No. S080477

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KELVYN RONDELL BANKS,

Defendant and Appellant.

LOS ANGELES COUNTY
SUPERIOR COURT

Case No. BA109260

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Los Angeles
The Honorable Charles E. Horan, Judge Presiding

APPELLANT'S REPLY BRIEF

Stephen M. Lathrop (S.B. #126813)
Certified Appellate Law Specialist
State Bar of Cal., Board of Legal Specialization
904 Silver Spur Road #430
Rolling Hills Estates, California 90274
Tel. 310.237.1000, ext. 3; Fax 310.237.1010

Attorney for Defendant/Appellant
KELVYN RONDELL BANKS

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INTRODUCTION

Appellant Kelvyn Rondell Banks respectfully submits this reply to respondent's brief.

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ARGUMENT

JURY SELECTION ISSUE, GUILT PHASE

I.

AN INDEPENDENT REVIEW OF THE RECORD – AS RESPONDENT ACKNOWLEDGES IS REQUIRED – DISCLOSES AN INFERENCE THAT THE PROSECUTOR EXCUSED AFRICAN-AMERICAN PROSPECTIVE JURORS NO. 6 (JUROR J.R.), FIRST NO. 12 (JUROR R.W.), AND SECOND NO. 12 (JUROR A.I.) ON PROHIBITED DISCRIMINATORY GROUNDS, THEREBY REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS AND THE DEATH JUDGMENT

Appellant explained in his opening brief that the record permits an inference that the prosecutor excused the following three African-American prospective jurors on prohibited discriminatory grounds: 1) Prospective Juror No. 6 (#5321, hereinafter "Prospective Juror J.R."); 2) First Prospective Juror No. 12 (#2726, hereinafter "Prospective Juror R.W."); and, 3) Second Prospective Juror No. 12 (#8322, hereinafter "Prospective Juror A.I.)."[1] (AOB 53-75.)

Appellant explained that the prosecutor's purported reason for excusing each of these jurors was a purported inability to impose the death penalty. (AOB 56; RT 25-1:1237 ["That is why I excused all of these people was [sic] for inability to impose the death penalty."].) The prosecutor's reason, as to each of three challenged jurors, is belied by a fair reading of the entire record, including the jury

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[1] Respondent refers to the prospective jurors by their initials (RB 63), derived from the jury questionnaires, and thus for ease of reference appellant adopts the same naming convention.

questionnaires and voir dire, which shows that each one would be fair and impartial and could impose the death penalty. (AOB 62-70; Prospective Juror J.R. – RT 24:876-877, 880-881, 886, 893, 899, 903, 926-930 [could impose death penalty]; Prospective Juror R.W. – RT 24:1037-1045; RT 24:1042 [could impose death penalty]; Prospective Juror I.A. – RT 25-1:1214 through 25-1:1219, 1220-1221 [could impose death penalty], 1222-1224.)

Respondent agrees that because appellant's trial preceded the United States Supreme Court's opinion in *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129], this Court does not defer to the trial court but, instead, "'independently determine[s] whether the record permits an inference that the prosecutor excused jurors on prohibited discriminatory grounds.'" (RB 69, quoting *People v. Carasi* (2008) 44 Cal.4th 1263, 1293; AOB 60-61.)

Respondent argues that each of the prospective jurors gave answers in their questionnaires and on voir dire that presented grounds for the prosecution to exercise a peremptory challenge. (RB 71-76.) Respondent's argument does not withstand critical analysis, which requires a thoughtful analysis of the prosecution's reasons in light of the record facts. (See *Snyder v. Louisiana* (2008) 552 U.S. 472, 476-478 [128 S.Ct. 1203, 170 L.Ed.2d 175].)

A. THE RECORD ESTABLISHES A REASONABLE INFERENCE THAT THE PROSECUTOR EXERCISED A PEREMPTORY CHALLENGE AGAINST PROSPECTIVE JUROR J.R. ON AN UNCONSTITUTIONALLY DISCRIMINATORY BASIS

Respondent acknowledges that Prospective Juror J.R. "testified that in the event of a penalty phase, she could choose between the two choices [of death and life without the possibility of parole]." (RB 72; RT 24:928-929.)

Respondent argues that Prospective Juror J.R.'s written answers in the questionnaire could reasonably have given the prosecutor "doubt about that juror's stance on the death penalty . . . ." (RB 73.)

Prospective Juror J.R. circled the answer "Don't know" to questions 32, 33, and 34.[2] Prospective Juror J.R. circled both "yes" and "no" responses to question 31(f), which asks, "Regardless of your views on the death penalty, would you as a juror, be able to vote for the death penalty on another person if you believe, after hearing all the evidence, that the penalty was appropriate?" (CT 4:1097.)

Respondent's analysis of Prospective Juror J.R.'s written responses fails to consider the entire record, which supports the conclusion that Prospective Juror J.R.

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[2] Question 32 asks, "In this penalty phase would you automatically, in every case, regardless of the evidence, vote for the death penalty?" Question 33 asks, "In this penalty phase would you automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole?" Question 34 asks, "Do you have any conscientious objections to the death penalty which you believe might impair your ability to be fair and impartial in a case in which the prosecution is seeking the death penalty?" (CT 4:1097-1098 [emphasis in original].)

was a conscientious person who could fairly apply the law and impose a sentence of death, if appropriate. As shown below, respondent omits Prospective Juror J.R.'s written answers to questions 28, 29, 30, 31, subdivisions (a) through (e), and 36, and fails to consider her written responses in the proper context of her oral responses during voir dire.

In her written responses, Prospective Juror J.R. stated that in the penalty phase she understood that the death penalty was one of the choices she would be called upon to make, and that the only other choice was life in prison without the possibility of parole. (CT 4:1096 [Questions 28 & 29, respectively].) In response to question 30, which asked her general feelings about the death penalty, she wrote, "I can't put my feelings into it rather good or bad it all depends on one's circumstances." (CT 4:1096.) The response to question 30 underscores Prospective Juror J.R.'s fairness and ability to make a decision in the penalty phase based on the circumstances of the case, setting aside her personal feelings on the matter.

In her responses to question 31, subdivisions (a) through (f), asking about her personal views of the death penalty, Prospective Juror J.R. is shown to have no preconceived ideas about, nor objections to, the death penalty. (CT 4:1096-1097.) She responded that she does not know whether the death penalty is used too seldom (question 31(a)) or too often (question 31(b)) because she does not follow the news and cases with respect to the death penalty. (CT 4:1096-1097.) She does not belong

to any groups that "support either elimination of, or increase use of the death penalty" (question 31(c)), nor are her views on the death penalty based on a "religious conviction" (question 31(d)). (CT 4:1097.) Responding to the question whether California should have the death penalty" (question 31(e)), she wrote, "I don't know, California makes those decisions." (CT 4:1097.)

In response to question 36, asking whether there is "ANYTHING that you would like to bring to the attention of the Court that you believe MIGHT affect your ability to be fair and impartial in this case[,]" Prospective Juror J.R. responded, "No." (CT 4:1098.)

In her voir dire responses to questions relating to her "yes/no" response to question 31(f) and her "don't know" responses to questions 32, 33, and 34, Prospective Juror J.R. is shown to have no preconceived ideas about, nor objections to, the death penalty. She responded "yes/no" to question 31(f) because there was no "I don't know" choice on the form, and she was simply responding that she did not know "anything much about the death penalty." (RT 24:928.) The same is true with respect to her "don't know" responses to questions 32, 33, and 34. (RT 24:928-929.) The trial judge inquired of Prospective Juror J.R.:

The Court: Do you understand there is [sic] two choices: life in prison without parole or the death penalty. Do you understand that?

Prospective Juror 6 [J.R.]: Yes.

The Court: The question, and we need to know this: if we get to that phase, if we get to a penalty proceeding in this case, can you make that choice?

Prospective Juror 6 [J.R.]: Yes.

The Court: Between life without parole or the death penalty based on that weighing process?

Prospective Juror 6 [J.R.]: Yes.

The Court: Will you believe that one verdict will be easier on you than the other for example?

Prospective Juror 6 [J.R.]: No, sir.

The Court: Can you think of any reason you wouldn't be an appropriate juror in this matter?

Prospective Juror 6 [J.R.]: No, sir.

The Court: Number 34 asks you if you have any conscientious objections, anything in your background, religious, philosophical or something about your conscience that would make it tough for you to be fair in a death penalty case and you said you don't know. Do you understand that question?

Prospective Juror 6 [J.R.]: Yes. It's open-minded person, sir.

The Court: And then 32 and 33 asks this. We talked about with one lady already, but 32 said: "In a penalty phase, would you automatically, in every case, regardless of what the evidence was, vote for the death penalty?" Number 33 said: "Would you automatically always vote for life without parole?" And you said "Don't know, don't know." Would you explain those answers to me.

Prospective Juror 6 [J.R.]: No, I wouldn't automatically [vote either way]. No.

The Court: All right. Do you understand that your duty, if we have a penalty phase, your duty just begins. Then you have to listen to additional evidence brought by the parties and after you heard it all you use your guilt phase evidence, plus whatever has been put on in the penalty phase and you have to decide what's the appropriate penalty. What's right here, life in prison or death? Do you understand that?

Prospective Juror 6 [J.R.]: Yes.

The Court: Do you believe you can handle that appropriately in this case?

Prospective Juror [6] [J.R.]:Yes, sir. [RT 24:927-930.]

Synthesizing Prospective Juror J.R.'s written and oral responses, and viewing both in context, there could be no justifiable, record-based doubt about her ability to impose the death penalty in an appropriate case. (CT 4:1096-1098; RT 24:927-930.)

In support of the challenge to Prospective Juror J.R., respondent cites *People v. Stevens* (2007) 41 Cal.4th 182, 194, arguing that the "prosecutor could reasonably harbor doubt about that juror's stance on the death penalty given her written answers in the questionnaire." (RB 73.) *People v. Stevens, supra*, is inapposite. There, the challenged juror at issue, Prospective Juror L.F., stated, "I honestly don't know[,]" in his written questionnaire in response to the question whether he would vote for the death penalty if it were on the ballot. (*Id.* at p. 193.) During voir dire, Prospective Juror L.F. was "ambivale[nt] . . . in his ability [to impose the death

penalty] and showed a lack of commitment in the ability to impose the death penalty." (*Id.* at p. 194.) The prosecutor's stated reason for challenging Prospective Juror L.F., i.e., an inability to impose the death penalty, was supported by the record because Prospective Juror L.F.'s written and oral responses each showed ambivalence in his ability to impose the death penalty. (*Ibid.*) Here, in contrast, Prospective Juror J.R.'s oral responses to voir dire reflect no ambivalence in her ability to impose the death penalty. Prospective Juror J.R.'s written responses, considered in context and as a whole, also reflect no ambivalence in her the ability to impose the death penalty.

Moreover, the prosecutor never questioned Prospective Juror J.R. about the "don't know" responses to questions 32, 33 and 34, nor did the prosecutor question her at all, but the record of the voir dire conducted by the trial judge reflects she was either being cautious about answering these questions or did not fully understand the questions. (RT 24:929-930; see *Miller-El v. Dretke* (2005) 545 U.S. 231, 246 [125 S.Ct. 2317, 162 L.Ed.2d 196] ["failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"]; *People v. Wheeler* (1978) 22 Cal.3d 258, 280-281.)

B. THE RECORD ESTABLISHES A REASONABLE INFERENCE THAT THE PROSECUTOR EXERCISED A PEREMPTORY CHALLENGE AGAINST PROSPECTIVE JUROR R.W. ON AN UNCONSTITUTIONALLY DISCRIMINATORY BASIS

Respondent argues that Prospective Juror R.W.'s written answers to questions 30, 31(e), and 34 show ambivalence in her ability to impose the death penalty. (RB 73-74.)

In her written responses, Prospective Juror R.W. stated that in the penalty phase she understood that the death penalty was one of the choices she would be called upon to make, and that the only other choice was life in prison without the possibility of parole. (CT 5:1369 [Questions 28 & 29, respectively].) In response to question 30, which asked her general feelings about the death penalty, she wrote, "*I have never given a serious thought to the death penalty.* I would have to say I honestly don't know if I could vote on putting some one [sic] to death." (CT 5:1369 [emphasis added].) This answer could reasonably be expected from any person, like Prospective Juror R.W., who had not previously given serious thought to the death penalty. Consistent with the response to question 30, Prospective Juror R.W. responded to question 31(e), asking whether California should have the death penalty, as follows: "I don't know. I don't see it as a way to stop crime because we don't kill everybody who commits a crime." (CT 5:1370.) Prospective Juror R.W. answered "I don't know" to question 34, asking whether she had a conscientious objection to the death penalty. (CT 5:1371.)

Respondent's analysis of Prospective Juror R.W.'s written responses fails to consider the entire record, which supports the conclusion that she was a conscientious person who could fairly apply the law and impose a sentence of death, if appropriate. As shown below, respondent omits Prospective Juror R.W.'s written answers to questions 31, subdivisions (a) through (d), 32, 33, and 36, and fails to consider her written responses in proper context of her oral responses during voir dire.

In her responses to question 31, subdivisions (a) through (d), asking about her personal views of the death penalty, Prospective Juror R.W. is shown to have no preconceived ideas about, nor objections to, the death penalty. (CT 5:1369-1370.) She responded that the death penalty is neither used too seldom (question 31(a)) nor too often (question 31(b)). (CT 5:1369-1370.) She does not belong to any groups that "support either elimination of, or increase use of the death penalty[,]" (question 31(c)) nor are her views on the death penalty based on a "religious conviction" (question 31(d)). (CT 5:1370.)

In response to question 32, asking whether she would "automatically, in every case, regardless of the evidence, vote for the death penalty[,]" she responded, "No." (CT 5:1370.) In response to question 33, asking whether she would "automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole[,]" she responded, "No." (CT 5:1370.) In response

to question 36, asking whether there is "ANYTHING that you would like to bring to the attention of the Court that you believe MIGHT affect your ability to be fair and impartial in this case[,]" she responded, "No." (CT 5:1371.)

In her voir dire responses to questions relating to her answers to questions 30, 31(e), and 34, Prospective Juror R.W. is shown to have no preconceived ideas about, nor objections to, the death penalty. The trial judge inquired of Prospective Juror R.W.:

The Court:	... Let's see here. You indicated on question 30, that you don't know if you can honestly vote for the death penalty in a criminal trial. Do you remember saying that?
Prospective Juror 12 [R.W.]:	Yeah, I remember.
The Court:	Is that a fact?
Prospective Juror 12 [R.W.]:	I don't know. Well, listening to what you had to say then by listening to the facts I think I would be able to.
The Court:	What has changed your mind?
Prospective Juror 12 [R.W.]:	Um, well, knowing that I have to listen to the facts and not go on my feelings.
The Court:	Well, what the law requires is the jury arrive at a penalty decision by weighing aggravating factors and mitigating factors. Not just overwhelmed with the emotional aspects of the case, whichever way that might lead you. But a weighing, a rational weighing process. Sometimes folks have such strong feelings about the matter that they're unable to do that or they talk themselves into

	believing they can and they really can't. You know, one can justify any decision in one's mind, I guess. What we need to know is this: both sides here get to have twelve people that can really make a decision, working with a clean slate not having that hammer over their head that we've talked about. Do you understand what I mean?
Prospective Juror 12 [R.W.]:	Yes.
The Court:	Do you believe you can do that, or do you think your feelings about the subject is [sic] so strong that you're committed to go the other way on a case?
Prospective Juror 12 [R.W.]:	Um, I think I can do it. I really didn't have any strong feelings about it. [RT 24:1042-1043.]

The prosecutor never asked any questions of Prospective Juror R.W. concerning her answers to questions 30, 31(e), and 34, and/or her ability to impose the death penalty. (Cf. *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246 ["failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"]; *People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.)

Synthesizing Prospective Juror R.W.'s written and oral responses, and viewing both in context, there could be no justifiable, record-based doubt about her ability to impose the death penalty in an appropriate case. (CT 5:1369-1371; RT 24:1042-1043.)

C. THE RECORD ESTABLISHES A REASONABLE INFERENCE THAT THE PROSECUTOR EXERCISED A PEREMPTORY CHALLENGE AGAINST PROSPECTIVE JUROR A.I. ON AN UNCONSTITUTIONALLY DISCRIMINATORY BASIS

Respondent argues that Prospective Juror A.I.'s written answers to questions 32 and 33, and her response during voir dire, show ambivalence in her ability to impose the death penalty. (RB 71.) Prospective Juror A.I. circled the answer "Don't know" to questions 32 and 33. (CT 6:1701.)

Respondent's analysis of Prospective Juror A.I.'s written responses fails to consider the entire record, which supports the conclusion that she was a conscientious person who could fairly apply the law and impose a sentence of death, if appropriate. As shown below, respondent omits Prospective Juror A.I.'s written answers to questions 28, 29, 30, 31, subdivisions (a) through (f), 34, and 36, and fails to consider her written responses in proper context of her oral responses during voir dire.

In her written responses, Prospective Juror A.I. stated that in the penalty phase she understood that the death penalty was one of the choices she would be called upon to make, and that the only other choice was life in prison without the possibility of parole. (CT 6:1700 [Questions 28 & 29, respectively].) In response to question 30, which asked her general feelings about the death penalty, she wrote, "In cases were [sic] the death penalty is the issue, the punishment probably befit [sic] the crime." (CT 6:1700.)

In her responses to question 31, subdivisions (a) through (f), asking about her personal views of the death penalty, Prospective Juror A.I. is shown to have no objections to imposition of the death penalty. (CT 6:1700-1701.) She does not belong to any groups that "support either elimination of, or increase use of the death penalty" (question 31(c)), nor are her views on the death penalty based on a "religious conviction" (question 31(d)). (CT 6:1701.) Responding to the question whether California should have the death penalty" (question 31(e)), she wrote, "Yes[.] A person commiting [sic] murder should know that if prosecuted their sentence could be death." (CT 6:1701.)

Further reinforcing her ability to impose the death penalty, Prospective Juror A.I. circled the answer, "Yes," in response to question 31, subdivision (f), which asks, "Regardless of your views on the death penalty, would you as a juror, be able to vote for the death penalty on another person if you believe, after hearing all the evidence, that the penalty was appropriate?" (CT 6:1701.)

In response to question 34, asking whether she had "any conscientious objections to the death penalty which you believe might impair your ability to be fair and impartial in a case in which the prosecution is seeking the death penalty[,] Prospective Juror A.I. responded, "No." (CT 6:1702.)

In response to question 36, asking whether there is "ANYTHING that you would like to bring to the attention of the Court that you believe MIGHT affect your

ability to be fair and impartial in this case[,]" Prospective Juror A.I. responded, "No." (CT 6:1702.)

Prospective Juror A.I.'s responses to questions 28, 29, 30, 31, subdivisions (a) through (f), 34, and 36 underscore her willingness and ability to impose the death penalty, if appropriate. (CT 6:1700-1702.)

In her voir dire responses to questions relating to her "don't know" responses to questions 32 and 33, Prospective Juror A.I. stated that she would not automatically vote either way, but would have to first listen to the evidence and weigh the aggravating and mitigating evidence before saying "yes" or "no." (RT 25-1:1219.) The colloquy between the court and Prospective Juror A.I., as shown below, reveals that Prospective Juror A.I.'s "don't know" answers resulted from an innocent misunderstanding of the question:

The Court:	. . . . If you do serve, you need to promise me this, that you will look at the evidence in this case because the law requires that the jury look at the evidence introduced.
Prospective Juror No. 12 [A.I.]:	I understand that.
The Court:	You promise you will do that?
Prospective Juror No. 12 [A.I.]:	Yes.
The Court:	Fair enough. 32 and 33. You were asked whether you would automatically always vote for the death penalty regardless of the evidence and you were asked whether you would automatically vote for life without parole. You said "don't

know", "don't know". Do you understand the process that the jury will be asked to go through in a penalty phase?

Prospective Juror No. 12 [A.I.]: Yes.

The Court: Are you sure?

Prospective Juror No. 12 [A.I.]: Yes.

The Court: The weighing process?

Prospective Juror No. 12 [A.I.]: Right.

The Court: Aggravation and mitigation?

Prospective Juror No. 12 [A.I.]: And because I would have to see or understand the reason behind it and I couldn't say yes or no.

The Court: Could you say yes or no to that question because this question asked, if you would automatically in every case regardless of the evidence -

Prospective Juror No. 12 [A.I.]: I would say no.

The Court: And the other one asked you if you would automatically in every case forget the evidence and vote for life without.

Prospective Juror No. 12 [A.I.]: I would say no.

The Court: That is what those questions asked. Do you understand that you have the obligation to weigh the evidence and arrive at a penalty decision in that way if we get there?

Prospective Juror No. 12 [A.I.]: Yes.

The Court:	Can you see yourself rendering a verdict of life without parole if the evidence and law led you there?
Prospective Juror No. 12 [A.I.]:	Yes.
The Court:	Can you see yourself rendering a verdict of death if the evidence and the law led you there?
Prospective Juror No. 12 [A.I.]:	Yes. [RT 25-1:1218-1220.]

Respondent, entirely ignoring the above colloquy between the court and Prospective Juror A.I., states, "During voir dire, Prospective Juror A.I. hesitated before responding no to the trial court's inquiry of whether she could think of any reason she would tend to favor either side." (RB 71.) Respondent is referring to the following colloquy, which begins immediately after the colloquy quoted above:

The Court:	Can you think of any reason you would tend to favor one side or the other here?
Prospective Juror No. 12 [A.I.]:	No.
The Court:	You hesitated. What was that hesitation about?
Prospective Juror No. 12 [A.I.]:	I'm just not sure.
The Court :	Tell me. What was on your mind right then?
Prospective Juror No. 12 [A.I.]:	I don't know. He [i.e., the defendant] seems very young. I might hesitate. [RT 25-1:1220.]

The court explained to Prospective Juror A.I. that she could consider the age of the defendant, together with other factors, but could not make a decision in the case based *solely* on age. (RT 25-1:1221.) Prospective Juror A.I. stated she

understood. (RT 25-1:1221.) Accordingly, her concern about appellant's young age was a valid factor that could be considered when imposing a sentence of death,[3] and it did not suggest that she would be unable to return a sentence of death.

Moreover, the prosecutor never examined Prospective Juror A.I. during voir dire, and thus failed to question her about her ability to impose a sentence of death, thereby suggesting that the explanation was a sham and a pretext for discrimination. (Cf. *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246 ["failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"]; *People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.)

Synthesizing Prospective Juror A.I.'s written and oral responses, and viewing both in context, there could be no justifiable, record-based doubt about her ability to impose the death penalty in an appropriate case. (CT 6:1700-1702; RT 25-1:1218-1221.)

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[3] It is well recognized that youth, as measured by chronological age, may be a mitigating factor. (See e.g., *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [107 S.Ct. 1821, 95 L.Ed.2d 347] [youth at the time of crime mitigating]; *Norris v. State* (1983) 429 So.2d 688, 690 [age 19]; *Hitchcock v. State* (1982) 413 So.2d 741, 747 [age 20]; *People v. Osband* (1996) 13 Cal.4th 622, 708-709 [age may be considered a factor in mitigation or aggravation].)

D. THIS COURT SHOULD REJECT RESPONDENT'S SPECULATIVE FACTUAL BASES PURPORTEDLY SUPPORTING THE CHALLENGES AS THE PROSECUTOR NEVER SPECIFICALLY MENTIONED THEM

Respondent raises for the first time a new purported basis for the prosecutor's challenges to the three jurors, speculating that the "prosecutor might reasonably have challenged the three jurors" based on the criminal history of their relatives, conceding, however, that "neither the prosecutor nor the trial court articulated the criminal history of the three jurors' relatives . . . ." (RB 74.)

This Court should disregard respondent's new argument seeking to justify the prosecutor's challenges. As the appellate court in *People v. Khoa Khac Long* (2010) 189 Cal.App.4th 826 stated in a recent decision reversing defendant's convictions in view of a finding of no substantial evidence supporting one of the three peremptory challenges:

> "It is true that peremptories are often the subjects of instinct [citation], and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his [or her] reasons as best he [or she] can and stand or fall on the plausibility of the reasons he [or she] gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. *If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, [the Attorney General,] or an appeals court, can imagine a reason that might not have been shown up as false.*" [*Id.* at p. 844 [emphasis added], citing *People v. Lenix* (2008) 44 Cal.4th 602, 624-625 and *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.]

E. COMPARATIVE JUROR ANALYSIS SUPPORTS AN INFERENCE OF DISCRIMINATORY INTENT

Comparative juror analysis also gives rise to the inference that the prosecutor acted with discriminatory intent in exercising the three peremptory challenges. (See *Snyder v. Louisiana, supra*, 552 U.S. at pp. 478-486 [finding *Batson*[4] error after engaging in comparative juror analysis]; *Miller-El v. Dretke, supra*, 545 U.S. at pp. 265-266 [same]; but see *People v. Lenix* (2008) 44 Cal.4th 602, 607 [reviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent, including comparative juror analysis when reviewing claims of error at *Wheeler/Batson*'s third stage]; *People v. Carasi, supra*, 44 Cal.4th at pp. 1295-1296 [rejecting comparative juror analysis when reviewing claims of error at *Wheeler/Batson*'s first stage].)[5]

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[4] *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69].

[5] *Batson* requires that at the first (prima facie case) stage, a trial court must "consider all relevant circumstances." (*Batson v. Kentucky, supra*, 476 U.S. at p. 96.) This by itself supports using juror comparisons at the first stage as well as the third stage. If a juror comparison can support an inference of discrimination at the third stage – as the availability of third-stage juror comparisons necessarily implies – then it can support an inference of discrimination at the first stage, which is a prima facie case. (*Johnson v. California, supra*, 545 U.S. at p. 170.) An inference is an inference, whatever the stage of the proceeding. (Cf. *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1149-1150; *United States v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 897, 904-905 [comparative juror analysis used in appellate review of first stage *Batson* denial].)

The prosecutor claimed that he excused each of the three jurors because of a purported inability to impose the death penalty. (RT 25-1:1237 ["That is why I excused all of these people was [sic] for inability to impose the death penalty."].) Respondent points to the fact that with respect to questions 32, 33, and 34, each of the three jurors circled at least one "don't know" answer, thereby supposedly suggesting an inability to impose the death penalty. (RB 71 [Prospective Juror A.I., questions 32 and 33], 72 [Prospective Juror J.R., questions 32, 33, and 34], 74 [Prospective Juror R.W., question 34].)

Yet, numerous unchallenged prospective jurors, including *three seated jurors*, circled at least one "don't know" answer to questions 32, 33, and 34, thereby undermining any reliance on this as a legitimate factor supporting the prosecutor's challenge of Prospective Jurors A.I., J.R., and R.W. (See CT 2:464-469 [Prospective Juror B.M.], 2:478-479 [Prospective Juror K.H.], 2:508 [Prospective Juror R.C.], 2:539, 541 [Prospective Juror L.D.], 2:570 [Prospective Juror W.R.], 3:585 [Prospective Juror J.D.], 3:631 [Prospective Juror Y.T.], 3:660 [Prospective Juror A.C.], 3:705 [Prospective Juror J.O.], 3:736 [Prospective Juror A.T.], 3:780 [Prospective Juror B.B.], 3:872 [Prospective Juror A.M.], 4:887 [Prospective Juror J.L.], 4:947-948 [Prospective Juror N.H.], 4:1112 [Prospective Juror H.S.], 4:1142-1143 [Prospective Juror L.B.], 4:1172-1173 [Prospective Juror V.B.], 5:1202 [Prospective Juror V.Y.], 5:1218 [Prospective Juror D.E.], 5:1249 [Prospective

Juror C.G.], 5:1353-1354 [Prospective Juror Y.G.], 6:1490 [Prospective Juror H.K.], 6:1506 [Prospective Juror C.G.], 6:1536 [Prospective Juror M.S.], 6:1686-1687 [Prospective Juror C.W.], 7:1776 [Seated Juror], 7:1836 [Seated Juror], 7:1912 [Seated Juror].)

F. REVERSAL OF APPELLANT'S CONVICTIONS IS REQUIRED, NOT REMAND AS SUGGESTED BY RESPONDENT, BECAUSE THE TIME LAPSE BETWEEN TRIAL AND A DECISION ON APPEAL PRECLUDES A FAIR AND RELIABLE HEARING ON REMAND

Appellant recognized in his opening brief that this Court has held that where the trial court erroneously denies a *Wheeler/Batson* motion at the first step of the *Batson* analysis the proper remedy is to remand the matter for a hearing at which the trial court can conduct the second and third steps of the *Batson* analysis. (AOB 72-73, citing *People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104.)

Due to the substantial amount of time that will have transpired between trial and an evidentiary hearing on remand, however, reversal is required because while trial counsel and the court may recall the circumstances of the case generally, there is no reasonable likelihood that they can reliably recall the specific circumstances of voir dire, thereby precluding a fair and reliable hearing on remand. (AOB 73-75.)

Respondent argues that remand is the appropriate remedy, citing *People v. Johnson*, *supra*, 38 Cal.4th at pp. 1099-1102. (RB 77.) Respondent is mistaken.

People v. Johnson, supra, 38 Cal.4th 1096 is distinguishable because the time lapse between appellant's trial and this Court's eventual resolution of his appeal – over 13 years as of the filing of this reply brief and likely 16 years at time of remand – will be substantially longer than in *Johnson* ~~and/~~or any case discussed therein, making a fair and reliable hearing on the facts impossible, and inviting speculation at any such hearing. (*Id.* at pp. 1101-1102; AOB 73-74.)

In *Johnson*, this Court remanded the matter where the lapse since jury selection had taken place was between 7 and 8 years. (*People v. Johnson, supra*, 38 Cal.4th at p. 1101.) Of the federal cases cited in *Johnson*, in which remand was ordered, none involved a time lapse as long as here. (*Id.* at pp. 1100-1101; *Batson v. Kentucky, supra*, 476 U.S. at p. 100 [trial was 2 years prior to reversal of the judgment]; *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1103 [trial held in March 1998 and remand ordered in January 2006]; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1086 [remand ordered 5 years after the state appellate court decision]; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1075 [remand ordered approximately 7 years after trial]; *United States v. Tindle* (4th Cir. 1986) 808 F.2d 319, 322 [remand after less than 4 years after trial].)

Reversal of the judgment is warranted.

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GUILT PHASE ISSUES

II.

APPELLANT DID NOT FORFEIT THE RIGHT TO BE FREE FROM CONVICTION IN COUNT 2 OF ATTEMPTED WILLFUL, DELIBERATE, AND PREMEDITATED MURDER OF LATASHA W. – AN OFFENSE GREATER THAN THAT CHARGED IN THE INDICTMENT

Appellant explained in his opening brief that although he was convicted in count 2 of the attempted willful, deliberate, and premeditated murder of Latasha W. (Pen. Code, §§ 187, subd. (a), 664), the indictment alleged only the lesser offense of an unpremeditated attempted murder, entirely omitting an allegation that the attempted murder was deliberate and premeditated. (AOB 76-77; CT 1:146, 8:2158; RT 34:2991.)

Appellant was sentenced under the harsher provisions of Penal Code section 664, subdivision (a) (RT 52:6043), which were never alleged in the indictment, thereby requiring reversal of the judgment on the enhancement allegation and reduction of the offense of conviction to attempted murder. (AOB 81; *People v. Reed* (2006) 38 Cal.4th 1224, 1227 ["A defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime"]; *People v. Mancebo* (2002) 27 Cal.4th 735, 743 ["pleading and proof" requirement of Penal Code section 667.61 precluded use of the uncharged multiple victim circumstance to impose a One Strike sentence]; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368-373 [constitutional due process protections compel

reversal of a conviction of an uncharged crime that is greater than the charged offense].)

Respondent acknowledges that the indictment failed to allege deliberation and premeditation. (RB 81-81.) Nonetheless, respondent argues that appellant forfeited the right to be free from conviction of an offense greater than that charged in the indictment because 1) trial defense counsel failed to raise the issue by demurrer (RB 78; citing *People v. Holt* (1997) 15 Cal.4th 619, 672, and Penal Code section 1004, subdivision (2)), 2) appellant had notice of the enhancement because the word "willfully" was used in the indictment, appellant had a copy of the grand jury transcript, which contained the prosecution's theory of attempted murder, and the grand jury was instructed on deliberate and premeditated attempted murder (RB 78-79), and 3) appellant neither objected to the verdict form nor did he object when the court sentenced him on the enhancement (RB 79). Respondent's forfeiture argument must be rejected.

The issue presented here has not been forfeited by failure of trial defense counsel to demur to the indictment or otherwise object in the trial court. Although a challenge to the adequacy of notice in the charging document typically will be deemed forfeited unless subject to an objection at trial (*People v. Holt* (1997) 15 Cal.4th 619, 672), a defendant does not forfeit the claim that the prosecution failed to comply with the pleading requirement set forth in Penal Code section 664,

subdivision (a). (*People v. Arias* (2010) 182 Cal.App.4th 1009, 1017; see *People v. Mancebo, supra*, 27 Cal.4th 735, 749, fn.7.)

Nor did the addition of the word "willfully" in the indictment cure the defect in omitting the allegation of premeditation and deliberation. With respect to attempted murder, a defendant acts "willfully" when he intends to kill at the time he acted. (*People v. Concha* (2009) 47 Cal.4th 653, 666; CALCRIM No. 601.) Specific intent to kill is a requisite element of unpremeditated attempted murder. (See *People v. Lee* (2003) 31 Cal.4th 613, 623.) Accordingly, the word "willfully" as used in the indictment did not provide notice of the uncharged, greater offense of deliberate and premeditated murder.

Respondent's reliance on the prosecution's theory of attempted murder as might be gleaned from the grand jury transcript, as a basis for due process notice to a defendant of the charges against him, must also be rejected. Respondent writes, in part: "Appellant thus had knowledge of the prosecution's theory from the grand jury transcript and written instructions. As such, *he would have demurred if he believed the wording of the indictment was uncertain.*" (RB 79 [emphasis added].) Regardless of the prosecution's theory as presented to the grand jury, the subsequent indictment returned by the grand jury as a true bill alleged only an unpremeditated attempted murder (CT 1:146); the wording stated a public offense and was not uncertain, and thus gave appellant no legal basis to demur. (See *Isaac v. Superior*

Court (1978) 79 Cal.App.3d 260, 263 [the standard applied by the courts in ruling on demurrers for failure to state a public offense is that the pleading must be clear enough so that no confusion or prejudice may result]; *People v. Randazzo* (1957) 48 Cal.2d 484, 491 [kidnapping charge containing unnecessary, confusing surplusage can be deleted while still leaving a chargeable offense which gives defendant notice].)

Absent consent, a defendant may not be convicted of an uncharged offense that is greater than the charged crime. Attempted premeditated murder is a separate and greater offense than attempted murder. (*People v. Seel* (2004) 34 Cal.4th 535, 548-549.) "It is fundamental that '[w]hen a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime . . . .'" (*People v. Lohbauer, supra*, 29 Cal.3d at p. 368 [citation omitted]; *People v. West* (1970) 3 Cal.3d 595, 612 ["When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime."].)

In *People v. Reed, supra*, 38 Cal.4th 1224, this Court explained the applicable principle:

> . . . . A defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime. [Citations.] The reason for this rule is settled. "'This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his

> defense and not be taken by surprise by evidence offered at his trial.' [Citation.]'" [Citation.] *The required notice is provided as to any charged offense and any lesser offense that is necessarily committed when the charged offense is committed.* . . . . [*Id.* at p. 1227 (emphasis added).]

Appellant did not consent to conviction of an uncharged and greater crime. The trial court suggested instructing on the crime of attempted willful, deliberate, and premeditated murder of Latasha W. (RT 32:2706-2707.) Subsequently, the record reflects that the trial court instructed only on unpremeditated attempted murder, entirely omitting instruction on deliberation and premeditation in connection with count 2 (attempted murder of Latasha W.). (RT 8:2131-2132.)

Under these circumstances, there can be no express or implied consent to conviction of an uncharged crime that is greater than attempted murder. If defense counsel had objected to the suggested instruction on the ground that it was legally incorrect and that attempted willful, deliberate, and premeditated murder constitutes a greater crime, she risked amendment of the indictment to charge this more serious offense. (See *People v. Ramirez* (1987) 189 Cal.App.3d 603, 623-624 [conviction for penetration by a foreign object while acting in concert reduced to simple penetration where the information did not contain in concert allegations because "[c]onviction for an uncharged greater offense not only raises the problem of notice but makes the inference of consent more difficult, as there is no reason why a defendant should acquiesce in substitution of a greater for a lesser offense."].)

Moreover, the verdict form did not cure the constitutional and statutory defect of failing to plead the allegation in the indictment. The court in *Arias* considered whether it would be proper to invoke the doctrine of implied consent to amendment as set forth in *People v. Toro* (1989) 47 Cal.3d 966, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.

In *Toro*, the defendant was convicted of an uncharged lesser related offense. This Court upheld the conviction, finding that the defendant impliedly consented to the jury's consideration of the uncharged offense by interposing no objection to instructions and a verdict form recognizing that offense. (*People v. Toro, supra*, 47 Cal.3d at 969-970, 976-977.) As the court in *Arias* noted, however, there is a "crucial difference" between an uncharged lesser related offense and an uncharged enhancement. (*People v. Arias, supra*, 182 Cal.App.4th at p. 1021.) "'[S]ubmission of lesser related offenses to the jury enhances the reliability of the factfinding process to the benefit of both the defendant and the People.'" (*People v. Arias, supra*, 182 Cal.App.4th at p. 1021, quoting *People v. Toro, supra*, 47 Cal.3d at pp. 969-970.) "The same considerations of practicality and policy do not apply, however, where the uncharged facts could only subject a defendant to greater liability. The defense will generally have no tactical interest in presenting the jury with a new avenue for imposing greater punishment." (*People v. Arias, supra*, 182 Cal.App.4th at p. 1021.) Therefore, the *Arias* court declined to extend the *Toro*

holding to the situation before it. (*Ibid.*) This reasoning is applicable here. Appellant could not have had a tactical reason for exposing himself to a further enhancement not set forth in the indictment.

Accordingly, defense counsel's acquiescence to a verdict form on attempted willful, deliberate, and premeditated murder of Latasha W. – a greater offense than the charged unpremeditated attempted murder in count 2 – cannot be construed as knowing consent to an implied amendment of the indictment. Similarly, it cannot be construed as consent to conviction of a crime that is greater than the charged unpremeditated murder. (See *People v. Mancebo, supra*, 27 Cal.4th at pp. 743-744 [defendant erroneously sentenced to an aggravated term under the One Strike law based on a multiple victim circumstance that was not alleged but which was demonstrated by his conviction of offenses committed against two victims]; *People v. Arias, supra*, 182 Cal.App.4th at pp. 1017-1019 [defendant erroneously sentenced under the harsher provisions of Penal Code section 664, subdivision (a) which were not pleaded]; *People v. Botello* (2010) 183 Cal.App.4th 1014, 1026 ["*Mancebo* and *Arias* compel the conclusion that [Penal Code] section 12022.53, subdivision (e)(l), cannot be used for the first time on appeal to save the imposed firearm enhancement under subdivision (d) . . . ."].)

Appellant's conviction in count 2 for the attempted willful, deliberate, and premeditated murder of Latasha W. must be reversed, and the conviction reduced to

attempted murder. (*People v. Toro*, *supra*, 47 Cal.3d at p. 973 [defendant may not be convicted of a crime neither charged nor necessarily included in a charged offense].)

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III.

THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE ESSENTIAL ELEMENTS OF WILLFULNESS, PREMEDITATION AND DELIBERATION IN CONNECTION WITH COUNT 2 (ATTEMPTED PREMEDITATED MURDER OF LATASHA W.) REQUIRES REVERSAL BECAUSE RESPONDENT HAS NOT PROVEN THE ERROR HARMLESS BEYOND A REASONABLE DOUBT

Appellant explained in his opening brief that although he was convicted in count 2 of the attempted willful, deliberate, and premeditated murder of Latasha W. (Pen. Code, §§ 187, subd. (a), 664), the jury was only instructed on the elements of a lesser unpremeditated attempted murder, and not on the elements of attempted *willful, deliberate, and premeditated* murder. (AOB 82-90; CT 1:146, 8:2158; RT 33:2803-2806 [attempted murder defined], 33:2790-2794 [premeditation and deliberation defined, but only in connection with the Haney homicide], 34:2991.)

Respondent acknowledges that the trial court instructed only on an unpremeditated attempted murder in connection with count 2, conceding that "the jury was not given CALJIC No. 8.67,[] which instructs [on the elements of willfulness, premeditation, and deliberation, and further instructs] that in the event the jury finds a defendant guilty of attempted murder, it then must determine separately whether the premeditation allegation was true." (RB 87-88 [footnote omitted].)

Respondent argues that "the instructional error" was harmless because 1) willfulness, premeditation, and deliberation were defined in connection with the

Haney homicide, 2) the instructions as a whole, including instruction on the firearm enhancements, were an adequate substitute for correct instructions, and 3) the verdict form reveals that the jury found true that the attempted murder was willful, deliberate, and premeditated. (RB 88-89.)

Appellant acknowledged in his opening brief that premeditation and deliberation were defined elsewhere, but those allegations were specific to the crime of murder (not attempted murder), and those allegations were specific to the Haney homicide as alleged in count 7, an offense for which appellant was acquitted. (AOB 86; RT 33:2790-2794.) Respondent cites no authority, and appellant is aware of none, for the speculative proposition that the jury could have been correct in guessing that the definition of first degree murder in count 7 applied equally to the definition of attempted willful, deliberate, and premeditated murder in count 2. (RB 89.)

This is not a case where the instructions as a whole adequately informed the jury of the elements of willfulness, deliberation, and premeditation in connection with the attempted murder of Latasha W., as suggested by respondent's citation to *People v. Burgener* (1986) 41 Cal.3d 505. (RB 89.) In *Burgener*, this Court rejected an argument that the trial court failed to instruct the jury that the finding as to express malice had to be unanimous and proven beyond a reasonable doubt, finding that the argument had no factual basis because the jury was instructed on

unanimity and that each element of each offense must be proven beyond a reasonable doubt. (*Id.* at pp. 539-540.) *Burgener* is inapposite because here the instructions on premeditation and deliberation explicitly applied only to the separate offense of first degree murder of Haney as charged in count 7, and no instruction permitted the jury to consider the instructions on first degree murder and apply those instructions to the separate offense of attempted murder as charged in count 2.

Contrary to respondent's suggestion, the instruction on the firearm-use enhancements as to each offense (CT 8:2143) also did not cure the error in omitting instructions on the elements of willfulness, deliberation, and premeditation in connection with the attempted murder of Latasha W. Firearm-use enhancements are sentencing enhancements, applicable only after a finding of guilty on an underlying charge (see *People v. Oates* (2004) 32 Cal.4th 1048, 1064-1065), whereas willfulness, deliberation, and premeditation in connection with the charge of attempted murder "constitute[] an element of the offense." (*People v. Seel*, *supra*, 34 Cal.4th at p. 549.) Accordingly, the instructions as a whole did not adequately inform the jury of the elements of willfulness, deliberation, and premeditation in connection with the attempted murder of Latasha W.

Nor does the true finding on the verdict form somehow cure the error in failing to instruct the jury on the essential elements of willfulness, deliberation, and premeditation in connection with the attempted murder of Latasha W., as suggested

by respondent's citation to *People v. Majors* (1998) 18 Cal.4th 385, 410 [oral instructional error was harmless in part where verdict form itself reflected a necessary finding by the jury]. (RB 89-90.) In *Majors*, this Court rejected an argument that the oral instruction on the robbery-murder special circumstance erroneously removed an element of the special circumstance from the jury's consideration, finding "that any error in the oral instruction was harmless . . . [because] [t]he jury received the correct instruction in written form." (*People v. Majors, supra*, 18 Cal.4th at p. 410.) In the context of a correctly instructed jury, this Court noted that "the verdict form itself reflects the jury's finding that defendant 'murdered the victims during the commission of a robbery.'" (*Ibid.*) *Majors* is inapposite because here the jury was never instructed on the elements of willfulness, deliberation, and premeditation as applicable to the offense of attempted murder, and thus the true finding reflected on the verdict form does not inform the analysis whether the true finding was determined through a correct application of the law.

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IV.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE FINDING IN CONNECTION WITH COUNT 9, ATTEMPTED ROBBERY OF CHARLES FOSTER, THAT THE GUNMAN HARBORED THE SPECIFIC INTENT TO STEAL

Appellant explained in his opening brief that there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the finding that the gunman harbored the specific intent to steal, an essential element of the offense in count 9 of the attempted second degree robbery of Charles Foster. (AOB 91-99.)

The evidence reveals that the gunman intended a homicide because the gunman approached Foster and shot him twice, never requesting money or property from him and departing the area without ever attempting to take anything from Foster. (AOB 95-96.) The evidence further showed that the gunman concealed his face with a red bandana, thereby attempting to avoid apprehension for committing the homicide. (RB 92.)

Respondent argues that the location of the homicide (in front of an ATM) reveals an intent to steal. (RB 92-97.) Not so. When considered in light of the totality of the circumstances, there is no credible inference of an intent to steal. For example, respondent acknowledges that Foster's "wallet was out[,]" thereby exposing the wallet to an easy taking had the gunman intended a robbery, but there was no attempt to take the wallet. (RB 92.) Respondent also acknowledges that "there was no specific demand for money," which gives rise to an inference of the

absence of an intent to steal. (RB 94; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 827.)

From these circumstances, however, respondent asserts that the jury could have inferred that appellant had the specific intent to steal. (RB 94.) Respondent is mistaken. Although inferences may constitute substantial evidence in support of a judgment, they must be the probable outcome of logic applied to direct evidence; mere speculative possibilities or conjecture are infirm. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585; *People v. Berti* (1960) 178 Cal.App.2d 872, 876.) A doubtful or uncertain fact must inure to the detriment of the party with the burden of proof on the issue. (*Reese v. Smith* (1937) 9 Cal.2d 324, 328; *People v. Tatge* (1963) 219 Cal.App.2d 430, 436.) Whether an inference rationally flows from the evidence is a question of law. (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 44-45; *People v. Berti, supra*, 178 Cal.App.2d at p. 876.)

The only fact respondent can point to in support of an inference of an intent to steal is the location of the homicide at an ATM. When considered in context of the totality of the circumstances presented to the jury – i.e., the absence of either a demand for money and/or property and the departure of the gunman without any loot and without a showing of a physical attempt to take any property – there can be

no rational inference of an intent to steal. (See *Eramdjian v. Interstate Bakery Corp.* (1957) 153 Cal.App.2d 590, 602 ["A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established."]; accord, *People v. Stein* (1979) 94 Cal.App.3d 235, 239.) In other words, considering the probable outcome of logic applied to the direct evidence, and avoiding mere speculative possibilities or conjecture, the only rational, non-speculative inference from the evidence is that the gunman intended to kill Foster.

This result also is shown in the fact that not all homicides committed at the location of an ATM automatically support a conviction for attempted robbery. Where the perpetrator of a homicide intends only to kill, and not steal, then the evidence is insufficient to support a conviction for attempted robbery. (See *People v. Bonner* (2000) 80 Cal.App.4th 759, 763 [attempted robbery requires the specific intent to commit robbery].)

Respondent cites to *People v. Rodrigues* (1994) 8 Cal.4th 1060, *People v. Jackson* (1963) 222 Cal.App.2d 296, *People v. Gilbert* (1963) 214 Cal.App.2d 566, *People v. Lindberg* (2008) 45 Cal.4th 1, *People v. Zapien* (1993) 4 Cal.4th 929, and *People v. Wilson* (2008) 43 Cal.4th 1 (RB 94, 96-97), but these cases are unavailing.

In *People v. Rodrigues, supra*, 8 Cal.4th 1060, the evidence showed that defendant and others planned to rob two brothers of drugs. (*Id.* at p. 1097.) During the attack on the brothers, a demand was made for the drugs (i.e., "where do you

have it?"), which fully supported an intent to steal. (*Id.* at pp. 1097, 1129-1130.) Here, there was no similar demand for property, and thus no inference of an intent to steal.

In *People v. Jackson, supra*, 222 Cal.App.2d 296, the evidence showed that the defendant entered the store, pointed a gun at the store operator, and made a demand for money, stating, "This is it." (*Id.* at p. 298.) Here, there was no similar demand for property, and thus no inference of an intent to steal.

In *People v. Gilbert, supra*, 214 Cal.App.2d 566, the evidence was sufficient to sustain a finding of an intent to steal where the defendant and an accomplice entered a market shortly after closing, accosted the proprietor at the cash register, and directed the remaining occupants to the back room in order to facilitate the robbery. (*Id.* at p. 567-568.) Here, there was no similar conduct in moving people around to facilitate a robbery, and thus no inference of an intent to steal.

In *People v. Lindberg, supra*, 45 Cal.4th 1, the evidence was sufficient to sustain a finding of an intent to steal where the defendant knocked the victim to the ground, demanded to know whether he had a vehicle (i.e., the object sought to be stolen), and put his knife to his throat before asking him again whether he had a car. (*Id.* at p. 29.) Here, there was no similar demand for property, and thus no inference of an intent to steal.

In *People v. Zapien, supra*, 4 Cal.4th 929, the evidence was sufficient to sustain a finding of an intent to steal where the defendant approached the victim and, in response, the victim stated, "I will give you the money and the jewelry," thereby giving rise to an inference that defendant had demanded the victim's property. (*Id.* at p. 984) Here, there was no similar statement by Foster giving rise to an inference that the gunman made a demand for property, and thus no inference of an intent to steal.

In *People v. Wilson, supra*, 43 Cal.4th 1, the evidence was sufficient to sustain a finding of an intent to steal where "the videotapes showed the gunman robbing the market and fatally shooting [victim] San in the course of the attempted robbery." (*Id.* at p. 16.) Here, there was no similar evidence of a robbery, and thus no inference of an intent to steal.

Respondent also argues that an attempted robbery "'requires neither the commission of an element of robbery nor the completion of a theft or assault.'" (RB 95, citing *People v. Lindberg, supra*, 45 Cal.4th at p. 28.) Although a correct statement of the law, this legal principle does not inform the analysis whether the evidence is insufficient to sustain the requisite finding that the gunman in the instant case harbored the specific intent to steal Foster's property.

Respondent speculates that an intent to steal might be shown when considering that appellant might have "changed his mind about taking Foster's

property, after the murder, because Johnson and McGill would have summoned the police, or because other ATM customers might arrive on the scene." (RB 96.) There is no evidence to support that theory, and respondent's cites to none, except for a hearsay statement by Dr. Osborne that was "not presented to the guilt phase jury" (RB 96, fn. 38), which cannot be used in support of the judgment. (See *People v. Samarjian* (1966) 240 Cal.App.2d 13, 18 ["The People must prevail on their own evidence" presented during trial].)

A reviewing court is commanded under the constitutional dictates of due process (*People v. Johnson, supra*, 26 Cal.3d at pp. 576-578) and the authorities cited above to make certain that a criminal conviction rests on facts and rational inferences, not rank speculation. Here, the evidence reveals no more than a homicide occurring at the location of an ATM, with the gunman approaching Foster, engaging him in dialogue, and then shooting him. (RT 30:2346-2347.) There was no evidence that the gunman requested money or property from Foster; nor is there evidence that the gunman either reached for Foster or that he reached for Foster's wallet. (RT 30:2327, 2346-2347, 31:2425.)

Accordingly, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the finding that the gunman harbored the specific intent to steal property from Foster, thereby requiring reversal of appellant's conviction in count 9 for attempted second degree robbery of Foster. (See *Jackson v. Virginia*

(1979) 443 U.S. 307, 315 [99 S.Ct. 2781, 61 L.Ed.2d 560] [the requisite qualitative nature of the evidence is that which is sufficient to permit the trier of fact to reach a "subjective state of near certitude of the guilt of the accused . . . ."].)

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V.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN APPELLANT'S CONVICTION FOR THE FIRST DEGREE MURDER OF CHARLES FOSTER, COUNT 8, UNDER THE FELONY-MURDER THEORY

Appellant explained in his opening brief that there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the finding that Foster was murdered during the commission of an attempted robbery, thereby requiring reversal of appellant's conviction in count 8 for the first degree murder of Charles Foster, which was predicated on a theory of felony-murder. (AOB 100-101.)

Respondent combines the response to this argument with her response to the preceding argument (*ante*, § IV.), arguing there is sufficient evidence of an attempted robbery. (RB 90, 97.)

As explained in section IV, *ante*, the evidence is insufficient as a matter of law to sustain a finding of an attempted robbery. Accordingly, appellant's conviction in count 8 for the first degree murder of Foster on the theory of felony-murder must be reversed.

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VI.

THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO SUA SPONTE INSTRUCT THE JURY IN CONNECTION WITH COUNT 8 (CHARLES FOSTER) ON EXPRESS-MALICE SECOND DEGREE MURDER, A LESSER INCLUDED OFFENSE OF FIRST DEGREE MURDER

Appellant explained in his opening brief that having been charged in count 8 of the accusatory pleading with the first-degree murder of Charles Foster, on theories of both express-malice murder and felony murder, and in view of the trial court's own determination that the evidence supported instruction on express-malice murder,[6] the trial court prejudicially erred in failing to sua sponte instruct on express-malice second degree murder. (AOB 102-113.)

Respondent argues that second degree murder is not a lesser included offense of felony murder because "malice is not an element of felony murder." (RB 98.) Respondent is applying the "statutory elements test" to the lesser-included-offense determination.[7] (See *People v. Anderson* (1975) 15 Cal.3d 806, 809-810.)

This Court need not reach the issue whether the statutory elements test is satisfied because, as appellant stated in his opening brief, "aside from the unsettled

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[6] The trial court stated that instruction on express-malice murder might be warranted because attempted robbery was "not necessarily the only inference [from the evidence]." (RT 32:2689.)

[7] Appellant and respondent both noted that this Court expressly has declined to resolve the question whether second degree murder is a lesser included offense of first degree felony murder. (AOB 106; RB 98; *People v. Valdez* (2004) 32 Cal.4th 73, 114-115, fn. 17.)

issue whether express-malice second degree murder is a lesser included offense of felony-murder under the elements test[,] . . . second degree murder is a lesser included offense under the accusatory pleading test." (AOB 106-107.)

Respondent does not address appellant's argument that express-malice second degree murder is a lesser included offense of felony-murder under the accusatory pleading test. (RB 97-99; AOB 105-107.) Here, the information alleged that appellant murdered Foster "with malice aforethought" (CT 1:150), thereby alleging second degree murder as a necessarily included offense under the accusatory pleading test. (See *People v. Toro* (1989) 47 Cal.3d 966, 972; *People v. Jeter* (1964) 60 Cal.2d 671, 675.)

Respondent argues that the trial court did not err in failing to sua sponte instruct on express-malice second degree murder "because the prosecutor proceeded solely on a felony murder theory." (RB 98.) Respondent is mistaken. The scope of the sua sponte duty to instruct is determined by the charge contained "in the accusatory pleading itself . . . ." (*People v. Birks* (1998) 19 Cal.4th 108, 119.) This is so because the role of the accusatory pleading is to provide notice to the defendant of the charges that he or she can anticipate being proved at trial. "When an accusatory pleading alleges a particular offense, it thereby demonstrates the prosecution's intent to prove all the elements of any lesser necessarily included offense. Hence, the stated charge notifies the defendant, for due process purposes,

that he must also be prepared to defend against any lesser offense necessarily included therein, even if the lesser offense is not expressly set forth in the indictment or information." (*Id.* at p. 118.) "Because a defendant is entitled to notice of the charges, it makes sense to look to the accusatory pleading . . . in deciding whether a defendant had adequate notice of an uncharged lesser offense so as to permit conviction of that uncharged offense." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1039 (conc. opn. of Chin, J.).) Because second degree murder is a lesser included offense of the offense charged against appellant in count 8 of the indictment (express malice murder), appellant was on notice that he might be convicted of that crime or any of its lesser included offenses – and, by parity of reason, that he could anticipate instruction on the lesser offense if supported by substantial evidence.

Respondent further argues that since the prosecution was not required to prove malice under the theory of felony murder, the trial court was justified in withdrawing the question of the degree of murder from the jury. (RB 99, citing *People v. Mendoza* (2000) 23 Cal.4th 896, 908-909.) Respondent is mistaken.

In *Mendoza*, this Court held that "[w]here the evidence points indisputably to a killing committed in the perpetration of one of the felonies section 189 lists, the *only* guilty verdict a jury may return is first degree murder. [Citations omitted.] Under these circumstances, a trial court 'is justified in withdrawing' the question of

degree 'from the jury' and instructing it that the defendant is either not guilty, or is guilty of first degree murder." (*People v. Mendoza, supra*, 23 Cal.4th at pp. 908-909 [underline added].) In other words, a determination of the degree of murder may be withdrawn from the jury only where the "evidence establishes as a matter of law that the murder is of the first degree . . . ." (*Id.* at p. 909.)

Here, the evidence did not point indisputably to a killing committed during the course of an attempted robbery, nor did the evidence establish felony murder as a matter of law, because the evidence was insufficient to sustain a finding that the gunman harbored the specific intent to steal, an essential element of the offense of attempted robbery. (See § IV., *ante*.) Even the trial judge recognized that the evidence of an attempted robbery was "not necessarily the only inference." (RT 32:2689.)

Recognizing that the trial court must instruct sua sponte on all lesser included offenses supported by substantial evidence, respondent asserts that there was no substantial evidence that only a homicide was intended. (RB 99-101.) Respondent's argument ignores the salient facts, including that 1) no demand for money and/or other property was made of Foster, 2) the gunman was *not* shown to have physically grabbed at Foster in an attempt to relieve him of his property, and 3) the gunman did not take anything from Foster, despite the fact that Foster's wallet was in plain view during the shooting incident. (See RB 100-101 [omitting

reference to salient facts]; AOB 108-109.) These facts give rise to a strong inference that the gunman did not intend to take Foster's property, and thus required the court to instruct on the offense of second degree murder. (See *People v. White* (1986) 185 Cal.3d 822, 830 [doubts as to the sufficiency warranting instruction on a lesser included offenses must be resolved in favor of the accused], overruled on other grounds in *People v. Santamaria* (1994) 8 Cal.4th 903, 922.)

Nor does respondent's citation to *People v. Wilson* (1992) 3 Cal.4th 926 support her assertion that there was no substantial evidence of an attempted robbery. (RB 101.) In *Wilson*, one week prior to victim Roy being killed, the defendant, who was shown to have perpetrated the killing, told an acquaintance that Roy had $4,000 and "'he was tempted to knock Roy off and take the money . . . .'" (*Id.* at p. 931.) Roy's corpse was found in a van, but his wallet was missing together with a substantial sum of money. (*Id.* at pp. 940-941.) In contrast to the substantial evidence presented in *Wilson* of an intent to steal, here there was no evidence suggesting an intent to steal. (See § IV., *ante*.) Appellant neither stated an intent to steal nor did he take any property from Foster. (AOB 108-109.)

Accordingly, the trial court was required to instruct sua sponte on the noncapital lesser included offense of second degree murder. (See *Beck v. Alabama* (1980) 447 U.S. 625, 634 [100 S.Ct. 2382, 65 L.Ed.2d 392] [in a capital case, the failure to instruct on a noncapital lesser included offense where supported by the

evidence violates the Due Process Clause and the Eighth Amendment]; *Honkies v. Reeves* (1998) 524 U.S. 88, 90 [118 S.Ct. 1895, 141 L.Ed.2d 76]; *Schad v. Arizona* (1991) 501 U.S. 624, 646-647 [111 S.Ct. 2491, 115 L.Ed.2d 555] [under the facts of this case, instruction on second degree murder provided a sufficient "third option" to withstand a *Beck* challenge to trial court's failure to instruct on other lesser included offenses].)

Respondent argues that any error in failing to instruct on second degree murder was harmless because the jury returned a conviction for felony murder after having been instructed that in order to do so it had to find the killing occurred during the attempted commission of robbery. (RB 101.) Respondent's harmless-error argument is premised on *People v. Koontz* (2002) 27 Cal.4th 1041 (and similar cases), holding that "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*Id.* at pp. 1085-1086; RB 101-102.)

The factual question posed by the omitted instructions on express-malice murder was whether the gunman acted with the specific intent to kill (express-malice second degree murder) or whether he acted with the further willful, deliberate, and premeditated intent to kill (express-malice first degree murder). The jury was not instructed to determine whether appellant acted with malice in

connection with the killing of Foster, nor did the jury decide such an issue. (CT 8:2116.) Accordingly, the factual question posed by the omitted instructions was *not* decided "adversely to defendant under other properly given instructions . . . ." (*Id.* at p. 1086.) In other words, the jury did not necessarily reject an implied-malice murder theory by returning a verdict on felony murder. (Cf. *People v. Horning* (2004) 34 Cal.4th 871, 906 ["If the jury had had any doubt that this was a felony murder, it did not have to acquit but could have simply convicted defendant of first degree murder without special circumstances"].)

Respondent argues that any error was harmless because the jury's true finding on the robbery-murder special circumstance shows it would have returned a verdict based on felony murder. (RB 102.) This argument lacks merit because here the evidence is insufficient as a matter of law to sustain the true finding on the robbery-murder special circumstance allegation that the murder of Foster was committed during the commission of an attempted robbery. (*Post*, § XI.)

Moreover, respondent's argument turns the harmless-error analysis on its head by suggesting that the test for prejudice is whether the jury might properly have reached the same verdict. (RB 102.) The test for prejudice from error in failing to instruct on a lesser non-capital offense, which gives rise to a constitutional violation in a capital case (see *Beck v. Alabama, supra*, 447 U.S. at pp. 634-635), is whether the prosecution has proven that the error was harmless beyond a reasonable

doubt. (*People v. Elliot* (2005) 37 Cal.4th 453, 475 [applying *Chapman* to assumed instructional error in failing to instruct on second degree murder].) Accordingly, even if this Court views the evidence sufficient to support the verdict of felony murder, the error in failing to instruct on the lesser offense of express-malice second degree murder was prejudicial because the evidence was weak and reasonably supported an interpretation consistent with express-malice second degree murder.

Respondent's harmless-error analysis, as set forth above, must also be rejected because the jury was restricted to an all-or-nothing approach (either acquit or convict of felony murder), and was not provided with a noncapital third option between the capital charge and acquittal. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 634-635.) In *Beck*, the high court struck down as unconstitutional a state statute which prohibited instructions on lesser offenses in a capital case, thereby limiting the jury's options to either convicting or acquitting the defendant of the capital crime. The court held that such a restriction was contrary to the long-settled rule that a "'defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" (*Id.* at p. 635.) Here, the evidence warranted instruction on express-malice second degree murder. (AOB 107-113.)

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VII.

THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING OFFICER MARTIN MARTINEZ'S TESTIMONY RECOUNTING LATASHA W.'S OUT-OF-COURT STATEMENTS

Appellant explained in his opening brief that the prosecutor elicited numerous inculpatory hearsay statements from Officer Martin Martinez recounting the full details of what Latasha W. told him occurred at the Coleman residence, which hearsay statements were made during the course of police questioning during a lengthy 2-hour interview. (AOB 114-130.)

Respondent acknowledges the hearsay nature of the testimony, but asserts that all of the statements made by Latasha W. during the 2-hour interview were admissible as spontaneous utterances. (RB 102, 105-110.) The record belies this assertion.

Respondent focuses on the initial contact with Latasha W., noting, as appellant did in his opening brief, that when Officer Martinez contacted Latasha W. she was in the street, yelling and frantic. (RB 103; AOB 121.) Initially, Martinez could not understand a lot of what she was saying, except he did hear her say that her "friend was just killed." (RB 104; AOB 121.) Appellant does not take exception to admission of this statement. (AOB 123.)

Thereafter, however, Martinez conducted a lengthy interview of Latasha W., both at an initial location adjacent to a nearby service station and then back at

Coleman's residence, questioning her in fine detail about the events that occurred at the Coleman residence. (AOB 115-119.) The statements made at these locations, which were given after Latasha W. had regained her composure, and which were given in response to detailed police questioning, were not made spontaneously, and thus were not admissible as spontaneous utterances. (AOB 121-123; *People v. Poggi* (1988) 45 Cal.3d 306, 318 [utterance must be spontaneous and unreflecting], citing *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468; *People v. Farmer* (1989) 47 Cal.3d 888, 903 [spontaneous utterance is the "instinctive and uninhibited expression of the speaker's actual impressions and belief"], overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

To be admissible under the spontaneous declaration exception to the hearsay rule (Evid. Code, § 1240), it must be shown that there was an occurrence startling enough to produce nervous excitement and render the subsequent statement spontaneous and unreflective, the utterance must have been made before there was time to contrive and misrepresent, and the utterance must relate to the circumstance of the occurrence preceding. (*People v. Poggi, supra*, 45 Cal.3d at p. 318.) The test is whether the statement was made under circumstances of such physical shock or nervous excitement that the likelihood of reflection and fabrication is precluded. (*People v. Farmer, supra*, 47 Cal.3d at p. 903.)

Here, when the statements at issue were made there was ample time for Latasha W. to have reflected on what had happened; she had been removed from the initial location where she spontaneously stated, "My friend was just killed" (RT 26:1641), and moved for questioning to an initial location adjacent to a nearby service station and then back at Coleman's residence, where she was questioned in detailed, narrative style. (AOB 121-123.) Latasha W. thus had ample time to deliberate and reflect on the events when answering police questions about the incident. (See *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1525 [the "narrative style as well as the quantity, detail and content of [the declarant's] statements suggest that they were not spontaneous statements . . . but rather, that they were made after [the declarant] had engaged in a deliberative or reflective process"].)

In *People v. Lynch* (2010) 50 Cal.4th 693, for example, this Court held that statements from the decedent to her daughter describing an attack by defendant one hour after the incident were not admissible as a spontaneous utterance where she was responding to questions in a comprehensive, unemotional manner and when the statements were made there was no indication she was excited or frightened. (*Id.* at pp. 753-754.) The daughter's questions were not suggestive, and the decedent's responses were not self-serving, but the decedent's description of the attack was comprehensive and included nonessential matters. (*Id.* at p. 754.) This Court noted

that the statements were not blurted out, but rather were made in response to questioning about an hour or more after the event. (*Ibid.*) The trial court thus erred by admitting the decedent's statements as a spontaneous utterance under Evidence Code section 1240. (*Ibid.*)

Latasha W.'s statements, like the statements of the decedent in *People v. Lynch, supra*, 50 Cal.4th 693, do not qualify as spontaneous utterances because the statements were made well after the incident occurred and they were made reflectively in response to comprehensive questioning (i.e., the statements were not blurted out). (AOB 121-123; RT 26:1644-1645.) Officer Martinez testified on cross-examination that Latasha W. "calmly" related the events (i.e., she was not excited and/or frightened). (RT 26:1644-1645.) Martinez testified, in part:

> Q: Now in the beginning when you said she was in the street, you couldn't understand what she was saying. She was screaming and carrying on. Is that right?
>
> A: That's correct.
>
> Q: At the gas station you were able to understand because she was more coherent to you?
>
> A: Yes.
>
> Q: *And over the course of the two hours she was able to calmly relate descriptions and things that went on in the house and give you what it is that you have testified to today*?
>
> A: *That is correct.* [RT 26:1644-1645 (emphasis added).]

Martinez's subsequent testimony that at the end of the two-hour interview Latasha W. was still shocked, shaking, and crying (RT 26:1659-1660) thus is belied by his earlier testimony on cross-examination that over the course of two hours Latasha W. "calmly" described the events. (RT 26:1644-1645.)

Finally, respondent argues any error in admitting Officer Martinez's hearsay statements was harmless because "Latasha W. testified before the jury and related everything she experienced during the crimes, which was consistent with her statements to the officer on the night of the crimes." (RB 109.) Yet, respondent acknowledges that the "evidence may have bolstered Latasha W.'s credibility . . . ." (RB 109.)

There is no question but that Officer Martinez's hearsay statements bolstered Latasha W.'s credibility. The statements materially bolster Latasha W.'s credibility because instead of first evaluating her credibility as she testified to the events, Latasha W.'s words were spoken through an authoritative figure (i.e., a police officer) as matters of established historical fact. Latasha W. was the only eyewitness to the events at the Coleman residence, and thus her credibility was the central issue in the case on counts 1 through 6. Accordingly, respondent has not proven beyond a reasonable doubt that the guilty verdicts in counts 1 through 6 were surely unattributable to the error in admitting Officer Martinez's hearsay statements. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d

182]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Appellant's convictions in counts 1 through 6 should be reversed.

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VIII.

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO INTRODUCE IRRELEVANT, HIGHLY PREJUDICIAL VICTIM-IMPACT EVIDENCE AT THE GUILT PHASE OF APPELLANT'S TRIAL, INCLUDING EVIDENCE THAT LATASHA W. WAS THE VICTIM OF A PRIOR MOLESTATION AND RAPE

Appellant explained in his opening brief that the trial court prejudicially erred by permitting the prosecutor to elicit irrelevant, highly inflammatory testimony from Latasha W. that three months prior to the Coleman homicide she was molested and raped by an unidentified person, and thereafter Coleman had comforted her and her family. (AOB 131-136.)

Respondent asserts partial forfeiture of the claim, arguing that the overruled defense relevancy objection "did not preserve for appeal appellant's current contention that the testimony was improper victim impact evidence. (RB 112-113, citing *People v. Guerra* (2006) 37 Cal.4th 1067, 1117.) Respondent is incorrect, and further fails to cite this Court's on-point authority, holding that "defendant's 'relevance' objection preserved his present claim [that victim-impact evidence should not have been admitted]." (*People v. Redd* (2010) 48 Cal.4th 691, 731, fn. 20.)

In *Guerra*, this Court held that a relevancy objection did not preserve for appeal a claim that the testimony constituted inadmissible character evidence under

Evidence Code section 1103.[8] (*Id.* at p. 1117.) Based solely on the relevancy objection, however, this Court reached the merits of the defense claim that admission of "Tobar's testimony created a uniquely sympathetic view of the victim in the guilt phase" (i.e., a claim, as here, that the witness's irrelevant testimony also constituted inadmissible victim-impact evidence). (*Id.* at p. 1118.) This Court held that "[a] court need not exclude otherwise admissible evidence merely because it might generate sympathy for a crime victim." (*Ibid.*)

By reaching the merits of the defense victim-impact argument in *Guerra*, this Court apparently was implicitly applying the longstanding rule, applicable here too, that

> . . . no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal. [*People v. Yeoman* (2003) 31 Cal.4th 93, 117.]

Victim-impact evidence during the guilt phase of trial is inadmissible because it is irrelevant. (*People v. Redd, supra*, 48 Cal.4th at p. 731.) Accordingly, the victim-impact claim is preserved for appeal because counsel's relevancy

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[8] Appellant does not assert that Latasha W.'s irrelevant testimony constituted inadmissible character evidence under Evidence Code section 1103.

objection called upon the trial court to consider the same facts and to apply the identical legal standard (i.e., relevancy). (See *Id.* at p. 731, fn. 20.)

Respondent also asserts that "appellant did not lodge any objection to the prosecutor's question regarding Latasha W. spending the night at Coleman's house[,]" and thus "the claim related to that question and answer is also forfeited." Not so. Moments prior to the prosecutor eliciting testimony about a heartwarming story of a night when Latasha W. and her sisters spent the night at Coleman's house (RT 27:1835-1837), the trial court overruled an objection to this line of questioning - i.e., the line of questioning regarding what caused Coleman to become a close friend. (RT 27:1836.) It was thus not incumbent on defense counsel to renew the objection in order to preserve it for appeal. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 126, citing *People v. Morris* (1991) 53 Cal.3d 152, 188-190, overruled on another point in *People v. Stansbury* (1995) 9 Cal.4th 619.)

Respondent next argues that Latasha W.'s testimony about the molestation, rape, and familiar relationship with Coleman was "relevant because it permitted Latasha W. 'to state facts and circumstances that tend[ed] to correct or repel <u>any wrong</u> impressions or inferences that might arise on the matters drawn out in cross-examination.'" (RB 141 [emphasis added], citing *People v. Tucker* (1956) 142 Cal.App.2d 549, 553, *People v. Corey* (1908) 8 Cal.App. 720, 725, and *People v. Talle* (1952) 111 Cal.App.2d 650, 672.)

The molestation, rape, and the familiar relationship were not relevant to correct or repel an inference that might have arisen from cross-examination. For example, respondent cites Coleman's reputation as a drug dealer and former gang member as matters supporting the relevancy of Latasha W.'s testimony that she was molested and raped three months prior to Coleman's death. (RB 114.) It was undisputed that Coleman was both a drug dealer and a gang member, as Officer Donna Shoates testified that Latasha W. told her that Coleman was a drug dealer who claimed membership in the Black P-Stone criminal street gang. (RT 32:2640.) Accordingly, Latasha W.'s testimony about the molestation, rape, and the familiar relationship did not tend to correct or repel *any wrong* impressions or inferences that might arise on the matters drawn out in cross-examination.

Moreover, the prosecutor never objected to defense counsel eliciting testimony about Coleman's drug dealing and gang affiliation, and thus having waived any objection to this testimony (Evid. Code, § 353, subd. (a); *People v. Frank* (1990) 51 Cal.3d 718, 733), it is improper for the prosecution to use the testimony as an avenue to elicit damaging and otherwise objectionable evidence in rebuttal. (See *People v. Carter* (1957) 48 Cal.2d 737, 753-754.)

Respondent also argues that any error in admission of testimony of Latasha W.'s prior molestation, rape, and familiar relationship was harmless, citing *People v. Wallace* (2008) 44 Cal.4th 1032 and *People v. Gurule* (2002) 28 Cal.4th 557.

(RB 115.) Respondent's argument ignores the fact that the victim-impact testimony materially bolstered the sympathy that the jury would naturally feel for Latasha W., and made it likely that the jury would convict appellant of the instant offenses, which included an offense for raping Latasha W., because of the sympathy they felt for her, especially considering there was no evidence that the prior molestation and rape were prosecuted.

In *People v. Wallace, supra*, 44 Cal.4th 1032, the appellate court found no prejudice in admitting evidence that the victim had poor eyesight and mobility problems because the jury already knew that the victim was a frail 83-year-old woman, "and thus the evidence regarding her poor eyesight and use of a cane would not have inflamed the jury." (*Id.* at p. 1058.) In contrast to the evidence found non-prejudicial in *Wallace*, the evidence of an unrelated molestation and rape, and close familiar relationship, were not matters already known to appellant's jury. Moreover, the instant case – with inflammatory evidence of an unrelated molestation and rape of a sixteen-year-old victim/witness, and close familiar relationship – stands in stark contrast to the benign evidence of poor eyesight and mobility problems held not prejudicial in *Wallace*.

In *People v. Gurule, supra*, 28 Cal.4th 557, this Court addressed the issue of prejudice in admitting evidence of the victim's nonviolent character, a description of his religious background, and that his mother hugged him the morning of his death.

(*Id.* at pp. 623-624.) This Court held that the evidence of nonviolence was "innocuous" and uncontested, and thus not prejudicial. (*Id.* at p. 623.) This Court characterized evidence about religious background and that the victim's mother hugged him the morning of his death as carrying "the potential to inflame the passions of the jury against defendant[,]" but held the evidence not prejudicial under the particular facts of the case. (*Id.* at pp. 623-624.) Here, the damaging evidence that Latasha W. was the victim of a prior molestation and rape stands in stark contrast to the relatively innocuous evidence held non-prejudicial in *Gurule.*

In sum, by eliciting testimony about an unrelated molestation and rape, and close familiar relationship, the prosecutor inflamed the jury's passions through irrelevant and inadmissible victim-impact evidence, and encouraged the jury to return a verdict of guilty based on passion. Respondent has not carried the burden of proving beyond a reasonable doubt that the guilty verdicts in counts 1 through 6 were surely unattributable to the error, and thus appellant's convictions in counts 1 through 6 should be reversed. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

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IX.

ADMISSION OF DR. ROBIN COTTON'S TESTIMONY ABOUT THE SUBSTANCE OF FORENSIC LABORATORY REPORTS PREPARED BY ANALYST GLEN HALL DEPRIVED APPELLANT OF THE SIXTH AMENDMENT RIGHT OF CONFRONTATION

Appellant explained in his opening brief that the trial court prejudicially erred by admitting Dr. Robin Cotton's hearsay testimony, which recounted the details of forensic laboratory reports prepared by analyst Glen Hall, who was not shown to be unavailable and was not subject to cross-examination. (AOB 137-152.)

A. THE CONFRONTATION CLAUSE CLAIM HAS NOT BEEN FORFEITED

Respondent argues that the confrontation clause claim is forfeited because appellant did not object to Cotton's testimony on Sixth Amendment grounds at trial, citing *People v. D'Arcy* (2010) 48 Cal.4th 257 and *People v. Geier* (2007) 41 Cal.4th 555. (RB 116; AOB 138.) Not so.

Although generally a defendant forfeits his right to claim error under the Sixth Amendment's confrontation clause on appeal by failing to object below (*People v. Lewis* (2006) 39 Cal.4th 970, 1028, fn. 19; see also *People v. Geier, supra*, 41 Cal.4th at pp. 609-611), appellant did not forfeit the confrontation clause claim because at the time of trial in 1998 it would have been futile to have raised it. (AOB 138-140.)

At the time of trial, the admission of extrajudicial hearsay statements of unavailable witnesses did not violate the confrontation clause if those statements, as

here, fell within a firmly rooted hearsay exception or contained particularized guarantees of trustworthiness. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 66, overruled by *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354].) In *Crawford*, the United States Supreme Court held that "[w]here testimonial statements are at issue, . . . the Sixth Amendment demands what the common law required; unavailability and a prior opportunity for cross-examination." (*Id.* at p. 68.) Moreover, the United States Supreme Court had not yet issued the decisions in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314] and *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705, 180 L.Ed.2d 610], as discussed below.

In view of the applicable law at the time of trial, the trial court would have been obliged to deny any objection to Cotton's testimony that was based on the forensic laboratory reports prepared by Hall, and, hence, it would have been futile to have raised it. (See *People v. Turner* (1990) 50 Cal.3d 668, 703 ["Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change."]; *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [no waiver of confrontation challenge to hearsay evidence of a proof of service to establish service of a summons or notice,

because "[a]ny objection would have been unavailing under pre-*Crawford* law"]; see *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2.)

Nor do the decisions in *People v. D'Arcy, supra*, and *People v. Geier, supra*, compel a different conclusion. In *D'Arcy*, although addressing the merits of the claim, this Court summarily held that defendant forfeited the claim that admission of a tape-recorded statement under the dying declaration exception to the hearsay rule violated his Sixth Amendment rights. (*People v. D'Arcy, supra*, 48 Cal.4th at p. 289-290.) The Court did not discuss the issue presented here: whether the forfeiture rule applies when "the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." (*People v. Turner, supra*, 50 Cal.3d at p. 703.) "[C]ases are not authority for propositions not considered." (*People v. Williams* (2004) 34 Cal.4th 397, 405.)

In *People v. Geier, supra*, 41 Cal.4th 555, the defendant argued on appeal that 1) expert testimony regarding the match between defendant's DNA and DNA extracted from the vaginal swabs was based on testing that the expert did not personally conduct, thereby violating his Sixth Amendment confrontation right as construed by the Supreme Court in *Crawford v. Washington, supra*, 541 U.S. 36, and 2) the expert's use of a population frequency calculation for Caucasians alone violated his due process rights by improperly suggesting to the jury that the perpetrator of the rape and murder was a member of defendant's racial group, citing

People v. Wilson (2006) 38 Cal.4th 1237. (*People v. Geier, supra*, 41 Cal.4th at pp. 593-594.)

With respect to the first issue, and contrary to respondent's assertion of forfeiture, this Court did *not* hold that the *Crawford* issue was forfeited, despite the fact that defendant did not object at trial to admission of the expert testimony on grounds of a violation of the confrontation clause and/or the Sixth Amendment. (*Id.* at pp. 593-594, 609-610.) The Court addressed the merits of the *Crawford* claim, presumably reaching the issue because *Crawford* constituted such an unforeseeable change in the pertinent law "that it is unreasonable to expect trial counsel to have anticipated the change." (See *People v. Turner, supra*, 50 Cal.3d at p. 703.)

With respect to the second issue, this Court held that the *Wilson* claim (i.e., the claim that the expert's use of a population frequency calculation for Caucasians alone violated defendant's due process rights) was forfeited by the failure of the defense to object on the ground raised on appeal. (*People v. Geier, supra*, 41 Cal.4th at p. 609.) The claim was forfeited because, among other things, if timely raised, the prosecution's expert "could presumably have testified to the frequency of the DNA profile for all three major populations." (*Id.* at p. 610.) The forfeiture holding is inapposite because here appellant did not raise a *Wilson* DNA-frequency claim.

B. ADMISSION OF COTTON'S TESTIMONY PREJUDICIALLY VIOLATED APPELLANT'S RIGHTS UNDER THE CONFRONTATION CLAUSE

Respondent next argues that Cotton's testimony was properly admitted under *People v. Geier, supra*, 41 Cal.4th 555, and that *Melendez-Diaz v. Massachusetts, supra*, 557 U.S. 305 is not controlling because the case is limited to the use of affidavits (as distinguished here from live testimony) to prove the results of scientific laboratory tests.[9] (RB 119-126.) Respondent is mistaken, and her argument, which preceded the decision in *Bullcoming v. New Mexico, supra*, 564 U.S. ___ [131 S.Ct. 2705], is not particularly relevant.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The clause "guarantees a defendant's right to confront those 'who bear testimony' against him."

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[9] As respondent acknowledges, the issue whether admission of the results of a forensic report by an expert who did not conduct the scientific testing violated the right to confrontation is currently pending review. (RB 121-122; *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886 [observing that some of *Geier*'s rationale has been undermined by *Melendez-Diaz*]; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046 [concluding that *Geier* appears to have been disapproved by *Melendez-Diaz*]; *People v. Benitez* (2010) 182 Cal.App.4th 194, review granted and holding for lead case, May 12, 2010, S181137 [finding that *Melendez-Diaz* overruled *Geier*]; *People v. Bowman* (2010) 182 Cal.App.4th 1616, 1618, review granted and holding for lead case, June 9, 2010, S182172.)

(*Melendez-Diaz, supra*, 557 U.S. 305 [129 S.Ct. at p. 2531]; *Michigan v. Bryant* (2011) 562 U.S. ___ [131 S.Ct. 1143, 1152-1153].) "'Testimony,' in turn, is a '"'"solemn declaration or affirmation made for the purpose of establishing or proving some fact."'"'" (*People v. Blacksher* (2011) 52 Cal.4th 769, 811, citing *Bryant*, 562 U.S. ___ [131 S.Ct. at p. 1153].)

In *Crawford v. Washington, supra*, 541 U.S. 36, the United States Supreme Court held the Sixth Amendment right of confrontation is violated by the admission of testimonial statements of a witness who is not subject to cross-examination at trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Id.* at pp. 53-54, 68.) It said: "Various formulations of this core class of 'testimonial' statements exist: 'ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; [and] 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford v. Washington, supra*, 541 U.S. at pp. 51-52.)

As respondent argues, based on *Crawford* and the ensuing decision in *Davis v. Washington* (2006) 547 U.S. 813, the California Supreme Court in *Geier, supra*, 41 Cal.4th 555, held an expert could testify about a DNA analysis, embodied in a DNA report, performed by another biologist who did not testify at trial. (RB 119-120; *Geier*, 41 Cal.4th at pp. 593-596.) *Geier* decided a hearsay statement is "testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier, supra*, 41 Cal.4th at p. 605.) According to *Geier*, such "routine forensic reports" (*id.* at p. 606) are not testimonial within the meaning of *Crawford* and *Davis* because they "constitute a contemporaneous recordation of observable events rather than the documentation of past events" (*id.* at p. 605) and thus do not meet all of the criteria for testimonial statements.

In June 2009, the court decided *Melendez–Diaz, supra*, 557 U.S. 305 [129 S.Ct. 2527], and in a five-to-four decision applied *Crawford* to hold that affidavits from forensic analysts concerning tests of a substance for the presence of illegal drugs are testimonial for Sixth Amendment purposes. (*Melendez–Diaz, supra*, 557 U.S. 305 [129 S.Ct. at p. 2532].) In part, the plurality observed that the affidavits were not only ""made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial""

but also had the sole purpose to provide "'"prima facie evidence"'" of the analyzed substance. (*Melendez–Diaz, supra*, 557 U.S. 305 [129 S.Ct. at p. 2532].)

Respondent argues that *Melendez-Diaz* did not overrule *Geier* because Justice Thomas separately concurred, explaining that he did so because the documents at issue were "'quite plainly affidavits' . . . ." (RB 123, citing *Melendez-Diaz, supra*, 557 U.S. 305 [129 S.Ct. at p. 2529].) Given this narrow concurrence, respondent argues that the *Melendez-Diaz* plurality's formulation – that testimonial hearsay extends to all "'statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'" – was not adopted by Justice Thomas and thus does not establish precedent. (RB 123,[10] citing *Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260].) This Court had previously suggested this is not the controlling test. (See *People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14 [stating the proper focus is "not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial" but, rather, whether "statements, made with

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[10] Respondent's argument is refuted by the fact that although Justice Thomas wrote separately, he also voted with the majority in *Melendez-Diaz*; thus, unlike cases in which there is no majority and the fifth vote for a result is provided by a concurring justice, *Melendez-Diaz* is not subject to the rule that its holding is limited only to those points on which the writers of the main opinion and the concurrence agree. (*Marks v. United States* (1977) 430 U.S. 188, 193.)

some formality, which, viewed objectively, are for the primary purpose of establishing or proving facts for possible use in a criminal trial"].)

Following *Melendez-Diaz*, and after respondent's brief was filed, the U.S. Supreme Court decided *Bullcoming v. New Mexico, supra*, 564 U.S. ___ [131 S.Ct. 2705], involving a charge of driving while intoxicated, in which the state sought to admit a blood-alcohol analysis report through the testimony of a forensic analyst who did not perform, observe or certify the analysis. (*Id.*, 564 U.S. ___ [131 S.Ct. at pp. 2710, 2711-2712].) The plurality in *Bullcoming* observed that the nontestifying analyst's certification "reported more than a machine-generated number" in that it also verified the lab had received the blood sample intact, the sample was in fact the defendant's, that the analyst performed a particular test adhering to a specific protocol, and the process had not been compromised. (*Id.*, 564 U.S. ___ [131 S.Ct. at p. 2714].) It held the report could not be introduced against the accused at trial under the "surrogate" testimony approach taken in the trial court. (*Id.*, 564 U.S. ___ [131 S.Ct. at pp. 2710, 2713].) It further held the report was testimonial even though unsworn, because it was "created solely for an 'evidentiary purpose' . . . made in aid of a police investigation," (*id.*, 564 U.S. ___ [131 S.Ct. at p. 2717]) and was "'formalized' in a signed document."[11] (*Ibid.*)

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[11] Justice Sotomayor, who supplied the fifth vote of the five to four decision, wrote a separate concurring opinion as to her reasons for concluding the report was testimonial. (*Id.*, 564 U.S. ___ [131 S.Ct. at p. 2720].) The plurality and

Following *Bullcoming*, the U.S. Supreme Court decided *Williams v. Illinois* (2012) __ U.S. __ [132 S.Ct. 2221], involving a charge of rape, in which the prosecution offered the testimony of state forensic specialist Lambatos that she had matched a DNA profile produced by an outside laboratory, Cellmark, to a profile the state lab produced using a sample of defendant's blood. (*Id.*, 132 S.Ct. at p. 2227.) The plurality in *Williams* observed that defendant's confrontation right was not violated because the testimony was not offered for the truth of the matter asserted (*Id.* 132 S.Ct. at p. 2224); nor did Lambatos identify the Cellmark report "as the source of any of the opinions she expressed." (*Id.* 132 S.Ct. at p. 2228.) The plurality observed that even if Cellmark's report had been introduced for its truth, there would have been no Confrontation Clause violation because it did not amount to testimony against an accused because the Cellmark "report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose." (*Ibid.*; see *id.* 132 S.Ct. at p. 2243 ["The Cellmark report is very different. It plainly was not prepared for the primary purpose of accusing a targeted individual."].) The plurality held that defendant's confrontation right was not violated because "the prosecutor

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Justice Sotomayor both believed the evidentiary purpose of the certificates was a factor in determining whether they were testimonial. (*Id.*, 564 U.S. ___ [131 S.Ct. at pp. 2716, 2720].)

made clear that she was asking Lambatos only about '*her own testing based on [DNA] information*' that she had received from Cellmark." (*Id.* 132 S.Ct. at p. 2237 [emphasis added].) In sum, the plurality reiterated that Lambatos "referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood." (*Id.* 132 S.Ct. at p. 2240.)

Melendez-Diaz and *Bullcoming* compel the conclusion that the contents of the forensic laboratory reports prepared by analyst Hall are testimonial within the meaning of confrontation clause jurisprudence. (*Melendez–Diaz, supra*, 557 U.S. 305 [129 S.Ct. at pp. 2532-2542]; *Bullcoming, supra*, 564 U.S. ___ [131 S.Ct. at p. 2713].) The forensic laboratory reports were the functional equivalent of statements by analyst Hall prepared for use at a later trial. The primary purpose was evidentiary: to record the results of DNA testing at various loci comparing DNA from appellant's blood to DNA from a sperm fraction of a vaginal swab taken from Latasha W., and to opine a match between appellant's and Latasha W.'s DNA for use in a criminal prosecution. (See *Bullcoming, supra*, 564 U.S. ___ [131 S.Ct. at p. 2717].)

Nor does *Williams* undermine the conclusion that appellant's confrontation right was violated when Cotton testified about the substance of forensic laboratory

reports prepared by analyst Hall. In contrast to *Williams*, where the prosecutor asked Lambatos only about her own testing based on DNA information, and where Lambatos did not identify the Cellmark report as a source of any of her opinions (*Williams, supra*, 132 S.Ct. at pp. 2224, 2237), Cotton conducted none of her own testing but, rather, identified the reports prepared by analyst Hall as the sole source of her opinions. (RT 30:2186-2191.)

Moreover, in contrast to *Williams*, where the report was produced before any suspect was identified, and thus the evidence adduced therein was not sought for the purpose of obtaining evidence against the accused (*Williams, supra*, 132 S.Ct. at pp. 2228, 2243), Hall's reports were prepared at the request of the prosecution – well after appellant was arrested and identified as a suspect – and with the express purpose of obtaining evidence against appellant. (RT 27:1829-1831, 28:1984-1985, 29:2154-2155, 30:2198.)

Cotton testified that she based her opinion on the forensic laboratory reports prepared by analyst Hall. (RT 30:2186-2191.) Cotton testified to Hall's findings, stating as follows: 1) Hall tested several loci on the DNA, and he found that all matched appellant, meaning appellant could not be excluded as a donor (RT 30:2186-2191); 2) in the first report Hall arrived at a statistical matching probability of 1 in 8,000, which was based on information for loci DQA1, LDLR, GYPA, HBGG and D7S8 (RT 30:2228); and, 3) in the second report Hall added the results

of tests he performed at additional loci CSF, TPOX, THO1 and XY, which resulted in a statistical match probability of 1 in 17 million. (RT 30:2216, 2230.)

The circumstances here are indistinguishable from those where the testifying expert was a mere conduit for forensic information prepared and analyzed by someone else, as in *Bullcoming*, because Cotton's testimony conveyed analysis of Hall's findings and detailed the contents of his two reports. Cotton's testimony thus was admitted against appellant under the "surrogate" testimony approach condemned in *Bullcoming* and *Williams*. (See *Bullcoming, supra*, 564 U.S. ___ [131 S.Ct. at pp. 2710, 2713]; *Williams, supra*, 132 S.Ct. at p. 2233.)

Nor is the constitutional error somehow cured by application of the general rule that an expert witness may rely on hearsay evidence when offering his or her independent expert opinion, as asserted by respondent. (RB 125-126, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Although an expert's recitation of sources relied upon for his or her opinion "does not transform inadmissible matter into 'independent proof' of any fact" (*id.*, at p. 619), "prejudice may arise if, '"under the guise of reasons,"' the expert's detailed explanation '"[brings] before the jury incompetent hearsay evidence."' [Citations.]" (*People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *People v. Dean* (2009) 174 Cal.App.4th 186, 193; *People v. Cooper* (2007) 148 Cal.App.4th 731, 747 [expert cannot bring incompetent hearsay before the jury under the guise of stating the reasons for the opinion].) Here, Cotton

repeated direct findings from the forensic laboratory reports prepared by analyst Hall, transforming Cotton into a mere conduit for forensic information prepared and analyzed by someone else.

Finally, respondent argues that any error in admitting Cotton's testimony about the contents of Hall's reports was harmless because Latasha W. identified appellant, which testimony "was sufficient by itself to convict appellant of Coleman's murder, Latasha W.'s attempted murder, and the sexual assault against her." (RB 126.) Not so.

The DNA evidence strongly and directly linked appellant to the assault on Latasha W. and killing of Coleman. (RT 30:2186-2191, 2193, 2216, 2228, 2230.) During closing summation, the prosecutor argued that the DNA evidence conclusively established that appellant was the perpetrator of these offenses (RT 33:2849-2850), enabling the jury to "feel comfortable" with Latasha W.'s own testimony about the identity of the perpetrator. (See also RT 33:2953-2955 [prosecutor's closing rebuttal where he argues the strength of the DNA evidence, and points to the statistical probability of a match (1 in 17 million)].) In view of the fact that identity was the sole contested issue (AOB pp. 5-11, 19-21), and the fact that there were only two pieces of evidence linking appellant to the assault on Latasha W. and killing of Coleman (AOB 5-11) – respondent has not proven that the error in admission of Cotton's DNA testimony was harmless beyond a

reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18.) Reversal of appellant's convictions in counts 1 through 6 is required.

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X.

DEFENSE COUNSEL'S ILL-INFORMED, DAMAGING CONCESSION DURING OPENING STATEMENT THAT APPELLANT WAS PRESENT AT THE SCENE OF THE MURDER OF CHARLES COLEMAN AND RELATED OFFENSES DEPRIVED APPELLANT OF THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Appellant explained in his opening brief that he was denied the constitutional right to the effective assistance of counsel when defense counsel gratuitously admitted during opening statement that appellant was present at the scene of the Coleman murder, thereby eviscerating his defense of mistaken identity. (AOB 153-165.)

Respondent acknowledges that "defense counsel admitted appellant's presence at the Coleman crime scene" (RB 129), but nonetheless asserts that such mistaken and gratuitous concession was not deficient because "defense counsel reasonably anticipated that the prosecutor intended to use the incriminating post-arrest statement at trial." (RB 130-131.) Respondent is mistaken.

The fallacy in respondent's argument is that defense counsel *erroneously assumed without adequate investigation* (i.e., deficient performance of counsel) that the prosecutor would seek to admit the statement. Defense counsel admitted that she "assumed" the statement would be used by the prosecution. (RT 26:1587.)

The trial court highlighted the unreasonableness of defense counsel assumption in remarks following defense counsel's statement that she "assumed"

the statement would be used by the prosecution. The trial judge stated, "Again, one way to find out *rather than assuming* is certainly to try to ask ahead of time." (RT 26:1587 [emphasis added].)

Defense counsel's concession that she merely assumed the statement would be used (and the reasonable and obvious inference therefrom that counsel had not discussed the matter with the prosecutor), together with the trial court's remark showing the unreasonableness of such an assumption, reveals counsel's deficient performance in failing to investigate whether the statement would be used, so as to make an informed decision on how to fashion her remarks during opening statement. (See *In re Thomas* (2006) 37 Cal.4th 1249, 1258 ["'{B}efore counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation.'"]; *Dobbs v. Turpin* (11th Cir. 1998) 142 F.3d 1383, 1388-1389 [counsel's failure to investigate and present evidence regarding petitioner's background because mitigating evidence would open the door to harmful impeachment was not a reasonable strategic decision; such a decision can not be reasonable when the attorney has not investigated his options and made a reasonable choice between them]; *Lockett v. Anderson* (5th Cir. 2000) 230 F.3d 695, 715 [counsel claimed that he thought mental health evidence presented in mitigation would invite harmful cross-examination and so avoided presenting it; counsel's decision was not

reasonable nor informed because he never pursued or developed the mitigating evidence to weigh against the possibility of harmful cross-examination; a strategic decision "must be rejected because no informed decision was made"].)

Respondent argues that "counsel's defense strategy . . . "was to acknowledge appellant's presence at the scene of the Coleman and Latasha W. crimes and to concede he was an aider and abettor, but to argue that he did not personally shoot Coleman and Latasha W. and rape Latasha W." (RB 131.) Respondent is mistaken. Defense counsel explicitly stated that she mistakenly mentioned the post-arrest statement, telling the trial judge that she "would certainly not have told the jury that he has admitted that he was present [had she realized that the prosecution would not seek to introduce the statement]." (RT 27:1662.) Accordingly, there was no reasoned and considered tactical determination to acknowledge appellant's presence at the scene of the crimes.

Trial defense counsel's performance in making an ill-informed, damaging admission during opening statement fell below the professional norms prevailing at the time. The American Bar Association Standards for Criminal Justice published at the time described the duty to investigate as follow:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement

> authorities. [ABA Standards for Criminal Justice Prosecution Function and Defense Function (3d ed. 1993), p. 181.]

Commentary to this standard, which is entitled "*The Importance of Prompt Investigation*," emphasizes that "[e]ffective investigation by the lawyer has an important bearing on competent representation at trial . . . ." (*Id.* at p. 183.) The ABA commentary states that "[f]ailure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel." (*Ibid.*, citing *Strickland v. Washington* (1984) 466 U.S. 668, 691 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Standards promulgated by the National Legal Aid and Defender Association similarly provide that "[c]ounsel has a duty to conduct an independent investigation *regardless of the accused's admissions or statements to the lawyer of facts constituting guilt*" and emphasize that "[t]he investigation should be conducted as quickly as possible." (Nat. Legal Aid & Defender Assoc., *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) Guideline 4.1 [emphasis added].)

"These [ABA] standards have consistently been relied on by the United States Supreme Court as relevant indicia of the prevailing practice norms." (*In re Thomas, supra*, 37 Cal.4th at p. 1262, citing *Rompilla v. Beard* (2005) 545 U.S. 374, 390-391 [162 L.Ed.2d 360, 125 S.Ct. 2456] and *Wiggins v. Smith* (2003) 539 U.S. 510, 524 [156 L.Ed.2d 471, 123 S.Ct. 2527].)

Respondent cites to several cases holding that counsel was not ineffective in making a concession as part of a reasoned tactical decision, including *People v. Gurule, supra*, 28 Cal.4th 557, *People v. Fairbank* (1997) 16 Cal.4th 1223, *People v. Samayoa* (1997) 15 Cal.4th 795, *People v. Freeman* (1994) 8 Cal.4th 450, *People v. Mayfield* (1993) 5 Cal.4th 142, *People v. McPeters* (1992) 2 Cal.4th 1148, and *People v. Mitcham* (1992) 1 Cal.4th 1027. (RB 131-132.) These cases are inapposite, however, because in every single case defense counsel was shown to have made the concession as part of a reasoned and informed tactical decision, based upon adequate investigation. This was not the situation here because defense counsel's concession was ill-informed, having been made based on inadequate investigation of the relevant facts (i.e., the facts relating to whether the prosecution would introduce appellant's statement).

Respondent's argument incorrectly suggests that because defense counsel's concession of appellant's presence at the scene might have been reasonable had it been made as a deliberate tactical choice, the inadvertent concession was not ineffective. (RB 131-132.) Although one attorney might, given the facts of the case, adopt a defense that involves conceding the defendant's presence at the scene, another attorney might, on the facts of his case, adopt a different defense and require the prosecution to prove that fact. An attorney who, like trial defense counsel here, adopts the latter strategy but "drops the ball" and inadvertently reveals

the defendant's admission to a fact she meant to subject to proof, has ineffectively undercut her chosen strategy. The fact that another attorney might have deliberately adopted a different strategy in another case does not make her mistake reasonable. (See *People v. Gurule*, *supra*, 28 Cal.4th at p. 611 ["[A] defense attorney's concession of his client's guilt, lacking any reasonable tactical reason to do so, can constitute ineffectiveness of counsel."])

In *People v. Davis* (1957) 48 Cal.2d 241, for example, this Court reversed the order denying defendant's motion for new trial on the ground of ineffective assistance of counsel arising from defense counsel's concession that defendant was present at the scene of the crime. (*Id.* at pp. 257-258.) Defense counsel's concession of defendant's presence at the scene occurred during supplemental closing argument. (*Id.* at p. 257.) In reversing the judgment, this Court stated, in part:

> From a review of the evidence presented at the trial and the statements made by counsel for Davis in his supplemental argument to the jury it is difficult to conceive a more direct and positive change of position to the prejudice of Davis, *or one more injurious to his right to have the jury fairly consider his theory of defense as disclosed by the evidence.* That this was done is further evidenced by the reasonable inference that might be drawn by the jury from the supplemental argument that Davis had told his counsel that *he was actually present at the scene of the murder.* . . . . [*Ibid.* (emphasis added).]

This Court also reversed the codefendant's judgment of conviction, finding that defense counsel's concession that defendant Davis was present at the scene so

infected the trial with unfairness that codefendant Morse was entitled to a new trial too. This Court stated, in part:

> The argument of counsel for Davis also prejudiced the rights of his codefendant Morse to a fair trial. They were jointly charged, tried and convicted. There was evidence that both had jointly participated in the commission of the offense. *When Davis' counsel placed Davis at that scene the effect on the jury could have been the same as to the defendant Morse. Where the rights of defendants have suffered such an interference or interruption as to fatally affect the regularity of the trial and conviction, a miscarriage of justice has resulted and both defendants are entitled to a new trial.* [*Id.* at pp. 257-258 (emphasis added).]

Respondent argues that "assuming defense counsel's remarks constituted deficient performance," appellant was not prejudiced by defense counsel's concession of his presence at the scene of the crimes charged in counts 1 through 6. (RB 132-134.) Respondent is mistaken.

Appellant was severely prejudiced by counsel's concession of defendant's presence at the scene of the crimes because the concession substantially lessened the prosecution's burden of proof on the contested issue of the identity of the person who killed Coleman and raped Latasha W. There was a gunman and one or two accomplices present at the scene of the offenses. (AOB 5-11.) Although Latasha W. identified appellant, she was the sole eyewitness. The reliability of her identification of appellant was drawn into question by evidence of the stressful nature of the events, inconsistencies in the description of the gunman, and the fact that the gunman and the accomplices were of the same race, thereby revealing that

any one of the jurors may have rejected her testimony absent defense counsel's concession of appellant's presence. (AOB 6-8, 19-20.) Further, although the prosecution presented DNA evidence, the defense presented substantial evidence undermining the strength of that evidence (AOB 21-23), and has now shown that the DNA evidence was erroneously admitted. (*Ante*, § IX.)

Respondent also argues appellant was not prejudiced by defense counsel's concession because the jury was told that statements of the attorneys are not evidence. (RB 132-134.) No so.

The admonition about statements of the attorneys did not cure the prejudice because this is a case where defense counsel's concession of appellant's presence so infected the trial with unfairness that a cautionary instruction could not possibly "un-ring the bell." (See *People v. Davis, supra*, 48 Cal.2d at pp. 256-158 [reversal of judgment due to ineffective assistance of counsel in conceding defendant's presence at scene of murder where, presumably, the court gave the standard admonition that statements of counsel are not evidence]; *People v. Ford* (1948) 89 Cal.App.2d 467, 470 ["where the misconduct is of such a character that it cannot be purged of its harmful effect by an admonition, it will be considered as a possible ground for reversal in cases where the jury has been admonished"]; *People v. Roof* (1963) 216 Cal.App.2d 222, 225 ["facts that have been impressed upon the minds of jurors which are calculated to materially influence their consideration of the issues

cannot be forgotten or dismissed at the mere direction of a court"]; *Jackson v. Denno* (1974) 378 U.S. 368, 382, fn. 10 [84 S.Ct. 1774, 12 L.Ed.2d 908] ["[R]egardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it."] [internal quotations marks omitted].)

Appellant was denied his constitutional right to effective assistance of counsel, requiring reversal of his convictions in counts 1 through 6.

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XI.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE TRUE FINDING ON THE SPECIAL CIRCUMSTANCE ALLEGATION THAT THE MURDER OF CHARLES FOSTER WAS COMMITTED DURING THE COMMISSION OF AN ATTEMPTED ROBBERY

Appellant explained in his opening brief that there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the finding that Foster was murdered during the commission of an attempted robbery, thereby requiring that the true finding on the felony-murder attempted robbery special circumstance be set aside. (AOB 166-169.)

Respondent combines the response to this argument with her response to Argument IV, *ante*, arguing there is sufficient evidence of an attempted robbery. (RB 90, 97.)

As explained in section IV, *ante*, the evidence is insufficient as a matter of law to sustain a finding of an attempted robbery. Accordingly, the true finding on the special circumstance allegation that the murder was committed during an attempted robbery must be set aside.

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XII.

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT'S INSTRUCTIONS TO THE GUILT-PHASE JURY IN THE LANGUAGE OF CALJIC NO. 17.41.1 – THE DISAPPROVED "JUROR SNITCH" INSTRUCTION – VIOLATED APPELLANT'S RIGHTS TO JURY TRIAL AND DUE PROCESS

Appellant argued in his opening brief, although recognizing *People v. Engelman* (2002) 28 Cal.4th 436, that by instructing in the language of CALJIC No. 17.41.1 (i.e., the jury snitch or anti-nullification instruction) the trial court violated appellant's federal constitutional rights to jury trial and due process by invading the secrecy of jury deliberations and undermining the jury's free exercise of the power of nullification. (AOB 170-173.)

Respondent argues that the claim has been forfeited because appellant did not object to the instruction in the trial court. (RB 135.) Respondent is mistaken. The claim is cognizable on direct appeal because the instruction is incorrect and it implicates appellant's substantial rights. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; Pen. Code, § 1259.)

Penal Code section 1259 states, in relevant part, "Upon an appeal taken by the defendant, the appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in a lower court, if the substantial rights of the defendant were affected thereby." Respondent's assertion that the instructional error claim is forfeited because appellant's substantial rights

were not affected misstates the statutory language. (RB 135.) In other words, it is illogical to argue, as respondent does, that section 1259 means that a defendant must object to an instructional error if, and only if, it did not affect his substantial rights or he has forfeited the claim.

Respondent fails to critically analyze the issue, but simply refers this Court to its decision in *People v. Engelman, supra*, 28 Cal.4th 436. (RB 135.) Appellant urges this Court to recognize the constitutional infirmity in CALJIC No. 17.41.1, which is revealed in the application of the time-honored concepts of the secrecy of jury deliberations and the power to nullify. The "secrecy of deliberations is the cornerstone of the modern Anglo-American jury system." (*United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606, 618.) A juror's ability to acquit "in the teeth of both law and facts" (*Horning v. District of Columbia* (1920) 254 U.S. 135, 138 [41 S.Ct. 53, 65 L.Ed. 185]) is a well-established power that has been with us since Common Law England. (*Bushell's Case* (C.P. 1670) 124 Eng.Rep. 1006 [releasing jury foreman Bushell, who was arrested for voting to acquit William Penn of unlawful assembly against the weight of the evidence and the requirements of the law]; *Dunn v. United States* (1932) 284 U.S. 390, 393-394 [recognizing power of nullification].)

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XIII.

THE TRIAL COURT'S REPEATED ERRONEOUS RULINGS AGAINST THE DEFENSE AND REMARKS DISPARAGING DEFENSE COUNSEL WARRANT REVERSAL OF APPELLANT'S CONVICTION FOR A DENIAL OF A FUNDAMENTALLY FAIR TRIAL

Appellant explained in his opening brief that throughout the pre-trial and trial proceedings the court made repeated one-sided rulings and remarks directed against defense counsel and appellant, disparaging counsel and weakening the defense's ability to present evidence countering the charges against appellant – the cumulative impact of which was to reveal bias by the trial judge and to deny appellant the constitutional right to a fundamentally fair trial. (AOB 174-189; see, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [113 L.Ed.2d 302, 331, 111 S.Ct. 1246] [trial by judge who is not fair or impartial constitutes "structural defect[ ] in the constitution of the trial mechanism" and resulting judgment is reversible per se]; see also *Gomez v. United* States (1989) 490 U.S. 858, 876 [104 L.Ed.2d 923, 939-940, 109 S.Ct. 2237].)

A. THE CONSTITUTIONAL CLAIMS HAVE NOT BEEN FORFEITED

Respondent argues that appellant forfeited the constitutional rights to an impartial judge and a fundamentally fair trial because he did not object below on these grounds, and he has not shown that objection would be futile, citing *People v. McWhorter* (2009) 47 Cal.4th 318, *People v. Bell* (2007) 40 Cal.4th 582, *People v. Snow* (2003) 30 Cal.4th 43, and *People v. Fudge* (1994) 7 Cal.4th 1075. (RB 136.)

The record reveals an egregious pattern of judicial bias rendering the trial fundamentally unfair, and thus it would have been futile for counsel to have objected on these grounds at trial and, indeed, objections would have risked further animosity toward defense counsel. Accordingly, since objection would have been futile, and no admonition would have cured the harm caused by the judge's actions, the constitutional claims are cognizable on direct appeal. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1189, fn. 27 [lack of objection is not a waiver where objection would have been futile]; *People v. Green* (1980) 27 Cal.3d 1, 35 [lack of objection does not waive error if objection and admonition would not have cured the harm]; *People v. Kitchens* (1956) 46 Cal.2d 260, 52 ["The law neither does nor requires idle acts"]; compare *People v. Hill* (1998) 17 Cal.4th 800, 843, fn. 8 [reviewing court may consider claim of prosecutorial misconduct despite lack of objection when error may have adversely affected defendant's right to a fair trial].)

In view of the fact that an objection would have been directed at the trial judge's own bias and misconduct in conducting the trial, no objection was necessary to preserve the constitutional claim because any objection would almost certainly have been overruled. (See *People v. Pitts* (1990) 223 Cal.App.3d 606, 692 [rule that objection is necessary to preserve issue on appeal "is not applicable where any objection would almost certainly be overruled"].)

Moreover, in each of the cases cited in support of respondent's forfeiture argument, this Court reached the merits of the constitutional claim, and thus the Court should reach the merits of appellant's constitutional claims. (See *People v. McWhorter, supra*, 47 Cal.4th at p. 373-374; *People v. Bell, supra*, 40 Cal.4th at p. 603-604; *People v. Snow, supra*, 30 Cal.4th at p. 78; *People v. Fudge, supra*, 7 Cal.4th at p. 1108.)

B. JUDICIAL BIAS IS REVEALED IN THE TRIAL COURT'S REJECTION OF MENTAL HEALTH ISSUES AFFECTING APPELLANT, HOLDING HEARINGS OUTSIDE OF APPELLANT'S PRESENCE, AND THREATS OF CELL EXTRACTION

Appellant explained in his opening brief that beginning during pretrial proceedings, and continuing through the trial, the judge refused to accept that appellant suffered from serious mental illness, which affected his ability to attend court hearings and assist in his defense. (AOB 177-182.) The judge's actions revealed that appellant had a trial before a partial judge, which necessarily rendered the trial fundamentally unfair. (AOB 186-189.)

Respondent argues that appellant has not explained how "the trial court's findings constituted misconduct . . . ." Not so. Appellant explained that the trial court's comments revealed judicial bias because the trial court "refused to accept that appellant suffered from serious mental illness, which affected his ability to attend court hearings and assist in his defense." (AOB 177.)

The trial court's position in refusing to accept that appellant was suffering from a very real and serious mental illness colored the judge's rulings in a manner that showed bias against the defense. (AOB 177-182, 186-189.) The trial court's findings constituted misconduct because at numerous hearings the court unreasonably rejected the mental health issues affecting appellant, which resulted in adverse consequences to the defense, including the denial of defense requests for continuances, hearings being held outside of appellant's presence, and threats of cell extraction. (AOB 177-182; *Taylor v. Hayes* (1974) 418 U.S. 488, 501 [94 S.Ct. 2697, 41 L.Ed.2d 897] [reversing where judge became "embroiled in a running controversy with petitioner"].)

Respondent argues that "the record supports the trial court's finding that appellant employed 'suicidal gestures' and physical complaints related to his medication in order to delay his trial." (RB 138.) Not so. Respondent acknowledges, as she must, that during the relevant time period "appellant was housed in a mental observation housing module for inmates who were suicidal." (RB 142; CT 2:366.) Respondent also acknowledges the uncontradicted evidence that during the relevant time period appellant actually attempted suicide three times. (RB 143-144; RT 17:454-455.) The record shows that appellant was indeed suffering from a severe mental illness, that he was being medicated, and that despite the medication he had tried to kill himself three times. (AOB 177-182.) The record

thus belies respondent's assertion that appellant was making physical complaints and employing some kind of "suicidal gesture" in a strategic fashion to delay the trial.

Nor does respondent's citation to *People v. Lewis, supra*, 39 Cal.4th 970 assist. (RB 154, 156.) There was no dispute in *Lewis* that the trial court's limited comment about the defendant feigning mental incompetence did *not* reflect bias by the judge. (*Id.* at p. 993-994.) As this Court stated, "Lewis's counsel, the trial court, and the prosecutor all believed that Lewis was competent to stand trial. *Each indicated at times that various outbursts*, including Lewis and Oliver's assault on counsel, *were feigned attempts to persuade the court and the jury of mental illness that did not exist.* (*Id.* at p. 994 [emphasis added].) This Court held that no bias was shown because the trial court's "observations were supported by the record, including expert testimony introduced at a hearing on Lewis's competence." (*Ibid.*) The instant record stands in stark contrast to *People v. Lewis, supra*, 39 Cal.4th 970, because here the record reveals substantial, uncontradicted evidence that appellant was suffering from a severe mental illness. (AOB 177-182.)

Respondent also argues that "with the exception of the trial court's August 12, 1998 comment, the trial court made all other challenged comments outside the presence of the jury which could not have adversely influenced the jury." (RB 138.) Respondent's argument misses the point. The constitutional right at issue here is the

right to "a judge with no actual bias against" the defendant, regardless of the impact on the jury. (*Bracy v. Gramley* (1997) 520 U.S. 899, 905 [117 S.Ct. 1793, 1799, 138 L.Ed.2d 97]; *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242 [100 S.Ct. 1610, 64 L.Ed.2d 182].)

C. JUDICIAL BIAS IS REVEALED IN THE TRIAL COURT'S INTERRUPTION OF DEFENSE OPENING STATEMENT

Appellant explained in his opening brief that the trial court improperly interrupted defense counsel's opening statement and admonished the jury, revealing bias against the defense because the interruption and admonition were inappropriate as counsel was properly explaining to the jurors the requirement to separately decide each of the three homicides. (AOB 182-183.)

Respondent argues that the trial court's action was justified because "defense counsel was essentially arguing what the jury should consider or 'discuss' during deliberations and how they should view the evidence that the prosecution was intending to present[,]" and thus counsel was making an "impermissible remark in opening statement." (RB 159.) Not so. (See *People v. Dennis* (1998) 17 Cal.4th 468, 518 [the "function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning."].) Defense counsel did not transgress these limits.

Preliminarily, the prosecutor did not object to counsel's comments, giving rise to a reasonable inference that the prosecutor did not consider defense counsel's comments to be improper. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1136, fn. 65 [defense counsel's failure to object to display of knife during closing argument "reasonably supports the inference that no" error occurred when the prosecutor displayed the knife].)

Further, defense counsel's comments during opening statement were entirely proper, and thus should not have drawn a sua sponte objection by the trial court. In her opening statement to the jury, defense counsel stated, in part:

> I want you to keep a very, very open mind as you are listening to this testimony.
>
> Each homicide is a totally different case and you have to decide on them totally separately.
>
> They are not being charged together so you can use one for the other.
>
> If a piece of evidence that you feel belongs to one or the other, that is fine. But they are three separate cases and you need to decide them separately and you need to decide them individually.
>
> It is fine for you to discuss and you should -- [RT 26:1591.]

The purpose of an opening statement "is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect." (*People v. Arnold* (1926) 199 Cal. 471, 486.) "Nothing prevents the statement from being presented in a story-like manner that holds the attention of lay jurors and ties

the facts and governing law together in an understandable way." (*People v. Millwee* (1998) 18 Cal.4th 96, 137.) Counsel was correctly and properly informing the jury about the evidence – i.e., that the evidence would show three separate homicides – and that each of the homicides must be decided separately. (See *People v. Ramos* (1982) 30 Cal.3d 553, 575 [prosecutor's remarks during opening statement about evidence to be presented and theory of the case were proper], reversed in part on other grounds in *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446].)

D. JUDICIAL BIAS IS REVEALED IN THE TRIAL COURT ACCUSING DEFENSE COUNSEL – IN THE PRESENCE OF THE JURY – OF BAD FAITH IN QUESTIONING PROSECUTION EXPERT WITNESS DR. ROBIN COTTON

Appellant explained in his opening brief that the trial court made erroneous accusations that defense counsel was questioning prosecution expert witness Dr. Robin Cotton in bad faith and based on facts not in evidence, thereby revealing bias against the defense. (AOB 183-186.)

Respondent argues that the trial court reasonably found that defense counsel's question posed to Dr. Cotton was asked in bad faith. (RB 160.) Not so.

There is no substantial evidence to support the trial court's conclusion that defense counsel's question posed to Dr. Cotton was asked in bad faith. Defense counsel established there were two DNA reports, a first report showing a random match probability of 1 in 8,000, and a subsequent report showing a random match probability of 1 in 17 million. (RT 30:2216, 2228-2230.) After testifying about the

preparation of the second report, defense counsel asked Dr. Cotton, "So basically under the first set of testing, the prosecution indicated they didn't like the statistics." (RT 30:2230.) Defense counsel explained that she asked the question in good faith, which was based on a reasonable belief that the prosecution did not like the statistical probability results of the first test, and so did additional testing. (RT 30:2237.) The judge responded that the implication of the question was that "they did it [i.e., the test] wrong the first time and then had to scrap it." (RT 30:2237.) The judge was incorrect; there was no such implication in trial defense counsel's questions of Dr. Cotton. The question simply asked about the motivation behind doing additional testing that resulted in a material increase in the random match probability from 1 in 8,000 to 1 in 17 million. (RT 30:2230.)

Respondent also argues that the trial court's comment in the presence of the jury did not constitute misconduct, citing *People v. Sturm* (2006) 37 Cal.4th 1218, *People v. Rodriguez* (1986) 42 Cal.3d 730, 766, Evidence Code, § 765, subd. (a), and Cal. Const., art. VI, § 10. (RB 163-167.) Not so. Instead of succinctly ruling on the objection in an unbiased fashion, the judge stated in the presence of the jury:

> Look, this is so objectionable. What the lady said was the following: They tested several loci and stopped, were asked to do more and said fine and kept going and kept up with their results. So, please, counsel, I assume you understand and please do not ask questions that misstate the evidence in the case or that assume facts not shown by the evidence in the case. Please don't do that. [RT 30:2230-2231.]

The judge's comment implicitly affirmed the testimony of Dr. Cotton, while at the same time accusing trial defense counsel of misstating the evidence.

Although the trial judge certainly has a duty to control trial proceedings and "to limit the introduction of evidence 'to relevant and material matters'" (RB 163, citing *People v. Sturm*, *supra*, 37 Cal.4th at p. 1241),

> "[i]t is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial . . . . When the court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client." (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1174-1175.) *This principle holds true in instances involving a trial judge's negative reaction to a particular question asked by defense counsel, regardless of whether the judge's ruling on the prosecutor's objection was correct; even if an evidentiary ruling is correct, "that would not justify reprimanding defense counsel before the jury."* (*Ibid.*; see also *People v. Black* (1957) 150 Cal.App.2d 494, 499 [Though counsel's line of inquiry was objectionable, and the evidentiary ruling essentially proper, the judge's remarks accusing counsel of unfairness constituted misconduct.].)

(*People v. Sturm*, *supra*, 37 Cal.4th at p. 1240 [emphasis added].)

Nor does Evidence Code section 765 permit the trial judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of defense counsel. Section 765, subdivision (a), states, "The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment." This provision, to appellate counsel's knowledge, has never been interpreted as affording a basis for

the trial judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of defense counsel. Indeed, such an interpretation is not supported by the plain meaning of the statute, which merely speaks to the court's authority with respect to the "mode of interrogation of a witness . . . ." (Evid. Code, § 765, subd. (a).)

Respondent's citation to *People v. Rodriguez, supra*, 42 Cal.3d 730 and article VI, section 10 of the California Constitution are equally unavailing. (RB 165-166.) In connection with a claim of error arising from the trial court's comment on evidence after the jury announced it was deadlocked, this Court held that under article VI, section 10 of the California Constitution the trial court may "*comment on the evidence* and the credibility of witnesses" provided that the comment is "accurate, temperate, nonargumentative, and scrupulously fair." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 766 [emphasis added].) *Rodriguez* is readily distinguishable because this case does not involve a trial court's fair comment on the evidence but, instead, involves the separate issue of judicial bias in denigrating trial defense counsel in the presence of the jury.

E. THE STANDARD JURY ADMONITION DID NOT REMEDY THE JUDICIAL BIAS WHICH RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR

Respondent argues that the court instructed the jury with the standard admonition against taking any cues from the judge (CALJIC No. 17.30), and thus

"the trial court's comment did not deprive appellant the [sic] rights to a fair trial or an impartial judge." (RB 167; CT 8:2144.)

The standard admonition afforded appellant no protection against the backdrop of the trial judge's repeated misconduct and biased rulings. (See *People v. Sturm, supra*, 37 Cal.4th 1218, 1233, 1237-1238.) Moreover, the standard admonition afforded appellant no protection against the judge's own bias, and thus the admonition did not remedy the infirmity here – i.e., adjudication by a biased judge, rendering the trial fundamentally unfair. (See *Bracy v. Gramley*, *supra*, 520 U.S. at p. 905 ["Due Process clearly requires" that . . .rulings be made by "a judge with no actual bias against" the defendant]; *Marshall v. Jerrico, Inc., supra*, 446 U.S. at p. 242; *Rose v. Clark, supra*, 478 U.S. 570, 577 [106 S.Ct. 3101, 92 L.Ed.2d 460] ["The State of course must provide a trial before an impartial judge"].)

Reversal of appellant's convictions is required.

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XIV.

THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS

In his opening brief, appellant identified numerous errors which occurred during the guilt phase of his trial. (AOB 53-193.) Respondent summarily addresses appellant's cumulative prejudice argument, asserting that "either no errors occurred or that any alleged error either considered individually or together was harmless." (RB 167.) Yet, respondent does not dispute that the death judgment must be evaluated in light of the cumulative effect of the multiple errors occurring at both the guilt phase. (RB 167; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn.15 [56 L.Ed.2d 468, 98 S.Ct. 1930] ["{T}he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."]; *People v. Hill, supra*, 17 Cal.4th at pp. 844-845.)

The cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [40 L.Ed.2d 431, 94 S.Ct. 1868] [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764 [97 L.Ed.2d 618, 107 S.Ct. 3102].)

The record in the instant case reveals serious errors that cumulatively violated appellant's due process rights under *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303 [93 S.Ct. 1038, 35 L.Ed.2d 297]. These rulings include the errors separately identified in Arguments I - XII, and the judicial bias described in Argument XIII, depriving appellant of a fundamentally fair trial. Reversal of appellant's convictions thus is required because respondent has not proven beyond a reasonable doubt that the guilty verdicts actually rendered in this trial were surely unattributable to the cumulative effect of the multiple errors. (Cf. *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244.)

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PENALTY PHASE AND SENTENCING ISSUES

XV.

APPELLANT'S REMOVAL FROM THE COURTROOM DURING THE ENTIRE PENALTY PHASE RETRIAL REQUIRES REVERSAL OF THE DEATH VERDICT

Appellant explained in his opening brief that the death verdict should be reversed because the trial court unreasonably and prejudicially took the extreme measure of eliminating appellant from the penalty phase retrial for a single fecal-throwing incident during voir dire of prospective jurors.[12] (AOB 194-224.)

Respondent argues that the trial court adequately pre-warned appellant that any disruptive behavior would result in removal from the courtroom for the entire penalty phase retrial. (RB 187-188.) Not so. Respondent points to the court's statement to appellant made on August 5, 1998, during the separate guilt-phase trial, where the court stated:

> There are two situations wherein a defendant is not present during even critical portions of a death case.

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[12] The following day appellant also spat at the judge when brought into the courtroom to inquire whether he desired to hear the proceedings from inside lockup. (RT 44:4719-4721.) Appellant was still not receiving medication and was frustrated that the court impeded his ability to communicate with his defense counsel. (RT 44:4719-4721.) This incident had no impact on the trial judge's exclusion order as the judge already had ruled that appellant would be removed from the courtroom during the entire penalty phase retrial. (RT 43:4498-4500, 4504.)

> One is when he waives his presence voluntarily in open court and says: ["]I don't want to be here for this particular proceeding,["] and the judge agrees.
>
> *The other is if the defendant becomes disruptive and has to be removed.*
>
> *If you, for some reason, refuse to come into the courtroom when required, which is every day, I will make a finding that you have disrupted the proceeding by your absence* and/or waived your right to your presence so the case will go on even if you are not here. [RT 23:750-751 (emphasis added).]

This advisement was not an adequate warning for appellant's current penalty phase retrial on March 9, 1999. The warning was not made in appellant's current trial but, rather, was made in his previous guilt-phase trial. Second, the court explicitly limited the scope of the warning by defining "disruptive" behavior in terms of a situation, not present here, where the defendant "refuse[s] to come into the courtroom when required . . . ." (RT 23:750.) Third, appellant was not "warned by the judge that he will be removed *if he continues his disruptive behavior*," as required by law (*Illinois v. Allen* (1970) 397 U.S. 337, 343 [90 S.Ct. 1057, 25 L.Ed.2d 353]; *People v. Carson* (2005) 35 Cal.4th 1, 8-9), because after the single fecal incident the trial judge issued a summary order barring appellant from the courtroom.

Respondent asserts that the trial court had no duty to personally address appellant regarding his behavior. (RB 188-190.) Respondent misstates this portion of appellant's argument, which is that the trial court prejudicially erred by issuing a

final, non-revocable order of removal at the time of the fecal-matter incident, without regard to appellant's future ability to conform his conduct to appropriate courtroom behavior. (AOB 214-215.)

In *Illinois v. Allen, supra*, 397 U.S. 337, the high court held that a defendant could be removed from the courtroom, but only so long "until he promises to behave himself." (*Id.* at p. 345; see *People v. Medina* (1995) 11 Cal.4th 694, 738-740 [defendant's continuous pattern of disruptive behavior in disregard of the court's repeated warnings about removal justified exclusion from trial].)

Respondent argues that the trial court acted within its discretion in barring appellant from the courtroom for the entire penalty phase retrial based on the single outburst during voir dire "without giving appellant the opportunity to conform his behavior." (RB 189.) The argument suffers from a false premise: throwing fecal matter "posed a *health risk to both the jury and to court personnel [that] justified appellant's permanent exclusion from the courtroom for the entire penalty retrial* especially since appellant's egregious misconduct came without any []warning." (RB 190 [emphasis added].) The false premise is revealed in the fact that such health risk would be entirely eliminated by a simple physical inspection of appellant prior to entry into the courtroom and use of shackles while present in the courtroom.

Respondent also argues that the trial court reasonably rejected the claim that appellant's misconduct resulted from mental illness because the fecal-matter

incident was planned and "defense counsel never asserted that appellant was incompetent to stand trial." (RB 190-191.) The trial court's rejection of appellant's untreated mental illness as forming a basis for his behavior was contrary to the evidence, and thus entirely unreasonable.

Defense counsel traced appellant's outburst to the fact that the jail authorities had stopped giving appellant medication for his severe mental illness. (RT 44:4508-4509.) In response to the trial judge's statement that appellant would be excluded from the courtroom during the entire penalty phase retrial, defense counsel explained to the trial judge:

> First of all, I am somewhat at a disadvantage because I gather the court, and I certainly know [prosecutor] Mr. McCormick, does not believe this man is mentally ill.
>
> He is mentally ill. He is brain damaged. We have the doctors who have testified to that and will testify to it again.
>
> *He needs to be medicated and he was medicated through the first trial.*
>
> Once we got the medication set the first trial, he was fine. He came. He behaved himself. He was pleasant.
>
> Since he has been back in this -
>
> First of all, he has been through most of his incarceration in county jail in the mental health ward so the jail knows there is something seriously wrong with Mr. Banks.
>
> *They stopped his medication. I think it was sometime in December or maybe a little earlier.*

He was at one point transferred after the first trial to county jail and then they brought him back.

There was another suicide attempt and they brought him back into the mental health ward and they stopped medicating him. [RT 44:4508-4409.]

The trial court did not dispute defense counsel's statements, as quoted above, that while medicated during the first trial appellant was on good behavior, and that at the time of the outburst at issue here the jail authorities had discontinued appellant's medication. (RT 44:4509-4511.)

Nor did appellant somehow forfeit the claim that the trial court's removal order had the legal consequence of violating appellant's right of personal presence because the court summarily ejected appellant from the courtroom, and thus failed to consider less restrictive alternatives. (RB 191-192, citing *People v. Marks* (2003) 31 Cal.4th 197, 224.) The trial court's summary order was definite and irrevocable: the court was excluding appellant from the courtroom, except for the limited purpose of testifying in his defense. (RT 43:4498-4500, 44:4504.) The defense objected to appellant's removal from the courtroom. (RT 43:4498-4500, 44:4508-4510.)

Respondent's citation to *People v. Marks, supra*, 31 Cal.4th 197 is unavailing. In *Marks*, this Court held that the failure to object to the presence of a deputy sheriff standing next to the testifying defendant barred the appellate claim that the trial court instead should have ordered defendant bound by restraints not

visible to the jury. (*Id.* at pp. 223-224.) Here, in contrast to defense counsel's failure in *Marks* to object to the courtroom security measures order by the trial court, defense counsel did object to the trial court's removal order. (RT 43:4498-4500, 44:4508-4510.)

Respondent also argues that appellant has not shown that the trial court's removal order is not entitled to deference, citing *People v. Welch* (1999) 20 Cal.4th 701, 773. (RB 192.) Although removal orders typically are reviewed for abuse of discretion (AOB 205, citing *People v. Welch, supra*, 20 Cal.4th at p. 773), review should be de novo here because the trial court failed to conduct a meaningful hearing on the issue of appellant's removal and the court failed to apply the correct legal analysis to the determination whether appellant should be permanently removed from the courtroom, as set forth in *Illinois v. Allen, supra*, 397 U.S. 337, 343-345 [setting forth three constitutionally permissible ways to deal with an obstreperous defendant]. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 342 [where the trial court's ruling is based on an incorrect legal analysis of the issue, independent review, not deference, is required]; see *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 636 [although an order granting a new trial is reviewed for abuse of discretion, when the order lacks adequate specification of reasons it is subject to independent review].)

Respondent argues that per se reversal of the death verdict is not required, noting that the issue was not ultimately decided by this Court in *People v. Concepcion* (2008) 45 Cal.4th 77, a case pending review when appellant filed his opening brief. (RB 193, fn. 48; AOB 219, fn. 21.) Reversal is required for structural error, however, because the trial court's removal of appellant for the entire penalty retrial impacted the entire trial process by which a verdict was rendered. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-309 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629 [113 S.Ct. 1710, 123 L.Ed.2d 353].)

Reversal is also required under the constitutional standard of prejudice because the prosecution has not proven that the error is harmless beyond a reasonable doubt. (*Rushen v. Spain* (1983) 464 U.S. 114, 117-120 [104 S.Ct. 453, 78 L.Ed.2d 267]; *People v. Hogan* (1982) 31 Cal.3d 815, 850; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21.)

In a capital case the jury properly can use their view of the defendant during trial to influence their judgment whether he lives or dies. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1420, citing *People v. Lanphear* (1984) 36 Cal.3d 163, 167 [sympathy for defendant may be based on jury's in-court observations]; RT 1220-1221.)

The prejudice in such a case from appellant's absence during the entire trial is manifest. As the judge told appellant in the guilt phase of the trial:

> If a jury sees [that] the defendant in a capital case is not there [in the courtroom], they may infer a lack of interest on your part which may not be the best thing for them to infer." [RT 23:751.]

Respondent argues that no prejudice has been shown because "with the exception of Deputy Arthur Penate, who testified about an incident in the jail in which appellant threw feces and urine at him after the first penalty phase trial, all the witnesses who gave material testimony in aggravation at the penalty retrial gave virtually identical testimony at the first penalty phase trial, at which appellant was present." (RB 193.) Respondent is mistaken, for the reasons set forth in his opening brief. (AOB 219-224.)

Moreover, the fact that the original penalty phase jury was unable to reach a unanimous verdict of death while appellant was present during the trial is persuasive evidence that his absence during the penalty phase retrial tipped the scales in favor of a death verdict. (*People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244 [error occurring at the second penalty trial was prejudicial and reversible in view of the fact that at the first penalty trial, where the error did not occur, the jury could not agree on a death verdict].)

Reversal of the death verdict is required.

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XVI.

THE TRIAL COURT PREJUDICIALLY ERRED BY REFUSING TO PERMIT APPELLANT TO PRESENT EVIDENCE OF INSTITUTIONAL FAILURE IN SUPPORT OF A LIFE SENTENCE

Appellant explained in his opening brief that the trial court prejudicially erred by entering a blanket order excluding evidence of institutional failure as a defense theory in mitigation, rejecting the defense case that the state's failure to diagnose and provide treatment over the years for appellant's severe mental illness was a mitigating factor in favor of a life sentence. (AOB 225-236; see *People v. Mickle* (1991) 54 Cal.3d 140, 193 ["The proffered evidence {of institutional failure} was relevant and admissible insofar as it suggested that defendant had sought and/or been denied treatment which might have controlled the same dangerous personality disorder that purportedly contributed to the instant crimes. The jury could reasonably view such fact as bearing on defendant's moral culpability".].)

The court's exclusion order prevented appellant from presenting the testimony of psychiatrist Dr. Louis Weisberg that there was no follow-through by the appropriate state authorities on his orders that while in the care and custody of the California Youth Authority appellant 1) undergo neurological evaluation for a brain and seizure disorder and 2) be enrolled in an intensive treatment program. (AOB 227.)

The court's exclusion order prevented appellant from presenting the testimony of psychologist Dr. Ira Mansoori that there was no follow-through by the appropriate state authorities on his orders that while in the care and custody of the California Youth Authority appellant undergo neuropsychological testing. (AOB 227-230.)

The court's exclusion order prevented appellant from presenting the testimony of protective services worker Juanita Terry about the failure of the appropriate state authorities in 1978 to diagnose and provide treatment for appellant's severe mental illness. (AOB 230.)

Respondent omits an analysis of the legal issue whether the trial court erred in excluding evidence of institutional failure as a defense theory in mitigation, as set forth above (RB 194-201), undoubtedly because the trial court's order is indefensible. (See *People v. Brown* (2003) 31 Cal.4th 518, 578 ["The trial court seemed to labor under the misconception that, to be relevant, the witness's testimony would have to demonstrate a correlation between hyperactivity as a child and violent conduct later in life. Section 190.3, factor (k) evidence need not be that specific; it was sufficient that the sympathetic evidence of defendant's asserted untreated hyperactivity, which was relevant to his character, tended to extenuate the gravity of the crime. To find this evidence irrelevant would be to call into question

much background and family history evidence commonly introduced in capital trials as mitigating evidence."].)

Respondent's failure to address the issue whether the trial court's orders limiting the defense case were erroneous, and its statement in footnote 49 that "[r]espondent does not concede error occurred[,]" amount to a waiver of the issue and implicit concession that the court erred by excluding evidence of institutional failure as a defense theory in mitigation. (See *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn.4 [raising an argument in a footnote in disregard of the rules of appellate practice waives the issue; *People v. Harris* (1993) 19 Cal.App.4th 709, 713-714 [an issue not supported by citation to appropriate legal authority is waived].)

Respondent asserts that "it is unnecessary to determine whether the trial court erred in limiting the testimony of the two doctors because any error was harmless." (RB 197.) Respondent asserts that "appellant contends that the trial court erroneously *precluded Dr. Weisberg from answering one question* during direct examination *and excluded some of the proffered testimony of Dr. Mansoori*, at the penalty retrial in violation of his federal and state constitutional rights to present mitigating evidence. (RB 197 [emphasis added].)

This is an inaccurate and unfair characterization of appellant's argument because prior to the testimony of the witnesses the court issued a blanket exclusion

order, prohibiting the defense from asking questions of these and any witnesses on the issue of institutional failure. (RT 47:5187-5197.) Defense counsel sought immediate clarification of the ruling, inquiring of the court, "If I choose to argue that the system has failed this young man and I can show that through the evidence where the system also neglected him, is the court going to preclude me from doing that?" (RT 47:5189.) The court responded, "You bet." (RT 47:5189.) The court continued, stating that this case does "not turn on whether somebody could have done a better job [in diagnosing and treating Mr. Banks while he was in the care and custody of the state, which might have controlled the same dangerous personality disorder that contributed to the instant crimes]." (RT 47:5191.) After additional colloquy between the court and counsel, the court summarized its ruling, "

> But as I point out, and will simply repeat for the last time in the trial, *the mere fact that you perceive that an agency or an individual somehow has failed in their duties is totally irrelevant.* [RT 47:5197 (emphasis added).]

The defense thus was prohibited from asking questions of any of the witnesses bearing on the defense of institutional failure in not diagnosing and providing treatment for appellant's severe mental illness. (RT 47:5189-5192.)

Defense counsel, abiding by the court's explicit ruling that institutional failure testimony would not be permitted, refrained from questioning which would invite prohibited testimony from the witnesses, and thus did not elicit significant testimony which had been presented at the first penalty phase or identified in her

offer of proof. Defense counsel unsuccessfully sought the court's permission to inquire of Drs. Weisberg and Mansoori whether the psychiatric and psychological diagnostic testing requested by them was performed, as relevant to the failure of the state to accurately diagnose and provide treatment for appellant's severe mental illness while in state custody so as to control his dangerous personality disorder, a mitigating factor in favor of a life sentence. (AOB 227-230.) The defense also presented testimony from witnesses Verna Emery and Juanita Terry (AOB 230-231), but abided by the trial court's earlier ruling and did not examine Terry on issues relating to institutional failure. (RT 49:5788-5796, 5799.)

In the instant appeal, appellant challenges the trial court's blanket exclusion order limiting the defense case in mitigation, and in so doing points to the proffered testimony of Drs. Weisberg and Mansoori, and the testimony of witnesses Emery and Terry, as an offer of proof establishing the existence of available evidence of institutional failure. (AOB 227-231.)

Respondent argues that *People v. Mickle* (1991) 54 Cal.3d 140, 193, and *People v. Brown*, *supra*, 31 Cal.4th at pp. 577-578, "the cases that appellant primarily relies on," "support a finding of harmless error in this case." (RB 198.) Respondent is mistaken. Appellant relied on these cases to support a finding of legal error (not prejudice) in the trial court's ruling excluding evidence of institutional failure as a factor in mitigation for a life sentence, citing the cases for

the correct proposition that "[t]his Court has long recognized that evidence of institutional failure may properly be presented by the defendant. (AOB 231.)

Moreover, the notion advanced by respondent that this Court should look to unrelated cases to determine whether, considering the unique facts of the instant case, appellant was prejudiced by the trial court's exclusion of the defense case of institutional failure is both novel and contrary to established law. Respondent acknowledges her burden of proving beyond a reasonable doubt that the error in limiting the defense case was harmless, a standard "identical in substance and effect to the federal . . . standard enunciated in *Chapman v. California*." (RB 198.) *Chapman* contemplates an inquiry into the impact which the particular error has had on *the instant jury*. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) This is true regardless of the weight of the evidence because *Chapman*

> instructs the reviewing court to consider . . . not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . . Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. [*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279 (emphasis in original).]

As the foregoing quotation reveals, it is the government's burden to show that the guilty verdict in this case – not some other case – "was surely unattributable to the error." (*Ibid.*; accord *People v. Quartermain* (1997) 16 Cal.4th 600, 621.)

Nor does *People v. Mickle, supra*, 54 Cal.3d 140, suggest harmless error in the instant case. In *Mickle*, "this Court found any error was harmless beyond a reasonable doubt because 'the jury heard a detailed account of the 'inappropriate' treatment received by defendant during each institutional confinement.'" (RB 198, citing *People v. Mickle, supra*, 54 Cal.3d at p. 193.) Appellant's jury heard no such detailed account of inappropriate treatment by defendant during each institutional confinement; instead, the jury heard no account of inappropriate treatment because the trial court ruled that "the mere fact that . . . an agency or an individual somehow has failed in their duties [to diagnose and provide treatment for appellant's mental illness] is totally irrelevant." (RT 47:5197.)

Nor does *People v. Brown, supra*, 31 Cal.4th 518, suggest harmless error in the instant case. In *Brown*, this Court found the error in the trial court's order sustaining the prosecutor's objection to defense expert Dr. Kaser-Boyd's proffered testimony whether defendant's untreated hyperactivity adversely impacted his school performance. (*Id.* at p. 577-578.) The error was clearly harmless, however, because the same evidence was admitted when Dr. Kaser-Boyd subsequently "testified – without objection – that, in her opinion, defendant's hyperactivity 'very likely did' have an impact on his performance in school." (*Id.* at p. 578.) The instant case is distinguishable from *Brown* because here the trial court excluded the entire defense case in mitigation of institutional failure, and evidence that the state

failed in their duties to diagnose and provide treatment for appellant's mental illness was never presented to the jury.

Respondent also argues the absence of prejudicial error because "defense counsel emphasized 'institutional failure' as a mitigating factor in closing argument." (RB 200.) Respondent is mistaken as this Court has long held that "[i]t is undeniable that the argument of counsel does not constitute evidence." (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 176.) The trial court explicitly instructed the jury, "Statements made by the attorneys during the trial are not evidence." (CT 9:2365; CALJIC No. 1.02 [Statements of Counsel Not Evidence].) Accordingly, argument of counsel cannot be considered a substitute for properly admitted evidence at trial on the issue of institutional failure.

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XVII.

THE TRIAL COURT PREJUDICIALLY ERRED BY ELICITING TESTIMONY FROM DEFENSE EXPERT WITNESS CARL OSBORNE SUGGESTING FUTURE DANGEROUSNESS, PERMITTING THE PROSECUTOR TO DO THE SAME, AND THEN OVERRULING THE DEFENSE OBJECTION TO THE PROSECUTOR'S ARGUMENT ON FUTURE DANGEROUSNESS

Appellant explained in his opening brief that the trial court prejudicially erred by sua sponte eliciting testimony on future dangerousness from defense expert witness Dr. Carl Osborne, permitting the prosecutor to do the same, over defense objection, and then permitting the prosecutor to argue that a death verdict was appropriate in this case because appellant would be very dangerous if held in prison for life. (AOB 237-247.)

Respondent argues that the claim relating to future dangerousness based on the trial court's sua sponte examination of Dr. Osborne is forfeited for failure to object. (RB 206.) Respondent is mistaken. Appellant did object afterward to admission of evidence suggesting future dangerousness through the prosecutor's questioning and argument, and the objections were overruled. (RT 49:5736.)

The issue of appellant's future dangerousness in state prison was first raised by the trial court when the court sua sponte asked Dr. Osborne on cross-examination the following leading, rhetorical question: "They can't force him to take them [i.e., the medications] in state prison either, can they?" (RT 49:5700-5701.)

Although no objection was made at that moment, shortly thereafter defense counsel did object when the prosecutor, following the trial court's lead, posed a question about appellant's future dangerousness in state prison. (RT 49:5736.) The trial court overruled the objection and refused defense counsel's request to approach the bench. (RT 49:5736.) After refusing defense counsel's request for a bench conference, the court permitted the prosecutor to engage Dr. Osborne in extensive questioning predicting appellant's future ability, if sentenced to state prison, to inflict violence on prison authorities and others inside the prison, including prison "guards," "nurses," and "visitors." (RT 49:5737-5739.)

Respondent does not contend that defense counsel's objection to the prosecutor's cross-examination of Dr. Osborne was insufficient to preserve the appellate issue relating to the prosecutor eliciting testimony suggesting future dangerousness. (RB 206-207.)

Instead, respondent's forfeiture argument is that the objection should have been made earlier in order to preserve the claim relating to the trial court's examination of Dr. Osborne, wherein the trial court first elicited testimony suggesting appellant's future dangerousness. (RB 206.) There is no forfeiture here, however, because such an objection would have been futile given the fact that moments later the trial court overruled the defense objection to the same line of questioning by the prosecutor. (RT 49:5736; *People v. Welch* (1993) 5 Cal.4th 228,

237 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile . . . ."]; *People v. Arias* (1996) 13 Cal.4th 92, 159.)

Nor is respondent's forfeiture argument assisted by her citation to *People v. Mitcham, supra*, 1 Cal.4th at p. 1053, *People v. Sanders* (1995) 11 Cal.4th 475, 531, *People v. Harris* (2005) 37 Cal.4th 310, 350, and *People v. Guerra, supra*, 37 Cal.4th at p. 1125.) In *Mitcham*, the appellate claim relating to the trial court's comments to the jury on the preliminary hearing process was forfeited for failure of defense counsel to object "where (as here) such action would have permitted the court to clarify any possible misunderstanding resulting from the comments . . . ." (*People v. Mitcham, supra*, 1 Cal.4th at p. 1053.) The *Mitcham* forfeiture rationale does not apply here because this was not a situation where an objection would have permitted the court to clarify a possible misunderstanding. The court's question of Dr. Osborne was clear in suggesting future dangerousness, and the fact that the court subsequently overruled the defense objection to the same line of questioning by the prosecutor reveals that the court would have overruled any objection to its examination of Dr. Osborne.

People v. Sanders, supra, 11 Cal.4th 475, is inapposite, too, as it applied the *Mitcham* forfeiture rationale, which is not applicable here. Further, in contrast to the instant case where defense counsel subsequently objected to the same line of

questioning by the prosecutor, revealing that an objection would have been futile, in *Sanders* there was no subsequent objection. (*Id.* at pp. 530-532.)

People v. Harris, supra, 37 Cal.4th 310 and *People v. Guerra, supra*, 37 Cal.4th 1067 also are inapposite because in contrast to the instant case there was no showing in either *Harris* or *Guerra* that an objection would have been futile. (*People v. Harris, supra*, 37 Cal.4th at pp. 348-350; *People v. Guerra, supra*, 37 Cal.4th at p. 1125.)

Respondent argues that "the trial court's questions were proper to clarify the defense expert's testimony, which suggested that appellant could be medicated to prevent future dangerousness." (RB 207, citing *People v. Harris, supra*, 37 Cal.4th at p. 350.) Respondent is mistaken. Defense counsel never questioned Dr. Osborne about whether appellant could be a good prisoner. Nor did defense counsel ask Dr. Osborne to offer an opinion on future dangerousness. Instead, prior to the court's questions, defense counsel inquired of Dr. Osborne about appellant's current medical condition, including treatment for appellant's current mental illness. (RT 49:5697-5700.)

Dr. Osborne testified that appellant's mental illness makes him volatile, and although medication can control the volatility appellant sometimes does not take his medication (RT 49:5700), to which the court sua sponte asked, "They can't force him to take them in state prison either, can they?" (RT 49:5700-5701.) This leading

question about what might happen in the future in state prison directly raised the prospect of future dangerousness because the question implied that the court was of the opinion that since the authorities cannot compel appellant to take his medication in state prison, appellant's volatile conduct would continue there.

Although respondent quotes *People v. Harris, supra*, 37 Cal.4th 310 as supporting the trial court's authority to "'participate in the examination of witnesses'" (RB 207, citing *People v. Harris, supra*, 37 Cal.4th at p. 350), respondent omits this Court's admonition, as follows:

> The constraints on the trial judge's questioning of witnesses in the presence of a jury are akin to the limitations on the court's role as commentator. The *trial judge's interrogation "must be . . . temperate, nonargumentative, and scrupulously fair.* The trial court may not . . . withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." . . . . [*Ibid.* (citations omitted) (emphasis added).]

Here, the trial court asked a leading question suggesting appellant's future dangerousness in state prison (RT 49:5700-5701), thereby violating this Court's admonition that a trial judge's interrogation must be "temperate, nonargumentative, and scrupulously fair." (*People v. Harris, supra*, 37 Cal.4th at p. 350.)

Acknowledging that "the prosecution is prohibited from offering expert testimony predicting future dangerousness in its case-in-chief[,]" respondent argues that the prosecutor permissibly explored the issue on cross-examination because appellant offered "expert testimony predicting good prison behavior in the future."

(RB 207, citing *People v. Jones* (2003) 29 Cal.4th 1229.) Appellant never offered expert testimony predicting good prison behavior in the future. (AOB 36-49; RT 49:5697-5700.) Accordingly, the trial court erred by overruling the defense objection to the prosecution's examination of Dr. Osborne eliciting testimony suggesting future dangerousness. (*People v. Jones, supra*, 29 Cal.4th at pp. 1260-1261.)

For the same reason, the trial court erred by overruling the defense objection to the prosecution's closing argument, wherein the prosecutor referred to Dr. Osborne's testimony on future dangerousness elicited during cross-examination. (RT 50:5955-5956; see *People v. Ervin* (2000) 22 Cal.4th 48, 99 [argument regarding future dangerousness is "permissible when based on evidence of the defendant's conduct rather than expert opinion"]; *People v. Thomas* (1992) 2 Cal.4th 489, 537.)

Nor is respondent's future dangerousness argument assisted by her citation to *People v. Ervine* (2009) 47 Cal.4th 745, *People v. Freeman, supra*, 8 Cal.4th 450, and *People v. Ervin, supra*, 22 Cal.4th 48. In each of these cases, the prosecutor's argument regarding future dangerousness was permissibly based on evidence of the defendant's conduct rather than expert opinion. (*People v. Ervine, supra*, 47 Cal.4th at p. 797; *People v. Freeman, supra*, 8 Cal.4th at pp. 520-521; *People v. Ervin, supra*, 22 Cal.4th at p. 99.)

Respondent argues that "assuming the trial court and prosecutor committed error on the issue of future dangerousness, there was no prejudice because Dr. Osborne did not agree with the implied premise of the prosecutor's line of questioning, replying that appellant's past violent behavior was 'very situational and specific.'" (RB 209.) Respondent is mistaken, selectively reading the cross-examination and omitting Dr. Osborne's testimony on future dangerousness, elicited by the prosecutor, that appellant "will remain as violent as he always has been" until he is in his "forties." (RT 49:5737.)

Respondent further argues harmless error based on Dr. Osborne's testimony "that appellant's condition could remit in his forties, implying that any future dangerousness was not permanent." (RB 209.) Far from rendering the error harmless, Dr. Osborne's testimony stated that for the foreseeable future (i.e., approximately 16 years) appellant would remain as dangerous as he had ever been, implying what was later explicitly stated by the prosecutor – i.e., a sentence of life in prison will place the lives of prison guards, nurses, and visitors in jeopardy. (RT 49:5737-5739.)

Reversal of the death verdict is required because respondent has not proven that the errors in permitting testimony and argument on future dangerousness were harmless beyond a reasonable doubt, especially in view of the substantial evidence that appellant presented in favor of a sentence to life in prison. (AOB pp. 36-49; see

People v. Lancaster (2007) 41 Cal.4th 50, 94; *Chapman v. California, supra*, 386 U.S. at p. 24.)

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XVIII.

THE TRIAL COURT PREJUDICIALLY ERRED BY STRIKING THE TESTIMONY OF DEFENSE EXPERT WITNESS DR. CARL OSBORNE THAT APPELLANT SUFFERED FROM ANTI-SOCIAL PERSONALITY DISORDER – RELEVANT MITIGATING EVIDENCE IN SUPPORT OF A LIFE SENTENCE

Appellant explained in his opening brief that the trial court prejudicially erred by striking the testimony of defense expert witness Dr. Carl Osborne that appellant suffered from anti-social personality disorder. (AOB 248-258.)

Recognizing that "[a]n opinion that a person suffered from anti-social personality disorder can be admitted if foundational requirements are met" (RB 219), respondent argues that the trial court was correct in striking Dr. Osborne's testimony that appellant suffered from anti-social personality disorder because 1) the appellant "failed to carry his burden of proof at the *Kelly-Frye* hearing"[13] (RB 220) and 2) Dr. Osborne's opinion lacked foundation (RB 221-222).

A. *KELLY-FRYE* HAS NO APPLICATION TO THE TRIAL COURT'S ORDER STRIKING THE ENTIRETY OF DR. OSBORNE'S PRIOR DIRECT TESTIMONY RELATING TO ANTI-SOCIAL PERSONALITY DISORDER

Respondent's argument about the *Kelly-Frye* hearing (RB 212-220) is a red herring because appellant made clear in his opening brief that he does not challenge the trial court's ruling excluding an opinion whether anti-social personality disorder

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[13] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

is hereditary.[14] (AOB 248-252.) Dr. Osborne testified, without objection by the prosecution, that appellant suffered from an anti-social personality disorder. (RT 48:5603-5604, 5614-5620.) Following this testimony, but still during direct examination of Dr. Osborne, defense counsel asked whether appellant was born with the disorder. (RT 48:5621.) In response to this limited question – i.e., whether the disorder was hereditary – the trial court declared a recess and held a *Kelly-Frye* hearing, after which it ruled, in pertinent part, as follows:

> This testimony is inadmissible, I believe, on a number of grounds.
>
> When I say "this testimony", I am referring to this testimony having to do with A.P.D., its heritability, opinions by your expert of its potential heritability, opinions by your expert that your client may have inherited to some degree the propensity for this condition, i.e., to commit criminal conduct, the opinions that his parents suffered from this - . . . . [RT 49:5673.] [¶]
>
> It [i.e., the testimony on heritability] does nothing but tell the jury what everybody knows. If you come from a bad background or have bad parents, you may turn out that way yourself.
>
> If the doctor wants to testify that oftentime [sic] if a person comes from a background that may be seen as less than ideal, i.e., a father who is not there, as apparently Mr. Banks' father was absent, that seems to be the great correlator in my experience, but if he wants to testify that Mr. Banks' father was not there, his mother was inept, and I would concur, she was inept in the extreme, a drunk and drug

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[14] The point was even conceded by trial defense counsel, as acknowledged in appellant's opening brief. (AOB 249 ["trial defense counsel acknowledged that Dr. Osborne 'cannot say whether he [i.e., appellant] was born with it at this point [in time].'".)

abuser and just does not have it together, if he wants to testify that oftentime those sorts of conditions can breed a child that has a less than even chance, I have no problem with it. [RT 49:5677-5678.]

Appellant challenges the trial court's order striking Dr. Osborne's testimony given *prior to the Kelly-Frye hearing* (i.e., testimony at RT 48:5603-5604, 5614-5620; see AOB 248), which was admitted upon adequate foundation and without objection by the prosecutor. (AOB 248-256.) Moreover, as the above-quoted ruling by the trial court makes clear, the court recognized the relevance of testimony about the effect of appellant's absent and abusive parents on his psychological development and explicitly ruled that Dr. Osborne could "testify that oftentime those sorts of conditions can breed a child that has a less than even chance . . . ." (RT 49:5677-5678.)

Dr. Osborne's direct examination continued a few minutes later and, as shown below, the trial court sua sponte interrupted counsel and unfairly accused her of violating the court's order prohibiting Dr. Osborne from testifying that the disorder is hereditary. (RT 49:5683.) The testimony resumed as follows:

Q: Dr. Osborne, yesterday we were discussing your diagnosis, part of your diagnosis, that Kelvyn Banks has an anti-social personality disorder.

A: Yes.

Q: And you came to your conclusion by your psychiatric testing, your interviewing Kelvyn and the study of the records and the background that you got.

A: I did.

Q: Okay. To come to that diagnosis, did you look at the type of people his parents were?

A: Yes.

Q: And what was some [sic] of the characteristics that his parents had that had an influence on Kelvyn?

The Court: Let me see both counsel at the bench. we spent an hour outside the jury's presence on this point. That is a minute ago.

(The following proceedings were held at the bench:)

Ms. Wilensky: I thought you said if you make -

The Court: Let me tell you a problem sometimes that you have here. Did you ever hear of a term called overreaching? Do you know what overreaching is. That is not willing to accept a pretty straight forward ruling by a court and trying to improve upon it. I don't like my rulings improved upon. If anybody is going to improve upon my rulings, it will be a higher court, not counsel.

Ms. Wilensky: I thought that you -

The Court: No. This is not even subtle to try to tie the two somehow together because you have to remember what your witness' opinion is on these things.

Ms. Wilensky: I'm not going to --

The Court: No.

Ms. Wilensky: You said if I want to bring out that he came from a family of drug abusers, violent people, that I could bring it out. What is the question that I ask that gets to that?

The Court: Insofar as you want to ask him - I am repeating it, again, for the last time and then we will have him step down if you can't

figure out what questions to ask. Insofar as he wants to offer an opinion or is of the opinion that a child raised by less than "A" plus parents might turn out to be a little less than "A" plus himself, you may do so. He may not tie it to any syndrome that he perceives your client has that is based on no more than criminality. You may not hint, you may not hint, that his opinions are heritable. If you cannot examine within those constraints, you have no more questions.

Ms. Wilensky: I'm not asking if they were inheritable at this point. Is the question then if Kelvyn's mother was a drug addict, did that affect your diagnosis -

The Court: I don't think that it is appropriate to get into any further areas on this. [RT 49:5682-5684.]

Defense counsel's question about how the characteristics of appellant's parents "influence[d]" appellant was entirely proper, and it was well within the confines of the court's ruling because the question could not reasonably be understood to elicit an opinion whether the disorder is hereditary. Nonetheless, appellant does not challenge the trial court's refusal to permit Dr. Osborne to answer this question (AOB 249.) Instead, appellant challenges the court's order moments later when it struck the entirety of Dr. Osborne's prior direct testimony relating to anti-social personality disorder. (AOB 249-250; RT 49:5685-5686.)

Respondent argues that the trial court properly struck the entirely of Dr. Osborne's prior direct testimony relating to anti-social personality disorder because it did not meet the requirements of *Kelly-Frye*. (RB 219-220.) Respondent is mistaken and misreads the appellate record. The trial court never held a *Kelly-Frye*

hearing on the admissibility of Dr. Osborne's opinion that appellant suffered from anti-social personality disorder; the hearing was limited to the issue whether an opinion could be stated that the disorder is hereditary, which issue is not contested on appeal. (RT 49:5624-5680 [*Kelly-Frye* hearing on the admissibility of Dr. Osborne's proposed testimony that anti-social personality disorder is heritable].)

Moreover, respondent acknowledges, as she must, that expert psychological or psychiatric opinion is not subject to *Kelly/Frye*. (RB 220, citing *People v. McDonald* (1984) 37 Cal.3d 351, 372, disapproved on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Absent some "special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1157.) This is because "'[w]hen a witness gives his personal opinion on the stand – even if he qualifies as an expert – the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible. . . .'" (*Ibid.*)

In *Stoll*, for example, a defendant accused of child molestation proffered expert opinion testimony by a psychologist who conducted tests on the defendant and concluded that she did not possess any pathology in the nature of sexual deviation. (*Id.* at p. 1146.) The trial court excluded the expert opinion on the grounds that it did not pass the *Kelly/Frye* test. (*Id.* at p. 1147.) This Court, however, held that "[t]he psychological testimony proffered here raises none of the

concerns addressed by *Kelly/Frye*. The methods employed are not new to psychology or the law, and they carry no misleading aura of scientific infallibility." (*Id.* at p. 1157.)

Here, respondent argues that "Dr. Osborne's stated reliance on 'the type of people [appellant's] parents were' (49RT 5682) for his diagnosis of anti-social personality disorder plainly signaled to the trial court that Dr. Osborne was relying on a genetic component, which is a new scientific basis for the diagnosis." (RB 220.) Not so. Dr. Osborne's diagnosis of anti-social personality disorder was properly based, in part, on a consideration of all the factors affecting appellant, including the type of toxic parenting to which appellant was subjected as a child (See RT 49:5677-5678 [trial court's ruling permitting testimony about the parental "conditions [that] can breed a child that has a less than even chance"].) Moreover, respondent cites no authority, and appellate counsel is aware of none, for the novel proposition that Dr. Osborne's consideration of all the factors affecting appellant, including the type of parenting he was forced to endure, somehow constitutes a new method to psychology or the law, or somehow carries a misleading aura of scientific infallibility.

In sum, Dr. Osborne did not present expert testimony regarding a "new scientific technique" or employ a method or analysis that is new to psychology or law. Nothing in his testimony carried a misleading aura of scientific infallibility.

Accordingly, respondent's argument that the trial court properly struck the entirety of Dr. Osborne's prior direct testimony relating to anti-social personality disorder as being inadmissible under *Kelly-Frye* must be rejected.

B. DR. OSBORNE'S TESTIMONY THAT APPELLANT SUFFERED FROM ANTI-SOCIAL PERSONALITY DISORDER WAS SUPPORTED BY ADEQUATE FOUNDATION

Respondent argues that "[r]egardless of the *Kelly-Frye* ruling, the trial court also excluded reference to that disorder from Dr. Osborne's testimony on the alternative grounds that his opinion lacked foundation given there was no evidence that appellant's parents had the same disorder . . . ." (RB 221.) Respondent is mistaken.

First, respondent should not be heard on appeal to complain that Dr. Osborne's testimony at issue here was inadmissible as lacking adequate foundation because the prosecutor failed to make such an objection below, and indeed did not raise any objection to the testimony whatsoever. (RT 48:5603-5604, 5614-5620; Evid. Code, § 353, subd. (a); see *People v. Seaton* (2001) 26 Cal.4th 598, 642-643 [failure to challenge foundation of expert testimony at trial forfeited challenge on appeal]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81-82 [failure to object to testimony in trial court on grounds asserted on appeal results in forfeiture of argument on appeal].)

Second, as set forth in the opening brief, Dr. Osborne's testimony was fully supported by adequate foundation, and thus the trial court's order striking the testimony of Dr. Osborne as lacking foundation was an abuse of discretion. (AOB 254-256.)

C. THE ERROR IN STRIKING DR. OSBORNE'S TESTIMONY PREJUDICIALLY DEPRIVED APPELLANT OF A RELIABLE PENALTY DETERMINATION, REQUIRING REVERSAL OF THE DEATH JUDGMENT

Respondent does not dispute that error in excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 94), which means that the death verdict must be reversed unless the error can be shown to be harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 990; RB 222-223.) The burden is on respondent – the beneficiary of the error – "either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (*People v. Spencer* (1967) 66 Cal.2d 158, 168.)

Respondent argues there was no prejudice from striking "Dr. Osborne's testimony related to anti-social personality disorder" because defense expert witness Dr. Louis Weisberg "testified as to the characteristics of anti-social personality disorder" and that "appellant had anti-social personality traits . . . ." (RB 222.) Respondent is mistaken.

Dr. Weisberg never testified that appellant suffered from anti-social personality disorder. (RT 48:5391-5415.) Moreover, although Dr. Weisberg answered a few questions "as to the characteristics of anti-social personality disorder" (RB 222, citing RT 48:5404-5405, 5414), respondent ignores the salient fact that this testimony was elicited entirely during the prosecutor's cross-examination of Weisberg, and in response to leading questions, and thus was extremely limited and designed to undermine the defense case. (RT 48:5404-5405, 5414.) Accordingly, the testimony was not a substitute for Dr. Osborne's testimony that appellant suffers from anti-social personality disorder; nor was it a substitute for Dr. Osborne's thorough discussion of anti-social personality disorder, and the many facets of the disorder adversely impacting appellant's ability to make a reasoned judgment in this case, reflecting significantly less culpability for appellant and thus mitigating against a verdict of death. (RT 48:5601-5626, 49:5591-5704.)

Respondent argues that anti-social personality disorder is simply a name for people who engage in criminal conduct. (RB 223, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 405, superseded by statute on another point as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) Respondent is mistaken. The "DSM III-R contains a detailed set of diagnostic criteria for diagnosis of an antisocial personality disorder. The disorder is identified by criteria other than repeated criminal and antisocial behaviors. It includes anger, unstable

moods, impulsiveness, lack of remorse, inability to empathize with others, and limited frustration tolerance." (*People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202, 211-212.)

Moreover, in *Carpenter* this Court did not hold, as respondent suggests, that anti-social personality disorder is simply a name for people who engage in criminal conduct. (RB 223.) Respondent cites *the testimony of the prosecutor's rebuttal witness* on the issue whether defendant Carpenter suffered from a "personality disorder"; this Court never passed on the issue whether such testimony accurately described the term "personality disorder." (*People v. Carpenter*, *supra*, 15 Cal.4th at pp. 405-406.)

Respondent also argues, in effect, that the prosecution knows what is best for the defense case in mitigation, asserting that "the exclusion of Dr. Osborne's testimony on anti-social personality disorder was not prejudicial given that the disorder is characterized by negative traits . . . ." (RB 223.) Respondent is mistaken. The trial court's order striking the entirety of Dr. Osborne's prior direct testimony relating to anti-social personality disorder court materially narrowed the defense case in mitigation for a life sentence. The order eliminated from the defense case highly relevant, non-cumulative testimony about life influences adversely affecting appellant's behavior, and the brain damaged suffered by

appellant, including damage to appellant's temporal lobe adversely affecting his ability to control his behavior. (RT 48:5603-5604, 5614-5620.)

For example, Dr. Osborne testified on direct examination, in part, as follows:

Q: Did your tests show anything to indicate that Mr. Banks was brain damaged?

A: Yes. The results that I got on the I.Q. tests were completely consistent with the theory of underlying brain damage.

Q: Can you explain that?

A: Well, you can do a broad variety of tests for any particular problem and you can come at it from a bunch of different ways. A neurologist, like Dr. Gold, has procedures that he uses. Psychologists like myself have a completely different way of looking at the same issue. What I looked at was Mr. Banks' ability to do certain kinds of tasks and how he actually functioned. The results particularly of what I just spoke of, in terms of his problems with working memory, that is consistent with temporal lobe damage. Temporal lobe damage is also consistent with anti-social personality disorder type behavior that Mr. Banks exhibits. They interact together.

Q: Can somebody have temporal lobe damage without having anti-social personality disorder

A: Certainly.

Q: Can somebody have anti-social personality disorder without having temporal lobe damage?

A: Yes.

Q: But you have right temporal lobe damage that has shown up enough in people with anti-social personality disorder that they can say that is one of the behavioral problems of having right temporal lobe damage?

A: It is a little different than how you phrased it. What happens with the kind of physical damage, brain damage, that we are talking about is it affects broadly impulse control. It affects aggressive impulses and sexual impulses. And these are the kinds of behaviors, sexual behaviors, aggressive behaviors, that also contribute to a diagnosis of anti-social personality disorder. So you get an added effect one on top of the other. [RT 48:5615-5617.]

This was part of the testimony the court eliminated from the defense case in mitigation when it struck the entirety of Dr. Osborne's prior direct testimony relating to anti-social personality disorder. Testimony about the negative traits associated with anti-social personality disorder was powerful evidence in mitigation for a life sentence because the jury could reasonably view the presence of the disorder in appellant as reducing his moral culpability. (See *People v. Williams* (2003) 31 Cal.4th 757, 778 [in affirming an SVP commitment, this Court noted that there was expert testimony that the defendant's control was impaired by a number of mental disorders, including "severe antisocial personality disorder, which enhance[d] his impulsivity and cloud[ed] his judgment."].)

Reversal of the death judgment thus is required because respondent has not proven that the error in striking the entirety of Dr. Osborne's testimony relating to anti-social personality disorder was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

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XIX.

THE TRIAL COURT PREJUDICIALLY ERRED BY ORDERING, OVER DEFENSE OBJECTION, A PSYCHIATRIC EVALUATION BY PROSECUTION PSYCHIATRIST DR. RONALD MARKMAN, AND ALLOWING DR. MARKMAN TO UNDERMINE THE DEFENSE CASE IN MITIGATION BY TESTIFYING AS AN EXPERT WITNESS IN THE PROSECUTION'S REBUTTAL CASE

Appellant explained in his opening brief that the trial court prejudicially erred by ordering appellant to submit to a psychiatric examination by Dr. Ronald Markman, an expert witness retained by the prosecution, and that reversal of the death judgment is required because the prosecution will be unable to prove that the admission of evidence from that compelled examination was harmless beyond a reasonable doubt. (AOB 259-269; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1103-1109 [holding that mandatory psychiatric examination constituted discovery within the meaning of the criminal discovery statutes (Pen. Code, § 1054, et seq.) and that those statutes do not authorize the trial court to order defendant to submit to a psychiatric examination by an expert retained by the People].)

A. THE TRIAL COURT ERRED BY ORDERING APPELLANT TO SUBMIT TO A PSYCHIATRIC EXAMINATION BY AN EXPERT RETAINED BY THE PROSECUTION AND PERMITTING ADMISSION OF EVIDENCE FROM THAT COMPELLED EXAMINATION IN THE PROSECUTION'S REBUTTAL CASE

Acknowledging that it is error for the trial to compel a defendant "'to submit to an examination by an expert retained by the prosecution'" (RB 231, citing *Verdin v. Superior Court, supra*, 43 Cal.4th at p. 1110), respondent argues that *Verdin* is

inapplicable to the court's order in this case because the "prosecution sought the *appointment* of Dr. Markman pursuant to Evidence Code section 730 (8CT 2182-2183) and the trial court implicitly ordered appellant to submit to a mental examination under that statute." (RB 231 [emphasis added].) Respondent is mistaken. The prosecution never sought the appointment of Dr. Markman pursuant to any provision of law, nor did the court appoint Dr. Markman to examine appellant. (RT 36:3248.) Instead, as explained below, the court ordered appellant to submit to an examination by Dr. Markman, an expert retained by the prosecution. (RT 36:3256-3257.)

In connection with the penalty phase retrial, the prosecutor never invoked Evidence Code section 730, nor did the prosecution seek an order *appointing* Dr. Markman for any purpose.[15] Instead, when the prosecution sought the instant order compelling appellant to submit to an interview, the prosecution already had retained Dr. Markman as an expert witness. (RT 36:3248.) The prosecutor informed the court:

> *Dr. Ronald Markman has been employed to provide assistance in psychiatric work for the prosecution.*

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[15] Respondent's citation to the clerk's transcript at CT 8:2182-2183 is a motion filed in connection with the *first penalty phase trial*, which motion was never renewed and/or brought in the penalty phase retrial, and thus the motion is irrelevant. (RB 231; see *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1037 [failure to timely renew motion waives claim]; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1305-1306.)

One of the things that he believes would be of usefulness in terms of making his evaluation is speaking to the defendant about a variety of issues.

I have asked for permission to have him speak with the defendant and I have been told that the defendant will be refusing to allow an evaluation by our doctor. [RT 36:3248 (emphasis added).]

Following a short hearing on the matter, the court ordered appellant to speak with Dr. Markman. (RT 36:3256-3257.) Contrary to respondent's argument, the court did not appoint Dr. Markman to conduct a mental evaluation of appellant. The court stated its ruling as follows, directing the majority of its comments to appellant:

That may be the case but I don't believe that is a legal ground for the defendant to refuse to speak.

I will put it this way.

You are ordered to cooperate with Dr. Markman in his interview of you regarding your background and so forth. Matters that he may find of interest.

If do you not do so, I don't believe there is any legal ground not to, so if you do not do so, the jury will be told in all likelihood by the court that your refusal is one that they can consider in weighing the validity of the evidence that you have put forth in the penalty phase.

Both sides are entitled to put on evidence of this sort.

And you cannot put on this evidence and yet deprive the opponent for putting on that evidence themselves.

So he will have to talk to you. And if do you not do that, it is a violation of a court order and then the remedy will be an instruction to the jury. [RT 36:3256-3257.]

Application of *Verdin* to the facts of this case compels the conclusion that the trial court erred by ordering appellant to submit to a mental examination by prosecution expert Dr. Markman. (*Verdin v. Superior Court*, *supra*, 43 Cal.4th at pp. 1103-1109.)

B. THE ERRONEOUS ADMISSION OF DR. MARKMAN'S REBUTTAL TESTIMONY WAS PREJUDICIAL BECAUSE IT CALLED INTO QUESTION THE CONCLUSIONS AND METHODOLOGY OF THE DEFENSE EXPERTS, AND THE TESTIMONY WAS NOT DUPLICATIVE AS DR. MARKMAN WAS THE ONLY MENTAL HEALTH EXPERT CALLED BY THE PROSECUTION DURING THE PENALTY PHASE RETRIAL

As explained in the opening brief, Dr. Markman's testimony strongly and unequivocally refuted the mitigation case presented by appellant in favor of a life sentence with regard to the mental health issues affecting appellant, and thus presented a strong basis upon which the jury could rely to return a death verdict. (AOB 263-269.)

Respondent argues that any error in ordering appellant to submit to a mental examination conducted by Dr. Markman was harmless. (RB 232-233.) Not so. The prosecution presented Dr. Markman's testimony to the jury in a forceful and persuasive manner. First, the prosecution touted Dr. Markman's supposedly superior credentials as a psychiatrist specializing in forensic psychiatry, drawing a sharp contrast between his credentials as a medical doctor and the absence of such credentials by defense expert witness and psychologist Dr. Carl Osborne. (RT 49:5809-5810.)

Second, and as explained below, Dr. Markman completely dismissed all the defense experts' diagnoses of appellant as mentally ill or organically brain-damaged; he portrayed appellant as not only sane and a deliberate liar, but calculating, even down to the gassing incident. (RT 49:5811-5841.) For example, Dr. Markman testified generally about impulse disorders, and then specifically about the gassing incident in the courtroom, which he described as demonstrating planning and thinking, both of which are inconsistent with someone suffering from an impulse disorder. (RT 49:5814-5816.) Dr. Markman also testified that the ATM shooting was entirely inconsistent with someone suffering from an impulse disorder because it showed premeditation. (RT 49:5816-5817.) Dr. Markman's testimony disputed the defense testimony of Dr. Osborne that appellant's impaired working memory is consistent with temporal lobe damage, which affects "impulse control[,]" including aggressive and sexual impulses. (RT 48:5617.)

Dr. Markman also dismissed Dr. Gold's diagnosis of appellant as organically brain-damaged. (RT 49:5817-5823.) Dr. Gold, a neurologist, testified that after examining appellant and conducing numerous tests, including an EEG, an MRI brain scan, and a SPECT scan, he found that appellant's brain was abnormal or damaged, and that appellant suffered from malfunction or abnormal function in both of his temporal lobes, which could affect emotions, behavior, and impulse control. (RT 48:5538-5539, 5545-5546, 5551, 5559, 5584-5585.) Dr. Markman rejected

these findings (RT 49:5817-5823), and further undermined Dr. Gold's credibility by testifying, "You can't make a diagnosis or can't predict behavior based on any of these tests [performed by Dr. Gold]." (RT 49:5821.)

The aggravating nature of Dr. Markman's portrayal of appellant, garnered from his personal 90-minute interview of appellant and review of appellant's handwritten notes, was compounded by the fact that his description of appellant was made in a case where the jury never saw appellant in the courtroom, thereby depriving the jurors of the ability to make an individual assessment of appellant's appearance and demeanor, which left the jury to accept Dr. Markman's portryal of appellant as a calculating, deliberate liar not worthy of a verdict of life.

Nor does respondent's citation to *People v. Wallace, supra*, 44 Cal.4th at p. 1088 assist her. (RB 232-233.) In *Wallace*, this Court held that the trial court erred under *Verdin* by ordering a psychiatric evaluation by prosecution psychiatrist Dr. Terrell and by allowing Dr. Terrell to testify to defendant's refusal to participate in the evaluation. (*People v. Wallace, supra*, 44 Cal.4th at p. 1087.) In finding the error harmless, this Court pointed to the fact that defendant never participated in the examination (and thus no confidential defense information was passed to the prosecution), and when impeaching the defense experts "Dr. Terrell did not rely on defendant's refusal to participate in the court-ordered examination." (*Ibid.*) This Court also pointed to the fact that "Dr. Terrell's testimony was substantially similar

to the testimony of prosecution psychologist William Thackrey, who also testified at the penalty phase." (*Ibid.*)

Wallace is distinguishable. First, in *Wallace* the defendant did not participate in the psychiatric evaluation, whereas here appellant fully participated in the psychiatric evaluation conducted by Dr. Markman, even providing Dr. Markman with appellant's handwritten notes describing appellant's past, and thus passing verbal and written confidential defense information directly to the prosecution. (RT 49:5810-5814, 5828.)

Second, in *Wallace* Dr. Terrell did not rely on the defendant's refusal to participate in the court-ordered examination, whereas here the focal point of Dr. Markman testimony was his 90-minute face-to-face interview of appellant, and Dr. Markman's testimony was inextricably intertwined with the information obtained during his face-to-face interview of appellant. (RT 49:5810-5814.) Respondent implicitly admits as much, setting forth the prosecution's rebuttal case in aggravation, in part, as follows:

> Dr. Ronald Markman was a medical doctor specializing in psychiatry. (49RT 5808-5809, 5825.) Dr. Markman conducted a personal interview with appellant for about one and one-half hours in the lockup area of the courthouse on September 2, 1998. (49RT 5810-5811, 5828, 5836-5837.) Dr. Markman asked appellant questions about the crimes that appellant had committed. (49RT 5811, 5835.) Based on the circumstances surrounding the interview, many of appellant's responses appeared to be very thought out and self serving. (49RT 5811-5812.) Appellant denied committing the

crimes he was convicted of in the guilt phase trial. (49RT 5812, 5835-5836.)

> Dr. Markman found appellant's written notes of his alleged memories of his past to be totally unconvincing and not consistent with any developmental or behavioral pattern. (49RT 5812, 5834.) For example, appellant wrote that he was concerned at the age of two years old that his mother was being physically abused by his father and that appellant was afraid that his mother would die and leave him. Dr. Markman found that the concept of recalling something that occurred at age two was highly unlikely and a particularly traumatic event such as the one described by appellant would be repressed. (49RT 5812-5813, 5834.) Moreover, the concept of death was not something a child developed until the age of at least eight or nine, possibly even age 10. (49RT 5813.) Another example of appellant's written notes that was unconvincing was his alleged recollection of his mother being in an automobile accident that occurred while she was pregnant with him. Appellant's narrative of that event was totally inconceivable given that he wrote about it as if he had an independent recollection of the event. (49RT 5813.) [RB 60-61.]

Third, in *Wallace* Dr. Terrell's testimony was substantially similar to the testimony of prosecution psychologist William Thackrey, whereas here Dr. Markman was the only mental health professional to testify for the prosecution during the penalty phase retrial. (RB 18-30, 60-62.)

Respondent asserts that the interview "comprised a very small and insignificant portion of the doctor's testimony." (RB 233.) Respondent is mistaken. Dr. Markman's credibility was bolstered by the fact he had personally interviewed appellant for 90 minutes, a fact the jury heard almost immediately after Dr. Markman took the witness stand. (RT 49:5810-5811.)

The prosecution quickly established that Dr. Markman had asked appellant "about the murder of a person named Charles Coleman, a person killed in a wheelchair, and a person named Charles Foster, a person that was killed at an A.T.M. machine . . . ." (RT 49:5811.) The prosecution also established a significant fact in aggravation – i.e., that appellant was answering Dr. Markman's questions in a "very thought through and self-serving" manner – which implicitly meant that appellant was shunning personal responsibility for his actions. (RT 49:5811.)

The prosecution elicited the fact that appellant denied participating in the incident in which Foster was killed, further showing in aggravation that appellant was unworthy of a life in state prison as he was shunning personal responsibility for his actions. (RT 49:5812.) These facts, which were only proven through the testimony of Dr. Markman, were important for the jury to consider when returning a death verdict.

The prosecution elicited testimony that Dr. Markman had reviewed some handwritten notes prepared by appellant, which revealed that appellant did not have "any developmental or behavior pattern . . . ." (RT 49:5812.) Dr. Markman testified on direct examination, in part:

Q: Did you have a chance to review some notes that had been written by Mr. Banks which he represented to be memories of his past?

A: Yes.

Q: Did you find those to be convincing or something else?

A: Totally unconvincing and not consistent with any developmental or behavioral pattern that I am aware of. [RT 49:5812.]

Dr. Markman's testimony that his interview with appellant revealed the absence of "any developmental or behavioral pattern" directly refuted the testimony of defense expert witnesses Drs. Weisberg, Gold, and Osborne that appellant suffered from 1) a neurologic problem (RT 48:5400), 2) a history of blackouts associated with violence (RT 48:5399, 5405), 3) severe mental illness (RT 48:5615; 49:5686-5692), and 4) brain damage (RT 48:5540, 5615; 49:5686-5692).

The prosecution elicited testimony that appellant was not being forthright with Dr. Markman during the interview, implying that appellant was evading personal responsibility for his actions and thus was unworthy of a life sentence. Dr. Markman testified about the interview of appellant, in part, as follows:

> He spoke specifically about being concerned at the age of two years old that his mother was being physically abused by his father, or by a person represented to be his father, and that he was afraid that his mother would die and leave him.
>
> Well, number one, the concept of recalling something that happened at age two is almost -- it would be highly unlikely. And particularly a traumatic event like that would be repressed.
>
> But generally at two years old, people do not remember things like that at age two.
>
> Secondly, the concept of death is not something that a child develops until at least eight or nine, possibly even ten. A permanent separation from a parent.

So that is one avenue.

> There is another area where he talks about his mother being in an automobile accident. That happened while she was carrying him. But he writes about it as if he has independent recollection of it which is totally inconceivable. [RT 49:5813.]

Respondent asserts that "appellant's statements to Dr. Markman did not influence the doctor's ultimate opinion that appellant did not suffer from impulse disorder or organic brain damage." (RB 233.) Respondent misreads the record. Dr. Markman never testified that appellant's statements to him (and the notes appellant wrote and gave to Dr. Markman) did not influence his opinion that appellant did not suffer from impulse disorder or organic brain damage.

Respondent asserts that appellant's statements to Dr. Markman elicited by the prosecution were "no more damaging to the defense than other statements appellant made to his own expert, Dr. Osborne, who testified that appellant was and currently is a manipulative person." (RB 233.) Respondent is mistaken. Dr. Osborne testified about appellant's manipulative behavior in terms of appellant's severe mental illness, and thus Dr. Osborne's testimony was significant mitigation evidence. In contrast, Dr. Markman testified in a manner which implicitly suggested appellant was untruthful and conniving. (RT 49:5810-5814.) Dr. Markman rejected a diagnosis of brain damage, and further implicitly rejected a diagnosis of a mental illness, testifying that there is no way of correlating brain damage with specific behavior. (RT 49:5841.)

Moreover, the prosecution elicited from Dr. Markman that appellant denied participating in the killing of Foster (RT 49:5812), which directly contradicted Dr. Osborne's testimony that appellant's admitted to killing Foster. (RT 49:5723-5729). This was further strong evidence in aggravation, only obtained through Dr. Markman's interview with appellant, suggesting both that appellant was deceitful and that he failed to take responsibility for his actions.

Given the damaging testimony that the prosecution was able to elicit from Dr. Markman based on the interview with appellant, it is reasonably possible that the jury would have returned a verdict of life without parole in this case if the trial court had not violated the criminal discovery statutes by ordering appellant to submit to a mental examination and allowing Dr. Markman to testify regarding his mental examination of appellant and his expert opinions relating thereto. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Reversal of the death judgment is required.

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XX.

THE TRIAL COURT PREJUDICIALLY ERRED BY REFUSING TO PERMIT EVIDENCE AT THE PENALTY RETRIAL ON THE ISSUE WHETHER APPELLANT COMMITTED THE UNDERLYING OFFENSES AND BY INSTRUCTING THE JURY THAT APPELLANT'S GUILT OF THE UNDERLYING OFFENSES WAS CONCLUSIVELY PRESUMED

Appellant explained in his opening brief that the trial court prejudicially erred during the penalty phase retrial by refusing defense evidence raising a doubt whether appellant committed the underlying offenses, by refusing to instruct the jury on the concept of lingering doubt – i.e., whether the jury might entertain a lingering doubt about appellant's innocence of the underlying offenses notwithstanding his convictions – and by instructing the jury that appellant's guilt of the underlying offenses was conclusively presumed to have been proven beyond a reasonable doubt. (AOB 270-277; *People v. Gay* (2008) 42 Cal.4th 1195, 1213.)

Respondent acknowledges "that evidence intended to create a lingering doubt as to the defendant's guilt of the offense is admissible at a penalty retrial as a factor in mitigation under section 190.3." (RB 237, citing *People v. Gay, supra*, 42 Cal.4th at pp. 1218-1220.)

Respondent further acknowledges "the applicability of *Gay* to the instant case" (RB 238), and thus concedes 1) error in the trial court's refusal to admit defense evidence raising a doubt whether appellant committed the underlying offenses and 2) error in the trial court's instruction to the jury that appellant's guilt

of the underlying offenses was conclusively presumed to have been proven beyond a reasonable doubt. (RB 238, 247-248.)

Respondent argues that the error in excluding "the facts offered to show lingering doubt at the penalty retrial would not have affected the verdict" (RB 247) because the evidence "was marginal and not strong" (RB 252), rendering the error harmless. Respondent is mistaken. Indeed, respondent implicitly concedes, as she must, that the defense offered numerous facts casting doubt on the identity of the assailant in connection with the Coleman and Foster homicides. (RB 248-253.)

In connection with the Foster homicide, respondent acknowledges that the defense sought to impeach eyewitnesses Sandra Johnson and Yvonne McGill with evidence that during the guilt-phase trial they described appellant as light-skinned, whereas in their statement to Detective Frank Weber shortly after the homicide they described the gunman as having a dark complexion. (RB 248.)

Respondent nonetheless asserts that the discrepancy in McGill's description of "the gunman's complexion as dark would not have cast any doubt on the accuracy of her identification of appellant based on the similarity of his eyes with those of the gunman . . . ." (RB 249.) Respondent is mistaken as the defense would have further impeached McGill with evidence that her view of the gunman was insufficient for a reliable identification because she admitted that "most of his face

was covered" (RT 30:2276) and she only got a "glimpse" of the gunman (RT 30:2299-2300).

Also in connection with the Foster homicide, respondent acknowledges that the defense sought to impeach eyewitness Manzanares with evidence that she gave various descriptions of the jacket the gunman was wearing, at times describing the jacket as black and white and at other times describing the jacket as being solid black. (RB 251-252.)

Respondent nonetheless asserts that the discrepancy in Manzanares's description of the gunman's jacket was "slight" and the "proffered impeachment was minimal" compared to Manzanares's identification of appellant. (RB 252.) Respondent is mistaken as the defense would have further impeached Manzanares with evidence that during the guilt-phase trial she admitted describing the gunman to the police as 5'6" to 5'7" tall and weighing approximately 190 pounds (RT 30:2390, 32:2565), whereas at the time appellant was 5'10" tall and weighed 225 pounds. (RT 28:1984-1985.)

In connection with the Coleman homicide, respondent acknowledges that the defense sought to impeach eyewitness Latasha W. with evidence that during the guilt-phase trial there was a discrepancy between her testimony describing the gunman and her prior statements to Officers Martin Martinez and Sal Labarbera. (RB 249-251.)

Respondent nonetheless asserts that "[t]he fact that Latasha W. had not described the suspect's complexion to the police would not have cast any doubt on the accuracy of her consistent lineup and trial identifications." (RB 250.) Respondent is mistaken. The defense would have further impeached Latasha W. with evidence that when Officer Labarbera first showed her a binder with over 100 photographs she identified one of the photographs, stating that the photograph in position number 11 "looked like" the person who attacked and shot her (RT 33:2725; Defense Exhs. G & H); however, the man she identified could not have been the gunman because he was in custody at the time of the incident. (RT 33:2732.)

Respondent also points to the DNA evidence as showing harmless error in the trial court's refusal to permit the defense to introduce evidence impeaching Latasha W.'s identification of appellant. (RB 250.) Respondent's argument fails to recognize that the jury was free to accept all, none, or some of the evidence in support of the prosecution's case (see *People v. Barton* (1995) 12 Cal.4th 186, 196; *People v. Jeter, supra*, 60 Cal.2d at pp. 675-676), and thus could have rejected the DNA evidence if it had cause to doubt the eyewitness identification. Moreover, the DNA evidence was improperly admitted at appellant's trial. (*Ante*, § IX.)

Respondent also asserts, without additional argument, that "the trial court's admonition to the jury that identity was not an issue at the penalty retrial (47RT

5313) and its concluding instruction that appellant's guilt was conclusively proven beyond a reasonable doubt (50RT 5909), were also not prejudicial." (RB 253, citing *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238.) Respondent is mistaken.

As shown above, respondent understates the quality and character of the proffered defense evidence casting doubt on the prosecution's theory that appellant committed the underlying offenses, and the fact that the jury might have considered a lesser penalty had it been allowed to hear and consider the defense of lingering doubt in full. (See *People v. Gay*, *supra*, 42 Cal.4th at p. 1213 [reversal of death verdict, concluding that the "trial court's evidentiary rulings {excluding evidence of lingering doubt} violated Penal Code section 190.3 and that the error, exacerbated by the trial court's admonition to the jury that defendant had been 'conclusively proven' to be the shooter and to disregard any statement or evidence to the contrary, was prejudicial"].)

Nor does respondent's citation to *People v. DeSantis* (1992) 2 Cal.4th 1198 support a finding of harmless error. In *DeSantis*, the "court gave defendant wide latitude to introduce evidence of the circumstances of the crime. Defendant recalled numerous witnesses from the guilt phase to raise doubts about the reliability of their inculpatory testimony, and challenged the accuracy of prosecution witnesses' testimony on cross-examination." (*Id.* at p. 1236.) Recognizing that defendant DeSantis was permitted to present evidence casting doubt on the prosecution's

theory that he committed the offenses, this Court stated, "Defendant cannot contend on appeal that he was denied the right to present evidence raising doubts about his guilt, nor does he do so . . . ." (*Id.* at p. 1238.) It was within this context – i.e., permitting defendant to introduce evidence to cast doubt on the prosecution's case on the issue of guilt – that this Court found no error in the trial court's instruction that defendant's guilt was to be presumed. (*Id.* at pp. 1238-1239.) *DeSantis* is distinguishable because here the trial court prevented the defense from presenting evidence raising doubts about appellant's guilt.

The strategy of casting doubt on the prosecution's theory that appellant committed the underlying offenses was a sound one; if not precluded by the trial court's evidentiary rulings and instructions, it could well have been effective. The defense of "residual doubt has been recognized as an extremely effective argument for defendants in capital cases." (*Lockhart v. McCree* (1986) 476 U.S. 162, 181 [90 L.Ed.2d 137, 106 S.Ct. 1758].) A "comprehensive study" concluded that "[t]he best thing a capital defendant can do to improve his chances of receiving a life sentence . . . is to raise doubt about his guilt." (*Cox v. Ayers* (9th Cir. 2009) 588 F.3d 1038, 1051, quoting Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum.L.Rev. 1538, 1563 (1998).

Accordingly, there is a reasonable possibility that the trial court's evidentiary rulings denying appellant the right to present evidence raising doubts about his guilt,

exacerbated by the trial court's failure to instruct on the concept of lingering doubt and the admonition that appellant's guilt of the underlying offenses had been conclusively proven, was prejudicial.

Reversal of the death judgment is required.

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XXI.

THE TRIAL COURT PREJUDICIALLY ERRED BY PERMITTING THE PROSECUTION TO INTRODUCE INADMISSIBLE TESTIMONY IN AGGRAVATION, INCLUDING TESTIMONY FROM DEPUTY ARTHUR PENATE AND CAROLE SPARKS

Appellant explained in his opening brief that the trial court prejudicially erred by permitting the prosecutor to elicit inadmissible testimony from 1) Deputy Arthur Penate about appellant's behavior in jail and purported mental state and 2) Carol Sparks about appellant being picked up by police and returned to her for runaways and thefts of bicycles and merchandise. (AOB 278-287.)

Respondent acknowledges that Penal Code section 190.3, factor (b), explicitly limits evidence in aggravation to "criminal activity [i.e., conduct that constitutes an offense proscribed by statute] by defendant involving the use or attempted use of force or violence . . . ." (RB 260-261.)

With respect to Deputy Penate's testimony about appellant's behavior in jail and purported mental state (i.e., evidence of noncriminal or nonviolent acts), respondent asserts forfeiture as to some of the evidence for failure to object and argues that the remaining "evidence was either relevant to an appropriate penalty issue or of such a minor character as to render any error in its admission clearly harmless." (RB 261.)

Respondent's forfeiture argument should be rejected because as soon as the prosecutor began eliciting inadmissible testimony from Deputy Penate relating to

appellant's general behavior in jail, statements made by appellant, and appellant's purported mental state (RT 46:4972-4975), defense counsel objected and requested to approach the bench, to which the court responded, "You may approach if you want, but the objection is overruled so far." (RT 46:4975.) Defense counsel objected on the grounds that the testimony "does not fit in the proper penalty aggravation statute." (RT 46:4976.) The trial court overruled the objection. (RT 46:4976.) The prosecutor continued eliciting inadmissible testimony, and defense counsel continued to object, but each objection was overruled. (RT 46:4978-4979.) Accordingly, defense counsel objected to the line of questioning relating to appellant's general behavior in jail, statements made by appellant, and appellant's purported mental state, and the trial judge permitted the testimony over defense counsel's objections, thereby preserving the issue for appeal. (See *People v. Mattson* (1990) 50 Cal.3d 826, 853-854 [objection to erroneously admitted evidence preserves claim for appeal]; Evid. Code, § 353, subd. (a).)

Respondent argues that Deputy Penate's testimony relating to appellant's general behavior in jail (i.e., always getting in trouble and being a troublemaker), statements made by appellant (i.e., statements showing that appellant was generally uncooperative), and appellant's mental state (i.e, appellant being housed with violent inmates, not mentally ill inmates, and appellant being manipulative), was admissible because it was part of the circumstances of the gassing incident. (RB

261-263, citing *People v. Kipp* (2001) 26 Cal.4th 1100, *People v. Taylor* (2010) 48 Cal.4th 574, *People v. Harris* (2008) 43 Cal.4th 1269, *People v. Monterroso* (2004) 34 Cal.4th 743, and *People v. Gutierrez* (2002) 28 Cal.4th 1083.) Respondent is mistaken.

The gassing incident was a specific, discrete incident that occurred in the course of a few moments in time when appellant threw feces and urine at Deputy Penate from inside the cell through the meal slot. (RT 46:4980.) Deputy Penate's extensive testimony about appellant's other noncriminal and nonviolent acts did not qualify as a circumstance of the criminal conduct in throwing feces and urine because the testimony was unrelated to the criminal conduct.

In *People v. Kipp, supra*, 26 Cal.4th 1100, for example, this Court held that defendant's reference to Satan as his savior "was admissible as part of the circumstances of the escape attempt and threats [to kill a sheriff's sergeant]" because the "defendant 'swore . . . to his savior, Satan,' that he would kill the sergeant 'in a very big way.'" (*Id.* at p. 1135.) *Kipp* is distinguishable because there the reference to Satan was made as part of the threat to kill the sheriff's sergeant, and thus was directly related to the violent criminal conduct (i.e., the criminal threat). In contrast, Deputy Penate's testimony relating to appellant's general behavior in jail, statements made by appellant, and appellant's mental state was not

specifically related to the gassing incident but, instead, was inadmissible bad-conduct evidence.

Nor is respondent's argument supported by her citation to *People v. Taylor, supra*, 48 Cal.4th 574. In *Taylor*, this Court held that defendant's statement, "I will fuck you up," which was made to Office Cherski, was admissible under factor (b) as either a criminal assault (Pen. Code, § 240) or a criminal threat (Pen. Code, § 422). (*Id.* at pp. 656-657.) *Taylor* is distinguishable because there the defendant's statement amounted to a violent crime, whereas here neither appellant's conduct and statements, nor Deputy Penate's testimony about appellant's mental state, amounted to a violent crime.

The decisions in *People v. Harris, supra*, 43 Cal.4th 1269, *People v. Monterroso, supra*, 34 Cal.4th 743, and *People v. Gutierrez, supra*, 28 Cal.4th 1083 also are inapposite because these cases involved the unrelated issue whether certain threats amounted to criminal conduct. (*People v. Harris, supra*, 43 Cal.4th at pp. 1310-1311; *People v. Monterroso, supra*, 34 Cal.4th at pp. 775-776; *People v. Gutierrez, supra*, 28 Cal.4th at p. 1153.)

Deputy Penate also testified that appellant was being housed with the "violent" people, not the "mentally ill" people, thereby strongly suggesting that appellant was not mentally ill. (AOB 279.) Respondent argues that this "testimony merely placed in context the other admissible gassing evidence." (RB 262, citing

People v. Lewis, supra, 39 Cal.4th 970.) Respondent is mistaken as Deputy Penate's testimony suggesting that appellant was not suffering from a mental illness was entirely speculative, and thus had no relevance to admission of the gassing incident as violent criminal conduct.

Nor is respondent's argument supported by her citation to *People v. Lewis, supra*, 39 Cal.4th 970. In *Lewis*, this Court held that testimony about defendant's placement in a high-security setting was admissible because it "tended to show the gravity of Oliver's violent and threatening criminal conduct behind bars, namely, that he was undeterred by heightened supervision and special security measures." (*Id.* at p. 1054.) *Lewis* is distinguishable because Deputy Penate's testimony suggesting appellant was not suffering from a mental illness did not have a tendency in reason to show appellant's violent conduct because the inference suggested by the testimony was entirely speculative. (See *Kuhn v. Department of General Services, supra*, 22 Cal.App.4th at p. 1633 ["inferences that are the result of mere speculation or conjecture cannot support a finding"]; *Louis & Diederich, Inc. v. Cambridge European Imports, Inc., supra*, 189 Cal.App.3d at pp. 1584-1585; *People v. Berti, supra*, 178 Cal.App.2d at p. 876.)

Deputy Penate also testified about finding graffiti in appellant's jail cell. (AOB 280.) Respondent argues that the "graffiti evidence was relevant as a circumstance of the gassing to show that appellant committed a willful and

intentional and planned act, rather than an impulsive one." (RB 264.) Respondent is mistaken. The graffiti was not shown to be at all related to the gassing incident because the prosecution failed to establish when the graffiti was written (RT 46:4982-4985) and Deputy Penate admitted that the gassing incident did not occur in the cell where the graffiti was found (RT 46:4983). Accordingly, contrary to respondent's assertion that the "graffiti evidence showed appellant's contempt for Deputy Penate, which was a relevant circumstance to show appellant's mind set when he committed the gassing" (RB 264), the graffiti evidence was inadmissible bad-conduct evidence. (See *People v. Boyd* (1985) 38 Cal.3d 762, 776 [criminal activity must involve "force or violence" directed toward persons, not merely property]; *People v. Gallego* (1990) 52 Cal.3d 115, 196.)

Respondent's litany that every part of Deputy Penate's long rant about appellant's general behavior in the jail was relevant background to the single gassing incident (RB 261-266), if accepted by the Court, is truly insidious. It would open the door to essentially unlimited, speculative testimony about defendants' behavior and character in the guise of "circumstances" of any factor (b) offense offered as aggravation. Respondent's theory of admissibility essentially erases all enforceable limits on aggravation.

Carol Sparks testified about appellant running away from home and committing various theft-related criminal offenses, including thefts of bicycles and

merchandise. (AOB 281-283.) Respondent argues for the first time on appeal that this evidence was admissible "to rehabilitate Sparks as she had taken appellant to the police station after he came home with stolen property." (RB 267.) Respondent is mistaken.

The issue at trial was not whether the prosecutor could examine Sparks about the fact that she once took him to the police station because she could not control him – an issue conceded by defense counsel. (RT 47:5371.) Instead, the issue was whether the prosecutor could elicit testimony about crimes committed by appellant. (RT 47:5371-5372.) In the context of whether the prosecution would be permitted to elicit criminal conduct, the trial court "overruled the defense objection and stated that at the end of the case, it would give a limiting instruction on the factor (b) crimes that the jury could consider." (RB 267; RT 47:5371-5372.) This was no cure for the error because the jury was permitted to hear testimony regarding the runaway and theft-related criminal conduct, which was inadmissible because it did not prove violent criminal conduct. (See *People v. Kirkpatrick, supra*, 7 Cal.4th at p. 1013 ["To be admissible under [factor (b)], a threat to do violent injury must . . . be directed against a person or persons, not against property."].)

Respondent argues that "[e]ven if erroneously admitted as a circumstance of the gassing incident, the testimony about appellant's non-gassing jail conduct" was harmless in view of the evidence of the criminal offenses. (RB 265.) Respondent

argues for the same reason that any error in admitting Sparks's testimony was harmless. (RB 267.) Respondent is mistaken.

Appellant recognizes that the prosecution presented a case in aggravation (RB 265), but it was closely balanced against substantial evidence presented by appellant in mitigation for a life sentence, including evidence that appellant suffered from childhood neglect and abandonment and neurological damage and mental illness. (AOB 36-49.) Accordingly, when considered in context of the persuasive mitigating evidence, it is reasonably possible that the inadmissible testimony of Deputy Penate and Sparks affected the verdict because cumulatively their testimony amounted to a broad attempt at character assassination covering not only his behavior in jail but his entire life history, suggesting that appellant was a lifelong criminal and an uncontrollable and calculating manipulator who was not suffering from any mental illness – i.e., one unworthy of a life sentence.

Moreover, Deputy Penate's damaging assessment of appellant's conduct and purported mental state, and Sparks's self-justification at her own son's expense were presented to the jury about a defendant who was invisible, absent from the courtroom for reasons unknown to them, inviting them to assume the worst from his failure to appear in court.

Reversal of the death judgment is required.

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XXII.

THE TRIAL COURT'S COMMENTS TO THE JURY DURING VOIR DIRE AND ITS INSTRUCTIONS PRECLUDED THE JURY FROM GIVING FULL AND FAIR EFFECT TO APPELLANT'S CASE IN MITIGATION, THEREBY REQUIRING REVERSAL OF THE DEATH VERDICT

Appellant explained in his opening brief that the trial court gave biased explanations of case issues to prospective jurors during voir dire, which improperly precluded the jury from giving full and fair effect to the good character evidence presented by appellant in mitigation and deprived appellant of a properly guided, individualized sentencing hearing, thereby warranting reversal of the death verdict. (AOB 288-299.)

Respondent argues that the issue has been forfeited because defense counsel did not object during voir dire. (RB 268-269.) Not so. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 929 [defendant's failure to object to preinstruction during voir dire does not forfeit the issue for appeal because instructional error claim affecting a defendant's substantial rights is reviewed without objection below], overruled in part on another point by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Appellant explained in his opening brief the trial court's biased explanations of case issues during voir dire is properly reviewed on appeal without objection below because appellant's substantial rights were affected. (AOB 289-290; Pen. Code, § 1259; *People v. Wickersham* (1982) 32 Cal.3d 307, 330 ["because

important rights of the accused are at stake, it also must be clear [from the record] that counsel acted for tactical reasons and not out of ignorance or mistake"]; *People v. Mosher* (1969) 1 Cal.3d 379, 393 [agreement that an instruction is proper is not a waiver of the right to complain about the instructions absent an expressed tactical purpose for the agreement].)

Respondent argues that the trial court's comments to the jury during voir dire were not misleading, citing *People v. Romero* (2008) 44 Cal.4th 386. (RB 269-272.) Although the trial court's explanation of case issues during voir dire may not have been "'intended to be, and were not, a substitute for full instructions at the end of trial'" (RB 270, quoting *People v. Romero, supra*, 44 Cal.4th at p. 423), the court never instructed the jury to disregard these explanations. The court's comments during voir dire, defining and limiting mitigation before the jury heard the evidence, assumed particular significance not accorded to instructions given after the close of evidence because they necessarily formed part of the framework within which the jury determined whether to impose a verdict of death, directing the jury's attention to the evidence the court's comments suggested was relevant to that decision and away from other mitigation that did not fit under the court's limited definition.

The trial court's explanations of case issues to prospective jurors during voir dire were misleading because the court presented mitigating factors solely in terms of matters that might mitigate the severity of the offense or that might mitigate

punishment, and omitted an accurate discussion of factor (k) mitigation. (AOB 290-295.) The explanations thus were unbalanced in favor of the prosecution, denying appellant due process of law. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-527 ["There should be absolute impartiality as between the People and the defendant in the matter of instructions"].)

Respondent suggests that there was no error because the court cautioned the first panel that it would provide more detail near the end of the trial. (RB 270.) The suggestion misses the point: due process requires balanced instructions that do not unduly favor the prosecution.[16] By giving examples of aggravating factors, while at the same time defining mitigating factors solely in terms of "good" things that appellant had done and matters relating to the offense – entirely omitting factor (k)

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[16] In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6 [93 S.Ct. 2208, 37 L.Ed.2d 82], the high court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See *Washington v. Texas* (1967) 388 U.S. 14, 22 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 [83 S.Ct. 792, 9 L.Ed.2d 799].) Noting the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra*, 412 U.S. at p. 474.)

Although *Wardius* involved reciprocal discovery rights, the principle applies with equal force to jury instructions. (See *People v. Moore, supra*, 43 Cal.2d at pp. 526-527; *Bollenbach v. United States* (1979) 326 U.S. 607, 614-615 [66 S.Ct. 402, 90 L.Ed. 350]; *Reagan v. United States* (1895) 157 U.S. 301, 310 [15 S.Ct. 610, 39 L.Ed. 709] ["The court should be impartial between the government and the defendant."]; *United States v. Meadows* (5th Cir. 1979) 598 F.2d 984, 989-990.)

mitigation (i.e. relevant life influences that adversely affected appellant) – the trial court's instructions were misleading and unbalanced. Nor was balance restored when at the end of trial the court instructed the jury on factor (k); the court simply read the instruction as part of a litany of other instructions, never once stopping to highlight examples of factor (k) mitigation. (RT 50:5912.)

Finally, respondent argues, "To the extent, if any, appellant asserts judicial bias in connection with the challenged comments on voir dire (AOB 290, 295), it should be rejected because appellant utterly fails to explain how the comments were biased." (RB 270.) Appellant does not assert a claim of judicial misconduct in connection the trial court's explanations of case issues to prospective jurors during voir dire. The claim, instead, is that the trial court's comments to the jury during voir dire and its instructions precluded the jury from giving full and fair effect to appellant's case in mitigation, thereby requiring reversal of the death verdict.

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XXIII.

THE TRIAL COURT'S INSTRUCTIONS TO THE PENALTY-PHASE JURY IN THE LANGUAGE OF CALJIC NO. 17.41.1 – THE DISAPPROVED "JUROR SNITCH" INSTRUCTION – VIOLATED APPELLANT'S RIGHTS TO JURY TRIAL AND DUE PROCESS

Appellant argued in his opening brief, although recognizing *People v. Engelman* (2002) 28 Cal.4th 436, that by instructing the penalty-phase jury in the language of CALJIC No. 17.41.1 (i.e., the jury snitch or anti-nullification instruction) the trial court violated appellant's federal constitutional rights to jury trial and due process by invading the secrecy of jury deliberations and undermining the jury's free exercise of the power of nullification. (AOB 170-173.)

Respondent combines the response to this argument with her response to Argument XII, *ante*, arguing that the trial court did not err by instructing the jury with CALJIC No. 17.41.1. (RB 134.)

As explained in section XII, *ante*, which is incorporated herein by reference, the chilling effect that the instruction necessarily had on jury deliberations – stifling free expression during the deliberative process – deprived appellant of his federal constitutional rights to jury trial and due process, thereby warranting reversal of the death judgment.

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XXIV.

THE TRIAL COURT COMMITTED PREJUDICIAL MISCONDUCT DURING THE DEFENSE SURREBUTTAL ARGUMENT BY DENIGRATING DEFENSE COUNSEL FOR ENGAGING IN PURPORTED UNETHICAL CONDUCT – THUS UNDERMINING COUNSEL'S CREDIBILITY AS APPELLANT'S ADVOCATE AND BOLSTERING THE PROSECUTION'S ARGUMENT FOR DEATH

Appellant explained in his opening brief that during the defense surrebuttal argument the trial court twice stopped counsel and harshly criticized counsel in the presence of the jury, explicitly suggesting that counsel's argument was unlawful and unethical, thereby giving rise to prejudicial judicial misconduct for discrediting the cause of the defense for a life sentence. (AOB 301-308.)

Respondent fails to address appellant's argument that the trial court committed *prejudicial misconduct by denigrating defense counsel in the presence of the jury*, except for the single-sentence statement, made without citation to any authority whatsoever, that the "trial court's brief comments were harmless since jurors would have understood that the court's ruling related only to the challenged remarks, not to the balance of counsel's argument." (RB 277; see *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2 [reviewing court may reject contentions unsupported by authority or analysis].)

Instead, respondent mischaracterizes appellant's argument as whether the "trial court placed unconstitutional limits on his penalty phase arguments on two occasions." (RB 272.) Respondent then argues that the trial court's limitations on

the defense closing arguments were proper. (RB 275-277.) Appellant did not raise the issue whether the trial court placed unconstitutional limits on defense counsel's penalty phase arguments. (See AOB 301-308.)

The issue arising from the trial court's conduct in denigrating defense counsel in the presence of the jury is whether the conduct rose to the level of judicial misconduct by undermining defense counsel's credibility as appellant's advocate and/or by bolstering the prosecution's argument for death. (AOB 304-307.)

Here, the trial court's comments were extremely prejudicial. The trial court twice interrupted defense counsel's surrebuttal argument, both times sending a clear message to the jury that defense counsel's argument was improper and should not be credited. (RT 50:5988-5990.)

The first time the court stopped counsel's argument, the court told the jury that defense counsel's argument was "getting quite out of hand." (RT 50:5988.) The court then admonished counsel, also in the presence of the jury to "stick to the appropriate path," suggesting to the jury that defense counsel had done something inappropriate and that the court felt that counsel was not abiding by the rules. (RT 50:5988.)

The second time the court stopped counsel's argument, the court admonished defense counsel in the presence of the jury, "Once again, these arguments, counsel,

if you want to sit down and formulate your thoughts to keep them ethical and lawful arguments, I will allow you to." (RT 50:5989.) The court explicitly suggested to the jury that defense counsel was engaging in *unethical* and *illegal* conduct. (RT 50:5989-5990.) The court also suggested its low opinion of defense counsel by admonishing counsel in the presence of the jury, "[D]o you want to debate with the court or do you want to be quiet and let the court admonish the jury as to their duties?" (RT 50:5989.)

> "It is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial . . . . When the court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client." [*People v. Sturm, supra*, 37 Cal.4th at p. 1240, citing *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1174-1175.]

The court's comments made it appear that appellant's counsel did not know what she was talking about when it came to points of law. The court's comments suggested to the jury that appellant's counsel acted unlawfully and illegally when presenting an argument for life on appellant's behalf. The court's comments also revealed to the jury the court's disdain for appellant's counsel.

A "trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution." (*People v. Carpenter, supra*, 15 Cal.4th at p. 353; see *People v. Jackson* (1955) 44 Cal.2d 511, 518-520 [judge's comments conveyed allegiance to the prosecution and disdain for defense

counsel]; *People v. Fudge, supra*, 7 Cal.4th at p. 1107; *People v. Clark* (1992) 3 Cal.4th 41, 143.) "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Sturm, supra*, 37 Cal.4th at p. 1233, citing *People v. Mahoney* (1927) 201 Cal. 618, 626-627 [reversing because the trial judge persisted in "making disparaging remarks . . . discredit{ing} the cause of the defense"].)

The damage from the court's comments went beyond their immediate substantive effect; they had the further effect of discrediting appellant's sole advocate for a life sentence, and thereby bolstering the prosecution's argument for a death verdict.

Reversal of the death verdict is required.

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XXV.

THE TRIAL COURT DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND A FAIR AND RELIABLE DETERMINATION OF PENALTY, BY ITS REPEATED ERRONEOUS RULINGS AGAINST THE DEFENSE AND REMARKS DISPARAGING DEFENSE COUNSEL

Appellant explained in his opening brief, and in section XIII, *ante*, incorporated herein by reference, that throughout this case, beginning well before trial and continuing through the penalty phase retrial, the trial court made repeated one-sided rulings and remarks directed against defense counsel and appellant, disparaging counsel and weakening the defense's ability to present evidence countering the charges against appellant and weakening appellant's ability to present evidence in mitigation for a life sentence. (AOB 309-319.)

These rulings and remarks – disparaging defense counsel, selectively overruling defense objections, and rulings favoring the prosecution – include the errors described in sections XV through XXI, inclusive, and XXIV of the opening brief and the several additional erroneous matters identified in this argument. (AOB 194-287, 301-319; see *People v. Carpenter, supra*, 15 Cal.4th at p. 353 [a "court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution"]; *People v. Sturm, supra*, 37 Cal.4th at p. 1233

[When trial is by jury, a "fair trial in a fair tribunal" requires the judge to refrain from conduct that can prejudice the jury].)

A. DISPARITY IN QUESTIONING OF, AND RULINGS ON CHALLENGES TO, DEATH-SCRUPLED JURORS AND PRO-DEATH JURORS

Respondent argues that the trial court did not commit misconduct in conducting its inquiries of prospective alternate jurors (RB 278-295), and any error was "harmless since none of these juror [sic] participated in deliberations." (RB 280-281.) Respondent's argument misses the point: the issue here is whether the trial court engaged in a pattern of conduct suggesting judicial bias, thereby rendering the trial fundamentally unfair. Appellant thus does not suggest that reversal is required based on the voir dire of alternative prospective jurors alone; instead, appellant argues that the voir dire of three prospective alternate jurors is relevant to the issue whether the trial court engaged in a pattern of conduct suggesting judicial bias. (AOB 310-313.)

Respondent asserts that appellant's argument appears to be based "solely on a numerical counting of questions [of prospective alternate jurors], which is insufficient to establish a constitutional violation in this context." (RB 280, citing *People v. Thornton* (2007) 41 Cal.4th 391.) Respondent is mistaken.

In *Thornton*, in the context of defendant's contention "that the trial court asked fewer questions of certain prospective jurors than of certain others," this Court reiterated that a similar claim was rejected in *People v. Navarette* (2003) 30

Cal.4th 458 ["a numerical counting of questions . . . is not sufficient to establish a constitutional violation in this context"]. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 425.)

Appellant does not make an argument regarding numerical counting of questions. (AOB 310-313.) Instead, appellant explained that a disparity in treatment between pro-death penalty jurors and death-scrupled jurors can be seen in the voir dire of Prospective Alternate Juror No. 4, who said in his questionnaire that he would always choose life regardless of the evidence, but during voir dire explained that the written answer was his personal view on the death penalty, and he could follow the law and apply the death penalty in the appropriate case. (RT 44:4654-4655; RB 282-283.) The trial court absolutely refused to accept the juror's statement that the questionnaire answer represented his personal view but that he could follow the law; the court kept accusing the juror, incorrectly, of not answering his question, insisting that he explain the disparity between his questionnaire answer and his answer on voir dire, even though he did explain it more than once, and accusing the juror of going around in circles with his answers. (RT 44:4651-4655.)

Notwithstanding Prospective Alternate Juror No. 4's stated ability to return a death verdict in the appropriate case, the prosecutor's challenge for cause was sustained over defense objection. (RT 44:4658; see *People v. Lewis* (2008) 43 Cal.4th 415, 488 ["prospective juror may be removed for cause only if that juror's

views in favor of or against capital punishment would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with the trial court's instructions and the juror's oath"].)

Respondent then asserts that "[a]ppellant appears to argue that in comparison with the lengthy questioning of Prospective Alternate Juror No. 4, the trial court's questioning of 'the very next prospective alternate juror' (herein designated as Prospective Alternate Juror K.H. . . .) was brief . . . ." (RB 287.) Respondent is mistaken. Appellant did not make an argument about the brevity of questioning. (AOB 311.) Instead, appellant pointed to the disparity in treatment of the two prospective jurors: Prospective Alternate Juror K.H. wrote in his questionnaire that "if you take another life for no just reason, you should pay the price, the death penalty" (RT 44:4668; RB 287), yet the defense challenge for cause was denied because during voir dire Prospective Alternate Juror K.H. said that he could follow the law. (RT 44:4670-4671.)

Appellant also explained that a disparity in treatment between pro-death penalty jurors and death-scrupled jurors can be seen in the voir dire of Prospective Alternate Juror No. 1, who said in his questionnaire, "If one takes another life he should pay with his." (CT 13:3627; AOB 311-312.) Respondent acknowledges Prospective Alternate Juror No. 1's jury-questionnaire statement that "[i]f one takes another life he should pay with his." (RB 291.) Respondent also acknowledges his

statement during voir dire, "I'm a strong advocate of the death penalty." (RB 291.) Nonetheless, the defense challenge for cause was denied because during voir dire Prospective Alternate Juror No. 1 said that he could follow the law. (RT 44:4709-4713.)

The record reveals a disparity in the trial court's questioning of, and rulings on challenges to, death-scrupled jurors and pro-death jurors.

B. LIMITS ON DEFENSE CROSS-EXAMINATION OF PROSECUTION PENALTY-PHASE WITNESS SANDRA HESS AND ADMONISHING COUNSEL IN THE PRESENCE OF THE JURY

During the penalty retrial the court sustained its own relevancy objection to defense counsel's cross-examination of prosecution witness Sandra Hess, and then in the presence of the jury sternly admonished trial defense counsel about asking irrelevant questions, improperly conducting discovery, and wasting everyone's time. (AOB 313-314.)

Respondent argues that the trial court's sua sponte objections to defense counsel's questions of Hess was entirely proper as it "'is well recognized that the trial judge may comment on the relevance of evidence, and may sua sponte exclude irrelevant evidence.'" (RB 298, citing *People v. Sturm, supra*, 37 Cal.4th at p. 1239.) Respondent misses the point.

The damage to appellant's case in mitigation for a life sentence arose from the court's personal attack on defense counsel, suggesting that she was incompetent

by asking irrelevant questions, improperly conducting discovery, and wasting everyone's time. (RT 45:4818-4823.) In citing this Court's decision in *Sturm* on a court's comment on evidence (quoted in the preceding paragraph), respondent omits the applicable holding that "'[i]t is completely improper for a judge to advise the jury of negative personal views concerning the competence . . . of the attorneys in a trial . . . .'" (*People v. Sturm, supra*, 37 Cal.4th at p. 1240, citing *People v. Fatone, supra*, 165 Cal.App.3d at pp. 1174-1175.) As here, "This principle holds true in instances involving a trial judge's *negative reaction to a particular question asked by defense counsel*, regardless of whether the judge's ruling on the prosecutor's objection was correct; even if an evidentiary ruling is correct, 'that would not justify reprimanding defense counsel before the jury.'" (*People v. Sturm, supra*, 37 Cal.4th at p. 1240 [emphasis added], citing *People v. Fatone, supra*, 165 Cal.App.3d at pp. 1174-1175.) Accordingly, respondent's argument regarding the propriety of the court's ruling limiting defense cross-examination, including whether defense counsel should have made an offer of proof as to relevance, is irrelevant. (RB 299-300.)

Nor was the harm somehow cured, as respondent asserts, when the trial court subsequently told the jury, "And we are going to try to do this [i.e., complete the examination of witnesses] cogently, rapidly and clearly. [¶] I want *both sides* to understand that is the goal here, that we are not going to be here for a year trying the

case." (RT 45:4823 [emphasis added]; RB 301; AOB 314.) The harm caused by the court's actions was already inflicted – the damage was done. By merely telling the jury that it wanted "both sides to understand that is the goal here," the court did not retract its comments disparaging defense counsel and the court did not rehabilitate defense counsel's reputation in the eyes of the jury. Nor did the court's comment somehow "level the playing field" as between the defense and prosecution as the court's previous comments were directed at defense counsel, not the prosecutor, and thus the jury would not have understood the comment to reflect that the prosecutor too was an incompetent lawyer.

C. JUDGE'S IMPROPER AND INAPPROPRIATE COMMENT TO PROSECUTION WITNESS BRIDGET ROBINSON, WHICH VOUCHED FOR HER CREDIBILITY

During the penalty phase retrial, the prosecution presented Bridget Robinson, who testified that appellant assaulted her by hitting her, choking her, and tying her up with a telephone cord. (RT 46:5113-5124.) As Robinson was being excused from the witness stand following her testimony, the judge stated, in the presence of the jury, "Ma'am, *I'm sorry this happened to you* and I want to thank you for coming back down. You can step down. Thank you so much." (RT 46:5140 [emphasis added]; RB 301; AOB 315.)

Respondent notes, as appellant did in his opening brief, that the court subsequently admonished the jury to disregard the statement, which implied that the

court believed Robinson's testimony and that she in fact endured an assault, battery, and choking incident at the hands of appellant. (RB 302; AOB 315.) The fact that the judge made the comment in the first place, however, is evidence of the appearance of bias.

Respondent argues that the court's comment "did not constitute vouching" for Robinson's credibility because the "comment was merely an expression of sympathy based on the witness's obvious demeanor and credibility . . . ." (RB 302.) Respondent is mistaken. The comment – "I'm sorry this happened to you" – implied that the events to which she testified actually occurred, and further implied that the court believed that the events actually occurred and felt sorrow for her suffering at the hands of appellant.

The comment constituted vouching because it was not based on the evidence but, instead, it was based on the court's own belief that the events to which Robinson testified actually occurred. (See *People v. Coddington* (2000) 23 Cal.4th 529, 616 [improper for a judge to vouch for the credibility of a witness], disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see *People v. Stansbury* (1993) 4 Cal.4th 1017, 1059 [rejecting a finding of vouching because the comment was properly based on the evidence].)

D. REVERSAL OF THE VERDICT OF DEATH IS IS REQUIRED

Appellant explained in his opening brief that the cumulative effect of the trial court's actions and rulings, as described above, together with the other rulings against the defense described in the previous sections of this brief (sections XIII, XV through XXI, inclusive, and XXIV, *ante*), operated in combination to deny appellant the constitutional right to trial before an impartial judge, thereby requiring reversal of the death judgment. (AOB 315-319.)

Respondent does not respond to this argument. (RB 277-303.)

Here, the judge's appearance of bias was conveyed to the jurors directly. By denigrating trial defense counsel, and repeatedly ruling on objections in ways that favored the prosecution, the judge "in the presence of the jury . . . conveyed the impression that he favored the prosecution . . . ." (*People v. Sturm, supra*, 37 Cal.4th at p. 1238; *People v. Carpenter, supra*, 15 Cal.4th at p. 353 [a "court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution"].)

In view of the substantial evidence in mitigation (AOB 36-49), and for the specific reasons set out in the arguments that address the foregoing rulings and omissions, it is reasonably possible and reasonably probable that, without the errors identified herein, or one or more of them, the jury would not have returned a verdict

of death. At the very least, it is reasonably probable that the cumulative effect of the judge's conduct adversely affected the penalty verdict. (*People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244; see generally, *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15.)

Reversal of the death verdict is required.

/ / /

XXVI.

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

Appellant explained in his opening brief that many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. (AOB 320-360.)

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has, in Argument XXVI of the

Opening Brief, identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them. Appellant contends that these arguments are squarely framed and sufficiently addressed in the opening brief, and therefore makes no reply.

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XXVII.

THE CUMULATIVE PREJUDICIAL IMPACT OF THE ERRORS AT THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL BY AN IMPARTIAL JURY AND A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION

Appellant has shown that error occurred at every stage of his trial from jury selection through the guilt and penalty phases, to judicial misconduct. The multiple errors mandate an analysis of prejudice that takes into account the cumulative and synergistic impact of the errors. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

Respondent counters that since there was no error, there cannot be cumulative prejudice. (RB 308-309.) To the extent she addresses prejudice, she simply states that "the record contains few, if any, errors made by the trial court or prosecution[,]" and there was no prejudicial error. (RB 308.)

This Court must consider the cumulative prejudicial impact of these various constitutionally-based errors, because the cumulative prejudicial impact can itself be a violation of federal due process. (*Taylor v. Kentucky, supra*, 436 U.S. at p. 487, fn. 15.) A trial is an integrated whole. This is particularly true of the penalty phase of a capital case, where the jury is charged with making a moral, normative judgment, and the jurors are free to assign whatever moral or sympathetic value they deem appropriate to each item of mitigating and aggravating evidence. The jurors

are told to consider the "totality" of the mitigating circumstances with the "totality" of the aggravating circumstances. (See CT 9:2397-2398; CALJIC No. 8.88.)

As appellant explained in his opening brief, the death sentence is unconstitutionally excessive and unreliable where, as here, appellant's conduct was the result of the unimaginable abuse and neglect inflicted on appellant during the vulnerable years of his mental and emotional development. This evidence included 1) being born to, and partially raised by, an abusive and drug-addicted mother, who had sustained serious injuries and ingested large quantities of prescription and street drugs during her pregnancy with appellant, 2) being repeatedly abandoned by that same mother, 3) having an abusive father who ultimately discarded appellant too, and 4) suffering from severe mental illness. (AOB 36-49.) Appellant's tragic background diminishes his blameworthiness and renders the sentence of death fundamentally unjust.

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CONCLUSION

For the reasons set forth above, and those set forth in appellant's opening brief, appellant Kelvyn Rondell Banks respectfully requests reversal of his convictions and the judgment of death.

Respectfully submitted,

Dated: 8-1-2012 By: _____

Stephen M. Lathrop
Attorney for Defendant/Appellant
KELVYN RONDELL BANKS

CERTIFICATE OF COMPLIANCE

I hereby certify under penalty of perjury that the number of words in the brief is 42,811 (not to exceed 47,600).

Respectfully submitted,

Dated: 8-1-2012 By: _____

Stephen M. Lathrop
Attorney for Defendant/Appellant
KELVYN RONDELL BANKS

PROOF OF SERVICE

STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 904 Silver Spur Road #430, Rolling Hills Estates, CA 90274. On August 1, 2012, I served the following document(s) described as **APPELLANT'S REPLY BRIEF** on the interested party(ies) in this action by placing _ the original or X a true copy thereof enclosed, in (a) sealed envelope(s), addressed as follows:

Allison H. Chung Deputy Attorney General 300 South Spring St., Ste 1702 Los Angeles, CA 90013	Linda Robertson California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105-3647
Clerk, Los Angeles Sup. Ct. Attn: Hon. Charles E. Horan Pomona Courthouse South 400 Civic Center Plaza Pomona, California 91766	Office of the District Attorney 210 W Ternple St #17-1116 Los Angeles, CA 90012
Mr. Kelvyn Banks, #P-47600 CSP-SQ San Quentin, CA 94974	Joy L. Wilensky 895 River Dr. Fort Bragg, CA 95437 [Trial Defense Counsel]

I am readily familiar with the firm's practice for collection and processing of correspondence and other materials for mailing with the United States Postal Service. On this date, I sealed the envelope(s) containing the above materials and placed the envelope(s) for collection and mailing on this date at the address above following our office's ordinary business practices. The envelope(s) will be deposited with the United States Postal Service on this date, in the ordinary course of business. I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this Proof of Service was executed on August 1, 2012, at Rolling Hills Estates, California.

Stephen M. Lathrop
Printed Name


Signature