a capital trial, there is no place for religious arguments, let alone arguments recreating Christ's crucifixion – the penultimate important moment in Christian history. Remarkably, the situation here is even more prejudicial as the prosecutor compared the defendant to the bad thief, also crucified and capitally punished, in order to argue that Appellant's lack of remorse requires the jury not to grant him further life and salvation. Thus, beyond the prejudice resulting from the biblical references, the prosecutor's argument also incurred additional prejudice because it constituted the

---

[166] This Court may review this claim because: 1) A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "an admonition would not have cured the harm caused by the misconduct." (*Hill, supra,* 17 Cal.4th at 820-821 (citations omitted)); and 2) "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights[including] ... the constitutional right to a jury trial." (*Vera, supra,* 15 Cal.4th at 276; see also *Loker, supra,* 44 Cal.4th at 704; and *People v. Belmares* (2003) 106 Cal.App.4th 19, 27).

conversion of lack of remorse into an aggravating factor.[167] No description or conception of overt remorsefulness could include the prosecutor's arguments here.

D. The Trial Court's Error and the Prosecutor's Misconduct was not Harmless Beyond a Reasonable Doubt.

The constitutional errors asserted here require reversal because, pursuant to *Chapman, supra*, 386 U.S. at 23, the state has not and cannot prove that the error was harmless beyond a reasonable doubt. (See also *Sochor, supra,* 504 U.S. at 532; and *Sanders, supra,* 373 F.3d at 1059-60).

For seven reasons the prosecution's lack of remorse argument prejudiced Appellant's constitutional rights and ability to earn a fundamentally fair penalty phase proceeding. First, the absence of remorse is a not statutory aggravating factor in California, and cannot be considered as such. Second, the current death penalty law does not permit argument as to the "absence of remorse." Third, the prosecutor's argument that remorse was a "condition precedent to mercy" precluded the jury from considering and giving any affect to the mitigating evidence presented in this case. Fourth, because Appellant did not testify or admit the killing, the argument violated his right against self-incrimination. Fifth, because there was no evidence to support an argument of overt remorselessness, the prosecutor's argument was based on impermissible speculation. Sixth, the prosecutor's argument that Appellant was not remorseful was materially inaccurate. Seventh, "absence of remorse" as interpreted by this Court lacks sufficient definition to be properly considered in the penalty determination. Finally,

---

[167] Undoubtedly, Respondent cannot argue that the prosecutor's argument was sanctioned as "overt remorseless" since Christ's crucifixion is almost two thousand years away from the Olsson homicide. This analogy shows just how far the prosecutor's remorse arguments strayed from those sanctioned under *Gonzalez, supra,* 51 Cal.3d at 1231 and *Cain, supra,* 10 Cal.4th at 77-78.

if such argument was proper, the jury should have been instructed how to properly assess and consider the absence of remorse in deciding the penalty.

Respondent does not argue as to the correct prejudice standard because the state believes no error occurred. (RB 321). In either case, Respondent cannot meet its burden of showing harmless error beyond a reasonable doubt here. In fact, the injection of the irrelevant and misleading "aggravating factor" of alleged lack of remorse resulted in an arbitrary and capricious death sentence. Appellant incurred prejudice from religious arguments, characterizing expressions of remorse as required for salvation, and misstatements of the law, characterizing expressions of remorse as a condition precedent to a life sentence. Respondent cannot justify the prosecutor's lack of remorse arguments based on circumstances of the crime and overt remorsefulness. The prosecution's creation of the illusory aggravating factor of alleged lack of remorse at the scene biased the jury's decision in favor of death in violation of the Eighth Amendment. (See *Stringer v. Black* (1992) 503 U.S. 222, 235-36). Since the jury was "told to weigh an invalid factor in its decision," this Court "may not assume it would have made no difference if the thumb had been removed from death's side of the scale" and must invalidate Appellant's death sentence. (*Id.* at 232, 236).

E. Conclusion.

Appellant has shown that the argument regarding the absence of remorse violated state law as well as his right to a fair trial, to refrain from self-incrimination, to an impartial jury, to due process, equal protection and to a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments, and parallel provisions of the California Constitution. The effect of each of these errors, individually and cumulatively, was that the jury was misled into finding the existence of an

inflammatory aggravating factor that required a death sentence. For all the reasons raised under this claim of error, the trial court's failure to preclude the prosecutor's arguments on remorse, and the arguments made by the prosecutor regarding absence of remorse, violated Appellant's rights to a fair trial, to refrain from self-incrimination, to an impartial jury, to due process, to equal protection, and to a reliable penalty determination under state law, the Fifth, Sixth, Eighth, and Fourteenth Amendments, and the parallel provisions of Article I of the California Constitution. Since Appellant was sentenced to death based on an irrelevant sentencing factor, he was improperly deprived of this liberty interest without due process in violation of the Fourteenth Amendment. His death sentence must be reversed.

XXIII. APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE ALL ESSENTIAL FACTORS WERE NOT PROPERLY CHARGED AND WERE NOT FOUND BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY.

A. Introduction.

The Sixth Amendment to the United States Constitution grants defendants the right to jury trial in all phases of criminal proceedings. (See U.S. Con., VI Amend. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...")). In fact, the Sixth Amendment, as recognized by the common law at its ratification, extends to criminal defendants the right to have all factual elements, necessary to impose criminal liability and sentencing, in all phases of the criminal proceeding found unanimously and beyond a reasonable doubt. (See Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. Pa. J. Const. L. 487 (2009)). In recognition of this constitutional and common law maxim; the Supreme Court has crafted a litany of cases defining and expanding criminal defendant's right to jury trial. (See *Jones, supra,* 526 U.S. at 243 n. 6; *Apprendi, supra*, 530 U.S. at 476; *Ring, supra,* 536 U.S. at 614; *Blakely, supra,* 542 U.S. at 301; and *Booker, supra,* 543 U.S. at 220).

In light of *Jones*, *Apprendi*, *Ring*, *Blakely*, and *Booker*, and more recently *Cunningham v. California* (2007) 549 U.S. 270., the California death penalty scheme is unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as Article I of the California Constitution. The Fifth, Sixth, and Fourteenth Amendments, and parallel provisions of the California Constitution require that the jury unanimously find beyond a reasonable doubt that aggravating circumstances exist, that the aggravating circumstances substantially outweigh mitigating circumstances, and that the

death penalty is appropriate. California does not require that the jury make any of these findings unanimously or beyond a reasonable doubt. Since the California death penalty system does not provide these protections, it is unconstitutional.

B. This Court Should Reconsider Its Earlier Case Law.

Pursuant to *Apprendi*, *Ring,* and *Blakely,* when a state bases an increased statutory punishment upon additional findings, the findings must be made by a unanimous jury beyond a reasonable doubt. Notwithstanding Supreme Court law holding this true, this Court has held that the penalty jury does not need to be instructed that any of its findings have to be made unanimously and beyond a reasonable doubt. (See e.g., *Prieto, supra*, 30 Cal.4th at 262-64; *People v. Snow* (2003) 30 Cal.4th 43, 126 n. 32; and *Martinez, supra,* 31 Cal.4th at 700. These opinions are based on a misapplication of federal constitutional requirements to California's penalty scheme. Accordingly, the cases must be reconsidered and overruled by this Court.[168]

Respondent attempts to rebut Appellant's argument wholly by citation to this Court's decision in *Dickey, supra,* 35 Cal.4th at 930-31. (See RB 32-33). Based on a string cite spanning two pages, Respondent argues that Appellant's argument "merits no further attention." (*Id.* at 334). Respondent characterizes Appellant's arguments as **merely** calling this Court's decisions "faulty or wrong," and claims that Appellant has failed to offer anything "new in the way of analysis." (See *Id.* at 333-34).

---

[168] In the last four years, this Court has repeatedly rejected the argument that California capital jury's failure to find, unanimously and beyond a reasonable doubt, all elements necessary to impose a capital sentence based on a finding and weighing of aggravating and mitigating factors does not violate the constitutional right to jury trial afforded by the Sixth and Fourteenth Amendments. (*Bunyard, supra,* 45 Cal.4th at 836; *Gutierrez, supra,* 45 Cal.4th at 789; and *Riggs, supra,* 44 Cal.4th at 248).

In truth, Appellant's argument covers twenty-four (24) pages and raises numerous arguments challenging the constitutionality of the jury's penalty phase verdict and the state's charging documents. (See II AOB 541-65). Respondent, however, fails to discuss thirteen (13) of Appellant's arguments.[169] Respondent's lack of effort undermines the state's

---

[169] Respondent does not address or rebut the following thirteen (13) arguments: 1) Under the Eighth Amendment, and in a capital case, heightened reliability concerns require unanimous jury findings beyond a reasonable doubt as to all elements necessary to impose a death sentence. (See II AOB 542); 2) In *Blakely, supra,* 542 U.S. at 296 and *Booker, supra,* 125 S. Ct. at 746, two cases not discussed in *Dickey* and Respondent's string cite, the Supreme Court found that the right to a jury finding beyond a reasonable doubt as to the "truth of every accusation" was "unquestionably applicable" to the Guidelines since this right had its "genesis in the ideals of our constitutional tradition." (See *Id.* at 543); 3) California's failure to allege in an indictment or information all the findings necessary to impose a death sentence violates Supreme Court precedent (*Id.* at 544) (citing S*tate v. Fortin* (2004) 178 N.J. 540, 633); 4) this Court has wrongly interpreted California's penalty scheme as a simple, two part process, neatly divided into an "eligibility" phase and a "selection" phase, when a California penalty determination involves several distinct steps, all of which require essential fact findings, before the "statutory maximum" of death is a possible punishment in accordance with capital defendant's Sixth Amendment rights. (See II AOB 547); 5) this Court has improperly focused its *Ring* analyses solely on one statute, Cal. Penal Code Section 190.2, and thus incorrectly held that section 190.2(a) establishes death as the statutory maximum penalty for first-degree murder with a special circumstance, and that *Apprendi* only applies to the special circumstance finding. (See *Id.* at 547); 6) this Court has incorrectly held that because a jury's penalty findings are "moral" and "normative" rather than "factual" *Ring* does not apply; when, in actuality, it is the effect of the jury's findings on the potential range of punishment that is determinative of *Ring*'s application. (See *Id.* at 551); 7) because the finding that the aggravating factors substantially outweigh the mitigating factors subjects a defendant to a higher penalty, and it is only after this finding that the jury decides whether death is warranted or appropriate, the weighing determination must be proven unanimously beyond a reasonable doubt. (See *Id.* at 553); 8) California's death penalty scheme requires additional factual findings beyond those made during the guilt phase before the death penalty is an available punishment and because

conclusion that Appellant's claim "merits no further attention." (RB 334). Similarly, Respondent's failure to set forth a sufficient opposition assures that the state is not in a position to determine whether Appellant has offered anything "new in the way of analysis." (RB 334).

In addition to the many legitimate arguments Respondent failed to address, Appellant has raised several new arguments indicating that this

---

these additional factual decisions are required for the increased punishment of death, California juries are required to unanimously find, beyond a reasonable doubt, that any aggravating factors exist, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty beyond a reasonable doubt. (See *Id.* at 556); 9) this Court's failure to require jury unanimity on the factual findings that lead to the jury's sentencing verdict violates principles of equal protection as guaranteed by the Fourteenth Amendment because capital defendants are entitled to more rigorous protections than those afforded to non-capital defendants. (See *Id.* at 557); 10) this Court's failure to require unanimity as to sentencing factors in a capital case thus violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment by depriving capital defendants state created liberty interest in the right to jury trial as guaranteed by the California Constitution. (See II AOB 558); 11) in California, the failure to provide adequate notice and a public charging determination in capital crimes violates due process guarantees under the Fourteenth and Fifth Amendments and fails to ensure that a defendant is not subject to capital jeopardy for a crime alleged only by the prosecution. (See II AOB 561 (citing *Hurtado v. California* (1884) 110 U.S. 516; *United States v. Cotton* (2002), 535 U.S. 625, 634; *Stirone v. United States* (1960) 361 U.S. 212, 217)); 12) because none of the aggravating factors used against Appellant were presented to a magistrate at the preliminary hearing, found to have sufficient evidentiary support to bring him to trial, or pled in a charging document, Appellant's due process rights under the Fifth and Fourteen Amendments were violated. (See II AOB 561); and 13) the failure to require the jury to return unanimous, beyond a reasonable doubt findings on the aggravating factors was particularly prejudicial in Appellant's case due to the prosecutor's decision not to charge Appellant with rape at the guilt phase, but to argue during the penalty phase that the rape was an uncharged act of violence and an additional aggravating factor, without ever meeting the burden of proof required to sustain an actual rape conviction or a statutory aggravating factor under section 190.3 (b). (See *Id.* at 563).

Court needs to revisit its precedent. *Cunningham v. California* reinforces the argument that denying capital defendant's the right to have all penalty phase determinations made by the jury unanimously and beyond a reasonable doubt violates the Sixth Amendment and Article I of the California Constitution. (See *Cunningham, supra,* 549 U.S. at 220). The Supreme Court explicitly rejected reasoning used by this Court in cases such as *Dickey* to argue that the finding of aggravating factors is not factual, and to claim that once a special circumstance is found death is the prescribed statutory minimum, and *Apprendi* no longer applies. (See *Ibid.*; and *Dickey*, *supra*, 35 Cal.4th at 929-31).

In examining California's Determinate Sentencing Law (DSL), the Court in *Cunningham* determined that the circumstances in aggravation were factual in nature and, because of this, under *Apprendi*, they must be submitted to a jury and found beyond a reasonable doubt. (See *Cunningham, supra,* 549 U.S. at 276-79, 290-91). In *Cunningham*, the Court emphasized that *Apprendi* identified a "bright-line rule." (*Id.* at 288). "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt." (*Id.* at 288-89; quoting *Apprendi*, *supra*, 530 U.S. at 490). *Any* determination that is factual in nature triggers the *Apprendi* rule. (*Ibid.*).

Cunningham also rejects this Court's position that because once a special circumstance is found, death is the prescribed statutory maximum, so *Apprendi*'s rule no longer applies. In *Cunningham*, the DSL provided that the upper term sentence could only be imposed by a trial judge finding an aggravating circumstance. (*Cunningham*, *supra*, 549 U.S. at 288). The Court distinguished between the middle term -- the most severe penalty that could be imposed by the judge without further factual findings, and the upper term – a penalty that required additional findings, making its

determination subject to the *Apprendi* rule. (*Id.* at 279). Therefore, just because a defendant is death eligible after a first degree murder conviction with a special circumstance, does not mean *Apprendi* no longer applies. Under the law applicable in cases such as Appellant's, death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist. (See Cal. Penal. Code § 190.3; and CALJIC 8.88). Under *Cunningham*, these further findings used in the penalty phase to impose a death sentence are within the rubric of *Apprendi*'s bright-line rule, and thus must be found by a jury beyond a reasonable doubt.

C. Conclusion.

Appellant was sentenced to death under an unconstitutional death penalty scheme that failed to require that all essential sentencing factors be charged and found by a grand jury or magistrate, and found beyond a reasonable doubt by a unanimous jury. Specifically, the jury was not required to unanimously find beyond a reasonable doubt that any aggravating circumstance existed, that any unanimously proven aggravating circumstances substantially outweighed the mitigating circumstances or that death was the appropriate penalty. Appellant's death sentence must be reversed for violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as Article I of the California Constitution.

XXIV. THE CUMULATIVE PREJUDICIAL EFFECT OF THE ERRORS IN APPELLANT'S PENALTY PHASE PROCEEDINGS REQUIRES REVERSAL OF HIS DEATH SENTENCE.

A. Introduction.

The prejudicial impact of multiple errors may result in an unfair and unconstitutional trial. (See *Taylor*, *supra*, 436 U.S. at 487 n. 15). "[E]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883; see also *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204) (citations and quotations omitted). In evaluating the matter, this Court should consider the prejudicial impact of the penalty phase errors together, rather than individually. Viewed together, the errors in this case undermine all confidence in the death sentence.

B. Argument.

Respondent concedes that Appellant has shown penalty phase error as to "missteps by the prosecutor during opening statement, fleeting witness reference to excluded victim impact evidence, and religious references by all counsel." (RB 335). Respondent argues that Appellant's other penalty phase claims of error fail. (*Ibid.*). According to Respondent's tally, when the claims of error are viewed cumulatively: "Appellant is no more entitled to reversal of the death judgment than he is when the errors are viewed singly." (*Ibid.*) This is because, in Respondent's view, there is no possibility that an "error free trial" would have resulted in a life sentence, based on the "egregious circumstances of the crime." (*Ibid.*). Respondent thereafter tries to justify its argument that Appellant did not suffer from cumulative prejudice again by recalling lurid details of the crime.

Respondent's arguments do nothing to prove or persuade that Appellant's penalty phase proceedings were not riddled with constitutional error and significant prejudice.

First, based on Respondent's concessions alone, Appellant has established cumulative prejudice sufficient to justify reversal of his death sentence. (See RB 335). The prosecutor's misstatements of the law, prejudicial victim impact evidence, highly inflammatory religious references and allusions to Christ's crucifixion violated Appellant's constitutional rights and rendered the penalty phase proceedings fundamentally unfair. (See Claim XV - The Prosecutor Committed Misconduct During the Presentation of Victim Impact Evidence and the Trial Court Erroneously Denied Appellant's Motion for a Mistrial; Claim XVI - The Prosecutor Committed Prejudicial Misconduct During the Penalty Phase Arguments; and Claim XVII - The Prosecutor's Religious Arguments Permeated the Penalty Phase Arguments and Prejudiced Appellant).

Second, the state's case in aggravation was not as strong as Respondent tries to argue. In fact, Respondent's arguments here, like the trial prosecutor's, are based entirely on circumstances of the crime and not evidence submitted as part of the state's case in aggravation. The circumstances of the crime are not the controlling or the dispositive factor in the penalty phase, especially in light of the strength of Appellant's case in mitigation. Respondent thus errs in arguing that the circumstances of the crime alone can justify Appellant's death sentence.

Third, Appellant's penalty phase proceedings were riddled with prosecutorial misconduct from start to finish. Throughout the penalty phase opening arguments the prosecutor committed misconduct by misstating facts he intended to prove, misstating the law, and violating the trial court's orders. During the presentation of evidence, the prosecution

proffered impermissible victim impact testimony and strove to exploit the court's decisions by asking the jury to focus on impermissible considerations. Worse, the prosecutor deliberately elicited inflammatory responses from witnesses in order to cajole objections from the defense and make Appellant appear obstructionist and callous towards victim witnesses. The prosecutor violated nearly every rule controlling and limiting the scope of arguments at the penalty phase. He recreated, without factual support, stories of sadism and sexual violence that **had little to do** with the provable facts of the crime and **more to do** with the prosecutor's speculative dramatization of the crime. His entire penalty presentation was framed and reinforced by misconduct.

Fourth, for its part, trial court error during the penalty phase proceeding impermissibly allowed Appellant's two scuffles in jail to be introduced as prior unadjudicated acts of "violence" and the prosecutor to argue non-statutory, false and inflammatory "aggravating" factors, including future dangerousness and the lack of remorse. Appellant had in fact, expressed remorse, yet was prohibited from expressing it to the jury. Nonetheless, the prosecutor told the jury to ignore all defense mitigation because remorse was "a condition precedent" to mitigation, and Appellant's remorselessness should be considered by the jury in making its sentencing decision.

Likewise, during the most crucial moments in the penalty phase proceedings, the trial court confused the jury by failing to answer their question regarding the "legal meaning" of life without parole. Rather than answer this question, the trial court simply referred the jurors back to the instructions and ultimately sealed Appellant's fate. But for the prosecutorial misconduct and trial court error in Appellant's case, there is more than a reasonable probability that he would not have been given a sentence of death.

C. Conclusion.

Under these circumstances, this Court can have no confidence in the reliability of the death verdict. (*Killian v. Poole*, *supra,* 282 F.3d at 1211). The errors singly and cumulatively violated Appellant's rights to due process, equal protection, a fair and impartial jury, to a fair trial, to present a defense, and to a fair and reliable penalty verdict, in violation not only of his rights under state law and the California Constitution but also under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Appellant's death sentence must be reversed.

XXV. THE TRIAL COURT FAILED WHEN PERFORMING ITS DUTIES IN REVIEWING THE JURY'S DEATH VERDICT.

A. Introduction.

In reviewing Appellant's death sentence, the trial court failed to exercise its responsibilities under section 190.4(e). The statutory and constitutional errors detailed below, individually and cumulatively, prejudiced Appellant and, as a result, the death sentence must now be vacated and reversed. (See e.g. *Brown*, *supra*, 45 Cal.3d at 1264 (holding that this Court "must reverse the penalty judgment on the basis of the section 190.4(e) error"); see also *People v. Sheldon* (1989) 48 Cal. 3d 935, 963).

Here, the trial court failed to sufficiently state its findings and reasons on the record. The trial court's findings as to aggravation, as to mitigation, and as to the comparative weight of the aggravation and the mitigation, were all improper and inadequate. The trial court failed to consider and give effect to valid mitigating evidence in violation of the Eighth and Fourteenth Amendments, and Article 1 of the California Constitution. (See *Lockett, supra*, 438 U.S. at 604). The trial court used improper standards to the detriment of Appellant. The trial court considered improper information that was not presented to the jury and that the defense never had the opportunity to confront, explain, or even review. The trial court failed to make an independent determination as to the evidence, and instead deferred to the implicit findings of the jury.

B. Appellant's Arguments have not Been Forfeited.

Respondent argues that Appellant has forfeited this argument for failure to lodge a contemporaneous objection at trial. (RB 342). Respondent says that the trial court's errors have been waived under *Hill,*

supra, 3 Cal.4th at 959. However, Respondent acknowledges the impossibility of the argument, by noting that *Hill* was decided 15 days after Appellant's modification hearing on December 4, 1992. (RB 342).[170] Simply put, at the time the trial court ruled on his motion for modification, Appellant had no legal duty, besides submitting his motion challenging the verdict, to object to the trial court's denial of that motion. Appellant's claims are not foreclosed by *Hill.*

C. The Trial Court's Ruling Was Deficient.

Respondent suggests that "Appellant's real complaint is not [that] the trial court failed to make independent findings, but that the court viewed the evidence differently than Appellant does and drew inferences unfavorable to him." (RB 348). Respondent says that "no prejudicial error occurred." (*Id.* at 337). However, Respondent must concede that the trial court erred in referring to the probation report (See *Lewis, supra,* 50 Cal.3d at 287). Respondent must also concede that the personal notes, also improperly relied upon by the trial court, are missing on appeal and affect meaningful review of the appellate record. (See Claim I - The Missing Portions of the Record Deprived Appellant of Meaningful Appellate Review).

Respondent concedes that no judge should deny a motion for modification of the jury's penalty verdict "merely because the jury's penalty verdict is supported by 'substantial evidence.'" (RB 338 (citing

---

[170] In light of Respondent's acknowledgment that *Hill* was decided after the modification hearing, it is patently unfair for the state to argue that Appellant's arguments are undermined because his counsel did not object at trial under *Hill.* There was no legal duty for Appellant to object until December 19, 1992 when *Hill* was issued. Thus, Respondent is being disingenuous when it argues that because counsel did not object to the ruling as vague, this inaction by counsel proves that the Court's sufficiently described the state's evidence. (RB 343). In actuality, counsel had no duty to object..

Bonillas, supra, 48 Cal.3d at 800-01)). Respondent argues that trial judges have "circumscribed" authority when reviewing a motion to modify the verdict, because sentencing "authority" under California law has been given to the jury.[171] (RB 338). Respondent asserts that the trial court fulfilled its obligations in Appellant's case. (*Ibid.*).

Respondent argues that the trial court complied with its duties to review the jury's verdict "count by count," summarize "the "requirements of section 190.4(e)," and recognize its power of "independent review" under *Rodriguez, supra,* 42 Cal.3d at 793. (RB 339). Respondent also credits the trial court with "agree[ing] that the jury's assessment that the circumstances in aggravation outweigh the circumstances in mitigation is supported by the weight of the evidence" (RB 339 (citing RT 3910)), and "in terms of credibility, [] agree[ing] with the implicit findings of the jury that the witnesses for the people were credible and believable." (RB 340 (citing RT 3911)). Based on a lengthy quotation of the trial court's reasoning, Respondent feels that the trial court "personally and carefully reviewed the transcripts of and evidence from the penalty phase." (RB 340).

Naturally, Appellant is challenging the trial court's decision because it was unfavorable. Bu that does not mean that the trial court's determination was not erroneous and did not result in prejudice to his constitutional rights. First, the trial court issued a conclusory denial of Appellant's motion for modification, which essentially rested on the court's view of the "substantiality" of the circumstances of the crime. (See RT

---

[171] Respondent's argument here supports Appellant's contentions in Claim XXIII - Appellant's Death Sentence must Be Reversed Because All Essential Factors Were Not Properly Charged and Were Not Found Beyond a Reasonable Doubt by an Unanimous Jury. All criminal defendants are entitled to trial by jury and proof beyond a reasonable doubt in accordance with the Sixth Amendment and Article I of the California Constitution.

3910). Second, Respondent makes too much of the trial court's generic statements in the record. Saying the magic words, "section 190.4(e)" and "independent review" does not ensure that the court's analysis followed those guidelines. Respondent's lengthy quotation and brief analysis of the trial court's ruling does nothing to support the state's view that the trial court "personally and carefully weighed the transcripts and evidence" or conformed its ruling to controlling authorities. Third, Respondent's conclusions are undermined by its failure to address all of Appellant's arguments challenging the trial court's ruling on the motion for modification.[172]

D. The Trial Court Made Deficient Aggravation Findings.

Respondent argues that there is no credibility, "either factually or legally," for Appellant's argument that the trial court's ruling was deficient

---

[172] Respondent did not address or rebut five (5) of Appellant's arguments: 1) The trial court's failure to make written and specific findings, as required by this Court, has precluded meaningful appellate review of Appellant's claim in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as Article 1 of the California Constitution. (See II AOB 574); 2) The trial court did not find whether any of the circumstances of the crime in Appellant's case were unique, in violation of sentencing factor (§190.3(a)), which requires discussion of circumstances that are "unique" to the case at issue. (See II AOB 577-78); 3) The trial court's findings in aggravation were inadequate and consisted solely of descriptions that run contrary to the definition of an aggravator as "any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (See *Id.* at 578); 4) The trial court failed to consider and give effect to uncontested mitigating evidence presented by the defense at the penalty phase and thus failed to consider the mitigating evidence presented here "with particularity" as required by statute, the Eighth and Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution. (See *Id.* at 585-86) 5) The trial Court's failure to conform with statutory requirements amounts to deprivation of Appellant's state-created liberty interest in violation of his rights under the due process clause of the Fourteenth Amendment. (*See Id.* at 596).

because "it is vague, unsupported by specific reasons and incapable or appellate review." (RB 342 -43 (citing II AOB 575-578)). Respondent wholly bases this conclusion on the fact that the trial court reviewed the circumstances of the crime and found the murder to have been "cruel, callous, vicious and pitiless." (RB 343). Respondent argues that there is "nothing vague" about the circumstances of the crime. (*Ibid.*).

First, Respondent's efforts to attack Appellant's credibility are unavailing. A simple review of the face of the trial court's order reflects the vagueness inherent in the ruling: "[T]he court independently finds that the circumstances surrounding the first degree murder [] were vicious and pitiless. The defendant brutally stabbed the victim numerous times and exhibited a high degree of cruelty and callousness." (RT 3912). Simply because the victim in this case was stabbed multiple times and the crime appeared vicious is not automatic justification for a death sentence. Respondent believes that continuing to cite circumstances of the crime facts, in an effort to bolster the "cruel, callous, vicious and pitiless" nature of the crime supports the trial court's description. However, by definition, all first-degree murders are vicious, pitiless, brutal, cruel, and callous. (*People v. Superior Court* (*Engert*) (1982) 31 Cal. 3d 797, 803). Moreover, it is this realization which has led the Supreme Court, as well as others, to strike aggravating factors qualified by the "cruelness" or "heinousness" of a crime. (See *Godfrey*, *supra,* 446 U.S. at 429 (footnote omitted)). The trial court's ruling was vague because it is applicable to all cases of first-degree murder and reflected the fact that the court had not independently considered the facts and circumstances unique to Appellant's case.

Second, despite Respondent's attempt, the circumstances of the crime alone cannot support a death sentence. A system or death sentence based entirely on the circumstances of the crime would unconstitutionally abridge a capital defendant's right to individualized and reliable sentencing.

(See *Sumner, supra,* 483 U.S. at 79-80 ("An inmate's participation may be sufficient to support a murder conviction, but in some cases it may not be sufficient to render death an appropriate sentence...."); and *Roberts, supra,* 428 U.S. at 334 ("The constitutional vice of mandatory death sentence statutes lack of focus on the circumstances of the particular offense and the character and propensities of the offender is not resolved by [limiting] first-degree murder to various categories of killings")). While such circumstances are a consideration during the penalty phase, Respondent's and the trial court's heavy reliance on the circumstances proves the weakness in the state's case in aggravation. Indeed, the trial court did not even cite to the prosecution's "future dangerousness" evidence involving the two scuffles at the Alameda County Jail as aggravation evidence sufficient to warrant the death penalty. This is likely because the evidence concerning both instances was insufficient to establish that a battery occurred and consensual wrestling or "hurt feelings" alone cannot justify a death sentence. (See Claim XIII - The Admission of Two Uncharged Misdemeanor Batteries as Aggravating Factors in the Penalty Phase Violated state Law and Appellant's Constitutional Rights).

E. The Trial Court Made Deficient Mitigation Findings.

Respondent contends that the trial court did not "ignore mitigating evidence" or "rule contrary to uncontradicted evidence." (RB 343). Respondent provides a list of cases where the court discusses "family history activities," "circumstances extenuating the *gravity* of the crime," and reasons "none of the evidence offered by the defendant could in any way be considered a moral justification or extenuation for his conduct." (*Id.* at 343 (citing RT 3912-13)). Respondent argues that the trial court was entitled to discredit the credibility of witnesses in mitigation and was relieved of any duty to recall all the mitigating evidence. (RB 344 (citing *Hawthorne, supra,* 4 Cal.4th at 80; and *People v. Dennis* (1998) 17 Cal.4th

468)). Respondent "disputes any suggestion that the trial court operated under a misapprehension of law and believed evidence wasn't mitigating unless it related to the circumstances of the crime." (RB 344). Respondent then repeats the list provided on the prior page, which includes the court's reasoning that "none of the evidence offered by the defendant could in any way be considered a moral justification or extenuation for his conduct." (*Id.* at 343 (citing RT 3912-13)).

First, other than the court's brief reference to "family history activities," the trial court wholly failed to discuss any of the intricacies of the social history evidence or other mitigation evidence offered by Appellant. Instead, the trial court's reasoning centered upon the fact that no evidence was introduced "extenuating the gravity of the crime" or "extenuating his conduct." (RB 341-42).

Second, the trial court did not assess the credibility of the witnesses, determine the probative force of the testimony, or weigh the evidence, as the statute requires. (See *Rodriguez, supra*, 42 Cal. 3d at 793; and *Jennings, supra*, 46 Cal. 3d at 995). Had the trial court actually stated that it discredited the witnesses' mitigation testimony, Respondent's citations to *People v. Hawthorne* would be relevant. Instead, Respondent merely **speculates** about the basis for the trial court's failure to recite the evidence in mitigation when discussing the court's reasoning in denying Appellant's motion.

Third, Respondent's repeated citation to the same statement made by the trial court regarding the lack of evidence of extenuating circumstances does nothing to support its assertion that the trial court did not operate under a misapprehension of law. (See RB 343-44). In fact, the quote reveals that, if Appellant wanted a favorable ruling on his motion for modification, the trial court required him to submit mitigation evidence that could be "considered a moral justification or extenuation for his conduct."

(RT 3912).

Fourth, Respondent does not address Appellant's specific **attacks** on the trial court's findings in mitigation. (See II AOB580-81). These include the arguments that the ruling was improper because it:1) applied a standard that this Court has found to be too narrow in *Easley*; 2) used language taken from the improper pre-*Easley* standard that mitigation evidence must relate to the crime itself; and 3) recognized the family background evidence, but assessed its weight under an irrelevant and inappropriate sentencing factor – whether the defendant reasonably believed there was a moral justification or extenuation for the crime.[173]

Fifth, and alternatively, assuming that the trial court did *not* commit error, its findings are still flawed because it found that *no mitigating evidence existed* in this case when evidence was presented under at least three separate mitigating factors. (RT 3907). For instance, Appellant had no prior felony convictions. This undisputed fact is mitigating under sentencing factor 190.3(c). (See *Crandell, supra,* 46 Cal.3d at 884).

Finally, the trial court's findings as to mitigation were flawed because it failed to properly analyze the factors that were mentioned by defense counsel, and which had to be mitigating as a matter of law. This Court has said that the statute requires the trial court to "*consider* all proffered mitigating evidence" in ruling on a section 190.4 application. (*Steele, supra,* 27 Cal. 4th at 1267-68 (emphasis in original); see also *Jennings, supra*, 46 Cal. 3d at 993). The Eighth and Fourteenth Amendments similarly require that a sentencer in a capital case consider

[173] Factor 190.3 (f) was irrelevant and the trial court should not have addressed it here. (See *People v. Crandell* (1988) 46 Cal.3d 833, 884 ("Because defendant offered no evidence of moral justification and did not rely in argument on the factor of moral justification (§ 190.3, factor (f)), this factor was irrelevant to penalty determination. As we have noted, it would be 'rare indeed' to find mitigating evidence in a capital case which could justify or excuse the defendant's conduct.")).

and give effect to all mitigating evidence presented. (See *Lockett, supra,* 438 U.S. at 604).

F. The Trial Court Improperly Found that the Circumstances in Aggravation Outweighed the Circumstances in Mitigation.

Respondent tries to rebut Appellant's arguments that the trial court did not sufficiently : (1) detail specific aggravating evidence; (2) detail the weight it gave to the aggravating evidence; (3) describe the weight it gave to mitigating evidence; and (4) describe its reasoning upon weighing the evidence. (RB 345). Respondent "submit[s] [that] Appellant must be examining another record." (*Ibid.*). In the alternative, Respondent argues that the court was not required to assign a particular weight and its finding was "sufficiently specific" under *Cunningham, supra,* 25 Cal.4th at 1040. Respondent concedes that a "more detailed statement of reasons would have been helpful to understand more fully the trial court's independent determination," (*Farnam, supra,* 28 Cal.4th at 195), but argues that the record, and particularly the circumstances of the crime, justify the court's conclusions. (See RB 346). Respondent's arguments fail.

Respondent credits the trial court for "specifically agree[ing]' with the jury's conclusion that the circumstances in aggravation outweighed those in mitigation because 'the weight of the evidence compel[s] such a conclusion." (RB 344 (citing RT 3910)). Respondent also credits the court for "personally assess[ing]" the factors in aggravation outweighed the factors in mitigation. (RB 344). Respondent then argues that the trial court sufficiently evaluated the circumstances of the crime, Appellant's family background, and found that no evidence extenuated the circumstances of the crime. (See *Id.* at 345).

First, Respondent's take on the record rests wholly upon the circumstances of the crime. These facts, in themselves, are insufficient to

establish that the trial court properly considered the weight of evidence marshaled during the penalty phase and then correctly weighed that evidence. Respondent's use of circumstances of the crime evidence, as cited by the trial court, to support the denial of Appellant's motion for modification proves that the circumstances were the only evidence evaluated by the trial court. In fact, one needs to look no further than the trial court's ruling to verify the truth of this proposition. (See RB 344 (citing RT 3912-13)).

Second, the fact that the trial court agreed with the jury does not prove that the trial court, or the jury for that matter, properly considered the penalty phase evidence. Respondent's arguments to the contrary are conclusory and fail to shed any light on the trial court's reasoning or motivations when denying the motion for modification. Moreover, the fact that the court stated that it "personally" reviewed the aggravation evidence does not ensure the sufficiency of that review or that the court reviewed the mitigating evidence. In fact, and in light of the court's statements in the record, the court's personal review of the evidence was deficient and wholly failed to consider the evidence in mitigation. Moreover, personal review is different "[from] thoughtful and effective [] review . . .,'" which necessarily includes "the reasons why it concluded the aggravating circumstances exceeded the mitigating circumstances." (*Bonillas, supra,* 48 Cal. 3d at 801 (quotations omitted)).

Finally, the trial court's weighing determination can hardly be described as specific. This is apparent when one reviews the trial court's orders issued in the cases Respondent relies upon in support of its opposition to this claim. In *Cunningham, supra,* 25 Cal.4th at 1039, the trial court made a point of explaining that it looked for "every conceivable angle upon which we could do something other than what the jury has proposed to do in this case." In Appellant's case, the judge did not state

that he had reviewed the evidence in mitigation or the evidence supporting the death judgment. In fact, it appears that the trial court actually narrowed its review to one factor and perspective of the evidence: whether Appellant had provided a moral justification or extenuation for the crime.

Similarly, in *Farnam, supra,* 28 Cal.4th at 195; in response to a brief order denying a motion for modification, this Court held that "a more detailed statement of reasons would have been helpful to understand more fully the trial court's independent determination that death was warranted. But the record here not only establishes that the court acted on a proper understanding of its statutory duties, it amply justifies the court's conclusion as well." (*Ibid.*). Quite to the contrary in Appellant's case, the record does not demonstrate that the trial court was operating under the correct apprehension of law or that it had reviewed all the evidence adduced at the penalty phase. Put simply, the trial court's order in Appellant's case is distinguishable from the trial courts' orders in *Cunningham* and *Farnam*.

G. The Trial Court Improperly Relied Upon its Notes.

Respondent concedes that the trial court reviewed its "personal notes" when deciding to deny Appellant's motion for modification. (RB 346). Respondent, however, argues that the court's conduct was not error because the court "knew the only evidence which the court is to review is that which was before the jury." (*Ibid.*). Thus, Respondent tries to provide assurances us that the court was "reviewing notes of evidence presented to the jury and was not relying on any unpresented matters." (*Ibid.*). In order to find prejudice, Respondent argues that this Court would have to apply the same standard to juror note-taking and blames Appellant for not "finding authority" contrary to juror note-taking. (*Ibid.*).

First, Respondent does not describe how authorities on juror note-

taking are relevant to judicial note-taking. Nor does Respondent describe how a judge's ruling on a motion for modification is similar to a jury's verdict. In fact, the opposite is true, and judges are not to rest their motions for modification on the substantiality of the evidence, but instead, on their determination after independent review of the record. (See *Rodriguez, supra*, 42 Cal. 3d at 793; and *Jennings, supra*, 46 Cal. 3d at 995).

Second, Respondent concedes that the trial court, in violation of applicable law, reviewed its notes in ruling on the motion for modification. (RB 346). This is important because Respondent has claimed that Appellant's review of those notes on appeal is unnecessary and unimportant. (See Claim I - The Missing Portions of the Record Deprived Appellant of Meaningful Appellate Review). However, far from Respondent's conclusions, whether the trial court's determination conformed with the law regarding its consideration of Appellant's motion for modification is a necessary, compelling and important fact in Appellant's case. Moreover, Appellant's inability to verify the contents of the trial court's notes hinders his ability to challenge the trial court's reasoning in denying his motion for modification.

Second, Respondent's assertion that this Court should "trust" that the trial court did not rely on "unpresented matters" when denying Appellant's motion for mistrial wholly fails to address the issue or the prejudice emanating from the trial court's course of conduct. (*See* RB 346). Despite Respondent's protestations, trust alone cannot verify the contents of the court's notes. Moreover, the important fact is that the trial court was prohibited from reviewing its notes in the first instance. Since there is no way of verifying the contents of the trial court's notes, and the trial court's use of the notes, in the first instance, was improper, these facts should create a presumption that the court's failure to preserve those notes indicates that they contained matters not present in the record. Respondent

has not set forth evidence indicating that the matters contained in the notes were innocuous and has thus failed to rebut the presumption.

Third, Respondent's arguments concerning juror note-taking is an attempt to divert this Court's focus from the issues at hand. Respondent's argument that, in order to prevail, Appellant must challenge "juror note-taking" is specious, when this claim centers upon the trial court's decision to deny Appellant's motion for modification based on unpreserved notes. Juror-note-taking is wholly irrelevant to determining the extent to which the trial court relied upon its trial notes and whether any impermissible notations were contained within the notes. Moreover, juror note-taking is not comparable here since the jury does not arbitrate over the parties' motions, review the sufficiency of the evidence, or independently review the penalty phase proceedings. (See Penal Code Section 190.4).

Here, the trial court improperly relied on information the defense never reviewed, much less had an opportunity to confront or explain, in sentencing Appellant to death. The trial court violated the most basic notions of the right to confront witnesses, the right to present a defense, the right to notice of the allegations and evidence to be presented against you, the opportunity to be heard, the state's burden of proving every element beyond a reasonable doubt, heightened reliability in capital cases, due process, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as Article I of the California Constitution. Due to all of these statutory and constitutional errors, Appellant's death sentence must now be reversed.

H. The Trial Court Improperly Relied Upon the Probation Report.

Respondent agrees that trial courts may not review or consult probation reports before deciding on a motion for modification. (RB 346-47 (citing *Lewis, supra,* 50 Cal.3d at 287)). Respondent concedes that the

trial court in Appellant's case read the probation report before deciding on his motion for modification. (RB 347 (citing RT 3917)). Respondent, however, argues that this Court "has no reason not take the trial court at its word," when it stated that it considered the materials in the probation report only as to sentencing for the non-capital offense. (RB 347 (citing *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913; and *People v. Levaditis* (1992) 2 Cal.4th 759, 787)). Respondent thus argues that *Lewis* is distinguishable. (RB 347).

First, because Respondent lacks other persuasive arguments or authorities to justify the trial court's ruling, it again must resort to "trusting" that the trial court did not inappropriately utilize Appellant's probation report. While deference to trial courts is often warranted, the fact that Respondent has had to resort to the same "trust" argument twice in one claim, to justify inappropriate actions and conduct undertaken by the trial court, works against the state's conclusion that the trial court fulfilled its statutory duties when ruling on Appellant's motion for modification. The job of this Court is not to blindly trust the trial court, but to review the proceedings to ensure they contained no error. Instead, of trusting the trial court again, this Court should presume, in the absence of clear evidence to the contrary, that the trial court's inappropriate conduct prejudiced Appellant's chances of receiving a fair ruling on his motion for modification. This is the only fair conclusion and the only conclusion, which prevents the future improper use of probation reports for motion for modification rulings by California trial courts.[174]

Second, Respondent's efforts to distinguish *Lewis* are unavailing. Respondent cannot deny the similar deficiencies in the trial court's order in *Lewis* and the trial court's order in Appellant's case. In both cases the trial

[174] This would place the burden on Respondent to rebut this presumption, a burden the state wholly failed to carry in their Brief.

courts: 1) based their ruling on the "substantiality" of evidence supporting the jury's verdict; 2) failed to adequately review the evidence in mitigation; 3) failed to identify the facts unique to the case before them; 4) failed to adequately weigh the aggravating evidence versus the mitigating evidence; 5) based their findings in aggravation on the brutality of the crime; and 6) required that the defendant submit a justification for the crime as mitigating evidence. Moreover, in *Lewis,* the trial court also improperly read the probation report before ruling on the motion for modification. Finally, the probation report, in both Appellant's case and *Lewis'* case, contained prejudicial information that was only revealed to the judge by reference to the probation report. (See *Lewis, supra,* 50 Cal.3d at 287).

Respondent's reliance upon *Ross, supra,* 19 Cal.3d at 913; and *Levaditis, supra,* 2 Cal.4th at 787, is misplaced here. *Ross* involved contempt proceedings, a bench trial, and whether the court applied the correct burden of proof. This situation is far removed from the heightened reliability demanded in capital cases and a motion for modification of a verdict sentencing a man to the punishment of death. In *Ross,* the defendant argued "that in the absence of an explicit statement by the trial court indicating that he was applying the reasonable doubt standard, error must be presumed." (*Ross, supra,* 2 Cal.4th at 913). The Court rejected this argument, and instead held "in the absence of any contrary evidence, we are entitled to presume that the trial court... properly followed established law." (*Ibid.* (citations omitted)). Here, however, the trial court did not properly follow established law by considering the probation report before ruling on the motion for modification. Thus, no presumption is necessary to show that the trial court violated applicable law. Similarly, in *Levaditis,* this Court held that no error occurred because the trial court considered the probation report after issuing its ruling on the motion for modification. (See *Levaditis, supra,* 2 Cal.4th at 787). *Ross* and *Leviditis*

are not comparable to Appellant's case, where, prior to ruling on Appellant's motion for modification, the trial court read the probation report that contained prejudicial information, and considered that information prior to rejecting the request for modification of Appellant's death sentence.

I. The Trial Court did not make an Independent Determination on the Appropriateness of the Death Penalty.

Respondent argues that the trial court correctly reviewed the evidence when ruling on Appellant's motion for modification because the trial court used the words "independent" or "independently" ten (10) times in the record.[175] (RB 348). Respondent argues that this Court should take the trial court at its word that it did not merely review the sufficiency of the evidence, or it felt that it had no authority to modify the verdict. Respondent argues that the trial court fulfilled its duty under section 190.4. (*Ibid.* (citing *Steele, supra,* 27 Cal.4th at 1268)).

First, the fact that the trial court stated the magic words "independent review" does not mean that the trial court's review was independent. Respondent claims that this Court should take the trial court at its word. (RB 348). However, Respondent makes this argument because the trial court's ruling, as reflected in the record, indicates that the court failed to independently consider the unique circumstances of Appellant's case. Put simply, "the [trial] court's comments offer[] no assurance" that it "exercised its independent judgment" in this case. (*People v. Burgener* (2003) 29 Cal. 4th 833, 892). This Court should not take the trial court at its word that it independently considered the evidence when the record indicates the contrary. Instead, this Court must review the trial court's

[175] Respondent fails to provide pinpoint citations for its assertion that the trial court stated "independent or independently" ten (10) times. (See RB 348).

determination to ensure that it complied with the law. This Court thus must look to see whether the trial court's order fulfilled *all* its duties under Penal Code Section 190.4 and this Court's precedents, including *Lewis*, *supra*, 50 Cal.3d at 287).

Second, the trial court relied too heavily upon the fact that it "agreed" with the juror's verdict. This Court has held that such a finding demonstrates that "the trial court did not exercise its independent judgment in reweighing the evidence" under the statute and has reversed the death sentence. (See *Rodriguez, supra*, 42 Cal. 3d at 793). Respondent does nothing to defeat this argument.

Appellant's case is simply not comparable to *People v. Steele* and others cited in Respondent's Brief, where this Court found that a trial court properly exercised its duties under Penal Code section 190.4. In *People v. Steele*, the trial court explicitly considered all of the defendant's evidence in mitigation. The trial court in *Steele* was so specific as to outline the defendant's "Vietnam experiences, his mental state, his state of intoxication, and the other evidence." (*Steele, supra,* 27 Cal.4th at 1268). Similarly, in *Steele,* the trial court did not consider the defendant's probation report prior to ruling on the motion, and there were no allegations that the trial court failed to preserve its trial notes for review on appeal. (*Ibid.*). In Appellant's case, the Court did not expressly consider Appellant's mitigation evidence, and instead held it against Appellant that none of the mitigation evidence constituted a "moral justification or extenuation for his conduct." (RT 3912). In whole, the trial court in Appellant's case issued a deficient ruling that wholly failed to consider the evidence or fulfill its statutory duties under Penal Code section 190.4.

In the last four years, this Court has decided fourteen (14) capital cases where appellant's have alleged that the trial court failed to accurately

rule upon the motion for modification lodged by the defense.[176] (See *infra* notes 149, 150, and 151). Typically, this Court has excused the claims due to the defendant's failure to object to the trial court's ruling on the motion for modification;[177] a situation not Applicable in appellant's case based on the fact that the contemporaneous objection rule announced in *Hill, supra,* 3 Cal.4th at 959, was decided fifteen (15) days after the trial court ruled on Appellant's motion for modification. However, this Court has also denied, on the merits, a variety of challenges to adverse decisions rendered by trial courts in response to motions to modify capital verdicts.[178] In two of the fourteen (14) cases, this Court found that the trial court erred during its consideration of the defense's motion for modification. (See *Carrington, supra,* 47 Cal.4th at 201; and *Mungia, supra,* 44 Cal.4th at 1139). In neither case, however, did this court find that the error prejudiced the defendant's right to favorable determination on the motion.

Here, in contrast, the trial court clearly erred. Due to the weaknesses in the state's case in aggravation, Appellant was prejudiced by the trial court's ill-consideration. First, unlike in *Mungia*, Appellant was not required to object because his conviction became final before this Court's precedent requiring such objections. Second, like in *Carrington*, the trial court did not exercise its responsibilities under section 190.4(e) and, like in *Mungia*, the result was a summary dismissal of Appellant's motion for modification that was evidently prejudged by the trial court. Third, unlike

---

[176] (See e.g., *Burgener, supra,* 46 Cal.4th at 231; *Alfaro, supra,* 41 Cal.4th at 1277; and *Romero, supra,* 44 Cal.4th at 386).

[177] (See *Tafoya, supra,* 42 Cal.4th at 147; *DePriest, supra,* 42 Cal.4th at 1; *Zambrano, supra,* 41 Cal.4th at 1082; *Geier, supra,* 41 Cal.4th at 555; and *Wallace, supra,* 44 Cal.4th at 1032).

[178] (See *Burney, supra,* 47 Cal.4th at 203; *Jackson, supra,* 45 Cal.4th at 662; *Bennett, supra,* 45 Cal.4th at 577; and *Richardson, supra,* 43 Cal.4th at 959).

in either *Carrington* or *Mungia,* here the trial court relied upon improper information, gleaned from the trial court's notes and Appellant's probation report that was not presented to the jury and which the defense never had the opportunity to confront, explain, or review. Finally, like in *Carrington*, here the trial court failed to make an independent determination as to the evidence and instead deferred to the findings of the jury based on the "substantiality" of evidence.

In sum, the trial court did not "carefully and conscientiously perform its duty under section 190.4." (*Steele, supra*, 27 Cal.4th at 1268). There is a reasonable possibility that Appellant would not currently be subject to the punishment of death had the trial court properly evaluated his motion. As a result, Appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as, Article I of the California Constitution have been violated by the trial court's improper motion for modification ruling.

J. Conclusion.

Respondent blames Appellant for "neglect[ing] to specify whether a remand for a penalty phase retrial or for a reconsideration of the verdict-modification application would be the appropriate remedy for the errors he discerns." (RB 337). In truth, both resolutions lead to the same result; reversal of Appellant's death sentence. The trial court incorrectly ruled on the motion for modification because it failed to adequately consider the evidence in mitigation, overly relied upon the circumstances of the crime and misapprehended governing law. Had it adequately considered the evidence, the inevitable conclusion would have been reached that Appellant was wrongfully sentenced to death. Here, the only remedy for the constitutional violations resulting from the trial court's error is reversal of Appellant's death sentence.

The independent review of a jury's death verdict by the trial court is a critical stage in the California death penalty scheme. It provides a crucial check necessary to prevent arbitrary and capricious death sentences, condemned by the Supreme Court as unconstitutionally "cruel and unusual" in *Furman* and its progeny. The Supreme Court has found California's independent review requirement an important safeguard in the California death penalty scheme. (See *Pulley, supra,* 465 U.S. at 52-54). Both "this court and the United States Supreme Court have cited the provisions of section 190.4, subdivision (e), as a [] safeguard against arbitrary and capricious imposition of the death penalty in California." (*Lewis, supra,* 33 Cal.4th at 226 (citations omitted)).

The trial court's duties under section 190.4(e) are critical to the constitutionality of the California death penalty scheme. (See *Pulley, supra,* 465 U.S. at 52-54; and *Frierson, supra*, 25 Cal.3d at 178-180). Section 190.4 is an "integral part" of the California scheme. (*Id.* at 231). Structural defects affecting the framework of the death penalty law are not subject to harmless error review. (See *Fulminante, supra,* 499 U.S. at 309-10). Here, the errors were structural, because they cannot be reviewed and because they prevent this Court from providing "thoughtful and effective" and meaningful review of the jury's death verdict. The trial court's errors thus undermined its role, and thus rendered Appellant's death sentence unfair and unreliable under Fifth, Sixth, Eighth and Fourteenth Amendments, as well as the parallel provisions of Article I of the California Constitution. (See e.g., *Gardner, supra,* 430 U.S. at 349). For each of these reasons, reversal of Appellant's death sentence is required.

XXVI. DEATH QUALIFICATION VOIR DIRE IS UNCONSTITUTIONAL.

A. Introduction.

Death qualification inquires "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Ashmus, supra,* 54 Cal. 3d at 961-962 (citing *Wainwright, supra,* 469 U.S. at 42, and *Adams, supra,* 448 U.S. at 45)). The result of death qualification is the exclusion of individual jurors from serving in death cases because of their moral and normative beliefs. Yet a juror's duty - as defined by California law - is to make "moral and normative" judgments, and by law, they are required to make "moral and sympathetic" determinations. (S*ee People v. Mattson* (1990) 50 Cal. 3d 826, 846). By excluding jurors because of their "moral and normative" beliefs, the process eliminates the "moral and normative beliefs" of the community.

Death qualification in California prevents citizens from being jurors in capital cases based on their "moral and normative" beliefs concerning the death penalty. These jurors are excluded despite the fact that the law specifically requires capital jurors to make "moral and normative" decisions in deciding to impose a capital sentence. By excluding those jurors who have "moral and normative" belief about the penalty – which in many cases lead them to question the propriety of its application -- the process of death qualification narrows the sentencing body to those who: 1) take less seriously the moral and normative issues involved in a death penalty case; 2) are predisposed to findings in aggravation; and 3) are predisposed to disregard non-statutory factors in mitigation. These citizen's voices are also eliminated from the data that courts rely on to determine whether a particular punishment offends evolving standards of decency under the

Eighth Amendment. (See *Coker, supra,* 433, U.S. at 584).

To make matters worse, California allows case-specific death qualification. This form of death qualification removes jurors who would be highly favorable to specific mitigation evidence. See Brooke M. Butler and Gary Moran, *The Role of Death Qualification in Venireperson's Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, (2002) 26:2 Law and Human Behavior 175 (hereafter "Butler & Moran, *Death Qualification & Evaluations of Aggravating and Mitigating Circumstances*). Dr. Butler and Moran have noted that there is an undeniable relationship between the death qualification process under *Witt* and venirepersons' evaluation of aggravating and mitigating circumstances. Indeed, "death qualified participants, when compared to *Witt* excludables, were less likely to believe that nonstatutory mitigators were valid reasons to give someone a life sentence." (*Id.* at 183). Simply put, there is no doubt that "a death qualified jury is significantly more likely to impose the death penalty than a jury comprised of excludables." (*Ibid.*).

Since the process of death qualification in California results in a non-representative jury – both conviction and death-prone - it does not meet the standards of heightened reliability required by the Eighth Amendment. To their detriment, capital defendants receive vastly different juries at the guilt phase in comparison with other defendants. Capital defendants charged with different varieties of capital murder also receive vastly different juries at the penalty phase from each other as a result of case-specific death qualification, and this Court has not ensured state wide standards to prevent these results. As a result, death qualification in California also violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment as well.

With those principles in mind, Respondent tries to rebut, ten (10) arguments raised in Appellant's Opening Brief challenging the

constitutionality of death qualification jury selection. (RB 349-51). Respondent feels that Appellant offers "no good reason for this court to reconsider its rulings as to the California Constitution." (*Id.* at 353). Respondent says that this Court should reject "Appellant's twenty-sixth assignment of error." (*Ibid.*). In making these claims, Respondent does not address ten (10) additional arguments raised by Appellant in his Opening Brief.[179] Respondent's decision not to address these arguments undermines

---

[179] Respondent did not address or rebut the following ten (10) arguments: 1) Death qualification of capital juries is unconstitutional in California because neither the legislature nor the electorate has enacted a statute requiring death qualification of penalty phase jurors and the statutes governing jury selection in criminal cases forecloses death qualification. (See II AOB 601 (citing Code of Civil Procedure §229(h)); 2) This Court has provided an unconstitutional "judicial gloss" to the statute that, contrary to its express language, allows the removal of jurors whose views would not affect their penalty determination. (See II AOB 602 (citing *Hovey v. Superior Court* (1980) 28 Cal. 3d 1, 9 n. 7 and n. 9)); 3) Death qualification, which removes certain members of the community, breaks the essential link between community values and the penal system by excluding from penalty deliberations certain community members and certain community values, thereby preventing formation of "the indicators" by which courts ascertain contemporary standards of decency in violation of the Eighth Amendment. (See II AOB 607 (citing *Trop v. Dulles* (1958) 356 U.S. 86, 101)); 4) Death qualification results in an unconstitutional death penalty scheme because without statutory grounding the current "substantially impaired" test is irrational and violates the Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution. (See II AOB 607); 5) By providing different schemes for selecting juries in capital and non-capital cases, California discriminates between two classes of defendants and impinges on the fundamental right to an impartial jury at the guilt phase and the right to life at both the guilt and penalty phases. (See *Id.* at 609); 6) Death qualification fails strict scrutiny analysis because it is not necessary, narrowly tailored, or the least drastic means. (See *Id.* at 611 (citing *Wygant v. Jackson Bd. of Education* (1986) 476 U.S. 267, 280 n. 6)); 7) The Supreme Court has not addressed whether death qualification has a negative impact on race, gender, and religion in jury composition and current research proves that death qualification has an adverse effect on these important classes in violation of the Fourteenth Amendment. (See *Id.* at 626); 8) The Supreme Court has not addressed whether the process of

the state's position that Appellant has put forth no persuasive arguments to justify his request that this Court revisit its precedent regarding death qualification.

B. Appellant's Argument Has Not Been Forfeited.

Respondent says that Appellant failed to object to the *Hovey* death qualification voir dire, and has thus failed to preserve these issues for appeal. (RB 351 (citations omitted)). Respondent is wrong.

First, Appellant was not required to object because the error affected a fundamental right, which infected his trial with structural error. This Court has found that the violations of fundamental constitutional rights are exempt from the general forfeiture rule. (See *Vera, supra,* 15 Cal. 4th at 276-277). Although the Court has not precisely defined exactly what it deems to be a "fundamental" right, there are few rights more fundamental than the right to jury trial. This Court should include violations of a capital defendant's constitutional right to an impartial jury and reliable sentencing in its definition of rights of fundamental and constitutional import.

Second, Appellant was not required to lodge a contemporaneous objection because the question presented on appeal is a pure question of law. This Court has recognized that the contemporaneous objection rule may also be waived for "pure questions of law." (See *Williams, supra,* 43

---

death qualification voir dire, and its influence throughout the trial, violates the Eighth Amendment's need for heightened reliability in capital trials. (See *Id.* at 631); 9) Death Qualification violates the Sixth Amendment's right to jury trial because the purpose of a jury is to guard against the exercise of arbitrary power through the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge. (See *Id.* at 631); and 10) Death qualification undermines the purposes of the Sixth Amendment right to a jury trial, by excluding individuals with views against the death penalty from petit juries and failing to create juries based on a fair cross-section of the community. (See *Id.* at 633).

Cal.4th at 624 (citations omitted)). While this doctrine has been developed in civil cases, Appellant's pure question of law here, regarding the constitutionality of death qualification *voir dire*, merits waiver of the contemporaneous objection rule and decision on the merits of the claim as presented by Appellant.

Third, this Court has created a catch-all exemption to the contemporaneous rule, which allows this Court to hear arguments for the first time on appeal where, as here, the challenge is non-evidentiary. (See *Williams, supra,* 17 Cal. 4th at 161 n.6).

C. The Supreme Court and this Court's Precedents do not Foreclose Appellant's Arguments.

Respondent says that Appellant's arguments have previously been rejected by the United States Supreme Court and this Court. (RB 351). Respondent says that Appellant's federal constitutional arguments have been foreclosed by *Lockhart, supra,* 476 U.S. at 162 and *Buchanan, supra,* 438 U.S. at 402. Respondent says that *Lockhart* foreclosed the use of social studies indicating "conviction prone" bias stemming from the death qualification process. (RB 352). Respondent says that *Buchanan* foreclosed the argument that death qualified juries violate the Sixth Amendment's right to an impartial jury. (*Ibid.*). Respondent is wrong.

First, the High court in both *Buchanan* and *Lockhart* recognized that "death qualification in fact produces juries *somewhat* more 'conviction - prone' than 'non - death - qualified' juries." (*Buchanan, supra,* 483 U.S. at 415 n. 16 (quoting *Lockhart, supra,* 476 U.S. at 173) (internal quotations omitted)).

Second, Respondent failed to address Appellant's argument that *Lockhart* does not control the issues raised under the California Constitution. (See *Raven, supra*, 52 Cal. 3d at 352-54; see also Smith, *Due Process Education for the Jury: Overcoming the Bias of Death Qualified*

Juries (1989) 18 Sw. U. L. Rev. 493). Over one hundred years ago, Iowa and South Dakota interpreted their states's constitutional guarantees to an impartial jury and reliable sentencing.[180] This Court should continue down the path it began in *Hovey* and find death qualification unconstitutional under the California Constitution.

Third, Respondent did not address Appellant's argument that new evidence establishes that the factual basis on which *Lockhart* rests is no longer valid,[181] and that the Supreme Court's decision was based on faulty science and improper logic. In *Lockhart,* the Supreme Court rejected evidence submitted in the form of social science studies conducted in a "manner appropriate and acceptable to social or behavioral scientists." Instead, the court grossly misinterpreted the data of juror bias, and "[t]he Court's adamant refusal to acknowledge the strength of the evidence before it casts grave doubts upon its ultimate holding in *Lockhart.*" (Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree* (1989) 13 Law & Human Behavior 185, 195). This improper scientific assessment was key, yet fatal, to *Lockhart*'s holding.

Moreover, the Supreme Court did not look at the studies as a whole body of data, allowing it to ignore the studies' cumulative effect. Since *Lockhart*, the research showing that death qualified juries are impartial, biased towards the prosecution, and not reflective of the community has

---

[180] (See *State v. Lee* (Iowa 1894) 60 N.W. 119, 121; and *State v. Garrington* (S.D. 1898) 76 N.W. 326, 327).

[181] All scientific research on death qualification shows that death qualification results in juries that are more prone to convict. (See Moar, *Death Qualified Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree* (1988) 19 Colum. Hum. Rts. L. Rev. 369, 374, 382-383) (hereafter Moar; and Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571, 581).

only grown.[182] The questions raised in *Lockhart* and *Witt* must be reevaluated in light of studies that continue to prove that death qualified jurors view the evidence, proceedings, victims and defendants in capital cases differently than non death qualified jurors. [183]

Modern death qualification now takes place: "in the context of record high abstract support of the death penalty, it operates to exclude persons who death penalty attitudes would merely impair them in performing their functions in a capital trial, and it eliminates persons on the basis of extreme death penalty support as well as opposition." (Craig Haney, Aida Hurtado, and Luis Vega, *Modern Death Qualification*: *New*

---

[182] Modern research, from the Capital Jury Project, indicates that death qualified juries are biased and impaired in seven different ways. (See William J. Bowers, *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings* (1995) 70 Ind. L. J. 1043) ("1) **Prejudgment**: Death qualified juries are prone to premature decision making; 2) **Death Bias**: death qualified juries are corrupted by the death qualification procedures; 3) **Mitigation Impairment**: death qualified juries suffer from a pervasive failure to comprehend and follow instructions regarding mitigation; 4) **Fatal Ignorance**: death qualified juries are likely to suffer from the widespread belief that death is mandatory in some cases; 5) **Irresponsibility:** death qualified juries are likely to evade responsibility for their sentencing decisions; 6) **Racism**: death qualified juries are likely to use the defendant or the victim's race (or both) as a factor in sentencing decisions; and 7) **Early Release Fears**: death qualified juries are likely to erroneously believe that life sentences will not result in lengthy incarcerations. In combination, these seven biases completely impede death qualified juries from impartially and objectively evaluating guilt phase evidence and making a moral and normative sentencing determination.").

[183] (See *generally* Moar, *supra,* at 374 (detailing criticism of the Court's analysis of the scientific data); See also Bersoff & Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research* (1995) 2 U Chi L Sch Roundtable 279; and Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology* (1990) 66 Ind. L. J. 137)).

Data on Its Biasing Effects (1994) 18:6 Law and Human Behavior 619, 621). Likewise, historical research indicates that the use of death qualified juries controverts the Sixth Amendment's right to jury trial guarantee and "frustrates the founder's understanding as to the role of the criminal jury." (G. Ben Cohen & Robert J. Smith, *The Death of Death Qualification* (2008) 59: 87 Western Reserve Law Review 3).[184]

Most importantly, modern research proves that the death qualification, and the exclusion of individual's with scruples towards the death penalty, defeats accuracy in jury determinations by inhibiting the comparison of different understandings of the evidence, and the jury's ability to reach a decision consistent with the evidence. (See Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries* (2008) Cornell Legal Studies Research Paper No. 08-030).[185] Significantly, death qualification likely decreases juries conscientiousness in their role as a sentencer, increases the likelihood that they will deny responsibility for the defendant's punishment, and increases the likelihood that they will rush to judgment. (See William J Bowers, Wanda D. Foglia, Jean E Giles & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision Making* (2006) 63 Wash. & Lee L. Rev. 931). In sum all modern statistics reveal that death qualification process undoubtedly biases the jury, *against the capital defendant*, and makes their determinations more death prone.[186]

---

[184] Available at: http://ssrn.com/abstract=1456367

[185] Available at: http://ssrn.com/abstract=1297272

[186] (See also Eisenberg, Garvey & Wells, *The Deadly Paradox of Capital Jurors*, 74 S. Cal. L. Rev. 371 (2001); Garvey, Johnson & Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627 (2000); Bowers & Steiner, *Death by*

Modern research also confirms that death qualified venirepersons are more likely than excludable jurors to endorse aggravating factors over mitigating factors. (See Butler & Moran, *Death Qualification & Evaluations of Aggravating and Mitigating Circumstances,* at 175). (Conducting a study of 450 venirepersons in Miami, Florida and concluding that death qualified venirepersons, when compared to excludable venirepersons were more likely to endorse aggravating circumstances and that *Lockhart v. Mcree* frustrated the constitutional capital sentencing scheme envisioned in *Gregg v. Georgia*). Moreover, modern studies have supplemented this conclusion with hosts of other verifiable studies proving that death qualified venirepersons possess a host of other behavioral and attitudinal features which bias their views of the evidence and proceedings during a capital trial.[187] Some of these features include: 1) a tendency to place undue stress upon victim impact evidence;[188] 2) a tendency to possess higher levels of homophobia, modern

---

Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing, 77 Tex. L. Rev. 605 (1999); Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538 (1998); Hoffman, *Where's the Buck - Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137 (1995); Bowers, Sandys & Brewer, *Crossing Racial Boundaries: A Closer Look* at *the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DePaul L. Rev. 1497 (2004); Sandys, *'Cross-Overs' - Capital Jurors who Change their Minds about Punishment: A Litmus Test for Sentencing Guidelines*, 70 Ind. L.J. 1183 (1995)).

[187] (See Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in Just World, Legal Authoritarianism, and Locus of Control on Venireperson's Evaluation of Aggravating and Mitigating Circumstances in Capital Trials* (2007) 25 Behav. Sci. Law 57).

[188] (See Brooke Butler, *The Role of Death Qualification in Venireperson's Susceptibility to Victim Impact Statements* (2008) 14(2) Psychology, Crime & Law, 133, 135-36).

racism, and modern sexism;[189] and 3) a tendency to overly trust forensic and scientific evidence even when developed by dubious methodology.[190] Needless to say, no modern evidence indicates that that death qualified venirepersons and excludable venirepersons approach or view a capital trial in the same manner.

Fourth, Respondent did not address Appellant's argument that social science evidence may be considered in light of the fact that the "*Hovey* problem"[191] has been solved.[192] Moreover, Respondent ignores Appellant's request that this Court take *Hovey* to its full conclusion. Death qualification of "guilt phase includables" renders the jury partial towards guilt and inhibits the purpose and functioning of the jury. (See *Hovey, supra*, 28 Cal. 3d at 18-19). This Court should now find that death qualification in California violates the Sixth and Fourteenth Amendments guarantee of a right to trial by an impartial jury, and violates the due

---

[189] (See Brooke Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process* (2007) 25 Behav. Sci. Law 857, 858).

[190] (See Brooke Butler, *The Role of Death Qualification and Need for Cognition in Venireperson's Evaluations of Expert Scientific Testimony in Capital Trials* (2007) 25 Behav. Sci. Law 561, 562).

[191] The "*Hovey* problem" was that the studies did not take into account the fact that California also excluded automatic death penalty jurors via "life qualification." (*Hovey, supra*, 28 Cal. 3d at 18-19).

[192] (See III AOB 618 (citing Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure* (1983) 78 J. American Statistical Assn. 544; Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 Law & Human Behavior 115; and Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials* (1988) 12 Law & Human Behavior 263)).

process guaranteed by the Sixth and Fourteenth Amendments and by Article I of the California Constitution.

Respondent next argues that Appellant's state constitutional arguments have been foreclosed by *Jackson, supra,* 13 Cal.4th at 1164; *Cumm*ings, *supra*, 4 Cal.4th at 1279; *People v. Carrera* (1989) 49 Cal.3d, 291, 333; *People v. Johnson* (1989) 47 Cal.3d 1194, 1214; and *People v. Caitlin* (2001) 26 Cal.4th 81, 112. Respondent argues that *Jackson*, like *Lockhart*, forecloses the use of social science evidence to prove death qualified jurors' biases. (RB 352). Respondent argues that *Cummings* forecloses arguments that death qualification violates the Fourteenth Amendment's right to a fair trial and that *Carrera* does the same regarding the Sixth Amendment right to an impartial jury. (See *Id.* at 353). Respondent argues that *Johnson* forecloses argument that the use of peremptory challenges exacerbates the problem. (*Ibid.*). Finally, Respondent argues that this Court most recently upheld the death qualification process in *Caitlin.* (*Ibid.*). Respondent's arguments miss the issue raised here.

First, the prosecutor shares responsibility with the trial court to preserve a defendant's right to a representative jury, and can only exercise peremptory challenges for legitimate purposes. Since the state is forbidden from excusing a class of jurors for cause based on their death penalty skepticism, those views are not a proper basis for a peremptory challenge. A jury shorn of the significant community viewpoint that these prospective jurors provide cannot suitably perform the essential purpose and function of a jury in a criminal trial. (See *Ballew, supra,* 435 U.S. at 239-242). Even if these jurors do not constitute a cognizable class for purposes of the Sixth Amendment's representative cross-section of the community analysis, (see *Lockhart, supra,* 476 U.S. at 174-77), they are distinct class and necessary for ensuring both the reliability of a capital sentencing decision and the

need for the jury to reflect the consensus of the community. (See *Witherspoon*, *supra*, 391 U.S. at 519).

Second, Respondent's argument that Appellant's social science has already been rejected is wrong and not supported by their citations to *Jackson, supra,* 13 Cal.4th 1164; *Cummings*, *supra*, 4 Cal.4th at 1279; and *Carrera, supra,* 49 Cal.3d at 333. Significantly, *Jackson* (1996), *Cummings* (1993), and *Carrera* (1989) were decided before most of the social science evidence proffered by Appellant was published.[193] Similarly, neither *Jackson, Cummings,* nor *Carrera* cited any of the social science studies referenced in Appellant's Opening Brief.[194] None of the cases have thus foreclosed Appellant's claim or the evidence used by Appellant to prove that the death qualification process is unconstitutional. Based on the persuasive value of this evidence, and Appellant's unrebutted arguments in his Opening Brief, this Court should revisit past precedent, including *Lockhart*, and review the constitutionality of death qualifying capital jurors.

---

[193] (See II AOB 608-09, 620 (citing *"Modern" Death Qualification, supra,* at 631); Bersoff & Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research* (1995) 2 U Chi. L. Sch. Roundtable 279; Allen et al., *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-analysis* (1998) 22 Law & Hum. Behav. 715, 725; and Garvey, *The Overproduction of Death* (2000) 100 Colum. L. Rev. 2030, 2097)).

[194] (See II AOB 616-22 (citing Smith, *supra,* at 528; Seltzer et al., *supra,* at 573;. Kadane, *supra*, at. 544; Luginbuhl & Middendorf, *supra,* at 263; Kadane, *supra,* at 202; Byrne, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries* (1986) 36 Cath. U. L. Rev. 287, 318; Moar, *supra,* at 374; Tanford, s*upra*, at137; Peters, *Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury?* (1987) 26 Washburn L.J. 382, 395; and Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data* (1984) 8 Law & Hum. Beh. 7, 13)).

D. Conclusion.

In the last four years, this Court has rejected constitutional challenges to California's death qualification system in two cases. (See *Taylor*, *supra*, 48 Cal.4th at 574 and *Mills, supra,* 48 Cal.4th at 158). Appellant's challenge to California's death qualification system is distinguishable from those raised in *Mills* and *Taylor*. Here, Appellant has raised arguments and evidence showing that this Court's precedent is fundamentally flawed. Appellant has proffered new and persuasive social science evidence indicating that the United States Supreme Court's decision in *Lockhart* is fundamentally flawed.

Due to death qualification in California, capital defendants face significantly different juries at the guilt phase than non-capital defendants. They also face juries that differ significantly from case to case due to case-specific death qualification. Capital defendants face guilt juries that are more prone to convict and more prone to issue a death sentence.

This Court has not established any uniform guidelines for death qualification in response to any of these constitutional problems, resulting in a failure of due process, and disparate treatment of capital defendants, in violation of the Fourteenth Amendment and the parallel provisions of Article I of the California Constitution. This improper treatment is unacceptable, especially when a person's life is at stake. Death qualification in Appellant's case was unconstitutional. His convictions, special circumstance finding, and penalty must be reversed.

XXVII. CALIFORNIA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PROPERLY NARROW THE CLASS OF DEATH PENALTY OFFENDERS AND OFFENSES.

A. Introduction.

To be constitutionally sound, a death penalty scheme must narrow the class of death-eligible offenders to the *few* who are eligible for death as opposed to the *many* who are not. The Eighth Amendment requires that "aggravating circumstances 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" (*Zant, supra*, 462 U.S. at 876). The Eighth Amendment requires the "jury's discretion be sufficiently channeled" and include the "principled distinction between the subset of murders for which the sentence of death may be imposed and those which are not subject to the death penalty...." (*Wade, supra*, 29 F.3d at 1319 (citations omitted); see also *Zant, supra,* 462 U.S. at 876-77).

California impermissibly allows 90% of all of first-degree murderers to be eligible for the death penalty. (Steven Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L. Rev. 1283, 1287 (hereafter Shatz & Rivkind). Thus, the California death penalty scheme does not meaningfully, rationally, or genuinely narrow the class of death-eligible offenders.

1. It does not narrow in a quantitative manner.
2. It does not narrow in a qualitative manner.
3. It was not carefully crafted by the legislature, but instead was enacted through a misleading initiative process.
4. It has expanded to cover more first degree murders with the assistance of expansive decisions by this Court.

California's death penalty statute fails all three aspects of the *Furman* mandate.[195] As a result, the scheme permits the arbitrary selection of offenses and offenders for capital prosecution in violation of due process and the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendment, as well as Article 1 of the California Constitution.

Respondent says that Appellant's claim is based "primarily on a law review article which studied more than 400 appealed first degree California murder cases between 1988 to 1992." (RB 354). Respondent tries to discredit the accuracy and reliability of any "empirical" evidence on death eligibility developed by "law professors and criminal defense attorneys." [196] (*Id.* at 359 n. 34). Respondent tries to argue that "Appellant's argument 27 is without merit." (*Id.* at 355).

Foremost, Appellant's argument is based on several matters; not just the significant findings made by Shatz & Rivkind in their cited work. Respondent does not try to rebut six constitutional arguments raised by Appellant under this claim of error in his Opening Brief. [197] Respondent's

---

[195] Respondent does not contest Appellant's assertion that the *Furman* mandate controls the resolution of this claim.

[196] "Law professor" Steve Shatz recently testified before the Honorable Thelton Henderson in *Ashmus v Ayers* (N.D.C.A 2008) Case No. 93-CV-00594. Prof. Shatz's testimony concerned the precise issue addressed here; the number of homicides eligible for capital prosecution under the California capital sentencing scheme. In fact, based on Prof. Shatz's law review article Judge Henderson granted an evidentiary hearing on the narrowing claim raised in *Ashmus*.

[197] Respondent did not address or rebut the following arguments: 1) Since 1977 the expansion, in sheer number and breadth, of California's special circumstances by the initiative process and this Court has failed to comply with the *Furman* mandate to quantitatively and qualitatively narrow the class of death-eligible offenders. (See II AOB 645-56); 2) A comparison between California's special circumstances and other death penalty states' aggravating or death qualifying circumstances demonstrates

failure to address these arguments undermines the state's conclusion that the California capital sentencing statutes adequately narrow the class of death-eligible offenders. The absence of any showing by Respondent, confirms the indefensible nature of the California capital sentencing statutes' failure to narrow the class of death-eligible offenders in line with constitutional mandates.

---

the unconstitutional breadth of California's scheme. (See *Id.* at 657 and 659 (citing *State v. Young* (Utah 1993) 853 P.2d 327, 396-411 (dissenting opn. of J. Durham)); 3) California's felony-murder rule is unconstitutionally broad because: (a) the felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary; (b) the felony-murder rule in California applies to killings even if they occur after the completion of the felony as long as the killing occurs during an escape; and (c) the felony-murder rule is not limited in its application by typical rules of causation and thus it applies to altogether accidental and unforeseeable deaths. (See II AOB 658 (citing *People v. Cooper* (1991) 53 Cal.3d 1158, 1166-1167)); (4) The lying in wait special circumstance under section 190.2(a)(15) is so all-encompassing that it includes nearly every premeditated murder because: (a) this Court has abandoned a strict adherence to the language of "while" lying in wait; (b) the language of the special does not require physical concealment; (c) does not require that the actual period of lying in wait include "watching;" and (d) it does not require that the killing occur simultaneously with the waiting. (See II AOB 660-64 (citing *People v. McDermand* (1984) 162 Cal.App.3d 770; and Osterman & Heidenreich, *Lying in Wait: A General Circumstance* (1996) 30 U.S.F. L. Rev.1249, 1279)); 5) The California statute is unconstitutional because a comparison of special circumstances first degree murders under 190.2 and non-special circumstance first-degree murderers under section 189 shows that, at the most, there are seven theoretical categories of first-degree murderers excluded from death eligibility and there are more special circumstances categories than "excluded" categories. (See II AOB 664); and 6) California's death penalty scheme *as a whole* does not meet the qualitative narrowing prong of the *Furman* mandate because death-eligible first-degree murderers are no more blameworthy than the "excluded" categories of first-degree murderers. (See *Id.* at 673).

B. Persuasive Authorities Demonstrate that the California Death Penalty Scheme Fails to Properly Narrow the Class of Death Penalty Offenders and Offenses.

Respondent characterizes the theory behind the Shatz & Rivkind article as "curious" and as based upon the argument that "California does not sentence enough people to death, i.e. that there are too many defendants who "deserve death (because they committed factually special circumstances but have managed to avoid that sentence." (RB 356 (citations and emphasis omitted)). Respondent describes the article as finding that "a large percentage of California first-degree murder cases have factually been special circumstance cases. This, the authors continue, reflects a failure of the special circumstances to significantly narrow the class of death-eligible murderers as *Furman v. Georgia* and *Zant v. Stephens* require for a constitutional death penalty." (*Id.* at 355 (citations omitted)).

Ultimately, Respondent says the article is based on "numerous misapprehensions concerning both the operation of California's statutory scheme and the import of federal constitutional requirements." (RB 356). Respondent says that there is no legal authority that a capital sentencing scheme is unconstitutional because it is "too lenient, too forgiving,[or] too compassionate." (*Ibid.*). Respondent contends that the Shatz & Rivkind article was rejected as unpersuasive in *Viera, supra,* 35 Cal.4th at 302, and should also be rejected here. (*Id.* at 359). Respondent says that "one should have little confidence in the capacity of law professors and criminal defense attorneys to accurately and reliably discern 'death eligibility' by 'empirical means.'" (*Id.* at 359 n. 34).

In truth, it is Respondent who has misapprehended the theories and conclusions reached in the Shatz & Rivkind article. Respondent's efforts to shift the "confusion" are unavailing. Respondent misunderstands "the

operation of California's statutory scheme and the import of federal constitutional requirements." (RB 356).

First, Respondent misquotes and mischaracterizes the study that led to the conclusions reached in the Shatz & Rivkind article. The study included 404 cases. (*Compare* RB 356; with Shatz & Rivkind, *supra*, at 1326). The study specifically focused on all 253 of the published opinions in capital cases issued by this Court and the California Courts of Appeal. (*Id.* at 1326 n. 252). The study also included the unpublished decisions of the Court of Appeal for the First Appellate District in 151 capital cases, during the period of 1988-1992.[198] (*Ibid.*) Of the 253 published first-degree murder cases, the study found that 242 could have been capitally charged based on facts qualifying special circumstances; leaving a mere eight cases that could not have been capitally charged. (*Id.* at 1329, Table 1)[199] As to the unpublished cases, the study found that the data "generally confirm[ed] the data for the published cases," and that 121 of the 142 total unpublished first-degree murder cases, or 85.2%, actually involved special circumstances. (*Id.* at 1330, 1331, and Table 2).

Second, Respondent does not contest the probative value of the Shatz & Rivkind article, which included the review of capital cases in Alameda County from 1988 to 1992. The same county and time frame

---

[198] During this five year period, in California 346 people per year, on average, were convicted of first-degree murder and 33.2 people per year, on average, were sentenced to death. (*Id.* at 1327-1328 and ns. 253 and 254). During this five year period, 9.6% of those convicted of first-degree murder were sentenced to death in California. (*Id.* at 1328).

[199] The empirical data confirms that the special circumstances do not genuinely narrow the class of death-eligible murders to a small subclass of offenders. Instead, the special circumstances perform the opposite function. Only a small subclass of offenders, 3.2%, are not eligible for death and nearly all the remaining offenders, 96.8%, are eligible for death. (See Shatz & Rivkind, *supra,* at 1328).

during which Appellant was sentenced to death. (*Id.* at 1326 n. 251). The study includes both the county and time period of Appellant's conviction, and is therefore highly relevant to his case and the constitutional precepts underlying this claim. This fact alone distinguishes Appellant's case from cases, like *Vieira, supra,* 35 Cal.4th at 302, where this Court rejected statistical evidence that the application of the California capital sentencing statutes has resulted in disparate and unconstitutional results.[200] Moreover, constitutional deficiencies in the California sentencing scheme had a very real effect on Appellant's case. He was "eligible" for death because of the breadth of the felony-murder special circumstance, the sole special circumstance alleged in his case. Appellant's death "eligibility" was not based on the circumstances of the crime alleged, but instead, based on the fact that the murder he purportedly committed occurred during a burglary.

Third, the Shatz & Rivkind article is not based on the theory that there are too many capital defendants' who deserve death that are not sentenced accordingly. Instead, it is based on the fact that the California

---

[200] Respondent argues that this Court previously rejected the Shatz & Rivkind article in *Vieira, supra,* 35 Cal.4th at 302. (See RB 359 ("In *Vieira* this Court specifically addressed the law review article in questions, and concluded that the statistics therein did not persuade it that any of its prior decision on the current issue were incorrect.")). While in *Vieira,* this Court addressed a study of California death penalty cases from 1998 to 1992, (*Viera, supra,* 35 Cal.4th at 302), this Court did not explicitly reference the Shatz & Rivkind article.

To the extent that this Court in *Vieira* considered the Shatz & Rivkind article, the case is distinguishable because the case involved a death verdict from Stanislaus County; a county not included in the study conducted by the Shatz & Rivkind. However, in Appellant's case, the Shatz & Rivkind article is geographically and contemporarily relevant and inclusive of Appellant's case in Alameda County between 1988 and 1992. The article thus has direct probative value in comparing the narrowing failures in Appellant's case while the defendant's case in *Vieira.*

capital sentencing statutes authorize too many capital defendant's cases for death. (See Shatz & Rivkind, *supra*, at 1326). Respondent's "interpretation" attempts to convert the article's central theory; that California's special circumstances authorize more murder cases for death than is constitutionally justified under the Eighth Amendment's narrowing requirements, or that could practically be prosecuted. (*Ibid.*)

Fourth, Respondent's argument that a capital sentencing scheme cannot be found unconstitutional because it is "too lenient, too forgiving,[or] too compassionate" is based on a misinterpretation of the Shatz & Rivkind article. (See RB 356). The authors never opined that the scheme was unconstitutional for being merciful. Instead, they opined that the scheme creates too much discretion in the hands of prosecutors and juries because it fails to narrow the class of death-eligible offenders as constitutionally mandated. (See Shatz & Rivkind, *supra*, at 1294).

Fifth, Respondent takes an implausible swipe at the credibility of law professors and defense attorneys. In truth, it is law professors who are most adept, capable, and proficient in compiling over "400 hundred first degree murder cases" and reviewing "probation reports and the trial record" to determine that most murder cases are death-eligible under California's expansive capital sentencing scheme. There are of course, no government studies to the contrary and Respondent fails to cite any conflicting academic sources. In fact, the conclusions reached by Shatz and Rivkind were also reached by the California Commission on the Fair Administration of Justice (CCFAJ) in its Final Report.[201]

There, the CCFAJ found that "87% of California's first degree

---

[201] CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *Final Report* (2008) Gerald Uelman, Ed., available at: http://www.ccfaj.org/documents/CCFAJFinalReport.pdf (last visited June 20, 2010).

murders are 'death eligible' and could be prosecuted as capital cases." (Final Report, *supra,* at 120). The CCFAJ also found the prior studies indicated that "for every 100 cases that were charged as capital cases, 40 actually went to trial on the guilt phase, 20 went to penalty phase, and 10 resulted in a judgment of death." (*Id.* at 128 (footnote omitted)). The CCFAJ chiefly blamed the inclusion of felony-murder as a special circumstance for the California capital sentencing statutes failure to adequately narrow the class of potentially death eligible offenders. (*Id.* at 140). Key to these findings was Professor Shatz's testimony.[202]

Sixth, the Shatz & Rivkind article demonstrates that California's special circumstances fail to genuinely narrow the class of death-eligible offenders. The study's consistent findings demonstrate that more than eighty percent of all first-degree murderers are eligible for the death penalty in California. When all the findings are combined, the study shows that 90% of all first-degree murderers in California are death-eligible. Only 10% of murder offenders are in fact excluded by the special circumstances. This total lack of narrowing is not sufficient for purposes of the *Furman* mandate; a conclusion reached by the CCFAJ in its Final Report as well. There, the CCFAJ found that "a narrowing of the California special circumstances... could largely eliminate the geographic variation in use of the death penalty..." and "the gravest concerns about the fairness of the death penalty might be alleviated or eliminated if its use were limited to the most aggravated cases." (Final Report, at 140). This conclusion was based on testimony before the Commission, which indicated that "the primary reason that the California Death Penalty Law is dysfunctional is because it

---

[202] (See Appendix B) - California Commission for the Fair Administration of Justice, available at: http://www.ccfaj.org/documents/reports/dp/expert/Shatz%20Testimony.pdf (last visited June 20, 2010).

is too broad, and simply permits too many murder cases to be prosecuted as death penalty cases." (*Id.* at 138). The CCFAJ thus urged the California legislature to develop a "formula or list to narrow California's death penalty law...carefully measured to actually achieve the benefits of narrowing" that the CCFAJ identified in its Final Report. (*Id.* at 141).[203] In the face of this reality, this Court should recognize the unconstitutionality of California's expansive special circumstances in accordance with the CCFAJ's comprehensive findings.

This is but one of many problems with the California death penalty system. In total, the problems amount to – as testified to by soon to be retired Chief Judge Ronald George - a "dysfunctional" capital sentencing system. (California Commission on the Fair Administration of Justice, Testimony of California Chief Justice Ronald M. George January 10, 2008, Report and Recommendations on the Administration of the Death Penalty in California, at 3).[204]

---

[203] The CCFAJ's recommendation coincided with the Constitution Project's' recommendation that the list of death eligible special circumstances be limited to the five aggravating factors or to aggravating factors that "legally affected all citizens of the state of California." Final Report at 138-139.

[204] *Available* at: http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20 DEATH%20PENALTY.pdf (last visited June 20, 2010).

C. Constitutional Authorities Demonstrate that the California Death Penalty Scheme Fails to Properly Narrow the Class of Death Penalty Offenders and Offenses.

1. This Court's Precedents do not Adequately Address Appellant's Claim.

Respondent argues that Appellant's claims are indistinguishable from the many cases where this Court found that the California death penalty scheme adequately narrows the class of eligible murderers. (See RB 356 (citations omitted)). Respondent is "certain" that death sentences are impeded "for reasons that have nothing to do with whether the case satisfies one or more special circumstances." (*Id.* at 357 (citations and emphasis omitted)). Respondent chastises Appellant "for not taking into account" lingering doubt, plea bargaining, prosecutorial discretion" and other "feature[s] of California law [that] occasionally permit[]s some persons who 'deserve' death (on account of their having committed a 'factually special circumstances murder') to avoid it." (*Id.* at 357 n. 32). In reality, however, this Court's precedent do not sufficiently address Appellant's claim, and Respondent's arguments fail for several reasons.

First, Appellant did take into account prosecutorial discretion when evaluating the constitutionality of California's capital sentencing scheme. (See II AOB 685; and Claim XXX - Appellant's Death Sentence Was Imposed Through the Arbitrary, Disparate, and Unconstitutional Implementation of California's Capital Sentencing Statutes). Appellant has challenged the constitutionality of the California capital sentencing scheme based on the fact that, given the expansive definition of death eligibility created by the use of overlapping and numerous special circumstances, prosecutor's have unlimited discretion to seek death in almost every case of first-degree murder. (See III AOB 735-36). Respondent attempts to

muddy the picture of eligibility by alleging that this variability is proper as the result of including prosecutorial discretion. The consideration of California prosecutors' unlimited discretion to impose capital charges, however, has the opposite effect. It makes the California capital sentencing scheme entirely arbitrary in light of the substantial amount of first degree murder and special circumstances cases not charged with capital crimes.

Second, Respondent misinterprets the meaning of "death eligibility." According to Respondent, "the only persons statutorily eligible for the death penalty are those who are: 1) charged and convicted of first degree murder; and 2) whose juries have found one or more special circumstances true; and 3) against whom the prosecution elects to seek death."[205] (See RB 359). This however, fails to actually quantify death eligibility as *statutorily* established. This determination is made by review of the applicability of special circumstances to all cases of first-degree murder arising in California. This review indicates that "87% of California's first degree murders are 'death eligible' and could be prosecuted as capital cases." (Final Report, *supra,* at 120).

Third, Respondent does not rebut with analysis greater than a string cite Appellant's assertion that this Court has not fully addressed his constitutional arguments. In his Opening Brief, Appellant noted that this Court has rejected arguments *similar* to those raised here. (See II AOB 682). Appellant requested that this Court revisit those decisions, and

---

[205] Respondent here contradicts the state's later arguments that prosecutorial discretion is sufficiently channeled and directed under the California Sentencing Scheme. (See Claim XXX - Appellant's Death Sentence Was Imposed Through the Arbitrary, Disparate, and Unconstitutional Implementation of California's Capital Sentencing Statutes). Moreover, any capital scheme that rests upon prosecutorial discretion to meet the constitutionally mandated narrowing requirements fails under the Eighth Amendment and *Furman*.

decide the issue differently. This request is not a rarity. The United States Supreme Court has re-thought: 1) victim impact testimony (see *Payne v, supra,* 501 U.S. at 808 (overruling *Booth, supra,* 482 U.S. at 496)); 2) the execution of the mental retardation (see *Atkins v. Virginia* (2002) 536 U.S. 304 (overruling *Penry, supra,* 492 U.S. at 302)); and 3) use of the juvenile death penalty (see *Roper v. Simmons* (2005) 543 U.S. 551 (abrogating *Stanford v. Kentucky* (1989) 492 U.S. 361)).

However, and in addition, this Court has never fully addressed the legal and empirical claims that are detailed here. This Court has never addressed claims as to the qualitative narrowing requirement or the requirement that the legislature creates the narrowing circumstances under the *Furman* mandate. This Court has never addressed the empirical data that demonstrates that the death sentence ratios in California are equivalent, or worse, than the death sentence ratios that were found unconstitutional in *Furman*. Beyond acknowledging that the 1978 initiative was "doubly misleading" (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 143 n. 11), this Court has never addressed the fact that the *Furman* mandate requires that the narrowing circumstances be created and defined by the legislature, not by voter initiative or this Court. (See *Strauss v. Horton* (2009) 46 Cal.4th 364, 414-16 (discussing *Frierson, supra,* 25 Cal.3d at 142). This Court has never fully addressed the requirement that death penalty schemes qualitatively narrow the class of death-eligible offenders. Accordingly, this Court's prior decisions do not foreclose the claims raised here.

2. The Violation of the *Furman* Death Sentence Ratio Renders the California Capital Sentencing Scheme Unconstitutional.

Respondent says that Appellant is wrong to contend that the decision in *Furman v. Georgia* "ruled that a statutory scheme that results in death sentences for as few as 15-20 percent of its 'death eligibles' is...in violation

of the Eighth Amendment." (RB 358). Respondent says that there is no authority for Appellant's argument. (*Ibid.*). Respondent says that Appellant's interpretation of *Furman* would do "great damage to *Lockett* and its progeny." (*Ibid.*). Respondent argues that it would be "bizarre" to distill a constitutionally mandated minimum death penalty ratio from *Furman* in light of the significant differences between California's capital sentencing scheme and Georgia's scheme in 1972. (*Id.* at 358 n. 33).

First, Respondent's analysis is missing California's exact death sentence ratio. That may be because Respondent does not want to admit that 84% percent of first-degree murderers were considered death-eligible, yet only 9.6% of all first-degree murderers are in fact sentenced to death in California. (Shatz & Rivkind, *supra*, at 1328). The death sentence ratio of these two figures (9.6% and 84%) is 11.4%. (*Ibid.*). The death sentence ratio found to be unconstitutional in *Furman* was 15%. (See David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990) Northeastern University Press, at 80). Thus, California's death sentence ratio is far worse than the rate in Georgia when *Furman* was decided.

Second, Appellant never argued that *Furman* requires the abandonment of California's death penalty scheme solely because it resulted in death sentences at a more arbitrary rate than Georgia's scheme in 1972. Appellant cited this death penalty ratio as empirical evidence that California's capital sentencing scheme operates in an arbitrary manner because it fails to effectively narrow the class of death eligible offenders. While this Court may find the incongruence in ratios an operative fact, Appellant offered the persuasive evidence amidst several theories challenging the constitutionality of the California scheme. (See II AOB 680-81).

Third, there is nothing "bizarre" in comparing death eligibility ratios between varying capital sentencing schemes. In fact, what is bizarre is the reality that even though the California sentencing scheme was enacted to meet the constitutional requirements of narrowed application, it has actually resulted in more disparate and disproportional death eligibility than prior schemes that have been declared unconstitutional.

Fourth, Respondent's contention that Appellant's interpretation of *Furman* "does great damage to *Lockett*" is misplaced and confusing. (RB 357 n. 32). Appellant's argument is based on *death eligibility* not *death selection* where *Lockett* and capital defendant's' free range to present mitigating evidence is relevant. *Lockett* is not concerned with the narrowing function of a capital sentencing scheme, as much as, the selection of the sentence of death after a defendant has been found death eligible. In fact, if California limited its capital sentencing scheme in accordance with *Furman*, no damage would be done to a capital defendant's ability to present a wide-range of mitigating evidence to persuade against the sentence of death after having been found death-eligible. Respondent's arguments to the contrary confuse the central issue raised in this argument.

Fifth, Respondent does not rebut Appellant's assertion that the arbitrary death sentence ratio has actually converted California's capital sentencing scheme into a scheme with unbridled discretion of the type condemned in the *Furman* line of cases. The jury who decided Appellant's fate had the same ultimate discretion in deciding whether he lived or died. Since special circumstances are so broad as to fit any first-degree murder case, the jury's finding of such a circumstance did not limit their discretion in any manner. The jury was allowed to make a "moral and normative" decision whether Appellant lived or died without any objective guidelines whatsoever. Thus, the system in California today more closely reflects the

artifice of discretion held valid under *McGautha v. California*[206] and, the next year, unconstitutional in *Furman v. Georgia.*

3. The Selection of Thirty Three (33) Special Circumstances by Initiative and Expansion of Those Special Circumstances by this Court Renders the California Capital Sentencing Scheme Unconstitutional.

The special circumstances set forth in section 190.2 purportedly narrow the class of first degree murderers subject to the death penalty in California. Current section 190.2 is not a legislative statute, but rather was created in 1978 by the electorate through California's ballot initiative process. Section 190.2 expands, instead of narrows, the class of offenses and offenders who are subject to the death penalty. The Supreme Court has held that the Constitution requires that legislatures enact statutes that quantitatively and qualitatively narrow the class of death-eligible murderers in a genuine and rational manner. (See *Gregg, supra,* 428 U.S. at 193-95).

Respondent argues that there is no merit in Appellant's argument that the California death penalty scheme is unconstitutional due to the enactment of many special circumstances through the initiative process. (RB 359). Respondent argues that the *Furman* mandate does not require the legislature to devise narrowing circumstances. (*Ibid.*). Respondent contends that it would be a "curious reading of *Furman* indeed (and one not shared by the people), that an act that would be constitutionally sound (sic) permissible if enacted by the citizenry's elected representatives is somehow unconstitutional when instituted by the citizenry directly." (*Id.* at 360). In

---

[206] In 1971, in *McGautha v. California* (1971) 402 U.S. 183, 207, the Supreme Court turned down a challenge to the then common procedure of giving the death penalty decision to a completely unguided jury: "[I]t is impossible to say that leaving to the untrammeled discretion of the jury the power to pronounce life or death in capital cases violates any provision of the Constitution."

Respondent's view, then, the fact that California's capital sentencing statutes were enacted by initiative has no bearing on the constitutionality of those statutes as applied.

First, conspicuously absent from Respondent's analysis is a discussion of the constitutionality, under the Eighth Amendment, of capital sentencing schemes created by legislative initiative. *Furman* mandated that the legislatures enact statutes to perform the required narrowing. In *Zant, supra*, 462 U.S. at 878, the Supreme Court stated that its "cases indicate [] that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." In *Lowenfield, supra,* 484 U.S. at 244, the Supreme Court again referenced this requirement of an "objective legislative definition." This Court has also acknowledged that *Furman* provides a mandate directed to the state legislature. (See *Bacigalupo, supra*, 6 Cal.4th at 465). For these reasons, "[t]he [Supreme] Court has thus plainly required that guidelines be expressly articulated *by the legislature* in the statute authorizing the death penalty." (*Harper, supra*, 729 F.2d at 575 (emphasis in original)). As the federal government conceded in *Harper*, "[t]he conclusion that the Constitution requires legislative guidelines in death penalty cases is thus inescapable." (*Id.* at 1225-26).

Second, Respondent does not discuss the historical expansion of the California capital sentencing scheme. Here, but for the initiative process, California would not currently have thirty-three (33) special circumstances, and would not have the most expansive death penalty scheme in the country. (See II AOB 674-79).

Third, decisions relative to death should not be left entirely in the hands of the populace. Enactments created by elected officials are capable of being suitably tailored to meet the Eighth Amendment's narrowing requirement than enactments created by popular will and revolt. Due to its

unique abilities to evaluate studies and gauge the consensus of its constituents, punishment is the peculiar domain of the legislature. It follows that the legislature should create and define the narrowing circumstances that would make someone eligible for the ultimate punishment. Recognizing this, the California legislature created the 1977 death penalty scheme. In fact, a central tenet of *Furman* is the argument that it is the legislature's duty to create narrowly tailored capital sentencing schemes.[207]

Fourth, Appellant argued that the creation and definition of death eligibility factors by the voters and this Court, rather than by the Legislature, was unconstitutional. (See II AOB 674-79). He offered the issue to explain why the special circumstances do not properly narrow in a quantitative or qualitative manner as required by *Furman*. (See *Id.* at 679). The *Furman* mandate specifically requires the legislature to devise narrowing circumstances. California violates this third prong of the *Furman* mandate and is a case study on the constitutional issues created by

---

[207] A tenet of capital punishment has been to ensure that justice is done by the state and not by private actors performing vigilante justice. (See *Furman, supra,* 408 U.S. at 308 ("When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy, of self-help, vigilante justice, and lynch law.'")). The initiative process in California, however, allows for vigilante justice by popular referendum. In this regard the initiative process is analogous to the story of the classic book and movie "The Ox Bow Incident." See Walter Van Tilburg Clark, *The Ox-Bow Incident* (Random House 1940; and Twentieth Century Fox, 1943). There suspected cattle rustlers and killers are lynched by a posse of cowboys based on the popular regard of the posse. The climax of the story is when, in a powerful scene, the posse votes for the hanging of the suspected criminals who are so executed at dawn. Shortly after the hanging, the alleged criminals however are revealed to be innocent. (See Harry F. Tepker, Jr., *The Ox-bow Incident* (1997) 22 Okla. City U. L. Rev. 1209).

adaptation of capital sentencing statutes through initiative.

Fifth, the initiative process chills legislative independence because changes to initiative statutes must pass through the distorting lens of a popular election. With the enactment of the 1978 initiative, the legislature's power to define the parameters of California's death penalty scheme was stripped away. The legislature could not respond by any means other than another initiative. The California Legislature has no independent means of assuring the constitutionality of California's death penalty without voter approval. Even if the California Constitution authorizes the use of voter initiatives to enact statutes, the process cannot be used to evade constitutional mandates. (See e.g., *Kopp v. Fair Pol. Practices Com* (1995) 11 Cal.4th 607, 652 (judiciary has limited power to revise or reform voter initiative statutes to assure constitutionality)).

Finally, the initiative process is subject to considerable abuse. Political rhetoric during public debate may obfuscate the issues at stake. This is especially true when the initiative involves hotly disputed and complicated issues, such as capital punishment. The 1978 death penalty initiative process was fraught with such abuses. This Court has acknowledged that the voters were misled by the "political rhetoric" of the ballot initiative that created the current death penalty scheme. (See *Carlos, supra*, 35 Cal.3d at 143 n. 11).

D. Conclusion.

In only a handful of recent cases has this Court addressed, without simply referencing a string cite, the constitutional narrowing challenge raised by the defendant. (See *Bonillas, supra,* 41 Cal.4th at 313 (rejecting a narrowing challenge that specifically focused upon flaws in Proposition 7 and the 1978 capital sentencing statute); *Stevens, supra,* 41 Cal.4th at 182 (2007) (rejecting a challenge to the constitutionality of the lying in wait factor); and *Lewis, supra,* 43 Cal.4th at 415 (rejecting a challenge to the

California felony murder definition and special circumstances)). Appellant, in his cumulative review of the California capital sentencing statutes legislative history and operation, asks this Court to thoroughly review the constitutionality of California' death penalty scheme and reconsider its prior erroneous holdings.

The Supreme Court recognized long ago that if the administration of the death penalty is to be even minimally rational, assuring that the death-eligible class is properly limited is a necessary first step. California's death penalty scheme constitutes a profound undermining of the *Furman* mandate. As Shatz and Rivkind concluded, this Court will either "have to enforce the *Furman* principle by holding California's scheme unconstitutional, or it will have to abandon that principle and, with it, any pretense that the Constitution requires the death penalty to be administered in an evenhanded and non-arbitrary manner." (Shatz & Rivkind, *supra,* at 1343). The former option is compelled by the empirical data, the Supreme Court's jurisprudence, this Court's jurisprudence, fundamental fairness, justice, and the state and federal Constitutions.

The California death penalty scheme violates all three requirements of the *Furman* mandate. It does not narrow in a quantitative sense. It does not narrow in a qualitative sense. It was not enacted and defined by the legislature. The scheme thus suffers from the same arbitrariness and capriciousness that was deemed unacceptable in *Furman*. For each of these reasons, the California death penalty scheme is unconstitutional. Since Appellant was sentenced to death under this unconstitutional scheme, his sentence must be reversed and vacated.

XXVIII. CALIFORNIA'S DEATH PENALTY SCHEME AS INTERPRETED BY THIS COURT AND AS APPLIED AT APPELLANT'S TRIAL IS UNCONSTITUTIONAL.

A. Introduction.

Appellant argued that California's broad death penalty scheme, and the use of the death penalty as an arbitrary, but routinely imposed punishment, offends evolving standards of decency under the Eighth and Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution. Respondent elects to defend against the arguments in "abbreviated fashion." (RB 361). Respondent supports its argument with string cites and infrequent analysis. Respondent notes that this method "essentially conveys that this Court has already declined to reconsider its previous rejections." (*Ibid.*). While this Court has addressed *some* of Appellant's claims .Respondent's lack of effort should fail to persuade this Court that these issues are not ripe for review, and that past precedents are not worth revisiting. The opposite is true.

B. Section 190.3(a) As Applied is Vague, Overbroad and Results in an Arbitrary and Capricious Death Penalty System.

The purpose of section 190.3 is to inform the jury of the factors to be considered in assessing the appropriate penalty. Appellant argued that factor (a), as applied, is arbitrary and contradictory in violation of the guarantee of due process of law and the Eighth Amendment's requirement for heightened reliability in capital cases, as well as Article 1 of the California Constitution. In defense of section 190.3(a), Respondent cites to *Osbond, supra,* 13 Cal.4th at 703; *Sanders, supra,* 11 Cal.4th at 563; *People v. Medina* (1995) 11 Cal.4th 694, 780; and *People v. Turner* (1994) 8 Cal.4th 137, 208. Respondent offers no analysis as to how or why these cases address Appellant's specific arguments. Moreover, Respondent, and

the cases referenced in its string cite, fail to rebut several arguments raised under this subcaption in Appellant's Opening Brief.[208]

In California, juries are required by law, and urged by the prosecution, to consider the facts of the crime itself, no matter what they are, as an "aggravating" factor. However, there is "'no principled way to distinguish [one] case, in which the death penalty was imposed, from the many cases in which it was not.'" (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 (quoting *Godfrey, supra,* 446 U.S. at 433)). In practice, factor (a) allows indiscriminate imposition of the death penalty for no reason other than the facts surrounding a murder. Yet, the Supreme Court has "plainly rejected" as unconstitutional the notion that "a particular set of facts surrounding a murder, however shocking they might be, [are] enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Id.* at 363). The vagueness and overbreadth of factor (a), as applied, arbitrarily and capriciously results in death sentences in violation of the Eighth and

---

[208] Respondent did not address or rebut the following arguments: 1) Factor (a) has been applied in such a "wanton and freakish" manner that almost every circumstance attending any murder can be, and has been, as the prosecution did in Appellant's case, characterized by prosecutors as "aggravating;" where the "facts and circumstances of the crime" act as the primary aggravating factor in the penalty phase. (See II AOB 688); 2) Given the vague and overbroad language of factor (a), and this Court's failure to limit it, prosecutors throughout California have unconstitutionally used the aggravator to argued that the jury should weigh almost every conceivable circumstance of the crime, even those that reflect opposite circumstances. (See *Id.* at 689); 3) Factor (a) unconstitutionally allows the prosecutor to argue non-statutory aggravators as "circumstances of the crime" which renders California's capital sentencing scheme invalid for failure "to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty." (See *Id.* at 693-694); and 4) The inclusion of "victim impact" evidence or "the lack of remorse" in this manner renders the phrase "circumstances of the crime" unconstitutionally meaningless. (See *Id.* at 694).

Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution.

Since factor (a) played the defining role at Appellant's penalty phase, this Court must now reverse his death sentence.

C. California's Death Penalty Scheme Lacks Safeguards to Avoid Arbitrary and Capricious Sentencing.

Permitting the use of the same facts to sustain a first degree felony murder conviction and a felony murder "special" circumstance finding at the guilt phase, and to establish a factor in aggravation under section 190.3(a) at the penalty phase is improper. It is unconstitutional to permit a penalty jury to separately consider more than one felony murder "special" circumstance under section 190.3(a), especially when the killing occurred during an indivisible transaction with a single criminal intent. Section 190.3(a) is unconstitutional as applied because it enables a jury to "triple count" the facts surrounding a murder committed in the course of a burglary and a robbery: 1) under the felony murder rule, to elevate the offense to first degree murder; 2) as a special circumstance, to make defendant eligible for the death penalty; and 3) at the penalty phase, as a "circumstance of the offense" warranting a sentence of death.

Respondent's opposition here s lacking. The two cases cites by Respondent do not address Appellant's specific claim – that the California capital sentencing scheme lacks sufficient safeguards to avoid arbitrary and capricious sentencing. (See RB 362 (citing *Smith, supra,* 35 Cal.4th at 373; and *Jenkins, supra,* 22 Cal.4th at 1050-53)). In *Smith*, this Court summarily denied several constitutional challenges to the California capital sentencing scheme – none of which addressed a challenge to the lack of procedures offered by the scheme. In *Jenkins*, this Court did address a claim challenging the lack of procedures contained by the California capital sentencing scheme. (See *Smith, supra,* 35 Cal.4th at 373; and *Jenkins,*

supra, 22 Cal.4th at 1053). The claim was denied with a string cite. (See *Ibid.*). Appellant urges this Court to reconsider these decisions in light of his persuasive claim.

1. The California Capital Sentencing Statutes as Applied to Appellant's Case Violated his Constitutional Rights by Failing to Require the Prosecution to Prove the State's Case Beyond a Reasonable Doubt.

The burden of proof is the most fundamental concept in our system of criminal justice and any error in articulating it is reversible error. (See *Sullivan, supra,* 508 U.S. at 279-281). Instructions given without a burden of proof fail to provide the jury with the legally required guidance to administer the death penalty. Without instruction as to the burden of proof, each juror may instead apply the standard he or she believes is appropriate in any given case. Jurors who believe the burden should be on the defendant to prove mitigation in the penalty phase will continue to abide by that belief if not instructed to do otherwise. It would be constitutionally unacceptable, under the Sixth, Eighth and Fourteenth Amendments, for a juror to vote for the death penalty because he or she misallocated a nonexistent burden of proof.

Respondent says that the constitution does not require that aggravating factors (other than prior criminality), the weighing determination, and the penalty determination be proven beyond a reasonable doubt. (RB 362). Respondent cites to *Dickey, supra,* 35 Cal.4th at 930; *Smithey, supra,* 35 Cal.4th at 573; *Bolden, supra,* 29 Cal.4th at 566; *Ochoa, supra,* 26 Cal.4th at 453-54; and *Barnett, supra,* 17 Cal.4th at1178. Respondent does not explain why these precedents are relative to Appellant's specific arguments or attempt to rebut two arguments raised

under this subcaption in Appellant's Opening Brief.[209]

In cases in which the aggravating and mitigating evidence is balanced, or the evidence as to the existence of a particular aggravating factor is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution, that one man should live and another die simply because one juror assigns the burden of persuasion to the state, and another assigns it to the defendant. (See *O'Neal v. McAninch* (1995) 513 U.S. 432, 436 (when the court is in "equipoise as to the harmlessness of error" the defendant "must win.")). The error in failing to instruct the jury on the proper burden of proof is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at 279-281). The trial court here failed to instruct the jury in Appellant's case accordingly.

2. At a Minimum, Each Sentencing Finding Must be Proven by a Preponderance of the Evidence.

Respondent says that the Constitution does not require that aggravating factors, the weighing determination, or the penalty determination meet a preponderance of the evidence standard. (RB 362 (citations omitted)). Respondent does not explain how these authorities address Appellant's arguments, nor does it acknowledge or rebut two

---

[209] Respondent did not address or rebut the following arguments: 1) Constitutionally, under the Eighth and Fourteenth Amendments, some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts so that the death penalty is evenhandedly applied and capital defendants treated equally from case to case. (See II AOB 697); and 2) It is "wanton" and "freakish," and the "height of arbitrariness," under the Eighth and Fourteenth Amendments, that one defendant should live and another die simply because one jury can break a tie in favor of a defendant and another can do so in favor of the state on the same facts, with no uniformly applicable standards to guide either. (See *Id.* at 698 (citing *Proffitt v. Florida* (1976) 428 U.S. 242, 260; and *Mills v. Maryland* (1988) 486 U.S. 367, 374)).

arguments raised under this subcaption in Appellant's Opening Brief.[210]

Appellant's jury, at a minimum, should have been instructed that the state had to prove by a preponderance of the evidence the existence of any factor in aggravation, and the propriety of the death penalty. Sentencing Appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (See *Hicks, supra,* 447 U.S. at 346). The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth and Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution, and is reversible *per se.*

3. California Law Fails to Require Unanimous Jury Agreement on Aggravating Factors.

Respondent says that there is no constitutional requirement that the jury must unanimously agree on facts in aggravation used in the penalty deliberations. (RB 363 (citations omitted)). Respondent does not elaborate further. Contrary to Respondent's position, it violates the Eighth and Fourteenth Amendments if each juror based his or her verdict on a different set of aggravators or a different process of weighing those aggravators. It is unconstitutional, and violates state law, for a jury verdict to be based on

---

[210] Respondent did not address or rebut the following arguments: 1) In non-capital cases, California does impose on the prosecution the burden to prove to the sentencer by a preponderance of the evidence that aggravating circumstances exist such that the defendant should receive the upper term. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments, and the Sixth Amendment's guarantee to a trial by jury, as well and Article I of the California Constitution. (See II AOB 700 (citing *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421)); and 2) The failure to allocate a burden of proof violates Evidence Code section 520 and Appellant's reasonable interest in adjudication with a properly allocated burden of proof in line with the due process clause of the Fourteenth Amendment. (See II AOB 700).

separate jurors finding different aggravating circumstances; or jurors separately voting on whether their individual set of aggravating circumstances warrants death; or if a sentence of death resulted from a vote of 1-11 against death or 11-1 for death. (See Cal. Penal Code section 190.4). A death sentence under those circumstances would be arbitrary, capricious, and would fail under the Eighth and Fourteenth Amendments. (See e.g., *Gregg*, *supra,* 428 U.S. at 188-89). Under *Ring* it would also violate the Sixth Amendment's guarantee of a trial by jury. (See *Ring*, *supra*, 536 U.S. at 584). The findings of one or more aggravating factors, and the finding that these factors outweigh mitigating factors, are essential elements of California's sentencing scheme, and a prerequisite to the "normative" weighing process. Thus, these decisions must be made unanimously and the California capital sentencing schemes failure to order such a requirement violates basic constitutional precepts.

4. California Law Fails to Require that the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

Respondent says that the Constitution does not require the jury to make written findings regarding aggravating factors. (RB 363 (citation omitted)). Respondent does no more to justify its arguments or explain the relevance of its citations, and does not acknowledge or rebut four arguments raised under this subcaption in Appellant's Opening Brief.[211]

---

[211] Respondent did not address or rebut the following arguments: 1) In a non-capital case, the sentencer is required to state on the record the reasons for the sentence choice. Under the Fifth, Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (See II AOB 703); 2) Written findings are essential for a meaningful appellate review of the sentence even if the decision to impose death is "normative and moral" its basis must be articulated. (See *Id.* at 703); 3) California's failure to require written sentencing findings is unconstitutional and places it in the minority of states (13 out of 32) who do not require written findings as to all

Given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances, *Tuilaepa, supra,* 512 U.S. at 979-980, there can be no meaningful appellate review without written findings. Otherwise, it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 314). Thus, the failure to require written or other specific findings by the jury regarding aggravating factors violates federal due process and the Eighth Amendment right to meaningful appellate review. (See *Brown, supra,* 479 U.S. at 543; and *Gregg, supra,* 428 U.S. at 195). This Court has held that the absence of these protections does not render the 1978 death penalty scheme unconstitutional. (See *Fauber, supra,* 2 Cal.4th at 859). That determination is wrong, and needs to be reconsidered.

5. California Law Fails to Provide the Inter-Case Proportionality Review Required to Prevent Arbitrary, Discriminatory, Or Disproportionate Impositions of the Death Penalty.

Respondent says that this Court's lack of proportionality review does not render California's capital sentencing statutes unconstitutional. (RB 363 (citing *People v. Gray* (2005) 37 Cal.4th 168, 247; *Bolden, supra,* 29 Cal.4th at 566; *Lewis, supra,* 26 Cal.4th at 394-95; *Barnett, supra,* 17 Cal.4th at 1182; *Crittenden, supra,* 9 Cal.4th at 156; *Mincey, supra,* 2 Cal.4th at 476; and *Hayes, supra,* 52 Cal.3d at 645)). Respondent does not rebut or acknowledge three arguments raised under this subcaption in Appellant's Opening Brief,[212] which undermines its position that the

---

aggravating circumstances. (See *Id.* at 704); and 4) Written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See *Id.* at 704-705).

[212] Respondent did not address or rebut the following arguments: 1) California's 1978 death penalty statute, as drafted and as construed by this

California capital sentencing scheme meets constitutional standards.

In a capital case, the Eighth Amendment requires that death judgments be proportionate, and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability is "that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay, supra,* 463 U.S. at 954 (alterations in original) (quoting *Proffitt, supra,* 428 U.S. at 251 (opinion of Stewart, Powell, and Stevens, JJ)). California's scheme wholly fails to meet this constitutional requirement.

6. The Prosecution May Not Constitutionally Rely on Unadjudicated Criminal Activity as an Aggravating Factor.

Factor (b) is unconstitutionally vague - especially in the absence of a requirement of unanimity – because it fails to provide guidance to the jury on how to distinguish a case that is death worthy from one that is not, and fails to guide the jury's discretion in deciding the appropriate penalty. Respondent argues that California's death penalty law is not unconstitutional because it permits the jury to consider unadjudicated offenses as aggravating evidence without the support provided by a unanimous jury. (RB 363) (citations omitted). Respondent does not explain

---

Court and as applied in fact, lacks any checks on arbitrariness and fails to pass constitutional muster without comparative proportionality review;. (See II AOB 705); 2) California is in the minority of death penalty states not requiring comparative, or "inter-case," appellate sentence review; (See *Id.* at 705); and 3) Under this Court's precedent, Appellant has shown that the state's capital punishment system operates in an arbitrary and capricious manner and that proportionality review is thus constitutionally required to correct the overbroad reach of the special circumstances and the absence of any other procedural safeguards to ensure a reliable and proportionate sentences. (See *Id.* at 707 (citing *People v. McLain* (1988) 46 Cal.3d 97, 121)).

its argument any further. However, allowing the jury to consider unadjudicated criminal activity results in an unreliable sentencing, permits consideration of a factor that is vague, and violates due process and equal protection principles guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I of the California Constitution. (See e.g. *Johnson, supra,* 486 U.S. at 578; and S*tate v. Bobo* (Tenn. 1987) 727 S.W.2d 945).

7. Factor 190.3(c) is Unconstitutionally Vague.

California's death penalty scheme is unconstitutional since it permits the jury to hear the underlying facts of a prior felony conviction as aggravating evidence. Respondent says that factor 190.3(c) is not unconstitutionally vague because it permits the jury to consider the presence of any prior felony convictions the defendant might have suffered. (RB 364) (citing *People v. Balderas* (1985) 41 Cal.3d 144, 201). However, allowing the jury to consider the facts of the prior felony convictions at the penalty phase is unconstitutional, and the consideration of a defendant's prior felony convictions constitutes double jeopardy and violates fundamental fairness. Lastly, together with 190.3(b), section 190.3(c) allows capital juries to improperly double count violent criminal conduct.

8. Restricting the List of Potential Mitigating Factors is Unconstitutional.

Respondent says that the use of restrictive adjectives in the list of potential mitigating factors does not impermissibly act as barriers to limit consideration of mitigation by a penalty jury. (RB 364) (citations omitted). Respondent offers no further exploration of the issue.

Respondent's assessment is incorrect. The use of adjectives such as "extreme" in factor (d); "reasonably" in factor (f); "substantial" in factor (g); "impaired" in factor (h); and "time frame" in factor (h) improperly restricts the jury's consideration of relevant mitigation evidence.

Specifically, the jury instruction based on factor (h) can be improperly interpreted by the jury as excluding consideration of mitigating evidence related to the defendant's impairments as mitigating if it did not influence the commission of the crime. It is unconstitutional in its formulation and application since it uses the term "impaired," which improperly suggests that the illness caused the crime. This Court's holdings to the contrary should be reconsidered.

9. Factor 190.3(i) is Unconstitutionally Vague.

Respondent says that factor 190.3(i) is not unconstitutionally vague because it permits the jury to consider the capital defendant's age in its sentencing determination. (RB 364 (citing *Sanders, supra,* 11 Cal.4th at 563-64; and *Medina, supra,* 11 Cal.4th at 780)). Respondent offers no further analysis.

The prosecution may not refer to the defendant's age or to the victim's age under 190.3(a) as aggravating factors. Factor (i) improperly permits juries to consider defendant's youth as an aggravating factor via standard jury instructions and allows prosecution arguments that defendant "was certainly old enough to know better" and was "old enough to understand the wrongfulness of his conduct." This court's holdings to the contrary are incorrect.[213]

10. Factor 190.3(k) is Unconstitutionally Vague.

Respondent says that factor 190.3(k) is not vague because it permits capital sentencing juries to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (RB 364 (quoting *Mendoz, supra,* 24 Cal.4th at 192)). Section 190.3(k) is unconstitutionally vague as it fails to provide guidance to the

---

[213] (See e.g. *Slaughter, supra,* 27 Cal. 4th at 1224; *Mendoza, supra,* 24 Cal. 4th at 190; *Jenkins, supra,* 22 Cal. 4th at 1051-1052; and *Box, supra,* 23 Cal. 4th at 1217).

jury on how to distinguish a death worthy case from one where the defendant should receive life without parole that is not, and fails to guide the jury's discretion in deciding the appropriate penalty.

11. The Failure to Instruct that Statutory Mitigating Factors were Relevant Solely as Potential Mitigators was Unconstitutional.

Respondent says that a failure to instruct the jury that section 190.3's statutory mitigating factors were relevant solely as potential mitigators does not constitute constitutional error. (RB 364 (citations omitted)). Respondent does not address two of Appellant's arguments under this subcaption.[214]

The California death penalty scheme is unconstitutional because it permits the jury to generally treat the absence of a mitigating factor as an aggravating factor. The statutory language to consider "whether or not" certain mitigating factors are present unconstitutionally suggests that the absence of such factors amounts to aggravation. This Court's opinions to the contrary are incorrect. (See e.g. *People v. Weaver* (2001) 26 Cal.4th 876, 991, 993; *Box, supra,* 23 Cal.4th at 1217-1219; *Anderson, supra,* 25 Cal.4th at 600-601; *Cunningham, supra,* 25 Cal.4th at 1040-44; *Boyette, supra,* 29 Cal.4th at 465-466).

---

[214] Respondent did not address or rebut the following arguments: 1) State law and the Eighth Amendment were violated by the prosecutor's erroneous statements during penalty phase closing argument and his use of a chart listing all the potential mitigating factors that the jury "had not heard" due to the likelihood that Appellant was treated "as more deserving of the death penalty than he might otherwise be by relying upon...illusory circumstance[s]." (See II AOB 714); and 2) California's lack of mitigating evidence instructions assure that from case to case, even with no difference in the evidence, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards in an arbitrarily, capricious and uneven manner. (See II AOB 714).

California's death penalty scheme is unconstitutional since it fails to identify which factors are aggravating and which are mitigating. The trial court should be required to identify to the jury which sentencing factors are aggravating and which are mitigating, as well as instruct that the "absence of a mitigating factor should not count as a factor in aggravation." Section 190.3 and related jury instructions do not inform the jury that certain sentencing factors are relevant only in mitigation of penalty. The trial court should be required to inform the jury that certain sentencing factors are relevant only in mitigation and that only three factors can be aggravating.

12. The Denial of Safeguards to Capital Defendants Violates the State and Federal Constitutions.

Respondent says that the denial of safeguards does not violate the Equal Protection Clause of the United States Constitution. In Respondent's only bit of analysis in this entire argument, the state argues that capital defendants are not similarly situated when compared with noncapital defendants. (RB 365 (citation omitted)).

In this case, the equal protection guarantees of the California and United States Constitutions must apply with greater force, the scrutiny of the challenged classification is stricter, and any purported justification by the People of the discrepant treatment is even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable. Moreover, those differences are entirely elected by prosecutors who have instituted capital cases in an arbitrary fashion across this state. (See Claim XXX - Appellant's Death Sentence Was Imposed Through the Arbitrary, Disparate, and Unconstitutional Implementation of California's Capital Sentencing Statutes).

The Supreme Court has demanded that a greater degree of reliability is required when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See e.g. *Monge v. California* (1998) 524 U.S. 721, 731-32). California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

D. The Trial Court Erred in Failing to Instruct the Jury in Accordance with Constitutional Requirements.

Without analysis, and based upon a lengthy string cite, Respondent argues that California's standard penalty phase jury instructions (CALJIC 8.85 and 8.88) are not unconstitutional. (RB 365-66 (citations omitted)). Respondent is wrong.

The trial court's error in reading the standard instructions in this case violated Appellant's rights. The factor (a) instruction, as applied here, was vague and failed to channel jury discretion which gave unbridled discretion in determining the penalty. The jury may only consider those aspects of the crime that make it an aggravated one for the purposes of reaching a death verdict and its consideration must be informed by principles that enable it to distinguish the defendant's crime from the majority of murders, crimes for which the perpetrators receive sentences less than death. The bare "circumstances of the crime" instruction lacks these guiding principles.

CALJIC 8.88 is vague, misleading, and fails to inform the jury that if the evidence in aggravation does not outweigh the evidence in mitigation a verdict of life without the possibility of parole is mandatory. It fails to inform the jury that a verdict of life without the possibility of parole can be returned even if aggravation outweighs mitigation. It fails to inform the jury that a death verdict requires findings beyond a reasonable doubt. It

fails to inform the jury which party, if any, bears the burden of persuasion as to the appropriate penalty. These failures are especially problematic since after *Ring*, the prosecutor bears the burden of proving the facts in support of the aggravators, that the aggravators substantially outweigh the mitigators, and that death is appropriate, beyond a reasonable doubt. (See *Ring, supra,* 536 U.S. at 584).

E. The Death Penalty Is Unconstitutional.

The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop, supra*, 356 U.S. at 100; see also *Roper, supra,* 543 U.S. at 551; and *Atkins, supra,* 536 U.S. at 304). The meaning of cruel and unusual punishment and due process of law' are not static concepts sealed at the time of their writing. "They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman, supra*, 408 U.S. at 420 (dissenting. opn. of Powell, J.)). The Eighth Amendment prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own.

Respondent alleges that Appellant's claim is curious in light of a Harris Poll that indicates that more than two-thirds of Americans support the death penalty. (RB 366 (citing http://www.harrisinteractive.com/harris_poll/index>)). First, the public's understanding of the underpinnings of capital punishment in America is skewed and based on misleading perceptions. (See Craig Haney, *Media Criminology and the Death Penalty* (2009) 58 DePaul L. Rev. 689, 733). This is demonstrated by the fact that the poll relied on by Respondent is likely based on answers by participants who were not informed of the

availability of life in prison without parole as a sentencing alternative.[215] More modern polls indicate that the American public is split, 50%-50%, when the sentencing determination is between the death penalty and life in prison without parole.[216] This verifies that "death penalty support appear[s] to be founded more on misconception and frustration with the lack of meaningful alternatives than reasoned analysis about what purposes the death penalty actually served or realistically could accomplish." (Craig Haney, *Commonsense Justice and Capital Punishment* (1997) 3 Psychol. Pub. Pol'y & L. 303, 317). Indeed, as much was recognized by Justice Marshall in his concurring opinion in *Furman v. Georgia*:

> While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable. [¶] In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

(*Furman, supra,* 408 U.S. at 361-62 (concurring opn. Marshall, J)).

Nevertheless, straw polls and other indicia of our democratic society

---

[215] Respondent's citation is no longer a valid url, and Appellant thus cannot confirm Respondent's assertion that 66% of Americans support the death penalty. Other polls, however, generally support Respondent's claim when the punishment of death is the *only option* presented to poll takers. See http://www.gallup.com/poll/1606/death-penalty.aspxhe (last visited April 18, 2010).

[216] See http://www.gallup.com/poll/1606/death-penalty.aspxhe (last visited April 18, 2010).

do not control whether or not use of the death penalty violates the Constitution. The Eighth Amendment removes the final decision for the imposition of punishment from the will of the masses. Instead, under the Eighth Amendment, it is up to the subjective analysis of this Court to determine whether the death penalty, as a punishment, is constitutional:

> The use to which [the] Eighth Amendment supposedly is put – to safeguard individual citizens against state sanctioned punishment that is "cruel and unusual – implies that the law must be more than simply what the community agrees is acceptable. Indeed, it's very purpose involves telling democratically elected representatives – -the executive and legislative branches of the government – -that there are certain kinds of punishments that, even though they may be supported and sanctioned by "the people," are not constitutionally acceptable. Somehow the courts must distinguish unconstitutional community sentiments from truly evolving standards, ones in which the deep structure of our collective attitudes and value systems genuinely have been transformed.

(Haney, *supra,* 3 Psychol. Pub. Pol'y & L. at 314). This Court must look beyond public opinion polls, to decide upon the propriety of the death penalty under the laws prescribed by the California and United States Constitutions.

Finally, state-sponsored killing as a form of punishment has now become simply unacceptable in world society. Although the Supreme Court in *Gregg* held that the death penalty was not per se "cruel and unusual," it also acknowledged that the Eighth Amendment is "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Gregg, supra,* 428 U.S. at 171 (plurality opinion) (internal citations and quotations omitted). Recent events and shifting public opinion prove that modern standards of decency have evolved to the point where the death penalty is now viewed as inhumane.

F. Conclusion.

In the last four years, this Court has rejected a variety of constitutional claims in seventy-seven (77) capital cases challenging the constitutionality of California's capital sentencing scheme due to its failure to narrow the class of death eligible offenders.[217] These cases include

---

[217] *Lewis, supra,* 46 Cal.4th at 1255; *Taylor, supra,* 48 Cal.4th at 574; *Gamache, supra,* 48 Cal.4th at 347; *Ervine, supra,* 47 Cal.4th at 745; *Carrington, supra,* 47 Cal.4th at 145; *People v. D'Arcy* (2010) 48 Cal.4th 257; *Taylor, supra,* 47 Cal.4th at 850; *Martinez, supra,* 47 Cal.4th at 399; *People v. McWhorter* (2009) 47 Cal.4th 318; *Burney, supra,* 47 Cal.4th 203; *Friend, supra,* 47 Cal.4th at 1; *Rogers, supra,* 46 Cal.4th at 1136; *People v. Avila, supra,* 46 Cal.4th at 680; *Gutierrez, supra,* 45 Cal.4th at 789; *Jackson, supra,* 45 Cal.4th at 662; *Doolin, supra,* 45 Cal.4th at 390; *Davis, supra,* 46 Cal.4th at 539; *People v. Curl* (2009) 46 Cal.4th 339; *Hawthorne, supra,* 46 Cal.4th at 67; *Hamilton, supra,* 45 Cal.4th at 863; *Bunyard, supra,* 45 Cal.4th at 836; *Farley, supra,* 46 Cal.4th at 1053; *Bennett, supra,* 45 Cal.4th at 577; *Mendoza, supra,* 42 Cal.4th at 686; *Morgan, supra,* 42 Cal.4th at 593; *Tafoya, supra,* 42 Cal.4th at 147; *DePriest, supra,* 42 Cal.4th at 1; *Alfaro, supra,* 41 Cal.4th at 1277; *Geier, supra,* 41 Cal.4th at 555; *Abilez, supra,* 41 Cal.4th at 472; *Bonilla, supra,* 41 Cal.4th at 313; *Stevens, supra,* 41 Cal.4th at 182; *People, supra,* 41 Cal.4th at 109; *Cook, supra,* 40 Cal.4th at 1334; *Leonard, supra,* 40 Cal.4th at 1370; *Prince, supra,* 40 Cal.4th at 1179; *Beames, supra,* 40 Cal.4th at 907; *Bell, supra,* 40 Cal.4th at 582; *Smith, supra,* 40 Cal.4th at 483; *Wallace, supra,* 44 Cal.4th at 1032; *Mungia, supra,* 44 Cal.4th at 1101; *People v. Hovarter* (2008) 44 Cal.4th 983; *Loker, supra,*44 Cal.4th at 691; *People v. Romero* (2008) 44 Cal.4th 386; *Parson, supra,* 44 Cal.4th at 332; *Riggs, supra,* 44 Cal.4th at 248; *Salcido, supra,* 44 Cal.4th at 93; *Whisenhunt, supra,* 44 Cal.4th at 174; *Page, supra,* 44 Cal.4th at 1; *Harris, supra,* 43 Cal.4th at 1269; *Richardson, supra,* 43 Cal.4th at 959; *Watson, supra,* 43 Cal.4th at 652; *Williams, supra,* 43 Cal.4th at 584; *Lewis, supra,* 43 Cal.4th at 415; *Zamudio, supra,* 43 Cal.4th at 327; *Rundle, supra,* 43 Cal.4th at 76; *Wilson, supra,* 43 Cal.4th at 1; *People v. Brasure* (2008) 42 Cal.4th 1037; *Howard, supra,* 42 Cal.4th at 1000; *Tate, supra,* 49 Cal.4th at 635; *Collins, supra,*49 Cal.4th at 175; *People v. Thompson* (2010) 49 Cal.4th 79; *Hartsch, supra,* 49 Cal.4th at 472; *Williams supra,* 49 Cal.4th at 405; and *People v. Lomax,* (2010) --- Cal.Rptr.3d ----, 49 Cal.4th 530. *Cowan, supra,* 50 Cal.4th at 401; *Lynch, supra,* -- Cal.Rptr. ---; *Brady, supra,* -- Cal.Rptrt.3d --; and *Jennings, supra,* -- Cal.Rptr.3d ---.

international law claims, (see Ground XXIX - Appellant's Conviction and Death Sentence Violates International Law); claims that California's capital sentencing scheme operates in an arbitrary manner; and claims that California's capital sentencing scheme violates the equal protection clause in the Fourteenth Amendment. (See Ground XXX - Appellant's Death Sentence Was Imposed Through the Arbitrary, Disparate, and Unconstitutional Implementation of California's Capital Sentencing Statutes).

Far from speaking to the constitutionality of the California capital sentencing statutes, this Court's failure to truly explore significant differences between arguments lodged in the seventy (70) plus different constitutional challenges undermines the legitimacy of the entire scheme. The thoughtful arguments lodged under this ground in Appellant's Opening Brief are based in respect of the legislative history of the California capital sentencing scheme and this Court's capital jurisprudence. They are thus the perfect vehicle for reconsideration of this Court's prior precedent. California's capital sentencing scheme violates the California and United States Constitutions. Although this Court has rejected various challenges to the California death penalty scheme, these rulings should be reconsidered, both in their analyses and their conclusions, in light of Appellant's persuasive arguments. The various fatal constitutional defects in California's death penalty law and the trial court's failure to instruct the jury in accordance with constitutional mandates, require that Appellant's sentence be invalidated.

XXIX. APPELLANT'S CONVICTION AND DEATH SENTENCE VIOLATES INTERNATIONAL LAW.

A. Introduction.

The right to life is the most fundamental of the human rights and is recognized in the Declaration of Independence and the International Bill of Rights. (See e.g., Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); and Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. art. 3, U.S. Doc. A/810 (1948) ("Everyone has the right to life, liberty, and security of the person")). Appreciation of the right to life makes it incumbent upon states to not take a person's life "arbitrarily." (See e.g., the International Covenant on Civil and Political Rights (hereinafter ICCPR); American Convention on Human Rights, art. 4, art. 6 1144 U.N.T.S. 123; and II AOB 728-29).

Appellant was charged with capital murder, tried, convicted, and sentenced to death in violation of Article 6(2) of the ICCPR, 999 U.N.T.S. 171, 175. This Article provides that the death penalty may only be imposed for the "most serious crimes." (See also American Convention on Human Rights, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996)); because death is recognized as a "quite exceptional measure." (Human Rights Committee, General Comment 6(16), para.7). The imposition of the death penalty in Appellant's case violates the ICCPR and the American Convention on Human Rights and constitutes an arbitrary deprivation of life in violation of international law. The state's failure to abide by international law renders Appellant's death sentence invalid.

Respondent concedes that Article VI, Section 2 of the United States Constitution provides that all treaties made under the authority of the

Untied States are the supreme law of the land. (RB 368). Respondent concedes that "the customs and usages of civilized nations have long been used as a source of international law binding upon all nations...." (RB 370 (citations omitted)). Respondent, however, says that "Appellant is precluded from raising this issue because he lacks standing to assert a violation of international law." (*Ibid.*). Alternatively, Respondent argues that this Court has already rejected Appellant's argument that the California capital sentencing scheme violates international law. (*Ibid.*).

Respondent's arguments are without merit. Appellant has not forfeited this claim and has standing to assert his rights under international law - which, as Respondent acknowledges, is the supreme law of the land. (See RB 368). Appellant's rights are bestowed by self-executing treaties and customary international law,[218] which create private rights for individuals independent of sovereign protestations. Moreover, this Court has yet to fully address the arguments raised herein. In sum, Respondent's opposition wholly fails to defeat Appellant's showing under this claim.

B. Appellant's Argument Has Not Been Forfeited.

Respondent first argues that this argument has been forfeited due to Appellant's failure, at trial, to object to his death sentence on international law grounds. (RB 367). Respondent analogizes the forfeiture of this argument to a situation where Appellant raised federal constitutional rights for the first time on appeal. (*Ibid.* (citing *People v. Rowland* (1992) 4 Cal.4th 238, 265, n.4; and *Carpenter, supra,* 15 Cal.4th at 385)). Under this Court's precedent, Respondent argues, Appellant's international law claim should be forfeited. (See RB 367).

Respondent's analogy to federal constitutional rights is misplaced.

---

[218] (See II AOB 729 ("Customary international law refers to a set of principles that are so widely accepted by members of the international community that they have evolved into binding rules of law.")).

Appellant's argument does not rest on the assertion of federal constitutional rights, but rather, rights bestowed by international law. While both are considered the "supreme law of the land," under Article VI, Section 2 of the United States Constitution, each has distinct origins and influences and applications. Respondent thus errs in arguing that international law and federal law are comparable and rise and fall based on the same rules of procedure. Arguments based on violations of international law should not be subject to the same forfeiture rules as claims based on federal law.

Even if the international violations are treated the same, valid exceptions to the contemporaneous objection rule exist and allow this Court to now hear these arguments. This Court has found that fundamental constitutional rights are exempt from the general forfeiture rule. (See *Loker, supra,* 44 Cal.4th at 704; and *Vera, supra,* 15 Cal. 4th at 276-77). Since it appears that Respondent would treat claims based on the violation of international law the same as claims based on the violation of the federal constitution, this argument, if found to be forfeited, would qualify under the exception made in *Vera.* This is especially true given that Appellant alleges violations of his international rights, which parallel many rights fundamental to the United States Constitution. Similarly, this Court created a catch-all exemption to the contemporaneous rule, which allows arguments for the first time on appeal where, as here, the challenge is non-evidentiary. (See *Wilson, supra,* 17 Cal. 4th at 161 n.6).

C. Appellant Has Standing to Assert His Rights Under International Law.

Respondent says that Appellant has failed to show standing to assert his rights under international law. In Respondent's view, "the principles of international law apply to disputes between sovereign governments and not between individuals." (RB 368 (citing *Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-47)). Respondent argues

that an individual can only challenge violations of international law when their complaint is accompanied by protests from the sovereign involved. (RB 368 (citing *Matta-Ballesters v. Henman* (7th Cir. 1990) 896 F.2d 255, 259; and *United States ex rel. Lujan v. Gengler* (7th Cir. 1990) 896 F.2d 59)).

Respondent is wrong. Appellant has standing to assert violations of his rights under international law. The language of the ICCPR expressly conveys its founder's intention to grant private individuals a cause of action to assert violations of their international and legal rights. (See Article 2(1), ICCPR). Article 26 of the ICCPR specifically guarantees that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Moreover, article 14 states that all persons "shall be equal before the courts and tribunals." (See also article 2(.1) of the, ICCPR).

For the most part, the authorities cited by Respondent deal with writs for habeas corpus initiated by prisoners who were abducted from foreign countries by the American government. The international law addressed by those cases is thus "designed to protect the sovereignty of states, and it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, or requires redress." *Gengler, supra,* 510 F.2d at 67). Such law is distinguishable from treaties like the ICCPR and International Convention for the Elimination of All Forms of Racial Discrimination (hereafter ICEAFRD), which require states that are party to the treaty to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind." (Article 2(1), ICCPR). The obligations imposed by the ICCPR and the ICEAFRD, and the attendant rights granted thereby, are owed separately and independently to Appellant.

Respondent's argument, taken to its logical conclusion, would

require the United States to protest California's treatment of Appellant in order for Appellant to assert his rights under international law. (See *Matta-Ballesters, supra,* 896 F.2d at 259 (requiring the Honduran government to lodge an official protest under treaties with United States and finding that protests before the American Embassy in Honduras and a bill introduced in the Honduran legislature showed that the people of Honduras did not object to the defendant's detention by American authorities)). This notion confuses fundamental principles of international law, namely that California is a sovereign entity capable of making international treaties.[219] California cannot enter into treaties and is thus not a sovereign entity within international law. Instead, the United States government has entered into two binding treaties that require this Court to hear Appellant's claim based on the Supremacy Clause and the violation of Appellant's rights under the ICCPR and the ICEAFRD.

The one exception to Respondent's reliance upon authorities regarding extra-territorial detentions is the reliance on *Hanoch Tel-Oren, supra,* 517 F.Supp. at 545-47. Respondent believes that *Hanoch Tel-Oren* sanctions its argument that "the principles of international law apply to disputes between sovereign governments and not between individuals." (RB 368). However, *Honoch Tel-Oren* is not applicable here since it is a civil case based on "four separate bases of jurisdiction: 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1332 (diversity of citizenship),

---

[219] Respondent's argument would apply in a situation where the United States, including California or another state, threatened to execute a foreign national or person abducted from a foreign country. For example, in the trial of Adolf Eichmann for crimes committed during the Nazi Holocaust, the Supreme Court of Israel permitted his execution because Argentina, in a joint communiqué with Israel, had waived its objections and cured any violation of international law. (See 6 M. Whiteman, Digest of International Law (1968) 1110; accord *Gengler, supra,* 510 F.2d at 67).

28 U.S.C. § 1350 (the statute providing for jurisdiction of actions brought by an alien alleging a tort in violation of the laws of the United States or the law of nations), and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, 1602-1611." (*Hanoch Tel-Oren, supra,* 517 F.Supp. at 545). Moreover, the plaintiffs in *Honoch Tel-Oren* "[a]bandon[ed] their position that federal criminal law gives them a right of action." (*Ibid.*).

Here, there is already a basis of jurisdiction for Appellant's claims based on the application of California's criminal law and the automatic appeal of Appellant's death sentence. This is not a "private human rights suit against a sovereign government." (See RB 370). This is a direct appeal in a capital case. The ICCPR and ICEAFRD are binding authorities, no different that the statutory and constitutional authorities Appellant has previously discussed. This Court may thus hear argument premised on the violation of the rights guaranteed by the ICCPR and ICEAFRD.

Respondent's argument mixes notions of self-execution and standing, by creating the "fiction" of cause of action as a requirement for asserting international rights as a defense in criminal proceedings. (See RB 370 ("It is well recognized that courts are not substitutes for international tribunals, and international law does not create the right of an individual to pursue a private human rights suit against a sovereign government.")). Respondent's "cause of action" conception of international law does not correctly describe the import or influence of treaties on domestic law:

> [A] treaty that does not itself confer a right of action . . . is not for that reason unenforceable in the courts. A right of action is not necessary if the treaty is being invoked as a defense. Moreover, treaties have long been enforced pursuant to common law forms of action. Furthermore, there are a number of possible federal statutory bases for rights of action to enforce treaties, the most important being section 1983 and the APA. Only if there is no other basis for the right of action should it be necessary to locate a right of action in the treaty itself.

(Carlos Manuel Vazquez, *Treaty - Based Rights and Remedies of Individuals* (1992) 92 Colum. L. Rev. 1082, 1141-43).

Appellant has standing to assert the violation of any rights guaranteed to him by state statute, federal statute, state constitution, or federal constitution and international law - the "supreme laws of the land." This Court thus has jurisdiction to hear this argument based on the violations of Appellant's rights under Article 14 of the ICCPR (enumerating due process rights relating to criminal proceedings); Article 6 of the ICCPR (providing that the death penalty may be imposed only where these standards are observed); Article 7 of the ICCPR (providing that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment") and Article 6 of the ICCPR (guaranteeing the right to a fair trial at all stages of the proceedings).

D. The California Capital Sentencing Scheme Violates International Law.

Though Respondent concedes that international treaties and customary international law have binding affect as the "supreme law of the land,"[220] the state argues that only "self-executing" treaties protect private rights. (RB 368-69). Respondent argues that a treaty is self-executing only if its framers "intended to prescribe a rule that...would be enforceable in the courts." (RB 369 (citing *Fuji v. state of California* (1952) 38 Cal.2d 718,

---

[220] See David Sloss, *The Domestication of International Human Rights: Non-self-executing Declarations and Human Rights Treaties* (Winter 1999) , 24 Yale J. Int'l L. 129, 146 fn. 97 (Winter 1999); Louis Henkin, Foreign Affairs and the United States Constitution 203 (2d ed. 1996); Jordan J. Paust, *International Law as Law of the United States* 368 (1996); Yuji Iwasawa, The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis (1986) 26 Va. J. Int'l L. 627, 645; and John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis* (1992) 86 Am. J. Int'l L. 310, 316.

722)). Respondent also offers an eight factor test that must be fulfilled, in the absence of legislative intent, for a treaty to be self-executing. (RB 369 (citing *Frolova v. Union of Soviet Socialist Republics* (7th Cir. 1985) 761 F.2d 370, 373; and *American Baptist Churches v. Meese* (N.D. Cal. 1989) 712 F.Supp. 756, 771)). According to Respondent's interpretation, no language in any of the treaties cited by Appellant, especially the ICCPR, indicates that the treaties are self-executing. (RB 369).

Respondent erroneously concludes that: 1) the ICCPR and ICEAFRD are not self-executing; 2) that self-execution is required for the application of the ICCPR and ICEAFRD; and 3) that the ICCPR and ICEAFRD do not serve to protect defendants in criminal cases from discriminatory application of California's laws.[221] To reiterate the ICCPR and ICEAFRD require states to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind." (Article 2(1), ICCPR).[222]

---

[221] Whether or not this Court finds the ICCPR to be self-executing it may still apply the treaty indirectly by comparing the ICCPR's provisions to other rules of decision controlling this case. (See Restatement (Third) of the Foreign Relations Law of the United States (1987) § 114; David Sloss, *supra,* at 145, 146 n. 92 ("Indeed, the United States has told the U.N. Human Rights Committee that the NSE declaration attached to the ICCPR does not preclude indirect judicial application of the ICCPR; See also Concluding Observations of the Human Rights Committee: United States of America, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1413th mtg. at para. 276, U.N. Doc. CCPR/C/79/ Add.50 (1995)).

[222] Appellant recognizes that the Ninth Circuit recently held that the ICCPR is not self-executing. (See *Serra v. Lappin* (9th Cir.2010) 600 F.3d 1191, 1197 (citing *Sosa v. Alvarez-Machain* (2004) 542 U.S. 692, 735)). This opinion is only persuasive, however, and as noted in the argument does not preclude this Court from indirectly applying the principles of the ICCPR. (See, e.g., *Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d 876, 883-84).

Appellant asserts the ICCPR's provisions as part of his criminal defense and based on the proposition that the treaty was automatically incorporated by the United States in lieu of ratification. This determination is supported by Article 2(1) of the ICCPR and the fact that the treaty's creators had the intent that the treaty would be automatically self-executing. (See Restatement (Third) of the Foreign Relations Law of the United States (1987) § 111(4). This Court is thus required to hear Appellant's claims based on the Supremacy Clause of the Constitution. (U.S. Const. Art. VI, cl. 2).

Respondent next argues that "customary international law" is not applicable to Appellant's case. (RB 370). Respondent says that because American courts "are not substitutes for international tribunals, and international law does not create the right of an individual to pursue a private human rights suit against a sovereign government." (*Ibid.* (citing *Hanoch Tel-Oren, supra,* 517 F.Supp. 542)). Respondent contends that "interpretation and application of the provisions of the United States Constitution to [a] question presented by state or federal statutory or constitutional law is ultimately an issue for the United States Supreme Court and the lower federal courts, not customary international law." (RB 370). Respondent thus concludes that Appellant's international law rights have not been violated since under Respondent's interpretation, his state and federal constitutional rights have not been violated.

First, United States courts may not ignore the precepts of customary international law. (*The Charming Betsy* (1804) 6 U.S. (2 Cranch) 64; *The Paquete Habana* (1900) 175 U.S. 677, 694-700; *The Nereide* (1815) 13 U.S. (9 Cranch) 388, 423. In general, customary international law has the same status as domestic legislation. (Restatement (Third) of Foreign Relations Law § 701, Comment E). The obligations imposed by international common law and the attendant rights granted thereby are

owed separately and independently to Appellant.

Second, Appellant was convicted and sentenced in violation of his due process rights. Article 14 of the ICCPR enumerates due process rights relating to criminal proceedings.[223] Article 14 provides for rights including equality before the courts and tribunals; a fair and public hearing by a competent, independent and impartial tribunal; a presumption of innocence; and the rights to obtain the attendance of his own witnesses and to confront witnesses against him. As documented throughout the Opening Brief, Appellant's trial was the product of arbitrariness and discrimination. As documented in this argument, these fundamental errors during Appellant's trial violate the provisions of the ICCPR and the ICEAFRD. California's failure to abide by international law in this regard renders Appellant's conviction and death sentence void.

Third, Appellant was convicted and sentenced to death in violation of his rights under Articles 6 and 14 of the ICCPR, which guarantee the right to a fair trial at all stages of the proceedings. International common law requires that capital defendants be granted special protection above and beyond the protection afforded in non-capital cases. The United Nations' "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (hereafter Safeguards), mandate that: "Capital punishment may only be carried out pursuant to a formal judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the

---

[223] Article 6 of the ICCPR provides that the death penalty may be imposed only where the ICCPR's standards are observed. The United Nations Human Rights Committee has held that when a state violates an individual's due process rights under the ICCPR, it may not carry out his execution. (See, e.g., *Johnson v. Jamaica* (1966) No. 588/1994, H.R. Comm. para. 8.9 [reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed].

International Covenant on Civil and Political Rights." (United Nations, Economic and Social Council Resolution (May 25, 1984). California's failure to require juror sentencing findings to be made unanimously and beyond a reasonable doubt, or even by a preponderance of the evidence, violates Article 14 of the ICCPR. (See Claim X - The Jury Did Not Find, Unanimously and Beyond a Reasonable Doubt, Each Factual Element Essential to Appellant's Conviction; and Claim XXIII - Appellant's Death Sentence must Be Reversed Because All Essential Factors Were Not Properly Charged and Were Not Found Beyond a Reasonable Doubt by an Unanimous Jury).

Fourth, Appellant's death sentence should be void for violations of Article 7 of the ICCPR, which provides that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." Universal Declaration of Human Rights (1948) G.A. Res. 217A (III), U.N. Doc. A/810, at 71. Because of the long delay between arrest and trial and between sentencing and execution, and the conditions in which Appellant is kept, execution of the death penalty in this case violates this provision of the ICCPR. International law bars execution when delay in carrying out the penalty is particularly protracted, a practice referred to as the "death row phenomenon." (See *Pratt and Morgan v. The Attorney General of Jamaica* (Privy Council 1993) 3 SLR 995 2 AC 1, 4 All ER 769 (en banc); *Soering v. United Kingdom* (1989) 161 Eur. Ct. H.R. (Ser. A); *Knight v. Nebraska* (1999) 528 U.S. 990 (Breyer, J., dissenting from denial of certiorari); *Ellidge v. Florida* (1998) 525 U.S. 944 (Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas* (1995) 514 U.S. 1045 (Stevens, J., respecting denial of certiorari); *Lewis v. Attorney General of Jamaica* (P.C. 12 September 2000) 3 WLR 1785)). Because of the long delay in capital cases and the conditions in which Appellant is confined, execution of the death penalty in this case violates international law.

E. This Court Should Reconsider Prior Precedent in the Face of Appellant's Persuasive Claim.

Respondent argues that this Court has already rejected Appellant's claims. (RB 370-71). Respondent argues that in *People v. Ghent,* this Court specifically held that the international law authorities, "similar to those now invoked by appellant do not compel elimination of the death penalty." (RB 371 (citing *Ghent, supra,* 43 Cal.3d at 778-79; *Roldan, supra,* 35 Cal.4th at 744; and *Blair, supra,* 36 Cal.4th at 755)). This Court's reasoning in those cases rests on a faulty assumption that is not justified in fact or law. This Court's prior opinions state that the United States reserved its rights to impose capital punishment, when signing the ICCPR and ICEAFRD. "Given states' sovereignty in such matters within constitutional limitations, our federal system of government effectively compelled such a reservation." *Brown, supra,* 33 Cal.4th at 404. The basis of this assumption, however, is not supported by the United States Constitution, which charges the federal government with, and specifically withholds from the states, all rights and abilities to enter into binding international treaties. (U.S. Con. Art. I, Section 10 ("No state shall enter into any Treaty, Alliance, or Confederation....). By signing the ICCPR and ICEAFRD, despite the reservations, the United States has entered into international treaties which must be regarded as the supreme law of the land. (U.S. Con. Article VI, Clause 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby....). This Court should thus look to the ICCPR and ICEAFRD as controlling authorities or, at the very least, as indirect points of reference for evaluating the constitutionality of the California capital sentencing statutes. This is especially true in light of Appellant's showing here. This

Court should reconsider its holdings denying standing to capital defendants seeking to vindicate the violation of their rights under the ICCPR and ICEAFRD.

F. Conclusion.

Violations of Appellant's rights under international law warrant the granting of relief without any determination of prejudice. The errors alleged in the Opening Brief so infected the integrity of the proceeding against Appellant that the errors cannot be deemed harmless. Respondent has failed to meet their burden of showing harmless error. The violations of Appellant's rights rendered the judgments fundamentally unfair, and resulted in a miscarriage of law. Accordingly, Appellant's death sentence must be reversed.

XXX. APPELLANT'S DEATH SENTENCE WAS IMPOSED THROUGH THE ARBITRARY, DISPARATE, AND UNCONSTITUTIONAL IMPLEMENTATION OF CALIFORNIA'S CAPITAL SENTENCING STATUTES.

A. Introduction.

The circumstances under which a defendant may be deemed eligible for the death penalty must be narrowly drawn and "fit the crime within a defined classification." (*Arave v. Creech* (1993) 507 U.S. 463, 471). Where the eligibility decision is based, in part, on the subjective and changing views of individual prosecutors, there is no "defined classification," "so as to 'make rationally reviewable the process for imposing a sentence of death.'" (*Tuilaepa, supra*, 512 U.S. at 973). Due to the unchecked discretion of the prosecutor in determining actual eligibility, California's system for capital prosecutions is not "rationally reviewable" and violates the California and federal Constitutions. Here, the imposition of Appellant's death sentence violated the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, along with Article 14 of the International Covenant on Civil and Political Rights, and Article 24 of the American Convention on Human Rights.

The Supreme Court has applied principles of Fourteenth Amendment jurisprudence and recognized that fundamental rights cannot be denied based upon arbitrary and disparate statewide "standards." (*Bush v. Gore* (2000) 531 U.S. 98, 106). In *Bush,* the High Court held that, where a single state entity has the power to assure uniformity in implementing a fundamental right, there must be at least *some* assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. (*Id.* at 109). A California prosecutor's choice as to who receives a capital prosecution is the product of an arbitrary and standard less process. (See III AOB 738-39).

At the time of Appellant's's trial, Alameda County had no written policy or published standards regarding the criteria for authorizing a capital case. The office disparately and discriminatorily chose to institute or not institute capital charges; as occurred in Appellant's case, where the Alameda County District Attorney chose to seek the death penalty against a man who was charged with a single victim felony-murder, had no prior convictions for crimes of violence, and no history of violence of any kind - save two alleged scuffles in jail while awaiting trial. The constitution requires more reliability and less discretion in capital cases. The constitution requires that punishment for crimes, and certainly the imposition of the gravest punishment of all, be based on review able, articulable and evenly applied criteria.

Respondent concedes that "it is clear that under California law prosecutors in special circumstance cases have discretion whether or not to seek the death penalty." (RB 372). Respondent concedes that "the law permits - indeed demands - that prosecutors treat different defendant's differently."[224] (*Ibid.*). Respondent, however, says that Appellant's arguments are "unavailing." (*Id.* at 373). In doing so, Respondent does not acknowledge or rebut three of Appellant's constitutional arguments raised under this claim of error.[225] Thus, contrary to Respondent's assertion,

---

[224] This statement contradicts Respondent's earlier statement that capital defendants and non-capital defendants are not distinct classes for purposes of equal protection analysis under the Fourteenth Amendment. (See RB 317 ("The state has [not] adopted a classification that affects two or more similarly situated groups in an unequal manner.") (citing *Massie, supra,* 19 Cal.4th at 571; and *Lucero, supra,* 23 Cal.4th at 717-18)).

[225] Respondent did not address or rebut the following arguments: 1) Appellant was arbitrarily sentenced to death in violation of the Equal Protection Clause because, in capital cases, state law fails to provide assurances that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. (See II AOB 736 (citing *Sioux City*

Appellant's claim does not rise and fall based on this Court's application of *Bush v. Gore* alone. (*Id.* at 373). Instead, an affirmative finding as to any one of the following arguments - which Respondent does not rebut - suffices for reversal of Appellant's capital sentence.

Respondent's failure to address these claims defeats their argument that a ruling on the applicability of *Bush* alone disposes of the issues raised here. Moreover, Respondent's failure to address these arguments undermines its conclusions that Appellant's rights under the Fourteenth Amendment have not been violated by the lack of standards guiding California prosecutors' capital discretion. Herein, Appellant demonstrates that Respondent's meager opposition is unavailing.

B. This Court Has Not Foreclosed Appellant's Argument.

Respondent says that "the People see no need to" substantively address this claim because "[t]his court has repeatedly rejected appellant's contention." (RB 372 (citations omitted)). However, the cases cited by Respondent do not address the arguments raised by Appellant in his Opening Brief. This is apparent by the fact that only *Maury, supra,* 30 Cal.4th at 438[226] was decided after *Bush v. Gore* and none of the cases

---

BrId.ge Co. v. Dakota County (1923) 260 U.S. 441, 445)); 2) The California Constitution creates a liberty interest, protected by the Due Process and Equal Protection Clauses, that criminal laws be "uniformly applied" to all citizens of the state and the California Attorney General's failure to uniformly apply the law, as chief law officer of the state, violates Appellant's rights under the California Constitution. (See II AOB 742); and 3) Appellant's death sentence violates his constitutional rights under the Fourteenth Amendment because the county-by-county disparities in capital prosecutions are not related to homicide rates, but to arbitrary factors, including the personal ideology of the prosecutor, political pressures from constituents, the budgetary constraints of the county, as well as "race, politics, and poorly performing law enforcement systems. (See *Id.* at 742).

[226] *People v. Maury,* however, is inapplicable to this decision because there the defendant contended that his death sentence should "be

address the import of *Bush* on equal protection jurisprudence. Two of the cases hold, in one sentence, that California law is not constitutionally defective because the prosecutor retains discretion whether or not to seek the death penalty." (*Dickey, supra,* 35 Cal.4th at 932; see also *Barnett, supra,* 17 Cal.4th at 1044).

Likewise, in *Haskett, supra,* 30 Cal.3d at 859-60, this Court addressed only whether the defendant "was denied equal protection because the district attorney sought the death penalty in his case, while choosing not to pursue it in other, assertedly similar cases." (citing *Furman, supra,* 408 U.S. at 238). Here, Appellant has shown that the California Attorney General has failed to uniformly apply California's capital sentencing statutes and that district attorney's disparate application of the statutes has resulted in the systemic violation of capital defendant's' constitutional rights to equal protection. Unlike in *Kirkpatrick, supra,* 7 Cal.4th at 1024, Appellant has proffered conclusive statistical evidence documenting that the application of California's capital sentencing statutes has resulted in wildly disparate results. (See Claim XXVII – California's Death Penalty Scheme is Unconstitutional Because It Fails to Properly Narrow the Class of Death Penalty Offenders and Offenses). Respondent has failed to cite any authorities or statistics that foreclose Appellant's meritorious and persuasive constitutional claim.

---

reversed because the district attorney improperly exercised his discretion to seek the death penalty against defendant for reasons contaminated by bias and conflict of interest arising from the district attorney's personal and emotional involvement in the case, and "motivated purely by his own self-interest." (*Maury, supra,* 30 Cal.4th at 438). This Court denied the claim because the defendant had not moved to recuse the prosecutor. (*Ibid.*). Here, Appellant has alleged that his constitutional rights to equal protection have been violated by the disparate and arbitrary application of the death penalty across California.

C. *Bush v. Gore* is Controlling, Applicable to this Capital Case, and Requires the Reversal of Appellant's Death Sentence for Violations of his Rights Under the Fourteenth Amendment.

Alternatively, Respondent argues that Appellant's argument lacks merit because *Bush v. Gore* is inapplicable to this capital case. (RB 373-74). Respondent views the application of *Bush* too narrowly, and argues that the "*Bush* Court expressly limited its analysis to the unique circumstances of the 2000 presidential election process in Florida and the recount procedures." (*Ibid.* (citing *Bush, supra,* 531 U.S. at 109). Respondent thus tries to limit *Bush*'s application to cases involving the "intent of the voter test," "recount mechanisms," and "interpreting physical marks on a physical objects." (*Ibid.*). Respondent argues that because the Supreme Court in *Bush* did not refer to the criminal law when discussing the equal protection challenge, the case is not applicable to criminal cases. (RB 373 (citing *People v. Wells* (1996) 12 Cal.4th 979, 984 n. 4)). Respondent argues that because the case is limited to cases involving ""interpreting physical marks on a physical object," it is irrelevant to consideration of "the prosecutor's thought process." (RB 374).

First, the implementation of the death penalty plainly involves the most fundamental right of all -- the right to life. (See *Ford v. Wainwright* (1986) 477 U.S. 399, 409).[227] Equal protection precludes the state from

---

[227] The fundamental rights of liberty and due process are also implicated when the state imposes its authority to execute one of its citizens, as well as the right to be free from the arbitrary and capricious imposition of the death penalty and the constitutionally express right to be free from cruel and unusual punishment. (See e.g., Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."))

engaging in arbitrary and disparate treatment that would deprive one person of his or her fundamental rights, and requires implementation of adequate statewide standards to prevent such disparate treatment. (See *Bush, supra,* 531 U.S. at 109). California lacks such statewide standards to prevent disparate treatment in implementation of the death penalty.

Second, Respondent does not counter Appellant's assertion that the violation of his fundamental right to life is analogous to the violation of a voter's right to vote as in *Bush v. Gore.* Just as in *Bush,* there is a single state entity (the California Attorney General) that has the power, as well as the duty, to ensure uniformity in implementing the fundamental right. Here, it is the fundamental right to life, as well as the rights to due process and freedom from cruel and unusual punishment. Just as in *Bush*, instead of uniformly implementing regulations regarding Appellant's fundamental right to life, the California Attorney General has allowed charging decisions to be made without any rules, in a standard-less and inconsistent fashion from county to county, and within each county, without any assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. Just as in *Bush,* "the want of those rules here has led to unequal evaluation" of who should live and who should be subject to death, and the standards for deciding who should be charged with the death penalty "might vary not only from county to county but indeed within a single county...." (*Bush, supra,* 531 U.S at 106). Fourth, Respondent's argument that "it is fundamental that a case is not authority for a proposition neither raised nor considered therein" (RB 373 (citing *Wells, supra,* 12 Cal.4th at 984 n. 4)), is without merit in cases involving arguments of constitutional import. In *Wells,* the defendant was convicted of vehicular manslaughter. (*Id.* at 982). He cited felony-murder cases, alleging that the trial court erred in failing to instruct the jury on which conduct of the defendant could constitute an inherently dangerous

misdemeanor. (*Id* at 983.). The case thus turned on the statutory construction of Penal Code sections 192(b)(c). (*Ibid.*).

Here, however, resolution of Appellant's claim requires interpretation and construction of the equal protection clauses of the Fourteenth Amendment and the California Constitution. When interpreting constitutional provisions, this Court is free to look to decisions by the Supreme Court addressing the same constitutional amendment and clause, which Appellant claims has been violated in his case. Fifth, due to its logical implications, many commentators have recognized *Bush's* application to death penalty cases.[228] Here, the need for equality and non-arbitrariness when a California prosecutor decides to seek capital charges and deprive a citizen of his or her life outweighs any benefits stemming from unbridled prosecutorial discretion. No argument for prosecutorial discretion can justify a system that contains no safeguards to ensure that the life of each offender is treated with equal dignity. California's law does not comply with the equal protection clause's "minimum requirement for non-arbitrary treatment" because the California Attorney General has failed to promulgate standards regulating the decision to seek capital charges by district attorney's offices. (*Bush, supra,* 531 U.S. at 105). Worse, California law, including this Court's dictates, does not even provide an "abstract proposition" or a "starting principle" as to how District Attorneys ought to constitutionally make these life - and - death decisions. (*Id.* at 106).

In the absence of any controlling authorities, this Court should look

---

[228] See Laurence Benner et al., *Criminal Justice in the Supreme Court: An Analysis of United States Supreme Court Criminal and Habeas Corpus Decisions* (2001) 38 Cal. W. L. Rev. 87, 91; Michael P. Seng, *Commentary: Reflections on When "We, the People" Kill* (2001) 34 J. Marshall L. Rev. 713, 717; and Cass R. Sunstein, *Symposium: Bush v. Gore: Order Without Law* (2001) 68 U. Chi. L. Rev. 737, 758.

to the experiences of its sister states in urging the California Attorney General to adopt a uniform capital case authorization policy. Out of concern for almost identical disparate statistics in capital charging practices, the New Jersey Supreme Court required its Attorney General to "instill uniformity in charging and prosecuting practices throughout the state." (*State v. Marshall* (1992) 613 A.2d 1059, 1112). Similarly, in Oregon, an assistant district attorney submitted a declaration and testified to the state's capital charging practices as proof that indeed the office utilized "a coherent, systematic policy" when charging the death penalty. (See *Cunningham v. Thompson* (2003) 186 Or.App. 221, 256-57). Here, this Court should follow the lead of its sister states and ensure that capital defendants are receiving equal treatment by requiring the California Attorney General to adopt uniform capital charging policies.

D. Conclusion.

Respondent concedes that there are no statewide standards in California to guide the District Attorneys of each county in determining whether to seek the death penalty against a potentially death-eligible defendant (i.e. where special circumstances are charged). Respondent concedes that the decision is left solely to the discretion of the prosecutor in the county where the crime was committed. Respondent concedes that each county may, and does, in fact impose its own standards (or none at all), for deciding who will face death. Respondent should not be able to concede a constitutional violation without Appellant receiving a remedy for his unconstitutional capital conviction.

While the criteria for death-eligibility set forth in section 190.2 are applicable in all counties, the California Constitution expressly requires the Attorney General to ensure the uniform enforcement of state law under Article V, Section 13. The California Attorney General has failed to apply section 190.2's death-eligibility criteria uniformly or ensure the uniform

application of capital prosecutions in the different counties. Due to the California Attorney General's failure to ensure uniformity, some offenders have been capitally prosecuted and chosen as candidates for the death penalty, while others with similar characteristics have not been singled out for the ultimate penalty.

These decisions have been made solely on the personal idiosyncrasies of the local prosecutor and district attorney's office. Undoubtedly, this process increases the substantial risk of arbitrariness in violation of the Eighth Amendment, and violates principles of due process and equal protection as guaranteed by the Fourteenth Amendment. Here, Appellant's death sentence violated the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, along with Article 14 of the International Covenant on Civil and Political Rights, and Article 24 of the American Convention on Human Rights.

CONCLUSION

For the reasons discussed, Appellant requests that this Court reverse the convictions, the special circumstance finding, and the sentence of death.

DATED: September 23, 2010

Respectfully Submitted,

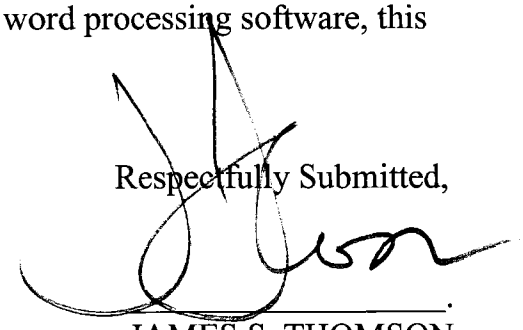
JAMES S. THOMSON
Attorney for Appellant
RICHARD C. TULLY

CERTIFICATE OF COMPLIANCE

I hereby certify that, according to our word processing software, this brief contains 158,158 words.

DATED: September 23, 2010

Respectfully Submitted,



JAMES S. THOMSON
Attorney for Appellant
RICHARD C. TULLY

People v. Tully; California
Supreme Court Case No. S030402

PROOF OF SERVICE BY MAIL

I, AAron Jones, declare:

I am employed in the County of Alameda, State of California. I am over the age of eighteen years and am not a party to the within-entitled action. My business address is 819 Delaware Street, Berkeley, California. On September 23, 2010, I served the within **APPELLANT'S REPLY BRIEF** on the below-listed parties, by delivery or depositing a true copy thereof in a United States mailbox regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed as follows:

Attorney General's Office
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-3660

Alameda County District Attorney
James Anderson
1225 Fallon Street, 9th Floor
Oakland, CA 94612

Melissa Hooper
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Honorable Philip V. Sarkisian
Alameda County Superior Court
1225 Fallon Street, Room 209
Oakland, CA 94612

ATTN. Mary Jameson
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Richard C. Tully
H-58500 3 E/B 105
San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 23, 2010, at Berkeley, California.

AARON JONES