IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>ERIC CHRISTOPHER HOUSTON,<br><br>Defendant and Appellant. | Case No.: S035190<br><br>Appeal From Judgment Entered in the Superior Court of Napa County, No. No. CR 14311<br><br>Hon. W. Scott Snowden, presiding |

# AUTOMATIC APPEAL FROM JUDGMENT OF DEATH

# APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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## I. THE FAILURE OF THE TRIAL COURT TO PROVIDE TO THIS COURT FOR ITS CONSIDERATION ON APPEAL, OR TO THE JURY FOR ITS USE IN DELIBERATIONS, A RELIABLE AND SETTLED RECORD BOTH OF WHAT WAS INTELLIGIBLE AND WHAT WAS UNINTELLIGIBLE ON THE VIDEO AND AUDIO TAPES REQUIRES REVERSAL OF THE JUDGMENT IN ITS ENTIRETY

### A. Respondent Has Misconstrued the Nature of the Prejudice Raised by Defendant With Respect to the Playing of the Audio and Video Tapes at Trial

Respondent characterizes the issues Defendant raised with respect to the playing of the tapes as alleging error in the admission of the tapes. This seriously misconstrues the citations of error raised by Defendant on this direct appeal.

Defendant's first basic assertion of error is that, because there is no transcript whatsoever of the audio tapes and the record on appeal establishes that there are many portions of the videotapes that are unintelligible or subject to widely differing interpretations of the words being uttered, the record on appeal is prejudicially defective. Defendant's conviction and sentence of death cannot be effectively challenged on appeal, nor can the Court fulfill its obligation to the People of the State of California to independently review the record for error, given the lacunae in the record. This error has nothing to do with admitting the tapes at the trial and everything to do with record preservation.

Defendant's second basic assignment of error is not that the trial court admitted the tapes to be played for the jury, but that it allowed the playing of the tapes to proceed and the case go to verdict without ever providing the jury with a definitive statement of what statements were intelligible on the audio tapes and an instruction that the jury was to disregard and not speculate as to what else was being said on the tapes, thereby infecting the

entire fact-finding process with speculative non-evidence. The playing of the tapes without guidance to the jury as to the content of the intelligible audio and an instruction to disregard that portion of the audio that was determined to be unintelligible represents a failure by the trial court to fulfill its basic responsibility – to ensure that a determination of guilt and the sentence of death were based on intelligible, competent evidence and not evidence outside the record, such as what a juror thought they heard on an unintelligible portion of the audio or videotape sound.

Respondent seeks to refashion Defendant's contentions in order to suggest to the Court that the gaping hole in the appellate record can be blamed on trial counsel and dismissed on the basis of counsel's having "forfeited" the claims advanced on appeal. Thus, Respondent characterizes Defendant's citations of error as follows:

> As an initial matter, appellant appears to contend that, whether or not transcribed, the audiotapes (Exhs. 82-88) – if not also the videotapes (Exhs. 57-A & 57-B) – should have been ruled inadmissible on the basis that they were not "sufficiently audible and comprehensible to satisfy due process and Eighth Amendment reliability standards for their admission." (AOB 219; see also AOB 220, fn. 36, 252-253, citing, inter alia, United States v. Robinson (6th Cir. 1983) 707 F.2d 872, 876.)
>
> Respondent's Brief, p. 136.

A review of pages 247 to 249 of Appellant's Opening Brief will show that Defendant did not, and does not, now contend as an issue on direct appeal, that the tapes should not have been admitted.[1]

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[1]Appellant is not waiving his right to assert in a subsequent petition for habeas corpus that based on evidence *dehors* the record, the tapes should not have been admitted, including, without limitation, that the failure to object to the admission of the tapes constituted ineffective assistance of counsel and that one or more timely or proper objections to the admission of the tapes would have resulted in their not being admitted at trial.

Defendant's objection with respect to the inadequate record is not that the tapes shouldn't have been admitted, but that having admitted the aural evidence on the tapes by playing them for the jury, the trial Court failed to preserve any record of what was audible as they were played. Six to six and one-half hours of audio tapes were played for the jury, with the jury being informed that the sound on the tapes represented, in part, statements by the Defendant during the commission of the crimes with which he was charged. It is today impossible to determine or make a reasonable assumption as to what words were intelligible to the jurors as they listened to the tapes or to determine when what was being heard on the tapes were being attributed to the Defendant by the jurors. This is because the trial court failed to follow the dictate of Penal Code Section 190.9 either by requiring the court reporter to transcribe what was audible and intelligible on the tapes while they were played or by providing the jury with a reliable transcription setting forth what words were intelligible and instructing the jury to disregard and not speculate as to any possible statements they might think they made out that were not reflected on the transcript.

With respect to Defendant's interrogation by law enforcement, the video tapes of which were played for the jury, the record correction process on appeal has demonstrated that the transcript provided by the plaintiff has serious inaccuracies as to what the Defendant said and that different people listening in different conditions hear different words being spoken. As with the audio tapes, the Court failed to preserve a record of what could be heard by having the court reporter transcribe what was audible as the videotape was being played. The Court then instructed the jury as it went to deliberate that the transcript they were being provided was *not* the evidence, but rather the evidence was what they had heard when the videotapes were being

played. Hence, there is no reliable record of the audible evidence presented to the jurors by virtue of the playing of the video-taped interrogation – there is no reporter's transcript of what was audible and intelligible when the video tapes were played in the courtroom, nor was any settled transcript given to the jury with instructions to disregard any words the jurors heard that were not reflected on the transcript and to take the words on the transcript as setting forth the only aural evidence they should consider with respect to the video tapes.

The transcript provided by the prosecution (Exhibit 89) is thus *neither* the evidence presented to the jury, nor is it a reliable record of the evidence presented to the jury. The record correction process has demonstrated that Exhibit 89 cannot serve as a substitute for an accurate transcription of the aural evidence because each time the tape has been played different people have heard different words being said by the Defendant. The discrepancies are material. The "more accurate" version that counsel agreed upon during record correction also is not a reliable record of the aural evidence presented to the jury. While it is likely that counsel for Defendant and counsel for Respondent have come closer to what Defendant might *actually* have said in the interview itself, they have not produced a more reliable transcript of what was the audible evidence played to the jury.

Respondent argues at page 148 of its brief that there is no absence of record because the tapes themselves are in evidence. The physical tapes are in evidence; this has never been disputed. That they are in the record solves nothing. The situation is analogous to having an appeal on a conviction for a drug offense where the evidentiary record contains the vial of white powder but does not contain either the written report or oral testimony of the expert who tested the powder to determine its composition. The vial of powder in

the evidentiary record is of no use in recreating what the expert testimony was that was heard by the jury. Neither will the physical tapes aid in determining what aural evidence was audible or intelligible to the jurors when the tapes were played.

The lack of record cannot be solved either by further record correction by the parties or by the Court listening and coming to its own conclusions as to what Defendant said either in classroom C-204 on May 1, 1992 or to law enforcement on May 2, 1992. The record required for this appeal is not a record of what Defendant actually said on May 1 or May 2, 1992, but what the jurors heard Defendant saying when they listened to the tapes in court in July 1993. For the latter no record exists and no record correction process can provide a reliable record.

Were there a reliable record of what was audible when the tapes were played in the courtroom, this Court could perform its duty to evaluate the evidence *presented* and determine its sufficiency to support the judgment. Further, were there such a record of the evidence presented, further evidence could be developed *dehors* the record through expert enhancement of the audio on the tapes to establish what the tapes show Defendant actually was saying when the tapes were recorded. If there were prejudicial discrepancies between the reported record of the tapes as played and the actual content of the speech as recorded, that might serve as a basis for seeking relief in a petition for habeas corpus. The failure of the trial court to preserve a record of the evidence as presented to the jury denies Defendant his right to challenge the sufficiency of the evidence on appeal and would appear to effectively undercut his ability to challenge prejudice arising from the

presentation of false or misleading evidence through habeas review.[2]

As this Court has held, "the entire network of rules governing matter properly included in the appellate record--are intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 585)

We cannot go back and recreate the sound that came out of the audio and video tape players in the Napa County Superior Court courtroom in July 1993. Respondent was the proponent at trial of the evidence for which there is no record. Respondent both acquiesced in excusing the reporter and failed to comply with the Court rule requiring the submission of a transcript prior to playing the recorded matter. Respondent cannot now use the record settlement, augmentation, and correction process to create new evidence that wasn't presented at trial as a substitute for the record of what is missing. (See *People v. Tuilaepa, supra:* "[t]he settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier.")

Respondent argues that it was beyond the capability of a certified court reporter to have transcribed what was being played in the courtroom in

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[2] While Defendant can still have the videotape enhanced and in a habeas petition compare its audio to the transcript provided to the Court by the prosecution, (Exhibit 89) Respondent will argue against such a claim the same as it argues here: that the transcript was not the evidence and the jury was instructed as such. Appellant cannot recreate what was audible at the time the tapes were played. Had a court reporter been present to report what was audible and unintelligible as the tapes were played, there would be a record to compare against. The opportunity for such a record was lost forever when the trial court excused the reporter from reporting the proceedings while the tapes were played.

a manner that could be relied upon by this Court as setting forth "the exact words that each and every juror heard" when the tapes were played. (Respondent's Brief, p. 150.) There is, of course, no way to produce a record of what jurors actually heard, but a record could have been made of what was audibly presented to them. Indeed, Respondent's argument could be made as to the reporter's transcript of live witnesses in the courtroom. Reporters and jurors are human, and they sometimes do hear live witnesses say different things. Nevertheless, appeals are decided on a daily basis using the transcripts provided by certified court reporters. Litigants and courts routinely rely on these transcripts as the official record of the proceedings. Errors in these transcripts may be corrected during the record correction process if agreement can be reached or the trial court can determine that the court reporter's transcript contains an error.

Here, there is not even the semblance of a record to correct. Eight hours of the most important evidence presented at trial is not available either to appellate counsel or to the Court. Given that the lack of a record is *prejudicial to the effective prosecution and/or determination of this appeal*, the judgment must be reversed and the case retried.

### B. The Constitutional and Statutory Requirements for a Complete Record on Appeal Are Not Options That Trial Counsel May Waive at their Discretion

Respondent argues that this appeal can proceed despite the fact that the record is missing eight hours of the evidence most crucial to the jury's verdicts in each of the three phases of the trial because the Defendant's trial counsel "forfeited" Defendant's right to an adequate appellate record.

Respondent's contention is wrong, as well as rather tardy.[3]

Further, the right to an appeal is personal to the defendant, and cannot be unilaterally waived or forfeited by trial counsel. (See Penal Code section 1240.1, subs. (a) and (b): (counsel must file notice of appeal when directed to do so by defendant regardless of counsel's views as to existence of arguably meritorious grounds for appeal); Just as counsel cannot unilaterally waive or forfeit a defendant's right to an appeal, counsel cannot be permitted to waive or forfeit a defendant's right to a meaningful appeal by forfeiting the defendant's right to an appellate record adequate to appraise the issues raised on appeal. (*Cf. Hughes v. United States* (6th Cir. 2001) 258 F. 3d 453, 463 ("if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully informed and publicly acknowledged consent of the client,' [citation], then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury"; counsel's failure to object to seating of biased juror did not waive biased-jury claim).)

Moreover, even if there were contexts in which trial counsel's conduct might be held to constitute a forfeiture of their client's right to an adequate record on appeal, it would violate basic Eighth Amendment principals to do so in a capital case. Death is different.

> [D]eath is a different kind of punishment from any other which may be imposed in this country. *Gregg v. Georgia*, 428 U.S. 153, 181-188 [citations] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also

[3] Respondent raised no such contention during the extensive record correction proceedings concerning transcriptions of the audio and video tape recorded evidence presented to the jury. Nor did the trial court raise any question about the appropriateness of that effort.

> differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
>
> (*Gardner v. Florida* (1977) 430 U.S. 349, 357-358.)

This Court does not disagree. (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 728.)

A capital defendant cannot waive his automatic appeal. (*People v Massie* (1998) 19 Cal.4th 550.) It follows that a capital defendant cannot waive the requirement of a complete transcript of the proceedings necessary for the prosecution and determination of his automatic appeal. If he could, then he could waive his right to any meaningful appeal, thereby vitiating the ban on waiver of the appeal. By waiving the right to a trial court record, the capital defendant could effectively stipulate to his death sentence. This he cannot do. All the more clearly, nor can trial counsel, by acts or omissions that fail to zealously guard his capital client's right to an adequate appellate record, effect a waiver of that right.

The United States Supreme Court has held that meaningful appellate review consistent with the Eighth Amendment requirements for imposition of the death penalty requires that the appellate court "consider the defendant's actual record: "What is important is an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant v Stephens*, (1983) 462 U.S. 862, 879." (*Parker v. Dugger* (1991) 498 U.S. 308, 321.)

Defendant's statutory and constitutional rights to a meaningful appellate review of his conviction and sentence require a full and adequate record. These are rights that cannot be forfeited due to trial counsel's nonchalance. As the Supreme Court explained in *Gardner v. Florida*, *supra*,

430 US 349, 361:

> Since the State must administer its capital-sentencing procedures with an even hand [citation], it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia. (Fn. omitted.) In this particular case, the only explanation for the lack of disclosure is the failure of defense counsel to request access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

There also is a public and governmental interest in assuring that the judgment of death has been properly imposed by the jury. The Defendant has no ability to waive the public's right to this review, even if, as clearly was not the case here, his waiver were to be knowing and intelligent:

> Section 1239(b) provides that an appeal of a sentence of death "is automatically taken" to this court. As we explained in *Stanworth*: This statute "imposes a duty upon this court 'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.' . . . [¶] . . . We cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him." (*People v. Stanworth*, *supra*, 71 Cal. 2d at p. 833.)
>
> (*People v. Massie* (1998) 19 Cal.4th 550, 566.)

This Court has recognized that there are rights so fundamental that no contemporaneous objection is required. (See, *e.g.*, *People v. Saunders* (1993) 5 Cal.4th 580, 589-592: no contemporaneous objection required to assert on appeal a claim of double jeopardy or denial of right to jury trial.) The same standard must apply where the right to meaningful appellate review of a judgment of death is prejudicially impaired as a result of an inadequate transcript of the evidence presented in the trial below.

In none of the decisions of this Court evaluating whether the failure to provide a transcript of proceedings under Section 190.9 was prejudicial has this Court ever discussed, let alone applied, a waiver or forfeiture analysis. The *only* decision cited by Respondent in support of a "waiver" or "forfeiture" is *People v. Wright* (1990) 52 Cal.3rd 367 at 415, which dealt with a claim based on an alleged but unobjected-to error in the trial court's polling of the jury after the verdict – not with any defect in the record of what had transpired in the trial court. No case is cited by Respondent even suggesting that a failure to provide a complete transcript as required by Section 190.9 or a claim based on the denial of an adequate appellate record can be waived by the actions or neglect of trial counsel.

### C. The Lacunae in the Record on Appeal Fatally Prejudice Defendant's Constitutional Right to Full Appellate Review

#### *1. The Missing Record of Eight Hours of the Most Important Evidence on the Central Issue of the Entire Trial Constitutes Structural Error Preventing Meaningful Appellate Review*

Defendant does not contend that a failure to comply with Penal Code Section 190.9 automatically requires a reversal. Defendant agrees that a showing of prejudice must be required. Defendant contends, however, that if ever there was a case that demonstrated the prejudice *on appeal* arising from the incompleteness of the record of proceedings in the trial court it is here.

Nevertheless, "The due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review. (*Griffin v. Illinois* (1956) 351 U.S. 12, 16–20; *Draper v. Washington* (1963) 372 U.S. 487, 495–496.

In his opening brief on appeal, Defendant went through every decision this Court had issued where error under Penal Code 190.9 had been alleged. (AOB at pp. 224-228.) No case cited there had raised inadequacy of the record with respect to substantial evidentiary material going to the crux of a key issue on appeal. Between the opening brief and this reply brief, the Court has addressed claims of inadequacy of the record in six additional cases:

- *People v. Zambrano* (2007) 41 Cal.4th 1082, at 1193-1198: failure to record colloquy at bench conferences.
- *People v. Rundle* (2008) 43 Cal.4th 76, at 110-112: unreported discussion on jury instructions.
- *People v. Harris* (2008) 43 Cal.4th 1269, 1283-1284: no reflection of physical gestures by witnesses; unadmitted charts used in closing arguments; identification of specific portions of taped statements replayed for jurors during deliberations; private conferences between counsel and between counsel and defendant; pretrial hearings in municipal court; list of rejected proposed jury instructions.
- *People v. Bennett* (2009) 45 Cal.4th 577, 588-590: interviews with prospective grand jurors.
- *People v. Dykes* (2009) 46 Cal.4th 731, 800: bench conference re responding to juror question.
- *People v. Taylor* (2010) 2010 48 Cal.4th 574, 660 conferences in chambers re scheduling, sidebar conferences on witness testimony, discussions re responding to juror questions.

As with the cases reviewed in the AOB, none of these cases presented a lack of record as to crucial evidence central to the entire proceeding such

that an evaluation of a challenge that the record lacked substantial evidence to support the verdict could not be conducted.

While the Court rejected the Section 190.9 challenge in *People v. Harris, supra,* it acknowledged that gaps in the trial record could rise to the level of "structural error" such that a specific showing of prejudice would not be required. (*People v. Harris, supra*, 43 Cal.4th at 1280)

Defendant's review of challenges to an incomplete record under Penal Code 190.9 reveals that this Court has never faced review of a capital trial resulting in a judgment of death where the missing record was of the scope or the gravity as exists in this case.

This *is* the situation where the gaps in the trial record *do* rise to the level of structural error. The Court should reverse the conviction and judgment and order a new trial in which, if it were to result in a new conviction and judgment of death, the trial court record would permit this Court to carry out its assigned duty of independent review of the entire trial court record.

2. *In the Context of a Capital Trial Where The Only Significant Factual Issue Was the Defendant's State of Mind, The Lack of a Reliable Record of the Evidence Presented to the Jury of Defendant's One and One-half Hour Statement to Law Enforcement Officers Discussing What He Was Thinking and Why He Did What He Did, and the Complete Absence of Any Record of the Six and One-half Hours of Audio Tapes During the Actual Incident Where Defendant is Speaking to the Hostage Negotiators and to His Student Hostages About What He Did and Why He Did It Eliminates Any Semblance that this Automatic Appeal Can Satisfy Due Process Standards, Defendant's Sixth Amendment Right to Effective Counsel on Appeal, or His Eighth Amendment Right to Meaningful Review of His Sentence.*

Even assuming this Court is unwilling to characterize the eight hours of missing evidence as "structural error," the lack of a record that would permit this Court to review what it could be deemed the jury heard the Defendant say demonstrates the extreme prejudice that Defendant faces in pursuing appellate review.

The cases reviewed in the opening brief and in this brief where this Court has held that the appellant failed to demonstrate prejudice never involved the absence of a record of material *evidence* presented to the jury. In most cases the claim of missing record involved bench or chamber conferences on subjects that were typically then discussed or ruled upon in formal reported proceedings. Typically the reported proceedings also reflected the opportunity for counsel to make whatever record they wished on the matter at hand.

The missing record here is not about procedure but is missing evidence.

Not only is the missing record missing evidence, but the very nature of the missing evidence and the issues to which it pertained at trial militate

against the record lacunae being satisfactorily resolved by either the Court or counsel now listening to the electronic tapes from which the evidence was derived.

The evidence that neither counsel nor the Court can now determine is what words were audible and intelligible to the jury and what words the jury understood as being the words of the Defendant both during the commission of the crime and the next day when Defendant was interrogated by law enforcement and repeatedly challenged to admit that he acted with deliberation and premeditation.

Counsel can, and counsel has, listened intently and carefully to the tapes over a period of months using high-quality sound equipment, and has reached tentative conclusions about what some of the garbled or unintelligible words on the tapes actually may be. The Court, of course, may also engage in that exercise. Counsel's exercises did not tell counsel nor will the same exercise performed by the Court tell the Court what the jury would have heard listening to the tapes one time being played back on whatever sound and video equipment was used in the Courtroom.[4]

Nor is the evidence of a nature that its content is or ever was subject to a "settlement" process by the trial court and counsel. The evidence goes not to determine any concrete fact (e.g. expert testimony as to the weight, chemical composition or other attribute of physical evidence) but to a state of mind. Evaluation of another person's state of mind necessarily rests on an evaluation of the precise words used by the person, the order in which

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[4] Another matter the record is silent upon are the technical specifications of the equipment used to play the video and audio tapes to the jury – the starting point for any attempt to recreate the aural evidence presented to the jury.

they were used, the context in which they were said, etc. It is one thing to settle a record that an expert witness testified to the chemical composition of the white powder found on the coffee table. Settling a record of eight hours of Defendant's describing why he came to the school, what he remembered doing there, and what was in his mind in order to determine whether he deliberated and premeditated, is a quite different task. In the latter case, it is the exact words used in their exact order and context that determines the outcome. Settling the record here is not humanly possible.

Listening to the tapes simply will not permit a meaningful evaluation of the evidence that was audible to the jurors going to Defendant's state of mind. To a significant extent on the videotape of the interrogation on May 2, 1992 (Exhibits 57a and b) and extensively on the audio tapes, (Exhibits 82-88) a listener cannot even determine when a voice represents the Defendant speaking as opposed to either law enforcement officers, or, on the audiotapes, other unknown people in the classroom. The record correction process has established that the transcript of the interrogation videotape provided by Plaintiff to the Court and given to the jury frequently misattributed to Defendant words spoken by the interrogating officers (and vice-versa). As no transcript of the audio tapes ever was provided to the trial court or jury, no comparison of the audio tape can even be done. Moreover, unlike the videotapes, the audiotapes didn't even provide visual cues to assist in determining who was speaking.[5]

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[5] Respondent asserts as to the videotapes that the jurors were unlikely to have attributed any statement to the wrong person because they had an opportunity "to not only listen to but to also view the interrogation." (Respondent's Brief, p. 143 n.66.) But the prosecution's transcriber made such errors despite, according to the trial court, "taking time to watch the videotape and type down what he or she believed he or she was seeing and

With respect to the audio tapes, Defendant and Respondent agree that the words spoken by Defendant to the hostage negotiator on those tapes are generally intelligible, but the exchanges between Defendant and the negotiators constitute only a small portion of the audio tapes, which are primarily noise and voices in the classroom. Even Respondent concedes the audio tapes are "somewhat unintelligible." (RB 138-139) An effort was made during record correction proceedings to transcribe the audio tapes or portions thereof using high quality audio equipment, headphones and frequent replaying of audio segments. (5 CT Supplemental-4 at p. 1327.) The transcriber opined that she had discerned and transcribed language that would not have been "available to a jury listening to the tapes one time utilizing speakers in a courtroom." (*Id.* at pp. 1327-1328.) Just what the transcriber heard that she believes the jurors could not have heard we do not know. What the jurors thought they heard that the transcriber did not we also do not know. There simply is no record of and no way to reconstruct what was audible when the audio tapes were played at trial.

Respondent argues that the audio tapes are relevant to show Defendant's disposition during the commission of the crime. Defendant has never claimed the tapes weren't relevant. The evidence is highly relevant; it is just that no one knows what the evidence is. It is precisely because the tapes are so highly relevant that the lack of a record as to what is on them compels a finding of fatal prejudice to Defendant.

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hearing on the videotape." (18 RT 4336-4337: describing Exhibit 89, the interrogation transcript, to the jurors.)

D. Because the Jury was Not Provided with a Settled Transcript of What on the Tapes Was Intelligible and What Was Not Intelligible and Thus to Be Ignored, Nor Instructed Accordingly, the Jury's Verdicts Are Necessarily Based Upon Speculation and Conjecture, Not Admissible Evidence

In his opening brief, Defendant submitted that the trial court failed in its fundamental duty to ensure that evidence introduced for consideration at trial is reliable, trustworthy, and intelligible to the fact-finder. (Citing to *People v. Stephens* (1953) 117 Cal.App.2nd 653, 661-663, *United States v. Robinson* (6th Cir. 1983) 707 F.2d 872, 876, *People v. Polk* (1996) 47 Cal.App.4th 944, 953-956.) As argued in the AOB, it is an abuse of discretion for a trial court to fail to take reasonable steps to ensure that electronic evidence to be played to a jury is accurate and trustworthy, and intelligible.

Defendant also argued, in a separate point, that he was prejudiced by the trial court permitting the jurors to use Exhibit 89, the prosecution's transcript of the interrogation video, in the jury room without properly instructing them as to its use. Defendant argued that the prejudice arose from the fact that Exhibit 89 contains a number of significant and prejudicial discrepancies from the transcripts of the video tapes that appellate counsel stipulated were "more accurate."

Defendant's two points were both separate and independent.

Apart from arguing that Defendant's trial counsel forfeited Defendant's right to complain that his trial was infected with speculative non-evidence, Respondent does not address at all the substantive claim that the trial court had an independent duty to ensure that the jury's attention was properly channeled so that it focused on what was determined to be intelligible on the tapes and not speculate on the possible content of hours of unintelligible sound. Respondent does not discuss the substance of either

the *Stephens* or *Robinson* decisions, and cites to *People v. Polk*'s statement that it is not error to play a tape with some unintelligible material without mentioning that the trial court in *Polk* had followed the very same procedures required by the Sixth Circuit in *Robinson* before playing the tape, *i.e.*, vetting the tape transcript to determine its accuracy, identifying on the transcript the unintelligible portions, instructing the jury to disregard and not speculate as to the content of the unintelligible portions. (See RB, p. 137)

The due process issues discussed in *Stephens, Polk,* and *Robinson* go to the very integrity of the trial court proceedings and, at least on the record in this case, cannot be forfeited. The presentation of hours of predominantly unintelligible tapes of the Defendant during the commission of the crime and tapes from the following day interrogation as to his state of mind at the time of the crime where such tapes are often confusing as to who is speaking and have many unintelligible passages was an invitation to the jurors to render a verdict based on speculation and surmise. Whether the jury's verdict was for acquittal or conviction, the use of such substantial, and potentially material, unreliable evidence undermines the validity of the entire fact-finding process.

Conscientious jurors, unless instructed otherwise, would want to make as much of the evidence presented comprehensible as they could. Moreover, it is basic to any understanding of human psychology that when interpreting perceptually incomplete or ambiguous stimuli, the human brain has a tendency to 'fill in' missing information based on expectations and previous experience. Thus, both as a matter of human brain function and as a natural consequence of jurors honestly trying to fulfill their duties, it can be assumed that the jurors necessarily were seeking and finding content in objectively unintelligible portions of the tapes.

By inviting the jurors to speculate in such a matter leaves the verdict and resulting judgment a potentially random outcome rather than a reasoned decision based upon reliable intelligible evidence. This type of error cannot be the subject of forfeiture, even if counsel were negligent in not objecting at the time.[6]

Additionally, the facts underlying the error were plainly recognized by the trial judge, who while listening to the tapes being played for the jury described what he was hearing as "gobbledygook that is all but unintelligible," although "there are things that you can understand from time to time on the tape." (18 RT 4246:4-10) That trial counsel, (either through neglect or calculation that the speculation engendered by playing the tapes would benefit Defendant) did not object should not permit the structural error to be excused.[7]

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[6] If a theoretical trial counsel had stipulated that the verdict as to his client's guilt could be decided by the toss of a coin, could a resulting guilty verdict be sustained on the premise that Defendant had "forfeited" the right to object on appeal? In a hypothetical case where the evidence suggested that conviction was highly probable, decision by coin toss might be seen as substantially favorable to the Defendant, reducing chance of conviction to 50% and trial counsel might have served his client's interest to choose it, but that would not be a reasonable basis upon which to affirm a judgment arising out of such a process.

[7] As noted in the AOB, after several hours the trial judge stopped the playing of the tapes and, upon learning that there was a copy of the tapes that was easier to listen to and contained more intelligible voices, asked defense counsel if they would stipulate to the playing of the more intelligible version. Defense counsel reasonably objected that the Plaintiff would need to demonstrate the reliability and accuracy of the better sounding copy. Rather than pursue the possibility of playing more intelligible tapes to the jurors, the trial court chose expediting the proceeding over ensuring the presentation of evidence meeting elementary due process standards. (RT:18 RT 4245:22-4246:22; 4249:1-4250:26)

As the court stated in *People v Stephens, supra,* "The case is one wherein there is lacking that element of fairness essential to due process...The right of an accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty." (*People v. Stephens, supra,* 117 Cal.App.2nd at 663).

The introduction of the tapes without first determining a reliable transcript identifying the content of the intelligible matter and identifying the unintelligible matter and properly instructing the jury to consider only that matter that was intelligible and not to speculate on the content of any matter identified as unintelligible matter was unwaivable structural error requiring reversal. Because that error taints any verdict the jury could render, the judgment must be reversed without regard to a demonstration of prejudice.

E. The Discrepancies Between Exhibit 89 and the "More Accurate" Transcript Developed During Record Correction Demonstrate the Potential for Prejudice By Not Employing the Procedures Endorsed by *People v Polk* and *United States v. Robinson*, as Well as the Actual Prejudice that Arose From Giving the Unvetted and Inaccurate Exhibit 89 to the Jury During Deliberations

Respondent argues that no prejudice flowed from introduction of the tapes without providing a settled transcript setting forth the intelligible statements and who made them, or from the failure to provide a limiting instruction that the jurors were not to speculate as to the verbal content of any other sound they heard on the tapes.

However, the discrepancies that exist between Exhibit 89 and the "more accurate" version as stipulated by Appellate counsel for both parties belie Respondent's contentions. Moreover, those discrepancies establish

actual prejudice occurred by providing the jurors with an inaccurate transcript to use during their deliberations.

Respondent presents speculative arguments that the jurors wouldn't have misunderstood the statements on the tapes in a prejudicial manner. Hence, at page 140 of its brief, at note 64, Respondent asserts that "Appellant engages in pure speculation, however, in assuming that the jurors guessed as to what was being said on the tapes in the places in which they could not make out the words spoken." Respondent then proceeds at pp. 145-146 to discuss the various significant discrepancies between the transcript of the video tape interrogation provided to the jury (Exhibit 89) and what the parties during record correction determined was the more probable "evidence" that exists when the audio portion of the video tape is scrutinized. Respondent posits that the jurors would have discounted the probable "erroneous" portions of Exhibit 89 because the "erroneous" transcriptions are inconsistent with other statements made by Defendant.

There are a number of serious problems with Respondent's position: First, as discussed *supra*, the *evidence* was what was *audible* to the jurors when the video tapes were played in the Courtroom. That *evidence* is missing from the record on this appeal. The parties on appeal don't have the record from which to argue, and this Court does not have a record from which to decide, whether the "errors" in Exhibit 89 prejudicially affected the outcome because there is no record of the evidence the jury should have considered.

While it may be tempting to buy in to Respondent's unsupported assumption that the jurors relied on Exhibit 89 because it would permit a comparison between what we know to be printed on Exhibit 89 and the probably more accurate version of the audio on the video tape created in

record correction, the Court would be purchasing an illusory solution. The prejudice arising from apparent mistakes in Exhibit 89 can't be measured by comparing Exhibit 89 with the record correction version – it must be measured by comparing Exhibit 89 with what the jurors actually heard in the Courtroom while the tapes were played. There is no reason to believe the version developed in record correction corresponds to what the jurors heard. The lack of a record of the actual evidence is fatal to resolving whether prejudice arose from the use of Exhibit 89.

Thus, for example, we have no way of knowing whether the "evidence" at trial was that the jurors heard Appellant state: "I was in the right frame of mind" [when entering the high school to start shooting] (Exhibit 89), or they heard "I wasn't in the right frame of mind...I don't know what frame of mind I was in even when I went in there," (Record Correction "more accurate" version) or something different from either version. Three scenarios about this discrepancy appear plausible:

1. If what was audible in the courtroom was the first version, then Exhibit 89 was not misleading at all with respect to the actual evidence, but there is a high likelihood that the verdict is based on evidence that is totally speculative and false as to Appellant's actual characterization of his state of mind as actually recorded on the tape.
2. If what was audible was in fact something closer to the revised version developed during appellate counsel's extended review in record correction, then Exhibit 89 might be analyzed on appeal to determine if it reasonably may have misled the jury and was prejudicial. However, the predicate to the scenario for conducting such an analysis, i.e., that the jury heard the second

version, is itself a matter of pure speculation by the parties to the appeal and the Court.

3. If what was audible in the Courtroom was something different than either what appeared on Exhibit 89 or in the revised version developed on appeal, then the parties and the Court can have no meaningful discussion as to whether the jury was misled by Exhibit 89, again this appeal will be an exercise in futility.

Second, Respondent's discussion assumes that jurors would evaluate an interrogation of Appellant by harmonizing apparent inconsistencies, and harmonizing them in *favor* of Appellant. This assumption simply does not comport with reality.

The video tape is an *interrogation* that may or may not contain *admissions* by Appellant as to a state of mind consistent with, or supporting, a finding of first degree murder by deliberation and premeditation. A criminal suspect is *interrogated* by law enforcement because the suspect is *denying* responsibility and the interrogators are attempting to get the suspect to *acknowledge* responsibility for the crime. What cannot be disputed from watching the videotape or reading Exhibit 89 is that throughout Appellant is denying he intended or meant to kill anyone. The videotapes are a prime example of the interrogation process, as Defendant repeatedly denies he premeditated and deliberated killing anyone while the interrogators apply a variety of approaches attempting to get Defendant to acknowledge that he did, in fact, premeditate and deliberate killing people.

The interrogators, and presumably the jurors, were evaluating the videotaped interrogation for *inconsistencies* in Defendant's statements – for his "telling" slips and apparent acknowledgments of culpability amidst the

plethora of denials. If the audible portions of the video tape played in the Courtroom led the jurors to believe that Defendant said he was "in the right frame of mind" and confirmed in that impression by the (apparently) erroneous Exhibit 89, it is likely they would have spotted that statement as an "aha! moment," i.e., the place where Defendant let his defenses slip and acknowledged his guilt. Except, of course, that as Respondent acknowledges, he didn't admit a deliberated intent to kill at all.

In the context of a criminal interrogation, jurors are unlikely to dismiss a "slip of the tongue" as inadvertent and therefore irrelevant because it is inconsistent with the defendant's repeated denials. Rather, they are most likely to see the "slip of the tongue" as revealing the defendant's *actual* state of mind – one that he is trying to hide from the interrogators (or even himself). The probable errors in Exhibit 89 raised by Defendant are therefore the most important statements attributed to Defendant in the most important evidence (the video tapes and audio tapes) presented to the jurors. Respondent's attempt to mitigate the prejudice flowing from the errors in Exhibit 89 is unavailing.

Third, as previously discussed, Respondent's argument that electronic tapes containing unintelligible portions are nevertheless admissible misstates Defendant's assertion of error. Defendant's contention is not that the sound obtained from playing the tapes was inadmissible at trial, but that in order to prevent the trial from being infected with completely unintelligible evidence that would invite the jurors to speculate as to its content and render an inherently arbitrary verdict, the trial court should not have permitted the playing of the tapes without first (1) having a transcript that correctly set forth the intelligible speech on the tape, (2) identifying the unintelligible portions of the tape, and (3) instructing the jurors that they were not to

speculate as to the content of the unintelligible portions.

Respondent cites to *People v. Polk* (1966) 47 Cal.App.4th 944 at 952-953 for the proposition that a partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete that the tape's relevance is destroyed. What Respondent did not mention in its citation to *Polk* is that the trial court in that case, *before* having the tape recording played for the jury, reviewed the tape and the transcript provided by the prosecution and required that the transcript omit language where the trial court could not make out what was on the tape and indicated on the transcript those portions of the speech on the tape that were unintelligible. Referring to the decision in *United States v. Robinson* (6th Cir. 1982) 707 F.2nd 872, cited by Defendant in his AOB to support the assertion of error in admitting the tapes without such a transcript, the *Polk* Court stated:

> While the decision in *United States v. Robinson, supra*, 707 F.2d 872 is not binding precedent on this court, it is interesting to note the actions the trial court took in this case virtually tracked every recommended procedure outlined by the *Robinson* court. The trial court listened to the tape several times to compare the tape to the transcript prepared by the prosecution. After hearing the tape the trial court ordered the irrelevant and prejudicial portions deleted. The trial court also directed the parties to meet and agree on those portions of the transcript which should be deleted or replaced with asterisks or the word "inaudible" or "unintelligible." The trial court also recommended the defense prepare a transcript representing its version of the tape recording. The defense in Polk's trial adopted the suggestion and prepared and submitted its version of the tape. The jury was permitted to compare the different versions while listening to the tape. Apparently, both the Leater and Polk juries listened to the tape many times during deliberations, indicating they did not blindly adopt as accurate the People's transcription of the tape.
>
> *People v. Polk, supra*, 47 Cal.App.4th at 954-955

The trial court in Defendant's trial did not review Exhibit 89 for

accuracy and did not make its own determination as to what was intelligible and unintelligible with respect to the transcript. It did not order the irrelevant and prejudicial portions deleted, and it did not order that the parties agree on which portions of the transcript should be deleted or replaced with asterisks or other indication that the speech was inaudible or unintelligible.

With respect to the audio tapes, the trial court recognized while listening to the tapes that much of what was on the tapes was unintelligible, but did not caution the jurors not to speculate as to what was being said. The trial court failed to require any transcript of the audio tapes be prepared. By its failure, the trial court permitted the jurors to engage in pure speculation as to the substance of what six to six and one-half hours of evidence of Defendant's statements contained.

Moreover, in *Polk* the tapes played corroborated reliable evidence from other sources establishing that Polk had participated in the charged homicides while Polk asserted an alibi defense. In the trial below, Defendant's participation in the homicides was not challenged. The relevance of the tapes was not to establish whether Defendant shot the victims, but to determine his state of mind when he was shooting.

No evidence of any statement by Defendant during the two minutes he was downstairs in Building C and shooting was introduced at trial. While various students held hostage on the second floor for the next eight hours testified as to what Defendant had said about the shooting and why he was at the school, their testimony was conflicting as to Defendant's intentions in coming to the school and knowledge of whether anyone had been killed. (See AOB pp. 45-49) Apart from the testimony of the students, the only other evidence of state of mind apart from the tapes was the testimony of accomplice David Rewerts that in their "fantasizing," Defendant talked

about going to the school and shooting people, and whatever inferences could be drawn from the unexplained diagram, lists, and note to his family. All of this evidence was equivocal at best. (See Argument VI, *infra.*)

Defendant's mental health expert testified that Defendant had no intention to kill and did not even know that he was shooting people. (20 RT 4714-4715) Defendant's mental state was virtually the entirety of what was disputed at trial, and the central issue underlying all three jury verdicts.

The tapes containing the sound of Defendant speaking while he was holding the hostages and responding to the police interrogators the following day was clearly the most significant evidence of mental state. Even if the actual words spoken by Defendant were clearly determinable, their meaning would likely be subject to varying interpretations. Since the actual words spoken are not known and could only be guessed at by the jurors, the verdicts based upon such evidence are necessarily based on rank speculation.

Permitting the jurors to proceed to verdict based on their speculative determination of what Defendant said on the tapes was fatally prejudicial and requires reversal.

Finally, Respondent's position assumes that the jurors disregarded the trial Court's instruction to them that what they heard played in the courtroom was the evidence and Exhibit 89 was merely an aid, but instead did the exact opposite: treated Exhibit 89 as evidence and definitive of what Defendant had said on the videotape, and so disregarded what they had heard in the Courtroom. There is nothing in the record to suggest that the jurors did disregard the trial court's instructions.

However, as noted in *United States v. Segines* (6th Cir. 1994) 17 F.3rd 847, at 854: "When tapes are unintelligible ... a transcript intended as an aid to the jury inevitably becomes, in the minds of the jurors, the evidence

itself." Thus, Respondent's argument that the discrepancies between Exhibit 89 and the transcript developed in record correction would not have prejudiced the jury are unavailing. The Sixth Circuit's common sense observation means that were this Court to attempt to conduct a prejudice review of the discrepancies between Exhibit 89 and the version developed in record correction, it would necessarily have to find that the provision of Exhibit 89 to the jury was prejudicial – it being more likely than not that the jury relied on the inaccurate statements set forth in Exhibit 89.

## II. THE COMPOSITION OF THE GRAND JURY AND THE PROCEDURE IT FOLLOWED IN RENDERING THE INDICTMENT REQUIRE REVERSAL OF THE ENTIRE JUDGMENT AS RESPONDENT HAS BEEN UNABLE TO DEMONSTRATE AN ABSENCE OF PREJUDICE

### A. *Dustin* Remains Good Law

Respondent seeks to overturn the decision in *Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311 that failure to record all of the substantive proceedings before the grand jury in a capital case is presumptively prejudicial. *Dustin* remains good law, however, and the Respondent's arguments against it are unavailing.

Respondent makes the argument it commonly makes regarding grand jury proceedings, namely that they are not part of the "case," and therefore not subject to the application of Penal Code Section 190.9 and/or other safeguards afforded to the defendant in pre-trial proceedings. Under the Respondent's premise, there is no case until the grand jury votes one.

However, like the situation in *Dustin*, the argument that the grand jury proceedings are not part of the case is disingenuous because, among other things, the grand jury proceedings resulting in the indictment occurred *after* the prosecution had filed an information and then dismissed it rather than

subject its probable cause witnesses to cross-examination in a preliminary hearing. This belies any suggestion that the grand jury was some form of independent fact finding body. Rather, the prosecutor's use of the grand jury was a purely tactical device to allow the prosecution to present its evidence in secret and avoid having its witnesses cross-examined. As the court stated in *Dustin*:

> Further, this argument is disingenuous because this matter had earlier been filed as a complaint in Stanislaus County, case No. 1001382. The charging decision had already been made by the district attorney prior to presenting evidence to the grand jury."
>
> *Dustin v. Superior Court, supra*, 99 Cal. App.4th at 1322.

The grand jury proceedings are conducted outside the presence of the Defendant. Additionally, the Defendant cannot be represented at the Grand Jury proceedings. Given these two predicate facts, asking the Defendant to demonstrate prejudice from unrecorded substantive activities of the grand jury violates his basic federal Constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution to fundamental due process and right to counsel.

Respondent seeks to place the burden on the Defendant to demonstrate prejudice arising from unrecorded activities taking place in a proceeding he cannot attend either in person or through counsel. The process affords Defendant neither the ability to lodge an objection to the process, ask for the statute to be followed, or meaningfully participate in any record settling about the missing activities during the record correction process. From a due process and right to counsel standpoint, the grand jury proceedings cannot be compared to trial proceedings.

In the trial court, no substantive proceedings may take place without the presence of Defendant's counsel and, in most instances without the

physical presence of the Defendant as well. In the trial court, both counsel and defendant are in a position to remind the trial court of its statutory duty to have all proceedings recorded.[8]

Even more important, Respondent is arguing for a requirement that would require defense counsel, post-trial, to meaningfully participate in settling the record of proceedings where defense counsel wasn't present as a necessary predicate for demonstrating prejudice. Realistically, the record of the grand jury proceedings could only be settled by the prosecutor and the grand jurors themselves, all of whom are likely to have an interest and bias to demonstrate that whatever occurred off the record, it did not prejudice or undermine the integrity of the grand jury's issuance of the indictment.

> In the absence of a transcript, coupled with the fact that no judge or defense representative was present, it is difficult to imagine how a defendant could ever show prejudice.
> *Dustin v. Superior Court, supra*, 99 Cal.App.4th at 1326

This Court should affirm the holding in *Dustin*.

B. Established United States Supreme Court Law Prohibits California from Treating Structural Error in the Grand Jury Proceedings as Potentially Harmless Error when Raised in Post-Conviction Proceedings

In 1986 in *Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264, the United States Supreme Court ruled as a matter of federal constitutional law that systematic racial or ethnic discrimination in the grand jury selection

[8] The requirement under Penal Code Sections 939.7 and 190.9 requiring that all proceedings be reported cannot be waived or forfeited by trial counsel, for the reasons discussed in connection with Argument I in the AOB and this Reply Brief. Nevertheless, defense counsel's presence permits defense counsel to remind the trial court of its statutory duty, and it is unlikely that a reminder/request from defense counsel to the trial judge that the proceedings are to be recorded would go unheeded by the trial court. This opportunity is missing from the grand jury proceedings.

process was "structural error" infecting not only the indictment but any resulting trial.

At the hearing on his motion to set aside the indictment, Defendant presented evidence that raised a *prima facie* case of systematic exclusion of various ethnic and racial groups, including African-Americans, Latinos, Punjabi's and Hmong. This evidence included testimony that the grand jury pools were comprised of persons nominated by prominent civic organizations such as the Rotary Club and non-mathematically random selection of persons on an alphabetical basis from lists of driver's license and voter registration data. (4 RT 857:17-858:23; 867:5-22; 4 RT 868:3-871:27; 5 RT 929:17-931:4; (4 RT 905:13-908:13; 5 RT 920:7-26) Defendants' expert testified that the methodology utilized for selection of the grand jury pools would systematically exclude persons in the identified suspect ethnic groups. (5 RT 1031:22-1034:16) The members of the identified ethnic groups are statistically under-represented in groups such as the Rotary, are less likely to have driver's licenses, and are less likely to have phones by which they can be contacted for interviews. In the absence of a mathematically random selection process, selecting names alphabetically would tend to discriminate against certain groups, such as Hmong, whose names begin with different letters than typical Caucasian names.

The motion was denied on the ground that Defendant had not shown the actual ethnic makeup of the grand juries. This could not be shown because the grand jury records maintained by Yuba County, even six years after *Vasquez*, contained no indication of the ethnic or racial membership of the grand jury panel. There was not even a process for persons to voluntarily identify their race or ethnicity.

Contrary to Respondent's argument, this evidence was sufficient at least to shift the burden to Respondent to show there had not been systematic discrimination by showing that the ethnic and racial makeup of the grand juries did reflect the ethnic and racial makeup of the residents of Yuba County.

Respondent argues that *People v. Pompa-Ortiz* (1980) 27 Cal.3rd 519, 529 requires Defendant to show prejudice arising from the grand jury selection process because he raises it in a post-conviction setting. *Pompa-Ortiz held* held that the prejudice arising from procedural irregularities in the preliminary hearing or grand jury process would only be presumed prejudicial if raised by extra-ordinary writ prior to trial, but that Defendants would be required to demonstrate prejudice if they raised such error post-conviction.

*Pompa-Ortiz* was decided before the United States Supreme Court issued its decision in *Vasquez*. Its holding, under the facts of this case, is directly in conflict with the federal constitutional imperative set forth in *Vasquez*, in that *Vasquez* held that the structural error of an indictment issued by a grand jury composed in a systematically discriminatory manner fatally infected not only the indictment but any resulting judgment at trial:

> Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense -- all on the basis of the same facts. Moreover, "[the] grand jury is not bound to indict in every case where a conviction can be obtained." *United States v. Ciambrone*, 601 F.2d 616, 629 (CA2 1979) (Friendly, J., dissenting). Thus, even if a grand jury's determination of probable cause is confirmed in

> hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.
>
> *Vasquez v. Hillery, supra*, 474 U.S. at 263.

This Court has never directly addressed the *Pompa-Ortiz* rule in light of the clear directive of *Vasquez*. The issue was addressed in *People v. Corona* (1989) 211 Cal.App.3d 529, 535, but the resolution in that case is clearly in direct conflict with the holding in *Vasquez*. In *Corona*, the court distinguished between intentional discrimination in the grand jury selection process and mere "absence of a fair cross-section of the community." (*People v. Corona, supra*, 211 Cal.App.3rd at 534). The *Corona* court analogized the systematic failure to assemble a grand jury from a fair cross-section of the community with the statutory procedural irregularity addressed in *United States* v. *Mechanik* (1986) 475 U.S. 66, 70-71, which dealt with the simultaneous presence of two witnesses in the grand jury room. The two types of procedural error – discriminatory composition of the grand jury and having one witness testify while another is present, are plainly not of the same level of gravity. One raises a direct constitutional infirmity to the entire process, the other may be utterly benign.

Further, the attempt to treat the *Vasquez* decision as applicable only to intentional discrimination but not to unconscious systematic discrimination is not supported by *Vasquez* or subsequent United States Supreme Court decisions. The structural error doesn't arise from the fact that the discriminatory composition was intentional, but from the fact that it was discriminatory. The subsequent decisions of the United States Supreme Court have never held that a systematic but non-intentional exclusion of significant racial or ethnic communities from the composition of grand or

petit juries was subject to harmless error analysis. The vice is the systematic exclusion of suspect segments of the community.

As stated in *Vasquez*:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired. See *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (reversal required when judge has financial interest in conviction, despite lack of indication that bias influenced decisions). Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained. See *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam); *Sheppard v. Maxwell*, 384 U.S. 333, 351-352 (1966). Like these fundamental flaws, which never have been thought harmless, discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.
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> *Vasquez v. Hillery, supra*, at 263-264.

Having set forth a *prima facie* case for systematic exclusion from grand jury service of suspect segments of the Yuba County population, Defendant established structural error not only in the grand jury process and the ensuing indictment, but also in the trial court judgment ensuing from the indictment. *Vaszquez'* holding is unambiguous that the petit jury's subsequent verdicts cannot either cure the error or shift the burden of showing prejudice to the Defendant. The entire proceeding is unsound and must be reversed.

## III. THE TRIAL COURT'S FAILURE TO QUESTION PROSPECTIVE JURORS UNDER OATH VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS AND AN IMPARTIAL JURY

A. Introduction

Defendant asserted in his opening brief that his conviction and sentence are unreliable because it does not affirmatively appear on the trial record that the statutorily required oath (Code of Civil Procedure Section 232, subd. (a) ["truthfulness oath"]) was actually administered to prospective jurors before bias and death qualification *voir dire* was conducted, and the trial court's settlement of the record with the mere presumption that this was done (Evidence Code § 664) was insufficient to satisfy either the statutory requirement that all proceedings in a capital case must be on the record (Pen. Code § 190.9) or the heightened degree of due process required in a capital case, and left an inadequate record for meaningful appellate review. This was structural error implicating defendant's right to be tried by an impartial jury, requiring reversal. (See AOB pp. 277-298 and cases cited therein.)

Respondent argues that: (1) the administration of the oath to prospective jurors before *voir dire* at defendant's capital trial was not a "proceeding" within the meaning of section 190.9; (2) at the settlement conference the trial court properly relied on the presumption under Evidence Code section 664 that official duties have been regularly performed and consequently defendant has the burden of showing that the oath was not administered; and (3) if there was an erroneous failure to administer the oath or create a record, defendant has the burden of demonstrating prejudice from the omission and has failed to do so. (RB pp. 181-193.)

B. The Administration of the Juror *Voir dire* Truthfulness Oath is a Proceeding Within the Meaning of Penal Code § 190.9

Indisputably, a death penalty case was in existence in the case at bar when prospective jurors were at the courthouse for jury selection

proceedings, and Penal Code section 190.9 therefore applied to every substantive aspect of those proceedings. (Compare *People v Bennett* (2009) 45 Cal.4th 577, 590 [§190.9 inapplicable to proceedings which occurred before capital crime committed]; see also *Dustin v. Superior Ct.* (2002) 99 Cal.App.4th 1311, 1313 [section 190.9 applies to grand jury proceedings], 1322 ["section 190.9 applies to 'all proceedings' under the plain meaning rule"]).

The trial court itself understood that the absence of a record of the administration of the oath was a violation of Penal Code section 190.9 (26 RT 6181-6182 ["in a death penalty case you don't do things that aren't on the record."], but presumed that the oath had been administered by court staff in the jury assembly room before the judge arrived there to address the assembled panel and settled the record accordingly. (26 RT 6183-6184.) Respondent has now argued, without analysis or citation to authority, that the presumed administration of the truthfulness oath by jury assembly room staff off the record and before the judge arrived did not constitute a "proceeding" within the meaning of section 190.9. (RB 191.)

Surely Respondent cannot be heard to argue that merely because something is usually done off the record it is automatically not a "proceeding" under section 190.9. Defendant's point is that because administration of the oath *is* a proceeding, it *should* have been done on the record at his trial.

Jury selection *voir dire* was a critical stage of the proceedings at Defendant's trial (*Morgan v. Illinois*(1992) 504 U.S. 719, 729-730; *Gomez v. United States,* (1989)490 U.S. 858, 876) and the primary responsibility of the judge during *voir dire* is to determine the prospective jurors' fitness to serve (*Wainwright v. Witt* (1985) 469 U.S. 412, 429). Thus, a measure

designed to ensure the truthfulness of potential jurors' responses during *voir dire* is directly related to the defendant's fundamental right to be tried by an impartial jury. (U.S. Const., Amends. VI, XIV; Cal. Const. Art. 1,§§ 15 , 16; *Gray v. Mississippi* (1987) 481 U.S. 648, 658, 659, fn. 9, 668; *Morgan v. Illinois, supra,* 504 U.S. at 726-728.)

The United States Supreme Court has left no doubt about the significance of the entire *voir dire* process in any criminal case: "Far from an administrative empanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner -- often, in the federal system, the court -- must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants *to ensure the jury's impartiality.* See, e. g., *Wainwright v. Witt*, 469 U.S. 412, 428, n. 9 (1985) (quoting *Reynolds v. United* States, 98 U.S. 145, 156-157 (1879))." (*Gomez v. United States, supra,* 490 U.S. at 875, emphasis supplied.[9])

Respondent cites *People v. Mellon* (2002) 97 Cal.App.4th 511 to support the argument that administration of the truthfulness oath need not be on the record. But *Mellon* was not a capital case[10] and is therefore inapposite for at least two reasons:

First, the requirement for scrupulous adherence to procedural rules

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[9]Because of the manifest importance of *voir dire* to securing an impartial jury, the *Gomez* court held that federal legislation authorizing magistrates rather than judges to preside over misdemeanor trials and "other proceedings" could not be extended to authorize magistrates to select a jury in a felony case. (Id., 490 U.S. at 876.)

[10]See *People v. Mellon, supra,* 97 Cal.App.4th at 513(defendant convicted of aiding and abetting robbery and false imprisonment).

was not constitutionally compelled in *Mellon*, as it was at Defendant's capital trial under the Eighth and Fourteenth Amendments. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 856 (conc. Opn. of O'Connor, J.); see also *People v. Champion* (1995) 9 Cal.4th 879, 908-909.)

Second, since it was not a capital case, no issue was raised in *Mellon* concerning the application of Penal Code section 190.9 to the administration of the oath. In a footnote the court referred only tangentially to the fact that the administration of the oath had not been done on the record in the *Mellon* trial and stated that it presumed the oath had been administered, citing Evidence Code section 664. It is axiomatic that cases are not authority for issues not raised in them. (*People v. Stone* (2009) 46 Cal.4th 131, 140; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 65-66; see also *Webster v. Fall* (1925) 266 U.S. 507, 511.) Defendant raises no issue concerning the reliance on Evidence Code section 664 in non-capital cases, which are simply irrelevant to the present issue.

Respondent has both trivialized the problem and set up a straw man by arguing that Defendant's position would lead to a requirement "that *all* discourse between jury assembly room staff and prospective jurors in capital cases be conducted on the record." (RB 191.) Defendant neither has argued for such a holding nor is such a holding necessitated were the Court to find for Defendant on this issue. Defendant agrees with respondent that it was not the Legislature's intent in enacting section 190.9 to create such an unworkable rule. Defendant, however, is not here arguing that there is any error or constitutional violation in the failure to record assembly room staff's instructions to prospective jurors about the location of courthouse restrooms,

where to stack their questionnaires, or how to record their attendance and get their parking passes. The proceeding of which there should have been a record was the administration of an oath of truthfulness, which was a solemn and substantial responsibility of the superior court implicating Defendant's constitutional right to an impartial jury, regardless of which personnel were charged with the duty and regardless of how commonplace the act might seem because of the frequency with which it is done.

Significantly, respondent has completely failed to respond to Defendant's analysis of this Court's conclusion in *People v. Carter* (2005) 36 Cal.4th 1114 that somehow the on-the-record administration of the Code of Civil Procedure section 232, subd. (b) "duty" oath to seated jurors made it unnecessary to give the section 232, subd. (a) "truthfulness" oath to the panel before *voir dire*. (*Id.,* at pp.1176-1177; see AOB 289-292.) The statute requires citizens called to jury duty to promise two quite distinct things in two completely different contexts; that is why there are *two* oaths. Defendant again urges this Court to reconsider and reverse this portion of the *Carter* opinion because the fact that jurors are properly sworn to execute their duties faithfully after they have been selected to sit on the jury simply cannot cure the omission of their oath to tell the truth when they are being questioned during jury selection, which in a capital case is often a delicate, difficult, and nuanced inquiry requiring very careful and honest revelations by prospective jurors.

There is no basis in law or logic--and respondent has identified none--for the assertion that the administration of the oath of truthfulness to prospective jurors was not required to be on the record. Defendant submits that, as the trial court recognized, administration of the truthfulness oath required by Section 232, subdivision (a)--a mandatory procedure in jury

selection-- was a proceeding which had to be conducted on the record both under Penal Code section 190.9 and because of the federal constitutional requirements of heightened due process in a capital case and the creation of an adequate record for appellate review. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 856 (conc. opn. of O'Connor, J.).)

C. The Trial Court's Reliance on Evidence Code Section 664 Was Not an Evidentiary Finding But a Legal Ruling that Defendant Has the Burden of Proving the Negative – That the Constitutionally and Statutorily Required Oath Was Admitted Even though the Trial Court Record Does Not Indicate that it Was. The Public Policy Underlying Evidence Code Section 664 Must Give Way to the More Important Policies Underlying The Necessity for Having *Voir Dire* Conducted Under Oath and the Legislature's Clear Statement that The Swearing of the Panel Members Must Be Done on the Record.

Respondent argues that the trial court exercised its discretion properly under Evidence Code section 664, which provides that "[i]t is presumed that official duty has been regularly performed." (RB 186.) Defendant acknowledges that, as a general rule, this presumption applies to court clerks. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1056-1057.) The general rule, however, cannot be applied here.

It should be noted that respondent has utterly failed to discuss any of the United States Supreme Court authority on which Defendant has relied for the principle that an extra measure of care must be taken with regard to all procedures in a capital case. Rather, without reference to any authority *contra*, Respondent instead merely points to Evidence Code section 664 to resolve the issue.

At the record settlement hearing no court personnel were called to testify and no court records or other documentation was introduced to assist the court in making an accurate determination of whether the oath had in fact

been given to Defendant's jurors. Rather, the court settled the record by simply presuming that it had been, since that was the *usual* practice of court staff. (26 RT 6181-6184.) This was an arbitrary method of settling the record which denied to Defendant the benefit of the procedures in the Penal Code and the Code of Civil Procedure designed to protect his rights to an impartial jury and an adequate record for appellate review.

With regard to respondent's argument that as a consequence of the Evidence Code section 664 presumption Defendant has the burden of establishing--in the circumstances of his case--that the truthfulness oath was not administered to most of the prospective jurors, Defendant turns to the cases cited purportedly in support of that position: *People v. Carter* (2005) 36 Cal.4th 1114 and *People v. Lewis* (2001) 25 Cal.4th 610, 629-631. (See RB 190.) Both are easily distinguishable and were discussed in Defendant's opening brief (see AOB 287-293); and neither is helpful to respondent, since they merely discuss the court's duty under Code of Civil Procedure section 332, and neither involves either Penal Code section 190.9 or Evidence Code section 664, let alone the interplay between the two.

Significantly, there was nothing missing from the record in either *Carter* or *Lewis*, so no issue based on Penal Code section 190.9 was raised. Opinions are not authority for issues not considered. (*People v. Stone, supra,* 46 Cal.4th at 140; *People v. Alvarez, supra,* 27 Cal.4th at 1176; *People v. Superior Court* (*Marks*), *supra,* 1 Cal.4th at 65-66; *Webster v. Fall, supra,* 266 U.S. at 511.)

In point of fact, both *Carter* and *Lewis* undermine the validity of the general statutory presumption that court staff have performed their duties as the law requires, as the holdings in both those cases show that the court staff did not perform their duties according to the code. Section 664 does not

confer some kind of doctrine of infallibility on court personnel as a substitute for demonstrable compliance with statutes which protect a capital defendant's state and federal constitutional rights to trial by an impartial jury.

In *Carter* there was no dispute about whether the truthfulness oath had been given; it had not. This Court, however, was able to point to other record facts for its finding that the Defendant was not prejudiced by the omission, namely: that the prospective jurors had filled out their questionnaires under penalty of perjury. (*Id.*, at 1177.) Defendant's jurors did not fill out questionnaires under penalty of perjury. Thus, in Defendant's case this Court cannot infer, as in *Carter*, that even if the truthfulness oath was not given to most of the prospective jurors, they "understood that they were required to respond truthfully to the questions posed during the *voir dire* . . . ." (*Id.*, 36 Cal.4th at 1177.) There is simply no factual basis for such an inference here, and such a critical fact about the essence of the selection of a jury in a capital case cannot simply be presumed, Evidence Code section 664 notwithstanding.

Nor was there any question in *Lewis* about whether the truthfulness oath had been given. In that case, it *was* given, although after the juror questionnaires had been filled out--which this Court *held to be a violation* of the procedure required by Code of Civil Procedure section 232, subdivision (a). (*Lewis,* 25 Cal.4th at 630.) Again -- without an actual record of the administration of the oath to Defendant's jurors, this Court cannot infer anything about whether, even if it was administered, this was done *before* the jurors filled out their questionnaires; so the same error may have occurred. The error was cured in *Lewis*, and was therefore non-prejudicial, because prospective jurors had signed their questionnaires under penalty of perjury and the truthfulness oath was administered before they were *voir*

*dired.*

Defendant was tried in 1993 and the *Lewis* opinion holding that the truthfulness oath had to be given before prospective jurors filled out questionnaires came down in 2001. It is at least reasonably probable that, like court personnel in the *Lewis* case in 1990 (*id.*, at p. 628), the court staff at Defendant's trial did not understand the importance of the timing of the administration of the oath. The trial court's settlement of the record in Defendant's case was necessarily limited to the simple presumption that the oath "was administered before the judge arrived . . . in the jury assembly room to speak to the prospective jurors." (26 RT 6184.) Thus, even if the truthfulness oath was in fact administered by court staff it is at least reasonably probable that this was not done *before* the venire members filled out their questionnaires--which again, were not under penalty of perjury. And the trial court's presumption that the oath was administered simply does not settle the record on this question.

It would be completely unreasonable for this Court to hold that Defendant must establish not only that the truthfulness oath was not administered to prospective jurors, but that, in addition, if it was given, this was not done before the jurors filled out their questionnaires.

The use of Section 664 by the trial court to assume the existence of an event (a) undisclosed on the record, (b) that, if it occurred would have had to have done so outside the presence of the trial judge, and (c) about which none of the trial counsel could have had any knowledge, is an issue of law to be determined by this Court *de novo* in light of the factual and legal context in which the issue arises.

The presumption created by Evidence Code Section 664 "is not evidence." (Evidence Code § 600) Rather, it is "an assumption of fact that

the law requires to be made from another fact or group of facts found or otherwise established." (*Ibid.*) As has been stated by at least two Courts of Appeal, the policy being promoted by Evidence Code Section 664 is to "reliev[e] governmental officials from having to justify their conduct whenever it is called into question." *Arthur v. Department of Motor Vehicles* (2010) 814 Cal.App.4th 1199, 1207, fn 3; *Jackson v. City of Los Angeles* (1999) 69 Cal.App.4th 769, 782.)

Whatever the merits of the public policy that government officials should not be required to justify their conduct *every time* it is called into question, that does not compel that Section 664's presumption be applied on *every occasion* when conduct of government officials is called into question. Rather, the importance of the policy underlying Section 664 must be weighed against countervailing public policy existing here that expressly requires that all proceedings be reported, as well as the policies holding that the unreported proceeding Respondent argues may be "assumed" to have occurred is central to the integrity of the entire capital trial process.

The application of Evidence Code Section 664 needs to be examined in light of any countervailing public policies that would call for government officials in this instance to explain why there is no record of a required duty having been performed. Here, there are at least two other strong countervailing public policies: First, is the policy arising from Defendants' Fifth, Sixth, and Eighth Amendment rights to be tried and have a penalty determination by unbiased jurors that have been qualified by a special set of criteria establishing their competence to sit as jurors in a capital trial and to have the benefit of an appellate record adequate to conduct review of the judgments of guilt and penalty. The second is the policy established by the legislature in Penal Code 190.9 that all proceedings in a capital trial are to be

reported.

Defendant submits that in light of these important and clearly demonstrated public policies, the failure to create a record of the administration of the oath of truthfulness to the *voir dire* panels cannot be mechanically erased by the Section 664 presumption. In this instance, the absence from the record of a recordation that the oath was administered should be sufficient to support a finding that the oath was not administered, at least in the absence of evidence that would support a contrary finding. The People have not come forward with any such evidence.

Nor is it a proper function of record correction to utilize Evidence Code Section 664 to posit the existence of an "assumed" event. As noted earlier, "[t]he settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 585) The trial court did not *correct* the record, it *assumed* the existence of a proceeding for which there is no record. This was a misuse of the record correction process.

This Court has not routinely applied a presumption that official acts have been performed when important constitutional rights of criminal defendants have been at stake. In *In re Smiley* (1967) 66 Cal.2nd 606, 629-630, this Court rejected an argument by the prosecution that the Court should assume that official acts were properly performed where the record before the Court failed to indicate that the defendant had been fully advised of all of his rights prior to the entry of a plea. In that case the Court found that since the legislature had enacted a statute requiring that there be a record of the advisement, the legislative "intent would be defeated if the prosecution were allowed to shift to the defendant the burden of proving the

negative fact that he was not given an explanation to which he did not know he was entitled." (*Ibid.*) The principal here is the same. The legislature requires the administration of the oath to the *voir dire* panel prior to filling out the questionnaires and requires that the proceeding be reported. The record does not report this happening, therefore the presumption must be that it did not and the burden is on the prosecution to establish that it did.

Defendant's position is that in his capital case the general Section 664 presumption cannot substitute for a record indicating that in actual fact, the citizens who appeared in court to answer questions concerning their qualification to serve on his jury understood that their answers were being given under penalty of perjury. The *voir dire* of prospective jurors in a criminal case is a critical stage of the trial (*Gomez v. United States* (1989) 490 U.S. 858, 876), the administration of an oath of truthfulness is essential to the proceeding, and in a capital case must be on the record as required by Penal Code section 190.9.

D. The Failure to Administer the Oath of Truthfulness on the Record Was Structural Error and If Not, Respondent Bears the Burden under Chapman of Demonstrating Beyond a Reasonable Doubt that If the Oath was Not Given the Omission Had no Adverse Effect on Defendant's Rights to an Impartial Jury and to Fair and Reliable Guilt and Sentencing Determinations

Respondent argues that, even if the trial court failed to comply with section 190.9, the burden is on Defendant to establish prejudice from that failure. (RB 191.)

Defendant's position, explained with reference to ample authority in his opening brief, is that, in the absence of any curative circumstances which could rationally satisfy a reviewing court that prospective jurors understood their legal and moral duty to answer *voir dire* questions with scrupulous care

and honesty in Defendant's capital case, the failure to administer the oath of truthfulness to prospective jurors on the record constituted structural error and requires reversal of the entire judgment. (See AOB 294-295 and cases cited therein.) This is so because a reviewing court cannot be sure that the oath was in fact administered and if it was not there is a real danger that one or more of Defendant's jurors did not answer bias and death-qualifying questions candidly and honestly, and in fact were unqualified to serve.

The violation of a defendant's right to an impartial jury cannot be treated as harmless error. (*Gray v. Mississippi* (1987) 481 U.S. 648, 668; *Chapman v. California* (1967) 386 U.S. 18, 23; *Rose v. Clark* (1986) 478 U.S. 570, 577-578.) This principle carries extra weight in the context of a capital case because of the Eighth Amendment requirement of reliability of both the guilt and penalty verdicts.(*Beck v. Alabama*(1980)447 U.S. 625, 637-638, 643; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*(1976) 428 U.S. 280, 305.) In *Chapman* itself, the United States Supreme Court recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." (*Chapman* v. *California*, *supra*, 386 U.S. at 23.) The right to an impartial jury is one of those rights. (*Id.*, at 23, note 8.) Specifically, in the context of death-qualification *voir dire*, the high court has explained that harmless error analysis does not apply, because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, which is essential to the integrity of the entire legal system. (*Wainwright* v. *Witt*, *supra*, 469 U.S. at 416).

Respondent, however, would have this Court treat the problem as one of mere trial error, i.e., subject to harmless error analysis, and makes the bald statement that "any error in failing to administer the oath was harmless under the applicable state . . . and federal . . . standards. (See *People v.*

*Rundle*, *supra*, at 112 [assessing violation of section 190.9, subdivision (a), for prejudice under both *Watson* and *Chapman*].)" (RB 194; citations to *People v. Watson* (1956) 46 Cal.2nd 818, 836 and *Chapman v. California* (1967) 386 U.S. 18, 24, omitted.) But assuming, *arguendo*, that this Court concludes the 190.9 violation in Defendant's case was not structural error, the omission still constitutes federal constitutional error--a violation of Defendant's rights to a heightened degree of due process in a capital case and of an adequate record for meaningful appellate review--and the analysis of the error must therefore use the *Chapman* standard, not *Watson*.

The *Chapman* standard requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Here, respondent must establish beyond a reasonable doubt that the failure to administer the truthfulness oath on the record did not contribute in any way to the guilt or penalty verdict. That is, respondent must convince this Court that even if the oath was not given, the prospective jurors understood during their *voir dire* that they were legally bound to answer questions truthfully and were subject to penalty for perjury if they did not, and that the omission could not have contributed to any of them responding to questions less than truthfully, thereby concealing bias or disqualification under *Witherspoon/Witt*[11] standards or vis-à-vis issues relating to the determination of guilt or sanity. Respondent cannot possibly carry this burden because there is nothing in the record to point to, to establish harmlessness of the error. Under *Chapman* the entire judgment must be reversed.

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[11] *Wainwright v. Witt* (1985) 469 U.S. 412, *Witherspoon v. Illinois* (1968) 391 U.S. 510.

Respondent, however, relies on *People v. Rundle* (2008) 43 Cal.4th 76 to support an argument that the failure to administer the truthfulness oath on the record is not reversible per se, and that Defendant must demonstrate prejudice from the error (RB191). *Rundle* is inopposite. In *Rundle*, there were some unreported off-the-record discussions of jury instructions, but the trial court discussed in open court what had gone on during those discussions and invited defense counsel to contribute to the record anything it was omitting, including objections to instructions the court had decided to give, and stating any further instructions the defense had requested and the court had refused in the off-the-record conferences; and at record settlement, trial defense counsel confirmed that all unresolved objections and requests had been placed on the record. (*Rundle, supra,* 43 Cal.4th at 111.) This Court concluded in those circumstances that the record was sufficient to allow adequate review of challenges to the jury instructions, and reviewed the issues of the trial court's failure to give certain instructions *sua sponte* on the assumption, because of the silent record, that trial counsel had not invited those errors. (*Id.,* at 112.)

The issue of prejudice here comes at two levels, neither of which is addressed by the holding in *Rundle*. The first level is whether prejudice arises *per* se from the failure to administer the oath. The record from the trial court prior to record correction fails to disclose any basis to believe that the oath was administered to the second *voir dire* panel, and has only a scintilla of non-admissible evidence (juror's nodding at Judge's remark) that the first *voir dire* panel had the oath administered. Thus, on the face of the record, the oath was not administered to either *voir dire* panel. Defendant submits that failure to administer the oath is structural error and prejudice need not be proven, or, alternatively, under *Anderson*, it is Respondent's burden to

prove the absent of prejudicial error.

Thus, to the extent the Court holds that a failure to administer the oath is sufficient to establish prejudice in and of itself, absent Respondent proving the oath was, in fact administered, Rundle doesn't help Respondent, because the prejudice is clear. Under Rundle Defendant has met his burden of showing prejudice, since the act of administering the oath was, itself, the content of the proceeding which should have been conducted on the record.

Respondent relies on *People v. Rogers* (2006) 39 Cal.4th 826 to support the claim that Defendant has the burden of showing that the record is inadequate to permit meaningful review. Assuming, arguendo, that this Court agrees, Defendant has no quarrel with the following summary set forth in *Rogers*: "The due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review. (*Griffin v. Illinois* (1956) 351 U.S. 12, 16–20 []; *Draper v. Washington* (1963) 372 U.S. 487, 495–496 [].) Similarly, the Eighth Amendment requires reversal only where the record is so deficient as to create a substantial risk the death penalty is being imposed in an arbitrary and capricious manner. (*Stephens v. Zant* (5th Cir. 1980) 631 F.2d 397, 403, rehg. den. & opn. mod. (1981) 648 F.2d 446, cert. den. (1981) 454 U.S. 1035.)"(*Rogers*, 39 Cal.4th at 857-858 (parallel citations omitted by Defendant).)

Given the state of the record in Defendant's case, there indeed is a substantial risk that the jurors who convicted him and sentenced him to death did not realize that they were under a legal obligation to answer questions truthfully during *voir dire*, including the "death qualification" questions, and that consequently one or more of them omitted important information or failed to respond as frankly and candidly as they would have

had they felt the compulsion of the oath, or otherwise failed to answer "accurately and truthfully" as required under state law.[12] That means there was a substantial risk that one or more of the seated jurors were not impartial, or were unqualified under *Witherspoon/Witt* standards; and *that* means that there is a substantial risk that the death penalty was actually imposed on Defendant in an arbitrary and capricious manner, requiring reversal.

E. Conclusion

Defendant submits that the administration of the oath of truthfulness must affirmatively appear on the record in a capital case because it is critical to this Court's ability to assess the reliability of the trial court's findings that the jurors selected to hear the case were qualified to sit on Defendant's jury. Therefore the reliability of every decision the jury made, including the decision to impose the death penalty, is seriously undermined by the failure to administer the oath. The obvious function of section 190.9 is to ensure that capital trials in this state have an adequate record for meaningful

[12] Particularly given the nuanced evaluation of jurors for death qualification, proving what an unsworn juror would have said had they been sworn will be impossible. There will likely be no "hard facts" to conflict with a factual response given in the *voir dire*. Few people are comfortable speaking with utter candor to strangers about their personal moral and political beliefs, even if they never would lie or deceive if asked a question that had a straightforward factual answer. Jurors who were asked how they felt about the death penalty and whether or not they were comfortable weighing mitigating evidence to find for life in the face of four people dead, including three teenagers, could not be expected to be as forthcoming and expressive of their views as they might be in the privacy of their home or with trusted friends. The administration of the oath, while not perfect, is calculated to make potential jurors *more* forthcoming on these sensitive private issues so that the Defendant may be tried by a jury that has been, as best the process can produce, a petit venire of death-qualified jurors.

appellate review (see *Dobbs v. Zant* (1993) 506 U.S. 357, 358 and cases cited therein; see also *Marks v. Superior Court* (2002) 27 Cal.4th 176, 191) and that verdicts in such trials meet the standard of reliability required by the Eighth and Fourteenth Amendments of the United States Constitution (*Beck v. Alabama, supra,* 447 U.S. 625; *Woodson v. North Carolina, supra,* 428 U.S.at 305; *Gregg v. Georgia* (1976) 428 U.S. 153, 187).

Further, Defendant submits that, under the reasoning and authority above and in his opening brief, where, as here, a proceeding in a capital case was not conducted on the record *and* it would be structural error if that proceeding in fact did not occur, then the usual rule that a section 190.9 violation is subject to harmless error analysis does not apply, and the entire judgment must be reversed.

## IV. THE EVIDENCE WAS INSUFFICIENT TO CONVICT DEFENDANT ON ANY OF THE ATTEMPTED MURDER COUNTS, BOTH AT THE CLOSE OF THE PROSECUTION CASE-IN-CHIEF WHEN DEFENDANT'S SECTION 1118.1 MOTION WAS ERRONEOUSLY DENIED, AND AT THE CLOSE OF GUILT PHASE EVIDENCE

Defendant demonstrated in his opening brief that, while there was ample evidence that Defendant shot the ten victims named in Counts V - XIV, there was insufficient evidence presented at trial from which a rational trier of fact could have concluded beyond a reasonable doubt that he did so with the specific intent to kill. (See AOB 299-329.) Specific intent to kill is an element of the crime of attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 327-328.)

Respondent argues that there was sufficient evidence to sustain all of the attempted murder verdicts. (RB 194-207.)

Since Respondent's brief was filed, this Court decided *People v. Stone* (2009) 46 Cal.4th131, in which it focused on the mental state required in the crime of attempted murder when "a person shoots into a group of people, intending to kill one of the group, but not knowing or caring which one." (*Id.,* at p.134.) This Court concluded that, while such a scenario does not support an attempted murder conviction under a "kill zone" theory (*id.,* at p.138; see *People v. Bland* (2002) 28 Cal.4th 313), a "person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*Stone*, 46 Cal.4th at p. 140.) The analysis in *Stone* emphasized that whether the victim is "particularly targeted or randomly chosen[,]" the culpability of the defendant must be determined separately with regard to each individual alleged victim. (*Id.*, at p. 141.)

The defendant in *Stone*, a gang member, fired a gun from a car at a group of rival gang members in a parking lot but hit no-one, and was charged with the attempted murder of a specific member of the group fired at. (*Id.*, at pp.134-135.) This Court characterized the allegation that the shooter had intended to kill the specific, named victim as "problematic given that the prosecution ultimately could not prove that defendant targeted a specific person rather than simply someone with the group." (*Id.*, at p.141.) And this Court advised that in cases like *Stone*, the information need not name a specific victim; it would have been sufficient to allege that the defendant attempted to murder "a member of a group of persons" in a particular place at a particular time. (*Id.*, at p.141.)

In remanding the *Stone* case to the Court of Appeal for reconsideration,[13] this Court admonished the court below to "consider any

[13]In *Stone* the district attorney petitioned for review (*id.*, 46 Cal.4th at p. 136) of the Court of Appeal's decision reversing the attempted murder

issues regarding the variance between the information--alleging defendant intended to kill Joel F.--and the proof at trial--defendant intended to kill someone although not specifically Joel F." (*Id.*, at p.142.) The implication of this admonition is that, although the appellate court had found no evidence that the defendant in *Stone* intended to kill Joel F. specifically, it could uphold the attempted conviction on remand if it found that there was sufficient evidence that the defendant "intended to kill someone" when he shot at the group which included Joel F.

Although the prosecutor at Defendant's trial argued to the jury essentially that he was, in the words of the *Stone* court, an "indiscriminate would-be killer" (*Stone, supra,* 46 Cal.4th at p. 140; see 21 RT 5089:22-27),[14] respondent does not contend on appeal that this theory justifies the attempted murder verdicts, instead asserting that sufficient evidence was presented at trial to support a rational conclusion that Defendant "specifically shot at, and intended to kill, each of the named attempted murder victims." (RB at p. 196, fn. 89.)

Defendant submits that there was no evidence presented at his trial which would support a rational conclusion that he affirmatively intended to

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conviction because (1) the trial court had erroneously instructed the jury on a "kill zone" theory and the prosecutor had told the jury it could convict the defendant of attempted murder if it found he had intended to kill "someone, even if not specifically" the victim named in the information (*id.*, at p. 139) and (2) there was "'not a scintilla'" of evidence that the defendant had intended to kill that particular individual (*id.*, at pp. 135-136).

[14]"22 Why would you go into a sanctuary for children
23 with big game ammunition, armed with shotgun, also with a
24 rifle if you were not intends (sic) go to kill someone? What
25 possible conceivable alternate reason could you have for
26 going to that place at that time if you didn't intend to
27 kill somebody?"

kill anybody, let alone that he intended the victims named in Counts V-XIV to die.[15] The circumstances of the shootings here are not in line with the facts in those cases where courts have found sufficient evidence of attempted murder. (See AOB 307-308 and cases cited therein.)

In *Stone* the shooter and the group he shot at indiscriminately were members of rival gangs, the gangs had been having conflict that very day, and he was in a car driven by someone else who drove away after he had fired one shot, so he had no opportunity to shoot again. (*Stone*, *supra,* 46 Cal.4th at pp. 134-135.) Jurors in that case would have known, because it is common knowledge, that gang members are very likely to try to kill each other when disputes arise between them, so when a gang member shoots at another gang in the circumstances that existed in *Stone*, it was reasonable to conclude that he did so with the intent to kill. No equivalent circumstance existed in Defendant's case to ground such a conclusion.

Here, with the exception of Robert Brens, there was no evidence--again, *beyond* the fact of the shootings--that Defendant harbored any actual malice toward the people on the first floor of Building C as a group, or any of the specific people alleged to have been the victims of attempted murder.

Under *Stone*, in an attempted murder case the prosecution must still prove that the defendant acted with the specific intent to kill. And the *Stone* opinion does not disturb the longstanding rule that, unlike for a charge of actual murder, implied malice is not enough. (*Id.*, at pp. 139-140.) The opinion does clarify that the prosecution may allege in charging documents that a defendant had the intent to kill someone in a group without targeting a particular person, and such an "indiscriminate would-be killer" (*id.*, at p.140)

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[15]See Argument VI, *infra.*

may be convicted of attempted murder of any person in that group. However, "'guilt of attempted murder must be judged separately as to *each alleged victim*' . . . whether the alleged victim was particularly targeted or randomly chosen." (*Id.*, at p.141, quoting from *People* v. *Bland, supra,* 28 Cal.4th at 331, emphasis supplied.)

Thus, in Defendant's case, where each count of attempted murder alleges a different victim, and where it is not disputed that Defendant shot each of the victims, this Court must review the record on each count to determine whether the prosecution produced evidence that was solid, credible, and substantial enough to convince a rational juror beyond a reasonable doubt that Defendant shot the named victim with the intent to kill either that person or just anyone in a group of which the victim was a part, rather than with the intent of merely wounding that victim or someone else or with careless disregard for whether the shot would turn out to be fatal to anyone or not. If the trial evidence would support a rational conclusion of the latter intent but not the former, it is insufficient to support a conviction of attempted murder. Defendant therefore turns to respondent's specific arguments in support of the verdicts.

First, respondent asserts that "evidence suggested" that Defendant had a motive to kill teachers and students at the high school, namely "his dissatisfaction with the way the school had treated him." (RB 202.) But that is pure speculation, as there was no evidence that any of the victims in Count V - IX had ever had anything to do with Defendant, nor that he believed that any of them was responsible, actually or symbolically, for the way "the school" had treated him in previous years when he was a student there. There was no comment or conduct by the defendant or other circumstance established by the evidence to "suggest" that Defendant

blamed everyone in the school on the day of the crimes or the victims named in the subject counts, for his past mistreatment.[16] If, as Respondent posits, the jury verdicts are based on a speculated or imagined motive that Defendant wanted everybody, anybody, or the particular people he wounded to die for the "sins" of the Lindhurst Unified School District and Robert Brens, there was no actual evidence to support it.

In response to Defendant's discussion of each attempted murder count pointing out the utter lack of motive to kill in each case, Respondent also counters that motive is not an element of attempted murder and that the prosecution was not required to show one. (RB 198, 202.) Defendant agrees, although "evidence of motive is often probative of intent to kill." (*People v. Smith* (2005) 37 Cal.4th 733, 741; accord, *People v. Lewis* (2001) 26 Cal. 4th 334, 370.) That is, when there is solid evidence of motive to kill--as when victim and assailant are members of rival gangs--there is a basis for finding such an intent. By the same token, lack of evidence of motive often militates against such a finding. For example, in *People v. Lee* (1987) 43 Cal.3d 666, this Court referred to two cases mentioned in Appellant's Opening Brief where error was found in the failure to instruct the jury on specific intent to kill, and pointed out that in addition to that error, "in neither case did the defendant have any apparent motive to kill, rather than merely injure, his victims[,]" whereas in *Lee* the defendant had

[16] It should be remembered that Defendant encountered Patricia Morgan in the parking lot, a teacher he liked. He made no attempt to shoot her. He encountered Marguerite Cole, another teacher, on the second floor. Defendant stated to the students in C-204 that he didn't like Mrs. Cole and called her a "bitch," but he didn't shoot her—he told her to leave the building. (3610:24-3611:6; 3658:4-12) Defendant has his shotgun pointed at Gregory Todd Howard and Lucy Lugo from five feet away while they were crouching on the floor, but did not shoot them. (2963:28-2968:25)

shot at police officers he knew to be armed in a "'kill or be killed' situation[,]" a circumstance which supported a finding of specific intent to kill. (*Id.*, at p. 679, referring to *People v. Ratliff* (1986) 41 Cal.3rd 675 and *People v. Johnson* (1981) 30 Cal.3rd 444; see AOB 307-308.) In Defendant's case, the lack of evidence of any reason Defendant would have wanted the named victims or any other person (other than Robert Brens) inside the school to die, simply removes that theoretical route to a rational finding of intent to kill on the attempted murder counts.

Second, respondent contends that the fact that Defendant fired from close range toward seven of the victims (Hinojosai, Scarberry, Gipson, Kaze, Boggess, Martinez, and Graham) in a manner that would have killed them if the buckshot had "'been on target'" was sufficient to sustain a finding of intent to kill with regard to them. (RB 204-205.) In support of this contention respondent quotes language from *People v. Smith* (2005) 37 Cal.4th 733, which in turn quoted *People v. Chinchilla* (1997) 52 Cal.App.4th 683. Like all cases cited in Appellant's Opening Brief which contained sufficient evidence to support findings of specific intent to kill on attempted murder counts, in both *Smith* and *Chinchilla* there was some kind of hostile relationship between the defendant and the victims, some reason that at the moment of shooting, the defendant would have intended for them to die. In *Smith* the defendant fired a shot at his ex-girlfriend and a baby who was her child with another man with whom the defendant had just had an altercation after insulting the ex-girlfriend. (*Smith*, *supra*, 37 Cal.4th at p. 742.) In *Chinchilla* the defendant was engaged in a shoot-out with the police and the victims were armed officers. (*Chinchilla, supra*, 52 Cal.App.4th at pp. 686-687.) As in every other case of which Defendant is aware where reviewing courts have found sufficient evidence of intent to kill to sustain attempted

murder convictions, it was reasonable to conclude on such evidence that the defendants who applied potentially deadly force to those victims harbored express malice toward them at the moment they fired. There simply are no comparable circumstances in the facts of Defendant's case. Absent such circumstances there is no basis for inferring a lethal intent or anything about what the defendant was specifically targeting. Respondent's assertion that the shots were fired in a manner that would have killed had they "been on target" simply assumes the lethal intent the evidence fails to establish. [17]

Third, respondent argues that the jury could rationally have concluded from the fact that Defendant fired "through the doorway" of classroom C-105A, that he intended to kill the three victims (Rodriguez, Collazo, and Yanez) who had been "in the vicinity" of the door and were wounded. This makes no sense, since respondent's previous argument was that shooting from close range directly at the victims was a fact that supported a finding of specific intent to kill those victims. Without explaining the connection, to support this argument, respondent points to the fact that Defendant used a shotgun loaded with double-aught buckshot, described by an expert witness

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[17] Respondent's argument that if Defendant's shotgun blasts at close range had been on target creates an inference he intended to kill is, in fact equally susceptible to the opposite inference: Defendant had considerable experience using the shotgun he was firing. The utility of a shotgun with shot pellets is that it doesn't require the precise aim of a rifle or other weapon firing a single projectile. That Defendant repeatedly fired at relatively close range and in each case the majority of the pellets did not hit their allegedly intended victims, raises the inference Defendant sought to avoid firing in a lethal manner. Absent some additional evidence he consciously sought the victims' deaths or their deaths would have accomplished some rational objective and/or that his "bad" aim was inadvertent – each of which is missing in this record – the evidence of Defendant repeatedly being off target cannot support a finding of the specific intent to kill needed for attempted murder.

at trial as antipersonnel ammunition, and had read in a book on weapons that double-aught buckshot had the biggest antipersonnel impact. (RB 205-206.) This merely amounts to evidence that Defendant used a deadly weapon, which is not in dispute. Clearly, if the facts of the case were exactly the same except that Defendant had used the .22 rifle he possessed rather than a shotgun, respondent would never agree that this was a circumstance suggesting lack of intent to kill. Since both weapons were perfectly capable of inflicting a fatal wound, the fact that he used a shotgun rather than a rifle was not probative of his mental state, and the jury could not rationally have concluded beyond a reasonable doubt that it was.

Fourth, Respondent claims that since there was no evidence Defendant had any reason to kill any particular victim other than Brens (the victim named in Count I), the jury could have concluded that he acted with the intent to kill *all* the other victims. (RB 206.) Respondent does not explain, however, what logical or common sense basis there would be for such a conclusion, which amounts to an argument that since Defendant had a reason for killing Brens and no reason for killing any of the victims in Counts V-XIV, he must have tried to kill them all. It would mean that the jury found specific intent based on lack of motive, and if that was the case, the verdicts were irrational.[18]

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[18]Respondent's position also ignores the evidence that Appellant did not fire at a variety of students and teachers for whom he had clear shots, often at close range. Nothing prevented Appellant from firing additional shots in Room C-108, where numerous students remained in their seats; nothing prevented Appellant from firing additional shots into Room C-107, where students remained veritable sitting ducks. Shortly after firing a potentially lethal shot at Wayne Boggess, and shooting into C-102 killing Beamon Hill, Appellant could easily have fired potentially lethal shots at Gregory Todd Howard and Lucy Lugo, but did not. (See 13 RT: 2960:23-2966:23) This

Fifth, respondent argues that just because the victims survived the shootings does not establish that Defendant was not trying to kill them. (RB 206.) This misses the point of Defendant's discussion of the circumstances of each of the subject shootings highlighting the fact that he could quickly and easily have fired again at eight of them (Hinojosai, Scarberry, Gipson, Boggess, Rodriguez, Yanez, Kaze, and Graham) if he had been trying to kill them. (See AOB 309-315, 316.) Respondent argues that the jury could "reasonably deduce from the evidence" that the reason Defendant didn't shoot again at the victims even though he knew they were not fatally wounded was that it would have put him at risk for "being overtaken by other students and/or teachers." (RB 207.) Any finding or conclusion that Defendant was acting "rushed" while he was downstairs would be nothing but pure speculation, with no basis in the evidence and therefore could not be characterized as a rational inference. There is no evidence whatsoever that while he was on the first floor anyone actually sought to interfere with Defendant or that anyone acted in a way that caused Defendant to believe that he did not have time to fire twice at the same person if he so chose.

Further, respondent's argument that the jury could reasonably have "deduced from the evidence" that since he apparently didn't have a reason for selecting the victims he wounded, Defendant, rather than stopping to finish them off with a second shot, could "just as satisfactorily fulfill his intent to kill" by moving on and shooting other people is patently illogical. (RB 208.) Under this theory, a juror would have had to think: "I know he

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evidence cannot be reconciled with Respondent's argument that Appellant intended to kill whomever he encountered based on his general animus toward the school. It also demonstrates that Respondent has no rational basis for ascribing an intent to kill any of the particular persons as charged in the indictment apart from the bald fact that he fired his gun towards them.

wanted to kill somebody at the time he shot A because he walked away after wounding A although he could easily have shot A again, and then he shot at B whom he also did not kill, and I know he wanted to kill B because he walked away after wounding B, although he could easily have fired at him again, and shot at C, whom he also did not kill," and so on. Concluding that Defendant was shooting anybody with the specific intent that he or she should die based on this strange line of reasoning would have been unreasonable and was unsupported by evidence.

Respondent's arguments, taken as a whole, amount to various ways of stating the position that shooting people is the same as trying to kill them, which means that every intentional shooting is attempted murder, so that a trier of fact does not really have to consider any other evidence in order to reasonably conclude that the shooter has committed the crime of attempted murder. As a matter of common sense and law, that is wrong. Defendant accepts that mental state evidence is often circumstantial, but the law always has maintained a clear distinction between the *actus reus* and the *mens rea*. There must be *something* more than merely firing one's gun in someone's direction, but there was nothing more in the evidence produced at Defendant's trial on the attempted murder counts.

For the reasons and under the authorities set out here and in Defendant's opening brief, all the attempted murder convictions must be reversed.

## V. DEFENDANT'S LIFE SENTENCES FOR TEN COUNTS OF ATTEMPTED MURDER AND THE JURY'S SPECIAL FINDINGS OF PREMEDITATION AND DELIBERATION ON THOSE COUNTS MUST BE REVERSED BECAUSE THEY WERE UNAUTHORIZED BY LAW

Defendant argued in his opening brief that the special findings of

premeditation and deliberation on Counts V-XIV, the attempted murder counts, were invalid and the imposition of life sentences for them was an act beyond the court's jurisdiction because the indictment does not allege that the attempted murders were committed with willfulness, premeditation, and deliberation as required by the express language of Penal Code Sections 664 and 1170.1 and the principles of due process. (See AOB 329-334 and cases and other authority cited therein.)

This is an issue of black letter law. The prosecution failed to include an allegation in the indictment that the attempted murders were committed with premeditation and deliberation; the jury wrongfully made findings that they were so committed; and the court wrongfully imposed a sentence enhancement accordingly. That should be the end of the matter, and the life sentences imposed on Counts V-XIV should be reversed.

Respondent argues, without reference to authority, that Defendant should have corrected the charging document himself. That is a novel and unsupportable argument. The defendant in a criminal trial is presumed innocent and Defendant entered a plea of not guilty to all charges. Defendant cannot be held responsible for the prosecutor's failure to allege in the indictment all the facts he intended to prove against Defendant at trial. Indeed, the absurdity of Respondent's argument is apparent from respondent's own assertion that, "if *appellant* had objected below on the ground that the indictment failed to allege that the attempted murders were committed with premeditation and deliberation, in all likelihood the trial court would have permitted the *prosecution* to amend the indictment." (RB 217.) A criminal defendant is not responsible for correcting the prosecution's work at trial in order ensure that the defendant will be tried on expanded charges and subject to the highest penalty possible in the event

that he is convicted. Respondent's *Alice in Wonderland* version of criminal procedure doesn't apply in California.

Respondent correctly points out that at the time of the offenses and trial in Defendant's case, Penal Code section 1170.1 did not contain the blanket language quoted in his opening brief to the effect that all enhancements must be alleged in the accusatory pleading. (RB 213, see AOB 330.) That language was added in 1997. (Stats. 1997 Ch. 750 § 3.) Appellate counsel apologizes for the misstatement in the opening brief, which was inadvertent and makes no difference to the resolution of the present issue. Defendant therefore relies on the other authorities and argument set forth in his opening brief, and primarily on Penal Code Section 664, subdivision (a) (hereafter, section 664(a))[19], expressly providing that life imprisonment may not be imposed for the offense of attempted murder unless the accusatory pleading contains an allegation that the offense was willful, deliberate and premeditated.

Respondent also argues that "section 664 is, strictly speaking, a penalty provision, not an enhancement." (RB 213.) The question of whether the subject provision is an "enhancement" or a "penalty provision" is moot in the context of the instant issue, in light of Defendant's acknowledgment that the pre-1997 version of section 1170.1 did not require that all enhancements be alleged in the accusatory pleading, nor did any other statute.[20] The express and unequivocal language in section 664,

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[19]Formerly numbered subdivision (1).

[20]Although the semantic differentiation makes no difference to the issue in Defendant's case, Defendant submits that respondent cannot rely on this Court's 1996 opinion in *People v. Bright* (1996) 12 Cal.4th 652 which characterized the subdivision (a) language concerning increased punishment as a penalty provision. In *Bright*, the phrase appears in the context of a

however, stated that life imprisonment for attempted murder committed with willfulness, premeditation and deliberation could not be imposed unless those facts were alleged in the accusatory pleading, which was not done in Defendant's case. Thus, Defendant could not lawfully be found to have

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discussion about whether the language about premeditation and deliberation in section 664 created a new degree of the crime of attempted murder or merely a new penalty provision for attempted murder. (See *People v. Bright, supra,* 12 Cal.4th at p. 669; see also *Porter v. Superior Ct.* (2009) 47 Cal.4th 124, 144 ["willful, deliberate, and premeditated" language in § 664, subd. (a) is *sentencing allegation*, not element of offense of attempted murder].) At the time that the *Bright* court used the phrase "penalty provision," with regard to section 664(a), this Court had not yet thoroughly analyzed the difference between a penalty provision and an enhancement, as it did in a later line of cases. (See *People v. Brookstone* (2009) 47 Cal.4th 583, 592-593 [citations to decisions explaining penalty provision provides "alternative penalty" while enhancement provides "additional punishment"], and cases cited therein.) Respondent quotes rule 4.405(3) of the California Rules of Court, defining an enhancement as "an additional term of imprisonment *added to the base term.*" (RB 213, italics supplied by respondent.) Defendant submits that the "base term" for attempted murder (that has not been charged and found to have been committed with premeditation and deliberation) is five, seven, or nine years. (§Pen. Code 664, subd. (a); see *People* v. *Seel* (2004) 34 Cal.4th 535, 542 ["Unless the jury finds this premeditation allegation to be true, a defendant convicted of attempted murder is subject to a determinate sentence of five, seven, or nine years."].) Defendant's characterization of the subject provision as an enhancement is consistent with this Court's analytical guidance in *People* v. *Brookfield, supra,* explaining *inter alia* that an "alternate penalty provision" may be considered a sentence enhancement when that is consistent with the legislative purpose of a statute (*id.*, at pp. 592-595) and is supported by this Court's observation in *People* v.*Smith* (2005) 37 Cal.4th 733, that "[t]he prosecution may seek a jury finding that an attempted murder was 'willful, deliberate, and premeditated' for purposes of *sentence enhancement.*" (*Id.*, at p. 740, emphasis supplied by Defendant; see also *People v. Lee* (2003) 31 Cal.4th 613, 620 [§664(a) is penalty provision increasing the punishment for attempted murder beyond maximum otherwise prescribed].)

committed the attempted murders with premeditation and deliberation and could not lawfully be sentenced to life imprisonment for those offenses.

Defendant's position is supported by this Court's opinions in *People v. Seel* (2004) 34 Cal.4th 545 and *People v. Izaquirre* (2007) 42 Cal.4th 126. This Court "reasoned in *Seel* that because the premeditation allegation (§ 664, subd. (a)), though designated a penalty provision in *Bright, supra*, 12 Cal.4th at page 669, "goes precisely to what happened in the 'commission of the offense' " ([*Apprendi v. New Jersey* (2000) 530 U.S. 466 at 496]) and effectively placed the defendant in jeopardy for an "offense" greater than attempted murder (*id.* at p. 494, fn. 19), the Court of Appeal's finding of evidentiary insufficiency barred retrial of the allegation under the federal double jeopardy clause. (*Seel, supra*, 34 Cal.4th at pp. 548–549.)" (*People v. Izaquirre, supra,* 42 Cal.4th at p. 132.)

It follows that, consistent with the reasoning of *Seel* and as a matter of fundamental fairness, Defendant cannot be sentenced for "an 'offense'" with which he was not charged.

Respondent should concede the error, and Defendant's sentences on Counts V-XIV should be reduced accordingly.

## VI. RESPONDENT HAS FAILED TO IDENTIFY ANY SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTING THE ELEMENTS OF DELIBERATION AND PREMEDITATION REQUIRED FOR THE CONVICTIONS OF FIRST DEGREE MURDER

### A. Summary of Respondent's Position and Defendant's Reply

The issue raised by Defendant in his Opening Brief as to whether there was substantial evidence *in the record* to support the four convictions of first degree murder can be stated simply:

(1) Is there substantial evidence in the record to support a finding

beyond a reasonable doubt that when Defendant was firing his shotgun on the first floor of Building C at Lindhurst High School on May 1, 1992, he was doing so with a specific intent to kill, formed "as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on cooly and steadily, [especially] according to a preconceived design"? (*People v. Bender* (1945) 27 Cal.2nd 164, 183), *People v. Halvorsen*, (2007) 42 Cal.4th 379, 429; or

(2) When viewed in its entirety, is the record lacking *substantial evidence* "that is reasonable, credible, and of solid value" to support an inference not merely that Defendant had an intent to kill, but that, in advance of his shooting, Defendant "carefully weighed considerations in forming [that] intent?" Rather, does the reasonable, credible, and solid evidence in the record show no more than that at the point of shooting Defendant understood his actions were "dangerous to life," and acted "with an abandoned heart?" (*People v. Bender, supra.*, at 178; *People v. Halvorsen, supra.*)

In his AOB, Defendant analyzed the wholly circumstantial evidence that might give rise to an inference of careful weighing of considerations in favor of killing and showed that when viewed in the context of the entirety of the record, that evidence was not substantial.[21]

Under the analysis for substantial evidence supporting a finding of first degree premeditated murder in *People v. Anderson* (1968) 70 Cal.2nd

[21] For purposes of this issue, Appellant does not challenge that there is substantial evidence in the record to support a judgment that each of the four homicides constituted second degree murder.

15, which is still the approved methodology for reviewing first degree murder convictions based on premeditation and deliberation, there must be "very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." (*People v. Eliot* (2005) 37 Cal.4th 453, 470-471).

As shown in the AOB, the record contains no evidence of planning any *killings*, is devoid of evidence of motive as to three of the four homicide victims, and, when the record as to the manner of killing is viewed in its entirety there is no substantial evidence indicating a deliberate manner of killing.

The six to six and one-half hours of evidence from the audio tapes played for the jury, and the one and one-half hours of the video taped interrogation, the content of which is uncertain, represent eight hours of the most crucial evidence relating to the issue raised here – was there substantial evidence to support a finding of deliberation and premeditation. Counsel cannot argue the content of this evidence either as supporting a finding of substantial evidence or negating the existence of substantial evidence. This Court, as it has no record whatsoever of the audio taped evidence and has only unreliable transcripts to tell it what the jury heard when the video tape of the interrogation was played, cannot meet its responsibilities to review the record in its entirety and evaluate the evidence Respondent points to in light of the entirety of that record.

Respondent points to evidence it says would permit a jury to infer that Defendant carried out planning activities. As presented in his opening Brief, for purposes of this issue Defendant does not contest that there is substantial evidence to support a finding that Defendant planned an assault on the facility of Lindhurst High School, the taking of one of more hostages, and

defending himself from what he believed would be a counter-assault by police once he was inside. What Defendant disputes is that there is evidence showing that Defendant planned to kill anyone.

Respondent points to Exhibit 64 which appears to be a diagram as to how Defendant would proceed through the school building, where he would fire his gun (but not indicating he would be firing his gun at any person either specifically or generically); Defendant made lists of the equipment he would need for his assault on the school facility and subsequent siege defense; he brought a pair of finger-cuffs for a hostage; he brought a canteen to drink water, etc., and he brought ammunition. But none of this planning evidence shows evidence of planning to kill any person or persons generally or specifically.

What evidence is in the record showing planning is more susceptible to the inference that Defendant did not plan to kill anyone as it is to the inference that Defendant did calculate he was going to kill people. To support a verdict circumstantial evidence giving rise to an inference of deliberated decision to kill must be irreconcilable with any other rational conclusion. (*People v. Thornton* (2006) 41 Cal.4$^{th}$ 391, 440-441; *People v. Hughes* (2002) 27 Cal.4$^{th}$ 287, 347.) CALJIC 2.02) If the evidence that would support an inference of culpable mental state is not "reasonable, credible, and of solid value" while the evidence that compels an inference of lack of culpablity is reasonable, credible, and of solid value, then there is no substantial evidence to support the verdict.

For each of the three subjects of analysis to be reviewed in accordance with *People v. Anderson, supra.,*: planning, motive, and manner of killing, the reasonable, credible, and solid value evidence points to a lack of prior calculated decision making, while the evidence that would support murder in

the first degree is speculative and often lacking in foundation.

Respondent argues that there is substantial evidence of planning. As noted, the bald statement as framed is not contested. When analyzed, however, none of the evidence of planning is evidence of planning specifically to kill, only of activities that while objectively likely to put many people at substantial risk for their physical and psychological safety, do not show or lead to an inference of a subjective calculated decision to kill.

Defendant had agreed there was evidence of motive with respect to Robert Brens, but no evidence of motive with respect to other three victims. Respondent recites extensive evidence to support the existence of motive as to Robert Brens, but cites no evidence indicating any motive to kill any student. Respondent then surmises that the jury could find motive as to the three students based on Defendant's anger at Brens. This is justifying the verdicts as to the killing of Jason White, Judy Davis, and Beamon Hill on the basis of "conjecture and surmise." Nor did killing any of the students further any possible purpose or goal of Defendant as presented by the prosecution – it could only serve to take attention away from Defendant's accusations against Brens and the school, while none of the students either presented a threat to Defendant's movements or was a witness whose silence might rationally permit Defendant to avoid detection or criminal charges.

Respondent also argues that the evidence as to the manner of killing, i.e., use of buckshot and shooting at close range, supports findings of deliberate, premeditated murder. The characterization of the evidence by Respondent that Defendant "chose" to use anti-personnel type ammunition when he could have used his .22 caliber rifle comes undone in light of the evidence that buckshot was the usual ammunition that Defendant used when

he went shooting. Of course, on this particular occasion Defendant could have opted to use a "less lethal" form of ammunition, but his purchase of the same type of ammunition he always purchased when engaging in legal target shooting does not demonstrate a *calculated* intent to kill as it did not represent any *change* in his normal, legal activity. His ammunition choice also is completely consistent with wanting ammunition he was comfortable with, in light of his expectation that once he took hostages he would be subject to attack by the police, and shotgun blasts with buckshot would be more effective at keeping police at bay so that he could achieve his desire to speak with the media. While Defendant did fire at people at close range, that fact cannot be viewed in isolation, for immediately after firing at close range Defendant left his victims visibly alive and went forward to continue firing. Respondent argues that the jury "could have" found that Defendant saw the victims as so severely wounded they were certain to die and/or that Defendant was afraid to stay another two seconds to shoot them again. This too is just "conjecture and surmise," as there is no evidence Defendant knew how to evaluate the mortality of a gunshot wound and there is no evidence that Defendant at any time believed he did not have enough time to fire twice at a victim if he so chose.

As discussed in greater detail below, the Respondent's attempt to marshal "substantial" evidence to support the analysis under *Anderson* is unavailing.

A. The Evidence of "Planning" Does not Show Any Plan to Kill

Respondent sets forth a litany of evidence showing planning activity. (RB 225-228). The specific evidence to which Respondent points does not raise an inference that Defendant's planning of an assault on the Lindhurst

High School facility included killing anyone:

- Respondent points to evidence that Defendant cased the school property prior to May 1, 1992. Apart from Defendant's confusing statements on the matter, there is no evidence this actually happened. However, assuming that it did, his casing out the school doesn't raise an inference that his intent was to kill anyone.
- Respondent points to evidence that Defendant read up on police tactics of SWAT teams. Entering the high school and taking one or more persons as hostages would presumably result in the summoning of a SWAT team to deal with the crisis. It says nothing as to whether Defendant's plan included killing anyone.
- Respondent points to evidence that Defendant read up on the criminal penalties for his actions. The record, however, contains no evidence indicating what specific criminal actions Defendant reviewed to determine the penalties involved. When viewed in light of the entirety of the record, it is apparent that Appellant either had no idea he had killed anyone or had never reviewed the penalties for either second or first degree murder, as he asked for and believed he had negotiated with the hostage negotiators a "deal" that would limit any prison time to "less than five years." (Exhibit 54) Had Appellant actually researched the criminal penalties for murder and realized he had killed anyone he would have known no such deal either could be anticipated or offered by the police.
- Respondent points to evidence that Defendant prepared a supply list of equipment he needed. The equipment included

"lighter fluid," a rifle sling, and pocket in which to hold .22 caliber shells. Respondent emphasizes the lighter fluid and that Defendant was carrying an ammunition pouch. Arguably, this evidence shows Defendant planned to bring a loaded fire arm to the school and possibly that he planned to fire it. This reinforces what the evidence already showed, namely that Defendant brought loaded weapons to the school and repeatedly pulled the trigger on the shotgun while it was loaded. The relationship of the lighter fluid to a deliberated intent to kill is not readily apparent. Defendant's own *fictitious* statement to the student hostages was that he had put the lighter fluid on the outside door knobs to impede entry by the police. There is no evidence he intended to use the lighter fluid to kill anyone, and no reasonable inference could arise from the fictitious lighter fluid to support a calculated decision to kill. As for the ammunition pockets and pouches, they support the obvious – that Defendant intended to bring loaded guns to the school, but not what he planned to do with those guns. The list does not create an inference that he was planning a homicide.

- Respondent points to the good-bye note Defendant wrote to his family. Exhibit 16a does not mention killing. It suggests that Defendant knew he was going to do something wrong: "my sanity has slipped away and evil tooken It's [sic] place." It also suggests that Defendant believed he might die, presumably in the hail of bullets coming from the SWAT team assault for which he was arming. What cannot be reasonably inferred from Exhibit 16a is that Defendant himself had decided to kill

anyone.

- Respondent points to Exhibit 64, the "Mission Profile" as evidence of planning. The document would support an inference that Defendant contemplated entering the school and shooting it up. As evidence from which it could be inferred that Defendant contemplated killing people it fails: there is nothing on Exhibit 64 that could reasonably be taken to represent a human being. The shots are aimed at boxes clearly identifiable as "desks" or at "lockers." There is no evidence in the record tying the arrangement of the desks to the actual seating arrangement in any class, and, as noted in the AOB, the layout of the classrooms does not comport with the authenticated model of Building C introduced into evidence by the Respondent. Thus, Exhibit 64 will not support an inference that Defendant planned or contemplated entering the building, entering room C-108b and firing on the specific people there, including Robert Brens and Judy Davis. Nor does Exhibit 64 indicate any intention to fire into room C-107 where Jason White was killed or C-102 where Beamon Hill was killed. As evidence of Defendant's deliberation and premeditation of his crime, the "Mission Profile" shows a lack of any calculated decision to kill people.
- Respondent points to the fact that Defendant sawed off the butt of his .22 rifle. In his interrogation Defendant stated that he sawed off the butt in order to enhance its maneuverability (Exhibit 89, p. 49) A need for maneuverability would be consistent with Defendant's anticipation that he would be

subjected to an assault by police. The record contains no evidence that Defendant used the .22 rifle while at the school. Evidence that he sawed off the stock is neither reasonable nor credible evidence of any deliberate decision to kill.

- Respondent points to evidence it says shows Defendant researched and purchased specific ammunition designed for "anti-personnel" use. (RB 224-225). Respondent frames this evidence out of the context of the overall record in order to suggest the ammunition purchases showed a conscious intention to kill. But when evaluated in the context of the entire record, the "choice" of ammunition no longer can be seen as credible evidence to support an inference of a considered decision to kill. Respondent introduced exhibit 58, a book on police tactics, showing underlining of passages related to the relative merits of different types of shotgun ammunition for "anti-personnel" use. No evidence was introduced showing that the underlining was made by Defendant, or that, assuming it was, when the underlining was made. Was it done while Defendant was "planning" his assault on the school or at some time earlier before he had ever thought of shooting up the high school? The transcript of the video-taped interview proffered by Respondent at trial had Defendant stating that he used buckshot and slugs when he went target shooting. (Exhibit 89, p. 43) Evidence also was introduced showing that Defendant had purchased buckshot in April for target shooting. (Exhibit 19a; 17 RT: 3879:5-3880:14). Defendant is shown in Exhibit 89, at page 72 as stating that the amount of ammunition he had

on him was not different than the amount he usually took when he went target shooting. The evidence of Defendant's "choice" of type and amount of ammunition is, at best, highly ambiguous as evidence of a decision to kill. Evidence that Defendant purchased types and amounts of ammunition that was no different than his purchases when engaging in his frequent and wholly legal target shooting activity lacks any compelling force. Again, that Defendant brought to the school the same types and quantity of ammunition he usually took with him to go target shooting is neither reasonable nor credible evidence that he came to the school having made a deliberate calculated decision to kill.

- Respondent argues that because Defendant took a .22-caliber rifle and ammunition, and other siege accessories to the school, he could have left his shotgun at home, and therefore his decision to take the shotgun evidenced a conscious decision that he was going to kill people. Despite this argument, it certainly would be improvident to surmise that had Defendant left his shotgun at home and only shot the .22 rifle at the school, that Respondent would have accepted Defendant's "decision" to leave the shotgun at home as evidence that he had not formed a deliberate intention to kill.[22] Of course Defendant could have (and should have) gone to the school with no guns. But

[22]Indeed, one can imagine the exact opposite argument being made, namely, that the .22 because of its small single shot required a precision of aim that would not have been present had he been using a shotgun, and hence had he left the shotgun at home and only brought the rifle, his choice of the .22 *proved* a calculated decision to kill.

Defendant is not contending that the record lacks sufficient evidence that he went to the school with the intent to shoot his guns. He did do that, and the evidence in the record would support a finding that he acted with a reckless disregard for the physical safety of the people in the school and with "an abandoned heart." His bringing and using the shotgun (and he used only buckshot, not the slugs) is perfectly consistent with his fantasy of shooting up the school. A shotgun with buckshot would put many holes in the desks, the lockers, the doors, etc. of the school as opposed to the little holes a .22 would make. It would "show the *school*" he *meant business*. Defendant's "choice" to bring the shotgun was fully consistent with Defendant's stated purposes, which did not include killing anyone, but for that same reason his "choice" to bring the shotgun is neither reasonable nor credible evidence for an inference that in bringing the shotgun he had made a deliberate decision to kill.

- Respondent points to the testimony of David Rewerts that Defendant talked about "shooting people" after he and Rewerts had just seen and were reveling in the experience of the film *Terminator 2* as evidence Defendant planned to kill people when he went to the school a few months later. In his AOB, Defendant argued, *inter alia*, that the import of the statement about "shooting people" had to be seen in light of the movie plot, in which the hero, a robot, is programmed to shoot human beings only to wound and not to kill them, and the villain, another robot, literally is shot dozens of times without ever

being killed. Respondent now says that it can't be assumed that jury knew the plot of *Terminator 2*.[23] *Terminator 2* was an immensely popular movie with a wider audience than the original *Terminator*[24], and it would be likely that at least some of the jurors did know its plot. However, juror ignorance of the plot of the actual movie Rewerts and Defendant were talking about when Defendant made the statement relied upon by Respondent *isn't evidence*. The basic plot of the *Terminator 2* movie, for which this Court may take judicial notice, places Defendant's fantasy of going to the school and shooting people like in *Terminator 2* in a context where "shooting people" would not connote *killing* them. Jurors' ignorance of the cultural context of Defendant's remark does not convert the statement into reasonable and credible evidence of a deliberate decision to kill.[25]

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[23] Respondent contends the movie found at Defendant's house during the police search after the incident was the original *Terminator* movie, not the sequel *Terminator 2*. Respondent is correct that the *video* found in the home was the first *Terminator* movie. But Rewert's testimony was that the conversation he had with Defendant took place after he and Defendant had returned home from watching the theatrical version of *Terminator 2*. (18 RT: 4068:8-4069:28)

[24] Wikipedia reports the original *Terminator* grossed $78M while *Terminator 2* grossed over $500M. (See http://en.wikipedia.org/wiki/The_Terminator and http://en.wikipedia.org/wiki/Terminator_2:_Judgment_Day)

[25] Additionally, as Rewerts was a possible accomplice in the crimes, his testimony was suspect and should have been viewed with caution. (See AOB, Argument VII, p. 387 *et seq.*). (See also, *Lee v. Illinois* (1986) 476 U.S. 530, 545; *Lilly v. Virginia* (1999) 527 U.S. 116, 132 [accomplice confessions untrustworthy because "likely to be attempts to minimize the declarant's culpability"]; *Bruton v. United States* (1968) 391 U.S. 123, 141; *Douglas v. Alabama* (1965) 380 U.S. 415, 419. And see *People v. Guiuan*

- Finally, Respondent points to the reference to "set on killing" in Exhibit 61a as evidence Defendant had made a decision to kill. As discussed in the AOB, this phrase appears in a reconstructed document pieced together from scraps of paper found in the trash, and even as reconstructed, as part of a sentence or sentence fragment from which an unknown number of words are missing. The reconstructed document remains so truncated that the actual meaning of what was written necessarily "leaves only to conjecture and surmise" (*People v. Bender* (1945) 27 Cal.2nd 164, 179) that what was written there meant that Defendant was planning to kill anyone. But beyond the necessarily speculative activity of deciphering what had been written, the fact that the document had been ripped up and discarded in the trash raises the opposite inference – that whatever was written on Exhibit 61a was not what Defendant wanted to say or meant at the time he wrote it. In short, Exhibit 61a is neither reasonable, credible, nor reliable evidence to support a finding that Defendant was planning to kill when he carried out preparation for a possible assault on Lindhurst High School.

Respondent presented much evidence of planning, but that evidence, taken as a whole in the context of the entire record, does not show planning to kill. With the benefit of hindsight gifted by the nightmare of violence

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(1988) 18 Cal.4th 558, 567, in which the Court explained that "the testimony of an accomplice on behalf of the prosecution is subject to distrust because such witness has the motive, opportunity, and means to help himself at the defendant's expense ..."

described by the students and teachers in Building C Respondent's evidence of planning provides an illusion that Defendant "must have" decided he would kill. But the actual "planning" evidence, while certainly showing planning of an assault on the school, lacks reasonable, credible, and reliable evidence that Defendant, as part of that planning, had made a decision to kill.

B. Respondent's Speculative Attempts to Posit Motives for the Killing of Judy Davis, Jason White, and Beamon Hill Do Not Support a Finding of Substantial Evidence for Deliberate and Premeditated Murder of Those Three Victims.

With the evidence in the record for planning a *homicide* being extremely weak to non-existent, a finding of substantial evidence for willful, premeditated and deliberated murder requires evidence of motive and evidence of a deliberate manner of killing. (See *People v. Eliot* (2005) 37 Cal.4th 453, 470-471: "some evidence of motive in conjunction with planning or a deliberate manner of killing.") In his AOB Defendant acknowledged the existence of evidence of motive with respect to Robert Brens, but pointed out that there was no apparent motive for the killings of Judy Davis, Jason White, or Beamon Hill.

Respondent discusses at length the evidence that Defendant was angry at Robert Brens and the school administration for not providing him support as a student and for his failing to graduate and the consequences that befell him that he believed resulted from his failure to graduate. (RB 232-238.) Respondent fails to point to any evidence in the record raising a possible motive for Defendant wanting to harm either his other homicide victims or the students in general, whom he also viewed as victims of the school administration's callousness. Nevertheless, Respondent posits that Appellant's anger at Brens and the school administration for the way they

treated students raises a reasonable inference Defendant wanted to *kill* students such that the jury would be justified in speculating that such was the case:

> A jury could reasonably infer that appellant's act of shooting not only Mr. Brens but also others associated with the school (i.e., students and teachers) was driven by his desire to exact revenge from the school on the whole.
>
> (RB 238-239.)

It is pure conjecture and surmise that Defendant's animosity toward the school district and Robert Brens for how they treated students encompassed animosity toward, or a desire to take revenge on, the students he considered victims of the same sort of callousness that he had experienced.

The evidence of Defendant's killing of Judy Davis, Jason White, and Beamon Hill contains no basis on which to posit a motive for those homicides. First, there is no evidence that Defendant knew any of the three victims. There is no evidence as to why these three students ended up being in Defendant's line of fire, other than Beamon Hill's heroic act of pushing Angela Welch out of the line of fire. But there is no evidence as to any motive Defendant would have had to injure or kill Angela Welch either.

None of the testimony of students or hostage negotiators alluded to by Respondent indicates any reason for wanting to injure the three homicide victims,[26] or, as well, any of the other gunshot victims. Indeed, the most notable characteristic of Defendant's conduct in the two minutes or so he spent on the first floor of Building C was the utter randomness and

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[26] For example, there is no evidence in the record that would permit an inference that Defendant selected the students he shot because they were "jocks," or popular, or teachers' favorites, as is sometimes the case in other incidents of school-related violence.

senselessness of his shooting.

Second, the record will not support any reasonable inference that the shootings of Judy Davis, Jason White, and/or Beamon Hill were keyed in some way to facilitate the shooting of Robert Brens. Davis was shot before Defendant shot Brens, and therefore could not have been shot because she was a witness to Brens' shooting. Nor is there the slightest evidence she was or appeared to be impeding Defendant's actions.

White and Hill were shot after Defendant shot Brens. Again, there is no evidence to support a finding that either White, Welch, or Hill were seeking to interfere or appeared to be seeking to interfere with Defendant's actions. Nor can their killing be logically tied to any desire to prevent them from being witnesses. Defendant already had left a number of unscathed witnesses to his shooting in C-108, and neither White, Welch, nor Hill had been present to see what happened in C-108.

There is a total absence of evidence in the record of any motive for the killing of Davis, White, or Hill. Thus, even if the motive evidence as to Robert Brens would help to support a finding of substantial evidence as to the conviction of first degree murder for his killing, there is no motive evidence to support a conviction of first degree murder for the killings of Davis, White, and/or Hill.

### C. When the Record is Viewed as a Whole, the Evidence as to the Manner of Killing Supports the Inference Only that Defendant Had Not Formed a Deliberate and Premeditated Intent to Kill

The dispute between Defendant and Respondent over whether the evidence as to the manner of killing is sufficient to support a finding that each killing was carried out as a result of a deliberate and premeditated decision to kill can be summarized as follows:

At trial and on appeal Respondent contends that evidence that Defendant aimed his shotgun loaded with buckshot at close range toward his victims is sufficient to support a finding of deliberate and premeditated murder.

Defendant contends that when viewed in the context of the record as a whole, including other evidence of Defendant's behavior on the first floor of Building C, Defendant's overall conduct is inconsistent with a finding of deliberate and premeditated murder.

The evidence of "manner of killing" that Respondent contends supports a finding of substantial evidence of premeditation and deliberation consists of the following:

- Rachel Scarberry testified she saw Defendant point his gun toward her and shoot her in the chest.
- Thomas Hinojosai testified he saw Defendant "swing around in the doorway" and shoot Robert Brens while holding the gun "on his shoulder or chest." To Hinojosai, Defendant appeared to be aiming the gun.
- Thomas Hinojosai testified that when Defendant shot Judy Davis he was ten feet away and had the gun "towards his shoulder, and he was looking down the barrel."
- After shooting Davis, according to Hinojosai, Defendant aimed the shotgun at Hinojosai, who fell over, and the shot missed.
- Kasi Frazier testified he saw Defendant "looking down the pointer" as the gun was pointed into Room C-107; Defendant fired and Frazier then saw that Jason White had been hit and was not breathing.
- Angela Welch saw Defendant shoot Wayne Boggess then walk

toward her classroom, C-102. Just before entering the classroom Defendant made eye contact with Welch. Beamon Hill, who was standing next to Welch, yelled "No" and pushed her out of the way. The gun fired and Hill was hit in the head.

- Davis, Brens, White, and Hill were shot with number four buckshot, which are "anti-personnel type rounds."
- Since Defendant also was carrying a .22 rifle, he could have shot the victims with the .22, presumably a less lethal weapon.
- Defendant shopped for number four buckshot on the morning of May 1, 1992.

Respondent argues that the manner of killing supports an "intent to kill:"

> the manner of killing suggested that appellant acted with the intent to kill when he shot and fatally wounded Mr. Brens, Davis, White, and Hill and that the intent to kill was premeditated and deliberate. Using the shotgun with which he had armed himself, appellant shot Mr. Brens and White in the chest, he shot Hill in the head, and he shot Davis in the head and chest. The fact that appellant shot the victims with number four buckshot evinced appellant's intent to kill.
>
> RB p. 241

Respondent relies on *People v. Smith* (2005) 37 Cal.4th 733, 741, and *People v. Chinchilla* (1997) 52 Cal.App.4th 683 at 690 for its proposition that the manner of killing can support an "intent to kill" for purposes of the deliberate and premeditated element for first degree murder.

Respondent confuses the element of "intent to kill" or "express malice" necessary for proving murder in either first or second degree with the *separate* element of premeditation and deliberation, necessary for proving murder in the first degree. *People v. Smith, supra.* and *People v. Chinchilla, supra*, both were cases assessing the existence of substantial

evidence to support convictions for attempted murder. Each held that the manner of killing may support a finding of the necessary *express malice* necessary for attempted murder.

A finding of express malice does not establish the necessary elements for first degree murder by deliberation and premeditation: "even if the shooting was not premeditated, with the shooter merely perceiving the victim as "a momentary obstacle or annoyance," the shooter's purposeful "use of a lethal weapon with lethal force" against the victim, if otherwise legally unexcused, will itself give rise to an inference of intent to kill. (*People v. Arias, supra*, 13 Cal.4th at p. 162.)" (*People v. Smith, supra*, 37 Cal.4th at 741.)

As has been previously discussed, first degree murder requires more than simply an intent to kill, otherwise the degrees of murder created by Penal Code §189 would be superfluous. "The *evidence* must show the act to have been the product of a "cold, calculated judgment," no matter how little time took place for that judgment to form." (*People v. Memro* (1995) 11 Cal.4th 786, at 862-863, citing to *People v. Perez* (1992) 2 Cal.4th 1117, 1123, and *People v. Bloyd* (1987) 43 Cal.3rd 333, 348.)

> For a killing with malice aforethought to be first rather than second degree murder, the intent to kill must be formed upon a preexisting reflection and have been the subject of actual deliberation or forethought
>
> (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 201.)

As a conviction for second degree murder will not make or contribute to making a defendant eligible for the death penalty, there must be a clear and objective method for distinguishing the elements of deliberate and premeditated first degree murder from second degree murder. If the same set of facts would permit a jury to enter a verdict for either first or second

degree murder, then the distinction is so vague and ambiguous that it fails to properly narrow the class of individuals eligible for death and makes the death penalty scheme arbitrary and capricious. *Furman v. Georgia* (1972) 408 U.S. 238; *Maynard v. Cartwright* (1988) 486 U.S. 356; *Clemons v. Mississippi* (1990) 494 U.S. 738.

The evidence Respondent points to with respect to the third prong of the *Anderson* methodology does not establish substantial evidence of a deliberate and premeditated decision to kill.

As previously discussed with respect to planning evidence, the evidence does not support an inference that Defendant deliberately and calculatedly selected buckshot over less destructive ammunition because he had decided on killing, but rather that buckshot was his routine choice of ammunition for target shooting. By selecting the same type of ammunition Defendant regularly used (buckshot) Defendant would be confident in his ability to use his weapon effectively (and he expected he would be under attack by the police), but it does not give rise to an inference that he deliberately chose the buckshot over less lethal ammunition because he was thinking of killing people.

Respondent's other argument from the planning evidence – that Defendant could have left the shotgun at home and just brought the .22 rifle also is specious, since an equally strong (or weak inference) of deliberate and premeditated decision to kill could be drawn had the evidence shown Defendant had made that very decision. Defendant's decision as to the choice of gun and ammunition is unexplained, other than that he used the weapon and ammunition he was most comfortable with, anticipating he was going to have to defend himself against a police assault. Once again, the conduct is criminal but the evidence of an "intent to kill ...formed upon a

preexisting reflection and [that was] the subject of actual deliberation or forethought," (*People v. Whisenhunt, supra,*44 Cal.4$^{th}$at, 201), the evidence of a "cold, calculated judgment," (*People v. Memro, supra*) is lacking.

At its best, Respondent's argument that the evidence that Defendant fired his shotgun at close range at the victims is sufficient only to raise an inference of actual malice but not also to show a cold calculated decision to kill.[27] Defendant submits that, on its face, this evidence doesn't support the elements of first degree murder.

However, even if firing a shotgun at reasonably close range could, standing alone, support an inference of premeditation and deliberation to kill, it does not do so in the light of the entirety of the current record. As previously noted, the only one of the three victims for whom the record supports any motive or rationale for killing was Robert Brens. Yet the record also shows that Robert Brens was visibly alive after he was shot and that Defendant left him alive when he exited room C-108.

The evidence does not provide any basis to believe that Defendant was aware whether his shots had killed Judy Davis, Jason White, or Beamon Hill. Yet in each case he turned and walked away without any apparent concern as to whether they were dead or still alive. This evidence in the record is completely inconsistent with a calculated decision by Defendant to take his victims' lives.

Respondent hypothesizes that a jury would be justified in surmising that Defendant didn't take any action to ensure the death of any of his

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[27] As discussed in Argument IV, the overall randomness of Defendant's actions on the first floor of Building C deprives the verdicts with respect to the attempted murders of the element of actual malice or "intent to kill" necessary to those counts.

victims because he *could* have been afraid of being apprehended by students or teachers.

> Here, a jury could reasonably *deduce* from the evidence that appellant did not pursue any of the victims after his first shot was not instantaneously fatal because to do so, rather than to continue his progression through the building, would have placed him at greater risk for being overtaken by other students and/or teachers.
>
> (RB 244-45 (emphasis supplied)

Respondent again relies on the attempted murder discussions in *People v. Smith, supra,* and *People v. Chinchilla, supra,* that evidence that a defendant fired only once at his victim "does not compel the conclusion that he lacked the animus to kill in the first instance." (RB p. 244) Again Respondent seeks to substitute evidence of an "animus to kill" for evidence of a "cold calculated judgement" to kill. For the four counts of first degree murder, the clear evidence in the manner of killing that Defendant showed no interest that his actions were actually resulting in death precludes a finding that there is substantial evidence to support the deliberation and premeditation element.

Any finding or conclusion that Defendant was acting "rushed" while he was downstairs would be nothing but pure speculation, with no basis in the evidence and therefore could not be characterized as a rational inference. There is no evidence whatsoever that while he was on the first floor anyone actually sought to interfere with Defendant or that Defendant believed he did not have time to fire twice at any victim if he so chose.[28]

Respondent's other hypothesis as to why Defendant fired only one shot at each victim – that "he could just as satisfactorily fulfill his intent to

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[28]Nor is there a whit of evidence to support Respondent's theorizing that Appellant left Brens alive because Appellant savored the thought of his victim dying slowly (and painfully). (RB 247.)

kill by moving on and firing at other persons within the building" (RB 247) – is actually proposing that Defendant lacked the requisite *mens rea*: namely, that Defendant's intention was to proceed through the building firing at random at objects and people he encountered, without regard to whether his shots were or were not lethal. Defendant then, was acting not with a calculated and premeditated decision to kill, but without regard to the injuries that his actions were likely to cause, i.e., with an "abandoned heart."

The evidence will not support a finding of murder other than in the second degree.

## VII. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO VIEW ACCOMPLICE REWERTS' TESTIMONY WITH CAUTION AND ITS ADMISSION OF REWERTS' LAY OPINION THAT DEFENDANT WAS LYING ABOUT BEING MOLESTED BY BRENS VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND RELIABLE GUILT AND PENALTY VERDICTS

### A. Introduction

Defendant argued in his opening brief that the trial court should have told the jury that it could consider David Rewerts to be an accomplice to the charged crimes whose testimony should be considered with caution, and should have excluded Rewerts' testimony that in his lay opinion, Defendant had never been sexually molested by Robert Brens. (See AOB 387-412.)

Respondent contends that Rewerts was not an accomplice as a matter of law so the trial court had no duty to give accomplice instructions, and that Rewerts' opinion testimony about Defendant's lack of a history of molestation was admissible. (See RB 247-268.)

### B. Rewerts' Status as an Accomplice

Defendant and Respondent agree that when there is evidence from

which a jury could reasonably conclude that a witness aided and abetted the charged crime, the trial court has a duty to give accomplice instructions *sua sponte*, including the definition of an accomplice. (Pen. Code §1111; see AOB 390-391, RB 250.) This Court has explained that, "an accomplice is one who aids or promotes the perpetrator's crime with knowledge of the perpetrator's unlawful purpose and an intent to assist in the commission of the target crime, and an accomplice may be guilty of the target crime and also of other crimes that are considered the natural and probable consequence of the target crime." (*People* v. *Williams* (2008) 43 Cal.4th 584, 637.) Also, "[f]or a criminal act to be a "reasonably foreseeable" or a "natural and probable" consequence of another criminal design it is not necessary that the collateral act be specifically planned or agreed upon, nor even that it be substantially certain to result from the commission of the planned act. For example, murder is generally found to be a reasonably foreseeable result of a plan to commit robbery and/or burglary despite its contingent and less than certain potential. (See *People* v. *Durham* (1969) 70 Cal.2nd 171, 185; *People* v. *Kauffman* (1907) 152 Cal. 331, 337; *People* v. *Lapierre* (1928) 205 Cal. 470, 471)" (*People* v. *Nguyen* (1993) 21 Cal. App.4th 518, 530-531, parallel citations omitted; see *People* v. *Prettyman* (1996) 14 Cal.4th 248, 267 [explaining analytical steps for finding culpability under this theory].)

In addition, an aider and abettor may be found culpable for lesser crimes than those the perpetrator is guilty of, i.e., "'the aider and abettor and the perpetrator may have differing degrees of guilt based on the same conduct depending on which of the perpetrator's criminal acts were reasonably foreseeable under the circumstances and which were not.'" (*People* v. *Prettyman* (1996) 14 Cal. 4th 248, quoting from *People* v.

*Woods* (1992) 8 Cal. App.4th 1570.) For example, an aider and abettor may be guilty of unpremeditated murder even though the direct perpetrator is guilty of premeditated, deliberate murder committed as the natural and probable consequence of a target crime. (*People* v. *Hart* (2009) 176 Cal. App.4th 662, 673.)

Defendant submits that there was substantial evidence at his trial to support a finding by the jury that Rewerts was an accomplice under any of these permutations of accomplice liability theory.

*1. Respondent's Recitation of Facts Supports Defendant's Position*

According to Respondent, the relevant evidence on this issue includes the following critical testimony by Rewerts himself:

a. Four or five months before May 1, 1992, on the day they went to the theater and watched the movie, *Terminator II*, and then on two or three occasions after that, Rewerts and Defendant talked together about the idea of Defendant going to the high school and shooting "a couple of rounds," and "a couple of people." (RB 248-249; 18 RT 4062-4063, 4068.) Defendant submits that this was undisputed evidence that Rewerts had knowledge at least that Defendant was planning to go to the high school and shoot off firearms, i.e., knowledge of unlawful purpose.

b. Once when he was talking with Defendant about going to the high school, Rewerts himself talked about "destroying things" and may have suggested even more serious conduct, since he testified at trial that he had made some "pretty absurd" statements. (RB 249; 18 RT 4064.) Defendant submits that this was undisputed evidence from which the jury could have concluded that Rewerts not only knew about the plan to go to the high school and commit a crime, but that he contributed ideas to the enterprise

and was actually part of the planning, i.e. aiding, promoting, and encouraging with intent to assist.

c. On the same occasion as the "destroying things" conversation, Rewerts was listening to Defendant read aloud from a book about military tactics, police procedure, and hostage situations. (RB 249; 18 RT 4063-4064.) Defendant submits that this was undisputed evidence from which the jury could have concluded that Rewerts had knowledge of these subjects, that he and Defendant shared an interest in such things, and that these topics came up as they were discussing committing a crime at the high school, i.e. knowledge of unlawful purpose, promoting and encouraging with intent to assist.

d. Rewerts knew that Defendant owned a shotgun, rifles, and some kind of small machine gun, had done some practice shooting with him, and knew that Defendant frequently practiced shooting. (RB 249; 18 RT 4066-4067) Defendant submits that this was undisputed evidence that Rewerts and Defendant both had the means and the ability to go to the school and shoot firearms or at least that Rewerts understood that the plan to shoot things at the school was not just a fantasy, i.e., knowledge of unlawful purpose and intent to assist.

*2. Respondent's Assertion that Rewerts Was Not an Accomplice as a Matter of Law Flies in the Face of the Record*

Respondent contends that as a matter of law Rewerts was not an accomplice, so the trial court had no duty to give accomplice instructions with regard to him. (RB 253-254.)

Defendant has no quarrel with the rule that, where as a matter of law a witness cannot be found to be an accomplice, the trial court has no duty to

give accomplice instructions. But this is not such a case.

Respondent cites *People* v. *Boyer* (2006) 38 Cal.4th 412 and *People* v. *Lewis* (2001) 26 Cal.4th 334 to support the argument that Rewerts was not an accomplice. (RB 253.) In *Boyer* a witness had driven the defendant to the scene of the crime and waited in the car some distance away while the defendant robbed and killed the occupants of a house and drove him away afterward. (*People* v. *Boyer, supra,* 38 Cal.4th at p. 421.) There was no evidence that the witness had any prior knowledge of the defendant's plan to commit any kind of crime, but he had initially been charged as an accomplice, and on appeal the defense argued that the witness had been involved in every step of the enterprise and that the jury could have concluded that he had acted as a lookout. (*Id.*, at p. 467.) The primary issue in *Boyer* was the *identity of the killer.* The *Boyer* opinion does not suggest that the witness was not an accomplice as a matter of law and does not reach the issue of whether accomplice instructions were required in that case, because even if they were, there was no prejudice from the failure to give them since the defendant's connection to the crime was sufficiently corroborated. (*Id.*, at pp. 467-468.) The *Boyer* opinion does reiterate the general rule that accomplice instructions need be given "only where there is substantial evidence that the witness was an accomplice[,]" (*id.,* at p. 466), but it contains no guidance or analysis relevant to respondent's contention that Rewerts could not have been found to be an accomplice as a matter of law.

In *Lewis,* the victim had been robbed, strangled, and beaten in an alley by someone wielding a wooden board. (*People v. Lewis, supra,* 26 Cal.4th at pp. 348-349.) There was evidence that a witness named Pridgeon had been doing drugs with the defendant that evening and was present when the

defendant attacked the victim; Pridgeon habitually carried sticks or boards; he was mentally retarded and untruthful; he had a history of mental illness and hallucinations; he was left-handed and the victim had been struck on the left side of her face; and evidence that some bloody shoes with the victim's blood on them fit Pridgeon better than they fit the defendant although another witness testifed the shoes belonged to the defendant. (*Id.*, at p. 369.) On this record the Court found no error, concluding as a matter of law that Pridgeon was not an accomplice because "there was no evidence other than speculation that Pridgon planned, encouraged or instigated" the crimes committed by the defendant. (*Id.*,at p. 370.)

By contrast, in Defendant's case, there was evidence consisting of Rewerts' own testimony from which a jury could reasonably have found that he was involved in planning at least the crime or crimes of shooting up the school facility(18 RT 4062:13-24, 4063:5-11), that he encouraged it (18 RT 4068:8-4069:12), and even that he partially instigated it (18 RT 4063:27-4064:13-22).

Remarkably, Respondent points to Defendant's statements to police about Rewerts' involvement in planning the crime to support the argument that he was not an accomplice. (RB 254-255.) Specifically, Respondent recounts Defendant's statements that when he and Rewerts were discussing Defendant's idea of going into the school, Rewerts suggested using a robot and talked about "how he would do it" if he were going to be the direct perpetrator. (RB 255.) That uncontradicted evidence of the "robot" conversation, in combination with Rewerts' own trial testimony, would have supported a finding by the jury that Rewerts participated in creating the plan that Defendant carried out.

*3. Respondent's Discussion of the Beeman*

*Case Ignores the Factual Similarity*

Defendant noted in his opening brief that the defendant in *People v. Beeman* (1984) 35 Cal.3rd 547 who was properly found to be an accomplice had testified that he did not think that the direct perpetrators would actually commit the crime they had been discussing and planning together. (AOB 391, fn. 81.) The reference to *Beeman's* facts in the opening brief supported Defendant's argument that in his case, the fact that Rewerts testified that he thought the planning sessions he had with Defendant were merely "idle talk" did not negate the fact that the jury could validly have concluded that he was an accomplice.

Respondent's discussion of *Beeman* acknowledges the trees but fails to see the forest. That is, Respondent lists most of the salient facts in *Beeman* and then simply argues that the defendant in that case was much more "involved" in preparing for the crime committed by the direct perpetrators than Rewerts was in planning the assault on the school in the case at bar. (RB 256-257.) But the *amount* of involvement makes no difference when it comes to accomplice liability; it is the *nature* of the involvement that counts, and the necessary elements are those previously identified, *supra*, which are present in this case. A person can aid and abet a crime in one conversation when he makes suggestions and other encouraging remarks, or in twenty meetings that include map-drawing, weapons-gathering, and strategizing; his accomplice status is the same.

*4. Respondent's Argument that Any Error Was Non-prejudicial Because There Was Corroboration of Defendant's Mental State Is Mistaken*

Respondent argues that if the trial court erred in failing to give accomplice instructions with regard to Rewerts, Defendant was not

prejudiced by the error because there was other evidence corroborating his intent to shoot people. (RB 258-259.) Respondent refers to evidence that Defendant bought double aught and number four buckshot the morning of the shootings, and was in possession of a book identifying buckshot as anti-personnel ammunition. (RB 258.)

As argued in Sections VI of the AOB and of this Reply Brief, apart from Rewerts' testimony, all of the evidence that Defendant had planned or premeditated that upon coming to the school he was going to shoot "people" as opposed to the "school," (i.e. school facility), was circumstantial. Moreover, as Defendant has argued, when viewed in the light of the record as a whole, the circumstantial evidence that the prosecution argued created an inference of planning and calculation to kill people was more susceptible to the opposite inference.

With respect to its lethality, Defendant did not *change* the nature and type of weapons or ammunition to go to the school, but used the same general type of ammunition for his shotgun that he routinely used when he went to the shooting range to do legal target shooting. His choice of ammunition therefore does not create an inference of a conscious decision to shoot people.

Defendant's selection of equipment that he brought and his use of the shotgun rather than .22 is entirely consistent with his statement that he expected to be facing a SWAT team siege, so that a shotgun would be the most reasonable weapon to keep police at bay. Again it does not create an inference of a conscious decision to shoot people.

Defendant's "Mission Profile" shows evidence of planning to shoot up the school facility, but is notably devoid of anything suggesting a human being in his planned lines of fire.

Defendant's indecipherable draft of a note which referenced "killing" was discarded and the note he left referenced neither killing nor shooting nor any injury to any person other than possibly Defendant himself.

Even Defendant's manner of killing does not create any inference of a calculated decision to kill stronger than its opposite inference, namely that the killing resulted from random shooting of objects and people without rhyme or reason. Except for Robert Brens, Defendant had no motive or rational purpose to kill or wound any of his victims.

Only *one* piece of evidence directly indicated a premeditated calculated decision to injure or kill people: Rewert's testimony regarding their collaborative fantasizing about shooting up the school.

Given the paucity of the evidence in the record of intent to kill and deliberation and premeditation to kill, and the highly ambiguous nature of that evidence, Rewerts' self-serving testimony that the idea of shooting people came from Defendant was critical to the prosecution's effort to convince the jury of Defendant's intent, willfulness, premeditation, and deliberation. Rewerts was clearly not called as a witness for the prosecution to establish that Defendant was the shooter. Rather, he was called because the primary issue in the case was Defendant's mental state, and Rewerts' testimony about the conduct and conversations of the two friends before May 1, 1992 was needed for the prosecution to carry its burden of proof on that issue. The jury was therefore entitled to know that Rewerts himself shared culpability for the crime in order to evaluate those aspects of his testimony which tended to exonerate himself and incriminate Defendant. Further, his potential status as an accomplice, would have cast doubt on his motivations for testifying and undercut the credibility of all of his testimony, including his opining that Defendant had not been molested by Mr. Brens,

an opinion damaging to Defendant's position at all three phases of trial. (See AOB 410-412).

Defendant submits that, if Rewerts' testimony about his and Defendant's pre-crime conversations and activities was evidence of Defendant's intent in going to the school with firearms, then by the same token it was probative of Rewerts' own involvement in encouraging him and planning with him, and was sufficient to support a jury's finding that he shared Defendant's intent. It is irrational to argue that it was relevant to the issue of Defendant's mental state and not Rewerts' own, especially if the testimony is taken with a grain of salt, as it should have been and would have been if the jury had been properly instructed.

On this record, for the reasons and under the authorities cited here and in the opening brief, the trial court's failure to tell the jury, (1) that Rewerts was an accomplice either to the charged crimes or to lesser included offenses, or alternatively, that the jury could find him to be so; and (2) that the testimony of an accomplice should be cautiously considered, was error implicating Defendant's federal constitutional rights to due process, a fair trial by jury, and reliable guilt and penalty verdicts in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Lockett v. Ohio* (1978) 438 U.S. 586, 605; *Gardner v. Florida* (1977) 430 US 349, 358; *Woodson v. North Carolina* (1976) 428 US 280, 305.) The burden is therefore on Respondent to establish beyond a reasonable doubt that the omission of accomplice instructions did not affect the verdicts (*Chapman v. California* (1967) 386 U.S. 18, 25) and respondent has failed to do so. Reversal of the entire judgment is required.

C. The Erroneous Admission of Rewerts' Opinion Testimony Was Reversible Error

Defendant asserted in his opening brief that Rewerts should not have been allowed to testify in rebuttal that, Defendant would have told Rewerts if Robert Brens had molested Defendant. As Rewerts testified Defendant had never told him of the molestation, Rewerts was opining that it never occurred. (AOB 403-412.) This testimony was elicited to counter expert testimony for the defense to the effect that Defendant had been molested by Brens, and amounted to lay opinion testimony on the veracity of Defendant's statements to expert witnesses about the molestation. (AOB 406; 21 RT 4858-4861.)

Respondent argues that this issue has been forfeited because at trial Defendant failed to object to Rewerts' testimony on this ground, that the testimony was admissible because it was based on his own perception of the nature of the relationship he and Defendant had, and that even if error, it was harmless. (RB 259-268.)

Defendant has explained in his opening brief the prejudicial effect of the erroneously admitted evidence and confines his argument in reply to respondent's first two points.

*1. The Issue is Cognizable on Appeal*

Respondent contends, first, that Defendant is precluded from raising the issue of Rewerts' opinion testimony on appeal because he failed to articulate the "lay opinion on veracity" objection at trial.

Defendant submits that the issue is reviewable on several grounds, as explained below.

a. This Court Must Review Defendant's Due Process Claim Predicated on the Erroneous Admission of Rewerts' Opinion

Defendant has argued on appeal that the trial court's admission of Rewerts' opinion testimony over objection resulted in a miscarriage of justice and constituted a denial of due process under the federal constitution. (AOB 408-409.) Such a due process claim is a completely appropriate appellate issue which is cognizable on appeal and should be reviewed by this Court. (See *People v. Partida* (2005) 37 Cal. 4th 428, 437-438.) As Respondent notes, prior to the start of evidence, the trial court had granted Defendant's motion that the court deem all defense objections "to be under the Federal and State Constitution." (11 RT 2428-2429.) (RB 264, n. 130.)

b. Trial Counsel's Objections Were Sufficient to Apprise the Trial Court of the Problem with Rewerts' Opinion Testimony

Defendant acknowledges that trial counsel did not technically object to Rewerts' testimony as inadmissible lay opinion concerning veracity under Evidence Code section 800, but submits that the issue is cognizable on appeal because the objections interposed at trial were sufficient to "fairly apprise the trial court of the issue it [was] being called upon to decide. (Code Civ. Proc., §§ 646, 647; *Cooper v. Mart Associates* (1964) 225 Cal.App.2nd 108, 118 ; *Grossblatt v. Wright* (1951) 108 Cal.App.2nd 475, 481.)" (*People v. Scott* (1978) 21 Cal. 3rd 284, 290, parallel citations omitted.) This is so because, "[i]n a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. (*People v. Bolinski* (1968) 260 Cal.App.2nd 705, 722-723; see *People v. Briggs* (1962) 58 Cal.2nd 385, 409-410.)" (*Id.*, 21 Cal.3d at p. 290, parallel citations omitted.)

Defendant's trial counsel objected to Rewerts' testimony on the grounds that it was speculative and lacked foundation. (21 RT 4920-4921.)

Those are the substantive conceptual underpinnings to the general rule that lay opinion testimony is inadmissible except in narrow circumstances, and amount to a succinct statement of why such testimony with regard to another's veracity is inadmissible. Thus, the objections trial counsel entered adequately apprised the trial of the problem with the opinion testimony the prosecutor elicited from Rewerts.

Moreover, trial counsel was not required to enter an objection under circumstances where such an objection would have been futile. Here, given the trial court's denial of Defendant's motion to exclude Rewerts' opinion testimony on the grounds that it was speculative and lacked foundation, it is obvious that merely adding the word, "lay opinion" would have made no difference. In an analogous situation, this Court has said, "Even if, contrary to the fact, the objection was not properly phrased, and even if it was not stated in the most precise terms, '[we] do not feel inclined to deprive defendant of his right to . . . be tried with competent evidence because of the oversight of his counsel in the midst of a difficult trial to remember that he should add the word, hearsay, to the statement of his objection.' (*People v. Darby* (1944) 64 Cal.App.2nd 25, 33; *People v. Bob*, (1946) 29 Cal.2nd 321.) Nor do we feel inclined to require more than one objection and one motion to strike when counsel has been ignored (inadvertently or otherwise) on two occasions. The situation is analogous to that where counsel is excused from making further offer of proof when the court has once indicated its refusal to receive a general class of evidence (*Costa v. Regents of University of California*, (1953) 116 Cal.App.2nd 445, 465." (*People v. Briggs* (1962) 58 Cal. 2nd 385, 410)

Similarly, in the case at bar, this Court should not deprive Defendant of his right to be tried by competent evidence merely because his trial counsel failed to add the phrase, "lay opinion" to the two objections which had already been overruled and were aimed at the same substantive problem with this portion of Rewerts' testimony. In the words of this Court, "no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal.4th 93, 117.) This issue raises such a claim, and this Court should review it.

c. *The Issue is Reviewable at this Court's Discretion Even in the Absence of an Adequate Objection*

It is clear from the objections that trial counsel *did* interject that they were trying to keep out evidence of Rewerts' opinion about the veracity of Defendant's statements concerning his molestation by Brens. (21 RT 4857-4864, 4920-4921.)

Assuming, arguendo, that this Court finds that the issue is forfeited because of trial counsel's failure to articulate the precise, correct technical ground of objection, this Court may nevertheless address the issue because, while a party is barred from asserting an issue in the absence of an objection at trial, an appellate court may raise the issue on its own. (*In re S.B.* (2004) 32 Cal.4th 1287: "[A]pplication of the forfeiture rule is not automatic."; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6: even if a party cannot raise a complaint about a sentencing issue, the appellate court may address

such an issue if it chooses to do so; see also *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27 [addressing defendant's claim of cruel or unusual punishment despite finding waiver].

### 2. *Rewerts' Opinion About Defendant's Veracity Was Inadmissible*

Respondent defends the admission of the objectionable portion of Rewerts' testimony with the surprising assertion that Rewerts' opinion that Defendant would have told Rewerts if Brens had really molested Defendant was actually just testimony "based on Rewerts's *perception* of the nature of the friendship he and appellant shared." (RB 263, underlining added.) This argument borders on the absurd, as Rewerts' speculation about what highly personal, traumatic, and embarrassing information Defendant would or would not have withheld from him was not at all equivalent to anything Rewerts ever directly perceived through his senses in the course of his relationship with Defendant, and goes beyond a mere characterization of the friendship as close or even intimate. Defendant does not dispute that Rewerts was qualified to testify about the "nature" of his own relationship with Defendant, in the sense of describing things that had occurred or had not occurred between them, and his own feelings of intimacy. But Rewerts was not an expert on adolescent psychology, nor on patterns of victim disclosure regarding sexual trauma, nor on anything else relevant here, and was manifestly not qualified to give an opinion about whether Defendant had in the past actually had experiences that he did *not* recount to Rewerts and *did* recount to someone else. Such opinion testimony was speculative, without foundation, and constituted lay opinion testimony about the veracity of Defendant's statements to others; and it was inadmissible for all those

reasons.

Defendant did not object to Rewerts' testimony that he and Defendant were "best friends," had practiced shooting together, watched a film, shared ideas and fantasies, had a sexual encounter, and so forth. This was the sort of thing that Rewerts was competent to tell the jury because it was a description of his own experience and therefore not speculative, and pertained to events that he had directly perceived with his senses and therefore had a factual foundation. That is why such testimony was admissible.

As expert witnesses, the mental health experts called at trial were entitled to testify to and explain how they relied on matters told to them by Defendant. (See, e.g., Evidence Code § 801.) Mental health experts rely on what they are told by the persons whose mental health they are evaluating. Their expertise enables and requires them to evaluate the *psychological* truth of what they are told (*i.e.,* is this something the Defendant believes, is it delusional, is it not genuinely believed but made up to manipulate the process), but it is beyond both their responsibility and their competence to evaluate the *objective* truth of what they are told.

Thus, it may be appropriate to question a trained mental health expert about whether they believe what a patient is telling them constitutes the patient's genuine belief or is the product of a psychological condition, e.g., a psychosis, personality disorder, malingering, etc.[29] However, it would not

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[29] The mental health experts at trial were asked whether they believed Defendant had been molested by Mr. Brens and/or what it meant. Groesbeck testified Defendant had a delusional relationship with Brens and that Defendant's belief in the molestations played a significant role in his psychoses. (22 RT 5327:7-5330:1; 5335:15-5337:3). Charles Schaffer, one of the court-appointed experts called by the prosecution, said it was

be proper to ask a mental health expert whether something told to the expert by the patient did or did not actually happen.

As a lay witness Rewerts was not competent to express an opinion as to whether Defendant truly believed the molestations he described to the experts or was manufacturing these stories to manipulate the process. The only reason for the prosecution to ask Rewerts his opinion as to whether Defendant would have told Rewerts of his having been molested by a teacher they both knew was to have someone identified as knowing Defendant well tell the jury Defendant was lying about the molestations to the mental health expert witnesses. The trial court's error in permitting Rewerts to so testify both prejudicially undermined Defendant's credibility and prejudicially undermined the testimony of defense expert witnesses as well as the prosecution mental health experts, as it implied the witnesses were relying on Defendant's statements he had been molested when his best friend was saying he knew Defendant was lying.[30]

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"unclear" to him whether the molest had happened or not, but his skepticism was circumstantially based: Defendant himself was credible when he told the story but to Schaffer the story seemed improbable and it gave Defendant a "motive" for shooting Brens. (23 RT 5525:6-5526:7). Captaine Thomas, the other court-appointed expert called by the prosecution testified he had "no reason to suspect [Defendant] was fabricating" the molestations. (22 RT 5141:1-6).

[30] In the penalty phase, Defendant testified to his being molested by Brens. This evidence would have been in the form of mitigation evidence. Had Rewerts been called to testify in penalty rebuttal that Defendant had never told him about the molestations despite Rewerts description of the closeness of their relationship, the evidence might have been marginally relevant to the jury's evaluation as to whether the molestations actually had taken place and what weight to give Defendant's testimony about them in mitigation. However, by calling Rewerts in the guilt phase to testify to his opinion that the molestations never happened, the Prosecution was using Rewerts to impeach the mental health experts as to the truth of evidence that had never

For the reasons and under the authorities cited in his opening brief and in the instant reply, Defendant submits that the erroneous admission of Rewerts' opinion on the truthfulness of Defendant's statements concerning his history of molestation resulted in unreliable guilt and penalty verdicts, requiring reversal of the entire judgment under the Eighth and Fourteenth Amendments of the United States Constitution. (*Beck v. Alabama* (1980) 147 U.S. 625.)

## VIII. BY TWICE REFERRING TO DEFENDANT'S MENTAL HEALTH EXPERT AS AN OBSCURANTIST AND SPEAKER OF INCOMPREHENSIBLE WORDS, THE TRIAL JUDGE FATALLY PREJUDICED THE JURORS AS TO NOT ONLY THE WITNESS BUT THE MENTAL HEALTH TESTIMONY AS A WHOLE

Respondent analyses the two disparaging characterizations of Helaine Rubinstein, Ph.D. separately, and suggests that neither remark would have prejudiced the jury as to her testimony. Respondent ignores the fact that both remarks would have been understood by the jurors as expressing the same disregard of the validity of mental health experts and testimony, thereby reinforcing the impression that the trial judge did not consider this type of evidence to be credible or given any weight.

Most people know of Gertrude Stein only that she wrote "a rose is a rose is a rose," – a poem that he vast majority of people find makes no sense and see as a paradigm of elite, inaccessible *avant garde* art. The trial judge equated Dr. Rubinstein with Gertrude Stein because she answered a question eliciting her opinion as to whether the psychological evaluation of persons

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been introduced for the truth of the matter. This both elevated Rewerts to the status of an expert and would have necessarily confused the jury as to the proper weight to give to the expert testimony.

not charged with crimes could be applied to the evaluation of persons charged with crimes, and she said

> A brain is a brain is a brain. I don't believe a heart surgeon needs to know whether his patient has been accused of a crime or not to perform the procedures that he's been trained to perform.
> (20 RT 2722:20-2723:3)

The witness was not in any way imitating Gertrude Stein's obscurantism.[31] But that is exactly what her response became once the trial Judge linked her innocuous statement to the world's most famously incomprehensible poet.

Standing alone the trial judge's reference to Gertrude Stein might have passed. However, when he later referred to the field of psychology as "mumbo-jumbo," he reinforced the prejudicial impact and implication of his earlier remark. A reasonable person would have understood the Judge to be suggesting that many people believe psychology is a lot of "mumbo-jumbo," and the Judge is probably one of them.

Respondent argues that no reasonable juror would have understood the Judge's remarks as deprecatory of either Dr. Rubinstein's testimony or the mental health evidence in general. That view was not shared by the prosecutor at trial, however, who deliberately repeated the "mumbo jumbo" characterization in his argument to the jury. It is unlikely that the prosecutor would have used the phrase himself if he hadn't believed it had resonated with the jurors when it was introduced into the record by the trial judge.

Prejudice may also be inferred from the fact that, although they

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[31]Indeed, the phrase "a brain is a brain is a brain" was actually stated in Defense counsel's question to Dr. Rubinstein, but by making his remark after the witness answered and expressing himself by manipulating her name, the Judge tied it to the witness rather than implying only that counsel had asked a clumsy question.

disagreed as to specific diagnoses, each of the mental health experts, including the two experts called by the Prosecution, agreed that Defendant suffered from severe ongoing mental illness. The jury's apparent dismissal of this evidence, even with respect to the penalty phase, suggests that it gave little value to *any* of the mental health evidence. One of the most likely sources of antipathy to the use of mental health evidence in evaluating the guilt and punishment of Defendant was the Judge's apparent scorn, not simply of Dr. Rubinstein's specific testimony, but of the very application of psychological expertise and diagnoses to the determination of issues of guilt and punishment.

The remarks of the trial judge concerning mental health evidence in a criminal trial fatally prejudiced the jury in this matter.

## IX. THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY IN THE PENALTY PHASE WAS PREJUDICIAL ERROR

Defendant stands by his arguments in his Opening Brief that the trial court's instructions to the jury during the penalty phase were erroneous and prejudicial.

## X. DEFENDANT'S CONSTITUTIONAL RIGHTS WERE PREJUDICIALLY VIOLATED BY THE PROSECUTOR'S MISCONDUCT IN BOTH GUILT AND PENALTY PHASE ARGUMENT

### A. In His Guilt Phase Argument The Prosecutor's Improper Reference to Defendant's Non-testimonial Demeanor in the Courtroom Was Prejudicial Error in Violation of His Fifth, Eighth, and Fourteenth Amendment Rights.

#### *1. Objection to the Argument Would Have Been Futile and Self-defeating*

Respondent contends Defendant waived any objection to the prosecutor's reference during guilt phase argument to Defendant's demeanor

while at counsel table during the trial, although Defendant had not waived his Fifth Amendment privilege against testifying and his demeanor in the courtroom was neither evidence nor of any relevance to the issues being presented for the jury's decision in the guilt phase.

While it is true that no objection was made, such an objection would have been futile and only reinforced the prejudice created by the remark. A "failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or when objecting would be futile. [citations]" (*People v. Sturm* (2006) 37 Cal.4th 1218 at 1237. Moreover, even without objection, the Court can review the conduct and find it erroneous and prejudicial.

*2. The Remark Was Egregiously Prejudicial*

Respondent makes light of the impact of the remark as not prejudicial and not infringing on Defendant's constitutional rights.

First Respondent suggests that the remark was actually an appeal to "ignore" Defendant's courtroom demeanor. This characterization is disingenuous – the remark directly asked the jury to take note of how Defendant cries when the subject of argument or testimony is about himself, but shows no emotion when the subject is his shooting victims. It is a direct appeal to the jury to consider Defendant's courtroom demeanor as evidence in their consideration of guilt. As such it was misconduct.

Respondent then argues that since the prosecutor did not expressly state that the jury should take note of Defendant's failure to testify, it did not violate his privilege against self-incrimination. However, Defendant had a constitutional right to be present in the courtroom throughout the proceedings (*People v. Harris* (2008) 43 Cal.4th 1269.), and he had a

constitutional right not to be compelled to testify. Defendant's exercise of those rights is not waived because, like any human being, his demeanor suggests emotional reactions to the evidence. His rights to be present and also not be a witness are not conditioned on his being a statue cast in stone. The prosecutor's argument violated both rights by using his constitutional right to be present in the Courtroom, and his purported demeanor, as a form of testimony by the Defendant to be used against him in assessing guilt.

The misuse by the prosecutor of Defendant's courtroom demeanor as evidence of his guilt also violated Defendant's Fifth Amendment rights by lessening the prosecutions' required burden to show guilt beyond a reasonable doubt based on admissible evidence. By suggesting that the jury could take into account Defendant's non-testimonial courtroom demeanor indicating lack of remorse, the prosecutor evaded his burden to prove by the *evidence* supported guilt beyond a reasonable doubt. (See, e.g., *Sullivan v. Lousiana* (1993) 508 U.S. 275; *Martin v. Ohio* 1987) 480 U.S. 228.)

Although the prosecutor was not directly confronting Defendant's failure to testify, his comment necessarily posited the question why Defendant hadn't said he was sorry for what he did. Respondent cites to several cases holding that comments about lack of remorse in penalty phase proceedings where the Defendant didn't testify didn't violate the Defendant's Fifth Amendment rights against self-incrimination. In penalty phase proceedings, evidence of remorse is typically presented by the defense as mitigation evidence. Such evidence might be presented by the testimony of the defendant himself, or might be presented through the testimony of third parties who might have been witnesses to actions of the defendant indicating remorse or contrition. In the context of that special type of proceeding, a comment that there is no evidence of remorse as indicating

there is no mitigating evidence of remorse may be acceptable (see *infra*).

But the presence or absence of remorse is utterly irrelevant to the guilt proceeding. No third-party testimony tending to show Defendant's remorse would be admissible in the guilt stage, nor would direct testimony of remorse be admissible if Defendant chose to waive his right against self-incrimination, took the stand, and started to say he was sorry. (See *People v. Boyette* (2002) 29 Cal.4th 381, 454: penalty phase is phase in which defendant may express remorse.) The only way Defendant could have shown remorse in the guilt phase was to waive his Fifth Amendment rights and take the stand to testify to his innocence (in which case any evidence of remorse for his own actions would be viewed as evidence of guilt.) In the context of the guilt phase, the prosecutor's comment can only be characterized as an indication of Defendant's failure to take the stand and testify.

B. In His Penalty Phase Argument the Prosecutor Argued Defendant's Absence of Remorse as a Reason to Impose the Death Penalty, i.e., an Aggravator, Not as a Reason Why Life Was Inappropriate, i.e., the Absence of a Mitigator

Respondent contends that because the prosecutor did not state explicitly that Defendant's lack of remorse should be considered in aggravation that he did not argue lack of remorse as a non-statutory aggravator. The prosecutor did not say that the lack of remorse was a factor against mitigation or that it was a reason not to decide for life. Rather, the prosecutor utilized the lack of remorse in his affirmative argument that the jury render a verdict of death. While not directly stating that the lack of remorse was an aggravator, by arguing it as a reason to vote for death, not that it was a reason not to vote for life, the prosecutor placed the lack of remorse on the aggravating side of the scale even though it is not a statutory

aggravator.

Lack of remorse is not a statutory factor in aggravation and it is error for a prosecutor to argue lack of remorse as an aggravating factor in penalty. (*People v. Bonilla* (2007) 41 Cal.4th 313, 355, 357; *People v. Cook* (2006) 39 Cal.4th 566, 611.) Imposing a sentence of death on the basis of an aggravating factor not permitted under state law violates the Fifth, Sixth, and Eighth Amendments to the United States Constitution. *Zant v. Stephens* (1983) 462 U.S. 862, 880-882.

## XI. THE CALIFORNIA DEATH PENALTY STATUTORY SCHEME AS CONSTRUED AND INTERPRETED BY THIS COURT VIOLATES THE UNITED STATES CONSTITUTION

In his opening brief, Defendant raised various challenges to the constitutionality of the California death penalty statute. Respondent correctly contends that these claims, or related claims, have been previously rejected by this Court. (RB 298-311.) For the reasons set forth in the opening brief, however, Defendant believes that the Court's prior decisions on these issues should be reconsidered and that the California death penalty statute is unconstitutional.

## XII. IN LIGHT OF THIS COURT'S DISCUSSION IN *STRAUSS V. HORTON* REGARDING THE NATURE AND SCOPE OF THE DISTINCTION BETWEEN CONSTITUTIONAL REVISION AND CONSTITUTIONAL AMENDMENT, THE COURT MUST READDRESS ITS HOLDING IN *PEOPLE V FRIERSON* THAT PROPOSITION 17 WAS A PERMISSIBLE STATE CONSTITUTIONAL AMENDMENT AND DID NOT VIOLATE THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO, AND THE ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION

In his opening brief, Defendant challenged the language of Proposition 17 which enacted Article I, Sec. 27 of the State Constitution by initiative process in 1972 in response to the Court's prior decision in *People*

*v Anderson* (1972) 6 Cal.3rd 628. Defendant challenged the language removing the death penalty from the scope of Article I, Sec. 6 as violative of both his Fifth Amendment right to due process and his 14th Amendment right to equal protection of the laws, but also challenged the additional language that was included in the initiative:

> nor shall such punishment [the death penalty] for such offenses be deemed to contravene any other provision of this constitution.

Defendant contends this language made the initiative a "revision" of the Constitution, because it qualitatively changed the basic governmental plan with respect to the treatment of persons charged with capital offenses. Proposition 17 was therefore an invalid use of the initiative process to revise rather than amend the state constitution. In *People v Frierson* (1979) 25 Cal.3rd 142 the Court, in a plurality opinion, declined to hold the initiative a "revision." Defendant has challenged the holding in *Frierson* as violating the basic separation of powers principle on a matter involving fundamental federal constitutional rights (the right to life and equal treatment under the law). Defendant contends that, as interpreted by *Frierson*, the acceptance of the initiative constitutes a violation of the establishment clause of the United States Constitution since it deprives capital defendants of the right to state judicial review independent of majoritarian political interference.

In *Strauss v. Horton* (2009) 46 Cal.4th 364, the Court conducted an extended discussion and analysis of the amendment/revision dichotomy in light of the enactment of Proposition 8, which overturned this Court's decision holding that the state restriction on the right to marry to persons of opposite sex violated the State Constitution. (*In re Marriage Cases* (2008) 43 Cal.4th 757) There is a striking similarity in the posture in which the

Court addressed the initiative enacted Article I, Sec. 27 in *Frierson* and the posture in which it addressed Proposition 8 in *Strauss*: in each case the Court had determined that that the state constitution provided important protections for a specifically defined group of persons – persons charged with capital crimes/ same-sex couple desiring to marry – and then through the initiative process a popular majority in an election had voted to deny the defined group the fruits of the Court's decision.

As in *Frierson*, the Court in *Strauss* declined to find the initiative in question constituted a revision to the State Constitution. However, the extended analysis of the history and rationale of the amendment/revision dichotomy in the California Constitution conducted by this Court in *Strauss* compels a finding that *Frierson* was wrongly decided.

While the circumstances under which *Frierson* and *Strauss* came to the Court are for all substantive purposes identical, two fundamental differences exist between the challenges made in the two cases.

First, the challenge raised by *Frierson* related to the right to be free from cruel *or* unusual punishment contained in the California Constitution and the fundamental right to life enshrined in both the federal and state constitutions, as well as the rights to equal treatment under the law provided by both the California and federal constitutions. In contrast, the challenge raised in *Strauss* arose from the California constitutional right to privacy, which is not explicitly provided for in the United States Constitution, and which, at least as of the time of *Strauss*, the denial of the right of same-sex couples to marry had not been held to be impinged by the implied federal constitutional right to privacy.[32]

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[32] But see *Perry v. Schwarzengger* (2010) 2010 U.S. Dist. LEXIS 78816.

Second, the initiative at issue in *Strauss* decreed only that marriage would be limited to persons of the opposite sex, but placed no restrictions or limitations on the ability of the judiciary to construe and interpret any laws or any controversies utilizing the provisions of the state constitution, including placing no limitation on the Court in interpreting and construing the language added by Proposition 8 with the other provisions of the state constitution. In contrast, the initiative at issue in *Frierson* directly and expressly limited the ability of the courts to apply and interpret the state constitution with respect to any controversy that would affect the imposition of capital punishment:

> nor shall such punishment [the death penalty] for such offenses be deemed to contravene any other provision of this constitution

Based on these two differences, in light of this Court's discussion of the proper application of the amendment/revision dichotomy, it is apparent that *Frierson* was wrongly decided. If *Frierson* was wrongly decided, then Proposition 17 was an invalid use of the initiative process to revise the California Constitution, and, in addition, Defendant's federal constitutional rights have been violated as discussed in Defendant's opening brief.[33]

The *Strauss* decision discussed not only *Frierson*, but the Court's subsequent decision in *Raven v. Deukmejian* (1990) 52 Cal.3rd 336, which found Proposition 115 to have effected a revision, not an amendment, to the

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[33] Defendant also contends that, even were this Court to affirm *Frierson*, his rights under the federal constitution would still have been violated because the Guarantee Clause does not permit a state to remove a criminal defendant's right to judicial review independent of state majoritarian interference. For purposes of this Reply Brief, Defendant is restricting his arguments to those that show that *Frierson* was wrongly decided as a matter of state constitutional jurisprudence

state constitution. As set forth in *Strauss*, the Court explained its ruling in *Raven* as follows:

> In explaining the basis for its conclusion, the court in *Raven* discussed both the quantitative and qualitative effects of Proposition 115. The court concluded that "[q]uantitatively, Proposition 115 does not seem 'so extensive ... as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions ... .' [Citation.] The measure deletes no existing constitutional language and it affects only *one* constitutional article, namely, article I. As previously outlined, the measure adds three new sections to this article and amends a fourth section. In short, the quantitative effects on the Constitution seem no more extensive than those presented in prior cases upholding initiative measures challenged as constitutional revisions." (*Raven, supra*, 52 Cal.3d at p. 351.)
>
> With respect to the qualitative effects of Proposition 115, the court in *Raven* explained: "We have stated that, apart from a measure effecting widespread deletions, additions and amendments involving many constitutional articles, 'even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also ... . [*A*]*n enactment which purported to vest all judicial power in the Legislature would amount to a revision* without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change.' [Citations.] [¶] *Proposition 115 contemplates a similar qualitative change.* In essence and practical effect, new article I, section 24, would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court. From a qualitative standpoint, the effect of Proposition 115 is devastating." (*Raven, supra*, 52 Cal.3d at pp. 351-352, first and third italics in original.)
>
> *Strauss v. Horton, supra,* 46 Cal.4th at 435-436.

The effect of Art. I, Sec. 27, approved by *Frierson*, was to limit the role of the California courts to enforcing rights relating to the imposition of the death penalty to those rights determined to exist under the United States Constitution:

> nor shall such punishment [the death penalty] for such offenses be deemed to contravene any other provision of this constitution.

See also the legislative analysis of Proposition 17 presented to the voters:

> This measure would therefore make effective the statutes relating to the death penalty to the extent permitted under the United States Constitution.

The provision denies capital defendants the right of independent review of the imposition of the death penalty or the process leading up to imposition of the death penalty under the provisions of the state constitution, stripping all state constitutional protections relating to the death penalty and leaving only protections arising as a matter of federal constitutional law. This is *precisely* the basis on which the Court found Proposition 115 to be unconstitutional under *Raven*:

> In elaborating upon why this provision constituted a far-reaching change in the nature of our state's basic governmental plan, the court in *Raven* observed that "new article I, section 24, would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect. As an historical matter, article I and its Declaration of Rights was viewed as the only available protection for our citizens charged with crimes, because the federal Constitution and its Bill of Rights was initially deemed to apply only to the conduct of the federal government. In framing the Declaration of Rights in both the 1849 and 1879 California Constitutions, the drafters largely looked to the constitutions of the other states, rather than the federal Constitution, as potential models. [Citations.] [¶] Thus, Proposition 115 not only unduly restricts judicial power, *but it does so in a way which severely limits the independent force and effect of the California Constitution.*" (*Raven, supra*, 52 Cal.3d at pp. 352-353.) "Proposition 115 ... substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections. It directly contradicts the well-established jurisprudential principle that, 'The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort ... .' [Citations.] In short, in the words of *Amador, supra*, this 'relatively simple enactment [accomplishes] ... such far

> reaching changes in the nature of our basic governmental plan as to amount to a revision ... .' [Citations.]" (*Id.* at pp. 354-355.)
>
> *Strauss v. Horton, supra,* 46 Cal.4th at 436-437 (emphasis supplied).

Defendant submits that despite the suggestion in *Raven* and *Strauss* to the contrary (see discussion at 46 Cal.4th at 437), the problem with Proposition 17 is constitutionally indistinguishable from the problem with Proposition 115 for which the Court found that proposition invalid. There is no rational basis to distinguish the denial of the rights of criminal defendants charged with capital crimes to independent state constitutional review from the rights of criminal defendants generally to independent state constitutional review. To the extent such a difference in application to the two sets of individuals exists, it constitutes invidious discrimination against the subset of criminal defendants charged with capital crimes and violates the equal protection rights of such defendants under both the State and Federal Constitutions.

Unlike the situation with respect to Proposition 115, the right of independent review of the California death penalty set forth in Proposition 17 cannot be severed from the remainder of the proposition. The language of Proposition 17 makes it clear that the central purpose of the enactment was to preclude independent review of the California death penalty scheme under the California Constitution by the California judiciary. While under this Court's jurisprudence regarding the permissible scope of initiative amendment to the Constitution, it might be possible for an initiative to enshrine the death penalty in the California Constitution, Proposition 17 was ineffective in doing so. As a result, Defendant's death sentence must be vacated as a result of an impermissible qualitative revision to the California

Constitution.

## XIII. EACH OF THE ERRORS RELATING TO THE CONDUCT OF THE TRIAL COMPOUNDED AND REINFORCED THE PREJUDICE ARISING FROM THE OTHER TRIAL ERRORS RAISED

Despite the overwhelming and undisputed evidence that Defendant fired the shots that killed and/or wounded students and teachers at Lindhurst High School, the evidence was extremely close (and indeed arguably insufficient) on the issues actually presented for the jury's resolution, including, most importantly:

- Were the killings the product of deliberation and premeditation or at worst, second degree murders committed without regard for human life and with an abandoned heart?
- Were the non-fatal shots fired that hit students and teachers fired with a specific intent to kill?
- Did the evidence show that Defendant had actually planned to kill persons?
- Did the evidence of Defendant's severe mental health conditions vitiate the inference from the evidence that he had carried out any rational planning activity at all?
- Did the Defendant's severe mental health conditions render him incapable of understanding the import of his conduct and its relationship to a moral structure of right and wrong , i.e., that he was going to the school to "save the children," – a higher good than any crime arising from taking Mr. Brens hostage.
- Did the two minutes of irrational violence carried out by

Defendant on May 1, 1992, when weighed against his 20 years of peaceful and law-abiding conduct, warrant the imposition of the death penalty for his crimes?

Each of these determinations rested primarily, if not entirely, on the jury's assessment of Defendant's state of mind, both leading up to the events of May 1, 1992, and during the incident itself.[34] Each of these determinations was necessarily impacted by the assignments of error which Defendant has raised:

- That the jury was permitted to try and decipher on its own and speculate as to six and one-half hours of audio tape of largely unintelligible statements made during the incident, some, unidentified number of which were statements made by Defendant. No record was made or preserved from which this Court may even evaluate what the jury could be deemed, reasonably, to have heard when the tapes were played.
- That the jury was permitted to listen to one and one-half hours of the video-taped interrogation of Defendant containing dozens of unintelligible statements which the jury was permitted to try and decipher on its own and speculate as to what was said and

[34] Even the penalty assessment would have rested primarily on an evaluation of Defendant's state of mind during the incident and leading up to the incident. Virtually no evidence was presented concerning Defendant's life and background, e.g., the actual conditions under which he was raised and came of age, the dynamics of his family life, specific conditions and events that may have contributed to Defendant's organic brain damage and emotional dysfunction. Thus the jury at penalty was faced with weighing the nature and circumstances of the crime against the evidence presented, or which jurors may have believed was presented, regarding what was going on in Defendant's mind during the incident.

who was saying it. No record was made or preserved from which this Court may even evaluate what the jury could be deemed, reasonably to have heard.

- That the jury was permitted to take into the jury room for deliberations a transcript of the video-taped interrogation containing multiple misrepresentations that were material and prejudicial to Defendant.
- That the trial judge effectively (though probably not intentionally) equated Defendant's principal mental health expert in the guilt phase with the world's best known obscurantist poet.
- That the trial judge appeared to characterize all mental health science as "mumbo-jumbo."
- That after Defendant's mental health experts had testified that Defendant had told them he had been molested by Robert Brens and they had testified as to how that affected their opinions, over objection David Rewerts was permitted to opine to the jury that no molestation had taken place because Defendant would have told Rewerts if that had happened.
- That the Prosecution's case for deliberate and premeditated murder was predicated entirely on circumstantial evidence which, when viewed in light of the record as a whole, was both not substantial and subject to inferences pointing more toward a lack of premeditation and deliberation as in support of such, and in no way supporting a finding of premeditation and deliberation beyond a reasonable doubt.
- That the Prosecution's case for attempted murders was

improperly and inadequately charged such that the jury should never have been asked to render verdicts on the charges, the circumstantial evidence in of a specific intent to kill was lacking as a matter of law, and the instructions to the jury as to the elements of attempted murder were prejudicially flawed.

- That the Prosecutor improperly and prejudicially asked the jury to take Defendant's non-testimonial courtroom demeanor indicating a lack of remorse into account in determining guilt.
- That the Prosecutor improperly and prejudicially argued Defendant's lack of remorse in his testimony during penalty as an aggravating factor for death, and not merely as the absence of a mitigating factor that would support a finding of life imprisonment.[35]

Each of these assignments of error impinge directly on the primary issues of fact in contention at trial: what was Defendant's state of mind preceding and during the incident on the first floor of Lindhurst High School?[36] Each one of these assignments of error adds to and compounds

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[35] Defendant's other claims raised in this appeal, including the constitutionally invalid method for impaneling the grand jury and the failure to conduct all of its proceedings on the record, and the failure to administer an oath of truthfulness to the *voir dire* panels, are prejudicial *per se*. However, were the Court to decide that these assignments of error, or any of them, required a showing of prejudice by Defendant, they also should be weighed in the effect of cumulative error.

[36] Even the issue of whether Defendant had been molested by Robert Brens was an issue relating to Defendant's state of mind. In guilt and sanity phases the issue was raised not for the truth of the matter but because Defendant had told the mental health experts who testified that he had been so molested. Each expert treated this information as a *psychological truth*, *i.e.*, as something the Defendant believed to be true whether it actually occurred or not.

support for a finding that the verdicts in this case cannot be relied upon, and that the entire fact-finding process was tainted with speculative evidence, prejudicial statements by the trial judge and prosecutor, and misleading or missing instructions. Singly and together, the assignments of error also make it clear that this Court lacks an adequate record to review the impact of these errors with respect to the validity of the verdicts under both state law and federal constitutional law.

## XIV. CONCLUSION

For the reasons stated in the Appellant's Opening Brief and in this Reply Brief, Defendant's convictions and judgment of death must be reversed.

Dated: August 23, 2010

RESPECTFULLY SUBMITTED,

DAVID H. SCHWARTZ
COUNSEL FOR
DEFENDANT AND
APPELLANT ERIC
CHRISTOPHER HOUSTON

**CERTIFICATE OF COUNSEL PURSUANT TO RULES 8.208 (b)(2)**

David H. Schwartz certifies as follows:

1. The Appellant's Reply Brief contains 36,789 words according to the word count feature of Microsoft Word 2010.

Dated: August 23, 2010

DAVID H. SCHWARTZ

## PROOF OF SERVICE BY MAIL

I, Joan Fong, declare:

I am over the age of eighteen and not a party to this action. My business address is 1 Market Street, Steuart Tower, Suite 1600, San Francisco, California 94105-1407.

On August 24, 2010, I served the within

**APPELLANT'S REPLY BRIEF**

by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully paid into the United States Mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 24, 2010 in San Francisco, California.

Joan Fong