IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEVEN ALLEN BROWN Defendant and Appellant.	**CAPITAL CASE** Crim. S052374 Tulare County Superior Court No. 32842

APPELLANT'S REPLY BRIEF

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

HONORABLE JOSEPH A. KALASHIAN, JUDGE

EMRY J. ALLEN
Attorney at Law
State Bar No. 60414

5050 Laguna Blvd., Suite 112
PMB 336
Elk Grove, CA 95758
Telephone: (916) 691-4118
emryallen@aol.com

Attorney for Appellant
Steven Allen Brown

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	
	)	No. S052374
v.	)	
	)	Tulare County
	)	Superior Court No.
	)	32842
STEVEN ALLEN BROWN,	)	
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant in this rely brief (herein "ARB") will address specific matters, in light of Respondent's Brief (herein "RB"), where additional briefing may benefit this Court. However, no attempt will be made to respond to all of respondent's contentions, because many if not most of those contentions have already been addressed in advance in Appellant's Opening Brief (herein "AOB"). Any occasion of appellant not responding or replying to any particular argument, subargument or allegation made by respondent is not a concession or waiver by appellant. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

To avoid undue repetition, appellant herein assumes this Court's familiarity with the salient facts and arguments set forth in the parties' prior briefing.

ARGUMENT
I

APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE ADMISSION OF EXPERT TESTIMONY UTILIZED TO ESTABLISH THE TRUTH OF THE CHARGED FELONY MURDER SPECIAL CIRCUMSTANCES.

At the outset, respondent contends that several of the subrguments raised in connection with this claim were not preserved in the trial court. Specifically, respondent contends that appellant's contentions that (1) the expert did not rely on competent evidence; (2) his opinion was not a suitable subject for expert opinion; (3) the prejudicial effect of the testimony in question outweighed its probative value. (RB 48.)

Respondent is mistaken.

Regarding respondent's first assertion, consideration of the question of what evidence the expert relies upon in forming his conclusion, is part and parcel of a proper exercise of discretion by the trial court in determining whether to admit the challenged opinion (AOB 164-167), and, importantly, this issue was litigated *in this case*. (AOB 167; 8 RT 110; *see*, *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [where the issue in question was actually litigated below, issue is preserved for appeal even if there is a discrepancy between the objection below and the issue raised on appeal].)

To the extent respondent is arguing that counsel should have renewed his objection and moved to strike the expert opinion based on the dearth of evidence in the record supporting the expert's opinion, respondent's argument is without merit. The basis of the expert's opinion was litigated pursuant to appellant's objection and subsequent testimony added nothing to the prosecution's offer of proof. Additionally, the absence of evidence supporting the rendering of the expert opinion is relevant to the question of prejudice and at a minimum, may be considered by the Court for that purpose. That is, such a state of the record affirmatively demonstrates that a damaging opinion was admitted without foundation, to the defendant's detriment.

As to respondent's claim re: appellant's purported assertion that the expert's opinion not was not one suitable for an expert opinion, respondent mischaracterizes appellant's position. In fact, appellant claims that the challenged opinion (the cause of death was drowning "in association with sexual assault") was unnecessary for the jury to resolve the issue before it because the witness had no particular expertise, or at least none was demonstrated, such as to render his opinion any more informed than that of a lay juror; and this argument was raised below. (AOB 169; 8 RT 109.) Strictly speaking, there may exist an expert with the necessary training and

experience to render an opinion such as that challenged here; quite simply, however, no such expert, or expertise, was proffered below. Accordingly, the challenged "expert" opinion would not have been helpful to the jury.

At worst, this aspect of the claim was properly preserved because it was necessarily subsumed by the question of whether the expert was allowed to testify on the "ultimate issue" in the case or to invade the province of the jury. Respondent concedes as much. (RB 51; *see, People v. Yeoman, supra*, 31 Cal.4th at pp. 117-118.)

As to respondent's assertion that counsel did not raise an objection that the probative value of the challenged evidence did not outweigh its prejudicial effect, respondent is again incorrect. The record clearly shows that counsel objected to the lack of any probative value of the challenged testimony ("he [the expert] wasn't there") and strongly objected to the prejudicial effect, in fact, asserting that admission of the challenged evidence would result in a federal due process violation. (8 RT 109-110, 112-113.) This aspect of the claim is properly preserved. (*People v. Yeoman, supra*, 31 Cal.4th at pp. 117-118.)

Regarding the merits of the claims, respondent points out that Dr. Miller had performed approximately 4000 autopsies and had gathered information, including discussions with individuals who had investigated the

case, prior to rendering an opinion on the cause of death. (RB 49.) While these facts may have qualified the doctor to render an opinion that the victim died from drowning, and had suffered a sexual assault, none of these facts rendered the doctor qualified to testify that the murder occurred "*in association* with" sexual assault.

The problem is, nothing about the thousands of autopsies, or the doctor's sources, casts any light on the "association" between the death and the sexual assault, beyond the fact and nature of the injuries themselves. And once these are described, the jurors are every bit as capable as an "expert" to decide for themselves as individuals, the nature of the "association" or whether an "association" was not proved beyond a reasonable doubt due to the absence of conclusive evidence on the issue.

The "expert" opinion corrupted this process to the defendant's detriment because, as stated in Appellant's Opening Brief, the opinion of the "expert" carries with it a false aura of infallibility which induces the jurors to substitute the judgment of the expert for their own, based solely on the expert's status as an "expert"—"He's an expert, he must know what he's talking about"—even though the "expert" opinion has no basis in fact beyond what is already known to the jurors. (AOB 164, 185; *see, People* v. *Bowker* (1988) 203 Cal.App.3d 385, 390.)

From the foregoing it is clear that the challenged opinion did not relate to subject matter beyond the knowledge of a lay person, in this case, a juror in appellant's case. 1 Even if it did, the challenged expert lacked the particular expertise to draw the conclusion challenged herein; *or,* if he did have such expertise, support for that fact does not appear in the record.

As stated in Appellant's Opening Brief:

People v. Killebrew (2002) 103 Cal.App.4th 644 (hereinafter "*Killebrew*"), cited at AOB 171-173, is illustrative. There, the Court of Appeal found that a "gang" expert went too far when he opined that if one gang member in a car possesses a gun, every other gang member in the car will know about it and will constructively possess the gun. This testimony in was improper for two reasons. First, the expert witness opined on a topic where he had no supporting evidence and none appeared in the record. Second, the subject "was not one for which expert testimony is necessary." (*Killebrew*, *supra*, at p. 658.) The Court of Appeal concluded "[the expert] simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved for the jury." (*Id.*)

Attempting to address these problems, respondent contends that the challenged opinion was admissible because without it, "the jurors had no

---

1 For example, by being present when the offense was committed.

ability to determine the time and manner of death without [the expert's] testimony" and, without such testimony, "the jury would not capable of determining the cause or the time of either April's drowning or the sexual assault." (RB 50, 52.)

Appellant agrees, but such fact does not render the opinion admissible, it merely demonstrates the factual deficiency in the prosecution's proof of the special circumstance allegations; that is, there, indeed, *was* no way for the jurors to determine the time and matter of death. Unfortunately for respondent, the expert's opinion did not legitimately remedy the problem because it *in fact* added nothing to what the jurors already knew. As indicated above, the fact that the witness possesses expertise in a particular subject matter does not necessarily mean that he is qualified to render an opinion on a different topic. It certainly does not mean that the proposed subject is one that is beyond the usual knowledge and experience of a lay person. (Evidence Code section 801.) In fact, neither is the case here.

Similar reasoning applies to respondent's rejoinder to appellant's claim the proffered expert testimony invaded the province of the jury. The parties agree that the test of admissibility where such a challenge is made is,, whether the proposed testimony would be helpful to the jury. (AOB 169; RB 51.)

Again, there was (and is) no showing that the evidence would be helpful to the jury because there was (and is) no showing that the subject matter of the testimony in question legitimately added anything to what was already known by the jurors. Indeed, the only thing Dr. Miller's conclusion added was, that is was rendered by a purported "expert." Obviously, and as repeatedly demonstrated above, this fact does not render the proffered opinion beyond the scope of the jurors' experience, or necessarily helpful the jurors in resolving the factual issues before them. The law requires that certain foundational requirements be met before expert testimony is presented. (AOB 169; Evidence Code section 801.) These requirements were not met here.

The issue of prejudice has been addressed above and in appellant's opening brief. (AOB 159-161; 185.) Clearly, the opinion that the murder occurred "in association with" a sexual assault, if accepted by the jury, could be and probably would be construed as conclusive on the issue of whether the murder occurred in the course of a sodomy, rape, etc. Respondent does not seriously argue to the contrary. (See, RB 49.)

This misleading congruency explains why the prosecution doggedly pursued the presentation of this testimony when it would have been much simpler to simply omit this opinion testimony and allow the expert to testify

as to what he actually knew—the cause of death and the injuries suffered by the victim.

However, as respondent herein concedes (RB 50, 52), absent the inadmissible "expert" testimony, there was no way for the jury to determine the circumstances of the victim's death. Because of this factual hiatus, the jurors, or some of them, could have harbored a reasonable doubt as to the validity of the special circumstances, absent the offending expert conclusion, due to the absence of proof on the issue. With the offending expert conclusion, by contrast, the jury had the testimony of an expert to the practical effect that the special circumstances were true, not based on any factual support, but based on the mere fact that the opinion emanated from an "expert." As discussed, an expert opinion without requisite factual support creates the danger that a juror will accept the expert opinion as infallible, and substitute the conclusion of the expert for the juror's own independent judgment (*People v. Bowker, supra*, 203 Cal.App.3d at p. 390), thereby abdicating the juror's responsibility and instead, deciding the case by "proxy." (*People v. Vichroy* (1999) 76 Cal.App.4th 92, 99.) Whether this is referred to as invading the province of the jury; or offering expert testimony without proper foundation therefore, the result is the same: The jury was given an improper basis for making an unreliable determination of

the factual validity of the special circumstances allegations.

In sum, Respondent has done nothing more than restate the conclusions reached by the trial court, without pointing to anything in the record that substantiates those conclusions. That is, Respondent simply states that the witness properly presented his testimony simply because the witness said that was the way that pathologists do their job. But the fact that pathologists may choose to blindly accept conclusions reached by police officers – that the bathtub drowning was associated with the sexual assault – does not mean it is proper to allow the prosecution to present those conclusions in the form of expert testimony.

Here, the evidence showed, at most, that the victim was sexually assaulted some time before she was drowned in the bathtub. The pathologist could properly conclude that she was sexually assaulted and that she was forcibly drowned, but neither the witness nor Respondent has pointedto any other facts that connect the two crimes. It was the province of the jury to determine whether this was sufficient to prove beyond a reasonable doubt that the drowning occurred in the commission of the sexual assault. That determination should not have been bolstered by the medically unsupported conclusion of a so-called "expert" witness.

Accordingly, the special circumstance findings must be reversed; and the judgment of death must be vacated.

II

THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTION TO PRESENT UNFAIRLY PREJUDICIAL AND INFLAMMATORY "OTHER ACTS" EVIDENCE, THEREBY VIOLATING APPELLANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS, A FUNDAMENTALLY FAIR TRIAL AND TO BE FREE OF THE ARBITRARY AND CAPRICIOUS IMPOSITION OF A JUDGMENT OF DEATH (CAL CONST., ART I , SECS. 7, 15, 17; U. S. CONST., AMENDS. V, VIII, XIV)

In his opening brief (AOB, Argument II), appellant asserted that he was prejudiced by improper admission of "other acts" evidence, to wit: evidence of an incident involving a sexual assault on Margaret Allen, age 74. This evidence was initially excluded as improper "propensity" evidence which if admitted would raise an unacceptable risk that appellant would be found guilty on the basis of an alleged propensity or disposition to commit criminal acts, regardless of his involvement (or not) in the crimes actually charged. (Evidence Code section 1101, subdiv. (a); 8 RT 190.).)

However, the evidence in question was nonetheless admitted through the testimony of Lynn Farmer. Farmer testified over objection that in the course of a "purse snatch," appellant said he did not want to be caught because he would be "hooked up" with April Holley and Allen. Appellant, per Farmer, also said that he did the same thing to Holley that he did to Allen, i.e., committed an act of anal intercourse. (AOB 189; 8 RT 194-19517 RT 2571-2577.)

Although not reversing itself on its prior 1101(a) ruling,2 the trial court nonetheless ruled the Farmer testimony admissible on grounds that it was an admission of appellant. (AOB 190; 17 RT 2573, 2581-2582.) Beyond its statement that the Farmer testimony "connect[ed] the two [the charged and uncharged acts] together" (17 RT 2578), the trial court articulated no independent theory of relevancy beyond the fact that the statement was an "admission."

---

2 Because the trial court did not change its ruling on the inadmissibility of evidence of the Allen incident, and because its ruling was supported by substantial evidence, appellant asserts that the correctness *vel non* of this ruling is not now before the Court on appeal, and in any event, the Court is bound by the trial court's ruling.

Nevertheless, in his opening brief, appellant demonstrated that the court's ruling was in fact correct, due to the importance of that ruling in this appeal. Respondent does not argue to the contrary, but does summarize facts which the prosecutor below argued in favor of the admissibility of evidence of the Allen incident; *i.e.*, purported similarities between that incident and the alleged conduct in the Holley case that tend to identify the perpetrator of one offense as the perpetrator of the other, *e.g.*, proof of a common scheme or plan, intent, etc. (Evidence Code section 1101, subdiv. (b); RB 54-55.)

Appellant notes here, as he does in his opening brief (AOB 202-203), that the "similarities" cited are not such as to permit an inference that the perpetrator of one offense committed both offenses. This is because the facts themselves are not distinctive; they are present in many if not most sodomy prosecutions, sex crimes and many crimes generally (*e.g.*, the crimes occurred at night, the victims were vulnerable, the victims were were alone, the victims were raped and sodomized; etc. The only feature of distinction common to both incidents is the use of a bathtub, but as demonstrated in the opening brief, this feature is not distinctive enough to permit one to conclude that the two offenses had a common perpetrator, given the fact numerous cases feature the use of a bathtub as in implement. (*See*, AOB 203, fn. 24, and cases therein cited.)

This cursory analysis did not solve the fundamental problem--that the only relevance of the reference in the proposed Farmer testimony to the Allen incident was as improper "propensity and criminal disposition" evidence.

Appellant's position in his opening brief, and his position now, is that while the fact that a statement may amount to an admission, may solve any hearsay problems, such fact does not by itself render the statement admissible without an independent showing of relevance. Stated another way, the fact that a statement may constitute an admission does not *a fortiori* render that statement admissible at trial. It must also be shown that the statement is relevant to some issue at the trial. (*People v. Allen* (1976) 65 Cal.App.3d 426, 433-436; AOB 208.)

In this case, appellant has demonstrated that the alleged statement of Farmer cast no light on the Holley incident or any other issue in the case, and were therefore irrelevant. At the same time, the statement invited the jury to engage in sheer speculation about described "events." This was improper and extraordinarily inflammatory and prejudicial. Indeed, much of it described events that never occurred.

Respondent for the most part does not address these arguments. Appellant will summarize them here in some additional detail.

Referring first to the "Holley" component of the Farmer

statement, that statement, if made, and made by appellant, was an admission of an act of anal intercourse with April Holley at some undermined time and under undermined circumstances. From the context in which it was allegedly made (appellant not wanting to get caught for a "purse snatch" because it might cause him to be "hooked up" with April in some undetermined way), it could be fairly inferred that this contact with Holly involved some unlawful activity, although not *necessarily* nonconsensual or forcible activity, and not necessarily connected with the charged offenses, in view of the fact that it was also a fair inference that appellant was acquainted with Holley before the acts leading to the charged offenses. (19 RT 3150.) The nature of the contact referenced in appellant's alleged statement to Farmer, and whether it was connected to the charged offenses, were, of course issues for the jury to decide from other evidence.

Factoring in the reference to the Margaret Allen incident, the statement, if believed, had appellant admitting to an act of anal intercourse (and no more) with the "old lady," conceded by the parties below to be Margaret Allen, and that he did the same thing to each subject. (Presumably, this is what the court meant when it stated that appellant "connect[ed] the two [the charged and uncharged acts] together" (17 RT 2578).)

Again, from the surrounding context it could be fairly inferred that this contact somehow involved unlawful activity, although exactly how is not disclosed or apparent from the four corners of the

statements. Whether the nature of the unlawful component, and the exact mechanism by which appellant might be "hooked up" with Allen were he caught for a "purse snatch," could have been determined from further details relating to the Allen incident is beside the point because such details were never presented to the jury (and if fact were inadmissible and not to be considered by the jury). (8 RT 190.) Thus, the question whether the jury could draw inferences relating to appellant's alleged statements based on the details of the Allen incident, was not before the trial court.

In sum, considering the separate components of the challenged statement together, appellant allegedly committed an act of anal intercourse with each subject, and did the same to each.

However, the reference to the Allen incident contained no articulable *fact* which clarified, qualified or explained the Holley statement, or appellant's alleged involvement in it, or rendered it more likely that the accompanying reference to Holley referred to the charged offenses.

That said, that reference raised improper *inferences* which implicated exclusionary criteria applicable to inadmissible "other acts" evidence. For example, the statement raised the inference that the speaker had a propensity to commit acts of anal intercourse. This is a textbook example of improper "he did it before, he probably did it this time" reasoning. (*People v. Felix* (1993) 14 Cal.App.4th 997, 1006-1007.) Importantly, the factual assumption underlying this

inference is inaccurate; that is, Allen, per the prosecution's own investigation and theory of the case, was *not* the victim of an act of anal intercourse, she was the victim of sodomy with a foreign object. The distinction is highly material because it is the supposed identity of actions in both situations that gives rise to the inference detrimental to appellant. Thus, appellant was subjected to unfairly prejudicial inferences on *the basis of "facts" that never took place*.3 The risk of a jury drawing unfair and unwarranted inferences based on incomplete or inaccurate information has been recognized by the case authority (*People v. Harris* (1998) 60 Cal.App4th 727, 738), and was realized here.

Additionally, in this case, the jury might have speculated that the nonexistent act of anal intercourse referenced in connection with Allen, was a *forcible* act, given that she was an "old lady," although appellant admitted to nothing of the sort and the circumstances did not dictate this conclusion. From this "fact," the jury might have concluded that the reference to Holly involved a forcible act also, thus rendering it more likely, at least in a juror's mind, that appellant was involved in the charged offense. Again, such an inference would be

---

3 Appellant acknowledges that if he were found to have actually made this statement, the choice of words was his. Nevertheless, the fact remains that the mere fact that a phrase comes out of a defendant's mouth, by itself, does not render that phrase factually relevant or immune from the provisions of section 352. Moreover, as defense counsel argued below (17 RT 2577), the fact that the alleged Farmer statement *misdescribed the uncharged act renders that statement inherently unreliable and cast grave doubt on whether the statement was ever made.*

based on nonexistent "facts," but nevertheless highly detrimental to appellant, both because of the danger that the jury would find appellant guilty based on a perceived propensity or disposition to commit forcible acts of anal intercourse, and because of the inherently inflammatory nature of such an act committed on an elderly female. (*People v. Boyd* (1979) 95 Cal.App;.3d 577, 589.)

Thus, the depiction of the uncharged act was an *incomplete and distorted description* of an event *that did not actually occur.* (*People v. Harris, supra*, 60 Cal.App.4th at p. 738 (emphasis added).)

Worse, the phrase "He did the same thing to April as he did to the "old lady," begs the question, "what happened to Margaret Allen?" This is exactly the type of incomplete information that invites speculation on the part of the jury. ("[T]he version [of the prior offense] that the jury heard . . . was an *incomplete and distorted description* of an event that did not actually occur [and thus] must have caused a great deal of speculation [by the jury] as to the true nature of the crime." (*People v. Harris, supra*, 60 Cal.App.4th at p. 738, emphasis added; see also, *People v. Massey* (1987) 192 Cal.App.3d 819, 825; *People v. Sandoval* (1992) 4 Cal.4th 155, 178 ["sanitizing" priors to mere "felony convictions "may invite jurors to speculate that the prior offenses were more heinous than they actually were.)

Were the jury to have speculated that Margaret Allen was killed, the jury would have found appellant guilty of the charged offense simply out of an abundance of caution and so as to not risk releasing a man who may have brutalized and killed an elderly woman, whether or not he killed an 11-year old girl (although the possibility that he killed Margaret Allen improperly rendered it more likely that he killed April Holley).

The egregious nature of this risk has been noted repeatedly: "In ascertaining the effect of the trial court's error, we consider the potentially devastating impact of other-crimes evidence that permits the jury to conclude that a capital defendant has a propensity to commit murder. Such evidence invites the jury to be swayed by speculation that, because the defendant previously has murdered, he also committed the charged murder. (*People v. Garceau* (1993) 6 Cal;.4th 140, 186, citing *Michelson v. United States* (1948) 335 U.S. 469, 475-476 and *People v. Smallwood* (1986) 42 Cal.3d 415, 428.)

Related to the above concern is the likelihood that the jury will convict the defendant in the charged case, based on his involvement in the uncharged case, and for other crimes unknown which he probably committed or will commit if given the chance, in view of his criminal

disposition and propensity to commit criminal, and violent, acts. (*See, People v. Smallwood, supra*, at pp. 428-429.)

Thus, the Allen incident as depicted in the Farmer testimony was not made "relevant" simply by virtue of the fact that it was an admission, and, in fact, carried a far greater risk of undue prejudice than the more detailed evidence of the Allen incident previously found to be inadmissible.

The result was that blatantly prejudicial and inflammatory material was conveyed to the jury. As articulated above, the offending evidence was not only inflammatory and unfairly prejudicial in a general sense because it was lacking in probative value and invited the jury to convict appellant of the charged offense based on his status as a "bad man" deserving punishment (*People v. Thomas* (1978) 20 Cal.3d 457, 464) and because it depicted appellant as having a propensity to commit the type of crime charged, but also because it was also the type of incomplete and inaccurate "evidence" that invited the jury to speculate that the uncharged act was more heinous that it actually was. (*People v. Massey* (1987) 192 Cal.App.3d 819, 825; *People v. Sandoval* (1992) 4 Cal.4th 155, 178, leading to a "potentially devastating impact." (*People v. Garceau*

(1993) 6 Ca;.4th 140, 186, citing *Michelson v. United StateS, supra,* 335 U.S. 469, 475-476 and *People v. Smallwood, supra,* 42 Cal.3d 415, 428.)

The effect of this evidence on the verdict is manifest. This was not a strong case. Appellant was essentially found guilty in this case based on this evidence (see, 8 RT 162; counsel argues that if appellant is convicted, it will be because of evidence of the Allen incident); the highly suspect testimony of Rhonda Schaub, and inconclusive DNA evidence. The prosecution's own witnesses gave appellant an alibi for the most likely time of the victim's death as provided by other prosecution witnesses. (Argument IV, *infra.*)

Importantly, the jury attached considerable significance to the Farmer testimony; it requested a re-read of his testimony in its entirety, and in particular, the statement allegedly made to him by appellant, at issue here. (2 CT 410.)

This was in addition to the numerous aspects of unfair prejudice which were clearly " used to establish [a] link in the chain of logic connecting the defendant with the charged offense" (*People v. Thompson* (1980) 27 Cal.3d 303, 316) and invited the jury to improperly decide appellant's guilt on the charged offenses on the

basis of the uncharged acts (*People v. Vichroy* (1999) 76 Cal.App.4th 92, 99 [improper for the jury to use uncharged acts as a convenient "proxy" for deciding that the defendant was guilty beyond a reasonable doubt of the charged offense]) and without reference to the other, lawfully admitted, evidence (*see, People v. Reliford* (2003) 29 Cal.4th 1007, 1014-1017). At a minimum, the jury was invited to decide the case without fully and fairly evaluating the relative strengths and weaknesses of the facts presented in support of and in opposition to the charged offenses.

Indeed, the improper inferences in this case were based on and inaccurate "facts," thus exacerbating the asserted due process violation and increasing the likelihood that the jury would be misled and its verdict, tainted. Reversal of the judgment is thus required under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 834; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Respondent expends considerable effort attempting to distinguish *People v. Allen, supra,* 65 Cal.App.3d 426, on its facts. The attempt is unavailing. Appellant relies on Allen for the limited proposition that in order to be admissible, evidence must be *relevant.* This is an unassailable proposition. *Allen* is *apropos* here because it

presents a situation in which an admission of a party was in fact excluded because it was not shown to be relevant to any fact in the case in question; that is, the evidence was not *a fortiori* admissible solely because it was an admission of a party. (*People v. Allen, supra*, at pp. 433-436.)

Respondent contends that the Farmer statement was admissible because "Farmer's testimony appellant's participation in the purse snatching [at the Best Western Motel in Tulare] gave context to appellant's statement. Appellant made the admission to Farmer as they fled from the hotel . . . The fact that he and Farmer were fleeing from the police gave context to appellant's statement that 'if he got busted' the police would connect him to 'the old lady and April.' The statement referring to 'the old lady and April' gave context and meaning to his admission that he did the 'same thing' to each of them, referring to the sexual assaults on April Holley and Margaret A." (RB 64.)

This is a circular, or "bootstrap" argument because it assumes the proposition to be proved; that is, it assumes in the first instance that appellant's statements are relevant "in context." However, as the discussion above demonstrates, the entire body of the alleged Farmer statements (that is, the statements in their full "context,")

offer *no* articulable *fact* which clarified, qualified or explained the Holley statement, or appellant's alleged involvement in it, or rendered it more likely that the accompanying reference to Holley referred to the charged offenses. (*See*, AOB 208.) At the same time, admission of the statements created an extraordinary danger of extreme and undue prejudice.4

Respondent's reliance on *People v. Turner* (1994) 8 Cal.4th 137, 188-190, RB 64), likewise does not address the "relevancy" problem. In *Turner*, statements made to the defendant "We had them tied up . . . Why did you do it?" And "you should have got rid of it [the gun]" were objected to as hearsay. The Court of Appeal concluded that the statements were non-hearsay because they were not admitted for their truth but rather to give context to the defendant's statements. Thus, there was no merit to the hearsay objections.

In the present case, of course, the issue is not hearsay but *relevance*. Under *Turner*, a question such as "When are you leaving" might be nonhearsay because it gives meaning to the defendant's answer, "Tuesday," but nothing in *Turner* suggests that the statement is admissible if no connection to the issues in the case is demonstrated.

In this case, no such connection is present, absent rank

---

4 It bears emphasis that although the prosecutor used a similar argument at trial, the court did not rely on it. (17 RT 2571, 2578.)

speculation about matters not properly before the jury. To the extent the offending evidence had "relevance," it was not *legal* relevance but rather, "relevance" of the most improper sort: "If he did it once, he probably did it this time." (*See, e.g., People v. Felix, supra,* 14 Cal.App.4th 997, 1006-1007 [robbery case; jury could conclude from prior robbery "if [he] did it once, [he] probably did it again;" see also, *People* v. *Alcala* (1984) 36 Cal.3d 604, 631 [propensity evidence "is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much* [, and inevitably tempts] the tribunal ... to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."], quoting 1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647 [emphasis the Court's].) Additionally, the danger that the jury will speculate on matters that are highly prejudicial and matters of pure fiction is palpable, and unacceptable in any case, and especially in a capital case.

For all of the above reasons, and for the reasons set forth in Appellant's Opening Brief, the judgment must be reversed.

III

THE ADMISSION INTO EVIDENCE OF RHONDA SCHAUB'S TESTIMONY, PURPORTING TO RELATE APPELLANT'S CONFESSION TO THE CHARGED MURDER, WAS ERRONEOUS

In arguing that there was no error in the admission of Rhonda Schaub's testimony to the effect that appellant made a statement to her implicating himself in the Holley murder, respondent initially attempts to minimize the impact of this evidence. ("The United States Supreme Court has noted that even if voluntary, a defendant's confession 'is not conclusive of guilt.' (*Crane v. Kentucky* (1986) 476 U.S. 683, 689 (*Crane*).).)" (RB 68.)

Respondent does not confront the observation of this Court, set forth at AOB 222, that a confession is "a kind of evidentiary bombshell which shatters the defense." (*People v. Neal* (2003) 31 Cal.4th 63, 86.) Indeed, this Court In *Neal* went on to note that "the improper admission of a confession is much more likely to be to affect the outcome of a trial than other categories of evidence, and thus is much more likely to be prejudicial . . . " (*People v. Neal, supra*, 31 Cal.4th at p. 86, citing *People v. Cahill* (1993) 5 Cal.4th 478, 503.) The Court suggested that the only circumstances under which a confession might not be prejudicial are, (1) where the defendant is caught by police in the act of committing the criminal act; (2)

numerous disinterested, reliable witnesses are produced whose testimony is confirmed by a wealth of uncontroverted physical evidence; or (3) a videotape of the offense is produced in addition to a confession. (*See, People v. Neal, supra*, 31 Cal.4th at p. 86, citing *People v. Cahill, supra*, 5 Cal.4th at p. 505.)

None of these circumstances, obviously, exist here. The prosecution had no witnesses to the charged offenses and no "videotape;" and no physical evidence whatsoever linking appellant to the charged offenses.

Respondent seeks to distinguish the present case from *Neal* on grounds that, unlike *Neal,* the facts of the present case did not involve *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) violations or a lack of voluntariness resulting from police misconduct. (RB 69.) Apparently, respondent is attempting to argue that any error here should be subject to the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) "reasonable probability of a more favorable result" standard of prejudice as opposed to the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) "harmless beyond a reasonable doubt" standard applicable to federal constitutional error. (RB 69-70.)

Respondent is incorrect. The *Watson* test has no application to

this claim. Some evidence is simply so inherently unreliable that its admission results in a violation of federal due process standards (*see, Chambers v. Mississippi* (1973) 93 S.Ct. 1038, 1040, 1047), as appellant argued below and in his opening brief. (1 CT 217; AOB 218.)

Respondent argues that there was no error because the jury was aware of the circumstances of appellant's alleged confession to Schaub. (RB 70.) This misses the point. As stated at AOB 219, some evidence is so inherently unreliable that a conviction based thereon cannot, *as a matter of law.* (*See,* AOB 219 and cases there cited.)

As demonstrated above, the circumstances surrounding Schaub's testimony rendered that testimony, on its face, unreliable, including but not limited to the numerous occasions on which she was interviewed but made no mention of the statement, and her equivocation on whether appellant even made the statement in question, even as told officers that it occurred. (18 RT 2990; AOB 221.) Schaub was strongly motivated to give testimony detrimental to appellant for reasons having nothing to do with appellant's involvement, or lack of it, in the Holley case; *e.g.*, her desire for revenge against appellant, as well as reinforcement of her own personal opinions of appellant's involvement. (18 RT 2995-2997.)

Respondent cites other items of "evidence" purporting to

implicate appellant in the Holley case, presumably for purposes of arguing that any error was harmless. (RB 70.) These are discussed in greater detail in the argument that follows, addressing the insufficiency of evidence to sustain the verdicts in appellant's case. (Argument IV, *infra.*) Suffice it to say for purposes of the instant argument that none of these implicate appellant in this case. (*Id.*)

Beyond that, only one item deserves special mention here, to wit: the DNA stipulation. To the extent respondent is suggesting that any evidence was presented regarding appellant being the donor, or not, of the semen recovered in this case, which she appears to be doing (RB 71), respondent is mistaken. (17 RT 2638-2639.)

In sum, the admission of the Schaub testimony purporting to relate the substance of appellant's statement to her implicating himself in the Holley case was erroneously admitted because it was unreliable as a matter of law. The admission of this evidence, over defense objection, violated appellant's federal due process rights and compels reversal of the judgment.

IV

THE PROSECUTION'S EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICTS

In his opening brief, appellant asserted, among other arguments, that the prosecution's case against appellant at trial was, on its face, inherently improbable if not impossible, because the prosecution's own witnesses established that appellant was not in Matheny Tract at the time of the victim's death in this case. (*See*, AOB 227-228, citing *People v. Barnes* (1986) 42 Cal.3d 284, 306; *People v. Hall* (1964) 62 Cal.2d 104, 106-112; *People v. Reyes* (1974) 12 Cal.3d 486, 497-498.) Although respondent disagrees (RB 73-75), respondent's arguments actually bolster, rather than weaken, appellant's position.

Here, the parties are in agreement that the time of death of the victim herein was near 9:00 p.m., or at least this was the theory of the case which the prosecution presented at trial. (RB 72; AOB 227.) Importantly, while this time is inexact, there is no credible reading of the record that would set the time of death at *prior* to 9:00 p.m. (See, RB 72; AOB 226.) Thus is, it clear that at least according to record, that the time of death was 9 p.m. or somewhat thereafter, but not before.

Respondent argues that witness Joe Mills provided a "window of

time" whereby appellant could have been at the victims house around 9:00 p.m. (RB 75.) Even viewing the record in a light most favorable to respondent (*People v. Snow* (2003) 30 Cal.4th 43, 66), respondent is incorrect.

Respondent notes that Joe Mills testified that appellant drove to the Marshalls' residence, then drove off in the general direction of the Holley residence. Appellant returned to the Marshalls' trailer twenty or thirty minutes later (17 RT 2667-2668), whereupon appellant, Mills and Bobby Joe Marshall, Jr., went to Linnell Camp. (RB 73.)

Respondent also notes that Margaret Thomas testified that a loud car was at the Holley residence at 8:25 or 8:30 p.m. and stayed awhile. (RB 75.) However, the parties *stipulated* that Thomas saw the vehicle at the Holley's "shortly after 8," and Thomas knew this because she looked at a clock at the time. (RB 75; *see also*, RB 73, 17 RT 2636.) The jury was instructed that this stipulation must be accepted as conclusively proved. (17 RT 2639.)

From the foregoing, respondent seems to be speculating that appellant drove to the Marshalls' trailer, left by himself, went to the Holley residence, arriving at 8:25 or 8:30, or even sooner (17 RT 2636), stayed there twenty or thirty minutes, then returned to the Marshalls,' after which appellant, Mills and Junior drove to Linnell Camp.

This scenario, contrary to respondent's speculation, places appellant at the Marshalls' at 9 p.m. at the latest, or more likely, well before that. As indicated above, under no reasonable reading of the record was the cause of death prior to 9 p.m.

Moreover, given the *stipulation* as to Margaret Thomas viewing of the vehicle at the Holley's shortly after 8 (17 RT 2636), by which the parties below were bound, appellant arrived at the Marshall's the second time, assuming he left in the first instance, near or before 8:30, after which he left with Mills and Marshall Jr. to the Cotton Gin to see Rhonda Schaub, and from there to Linnell Camp, not to return to Matheny Tract until around 2 a.m. on Sunday morning. (AOB 227; 17 RT 2669-2682, 2752-2763; 18 RT 2968-2971, 3003; 19 RT 3352-3353.)

In either event, based on the evidence in the record, appellant's assertion that he was not in Matheny Tract at the time of the offense, is not only unaffected by respondent's arguments, it is strengthened.5

The remaining assertions in Respondent's Brief have been addressed

---

5 Appellant reiterates his mindfulness that the time estimates herein are just that--estimates. However, it bears emphasis that the stipulation as to when Margaret Thomas saw a vehicle at the Holleys' is quite specific (shortly after 8; Ms. Thomas looked at a clock (17 RT 2636)); and that no fair reading of the record, which record is binding on the reviewing court, permits a cause of death prior to 9 p.m. This, quite simply, is the state of the record.

in advance in Appellant's Opening Brief. Briefly summarized, the statements attributed to appellant on the morning after the murder ("the little bitch got what she deserved; we've got to get our stories straight;" (RB 74) do not implicate appellant in the murder. These are entirely compatible with observations made by a person who learned about the incident after the fact but had no involvement in it. "We've got to get our stories straight" further expresses the reality that anyone outside on that Saturday night is automatically a suspect and that any inconsistency in accounts of events given to the police by itself could lead to an accusation of murder, even if false.

As regards physical evidence implicating appellant in the murder (RB 74), quite simply, there was none.6 The testimony of Rhonda Schaub (RB 74) has been discussed in detail in Appellant's Opening Brief and in the previous argument. Even if this evidence had been admissible, which appellant strongly asserts it was not, it was simply too unreliable to sustain a verdict supporting a judgment of death.

For the above reasons, and for the reasons set forth in Appellant's Opening Brief, the judgment must be reversed.

---

6 Appellant here emphasizes that the statement of respondent set forth in the previous argument (RB 70-71), to the effect that the jury was told that appellant was not eliminated as a donor of the semen recovered in this case, is incorrect.

.V

APPELLANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS OF LAW, TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENTS, AND TO RELIABILITY IN THE DETERMINATION TO IMPOSE A SENTENCE OF DEATH WERE VIOLATED BY VIRTUE OF TRIAL COUNSEL'S FAILURE TO EXERCISE REASONABLE PROFESSIONAL JUDGMENT IN FAILING TO PRESENT MITIGATING EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S TRIAL

A. Trial Counsel's Performance, On the Record, Was Deficient

Very briefly summarized, appellant's assertion is that trial counsel's performance at the penalty phase was substandard in that counsel failed to exercise sound professional judgment in responding to appellant's request that no mitigating evidence be presented at the penalty trial. Specifically, counsel believed, incorrectly, that he was ethically bound to comply with appellant's request, and for this reason, and no other, he in fact acquiesced in that request. (AOB 270; 21 RT 3721 [counsel had no tactical predicate for not presenting available mitigating evidence].)

Counsel's underlying assumption that he was required to so acquiesce was wrong. (*Mitchell v. Kemp* (11th Cir. 1985) 762 F.2d 886, 890 [disapproving "blindly follow[ing]" defendant's request to refrain from presenting mitigating evidence]; *see also, Jeffers v. Blodgett* (9th Cir. 1993) 5 F.3d 1180, 1978 [counsel's acquiescence not IAC because counsel's decision was supported by sound trial strategy]; AOB 263-266.). His

mistaken belief that he was *mandated* to accept his client's unwise choices was below the minimum standard of care for attorneys similarly situated.

Respondent mischaracterizes appellant's claim as one relying on the holding of *People v. Deere* (1985) 41 Cal.3d 353, 364 (*Deere I*) to the effect that counsel is ineffective for failing to present mitigating evidence over the defendant's objection. (RB 86-87.) Respondent notes that this aspect of *Deere* was disapproved by this Court in *People v. Lang* (1989) 49 Cal.3d 991 at 1031-1032.)

To the contrary, however, the issue that appellant presents here is not that counsel failed to present mitigating evidence. The issue is also not that counsel wrongly made a tactical decision to acquiesce in his client's unwise choice. Instead, the issue here is that counsel failed to exercise the constitutionally-required reasoned professional judgment in deciding whether there were legitimate tactical reasons for acceding to appellant's request to forswear the presentation of mitigating evidence. Counsel's performance was deficient because he failed to exercise the discretion he possessed. This failure resulted from his mistaken belief that he was professionally obligated to follow his client's desires, no matter what he personally felt about those desires.

The subsequent failure to present mitigating evidence was the result of this deficient performance in failing to exercise any professional

judgment, out of a mistaken belief that he had no judgment to exercise. . (AOB 248-254.) Appellant in this argument makes no assertion that trial counsel is always required to overrule a demand by the defendant that evidence not be presented. Appellant does assert that notwithstanding such a demand by the defendant, counsel *may* present the disputed evidence if he/she concludes, in the exercise of his/her sound professional judgment, that such action would be of benefit to the defendant. To this extent, appellant relies on the observation in *Deere* that it is generally the attorney who is charged with deciding what evidence to present at trial. This aspect of *Deere I* was not affected by *Lang*. (AOB 254-257.)

Consistent with this principle, if counsel in the exercise of sound professional judgment decides that it is in the defendant's best interests to honor the defendant's demand to not present certain evidenced, such omission is permissible. That is what *Lang* held, and that is *all* that *Lang* held. *Lang* considered only whether an attorney is permitted to reach a tactical conclusion that, on balance, the best strategy is to accede to a particular defendant's desire to forego the presentation of mitigating evidence. *Lang* did not consider whether attorneys in *every* capital trial must *always* abandon the exercise of any sound professional judgment by blindly acquiescing to the defendant's demand simply because the defendant made it.

Accordingly, respondent's reliance on cases such as *Lang* (see also, *People v. Howard* (1992) 1 Cal.4th 1132; *People v. Memro* (1995) 11 Cal.4th 786; RB 88-89), which disapproved that aspect of the *Deere I* holding that counsel has a duty to present mitigating evidence over his/her client's objection, is inapt. Specifically. respondent in opposing this claim relies upon the following language from *Lang*:

> [D]efendant cannot be permitted to claim that his counsel was deficient in acceding, against counsel's own judgment, to defendant's insistent request that certain evidence not be presented. (RB 89, citing *Lang*, 49 Cal.3d at p. 1032.)

But *Lang* did not explain the basis for any conclusion that trial counsel there acceded to his client *against counsel's own judgment*. Instead, defense counsel in *Lang* presented mitigating evidence in the form of a stipulation that after the defendant's prior escape, he had subsequently given up without resistance when confronted by authorities, and in the form of testimony from a correctional officer that the defendant had no disciplinary problems during fourteen months of county jail time prior to trial. (*Lang, supra,* at p. 1008.) Counsel in *Lang* only acceded to the client's desire that one particular potential witness not be called. That witness was the defendant's elderly grandmother, and the *Lang* opinion's only description of counsel's reasoning indicated that counsel found merit in his client's reasoning: "Counsel stated that defendant, '*to his credit as a human being* ...

did not want to put his elderly grandmother through that kind of experience of the emotional trauma of having to come here and testify.' " (*Lang, supra,* at p. 1029; emphasis added.)

Thus, *Lang* dealt only with an attorney who did present some meaningful mitigating evidence, and acquiesced to his client in regard to a single witness, when the client had good reasons for not wanting that witness called. Nothing in the *Lang* opinion supports any conclusion that the attorney's personal judgment differed from the client's wishes. The essence of *Lang* is contained in it's statement that, "Given the attorney's ethical duty of loyalty to the client, it is 'not outside the range of competent attorney actions to fail to present mitigating evidence when the defendant adamantly endorses that position.' (Maintaining Systematic Integrity, supra, 55 Tenn.L.Rev. at p. 140.)" (*Lang, supra,* at p. 1031.) The contention in the present case is that*Lang* holds only that an attorney who considers the full range of competent attorney actions and decides to acquiesce to a client's reasonable desire to spare one elderly witness the ordeal of emotional cross-examination, is not necessarily ineffective. That is not at all the same as saying, as Respondent now says, that an attorney is necessarily effective even when he fails to consider any range of competent actions, but instead believes he has no choice but to blindly acquiesce in any desires the client might have in regard to the penalty trial

Thus, *Lang*, in fact, did not consider the issue raised here, and, indeed, *by its own terms*, does not control this case because this case involves an "antecedent claim of ineffectiveness of counsel," *i.e.*, counsel's abandonment of the exercise of sound professional judgment in response to appellant's request that mitigating evidence not be presented. As was pointed out in Appellant's Opening Brief, a client is entitled to his attorney's reasonable professional judgment at all stages of the proceedings at which the attorney represents the client. (AOB 250.) Respondent argues that an attorney, *by definition*, acts reasonably by declining to present evidence based solely on the client's request to that effect. In other words, the client's request that certain evidence not be presented does not merely immunize the attorney from any claim of ineffectiveness of counsel (IAC) where the attorney honors that request., but instead precludes the attorney from choosing any other course of conduct.

The questions presented here, (and not addressed by *Lang*) are (1) whether an attorney fails to exercise reasonable professional judgment where, as here, counsel "blindly acquiesces" in a client request to not present evidence, that is, does so solely on the basis of a perceived ethical obligation on counsel's part to honor such a request; *and if so*, (2) whether such failure amounts to "antecedent ineffectiveness" so as to remove the case from the ambit of *Lang*. (*Id.* at pp. 1032-1033; AOB 258.) As indicated, neither

question was presented to, or resolved by, this Court in *Lang*.

For example, as discussed above, an attorney in a capital case who honors a client's request demand that no mitigating evidence be presented, without first ensuring that the client understands the nature of the omitted evidence and the fact that such evidence could result in a penalty of life over death, is manifestly not fulfilling his duty to exercise sound (reasonable) professional judgment in the client's case, and under these circumstances, counsel's omission constitutes IAC notwithstanding the language of *Lang* cited by respondent.

Similarly, counsel who is aware of his client's psychosis, yet accedes to a demand of that client to forswear the presentation of mitigating evidence, without first taking steps to determine the competency of the client to make that decision, has manifestly failed to exercise reasonable professional judgment.

But what of the attorney whose client suffers from psychosis, *unbeknownst* to the attorney? Does counsel's lack of knowledge absolve him/her from any duty to investigate his client's background, including mental status, for purposes of determining if the client truly is competent to enter a waiver of the right to present mitigating evidence at a penalty trial?

Of course not. The attorney must scrupulously safeguard the client's right to present a case in support of a judgment of life over death. He must

leave no doubt that the client is competent to relinquish that right, and does so knowingly, intelligently and voluntarily, and as an expression of his true wishes, and not merely as a result of a transitory whim or expression of short-term frustration. (*People v. Stanley* (2006) 39 Cal.4th 913, 932-933 [a waiver must be unequivocal to be valid; waiver that is te product of frustration or in the heat of anger is not unequivocal].)

In all of the above hypothetical cases, were counsel to refrain from presenting evidence in support of a judgment of life over death, simply because his client asked him to do so, counsel would not be exercising reasonable professional judgment on behalf of his client, and the failure to present evidence based on the client's instructions to that effect would amount to ineffective assistance. (*Mitchell v. Kemp, supra*, 762 F.2d atp. 890; *Jeffers v. Blodgett, supra*, 5 F.3d at p. 1197.)

Finally, assume that the attorney, again, has no knowledge of any mental disease or defect on the part of the client. As discussed in the previous paragraph, counsel's duty to exercise reasonable professional judgment is unaffected. Is this duty somehow, retroactively, abrogated if it ultimately happens that the client suffers from no material mental disease or defect?

Once again, the answer has to be, "No." As to this last hypothetical, counsel's acquiescence to counsel's request to forswear the presentation of

mitigating evidence, when such acquiescence is based solely on counsel's mistaken belief that he/she was ethically bound to slavishly and unquestioningly accede to such request, is unreasonable because such counsel would be abrogating his duty to safeguard the rights of his client. Under this fact pattern the deficiency under the "performance" prong of *Strickland* (*Strickland v. Washington* (1984) 466 U.S. 668) is patent.

Indeed, in the circumstances presented in all of these hypotheticals, the duty of the attorney is not to blindly acquiesce or slavishly accede to the client's wishes, but to exercise reasonable professional judgment so as to safeguard the rights of the client. The two concepts are mutually exclusive. That is, the attorney who does blindly acquiesce to such demands based solely on an incorrect belief that his ethical duty requires it, is not exercising sound reasonable judgment on behalf of his client, and, to the contrary, is failing to provide effective assistance, at least as to the performance prong of *Strickland.*

In appellant's case, this deficient performance led directly to counsel's failure to present mitigating evidence because the record clearly shows that counsel's decision not to present mitigating evidence was based entirely on an ethical obligation he perceived, albeit incorrectly, to honor appellant's request that such evidence not be presented, and, explicitly, *not* on any reasoned tactical choice on counsel's part. (AOB 270; 21 RT

3721.) Counsel was prepared to, and wanted to present mitigating evidence and expended considerable time and effort preparing a case in mitigation. But for his erroneous belief that he was bound by appellant's request, he would have presented the available mitigating evidence. Counsel also stated for the record, in addition to the fact that his decision not to present mitigating evidence was supported by no tactical predicate on his part, that he was not challenging the admission of the "Margaret Allen" evidence at the penalty phase due to his perceived ethical obligation to accede to appellant's request. Counsel made it clear that he would otherwise have challenged the admissibility of this evidence.

Significantly, respondent does not challenge appellant's assertion that counsel's blind acquiescence to appellant's demands led directly to counsel's failure to present mitigating evidence at the penalty phase. (RB 90-93.) Respondent does argue the merits of the substantive admissibility of the "Margaret Allen" evidence at the penalty phase (RB 90), not raised in Appellant's Opening Brief, but does not disagree with appellant's assertion that counsel's failure to object to this evidence, coupled with counsel's disavowal of any tactical basis for his omissions, was proof of counsel's slavish, blind and unquestioning acquiescence to appellant's requests.

In sum, counsel's failure to present mitigating evidence in this case was the direct result of antecedent ineffectiveness of trial counsel, to wit:

counsel's abandonment of reasoned and sound professional judgment in responding to appellant's requests to forswear the presentation of mitigating evidence, thus triggering the exception to the main Lang holding immunizing counsel from claims of IAC based on acquiescence to the defendant's desires that evidence not be presented. *Lang* and its progeny were not presented with, and did not decide, the question whether such deficient performance was or could be considered antecedent ineffectiveness of counsel.

In addition to asserting that counsel's deficient performance directly led to the omission of mitigating evidence in appellant's penalty phase, appellant also asserted in his opening brief that trial counsel was ineffective by not revisiting the issue of the supposedly unequivocal nature of appellant's waivers of the right to present evidence and argument in opposition to a sentence of death, in light of clear indications on appellant's part, manifested subsequent to the entry of these waivers, that such waivers were the product of anger and frustration at the jury's guilt phase verdicts, and thus, did not reflect his true wishes at the time. (AOB 273, citing *People v. Stanley, supra* .)

As noted in *Stanley,* a waiver that is the product of pique or frustration is not "unequivocal," *even though the waiver appears to have been made in clear and unambiguous language, and is facially "unequivocal."* (*People v.*

Stanley, 39 Cal.4th 913, 932, citing *Williams v. Bartlett* (2nd Cir. 1994) 44 F.3d 95, 100; *People v. Marshall* (1997) 15 Cal.4th 1, 21; *Reese v. Nix* (8th Cir. 1991) 942 F.2d 1276, 1281.)

In appellant's case, the evidence indicating that appellant's waivers (of his right to present mitigating evidence and argument in opposition to death) were reactions to an adverse ruling (the guilty verdicts). Here, appellant demonstrated not just "pique" or "frustration" (which would have amounted to substantial evidence of an equivocal waiver), (*People v. Stanley, supra,* 39 Cal.4th at pp. 932-933) but outright hostility. After the jury returned its verdict of guilty, appellant absented himself from the penalty trial. (21 RT 3725, 3735.) This was an act of extreme disrespect to the jurors.

Thereafter, appellant decided to return to the penalty phase proceedings, to scold the jury for knowingly convicting an innocent man. (21 RT 3812-3813.) 7 This is extremely significant because in tone it is far more extreme as an expression of anger and frustration than most if not all

---

7 A: I just hope they all have a clear conscience, and I hope they know that they convicted an innocent man. I maintain my innocence in this case and also the Margaret Allen. I had nothing to do with either.

I think the people you should be looking at is the Richardsons and Mr. Lynn Farmer himself. I had nothing to do with this. If you guys got a clear conscience, then I'm asking you to give me death. (21 RT 3812-3813.)

cases finding a waiver to be equivocal based on pique or frustration. (*See, People v. Stanley, supra*, 39 Cal.4th at pp. 932-933; *People v. Marshall, supra*, 15 Cal.4th 1, 21-22, and cases cited therein.)

These events occurring in the wake of an adverse consequence (as occurred n *Stanley* and like cases), are all indicia of, and substantial evidence of, an equivocal waiver of rights.

Because substantial evidence came to light that appellant's "waiver" of his right to present evidence and argument in support of a judgment less that death, trial counsel was duty bound to revisit the issue of the validity of such "waiver." As argued in Appellant's Opening Brief, *it is ineffective assistance of counsel* under the ABA guidelines to simply acquiesce in a client's desire to be executed. Appellant's emphasizes that in the posture of this case, he is not required to show that his waivers were in fact invalid; only that there was substantial evidence of invalidity so as to renew a duty on the part of counsel to do more that "simply [blindly] acquiesce" in his client's request to be executed, given that such requests are often the product of guilt or despair rather than a rational decision." (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Commentary to Guideline 10.5.)8

---

8 It bears emphasis that this contention is in offered in addition to, and not as an alternative to, appellant's core claim that counsel's

Respondent offers little in the way of opposition to appellant's contention that substantial evidence supports the proposition that appellant's waivers were invalid. (*See*, AOB 287; RB 91-92) Respondent ignores *Stanley* in connection with this argument, although she does attempt to distinguish it in a separate Argument on grounds that the waiver in *Stanley* was a waiver of the right to counsel whereas the waiver here was a waiver of the right to present evidence and argument in support of a judgment of a sentence less than death. (RB 105-106.) For purposes of determining whether a waiver of rights is unequivocal, respondent does not offer any reason why this distinction should be deemed material. Indeed, the rationale of *Stanley* and like cases (that great care must be exercised to ensure that a waiver of an important constitutional right is unequivocal) is peculiarly applicable to death penalty cases, given the extraordinarily high stakes in such cases.

Respondent attacks appellant's reliance on the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which state that "[i]n a *capital penalty trial,* where a defendant states a desire to be sentenced to death in a capital case, "[i]*t is ineffective*

---

performance was deficient at the outset for not exercising sound professional judgment in blindly acquiescing to appellant's requests to forswear the presentation of mitigation and argument in support of a judgment less than death.

assistance of counsel to *simply acquiesce* to such wishes [to be executed, be it for punishment or to avoid life in prison], which usually reflect overwhelming feelings of guilt or despair rather than a rational decision" (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Commentary to Guideline 10.5; emphasis added), arguing that these are "only guides" to the courts for purposes of determining the performance standards to be applied pursuant the performance prong of *Strickland* (*Strickland v. Washington, supra*, 466 U.S. 668), and are not binding on the courts. (RB 86)

But after conceding that the ABA guidelines are proper guides to reviewing courts, respondent then inexplicably seeks to case the ABA guidelines aside entirely, as if they have no place at all in the present discussion. Whether binding or not, the guidelines exist for a reason, and that is, to provide assistance to the court and counsel in handling capital litigation. They were drafted to be read and heeded. Accordingly, appellant would respectfully point out that whether binding or not, the ABA standards were said to provide "well-defined norms" in *Wiggins v. Smith* (2003) 539 U.S. 510, 524, for purposes of causing the Supreme Court to find that trial counsel in that case was ineffective for abandoning the background investigation of the client after having acquired only rudimentary knowledge of the client's history form a narrow set of sources. (*Wiggins v.*

Smith, supra, 539 U.S. 510, 524.)

Respondent further argues that this claim is foreclosed by *Schriro v. Landrigan* (2007) 550 U.S. 465. (RB 86.) Not only does *Schriro* not foreclose appellant's claim, it *supports* it.

In *Schriro*, the defendant therein frequently disrupted, sometimes by force, any attempt by counsel to present [mitigating] evidence at the penalty phase of his capital trial. (*Id.* at p. 470.) On post-conviction review the defendant sought an evidentiary hearing on the question whether his counsel was ineffective for failing to present mitigating evidence. (*Id.* at pp. 471-472.)

The Supreme Court denied relief. The Court found that the defendant could not make out an ineffective assistance of counsel claim because he could not show *prejudice* from counsel's omission. On the record presented, the defendant would have prevented any presentation of mitigating evidence and disrupted any attempt to present such evidence. Thus, counsel's omission did not result in a failure to present mitigating evidence and an evidentiary hearing was necessary. (*Schriro v. Landrigan*, at pp. 475-477.)

On the facts, *Shriro* obviously has no application to the present case. Here, after the guilt phase verdict, appellant caused himself to be removed from the proceedings. At that point counsel could have easily presented his

entire case in mitigation without interference from appellant, who was absent. That he did not was due entirely to his mistaken belief, resulting in the abandonment of reasoned professional judgment, that he somehow had an ethical duty to slavishly follow appellant's orders without acquiescence to such a request. (AOB 251.)

Also significant is the fact that the Court denied relief on the basis of a lack of *prejudice*. This suggests a problem of *deficient performance*, specifically, the failure of trial counsel to present mitigating evidence based solely on the defendant's desire that he not do so, which problem the Court did not to address because it was unnecessary in the context presented. Such analysis, if accurate, would be consistent with the language of cases such as *Mitchell v. Kemp*, *supra,* and *Jeffers v. Blodgett, supra.* More to the point, it would be consistent with appellant's position that there is indeed a problem of deficient performance where counsel blindly accedes to the desire of the defendant that no mitigation be presented, simply because the defendant made the request.

In sum, the manner of the court's disposal of the claim in *Schriro* gives credence to appellant's threshold IAC claim herein. At worst, from appellant's standpoint, *Schriro* is distinguishable on its facts.

Finally, respondent claims that trial counsel herein was not ineffective by failing to investigate appellant's background in preparation for the

penalty phase. (RB 90.) As is the case with the substantive admissibility of evidence of the Margaret Allen incident at the penalty phase, respondent is responding to an argument not presented by appellant. (AOB 266.)

B. Prejudice

This aspect of the instant claim has been discussed at great length in Appellant's Opening Brief (AOB 269-287) and those arguments will not be recited in detail here. In particular, respondent's contention that the record in this case does not establish prejudice under *Strickland* (RB 93-94) was anticipated and refuted in advance, in Appellant's Opening Brief. (AOB 288-290, distinguishing *People v. Williams* (1988) 44 Cal.3d 1127, 1153-1154.)

Additionally, the record here establishes that defense counsel had expended considerable time and effort in preparing a defense case in mitigation, wanted very much to present it and did not, only because he erroneously believed he was duty-bound to honor appellant's stated wishes. (AOB 253-254.) Had counsel known that he retained the ultimate discretion to present a case in mitigation notwithstanding appellant's stated desires, there is a strong possibility he would have done so. (*In re Jones,* (1996) 13 Cal.4th 552, 567 [trial counsel was found to be ineffective, and relief was granted, where trial counsel made no attempt to locate a witness who "*conceivably* could have offered testimony relevant to the defense"]

(emphasis (added).)

As regards appellant's assertion that prejudice is established within the meaning of *People v. Bloom* (1989) 48 Cal.3d 1194, in part because the judgment of death in appellant's case was not arrived at "under proper instructions and procedures" (Id., at pp. 1227-1228; AOB 286-290), respondent contends that appellant's argument "presumes what it seeks to prove." (RB 95.)

Respondent's point is not altogether clear, but in any case respondent is mistaken. Under appellant's argument, the underlying predicate is, that trial counsel's performance was substandard. If this occurred, then one of the "prejudice" prongs set forth in *Bloom* has been met, *i.e.*, the lack of proper procedures (including the provision of effective assistance of counsel)9 relied upon in arriving at the judgment of death. (AOB 286-290.)

For all of the foregoing reasons, the judgment of death must be reversed.

---

9 It will be recalled that the second prong of *Bloom* prejudice met in this case was, there is no showing that the jury was allowed to consider such mitigating evidence as the defendant chose to present. (*Bloom*, at pp. 1227-1228.) This is because there is no reliable showing that appellant's purported relinquishment of the right to present mitigating evidence was the product of an unequivocal waiver of rights on his part. (AOB 287, 314.)

VI

APPELLANT'S RIGHTS TO CONFRONTATION, DUE PROCESS, RELIABILITY IN THE DETERMINATION OF FACTS UNDERLYNG A DEATH JUDGMENT, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENTS WERE VIOLATED BY THE TRIAL COURT'S ACT OF PERMITTING APPELLANT TO BE ABSENT DURING THE PENALTY TRIAL.

Respondent acknowledges that the Court erred in permitting appellant to waive his right to be present at the penalty phase of the trial. (RB 98.) However, respondent asserts that the error was harmless. (RB 98-99.) Respondent is incorrect.

Appellant has addressed this issue in advance in Appellant's Opening Brief. Respondent here relies heavily on the "evidence tying appellant to April Holley's murder . . ." and appellant's statement to the jurors that he wanted a death sentence (RB 99), in arguing that the error was nonprejudicial. However, the fact is that there was no evidence of substance "tying" appellant to the offense (*See, Argument* IV, *supra*) and substantial evidence *exonerating* appellant; *i.e.*, an alibi supported by the prosecution's own witnesses. (ARB 32-33; *see, People v. Lewis* (2009) 46 Cal.4th 1255, 1314 [jury may consider lingering doubt of the defendant's guilt as a mitigating circumstance].)

Additionally, appellant's purported request for a death sentence was easily discountable as the product of appellant's pique and frustration at the

verdict of guilty, in a case deemed by him to be grounded on flimsy evidence. Given these facts, a reasonable jury might well be expected to return a verdict of life without possibility of parole. However, appellant's apparently willful act of absenting himself from the penalty phase proceedings, in the wake of his prior scolding of the jurors for convicting an innocent man, may well have altered appellant's perceived demeanor in the eyes of the jurors from that of a temporary frustrated litigant to an openly hostile one. The jurors could have and probably did view this hostility as an insult directed to them. Under these circumstances there is a reasonable probability that the error in permitting appellant to be absent was a material if not deciding factor in the jury's decision to impose a judgment of death.

As stated at AOB 299-300:

> . . . the fact that appellant purportedly "chose" to be absent, whether a rational choice or not, could have been interpreted as an egregious act of disrespect for the proceedings (and, inferentially, for the jurors) which could have the effect of infusing appellant's berating of the jury with invective that would not otherwise have been present. In sum, appellant's diatribe, and his absence from the proceedings, exacerbated each other and could have tipped the balance in the direction of a death verdict.

Regarding appellant's federal constitutional claims, respondent, as in prior arguments, continues to assert the theme that appellant "unwaveringly maintained both his desire to receive the death penalty rather than a life-without-parole sentence, and his wish to not be present during the

prosecution's penalty phase case." (RB 96.) Respondent, as in other arguments, cites appellant's supposed "unwavering desire" as conclusive proof that appellant entered a valid waiver of his right to be present during the presentation of the prosecution's penalty phase case. (RB 96-97.)

However, as in other arguments, respondent ignores the fact that a defendant's statements which on their face purport to enter a waiver of some right, do not necessarily reflect a *valid* waiver of that right, particularly when the "right" being waived is one of extreme importance. This is import of *People v. Stanley* (2006) 39 Cal.4th 913, 932-933 [waiver resulting from anger or frustration at the guilty verdict is not a valid waiver]), ignored by respondent. Indeed, no matter how bold, relentless, (facially) explicit or "unwavering," a purported waiver that is the product of anger or frustration is not a valid waiver. (*Id.* at pp. 932-933.) This was clearly the case here. (See, AOB, p. 298, fn. 43 and AOB, Argument V.) Respondent does not address this reality. Accordingly, respondent's contention that appellant entered a valid waiver of his right to be present at the penalty phase trial must fail.

VII

APPELLANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, RELIABILITY IN THE DETERMINATION OF FACTS UNDERLYNG A DEATH JUDGMENT, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENTS WERE VIOLATED BY VIRTUE OF TRIAL COUNSEL'S ACT OF PERMITTING APPELLANT TO WAIVE HIS RIGHT TO PRESENT MITIGATING EVIDENCE, AND THEREAFTER FAILING TO WITHDRAW HIS SUPPORT OF THAT WAIVER EVEN IN THE FACE OF COMPELLING EVIDENCE THAT SUCH WAIVER WAS EQUIVOCAL AND THUS, INVALID

As a separate assignment of error related to but distinct from the ineffectiveness (IAC) claim presented in Argument V, *supra*, appellant in his opening brief asserted that trial counsel committed IAC by allowing appellant to go forward with his purported waivers of the right to present mitigating evidence and to attack the prosecution's case in favor of a judgment of death, and thereafter, by failing to seek to have such "waivers" withdrawn or disavowed by the court. (AOB, Argument VII.)

In sum, it is appellant's position that counsel was aware before, during and after the purported "waivers" that such waivers were equivocal; that effective counsel would have known that; and that in light of this knowledge, effective counsel would not have allowed appellant enter such waivers. At a minimum, effective counsel would have challenged those waivers once appellant attempted to waive his presence at the penalty phase,

and thereafter, scolded the jury for knowingly convicting an innocent man. Both actions clearly were the result of pique and frustration at the guilt phase verdict and acts symptomatic of a "waiver" that does not express the defendant's true wishes. In a word, this was an *invalid* ":waiver." (AOB 275-276; *Stanley, supra*, 39 Cal.4th at pp. 932-933.)

Respondent, predictably, points to the words spoken by appellant and relies on those words as conclusive proof that they express a valid waiver. (RB 100.) As demonstrated repeatedly in Appellant's Opening Brief and in this Reply, they do not.

Regarding the prejudice resulting from counsel's deficient performance, appellant respectfully refers to the arguments set forth at AOB 269-297, and Argument V in this Reply Brief. For the reasons set forth in those arguments, the judgment must be reversed.

VIII

TRIAL COUNSEL WAS INEFFECITVE BY VIRTUE OF HIS FAILURE TO PRESENT AVAILABLE MITIGATING EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S TRIAL.

As an argument separate from, but related to, Argument V set forth in Appellant's Opening Brief, appellant asserts his trial counsel was ineffective for failing to present available mitigating evidence, to wit: the background and character evidence, including evidence of abuse and institutional failure, not presented pursuant to appellant's request that such evidence not be presented. Trial counsel's failure to present this evidence denied appellant his federal and state rights to effective assistance of counsel and due process of law, and his right to a reliable death judgment.

In this claim, appellant contends that trial counsel has a duty to present available mitigation at the penalty phase of a capital trial, over the defendant's objection, if necessary. The failure to perform that duty here deprived appellant of effective assistance of counsel. (*Deere I, People v. Deere* (1985) 41 Cal.3d 353, 364.)

Respondent counters that *Deere I* has been disapproved by this Court in *People v. Lang* (1989) 49 Cal.3d 991, 1031-1033. (RB 101.) Appellant contends that *Lang* and cases relying thereon are wrongly decided and operate to violate a capital defendant's constitutional rights as set forth

above, and that the reasoning of *Deere I* is both persuasive and correct:

> "Since 1976 the United States Supreme Court has repeatedly recognized that the qualitative difference between death and all other penalties demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305[49 L.Ed.2d 944, 961, 96 S.Ct. 2978] (plur. opn.).) And since 1978 the high court has insisted that the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 [57 L.Ed. 2d 973, 989-990, 98 S.Ct. 2954 (plur. opn. of Burger, C.J.).)

To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant himself was prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated.

> In *People v. Frierson* (1979) 25 Cal.3d 142, 164-167 (158 Cal. Rptr. 281, 599 P,2d 587], we held *when mitigating testimony can be produced with due diligence, failure to call witnesses to give such evidence in the penalty phase of a capital trial deprives the defendant of effective assistance of counsel.*" (emphasis added.) (*Deere I, supra*, 41 Cal.3d 353, 364.)

It is clearly the policy of this state, as well as a requirement of the Eighth Amendment, that the death penalty be administered in a nonarbitrary fashion. (*See, People v. Thomas* (2011) 2011Cal.Lexis 7682, Slip Opn. P. 52; *Godfrey v. Georgia* (1976) 428 U.S. 153, 195.)

A rule requiring counsel in death penalty cases to develop *and* present mitigating evidence would clearly have the effect of rendering the imposition of judgments of death far less arbitrary than were such a rule absent. Inevitably, where a defendant in a capital case is permitted to overrule counsel and preclude the presentation of mitigating evidence at a penalty trial, some of those waivers of the right to present mitigating evidence are and will be valid, and some not. In some cases the competency of the client and the validity of the purported waiver are and will be challenged, in others, not. In many cases, invalid waivers are or will be either unchallenged or if challenged, improperly upheld.

In those cases, imposition of the death penalty proceeds based on an invalid waiver of the defendant's right to seek a judgment less than death.10 This is an avoidable error and as such amounts to an unreliable, arbitrary, capricious and "freakish" (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 439, citing *Furman v. Georgia* (1972) 408 U.S. 328, 310 (Stewart, J., concurring)) method of imposing a judgment of death; and violates the defendant's right to be free of cruel and unusual punishments. (U.S. Const., Amend. VIII; Cal. Const., Art. I, sec. 17.)

10Obviously, a rule such as that forwarded in this claim would preserve valuable judicial resources because where there is a "waiver" such is at issue here, extensive litigation is likely at each stage of the proceedings, testing the validity, or not, of the purported waiver. Investigation, expert witnesses and other court-subsidized resources are required, above and beyond those called for in the "usual" capital case.

In this case, trial counsel did not present available mitigating evidence and acquiesced in appellant's request that mitigating evidence not be presented and that the prosecution's evidence in aggravation not be challenged. This resulted in an unreliable, arbitrary and capricious judgment of death and a violation of appellant's state and federal due process rights as discussed above and in Appellant's Opening Brief. (AOB 236; U.S. Const., Amends. VI, VIII, XIV; Cal. Const., Art. I, secs. 15, 17; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605; *People v. Deere* (*Deere I*) (1985) 41 Cal.3d 353, 364.)

Accordingly, the judgment of death should be vacated in appellant's case.

IX

APPELLANT WAS DENIED COUNSEL AT THE PENALTY PHASE OF HIS TRIAL, REQUIRING PER SE REVERSAL OF THE JUDGMENT OF DEATH

Appellant has previously asserted that trial counsel was ineffective by virtue of acts and omissions permitting and perpetuating appellant's waiver of the presentation of mitigating evidence, the right to cross-examine witnesses in aggravation, and the right to a penalty phase closing argument. (Argument VII.)

In a related but distinct claim, appellant here asserts that his purported waivers of his rights to present mitigating evidence and to cross-examine prosecution witnesses in aggravation were in practical effect, relinquishments of the only mechanisms available to him for purposes of seeking a sentence less than death at the penalty phase of the trial. (21 RT 3724-3728, 3732-3735.) Accordingly, such purported "waivers" were and are indistinguishable from, and for all practical purposes amounted to, a waiver of, the right to counsel at the penalty phase. (AOB, Argument IX.)

However, because appellant's "waiver" was *invalid* inasmuch as it was *equivocal* (*People v. Stanley* (2006) 39 Cal.4th 913, 932-933 [waiver must be unequivocal to be valid; waiver that is the product of anger or frustration is not unequivocal]), appellant was denied his right to counsel at a critical stage of the proceedings, *i.e.*, the penalty phase of his capital trial;

and also was denied his rights to due process and to be free from the arbitrary imposition of the death penalty. (U.S. Const., Amends. VI, VIII, XIV.) The denial of counsel was reversible error per se. (*United States v. Cronic* (1984) 466 U.S. 648, 659; *King v. Superior Court* (2003) 107 Cal.App.3d 929, 950 [attorney who argues against his client and in support of the prosecution's case, absent appropriate waivers, denies his client the right to counsel.)

Consistent with previous arguments, respondent is content to limit opposing arguments to the face of face of appellant's purported waivers, and from there, conclude that appellant's waivers were valid. (RB 101-104.) And while respondent in connection with a different argument notes that *Stanley, supra*, involved a waiver of the right to counsel (and not waivers of the right to challenge the imposition of a sentence less than death) (RB 105-106 ; Argument X), respondent in connection with neither that claim nor any other claim in this case, articulates whey the rules enunciated in *Stanley*, that an equivocal waiver is invalid and a waiver entered as a result of anger or frustration is not unequivocal, does not or should not apply to cases such as the present case. Indeed, Stanley by its terms is not limited to *express* waivers of the right to counsel, nor should it be. Important as the right to counsel is, the right to the services of counsel to assist in a defense against a sentence less than death is, purportedly "waived" by appellant here,

is very arguably, even more important. Given the heightened standards of reliability demanded of judgments of death, the purported "waivers" in the present case demand at least as much scrutiny as waivers of counsel in noncapital cases. Respondent does not meaningfully address these concerns. Appellant's reliance on *Stanley* and similar cases for the proposition that his "waivers" were or likely were equivocal and thus, invalid, are thus unrebutted. Accordingly, the judgment of death must be reversed.

X

THE TRIAL COURT ERRONEOUSLY ACCEPTED APPELLANT'S WAIVERS OF THE RIGHT TO PRESENT MITIGATION, AND RIGHT TO CROSS-EXAMINE WITNESSES IN AGGRAVATION, AND HIS *DE DFACTO* WAIVER OF THE RIGHT TO COUNSEL FOR PURPOSES OF SEEKING A SENTENCE LESS THAN DEATH

As a separate claim, related to but distinct from the previous claims, appellant has asserted that the trial court erred in allowing appellant to forswear his right to present mitigation and right to cross-examine the prosecution witnesses in aggravation. Such failure on the court's part denied appellant his federal and state constitutional rights to due process, to a fundamentally fair trial, to confront and cross-examine the witnesses against him, and to a reliable, non-arbitrary death judgment. (U.S. Const., Amends. VIII, XIV; Cal. Const., Art. I, secs. 15, 17.)

This argument has been thoroughly briefed in Appellant's Opening Brief and those arguments need not be repeated here. In sum, appellant asserts that the same facts that occurred over the course of the trial that shuld have alerted trial counsel to the fact that appellant's "waivers" of his rights to defend against prosecution attempts to have a death sentence imposed were equivocal, , should likewise have alerted the trial court to this fact. The court therefore had a *sua sponte* duty to intervene and withdraw its approval

of appellant's purported "waivers."

Respondent in connection with this claim acknowledges *People v. Stanley, supra,* 39 Cal.4th 913, 932-933 [waiver must be unequivocal to be valid; waiver that is the product of anger or frustration is not unequivocal]), and like cases, upon which appellant relies, but notes only that in *People v. Stanley, supra,* 39 Cal.4th at pp. 932-933, the defendant sought to represent himself and that his attempted waiver of the right to counsel was invalid (as is asserted here). Respondent simply concludes that *Stanley* is inapplicable to the present case because appellant here did not seek self-representation. (RB 105-106.)

Again, respondent offers no rationale for the proposition that the reasoning of *Stanley* is or should not be applicable to the purported "waivers" in the present case. Its holding was not by its terms limited to requests by defendants for self-representation. In any case, the "waivers" of the rights to present mitigation evidence, to cross-examine prosecution witnesses in aggravation, and to have counsel argue for a sentence less than death, for all practical purposes amounted to a waiver of the right to counsel at the penalty phase. Such waiver demands at least as much scrutiny as the waivers in *Stanley* and like cases, and exhibits much more evidence of equivocation

than many of the cases that follow *Stanley's* rationale and conclude that the waivers in question were invalid. (Argument V, *supra.*) Again, respondent does not meaningfully address this issue.

For all the above reasons, and for those presented in appellant's opening brief, as well as the preceding arguments in this reply brief, the judgment below must be reversed.

XI

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

In his opening brief, appellant showed that the California Death Penalty Law has numerous constitutional defects which this Court has consistently refused to acknowledge. (AOB 316-336.) Respondent disagrees, finding this complex statutory framework to be flawless. (RB 106-112.) Because the purpose of this portion of the opening brief was only to preserve these issues for further review in federal courts, there is no need to address them further at this point.

CONCLUSION

For all of the many witnesses presented, the prosecution's case against appellant was not strong. Indeed, the items of evidence argued by the prosecution as sufficient to sustain the verdict (2 CT 505) were inadmissible and extraordinarily inflammatory, unreliable as a matter of federal Constitutional law, or of negligible (if any) probative value. Additionally, trial court error irretrievably prejudiced the trial as to the special circumstance allegations. Finally, trial counsel's ineffectiveness resulted in the failure of the defense to present mitigating evidence at the penalty phase of the trial. *On the record*, this failure was not attributable to any tactical decision or judgment on counsel's part.

In sum, Eighth Amendment reliability standards, and federal and state due process proscriptions, forbid a judgment of death, and, indeed, a judgment of conviction, based on the evidence presented, and the errors occurring at appellant's trial. As to the death judgment, voluminous mitigating evidence was available but not presented as a direct result of trial counsel's act of "blindly follow[ing] and "simply acquies[ing]" in appellant's stated desire to receive a death sentence. This was ineffective assistance of counsel. Appellant's stated desire was probably invalid as a waiver and both trial counsel and the trial court erroneously permitted the

penalty trial to proceed to its conclusion, driven by this likely invalid "waiver." (Arguments V, X *supra.*) For these reasons, this death judgment is, on its face, unreliable. The Eighth Amendment simply cannot tolerate a judgment of death imposed under these circumstances. To whatever extent such a procedure is sanctioned under California law, it is contrary to both federal law and to California's policy of avoiding unreliable, arbitrary and capricious judgments of death. (Argument VIII, *supra.*)

For all of the foregoing reasons, and for the reasons set forth in Appellant's Opening Brief, appellant respectfully requests that the judgment below be reversed in its entirety.

DATED: August , 2011

Respectfully submitted,

Emry J. Allen
Attorney at Law

Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Emry J. Allen, declare:

I prepared the attached Appellant's Reply Brief in *People v. Steven Allen Brown, S052374,* on a computer using word Office 2007. According to that program, the word count of said brief, excluding tables, attachments and this certificate, 14,093 words.

DATED: August , 2011

EMRY J. ALLEN

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Steven Allen Brown**
Case Number: **Crim. S052374**
Tulare County Superior Court No. 32842

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is PMB 336, 5050 Laguna Blvd., Suite 112, Elk Grove, CA 95758. On the date shown below, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelope(s) in a United States Postal Service mailbox at Elk Grove, California, with postage thereon fully prepaid.

[SEE ATTACHED SERVICE LIST]

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

Executed on August , 2011 at Elk Grove, California.

_____
Emry J. Allen

SERVICE LIST—APPELLANT'S REPLY BRIEF

People v. Brown, S052374

Mr. Steven Allen Brown
Post Office Box E-08052
San Quentin, CA 94974

Mark E. Cutler, Esq.
P.O. Box 172
Cool, CA 95614

District Attorney
221 S. Mooney Blvd., Rm. 224
Visalia, CA 93291

California Appellate Project
101 2nd Street, Suite 600
San Francisco, CA 94105

Kathleen McKenna
Deputy Attorney General
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

Mark D. Greenberg, Esq.
PMB 429
484 Lake Park Avenue
Oakland, CA 94610

Tulare County Superior Court
County Civic Center
221 S. Mooney Blvd.
Visalia, CA 93291