IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
KEITH TYSON THOMAS,
Defendant and Appellant.

Case Number
S067519

Alameda County Superior Court Case No. 118686B
Honorable Alfred A. Delucchi, Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS [cont.]

TABLE OF CONTENTS [cont.]

TABLE OF CONTENTS [cont.]

TABLE OF CONTENTS [cont.]

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES [cont.]

TABLE OF AUTHORITIES [cont.]

TABLE OF AUTHORITIES [cont.]

TABLE OF AUTHORITIES [cont.]

TABLE OF AUTHORITIES [cont.]

TABLE OF AUTHORITIES [cont.]

TABLE OF AUTHORITIES [cont.]

TABLE OF AUTHORITIES [cont.]

TABLE OF AUTHORITIES [cont.]

Constitutions

Statutes

TABLE OF AUTHORITIES [cont.]

Miscellaneous Authorities

TABLE OF AUTHORITIES [cont.]

Internet Sources

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APPELLANT'S REPLY BRIEF

In this automatic appeal, Keith Tyson Thomas is before the Court following his conviction on one count of murder (Pen. Code, § 187, subd. (a)),[1] with true findings on four felony-murder special circumstances (§ 190.2, subd (a)(17)). Thomas was also found guilty on charges of kidnapping (§ 209, subd. (b)), robbery (§ 211), rape (§ 261, subd. (a)(2)), and sodomy (§ 286, subd. (d)), in connection with the murder. In a separate incident, Thomas was found guilty of residential robbery and assault on a peace officer (§ 245, subd. (d)(3)). Finally, Thomas was convicted of being a felon in possession of a firearm. (§ 12021, subd. (a).) The jury returned true findings on armed with a firearm (§ 12022, subd. (a), 12022.3, subd. (b)) conduct enhancements. The jury found enhancements for personal use of a firearm (§ 12022.5) to be not true. There is, then, at a minimum a reasonable doubt as to whether Thomas was the actual killer.

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[1] Statutory references are to the Penal Code unless otherwise noted.

In the opening brief, appellant advanced 17 claims of constitutional error requiring reversal of the guilt and penalty phase verdicts. Thomas also highlighted a range of failings in the state's capital punishment law that demonstrate the death penalty is administered in California in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

Deploying the familiar three-deep defense of waiver, no error, and harmless error, the attorney general contends the assignments of error are without merit and the convictions and sentence of death should be affirmed. Throughout respondent's brief, the attorney general alleges appellant's trial lawyers waived assignments of error for various purported procedural failures. Because the assertions of waiver are common, Mr. Thomas will generally reply to the waiver argument in this space so as to avoid tedious repetition of the following rejoinder.

First, it should be remembered that trial objections do not need to conform to the exacting standards of the Harvard Bluebook.[2] It is well settled that "Objections stated orally in the heat of trial cannot be analyzed with the legal acuity reserved for the interpretation of statutes and contracts." (*People v. Williams* (1970) 9 Cal.App.3d 565, 570 [88 Cal.Rptr. 349].) The purpose of the waiver rule is not to set a trap for the unwary. Instead, the rule is based upon the proposition a trial court should be given the

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[2] The Bluebook: A Uniform System of Citation (18th Ed. 2005).

opportunity to correct any error. (*People v. Green* (1980) 27 Cal.3d 1, 27 [164 Cal.Rptr. 1, 609 P.2d 468].) Hence, an objection is sufficient if the court is adequately informed of the reasons for it. (*People v. Wattier* (1996) 51 Cal.App.4th 948, 953 [59 Cal.Rptr.2d 483].) Given the underlying purpose of the waiver rule, a reviewing court should reach the merits of a claim of error even if it has only marginally been preserved for appeal. (*Ibid.*)

Second, questions of law derived from undisputed facts can be raised for the first time on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 235 [19 Cal.Rptr.2d 520, 851 P.2d 802].) This Court has imposed no waiver rule for pure questions of law that can be resolved without reference to the trial court record. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153 [119 Cal.Rptr.2d 922, 46 P.3d 388].) The court can therefore reach constitutional claims raised for the first time on appeal. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815 [113 Cal.Rptr.2d 466].) Furthermore, when an issue has been fully litigated in the trial court, the reviewing court has a complete record for assessing the assignment of error. (See e.g., *People v. Morris* (1991) 53 Cal.3d 152, 189 [279 Cal.Rptr. 720, 807 P.2d 949].)

At two points, the attorney general argues appellant has waived his federal constitutional claims of error because objections were based on the state law grounds and trial counsel failed to mention provisions of the federal Constitution. (RB 101, 143.) Although this Court has on occasion found constitutional issues waived for failure to raise them in the trial court, the constitutional

claims stated in the opening brief are based on the same facts and circumstances as presented at trial. "[N]o useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved." (*People v. Yeoman* (2003) 31 Cal.4th 93, 117 [2 Cal.Rptr.3d 186, 72 P.3d 1166]; see also *People v. Doolin* (2009) 45 Cal.4th 390, 430, fn. 26 [87 Cal.Rptr.3d 209, 198 P.3d 11]; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [17 Cal.Rptr.3d 532, 95 P.3d 811].) Indeed, the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." (*Burger v. Kemp* (1987) 483 U.S. 776, 785 [107 S.Ct. 3114, 97 L.Ed.2d 638].) Accordingly, the Court should reach the merits of appellant's claims involving constitutional rights.

Third, the law does not require the doing of a futile act. (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1438 [105 Cal.Rptr.2d 504].) Thus, argument or objection is not required to preserve a point for review when the objection would have been futile. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8 [113 Cal.Rptr.2d 804]; *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5 [161 Cal.Rptr. 762, 605 P.2d 401].) For example, prosecutorial misconduct in closing argument can be raised for the first time on appeal when the record shows that an objection or a request for an admonition would have been pointless. (*People v. Boyette* (2002) 29 Cal.4th 381, 432 [127 Cal.Rptr.2d 544, 58 P.3d 391]; *People v. Hill* (1998) 17 Cal.4th 800, 820 [72 Cal.Rptr.2d 656, 952 P.2d 673].)

Finally, even if a defendant forfeits an issue by failure to object in the trial court, an appellate court retains the discretion to

nonetheless reach the merits of the assignment of error. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 404 [26 Cal.Rptr.3d 871]; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984 [14 Cal.Rptr.3d 780].) Because appellant has been sentenced to death, the Court has a duty to search out error in the trial record. The Court should exercise its discretion to reach the merits of any claim of error as to which a sufficient objection was not made in the lower court. Given the foregoing principles, appellant urges the Court to reach and decide the merits of all claims of error described in the opening brief.

Some of the points made by the attorney general require a response, while others were anticipated in the opening brief, or require no further explanation. In any event, Mr. Thomas stands by the claims of error and does not waive any of the issues raised in the opening brief. (See e.g., *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3 [13 Cal.Rptr.2d 475, 839 P.2d 984].) For the reasons which follow, as well as the grounds stated in the opening brief, the Court should grant appellant the relief prayed for in this appeal, reverse the judgment, and remand the case for a new trial.

GUILT PHASE ERROR

I.

THE REMOVAL OF APPELLANT'S APPOINTED LAWYERS FOR A PURPORTED CONFLICT OF INTEREST REQUIRES REVERSAL OF THE JUDGMENT.

The attorney general denies the trial judge committed error in removing appellant's appointed counsel over his objection. In the government's view, recusal was required because the representation violated the public defender's duty of loyalty to the codefendant. (RB 43-47.) The argument is not persuasive.

(A) Recusal Was Not Required Because of an Ongoing Duty of Loyalty to the Codefendant.

Respondent maintains the public defender's ongoing duty of loyalty to codefendant Glover, who had been represented by the agency in juvenile court, required recusal of defense counsel. (RB 44.) Like the trial court, the government relies upon *Damron v. Herzog* (9th Cir. 1995) 67 F.3d 211, to support the need for recusal. (RB 43-45.)

The government's analysis is deeply flawed. This Court has explained that potential conflicts of interest typically occur in one of two scenarios: "(1) in cases of successive representation, where an attorney seeks to represent a client with interests that are potentially adverse to a former client of the attorney; and (2) in cases of simultaneous representation, where an attorney seeks to represent in a single action multiple parties with potentially adverse interests." (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159 [84 Cal.Rptr.3d 597, 194 P.3d 330].) The fiduciary duty at stake and the applicable

disqualification standards vary in these situations. In cases of successive representation, "'the chief fiduciary value jeopardized is that of client *confidentiality*.' [Citation.]" (*Ibid.*) In cases of simultaneous representation, the value at issue is the attorney's duty of loyalty rather than confidentiality. (*Id.* at p. 160.) This dichotomy was well established at the time of trial in the present case. (See e.g., *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537, 885 P.2d 950].) Because the alleged conflict in this case was grounded upon successive representation, the issue was one of client confidentiality rather than loyalty, as respondent would have it.

The government misconstrues the question as one of loyalty instead of confidentiality on the authority of *Damron v. Herzog*, *supra*, 67 F.3d 211. (RB 43-45.) In the opening brief (AOB 49-51), appellant delineated the reasons why *Damron* has no bearing on the present case. First, decisions of the federal circuit courts of appeal are persuasive rather than binding authority. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292 [65 Cal.Rptr.2d 145, 939 P.2d 259].) There is simply no need to rely upon a Ninth Circuit case when this Court has a robust jurisprudence on point. (*Flatt v. Superior Court*, *supra*, 9 Cal.4th 275.) The government fails to articulate any persuasive reason why the Court should abandon its own conflict of interest decisions in favor of a Ninth Circuit civil case with a holding the federal court of appeal stressed was limited to a claim of attorney malpractice.

Second, the facts of *Damron* are not merely distinguishable from the present matter—the two cases are poles apart. As

explained in the opening brief (AOB 50-51), the Ninth Circuit case was a civil malpractice action by a disgruntled former client. The case turned upon the Idaho rules of professional conduct and the circuit court of appeal's interpretation of the common law. The court cautioned its holding was limited to construing the duty of loyalty to a former client in light of the Idaho rules and the common law for purposes of malpractice analysis. (*Damron v. Herzog*, *supra*, 67 F.3d 211, 215.)

The government ignores the fundamental distinctions between the present matter and the Ninth Circuit case based upon the slender thread of the federal court's interpretation of the common law. (RB 45.) Respondent points out the Ninth Circuit cited decisions by the federal Supreme Court, as well as California cases. (*Ibid.*) The attorney general neglects to mention the California decisions cited by the federal court are not relied upon for the proposition the common law imposes upon California lawyers an indefinite duty of loyalty to a former client. Instead, the Ninth Circuit cited California cases for the proposition that when the successive representation concerns the same transaction, access to confidential information can be presumed, whether or not the information is acted upon or disclosed. (*Damron v. Herzog*, *supra*, 67 F.3d 211, 214-215.) This point is not applicable to public law agencies with a criminal law practice. (*In re Charlisse C.*, *supra*, 45 Cal.4th 145, 162-163.)

The one federal high court decision mentioned in *Damron v. Herzog*, *supra*, 67 F.3d 211, at the opinion pages cited by the attorney general, *Stockton v. Ford* (1850) 52 U.S. (11 How.) 232 [13

L.Ed. 676]. The decision is cited for the mundane proposition that counsel owes the client a duty of loyalty and fairness. (*Damron v. Herzog*, *supra*, 67 F.3d 211, 214.) These citations cannot bootstrap the Ninth Circuit case into being relevant to the present matter.

Third, the attorney general's argument fails to account for the fact appointed defense counsel was a public agency. As explained in the opening brief (AOB 43-44), public agency lawyers are in a different position for conflict of interest analysis from private counsel, particularly private counsel in civil matters. This Court has explained there are several important reasons for applying a different analysis when a potential conflict of interest involves a public agency. First, public sector lawyers do not have a financial interest in their cases. As a result, they do not have an incentive to breach client confidences or favor one client over another. (*In re Charlisse C.*, *supra*, 45 Cal.4th 145, 163.) Second, if strict rules of vicarious disqualification are applied to public agency lawyers, these agencies will find it difficult to recruit qualified counsel. At the same time, private firms will be reluctant to take on a lawyer leaving a public defender's office or similar agency. (*Ibid.*) Third, vicarious disqualification of a public entity increases the cost of litigation, which can result in public law firms making conflict of interest decisions on the basis of financial considerations rather than the public interest. (*Ibid.*) Moreover, public law offices tend to develop special expertise not generally shared by the private bar. (*Ibid.*) The use of strict vicarious disqualification rules on public defenders would deprive defendants of this hard-earned skill.

For these and other reasons, the courts have been willing to accept screening procedures and ethical walls as an alternative to disqualification of a public law office. (*In re Charlisse C.*, *supra*, 45 Cal.4th 145, 163.) Screening procedures and ethical walls can isolate attorneys with an actual conflict of interest so that the public defender need not be removed from the case and the client's confidences can be preserved.

In this case, the public defender's longstanding "no peek" rule protected Glover's client confidentiality. Glover's juvenile files from 1987 to 1990 were all closed by 1991. The files were in storage and, at the time of the motion to disqualify the public defender, none had ever been retrieved from an off-site location. (9 CT 2547.) The attorneys assigned to represent Thomas signed declarations under penalty of perjury stating neither had ever represented Glover, appeared in court with the codefendant, seen any of the agency's files from his juvenile cases, or talked about his cases with any attorney who had represented Glover. The trial court accepted the veracity of these declarations. (1 RT 126, 129, 140.) The combination of a "no peek" rule and the absence of any attorney-client relationship between appellant's assigned lawyers and the codefendant assured Glover's client confidentiality would be protected. There was, then, no reason to remove the public defender.

Respondent argues public defender Gaskill's position at the second hearing on the motion to relieve appointed counsel amounted to an admission his agency was "professionally constrained" by the Ninth Circuit case. (RB 45.) The government

goes on to claim Gaskill "expressly acknowledged" that assigned counsel owed a duty of loyalty to Glover and, as a result, could not be involved in a joint trial. (*Ibid.*) Because Gaskill intended to follow the *Damron* case, the court had little choice but to relieve the public defender. (RB 46.) Appellant does not agree with this reading of the record.

At the second hearing, Gaskill never stated he would follow the *Damron* case. Gaskill stated, "Well, the question probably could be put narrowly as follows: Does Ms. Browne have a duty to Mr. Glover at all by virtue of the fact that one or more matters handled by another member of her law firm at a time in the past will be made the basis of an argument to Mr. Glover's detriment or potential detriment in the case?" (4 RT 419.) In his view, separating the trials of Glover and appellant would be prudent, as it would moot the potential duty of loyalty issue. (4 RT 420, 438.) The public defender's analysis was not an admission his agency was professionally constrained by *Damron v. Herzog*, *supra*, 67 F.3d 211.

Had Gaskill advised the court he was following the Ninth Circuit decision, he would have declared a conflict. Rather than get off the case, the public defender told the court he would not ask to be relieved. (4 RT 420.) Assigned counsel assured the court that there was no conflict under California law. (4 RT 439, 449.) Counsel did believe a conservative approach that would not run afoul of *Damron v. Herzog*, *supra*, 67 F.3d 211, would be to sever the trials of Thomas and the codefendant. (4 RT 423-424.)

The government points out that appellant accepts the proposition that great weight must be given to defense counsel's assertions regarding a conflict of interest. (RB 45.) This is true. The conflict cases involving criminal defense attorneys do emphasize counsel is frequently in the best position to analyze a potential conflict of interest. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 485-486 [98 S.Ct. 1173, 55 L.Ed.2d 426]; *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 538-538 [194 Cal.Rptr. 448, 668 P.2d 755].) This enhanced perspective is a consequence of counsel's greater knowledge of the relevant facts—facts that need not be disclosed to the trial court if the revelation would violate the attorney-client privilege. (See e.g., *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 592 [59 Cal.Rptr.2d 280].) This Court has noted that trial court decisions on conflict of interest questions are usually made "'in the murkier pretrial context when relationships between parties are seen through a glass, darkly.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 996 [77 Cal.Rptr.3d 163, 183 P.3d 1146].) When the court must make a decision on the basis of incomplete information and defense counsel is permitted to allege a conflict without disclosing all the relevant facts, a trial court has little choice but to rely upon the representations of counsel.

In this case, the relevant facts were established at the October 5, 1995, hearing on the original motion to remove defense counsel. At that hearing, the trial court relied upon the factual assertions of defense counsel. Judge Delucchi concluded the assigned lawyers were credible and entitled to belief in declaring they had no knowledge of Glover's juvenile files and never had an attorney-client

relationship with the codefendant. (1 RT 126, 129, 140.) This conclusion is supported by substantial evidence, and is entitled to deference on appeal. (*In re Charlisse C.*, *supra*, 45 Cal.4th 145, 159.) Indeed, the trial court's October 5, 1995, ruling denying the motion to recuse the public defender should have ended the matter.

The only change between the October 5 and October 16, 1995, was the publication of the Ninth Circuit's decision in *Damron v. Herzog*, *supra*, 67 F.3d 211. During an in camera hearing on the latter date, Gaskill advised the court on how his office interpreted the new case. In his opinion, the safest course was for the court to grant a severance. (4 RT 417.) This statement interpreting how a new case might apply to the present matter was nothing more than counsel's interpretation of a legal issue. Contrary to the government's argument (RB 45-46), Gaskill did not leave the court with no choice but to relieve defense counsel. Judge Delucchi was free to accept or reject Gaskill's understanding of the Ninth Circuit's decision just as he was not persuaded by counsel's interpretation of other decisions.

To argue the trial court had to relieve counsel or grant a severance is to posit a false dilemma. As seen above and argued in the opening brief, *Damron v. Herzog*, *supra*, 67 F.3d 211, was not binding on the trial court. To the contrary, Judge Delucchi was required to follow the decisions of the California Supreme Court and courts of appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) The lower court was not required to either grant a severance motion or relieve

defense counsel on the authority of the Ninth Circuit decision.

Respondent speculates appellant's defense could have suffered had the public defender remained on the case. The government sees a "tension" between counsel's duty of loyalty to Glover and her obligation to provide Thomas with effective representation. (RB 46-47.) This argument is in "tension" with the government's position that great weight must be given to defense counsel's representations concerning conflicts of interest. (RB 45-46.)

More to the point, the premise of the argument is mistaken. Assigned counsel had no attorney-client relationship with Glover. The present matter is a case of successive representation, where the operative ethical issue is client confidentiality, not loyalty. (*Flatt v. Superior Court*, *supra*, 9 Cal.4th 275, 283.) The government's citation to the Rules of Professional Conduct (RB 46) is unavailing. Rule 3-310(e) prohibits members of the bar from accepting employment adverse to a former client when the member has obtained confidential information as a result of the employment. Here, assigned counsel had no confidential information as a result of the agency's past representation of Glover in juvenile court. Because assigned counsel did not have conflicting duties to Thomas and the codefendant, there was no "tension" that could affect appellant's defense.

(B) **The Public Defender Did Not Have a Conflict of Interest Based Upon Client Confidentiality.**

Respondent asks the Court to apply the substantial relationship test to find Glover's juvenile court matters required the

disqualification of the public defender in this matter. (RB 47.) This analysis is not applicable to a public agency like a public defender's office. This Court has explained, "California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices. Instead, in this context, courts have looked to whether the public law office has adequately protected, and will continue to adequately protect, the former client's confidences through timely, appropriate, and effective screening measures and/or structural safeguards." (*In re Charlisse C.*, *supra*, 45 Cal.4th 145, 162.)

The government argues there was a substantial relationship between Glover's juvenile cases and the charged offenses. (RB 48.) This is not correct. As seen in the opening brief (AOB 42-46), the courts do not rigidly adhere to the substantial relationship test in criminal cases. A common sense, flexible approach is particularly appropriate when the alleged conflict involves a public law office. (*In re Charlisse C.*, *supra*, 45 Cal.4th 145, 162.)

The attorney general tries to avoid the authorities cited in the opening brief by means of factual distinctions. The government assures the Court that *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 [45 Cal.Rptr.3d 464] is not on point because in that case the public defender had previously represented a government witness, whereas in this matter the agency had represented a codefendant. (RB 49.) Respondent tries to distinguish *People v. Cox* (2003) 30 Cal.4th 916 [135 Cal.Rptr.2d

272, 70 P.3d 277], and *People v. Clark* (1993) 5 Cal.4th 950 [22 Cal.Rptr.2d 689, 857 P.2d 1099] on the same basis. (RB 49, fn. 13.)

The government draws a "distinction without a difference." (See e.g., *La Francois v. Goel* (2005) 35 Cal.4th 1094, 1101 [29 Cal.Rptr.3d 249, 112 P.3d 636].) *Rhaburn*, *Cox*, and *Clark* did not turn upon the fact the former clients were adverse witnesses rather than codefendants. In all three cases, the alleged conflict issues turned upon the question of whether there was a reasonable possibility defense counsel had confidential information about the witnesses. (*Rhaburn v. Superior Court*, *supra*, 140 Cal.App.4th 1566, 1581; *People v. Cox*, *supra*, 30 Cal.4th 916, 949; *People v. Clark*, *supra*, 5 Cal.4th 950, 1001-1002.)

The government argues *Leversen v. Superior Court*, *supra*, 34 Cal.3d 530, is more on point than the cases cited by appellant. (RB 50.) *Leversen*, however, supports appellant's position. In that case, defense counsel declared a conflict when a defense witness named a current client of the law firm as the mastermind of a jewelry store robbery. The trial court found counsel's assertion of a conflict was made in good faith, but denied motions to be relieved and for a mistrial. This Court issued a writ of mandate. The Court explained, "Having accepted the good faith and honesty of petitioner's statements on the subject, the court was bound under the circumstances to rule that a conflict of interest had been sufficiently established." (*Id.* at p. 539.) In other words, a trial court should as a general rule, accept defense counsel's representations concerning a conflict of interest. (*Id.* at pp. 537-538; *Aceves v. Superior Court*, *supra*, 51 Cal.App.4th 584, 594.)

Here, defense counsel assured the court that there was no conflict under California law. (4 RT 439, 449.) The court had previously found assigned counsel did not have confidential information from Glover's juvenile court files. There was no basis for the court to relieve the public defender over appellant's objection.

Finally, the attorney general reminds the Court that the appearance of justice is an important consideration in ruling on a motion to remove defense counsel.[3] (RB 51.) The appearance of justice and public confidence in the integrity of the proceedings did not require the trial court to relieve the public defender. Assigned counsel had no attorney-client relationship with Glover. These lawyers had no duty of loyalty to Glover. The agency's juvenile court files for the codefendant were protected by a longstanding "no peek" rule. Defense counsel did not have knowledge of any confidential client information Glover may have given to other lawyers in juvenile court. Thus, neither the appearance of justice or public confidence in the courts required the lower court to remove defense counsel over appellant's objection.

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[3] The case cited by the government, *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771, 135 P.3d 20], concerned recusal of the city attorney's office for a conflict of interest when the city attorney had previously represented a company targeted in a criminal investigation. A city attorney's office is a public law firm, but its function is quite different from that of a public defender.

(C) **The Violation of the Sixth Amendment Right to Counsel Requires Reversal of the Judgment.**

In the opening brief (AOB 54-57), Thomas argued the lower court's abuse of discretion in removing his appointed counsel was prejudicial structural error. Appellant cited *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150 [126 S.Ct. 2557, 165 L.Ed.2d 409] for the proposition that it is impossible to assess prejudice from the trial court's mistaken decision relieving counsel. Thomas nonetheless identified four indicia of prejudice. First, the trial judge's abuse of discretion deprived Thomas of a skilled attorney with significant capital case experience supported by a public law office with a longstanding reputation for excellence. (See e.g., *Rhaburn v. Superior Court*, *supra*, 140 Cal.App.4th 1566, 1580 ["public law offices often develop specific expertise in particular areas of law . . ."].) Second, once the public defender was appointed to represent Thomas, the court could not arbitrarily remove his attorney. Third, recusal at such a late point in the proceedings resulted in a hardship for Thomas. (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 565 [20 Cal.Rptr.2d 132].) Fourth, because Glover's case went to trial ahead of appellant's case, Thomas was the victim of inconsistent theories advanced by the government.

Rather than respond to appellant's position, the government attacks a straw man.[4] Respondent falsely claims appellant's

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[4] "A straw man argument is an informal fallacy based on misrepresentation of an opponent's position. To 'set up a straw

argument is that he was deprived of counsel of his choice. (RB 51.) The district attorney made the same claim in the lower court. (4 RT 426.) This position, of course, is easily refuted for it is long settled that the indigent defendant's Sixth Amendment right to appointed counsel does not include a right to the appointment of counsel of choice. (*Williams v. Superior Court* (1996) 45 Cal.App.4th 320, 327 [53 Cal.Rptr.2d 832].) Indeed, this settled rule is noted in the opening brief. (AOB 56.)

The appointment and removal of defense counsel are distinct issues. As this Court has explained, "The *removal* of an indigent defendant's appointed counsel, which occurred here, poses a greater potential threat to the defendant's constitutional right to counsel than does the refusal to *appoint* an attorney requested by the defendant, because the removal interferes with an attorney-client relationship that has already been established." (*People v. Jones* (2004) 33 Cal.4th 234, 244 [14 Cal.Rptr.3d 579, 91 P.3d 939].)

In this case, Thomas personally stated on the record that he wanted Browne to remain his attorney. (4 RT 414.) Defense counsel repeatedly reminded the court of the good attorney-client

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man,' one describes a position that superficially resembles an opponent's actual view, yet is easier to refute. Then, one attributes that position to the opponent. For example, someone might deliberately overstate the opponent's position. While a straw man argument may work as a rhetorical technique—and succeed in persuading people—it carries little or no real evidential weight, since the opponent's actual argument has not been refuted." (Wikipedia, Straw Man, <http://en.wikipedia.org/wiki/Straw_man> [as of February 6, 2009].)

relationship she enjoyed with appellant. Indeed, Browne claimed a "special relationship" with Thomas that would make any removal of appointed counsel unfair to him. (4 RT 425.) In her view, relieving the public defender would violate appellant's Sixth Amendment right to counsel. (4 RT 443.) This position, founded upon an existing attorney-client relationship, is consistent with *People v. Jones*, *supra*, 33 Cal.4th 234, 244.) The government's distorted straw man should not be confused with appellant's Sixth Amendment argument.

For all of the foregoing reasons, the removal of defense counsel over appellant's objection violated his rights to counsel (U.S. Const., 6th Amend; *Powell v. Alabama* (1932) 287 U.S. 45, 68 [53 S.Ct. 55, 77 L.Ed. 158]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 345 [83 S.Ct. 792, 9 L.Ed.2d 799]), a fair trial (*ibid.*), due process (U.S. Const., 5th & 14th Amends.), and a reliable penalty determination (U.S. Const., 8th Amend; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944]). The judgment should be reversed.

II.

INTERROGATION OF APPELLANT AFTER HE INVOKED THE FIFTH AMENDMENT RIGHT TO COUNSEL VIOLATED *EDWARDS V. ARIZONA*.

In the opening brief (AOB 63-67), Thomas argued he invoked the Fifth Amendment right to counsel during interrogation by Hayward detective Frank Daley. When appellant later initiated contact with Hayward detectives and agreed to waive his Fifth Amendment rights, the contact was limited to the Hayward robbery investigation. (AOB 67-70.) Consequently, the Kozicki and Kiefer interrogation about the Francia Young murder investigation violated the Fifth Amendment right to counsel pursuant to *Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880, 71 L.Ed.2d 1]. The government disagrees with this analysis.

(A) Appellant's Initiation of Contact With the Police and Waiver of Rights Was Limited to the Hayward Robbery Investigation

According to respondent, "No authority supports Thomas's contention that the reinitiation of contact with police must be deemed offense specific where police are investigating multiple crimes." (RB 60.) In the attorney general's view, both the assertion and waiver of rights "apply generally to all subjects of questioning by police." (*Ibid.*) Thus, appellant's argument is that, as a matter of fact, he limited the subject of interrogation to the Hayward case. (RB 61.)

Thomas agrees with the proposition that the cases hold both the invocation and waiver of rights are, in the absence of evidence to

the contrary, considered to be general. (See *Arizona v. Roberson* (1988) 486 U.S. 675, 684 [108 S.Ct. 2093, 100 L.Ed.2d 704].) Nevertheless, the high court recognizes that both the assertion and waiver of rights can be specific rather than universal.

Connecticut v. Barrett (1987) 479 U.S. 523 [107 S.Ct. 828, 93 L.Ed.2d 920] illustrates both a restricted assertion of the Fifth Amendment right to counsel and a limited waiver of that right, as well as the Fifth Amendment right to remain silent. In that case, a suspect agreed to oral questioning, but refused to make a written statement in the absence of counsel. The court concluded this limited waiver of rights did not require suppression of the suspect's oral confession so long as the police honored the limits specified by the subject. (*Id.* at pp. 529-530.)

In *Colorado v. Spring* (1987) 479 U.S. 564 [107 S.Ct. 851, 93 L.Ed.2d 954], by contrast, the high court found it irrelevant that the police failed to inform the suspect of all possible subjects of interrogation. The failure to list the crimes under investigation did not render the suspects waiver of rights invalid, for the suspect in no way limited the waiver. (*Id.* at p. 577; see *Arizona v. Roberson*, *supra* 486 U.S. 675, 684 [comparing and contrasting the *Barrett* and *Spring* decisions].) Based upon the facts of the case, then, a suspect can make a limited assertion or waiver of Fifth Amendment rights.

Here, respondent does not contest the notion Thomas made a general assertion of the Fifth Amendment right to counsel when he told Hayward detective Daley that he would not agree to any further questioning in the absence of counsel. (12 RT 791.) The issue,

then, is whether Thomas made a partial or general waiver of Fifth Amendment rights when he reinitiated contact with Hayward detectives.

As explained in the opening brief (AOB 67-68), in *Oregon v. Bradshaw* (1983) 1039 [103 S.Ct. 2830, 77 L.Ed.2d 405] the high court considered whether a question by a suspect who had invoked the Fifth Amendment right to counsel reinitiated contact with the police. The court explained a suspect reinitiates contact when his statements "represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." (*Id.* at p. 1045.)

In this case, Thomas reinitiated contact with Hayward officers about a Hayward incident. The testimony presented at the hearing on appellant's motion showed Thomas initiated further contact by telling a community service officer that he wanted to talk to a detective about the case. (12 RT 797, 800, 803.) Detective Allen testified the jailer informed him that Thomas had asked to speak to Daley, the detective who had questioned him about the Hayward incident. (12 RT 778-780, 878.) Allen talked to appellant in the jail, and confirmed he wanted to talk about the Hayward incident. (12 RT 884.) Thomas said he had talked to a lawyer and he did not want to take the fall for the robbery or shooting at the police. (12 RT 884.) Allen subsequently questioned Thomas about the Hayward matter and nothing else. (12 RT 894.) He did not question Thomas about the Oakland murder, and appellant did not ask to talk to anyone about that case. (12 RT 891, 896-897.)

On these facts, it is reasonable to conclude Thomas initiated contact with a Hayward detective about a Hayward crime. To construe appellant's actions and statements as demonstrating a generalized desire to talk about any crime being investigated by any law enforcement agency requires ignoring the plain meaning of appellant's statement he did not want to take the fall for the robbery or shooting at the police.

This scenario is distinguishable from *Oregon v. Bradshaw*, *supra*, 462 U.S. 1039. In that case, a suspect who had invoked the right to counsel later asked, "Well, what is going to happen to me now?" (*Id.* at p. 1042.) The plurality reasoned, "Although ambiguous, the respondent's question in this case to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation . . ." The open-ended question could not be construed as placing any restrictions on the renewed contact with the police.

Here, on the other hand, Thomas did not ask a broad question that could be interpreted as opening the door to a wide-ranging interrogation. When Allen attempted to clarify appellant's request, Thomas told him "that he didn't want to take any fall in regards to shooting at a police officer or the robbery portion of it, and he wanted to make that right and he wanted to talk to me." (12 RT 884.) From Allen's testimony, then, it is apparent Thomas was willing to waive his Fifth Amendment privileges only as to the Hayward incident. His willingness to be questioned about the Hayward matter was not a general waiver of the Fifth Amendment right to counsel. The interrogation about the Oakland murder

investigation was therefore contrary to the Fifth Amendment and *Edwards v. Arizona*, *supra*, 451 U.S. 477.

The government characterizes appellant's statement that he did not want to take the fall for the Hayward incident as nothing more than an identification of topics for discussion. (RB 61.) Respondent denies the remark limited the subsequent interrogation in any way. (*Ibid.*) Respondent goes on to maintain appellant's comments were ambiguous and, therefore, Kozicki was entitled to clarify the ambiguity and determine whether Thomas wanted to discuss the Oakland murder investigation. (RB 61.) No. Appellant's statements were not ambiguous. Where there is no ambiguity, law enforcement cannot badger a subject so as to generate an ambiguity that can then be used as an excuse for additional questioning. (*Smith v. Illinois* (1984) 469 U.S. 91, 100 [105 S.Ct. 490, 83 L.Ed.2d 488].)

Furthermore, the government's argument is nothing more than a red herring.[5] Kozicki never attempted to resolve any supposed ambiguity. Kozicki knew appellant had invoked his Fifth Amendment rights. (9 RT 545-546, 554.) He talked to two prosecutors—including the deputy who tried the case for the government—and based upon their review of information went ahead and interrogated Thomas. (9 RT 558.) At no point did Kozicki attempt to clarify with Thomas any ambiguity about his assertion of Fifth Amendment

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[5] The term "red herring" originally referred to the practice of using red herring in training hounds. The term now refers to an argument that is intended as a distracting change of subject. (The New Oxford American Dictionary (2001) p. 1427, col. 3.)

rights.

The government relies upon the fact Thomas waived his Fifth Amendment rights during the Kozicki interrogation as indicative of a desire to engage in a general discussion of all crimes under investigation. (RB 61-62.) Not so. Any statement obtained in violation of the Fifth Amendment right to counsel is involuntary and inadmissible "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 177 [111 S.Ct. 2204, 115 L.Ed.2d 158].) Especially in a case like this in which three days elapsed between the request for counsel and the interrogation about the Oakland murder case, the mere repetition of *Miranda* warnings cannot overcome the presumption of coercion that results from prolonged incarceration. (See *Arizona v. Roberson*, *supra*, 486 U.S. 675, 686.) The waiver of rights was coerced rather than knowing, intelligent, and voluntary. The trial court committed error in denying the motion to exclude appellant's admissions.

(B) **The Constitutional Error Requires Reversal of the Judgment.**

Respondent agrees that prejudice from erroneous admission of statements obtained in violation of the Fifth Amendment is measured according to the standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (RB 64.) The government perceives no prejudice to Thomas due to the overwhelming evidence of guilt without consideration of appellant's statements to Kozicki. According to the attorney general, the evidence was so great that defense counsel did not challenge the

felony-murder, kidnap, rape, and robbery charges. (RB 65.) Instead, defense counsel challenged the sodomy charge, special circumstances, and firearm use enhancement. (*Ibid.*) As for penalty, the government maintains introduction of appellant's admissions could not have any effect on the jury's sentencing decision. (RB 66.) Appellant does not agree with this review of the evidence and the penalty verdict.

In the opening brief (AOB 72), Thomas pointed out the jury viewed the admissions as important to the guilt and penalty phase decisions. The jury asked to hear the taped portion of the interrogation played during guilt and penalty phase deliberations. (60 RT 6276-6277; 66 RT 7094.) Respondent does not answer this argument.

Like the jury, the trial prosecutor recognized the importance of the Kozicki interrogation. In the opening brief (AOB 71-72), Thomas pointed out the prosecutor made generous use of the statement to savage Thomas. In his guilt phase argument, the prosecutor parsed the admissions into four distinct statements—almost all of which he derided as false. In his view, the statements minimized appellant's involvement and shifted blame to Glover. Thus, the admissions displayed consciousness of guilt. (59 RT 6101-6106.) Again, the government does not respond to this evidence of prejudice to Thomas.

In his penalty phase argument, the prosecutor even mocked Thomas for telling Kozicki that he was sorry about what happened. The prosecutor decried appellant's remorse by stating, "What a

crock." (66 RT 6973.) Remorse, of course, is am important mitigating factor. This Court has commented, "The concept of remorse for past offenses as a mitigating factor sometimes warranting less severe punishment or condemnation is universal." (*People v. Ghent* (1987) 43 Cal.3d 739, 771 [239 Cal.Rptr. 82, 739 P.2d 1250].) The prosecutor—an experienced death penalty litigator—knew how to twist important mitigation and drain from it any value as mitigation.

The Fifth Amendment error in overruling the motion to exclude appellant's statements to Kozicki was not harmless beyond a reasonable doubt. The judgment must be reversed, for the convictions and sentence are contrary to the Fifth Amendment right to counsel (*Edwards v. Arizona*, *supra*, 451 U.S. 477), right to a fair trial (U.S. Const., 6th Amend.), due process (U.S. Const., 5th & 14th Amends.), and right to a reliable penalty determination (U.S. Const., 8th Amend., *Woodson v. North Carolina*, *supra*, 428 U.S. 280).

III.

THE FAILURE OF LAW ENFORCEMENT TO RECORD THE ENTIRE INTERROGATION OF APPELLANT VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The public defender's trial motion number 14 asked the court to exclude appellant's December 26, 1992, admissions to detectives Kozicki and Kiefer for assorted constitutional violations attributable to the failure to make a verbatim recording of the complete interrogation. In the opening brief, Thomas argued the lack of a word for word audio or video recording (AOB 75-82) and loss of exculpatory evidence (AOB 82-85) required reversal of the judgment. Furthermore, appellant maintained his waiver of Fifth Amendment rights was not knowing, intelligent, and voluntary. (AOB 85-89.) The government denies there was any error.

(A) Failure to Make a Verbatim Recording of the Complete Interrogation.

As seen in the opening brief (AOB 75-75), in *Stephan v. State* (Alaska 1985) 711 P.2d 1156, 1157, the Alaska Supreme Court held the due process clause of the state constitution required law enforcement to tape record the questioning of criminal suspects. The decision was at the leading edge of a national movement towards requiring complete, unexpurgated recordings of police interrogations of suspects, most especially in death penalty cases.

This Court rejected the *Stephan* rule in *People v. Holt* (1997) 15 Cal.4th 619, 664 [63 Cal.Rptr.2d 782, 937 P.2d 213]. This decision was reaffirmed in *People v. Gurule* (2002) 28 Cal.4th 557,

603 [123 Cal.Rptr.2d 345, 51 P.3d 224].) The government urges the Court to reaffirm its decision in *Holt*. (RB 69-70.)

Events have overtaken *Holt*, and it should be reexamined. As seen in the opening brief (AOB 77-79), a national consensus is coalescing around the proposition police interrogations of suspects in serious cases, particularly murders investigations, be recorded in their entirety. The American Bar Association has endorsed mandatory recording of interrogations. (ABA Report to the House of Delegates (Feb. 2004), <http://www.abanet.org/leadership/2004/recommendations.8a.pdf> [as of February 9, 2009].) The American Law Institute's Model Code of Pre-Arraignment Procedures (1975), section 130.4(3), also contains a recording requirement.

On July 25, 2006, the California Commission on the Fair Administration of Justice published a report recommending the Legislature adopt a statute requiring the electronic recording of the entirety of any custodial interrogation of a suspect in a serious felony when the questioning occurs at a place of detention. (California Commission on the Fair Administration of Justice, Report and Recommendations Regarding False Confessions, <http://www.ccfaj.org/rr-false-official.html> [as of February 9, 2009].) The Legislature has twice passed laws requiring verbatim recordings in all investigations of violent felonies, only to see the governor veto the bills. (Sen. Bill 171 (2005-2006 Reg. Sess.); Sen. Bill 511 (2007-2008 Reg. Sess.), <http://info.sen.ca.gov/cgi-bin/postquery> [as of February 9, 2009].)

The Court's decision in *Holt* should be reconsidered and reversed.

(B) **The Deliberate Destruction of Exculpatory Evidence Violated the Fifth and Fourteen Amendments Right to Due Process.**

In the opening brief (AOB 82-85), Thomas argued the deliberate failure to record the complete interrogation resulted in the irretrievable loss of exculpatory evidence in violation of his Fifth and Fourteenth Amendment right to due process. (*California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413]; *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281].)

The government states the failure to record the complete interrogation was a failure to gather evidence rather than a failure to preserve it. (RB 70.) Respondent notes this Court has stated that it is not clear whether the failure to gather evidence comes within the due process requirements of *Trombetta* and *Youngblood*. (RB 71.) This is true. At the same time, this Court "has suggested that there *might* be cases in which the failure to collect or obtain evidence would justify sanctions against the prosecution at trial . . ." (*People v. Frye* (1998) 18 Cal.4th 894, 943 [77 Cal.Rptr.2d 25, 959 P.2d 183], emphasis added.) The present matter is just such a case where the failure to collect readily available evidence violated appellant's right to due process.

Recording the entire interrogation would not have posed any inconvenience to law enforcement or jeopardized the opportunity to interrogate Thomas. Kozicki and Kiefer interrogated appellant in a room at the Hayward police department that was equipped with

concealed recording equipment. (9 RT 561.) Kozicki had a portable tape recorder. (9 RT 558-559.) Making a complete recording would not have burdened the police.

Kozicki plainly did not want a verbatim record of the interrogation. Instead, he wanted admissions—admissions made in response to leading questions that coincided with the detective's theory of the case. Only when Thomas was prepared to give him what he wanted did Kozicki turn on the tape recorder. The result is a predictable series of admissions—frequently no more than a yes or no answer—to leading questions loaded with damning facts.[6]

For law enforcement, this is the "best of all possible worlds."[7] The government gets a confession, and the defendant gets nothing. Kozicki testified one reason he did not tape the complete interrogation was he wanted a consistent story. (9 RT 561.) To the extent possible, Kozicki got what he wanted. No doubt he also wanted to eliminate as many mitigating facts as he could from the version eventually committed to tape.[8]

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[6] Exhibit 50A, a transcript of the taped portion of the interrogation, shows that in appellant's confession Kozicki did almost all of the talking.

[7] The phrase "best of all possible worlds" can be traced to Thomas Aquinas, who reasoned the present world was not the best of all possible as a result of defects within the creation rather than the creator. (Thomistic Philosophy, Aquinas and the Best of All Possible Worlds, <http://aquinasonline.com/Topics/boapw.html> [as of February 9, 2009].) Voltaire mocked the religious and philosophical optimism underlying the "best of all possible worlds" in his satirical novel, Candide.

[8] Mitigating factors could include the facts of the capital crime (§ 190.3, factor (a) [circumstances of the crime], factor (g)

It is a truism that police officers are engaged in the "often competitive enterprise of ferreting out crime." (*Johnson v. United States* (1948) 333 U.S. 10, 13-14 [68 S.Ct. 367, 92 L.Ed. 436].) As a result, the police are not neutral or detached from their work. (*Ibid.*) Hence, when the police fail to make a complete recording of an interrogation, the court is entitled to be skeptical of the officer's version of events. (*Commonwealth v. DiGiambattista* (Mass. 2004) 442 Mass. 423, 447 [813 N.E.2d 516].) By failing to record the entire interrogation, Kozicki skewed the facts included in the taped confession.

Respondent claims Thomas did not lose any evidence, for a summary of his exculpatory statements was introduced through the testimony of Kozicki and Kiefer. (RB 71.) It is true that on cross-examination Kozicki confirmed that Thomas told him that he did not want the victim to be harmed, and repeatedly told Glover to tie her up and leave her. (57 RT 5942, 5943, 5945.) Kozicki related that Thomas said he had a hard life, one filled with problems. (57 RT 5942.) Kozicki also testified that when he was asked appellant if he was sorry, Thomas said that he was. (57 RT 5945.) The jury also heard the audio taped fraction of the interrogation. (57 RT 5932.) This included some of the same statements. All of this information is described in the opening brief. (AOB 84.) Nevertheless, the failure to make a verbatim recording of the complete interrogation denied Thomas his Fifth and Fourteenth Amendment right to due process.

[substantial domination by another], and factor (j) [accomplice or

The cross-examination and staged admission were a poor substitute for a contemporaneous recording. Indeed, there is no substitute for a verbatim record. As the Eighth Circuit has explained in a slightly different context, "If he is hesitant, uncertain, or faltering, such facts will appear. If he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not." (*Hendricks v. Swenson* (8th Cir. 1972) 456 F.2d 503, 506.) The staged question and answer sessions and the notes taken by Kozicki and Kiefer were mere shadows of the context, content, and emotional force of appellant's unrecorded statements. The attorney general is wrong in arguing Thomas had the benefit of evidence comparable to the interrogation that went unrecorded.

(C) **Appellant's Waiver of Fifth Amendment Rights Was Not Knowing, Intelligent, and Voluntary.**

In the absence of a verbatim recording, voluntariness issues are reduced to a credibility contest between the suspect and the police. The outcome of this unequal competition is often a foregone conclusion. "There is the word of the accused against the police. But his voice has little persuasion." (*Reck v. Pate* (1961) 367 U.S. 433, 446 [81 S.Ct. 1541, 6 L.Ed.2d 948].) This lopsided credibility contest between the prisoner and his jailer may be the real reason why the Oakland Police Department had a policy against tape recording any interrogation until the questioner was satisfied he had the answers he wanted.

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minor participant].)

In the opening brief (AOB 86-88), Thomas identified a number of factors from the totality of the circumstances surrounding appellant's interrogation that demonstrated his waiver of Fifth Amendment rights was not knowing, intelligent, and voluntary. These included his young age, being held incommunicado for two and one-half days, and the *Edwards v. Arizona*, *supra*, 451 U.S. 477, violation. Thomas also pointed out Kozicki and Kiefer used deception to obtain a confession, including reading Thomas his *Miranda* rights from an admonition form signed by Glover, allowing him to see an ATM photo of himself, and telling Thomas that Glover had been questioned and laid the blame on him.

The government repeats there was no *Edwards* violation. (RB 74.) This issue has already been discussed at length above under argument two as well as in the opening brief. Again, the repetition of *Miranda* warnings three days after the request for counsel does not rebut the presumption of coercion. (*Arizona v. Roberson*, *supra*, 486 U.S. 675, 686.) As for appellant's age, respondent argues Thomas was not a minor, and even children with below-average intelligence can waive the protections of the Fifth Amendment. (RB 75.) True enough. Be that as it may, Thomas was young, and his age is a relevant factor within the totality of the circumstances test. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725 [99 S.Ct. 2560, 61 L.Ed.2d 197].)

Regarding the time Thomas was held in custody up to the time of the interrogation, the attorney general writes, "Custodial interrogation is inherent in any *Miranda* inquiry, and cannot alone

evidence coercion." (RB 75.) This is not correct. In *Miranda v. Arizona* (1966) 384 U.S. 436, 457 [86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974], the high court stated that compulsion is inherent in incommunicado interrogation. Thus, the fact Thomas was held in jail for two and one-half days before the contested interrogation is indeed a factor to be considered within the totality of the circumstances.

Concerning the *Miranda* admonition signed by Glover, the government states Kozicki did not know whether or not Thomas actually saw the form. (RB 75.) The attorney general neglects to mention Thomas was seated next to Kozicki when the detective pulled out the Glover form. (9 RT 567.) In the tight quarters of an interrogation room, appellant was a mere foot from the detective. (*Ibid.*) Kozicki admitted Thomas could easily have read the form. (9 RT 568-569.) If Kozicki read the admonition to Thomas from the form, appellant would have had ample opportunity to observe the signature. (Cf. 9 RT 566, 4 CT 1105.) Certainly the "inadvertent" display of the admonition suggests the police intended for Thomas to see and read the signature on the document.

The government goes on to state, "the fact that Thomas had earlier given a statement to Hayward police cuts against his argument that Glover's waiver form *alone* prompted him to submit to interrogation." (RB 75, emphasis added.) Appellant has not argued the display of the *Miranda* admonition signed by Glover caused him to submit to questioning. As seen above, the correct standard is a totality of the circumstances test. (*Fare v. Michael C.*, *supra*, 442 U.S. 707, 725.) The waiver form signed by Glover was one factor—

albeit an important one—within the circumstances surrounding the waiver of Fifth Amendment rights.

Finally, respondent maintains Kozicki's statement to Thomas that he had questioned Glover and he had blamed appellant for the crimes took place after Thomas waived his Fifth Amendment rights. The attorney general argues the accidental display of the ATM photograph also occurred after Thomas waived his rights. Hence, neither fact coerced Thomas to agree to waive the protection of the Fifth Amendment. (RB 75-76.) Thomas does not agree with this reading of the appellate record.

During cross-examination at the hearing on appellant's motion in limine, Kozicki stated, "I did not tell Mr. Thomas anything—any specifics about my investigation under after I admonished him." (9 RT 562.) Once he had "admonished" Thomas, Kozicki told appellant that Glover had laid off much of the blame on him. (*Ibid.*) As appellant reads the record, this conversation took place after Kozicki advised Thomas of his *Miranda* rights and before appellant agreed to waive his Fifth Amendment protections. That Kozicki may have given a different account a year and one-half later in his trial testimony makes no difference. Instead, the court's decision must be assessed in light of the evidence before the court at the time of the ruling on the motion in limine.

In summary, the judgment must be reversed, for the convictions and sentence are contrary to the right against self-incrimination (*Miranda v. Arizona*, *supra*, 384 U.S. 436), right to a fair trial (U.S. Const., 6th Amend.), due process (U.S. Const., 5th &

14th Amends.), and right to a reliable penalty determination (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, U.S. Const., 8th Amend.).

IV.

THE GOVERNMENT'S USE OF INCONSISTENT THEORIES ON THE IDENTITY OF THE ACTUAL KILLER AMOUNTED TO PROSECUTORIAL MISCONDUCT.

Prosecutor James Anderson used inconsistent theories in the separate trials of Thomas and Glover. In his guilt phase closing argument in the Glover trial, the prosecutor assured the jury that, "From the evidence, Henry Glover is clearly the shooter." (13 CT 3727.) The jury was not persuaded and returned not true findings on enhancements for personal use of a firearm. (11 CT 3278-3289.) In appellant's trial, Anderson used the same evidence to argue Thomas was the actual killer. Again, the jury was not persuaded and returned not true findings on the enhancements for personal use of a firearm. (60 RT 6306-6322.) The government maintains the district attorney was entitled to use incompatible theories in the separate trials and, in any event, Thomas was not prejudiced by the prosecutor's actions. The argument is not persuasive.

(A) The Government's Use of Inconsistent Theories Was Not Justified By Any Ambiguity as to the Identity of the Shooter.

Respondent advances three reasons why the prosecutor's use of incompatible theories did not violate any right provided by the federal Constitution. First, the prosecutor's change in theory did not concern a fact used to convict Thomas or increase his punishment. (RB 83.) Second, the district attorney did not act in bad faith, as the evidence as to who was the shooter was ambiguous. (RB 84.)

Finally, the prosecutor did not attempt to manipulate the evidence so as to obtain a death sentence. (RB 85.)

In support of the argument the prosecutor did not change his theory on a fact used to convict Thomas or increase his punishment, the government compares the present matter to *Nguyen v. Lindsey* (9th Cir. 2000) 232 F.3d 1236. (RB 83.) In that case, gang members Nguyen and Phung participated in a gun battle. In the uneven contest, Phung took on Nguyen and several associates. A bullet fired in the melee struck and killed a bystander sitting in a parked car. Phung and Nguyen were tried separately for murder on a provocative act theory.[9]

In the first trial, the prosecutor argued Phung fired the first gunshot. This argument was based upon statements by two of Nguyen's companions that were admitted into evidence by stipulation. (*Nguyen v. Lindsey*, *supra*, 232 F.3d 1236, 1238.) In the Nguyen trial, the prosecutor argued Nguyen's side fired first. This argument was based upon Nguyen's statement that one of his companions had fired the first shot at Phung. (*Id.* at p. 1240.) At a state court hearing on Nguyen's petition for writ of habeas corpus, the prosecutor testified the statements Phung fired first were admitted at his trial by stipulation, but were not available in Nguyen's trial. (*Id.* at p. 1238.)

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[9] Under the provocative act doctrine, "when a defendant or his accomplice commits a provocative act and his victim or a police officer kills a third party in reasonable response to that act, the defendant is guilty of murder even though he did not act with malice aforethought." (*People v. Lima* (2004) 118 Cal.App.4th 259, 265 [12

Nguyen's petition for writ of habeas corpus in federal district court was denied. The Ninth Circuit affirmed this decision. The court noted the state court of appeal had found the prosecutor "presented the same underlying theory of the case at each trial—the initiator and those who voluntarily took part in the mutual combat are responsible for the crime." (*Nguyen v. Lindsey*, *supra*, 232 F.3d 1236, 1240.) The court explained, "As to who fired the first shot, it is true that the prosecutor made different arguments at each trial, but it is also true that these arguments were consistent with the evidence actually adduced at each trial."

The *Nguyen* decision is of no benefit to the government. In that case, there was a firefight on the streets of Orange County. Regardless of which side fired the first gunshot, many bullets were fired—none in self-defense. By using firearms on one another in a public place, Phung and his adversaries engaged in mutual combat. Hence, the identity of the initial shooter was meaningless.

Here, on the other hand, only one gunshot was fired. In *Nguyen*, the identity of who fired the first shot was not crucial, for none of the shooters acted in self-defense and all engaged in mutual combat. In this case, the identity of the actual killer mattered a great deal, for it was an aggravating circumstance of the crime the jury could have used to impose the death penalty.

The prosecutor knew this fact was crucial. In his guilt phase closing argument, the prosecutor told the jury the identity of the killer

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Cal.Rptr.3d 815].)

was the only real issue in the case. (59 RT 6087.) Minutes later, he described the identity of the shooter as "the single most important jury issue here." (59 RT 6095.) The prosecutor maintained the most reasonable inference was that Thomas, whom he described as a "slick, savvy, street-wise ex-felon" was the killer. (59 RT 6106.)

The prosecutor returned to this theme in his rebuttal argument. He reminded the jury that the only real issue was the identity of the shooter. (59 RT 6205.) The prosecutor described for the jury three reasons why Thomas was the actual killer. (59 RT 6189, 6192, 6195-6196.) The attorney general should not be allowed to downplay in this Court the question the trial prosecutor assured the jury was the central point of contention.

Again relying upon *Nguyen*, the government argues the prosecutor pursued the same "underlying theory" against Thomas and Glover despite offering inconsistent theories on the identity of the shooter. (RB 83.) This is not correct. In *Nguyen*, the government relied upon a single underlying theory—the provocative act doctrine—that did not turn upon which defendant in mutual combat fired the first shot.

Here, by contrast, the identity of the shooter was a gigantic issue. In a capital case where there was more than one person participated in the fatal incident, relative culpability can be decisive on the question of penalty. (See e.g., *Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434, 1441.) Relative culpability is a statutory factor the jury is required to consider in determining the punishment for a death-eligible defendant. (§ 190.3, factor (j).) In this case, the actual killer, the person who fired the single, fatal gunshot, was plainly the more

culpable offender. Because of relative culpability, the shooter was the more likely of the two defendants to receive a death sentence. Relative culpability explains why the prosecutor tried to persuade two different juries that both men fired the one bullet that killed the victim. It therefore blinks reality for respondent to maintain the district attorney's change in theory did not concern a fact used to convict Thomas or increase his punishment.

The government's second justification for the prosecutor's use of inconsistent theories is the district attorney did not act in bad faith since the evidence as to who was the actual killer was ambiguous. (RB 84.) If it is assumed the evidence was ambiguous, this fact does not mean the prosecutor did not act in bad faith. In cases where the identity of the actual killer is uncertain, the government should not act as if there is no ambiguity and urge the jury to find two different suspects fired a gunshot that only one of them could have fired. "When the prosecution advances a position in the trial of one defendant and then adopts an inconsistent position in the trial of another on the same facts, the prosecution is relying on a known falsity." (Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight* (2001) 89 Cal. L.Rev. 1423, 1425 [*Prosecutorial Inconsistency*]; see also *In re Sakarias* (2005) 35 Cal.4th 140, 155-156 [25 Cal.Rptr.3d 265, 106 P.3d 931] [when a prosecutor attributes a single act to two defendants in separate trials "the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of a criminal trial as a

search for the truth"].) The use of a known falsehood in at least one of the trials corrupts due process. (*Prosecutorial Inconsistency*, *supra*, 89 Cal. L.Rev. 1423, 1425.) This is the essence of bad faith.[10]

Furthermore, it is not at all clear that bad faith is required. As a general matter, when the defendant claims prosecutorial misconduct, reviewing courts consider the effects of the questioned conduct on the defendant without regard to whether the prosecutor acted in bad faith. (*People v. Crew* (2003) 31 Cal.4th 822, 839 [3 Cal.Rptr.3d 733, 74 P.3d 820].) The use of inconsistent theories is analogous to prosecutorial misconduct, so there is no justification for grafting a bad faith requirement onto the assignment of error.

The government's third defense of the prosecutor's irreconcilable theories is the prosecutor did not manipulate the evidence so as to obtain a death sentence. (RB 85.) While this is true, it can hardly be described as a defense of the prosecutor's conduct. To the contrary, when the district attorney offers irreconcilable interpretations of the same evidence in two separate trials, the change suggests gamesmanship—an effort to obtain the maximum number of convictions and death sentences at the expense of the search for truth. (*Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, 1050.)

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[10] The Eighth Circuit has decried the use of inconsistent and irreconcilable theories against multiple defendants in separate trials—a practice the court described as "foul blows." (*Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, 1051.) This characterization certainly suggests bad faith is inherent in the use of inconsistent

(B) **Appellant Was Prejudiced as a Result of the False Claim He Was the Shooter.**

In this context, prejudice analysis is based upon the answers to two questions: first, whether the government's attribution of the act to the defendant is probably true or probably false; second, whether a false attribution could reasonably have affected the penalty verdict. (*In re Sakarias*, *supra*, 35 Cal.4th 140, 164.)

In the opening brief (AOB 103-107), Thomas detailed the reasons why Glover was likely the actual killer. From this litany, the government notes only four points: (1) the testimony of Williams Dials suggested Glover was the more active participant in the Young kidnapping; (2) Glover used the assault rife in the Flennaugh robbery and firefight with the police; (3) Glover was more active than Thomas in the Silvey attempted kidnapping; and (4) by turning himself in, Thomas demonstrated a lack of consciousness of guilt. (RB 86.)

According to the government, "Most of Thomas's inferences derive from evidence of Glover's bad character and propensity for violence that neither party could have argued at trial." (RB 86.) For this dubious proposition, respondent cites Evidence Code section 1101 and two cases on the admissibility of character evidence to support a third-party culpability argument. Section 1101 and the cases interpreting it are irrelevant to the present issue. Thomas predicated his argument upon evidence admitted at trial. Items (1)

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theories.

and (2) concerned charged offenses. Item (3) was penalty phase factor (b) evidence. Item (4) was introduced in the government's guilt phase case-in-chief. Respondent's citations to Evidence Code section 1101 and cases on the admissibility of third-party culpability evidence are simply irrelevant.

The government's argument the parties could not have argued about Glover's character and propensity for violence is unusual. It is black letter law that in closing argument counsel for the parties can comment on and draw inferences from the evidence. (*People v. Valencia* (2008) 43 Cal.4th 268, 284 [74 Cal.Rptr.3d 605, 180 P.3d 351].) In this case, the prosecutor and defense counsel used closing argument to comment on the character of Thomas and Glover, their respective roles in the crimes, and who was the likely shooter.

In his guilt phase closing argument, defense counsel made many of the same points raised in the opening brief that respondent alleges could not have been argued at trial. Defense counsel maintained the Hayward incident and the BART kidnapping suggested Glover was the shooter. (59 RT 6168.) Counsel used the Hayward incident to illustrate the relationship between Thomas and Glover. (59 RT 6139-6153.) The codefendant was the more active and more violent offender. (59 RT 6139-6141.) Glover carried the assault rifle, and he took part in a firefight with the police. (59 RT 6141.) The evidence therefore suggested Glover was the leader and Thomas no more than the "hired help." (59 RT 6153.) Glover was in charge at the scene of the BART station kidnapping. (59 RT 6156-6159.) Given the known facts of these two incidents,

Glover's impulsiveness and propensity for violence, Glover was the shooter. (59 RT 6174-6175.)

In the penalty phase, defense counsel returned to this line of argument, this time in illustrating the relative culpability of Thomas and Glover. Counsel reminded the jury that Glover carried an AK-47 during the Flennaugh incident and used the weapon in an attempt to kill two police officers. (66 RT 7032.) Glover was in charge during the Silvey incident. (66 RT 7033.) Plainly, he was the more culpable of the two men. (66 RT 7031-7033.)

As for Thomas, in guilt and penalty phase arguments, defense counsel reminded the jury that appellant turned himself in on Christmas Eve—an extraordinary time of year to voluntarily go into custody. (59 RT 6164; 66 RT 7031.) Appellant's decision to surrender stood in stark contrast to Glover's willingness to initiate a gun battle and attempt to murder two police officers in an effort to avoid capture. (66 RT 7035.)

Against the range of factors pointing to Glover as the shooter, the government can muster only two bits of evidence. First, Thomas admitted to handling the AK-47 at the scene of the BART station kidnapping. Second, Thomas's DNA was found on the murder victim. Hence, he had a motive to eliminate Young as a witness to his crimes. (RB 86.) These points are at odds with the familiar rule that a reviewing court is required to construe the evidence in the light most favorable to the fact finder's decision. (*People v. Munoz* (2008) 167 Cal.App.4th 126, 128 [83 Cal.Rptr.3d 843].)

Thomas did indeed tell Kozicki that he went to retrieve the AK-

47 for Glover at the time of the BART kidnapping. (57 RT 5921.) In the trial court, the prosecutor sneered at appellant's statements to Kozicki as nothing but lies—with the exception of the claim he retrieved the rifle for Glover. (59 RT 6096.) While this admission may have been in harmony with the government's theory of the case, it was inconsistent with other, more reliable evidence.

Corroboration is a common means of determining the truth or falsity of statements. (See e.g., *People v. Cook* (2006) 39 Cal.4th 566, 579 [47 Cal.Rptr.3d 322, 139 P.3d 492]; *People v. Boyer* (2006) 38 Cal.4th 412, 467 [42 Cal.Rptr.3d 677, 133 P.3d 581].) Here, the admission was contradicted rather than corroborated by the evidence. Kozicki testified that Thomas said he went to retrieve the firearm for Glover. When he returned, Glover was closing the Mustang's trunk with someone inside. (57 RT 5921.)

William Dials described a starkly different sequence of events. Dials testified he observed Glover and Young get inside the Mustang while Thomas remained outside the vehicle as a lookout. (52 RT 5365, 5367, 5370.) After a few minutes, Glover and Young exited the car and walked to the rear of the vehicle. (52 RT 5370.) Young got into the trunk. (52 RT 5372.) Glover and Thomas got into the passenger compartment and drove away. (52 RT 5373.)

If the Dials testimony is true—and Dials is a minister as well as a disinterested eyewitness—then appellant's statement to Kozicki cannot be correct. Dials placed Thomas at the scene throughout the incident. Thomas, on the other hand, claimed he was not present when Glover confronted Young and persuaded her to get into the trunk.

The jury verdicts, including a conviction for kidnapping and a true finding on a kidnap-murder special circumstance, strongly suggest the jury credited the testimony of Dials rather than appellant's statement. Consistent with the rules on appeal, the Court should construe the evidence in the light most favorable to the verdicts. (*People v. Munoz*, *supra*, 167 Cal.App.4th 126, 128.) It is therefore unavailing for the government to cite the admission as suggesting Thomas rather than Glover was the shooter.

As for the DNA evidence, it is true that sperm with the same DNA profile as Thomas was found in the victim's vagina. (55 RT 5620.) Glover was eliminated as a possible sperm donor. (*Ibid.*) That Glover did not leave sperm inside the victim does not mean he did not have sex with her. Glover could have used a condom, failed to achieve an orgasm, or pulled out before reaching a climax. A fresh condom wrapper, meaning it was not faded from the weather, was found at the crime scene. (53 RT 5447-5448.) Glover had used condoms with his girlfriend, Camille Green. (56 RT 5856.) Hence, it is reasonable to infer Glover used a condom when he had intercourse with the murder victim.

The Glover jury convicted him on the rape and sodomy charges and returned true findings on the rape-murder and sodomy-murder special circumstances. (11 CT 3282, 3283, 3285, 3286.) Consistent with the rule requiring the Court to view the evidence in the light most favorable to the verdicts, the Court should conclude there is substantial evidence Glover raped the murder victim. Respondent's argument, then, fails as contrary to the evidence. If

Thomas had a motive to eliminate Young as the victim of his sexual crimes, Glover had exactly the same motive.[11] The DNA evidence does not point to Thomas as the actual killer.

In short, there is significant evidence Glover was the actual killer. The government's paltry efforts to suggest Thomas was the shooter founder on the evidence and are contrary to the rules on appeal. The present case therefore satisfies the first element of the test for prejudice: the government's attribution of the fatal act to Thomas is very probably false. (*In re Sakarias*, *supra*, 35 Cal.4th 140, 164.)

Turning to the second question—whether the false attribution could reasonably have affected the penalty verdict—the government assures the Court that Thomas was not prejudiced because the jury returned not true findings on the personal use enhancements. (RB 87.) The findings on the personal use enhancements mean the jury found the allegations had not been proven beyond a reasonable doubt—not that the prosecutor's theory did not cause members of the jury to suspect that Thomas was the shooter. As this Court has repeatedly held, the jury is not required to find aggravating evidence true beyond a reasonable doubt. (*People v. Prieto* (2003) 30 Cal.4th 226, 263 [133 Cal.Rptr.2d 18, 66 P.3d 1123].)

Respondent also points out the prosecutor accepted the jury's verdict and argued for the death penalty on the ground Thomas was an aider and abettor. (RB 87.) When he talked about factor (j), role

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[11] In his guilt phase rebuttal argument, the prosecutor maintained both men had a motive to kill Young to avoid having her

in the offense, the prosecutor did acknowledge the guilt phase verdicts indicated the jury saw Thomas as an aider and abettor. (66 RT 6994.) Nevertheless, the true findings on the special circumstances showed the jury considered Thomas a major participant. Hence, according to the prosecutor, factor (j) did not apply. (66 RT 6994-6995.) The prosecutor assured the jury it did not matter who pulled the trigger, for the law permits the death penalty for non-killers. (66 RT 6963-6964.) He explained the moral responsibility was the same for all "predators." (66 RT 6964.) This is hardly, as the government would have it, an argument that Thomas was an aider and abettor.

To answer the second question—whether the district attorney's use of inconsistent theories affected the penalty verdict—the court applies a "reasonable likelihood" test that is equal to the *Chapman v. California*, *supra*, 386 U.S. 18 "harmless beyond a reasonable doubt" standard. (*In re Sakarias*, *supra*, 35 Cal.4th 140, 165.) As seen in the opening brief (AOB 107-108), there is a reasonable likelihood the government's use of inconsistent theories affected the penalty verdict.

Although Thomas was not the actual killer, the prosecutor argued in guilt phase that appellant pulled the trigger. Again, although the not true findings establish the jury did not believe this fact had been proven beyond a reasonable doubt, individual jurors could nevertheless suspect Thomas was the killer. This impression

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identify them to the police. (59 RT 6204.)

could be weighed in favor of a death sentence under factor (a) [circumstances of the crime] and factor (j) [relative culpability].

A lingering suspicion Thomas was the shooter—a consequence of the government's use of inconsistent theories—was reasonably likely to tip the balance against Thomas. At the time of the crime, Thomas was 19-years-old. His social history showed horrific physical and sexual abuse. Appellant's criminal history was not substantial. Admittedly, the crimes against the murder victim were terrible. Be that as it may, Thomas was less culpable than Glover—and he received a term of life imprisonment without the possibility of parole. But for the prosecutor's cynical use of inconsistent theories, it is likely Thomas would have received the lesser penalty of life imprisonment without the possibility of parole. The Court should reverse the death sentence.

V.

THE ADMISSION OF INFLAMMATORY PHOTOGRAPHS VIOLATED APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

In the opening brief (AOB 109-117), Thomas argued the trial court committed error in overruling defense objections to three photographs, exhibits 13C, 13E, and 13F. Appellant maintained admission of the gory photographs violated his Fifth and Fourteenth Amendment right to due process. Respondent agrees the due process objection has not been waived. (RB 89, fn. 20.) Nevertheless, the attorney general finds no error in the trial court's ruling. (RB 90-92.) The law in this area is well settled. The parties cite overlapping cases for the established guidelines for considering a challenge to the admission of disturbing photographs in a murder case. Hence, the issue is well framed and does not require further discussion.

As for prejudice, the government argues the evidence in both the guilt and penalty phases was compelling. Moreover, given the presence of other, properly admitted photographs, Thomas could not be prejudiced by the admission of exhibits 13C, 13E, and 13F. (RB 92.) Notably absent from the government's discussion is any mention of the appellant's prejudice argument. While the attorney general may consider the evidence compelling, the jury apparently had a different view.

Guilt phase deliberations lasted in excess of 16 hours over four trial days. The jury asked to hear anew the testimony of two

witnesses. (13 CT 3872.) The jury also asked to listen to the audio taped portion of appellant's interrogation by Kozicki and Kiefer. (*Ibid.*) The jury posed a question to the court. (13 CT 3880.) At the end of guilt phase deliberations, the jury returned not true findings on the arming enhancements. All of these factors are indicia of a close—rather than a compelling—case. In the penalty phase, the jury deliberated for more than 15 hours over a period of five days. Again, this is a sign of a close case.

Because the guilt and penalty phase decisions were close questions rather than open-and-shut issues, the error in overruling the defense objections to the gruesome photographs was prejudicial whether using the *Chapman* test for constitutional error or the *People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243] test for state law error. The Court should reverse the judgment.

VI.

THE TRIAL COURT COMMITTED ERROR IN DENYING A MISTRIAL AS A RESULT OF *DOYLE* ERROR.

In the opening brief (AOB 118-121), Thomas argued the trial court committed error in denying a mistrial motion after detective Daley testified his interrogation of appellant ended because Thomas invoked his Fifth Amendment right to counsel. Respondent denies there was any violation of *Doyle v. Ohio* (1976) 426 U.S. 610, 619 [96 S.Ct. 2240, 49 L.Ed.2d 91]. (RB 94-97.) If there was a technical violation, the government assures the court the insignificant nature of the violation could not have prejudiced Thomas. (RB 97.)

Doyle and *Wainwright v. Greenfield* (1986) 474 U.S. 284, 290 [106 S.Ct. 634, 88 L.Ed.2d 623] "are founded on the notion that it is fundamentally unfair to use post-*Miranda* silence against the defendant at trial in view of the implicit assurance contained in the *Miranda* warnings that exercise of the right of silence will not be punished. [Citation.] A similar process of reasoning supports the conclusion that any comment that penalizes exercise of the right to counsel is also prohibited. [Citations.]" (*People v. Crandell* (1988) 46 Cal.3d 833, 878 [251 Cal.Rptr. 227, 760 P.2d 423].)

If it is unfair for a prosecutor to comment on a defendant's post-arrest silence as evidence of guilt, it is also unfair to elicit testimony the accused invoked the right to counsel. When the prosecutor comments on the assertion of the Fifth Amendment privilege, he or she explicitly invites the jury to draw a negative inference from the assertion of a constitutional right. Similarly, when

a prosecutor asks a witness to testify to the defendant's post-*Miranda* silence, the evidence is in place for the jury to draw a negative inference. In either case, the assertion of a basic right is used to the defendant's detriment. Here, Daley's testimony that Thomas had asked for an attorney was improper and a violation of the Fifth and Fourteenth Amendment right to due process.

The trial judge abused his discretion in denying the mistrial motion. As seen above and in the opening brief, the jury plainly regarded both the guilt and penalty decisions as close issues. Because this is a close case, any significant error that tends to assist the prosecution or discredit the defense is prejudicial. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [15 Cal.Rptr.2d 112].) Testimony appellant invoked his Fifth Amendment rights compromised the defense case and bolstered the government's position. The error in denying the mistrial motion, then, was prejudicial. As a result of the improper testimony and the lower court's mistaken ruling, appellant was deprived of due process (U.S. Const., 5th & 14th Amends.), a fair trial (U.S. Const., 6th Amend.), and a reliable penalty determination (U.S. Const., 8th Amend.). The judgment should be reversed.

VII.

THE PROSECUTOR COMMITTED MISCONDUCT IN HIS CLOSING AND REBUTTAL ARGUMENTS.

Thomas has alleged the trial prosecutor, James Anderson, engaged in misconduct during closing argument in both guilt and penalty phases of the trial. Before responding to the merits of this claim, the attorney general chides appellant for citing newspaper articles describing the career of the now-retired Mr. Anderson. (RB 98, fn. 21.) According to the government, newspaper articles are outside the record on appeal and not a proper subject for judicial notice. (*Ibid.*)

To support the assertion appellant's use of newspaper articles about prosecutor Anderson is improper, respondent's cites *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112 [119 Cal.Rptr.2d 709, 45 P.3d 1171]. In *Zelig*, the guardians for two minor children brought a civil action against Los Angeles County for negligence, negligent infliction of emotional distress, wrongful death, and violation of civil rights based upon a courthouse incident in which their father shot and killed their mother. The county's demurrer to the complaint was sustained, and an appeal was taken.

This Court found the alleged statutory basis for liability was not applicable. The Court therefore denied a motion for judicial notice of numerous newspaper and periodical articles on the volume of cases in the county's court system and the incidence of violent crime nationwide as moot. Since the court concluded there was no basis of liability, foreseeability was a moot point.

In dicta, the Court stated, "The truth of the content of the articles is not a proper matter for judicial notice, and the circumstance that the articles were published is irrelevant to our discussion." (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th 1112, 1141, fn. 6.) "A decision is authority only for the point actually passed on by the court and directly involved in the case. General expressions in opinions that go beyond the facts of the case will not necessarily control the outcome in a subsequent suit involving different facts." (*Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721, 728 [2008 Cal.App. Lexis 2532].) *Zelig*, then, is not relevant.

Moreover, the newspapers and other periodicals cited in *Zelig* concerned a central point in the litigation. Here, the newspaper articles concerning prosecutor Anderson simply provide background information about the man.[12] Whether or not the Court considers this personal history has no bearing on the merits of appellant's argument.

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[12] The record on appeal confirms Anderson became the supervisor of the death penalty unit in 1991. (3 RT 384; 121 RT 921.) The case authorities cited in the introduction to the misconduct argument also confirm Anderson supervised the capital case team. (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 180 [115 Cal.Rptr.2d 674, 38 P.3d 512]; *In re Freeman* (2006) 38 Cal.4th 630, 646 [42 Cal.Rptr.3d 850, 133 P.3d 1013].)

(A) **The Misconduct Issue Has Not Been Waived**

In the opening brief (AOB 126), Thomas predicted the government would allege he has waived the claim of error. Appellant addressed the point in the opening brief so as to reduce the need to consider the issue in the reply brief. Respondent has not disappointed. The government notes trial counsel objected the prosecutor misstated the record, while the argument on appeal is he attempted to shift the burden of proof. (RB 101.) The government also urges waiver on the ground defense counsel objected to only two of the prosecutor's comments. (*Ibid.*)

Concerning the failure to articulate the correct ground for the objection, in the opening brief appellant pointed out the trial court granted a motion to federalize all objections, and further agreed that all objections of counsel would include the entire federal Constitution. (1 RT 161-163.) The court also granted a motion to make all in limine decisions binding. (1 RT 157-159.) After Mr. Wagner replaced the public defender, he adopted as his own all motions made by the public defender. (9 RT 513-514.) The court proceeded on the assumption counsel endorsed his predecessor's motions (15 RT 1170), and both the court and defense counsel affirmed this understanding prior to jury selection (27 RT 1802). The district attorney voiced no objection to this procedure. Hence, trial counsel's objections to the prosecutor's argument must be viewed as also incorporating all federal constitutional grounds—including the due process right to the presumption of innocence and requiring the government to bear the burden of proving guilt beyond a

reasonable doubt. (*In re Winship* (1970) 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368].)

The government simply fails to address this argument against waiver. The oversight is striking. On another issue, the attorney general agreed a federal due process argument had not been waived even though defense counsel only stated an Evidence Code section 352 objection. The government explained the federal ground had been mentioned in a written motion and his motion "to have all objections be deemed to encompass the state and federal constitution" had been granted. (RB 89, fn. 20.) "All objections," of course, included objections to the prosecutor's closing and rebuttal arguments. The waiver argument is meritless, particularly given that the prosecutor voiced no objection to wide-ranging federalization in the trial court.

(B) **The Prosecutor Attempted to Shift the Burden of Proof.**

On the merits, respondent argues it was appropriate argument for the prosecutor to claim in his rebuttal argument that defense counsel had conceded guilt on eight of the nine charges, excluding only the rape count, firearm enhancements, and the felony-murder special circumstances. (RB 105.) The government goes on to state the prosecutor did not urge the jury to forego deliberations on any of the charged counts. (RB 106.) Neither point can withstand scrutiny.

Defense counsel can, in an appropriate case, make a tactical decision to concede the client's guilt, particularly in a two-stage capital case, so as to retain credibility for the sentencing phase. (*Florida v. Nixon* (2004) 543 U.S. 175, 191-192 [125 S.Ct. 551, 160 L.Ed.2d 565].) In the present case, defense counsel acknowledged

the government's evidence was overwhelming evidence as to the kidnapping, robbery, and rape charges. (59 RT 6108.) Counsel told the jury it was a fallacy to infer from these crimes that Thomas was also guilty of murder. (59 RT 6178.) Counsel urged the jury not to find Thomas guilty of *any* charge on which the prosecutor had not proven guilt beyond a reasonable doubt. (59 RT 6179.) He specifically asked the jury to find Thomas was not guilty of the sodomy charge, and to return not true findings on the firearm enhancements and special circumstances. (59 RT 6180-6181.)

A fair reading of the defense closing argument is that he did acknowledge Thomas was guilty of kidnapping, robbery, and rape. It is not accurate to maintain the defense lawyer conceded guilt on all counts except the sodomy, personal use of a firearm, and felony-murder special circumstances.

In his rebuttal, the prosecutor falsely stated defense counsel admitted Thomas was guilty of murder, kidnapping, rape, robbery, felon in possession of a firearm, burglary, and two counts of assault with a firearm. (59 RT 6184-6185.) This is not, as the government would have it, "an accurate assessment of the record . . ." (RB 105.)

The government's second claim—the prosecutor's arguments did not urge the jurors to forego deliberations on any of the charged counts—is contrary to the record on appeal. On rebuttal, the prosecutor told the jury to go upstairs and fill out the verdict forms for guilty on all counts other than the sodomy because defense counsel had conceded appellant's guilt. (59 RT 6184-6185.) In his final remarks, the prosecutor reminded the jurors, "Now, remember what I

said. They've conceded eight of the nine counts. So to make these deliberations go more quickly, fill out the guilty forms of the ones I told you they conceded. And then discuss the sodomy, then discuss the special circumstances, and then discuss the use of the firearm." (59 RT 6205.)

The only reasonable reading of the prosecutor's argument is that he urged the jury to fill out the guilty verdict forms for all counts but the sodomy charge. Then the jury could deliberate on the one contested count, special circumstances, and the firearm enhancements. The deliberations would be accelerated by completing eight verdict forms without the need for any discussion of the evidence. The prosecutor did, indeed, tell the jury—twice—there was no need to bother themselves with deliberations on eight of the nine alleged offenses.

As for prejudice, Thomas argued in the opening brief (AOB 128-129) that reversal was required no matter what the standard for assessing the harm from the prosecutor's improper argument. Respondent takes the contrary view, and maintains any error was harmless under any standard. (RB 106.)

The Court should find the improper argument was at least federal constitutional error. In *People v. Woods* (2006) 146 Cal.App.4th 106 [57 Cal.Rptr.3d 7], the prosecutor argued defense counsel had an obligation to present evidence. The trial court overruled a defense objection to the argument. The court of appeal concluded the mistaken ruling exacerbated the erroneous argument: "It is inconceivable that the jury would understand this uncorrected, implicitly approved statement to mean anything other than appellant

carried a burden of proof or production." (*Id.* at p. 114.) The prosecutor's argument was inconsistent with due process, and therefore federal constitutional error. (*Ibid.*)

Here, as in *Woods*, defense counsel's objections to the prosecutor's improper argument were overruled. (59 RT 6184-6185.) The trial judge's rulings tacitly approved the prosecutor's assertion defense counsel had conceded eight of the nine charges and it was therefore unnecessary to deliberate on these counts. Instead, the jury could simply fill out the guilty verdict forms, and then deliberate the sodomy charge, special circumstances, and firearm enhancements. (59 RT 6184-6185, 6205.)

The government's citation to *People v. Gonzalez* (1990) 51 Cal.3d 1179 [275 Cal.Rptr. 729, 800 P.2d 1159] is distinguishable. In that case, the prosecutor made a brief comment alleging it was up to the defense to raise a reasonable doubt. Defense counsel failed to object. This Court considered the remark to be ambiguous. If the statement was an effort to shift the burden of proof, then it was misconduct. If, on the other hand, it was meant to suggest the government's evidence was sufficient to overcome the burden of proof and the defense case did not undermine it, then the statement was not improper. (*Id.* at p. 1215.) When the issue was framed in terms of inadequate assistance of counsel for failure to make a timely objection, the Court found the comment failed to satisfy the prejudice prong of the *Strickland* test.[13]

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[13] *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct.

In this case, the prosecutor's remarks were not ambiguous. Anderson clearly, forcefully, and repeatedly assured the jury that eight of the nine counts had been conceded and there was therefore no need for deliberations. (59 RT 6184-6185, 6205.) In *Gonzalez*, defense counsel failed to object; here, on the other hand, counsel twice objected without success. In this case, the prejudice issue is framed in terms of prosecutorial misconduct amounting to a violation of Fifth and Fourteenth Amendment right to due process. In *Gonzalez*, the question was resolved on the Sixth Amendment ground of the right to adequate assistance of counsel. *Gonzalez*, then, is of no benefit to respondent. The judgment should be reversed.

2052, 80 L.Ed.2d 674].

VIII.

REVERSAL OF THE JUDGMENT IS REQUIRED FOR CUMULATIVE ERROR.

The trial in this case was infected with several serious errors. These errors deprived Thomas of due process (U.S. Const. 5th & 14th Amends.) a fair trial (U.S. Const. 6th Amend.) and a reliable penalty determination (U.S. Const. 8th Amend.). Should the Court conclude none of the errors require reversal standing along, reversal for cumulative error is the appropriate remedy.

Respondent denies there were any errors; hence, there are no errors to accumulate, and no basis for reversal for cumulative error. (RB 107-108.) As seen above and in the opening brief, this assertion is incorrect. The judgment should be reversed for cumulative error.

PENALTY PHASE ERROR

IX.

THE TRIAL COURT'S DENIAL OF CHALLENGES FOR CAUSE TO PRO-DEATH JURORS DEPRIVED APPELLANT OF HIS RIGHT TO AN IMAPARTIAL JURY, DUE PROCESS, AND A RELIABLE PENALTY DETERMINATION.

In the opening brief (AOB 132-145), Thomas argued the trial court committed error in denying four challenges for cause to pro-death jurors. Appellant recognized defense counsel failed to satisfy this Court's stringent requirements for preserving the issue for review. Thomas argued these prerequisites should be reconsidered. (AOB 141-145.) Respondent disagrees, and argues the claim of error has been waived. (RB 109.)

(A) **The Court Should Reconsider the Requirements for Preserving the Issue for Review on Appeal.**

To preserve a claim the trial court committed error in denying a challenge for cause, the defendant must exercise a peremptory challenge to excuse the offending venire member, exhaust the available peremptory challenges, and express dissatisfaction with the jury as finally constituted. (*People v. Weaver* (2001) 26 Cal.4th 876, 910-911 [111 Cal.Rptr.2d 2, 29 P.3d 103].) This Court has continued to follow this rule in recent capital cases. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1290 [82 Cal.Rptr.3d 265, 190 P.3d 616].)

In the opening brief (AOB 142), Thomas acknowledged defense counsel failed to meet any of these requirements. Appellant argued the Court should reconsider these prerequisites. (AOB 142-

145.) The attorney general maintains the claim of error has been forfeited without any discussion of appellant's waiver argument. It is therefore unnecessary to revisit the argument presented in the opening brief.

Thomas would add the following justification for the Court to find the claim of error has not been waived. In *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, the Sixth Circuit held trial counsel cannot, by his errors and omissions, waive the defendant's right to an impartial jury. Instead, the defendant must personally make a knowing and intelligent waiver of this right. Therefore, defense counsel's failure to challenge for cause or exercise a peremptory challenge to remove a biased juror cannot waive the defendant's right to appeal the violation of the Sixth Amendment right to an impartial jury. (*Id.* at p. 463.)

In this case, four of defense counsel's challenges for cause were denied. One biased juror was excused by a defense peremptory challenge. A second was seated as an alternate juror. Defense counsel failed to exercise an available peremptory challenge as to this juror. As in *Hughes*, this Court should find counsel's actions did not waive the Sixth Amendment issue, which should be decided on the merits.

(B) **The Challenges for Cause.**

As for the four potential jurors who were unsuccessfully challenged for cause by defense counsel, respondent highlights voir dire responses the government suggests demonstrate the trial court's rulings are supported by substantial evidence. (RB 110-113.)

The government points to very little information not already discussed in the opening brief.

(C) **Appellant Was Prejudiced by the Rulings.**

On the question of prejudice, the attorney general argues the contested rulings did not affect his right to a fair and impartial jury because none of the four contested venire members sat on the jury. (RB 113.) As seen in the opening brief (AOB142), of the four prospective jurors challenged for cause without success, only Pamela Snyder took a place in the jury box and was excused by defense counsel.[14] (52 RT 5227.) Juror No. 17 was seated as an alternate, and defense counsel did not exercise a peremptory challenge to excuse the juror.[15] (52 RT 5232.) Horodas and Disperati were not called to the jury box, so counsel had no opportunity to exercise peremptory challenges to excuse them.

To support the absence of prejudice argument, the government cites *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80]. (RB 114.) This case was discussed in the opening brief. (AOB 143-144.) The decision in *Ross* is inconsistent with *Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 622], which was decided one year before *Ross*. In *Gray*, the high court held that jury selection errors defy harmless error analysis. (*Id.* at p. 665.) As a result, the erroneous *Witherspoon* exclusion removal of a qualified juror required reversal of the

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[14] The defense exercised a total of 16 peremptory challenges to potential trial jurors. (52 RT 5225-5232.)

[15] Defense counsel used one peremptory challenge as to potential alternate jurors. (52 RT 5232.)

petitioner's death sentence. (*Id.* at p. 668.) Justice Marshall has explained that *Gray* stands for the proposition that reversal is mandatory when "the composition of the jury panel as a whole could possibly have been affected by the trial court's error." (*Ross v. Oklahoma*, *supra*, 487 U.S. 81, 92 (dis. opn. of Marshall, J.) This is so whether the error is grounded upon *Witherspoon* exclusion or failure to excuse for cause jurors biased in favor of capital punishment, for either error affects the composition of the jury panel under the *Gray* standard. (*Id.* at p. 93 (dis. opn. of Marshall, J.)

The majority opinion in *Ross* attempted to limit the holding in *Gray*: "We decline to extend the rule of *Gray* beyond its context: the erroneous '*Witherspoon* exclusion' of a qualified juror in a capital case. We think the broad language used by the *Gray* Court is too sweeping to be applied literally, and is best understood in the context of the facts there involved." (*Ross v. Oklahoma*, *supra*, 487 U.S. 81, 87-88.)

Although the *Ross* majority attempted to limit *Gray*, it is the latter case that should be followed here. *Gray* takes its meaning from the crucible of the courtroom. Jury selection errors—whether they are *Witherspoon* exclusion or failure to grant a challenge for cause to a venire member whose zeal for capital punishment blinds him or her to mitigation—change the dynamics of jury selection.

Because the trial court failed to grant the defense challenges for cause, four biased members were added to the pool of potential jurors. The peremptory challenges allotted to the defense, however, remained static. Defense counsel had to exercise greater care in

the use of peremptory challenges because of the presence of the four unfavorable jurors.

Because Horodas, Snyder, Disperati, and Juror No. 17 were in the mix, the random order for voir dire was changed. It can never be known what the random order would have been if the unfavorable jurors had not been in the jury pool. To argue Thomas was not prejudiced by the trial court's errors is to ignore the reality of the courtroom.

In summary, the jury selection errors violated appellant's rights to due process (U.S. Const., 5th & 14th Amends.), a fair trial by an impartial jury (U.S. Const., 6th Amend.), and a reliable penalty determination (U.S. Const., 8th Amend.). The court should reverse the judgment.

X.

THE TRIAL COURT COMMITTER ERROR IN DENYING DEFENSE MOTIONS TO PROHIBIT THE CASE FROM PROCEEDING TO A PENALTY PHASE AND TO MODIFY THE SENTENCE.

At two points following the guilt phase, defense counsel raised proportionality issues triggered by Glover's sentence of life imprisonment without the possibility of parole. On October 3, 1997, prior to the start of the penalty phase, defense counsel argued intra-case proportionality would render a death sentence for Thomas arbitrary and capricious in violation of the Eighth and Fourteenth Amendment. Counsel therefore asked the court to prohibit the case from going forward to a penalty phase. (60 RT 6355-6356.) The court denied the request. (60 RT 6359.)

On January 9, 1998, after the jury returned a penalty decision and prior to the sentencing hearing, defense counsel filed a motion to reduce the punishment from death to life imprisonment without the possibility of parole. (14 CT 4155.) In the motion, counsel argued imposition of the death penalty would be cruel and unusual in violation of the Eighth Amendment and Article I, section 17 of the California Constitution. The court denied the motion to modify the punishment on proportionality grounds and sentenced appellant to death. (67 RT 7131, 7138.) In the opening brief (AOB 148-155), Thomas argued the lower court committed constitutional error in denying these motions. The government denies there was any error.

(A) **The Death Sentence Is Cruel and Unusual Punishment in Violation of Article I, Section 17 of the California Constitution.**

Respondent points out the Eighth Amendment does not require state courts to conduct inter-case proportionality. (RB 116.) This fact was noted in the opening brief. (AOB 148.) The assignment of error is predicated on intra-case proportionality review, not inter-case proportionality.

Next, the attorney general argues the defense motions were based solely upon the fact Glover received an LWOP sentence even though he was likely the actual killer. (RB 117.) This is not correct. The oral motion to prohibit a penalty phase was based upon intra-case proportionality and highlighted the disparate roles in the offense of Glover and Thomas. Given their different levels of culpability—and Glover's LWOP sentence—counsel argued a death sentence for Thomas would violate the Eighth and Fourteenth Amendments. (60 RT 6355-6356.)

In the motion to modify the verdict, defense counsel argued intra-case proportionality. The motion examined the facts of the case and argued Glover was the more culpable offender. The motion also examined the background and history of both men. In light of the relevant facts—including the LWOP sentence imposed on Glover—defense counsel maintained the state and federal constitutions prohibited imposition of the death penalty on Thomas. (14 CT 4155-4163.1.) At the hearing on the motion, counsel added imposition of the death penalty in this case would violate federal due process and equal protection. (67 RT 7119.) Neither motion, then, was based solely upon Glover's sentence.

The government interprets this Court's decisions on intra-case proportionality narrowly, and argues the assessment excludes any consideration of the punishment imposed on others. (RB 117.) The case cited by the government, *People v. Mincey* (1992) 2 Cal.4th 408, 476 [6 Cal.Rptr.2d 822, 827 P.2d 388] holds that, "Evidence of the disposition of a codefendant's case, as opposed to evidence of the codefendant's complicity and involvement in the offense, is not relevant to the decision at the penalty phase, which is based on the character and record of the *individual* defendant and the circumstances of the offense." (Emphasis in original.) In other words, although a codefendant's sentence is not relevant to the jury's penalty phase decision, the codefendant's level of culpability is an important factor. This follows from the Eighth Amendment requirement that a death-eligible offender's sentence be predicated upon his character and background, as well as his individual role in the offense. (*Enmund v. Florida* (1982) 458 U.S. 782, 798 [102 S.Ct. 3368, 73 L.Ed.2d 1140].)

A court reviewing a death sentence is in a rather different position than a sentencing jury. This Court has long held the California Constitution requires intra-case proportionality review. (*People v. Ochoa* (1998) 19 Cal.4th 353, 478 [79 Cal.Rptr.2d 408, 966 P.2d 442].) In performing this review, the Court examines "the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the

defendant, including age, prior criminality, and mental capabilities." (*People v. Hines* (1997) 15 Cal.4th 997, 1078 [64 Cal.Rptr.2d 594, 938 P.2d 388].)

In reviewing the circumstances of the crime, the Court is frequently called upon to assess the relative culpability of multiple defendants. (See e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1224 [96 Cal.Rptr.2d 1, 998 P.2d 969]; *People v. Ochoa*, *supra*, 19 Cal.4th 353, 478; *People v. Hines*, *supra*, 15 Cal.4th 997, 1078-1079; *People v. Avena* (1996) 13 Cal.4th 394, 447 [53 Cal.Rptr.2d 301, 916 P.2d 1000].) In several of these cases, the Court also considers the sentence imposed on the defendant's associates. (*People v. Ochoa*, *supra*, 19 Cal.4th 353, 478 [death penalty not disproportionate to 8-year term imposed on a codefendant who was not an actual killer and did not participate in all the defendant's crimes]; *People v. Avena*, *supra*, 13 Cal.4th 394, 447 [death penalty not grossly disproportionate where a codefendant received a sentence of 34 years to life, and another was granted immunity and had all charges dismissed after 14 months in jail].) Respondent is simply mistaken in arguing intra-case proportionality review never includes consideration of another participant's sentence.

The government questions whether Thomas can argue the death sentence is disproportionate in light of "his status as an aider and abettor, his youth, and his depraved childhood." (RB 117.) In respondent's view, Thomas did not argue these factors in the trial court. (*Ibid.*) Once again, respondent is mistaken. In the motion to reduce the punishment, counsel explicitly referred to appellant's role in the offense, his youth, and the hardships he had endured. (14 CT

4160-4161.) Furthermore, this Court considers these facts as a matter of course in conducting intra-case proportionality review. (*People v. Hines*, *supra*, 15 Cal.4th 997, 1078.)

While the facts of the present case are dreadful, Thomas was far less culpable than Glover. As seen above and in the opening brief, it is more likely that Glover rather than Thomas was the shooter. Glover rather than Thomas talked to—and no doubt intimated—Young inside the Mustang and then forced her to get into the vehicle's trunk. (52 RT 5369-5370.) In the Flennaugh incident, Glover carried the AK-47, demanded money, punched the pregnant victim and broke her nose. (55 RT 5643, 5680.) When the police arrived, Glover engaged in a firefight rather than surrender. (55 RT 5647-5648.) In the Silvey-White robbery, Glover once again confronted the victim, punched her, and fought with her. (61 RT 6443, 6449-6450.) Thomas, by contrast, played a much lesser role. Given this pattern of Glover acting as the leader, his willingness to engage in physical violence against a pregnant woman and an elderly female, there can be little doubt Thomas was far less culpable than Glover.

Thomas was a mere 19-years-old at the time of the crimes against Young. For some purposes—such as voting—a 19-year-old is considered an adult. For others—like buying alcohol—Thomas was still a minor at the time of the crimes. Surely his age is a mitigating factor. Appellant's childhood rivals the most horrifying creations of modern fiction. Intra-case proportionality review pursuant to Article I, section 17 of the California Constitution

confirms the death sentence in this matter amounts to cruel and unusual punishment, for it is disproportionate to appellant's actions, his character, and his personal history. The trial court committed error in denying the defense motions to prohibit a penalty phase and to modify the verdict.

(B) **The Death Sentence Is Cruel and Unusual Punishment in Violation of the Eighth Amendment.**

In the opening brief (AOB 152-154), Thomas maintained the death sentence in this case was imposed in violation of the Eighth Amendment. While the Eighth Amendment has not been construed to require inter-case proportionality review (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]), appellant is persuaded the amendment does mandate intra-case proportionality review. Respondent eschews any discussion of this issue. Despite the government's silence on this point, developments since the opening brief was submitted need to be brought to the Court's attention.

In *Kennedy v. Louisiana* (2008) ___ U.S. ___ [128 S.Ct. 2641, 2650-2651, 171 L.Ed.2d 525], the federal Supreme Court held the death penalty for the rape of a child violated the Eighth and Fourteenth Amendments. The court's discussion of capital punishment is relevant to the present case. The court stressed the need to limit imposition of the death penalty: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint. [¶] For these reasons, we have explained that capital punishment must 'be limited to those offenders who commit a

"narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."' [Citations.]" (*Id.* at p. 2650.) Looking back over 32 years of capital case decisions, the majority acknowledged the court's death penalty jurisprudence lacked a unifying principle. (*Id.* at p. 2659.) Nevertheless, the court has "insist[ed] upon confining the instances in which capital punishment may be imposed." (*Ibid.*)

One means of restricting the use of capital punishment to those "most deserving of execution" is by means of proportionality review. In *Walker v. Georgia* (2008) ___ U.S. ___ [129 S.Ct. 453, 172 L.Ed.2d 344], Justice Stevens, writing separately in a case where certiorari was denied, sounded the alarm as to Georgia's system of inter-case proportionality review. For a number of years, the Georgia Supreme Court performed comparative analysis by comparing death judgments to similar cases in which death or life imprisonment had been imposed. This practice was dropped, and the court limited inter-case proportionality review to cases in which death had been imposed. Justice Stevens believed this change resulted in arbitrary or discriminatory imposition of the death penalty in violation of the Eighth Amendment. (*Id.* at p. 457.)

The federal death penalty recognizes the sentence imposed on an equally culpable offender as a factor in mitigation.[16] (18

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[16] 18 U.S.C. 3592 provides, in relevant part: "(a) Mitigating factors. In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following: . . . [¶] (4) Equally culpable defendants.

U.S.C. § 3592, subd. (a)(4).) Under the federal death penalty law, when the government does not seek death against a more culpable offender or the jury returns a sentence of less than death, then the government is prohibited from seeking death against a less culpable defendant. (See *United States v. Littrell* (2007 C.D.C.A.) 478 F.Supp.2d 1179, 1189-1190.)

In the present case, the LWOP sentence imposed on Glover, who was equally or more culpable than Thomas, was sufficient cause for the court to grant the motion to prohibit a penalty phase. After the jury returned a death verdict, the court should have granted a motion to modify the punishment to life imprisonment without the possibility of parole. The death sentence imposed on Thomas violates the Eighth Amendment and should be reversed.

Another defendant or defendants, equally culpable in the crime, will not be punished by death."

XI.

THE TRIAL COURT COMMITTED ERROR IN DENYING A MOTION TO EXCLUDE SILVEY'S IDENTIFICATION OF APPELLANT AS UNRELIABLE AND TAINTED BY SUGGESTIVE POLICE PROCEDURES.

In the opening brief (AOB 160-163), Thomas argued the totality of the circumstances showed Constance Silvey's identification of him was tainted by suggestive procedures that violated due process. Appellant pointed to four factors to support this position: Silvey admitted she had only a limited opportunity to see the second offender. (21 RT 1619-1620.) The parties stipulated Silvey told a patrol officer after the incident that she "did not see suspect number two very good." (21 RT 1677.) Her attention was focused on the person who attacked her, while the second offender went to her car. (*Ibid.*) At the lineup, Silvey was uncertain of her identification of Thomas, and she registered this doubt by putting a question mark on the identification form. (21 RT 1591-1592.)

The most important factor supporting appellant's due process argument is the suggestive procedures employed by law enforcement. Inspector Wolke told Silvey about the possible connection between the assault on her and the BART station kidnapping. (20 RT 1538-1539.) Silvey was familiar with this incident from the newspaper and television news. (21 RT 1600-1602.) Silvey testified she had read about the incident in the newspaper before the assault on her. (21 RT 1625.) The government highlights Silvey's testimony she did not see any

newspaper photos of the BART kidnapping suspects prior to the lineup. (RB 123.) Silvey also testified she watched the local television news. (21 RT 1601-1602.) She could have seen photos of Thomas and Glover on television.

Whether or not Silvey saw suspect photos in the media before the lineup, the procedures at the lineup were suggestive. In the opening brief (AOB 161-162), Thomas detailed why the lineup was suggestive. The government complains appellant fails to detail how the lineup was suggestive as to him. As to this point, the attorney general maintains appellant's argument Glover stood out in the lineup is beside the point. (RB 123.) Not so.

Glover did stand out in the lineup. An examination of exhibits 57 and 58 shows that of the eight lineup participants, only Glover had substantial facial hair. Silvey testified the assailant had a moustache and perhaps additional facial hair. (21 RT 1647-1648.) The composition of the lineup was therefore suggestive as to Glover.

Thomas was prejudiced by the composition of a lineup in which Glover stood out as much for his facial hair as for the fact he was the only participant who held his number upside down. Because Thomas and Glover were in the same lineup, Silvey was able to pick Thomas from a group of seven rather than eight. In exhibits 57 and 58, the lineup participants in positions two and four appear to have moustaches. Thomas and the inmates in positions five and eight are clean-shaven. For an important characteristic—facial hair—Thomas was part of a very small group of three to five

men.[17] These circumstances, as well as the facts identified in the opening brief, demonstrate the lineup was suggestive as to Thomas.

The trial court committed error in denying the motion to exclude Silvey's identification of Thomas. Denial of the motion resulted in a denial of due process (*Stovall v. Denno* (1967) 388 U.S. 293, 303 [87 S.Ct. 1967, 18 L.Ed.2d 1199]) and a miscarriage of justice (*id.* at p. 297.) Because the identification was crucial to the most substantial factor in aggravation presented during the case-in-aggravation, the penalty decision in this matter does not meet the Eighth Amendment requirement of heightened reliability. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305.) The penalty verdict must be reversed.

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[17] The inmate in position one is obscured and only partially in the picture frame. It is difficult to tell if the individual in position six has any facial hair.

XII.

THE VICTIM IMPACT TESTIMONY OF MARY YOUNG AND ELY GASSOWAY VIOLATED THE EIGHTH AMENDMENT AND REQUIRES REVERSAL OF THE PENALTY DECISION

In the opening brief (AOB 164-171), Thomas argued the trial court committed error in overruling his objections to victim-impact testimony that exceeded the parameters described by Justice Kennard in her concurring and dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173 [3 Cal.Rptr.2d 426, 821 P.2d 1302]. In that case, Justice Kennard wrote it was a mistake to construe the circumstances of the crime as defined in section 190.3 factor (a) as including victim-impact evidence. She believed the circumstances of the crime "should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in the proof of the charges adjudicated in the guilt phase." (*Id,* at p. 264 (conc. & dis. opn. of Kennard, J.).)

Respondent correctly points out Justice Kennard's views do not represent the controlling standard in California. (RB 128.) The Court should reconsider its victim-impact jurisprudence in light of Justice Kennard's views and the federal Supreme Court's recent cases emphasizing the need to limit application of the death penalty. (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. 2641; *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]; *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335].)

At the same time as the high court has been narrowing the reach of capital punishment, this Court has steadily extended the

parameters of victim-impact evidence. From *People v. Edwards* (1991) 54 Cal.3d 787 [1 Cal.Rptr.2d 696, 819 P.2d 436] to the present writing, appellant is not aware of a single case in which this Court has reversed a death sentence due to the admission of victim-impact evidence. In recent months, the Court has sanctioned the use multimedia productions for this evidence, including a 14-minute montage of still photos of murder victims—including grave markers and inscriptions. (*People v. Zamudio* (2008) 43 Cal.4th 327, 367-368 [75 Cal.Rptr.3d 289, 181 P.3d 105].) At this point in time, it is difficult to discern any limits on what the Court is willing to sanction as victim-impact evidence.

It is worth recalling that the federal high court has not had occasion to consider victim-impact evidence since its landmark decision in *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720]. In that case, the majority held the Eighth Amendment did not prohibit the states permitting the sentencing jury a "quick glimpse" of the victim's life. (*Id.* at p. 827.) The court also approved the brief testimony at issue in *Payne*, which described in a few sentences the emotional impact of the murder on the victim's family. (*Id.* at p. 817.)

Over time, the "quick glimpse" of the victim's life has been transformed to include multimedia presentations. (*People v. Zamudio*, *supra*, 43 Cal.4th 327; *People v. Kelly* (2007) 42 Cal.4th 763, 796-797 [68 Cal.Rptr.3d 531, 171 P.3d 548].) The class of persons permitted to give victim-impact testimony, originally limited to the immediate family, has grown to include a laundry list of

witnesses, such as extended family, friends, work colleagues, and representatives of the community at large. (Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L.Rev. 257, 271.) Each enlargement of the "quick glimpse" and addition to the class of persons who claim to have been harmed by a murder carries victim-impact evidence farther away from high court's cautious, tentative approval in *Payne*.

The Court should use this case to rein in the government's abuse of victim-impact evidence, and restrict the evidence to the parameters described by Justice Kennard in *Fierro*. This limitation would be in harmony with the federal Supreme Court's efforts in recent years to limit the death penalty. As this Court has acknowledged, the greater the extent of victim-impact evidence, the greater the risk the penalty decision will be a result of emotion rather than reason. (See e.g., *People v. Kelly*, *supra*, 42 Cal.4th 763, 796-797 [cautioning trial courts to preview multimedia presentations of victim-impact evidence and to monitor the jury during its introduction to ensure the proceedings do not reach an unacceptable level of emotion].) Because the victim-impact evidence in this case exceeded the *Fierro* limits, the penalty decision should be reversed as a violation of the Eighth Amendment.

XIII.

LIMITIATIONS PLACED ON THE CASE IN MITIGATION VIOLATED THE EIGHTH AMENDMENT AND REQUIRES REVERSAL OF THE PENALTY DECISION.

In the opening brief (AOB 172-180), Thomas maintained the trial court's ruling prohibiting specific testimony that his mother, Veronica Johnson, was a victim of incest violated his Eighth Amendment right to present mitigation. Appellant also argued the court committed error in disallowing testimony Johnson attempted to kill a stepbrother with a meat cleaver.

The government responds Thomas was given wide latitude to present evidence about his mother. (RB 133.) Further, respondent notes the defense did present testimony Johnson reported having been sexually molested by her father or stepbrother between the ages of nine and 12. (*Ibid.*) The attorney general goes on to state, "Thomas fails to explain how this fact [Johnson being an incest victim], without more, had any bearing on his relationship with his mother, or his motivation to rape and sodomize a young woman." (*Ibid.*) Finally, the government maintains any error was harmless given the egregious facts of the case and appellant's criminal history. (RB 134.)

The evidence the court permitted of Johnson's sexual victimization was a pale shadow of the true facts. Lucille Serwa, a child welfare worker, testified Johnson told her that between the ages of nine and 12 she had been molested by either her father or stepbrother. (64 RT 6751.) Psychologist Ranald Bruce testified

Johnson was sexually and physically abused during her childhood. (65 RT 6869.)

The brief testimony was so vague as to be meaningless. The first reference to sexual abuse referred to either the father or stepbrother. Thus, either figure could have been responsible for the abuse. The second mention of sexual abuse was even more obscure, a bare reference to sexual abuse without naming a perpetrator or specifying the crime against the child.

The inability to name Johnson's father as her abuser meant the jury never learned the crime was incest. The prohibition on specific instances of abuse meant the jury was never told Johnson's father had sexual intercourse with her. From the evidence permitted by the court, the jury could have concluded the sexual exploitation of Johnson was comparatively minor, such as fondling the breasts from outside the clothing. While fondling by someone outside the family is reprehensible, it is trivial when compared to a father raping his own daughter. The evidence permitted by the trial court was no substitute for the information that was excluded.

Respondent complains Thomas fails to explain how his mother's sexual victimization had any bearing on his relationship with her. (RB 133.) The rationale for the proffered evidence was explained by defense counsel in the trial court (63 RT 6622-6624, 6626-6628) and reiterated in the opening brief (AOB 177-180). It is no secret that violence and sexual abuse, like a evil virus, is passed from one generation to the next.[18] Johnson was viciously beaten

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[18] "The sins of the father are to be laid upon the children."

with objects ranging from boards to ropes to an umbrella. (63 RT 6719; 64 RT 6752.) She, in turn, beat Thomas with belts and electric cords from an early age. (63 RT 6700; 65 RT 6872.) Johnson was frequently held down when she was beaten. When she became the parent, Johnson enlisted helpers to restrain Thomas for beatings. (63 RT 6687, 6717.) As a 14-year-old, her family threw Johnson away. (63 RT 6718-6719.) In her turn, Johnson abandoned Thomas on multiple occasions. (65 RT 6883.)

Johnson was a victim of sexual abuse. (64 RT 6751.) She, in turn, permitted Thomas to be molested twice as a young child. (63 RT 6687-6688; 65 RT 6876.) Johnson was so damaged she laughed at the sexual exploitation of her child and denied there was anything wrong with it. (65 RT 6876.)

That Johnson was a victim of incest is consistent with the nightmare that was her childhood. It was also of a piece with Johnson's extraordinary failure to protect Thomas from sexual exploitation and, indeed, laughed at the abuse visited upon her child. Johnson's taboo victimization surely played a role in her relationship with her son. Because the trial court limited the evidence, however, the defense psychologist was not able to explain the impact of incest on the parent-child relationship for the jury. Instead, Bruce testified in general terms that child sexual abuse has negative consequences. (RT 6869-6870, 6890.)

(Shakespeare, The Merchant of Venice, act III, scene 5, lines 1-2.)

The government argues Thomas has failed to link the excluded incest evidence to his motivation to rape and sodomize the murder victim. (RB 133.) This complaint is meritless. There is no need for proffered mitigation to have any nexus to the capital crime. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233 [127 S.Ct. 1654, 167 L.Ed.2d 585]; *Tennard v. Dretke* (2004) 542 U.S. 274, 285-286 [124 S.Ct. 2562, 159 L.Ed.2d 384].) It is enough that the horrors visited upon Johnson affected her and her ability to be a mother to Thomas.

In the opening brief (AOB 176-177), Thomas pointed out the controlling standard of care requires defense counsel to investigate the defendant's family history—including any history of physical and sexual abuse of family members. (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) 31 Hofstra L.Rev. 913, 1015.) This duty includes the traumas and abuse of family members. (*Blanco v. Singletary* (11th Cir. 1991) 943 F.2d 1477, 1501.) Counsel who fails to investigate and present his client's family history risks being found to have provided inadequate assistance of counsel. (See e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 527 [123 S.Ct. 2527, 156 L.Ed.2d 471].)

The government fails to address this important argument. Appellant's trial counsel investigated and tried to present to the jury the important facts of his family history. The trial court wrongly excluded important evidence Johnson was an incest victim and had attempted to kill a stepbrother with a meat cleaver after she found him sexually abusing his sister.

Respondent argues the trial court's ruling could not have

prejudiced Thomas because the circumstances in aggravation were egregious. (RB 134.) Again, the murder in this case was terrible. At the same time, Glover rather than Thomas was the leading actor. Thomas did have a criminal history; however, appellant disputes the government's characterization of his background as egregious. (RB 134.) It was nothing of the sort. As pointed out in earlier prejudice discussions, Thomas was 19-years-old at the time of the murder. Had the crime occurred 19 months earlier, Thomas would not have been eligible for the death penalty.

The exclusion of relevant mitigation was constitutional error meriting reversal of the penalty judgment.

XIV.

THE PROSECUTOR ENGAGED IN EGREGIOUS MISCONDUCT IN CLOSING ARGUMENT THAT TAINTED THE PENALTY PHASE WITH UNFAIRNESS AND DEPRIVED APPELLANT OF DUE PROCESS AND A RELIABLE PENALTY DETERMINATION.

Respondent argues the claims of prosecutorial misconduct in penalty phase argument have largely been waived for failure to object. On the merits, the government denies there was any misconduct. If misconduct is assumed, the attorney general claims it was harmless. None of these points are persuasive.

(A) The Prosecutor Engaged in Dehumanizing Name-Calling

In the opening brief (AOB 181-184), Thomas argued the prosecutor's liberal use of name-calling amounted to misconduct. Respondent points out defense counsel failed to object to the vituperation, so the claim of misconduct is waived on appeal. (RB 136.) The government is correct insofar as defense counsel failed to object to any of the nine instances of name-calling. It does not follow, however, that the Court cannot consider the merits of the claim of error.

As noted in the introduction, an objection is not required when it would be futile. (*People v. Boyette*, *supra*, 29 Cal.4th 381, 432.) In this case, Anderson engaged in a multitude of inappropriate actions in closing argument. When defense counsel did object, the court either overruled the objection or sustained it and gave the jury a tepid admonition. Furthermore, Anderson was never deterred by an objection being sustained against him. For example, when he yelled about the jury being the conscience of the community,

defense counsel's objection was sustained. (66 RT 7013-7014.) The prosecutor was not chastened by the adverse ruling and went on with his inappropriate conscience of the community tirade, and asked the jury to use this case to "send a message." (66 RT 7016.) Further objections would have been futile.

The Court has the authority to consider the merits of an assignment of error even when there is no justification for the failure to object. (*People v. Smith* (2003) 31 Cal.4th 1207, 1215 [7 Cal.Rptr.3d 559, 80 P.3d 662].) The Court has exercised this discretion to consider the merits of a claim of prosecutorial misconduct. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072-1076 [25 Cal.Rptr.2d 867, 864 P.2d 40].) The Court should exercise its discretion to decide the merits of the claim of misconduct in penalty phase argument.

On the merits, the government maintains the epithets were justified by the facts of the Young murder, the Silvey incident, and the Flennaugh robbery. (RB 137.) In other words, respondent endorses execration in the penalty phase of capital cases. This, however, is not the law. The Supreme Court does not condone the use of opprobrious terms (*People v. Yeoman*, *supra*, 31 Cal.4th 93, 149) or profanity (*People v. Harrison* (2005) 35 Cal.4th 208, 259 [25 Cal.Rptr.3d 224, 106 P.3d 895]) in closing argument. When the remarks are brief or passing, the Court does not find the inappropriate name-calling prejudicial. (See e.g., *People v. Yeoman*, *supra*, 31 Cal.4th 93, 149 [defendant not prejudiced when the prosecutor referred to him as an animal one time in closing

argument].)

Here, prosecutor Anderson dipped into his standard repertory of vilification and on nine separate occasions used opprobrious language to demean and dehumanize Thomas. (Chapman, *A Passionate Foe of Killers Cedes Stage After 34 Years*, Oakland Tribune (Oct. 7, 2004) More Local News.) The vilification was neither brief nor passing.

(B) **The Prosecutor Made Repeated Appeals to Passion and Prejudice**

Concerning the prosecutor's appeals to passion and prejudice, the government argues arguments about future dangerousness are appropriate in penalty phase closing argument. (RB 138-139.) This is true. However, as the cases cited by respondent show, the evidence must support such arguments. (*People v. Michaels* (2002) 28 Cal.4th 486, 540-541 [122 Cal.Rptr.2d 285, 49 P.3d 1032].) For example, in *People v. Higgins* (2006) 38 Cal.4th 175, 251 [41 Cal.Rptr.3d 593, 131 P.2d 995], cited by respondent, the prosecutor argued the defendant's record of bad conduct in custody showed he would be a future danger if sentenced to LWOP. This Court concluded the argument was proper, for it was grounded upon the evidence proffered in aggravation. (*Id.* at p. 253.)

In this case, prosecutor Anderson argued future dangerousness on the basis of a life sentence—not the evidence. (66 RT 7011-7012.) Because the argument was not linked to the evidence in any way, it was improper and misconduct.

As for the prosecutor's appeals to the jury as the conscience of the community, the government argues defense objections to the

argument were sustained and the jury was admonished to disregard the argument. Respondent points out the jury is assumed to heed the court's instructions and admonitions. (RB 139-140.)

In the opening brief (AOB 187-188), Thomas pointed out there are times when an admonition cannot "unring the bell." (*People v. Hill*, *supra*, 17 Cal.4th 800, 845.) At some point, admonitions are no longer effective. As the Fifth Circuit has explained, "Furthermore, the cleansing effect of the cautionary instructions in this case is dubious for, as the trial judge himself observed during the trial, '*you can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.*' Stated another way, the bench and bar are both aware that *cautionary instructions are effective only up to a certain point.* There must be a line drawn in any trial where, after repeated exposure of a jury to prejudicial information, a judge realizes that cautionary instructions will have little, if any, effect in eliminating the prejudicial harm." (*O'Rear v. Fruehauf* (5th Cir. 1977) 554 F.2d 1304, 1309.)

In this case, the court's admonitions were so truncated as to be incomprehensible. The prosecutor engaged in so many acts of misconduct that admonitions were useless. In addition to nine instances of name-calling, the prosecutor made four different appeals to passion or prejudice, committed *Griffin* error, and twice engaged in *Boyd* error. Against this barrage of inappropriate argument, the court's admonitions were useless. The government's reliance on the admonitions is therefore misplaced.

(C) ***Griffin* Error**

A prosecutor's comment on the defendant's failure to testify violates the Fifth Amendment privilege against self-incrimination. (*Griffin v. California* (1965) 380 U.S. 609, 612 [85 S.Ct. 1229, 14 L.Ed.2d 106]. In this case, Thomas maintained the prosecutor committed *Griffin* error in his comments on appellant's failure to present an alibi defense to the Silvey incident. (AOB 188-190.) The government denies there was *Griffin* error. In respondent's view, the argument "was expressly directed to Thomas's lack of alibi witnesses for the Constance Silvey crimes." (RB 142.) Not so.

The prosecutor's comments certainly started out as a discussion on the state of the evidence and the failure to produce any alibi witnesses. (66 RT 6989-6990.) However, the statement "Not one person came forward," is of a different character. As a result, the government's reliance on *People v. Brown* (2003) 31 Cal.4th 518 [3 Cal.Rptr.3d 145, 73 P.3d 1137] is misplaced. By shifting the focus of the argument from alibi to "one person," the prosecutor moved his attention from the state of the evidence to appellant. The "one person" who failed to come forward was surely Thomas. This is *Griffin* error.

Because the trial court overruled defense counsel's objection to the argument, the prosecutor was emboldened to continue the improper argument, thereby exacerbating the prejudice to Thomas. (66 RT 6990-6991.)

(D) ***Boyd* Error**

Boyd error occurs when a prosecutor erroneously argues that factor (k) evidence, which can only be considered as mitigation, is in

fact aggravation. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776 [215 Cal.Rptr. 1, 700 P.2d 782].) Here, the prosecutor tried to change mitigation into aggravation by accepting that he had a terrible childhood, and then arguing the abuse inflicted on him as a child did not cause Thomas to commit murder and other crimes. (66 RT 6996, 6999.) Second, the prosecutor used the testimony of a defense psychologist to argue Thomas would always be a walking time bomb. (66 RT 7011.)

Respondent argues the issue has been waived. As to the first comment, the attorney general notes defense counsel failed to object. As to the second argument, the government alleges the objection in the trial court was made on the ground the comments were beyond the scope of the record rather than *Boyd* error. Accordingly, respondent argues both strands of the issue have been waived. (RB 143.)

As seen above, this Court has the discretion to reach the merits of claims of error even in the absence of an objection. (*People v. Smith*, *supra*, 31 Cal.4th 1207, 1215.) In a capital case, the court must be especially vigilant to scour the record for constitutional error. (*Burger v. Kemp*, *supra*, 483 U.S. 776, 785.) The Court should reach the merits of the first claim of *Boyd* error.

As for the second instance of *Boyd* error, the Court should consider the merits for several reasons. First, the trial court granted a defense motion to federalize objections so that all objections include all federal constitutional grounds. The prosecutor had no objection to this procedure. (1 RT 161-162.) As a result, the

objection to Anderson's argument must—by the government's agreement—be deemed to include all federal constitutional grounds. These grounds include the Eighth Amendment requirement the jury consider any aspect of the offender's character and background that is proffered as a basis for a sentence of less than death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 [98 S.Ct. 2954, 57 L.ed.2d 973] (plur. opn. of Burger, C.J.).)

Factor (k) codifies this Eighth Amendment requirement. (*People v. Boyd*, *supra*, 38 Cal.3d 762, 775.) Consequently, the prosecutor's efforts to twist factor (k) mitigation into aggravation were in violation of the Eighth Amendment. Defense counsel's objection, which included all federal constitutional grounds, was sufficient to preserve the claim of *Boyd* error for review.

Additionally, the constitutional ground advanced on appeal merely restates the trial court objection on alternative legal grounds. Hence, there is no compelling reason to apply the waiver rule to the claim of *Boyd* error. (*People v. Yeoman*, *supra*, 31 Cal.4th 93, 117.)

On the merits, the government defends the contested argument as comments the evidence offered in mitigation carried little persuasive force when compared to the crimes on which Thomas had been convicted. (RB 145.) This benign description does not fit the prosecutor's argument. In the first example of *Boyd* error, the prosecutor used the evidence of appellant's appalling childhood to argue the mistreatment did not cause him to commit the crimes at issue in this case. (66 RT 6999.) This is a spurious argument, for there does not need to be any linkage between mitigation and the capital crimes. (*Tennard v. Dretke*, *supra*, 542

U.S. 274, 185-186.) Anderson used the lack of a connection between the mitigation and the crimes to argue for the death penalty. This is to use mitigation as aggravation. It is the definition of *Boyd* error.

In the second instance of *Boyd* error, the prosecutor used the testimony of defense psychologist Ranald Bruce to argue Thomas would be a "walking time bomb forever." (66 RT 7011.) Because he would not receive therapy in state prison, Thomas would be a danger if sentenced to LWOP. (66 RT 7011-7012.) This is not, as the government would have it (RB 145), a comparison of aggravation and mitigation. Instead, it is a bald-faced use of mitigation to argue future dangerousness. In other words, it is the use of mitigation as aggravation. Again, this is *Boyd* error.

(E) **The Constitutional Error Requires Reversal of the Penalty Verdict**

On the question of prejudice, the government relies upon the jury instructions as a cure for any assumed misconduct. Respondent reminds the Court that it is presumed the jury followed the trial judge's instructions. Hence, any misconduct was washed away by the instructions. (RB 145-146.)

It is, of course, true that reviewing courts presume juries follow the trial court's instructions. The presumption, like all things legal, is subject to exceptions. Thus it is settled a limiting instruction cannot cure the prejudice from the introduction of the confession of a non-testifying codefendant. (*Bruton v. United States* (1968) 391 U.S. 123, 135 [88 S.Ct. 1620, 20 L.Ed.2d 476].) Justice Robert

Jackson—whose courtroom experience as a trial lawyer and as chief prosecutor for the United States at Nuremberg made him a leading authority on such issues—scoffed at the effectiveness of limiting instructions: "The naive assumption that prejudicial effects can be overcome by instructions to the jury [citation] all practicing lawyers know to be unmitigated fiction. [Citation.]" (*Krulewitch v. United States* (1949) 336 U.S. 440, 453 [69 S.Ct. 716, 93 L.Ed. 790] (conc. opn. of Jackson, J.).) This Court has cautioned that limiting instructions appear to call for "'discrimination so subtle [as to be] a feat beyond the compass of ordinary minds.'" (*People v. Antick* (1975) 15 Cal.3d 79, 98 [123 Cal.Rptr. 475, 539 P.2d 43]; see also *People v. Laursen* (1968) 264 Cal.App.2d 932, 939 [71 Cal.Rptr. 71][limiting instruction insufficient to cure prejudice from prosecutorial misconduct in closing argument].)

Respondent's reliance on the court's instructions to cure any error is misplaced. The prosecutor committed misconduct in penalty phase closing argument that deprived Thomas of due process (U.S. Const., 5th & 14th Amends.) and a reliable penalty determination (U.S. Const., 8th Amend.). The penalty decision should therefore be reversed.

XV.

THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO INFORM THE JURY OF THE PRESUMPTION OF INNOCENCE AND ALLOCATION OF THE BURDEN OF PROOF FOR FACTOR (B) EVIDENCE, AND CONTAINED INCOMPLETE DIRECTIONS ON THE EVALUATION OF EVIDENCE.

In the opening brief (AOB 193-210), Thomas argued the trial court committed error by failing to instruct the jury with CALJIC 2.00 [direct and circumstantial evidence], 2.01 [sufficiency of circumstantial evidence], and 2.22 [weighing conflicting testimony]. Appellant maintained the court's modification of CALJIC 2.90 [presumption of innocence] was federal constitutional error in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and its progeny. Finally Thomas maintained the court committed error by failing to delete inapplicable factors from CALJIC 8.85. The government finds no merit in any of the assertions of jury instruction error.

(A) The Court Had a Sua Sponte Duty to Instruct the Jury on Direct and Circumstantial Evidence Pursuant to CALJIC Nos. 2.00 and 2.01

In the opening brief (AOB 196-197), Thomas argued the trial court had a sua sponte duty to instruct the jury on direct and circumstantial evidence pursuant to CALJIC 2.00 and 2.01. Respondent counters both the government and the defense penalty phase cases were grounded upon direct evidence. The instructions therefore were not necessary. The introduction of circumstantial

evidence was limited to the guilt phase, and the jury had already returned verdicts on the charges and enhancements. In any event, if it was error to omit the instructions, it was harmless. (RB 148-149.) Thomas does not agree with this assessment.

While the jury had returned guilt phase verdicts, the evidence presented in that portion of the trial remained highly relevant to the penalty phase decision as factor (a) evidence. In his penalty phase argument, the prosecutor stressed the factor (a) crimes alone "cry out for the death penalty." (66 RT 7013.) Even if the statement contains a certain amount of hyperbole, there can be no doubt factor (a) was an important element of the jury's penalty decision. Hence, the jury needed to be instructed on direct and circumstantial evidence pursuant to CALJIC 2.00 and 2.01.

(B) **The Court Had a Sua Sponte Duty to Instruct the Jury on Weighing Conflicting Testimony Pursuant to CALJIC No. 2.22**

In the opening brief (AOB 197-198), Thomas argued the trial court committed error in failing to give the jury the standard instruction on conflicting testimony. Appellant pointed to important conflicts in both the guilt and penalty phase evidence that warranted the instruction. Respondent denies CALJIC 2.22 was required for the guilt phase conflicts, which the jury had already resolved. As for the penalty phase, the government claims CALJIC 2.21.1 on discrepancies in testimony was sufficient. In any case, the attorney general maintains any assumed error was harmless. (RB 150-151.)

Once again, the guilt phase conflicts were important to the penalty phase decision, as the crimes of conviction were factor (a) evidence.

(C) **The Trial Court's Modification of CALJIC No. 2.90 Was Federal Constitutional Error.**

The trial court gave the jury a truncated version of CALJIC 2.90 that failed to mention the presumption of innocence. (14 CT 4100.) The modification was in line with this Court's decision in *People v. Prieto*, *supra*, 30 Cal.4th 226. In the opening brief (AOB 198-207), Thomas argued *Prieto* must be reexamined in light of *Apprendi* and its progeny, culminating in *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. Respondent points out this Court has rejected the same argument in other cases, including *People v. Prince* (2007) 40 Cal.4th 1179 57 Cal.Rptr.3d 543, 156 P.3d 1015]. (RB 154-155.) Thomas nonetheless stands by the argument made in the opening brief. The trial judge committed constitutional error in failing to instruct the jury on the presumption of innocence as to the factor (b) allegations.

(D) **Failure to Delete Inapplicable Factors From CALJIC No. 8.85**

In the opening brief (AOB 207-208), Thomas argued the lower court committed error in denying a defense motion to delete as inapplicable factors (e) and (f) from CALJIC 8.85. Appellant noted this Court has rejected this argument in the past. (*People v. Webb* (1993) 6 Cal.4th 494, 532-533 [24 Cal.Rptr.2d 779, 862 P.2d 779].) Respondent also points out the Court has repeatedly rejected this

argument. (RB 155.) Nevertheless, for the reasons stated in the opening brief, it was federal constitutional error in violation of the Eighth and Fourteenth Amendments for the lower court to deny appellant's motion.

In summary, the failure to give the jury an accurate instruction on the presumption of innocence was structural error requiring reversal without regard to proof of prejudice. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 124 L.Ed.2d 182].) At the least, the errors were of constitutional dimension and were not harmless beyond a reasonable doubt. The penalty verdict should be reversed.

XVI.

THE PENALTY JUDGMENT SHOULD BE REVERSED FOR CUMULATIVE ERROR.

In the opening brief (AOB 210), Thomas maintained the numerous penalty phase errors required reversal of the judgment, both individually and cumulatively. Respondent denies there were any errors to accumulate and, if there were errors, they were harmless. (RB 156.) For the reasons stated above and in the opening brief, this is not correct. The death sentence in this case fails to satisfy the Eighth Amendment reliability requirement. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].) The penalty verdict should be reversed.

XVII.

TRIAL COURT FAILED TO CONSIDER MITIGATING CIRCUMSTANCES IN RULING ON THE MOTION TO MODIFY THE DEATH SENTENCE

In the opening brief (AOB 211-215), Thomas argued the trial court abused his discretion in denying the statutory motion to modify the punishment from death to LWOP. Appellant argued the court used the word "extenuate" five times. Read in context, the court's use of the word suggested the judge discounted the case in mitigation because it did not have a causal relationship to the capital crimes and therefore did not "extenuate" the offenses. (67 RT 7137-7138.) Thomas also complained it was an abuse of discretion for the court to find his age at the time of the crimes was not a factor in mitigation.

Respondent dismisses the first claim of error as specious. In the government's view, the trial court's language merely tracked factor (k). (RB 161.) As for appellant's age, the attorney general states this factor is neither aggravating nor mitigating. Age is instead a metonym for any age-related matter suggested by the evidence or common experience. (RB 163.) The government's claims are not persuasive.

A fair reading of the court's announcement of the decision to deny the motion to modify is the judge attached no weight to the case-in-mitigation because it had no causal relationship to the capital crimes. The high court has made it clear that mitigation does not need to have any kind of nexus to the offender's crimes. (*Tennard v. Dretke*, *supra*, 542 U.S. 274, 285-286.) The lower

court's statements plainly suggest the judge dismissed the defense mitigation because of the lack of any nexus to the crimes. This reading is not affected by the fact the word "extenuate" appears in the text of factor (k).

This Court has held that factor (i) is neutral, and counsel can argue it is aggravating or mitigating. (*People v. Jones* (2003) 30 Cal.4th 1084, 1124-1125 [135 Cal.Rptr.2d 370, 70 P.3d 359].) As a person younger than 18 is ineligible for the death penalty (*Roper v. Simmons*, *supra* 543 U.S. 551, 568), the proposition that an 18 or 19-year-old offender's age is mitigating seems difficult to challenge. The federal high court has for decades acknowledged youth is a factor in mitigation. (*Johnson v. Texas* (1993) 509 U.S. 350, 367 [113 S.Ct. 2658, 125 L.Ed.2d 290]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115 [102 S.Ct. 869, 71 L.Ed.2d 1].)

Appellant was 19-years-old at the time of the crimes. His age was a factor in mitigation, and it was an abuse of discretion for the trial judge to find otherwise. In his penalty phase argument, the prosecutor argued that because Thomas was 19 he was a "full-blown adult." (66 RT 6993.) As a result, his age was not a factor in mitigation. This is nonsense. A teenager who cannot buy a beer is not a "full-blown adult." He is a teenager. Similarly, it was an abuse of discretion for the trial judge to conclude appellant's age was not a factor in mitigation.

The trial court's ruling on the motion to modify was an abuse of discretion. Because the judge failed to follow state law, the decision deprived Thomas of a liberty interest protected by the

Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 347 [100 S.Ct. 2227, 65 L.Ed.2d 175].) The sentence should be set aside and the case remanded for a new sentencing hearing.

SYSTEMIC ERROR

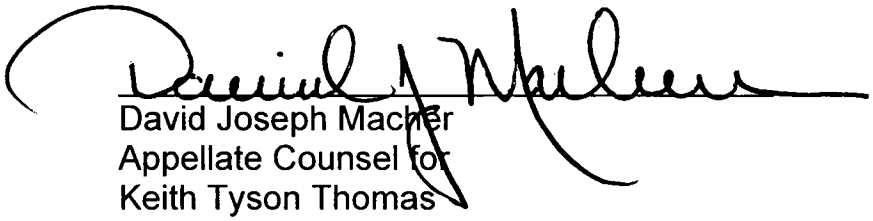
In the opening brief, Thomas made a number of challenges to the state's death penalty system, including section 190.2 failed to narrow the class of death-eligible defendants as required by the Eighth Amendment (AOB 218-219), section 190.3, factor (a) is applied so as to permit arbitrary and capricious imposition of the death penalty (AOB 220-222), the death penalty can be imposed without a unanimous jury finding on each fact necessary to raise the punishment from LWOP to death (AOB 223-244), the death penalty violates equal protection as death-eligible defendants do not receive the benefit of procedural safeguards available to non-capital defendants (AOB 245-247), and capital punishment violates international law (AOB 248-251). Respondent contests each of these challenges, and notes this Court has previously rejected all of these claims. (RB 163-170.) Thomas stands by the claims of constitutional error, and asks the Court to set aside the death sentence in this matter as a result of the systemic failures described in the opening brief.

CONCLUSION

For the foregoing reasons, as well as the grounds stated in the opening brief, appellant Keith Tyson Thomas respectfully requests the court grant the relief prayed for in this appeal.

Dated: February 27, 2009.

Respectfully Submitted,



David Joseph Macher
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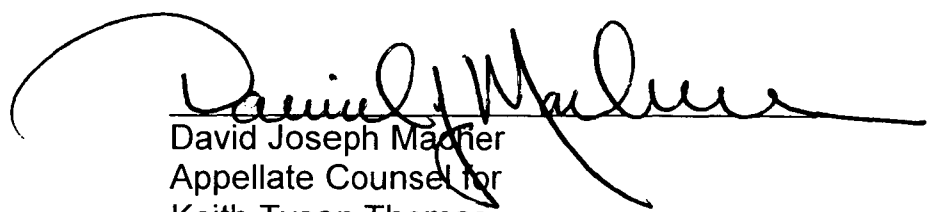
CERTIFICATE OF LENGTH

I, David Joseph Macher, appellate counsel for Keith Tyson Thomas, hereby certify, pursuant to the California Rules of Court that the word count for this document is 24,376 words. The total excludes the tables, proof of service, and this certificate. This document was prepared in Microsoft Word for Mac, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Murrieta, California, on February 27, 2009.



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Declaration Of Service By Mail

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 25096 Jefferson Avenue, Suite B-6, Murrieta, California 92562.

On February 28, 2009, I served the foregoing document described as **Appellant's Reply Brief** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Murrieta, California, addressed to the person in charge as follows:

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I declare under penalty of perjury that under the laws of the State of California that the above is true and correct.

Executed this 28th day of February 2009 at Murrieta, California.

David Joseph Macher