IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ROPATI SEUMANU, Defendant and Appellant.	CAPITAL CASE S093803 Alameda No. No. H24057A

Appeal From the Judgment of the Superior Court,

State of California, County of Alameda

The Hon. Larry J. Goodman, Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

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* Appellant has kept the same numeration of arguments used in the opening brief, but not the same order. (See below, INTRODUCTION, pp. 1-2.)

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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Plaintiff and Respondent,	)	**S093803**
vs.	)	
ROPATI SEUMANU,	)	**Alameda No. No. H24057A**
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

In addressing respondent's arguments in this reply brief, appellant has rearranged the order of the issues while retaining the numeration of the arguments as designated in the opening brief and correspondingly in respondent's brief. Specifically, appellant has grouped together each guilt phase error with its corresponding penalty phase error. The intent is not to disguise or dilute the seriousness of guilt error in this case, but to better reflect the continuity and intensity of the penalty errors whose momentum of prejudice began with the prosecutor's very opening statement in the guilt phase of trial. There was in this

case an extraordinary unity imposed on the formally distinct phases of trial by Ms. Backers' pervasive and persistent invocation of high emotion and pathos throughout the trial. This is also the source or substance of many, if not all, of the errors in this case, whether guilt or penalty. The reordering of the issues in this brief is an attempt to accommodate this reality.

ARGUMENT IN REPLY

I.
REPLY CONCERNING THE "EVIDENCE" OF MS. BACKERS' SUBJECTIVE MOTIVES FOR BESTOWING FAVORABLE PLEA ARRANGEMENTS TO IULI AND PALEGA, AND HER VOUCHING THEREBY FOR THEIR CREDIBILITY AND APPELLANT'S GUILT

Appellant contended that Ms. Backers improperly injected into the case the issue of her subjective motives for conferring on Tony Iuli and Jay Palega exceedingly favorable plea bargains, allowing them to plead to a charge of voluntary manslaughter and to obtain a determinate term of only 16 years in prison. Through the direct examination of Tony Iuli (AOB, pp. 53-56), through the "Muraoka" stipulation (AOB, pp. 64-67), and in closing arguments through the encomium of her own elevated moral conscience, whose unerring sensitivity sanctioned a degree of leniency toward Iuli and Palega, but demanded the full measure of the law's condemnation against appellant, she effectively vouched for the credibility of the former two, and the guilt of the latter. (AOB, pp. 68-77.)

As for procedural default, appellant contended that any forfeiture was excused here by the patent futility of an objection. The trial court, impervious to Ms. Backers' own procedural default in this case, clung persistently to the erroneous notion that defense counsel, in his opening statement, had "opened the door" to the subject of Ms. Backers' subjective motives, and that the evidence relevant to these motives had to be admitted in one form or another. This rendered

any would-be objection in any of the three contexts presented a futile gesture. (AOB, pp. 46-53, 65-66.) Appellant argued in the alternative that the failure to object by defense counsel constituted ineffective assistance of counsel established on the face of the appellate record alone. (AOB, pp. 80-81.)

Respondent does invoke procedural default (RB, pp. 55-57), as anticipated. Respondent then proceeds to address the merits of each aspect of the vouching claim, arguing that in respect to Iuli's direct examination, nothing there even implied that Ms. Backers was placing her prestige behind Iuli's veracity. According to respondent, Ms. Backers' questions were intended only to place "Iuli's letter and his and Palega's plea agreement in context." (RB, p. 61.) As for the Muraoka stipulation, according to respondent, that could not be prosecutorial vouching for two reasons: first because the judge, and not the prosecutor, chose the wording of the stipulation, and secondly because the stipulation made it clear that Iuli and Palega were given deals based upon Ms. Backers' " 'review and evaluation *of the evidence*.' " (RB, p. 69, emphasis added in respondent's brief.) Finally, as for the closing arguments, respondent takes the position that there was no vouching there, either because Ms. Backers arguments were based on evidence presented (RB, p. 75), or because they were properly made in rebuttal to defense counsel's opening statement, which rendered these arguments and the evidence adduced in support of them relevant. (RB, pp. 75-77.) As respondent explains the situation:

> Defense counsel told the jury that the prosecutor extended plea deals to Iuli and Palega because she did not have enough evidence to proceed to trial in 60 days. (6 RT 1643.) Counsel challenged the prosecutor's motives, competency, and most importantly her evidence at the beginning of trial. In response, the prosecutor simply elicited *relevant* evidence and argued her case to rebut defense counsel's suggested inferences. The admission of evidence regarding the prosecutor's reasons for offering plea deals

constituted proper rebuttal evidence; the trial court did not abuse its discretion by ruling it admissible." (RB, p. 83, emphasis added.)

This last argument, if accepted, comprehensively disposes of all aspects of appellant's vouching claims. For if Ms. Backers' subjective motives were relevant, material, and therefore admissible, then there was simply no error here at all. Further, the entire premise of appellant's claim of excuse from forfeiture dissolves in the jurisprudential theory presented in the above paragraph, where respondent seems to equivocate between the claim that the prosecutor's motives have independent relevance in the case and the claim that somehow the "opened door" is an entrée for otherwise irrelevant evidence. Thus, before answering respondent's claims about procedural default, it is first necessary to address the substantive issue of what is and is not material or relevant, and how the concept of relevance and materiality is the very premise of the prohibition of vouching by the parties. The matter should not require much argument, but respondent's insistent misconception and error requires a forceful elaboration in response.

A.

As a general principle, the motives and conduct of the authorities are simply immaterial and irrelevant to the central question in a criminal case, which is guilt or innocence. The principle is not difficult to formulate or understand:

"It will be seen that only in rare instances will the 'conduct' of an investigating officer need to be 'explained', as in practically every case, the motive, intent, or state of mind of such an officer will not be 'matters concerning which the truth must be found.' At heart, a criminal prosecution is designed to find the truth of what a defendant did, and, on occasion, of why he did it. It is most unusual that a prosecution will properly concern itself with why an investigating officer did something." (*Teague* v. *State* (Ga.1984) 314 S.E. 2nd 910, 912.)

Or again:

> " . . . . The means by which a particular person comes to be suspected of crime – the reason law enforcement's investigation focuses on him – is irrelevant to the issue to be decided at trial, i.e., that person's guilt or innocence, except insofar as it provides independent evidence of guilt or innocence." (*People* v. *Johnson* (2006) 139 Cal.App.4th 1135, 1150.)

The same principle applies to the subjective motives and conduct of prosecutors: "[E]vidence of the State's motive for prosecuting the defendant was not relevant to any material issue in the case." (*Britain* v. *State* (Ala.Cr.App.1987) 518 So.2nd 198, 202.) Or again: "Whatever the prosecutor's motives may have been mere conjecture by the defense and have [this may be an accurate quote but it should be either are/have or is/has] nothing to do with Dixon's guilt or innocence." (*State* v. *Dixon* (Oh.App.2003) 790 N.E.2nd 349, 359.) Thus too, in *People* v. *Von Villas* (1992) 10 Cal.4th 201, the court dismissed a claim that the evidence of the prosecutor's consciousness of the weakness of his case, in the form of his own "party admissions," was admissible as relevant and material evidence. (*Id.* at pp. 249-250.)

In *People* v. *Carr* (2000) 81 Cal.App.4th 837, it was held that the consent and authorization of the son of the victim was not a defense to the crime of cross-burning under Penal Code section 11411, and the prosecutor did not therefore misstate the law in so asserting. (*Id.* at pp. 841-843.) In a footnote to this ruling, the Court made an observation pertinent to the instant issue:

> "While we uphold the substance of the prosecutor's remarks, we note that one of them was phrased inappropriately. In defending her decision to stipulate to the fact that Jarod suggested the cross

> burning, the prosecutor stated to the jury, 'Do you think that in representing my client when we entered into that stipulation that Jared Shostak made those remarks to those other individuals, that somehow that would jeopardize – I would purposely in representing my client jeopardize that element?' As the Attorney General concedes, the prosecutor's motive for entering into the stipulation was irrelevant and outside the scope of the evidence. However, the comment was not prejudicial because, as we have explained, Jarod was legally unable to authorize the cross burning." (*Id.* at p. 843, fn. 4.)

How is it that the Attorney General in *Carr* can concede the obvious, while the Attorney General in the instant case can not?

If the matter requires further discussion, one might consider the untoward implications of respondent's position that the prosecutor's conduct and motives in this case were material and relevant. Once Ms. Backers, whether implicitly through "evidence" or expressly in argument, insisted on the integrity and purity of her motives, then the illegality of her actions becomes relevant in rebuttal. As pointed out in the opening brief, the plea dispositions conferred on Iuli and Palega were in violation of Penal Code section 1192.7(a), which outlaws plea bargaining "unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence."

Again, Iuli and Palega confessed to first-degree felony murder before they were offered any deal. There were no material witnesses unavailable. And the reduction of a sentence from death or life without parole to 16 years 8 months is substantial by any measure. (See AOB, p. 45, fn. 15.) Was Ms. Backers so alarmed about the weakness of her case that she would violate the law in order to strengthen it? Was trial counsel ineffective for not presenting evidence that she resorted to illegality in order to obtain buttressing evidence against appellant? One can be certain that if there were danger of this sort of impeachment, the

Attorney General would indeed concede that Ms. Backers' motives and conduct were irrelevant to the issue of guilt or innocence.

The question of vouching is of course connected to this question of relevance and materiality. The heart of a vouching error is that it violates the "fundamental tenet of the adversarial system that juries are to ground their decision on the facts of a case and not on the integrity or credibility of the advocates." (*People* v. *Donaldson* (2001) 93 Cal.App.4th 916, 928; *United States* v. *Prantil* (9th Cir.1985) 764 F.2nd 548, 553.) Thus, the prohibition against allowing prosecutors to strengthen their cases "by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it" (*People* v. *Huggins* (2006) 38 Cal.4th 175, 207) extends to a prohibition of "evidence" that serves only to establish, buttress, or imply such an argument. (See *United States* v. *McCoy* (9th Cir.1985) 771 F.2nd 1207, 1210-1211; see also *People* v. *Donaldson, supra*, 93 Cal.App.4th 916.) Here, the claims are that the "evidence," whether from Iuli or Muraoka, and the arguments fed by the evidence constituted vouching. Respondent's claim that they were not vouching because Ms. Backers' subjective state of mind was relevant is meritless, whether that claim is based on independent relevance or on some theory of the "opened door," which does not exist jurisprudentially. (*People* v. *Gambos* (1970) 5 Cal.App.3rd 187, 192; *People* v. *Arends* (1958) 155 Cal.app.2nd 496, 508-509.)

B.

With this, one may return to the question of forfeiture. Once one secures the premise that the prosecutor's motives and subjective intent are immaterial and irrelevant in a criminal case, then questions must be answered, not by appellant, but by respondent. When Mr. Ciraolo made the objectionable observations in his opening statement, why was Ms. Backers not required to lodge a timely objection and request an admonition? (*People* v. *Bain* (1971) 5 Cal.3rd 839, 849; *People* v. *Kirkes* (1952) 39 Cal.2nd 719, 725-726.) How was her remedy to adduce further

irrelevant evidence and argument when there is no doctrine of the "opened door" in California? (*People* v. *Arends*, *supra*, at pp. 508-509.) Respondent does not even attempt to explain, perhaps under the deluded notion that the evidence was relevant and that the defense itself did not commit an impropriety. As seen from the forgoing, that is wrong.

But respondent does launch at least some direct attack on appellant's claim of futility of objection. According to respondent, the would-be effectiveness of a timely, properly formulated objection here is established by the fact that "the trial court was receptive to appellant's arguments against the prosecutor discussing her personal beliefs and moral reasons for offering Iuli and Palega lower sentences. (See 10 RT 2400, 2401-2402; 13 RT 2961-2971.)" (RB, p. 57.) The portions of the record he cited, let alone any other part of the record, *do not in fact* demonstrate this at all.

Respondent's first citation is to the discussion over the so-called "Berger stipulations," whose purpose was to rebut trial counsel's opening statement about Ms. Backers' motives. If one examines the relevant passages, one sees that the defense-engendered concern of the trial court was how the attorney-client privilege would be encroached by cross-examination of Mr. Berger if he were called to testify (10RT 2400), and how evidence to rebut Mr. Ciraolo's claim in opening statement might be reasonably managed. (10RT 2401-2402.) Apart from this, the trial court clearly committed itself to the fundamental error that Ms. Backers' subjective motives were now relevant. For when Ms. Backers told the court that there was still time to think matters over before she would have to call Berger to the stand, the court responded:

> "It is not a question of thinking about it. It is a question that I agree with Mr. Ciraolo that what he said was fair comment. However, I also agree that Ms. Backers has a right to put her spin on the same facts before the jury." (10RT 2401.)

Mr. Ciraolo and the court were wrong about Mr. Ciraolo's fair comment; the court was wrong about Ms. Backers' right "to put her spin" on irrelevant facts.

The second instance cited by respondent was the discussion about the proffered testimony of William Muraoka. She wanted Muraoka to testify that she, Ms. Backers, announced to him, Muraoka, that she had made a "moral" decision not to prosecute Iuli and Palega to the full extent of the law. (13 RT 2962-2963.) The discussion of this aspect of her offer of proof exhibited again the trial court's imperviousness to the irrelevance of Ms. Backer's subjective motivations:

> "MR. CIRAOLO: . . . . [T]he ultimate substance of this whole exercise appears to be that Ms. Backers has rendered a personal opinion as to the moral justification of making an offer. And the personal belief and opinion of a district attorney as to a person's guilt is misconduct.
>
> "The – I cite Witkin's Criminal Law, second edition, section 2908, volume 52909 [*sic*], 210 and 1999 supplement. The gist of all these authorities is that if the prosecutor, in closing argument makes comments on the evidence, that is proper. If the prosecutor renders a personal opinion as to belief of guilt or innocence, that is misconduct and grounds for reversal. If the prosecutor vouches for the credibility of a witness, it could be misconduct. The one case cited deals with the credibility of a witness in a plea bargain that was not read to the jury, was vouching, but under those circumstances was harmless.
>
> "THE COURT: Mr. Ciraolo, haven't you sort of thrown open the doors to what her motivation for making these offers was because your whole case so far has been based upon the implication that these offers were made in a fit of panic because your client pulled his time waiver?
>
> "MR. CIRAOLO: Your Honor –
>
> "THE COURT: Let me finish.

"So how do, in the spirit of fair play, in a search for the truth, do I allow Ms. Backers to rebut that insinuation that you've been raising throughout your entire cross-examination of both the last two witnesses where she is able to put on the record what maybe really happened.

"MR. CIRAOLO: Your honor, the way that can be done in fair play is as the court had previously ruled on this issue with Mr. Berger, by stipulation as to a time line.

"Ms. Backers may be able to make fair comment as to the evidence, but her personal opinions, especially when she talks of the moral judgment, I feel are completely inappropriate and would be grounds for reversal.

"THE COURT: It may be inappropriate if done without you doing what you did, but I am not so sure it is inappropriate based upon the position you have taken.

"You have basically put her motivation at issue in front of the jury. And somehow she should be allowed to rebut what you inferred was –

"MR. CIRAOLO: She could rebut it quite simply, is that even though this case was pending she had the opportunity to evaluate the case, look at the evidence, and make decisions on the evidence that was presented to her. She doesn't have to talk about moral judgment. She doesn't have to talk about opinions of other counsel.

"THE COURT: Well, if you take the word 'moral' out of her offer of proof, isn't that what Mr. Muraoka would be testifying to?" (13RT 2965-2967.)

When Ms. Backers added her objection that she had been falsely accused of acting in a panic when in fact she had made a "moral decision" about her case (13 RT 2967-2968), the Court responded: "I am not sure your moral decision is relevant. I mean, it may be relevant as your evaluation of the case, and based upon your evaluation of the case you thought you could make these offers, but

your moral judgment I don't think is something the jury needs to know about." (13 RT 2968.) It was agreed that the solution to this was *not* to preclude the Muraoka evidence, but simply to take the word "moral" out. (13 RT 2968-2969.)

If anything, these passages refute respondent's claim. Mr. Ciraolo in fact formulated expressly the proper objection and still the trial court resisted any claim that Ms. Backers' personal motivations were immaterial and irrelevant. If the court was receptive to any objection, it was that Ms. Backers could not be allowed in the evidentiary portion of trial to present the argumentative claim that her plea disposition for Iuli and Palega was a "moral decision." Of course, this did not stop Ms. Backers from making that claim *viva voce* in closing argument where the "inference" from Mr. Muraoka's "percipient" facts could be made express. (17RT 3475-3477, 3512-3513.)

Finally in regard to the Muraoka stipulation specifically, respondent argues that appellant is estopped from attacking a stipulation he had entered into. (RB, p. 69.) If this formulation is meant to suggest invited error, the record is clear from the above that defense counsel *did* object to the admission of Muraoka's evidence and that he agreed to a stipulation as the second best alterative forced on the defense by the trial court's *independent* intention of admitting this evidence one way or the other. Under these circumstances, there is no forfeiture and the defense cannot be taxed with invited error. (*People* v. *Riggs* (2008) 44 Cal.4th 248, 289; *Nogart* v. *Upjohn Co.* (1999) 21 Cal.4th 383, 403; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3rd 202, 213.)

The overall record as discussed here and in appellant's opening brief is manifestly clear. The trial court's inability to see the line between the *witness's* personal motives and the personal motives of the prosecutor, combined with a commitment by the court to the fallacious doctrine of "open doors," precluded any possibility of success for the correct legal argument if such had been presented at any of the junctures raised. Hence, no relevant protagonist in this case is "sandbagged" by this issue. Not the People, whose own sandbagging initiated this

comedy of errors; not the trial judge, who understood that the issue was relevance and materiality, yet who misapplied these concepts *sua sponte*; and not the process of criminal justice, where an unreliable and unfair trial emerged from the confluence of each party's good faith misapplication and misrepresentation of the law. Forfeiture should not bar review of the claims advanced here.

One may turn to the more individualized arguments respondent makes as to each aspect of the vouching error in this case.

C.

The direct examination of Iuli was not vouching, respondent says, because "[t]he questions posed by the prosecutor and the answers given in no way vouched for Iuli's and Palega's credibility or referred to evidence outside the record. [Citation.] Nor did they place the government's prestige behind Iuli and/or Palega as a way to assure the jury of their veracity. Rather, the prosecutor's questions merely placed Iuli's letter and his and Palega's plea agreements in context. Moreover, these questions did not indicate that the prosecutor had evidence supporting Iuli's or Palega's testimony that was not presented to the jury." (RB, p. 61.)

What does respondent mean by "context" in this context? Why was it "contextually" relevant that Iuli talked to Ms. Backers about a deal for Jay Palega, pointing out to her the reasons that Jay Palega should be treated more leniently than Paki (see AOB, pp. 53-54), which, coincidentally, happened to be reasons that applied to Iuli himself as well? Why did this evidence have to be cast in the form of an account of a discussion between Iuli and Backers about Jay Palega rather than simply Iuli's direct testimonial assertion that he thought Palega got the deal that Palega, and indeed Iuli himself, deserved? The answer of course is that Iuli's reasons that Jay Palega should get a deal are irrelevant whether or not one

adds the empty qualifier "contextually."[1] The real purpose of the evidence, which was cast in the form of a past conversation between Iuli and Ms. Backers, was to provide the jury circumstantially with the reasons *Ms. Backers* gave a deal to *both* Iuli and Palega: she believed them to be morally less culpable than appellant. That the clear implication is lost on respondent, may be attributed to a kind of adversarial opacity.[2]

In regard to the Muraoka stipulation, respondent makes two specific arguments: because the trial court selected the wording of the stipulation, the error cannot be *prosecutorial* vouching (RB, p. 69); secondly, the stipulation does not suggest vouching because it explicitly had Ms. Backers stating that she conferred the deals only after " 'review and evaluation *of the evidence.*' " (RB, p. 69, emphasis added in respondent's brief.)

Respondent's first argument has a kind of charming naiveté to it in urging an empty nominalism. Appellant is willing to call the Muraoka stipulation court error if that solves the problem. But unless a court allows it, there never is a vouching error, and the basic problem is that the evidence allowed by the court constitutes prosecutorial vouching in evidentiary form.

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[1] The obvious meaning of "context" in a forensic context is all competent evidence that is relevant to a material issue in the case. The fundamental premise of vouching error is that the prosecutor's subjective motives or opinions are neither a material issue nor relevant to a material issue in the case.

[2] Appellant, in the direct examination of Iuli, and indeed in all aspects of the error presented here, is focusing on the vouching as the prosecutor's invocation of his personal prestige to strengthen the case. (*People* v. *Huggins*, *supra*, 38 Cal.4th 175, 207.) Appellant is not claiming vouching in the form of implying off-the-record information or evidence. (*People* v. *Zambrano* (2007) 41 Cal.4th 1082, 1167; *People* v. *Fierro* (1991) 1 Cal.4th 173, 211; see also *United States* v *Roberts* (9th Cir.1980) 618 F.2nd 530, 533 ["Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony."].) However, the two forms have a common ground in that the prosecutor's prestige is indeed outside the evidence and off the record.

The second argument is premised on the principle that a prosecutor may indeed express his or her *personal* estimation of the strength of the objective evidence. (*People* v. *Frye* (1998) 18 Cal.4th 894, 971; *People* v. *Brown* (1981) 119 Cal.App.3rd 116, 133.) But this means at the very least the evidence presented to the jury in open court where all parties, the court, and the jurors view it together, evaluate it, and review it simultaneously as part of the controlled trial process. It does not mean Ms. Backers' *pretrial* review of the evidence. (See *People* v. *Johnson* (1981) 121 Cal.App.3rd 94, 103 ["This implication [of vouching] was made manifest by the prosecutor's reminder that he had personally investigated the allegations."].) It is this pretrial evaluation and review, resulting in favorable plea deals offered to Iuli and Palega, that amounts to an invocation of Ms. Backers' personal prestige in support of their credibility and appellant's guilt. This prestige is not a legitimate part of the objective evidence, but an insidious parasite on it.

In regard to the closing arguments, respondent repeats many of the same themes in a kind of potpourri. Respondent's claim that the arguments were proper and relevant rebuttal (RB, pp. 75-76, 79-83) has been addressed above. (See pp. 4-7.) But another current in respondent's flood of protest against appellant's claim is the contention that Ms. Backers' closing arguments were nothing more than legitimate comment on the evidence (RB, p. 75), and could not be construed by the jurors as anything other than that. (RB, pp. 77-78.) Appellant has already developed clearly how the implied vouching in the Iuli examination and the Muraoka stipulation is unmistakable. There is little reason to elaborate for the closing arguments where an argumentative gloss was then given to the supposedly percipient facts established through Iuli and the stipulations, and where Ms. Backers openly pronounced her own morality and integrity in this prosecution. There is no need to re-retail the obvious instances (see AOB, pp. 68-76.) Rather, it will be more useful to examine *People* v. *Alverson* (1964) 60 Cal.2nd 803, which has some significant parallel to the instant case, which will seal the question on all

the aspects of vouching in this claim, and which will rebut even the suggestion that Ms. Backers argument was legitimate.

D.

In *Alverson*, three defendants were tried for burglary. One of them, Williamson, testified at trial, admitting to having driven the getaway car but claiming he had not known that the other two had burgled a store until they got back into the car. He drove them away in flight only because he had a prior conviction and was afraid to be found by the police with the other two. His testimony included a positive identification of the other two defendants, Alverson and Stoner, who had themselves proffered alibi defenses through their own testimony. Although the prosecution's case against the latter two might have sustained a conviction by itself, the addition of Williamson's testimony, which was the only direct evidence of identification, rendered the prosecution case much stronger. (*Id.*, at pp. 804-805.)

The prosecutor in *Alverson* took advantage of Williamson's self-serving testimony. In the final closing, the prosecutor made the following argument:

> "'A man here, Mr. Williamson, has been charged along with two others, Mr. Alverson, Mr. Stoner, and quite frankly in my own mind I think Mr. Williamson is telling you the truth, and quite frankly I do not think he is guilty of this charge.
>
> " . . . .
>
> "'The defendant here, Williamson, has taken the stand. He has told what I consider is a plausible forthright story. . . .
>
> "'All right, the testimony you have heard, it's up to you to determine whether, in fact, he is guilty or innocent of the charge. I express to you my own opinion, I express to you what I think the

evidence has shown, and I wouldn't make the statement until all the evidence is in . . . .

"'I am beginning to sound like defense counsel, but this is the duty of a District Attorney, of the prosecutor, not to convict innocent people, it's to convict the guilty, and I will leave it very simply, very plainly with you here.'" (*Id.*, at p. 806.)

Williamson was acquitted on this invitation, but Alverson and Stoner were convicted. (*Id.*, at p. 804.)

Respondent, presumably, would find no problem here. What, after all, was the prosecutor doing? He was arguing about the *evidence*. Wasn't Mr. Williamson's testimony evidence? If the prosecutor found it objectively believable, where is the impropriety? This Court, however, reversed:

"The tactics used by the prosecuting attorney necessarily disturbed the delicate balance between the defense and prosecution to the disadvantage of appellant Alverson. At the very outset of the trial the prosecutor comes into the case as a champion of the People paid to prosecute offenders. The very importance of that position is, of course, apparent to the jury. The defendant has, in his favor, the presumption of innocence. But, if in addition to his basic advantage of being the champion of the People the prosecutor is to be permitted to stand before the jury like a knight in shining armor, and state that he would not think of prosecuting a man he believed to be innocent, and that he personally believed one of the defendants whose testimony had implicated the other two defendants, then the prosecutor has secured a very unfair advantage indeed.

"The argument of the prosecutor asking for the acquittal of Williamson for the reason that he personally believed that Williamson was innocent, and that he, the prosecutor, did not want to convict an innocent man, necessarily also told the jury that, by continuing to prosecute Alverson and Stoner he, the prosecutor, personally believed that they were guilty. Had he expressly made such a statement it would have been reversible error. The law is well settled that such an argument is not only improper, but constitutes misconduct, is prejudicial and requires a reversal, even though not

objected to by the defendant, and even though no request to admonish the jury to disregard it has been made." (*Id.*, at pp. 808.)

Ms. Backers was more extreme than the *Alverson* prosecutor to the extent that she could not even colorably claim the warrant of objective evidence, since, unlike the testimony of Williamson, her personal motives for conferring deals in this case *should not even have been* entered into evidence. If Ms. Backers, unlike the *Alverson* prosecutor in regard to Williamson, did not commit herself in this case to Iuli and Palega's legal innocence, she certainly committed herself to their relative moral innocence, informing the jury that "the moral difference" was "why there were different offers made" to Iuli and Palega (17RT 3475), why Ms. Backers' discretion "was exercised with a proper amount of integrity" (17RT 3477) and why the "moral fiber" of appellant and Tautai warranted the full measure of law harshness. (17RT 3477.) The argument is not even ambiguous. She was offering a personal opinion about the relative culpability of each participant, and this opinion was "not relevant to any issue at trial" (*People* v. *Cain* (1995) 10 Cal.4th 1, 64) and constituted improper vouching. (*People* v. *Alverson*, *supra*, 60 Cal.2nd 803, 808-809.)

E.

Appellant also devoted some analysis to the federal constitutional violations that resulted from Ms. Backers' vouching. (AOB, pp. 77-80.) Appellant argued that the reach and suffusion of this misconduct met the level of a due process violation in denying appellant a fundamentally unfair trial. (*Darden* v. *Wainwright* (1986) 477 U.S 168, 181.) In addition, appellant argued that when the prosecutor injects him-or-herself into the case as providing either testimony, or simply a testimonial for a witness or for the guilt of appellant, he or she is not, and cannot, be cross-examined or confronted, which renders these types of errors a violation of the Sixth Amendment. (*People* v. *Gaines* (1997) 54 Cal.App.4th 821,

823-825; see also *People* v. *Bolton* (1979) 23 Cal.3rd 208, 213, 215; and *People* v. *Harris* (1989) 47 Cal.3rd 1047, 1083.) That also occurred here. Finally, the distortion that vouching introduced into the evaluation of the objective evidence constitutes a violation of the Eighth Amendment in a capital case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628.)

Respondent takes issue with most of this in only a general way, urging that prosecutorial misconduct is generally not deemed to rise to the level of federal constitutional magnitude. (RB, p. 78.) The citations and the overall context of respondent's argument suggest that he is referring to the due process claim apart from the Sixth and Eighth Amendment claims. One of course might concede the general without conceding the specific, for if generally, prosecutorial misconduct does not rise to the level of a violation of due process, here it did.

As to the Sixth Amendment claim, respondent's answer seems primarily to be that there was no error at all, let alone a federal constitutional one. (RB, pp. 78-79.) But there is a secondary suggestion manifest in respondent's assertion made to counter the claim that Ms. Backers' integrity and expertise were not extra-evidentiary considerations that could not be cross-examined or confronted. According to respondent, "[t]he prosecutor here never discussed her integrity, reputation, or expertise with the jury." She certainly invoked her own integrity explicitly. (17RT 3475-3577.) Implicitly, along with her own competence and experience, it was invoked in the Iuli examination and in the Muraoka stipulation. Finally, once she invoked anything of a personal nature, her position as a public prosecutor naturally imported the aura of prestige, competence, and experience that the office accords to the person. *Alverson*'s "knight in shining armor" (*People* v. *Alverson*, *supra*, 60 Cal.2nd 803, 808) possesses not only the chivalric ideals and virtues, he possesses the skill, competence, and experience to make those ideals effective. There is indeed a Sixth Amendment claim in Ms. Backers' vouching.

As to the Eighth Amendment claim, respondent does not address this. One might assume, however, that his answer would be that there was no vouching error

in any event to distort the reliability of the factual determination in this case. The answer to this is, of course, in everything demonstrated by appellant in this brief and in appellant's opening brief.

Finally, respondent raises the first of what will be many repetitions: the failure to invoke any constitutional objection forfeits the constitutional aspect of any claim of error. (RB, p. 57.) The law is quite settled by now, however, that a specific constitutional objection is not required when the claim aims at the unconstitutional *consequences* of what would otherwise be state-law error alone. (*People* v. *Partida* (2005) 37 Cal.4th 428, 438-439; *People* v. *Boyer* (2006) 38 Cal.4th 412, 441; *People* v. *Carasi* (2008) 44 Cal.4th 1263, 1289, fn. 15; *People* v. *Gutierrez* (2009) 45 cal. 4th 789, 809.) Here, the violations of due process and of the Sixth and Eighth Amendments are the results of independent errors of prosecutorial misconduct and vouching. No specific constitutional objection was required to preserve this aspect of the issue.

F.

In arguing prejudice, appellant began with analysis of the evidence, focusing on the degree to which the accomplice testimony of Tony Iuli and Jay Palega was important to the prosecution's case – a matter that depended on the strengths and weaknesses of the incriminating circumstantial evidence. On the one hand, a week after the robbery, appellant was arrested with Nolan's engagement ring and Movado watch on his person; Nolan's property was scattered about in the hang-out room; Brad Archibald testified to selling appellant the shotgun used to kill Nolan; and the leather jacket with Nolan's blood on it had been stolen by appellant from St. Rose's hospital a few months earlier. (AOB, p. 82.)

On the other hand, as appellant pointed out, the intensity of a communal regimen at the Folsom Street house was apparent. The house was a three-bedroom bungalow where 25 people and three or four different families lived in a quasi-

tribal structure. Appellant's father was a chief, and appellant was the chief's son, with the attendant duties of that position and the concomitant prestige. (AOB, p. 83.) Not only did this provide an evidentiary base to undercut the incriminating inferences from the loot scattered, not merely about the hang out room, but in the kitchen as well, it also undercut the incriminating fact that some of the loot was recovered from appellant's person. For under the melded ethos of tribe and gang, appellant would receive a portion of the "loot/spoils" from the "jacking/raiding" excursion of the younger "gangbanger/warriors." In short, it was not implausible or impossibly inconsistent for appellant to be home discharging his duties to the family, legally innocent of the crimes which he nonetheless morally sanctioned, which he provided the guns for, and from which he took his tribute. (AOB, pp. 83-84.)

The point here was and is that the testimony of Tony Iuli and Jay Palega was needed by the prosecution to dispel the weaknesses in the physical evidence that pointed in the direction of reasonable doubt in favor of the defense. Undoubtedly, there was a strong element of *mutual* reinforcement between the two aspects of the case, but the mutuality was necessary *and* especially beneficial with Ms. Backers' undue inflation, through vouching, on the accomplice side of the equation. When one considers that the accomplice testimony was highly motivated to conform to the prosecution's requirements – with Iuli and Palega exchanging paroleless life-terms for a mere sixteen years --, then the effect of a vouching error could not but be a significant distortion in the assessment of guilt in this case.

Respondent's argument for lack of prejudice fails to focus specifically or analytically on what was strong or not about the prosecution's case *independent* of Iuli and Palega's evidence. Respondent gives a lengthy rendition of the events of May 17 by resummarizing the testimony of Iuli and Palega. (RB, pp. 85-86.) The only adjustment for a prejudice argument is respondent's commentary that this or that evidence (from Iuli or Palega) made "appellant's intentions clear" (RB, p. 85),

or clearly showed "his guilt" (*ibid.*), or made his role "as killer and leader of the group . . . evident." (RB, p. 86.) One need not deny that based on an uncritical acceptance of the testimony of Iuli and Palega, all of this is true; but in regard to vouching error that unduly buttresses that testimony, all of this begs the question.

But to the extent that respondent's lengthy resummary of the case is indiscriminate, he necessarily touches on points that do need to be addressed. Respondent begins his argument on prejudice with a detailed rendition of how appellant obtained the guns and ammunition from Brad Archibald and how he displayed this new firepower to Iuli and Palega. (RB, pp. 84-85.) Although respondent introduces this as evidence of "[a]ppellant's intentions to commit robbery *and* murder" (RB, p. 84, emphasis in original) – a matter not very material to the issue of identity of the perpetrator – the allegedly clear proof of such intent would contribute to proof of identity, and in this regard one *should* examine more closely the evidence given by Brad Archibald.

According to Archibald, appellant obtained the guns from him in late February or early March (10RT 2414-2416) – a couple of months before the robbery. Archibald further testified that what initiated the transaction was Archibald's casual remark noting the bullet holes in the family van parked outside appellant's house. When Archibald asked what happened, appellant explained and then asked if Archibald had any guns appellant could buy for protection. (10RT 2416-2417, 2426, 2441.) This hardly constitutes "clear" evidence that appellant obtained the guns with a view to going on a robbery expedition on May 17. One could add Tony Iuli's testimony that Archibald, or at least some white guy, delivered the guns to appellant only three days before May 17 (10RT 2468) and conclude that this showed appellant's clear intent to go out robbing, but then, again, the credibility of Tony Iuli is the very point at issue in the vouching errors.

As to the physical evidence, respondent goes over it again, but fails to address appellant's argument about it. Respondent goes through every piece of incriminating evidence recovered anywhere in the Folsom Street house. (RB, pp.

87-88.) Respondent resummarizes the ballistics evidence that connected the pellets recovered from Nolan's chest to the shotgun appellant bought from Archibald. (RB, p. 88.) Respondent also mentions the recovery of the wedding ring and the Movado watch from appellant's person (RB, p. 88), but it is treated on a level equal with the items recovered from the house itself. None of this addresses appellant's identification of the weakness in the circumstantial evidence from which indeed a reasonable doubt, rooted in the evidence, could arise.

From here, respondent goes over the deficiencies of the defense case, finding Tautai's motive to fabricate, inherent in his immunity from the death penalty as a juvenile (RB, p. 89), somehow more compelling than Iuli and Palega's motive to fabricate, inherent in the promise of a generously lenient determinate term – a term Iuli was so determined to obtain that he turned down two previous offers of reduced *in*determinate terms. In any event, respondent also finds it crucially destructive of Tautai's credibility that Tautai, in his immediate post-arrest statement, identified appellant as participating in the crime. (RB, p. 89.) Yet Tautai testified that his initial statement was a lie motivated by his covetousness of appellant's place and status as next in line for chief. (15RT 3309-312, 3319.) Undoubtedly, envy in this specific cultural garb is strange to American sensibilities, but envy is not, and it is certainly no stranger than the respondent's theory that Tautai would sacrifice himself to a "mere" life term in prison at the other extreme.

The other alleged problems with Tautai's testimony, his inconsistencies, evasions, quasi-evasions, were really no greater than one would expect in dealing with gangbangers in trial, and they do not exceed the same problems exhibited by Tony Iuli and Jay Palega. The same is true for Lucy Masefau's testimony with the key question of why she waited four years to reveal appellant's alibi. (RB, p. 90.) The clash of cultures, not merely Samoan versus American, but American gang culture versus American can account for this, but even if she had come forward at the earliest opportunity, respondent, and Ms. Backers before her, would be

emphasizing that she was his wife – one of the relationships that renders alibis inherently ineffective with jurors. The point here is that the key to the guilt determination was still the circumstantial evidence, and if the strengths for the prosecution reinforced the accomplice testimony of Iuli and Palega, the weaknesses reinforced the alibi testimony of Tautai and Lucy.

Appellant's analysis of prejudice was not confined to the evidence itself. He demonstrated how the vouching errors in this case were particularly volatile in a trial atmosphere that was personalized by Ms. Backers right from opening statement, where she sought to draw out all the inflammatory emotion in the case, and then maintain the intensity of this emotion during the evidentiary presentation and through to her closing arguments in the guilt phase. (RB, pp. 84-88.) Whether or not these other instances crossed the line of propriety (and some did), Ms. Backers' tone was unmistakably personal, and the vivid force of this personality could not but make an impression on the trial process. This was not to say that she could not exploit her gifts as an advocate, but it is to say that because of these gifts her *improprieties* were amplified in their effect and resounding in their results. Respondent addresses none of this aspect of the question of prejudice.

Appellant has met his burden of establishing a reasonable probability that absent these errors, appellant would have been acquitted. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.) Respondent cannot meet his burden of establishing beyond a reasonable doubt that the vouching errors were harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XV.[3]
REPLY CONCERNING VOUCHING ERRORS AS THEY AFFECTED THE PENALTY DETERMINATION

As appellant argued in his opening brief, the vouching errors that occurred in the guilt phase of trial constituted also vouching errors in the penalty phase of trial, not only because the two phases are formally subdivisions of a unitary proceeding (*People* v. *Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1233), but because all the guilt phase evidence and presentation constitutes evidence and presentation for the penalty phase of trial. (*People* v. *Ramirez* (2006) 39 Cal.4th 398, 374; *People* v. *Champion* (1995) 9 Cal.4th 879, 946-947.) (AOB, pp. 182-183.) As for this trial specifically, apart from the fact that Iuli and Palega reappeared to testify at the penalty phase, the entire problem of vouching in this case crystallized not only around their allegedly diminished degree of moral culpability, but around their drastically diminished degree of *punishment* – for both a massive reduction to 16 years and 8 months from an unparolable life term for Iuli and from a possible death penalty for Palega. (AOB, p. 184-185.)

In examining the penalty trial, appellant demonstrated how the improper appeal to Ms. Backers' personal morality in the guilt phase of trial resonated at the penalty phase and vitiated otherwise proper arguments for a penalty trial, engendering a substantial likelihood that they too represented the prosecutor's personal moral assessment of the case and the penalty. (AOB, pp. 185-192.) Finally, appellant demonstrated how all this was prejudicial in a case in which aggravation was overwhelmingly dependent on factor (a) evidence related to the charged crime, and in which the factor (b) evidence did not weigh heavily in the balance. (AOB, pp. 192-197.)

Respondent begins his reply with a brief re-invocation of his argument for procedural default. (RB, p. 177.) The answer to that need not be repeated of

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[3] See the introduction above, pp. 1-2.

course, because the vouching errors at issue are the same ones discussed above, all occurring at the guilt phase of trial. How they resonated at the penalty phase was not vouching error in itself, but rather showed the effect of the guilt-phase vouching carried over into the penalty phase of trial. One may denominate this as "prejudice," if it helps the analysis, but the point is that once Ms. Backers' personal expression of morality and invocation of personal prestige was injected into the case, it tainted all expressions that were colorably personal, including her invocations of morality that would have been otherwise appropriate to the penalty phase of trial. Thus, when respondent moves to the substance of the issue and contends that "[i]n all instances cited by appellant, the prosecutor was clearly arguing that the death penalty was the moral and proper verdict based on the facts of the instant case" (RB, p 177), he would be correct except for the fact that the jurors had no way, at this point, of distinguishing what was and was not based *solely* on the facts of the case and what was based on the self-proclaimed integrity of Ms. Backers' own moral assessment of the penalty.[4]

Respondent next takes exception to appellant's citation to *Kindler* v. *Horn* (E.D. Pa.2003) 291 F.Supp.2nd 323, where the prosecutor expressly endorsed the death penalty for one of the defendants in a joint penalty trial, while professing a respectful deference to the jury's prospective disposition of the other. (AOB, p. 188.) The denigration of the parallel by respondent is not based on the fact that in *Kindler*, the foil for vouching was a co-defendant instead of an accomplice, as it was here. Rather, according to respondent, *Kindler* involved the assurance by the prosecutor of evidence not presented, while here there was no such intimation. (RB, p. 178.) But as seen in the previous argument (see above, p. 13, fn. 2), that is

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[4] The same gross mischaracterization of appellant's argument informs respondent's statement that "[a]ppellant next argues that the prosecutor committed misconduct because she relied on facts testified to by Iuli and Palega for the death penalty." (RB, p. 178.) No, appellant contends that Ms. Backers' vouching for Iuli and Palega also carried over in its effect to their penalty phase testimony.

not the only form of vouching; there is also the invocation of the extra-evidentiary consideration of the prosecutor's personal or official prestige. (*People* v. *Huggins* (2006) 38 Cal.4th 175, 207; *People* v. *Riggs* (2008) 44 Cal.4th 248, 302.)[5]

In the context of a penalty trial, vouching occurs when the expression of personal views would inflame the jury (*People* v. *Ghent* (1987) 43 Cal.3rd 739, 772), or when the emphasis on the prosecutor's authority or personal integrity invite and encourage the jurors to defer to the prosecutor's judgment. (*Weaver* v. *Browersox* (8th Cir.2006) 438 F.3rd 832, 841.) By these measures, the only difference between the misconduct of the prosecutor in *Kindler* and that of Ms. Backers was that in *Kindler* the prosecutor's vouching came in the formal penalty trial itself, while Ms. Backers' vouching occurred at the guilt phase of trial. But as seen from above, this represents a merely formal distinction since the guilt phase occurrence was part of the same trial and resonated throughout.

In regard to prejudice, appellant engaged in a detailed analysis of the penalty determination. As appellant demonstrated, the decisive factor in aggravation was the narrow factor (a)[6] evidence connected with the commission of the crime. The victim-impact evidence, which was effectively elaborated beginning in the guilt phase itself, was emotionally compelling, but there had to be some limit to the amount of punitive responsibility one could load on the shoulders of appellant for consequences he could not possibly anticipate or intend. At some point, this becomes simple fortuity without significant moral weight for

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[5] Even when the emphasis in vouching is on the prosecutor's qualities and prestige, there is always a residual implication that the prosecutor is privy to information not presented to the jury. In this case there was indeed a strong implication of this in the Muraoka stipulation's assurance that the plea bargains conferred on Iuli and Palega were based on Ms. Backers' "review and evaluation of the evidence . . . ." (13RT 3000-3001.)

[6] "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to section 190.1." (Pen. Code, § 190.3(a).)

the assessment of the degree of punishment. (AOB, pp. 194-195.) Also, as appellant demonstrated in his opening brief, the factor (b)[7] aggravation, which painted an unflattering portrait of an adolescent street thug, was nonetheless disproportionate to the violence of the charged crime, and did not significantly encroach on defendant's evidence in mitigation that showed him to be a man of responsibility at least within the narrow scope of his family relations. (AOB, pp. 195-196.) The key element in the penalty trial was therefore the *immediate* circumstances of the commission of the crime, and the details of this were particularly dependent on the guilt phase testimony of Iuli and Palega.

Respondent does not answer in kind, either in this argument or anywhere in the remainder of the brief. The closest he comes to addressing penalty phase prejudice is a brief reference to the ineffective assistance of counsel claim, used by appellant as an alternative argument for preservation of the vouching issues. (AOB, pp. 80-81.) In his answer on the penalty phase aspect of the vouching issue, respondent asserts that there was no ineffective assistance of counsel because, *inter alia*, "in light of the overwhelming evidence of appellant's guilt (see Arg. I, § I *ante*), appellant was not prejudiced by counsel's failure to object." (RB, p. 179.) But of course by now guilt was not at issue but penalty and moral culpability, and within this broader area of consideration, there were considerable factual variations possible that undercut the prosecution's picture of the event – a picture whose detail depended on the testimony of Tony Iuli and Jay Palega. One may take respondent's oblique argument on prejudice here as a concession, however, that the case for penalty relied predominantly on factor (a) and not on factor (b). This boosts appellant's claim that without the vouching errors, there was a reasonable possibility that the jury verdict would have been less than death.

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[7] "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3(b).)

(*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

II.
REPLY CONCERNING *DOYLE* ERROR

Appellant contended that Ms. Backers' argument that appellant's four-and-a-half year time waiver, during which he kept his alibi "secret," constituted misconduct under the principles of *Doyle* v. *Ohio* (1976) 426 U.S. 610. (AOB, pp. 89-91.) The *Doyle* violation inhered in Ms. Backers' exploitation for prosecutorial purposes of appellant's rights under *Miranda* (*Miranda* v. *Arizona* (1966) 384 U.S. 436), and of his rights under the Sixth Amendment to representation of counsel and to effective assistance of counsel. (AOB, pp. 91-92.) In regard to defense counsel's default in failing to object, appellant urged that the People should be estopped since the Berger stipulation were designed for a specific purpose (see AOB, pp. 47-53) and not as an omnibus piece of evidence to be used in any manner the prosecutor wished. (AOB, p. 95.) In any event, as appellant argued, these considerations favored an exercise of this Court's discretion to review an issue of constitutional law over which there is no factual dispute. (AOB, pp. 95-96.) Finally, appellant contended that a timely objection and admonition would have been futile. (AOB, p. 96.)

Respondent begins by invoking procedural default, without addressing any of appellant's specific arguments. (RB, pp. 98-99.) There is little here to add, excepting perhaps to amplify on the futility argument which was made on the basis of the specific record in this case. There is in fact authority that a failure to object to *Doyle* error does not constitute a forfeiture on the ground that harm from such error *in general* cannot be cured by admonition. (*Morgan* v. *Hall* (1st Cir.1978) 569 F.2nd 1161, 1168; *United States* v. *Prescott* (9th Cir.1978) 581 F.2nd 1343, 1352; but see *People* v. *Crandell* (1988) 46 Cal.3rd 833, 879, fn. 14.)

On the substance of the issue, respondent begins with the definitive assertion that "[a]ppellant fails to understand *Doyle* error." (RB, p. 99.) According to respondent, "*Doyle* applies only where the defendant testifies and is cross-examined about his post-*Miranda* silence. [Citation.] Appellant's claim ignores the fact that he never testified and was not cross-examined. *Doyle* does not apply to the case at bar." (RB, p. 99.)

Doyle error is predicated on the prosecution's use of the defendant's reliance on an enumerated constitutional right as evidence of guilt. (*Doyle* v. *Ohio*, *supra*, 426 U.S. at pp. 610-613.) "[P]rosecutors may not comment on a defendant's post-arrest silence in their case-in-chief, on cross-examination, *or* in closing arguments" (*United States* v. *Tarwater* (6th Cir.2002) 308 F.3rd 494, 511, emphasis added), and "*Doyle* error can occur either in questioning of witnesses *or* jury argument." (*People* v. *Lewis* (2004) 117 Cal.App.4th 246, 256, emphasis added; *People* v. *Evans* (1994) 25 Cal.App.4th 358, 368.) Moreover, *Doyle* error does not *only* occur when the defendant testifies. (See *People* v. *Lindsey* (1988) 205 Cal.App.3rd 112, 116-117; see also *Knapp* v. *White* (E.D.Mich.2003) 296 F.Supp.2nd 766, 776.) Respondent's characterization of *Doyle* is preposterous.

From a literal formalism, respondent proceeds to a substantive literalism, claiming that nothing in Ms. Backers' remarks constituted a "specific comment on appellant's 1996 post-arrest and post-*Miranda* silence," but rather a comment on Lucy Masefau's delay in coming forward. (RB, p. 100.) But if it were only that, and not intended to imply that the manipulation was by the defense and the defendant, why was the delay tied to appellant's exercise of a time waiver? Why did the preface to this argument refer *expressly* to what *appellant* was doing?: "In June of 1997, if you are sitting here and you are innocent and you have an airtight alibi, you can have your trial in 60 days. [¶] But he didn't. *He* waived time. *He* waived time. And that is proven by stipulation in this case. [¶] Real alibi witnesses do not sit on their alibi and keep it secret for four-and-a-half years while their allegedly innocent husbands are rotting in jail." (17RT 3472-3473, emphasis

added.) The implication of course is that it took *appellant* four and a half years to enlist his wife in this (in Ms. Backers' view) trumped-up alibi. When the express reference is to a proxy for the defendant, *Doyle* error still occurs through plain implication. (See *People* v. *Lindsey*, *supra*, 205 Cal.App.3rd at pp. 116-117.)

Respondent also takes issue with the Sixth Amendment and Eighth Amendment predicate for the *Doyle* error. (RB, p. 100.) However, in regard to the latter, appellant never urged that as a *Doyle* predicate. Appellant was not arguing that Ms. Backers' remarks penalized his reliance on the Eighth Amendment and thereby constituted unfairness under the Fourteenth Amendment. Rather, appellant was arguing that the *Doyle* error, predicated on Fifth and Sixth Amendment reliance, *resulted* in an unreliable capital determination in violation of the Eighth Amendment. To this end, appellant went to lengths to demonstrate this unreliability in reference to the specific record in this case. (RB, pp. 92-95.)

As to the Sixth Amendment, which appellant was urging as a predicate for the *Doyle* error, respondent teaches us that this Court is not bound by *Marshall* v. *Hendricks* (3rd Cir.2002) 307 F.3rd 36, but does not teach us why we should not be persuaded by it, or by what reasoned principle *Doyle* can be limited to a reliance on a *Miranda* right. In any event, the Third Circuit Court of Appeal is certainly not the only court that applies the *Doyle* principle to reliance on rights other than *Miranda*. (*People* v. *Wood* (2002) 103 Cal.App.4th 803, 808-809; *People* v. *Keener* (1983) 148 Cal.App.3rd 73, 79; *People* v. *Garcia* (2009) 171 Cal.App.4th 1649, 90 Cal.Rptr.3rd 440, 447.)[8]

Respondent devotes a subsection of his argument to demonstrating that if there was no *Doyle* error here, there was no prosecutorial misconduct. (RB, pp. 101-102.) Appellant has carefully reviewed his opening brief and fails to detect

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[8] *Garcia* also finds that there is a constitutional prohibition against using evidence of the invocation of the Fifth Amendment right to silence even without there being *Miranda* warnings. (*Ibid.*)

where any divergence between *Doyle* misconduct and prosecutorial misconduct is asserted.

In regard to prejudice, appellant referred back to his analysis of the case in the first argument, showing that there was a substantial basis on which to form a reasonable doubt as to guilt. This analysis was independent of Lucy Masefau's testimony. (AOB, pp. 82-83.) Because appellant's defense was not completely dependent on alibi, and therefore not completely dependent on Lucy Masefau's testimony, the prosecutor's misconduct in impugning appellant's alleged dishonesty and manipulation of the criminal justice system was prejudicial, since the imputation extended its taint far beyond the localized issue of an alibi. (AOB, pp. 96-97.) Respondent answers the prejudice argument with the question-begging demonstration of how bad Lucy Masefau's testimony was. (RB, p. 103.) Respondent thus fails to meet his burden to show that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

III, XVII.[9] REPLY CONCERNING MISCONDUCT IN IMPUGNING DEFENSE COUNSEL'S INTEGRITY AND ACCUSING HIM OF FABRICATING EVIDENCE

In issue III of the opening brief, appellant faulted Ms. Backers for impugning the integrity of defense counsel and for accusing him of fabricating evidence. (AOB, pp. 97-101.) In one instance in her closing argument, she asked rhetorically why Mr. Ciraolo cared about the shotgun wadding if his client did not do the murder. The answer that was obvious to her was that Mr. Ciraolo in fact knew that "Paki is the shooter." (17RT 3436-3437.) (AOB, p. 99.) In the second instance, she accused Mr. Ciraolo of perpetrating a long list of "shams," first of which was the misleading contention that the wadding did not really come from Nolan's chest. (17RT 3604-3605.) (AOB, p. 101.) Appellant argued that the

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[9] See Introduction above, pp. 2-3.

failure to object should be excused for futility, first because the trial court demonstrably believed that subjective beliefs and motives of the parties were material issues in the case, and secondly because Ms. Backers' personalization of this case through vouching would prevent the *jury* from being able to distinguish proper from improper even in the face of a correct admonition. (AOB, p. 101-102.) In argument XVII, appellant demonstrated how the imputation against the honesty and integrity of defense counsel hovered over the entire case so as to prejudice appellant also at the penalty phase of trial. (AOB, pp. 207-208.)

Respondent denies that there was misconduct at all. According to respondent, only appellant's "own overly-dramatic interpretation of the prosecutor's actual closing remarks" could transform Ms. Backers' argument on the wadding into an imputation against defense counsel. (RB, p. 107.) "Appellant's claim fails," he tells us, "because the prosecutor never stated that defense counsel knew appellant was guilty or that defense counsel did not believe appellant's defense." (RB, p. 107.) Respondent does not specifically refer to the second instance of misconduct, where Ms. Backers was accusing Mr. Ciraolo of putting forth various "shams," but his implied argument seems to be that Ms. Backers was merely speaking about the inflation by defense counsel of otherwise unpersuasive evidence. (RB, p. 108.)

In regard to the law, there is no dispute: "It is improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case." (*People* v. *Thompson* (1988) 45 Cal.3rd 86, 112; *People* v. *Valencia* (2008) 43 Cal.4th 268, 302.) There is also no dispute here that the parties are indeed accorded

> "a wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. ([*People* v.] *Bemore* [(2000)] 22 Cal.4th [809,] 846 . . . .) For example, it is not misconduct for a prosecutor to accuse counsel of making an 'irresponsible' third party culpability claim. (*People* v. *Frye* (1998) 18 Cal.4th 894, 978 . . . .) A

> prosecutor may also criticize the defense theory of the case for lacking evidentiary support. (*People* v. *Fierro* (1991) 1 Cal.4th 173, 212, & fn. 9 . . . .)" (*People* v. *Belton* (2008) 168 Cal.App.4th 432, 441.)

At issue here is which side of the line Ms. Backers' argument stands.

It has been conceded that Ms. Backers was entitled to expend whatever degree of rhetorical heat she wished on the issue of the wadding, which, as demonstrated in the opening brief, was a minor one. She could ask, "Well, why does Mr. Ciraolo care if the shooting was at close range if Tautai is the shooter?" to illustrate how the issue of the wadding did not help the defense case. Indeed, she could even call Mr. Ciraolo "irresponsible" for implying that Clifford Tschetter was somehow incompetent or dishonest. But what she could not do was answer her own rhetorical question as follows: "Because he knows you are not going to believe that Tautai is the shooter. *He knows* that Paki is the shooter. *And he is hedging his bets* by making all this conversation about this wadding because *he knows* that you know that Paki is the shooter." (AOB, p. 99.) When this question of the wadding is also attributed to Mr. Ciraolo as a "sham," there is further implied a fabrication of evidence. In short, it is not appellant that is over-dramatizing Ms. Backers' argument, it is Ms. Backers who seems to feel the persistent need to over-dramatize her own argument by making the attorneys, herself included, protagonists in a morality play unfolding before the jury.

In regard to procedural default, appellant has set forth his argument in the opening brief. (AOB, p. 102.) Respondent answers with the assertion that appellant's argument on futility of objection is "pure conjecture" (RB, p. 104) and "bald assertion." (RB, p. 105.) It is not conjecture that the trial court believed that the subjective motives of the prosecutor were relevant and material to this case. This has been demonstrated thoroughly. (See above, pp. 8-12.) Why would the trial court then sustain an objection by defense counsel to an argument that questions his motives? The very heading of respondent's argument, "**The**

Challenged Remarks Were Relevant" (RB, p. 105), sums up the same fallacy that led to the vouching errors. Clearly, the court would not have sustained a timely objection to Ms. Backers' argument. Further, appellant's claim of futility of objection is hardly *ipse dixit*. In a case that had been personalized by Ms. Backers' vouching and overall rhetorical habits, the jury would simply be unable to discern a coherent principle by which one argument was proper and one was not even in the face of an admonition. Even if the jurors might try to obey the bare force of the admonitory prohibition from the court, the emotional charge of Ms. Backers' argument and presentation could not but still have influence on the jurors.

On the issue of federal constitutional error, appellant contended that Ms. Backers' imputations against defense counsel touched directly on appellant's right, guaranteed by the Sixth and Fourteenth Amendments, to a meaningful opportunity to present a defense (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 689-690), on his right to a conviction based only on competent and relevant evidence (*Bruton* v. *United States* (1968) 391 U.S. 123, 131, fn. 6), to his right to effective assistance of counsel (*Bruno* v. *Rushen* (9th Cir. 1983) 721 F.2nd 1193, 1194-1195), to his right to a fundamentally fair trial free from egregious prosecutorial overreach (*Darden* v. *Wainwright* (1986) 477 U.S. 168, 181), and to his Eighth Amendment right to a reliable capital determination. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) (AOB, 103-104.) Despite the specific contentions, respondent does little more than wag his finger and admonish that prosecutorial misconduct is generally not federal constitutional error. (RB, p. 109.) He adds to this perfunctory censoriousness, the further claim that "[s]ince no error occurred under state law, there was no federal constitutional violation." (RB, p. 109.) But there was in fact state law error and it resulted in prejudice of constitutional magnitude.[10]

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[10] Again, respondent's claim that federal constitutional error was procedurally defaulted (RB, p. 109) cannot be maintained as an independent form of procedural default here. (*People* v. *Partida* (2005) 37 Cal.4th 428, 438-439.)

IV.
REPLY CONCERNING MS. BACKERS' APPEAL TO PASSION AND PREJUDICE, WHICH UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE GUILT PHASE OF TRIAL

In argument IV of the opening brief, appellant reprehended as a denial of due process Ms. Backers' use of the guilt phase of trial to inflame the moral indignation of the jurors and to exploit their passions and prejudices with the emotional tale of a bridegroom murdered on the eve of his wedding. Her rhetoric was calculated to inflame the jurors' emotions, and to overturn the equilibrium of their impartiality; her behavior in doing so was misconduct. (AOB, pp. 105-106.)

The improper strategy began in Ms. Backers' opening statement, where the colorless dull dross of indicia evidence to show Nolan's ownership of, and connection to, various items recovered from the Folsom Street house became the pretext for her express evocation of the imminent nuptial joys that were shattered in horror (AOB, pp. 106-108); where the crime victims were transformed into Ms. Backers' personal clients as though vindication of the public order and public justice was an insufficient occasion for prosecuting the crime of murder (AOB, pp. 109-110); and where the defendant did not kill and flee on the prosaic streets of Hayward, but rather "he left that sweet bridegroom to die all alone on a deserted street." (6RT 1641.) (AOB, p. 110.) Appellant also demonstrated that although there was little room here to increase the rhetorical heat of opening statement, Ms. Backers' was eminently able to maintain at least the same intensity through to her closing arguments. (AOB, pp. 84-85, 110-111.) Appellant acknowledged the failure of objection, but urged the excuse of futility in the face of this overheated rhetoric and the trial court's liberality toward Ms. Backers' general tactic of reducing all guilt issues to the level of *ad hominem* resolution. (AOB, pp. 112-113.)

In regard to procedural default, respondent takes issue with appellant's reliance on *People* v. *Bandhauer* (1967) 66 Cal.2nd 524. Appellant's reference to

Bandhauer was in support of a generalized proposition that misconduct (of any type) that is scattered insidiously through an opening statement or a closing argument or both, should not be procedurally defaulted where any one instance taken alone was either equivocal or not worth noting, but where the overall effect was devastating. (AOB, pp 112-113.) The parallel between *Bandhauer* and this case is significant in this regard, yet respondent has eyes only for the literal difference that *Bandhauer* involved the misconduct of vouching while this issue involves the misconduct of appealing to passion and prejudice. (RB, p. 115.)

If it does make any difference, both forms of misconduct are similar in that they improperly inject extra-evidentiary considerations into the trial process. If it does make any difference, in this case, Ms. Backers' vouching tended to turn even proper argument into a personally subjective expression of pity or indignation. But none of this makes a difference in reference to the question of procedural default, and respondent must find a better ground on which to distinguish *Bandhauer*.

Appellant also invoked futility of objection based on the latitude the trial court accorded to Ms. Backers to commit the same sort of misconduct in formulating her questions to Lucy Masefau. (AOB, p. 113.) Respondent notes that indeed the court did overrule defense objections to Ms. Backers' referring to Nolan as a "sweet Filipino boy," and to asking Lucy whether she watched the traumatized family on the news, but objects to appellant's conclusion from the overruling of these blatantly argumentative questions. "The fact that the trial court permitted the prosecutor some latitude in cross-examining an adverse witness provides no support for appellant's claim that an objection during opening and closing arguments would have been futile." (RB, p. 116.) Why not? Is the merely formal difference as to when an impropriety occurs in the trial process significant when the substance of the impropriety is the same no matter where in the process it occurs? Respondent does not tell us, and leaves us to accept the assertion as self-evident.

In regard to appellant's contention that an admonition would have been ineffective in the face of Ms. Backers' inflammatory rhetoric, respondent begs the question by making the substantive argument that there was nothing to admonish:

> " . . . . First, the prosecutor did not engage in 'exploitive rhetoric;' rather she presented the heinous and true facts to the jury. The evidence presented during the guilt phase plainly demonstrated that appellant murdered Nolan on his wedding day and stole his wedding watch, a gift from his bride. [Citations.] The prosecutor is not required to save the most damaging and emotional facts until penalty phase simply because they are damning to appellant. Appellant's crimes were heinous and his timing unimaginably painful for Nolan's loved ones. Appellant's own actions made his crimes and his trial emotionally charged, not the prosecutor's argument of the facts." (RB, pp. 116-117.)

No one required Ms. Backers to save damaging and emotional facts until the penalty phase simply because they are damning to appellant. Nolan Pamintuan was robbed and murdered on the eve of his wedding on his way home from the rehearsal dinner. From appellant's house and person were recovered wedding gifts and other items connected to Nolan's wedding. But the central significance of the wedding at the *guilt* phase of trial was simply to help identify the loot recovered and more broadly to provide the context for Nolan's movements in the time proximate to the murder and its aftermath.

The wedding was not an important consideration in assessing the legal guilt of the defendant. The thrust of the evidence would have been the same if Nolan Pamintuan's wedding was a week away, or if he had been returning from a baseball game instead of a rehearsal dinner, or even if he was not the "sweet bridegroom," but perhaps a repulsive old stumble-bum murdered in an alley for the spare change he had cadged for another bottle of cheap wine, or perhaps a flashy drug dealer murdered in a sale gone awry. From the perspective of the guilt

determination, the wedding and its timing was fortuitous, and it behooved Ms. Backers' to restrain her rhetoric in this regard until she obtained, if she could, a conviction for first-degree murder predicated on the special circumstance, *not* for the killing of a bridegroom or even a "sweet bridegroom" on the eve of his wedding, but for killing a human being in the commission of a robbery.

This Court has clearly formulated the standard by which tactics such as those used by Ms. Backers are to be measured. "During the guilt phase of a capital trial, it is misconduct for a prosecutor to appeal to the passions of the jurors by urging them to imagine the suffering of the victim." (*People* v. *Jackson* (2009) 45 Cal.4th 662, 691.) For "an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People* v. *Stansbury* (1993) 4 Cal.4th 1017, 1057; *People* v. *Mendoza* (2007) 42 Cal.4th 686, 704.) If there is any doubt that Ms. Backers' crossed the line inherent in these formulations, one should consider this Court's admonition to trial judges regarding the control of the emotional aspects of a *penalty* trial. Although there is in a penalty trial materiality and relevance to these sorts of appeals to sympathy for the victim,

> "[n]evertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People* v. *Haskett* (1982) 30 Cal.3rd 841, 864; see *People* v. *Jackson*, *supra*, 45 Cal.4th at pp. 691-692.)

Thus, if restraint still has its place in a penalty trial, can there be any doubt that Ms. Backers' crossed the line of propriety at least for a guilt trial? To return to the question of procedural default, can there be any serious question that the impropriety of her rhetoric in the guilt phase of trial was incurable through admonition? To both questions, the answer is no.

In examining specific instances, respondent does little more than avert his eyes from the reality of the record in this case. What appellant has characterized as the rhetorical inflation of the wedding details in excess of their probative value for the issues of guilt, respondent characterizes as a sort of rhetorical dividend from the relevant and material evidence coinciding with the wedding details. (RB, pp. 117-118) Respondent's position of course destroys the formulated mean of restraint this Court had laid down in such matters. A murder victim can only be a human being. (Pen. Code, § 187.) As such, he or she will have some or most or all of the essential or accidental attributes of human life, many of which can be amplified emotionally in a way that resonates with the other human beings sitting on a jury and judging the issue of legal guilt. But in a guilt trial, there is not a great deal of room for this amplification to expand, so that a wedding, for example, that has some relevant part in establishing the provenance of loot taken in a robbery, has no sentimental function to discharge in such a trial. Even a cursory examination of Ms. Backers' opening statement and closing argument reveals that intense sentiment was the tail wagging the dog of forensic proof.

Respondent's contrived imperception extends to his examination of the closing argument where Ms. Backers punctuated her narrative of the robbery/murder with an invitation to the jurors to "imagine" how terrified Nolan must have felt. According to respondent, the words, "imagine begging for your life, begging let go [etc.]" and "imagine trying to save your own life [etc.]" was not an invitation "to view the crime through Nolan's eyes" but rather an illustration "of appellant's thought process leading up to him shooting Nolan and the cold-blooded nature of his decision to do so." (RB, p. 120.) If so, why did

each juror have to exercise his or her own imagination as to how it felt to beg for one's own life? If the point was that the perpetrator's ability to withstand the pathetic pleas of the victim was evidence of a cold-blooded state of mind, then there was no need to urge the jurors to *feel* the victim's fear and terror.

One could keep parsing the matter in all sorts of subtle ways, as respondent does when he explains how Ms. Backers' reference to Nolan and his family as her "clients" was not really a reference to Nolan and his family as her clients. (RB, pp. 120-121.) But the undue emotionalization of the opening statement, with talk of weddings and trophy killings and sweet bridegrooms, simply swept away all nuance in a flood of rhetoric so that indeed, Nolan and his family in fact appeared to be – as Ms. Backers emphatically told the jury they were -- Ms. Backers' literal clients.

Respondent's attempt to reduce the matter of Ms. Backers' excess to discrete instances in which one has nothing to do with the other ignores the critical mass of rhetorical heat that pervaded the entire guilt trial with undue and inappropriate emotion. And it is this point that renders respondent's argument on prejudice unavailing when he points to how, in *People* v. *Stansbury*, *supra*, 4 Cal.4th 1017, this Court found the prosecutor's misconduct to be without prejudice. (RB, pp. 122-123.) In order to make this case fit the paradigm of *Stansbury*, respondent has to assert that "even if the prosecutor's references to Nolan and his family constituted misconduct, given the challenged comments were isolated, and made at the beginning of a lengthy closing argument and rebuttal, any alleged error was similarly not prejudicial." (RB, p 123.) Ms. Backers' emotionalization of this case began *not* at the beginning of her final closing, but *at the beginning of the case* in her opening statement to the jury. Thus, the case was at least book-ended, as it were, with her misconduct, but the emotionalization, through her persistent rhetorical vehemence, which included the vouching errors, spread itself over the entire trial. At one and the same time, this renders her misconduct prejudicial under the standard of *People* v. *Watson* (1956) 46 Cal.2nd 818, as well

as a due process violation under *Darden* v. *Wainwright* (1986) 477 U.S. 168, subject therefore to the standard of review for constitutional error under *Chapman* v. *California* (1967) 386 U.S. 18.

V.
REPLY CONCERNING TONY IULI'S HEARSAY STATEMENT THAT APPELLANT "BLEW SOME DUDE AWAY"

Argument V addressed the hearsay Ms. Backers elicited from Tony Iuli regarding what he had told his wife about the incident. Iuli's answer was, " 'Your fucking brother blew some dude away.' " (AOB, pp. 114-115.). Appellant argued that the evidence was not relevant for the non-hearsay theory of fresh complaint (AOB, pp. 115-116); that it was not admissible under Evidence Code section 1230 as a declaration against penal interest (AOB, p. 116); that it was not a spontaneous declaration under Evidence Code section 1240 (AOB, pp. 116-117); and that it was not admissible as a prior consistent statement since defense counsel's opening statement could not, as a matter of law, establish the foundation for this hearsay exception. (AOB, pp.117-120.) Respondent counters that the statement was indeed admissible as a spontaneous utterance (RB, pp. 125-128) and as a prior consistent statement because opening statement could establish the proper foundation. (RB, pp. 128-131.)

First as to spontaneous utterance under Evidence Code section 1240, this requires that the declarant speak under the stress of excitement while his or her reflective powers are still in abeyance due to this stress. (*People* v. *Gutierrez* (2009) 45 Cal.4th 789, 809-810.) According to respondent, sufficient evidence of this inhered in the fact that Iuli had witnessed the murder of Nolan, fled the scene rapidly, watched appellant, Tautai, and Palega wipe down the bloody van, walked home carrying the murder weapon, helped divide the loot, joined his wife in the van to go to sleep, and then without any apparent prompting, told her, "Your fucking brother blew some dude away." (RB pp. 127-128.) Respondent's string

of events between the murder and the declaration is accurate except for the fact that Iuli did not merely watch the others clean the van, he *helped* clean the van himself. (12RT 2847.) In other words, Iuli consciously participated in the suppression of the evidence of the stressful event, and yet, according to respondent, could not reflect on it. No reasonable trier of fact could have found a spontaneous utterance by even a preponderance of the evidence, which was Ms. Backers' burden of proof for this or any other hearsay exception. (*People* v. *Marshall* (1996) 13 Cal.4th 799, 832; *People* v. *Herrera* (2000) 83 Cal.App.4th 46, 59.)

This leads to a second difficulty for respondent, which renders questions of sufficiency of the evidence moot. Before questions of sufficiency of the evidence of spontaneous statement even arose, the burden *should* have been placed on Ms. Backers to indicate what hearsay exceptions she was relying on. When the opponent of the evidence lodges a hearsay objection, which Mr. Ciraolo did, then "[t]he proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation." (*People* v. *Livaditis* (1992) 2 Cal.4th 831, 778.) If the trial court had done this, then indeed there might or might not appear on the record facts sufficient or not to establish spontaneous utterance. For example, while respondent correctly represents that there was no evidence of a prompting from Iuli's wife before he made that statement, that was because Ms. Backers simply asked, without the foundation of facts already in evidence, "What did you tell your wife?" (11RT 2626.)

If Ms. Backers had been held to her burden, we might know whether or not Iuli's statement was in fact unprompted or in response to a question from his wife, such as, "What have you been doing?" or "Where have you been?" If Ms. Backers had been held properly to her burden, we might even know from Iuli's own mouth whether he was unable to reflect as he was wiping his fingerprints off the van. In short, we would know whether or not the trial court even exercised any discretion in regard to spontaneous utterance. One suspects that the trial court did

not view the matter in this way, and respondent cannot steal a march with some sort of hypothetical act of discretion on a record that the People had the burden to clarify.

As for prior consistent statement, there was sufficient evidence of a foundation if, and only if, defense counsel's opening statement could count as providing such foundation. In his opening brief, appellant demonstrated on general principles why opening statement cannot provide evidentiary foundations for any hearsay exception (AOB, pp. 119-120), and how specifically in reference to the statutory exception for prior consistent statement the Legislature, in Evidence Code section 1236, did not intend to broaden the source of foundational facts beyond the confines of the evidentiary process. (AOB, pp. 118-119.)

Respondent's position regarding opening statement is far from clear, but he seems to urge that opening statement, in combination with the trial court's discretion to vary the order of proof, is all that was required in this case to sanction the hearsay as a prior consistent statement. (RB, p. 131.) But respondent has no answer to the question of what rational discretion, in the face of a valid hearsay objection, allows a witness, in advance of actual impeachment, to rehabilitate himself by his own prior consistent statement to which only he is attesting. (AOB, pp. 120-121.)

The only real question here is not the existence of error, but of prejudice. As demonstrated in the opening brief, the jumbling of proper procedures created drama at the expense of objective assessment of the truth. Appellant demonstrated how Ms. Backers capitalized on the hearsay error, and how this error entered into the broader stream of Ms. Backers' dramatization of this case overall. (AOB, pp. 121-124.) Respondent's answer: there was no drama; Ms. Backers was merely an efficient prosecutor, which in turn made the trial judge an efficient judge. But then respondent never sees the smooth surface of this conviction roiled by anything Ms. Backers did or by the trial court's complacent tolerance of her tactics; if anything was possibly wrong, it could not possibly have been

prejudicial. (RB, p. 132) There is no answer to this but to invite this Court to take a serious and careful look at the actual record, as appellant is sure the Court will do.

Finally, respondent makes perfunctory objections to any characterization of the error as an Eighth Amendment violation. First, he argues that appellant made only a hearsay objection and not an Eighth Amendment objection. (RB, p. 125.) Secondly, he argues that a hearsay violation cannot inherently amount to an Eighth Amendment violation. In answer to the first argument, an Eighth Amendment objection is not required to contend that the error, in its effect, resulted in a violation of the Eighth Amendment. (*People* v. *Partida* (2005) 37 Cal.4th 428, 438-439.) In answer to the second argument, if the prejudicial effect of the error was sufficient to inject a significant element of unreliability into the guilt verdict in a capital case, then an evidentiary error can in fact violate the Eighth Amendment. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 628.)

VI.
REPLY CONCERNING TONY IULI'S IMPROPER OPINION REGARDING TAUTAI

Appellant contended that Tony Iuli should not have been allowed to testify that, in his opinion, Tautai acceded to appellant's alleged request that one of the juveniles "take the beef." Not only did Iuli attest to his opinion, he attested to the reasons for it: "I think because it was his brother, his older brother. He wouldn't want to see his older brother go down." (AOB, pp. 125-126.)

In answer respondent simply repeats the trial court's incoherent justification for its ruling: "As noted by the trial court's ruling, the prosecutor was not asking Iuli for opinion testimony. Rather she was simply asking him to explain the factors upon which he based his conclusion that Tautai 'looked like he was going take the beef for somebody.'" (RB, p. 136.)

What a knot of absurdity! A lay opinion by definition is an impression incapable of articulable analysis. (*People* v. *Hurlic* (1971) 14 Cal.App.3rd 122, 127.) But if it is supported by articulable reasons, such reasons are admissible only as *percipient* facts, and then with the opinion itself precluded and suppressed. (*Ibid.*) Iuli's reasons for his opinion were not percipient facts, while his opinion was not lay, and was properly stricken by the trial court. Nothing here was admissible evidence.

In regard to prejudice, respondent argues that the improper evidence was in any event cumulative. Iuli later testified that Tautai told Iuli that Tautai was going to take the blame. (RB, p. 137.) But this is hardly cumulative. There is quite a difference between taking the blame for something one did, and taking the blame on behalf of someone else. Ms. Backers' knew the difference, and the version she chose to elaborate in opening argument was the one based on Iuli's quasi-competent, and stricken opinion: "But he is looking at Tautai. And Tautai looks like he is going for it. Like he is going to fall for it and take the heat for his big brother. He said Tautai didn't get angry, Tautai didn't get mad and say to Paki: This is your own beef. He didn't have the reaction Tony had, but this is his older brother. And he said Tautai wouldn't want to see his older brother go down for this murder." (17RT 3514; see AOB, pp. 127-128.) The error here was prejudicial and requires reversal. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)[11]

VII.
REPLY CONCERNING THE ALLEGED CONTRACT ON TONY IULI

In issue VII, appellant demonstrated that Tony Iuli's testimony about the alleged contract appellant placed on Iuli's life was hearsay. Although the trial

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[11] Respondent's perfunctory incantation that the constitutional issue is forfeited (RB, pp. 135-136) is meritless; its repetition is frivolous. (*People* v. *Partida* (2005) 37 Cal.4th 428, 438-439.)

court initially sustained the hearsay objection to the direct question posed to Iuli of whether or not there had been a contract on his life, the court overruled the hearsay objection to Iuli's testimony that Iuli had told Tautai that appellant had placed a contract on his, Iuli's, life. This indeed was merely hearsay compounded, and the objection should have been sustained. (AOB, pp. 129-131.)

From here, Iuli's testimony metastasized further; the jurors were told that Tautai responded to the news by indicating that he already knew about the contract on Iuli's life. (AOB, pp. 133-134.) With the aid of Ms. Backers' leading questions based on a fact in evidence only through incompetent hearsay, the jurors were told that Tautai agreed to convince appellant to "take the heat off" Iuli if Iuli agreed not to testify against appellant. (AOB, pp. 135-136.) Finally, this complex of evidence was topped off with a monosyllabic affirmation by Iuli to Ms. Backers' hearsay question, "[D]id you tell Tautai that you have been sitting here for four years for something his fucking dumb-ass brother did?" (AOB, p. 135-136.) As for preservation of these issues for review, all incompetent hearsay, except for the last instance of the "fucking-dumb-ass-brother" statement, was objected to. If there was any default, however, it was excused by futility or it constitutes ineffective assistance of counsel.

On the hearsay question, respondent takes the tack anticipated in the opening brief: Iuli's testimony that there was a contract out on his life was adduced, *not* for the truth of the matter asserted, for purposes of credibility. Apparently, as respondent relates the matter, Iuli's affinity for the truth was so strong that even the threat of death could not deter him from telling it. (RB, p. 143.) If the alleged contract, however, was adduced merely to buttress Tony Iuli's credibility, why was it necessary to introduce it through Iuli's alleged conversation with Tautai? Was it because the trial court initially sustained the hearsay objection when Iuli was asked directly if there was a contract on his life? If so, then Ms. Backers' had the burden at that point to announce to the court the non-hearsay purpose of the evidence. (*People* v. *Livaditis* (1992) 2 Cal.4th 831, 778;

see also *People* v. *Armendariz* (1984) 37 Cal.3rd 573, 585; *People* v. *Bunyard* (1988) 45 Cal.3rd 1189, 1204-1205.) She did not, thereby depriving defense counsel of the opportunity make an argument based on relevance or on Evidence Code section 352. Further, if the evidence was adduced for the non-hearsay purpose of establishing Iuli's credibility, why was it necessary to have Iuli testify that Tautai acknowledged *the truth of the matter asserted* in Iuli's own representation that appellant placed a contract on Iuli's life? It was of course unnecessary, and the reason Ms. Backers presented the evidence in this way was because she wanted to represent this alleged contract as a fact to be adduced in the guilt phase as consciousness of guilt:

> "They have this conversation in Samoan.
>
> "What is the conversation, Tony?
>
> "Tautai said – I told Tautai that I was going to take the deal and if they came at him with a deal that he should take it too. I also told Tautai that I had some heat on me and his brother Paki had put some heat on me, put a contract out on me to have me killed. *He fully acknowledged it.* Tautai said that he knew about that, he knew about the hit, he knew about the contract, and he tried to talk Tony out of taking the deal because, you know, the deal hasn't gone down yet. Tony doesn't plead until the next day, on the 26th.
>
> "So he tries to talk Tony out of taking a deal. And in exchange for that, he will lift the contract, he will try to get Paki to take the heat off."
>
> "*That is what you call consciousness of guilt.* . . . ." (17RT 3515, emphasis added.)

Thus, Ms. Backers herself refutes respondent's claim.

In regard to Iuli's complaint that he was in jail because of what Tautai's "fucking dumb-ass brother did," respondent claims this too was not hearsay, but

was relevant to explain why Iuli did not accept Tautai's offer to "take the heat off." (RB, p. 145.) Of course, Iuli did not testify that this statement was made in response to Tautai's alleged offer. Perhaps Ms. Backers in her leading questions should have paid more attention to the proper narrative connections. In any event, respondent's claim assumes that there was *competent* evidence that "heat" from appellant was even on Iuli to begin with. There was no competent evidence of this. But even apart from the lack of fact that was properly in evidence, Iuli's extrajudicial declaration that he had been in custody for four years because appellant murdered Nolan Pamintuan was, is, and ever will be "a statement that was made other than by a witness while testifying at the hearing and that [was] offered for the truth of the matter stated." (Evid. Code, § 1200(a).)

As to procedural default, respondent properly confines his colorable claims to the leading questions and to the "fucking-dumb-ass-brother" statement. (RB, p. 141.) As for the leading questions, these were merely pointed out to show how inflated the probative value of the incompetent evidence was in reality. Appellant is not asking for a reversal of a capital conviction based on use of leading questions posed to a friendly witness on direct examination. Appellant is asking for reversal based on a serious hearsay error. As for the "dumb-ass-brother" statement, just as the trial court appeared to believe that Tony Iuli could give his opinion of Tautai's action by adducing the reasons for that opinion, the trial court also believed that Iuli's hearsay representations were somehow transmuted into non-hearsay evidence if adduced through a conversation between Iuli and Tautai. The trial court would surely have overruled a timely hearsay objection to any statement made in the course of that conversation.

But if trial counsel is to be faulted for any omission or even defect in the objections that he did lodge, then there is here a claim of ineffective assistance of counsel. Respondent answers this claim by pointing to the two hearsay objections that were lodged, and then asserting that "it is unreasonable to conclude that counsel did not object to the challenged statements as a matter of trial tactics."

(RB, p. 147.) Respondent, however, is mistaken if he believes that the inferable existence of a tactical reason ends the inquiry even on appeal. "Reviewing courts defer to counsel's *reasonable* tactical decisions in examining a claim of ineffective assistance of counsel . . . ." (*People* v. *Stanley* (2006) 39 Cal.4th 913, 954, internal quotation marks omitted, emphasis added.) Consequently, on appeal the appellant has the burden of establishing not that there is no conceivable tactical purpose in counsel's omission, but that there is "no conceivable *reasonable* tactical purpose." (*People* v. *Padilla* (2002) 98 Cal.App.4th 127, 136, emphasis added.)

Thus, if the record does not establish that counsel was quiet due to the futility of objection, then the question remains whether or not his discrimination between the various opportunities to lodge a hearsay objection was *reasonable*. What is *conceivably reasonable* in this case about allowing *any* excludable testimony to the effect that appellant put out a contract to kill Tony Iuli? It is not reasonable, and the claim of ineffective assistance of counsel, if necessary to address at all, is adjudicable on the record on appeal. (*People* v. *Moreno* (1987) 188 Cal.App.3rd 1179, 1190-1191.)

In regard to prejudice, whether from trial error or as part of a claim of ineffective assistance of counsel, respondent ticks off his, by now, perfunctory points: the evidence was "overwhelming;" appellant's "cohorts" identified him; appellant's brother's testimony was unbelievable. (RB, p. 146.) There is nothing new to add to appellant's detailed rendition of the substantial evidence capable of raising a reasonable doubt as to appellant's guilt in this case, but one might make the minor point that what respondent calls a "cohort" the law calls an "accomplice," the use of whose testimony, along with that of "informers, accessories, . . ., false friends, or any of the other betrayals which are 'dirty business'[,] may raise serious questions of credibility." (*On Lee* v. *United States* (1952) 343 U.S. 747, 757.) Thus, if Tautai's testimony struck respondent's adversarial sensibilities as unbelievable, respondent might do well to linger in his

own backyard a while in order to contemplate the strange growth of two prosecution witnesses clearly guilty of special circumstance murder but allowed to plead to the inapt crime of voluntary manslaughter for the exceedingly lenient term of 16 years. Not only is there on this record a reasonable doubt that the error here was harmless (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24), there is a reasonable probability of acquittal if the evidence of appellant's alleged contract on Tony Iuli had been properly suppressed. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837; *Strickland* v. *Washington* (1984) 466 U.S. 668, 694.)

XVIII.
THE PROSECUTOR'S USE AT THE PENALTY PHASE OF THE HEARSAY CONTRACT

Ms. Backers did not only use the alleged contract on Iuli's life as consciousness of guilt evidence, she used it at the penalty phase as evidence in aggravation. "What mercy," she asked in penalty phase closing, "did he show to Tony when he put out a contract on his life, when Tony decided to come forward?" (20RT 4200.) Thus, as appellant contended in argument XVIII, the evidentiary error in allowing incompetent evidence of the contract became penalty phase error. (AOB, pp. 209-210.)

It became penalty phase error not by virtue of Ms. Backers' argument, which simply adjusted the prejudice to a new context, but by virtue of the fact that guilt phase evidence was still before the jury at the penalty phase of trial. (*People* v. *Ramirez* (2006) 39 Cal.4th 398, 474; *People* v. *Champion* (1995) 9 Cal.4th 879, 946-947.) Indeed, the jurors were explicitly instructed in accord with CALJIC No. 8.84.1 and 8.85, that the guilt phase evidence was before them and was to be considered in assessing the punishment. (18RT 3676; 20RT 4225-4226.) Thus, respondent's claim that the penalty phase aspect of this issue is forfeited due to trial counsel's failure to object to Ms. Backers' use of the alleged contract in closing argument (RB, p. 185) falls far from the mark. The error was sown in the

guilt phase and yielded a second crop of prejudice reaped in the penalty phase. No fresh objection was required.

Indeed, in the penalty phase, *if* such a contract had been proven by competent and admissible evidence, it was relevant either as part of "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding . . ." (Pen. Code, § 190.3(a)), or as evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3(b).) But the contract was never proven by anything except hearsay allegations. In a penalty trial in which the properly admitted factor (b) evidence was not compelling and in which there were counter-considerations to the factor (a) evidence (see AOB, pp.193-197), the evidence of a contract to kill, with all the connotation of cold-blooded murder associated with such a nefarious instrument, could not but add decisive weight to the case in aggravation. Thus, if the error in question does not require reversal of the guilt judgment, it requires reversal of the penalty judgment in this case. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.34d 432, 445-448.)

IX.
JUDICIAL MISCONDUCT DURING CROSS-EXAMINATION EXAMINATION OF TAUTAI

As might be gathered from an examination of the record on this appeal, Ms. Backers often had difficulty distinguishing between the occasions for evidence and the occasions for argument. In claim IX of the opening brief, appellant pointed to an instance where the trial court was unable to refrain from expressing at least a limited sympathy with Ms. Backers' confusion. In cross-examining Tautai, she *asserted*, "You are under oath to tell the truth. I know that doesn't mean much to you." When trial counsel lodged an objection that this was argumentative, the trial

court responded, "Ms. Backers, I know the temptation, but sustained." (AOB, p. 144.) This, as appellant argued, was judicial misconduct (AOB, pp. 144-145), an objection to which would have been futile. Irony, unfortunately, is difficult to undo. Its essence is to mock pretensions to seriousness, and it does no good to insist on that seriousness once it is mocked. (AOB, p. 145.)

Respondent does not address appellant's specific contentions regarding procedural default, but advances the perfunctory argument that there was here procedural default. (RB, p. 151.) In response to this, one might pose a fundamental question about the rules of forfeiture. If they are designed to provide an opportunity to the court and the prosecution to correct or avoid trial error (*People* v. *Partida* (2005) 37 Cal.4th 428, 433-434), what purpose does it serve here where the court's misconduct was by its terms a self-consciously gratuitous remark ("I *know* the temptation *but* . . . ")? The court's opportunity to correct the impropriety was before it was uttered. Further, how equitable is it in these circumstances to place the burden on defense counsel to correct the impropriety, and to face the risk that its author, in front of the jury, will refuse to retract it and thereby reauthorize it? To require an objection to preserve the issue of misconduct here would be unfair. (See *People* v. *Sturm* (2006) 37 Cal.4th 1218, 1237.)

As to the substance of the claim, respondent seems to admit that the court's remarks were a "commentary" on the evidence. He does so in order to take advantage of the rule that a court may make fair commentary on the evidence. (RB, p. 152.) According to respondent, once "appellant's hyperbole" is stripped away, what's left "was simply a politely-phrased reminder to the prosecutor to refrain from losing her composure and commenting on Tautai's deliberate evasiveness and decision to be less than forthright when answering the prosecutor's questions." (RB, p. 152.) This, of course, is not even close. Whether the court's comment was politely phrased or not, it was an expression of sympathy for the impulse to insult the witness in regard to his lack of respect for the oath. This is an "aspersion" on the witness; not, as respondent would have it, a "fair

comment" on the evidence. Thus, despite whatever exquisite tact was required to shield Ms. Backers' fragile sensitivity to any claim of inappropriate conduct, the court's comment was itself misconduct. (*People* v. *Rigney* (1961) 55 Cal.2nd 236, 241.)

In regard to prejudice, respondent contends CALJIC No. 17.30 cured the prejudice. The instruction tells the jurors that the trial court did not "intend" by any statement, action, or ruling to imply belief or disbelief of any witness. (17RT 3646; RB, 153.) But the misconduct at issue here was plainly intentional and thus not within the terms of the stereotyped admonition. Even if it were included within the admonitory instruction, that admonition was useless and could not cure the harm for the same reasons the issue here is not procedurally defaulted. Contrary to respondent's claim, the court's misconduct was prejudicial in its local effect as an aspersion on Tautai's credibility, and in its broader consequence in exhibiting to the jurors the bias of the tribunal itself. (See AOB, pp. 145-146.)

X.
REPLY CONCERNING ERROR IN ADMITTING EXHIBIT 46 WITHOUT HAVING OR PRESENTING PROOF OF A PROPER FOUNDATION

In argument X of the opening brief, appellant demonstrated that Ms. Backers introduced in the guilt phase Exhibit 46, a supposed chart of gang status based on criminal exploits, without establishing a foundation for it in the cross-examination of Tautai. Indeed, as demonstrated by Tony Iuli's testimony at the penalty phase, Ms. Backers did not establish a foundation because she did not have one. Although Iuli was able to authenticate the claim that the provenance of the chart was appellant and that Iuli had typed it up for him, the most she could elicit was that the chart was a "badge of honor," while on cross-examination he characterized the chart as a fraternal list – a list of brothers in their extended family household -- arranged in chronological order from eldest to youngest.

(AOB, pp. 149-150.) Appellant further demonstrated that the effect of the court's evidentiary errors in relation to this chart was to establish Ms. Backers, through her questions, as the effective witness here in violation of the Sixth Amendment right to confront and cross-examine, in violation of the Fourteenth Amendment's requirement that a conviction be based on competent evidence, and in violation of the Eighth Amendment's requirement that a capital conviction be based on reliable evidence. (AOB, pp. 160-161.)

Respondent, recognizing that the foundational issue here is well preserved by repeated objections, nonetheless invokes procedural default for the additional claim of prosecutorial misconduct in Ms. Backers' intentional assertion and implication of facts in her questions that she was not prepared to prove either through an affirmative answer from Tautai or from testimony from Tony Iuli. (RB, p. 160.) To answer this it is worth consulting this Court's statement as to the need for a timely objection for this form of prosecutorial misconduct:

> "It is misconduct for a prosecutor to ask a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable ground to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. [Citation.] But if the defense does not object, and the prosecutor is not asked to justify the question, a reviewing court is rarely able to determine whether this form of misconduct has occurred. [Citation.] Therefore, a claim of misconduct on this basis is waived absent a timely and specific objection during the trial. [Citation.]." (*People* v. *Price* (1991) 1 Cal.4th 324, 481; see also *People* v. *Earp* (1999) 20 Cal.4th 826, 859-860.)

In the instant case, defense counsel's foundational objections *should* have initiated the process in which Ms. Backers was called on to make an offer of proof as to the facts that she did or did not have. But the trial court improperly overruled the foundational objections and thereby cut off any possibility at that point of uncovering the misconduct being committed in the cross-examination of Tautai.

Thus, trial counsel had no opportunity to develop the record to the point where an appropriate objection could be made. Where there is no meaningful opportunity to lodge the appropriate objection or objections, there is no forfeiture. (*People* v. *Scott* (1994) 9 Cal.4th 331, 356; see also *People* v. *Kennedy* (2008) 168 Cal.App.4th 1233, 1241, fn. 3.)[12]

But then, according to respondent, there were no foundational errors here either. According to respondent, the chart did not have to be authenticated as a product of appellant, since its authenticity was irrelevant to the impeachment of Tautai. (RB, 161.) Further, according to respondent, from Tautai's testimony that "uso" meant "brothers for life," and from his testimony identifying some of the people on the chart, there was adequate foundation to establish that this was a gang chart ordered on the basis of criminal competence, showing Tautai in the lowly fifth position. This in turn, was supposed to impeach Tautai's claim that he had "earned stripes" by the murder of Nolan Pamintuan. (RB, pp. 161-162.) Respondent's argument is as meritless as the trial court rulings on which the argument is based.

It is true that a document need not be authenticated when its mere existence is the relevant issue to establish, for example some motive or state of mind material to the resolution of the case. (*People* v. *Marsh* (1962) 58 Cal.2nd 732, 740; *People* v. *Adamson* (1953) 118 Cal.App.2nd 714, 719-720.) But the mere existence of this chart provides absolutely no impeachment of Tautai's claim to have been the killer in this case *unless* the chart was, in fact, a list of gang members composed by someone who knew what crimes Tautai had committed and intended to set forth a hierarchy based on those crimes. If this is not, strictly speaking, authentication evidence, it is foundational to the relevance of the chart,

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[12] Although Ms. Backers' own examination of Tony Iuli at the penalty phase of trial provides the reviewable record establishing her misconduct at the guilt phase, the penalty phase record has nothing to do with the question of procedural default at the guilt phase. At the guilt phase, there was no opportunity for a timely objection based on prosecutorial misconduct.

and Ms. Backers simply did not have any of these foundational facts through Tautai.

Furthermore, the manner in which she presented the evidence clearly *was not only* for purposes of impeaching Tautai. It will be recalled that *in limine*, she announced her intention to introduce Exhibit 46 as a party admission by appellant, specifically a boast that he had killed Nolan Pamintuan. (6RT 1540-1541.) Although the trial court told her that this was "a stretch" (6RT 1541), Ms. Backers, as might be gathered by now, firmly subscribed to the principle that any evidentiary hurdle could be overcome simply by reformulating the question. Thus, her first question about Exhibit 46 was: "And your brother drew up a little drawing of some people in the gang, right?" (15RT 1332; 74CT 20706, No. 8.) If the author of the chart was irrelevant, why did Ms. Backers' ask the question in a way as to establish the alleged author? The answer of course is that she wanted what she deemed to be a party admission by appellant. If she had any real intent to impeach Tautai with Exhibit 46, it was to impeach him with appellant's alleged admission, wherein appellant gave himself pride of place on the chart to Tautai's paltry fifth (or is it third?) place.

But even without establishing a qualified author of the writing, there were still no foundational facts to establish that the writing was a gang chart, that it represented a criminal ranking, that Tautai was fifth and not third in the ranking, or that the writing was intended as a boast about the commission of the murder charged in this case. All of this was conveyed to the jury, not through evidence, but through Ms. Backers' questions. (15RT 3332-3338; see also AOB, pp. 151-159.) Respondent's claim that Tautai was simply free to testify that the exhibit was something other than represented in Ms. Backers' questions (RB, p. 162) begs the foundational question and is premised on the trial court's dubious principle that a witness who professes not to know about a matter provides the foundational fact that he *does* know about the matter, so long as the court is

convinced the witness utterly lacks any veracity. (15RT 3336-3337.) As demonstrated in the opening brief, this is a legal absurdity. (AOB, p. 157.)

What occurred in the instant case finds an instructive parallel in *People* v. *Southern Cal. Edison Co.* (1976) 56 Cal.App.3rd 593. In that case, where the State of California was suing the Edison Company for reimbursement of fire suppression expenses (*id.* at p. 596-597), the state proved its damages through a properly admitted business record that summarized the items of expense incurred by the state in fighting the fire attributable to Edison. (*Id.* at p. 606.) The witness, although qualified to testify to the meaning of the summary and to the existence of supporting documents, had no personal knowledge of the fire or its actual suppression. However, as the court explained, Edison improperly created a false factual issue as to the reasonableness of the expenditures reported in the document by cross-examining this witness on matters beyond his competence and using him merely as a sounding board for loaded questions:

> "Except to the extent that an expert may give testimony not based on personal knowledge, under Evidence Code 702, subdivision (a), which codifies a long-existing rule of evidence, the testimony of every witness, whether expert or lay, concerning facts to which he testifies is inadmissible unless he has personal knowledge of those facts. Nevertheless, by combining the content of the attorney's question (which of course, is not evidence) with the answer, Edison, through cross-examination of Mr. Ford concerning the fire cost report and the expenses incurred, attempted to create a factual question on the issue of the reasonableness of the expenses. These questions went to lack of the witness' first-hand knowledge as to the employment of each fire crew member and each piece of equipment and questions which he could not answer, such as the reason for fire units being sent to the fire which were not used, unfamiliarity with the uses to which man-hours charged were put, the fact he could not testify that some of the suppression charges were not for firefighting on federal lands, whether contract aircraft was used on the fire in question or whether the subsistence charge was for fighting only state fires. It is plain enough that Mr. Ford's personal knowledge only extended to matters appearing on the face

> of the report and supporting documents, such as inaccuracies in the entries or calculations, and that he was incompetent to testify as to the matters covered in the questions asked because he lacked the personal knowledge required to answer." (*Id.* at pp. 606-607.)

The technique employed by the attorney for Edison in the above passage should be recognizable as Ms. Backer's technique in cross-examining Tautai: use the witness to create the appearance that a factual *argument* rests on factual *proof.* In the instant case, the situation was worse since Exhibit 46, unlike the expense summary, which qualified for admission as a business record, could not even *partially* qualify as competent evidence.[13]

In regard to prosecutorial misconduct, respondent repeats his assertion that the claim is waived for failure to object (RB, 163), a claim that does not improve with the repetition. On the substance, he also repeats that there was no misconduct because the prosecutor was not required to authenticate the chart. (RB, pp. 163-164.) This too has been addressed, and it was demonstrated that the author of the chart was foundational to its relevance, whether one wishes to call that authentication or not.

Respondent's primary argument is that Tony Iuli's testimony in the penalty phase establishes at least good faith belief on the part of Ms. Backers either that she could obtain the correct answers from Tautai or that she could prove the matter through Iuli. Respondent points to two places in Iuli's testimony: his tautological assertion that "Americas Most Wanted Samoans" means "what it says," and his monsyllabic affirmation to Ms. Backers' leading question, "You told me that was

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[13] Of course, Tautai's ability to translate the word "uso" and to identify names on the chart, was parallel to Mr. Ford's ability to testify to the prima facie meaning of the expense summary in *Southern Cal. Edison.* The difference of course is that the meaning of "uso" and the identity of names did not establish the competence or even relevance of Exhibit 46 through Tautai's knowledge of certain facial features of the chart, while Mr. Ford's testimony did establish the cost summary as a business record relevant to prove the state's damages in the case.

a badge of honor, right?" (RB, p. 165.) According to respondent, "given the format of the list and Iuli's testimony that the phrase 'America's Most Wanted Samoans' included in Exhibit 46 was a badge of honor, the prosecutor could reasonably have believed that the list was a gang status list and that Tautai would confirm that fact." (RB, pp. 165-166.)

This argument was anticipated in the opening brief. At best, Ms. Backers established through Iuli that the chart was authored by appellant and that *it looked to Iuli* like a "badge of honor." She could not establish that it was a badge of honor for having murdered Nolan Pamintuan or for having committed any specific crime, or that the order of arrangement was by criminal prowess rather than by age. (AOB, p. 160.) In short, Ms. Backers *knew* she could not provide a foundation for Exhibit 46 through Tony Iuli.

Thus, the claim that Iuli's evidence conferred on Ms. Backers a reasonable expectation that Tautai would confirm that the chart was a "badge of honor," one can pertinently reply, "So what?" She had nothing to confer on her any expectation that Tautai would state anything more than Iuli did, and this was not enough. Moreover, it was at the very beginning of her cross-examination of Tautai over Exhibit 46 that Tautai announced to her that he had no memory of that chart. (15RT 3332-3333.) Then and there she was disabused of even her *un*reasonable expectation that Tautai would give an affirmative answer to what she was trying to prove.

Whatever anodyne gloss respondent uses to skew what is plainly apparent on the record, that record establishes that Ms. Backers knew she could not prove that Exhibit 46 represented an admission by appellant or a boast for the killing of Nolan Pamintuan. Trivial and laborious procedures for assuring the integrity of evidence were simply not for her, and abetted by the trial court's apparent sympathy with her impatience for foundational requirements, she was able to commit undetectable misconduct.

In regard to the constitutional claims, respondent argues only that these were defaulted for failure to state constitutional objections. (RB, p. 160.) This is a feeble argument, for the constitutional claims advanced here are based on the *consequential* prejudice from the evidentiary errors and the misconduct. As such, they are not forfeited. (*People* v. *Partida* (2005) 37 Cal.4th 428, 438-439.)

Finally, in regard to prejudice, respondent claims that the evidence of the chart had little weight since Tautai testified that he did not recall seeing it, and was in any event cumulative since there was other evidence to establish that Tautai did not kill Nolan. (RB, p. 167.) The idea that anything Tautai said in the face of Ms. Backers' overheated questions, chock full to the brim with her own factual assertions, would have any weight with the jury is ludicrous. The problem of course was that Ms. Backers' display, as it had so often during this trial, *distracted* from the rational assessment of evidence and from the true issues in the case. That Tautai had credibility problems from which the jurors could have reasonably rejected his testimony cannot hide the fact that Tony Iuli and Jay Palega also had serious credibility problems from which the jury could have reasonably rejected *their* testimony.

When a jury's decision to reject the problematic testimony of one side over the problematic testimony of the other, then one must ask whether some legal error skewed the proper assessment of evidence. Here, the trial court's ruling and Ms. Backers' misconduct purveyed to the jurors inflammatory evidence so far in excess of any real probative value contained in that evidence that, absent the errors, there is a reasonable probability that appellant would have been acquitted. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-387.) In any event, respondent certainly cannot on this record, show beyond a reasonable doubt that the errors were harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XIX
EXHIBIT 46 AT THE PENALTY PHASE OF TRIAL

In argument XIX, appellant continued his examination of the effect of Exhibit 46 at the penalty phase of trial, where Iuli testified about it as summarized in argument X, and where it became in Ms. Backers' penalty closing the "badge of honor he awarded to himself for blowing Nolan's chest to pieces." (20RT 4133-4134; see AOB, pp. 210-213.) Respondent takes the position that Exhibit 46 was admissible evidence at the penalty trial and that the prosecutor's argument was within the bounds of proper inference. (RB, pp. 186-187.)

The premise of respondent's compact argument, it seems, is that Exhibit 46 at the penalty phase had some independent value as evidence in aggravation, but respondent does not clarify what that value is. If it *were* a boast for having "blow[n] Nolan's chest to pieces," then it was arguably factor (a) evidence as part of the circumstances of the charged crime itself. But this leads back to the foundational requirement to establish its relevance. Nothing in Tony Iuli's testimony established that he personally knew the chart to be a boast by appellant regarding the commission of the charged crime, or that he had any reason to believe that it was anything of the sort. Significantly, Ms. Backers never asked Iuli to confirm even the basic inference underlying her questions to Tautai, that the list was one of gang members. Iuli's actual testimony – carefully left unelaborated by Ms. Backers-- was that the list, as far as he could see, was one simply of the "brothers in our house" arranged by chronological age. Thus, Ms. Backers' argument, far from being an inference from competent evidence, was a speculation from *no* evidence – an inference, in fact, from an evidentiary void which she herself consciously created, preferring, no doubt, the opportunity to make a sensational argument unimpeded by the inconvenient truth.

Respondent does not raise the question of procedural default for the penalty phase aspect of the argument. Appellant would be happy to take this as a

concession that there was none, but the record shows no objection was made to Tony Iuli's testimony about Exhibit 46. Of course, the foundational objections had been overruled when posed to questions placed to the even weaker witness, Tautai. It is clear that objection to Iuli's testimony at the penalty phase would have been futile. (*People* v. *Chatman* (2006) 38 Cal.4th 344, 380; *People* v. *Abbaszadeh* (2003) 106 Cal.App.4th 642, 648; *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.)

This futility extended to the prosecutorial argument that purported to be based on the "evidence" that should not have come in. But the futility here was manifest not only in the trial court's erroneous attitude toward the same evidence in the guilt phase, but also by the fact that the cat, as it were, was very much out of the bag by the time of the penalty phase. Ms. Backers, through her questions to Tautai, conveyed to the jury, with trial court sanction, all that she wanted them to know. Iuli's testimony, carefully limited by the questions she did, and did not, ask him, did not add or detract from the insinuations raised by her cross examination questions to Tautai. Objection and admonition at the penalty phase would not have cured the prejudice emanating from this highly inflammatory evidence. For this reason too, there is no forfeiture of the penalty phase issues surrounding Exhibit 46. (*People* v. *Hill* (1998) 17 Cal.4th 800, 821.)

XI.
REPLY CONCERNING THE ALLEGED OFFER BY TAUTAI TO TESTIFY AGAINST APPELLANT

In argument XI of the opening brief, appellant contended that Ms. Backers committed misconduct in asserting, again through her questions, that Tautai asked her for the same deal that she gave to Iuli and Palega, but that she flatly refused to do it. (15RT 3343-3344.) This was misconduct. She in fact knew she had *not* spoken to Tautai but to his attorney Mr. Daley. Thus, she committed misconduct in knowingly trying to elicit evidence without foundation. (*People* v. *Bonin*

(1988) 46 Cal.3rd 659, 689.) Secondly, she committed misconduct in knowingly implying, indeed in asserting, false evidence to the jury in the narrow sense that Tautai did not talk to her. (*People* v. *Warren* (1988) 45 Cal.3rd 471, 480.) Thirdly, she committed misconduct either in knowingly implying, or in failing to correct after she knew, the broader falsity in her questioning: Tautai was not asking even vicariously for a deal. (*People* v. *Seaton* (2001) 26 Cal.4th 598, 647.) (AOB, pp. 162-171.) Respondent argues that there was no misconduct. Because Mr. Daley had approached Ms. Backers, it was reasonable for her "to assume" that Tautai authorized this approach and did so "because he wanted the same deal negotiated by Iuli and Palega." (RB, p. 170.)

This is all that respondent can muster on the substantive question of error. Respondent does not address *at all* the problem that Ms. Backers knew she had no foundation for the evidence she was trying to elicit. She, and only she at that point, knew that Tautai himself did not speak to her and that he therefore did not have the requisite personal knowledge to answer her questions as asked (Evid. Code, § 702), that is, when she even bothered with the *form* of a question. As to the falsity itself, what can respondent say? Tautai never talked to Ms. Backers and Ms. Backers had never talked to him.

But respondent attempts to justify this as a reasonable facsimile of the truth. Ms. Backers could assume from the feelers advanced by Mr. Daley that Tautai *just as well might have been* talking to her and asking for a deal. In more legal terms, she had, in respondent's view, a reasonable expectation that Tautai would understand what was meant and would in fact affirm that he asked her for a deal and that she had told him "no way." (See *People* v. *Price* (1991) 1 Cal.4th 324, 481; *People* v. *Warren*, *supra*, 45 Cal.3rd 471, 480.) Apparently he did not understand. The further difficulty here is that one cannot dispense completely with the literal truth in this context. Jurors, unlike readers of fine literature, are not there to admire metaphor and allegory. They are there to assess facts, and only those perceived directly and without hearsay by a witness, without the gloss of the

witness's immaterial interpretations or impressions. (*People* v. *Hurlic* (1971) 14 Cal.App.3rd 122, 127; *People* v. *Sergill* (1982) 138 Cal.app.3rd 34, 40.) But as importantly, if not more so, Ms. Backers at least knew the broader falsity of her implications when Mr. Daley announced that Tautai in fact was not privy to his advances to her. At that point, she had a duty to correct the false and misleading character of her cross-examination of Tautai. (*People* v. *Seaton*, *supra*, 26 Cal.4th 598, 647 ["Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents even if the false evidence was not intentionally submitted."]; *People* v. *Morrison* (2004) 34 Cal.4th 698, 716; *Campbell* v. *Superior Court* (2008) 159 Cal.App.4th 635, 652.) The misconduct here is simply crystal-clear.

In a passing sentence in his argument on ineffective assistance of counsel, respondent does assert that there was procedural default. (RB, p. 173.) Appellant made detailed contentions on this topic (AOB, pp. 169-170), and respondent deigns not to address any specific point. There is not much for appellant to add here. One might amplify, however, that, as with Exhibit 46, the correct basis for an objection was not apparent at the time Ms. Backers' asked her facially appropriate questions calling for relevant and material answers based on the witness's personal knowledge. There was therefore no meaningful opportunity to object, and therefore no procedural default. (*People* v. *Scott* (1994) 9 Cal.4th 331, 356; see also *People* v. *Kennedy* (2008) 168 Cal.App.4th 1233, 1241, fn. 3.)

In regard to the alternative argument of ineffective assistance of counsel, respondent merely asserts *ipse dixit* that this is a habeas corpus issue (RB, p. 173), but does not address appellant's argument demonstrating that adequacy of the claim on the face of the record on appeal. (AOB, p. 172.) Respondent's alternative argument is merely that there was no misconduct and therefore nothing to object to. (RB, p. 173.) As demonstrated in the opening brief and in this brief, there most certainly was misconduct. Whether it was apparent or not when it

occurred is simply a question that goes to the issue of procedural default versus ineffective assistance of counsel.

Respondent's argument on prejudice was simply to incorporate the claim that evidence of guilt was overwhelming, which, as shown by appellant at numerous junctures, was to overlook the significant problems with that case and to slight the evidence favorable to the defense, from which evidence a reasonable doubt could arise. (RB, p. 171-172.) Respondent, however, has a tailored argument on prejudice that he seems to have erroneously placed in his section on substantive error. He argues that Tautai's "vehement" denials, combined with the jury instruction in accord with CALJIC No. 1.02, admonishing the jurors that the questions of attorney are not evidence, cured the harm from Ms. Backers' misconduct. (RB, p. 171.)[14]

In answer to this, one may first note that Ms. Backers was happy to abandon her role as an attorney and become a witness in the relevant cross-examination: "You wanted the same deal that Tony and Jay got, and I said no way." (15RT 3343.) One may note secondly, that when Mr. Ciraolo objected to this as testifying by Ms. Backers, the court overruled the objection. (15RT 3343.) One may note thirdly that the entire exchange ended with the unmistakably argumentative: "Are you telling this jury that you did not ask me for the same deal Tony and Jay got so you could testify against your big brother?" (15RT 3344.)

Thus, if, at the end of the guilt trial, the court admonished that the statements and questions of the attorneys are not evidence (17RT 3612-3613), how

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[14] Respondent cites to 17RT 3428 and to CALCRIM No. 222. The correct references are 17RT 3612 to 3613 and, as noted, CALJIC No. 1.02, which provided in relevant part: "Statements made by the attorneys during the trial are not evidence. [¶] . . . [¶] If an objection was sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection. [¶] Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps you to understand the answer."

effective would that be where the court *overruled* the objection that Ms. Backers was making a testimonial statement? The jurors simply had no rational way to *follow* the instruction in regard to the cross-examination at issue. Moreover, one must consider that throughout this trial, starting with opening statement, Ms. Backers conferred a highly personal tone wherever she could do so, and no admonition was sufficient to offset her improper incursion into the case as an evidentiary factor in and of herself. Finally, by the end of trial, given the latitude expressly given to Ms. Backers by the trial court, a jury would have an exceedingly difficult time figuring out which statements, assertions, implications, or even questions the admonitory instruction was *really* supposed to apply to. As for Tautai's denials, he simply could not compete for the jury's estimation against Ms. Backers' self-testimonial not merely for her actions in "talking to" Tautai, but for her character as a prosecutor with moral integrity.

Finally, respondent makes a perfunctory argument that the misconduct by Ms. Backers was not federal constitutional error. (RB, p. 172.) He does not explain how the knowing use of false evidence is not a violation of the Due Process Clause of the United States Constitution. (*Giglio* v. *United States* (1972) 405 U.S. 150, 153; *Napue* v. *Illinois* (1959) 360 U.S 264, 269.) He does not explain how the purveyance of false evidence solely through statements made by the prosecutor or implied in her questions is not a violation of the Sixth Amendment right to confront and cross-examine adverse witnesses. (*People* v. *Gaines* (1997) 54 Cal.App.4th 821, 823-825; see also *People* v. *Bolton* (1979) 23 Cal.3rd 208, 213, 215; and *People* v. *Harris* (1989) 47 Cal.3rd 1047, 1083.) Finally, he does not explain how the injection of unreliable information significant to the assessment of guilt *vel non* in a capital case is not a violation of the Eighth Amendment. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) Apparently seeing no need to explain these matters, respondent also sees no need to demonstrate how Ms. Backers' misconduct was not harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

VIII., XII., XIII.
CUMULATIVE ERROR AND PREJUDICE

In the eighth argument appellant discussed the cumulative prejudice from the incompetent hearsay and opinion evidence of Tony Iuli (arguments V, VI, and VII). (AOB, pp. 139-141.) In argument XII, the discussion of cumulative prejudice focused on the trial court's aspersions against Tautai's credibility (argument IX), the improper attempt to use Tautai as the supposed foundation for the supposed gang chart (argument X), and Ms. Backers' misconduct in misrepresenting a supposed plea negotiation between her and Tautai (argument XI). (AOB, pp. 173-174.) Finally, in argument XIII, appellant discussed the accumulation of guilt phase error overall as a violation of his due process and Eighth Amendment rights. (AOB, pp. 174-178.)

Respondent takes his natural position: there was no error to accumulate. (RB, p. 148, 173-174.) Nonetheless, respondent assures us that even if there were multiple errors, "they 'did not undermine the facts supporting [appellant's] guilt[.]' (*People* v. *Hinton* [(2006)] 37 Cal.4th [839,] 872.)" (RB, p. 174.) The quote from *Hinton* addresses multiple instances of prosecutorial misconduct that were "relatively few" and whose individualized prejudice was "minimal to nonexistent." (*Hinton*, *supra*, at p. 872.) Further, in *Hinton*, the defendant there failed to "explain[] how or why these errors in combination warrant a new trial." (*Ibid.*) None of these conditions pertain here.

As rehearsed throughout the opening brief and reply brief, the physical evidence alone could not foreclose inferences that at the very least sustained a reasonable doubt as to appellant's guilt. The prosecution needed a *credible* Tony Iuli and Jay Palega; and it needed a severely impeached Tautai Seumanu. Each and every error contributed substantially to one of these factors, and indeed all of them to both factors, since the credibility of Iuli and Palega was in a zero-sum relationship to that of Tautai. But one cannot forget the vouching errors (argument

I), the *Doyle* error (argument II), the imputations against defense counsel (argument III), and the appeals to passion and prejudice, by means of all of which Ms. Backers succeeded in injecting herself into the case as a kind of *meta*-witness, who certifies personally the integrity, virtue, and truth of her own prosecution. There was in this case serious and pervasive error whose accumulation was co-extensive with the central factual issues in the case. Appellant's conviction for special circumstance murder must be reversed.

XIV.
REPLY CONCERNING CALJIC No. 2.15

In argument XIV, appellant contended that CALJIC No. 2.15 was unconstitutional in its admonition that "[b]efore guilt may be inferred" from conscious possession of recently stolen property, there must be corroborating evidence, though such evidence "need only be slight . . . ." Appellant pointed out that there exists only one published case in California in which this precise attack on CALJIC No. 2.15 was raised, and the court simply did not address the argument, relying instead on the, by now, stereotyped proposition that the instruction does not create an irrebuttable presumption. (*People* v. *Snyder* (2003) 112 Cal.Ap.4th 1200, 1226.) That it does not, does not settle the question of whether instructing the jury on "slight" corroboration creates the danger of lightening the burden of proof beyond a reasonable doubt. Finally, appellant cited the rejection of the federal courts of the "slight-evidence" instruction in conspiracy cases. (AOB, pp. 178-181.)

Respondent does little more than quote without comment the same passage from *Snyder* quoted by appellant to demonstrate that *Snyder* did not address the issue. In regard to the federal cases on conspiracy, respondent feels no compulsion to provide us with a distinguishing principle, but only with the jurisdictional rule that federal cases are not binding on this court, and the formal

principle that those cases address the question of conspiracy and not theft. (RB, pp. 175.)

More important than these paltry and perfunctory contentions is the appearance, since the filing of the opening brief of this Court's pronouncements on CALJIC No. 2.15 in *People* v. *Parson* (2008) 44 Cal.4th 332. Although *Parson* upholds the instruction in comprehensive terms (*id.*, at pp. 355-358), it also does not specifically address issue of the word "slight." However, *Parson* does make a generalization that seems fatal to the argument advanced here: "[T]here is nothing in the instruction that directly or indirectly addresses the burden of proof, and nothing in it relieves the prosecution of its burden to establish guilt beyond a reasonable doubt. [Citations.]" (*Id.*, at p. 355-356.) A hint of doubt as to the absolute cast of this assertion creeps in when this Court adds, "In any event, given the court's other instructions regarding the proper consideration and weighing of evidence and the burden of proof, there simply is no possibility CALJIC No. 2.15 reduced the prosecution's burden of proof in this case." (*Id.*, at p. 356, internal quotation marks omitted.)

It is difficult to see how the burden of proof is not, in CALJIC No. 2.15, at least *indirectly* implicated. The instruction talks throughout about the inference of guilt, which of course is the *ultimate* inference in a criminal case and the focus of the standard of proof beyond a reasonable doubt. If CALJIC No. 2.15 does not implicate the burden of proof, then it is difficult to see what animated the Court in *United States* v. *Gray* (5th Cir.1980) 626 F.2nd 494.

In *Gray*, the trial court in a federal conspiracy case instructed the jurors that " '[t]he Government need only introduce slight evidence of a particular defendant's participation, once the conspiracy is established . . . beyond a reasonable doubt.' " (*Id.*, at p. 500.) The Court found this instruction improper as undermining the standard of proof beyond a reasonable doubt. Further, and importantly, the Court found ineffective the trial court's attempts to correct the error. The trial court called the jurors back and added:

" 'The Government need only introduce slight evidence of a particular defendant's participation once the conspiracy is established, but must establish, beyond a reasonable doubt, that each member had a knowing special intent to joint the conspiracy. Mere association with a conspirator is not enough.'

" 'My particular remarks that I want to make to you about the slight evidence is that means that just a little evidence as to participation, but even as to that slight or little evidence, you must be convinced, beyond a reasonable doubt that he participated.' " (*Ibid.*)

Thus, the trial court in *Gray* tried to make it clear to the jurors that "slight evidence" was a quantitative concept that nonetheless had to constitute proof beyond a reasonable doubt before guilt for the crime of conspiracy could be found. Yet the court in *Gray* found the phrase "slight evidence," despite the gloss, could "only be seen as suffocating the 'reasonable doubt' reference." (*Ibid*; see also *United States* v. *Hall* (5th Cir. 1976) 525 F.2nd 1254, 1255-1256, fn. omitted.) Even if this Court cannot subscribe to the metaphor of "suffocation," it seems nonetheless impossible to maintain that CALJIC No. 2.15 neither directly nor indirectly suggests anything about the burden of proof.

In any event, if *Parson* leaves any opening for a claim against CALJIC No. 2.15 in a specific case, then this is the case. Appellant's conscious possession of recently stolen property was enormously important to the guilt determination. There was no dispute that he possessed the property; and there was little dispute that he knew it was recently stolen. But on the peculiar facts of this case, where 24 people lived in a 1200 square foot house on a communal basis, the sharing of property would not be extraordinary. Moreover, in a communal regimen ordered by tribal values, wherein the son of a chief had a kind of prestige and status, appellant could well have obtained these items as tribute, without being guilty of felony murder. These were possibilities rooted in the evidence and would in turn

serve to corroborate appellant's alibi. To that extent, CALJIC No. 2.15 burdened the defense by lightening the prosecution's burden of proof, appellant's right to due process under the Fourteenth Amendment was violated, and his conviction for murder must be reversed. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XVI.
REPLY CONCERNING TRIAL COURT'S ADMONITION REGARDING THE "SO-SUBSTANTIAL" STANDARD FOR DETERMINATION OF PENALTY

In argument XVI of the opening brief, appellant examined the trial court's repeated gloss during jury selection of the "so-substantial" standard of CALJIC No. 8.88 as "ambiguous." The standard, which requires the jurors to find, before finding death appropriate, that the "aggravating circumstances are so substantial in comparison with the mitigating circumstances. . ." (CALJIC No. 8.88), finds its rationale in the need to distinguish a *capital* murder from the inherently aggravating fact of a murder already certified by the jury's guilt phase verdict. Thus, the standard is formulated as a ratio, which quintessentially represents the rational structure of a capital penalty trial. To describe the so-substantial standard as ambiguous, as the trial court did repeatedly, created a substantial likelihood of undermining this rational structure and thereby stripping the penalty determination of its Eighth Amendment validity. (AOB, pp. 197-206.)

Respondent begins with an invocation of procedural default on the ground that appellant did not ask for a clarification of the trial court's comments. (RB, p. 180.) The rule cited by respondent applies only when the complaint is failure to modify, clarify, or amplify a statement of law that is otherwise correct. (*People* v. *Mayfield* (1997) 14 Cal.4th 668, 778-779; *People* v. *Guerra* (2008) 37 Cal.4th 1067, 1134; *People* v. *Rundle* (2008) 43 Cal.4th 76, 151.) Appellant here is *defending* CALJIC No. 8.88's formulation of the "so-substantial" standard against the trial court's misleading and erroneous "amplification" of it. The trial court's

gloss on the instruction was simply incorrect and rendered CALJIC No. 8.88 misleadingly ambiguous. Appellant's claim therefore comes within the purview of Penal Code section 1259, which dispenses with the need for objection or exception for review of any jury instruction that affected the substantial rights of the defendant. (*People* v. *Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; *People* v. *Brown* (2003) 31 Cal.4th 518, 539, fn. 7; see *People* v. *Johnson* (2004) 119 Cal.App.4th 976, 984.)[15]

On the substance of the claim, respondent cannot defend the characterization in any broad manner. Indeed, appellant's very authority for error is this Court, which has declared expressly that the "so-substantial language of CALJIC No. 8.88 is not impermissibly vague or ambiguous." (*People* v. *Harris* (2008) 43 Cal.4th 1269, 1321; *People* v. *Mendoza* (2007) 42 Cal.4th 686, 707-708.) According to respondent, however, in the context of conveying to the jurors that the penalty decision rested on moral factors subject to each juror's individual assessment and evaluation, the characterization of the so-substantial standard as "ambiguous" was merely the "court's attempt to indicate that each juror would bring their own individual standard to the weighing process." (RB, pp. 181-182.) However, it was by consideration of the same context that appellant found the fatal ambiguity in the characterization of the standard as "ambiguous." Again, by identifying the difficulty in applying the standard as an ambiguity inhering *in* the standard, the trial court invited the jurors to turn their subjectivity *on the standard itself*, which is, effectively, to destroy any rational control on the juror's penalty

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[15] Respondent does not make any argument based on the fact that the instructional error arose through the trial court's comments during jury voir dire on an instruction that would be given in the case. One must, however, distinguish between types of voir dire comments that a court might make to a jury. Here, the comment was addressed directly, explicitly, and with reference to a jury instruction the jurors would be called on to apply at the end of the penalty phase. It was, in short, the type of comment that comes within the purview of Penal Code section 1259. (See *People* v. *Abbaszadeh* (2003) 106 Cal.App.4th 642, 650 (maj.) and 653 (Sims, J. conc. & diss.).)

decision. (See AOB, pp. 200-201.) Respondent seems not to perceive how his own paraphrase of what the trial court meant simply perpetuates the fatal ambiguity itself.

In regard to appellant's argument on the use of "good" and "bad" to describe, respectively, mitigation and aggravation, respondent interprets this as an independent claim of error. (RB, p. 182.) Appellant's point, however, was that *without* the rational control of the so-substantial standard, the terms "good" and "bad" lose their appropriate context and reinforce the erroneous conception that the penalty assessment is weighed on a scale calibrated by perfect balance between good and bad, between aggravation and mitigation, between life and death.

In regard to prejudice, respondent cites *People* v. *Romero* (2008) 44 Cal.4th 386 wherein this Court found no prejudice from the trial court's casual explanation during voir dire of how a penalty trial worked. These comments, as this Court found, were for purposes of voir dire and did not constitute a "substitute" for instruction at the end of trial. (*Id.* at p. 423; RB, p. 183.) What respondent fails to see here is that even if the trial court made its comments for purposes of voir dire, the comment itself was aimed *directly* at explaining to the jurors what CALJIC No. 8.88 meant, and that CALJIC No. 8.88 provides the fundamental structure of the penalty determination. Thus, unlike *Romero*, which involved loose comments about aggravation and mitigation that were not in themselves really incorrect, the impropriety here was narrowly focused on a specific instruction of central importance to the penalty trial. *Romero* is distinguishable.

This distinction also rebuts respondent's finding of significance in the absence of any request by the jurors for a clarification of CALJC NO. 8.88. (RB, p. 182.) Why should they ask for a clarification when the one they were given during voir dire informed them that the standard itself was whatever they wanted it to be? Respondent also points to the trial court's admonition that its comments during voir dire were only informal, and that formal instruction would be given at the end of the trial. (RB, p. 182-183.) But these admonitions would be effective

only against the types of comments at issue in *Romero*. They would not be effective to a comment made directly on the meaning of one of the formal instruction to be given at the end of trial.

Finally, respondent invokes *People* v. *Watson* (1956) 48 Cal.2nd 818 as representing the correct standard of review. This is false. The burden in on respondent to establish beyond a reasonable doubt that the error was harmless. (*People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) As noted above, there were indeed substantial grounds on which a juror might not find that the aggravation in this case was *so* substantial in comparison with the mitigation, and on this record respondent cannot meet his burden. At the very least, the penalty determination in this case must be reversed.

XX.
REPLY CONCERNING THE INVOCATION OF RICHARD ALLEN DAVIS AS THE PARADIGM FOR EXPLAINING APPELLANT'S SUPPOSED INSULT TO THE JURY FOR WEARING HIS JAIL CLOTHING DURING THE PENALTY PHASE OF TRIAL

In argument XX of the opening brief, appellant related how, despite assurances from the trial court that no adverse inference was to be drawn from appellant's choice to wear jail clothing during the penalty phase of trial, Ms. Backers nonetheless invited the jurors to infer that appellant intended it as an insult to them. To illustrate her point and its supposed significance, she asked rhetorically, "[D]o you remember what Richard Allen Davis did to his jury after he got convicted?" (20RT 4166.) This violation of the trial court's admonition and the reference to the notorious example of Richard Allen Davis's obscene gesture to the jury constituted misconduct so inflammatory that an objection and admonition, if made or requested, would have been futile to stem the prejudice. (AOB, pp. 214-215.)

In terms of violating the trial court's admonition, respondent contends that defense counsel made appellant's appearance in jail clothing a subject through her direct examination of Dr. Griffith. (20RT 4071.) This, therefore, opened the issue for cross-examination and for argument. (RB, pp. 188-191.) Respondent is correct; the contention that Ms. Backers committed misconduct in violating the trial court's admonition must be withdrawn. She was free to argue the inference of rebelliousness from appellant's wearing of jail clothing. This, however, does not resolve the question of whether there was propriety in comparing appellant's jail clothing with Richard Allen Davis's execrable conduct.

Respondent acknowledges the proposition that linking the defendant to paradigmatic villains is generally to be avoided. (RB, p. 191.) However, respondent cites *People* v. *Jablonski* (2006) 37 Cal.4th 774, where this Court found the comparison of defendant in that case with Lorena Bobbit and the Menendez brothers to be an anodyne illustration of defendants who sought to deflect guilt by claiming victimhood. (*Id.* at p. 836; see RB, pp. 191-192.) "As in *Jablonski*," respondent contends, "the prosecutor here referred to Davis not as a means of comparing appellant's crimes with Davis's and/or that showing that Davis had appellant and/or their actions in court were similar, but to illustrate her point that appellant, like Davis, showed contempt for the jury's verdict." (RB, p. 192.)

If one might be permitted to stop this whirly-gig of a sentence and remove the dizzied elements that make it up, the "prosecutor's point" that was "illustrated" by the comparison, was that appellant in wearing jail clothing insulted the jury that just convicted him of murdering that "sweet bridegroom," just as Richard Allen Davis, by leering, smirking, and gesturing, insulted the jury that just convicted him of murdering a little girl. This of course is misconduct since the comparison with Richard Allen Davis in fact had no point whatsoever if it was not to compare appellant's courtroom conduct with that of Davis and to magnify the relative triviality of the former by the odiousness of the latter – an odiousness all the more

intense for the actual crime Davis committed.[16] Respondent's invocation of *Jablonski*, a case involving five murders by one defendant (*People* v. *Jablonski*, *supra*, 37 Cal.4th at pp. 784-785, 793-795), where the comparison to Lorena Bobbitt and the Menendez brothers had a point identifiably independent of the inflammatory connotations of the crimes committed in those cases, is off the mark here.

Respondent finally argues lack of prejudice on the ground that the jurors were not reasonably likely to misapply the reference to Richard Allen Davis. (RB, pp. 192-193.) But then respondent has never really explained how that comparison was supposed to be properly applied to begin with – unless one actually considers respondent's rhetorical vertigo to be an explanation.[17]

XXI.
REPLY CONCERNING CHURISH'S IMPROPER TESTIMONY ABOUT A CONJECTURED ROBBERY

The burden of argument XXI of the opening brief is that Darryl Churish's attested assumption that appellant offered to commit robbery for Churish constituted inadmissible conjecture and prosecutorial misconduct insofar as Ms. Backers' knowingly sought to elicit speculation and conjecture. (AOB, pp. 217-218.)

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[16] Contrary to respondent's contention (RB, p. 92, fn. 71), Ms. Backers' clearly expected the jurors to understand precisely and specifically what Richard Allen Davis's conduct was due to the notoriety of that conduct. This renders the judicial notice requested in the opening brief (AOB, p. 216 and fn. 46) relevant, material, and therefore qualified for judicial notice. (*People ex rel. Lockyer* v. *Shamrock Food Co.* (2000) 24 Cal.4th 415, 422, fn. 2.)

[17] Respondent's claim that the misconduct cannot be characterized as federal constitutional error because of procedural default is frivolous. (*People* v. *Partida* (2005) 37 Cal.4th 428, 433-439.)

Respondent attempts to avoid the claim by parsing and truncating the actual testimony. As respondent would have it: "Churish's response, which appellant objected to as speculative, was that appellant did not directly tell Churish he would take a jacket for him, but that on a particular occasion when Churish had admired a jacket, appellant had asked Churish if he wanted it. (18RT 3783.) Thus, Churish merely testified as to what appellant said; his testimony was direct and free from speculation and conjecture. The trial court properly overruled appellant's objection on this basis." (RB, p. 195.)

The actual testimony was a follows, with only the portion paraphrased by respondent left out of italics:

> "Q. *Now Mr. Churish, had Paki ever offered to you that he would take somebody's coat from them so he could give it to you?*
>
> "A. *I don't know if he came out straight up and said offered it*, but one time, I guess I looked at a jacket. And he is like – we were at the mall – and he asked me if I wanted it. *I was like, no, that is all right. Because I would have to take it home to my mom and explain how I got it.*" (18RT 3783.)

Thus, if one separates out the percipient testimony, one is left with Ms. Backers' question containing a theory that interpreted the percipient facts as an offer to commit robbery, and with Churish's answer affirming this interpretation. Of course, neither Ms. Backers' nor Churish's interpretations are evidence. For respondent to reduce the issue to the unitalicized portion of the above passage is misleading and fails to take into account the full context provided by the question and the full answer.[18]

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[18] It is of course necessary to consider Ms. Backers' question as part of the context. "The attorneys' questions are significant . . . if they help you understand the witnesses' answers." (CALCRIM No. 104.) Again, Ms. Backers' set forth her interpretation, and Churish was responsive to it.

In regard to Ms. Backers' question, "He was going to take it off that guy for you, right?", respondent contends that this was not calling for a speculative answer because in a separate incident Churish had witnessed appellant taking a Georgetown jacket from someone at a bus stop. (RB, p. 195.) Respondent does not explain how this qualification renders the matter any less conjectural in the mouth of a witness, who is required to stick to percipient facts and to leave "concluding" to the jurors. (*People* v. *Hurlic* (1971) 14 Cal.App.3rd 122, 127.) Of course, without Churish's conclusion, there was nothing relevant to go to the jury since Churish's actual observation did not give rise to any admissible category of aggravating evidence. Contrary to respondent's contention (RB, p. 195), Ms. Backers' question was indeed a "deceptive" *and* "reprehensible" method of attempting to persuade the jury. (*People* v. *Stanley* (2006) 39 Cal.4th 913, 951.) It is also constitutional error under the Eighth Amendment in having reduced the reliability of the penalty assessment in this case – a claim cognizable despite respondent's tired refrain of procedural default for consequential constitutional claims (RB, p.195, fn. 72). (*People* v. *Partida* (2005) 37 Cal.4th 428, 433-439.)

XXII., XXIII.
CUMULATIVE ERROR FOR PENALTY PHASE

In argument XXII, appellant grouped together a series of errors that tended to reinforce the charge of shystering dishonesty against Mr. Ciraolo and the defense, and perjurious immorality against defendant and his witnesses. These errors included the direct imputations Ms. Backers made against defense counsel in argument (XVII); the contract to kill Tony Iuli, which existed only in Ms. Backers' over grasping theories rather than in competent and substantial evidence (XVIII); the *Doyle* (*Doyle* v. *Ohio* (1976) 426 U.S. 610) error, whose effect was to impute to defendant himself the manipulation of the criminal justice system (**II**); the trial court's prejudicial pleasantry at the expense of Tautai's credibility as a witness (IX); and finally, the incompetent opinion by Iuli that Tautai sold his

testimony to appellant (VI), coupled with the outright falsehood that he unsuccessfully tried to sell the contrary testimony to Ms. Backers (XI). (AOB, pp. 219-222.)

Accumulated with all this, in argument XXIII, was Ms. Backers' vouching, which pervaded the case throughout and served prosecutorial purposes in the penalty as well as the guilt phase of trial (I, XVI); the pairing of appellant's trivial impropriety in wearing jail clothing with Richard Allen Davis's villainous and execrable insult to the jury condemning him (XX); the so-called gang list boasting of the murder of Nolan Pamintuan, all trumped up even in excess of Tony Iuli's monosyllabic assents to Ms. Backers' leading questions (X, XIX); Darryl Churish's conjectural speculation that appellant was about to commit a robbery as a favor to Churish (XXI); and finally the trial court's serious distortion of the "so-substantial" standard that confers the fundamental rational structure on death penalty trial (XVII). (AOB, pp. 222-224.)

Respondent insists that there simply was no problem with this trial. (RB, p. 196.) But if there was, he assures us, "lengthy criminal trials are rarely perfect" and there was here no miscarriage of justice in any event, "[g]iven the overwhelming evidence of appellant's guilt . . . , appellant's incredible alibi defense and claim that Tautai killed Nolan, and the strength of the case presented in aggravation . . . ." (RB, pp. 196-197.)

There are two points to note about respondent's answer. The first is his emphasis on lack of prejudice from these errors on the question of guilt. Here, however, the question is no longer guilt, but the degree these errors distorted and affected the penalty trial, especially in connection with factor (a) (Pen. Code, § 190.3(a)) evidence. The second point is that this is the first time in his brief that respondent made any penalty phase prejudice argument that invoked the supposed strength of the prosecution's case in aggravation. (See RB, pp. 179, 182-183, 184, 185, 186-187, 193, 195, 196.) And even then, as one may see, it is an abstraction. This is in contrast to appellant's specific argument that demonstrated indeed that

the prosecution's case in aggravation was not insuperable under the rational "so-substantial" standard, and that there were ponderable and significant factors in mitigation in this case. (AOB, p. 224.) There was a multitude of error in this case; it accumulated; and this accumulated prejudice raises at least the possibility that without this prejudice the jurors would have returned a life verdict. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XXIV.
VICTIM-IMPACT EVIDENCE UNDER STATE LAW

In argument XXIV, appellant contended that contrary to the understanding of current law, the phrase "circumstances of the crime" in Penal Code section 190.3(a) was not understood or intended to include victim-impact evidence when the current statute was enacted by popular initiative in November, 1978. The controlling gloss that conferred meaning on the enactment was derived from the controlling judicial interpretations in *People* v. *Love* (1960) 53 Cal.2nd 843 and in *People* v. *Floyd* (1970) 1 Cal.3rd 694, which address a statute substantially similar to the 1978 enactment. (AOB, pp. 225-229.)

Respondent first answers that the claim is forfeited for failure to object to the evidence. (RB, p. 197.) However, there is no timely objection requirement when existing law is seen as foreclosing the availability of any meritorious objection. (*People* v. *Black* (2007) 41 Cal.4th 799, 810-811; *People* v. *Saunders* (1993) 5 Cal.4th 580, 606-607.) At the time of trial in the instant case, it was firmly settled that victim impact evidence was admissible pursuant to Penal Code section 190.3(a). (*People* v. *Edwards* (1991) 54 Cal.3rd 787, 833-836; *People* v. *Kirkpatrick* (1994) 7 Cal.4th 988, 1017; *People* v. *Stanley* (1995) 10 Cal.4th 764, 831-832; *People* v. *Sanchez* (1995) 12 Cal.4th 1, 73; *People* v. *Riel* (2000) 22

Cal.4th 1153, 1221, fn. 11.) Review of the claim here, which maintains that the settled law is incorrect, is not forfeited.

On the substantive claim, respondent faults the argument for ignoring "precedential authority." (RB, pp. 197-198.) This of course is false and begs the question of whether or not precedential authority itself ignored the history of the 1978 enactment, which includes a consideration of *People* v. *Love*, *supra*, 53 Cal.2nd 843. In *Love*, the court excluded the victim-impact evidence that showed the pain the victim suffered from the infliction of homicidal injuries by the defendant. This Court found no significant probative value in this without further evidence that the defendant intended to inflict such pain. (*Id.* at p. 857, fn. 3.) This lack of subjective responsibility for a specific consequence had been the basis for holding such evidence unconstitutional before the United States Supreme Court changed its view in *Payne* v. *Tennessee* (1991) 501 U.S. 808. This Court has never addressed *Love* in its manifold statements that victim-impact evidence is statutorily inadmissible in California.

Respondent does not address the matter either, but implies that *Love* is limited to inflammatory victim impact evidence, and that this distinguishes *Love* from the instant case where the trial court did preclude a video of the wedding rehearsal and of the wedding day with the priest announcing Nolan's death (19RT 3674), while still allowing extensive victim-impact evidence that included, *inter alia*, extensive testimony about the wedding. *Love*, as seen from the above paragraph cannot be read that narrowly. Further, to use the instant case as a foil for this attempt to narrow the meaning of *Love*, is meritless. If in *Love* there was a tape of the groans of the victim, here there was the pathos of a mother identifying her son in the morgue on the eve of his wedding, and of a funeral occurring in the same church where this wedding was supposed to take place – all of this no less vivid for having been described verbally rather than displayed visually. This evidence should not have been presented to the jury, and it was clearly prejudicial.

(*People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965; *People* v. *Brown* (1988) 46 Cal.3rd 432, 446-448.)

XXV.
CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY LAW AS INTERPRETED AND APPLIED

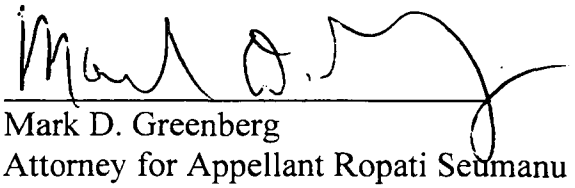
In argument XXV, appellant presented a series of constitutional claims against California's death penalty law. These have been repeatedly rejected by this Court, and their presentation in abbreviated fashion was for purposes of issue-preservation. (AOB, pp. 229-257.) Respondent, for the same reason, addresses them in summary fashion. (RB, pp. 199-200.) There is no need to offer anything further, except to assert, again for purposes of issue-preservation, that he is not conceding these issues.

CONCLUSION

For the reasons stated in this brief and in appellant's opening brief, his conviction for murder must be reversed. At the very least, the judgment of death must be reversed.

Dated: April 9, 2009

Respectfully submitted,

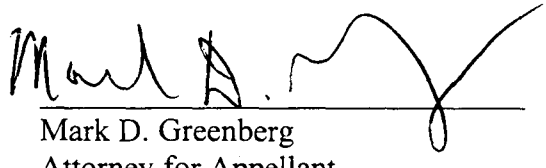


Mark D. Greenberg
Attorney for Appellant Ropati Seumanu

CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 27,528 words.

Dated: April 9, 2009



Mark D. Greenberg
Attorney for Appellant

[CCP Sec. 1013A(2)]
The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 484 Lake Park Avenue, No. 429, Oakland, California; that he served a copy of the following documents:

APPELLANT'S REPLY BRIEF

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on April 13, 2009, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 13, 2009 at Oakland, California.

Mark D. Greenberg
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