SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, Vs. **DANIEL GARY LANDRY** Defendant and Appellant.	S100735 **CAPITAL CASE** (San Bernardino County Superior Court, Case No. FCH-02773)

ON AUTOMATIC APPEAL FROM THE SUPERIOR COURT,
STATE OF CLIFORNIA, COUNTY OF SAN BERNARDINO,
THE HONORABLE PAUL M. BRYANT, PRESIDING

APPELLANT'S REPLY BRIEF

DONALD R. TICKLE
State Bar No. 142951
P.O. Box 400
Volcano, CA 95689-0400
(209) 296-4536 (voice & facsimile)
E-mail: drt@volcano.net

Attorney for Defendant-Appellant
DANIEL GARY LANDRY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA	]	S100735
Plaintiff and Respondent,	]	**CAPITAL CASE**
Vs.	]	(San Bernardino County Superior Court,
DANIEL GARY LANDRY	]	Case No. FCH-02773)
Defendant and Appellant.	]	

ON AUTOMATIC APPEAL FROM THE SUPERIOR COURT,
STATE OF CLIFORNIA, COUNTY OF SAN BERNARDINO,
THE HONORABLE PAUL M. BRYANT, PRESIDING

APPELLANT'S REPLY BRIEF

DONALD R. TICKLE
State Bar No. 142951
P.O. Box 400
Volcano, CA 95689-0400
(209) 296-4536 (voice & facsimile)
E-mail: drt@volcano.net

Attorney for Defendant-Appellant
DANIEL GARY LANDRY

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

State Cases:

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Constitutions:

Federal Statutes:

State Statutes:

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Other Authorities:

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA	]	S100735
Plaintiff and Respondent,	]	(San Bernardino County Superior Court,
Vs.	]	Case No. FCH-02773)
DANIEL GARY LANDRY	]	**APPELLANT'S REPLY BRIEF**
Defendant and Appellant.	]	**(Death Penalty Case)**

INTRODUCTION

Prior to being imprisoned and denied mental health care, appellant Daniel Landry never committed a crime involving force or violence.

From the time he was in kindergarten, appellant had received mental health treatment after his grandparents gained custody of him. (12 RT 2972; 13 RT 3350.) They took appellant from his parents because of physical abuse and neglect that as a toddler reduced him at times to foraging in a trash can for food and sleeping under a car for shelter. (12 RT 2946-48, 2983-85; 13 RT 3102.) His grandparents later learned that Daniel had been sexually abused by his father's best friend and a woman who was his mother's friend. (12 RT 3028; 13 RT 1336, 1339-40; Suppl.B CT 8.)

At first, appellant couldn't talk and communicated by grunts and pointing because both of his parents were deaf. (12 RT 2950, 2955.) (*Ibid.*) He had "extreme nightmares" where he would scream and be scared to death. (12 RT 2951.) He would hoard food and hide under his bed. (12 RT 2952.)

Appellant received care from psychiatrists and psychologists throughout his childhood and adolescence. (12 RT 2972; 13 RT 3350.) This included residential treatment in acute care psychiatric facilities when his grandparent's health insurance allowed it. (12 RT 2910; 13 RT 3313-14, 3327-28, 3351-53.) When appellant wasn't in a residential treatment program, he was put in special education classes at school. (13 RT 3348-49.)

As a teenager, appellant committed some theft crimes. Following a theft-related burglary at the age of 16, the juvenile court placed appellant in a closed, residential treatment center where he received psychological counseling and treatment for nine months. (13 RT 3335-36, 3341.) There is no evidence that appellant committed any acts of force or violence against others while he was receiving mental health care as a minor. His only acts of violence were self-directed attempts at suicide. (13 RT 3320-21, 3332, 3328-29; Exh. No. 95, CT. Suppl. B 11.)

When appellant was 19 years-old, he pled guilty to another theft-related burglary. The court sent him to the Youth Authority rather than to state prison he was too immature for prison. (12 RT 3021-22; Exh. No. 95, CT. Suppl. B 10; Exh. No. 42, 4 CT 1104.) The Youth Authority recognized that because of "extreme traumatic experiences" as a child appellant had "serious ... emotional and mental problems" requiring "intensive treatment." (12 RT 3068-69, 3072; Suppl.B CT 12.) Accordingly, the Youth Authority set up a "specialized counseling program" for him that included "intensive individualized psychotherapy" and group therapy. (*Ibid.*) There is no evidence that appellant engaged in any violent criminal activity when he received treatment and counseling.

Appellant ran away from the Youth Authority and pled guilty to a non-violent escape. (Welfare & Inst. Code 1768.7; Exh. No. 42, 4 CT 1106.) He was sent to state prison to complete his sentence for the burglary and escape.

(Exh. No. 42, 4 CT 1103, 1106.) While in prison this first time, the records of his medications showed that he was being treated for bipolar disorder. (13 RT 3134-35; Exh. No. 95, CT. Suppl. B 13-24.) There is no evidence that Daniel engaged in any violent criminal activity during his first term in state prison when he received treatment for his bipolar disorder.

When appellant was 23 years-old, he was sent to prison for eight years after pleading guilty to one count of residential burglary to commit larceny. (Exh. No. 42, 4 CT 1108; Exh. No. 64, 4 CT 1194-95, 5 CT 1224.) There is no evidence that he used force or violence during the burglary. (*Ibid.*)

Two years later while at Calipatria State Prison in July of 1994, appellant engaged in his first criminal activity involving force or violence when he admitted stabbing another inmate. (10 RT 2475-78; Exh. No. 95, CT. Suppl. B 37.) Prior to that time, Daniel's prison records contained reports of multiple injuries to him indicating that he had been the victim of intimidation and violence. (13 RT 3256-57.) At that time, Calipatria State Prison was still in "shake down" mode after opening in 1992. (13 RT 3288-89.) According to a correctional officer with 22 years of experience, Calipatria State Prison was known as being violent and out of control. (*Ibid.*; 8 RT 1992-94)

Shortly after committing his first stabbing, appellant sent a letter to the Department of Corrections pleading for psychological treatment and medication:

> I, Inmate Landry, Daniel D-62144 am writing this letter out of concern for my mental state and future <u>after</u> prison. During my stay here at Calipatria, I have (for some two years now) attempted to receive psychological treatment. I have filled out the proper paperwork, and have requested interviews with anyone for help.
>
> In the past, I was diagnosed as a manic depressive and given the recommended dosage of Lithium, this was in C.M.C. – East. I have attempted (as earlier stated) to renew my prescription with

the state, for my medication.

As a plea for help, I will/and want to enter a program (available at C.M.C.) for my condition, or just simply put I want help, and someone to talk to, I know programs are available, I've seen them.

I am presently in ad-seg (in Calipatria) for a stabbing assault, in my past I have no prior violence, or such misbehavior. I was found guilty and given a 24 month S.H.U. term. I know I must pay for these crimes I have been accused of, but I would like to be endorsed (after S.H.U. term) to C.M.C.-East, or any such facility having programs to help, not just punish inmates.

Respectfully[,] Daniel Landry D-62144 (Exh. No. 95, CT. Suppl. B 37.)

A couple of months later, on September 14, 1992, a state assemblyman at the request of appellant's grandmother (Esther Renfro) wrote James Gomez, the Director of the Department of Corrections, "regarding Daniel's mental health and psychiatric care." (CT. Suppl. B 32.) "According to Mrs. Renfro, Daniel has not been through a psychiatric evaluation and is not in a facility to receive the appropriate therapy should he need counseling." (*Ibid.*)

On October 20, 1992, the Director concluded that based on the Department's initial evaluation of appellant over four years earlier in May of 1988, there was "no evidence" that appellant had "any serious mental illness" or need for "psychiatric medication" or placement at an institution for "psychiatric reasons." (CT. Suppl. B 35.)

As a result, appellant continued in a downward spiral of violent criminal activity that was the basis for the prosecution's factor (b) case. (Penal Code, § 190.3, subd. (b)l 1 AOB 31, foll.) Appellant also periodically continued to seek help. For example, on August 19, 1994, appellant asked for counseling and a drug program after he competed his SHU term and "help to

prevent coming back to prison ...." (CT. Suppl. B 38.) On February 24, 1995, appellant requested counseling to find out "why I keep coming to prison." (CT. Suppl. B 39.) "I need an understanding." (CT. Suppl. B 40.)

During some inmate classification meetings after appellant committed an assault, prison staff noted appellant's "need of psychiatric treatment." (CT. Suppl. B 47; *see also id.* at 49 [Recommendation to keep Daniel in administrative segregation "pending psychiatric review."]; 13 RT 3146.) Nevertheless, a staff psychologist on November 2, 1995 concluded that appellant did "not meet the criteria for" the inmate mental health population. (CT. Suppl. B 52; 13 RT 3147.)

On February 22, 1997, after appellant committed another stabbing, a lieutenant at the California Institution for Men ("C.I.M.") ordered appellant placed in administrative segregation but again noted "Medical/Psyche Concerns." (CT. Suppl. B 78; 13 RT 3151.) Appellant was transferred to the Security Housing Unit ("SHU") at Corcoran State Prison. (Exh. No. 95, CT. Suppl. B 80.)

During a mental health screening at the Corcoran SHU on April 4, 1997, a doctor for the first time recognized that appellant met the "criteria for inclusion in the "Mental Health Services Delivery System." (CT. Suppl. B 80.) He prescribed Lithium for appellant because appellant said that it had kept him stable in the past. (*Ibid.*)

Appellant had given the same information to prison staff as early as June of 1992 before he committed his first stabbing. (13 RT 3142; CT. Suppl. B 31, 33.) However, he received no treatment or medications. (13 RT 3143; CT. Suppl. B 34.) When appellant received Lithium at the Corcoran SHU during May of 1997, there is no evidence that he engaged in any violent criminal activity. (13 RT 3152; CT. Suppl. B 82, 84, 85-86.)

On May 27, 1997, the Department of Corrections transferred appellant

back to C.I.M. However, his "Confidential Medical/Mental Health Information Transfer Summary" inexplicably stated that Daniel had no mental health problems ("none") and that he was receiving no medications ("none"). (CT. Suppl. B 87-88; 13 RT 3152.)

On August 3, 1997, appellant stabbed and killed inmate Daniel Addis on the exercise yard at C.I.M. resulting in the capital/murder charges. (1 CT 44; Penal Code, §§ 187, subd. (a), 4500; 1 CT 44.)

On August 12, 1997, Caroll Yap, M.D., noted that appellant was "mentally ill" and, for the first time since appellant return to prison in June of 1992, ordered a mental health treatment plan for him. (CT. Suppl. B 93-94; 13 RT 3153.)

The testimony by three mental health experts (Drs. Lantz, Lipson, and Gawin) showed that Daniel's involvement in violent criminal activity in prison was the result of the denial of treatment and care for his bipolar disorder and schizoid personality disorder. (13 RT 3107-09, 3123, 3134-53, 3156-58, 3246-49, 3257; 1 AOB 57-58.) The prosecution presented no contrary experts.

Frank Gawin, M.D., a Fulbright scholar and Professor of Psychiatry at UCLA, testified that appellant received a "dismal" level of care that violated constitutional norms. (U.S. Const., 8th Amend.; 13 RT 3154-57, addressing *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, and *Coleman v. Wilson* (E.D. Cal. 1995) 912 F.Supp. 1282; *see also* 13 RT 3229-31, 3257-59, 3263-64.)

The high court recently confirmed that "[f]or years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result." (*Brown v. Plata* (2011) ___ U.S. ___ [131 S. Ct. 1910; 179 L. Ed. 2d 969, 982].) The State of California has now "conceded that deficiencies in

prison medical care violated prisoners' Eighth Amendment rights." (179 L. Ed. 2d at p. 985.)

In particular, "[p]risoners in California with serious mental illness do not receive minimal, adequate care." (*Id.* at p. 983.) This included the times at issue in this case. "Over 15 years ago, in 1995, after a 39-day trial, the *Coleman* District Court found 'overwhelming evidence of the systematic failure to deliver necessary care to mentally ill inmates' in California prisons. ... Mentally ill inmates 'languished for months, or even years, without access to necessary care.'" (*Id.* at p. 984, quoting *Coleman v. Wilson,* 912 F. Supp. 1282, 1316 (ED Cal.).) The record in this case shows that the same was true for Daniel Landry.

The sad reality of this case is that the Addis homicide would never have occurred if prison staff had properly attended to either appellant or Addis. Multiple correctional officers on duty, including the Sergeant in charge, knew that Addis would be assaulted if he went to the prison yard. (1 AOB 7-13; Section VI.B.2., below.) Nevertheless, they did not protect him but put him on the yard. (*Ibid.*)

"[C]apital punishment must 'be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them 'the most deserving of execution.'" (*Kennedy v. Louisiana* (2008) 554 U.S. 407 [128 S. Ct. 2641, 2649-50; 171 L. Ed. 2d 525, 538]; citations and internal quotation omitted.)

To execute Daniel Landry under the circumstances of this case would be a miscarriage of justice.

ARGUMENT

Appellant hereby reasserts and incorporates by reference all arguments presented in his opening brief. Portions of Respondent's brief ("RB") were completely addressed in that brief. In this reply brief, appellant discusses matters requiring additional comment.

I.

RESPONDENT AGREES THAT THE COURT SHOULD REVIEW THE SEALED RECORDS TO ENSURE THAT APPELLANT RECEIVED ALL MATERIALS RESPONSIVE TO HIS DISCOVERY REQUESTS.

A. Introduction.

Respondent agrees (RB 1-2, 53-54) that the Court should review three sets of records sealed by the trial court in response to appellant's discovery requests: (1) the confidential file (known as the "C-file") maintained by the Department of Corrections[1] for appellant, the homicide victim inmate Daniel Addis, and Gary Green, the Nazi Low Rider ("NLR") prison gang shot-caller and inmate who ordered the "hit" on Addis (AOB 80, 83-92); (2) the personnel files for three correctional officers on duty on the day of the Addis homicide and who testified at trial (Frank Esqueda; Sergeant Arioma Sams, and Rosamaria Maldonado) (1 AOB 92-95); and (3) the records from the State Compensation Insurance Fund (SCIF) and the California Institution for Men (C.I.M.) pertaining to Officer Maldonado, who retired from the Department of Corrections because of the Addis homicide (1 AOB 95-99).

Nevertheless, respondent makes various arguments purporting to

1. Effective July 1, 2005, the Department of Corrections was re-named the Department of Corrections and Rehabilitation. (Penal Code, § 5000.) Appellant will use the former name because that was the name in effect and used at appellant's trial and on the documents admitted in evidence.

explain why no relevant records should exist and why no prejudice is possible from the trial court's failure to disclose them to appellant. (RB 54-57.)

B. There Is Reason To Believe That Additional Responsive Records Exist In The Inmate C-Files.

Respondent asserts that appellant received a "considerable amount of discovery" from the C-files for appellant, Green, and Addis. (RB 54.) However, the issue is whether appellant received all of the materials to which he was entitled under state law and the Due Process Clause of the Fourteenth Amendment. (1 AOB 81-83; Penal Code, §§ 1054, subd. (e), 1054.1; *In re Littlfield* (1993) 5 Cal.4th 122, 131 ["timely pretrial disclosure of all relevant and reasonably accessible information, to the extent constitutionally permitted, facilitates 'the true purpose of a criminal trial, the ascertainment of the facts'"], citation omitted; *Brady v. Maryland* (1963) 373 U.S. 83 [10 L. Ed. 2d 215, 83 S. Ct. 1194].)

Respondent agrees (RB 54) that appellant received only one page from Addis's C-file. (1 AOB 89.) Nevertheless, respondent insists that there is no reason to believe that any additional relevant materials are contained in his file. (RB 54-55.) The single page disclosed was a report of an unrelated incident involving Addis at Folsom State Prison on December 29, 1992, more than four and a half years before he was assaulted at C.I.M. on August 3, 1997. (2 CT 316.)

Other evidence showed that Addis assaulted a correctional officer at C.I.M. on May 27, 1997. (6 RT 1423-25; Exh. No. 46, 4 CT 1159 ; Exh. No. 65, 5 CT 125-26.) On July 15, 1997, about two weeks before he was killed, Addis asked in confidence to leave the cell tier because he had stolen tobacco from the stash that the NLR shot caller controlled for the other inmates on the tier. (7 RT 1593-95; 6 RT 1400; Exh. No. 52, 4 CT 1152-53.) Those same inmates were on the exercise yard at the time of the homicide. (5 RT 1066-67,

1136; 6 RT 1419-20; 8 RT 1784.) There was also evidence that Addis had numerous enemies in prison and that he had previously requested protective custody. (7 RT 1672.)

As explained in appellant's opening brief, Addis's history with the staff and other inmates, including prison gang member, was relevant to two defense at the guilt and penalty phases of appellant's trial, *i.e.*, that appellant acted under duress after the NLR shot caller ordered a "hit" on Addis, and that there was staff complicity or negligence in how Addis was handled on the day he died. (1 AOB 83-89.) Given the trial testimony about Addis's history with the other inmates and staff, there are substantial reasons to believe that additional responsive materials exist in his C-file. (*Ibid.*)

The Operations Manual for the Department of Corrections and Rehabilitation defines the C-File as "[t]he master file maintained by the Department containing reports, evaluations, and correspondence regarding each person committed to its jurisdiction ...." (Department of Corrections & Rehabilitation Operations Manual, Chapter 7, Adult Case Records Information, § 71010.8.1.)[2] Accordingly, there is reason to believe that more than the one document in Addis's C-file was responsive to appellant's discovery request. For example there should be documents related to the circumstances of Addis's battery on a correctional officer before he was killed, why he had enemies in prison, and why he had previously requested protective custody. (1 AOB 89.)

In addition, the trial court should have permitted trial counsel for appellant to review Addis's C-file because new records materialized at trial

---

2. The Department Operations Manual is available at: www.cdcr.ca.gov/Regulations/Adult_Operations/DOM.

showing that the prosecution had access to the file.[3] (1 AOB 89-91.) Respondent disputes that the prosecution had access to Addis's C-file during trial. (RB 55-56.) However, the prosecutor admitted that Department of Corrections Officer Lacey, the investigating officer before and at trial, was able to provide materials to her from Addis's file. (2 CT 576; 3 CT 743-44.)

Under these circumstances, the denial of an opportunity to review Addis's file violated appellant's due process rights to reciprocal discovery. (*Wardius v. Oregon* (1973) 412 U.S. 470 [93 S. Ct. 2208; 37 L. Ed. 2d 82]), to impeachment and exculpatory evidence, to a fair trial, and to the effective assistance of counsel. (1 AOB 90; 2 CT 576-77, 578-579, citing U.S. Const., 5th, 6th and 14th Amends.; *see, e.g., United States v. Bagley* (1985) 473 U.S. 667, 676 [105 S. Ct. 3375; 87 L. Ed. 2d 481] ["Impeachment evidence, ... as well as exculpatory evidence, falls within the *Brady* rule."].)

C. The Import Of The Correctional Officer's Testimony At Trial Is Relevant To Review Of Their Personnel Files.

Respondent agrees that the Court should review the personnel files for correctional officers Arioma Sams, Frank Esqueda, and Rosamaria Maldonado which the trial court sealed. (2 RT 370-71; 2 CT 488; 1 AOB 92-95.) All three were designated as prosecution witnesses to the Addis homicide and testified at trial.[4] (2 RT 292-93; 4 RT 958-59; 5 RT 1057; 6 RT 1290-91; 8 RT 1801-02.)

---

3. Appellant has also requested the Court to grant appellate counsel an opportunity to review Addis's file because of his duty to preserve evidence for habeas counsel. (1 AOB 91-92; *In re Clark* (1993) 5 Cal.4th 750, 811; Supreme Court Policies Regarding Cases Arising From A Judgment Of Death, Policy 3, Standard 1-1.)

4. After appellant made his discovery requests, the prosecution decided not to call Officer Maldonado as a witness. (4 RT 958-59.) Appellant then called her as a witness in the defense guilt phase case. (8 RT 1801.)

Respondent argues that the "import of an officer's testimony" at trial should have "no place" in this Court's review of their sealed records. (RB 57.) However, the fact that the prosecution intended to call them as witnesses was relevant to the prosecution's disclosure duties. (Penal Code, § 1054.1, subd. (f) ["The prosecuting attorney shall disclose to the defendant or his or her attorney .... (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial ...."].)

The import of the witnesses' testimony at trial was also relevant as a matter of due process to evaluating the materiality of any undisclosed impeachment or exculpatory evidence in their files. (2 AOB 81-83; U.S. Const., 14th Amend; *Kyles v. Whitley* (1995) 514 U.S. 419, 434-35 [115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490]; *In re Brown* (1998) 17 Cal.4th 873, 891; *United States v. Bagley, supra,* 473 U.S. at p. 676.)

D. Prejudice Should Be Assessed After Appellant Has Reviewed The Evidence And Submitted Any Necessary Additional Briefing.

If the Court finds that additional discoverable materials, appellant has requested an opportunity to review them and to submit additional briefing on their significance to the guilt and penalty phase issues. (1 AOB 81.)

Respondent speculates that the denial of any discovery was harmless error under any standard of review because of the "vast" amount of evidence against appellant. (RB 57.) This argument is the sound of one hand clapping. Appellant has not seen the materials at issue. As an indigent, he is entitled to the effective assistance of counsel on appeal. (*Douglas v. California* (1963) 372 U.S. 353, 354 [83 S. Ct. 814; 9 L. Ed. 2d 811]; *see also People v. Brown* (1960) 55 Cal.2d 64, 71, J. Traynor, concurring.) Appellant has accordingly requested an opportunity to review the materials in order to address the

question of prejudice. (1 AOB 80-81.)

In connection with this issue and the other issues discussed below, respondent asserts that the evidence against appellant was overwhelming. It is important to recall that from opening statement this was a case of an admitted killing. (5 RT 1050.) The other two charged incidents (Counts 3 & 4) were undisputed. (10 RT 2290-91.) Nevertheless, the jury deliberated for more than 9 hours over the course of three days before convicting appellant of murder and the capital offense. (4 CT 939-41.)

In a case of an admitted killing, the length of jury deliberations shows that despite the purportedly "vast" amount of evidence against appellant, the jury had serious questions about the prosecution's case and did not consider the question of guilt to be clear cut. (*See, e.g., People v. Rucker* (1980) 26 Cal.3d 368, 391 [The fact that the jury deliberated nine hours before reaching a verdict shows that the "question of the appellant's criminal liability was not clear-cut ...."]; *People v. Collins* (1968) 68 Cal.2d 319, 332-33 [Nine hours of deliberations shows that the "case was apparently a close one."]; *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 855, fn. 8 [Nine hours of deliberations over three days shows that the jury had "serious questions" about the prosecution's case.].)

The prosecution offered the jury a single theory of first degree murder, which was willful, deliberate and premeditated murder as the only theory of first degree murder. (3 CT 874-75; 9 RT 2253.) On the second day of deliberations (April 19, 2001), the jurors asked for copies of the jury instruction on that theory (CALJIC No. 8.20), showing that they had serious questions about the degree of the crime. (3 CT 830; 10 RT 2347.)

Several sections below discuss the reasons why the existing record calls into question the prosecution's theory of first degree murder. (See Sections IV.E., VI.D., VII.E., VIII. & IX..) Accordingly, this Court should reject

respondent's preemptive attempt to argue that no prejudice is possible from the denial of additional discovery.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION TO SEVER THE TRIAL OF THE CHARGES RELATED TO THE CAPITAL/MURDER OFFENSE (COUNTS 1 & 2) FROM THE UNRELATED, LESSER CRIMES (COUNTS 3 & 4) WHICH OCCURRED WEEKS LATER.

A. Introduction.

The prosecution charged appellant with crimes related to three separate incidents: the fatal stabbing of inmate Addis on August 3, 1997, which was charged as both murder (Penal Code, § 187, subd. (a); Count 1) and a capital offense (Penal Code, § 4500; Count 2); assault with a deadly weapon on inmate Matthews on September 18, 1997 (Penal Code, § 4500; Count 3); and possession of a weapon on October 15, 1997 (Penal Code, § 4502, subd. (a), Count 4). (2 CT 489, 498-99.)

Appellant asked the court to sever trial of the capital/murder charges from the other charges. However, the trial court denied severance because the three incidents occurred within a two month period, each occurred at Palm Hall at C.I.M., and each involved a prison made weapon. (2 RT 403-04; 2 CT 512; 1 AOB 99-101.)

Respondent argues that the denial of severance was not an abuse of discretion occurred because the trial court's ruling did not "'fall[] outside the bounds of reason.'" (RB 59, quoting *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.)

Appellant recognizes that this shorthand phrase is sometimes used to describe the standard of review for an abuse of discretion. More precisely, the abuse of discretion standard "asks in substance whether the ruling in question

'falls outside the bounds of reason' under the applicable law and the relevant facts [Citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162.) A "trial court abuses its discretion when the factual findings critical to its decision find insufficient support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) In addition, a ruling "that rests on an error of law constitutes an abuse of discretion." (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159.)

Moreover, "[e]ven if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in gross unfairness amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162, citations and internal quotations omitted.) Applied here, these standards show that severance should have been granted.

B. The Charged Weapon Possession (Count Four) Was Neither Of The Same Class Nor Connected Together In Its Commission With The Other Crimes.

The first error committed by the trial court was its ruling that the weapon possession offense (Penal Code, § 4502; Count 4) was of the same class as the assaultive crimes because it involved the "possession of a prison-made weapon necessary to commit similar assaults." (2 RT 404.)

This ruling was legally incorrect because Penal Code section 4502 is a possession offense, not an assaultive crime. (1 AOB 104; *see, e.g., People v. Rodriguez* (1975) 50 Cal.App.3d 389, 395 [For Penal Code section 4502, "intended violent use is not an element of possession."].) It was factually incorrect because the prosecution presented no evidence that appellant possessed the weapon to commit assaults.

Respondent does not dispute the latter point. As to the question of law, respondent argues that Penal Code section 4502 is of the same class as Penal Code section 4500 because both statutes are part of Title V of the Penal Code

entitled "Offenses relating to Prisons and Prisoners" and Chapter 1 of that title is entitled "Offenses by Prisoners." (RB 61.)

However, "[t]he title does not make the law." (*Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1288.) "Title or chapter headings are unofficial and do not alter the explicit scope, meaning, or intent of a statute." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 602; *accord People v. Wheeler* (1992) 4 Cal. 4th 284, 293-94.) The language of the Penal Code section 4502 shows that it is a possession offense, not an assaultive offense. (1 AOB 104-05 & fn. 101 *see, e.g., People v. Rodriguez* (1975) 50 Cal.App.3d 389, 395 [For Penal Code, § 4502, "intended violent use is not an element of possession."].)

Alternatively, respondent argues that three cases show that the weapon possession offense was of the same class as the other crimes: *People v. Lucky* (1988) 45 Cal.3d 259, 276, *People v. Moore* (1986) 185 Cal.App.3d 1005, 1012; and *People v. Thomas* (1990) 219 Cal.App.3d 134, 140. (RB 61.) However, those cases support do not support respondent's position.

In *People v. Lucky, supra,* 45 Cal.3d 259, the defendant was charged with robbery, attempted robbery, and murder. (*Id.* at pp. 270-272.) This Court found that "the statutory requirements for joinder under section 954 were satisfied" because "robbery and attempted robbery ... belong to the same class of crimes. [Citation.] As for the robbery and murder charges, they are also deemed to be of the 'same class,' insofar as both offenses share common characteristics as assaultive crimes against the person. [Citations.]" (*Id.* at p. 276.) A weapon possession offense was not at issue. (*Ibid.*)

The same is true of *People v. Moore, supra,* 185 Cal.App.3d 1005. In that case, the defendant was charged with multiple counts of child annoyance and molestation. (*Id.* at p. 1008, Pen. Code, §§ 647a, 288, subd. (a), 273a).) Those crimes were all of the same class because they all shared the common

element of "'lewd conduct toward young female minors.'" (*Id.* at p. 1012.) A weapon possession offense was not at issue. (*Ibid.*) Therefore, neither *Lucky* nor *Moore* resolves the question presented here. (*People v. Scheid* (1997) 16 Cal.4th 1, 17 ["'Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. [Citation.].'"].)

People v. Thomas, supra, 219 Cal.App.3d 134 ("*Thomas*"), did involve a weapon possession offense (Penal Code, § 12021, subd. (a)) in conjunction with a charge for attempted murder (Pen. Code, §§ 664, 187) and six counts of armed robbery with personal use of a firearm (Penal Code, §§ 211, 12022.5). (*People v. Thomas, supra,* 219 Cal.App.3d at p. 137.) In a brief discussion, the *Thomas* court stated that the "offenses charged pertained to the 'same class of crimes,' (§ 954) being assaultive crimes against the person, and were properly joined." (*Id.* at p. 140.)[5]

However, that statement must be read in the context that the weapon at issue in the weapon possession offense (a pistol) was same as the weapon used in the armed robberies. (*Id.* at p. 140 ["'a number of the victims have viewed the pistol found in the defendant's joint residence and have identified it as being the same weapon as was pointed at them and used upon them in the commission of the robbery'"], quoting the trial court.) This is the same distinction identified by appellant for when a firearm possession offense may be properly joined. (1 AOB 106-107; *see, e.g., People v. Cunningham* (2001) 25 Cal.4th 926, 984; *People v. Pike* (1962) 58 Cal.2d 70, 84; *People v. Scott*

---

5. The *Thomas* court cited *People v. Walker* (1988) 47 Cal.3d 605 in support of its ruling. That case did not address joinder of an unrelated weapon possession offense. The defendant was charged with robbery, murder, and assault with intent to commit murder, "assaultive crimes against the person, all of them being considered of the same class.'" (*People v. Walker, supra,* 47 Cal.3d at p. 622, citation and internal quotations omitted.)

(1944) 24 Cal.2d 774, 779.)

Conversely, severance is proper where "the handweapon used in each otherwise unrelated crime is not identified as being the same weapon used in ... [the other charged crimes], and any connection based on a class of weapons is attenuated by a considerable time difference in the commission of the crimes." (*Walker v. Superior Court* (1974) 37 Cal.App.3d 938, 941; 1 AOB 106-07.)

Respondent concedes that the weapon at issue in Count 4 was "not the same weapon" used Counts 1-3. (RB 66, 67 ["the same weapon was not used in each offense"].) To circumvent this concession, respondent notes (RB 62) that section 954 permits joiner of offenses of a different class if they were "nevertheless 'connected together in their commission' ... [and] linked by a common element of substantial importance.'" (*People v. Valdez* (2004) 32 Cal.4th 73, 119 ("*Valdez*"), internal citations and quotations omitted.)

This principle applied in *Valdez* because the "apparent motive for the escape" charge (Penal Code, § 4532, subd. (b)) joined with the murder charge "was to avoid prosecution for the murder." (*Ibid.*) In this case, there was no comparable nexus between weapon possession in Count Four and any of the other charged crimes.)

Respondent contends that *Valdez* rationale applies to Count 4 because it charged appellant with possession of an inmate-manufactured weapon after two prior assaults using an inmate-manufactured weapon. (RB 61, 62-63.) The parties agree that the relevant record is the evidence presented at the preliminary hearing, the transcript of which the trial court reviewed before ruling on the severance motion. (2 RT 403; 1 AOB 102; RB 59.)

At the preliminary hearing, the prosecution presented no evidence that the weapon possession on October 15, 1997 (Count 4), had any connection to the prior assault on Addis on August 3, 1997 (Count 1 & 2), or on Matthews

on September 18, 1997 (Count 3). Nor did the prosecution present evidence committed or attempted to commit an act of violence with the weapon at issue in Count 4. (1 RT 20-141.) Respondent concedes this point. (RB 70 ["count four did not involve an act of violence by Landry"].)

Respondent argues that the cases relied on by appellant are distinguishable and in fact support its position. (RB 95-68.) However, in each case the weapon at issue in the weapon possession offense was the same as the weapon used in the charged assaultive crimes.

In *People v. Cunningham, supra*, 25 Cal.4th 926, the defendant was charged with the murder and robbery of one man (Carmen Enrique Treto) and the attempted murder and attempted robbery of another (Juan Cebreros) as well as possession of a firearm by person convicted previously of a felony. (*Id.* at p. 957; Pen. Code, § 12021, subd. (a).) The defendant moved to sever the charge of possession of a firearm by an ex-felon (Count V) because he did not want the jury to learn that he had been previously convicted of a felony. (*Id.* at pp. 983, 984.)

The defendant forfeited the claim by failing to obtain a ruling from the trial court on the claim. (*Id.* at p. 984.) Nevertheless, this Court held that "the trial court would not have erred in denying the motion. Section 954 provides that an accusatory pleading may charge two or more different offenses connected together in their commission. The firearm used to commit the offenses was the same, and joinder was proper pursuant to that statute." (*Id.* at p. 984.) In this case, respondent concedes that the weapon at issue in Count 4 was not the same weapon at issue in Counts 1-3. (RB 66, 67 ["the same weapon was not used in each offense"].)

In *People v. Pike, supra,* 58 Cal.2d 70, defendants Pike and Ceniceros were both charged in Count I with the murder of police officer Richard D. Kent on December 8, 1960. "In Count II Pike was charged with armed

robbery of Berta and Rudolph Fleischner on December 6, 1960." (Id. at p. 77.) On appeal, defendant Ceniceros argued that he was deprived of a fair trial by the denial of his motion to sever Count II. (*Id.* at p. 84.) This Court found no merit to the argument because "the gun with which Pike committed the armed robbery of the Fleischner store on December 6 (Count II) and with which he wounded Mr. Fleischner and Mrs. Johnson during that robbery, was the gun with which he shot and killed Officer Kent during the attempted armed robbery of the Lucky store on December 8 (Count I)." (*Ibid.*)

In *People v. Scott, supra,* 24 Cal.2d 774 ("*Scott*"), the information charged the defendant with "rape in Counts I, II, and III, on the basis of a single act of intercourse with a sixteen-year-old girl against her will. ... Count IV, based upon the same acts set out in Counts I, II, and III, charged defendant with contributing to the delinquency of a minor in violation of section 702 of the Welfare and Institutions Code. Count V charged the defendant with tampering with the identification marks on an automatic pistol in violation of section 13 of the Dangerous Weapons' Control Law of 1923, as amended (Stats. 1923, ch. 339; Deering's Gen. Laws, 1937, Act 1970, p. 999)." (*Id.* at p. 776.)

The defendant argued "that his motion to dismiss Count V should have been granted on the ground that the violation of the Dangerous Weapons' Control Law charged therein and the rape charged in the other counts of the information could not be tried together." (*Id.* at p. 778.) *Scott* rejected this claim because the "possession of the firearm in the present case intimidated the complainant and was therefore an important element of the rape. It was also the basis of the offense charged under the Dangerous Weapons' Control Law. The possession of the weapon was thus a common and important element of each crime." (*Id.* at p. 779.)

In *Walker v. Superior Court, supra,* 37 Cal.App.3d 938, the Court of

Appeal similarly recognized that "joinder is generally proper where a specific weapon is common to more than one crime." (*Id.* at p. 942.) As noted, it also explained that it is error to deny severance of a weapon possession where the weapon was not used in the charged assaultive crime and committed at substantially different times. (*Id.* at p. 941; 1 AOB 106-107.)

For all these reasons, the applicable law and facts show that the trial court erred in finding that Count Four was properly joined for trial with the other counts.

C. The Other Relevant Factors Supported Severance.

1. The Evidence Of The Unrelated Crimes Was Not Cross-Admissible.

Respondent contends that the evidence of the three separate offenses was cross-admissible to prove a common scheme or plan for each offense. (RB 70.) In order to be admissible to show a common plan or scheme, the evidence of another crime "must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*People v. Catlin* (2001) 26 Cal.4th 81, 111, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) On respondent's view, the three incidents met this standard because each offense involved "use" of an inmate-manufactured weapon. (RB 70.)

However, Count 4 did not involve use of a weapon. It involved constructive possession of a weapon. The evidence presented at the preliminary hearing was that a piece of sharpened aluminum metal stock fell to the floor when the officers slid open the cell gate to remove appellant from his cell after handcuffing him. (1 RT 121-127.) The prosecution presented no evidence that appellant used or attempted to use the weapon. (*Ibid.*) Therefore, the weapon possession on October 15, 1997, in connection with

Count Four could not be construed as a manifestation of a common plan to commit the assaults committed weeks earlier against Addis on August 3, 1997 (Counts 1 & 2) or against Matthews on September 18, 1997.

Alternatively, respondent argues that because all of the charges involved an inmate-manufactured weapon, evidence concerning how inmates made and moved weapons within prison would have been cross-admissible. (RB 70.) There are several problems with respondent's position.

The prosecution presented no evidence of the movement of weapons with respect to Count 4. (1 RT 121-131.) The evidence was simply that the weapon that fell to the floor when the officer slid open the gate to appellant's cell. (1 RT 127-29.)

With respect to the assault on inmate Matthews on September 18, 1997, the prosecution also presented no evidence of how weapons moved within prison. (1 RT 80-90, 104-06, 106-09, 115.) As to weapon manufacture, the weapon was claimed to be a razor blade mounted on a tooth brush handle. (1 RT 108.)

With respect to the stabbing of Addis on the prison yard on August 3, 1997, Officer Esqueda testified that the weapon was sharpened metal stock with a cellophane handle and a cardboard sheath. (1 RT 37-39.) The prosecution presented no evidence of how weapons were moved within prison. (1 RT 25-79.) At trial, the prosecution presented some evidence of this in connection with the assault on Addis. (5 RT 1115-18, 1244-46.) However, "'the propriety of a ruling on a motion to sever counts is judged by the information available to the court at the time the motion is heard.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) The absence of such evidence at the preliminary hearing shows that it was a tangential issue and not part of a common plan for all three incidents.

In sum, the record rebuts respondent's claim that the three incidents

involved a common weapon movement or manufacturing process.

More fundamentally, respondent has ignored the dramatic differences between the two assaults. The August 3, 1997, assault on Addis occurred on the exercise yard at Palm Hall when multiple inmates were present. (1 RT 25-28.) It was set-up by inmate Green, who directed Addis to the card table where he was stabbed. (1 RT 29-32.)

The September 18, 1997, assault on Matthews occurred 47 days later when appellant was confined alone in his cell in administrative segregation. Inmate Matthews broke away from two escorting officers. He ran over to appellant's open cell port after appellant asked Matthews if he wanted a cigarette. (1 RT 82-86, 94-101.) There was no evidence that Green or any other inmate was involved in assaulting Matthews.

As previously noted, the weapon possession on October 15, 1997, involved no assault at all. (1 RT 121-131.)

Given these substantial dissimilarities between the three incidents and the fact that a different weapon was involved in each incident, there was no basis to conclude that the two incidents were part of a common plan. Respondent notes that "even with respect to the comparatively higher degree of similarity required for the use of other-crimes evidence to establish 'common scheme or plan,' the standard can be met despite the existence of some factual differences between or among the charged offenses." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1225 ("*Alcala*"); RB 70.)

However, *Alcala* also recognized that the offenses "'must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' ... To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the

plan thus revealed need not be distinctive or unusual." (*Id.* at p. 1223, fn. 13, quoting *People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403, internal quotations and citations omitted.)

The preliminary hearing testimony showed that the assault on Matthews was a spontaneous act. It occurred after appellant's cell port was left open and officers happened to pass by while escorting Matthews back to his cell from the showers. (1 RT 81-83, 88.) Respondent has identified no evidence to show that this was a manifestation of a general plan which included the assault on Addis in the prison yard 47 days earlier. The weapon possession on October 15, 1997, did not even involve a similar result (an assault) let alone common features showing it was part of a common plan.

Respondent also claims that evidence of "security procedures" at C.I.M. was cross-admissible for all four counts. (RB 70-71.) However, there were different witnesses for three different security situations. Officer Esqueda testified about the procedure for putting inmates onto the exercise yard in connection with the August 3, 1997 Addis incident. (Counts 1 & 2; 1 RT 45-50.) Officer Lourenco testified about procedures for escorting a prisoner from the shower in administrative segregation in connection with the September 18, 1997 Matthews incident. (Count 3; 1 RT 81-82, 90, 91-93, 94-98.) Officer Lopez testified about the procedure for handcuffing a prisoner and removing him from his cell for exercise on the tier rather than on the prison yard in connection with the October 15, 1997 weapon possession charge. (Count 4; 1 RT 121-27.) Thus, the record shows an absence of common features and witnesses for the three incidents.

Finally, respondent notes that even assuming the evidence was not cross-admissible, "cross-admissibility is not the *sine qua non* for joinder of offense." (RB 71, citing *People v. Geier* (2007) 41 Cal.4th 555, 575.) Appellant recognized this in his opening brief. (1 AOB 108; Penal Code, §

954.1; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1129.)

Nevertheless, "[c]ross-admissibility is the crucial factor affecting prejudice" in conjunction with the other factors relevant to the analysis of severance. (*People v. Stitley* (2005) 35 Cal.4th 514, 531; *Alcala, supra,* 43 Cal.4th at p. 1227.) As next explained, respondent errs in arguing that none of the other relevant factors supported severance.

2. Inflammatory Effect.

The next factor is whether some of the charges were unusually likely to inflame the jury against the defendant. (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1120.) The focus is not simply on the charges themselves but also on the evidence surrounding them. (*People v. Balderas* (1985) 41 Cal.3d 144, 174; 1 AOB 110.)

Respondent contends that none of the charges were particularly likely to inflame the jury against appellant. (RB 71.) However, the slashing assault on the handcuffed Matthews using the ruse of offering him a cigarette was inflammatory because, at the guilt phase, there appeared to be no mitigating circumstance. Moreover, the combined effect of that incident with the weapon possession incident undercut appellant's defense of duress and staff complicity and/or negligence in the Addis homicide based on the facts peculiar to that incident. (1 AOB 110-11.)

Respondent contends that nothing in the record at the time of the severance motion indicated what appellant's defense would be at trial. (RB 72.) However, the trial court at the time it denied severance knew of appellant's separate defense to the capital murder charges from multiple sources.

On September 6, 2000, appellant filed an opposition to the prosecution's motion to quash appellant's subpoena duces tecum for the Department of Corrections files for himself, Addis and Green. (1 CT 117.) In

that briefing, appellant explained in detail his separate defense to the capital/murder charges. (1 CT 117-126.) This included duress and the mitigating circumstance of correctional staff complicity or negligence because of the way they handled Addis. (1 CT 124-25.)

On September 7, 2000, appellant filed a motion for discovery of the inmate and officer files. (1 CT 127.) This motion also explained the separate defense to the capital/murder charges. (1 CT 132-39.) The trial court addressed the discovery issues at hearings on January 10, 2001, and January 18, 2001. (2 RT 305, 306-309, 370-371; 2 CT 467-68, 488;1 AOB 83-89.)

Appellant filed his severance motion 20 days later on January 30, 2001. (2 CT 489-500.) The grounds for severance included the proposal of making an *in camera* proffer by appellant of "testimony concerning the charges in counts 1 and 2 that would avail him a defense not applicable to the offenses alleged in counts 3 and 4." (2 CT 497.) On February 8, 2001, the trial court held a hearing at which appellant made an in-camera offer of the proposed testimony in defense to the capital/murder charges.[6] (2 CT 510; 2 RT 373-374.) The court denied the severance motion on February 9, 2001. (2 RT 400, 403-04; 2 CT 512.) In sum, the trial court for multiple reasons knew of appellant's separate defense to the capital/murder charge when it denied severance.

The subsequent, unrelated incidents suggested that appellant had a disposition to violence, which was inadmissible evidence at the guilt phase of trial. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 393 ["Subdivision (a) of section 1101 prohibits admission of evidence of a person's character ... to prove the conduct of that person on a specified occasion."].) The other incidents were

---

6. Respondent agrees that the Court should review the sealed in camera offer of proof in deciding whether the trial court erred in denying severance. (RB 76; 1 AOB 114.)

also inflammatory in the sense of creating an emotional bias against appellant with respect to the most serious charges. (*People v. Crittenden* (1994) 83, 133 [Improper prejudice relates to evidence that creates "an emotional bias against . . . an individual, while having only slight probative value with regard to the issues."].)

Respondent argues (RB 73) that a case such as *People v. Crittenden, supra,* is irrelevant to the analysis because it addressed the admissibility of evidence pursuant to Evidence Code section 352, whereas to prevail on a severance motion, the defendant must make "a *clear showing of prejudice* to establish that the trial court abused its discretion[.]" (*People v. Soper* (2009) 45 Cal.4th 759, 774 ("*Soper*"), citations, internal quotations omitted.)

However, *Soper* also recognized that whether "evidence would otherwise be inadmissible [under Evidence Code section 352] may be considered as a factor suggesting possible prejudice, but countervailing considerations [of efficiency and judicial economy] that are not present when evidence of uncharged offenses is offered must be weighed in ruling on a ... motion [to sever properly joined charges]." (*People v. Soper, supra,* 45 Cal.4th at p. 773, brackets inserted in original.)

In this case, the factors of efficiency and judicial economy carried little if any weight. (1 AOB 116.) At the preliminary hearing, the prosecution presented no witnesses in common to the three incidents. (*See* 1 RT 20-141.) Moreover, there is no reason to believe that if the capital murder charges had been tried first, that the prosecution would have continued to press the lesser charges. (1 AOB 116.) Appellant was already facing a three strikes sentence of 25 years-to-life commencing on February 10, 2000. (Exh. No. 42, 4 CT 1099.)

Accordingly, when the additional factors identified by *Soper* are added to the Evidence Code 352 analysis, the conclusion remains the same: joint

trial of all three charges would create an emotional bias against appellant and impair appellant's ability to defend against the capital/murder charges.

3. Risk of Improper Spillover Effect.

The next factor is whether "'a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges ....'" (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1120, citation omitted; 1 AOB 111.)

Respondent contends that the evidence for all of the charges was equally strong. (RB 73.) Appellant disagrees for the reasons previously stated. (1 AOB 111-12.) However, even assuming the contrary, an improper spillover effect existed. Joint trial of the unrelated offenses was prejudicial to appellant's ability to defend against the capital/murder charges because the evidence of the other offenses functioned as improper disposition evidence.

Respondent asserts that this is not relevant consideration for severance. (RB 74-75.) However, this Court has recognized that even "'when cautioned juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one.' [Citation.]" (*People v. Smallwood* (1986) 42 Cal.3d 415, 432, fn. 14; 1 AOB 112.) The "danger" is that the jury will "aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both charges." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 453-454.)

Respondent notes (RB 75) that "the benefits of joinder are not outweighed--and severance is not required--merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried." (*People v. Soper, supra,* 45 Cal.4th at p. 781, emphasis added.) However,

multiple factors in this case supported severance, not merely the factor of a separate defense to the capital/murder charges. The risk of an improper spillover effect was another factor supporting severance in this case.

4. Capital Case Factor.

Severance of Counts 3 and 4 was also proper because the murder of Addis was also charged as a capital offense pursuant to section 4500. (1 AOB 113.) Respondent argues that this factor does not apply because the capital charge did not result from the joinder with other offenses. (RB 75.) That is one way in which the capital case factor applies. (*See, e.g., People v. Geier, supra,* 41 Cal.App.4th at p. 576.)

However, it is not the only way. The capital case factor also applies if "'any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1316, internal quotation omitted, emphasis added.)[7] Because "one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams, supra*, 36 Cal.3d at p. 454, *accord People v. Gutierrez, supra,* 28 Cal.4th at p. 1120.)

A need for greater scrutiny also derives from the heightened need for reliability imposed by the Eighth Amendment on both phases of a capital trial. (1 AOB 112; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38 [100 S. Ct. 2382, 65 L. Ed. 2d 392] ["To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.

---

7. Multiple cases are in accord. (*See, e.g., People v. Lynch* (2010) 50 Cal.4th 693, 736; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1129; *People v. Sandoval* (1992) 4 Cal. 4th 155, 173; *People v. Memro, supra,* 11 Cal. 4th at

The same reasoning must apply to rules that diminish the reliability of the guilt determination."], footnote omitted.)

D. Severance Should Also Have Been Granted Because Appellant Had A Separate Defense To The Capital/Murder Charges That Was Not Relevant To The Other Charges.

Severance may be necessary where the defendant presents substantial evidence of a defense to the most serious charges that does not pertain to the other charges. (1 AOB 114-15; *see, e.g., People v. Sandoval, supra,* 4 Cal.4th at pp. 173-174; *United States v. Sampson* (2nd Cir. 2004) 385 F.3d 183, 190-191, cert. denied, *Sampson v. United States* (2005) 544 U.S. 924 [125 S.Ct. 1642; 161 L.Ed.2d 483]; *United States v. Archer* (7th Cir. 1988) 843 F.2d 1019, 1022, cert. denied, *Archer v. United States* (1988) 488 U.S. 837 [109 S.Ct. 100; 102 L.Ed.2d 76]; *United States v. Lewis* (8th Cir. 1976) 547 F.2d 1030, 1033, *cert. denied*, 429 U.S. 1111, 97 S. Ct. 1149, 51 L. Ed. 2d 566 (1977).)

Respondent repeats the argument that "nothing" in the record before the trial court at the time of the severance ruling suggested that appellant had a separate defense to the capital offense. (RB 76.) As explained above, appellant's prior discovery motions as well as the in camera offer of proof at the hearing on the severance motion showed that appellant had a separate defense to the capital/murder charges. (2 CT 497, 510; 2 RT 373-374.)

Respondent later concedes this by recognizing that appellant made an *in camera* offer of proof of his defense and joins in appellant's request for the Court to review the sealed transcript of the offer of proof. (RB 76; 1 AOB 114.) If the Court finds that the trial court erred in denying severance on this basis, respondent requests that the in camera proceedings "be unsealed to allow the parties to review this record and address the offer of proof to the trial

---

pp. 849-850; *People v. Davis, supra,* 10 Cal. 4th at p. 508.)

court." (RB 76.)

Appellant objects to unsealing the transcript without conditions. The sealed transcript of the offer of proof consists of attorney-client communications related to the capital/murder charges. (2 RT 373-74; 2 CT 497.) If unsealed, the transcript should be made available only to counsel for appellant and respondent, this Court and any subsequent court in post-conviction proceedings related to this case.

In addition, any order unsealing the transcripts should specify: (1) that appellant has not waived his privilege against self-incrimination (Cal Const. Art. I, § 15; U.S. Const., 5th Amend.); (2) that the waiver of the attorney-client privilege is limited to the subject matter addressed by the sealed transcript for February 8, 2001, and only for post-conviction proceedings related to this case; and (3) that the waiver of the attorney-client privilege would not apply to a retrial. (*See People v. Ledesma* (2006) 39 Cal.4th 611, 693-95; *Simmons v. United States* (1968) 390 U.S. 377, 393-394 [19 L. Ed. 2d 1247, 88 S. Ct. 967] ["we find it intolerable that one constitutional right should have to be surrendered in order to assert another"]; *accord United States v. Salvucci* (1980) 448 U.S. 83, 89-90 [100 S.Ct. 2547; 65 L.Ed.2d 619]; *People v. Boyette* (2002) 29 Cal.4th 381, 415.)

E. Judicial Economy Favored Severance Because There Would Have Been No Significant Duplication Of Evidence And The Lesser Charges Would Likely Have Been Resolved After Trial Of The Capital/Murder Charges.

Respondent argues that judicial economy favored joint trial because "clearly in separate trial the prosecution would have been required to put on evidence about security procedures at C.I.M. as well as about prison manufactured weapons." (RB 75.)

Respondent's use of the adverbial crutch ("clearly") should not obscure the fact that there were no common witnesses for the three different security

situations, the type of weapon, or the manufacture of weapons. (See Sections B., C. & E., above.) The preliminary hearing testimony showed that the three incidents were separate, unrelated and without any significant overlap of evidence to favor joint trial in the interest of judicial economy.

F. Under State Law, Reversal Is Required Because The Circumstances Show Undue Prejudice From Joint Trial.

Under state law, reversal is required if the denial of severance posed a substantial danger of undue prejudice. (*People v. Sapp* (2003) 31 Cal.4th 240, 258.) In connection with this issue, appellant noted that prejudice may be mitigated where the trial court instructed the jury that each count charged a distinct crime and that the jury must decide each count separately. (1 AOB 117-18.) However, no such instruction was given in this case.

Respondent misconstrues this as a claim of instructional error for which appellant made no objection at trial. (RB 77.) Appellant made no claim of instructional error. (1 AOB 117-18.) The point is that in the absence of such an instruction the jurors were likely to improperly aggregate the evidence to appellant's detriment. (1 AOB 118; c.f. *United States v. Lane* (1986) 474 U.S. 438, 449 [88 L. Ed. 2d 814, 106 S. Ct. 725]; *People v. Geier* (2007) 41 Cal.4th 555, 578; *Davis v. Woodford* (9th Cir. 2004) 384 F.3d 628, 639.)

Prejudice is also present because the prosecution in closing jury argument exploited the error in urging the jury to convict appellant of the capital/murder charges because of evidence that he committed the offenses on September 18, 1997, and October 15, 1997. (1 AOB 118; 10 RT 2279.)

Respondent attempts to misconstrue this as a claim of prosecutorial misconduct forfeited by the lack of an objection at trial. (RB 77.) Appellant presented no such claim in his opening brief. (1 AOB 118.) The evidence was admitted and, therefore, the prosecutor was entitled to argue it. (*See, e.g., People v. Gamache* (2010) 48 Cal.4th 347, 371.)

The point is that after the court overruled appellant's objection to joint trial, the prosecutor used the error at trial to seek appellant's conviction for the capital/murder charges. That fact is probative of prejudice. (*See, e.g., People v. Woodard* (1979) 23 Cal. 3d 329, 341 [Prejudice is present when the "the prosecutor exploited" the error "during final arguments."].)

G. Due Process Also Requires Reversal Because Forcing Appellant To Defend Against Two Additional Charges While On Trial For His Life Deprived Him Of A Fair Trial.

Respondent oddly asserts that "Landry does not argue that as a result of joinder, he was denied due process of law." (RB 77.) However, Argument Section II.H. of appellant's opening brief was separately captioned in bold: "Due Process Also Requires Reversal Because Forcing Appellant To Defend Against Two Additional Charges While On Trial For His Life Deprived Him Of A Fair Trial." (1 AOB 119.)

That was followed with a two page discussion explaining whether a due process violation occurred in this case. (1 AOB 119-120; U.S. Const., 5th & 14th Amends.) Accordingly, due process provides an additional ground to find prejudicial error from the denial of severance in this case.

III.

THE TRIAL COURT'S DENIAL OF APPELLANT'S REQUESTED QUESTIONS FOR THE JURY QUESTIONNAIRE VIOLATED STATE AND FEDERAL LAW.

A. Introduction.

The trial court denied appellant's request to include the following two questions on the written questionnaire used for jury voir dire:

> Proposed Question 40B: "Please indicate which statement best describes your opinion of life in the prison system prior to hearing the evidence in this case: ___ Prisoners are safer on the inside than they would be on the outside. ___ Prisoners are about as safe on the inside as they would be on the outside. ___ Prisoners are less safe on the inside than they would be on the outside."
>
> Proposed Question 40C: "Whatever your opinion as to the safety of living in the prison system may be, how willing are you to consider evidence that many prisoners' primary task on the inside is staying alive?" (Court Exh. No. 1, 4 CT 1084; 2 RT 318-19, 321.)

The failure to include those questions on the jury questionnaire violated appellant's state and federal rights to due process, a fair trial, an impartial jury, and to the reliable determination of guilt and penalty in a capital case. (1 AOB 121-123; U.S. Const. Amends, 5th, 6th, 8th, & 14th Amends.; Cal Const., Art I., §§ 7, subd. (a), 15, 16, 17; *Sawyer v. Smith* (1990) 497 U.S. 227, 243 [110 S. Ct. 2822; 111 L. Ed. 2d 193].)

Respondent argues that defense counsel agreed to the questionnaire omitting the questions he proposed and thereby forfeited appellant's claims or error. (RB 78, 81.) Alternatively, respondent argues that appellant's claims lack merit because the questions were an improper "attempt to educate the potential jurors of the facts of the case and to argue it, so the trial court

properly restricted and modified his requested questions." (RB 81.) Neither argument has merit.

B. Appellant's Claims Are Cognizable.

The record shows that defense counsel acquiesced to the court's ruling after it refused to include the questions he proposed. Therefore, appellant did not forfeit his claim of error.

After defense counsel proposed the questions, the trial court stated: "I'm not inclined to permit the 'B' subpart. .... And I'm not prepared to do the 'C' subpart." (2 RT 321.) Defense counsel acknowledged the adverse ruling by ruling responding, "Okay." (*Ibid.*) He then suggested the alternative of asking whether the juror "'would agree to consider evidence that many prisoners have to be concerned about their safety.' Is that less argumentative?" (*Ibid.*) The prosecutor objected, "it's still argumentative." (*Ibid.*)

The court proposed a modification of Question 40A. (*Ibid.*) As offered by appellant, that question stated: "To what extent can you consider evidence that living in the prison system, that is to say being a prisoner, is an ongoing experience different from living in society as you know it?" (4 CT 1084.) The court proposed to modify this to begin, "'Would you be willing to consider evidence?'" (2 RT 321.) Defense counsel responded: "Okay. If we are not going to do 'B' and 'C,' can we go back to 'B' and 'A' and could I ask that we add after 'A,' 'Please Explain'?" (2 RT 321-22.) The court agreed to this.

As a result, the written question submitted to the jury stated in full: "Would you be willing to consider evidence that living in the prison system, that is to say being a prisoner, is an ongoing experience entirely different from living in society as you know it? Please Explain" (*See* 1 Supp. CT A 11 [Question 96b]; 4 CT 1084.)

After the jury questionnaire was compiled in its final form, defense counsel stated, "I have reviewed the third amended questionnaire which was

turned in at the last appearance and I have no objection and would agree that that questionnaire can be used." (2 RT 406.) From this, respondent contends that defense counsel forfeited appellant's claims. (RB 85.)

However, the record as summarized above shows that defense counsel was trying to salvage what he could after the court refused to include the questions he requested for the jury questionnaire. (2 RT 321-22 ["If we are not going to do 'B' and 'C,' can we go back to 'B' and 'A' and could I ask that we add after 'A,' 'Please Explain'?" (2 RT 321-22.) The final remark about the third amended jury questionnaire showed only that he had agreed to the format of the questionnaire after the court had ruled against the questions he had proposed. (2 RT 406.)

Yielding to a trial court's adverse ruling is not a forfeiture. "'It is the imperative duty of an attorney to respectfully yield to the rulings of the court, *whether right or wrong.*'" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1374, original emphasis, citation omitted.) "'An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith ....'" (*People v. Calio* (1986) 42 Cal.3d 639, 643, citation omitted; *People v. Riggs* (2008) 44 Cal.4th 248, 289 [The defendant's attempt to make "the best of an allegedly erroneous ruling ... does not bar his claim on appeal."].)

Respondent claims that *People v. Benavides* (2005) 35 Cal.4th 69, 88, demonstrates forfeiture. (RB 86.) In that case, defense "counsel stipulated that eight prospective jurors could be excused based upon their responses to questionnaires alone." (*People v. Benavides, supra,* 35 Cal.4th at p. 87.) On appeal, the defendant argued that "the trial court erred in excusing, upon stipulation, eight prospective jurors based solely upon their responses to juror questionnaires without follow-up questioning." (*Ibid.*) Given the stipulation,

this Court held that the defendant was "barred from raising on appeal this claim regarding defects in the jury selection procedure." (*Id.* at p. 88.)

This is not a case where appellant is trying to unwind a stipulation he made at trial. The record shows that the trial court denied appellant's requested jury questions. His subsequent attempt to make the best of an adverse ruling was not a forfeiture. (*People v. Calio, supra,* 42 Cal.3d at p. 643; *People v. Riggs, supra,* 44 Cal.4th at p. 289.)

C. The Proposed Questions Were Necessary To Expose Possible Biases Of Potential Jurors And To Ensure A Fair And Impartial Jury On Issues That Were Central To This Case.

Respondent contends (RB 86-87) that appellant's proposed questions were "attempts to indoctrinate the jury with his defense" and analogous to questions prohibited in *People v. Butler* (2009) 46 Cal.4th, 861, and in *People v. Sanders* (1995) 11 Cal.4th 475, 538-39. However, those cases prohibited questions addressing case-specific facts, unlike the questions proposed by appellant.

In *People v. Butler, supra,* 46 Cal.4th 847 ("*Butler*"), the prosecution charged the defendant with two counts each of murder, robbery, and carjacking in an encounter with two Japanese citizens in the parking lot of a Ralph's grocery store in San Pedro. (*Id.* at pp. 851-52.) The "centerpiece" of the prosecution's penalty phase evidence was evidence that the defendant participated in the murder of a fellow jail inmate while awaiting trial for the charged crimes. (*Id.* at p. 852.) During discussions about the scope of jury voir dire, defense counsel stated that he "wanted to explore whether any juror 'would automatically vote for death, if they knew about the jail killing.' He claimed, 'The only way I can know that is if they have been asked, knowing that [defendant] is charged in this jail killing and is involved in this jail killing.'" (*Id.* at p. 858.)

The trial court "concluded it would be inappropriate 'to go into aggravating and mitigating circumstances in the specifics, not the abstract.' It would be enough to question the jurors generally about 'multiple killings,' without 'asking them to prejudge the case.'" (*Ibid.*) As a result, "[t]he juror questionnaire asked whether '[a]nyone who intentionally kills more than one person without legal justification and not in self defense, should receive the death penalty.'" (*Id.* at p. 859.)

This Court affirmed. "[A]s we have said on many occasions, '[d]efendant ha[s] no right to ask specific questions that invite[] prospective jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating evidence, to educate the jury as to the facts of the case, or to instruct the jury in matters of law." (*Id.* at p. 859, citations omitted.) "[O]ur cases make it clear that counsel was not entitled to do what he sought to do here: tell the panel that his client 'is charged in this jail killing and is involved in this jail killing.'" (*Id.* at p. 861.) In contrast, "[d]efense counsel was free during voir dire to explore the prospective jurors' general attitudes about jailhouse killings and whether the death penalty is always appropriate for such perpetrators."

The questions proposed by appellant were analogous to the type of question considered proper by this Court, *i.e.,* to explore the prospective jurors' general attitudes about inmate safety and survival without incorporating the specific facts of the case. Accordingly, *Butler* supports appellant's position.

In *People v. Sanders, supra,* 11 Cal.4th 475 ("*Sanders*"), the prosecution charged the defendant with four murders, robbery, attempted robbery and assault with a deadly weapon. (*Id.* at p. 497.) The incident became known as the "'Bob's Big Boy murders'" because it occurred at one of a chain of fast-food restaurants with that name. (*Id.* at pp. 497-98.)

During voir dire, defense counsel posed a detailed hypothetical question

based on the facts of the robbery and shooting at the restaurant but which, as the trial court observed, "'ignored most of the other factors which contain a potential for mitigation.'" (*Id.* at p. 538.)[8] The trial court "subsequently ruled as follows. 'I will not permit any hypothetical facts to be presented to jurors concerning the case; any questions that they are asked about their ability to vote for either penalty must be confined to the face of the information that they have been read, where the defendant is charged with a certain number of robberies and murders and special circumstances.'" (*Id.* at p. 538.)

The trial court explained, 'I am not going to let you tell them a horror story about what the most aggravating factor is and then give them almost nothing by way of mitigating factors and then ask them what penalty they are going to impose. I don't think it is a proper inquiry.'" (*Id.* at p. 538.) On appeal, the defendant argued "that the trial court erred in restricting the

---

8. "Defense counsel posed a hypothetical question to prospective juror Wong as follows. '[T]wo men go into a restaurant in the early morning hours. They herd 11 people, two customers and nine employees, to the back area of the restaurant. The two men are armed with shotguns. They rob all the people and make them lie on the floor and they rob them all. They put them all in a freezer. The people obey all the orders and instructions that the two men give them. They do not fight with them or protest. They are told to get on their knees and face the walls. They do that. No one says anything. And the two men open fire, as you put it, with their shotguns. And they go on firing even though one of the victims begs for her life. They do not stop firing until they run out of ammunition. They pick up the casings that their guns have expended. They leave everybody in this darkened freezer where people are dying and people are moaning. [P] Now, if those are the facts that you are presented with at the penalty phase, you understand you are entitled to rely on those facts as one of the circumstances in deciding a penalty, do you not?' Defense counsel was also permitted to ask: 'Now, don't you believe that that's precisely the kind of case where with your ideas of justice, the death penalty is the only appropriate kind of penalty?' She then asked if various hypothetical aggravating and mitigating factors--such as the defendant's criminal record, age, and background--would make a difference to the juror." (*People v. Sanders, supra,* 11 Cal.4th at p. 538.)

questions on voir dire and denying counsel permission to use case-specific hypotheticals as a means of exploring possible challenges for cause and peremptory challenges." (*Id.* at pp. 538-39.)

Sanders rejected the defendant's claim, concluding that it "'is not a proper object of voir dire to obtain a juror's advisory opinion based on a preview of the evidence. Many persons whose general neutrality toward capital punishment qualifies them to sit as jurors might, if presented with the gruesome details of a multiple-murder case, conclude that they would likely, if not automatically, vote for death.' [*People v. Mason* (1991) 52 Cal. 3d 909, 940].) As in *Mason*, we conclude that the trial court properly exercised its discretion to disallow the proposed hypothetical questions." (*Id.* at p. 539, footnote omitted.)

The questions proposed by appellant bore no resemblance to the case-specific, hypothetical questions in *Sandoval*. Nor could they be construed as soliciting an advisory opinion from the jury based on a preview of specific evidence. They simply sought to elicit any bias or preconceived beliefs about inmate safety (Proposed Question 40B) and survival (Proposed Question 40C).

A trial court commits error "when it refuses to allow an inquiry which bears a substantial likelihood of uncovering jury bias. Trial counsel must be allowed, within reason, to effectively probe the recesses of a juror's mind in order to determine his or her real attitudes and prejudices." (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1460, citations omitted; *accord People v. Box* (2000) 23 Cal. 4th 1153, 1179; 1 AOB 125.)

Respondent claims that appellant's "questions were attempts to indoctrinate the jury with his defense." (RB 87, 88.) However, the questions did not address appellant's defense for either phase of the trial. In the guilt phase, appellant's defense to the capital/murder charge was duress from a prison gang and staff complicity in putting Addis on the yard knowing that he

would be assaulted. (5 RT 1051-57.) In the penalty phase, in addition to those factors as pertinent to the circumstances of the capital crime, appellant presented mitigating evidence of his abuse and neglect as a child and the denial of mental health care for his long-standing mental health problems while incarcerated. (10 RT 2437-1441; 10 RT 3518-36.)

Neither of appellant's questions addressed specific facts related to those defenses. Accordingly, respondent errs by arguing that the questions in this case were analogous to those in either *Butler* or *Sanders*.

D. The Oral Voir Dire Permitted By The Trial Court Was Insufficient To Rectify The Error Because The Trial Court Limited The Scope Of Voir Dire To The Subjects Allowed On The Written Questionnaire.

Citing *People v. Navarette* (2003) 30 Cal.4th 458 ("*Navarette*"), respondent alternatively argues that there was no error in denying the written questions because the trial court permitted follow-up questions during oral voir dire. (RB 88.)

In *Navarette*, the trial court had refused to include questions on the jury questionnaire related to a jurors' prior work experience, how a supervisor should keep workers in line, and whether a person should maintain a belief she or he believed was right.[9] However, the trial court told defense counsel: "'[Y]ou can ask any questions you want[] that are not in your questionnaire.' Counsel therefore had express permission and ample opportunity to ask the very same questions that defendant now complains the court erroneously

9. Specifically, the questions were: "'What has been your favorite job and what (do/did) you enjoy about it?' 'What has been your least favorite job and what (do/did) you dislike most about it?'; 'If you were a supervisor or employer, what do you think is the best way to keep workers in line?'; and 'A person should maintain his or her belief on a subject so long as he or she feels that belief is right. Strongly Agree___ Agree Somewhat___ Disagree Somewhat___ Strongly Disagree___ Please explain.'" (*Id.* at p. 486.)

prevented him from asking. [Citation.] [¶] Furthermore, the court allowed a 31-page juror questionnaire that sufficiently covered the areas of inquiry defendant now claims he was unable to pursue." (*Id.* at p. 486.)

In this case, the jury questionnaire did not cover the areas of inquiry addressed by appellant's proposed questions. This is confirmed by the questions themselves and the answers given by the seated jurors and alternates. (1 AOB 130-32.) Moreover, unlike *Navarette*, the trial court in this case limited the scope of voir dire to the areas addressed by the questions it permitted on the jury questionnaire.

The trial court initially stated that it would allow some "individual voir dire on any issue, whether its death penalty or other ...." (3 RT 343.) Defense counsel then asked for an "average of five minutes" of individualized voir dire for each juror. (3 RT 345.) The court responded, "I think we sort of need to see what questionnaires come back before I commit to something on that." (3 RT 345.) Thus, the scope of voir dire in this case was governed by the questions permitted on the jury questionnaire, unlike the situation in *Navarette*.

Respondent asserts that the jury knew prior to looking at the questionnaires that the case concerned inmate safety and survival because the prosecution had charged appellant with murder of an inmate and an assault on another inmate. (RB 87.) If so, appellant should have been able to include the type of general questions he proposed to expose any biases or preconceived opinions on inmate safety and survival. The fact that jurors' responses to the questionnaire did not address those subjects confirms that the questions permitted by the trial court were insufficient. (1 AOB 130-31.)

E. *Witherspoon-Witt* Error Occurred Because The Trial Court Denied Appellant An Opportunity To Make A Suitable Inquiry To Expose Bias Affecting Penalty Phase Deliberations.

The denial of the proposed questions violated the standards necessary to prevent the seating of a jury "'uncommonly willing to condemn a man to die.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 418 [105 S. Ct. 844; 83 L. Ed. 2d 841] ("*Witt*"), quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521 [105 S. Ct. 844; 83 L. Ed. 2d 841] ("*Witherspoon*"); 1 AOB 126-27.)

Respondent argues that no *Witherspoon-Witt* error occurred because this Court has held that the defendant is entitled only to determine in the abstract the jurors' views about the death penalty. (RB 89; citing *People v. Butler, supra,* 46 Cal.4th at p. 859.) However, a defendant may also inquire whether a prospective juror "would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances ...." (*People v. Earp* (1999) 20 Cal.4th 826, 851-53; *accord People v. Zambrano, supra,* 41 Cal.4th at pp. 1120-1121; *People v. Butler, supra,* 46 Cal.4th at p. 860.)

The questions in this case were designed to determine whether jurors had any preconceived ideas about the circumstances of prison safety and survival which would invariably lead them to vote for or against the death penalty. Accordingly, the denial of opportunity to pose the questions was *Witherspoon-Witt* error.

F. Respondent Conceded Prejudice By failing To Address It.

In his opening brief, appellant explained the prejudicial effect of the denial of his questions proposed for the jury questionnaire. (1 AOB 132-136.) Respondent did not address the question of prejudice and thereby conceded it.

(*See, e.g., People v. Adams* (1983) 143 Cal.App.3d 970, 992 ["Respondent's failure to argue the point [of prejudice] must be viewed as a concession that if error occurred, reversal is required."]; *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1278 ["The People have not made the slightest attempt to meet this standard [of prejudice], an omission we view as a tacit concession they cannot do so."].)

IV.

BECAUSE OF INSUFFICIENT AUTHENTICATION, THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE TWO LETTERS THE PROSECUTION CLAIMED WERE WRITTEN BY APPELLANT AND ADDRESSED PRISON GANG ISSUES AND THE CIRCUMSTANCES OF THE CAPITAL/MURDER.

A. Introduction.

Over appellant's objections that the evidence was hearsay, speculation, irrelevant, and lacking proper authentication, the trial court admitted in evidence two letters which the prosecution claimed were written by appellant and addressed the Addis homicide and showed appellant's involvement in prison gang activity. (2 AOB 137; Exh. No. 66, 5 CT 1227-30; Exh. No. 67; 5 CT 1231-34; 7 RT 1744-45, 1746, 1748, 1753-54; 8 RT 1885-87, 1949.)

Respondent contends that appellant forfeited his claims. (RB 91, 92.) Alternatively, respondent argues that copies of the letters were properly authenticated and admitted under the secondary evidence rule. (RB 91, 92-104; Evid Code, §§ 1520-22.) Respondent is mistaken on both counts.

B. Appellant's Claims Are Cognizable.

Respondent agrees that appellant objected that there was no foundation for admitting the letters because they were not properly authenticated and that he objected to testimony about the letters by the prosecution's gang expert. (RB 92.) Nevertheless, respondent contends that appellant did not object to

the "contents of the letters" or make an objection sufficient to address whether the letters were admissible by the "Secondary Evidence Rule." (RB 92.) The record shows otherwise.

"An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented." (*People v. Scott* (1978) 21 Cal.3d 284, 290, citations omitted.) Measured against this standard, appellant's claims "were not waived by any lack of specificity." (*Ibid.*)

The prosecutor began by asking her gang expert (Mr. Willett) to explain the first paragraph of the first letter (Exhibit No. 66; 5 CT 1227-28). (7 RT 1744-45.) In particular, the prosecutor asked the expert to explain the statement, "upon my return, this punk decides to disrespect me and threaten me harm, what nerve! Guess he came up short." (7 RT 1745.) Defense counsel objected to the contents of the letter by stating that "it's speculation who's being referred to and therefore, it's irrelevant." (7 RT 1745.) The trial court overruled the objection. (*Ibid.*)

The prosecution proceeded to ask the witness to "assum[e] he is referring to the victim in the case ...." (*Ibid.*) Defense counsel "[o]bject[ed] to the assumption. That's an improper question. There's no basis to make that assumption." (*Ibid.*) The court sustained this objection. (*Ibid.*)

The prosecutor then started to ask about "this 187" referred to in the second paragraph of People's Exhibit No. 66. (7 RT 1745; *see* 5 CT 1227-28.) The court sustained defense counsel's objection that the prosecutor was testifying about the contents of the letter and granted defense counsel's request for a sidebar. (7 RT 1745-46.) Counsel was required to request a sidebar to object to secondary evidence. (Evid. Code, § 1522, subd. (b) ["In a criminal action, a request to exclude secondary evidence of the content of a writing,

under this section or any other law, shall not be made in the presence of the jury."].)

At the sidebar, defense counsel further objected to the contents of the letter by arguing that its language was "vague and uninterpretable" and there was no basis for the prosecution's attempt to relate it to the charged murder. (7 RT 1746.) The court overruled those objections. (7 RT 1747.) Referring to both letters (People's Exhibit Nos. 66 & 67), defense counsel stated, "I have been assuming all of these writings that have been referred to are going to be authenticated at some point." (7 RT 1748.)

The court did not rule on the authentication issue at the time. (*Ibid.*) However, the statement by defense counsel shows that he raised the issue of authentication in recognition of the requirement of authentication before secondary evidence may be admitted. (*In re Kirk* (1999) 74 Cal.App.4th 1066, 1074 ["The secondary evidence rule, however, does not 'excuse[] compliance with Section 1401 (authentication).' (Evid. Code, § 1521, subd. (c).)."].)

The trial court ruled on the authentication issue when the prosecution asked the court to admit the letters in evidence at the conclusion of the guilt phase trial. Defense counsel objected that "[t]here's no foundation that Mr. Landry wrote them." (8 RT 1885-86.) "There was no ability of Mr. Willett to lay a foundation for those letters, and obviously he had no personal knowledge as to who wrote them. There has been no authenticating witness called to establish that they are in fact appropriate records of the Department of Corrections." (8 RT 1886-87.) The court added, "Nor did anyone testify as to how they were taken from" appellant. (8 RT 1887.)

Defense counsel responded, "I was going there. ... There is no testimony as to the method of seizure or where or when or from whom or how we know Mr. Landry wrote them. And so under those circumstances, there hasn't been proper authentication and they are just hearsay." (*Ibid.*) The court

asked Mr. Lacey, the prosecution's investigating officer at trial from the Department of Corrections, "Are there records that indicate when these are seized or who they are seized by?" (8 RT 1888.) Lacey responded, "No." (*Ibid.*) The court deferred ruling until the following Monday morning in order to think about the issues. (*Ibid.*)

On Monday, April 9, 2001, the court stated: "I took a ruling on two exhibits under submission. I didn't intend to have any further argument. But Exhibit 66 and 67 are received at this time." (8 RT 1949.)

This record shows appellant adequately apprised the court that he objected to the contents of the letters (*i.e.*, that they were written by appellant and addressed the circumstances of this case) and that they had not been authenticated. The trial court understood the issues and ruled against appellant. Therefore, appellant's claims "were not waived by any lack of specificity." (*People v. Scott, supra,* 21 Cal.3d at p. 290.)

Respondent claims that two cases show the contrary. (RB 92.) In *People v. Cain* (1995) 10 Cal.4th 1, the defendant on appeal contended that admission of several crime scene and autopsy photographs was prejudicial at both the guilt and penalty phases of the trial. (*Id.* at p. 28.) This Court concluded, "[b]ecause trial counsel did not object to the admission of any of these photographs, defendant's objections are waived." (*Ibid.*) As explained above, appellant made multiple objections to the letters at trial.

People v. Demetrulias (2006) 39 Cal.4th 1 held that an "objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a 'placeholder' objection stating general or incorrect grounds (e.g., 'relevance') and revise the objection later in a motion to strike stating specific or different grounds." (*Id.* at p. 22.) Respondent contends that this rule applies because appellant did not object to the contents of the writing when he initially objected. (RB 92.)

However, defense counsel objected multiple times to the contents of the writing. (7 RT 1745 ["It's speculation who's being referred to and therefore, it's irrelevant."]; *ibid.* ["There is no basis to make that assumption]; 7 RT 1746 ["counsel is trying to relate it to the 187 and there is no basis for that in the evidence"].) That was sufficient to raise the question of whether the secondary evidence rule could be properly applied. (*People v. Panah* (2005) 35 Cal.4th 395, 475 [The "'best evidence rule applies only when the contents of a writing are at issue.'"], quoting *Hewitt v. Superior Court* (1970) 5 Cal. App. 3d 923, 930.)

The trial court also showed that any additional objections would have been futile. When it overruled appellant's objection to admitting the letters in evidence, the court stated that it "didn't intend to have any further argument." (8 RT 1949.) "A litigant need not object ... if doing so would be futile." (*People v. Wilson* (2008) 44 Cal.4th 758, 793.) The United States Supreme Court has applied the same rule to address constitutional claims. (*See, e.g., Estelle v. Smith* (1981) 451 U.S. 454, 468, fn. 12 [68 L.Ed.2d 359; 101 S.Ct. 1866] [Citing with approval *United States v. Smith* (5th Cir. 1979) 602 F.2d 694, 708, fn. 19, which states "that the apparent futility of objecting to an alleged constitutional violation excuses a failure to object"].)

For all these reasons, appellant's claims are cognizable and respondent's forfeiture argument should be rejected.

C. The Letters Were Not Properly Authenticated And Therefore Irrelevant And Inadmissible Hearsay.

Respondent agrees that a writing must be authenticated before it may be received in evidence. (RB 96; 2 AOB 148; Evid. Code, § 1401, subd. (a) ["Authentication of a writing is required before it may be received in evidence."].) The same requirement is imposed before secondary evidence may be admitted. (*In re Kirk, supra,* 74 Cal.App.4th at p. 1074 ["The

secondary evidence rule, however, does not 'excuse[] compliance with Section 1401 (authentication).' (Evid. Code, § 1521, subd. (c).)."]; 2 AOB 148.)

"[I]n some legal systems it is assumed that documents are what they purport to be, unless shown to be otherwise. With us it is the other way around. Generally speaking, documents must be authenticated in some fashion before they are admissible in evidence." (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525, citing Evid. Code, § 1400, *et seq.*) Respondent agrees that as the proponent of the document, the prosecution had the burden of establishing by a preponderance of the evidence the authenticity of the letters, *i.e.*, that they were written by appellant and addressed the Addis homicide and appellant's involvement in prison gang activity. (RB 96-97; 2 AOB 149-50; *see, e.g., People v. Marshall* (1996) 13 Cal.4th 799, 832-33.)

Respondent claims that the letters were authenticated because they referred to "matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing." (Evid. Code, § 1421; RB 98.) Alternatively, respondent argues that the letters themselves contained circumstantial evidence establishing appellant as the author. (RB 98, 100, 101; Evid. Code, § 1410 ["Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved."].)

Respondent notes (RB 98) that Evidence Code section 1421 uses the word "author" rather than "writer" so "it is not necessary for purposes of authentication of a writing that the writing be physically created by the author's hand." (*People v. Lynn* (1984) 159 Cal.App.3d 715, 736, fn. 10.) However, the prosecution offered the letters in evidence on the theory that appellant personally wrote them. (7 RT 1746; 8 RT 1886.) Respondent's citation to *People v. Lynn, supra,* should not obscure the fact that the prosecution presented no known exemplar of appellant's handwriting to show that he

authored either letter. Regardless, the prosecution also presented no evidence that appellant directed someone to write the letters on his behalf.

Respondent's attempt to show that the letters were self-authenticating also falls short. Respondent notes that the first letter (People's Exhibit No. 66; 5 CT 1228) was signed "-S-", which respondent construes as shorthand for appellant's nickname of "Smurf." (RB 99.)[10] The second letter was signed "Smurf." (People's Exhibit No. 67, 1233.) The envelope for the first letter had "Daniel Landry" with his inmate number and a location in the Cyprus segregation unit at C.I.M. as the return address. (RB 99; see 5 CT 1227.)

However, these were not "matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing." (Evid. Code, § 1421.) The evidence is that "everbody" called appellant "Smurf" because he was small and that this was known to correctional staff. (5 RT 1076, 1225; *see* Exhibit No. 42, 4 CT 1109 [identifying appellant as was 5'6" and 150 pounds].)

As to appellant's inmate number and location, this was known by many people as reflected in inmate movement records, other documents from the Department of Corrections, and trial testimony. (*See, e.g.,* Exh. No. 42; 4 CT 1103, 1108, 1110-12; Exh. No. 42A, 4 CT 1115-19; Exh. No. 45, 4 CT 1123; Exh. No. 50, 4 CT 1145; Exh. No. 53; 5 RT 1901-03; 6 RT 1325-26.)

The reality is that even such personal information as an address, telephone number and nominally private Social Security number "is *likely* to be known to a great many persons other than the person claimed to have signed" a document. (*Arcaro v. Silver Enterprises* (1999) 77 Cal.App.4th 152, 157 fn. 4, original emphasis; 2 AOB 153.) This admonition is particularly

---

10. Respondent claims that "Smurf" was appellant "NLR gang moniker." (RB 99.) However, the prosecution presented no evidence that appellant received or adopted "Smurf" as a gang moniker.

appropriate where appellant's name and location was reflected on multiple documents as explained above and the prosecution conceded that there was no evidence of where, when or how the letters were seized or that anyone saw appellant write them. (8 RT 1887-88.)

Respondent next claims that the testimony of Department of Corrections Officer Lacey authenticated the two letters. (RB 99.) Officer Lacy testified about general procedures for intercepting inmate mail. (7 RT 1759-60.) However, he had no personal knowledge of their origins or how they were obtained. He said that first letter was received by other staff in his office at C.I.M. (7 RT 1760.) The second letter was transmitted to him by facsimile from Corcoran. (7 RT 1761.)

There was evidence that appellant was at those institutions at the time. (*Ibid.*) However, Officer Lacey answered "no" when the trial judge asked him, "Are there records that indicate when these are seized or who they are seized by?" (8 RT 1888.) Therefore, he could not authenticate the letters.

Respondent suggests (RB 99) that the letters in this case are analogous to the documents at issue in *People v. Olguin* (1994) 31 Cal.App.4th 1255, *People v. Gibson* (2001) 90 Cal.App.4th 371, and *People v. Lynn* (1984) 159 Cal.App.3d 715. (RB 99.) In two of those cases, the documents were seized from the defendant's residence. (*People v. Olguin, supra,* 31 Cal.App.4th at p. 1372 [The lyrics were "found in a search of Mora's home three weeks after the crime."]; *People v. Gibson, supra,* 90 Cal.App.4th at p. 383 ["the locations where these items were seized were each a residence of appellant"].) In this case, there was no evidence that the correctional staff seized the letters from appellant or his cell. (8 RT 1888.)

In the third case, the defendant personally acknowledged the authenticity of two notes as referring to the charged murder. (*People v. Lynn, supra,* 159 Cal.App.3d at pp. 735 ["Lynn's statement to Morgan after the notes

were turned over to authorities fulfills the requirements of Evidence Code section 1414."].) Here, there is no evidence that appellant made any statements acknowledging the authenticity of the letters.

Respondent next argues that the letters contained circumstantial evidence that Landry was the author. (RB 100.) As to the first letter (People's Exhibit No. 66), respondent claims that it referred to the murder of Addis ("Yeah this 187 kinda put me at ease, had to earn it, bein' in prison for nothin' aint happenin."), a plan to claim self-defense ("I'll be calling Joey down to testify that he heard dude threatening to kill me on the yard, he was upstairs in the vent, and heard it all!"), and a plan to present a "mental defense" ("Buz will be down to testify on my personality disorder (bi-polar), and it gets bad when I don't get my meds. He knows this, also, if you could, let him know I need em too, and will be callin'. They weren't given me my meds here, their fault! [smiley face]"). (RB 100, quoting People's Exhibit No. 66, 5 CT 1228.)

There are multiple problems with this argument. Appellant did not claim self-defense at trial. He attempted to present a duress defense. (9 RT 2092-94, 2165-68; 3 CT 796-800.) As to bipolar disorder, appellant presented evidence of that in the penalty phase. (13 RT 2121-27.) However, neither the prosecution nor defense presented any evidence of bipolar disorder at the guilt phase when the trial court ruled on the admissibility of the letter. Evidence that was not before the trial court at the time of the ruling may not be considered as a foundation for admitting the letter in evidence. (*People v. Welch* (1999) 20 Cal.4th 728, 739 ["We review the correctness of the trial court's ruling at the time it was made, however, and not by reference to evidence produced at a later date."].)

Respondent also errs in claiming that the first letter referred to the murder of Addis. (RB 99.) The first letter referred to a "punk" who had disrespected and threatened harm to the author. (5 CT 1228 ["Yeah, upon my

return, this punk decides to disrespect me, and threaten to do me harm, what nerve!"].) Apart from the letter, the prosecution presented no evidence of threats or disrespect by Addis towards appellant. Thus, as the trial court recognized, there was no factual basis to assume that the "punk" referred to in the first paragraph was Addis.[11] (7 RT 1745.)

The letter also stated that "Joey" had overheard the threat. (5 CT 1228 ["I'll be calling Joey down to testify that he heard dude threatening to kill me on the yard, he was upstairs in the vent, and heard it all!"].) The prosecution presented no evidence that anyone named "Joey" was at C.I.M. at the time of the assault on Addis. Glen Willett, the prosecution's prison gang expert, testified that he knew of an AB gang member by the name of Joey Hayes. (7 RT 1739.) However, Hayes was an inmate at Pelican Bay State Prison, not at C.I.M. (*Ibid.*)

If an AB or NLR gang member was an inmate at C.I.M., he would typically have been housed on the third tier of Palm Hall. (5 RT 1066-67, 1182; 6 RT 1270-71.) The record contains the logs of the inmates housed on the third tier of Palm Hall on July 15th, 16th, 21st and 22nd of 1997, and on August 3, 1997, the day Addis was killed. They identified no inmate by the name of Hayes. (Exhibit No. 75, 5 CT 1247-41; Exhibit No. 76, 5 CT 1252-55.) Therefore, respondent is mistaken in arguing that the reference to incident overheard by "Joey" addressed the Addis homicide.

The only other evidence offered by the prosecution to prove that the letter referred to the murder of Addis was the date Lacey's office received the letter, which was September 9, 1997. (8 RT 1887-88; 5 CT 1227.) That date was more than a month after Addis died on August 3, 1997. (5 RT 1059.)

---

11. The prosecutor asked Willett to assume that the author was "referring to the victim in this case ...." (7 RT 1745.) Defense counsel objected, "That's an improper question. There is no basis to make that assumption." (*Ibid.*)

Moreover, the letter referred to an incident that occurred "upon my return ...." (5 CT 1228.) The prosecution presented no evidence that appellant stabbed Addis upon his return to C.I.M. For this additional reason, the author appeared to be referring to a different incident.

Respondent next argues that both letters used "NLR gang lingo" and one letter was addressed to Joseph Lowery and the other to "Mr. Lowery" who respondent characterizes as "a prominent NLR gang member[.]" (RB 100, 101.) On respondent's view, this showed that appellant wrote the letters. (*Ibid.*)

However, "gang lingo" by its very nature refers to something in common to a group of people and not something distinctively known only to appellant. The entire third tier of inmates at C.I.M. was predominantly composed of NLR gang members. (5 RT 1066-67, 1136, 1185-86; 6 RT 1419-20; 8 RT 1784.)

As to Joseph Lowery, if he was a prominent NLR gang member, than it was not likely that he was known only to appellant. Respondent mistakenly claims that "the guilt phase evidence tied appellant to Lowery ...." (RB 106-107.) The prosecution presented no evidence tying appellant to Lowery at the guilt phase. Respondent's citations to putative guilt phase evidence are all to the subsequent penalty phase. (*Ibid.*, citing 11 RT 2528-31, 2533-41, 2556-62, 2564, 2575, 2615-19, 2621-22, 2714-18, 2731.) That evidence may not be considered as a foundation for admitting the letters in the guilt phase. (*People v. Welch, supra,* 20 Cal.4th at p. 739 ["We review the correctness of the trial court's ruling at the time it was made, however, and not by reference to evidence produced at a later date."].)

As to the second letter (People's Exhibit No. 67; 5 CT 1233), respondent argues that appellant authored it because it was transmitted by fax

---

The court sustained the objection. (*Ibid.*)

to C.I.M. from an officer at Corcoran State Prison on December 22, 1997. By that time Landry had been transferred from C.I.M. to Corcoran State Prison. (RB 101, citing 7 RT 1761-62.)

However, the author did not state that he had been transferred from C.I.M. The author stated, "I've been relocated, so the KGB has been befuddled once again, but dammit man!, the sweatsuits are on." (5 CT 1233.) Mr. Willett testified that "KGB" was an expression used by gang members to refer to correctional officers. (7 RT 1712.) If, as respondent claims, the author addressed being relocated from C.I.M. after stabbing Addis, there is no way that would have "befuddled" the correctional officers at C.I.M. Multiple officers at C.I.M. witnessed the events at or around the time of the homicide, including Sergeant Sams, investigating Officer Lacey, and officers Esqueda, Bisares, Maldonado, McAlmond, Kaffenberger, Valencia, and Ginn. (5 RT 1057-60, 1094-5, 1184, 1260-61; 6 RT 1323-24; 7 RT 1593-95, 1630-32, 1683-84; 8 RT 1784-85.)

Respondent also ignores the fact that after the author stated that "the KGB has been befuddled once again," he explained how this was the case by reference to an unrelated incident: "I can clarify events of the ol' guy. It was done by another, but guided by yours truly! Ol Bull from Mop's hometown did an extraordinary job of it. Good guy!" (5 CT 1233.)

There is no reason to believe that this referred to the Addis homicide. The prosecution presented no evidence of the identity of the "ol' guy" or "Ol Bull." As to Addis homicide, it was undisputed that appellant stabbed him, not that he guided someone else to do so. (5 RT 1050.) Therefore, it appears that the author was someone other than appellant who had been relocated after his involvement in a different, unrelated incident.

Respondent also argues that appellant wrote the second letter (Exhibit No. 67) because it referred to a court appearance in January of 1998 and a

Penal Code section 1381 hearing. (RB 101; 5 CT 1223 ["I should be truckin to court in Jan. sometime, I don't think they'll come callin before the holidays?, they have until Feb. on the 1381, possible reject? [illegible] possible!"].)

However, the prosecution did not file the felony complaint against appellant for the Addis homicide until April 10, 1998. (1 CT 1.) The warrant for appellant's arrest did not issue until May 14, 1998. (Suppl. CT 2-3.) The clerk's transcript contains no record of any court proceedings related to this case in either January or February of 1998. (See Vol 1, Clerk's Transcript On Appeal, Chronological Index.)

The letter stated that "they have until Feb. on the 1381 ...." (5 CT 1223.) Respondent construes this as referring to a "possible competency proceeding ...." (RB 101.) However, Penal Code section 1381 addresses the requirement to bring a second "pending" case to trial against an incarcerated defendant within 90 days after a written demand by the defendant.[12] (Penal Code, § 1381; *Ng v. Superior Court of San Francisco* (1992) 4 Cal.4th 29, 40 ["Penal Code section 1381 provides generally that an inmate incarcerated on

12. In 1997, Penal Code section 1381 in pertinent part provided: "Whenever a defendant has been convicted, in any court of this state, of the commission of a felony or misdemeanor and has been sentenced to and has entered upon a term of imprisonment in a state prison ..., and at the time of the entry upon the term of imprisonment or commitment there is pending, in any court of this state, any other indictment, information, complaint, or any criminal proceeding wherein the defendant remains to be sentenced, the district attorney of the county in which the matters are pending shall bring the defendant to trial or for sentencing within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment or commitment and his or her desire to be brought to trial or for sentencing unless a continuance beyond the 90 days is requested or consented to by the person, in open court, and the request or consent entered upon the minutes of the court in which event the 90-day period shall commence to run anew from the date to which the consent or request continued the trial or sentencing."

one set of charges may demand to be tried or sentenced on 'any other indictment, information, complaint, or any criminal proceeding wherein the defendant remains to be sentenced' that is pending in California."], italics and footnote omitted.)

As noted, the prosecution did not file the criminal complaint in this case until April 10, 1998. (1 CT 1.) Therefore, Penal Code section 1381 could not have applied because there was no case pending against appellant in December of 1997 when respondent claims the letter was written. As such, the contents of the letter conflict with respondent's claim that appellant authored it.

Finally, respondent notes that the second letter was signed with appellant's nickname "Smurf." (RB 101.) As previously explained, "everybody" knew appellant as Smurf (5 RT 1076) so this was not something "unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing." (Evid. Code, § 1421.) Without any handwriting analysis to show that "Smurf" was written by appellant or at his direction, the use of the nickname was insufficient to authenticate the letter.

For all these reasons, the record fails to show by a preponderance of the evidence that appellant authored either letter. (*People v. Guerra, supra,* 37 Cal.4th at p. 1120.) Because of insufficient authentication, the letters were irrelevant and inadmissible hearsay. (*People v. McWhorter* (47 Cal.4th 318, 362 [A report that was not authenticated "remained unsubstantiated hearsay."]; *People v. Beckley* (2010) 185 Cal.App.4th 509, 518 [Without authentication, "the writing is irrelevant because it has no 'tendency in reason' to prove or disprove a fact at issue in the case. (Evid. Code, § 210.)"].)

D. The Trial Court Erred In Admitting Secondary Evidence Of The Letters.

The lack of proper authentication barred proof of the contents of the letters by secondary evidence. (Evid. Code, § 1401, subd. (b) ["Authentication of a writing is required before secondary evidence of its content may be received in evidence."]; *In re Kirk, supra,* 74 Cal.App.4th at p. 1074 ["The secondary evidence rule, however, does not 'excuse[] compliance with Section 1401 (authentication).' (Evid. Code, § 1521, subd. (c).)."].)

Assuming the contrary for purposes of argument only, the trial court should not have permitted the prosecution to prove their contents by secondary evidence. (2 AOB 143-48.) Respondent claims that the copies were necessary because the originals had been mailed to the intended recipient. (RB 95.) However, Officer Lacey was the only witness on the provenance of the letters. He specifically testified that he had no information about when the letters were seized or who seized them. (8 RT 1888.) No one with personal knowledge testified that the original letters had been mailed.

In some instances, "lost documents may be proved by secondary evidence." (*Dart Industries Inc. v. Commercial Union Insurance* (2002) 28 Cal.4th 1059, 1068; Evid. Code, § 1522, subd. (a)(1) [Secondary evidence includes a duplicate "as defined in Evidence Code section 260."]; 2 AOB 144-45.) However, this rule has a limitation. "Evidence Code section 1521, subdivision (a), provides that '[t]he content of a writing may be proved by otherwise admissible secondary evidence,' excepting when '[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion' or when '[a]dmission of the secondary evidence would be unfair.'" (*Ibid.*)

As explained above and in appellant's opening brief (2 AOB 145-46), there was a genuine dispute about material terms of the letters, including

whether appellant authored either letter and whether they reflected appellant's involvement in the assault on Addis and gang activity. (7 RT 1745, 1746, 1748; 8 RT 1885-86; 1886-87.)

Respondent notes (RB 95) that the "foundation for admission of a writing or copy is satisfied by the introduction of evidence sufficient to sustain a finding that the writing and copy are what the proponent of the evidence claims them to be." (*People v. Garcia* (1988) 201 Cal.App.3d 324, 329.)[13] Respondent claims that this rule authorizes admission of the letters because appellant did "not attack the prosecution's representation that copies admitted were prison letters." (RB 95.)

This straw man may be quickly set aside. The prosecution did not proffer the documents simply as "prison letters." The prosecution claimed that they were letters written by appellant referring to the murder of Addis. (7 RT 1745-46.) As explained above in Section C., there was a substantial dispute about whether that was the case. Copies of so-called "prison letters" written by another prisoner and/or referring to a different incident were irrelevant because they did not address a "disputed fact that was of consequence to the determination of the action" (Evid Code, § 210.)

Therefore, even if respondent is correct that the original letters were unavailable because they were mailed, that does not resolve the dispute about

---

13. *People v. Garcia, supra,* addressed the defendant's objection to admission in evidence of a copy of a composite drawing offered to identify him as the suspect in a murder prosecution. "The eyewitness testified that he gave a description of the suspect to the police, that he met with a police artist to make a drawing of the suspect, and that he recognized People's exhibit 5 as similar or the same as the sketch he had the artist draw. In addition, a police detective testified that he and the eyewitness met with the police artist, who made a composite drawing of the suspect in his presence, and that he recognized the drawing depicted in exhibit 5." (*People v. Garcia, supra,* 201 Cal.App.3d at p. 329.) The prosecution presented no comparable evidence of the circumstances of the creation of the letters at issue here.

their authenticity (Evid. Code, § 1521, subd. (c) ["Nothing in this section excuses compliance with Section 1401 (authentication)."]), or the dispute "concerning material terms of the writing ...." (Evid. Code, § 1521, subd. (a).)

E. The Erroneous Admission Of The Letters Was Prejudicial To Appellant's Defense At Both The Guilt And Penalty Phases Of The Trial.

The admission of the letters was prejudicial at both the guilt phase and the penalty phase of appellant's trial. (2 AOB 155-160.) As to the guilt phase, respondent argues that no prejudice was possible because appellant offered a duress defense and duress is not a defense to murder. (RB 105, citing *People v. Maury* (2003) 30 Cal.4th 342, 421-22, and *People v. Anderson* (2002) 28 Cal.4th 767, 772.) Appellant disagrees for the reasons previously stated and discussed further below. (2 AOB 172.)

Nevertheless, even assuming that duress is not a legal defense to murder, a jury from evidence of duress a jury may find reasonable doubt of willful, deliberate and premeditated murder. (*People v. Anderson, supra,* 28 Cal.4th at p. 767 ["Here, the jury found premeditation. In some other case, it might not. It is for the jury to decide."].) Evidence of duress is also relevant to the question of whether the defendant acted with implied malice. (*Id.* at p. 780 ["The reasons a person acted in a certain way, including threats of death, are highly relevant to whether the person acted with a conscious or wanton disregard for human life. [Citation.] This is not due to a special doctrine of duress but to the requirements of implied malice murder."].)

Admission of the letters was prejudicial because the prosecution relied on them to argue that appellant had contrived his duress defense and committed the killing to elevate his status within the prison gang. (2 AOB 156-57; 7 RT 1735-36; 14 RT 3495-96.) The prosecutor also argued that appellant used his bipolar disorder as an excuse for the crime while bragging

about the killing. (14 RT 3496-97.) "There is no reason why the reviewing court should treat this evidence as any less crucial than the prosecutor -- and so presumably the jury -- treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 868.)

But for the letters, the other, properly admitted evidence showed that appellant had associated with the NLR gang for protection and that he assaulted Addis because he could have easily been killed by NLR if he had refused to carry out the hit on Addis ordered by the NLR shot caller. (2 AOB 157-58.) The other evidence also showed that appellant had a long-standing bipolar disorder and schizoid personality disorder and the denial of treatment for them led to his downward spiral and involvement in violent activity. (See Introduction, above, and 2 AOB 158-160.)

Respondent points to other evidence which in its view established appellant's voluntary involvement with the NLR gang. (RB 105.) Respondent states Department of Corrections Special Agent Willett "identified numerous NLR gang tattoos on Landry's body." (RB 105.) Respondent has incorrectly characterized Willett's testimony. Appellant had no "NLR" tattoos. He had tattoos of outstretched hands on the fingers of which "Sinfin" was spelled out, "Irish Pride" on the top of his wrists, and a caricature of a man with a shamrock on his stomach. (7 RT 1733.)

In Mr. Willett's opinion, these tattoos showed an association or an affiliation with the "Aryan Brotherhood" gang, not with the NLR. (*Ibid.*) Moreover, the prosecution presented no evidence that appellant was an AB gang member. As such, all the symbols and words are consistent with "Irish Pride" rather than involvement with the NLR.

Respondent further notes evidence that NLR shot callers led exercises on the exercise yard and there was some evidence that appellant had led exercises with other NLR gang members. (RB 105-06.) However, Officer Esqueda testified that Green was the shot caller for the white inmates at Palm

Hall. (5 RT 1133.) Officer Ginn agreed that the "white guys have one" shot caller. (8 RT 1782.) Green led the exercises on the yard and they were mandatory. (5 RT 1133.) For a transgression as minor as not participating in exercises, an inmate might get roughed up or beaten. (5 RT 1133-34.) Green decided whether or not that would happen. (5 RT 1134.)

Former inmate Allen testified that appellant was always one of the NLR gang members who led exercises. (5 RT 1228-29.) However, former inmate Rogers testified that Green usually led the exercises and that he did so on the day he orchestrated the assault on Addis. (6 RT 1275-76.) He did not recall seeing appellant leading the exercises. (*Ibid.*) Rogers explained that the shot caller was the guy with the "keys to the car." That meant that he was "in charge of all the white guys" and made the rules about what was done or not done amongst the white inmates. (6 RT 1275-76.)

Moreover, the lieutenant who conducted the hearing on the rules violation by Green found that he "ordered the 'hit' on ADDIS." (Exh. No. 50, 4 CT 1145.) Thus, while there was evidence that appellant associated with the NLR, the evidence is that Green was the shot caller who made the decisions about what happened to the white inmates. This evidence was consistent with appellant's position that he associated with the gang for protection in prison. (See, e.g., 8 RT 2001-2003.)

Respondent contends that there was "absolutely no evidence inmate Green coerced Landry to murder Addis." (RB 106.) Appellant detailed that evidence in his opening brief (2 AOB 179-86) and it will be discussed further below in Section B. Here, appellant emphasizes that the Department of Corrections found that the NLR shot caller Green ordered the hit on Addis and this was supported by the testimony at trial. (Exh. No. 50, 4 CT 1145; Section VI.B.2., below; 2 AOB 182-85; *see, e.g.,* 5 RT 1079-80, 1084-85, 1134-37, 1148, 1164-65, 1184, 1248-49; 7 RT 1593-94.)

An inmate who did not carry the gang's order "can easily get killed. As a matter of fact, in most cases where your gangs are disciplined enough, that's precisely what happens. They want to put the message out that ... you don't break ranks, you don't misbehave, you don't ignore orders. You follow or you're gone." (8 RT 2005; *see also* 8 RT 1942 [If appellant had failed to he carry out the ordered assault, he "would be a walking dead man."].) The prosecution's own gang expert (Mr. Willett) confirmed that the NLR would retaliate against an inmate who did not cooperate with the gang's program or tried to drop out of the organization. (7 RT 1729-30.)

Based on how the prison staff had handled Addis, an inmate would conclude that it was useless to rely on the staff for safety, even if he requested protective custody because inmates may be killed in protective custody. (5 RT 1248-49; 8 RT 1945-46, 2010-11.) As former inmate Rogers explained, if an inmate sought protective custody, "there's a good chance they will try to take your life for that." (5 RT 1248-49.)

As to the penalty phase, respondent argues that appellant overlooks the numerous acts of force or violence and possession of a weapon offered as factor (b) evidence. (Penal Code, § 190.3, subd. (b); RB 106.) However, as explained in the Introduction to this reply brief, it was not until two-years after appellant was sent to prison and denied mental health treatment that he first engaged in criminal activity involving force or violence. (10 RT 2475-78; Exh. No. 95, CT. Suppl. B 37.) After that occurred, appellant made a poignant plea for mental health treatment that fell on deaf ears. (*Ibid.*) Moreover, the homicide would never have occurred but for the fact that correctional officers put Addis on the prison yard knowing that he would be assaulted. (See Section VI.B.2, below.)

V.

THE TRIAL COURT ERRED IN DISCHARGING JUROR NO. 10 BECAUSE HER INABILITY TO PERFORM HER DUTY AS A JUROR WAS NOT A DEMONSTRABLE REALITY.

A. Introduction.

Before guilt phase jury instructions and closing argument, the trial court over appellant's objection discharged Juror No. 10, who had called in sick because of flu symptoms. (9 RT 2209-2215; 2 AOB 160-163.)

Respondent contends that appellant identified the incorrect standard of review and that the dismissal of Juror No. 10 was proper under the correct standard.

However, reversal of the judgment is required because the juror's inability to perform her duties as a juror was not a demonstrable reality. (*People v. Hernandez* (2003) 30 Cal.4th 1, 3 [Where the trial court improperly discharged a juror, the "defendant is entitled to the benefit of a reversal of his conviction."].)

B. The Standard Of Review Defined by *People v. Barnwell* Applies To Dismissal Of A Juror For Illness.

Under Penal Code section 1089, a trial court may discharge a juror if to a "demonstrable reality" the juror is unable to perform his or her duty. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 ("*Barnwell*"); 2 AOB 164-65.) Respondent argues that appellant erred in relying on *Barnwell* for the standard of review because that case involved discharge of a juror for refusal to deliberate rather than for illness. (RB 111.)

Respondent claims that *People v. Dell* (1991) 232 Cal.App.3d 248, 254-256, established that the demonstrable reality standard is "substantially different" for dismissal on grounds of illness. (RB 111.) However, respondent doesn't explain what the difference is. (*Ibid.*) Regardless, this Court has

applied the same standard of review to the question of whether there was good cause for discharge of a juror, whether for illness or for any other circumstance raising a question of whether a juror was "unable to perform his or her duty ...." (Penal Code, § 1089.)

In each instance, the juror's inability to perform his or her duties "must appear as 'a demonstrable reality' and will not be presumed." (*People* v. *Lucas* (1995) 12 Cal.4th 415, 489 [addressing whether there was good cause to discharge a juror after the guilt phase verdict because of a vacation conflict with the penalty phase of the trial]; *People* v. *Roberts* (1992) 2 Cal.4th 271, 325 [applying the demonstrable reality standard to the question of whether illness of a juror was good cause for discharge]; *People v. Zamudio* (2008) 43 Cal.4th 327, 349 [applying the demonstrable reality standard to the question of whether illness of a juror's father was good cause for discharge]; *People v. Lynch* (2010) 50 Cal.4th 693, 744 [applying the demonstrable reality standard to issue of removal of juror who became upset over allegation of alcohol use]; *People v. Wilson* (2008) 44 Cal.4th 758, 824 [applying the demonstrable reality standard to the question of whether there was good cause for discharge of a juror for allegedly concealing that he would consider his own personal knowledge and experience of African-American families when evaluating the mitigating evidence.].)

Barnwell held that the "demonstrable reality test entails a more comprehensive and less deferential review" than the substantial evidence or abuse of discretion standards. (*People v. Barnwell, supra,* 41 Cal.4th at pp. 1052-53.) "[T]he reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Id.* at p. 1053.) *Barnwell* concluded: "To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases." (*People v.*

Barnwell, supra, 41 Cal.4th at p. 1051; *accord People v. Wilson, supra,* 44 Cal.4th at p. 821.)

Following *Barnwell,* the leading treatise on California criminal law has cited it as the general standard for evaluating whether there is good cause for discharge of a juror. (5 Witkin & Epstein, *California Criminal Law* (April 2011 Supplement) Criminal Trial § 508 at pp. 350-51.) Accordingly, appellant has properly relied on the demonstrable reality standard as explicitly held by *Barnwell.*

C. The Cases Relied On By Respondent Differ From This One.

On the morning of Wednesday, April 18, 2001, the 58th day of trial, Juror No. 10 called the court and said that she had the flu but that she would be able to resume her duties on the following Monday. (9 RT 2009, 2212-13; 2 AOB 160-62.) Defense counsel objected that "we have gone through this trial this way trying the case to these 12 people. I think the defendant's entitled to have that person decide this case, and I think it's reasonable to wait for that person until Monday." (9 RT 2213-14.)

The court refused to wait until Monday, dismissed Juror No. 10, and seated an alternate. (9 RT 2214.) Under the circumstances of this case more was necessary to establish to a demonstrable reality that Juror No. 10 was no longer able to perform her duties as a juror. (2 AOB 165-169.)

Respondent argues that three cases show the dismissal of Juror No. 10 was proper. (RB 108.) However, there are important differences between those cases and this one.

In *People v. Roberts, supra,* 2 Cal.4th 271 ("*Roberts*"), the "jury was about to resume deliberating after a weekend recess when the court and parties learned that a juror was ill with a sore throat and high blood pressure. The weather was poor and the juror was afraid of contracting pleurisy. She said she might be able to return in three days." (*Id.* at pp. 323-24.) "The

prosecution suggested replacing the juror with an alternate because there was no 'real assurance at the end of those three days ... that she would be with us.'" (*Id.* at p. 324.) Defense counsel "preliminarily felt it better to wait for three days because otherwise the jury would have to start deliberations anew." (*Ibid.*)

Without objection from either party, the trial court decided to ask the other jurors "'what they want to do.' After the court explained the situation, the jury conferred, apparently only momentarily, before announcing it wanted an alternate sworn." (*Ibid.*) "After a recess, defendant's counsel conceded there was statutory good cause to replace the juror with the alternate, but formally objected to her replacement on the sole ground that too much time had already been spent on deliberations." (*Ibid.*) "The court found that the alternate should be seated, because of the original juror's illness and 'having discussed this with the jury to see what they preferred to do ....'" (*Ibid.*)

Under these circumstances, the *Roberts* Court found "no error." (*Ibid.*)[14] "Here the court did its duty by telephoning the ill juror, discussing the matter on the record with counsel, and stating its reasons. Hence there was no abuse of discretion in its ruling that good cause existed to discharge the ill juror." (*Id.* at pp. 324-25.)

This case differs. Defense counsel did not concede that there was good cause for discharge and just formally object to discharge. He objected that he had tried "the case to these 12 people. I think the defendant's entitled to have that person decide this case, and I think it's reasonable to wait for that person until Monday." (9 RT 2213-14.) Moreover, Juror No. 10 was not at risk of a serious illness such as pleurisy and uncertain as to whether she would be able

---

14. However, it did "caution that trial courts must not permit jurors to exercise any control over the composition of the jury. That function is reserved exclusively for the trial court." (*People v. Roberts, supra,* 2 Cal.4th at p. 325.)

to return to duty after three court days. Juror No. 10 simply had the flu and had not gone to the doctor. (9 RT 2212-13.) She expected to be able to resume her duties on Monday. (*Ibid.*)

In *People v. Smith* (2005) 35 Cal.4th 334, "[a]fter the jury was sworn, but before counsel's opening statements, Juror Robert B. informed the court that he needed to fly to Seattle to deal with a family emergency. His mother was 82 years old, had 'shortness of breath,' and he had just learned a nurse had been brought in to care for her. Robert B. did not know how long he would have to remain in Seattle, but he was willing to come back and serve on the jury if the trial could be delayed to accommodate him. The prosecutor proposed seating an alternate juror; the defense objected." (*Id.* at p. 348.)

The trial court decided not to wait to hear from the juror until he arrived in Seattle to determine whether to replace him. "Robert B.'s first priority, the court said, would and should be his ailing mother's condition, not his duty of jury service; he could not be expected to go to Seattle, see his mother, and immediately turn around and fly back to California." (*Id.* at p. 348.)

This Court found no error because there was good cause to conclude that the juror would "be absent from trial for an indefinite period ...." (*Id.* at p. 349 ["We conclude that when, as here, a juror has good cause to be absent from trial for an indefinite period, the trial court does not abuse its discretion in replacing that juror with an alternate juror."].)

This case differs because the court was not faced with the absence of a juror for an indefinite period at the beginning of trial. On Wednesday morning, after the close of the guilt phase evidence, Juror No. 10 said that she could she could resume her duties on the following Monday. (9 RT 2212-13.)

In *People v. Bell* (1998) 61 Cal.App.4th 282 ("*Bell*"), the "jury trial began on Friday, July 12, 1996. On that day both counsel presented opening statements and the People called four witness to testify. Court was recessed for

the weekend. On Monday morning, juror No. 2 called the court and spoke to the court clerk. He stated his son had an emergency and he needed to take him to the doctor. He was somewhat vague and did not indicate the nature of the emergency. Juror No. 2 stated he was a member of a health maintenance organization (HMO) and he had not determined what preliminary steps were necessary to get his son to a doctor. He believed he could be back by 1:30 p.m., but did not anticipate being able to arrive any sooner. At the court's request, juror No. 2 agreed to call back at 10:30 a.m. to update his situation." (*Id.* at p. 287.)

However, the trial court decided not to wait for the call because "the juror did not know exactly when he could return. The court further observed the trial was almost over and the other jurors, alternates, and witnesses were being kept waiting. Under the circumstances presented, the court decided to discharge juror No. 2, replace him with an alternate juror, and move forward with the trial in the interest of judicial economy." (*Id.* at p. 288.)

The Court of Appeal affirmed. "[U]nder the circumstances, it was not an abuse of discretion to discharge him from the panel. The court made a reasonable inquiry into good cause through its phone contact with juror No. 2 and the conference with the parties. The court found juror No. 2 needed to take his son to the doctor and, although he believed he could be back by 1:30 p.m., he was unable to make any firm commitments regarding when he would return. In addition, from the facts presented, the court made a reasonable and permissible inference juror No. 2 might not be able to return at all that day. In the meantime, the other 11 jurors and 2 alternates were waiting for court to convene. In addition, at least five of the People's six scheduled witnesses were waiting to testify. Thus, the court made an adequate inquiry and no further investigation was required." (*Id.* at p. 288.)

There are legal and factual reasons why *Bell* should not be followed.

The Court of Appeal referenced the demonstrable reality standard of review. However, it construed this simply to mean that an "abuse of discretion occurs where the court's decision exceeds the bounds of law or reason." (*People v. Bell, supra,* 61 Cal.App.4th at p. 287.) In support of this statement of the law, *Bell* cited *Mallett v. Superior Court* (1992) 6 Cal. App. 4th 1853, 1874 ("*Mallet*"). (*Ibid.*)

However, *Mallett* did not address the discharge of a juror pursuant to Penal Code section 1089. It addressed the standard of review for the exercise of authority under Government Code section 68073. That statute vests in a county board of supervisors the duty "to provide 'suitable' rooms for holding superior, municipal and justice courts and 'sufficient' attendants, equipment, furniture and supplies necessary for the transaction of the business of the court." (*Mallett, supra,* 6 Cal. App. 4th at p. 1857, quoting Gov. Code, § 68073.)

As previously explained, *Barnwell* held that the "demonstrable reality test entails a more comprehensive and less deferential review" than the substantial evidence or abuse of discretion standards. (*People v. Barnwell, supra,* 41 Cal.4th at pp. 1052-53.)

Accordingly, the *Bell* court applied the wrong standard of review. In addition, this case differs factually from *Bell* because there were no witnesses waiting to testify and Juror No. 10 said she would be able to resume her duties by Monday. (9 RT 2212-13.)

D. The Cases Discussed By Appellant Show That Juror No. 10 Should Not Have Been Discharged.

As to the cases cited by appellant, respondent makes two arguments. First, respondent argues that the cases do not establish a benchmark level of illness. (RB 112.) However, the record shows that, whatever the benchmark is, the circumstances of Juror No. 10 was nowhere near it. (2 AOB 165-69)

Second, respondent objects that some of the cases cited by appellant were decided on the basis of former Penal Code section 1123, which was the predecessor statute to Penal Code section 1089. (RB 112.) However, respondent identified no significant difference between the two statutes.[15] Moreover, this Court has recognized that the same good cause standard applies to discharge of a juror under both statutes. (*See, e.g., People v. Roberts, supra,* 2 Cal.4th at p. 324; *People v. McPeters* (1992) 2 Cal.4th 1148, 1175, superseded by statute on another point as explained by *People v. Wallace* (2008) 44 Cal.4th 1042, 1087.)

E. A Three Day Delay Was Reasonable Under The Circumstances Of This Case.

Finally, respondent argues that a three-day delay would have been unreasonable because it would have kept the jury from receiving jury instructions and beginning deliberations for 11 days, counting from the close of evidence on Thursday, April 12, 2001, until Monday, April 23, 2001, when Juror No. 10 said that she would be able to return. (RB 113-14.)

However, the trial court had already scheduled a break before jury instructions and closing argument. The defense guilt phase case concluded on Thursday, April 12, 2001. (9 RT 2109, 2152.) Friday was the regular "dark" day during the trial. (9 RT 2159-60.) The court scheduled two days (Monday, April 16, 2001, and Tuesday, April 17, 2001) to work on jury instruction with counsel and without the jury. (9 RT 2163, 2197.) On Wednesday, April 18, 2001, Juror No. 10 called in sick, but said that she would be available on

15. Former Penal Code section 1123 provided that "'[if] before the jury has returned its verdict into court, a juror becomes sick or upon other good cause shown to the court is found to be unable to perform his duty, the court may order him to be discharged . . . and draw the name of an alternate.'" (*People v. Pervoe* (1984) 161 Cal.App.3d 342, 355.)

Monday, April 23, 2001. (9 RT 2207, 2212-13.)

That delay would have been minimal, given the time course of the trial. Trial had been underway for 58 days, from the beginning of voir dire on February 20th to April 18th when Juror No. 10 called in sick. (2 RT 410; 9 RT 2207, 2209.) The trial court identified no reason why a three day delay was unreasonable and the prosecution did not object to the defense request to wait three days so that Juror No. 10 could return to duty. (9 RT 2212, 2213-14.)

Moreover, the court and counsel had already anticipated a substantial delay between the guilt phase and the penalty phase of the case. After the defense case concluded on April 12, 2001, the court and counsel discussed the schedule for the penalty phase. (9 RT 2109, 2153, 2156.)

The court noted that the prosecution intended to call 50 witnesses for the penalty phase and that the defense would need time to prepare motions and the court would need time to rule on them. (9 RT 2157.) Therefore, the court and counsel agreed that the penalty phase trial would begin sometime between April 30th and May 15th. (*Ibid.*) In sum, the prior and anticipated time course of the trial shows that waiting for three days for Juror No. 10 was reasonable when the defense wanted her to deliberate on the case.

Respondent argues that there is "no authority that the trial court has a duty to wait to wait for an ill juror to become well, and this would defeat the language of Penal Code section 1089 providing for the discharge of a juror who 'becomes ill.'" (RB 113.) However, there is no presumption that the trial court should discharge a juror because of a transient illness. The "history of Penal Code section 1089 indicates a consistently recurring refusal by the Legislature to authorize unrestricted substitution of jurors, or allow an unlimited discretion in that regard." (*People v. Hamilton* (1963) 60 Cal.2d 105, 125, disapproved on another ground by *People v. Morse* (1964) 60 Cal.2d 631, 649.)

Moreover, Penal Code section 1089 itself authorizes a trial court to take less drastic actions than dismissal and substitution. "Because the court has the power to discharge a juror who is unable to perform his or her duties pursuant to section 1089, a court may also undertake less drastic steps to ensure that a juror is able to continue in his or her role." (*People v. Russell* (2010) 50 Cal.4th 1228, 1251.)

The courts have also recognized that the "goal of expediting the adjudication of cases ..., though laudable, should not blind [a judge] to the fundamental elements of a fair criminal proceeding," and should not be allowed "to outweigh a defendant's right to a fair trial ...." (*McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 195, 196; *see also Ungar v. Sarafite* (1964) 376 U.S. 575, 589-590 [84 S.Ct. 841; 11 L.Ed.2d 921] ["[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."]; 2 AOB 169.)

For all these reasons, the trial court erred in discharging Juror No. 10 over appellant's objection and the judgment must be reversed. (*People v. Hernandez* (2003) 30 Cal.4th 1, 3 [Where the trial court improperly discharged a juror, the "defendant is entitled to the benefit of a reversal of his conviction" but he is "not ... immune from reprosecution."].)

VI.

THE TRIAL COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED DURESS INSTRUCTIONS VIOLATED HIS FEDERAL CONSTITUTIONAL TRIAL RIGHTS.

A. This Court's Decision in *People v. Anderson* Should Be Reconsidered.

The trial court refused to give four instructions requested by the defense to address the evidence that appellant acted under the threat or compulsion of death or great bodily injury ("duress") at the time of the charged murder (Count 1, Penal Code, § 187, subd. (a)) and capital offense (Count 2, Penal Code, § 4500). (9 RT 2164-65.) The instructions were designed to give the jury a legal basis to consider evidence of duress to find reasonable doubt of willful, deliberate and premeditated murder or the malice aforethought necessary for murder and the capital offense. (Penal Code, § 4500; 2 AOB 172-175.)

Respondent contends that the trial court properly refused all four requested instructions because there was "no evidence" of duress. (RB 122.) As discussed further below, the record shows that the NLR shot caller ordered the assault on Addis and if appellant had refused to commit the assault he would have been "a walking dead man" on the prison yard. (8 RT 1941-42.) It would have been useless to turn to the prison staff for safety because they had put Addis onto the yard knowing that he would be assaulted. (8 RT 1942, 1946, 2005, 2010-11.)

Even if there was evidence of duress, respondent argues that the *People v. Anderson* (2002) 28 Cal.4th 767 ("*Anderson*") and concordant cases foreclose any duress instructions for capital or murder charges and there is no reason to reconsider this issue. (RB 115, 117, citing *People v. Anderson, supra,* 28 Cal.4th at p. 770 ["Duress is not a defense to murder."]; *accord*

People v. Burney (2009) 47 Cal.4th 203, 249; *People v. Wilson* (2005) 36 Cal.4th 309, 331-332; *People v. Vieira* (2005) 35 Cal.4th 264, 289-90; *People v. Maury* (2003) 30 Cal.4th 342, 421.)

Appellant has acknowledged as he must the decisions by this Court. (2 AOB 186-188.) However, there are reasons to reconsider the reasoning of *Anderson*. The defendant in *Anderson* argued that "a killing under duress is either first degree murder with special circumstances or no crime at all." (*Id.* at p. 773.) *Anderson* rejected this argument based on the analyzed the language and legislative history of Penal Code section 26, subdivision 6.[16] (*People v. Anderson, supra,* 28 Cal.4th at pp. 770, 772-778, 784.)

Appellant is not claiming that a killing under duress is either a special circumstance murder or no crime at all. A killing under duress is an unlawful homicide. (2 AOB 191-93.)

The question is what crime and who decides? In general, the "the power to define crimes and fix penalties is vested exclusively in the legislative branch." (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632; Penal Code, § 6.) However, after defining a crime the legislature may not deprive a defendant of an opportunity to present a defense to the mental state necessary for the crime.

"The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 493 [120 S. Ct. 2348; 147 L. Ed. 2d 435].) Therefore, a state may not by a legislative device deprive a defendant of his

16. "Since its adoption in 1872, Penal Code section 26 has provided: 'All persons are capable of committing crimes except those belonging to the following classes: [P] . . . [P] . . . Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats of menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.'" (*People v. Anderson, supra,*

right to a jury instruction permitting consideration of evidence from which the jury could find reasonable doubt of the mental state necessary for a crime. (2 AOB 180, 198-99; U.S. Const., 5th, 6th, 8th & 14th Amends.; *see, e.g., Holmes v. South Carolina* (2006) 547 U.S. 319, 324 [126 S. Ct. 1727; 164 L. Ed. 2d 503] ["'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"], citations and internal quotations omitted; *Martin v. Ohio* (1987) 480 U.S. 228, 234 [107 S.Ct. 1098; 94 L.Ed.2d 267] [Due process requires jury instructions "to convey to the jury that all of the evidence ... must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime."].)

"If criminal trials are morality plays, they are especially so when excuses are pleaded, and perhaps most of all when a claim of duress is raised. Juries should write the final act of such plays." (Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits* (1989) 62 So.Cal. L.Rev. 1331, 1374, footnotes omitted.)

B. <u>There Was Substantial Evidence Of Duress</u>.

Respondent recognizes that the prosecutor asked the court to give some instruction on duress because it had been the subject of extensive testimony at trial. (RB 119; see 9 RT 2056 ["I know it's been bantied [*sic*] about so much, I think we have to say something about it."].) Nevertheless, respondent contends that there was "no evidence to support giving any duress instructions." (RB 122.) Respondent's position is predicated on a legal error and a misreading of the record.

Respondent initially erred by relying on evidence favorable to the

---

18 Cal.4th at p. 773, footnote omitted.)

prosecution's view of the duress issue and attacking the credibility of the evidence favorable to the defense. In deciding whether to instruct the jury on a defense, the evidence should be "[c]onstrued in the light most favorable to" the defendant. (*United States v. Bailey* (1980) 444 U.S. 394, 398 [100 S. Ct. 624; 62 L. Ed. 2d 575].) "'In evaluating the evidence to determine whether a requested instruction should be given, the trial court should not measure its substantiality by weighing the credibility [of the witnesses] . . . . Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.'" (*People v. Tufunga* (1999) 21 Cal.4th 935, 944, citations omitted; 2 AOB 180-81.)

Thus, even though a court may find the evidence "less than convincing" it must instruct the jury on the defense theory. (*People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Flannel* (1979) 25 Cal.3d 668, 684-85 [The "'fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. That is a question within the exclusive province of the jury.'"], citation omitted.) A court "does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt ....'" (*People v. Salas* (2006) 37 Cal.4th 967, 982-83, citation omitted.)

Turning to the evidence, respondent's salient factual error is arguing that there was "no evidence" (RB 122) that Green, the NLR shot caller ordered appellant to assault Addis or that appellant was at risk of death or great bodily harm if he failed to do so. (*People v. Perez* (1973) 9 Cal.3d 651, 657-58 [For duress, the "fine distinction between fear of danger to life and fear of great bodily harm is unrealistic."]; Witkin & Epstein, California Criminal Law, Defenses § 59 (3rd Ed. 2000) at p. 395 ["The more recent cases have concluded that threat of bodily harm is sufficient to raise the defense. [Citations.]"]; 2 AOB 181-86.) The record rebuts respondent.

1. The Department of Corrections Report.

Based on information from multiple sources, the Department of Corrections found "GREEN was involved in a conspiracy to assault ADDIS which resulted in his death. Information received indicates that GREEN ordered the 'hit' on ADDIS." (Exh. No. 50, 4 CT 1145.)

The Department of Corrections also found that Green was the shot caller for the NLR and that he was present on the yard and orchestrated the assault on Addis by appellant:

> "Confidential source(s) indicate that GREEN was overheard yelling at Officer R. Maldonado stating 'bring that Wood ADDIS to the yard and bring him now. GREEN yelled several times to Officer Maldonado. Green repeatedly questioned Officer Maldonado about ADDIS coming to the yard. Officer Maldonado stated that GREEN started pacing back and forth in a very agitated manner when suddenly GREEN shouted, 'I want to talk to the fucking Sergeant or Lieutenant. The youngster has got to come out.' Officer Maldonado stated that when ADDIS finally exited the building ... she found it peculiar that GREEN never acknowledge[d] ADDIS' presence on the yard like he did the other White inmates, with handshakes and hugs. ... Officer Esqueda also stated that when ADDIS entered the yard, GREEN nor any other inmate, acknowledge[d] ADDIS until the very end of yard time, at which time GREEN was observed shaking ADDIS' hand and telling ADDIS, 'go ahead Danny, go to the table and play cards. It's all right.' Officer Esqueda also stated that several minutes after telling ADDIS 'it's all right', GREEN approached the table where ADDIS was playing cards. Immediately upon GREEN'S arrival, ADDIS was assaulted by LANDRY. During the time of ADDIS' assault and subsequent death, GREEN was the 'shot caller' for the White Management inmates in Palm Hall Ad/Seg. GREEN'S C-file confirms that GREEN is a validated member of the White supremacists prison gang Nazi Low Rider (NLR). (4 CT 1146.)

Respondent objects that the finding by the Department of Corrections did not constitute a finding beyond a reasonable doubt that Green ordered the hit and that Green did not admit to ordering the hit. (RB 123.) However, the

prosecution made no objections to the Department of Corrections report at trial and agreed to its admission in evidence. (6 RT 1409-1411; 9 RT 2207-09.) Respondent's belated objections should therefore be rejected. (*People v. Taylor* (1993) 19 Cal.App.4th 836, 851 ["[W]aiver can be a two-edged sword and in this case the second edge cuts against the People."].)

Even if considered, respondent's objections are wide of the mark. The prosecution conceded at trial that Green was a "co-principal" and "equally guilty" of the fatal assault on Addis. (10 RT 2315-16.) This concession was proper because the Department of Corrections showed that Green as the NLR shot caller had ordered and orchestrated the assault on Addis. Respondent cites no authority that an admission is not necessary.

Moreover, as next explained, the report by the Department of Corrections was supported by multiple witnesses at trial. All of this evidence is relevant to show that appellant was a risk of death or great bodily harm from the NLR if he had refused to assault Addis.

2. Testimony By Percipient Witnesses.

Multiple correctional officers, including Sergeant Sam, the officer in charge on the day of the assault, knew or had reason to know that Addis would be assaulted if he was put on the yard that day. (1 AOB 7-12; 2 AOB 183.) This was significant because it confirmed the defense expert's testimony that the manner in which the staff had handled Addis that day showed that appellant could not rely on the staff for protection from the NLR. (*See, e.g.*, 8 RT 1941-42, 1945-46, 1966-67, 2009, 2010-11.)

Respondent here and at several other places in its brief argues that the evidence "as a whole" does not show that the correctional officers knew or had reason to know that Addis would be assaulted. (*See, e.g.*, RB 125-127, 157, 231.) However, the evidence should be "[c]onstrued in the light most favorable to" the defendant. (*United States v. Bailey, supra,* 444 U.S. at p.

398; *People v. Tufunga, supra,* 21 Cal.4th at p. 944.)

At the morning briefing on August 3, 1997, the Palm Hall staff discussed the risk to Addis before the guards started bringing inmates to the exercise yard. (Exh. No. 52; 4 CT 1152-53; 6 RT 1324, 1333-35, 1337-38.) Sergeant Sams testified that "officers or staff were telling me that [Addis] might not be in favorable conditions to go" to the yard. (6 RT 1324.)

Officer Esqueda was in the gun tower overlooking the yard. (5 RT 1057-58, 1126-27.) He knew that it was risky for an inmate to be on the yard if he was not popular with other inmates. (5 RT 1111.) He also knew that Green was the NLR shot caller with power over the white inmates. (5 RT 1133.) Green decided whether another inmate would be roughed up or beaten, even for something as minimal as not joining in exercises on the yard. (5 RT 1133-34.) When Addis was brought to the yard that day, Green did not greet him. (5 RT 1143-44.) Because the shot caller did not greet Addis, the other inmates could not do so. (5 RT 1149.) That raised a question about Addis's safety on the yard. (5 RT 1143-44.)

Officer Esqueda also knew that Addis had rolled off the third tier where the other white inmates were housed. Most of the inmates on the tier were prison gang members but Addis was unaffiliated. (5 RT 1067-68, 1136.) After rolling off the tier, Addis was sent to the segregation unit ("Cypress Seg.") "[f]or his own safety" because Cypress Seg. had "single-man cells." (5 RT 1168.)

On August 3, 1997, Officer Valencia was a floor officer at Palm Hall. (5 RT 1171.) He also knew that Addis was not affiliated with a gang and that he had rolled off the third tier where the other white inmates and gang members were housed. (5 RT 1182-83; 8 RT 1784.) An inmate rolled off a tier either because of a disciplinary or a safety concern. (5 RT 1183.) In Addis's case, there was a safety concern. Officer Valencia knew that Addis

had taken cigarettes from the stash he was holding on the tier for the white inmates. (5 RT 1184.)

"Tobacco is almost a currency in jail." (5 RT 1185.) The NLR shot controlled the distribution of tobacco on the tier. (5 RT 1185-86.) If an inmate stole tobacco, he put himself in danger. (5 RT 1187-88.) If he then rolled off the tier, Officer Valencia would have a concern for the inmate's safety. (5 RT 1188.) He would be in danger on the yard even if he was classified as yard eligible. (5 RT 1188-89.)

As to Officer Ginn, Respondent concedes that he thought that Addis might get "beat up" if he went onto the yard. (RB 157, fn. 58.) Nevertheless, respondent inexplicably claims that Officer Ginn was "unaware of any safety concerns" for Addis. (*Ibid.*) The evidence is that when Sergeant Sams told Officer Ginn to get Addis from the first tier, Officer Gin told him that "'Addis is the guy that was up on the tier before but got a bed move to the other side. If he goes out, I think he may – get beat up,' because Addis was one of those guys who just ... didn't fit with the other white guys." (8 RT 1778.) Officer Gin knew from his own observations that the other inmates "didn't accept" Addis. (8 RT 1778-79.) Officer Ginn also thought that Addis would get "punched around" if he went onto the yard." (8 RT 1783.)

On August 3, 1997, Officer Maldonado was the gate officer for the exercise yard. (8 RT 1801-02, 1832-34.) She knew Green as the shot caller for the white inmates. (8 RT 1805.) After Green arrived on the yard, he started yelling and demanding that Addis be brought to the yard. (8 RT 1805-07.) Green "was agitated. He wanted ... [Addis] to come out." (8 RT 1809.) Appellant did not bother Officer Maldonado about getting Addis onto the yard. (8 RT 1845-46.)

When Addis appeared at the gate to the yard, Maldonado thought that he might be at risk. (8 RT 1812.) After releasing Addis onto the yard, she told

Sergeant Sams, "'You know, Sarge, they're going to take him out.'" (8 RT 1815-17; Exh. No. 68, 5 CT 1235.) After the homicide, Maldonado sought counseling with Dr. David Friedman. On May 27, 1999, she told Dr. Friedman that they knew "'an inmate was to be killed. We all knew it. I told the supervisor that he would be killed if we let him out of his cell.'" (8 RT 1856.) Maldonado received harassing telephone calls at home with people calling her a rat. (8 RT 1869.)

Former inmate Ricky Rogers on the yard that day. (6 RT 1274-75.) He explained that the shot caller was the guy with the "keys to the car." That meant that he was "in charge of all the white guys" and made the rules about what was done or not done amongst the white inmates. (6 RT 1275-76.) If an inmate sought protection from prison staff, even by just rolling off the tier, he would be "considered a PC [protective custody] rat, and there's a good chance they will try to take your life for that." (5 RT 1248-49.)

Nevertheless, the officers put Addis onto the yard. Accordingly, a person in appellant's position would conclude that he could not rely on prison staff for protection from the NLR.

3. Expert Testimony.

Expert testimony confirmed that appellant was at risk of death or great bodily injury if had not carried out the hit ordered by Green. (2 AOB 183-85.) Respondent objects that the defense experts (former Department of Corrections officers Steven Rigg and Anthony Casas) "only" reviewed staff reports about the assault and the trial testimony of some of the correctional officers and they did not speak to appellant. (RB 126.) However, the prosecution made no such objections to their testimony at trial. Therefore, they may not be considered on appeal. (*People v. Taylor, supra,* 19 Cal.App.4th at p. 851.)

If considered, respondent's objection should be overruled. A gang expert may rely on incident reports and trial testimony. (Evid. Code, § 801,

subd. (b) [Expert testimony may be "[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates ...."]; *People v. Gardeley* (1996) 14 Cal.4th 605, 618 ["Expert testimony may ... be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions."].) Respondent identifies no authority that an expert must interview the defendant in order to testify.

Respondent also argues that expert testimony is insufficient to find the motive or intent for an act. (RB 126.) However, expert testimony is regularly accepted as proof of those factors, particularly in the gang context. (2 AOB 182; *see, e.g., People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-50 [Evidence of gang beliefs and practices "can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime."]; *United States v. Mills* (11th Cir. 1983) 704 F.2d 1553, 1559-1560 [Testimony of a "quasi expert" on the organization, history, and activities of the Aryan Brotherhood was properly admitted as relevant to the defendant's motive and intent for an alleged Aryan Brotherhood contract killing.].)

Appellant emphasizes that two defense experts with decades of experience in California state prisons (Anthony Casas and Steven Rigg), confirmed that appellant's life was at risk if he had not carried out the shot caller's order to assault Addis. (2 AOB 182-185; Statement of Facts Section II.C., 1 AOB 22-28.)

In particular, Mr. Casas explained that an inmate like appellant who was small and inexperienced would need a gang for protection when he came into

prison. (8 RT 2001-2003.) However, in exchange for protection, a gang expects cooperation. (*Ibid.*) "You try to get out or don't do what you are told, you are taken out." (8 RT 2004.) The "orders can include everything from performing assaults, rapes, murders, everything." (8 RT 2005.)

If an inmate refused to perform as ordered, "[h]e can easily get killed. As a matter of fact, in most cases where your gangs are disciplined enough, that's precisely what happens. They want to put the message out that ... you don't break ranks, you don't misbehave, you don't ignore orders. You follow or you're gone." (8 RT 2005.) Based on the evidence of how the prison staff had handled Addis, an inmate in appellant's position would have concluded that it would have been useless to turn to the staff for safety. (8 RT 2010-11.)

Mr. Rigg explained that "gang involvement is a way of survival" in prison but that the gang expects loyalty in return. (8 RT 1939-40.) The shot caller has the authority to tell others what to do, including whether to commit an assault. (8 RT 1940.) If an inmate did not carry out the assault, "[h]e is putting himself at risk anywhere from being assaulted to murdered." (8 RT 1941.) Under the circumstances of this case, if appellant had failed to assault Addis, he would have been "a walking dead man" right then on the yard. (8 RT 1942.) "[I]t would have been very difficult for him to receive assistance from staff, especially knowing how the unit was being operated." (8 RT 1946.)

The prosecution's own gang expert (Glen Willett) confirmed that the NLR would retaliate against an inmate who did not cooperate with the gang's program or tried to drop out of the organization. (7 RT 1729-30.) As noted, former inmate Rogers also confirmed that if an inmate sought protective custody, "there's a good chance they [*i.e.*, gang members] will try to take your life for that." (5 RT 1248-49.)

Respondent argues that the expert testimony is negated by other

evidence that appellant participated in the NLR gang and led exercises on the yard. (RB 123.) This argument again ignores the principle that, in deciding whether to instruct on a defense theory, the evidence should be "[c]onstrued in the light most favorable to" the defendant. (*United States v. Bailey, supra,* 444 at p. 398; *People v. Flannel, supra,* 25 Cal.3d at pp. 684-85; *People v. Turner, supra,* 50 Cal.3d at p. 690.)

Respondent goes so far as to claim that there was evidence that appellant "helped plan the murder of Addis." (RB 123-24.) However, this claim is unsupported by any citation to the record.

Therefore, it should be rejected. (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 ["This assertion is unsupported by an appropriate record reference. 'If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived. [Citation.]"]; California Rules of Court, Rule 8.204, subd. (a) [Each brief must support a factual claim by "citation to the volume and page number of the record where the matter appears."].) Even if considered, the evidence is that Green ordered and orchestrated the assault on Addis because he had stolen tobacco from the NLR and tobacco functioned as a currency within prison. (Exhibit No. 50, 4 CT 1145; 5 RT 1184-85; 6 RT 1400; 7 RT 1593-94.)

Respondent claims that in this case there was less evidence of duress than in *People v. Burney* (2009) 47 Cal.4th 203 ("*Burney*"). However, in *Burney* the defendant's own "statement indicates that he shot the victim rather than handing the gun back to his codefendant because he feared that if his codefendant attempted to shoot the victim, his codefendant's drunken state would cause him to mistakenly shoot *defendant.*" (*Id.* at pp. 249-50.) "Indeed, when asked by Detective Erickson why, upon hearing his codefendant's exhortations to kill the victim, defendant did not simply hand him the gun and

tell him to kill the victim himself, defendant responded, 'Cause ... I don't want him to shoot me by accident.'" (*Id.* at p. 250.)

There is no comparable evidence in this case. Respondent contends that because appellant admitted killing Addis he did not act under duress. (RB 124.) However, the statement itself and the context in which it was made shows otherwise.

At the time appellant admitted killing Addis he was held in the maximum security area ("deep seg") at C.I.M. (8 RT 1904-05.) Appellant told Officer Rounds to tell the lieutenant that if he was not moved from a cell in the back of the unit he would "go off", "bang the rails", plug the toilets and flood the tier. (8 RT 1906.)

Officer Rounds told appellant that his actions would not get him what he wanted. She explained that there was an on-going investigation into the death of Addis. Because the investigation was not complete, appellant could not be moved from deep seg. (8 RT 1906.) Appellant interrupted her stating, "'I killed him, so I confessed I killed him. The investigation is over.'" (8 RT 1906-07.)

These circumstances show appellant reacting to the stress of being in deep segregation and admitting that he killed Addis in the hope that it would result in better housing. The admission did not, as respondent suggests, contain an implicit admission that the NLR had not ordered the hit on Addis or that appellant was not at risk if he did not comply.

C. Appellant's Federal Constitutional Trial Rights Required The Trial Court To Give The Requested Duress Instructions Because They Were Supported By Substantial Evidence.

The United States Constitution, including the Eighth Amendment, required the trial court to instruct the jury as requested on duress because of substantial evidence that appellant acted under duress. (2 AOB 194-196, 203-

205; U.S. Const. 5th, 6th, 8th & 14th Amends.)

Respondent contends that the Eighth Amendment has no role in the analysis. (RB 127-28.) Respondent agrees (RB 128) that the Eighth Amendment "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (*Kennedy v. Louisiana* (2008) 554 U.S. 407, [128 S.Ct. 2641, 2649; 171 L.Ed.2d 525], quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101 [78 S. Ct. 590; 2 L. Ed. 2d 630], plurality opinion; 2 AOB 189). However, respondent argues that this concept is irrelevant to the question of whether the trial court should have instructed the jury on duress as requested. (RB 128.)

Respondent is mistaken because the *Anderson* court relied on the common law antecedents to Penal Code section 26, subdivision 6, to conclude that duress was not a defense to any form of murder. (*People v. Anderson, supra,* 28 Cal.4th at p. 770 ["as in Blackstone's England, so today in California: fear for one's own life does not justify killing an innocent person"];*see also id.* at p. 772-73.) The decisions by other courts and criticisms by scholars and the Model Penal Code show that, under the Eighth Amendment's evolving standards of decency, a complete bar to instructions on duress in capital/murder case no longer passes scrutiny. (2 AOB 189-194.)

"[S]ince duress is an excuse rather than a justification, the real issue (it bears repeating with some additional emphasis) is whether a coerced person who unjustifiably violates the moral principle [of not killing] *necessarily, unalterably, and unfailingly* deserves to be punished as a murderer, as the common law insists." (Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits* (1989) 62 So.Cal. L.Rev. 1331, 1372.) Whatever the common law rule, current Eighth Amendment law shows that this should be a question for the jury to decide. (2 AOB 189-194.)

The Eighth Amendment is also relevant because each of the duress

instructions requested by appellant provided a basis to find appellant culpable of a lesser included offense of first degree murder and the capital offense. (2 AOB 172-175.) The high court has recognized that in a capital case, the jury must be permitted to consider a verdict of guilt of a lesser included offense when the evidence would have supported such a verdict. (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S. Ct. 2382; 65 L. Ed. 2d 392]; 2 AOB 190.)

A lesser included offense instruction "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. As Mr. Justice Brennan explained in his opinion for the Court in *Keeble v. United States,* 412 U.S. 205, 208, providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard ...." (*Id.* at pp. 633-34.)

"That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. [¶] Such a risk cannot be tolerated in a case in which the defendant's life is at stake." (*Id.* at p. 637.)

"To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, ... [California] is constitutionally prohibited from withdrawing that option from the jury in a

capital case." (*Id.* at p. 638, footnote and citation omitted.)

As to appellant's Sixth Amendment right to present a defense, respondent argues that no violation of that right occurred because appellant was not "precluded" from putting on a defense. (RB 129.) On respondent's view, appellant was simply not permitted "to manufacture a defense where no evidence of it existed and which was legally untenable based upon the evidence." (*Ibid.*)

The foregoing discussion shows that there was substantial evidence of duress. That defense was legally tenable under the United States Constitution because it went to the core element of the intent necessary for murder and the capital offense. (*Apprendi, supra,* 530 U.S. at p. 493 ["The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'"].)

Accordingly, the denial of the requested instructions violated appellant's due process and Sixth Amendment right to present a complete defense and lowered the prosecution burden of proof. (2 AOB 194-95; U.S. Const., 6th & 14th Amends.; *see, e.g., Holmes, supra,* 547 U.S. at p. 324; *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [106 S.Ct. 2142; 90 L.Ed.2d 636]; *Mathews v. United States* (1988) 485 U.S. 58, 63 [108 S.Ct. 883; 99 L.Ed.2d 54] [A "defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."].)

As a matter of public policy, respondent notes that *Anderson* criticized the possibility of misuse of the duress defense in killings involving prison gangs and that the legislature should decide whether the defense is available.[17]

---

17. "If duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer. Persons who know they can claim

(RB 127.) On respondent's view, if duress instructions were authorized in this case, they would be required in every case murder prosecution involving prison gangs. (RB 127.)

In theory, any defense, including an established defense like self-defense, may be contrived and the prosecution may or may not be justified in making this argument to the jury. (*See, e.g., People v. Minifie* (1996) 13 Cal.4th 1055, 1071-72; *People v. Phlean* (1899) 123 Cal. 551, 558 ["The theory of the prosecution is, that defendant, on account of the threats of the deceased, deliberately resolved to kill him, and in order to give the killing the appearance of an act of self-defense arranged and contrived the circumstances upon which he now relies to give an air of plausibility to his account of the fatal meeting."].)

Whether or not that argument should be accepted is for the jury to decide. (*Ibid.*; *United States v. Scheffer* (1998) 523 U.S. 303, 312-13 [118 S. Ct. 1261; 140 L. Ed. 2d 413] ["Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'"], citation omitted; *United States v. Gaudin* (1995) 515 U.S. 506, 514-15 [115 S.Ct. 2310; 132 L.Ed.2d 144] ["[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."].)

---

duress will be more likely to follow a gang order to kill instead of resisting than would those who know they must face the consequences of their acts. Accepting the duress defense for any form of murder would thus encourage killing. Absent a stronger indication than the language of *section 26*, we do not believe the Legislature intended to remove the sanctions of the criminal law from the killing of an innocent even under duress." (*People v. Anderson, supra,* 28 Cal.4th at pp. 777-78.)

Moreover, the state of the evidence in the case before the court determines whether or not an instruction should be given on a defense. (*People v. Barton* (1995) 12 Cal.4th 186, 195 [A trial court's duty to instruct on a defense arises "'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citation.]"]; *see also People v. Preston* (1973) 9 Cal. 3d 308, 319 ["Jury instructions must be responsive to the issues, which in a criminal case, are determined by the evidence."].)

As the high court has explained, "our course of constitutional adjudication has not been characterized by this 'in for a penny, in for a pound' approach." (*Neder v. United States* (1999) 527 U.S. 1, 17 [119 S. Ct. 1827; 144 L. Ed. 2d 35].)

Here, the requested instructions were supported by the testimony from correctional officers, defense and prosecution experts, and a former inmate (Rogers) called as witness by the prosecution and who was not a NLR or AB gang member. (See Section VI.B.2., above; 6 RT 1267-68, 1271.) For all these reasons, the trial court's failure to instruct the jury on duress as requested violated appellant's federal constitutional trial rights.

D. CALJIC No. 8.20 and CALJIC No. 4.40 As Modified Were Insufficient To Cure The Error From The Denial Of The Requested Instructions.

Respondent argues that any error in refusing to give the requested duress instructions was cured by the fact that the court instructed the jury with CALJIC No. 8.20, a modification of CALJIC No. 4.40, and the lesser included offense of express malice second degree murder (CALJIC No. 8.30). (RB 121, 127, 129.)

CALJIC No. 8.20 in pertinent part stated: "If you find that the killing

was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree." (3 CT 874-75.) Respondent notes that *Anderson* concluded that this instruction permitted the jury to consider whether there was evidence of duress sufficient to find reasonable doubt that the defendant acted with premeditation. (*People v. Anderson, supra,* 28 Cal.4th at p. 784.)

CALJIC No. 8.20 was insufficient to cure the error in this case. That instruction erred because it required evidence "precluding" premeditation and deliberation whereas reasonable doubt is all that due process requires. (2 AOB 209; Section VII., below; *see, e.g., Gaudin, supra,* 515 U.S. at pp. 522-23; *In re Winship* (1970) 397 U.S. 358, 364 [25 L. Ed. 2d 368; 90 S. Ct. 1068].)

In addition, CALJIC No. 8.20 identified "heat of passion" as an example of the type of "condition" that may preclude the idea of deliberation. (3 CT 874.) Without additional instruction from the court, there is no reason to believe that a juror would conclude that duress was a condition analogous to heat of passion precluding the idea of deliberation. (2 AOB 202-03; *see, e.g., Carter v. Kentucky* (1981) 450 U.S. 288, 302 [101 S.Ct. 11 12, 67 L.Ed.2d 241] ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law."]; *People v. Crossland* (1986) 182 Cal.App.2d 113, 199 [In reviewing a jury instructions, "our concern must be what the jury of laymen may have understood [the court] to mean."].)

For related reasons, CALJIC No. 8.30 ("Unpremeditated Murder of the Second Degree") was insufficient to cure the error from the omission of the defense instructions. As given here, CALJIC No. 8.30 stated in full: "Murder of the second degree is also the unlawful killing of a human being with malice

aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." (3 CT 876.) Nothing in that instruction informed the jury that evidence of duress was relevant to the question of whether an unlawful killing was first or second degree murder.

The trial court at the request of the prosecution (9 RT 2056) partially instructed on the issue of duress by modifying CALJIC No. 4.40. The instruction stated:

> A person is not guilty of a crime other than Assault By A Life Prisoner as alleged in Count 2 when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:
>
> 1. Where the threats and menaces are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and
>
> 2. If this person then actually believed that his life was so endangered.
>
> This rule does not apply to threats, menaces, and fear of future danger to his life, nor does it apply to the crime of Assault By A Life Prisoner as alleged in Count 2. (3 CT 871, CALJIC No. 4.40, modified.)

As the prosecution argued in closing, this instruction explicitly stated that duress was not a defense to Count 2, the charged violation of Penal Code section 4500. (9 RT 2256-57.) Therefore, it could not cure the error in failing to instruct the jury that from evidence of duress the jury could find reasonable doubt of the malice aforethought necessary for Count 2 or return a verdict of the lesser included offense of assault with a deadly weapon. (3 CT 791, 795.)

The modification of CALJIC No. 4.40 implied that duress was a defense to murder (Count One). Respondent argues that because the jury

found appellant guilty of willful, deliberate and premeditated murder, the jury necessarily rejected duress as a defense. This is incorrect for two reasons.

First, to find appellant guilty of first degree murder, the jury had to rely on the CALJIC No. 8.20. As previously explained, that instruction created an insurmountable hurdle by requiring evidence "precluding" the mental state necessary for first degree murder, rather than reasonable doubt. (2 AOB 209; Section VII., below.)

Second, CALJIC No. 4.40 created an all or nothing choice between a murder conviction and a complete acquittal. (3 CT 871 ["A person is not guilty of a crime other than Assault By A Life Prisoner as alleged in Count 2 when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances …."].) A defendant who kills under duress is not entitled to an acquittal and the evidence presented to the jury did not show that appellant was not guilty of any crime. (See Section VI.A., above; 2 AOB 191-193.)

Without the requested instructions, the jury was left with an all or nothing choice which "enhances the risk of an unwarranted conviction." (*Beck, supra,* 447 U.S. at p. 638.) For all these reasons, the other instructions were insufficient to cure the error and the denial of the defense instructions was prejudicial to appellant's defense to Counts 1 and 2 and the resulting death judgment. (2 AOB 205-08.)

VII.

THE TRIAL COURT ERRED BY REQUIRING EVIDENCE "PRECLUDING" DELIBERATION AND PREMEDITATION (CALJIC NO. 8.20) TO ESTABLISH REASONABLE DOUBT OF FIRST DEGREE MURDER.

A. Introduction.

CALJIC No. 8.20 impaired the jury's ability to find reasonable doubt that appellant committed a willful, deliberate, and premeditated murder by requiring evidence "precluding" deliberation. (3 CT 8.74; 2 AOB 209-211; *see, e.g., In re Winship, supra,* 397 U.S. at p. 364; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 697-98 [95 S. Ct. 1881, 44 L. Ed. 2d 508]; *People v. Morse, supra,* 60 Cal.2d at p. 657.)

Respondent contends that appellant forfeited his claims. Alternatively, respondent argues that this Court has previously rejected those claims and there is no reason to reconsider the issues. (RB 129-30, 132, citing *People v. Morgan* (2007) 42 Cal.4th 593, 620-21, *People v. Jurado* (2006) 38 Cal.4th 72, 127, and *People v. Nakahara* (2003) 30 Cal.4th 705, 715.) As next explained, appellant's claims are cognizable for multiple reasons. (*See also* 2 AOB 211-213.) Moreover, the decisions cited by respondent did not resolve the issues presented here and other authority demonstrates the merits of appellant's position.

B. Appellant's Claims Are Cognizable.

Citing *People v. Catlin, supra,* 26 Cal.4th 81 ("*Catlin*"), respondent argues that appellant forfeited his claims because he did not object at trial to the use of "precluding" in CALJIC No. 8.20. (RB 130.)

In *Catlin*, defense counsel asked the trial court to delete references to express malice in CALJIC No. 8.11 because he believed that there was no evidence of express malice. (*Id.* at pp. 147-48.) The prosecution concurred in

this requests and the trial court then deleted the definition of express malice from CALJIC No. 8.11. (*Id.* at pp. 147-48.) However, the trial court "also gave CALJIC No. 8.20, which began: 'All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with *express malice* aforethought is murder of the first degree.' (Italics added.)" (*Id.* at p. 148, footnote omitted.)

On appeal, the defendant argued that including the reference to express malice in CALJIC No. 8.20 was error given the agreement of the parties. (*Ibid.*) This court rejected the claim because the definition of first degree murder was correct and appropriate to the facts of the case:

> "To the extent defendant claims that the giving of CALJIC No. 8.20 without modification constituted error, we observe that defendant did not request a modification of this standard instruction, an instruction that was appropriate under the facts of this case. 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*Id.* at p. 849.)

This rule does not apply to appellant's claims. His argument is that use of the word "precluding" in CALJIC No. 8.20 "is *not* 'correct in law' and that it violated his right to due process of law; the claim therefore is not of the type that must be preserved by objection." (*People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7, citing Penal Code, § 1259 ["The appellate court may . . . review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."], and *People v. Flood* (1998) 18 Cal. 4th 470, 482, fn. 7 ["Defendant's failure to object to the . . . instruction does not preclude our review for constitutional error."].)

For the same reasons, appellant's claim of instructional error is

cognizable as affecting his substantial rights under state and federal law. (Penal Code, §§ 1259, 1469; *see also People v. Dennis* (1998) 17 Cal.4th 468, 534-35 ["section 1259 allows us to review--even in the absence of an objection--instructional error that affects substantial rights"].) "[W]e do not deem forfeited any claim of instructional error affecting a defendant's substantial rights." (*People v. Dunkle* (2005) 36 Cal.4th 861, 929.)

Alternatively, respondent suggests (RB 130-31) that appellant invited the error because defense counsel agreed to CALJIC No. 8.20. The entire discussion of CALJIC No. 8.20 was as follows:

The Court: "Next is [CALJIC No.] 8.20."

Defense counsel: "Agree."

The Prosecutor: "Agreed." (9 RT 2066.)

Defense counsel's unadorned statement ("agree") as the court went through a list of jury instructions does not show that he deliberately acted for tactical reasons as opposed to ignorance or mistake. This Court recently reached the same conclusion under analogous circumstances in *People v. Moore* (2011) 51 Cal.4th 386. There, respondent similarly argued that any error in giving two pattern instructions (CALJIC No. 8.71 ["Doubt Whether First Or Second Degree Murder"] & CALJIC No. 8.72 ["Doubt Whether Murder or Manslaughter"]) "was invited because defense counsel included both on his list of requested instructions. " (*Id.* at p. 410.)

This Court rejected respondent's argument because "'[t]he invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for requesting or acquiescing in the instruction.' (*People v. Moon* (2005) 37 Cal.4th 1, 28.) Here, no such tactical reason appears in the record. CALJIC Nos. 8.71 and 8.72 were the commonly used pattern instructions on application of the reasonable doubt principle to lesser included homicide offenses, a topic on which counsel obviously and appropriately

wanted the jury to be instructed. Trial counsel's failure to detect in the standard instructions the flaw appellate counsel perceives and to request a modification does not demonstrate a tactical intent to induce the error now claimed." (*People v. Moore, supra,* 51 Cal.4th at p. 410.)

The same reasoning applies in this case because defense counsel said no more than "agree" when the trial court indicated it would instruct the jury with CALJIC No. 8.20. (9 RT 2066.)

Respondent contends that that requiring the jury to find evidence "precluding the idea of deliberation" (CALJIC No. 8.20) "played right into" the defense theory that appellant acted under duress in assaulting Addis. (RB 130.) However, requiring evidence precluding the mental state necessary for first degree murder was inconsistent with the defense theory of reasonable doubt based on evidence of duress.

This conclusion is confirmed by two of duress instructions requested by defense counsel, both of which related evidence of duress to the reasonable doubt standard. (3 CT 794 ["To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused death was not done under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury."]; 3 CT 795 ["As to this alleged offense, the burden is on the People to prove beyond a reasonable doubt each of the elements of the offense and that the act which caused death was not done under the actual an reasonable belief in the necessity to act because of imminent peril to life or great bodily injury."].)

For all these reasons, the record rebuts respondent's claim that defense counsel invited the instructional error in CALJIC No. 8.20.

C. The Authority Cited By Respondent Does Not Resolve Appellant's Claims.

Turning to the merits, respondent mischaracterizes appellant's claim as being that the use of the word "precluding" is inherently ambiguous. Appellant's claim is precisely the opposite: by every measure of current usage "precluding" unambiguously means preventing something from occurring. (2 AOB 213-218.)

Respondent argues that this Court has repeatedly rejected appellant's claims. (RB 132-33.) Respondent relies principally on *People v. Nakahara* (2003) 30 Cal.4th 705 ("*Nakahara*"). However, as explained in appellant's opening brief, neither that case nor the case it relied on (*People v. Catlin, supra,* 26 Cal.4th at pp. 84, 148, 151), addressed the dictionary, statutory, and legal authority showing that the jury would have understood "precluding" as meaning "preventing." (2 AOB 213-218.)

The *Nakahara* court concluded that CALJIC No. 8.20 is "unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. These instructions make it clear that a defendant is not required to absolutely preclude the element of deliberation. (*People v. Nakahara,* 30 Cal.4th at p. 715.) In *People v. Morgan* (2007) 42 Cal.4th 593, the Court reached the same conclusion.[18] (*Id.* at pp. 620, 621, citing *People v.*

---

18. Respondent also cited In *People v. Millwee* (1998) 18 Cal.4th 96 ("*Millwee*"). (RB 132, 133.) In that case the defendant argued "that because instructions on first degree premeditated murder were 'not warranted by the evidence,' they infected the fact-finding process and created an 'aura of guilt easing the way for conviction' of the charged crimes. However, the standard instruction given by the court on willful, deliberate, and premeditated murder [CALJIC No. 8.20] is a correct statement of law." (*Id.* at p. 135, fn. 13.) *Millwee* did no discuss the use of "precluding" in CALJIC No. 8.20 and, therefore, has no application here. (*People v. Heitzman* (1994) 9 Cal.4th 189,

Nakahara, supra, 30 Cal.4th at p. 715.)

On respondent's view (RB 133), this reasoning forecloses appellant's claims because the trial court in his case also gave the usual instructions on reasonable doubt, the presumption of innocence, and the prosecution's burden of proof. (3 CT 866, CALJIC No. 2.90 ["Presumption Of Innocence – Reasonable Doubt – Burden Of Proof"]; 2 AOB 221-22.)

However, those general instructions applied equally to first and second degree murder. As a result, the jury would have looked to the specific instruction (CALJIC No. 8.20) to evaluate the question of premeditation and deliberation.

The general instructions, therefore, could not cure the error. "It has long been held that jury instructions of a specific nature control over instructions containing general provisions." (*People v. Stewart* (1983) 145 Cal.App.3d 967, 975, citing *Nickell v. Rosenfield* (1927) 82 Cal.App. 369, 377.) "'It is where the specific instruction is good, and the general one bad, that an error 'is usually held cured.'" (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395, quoting 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 329, p. 373.)

In addition, the high court has recognized that general instructions on the burden of proof and the presumption of innocence are insufficient to cure the error of a conflicting, specific instruction. In *Francis v. Franklin* (1985) 471 U.S. 307 [85 L. Ed. 2d 344; 105 S. Ct. 1965], the defendant was charged in Georgia state court with murder and the court gave conflicting instructions related to the determination of malice aforethought.

One instruction in pertinent part stated that "[a] person of sound mind

---

209 ["It is well settled that a decision is not authority for an issue not considered in the court's opinion."].)

and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." (*Id.* at pp. 311-12.) The high court held that such an instruction violated due process because it had "the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." (*Id.* at 313.)

The state argued that the instructional error was cured by "an earlier portion of the charge instructing the jurors that the defendant was presumed innocent and that the State was required to prove every element of the offense beyond a reasonable doubt." (*Id.* at 319.) The state also pointed to a sentence "immediately following the challenged portion of the charge, which reads: '[a] person will not be presumed to act with criminal intention....'" (*Id.* at pp. 318-19, footnote and citation omitted.)

The high court rejected the argument that these additional instructions cured the error: "Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (*Id.* at 322.)

The same reasoning shows that the contradiction between the general instruction on reasonable doubt and the presumption of innocence (CALJIC No. 2.90) and the requirement of evidence "precluding" deliberation (CALJIC No. 8.20) could not cure the error in this case.

D. "Precluding" Means "Preventing."

Humpty Dumpty said, "When I use a word ... it means just what I choose it to mean, neither more nor less." (Lewis Carroll, Through the

Looking Glass, and What Alice Found There (1871).)[19] However, in a criminal trial, "our concern must be what the jury of laymen may have understood [the court] to mean." (*People v. Crossland, supra,* 182 Cal.App.3d at p. 199; *see also People v. Cox* (1991) 53 Cal.3d 618, 667 [In "'determining whether an instruction interferes with the jury's consideration of evidence presented at trial, we must determine' what a reasonable juror could have understood the charge as meaning.' [Citation.]"].)

Terms used in jury instructions are construed as "commonly understood by those familiar with the English language" (*People v. McElleny* (1982) 137 Cal.App.3d 399, 403) as reflected in dictionaries and common usage. (*People v. Williams* (1969) 71 Cal.2d 614, 632, fn. 5 ["It should be borne in mind that for nontechnical words, such as 'preclude,' dictionaries reflect actual popular usage and not abstractly 'correct' definitions."]; *see also* Penal Code, § 7, subd. 16 [Non-technical words and phrases "must be construed according to the context and approved usage of the language …."].)

This Court, the California Legislature, the United States Supreme Court, and standard dictionaries all use "precluding" as meaning "preventing." (2 AOB 213-218.) Respondent has done the same. (RB 129.) This Court recently did so again. (*People v. Maikhi* (2011) ___ Cal.4th ___ [2011 Cal. LEXIS 6104 at pp. *50-51] ["the Fourth Amendment does not preclude a state from authorizing a game warden to briefly stop a person the warden encounters on a pier, in a boat, or in the field, who the warden reasonably believes has recently been fishing or hunting"].)

It must therefore be concluded that appellant's jury did the same.

Accordingly, the use of "precluding in CALJIC No. 8.20 lowered the

---

19. Through the Looking Glass, *supra*, is in the public domain and available at www.gutenberg.org/ebooks. The above quote is from location 871.

prosecution burden of proof, violated appellant rights to due process and to trial by jury, and impaired the reliability of the factfinding in a capital case. (2 AOB 209-210; Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; *see, e.g., In re Winship, supra,* 397 U.S. at p. 364; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521 [99 S. Ct. 2450; 61 L. Ed. 2d 39]; *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [106 S.Ct. 2595; 91 L.Ed.2d 335] ["In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."].)]

E. The Instructional Error Was Prejudicial To The Jury Finding Of First Degree Of Murder.

The prosecution sought a verdict of first degree murder on one theory: willful, deliberate and premeditated murder based on CALJIC No. 8.20. (9 RT 2253, 2270-71; 3 CT 874-75.) There are several reasons why the use of the "precluding" standard in CALJIC No. 8.20 was reversible error.

On the second day of deliberations (April 19, 2001), the jurors asked for and the trial court provided individual copies of CALJIC No. 8.20. (3 CT 830; 10 RT 2347.) This showed that, in a case of an admitted killing, the jurors had serious question about of the degree of the murder and necessarily relied on the erroneous "precluding" standard to review the evidence permitting a finding of less than willful, deliberate and premeditated murder. (*United States v. Olano* (1993) 507 U.S. 725, 740 [113 S. Ct. 1770; 123 L. Ed. 2d 508] ["[W]e presume that jurors, conscious of the gravity of their task, attend closely the particular language of the court's instructions in a criminal case . . . and follow the instructions given them."'], citations omitted.)

Based on evidence of duress, sudden quarrel, and heat of passion, appellant contested that he acted with the necessary mental state for first degree murder "and raised evidence sufficient to support a contrary finding ...." (*Neder, supra,* 527 U.S. at p. 19.) Therefore, reversal is required. (*Ibid.*;

see also Lemons v. Regents of the University of California (1978) 21 Cal.3d 869, 876 [A factor indicating prejudice is "whether the jury requested a rereading of the erroneous instruction...."]; 2 AOB 222-24.) This error also requires reversal of the death judgment because there is no tenable precedent for affirming a death judgment without a proper finding of first degree murder. (2 AOB 224, 283-88, 333-34.)

Respondent argues that because appellant attempted to present a defense of duress that somehow means that evidence of heat of passion and provocation could not also provide a basis for finding reasonable doubt of willful, deliberate and premeditated. (RB 133-34.) On respondent's view, those factors and duress are "mutually exclusive." (RB 134.)

Appellant disagrees. Heat of passion, provocation, and duress may all be present depending on the circumstances of the encounter. Regardless, a defendant may present inconsistent defenses. (*People v. Atchison* (1978) 22 Cal.3d 181, 183 ["'Inconsistent defenses are normally permitted in criminal as well as civil cases; e.g., not guilty and insanity; denial of act and self-defense.' [Citation.]"]; *Mathews, supra,* 458 U.S. at pp. 63-64 [The defendant is entitled to jury instructions on "inconsistent defenses" such as self-defense and heat of passion or accident and self-defense.].)

The question of which evidence to credit was for the jury to decide. (*See, e.g., Gaudin, supra,* 515 U.S. at pp. 514-515 ["[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."].) "It was within [the jury's] province to reject some testimony, and to accept such as to them seemed credible." (*People v. Lewis* (1899) 124 Cal. 551, 552; *People v. Ochoa* (2001) 26 Cal.4th 398, 444 ["We have observed 'a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others.'"]; quoting *People v. Williams* (1992) 4 Cal. 4th 354, 364.)

This rule applies even when contradictory evidence is presented. (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67-68 ["It is well settled that the trier of fact may accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted."]; *see also People v. Hernandez* (2003) 111 Cal.App.4th 582, 589-590 [A jury is "not required to make a binary choice between the prosecution evidence and the defense evidence."].)

By pointing to multiple paths to find reasonable doubt, respondent has demonstrated rather than rebutted the existence of prejudice.

VIII.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON IMPLIED MALICE SECOND DEGREE MURDER (CALJIC NO. 8.31).

A. The Fact That Appellant Attempted To Present A Duress Defense Did Not Abrogate The Trial Court's Duty To Instruct On Lesser Included Offenses.

There was sufficient evidence to instruct the jury on both implied malice and voluntary manslaughter as lesser included offenses of murder. (2 AOB 224-26, 231-33.)

Respondent asserts that appellant's "entire defense" was duress. (RB 138.) From this, respondent infers that instructions on neither implied malice murder nor voluntary manslaughter were necessary. (RB 138-39.) Respondent is mistaken.

In *People v. Barton* (1995) 12 Cal.4th 186 ("*Barton*"), the defendant contended that the trial court erred by instructing the jury on voluntary manslaughter because "it was inconsistent with the defense theory that the killing of Sanchez was accidental." (*Id.* at p. 193.) *Barton* rejected this claim because the "'obligation to instruct on lesser included offenses exists even

when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to it being given.'" (*Id.* at p. 195, citation omitted.)

The reason for this rule is that a " trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged." (*Id.* at p. 196; *accord People v. Breverman* (1988) 19 Cal.4th 142, 155.) For the same reasons, the trial court had a sua sponte duty to give all lesser included offense instructions supported by the evidence, regardless of appellant's request for instructions on duress.

B. For Multiple Reasons, There Was Sufficient Evidence To Instruct The Jury On Implied Malice Second Degree Murder.

Based on evidence favorable to the government's theory of the case, respondent argues that there was "no evidence" from which the jury could find implied malice second degree murder. (RB 138.) Respondent's argument fails when measured against the correct standards.

To determine whether evidence is substantial enough to support a lesser included offense instruction, a court "determines only its bare legal sufficiency, not its weight." (*People v. Moye* (2009) 47 Cal.4th 537, 556.) The "courts should not evaluate the credibility of witnesses, a task for the jury." (*People v. Breverman, supra,* 19 Cal.4th at p. 162; Penal Code, § 1172 ["[T]he jurors are the exclusive judges of all questions of fact submitted to them and the credibility of the witnesses."].) The "testimony of a single witness, including the defendant, can constitute substantial evidence." (*People v. Lewis* (2001) 25 Cal.4th 610, 646, citations omitted.) "'Doubts as to the

sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citation.]" (*People v. Tufunga, supra,* 21 Cal.4th at p. 944.)

Turning to the evidence, respondent argues that the trial court could not instruct on implied malice murder because of the manner in which the stabbing occurred and, respondent claims, appellant brought the knife onto the yard through several layers of security. (RB 138.)

As to the latter claim, the evidence is that after the stabbing, Officer Esqueda found a cardboard knife sheath wrapped in cellophane amidst some towels in the shower area. (5 RT 1107-08.) The shower area was open to all of the 12-15 inmates who were on the yard that morning. (5 RT 1073-74.) The prosecution presented no evidence that appellant was the inmate who brought the knife onto the yard.

As to the manner of killing, respondent apparently believes that a stabbing to the neck shows the intent to kill as a matter of law. (RB 138.) However, several cases have affirmed findings of implied malice from an assault with a knife, including a knife wound to the neck. (2 AOB 228; *see, e.g., People v. Memro* (1985) 38 Cal.3d 658, 700 ["appellant's use of a knife to cut Scott's throat exhibited the requisite wanton disregard for human life" of implied malice], overruled on another point by *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; *People v. Nieto-Benitez* (1992) 4 Cal.4th 91, 113 [implied malice may be shown by "striking the victim with a knife"]; *People v. Pacheco* (1981) 116 Cal.App.3d 617, 627 ["As to his intent, the jury also could have reasonably found that defendant possessed the requisite implied malice from his assault with a deadly weapon which resulted in 45 stab wounds to LeBeau, and some to Eva."].)

Therefore, evidence that appellant assaulted Addis with a knife may be construed as an act done "with actual or presumptive knowledge that serious bodily injury was likely to occur. [Citations.] That mental state permits an

inference of implied malice, however, and does not support a conclusion that no instruction on second degree murder on a theory of implied malice was necessary." (*People v. Coddington* (2000) 23 Cal.4th 529, 592-93 [addressing evidence that the defendant strangled the victims by pulling "FLEX-CUFs" tight across the neck.].)

Other cases show that an instruction on implied malice murder is appropriate where a killing occurs by means of an assault with a deadly weapon during an argument and/or in the heat of passion but with insufficient provocation. (2 AOB 227-28; Penal Code, § 188 [Malice "is implied, when no considerable provocation appears ...."]; *see, e.g., People v. Wright* (2005) 35 Cal.4th 964, 984 [In an unlawful killing occurred in response to a minor or misperceived threat "malice would be implied on account of the insufficiency of the provocation"]; *People v. Love* (1980) 111 Cal.App.3d 98, 104-107 [The trial court properly instructed the jury on implied malice murder (CALJIC No. 8.31) and that the evidence supported a verdict for that offense where the defendant shot the victim once in the head after they had argued over possession of the keys to a car.]; *People v. Goodman* (1970) 8 Cal.App.3d 705, 707 [Instruction on implied malice proper "because malice could be implied "from the circumstances surrounding the commission of an assault that results in murder ...."], approved on the same ground by *People v. Nieto-Benitez, supra,* 4 Cal.4th at p. 107].)

In this case former inmate Rogers said that appellant and Addis were arguing "[j]ust moments" before the stabbing. (5 RT 1248.) Respondent objects that this testimony came on cross-examination. (RB 141.) However, the prosecution made no objection at trial to Rogers' testimony on cross-examination. Therefore, respondent forfeited this claim. (*People v. Taylor, supra,* 19 Cal.App.4th at p. 851.)

Even if considered, respondent's objection is mistaken. Testimony on

cross-examination is evidence which may be considered by the jury. (Evid. Code, § 140 ["'Evidence' means testimony ... offered to prove the existence or nonexistence of a fact."].) Indeed, cross-examination is the "'greatest legal engine ever invented for the discovery of the truth.'" (*Lilly v. Virginia* (1999) 527 U.S. 116, 124 [144 L.Ed.2d 117; 119 S.Ct. 1887, 1894], citation and internal quotation omitted]; *accord Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 840.)

Respondent attempts to impeach Rogers' testimony. (RB 141.) This attempt should be rejected because in "deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*People v. Breverman, supra,* 19 Cal.4th at p. 162; Penal Code, § 1172.)

Respondent's factual position is also ill-founded. Respondent notes that Rogers testified that he thought there was an argument because "[m]ostly the way Smurf was speaking to him sounded angry." (5 RT 1248.) Respondent claims that this "in no way suggested Addis provoked Landry's anger or that they were in fact arguing." (RB 141.)

However, Rogers also said "they were kind of arguing about something." (5 RT 1248.) That means that means Addis said something to appellant. Evidence that appellant responded in anger is a basis to find that the defendant acted in the heat of passion. (*People v. Breverman, supra,* 19 Cal. 4th at p. 163 [the passion aroused may be "'anger or rage'"], citation omitted.)

Moreover, the prosecution presented evidence of the reason for the argument. Assuming that the first letter admitted in evidence was from appellant and addressed the Addis homicide (*c.f.* Section IV., above), Addis had threatened "to do ... harm" to appellant and "to kill me on the yard." (Exh. No. 66; 5 CT 1228.) From that evidence, the jury could find reasonable doubt of willful, deliberate and premeditated and return a verdict of implied malice

second degree murder.

The "'existence of provocation which is not "adequate" to reduce the class of the offense [from murder to manslaughter] may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation' an inquiry relevant to determining whether the offense is premeditated murder in the first degree, or unpremeditated murder in the second degree." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 329; internal quotation and citation omitted.)

Respondent objects that the statements in the letter "are vague, hearsay and self-serving." (RB 142.) Appellant agrees and those are some of the reasons the letter should not have been admitted in evidence. (See Section IV., above; 2 AOB 137.) However, if the letter was properly admitted in evidence as a letter by appellant discussing the circumstances of the Addis homicide, it provides substantial evidence for lesser included offense instructions. (*People v. Lewis, supra,* 25 Cal.4th at p. 646 [Evidence from "a single witness, including the defendant, can constitute substantial evidence."].)

As to respondent's objections, they should be rejected because the prosecutor made no objections but requested admission of the letter at trial. (9 RT 2207-09.) In particular, the prosecutor argued that the letter was neither vague nor hearsay. (7 RT 1745-46, 1748.) Respondent has taken the same position on appeal. (RB 90, 95, 100, 103-04.) Accordingly, respondent has forfeited any objections to the letter at this stage. (*People v. Taylor, supra,* 19 Cal.App.4th at p. 851.)

Even if considered, evidence of a threat by Addis is not hearsay. Threats are "simply verbal conduct" relevant for the non-hearsay purpose of explaining the reason for the argument and its effect on appellant. (*People v. Curl* (2009) 46 Cal.4th 339, 362; *People v. Boyette* (2002) 29 Cal.4th 381, 429

["Moreover, evidence of threats would not have been barred by the hearsay rule, for such evidence would not have been offered for its truth ..., but for a different purpose: to show the effect of the statements on defendant."].)

Therefore, if the letter was properly admitted in evidence, it was sufficient evidence of provocation to support an instruction on implied malice second degree murder. (*People v. Carasi, supra,* 44 Cal.4th at p. 1306; *People v. Wickersham, supra,* 32 Cal.3d at p. 329.)

C. The Other Jury Instructions Were Insufficient To Cure The Omission Of An Instruction On Implied Malice Murder.

Alternatively and inconsistently, respondent argues that the jury was adequately instructed on implied malice second degree murder. (RB 137-38.) Respondent concedes (*ibid.*) that the court did not instruct the jury with CALJIC No. 8.31 ("Second Degree Murder--Killing Resulting From Unlawful Act Dangerous To Life"). Nevertheless, respondent argues that it was sufficient that the trial court instructed the jury with the definition of malice aforethought in CALJIC No. 8.11 ("Malice Aforethought Defined"), which included the definition of implied malice (3 CT 873; 9 RT 2233-34) and on express malice second degree murder by CALJIC No. 8.30 ("Unpremeditated Murder of the Second Degree"). (3 CT 876; 9 RT 2235-36.)

Respondent failed to quote the language of CALJIC No. 8.30. That instruction provided in full: "Murder of the second degree is also the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is sufficient to prove deliberation and premeditation." (3 CT 876, emphasis added.) As the underscored language indicates, CALJIC No. 8.30 addressed only express malice murder as a form of second degree murder. (Penal Code, § 188 [Malice "is express when there is manifested a deliberate intention, unlawfully to take away the life of a fellow creature ...."].)

As quoted in the margin, CALJIC No. 8.11 included the definition of implied malice.[20] (3 CT 873.) However, it did not explain that an unlawful killing with implied malice was second degree murder. For this reason, the omitted instruction (CALJIC No. 8.31) was necessary:

> Murder of the second degree is also the unlawful killing of a human being when:
>
> 1. The killing resulted from an intentional act,
>
> 2. The natural consequences of the act are dangerous to human life, and
>
> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.
>
> When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being. (CALJIC No. 8.31 [("Second Degree Murder--Killing Resulting From Unlawful Act Dangerous To Life")].)

None of the instructions identified by respondent contained this or

---

20. CALJIC No. 8.11 (6th Ed. 1996) as given here stated: "'Malice' may be either express or implied. [¶] Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] Malice is implied when: [¶] 1. The killing resulted from an intentional act; [¶] 2. The natural consequences of the act are dangerous to human life; and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. [¶] When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. [¶] The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. [¶] The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act." (3 CT 873.)

similar language. Accordingly, they could not cure the error. (2 AOB 225.)

D. Reversal Is Required Because Appellant's Conviction For First Degree Murder Is Suspect And The Circumstances Of The Crime Supported A Finding Of Implied Malice.

Citing *People v. Moye, supra,* 47 Cal.4th at p. 556 ("*Moye*"), respondent argues that even assuming error no prejudice was possible because "Landry fails to establish it is reasonably probable that the jury would have returned a more favorable outcome had the jury been so instructed." (RB 144.) However, that is the state law standard of prejudice which applied because *Moye* was not a capital case. (*People v. Moye, supra,* 47 Cal.4th at p. 540 ["Defendant ...was convicted of second degree murder."].)

In a capital case, the failure to instruct on a lesser included offense is federal constitutional error. (U.S. Const., 8th & 14th Amends.; *Beck, supra,* 447 U.S. at p. 638; *People v. Breverman, supra,* 19 Cal.4th at pp. 166-67.) Therefore, reversal is required unless respondent demonstrates "beyond a reasonable doubt" that the error did that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824].)

"To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884; 114 L.Ed.2d 1432], overruled on another point by *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4. [112 S.Ct. 475; 116 L.Ed.2d 385].)

Respondent argues that because the jury found appellant guilty of first degree murder (Count 1) despite a duress instruction the jury "necessarily" rejected implied malice second degree murder. (RB 139.) There are several problems with this argument.

The duress instruction did not give the jury the option of finding

appellant guilty of a lesser included offense. It stated that if the jury found evidence of duress then appellant was "not guilty of a crime other than Assault By A Life Prisoner as alleged in Count 2." (3 CT 871, CALJIC No. 4.40, modified.) "Juries are presumed to follow their instructions." (*Yates v. Evatt, supra,* 500 U.S. at p. 403; *People v. Carter* (2003) 30 Cal.4th 1166, 1219-20.)

Applied here, this means that the jury could not find appellant guilty of a lesser included offense of murder because CALJIC No. 4.40 required an outright acquittal for the murder if it found evidence of duress. As previously discussed, the law and evidence did not support a finding that appellant was not guilty of any crime for the assault on Addis. (Section VI.A., above; 2 AOB 192-94.)

The case law previously discussed shows that under the circumstances of this case a reasonable juror if given the option would have found implied malice murder rather than first degree murder. (2 AOB 230-31; *see, e.g., People v. Memro, supra,* 38 Cal.3d at p. 700 ["appellant's use of a knife to cut Scott's throat exhibited the requisite wanton disregard for human life" of implied malice]; *People v. Nieto-Benitez, supra,* 4 Cal.4th at p. 113 [implied malice may be shown by "striking the victim with a knife"].)

Respondent claims (RB 139) that *People v. Beames* (2007) 40 Cal.4th 907 ("*Beames*") shows that the jury's finding of willful, deliberate and premeditated murder resolved the factual question posed by the omitted instruction on implied malice murder. However, the jury in *Beames* had been instructed on the torture-murder special circumstance which "requires the intent to kill. [Citations.] When the jury found this special circumstance true, it necessarily determined that defendant intended to kill Cassie when he tortured her." (*Id.* at p. 928.) "Likewise, in finding the killing was intentional, the jury necessarily found express, not implied, malice. [Citation.] Accordingly, any error in failing to instruct on implied-malice second degree

murder also was harmless." (*Ibid.*)

In this case, the prosecution alleged no special circumstances and the jury made no findings comparable *Beames.* (1 CT 42-45; 4 CT 916-18 [verdict forms].) Other instructional errors show that the issue of willful, deliberate and premeditated was not properly resolved against appellant. First, the trial court denied appellant's properly requested instruction that the jury could find reasonable doubt of willful, deliberate, and premeditated murder from evidence of duress. (2 AOB 172-73, 201; 3 CT 790; *see also People v. Anderson, supra,* 28 Cal.4th at p. 784 ["a killing under duress, like any killing, may or may not be premeditated, depending on the circumstances"].)

Second, the jury was unaware that "the circumstances of duress would certainly be relevant to whether the evidence establishes the elements of implied malice murder." (*People v. Anderson, supra,* 28 Cal.4th at pp. 779-80.)

Third, the trial court erroneously instructed the jury that evidence precluding deliberation was necessary (CALJIC No. 8.20) when only reasonable doubt was required. (See Section VII., above; 2 AOB 209.)

Finally, respondent repeats the argument that the evidence of first degree murder was "overwhelming" because of putative evidence of planning in bringing the knife, appellant's commission of a stabbing, and the evidence of appellant's involvement with the NLR gang. (RB 144.)

As previously explained, the prosecution presented no substantial evidence that appellant brought the knife onto the yard. Moreover, respondent has overlooked the case showing that a reasonable juror if given the option would have found implied malice murder from the stabbing assault. (2 AOB 230-31; *see, e.g., People v. Memro, supra,* 38 Cal.3d at p. 700; *People v. Nieto-Benitez, supra,* 4 Cal.4th at p. 113.)

As to the gang evidence, respondent argues that appellant "affiliated

with the NLR gang leadership by leading calisthenics ...." (RB 144.) As explained above in Section VI.B.2, the inmates and correctional officers said that Green was the NLR shot caller for the white inmates and there was only one shot caller. (5 RT 1133; 6 RT 1275-76; 8 RT 1782.) There is no evidence that appellant exercised authority or control over Green. Green ordered the hit on Addis and led the exercises on the yard the day of the assault. (5 RT 1133; 6 RT 1275-76; Exh. No. 50, 4 CT 1145.) Green but not appellant demanded that Addis be brought to the yard that day. (8 RT 1807-09, 1845-46.)

Respondent's claim of "overwhelming" evidence of willful, deliberate and premeditated is also inconsistent with the length of jury deliberations (more than nine hours over the course of three days) in a case of an admitted killing. (5 RT 1050; 4 CT 939-41.) This showed that the "question of the appellant's criminal liability was not clear-cut ...." (*People v. Rucker* (1980) 26 Cal.3d 368, 391 [The fact that the jury deliberated nine hours before reaching a verdict shows that the "question of the appellant's criminal liability was not clear-cut ...."]; *see also People v. Collins, supra,* 68 Cal.2d at pp. 332-33 [Nine hours of deliberations shows that the "case was apparently a close one."]; *Gibson v. Clanon, supra,* 633 F.2d at p. 855, fn. 8 [Nine hours of deliberations over three days shows that the jury had "serious questions" about the prosecution's case.].)

For all these reasons, respondent has failed to show that the trial court's failure to instruct on the lesser included offense of implied malice second degree murder was harmless beyond a reasonable doubt.

IX.

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THREE FORMS OF THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER SUPPORTED BY THE EVIDENCE.

A. Introduction.

The trial court also had a *sua sponte* duty to instruct the jury on three theories of voluntary manslaughter: sudden quarrel or heat of passion; imperfect self-defense; and assault with a deadly weapon without malice aforethought. (2 AOB 231.)

Respondent contends that there was "no evidence" to support voluntary manslaughter instruction on any theory. (RB 138-39.) In this argument, respondent repeats the error of disputing the credibility of the evidence and focusing on the evidence favorable to the prosecution's case. (See Section VIII.B., above, *see, e.g., People v. Moye, supra,* 47 Cal.4th at p. 556 [To determine whether evidence is substantial enough to support a lesser included offense instruction, a court "determines only its bare legal sufficiency, not its weight."]; *People v. Breverman, supra,* 19 Cal.4th at p. 162.)

Viewed from the proper perspective, there was sufficient evidence to instruct the jury on the three theories of voluntary manslaughter.[21]

---

21. As previously explained, the trial court should also have instructed the jury that it could find voluntary manslaughter based on evidence of duress. (3 CT 879; 2 AOB 174, 196; Section VI., above.)

B. If Exhibit No. 66 Was Admissible On The Theory That It Was A Letter Written By Appellant Addressing The Circumstances Of The Homicide, There Was Sufficient Evidence To Instruct The Jury On Voluntary Manslaughter Based Upon Sudden Quarrel In The Heat Of Passion And Imperfect Self-Defense.

Inmate Rogers overheard appellant and Addis arguing moments before the assault and appellant sounded angry. (5 RT 1248.) The letter which the prosecution claimed was written by appellant and addressed the assault on Addis showed that Addis had threatened "to do ... harm" to appellant and "to kill me on the yard." (Exh. No. 66, 5 CT 1228.)

This was evidence sufficient to instruct the jury on both heat of passion and imperfect self-defense theories of voluntary manslaughter.[22] (2 AOB 232-34; *People v. Wickersham* (1982) 32 Cal.3d 307, 326 ["'there is no specific type of provocation required by section 192 and ... verbal provocation may be sufficient'"], citation omitted; *People v. Cruz* (2008) 44 Cal.4th 636, 664 ["when a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury ... [and] the doctrine of 'imperfect self-defense' applies to reduce the killing from murder to voluntary manslaughter"], citations omitted; 2 AOB 232-34.), citation and footnote omitted.)

Respondent contends that *People v. Moye, supra,* 47 Cal.4th 527 ("*Moye*"), shows that there was insufficient evidence to instruct the jury on heat of passion voluntary manslaughter. (RB 143.) However, the defendant in *Moye* testified at trial in a way that was contrary to his appellate claim that the trial court erred by failing to instruct on a sudden quarrel/heat of passion

22. As explained above, respondent's belated objections on appeal to the letter which are contrary to the prosecution position at trial should not be considered. (See Section VIII.B., above; *People v. Taylor, supra,* 19 Cal.App.4th at p. 851.)

theory of voluntary manslaughter.

"In the face of defendant's own testimony, no reasonable juror could conclude defendant acted 'rashly or without due deliberation and reflection, and from this passion rather than from judgment ...' [citations] (*Breverman, supra,* 19 Cal.4th at p. 163) when, according to defendant, he responded to Mark's attack with the baseball bat by grabbing the bat from him and using it to defend himself from Mark's continuing advances. The thrust of defendant's testimony, in every particular, was that he approached Mark and Ruben with peaceful intentions, thinking Mark was his brother Ronnie, intending to talk things out and resolve any lingering hostility that might have carried over from the previous evening's altercation." (*People v. Moye, supra,* 47 Cal.4th at pp. 553-54.)

In this case, appellant did not testify in a manner contrary to a claim of voluntary manslaughter. The letter admitted in evidence as written by appellant demonstrated adequate provocation of a threat to kill or to do harm by Addis on the yard. (Exhibit No. 66, 5 CT 1228.) That evidence was consistent with the testimony by inmate Rogers about an argument between appellant and Addis just moments before the stabbing. (5 RT 1248.)

Accordingly, there was sufficient evidence of provocation to instruct the jury on heat of passion voluntary manslaughter. (*People v. Avila* (2009) 46 Cal.4th 680, 705 ["'The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.' [Citation.]"]; *People v. Wickersham, supra,* 32 Cal.3d at p. 326 ["'there is no specific type of provocation required by section 192 and ... verbal provocation may be sufficient'"], citation omitted.)

C. The Trial Court Should Also Have Instructed The Jury On Voluntary Manslaughter Based Upon Evidence Of An Assault With A Deadly Weapon Without Malice Aforethought.

"Manslaughter, a lesser included offense of murder, is an unlawful killing without malice." (*People v. Cruz, supra,* 44 Cal.4th at p. 664, citing Penal Code, § 192, and *People v. Ochoa* (1998) 19 Cal.4th 353, 422.) Based on this principle, *People v. Garcia* (2008) 162 Cal.App.4th 18 ("*Garcia*") held that a fatal assault with a deadly weapon without malice is voluntary manslaughter. (2 AOB 234-35.)

Respondent contends that *Garcia* does not apply because it involved a charge of second degree murder rather than first degree murder and the question was whether the trial court should have instructed the jury on involuntary manslaughter. (RB 140.) However, the jury convicted the defendant of voluntary manslaughter. (*People v. Garcia, supra,* 162 Cal.App.4th at p. 24 ["The jury found Garcia not guilty of murder but guilty of voluntary manslaughter as to Gonzalez ...."].) The analytic point is that if there is evidence from which the jury may find the absence of malice, it may find that an assault with a deadly weapon is voluntary manslaughter rather than murder. (*Id.* at p. 22 ["An unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter."].)

In this case, the evidence is that appellant assaulted Addis with a deadly weapon in the form of a knife. (5 RT 1087, 1261; 6 RT 1315-17.) There was also evidence from which the jury could find that appellant committed the assault without malice aforethought from either the evidence of duress, argument, or provocation. (2 AOB 235-36.)

Respondent also attempts (RB 140) to distinguish *Garcia* because "[t]here apparently was no allegation Garcia actually intended to kill" the

victim. (*People v. Garcia, supra,* 162 Cal.App.4th at p. 32.) However, obligation to instruct the jury on a lesser included offense is determined by the evidence, not by the prosecution's allegation. (*People v. Breverman, supra,* 19 Cal.4th at p. 154 [The trial court must instruct on a lesser included offense "when the evidence raises a question as to whether all of the elements of the charged offense were present ...."].)

Moreover, the qualified statement by the Court of Appeal (there "apparently was no allegation Garcia actually intended to kill") indicates the existence of evidence of express malice and this is supported by the record. Defendant Garcia first argued with one "Avila" outside of a neighborhood market, hitting him near the left eye with a handgun and knocking him to the ground. (*People v. Garcia, supra,* 162 Cal.App.4th at p. 22.) Garcia then went back to his girlfriend's house, got a shotgun, and returned to the market. (*Ibid.*)

The victim Gonzalez "told Garcia to put the gun away. Garcia ordered Gonzalez to shut up and to mind his own business. The two men yelled at each other, and Gonzalez moved toward Garcia ('lunged' at him, according to Garcia). Garcia struck Gonzalez with the butt of the shotgun to back him up. Although Garcia testified he did not aim at a specific spot, the gun hit Gonzalez in the face. Gonzalez fell to the sidewalk and hit his head, which began to bleed profusely. Gonzalez subsequently died from craniocerebral injuries due to blunt force head trauma." (*Id.* at pp. 22-23.)

"Barajas saw Gonzalez bleeding on the ground. When he tried to help him, Garcia pointed the shotgun at Barajas's back and asked if he 'wanted to be dead as the person who was lying there.'" (*Id.* at p. 23.) Thus, there was some evidence that Garcia acted with the intent to kill when he hit Gonzalez in the face with the shotgun. Nevertheless, when given the opportunity, the jury credited other evidence and found Garcia guilty of voluntary manslaughter.

(*Id.* at p. 22.)

For analogous reasons, the jury in this case should have been permitted to consider voluntary manslaughter as a lesser included offense based on the evidence of assault with a deadly weapon just moments after an argument.

D. Prejudice Is Present.

As to prejudice, respondent repeats the erroneous argument that appellant had the burden to show a reasonable probability that the denial of lesser included offense instruction requires reversal. (RB 144, citing *People v. Moye, supra,* 47 Cal.4th at p. 556.) In a capital case, the failure to instruct on a lesser included offense supported by the evidence is federal constitutional error. (*Beck, supra,* 447 U.S. at p. 627.) Accordingly, respondent must demonstrate that the error was "harmless beyond a reasonable doubt." (*Chapman, supra,* 386 U.S. at p. 24; *People v. Breverman, supra,* 19 Cal.4th at pp. 166-67.)

Respondent contends that the verdict of first degree murder shows there was no prejudice from the absence of instructions on voluntary manslaughter. (RB 144.) Failure to instruct the jury on a lesser included offense may be "harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

However, the trial court gave no instruction permitting the jury to find voluntary manslaughter on any theory. The only reference to a factor relevant to voluntary manslaughter was in CALJIC No. 8.20, which in pertinent part stated: "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. (3 CT 874.)

As previously explained, that instruction created an insurmountable hurdle to consideration of evidence of heat of passion by requiring evidence precluding that mental state. (See Section VII., above; 2 AOB 209.) Moreover, CALJIC No. 8.20 made no mention or explanation of the standards for provocation, imperfect self-defense, or an assault with a deadly weapon without malice aforethought. (3 CT 874.)

Respondent also repeats the argument that the evidence of first degree murder was so "overwhelming" that the absence of voluntary manslaughter instructions could not be prejudicial. (RB 144.) Appellant has addressed that argument. (See Sections I.D., VII.E. & VIII.D, above.). Here, appellant emphasizes that the length of jury deliberations in a case of an admitted killing shows that the jury did not find the evidence overwhelming. (*Ibid.*)

Accordingly, there is a reasonable possibility that a jury would have convicted appellant of voluntary manslaughter rather than murder if given that option. Therefore, the trial court's failure to instruct the jury on any form of that lesser included offense was not harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24; 2 AOB 236-38.)

X.

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT THE DEFENDANT WAS ENTITLED TO THE BENEFIT OF THE REASONABLE INTERPRETATION OF EXPERT TESTIMONY AS A FORM OF CIRCUMSTANTIAL EVIDENCE.

A. Introduction.

Expert testimony is a form of circumstantial evidence. (2 AOB 241-42; *see, e.g., People v. Jones* (1954) 42 Cal.2d 219, 222; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *Coleman v. Alabama* (1964) 377 U.S. 129, 130 [84 S.Ct. 1152; 12 L.Ed.2d 190].) Accordingly, the trial court should have instructed the jury that the benefit of the interpretation rule applied to expert testimony, *i.e.*, if the expert testimony permitted two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, the jury must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt.[23] (2 AOB 238-240, 242.)

Respondent contends that appellant forfeited this claim. (RB 145-46.) Alternatively, respondent argues that the instructions as a whole properly informed the jury that the benefit of the interpretation rule applied to expert testimony. (RB 146-49.) Respondent is mistaken on both points.

B. Appellant's Claim Is Cognizable.

Respondent claims that appellant forfeited this claim because he did not object to or requests modification of the instructions on circumstantial evidence (CALJIC Nos. 2.01 & 2.02) or the expert witness instructions (CALJIC Nos. 2.80, 2.82, 2.83). (RB 146.)

---

23. Respondent claims that appellant failed to explain what instruction should have been given. (RB 151.) The instruction as stated above was set forth in several places in appellant's opening brief. (2 AOB 239, 240, 242, 243, 248.)

However, this claim of instructional error falls under the rubric that the "court has a duty to instruct sua sponte on the general principles of law relevant to the evidence. This includes the duty to instruct on those general principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885; *accord People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 ["In a criminal case the trial court is required to instruct the jury of its own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence."]; *People v. Breverman, supra,* 19 Cal.4th at p. 154; 2 AOB 240.)

This duty exists, "regardless of the failure of defense counsel to offer such instructions or to object to their omission." (*People v. Graham* (1969) 71 Cal.2d 303, 319-20; *see also Kelly v. South Carolina* (2002) 534 U.S. 246, 256 [122 S.Ct. 726; 151 L.Ed.2d 670] ["A trial judge' s duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part."].) A defendant is not required to "request amplification or modification in order to preserve the issue for appeal where, as here, the error consists of a breach of the trial court's fundamental instructional duty." (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

Therefore, even "in the absence of a request by defendant, the trial court erred in failing to give an instruction that to justify a conviction on circumstantial evidence, the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." (*People v. Yrigoyen, supra,* 45 Cal.2d at p. 49 ("*Yrigoyen*"); *People v. Bender* (1945) 27 Cal.2d 164, 176 ("*Bender*") [Addressing a claim of instructional error related to the benefit of the interpretation rule where the "defendant requested no instructions."]; 2 AOB 240.)

Respondent argues that *Yrigoyen* and *Bender* apply only if the prosecution relies primarily on circumstantial evidence and asserts that in this case instructions on circumstantial evidence were "arguably" unnecessary. (RB 150.) However, the prosecution agreed that the trial court should instruct the jury on both circumstantial evidence and expert testimony. (9 RT 2043-45 [addressing CALJIC No. 2.02 ("Direct and Circumstantial Evidence – Inferences.") and CALJIC No. 2.02 ("Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State."); 9 RT 2050 [addressing CALJIC No. 2.80 ("Expert Testimony –Qualifications of Expert"), CALJIC No. 2.82 ("Hypothetical Questions"), and CALJIC No. 2.83 ("Resolution of Conflicting Expert Testimony"])

In particular, the prosecution agreed to circumstantial evidence instructions because it recognized that the salient disputed issue at trial was the intent with which appellant committed the stabbing of Addis. (9 RT 2043-44.) This was correct because "[e]vidence of a defendant's state of mind is almost inevitably circumstantial ...." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *see also* Penal Code, § 21, subd. (a) ["The intent or intention is manifested by the circumstances connected with the offense."].)

Moreover, the trial court concluded that instructions on both circumstantial evidence and expert testimony were necessary. (9 RT 2043-44, 2050.) Having decided to instruct the jury on those issues, the trial court had a duty to give instructions that were "accurate and complete" even if there was no *sua sponte* duty to do so. (*People v. Montiel* (1993) 5 Cal.4th 877, 942 ["Though there is no sua sponte duty at the penalty phase to instruct on the elements of 'other crimes' introduced in aggravation, when such instructions are given, they should be accurate and complete."], citations omitted; *accord People v. Prieto* (2003) 30 Cal.4th 226, 268; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1134-35 ["a trial court has no sua sponte duty to instruct on the

relevance of intoxication, but if it does instruct, as the court here did, it has to do so correctly"].) For the same reason, the trial court should have instructed the jury on how the principles of circumstantial evidence related to expert testimony. (2 AOB 240-242.)

Appellant's claim of instructional error is also cognizable as affecting his substantial rights (Penal Code, §§ 1259, 1469), because justice requires consideration of the issues (*People v. Norwood* (1972) 26 Cal.App.3d 148, 152; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394), and to forestall a later claim that trial counsel provided constitutionally inadequate representation by failing to object or to request modification of the instructions. (*People v. Mattson* (1990) 50 Cal.3rd 826, 854; *People v. Norwood, supra,* 26 Cal.App.3d at p. 153; 2 AOB 211-13, 240.) Respondent did not dispute these alternative theories of cognizability. (RB 144.)

C. Expert Testimony Is A Form Of Circumstantial Evidence To Which The Benefit Of The Interpretation Rule Applies.

Respondent does not dispute that expert testimony is a form of circumstantial evidence or that the benefit of the interpretation rule applies to circumstantial evidence. (2 AOB 240, 241-42.) Instead, respondent argues that there is "no authority" requiring the court to instruct the jury that expert testimony is a form of circumstantial evidence to which the benefit of the interpretation rule applies. (RB150.)

The authority discussed above showed that once the trial court decided to instruct the jury on circumstantial evidence and expert testimony it had a duty to give "accurate and complete" instructions on those issues. (*People v. Montiel, supra,* 5 Cal.4th at p. 942; *People v. Prieto, supra,* 30 Cal.4th at p. 268; *People v. Mendoza, supra,* 18 Cal.4th at p. 1134-35.) This rule should be construed to encompass the legal principle at issue here. (2 AOB 241-42.)

Without identifying any specific language, Respondent contends that

other instructions adequately informed the jury that the benefit of the interpretation rule applied to expert testimony. (RB 147-48, citing CALJIC Nos. 2.01, 2.02, 2.80, 2.82, 2.83 2.90.) Respondent claims that these instructions adequately addressed "all the evidence – including the expert witness testimony – on the issues to which it was pertinent." (RB 149.) On respondent's view, this is the case because jurors "must be credited with possessing intelligence and commonsense which they do not abandon when presented with jury instructions." (RB 150, citing *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396 ("*Bragg*").)

The trial court's failure to explain that the benefit of the interpretation rule applied to expert testimony is not analogous to the instructional issue in *Bragg*. The defendant in *Bragg* argued that the trial court's modification of the instruction for attempted murder (CALCRIM No. 600) to address concurrent intent for those within a "kill zone" permitted the jury to find him guilty "'merely by finding that the defendant intended to *harm*, rather than kill, those in the zone of danger around the intended victim[.]'" (*People v. Bragg, supra,* 161 Cal.App.3d at p. 1395.)

However, the modification of CALCRIM No. 600 given by the trial court stated that the jury must find that the defendant "'either intended to kill [S.P.] and [R.S.], or intended to kill anyone within the kill zone.'" (*Id.* at p. 1394.) "The trial judge also told the jury that '[a] person may *intend to kill* a specific victim or victims and at the same time *intend to kill* anyone in a particular zone of harm or 'kill zone.' (Italics added.)" (*Id.* at p. 1395.)

Given this instructional language, the Court of Appeal concluded that the jury was adequately informed that it must find an intent to kill and not just and intent to harm. "'We credit jurors with intelligence and common sense and do not assume that these virtues will abandon them when presented with a court's instructions.'" (*Id.* at p. 1396, citations omitted.) "No reasonable juror

could have failed to understand from the instructions as a whole that, to the extent the court occasionally used the word 'harm' or the phrase 'zone of harm,' the harm to which the court referred was the ultimate harm of death and that the law required that defendant had to have intended to kill the victims. Given the totality of the instructions, there was no error." (*Ibid.*)

In this case, no instruction showed that expert testimony was a form of circumstantial evidence to which the benefit of the interpretation rule applied in a way analogous to *Bragg* where the allegedly defective instruction itself incorporated the principle that the defendant argued was necessary to consideration of the issue.

To the contrary, the instructions on expert testimony identified it as a special type of evidence to which distinct rules applied and did not explain that expert testimony was a form of circumstantial evidence. (3 CT 862, CALJIC No. 2.80 ["Witnesses who have special knowledge, skill, experience training or education in a particular subject have testified to certain opinions. Any such witnesses is referred to as an expert witness."]; 3 CT 864; CALJIC No. 2.82 ["Hypothetical Questions"]; 3 CT 865, CALJIC No. 2.83 ["Resolution Of Conflicting Expert Testimony"].)

Moreover, the instructions on circumstantial evidence (CALJIC Nos. 2.01 and 2.02) did not identify expert testimony as a form of circumstantial evidence. (2 AOB 239-40, footnotes 21&22.) As to CALJIC No. 2.90, respondent offers no explanation of how instructing the jury on the presumption of innocence and reasonable doubt showed how the benefit of the interpretation rule applied to expert testimony as a form of circumstantial evidence.[24] (3 CT 866.)

---

24. CALJIC No. 2.90 provided: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a

Therefore, there is no reason to believe that the jurors without guidance from the trial court would have concluded that the benefit of the interpretation rule applied to expert testimony. "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter, supra,* 450 U.S. at p. 302.)

D. CALJIC No. 2.83 Did Not Eliminate The Prejudice Of The Error.

Assuming error, respondent argues that any prejudice was eliminated by the instruction on resolving conflicts in expert testimony (CALJIC No. 2.83). (RB 152.) However, that instruction simply advised the jury to consider the qualifications, believability, and foundation for each opinion in weighing expert testimony. CALJIC No. 2.83 as given here provided in full:

> In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the qualifications and believability of each witness, the reasons for each opinion and the matter upon which it is based. (3 CT 865.)

Nothing in CALJIC No. 2.83 advised the jurors that the benefit of the interpretation rule applied to expert testimony as a form of circumstantial evidence. Because a reasonable interpretation of the expert testimony at both phases of the trial favored the defense theories, the instructional error was prejudicial to the verdicts in both the guilt phase and the penalty phase. (2 AOB 244-249.)

---

verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (3 CT 866.)

XI.

AS REQUESTED BY APPELLANT, THE TRIAL COURT SHOULD HAVE MODIFIED CALJIC NO. 2.11.5 TO ADDRESS THE TREATMENT OF ACCOMPLICE GREEN BY THE DEPARTMENT OF CORRECTIONS.

A. The Department of Corrections Treatment Of Green Was Not An Extraneous Concern In This Case.

The trial court denied appellant's requests to add the following language to CALJIC No. 2.11.5 ("Unjoined Perpetrators Of Same Crime") to address how the Department of Corrections handled NLR shot caller Green: "'You may, however, consider the actions taken against Mr. Green by members of the Department of Corrections to the extent same have been proved in this case as they may bear upon issues of fact which you are asked to determine.'" (9 RT 2198-99, 2200; 2 AOB 249-50.)

Respondent contends that the trial court properly denied the request because CALJIC No. 2.11.5 correctly told the jurors that their "only" concern was whether the prosecution had proved appellant's guilt, not whether Green had or would be prosecuted, and the Department of Corrections' actions towards Green was an extraneous concern in the case . (RB 155.) Moreover, respondent argues that the proposed modification would have been confusing because the jury would have been told it could consider the actions of the Department of Corrections but not those of the prosecution. (RB 156.)

Appellant agrees that at the guilt phase whether or not Green was prosecuted was an extraneous concern. (9 RT 2200; 2 AOB 250, 251, *see, e.g., People v. Cox, supra,* 53 Cal. 3d at p. 668; *People v. Brown* (2003) 31 Cal.4th 518, 560.) However, the proposed modification addressed the actions by the Department of Corrections, not by the prosecution. As defense counsel explained, "I am simply asking the Court to clarify the behavior of the

Department of Corrections towards Green, independent of any prosecutorial decisions that may be relevant to the facts of the case." (9 RT 2200.)

Respondent has otherwise recognized that "'[w]e credit jurors with intelligence and common sense and do not assume that these virtues will abandon them when presented with a court's instructions.'" (*People v. Bragg, supra,* 161 Cal.App.3d at p. 1396, citations omitted.) The jury throughout the trial was presented with the difference between the Department of Corrections who handled prison inmates and the prosecutor as the representative of the Office of the District Attorney responsible for deciding whether someone would be prosecuted. Accordingly, there is no reason to believe that the jury would have been confused about this during jury deliberations.

A requested instruction may be refused if it is legally inaccurate, "merely duplicates other instructions, or is not supported by substantial evidence." (*People v. Bolden* (2002) 29 Cal.4th 515, 558-59, citations omitted.) The instruction requested by appellant suffered from none of those defects.

Respondent claims that there is no legal support for appellant's proposed instruction. (RB 157.) However, the proper purpose of CALJIC No. 2.11.5 "is to focus the jury's attention on an individualized evaluation of the evidence against the person on trial without extraneous concern for the fate of other participants irrespective of their culpability." (*People v. Cox* (1991) 53 Cal. 3d 618, 668; *accord People v. Williams* (1997) 16 Cal.4th 153, 226.)

Given Green's role in the assault on Addis, the Department of Corrections treatment of him was not an extraneous concern in assessing appellant's level of culpability for the capital/murder charges. (2 AOB 251-255.) Nothing was more telling of the power of the shot caller than the fact that the Department of Corrections paroled Green 20 days after finding that he ordered and orchestrated the hit on Addis. (8 RT 1974-75.)

Accordingly, the trial court should have instructed the jury as requested to support the defense duress theory. (2 AOB 255-56; *see, e.g., United States v. Mathews, supra,* 485 U.S. at p. 63 [The defendant has a right "to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."]; *Kornahrens v. Evatt* (4th Cir. 1995) 66 F.3d 1350, 1354 ["if a defendant has a particular theory of defense, he is constitutionally entitled to an instruction on that theory if the evidence supports it"].)

B. Prejudice Is Present Under The Circumstances Of This Case.

Respondent argues that no prejudice is possible because appellant failed to show that the denial of the modification to CALJIC No. 2.11.5 affected the jurors' ability to consider the evidence any more favorably. (RB 158.) However, because of the federal constitutional error, the burden is on respondent to show that the error was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24; 2 AOB 255.)

Respondent argues that appellant presented an inaccurate summary of the evidence supporting the defense theory. (RB 157.) However, appellant accurately summarized the record. (2 AOB 255-57.) The errors lie with respondent.

Respondent erroneously stated that the Department of Corrections released Green "10 months" after Addis was killed. (RB 153.) The homicide occurred on August 3, 1997. (5 RT 1072.) On October 10, 1997, the Department of Corrections found that Green ordered the "hit" on Addis and that he was "guilty" of a conspiracy to commit battery resulting in death. (Exh. No. 50, 4 CT 1145-46.) The hearing officer imposed a penalty of a 360 day credit loss. (*Ibid.*) Green was returned to the "main line" tier and then paroled on October 30, 1997. (8 RT 1974-75.) That was 20 days after the hearing on October 10, 1997. (8 RT 1974-75.) In effect, the Department of

Corrections "did not punish [Green] for being involved in a conspiracy as charged, yet they found him guilty." (8 RT 1975-76.)

Respondent also claims that Sergeant Sams and Officers Esqueda, Valencia and Ginn did not know that Addis's safety was at risk if he went on the yard. (RB 157, fn. 8.) The evidence speaks for itself as summarized above in Argument Section VI.B.2. Here, appellant emphasizes that respondent's claim is contrary to the testimony of those officers as well as former inmate Rogers, defense experts Rigg and Casas, and prosecution expert Willett.

Nevertheless, the Department of Corrections paroled Green 20 days after finding that he ordered and orchestrated the hit on Addis. (8 RT 1974-75; Exhibit No. 70, 5 CT 1239.) Accordingly, the actions of the Department of Corrections towards Green were relevant to appellant's duress defense as reflecting the power of the NLR gang and the requested modification to CALJIC No. 2.11.5 should have been given.

XII.

DUE PROCESS REQUIRES REVERSAL OF COUNTS ONE AND TWO BECAUSE OF THE CUMULATIVE EFFECT OF THE TRIAL ERRORS.

Respondent contends that no errors occurred in the guilt phase of the trial so there was no cumulative effect to consider. (RB 158.) The flaws in respondent's position have been explained. The cumulative effect of the trial errors requires reversal as a matter of due process because it rendered appellant's defense "far less persuasive than it might have been ...." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302-303 [93 S.Ct. 1038; L.Ed.2d 297]; 2 AOB 257-58.)

The trial court denied appellant's motion to sever the charges of the later, unrelated incidents. (Counts 3 & 4.) This improperly enabled the prosecution to argue to the jury that the other crimes showed that appellant

acted with premeditation and deliberation in the assault on Addis. (Counts 1 & 2; *see* Section II., above.)

The case presented multiple issue related to inmate safety and survival that were central to the defense of the case. However, the trial court refused to permit appellant to include questions about these issues on the jury questionnaire used for voir dire. (*See* Section III., above.)

The admission of hearsay evidence by unauthenticated secondary evidence lowered the prosecution's burden of proof and improperly permitted the prosecution to argue that appellant's defense was contrived. (*See* Section IV., above.) Then, just before closing arguments, the court dismissed a juror who appellant wanted to sit in deliberations. (*See* Section V., above)

These errors were compounded by a series of instructional errors that deprived appellant of a verdict that the Addis homicide was less than first degree murder and further lowered the prosecution's burden of proof. (*See* Sections VI., VII., VIII., IX., X. & XI., above) The result of these errors combined to deprive appellant of a fair opportunity to defend against the charges as he was entitled to do under state and federal law. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) Accordingly, the cumulative effect of the guilt phase trial errors provides an additional ground for reversal.

XIII.

DUE PROCESS REQUIRES REVERSAL OF TWO COUNTS OF VIOLATING PENAL CODE SECTION 4500 BECAUSE APPELLANT WAS NOT "UNDERGOING A LIFE SENTENCE" AT THE TIME OF THE ALLEGED CRIMES.

A. A Claim Of Insufficient Evidence May Be Raised For The First Time On Appeal.

The jury convicted appellant of two counts of violating Penal Code section 4500: Count 2, the capital charge of fatally assaulting inmate Addis on August 3, 1997; and Count 3, the non-fatal assault on inmate Matthews on September 18, 1997. (1 CT 44-45; 4 CT 918, 920.) Section 4500 applies only if the defendant was "undergoing a life sentence" at the time of the alleged offense. (Penal Code, § 4500.)

Was appellant serving a sentence on a judgment carrying a life term at the time of the two alleged violations of section 4500? The answer to this is "No." Appellant's life sentence did not begin until February 10, 2000, more than two years after the alleged violations of section 4500. (Exh. No. 42, 4 CT 1096 ["Life Term Starts 2-10-2000"], 4 CT 1099 ["Life term begins 2/10/2000"]; Penal Code, § 1170.1, subd. (a).)

Accordingly, appellant's state and federal rights to due process of law require reversal of his two convictions for violating section 4500 and the resulting and death sentence for Count Two. (2 AOB 259-60; Cal. Const., Art. I, §§ 7, subd. (a), 15; U.S. Const. 5th & 14th Amends.; *People v. Johnson* (1980) 26 Cal.3d 557, 576; *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320 [99 S.Ct. 2781; 61 L.Ed.2d 560].)

Respondent contends that appellant forfeited his claims because he failed "to challenge evidence in the trial court ...." (RB 159-60.) However, a claim of insufficient evidence is cognizable for the first time on appeal without

an objection to the evidence at trial. (2 AOB 260, citing *People v. Rodriguez* (1998) 17 Cal.4th 253, 262.)

The courts have repeatedly reaffirmed this rule. (*See, e.g., People v. Butler* (2003) 31 Cal.4th 1119, 1126 ["'Generally, points not urged in the trial court cannot be raised on appeal. ... The contention that a judgment is not supported by substantial evidence, however, is an obvious exception.' [Citation.]"]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 ["In the absence of a guilty plea, the sufficiency of the evidence to support a finding is an objection that can be made for the first time on appeal."].)

Respondent cites several cases claiming they demonstrate appellant forfeited his claim. However, none of those cases questioned the rule that a claim of insufficient evidence may be addressed for the first time on appeal. (RB 160, citing *People v. Williams* (1997) 16 Cal.4th 153, 194 ["Defendant never sought at trial to challenge the qualifications of the prosecution's gang experts, and it is too late to raise the issue now."]; *People v. Roberts* (1992) 2 Cal.4th 271, 298 ["defendant never sought to challenge the witnesses' qualifications as experts, and it is too late to raise the issue now"]; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1433-34 ["In the trial court, appellants did not object to this testimony on the ground it was 'beyond the proper scope of expert testimony.'"]; *People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8 [addressing failure to object at trial to admissibility of testimony "about statements by Viivi declaring and/or circumstantially indicating her fear of him and Sakarias"]; *People v. Carpenter* (1997) 15 Cal.4th 312, 385 [addressing failure to object that the trial "court erred in admitting the photographs"]; *People v. Davis* (1995) 10 Cal.4th 463, 501-02, fn. 1 [Defendant failed to object at trial that he "should have been permitted to introduce evidence of specific conduct to impeach the credibility of a witness."]; *People v. Champion* (1995) 9 Cal.4th 879, 918 [addressing failure to object at trial "that admission

of the evidence of Jefferson's killing violated Evidence Code sections 352 or 1101"]; *People v. Rowland* (1992) 4 Cal.4th 238, 265, fn. 4 [refusing to address claim of denial of confrontation rights where the defendant at trial objected only that the evidence was "more prejudicial than probative"]; *People v. Earp* (1999) 20 Cal.4th 826, 893 [addressing failure at trial to object on constitutional grounds to "Barragan's discharge from jury service"].)

Therefore, the cases cited by respondent have no application here. (*People v. Scheid* (1997) 16 Cal.4th 1, 17 ["'Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. [Citation.].'"].)

Respondent makes several additional arguments. However, none of them establish that appellant forfeited a claim of insufficient evidence.

First, respondent notes that defense counsel agreed to the admission in evidence of appellant's "prison packet" (Exhibit No. 42) "establishing appellant's life sentence. (RB 161.) However, the prison packet showed that appellant's life sentence did not begin until February 10, 2000, after the alleged violations of section 4500. (Exh. No. 42, 4 CT 1096 ["Life Term Starts 2-10-2000"], 4 CT 1099 ["Life term begins 2/10/2000"].)

Second, respondent argues that "during the penalty phase closing arguments" defense counsel admitted that appellant had committed an assault that had made him "a lifer." (RB 161, citing 14 RT 3527, 3539-40.) However, defense counsel in the guilt phase did not admit that appellant was undergoing a life sentence at the time of the alleged violations of section 4500. (*Ibid.*)

At the time of the penalty phase argument, the jury had returned its guilt phase verdicts finding two violations of section 3500. (4 CT 918, 920.) Defense counsel had to accept the reality of those verdicts in responding to the prosecution's argument that appellant should be sentenced to death because he

had already received a life sentence. (*See, e.g.,* 14 RT 3527-29, 3539-40.) Respondent cites no authority that anything said at the penalty phase can cure a defect of insufficient evidence at the guilt phase.

Third, respondent claims that defense counsel invited any error of insufficient evidence because he agreed to CALJIC No. 7.35 defining the requirement of life prisoner status and he did not object to the "definition of life prisoner" in CALJIC No. 7.35. (RB 161-62.) Respondent emphasizes that CALJIC No. 7.35 stated that a "person is a life prisoner after the imposition of a sentence of life imprisonment regardless of the place of confinement." (3 CT 882-83; 9 RT 2238-39.)

However, defense counsel agreed only that a sentence of 25 years-to-life was a life sentence. (7 RT 1648 ["I agree that's the law."].) He did not agree that appellant was undergoing a life sentence at the time of the alleged violations of section 4500. (*Ibid.*)

During the discussion of CALJIC No. 7.35, the prosecutor stated that the parties had "agreed on a modification in the third paragraph which states, 'A prisoner is a life prisoner when undergoing a sentence the maximum term of which is life imprisonment if no term less than life has been fixed.' We would add, 'A term of 25 years-to-life is a life sentence within the meaning of these instructions." (9 RT 2067.) The only additional comment made by defense counsel was that the proposed instruction as it related to Count 2 "does not include the element that the victim must die." (9 RT 2068.) "Not that there's any dispute. It's just that we have to tell them that." (9 RT 2069.)

Defense counsel did not address or make any concession with respect to the language respondent emphasizes. (9 RT 2067-69.) Accordingly, the doctrine of invited error does not apply. (*See, e.g., People v. Tapia* (1994) 25 Cal.App.4th 984, 1031 [The doctrine of invited error applies, "only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for

tactical reasons and not out of ignorance or mistake' or forgetfulness."], quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 330.)

Both this Court and the United States Supreme Court have recognized that on appeal a defendant as a matter of due process may challenge the sufficiency of the evidence of a conviction. (2 AOB 260; *see, e.g., People v. Lewis* (2001) 25 Cal.4th 610, 656 ["The United States Supreme Court has explained [that] 'a criminal defendant ... is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts.'"], quoting *United States v. Powell* (1984) 469 U.S. 57, 67 [105 S.Ct. 471; 83 L.Ed.2d 461]; Cal. Const., Art. I, §§ 7, subd. (a), 15; U.S. Const., 5th & 14th Amend.)

For all these reasons, appellant's claims of insufficient evidence for Counts 2 and 3 are properly before this Court.

B. Pursuant to Penal Code Section 1170.1(c), Appellant Was Not Undergoing A Life Sentence At The Time Of The Alleged Violations of Penal Code Section 4500.

Respondent contends that *People v. Superior Court (Bell)* (2002) 99 Cal.App.4th 1334, 1342-44 ("*Bell*") shows that appellant was undergoing a life sentence at the time of the alleged violations of section 4500. (RB 162-64.) However, there are important differences between this case and *Bell*.

In *Bell*, the defendant in one proceeding "was convicted of 15 offenses, including kidnapping for ransom (§ 209, subd. (a)) and kidnapping for robbery (§ 209, subd. (b)). In October 1992, defendant was sentenced by the Sacramento County Superior Court to state prison for a determinate term of 27 years eight months and two consecutive, indeterminate terms of life with the possibility of parole. During defendant's incarceration, he was charged with a new felony offense of assault by a life prisoner in violation of section 4500." (*Bell, supra,* 99 Cal.App.4th at pp. 1336-37.)

In the trial court, the defendant brought a motion to dismiss (Penal Code, § 995) the charge of violating section 4500. (*Id.* at p. 1338.) Penal Code section 669 required him to first serve the determinate component of his sentence prior to the life term.[25] On that basis, the defendant argued that he was not undergoing a life sentence at the time of the alleged violation of section 4500. (*Id.* at pp. 1337, 1338.) The trial court granted the motion and the prosecution filed a petition for a writ of mandate in the Court of Appeal. (*Id.* at p. 1338.)

The Court of Appeal granted the writ and reversed the trial court's ruling. It concluded that the case law construing section 4500 "established that a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had 'nothing left to lose' by committing the assault." (*Id.* at p. 1341.)

In this case, appellant on the day of the assault was not serving a sentence which potentially subjected him to actual life imprisonment. He was serving a determinate term of eight years for burglary based on his June 19, 1992 guilty plea in Los Angeles County Superior Court to that offense with a

---

25. At the time of the decision in *Bell* in 2002, Penal Code section 669 provided "in pertinent part: 'Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction. Whenever a person is committed to prison on a life sentence which is ordered to run consecutive to any determinate term of imprisonment, the determine term of imprisonment shall be served first and no part thereof shall be credited toward the person's eligibility for parole as calculated pursuant to Section 3046 or pursuant to any other section of law that establishes a minimum period of confinement under the life sentence before eligibility for parole.'" (*Bell, supra,* 99 Cal.App.4th at p. 1337, fn. 2.)

prior conviction for burglary. (Exh. No. 42; 4 CT 1095, 1108.) The sentence on the burglary ran until February 9, 2000, after which his life term commenced. (Exh. No. 42, 4 CT 1096 ["Life Term Starts 2-10-2000"], 4 CT 1099 ["Life term begins 2/10/2000"]; 2 AOB 262.)

The subsequent life term related to a separate judgment from a different case. On September 11, 1995, while in custody for the burglary, appellant pled guilty in Imperial County Superior Court to possession of a deadly weapon by a person confined in a penal institution (Penal Code, § 4502). (Exh. No. 42, 4 CT 1110.) Because of his two prior burglary convictions, appellant received a "three strike" sentence of 25 years-to-life for the weapon possession offense. (Penal Code, § 667, subd. (e)(2)(ii); Exh. No. 42, 4 CT 1099, 1110.)

Pursuant to Penal Code section 1170.1, subdivision (c), the Department of Corrections correctly determined that the life sentence on the subsequent Imperial County case did not begin until February 10, 2000, more than two years after the alleged assaults at issue in Counts 2 and 3.[26] (2 AOB 262-63.) Exh. No. 42, 4 CT 1096 ["Life Term Starts 2-10-2000"], 4 CT 1099 ["Life term begins 2/10/2000"].) Therefore, unlike the defendant in *Bell*, appellant was not serving a sentence on a judgment that included a life term at the time of the crimes in August and October of 1997.

---

26. Penal Code section 1170.1 in pertinent part provides: "In the case of any person convicted of one or more felonies committed while the person is confined in a state prison or is subject to reimprisonment for escape from custody and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a). This subdivision shall be applicable in cases of convictions of more than one offense in the same or different proceedings." (Penal Code, § 1170.1, subd. (c); emphasis added.)

There was no discussion of Penal Code section 1170.1, subdivision (c) in *Bell*. Therefore, *Bell* does not resolve the question presented here. (*People v. Scheid* (1997) 16 Cal.4th 1, 17 ["'Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. [Citation.].'"].) The decision in *Bell* simply followed from this Court's earlier recognition that Penal Code section 669 "is not germane to the subject" of whether the defendant was undergoing a life sentence at the time of the alleged violation of section 4500 (*People v. McNabb* (1935) 3 Cal. 2d 441, 457 ("*McNabb*"); *see Bell, supra,* 99 Cal.App.4th at pp. 1340-41; 2 AOB 271-72.)

McNabb is instructive for another reason. If the defendant in *McNabb* "been discharged or released from serving the uncompleted [determinate] terms [for two robberies] by a writ of *habeas corpus* or by pardon he would have still been held as a prisoner serving a life term on said later commitments." (*Id.* at p. 457.) In other words, "[t]he prisoner is undergoing a life sentence whatever may happen." (*Ibid.*)

In contrast, if appellant's burglary conviction was reversed, he would no longer have been serving a life term on his later commitment for the weapon possession offense. Appellant would only have had one "strike" prior and therefore been subject to a term of years for his weapon possession conviction (Penal Code, § 4502) rather than a life term. (2 AOB 272.) Respondent claims (RB 164) that *In re Carmichael* (1982) 132 Cal.App.3d 542 ("*Carmichael*"), eliminated this distinction. However, that case confirms that the defendant's status on the day of the alleged violation of section 4500 is the determining factor.

In *Carmichael,* the trial court sentenced the defendant in 1971 to a sentence of five years to life for robbery under the former Indeterminate Sentence Law when in 1971. (*Id.* at p. 546.) In 1972 while serving that life

term, he committed a non-fatal assault on an inmate in violation of section 4500, and received a sentence of nine years. (*Id.* at p. 543 & fn. 2.) In 1981, the defendant filed a petition for a writ of habeas corpus in Solano Superior Court where he had been sentenced for the robbery. (*Id.* at p. 544.)

He argued that under the subsequently enacted Determinate Sentence Law (DSL), his sentence for the robbery as a matter of equal protection should be retroactively reduced to the determinate term for robbery which was two, four or six years. (*Ibid.*) Therefore, he contended that he should be sentenced pursuant to Penal Code section 4501 as it existed in 1972 which applied to assaults by non-life prisoners and carried a maximum sentence of three years. (*Ibid.*)

The Superior Court agreed. It issued a writ to the Board of Prison Terms directing it to compute Carmichael's term of imprisonment pursuant to Penal Code Section 4501. (*Id.* at p. 545.) The prosecution appealed the order granting the writ and the Court of Appeal reversed. (*Id.* at p. 543.)

"Mr. Carmichael was not convicted of a crime of aggravated assault by an inmate serving a robbery term but of aggravated assault by an inmate serving a life term. Status as a lifer then defined and continues to define the assault offense under section 4500. That status of lifer at the time of the assault is what the Legislature was focusing on in attaching the severe penalties which flow from a section 4500 conviction. ... [I]t is the prisoner's status on the day of the offense that is crucial. Thus, a life prisoner may be validly convicted of violating section 4500 even though the conviction under which he became a life prisoner is later declared invalid." (*Ibid.*, emphasis added.)

In this case, appellant's status on the day of the offense was someone serving an eight-year term for burglary, not a life prisoner as in *Carmichael.* (Exh. No. 42, 4 CT 1096 ["Life Term Starts 2-10-2000"], 4 CT 1099 ["Life

term begins 2/10/2000"].) This is confirmed by the fact that, unlike *Carmichael,* if appellant's subsequent three strikes life sentence for his Imperial County conviction was declared invalid, appellant would not have been undergoing a life sentence at the time of his alleged violations of section 4500. He would have been serving eight years for burglary. (*Ibid.*)

The same conclusion follows from the cases addressing Penal Code section 1170.1, subdivision (c). Those cases have uniformly applied it according to it plain terms, *i.e.*, that when as here the defendant receives a consecutive sentence for an offense committed in prison, the consecutive term for that offense "runs from the time the defendant otherwise would have been released from prison." (*People v. Rosbury* (1997) 15 Cal.4th 206, 211; 2 AOB 263-270.)

Respondent claims that appellant ignored the language of Penal Code section 1170.1, subdivision (c), which states: "If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a)." On respondent's view, subdivision (a) dictates that appellant's sentence should be aggregated, even though appellant was "technically" serving a determinate term for burglary at the time of the alleged violations of section 4500. (RB 165)

Appellant addressed this issue in his opening brief in his discussion of *People v. Langston* (2004) 33 Cal.4th 1237 ("*Langston*"). (2 AOB 267-270.) Like respondent here, the defendant in *Langston* had relied "on section 1170.1, subdivision (a), requiring imposition of an aggregate term of imprisonment for all consecutive felony convictions, whether in the same proceeding or later, '[e]xcept as otherwise provided by law.' But as the Attorney General observes, this subdivision is inapplicable to in-prison offenses, which are governed by section 1170.1, subdivision (c), requiring the term of imprisonment for such offenses to 'commence from the time the person would otherwise have been

released from prison,' *i.e.*, after completion of the original term." (*Id.* at p. 1246, emphasis added.)

In sum, the plain language of section 1170.1, subdivision (c), the relevant case law, rules of statutory construction, and the due process principle of lenity (2 AOB 263-270, 273-75), all show that at the time of the alleged assaults in this case, appellant was serving an eight year term for burglary and not "undergoing a life sentence" as required by section 4500. Accordingly, due process requires reversal of Counts 2 and 3.

XIV.

PENAL CODE SECTION 4500 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT BECAUSE IT DID NOT SUFFICIENTLY NARROW THE CLASS OF LIFE PRISONERS ELIGIBLE FOR THE DEATH PENALTY OR PROVIDE A MEANINGFUL BASIS FOR DISTINGUISHING THE EXTREME CASES WHERE DEATH IS THE APPROPRIATE PUNISHMENT.

A. Introduction.

Section 4500 imposes essentially two requirements for death eligibility. First, it requires a fatal assault with malice aforethought, which is the equivalent of second degree murder. (Penal Code, §§ 188, 189.) Second, it requires that the defendant was "undergoing a life sentence" at the time of the assault.[27] (Penal Code, § 4500; 2 AOB 276.) Since modern death penalty jurisprudence began with *Furman v. Georgia* (1972) 408 U.S. 238 [92 S. Ct.

27. Penal Code section 4500 in pertinent part provides: "Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 ...."

2726; 33 L. Ed. 2d 346], there is no precedent for predicating death eligibility on the commission of the equivalent of second degree murder. (2 AOB 281-84.)

The jury also found that the fatal assault on Addis was first degree murder as a willful, deliberate and premeditated murder. (4 CT 916.) However, the prosecution alleged none of the special circumstances for first degree murder (Penal Code, § 190.2) and the jury found none. (1 CT 42-43, 4 CT 916.)

Therefore, appellant's eligibility for the death penalty reduced to the allegation that he was undergoing a life sentence at the time of the crime.[28] Reducing death eligibility to that factor is arbitrary and overbroad on its face or as applied to appellant in violation of his Eighth Amendment rights. (2 AOB 280-83.)

Respondent argues that Penal Code section 4500 passes scrutiny because in its current form it applies only to life prisoners who commit a fatal assault with malice aforethought and does not make the death penalty mandatory. (RB 169, 173.) That argument merely paraphrases the language of the statute. (See Footnote 28.) The question is whether a defendant should be eligible for the death penalty for committing the equivalent of second degree murder solely because he was allegedly undergoing a life sentence at the time of the crime.

The prior cases rejecting constitutional challenges to section 4500 have offered three justifications for making life prisoner status dispositive of death eligibility. (2 AOB 303.)

First, it was said that the death penalty was necessary as retribution

---

28. For purposes of this argument, appellant assumes without conceding that he was undergoing a life sentence at the time of the crime. (*C.f.* Section XIV, above; 2 AOB 259.)

because no further punishment could be imposed on an inmate already serving a life term. (*In re Finley* (1905) 1 Cal.App. 198; *People v. Oppenheimer* (1909) 156 Cal 733, 737.)

Second, death was considered necessary as a deterrent because good conduct rules do not apply to reduce a life term. (*In re Finley, supra,* 1 Cal. App. at p. 202; *People v. Finley* (1908) 153 Cal. 59, 62; *People v. Wells* (1949) 33 Cal.2d 330, 335.)

Third, the death penalty was justified as necessary to ensure "prison discipline and protection of guards and inmates ...." (*People v. Wells, supra,* 33 Cal.3d at p. 336.)

None of those rationales pass scrutiny under current law. (2 AOB 300-315.) The homicide rate is higher in prisons in states with the death penalty than those without it. (2 AOB 309-312.) Additional forms of restraint exist that are lawful and sufficient for deterrence, retribution, discipline, and protection of inmates and staff. (2 AOB 300-315.) This is particularly true in this case because appellant committed no crimes of force or violence when he received regular mental health counseling and medication or confined in a Secure Housing Unit ("SHU") and provided medication for his bipolar disorder. (13 RT 3152; Exh. No. 95, CT. Suppl. B 82, 84, 85-86.) Finally, in 75% of the jurisdictions in the United States, appellant would not have been eligible for the death penalty based on his alleged status as a life prisoner. (2 AOB 315-333.)

Respondent makes various efforts to show that appellant was properly made eligible for the death penalty. However, Respondent's position ultimately reduces to reliance on case law from 60 to 100 years ago, none of which passes scrutiny under existing Eighth Amendment law.

B. The Authority Relied On By Respondent Does Not Show That Appellant Should Have Been Eligible For The Death Penalty.

At the outset, it is important to identify several errors and a concession made by respondent.

First, respondent at several points argues that section 4500 properly narrows death eligibility because it provides that the death "penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 ...." (Penal Code, § 4500; RB 173, 176-77, 178.)

However, the high court has "distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. *Tuilaepa v. California,* 512 U.S. 967, 971, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Id.,* at 971. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.,* at 972." (*Buchanan v. Angelone* (1998) 522 U.S. 269, 275 [118 S. Ct. 757; 139 L. Ed. 2d 702].)

The eligibility phase is at issue here. (2 AOB 280-81.) "The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process ...." (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 246 [108 S. Ct. 546; 98 L. Ed. 2d 568], emphasis added.)

Second, respondent erroneously claims that the issue is whether section 4500 is vague. (RB 168, 170-71.) The issue is whether section 4500 is unconstitutional because it is arbitrary and overbroad on its face or as applied to appellant. (2 AOB 276, 280-81, 283-88, 304-315, 315, 330-334.)

Third, respondent erroneously asserts that appellant's demurrer did not present to the trial court the question of whether section 4500 adequately

narrowed eligibility for the death penalty. (RB 171-72.) Appellant's demurrer argued that Penal Code section 4500 was overbroad in two senses. First, it applied to a crime that was the equivalent of second degree murder. (1 CT 57.) Second, it applied to all defendants regardless of whether they were undergoing a life sentence for a violent crime or a "three strikes" life sentence like appellant after two theft-related burglary convictions. (1 CT 57-58.)

Appellant then discussed the high court cases addressing the standards for whether a statute adequately narrows death eligibility. (1 CT 61-64, citing, *inter alia*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [64 L.Ed.2d 398, 100 S.Ct. 1759]; *Zant v. Stephens* (1983) 462 U.S. 862, 877 [77 L. Ed. 2d 235, 103 S. Ct. 2733]; *Lewis v. Jeffers* (1990) 497 U.S. 764, 774 [110 S.Ct. 3092; 11 L.Ed.2d 606].) Accordingly, appellant raised the overbreadth issue below.

On the merits, respondent concedes (RB 169) that section 4500 requires a fatal assault committed with malice aforethought. That is the equivalent of second degree murder. (*People v. Knoller* (2007) 41 Cal.4th 139, 151 ["Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder."]; Penal Code, §§ 188, 189.)

The only additional requirement imposed by section 4500 is the status of "undergoing a life sentence" at the time of the crime. Respondent argues that this is sufficient for death eligibility because it applies only to a small subclass of defendants and not to all murderers. (RB 168, 169.)

This argument begs the critical question of whether life prisoner status at the time of a fatal assault with malice aforethought defines one of those "extreme cases" of a killing which society views as "so grievous an affront to humanity that the only adequate response may be the penalty of death." (*Gregg v. Georgia* (1976) 428 U.S. 153, 184 [96 S. Ct. 2909; 49 L. Ed. 2d

859]; *accord Kennedy v. Louisiana, supra,* 128 S. Ct. at pp. 2649-50; 2 AOB 282.)

On that question, respondent relies on a 100 year-old case. (RB 176.) In *Finley v. California* (1911) 222 U.S. 28 [32 S.Ct. 13; 56 L.Ed.2d 75]. the United States Supreme Court stated that "'life termers,' as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over.'" (*Id.* at p. 31, quoting *People v. Finley* (1908) 153 Cal. 59, 62.) Respondent reliance on *Finley v. California, supra,* is misplaced for multiple reasons.

The high court has since recognized that the "simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death." (*Sumner v. Shuman* (1987) 483 U.S. 66 [107 S. Ct. 2716; 97 L. Ed. 2d 56].)

In addition, respondent ignores the fact that the *Finley* case did not address Eighth Amendment standards. The defendant had raised an equal protection challenge to the imposition of the death penalty, not an Eighth Amendment challenge. (*Finley v. California, supra,* 222 U.S. at p. 31; *People v. Finley, supra,* 153 Cal. at p. 62.)

The high court did not hold that the Eighth Amendment applied to the states for another 50 years. (*Robinson v. California* (1962) 370 U.S. 660 [82 S. Ct. 1417; 8 L. Ed. 2d 758].) The overbreadth standards evolved in the 1970's. (*See, e.g., Furman, supra,* 408 U.S. at p. 242 [The adoption of the Eighth Amendment "was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature ...."]; *Gregg, supra,* 428 U.S. at p. 184 ["capital punishment may be the appropriate sanction in extreme cases"], p. 188 ["Because of the uniqueness of the death penalty, *Furman* held that it

could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."].)

Moreover, *Finley v. California, supra,* affirmed a mandatory death penalty for the commission of a non-fatal assault by a life prisoner pursuant to former Penal Code section 246, the predecessor to section 4500. (*Finley v. California, supra,* 222 U.S. at p. 31.) The comment quoted by respondent must be read in the context of a different time when a mandatory death penalty was tolerated, even for a non-fatal assault.

Under current law, the death penalty may be neither mandatory nor imposed for a non-fatal assault. (2 AOB 301-02; *see, e.g., Woodson v. North Carolina* (1976) 428 U.S. 280, 287 [96 S. Ct. 2978; 49 L. Ed. 2d 944]; *Coker v. Georgia* (1977) 433 U.S. 584 [97 S. Ct. 2861; 53 L. Ed. 2d 982]; *Kennedy v. Louisiana, supra,* 128 S. Ct. at pp. 2650-51.)

For all these reasons, *Finley v. California, supra,* may not be construed as resolving appellant's Eighth Amendment claim. (*Illinois v. Lidster* (2004) 540 U.S. 419, 424 [124 S. Ct. 885; 157 L. Ed. 2d 843] [The court's opinions must be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering."].)

Respondent concedes that the former decisions affirming the mandatory death penalty for non-fatal assaults are no longer valid. (RB 173, citing *People v. Finley* (1908) 153 Cal. 59 ("*Finley*"), *People v. Oppenheimer* (1909) 156 Cal. 733 ("*Oppenheimer*"), and *People v. Wells* (1949) 33 Cal.2d 330 ("*Wells*").) Nevertheless, respondent claims that those decisions have not been "completely undermine[d]" by current Eighth Amendment standards. (RB 173.) However, respondent failed to explain in what way they continue to be valid. (*Ibid.*)

Finley, *Oppenheimer*, and *Wells* all affirmed a mandatory death

sentence for non-fatal assaults. Moreover, none of those cases addressed Eighth Amendment standards. (2 AOB 293-96.) *Oppenheimer* did address the "cruel or unusual punishments" clause of former Article I, section 6, of the California Constitution. (*People v. Oppenheimer, supra,* 156 Cal. at p. 737.) However, it did so only to the extent of stating that a mandatory death penalty for a non-fatal assault was not so disproportionate to the crime "as to shock the moral sense of the people.'" (*Ibid.*, citation omitted; 2 AOB 294-95.) That is no longer the case. (*Kennedy, supra,* 128 S.Ct. at p. 2650-51 [the death penalty may not be imposed on someone who did not kill or assist another in a killing].)

By a separate habeas petition, the defendant in *Wells* presented a state constitutional and Eighth Amendment claim of cruel and/or unusual punishment. (*In re Wells* (1950) 35 Cal.2d 889.) That claim was rejected by a single sentence. (*Id.* at p. 895 ["In *People v. Oppenheimer* (1909), 156 Cal. 733, 737 [106 P. 74], imposition of the death penalty on a prisoner who committed a battery under circumstances materially similar to those here was upheld against the objection that it amounted to cruel and unusual punishment. We are convinced that that case was correctly decided. (See also *In re Finley* (1905), 1 Cal.App. 198, 203 [81 P. 1041].)"].) As previously explained, the holdings of *Oppenheimer, Wells*, and *Finley* are no longer valid. (2 AOB 301-02.)

Alternatively, respondent argues (RB 169) that *Tuilaepa v. California, supra*, 512 U.S. 967 ("*Tuilaepa*") shows that section 4500 passes scrutiny because *Tuilaepa* stated that "aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)." (*Id.* at p. 972.) That truism does not resolve the question of whether section 4500 is arbitrary and overbroad.

In pertinent part, *Tuilaepa* recognized that the arbitrariness of the death

penalty is mitigated when a sentencing "factor does not require a yes or a no answer to a specific question, but instead only points the sentencer to a subject matter." (*Tuilaepa, supra,* 512 U.S. at p. 974.) *Tuilaepa* addressed a challenge to sentencing factors at the penalty selection phase. However *Stringer v. Black* (1992) 503 U.S. 222 [112 S. Ct. 1130; 117 L. Ed. 2d 367], shows that similar considerations apply to eligibility factors: "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." (*Id.* at p. 235.)

This admonition applies here because section 4500 reduces death eligibility to the yes or no question of whether the defendant was a life prisoner at the time of the crime. (2 AOB 286-288.) That factor is arbitrary and overbroad because a life sentence is so broadly available in California and any type of life sentence makes the defendant eligible for the death penalty, regardless of the nature of the crime for which it was imposed. (2 AOB 288, 306-309.) As such, a life sentence "does not contribute significantly to the profile of that person for purposes of determining whether [the defendant] should be sentenced to death." (*Shuman, supra,* 483 U.S. at p. 81.)

Respondent agrees that under section 4500 all life prisoners, regardless of the nature of the life sentence and the crime for which it was imposed, are treated the same for purposes of determining death eligibility. (RB 171) However, respondent claims that this is analogous to the robbery-murder and poison-murder special circumstances. (Penal Code, §§ 190.2, subd. (a)(17)(A)), 190.2, subd. (a)(19).) Respondent notes that those special circumstances apply regardless of the nature of the robbery or the type of poison used in the crime. (RB 171.)

However, those special circumstance circumstances identify distinctive aggravating features of the killing itself. The robbery-murder special

circumstance applies where robbery was the "motivating factor for the murder." (*People v. Bradford, supra,* 14 Cal.4th at p. 1056; *People v. Duncan* (1991) 53 Cal. 3d 955, 970 ["All the evidence points to robbery as the motive for the killing."].)

The poison-murder special applies where the defendant "intentionally killed the victim by the administration of poison." (Penal Code, § 190.2, subd. (a)(19; *People v. Catlin, supra,* 26 Cal.4th at p. 158 ["The special circumstance allegation, unlike the definition of first degree murder by poison, requires proof that the defendant intentionally killed the victim.].) Moreover, the circumstances of poison-murder are particularly reprehensible because the "poisoner acts surreptitiously, thus avoiding detection and defeating any chance at self-defense, and often betrays the most intimate trust." (*Id.* at p. 159.)

In contrast, Penal Code section 4500 requires only the equivalent of second degree murder apart from the fact of life prisoner status. No distinction is made between those serving life terms for a violent crime or someone like appellant who received a "three strikes" life term for a weapon possession offense carrying a maximum sentence of fours years (Penal Code, § 4502, subd. (a)) because of two prior theft-related burglaries. (4 CT 1110, Exh. No. 42; 1 RT 151-52.)

Respondent contends that *People v. Dorado* (1965) 62 Cal.2d 338 ("*Dorado*"), overruled on another point by *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17, shows that Penal Code section 4500 is not overbroad. (RB 176.) However, *Dorado* did not address current overbreadth standards. *Dorado* affirmed imposition of a mandatory death penalty for a defendant who committed a fatal stabbing while serving an indeterminate sentence of five years to life for the sale of marijuana in violation of former Health & Safety Code section 11500. (*People v. Dorado, supra,* 62 Cal.2d at pp. 357-58.)

Respondent otherwise concedes that this sentence would violate current Eighth Amendment law. (RB 173-74.)

Nevertheless, respondent claims that *Dorado* is pertinent because the defendant argued that, when the predecessor statute to section 4500 was enacted in 1901, the indeterminate sentencing law had not been adopted so that the legislature did not contemplate that "one out of every three prisoners" would be serving life terms. (*Id.* at p. 357.) *Dorado* rejected that argument because limiting the availability of a life sentence must "lie with the Legislature." (*Ibid.*) *Dorado* therefore concluded that the defendant's mandatory death sentence was constitutional under the line of cases beginning in 1908 with *People v. Finley, supra,* 153 Cal. at p. 62.

In general, the power to fix penalties lies with the legislature. However, that power is limited by the Eighth Amendment. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 516 ["[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch." [Citations.]"]; *Enmund v. Florida* (1982) 458 U.S. 782, 788 [102 S. Ct. 3368; 73 L. Ed. 2d 1140].)

Dorado was decided in 1965, before modern death penalty jurisprudence began in the 1970's with *Furman, supra,* 408 U.S. 238, and *Gregg, supra,* 428 U.S. 153. As discussed further below, respondent identifies no current authority showing that section 4500 satisfies the Eighth Amendment's narrowing requirements.

C. *Sumner v. Shuman* Shows That Predicating Death Eligibility On Life Prisoner Status Conflicts With Current Eighth Amendment Standards.

As noted, the prior cases offered three justifications for making life prisoner status dispositive of death eligibility. (2 AOB 303.) It was said that the death penalty was necessary as retribution because no further punishment could be imposed on an inmate already serving a life term. (*In re Finley* (1905) 1 Cal.App. 198; *People v. Oppenheimer, supra,* 156 Cal at p. 737.) Relatedly, death was considered necessary as a deterrent because good conduct rules did not apply to reduce a life term. (*In re Finley, supra,* 1 Cal. App. at p. 202; *People v. Finley, supra,* 153 Cal. at p. 62; *People v. Wells, supra,* 33 Cal.2d at 335.) In addition, the death penalty was justified as necessary to ensure "prison discipline and protection of guards and inmates ...." (*People v. Wells, supra,* 33 Cal.3d at p. 336.)

Sumner v. Shuman, supra, 483 U.S. 66, shows that these rationales no longer pass scrutiny. Respondent contends that *Shuman* is irrelevant because it addressed a mandatory death penalty provision and the selection of the death penalty in California is governed by Penal Code section 190.3 and 190.4. (RB 174-75.)

However, *Shuman's* reasoning shows that defining death eligibility by prisoner status is arbitrary and overbroad. (2 AOB 304-15.) As noted, the "simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death." (*Shuman, supra,* 483 U.S. at p. 80.) "Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label 'life-term inmate' reveals little about the inmate's record or character." (*Id.* at p. 81.) The same is true of section 4500

because it treats all life prisoners the same for purposes of determining death eligibility.

As to retribution, "there are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization." (*Id.* at p. 84.) The same sanctions can serve as a deterrent and protect inmates and staff. (3 AOB 312-15.)

The deterrence rationale is also undermined by data from the United States Department of Justice and other researchers showing that homicide rate in prisons is greater in states with the death penalty, even in the era when death was the mandatory punishment. (2 AOB 309-312.) Respondent does not dispute this data.

Instead, respondent makes three arguments. First, respondent notes (RB 176) that *Shuman* stated that "a guided-discretion sentencing procedure does not undermine any deterrent effect that the threat of the death penalty may have. Those who deserve to die according to the judgment of the sentencing authority will be condemned to death under such a statute." (*Shuman, supra,* 483 U.S. at pp. 82-83, emphasis added.) Because section 4500 is a guided discretion statute where the penalty is "determined pursuant to the provisions of Sections 190.3 and 190.4" (Penal Code, § 4500) respondent argues that it "passes constitutional muster as a deterrent." (RB 176-77.)

Respondent's argument ignores the conditional ("may have") in *Shuman's* comment about the deterrent effect of the death penalty. The high court did not state that the death penalty for prisoners in fact had a deterrent effect. (*Shuman, supra,* 483 U.S. at pp. 82-83.) The data collected by the United States Department of Justice indicates that it does not. (2 AOB 309-

12.)

Moreover, respondent has again confused the death selection phase of a capital trial with the death eligibility phase. As previously explained, the "fact that the sentencing jury is also required [at the penalty phase] to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process ...." (*Lowenfield v. Phelps, supra,* 484 U.S. at p. 246.)

Second, respondent argues that *Shuman* shows that the death penalty for life prisoners is justified by the state's retribution interests. (RB 177.) Respondent relies on the statement that "under a guided-discretion statute, a life-term inmate does not evade the imposition of the death sentence if the sentencing authority reaches the conclusion, after individualized consideration, that the inmate merits execution by the State." (*Shuman, supra,* 483 U.S. at p. 84.) This argument repeats the error of confusing the issues of death eligibility and death selection. It also ignores the fact that *Shuman* specifically stated that "other sanctions less severe than execution that can be imposed even on a life-term inmate." (*Ibid.*)

The high court recently cautioned that of all the rationales offered for punishment, it is retribution "that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy v. Louisiana, supra,* 128 S.Ct. at p. 2650.)

Stated simply, the death penalty is excessive if it "serves no penal purpose more effectively than a less severe punishment." (*Furman, supra,* 408 U.S. at p. 280 Brennan, J., concurring; *see also id.* at pp. 312-13 [The death penalty is cruel and unusual punishment if it makes "only marginal

contributions to any discernible social or public purposes."], White, J., concurring.)

These admonitions are particularly pertinent in this case because appellant never committed a crime of force or violence until two years after he was imprisoned for a theft-related burglary and denied mental health treatment. (*See* Introduction, above.) Respondent claims that death was necessary retribution because appellant had already served time in a Secured Housing Unit (SHU) and committed the crime on the yard at Palm Hall, the Administrative Segregation Unit at C.I.M. (RB 177.)

However, the records show that when appellant was placed in the SHU at Corcoran State Prison and provided medication, he committed no assaults. (14 RT 3510; 2 AOB 314.) A doctor at that time recognized that appellant had bipolar disorder and prescribed medication to keep him stable. (CT. Suppl. B, Exh. No. at 81.) However, when the Department of Corrections transferred appellant to C.I.M. later in May, the transfer summary prepared by correctional staff stated that appellant had no mental health problems ("none") and received no medications ("none"). (CT Suppl. B, Exhibit No. 95 at 87.) As a result, appellant received no mental health treatment or medications during the period leading up to his assault on Addis.

This confirms the testimony by Drs. Gawin, Lipton, and Lantz that appellant's violent activity in prison was the result of the denial of mental health treatment. (13 RT 3123, 3157-58, 3166-68, 3201-3202, 3259-66.) It also shows the state's legitimate interests in deterrence, retribution and protection of other inmates and staff could have been achieved by placing appellant in more restrictive custody and providing him with mental health treatment.

D. An Interjurisdictional Comparison Demonstrates A Lack Of Societal Consensus That A Fatal Assault With Malice Aforethought By A Life Prisoner Is The Type Of Extreme Crime For Which The Only Adequate Response Is The Death Penalty.

An additional consideration for evaluating whether a statute defining a capital offense passes Eighth Amendment scrutiny is an interjurisdictional comparison. (2 AOB 315-333.) Respondent contends that an interjurisdictional comparison is improper because this Court has held that intercase proportionality review of death sentences is not constitutionally required. (RB 177-78.) However, intercase and interjurisdictional review are two different things.

The former involves a request to compare the conduct of the defendant in one case to that of defendants in other cases. (*People v. Taylor* (2009) 47 Cal.4th 850, 900; *People v. Brasure, supra,* 42 Cal.4th at p. 1068; *People v. Snow, supra,* 30 Cal.4th at p. 126.)

The latter compares the death penalty laws in different jurisdictions. The high court has repeatedly recognized this as a proper appellate consideration in determining whether the defendant should be eligible for the death penalty. (2 AOB 315-16, 330-333; *see, e.g., Kennedy v. Louisiana, supra,* 128 S. Ct. at p. 2650 [The "Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'"], quoting *Roper v. Simmons, supra,* 543 U.S. 551, 563 [125 S. Ct. 1183, 1190; 161 L. Ed. 2d 1]; *accord Atkins v. Virginia* (2002) 536 U.S. 304, 311-12 [122 S. Ct. 2242; 153 L. Ed. 2d 335] ["We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.' [Citation]."]; *see also Coker v. Georgia, supra,* 433 U.S. at p. 596; *Enmund v. Florida, supra,* 458 U.S. at p. 793.)

Alternatively, respondent claims that an interjurisdictional comparison shows that custody status is properly used to determine death eligibility. (RB 178.) In making this claim, respondent errs by combining the jurisdictions where custodial status is used for penalty selection with the jurisdictions where it is used for death eligibility. (*Ibid.*; *Lowenfield v. Phelps, supra,* 484 U.S. at p. 246.)

At the time appellant filed his opening brief and today, a proper survey shows that 75% of American jurisdictions (39 of 52) comprising the 50 states, the District of Columbia, and the United States government, do not use custody status to determine death eligibility.[29] (2 AOB 330.) Respondent agrees. (RB 178 [noting that only 13 of 52 jurisdiction use custody status for determining death eligibility].)

Respondent claims (RB 178) that appellant erred by including jurisdictions without the death penalty in his analysis. However, the United States Supreme Court has included jurisdictions without the death penalty in conducting the same type of analysis. (2 AOB 330-333; *Kennedy v. Louisiana, supra,* 128 S. Ct. at p. 2653; *Roper v. Simmons, supra,* 543 U.S. at p. 564; *Coker v. Georgia, supra,* 433 U.S. at p. 596; *Enmund v. Florida, supra,* 458 U.S. at pp. 792-93; *Atkins v. Virginia* , *supra*, 536 U.S. at pp. 313-16.)

In *Enmund*, the court found it significant that "only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die." (*Enmund, supra,* 458 U.S. at p. 792.) In *Atkins* and *Roper*, the fact that only

---

29. Since appellant filed his opening brief, two states (Illinois and New Mexico) eliminated the death penalty. (See www.deathpenaltyinfo.org.) However, those states did not previously use life prisoner status to determine death eligibility. (2 AOB 319-20, 322.) Therefore, the overall percentage of states not using custody status to determine death eligibility remains the same.

60% of the states (30 of 50) permitted the death penalty for the mentally retarded and persons under the age of 18, respectively, was significant. (*Atkins, supra,* 536 U.S. at pp. 313-16; *Roper, supra,* 543 U.S. at p. 567.) Therefore, the fact that appellant would not have been eligible for the death penalty in 75% of the American jurisdictions weighs heavily against life prisoner status as the sole basis for determining death eligibility. (2 AOB 330-333.)

Finally, respondent argues that appellant's assault on Addis is the kind of "extreme" crime for which the death penalty is the only adequate retribution.[30] (RB 179.) This argument is rebutted by the fact that none of the special circumstances for first degree murder applied to this case and section 4500 required only the equivalent of second degree murder. Moreover, the assault on Addis would not have occurred if the Department of Corrections had provided appellant with mental health care (see Introduction) or if the staff had not put Addis on the prison yard knowing that he would be assaulted. (See Introduction & Section VI.B.2., above.)

For all these reasons, section 4500 on its face and as applied to appellant violated his Eighth Amendment rights.

---

30. Respondent also points to the factor (b) evidence presented in the penalty phase. (RB 179.) This is yet another example of respondent's repeated unwillingness to accept the distinction between the eligibility and selection phases of a capital trial.

XV.

THIS COURT SHOULD RECONSIDER THE ISSUE OF WHETHER DISPARITIES BETWEEN COUNTIES IN SEEKING THE DEATH PENALTY VIOLATES APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

The trial court denied appellant's pretrial motion arguing that the decision by the San Bernardino County District Attorney to seek the death penalty violated appellant's rights to due process and equal protection because of disparities between California counties in seeking the death penalty. (3 AOB 335-337.)

Respondent notes (RB 180) as appellant acknowledged (3 AOB 342) that this Court has generally held that "[p]rosecutorial discretion in deciding whether to seek the death penalty is constitutional." (*People v. Davis* (2009) 46 Cal.4th 539, 628; *accord People v. Snow* (2003) 30 Cal.4th 43, 126.) However, this Court has also recognized that "prosecutorial policies and practices relating to the death penalty" are not "immune from federal or state constitutional scrutiny." (*People v. Ashmus* (1991) 54 Cal.3d 932, 980.) The study by the California Commission for the Fair Administration of Justice (the "Commission") shows that this issue is ripe for reconsideration.

The Commission examined several aspects of the administration of California's death penalty law, including "geographic disparities in employment of the death penalty, the unavailability of accurate information regarding the administration of the death penalty, [and] the transparency of prosecutorial decision-making ...." (CCFAJ, Report And Recommendations On The Administration Of The Death Penalty In California (June 30, 2008) at p. 12, http://www.ccfaj.org.; 3 AOB 340-41.))

The Commission made a "concerted effort" to survey the District Attorneys about these issues. Unfortunately, those efforts were "largely

unsuccessful" because 34 of the 58 District Attorneys, including the San Bernardino County District Attorney who prosecuted appellant, refused to participate. (*Id.* at pp. 96-97.)

Nevertheless, the Commission observed that "[e]vidence of disparities in the administration of the death penalty undermines public confidence in our criminal justice system generally. It is our duty to ensure that every aspect of the criminal justice system is administered fairly and evenly, and that all residents of the state are accorded equal treatment under the law. This is especially true when the state chooses to take a life in the name of the people." (*Id.* at p. 96.)

Respondent offers no reason to disagree with this assessment. Accordingly, there are substantial reasons to believe that the death penalty in California is not being administered in a way that comports with the statutory requirements for uniform enforcement of the law and the constitutional requirements for due process of law and equal protection of the law. (2 AOB 337-341; Cal. Const., art. I, §§ 7, subd. (a), 15; U.S. Const., 5th & 14th Amends.; Gov. Code, § 12510; Cal. Const., Art. V, § 13 ["Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced."].)

Reconsideration is also appropriate because Penal Code section 4500 grants a District Attorney unqualified discretion to seek the death penalty against a life prisoner regardless of the nature of his life sentence or the crime for which it was imposed. (2 AOB 341-44.) On respondent's view, this too is just a matter of legitimate charging discretion. (RB 180-81.)

However, charging discretion "satisfies the constitutional prohibition against arbitrary and capricious exaction of the death penalty" only if the statute making the death penalty available "acceptably narrow[s] the

circumstances under which capital punishment may be sought and imposed ...." (*People v. Keenan* (1988) 46 Cal.3d 478, 506; *see also Furman v. Georgia, supra,* 408 U.S. at p. 313 [A capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."].)

The disparity between counties in California is inconsistent with the high court's command that death eligibility should be narrowly tailored so as to separate death-worthy cases from ordinary murders. (*See, e.g., Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [102 S. Ct. 869; 71 L. Ed. 2d 1] [The death penalty must "be imposed fairly, and with reasonable consistency, or not at all."]; *accord Kennedy v. Louisiana, supra,* 128 S. Ct. at p. 2659 [In construing the Eighth Amendment, the high court has "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence."]; 2 AOB 282.) The variable treatment between counties in enforcement of the same statute is inconsistent with this command. (Adam M. Gershowitz, Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty, Vand. L. Rev. 307, 313 (2010).)

XVI.

FOR MULTIPLE REASONS, THE TRIAL COURT ERRED IN THE PENALTY PHASE BY ADMITTING EVIDENCE OF THE DETAILS OF APPELLANT'S PRIOR THEFT-RELATED JUVENILE AND ADULT OFFENSES.

A. Introduction.

In the penalty phase, appellant called as a witness James Cueva, a casework specialist at the California Youth Authority (hereafter "C.Y.A." or "Youth Authority"), who functioned as a social worker within the Youth Authority.[31] (12 RT 3016-17.) On direct-examination, Cueva testified that in October of 1987 he evaluated appellant when he was 19 years-old after he had been sent to the Youth Authority for a burglary rather than to state prison because of his immaturity and lack of sophistication. (12 RT 3018, 3021-22.)

Cueva concluded that because of appellant's "extreme traumatic experiences" as a child, including sexual abuse and neglect, and his "serious ... emotional and mental problems", appellant "needed intensive treatment." (Exh. No. 95, CT. Suppl. B 11-12; 12 RT 3039.) Accordingly, Cueva recommended a long-range treatment plan for appellant with "intensive individual psychotherapy" and group therapy. (Exh. No. 95; Suppl.B CT at 12; 12 RT 3039.)

Over appellant's objection that the evidence was irrelevant and inadmissible pursuant to Penal Code section 190.3, the trial court permitted the prosecution to cross-examine Cueva to present extensive and detailed evidence of appellant's juvenile and young adult criminal history of theft-related crimes, one instance of a non-violent escape from the Youth Authority, and multiple

---

31. Effective July 1, 2005, the CYA became known as the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. (Welf. & Inst. Code, §§ 1703, subd. (c), 1710, subd. (a).) Appellant will use "C.Y.A." or

felony charges that had been dismissed as part of a plea agreement when appellant was 19 years-old. (3 AOB 344, 348-350.)

Respondent concedes that none of the criminal activity was admissible as factor (b) evidence because it did not involve force or violence. (Penal Code, § 190.3, para. 2 & subd. (b); *People v. Lucky* (1988) 45 Cal.3d 259, 294-95.) Respondent also concedes that a juvenile adjudication is inadmissible as factor (c) evidence because it is not a conviction. (Penal Code, § 190.3, subd. (c); *People v. Weidert* (1985) 39 Cal.3d 836, 844-45; 3 AOB 351-52.)

Respondent's position is that because Cueva testified as an expert witness, the details of appellant's criminal history as a minor and young adult were properly admitted on cross-examination "to discredit an expert's opinion" (RB 182) and "to explore the grounds and reliability of Cueva's opinion." (RB 185.) On Respondent's view, this was necessary because appellant's criminal history "played an extremely important part in his evaluation of Landry." (*Ibid.*)

As next explained, the factual premise of respondent's argument is incorrect. Appellant's non-violent criminal history did not play an important part in either Cueva's assessment of appellant at the Youth Authority or in his testimony on direct examination at trial. The reality is that the prosecution used Cueva to present evidence of criminal activity which was irrelevant and inadmissible in the prosecution case because it was neither factor (b) nor factor (c) evidence.

B. Appellant's Non-Violent, Theft-Related Criminal History Was Not An Important Part Of Cueva's Assessment Of Appellant.

Before and after the direct-examination of Cueva, appellant objected to permitting the prosecution to cross-examine him about the details of

---

"Youth Authority" because those names were used at trial.

appellant's criminal history. (12 RT 3013-15, 3040-41.) The trial court held a hearing at which Cueva testified outside of the presence of the jury. (Evid. Code, § 402; 12 RT 3041.) Respondent contends that the testimony from that hearing showed appellant's criminal history was extremely important to Cueva's evaluation of appellant. (RB 183.) However, his report and direct testimony show that was not the case.

At the Evidence Code section 402 hearing, Cueva explained that appellant's "offense history" was part of a "referral document." (12 RT 3041-42; Exhibit No. 96, 5 CT 1270-73.) As a matter of Youth Authority policy, the referral document would be "attached to the clinical report for whatever reason – you know, the Youth Authority does it. But they do it because it has all the information compiled in there that's pertinent to law enforcement and security practices because if we need to get quick information about somebody's status, you know we will get it from the top page." (12 RT 3041.)

The offense history included "prior convictions, sustained petitions of the inmate, description of the most recent offense, co-offenders involved in the most recent offense, a victim or impact statement, offender's version, and correctional experience." (12 RT 3042.) Cueva said that was "[e]xtremely important" to his overall assessment and recommendations for "any" ward at the Youth Authority. (*Ibid.*) In response to a question from the court, Cueva also said that appellant's criminal history was "[v]ery important" to his analysis and opinions on direct examination. (12 RT 3044.)

That may be true in some cases. However, Cueva did not remember appellant or interviewing him because he performed his evaluation 14 years ago. (12 RT 3018, 3043, 3049.) Cueva's more developed testimony and his report both show that appellant's criminal history was not important in his clinical impressions of appellant or in his recommended program and treatment for appellant while in custody. (Exhibit No. 95, Suppl. B at 10-12.)

Cueva's written report included a brief statement that appellant "was committed to the Youth Authority as a result of sustained convictions, three counts of residential burglary, 1st degree, one count of grand theft auto, and one count of commercial burglary, 2nd degree. His YA commitment time is 2 years, 7 month. He has had sustained convictions: burglary on two occasions and five non-sustained conviction for grand theft auto and commercial burglary, 2nd degree." (Exh. No. 95, CT. Suppl. B 10.)

On direct-examination, Cueva did not discuss those facts in explaining his opinion about appellant's psychological and emotional problems and need for intensive mental health treatment. (12 RT 3016-3041.) In his concluding written evaluation, Cueva mentioned appellant's offense history only indirectly by stating that appellant's anger towards his parents had "been channeled into antisocial activities for society." (Exh. No. 95, CT. Suppl. B 10.)

At the Evidence Code section 402 hearing, Cueva said that he was required to document the offense history of anyone who entered the Youth Authority. (12 RT 3045.) However, the "services are provided, you know, on the basis of his need, you know. I mean regardless whether, you know, whether he committed murder or whether he committed theft, you know. In the end, you know, our interest is to give him the opportunity, you know, to improve himself, you know." (12 RT 3045, emphasis added.)

The court asked Cueva whether "you look at the details of the individual crimes in making your assessment as to what should happen to this individual?" (12 RT 3047.)

Mr. Cueva: "We look at the individual crimes, you know, because it shows a pattern, you know. And it shows also a pattern of intervention, you know, at a County level."

Court: "Do you look at the specificity of whether he took, let's say, $500 or $5,000."

Cueva: "Yes, we look at the specificity because, depending on the crime, if it is a violent crime, you know, we look at the specificity because it will yield a particular plan."

Court: "How about if it is a series of theft offenses?"

Cueva: "It may, you know, because we may send him to a placement program where they have a specific program, you know, that will deal with individuals, you know, who are just thieves or murderers. If it is a murderer, we may send them to [Penal Code section] 187 class. If it is a sex offender, we may send him to a sex offender program. So we look at the pattern of behavior." (12 RT 3047-48.)

However, Cueva's report did not recommend a treatment plan for a theft offender. His treatment plan was for "intensive individual psychotherapy" because of appellant's "serious ... emotional and mental problems" caused by his " extreme traumatic experiences" of sexual abuse and neglect as a child. (Exh. No. 95, CT. Suppl. B 10, 11; 12 RT 3039.)

In sum, the evidence when considered as a whole shows that the details of appellant's criminal history as a juvenile and young adult were not important to Cueva's evaluation of appellant. As next explained, respondent also errs in arguing that evidence of that criminal history was admissible on cross-examination.

C. The Evidence Of Appellant's Criminal History Was Inadmissible On Cross-Examination Because It Did Not Impeach The Evidence Of Appellant's Psychological And Emotional Problems.

Respondent claims (RB 182) that the detailed evidence of appellant's criminal history was admissible under the rubric that "[a] party 'may cross-examine an expert witness more extensively and searchingly than a lay witness, and the prosecution was entitled to attempt to discredit the expert's opinion. In cross-examining a psychiatric expert witness, the prosecutor's good

faith questions are proper even when they are, of necessity, based on facts not in evidence.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 358 ("*Wilson*"), quoting *People v. Dennis* (1998) 17 Cal.4th 468, 519, internal citations omitted.)

Respondent claims that *Wilson* is "on point." (RB 185.) However, *Wilson* addressed different circumstances and shows that the cross-examination of Cueva was improperly used to admit non-statutory, aggravating evidence.

In *Wilson*, the defense called as a witness a forensic psychologist (Dr. Maloney) who had reviewed the defendant's childhood psychological evaluations. (*People v. Wilson, supra,* 36 Cal.4th at p. 358.) "Dr. Maloney testified on direct examination that when defendant was about 13 years old, he was placed in a psychiatric hospital for 'bizarre behavior,' and later explained that defendant displayed 'juvenile delinquency, acting out.'" (*Id.* at pp. 358-59.)

On cross-examination, the prosecution challenged Dr. Maloney's assessment by asking him "whether he had read a 1964 letter describing defendant's burglaries and assault with a loaded gun, which conduct had led to defendant's hospitalization. Dr. Maloney stated he did not recognize the letter. Dr. Maloney ultimately agreed with the prosecution that some of the 'bizarre behavior' referred to behavior that was 'criminal.' The jury learned that several documents, none of which Dr. Maloney recognized or were admitted into evidence, contained information about defendant's 1964 burglaries and assault with a loaded gun, and his probation officer's assessment of defendant's parents' care and concern for him." (*Id.* at p. 359.)

On appeal, the defendant argued that this was improper cross-examination to elicit inadmissible, aggravating evidence. (*Id.* at p. 358.) *Wilson* rejected this claim "[b]ecause Dr. Maloney relied only on documents

provided by defense counsel and defendant's own statements, the prosecution was entitled to challenge Dr. Maloney on his assessment by asking whether he considered other documents." (*Id.* at p. 359.)

In this case, one and the same person (Mr. Cueva) interviewed appellant and prepared the report. (12 RT 3018, 3023-25, 3051.) As explained above, Cueva's written assessment and direct testimony showed that appellant's offense history did not in fact play a role in his psychological assessment of appellant or in his treatment recommendations. This was confirmed by the prosecution's cross-examination of Cueva.

The prosecutor did not seek to impeach Cueva's opinion about appellant's emotional and psychological problems, history of sexual abuse and neglect, or need for intensive therapy. The entire thrust of the cross-examination (12 RT 3049-3071) was to present the details of an offense history which could not have been presented by the prosecution as evidence in aggravation. (3 AOB 348-350, 351; (*People v. Boyd* (1985) 38 Cal.3d 762, 774 ["Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation."]; *accord People v. Gordon* (1990) 50 Cal.3d 1223, 1266 [In *People v. Boyd, supra,* "we made it plain that the only circumstances material to the determination of penalty are those defined in Penal Code section 190.3 ...."].)

The prosecutor asked only a few questions about Cueva's assessment of appellant at the end of her cross-examination. (12 RT 3068-69, 3070, 3071-72.) Cueva confirmed that appellant needed a "specialized counseling program" and "intensive treatment." (12 RT 3069.) The core program designed for appellant was to get him treatment, keep him secure, and to provide him with schooling. (12 RT 3070-71.) The prosecutor asked whether

appellant's emotional and psychological state was the result of his being incarcerated. (12 RT 3071-72.) Cueva agreed that was sometimes the case. (*Ibid.*) "But in this case" appellant had "serious emotional problems, emotional and mental problems" and his "acute chronic depression" was not "reactive depression as a result of incarceration." (*Ibid.*)

Thus, the record shows that the purpose of cross-examining Cueva questions about appellant's offense history was not to impeach his psychological assessment of appellant but to present inadmissible details about appellant's offense history.) The other cases cited by respondent recognized similar distinctions in defining the scope of permissible cross-examination. (RB 182, 185.)

In *People v. Alfaro* (2007) 41 Cal.4th 1277, the court approved cross-examination of two defense psychologists and rebuttal testimony by another psychologist showing that the defendant had faked some of his responses to a Minnesota Multiphasic Personality Inventory ("MMPI") evaluation. (*Id.* at pp. 1324-25.) That was proper cross-examination and rebuttal evidence because both defense experts had reviewed a data sheet from the MMPI with a notation about faked responses but nevertheless concluded that "the information was of no use to them." (*Id.* at p. 1325.)

Therefore, "the trial court properly allowed the prosecutor to inquire as to both experts' reasons for disregarding the MMPI data as well as Rogers's 'probable fake bad' notation" on the data sheet." (*Ibid.*) In this case, no comparable evidence existed in the details of appellant's juvenile and young adult criminal history showing that appellant had faked his responses when interviewed. Indeed, Cueva made no such claim in his testimony or report. (12 RT 3016-3040, 3049-72; CT Suppl. B, Exhibit No. 95 at 8-12.)

In *People v. Lancaster* (2008) 44 Cal.4th 691 ("*Lancaster*"), the "defense presented testimony from a clinical and forensic psychologist, Dr.

Richard Romanoff. Dr. Romanoff had reviewed defendant's penal and medical records, met with him several times, and conducted various tests. He concluded that defendant has an antisocial personality, characterized by a predisposition toward criminal behavior, deceitfulness, impulsivity, aggressiveness, recklessness, and lack of remorse." (*Id.* at p. 60.) The defendant testified and "professed his innocence ...." (*Id.* at p. 61.)

The pertinent issue on appeal was whether the prosecution could present portions of Dr. Romanoff's interview of the defendant where he gave a false alibi to the charged murder. (*Id.* at pp. 104-05 ["Defendant contends the trial court committed prejudicial error by allowing the tapes to be played without excluding his alibi statement regarding marital sex."].) *Lancaster* found no error. "[B]y testifying and asserting his innocence, defendant placed at issue his statements regarding the circumstances of the crime. The alibi evidence was not offered in aggravation, but to impeach both defendant and Dr. Romanoff." (*Id.* at p. 105.) In this case, none of the evidence offered on cross-examination of Cueva was impeachment evidence related to the circumstances of the crime.

In *People v. Mitcham* (1992) 1 Cal.4th 1027 ("*Mitcham*"), this Court held that the trial court properly permitted the prosecution to rebut the defense experts opinion with evidence of an uncharged prior robbery (the "Vogue Fashion robbery"). (*Id.* at p. 1069.) The defense expert ("Dr. Lerner") had offered opinion testimony that the defendant's criminal behavior was affected by his PCP use. (*Id.* at pp. 1042, 1069.) The evidence of the Vogue robbery was relevant rebuttal evidence because Dr. Lerner "acknowledged that the circumstances of the Vogue Fashion robbery did not indicate PCP use." (*Id.* at p. 1070.)

In this case, nothing in Cueva's evaluation of appellant showed that appellant's mental health problems since pre-school age were transient or self-

induced.

Moreover, *Mitcham* addressed a situation where the defendant had offered "good character" evidence in the penalty phase and portrayed his "juvenile life as exemplary." (*People v. Mitcham, supra,* 1 Cal.4th at pp. 1042, 1071-72.) "By introducing evidence of good character, a defendant places his or her character in issue, thus opening the door to prosecution evidence tending to rebut that 'specific asserted aspect' of the defendant's character. [Citations.] Generally, the scope of bad character evidence offered in rebuttal must relate directly to the particular character trait concerning which the defendant has presented evidence. [Citations.]" (*Id.* at p. 1072.)

"The rebuttal evidence of defendant's acts of delinquency, including incidents of violence, directly related to this general picture of a well-behaved youth presented by the defense. ... The defense evidence painted an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character. The breadth and generality of this good character evidence warranted rebuttal evidence of the scope offered. [Citation.] Because the prosecution's evidence was proper rebuttal, defendant's objections to its admission are not well taken." (*Id.* at p. 1072.)

In this case, appellant did not attempt to present a defense of a well-behaved and sociable youth. Through Cueva and other witnesses, appellant presented evidence of an extremely troubled youth with long-standing psychological and emotional problems because of a "toxic" childhood. (13 RT 3255; Exhibit No. 95, Suppl. Ct 10.) As a result, appellant required mental health care since a pre-school age, including residential treatment when his grandparent's health insurance permitted it. (13 RT 3351-53.)

As explained in appellant's opening brief, "'[e]vidence that a defendant suffered abuse in childhood generally does not open the door to evidence of defendant's prior crimes or other misconduct.'" (*People v. Loker* (2008) 44

Cal.4th 691, 709-10 ("*Loker*"), quoting *In re Lucas* (2004) 33 Cal.4th 682, 733; *accord People v. Ramirez* (1990) 50 Cal.3d 1158, 1192-93 [Testimony about the defendant's difficult childhood, did not "'open the door to *any and all* bad character' evidence the prosecution can dredge up.'"], original emphasis, quoting *People v. Rodriguez* (1986) 42 Cal. 3d 730, 792, fn. 24; 3 AOB 355.)

Respondent contends that *Loker, supra,* does not apply because it addressed cross-examination of lay witnesses. (RB 186.) However, the cross-examination at issue related to a "six-page report ... prepared by defense psychiatrist Thomas Gaughan in connection with defendant's Arizona crimes, and was included in the Arizona probation file." (*People v. Loker,* 44 Cal.4th at p. 708.) Dr. Gaughan was not called as a witness. "Nevertheless, many witnesses were cross-examined with reference to the Gaughan report." (*Ibid.*)

Loker concluded that "[w]hen a witness does 'not testify generally to defendant's good character or to his general reputation for lawful behaviors, but instead testifie[s] only to a number of adverse circumstances that defendant experienced in his early childhood,' it is error to 'permit[] the prosecution to go beyond these aspects of defendant's background and to introduce evidence of a course of misconduct that defendant had engaged in throughout his teenage years that did not relate to the mitigating evidence presented on direct examination.'" (*Id.* at pp. 709-10, quoting *People v. Ramirez, supra,* 50 Cal.3d at p. 1193.)

In this case, Mr. Cueva's report was admitted in evidence. Neither that report nor any defense witness presented a claim of generally good character or a general reputation for lawful behavior. Accordingly, the principle recognized by *Loker* should apply in this case.

D. Appellant's Constitutional Claims Are Cognizable.

The admission of the non-statutory aggravating evidence violated appellant's due process right to a fair trial (U.S. Const., 5th & 14th Amends.) and his Eighth Amendment right to reliable sentencing proceedings. (3 AOB 357-58; see, e.g., *Oregon v. Guzek* (2006) 546 U.S. 417, 525-26 [126 S. Ct. 1226; 163 L. Ed. 2d 1112]; *People v. Sharp* (1972) 7 Cal.3d 448, 459 ["It is clear that the assurance of a fair trial is constitutionally founded in due process."].)

Admission of the evidence of appellant's juvenile adjudications was also error under the *Apprendi* line of cases because it did not satisfy the constitutional safeguards of trial by jury. (3 AOB 358-362; *Apprendi, supra,* 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584, 589 [122 S. Ct. 2428; 153 L. Ed. 2d 556] ["Capital defendants, no less than noncapital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."]; *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1193-94.)

Respondent contends that appellant forfeited his constitutional claims by failing to raise them at trial. (RB 182, 187.)

In his opening brief, appellant acknowledged that his trial counsel did not object on constitutional grounds to the erroneous admission of the evidence on cross-examination of Mr. Cueva. (3 AOB 356.) However, appellant explained that his constitutional claims were cognizable for multiple reasons. (*Ibid.*)

These include futility, the fact that the federal constitutional claims were based on the same facts as the state law claims, justice requires that the issues be reviewed, and review is appropriate to forestall a later claim of ineffective assistance of counsel. (*Ibid.*; 1 AOB 123-24; 2 AOB 212-13; *see, e.g., People v. McDermott* (2002) 28 Cal.4th 946, 1001; *Estelle v. Smith,*

supra, 451 U.S. ay p. 468, fn. 12; *People v. Yeoman* (2003) 31 Cal.4th 93, 117; *People v. Mattson, supra,* 50 Cal.3rd at p. 854; *People v. Norwood, supra,* 26 Cal.App.3d at p. 152.)

Respondent claims that *People v. Carpenter* (1997) 15 Cal.4th 312, 385 ("*Carpenter*"), establishes forfeiture. (RB 187.) However, since *Carpenter,* this Court has repeatedly recognized that "[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal.4th 93, 117; *accord People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Partida* (2004) 37 C4th 428, 436; *People v. Carasi* (2008) 44 Cal.4th 1263, 1289; *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

For all these reason, appellant's constitutional claims are cognizable.

E. *People v. Nguyen* Should Be Reconsidered.

On the merits, respondent addressed one of appellant's federal constitutional claims. Respondent notes (RB 187) that after appellant filed his opening brief, this Court held that, notwithstanding the *Apprendi* line of cases, juvenile adjudications may be considered for purposes of adult sentencing. (*People v. Nguyen* (2009) 46 Cal.4th 1007 ("*Nguyen*"), *cert. denied Nguyen v. California* (2010) ___ U.S. ___ [130 S.Ct. 2091; 176 L.Ed.2d 722].)

Nguyen should be reconsidered for several reasons. *Apprendi* established the constitutional principle that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at p. 490, *accord Oregon v. Ice* (2009) 555 U.S. 160 [172 L. Ed. 2d 517, 129 S. Ct. 711]; *Cunningham v.*

California (2007) 549 U.S. 270 [166 L. Ed. 2d 856, 127 S. Ct. 856]; *United States v. Booker* (2005) 543 U.S. 220 [160 L. Ed. 2d 621, 125 S. Ct. 738]; *Blakely v. Washington* (2004) 542 U.S. 296 [159 L. Ed. 2d 403, 124 S. Ct. 2531].)

A juvenile adjudication does not fall within the prior conviction exception because it is not a conviction. (Welf. & Inst. Code, § 203 ["An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."]; *People v. Hayes* (1990) 52 Cal.3d 577, 633 ["Juvenile court adjudications under Welfare and Institutions Code section 602 are not criminal convictions ...."].)

Apprendi explained that in order to satisfy the prior conviction exception, sentence-enhancing facts must be based on "a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial." (*Apprendi, supra,* 530 U.S. at p. 496.) The reason for this rule is that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial" and one in which the defendant lacked that right. (*Ibid.*; *see also Jones v. United States* (1999) 526 U.S. 227, 249 [143 L. Ed. 2d 311, 119 S. Ct. 1215] ["[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense ... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."].)

Limiting the use of juvenile adjudication is also consistent with another reason the Sixth Amendment right to trial by jury applies to state proceedings. In holding that the Sixth Amendment right to trial by jury applies in state proceedings, the high court explained that the right to a jury trial is not based solely on the reliability of the fact-finder. It also "reflect[s] a fundamental

decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 156 [88 S. Ct. 1444; 20 L. Ed. 2d 491].)

Since *Apprendi*, the high court emphasized the same principle in extending the right to trial by jury to sentencing factors other than a prior conviction. (*Blakely v. Washington, supra*, 542 U.S. at pp. 305-06 ["the right to a jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional power . . . Without that restriction, the jury would not exercise the control that the Framers intended."]; *Ring v. Arizona, supra,* 536 U.S. at p. 607 ["The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders."]; *see also Apprendi, supra,* 530 U.S. at p. 498, conc. opn. of Scalia, J. [Judicial finding of a fact other than a prior conviction affecting "the length of the sentence to which [the defendant] is exposed" is contrary to the Sixth Amendment requirement of proof "*beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.*"], original emphasis.)

A juvenile court adjudication shows that, in a proceeding in which the accused minor had no right to trial by jury, a juvenile court judge determined that the minor committed a criminal offense. The essential teaching of *Apprendi* is that such nonjury determinations cannot be used to increase criminal penalties beyond prescribed statutory maximums. For the same reasons, admission of appellant's juvenile adjudications to impose the death penalty violated appellant's Sixth Amendment rights.

Reconsideration of *People v. Nguyen, supra,* is also warranted because the use of juvenile adjudications to impose the death penalty conflicts with the Eighth Amendment's heightened reliability requirements for sentencing. (*Oregon v. Guzek, supra,* 546 U.S. at pp. 525-26.) The high court has

recognized that juveniles are "'categorically less culpable than the average criminal.'" (*Roper v. Simmons* (2005) 543 U.S. 551, 567 [125 S. Ct. 1183; 161 L. Ed. 2d 1] ("*Roper*"), quoting *Atkins, supra,* 536 U.S. at p. 316; *J.D.B. v. North Carolina* (2011) ___ U.S. ___ [2011 U.S. LEXIS 4557 at p. *20 [Children "'generally are less mature and responsible than adults,' ... they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' [and] they 'are more vulnerable or susceptible to . . . outside pressures' ...."], citations omitted).

"[A]s any parent knows and as the scientific and sociological studies ... tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" (*Roper, supra,* 543 U.S. at p. 569, quoting *Johnson* v. *Texas* (1993) 509 U.S. 350, 367 [113 S. Ct. 2658; 125 L. Ed. 2d 290].)

Moreover, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 104; *accord Roper, supra,* 543 U.S. at p. 569.) This is true for appellant because his juvenile offense history was the result of his "serious ... emotional and mental problems" and "extreme traumatic experiences" as a child. (Exh. No. 95, CT. Suppl. B 11; 12 RT 3039.) Accordingly, admission of appellant's juvenile offense history also violated his Eighth Amendment rights.

F. Prejudice Is Present Because The Prosecution Argued To The Jury That Appellant's Juvenile And Young Adult Offense History Showed That He Deserved The Death Penalty Rather Than Sympathy.

Assuming error, respondent argues (RB 189) that there was no prejudice because the jury also received Exhibit No. 95 and could see appellant's criminal history for itself. (RB 188-89.)

However, the information about appellant's criminal history in Exhibit No. 95 was limited to the following statement: "Daniel Landry is a 19 year old Caucasian male who was committed to the Youth Authority committed to the Youth Authority as a result of sustained convictions, three counts of residential burglary, 1st degree, one count of grand theft auto, and one count of commercial burglary, 2nd degree. His YA commitment time is 2 years, 7 month. He has had sustained convictions: burglary on two occasions and five non-sustained conviction for grand theft auto and commercial burglary, 2nd degree." (Exh. No. 95, CT. Suppl. B 10.)

The details of appellant's criminal history were presented through the prosecution's cross-examination of Cueva and a separate exhibit (Exhibit No. 96) admitted in evidence at the request of the prosecution after the trial court overruled the defense objections to the cross-examination of Cueva. (3 AOB 347-48; 12 RT 3048-49, 3054-63; Exh. No. 96, 5 CT 1271-72.)[32]

Alternatively, respondent argues that *People v. Loker, supra*, 44 Cal.4th at pp. 725-26, and *People v. Bramit* (2009) 46 Cal.4th 1221, 1239, show that

---

32. As explained in appellant's opening brief, defense counsel did not specifically object to the admission of the additional components of Cueva's report. However, the circumstances show that appellant fairly apprised the court that he was objecting to the entire subject area and the court's ruling showed that any additional objection would have been futile. (3 AOB 347, fn. 50.) Respondent does not disagree.

the error was harmless. (RB 189.)

Loker differs from this case because the report with the adverse evidence was not admitted in evidence. (*People v. Loker, supra*, 44 Cal.4th at p. 725.) Moreover, the prosecution during closing argument "made no mention of the report." (*Id.* at p. 726.) In addition, the "prosecutor's insinuations about the 'bad things' in the Gaughan report did not tend to undercut the thrust of this evidence. Instead, they were consistent with the portrait of defendant as an abused, confused, emotionally disturbed youth." (*Id.* at p. 726.)

In this case, the portions of Mr. Cueva's report detailing appellant's offense history was admitted in evidence. (Exh. No. 96, 5 CT 1271-72.) Moreover, the prosecution relied on that evidence to claim that by the time appellant was 19 years-old he was a "chronic habitual offender" who had stolen a firearm during one of the burglaries and had escaped from a custody placement. (12 RT 3063-64; Exh. No. 96, 5 CT 1270, 1272.)

The prosecutor also argued that appellant's juvenile and young adult offense history showed that he did not deserve sympathy but the death penalty: "As you know, he has a distinguished history of being a criminal and a delinquent. Juvenile delinquent as a juvenile and an adult criminal once he turned 18." (14 RT 3454.) Evidence that appellant committed burglaries after his release form a juvenile residential treatment facility (the Kirby Center) showed that appellant "takes what is given and he throws it out the window." (14 RT 3505.) "We are here because of his choices and his evilness and his criminality and so please don't be swayed. ... There is no reason you should feel sympathy, any shred of sympathy for Daniel Landry." (*Ibid.*)

People v. Bramit, supra, also pales in comparison to this case. There, the trial court erred by admitting a single piece of evidence -- that the defendant brought "BB guns onto school grounds when he was 12 years old" -

- because that conduct was not a crime at the time it occurred. (*People v. Bramit, supra,* 46 Cal.4th at p. 1239.)

Here, the excerpt of the prosecutor's argument quoted above shows that appellant's juvenile and young adult offense history was an important component of her position that appellant deserved death rather than sympathy. Respondent contends that the error was insignificant because of the evidence of multiple factor (b) offenses. (RB 189.)

However, the defense penalty phase case was based on appellant's extreme traumatic experiences as a child to explain two things: his inability to function outside his grandparent's home; and the cause of the mental health problems that led to his first criminal conduct involving force or violence when denied care and treatment in prison. (*See, e.g.,* 14 RT 3520-21, 3523-28, 3533-34, 3542-43, 3546-47.)

It is precisely for this reason that the prosecution relied on appellant's juvenile and young adult offense history to argue that he deserved death rather than sympathy. "There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor -- and so presumably the jury -- treated it." (*People v. Cruz, supra,* 61 Cal.2d at p. 868.) Accordingly, the "jury argument of the district attorney tips the scale in favor of finding prejudice ...." (*People v. Minifie, supra,* 13 Cal.4th at p. 1071.)

XVII.

THE ADMISSION IN EVIDENCE OF AN UNATTACHED RAZOR BLADE LEFT IN PLAIN VIEW ON THE DESK TOP IN APPELLANT'S CELL AND THE JURY INSTRUCTION THAT THIS WAS EVIDENCE OF THE USE OR THREAT OF FORCE OR VIOLENCE (FACTOR (B)) VIOLATED STATE AND FEDERAL LAW.

A. Case Law Shows That More Substantial Evidence Of Force Or Violence Is Necessary Than Is Present Here.

Over appellant's objection that it was not proper factor (b) evidence, the court admitted evidence that on April 18, 2001, a deputy sheriff found a razor blade on the desk in appellant's cell in the county jail while appellant was in court for his capital trial. (12 RT 2854-55; 3 AOB 365-367.) This objection was based on the evidence that appellant used the razor blade as a pencil sharpener and Sergeant Roelle, who found the razor blade, did not discipline appellant or even write a report about the incident. (12 RT 2847-49, 2850.)

Respondent contends that the razor blade was "illegal" (RB 190) and admissible as factor (b) evidence based on several prior decisions. (RB 194.) However, the case law when properly construed requires more substantial evidence of force or violence than is present here.

Evidence of a razor blade is properly admitted where it was hidden and its possession occurred in the context of assaultive behavior by the inmate and possession of other, unequivocal weapons. (*People v. Mason, supra,* 52 Cal.3d at pp. 931; *People v. Tuilaepa, supra,* 4 Cal.4th at pp. 580-89). Alternatively, it may be proper where the defendant possessed multiple razor blades and there was evidence that he intended to fashion them into weapons (*People v. Pollock, supra,* 32 Cal 4th at pp. 1166, 1177-78), or the defendant made a threat of violence and/or he had been involved in attacks on other inmates in the same time period. (*People v. Gutierrez, supra*, 28 Cal.4th at pp.

1152-43; *People v. Combs* (2004) 34 Cal.4th at 821, 857-60; *People v. Thornton, supra*, 41 Cal.4th at pp. 407, 465; *People v. Wallace, supra,* 44 Cal.4th at pp. 1047, 1051, 1081-82; 3 AOB 376.)

None of those factors were present in connection with the razor blade incident at the county jail. (3 AOB 376-77.) The cases cited by respondent confirm that the evidence here did not pass the threshold for factor (b) evidence, *i.e.*, "the use or attempted use of force or violence or the express or implied threat to use force or violence." (Penal Code, § 290.3, subd. (b).)

Respondent notes that in *People v. Butler* (2009) 46 Cal.4th 847, the court stated that "possessing contraband razor blades in custody constitutes an 'express or implied threat to use force or violence' under section 190.3, factor (b)." (Id. at pp. 871-72.) However, in that case the "[d]eputies testified that on three occasions they found blades broken out of plastic razors in defendant's jail cell." (*Id.* at p. 871.)

In this case, a deputy on one occasion found a razor blade left in plain view on appellant's desk in his jail cell in a manner consistent with appellant's statement that he used it to sharpen a pencil. (12 RT 2847, 2850.) There was no evidence that appellant engaged in any actual or attempted criminal activity involving force or violence during the three years since he transferred from state prison to the county jail on May 1, 1998. (Exh. No. 42, 4 CT 1096.) To the contrary, appellant after his transfer debriefed about prison gangs and provided information to law enforcement about planned assaults on deputies at the jail. For that reason, he was placed in protective custody in jail. (12 RT 2831; 14 RT 3527; 2 CT 584.)

In *People v. Wallace* (2008) 44 Cal.4th 1032, "Fresno County Correctional Officer Lawrence Daluz testified that while searching defendant's cell in July 1991 he found a bare razor blade and a plastic razor that had been altered to expose about half of the blade. These items were considered

contraband because of their altered condition, which facilitated their use as weapons. Daluz explained that a bare razor blade could be affixed to an object, such as a toothbrush, to create a weapon." (*Id.* at p. 1081.) "Fresno County Correctional Officer Gary Tatum testified that defendant tried to excuse his possession of the razors by stating he used them to cut the hair of other African-American inmates. But Tatum disbelieved this explanation because the razors used by other inmates to cut hair did not have the plastic broken to expose the blades." (*Ibid.*)

On appeal, the defendant argued that the admission of the razor blade was an abuse of discretion. (*Ibid.*) This Court rejected the claim given The "circumstances of defendant's possession of the contraband, particularly when viewed together with his overall conduct while in custody--which included five rules violations for fighting--lead us to conclude that the trial court did not abuse its discretion in admitting the evidence of defendant's razor possession under section 190.3, factor (b)." (*Id.* at p. 1082.)

This case differs because it did not involve finding a bare razor blade next to one that was still exposed and mounted in the handle for use as a weapon. Respondent argues that this case is similar because appellant "had several outbursts while in custody." (RB 195.) This argument ignores the fact that appellant's last "outburst" was on September 18, 1997, the charged assault on inmate Matthews at C.I.M. (Count 4; 6 RT 1474-76, 1509-1510.) The prosecution presented no evidence of any outburst by appellant after he transferred to the county jail in May of 1998. (13 RT 1328-29; Exh. No. 42, 4 CT 1096.)

Respondent's claim that the razor blade found in plain view on appellant's desk reflected a crime of force or violence is speculation, which "'is not evidence, less still substantial evidence.'" (*People v. Waidla, supra,* 22 Cal.4th at p. 735, citations omitted; *see also People v. Felix* (2001) 92

Cal.App.4th 905, 912 ["But there must be evidence to support an inference and the prosecution may not fill an evidentiary gap with speculation."].)

In *People v. Pollack* (2004) 32 Cal.4th 1153, the "defendant had been found in possession of a razor blade in his jail cell on four occasions between March 7 and September 15, 1990." (*Id.* at pp. 1177-78.) A correctional officer testified that "inmates were known to use such blades as weapons, often after fastening them to handles." (*Ibid.*) In this case, the jail deputies found a razor blade on one occasion. Sergeant Roelle did not testify that he had reason to believe that appellant intended to fashion a weapon from the razor blade. This is the apparent explanation for why he did not discipline appellant or write a report about the incident. (12 RT 2847-49.)

For all these reasons, the trial court erred by admitting evidence of the razor blade, even if it was illegal as respondent claims. (Penal Code, § 190.3 ["[N]o evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence."].)

B. Appellant's Constitutional Claims Are Cognizable.

The erroneous admission of the evidence of the razor blade violated appellant's constitutional rights to due process, to a fair trial, to trial by jury, and to reliable capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; 3 AOB 380-81.)

Citing *People v. Lewis, supra,* 39 Cal.4th at p. 1052, Respondent contends that appellant forfeited his constitutional claims. (RB 196.) However, the defendant in *Lewis* "failed to object to the admission of the foregoing evidence on any ground at trial." (*People v. Lewis, supra,* 39 Cal.4th at p. 1052.)

Under the standards previously discussed (see Argument Sections III.B.

& VII.B, above) these claims of error are cognizable because the trial court's ruling shows that any additional objection would have been futile and the question of whether admission of the evidence was constitutional error is a question of law based on the same facts as the state law claim of error. (*See, e.g., People v. Redmond* (1981) 29 Cal.3d 904, 917; *Estelle v. Smith, supra,* 451 U.S. at p. 468, fn. 12; *People v. Yeoman, supra,* 31 Cal.4th at p. 117.)

C. In A Close Case Like This, The Error Was Prejudicial Because It Permitted The Prosecution To Improperly Argue That Appellant Posed A Continuing Threat Of Violence While Incarcerated.

Assuming error, respondent argues that it was harmless "under any standard." (RB 196.) Respondent believes that this is so because evidence of possession of a razor blade was "neither shocking nor more inflammatory" than the evidence that while "in prison" appellant had been found with weapons on multiple occasions. (RB 196.)

Respondent's argument highlights the key distinction. The finding of the razor blade was the only evidence offered by the prosecution to show that after appellant's transferred from prison to the county jail and debriefed about prison gangs that he engaged in criminal activity involving actual or attempted force or violence. (3 AOB 379-80.)

Moreover, respondent ignores the role that the evidence played in the prosecution closing argument in the penalty phase. The prosecution argued that the defendant "was taken out of the state prison system ... in April [*sic*] of '98 and put in the West Valley Detention Center where he was charged with and awaiting trial on this case, knowing he was facing the death penalty, and yet even with that, even with being in trial, even with being in trial before you, and it was during the guilt phase where he was facing first degree murder, assault by a life prisoner triggering the death penalty, what does Sergeant Roelle find on April 18, 2001? A razor blade in the defendant's cell. ... His

answer to that was well, it's mine but I was using it to sharpen pencils. Yet another razor blade on a person like this who is a master at making weapons and it doesn't even stop while he is on trial for his life." (14 RT 3487-88.)

In a handout distributed to the jury by the prosecutor for closing argument (14 RT 3450), the prosecutor in capital letters and bold and italicized print stated that "while the guilt phase trial is ongoing" Sergeant Roelle found a razor blade on the desk in his cell which he was "never" allowed to have. (4 CT 987.) The significance of this evidence was reinforced by a jury instruction stating that simple possession of the razor blade was evidence of criminal activity "which involved the express or implied use of force or violence or the threat of force or violence." (4 CT 1023, CALJIC No. 8.87.)[33]

But for the razor blade evidence, the record shows that appellant's criminal activity involving force and violence had ended more than three and a half years earlier with the assault on inmate Matthews on September 18, 1997. (6 RT 1474-76, 1508-10.)

As previously explained, the record shows that despite evidence of numerous incidents of properly admitted factor (b) evidence, this was a close case on the question of penalty because the jury deliberated over the course of four days before returning a death verdict. (4 CT 1048-49.) Given the tone of the prosecution's jury argument and the indication of a close case, the admission of the erroneous factor (b) evidence was prejudicial error. (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62; *People v. Minifie, supra,* 13 Cal.4th at p. 1071.) Accordingly, the death judgment should be reversed.

---

33. In Argument Section XX., below, appellant presents the additional claim that this instruction improperly took the factual question from the jury of whether the proffered factor (b) evidence involved force or violence.

XVIII.

ADMISSION OF EVIDENCE OF ALLEGED CRIMINAL ACTIVITY BEYOND THE STATUTE OF LIMITATIONS WAS UNCONSTITUTIONAL AND PREJUDICIAL TO THE DEATH JUDGMENT.

A. Appellant's Claims Are Cognizable.

Eighteen of the proffered factor (b) offenses fell outside the three year statute of limitations when measured from the date of the filing of the felony information on July 27, 1998. (1 CT 42.) Therefore, the admission of evidence related to those offenses violated appellant's rights to due process, to trial by jury, to a fair trial, and to heightened reliability in capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; 3 AOB 381.)

Citing *People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1052, respondent contends that appellant forfeited these claims of error. (RB 197.) However, the cited case addressed a failure to object that other criminal activity fell within the definition of factor (b). (*People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1052 ["On appeal, Oliver argues that these acts did not satisfy the "crime" and/or "violence" requirements of section 190.3, factor (b), and that they were inadmissible in aggravation at the penalty phase."].)

Other authority shows that the statute of limitations is jurisdictional and may be asserted by the defendant "at any time." (*People v. Williams* (1999) 21 Cal.4th 335, 339-40 ["'Commencing in 1934, this court and the Courts of Appeal have repeatedly held that a defendant may assert the statute of limitations at any time.'"], citation omitted; *People v. Chadd* (1981) 28 Cal.3d 739, 755-757 [A challenge to the statute of limitations for a crime is subject to direct or to collateral attack and may be raised at any time, before or after judgment.]; 3 AOB 381-82.)

Alternatively, this claim may be addressed to forestall a later claim of ineffective assistance of counsel. (3 AOB 382; *People v. Mattson, supra,* 50 Cal.3rd at p. 854; *accord People v. Barber* (2002) 102 Cal.App.4th 145, 150.)

B. The Heightened Need For Reliability In A Capital Case Requires Reconsideration Of This Issue.

Appellant has acknowledged several decisions by this Court rejecting the claim that the statute of limitations applied to evidence of crimes offered as factor (b) evidence. (3 AOB 386.) Respondent cites (RB 197) the additional case of *People v. Jurado* (2006) 43 Cal.4th 72, which held that "Section 190.3, factor (b), imposes no time limitation on the introduction of unadjudicated violent crimes; rather, it permits the jury to consider a capital defendant's criminally violent conduct occurring at any time during the defendant's life. Thus, evidence of violent criminal activity is admissible even though prosecution of the crime would be time-barred ...." (*Id.* at p. 135, citations omitted.)

Respondent contends that there is no reason to reconsider this issue. (RB 197.) However, the rationale for barring prosecution of time barred offenses should apply with particular force when an offense is offered in capital sentencing proceedings as a basis for imposing the death penalty.

Appellant emphasizes that once the statute of limitations for an offense expires, prosecution for that offense is forever time-barred because of a presumption that the evidence is "'legally insufficient.'" (*Stogner v. California* (2003) 539 U.S. 607, 615-616 [123 S. Ct. 2446; 156 L. Ed. 2d 544], citation omitted.) The reason for this rule is that limitation periods "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (*United States v. Marion* (1971) 404 U.S. 307, 322 [92 S. Ct. 455; 30 L. Ed. 2d 468]; 3 AOB 384-85.)

These principles should apply with particular force in capital sentencing proceedings because of the heightened need for reliability and accurate fact-finding. (3 AOB 385-86; *see, e.g., Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246; 141 L.Ed.2d 615] ["Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital sentencing proceedings."], citing, *inter alia, Lockett v. Ohio, supra,* 438 U.S. at p. 604 [The "qualitative difference between death and other penalties calls for a greater degree of reliability ...."].)

Accordingly, appellant requests reconsideration of this issue.

C. Reversal Is Required Because The Prosecution Urged The Jury To Rely On The Time-Barred Factor (b) Offense To Impose The Death Penalty.

Respondent contends that no prejudice is possible because other factor (b) evidence within the statute of limitations showed that appellant stabbed three inmates (Miller, Labatt, and Sanson) and on four occasions possessed weapons in his cell. (RB 197-98.) Therefore, on respondent's view, it is not "reasonably probable" that appellant would have received a more favorable outcome in the penalty trial. (RB 198.)

Respondent is mistaken for several reasons. Respondent's argument is based on the wrong standard of prejudice for penalty phase error. Under federal law, reversal is required unless respondent demonstrates that the violation of appellant's federal constitutional rights was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.) Under state law, "error in the admission of evidence under section 190.3, factor (b) is reversible only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 527, quoting *People v. Lancaster* (2007) 41 Cal.4th 50, 94.)

In addition, respondent ignores the role that the time-barred factor (b) offenses played in the prosecution's closing jury argument. The prosecutor repeatedly referred to those incidents, both verbally and with pages of detailed summary tables and charts. (14 RT 3439-40 [identification of summary materials used by prosecutor in closing penalty phase argument]; 4 CT 983-988 [copy of tables used by prosecution in closing argument]; 14 RT 3470-3483 [References to time barred other criminal activity prior to July 27, 1995, and related tables.].) The written materials were distributed to the jurors during the prosecutor's argument. (14 RT 3450.)

In *Johnson v. Mississippi* (1988) 486 U.S. 578 [108 S. Ct. 1981; 100 L. Ed. 2d 575], the United States Supreme Court reversed the death judgment where the prosecutor "repeatedly" urged the jury to give weight to inadmissible evidence of a single prior violent offense in balancing aggravating and mitigating circumstances. "Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'" (*Id.* at p. 586, quoting *Gardner v. Florida* (1977) 430 U.S. 349, 359 [97 S. Ct. 1197; 51 L. Ed. 2d 393] (plurality opinion).)

A fortiori, prejudice is present in this case under either the state or federal standard. (3 AOB 388.)

XIX.

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON DEFENSES AND THE APPLICATION OF APPELLANT'S MITIGATING MENTAL HEALTH EVIDENCE TO THE FACTOR (B) EVIDENCE OFFERED IN AGGRAVATION BY THE PROSECUTION.

A. Introduction.

As noted, the prosecution in the penalty phase presented multiple incidents of criminal activity as factor (b) evidence. (Penal Code, § 190.3, subd. (b); 14 RT 3439-40; Statement Of Facts, Section III.; 4 CT 942-952 [Second Amended Notice of Intention To Introduce Evidence In Aggravation (Pursuant To Penal Code Section 190.3).) At the request of the prosecution the trial court instructed the jury on the elements of the proffered factor (b) offenses. (12 RT 2861-62, 2875; 4 CT 1022, CALJIC No. 8.86 ["Penalty Trial – Conviction Of Other Crimes – Proof Beyond A Reasonable Doubt"]; 4 CT 1025-1037.)

However, with respect to the October 21, 1994, cell extraction at Calipatria State Prison, the court did not instruct the jury on the legal standards for self-defense and the right to resist excessive force. (3 AOB 393-401.) With regard to all of the factor (b) offenses, the trial court failed to instruct the jury that it should consider the evidence of appellant's mental health problems in deciding whether they justified the penalty of death or of life without possibility of parole. (3 AOB 402-414.)

Both errors violated appellant's state and federal rights to due process, to a fair trial, and to trial by jury and to capital sentencing proceedings that are reliable and not arbitrary and capricious. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; 3 AOB 392.)

Respondent claims that defense counsel invited any instructional error.

Alternatively, respondent argues that instructions on defenses to factor (b) offenses are not necessary because such offenses are not akin to charged crimes. Finally, respondent argues that CALJIC No. 8.85 ("Penalty Trial – Factors For Consideration") adequately informed the jurors that they could consider any defense to the factor (b) offenses. (RB 199.) Below, appellant addresses these arguments in turn.

B. Defense Counsel Did Not Invite The Errors.

In support of its claim of forfeiture, respondent emphasizes (RB 201) that after the prosecution requested instruction on the elements of the factor (b) offenses (12 RT 2861), defense counsel stated that "[b]asically I am objecting, to go though all of that, where the circumstances – where it's pretty obvious we are not contesting the existence of these various offenses. It really doesn't seem necessary." (12 RT 2861-62.) This is insufficient to establish that defense counsel invited the trial court not to instruct the jury on applicable defenses to the factor (b) offenses.

"The trial court's duty to fully and correctly instruct the jury on the basic principles of law relevant to the issues raised by the evidence in a criminal case is so important that it cannot be nullified by defense counsel's negligent or mistaken failure ... to request an appropriate instruction. The existence of some conceivable tactical purpose will not support a finding that defense counsel 'invited' an error in instructions. The record must reflect that counsel had a deliberate tactical purpose." (*People v. Avalos* (1984) 37 Cal.3d 216, 229, citations omitted; *accord People v. Valdez* (2004) 32 Cal.4th 73, 115-16.) "This rule is necessary to ensure that an accused's right to complete instructions is fully protected." (*People v. Wickersham, supra,* 32 Cal.3d at p. 332.)

Defense counsel's cross-examination of the prosecution witnesses and the evidence offered by him shows that he did not for tactical reasons fail to

request appropriate instructions on the applicable defenses to the factor (b) evidence.

The self-defense and excessive force issues related to the cell extraction incident at Calipatria State Prison on October 21, 1994. Four inmates, including appellant, withheld their dinner trays while locked in their cells in protest because one of the inmates was going to be transferred. (10 RT 2442-2445, 2448-49; 11 RT 2636, 2653-54.) The prosecution presented no evidence that appellant was armed or threatened to harm anyone while locked alone in his cell. (*Ibid.*) Appellant had simply barricaded himself in his cell with his mattress and refused to give up his food tray. (11 RT 2636.)

On cross-examination of Officer Cotton, defense counsel developed evidence that an officer fired a taser into appellant's cell. (10 RT 2450.) A taser is a gun that shoots pieces of metal hooked to a wire that delivers an electric shock. (*Ibid.*) A medical report showed that appellant received puncture wounds to his back and left chest consistent with a taser. (10 RT 2450.) Multiple officers entered appellant's cell. One hit appellant with a shield, knocking him onto the lower bunk. (10 RT 2453-54.) After this occurred, Officer Cotton handcuffed appellant. Appellant started kicking when another officer climber on top of him to restrain his legs. (*Ibid.*)

On cross-examination of Lieutenant Sweitch, who was a Sergeant at the time of the cell extraction, defense counsel developed evidence that after *Coleman v. Wilson* (E.D. Cal. 1995) 912 F.Supp. 1282 tasers were no longer used on inmates with mental health problems. (11 RT 2629-30, 2651-53.) In the defense case, appellant presented evidence that he had bipolar disorder and that use of a taser on someone with bipolar disorder "would be stressful in the extreme." (13 RT 3158; 3 AOB 400-402.)

The cell extraction occurred approximately three months after appellant wrote his letter to the Department of Corrections from Calipatria requesting

help for his mental health problems. (Exh. No. 95, CT. Suppl. B 37.) Prison medical records from before the incident showed that appellant had bipolar disorder. (13 RT 2121-22.) In closing, defense counsel argued that appellant was not a threat to staff and he had kicked a correctional officer only after he had been tasered. (14 RT 3541.)

Accordingly, the record shows that the defense contested whether the circumstances of the cell extraction reflected a crime of force or violence justifying the imposition of the death penalty. Moreover, once the trial court overruled the defense objection to instruction on the elements of the factor (b) offenses, it had a duty to instruct the jury on defenses supported by the evidence. (3 AOB 395.)

To address the prosecution's theory of the cell extraction, the trial court pursuant to CALJIC No. 7.37 instructed the jury on battery by a state prisoner on a non-confined person. (4 CT 1030; Penal Code, § 4501.5.) The Use Note for CALJIC No. 7.37 states that where the evidence raises a question of whether the use of force was lawful, "the court will have to define lawful force and give appropriate self-defense ... instructions ...." (CALJIC No. 7.37 (6th Ed. 1996) Use Note at p. 365.) The "Bench Notes" for the current pattern instruction on Penal Code section 4501.5 similarly states that "[i]f there is sufficient evidence of self-defense ..., the court has a *sua sponte* duty to instruct on the defense." (CALCRIM No. 2723; 3 AOB 395.)

The level of force used on appellant, including the taser, also raised a question of excessive force under state and federal law and, therefore, required an appropriate instruction. (3 AOB 396-98; *see, e.g., Madrid v. Gomez* (N.D. Cal. 1995) 889 F. Supp. 1146, 1245 ["The Eighth Amendment also prohibits those who operate our prisons from using 'excessive physical force against inmates.'"], quoting *Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S. Ct. 1970; 128 L. Ed. 2d 811]; *People v. Curtis* (1969) 70 Cal.2d 347, 356-57

["[T]he rule allowing resistance to excessive force, which applies during a technically lawful *or* unlawful arrest, protects a person's right to bodily integrity and permits resort to self-defense."].)

With respect to all of the factor (b) offenses, appellant presented the defense that he began to commit those offenses only after he was denied mental health care, even after plaintive requests for help from appellant, his grandmother, and her assemblyman. (*See, e.g.,* 14 RT 3520-21, 3526-27, 3534, 3542-43, 3547-48; Exh. No. 95, CT. Suppl. B 31, 32, 37.)

Therefore, the record rebuts respondent's claim that defense counsel had a deliberate tactical purpose for the trial court not to instruct the jury that it should consider appellant's mental health problems in evaluating whether the factor (b) evidence justified a sentence of life without the possibility of parole rather than death. (3 AOB 402.)

In support of its position, respondent cites *People v. Caitlin, supra,* 26 Cal.4th at p. 149 ("*Caitlin*"). (RB 202.) The issue in *Caitlin* was whether the trial court erred by failing to delete the reference to express malice in CALJIC No. 8.20 because both parties had agreed to delete the reference to express malice in another instruction, CALJIC No. 8.11. (*People v. Caitlin, supra,* 26 Cal.4th at pp. 148-49.)

Caitlin rejected this claim because "defendant did not request a modification of ... [CALJIC No. 8.20], an instruction that was appropriate under the facts of this case. 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*Id.* at p. 149, citations and internal quotation omitted.)

Caitlin does not apply here because appellant is not claiming that language in a pattern instruction should have been deleted or modified. The question is whether the trial court had a sua sponte duty to instruct the jury on

defenses to factor (b) offenses supported by the evidence once it granted the prosecution's request to instruct the jury on the elements of those offenses. As next explained, the answer to this question should be "yes." (*See also* 3 AOB 389-393.)

C. Once The Trial Court Decides To Instruct The Jury On The Elements Of The Factor (b) Offenses It Should Also Instruct On Defenses Supported By The Evidence.

On respondent's view (RB 199, 200), no defense instructions should be given because the "proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on his character, rather than on the labels to be assigned the past crimes or the existence of technical defenses to prior bad acts." (*People v. Cain* (1995) 10 Cal.4th 1, 73 ("*Cain*"), citations omitted.) The Court has also stated that, "for tactical reasons, defendants in the vast majority of cases do not want to risk highlighting prior violent crimes or alienating the jury with hypertechnical defenses to bad acts which otherwise seem clearly aggravating." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 592 ("*Tuilaepa*").)[34] However, the circumstances of *Cain* and *Tuilaepa* differ from this one.

In *Tuilaepa,* the defendant claimed that "the trial court erred in not including in the instruction the names and elements of the crimes offered by the prosecution under factor (b). Defendant argues that, absent such a 'frame of reference,' the jury might have improperly based their penalty determination

---

34. The other cases cited by respondent did not address the question of whether the trial court should instruct on defenses to factor (b) offenses. (RB 199, citing *People v. Anderson, supra,* 25 Cal.4th at pp. 587-88 [rejecting claim that the trial court had a sua sponte duty "to instruct, sua sponte, on the elements of the crimes the jury could consider in connection with the Mackey killing"]; *People v. Phillips* (1985) 41 Cal.3d 29, 68 ["The trial court had no sua sponte duty to instruct the jury about the elements of all of the crimes that may have been introduced at the penalty phase."].)

on acts which were not criminal or violent or which had not been proven to the requisite level of certainty." (*Id.* at p. 591.)

Here, the situation was the opposite. The trial court over appellant's objection instructed the jury on the elements on all of the factor (b) offenses. (12 RT 2861, 2862-63.) However, it thereafter gave no instructions on defenses to the factor (b) offenses supported by the evidence. (See Section B., above; 3 AOB 389-93.)

Tuilaepa explained that the trial court has no sua sponte duty to instruct on the elements of factor (b) offenses because, "for tactical reasons, defendants in the vast majority of cases do not want to risk highlighting prior violent crimes or alienating the jury with hypertechnical defenses to bad acts which otherwise seem clearly aggravating." (*People v. Tuilaepa, supra,* 4 Cal.4th at p. 592 .) From this, respondent infers that the trial court had no duty to instruct on the defenses at issue here.

However, the circumstances of the cell extraction were not clearly aggravating nor hypertechnical because of substantial evidence of excessive force. (*See* Section B, above; 3 AOB 393-401.) As to all of factor (b) offenses, the mental health evidence was not hypertechnical but went to the critical penalty phase issue of whether the factor (b) offenses reflected someone who was violent as a matter of character or because of the denial of treatment for his multiple, long-standing mental health problems.

In *Cain,* the defendant argued that the trial court erred by failing "to instruct, sua sponte, on the elements of assault [offered as a factor (b) offense] and on defense of others as a legal defense to assault." (*People v. Cain, supra,* 10 Cal.4th at p. 72.) *Cain* found no error from failing to instruct on the elements of the factor (b) offenses because "we have repeatedly held there is no duty, absent a request, to instruct on elements of crimes proven under factor (b)." (*Ibid.*, citations omitted.) As noted, this case differs because the trial

court over appellant's objection had granted the prosecution's request to instruct on the elements of all the factor (b) offenses.

As to the defense to the factor (b) assault, *Cain* "noted a trial court is not *prohibited* from giving such instructions on its own motion when they are 'vital to a proper consideration of the evidence.'" (*Ibid.*, quoting *People v. Davenport* (1985) 41 Cal. 3d 247, 282; *see also People v. Montiel* (1993) 5 Cal.4th 877, 942 [Assuming without deciding "that penalty instructions on the elements of aggravating 'other crimes' should include, on the court's own motion if necessary, any justified ... instructions" on a defense supported by the evidence.].)

Cain concluded that it need "not decide whether under some circumstances the trial court would have a sua sponte obligation to instruct on elements or defenses." (*Ibid.*) The defense had been able to present evidence of the defense of others in the alleged assault. Moreover, the record reflected "tactical considerations" for not wanting to highlight the particulars of the crime. (*Ibid.*) This was demonstrated by the fact that "the prosecutor devoted little time" to the assault at issue in its closing argument. (*Id.* at p. 73.) Defense counsel "also deemphasized the incident in his summation." (*Ibid.*)

In this case, the prosecutor repeatedly emphasized the factor (b) offenses in her opening and closing statements in the penalty phase. (10 RT 2428-36; 14 RT 3470-77, 3479-89, 3507-10, 3511.) In addition to requesting instructions on the elements of all of the factor (b) offenses, the prosecutor presented to each juror a chart identifying all of the factor (b) offenses and discussed them at length during closing argument. (14 RT 3470-72; 4 CT 983-988.) The prosecutor also argued that the cell extraction incident justified the death penalty because it showed that appellant was a danger to prison staff. (14 RT 3476.)

The argument made by appellant in the penalty phase was that the

factor (b) offenses occurred as the result of the denial of mental health treatment. (*See, e.g.,* 14 RT 3520-21, 3526-27, 3534, 3542-43, 3547-48.) As to the cell extraction incident, appellant argued that he was not a threat to staff because he kicked a correctional officer only after he had been tasered. (14 RT 3541.) Thus, unlike the situation in *Cain*, instructions on the applicable defenses in this case were "vital to a proper consideration of the evidence." (*People v. Davenport, supra,* 41 Cal. 3d at p. 282.)

D. There Was Sufficient Evidence To Instruct The Jury On Defenses To The Factor B Offenses.

Alternatively, respondent argues that when the "the totality of the evidence" is considered there was no basis to instruct the jury on self-defense or excessive force in connection with the alleged battery on staff in the cell extraction at Calipatria. (RB 203-04.) Respondent once again errs by failing to recognize that in deciding whether to instruct the jury on a defense, the evidence should be "[c]onstrued in the light most favorable to" the defendant. (*United States v. Bailey, supra,* 444 U.S. at p. 398.) "[T]he trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt ....'" [Citation.]'" (*People v. Salas, supra,* 37 Cal.4th at pp. 982-83.)

The trial judge must accept as true the evidence favorable to the defendant, disregard conflicting evidence, and draw only those inferences from the evidence which are favorable to the defendant. (*People v. Flannel, supra,* 25 Cal.3d at pp. 684-85.) Thus, even though a trial judge may find the evidence "less than convincing" it must instruct the jury on the defense theory. (*People v. Turner* (1990) 50 Cal.3d 668, 690.) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citation.]" (*People v. Tufunga, supra,* 21 Cal.4th at p. 944.)

Applied here, the evidence discussed above in Section B. and

previously in appellant's opening brief shows there was sufficient evidence to instruct the jury on self-defense and excessive force based on the testimony of the officers involved, appellant's mental health records, and the testimony by Dr. Gawin. (3 AOB 398-402.) Respondent believes that appellant did not have a right of self-defense to the use of excessive force because he refused to give up his food tray or agree to be handcuffed and come to out of his cell. (RB 203.)

Inmates are subject to the commands of a correctional officer. However, they "do not, however, forfeit all rights to self-defense. Thus a correctional officer is not entitled to use unreasonable or excessive force while escorting a prisoner. If the officer does, the prisoner is not guilty of violating P.C. 4501.5 (battery by a prisoner on a nonprisoner ...." (1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 67; 3 AOB 396.)

The right to use reasonable force to resist excessive force is also recognized by statute and case law. (3 AOB 396-97; Pen. Code, § 692 ["Lawful resistance to the commission of a public offense may be made ... [b]y the party about to be injured."]; Pen. Code, § 693 ["Lawful resistance to the commission of a public offense may be made ... [b]y the party about to be injured."]; *People v. Curtis* (1969) 70 Cal.2d 347, 356-57 ["[T]he rule allowing resistance to excessive force, which applies during a technically lawful *or* unlawful arrest, protects a person's right to bodily integrity and permits resort to self-defense. ... Sections 692 and 693 set forth the basic privilege one has to defend against unlawful force."]; *see also* Civ. Code, § 50 ["Any necessary force may be used to protect from wrongful injury the person ... of oneself ...."].)

Respondent claims that appellant has ignored his "violent history known to the guards by that time." (RB 203.) However, none of the witnesses to the cell extraction testified that they knew of or acted because of other

incidents. Nor did they testify that appellant had a weapon, was in the process of fabricating a weapon, or threatened the guards with force or violence.

Moreover, the staff at Calipatria knew or should have known that appellant had serious mental health problems. In July of 1994, three months before the cell extraction incident in October, Calipatria received the plaintive letters from appellant and his grandmother requesting mental health treatment (CT. Suppl. B, Exh. No. 95 at 36-37.) Prison medical records from before the incident showed that appellant had bipolar disorder. (13 RT 2121-22.)

As to the mental health defense to the factor (b) offenses, respondent claims that appellant failed to offer a "hint" of what an appropriate instruction should have been. (RB 207.) However, appellant explained that the court should have instructed "the jury that it must consider the evidence of appellant's mental health problems in deciding whether the evidence of other criminal activity justified a sentence of death or life without the possibility of parole." (3 AOB 402, 404.)

E. The Other Instructions Referred To By Respondent Addressed The Circumstances Of The Capital Offense, Not The Factor (b) Evidence.

Respondent contends that the portions of CALJIC No. 8.85 ("Penalty Trial – Factors For Consideration") addressing factors (d), (h) and (k) advised the jury to consider the evidence of appellant's mental health problems in evaluating the factor (b) evidence. (RB 204-06.)

Respondent notes (RB 204-05) that the opening paragraph of CALJIC No. 8.85 stated that the jury "shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guide by the following factors, if applicable: ...." (4 CT 1020.) However, the specific language for factors (d) and (h) addressed the circumstances of the capital

crime.

The factor (d) instruction advised the jury that it could consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (4 CT 1020.) The factor (h) instruction advised the jury that it could consider "[w]hether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct." (*Ibid.*) Thus, the jury would have applied the factor (d) and factor (h) instructions to the capital offense, not to the factor (b) offenses. (*United States v. Olano, supra,* 507 U.S. at p. 740 ["[W]e presume that jurors, conscious of the gravity of their task, attend closely the particular language of the court's instructions in a criminal case . . . and follow the instructions given them."'], citations omitted.)

Respondent further notes that the factor (k) instruction advised the jury that it could consider "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (4 CT 1021.)

However, respondent fails to explain how the factor (k) instruction informed the jury that it should consider the mental health evidence in evaluating the factor (b) evidence. The instruction did not refer to the factor (b) evidence. The specific language of CALJIC No. 8.85 addressing the factor (b) evidence advised the jury to consider "the presence or absence of criminal activity other than the crimes for which the defendant has been tried in the present proceedings, which involved the attempted use of force or violence or the express or implied threat to use force or violence." (4 CT 1021.) It did not advise the jury to consider of any legal defenses or mitigating mental health evidence with respect to that criminal activity. (*Ibid.*)

Moreover, the instruction on the standard of proof for the factor (b) offenses said that they "all ... involved the express or implied use of force or violence or the threat of force or violence. (4 CT 1023, CALJIC No. 8.87.) The only issue left for the jury to decide was the undisputed issue that appellant was the person involved in the criminal activity. (*Ibid.* ["Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant Daniel Landry did in fact commit the criminal activity."].)

Accordingly, in the absence of the appropriate defense instructions, the jury would have concluded that all of the factor (b) evidence was an aggravating circumstance without consideration of any mitigating circumstance.

Finally, none of the components of CALJIC No. 8.85 respondent proffers as curative addressed either self-defense or excessive force. For all these reasons, CALJIC No. 8.85 was insufficient to cure the trial court's error in failing to instruct on the appropriate defenses to the factor (b) evidence.

F. Omission Of Defense Instructions Requires Reversal.

Respondent contends that appellant's prejudice argument presupposes that the jury imposed the death sentence based "only" on the factor (b) evidence. (RB 205.) This is incorrect. The point is that the evidence of 27 factor (b) offenses was the salient evidence offered by the prosecution during the penalty trial. The prosecution called multiple witnesses to testify about 27 factor (b) offenses accompanied by numerous exhibits. (1 AOB 31-43 [summary of factor (b) evidence].)

Moreover, the majority of the prosecution's penalty phase closing argument addressed the factor (b) evidence accompanied by summary tables. (14 RT 3470-77, 3479-89, 3507-10, 3511; 4 CT 983-88.)

Respondent notes (RB 206) that defense counsel in his penalty phase

closing argument discussed appellant's troubled upbringing, his resulting psychological problems, and the lack of proper mental health care while in prison. (14 RT 3520-3534.) In particular, respondent points out that defense counsel argued that the lack of mental health treatment diminished the weight of the factor (b) evidence. (14 RT 3534.)

However, "arguments of counsel cannot substitute for instructions by the court." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488-89 [98 S. Ct. 1930; 56 L. Ed. 2d 468]; accord *Carter v. Kentucky, supra,* 450 U.S. at p. 304.) "[I]nstruction by the trial court would weigh more than a thousand words from the most eloquent defense counsel." (*People v. Reynolds* (1988) 205 Cal.App.3d 776, 781.)

In the guilt phase, the court instructed the jury that it rather than arguments of counsel was the source of the law that "[y]ou must accept and follow ...." (3 CT 839-40, CALJIC No. 1.00 ["You must accept and follow the law as I state it to you, regardless of whether you agree with the law. If anything said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions."].) At the penalty phase, the court reiterated that "[y]ou must accept and follow the law that I shall state to you." (4 CT 1005, CALJIC No. 8.84.1.) Therefore, the jurors would not have considered the arguments of defense counsel as providing the law governing their review of the factor (b) evidence.

Penalty phase error requires reversal unless the error was harmless beyond a reasonable doubt (*Chapman, supra,* 386 U.S. at p. 24) or there is a reasonable possibility that the error affected the verdict. (*People v. Lewis, supra,* 43 Cal.4th at p. 527.) Given the critical role of the factor (b) evidence in the penalty phase, the failure to instruct on defenses to the factor (b) evidence was prejudicial under state or federal law. (3 AOB 404-414.)

XX.

CALJIC NO. 8.87 ERRED BY FAILING TO REQUIRE JURY UNANIMITY AND BY DIRECTING THE JURY TO FIND THAT "ALL" OF THE FACTOR (B) EVIDENCE INVOLVED THE EXPRESS OR IMPLIED USE OF FORCE OR VIOLENCE OR THE THREAT OF THE SAME.

A. Appellant's Claims Are Cognizable.

Another instructional error affected all of the factor (b) evidence. CALJIC No. 8.87 erred by failing to require unanimity, by creating a mandatory presumption that the alleged criminal activity involved the use of force or violence, and by directing verdict on the question of force or violence. These errors violated appellant's state and federal constitutional rights to due process of law, to trial by jury, to a fair trial, and to reliable capital sentencing proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; 3 AOB 415, 417-425.)

Respondent claims (RB 207-08) that defense counsel invited the errors by the following statement: "My suggestion as to [CALJIC No.] 8.87, your Honor, is that rather than enumerating each of the events that would have been proved in the case, that it simply be worded more generically to say something like evidence has been introduced for the purpose of showing the defendant committed a criminal activity which involved the express or implied use of force or violence or the threat of force or violence. And go from there. But to put into the instruction a list of every date and every little incident, I think, is not even necessary or appropriate." (12 RT 2862-83.)

As previously explained, the doctrine of invited error applies, "only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness." (*People v. Tapia, supra,* 25 Cal.App.4th at p. 1031, quoting *People v.*

Wickersham, supra, 32 Cal.3d at p. 330.) Nothing in the statement by defense counsel shows that for tactical reasons he invited the instructional errors at issue here.

Moreover, respondent does not dispute that if appellant is correct as to the nature of the errors, his claims are cognizable as affecting appellant's substantial rights (Penal Code, § 1259; (*People v. Gray* (2005) 37 Cal.4th 168, 234 ["If, however, defendant is correct that the factor (b) instruction directed a verdict on a point essential to his death penalty judgment, the instruction would have affected a substantial right of his, and section 1259 would permit him to raise the issue on appeal despite failure to object."]), because justice requires consideration of the issue (*People v. Barber, supra,* 102 Cal.App.4th at p. 150), or to forestall a later claim of ineffective assistance of counsel (*People v. Mattson, supra,* 50 Cal.3rd at p. 854; *People v. Norwood, supra,* 26 Cal.App.3d at p. 153; 3 AOB 416-17.)

B. <u>The Issues Should Be Reconsidered By This Court</u>.

In his opening brief, appellant acknowledged decisions by appellant rejecting similar claims of error with respect to CALJIC No. 8.87. (3 AOB 417-18.) Respondent cites additional adverse authority issued after appellant filed his opening brief. (RB 208-209, citing *People v. Butler, supra,* 46 Cal.4th at . 872 ["We have also consistently ruled that whether criminal acts pose a threat of violence is a legal question for the trial court, and that CALJIC No. 8.87 does not create an unconstitutional mandatory presumption. [Citations.]"]; *People v. Jackson* (2009) 45 Cal.4th 662, 700 [rejecting claim that CALJIC No. 8.87 erred by failing to require the jury to find unanimously that defendant committed a particular prior act under factor (b)]; *People v. Taylor, supra,* 47 Cal.4th at p. 898 [same].)

These holdings should be reconsidered under the authority discussed in appellant's opening brief. (3 AOB 417-425.) For purposes of this reply,

appellant emphasizes two points.

First, the current pattern instruction addresses the factor (b) evidence as "alleged" and directs the jury to determine whether it "involves the unlawful use or attempted use of force or violence or the direct or implied threat to use force or violence." (CALCRIM No. 763 ["Death Penalty: Factors to Consider--Not Identified as Aggravating or Mitigating (Pen. Code, § 190.3)"]; *see also* CALCRIM No. 764 ["Death Penalty: Evidence of Other Violent Crimes"] ["The People must prove beyond a reasonable doubt that the defendant committed each of the alleged crimes."]; 3 AOB 419-20.)

Second, the Sixth Amendment requires "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" (*Blakely v. Washington, supra,* 542 at p. 301, citation omitted; *accord Apprendi v. New Jersey, supra,* 530 U.S. at p. 477.)

The reason for requiring unanimity is to ensure the reliability of the verdict. As then Circuit Justice Kennedy explained:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict. (*United States v. Lopez* (9th Cir. 1978) 581 F.2d 1338, 1341.)

In a capital case such as this, these concerns are heightened. (3 AOB 424; *see, e.g., Monge, supra,* 524 U.S. at p. 732 ["Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital sentencing proceedings."]; *Sawyer v. Smith* (1990) 497

U.S. 227, 243 [110 S. Ct. 2822; 111 L. Ed. 2d 193] ["All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense."].)

C. Respondent Conceded Prejudice.

If error is present, respondent conceded the issue of prejudice by failing to address it. (*People v. Johnwell, supra,* 121 Cal.App.4th at p. 1278 ["The People have not made the slightest attempt to meet this standard [of prejudice], an omission we view as a tacit concession they cannot do so."]; *People v. Adams, supra,* 143 Cal.App.3d at p. 992 ["Respondent's failure to argue the point [of prejudice] must be viewed as a concession that if error occurred, reversal is required."].)

XXI.

EVIDENCE OF DISPARATE TREATMENT OF AN ACCOMPLICE IS CONSTITUTIONALLY RELEVANT EVIDENCE SO THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY THAT IT MUST RETURN A LIFE VERDICT IF IT FOUND THAT DEATH PENALTY WAS DISPROPORTIONATE IN COMPARISON FOR APPELLANT.

A. Introduction.

Under federal law, the disparate treatment of the accomplice Green under the circumstances of this case was relevant mitigating evidence. (*See, e.g., Parker v. Dugger* (1991) 498 U.S. 308, 310 [111 S. Ct. 731; 112 L. Ed. 2d 812] [Disparate treatment of an accomplice is non-statutory mitigating evidence relevant "to determine whether ... [the defendant's] death sentence meets federal constitutional requirements."]; *see also id.* at pp. 315, 321; *Tennard v. Dretke* (2004) 542 U.S. 274, 284-85 [124 S. Ct. 2562; 159 L. Ed. 2d 384] ["'Relevant mitigating evidence is evidence which tends logically to

prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value' [Citation]"].)

The same should be the case as a matter of state law. (Penal Code, § 190.3, paragraph 1 [The jury may consider "any matter relevant to aggravation, mitigation, and sentence ...."]; Evid. Code, § 210 [Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."]; 3 AOB 432, 436.)

Accordingly, the trial court should have instructed the jury that it must return a verdict of life without the possibility of parole if it found that a death sentence for appellant was disproportionate punishment for the crime when compared to the treatment of an accomplice. (3 AOB 428; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233 [127 S.Ct. 1654, 1668; 167 L.Ed.2d 585] ["'Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.' [Citation]."].)

B. <u>Respondent's Position Is Based On Several Errors</u>.

Respondent argues that there was no factual or legal basis to instruct the jury to determine whether a death sentence for appellant would be disproportionate in comparison to the treatment of an accomplice. Respondent's argument is based on several errors.

Respondent claims that Green was released from prison "10 months" after Addis was killed. (RB 210.) Addis was killed on August 3, 1997. (5 RT 1057.) On October 10, 1997, the Department of Corrections found Green "guilty" of a conspiracy to commit a battery resulting in the death of Addis. (4 RT 1145-46, Exh. No. 50.) On October 30, 1997, the Department of Corrections paroled Green from state prison. (6 RT 1419; Exh. No. 53, 4 CT

1157.) That date was 20 days after the guilt determination and less than three months after he ordered and orchestrated the assault on Addis.

Next, respondent claims that "all" the jury learned about Green was that he made "a ruckus" about bringing Addis onto the yard and that in a "disciplinary action at Calipatria pursuant to CDC 115 procedures which found he was involved in a conspiracy to murder Addis, partially based upon the fact he was a NLR 'shot caller.'" (RB 211.) Therefore, on respondent's view, there was only "speculation" in the record about Green's role in the crime. (*Ibid.*)

The administrative hearing occurred at C.I.M., not at Calipatria State Prison. (Exhibit No. 50, 4 CT 1145.) The lieutenant in charge of the hearing did not find that Green was involved in a conspiracy to commit murder. He found Green "guilty" of a "conspiracy to commit a battery resulting in the death of inmate Addis ...." (4 CT 1145, 1146.)

Respondent also errs in asserting that there was only "speculation" in the record about Green's role in the assault on Addis. (RB 211.) An inference is speculative if it does not have a foundation in the record. (*People v. Raley* (1992) 2 Cal.4th 870, 891 ["'A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'"], citation and internal quotation omitted.)

As explained above in Section VI.B.2, Green's role in the crime was a central issue in the case, beginning with the first prosecution witness (Officer Esqueda, 5 RT 1079-80), additional officers (Sergeant Sams, 6 RT 1308-08, 1345-54, 1403-1413; Officer Valencia, 5 RT 1180-86, 1189-90; Officer Ginn, 8 RT 1781-83; Officer Kaffenberger, 7 RT 1595-96,), inmates (Allen, 5 RT 1231-33; Rogers, 6 RT 1275-76, 1286-87), and the prosecution's prison gang expert (Glen Willettt; 7 RT 1719, foll.). It continued in the defense case with the testimony of Officer Maldonado (8 RT 1801, foll.) and the defense experts

(Steven Rigg and Anthony L. Casas). (8 RT 1911, foll., 8 RT 1922, foll.) (3 AOB 435.)

Without objection from the prosecution, the trial court also admitted in evidence a series of exhibits detailing the Department of Corrections' investigation, administrative disposition, and parole of Green. (9 RT 2207-09 [admitting exhibits without objection from prosecution]; 4 CT 1145-49, Exhibit No. 50 ["Rules Violation Report" for hearing finding Green guilty of conspiracy to commit a battery on an inmate resulting in death of Addis.]; 4 CT 1150-51, Exhibit No. 51 ["Confidential Information Disclosure Form" stating that more than one source "independently" provide information that Green "ordered the 'hit' on ADDIS, and that you were adamant about his arrival to the yard on that date [08-03-97]."]; 4 CT 1162, Exh. No. 56 [9/26/97 "Rules Violation Report" of investigation of Green role in demanding that Addis be brought to the yard, and 10/10/97 finding Green guilty and that more than one source independently provided information that Green "ordered the 'hit' on ADDIS."]; 4 CT 1163, Exh. No. 57 [Continuation of 10/10/97 Rules Violation Report stating that Green had admitted he was "the 'shot caller' for the white management population within Palm hall" and "a validated member of the white supremacist prison gang NLR (Nazi Low Rider)."]; 5 CT 1239, Exhibit No. No. 70 [custody chronology for Green for 7/15/97 to 6/23/98, showing that he was paroled on 10/30/97].)

Accordingly, respondent errs in arguing that there was only speculation in the record about Green's role in the assault on Addis and his disparate treatment.

Respondent also errs in arguing that Green had to be paroled because he had completed his sentence. (RB 212.) Sergeant Sams testified that "If he's maxed out on his sentence, there is nothing that can be done." (6 RT 1442-43].) However, there is no evidence that Green had served his entire sentence.

To the contrary, the lieutenant imposed as punishment a 360 day credit loss, indicating that Green had additional time to serve. (Exh. No. 50, 4 CT 1146.)

Even assuming that Green had served his entire sentence, the Department of Corrections could have held Green in custody up to the length of his parole term if it had referred him for criminal prosecution. (Penal Code, § 2932, subd. (g).)[35] The Attorney General explained this in response to a question from the Director of the Department of Correction by discussing the identical language in former subdivision (d) of Penal Code section 2932. (65 Ops. Cal. Atty. Gen. 668 [1982 Cal. AG LEXIS 3 at p. *1 ["A state prisoner ... may be held in state prison after his or her anticipated good-time release date has expired if prison administrative proceedings or criminal proceedings are pending which could result in the loss of good-time credits."].)

If Green was not prosecuted, any additional time in custody would have been deducted from his parole term. (Penal Code, § 2932, subd. (g); *In re Semons* (1989) 208 Cal App 3d 1022, 1028 & fn. 9; 65 Ops. Cal. Atty. Gen. at p. 668.) When the Department of Corrections released Green on October 30, 1997, his tentative discharge date from parole was October 19, 2000. (Exhibit No. 70, 5 CT 1239.) Therefore, the 360 day credit loss was less than his parole term and Green could have been held in prison for that period of time if the Department of Corrections had referred him for prosecution. (Penal Code, § 2932, subd. (g); 65 Ops. Cal. Atty. Gen. at p. 668.)

By releasing Green on October 20, 1997, the Department of Corrections "did not punish him for being involved in a conspiracy as charged, yet they

---

35. In 1997, Penal Code section 2932 provided: "If time credit denial proceedings or criminal prosecution prohibit the release of a prisoner who would have otherwise been released, and the prisoner is found not guilty of the alleged misconduct, the amount of time spent incarcerated, in excess of what the period of incarceration would have been absent the alleged misbehavior, shall be deducted from the prisoner's parole period." (Penal Code, § 2932,

found him guilty." (8 RT 1975-76.)

C. Given The Evidence In This Case, The Disparate Treatment Of Green Was Either Mitigating Evidence Relevant To The Circumstances Of The Crime Or Non-Statutory Mitigating Evidence.

Respondent contends that several cases show that the disparate treatment of Green was irrelevant to the decision of whether appellant should be sentenced to death because it did not shed any light on circumstances of the offense or on appellant's background, character or mental condition. (RB 210, 211, 212, 213, citing *People v. Brown, supra,* 31 Cal.4th at p. 562; *People v. McDermott* (2002) 28 Cal.4th 946, 1004-05; *People v. Bemore* (2000) 22 Cal.4th 809, 857 ("*Bemore*".) Appellant addressed and distinguished those cases in his opening brief. (3 AOB 434-36.)

Respondent asserts that *Bemore* is "particularly on point." (RB 210.) In *Bemore*, the defendant and Keith Cosby were jointly charged but separately tried for the robbery and murder of the clerk at the "Aztec Liquor Store" in San Diego. (*People v. Bemore, supra,* 22 Cal.4th at pp. 817, 821, fn. 4.) The defendant argued that "the trial court erred in failing to instruct the jury sua sponte as to the sentence received by Cosby in a separate trial based on his participation in the Aztec crime." (*Id.* at p. 857.)

However, the defendant conceded at his trial that evidence of "Cosby's sentence 'should be excluded" because it was "irrelevant and inadmissible." (*Id.* at p. 857.) Apart from this concession, *Bemore* stated that the "'fact that a different jury under different evidence, found that a different defendant should not be put to death is no more relevant than a finding that such a defendant should be sentenced to death. Such evidence provides nothing more than incomplete, extraneous, and confusing information to a jury, which is then left

---

subd. (g).)

to speculate [on the matter].' [Citation.]" (*Ibid.*)

In this case, there was no separate jury, evidence, or sentence for Green. Without objection from the prosecution, the court admitted all of the testimony about Green's role in the crime, as well as the Department of Corrections' investigation, guilt determination, and release of Green on parole.[36] (9 RT 2207-09.) In addition, the prosecutor conceded that Green was a "co-principal" in the crime and "equally guilty" as appellant. (10 RT 2315-16; 3 AOB 427.)

Accordingly, the evidence related to Green was no more incomplete, extraneous or confusing than the evidence offered to establish appellant's role in the crime. From evidence that Green received essentially no punishment despite the findings of the Department of Corrections and the prosecution's concessions, a properly instructed juror would have reasonably concluded that the Addis homicide was not the type of crime for which the death penalty should be imposed. (3 AOB 442-43; *see, e.g., Kennedy v. Louisiana, supra,* 128 S.Ct. at pp. 2649-50; *Gregg v. Georgia, supra,* 428 U.S. at p. 184.)

As such, the evidence was relevant to the "circumstances of the crime

---

36. See Statement of Facts, 1 AOB 4-5, 7-13; 4 CT 1145-49, Exhibit No. 50 ["Rules Violation Report" for hearing finding Green guilty of conspiracy to commit a battery on an inmate resulting in death of Addis.]; 4 CT 1150-51, Exhibit No. 51 ["Confidential Information Disclosure Form" stating that more than one source "independently" provide information that Green "ordered the 'hit' on ADDIS, and that you were adamant about his arrival to the yard on that date [08-03-97]."]; 4 CT 1162, Exh. No. 56 [9/26/97 "Rules Violation Report" of investigation of Green role in demanding that Addis be brought to the yard, and 10/10/97 finding Green guilty and that more than one source independently provided information that Green "ordered the 'hit' on ADDIS."]; 4 CT 1163, Exh. No. 57 [Continuation of 10/10/97 Rules Violation Report stating that Green had admitted he was "the 'shot caller' for the white management population within Palm hall" and "a validated member of the white supremacist prison gang NLR (Nazi Low Rider)."]; 5 CT 1239, Exhibit No. No. 70 [custody chronology for Green for 7/15/97 to 6/23/98, showing he

of which the defendant was convicted in the present proceeding ...." (Penal Code, § 190.3, subd. (a).) This follows from the definition of relevance as including evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.". (Evid. Code, § 210.) "This definition of relevant evidence is manifestly broad. Evidence is relevant when no matter how weak it is it tends to prove a disputed issue." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843; *accord People v. Freeman* (1994) 8 Cal.4th 450, 491.)

In this case, one of the disputed factual questions was whether the circumstances of the crime justified the death penalty for appellant given that the person who ordered and orchestrated the crime effectively received no punishment. (*See, e.g.,* 8 RT 1975-76; 10 RT 2299-2309.) Accordingly, the trial court should have instructed the jurors that they could consider this disparate treatment in deciding whether appellant should be sentenced to death. (*Abdul-Kabir v. Quarterman, supra,* 127 S.Ct. at p. 1668 ["'Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.' [Citation]."].)

Even assuming (for purposes of argument only), that the evidence was not relevant to the circumstances of the crime, it was relevant non-statutory mitigating evidence. In penalty proceedings, mitigating evidence is not limited to the specific categories of evidence defined by factors (a) to (k). The jury may consider "any matter relevant to ... mitigation, and sentence, including, but not limited to" factors (a) to (k). (Penal Code, § 190.3, ¶ 1.)

A reasonable juror would have properly concluded that, while appellant should be punished, he should not be sentenced to death where the ringleader of the crime effectively received no punishment. In *Littrell v. United States*

---

was paroled on 10/30/97].

(C.D. Cal. 2007) 478 F.Supp. 2d 1179, a case which respondent did not address or distinguish, the court reached this conclusion where the government did not seek the death penalty against the gang leaders who ordered the killing of an inmate. (3 AOB 443-45.)

D. *Parker v. Dugger* Supports Appellant.

Disparate treatment of an accomplice is also relevant mitigating evidence under the Eighth Amendment. In *Parker v. Dugger, supra,* 498 U.S. 308 ("*Parker*"), the high court held that disparate treatment of an accomplice is relevant mitigating evidence. In his opening brief, appellant recognized decisions by this Court construing *Parker* as reflecting only a "Florida rule" rather than a federal constitutional rule. (*People v. Mincey* (1992) 2 Cal.4th 408, 479-80; *accord People v. Cain, supra,* 10 Cal.4th at p. 63; 3 AOB 437-38.)

Respondent cites additional authority concluding the same and argues that there is no reason to reconsider this issue. (RB 213, citing *People v. Brown, supra,* 31 Cal.4th at pp. 562-63; *People v. McDermott, supra,* 28 Cal.4th at pp. 1004-1005; *People v. Bemore, supra,* 22 Cal.4th at pp. 857-58; *People v. Rodrigues,* (1994) 8 Cal.4th 1060, 1188-89.)

However, *Parker* may not be limited as a "Florida rule." The case came to the United States Supreme Court via a collateral attack on a state court judgment in federal habeas proceedings. (*Parker, supra,* 498 U.S. at pp. 311-13.) That meant that the federal courts only had jurisdiction to address a federal question. (28 U.S.C. 2254; *Cullen v. Pinholster* (2011) ___ U.S. ___ [131 S. Ct. 1388, 1398; 179 L. Ed. 2d 557, 569]; *Coleman v. Thompson* (1991) 501 U.S. 722, 730-31 [111 S. Ct. 2546; 115 L. Ed. 2d 640].)

Parker explained this by stating that "[t]his case requires us to determine precisely what effect the Florida courts gave to the evidence petitioner presented in mitigation of his death sentence, and consequently to

determine whether his death sentence meets federal constitutional requirements. (*Id.* at p. 310.)

The defendant's sentence did not pass federal constitutional scrutiny because the state trial court and the Florida Supreme Court did not consider "nonstatutory mitigating evidence." (*Id.* at pp. 311.) In federal habeas proceedings, the District Court found "sufficient evidence in the record to support a finding of nonstatutory mitigating circumstances ...." (*Id.* at p. 312.) The District Court ordered the State of Florida to hold a resentencing hearing within 120 days, or to vacate the death sentence and impose a lesser sentence. (*Ibid.*)

The District Court relied on *Hitchcock v. Dugger* (1987) 481 U.S. 393 [107 S. Ct. 1821; 95 L. Ed. 2d 347]. (*Parker, supra,* 498 U.S. at p. 312.) *Hitchcock* reiterated the Eighth Amendment rule that "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." (*Hitchcock, supra,* 481 U.S. at p. 394, citing *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669; 90 L.Ed.2d 1]; *Eddings v. Oklahoma, supra,* 455 U.S. at p. 114, and *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S. Ct. 2954; 57 L. Ed. 2d 973].) The Eleventh Circuit reversed the District Court, but *Parker* granted certiorari and reversed the Court of Appeals. (*Parker, supra,* 498 U.S. at pp. 312-13.)

The non-statutory mitigating evidence included evidence "that none of Parker's accomplices received a death sentence for the Sheppard murder." (*Id.* at p. 314.) The failure of the state courts to consider that evidence was error because "[u]nder both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence. (*Id.* at p. 315, emphasis added, citing, *inter alia, Lockett v. Ohio* (1978) 438 U.S. 586 [98 S. Ct. 2954; 57 L. Ed. 2d 973] (plurality opinion), and *Eddings v. Oklahoma, supra,* 455 U.S. 104.)

Accordingly, *Parker* did not just address a Florida Rule. (3 AOB 439-

40.) It relied on a fundamental principal of Eighth Amendment barring a refusal to consider "any mitigating evidence." (*Parker, supra,* 498 U.S. at p. 315; *Hitchcock, supra,* 481 U.S. at p. 394 ["in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence"].)

In affirming the death sentence, the Florida Supreme Court had failed to consider non-statutory mitigating evidence, including disparate treatment of the accomplices. (*Parker, supra,* 498 U.S. at p. 321.) The failure to do so was "arbitrary" in violation of the Eighth Amendment rule that "'[i]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Ibid.*, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460 [104 S. Ct. 3154; 82 L. Ed. 2d 340].)

Moreover, the high court since *Parker* has subsequently held that under the Eighth Amendment "'[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (*Tennard v. Dretke, supra,* 542 U.S. at pp. 284-85, quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440-441 [110 S. Ct. 1227; 108 L. Ed. 2d 369].) "Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." (*Id.* at p. 285, *accord Smith v. Texas, supra,* 543 U.S. at p. 45; 3 AOB 441-42.)

As previously explained (3 AOB 442-45) and discussed further below, a properly instructed juror would have reasonably deemed the disparate treatment of Green to have mitigating value in deciding whether appellant should be sentenced to death.

E. The Death Judgment Must Be Reversed.

As to prejudice, respondent erroneously asserts that appellant "single-handedly" carried out the murder of Addis. (RB 212.) The evidence from multiple sources showed that Green ordered and orchestrated the assault on Addis and positioned him to be assaulted at the table on the yard. (5 RT 1079-80, 1084-85, 1134-35, 1138-40, 1143-44, 1148, 1164-65, 1232-33; 6 RT 1283-85; 8 RT 1805-1809.)

Respondent also argues that the assault on Addis was the type of "extreme" case for which the death is the only appropriate penalty because appellant committed an unprovoked stabbing on Addis in front of other inmates and guards. (RB 213.) If, as respondent otherwise argues (RB 91-104), the letter admitted in evidence as Exhibit No. 66 addressed the assault on Addis, then Addis provoked the assault by threatening to do him harm and to kill him on the yard. (5 CT 1228.) The fact that it occurred on the prison yard in front of others was the result of the manner in which Green orchestrated the assault that he had ordered.

Appellant does not condone the killing of Addis or claim that he should not be punished for committing the fatal assault. However, a properly instructed jury would have found that if Green received no punishment despite his leadership role in the assault, then appellant should not be sentenced to death. In *Littrell v. United States, supra,* 478 F.Supp. 2d 1179, the court reached the same conclusion under analogous circumstances of an assault on an inmate ordered by AB gang leaders. (3 AOB 443-45.)

Appellant concludes with the high court's admonition that "in the absence of an appropriate instruction directing the 'jury to consider fully' mitigating evidence as it bears on the extent to which a defendant is undeserving of a death sentence, 'we cannot be sure' that it did so." (*Abdul-Kabir v. Quarterman, supra,* 127 S.Ct. at pp. 1669, citation omitted.) For the

same reasons, appellant's death sentence should be reversed.

XXII.

THE USE OF RESTRICTIVE ADJECTIVES IN THE JURY INSTRUCTIONS ON SEVERAL MITIGATING FACTORS AND THE REQUIREMENT OF A NEXUS TO THE CRIME BARRED CONSIDERATION OF MITIGATING EVIDENCE.

The principal mitigating evidence offered by appellant was his life-long history of mental health problems, including a schizoid personality disorder and bipolar disorder. (3 AOB 460-65; *see, e.g.*, 13 RT 3108, 3199-3201.) As a result, appellant was easily manipulated by others, subject to duress, and acted violently when denied mental health treatment, although he was not violent by nature. (13 RT 3201-3202, 3108-09; 3 AOB 460-65.)

The jury instruction addressing mental health issues and duress (CALJIC No. 8.85, factors (d), (g) & (h)) improperly restricted consideration of that evidence by requiring a nexus or causal connection to the crime. (3 AOB 447, 448-452.) In addition, by use of the qualifying adjectives "extreme", "substantial", and "impaired", the instructions on those factors improperly imposed a threshold requirement for consideration of mitigating evidence. (3 AOB 453-54.)

In his opening brief, appellant acknowledged decisions by this Court rejecting similar claims. (3 AOB 448; *see, e.g.*, *People v. Romero* (2008) 44 Cal.4th 386, 429; *People v. Griffin* (2004) 33 Cal.4th 536, 598-99; *People v. Crew* (2003) 31 Cal.4th 822, 860.)

Respondent identifies additional authority (RB 214-15) stating that "[b]ecause the jury was instructed on miscellaneous sympathy evidence under section 190.3, factor (k), '[t]he temporal language in section 190.3, factors (d) and (h) (consideration of any extreme mental or emotional disturbance or impairment from mental disease or defect or the effects of intoxication *at the*

time of the offense), [does] not preclude the jury from considering any such evidence merely because it did not relate specifically to defendant's culpability for the crimes committed.'" (*People v. Combs, supra,* 34 Cal.4th at pp. 867-68, footnote omitted, quoting *People v. Hughes* (2002) 27 Cal.4th 287, 405, fn. 33.)

This Court has also stated that "factor (k), the so-called catchall provision, is the statutory factor under which 'consideration of nonextreme mental or emotional conditions' is clearly permitted." (*People v. Stanley* (2006) 39 Cal.4th 913, 963, citation and internal quotation; *see also People v. Alfaro, supra,* 41 Cal.4th at p. 1331, *People v. Rogers* (2006) 39 Cal.4th 827, 895 [addressing consideration of duress].)

These issues should be reconsidered for several reasons. The nexus requirements in factors (d), (g) and (h) conflict with high court decisions. (3 AOB 449-51; *Smith v. Texas, supra,* 543 U.S. at p. 45 ["we never countenanced and now have unequivocally rejected" a nexus test for mitigating evidence]; *Tennard v. Dretke, supra,* 542 U.S. at p. 283 [rejecting requirement that the crime must be attributable to the defendants mental impairment for the impairment to be mitigating].)

The high court has also rejected the type of threshold requirements imposed by factors (d), (g), and (h) for consideration of mitigating evidence. (3 453-54; *Tennard, supra,* 542 U.S. at p. 283 [Rejecting the requirement that the defendant's mental impairment must be "'a uniquely severe permanent handicap ....'"]; *see also McKoy, supra,* 494 U.S. at pp. 440-441 ["Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'"].)

In addition, this Court has recognized that the circumstances of a particular case may provide a basis for concluding "that the jury in the present

case failed to give proper weight to the mitigating evidence. (*People v. Ghent* (1987) 43 Cal.3d 739, 776.) In this case, there are both general and specific reasons for concluding that the factor (k) instruction did not cure the errors. (3 AOB 454-459.)

Here, appellant emphasizes that the factor (k) instruction did not address the categories of evidence referred to by factors (d), (g), and (h). To the contrary, it specifically stated that it addressed "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (4 CT 1021, CALJIC No. 8.85, emphasis added.)

As a result, a reasonable juror would have concluded that factor (k) addressed different types of evidence than those specifically addressed by factors (d), (g), and (h). Moreover, the jury would not have believed that factor (k) overrode the thresholds those specific instructions imposed ("extreme", "substantial", "impaired") for consideration of such evidence. A contrary conclusion would violate the appellate presumption "'that jurors, conscious of the gravity of their task, attend closely to the particular language of the court's instructions in a criminal case ... and follow the instructions given them.'" (*United States v. Olano, supra,* 507 U.S. at p. 740.)

There are also specific reasons to conclude that the jury failed to give proper weight to the categories of evidence identified by factors (d), (g), and (h), even though the court also gave the factor (k) instruction. This is apparent from the prosecution's closing argument in the penalty phase and the trial court's restrictive reading of those same factors in denying appellant's automatic motion to modify the death verdict. (3 AOB 456-58.)

Respondent contends that the prosecutor's jury argument is irrelevant to

the analysis. (RB216.) However, arguments of counsel are relevant to determining the probable impact of an instruction on the jury. (*See, e.g., People v. Young* (2005) 34 Cal.4th 1149, 1202 ["The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury."]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 ["In determining whether there was prejudice, the entire record should be examined, including ... the arguments of counsel ...."].)

Here, the prosecutor argued that the each of the categories of evidence identified by factors (d), (g) and (h) did not apply because of the their threshold restrictions and nexus requirements. (3 AOB 3490-91, 3496, 3497, 3498.) The trial court's ruling in denying appellant's automatic motion to modify the death verdict (Penal Code, § 190.4, subd. (e)) showed that it applied those factors in the same way. (4 CT 1056-62; *see* Argument 15, below.) If the trial court applied the factors in this way, the only reasonable conclusion is that the jury did so as well. (3 AOB 457.)

As to the question of prejudice from the errors in CALJIC No. 8.85, respondent forfeited the issue by failing to address it. (*People v. Adams, supra,* 143 Cal.App.3d at p. 992 ["Respondent's failure to argue the point [of prejudice] must be viewed as a concession that if error occurred, reversal is required."]; *People v. Johnwell, supra,* 121 Cal.App.4th at p. 1278 ["The People have not made the slightest attempt to meet this standard [of prejudice], an omission we view as a tacit concession they cannot do so."].)

XXIII.

THE COURT SHOULD RECONSIDER WHETHER CALJIC NO. 8.88 IMPROPERLY CIRCUMSCRIBED THE DELIBERATIVE PROCESS FOR THE PENALTY PHASE.

CALJIC No. 8.88 defined the deliberative process for deciding whether appellant should be sentenced to death or life without the possibility of parole. (4 CT 1044; 3 AOB 466.)

That instruction was constitutionally flawed because: (1) it failed to inform the jurors that the defendant did not have to persuade them that death was not the appropriate penalty; (2) it used the vague "so substantial" standard for comparing mitigating and aggravating circumstances; (3) it failed to convey that the central question was whether death was the appropriate penalty and not simply warranted; (4) it required the "totality" of the mitigating evidence to outweigh the aggravating evidence where a single mitigating factor is sufficient; (5) it failed to convey that a life sentence was mandatory if the aggravating factors did not outweigh the mitigating ones; and (6) it failed to require juror unanimity on aggravating factors. (3 AOB 467-485.)

These flaws violated appellant's fundamental rights to due process, to a fair trial by jury, and to a reliable penalty determination, and require reversal of his death sentence. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; *see, e.g., Sawyer v. Smith, supra,* 497 U.S. at p. 243 ["All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense."].)

In his opening brief, appellant acknowledged that this Court has rejected similar constitutional challenges to CALJIC No. 8.88. (3 AOB 468; *see, e.g., People v. Lindberg* (2008) 45 Cal.4th 1, 51-53; *People v. Hovarter* (2008) 44 Cal.4th 983, 1028; *People v. Page* (2008) 44 Cal.4th 1, 55; *People v.*

Harris (2008) 43 Cal.4th 1269, 1321-22; *People v. Zamudio* (2008) 43 Cal.4th 327, 372-73; *People v. Riggs* (2008) 44 Cal.4th 248, 328.)

Respondent identifies similar authority and argues that there is no reason to reconsider these issues. (RB 217-19.) Appellant disagrees because this was a close case on the question of penalty. (3 AOB 468.) Despite presenting evidence of an admitted killing and 27 factor (b) offenses, the jury in the penalty phase deliberated over the course of four days, beginning on the afternoon of May 22, 2001, and continuing until the morning on May 25, 2001, when it jury returned the death verdict. (4 CT 997, 998, 1001, 1048.)

"In a close case, such as this, any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." (*People v. Zemavasky, supra,* 20 Cal.2d at p. 62.) Accordingly, the death judgment should be reversed and the case remanded for resentencing. (*Mills v. Maryland* (1988) 486 U.S. 367, 383-84 [108 S. Ct. 1860; 100 L. Ed. 2d 384] ["The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing."].)

XXIV.

SEVERAL ASPECTS OF CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL VIOLATED THE UNITED STATES CONSTITUTION.

Additional instructional errors affected the jury's determination that appellant should be sentenced to death: (1) the jury was not required to unanimously find the existence of aggravating factors beyond a reasonable doubt; (2) the jury was not required to make written findings of aggravating factors; (3) the denial of inter-case proportionality review violates the Eighth Amendment's proscription against the arbitrary, discriminatory, or

disproportionate imposition of the death penalty; (4) the failure to instruct the jury that statutory mitigating factors were relevant solely as potentially mitigating evidence impaired a fair and reliable determination of whether death was the appropriate punishment; (5) the California sentencing scheme (Penal Code, § 190.3) violates the equal protection clause of the Fourteenth Amendment by denying procedural safeguards to capital defendants that are afforded to non-capital defendants.

These errors individually and collectively require reversal of the death judgment because they violated appellant's rights to due process, to trial by jury, to a fair trial, and to reliability in capital sentencing proceedings. (3 AOB 485-497; Cal. Const., Art I, §§ 7, subd. (a), 15, 16, 17; U.S. Const, 5th, 6th, 8th & 14th Amends.)

In his opening brief, appellant acknowledged that this Court has previously rejected similar constitutional challenges to California's sentencing procedures in death penalty cases. (3 AOB 485, 486-97.) Respondent cites similar adverse rulings by this Court and argues that there is no reason to reconsider the issues. (RB 220-223.)

For this reply, appellant emphasizes that in this capital case he was deprived of protections that the legislature, the United States Supreme Court, and this Court have recognized as important assurances of reliability in making much less important sentencing determinations. The tolerance for lesser protections violates the principle that because "death is different" and therefore the Eighth Amendment "impose[s] protections that the Constitution nowhere else provides." (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680; 115 L.Ed.2d 836].)

XXV.

IN DENYING APPELLANT'S AUTOMATIC MOTION TO MODIFY THE DEATH VERDICT, THE TRIAL COURT FAILED PROPERLY TO WEIGH AND TO CONSIDER STATUTORY AND NON-STATUTORY MITIGATING EVIDENCE.

A. Appellant's Claims Should Be Considered.

The flaws in the instructions related to the determination of the death penalty were reflected in errors made by the trial court in denying appellant's automatic motion to modify the death judgment. (Penal Code, § 190.4, subd. (e); 4 CT 1056 -62 ["Statement Of Reasons For Denial Of Automatic Motion To Modify Sentence (P.C. 190.4)"]; 3 AOB 497-502.)

In his opening brief, appellant acknowledged that defense counsel did not object to the trial court's ruling and that this Court has required an objection in order to review the trial court's ruling. (3 AOB 498; *People v. Hill* (1992) 3 Cal.4th 959, 1013; *People v. Carasi, supra,* 44 Cal.4th at p. 1316.) For the same reason, respondent urges the Court to find this claim forfeited for purpose of appeal. (RB 225.)

These claims should be considered because they affected appellant's fundamental right to life protected by the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. (3 AOB 498-99; *see, e.g., People v. Olivas* (1976) 17 Ca1.3d 236, 251 ["personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions"]; *People v. Vera* (1997) 15 Cal.4th 269, 276-277 ["Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights."].)

Moreover, "[a]n appellate court may note errors not raised by the parties if justice requires it." (*People v. Norwood, supra,* 26 Cal.App.3d at p. 152; *see also* Cal. Const., Art. V., § 13 [A judgment may be reversed if "the error complained of has resulted in a miscarriage of justice."] Deering Cal. Evid. Code, § 353, Law Revision Commission Comments [The requirement of a timely and specific objection before appellate review is "subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law."].)

In addition, "[a] matter normally not reviewable upon direct appeal, but which is shown by the appeal record to be vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal." (*People v. Norwood, supra,* 26 Cal.App.3d at p. 153; *accord People v. Mattson, supra,* 50 Cal.3rd at p. 854.) For all these reasons, appellant requests the Court to review his claims of error in the trial court's ruling. (3 AOB 498-99.)

B. The Errors.

Respondent contends (RB 225-26) that no errors were committed because the "trial court is not required to find that evidence offered in mitigation does in fact mitigate." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1334, citing *People v. Scott* (1997) 15 Cal.4th 1188, 1222.)

However, the issue here is whether the trial court recognized that the evidence offered fell within the constitutional definition of mitigating evidence. Respondent emphasizes (RB 226) that the court stated that it did not intend to list every item of evidence or all arguments presented, but to recite the principle factors informing its decision. (14 RT 3584.)

However, as respondent otherwise recognizes (RB 227), the trial court specifically stated that it found no evidence of factor (d) ("Influence of Extreme Mental of Emotional Disturbance"), or factor (g) ("Extreme Duress or

Substantial Domination of Another"). (4 CT 1061 ["None was shown."].) It also found "no evidence" of factor (h), *i.e.*, that appellant's capacity to appreciate the criminality of his conduct was "impaired as a result of mental disease or defect." (4 CT 1020, 1061.)

Nevertheless, respondent contends that the trial court properly considered all of the mitigating evidence in its analysis of the application of factor (k). (RB 227-28.) However, that analysis made no mention of the evidence of duress or substantial domination, or that appellant's schizoid personality disorder made him easily manipulated by others. (4 CT 1061-62; 13 RT 3108-09; 3 AOB 500.)

The trial court also overlooked the evidence that appellant's capacity to appreciate the criminality of his conduct was impaired by mental disease or defect. Dr. Gawin explained that during hypomanic phase of bipolar disorder, a person's judgment "is profoundly impaired." (13 RT 3166.) People in that state can still plan and react, "but they have no capacity to exercise understanding of the consequences of their acts." (*Ibid.*)

The trial court stated that appellant "should have received better mental health supervision in the prison," but concluded that this "had little to do with the decision to kill." (4 CT 1062.) There are both legal and factual errors in this ruling.

As a matter of law, the high court has rejected the view that mitigating evidence must have a nexus or causal connection to the capital offense. (*Tennard, supra,* 542 U.S. at p. 284 [Evidence of "impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately" at the time of the capital offense.]; *Smith, supra,* 543 U.S. at p. 45 [The state court erred by requiring a "'link or nexus between his troubled childhood or his limited mental abilities and this capital murder.'"], quoting state court decision.)

As a matter of fact, there was substantial evidence that the denial of treatment for appellant's bipolar disorder was a substantial contributing factor to his violent criminal activity. As explained in the Introduction and appellant's opening brief, appellant never engaged in criminal activity involving force or violence when he received mental health treatment as a juvenile or during his first adult term in prison. All of the factor (b) offenses and the charged crimes occurred during appellant's second prison term when he was denied treatment and medication for his bipolar disorder and his schizoid personality disorder. (3 AOB 501; 13 RT 3123, 3153, 3166, 3256-57, 3263-64; Exh. No. 95, CT. Suppl. B 93-94.)

Respondent does not dispute this evidence. Instead, respondent claims (RB 228-29) that this Court has rejected similar arguments in *People v. Turner* (1999) 50 Cal.3d 668, 717, *People v. Welch, supra,* 20 Cal.4th at p. 775, and *People v. Rich* (1988) 45 Cal.3d 1036, 1123-24.[37] However, those cases addressed different situations.

In *People v. Turner, supra,* the defendant argued that the trial court had improperly considered "nonstatutory" aggravating factors. (*People v. Turner, supra,* 50 Cal.3d at p. 717.) This Court rejected that claim because the trial judge "judge indicated at the outset his understanding that section 190.3 contains the pertinent sentencing factors." (*Ibid.*) Appellant is not claiming that his trial judge considered nonstatutory aggravating factors. The trial court erred because it either required mitigating evidence to have a nexus to the charged crime or failed to recognize the existence of constitutionally relevant mitigating evidence.

In *People v. Welch, supra,* the defendant argued that the trial court had

37. Respondent has erroneously referred to *People v. Turner, supra,* 50 Cal.3d 668, as "*People v. Taylor.*" (RB 228-29.)

"improperly discounted evidence of his intoxication at the time of committing the crimes." (*People v. Welch, supra,* 20 Cal.4th at p. 775.) This Court rejected the claim because the trial court was "within its discretion in concluding that the evidence did not support his claim that his actions were greatly influenced by drug or alcohol intoxication." (*Ibid.*) This ruling must be considered within the context of the law of voluntary intoxication and the facts of *Welch.*

As the trial court had instructed the jury, "'[o]ur law provides that no act committed by a person while in a state of voluntary intoxication by either drugs or alcohol is less criminal by reason of his having been in such condition . . . . In the crime of murder, however, a necessary element is the existence in the mind of the defendant of the specific mental state which we just talked about [i.e. deliberation and premeditation] . . . . If the evidence shows the defendant was intoxicated at the time of the offense, you may consider his state of intoxication, if any, in determining if the defendant had such required mental states.'" (*Id.* at pp. 756-57.)

Measured against that standard, there was no substantial evidence that the defendant was so intoxicated that he could not form the mental state necessary for willful, deliberate and premeditated murder. The evidence showed that the defendant "broke down the front door of Barbara Mabrey's home in Oakland, and killed six persons as they were sleeping in various rooms." (*Id.* at p. 772.) On multiple occasions in the months preceding the murders the defendant had threatened to kill or assaulted Mabrey. (*Id.* at pp. 722-73 [The defendant "pointed the pistol at Barbara" and said "she would be killed slowly, shooting her arms off first and then her legs."].) The defendant armed himself with "an Uzi carbine" to commit the murders. (*Id.* at p. 724.) None of the survivors of the shooting testified that the defendant appeared to be intoxicated at the time. (*Id.* at pp. 724-25.) Given this evidence, *Welch*

understandably found no error in the trial court's denial of the motion for acquittal because of voluntary intoxication.

In *People v. Rich, supra,* an amicus curiae argued that in denying the automatic motion to modify the death judgment the trial court "erroneously failed to consider 'nonextreme' mental and emotional disturbance as mitigating evidence." (*People v. Rich, supra,* 45 Cal.3d at p. 1123.)

Rich rejected that claim because "the court merely stated it found no evidence of 'extreme mental or emotional disturbance at the time of the offenses.' The court was free (as was the jury) to consider under former factor (j) any evidence of defendant's 'nonextreme' mental or emotional disturbance at the time of offenses, or to consider the presence of such disturbance generally. The fact that the court failed to find sufficient mitigation to outweigh the aggravating factors does not mean that the court failed to consider all of defendant's mitigating evidence. Viewing the court's comments as a whole, we find no error." (*Id.* at pp. 1123-24.)

Here, the trial court erroneously found that the evidence of appellant's mental health problems was not mitigating because it "had little to do with the decision to kill." (4 CT 1062.) That was contrary to the unrebutted testimony of the three defense experts shows that the denial of mental health treatment explained why appellant for the first time in his life engaged in criminal activity. (13 RT 3107-09, 3123, 3134-53, 3156-58, 3246-49, 3257; 3 AOB 501-02.) Moreover, even assuming the contrary, the trial court committed legal error as explained above by requiring a nexus to the crime for evidence of mental health problems to be mitigating. (*Tennard, supra,* 542 U.S. at p. 284; *Smith, supra,* 543 U.S. at p. 45.)

For all these reasons, the trial court failed to properly review, consider and take into account relevant mitigating evidence and the death judgment should be reversed. (Penal Code, § 190.4, subd. (e); (*People v. Ashmus, supra,*

54 Cal. 3d at pp. 1006-1007; *People v. Holt* (1997) 15 Cal.4th 619, 710-11; U.S. Const., 8th Amend.; *see also Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S. Ct. 871; 79 L. Ed. 2d 29].)

XXVI.

IMPOSITION OF THE DEATH PENALTY IN THIS CASE VIOLATED INTERNATIONAL NORMS OF LAW, HUMANITY, AND DECENCY AND, THEREFORE, THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

International standards of law, humanity, and decency provide an additional basis for concluding that the death penalty should not be imposed on appellant. (3 AOB 503-508.) Appellant's opening brief acknowledge authority by this Court rejecting similar claims. (3 AOB 504; *see, e.g., see, e.g., People v. Hovarter* (2008) 44 Cal.4th 983, 1029; *People v. Brasure* (2008) 42 Cal.4th 1037, 1071-72; *People v. Perry* (2006) 38 Cal.4th 302, 322.) Respondent identifies additional authority decided after appellant filed his opening brief and argues that there is no reason to reconsider the issues. (RB 223, citing *People v. Rogers* (2009) 46 Cal.4th 1136, 1181; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

However, the high court has recognized that international norms inform consideration of whether death is the appropriate penalty. (3 AOB 503-04; *see, e.g., Roper v. Simmons, supra*, 543 U.S. at p. 575 ["[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"]; *Atkins v. Virginia, supra,* 536 U.S. at p. 321, fn. 21 [noting the abolition of the juvenile death penalty "'by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,'" has "relevance ... in determining whether a

punishment is cruel and unusual'"], quoting *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830-31 & fn. 31[108 S. Ct. 2687; 101 L. Ed. 2d 702]; *Coker v. Georgia*, *supra*, 438 U.S. at p. 596, n. 10 ["It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue"].)

In particular, appellant emphasizes that international law prohibits the execution of persons with mental disabilities and appellant suffered from an untreated bipolar disorder and schizoid personality disorder at the times relevant to this case. (3 AOB 503-08; *see also* U.N. Commission on Human Rights, *Question of the Death Penalty*, Res. 2003/67 (April 24, 2003); U.N. Doc. E/CN.4/2005/L.77 (2005) [calling on countries retaining the death penalty "not to impose the death penalty on a person suffering from *any form of mental ...disabilities* or to execute any such person"]; Report of the Special Reporter on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. E/CN.4/1997/60 (1996) [calling on states that impose the death penalty on the mentally ill to "bring their domestic criminal laws into conformity with international legal standards"]; *see also* U.N. Econ. & Social Council ("ECOSOC"), Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50; ECOSOC, *Implementation of the Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty,* U.N. Doc. Res. 1984/50 (May 25, 1984).)

Therefore, the death penalty should not be imposed on appellant as a matter of international law. Appellant accordingly requests the Court to reconsider the issues of international law as they relate to whether the death penalty is appropriate for him.

XXVII.

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE EXECUTION OF DANIEL LANDRY WOULD BE CRUEL AND/OR UNUSUAL PUNISHMENT.

A. Introduction.

Appellant has requested this Court to "review the facts of ... [this] case to determine whether a death sentence is so disproportionate to a defendant's culpability as to violate the California Constitution's prohibition against cruel or unusual punishment." (*People v. Howard* (2008) 42 Cal.4th 1000, 1032, Cal. Const. Art. I, § 17; 3 AOB 509.) In addition, "a capital defendant is entitled under the California Constitution to *intra*case proportionality review to determine whether the penalty of death is disproportionate to the defendant's culpability." (*People v. Rogers* (2006) 39 Cal.4th 826, 894, citations omitted.; 3 AOB 509-10.)

The Eighth Amendment of the United States Constitution also permits a reviewing court to review whether a sentence authorized by the Legislature is cruel and unusual punishment. (*Enmund v. Florida, supra,* 458 U.S. at p. 788; *Roper v. Simmons, supra,* 543 U.S. at p. 560; *People* v. *Dillon* (1983) 34 Cal.3d 441, 478.)

Respondent makes various factual claims that are either mistaken or insufficient to show that appellant should be executed.

B. There Are Multiple Mitigating Circumstances Related To The Fatal Assault On Addis.

Respondent claims that there were no mitigating circumstances to the fatal assault on Addis. (RB 231.) However, the record shows that appellant as a child was subjected to a "toxic" environment of physical, sexual, and emotional abuse by men and women and denied such basic care and nurturing that he was at times reduced to scavenging from garbage cans for food and

sleeping under a car for shelter. (12 RT 2946; 13 RT 3102, 3255, 3320, 3336, 3339-40; Exh. No. 95, Suppl.B CT 8, 11; 3 AOB 510-11.)

As a result he developed a schizoid personality disorder, compounded by post-traumatic stress disorder and bipolar disorder. (13 RT 3108, 3121-22, 3130-31, 3248.) His grandparents tried to save him, but "those early years of damage .... It's something that you don't recover from." (13 RT 3103-05; *see also* 13 RT 3107-08, 3111-12, 3246-48, 3332-33.) As a teenager and a young adult, he committed some property crimes. However, there is no evidence that he was ever armed or tried to hurt anyone. (Exh. No. 95, Suppl.B CT 10; Exh. No. 96, 5 CT 1270-71.) This did not occur until two years after he had been placed in state prison for another theft-related burglary. By that time, he had been denied care and treatment despite repeated pleas by himself, his grandmother and his assemblyman. (Exh. No. 95, CT. Suppl. B 31-40.)

The unrebutted testimony from three, highly qualified mental health professional (Dr. Lantz, Dr. Gawin, Dr. Lipson) showed that appellant's criminal activity in state prison resulted from the denial of treatment for his multiple, long-standing mental health problems. (13 RT 3201-3202 [Appellant was not "a characterlogically violent person" despite episodes of violence.]; 13 RT 3123, 3157-58, 3166-68; 13 RT 3259-66.)

Because of his schizoid personality disorder, appellant could be "easily manipulated by other people." (13 RT 3109.) Finally, appellant succumbed to the manipulation of the NLR shot-caller who ordered a "hit" on Addis because he stole tobacco from the NLR and tobacco functions like a currency in prison. (Exh. No. 50, 4 CT 1145; 5 RT 1185.) With knowledge that Addis would be assaulted, the guards nevertheless put Addis on the prison yard after Green demanded that he be brought out. (5 RT 1148; 8 RT 1815-17 ["'You know, Sarge, they're going to take him out.'"]; 8 RT 1856 ["'[A]n inmate was to be killed. We all knew it.'"].) Appellant did not demand that Addis be brought to

the yard. (8 RT 1845-46.)

On respondent's view, there is no reason to fault the actions of the prison staff on the day of the assault. (RB 231.) The facts speak for themselves. (See Section VI.B.2., above.) Every correctional officer who testified at trial and came in contact or saw Addis before the assault, including the Sergeant in charge, knew or had reason to believe that Addis would be assaulted if he went to the yard that day. Nevertheless, they did nothing to protect him. (*Ibid.*; *see also* 1 AOB 7-13)

Common sense dictates that the staff should have handled Green and Addis differently that day. The testimony of two highly qualified experts on prison procedures confirmed this.

Steven Rigg worked for the Department of Corrections for 17 years. (8 RT 1911-13.) He explained that after Green demanded that Addis be brought to the yard, the staff should have immediately removed him from the yard and disciplined him for making a disturbance and distracting the tower gunner. (8 RT 1925-26.) Green's agitated state and his yelling and demanding for Addis would lead any reasonable officer to conclude that Addis would be trouble on the yard and that Green was involved. (8 RT 1926-27.) Having received information that Addis would be assaulted, the staff should not have put him on the yard without a thorough investigation. (8 RT 1927-29.)

Anthony Casas served over 22 years with the Department of Corrections. (8 RT 1991-94.) He explained that the events leading up to the assault on Addis were filled with "red flags" any one of which "should have alerted a staff member that works these kinds of units that there was a problem. Collectively it's hard to describe how screwed up the whole situation was." (8 RT 2009.)

A staff member has the authority to deprive an inmate of yard time if his safety would be in jeopardy. This is called a "suspension of privilege

pending an investigation to see if the inmate's life is in danger. ... I just don't understand why it wasn't done." (8 RT 2007.) When Officer Maldonado told Sergeant Sams that Addis would be assaulted, the appropriate action would have been to immediately take Addis and Green off the yard and conduct an investigation. (8 RT 2010.) Sergeant Sams' hands were not tied, as he claimed (8 RT 1779), because the circumstances showed that Addis would be assaulted on the yard. (8 RT 2010.)

For all these reasons, respondent's attempt to excuse the actions of Department of Corrections should be rejected.

C. The Department of Corrections Failed To Provide Adequate Mental Health Care And Treatment For Appellant.

The Department of Corrections also erred by failing to provide mental health care and treatment for appellant. Respondent concedes that appellant "had been in and out of hospitals and treated for psychological and mental illness for several years." (RB 232.)

The record also shows that when appellant received counseling and medication for his mental health problems, he never engaged in criminal activity involving force or violence against others either on street, in custody at the Youth Authority, or during his first term in prison for a theft-related burglary. (*See* Introduction, above.) Appellant's only acts of violence were repeated suicide attempts as a teenager and young adult, confirming the severity of his mental health issues. (13 RT 3320-21, 3332, 3348-49, Exh. No. 95, Suppl.B CT 11, 13.)

On respondent's view, appellant's claim that he was denied adequate mental health treatment in prison is "disingenuous" because at times appellant and his grandmother failed to acknowledge or to disclose that appellant had a mental illness or that he was presently under a doctor's care. (RB 231-32.) In addition, there were occasions when appellant refused to take prescribed

medication. (RB 232.)

Appellant's medical records from the Department of Corrections show that the staff had known for years that appellant had severe mental health problems and that his acting out violently related to those problems. That evidence was summarized above in the Introduction to this brief and in appellant's opening brief. (1 AOB 43-63, 72-78.)

Appellant emphasizes that appellant pleaded for mental health treatment after he committed his first stabbing in July of 1994. (Exh. No. 95, CT. Suppl. B 37.) During some inmate classification meetings after additional assaults, prison staff noted appellant's "need of psychiatric treatment." (Exh. No. 95, CT. Suppl. B 47; *see also id.* at p. 49 [Recommendation to keep appellant in administrative segregation "pending psychiatric review."]; 13 RT 3146.) Nevertheless, the Department of Corrections did not begin to develop a treatment plan for appellant until after he fatally stabbed Addis. (Exh. No. 95, CT. Suppl. B 93-94; 13 RT 3153.)

Respondent criticizes appellant's grandmother (Esther Renfro) because on one occasion in October of 1987, she filled out a questionnaire for the Youth Authority and stated that appellant did not have a "mental illness or nervous breakdown." (14 RT 3383-85; Exhibit No. 97, 5 CT 1274.) At trial, Mrs. Renfro explained that she knew that appellant had a behavioral problem but she "never had a name for it." (14 RT 3384.)

Regardless, when asked to provide information in July of 1987, appellant stated that he wanted psychiatric or psychological "regularly" while in prison. (Exhibit No. 95 at p. 2, CT Suppl. B.) Appellant also disclosed that he had been institutionalized in a mental hospital or psychiatric clinic in 1978-1980, 1981, and 1984. (*Ibid.*) In October of 1987, Mr. Cueva reported that appellant had serious emotional and mental health problems requiring "intensive" treatment. (12 RT 3068-69, 3072; Suppl.B CT 12.)

On July 17, 1992, while at the reception center at the California Correctional Institution, appellant reported that he was manic depressive and he had previously been prescribed Lithium. (CT. Suppl. B 30; 13 RT 3141.)

On September 3, 1992, the day after appellant arrived at Calipatria State Prison, appellant again reported that he was manic depressive and he had been taking Lithium. (Exh. No. 95, CT. Suppl. B 31; 13 RT 3142.)

In September of 1992, Mrs. Renfro asked her assemblyman to contact the Director of the Department of Corrections. The assemblyman wrote and explained to the Director that Mrs. Renfro had "expressed concern regarding Daniels' mental health and psychiatric care." (Exh. No. 95 at p. 32, CT Suppl. B.) "According to Mrs. Renfro, Daniel has not been through a psychiatric evaluation and is not in a facility to receive the appropriate therapy should he need counseling." (*Ibid.*)

Respondent oddly attempts to impeach this evidence by stating that Mrs. Renfro "only" contacted her assemblyman (RB 232) because appellant "wrote me and said 'I need help.'" (14 RT 3385.) This showed that appellant's grandmother to the best of her ability tried to inform the Department of Corrections of appellant's desperate need for mental health care. It also showed that when appellant was in a state to recognize his need for help, he tried to get help.

On July 6, 1994, Mrs. Renfro wrote to Calipatria State Prison stating that she had been trying "for years" to get help for appellant. "He is finally trying to face the fact that he needs help. ... He is on a path of self destruction." (Exh. No. 95, CT. Suppl. B 36.)

This was followed by a personal "plea for help" from appellant after he committed his first stabbing assault. (Exh. No. 95 at 37, CT. Suppl. B.) "I will/and want to enter a program (available at C.M.C.) for my condition, or just simply put I want help, and someone to talk to ...." (*Ibid.*) "I am

presently in ad-seg (in Calipatria) for a stabbing assault, in my past I have no prior violence, or such misbehavior. I was found guilty and given a 24 month S.H.U. term. I know I must pay for these crimes I have been accused of, but I would like to be endorsed (after S.H.U. term) to C.M.C.-East, or any such facility having programs to help, not just punish inmates." (*Ibid.*)

On August 19, 1994, appellant again requested a psychological consultation for "help to prevent coming back to prison ...." (Exh. No. 95, CT. Suppl. B 38.) He asked for counseling and a drug program after he competed his SHU term. (*Ibid.*) He continued to request mental health treatment in February and March of 1995 (Exh. No. 95, CT. Suppl. B 39, 40, 44, 45.)

Unfortunately, he also continued to assault other inmates. During some inmate classification meetings after those incidents, prison staff noted appellant's "need of psychiatric treatment." (Exh. No. 95, CT. Suppl. B 47; *see also id.* at p. 49 [Recommendation to keep appellant in administrative segregation "pending psychiatric review."]; 13 RT 3146.)

Nevertheless, on November 2, 1995, a staff psychologist concluded that Daniel did "not meet the criteria for" the inmate mental health population. (Exh. No. 95, CT. Suppl. B 52; 13 RT 3147.) The Department of Corrections finally recognized that appellant needed a mental health treatment plan only after he stabbed and killed Addis. (13 RT 3261-62; Exh. No. 95, CT. Suppl. B 93, 94.)

Respondent faults appellant because on one occasion he denied that he had mental health problems and on some other occasions he refused medication. (RB 232, citing 13 RT 3164, 3169-70, 3267; see Exhibit No. 95 at p. 89, CT Suppl. B.) However, there was no basis to conclude that appellant was malingering. (13 RT 3155; *see also* 13 RT 3085-87.) The records in the possession of the Department of Corrections showed that appellant had a mental illness requiring treatment. Nevertheless, he received a "dismal" level

of care that, in other contexts, would be a basis for legal action against the physicians. (13 RT 3156-57.)

As to appellant's occasional non-compliance with medication, Glen Lipson, Ph.D., a diplomat in forensic psychology, explained why that occurred. Dr. Lipson testified as an expert on prison mental health services. (13 RT 3219, 3222-23.) He had worked in psychological services at the federal Metropolitan Correctional Center in San Diego and the United States Penitentiary at Leavenworth, Kansas. (13 RT 3219-20, 3222-23.) After the federal courts ordered the State of Nevada to institute a mental health care system for its prisons, Dr. Lipson worked with the Nevada prison officials to bring its mental health services up to the necessary standards. (13 RT 3220-21.) Since then, Dr. Lipson had also evaluated inmates in the California prison system with mental health problems. (13 RT 3222, 3226.)

Dr. Lipson explained that one of the biggest issues with all psychiatric disorders is compliance with medications. Accordingly, prison staff must continue to work with an inmate after medication is prescribed to ensure that the inmate stays on medication. (13 RT 3232-33.)

An additional factor is that an inmate receiving mental health treatment is perceived as vulnerable by other inmates. (13 RT 3260.) As a result, inmates may be afraid to receive treatment. (*Ibid.*) Appellant's records contained reports of a lot of different injuries to him which suggested that he had been the victim of intimidation and violence while in prison. (13 RT 3256-57.) However, appellant did not report those incidents as assaults so that the situation would not escalate. (*Ibid.*)

The nature of bipolar disorder also creates problems with compliance. When "feeling up" in the manic phase, someone with bipolar disorder will deny having problems. When in the depressed cycle of the illness, the person is unable to recognize his problem. (13 RT 3250, 3258-59.) When untreated,

these symptoms may last for years. (13 RT 3122.) Accordingly, prison staff must implement treatment protocols explain the disease to the patient because denial and lack of understanding accompanies bipolar disorder. (13 RT 3259-60.) However, that was not done in appellant case. (*Ibid.*; *see also* 13 RT 3156-57.)

The sad reality of this case is that the Addis homicide would never have occurred if prison staff had properly attended to either appellant or Addis. However, they failed to do either.

Appellant ends where he began. The State of California has now "conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights." (*Brown v. Plata, supra,* 179 L. Ed. 2d at p. 985.) In particular, "[p]risoners in California with serious mental illness do not receive minimal, adequate care." (*Id.* at p. 983.) This included the times at issue in this case. "Over 15 years ago, in 1995, after a 39-day trial, the *Coleman* District Court found 'overwhelming evidence of the systematic failure to deliver necessary care to mentally ill inmates' in California prisons. ... Mentally ill inmates 'languished for months, or even years, without access to necessary care.'" (*Id.* at p. 984, quoting *Coleman v. Wilson, supra,* 912 F. Supp. at p. 1316.)

The record in this case shows that the same was true for Daniel Landry. He recognizes that he committed a crime against Addis. However, the execution of Daniel Landry would be a second violation of the Eighth Amendment after the prolonged denial of mental health care. (3 AOB 513-514.)

XXVIII.

ON COUNT 3, THE TRIAL COURT ERRED BY IMPOSING THE WEAPON ENHANCEMENT (PENAL CODE, § 12022, SUBD. (B)(1)) BECAUSE THE PROSECUTION PLED AND THE JURY FOUND USE OF A WEAPON AS AN ELEMENT OF THE VIOLATION OF SECTION 4500.

For Count 3, appellant's conviction for the assault on inmate Matthews (Penal Code, § 4500; Count 3), the trial court imposed a consecutive one-year term for the for use of a deadly weapon (a knife) pursuant to Penal Code section 12022, subdivision (b)(1). (14 RT 3596-97.) The accusatory pleading test shows that the use of the deadly weapon was an element of Penal Code section 4500 as that crime was alleged in this case. (3 AOB 516-17.)

Therefore, Penal Code section 12022 by its own terms provides that the enhancement may not be imposed. (Penal Code, § 12022, subd. (b)(1) [A consecutive one-year term shall be imposed, "unless use of a deadly or dangerous weapon is an element of that offense."]; *see also, People v. McGee* (1993) 15 Cal.App.4th 107 ("*McGhee*") [The prosecution may not circumvent the limitation of Penal Code section 12022, subdivision (b), by pleading only an assault by means of force likely to cause great bodily injury (Penal Code, § 245, subd. (a)(1)) where a knife was used to commit the crime.]; 3 AOB 515-17.)

Respondent argues that *McGhee* does not apply because *People v. Ross* (1994) 28 Cal.App.4th 1151, 1156 fn.7 ("*Ross*") construed *McGhee* as limited to its facts.[38] (RB 238.) However, *Ross* shows that the analogous factual

38. Respondent also cited *People v. Milward* (2010) 182 Cal.App.4th 1477. (RB 238.) However, the Court depublished that case by a grant of review. (*People v. Milward (George)* (2010) 111 Cal. Rptr. 3d 694, 233 P.3d 1090, 2010 Cal. LEXIS 6759 (S182263).) The Court granted review of two issues: "(1) Is assault with a deadly weapon (Pen. Code § 245, subd. (a)(1)) a

situation is present here.

In *Ross,* the People appealed after the trial court stayed (Penal Code, § 654) a Penal Code section 12022.5 firearm enhancement upon a conviction for voluntary manslaughter. (Penal Code, § 192, subd. (a).) The trial court had stayed the enhancement "because the gun use was also the act accomplishing the homicide." (*People v. Ross, supra,* 28 Cal.App.4th at pp. 1155-56.)

However, the firearm enhancement was mandatory "unless use of a firearm is an element of the offense of which he or she was convicted." (Penal Code, § 12022.5, subd. (a).) The Court of Appeal held that the trial court erred because "'firearm use is not an element of the offense of . . . manslaughter and the Legislature clearly intended to impose more severe penalties for homicides committed with the use of a firearm.' [Citation.]" (*Id.* at p. 1156.)

The defendant argued that *McGhee* barred imposition of the enhancement. (*Id.* at p. 1156, fn. 7.) *Ross* distinguished *McGhee* because it addressed a violation of Penal Code section 245, "which can be violated in two specified ways, 'by assaulting a person with a deadly weapon other than a firearm *or* by means of force likely to produce great bodily injury.'" (*Ibid.*, quoting *People v. McGee, supra,* 15 Cal. App. 4th at p. 114, italics in original.) The situation differed in *Ross* because the "definition in section 192 of the offense of manslaughter ('the unlawful killing of a human being without malice') nowhere includes, as an element of that offense, the use of a firearm. For that reason *McGee* has no application to this case." (*Ibid.*)

Here, the definition of the crime (Penal Code, § 4500) included use of a

---

necessarily included offense of assault by a life prisoner with a deadly weapon (Pen. Code § 4500)? (2) Was *People v. Noah* (1971) 5 Cal.3d 469 binding on the Court of Appeal unless and until overruled by this court?" (*Ibid.*) In this case, the trial court at the requests of the prosecution instructed the jury that assault with a deadly weapon was a lesser included offense of section 4500 for Count 4. (9 RT 2179; 3 CT 899.)

deadly weapon and the prosecution charged that the defendant used a deadly weapon to commit the crime. (1 CT 43; 3 AOB 515.) Accordingly, both *Ross* and *McGhee* show that the trial court erred in imposing the weapon enhancement (Penal Code, § 12022, subd. (b)(1)) on appellant.

Finally, citing *People v. Murray* (1994) 23 Cal.4th 1783, 1788 ("*Murray*"), respondent argues as a matter of "public policy" that appellant should be punished more severely because of his high degree of culpability. (RB 238.) *Murray* addressed a claim that the trial court erred by imposing a sentence greater than the double the base term limitation of Penal Code section 1170.1, subdivision (g). It did not discuss or even mention the statutory exception for imposing a consecutive term for a weapon enhancement when use of the weapon is included in the offense. (Penal Code, § 12022, subd. (b)(1).) Therefore, *Murray* has no application here. (*People v. Heitzman* (1994) 9 Cal.4th 189, 209 ["It is well settled that a decision is not authority for an issue not considered in the court's opinion."].)

If respondent's policy argument is considered, the legislature defined the relevant policy by enacting the exception in the statute defining the enhancement. (*People v. Superior Court (Romero), supra,* 13 Cal.4th at p. 516 ["[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch."], citations omitted.) Accordingly, respondent's public policy argument should be rejected.

XXIX.

THE CUMULATIVE EFFECT OF THE PENALTY PHASE ERRORS PROVIDES AN ADDITIONAL GROUND FOR REVERSING THE DEATH JUDGMENT.

Respondent contends that no error was committed in the penalty phase and any error was harmless. (RB 239.) Appellant disagrees for the reasons already explained. Even if none of the errors individually requires reversal, their cumulative effect does because they collectively deprived appellant of a fair opportunity to show that he should not be sentenced to death. (3 AOB 517-20; *Andres v. United States* (1948) 333 U.S. 740, 752 [68 S.Ct. 880; 92 L.Ed. 1055] ["In death cases doubts such as those presented here should be resolved in favor of the accused."].)

CONCLUSION

For all of the foregoing reasons, appellant requests the Court to reverse his convictions for Counts One and Two, the death judgment, and the additional one-year term imposed on Count Four.

Dated: June 28, 2011.

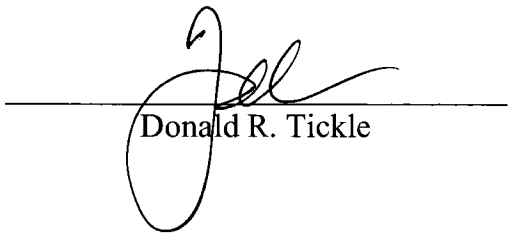
Respectfully submitted,

By: _____
Donald R. Tickle
Counsel for Defendant-Appellant
DANIEL GARY LANDRY

WORD COUNT CERTIFICATE

I have been appointed by this Court as the attorney for appellant Daniel Gary Landry. Pursuant to California Rules of Court, Rule 8.360, subdivision (b)(1), I hereby certify, based upon the word-count feature of the "Word" word processing program, that the length of this reply brief, including footnotes but not including the tables and this certificate, is 77,877 words. A request for leave to file an oversize brief has been submitted in conjunction with this opening brief.

Executed this 28th day of June 2011 at Jackson, California.



Donald R. Tickle

PROOF OF SERVICE
(*People v. Daniel Gary Landry,* S100735)

I declare that I am over the age of 18, not a party to this action and my business address is P.O. Box 400, Volcano, CA, 95689-0400. On the date shown below, I served APPELLANT'S REPLY BRIEF to the following parties hereinafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Jackson, California, addressed as follows:

Daniel Gary Landry (D-62144)

Clerk, Criminal Division
San Bernardino County Superior Court
Rancho Cucamonga District
8303 North Haven Avenue
Rancho Cucacmonga, CA 91730

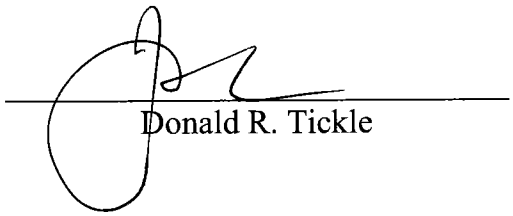
Central Records
Attn: Morey Garelick, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Karl Terp
Deputy Attorney General
Office of the Attorney General
P.O. Box 85266
San Diego, CA
(Counsel for Respondent)

Capital Case Unit
Office of the Public Defender
San Bernardino County
900 E. Gilbert St., Bdg. 1
San Bernardino, CA 92415

Karen Schmaus
Deputy District Attorney
Office of the District Attorney
316 N. Mt. View Ave.
San Bernardino, CA 92415

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 28th day of June of 2011 at Jackson, California.



Donald R. Tickle