IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JOSE LUPERCIO CASARES,

Defendant and Appellant.

Case No. S025748

(Tulare Superior Ct. No. 027503)

APPELLANT'S REPLY BRIEF

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

HONORABLE DAVID L. ALLEN, JUDGE

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INTRODUCTION

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

I.

THE STATE FAILED TO ADDUCE SUFFICIENT EVIDENCE TO SUPPORT THE FIRST DEGREE MURDER CONVICTION

Respondent has countered appellant's argument that the state failed to adduce sufficient evidence of premeditation and deliberation by reiterating the trial prosecutor's theory that the plan to kill was in effect at the time that appellant and Contreras left the house armed, that the stop at the buyer's house was just a ruse, and that the "concerted action" by appellant and Contreras in shooting and stabbing the victims was "solid evidence of a plan." (RB:56.)

The theory of a plan as proffered by respondent is directly contrary to the only theory the trial court found plausible in light of the verdicts in the trial of Contreras, where the jury acquitted Contreras of conspiracy to commit murder and found the lying-in-wait special circumstance not true. Appellant moved pre-trial motion that the doctrine of collateral estoppel precluded the prosecution from prosecuting appellant with conspiracy to commit murder and with the lying-in-wait special circumstance. (4CT:910-918.) The trial court dismissed the conspiracy count under that doctrine (1RT:171-173; 4CT:952), but denied the motion as to the special circumstance. The court reasoned:

> The co-defendant, Contreras, was convicted of murder either on the theory of aiding and abetting, or felony-murder, or both. However, it is apparent by the jury's finding that they had reasonable doubts as to Contreras' personal knowledge as to when, how, or if Casares would use the handgun.
>
> The evidence shows that Casares abruptly produced the gun and almost immediately used it to shoot Sanchez in the head. It was not an unreasonable finding by the jury that Contreras was not privy to Casares' innermost thoughts about when, how and where to use

the handgun on Sanchez.

(4CT:959-960; see also 1RT:159-160 [court considers declaration filed by Contreras regarding juror interview which indicated consensus that Contreras was taken by surprise by the "sudden act" of Casares in shooting one of the victims, that Contreras reacted by stabbing the other one, and that this may have been why the jury found no conspiracy].) Thus, the trial court found that there was less than "solid evidence" of "concerted action" by appellant and Contreras.

Respondent also argues that is it reasonable to infer from the actions of appellant and his codefendant that appellant's motivation to kill was "to steal the cocaine, to secure their escape, and to ensure that there was no retribution for their actions." (RB:57.) Respondent further argues that this motive supports the verdict of first-degree premeditated and deliberate murder. However, the robbery charge and special circumstance allegation were dismissed for lack of evidence against appellant. (2CT:380-382.) In any event, a motive to rob can be exclusive from a motive to kill. There exists no direct evidence nor sufficient circumstantial evidence that appellant possessed a motive to kill, as opposed to rob, Sanchez. Thus, the evidence of premeditation and deliberation, if any, was circumstantial.

In order to bolster its circumstantial case for first-degree murder, the prosecution argued, as respondent does also, that the existence of a buyer was a ruse and that appellant used that ruse to draw Sanchez out to the location where he was shot. (8RT:1659-1660; RB:56.) There exists no legally sufficient evidence to support this argument, however. The use of circumstantial evidence in proving first-degree murder was discussed in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*). This Court stated:

> Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, we must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citation] or whether it "leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation. [Citation.]"

(*Id.* at p. 25, italics in original.)

In turn, an inference is a "conclusion reached by considering other facts and deducing a logical consequence from them." (Black's Law Dict. (8th ed. 2004) p. 793, col. 2.)

> The strength of an inference may vary widely. In some circumstances, the preliminary facts may virtually compel the conclusion. In other circumstances, the preliminary facts may minimally support the conclusion. But to constitute an inference, the conclusion must to some degree reasonably and logically follow from the preliminary facts. If, upon proof of the preliminary facts, the conclusion is mere guesswork, then we refer to it by such words as speculation, conjecture, surmise, suspicion and the like; and it cannot rise to the dignity of an inference.

(*People v Massie* (2006) 142 Cal.App.4th 365, 373-374.)

The question is whether the evidence in this case supports the People's theory that a buyer was a ruse, that appellant planned to kill Sanchez all along, and that appellant used that ruse to draw Sanchez to the place where he was shot. The answer to that question is a resounding "no." There exists no evidence other than speculation that the buyer did not exist. The evidence that appellant, who was participating in an illegal drug transaction, was armed is not sufficient to support premeditated murder. (AOB:49-50.) And it belies reason that appellant "lured" Sanchez to a

populated residential neighborhood that supplied many witnesses for the prosecution, particularly with the existence of readily available, nearby unpopulated areas. None of this evidence is sufficient to prove beyond a reasonable doubt that appellant committed premeditated and deliberate murder. The mere fact that a defendant has time to consider his actions is, without more, insufficient to support an inference that the defendant *actually* premeditated and deliberated. Indeed, if the simple passage of time was enough to infer premeditation and deliberation, then virtually any unlawful killing with malice aforethought would be first-degree murder.

Respondent posits that the most significant evidence of premeditation and deliberation is the manner in which Sanchez was killed by a single gunshot to the back of the head. (RB:57.) It is difficult to discern another method by which a gun from the back seat of a vehicle could be fired upon a driver in the front seat. This does not evidence premeditation. Assuming arguendo the Court rejects appellant's argument that the evidence showed there was a struggle for the gun when it was fired, while the manner of killing may support a finding of malice necessary to convict appellant of murder, that alone is insufficient to support first-degree murder because the prosecution must show more than intent to kill. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) The prosecution must still establish that the gunshot to the head was pursuant to a "'preconceived design' to take his victim's life . . ." (*Anderson, supra*, 70 Cal.2d at p. 27.) Pulling the hammer back on a loaded gun while it is pointed at another can constitute evidence of an intentional act performed with conscious disregard for human life, i.e., acting with implied malice; however, these actions, without more, are not sufficient to support a finding of premeditation and

deliberation.[1] (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1273-1274.) In this case, there exists no meaningful evidence that appellant's actions are sufficient to support a finding that appellant planned to kill Sanchez.

Respondent dismisses evidence of a struggle – i.e., that Sanchez's watch was pulled up on his left hand (People's Exh. No. 4) – and argues that "the conclusion logically compelled is that the watch likely moved when Sanchez's body was pulled and dumped from the car." (RB:58.) Given that Sanchez's watch was pulled up on his left hand (4RT:744) – the hand that would have reached for the gun held to the left rear of his head – and evidence that he was pulled from the car from the passenger side of the car (4RT:809-810) – thus engaging the right side of Sanchez's body – it is illogical that the watch was moved in the way respondent suggests.

In addition, Lopez testified during this trial, as well as in the Contreras trial, that "he pulled the pistol," indicating a struggle. (6RT:1263-1264, 1302-1303.) Respondent asserts that "[w]hatever ambiguity there might have been in Lopez's initial phraselogy [sic], the record establishes that Lopez ultimately clarified that he was referring to appellant's act of pulling the trigger on the gun that he was pointing at Sanchez's head" citing to "6RT:1318 and 1319-1320 [questions by the court further clarifying that 'pull' the pistol is to 'pull the trigger and fire'];"

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[1] "[C]ocking, aiming and firing a revolver essentially describes the act of shooting a revolver. If these actions could, without more, constitute premeditation and deliberation, we would effectively add killing perpetrated by a revolver to the list of crimes specifically enumerated in section 189 and thereby substantially broaden the scope of first degree murder and eliminate the purposeful division created by the Legislature." (*People v. Boatman, supra,* 221 Cal.App.4th at p. 1274, fn. 4.)

RB:58, fn. 62.) However, an examination of the text shows that the ambiguity is less than clarified by the court's questioning of Lopez:

THE COURT: How would he say in Spanish pull the pistol?

THE WITNESS: To fire the pistol, to fire.

THE COURT: Okay.

MR. LEDDY: All right. Thank you, your Honor.

THE COURT: How would he say in Spanish to take out the pistol? To hold up the pistol in his hand?

THE WITNESS: To grab the pistol.

THE COURT: Okay.

(6RT:1319.) With regard to the court's first questions, in order to clarify the issue, the court's question should have been how Lopez would have said "he fired the pistol" in Spanish and then the answer in English should have been "he pulled the pistol." The key issue here is the Spanish verb the witness used and whether the Spanish verb for "fired" also means "pulled the trigger." Thus, Lopez's testimony was never "clarified" and the evidence – the watch pulled up on Sanchez's left hand – shows that there was a struggle for the gun.

Respondent argues that it is of no moment that the prosecution's case for premeditated and deliberate murder was predicated by asking the jury in closing argument to assume an intent to kill, and then to speculate that appellant planned the killing because the needed to car to flee the scene. (RB:58-59.) However, this Court has noted that, while it is true that the prosecutor's argument is not evidence and that the jury may consider theories other than those put forth in the argument, it is also true that the prosecution theory and argument are logical places to look for an explanation for a finding of premeditation. (*People v. Perez* (1992) 2

Cal.4th 1117, 1162; see also id. at p. 1144, dis. opn. of Mosk, J.) When one looks in that logical place in this case, one sees only a theory based on an assumption followed by layers of speculation.

Finally, respondent argues that the fact that the killing was done in a residential area with many witnesses means only that the "plan" was not "fool proof." (RB:59-60.) Contrary to respondent's assertion, the reasonable inference to be drawn from this evidence is that the plan was not a plan at all, but rather a rash, impulsive act. (Cf. *People v. Hovarter* (2008) 44 Cal.4th 983, 1019, citing *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237 and cases cited therein [a killing committed in an isolated or secluded setting suggests a premeditated plan designed to avoid detection].)

For all the foregoing reasons, as well as those stated in his opening brief, appellant's conviction of first-degree premeditated murder must be reversed; retrial is barred. (*Burks v. United States* (1978) 437 U.S. 1, 18.)

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II.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS OF LYING-IN-WAIT; AS APPLIED TO THIS CASE, THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS VAGUE AND OVERBROAD

The crux of respondent's argument that there exists sufficient evidence of the elements of the lying-in-wait special circumstance is that appellant intended to kill Sanchez from the moment he left his house and that a stop at a buyer's house was just a ruse and part of the plan to kill. (RB:62, 64.) While this Court must accept all logical inferences the jury might have drawn from the evidence, the Court must not accept illogical leaps unsupported by the evidence adduced at trial. It makes no sense for appellant to have stopped and gone up to the door of a house, when the victims were out of his or Contreras' control, able to watch what appellant was doing, unless there was an actual buyer at that house. If there were no buyer, when appellant knocked on a door and a stranger answered, the "ruse" would have been exposed while appellant was not in the car and Sanchez and Lopez were in the public eye and free to leave. If the buyer was in fact a ruse, at any point on the drive appellant could have asked Sanchez to pull over on the side of the road to meet a buyer; there is no logical reason that a buyer had to be located at a home. Thus, the alleged "ruse" is not supported by any logical inference from the evidence.

What the evidence adduced at trial supports is this: appellant got out of the car and went to a house because there was a potential buyer there. When the deal did not work out, appellant told Sanchez and Lopez that the buyer would meet them up the road. While that statement may have been a ruse, there is no evidence that it was formed prior to the failed attempt to

get the buyer at the house to close the deal. And while this evidence supports an inference that, after the failed drug deal, appellant may have been formulating a plan and the intent to rob Sanchez and Lopez of the drugs, it does not rationally support the inference that appellant intended to kill Sanchez. Rather, the evidence – Sanchez was told to pull over while it was still light outside in the middle of a residential area; Sanchez's watch pulled up from his wrist to the middle of his left hand; the shot came from the left rear side Sanchez's head; and Lopez's repeated testimony that "he pulled the pistol" – supports the inference that Sanchez was killed while he and the shooter engaged in a struggle for the gun.

In addition, the facts do not support the district attorney's argument that appellant and Contreras had to kill the victims in order to get away with the robbery. The fact is that the victims were drug dealers who would not have reported a drug robbery to law enforcement. They could have been kicked out of the car at any time and left to their own devices without concern by the perpetrators that law enforcement would be looking for them. One needs only to look at Lopez's long-standing denial that there were any drugs involved in the incident, under oath and even after he was close to mortally wounded by his assailants, to recognized that had the victims been freed after the drugs and car were taken, they would not only have not reported the crime, but they would have denied that any crime occurred.

Respondent argues that the following facts evidence concealment of purpose – purportedly to kill the victims and steal the cocaine: "That this was an intentional killing[2] is evidenced by the fact that appellant armed

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[2] Respondent also uses the term "intentional killing" with (continued...)

himself prior to getting in the car, that apparent ruse he used to place Sanchez at a position of disadvantage, the manner in which he killed Sanchez, appellant's direction to Contreras and the two acting in concert, and appellant's attempt to also kill Lopez." (RB:64-65.)

These facts do not evidence concealment of purpose within the meaning of the special circumstance. First, as argued in his opening brief, arming oneself when setting up and consumating a drug deal does not demonstrate murderous intent, but rather self-preservation. (AOB:70; Argument I, *ante*.) Second, the only reasonable inference from the evidence, as shown above, is that the stop at the buyer's house was not a ruse and that appellant formulated a plan to steal the drugs after the drug deal failed. Third, the evidence shows Sanchez was killed in a struggle for the gun. (See AOB:54-57.) Fourth, as explained in Argument I, *ante*, the trial court's ruling dismissing the conspiracy count indicates that it did not believe the defendants "acted in concert." And fifth, appellant's shooting at Lopez after Sanchez was shot does not evidence a deliberate plan to kill

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[2](...continued)
imprecision. An intent to kill is not sufficient for a finding of premeditation and deliberation:

> A deliberate intent to kill . . . is a means of establishing malice aforethought and is thus an element of second degree murder in the circumstances of this case. In order to support a finding of premeditation and deliberation the manner of killing must be, in the words of the *Anderson* court, "so particular and exacting" as to show that the defendant must have intentionally killed according to a "preconceived design."

(*People v. Rowland* (1982) 134 Cal.App.3d 1, 9.) An intentional killing may constitute nothing more than a second-degree murder. If the killing in this case was nothing more than intentional, then the special circumstance would not apply.

Sanchez or even an intent to kill Lopez that pre-existed the shooting of Sanchez. The facts of this case – absent the speculation injected by the prosecution's argument – were insufficient to prove the lying-in-wait special circumstance beyond a reasonable doubt.

Respondent further argues that appellant's comparison of the facts of his case to other cases in which the lying-in-wait special circumstance was found true is misplaced, since "each case necessarily depends on its own facts." (RB:66, citing *People v. Mendoza* (2011) 52 Cal.4th 1056, 1075.) If respondent means that examining other cases provides no guidance in assessing evidentiary sufficiency, then respondent is wrong. Literally, the proposition that simply comparing facts in different cases does not demonstrate evidentiary sufficiency is correct. However, the analytic process involved in inter-case comparison is to look to the elements and compare those to the facts that prove the elements. Appellant has done so above and in his opening brief. The comparison of the facts of his case to that of other cases is then valid as the second step when one looks to what types of acts the courts have in the past considered sufficient. Appellant has demonstrated that his case is distinguishable from every other case in which this Court has found sufficient evidence of the lying-in-wait special circumstance.

With regard to the issue of whether there was as substantial period of watching and waiting, respondent argues that appellant is incorrect in his assertion that the stop at the buyers house where the victims left and went into a store constituted a "cognizable interruption" in events such that the period of watchful waiting had to begin when the four got back into the car and drove away. (RB:66.) In support, respondent cites *People v. Edwards* (1991) 54 Cal.3d 787, 825 (*Edwards*), for the proposition that "[a] killer

need not view his intended victim during the entire period of watching and waiting." *Edwards* in inapposite. Edwards was first seen entering a campground about three hours before he shot two young girls. (*Ibid.*) He then reentered it, and observed his victims going in the opposite direction. (*Ibid.*) Rather than shoot them when he first saw them, he turned around, followed them, and, when they had reached the most isolated spot in the area, struck. (*Ibid.*) The Court's proposition that a defendant need not view his intended victim during the entire period of watching and waiting referred to the short period of time in which it took Edwards to turn his truck around, not to the three hour gap between the first time he entered the park and when he reentered it. Appellant agrees that in *Edwards* there was no "cognizable interruption" in the continuous flow of lethal events during the time it took Edwards to turn his truck around.

Respondent next argues that even if appellant were correct and that the period of watchful waiting began only when the four got back into the car and drove away, then that period of time was sufficient to negate any inference that the killing was from sudden impulse or panic. (RB:67-68.) However, the evidence in this case showed no plan to kill. Rather, after the deal with the buyer fell through, and in the short period of time it took appellant to drive from the store to the location Sanchez was shot (.3 miles), appellant decided to take the drugs, and Sanchez was shot over a struggle for the gun.

Respondent also objects to appellant's citation to Google Maps for the time it would take to drive .3 miles – less than 30 seconds – as that resource is outside the record on appeal. (RB:68-69, fn. 67.) However, internet citations are a valid secondary source according to the California Style Manual (4th ed. 2000) §3.15, pp. 108-109, and have been used in any

number of opinions of this Court and in qualitatively more debatable contexts. (See, e.g., *People v. Diaz* (2011) 51 Cal.4th 84, 97, fn.12 [citing internet resources as authority for proposition that drug traffickers commonly use cell phones]; *In re Roberts* (2005) 36 Cal.4th 575, 585, fn. 4 [citing internet resource to support Attorney General's contention that volume of habeas corpus petitions seeking relief from unfavorable parole board determination has grown due to Three Strikes Law]; *In re W.B., Jr.* (2012) 55 Cal.4th 30, 46 [citing internet resource to support contention that sociological research has demonstrated a strong link between childhood abuse or neglect and later delinquent behavior].) In any event, the prosecution had the burden of establishing that the drive from the store to the location of the shooting was long enough to allow one to premeditate and deliberate, and it failed to adduce that evidence at trial. Thus, it failed to carry its burden of proving the lying-in-wait special circumstance.

Respondent further argues "that the jury's finding that Sanchez was surprised cannot seriously be disputed." (RB:69.) Respondent argues that it is "unaware of any cases that hold that the brief moment it took Sanchez to hand appellant the drugs was sufficient to make the killing something other than a surprise attack from a position of advantage on an unsuspecting victim." (RB:70.) Respondent then compares the facts of this case to that of *People v. Lewis* (2008) 43 Cal.4th 415, 514-515, in which this Court found that victims of ATM robberies who were driven around before being killed knew their life was in danger and therefore were not "surprised" within the meaning of the lying-in-wait special circumstance. That there are no such cases is of no moment, since the facts of this case establish that the victim was not surprised – he knew his life was in danger and he struggled for the gun. (See *People v. Thomas* (1992) 2 Cal.4th 489, 516

[comparing facts of different cases did not demonstrate the insufficiency of the premeditation evidence in the case at hand].) Further, the evidence adduced at trial established that Sanchez was nervous to be involved in the drug deal (5RT:1133, 1142); clearly he comprehended the potential for violence when involved in that kind of illegal activity.

For all the forgoing reasons, as well as those set forth in appellant's opening brief and in Argument I, *ante*, the lying-in-wait special circumstance must be reversed for insufficiency of the evidence and his death sentence vacated. Retrial of the special circumstance is barred. (*People v. Lewis, supra*, 43 Cal.4th at p. 515 [Citations].)

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III.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO NARROW THE CLASS OF DEATH-ELIGIBLE DEFENDANTS OR ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED AND THOSE IT IS NOT

Appellant argued in his opening brief that the lying-in-wait special circumstance is unconstitutional, and urged this Court to revisit its prior holdings to the contrary. (AOB:84-93.) Respondent simply relies on this Court's prior decisions without adding new arguments. (RB:72-76.) Accordingly, the issues relating to the constitutional challenge are joined and no reply is necessary.

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IV.

THE LYING-IN-WAIT INSTRUCTIONS OMITTED KEY ELEMENTS OF THE SPECIAL CIRCUMSTANCE, AND WERE ERRONEOUS, INTERNALLY INCONSISTENT AND CONFUSING

Appellant argued in his opening brief that the lying-in-wait special circumstance instructions were not only confusing and contradictory, but failed to explain to the jury that the key elements of the special circumstance – concealment of purpose and watchful waiting for a time to act – referred to a concealed intent to kill and waiting for a time to launch a lethal attack. (AOB:95-103.) Respondent disagrees, arguing that this Court specifically rejected appellant's argument in a number of cases, most specifically in *People v. Streeter* (2012) 54 Cal.4th 205, 251. (RB:76-82.) Appellant counters that the reasoning of his arguments in his opening brief that CALJIC No. 8.81.15 (5th ed. 1989 rev.) omits key elements of the concealment of purpose and watchful waiting for a time to act is sound and respectfully asks the Court to reconsider its holding to the contrary.

Additionally, appellant argues that the instruction failed to apprise the jury that, as a matter of law, there existed a "cognizable interruption" when appellant, Sanchez and Lopez got out of the car and went in different directions, and that therefore the period of "watchful waiting" began, as a matter of law, when the three returned to the car and drove off. (AOB:99.) Respondent counters that this Court has found the instruction adequately explains the concept of "cognizable interruption" in *People v. Michaels* (2002) 28 Cal.4th 486, 516-517) and that appellant was required to request a "pinpoint instruction" to clarify this point for the jury. (RB:81.)

However, the prosecution carried the burden of proving each and every element of the special circumstance allegation and the court had an

obligation to instruct the jury as to the prosecution's burden. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) In this case, the jury was instructed that the lying-in-wait special circumstance required that: "For a killing to be perpetrated while lying in wait, both the concealment *and* watchful waiting as well as the killing must occur in the same time period, or an uninterrupted attack commencing no later than the moment concealment ends." (Italics added.) Here, there existed a clear or "cognizable interruption" in this case – when appellant left the car and walked to a nearby house and Sanchez and Lopez went into the store and had a beer – which legally tolled the period of "watchful waiting" such that the relevant time for this element of the special circumstance began when the three joined Contreras in the car and drove off. The trial court failed to instruct the jury sua sponte that, as a matter of law, the period of watchful waiting could not begin until after the cognizable interruption. The failure to so instruct lightened the prosecution's burden of proof in violation of appellant's rights to due process and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and undermined the need for heightened reliability at all stages of a capital case. (*In re Winship* (1970) 397 U.S. 358, 364; *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524; *Beck v. Alabama* (1980) 447 U.S. 625, 638; see also AOB:99-103.) Appellant's conviction and death judgment must be reversed.

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VII.

INSUFFICIENT EVIDENCE SUPPORTED THE EVIDENCE IN AGGRAVATION INTRODUCED UNDER FACTOR (B); REVERSAL OF APPELLANT'S DEATH SENTENCE IS REQUIRED

In appellant's opening brief, he argued that several categories of Penal Code section 190.3, subdivision (b) ("factor (b)") evidence should not have been admitted during the penalty phase and prejudiced the jury's determination of his sentence. Respondent argues that each contested category was properly admitted, and even if improperly admitted, the introduction of the evidence was harmless. Appellant addresses each improperly admitted incident in aggravation in turn.

A. Because The Prosecution's Star Penalty Phase Witness Testified That Appellant Acted Under Duress, There Existed Insufficient Evidence To Support Incident in Aggravation 2F, The Kidnaping And Repeated Rape Of Rosa Baca

Appellant, a borderline mentally retarded minor,[3] was forced under threat of death to have sexual relations with Rosa Baca, whom his father had kidnaped to be his son's "wife," just as he had kidnaped appellant's mother to be his own "wife" prior to appellant's birth. (AOB:121-144;

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[3] Respondent cites the incorrect statement of the prosecution that appellant was 18 at the time of the Baca incident. (RB:95.) However, respondent also correctly notes that if the incident occurred in 1972, as Baca testified, appellant would have been 15 or 16 at the time. (RB:95-96 fn.77.) Appellant's young age is corroborated by Dr. Blak's testimony that appellant came to the United States when he was 16. (9RT:2032.) To the extent relevant, appellant was possibly younger than 16 when the Baca kidnaping occurred, given that after his father's death, appellant relocated to another part of Mexico prior to immigrating to the United States. (9RT:2030-2032.) Appellant's father was killed approximately five months after the Baca kidnaping. (RB:42; 9RT:1956.)

9RT:2149-2151.) Respondent concedes, as he must, that the victim of these crimes, Rosa Baca, testified unequivocally that "every time she had intercourse with [appellant] . . . it [was] because the father ordered [him] to do it." (9RT:1972; see also 9RT:1977 [Baca slept with Jose "only when the father would decide that I have to sleep with him" and the father would be present].) And the record clearly establishes that Baca personally witnessed appellant's father threaten to kill appellant several times if he did not do as he was ordered. (9RT:1972.) Baca likewise testified that appellant told her that he did not want to participate and the only reason he did not defend her was his fear of being killed by his father. (9RT:1978-1980.)

Respondent expressly concedes that appellant and his family were subject to "significant" physical abuse by his father, who "apparently had a penchant for threatening to kill everyone in the household." (RB:94 fn. 74, 99.) The abuse suffered by appellant and his family was indeed extraordinarily severe: appellant's father savagely beat appellant during his childhood with cordons of wood, (9RT:2152; see also 9RT:2031, 2116-2117), "severely" beat his son starting at age five (9RT 2027), repeatedly beat and strangled appellant and his family members into unconsciousness (9RT:1986; 9RT:2145.), and repeatedly hung multiple family members by the neck from the rafters of their home. (9RT:2135-2139; 2142; see also 9RT:2026 [appellant suffered a "very intense, longstanding history of victimization"].)

The prosecutor's theory to the jury, which verged on the preposterous, was that it's own witness, the victim of kidnaping and repeated sexual assaults, was somehow lying about the fact that appellant's father was present and coerced each of her and appellant's sexual encounters. (10RT:2211-2212.) Perhaps wisely, respondent makes no

attempt to challenge the credibility of Baca's testimony that appellant's father ordered each assault. Instead, respondent conjures up a new theory, never even mentioned by the prosecution to the jury, in attempt to salvage this factor (b) evidence.

According to respondent, even if Jose Casares, Sr. was present and ordered every sexual assault by his borderline mentally retarded minor child under threat of death, these statements were mere "general threats" giving rise to a nonspecific "fear of future harm," insufficiently "immediate" to establish the defense of duress. (RB:99-100.) Moreover, respondent asserts that, to the extent that appellant might have reasonably feared only imminent great bodily harm, this would be insufficient to establish the defense of duress. (RB:100 fn. 79.) Respondent's formalistic attacks, not anchored in the record, do nothing to controvert the reality conclusively established at appellant's trial: that appellant, a borderline mentally retarded child, along with his family, suffered chronic, unspeakable physical and sexual abuse at the hands of his father and had no realistic possibility of defying him. For this reason, the evidence should never have been presented to the jury as aggravation.

1. The Issue Is Not Forfeited

Respondent argues that issue of the insufficiency of the Baca evidence is forfeited because "appellant failed to object in the trial court to the introduction of [the Baca] evidence, nor did he ask to have it stricken once the content of Rosa B.'s testimony became known." (RB:98.) As to appellant's initial withdrawal of his request for a *Phillips* hearing, he can hardly be faulted. Trial counsel correctly recognized "that if the [police] reports we have are to be believed, [then] there would be substantial evidence to go to the jury with." (1RT:187.) However, the police reports

he was provided were not the whole story. It was only *after* Baca's trial testimony, which like that of all other percipient witnesses confirmed that appellant acted under duress, that it became clear that no substantial evidence existed to support this factor (b) incident.

Subsequent to Baca's testimony, trial counsel certainly argued to the sentencing body that the evidence was insufficient to sustain a factor (b) finding. (See 10RT:2229-2231 [defense penalty closing argument].) The only issue for this Court to decide relating to forfeiture is thus whether appellant should be penalized for the fact that trial counsel did not, in addition to *arguing* that the evidence was insufficient, additionally move to strike the Baca incident based on sufficiency grounds after her testimony concluded.

Under the law existing at the time of the trial, no requirement existed for such a motion to preserve the issue of sufficiency for review. Although this Court subsequently, and incorrectly, interposed such a requirement in 1993, *People v. Montiel* (1993) 5 Cal.4th 877, 928 & fn. 23, appellant's sufficiency claim may not be forfeited based on subsequent legal developments. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 643 ["because at the time of this trial [this Court] had not expressly held that an objection is necessary to preserve [the claimed] error on appeal, we do not apply this rule here."]; *People v. Collins* (1986) 42 Cal.3d 378, 389 [applying subsequently created requirements for preserving claims would result in the "brutal absurdity of commanding a man today to do something yesterday. [citations and internal quotations omitted]."]

a. Relevant Legal Principles and Developments in Case Law

"Parties may generally challenge the sufficiency of the evidence to support a judgment for the first time on appeal because they 'necessarily objected' to the sufficiency of the evidence by 'contesting [it] at trial.' [citations]." (*People v. McCullough* (2013) 56 Cal.4th 589, 596; see *People v. Rodriguez* (1998) 17 Cal.4th 253, 262, 70 Cal.Rptr.2d 334, 949 P.2d 31 [sufficiency challenge to prior "strike" allegation not forfeited by lack of objection]; cf. *In re Troy Z.* (1992) 3 Cal.4th 1170, 1180–1181 [guilty plea or no contest plea waives challenge to the sufficiency of the evidence].)

Thus, although "'generally, points not urged in the trial court cannot be raised on appeal[,] [Citation.] [t]he contention that a judgment is not supported by substantial evidence, [] is an obvious exception.' [Citation.] . . . [Q]uestions of the sufficiency of the evidence are not subject to forfeiture." (*People v. Butler* (2003) 31 Cal.4th 1119, 1126-1128, & fn. 4; *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17 ["contention that a judgment is not supported by substantial evidence" is an "exception" to the rule that "points not urged in the trial court cannot be raised on appeal"].))

The cognizability of sufficiency claims for factor (b) evidence absent an objection at trial first arose in *People v. Boyd* (1985) 38 Cal.3d 762 (*Boyd*), which held that section 190.3 required evidence of a factor (b) crime to be proved beyond a reasonable doubt. In *Boyd,* this Court assessed the sufficiency of several threats of violence, some of which were objected to and some of which were not. (*Id.* at pp. 777-778.) With regard to the unobjected to factor (b) incidents, the Court held "[w]e need not now decide whether the defense's failure to object bars it from raising this point on

appeal." (*Id.* at p. 777.)

This Court subsequently considered a sufficiency claim in *People v. Thompson* (1988) 45 Cal.3d 86 (*Thompson*). In *Thompson*, the court considered, among other factor (b) evidence, the defendant's "alleged discussion with [a witness] Del Frate about killing [a witness at trial against the defendant] Leitch and disposing of Leitch's car and body to make it appear he had fled." (*Id.* at 100, 118, 126.) The *Thompson* Court first noted the rule in *Boyd* that "the trial court should not permit the penalty jury even to consider such a crime as an aggravating factor unless there is sufficient evidence to find its essential elements true under the reasonable doubt standard." (*Id.* at p. 127.) Although the record does not suggest that trial counsel objected to the sufficiency of this factor (b) evidence, the Court held with respect to the alleged solicitation of murder that "[s]ince there was insufficient substantial evidence to establish violation of section 653f as a separate crime, we conclude that whatever the relevance of this evidence at the guilt phase to show defendant's consciousness of guilt, the trial court should not have permitted it to be argued under factor (b) at the penalty phase." (*Id.* at p. 129.) However, the court found that any error was harmless. (*Ibid.*)

In *People v. Carrera* (1989) 49 Cal.3d 291 (*Carrera*), the Court addressed a claim that the defendant had threatened other inmates in county jail. (*Id.* at p. 341.) On appeal, the defendant claimed that the evidence was insufficient to demonstrate that he had committed any crime because he had not communicated the threat to the other inmates. (*Ibid.*) The Court noted:

> Defendant raised no objection to the sufficiency of the evidence, however (see *Boyd, supra*, 38 Cal.3d at pp. 777–778, 215 Cal.Rptr. 1, 700 P.2d 782), and thus offered the trial court no occasion to consider in a hearing outside the presence of the jury whether there

> was sufficient evidence to prove each element of the offense. Even if the contention is properly before us on appeal, Jones testified not only that he overheard defendant making the threat, but also that the persons to whom defendant allegedly made the threat then relayed the threat to him. There was sufficient evidence to permit the jury to consider whether defendant, acting through the other inmates, threatened Jones within the meaning of the statute.

(*Ibid.*)

The *Carrera* Court's citation to *Boyd* (which as noted previously left open the issue of forfeiture of factor (b) sufficiency claims), the *Carrera* Court's assumption that the issue was properly before them, as well as the Court's total failure to engage in any analysis of the sufficiency exception to forfeiture, indicates that the Court again left the issue open. Thus, whether forfeiture of factor (b) sufficiency claims was even possible was still an open question at the time of trial. And the suggestion of *People v. Thompson, supra*, 45 Cal.3d at p. 129 was that such claims would be addressed for the first time on appeal.

In a separate line of cases dealing not with *sufficiency* of the evidence supporting the factor (b) "crime," but with whether the crime was one involving "force or violence" as required under factor (b), this Court held as early as 1990 that failure to object on *this* ground forfeited any complaint of this form of *Boyd* error on appeal. (See *People v. Clark* (1990) 50 Cal.3d 583, 625 ["In the face of an express statutory command governing the admissibility of evidence a party may not complain that failure to object is excused because he could not be held to anticipate a judicial decision holding that the statute means just what it says"]; *People v. Pinholster* (1992) 1 Cal.4th 865, 960 [following *Clark*]; see also *People v. Nakahara* (2003) 30 Cal.4th 705, 720 [factor (b) "force or violence"

component is legal question for judge, not factual question whose sufficiency is determined by the jury].)

The question of whether this Court's general forfeiture exception for sufficiency claims applied to factor (b) sufficiency claims was first considered by this Court in *People v. Montiel, supra*, 5 Cal.4th at p. 928 in 1993. Without citation to any prior authority on the issue, the Court explained its rejection of the general rule of no forfeiture of sufficiency claims in a footnote:

> Even if defendant need do nothing at trial to preserve an appellate claim that evidence supporting his *conviction* is legally insufficient, a different rule is appropriate for evidence presented at the penalty phase of a capital trial. There the ultimate issue is the appropriate punishment for the capital crime, and evidence on that issue may *include* one or more other discrete criminal incidents. (§ 190.3, factors (b), (c).) If the accused thinks evidence on any such discrete crime is too insubstantial for jury consideration, he should be obliged in general terms to object, or to move to exclude or strike the evidence, on that ground.

(*People v. Montiel, supra*, 5 Cal.4th at p. 928, fn. 23 italics added.)

The forfeiture holding in *Montiel* with regard to sufficiency claims has been reiterated without further meaningful analysis by subsequent decisions of this Court. (See, e.g., *People v. Livingston* (2012) 53 Cal.4th 1145, 1175; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1060.)

b. The Reasoning of *Montiel* Is Unpersuasive and Should Be Reconsidered

According to perfunctory reasoning of *Montiel*, the reason for a "different rule" for forfeiture of sufficiency claims at penalty and guilt is simply the fact that the "ultimate issue is the appropriate punishment for the capital crime" which may involve multiple underlying criminal incidents. (*People v. Montiel, supra*, 5 Cal.4th at p. 928, fn. 23; see also *People v.*

Livingston, supra, 53 Cal.4th at p. 1175 [distinction is simply that "evidence was admitted at the penalty phase of a capital trial as aggravating evidence, not to support a conviction for that crime"].) This reasoning provides no basis for a distinction in appellate review between sufficiency claims at guilt and penalty.

The reason claims relating to the sufficiency of guilt evidence are deemed unforfeitable is that "[p]arties may generally challenge the sufficiency of the evidence to support a judgment for the first time on appeal because they 'necessarily objected' to the sufficiency of the evidence by 'contesting [it] at trial.' [citations]." (*People v. McCullough, supra*, 56 Cal.4th at p. 596.) Here, appellant unquestionably contested the sufficiency of the factor (b) evidence at his penalty phase trial, just as he contested the sufficiency of the evidence of his guilt.

Nor do this Court's cases create a meaningful difference in forfeiture between sufficiency claims of contested proceedings that affect guilt versus those that merely affect sentence. In *People v. Rodriguez, supra*, 17 Cal.4th 253, for instance, the Court addressed the sufficiency of the evidence supporting a prior felony "strike" under the three strikes law, section 666. (*Id.* at pp. 261-262.) The Court found that the prosecution's abstract of judgment offered at trial to support one of the strike allegations was insufficient to sustain the trial court's finding and reversed. (*Id.* at p. 262.) The Court rejected the Attorney General's forfeiture argument that the defendant raised the issue for the first time on appeal, stating: "[t]o the contrary, defendant at the outset mounted the most complete challenge possible to the strike allegation: He demanded a trial." (*Ibid.*). In short, the *Rodriguez* Court applied, to a fact affecting *only* sentence and not guilt, the well-established rule that sufficiency of the evidence may be raised on

appeal because the defendant "'necessarily objected' to the sufficiency of the evidence by 'contesting [it] at trial.' [citations]." (*People v. McCullough, supra*, 56 Cal.4th at p. 596; see also *People v. Rodriguez* (2004) 122 Cal.App.4th 121, 129 [no forfeiture for insufficiency claims relating to sentencing enhancements].) The same is true here.

There is simply no meaningful difference between evidence supporting prior strike allegations, or other sentencing enhancements, and factor (b) evidence. To use the terminology of *Montiel*, both are "evidence" on the sentencing issue which "may include one or more other discrete criminal incidents." (*Montiel, supra*, 5 Cal.4th at p. 928, fn. 23.) Like both guilt findings and many other sentencing enhancements, the prosecution bears the burden of proving factor (b) evidence beyond a reasonable doubt. (*Boyd, supra*, 38 Cal.3d at p. 778; *People v. Rodriguez, supra*, 122 Cal.App.4th at p. 128 ("[t]he prosecution has the burden of proving beyond a reasonable doubt each element of a prior conviction used to enhance a defendant's sentence"] see also *People v. Saunders* (1993) 5 Cal.4th 580, 602 (dis. opn. of Kennard, J.) [explaining that sufficiency review is not forfeitable in a criminal case because "in this situation [] it is the prosecution, not the defendant, that bears the burden of proof."].) Nor does the fact that there may be *multiple* factor (b) incidents change the calculus. There were multiple felony strikes in *Rodriguez*, but the court nonetheless reversed on unforfeitable sufficiency even though its "decision to reverse this finding does not affect defendant's sentence . . . [u]nless the trial court exercises its discretion to dismiss one or more strikes." (*People v. Rodriguez, supra*, 17 Cal.4th at p. 262, fn. 6.)

The terse logic of *Montiel* also does not hold up in light of how and when factor (b) sufficiency is treated by trial courts and weighed by juries.

Under the reasoning of *Montiel, supra*, 5 Cal.4th at p. 928, fn. 23, the defendant must necessarily "object, or [] move to exclude or strike the evidence" in support of each insufficient factor (b) incident to preserve the claim for appellate review. But it is entirely unclear when the time is ripe for such an objection or motion to be made. As this case and others attest, preservation of an issue of sufficiency of evidence at trial often cannot properly be accomplished at an in limine *Phillips* hearing: the trial court does not make the ultimate sufficiency determination based on all available evidence at such a hearing as it may lack, or indeed properly exclude, critical defense evidence. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 225 [trial court need not consider defense rebuttal testimony at the *Phillips* hearing].) In fact, the trial court need not hold a *Phillips* hearing at all, and can thus opt instead to let the jury sort out the substance of factor (b) allegations. (*See Id.* at p. 225 ["such a hearing is not required"]; *People v. Young* (2005) 34 Cal.4th 1149, 1209 [the *Phillips* plurality "did not, . . . require such an inquiry. [Citations.] Nor did we predicate the admission of evidence of unadjudicated criminal conduct on the outcome of such an inquiry."].)

Nor does it suffice, as again demonstrated by this case, to require a defendant to "exclude or strike the evidence" (*Montiel, supra*, 5 Cal.4th at p. 928, fn. 23) after new evidence demonstrating insufficiency is adduced during trial. The point at which evidence tips from relatively weak to legally insufficient is frequently difficult to discern as a matter of trial practice. In this case, appellant theoretically could have considered objecting after the testimony of Baca. But the trial court undoubtedly would have found such an objection premature, because there were several witnesses who would discuss the Baca assaults later in the trial, any one of

whom could have potentially grounded the prosecution case in sufficient evidence or, alternatively, tipped the scales into insufficiency. Requiring renewed sufficiency objections throughout the trial imposes an undue burden and delay, particularly where it is entirely obvious from the substance of the penalty phase that the defense is contesting the sufficiency of the factor (b) evidence at issue.

Even a formalistic requirement of a motion to strike at the close of evidence would be both legally premature and ineffectual. It would be premature because sufficiency error does not even *occur* until the jury finds against the defendant. (Cf. *People v. Guiton* (1993) 4 Cal.4th 1116, 1125 [sufficiency error "occurs when a jury, properly instructed as to the law, convicts on the basis of evidence that no reasonable person could regard as sufficient"]; see also *People v. Scott* (1994) 9 Cal.4th 331, 356 [no forfeiture absent "a meaningful opportunity to object"].) And regardless, if by the close of the penalty phase there is insufficient evidence to support the factor (b) finding, it was error to instruct the jury on the factor (b) evidence at issue in the first place. (*People v. Dunkle* (2005) 36 Cal.4th 861, 929, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22 ["[W]e do not deem forfeited any claim of instructional error affecting a defendant's substantial rights."].) As explained in the opening brief, it is not only the presentation of the Baca evidence itself, but also attaching the label "aggravating" to it that creates constitutional error. (AOB:126-127.)

Even if the close of evidence were the legally appropriate point at which to address claimed insufficiency and secure exclusion, striking the evidence at this juncture would do little to prevent the precise claim from being raised on appeal, because the jury's thought process would have been

infected by presentation of the evidence in the first place. In other words, in the event that a meritorious motion to strike or exclude were granted, the very same facts would be repackaged as a constitutional claim that the jury's individualized weighing process had been tainted by irrelevant and inflammatory evidence, despite the court's instruction to strike it from consideration after the evidence was presented. Thus, the purposes of the forfeiture doctrine would not be served. (Cf. *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 ["[t]he purpose of the waiver doctrine is to bring errors to the attention of the trial court so they may be corrected or avoided"].)[4]

And, specific to the facts of this case, it is not clear that appellant desired to "exclude or strike the evidence," as suggested by *Montiel, supra*, 5 Cal.4th at p. 928, fn. 23, after the factor (b) evidence was demonstrated to be insufficient at trial. The fact that appellant's father had coerced him into sexual violence was arguably mitigating evidence. Forcing the trial court to strike or exclude the evidence could therefore theoretically undermine the defense case. And a motion to strike or exclude the evidence would not cure the error: It was not only introducing the evidence itself, but also instructing the jury that it could treat that evidence as aggravating that created the constitutional violation. (See *supra*; AOB:126-127.)

Finally, given the heightened standard for reliability in death determinations, *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, forfeiture should not be applied to factor (b) sufficiency claims. Given the unique severity of the death penalty, it is critical to ensure that evidence of a

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[4] Non-meritorious sufficiency claims can easily be disposed of by this Court as failing to demonstrate the difficult-to-satisfy threshold for such claims or, alternatively, as harmless.

defendants' past crimes used to put them to death is not wholly insufficient. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1138 (Horton) [allowing collateral challenge of prior murder conviction because "the unique nature of the death penalty imposes a special need for reliability in the determination of the applicability and appropriateness of this ultimate sanction."].) The gravity and seriousness of a death judgment should not be undermined by insubstantial allegations of wrongdoing that may inflame and confuse a jury.

As Justice Arabian noted in his concurrence in *People v. Welch* (1993) 5 Cal.4th 228, when the allegedly forfeited claim "implicat[es] fundamental principles of policy and constitutional guaranties . . . the prerequisite of an objection to appellate review would frustrate rather than subserve the interests of justice." (*People v. Welch, supra,* 5 Cal.4th at p. 228,(conc. opn. of Arabian, J.).) The importance of rendering a fair and reliable death judgment based on substantiated evidence implicates just such important policy and constitutional guarantees, regardless of whether defense counsel argued the insufficiency of evidence to the judge in addition to arguing it to the jury.

c. Because *Montiel* Was Decided after Apellant's Trial, his Claim Should not Be Subject to Forfeiture

As explained recently in *McCullough*, this Court's "application of the forfeiture bar to sentencing matters is of recent vintage," arising *after* appellant's trial. (*People v. McCullough, supra*, 56 Cal.4th at p. 594 [citing *People v. Welch, supra,* 5 Cal.4th at p. 228; and *People v. Scott, supra,* 9 Cal.4th at p. 331].) Prior to *Welch* and its progeny, for instance, the Court of Appeal in *People v. Ramos* (1980) 106 Cal.App.3d 591 disapproved of by *People v. Scott, supra*, 9 Cal.4th at p. 353 stated that since a defendant's

sentencing arguments "resemble[d]" a challenge to the sufficiency of the evidence and questioned "the validity of certain aggravating factors," such arguments could not be barred on appeal as waived. (*Id.* at p. 598, fn. 1.) Cases such as *Welch* and *Scott,* altering these longstanding no-forfeiture rules for certain sentencing errors, were applied *prospectively* because of potential unfairness to parties who may have thought these sentencing error claims could be addressed for the first time on appeal. (*People v. McCullough, supra*, 56 Cal.4th at p. 594.) Similarly in this case, trial counsel may have reasonably relied upon the longstanding principle that no objection to sufficiency claims would be necessary when a penalty phase trial on the factor (b) evidence was held.

People v. Montiel, supra, 5 Cal.4th at p. 877, like *Welch, supra*, 5 Cal.4th 228, abruptly altered the legal landscape applicable to sufficiency claims. It explicitly stated that it was changing the rules of the game, noting that "a different rule" for forfeiture of sufficiency claims is appropriate for factor (b) evidence presented at the penalty phase of a capital trial. (*People v. Montiel, supra*, 5 Cal.4th at p. 928, fn. 23.) Yet prior cases of this Court, in which no sufficiency objection had been raised, suggested that this Court would nonetheless review factor (b) sufficiency claims. (*See People v. Thompson, supra*, 45 Cal.3d 86, at 127, 129 [accepting sufficiency claim, despite lack of objection, but holding any error harmless].) And the most recent pronouncements at the time of appellant's trial provided no concrete answer either. (*See People v. Carrera, supra*, 49 Cal.3d 291 at p. 341 [although noting lack of objection, rejecting sufficiency claim on the merits].) In fact, the holding of *Montiel* has been inconsistently applied by this Court, which has continued to review on the merits factor (b) sufficiency claims despite the fact that any objection to the evidence at trial

was withdrawn. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1172 [reviewing on the merits factor (b) sufficiency claim despite the fact that counsel withdrew objection, unrelated to sufficiency, to contested factor (b) evidence].) Under these circumstances, due process dictates that the rule of *Montiel* not be applied retrospectively to appellant's trial, at which time trial counsel may have reasonably believed that all that was required to preserve the issue was arguing sufficiency to the jury. (*People v. McCullough, supra*, 56 Cal.4th at p. 594.)

d. Even if Trial Counsel has Forfeited the Issue, this Court Retains Discretion to Decide it

The fact "that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to 'prevent [ ]' or 'correct[ ]' the claimed error in the trial court [citation] does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) An appellate court is "generally not prohibited from reaching a question that has not been preserved for review by a party." (*Ibid.*) Because of the heightened need for reliability in capital cases, *Horton, supra,* 11 Cal.4th at p. 1138, this Court should exercise its discretion and not allow appellant to be sent to his death based upon aggravating incidents that had no support in the evidence. This Court should therefore rule on the merits of appellant's claim.

2. Respondent Incorrectly Asserts That the Law of Duress Creates a Distinction Between a Reasonably Perceived Threat of Great Bodily Injury and Death

California Penal Code section 26, which codifies the duress defense in California, states that "Persons . . . who committed the act . . . charged under threats or menaces sufficient to show that they had reasonable cause

to and did believe their lives would be endangered if they refused" are not guilty. (Cal. Pen. Code, § 26.) This defense requires that the defendant's fear be objectively "reasonable" but "does not require that appellant be in fact correct in his assessment of the situation. (*People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 27.)[5]

As explained in the opening brief, this Court has noted that "[a]lthough a number of cases in this state have held that the fear [delineated in section 26] must literally be of *death*, *People v. Otis*, 174 Cal.App.2d 119, 124 [. . .], suggests the fine distinction between fear of danger to life and fear of great bodily harm is unrealistic." (*People v. Perez* (1973) 9 Cal.3d 651, 657, italics in original.) Other cases support this conclusion. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 49 [defense of duress, unlike duress under Penal Code section 288, subdivision (b), "require[s] a showing the victim acted out of fear of imminent death or great bodily harm"]; *People v. Heath* (1989) 207 Cal.App.3d 892 [duress excuses criminal conduct "where the actor [is] under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law"];1 Witkin, Cal. Crim. Law 4th (2012) Defenses, § 58, p. 497 [although some decisions use "literal language," California cases have suggested that "fear of great bodily harm" is sufficient]; LaFave 2 Subst. Crim. L. § 9.7 (2d ed.) [fear of

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[5] Although appellant cites Penal Code section 26, appellant, like the court in *Pena*, uses the term "duress" in its broadest sense, encompassing the doctrines of necessity and duress. (See *In re Weller* (1985) 164 Cal.App.3d 44, 51 [noting that some courts have used the terms "duress," "coercion," "necessity," "compulsion," and "justification" interchangeably].) The jury here was instructed on both necessity and duress. (RT:1179-1180.)

serious bodily harm generally sufficient]; CALCRIM 3402, Bench Notes [although citing inconsistent language in cases, noting "[f]ear of great bodily harm can also raise the defense of duress"].)

Respondent objects to this principle in a footnote (RB:100, fn. 79) without even attempting to distinguish contrary authority, including cases such as *People v. Heath, supra,* 207 Cal.App.3d 892, upon which respondent elsewhere relies to set out the elements of duress. (RB:99.)

Appellant's case provides a clear example of why any distinction between a reasonable fear of great bodily harm and death is often meaningless in the context of duress. The record establishes that appellant's father commonly subjected family members to extreme violence at the slightest provocation. (See, e.g., 9RT:2116 [after suspecting daughter had romantic encounter, appellant's father tied daughter up with her wrists over her head, then proceeded to beat appellant's mother and then to beat appellant so severely that he was incapacitated and was forced to leave the house to recuperate with another family]; 9RT:2138-2139 [appellant's mother and sister repeatedly hung by the neck from the ceiling rafters until they passed out]; 9RT:2031 [mother beaten severely for taking a bath without permission].) No reasonable person could in those circumstances meaningfully distinguish between a fear of death or great bodily harm.

Respondent ignores this evidence when he oddly asserts the absence of duress was supported by the testimony of Baca and appellant's sister, Maria. (RB:100.) Baca and appellant's sister described the threats, humiliation, and physical abuse suffered by appellant even when he *attempted to comply* with his father's orders, but was unable to maintain an erection and therefore unable to have sex with Baca. (9RT:1981, 2140.) According to respondent, this testimony established that appellant, when too

terrified to consummate the sexual acts demanded by his father, was benignly "chided" and "at most, physically abused" thus negating any duress defense. (RB:100.)[6]

Given the severity of the abuse inflicted by appellant's father on the family, respondent's allegation that a failure to successfully comply with orders which "merely" resulted in "at most, physical abuse[]" inappropriately trivializes the threat of great bodily harm under which appellant acted. More importantly, the physical and emotional abuse which appellant suffered for *attempting to comply* with his father's demands does not lessen the likelihood that appellant's maniacal father would follow through with his threats of death if appellant tried to refuse to comply with

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[6] The record is somewhat confused with regard to this testimony, but the only reasonable reading indicates that respondent's suggestion, that appellant was perhaps "merely chided" is incorrect. Appellant's sister testified that "sometimes" appellant was beaten when he failed to consummate the assault due to his failure to maintain an erection. (9RT:2140.) However, his sister's translated answers were in response to a question about "that one time" when appellant "could not do it." (9RT:2140.) Baca likewise testified about a single incident in which appellant was unable to consummate the assault out of fear. (9RT:1981.) Because neither Baca nor appellant's sister were asked or testified about multiple instances, the only reasonable interpretation of appellant's sister's testimony is that appellant was beaten after the single incident in which he failed to consummate the sexual assault of Baca due to his failure to maintain an erection. Although Baca corroborated the verbal abuse and in addition mentioned threats by appellant's father occurring during this incident, (9RT:2140) she said nothing one way or the other about a beating, but certainly did not deny that a beating occurred. It is not clear if this is because she was not asked about a beating associated with this incident, or merely because she did not witness the beating, or if in fact there were multiple incidents. However, no reasonable juror could have found beyond a reasonable doubt that appellant was "merely chided" based merely on an unexplained ellipsis in Baca's testimony.

his commands.

Respondent suggests appellant should have risked defying his father's death threats and directly refused to assault Baca. Had he done so, it is at least conceivable that appellant would "at most" have suffered the severe physical abuse of the type commonly perpetrated by his father, such as being beaten and then hung from a noose repeatedly until he lost consciousness, or simply beaten into unconsciousness. (Cf. 9RT:2116; 9RT:2138-2139; 9RT:2145.) In such a circumstance, it would be impossible for any reasonable person, much less a borderline mentally retarded child, to know that he would not die as a result. In short, neither the law nor the facts of this case supports a distinction between a threat of death or great bodily harm in the context of duress.

3. The Law of Duress in California Does not Embrace Respondent's Formalistic Views of Immediacy

The purpose of allowing the defense of duress for non-murder crimes "is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person." (*People v. Anderson* (2002) 28 Cal.4th 767, 772; see also Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits (1989) 62 So.Cal. L.Rev. 1331, 1376 ["The question at hand is whether the actor—the immediate law violator—had a fair chance to avoid acting unlawfully, i.e., whether a person of reasonable moral firmness would have resisted the human or natural threat."].) The coercive threat must be "sufficiently grave and severe as to similarly coerce a non-heroic, but reasonably firm, person into criminal conduct." (See *State v. B.H.* (2005) 183 N.J. 171, 191 [holding that the trial court

improperly restricted expert evidence on battered women's syndrome to support a claim of duress where nineteen-year-old mother raped her seven-year-old step-son at the behest of her abusive husband,].)

As Justice Tobriner explained in *People v. Lo Cicero* (1969) 71 Cal.2d 1186, the purpose of the immediacy requirement is to distinguish between an "active aggressor threatening immediate danger" and the "phantasmagoria of future harm." (*Id. at* 1191.) The rationale for the immediacy requirement is that courts should not "justify or excuse the commission of a felony against the person or property of an entirely innocent person because the person doing the deed had reason to fear, and did fear, not an imminent and immediate danger to his life, but a future and remote danger, and *one that in the very nature of things could be readily averted by innocent methods.*" [citation] (*People v. Otis, supra*, 174 Cal.App.2d at p. 125, italics added.)

Of significance to appellant's situation, the immediacy requirement is not entirely blind to context. In *Lo Cicero*, Justice Tobriner provided the following discussion of *People v. Anderson* (1968) 264 Cal.App.2d 271, upon which the defendant in *Lo Cicero* attempted to rely:

> *Anderson* involved a conviction for sexual offenses committed on a 16-year-old boy [Patrick H.] who worked at defendant's ranch. Although the acts charged occurred over a three-day period, the testimony showed similar acts occurred regularly for several preceding months. The defendant had threatened the boy with beatings, with death, and with commitment to a mental institution. The Court of Appeal found that because of these threats the boy [Patrick H.] acted under duress and was not an accomplice. Defendant argues that the victim in *Anderson* could not have been in fear of present and immediate violence for a period of several months. The *Anderson* decision, however, rests not merely on the threats by the defendant (threats much more explicit than any in the present case), but on these threats in combination with the minority

> of the victim and his domination by the defendant, leading to a conclusion that the *Anderson* victim 'assented,' but did not 'consent,' to the offenses. (See 264 Cal.App.2d at 276—277, 70 Cal.Rptr. 231; *People v. Westek* (1948) 31 Cal.2d 469, 475, 190 P.2d 9.) These additional considerations distinguish the *Anderson* holding from the present case and the line of precedent dating from *Sanders.*

(*Id.* at 1191, fn. 5.)

Although *Anderson* involved a defendant's claim that the testimony of his minor victim, as an alleged accomplice, required corroboration, *People v. Anderson,* supra, 264 Cal.App.2d 271, p. 274, *Lo Cicero* explained that *Anderson* informed the "immediacy" requirement of duress. (*People v. Lo Cicero, supra*, 71 Cal.2d at p. 1191, fn. 5.) A minor, when under repeated and "explicit" threats of death and "domination" over a period of months by an adult is acting under duress when engaging in sexual conduct, despite the long duration of the coercive conduct. (*People v. Lo Cicero, supra*, 71 Cal.2d 1186 at p. 1191, fn. 5.) The *Lo Cicero* court's reasoning holds particularly true in this case where the victim was not only a minor, but is a bordeline mentally retarded child living with his guardian-abuser in an extremely isolated rural area. In fact, respondent elsewhere expressly *embraces* the conclusion that appellant was completely dominated by his father, stating that the "jury was . . . very aware of the 'utter dominance' appellant's father exerted through his threatening and violent conduct. This much was clear." (RB:154.)

Courts have recognized that bordeline mental retardation and dependance upon the abuser is an important contextual factor in assessing the defense of duress. (See, e.g., *Commonwealth v. DeMarco* (2002) 570 Pa. 263, 272–73, 809 A.2d 256; id., at 274–75, 809 A.2d 256 [holding that evidence that defendant was borderline mentally retarded and living with

coercer was salient situational factor for duress, even though coercer was not present when crimes were committed].) Thus, for example, where a father ordered his two adopted children, age 8 and 10 to have sex with one another and threatened that if they told, their mother "would be put in jail and the children would go to a foster home," *Parnell v. State* (1996) 323 Ark. 34, 35, the older child "acted under duress" and "would not be guilty of a crime." (*Id.* at 423-424.)

In short, California law and that of other states explicitly recognizes that the requirement of "immediacy" is contextual and that duress can exist over a period of months when a minor is the subject of chronic, coercive abuse. In this case, the undisputed evidence of a lifetime of extraordinary, unremitting abuse suffered and witnessed by appellant is far more severe than that discussed in *Anderson* and could leave no reasonable juror with the impression that the threats of death communicated by appellant's father was a benign "phantasmagoria of future harm." (*People v. Lo Cicero*, *supra*, 71 Cal.2d at p. 1191.)

Quite naturally, respondent does not suggest that Baca's own fear of serious harm was not "immediate" despite the fact that she was assaulted over the course of many months. Appellant's fear of great bodily harm to his new "wife," Baca, should he not comply with his father's sadistic orders also would be sufficient to sustain the claim of duress. (1 Witkin, Cal. Crim. Law 4th (2012) Defenses, § 59, p. 497 ["Virtually every jurisdiction that has decided the issue has held that the defense may be based on threats to third persons"]; *People v. Pena*, *supra*, 149 Cal.App.3d Supp. 14 at p. 23 [threat of harm to third party sufficient]; La Fave, 2 Subst. Crim. L. § 9.7 (2d ed.) ["Doubtless a reasonable fear of immediate death or serious bodily injury to someone other than the defendant, such as a member of his family,

will do"].) Given that Baca specifically testified that appellant was being forced to enter into sexual relations with Baca in "the same way [she] was being forced to enter into sexual relations with him" (9RT:1974) the only supportable conclusion that a reasonable jury could draw is that they were *both* subject to an "immediate" threat of physical violence by appellant's father.

4. There Is no Evidence upon which a Reasonable Jury Could Base a Finding that the Assault Could Be "Readily Averted by Innocent Methods"

The touchstone of the immediacy requirement, and that of the duress and necessity defenses generally, is the question of whether the crime in question could be "readily averted by innocent methods." (*People v. Otis*, *supra*, 174 Cal.App.2d at p. 125; La Fave, 2 Subst. Crim. L. § 9.7 (2d ed.) [defendant who acts under duress is "excused because he 'lacked a fair opportunity to avoid acting unlawfully'" [citation]].) Stated differently, "[o]n principle, the threatened harm, though perhaps it need not be 'immediate,' ought not to be remote in time, for until the threatened disaster is pretty close to happening, there may arise a chance both to refuse to do the criminal act and also to avoid the threatened harm—the opportunity to escape without undue danger which the cases recognize as enough to deprive the defendant of his defense." (*Ibid.*)

Here, there was no substantial evidence upon which the jury could have based a finding that appellant's father's threats were insufficiently "immediate" in the sense that appellant could have "averted [the assaults] by innocent methods." (*People v. Otis*, *supra*, 174 Cal.App.2d at p. 125.) As the record indicates, appellant lived in an extraordinarily remote region of Michoacan, Mexico in which a "near" residence was about two hours

away walking. (9RT:1964-1965.) Appellant never left his father's ranch to go to school. (9RT:1982.) Nor is there any indication that appellant's home had electricity, much less a phone with which to contact authorities, or any vehicle by which he could effectuate any escape.[7]

Perhaps with good reason, respondent is unable to posit any alternative course of action that appellant *should* have taken to avoid his father's sexual abuse. There is no substantial evidence in the record to suggest intervention by authorities was a realistic possibility. And the record affirmatively suggests the opposite – that appellant's father did not permit escape from his abuse without triggering "undue danger." (9RT:1975 [Baca fired upon when attempting to escape].) Finally, even were appellant to have escaped the ranch, Baca's family may have discovered him and killed him as they ultimately killed his father. (9RT:1963-1964.)

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[7] The record on habeas will affirmatively indicate that appellant's remote "rancho" had no electricity, phone, or vehicles. Appellant recognizes that any information in the habeas petition is outside the record and that the focus on sufficiency review is the existence of substantial evidence *within* the record upon which a jury could base its finding of guilt beyond a reasonable doubt. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) However, "[a]n absence of evidence is not the equivalent of substantial evidence. [citation.] If an absence of evidence could satisfy the burden of proof, the concept of burden of proof would have no meaning." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 655.) Since there is no *affirmative* evidence suggesting any reasonable method by which appellant could have escaped or contacted authorities to avoid his father's sexual abuse, a jury's finding that appellant could have done either is unsupported speculation. As such, the Baca incident is not supported by substantial evidence.

Perhaps in some heroic fantasy, the borderline mentally retarded minor would have struck off into the wilderness in an area "particularly noted for its violence" (9RT:1901) risking his own life in an effort to seek help, but the law does not require this. (*People v. Heath* (1989) 207 Cal.App.3d 892, 900 [test for duress is "reasonable cause" for belief that life was endangered]; *State v. Heinemann* (2007) 282 Conn. 281, 303 [defendant not held to the standard of heroism, but that of a "reasonable person" with a "gross and verifiable" mental disability such as borderline mental retardation].)

5. The Eighth Amendment and Due Process Do not Permit Appellant to Be Sent to his Death Based upon Criminal Acts in which his Abusive Father Forced him to Engage

Regardless of the outcome under state law, the Eighth Amendment and Due Process forbid a death sentence based upon involuntary conduct forced upon a minor by his abusive parent. (*Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1308 overruled on other grounds by *Lambright v. Stewart* (9th Cir.1999) (en banc) 191 F.3d 1181; see also *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 375-378 [erroneous admission of testimony violated defendant's right to fair trial].) Respondent attempts to distinguish *Beam* by arguing that *Beam* involved only "nonviolent and/or legal conduct" to support the aggravating factor at issue, whereas this case involved criminal conduct. (RB:102.) Respondent simply misapprehends the record in *Beam*.

In *Beam*, the defendant was forced to engage in a sexual assault of his mother just as appellant was forced to engage in a sexual assault of Baca: there is no indication whatsoever that the mother in *Beam* was complicit in the father's abuse. (*Beam v. Paskett, supra*, 3 F.3d at p. 1308 fn. 6 ["Beam's father forced Beam and his retarded older brother to have

sex with Beam's mother while Beam's father watched. If anyone refused, Beam's father would beat the recalcitrant party"].) Faced with this evidence, the Court in *Beam* did not engage in a hypertechnical analysis of whether Beam's father's beating was a sufficiently severe threat to warrant a finding that the defendant acted under an "immediate" fear of death on every occasion that the defendant's father forced him and his brother to participate in a sexual assault of his mother. Instead, the court recognized the obvious: "victims of [sexual abuse] may not be further punished by making their misfortune the basis for their subsequent execution." (*Id.* at p. 1310.) The rule in *Beam* applies with full force to the evidence in this case and warrants reversal.

6. The Error Is Unquestionably Prejudicial

Respondent argues that the error is harmless, citing the fact that the jury was instructed that it could only consider the Baca evidence as aggravation if it found the crime proven beyond a reasonable doubt. (RB:102.)[8] In short, respondent claims that if the evidence could only support a claim of duress, no juror would have found otherwise. This argument is not grounded in reality or this Court's precedents.

Respondent's tack is a peculiar one: respondent first argues at length that there *is* substantial evidence to support the factor (b) evidence before claiming that the error is harmless because no properly instructed juror would have found the factor (b) evidence true. Respondent's own argument proves that a reasonable person, even one with years of legal training, could have improperly determined the Baca incident was proven beyond a

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[8]As explained in appellant's opening brief, the claim is not subject to harmless error analysis. (AOB 140-141.) Respondent makes no attempt to address this argument.

reasonable doubt based on a misreading of the "immediacy" requirement and used this incident to sentence appellant to his death. Indeed, claiming that the evidence was sufficient was exactly what the prosecution argued to the jury. (10RT:2210-2212.) It is difficult to accept the proposition that not even one juror could have unreasonably accepted the very argument presented to it by the prosecution and sentenced appellant to death on that basis. (*People v. Fletcher* (1996) 13 Cal.4th 451, 471 [if a "legally trained prosecutor" was unable to properly limit evidence,"we safely can infer that this was true of the lay jurors as well"].)

Respondent proves too much. Under respondent's logic, because all properly instructed juries are informed of the reasonable doubt burden, no case would ever be reversed for insufficiency. However, juries frequently find crimes true despite the insufficiency of the evidence supporting the crime, even when properly instructed on the burden of proof. (See, e.g., *People v. Williams* (1992) 9 Cal.App.4th 1465 [insufficient evidence of grand theft of person]; *People v. Cervantes* (2001) 26 Cal.4th 860 [insufficient evidence of provocative act murder]; *People v. Nguyen* (2000) 24 Cal.4th 756, 761 [insufficient evidence of robbery].) Concern for such errors is the exact reason sufficiency review is conducted by appellate courts.

The same concerns apply to factor (b) sufficiency claims. When there is insufficient evidence to support an aggravating factor, even though the Court cannot *know* that any of the jurors found the factor to be true, the Court must "presume that at least one did so. Otherwise, [the Court] would run an unacceptable risk of rejecting a potentially meritorious claim by gratuitously denying the existence of its factual predicate." (*People v. Clair* (1992) 2 Cal.4th 629, 680.)

Respondent makes no attempt to distinguish the command of *Clair*, despite the fact that appellant cited *Clair* for precisely this point. (AOB:125.) Instead, respondent cites *People v. Barnett* (1998) 17 Cal.4th 1044, 1172-1173. In *Barnett*, the prosecution forgot to offer evidence showing that defendant was in fact the person identified by one of his victims, Helen T., as her rapist. (*Id.* at p. 1172.) The *Barnett* court noted that in light of the proper instruction on the burden of proof it was not reasonably possible that a rational jury would have permitted "inconclusive evidence connecting defendant with the alleged rape to cause it to impose the death penalty." (*Id.* at p. 1172-1173.) The present case, like *Barnett*, does not involve "inconclusive" evidence of appellant's involvement in the underlying crime, which a reasonable doubt instruction would most naturally cure.

Crucially, respondent omits that "the [*Barnett*] jury also heard evidence of other violent sexual crimes by defendant to wit, evidence that in 1977 defendant raped and sodomized 17-year-old Mae G. and forced her at knife point to orally copulate him," that the defendant in *Barnett* had "committed murder while engaged in the crimes of robbery and kidnapping and that the killing was intentional and involved the infliction of torture," and that the jury heard of defendant's extensive and violent "felony convictions and his assaults upon police officers." (*People v. Barnett, supra,* 17 Cal.4th at pp. 1172-1173.)

It was in light of *this* evidence, that the *Barnett* court held "[o]n this record, given the properly admitted evidence of defendant's substantial criminal history and the circumstances of the instant offenses, it was not reasonably possible that the jury would have rendered a different verdict had it not heard the evidence of Helen T.'s rape." (*People v. Barnett,*

supra, 17 Cal.4th at pp. 1172-1173.) Notably, this finding was made despite the obvious reality that "testimony alleging rape" is normally "inflammatory" to a penalty phase jury. (*Id.* at p. 1173; see also *People v. Frank* (1985) 38 Cal.3d 711, 732 (plurality opn. of Mosk, J.) [there is a "substantial danger of prejudice that is inherent in proof of prior sexual offenses"].)

In contrast here, unlike in *Barnett*, there was no other factor (b) evidence showing that appellant had committed any other violent sexual crime. Particularly because of the spillover affect of appellant's capital conviction for murder, a single juror might be tempted to find the Baca incident aggravating despite the insufficiency of the evidence. (See *Williams v. Superior Court* (1984) 36 Cal.3d 441, 453 [noting that it may be "difficult for jurors to maintain doubts about [a] weaker case when presented with stronger evidence as to the other"]; *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 139 [joinder of weak murder case with strong sexual assault case was improper].)

As detailed in the opening brief, the jury struggled in delivering its verdict. (AOB:140-144.) Allowing the jury to consider the Baca incident under factor (b) created a reasonable possibility that the outcome would have been different. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

B. The Evidence Presented In Support Of Incident In Aggravation 2A Was Insufficient To Establish Criminal Conduct Under Factor (b)

As explained in the opening brief, the prosecution admitted, through a law enforcement witness, appellant's statement that he fired in self-defense upon a vehicle whose occupant's threatened to kill him. (AOB:144-151.) Because the prosecution made no argument to counter

appellant's self-defense claim, and the evidence similarly provided none, there was insufficient evidence upon which to present this factor (b) evidence to the jury. (*Ibid.*).

1. There Is no Forfeiture

Respondent initially asserts that appellant forfeited this claim. (RB:105-106.) For the reasons discussed above in relation to the Baca incident: (1) the law at the time of appellant's trial did not require appellant to object to the sufficiency of factor (b) evidence to ensure review of sufficiency by this Court; and (2) this Court's subsequent requirement that an objection is required should be overruled. (See *ante*, section VII(A)(1).)

2. There Was no Substantial Evidence Supporting a Factor (b) Finding

On the merits, respondent counters that three pieces of evidence could have grounded a jury's decision to reject appellant's self-defense claim in substantial evidence, namely: (1) that Officer Mayberry, who witnessed the shooting, provided "no evidence that the occupants of the vehicle possessed, brandished, or otherwise used any weapon of any sort to place appellant in reasonable fear for his life;" (2) that appellant's shots hit the rear bumper of the vehicle, making it "reasonable to infer the vehicle was moving away from appellant and did not present and threat;" and (3) that appellant admitted that he did not actually see a weapon. (RB:107.)

As to the fact that neither Officer Mayberry nor appellant saw the victims with a weapon, seeing the victim with a weapon is simply not a requirement for self-defense. The law has "long been well settled" that a defendant who "knows *or has reason to believe* [the victim] has armed himself with a deadly weapon for the avowed purpose of taking his life or inflicting a great personal injury upon him, may reasonably infer, when a

hostile meeting occurs, that his adversary intends to carry his threats into execution." (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1187-88 disapproved on other grounds by *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083, italics added.) Antecedent threats coupled with an overt act that would be perceived by a reasonable defendant as placing his life in immediate danger are sufficient. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1069.) The uncontroverted statement of appellant that the alleged victims exited their vehicle and told appellant "I have a gun and I can kill you" or "I've got a gun, and I can kill you if I want to" and subsequently gestured at appellant indicating they wanted a physical altercation surely established such a reasonable fear. (9RT:1999-2001.)

As to the fact that appellant hit the rear of vehicle, respondent's first premise, that a reasonable jury could infer that the vehicle was "moving away," is correct. However, the ultimate conclusion that the vehicle therefore "did not present a threat" is not supported by substantial evidence. (RB:107.) There is simply no indication that the distance between appellant and the vehicle in question, 30 or 40 feet,[9] would in any way alleviate the threat of bodily harm to appellant from an armed passenger threatening physical harm. Nor did the speed at which the vehicle was moving provide any hint that it was simply leaving the area. Mayberry's percipient testimony indicated that the alleged victim's vehicle was moving slowly west as though the occupants "were looking" for something. (9RT:1951.)

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[9] Respondent, citing Mayberry's initial testimony, indicates that the distance was actually 50 feet. (RB:104-105; 9RT:1946.) However, Mayberry later clarified that he merely "guesstimated" the 50 feet figure, but that the distance from the casings to where the vehicle was when it was fired upon was three or four 10-foot wide parking spaces. (9RT:1952.)

Respondent's argument fails to appreciate that the vehicle was moving so slowly that, during the period that the car passed, appellant (1) opened his own vehicle, (2) retrieved his rifle from the back seat, (3) aimed it at the truck, and (4) fired twice at the car, it was only 30 or 40 feet away. (9RT:1945, 1947, 1952.) A vehicle traveling this slowly with armed passengers threatening physical harm is clearly a danger to anyone standing in its wake, and no reasonable person would feel the threat alleviated by the fact that the car happened to be a few parking spaces in front of them.

3. The Error Was Prejudicial

For the reasons discussed above with respect to the Baca incident, an instruction on reasonable doubt does not cure the insufficiency of the factor (b) evidence. (*Ante*, section VII(A)(6); *People v. Clair* (1992) 2 Cal.4th 629, 680 [where insufficient evidence supports factor (b) evidence, Court must "presume that at least one [juror] did" find factor (b) evidence true]). If that were true, no case would ever be reversed for evidentiary insufficiency. Particularly because of the spillover affect of appellant's capital conviction for murder, a juror might improperly use this incident despite the insufficiency of the evidence. (See *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 453 [discussing spillover effect for joined cases].)

C. Because Mere Possession Of A Firearm Does Not Itself Constitute An Act Committed With Actual Or Implied Force Or Violence, And Because Even Possession Was Not Established In This Case, The Trial Court's Admission Of Evidence Of Appellant's Alleged Gun Possession Was Insufficient To Constitute Factor (b) Evidence

As respondent correctly acknowledges, (RB:108-109) appellant makes three claims of error regarding the introduction of the three factor (b) firearm possession incidents (the Strawberry Street incident, the Circle-K incident, and the Arrow Motel incident, incidents 2C, 2D, and 2E

respectively). First, there was insufficient evidence of constructive possession with regard to incidents 2C and 2D. (AOB:160-166.) Second, the trial court abused its discretion by improperly submitting to the jury the question of whether the crimes constituted implied threats of violence. (AOB:166-171.) Third, allowing factor (b) evidence of weapons possession based on an assumption that the weapons might be used at some "undetermined time point" was erroneous. (AOB:171-175.) Appellant addresses respondent's contentions regarding these errors in turn.

1. The Evidence of Constructive Possession Was Insufficient

Respondent initially asserts that appellant forfeited this claim. (RB:119.) For the reasons discussed above in relation to the Baca incident: (1) the law at the time of appellant's trial did not require appellant to object to the sufficiency of factor (b) evidence to ensure review of sufficiency by this Court; and (2) this Court's subsequent requirement that an objection is required should be overruled. (See *ante*, section VII(A)(1).)

Turning to the merits, respondent and appellant agree on the law–proximity to a weapon, standing alone, is not sufficient evidence of possession. (RB:119 [citing *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417]; see also *People v. Antista* (1954) 129 Cal.App.2d 47; *People v. Bledsoe* (1946) 75 Cal.App.2d 862; *People v. Boddie* (1969) 274 Cal.App.2d 408, 411.) Respondents argument, however, directly contradicts this very legal principle. With respect to both incidents, respondent argues that appellant's proximity to the weapon, in conjunction with his control of the vehicle in which the weapons appeared, establishes constructive possession. (RB:120.) This argument is directly contrary to *Bledsoe, supra*, 75 Cal.App.2d 862, at pp. 863-864 [possession of keys

insufficient to establish knowing possession of items inside vehicle], and the case cited by respondent, *People v. Sifuentes, supra*, 195 Cal.App.4th at p. 1417 [fact that defendant had rented room and gun was found under bed sat on by compatriot gang member insufficient to establish constructive possession].) These cases stand for the basic principle that when more than one person has access to a location, the mere fact that a weapon is found hidden somewhere in that location does not establish constructive possession, regardless of the defendant's relative proximity to the item's hiding place. Something more is required. The additional evidence suggested by respondent fails to satisfy this requirement.

Respondent argues that the fact that appellant told investigating officers he was not the registered owner of the vehicles establishes constructive possession because respondent was issuing a "preemptive denial." (RB:120.) Far from suspicious, appellant's *honest* statements about the car's ownership are precisely the type of information anyone would provide to police investigating a vehicle, particularly to foreclose accusations of vehicle theft were such ownership information not provided. That appellant was a convicted felon at the time provided him with every incentive to promptly inform police that he was not illegally in possession of a stolen vehicle. Indeed, none of the testifying officers even *suggested* that appellant's act of informing them that he was not the registered owner of the vehicle aroused their suspicions.

Respondent makes a feeble argument that *Antista*, *Boddie*, and *Bledsoe* are distinguishable because in these cases "it was reasonably probable that the [hidden item] was not the defendant's, but that it belonged to one of the other persons present or a person who had very recent access to the area." (RB:125.) However, this statement perfectly mirrors the facts

of this case and the facts cited by respondent do nothing to differentiate these cases' holdings. With respect to the Circle K incident, respondent alleges that "appellant was the lone occupant in the van when the officer arrived" and "had been using the van that night" (RB:125) without acknowledging that there was another occupant of the car at the scene questioned by the investigating officer or that appellant was not the registered owner of the vehicle. (AOB:158.) As to the Monte Carlo, respondent makes the conclusory and unsupported allegation that appellant was "the only one with access to the vehicle as he was the person with the keys." (RB:126.) Although a reasonable juror might have inferred that appellant did at one point drive the car based on testimony that he was seen sitting in the driver's seat, nothing about holding a pair of keys provides substantial evidence that appellant had "exclusive access" to the car which he did not own.

Finally, respondent urges that the jury could have used other instances of appellant's firearms possession as propensity evidence to supply substantial evidence of constructive possession. (RB:120-121, 126.) However, as this Court has explicitly held, evidence that the defendant possessed a weapon on one occasion is inadmissible to prove his commission of a crime with a different weapon on another occasion "for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056 [citing *People v. Cox* (2003) 30 Cal.4th 916, 956, and *People v. Riser* (1956) 47 Cal.2d 566, 577]; *People v. Smallwood* (1986) 42 Cal.3d 415, 428 ["whenever an inference of the accused's criminal disposition forms a 'link in the chain of logic connecting the uncharged offense with a material fact' . . . the uncharged offense is simply

inadmissible, no matter what words or phrases are used to 'bestow a respectable label on a disreputable basis for admissibility – the defendant's criminal disposition'"].)[10]

Respondent's propensity argument, if embraced by the jury or this Court, would violate not only the laws of California and other states, but due process as well. (*McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378 [admission of evidence that the defendant had previously possessed knives not linked to charged crime to prove the defendant's propensity to possess such weapons at other occasions violated due process]; see *State v. Pogue* (Wash. Ct. App. 2001) 104 Wash.App. 981, 985 [evidence of past drug use was forbidden propensity evidence where defense theory was absence of knowledge of drugs in vehicle, not lack of knowledge that substance was illegal]); *Com. v. Frongillo* (Mass. App. Ct. 2006) 66 Mass.App.Ct. 677, 684. [evidence of the defendant's involvement in a shooting is insufficient to permit an inference that he had constructive possession of unrelated firearms and ammunition found in apartment]; *State v. Boggs* (2008) 287 Kan. 298, 316-317 ["If a person asserts that he or she does not know that there are drugs in a residence (or in this case, under the seat in a vehicle), prior use of drugs neither proves nor disproves the validity of that assertion."].)

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[10] Absent a propensity theory, respondent's logic is reduced to the absurd claim that because appellant has possessed firearms in the past, he must necessarily be aware of the location of all hidden firearms in his proximity at all times. The *only* inferential path leading to respondent's claimed theory of relevance is that, because appellant had possessed weapons on one occasion, he was more likely to possess them on another. In other words, the only theory is forbidden propensity. (*People v. Smallwood, supra*, 42 Cal.3d at p. 428.)

2. The Trial Court Abused It's Discretion in Submitting the Issue of Implied Force or Violence to the Jury

In his opening brief, appellant argued that the trial court improperly submitted to the jury the question of whether the facts of appellant's firearm possessions amounted to crimes involving implicit threat of violence under factor (b). (See 1RT:146-148; AOB:167-168.) Respondent focuses in isolation on the trial court's statement that "if they can establish that he had actual or constructive possession, [this] gives rise to *an assumption* there was an implied threat of violence there" (1RT:147, italics added), as a "a clear statement that the court considered the evidence to be proper factor (b) evidence" and did not submit the question to the jury. (RB:115.)

Respondent recognizes that the court stated—*explicitly*—that there was "a question of fact whether the jury accepts" that the circumstances gave rise to an implicit threat of violence. (RB:115; 1RT:147.) Indeed, this was also the expressly stated position of the prosecution at the *Phillips* hearing, which the trial court later adopted:

> what the court is looking for right now, just enough to get us to the point where the court would say yes, you can take that and present that to the jury, and then they will have to make the determination naturally as to the issue . . . if the facts justify the finding of additional demonstration of violence on the part of the defendant.

(1RT:136; see also 1RT:146-147 [court concluded he was "partial to the district attorney's argument"].)

Respondent brushes the trial court's unequivocal error aside, arguing that this statement merely "reflects the court's understanding that it would not be dictating to the jury that they must find these incidents aggravating." (RB:115.)

The problem with respondent's argument is that it contravenes this Court's numerous holdings regarding the allocation of responsibility between judge and jury regarding factor (b) evidence. Repeatedly, this Court has held that the *only* predicate fact the jury determines prior to utilizing factor (b) evidence in aggravation is whether the defendant committed the misconduct alleged, not whether the crime involves force or violence. (*People v. Taylor* (2010) 48 Cal.4th 574, 656 [jury determines only that defendant committed the conduct at issue, while "trial court properly determine[s] the *legal question* whether the prosecution's proposed evidence in aggravation was an actual crime involving violence or the threat of violence"], italics added; *People v. Moore* (2011) 51 Cal.4th 1104, 1139 [preliminary finding of whether criminal activity involves force or violence is "a legal decision for the trial court"]; *People v. Howard* (2008) 42 Cal.4th 1000, 1027-1028 [rejecting argument that whether the offense involved the threat of force or violence "was a question for the jury to decide. To the contrary, it was a legal issue to be decided by the court, as we have repeatedly held."].)

The reason for this allocation of responsibilities is to avoid the problem that, were the jury to be tasked with determining the force or violence requirement, the wording of CALJIC No. 8.87 would *require* such finding and thereby create an unconstitutional mandatory presumption. (*People v. Butler* (2009) 46 Cal.4th 847, 872 [court has "consistently held" that because the force or violence component of factor (b) a legal question for the trial court, "CALJIC No. 8.87 does not create an unconstitutional mandatory presumption"]; *People v. Lewis* (2008) 43 Cal.4th 415, 530, [accord] *People v. Gray* (2005) 37 Cal.4th 168, 235 [accord] *People v. Nakahara* (2003) 30 Cal.4th 705, 720 [accord]; *People v. Streeter* (2012) 54

Cal.4th 205, 266 [accord] *People v. D'Arcy* (2010) 48 Cal.4th 257, 302 [accord].)

Thus, when the trial court stated that it "was a question of fact whether the jury accepts" that the facts "involved implied use of violence in the future, some undetermined time point" (1RT:147), it was expressly abdicating its responsibility to make this predicate determination.

3. Allowing Weapons Possession Charges to Be Introduced Under Factor (b) for Possible Threat at Some "Undetermined Time Point" in the Future Was Erroneous

In his opening brief, appellant argued that the trial court improperly allowed the factor (b) evidence to be presented to the jury based on the possibility that it might be used at some "undetermined time point" in a violent manner. (AOB:171-175.) Respondent counters that, because an implied threat of violence may exist even if a defendant does not display the weapon "in a provocative or threatening manner," the trial court's speculation that any firearm may be used at some point in the future is permissible. (RB:115-116, citing *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589.)

Respondent is incorrect. Whether implicit or express, factor (b) only encompasses *imminent* threats of violence: i.e. "[o]nly evidence of 'prior assaultive behavior.'" (*People v. Phillips* (1985) 41 Cal.3d 29, 72 fn. 24 [citing legislative history], italics omitted.) Therefore, the trial court's finding that a potential threat at "some undetermined time point" is sufficient was erroneous. A conditional future threat will not suffice. (See *People v. Page* (2004) 123 Cal.App.4th 1466, 1473 [a "conditional future threat will not suffice" to establish an assault].)

Similarly, a holding that "mere possession of guns constituted a crime of violence" under factor (b) is error. (*People v. Cox* (2003) 30 Cal.4th 916, 973.) The logic of the trial court in this case, that guns in appellant's possession that were accessible to him might be used in an "offensive" manner at "some undetermined time point," encompasses any "mere possession" of a firearm by appellant, regardless of the facts surrounding it. (*Ibid.*) As such, the trial court's reasoning was incorrect.

4. Prejudice

Respondent argues that any error was harmless based on the reasonable doubt instruction. (RB:126.) As argued above, reasonable doubt instructions do not cure insufficiency errors to factor (b) evidence. (*People v. Clair*, *supra*, 2 Cal.4th at p. 680; see *ante*, section VII(A)(6).) If that were true, no case would ever be reversed on insufficiency.

The danger that the jury would find appellant guilty of factor (b) crimes absent sufficient evidence is particularly strong given the improper propensity arguments suggested by respondent (RB:120-121), not to mention the strong potential the spillover effect from the conviction for capital murder itself. In light of these obvious biasing factors, it is difficult to accept the proposition that no juror could have accepted the very argument presented to it by the prosecution. (*People v. Fletcher*, *supra*, 13 Cal.4th at p. 471.)

The repeated claims of illegal weapons possession were key to the prosecution narrative. (AOB:150-151.) As detailed in the opening brief, the jury struggled in delivering its verdict. (AOB:140-144.) The errors in the introduction of the factor (b) weapons possession incidents were prejudicial in that they created a reasonable possibility that the outcome would have been different. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

VIII.
THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTIONS TO EXCLUDE EVIDENCE ASSOCIATED WITH INCIDENTS IN AGGRAVATION 2C AND 2D AND THEREBY VIOLATED HIS FOURTH AMENDMENT RIGHTS

As argued in the opening brief, the trial court erroneously denied appellant's two motions to suppress evidence relating to incidents in aggravation 2C and 2D. (AOB:176-198.) Respondent argues that the trial court correctly found no Fourth Amendment violations during either incident. (RB:130-146.) For the reasons discussed below, respondent is incorrect.

In addition to its argument on the merits, and for the first time on appeal, respondent also urges this Court to take the drastic step of foreclosing any Fourth Amendment remedy for unconstitutionally obtained factor (b) evidence. (RB:127-130.) This Court should decline respondent's invitation to effect a sea-change in Fourth Amendment law in capital cases based on an argument never raised in the trial court. To do so at this juncture would deprive appellant and the trial court of any opportunity to create a record substantiating why an exclusionary rule should be made available, or what alternative remedies might be sought were the traditional remedy of exclusion foreclosed. Absent such a record, this Court cannot provide meaningful review by affirming on an alternate, but unlitigated, theory.

Should this Court decide to reach this issue, it should reaffirm that an exclusionary remedy may be sought for tainted factor (b) evidence. Despite recent suggestions to the contrary, this Court *has* applied the exclusionary rule to evidence of other crimes introduced at penalty. (*People v. Frank* (1985) 38 Cal.3d 711, 734 (opn. of Mosk, J.) see also id. at p. 747 (conc.

and dis. opn. of Bird, C.J.) [use of notebooks documenting prior sex crimes at penalty phase required reversal where notebooks were improperly admitted due to overbroad warrant].)[11] Respondent provides no basis from departing from this decades-old precedent.

Capital defendants, perhaps more than any other category of defendant, are entitled to surety that the determination of their fate is not infected by unconstitutional state misconduct. It is "particularly important to assure that [evidence] that is sought to be used as a basis or justification for the imposition of the death penalty is not tainted by a fundamental constitutional flaw." (*Horton, supra*, 11 Cal.4th at p. 1134.) Moreover, the core concern animating criticism of the Fourth Amendment exclusionary rule, that "[t]he criminal is to go free because the constable has blundered," *People v. Defore* (1926) 242 N.Y. 13, 21, is not implicated. Defendants subject to penalty phase hearings will, at a minimum, die in prison.

The cases determining the availability of the exclusionary rule in specific instances have uniformly weighed the costs and benefits of the rule. (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1016; *United States v. Calandra* (1974) 414 U.S. 338, 351-352.) Although furtherance of the "primary purpose" of the exclusionary rule – deterrent value – may be relatively low in excluding certain forms of factor (b) evidence, other purposes for the exclusionary rule weigh strongly in favor of allowing the

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[11] Although principal opinion in *Frank* rested on a violation of the California analogue to the Fourth Amendment, its harmless error analysis necessarily required imposition of the exclusionary rule based on assumed Fourth Amendment error. (*People v. Frank, supra*, 38 Cal.3d at p. 730 (opn. of Mosk, J.); see also *People v. Frank , supra*, 38 Cal.3d at p. 747 (conc. and diss. opn. of Bird, C.J.) [overbroad warrant violated Fourth Amendment].)

remedy in capital sentencing proceedings. (See *People v. Sanders* (2003) 31 Cal.4th 318, 334 [exclusionary rule is not only a deterrent, but also preserves "the imperative of judicial integrity" and avoids "legitimizing the conduct which produced the evidence" by allowing its admission at trial]; *People v. Aylwin* (1973) 31 Cal.App.3d 826, 840 [exclusionary rule exists as a "rejection of any gain by the state from its participation in the ignoble acts"].)

On the other side of the equation, respondent has failed to provide any evidence that allowing an exclusionary remedy for tainted factor (b) evidence has significant social cost. To be sure, the state "has a legitimate interest in allowing a jury to weigh and consider a defendant's prior criminal conduct in determining the appropriate penalty, so long as reasonable steps are taken to assure a fair and impartial penalty trial. [citation]." (*People v. Tafoya* (2007) 42 Cal.4th 147, 186.) But introduction of the fruits of a constitutional violation during a capital sentencing proceeding is not a legitimate interest – it is instead a violation of the Eighth Amendment and Due Process. Even presuming that executing someone based upon tainted evidence that is otherwise excludable is a legitimate state interest, the likelihood that such an interest is substantially impaired by providing for an exclusionary remedy is, at best, unsubstantiated.

Convincing this Court or any other that factor (b) evidence should be excluded under the Fourth Amendment is unusual. And even assuming that such exclusion does occasionally occur, it is infrequent that the exclusion will impact the outcome of the case because, as this Court has held on numerous occasions, the case in aggravation in death penalty cases is

frequently "overwhelming."[12] In other words, there is little evidence that admission of (rarely excluded) factor (b) evidence would cause juries to return a death verdict where they would otherwise have sentenced the defendant to life without the possibility of parole. Finally, regardless of the slim possibility that exclusion may impact juries' determinations, the threatened harm that respondent fears – that deserving defendants will not be executed due to excluded evidence – simply has no factual support. However, polluting capital trials with tainted evidence would harm the integrity of the judicial system and risk reversal of sentences at a later date.

Because Respondent has failed to demonstrate that the benefits to judicial integrity achieved by allowing an exclusionary remedy are outweighed by the costs, this Court should reject respondent's invitation to allow tainted factor (b) to be presented in capital sentencing proceedings.

A. Respondent's Attack On The Exclusionary Rule At Sentencing Should Not Be Entertained For The First Time On Appeal

Compliance "with the fundamental guarantees of the Fourth Amendment is not a game to be won by inventive counsel but a practical,

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[12] For but a sampling, see, e.g., *People v. McLain* (1988) 46 Cal.3d 97, 109 ["evidence in aggravation was overwhelming"]; *People v. Hamilton* (1988) 46 Cal.3d 123, 149 [accord]; *People v. Malone* (1988) 47 Cal.3d 1, 38 [accord]; *People v. Rich* (1988) 45 Cal.3d 1036, 1114 [accord]; *People v. Bonin* (1988) 46 Cal.3d 659, 702 [accord]; *In re Visciotti* (1996) 14 Cal.4th 325, 355 [accord]; *People v. Brown* (1988) 46 Cal.3d 432, 456 [accord]; *People v. Farnam* (2002) 28 Cal.4th 107, 189; [accord] *People v. Williams* (2010) 49 Cal.4th 405, 467 [accord]; *People v. Heishman* (1988) 45 Cal.3d 147, 201 [accord]; *People v. Williams* (1988) 44 Cal.3d 883, 954 [accord]; *People v. Howard* (1992) 1 Cal.4th 1132, 1189 [accord]; *People v. Moore* (1988) 47 Cal.3d 63, 92 [accord]; *People v. Walker* (1988) 47 Cal.3d 605, 640 [accord]; *People v. Keenan* (1988) 46 Cal.3d 478, 527 [accord].

day-to-day responsibility of law enforcement personnel." (*People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 198 [declining to reach People's new Fourth Amendment theory on appeal].) As such, if the People have theories to support a contention that evidence should not be excluded as the product of illegal police conduct, "the proper place to argue those theories [is] on the trial level at the suppression hearing. The People offered no such argument at that hearing and may not do so for the first time on appeal." (*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640; see also *People v. Miller* (1972) 7 Cal.3d 219, 226 [the People cannot introduce on appeal a new Fourth Amendment theory in view of, among other things, the defendant's lack of opportunity to "argue before the trier of fact the theory's invalidity or inapplicability"]; *People v. Watkins* (1994) 26 Cal.App.4th 19, 30 ["Ordinarily, the prosecution cannot justify a search or seizure on appeal on a theory that was not presented to the trial court"].)

This Court has created an exception to the rule articulated in *Lorenzana* where the "defendant does not appear to have been prejudiced by any lack of formal notice" of the new theory. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 138 [inevitable discovery can be raised for the first time on appeal].) However, the exception is limited. (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1242 ["we have cautioned that appellate courts should not consider a Fourth Amendment theory for the first time on appeal when 'the People's new theory was not supported by the record made at the first hearing and would have necessitated the taking of considerably more evidence' or when 'the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition.' [citation]"].)

At first glance, the application of the exclusionary rule to tainted factor (b) evidence might appear to meet the narrow exception articulated in *Green*: whether Fourth Amendment violations permit exclusion of factor (b) evidence can be framed as a purely legal question. However, in the practical application of respondent's theory to an actual case, the *Green* exception is inapplicable.

Because the issue of the exclusionary rule's application was not raised below, a record exploring potential exceptions to the far-reaching rule urged by respondent, as well as the possibility that appellant might seek *alternate* remedies to the exclusionary rule, was not developed at trial.[13] Adoption of respondent's theory would have placed the trial court in completely uncharted territory and may have placed a host of additional factual and related legal concepts at issue in the court below. To permit the People to assert this new theory on appeal therefore deprives appellant an adequate and fair opportunity to respond and fully litigate the case in the trial court, and hampers this Court's ability to perform meaningful review of the case under the People's newly minted theory.

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[13] Because there is no controlling United States Supreme Court precedent on this issue, the trial court would have had to independently assess what the Fourth Amendment's exclusionary rule would have required. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 79 [in the "absence of a decision by the high court directly on point, we must fulfill our independent constitutional obligation to interpret the federal constitutional guarantee against unreasonable searches and seizures"].)

1. Whether the "Fundamental Constitutional Defect" Exception Suggested in *People v. McKinnon* (2011) 52 Cal.4th 610 Would Allow for an Exclusionary Remedy, and Whether Penal Code section 1538.5 Provides for Exclusion, Requires Analysis of Facts not Adequately Developed in the Record Below

This Court recently suggested that the propriety of making suppression motions to exclude prior crime factor (b) evidence is an open question under California law. (*People v. McKinnon, supra,* 52 Cal.4th at p. 610, fn. 45 (*McKinnon*); but see *People v. Frank, supra,* 38 Cal.3d at p. 711 (opn. of Mosk, J.); see also id. at 747 (conc. and diss. opn. of Bird, C.J.) Nonetheless, the *McKinnon* Court assumed without deciding that suppression of constitutionally tainted factor (b) evidence was a proper remedy. (*Ibid.*) The Court did so in part because at trial and on appeal, as in this case, the People did not "contest the procedural propriety of defendant's suppression motion" under California Penal Code § 1538.5, and because it was "at least arguable" that the "fundamental constitutional defect" articulated in *Horton, supra*, 11 Cal.4th at pp. 1134–1136 for factor (c) evidence would apply to allow such a remedy.

The *McKinnon* Court was correctly hesitant to adopt a significant change in Fourth Amendment law without an adequate record. For the very reasons articulated in *McKinnon*, respondent's belated attempt to raise the issue for the first time on appeal does not transform the record in this case into an adequate vehicle to assess the complicated questions posed by respondent's theory.

The first concern voiced by this Court in *McKinnon* was the *procedural* propriety of a motion under Penal Code section 1538.5 seeking to exclude to factor (b) evidence, raised for the first time during a capital trial. (*McKinnon, supra*, 52 Cal.4th at p. 684, fn. 45.) The Court noted that

under section 1538.5 a suppression motion "must be timely brought, and, once denied, can only be renewed under specified circumstances." (*Ibid.*) However, the Court also noted a potential counterargument: that this rule may be forgiven due to the absence of opportunity to suppress the evidence at the time the factor (b) incident arose. (*Ibid.* ["Defendant was never charged with any offense arising from the November 1988 incident, and the record does not disclose whether he had any prior opportunity and incentive to contest the validity of the search that led to discovery and seizure of the bullets and rock cocaine on his person"] see also Penal Code section 1538.5 (h) ["If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial"].)

In addition, if a prior opportunity to exclude the evidence *was* available and successful, regardless of respondent's theory regarding the application of the exclusionary rule to capital sentencing proceedings, the plain language of section 1538.5 appears to forbid the use of suppressed evidence at "at *any* trial or other hearing." (See section 1538.5 (d) *italics added*; *People v. Belleci* (1979) 24 Cal.3d 879, 886 [previously suppressed evidence inadmissible at sentencing hearing under section 1538.5].)[14] And

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[14] Some lower courts have indicated that the holding of *Belleci* has been overruled by Proposition 8. (See, e.g., *People v. Moore* (1988) 201 Cal.App.3d 877, 885 ["*Belleci*'s unqualified holding that evidence suppressed pursuant to section 1538.5 is inadmissible at any trial or hearing must be modified to include the qualification: if exclusion is mandated by the Fourth Amendment exclusionary rule of the federal Constitution"].) However, because there is no state or federal consensus that evidence tainted by Fourth Amendment violations should be admissible at capital

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irrespective of the application of section 1538.5, the Court in *McKinnon* also suggested that the "fundamental rights" exception articulated in *Horton, supra*, 11 Cal.4th at pp. 1134–1136 for factor (c) evidence could apply. (*McKinnon, supra*, 52 Cal.4th at p. 684, fn. 45.) United States Supreme Court precedent clearly embraces the conclusion that the Fourth Amendment is indeed a "fundamental" right. (*United States v. Ross* (1982) 456 U.S. 798, 811 ["What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard *fundamental values* which would far outlast the specific abuses which gave it birth."]; *Weeks v. United States* (1914) 232 U.S. 383, 392 ["The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of *such fundamental rights.*"]; *Mapp v. Ohio* (1961) 367 U.S. 643, 649 ["[citation] '(A) conviction in the federal courts, the foundation of which is evidence obtained in disregard of *liberties deemed fundamental by the Constitution,* cannot stand.' [citation]".)

Regardless of the individual merit of any of these arguments or potential counter arguments, an accurate assessment of the issues depends on facts that are not currently in the record. For instance, the *McKinnon* Court suggested that the availability of an exclusionary remedy may be limited by failure to move to exclude at the initial criminal proceeding out

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[14](...continued)
sentencing proceedings, Proposition 8 does not preempt *Belleci*'s holding in this case. (*In re Tyrell J., supra*, 8 Cal.4th at p. 79.)

of which the factor (b) incident arose. However, the result of any such proceedings, if they existed, is not part of the record.[15] It is not clear what, if any, evidence appellant may have successfully excluded at a prior proceeding. (Cf. *Belleci, supra*, 24 Cal.3d at p. 886 [successfully suppressed evidence may not be admitted at subsequent sentencing].)

At the same time, assuming there was no successful suppression motion at the proceedings that arose from these factor (b) incidents, the application of the *Horton* doctrine may turn on whether appellant had an attorney at these proceedings, or the critical stages thereof. (See *Horton, supra*, 11 Cal.4th 1068 at pp. 1134–1136 [prior murder conviction inadmissible where attorney was not present during period of jury deliberation].) Relatedly, if there were there *no* proceedings that resulted from the factor (b) incidents at issue, it is possible that appellant never had *any* attorney who could have sought exclusion of the evidence in the first instance. (See Cal. Penal Code 1538.5 (h); *People v. McKinnon, supra*, 52 Cal.4th at p. 684 fn. 45 [fact that there was no earlier proceeding may support later attempt at exclusion]; *cf. Horton, supra*, 11 Cal.4th at p. 1135 [denial of counsel at a critical stage warrants collateral review of conviction at subsequent capital proceeding]; see also *People v. Gurule* (2002) 28 Cal.4th 557, 635 ["Because the People did not object to defendant's motion

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[15] As noted in the opening brief, (AOB:178 & fn. 49) there is a somewhat cryptic reference to a "concession" by the prosecution in a prior preliminary hearing associated with the Strawberry Street incident about the search exceeding the scope of the warrant. However, the referenced transcript itself was lost and is no longer part of the record. (3SuppCT:716.) It is unclear whether a section 1538.5 motion was ever filed, ruled upon, or otherwise impacted by the referenced statement, nor is there a definitive record of the result of any proceedings associated with the Strawberry Street incident.

to strike the prior murder conviction on procedural grounds, we assume without deciding that defendant's challenge to his prior murder conviction was properly raised and preserved for appeal."])

In short, respondent's novel theory raises numerous factual and procedural questions regarding the underlying factor (b) incidents that were never properly explored at the trial court level. As a result, because appellant had no notice of the new theory and no opportunity to develop the record to answer these questions, this Court should decline to address respondent's theory for the first time on appeal. (*Robey v. Superior Court*, *supra*, 56 Cal.4th at p. 1242.)

2. Because Appellant Had No Notice of Respondent's New Theory, He Did not Develop a Record upon which to Assess Potential Alternate Remedies or Other Exceptions to Respondent's Theory

Even if the trial court could have correctly held that an exclusionary remedy might not have been available, potential allowance of alternate remedies also impedes meaningful appellate review of respondent's freshly introduced alternate theory. For decades, Courts and commentators have offered various criticisms and suggested numerous alternate remedies to replace the exclusionary rule. (See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (1971) 403 U.S. 388, 426 (diss. opn. of Burger, C.J.) [discussing alternatives to exclusionary rule].) But for the same period, and certainly up to the point of appellant's trial, the availability of an exclusionary remedy at the penalty phase had remained unquestioned by this Court. (See *People v. Frank*, *supra*, 38 Cal.3d at p. 711, 734 (opn. of Mosk, J.) see also id. at p. 747 (conc. and dis. opn. of Bird, C.J.) [use of notebooks documenting prior sex crimes at penalty phase required reversal where notebooks were improperly admitted due to

overbroad warrant].)

Had appellant known the availability of the exclusionary remedy was to be placed in questioned by the prosecution at trial, he may have sought an alternate remedy, or may have sought to present additional evidence in the hope of securing the existing remedy. It is difficult to assess all of the legal strategies which might have been pursued if the People had sought the legally unprecedented shift in Fourth Amendment law which respondent suggests this Court adopt for the first time on appeal. However, it is not difficult to construct hypotheticals in which further record development may have been required. For instance, appellant could have, in the alternative to suppression, sought an instruction that the jury could consider state misconduct when assessing penalty. (Cf. CALJIC 2.28 [instruction on failure to timely disclose evidence]; *People v. Zamora* (1980) 28 Cal.3d 88, 99-104 [instructions available for *Youngblood* and *Trombetta* violations]; *People v. Medina* (1990) 51 Cal.3d 870, 894 [court has discretion to instruct jury on destruction of evidence even if no due process violation shown].) Or perhaps the trial court would have been inclined to adopt a modified exclusionary remedy for tainted factor (b) evidence, available only upon a different or heightened showing. (See *Bivens, supra*, 403 U.S. at p. 426 (dis. opn. of Burger, C.J.).) In that case, appellant may have attempted to place additional evidence on the record which would not have otherwise been relevant.[16]

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[16] For instance, appellant might have attempted to magnify the wrong done to him by the police. By producing evidence that his detention was the product of racist profiling of Latino suspects, appellant may have argued the products of the illegal search should be excluded in the unique context of a penalty phase hearing despite the reduced probability of

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Assuming this Court finds merit to appellant's Fourth Amendment claims, it is difficult if not impossible for this Court to assess what might have happened—and how it would have prejudiced appellant—had the prosecution pursued the theory it presents today at the time of trial. Therefore, heeding its own advice, this Court should not address respondent's novel theory for the first time on appeal. (*See Robey v. Superior Court, supra,* 56 Cal.4th at p. 1242 [higher courts should be cautious when invited to address new a Fourth Amendment theory on appeal].)

B. This Court Should Continue To Allow An Exclusionary Remedy For Tainted Factor (b) Evidence

Although most frequently applied in criminal guilt-phase proceedings, this Court and others have applied the exclusionary rule in a variety of different contexts. (*In re William G.* (1985) 40 Cal.3d 550, 568 & fn. 17 [juvenile proceedings under Welf. and Inst. Code, § 602]; *People v. One 1960 Cadillac Coupe* (1964) 62 Cal.2d 92, 96–97 [civil forfeiture]; *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 669 [Public Utilities Commission hearing]; *Elder v. Bd. of Medical Examiners* (1966) 241 Cal.App.2d 246, 260 [administrative proceeding to revoke medical license]; *People v. Moore* (1968) 69 Cal.2d 674, 682, 72 Cal.Rptr. 800, 446 P.2d 800, overruled on other grounds by *People v. Thomas* (1977) 19

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[16](...continued)
deterrence underscored by respondent. (Cf. *Whren v. United States* (1996) 517 U.S. 806, 810 [officer motivation normally irrelevant to Fourth Amendment violation].) Or if the trial court considered adopting a "sliding scale" remedy based on the seriousness of the factor (b) offense, see Kaplan, *The Limits of the Exclusionary Rule* (1974) 26 Stan. L. Rev. 1027, 1048, appellant might have attempted to provide additional evidence to the trial court about the nature of the offenses at issue.

Cal.3d 630, 637 [civil commitment proceedings for narcotic addicts]; see also La Fave,1 Search & Seizure § 1.7(f) (5th ed.) [citing cases applying the exclusionary rule in Federal Trade Commission hearings, Securities and Exchange Commission proceedings, Occupational Safety and Health Administration proceedings, proceedings before the Public Utilities Commission, National Labor Relations Board hearings, and other civil and administrative proceedings].) This Court has repeatedly assumed that the exclusionary rule applies in capital sentencing proceedings. (See, e.g., *McKinnon, supra,* 52 Cal.4th at p. 684, fn. 45.) *People v. Huggins* (2006) 38 Cal.4th 175, 241.) And this Court has necessarily applied some form of exclusionary rule during the penalty phase by reversing a sentence based on evidence utilized during sentencing proceedings which was seized under an overly broad warrant. (See *People v. Frank, supra,* 38 Cal.3d at p. 734 (opn. of Mosk, J.) see also id. at p. 747 (conc. and dis. opn. of Bird, C.J.) [improper admission of defendant's notebooks, including admission of past sex crimes, required reversal of sentence].)

The admittedly imprecise "framework" for determining the application of the exclusionary rule to a given proceeding is to "weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. [citation]" (*Conservatorship of Susan T., supra,* 8 Cal.4th at p. 1016.) Although the likelihood of deterrence achieved by suppressing certain forms of factor (b) evidence may be relatively low, weighing the concerns underlying the exclusionary remedy in the unique context of capital cases militates in favor of retaining the remedy.

1. The General Rule in Non-Capital Sentencing Proceedings does not Provide an Answer to the Application of the Exclusionary Rule in Capital Sentencing Proceedings

Respondent first argues that this Court's passing citation in *People v. Huggins supra,* 38 Cal.4th at p. 241 to the rule recognized in *United States v. Ryan* (10th Cir. 2001) 236 F.3d 1268, 1271 (*Ryan*) should determine the application of the exclusionary rule to tainted factor (b) evidence. (RB:127-128.) Neither the offhand comment in *Huggins*, nor the general rule it referenced, provides a definitive answer to whether the exclusionary rule applies during penalty phase proceedings.

In *Huggins*, while assuming the *applicability* of the Fourth Amendment exclusionary rule, this Court noted the general rule mentioned in *Ryan, supra*, 236 F.3d at p. 1271 that constitutional exclusionary rules do not apply at *non-capital* federal sentencing proceedings. (*People v. Huggins supra,* 38 Cal.4th at 241); see also *Ryan, supra*, 236 F.3d at p. 1272 [citing other federal courts of appeal].) Respondent argues that the "rationale for these decisions" compels a rule that Fourth Amendment exclusion is not available in capital sentencing proceedings. However, respondent's argument merely begs the question.

The rule in *Ryan* and other federal cases disallowing an exclusionary remedy at federal sentencing are themselves based on balancing the costs and benefits of an exclusionary remedy in a factual distinct context – *judicial* sentencing in *non-capital* cases under the federal guidelines – under the general test first articulated in *United States v. Calandra, supra*, 414 U.S. 338. (See *United States v. Graves* (10th Cir. 1986) 785 F.2d 870, 875 ["[o]ther circuit courts have also applied the *Calandra* balancing approach"].) Thus, merely citing the general consensus that the *Calandra*

balancing favors respondent's position in non-capital federal sentencing does not answer the question of whether an exclusionary rule should be applied at a capital penalty phase hearing. In fact, this Court has necessarily held, by reversing a death sentence evidence improperly obtained under an overbroad warrant, that the exclusionary rule *does* apply to evidence introduced at capital sentencing. (See *People v. Frank*, *supra*, 38 Cal.3d at p. 734 (opn. of Mosk, J.); see also id. at p. 747 (conc. and dis. opn. of Bird, C.J.).)

Many of the concerns that inform the availability of Fourth Amendment exclusion for judicial sentencing in the non-capital context are polar opposites to those which might apply to jury sentencing at capital trials. (Cf. *United States v. Schipani* (E.D.N.Y. 1970) 315 F.Supp. 253, 259 [applying exclusionary rule to highly discretionary sentencing impractical where "[i]t would be almost impossible for a district judge, who has screened proffered evidence on the motion to suppress, to banish it entirely from his mind at sentencing"].) And indeed, despite the long history of relaxed admission of evidence at judicial sentencing, the United States Supreme Court has applied *other* constitutional exclusionary rules in capital sentencing. (See *Estelle v. Smith* (1981) 451 U.S. 454, 462-463 [excluding statement obtained in violation of Fifth Amendment because "[w]e can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees."].) Therefore, the existence of a general rule disallowing Fourth Amendment exclusion in federal sentencing proceedings does not determine the application of the

exclusionary rule in this case.

2. Eighth Amendment and Due Process Concerns, and the Corrosive Effect on Judicial Integrity of Sentencing an Individual to Death Based on Constitutionally Tainted Evidence Outweigh, the Minimal Harms of Permitting Exclusion in Capital Cases

Respondent asserts that providing for suppression of illegally obtained evidence at a penalty phase would have "very little deterrent value" and thus the exclusionary rule should not apply to tainted factor (b) evidence. (RB:129.) Appellant assumes *arguendo* that in some, but by no means all cases, the deterrent effect of excluding illegally obtained factor (b) evidence may indeed be relatively low. However, because deterrence is not the only purpose driving application of the exclusionary rule, a shortcoming in deterrent value does not itself mean that an exclusionary remedy is inappropriate.

The exclusionary rule is intended "not only to have a deterrent effect on police misconduct, but to preserve the integrity of the judicial system." (*In re William G.* (1985) 40 Cal.3d 550, 567, fn.17; *People v. Sanders*, *supra*, 31 Cal.4th at p. 334 [accord].) Thus, the rule serves as a "rejection of any gain by the state from its participation in the ignoble acts," (*People v. Aylwin*, *supra*, 31 Cal.App.3d at p. 840), and refusing admission of tainted evidence avoids "legitimizing the conduct which produced the evidence." (*People v. Sanders*, *supra*, 31 Cal.4th at p. 334.) As powerfully argued by Justice Brandeis in *Olmstead v. United States* (1928) 277 U.S. 438:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds

> contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Id. at p. 485 (dis. opn. of Brandeis, J.); see also *Mapp v. Ohio* (1961) 367 U.S. 643, 659 ["Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence"].)

The preservation of the integrity of the judicial system is more, not less, important when a criminal defendant is sentenced. It "is 'morally incongruous' for the state to impose punishment when it, itself, has become a law breaker." (*In re Ralph Martinez* (1970) 1 Cal.3d 641, 654 (diss. opn. of Peters, J.).) Although the *Martinez* Court did not accept this reasoning in the context of parole revocation proceedings, Justice Peters's reasoning is particularly forceful in capital cases.

The United States Supreme Court, "has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos* (1983) 463 U.S. 992, 998-999.) The Court's principal concern has been "more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." (*Id.* at p. 999, italics in original.)

Because "it is a constitutional imperative that '[n]o state shall deprive any person of [his] life . . . without due process of law," the procedures governing capital trials are designed to ensure fundamental fairness to the accused." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1323 (conc. and dis. opn. of Werdegar, J.). "Unless the imposition of the death

penalty consistently rests on the most scrupulous regard for fair procedure . . . it may well teach a lesson that aggravates the very dangers it was intended to deter." (*Harris v. Alabama* (1995) 513 U.S. 504, 523 (dis. opn. of Stevens, J.).) Allowing the State to use constitutionally tainted evidence to secure a death verdict undermines the very sense of justice that the death penalty seeks to promote.

Moreover, introduction of constitutionally inadmissible evidence at a capital sentencing proceeding itself violates the Eighth Amendment and Due Process. (See *Clemons v. Mississippi* (1990) 494 U.S. 738, 754 [discussing past precedents wherein an Eighth Amendment violation was found where the "jury was permitted to consider inadmissible evidence in determining the defendant's sentence"]; *Gardner v. Florida* (1977) 430 U.S. 349, 358 [capital-sentencing procedure which permits a trial judge to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel violates due process]; *Smith v. Murray* (1986) 477 U.S. 527, 555 (dis. opn. of Stevens, J.) [introduction of "evidence that itself represents an independent constitutional violation-quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment"].) Therefore, even in the absence of a strong deterrent value, the benefits of applying the exclusionary rule to penalty phase proceedings are strong.

On the other side of the ledger, respondent voices concern that exclusion would limit the pool of aggravating evidence upon which the jury can base its moral assessment of a defendant's sentence. (RB:129.) This complaint, though perhaps attractive at first glance, does not outweigh the benefits to the integrity of the death penalty system of continuing the existing exclusionary regime.

As an initial matter, the strongest criticism of the exclusionary rule, "[t]he criminal is to go free because the constable has blundered," *People v. Defore, supra,* 242 N.Y. p. 21, does not inform the application of the exclusionary rule to factor (b) evidence. (Cf. *Olmstead v. United States, supra*, 277 U.S. at p. 470 (dis. opn. of Holmes, J.) [endorsing exclusionary rule because "for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."].) As this Court's precedents underscore, the greatest evil wrought by the exclusionary rule is endangering the public by a0llowing dangerous criminals to go free prior to serving their allotted sentence. (*In re Ralph Martinez, supra,* 1 Cal.3d at p. 650 [declining to extend the exclusionary rule to parole revocation proceedings because "[t]o blind the [parole] authority to relevant facts in this special context is to incur a risk of danger to the public which, at least as of this date, outweighs the competing considerations of a problematical gain in deterrence"].)

It is true that the state "has a legitimate interest in allowing a jury to weigh and consider a defendant's prior criminal conduct in determining the appropriate penalty, so long as reasonable steps are taken to assure a fair and impartial penalty trial. [citation]." (*People v. Tafoya, supra,* 42 Cal.4th at p. 186.) Appellant vehemently disagrees with the proposition that a "fair" capital sentencing procedure endorses using unconstitutionally obtained evidence to secure a death sentence. Several other states expressly forbid capital juries from hearing evidence secured in violation of the federal or state constitutions. (Kan. Stat. Ann. § 21-6617(c); Nev. Rev. Stat. Ann. § 175.552(3); Tex. Crim. Proc. Code Ann. art. 37.071(2)(a)(1); Ala. Code § 13A-5-45(d); Fla. Stat. Ann. § 921.141(1); Or. Rev. Stat. Ann. § 163.150(1)(a); S.C. Code Ann. § 16-3-20(B); Okla. Stat. Ann. tit. 21, §

701.10(D); Miss. Code. Ann. § 99-19-10(1); Tenn. Code Ann. § 39-13-204(c).)

Even were an interest in using tainted evidence legitimate, the interest in executing those defendants deserving of a death sentence is not impaired at the moment the ruling excluding evidence is made. The State is only impacted to the extent that a defendant would otherwise be executed but for the application of an exclusionary remedy. For a variety of reasons, changing the rules going forward as respondent suggests is unlikely to impair the State's interests in punishment of deserving defendants.

First, successful suppression motions are a relative rarity, particularly in capital cases. For instance, this Court has only once reversed a sentence based on a Fourth Amendment violation, (*People v. Frank, supra*, 38 Cal.3d at p. 711), and this was not even based on the exclusionary limitation respondent proposes for searches in "unrelated prosecutions" potentially years away from the capital crime. (RB:129.)[17]

Second, to impair the State's interest in appropriate punishment, the excluded evidence would have to be such that admission of this evidence would have caused the jury to return a death sentence where it otherwise would not. As this Court has repeatedly held, many cases are highly aggravated and the admission or exclusion of individual tainted factor (b) incidents (of which there are often a considerable number) is unlikely to determine the outcome of an individual sentence. Nor has respondent provided any evidence substantiating the pure speculation that additional

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[17] The search in *Frank* resulted from police investigation of the capital murder itself and the diary documenting defendants crimes were presented in both guilt and penalty phases of the trial. (*People v. Frank*, *supra*, 38 Cal.3d at p. 722.)

deserving inmates will be executed in California if this Court adopts a rule allowing tainted evidence at the penalty phase.

In short, if this Court refuses to undermine the interest of judicial integrity by allowing tainted factor (b) evidence to be introduced at the penalty phase, the state will likely suffer no detriment. Because respondent has refused to substantiate the costs of providing for an exclusionary remedy, this Court should decline his invitation to radically alter Fourth Amendment law in capital cases.

C. The Trial Court's Rulings On The Suppression Motions Were Erroneous

Respondent argues that the trial court's rulings with respect to the Strawberry Street and Circle K searches was correct or should be upheld on grounds not raised in the trial court. (RB:133-138, 142-148.) Appellant address each argument in turn.

1. The Trial Court's Ruling that there Was no Fourth Amendment "Standing" During the Strawberry Street Search Was Incorrect

Respondent claims that appellant cannot demonstrate a reasonable expectation of privacy in a car whose keys he held and in which police officers had repeatedly seen him. The argument is without basis in fact or law.

First, respondent falsely asserts that appellant "disclaimed *any proprietary or possessory* interest in the area searched." (RB:134.) This assertion is not substantiated by the facts. All appellant did was accurately state he was not the owner. (1RT: 60-61.) This is hardly the "complete disavowment of any proprietary interest" claimed by respondent and this is

not what the case law requires to abandon Fourth Amendment interests.[18] (RB:134; cf *People v. Allen* (1993) 17 Cal.App.4th 1214, 1222-1223 ["the trial court erred in determining defendant's lack of standing based exclusively on his one statement giving his address as 4782 East Orleans without considering the other relevant evidence . . . Unlike cases where a defendant makes vigorous oral disclaimers of ownership [Citation], defendant here did not disclaim all interest in the area searched, the Lyell Avenue address; he merely gave a different location as his address"]; see also 4 Witkin, Cal. Crim. Law 4th (2012) Illegal Evid, § 51, p. 801. [a person who denies ownership the property searched or seized, "where the prosecution asserts that the person is the owner or possessor of the property, may still have standing to contest the legality of the search or seizure"].)

It is only where the suspect has "in effect given the authorities the green light to proceed insofar as his or her own Fourth Amendment rights are concerned" that a complete disavowal of ownership precludes a claim of reasonable expectation of privacy. (*People v. Allen, supra*, 17 Cal.App.4th at p. 1222, citing *People v. Dees* (1990) 221 Cal.App.3d 588, 594–595.) However, the trial court itself admitted that appellant's statement that he did not own the vehicle was an "ambiguous response" with respect to his possessory interest in the vehicle because it was not predicated upon a

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[18] Respondent finds no relevance in the fact that appellant did not speak English, and underscores that one officer, who spoke Spanish, asked appellant if he *owned* the vehicle. (RB:134, fn.84.) Respondent's assertion is true as far as it goes, but does not address the importance of the fact that appellant was asked only a *single* question in his language about *ownership* and not about lawful possession. (1RT:70.) This fact strongly undermines the importance ascribed by respondent to the fact that appellant told officers honestly that he was not the owner.

request to search. (1RT:94.) As such, the trial court correctly concluded that "the fact that [appellant] mumbled something about it is not my car when they took the keys out of his pocket doesn't really mean much to me unless it was prefaced by a request to search." (1RT:94.)

Instead, analysis of reasonable expectation of privacy looks at obvious inferences, such as the fact that someone who possesses the keys to a vehicle has a possessory interest sufficient to support standing. (See *People v. Tufts* (Colo. 1986) 717 P.2d 485, 490-491 [defendant had standing to challenge search because his "possession of keys to the automobile searched strongly suggests that he was not simply a passenger in the car. Rather, the evidence supports the inference that Davidson was permitted to use the car by the registered owner"].) The reasoning of *Tufts* makes *precisely* the same common sense argument made by the *prosecution* with respect to constructive possession. (See 4CT:899 ["[p]ossession of the keys to a car parked in front of an apartment of which defendant was an occupant raises an inference he is the possessor [sic] the car. That inference is buttressed by Agent Lynn's frequent observation of defendant as sole occupant of the car in the same block where the apartment subject to search was located."]; see also 1RT: 92 [prosecutor's admission at the suppression hearing that the evidence presents "pretty strong indicia of ownership *or possession*"].) In fact, the inference of lawful possession demonstrated by the facts is so strong that respondent argues that appellant's statement that he did not own the vehicle displayed an "apparent lack of candor." (RB:137-138.) The People's contrary argument on appeal is thus both cynically hypocritical and without merit.

Next, respondent attempts to distinguish *People v. Dees*, *supra*, 221 Cal.App.3d at p. 595 on the basis that "Unlike *Dees*, appellant did not base

his suppression motion on the preliminary hearing transcript, so appellant is not arguing that the prosecution took an inconsistent position *at the suppression hearing.*" (RB:136, italics added.) The timing of the prosecution's utterly inconsistent theories is a distinction without a difference. The People should be collaterally estopped from simultaneously arguing that the facts suggest that appellant possessed the vehicle for purposes of constructive possession but did not possess the vehicle for purposes of a reasonable expectation of privacy. And, to the extent that timing is relevant, the People made *precisely* the same point about possessory interest at the suppression hearing. (1RT: 92 [assuming defense motion is denied "it is going to be pretty strong indicia of ownership *or possession*"].) Perhaps more importantly, the trial court should not be permitted to make such inconsistent findings, even if they occur at different stages of the proceeding.

Respondent attempts to reconcile the inconsistency by claiming that the constructive possession theories adopted by the prosecution and accepted by the trial court were not inconsistent because constructive possession turned solely upon "access" to the vehicle and not "ownership." (RB:126.) However, lawful *access* to a vehicle is all that is required for a reasonable expectation of privacy. (*People v. Leonard* (1987) 197 Cal.App.3d 235, 239 [individual "who has the owner's permission to use a vehicle and is exercising control over it has a legitimate expectation of privacy in it"].) And permission may be inferred from the circumstances. (*United States v. Jones* (2012) 565 U.S. _____, 132 S.Ct. 945, 949 fn. 2, 181 L.Ed.2d 911 [Although a Jeep was registered to defendant's wife, he drove it and, therefore, "had at least the property rights of a bailee"]; *People v. Tufts, supra,* 717 P.2d at pp. 490-491 [possession of keys to the

automobile searched strongly suggests that codefendant had permission to use car]; *People v. Fuentes–Borda* (N.Y. App. Div. 1992) 186 A.D.2d 405, 589 N.Y.S.2d 5, 6 ["the police observations of defendant and his companion entering, exiting and locking the apartment established a privacy interest sufficient to confer standing"]; *United States v. Doe* (E.D.Tex.1992) 801 F.Supp. 1562, 1573 [finding that defendant established a legitimate expectation of privacy in a car through "testimony by a government witness from which it [wa]s reasonable to infer that defendant's possession of the vehicle was lawful and with permission".].)

Respondent claims that this Court must reject appellant's claim of a possessory interest in the vehicle by speculating that the car was stolen. But there is no evidence nor information to suggest that appellant had stolen the vehicle. (Cf. *Ibid.* [noting the government had not "produced an iota of evidence that defendant lacked permission to drive the car"].) Although the record indicates that police ran the vehicle registration (4CT:899), none of the investigating officers testified that the car was reported stolen, nor is there any evidence that appellant was arrested for possessing a stolen vehicle.

Next, respondent argues that the warrant could reasonably be read by investigating officers as authorizing a search of the Monte Carlo. Respondent expressly concedes, as it must, that the vehicle was not in the location named in the warrant. (RB:137.) However, respondent asserts that an objective officer would reasonably interpret the warrant of an apartment building to authorize searches of any vehicles nearby to the apartment complex. (RB:137.) This Court cannot sanction respondent's expansive theory that police may barge into any vehicle near a searched premises provided that police discover keys to a vehicle, (not named in the warrant),

on a person, (also not named in the warrant), who happens to be present.

Searching an individual not named in the warrant based only on his or her presence at the site searched is unquestionably illegal. (*Ybarra v. Illinois* (1979) 444 U.S. 85, 91.) By extension, such an illegal search cannot render valid further searches *outside* of the location authorized by the warrant unless there is an independent basis for the search.

Respondent's final claim attempts to provide such a basis by arguing that appellant's honest statement that he did not own the car showed a "lack of candor" sufficient to support probable cause to search the vehicle. (RB:137-138.) In other words, respondent argues that the evidence was so strong that appellant was in possession of the vehicle that failure to immediately assert that he had a possessory interest was sufficiently suspicious as to establish probable cause to search the vehicle. Not only does this claim expose the flimsiness of respondent's prior arguments that appellant did not have a reasonable expectation of privacy in the vehicle, it fails in two further respects.

Most obviously, the argument that appellant was dishonest to police has no basis in fact. Appellant's true statements that he did not own the vehicle by their very nature cannot support a "lack of candor" sufficient to establish probable cause. The fact that appellant *obviously* had possession of the vehicle (the keys were in his pocket, after all) strongly suggests not that appellant was trying to trick officers into believing an easily disproved falsehood, but instead that appellant understood their question to refer to ownership and not to possession.

Secondarily, respondent's newly created probable cause theory was not raised at trial (Cf. 3CT:874-877 [prosecutor's opposition]; 1RT:76, 85-86, 90-92 [prosecution argument]) and cannot be used to justify the search

on appeal. (*Robey v. Superior Court, supra* 56 Cal.4th at p. 1242 [theories that could have been met with additional record development cannot be raised by the prosecution for the first time on appeal]; see also, *ante,* Section VIII(A) [accord.]) Had the prosecution relied upon appellant's alleged "lack of candor" regarding his possessory interest in the vehicle to support the search, appellant would have been on notice and would have had the opportunity to place additional evidence in the record to rebut this theory. Therefore, this Court cannot affirm the ruling on an alternate basis that was not litigated below.

For these reasons, the search into the vehicle was a violation of the Fourth Amendment and the associated evidence introduced under factor (b) should have been suppressed. Had the evidence been suppressed, there was a reasonable possibility that the outcome of the penalty phase would have been different. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

2. The Trial Court's Erroneous Admission of the Evidence Illegally Seized During the Circle K Incident Warrants Reversal

With respect to the search of the van at the Circle K, respondent makes several different arguments to support the trial court's determination. Each fails.

First, respondent argues that police had reasonable suspicion to detain appellant. (RB:143.) In short, the fact that appellant chose to park in the "dimly lit" area on the side of the building near the entrance of the Circle K does not provide reasonable suspicion. (AOB:193-196; *People v. Perrusquia* (2007) 150 Cal.App. 4th 228.) Respondent attempts to distinguish the nearly identical facts of *Perrusquia* on several grounds, all of which are ultimately unpersuasive.

First, respondent notes that the Circle K had previously been robbed. (RB:146.) However, the *Perrusquia* court rejected this argument directly, when assessing the string of robberies of 7-11's present in *that* case: "Even recent, specific crimes, without additional factors specific to the defendant, are not sufficient." (*People v. Perrusquia*, *supra*, 150 Cal.App.4th at p. 233; see also *United States v. Manzo-Jurado* (9th Cir. 2006) 457 F.3d 928, 939) ["Although an officer, to form a reasonable suspicion of criminality, may rely in part on factors composing a broad profile, he must also observe additional information that winnows the broad profile into an objective and particularized suspicion of the person to be stopped"].) Particularly given the high frequency with which convenience stores and their employees are victims of theft and robbery, the fact that the Circle K was victimized previously does not provide evidence *specific to appellant* warranting detention.

Next, and without citing any supporting case authority, respondent reiterates that the vehicle's position in a "dark" section of the parking lot supports a reasonable suspicion. (RB:146.) The fact that appellant parked conveniently near to the entrance of the store, (see People's In Limine Exhibit 1 [diagram of Circle K lot]) even in an area that was allegedly dimly lit (cf. 1RT:27-38 [investigator testimony contradicting claims of poor lighting]), does not provide reasonable suspicion. (*United States v. See* (6th Cir. 2009) 574 F.3d 309, 314 [no reasonable suspicion although it was 4:30 in the morning, suspect was parked in a high-crime area, in a dimly lit area of the lot, officer had been instructed to pay special attention to non-resident loiterers because of a recent increase in robberies, and the car did not have front license plate].)

Many parking lots of liquor stores and other establishments victimized by theft have poor lighting and this does not allow police to detain anyone who parks there. Nor was there any evidence that appellant was waiting in an idling car, suggesting he might be a "getaway driver." (But see *Perrusquia*, 150 Cal.App.4th 228, at p. 231 [fact that suspect waiting in car had engine idling and was facing exit still did not provide reasonable suspicion].)

Respondent also argues that the fact that appellant lacked identification distinguishes *Perrusquia* and justifies appellant's detention. (AOB:143, 146.) This argument overlooks the sequence of events and their bearing on the ultimate search. It is well established that a police officer cannot stop a citizen and demand identification "without any specific basis for believing he is involved in criminal activity." (*Brown v. Texas* (1979) 443 U.S. 47, 52 ["even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it."]; *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 239 [accord].) The trial court thus properly ruled that "[i]n the instant case, Casares was not free to leave until after Officer Stow had concluded his identification procedure with the defendant, hence there was not a consensual encounter; there was a detention." (4CT:948.) The trial court erred, however, in finding the detention supported by reasonable suspicion.

As respondent's own recitation of the facts illustrates, the identification procedure that *initiated* the detention began when police demanded identification from appellant. (RB at p. 139; 1RT:11, 16.) An observation "made after and caused by a stop cannot be bootstrapped into

grounds for reasonable suspicion warranting the stop." (*United States v. Frisbie* (5th Cir. 1977) 550 F.2d 335, 338; *United States v. Little* (10th Cir. 1995) 60 F.3d 708, 714 [defendant's responses provided after unlawful restraint could not be used to determine whether there was reasonable suspicion for search].) Thus, the fact that police *subsequently* discovered that appellant lacked identification or provided false information cannot be used to provide reasonable suspicion for the stop.

For identical reasons, respondent's attempt to rely upon the authority granted by *In re Arturo D.* (2002) 27 Cal.4th 60 and *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002 to search vehicles or individuals for identification also fails. (See RB at 143-144.) Because there was no reasonable suspicion to detain appellant and demand that he produce identification, *Brown v. Texas, supra,* 443 U.S. at p. 52, information regarding appellant's lack of identification obtained by police during the unlawful detention cannot be used as the basis to justify the subsequent search of appellant or his vehicle.[19]

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[19] Respondent also seeks to undermine the trial court's *correct* ruling that the search of appellant's pockets was unlawful, citing *People v. Loudermilk, supra*, 195 Cal.App.3d 996. (RB at 146.) However, there is no "identification search" exception to the warrant requirement which allows searching of individuals' pockets for identification without a warrant. (*State v. Webber* (1997) 141 N.H. 817, 819.) Generally, "the warrantless search and seizure of a defendant's wallet to find proof of identity during an investigatory stop constitutes an unreasonable search and seizure." (Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues* (2004) 56 Fla. L. Rev. 697, 760 [collecting cases so holding, but noting contrary rule of *Loudermilk*].) If *Loudermilk* ever was good law and respondent can raise this new theory for the first time on appeal, both propositions which appellant strongly contests, it has been disapproved by subsequent Supreme Court authority which has delineated the limited scope

(continued...)

Finally, respondent claims that appellant's consent validated the subsequent search of the vehicle. (RB:145.) It is "axiomatic that a consent to search produced by an illegal arrest or detention is not voluntary." (*People v. Valenzuela* (1994) 28 Cal.App.4th 817, 833, *People v. Zamudio* (2008) 43 Cal.4th 327, 341, 75 Cal.Rptr.3d 289, 181 P.3d 105 ["Consent that is the product of an illegal detention is not voluntary and is ineffective to justify a search or seizure"].) Because of both the illegal detention and search of appellant, any attempt to justify a subsequent search based on his allegedly "voluntary" consent is spurious. A suspect's "consent" has no meaning if law enforcement officials demonstrate that they will ignore the Fourth Amendment's requirements and proceed with further investigations regardless of constitutional limitations.

For these reasons, the trial court's ruling was unquestionably incorrect and the evidence should have been excluded. For the reasons discussed in appellant's opening brief (AOB:198), had the evidence been suppressed, there was a reasonable possibility that the outcome of the penalty phase would have been different. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

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[19](...continued)
of the *Terry v. Ohio* (1968) 392 U.S. 1 stop and frisk authority. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375 [a *Terry* frisk search exceeds the proper scope if "the incriminating character of [an item is] not immediately apparent"].) Even if a suspect provides incorrect identifying information, police must still obtain a warrant to search his person.

IX.

THE TRIAL COURT COMMITTED *SKIPPER* ERROR IN EXCLUDING EVIDENCE THAT APPELLANT'S FATHER KIDNAPED AND RAPED APPELLANT'S MOTHER IN THE SAME MANNER THAT HE KIDNAPED AND RAPED ROSA BACA

Because of the heightened need for reliability in capital sentence, trial courts "should be exceptionally careful when considering whether to admit or exclude evidence" when balancing its probative value against potential prejudice. (*United States v. Taveras* (E.D.N.Y. 2006) 424 F.Supp.2d 446, 462 [citing Federal Rule of Evidence, Rule 403].) Exclusion of testimony showing that appellant's mother was kidnaped and forced into a lifetime of sexual slavery and abuse by appellant's father violated this principle and fatally infected the jury's assessment of appellant's background and character.

As this Court is well aware, physical abuse of capital defendants and domestic violence in their families is commonplace. Being born into a regime of kidnaping and rape, however, is an extraordinary disadvantage that a fairminded juror would not ignore. Respondent, echoing the trial court, argues that the horrific fact that appellant's mother was herself kidnaped and raped, and thus that appellant was the product of rape, was merely "cumulative" of evidence showing that appellant's father was extraordinarily abusive. (RB:149-151.) But physical abuse, even the extreme physical abuse documented in this case, cannot be equated to the grotesque reality of appellant's family that the jury did not hear.

The obvious distinction between physical abuse and a family created through enslavement explains why individuals such as Ariel Castro[20] and Phillip Garrido[21] have earned their status as among the "most reviled criminals in modern American history." (Pearce, *Ariel Castro's Son Opens Up About The Horror His Father Left Behind*, L.A. Times (September 22, 2013).) Creating a family through forced abduction and repeated sexual assault is among the most heinous and damaging misconduct an individual can undertake. Accordingly, it is impossible to uphold a ruling that the evidence of appellant's mother's kidnaping risked an "undue consumption of time" as required by Evidence Code section 352.

Respondent further argues that appellant never informed the trial court of the proffered relevance of this evidence as required under Evidence Code section 354. However, appellant satisfied the requirements of section 354 by explaining that the evidence was relevant to show the duration and nature of the abuse suffered by appellant's mother and its "foundational" description of the father's impact on the family. (9RT:2150.) Appellant also explained that the evidence was relevant to rebut the prosecution's case in aggravation. (9RT:1966-1967.) In fact, the trial court's abrupt decision to exclude the kidnaping evidence arbitrarily contradicted its prior ruling: that the kidnaping of appellant's mother and others would be admissible to demonstrate appellant's "mental state" with respect to the Baca kidnaping and rape. (*Ibid.*)

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[20] Gabriel and Yaccino, *Officials, Citing Miscarriages, Weigh Death Penalty in Ohio Case,* N.Y. Times (May 9, 2013).

[21] McKinley and Pogash, *Kidnapped at 11, Woman Emerges After 18 Years*, N.Y. Times (August 27, 2013)

Finally, respondent argues that because appellant may have been unaware of the kidnaping of his mother, this abominable crime could have no relevance as mitigating evidence. Respondent's theory completely misunderstands the nature of mitigating evidence and would lead to absurd results. If, for instance, Ariel Castro or Phillip Garrido's children by kidnaping and rape had been rescued at infancy, and later committed a criminal offense, respondent's theory would label the background of the children's conception "irrelevant" if the children had been kept unaware of their history. No reasonable juror would come to the same conclusion. Anyone with an ounce of common sense could infer that such unspeakable abuse, so close in time to critical periods of caregiving, would negatively impact a mother's ability to fulfill her role as a parent—even if she ultimately escaped—and would be relevant to help understand future misconduct by her offspring.

In this case, unlike in the case of Castro or Garrido, law enforcement never intervened. Appellant was only able to escape his father's reign of terror when Jose Casares, Sr. was murdered in retaliation for the Baca kidnaping. The jury was entitled to understand the full extent of appellant's tragic background. Equally importantly, the jury should have heard of this prior kidnaping to rebut and mitigate the prosecution case in aggravation: that appellant's father committed an identical kidnaping years later and forced appellant to participate. Because the trial court's unexplained reversal of its prior decision to admit prior kidnaping evidence on this ground finds no support in logic or law, it cannot be sustained and appellant's sentence must be reversed.

A. Reversal Is Not Barred By Evidence Code 354

As a threshold issue, respondent claims appellant inadequately explained the relevance of the proffered evidence as required by Evidence Code section 354. (RB:152 [citing Evid. Code, § 354 and *People v. Anderson* (2001) 25 Cal.4th 543, 580].) The requirements of Evidence Code section 354 are not stringent. Section 354 only requires that the "substance, purpose, and relevance of the excluded evidence" be made known to the court "by the questions asked, an offer of proof, or by any other means." (Evid. Code 354 subd(a).) Moreover, Evidence Code section 354 simply requires defendants to make "as adequate an offer as could reasonably be expected under the circumstances." (*Montez v. Superior Court* (1970) 10 Cal.App.3d 343, 351; see also *People v. Morris* (1991) 53 Cal.3d 152, 188 [parallel Evidence Code section 353 does not "exalt form over substance. No particular form of objection or motion is required"].)

Furthermore, where the error consists of "excluding admissible evidence, sustaining an objection to admissible evidence, or granting a motion to strike, ordinarily no further act at the trial is required of a party as a basis for raising the error on appeal. In this situation, the party asks the question in a form that clearly discloses its purpose, relevancy, and materiality, and the trial court sustains the objection or strikes out the answer." (3 Witkin, Cal. Evid. 5th (2012) Presentation, § 415, p. 570 citing *People v. McGee* (1947) 31 Cal.2d 229, 242 [questions, together with colloquies with trial judge, clearly disclosed purpose of evidence]; *Delta Dynamics, Inc. v. Arioto* (1968) 69 Cal.2d 525, 527 [counsel's question, together with pretrial conference order, disclosed purpose].) Thus, even when the record "does not disclose that *any mention* was made to the trial

court that the statement was being offered for the [specified] purpose" section 354 is met when the "the proffered evidence, in the manner in which it was offered, had all of the earmarks of an attempt to show" that purpose. (*Larson v. Solbakken* (1963) 221 Cal.App.2d 410, 421, italics added.)

Indeed, the purpose of section 354 is not to impose hyper-technical burdens on counsel, but simply to "reiterate[] the requirement of the California Constitution that a judgment may not be reversed, nor may a new trial be granted, because of an error unless the error is prejudicial." (7 Cal. Law Revision Com. Rep. (1965) p. 55, reprinted in West's Ann. Evid. Code foll. § 354; *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148 [California Law Revision Commission "are declarative of the intent not only of the draftsman of the code but also of the legislators who subsequently enacted it [citation]" and are therefore persuasive, "albeit not conclusive, evidence of that intent"].) So long as the trial court has "sufficient information to make the ruling" Evidence Code section 354 is satisfied. (*People v. George* (1959) 169 Cal.App.2d 740, 745.) Appellant's attempt to introduce the kidnaping evidence easily satisfied these requirements.

Defense counsel specified that evidence would show the duration and form of appellant's mother's victimization by appellant's father. (9RT:2150.) Specifically, defense counsel stated that evidence was relevant to show that the abuse "continued from that point [the kidnaping of appellant's mother] on" and that it was "foundational" to a description of the "abuse [appellant's father] continued to pour on the mother" from that point in time and to "set the stage" to describe appellant's father's conduct. (9RT:2150.) There can be no serious question that this defense proffer was in support of classic factor (k) mitigation.

Indeed, the prosecutor himself recognized that the testimony involved "family history" and that the only issue to which he objected was whether this history resulted in "trauma to the defendant" (9RT:2149) or was merely repetitive evidence demonstrating that appellant's father was a "bad man." (9RT:2150.) And the trial court likewise rested its ruling in part on the time frame of the abuse and its potential impact on appellant. (9RT:2150 [noting evidence could be excluded because appellant would not be a "percipient witness" until he was "born and old enough to perceive"].) In short, all parties were aware that the duration and form of the abuse, and whether appellant was impacted by it, were at issue. (*People v. George*, *supra*, 169 Cal.App.2d at p. 745 [trial court needs only "sufficient information to make the ruling"]; see also *People v. Scott* (1978) 21 Cal.3d 284, 290 ["objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide"].)

Nor did trial counsel fail to inform the trial court that the evidence was relevant to rebut the prosecution's case in aggravation. Defense counsel had, the day before, explained to the trial court that prior kidnapings (which counsel had previously attempted to adduce from Baca herself) were relevant to rebut the prosecution's case that appellant was a "ready participant" in the Baca rape:

> MR. THOMMEN [defense counsel]: In fact, hadn't your brother kidnapped a relative of Jose's some years before you were taken?
> MR. LEDDY [the prosecutor]: Well, I'd object to that. And I don't think that's relevant, what may have happened with her relatives.
> THE COURT: I'll sustain the objection.
> MR. THOMMEN: Well, your Honor, he's raised the spectre of her being kidnapped for purposes of my client evidently being able to rape her and so on. And if there's another

reason, we should be able to bring that out.
MR. LEDDY: Well, maybe we could get an offer of proof at the bench, because right now I don't see anything there that would indicate that -- I can't follow where counsel's going on this. May we approach the bench?

(Whereupon, the following proceedings were held at the bench, to wit:)

MR. THOMMEN: My information is that there were several kidnappings that went on from one family to another. It started out with her family kidnapping someone from Jose's father's family and then he kidnapped his wife from a family and then they kidnapped someone from them. And somehow, it always occurred around 12, 13 years old. It may have been a retaliatory thing on the father's part rather than Jose's wishing to have her for his own plaything. And I think I should be able to get into that.
THE COURT: I suppose so, if it involves his mental state.

(9RT:1966-1967.)[22]

In other words, the trial court had in fact *accepted* appellant's theory now raised on appeal. The trial court found, correctly, that evidence of prior kidnapings was admissible to prove appellant's "mental state" with respect to the Baca rapes by showing the kidnaping was motivated solely by his father and was not a product of appellant's interest in Baca as argued by the prosecution. (See 9RT:1901-1902 [because appellant expressed interest in Baca, he was a "ready participant" in the kidnaping and sexual assault]; 9RT:2211 [questioning possibility that appellant could have "distaste" for being forced to commit sexual assaults and therefore he must have "acted in concert" with his father].)

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[22] Defense counsel was unable to adduce the information from Baca, apparently because she was unaware of the prior kidnapping. (9RT:1968.)

It is true that the offer of proof provided when defense counsel questioned Baca explicitly referenced the multiple prior instances of kidnaping suggesting a "retaliatory" motive. (9RT:1967.) However, it is reasonable to assume that appellant was trying to adduce the same history he was attempting to present the day before. (See *People v. McGee, supra,* 31 Cal.2d at p. 242 [questions alone, together with prior colloquies with trial judge disclosed purpose of evidence].) Regardless, even appellant's mother's kidnaping in isolation shows that the abduction of Baca was more likely motivated solely by appellant's father. In the words of trial counsel, the mother's kidnaping would show that an identical kidnaping years later was the "father's part rather than Jose's wishing to have her for his own plaything." (9RT:1967.) Thus, the evidence helps to explain appellant's nonculpable "mental state" with respect to the Baca kidnaping. (*Ibid.*)

In the heat of trial and surprised by an unexplained reversal in ruling, the fact that defense counsel did not reiterate his prior arguments, and did not spell out every conceivable logical inference which flowed from his proposed theory of relevance does not render the claim unreviewable under Evidence Code section 354. (*Montez v. Superior Court, supra*, 10 Cal.App.3d at p. 351 [Evidence Code section 354 requires "as adequate an offer as could reasonably be expected under the circumstances"].)

B. The Evidence Was Not Cumulative

Respondent recites the evidence that appellant's father was exceptionally cruel and abusive to his family members to support the trial court's conclusion that the kidnaping evidence was "cumulative." (RB:149-151.) However, cumulative testimony in a death penalty case "by its very nature, adds nothing to the evidence considered by the sentencing court." (*Worthington v. Roper* (8th Cir. 2011) 631 F.3d 487, 506 fn. 12; see also

AOB:208-211.) Thus, only if this Court can find that the evidence would have had no impact on the jury's task of evaluating defendant's background and character can it sustain the finding that the evidence was merely "cumulative." And even if evidence is "identical in subject matter" to prior evidence it is not cumulative if there exist differences with "respect to its evidentiary weight." (*People v. Carter* (1957) 48 Cal.2d 737, 748.)

The evidence of the kidnaping of appellant's mother carried evidentiary meaning captured by no other background evidence presented at trial. (See *infra,* section XI(C).) It is for this reason that the prosecution's repeated and intentionally misleading insinuation that appellant's father, though "evil," may have been "painted a little blacker than it was" (10:RT:2210; see also 10RT:2196-2197), was so troubling. By taking advantage of the trial court's incorrect ruling, the prosecution's argument left the jury with the impression that appellant's family members had *exaggerated* the nature of abuse in order to save appellant's life. Had the jurors heard of appellant's mother's kidnaping, they could have reasonably inferred the opposite: that the evidence presented at trial was merely the tip of an iceberg of horrendous physical and sexual abuse that predated appellant's birth and which appellant was forced to endure from the moment of his birth until his father's murder.

As the trial court itself recognized before inexplicably reversing course, demonstrating appellant's father's repeated instances of kidnap and rape would also have provided the jury with forceful evidence to rebut the prosecution case in aggravation regarding the Baca rapes. (9RT:1966-1967.) The unfairness of a state prohibiting rebuttal to its aggravation evidence is the very evil which *Skipper* sought to prevent. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 165.) It is therefore impossible to

conclude that the evidence was cumulative.

C. The Evidence Of The Kidnaping Of Appellant's Mother As A Young Teenager Was Unquestionably Relevant

Respondent accurately cites this Court's pronouncements that family background "is of no consequence in and of itself" but "the background of the defendant's family is material if, and to the extent that, it relates to the background of defendant himself." (*People v. Rowland* (1992) 4 Cal.4th 238, 279; *In re Crew* (2011) 52 Cal.4th 126, 152 [accord].) However, perhaps quite obviously, family background and one's personal background are virtually always, if not universally, inextricably intertwined. For this reason, courts across the country have found that multi-generational dysfunction to be relevant mitigation in capital cases. (See, e.g., *Williams v. Norris* (8th Cir. 2010) 612 F.3d 941, 945 ["The jury found one mitigating circumstance: Williams had experienced inter-generational family dysfunction"]; *State v. Bocharski* (2008) 218 Ariz. 476, 495 [strong mitigation, including "dysfunctional family of origin including multigenerational violence, criminality, and substance, sexual, emotional, and physical abuse" warranted reversal of death sentence]; *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100, 1129 ["abundance of classic mitigating evidence that was available" included expert testimony of "environment of intergenerational alcoholism, child abuse, and domestic violence"]; *Rundle v. Warden, San Quentin State Prison* (E.D. Cal., Nov. 22, 2013, 2:08-CV-01879 TLN) 2013 WL 6178506 at *77, 82 [trial counsel unreasonably failed to present evidence that petitioner's mother was raped by her father when she twelve to fourteen years old to show "petitioner was caught up in a family cycle of abuse"]; see also ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

(2003), Guideline 10.11, commentary, p. 108 ["an understanding of the client's extended, multigenerational history is often needed for an understanding of his functioning," meaning that "construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception and to the present"].) Thus, when family background necessarily and obviously impacts the defendant's personal background, to interpose an artificial distinction between "family background" and "defendant background" evidence is unhelpful. Carrying this distinction to the formalistic extreme suggested by respondent —ignoring "family background" of which the defendant may be unaware but that reasonably and logically informs the defendant's own background—violates the command of *Lockett v. Ohio* (1978) 438 U.S. 586, 604.

The heart of respondent's argument is that there was no offer of proof that appellant was "aware of or affected by events that took place prior to his birth" and absent a showing of "appellant's awareness, the evidence is irrelevant." (RB:151, 153.) Respondent's claim that appellant has to be *aware* of the events for these events to impact him is manifestly incorrect. As the cases cited in the preceding paragraph make clear, events long predating an individual's birth may have profound impacts on a defendant, even if the defendant is not aware of the full extent of his family's dysfunction. (See also *State v. Santiago* (2012) 305 Conn. 101, 233 [inquiry into mitigation is "is not confined to the defendant and his experiences" and therefore failure to disclose evidence of sibling abuse which defendant did not witness was reversible error]; *Stankewitz v. Wong* (9th Cir. 2012) 698 F.3d 1163, 1169) [even unremembered childhood trauma may have catastrophic effects on those who survive it]; *People v.*

Panah (2005) 35 Cal.4th 395, 417 [mitigation included testimony of mother's abuse both during and after pregnancy]; *People v. Jennings* (2010) 50 Cal.4th 616, 637 [mitigation evidence included testimony that "individuals are 'children of [their] parents' and parents will shape the lives of their children absent outside intervention, which did not occur in defendant's case."].)

Nor did the trial court require a further offer of proof to draw the obvious inference that appellant was "affected" by his mother's kidnaping regardless of whether he was aware of it. (RB:151.) Any juror could have inferred from the kidnaping alone that the abduction and enslavement of appellant's mother would have negative consequences on appellant above and beyond the physical abuse suffered by appellant and his family members that was presented at penalty. (Cf. *People v. McDowell* (2012) 54 Cal.4th 395, 423-427 [trial court properly excluded expert testimony where jury could "rely on their common sense" to infer the impacts of childhood abuse on adult behavior].) Just as this Court has found that childhood abuse of a *defendant* has obvious impacts on adult behavior that any juror can understand without expert testimony (*ibid.*), so too could any reasonable juror conclude that the childhood abduction of appellant's mother would have impacts on her, and in turn, upon appellant.

Respondent cites *In re Crew* (2011) 52 Cal.4th 126, 152, for the proposition that "family background" of which appellant may have been unaware could not possibly be relevant mitigation. (RB:151.) Respondent reads too much into *Crew*. In *Crew*, this Court questioned the prejudicial impact of failure to present evidence that the defendant's mother was sexually abused as a child, or that the defendant's sisters were molested, given that there was no proof that defendant was aware of this misconduct

at the time of trial. (*In re Crew, supra*, 52 Cal.4th at p. 152.) Similarly, in *People v. McDowell, supra*, 54 Cal.4th at p. 395, this Court found that the trial court properly excluded evidence that the defendant's father beat the defendant's grandfather because the defense counsel "never argued that defendant was aware of that particular aspect of abuse by his father and never made an offer of proof or an attempt to lay a factual foundation for the view that the abuse of defendant's grandfather had affected defendant." (*Id.* at 434.)

Appellant disagrees with holdings of *Crew* and *McDowell*, which improperly limited the scope of mitigation in contravention of *Lockett v. Ohio* (1978) 438 U.S. 586, 604, as demonstrated by the many cases cited above explaining the relevance of multigenerational traumas in penalty phase presentations. Regardless, cases such as *Crew* and *McDowell* have held only that abuse of family members which is both unknown and either temporally or relationally remote may not impact a defendant in an obvious way. Without more, *Crew* and *McDowell* find that such "family background" evidence, unconnected to the defendant, may be irrelevant.

If, as in *Crew,* the mother was molested as a child, it may be unclear absent further proof that this molestation would impact the defendant decades later. Similarly, although the defendant's sister may have been molested while the defendant was alive (*In re Crew, supra*, 52 Cal.4th at p. 152) the absence of awareness by the defendant makes a mechanism for impact non-obvious, since a sister is not necessarily a caregiver. And although the time frame in *McDowell* is unspecified, even if the abuse of the grandfather by the father was occurring during the defendant's own lifetime, it is equally unclear absent further proof how the unknown abuse of the grandfather would impact the defendant.

But family abuse "is material if, and to the extent that, it relates to the background of defendant himself." (*People v. Rowland, supra,* 4 Cal.4th at p. 279.) The dysfunctional family history of a defendant's caregivers is unquestionably relevant to the extent that this history has negative effects on these caregivers during the period that they care for the defendant. (See, e.g., *In re Crew, supra*, 52 Cal.4th at p. 152. [relevant evidence of defendant's background included fact that defendant's abused mother was cold and aloof and suffered from depression].) If there is little or no temporal separation between severe abuse of a caregiver and the provision of care to the defendant, the abuse of the caregiver would obviously impact his or her ability to care for the defendant and is therefore itself evidence of the defendant's own background.

As an extreme example, one could imagine a mother who was, entirely unbeknownst to her child, tortured immediately preceding every instance of caregiving. Any juror could reasonably infer that this torture, even if unknown to the child, would negatively impact the child's maternal care and development. The evidence in this case is disturbingly close to that example. The kidnaping of appellant's mother would have substantiated that her horrific abuse overlapped with critical periods of appellant's in utero and early childhood development. (AOB:204-206.)[23]

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[23] Respondent complains that the offer of proof, though noting that severe abuse of appellant's mother was "continual[]" and "continued from that point [her abduction] on," was insufficiently specific with respect to whether appellant's mother was beaten during pregnancy. (RB:153.) Given the evidence that appellant's father beat appellant's mother daily and never allowed the lacerations from beatings to heal (see, e.g., 9RT:2138), a jury could fairly infer that if the inception of the "continual[]" beatings was the abduction, appellant's mother was beaten during pregnancy and through (continued...)

As such, the kidnaping "relates to the background of the defendant himself" (*People v. Rowland, supra*, 4 Cal.4th at p. 279) and should have been admitted.

As noted in the opening brief, "[s]exual abuse is different than physical abuse" and evidence of these different forms of mistreatment is not cumulative. (*Foust v. Houk* (2011) 655 F.3d 524, 543 fn. 9; AOB:212.) Respondent similarly attempts to argue that the *sexual* nature of the abuse of appellant's mother evidenced by her abduction was irrelevant because there was no showing that appellant was aware of it. (RB:154.) Appellant need not be aware of his mother's repeated rape (though given that the family lived in a one-room house, it would be reasonable for a jury to infer he was) for this trauma to have an impact on his mother, and in turn, him. It would not require a professional psychologist's testimony, nor was further proof required, to allow a jury to infer that a lifetime of rape would impact a mother's ability to concurrently care for her child, particularly in the critical formative stages of early childhood of which no evidence was presented. Such an inference would be especially likely where appellant himself was the product of rape. These logical inferences could be made regardless of whether appellant had any direct knowledge of his mother's abduction. As such, it is precisely the type of powerful mitigating evidence the exclusion of which the Eighth Amendment forbids.

Equally important, the kidnaping evidence was clearly relevant to counter the prosecution's case in aggravation. As noted previously, the trial court initially ruled that the evidence of prior kidnapings was relevant to

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[23](...continued)
appellant's infancy.

prove appellant's "mental state" (9RT:1966-1967) in order to rebut the prosecutor's theory that appellant was a "ready participant" in the Baca assault. (9RT:1902; 9RT:2211.) Both the prosecution, and now respondent on appeal, have argued that appellant's initial interest in Baca supported the conclusion that he was complicit in the assaults. (10RT:2210-2012; RB:100.) But appellant's father's prior kidnaping of his mother strongly supports the defense theory that the nearly identical Baca kidnaping was solely a function of the father's own violent nature, and not due to appellant's initial interest in Baca. (AOB:206-207.)

Respondent's only retort to this argument is that the jury was "very aware of the 'utter dominance' appellant's father exerted over the family through his violent and threatening conduct" and therefore it had no need to hear additional evidence showing that appellant's mother was enslaved in precisely the same manner as Baca. (RB:154.) Appellant certainly agrees that the evidence unequivocally established that appellant's father used threats and violence to exert "utter dominance" over the entire family. (See *supra*, Claim VII(B) [evidence established duress during Baca sexual assaults as a matter of law].) However, any argument by respondent that the jury did not need more evidence regarding this "domination" is undermined by respondent's lengthy argument that there was sufficient evidence for the jury to reject appellant's duress claim. (See RB:91-103.) If there was sufficient evidence to support the prosecution theory that duress was absent, appellant was unquestionably entitled to rebut it. (See *Skipper v. North Carolina* (1986) 476 U.S. 1, 9 (conc. opn. of Powell, J. [due process violated when exclusion of evidence prevented defendant from "rebut[ting] evidence and argument used against him"]; *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 165.) And given the weakness of the

evidence documenting appellant's willing participation in the assaults, including the victim's testimony to the contrary, exclusion of *any* evidence with a tendency to undermine the prosecution's theory is prejudicial.

D. The Error Was Prejudicial

Respondent makes a final, perfunctory argument that because there was other evidence regarding appellant's "violent upbringing," the evidence of his mother's abduction would not have impacted the jury's verdict. (RB: 155.) However, the abduction of appellant's mother demonstrates not merely severe physical abuse already adduced at trial, but profound sexual and psychological violence infecting the very foundation of the familial and mother-son relationship from its inception. As argued above, there is a compelling difference between severe physical abuse and an entire family unit that is the product of kidnaping and rape.

For the reasons argued in the opening brief, failure to present the jury with evidence of such sexual abuse within a defendant's household is prejudicial, particularly where rape was an aggravating circumstance. (AOB:212.) Beyond providing the basis for compelling mitigation evidence, the kidnaping of appellant's mother also strongly undercut the prosecution theory of the Baca rape. (AOB:212-213.) As detailed in the opening brief, the jury struggled in delivering its verdict. (AOB:140-144.) The exclusion of the kidnaping evidence was not harmless beyond a reasonable doubt.

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X.

APPELLANT'S ALLEGED JUVENILE MISCONDUCT WAS IMPROPERLY INTRODUCED AS EVIDENCE IN AGGRAVATION

Appellant objected in the opening brief to the presentation of the Baca incident in aggravation due to the fact that appellant was a minor at the time. (AOB:214-216.) As also noted in the opening brief, this claim has been rejected numerous times by this Court. (AOB:216.)

Respondent argues that appellant's claim is forfeited due to lack of objection at trial. (RB:156.) If this Court is to reexamine its past precedents, it will be due to the ever-increasing weight of recent Supreme Court authority forcefully explaining why juvenile offenders have reduced culpability and are in a different class than non-juvenile offenders when it comes to society's harshest punishments. (*Roper v. Simmons* (2004) 543 U.S. 551, 560; *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2458 ["children are constitutionally different from adults for purposes of sentencing"]; *Graham v. Florida* (2011) 560 U.S. 48, 68 ["developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"]; see also *People v. Caballero* (2012) 55 Cal.4th 262, 266. [requirement of 110 year sentence prior to parole eligibility based on juvenile conduct violates Eighth Amendment].)

If and when this Court embraces the logic of these opinions and bars the use of unadjudicated juvenile criminal conduct under factor (b), it will be based upon on this (or future) intervening caselaw, which was unavailable to defense counsel at the time of trial. This Court has "excused a failure to object where to require defense counsel to raise an objection 'would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other

situations where defendants might hope that an established rule of evidence would be changed on appeal. [Citation.]'" (*People v. Edwards* (2013) 57 Cal.4th 658, 705.) Therefore, if this Court reverses its prior decisions allowing unadjudicated criminal conduct under factor (b), defense counsel's failure to object should not constitute a forfeiture.

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XI.

APPELLANT'S DEATH SENTENCE IS BASED SOLELY ON A LYING-IN-WAIT SPECIAL CIRCUMSTANCE THAT IS DISPROPORTIONATE AND ARBITRARILY APPLIED

In his opening brief, appellant argued that the "lying-in-wait" special circumstance lies below the constitutional floor of the narrowing function required by the Eighth Amendment and is, at best, at the lower boundary. (AOB:224-225.) In combination with: (1) the lack of national, societal, or moral consensus that concealment of purpose alone justifies a death sentence; (2) the extraordinary rarity of lying-in-wait as the sole special circumstance in comparison with the vast numbers of both capital and non-capital homicides which could be death-eligible under a lying-in-wait theory; and (3) the disproportionate application of the lying-in-wait special circumstance to the unique facts of this case, the danger of arbitrariness render appellant's death sentence under the lying-in-wait special circumstance invalid.

Respondent refuses to acknowledge appellant's argument as anything other than the narrowing argument presented separately in appellant's brief. (RB:158-159 ["While appellant presents his argument in terms of the lying-in-wait special circumstance as being disproportionate and arbitrary [sic] applied, as respondent understands it, the basic premise underlying each of his arguments is . . . that the lying-in-wait special circumstance is overbroad as interpreted by this Court, and therefore, fails to adequately narrow the subclass of murders eligible for the death penalty."].) Respondent misreads appellant's claim. As a result of this misapprehension, respondent fails to genuinely grapple with many of the risks associated with an extraordinarily (if not unconstitutionally) broad

lying-in-wait special circumstance or how any of the other features of the lying-in-wait special circumstance may combine to render appellant's sentence unconstitutional.

For instance, in response to appellant's argument that the lying-in-wait special circumstance is very broad and therefore increases the risks of arbitrarily applied punishment, respondent merely states that "as noted in addressing appellant's claim "III," *ante*, this Court has repeatedly rejected the claim that the lying-in-wait special circumstance fails to perform the required narrowing function." (RB:159-160.) This misses the point entirely. Appellant has conceded that this Court has found that lying-in-wait performs, if only barely so, the requisite Eighth Amendment narrowing function. (AOB:217-218, 221-225.) The essential point that respondent overlooks is that this Court's jurisprudence, by construing the lying-in-wait special circumstance very broadly, has heightened the risk of arbitrary death sentencing. In combination with other features concerning application of the lying-in-wait special circumstance (generally and to this case specifically), this heightened risk of arbitrariness renders appellant's sentence unconstitutional. (Cf. *Tuilaepa v. California* (1994) 512 U.S. 967 (conc. and dis. opn. of Blackmun, J.) ["consideration of a small slice of one component of the California scheme says nothing about the interaction of the various components . . . and whether their end result satisfies the Eighth Amendment's commands"].)

One vital point upon which appellant relies, which has nothing to do with narrowing, is the extreme infrequency of a death sentences resting solely on the lying-in-wait special circumstance. (AOB:240-241.) Respondent contends that appellant's arguments regarding the rarity of a lying-in-wait special circumstance being the sole special circumstance are

foreclosed by *People v. Jurado* (2006) 38 Cal.4th 72, 127, in which a death sentence based upon only on lying-in-wait special circumstance was upheld. (RB:160.) However, the defendant in *Jurado* raised only a narrowing claim, not the claim regarding the risk of arbitrary and disproportionate punishment that appellant raises here. (Cf. Id. at p. 127 [noting that Court has "repeatedly rejected" the defendant's claim that lying in wait "fail[s] to appropriately narrow the class of persons eligible for the death penalty"]; see also *People v. Combs, supra*, 34 Cal.4th at p. 869 (conc. opn. of Kennard, J.) [paucity of death sentences based only upon "lying-in-wait" "may well reflect a view that "lying-in-wait" should not be the sole basis for imposing the death penalty"].)

Respondent next argues that the frequency with which lying-in-wait is charged in death penalty cases along with *other* special circumstances somehow reduces the concerns of arbitrariness and disproportionality articulated by appellant. (RB:162-163 & fn. 87.) However, given the breadth of the lying-in-wait special circumstance, a prosecutor might add lying-in-wait to the list of special circumstances alleged not based on the heinousness of lying-in-wait, but instead upon the strategic concern that another eligibility factor may be later overturned. Similarly, it is difficult to discern concrete meaning from capital cases which do *not* charge lying-in-wait as an eligibility factor. Although there is some strategic benefit to "piling on" a lying-in-wait special circumstance, a prosecutor may have countervailing strategic considerations for focusing the jury's attention solely on other, more highly aggravating, special circumstances. In short, the number of death penalty cases in which lying-in-wait is charged along with other circumstances *vel non* is of little meaning.

However, the rarity that lying-in-wait is charged as the *only* circumstance does confirm that it is not viewed by society as in the category of heinous crimes deserving of death. (See *People v. Combs*, *supra*, 34 Cal.4th at p. 869 (conc. opn. of Kennard, J.) see also *Kennedy v. Louisiana* (2008) 554 U.S. 407, 434 [fact that "only two individuals [are] now on death row in the United States" for aggravated child rape relevant in determining Eighth Amendment national consensus].) Respondent argues that the rarity of a particular circumstance does not itself "equate to inequality or disproportionality." (RB:163 [citing *People v. Dennis* (1998) 17 Cal.4th 468, 513.) Respondent's assertion is true, but incomplete. What respondent fails to point out is that *Dennis* involved a complaint that first degree murder of a pregnant woman and the second degree murder of a fetus was so rare as to trigger Eighth Amendment concerns. (*Ibid.*) This form of murder is obviously relatively uncommon and thus it is only understandable that there are few murderers who are death-eligible on those facts. In other words, rarity *alone* does not show that a crime is not egregious. (*Ibid.*) What makes lying-in-wait unique is that it applies to thousands of capital and non-capitally charged homicides and *still* is extraordinarily rare as a sole special circumstance. (Cf. *Kennedy v. Louisiana, supra*, 554 U.S. 407, 439 [fact that hundreds of child rapes occur per year creates problems with arbitrary infliction of death penalty].)[24]

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[24] This fact is particularly telling given that lying-in-wait is sufficiently broad that it can be employed as a "stopgap" measure for otherwise particularly heinous crimes that do not yet qualify as death eligible under California's ever-expanding death penalty regime. (Cf. *United States v. Maze* (1974) 414 U.S. 395, 405 (dis. opn. of Burger, C.J.) [discussing how broadly phrased mail fraud statute has been employed by

(continued...)

A recent study conducted by the late Professor David Baldus found that lying-in-wait is present in approximately 30 percent of all homicides in California, including second degree murder and voluntary manslaughter cases. (See Amended Declaration of David C. Baldus, *Ashmus v. Wong* (N.D. Cal. Nov. 18, 2010) (No. C 93-0594 THE) at p. 26, ¶ 69 & fn. 51 [lying in wait factually present in 29 percent of all of California's first degree, second degree, and voluntary manslaughters].)[25] As noted in appellant's opening brief, there have been approximately 100,000 homicides since the inception of the death penalty in 1978, though the numbers have changed slightly since the opening brief was filed. (See California Criminal Justice Statistics Center, Crime In California 2012, at p.5 (hereinafter "Crime in California 2012") available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd12/c

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[24](...continued)
prosecutors as stopgap measure to combat new frauds that were not yet addressed by more particularized legislation at the time of the fraud]; see also *People v. Edwards* (1991) 54 Cal.3d 787 [sole special circumstance was lying in wait where defendant killed 12-year-old girl he did not know for no discernable reason].)

[25] The Baldus declaration is before the Court in numerous habeas corpus petitions. (See, e.g., *In re Weatherton,* Petition for Writ Of Habeas Corpus, S214555 (filed on 11/12/2013) [Petition Ex. 8].) It is not part of the record in this case, and appellant relies upon it not as "evidence," but merely for its reasoning, in the way one might rely upon studies published in a law review article or any other "legislative fact." (See generally, Note on subd. (a) of Fed. Rule Evid. 201; c.f., Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev.1283, 1320 [the lying-in-wait special circumstance makes most premeditated murders potential death penalty cases].)

d12.pdf?>)[26]

Assuming the accuracy of the Baldus study, there have been approximately 30,000 homicides which *could* have been charged as first-degree and death eligible under a theory of lying-in-wait, but only one hundredth of 1 percent of these cases have resulted in death verdicts. Even attributing the roughest precision to these estimates suggests that there are thousands of cases in which death eligibility could be secured under a lying-in-wait theory, but only three cases reviewed by this court in which this special circumstance alone has resulted in a death judgment. As noted by the United States Supreme Court in *Kennedy v. Louisiana*, *supra*, 554 U.S. 407, when there is a broad applicability of an eligibility factor, there is a significant risk that the imposition of the death penalty may become "so arbitrary as to be 'freakis[h].'" (*Id.* at p. 439.) These figures surely demonstrate that relying upon lying-in-wait alone is sufficiently arbitrary to render the sentence unconstitutional. (*Id.* at p. 438 [hundreds of eligible capital rapes per year in *all* death penalty jurisdictions problematic]; cf. *Furman v. Georgia* (1972) 408 U.S. 238, 386, fn. 11 (conc. opn. of Burger, C.J.) [noting a Georgia death sentence rate of 15 to 20 percent of eligible homicides in an unconstitutional death penalty scheme].)

Respondent notes appellant's arguments that there is little moral logic and a lack of national consensus that concealment of purpose lying-in-wait alone justifies imposition of the death penalty, but argues that "this argument is, again, premised on the belief that the special circumstance fails to adequately narrow." (RB:160.) Again, respondent is incorrect.

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[26] The sum of all homicides listed in the report between 1978 and 2012 is 95,650. (See *Id.* at p. 5)

Arguments regarding moral justification and national consensus have nothing to do with narrowing.

For instance, California could conceivably enact a statute imposing death-eligibility based on murder-by-gun, which could theoretically *narrow* the class of individuals eligible for the death penalty, since only a subset of murders are committed with guns. Courts have found lying-in-wait sufficiently narrows on this premise. (Cf. *Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159, 1175 ["Even under the California Supreme Court's liberal interpretations of "lying-in-wait", [certain] hypothetical first-degree murders would not merit the special circumstance"]; *People v. Lewis*, *supra*, 43 Cal.4th at 515 [relying in part on the Ninth Circuit's decision in *Morales* to reject attack on "lying-in-wait"]; *People v. Jurado* (2006) 38 Cal.4th 72, *supra*, at p. 146 (conc. opn. of Kennard, J.) [rejecting constitutional challenge to "lying-in-wait" because it does "not apply to every defendant convicted of a murder. . . [Citation.]"].)

However, as evidenced by a lack of national consensus or moral justification for a hypothetical murder-by-gun special circumstance, serious questions would remain as to whether this eligibility requirement—though admittedly narrowing the class of eligible murderers—would sufficiently reduce the risk of arbitrary and disproportionate punishment to pass Eighth Amendment scrutiny.

It is true, as respondent notes, that this Court has recognized that lying-in-wait murder has "been 'anciently regarded...as a particularly heinous and repugnant crime.' [Citation.]" (RB:161 citing *People v. Edelbacher* (1989) 47 Cal.3d 983 and *People v. Stanley* (1995) 10 Cal.4th 764, 795.) However, concealment of purpose lying-in-wait is not of that ancient variety, but is of much more recent vintage. (See *People v. Stevens*,

supra, 41 Cal.4th at p. 223 (dis. opn. of Moreno, J.) ["Whether we still share with the medieval Normans that special repugnance for lying-in-wait murder as originally conceived 'an ambush assassination that involves physical concealment and a substantial period of watching and waiting' there is nothing to indicate that ordinary murder by surprise, the lying-in-wait special circumstance as construed by this court, has been historically, or is regarded currently, as an especially heinous form of murder"].) As such, there is no uniform consensus that concealment of purpose lying-in-wait is especially heinous. This lack of national consensus or moral justification for singling out California's unique definition of lying-in-wait murders for the death penalty heightens the risk of arbitrary or disproportionate punishment. In combination with other features of how California's lying-in-wait is applied in death penalty cases, the risk of arbitrariness is so high as to render the imposition of a death sentence based solely on a lying-in-wait special circumstance unconstitutional.

Moreover, this case presents clear evidence of this arbitrary and disproportionate punishment, given that the facts demonstrate relatively low aggravation and particularly high mitigation. (See AOB:244-245.) Respondent correctly identifies the factors identified by appellant: "that the evidence of lying in wait was weak; that it was the sole special circumstance to be found true; that he presented powerful mitigating evidence; that the victims were engaged in inherently dangerous and illegal conduct; and that the codefendant who was tried separately was acquitted of lying-in-wait. (RB:163; AOB:244.) Respondent counters with the following: (1) appellant was "a major participant, if not outright directing the crime;" (2) "the murder was committed in an especially cold and callous manner;" and (3) the murder was performed while lying-in-wait, the

evidence supporting which was "quite strong." (RB:164-165.)

Respondent's claim that the murder was committed in a "cold and callous manner" adds nothing to the analysis. (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 802 [aggravator "especially heinous, atrocious or cruel manifesting exceptional depravity" denoting "conscienceless, or pitiless crime which is unnecessarily torturous to the victim" constitutionally invalid]; *People v. Sanders* (1990) 51 Cal.3d 471, 520 [accord].) With respect to the fact that appellant was a major participant in this murder, *all* first degree murders reflect a high degree of moral culpability. More is required, particularly if this Court finds the lying-in-wait special circumstance problematic.

Respondent's claim that the evidence of lying in wait is "quite strong" (RB:165) is preposterous, as argued above with respect to the lack of sufficiency of evidence. The codefendant's acquittal on that allegation is a testament to weakness of the evidence. Finally, respondent attempts to distinguish the case by highlighting the factors which allegedly support the lying-in-wait special circumstance: "appellant had armed himself with a handgun" had "positioned himself behind Sanchez, which basically left Sanchez defenseless" and proceeded to "executed Sanchez with a single gunshot to the back of Sanchez's head." (RB:164.) There is nothing remotely heinous, or even surprising, about the fact that appellant armed himself prior to a proposed drug deal. And that appellant "positioned himself behind Sanchez" was hardly a consequence of some evil scheme–appellant merely got into the victim's car. Quite naturally, the victims were occupying the front seats. The fact that appellant shot Sanchez from behind was similarly a consequence of these fortuitous facts.

Put simply, there is nothing about this case that distinguishes it from any other run-of-the-mill drug-related murder. The mitigating evidence was unquestionably strong. The evidence at trial was that appellant was borderline mentally retarded, with an I.Q. score in the 70-75 range and with intellectual functioning below that of a sixth grade level. (9RT:2067, 2075.) Respondent repeatedly acknowledges the severity of the abuse appellant was forced to endure. (RB:99 [appellant was subject to physical abuse by his father, who "apparently had a penchant for threatening to kill everyone in the household"], see also p. 154 [evidence was "clear" that appellant's father exerted "utter dominance" over the family through threatening and violent conduct].) In light of the risk of arbitrariness associated with the lying-in-wait special circumstance and how it was applied in this case, appellant's death sentence is disproportionate.

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CONCLUSION

For all the foregoing reasons, appellant's conviction must be reversed and his judgment of death vacated.

DATED: April 1, 2014

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(Cal. Rules of Court, rule 8.630 (b)(2)

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant Jose Lupercio Casares, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 33,983 words in length excluding the tables and this certificate.

DATED: April 1, 2014

Kathleen M. Scheidel
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DECLARATION OF SERVICE

Re: People v. Jose L. Casares No. S025748

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

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Each said envelope was then, on April 1, 2014, sealed and deposited in the United States mail at Oakland, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed on April 1, 2014, at Oakland, California.

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DECLARANT