SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN CLYDE ~~ABLER~~ ABEL Defendant and Appellant	No. S064733 CAPITAL CASE (Orange County Superior Ct. No. 95CF1690)

SUPREME COURT
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Deputy

APPELLANT'S REPLY BRIEF

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

HONORABLE ROBERT R. FITZGERALD, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S064733 CAPITAL CASE
v.	)	(Orange County Superior Ct. No. 95CF1690)
JOHN CLYDE ABLE,	)	
Defendant and Appellant	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief appellant replies to the State's arguments that necessitate an answer in order to present the issues fully. However, he does not address the arguments regarding each claim raised in the opening brief. In large part, the government urges this Court to reject claims because the Court has rejected similar claims before. On these matters, appellant believes that his arguments have been adequately presented, but addresses this Court's case law where necessary. Appellant does not reply to every contention made by respondent with regard to the claims he does discuss. Rather, appellant focuses only on the most salient points not already covered in the opening brief. The failure to address any particular argument or allegation made by the State, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment, waiver or forfeiture of the point by appellant. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Armando Miller was shot and killed in January, 1991. It was not until June 26, 1995, more than four years later, that John Abel ("appellant") was charged with his homicide. (1A CT 18-21.) Respondent's statement of facts fails to give an accurate view of how appellant came to be implicated in the Miller homicide – an important part of evaluating the evidence in this case.

At the time Armando Miller was shot, the police had very few ideas about who could have been involved. Colleen Heuvelman saw someone standing against the wall of the bank. (5 RT 693-697.) Bettina Redondo observed a man with a gun leave the bank. (4 RT 556-558.) The police conducted an in-field identification of several suspects with Redondo and Heuvelman and others immediately after the shooting, but it came to nothing. (5 RT 639-641, 788, 806.) A couple of days after the homicide, Redondo, shaking with emotion, identified someone named "Turtle Jones" saying she was "90 percent" sure he was the gunman. (4 RT 577-578, 6 RT 823; 8 RT 1213-1214.) Turtle Jones could have been involved with the crime since he had been in the Miller check cashing store. (6 RT 824.) However, this turned out to be a false lead because later, again shaking with emotion, Redondo identified someone else, who was not Turtle Jones, in a physical line-up as the gunman. (4 RT 578-580; 8 RT 1232-1235, 1247-1250.) The situation was similar with witness Heuvelman. A couple of months after the homicide, she was shown a six-pack not containing appellant's picture, and identified two people who looked similar to the gunman. (5 RT 709-710.) That was where the case sat. Nothing was done to follow-up on the investigation for the rest of 1991 or 1992.

It was only in August1993 that the police got a telephone tip which was at the time anonymous, but which later was revealed to be from Joanne

Gano, implicating appellant in the crime. (2 CT 453; 5 RT 790-795.) Joanne Gano was the wife of James Gano, who was himself a suspect in the murder. (2 CT 453; 9 RT 1366.) In spite of the tip, the case was put on suspended or "inactive" status for a year and a half. (5 RT 797-798.) It was not until March 1995, fully four years after the homicide, that witnesses Heuvelman and Redondo were shown photos of appellant, whom they identified. (5 RT 790-792.)[1] There is no evidence that either witness attended a live line-up in which appellant participated. Heuvelman identified appellant at trial, but Redondo was unable to do so. (4 RT 629-630.)

The final important part of the prosecution's case was the testimony of Lorraine Ripple to the effect that appellant, a former crime partner of hers, had confessed to her and gave her the gun from the crime. (6 RT 856, 896.) This evidence was not gathered until May 1995, when Ripple for the first time told the police what she had supposedly known about appellant's involvement since 1991.[2] (6 RT 848.) The prosecution put on no evidence to corroborate the things Ripple said about appellant: it did not attempt to locate the person Ripple supposedly sold the gun to; it did not attempt to

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[1] It was Detective Thomas Tarpley who showed witnesses Redondo Ms. Huevelman appellant's photograph. (5 RT 790-792.) Detective Tarpley is not unknown to the Court. He was also the investigating officer in the case of a homicide in Laguna Beach. The detective showed witnesses a photograph of Manuel Rodriguez. Both these witnesses identified Rodriguez. Later, officers concluded that this Rodriguez could not have committed the crimes. Ultimately, a different individual was convicted. (See *People v. Garcia* (2005) 134 Cal.App.4th 521.) [since this was a COA case, why is Tarpley known to the CSC?]

[2] One of Ripple's main contacts with law enforcement was Detective Tarpley. (6 RT 859.)

verify her allegations that appellant had supposedly been involved in other homicides.

So, the prosecution's case was based on eyewitness testimony which had changed over the years and on a witness who many years after the crime alleged that appellant had incriminated himself. In order to bolster its case, the prosecution also offered evidence of appellant's past bad behavior, which in no way was connected to the homicide. For instance, prosecution witness Ripple testified that appellant was in a gang (6 RT 940) and that appellant had another (Debbie Langford) threaten her (6 RT 957-958). The prosecution also put on the evidence of an police officer who testified that when "contacted," appellant was in the possession of a loaded MAC-11, a .22 caliber pistol loaded with a magazine, along with a couple of other magazines containing nine millimeter rounds. (7 RT 1000, 1004-1005.)

* * * * *

I.

THE TRIAL JUDGE'S MISCONDUCT IN MAKING DISPARAGING COMMENTS ABOUT DEFENSE COUNSEL AND ACTING AS A SECOND PROSECUTOR AT APPELLANT'S TRIAL REQUIRES REVERSAL

In his opening brief, appellant showed that Judge Fitzgerald's misconduct in making disparaging remarks about counsel in front of the jury and in effect acting as a second prosecutor in the case required reversal. (AOB 14-40.) The government argues that appellant has forfeited his right to appeal the misconduct, that none of the behavior amounted to misconduct because the trial judge was "even-handed," and that any possible misconduct was not prejudicial. (RB 17-55.) Respondent is wrong on all points.

A. Appellant Has Not Forfeited His Claim

Respondent contends that in the absence of an objection to the complained of misconduct any issue relating to judicial misconduct is waived. (RB 18.) However, as appellant argued in his opening brief (see AOB 37-38), the misconduct in this case was so egregious that reversal is warranted notwithstanding counsel's failure to object. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-822 [concluding that prosecutor's pervasive and continual misconduct rendered attempts by trial counsel to object futile and counterproductive to the client], *People v. Sturm* (2006) 37 Cal.4th 1218, 1237; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 [court retains "discretion to excuse the lack of an objection and elect to exercise that discretion in defendant's favor because of the shocking nature of the error which rendered the trial unfair"].) It was held long ago that issues relating to the biases exhibited by a trial judge are cognizable on appeal despite the

lack of an objection in the trial court. (See *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 244.)

Canon 1 of the California Code of Judicial Ethics requires judges to "participate in establishing, maintaining, and enforcing high standards of conduct" and to "personally observe those standards so that the integrity and independence of the judiciary will be preserved." Because of the importance of this principle, this Court should address the merits of appellant's claim of judicial misconduct despite the failure of trial counsel to object. The public interest point is especially salient in this case, because, as noted in appellant's opening brief, this trial judge has repeatedly be held to have acted improperly in cases before this Court and before the California Courts of Appeal. (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1174; *People v. Melton* (1988) 44 Cal.3d 713, 753; *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1024.) Moreover, as commentators have observed, the rule that an appellate court will not consider points not raised at trial does not apply to "[a] matter involving the public interest or the due administration of justice." (9 Witkin, Cal.Procedure (3d ed. 1985), Appeal, § 315, p. 326.) Because this case presents an issue involving the due administration of justice, this Court should consider the claim without a trial objection.

Respondent cites *People v. Monterroso* (2004) 34 Cal.4th 743, 762, for the proposition that where defense counsel fails to object to judicial misconduct, a claim may not be raised on appeal. (RB 20.) Respondent, however, fails to acknowledge that appellant distinguished *Monterroso* in his opening brief, observing that in that case, a single instance of misconduct was alleged. (AOB 35.) The misconduct in appellant's case, by way of contrast, must be viewed in context with numerous prejudicial acts.

Because of the multiple acts of judicial misconduct, objection was not required.

Respondent also cites *People v. Sturm* (2006) 37 Cal.4th 1218, 1237, for the proposition that an objection was required because the trial court could have allayed the prejudice flowing from its derogatory remarks by advising the jury to disregard them. Respondent quotes *Sturm* out of context and, when taken in context, *Sturm* does not stand for that proposition. This Court in *Sturm* did observe that sometimes an admonition from a trial judge can limit the prejudice of judicial misconduct. (*Ibid.*) However, under the facts of *Sturm*, the misconduct could not have been cured by an admonition. In fact, in *Sturm* this Court observed that where there is evident hostility between the trial judge and defense counsel "[i]t would also be unfair to require defense counsel to choose between repeatedly provoking the trial judge into making further negative statements about defense counsel and therefore poisoning the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal." (*Id.* at p. 1237.) In this case, requiring appellant's counsel to continually object to the misconduct would have created a very negative impression of counsel before the jury, poisoning the jury in an attempt to preserve an issue on appeal. As in *Sturm*, appellant was not required to do that.

Respondent argues that the trial judge actions were not misconduct because he was simply trying to be humorous, so there was no need to object. (RB 21.) The so-called humor, even if that is what it was, actually supports appellant's argument that a trial objection was not required. It is more, not less, difficult for defense counsel to object when the trial judge's misconduct takes the form of inappropriate humor, as, for instance in this case, when the trial judge cautioned members of the jury not to talk about the case during the break or else they would be "shot." (3 RT 398.) As

Judge Carnahan observed in his essay in the Los Angeles Daily Journal, "a captive attorney audience may feel compelled to laugh rather than risk an objection." (Hon. Douglas G. Carnahan, *Judicial Jests*, Los Angeles Daily Journal (July 27, 1999) p. 6, cols. 3-5.)

B. The Trial Judge Was Not Even-Handed

The State calls appellant's trial judge "no-nonsense" and urges that the trial judge acted evenhandedly with both parties. (RB 20-21.) As part of its argument, respondent points to occasions where the trial judge sustained objections made on the part of appellant's trial counsel. (RB 20.) These examples do not decrease the impact on the jury of the trial judge questioning the honesty and integrity of the defense and the defense investigation. Recall that the trial judge accused the defense of lying (10 RT 1645), and then characterized defense objections to the remarks as the attorneys being "overly sensitive" (10 RT 1709). He also told the jury that they could disregard all of the defense counsel's argument. (10 RT 1645.) The trial judge also allied himself with the prosecution in complaining about the way in which the defense was conducting an examination. (9 RT 1352.) He also improperly coached prosecution witnesses. (4 RT 629.) In all of the examples where the court sustained defense objections cited by respondent, it appears that the trial judge correctly ruled in favor of the defense. In none of the examples cited by respondent did the trial judge ever suggest that the prosecution had lied, suggest that it was incompetent, insinuate that the government's representative had done something illegal, or suggest answers to help a defense witness. The fact that the trial judge sometimes made correct evidentiary rulings, usually in response to defense objections, does not take away from the overall prejudicial impact of the judge's other actions.

In support of its argument, respondent also points to places in the record where the trial judge made comments about the prosecutor's performance. (RB 21.) Respondent has overstated and misreported the examples he uses. For instance, respondent argues that the trial judge was acting as a even handed judge when he told the prosecutor to "think before [he] object[ed]." (RB 21; 9 RT 1399-1400.) In this instance, trial counsel (Mr. Freeman) was attempting to elicit information from prosecution witness, Thomas Tarpley, about James Gano, someone who the police suspected of involvement in the crime. The trial judge sustained a relevance objection made by the prosecution to a question about whether Gano had been identified as a principal in the crime. (9 RT 1400.) The trial judge then also sustained an objection to a question about whether Gano was working together with witness Tarpley, with the trial judge interpreting defense counsel's question as seeking information about whether Gano worked with Tarpley as a police officer. (9 RT 1399.)

It is clear that Freeman did not intend to ask Tarpley whether Gano was working with him as a police officer – there was never a suggestion that Gano was an "officer" of any kind. It was at the suggestion of the prosecution that the question meant something clearly not intended that the trial judge sustained what was really a legitimate question from the defense, i.e., about Gano's relationship with the police. In the next question, defense counsel made explicit that it wanted to know whether Gano had worked with Tarpley as an informant. The prosecution objected, but then clearly thought better of it, seemingly realizing that Gano's relationship with the police as an informant was a legitimate area for defense inquiry. However, before he could clarify, the judge jumped in and sustained the objection – and then would not let the prosecutor withdraw what was clearly an illegitimate objection. As such, far from being an instance of even-

handedness or "toe the line," respondent's example is really another example of the trial judge acting in favor of the prosecution.[3]

The situation is the same with the second example the State gives of so-called "even-handedness." Respondent notes that following a prosecution question, the trial judge stated: "What you said did not make any sense" (RB 21; 11 RT 1831) and then urges that this shows the trial judge was equally strict with the defense and the prosecution. Respondent suggests that with this remark the trial court was chiding the prosecution for asking an improper question. In context, it is clear that the trial judge was really trying to help the prosecutor ask proper questions to get the information the prosecutor wanted from the witness. The exchange occurred during the testmiony of prosecution witness Thomas Trier, who

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[3] The entire exchange was as follows:

Q. [By Mr. Freeman] Is – and you have identified in your investigation James Gano as a principal involved in this crime before the court?

Mr. Rosenblum: Objection, irrelevant.

The Court: Sustained.

Mr. Rosenblum: Calls for speculation.

By Mr. Freeman: Q. Were you working with James Gano for about an eight, nine-month period in 1995.

Mr. Rosenblum: Objection, working with – as a police officer.

The Court: He's a police officer, Gano is not. Sustained.

By Mr. Freeman: Q. Working with him as an informant.

Mr. Rosenblum: Objection, irrelevant.

The Court: Sustained.

Mr. Rosenblum: I'll withdraw that last objection, if he want to ask him about that.

The Court: Too late. Sustained. Sustained is sustained.

Mr. Rosenblum: All right.

The Court: You got to think before you object.

Mr. Rosenblum: I suppose so.

The Court: But nice try.

Mr. Freeman: Nothing further.

(9 RT 1399-1400.)

was an FBI agent called by the prosecution to help tie appellant to some robberies in Hacienda Heights and Rowland Heights. (11 RT 1828.) Witness Trier also testified regarding appellant's participation in one of the robberies with Lorraine Ripple and Chris Anderson. (11 RT 1830.) So, what really happened was that the prosecutor showed Trier a bank surveillance photograph of an individual holding a gun and then asked a question not about the photograph, but a question that had to be answered before the photograph was relevant, i.e., did Lorraine Ripple identify Chris Anderson in relation to the robbery the photograph appeared to be from. (11 RT 1831.) The judge then asked the prosecution: "Does that mean the person in that photograph was Chris Anderson." The prosecution then realized that he had not laid a proper foundation and stated: "Well, we're going to get to that." It was then that the trial court said: "What you just said did not make any sense." (11 RT 1831.) Thus the trial judges remark, far from chiding the prosecution as respondent suggests, was really an attempt to help the prosecution ask the right question, i.e., to lay the foundation so that the photograph could be used as evidence. As such, respondent's supposed example of "even-handedness" is really an example of the trial court going out of its way to help the prosecution.

Respondent's third example of supposed "even-handedness" is really another example of the trial court helping the prosecution. In this instance, the district attorney examined his witness Lorraine Ripple about what appellant's mustache looked like, clearly wanting her to describe appellant as having a mustache that went beyond the corners of his mouth, but inadvertently asking a question which made it sound like the mustache grew in his mouth by asking whether the mustache was "between [appellant's] lips." (RB 21; 6 RT 651.) The trial court noted that the area between the lips was the mouth, joking that this is where the district attorney's foot

belonged. (6 RT 651.) In response, the district attorney was able to clarify that what he meant by asking whether the mustache was "between the lips" was whether the mustache was between the corners of the mouth. (6 RT 652.) This helped, not hurt, the prosecution. It was certainly not an example of "evenhandedness," as the government contends.[4] In short, respondent has not shown that the trial judge was even handed or "no-nonsense."

C. The Misconduct Requires Reversal

Respondent next argues that the misconduct does not require reversal because the individual instances of misconduct were not misconduct, and, even if misconduct were not prejudicial. (RB 29-53) It also asserts that the judge's action do not show "bias." (RB 53-54). Respondent is wrong. Appellant first discusses respondent's contention relating to each instance of misconduct. He then addresses respondent's contentions about the impact of the errors.

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[4] The entire exchange was as follows:

Q. Now, I would like to show you the mustache that he had. Was it a thin mustache or bak in '91 or thicker mustache?

A. Okay. At times he'd keep it trimmed, just in this area, and then other times he let it grown down the sides. Sometimes he let a goatee grow.

Q. When you said in this area, you are talking about between his lips and then you said sometimes he let it grow beyond his lips.

A. Yes.

Mr. Rosenblum: May I ask what the next exhibit –

The Court: Between his lips is in his mouth –

Mr. Rosenblum: Thank you, your honor.

The Court: – where you put your foot.

Mr. Rosenblum: That's why you are the judge, and I am the D.A. Between the corners of his mouth, actually.

(6 RT 651-652.)

1. The Trial Judge's Remark That It Could Disregard Defense Counsel's Closing Argument Was Misconduct

Appellant demonstrated that the trial court's statement that the jury could ignore defense counsel's argument if it believed that counsel was deliberately misrepresenting the facts was misconduct. (AOB 18-20.)--The judge made this remark shortly after the prosecution had objected to defense counsel's reference to James Gano as the man behind the robbery. (10 RT 1642-1643.) Respondent asserts that the trial judge's comment during closing argument that the jury could ignore defense counsel's argument if it thought that counsel was lying was not prejudicial. In a footnote and at page 27 of its brief, respondent suggests that there really was no evidence before the jury that Craig Elz and James Gano were arrested for a bank robbery. (RB 24, fn. 19, 27.) It is clear that without explicitly saying so, respondent has pointed to this evidence as a way of suggesting that the trial judge was correct and that defense counsel was, in fact, lying when he asserted that there was evidence that Gano and Elz were arrested for robbery.

This is incorrect. It is true that the evidence of the arrest was solely the evidence of a taped interview of witness Bettina Redondo by defense investigator Douglas Portratz. (Defense Exhibit F; 5 RT 642-643.) The evidence consisted of an assertion by that investigator that the two men had been arrested for robbery. (3 CT 1171.) Nevertheless, the evidence of the interview was before the jury without limitation. Had the prosecution wished to limit the purpose for which the evidence was introduced it should have asked for instructions limiting the purposes for which the jury could use the tape. It did not. Therefore, the evidence was properly before the jury for all purposes. (*People v. Richards* (1976) 17 Cal.3d 614, 618-619 [party who failed to request a limiting instruction pertaining to evidence

admitted could not complain of its absence]; see Cal. Evid. Code, § 355 [when evidence is to be considered for a limited purpose the court shall upon request limit the scope of the evidence and instruct the jury accordingly].) It is clear therefore that defense counsel was perfectly within his rights to refer to the evidence and that the trial judge's derogatory hint that trial counsel was intentionally misrepresenting the evidence was completely unjustified.[5]

Other than the above noted footnote and page reference, respondent does not suggest that the judge's remark was not misconduct. Rather, respondent argues that any possible misconduct was not prejudicial. (RB 27-29.) Respondent is wrong. First off, respondent's assertions that the remark was inconsequential might have more force if the judge had made only this one remark. If it were an isolated remark, then it would be understandable that the jury would think that the judge made an unfortunate but innocent remark to which it should pay no attention.[6] But that is not what happened. Rather, the remarks at closing were the culmination of the trial court's disrespectful behavior – which appellant detailed at length in his opening brief.

Respondent asserts that because the trial court's statement did not specifically mention the defense, that the jury would have believed that the remark was neutral, so that the jury should take from it that it was free to disregard either the prosecution or the defense should it believe that either was lying. (RB 27.) Respondent has again taken the trial judge's remarks

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[5] Recall it was the prosecution who injected James Gano into the case. The prosecutor, in his opening statement, had himself discussed Gano's involvement as the principal in setting up this crime and introducing appellant to the Millers. (4 RT 403-431.)

[6] As the saying goes in German: "*Einmal ist Keinmal.*"

out of context.[7] The trial judge's remark was made immediately after the prosecution stated he did not recall there being evidence of the arrest and after the trial judge himself stated that the did not think there had been evidence of the arrest. The remark included a reference to the attorney's argument, during the argument itself. No juror would have believed that the trial judge was simply warning them about the abstract possibility that an attorney might lie. Rather, the judge was warning them that, in his opinion, *this* defense attorney was lying.

Respondent also asserts that there was no prejudice to the remark about lying attorneys because counsel was allowed to finish his argument without additional interference from the trial judge. (RB 27.) The fact that the trial judge did not additionally interfere in trial counsel's closing makes no difference – the damage had already been done when he insinuated that the jury should believe nothing of what that counsel said. Finally, respondent asserts that there was no prejudice from the remark, given the prosecution's remarks in his closing and the admonition the trial judge gave

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[7] The context for the remark is as follows:

[By Defense Counsel Freeman] So now the photograph of Craig Elz, the brother-in-law of james Gano, who was involved – James Gano and his brother-in-law were arrested for a bank robbery in Garden Grove, which is in evidence, in 1995, February. And this is a photograph of Mr. Elz.

Mr. Rosenblum: Excuse me, you Honor I don't remember there being any evidence of –

The Court: I don't know if that's in evidence, Mr. Freeman.

Mr. Freeman: Well. . .

The Court: Ladies and gentlemen, if either side's attorney intentionally misrepresent's any fact during the course of the trial, including their argument, of course, and you think they're lying to you, you can disregard their whole argument if you want to.

Go ahead.

Mr. Freeman: Thank you.

(10 RT 1644-1645.)

the jury at the request of the prosecution. (RB 27-28.) As appellant pointed out in his opening brief, the trial judge couched his admonition in a context that only made the remark worse, noting that some attorneys were "overly sensitive." (10 RT 1709; AOB 17.) All the trial court did with this remark was embellish his previous statements. (AOB 17.) Respondent does not address this point.

Respondent likens the judge's remark to a jury instruction, such as CALJIC No. 2.52, the so-called "flight instruction," for which a jury has to find a predicate fact before the instruction comes into play. (RB 28.) It argues that the jury had to find that trial counsel was lying before it could disregard his argument and that the judge later told the jury that he did not believe that any attorney had lied. As such, so the argument goes, the jury could not find the factual predicate and could not, therefore, have disregarded trial counsel's argument.

Respondent's analogy actually works against respondent. A corollary to the rule that a judge must instruct on all evidentiary matters supportive of a defendant's case (*People v. Barton* (1995) 12 Cal.4th 186, 195) is the rule that a jury must not be instructed upon legal principles that have no bearing in the case. Instructions such as CALJIC No. 2.52 cannot be given unless there is substantial evidence of flight (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1245) and that the flight tends to show the defendant's guilt. (*People v. Smithey* (1999) 20 Cal.4th 936, 982; *People v. Turner* (1990) 50 Cal.3d 668, 694.) It is error to give the instruction without evidence of the predicate facts. (*People v. Pensinger*, *supra*, 52 Cal.3d at pp. 1243-1244 ["Instruction on an entirely permissive inference is invalid as a matter of due process only if there is no rational way the jury could draw the permitted inference."].) It is error to read instructions which correctly state the law, but which are not applicable to the facts of the case

or which find no support in the evidence. The error rests in the fact that such instructions tend to confuse and mislead the jury by, in effect, creating a false issue. (*People v. Roe* (1922) 189 Cal. 548, 559; *People* v. *Jackson* (1954) 42 Cal.2d 540.) Therefore, even if respondent's analogy is appropriate and the judge's remark can be treated like an instruction, it was prejudicial. It suggested to the jury that there was evidence of lying by counsel – when in fact there was none. Moreover, it created an issue for the jury, i.e, was defense counsel lying, when, in fact, there was no such issue properly before it.

Respondent next argues that any prejudice was cured by jury instructions, including CALJIC No. 17.30, which informed the jury that it should not take a cue from the judge. (RB 28; see 10 RT 1738.) Respondent does not analyze this instruction in detail. If so, it might have noted that the instruction does not refer to what the judge thinks about the attorneys, rather it only warns the jury not to take a cue about which witnesses to believe. By its own terms then, CALJIC No. 17.30 does not apply.

Finally, respondent also argues that the prosecution's argument helped cure the error. (RB 28.) The prosecution argued in its final argument that it did not think that defense counsel was lying. (10 RT 1671.) This was fine as far as it goes. The trouble is it does not go far enough because it was the judge, not the prosecutor, who insinuated that defense counsel was a liar.

2. The Judge's Remarks Were Not Innocent Attempts at Humor

Respondent next argues that instances of alleged humor in appellant's trial were acceptable. (RB 29-33.) It is true that this Court has held that a small amount of humor can be appropriate to relieve the tension

of a trial. (*People v. Melton* (1988) 44 Cal.3d 713, 753.) However, this is a limited exception to the rule that a trial judge has the obligation to "maintain decorum in keeping with the nature of the proceeding." *(United States v. Young* (1985) 470 U.S. 1, 10; see Cal. Code Jud. Ethics, canon 3B(4).) This Court has observed that attempts at humor are risky ventures during a capital trial. (*People v. Sturm, supra,* 37 Cal.4th at p. 1237.) This case presents a perfect example of why trial courts should heed that warning. It is never appropriate when a person is on trial for his life to threaten to kill jurors if they talk about the case during court breaks. This sends a clear signal to the jury of lack of seriousness with which this judge regarded appellant's case.

Respondent argues that the remark about shooting jurors who talk was justified by other remarks made by the trial judge, which respondent thinks are also humorous, i.e., that the judge thought a juror who was a Korean war veteran should be dead, and that he (the trial judge) was the only one allowed to mistreat jurors. (RB 30.) There is nothing about these remarks that shows that the other remarks about shooting jurors was not misconduct. Instead, these remarks should be added to the list of inappropriate statements made by this judge.

Respondent also asserts that the jury could tell that the trial was serious because the trial judge stated that this (i.e., the trial) was "serious stuff." (RB 31, citing 2 RT 137.) Respondent has once again taken the trial judge's remarks out of context. It is true that the trial judge told the jury that this trial was "serious stuff." However, immediately after that remark he cajoled Juror 6 into minimizing his or her feelings that the evidence might be too violent to listen too.[8] The judge also told the jury that the

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[8] The exact exchange was as follows:

(continued...)

photographs in this case "were not as ghastly as some of the cases" he had. (2 RT 139.) He characterized the photos as of a person in his "final resting place," observing only that they might not be "that wholesome." (2 RT 139.) He also characterized prospective jurors who might have problems looking at photographs of a dead body as "a bit squeamish," when asking whether they would rather be on a different case. It would take a brave person to admit that he or she was too "squeamish" to look at photographs the trial court had just characterized as "not that bad." Not surprisingly no one on the jury admitted that they would have difficulty viewing the photographs. Once again, instead of supporting respondent, this is actually another example of the ways in which this trial judge refused to treat appellant's capital case with appropriate seriousness.[9]

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[8](...continued)

The Court: Is there anyone that has a feeling that they'd just rather not get involved in this kind of a serious case?

Okay. That's Juror Number 6, (Juror No. 6). The attorneys, I'm sure, will not that and probably will accommodate you by excusing you.

So if there's anyone else now that's not ready to go the full, as we say, nine yards in a capital case - -

Q. Did you really mean that, (Juror No. 6)?

A. Well, I'll tell you why I said that. I'm the type of person that doesn't even like to watch violent movies because I'll have nightmares, that's all.

Q. That doesn't meant that if selected on a case you won't do all that's necessary to come back with an appropriate verdict, correct?

A. No, not at all.

(2 RT 137-138.)

[9]The court's remarks were as follows:

The Court: It may be that there are photographs that will be offered by one or both sides involving a deceased human being. That's all part of a homicide case, ladies and gentlemen. Reason we're here is somebody's dead. Somebody's dead at the hands of another. . . . Somebody was killed by somebody else. So that's serious stuff.

(continued...)

Respondent also defends the remarks the trial judge made while defense counsel was examining prosecution witness Detective Tarpley, in which the court asked the prosecution for help in getting the defense to obey the rules of evidence.[10] It characterizes the remark as a witty statement directed to defense counsel, not even amounting to a rebuke, which was made as part of the trial judge's attempt to control the proceedings. (RB 32-33.) Appellant first notes that he did not assert that

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[9](...continued)

In order to persuade you of the seriousness of the fact – and there may be other various evidentiary situations that may be important to both sides – you may see some photographs of a deceased individual.

Is that in the scheme of things from both sides? Mr. Rosenblum, are we talking about photographs of a deceased individual?

Mr. Rosenblum: Just a couple, your honor.

The Court: So at least it's not as ghastly as some of the cases that I've had.

But the bottom line is when you take on the job as jurors in a murder case, it is required of the juror to look at every piece of evidence. Some photographs of a deceased human being in their final resting place my not be that wholesome a thing.

If you're going to be a juror, you'll have to accept the responsible [sic.] of looking at the photographs if they are required of you.

Q So, (Juror No. 6), can you tell me if you are selected as a juror on the case that you will in fact look at the photographs even though it may be distasteful?

A Yes, I would.

The Court: Is there anyone else that feels a bit squeamish that would rather be on another case and not think about the photographs?

(Whereupon the jury responded in the negative.)

(2 RT 138-139.)

[10]The remark was as follows:

Mr. Rosenblum: Counsel again is testifying. He's trying to summarize –

The Court: I don't know how to stop him; do you have a hint for me Mr. Rosenblum?

Mr. Rosenblum: All I can do is object.

(9 RT 1352.)

the trial judge's remark was an example of inappropriate humor. Rather, he showed that the remark was the part of a pattern of participation in the trial more as a prosecutorial advocate and partisan than as a neutral arbiter. (AOB 22.) Respondent does not address this aspect of the remark. However, even if humor, the remark was misconduct. As a joke, the remark sent a clear signal to the jury of the poor regard in which the trial court held appellant's counsel and inferentially sent a signal to the jury about what value he placed on the testimony that counsel was putting on. The jury was likely to give appellant's case less credibility because the trial judge clearly believed that the defense did not deserve his serious attention.

3. The Trial Judge Improperly Assisted the Prosecution

Appellant showed that in several instances the trial judge improperly assisted the prosecution in putting on its case by asking appellant to remove his glasses so that the witness could better identify him and by the court's comment that the coat the defense was using as part of its examination was not a "military coat." (AOB 24-25.) Respondent asserts that the trial judge was simply doing his duty "to assist the jury in seeking the truth." (RB 33.) Respondent is wrong. Respondent's error is again to take the trial judge's actions out of context.

Here is the context: Just before the remark was made, defense counsel asked witness Colleen Heuvelman whether she could identify appellant. (4 RT 629.) The judge, not the prosecution, stepped in to ask that the glasses be removed. (4 RT 629.) This suggested that the judge believed that the defense question was unfair in that counsel had asked the witness to make an identification under dissimilar circumstances – something which the judge had to put right, in light of what the jury must have now thought were sharp defense practices. This should have been a

matter for the prosecution, not the judge. The alliance between the prosecution and the trial judge was even more clear when the prosecution made another objection to the question calling for an identification, stating that appellant should also have a hat on. (4 RT 629.) The only impression the jury could have had from the exchange was that the prosecution and judge were allied against the defense.

Respondent cites *People v. Alfaro* (1976) 61 Cal.App.3d 414, 426, for the proposition that it is not error for a court to ask questions of its own and may enlarge or limit on other questions to seek the truth. (RB 36-37.) Respondent has incompletely cited *Alfaro*. In that case, the trial court did hold that a trial judge can ask question, but emphasized that the real duty of the trial judge is to assure that the defendant gets a fair trial and that justice is done. (*Id.* at p. 426-427.) As this Court has recently held: When questioning witnesses, the court may not assume the role of either the prosecution or of the defense; the court's questioning must be temperate, non-argumentative, and scrupulously fair, and it must not convey to the jury the court's opinion of the witness's credibility. (*People v. Cook* (2006) 39 Cal.4th 566, 597.) It is clear here that by undermining the defense's attempts to show that witness Heuvelman could not identify appellant in court, the trial judge was suggesting to the jury that her failure did not matter and that the jury should rely upon her out of court identification, in spite of her inability to identify appellant in court. This type of inference undermines to the goal of an impartial fact finder.

Respondent also argues that the trial judge's statement that he personally thought that the coat the defense was using did not look like a military coat was also part of the trial court's attempt to assure that the facts were fairly presented. (RB 33.) However, whether the coat the defense was using was a military coat was surely a fact for the jury to determine. If the

prosecution believed that the coat did not look like the one that the perpetrator was supposedly wearing the day of the murder, it was free to ask the witness questions about whether the coat looked like the one she supposedly saw and was free to argue to the jury that the coat was not representative. Instead, the trial judge acted as the prosecutor and inappropriately undermined the defense case. The exchange was even more inappropriate because witness Heuvelman, in response to trial counsel's remark that each was entitled to an opinion about the coat, disagreed with defense counsel, instead concurring with the trial judge, noting that her husband's military coat was not at all similar to the one defense counsel was holding. (5 RT 737.) The trial judge then agreed with the witness, adding that his military coat did not look like the defense's and that he was sure that the prosecutor's military coat was not similar either. (5 RT 737.)[11] This whole exchange suggested to the jury that the defense was trying to fool the witness and had only been stopped by the judge, who like both the prosecution and the witness, knew that the defense was unfairly questioning the witness. This can only have undermined the defense's credibility. As such, judge's actions were highly improper.

Respondent argues that any misconduct was not prejudicial because the witness failed to identify appellant in court. (RB 37.) However, the

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[11] The testimony was as follows:

Mr. Rosenblum: Your honor, the record should reflect that he's [defense counsel] is holding up a blue trench coat.

The Court: Not military type.

Mr. Rosenblum: No, nothing military about the coat.

Mr. Freeman: Everybody's entitled to opinions.

The Witness: Oh, sir, my husband's military coat is much different than that.

The Court: So is mine, so is Mr. Rosenblum's, I'm sure.
(5 RT 737.)

appellant's point is that the judge's actions in undermining the defense's cross-examination actually made Heuvelman's out-of-court identification of appellant more reliable by suggesting that the trial court believed the defense question was unfair – thereby suggesting that it did not matter that she could not identify appellant in court.

4. The Trial Judge Improperly Cut Off Defense Counsel's Cross-Examination of a Key Witness

Appellant showed that the trial judge improperly curtailed defense counsel's cross-examination of witness Colleen Heuvelman. (AOB 25-26.) Respondent argues that the cross-examination elicited improper hearsay and it was therefore appropriate for the trial court to cut off the examination. It also argues that the trial court's remark that the cross-examination was "silliness" was out of the presence of the jury and that appellant got his evidence out anyway. (RB 38-39.) Respondent does not deal with appellant's main contention that the judge's interruption of defense counsel's cross-examination and summoning him to the bench to chastise him for no good reason broke the flow of his defense and undercut counsel's confidence. Appellant will not repeat his argument here.

5. The Trial Court Improperly Curtailed Questioning of Officer Solis

In his opening brief, appellant demonstrated that the trial court improperly curtailed the defense cross-examination of Officer Solis, who testified for the prosecution about the failure of witnesses to identify Kenneth Moorehead at a field show-up. (AOB 26-28.) Respondent argues that the trial court properly restricted the cross-examination on the grounds that the questioning constituted impeachment on a collateral matter. Respondent considers the issue collateral because the defense put on no

evidence that Moorehead was responsible for the shooting. (RB 40-43.) Respondent errs.

First, respondent inaccurately relates the facts, implying that no -one at the field line-up identified Moorehead. (RB 41 ["There is no evidence on the record that any of the three or four witnesses positively identified Moorehead as the shooter."]) Instead it is clear that someone, a man named "Jenkins," did in fact state that Moorehead met the description of the suspect shooter. (5 RT 802-803.) This fact was apparently in the police report and was what the defense sought to use to impeach Officer Solis previous statement that no one from at the field line-up had identified Moorehead. However, this Court will never know for sure the details of Jenkins identification because the trial court did not let the defense attorney ask any questions about the matter. Far from being, "collateral," the reliability of eyewitness identification of witnesses Heuvelman and Rodendo were key to the prosecution's case. Detective Solis was a witness to the failure of these two women to make an identification at the field show-up, therefore, it was critical to the defense to explore the accuracy of Solis' recollection of the event. It was error for the judge to prevent the question.

Respondent also argues that there was no harm to the court's remark that defense counsel was "tilting at windmills," because the remark was made out of the presence of the jury. (RB 42.) Appellant acknowledges that the remark was made out of the presence of the jury; however, the remark was still prejudicial insofar as it threw cold water on trial counsel's confidence, which necessarily led them to pull punches in a case which clearly needed a vigorous defense advocate.

6. The Trial Court Improperly Suggested the Defense Investigator Be Prosecuted

Appellant showed that the trial judge's remark that the defense investigator Donald Protratz should be arrested and charged for attempting to dissuade a witness was improper misconduct that had a chilling effect on the defense. (AOB 29-30.) The government urges that the comment was a proper comment upon the evidence because the investigator had tried to dissuade a witness, and argues the remark was not prejudicial because it was not in the presence of the jury. It urges that appellant has not shown there was a chilling effect. (RB 42-45.) Not so.

The judge's remark to the prosecution that the defense investigator should be charged with a crime came in the context of the defense's attempt to cross examine eyewitness Bettina Redondo, who, as appellant has pointed out, tentatively identified several other men as responsible for the crime. (See p. 2, *ante*; 4 RT577-578, 6 RT 823; 8 RT 1213-1214, 1232-1235, 1247-1250.) As part of its cross-examination of witness Redondo, defense counsel asked her about an interview she had with investigator Portratz. Redondo asserted that the investigator had suggested that someone other than appellant (namely Craig Elz) was responsible for the homicide. Respondent lays out the examination of Redondo in great detail and then argues that it was a fair inference from this evidence that the investigator was in fact attempting to dissuade a witness and that the trial judge's comment was a fair comment on this situation. (RB 42-44.)

This is patently false. Respondent cites, but does not quote Penal Code section 136.1, the section it alleges the investigator violated. Doing so reveals that the defense investigator did nothing at all to run afoul of the law. Penal Code section 136.1 makes it unlawful to prevent or dissuade potential witness from attending upon trial or attempting by threat or force

to induce a person to withhold testimony. (*People v. Thomas* (1978) 83 Cal.App.3d 511, 512-513.)[12] There is absolutely nothing about what investigator Portratz supposedly did with witness Redondo suggesting that he attempted to dissuade her from testifying – certainly not by threat or force. The defense had every right – and indeed had an obligation – to test Redondo's ability to accurately identify the person she saw. In fact, Redondo did admit during the interview that the photograph she was shown of Craig Elz was closer to the composite drawing that was made of the

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[12] In relevant part Penal Code section 136.1 provides:

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision ©, every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

person she saw than was the photograph of appellant. (3 CT 1167.)[13] The fact that the witness testified that she felt that the defense investigator was trying to convince her that someone else was responsible for the murder does not mean that the investigator was acting improperly, much less criminally. In fact, the defense investigator invited Redondo to talk over the matter with the police investigator (Tarpley) if she so desired. (3 CT 1169.) There was nothing criminal about his behavior.

The trial judge's remark that he had never seen a better case for attempting to dissuade a witness so vastly oversteps the boundaries of proper comment on the evidence as to be ludicrous. Respondent cited *People v. Snow* (2003) 30 Cal.4th 43, 78, for the proposition that it is appropriate to harshly rebuke an attorney for improper conduct. The attorney did nothing wrong here; rather, it was the actions of the investigator (not the attorney) that were under the microscope, so *Snow* does not apply. Even if *Snow* can be read to apply to investigator conduct, it is clear that *Snow* does not control in this case because the investigator did nothing wrong. It is highly improper for a trial judge to engage in any action that denigrates the intelligence or capacity of witnesses. (See

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[13] The exchange between Portratz and Redondo was as follows:

Portratz: Okay. Now I'm not trying to trick you or anything. Um.... but we just received these blling... this booking photograph Monday [of Craig Elz], and I have a small one, if you want to see the original. .... Here is the original color booking photograph ...... What do you thing?.....

Redondo: Well I think that this person looks more like the drawing [the composite] than this person!

Portratz: Okay....

Redondo: huh .... (laughs).

Portratz: Okay.. So you think Elz looks more like the drawing than Abel, right?

Redondo: Yes.

Podlasky v. Price (1948) 87 Cal.App.2d 151, 164-166.) The same rule applies to parties. Yet that is exactly what the judge did in this case.

Respondent alleges that appellant has not shown that there was a chilling effect on the defense's presentation of the case. This is not so. Respondent misses the point that this action accusing the defense investigator of a crime was only one of many instances where the defense was accused of bad practices. Taken in context, the remark would have made any reasonable attorney more reluctant to defend vigorously a case for fear that the next untoward remark on the part of the judge would be made in front of the jury.

7. Refusal to Permit Defense Requested Sidebar Conferences Was Improper

Appellant also argued that the trial judge showed his contempt for the defense by refusing to grant defense requests for side bars – while at the same time granting prosecution requests for the same thing. (AOB 30-31.) Respondent argues that with the first example cited by appellant, defense counsel did not really make a request for a side bar. Appellant respectfully disagrees with respondent's characterization of the facts. Defense counsel clearly wanted to make an objection to a question and was trying to say that he would make it at a side bar if the court wished it. However, the trial court cut him off and denied the objection without giving him an opportunity to explain.[14] As to the second example, appellant agrees that

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[14] The exact testimony is as follows:

Q. [By the prosecution] Where in the transcript did you get the impression in your mind that he was trying to seel you that it was Elz involved and not Gano? Can you cite that portion to the jury and tell them what - -

The Court: Give us the page and line.

The Witness: Page 6.

(continued...)

the prosecution request for sidebar was properly granted, but argues that the defense side bar should also have been granted. The defense counsel clearly wanted to explore whether the prosecutor was improperly asking questions about material the defense had not explored in cross-examination. Moreover, it was improper to deny a defense request and then immediately thereafter grant a prosecution request. This created a bad appearance in front of the jury. It also would have chilled defense counsel's willingness to ask for more bench conferences.

8. The Court Improperly Told the Jurors That Appellant's Wife Was in Custody

Appellant showed that the trial court had improperly insinuated that appellant's wife, Vicki Ross, had been in custody during the defense cross-examination of Lorraine Ripple. (AOB 31-32.) Respondent argues that appellant has misread the passage and that the judge was actually suggesting that the witness (Lorraine Ripple) was in custody. (RB 47-48.) Appellant urges that it is respondent who has misread the passage and that at best the passage is ambiguous. The "she" in the passage could refer to either Lorraine Ripple or Vicki Ross.

9. The Trial Court Showed a Bias Against Appellant and For The Death Penalty

In his opening brief, appellant showed that the judge clearly favored the death penalty in the manner in which he questioned the jury. (AOB 33.) Respondent argues that the judge's questioning was even-handed. (RB 48-

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[14](...continued)

Mr. Peters: I'm going to object to the form of the question. I think it contains a fact not –

The Court: Sorry?

Mr. Peters: You want us at side bar?

The Court: Objection, overruled. Request for sidebar denied.

(5 RT 654.)

49.) Respondent has misunderstood the gist of appellant's argument. Appellant acknowledged in his opening brief that the trial judge had used the phrase "intestinal fortitude" in connection with both the penalty of death and the penalty of life without parole. (AOB 32.) Thus appellant's complaint was not the fact that the judge used the phrase "intestinal fortitude" in his questioning, as respondent seems to imply. (RB 49.) Rather, it was the implication from the manner of the judge's questioning that the court needed a morally strong person because he or she might have to impose the death penalty. It would be a far different matter if the trial judge had asked the jurors if each had the courage of his or her convictions, i.e., to do what the person thought was right. Without the qualifier suggested by appellant, the judge was clearly suggesting that he wanted people on the jury who would not take the easy way out and impose life without parole. This was improper.

10. The Judge Suggested That Life Without the Possibility of Parole Might Not Mean There Would be No Parole

Appellant demonstrated that the trial judge improperly suggested to the jurors that life without the possibility of parole might mean something other than a sentence of life without the possibility of parole. (AOB 34-35.) Respondent points out that several instances where the trial judge told the jurors that they had to assume that appellant would die in prison. (RB 50-51.) However, respondent does not address appellant's point that the problem with the judge's comments was that by telling the jurors that there was no guarantee that the appellant would spend the rest of his life in prison he was insinuating to the jurors that he was only informing the jurors that appellant would spend the rest of his life in prison because he had to for obscure technical reasons – but he really did not mean it. In appellant's case, the judge often adopted an attitude where he said a number of things

which the jurors were clearly not to take him seriously (for instance where he suggested that jurors who talked about the case would be shot [3 RT 398]). This is an instance where at least some of the jurors could have been persuaded that the judge did not mean what he said, to the detriment of appellant.

11. The Trial Judge Improperly Discouraged a Read-Back

Appellant showed that the trial judge improperly discouraged the jurors from asking to have testimony read back to them. (AOB 33-34.) Respondent urges that the trial court's statements were not improper because the trial judge said that he did not mean to dissuade the jurors from asking to have testimony read back to them. (RB 52-53.) Respondent's reliance on this statement is insufficient to rebut appellant's argument. The very fact that the judge told the jurors that they would not need to have testimony read back to them was dissuasion – even if the judge said it was not. As pointed out immediately above, the judge in this case often said one thing when he meant another. This is simply another example of this pattern.

12. The Totality of the Judge's Remarks Require That Appellant's Conviction Be Reversed Without A Showing of Prejudice

When addressing the prejudicial effect of the trial court remarks, respondent isolates each comment and addresses each one in as if it was made in a vacuum. Having isolated the comments of the judge, respondent then argues that appellant has not shown any harm. This is an understandable tactic for minimizing the true impact of the court's conduct, but it does a disservice to the issue. The trial court's repeated inappropriate comments, even if they were innocuous (which they were not) had they occurred in isolation (which they did not), when combined they set an

improper tone for the trial. (See *Sechrest v. Ignacio* (2008 9th Cir.) --- F.3d ----, 2008 WL 5101988 at * 11, citing *Hall v. Whitely* (1991 9th Cir.) 395 F.2d 164, 165 [Thus, we must examine the "'entire proceedings' to determine whether the prosecutor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"].) It is especially important to see all of the trial judges remarks as a whole because much of appellant's showing rests upon the pattern that this judge had of adhering to the language of the law, but then with a joke or an off-hand remark made it clear to the jury that the whole enterprise was a sophisticated game which the jurors did not have to take seriously (just has the trial judge had not). (See *People v. Abbaszadeh*, *supra*, 106 Cal.App.4th at p. 646 [the trial judge's improper remarks "set the wrong tone".]) As such, the trial judge's actions in this case did not constitute the type of "exceedingly discreet" conduct in the presence of the jury which is required of trial judges. (*People v. Zammora* (1944) 66 Cal.App.2d 166, 210.)

Judicial unfairness is of such import that appellate courts have departed from the general rule that an appellant must make an affirmative showing of prejudice when the appearance of unfairness colors the trial record. In such a case, the test is whether the court's comments would cause a reasonable person to lack confidence in the fairness of the proceedings. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 461.) Once all of the misconduct by the trial judge is viewed as a totality it is clear that that test has been met in this case.

Moreover, under any standard of review, the record here does not inspire confidence. Respondent asserts that there was no doubt regarding appellant's guilt, citing the evidence of the eyewitnesses and that of Lorraine Ripple. (RB 55.) Respondent greatly overstates the strength of

the prosecution's case. Lorraine Ripple was a convicted felon who did not tell the truth when first she was asked about what she supposedly knew. She also seemed to have an axe to grind against appellant. The supposed eyewitnesses were far from reliable – with both witnesses having tentatively identified individuals other than appellant. (See pp. 2-3, *supra*.) There was, of course, no forensic evidence against appellant. Given the paucity and shakiness of evidence against appellant and the cumulative effect of the judge's many instances of misconduct in which he aligned himself with the prosecution, the prosecution cannot possibly meet its burden by demonstrating that the judge's conduct was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The judgment must be reversed.

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II.

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT A MISTRIAL AFTER THE PROSECUTOR IMPROPERLY ELICITED TESTIMONY FROM PROSECUTION WITNESS LORRAINE RIPPLE ABOUT APPELLANT'S GANG MEMBERSHIP AND THREATS AGAINST HER

Appellant showed that the trial court erred in failing to grant a mistrial after the prosecution improperly elicited testimony from Lorraine Ripple about appellant's supposed gang membership and about threats which had supposedly been made against her and her family. (AOB 42-49.) Respondent argues that the claim has been forfeited and, even if not forfeited, the argument fails on the merits because the gang reference was "benign" and the reference to the threats on Ripple were relevant to her credibility. Respondent also asserts there was no prejudice. (RB 55-56.) Respondent is wrong on all counts.

A. Appellant's Claims Are Not Forfeited

Respondent claims that appellant has forfeited his claim that the admission of gang evidence violated his constitutional rights to due process and a fair trial because of a failure to object to the admissibility of the evidence. (RB 56-57.) This assertion is puzzling since respondent itself cites the portions of appellant's opening brief, AOB 45-47, where appellant discussed the record proceedings where appellant objected to the prosecution's use of the evidence. (RB 56.) Contrary to respondent's assertion, appellant's specifically requested a mistrial on the grounds that the prosecution had elicited evidence of gangs, adding that the prosecution introduced the evidence after a specific request from the defense that it be given advanced notice of character evidence. (6 RT 960-963.)

In a footnote, respondent asserts that appellant failed to make objection to Ripple's mention of the evidence until after Ripple was excused

by the trial court. (RB 56, fn. 41.) This is incorrect, as a careful examination of the records shows. Appellant asked for a mistrial on page 960 of the transcript. (6 RT 960.) It is true that a page earlier Ripple was excused. (See 6 RT 359.) However, it is also abundantly clear that the witness was still there. (6 RT 961.) In fact, the prosecution asked that she not be excused, something in which the court seemingly acquiesced. Ripple was clearly in the courtroom – even though the trial court suggested that she be removed.[15] Right after the prosecution asked that the witness remain in the courtroom, the defense attorney made his objection and the trial court excused Ripple again. However, even after she was excused it is clear that she remained in the courtroom because it was after the judge said she was excused the second time that Ripple complained that a defense witness Deborah Langford had used appellant's attorneys to send letters about her testimony all over the prison system. Although Ripple does not again speak after this outburst there is no indication that she left the courtroom. In any

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[15] The sequence of events was as follows:

Mr. Peters: Can we have a hearing outside the present –

The Court: The defense will be ready to start tomorrow at 9:30.

I'll excuse the jury until 9:30 tomorrow, Ladies and Gentlemen. Thank you very much, we'll see you tomorrow. Do not talk about the case.

This witness is excused and will be transported back to state prison with the court thanks.

Mr. Rosenblum: Your honor we're going to ask to keep her here just in case, at this point in time.

(The following proceedings were held in open court out of the presence of the jury:)

The Court: Okay. The issues you want to put on the record you don't need to remove the witness, then?

Mr. Rosenblum: No.

The Court: Why are we on record?

Mr. Peters: I want to make a record.

(6 RT 959.)

case she obviously had not been excused as a witness since the prosecution wanted her kept available.[16]

It could be that respondent's forfeiture argument is really one that trial counsel should have objected *immediately* after Ripple mentioned the gangs. This is not the law, as is shown by the very case cited by respondent, *People v. Hayes* (1999) 21 Cal.4th 1211, 1261. In *Hayes*, this Court held that an argument is waived unless a timely objection is made. A timely objection is one which alerts ". . . the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." (*Ibid,* citing Cal. Evid. Code, § 353.) This is exactly what appellant did. Very shortly after Ripple's testimony, appellant objected to the testimony and explained why it was inadmissible, i.e., that it was prejudicial character evidence, which the jury would focus on rather than guilt issues. (6 RT 960-963.) Immediately thereafter, the prosecutor explained why he thought that the evidence was admissible, i.e., that the fear of gangs and retribution went to

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[16] The exact incident was as follows:

Mr. Peters [defense counsel]: I'm making a request the court mistry this case because of the 1101(A) char4acter evidence that came in through this witness that Mr. Rosenblum brought in by asking any of those areas.

The Court: The witness is excused.

Thank you.

Mr. Peters: She goes on and on about her sons are going to be killed with no –

The Witness: Well, you don't have any problem with that – and sending that God damned letters all over the God damn country do you? Who is financing that, because Debbin Lang (sic) is not affording 30 cents a page for every God damn one of these pages you got to sen around, you son of a bitch.

Mr. Peters: I didn't understand why there was a women's S.H.U., now I can see why.

(6 RT 971.)

Ripple's credibility. (6 RT 964-966.) The trial judge initially ruled that the evidence was inadvertent, holding that it was inadmissible (6 RT 960), but the next day changed his mind, decided that the defendant's objection was well taken in portions and struck the portions of the testimony where Ripple referred to her fear of retaliation, then admonishing the jury that this portion of the testimony could not be considered. (7 RT 967.) Appellant complied in every way with proper procedure.

Respondent also objects that appellant did not mention the due process clause of the Constitution when he objected to the evidence, so that the federal claim is waived. (RB 57.) It is true that appellant did not allege a violation due process at trial, but does not mean that appellant has forfeited his claim. Here, the appellate claim is exactly the same as the one raised in the trial court, appellant is merely addressing the constitutional violation that arises from the trial court's failure to grant a mistrial following the improper admission of unconstitutional evidence. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) As this Court observed, the failure to invoke the Constitution will not prevent an argument on appeal that "(1) the trial court erred in overruling the trial objection, and (2) the error was so serious as to violate due process." (*Id.* at p. 436, fn. omitted.)

Respondent also asserts that appellant has waived his claim relating to the mistrial because he failed to object to the prosecution's mention of the supposed danger to Ripple from her testimony. (10 RT 1542 ["Lorraine Ripple was here at great risk to herself and great risk to her family."]; 10 RT 1692 ["[d]o you think she would risk being killed . . ."].) The government disputes appellant's assertion that there was no use in objecting to the misconduct in that it would only have emphasized the evidence to the jury, averring that appellant has miscited *People v. Hill* (1998) 17 Cal.4th 800 and *People v. Zambrano* (2004) 124 Cal.App.4th 228, for the

preposition that "any objection would have only served to draw further attention to the matter and the issue had already been litigated." (RB 57-58.)

Appellant agrees that he has incompletely cited these cases. They do not stand for the proposition that objection to evidence is not required if the issue has been litigated before. However, this does not help respondent. *People v. Hill, supra*, 17 Cal.4th at p. 821, after all, stands for the proposition that an attorney's failure to object is excused when to do so would be counterproductive to his or her client. In this case, objecting would have harmed the client by drawing attention to the testimony. (See *Crabbe v. Rhoades* (1929) 101 Cal.App. 502, 512-515 ["The question is whether or not the argument falls within that class of argumentative statements which are grossly improper and highly prejudicial, and whose evil influence and effect cannot be eradicated from the minds of the jury by any admonition from the trial judge"].) This is exactly the point appellant made in his opening brief.

Finally, this case was closely balanced and the misconduct was material to the appeal. In such cases, misconduct of the prosecutor may be raised as error on appeal without an objection at trial. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 182 ["'.... 'Misconduct of the prosecuting attorney may not be assigned as error on appeal if it has not been assigned at the trial unless, the case being closely balanced and presenting grave doubt of the defendant's guilt, the misconduct contributed materially to the verdict or unless the harmful results of the misconduct could not have been obviated by a timely admonition to the jury.....' [Citation.]")

Moreover, appellant was also using the prosecution's argument to show the prejudicial impact of admitting Ripple's evidence. To this extent,

because appellant is not claiming error, it is immaterial that appellant's trial counsel failed to object to the remarks.

B. The Trial Court Erred In Admitting Ripple's Testimony About Appellant's Supposed Gang Affiliation

Respondent appears to concede appellant's main argument, i.e., that the evidence of gangs was not relevant to motive, intent or identity. (RB 55; see AOB 44.) Respondent also does not seek to reassert the district attorney's argument that evidence of gangs was admissible because appellant had already impugned his own character. Rather, respondent urges that Ripple's testimony that her son is in a gang that appellant was once a member of was admissible because it was relevant to Ripple's credibility. (RB 55-66.) Respondent cites *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450, for the proposition that evidence of gang affiliation is admissible if it has "significant probative value in proving a witnesses credibility." (*Id.* at p. 1450.) Appellant does not dispute that evidence of gangs is admissible if it has significant value in proving credibility. He, however, strongly disputes that Ripple's allusion to appellant once having belonged to a gang was relevant to her credibility as respondent suggests. In order for the gang reference to be relevant to credibility, evidence that appellant was once in a gang would have to make it more likely that Ripple was telling the truth about the subject of her testimony, i.e., appellant's supposed confession to her. But there is nothing about Ripple's allegation – which, by the way had absolutely no other supporting evidence – that makes it more likely that she would be telling the truth about a crime (the homicide in this case) which nobody suggested was connected to gang membership. It is true, as respondent point out, that Ripple's credibility was a hot issue in this case. However, that is not

enough. Since the gang evidence is not relevant to credibility, it is was not admissible.

Respondent urges that any possible harm from the testimony about gangs was purged by the trial court's admonition to the jury to disregard the evidence. (RB 67.) However, he does not deal with appellant's argument that the admonition was too little and too late. (See AOB 49-50.) Appellant will not repeat the arguments here.

C. The Prosecution Committed Misconduct

Appellant demonstrated that the prosecution committed misconduct when it elicited information from Ripple regarding threats to herself and her family. (AOB 46-47.) Respondent argues that there was no misconduct because the record does not show that the prosecution deliberately elicited the information. (RB 68.) Appellant disagrees. Ripple's question to the prosecutor whether he got what he wanted shows otherwise. [17] (6 RT 940.) In any case, the disagreement is immaterial, since prosecutorial misconduct does not depend upon whether the prosecution intentionally committed misconduct. (*People v. Hill* (1998) 17 Cal.4th 800; 821 [bad faith showing not required for reversible error due to prosecutorial misconduct].)

In relation to appellant's argument that the prosecutor improperly argued that witness Ripple was testifying at great risk to herself, respondent

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[17] The exact exchange was as follows:

Q. You had said something on cross-examination about why it is so difficult for you to be here. I think you indicated something about having sons in Arizona, things of that nature, that caused you some concern as you sit here today. Could you please explain what you were talking about to the jury?

A. Okay. My son is also affiliated with a gang that John was once a member of –

Q. Before we talk about that, I just –

A. Is that what you wanted?

(6 RT 940.)

urges that this remark did not violate the court's admonition for the jury to ignore the testimony Ripple earlier gave that she was testifying "at great risk to herself and great risk to her family." (See AOB 47-48; RB 69; 10 RT 1542.) The government urges that the remark was simply a comment upon the fact that Ripple was not a confidential informant. Respondent's remark does not make sense given that the prosecution refers to the danger to Ripple and to her family. The mention of "family" clearly relates the prosecution's remark to the earlier testimony the court ordered the jury to disregard. Respondent cites other testimony that witness Deborah Lankford spread information that Ripple was testifying against appellant. (RB 69.) However, nothing in this testimony is about Ripple's family. It is clear that the prosecution wanted to remind the jurors about the gang testimony and to the threats that had supposedly been made against Ripple's son. It is true that there were other places in the record where Ripple made reference to danger to her sons and her testimony. However, all those remarks are only plausible if one believes Ripple's testimony that appellant was in a gang; but, this was the testimony that the trial court excluded. As such, the prosecution's reference in argument was improper.

D. Reversal is Required

Respondent argues that none of the errors relating to gangs and the threats to Ripple require reversal because there was ample evidence to convict appellant. (RB 71.) Respondent does not deal with appellant's point that this gang and threat evidence was the kind of emotional evidence that would cause the jurors to disregard the other evidence, to mistrust appellant (whose testimony they had to evaluate) and to convict him solely

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because of violence in his past. This case was a credibility contest and the gang evidence unfairly tipped the contest towards the prosecution. (See AOB 51-52.)

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III.

THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S REQUEST FOR A PRETRIAL LINEUP DEPRIVED APPELLANT OF DUE PROCESS AND REQUIRES REVERSAL

Appellant demonstrated in his opening brief that his request for a pretrial lineup deprived him of his due process rights and requires reversal. (AOB 53-62.) The State urges that the request for a lineup was untimely and that there was no reasonable likelihood of misidentification. (RB 71.) It also argues that the lineup would not have resolved any disputes relating to identification and that, even if there was error, any error was harmless. (RB 71.) Respondent is wrong.

A. The Request Was Timely

In his opening brief, appellant cited the rule that ordinarily a motion for a line-up should be made as soon after arrest or arraignment as practicable" *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625), but argued that he had shown cause for the delay. (AOB 59-61.) Respondent does not address appellant's argument that because the request for a line-up was many months before the date of the trial, there could be no damage to the state's case, especially where, as in this case, many years passed since the crime with the prosecution doing nothing to bring the matter to a close. (AOB 55.) Instead, respondent urges that this case is controlled by *People v. Baines* (1981) 30 Cal.3d 143. In *Baines*, defense counsel gave as its reasons for delay a local court rule which required motions to be heard at pretrial conference, which was months later than the arraignment. (*Id* at p. 148.) *Baines* is not parallel to this case. Appellant does not maintain that counsel had deliberately delayed bringing the motion because of a local rule. Rather, he demonstrated that it was the complexity of the representation that caused him to delay bringing the motion. Part of the

delay was due to confusion about where appellant was being held and about his transfer from Southern to Northern California. Moreover, in *Baines* the Court held that the reason the request for a pretrial lineup had to be made close to the time of arraignment is because the value of a pretrial lineup is substantially diminished once a preliminary examination has been conducted and a direct confrontation between a defendant and his accusers has occurred. (*People v. Baines*, *supra*, 30 Cal.3d at p. 148.) In this case, there was no confrontation between appellant and the eyewitnesses, so there is no harm to the pretrial line-up being done later in the proceedings, especially where the request was still well before the date of trial. Appellant also argued that in this case an in court identification of the witness was anticipated, so that a line-up closer to the time of trial was an appropriate way to test the witnesses' recollection. (AOB 55.) Respondent does not address this argument at all.

B. Eyewitness Identification was Material and There was a Substantial Likelihood of Mistaken Identification

Respondent concedes that eyewitnesses identification was a material issue in this case, but asserts that there existed no reasonable likelihood of a mistaken identification which a lineup would tend to resolve. (RB 75.) Respondent argues that the fact that witness Redondo's composite photograph resembled appellant means that even if there was the possibility that there was a mistaken identification, a mistaken identification was not reasonably likely. (RB 76.) Respondent ignores the fact that Redondo changed her mind three times as to the identity of the assailant. (AOB 55.) Redondo's later statement that she was "sure" the photograph of appellant was that of the man she saw, does not undo the many other times she told the police she could make an identification. Respondent attempts to explain why Redondo might have misidentified other individuals, but the fact is she

was all to willing to pick people out without really being certain. Looking at all the changes Redondo made in her identification, Redondo just seems to be the type of person to try and be helpful, only to change her mind later. A lineup would have put all this doubt to rest. Witness Heuvelman identified two different suspects from a photographic lineup as bearing a resemblance to the man she saw, neither of whom was appellant. (5 RT 709-710.) At trial she identified appellant, who was obviously sitting in the defendant's chair. (See *United States v. Williams* (9th Cir. 1970) 436 F.2d 1166, 1168 [at trial "the defendant is conspicuously seated in relative isolation."].)

Respondent characterizes the identifications made by the witness Heuvelman as "absolutely certain." (RB 79.) This, of course, is a credibility judgement; to deny the eyewitness lineup the jury would have had to credit Heuvelman's and Redondo's testimony and discount their previous identifications. As appellant has already pointed out, the trial court does not have the discretion to determine witness credibility as a means of denying a lineup when the prosecution is not subject to such restrictions to get a lineup. (*People v. Hansel* (1991) 1 Cal.4th 1211, 1221; *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

C. Prejudice

Respondent characterizes appellant's argument that he would have benefitted from a lineup as "speculative." (RB 80.) Appellant will not here repeat his prejudice argument. However, he observes that respondent misunderstands the prejudice standard for federal constitutional error. Under *Chapman v. California, supra,* 386 U.S. at p. 24, when the state has denied appellant his right to due process and a fair trial, it must demonstrate that the erroneous denial of appellant's request for a pretrial lineup was

harmless beyond a reasonable doubt. Clearly, the burden is on the state to demonstrate that the error cause no harm. Even if the effect of the error is "speculative," as respondent contends, then this Court must reverse because the state has not demonstrated that the error is harmless.

* * * * *

IV.

THE IMPROPER PARADE OF WEAPONS AND GRAPHIC DEPICTION OF APPELLANT'S ARREST, BOTH UNRELATED TO THE PRESENT OFFENSE, CONSTITUTE REVERSIBLE ERROR

Appellant showed that it was reversible error to admit evidence of guns seized from appellant's car nine months after the murder on the grounds that they were in no way connected with the charged crime and were irrelevant and improper character evidence. (AOB 63-71.) The government urges that appellant has waived the claim by failure to make a proper objection. (RB 83.) It also argues that the evidence was admissible on the issue of Lorraine Ripple's credibility and for illustrative purposes (RB 84-87) and, in any case, the admission of the evidence was not prejudicial. (RB 87-88.) Respondent is wrong on all accounts.

A. Appellant's Objections Were Adequate to Preserve the Issue on Appeal

Respondent argues that since appellant's argument was only on relevancy grounds, any other objection is not preserved for appeal. (RB 80, 83.) Contrary to appellant's argument, respondent asserts that an objection would not have been futile, noting that the "totality of the record" shows that it would not have been. (RB 83.) Respondent's assertion is a bare one as it does not point to anything in the record, in totality or not, that shows that the objection would not have been futile. As appellant pointed out (AOB 64, fn. 32) the trial court denied the objections made both before Rubino's testimony and after his testimony. It is hard to see what difference an objection made during his testimony might have made. Respondent points to places in the record where the court encouraged a stipulation and where it had the prosecution re-characterize a question (RB

83), but neither of these items had anything to do with the officer's testimony about the guns and so are not relevant.

Respondent asserts that appellant has waived any claim that the evidence was inadmissible character evidence. (RB 80, 83.) The State is responding to an argument appellant has not made. Appellant did not claim in his opening brief that the evidence had been admitted as improper character evidence. Rather, appellant's claim is that the evidence was irrelevant and that one of the prejudicial impacts of the admission of the evidence was that it could have been used be the jury to infer guilt based on appellant's bad character as a person who carried weapons. (See AOB 67.)[18]

B. The Evidence Was Not Admissible to Rehabilitate Ripple; Nor Was It Admissible as Illustrative

Respondent urges that the gun evidence was admissible because Ripple's credibility had been attacked by trial counsel, noting that evidence is relevant if it has any tendency in reason to prove or disprove a disputed

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[18] Appellant's counsel, although somewhat unclearly, made this point in his argument against the evidence. As he stated: "And what has gone before this jury has been trashed with 1101 character-type evidence without asking any chance to check it. And the court – us getting ambushed by this material, it's serious material. Gangs and Colombian cartels, and he's gone to kill the sons and Debby Langford is doing this. And it has – without any proof or offer of proof it has any connection to do -- that John Abel's behind this, Yet he bears the entire brunt in a case where one lady can't make an in court identification. The other lady witnessed a person before the crime occurred, then the last piece of evidence is somebody who has got an extensive felony record, and you know, is a female Al Capone. But you know if you trash Mr. Abel, the all that stuff clears up. . . . The jury's going to forget about that and focus on the character of Mr. Abel, which is not an issue here." (6 RT 962.) Later, trial counsel said: "It seems to me though that the court bringing in this detective in, who says he has contact with the defendant, again, we're pushed up cleverly against the edges of 1101A evidence again." (7 RT 983.)

fact (RB 83-84), which standard, respondent seems to believe gives the prosecution unlimited license to put on any evidence related to any topic Ripple testified about. First of all, the guns could not come in at all, neither as rebuttal nor on direct, because they were not relevant to the Miller homicide at all. These guns had nothing to do with the homicide for which appellant was on trial. However, even if relevant, evidence cannot come in as rebuttal, if it "unduly magnif[ies] certain evidence by dramatically introducing it late in the trial." (*People v. Mayfield* (1997) 14 Cal.4th 668, 761.) Relevant evidence is also properly excluded if cumulative. (*People v. Raley* (1992) 2 Cal.4th 870, 913; *Dunbar v. Messin* (1963) 217 Cal.App.2d 240.) Moreover, prosecution rebuttal evidence must tend to disprove a fact of consequence on which the defendant has introduced evidence. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1088.) In this case, the evidence from the detective magnified evidence of little or no consequence when evidence had already been introduced about the guns. As such, it should not have been admitted.[19]

Respondent also argues that the guns were admissible to illustrate Ripple's testimony because it showed what a .22 caliber handgun looked

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[19] Appellant's trial counsel in the context of his argument that the detective's gun testimony should not be admitted objected on grounds that the evidence brought undue attention to an insignificant issue. At 9 RT 983, defense counsel made the following request in relation to the gun evidence: "So, I ask the court to make a ruling that any further information beyond Ripple's statement and the fact that she identified those guns, and she has already said that the defendant had those guns, this is cumulative evidence that he had these guns and these are not the guns, of course, that were used in the homicide." In response to a court question about why he should not permit the gun evidence on the grounds that it was relevant to Ripple's credibility, defense counsel stated: "I think the reason you shouldn't is because of the, you know, this – [¶] the emotional temperature of the case keeps heating on outside issues. But I think the reason you shouldn't, this is pretty superfluous." (9 RT 984.)

like. This is not persuasive. Defense counsel would have had no objection to evidence of any old .22 coming in to show that Ripple knew what these guns looked like. It was the fact that these guns were in the possession of appellant that made their admissibility objectionable. The detective's testimony was about finding the guns in appellant's car. This testimony did not go to the illustrative value of the evidence.

C. Admission of the Gun Evidence Was Prejudicial

Respondent argues that the evidence was not prejudicial in light of the other evidence offered against him. Respondent has merely asserted that this is true without any argument. Most importantly, respondent does address appellant's argument that he was particularly prejudiced by the introduction of evidence that he was in possession of a .22 weapon because the actual murder weapon in this case, also a .22 caliber weapon, was never recovered. (4 RT 531.) Showing that appellant had possession of a similar .22 caliber weapon implied guilt by association with the same type of weapon – thus implying to the jury that the prosecution had forensic evidence connecting appellant to the crime, when in fact it did not. Respondent's almost nonchalant assertion that there was no prejudice fails to acknowledge the dramatic nature of the evidence. With this evidence, the prosecution led jurors to believe that since appellant was the type of person to be so heavily armed and dangerous as to need nine law enforcement officers with guns drawn to arrest him, he was the type of person who would be guilty of murder.[20]

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[20] In a footnote, respondent asserts that appellant has waived any objection to the prosecution's reference to the gun evidence. Here, as argued above (see fn. 16, *supra*) appellant was using the prosecution's argument to show the prejudicial impact of admitting the detective's gun evidence. To this extent, because appellant is not claiming error, it is

(continued...)

V.

PREJUDICIAL VICTIM IMPACT EVIDENCE THAT APPELLANT "KILLED" THE VICTIM'S BROTHER VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND HIS DEATH JUDGMENT MUST BE REVERSED

Appellant showed that the testimony of the victim's mother that appellant "killed" Bobbie Miller (who, in fact, later died of heart disease) when he killed Armando Miller violated his constitutional rights and that his death sentence must be reversed. (AOB 73-79.) Respondent argues that appellant has waived this argument, that the evidence was admissible, and that, even if properly admitted was not prejudicial. (RB 88.) Respondent errs.

A. The Issue is Not Waived

Respondent first argues that appellant has waived the issue. It faults appellant for failing to ask for an admonition. Respondent acknowledges that the trial court denied appellant's request to strike the evidence; it acknowledges that the trial judge denied appellant's motion to strike; and it acknowledges that the trial judge stated that he believed that the evidence was admissible as part of the "family's hardship." (RB 88-89.)[21] Yet, in spite of this it argues that appellant had the obligation to ask for an admonition to preserve an appellate issue. What possible difference would the request for an admonition have made? The trial judge said that he

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[20](...continued)
immaterial that appellant's trial counsel failed to object to the remarks.

[21] Respondent implies that appellant did not clearly make a motion to strike the testimony. (RB 88.) However, the trial court clearly took it as one. It is the trial court's action that makes it clear what is apparently not clear to respondent: appellant's counsel found the testimony objectionable. He simply did not wish to object to the testimony of the victim's mother in front of the jury.

thought the evidence was admissible. He surely would have refused to tell the jury to ignore evidence he believed was admissible. Respondent is asking for an empty gesture to preserve an important appellate issue. The law requires no such thing. (*People v. Hill* (1998) 17 Cal.4th 800, 820 and *People v. Zambrano* (2004) 124 Cal.App.4th 228, 236.)

B. The Mother's Testimony About the Death of the Brother Was Not Admissible as Victim Impact Testimony

Respondent next questions appellant's argument that Mrs. Miller's testimony that appellant had "killed" two of her sons was inadmissible at the penalty phase, arguing that the mother's statement would have been understood by the jury as simply as a statement of her grief, not as a statement that appellant was responsible for her second son's death. (RB 90-91.) In response, appellant asks only that this Court look at the exact language of Mrs. Miller's statement: "you know, he [appellant] don't just kill me one son he kill me two sons [sic]." (11 RT 1958.) It is impossible not to view this language as Mrs. Miller's statement that appellant had killed her second son. It was not just a statement that she was mournful that she had lost the second son; she held appellant responsible. It is clear that the mother thought that appellant had murdered both sons, one directly, and one indirectly by fatally aggravating his heart problem.[22]

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[22] The rest of Mrs. Miller's testimony about her son makes this clear. The prosecution asked her if the death of her son Armando had been difficult. She answered:

"A. Yes, very difficult because we just not lost one sone, we lost another one, Bobby. He got real hurt because he love Armando and both of them have things to do, you know, they're all excited, oh, yeah, we gonna do this, we gonna do that. They want to work they want to do some good things and all arranged.

So Bobby got hurt in his heart. He got so much that, you know, that

(continued...)

Appellant is not here disputing the admissibility of the effect of the death of her son on the mother. This Court has held that the impact of acts on the victim's family is admissible at the penalty phase under Penal Code section 190.3, subdivision (a), as a circumstance of the crime. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1171.) Rather, appellant disputes the admissibility as victim impact evidence of a supposed additional criminal consequence of appellant's act under the guise of victim impact evidence. If the prosecution had had evidence that the shooting of Armando Miller caused the death of the Miller brother, by whatever means, appellant could have been charged with the homicide of the brother. In that case the prosecution would have had to prove beyond a reasonable doubt the defendant's act was a proximate cause of the death of the brother (*People v. Gardner* (1995) 37 Cal.App.4th 473, 478, 479) and would have had to prove beyond a reasonable doubt that appellant's act set "in motion a chain of events that produce[d] as a direct, natural and probable consequence . . . the [death] and without which the [death] would not [have] occur[ed]." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 48, citing CALJIC No. 3.40 (1992) rev.)

If the prosecution had offered the homicide of the Bobby Miller as "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or

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[22](...continued)
he can't trust, who could do this to his brother so this make him sick for his heart. It come more because like they say, you have healthy mind, healthy heart.

So, you know, he don't just kill me one son he kill me two sons.
The prosecution followed up:

Q. So your son, Bobby, eventually died of heart problems?

A. Yes, uh-huh."

(11 RT 1958.)

violence" under Penal Code section 190.3, subdivision (b), that the defendant engaged in the alleged criminal activity would have had to have been established beyond a reasonable doubt, and the trial judge would have had to so instruct the jury. (*People v. Champion* (1995) 9 Cal.4th 879, 949; *People v. Phillips* (1985) 41 Cal.3d 29, 65, 84.) The prosecution would have been required to specify the prior crimes which it complains the defendant committed. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-56, fn. 21.) In fact, the prosecution would not even have been able to put the evidence on unless there were evidence of criminal activity "that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt." (*People v. Griffin* (2004) 33 Cal.4th 536, 584.)

As it was, by introducing the notion that appellant was responsible for the death of Bobby Miller as evidence of the circumstances of the crime under Penal Code section 190.3, subdivision (a), the jury could rely upon this as aggravating evidence, and sentence appellant to death on the basis of such evidence without any assurance that the jury had found that there was evidence to show that appellant was actually responsible for Bobby Miller's death. This is because there is no requirement that a jury find beyond a reasonable doubt that evidence offered as victim impact evidence is a "circumstance of the crime." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.) Consideration of such other crimes evidence without the protection of an instruction creates the danger of an unreliable penalty determination. (*People v. Michaels* (2002) 28 Cal.4th 486, 539.)

Yet this Court has long held that to qualify as aggravation under section-190.3, subsection (b), the crimes of the defendant must be proved beyond a reasonable doubt. It is long-standing precedent "[t]hat a defendant during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes only when the

commission of such other crimes is proved beyond a reasonable doubt. [Citations.]" (*People v. Stanworth* (1969) 71 Cal.2d 820, 840; *People v. Robertson* (1982) 33 Cal.3d 21, 53-55.) Since there is no requirement that "circumstances of the crime" be proved beyond a reasonable doubt, clearly the meaning of the term was not meant to extend to evidence of other crimes., such as the indirect killing of Bobby Miller belong either in the guilt phase or in the domain of 190.3, subdivision (b). As such, it was error to admit the evidence.[23]

Respondent cites this Court's cases stating that victim impact evidence is admissible, even in those cases where the evidence is about traits of the victim, or the victim's family, which the defendant could not have known anything about. (RB 92, citing *People v. Pollack* (2004) 32 Cal.4th 1153, 1183.) Appellant concedes that this Court has held admissible as victim impact evidence traits of the victim which were unknown to the defendant and that it has held admissible traits of the victim's family. However, he submits that this is an instance of a trait which was unknown to the defendant of someone who was not a victim, but rather a member of the victim's family. This goes too far.

Respondent cites *People v. Brown* (2004) 33 Cal.4th 382, 398, as parallel to this case. (RB 91.) In that case, at the page cited by respondent, this Court held that a brother's saluting a grave and a father not going on any more fishing trips were emotional understandable reactions to a death and were thus admissible as evidence of the circumstances of the crime under section 190.3, subdivision (a). *Brown*, however, did not uphold the

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[23] Should this Court hold that the evidence that appellant killed Bobby Miller was admissible as factor (b) evidence, it was still error to admit the evidence without an instruction that the jury had to find the facts of this crime beyond a reasonable doubt.

admissibility under that subdivision of testimony that a defendant was responsible for the homicide of another person, of which the defendant could have had no knowledge. Appellant urges that the evidence in this case goes beyond that in *Brown* and he urges that hold the evidence in this case as inadmissible.

C. Respondent Cannot Show That the Evidence Was Not Prejudicial

Respondent urges that the testimony that appellant was responsible for a second homicide was not prejudicial because it was not so emotional as to render the penalty phase unfair. (RB 91.) It also argues that the prosecution's argument in closing that the jury should not consider Mrs. Miller's statement that appellant killed two of her sons as a evidence that Bobby Miller's death was caused by appellant, cures any prejudice from the statement. (RB 93.) Respondent is not correct.

First, this Court has in other cases considered the prejudice of the consideration of other crimes evidence. In *People v. Robertson, supra*, 33 Cal.3d at p. 54, this Court held the error in admitting evidence of other crimes at the penalty phase without an instruction that the jury had to find beyond a reasonable doubt that the defendant had committed those cases was prejudicial, reasoning that the prejudice from other crimes "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*Ibid*, citing *People v. Polk* (1965) 63 Cal.2d 443, 450 [failure to give an instruction that the other crimes evidence had to be proved beyond a reasonable doubt was reversible error].) Second, turning to respondent's argument that any error in admitting the evidence was cured by the prosecution's statements regarding the evidence, this Court ordinarily presumes that the jury followed the Court's instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 717 ["When

argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'"] In this case, the jury was instructed that it could consider as aggravation evidence of the circumstances of the crime. (3 CT 1036-1036(A); 12 RT 2133-2135; CALJIC No. 8.88.) All of Mrs. Miller's testimony was offered as evidence of circumstances of the crime, including the statements of which appellant complains. It is clear that Mrs. Miller believed that appellant was responsible for the death of both of her sons. It is likely indeed that the jury so considered the evidence of a grieving mother in the manner she clearly meant it – no matter what the prosecution argued.

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VI.

APPELLANT WAS DENIED HIS DUE PROCESS RIGHTS BY THE UNJUSTIFIED PRE-CHARGING DELAY

Appellant showed in his opening brief that there was a precharging delay which prejudiced his ability to put on his defense and that reversal is thus required. (AOB 80-89.) Respondent believes that there was no deliberate or negligent delay and that, even assuming there was a delay, there was no prejudice. (RB 94-108.) Appellant responds to all these contentions.

A. Appellant Was Prejudiced by the Delay

Appellant showed that he was prejudiced by the delay in bringing the charges in his case for four reasons: 1) the faded memory of James Gano; 2) the faded memory of witness Elaine Tribble; 3) appellant's own faded memory; and 4) the destruction of telephone records which would have corroborated appellant's alibi. (AOB 80-85.) Respondent argues first that appellant's detailed testimony shows that his memory had not faded. (RB 101.) Respondent's discussion of appellant's testimony is incomplete. So, although appellant remembered some critical information, there was other critical information he could not remember. For instance, part of his alibi defense was that he might have driven his friend Debbie Lankford to a methadone clinic. (9 RT 1464.) However, he was unable to remember the exact date, a fact critical to evidence of the incident supporting his alibi. Also, appellant had no notes or calendars from four years prior, something which he might have had if the prosecution had brought the case without delay. (9 RT 1452.) Also although appellant remembered a meeting with Elaine Tribble, he could not recall the name of a second person he saw about a possible loan (9 RT 1456-1457), information he would likely have

recalled (or had written documentation of) had the case not be unduly delayed.

Respondent also claims that James Gano's memory was not faded – and even it was, a better memory would not have served appellant since Gano's testimony was largely harmful to him. (RB 101-102.) Respondent ignores the many times at the preliminary hearing that Gano testified "I don't recall" or "I don't remember," often in reference to his inability to recall specific information about critical conversations which allegedly occurred with appellant. (See 1 CT 106-107, 110, 111-116, 119-123, 128-138, 140, 142-143.) His forgetfulness made it impossible for appellant to establish anything from Gano to corroborate his alibi. Respondent is correct that there was testimony Gano might have given that would have been harmful to appellant, but since Gano was a primary player in the mortgage company appellant was working for Gano was still critical to corroborating the alibi. It does not make a difference to the analysis that Gano was also a prosecution witness. Recall that this Court has held that the fading memory of a *prosecution* witness in a case which relied almost entirely on eyewitness identification made a fair trial impossible. (*People v. Hill* (1984) 37 Cal.3d 491, 498.)

Respondent next asserts that Elaine Tribble's memory gaps and the missing mortgage documents were not prejudicial. It asserts that Tribble might not have remembered the dates critical to appellant's alibi had the delay not occurred and the missing phone records would not necessarily have confirmed that appellant had been out to see Tribble about the loans. (RB 101-102.)[24] By separating out the two kinds of missing evidence

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[24] Respondent goes so far to assert that the phone records would *not* have confirmed that there was a phone call, because, in respondent's (continued...)

(Tribble's better memory and the phone records), respondent has unfairly increased appellant's burden. Appellant's point is that if there had been the no delay then he would have had the phone records and if he had the phone records, they could have been used to refresh Tribble's memory.

Furthermore, respondent's characterization of the issue implies that appellant must establish precisely what the evidence would have shown had the case been promptly charged. This is an impossible burden: if appellant knew exactly what the missing documents and testimony showed, he would have put the evidence on, in which case he would not need to bring this claim. The prejudice standard, as articulated by this Court, is not so onerous. Long ago, this Court stated in *People v. Archerd* (1970) 3 Cal.3d 615, 640, that prejudice may be shown by "the loss of a material witness or other missing evidence or fading memory caused by lapse of time." There is nothing in this standard about appellant having to specify precisely what evidence he is missing. It is enough that he can establish that the passage of time hindered him from putting on a defense. (See also *People v. Hartman* (1985) 170 Cal.App.3d 572, 580 [prejudice was in part that the witnesses who might have been able to confirm alibi were unlikely to have remembered the events.].)

B. The Delay Was Not Reasonable

The State attempts to justify the delay on this case by asserting that it was simply a matter of the police trying a new and better tactic: Detective Solis tried one tactic which did not work out; then, Detective Tarpley tried another, which did. (RB 107.) Respondent does not address the fact that

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[24](...continued)
view, Appellant's testimony about the phone call was fabricated. (RB 105.) Of course, had the case been brought in a timely matter, the records establishing whether there was or was not a phone call would have been available and there would be no need for respondent to speculate.

there were months when the case was "suspended" and on "inactive" status when there was no police work – good or bad – done on the case. This action at least constitutes negligence on the part of law enforcement. Respondent suggests, as part of this argument, that there was no deliberate attempt to sabotage appellant's case simply because different police investigators tried different techniques; however, appellant's showing negligence on the part of law enforcement is sufficient to establish that the delay was not reasonable. As such, his conviction must be reversed due to the unreasonable delay in bringing the indictment.

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VII.

THE TRIAL COURT PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY INSTRUCTING THE JURY ON FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH MALICE MURDER

Appellant asserts that because the information in his case charged him with only murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 90-97.) Respondent initially asserts that the contention is waived because appellant failed to object at trial. (RB 109.) Respondent then asserts that even if this claim is cognizable, it has been rejected by this Court in the past. (RB 109-112.) The claim is cognizable and the cases cited by respondent rely upon faulty analysis.

A. Appellant Has not Waived the Issue

Respondent asserts that appellant's claim is waived because of his failure to object at trial. Appellant's failure to object to the trial court's instructions is of no moment. Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel (*People v. Williams* (1999) 21 Cal.4th 335, 340), and since no accusatory pleading charging appellant with first degree murder had been filed, the court lacked subject matter jurisdiction to proceed with that charge (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368).[25] Respondent cited *People v. Kipp* (2001) 26 Cal.4th

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[25] In People v. *Toro* (1989) 47 Cal.3d 966, overruled on other grounds in *People* v. *Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3, this Court recognized a limited exception to this rule. *Toro* held that defense counsel could waive the jurisdictional bar in order to allow the defendant to be convicted of a lesser but not included offense. The exception was designed for the defendant's benefit, to provide the jury the broadest range of options supported by the evidence and allow the defendant to be convicted of a less (continued...)

1100, 1131-1132, *People v. Memro* (1995) 11 Cal.4th 786, 859, and *People v. Diaz* (1992) 3 Cal.4th 495, 556, for the proposition that appellant has waived any due process claims based on notice by his failure to object. However, since appellant's claim is based on the trial court's jurisdiction, and not on notice to the defendant, these cases are immaterial.

B. Respondent Has Cited Case Law Which is Fundamentally Confused About the "Elements" of a Crime

According to respondent, and some of the cases on which respondent relies, malice murder and felony murder are not two different crimes but rather merely two theories of the same crime with different elements. By adapting this proposition, respondent asserts that this Court in *People v. Hughes* (2002) 27 Cal.4th 287, 369-370, and *People v. Kipp, supra*, 26 Cal.4th at p. 1131, correctly held that there was no problem with failing to charge felony murder in the information because felony murder is not a distinct crime from premeditated murder. (RB 110.) However, the position in these and other cases from this Court embodies a fundamental misunderstanding of how, for the purpose of constitutional adjudication, the courts determine if they are dealing with one crime or two. Comparison of the act committed by the defendant with the elements of a crime defined by statute is the way our system of law determines if a crime has been committed and, if so, what crime that is. "A person commits a crime when his or her conduct violates the essential parts of the defined offense, which

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[25](...continued)
serious offense if that is what the evidence showed. The exception has no application here, where the uncharged offenses were not lesser offenses but ones which, unlike the charged offense, could subject the defendant to a sentence of death.

we refer to as its elements." (*Jones v. United States* (1999) 526 U.S. 227, 255 (dis. opn. of Kennedy, J.).)

Moreover, comparison of the elements of two statutory provisions is the traditional method used by the United States Supreme Court to determine if the crimes at issue are different crimes or the same crime. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the appellant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections did describe different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.) Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment. (*United States v. Dixon* (1993) 509 U.S. 688, 696-697.)

People v. Dillon (1983) 34 Cal.3d 441, which was and still is the controlling interpretation of the felony murder law, properly applied the *Blockberger* test for determining the "same offense" when it declared that "in this state the two kinds of murder are not the 'same' crimes." (*Id.* at p. 476, fn. 23.) Malice murder and felony murder are two crimes defined by separate statutes, for "each provision requires proof of an additional fact which the other does not." (See *Blockberger v. United States*, *supra*, 284

U.S. at p. 304.) Malice murder requires proof of malice (Pen. Code, § 187), and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not.

Therefore, it is incongruous to say, as this Court did in *People v. Silva* (2001) 25 Cal.4th 345, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which appellant relies meant "only that the *elements* of the two kinds of murder differ; there is but a single statutory offense of murder." (*People v. Silva*, *supra*, 25 Cal.4th at p. 367, emphasis added.) If the *elements* of malice murder and felony murder are different, as *Silva* acknowledges they are, then malice murder and felony murder are different crimes. (See *United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

"Calling a particular kind of fact an 'element' carries certain legal consequences. [Citation.]" (*Richardson v. United States* (1999) 526 U.S. 813, 817.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The same consequence follows in a California criminal case; the right to a unanimous verdict arises from the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

In addition, "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. [Citations.]" (*Jones* v. *United States*, *supra*, 526 U.S. at p. 232.) In this case, where appellant was charged with one crime, but the jury was

instructed that it could convict him of another, that rule was breached as well, violating appellant's rights to due process, a jury determination of each element of the charged crime, adequate notice of the charges, and a fair and reliable capital guilt trial.

C. This Court Has Misapplied *Apprendi*

Appellant asserted that regardless of this Court's interpretation of *Dillon*, the United States Supreme Court opinion in *Apprendi v. New Jersey* (2000) 530 U.S. 466 required a different result. Respondent disagrees and in support of its position cites *People v. Nakahara* (2003) 30 Cal.4th 705. In that case, this Court reiterated its position that felony murder and premeditated murder are not distinct crimes and need not be separately pled. (*Id.* at p. 712) Further, this Court declared that it was not persuaded otherwise by *Apprendi*. In that case, the United States Supreme Court declared that any *fact* that increases the maximum penalty for a crime, other than a prior conviction, must be formally charged, submitted to the fact finder, treated as a criminal element, and proved beyond a reasonable doubt. (*Id.* at pp. 712-713.) According to this Court, "we see nothing in *Apprendi* that would require a unanimous jury as to the particular *theory* justifying a finding of first degree murder. [Citation.]" (*Id.* at p. 713.)

Appellant has explained why his argument cannot be avoided by recharacterizing the facts necessary to invoke the felony-murder rule as "theories" rather than elements of first degree murder. (AOB 92-94.) Yet, this Court does exactly that in *Nakahara*. (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 713.)

Under United States Supreme Court precedent, a different analysis is used for facts which are not elements in themselves but rather theories of the crime, alternative means by which elements may be established. A discussion in *Richardson v. United States* (1999) 526 U.S. 813 explains this

distinction. There, the United States Supreme Court cited *Schad v. Arizona* (1991) 501 U.S. 624 as an example of a case involving means rather than elements.

> The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad v. Arizona*, 501 U.S. 624, 631-632, ... Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement – a disagreement about means – would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force. [Citation.] (526 U.S. at p. 817.)

This case, in contrast, involves elements – not the theories, means, or "brute facts" that may at times be relied upon to establish the elements. Malice has always been considered an essential element of malice murder; the statutory definition in Penal Code section 187 makes that clear. Similarly, the commission or attempt to commit a felony listed in Penal Code section 189, and the specific intent to commit that felony, have always been considered elements of first degree felony murder. As this Court has acknowledged, the elements of these two crimes are not the same. (*People v. Silva*, *supra*, 25 Cal.4th at p. 367; *People v. Hughes*, *supra*, 27 Cal.4th at pp. 368-370.)

Recent opinions by this Court offer further support for appellant's argument. In *People v. Seel* (2004) 34 Cal.4th 535, the defendant was convicted of attempted premeditated murder. (Pen. Code, §§ 664, subd. (a); 187, subd. (a).) The Court of Appeal reversed the finding of premeditation and deliberation due to insufficient evidence and remanded for retrial on that allegation. In holding that double jeopardy protections barred retrial on

the premeditation allegation under *Apprendi v. New Jersey* (2000) 530 U.S. 466, this Court endorsed the view that "'[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."'" (*People v. Seel, supra*, 34 Cal.4th at p. 549, citing *Apprendi v. New Jersey, supra*, 530 U.S. at p. 493.) Intent, of course, is an element that makes malice murder a different crime than felony murder.

In *Burris v. Superior Court* (2005) 34 Cal.4th 1012, this Court held that under Penal Code section 1387, the dismissal of a misdemeanor prosecution does not bar a subsequent felony prosecution based on the same criminal act when new evidence comes to light that suggests a crime originally charged as a misdemeanor is in fact graver and should be charged as a felony. (*Id.* at p. 1020.) In reaching this conclusion, the Court compared the elements of the offenses at issue: "When two crimes have the same elements, they are the same offense for purposes of Penal Code section 1387." (*Id.* at p. 1016, fn. 3, citing *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, 1118 [applying "same elements" test to determine whether new charge is same offense as previously dismissed one for purposes of section 1387].) The negative implication is obvious: when two crimes have different elements, they are *not* the same offense.

Seel and *Burris* thus reaffirm the fact that because premeditated murder and felony murder have different elements in California, they are different crimes, not merely two theories of the same crime. The jury should not have been permitted to convict appellant of murder without being required to unanimously determine that the crime was either a premeditated (malice) murder under Penal Code section 187 or felony murder under Penal Code section 189. Appellant's first degree murder conviction and the entire judgment must therefore be reversed.

VIII.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S AUTOMATIC MOTION FOR MODIFICATION OF THE VERDICT

Appellant showed that the trial court erred when it used the wrong standard for considering the circumstances in mitigation and when it heard other statements from victim family members prior to ruling on the motion for modification under Penal Code section 190.4. (AOB 98-106.) Respondent asserts that the issue should not be considered because it was waived, that the wrong standard was not used and that record does not show that the trial judge considered statements not presented to the jury. Respondent also asserts that appellant was not prejudiced. Respondent is incorrect on all fronts.

A. This Court Should Consider the Issue Without Appellant's Objection

Respondent cites this Court's case law that failure to object waives both appellant's claim that the trial court used the wrong standard and his claim that it improperly considered victim's statements. (RB 113-114, citing *People v. Rogers* (2006) 39 Cal.4th 826, 906-907; *People v. Kennedy* (2005) 36 Cal.4th 595, 638.) This Court should nevertheless consider the claim. The reviewing Court may consider a claim despite a lack of objection when the error may have adversely affected a defendant's right to a fair trial. (*People v. Hill, supra*, 17 Cal.4th 800, 843, fn. 8.) This is exactly what occurred in appellant's case. The trial court upheld appellant's death sentence, when, had the trial judge applied the correct standard using only the evidence before the jury, he would not have.

B. The Trial Court Applied the Incorrect Standard

In his opening brief appellant pointed to the trial judge's statement that appellant had not proved any mitigating factors "beyond a reasonable

doubt" and showed that this was a violation of the court's responsibilities under Penal Code Section 190.4. The State characterizes the trial judge's statement that mitigation had not been proved beyond a reasonable doubt as a simple "misstatement" or "minor slip of the tongue" on the part of the judge. (RB 115, 116.) It argues that when the record is considered as a whole it is clear that the trial judge knew what his responsibilities were and that he did not erroneously require appellant to have shown mitigating circumstances beyond a reasonable doubt. (RB 115.) Respondent is presumably relying upon the fact that the trial judge stated what he believed his responsibilities were under Penal Code Section 190.4, subdivision (e). However, what respondent does not note is that the judge actually misread the code section: He stated that he was bound to use the definition of "aggravation" and "mitigation" as "defined in section 190.4." (12 RT 2170.) However, aggravation and mitigation are not defined in section190.4, and section 190.4 does not say that they are. The terms are defined in section 190.3, which is what section 190.4 says. This error suggests that the trial judge had not carefully read the section. It follows that this Court cannot assume that just because he read, or more specifically, misread, the statute on the record, that the judge understood what his responsibilities were.

C. The Trial Judge Erred in Considering Statements From Victims Not Presented at Trial

Respondent urges that although the trial court heard from victim family members Holly Daniels and America Miller before it made it decision on appellant's 190.4 motion (which it acknowledged was not the proper procedure), there is no indication that the trial court was influenced by these statements so. Respondent argues without an indication on the record that the trial court was improperly influenced by the statement, this

Court must assume that it was not. (RB 116.) Respondent is right that this Court cannot assume that the trial court was influenced by improper material without an indication on the record; however, it is wrong that there is nothing on the record to indicate that he improperly used the new victim evidence. In fact, the trial judge explicitly asked both parties if there was additional material they wished to present before he ruled.[26] In response, appellant made a statement asserting his innocence. The prosecutor, Mr. Rosenblum, had Holly Daniels and America Miller make statements. (12 RT 2172-2176.) Since the evidence was put on in response to an explicit request to the parties by the trial court to put on any final information it wanted considered as part of the modification motion, this Court should assume that the trial court did in fact consider the information.

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[26] The exact language of the judge's statement was: "Now, do either counsel, before I proceed, wish to be heard further *on this motion for modification of the jury verdict as to the selection and determination of which of the penalties is appropriate."* (12 RT 2172, italics added.)

IX.

THIS COURT MUST INDEPENDENTLY REVIEW LORRAINE RIPPLE'S CONFIDENTIAL PSYCHIATRIC RECORDS TO ENSURE THE ACCURACY OF THE TRIAL COURT'S RULING

During record correction proceedings, appellant attempted to obtain copies of the medical and psychological records for witness Lorraine Ripple. (2 CT 614-616; 6 RT 939; see AOB 107-109.) The trial judge refused to turn the records over to the defense. Instead, the judge inspected those records and turned over a single paragraph of information from the records. (10 RT 1581.) The trial court ordered Ripple's records sealed and they became part of the certified appellate record. (2 CT 641; 10 RT 1581.)[27] Appellant urged this Court to independently review Ripple's psychiatric records to ensure the accuracy of the trial court's ruling. Respondent does not dispute that this is the proper procedure for appellant to obtain this Court's review of the record. (RB 119.) However, respondent misleadingly cited this Court's opinion in *People v. Webb* (1993) 6 Cal.4th 494, 516, for the proposition that a ". . . defendant may not have a constitutional right to examine psychiatric records even if the records are material to the case." (RB 122.)

This is not accurate – or, at least, is incomplete. This Court in *Webb* did observe that "[s]imply stated, it is not clear whether or to what extent the confrontation or compulsory process clauses of the Sixth Amendment grant *pretrial* discovery rights to the accused. (*Ibid*, italics added.) However, as the quotation from the case shows, *Webb* was about whether there were pretrial discovery rights that flowed from the Sixth Amendment.

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[27] Appellant attempted to obtain a copy of the records during record correction proceedings, but appellate counsel's request for the records was denied. (1 Clerk's Suppl. Transcript (1/20/04) 70.)

It does not say, as respondent implies, that there is doubt about whether a defendant has a right to privileged records that are material to his case. In fact, in *Webb* this Court in defending the trial court's actions noted that the trial judge disclosed "[a]ny information having any arguable bearing on defendant, the capital crimes, and [the witness'] ability to testify truthfully and accurately was disclosed. (*Ibid.*)

Respondent also suggests that the test this Court must apply when reviewing the records is whether ". . . Abel's need for the balance of the records outweighs Ripple's constitutional right to privacy." (RB 122.) Calling the Court's task a "balancing test" is misleading. It is well-recognized that ". . . that the right to privacy is not absolute, but may yield in the furtherance of compelling state interests." (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.) Appellant has a Sixth Amendment right to obtain at trial the information in Ripple's records necessary to make cross-examination effective. (*Davis v. Alaska* (1974) 415 U.S. 308, 320.) If there was information in Ripple's psychiatric files that was relevant, or could lead to material information, pertaining to Ripple's ability or motivation to testify truthfully or accurately, that information had to be disclosed, regardless of the strength of Ripple's privacy rights. Put otherwise, if there is information that is necessary to appellant's right to a fair trial – for whatever reason -- then Ripple's right to privacy must yield without any balancing. (See *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1691-1692, citing *People v. Reber* (1986) 177 Cal.App.3d 523, 532. [No error in non-disclosure of records using standard that they contained no information whose release was potentially essential to vindicate defendant's right to a fair trial and to confront a witness].)

A confrontation clause violation arises if the trial court failed to disclose impeaching information to the defense that would have given a

reasonable jury a "'significantly different impression of [the witness's] credibility'" (*Murdoch v. Castro* (9th Cir.2004) 365 F.3d 699, 705, citing *Olden v. Kentucky* (1988) 488 U.S. 227, 232.) All material evidence from the file must be disclosed. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine the confidence in the outcome." (*United States v. Bagley* (1985) 473 U.S. 667, 682 (opinion of Blackmun, J); *Pennslyvania v. Richie* (1987) 480 U.S. 39, 57.) As such, this Court must review the medical and psychiatric records, determine whether they contain any impeachment or exculpatory evidence, and then determine whether had that information been disclosed there is a reasonable probability of a better outcome for appellant.

Respondent also asserts that the trial court "properly exercised its discretion" in releasing some, but not all of the records. (RB 122.) This suggests that the correct standard for this Court in reviewing the records is whether the trial court "abused its discretion" in disclosing some, but not all, of the records, and that this court can conclude that there was no error even if there were some records in Ripple's file that are material, so long as the trial court did not "abuse his discretion."[28] This is not the correct standard. Instead this Court must itself review the records and determine whether there was information in the file meeting the materiality standard, i.e., material that should have been disclosed to the defense because this material would have given the jury a significantly different impression of the witness's credibility so that there is a reasonable probability that the

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[28] Appellant himself stated in his opening brief that the standard is whether the trial court "abused its discretion" in failing to turn over the record. (AOB 122.) This is not correct, as appellant now points out.

result of appellant's trial would have been different. In this regard, the standard of review is like that of a violation of the defendant's rights under *Brady v. Maryland* (1963) 373 U.S. 83, 87 when the prosecution fails in its duty to turn over exculpatory material to the defense. In *Brady* cases, this Court reviews the information itself to determine materiality.[29]

Finally, respondent urges that the failure to disclose additional evidence from the records is harmless under either *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18, 24, on the grounds that any additional impeachment of Ripple in the records would be cumulative. (RB 123-124.) This assertion is wrong-headed. Appellant's main thrust in challenging Ripple's testimony was to show that she was lying. However, he was unable, because he had no information about Ripple's psychological problems, to supply the jury with a reason why Ripple might lie about him and implicate him in this homicide; and, while appellant's argument is necessarily speculative given that the trial court has not provided appellant's counsel with access to Ripple's records, given the volume of the records (sixty pages) and the reasons trial counsel gave for needing the records (i.e., Ripple's suicide attempt, her letter about cutting off fingers and men's genitals and her delusional possessiveness towards appellant[30]), any information the records might have about Ripple's psycho-

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[29] Moreover, as this Court considers the issue of whether to release the records, it should also recognize a trial court's concomitant power to issue whatever protective orders are necessary should any further disclosure be compelled to preserve petitioner's rights to a fair trial. (See, e.g. *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 846; *Millaud v. Superior Court* (1986) 182 Cal.App.3d 471, 476.)

[30] Respondent asserts that appellant has incorrectly cited the record concerning the reasons trial counsel gave for needing a psychiatric (continued...)

pathology could have proved very useful in attempting to undermine the persuasiveness of Ripple's testimony. If appellant had had this information he might have been able to explain why Ripple lied about him. As such, should the records provide information about Ripple's psychological character, the failure to provide this information would not be harmless beyond a reasonable doubt. Ripple was almost the state's entire case because the eyewitnesses had been largely discredited and there was no physical evidence. So, anything showing that Ripple was manipulative, dangerous and untruthful would have caused the jury to discredit her testimony.

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[30](...continued)
examination for Ripple. (RB 121, fn. 69.) The letter appellant referred to is mentioned at 11 RT 1960-1966, not 7 RT 990-991, as cited in the opening brief. Respondent also asserts that Ripple's "emotional outbursts" were related to her fear regarding her sons. (RB 121, fn. 69.) Respondent ignores the fact that the trial judge himself called her "angry," not sad or fearful. (See 7 RT 990.)

X.

THE CUMULATIVE EVIDENTIARY ERRORS BY THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR AND RELIABLE DETERMINATION OF GUILT AND PENALTY

Appellant showed in his opening brief that the trial court denied his right to a fair trial by an accumulation of evidentiary errors. (AOB 113-122.) The State urges that appellant's claims are waived, that there were no errors and that, even if there were errors, there was no prejudice. (RB 125-135.)

A. Appellant's Claims Are Not Waived

Respondent believes any constitutional basis for the argument is waived because no constitutional basis for the objection was asserted at trial. (RB 125.) Respondent has neglected this Court holding in *People v. Partida* (2005) 37 Cal.4th 428. In that case, this Court held that if the appellate court is asked to address the constitutional violations that arise from trial court error's then those constitutional violations can be considered on appeal. (*Id.* at p. 435.) Here the appellate claims are exactly the same as the ones raised in the trial court; appellant is merely addressing the constitutional violations that arise from the trial court's errors. Moreover, appellant has claimed that it is the cumulative effect of the errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. An appellate court has the authority to review constitutional issues not raised in the trial court. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Brown* (1996) 42 Cal.App.4th 461, 471; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.) As this Court has held: "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. [Citations.]" *People v. Vera* (1997) 15 Cal.4th 269, 276 -277; accord,

People v. Saunders (1993) 5 Cal.4th 580, 592, 589 fn. 5; *People v. Valladoli* (1996) 13 Cal.4th 590, 606.)[31]

B. The Trial Court Improperly Permitted the Prosecutor to Use Leading Questions in Direct Examination of Heuvelman

Respondent first asserts that the questions to witness Heuvelman were not leading when one looks at the context in which the questions were asked. (RB127-128.) Respondent is correct that this Court should look at the context of the question to Heuvelman when determining whether the questions were impermissibly leading. However, respondent then truncates his presentation of the context of the question – thereby distorting that very context. Respondent correctly states that the prosecutor asked Heuvelman the following:

> And what did you tell the police department about the person, number six, in his resemblance?

(5 RT 710.)

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[31] Moreover, this Court has the discretion to consider appellant's claim should it choose to do so. As this Court has held: "Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to 'prevent[]' or 'correct[]' the claimed error in the trial court [citation] does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. *An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party.* ([Citation]; see, e.g., *People* v. *Berryman* (1993) 6 Cal.4th 1048, 1072-1076 [] [*passing on a claim of prosecutorial misconduct that was not preserved for review*]; *People* v. *Ashmus* (1991) 54 Cal.3d 932, 975-976 [] [*same*].) Indeed, it has the authority to do so. [Citation] .... Therefore, it is free to act in the matter. [Citation] *Whether or not it should do so is entrusted to its discretion.* [Citation]" (*People v. Williams* (1998) 17 Cal.4th 148, 161 fn. 6; italics added.) Also "An appellate court may note errors not raised by the parties if justice requires it. [Citations.] (*People v. Norwood* (1972) 26 Cal.App.3d 148, 152.)

Heuvelman answered:

> I said – there was one specific thing I said, that there was a marking on his face. And I said if this was a birthmark, that was definitely not him.

(5 RT 710-711.)

Then respondent writes that "Heuvelman further indicated that there was a 20% to 40% possibility of (number 6 being the person)." (RB 126.) However, respondent leaves out the actual exchange between the prosecutor and the witness. Here it is:

> Q. Did you tell the police that there was a possibility of 20 to 40 percent.
>
> A. Yes, sir.

(5 RT 711.) So, the government's statement that the witness "indicated" the percentage possibility that the suspect was the person she saw at the bank is misleading – because it left out the context. In fact, the prosecutor told her what the percentages were and she adopted the answer implicit in his question. When the question and the answer are seen it is clear that the prosecutor spoon fed the percentages to the witnesses and then got her to disclaim that she had never identified this other man as the person she saw. This is exactly the point appellant made in his opening brief. (See AOB 116.) Once the context is seen, it is clear that the trial court erred in overruling counsel's objection to the prosecution's leading question.

C. The Trial Court Improperly Restricted Detective Solis' Cross-Examination Regarding In-Field Identifications

Appellant argues that the trial court improperly prevented appellant's trial attorneys from questioning Detective Solis about an field identification of suspects other than appellant. Appellant has already addressed respondent's contention that questions about the field identification were on a collateral matter. (See pp. 24-25, *supra*.) Respondent also contends that

the trial judge's decision to restrict the questioning of the detective was discretionary and that appellant has not shown that the trial court abused its discretion. Respondent quotes *People v. Chatman* (2006) 38 Cal.4th 344, 372, for the proposition that to show a violation of the Sixth Amendment a defendant must show that the prohibited cross-examination would have produced a "significantly different impression" of the witnesses credibility. (RB 130.) Appellant has not claimed that the cross-examination of Detective Solis went to the credibility of Detective Solis. Rather, questioning Solis concerning other misidentifications which occurred contemporaneously with the crime would have afforded jurors a significantly different impression of Heuvelman's and Redondo's credibility. The prohibited cross-examination interfered with appellant's ability to present his theory of defense, which was that appellant was innocent and that the identifications of him were mistaken.

* * * * *

XI.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF

In his opening brief, appellant sets forth various deficiencies relating to the application of the California death penalty statute. Most particularly, appellant decries the statute's failure to assign a burden of proof regarding the aggravating factors and the overall penalty determination; the failure to impose a burden of proof beyond a reasonable doubt; the failure to require the state to bear at least some burden of persuasion at the penalty phase; and the failure to require juror unanimity on the aggravating factors. Appellant also complains of the misinstruction to the jury in this case that caused the defendant to carry some burden of proof; and of the failure to instruct the jury on the presumption of life imprisonment without parole as the appropriate sentence. (AOB 123-155.)

Rather than attempt to refute the arguments appellant sets forth in his opening brief, respondent merely notes that this Court has previously rejected these claims and urges the Court to decline appellant's invitation to reconsider its prior rulings. (RB 135-142.) Accordingly, the issues are joined and for the most part no extended reply is necessary.

However, respondent does assert that *Cunningham v. California* (2007) 549 U.S. 270 does not change this Court analysis. Appellant acknowledges that since respondent filed its brief this Court has held in *People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298, that *Cunningham* does not change this Court's holdings. Nevertheless, this Court has not considered the details of the *Cunningham* case. Appellant does so here, and urges this Court to reconsider its holding.

As appellant argues in his opening brief, the *Blakely* Court held that the trial court's finding of an aggravating factor violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than the maximum otherwise allowable for the underlying offense. In *Blakely,* the United States Supreme Court held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to a jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296, 303-304.)

In *Cunningham v. California, supra*, 549 U.S. 270, the United States Supreme Court considered whether *Blakely* applied to California's Determinate Sentencing Law. The question was does the Sixth Amendment right to a jury trial require that the aggravating facts used to sentence a non-capital defendant to the upper term (rather than to the presumptive middle-term) be proved beyond a reasonable doubt? The High Court held that it did, reiterating its holding that the federal Constitution's jury trial provision requires that *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, including the aggravating facts relied upon by a California trial judge to sentence a defendant to the upper term. In the majority's opinion, Justice Ginsburg rejected California's argument that its sentencing law "simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range" (*id.* at p. 289, citing *People v. Black* (2005) 35 Cal.4th 1238, 1254) so that the upper term (rather than the middle term) is the statutory maximum. The

majority also rejected the state's argument that the fact that traditionally a sentencing judge had substantial discretion in deciding which factors would be aggravating took the sentencing law out of the ambit of the Sixth Amendment: "We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." (*Id.* at p. 290.) Justice Ginsburg's majority opinion held that there was a bright-line rule: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. *Blakely*, 542 U.S., at 305, and n. 8, 124 S.Ct. 2531." (*Ibid.*)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (*People v. Farnam* (2002) 28 Cal.4th 107, 192; *People v. Duncan* (1991) 53 Cal.3d 955, 977-978; see also CALJIC No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in *Cunningham* dictates that California's death penalty statute falls under the purview of *Blakely*, *Ring*, and *Apprendi*.

In *People v. Prieto* (2003) 30 Cal.4th 226, 275, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 462, this Court held that *Ring* and *Apprendi* do not apply to California's death penalty scheme because death penalty sentencing is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." However, as noted above, *Cunningham* held that it made no difference to the

constitutional question whether the factfinding was something "traditionally" done by the sentencer. The only question relevant to the Sixth Amendment analysis is whether a fact is essential for increased punishment. (*Cunningham v. California*, *supra*, 549 U.S. at p. 290.)

This Court has also held that California's death penalty statute is not within the terms of *Blakely* because a death penalty jury's decision is primarily "moral and normative, not factual" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275), or because a death penalty decision involves the "moral assessment" of facts "as reflects whether defendant should be sentenced to death." (*People v. Moon* (2005) 37 Cal.4th 1, 41, citing *People v. Brown* (1985) 40 Cal.3d 512, 540.) This Court has also held that *Ring* does not apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn.14.)

None of these holdings are to the point. It does not matter to the Sixth Amendment question that juries, once they have found aggravation, have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be sentenced to death. What matters is that the jury has to find facts – it does not matter what kind of facts or how those facts are ultimately used. *Cunningham* is indisputable on this point.

Once again there is an analogy between capital and non-capital sentencing: a trial judge in a non-capital case does not have to consider factors in aggravation in a defendant's sentence if he or she does not wish to do so. However, if the judge does consider aggravating factors, the factors must be proved in a jury trial beyond a reasonable doubt. Similarly,

a capital juror does not have to consider aggravation if in the juror's moral judgement the aggravation does not deserve consideration; however, the juror must find the fact that there is aggravation. *Cunningham* clearly dictates that this fact of aggravation has to found beyond a reasonable doubt.[32] Because California does not require that aggravation be proved beyond a reasonable doubt, it violates the Sixth Amendment.

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[32] The United States Supreme Court in *Blakely* as much as said that its ruling applied to "normative" decisions, without using that phrase. As Justice Breyer pointed out, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 295 (dis. opn. Of Breyer, J.).) Merely to categorize a decision as one involving "normative" judgment does not exempt it from constitutional constraints. Justice Scalia, in his concurring opinion in *Ring v. Arizona*, *supra*, 536 U.S. at p. 610, emphatically rejected any such semantic attempt to evade the dictates of *Ring* and *Apprendi*: "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt."

XII.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argues that this Court should reconsider its previous rulings and hold that instructing the jury pursuant to CALJIC No. 8.88 violated his constitutional rights. (AOB 156-157.) Rather than attempt to refute the arguments appellant sets forth in his opening brief, respondent merely notes that this Court has previously rejected this claim and urges the Court to decline appellant's invitation to reconsider its prior rulings. (RB 142-144.) As explained at length in the opening brief, the cases relied upon by respondent were wrongly decided. This Court should hold that instructing the jury pursuant to CALJIC No. 8.88 violated appellant's constitutional rights and vacate the death judgment.

This Court should reject respondent's contention that appellant has waived this claim. Respondent, citing *People v. Lewis* (2002) 25 Cal.4th 610, 615, and *People v. Sanders* (1993) 5 Cal.4th 580, 609, argues that appellant was obliged to seek a clarifying instruction. That is incorrect. As the precedents cited in *Lewis* and *Sanders* make clear, a defendant must seek a clarifying instruction when contending that the instruction given is inadequate or unclear, rather than incorrect. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192; *People v. Johnson* (1993) 6 Cal.4th 1, 52.) Because appellant argues that CALJIC No. 8.88 contained myriad legal errors and was thus incorrect, appellant did not have to seek a clarifying instruction. (See *People v. Smithey* (1999)20 Cal.4th 936, 976, fn. 7; Pen. Code, § 1259.)

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XIII.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant asserts in his opening brief that California's failure to conduct intercase proportionality review of death sentences violates the Eighth and Fourteenth Amendments. (AOB 168-169.) Respondent, in its opposition, cites cases from this Court denying this very claim. (RB 144-145.)

Appellant acknowledges these cases, and further acknowledges that these cases are in turn based upon the United States Supreme Court's holding in *Pulley v. Harris* (1984) 465 U.S. 37. (AOB 168.) However, that was then and this is now. As appellant contends in his opening brief, the intervening 22 years between *Pulley* and the present time have seen the California sentencing scheme become one that demands proportionality review to ensure its constitutional application. This Court should revisit this issue and rule accordingly.

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XIV.

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

In his opening brief, appellant argues that capital punishment violates the Eighth Amendment's prohibition because it is contrary to international norms of human decency. Appellant further argues that even if capital punishment itself does not violate the Eighth Amendment, using it as a regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does. (AOB 172-177.) Respondent asserts that appellant has waived the claim, that he lacks standing to bring this claim, and that even if appellant has standing the claim should be denied on its merits. (RB 145-149.)

A. An International Law Claim Cannot Be Waived by Failure to Object on International Grounds in the Trial Court

Respondent asserts that appellant has waived any claim that the death penalty violates international norms by not raising the issues that the statute violated the government's treaty obligations at the trial level. (RB p. 145.) Respondent erroneously treats issues of international law as bound by state evidence rules. However, under international treaty law, a nation may not use the provisions of its domestic law as justification for its failure to perform a treaty obligation. (Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, article 27 ["A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."]; see also Restatement (Third) of the Foreign Relations Law, §§ 115 321 cmt.a.) A treaty claim cannot be trumped by a state law or rule of procedure. For example, the International Court of Justice recently held that the United States could not invoke the domestic doctrine of 'procedural default' in

order to deny review and reconsideration of criminal cases involving violations of individual rights protected by a multilateral consular treaty. (*LaGrand Case (Germany* v. *U.S.*), 2001 I.C.J. (Judgment of June 27, 2001), para. 90-91.) An international fair trial right cannot ordinarily be waived by a failure to raise an objection at trial. For example, the Human Rights Committee has stated that, in order to safeguard the fair trial rights conferred under articles 14(1) and 14(3) of the ICCPR, "judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution." (Human Rights Committee, General Comment 13, para. 15, available at <http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+13. En?OpenDocument>.)

B. Appellant Has Standing

Respondent initially challenges appellant's standing to invoke the International Covenant Of Civil and Political Rights (ICCPR) as one of the bases for his claim. (RB 130-131.) In support of its assertion, respondent relies upon the federal district court's decision in *Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542. This reliance is misplaced, as that case involved an individual's attempt to litigate in a United States court a civil suit against a foreign government. (*Id.* at pp. 545-547.) That type of situation is totally inapposite to a United States citizen's attempt to enforce against his own government a treaty to which that government is a signatory.[33] Respondent implicitly acknowledges this

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[33] Appellant realizes, as respondent has noted (RB 146), that in *People v. Brown* (2004) 33 Cal.4th 382, 403, this Court referred to *Hanoch Tel-Oren* while saying that it was setting aside the standing issue regarding this claim and ruling on the merits of the claim itself. Appellant believes that is the proper course to take, since he believes that *Hanoch Tel-Oren* (continued...)

view by citing *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1286, which holds that the language of the ICCPR governs the relationship between an individual and his state. That case sets forth the correct view as far as standing to assert this type of claim.

C. Customary International Law Forbids the Death Penalty

Respondent argues that because there are still nations which have the death penalty and because those which do not have the death penalty barred it for political, not legal reasons, international customary law does not bar the death penalty. (RB 146-147.) First off, respondent misquotes the facts. It states that 110 countries have retained the death penalty and 86 have abolished it (with 11 reserving it for extraordinary crimes and 25 effectively without a death penalty in that they have not executed anyone in the last ten years.) (RB p. 147.) This is not true. The facts are that only 62 countries retain the death penalty for ordinary crimes. 92 countries have abolished the death penalty for all crimes; 10 have abolished it for all ordinary crimes; and 33 have abolished the death penalty in practice, in that they have not had an execution for the past ten years. (http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries, visited October 22, 2008.) Respondent's 2005 statistics are clearly out of date. Clearly, the trend is for countries to abolish the death penalty.

This suggests that there is a "general and consistent practice of states" to abolish the death penalty. (*Buell v. Mitchell* (2001 6th Cir.) 274 F.3d 337, 372.) As *Buell* recognizes to constitute customary international law there does not have to be universal acceptance of a practice; rather, there must be a "general and consistent practice" which reflects "wide

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[33](...continued)
does not address his standing to assert this particular claim.

acceptance." (*Ibid.*) Since the large majority of states have abolished the death penalty and the trend is towards more states doing so, abolition is a general practice which has the force of international law. As pointed out in appellant's opening brief, the United States is one of the few countries that regularly uses the death penalty as a form of punishment. (AOB pp. 171-172.)

Moreover, customary international law does not only flow from the general usage and practice of states. It also comes from the work of jurists"writing on public law and from judicial decisions recognizing and enforcing international law. (*United States v. Smith* (1820) 18 U.S. 153, 160-161; *Lareau v. Manson* (D. Conn. 1980) 507 F. Supp. 1177, 1187, fn.9 (finding international standards on the treatment of prisoners "significant as expressions of [Connecticut's] obligations to the international community of the member states of the United Nations"]; see also, *Rodriguez-Fernandez v. Wilkinson* (10th Cir. 1981) 654 F.2d 1382, 1388 [citing the American Convention on Human Rights and the Universal Declaration of Human Rights as support for customary principle prohibiting prolonged arbitrary detention]; *Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d 876, 883-885 [consulting the American Convention on Human Rights and the International Covenant on Civil and Political Rights to determine the customary prohibition on torture]; *Forti v. Suarez- Mason* (N.D. Cal. 1987) 672 F. Supp. 1531,1542 [recognizing the Universal Declaration, American Convention, and the Civil and Political Covenant as evidence of a customary norm against summary execution].)

In this regard, there are cases recognizing and enforcing the international obligations not to punish with the death penalty. So, for example, in *United States v. Burns*, 2001 SCC 7, File No. 26219 a Canadian court refused to extradite a defendant without assurances that the death

penalty would not be imposed on grounds that international standards, especially in democratic societies are moving in the direction of abolition of the death penalty. Also, in a recent decision, the European Court of Human Rights ruled that the practice of the Council of Europe's member states now means the death penalty is prohibited by the European Convention on Human Rights, despite the explicit recognition of capital punishment in Article 2(1) of the Convention. (*Öcalan v. Turkey*, App. No. 46221/99, 2003 Eur. Ct. H.R. 125, at paras. 188-99.) Other cases from international tribunals are similar in acknowledging the limits in international law on the death penalty. Respondent is simply wrong when it asserts that other countries have abolished the death penalty out of political expediency. (See RB 148.) The cases cited above show that these countries believe that they are legally obliged not to enforce the death penalty.

E. Recent Case Law Supports Appellant's Position

As to the merits of the claim, respondent's opposition rests merely upon the ground that this Court has previously rejected the argument that Appellant's death sentence violates the International Covenant of Civil and Political Rights ("ICCPR"). (RB 147-148.) Appellant is well aware of this Court's decisions in this area, but respectfully requests this Court to reconsider and disapprove them.

Recent developments in Eighth Amendment jurisprudence further support appellant's claims. In *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183, the United States Supreme Court struck down death as a constitutional penalty for juvenile offenders. In holding that the execution of juvenile criminals is cruel and unusual punishment, the Court looked to standards set by international law as informing the Eighth Amendment:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the

> world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion) ('The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime'). . . ." (543 U.S. at p. ___ [125 S.Ct. at p. 1198].)

In addition, this Court has itself looked to the provisions of international law to resolve difficult questions regarding the parameters of constitutional rights. So, in *In re Marriage Cases* (2008) 43 Cal.4th 757, 819, fn. 41, this Court cited the Universal Declaration of Human Rights as part of its determination that marriage was a basic civil right protected by the California Constitution. In that same case, this Court also cites the ICCPR. (*Ibid.*) Those documents apply equally to the definition of appellant's right to life and liberty protected by the California and federal Constitutions.

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XV.

CALIFORNIA'S DEATH PENALTY SCHEME FAILS TO REQUIRE WRITTEN FINDINGS REGARDING THE AGGRAVATING FACTORS AND THEREBY VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

Appellant asserts that California should require written findings from the jury regarding the aggravating factors it found in imposing the death penalty. (AOB 178-179.) Respondent believes this Court should continue to hold that such findings are not necessary. (RB 148-149.)

The importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[34]

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[34] *See* Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27 § 413(i) (1992); Miss. Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex.

(continued...)

California's failure to require such findings renders its death penalty procedures unconstitutional.

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* (2002) 536 U.S. 584 has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective factfinding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

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[34](...continued)
Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

XVI.

THE CUMULATIVE EFFECT OF THE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT, REQUIRING REVERSAL

Appellant believes that his trial was infected with numerous errors that deprived him of the type of fair and impartial trial demanded by both state and federal law. However, cognizant of the fact that this Court may find any individual error harmless in and of itself, it is appellant's belief that all of the errors must be considered as they relate to each other and the overall goal of according him a fair trial. When that view is taken, he believes that the cumulative effect of these errors warrants reversal of his convictions and death judgment. (AOB 113-121.)

Respondent asserts that there was no error, and if there was error appellant has failed to show prejudice. (RB 149.) It is trivially true that if this Court finds no error, the cumulative error doctrine would not come into operation. Consequently, if respondent is correct about the total lack of error, the Court will obviously deny this claim. As to respondent's assertion that appellant has failed to show prejudice, it is a mere assertion based upon no reasoning or argument. As such, it does not merit a response, and appellant merely reiterates what he has set forth in his opening brief.

* * * * *

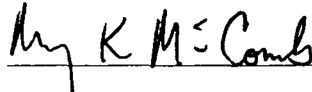
CONCLUSION

For all the reasons stated above and in appellant's opening brief, the judgment of conviction and sentence of death in this case should be reversed.

Dated: February 11, 2009.

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender



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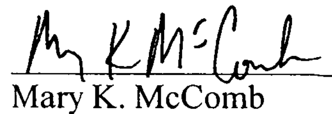
CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.204(c)(1))

I am the Deputy State Public Defender assigned to represent appellant, John Clyde Abel, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is approximately 28,015 words in length.

Dated: February 11, 2009



Mary K. McComb

DECLARATION OF SERVICE BY MAIL

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Case Number: **Supreme Court No. Crim. S064733**
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I, the undersigned, declare as follows:
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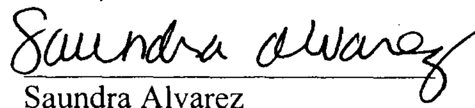
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 11, 2009, at Sacramento, California.



Saundra Alvarez