SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. CALVIN DION CHISM, Defendant and Appellant.	**Case No. S101984** Los Angeles County Superior Court Case No. NA043605 **DEATH PENALTY CASE**

APPELLANT'S REPLY BRIEF

On Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

Honorable Richard R. Romero, Judge Presiding

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INTRODUCTION

Appellant was convicted of the first degree felony-murder of Richard Moon resulting from an alleged attempted robbery at Eddie's Liquor Store in Long Beach. After the initial jury deadlocked on penalty, a second jury sentenced appellant to death. Appellant's conviction rested on the accomplice testimony of Marcia Johnson, a witness repeatedly tested and who came up wanting. Because the circumstances of the capital crime bore the commonplace characteristics of similar liquor store robberies in which a death results, appellant's sentence of death rested instead on appellant's short criminal history involving firearms and substantial victim impact evidence introduced by the prosecution. In contrast, there was abundant mitigation evidence that warranted a sentence less than death, including proof of appellant's impoverished background and the deprivations he endured at

the hands of his neglectful, drug-addicted mother who abused drugs from well before the time appellant was born.

In this capital case, which lacked substantial inculpatory evidence outside of Marcia Johnson's testimony, the trial judge made multiple, critical evidentiary errors, allowing both trial testimony and exhibits that had no business being put before the jury. Although there was no concrete evidence of what occurred inside the liquor store, and no proof establishing who the actual shooter was, the trial court's errors permitted the prosecutor to argue that appellant was the shooter and that he admitted his involvement. At the penalty retrial, these errors and others effectively removed from the jury's consideration any lingering doubt about appellant's guilt and skewed the process in the direction of death. Moreover, during jury selection for the penalty retrial, the prosecutor improperly removed two African American prospective jurors based on group bias, misconduct that was calculated to remove potential jurors who would not prejudge appellant's guilt in a case involving an African American accused of killing a Caucasian liquor store clerk.

The devastating prejudice resulting from these errors calls for reversal of appellant's guilt phase conviction, as well as the true finding on the attempted robbery-murder special circumstance allegation. Similarly, because of the taint of these errors on the penalty phase, reversal of appellant's death sentence is also required.

In this reply brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in Appellant's Opening Brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People* v. *Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue

has been adequately presented and the positions of the parties fully joined.[1]

Following appellant's conviction at the guilt phase trial, the jury deadlocked during penalty phase deliberations and, following a new penalty trial, a second jury found death to be the appropriate penalty. Because the circumstances of the capital crime was a factor for the second jury to consider in its determination of penalty, it was tried anew for that jury and many of the same evidentiary errors occurred. Those errors were set out as separate issues in appellant's opening brief inasmuch as they were presented to separate juries making separate determinations. Respondent replies separately to those arguments, setting out separate guilt and penalty phase arguments, but the penalty phase arguments by-and-large incorporate the legal arguments relating to error alleged in the guilt phase arguments. To simplify the task of this court, in this Appellant's Reply Brief the guilt and penalty phase arguments on those specific issues are consolidated and footnotes cross-reference where the separate guilt and penalty phase issues can be found in Appellant's Opening Brief ("AOB") and Respondent's Brief ("RB").

Finally, appellant notes respondent's concession to the correctness of Argument XXIV in appellant's opening brief relating to conduct credits and requests that this court modify the abstract of judgment accordingly.

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[1] Unless otherwise indicated, all statutory references shall be to the Penal Code. As in Appellant's Opening Brief, the Clerk's Transcript will be cited "CT" and will be formatted "CT VOLUME:PAGE." The Reporter's Transcript will be cited "RT" and will be formatted "RT VOLUME:PAGE."

ARGUMENT

I. IMPROPER ADMISSION OF STEVEN MILLER'S STATEMENT TO OFFICER ROMERO WAS VIOLATIVE OF APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES

A. INTRODUCTION

Steven Miller did not testify in this case. Instead, based on Officer Rudy Romero's testimony that he was part of the first police unit to arrive at the crime scene shortly after the shooting, that he contacted Steven Miller outside Eddie's Liquor Store (RT 5:938, 940, 945, 21:4630-4631, 4634, 4651), and that Miller "was very, very nervous and seemed to be unsettled his nerves" [guilt phase] and "very nervous and shaken" [penalty phase] (RT 5:940, 21:4634), Romero was allowed to testify at both the guilt phase and penalty phase retrial to his subsequent conversation with Miller. Admission of Romero's testimony apparently was premised on the nature of Miller's statement as a spontaneous statement, in accordance with Evidence Code section 1240. Romero testified that Miller told him, "I think he's dead." (RT 5:942, 21:4640.)

According to Romero, Miller told him that he was sitting across the street at a bus bench with his girlfriend when he saw two black males walk westbound and enter the liquor store. Shortly afterward, Miller heard a popping sound like a gunshot, then observed the same two men run out of the store, go northbound approximately two blocks on Butler Avenue, and possibly go eastbound on Marker Street. (RT 5:942-943, 949, 980, 21:4648-4650.) Miller told Romero that he immediately ran across the street to the liquor store, entered, and saw the clerk on his back, under the

counter, unconscious and bleeding. Miller said he ran to a telephone and called the police. (RT 5:944.) Miller described both suspects to Romero as 17 to 18 years old, 5'8" to 5'9" tall, with short, not shaved, Afro-style hair and thin builds. One suspect was wearing a black shirt with more than one white stripe on the front and dark jeans; the other suspect was wearing a colored shirt of unknown color and long dark shorts. (RT 5:945, 953, 959, 21:4650-4651, 4663.)

In *Crawford v. Washington* (2004) 541 U.S. 36 ("*Crawford*"), the United States Supreme Court overruled *Ohio v. Roberts* (1980) 448 U.S. 56 and held that to protect the integrity of the federal Confrontation Clause guarantee of defense cross-examination of prosecution witnesses, out-of-court testimonial statements introduced by the prosecution must be precluded unless the declarant testifies or is unavailable and the defense has had a prior opportunity for cross-examination of the declarant. (*Crawford, supra*, 541 U.S. at p. 68.)

Because respondent concedes that Miller was unavailable as a witness and that the defense had no prior opportunity to cross-examine him,[2] the question of error here necessarily hinges on whether Miller's statement to Romero was testimonial in nature.[3]

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[2] Respondent's Brief ("RB"), pp. 69, 173.

[3] This consolidated reply relates to Argument III in Appellant's Opening Brief with reference to the guilt phase trial and Argument XIII with reference to the penalty phase retrial. The arguments are numbered the same in Respondent's Brief.

B. APPELLANT'S CLAIM WAS NOT FORFEITED BY A FAILURE TO OBJECT IN THE TRIAL COURT

According to respondent, defense counsel's failure to object to Miller's out-of-court declaration forfeits the claim on appeal because he cannot rely on the pronouncement in *Crawford, supra*, which articulates a new interpretation of the Confrontation Clause three years post-trial. Respondent's position vis-à-vis forfeiture is unfounded.

As respondent notes, the grounds for an objection at the time of appellant's trial were based on state law -- whether Miller's statement qualified as a spontaneous statement pursuant to Evidence Code section 1240 -- and the confrontation clause under federal law -- whether the statement carried sufficient indicia of reliability pursuant to *Ohio v. Roberts*, *supra*, 448 U.S. 56. While appellant's counsel did lodge an objection premised on hearsay, it was rightly withdrawn when the prosecutor made an offer of proof that qualified the statement for admission on both bases existing at the time of trial. (RT 5:941-942.) If *Ohio v. Roberts* was still good law at this time, respondent's forfeiture argument would likely be well taken.

However, interpretation of the Confrontation Clause took a dramatic and unforeseen turn in 2004 with *Crawford*, requiring courts to not consider the *reliability* of hearsay statements -- the defining mark of *Ohio v. Roberts* since 1980 -- but instead to focus attention on the *testimonial* nature of the declaration. *Crawford* "announced a new standard for determining when the confrontation clause of the Sixth Amendment prohibits the use of hearsay evidence . . . ." (*People v. Cage* (2007) 40 Cal.4th 965, 969.) Although *Crawford* was decided after appellant's trial, it is well-settled that a new rule announced by the high court applies to all criminal cases that are still pending on appeal. (*Id.* at p. 974, fn. 4; *Schriro v. Summerlin* (2004) 542 U.S. 348, 351.) Respondent's reliance on language in *People v. Alvarez*

(1996) 14 Cal.4th 155, 186, and *People v. Dennis* (1998) 17 Cal.4th 468, 529, that a Confrontation Clause claim is not preserved by an objection solely on the basis that a spontaneous statement is inadmissible hearsay, is not well-taken, as both of those cases arose prior to the sea change in Confrontation Clause analysis articulated in *Crawford.*

Notably, respondent ignores the assertion in appellant's opening brief, supported by this court's prior decisions, that appellate courts will not insist upon an objection where such an objection would have been futile at the time. This exception is applicable where the statutory or case law binding the lower court at the time would have precluded the claim. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649; *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.) "When the ground of objection rests on a change in the existing law so substantial that counsel cannot reasonably be expected to anticipate it, the failure to object is excused. (Citations.)" (*People v. Cage*, *supra,* 40 Cal.4th at p. 974, fn. 4.) The rule change effected by *Crawford* meets this standard. (*Ibid.*). Here, it would have been pointless to object on Confrontation Clause grounds relating to testimonial statements, unavailability, and prior opportunity to cross-examine when Miller's statement was properly admitted as a spontaneous statement and complied with then current binding requirements of *Ohio v. Roberts*, *supra*, 448 U.S. 56. "Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.)

This exception wisely exempts issues such as the one at hand because doing otherwise sets an unattainable threshold for claims of error, requiring an objection premised on unknowable changes in the law that occur when the United States Supreme Court establishes otherwise contrary

authority. Accordingly, on these facts, appellant has not forfeited his Confrontation Clause claim by failing to object. (*People v. Jennings* (2010) 50 Cal.4th 616, 652; *People v. Cage*, *supra*, 40 Cal.4th at p. 974, fn. 4.)

C. MILLER'S STATEMENT TO ROMERO WAS TESTIMONIAL

In *Davis v. Washington* (2006) 547 U.S. 813 ("*Davis*"), the United States Supreme Court held that statements to police officers responding to the scene of a crime are "nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822, fn. omitted.) Police interrogation is not required to render statements testimonial. "The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers from detailed interrogation. . . . [I]t is in the final analysis the declarant's statements, not [any] interrogator's questions, that the Confrontation Clause requires us to evaluate." (*Id.* at p. 822, fn. 1.) In *Davis*, the court ruled that statements made by a woman in *Hammon v. Indiana* -- one of two cases determined in *Davis* -- in response to the "initial inquiries" of responding police officers that "recounted . . . how potentially criminal past events began and progressed" were testimonial. (*Id.* at pp. 829-831.)

In *Michigan v. Bryant* (2011) 562 U.S. ___ [131 S.Ct. 1143, 179 L.Ed.2d 93] ("*Bryant*"), the United States Supreme Court recently refined the doctrine in *Davis*, applying it to a situation where first responders found a victim shortly after he had been shot and mortally wounded, in a parking

lot to which he had driven himself from the location where he had been shot. (*Bryant*, *supra*, 562 U.S. at p. ___ [131 S.Ct. at p. 1150].) In *Bryant*, the court found that the victim's statement identifying the shooter was nontestimonial. The court set forth a two-step process to analyze whether a statement was testimonial, asking (a) whether an ongoing emergency existed, and (b) if so, whether the primary purpose of the statements was to resolve the emergency. (*Id.* at p. ___ [131 S.Ct. at p. 1165].) Each step involves a multi-factor inquiry.

Bryant recognized that whether an ongoing emergency existed at the time of the statement is a "highly context-dependent inquiry." (*Bryant*, *supra*, 562 U.S. at p. ___ [131 S.Ct. at p. 1158].) The court specifically referenced four factors relevant to the determination of this first step of the inquiry. First is whether any threat is "neutralized" or "continuing." (*Id.* at p. ___ [131 S.Ct. at p. 1158].) The court found the threat in *Hammon* was neutralized because it "involved domestic violence" and the police were in control of the suspect. In contrast, the court characterized the threat in *Bryant* as continuing because it involved "an armed shooter, whose motive for and location after the shooting, were unknown." (*Id.* at p. ___ [131 S.Ct. at pp. 1158, 1164].) Second, the court considered whether a "threat[] to public safety" exists. The court noted there was no threat to public safety in *Hammon* because it involved a "purely private dispute." (*Id.* at p. ___ [131 S.Ct. at p. 1163].) *Bryant*, on the other hand, involved a broader "zone of potential victims," "encompassing[ing] a threat potentially to the police and the public." (*Id.* at p. ___ [131 S.Ct. at pp. 1158, 1164].) The court limited the application of this factor, stating it did not mean to "suggest[] that an emergency is ongoing in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose." (*Id.* at p. ___ [131 S.Ct. at p. 1159].) Third, the court asked what "type of weapon [was] employed." (*Id.* at p. ___ [131 S.Ct. at p. 1158].) The court

noted that a gun was different than the fists used in *Hammon* and that "removing [the victim] to a separate room was sufficient to end the emergency." (*Id.* at p. ___ [131 S.Ct. at p. 1159].) Finally, the court stated that the medical condition of the victim was a consideration as to whether the emergency continued. (*Id.* at p. ___ [131 S.Ct. at p. 1159].)

The *Bryant* court made clear that the second step -- the primary purpose test -- is objective and "requires a combined inquiry that accounts for both the declarant and the interrogator." (*Bryant, supra*, 562 U.S. at p. ___ [131 S.Ct. at p. 1160].) Courts "should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." (*Id.* at p. ___ [131 S.Ct. at p. 1162].) The court identified numerous factors in determining the primary purpose. First, "[t]he medical condition of the victim is important to the primary purpose inquiry to the extent it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." (*Id.* at p. ___ [131 S.Ct. at p. 1159].)

The second factor is the formality of the statements. The degree of "[]formality in an encounter between a victim and the police" informs the primary purpose of an interrogation. (*Id.* at p. ___ [131 S.Ct. at pp. 1159, 1166].) In *Hammon*, the interaction between the declarant and the officer was formal because the officers had "actively separated" her from the suspect and her statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." (*Davis, supra*, 547 U.S. at p. 830.) *Bryant* instead involved relative informality because "the questioning . . . occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion." (*Bryant, supra*, 562 U.S. at p. ___ [131 S.Ct. at p. 1160].) A third factor is

the level of police knowledge at the time the statement was obtained. In *Bryant*, the police lacked knowledge of "why, where or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred." (*Id.* at p. ___ [131 S.Ct. at p. 1165].) This must be contrasted with a situation in which the police have a sense of what happened and believe that it was criminal, as it is more likely that statements are given primarily for prosecutorial use.

The court resolved *Bryant* adversely to the defendant, finding the statement nontestimonial because the "circumstances of the encounter as well as the statements and actions of [the victim] and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.'" (*Bryant*, *supra*, 562 U.S. at p. ___ [131 S.Ct. at pp. 1166-1167].) According to the court, the circumstances of the encounter supported this conclusion. The police arrived at the scene and, in response to the first question about what happened, the victim stated he had been shot by the defendant. The victim answered questions about the location of the shooting and a description of the shooter. At the time of his statements, the victim was lying in a parking lot, bleeding from a mortal wound and asking questions of his own about the pending arrival of medical services. The court concluded that a person in the victim's situation would not have a primary purpose of establishing or proving past events in a prosecution. (*Id.* at p. ___ [131 S.Ct. at p. 1165].) Analyzing the objective expectations of the police, the court concluded they responded to a shooting without knowledge of why, when or where it had occurred and that the answers they sought to elicit were limited to assessing the situation and the threat to the safety of themselves, the victim and the public at large -- in other words, "the information necessary to enable them 'to meet an ongoing emergency.'" (*Id.* at p. ___ [131 S.Ct. at pp. 1165-1166].) The circumstances confirmed the police expectation that an

ongoing emergency was underway and the victim's responses neither gave a motive for the shooting nor indicated that the shooter would not return. (*Id.* at p. ___ [131 S.Ct. at p. 1166].) Finally, the court considered the formality of the situation and interrogation, calling it fluid and confused, analogous to the harried 911 call in *Davis*, rather than the structured police station interview in *Crawford.* (*Id.* at p. ___ [131 S.Ct. at p. 1166].)

To date, all of the pronouncements of the United States Supreme Court have involved crime victim's statements to the police. In *People v. Blacksher* (2011) 52 Cal.4th 769 ("*Blacksher*"), this court considered the case of a non-victim witness' statement to first responders to the crime scene. There, a 911 call erroneously stated that the defendant had killed his sister, then shot himself. Police were dispatched to the crime scene with that information. When they arrived, police approached Eva, the defendant's mother, who was teary-eyed, distraught, and very agitated and volunteered that her daughter and grandson had been shot and were likely dead. Police questioned Eva to determine whether it was safe for them to go inside to aid the victims. Eva told them the defendant had entered the house, spoken with her, then argued with his sister and shot the victims. She did not know if the defendant was still in the house and described his clothing. The neighbor who called 911 told police the defendant's car was no longer in the driveway, suggesting he had probably left the scene. Three or four minutes after the conversation started, other officers entered the house. The conversation between police and the witnesses lasted ten to fifteen minutes from start to finish. (*Id.* at p. 809.) Citing the recent decision in *Bryant*, this court relied on the situational unknowns creating an ongoing emergency to find that Eva's statement to the police was nontestimonial. (*Id.* at p. 816.) In making its determination, the court noted the shooter's motive was unknown and that neither Eva nor the police knew if the defendant was still present. Once police ascertained the defendant was no longer on the

premises, the colloquy between Eva and the police was to deal with the emergency presented by an armed shooter whose whereabouts were unknown. (*Ibid.*) This court characterized this as an emergency situation, stating that the objective primary purpose was to deal with the emergency, determine the defendant's whereabouts, and ascertain the threat he posed. (*Id.* at pp. 816-817.)

In the present case, respondent asserts[4] that Miller's "statements . . . were nontestimonial because the statements were made to meet an ongoing emergency." (RB 70.) Respondent characterizes the situation as an emergency because 1) the police responded to a radio call requiring prompt assistance; 2) Miller was interviewed by Romero immediately upon arrival at the scene; and 3) a very nervous Miller said, "I think he's dead." Respondent portrays Officer Romero's questions as necessary to assess the situation and determine a course of action, including whether medical assistance was necessary, whether suspects were still on the scene or if they were armed and at large. (RB 70-71.) Respondent avers that police were concerned not only with the safety of the shooting victim, but with the threat to public safety as well, particularly since Miller said they had run down the street. (RB. 71.) These assertions notwithstanding, respondent has failed to show that the "circumstances of the encounter as well as the statements and actions of [Miller] and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.'" (*Bryant*, *supra*, 562 U.S. at p. ___ [131 S.Ct. at pp. 1166-1167].)

First, despite respondent's fanciful characterization of police concerns about the killers being armed and at large, nothing in the discussion

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[4] Respondent's brief was filed prior to either *Bryant* or *Blacksher*

between Miller and Officer Romero reflects those alleged concerns. The shooting occurred inside a liquor store and Miller described the perpetrators running a number of blocks from the scene. After the perpetrators disappeared, Miller went into the store, saw the victim, whom he believed to be dead, left the store, and his female companion called 911. While Miller spoke with Romero, Romero's partner went into the store to check on the victim and confirmed Miller's initial statement that the man was dead. But there was no evidence that the police did anything at the scene or nearby to look for suspects. Indeed, after Romero finished questioning Miller and his companions, he went into the store to check on the victim, started cordoning off the crime scene and radioed for assistance. (RT 5:952-953.) After assistance eventually arrived, nothing occurred to indicate the police were treating the crime scene as an ongoing emergency as opposed to the collection of evidence for use in a later prosecution. (5:918, 984.)

The *Bryant* inquiry demands a showing that Miller's statement was testimonial. The circumstances of the encounter demonstrated there was no ongoing emergency. Because the victim died prior to the arrival of the police, attention of first responders was not drawn to that person's well-being, but to the task of cordoning off the crime scene and collecting a preserving evidence that could lead at some future time to apprehension and prosecution of the perpetrators. The shooter was gone and the motive appeared to be a robbery, so there did not appear to be an ongoing threat to public safety in the area. Miller was sequestered with the police and patiently answered questions about what he had seen, largely relating to factors that could be used circumstantially for identification. The police appeared to act purposefully and in a managed style. It was patently obvious that the temporal emergency had ended with the arrival of the police.

The objective expectations of the police showed that they responded to a liquor store shooting, with knowledge of where and when it occurred

and the likely motive. The police immediately ascertained that the victim was dead and located a witness -- indeed, three witnesses -- who had chosen to remain at the scene, an unlikely choice if they perceived any danger to themselves. The information the police sought from Miller was designed to help identify and locate a perpetrator at some future time, not to prevent any immediate danger at the site of the interrogation. The police were not seeking "the information necessary to enable them 'to meet an ongoing emergency.'" (*Bryant*, *supra*, 562 U.S. at p. ___ [131 S.Ct. at pp. 1165-1166].)

Similarly, Miller's objective expectations did not display any belief that he was responding to the police to help them in an ongoing emergency. Unlike the dying victim in *Bryant*, Miller was an accidental witness, in the right place at the wrong time, and assuming he was acting as a normal human being, if he perceived any danger to himself he would have departed the scene for at least a period of time to assure his own safety. But he did not. Miller was aware that the perpetrators had fled the scene and he had no expectation that they would return. He went into the store to check on the victim as his female companion called 911. Miller demonstrated nervousness because he had just witnessed a killing, as most people would, and that was the basis for admission of his statement as an excited utterance. Miller gave the police the information they sought solely to help locate and prosecute the perpetrators.

Finally, the situation was neither harried, fluid or confused. Instead, the picture painted was one of controlled police work. The police immediately cordoned off the crime scene and established authenticated controls of everything that occurred on-scene. The crime had occurred, the perpetrators had fled, and the police calmly set out to gather information. Although occurring in the field, this was akin to the structured police station interview in *Crawford*. (*Bryant*, *supra*, 562 at p. ___ [131 S.Ct. at p. 1166].)

This case is distinguishable from *Blacksher*, in which this court relied largely on the mistaken beliefs conveyed to the police about the identity of the victims, whether they were in need of medical treatment, and the continuing presence of the killer inside the house. These objective realities created a chaotic situation in which both the witness and the police were seeking to deal with the ongoing emergency. In marked contrast, the present case offered a grouping of things known, including the death of the victim prior to the arrival of the police, the likely motive, and the non-presence or improbable return of the perpetrators.

Here, the primary purpose of the interrogation was not to assist the police in an ongoing emergency, but to gather information for later use, be it to identify and locate the perpetrators or to prosecute them following arrest. No one required assistance at the scene. Miller described only past events, such as his confirmation that the victim was dead, where the alleged perpetrators had come from and run to, and his description of the perpetrators and their clothing. The emergency at the crime scene had ended and there was nothing Miller offered in the way of information that was aimed at responding to an emergency. Miller simply described the crime scene and the perpetrators and the testimonial nature of his statement should not change based on the happenstance of where it was made. Miller's statement to the police was testimonial hearsay and its admission at both the guilt and penalty phases was barred by the Confrontation Clause.

D. APPELLANT WAS PREJUDICED BY ADMISSION OF THE STATEMENT

Because the error involved a federal constitutional violation, reversal is required unless respondent can demonstrate beyond a reasonable doubt that the error is harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24;

People v. Cage, *supra*, 40 Cal.4th at p. 991.) Respondent agrees that *Chapman* provides the appropriate test of prejudice. (RB 73.)

While this case appears to have been heavily weighted in favor of the prosecution at the guilt phase -- and respondent certainly characterizes it that way -- it was actually far closer. The prosecution primarily relied on the unreliable, untrustworthy accomplice testimony of Marcia Johnson, ("Marcia") whose multiple statements to police conflicted with her testimony on the witness stand. Rather than truth, her statements reflected her need to parrot the police suggestions of appellant's involvement to protect the sweet deal she cut with the prosecutor. Although the jury heard evidence of an alleged adoptive admission by appellant, it was improperly premised on his lack of response to a writing the prosecution never proved he had read. The prosecutor argued that appellant's participation in the earlier Rite Way Market robbery and his possession of a gun taken in that robbery demonstrated his intent, identity and common plan in the instant case, but there was little in common between the two crimes. Indeed, subsequent possession of a gun allegedly used in a killing does not demonstrate that the possessor used it. Moreover, there were no eyewitnesses to the crime and the videotape and enhanced still photographs did not reveal enough detail to ascertain the perpetrators.

Respondent asserts there was strong evidence establishing appellant's identity apart from Miller's statement. While acknowledging *Chapman*'s application, respondent sets out a differing standard of prejudice: "While Miller's statements were helpful for the prosecution in that he provided a description of the fleeing suspects, the direction they fled, and the time frame of the shooting, his statements were not necessary for the guilty verdicts." (RB 73.) Of course, under *Chapman*, the standard is not whether the improperly admitted evidence is necessary to a verdict -- a standard of prejudice seemingly requiring more of an appealing defendant

than the "reasonable probability" standard for state law error set forth in *People v. Watson* (1956) 46 Cal.2d 818 -- but places the burden on respondent to demonstrate beyond a reasonable doubt that the error is harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Respondent's asserted standard of prejudice, and the factual arguments that follow, are more akin to a determination of whether there was sufficient evidence to support the verdict. Instead, *Chapman* contemplates an inquiry into the impact which the particular error has on the instant jury. This is true regardless of the weight of the evidence.

> [T]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [italics in original].)

Respondent's argument on prejudice focuses on the prosecutorial version of the case, largely ignoring adverse, weak or impeaching evidence, and never addresses how Miller's statements potentially impacted the jury. Significantly ignored by respondent is the emphasis the prosecutor placed on the statements during her summation to the jury. In her opening argument, the prosecutor utilized all of Miller's description, used it to corroborate other evidence, and characterized his account of the perpetrator's flight path as "extremely important." (RT 10:2060-2062.) In her closing summation, the prosecutor acknowledged that Miller's description of the per-

petrators was far more detailed than either Peter Motta or Stephanie Johnson, the only other witnesses who observed the perpetrators between the liquor store and the alleged getaway van. The prosecutor's reliance thus reinforced Marcia's continually changing accomplice testimony. If the prosecutor had not exploited the error, perhaps there would be less prejudice from this specific error, but in reality the prosecutor exploited it to great effect.

Similarly, respondent does not address extended jury deliberations in a guilt phase case featuring few contested issues beyond identity. Richard Moon was shot and killed while working in a liquor store. A videotape showed two people going into and out of the store at the time of the alleged attempted robbery. Marcia offered accomplice testimony that appellant was one of the perpetrators. Yet the jury took 3½ days to convict and asked for a readback of all of Marcia's testimony, plus that of Detective Paul Edwards relating to Marcia, indicating that they were having trouble with her veracity, credibility and descriptions. Because Miller's erroneously admitted description tied into Marcia's otherwise weak testimony describing appellant and the location of the alleged getaway van, the jury was presented with an easier route to identify appellant as one of the perpetrators that ran to the van's location and the prosecution's burden of proof was substantially lessened.

It is clear that admission of Miller's out-of-court statement violated appellant's constitutional right to confront the witnesses against him and directly contributed to the verdict of guilt. Respondent cannot and has not demonstrated that Steven Miller's improperly admitted statement was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Reversal of appellant's guilt phase conviction is mandated.

So too must appellant's sentence of death be reversed. As acknowledged by respondent, penalty phase *Crawford* error is analyzed for preju-

dice pursuant to *Chapman*. (*People v. Romero* (2008) 44 Cal.4th 386, 422; RB 173.) And while appellant may not relitigate guilt at a penalty phase trial or retrial, evidence of the circumstances of the capital crime creating a lingering doubt of guilt is admissible. (*People v. Gay* (2008) 42 Cal.4th 1195, 1221-1223.)

The prosecutor used this improperly admitted evidence to help establish that appellant was one of the perpetrators of the capital crime. While it did not establish identity, Miller's description of the perpetrator was far more detailed than that provided by any of the other witnesses. In a case with much mitigation evidence placed before the jury and in which the guilt phase jury deadlocked on the appropriate penalty, the improperly admitted evidence unfairly tipped the scales toward death and encouraged the jury to disregard lingering doubt of appellant's guilt.

Respondent has not demonstrated beyond a reasonable doubt that a different, more favorable result would not have been obtained absent Miller's wrongfully admitted statement to the police. (*Chapman*, *supra*, 386 U.S. at p. 24.) Reversal of appellant's death sentence is mandated.

II. IMPROPER ADMISSION OF DETECTIVE CHAVERS' TESTIMONY THAT EITHER CO-DEFENDANT MARCUS JOHNSON OR ANOTHER PERSON THREATENED ZONITA WALLACE MANDATES REVERSAL

To prove that Zonita Wallace ("Wallace") allegedly was afraid to testify, the trial judge allowed Detective Catherine Chavers to testify that three years prior to trial, she heard either co-defendant Marcus Johnson ("Marcus") or his cousin tell Wallace that she had spoken to the police, that Wallace denied doing so and that, thereafter, Wallace appeared to be uncomfortable and frightened. Whether or not Wallace experienced fear when the alleged statements were made, there was no evidentiary nexus linking the three year old statement to any fear experienced by Wallace at the time she testified. Thus, introduction of the statement by Marcus or his cousin into evidence through Detective Chavers' testimony was error.[5]

Generally, the fact that a witness experiences fear while on the witness stand or is otherwise afraid to testify is relevant to the jury's determination of the credibility and weight to be afforded the witness' testimony. (*People v. Warren* (1988) 45 Cal.3d 471, 481; *People v. Avalos* (1984) 37 Cal.3d 216, 232.) This doctrine has limits because "evidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated.)". (*People v. Warren*, *supra*, 45 Cal.3d at p. 481 [citations omitted].) Here, although Wallace may have been fearful if and when the statement was made, there was no evidence that Wallace was fearful while testifying, especially given the lack of time between the statement and her testimony. Additionally, there was no evidence that *appellant* threatened her. Hence, the evi-

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[5] This reply relates to Argument IV in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

dence of statements made by Marcus or his cousin was wholly irrelevant and improper. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 808, fn. 5; *People v. Benjamin* (1975) 52 Cal.App.3d 63, 81.)

Respondent correctly states that the fear to testify need not be connected to a defendant, but mistakenly urges that a statement made three years prior to trial is probative of the issue because Wallace would not go to court immediately after the statement and changed her story somewhat from her initial statement to police when she testified three years later.

Respondent ignores three essential details. First, Wallace did choose to testify, despite any statements to the contrary she may have uttered at the time of the supposed confrontation. Second, three years is a long time to retain specific memories. Third -- and critical to the analysis -- there was no evidence at trial that Wallace was fearful of testifying. The prosecution certainly had the ability to put forth evidence that Wallace was fearful and to explain why. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) It failed to do so.

Respondent asserts that appellant's claim is forfeited because defense counsel did not join in the objection of co-defendant Marcus Johnson. This court has stated the rule as follows: "'Generally, failure to join in the objection or motion of a codefendant constitutes a waiver of the issue on appeal.' (*People v. Santos* (1994) 30 Cal.App.4th 169, 180, fn. 8, 35 Cal.Rptr.2d 719; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048, 5 Cal.Rptr.2d 230, 824 P.2d 1277.)" (*People v. Wilson* (2008) 44 Cal.4th 758, 793 ("*Wilson*").) "A litigant need not object, however, if doing so would be futile." (*Ibid.*) In *Wilson*, the defendant contended that objection would be futile because he had seen how the trial court treated his co-defendant's motion. This court held there was a lack of futility because the trial court held the door open in its previous ruling for further foundational information and reconsideration. (*Ibid.*)

The present case is different. First, Marcus Johnson's counsel objected on the same ground as appellant urges in this appeal -- that the hearsay evidence was irrelevant, lacking an evidentiary nexus to Wallace's alleged fear. (RT 8:1431-1442.) The trial judge overruled the objection on that specific ground. (RT 8:1439-1440.) The effect of the ruling was to permit testimony that would have an equal impact on both defendants in terms of explaining Wallace's alleged fear to testify, and would have a far more devastating impact on Marcus because the statement to Wallace allegedly was made by him or someone in his presence. In light of this ruling, objection by appellant would have been futile. Appellant's attorney did not need to explain to the trial judge that there might be less of an impact on his client; only if he was able to show the effect differed in kind, not scope, would an objection have been tenable.

Moreover, appellant's counsel was asked if he wished to interpose an objection after the court heard argument and ruled on Marcus's objection to the evidence. To the extent that appellant's counsel believed that there was an additional ground for objection beyond that which would be futile, he did so, noting, "Your Honor, for the record, I'll join with counsel on the *Aranda* issues. (RT 8:1442.) This objection was lodged because it was unavailable to Marcus Johnson to the extent that he -- or someone he was with -- made the statement at issue that was potentially inculpatory of appellant.

When the trial judge overruled appellant's additional objection, he did not leave room for reconsideration and immediately moved on to a different subject. (RT 8:1442.) Hence, because the trial judge previously ruled after extensive argument on a co-defendant's motion made on the same ground as urged here, objection by appellant's counsel on that specific ground would have been futile and the failure to object did not forfeit this issue on appeal.

Respondent also contends that the error in admission was non-prejudicial, urging review under the standard of *People v. Watson*, *supra*, 46 Cal.2d 818, 836, which mandates reversal if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. According to respondent, a more favorable outcome was unlikely with the offending testimony removed because (1) Wallace's fear was unconnected to appellant, (2) there was other evidence showing that Wallace loaned her van to co-defendant Samuel Taylor on the day of the crime at Eddie's Liquor Store, and (3) the evidence against appellant was strong.

Respondent is wrong. First, whether or not Wallace's fear was connected to appellant, the presence of the threat in evidence without any kind of limiting instruction allowed the jury to infer Marcus Johnson's consciousness of guilt in making the statement. Because appellant was connected to Marcus, it was natural for that inference to be drawn as to appellant and for the jurors to consider appellant equally guilty if they considered Marcus guilty. This was truly the only purpose for introducing evidence of an alleged threat to Wallace. With reference to the facts making this a much closer case than acknowledged by respondent, appellant has set them out in detail in Argument I(D), *ante*.

Finally, while appellant contends that there was federal constitutional error, the error was also prejudicial under the "reasonable probability" standard for state law error set forth in *People v. Watson*, *supra*, 46 Cal.2d 818. While less stringent than the *Chapman* standard for federal constitutional error, *Watson* does have teeth. Pursuant to *Watson*, a reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [emphasis in original, citations omitted].) Hence, *Watson* mandates reversal if the error can "undermine

confidence" in the verdict. (*Ibid.*) This court has continually reiterated the "reasonable chance" standard. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) Thus, the trial court's error was sufficiently prejudicial to compel a reversal, even under state law principles, because of the closeness of the case, the inflammatory nature of the evidence, and the obvious harm to appellant arising from admission of the improper testimony.

Appellant's conviction must be reversed.

III. PERMITTING DETECTIVE EDWARDS' TESTIMONY ABOUT APPELLANT'S STATEMENT TO MARCIA JOHNSON AS A PRIOR INCONSISTENT STATEMENT WAS REVERSIBLE ERROR

Despite a complete lack of the necessary statutory foundation for its admission within the prior inconsistent statement exception to the hearsay rule, Detective Paul Edwards was permitted by the trial judge to testify that Marcia Johnson told him that in the pre-incident meeting before the Eddie's Liquor Store robbery, appellant stated to the assembled group of perpetrators he had been to the store before, was planning to rob it, and there was only one old man inside who was the clerk. Admission was precluded because Evidence Code section 770 mandates that the witness -- here, Marcia Johnson -- either be given an opportunity to explain or deny the statement while testifying, or not be excused from further testimony at the conclusion of her testimony. Neither requirement was met.[6]

Respondent asserts that the challenged testimony met both foundational prongs of Evidence Code section 770. Respondent first contends that Marcia's statement to Edwards was inconsistent with her trial testimony because Marcia was asked numerous times, on both direct and cross-examination, "what appellant said during the planning and what she told Detective Edwards about those discussions." (RT 93.) Respondent acknowledges that Marcia neither confirmed nor denied that she told Edwards about what appellant said regarding his alleged prior visit to the liquor store. Marcia was not specifically asked about that part of her statement, but respondent contends that the lack of specificity was not necessary to introduction of the prior inconsistent statement because Marcia testified about

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[6] This reply relates to Argument V in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

the time and place of her interrogation and who was involved in it. (RT 94.)

Respondent in essence is contending that asking Marcia on the witness stand the very broad question of what appellant said and what she told Edwards about it itself opens her to impeachment with anything she said to Edwards on the same general subject as a prior inconsistent statement, whether or not she was evasive or broached the specific statement that is the subject of impeachment. Respondent's contention must fail.

In *Bossi v. State of California* (1981) 119 Cal.App.3d 313, the witness was handed the transcript of a deposition taken 1½ years earlier and asked whether all of the questions were asked and the answers given. It was held to be an insufficient foundation for admission of the statements themselves because the witness was not afforded "a realistic opportunity to explain or deny any specific statement contained therein." (*Id.* at p. 325.) This holding applies here, for while Marcia was asked about and told Detective Edwards what appellant said at the planning meeting, her answers solely concerned what appellant said he planned to do, not what he had done in the past. Merely raising the subject of Marcia's conversation with Edwards did not give Marcia an opportunity to explain or deny the specific things she told him concerning appellant's statements about his previous visit to the liquor store. Marcia neither denied that she made the statement, nor was she afforded an opportunity to explain any inconsistency.

In *People v. Strickland* (1974) 11 Cal.3d 946, this court held there was sufficient foundation for a prior inconsistent statement of a witness to a murder when the witness' testimony differed dramatically from an earlier statement to the police. There, the prosecutor's direct examination of the witness referenced the statement to the police and the witness denied telling the police the specific statements sought to be used for impeachment. (*Id.* at p. 954.) In the present case, no such foundation was laid, as neither the

prosecutor nor any of the defense attorneys questioned Marcia on the topic of appellant's alleged statement about a previous visit to the liquor store and what he observed inside.

Moreover, there can be no claim that inconsistency was based on deliberate evasion by Marcia as (1) the trial court made no such finding, and (2) Marcia was testifying pursuant to a plea agreement requiring that she tell the truth. Marcia did not claim a lack memory of her prior statement; she merely was never asked about the details. (*People v. Ervin* (2000) 22 Cal.4th 48, 84–85; *People v. Alexander* (2010) 49 Cal.4th 846, 909.)

While the prosecutor clearly did not meet the foundational requirement for properly examining Marcia about her prior statement, respondent adopts the fallback position that the questioning was proper because Marcia was subject to recall as a witness. By respondent's logic, appellant's failure to recall her to lay the prosecutor's foundation for the inconsistent statement somehow waives appellant's claim. (RB 94-95.) So too must this argument fail. As respondent concedes, Marcia had been excused at the end of her testimony. (RT 94.) This should be the end of the inquiry. (*People v. Alexander*, *supra*, 49 Cal.4th at p. 909.)

Respondent also argues that because "the trial court determined that she was subject to recall and stated that appellant's counsel could recall her . . . [a]ppellant's counsel could have done so if he believed she was not sufficiently provided an opportunity to explain or deny her prior statements." (RB 94.) Indeed, the trial judge ruled that Marcia would be subject to recall by appellant's counsel if he wished to lay the prosecutor's foundation. Whether or not Marcia was subject to recall, it was not up to defense counsel to do the foundational lifting for the prosecutor. The proponent of hearsay evidence has the burden to show that a statement comes within an exception to the hearsay rule. (*People v. Ramos* (1997) 15 Cal.4th 1133,

1177; *People v. Livaditis* (1992) 2 Cal.4th 759, 779; Jefferson, California Evidence Benchbook, (1972) § 1.3, p. 5.) Here the proponent was the prosecutor and the prosecutor, faced with the need for further foundational facts, failed to recall Marcia as a witness and instead erroneously urged that appellant's attorney could do so if he so desired.

To the extent that the trial judge premised his discretion on appellant's ability to recall Marcia as a witness for further questioning on foundational issues, the exercise of discretion in this case was flawed because the trial court operated under an erroneous view of the facts and law. (*United States v. Morales* (9th Cir. 1997) 108 F.3d 1031, 1035 [a trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts]; *In re Cortez* (1971) 6 Cal.3d 78, 85-86 [""To exercise the power of judicial discretion all the facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision.""].) Here, the trial judge was either operating on the belief that Marcia had not been excused as a witness or that defense counsel was obligated to lay a foundation for the prosecution's prior inconsistent statement if she could be recalled. Either view was flawed. Because the proper foundation for admission of Edwards' testimony of a prior inconsistent statement of Marcia Johnson was not laid, permitting it into evidence was error.

Finally, respondent contends that the error in admission was nonprejudicial, urging review under the standard of *People v. Watson*, *supra*, 46 Cal.2d 818, 836, mandating reversal if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. According to respondent, a more favorable outcome was unlikely with the offending testimony removed because (1) other evidence demonstrated that appellant had been to Eddie's Liquor Store in the past to

plan the robbery, and (2) the evidence against appellant was strong. (RB 95-96.)

Respondent's assessment is wide of the mark. First, the evidence that respondent claims supports an inference that appellant paid a previous visit to the liquor store to plan the robbery does no such thing. Respondent bases the claim on Marcia's testimony that appellant said that he wanted to rob the specific store and assigned tasks to everyone, specifically describing how to get to the store, telling Marcia to first go inside to look for clerks and cameras, and telling Taylor and Marcia to remain outside while appellant and Johnson went inside.

A far more limited inference is the only one supported by the proffered evidence. Respondent's asserted inference might as well be that appellant was a regular customer of the liquor store, for that inference was equally unsupported. Instead, if the jury believed Marcia's testimony, it might support an inference that appellant targeted the store, but only that he had observed the store from the outside and knew the route to the location. Indeed, if appellant had actually gone inside on a recent occasion and scrutinized the number of cameras and clerks, there would be no reason to tell Marcia to do the same thing immediately prior to the robbery.

Instead, the improperly tendered evidence added credence to the prosecution's position that appellant led the robbery attempt and was the actual shooter, despite a total lack of evidence regarding exactly what occurred inside the store. With reference to the facts and factors making this a much closer case than acknowledged by respondent, appellant has set them out in detail in Argument I(D), *ante*.

While appellant contends that there was federal constitutional error, the error was also prejudicial under the "reasonable probability" standard for state law error set forth in *People v. Watson*, *supra*, 46 Cal.2d 818. Thus, the trial court's error was sufficiently prejudicial to compel a rever-

sal, even under state law principles, because of the closeness of the case, the inflammatory nature of the evidence, and the obvious harm to appellant derived from admission of the improper testimony.

Appellant's conviction must be reversed.

IV. ADMISSION OF APPELLANT'S LACK OF RESPONSE TO IRIS JOHNSTON'S LETTER AS AN ADOPTIVE ADMISSION WAS REVERSIBLE ERROR

Respondent contends throughout its brief that there was no prejudice inuring to appellant from egregious errors made at trial because there was abundant other properly-admitted evidence that demonstrated appellant's culpability in the Eddie's Liquor Store robbery. Featured in respondent's recitation of other evidence is appellant's apparent lack of response to Iris Johnston's written letter to him accusing him of the crime. This letter was admitted as an adoptive admission. However, appellant's so-called adoptive admission was improperly admitted by the trial judge because admission of a defendant's silence when confronted with an accusatory writing, especially a narrative, is forbidden in a criminal case. In addition, the entire writing may not be admitted when the alleged admission or other admissible portion only relates to a portion of it. In the absence of admissible evidence of an adoptive admission, instructing the jury with CALJIC No. 2.71.5 on adoptive admissions was error. Finally, because the police located, seized, and lost a letter from appellant to Johnston that was dated after her letter to him and may have been a denial or other response, it was error to allow into evidence appellant's so-called adoptive admission based on his "silence," particularly when police failed to record or divulge to the defense the contents of the letter it lost. Indeed, appellant may have replied to Johnston's letter, which will never be known due to the prosecution's loss of the evidence.[7]

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[7] This consolidated reply relates to Argument VI in Appellant's Opening Brief with reference to the guilt phase trial and Argument XIV with reference to the penalty phase retrial. The arguments are numbered the same in Respondent's Brief.

A. AN ADMISSION IN A CRIMINAL CASE MAY NOT BE IMPLIED FROM FAILURE TO RESPOND TO A WRITING

Without citing any case law to support its position, respondent first disagrees with appellant's assertion that an admission in a criminal case may not be implied from the failure to respond to a writing. Respondent premises its position on language in Evidence Code section 225 that a "statement" for hearsay purposes, such as one in Evidence Code section 1221 on adoptive admissions, may be written. However, the clear line of case law in California is that the failure to respond to such a writing may not be considered an admission because there can many reasons not to do so other than an adoption as true of the matters stated in the writing.[8] (See *Security-First Nat. Bank of Los Angeles v. Spring Street Properties* (1937) 20 Cal.App.2d 618, 626; *Hughes v. Pacific Wharf & Storage Co.* (1922) 188 Cal. 210, 225; *A. B. Leach & Co. v. Peirson* (1927) 275 U.S. 120, 128.) Indeed, even in civil litigation, the instances in which failure to respond to a writing can amount to an admission are severely limited. (*Simpson v. Bergmann* (1932) 125 Cal.App. 1, 8; *Kelly-Springfield Tire Co. v. Sischo* (1933) 136 Cal.App. 38, 42-43.)

Here, Johnston testified that she handed appellant her letter, but she did not see him read it. The letter was found on appellant's dresser one week later, although it was unknown if the envelope had been opened. Respondent asserts that this supports an inference that appellant read the letter because it was unlikely that appellant would have placed it on his dresser without reading it and because the police officer locating the letter "would have noted that he was the first to open the letter if that had been the case."

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[8] Appellant is arguing that silence in the face of a writing may not be considered an adoptive admission in a criminal case, not whether an affirmative response to a writing can be so considered.

(RB 103.) Respondent reads too much into the inference based on finding the letter. It is just as likely the officer would have noted the letter was open if he found it that way given the ultimate importance of the letter to the prosecution's case against appellant. Either inference mandates speculation and cannot support a foundational finding that appellant either read or did not read the letter. This scenario points out a critical problem with basing an adoptive admission on a written statement because, as in this case, there is no way to demonstrate that appellant read the letter and was aware of its content. For just this reason, the three criminal cases in California permitting a written underpinning for an adoptive admission have been limited to situations where the written document was read to the defendant, thus altering its nature from written to oral and allowing the inference that the defendant was confronted with the accusation. (*People v. Rollins* (1910) 14 Cal.App. 134, 138; *People v. Mechler* (1925) 75 Cal.App. 181, 186-187; *People v. Porter* (1923) 64 Cal.App. 4, 11.)

Irrespective of whether there was evidence that appellant read Johnston's letter, the crux of this issue is that there was no correlative foundational duty to respond to it, lest it be deemed an admission on appellant's part. As stated before, this is because there are many reasons not to respond to a writing other than an admission that the matters stated are true. Appellant may not have read Johnston's letter. Appellant may simply have wished to drop his relationship with Johnston, as Johnston strongly stated in her letter, and felt that no reply was necessary because her demand was self-executing. There was no history of mutual correspondence between the parties, so appellant may not have felt the need to respond in writing, and he did not see Johnston again until she testified. In the week after the letter was written to the time it was discovered, appellant may have been busy with other matters demanding his time. Appellant may have had limited writing skills. Or, appellant may affirmatively have chosen not to re-

spond as "[a] person accused of crime has no duty to discuss the case with his accusers." (*Martinez v. Superior Court* (1964) 224 Cal.App.2d 755, 757; see also *People v. Simmons* (1946) 28 Cal.2d 699, 715.) Finally, as discussed later, appellant may have responded to the letter in writing, but the response, when discovered by the police, was otherwise not noted in terms of its contents and lost before it was provided to the defense.

In response, respondent merely parses some of the cases set forth in appellant's opening brief, but never addresses the holding in those cases or the remaining cases that are not addressed by respondent: that the failure to respond to a writing may be admitted as the basis of an adoptive admission only in very limited circumstances in civil cases and never in criminal cases.

Here, unlike a verbal accusation in someone's presence, Iris Johnston could not and did not testify that she saw appellant read the letter. Likewise, there was no proof that he read it or ever became aware of its contents. Lacking such evidence, even if this court were inclined to extend or broaden the civil exception into criminal cases, this is not the case in which to do it. Hence, it was error to admit Johnston's written communication to appellant as the underlying basis for an adoptive admission premised on his silence

B. AN ADOPTIVE ADMISSION MAY NOT BE IMPLIED FROM SILENCE IN THE FACE OF A NARRATIVE STATEMENT

To the extent that the Johnston's accusation was properly admitted as the foundation underlying appellant's adoption of its truth through his silence -- a point not conceded by appellant -- it was improper to admit the entire narrative contained in her letter.

In *People v. Sanders* (1977) 75 Cal.App.3d 501, 508 ("*Sanders*"), the Court of Appeal found that it was improper to allow as an adoptive admission the defendant's silence in the face of a prolonged police interrogation.: "It is fundamentally unfair to expect point-by-point denials of long narrative statements, containing several facts as well as theories and inferences — particularly where the statements are not in question form." (*Ibid.*) Here, Johnston's letter contained just such a narrative. She asks appellant, "What's up?", then tells him that she is bored. Next comes a potential accusation as she informs appellant that she believes "you guys did that little rubbery [sic] in Long Beach." Next, Johnston tells appellant the alleged facts she believes supports her theory, including things she supposedly told only herself contemporaneously with the occurrences. Finally, she tells appellant she does not want to progress any further in their relationship because she fears he will be caught, then suggests he can contact her or tell her things. (Exhibit 2.) As in *Sanders*, Johnston is not asking questions and a response would have to entail denials of multiple facts, theories and inferences, so "[i]t is fundamentally unfair to expect point-by-point denials." (*Ibid.*)

Even through *Sanders* was featured in appellant's opening brief, respondent has failed to respond to it, distinguish it, or even mention it. Appellant submits that *Sanders* controls the issue here. Instead of confronting *Sanders*, however, respondent changes direction and urges that appellant's reliance on *Williamson v. United States* (1994) 512 U.S. 594 ("*Williamson*") for the proposition that a trial court must examine for admissibility each hearsay statement contained in an adoptive admission is misplaced. According to respondent, *Williamson* is easily distinguished because it concerned admissions found in a declaration against penal interest, as opposed to an adoptive admission. (RB 107.) This court has previously ruled otherwise, finding that the parsing required by *Williamson* was equally appli-

cable to adoptive admissions. (*People v. Davis* (2005) 36 Cal.4th 510, 535 ("*Davis*").)

Respondent also contends that *Williamson* is not applicable because the trial court complied with its mandate, but does not cite to the record where that holding can be found. Indeed, aside from generic statements by the trial judge that the entire statement gives context to the accusation, there is no finding that specific statements are admissible.

Finally, relying on *Davis*, *supra*, 36 Cal.4th at pp. 536-538, respondent asserts that Johnston's entire letter was necessary for the nonhearsay purpose of providing context to Johnston's accusation. In *Davis*, recordings of two jailhouse conversations with the defendant were admitted as adoptive admissions. This court found that numerous non-accusatory portions of the recordings were admissible because they gave context to the admissible portions. Examples given by this court included portions indicating that appellant heard and understood the meaning of what was said, allowing the jury to consider for itself what was said, and allowing the jury to consider the tone of voice and inflection to infer whether there was an admission. (*Ibid.*) In the present case, the non-accusatory portions of Johnston's letter did not give meaning to her accusation. She accused appellant of a crime and the reasons allegedly underlying her belief did not give meaning to the accusation itself, but instead were meant solely to bolster Johnston's otherwise unreliable testimony. If the jury sought the context of her accusation, it only needed to consider her testimony about what she allegedly witnessed that was consistent with the letter.

C. THERE WAS NO OTHER BASIS FOR ADMISSION OF THE ENTIRE LETTER

Appellant contended in his opening brief that neither Evidence Code section 771 on use of a writing to refresh a witness' memory, nor Evidence

Code section 770 on prior inconsistent statements permitted introduction of the entire letter beyond an accusation to which appellant was required to respond. Respondent merely counters that admission on these grounds rendered any error harmless. Aside from noting that respondent never demonstrates how those code sections permitted admission of this evidence, appellant will make no further response here.

Similarly, respondent has chosen not to reply to appellant's contentions that Evidence Code section 352 precluded introduction of the entire letter and that Evidence Code section 356 could not be utilized by the prosecutor to introduce the entire letter. Accordingly, no response on those grounds will be made here.

D. LACKING AN EVIDENTIARY BASIS, IT WAS ERROR TO INSTRUCT THE JURY WITH CALJIC NO. 2.71.5 ON ADOPTIVE ADMISSIONS

Over defense objection, the trial judge instructed the jury with CALJIC No. 2.71.5 on adoptive admissions. Because Iris Johnston's letter to appellant was admitted to demonstrate that his failure to respond was an adoptive admission premised on silence, its admission was error, particularly without proof that he ever read the letter. In the absence of any evidence of an adoptive admission, instructing with CALJIC No. 2.71.5 on adoptive admissions was error.

Respondent counters that because Johnston's letter was properly admitted as an adoptive admission, jury instruction with CALJIC No. 2.71.5 was proper.

Obviously, the ultimate answer to whether the jury was properly instructed hinges on whether there was evidence of an adoptive admission.

Appellant submits that there was no such evidence, hence the instruction was given in error.

E. THE LOSS OR DESTRUCTION OF APPELLANT'S REPLY LETTER TO JOHNSTON WAS FEDERAL CONSTITUTIONAL ERROR MANDATING SANCTIONS

Three months after the crime at Eddie's Liquor Store, appellant sent Johnston a letter that possibly was a reply to her initial letter given to him, which she delivered by hand. The police discovered appellant's letter at Johnston's house, read it without recording its contents, and disclosed its existence to the defense. However, it never disclosed the contents of the letter which was later characterized by police as a reply to Johnston's letter. Subsequently, and before the prosecution provided a copy to the defense, appellant's reply letter was either lost or destroyed by the police, in violation of appellant's constitutional due process right to a fair trial and to prevent a defense. Because appellant's letter potentially negated his so-called adoptive admission and was unavailable, defense counsel unsuccessfully sought exclusion of Johnston's letter to appellant proffered by the prosecution to support is contention that appellant made an adoptive admission of guilt because he failed to respond to Johnston's accusations regarding his involvement in the Eddie's Liquor Store robbery.

Respondent's reply that losing or destroying appellant's letter to Johnston did not violate due process is flawed. Respondent analogizes the lost letter to a failure to preserve evidence that might prove exonerating. While "failure to preserve" issues typically involve evidence subject to testing, here, no testing was required to establish the evidentiary value of the letter. Given the context of the case -- a context very familiar to Detective Reynolds as the prime investigating officer on the case -- the potential

exculpatory value of appellant's letter to Johnston was apparent. Since the only copy was in the sole possession and control of the prosecution, appellant's defense team had no means to obtain comparable evidence or to determine what the original stated. Thus, Reynolds' failure to note the contents in a report constituted appallingly reckless police and prosecutorial conduct, as was the failure to turn over the letter to defense counsel and preserve it for trial after it had been booked into evidence. Appellant's due process right was violated. (*California v. Trombetta* (1984) 467 U.S. 479, 488-489; *Arizona v. Youngblood* (1988) 488 U.S. 51, 58.)

Respondent argues that, at most, appellant can demonstrate only that the evidence might have been exculpatory and that self-serving denials by a criminal defendant are not necessarily admissible. Yet, respondent argues, quite disingenuously, that Detective Reynolds' characterization of the evidence as a "love letter" that did not reference the capital crime was sufficient to justify admission of Johnston's letter to establish appellant's adoptive admission. Respondent's position is equally, if not more, self-serving.[9] The problem with respondent's position is that it seeks to take unfair advantage of appellant's inability to present his potentially exculpating letter, which was in the sole possession of and lost by the prosecution. Respondent's speculative and specious contention that Reynolds would have noted the contents of the letter if it, in fact, was exculpatory is also self-serving and should be rejected. Reynolds did not note the contents despite his knowledge that Johnston's letter to appellant was potentially an important accusation that appellant may not have denied and that the police lost ap-

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[9] It should be noted that Detective Reynolds testified to the contents of this letter, which he had seized three years earlier and about which he made no notes. Moreover, he was biased in favor of the prosecution and thus motivated to testify in a manner most damaging to the defense.

pellant's reply to the letter. The prosecution should not benefit from appellant's inability to refute the prosecution's claim that his failure to respond to Johnston was an adoptive admission of guilt when the evidence that would have allowed him to do so was lost as a direct result of the prosecution's misfeasance or malfeasance in failing to preserve it.

Relying on *People v. Jurado* (2006) 38 Cal.4th 72, 130 ("*Jurado*"), respondent contends that even if appellant's letter to Johnston was a denial of her accusation, it would be inadmissible as a self-serving statement. In *Jurado*, the defendant sought introduction of his denials of culpability made in a post-arrest police interrogation. The court denied the proffer, finding the statements lacked trustworthiness, as the defendant had a compelling reason to minimize his culpability. (*Ibid.*) Respondent's reliance on *Jurado* is misleading. Here, the evidentiary value of appellant's letter to Johnston was its potential to refute the claim that appellant made an adoptive admission of guilt by failing to respond to Johnston's accusations. But where it is the prosecution that is responsible for the loss of material evidence, it should not be permitted to sandbag the defense by arguing, on the one hand, that the lost evidence was self-serving and therefore inadmissible while, on the other, that appellant's "silence" is proof of his adoptive admission. The prosecution cannot have it both ways.

Respondent next urges that because the loss of the letter was inadvertent, as opposed to being done in bad faith, appellant cannot demonstrate a violation of his due process right. But, here, the issue does not turn on whether the prosecution's agents were acting in good or bad faith, but on the impact of the prosecution's actions on appellant's state and federal constitutional trial rights. The evidence lost by the police was material to the disputed issues in this case. In this context, material evidence is evidence which possessed an exculpatory value that was apparent before the evidence was destroyed and was of such a nature that the defendant could not

obtain comparable evidence by other reasonably available means. (*California v. Trombetta*, *supra*, 467 U.S. at pp. 488-489.) Moreover, the government has "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." (*Arizona v. Youngblood*, *supra*, 488 U.S. at p. 58.) Where evidence has apparent exculpatory value at the time of its loss or destruction, bad faith need not be shown. (*Bullock v. Carver* (10th Cir 2002) 297 F.3d 1036, 1056; *Cooper v. Calderon* (9th Cir. 2001) 255 F.3d 1104, 1114; but see *Killian v. United States* (1961) 368 U.S. 231, 242 [destruction of police notes used for investigatory report not in violation of defendant's rights if the notes served their purpose, destruction was done in good faith and in accord with normal practice]; *People v. Tierce* (1985) 165 Cal.App.3d 256, 263-264 [same].) Here, the letter was never discovered to the defense, there were no "notes about its contents, and its loss was in clear violation of the prosecution's duty to preserve material evidence. Respondent's repeat of the prosecution's self-serving characterization of the lost letter is not entitled to deference because of the failure to preserve the evidence. Appellant's federal right to due process was violated and appellant was denied any ability to claim that he failed to reply to Johnston's accusatory letter.

Appropriate sanctions range from instruction to the jury, suppression of evidence, or dismissal of the charges. (*People v. Zamora* (1980) 28 Cal.3d 88, 99-104; *People v. Moore* (1983) 34 Cal.3d 215; *People v. O'Hearn* (1983) 142 Cal.App.3d 566.) Even if the defense fails to prove apparent exculpatory value or bad faith, with proof of a loss of material evidence, the trial court retains "discretion to impose appropriate sanctions, including fashioning a suitable cautionary instruction." (*People v. Medina* (1990) 51 Cal.3d 870, 893, 894.) Here, despite the obvious exculpatory value of appellant's letter to Johnston and the bad faith of the police in los-

ing it, no sanctions in any form were imposed on the prosecution by the trial judge, This failure exacerbated the denial of appellant's original request to exclude Johnston's letter as the foundational basis of appellant's implied admission premised on silence.

F. THE ERROR WAS PREJUDICIAL

Despite respondent's repeated insistence throughout its brief that appellant's alleged adoptive admission was critical to the prosecution's guilt phase case against appellant, respondent here claims just the opposite -- that erroneous admission of the evidence did not create undue prejudice.

In support of its position, respondent asserts that there was other evidence of the points Johnston recited in her letter to support her accusation. Aside from the letter itself -- inadmissible as either a writing used to refresh her memory or as prior inconsistent statements -- those points were only found in Johnston's weak and inconsistent testimony. Moreover, it was not what Johnston alleged that prejudiced appellant; it was the use of the letter as a foundational basis for appellant's alleged admission through silence. In her argument, the prosecutor urged the jurors to consider the letter as proof that appellant's silence proved his participation in the crime. If the jurors believed the accusations in the letter, the prejudice is obvious, as it lessened the prosecutor's burden of proof in an otherwise close case by permitting an inference of guilt from erroneously-admitted evidence. (See *Arizona v. Fulminate* (1991) 499 U.S. 279, 295-302.)

Here, the improperly admitted evidence pointed directly at appellant as one of the perpetrators of an attempted robbery and killing, painting him as callous and narcissistic. With reference to the facts and factors making this a much closer case than acknowledged by respondent, appellant has set them out in detail in Argument I(D), *ante*.

Finally, while appellant contends that there was federal constitutional error, the error was also prejudicial under the "reasonable probability" standard for state law error set forth in *People v. Watson*, *supra*, 46 Cal.2d 818. Thus, the trial court's error was sufficiently prejudicial to compel a reversal, even under state law principles, because of the closeness of the case, the inflammatory and offensive nature of the evidence and the obvious harm to appellant derived from admission of the improper evidence.

Appellant's guilt phase conviction must be reversed.

In addition, the error was prejudicial at the penalty phase retrial because the improper inference drawn from an admission that appellant committed the crime was powerful evidence negating the mitigating circumstance of lingering doubt and skewing the jury's weighing process in favor of death.

While appellant contends that the applicable test for prejudice arises from federal constitutional error, respondent concedes that the applicable test of prejudice from state law error in a penalty trial is the same as for federal constitutional error under *Chapman v. California*, *supra*, 386 U.S. at p. 24. Thus, in the penalty phase context, the required showing of a "reasonable possibility" the error affected the verdict under state law is the same as respondent's burden of demonstrating that the error was harmless beyond a reasonable doubt under federal law. (RB 177, citing *People v. Jones* (2003) 29 Cal.4th 1127, 1264, fn. 11.)

Respondent also asserts that there was no reversible prejudice, noting matters contained in Johnston's letter that were admitted through her testimony. (RB 177-178.) Respondent misses the point. There were no other admissions or confessions in this case from appellant. It was not the impact of what was stated in Johnston's letter itself or her testimony about what appellant said or did that undermined any lingering doubt of appel-

lant's guilt, rather, it was the prosecution's assertion that appellant's silence in the face of that letter was an admission of guilt. This error skewed the penalty determination away from any lingering doubt of appellant's guilt and in favor of death.

Respondent counters that there was no prejudice because there was substantial other evidence that appellant was the "mastermind behind the crimes," "the actual shooter," and that he "planned and occupied a leadership position in the crimes." (RB 178-179.) But, that evidence rested entirely of upon the ever -changing, unreliable, and uncorroborated accomplice testimony of Marcia Johnson, who was testifying pursuant to a highly favorable plea agreement. And, although the prosecutor argued the point strenuously, the surveillance videotape from Eddie's did not show appellant -- or anyone who arguably was appellant -- carrying a gun.

Respondent asserts that based on appellant's prior and current criminality, the evidence introduce in aggravation established appellant's nature as "a violent and dangerous criminal who showed little, if any, empathy for his victims and who did not appear to be amenable to rehabilitation." (RB 179.) The evidence does not bear out respondent's contention. The evidence from the Gilbert High School incident was unclear at best. The only witness testified she heard what she believed were gunshots coming from appellant's direction and saw appellant extend his arm at shoulder level, but she saw neither a gun, smoke nor muzzle flash. In the Cypress Arnold Park incident, although appellant was and was armed, the gun he was holding fired accidentally when his arm was pushed down and the gun was grabbed by the victim. In the Rite Way Market robbery, the only evidence was that appellant stole the gun from the market. These incidents reflect poor judgment to be sure, especially considering appellant's youth and his troubled background. They are not sufficient to support respondent's contention that

appellant was an irredeemable human being who should be sentence to death based on unproven assertions that he shot Mr. Moon.

Respondent is dismissive of appellant's compelling evidence in mitigation and his unsuccessful attempts to improve himself. Respondent blithely ignores uncontroverted evidence that appellant was born to a 13 year old, drug addicted mother and the damaging effects of his life history. He was the first of her six children. When appellant was 7 years old, she lost custody because she was selling cocaine out of her home. His mother was not present when he was young, as she was in-and-out of prison. Appellant was sexually abused twice before he was 10 years old. When appellant was 10 years old, his father was killed in an act of violence and appellant had the burden of identifying the body. As a result of these early deprivations and traumas, appellant spent his youth bouncing between McClaren Hall and the homes of his grandparents. Not surprisingly, appellant began abusing drugs and alcohol when he was 11 years old. Despite his unstable, violent and traumatic upbringing, appellant was greatly influenced by religion and learned to inspire others. While held in the California Youth Authority, appellant's religious activities helped to reduce the level of violence in the institution and he had a very positive impact on others. Thus, the defense at the penalty trial was premised on lingering doubt about the guilt finding on the capital crime, together with a request for mercy and sympathy.

Within that context, any assessment of prejudice in the penalty phase retrial must begin with the fact that the first penalty phase jury deadlocked on the determination of sentence, indicative of the closeness of the case and that jury's analysis of the evidence presented by both sides. (See *People v. Brooks* (1979) 88 Cal.App.3d 180, 188; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.) The second penalty jury heard this same erroneously-admitted evidence and clearly drew only adverse inferences. Even if

appellant concedes, arguendo, that no prejudice occurred in the guilt trial, it is nevertheless true that the same error may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609.) "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888.)

Here, prejudicial evidence in the nature of an admission that appellant committed the charged crime was erroneously admitted in a capital case, negating appellant's strong mitigating circumstance of lingering doubt and skewing the jury's weighing process in the direction of death.

Reversal of appellant's death penalty is mandated.

V. ABSENT A PROPER FOUNDATION FOR STILL PHOTOGRAPHS TAKEN FROM A VIDEOTAPE IN THE LIQUOR STORE, ADMISSION WAS PREJUDICIAL ERROR

As with Iris Johnston's letter improperly admitted as the foundational basis for proof of appellant's alleged adoptive admission by silence, respondent argues throughout its brief that the two enhanced still photographs taken from the surveillance videotape inside Eddie's Liquor Store were properly admitted and thus negated the prejudicial impact of other errors. While the videotape itself was properly admitted, its poor quality did not clearly establish that appellant was one of the perpetrators shown in the video. The two enhanced photographs, however, contained far more detail which, according to the prosecutor, showed appellant as one of the perpetrators. Because there was evidence that something was done to the photographs that the authenticating witness had no knowledge of and could not describe, the prosecutor failed to lay a proper foundation demonstrating that the photographs were not enhanced or otherwise digitally manipulated. Thus, they were improperly admitted.[10]

In a "silent witness" case such as the present one, the proper foundation for a surveillance photograph not only mandates a showing of when and where a photograph or videotape was made, but also that it has not been tampered with in any fashion. This foundational proof is in lieu of evidence that the picture accurately depicts what it purports to show because there is no witness who can testify that he or she observed what occurred. (*People v. Mitman* (1954) 122 Cal.App.2d 490, 495; *People v.*

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[10] This consolidated reply relates to Argument VII in Appellant's Opening Brief with reference to the guilt phase trial and Argument XV with reference to the penalty phase retrial. The arguments are numbered the same in Respondent's Brief.

Doggett (1948) 83 Cal.App.2d 405, 410-411; *People v. Bowley* (1963) 59 Cal.2d 855, 859-861 ("*Bowley*").)

Respondent cites *Bowley* for the first half of the foundational analysis, but omits the critical portion relating to proof that the photograph had not been tampered with. (RB 118.) The second prong of the analysis is not a mere technicality, but an additional foundational requirement in a "silent witness" case, as there is substantial potential for mischief if a photograph has been digitally altered. Even in a "non-silent witness" case, changes may be so subtle that an authenticating witness may not notice the differences. Other, more nefarious results are possible through digital manipulation, including misidentification. It is the burden of the party proffering the evidence -- here, the prosecution -- to lay the foundation for the evidence before it can be admitted, not that of the opposing party to demonstrate there is evidence of tampering. (Evid. Code, § 403, subd. (a).)

Respondent first asserts that the original videotape was properly authenticated because the responding officers testified that it showed an accurate depiction of the scene they observed upon their arrival at the store. While appellant agrees that the original videotape was properly authenticated, the police testimony could not provide authentication beyond the portion of the video in which the police could be observed. Nevertheless, it was evidence that the video had not been altered through its chain-of-custody that gave rise to its admissibility. Thus, because the original surveillance videotape recovered from Eddie's Liquor Store was a classic "silent witness" video and was properly authenticated, admission of that exhibit was proper. Similarly, the three still photographs taken directly from that videotape without enhancement also were properly admitted.

But the two remaining photographs failed to meet the foundational requirements. Respondent speculatively counters that the photographs were properly admitted because they were printed directly from the original

videotape without enhancement. Respondent urges that Cisnero's testimony that the Aero Space "VCR" merely showed a larger frame than the VCR at the police station established that there were no changes or enhancements in the new photographs printed at that location. The record proves respondent wrong.

Cisneros did not testify that a "VCR" was utilized at Aero Space Corporation. Instead, he testified that he took the videotape to that location for enhancement -- to make it "clearer" -- presumably because there was not enough identifying information in the original to be of much use in identifying and prosecuting the perpetrators. The technician put the videotape into a "machine" and Cisneros had no idea how the machine worked or what it did. He testified that the machine had a computer terminal and a monitor; hence, it was not merely a VCR, as postulated by respondent. Cisneros observed the person at the controls of the machine, but did not work it himself and did not know what was done to the videotape. Indeed, Cisneros had no idea how Exhibits 41 and 42 were produced and could not testify in any manner that they had not been digitally manipulated.

Because Cisneros could not testify from personal knowledge that the photographs had not been manipulated, he could not lay a foundation for the two remaining photographs as to whether or not they had actually been manipulated. Without that foundation, the photographs were improperly admitted by the trial judge over defense objection.

Finally, respondent asserts that the error in admitting the two enhanced photographs was not prejudicial despite insistence in numerous other areas of respondent's brief that the pictures played a critical part of the jigsaw puzzle connecting appellant with the crime at Eddie's Liquor Store.

To support its position, respondent contends that the still photographs in question showed little more than the videotape, including the

"distinctive Nike Air T-shirt" found in appellant's bedroom one week later. This argument is misleading. First of all, a Nike Air T-shirt with a Nike "swoosh" is not distinctive. It may be recognizable, but Nike paraphernalia, including T-shirts, are generic. Second, as argued to the jury by the prosecutor, the still photographs showed the Nike swoosh in far more obvious detail. Notably, and conveniently ignored by respondent, the prosecutor argued that the still photographs, unlike the videotape, showed appellant's "very distinctive ear. The size, the shape, the way that it protrudes slightly away from the skull. And you'll see, based on the face structure, the cheek bones, the upper lip that protrudes slightly, the facial hair, that the person in the video is the defendant Chism." (RT 10:2060.) Moreover, a request from the guilt phase jury during deliberations clearly indicated that the Eddie's Liquor Store videotape did not show them what the enhanced photographs displayed. (CT 3:612 ["if the enhanced version of Eddie's [videotape] is available - we need it!"].) Hence, the jurors sought important information from and relied on the enhanced photographs, which clearly showed more than the original videotape.

As argued by the prosecutor, the improperly admitted photographs pointed directly to appellant as one of the perpetrators at Eddie's Liquor Store. With reference to the facts and factors making this a much closer case than acknowledged by respondent, appellant has set them out in detail in Argument I(D), *ante*.

Finally, while appellant contends that there was federal constitutional error, the error was also prejudicial under the "reasonable probability" standard for state law error set forth in *People v. Watson*, *supra*, 46 Cal.2d 818. Thus, the trial court's error was sufficiently prejudicial to compel a reversal, even under state law principles, because of the closeness of the case, the powerful nature of the evidence and the obvious harm to appellant derived from its admission.

Appellant's guilt phase conviction must be reversed.

Similarly, the error was also prejudicial at the penalty phase retrial because the improperly admitted enhanced photographs were powerful evidence of appellant's identity as a perpetrator and shooter. This evidence was utilized to damning effect by the prosecutor who argued that the mitigating circumstance of lingering doubt could therefore be dispensed with, thus distorting the jury's weighing process in the direction of death.

Respondent argues that photographs did not really add anything on the issue of identity because appellant's identity was established by the surveillance videotape. That position, however, is belied by the efforts of law enforcement to obtain the enhanced photographs precisely because the original surveillance video did not give them clear evidence of identity. Moreover, the prosecutor's argument that it demonstrated appellant's identity speaks to the importance of the enhanced photographs to the prosecution's case. Respondent repeatedly refers to the videotape as showing that appellant did things or wore things while inside Eddie's, but in reality the videotape does not show who was inside Eddie's. Indeed, respondent only surmises that it was appellant. Outside of Marcia Johnson's weak accomplice testimony, the enhanced photographs were the most compelling evidence of identity put before the jury.

Given the strong mitigation case put on by appellant and the relatively weak evidence of his guilt of the capital crime, lingering doubt of his guilt was of necessity a major factor in the determination of penalty. As acknowledged by respondent, the enhanced photographs taken from the crime scene largely put that consideration to rest. Because respondent has not demonstrated beyond a reasonable doubt that the error did not contribute to the verdict of death, reversal of that verdict is mandated.

VI. INTRODUCTION OF PRIOR CRIME EVIDENCE TO PROVE IDENTITY, COMMON PLAN, AND INTENT TO ROB AT EDDIE'S LIQUOR STORE WAS ERROR MANDATING REVERSAL

A. INTRODUCTION

Appellant was charged with attempted robbery and murder on a robbery-murder theory arising from the incident at Eddie's Liquor Store. In a separate count, appellant was charged with the Rite Way robbery that occurred one month earlier. Despite sparse evidence of the required similarity between the crimes to permit cross-admission of the earlier robbery to prove the capital crime, and appellant's willingness to plead to the Rite Way robbery and stipulate that he obtained the gun used in the capital crime in that robbery, the trial court erroneously allowed highly prejudicial evidence of the prior crime to prove identity, common plan, knowledge, and intent to rob at Eddie's Liquor Store. Additionally, the trial court misinstructed the jury regarding the limited purpose for which the evidence could be considered, thus permitting the jury to consider the evidence for improper purposes as to appellant, including conduct in conformity with a demonstrated propensity to rob. The prosecutor seized on this inherently prejudicial evidence in her jury arguments, using it both to inflame and convince the jury that appellant intended to rob at Eddie's Liquor Store and, therefore, was death-eligible.

Respondent argues that the trial court's cross-admission of the Rite Way robbery was not an abuse of discretion, as it was relevant to prove identity, motive, intent, and a common scheme or plan. Respondent also urges that any error in admitting the evidence was harmless under any standard of prejudice.

In so arguing, respondent necessarily ignores persuasive authority from this court establishing that such evidence and the related jury instruction was improper. As a result, appellant suffered prejudice mandating reversal.[11]

B. IT WAS AN ABUSE OF DISCRETION TO ADMIT EVIDENCE OF THE RITE WAY ROBBERY TO DEMONSTRATE IDENTITY, COMMON PLAN, INTENT OR KNOWLEDGE AT THE KILLING AT EDDIE'S LIQUOR STORE

Respondent first posits that the trial court was not required to accept appellant's offer to plead guilty to the Rite Way burglary, nor his stipulation that during that robbery, he obtained the gun used one month later at Eddie's Liquor Store. In making this argument, however, respondent never mentions the authority relied on by appellant and conflates the two separate crimes in determining the propriety of the offered plea.

First, respondent has completely overlooked two lines of argument in appellant's opening brief. In *People v. Reza* (1984) 152 Cal.App.3d 647 ("*Reza*"), the defendant stood accused of one attempted burglary premised on strong evidence and one burglary based on weak evidence. The defendant offered to plead guilty to the attempted burglary count and the prosecutor's opposition was premised on the desire to use the evidence in the stronger count to help prove the weaker one. (*Id.* at p. 652-653.) The Court of Appeal found the trial court's refusal of the plea to be error because it is improper for a prosecutor to oppose a guilty plea for the purpose

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[11] This reply relates to Argument VIII in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

of using the evidence to convict on another count as opposed to doing justice. (*Id.* at pp. 654-656.)

Similarly, because evidence of other misconduct is highly inflammatory, if the defense stipulates to the fact the prosecutor desires to prove, the prosecution should be prevented from introducing such evidence to prove an otherwise already-established fact. (*People v. Guzman* (1975) 47 Cal.App.3d 380, 389-390; *People v. Perry* (1985) 166 Cal.App.3d 924, 931-932.)

Instead of dealing with the aforementioned arguments, respondent contends that a trial court is not obligated to accept a partial stipulation where the defense does not admit all elements of a charged crime. (RB 126-127.) In support of its position, respondent cites *People v. Sakarias* (2000) 22 Cal.4th 596, 629. While that case stands for the principle respondent urges, respondent's reliance is misplaced. Here, appellant offered to plead guilty to the Rite Way robbery, which necessarily includes an admission of all elements of the crime to which appellant offered to plead. (*Sanchez v. Superior Court* (2002) 102 Cal.App.4th 1266, 1274.) Respondent's argument seeks to impose a new principle that a guilty plea need not be accepted if it does not include admission to all elements of a separately charged crime -- here the capital crime. That is not the law nor should it be.

Reza is the applicable law and should govern the outcome here. The evidence inculpating appellant in the Rite Way robbery was very strong, while the inculpatory evidence relating to Eddie's Liquor Store was far weaker. When the prosecutor made clear she wanted to use the evidence from Rite Way against appellant in the Eddie's prosecution, appellant sought to plead guilty to the Rite Way robbery and admit that the gun used at Eddie's was stolen from Rite Way. The prosecutor refused to accept appellant's offer to plead guilty to the Rite Way robbery or to otherwise stip-

ulate to facts of the offense because she sought to introduce the stronger evidence of that robbery in order to get a conviction in the weaker capital case. Because appellant offered both the open guilty plea to the Rite Way robbery and a stipulation that the gun was obtained in that robbery, cross-admission of that evidence should have been denied.

In the event the trial court could have gone past those concerns and considered whether Evidence Code section 1101, subdivision (b), allowed introduction of the prior robbery, the answer is that the court clearly abused its discretion in permitting it into evidence. No matter the inference for which the evidence was to be used, the dissimilarities in the two crimes prohibited introduction. Respondent disagrees and first posits that the crimes' similarities were enough to permit introduction of the Rite Way robbery to demonstrate a common design or plan, intent, and identity. Respondent's supposed similarities miss the point.

Respondent states that the crimes were similar because a small retail market was targeted during the daytime, but that generic description is applicable to a high percentage of commercial robberies. Respondent also states that the two stores "were in close proximity and the incidents occurred within a short time period." (RB 129.) This assertion flies in the face of this court's holdings on the subject, as there was a one month gap and approximately a three mile distance between the two crimes. Although cited in appellant's opening brief, respondent ignores *People v. Demetrulias* (2006) 39 Cal.4th 1 ("*Demetrulias*"), where there were striking similarities between two assaults, as well as several factual differences, but the court allowed evidence of the earlier crime based on the short distance (less than one mile) between them and the immediacy of the second crime after the first. (*Id.* at pp. 16-17.) In so holding, this court distinguished *People v. Harvey* (1984) 163 Cal.App.3d 90, 104-105 ("*Harvey*"), where the Court of Appeal found a six month gap between the two crimes

to be a major disparity mandating exclusion of an earlier robbery that the prosecution sought to introduce in a homicide prosecution to prove intent to rob. Appellant submits that, on the question of time and distance, this case is controlled by the holding in *Harvey* and that, unlike in *Demetrulias*, *Harvey* cannot be distinguished here.

Respondent contends that the two crimes were similar because in each a group was involved inside the store and two people confronted the store clerk. Again, this is a difference, not a similarity, because the group of perpetrators at Rite Way consisted of four or five people while the robbery at Eddie's involved only the two men that confronted the clerk.

Respondent urges that in each robbery one person went inside to scout the location immediately prior to the robbery. However, this apparent similarity does not help respondent. The scout at Rite Way was one of the eventual robbers and entered the store fifteen to twenty minutes beforehand, while at Eddie's the scout was not involved in the robbery and the time gap was merely the time it took Marcia Johnson to walk a couple of blocks from the store to the getaway van and for appellant and Marcus Johnson to walk in the opposite direction.

Respondent points to the fact that in each incident the group was armed and a suspect entered the area behind the counter. Of course, there is nothing distinctive or "signature"-like to this aspect, which is common to most commercial robberies.

Respondent next points to the gun stolen at Rite Way, used at Eddie's Liquor Store, and found in appellant's residence about a week after the killing. However, while acquisition of the gun at an earlier date may have been cross-admissible in the capital case, appellant's counsel offered to stipulate to the facts surrounding appellant's acquisition of the gun. Indeed, defense counsel's jury summation admitted appellant's guilt to the Rite Way robbery and his theft of the gun at that time. (RT 10:2163-2164.)

Respondent then argues that the perpetrators at Rite Way contemplated murder, thus making it similar to the murder at Eddie's. Not so. In the prosecutor's account of what occurred at Eddie's, appellant entered and shot Richard Moon without provocation. At Rite Way, appellant was not armed and made a reference inside the store to "187," which in Officer Lipkin's opinion meant that the incident should remain a robbery and not be escalated to a murder. (RT 5:898-900.) To accept respondent's interpretation of appellant's statements during the earlier robbery as proof that he contemplated a murder is to speculate about what appellant meant by those words. In any case, the prosecution should not be permitted to rely on what it "thinks" was in appellant's mind at the time of an incident that occurred one month earlier to "prove" appellant's state of mind at the time of his alleged involvement in the capital crime.

Other than pointing out incidental similarities between the two crimes, respondent ignores appellant's argument relating to the marked dissimilarities between the two crimes. The number of perpetrators entering the store at Rite Way was four or five, at Eddie's it was two. Appellant and Johnson were dressed differently in the Rite Way robbery than the perpetrators at Eddie's. At Rite Way, proof of appellant's involvement was evident from the video and established by his offer to stipulate, while his alleged involvement at Eddie's rested on the testimony of an accomplice who cut a deal with the prosecution. At Rite Way, appellant sought to prevent others from shooting and there was no shooting. At Eddie's, one of the assailants shot the victim, apparently without cause. At Rite Way, money and a gun were taken, while at Eddie's, nothing was taken or disturbed.

Despite the differences between the crimes that drive the analysis, respondent urges that the similarities were sufficiently similar to be "highly probative on the issue of intent." (RB 129.) The problem with respondent's argument is that it omits to inform why the so-called similarities are

sufficient, and instead, focuses merely on why the prosecutor had to show intent to rob. Appellant concedes the prosecution's necessity of showing intent, for the prime theory of the case was that an attempted robbery occurred at Eddie's Liquor Store. But the mere need to prove an element of a crime and special circumstance allegation cannot transform evidence inadmissible for a specific purpose into something it is not. Instead, respondent's argument about the necessity for the evidence -- "Thus, the circumstances of the Riteway robbery were crucial in demonstrating that appellant and codefendant Johnson possessed a similar intent to rob when they entered Eddie's Liquor Store in a similar fashion" (RB 130 [emphasis added]) -- demonstrates that its admission was improper and prejudicial.

To demonstrate intent, the incidents must be "sufficiently similar to support the inference that the defendant 'probably harbor[ed] the same intent in each instance.' [Citations.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402; see *Demetrulias*, *supra*, 39 Cal.4th at p. 15.) Here, especially in light of the time and distance between the two crimes, the incidents lacked a nexus showing that appellant harbored the same intent in each crime.

Respondent next contends that the similarities were sufficient to demonstrate a common plan or design. Here, respondent argues only that showing appellant and Johnson were involved in both crimes establishes that they had a relationship and, therefore, committed the crime at Eddie's "in the manner alleged by the prosecution." (RB 131.) This argument fundamentally misunderstands what is required to demonstrate common plan or design. Respondent is urging that minimal similarities enable an inference that both crimes were committed in the same fashion. In contrast, an inference of common plan or design is dependent on a high degree of similarity -- a "concurrence of similar features" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402) -- it is not used to prove that the other crime occurred in the same fashion. Here, the concurrence of features simply did not exist.

Finally, respondent argues that there was enough similarity to demonstrate appellant's identity as one of the perpetrators. However, identity requires further similarity beyond that necessary for common plan or design, a "'pattern and characteristics . . . so unusual and distinctive as to be like a signature.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.) Hence, if there was not enough to demonstrate common plan or design, there is not enough for identity. Respondent chooses to default to an argument that the evidence showed identity -- the same weapon, the commonality of offenders, time and place -- rather than focusing on the distinctive, signature-like features of the two crimes, which negate its claims regarding identity. For instance, the fact that appellant knew Johnson and had committed a prior crime with him might have some relevance, but does not meet the standard permitting an inference that appellant is the person who committed the capital crime. As set forth earlier, the feature set utilized by respondent does not support the inference that appellant's involvement in the Rite Way robbery unequivocally or necessarily establishes his identity as a perpetrator in the Eddie's Liquor Store killing.

To the extent that there were similar features in the two crimes that justified admission of the Rite Way evidence, respondent argues that the evidence was also more probative than prejudicial because the testimony and videotape of the Rite Way robbery were not unduly inflammatory. Again, this argument must fail because respondent misconstrues the nature of the resultant prejudice. It is not whether the earlier crime evidence was inflammatory on its own that is dispositive, but the nature of prior crime evidence admitted for an improper purpose that is prejudicial. Dissimilarities between the incidents vitiates the probative value of the evidence. (*Demetrulias*, *supra*, 39 Cal.4th at p. 19.) Admission of the Rite Way evidence to prove the essential elements of the capital crime was prejudicial because it permitted the prosecutor to draw improper inferences regarding

identity, common plan, and intent to rob that otherwise would not have been available. According to respondent, these inferences were crucial to the prosecutor's case, thus establishing that the state could not have proven its case without it.

Because the Rite Way evidence failed to prove that appellant committed the crime at Eddie's Liquor Store, it improperly demonstrated propensity through the specious and prejudicial inference that because appellant stole the gun that was used at Eddie's, appellant must have been the person that used it. This the law proscribes -- an inference that because appellant behaved in a certain way on an earlier date, he must have acted in conformity with that behavior in committing a capital crime.

The evidence was improperly admitted pursuant to Evidence Code section 1101, subdivision (b).

C. THE ERROR WAS PREJUDICIAL

Finally, respondent asserts that the error in admitting the prior crime evidence to demonstrate identity, common plan, and intent to rob was not prejudicial despite its concession throughout its brief that the evidence was highly important in establishing appellant's guilt and intent at Eddie's Liquor Store. Indeed, respondent stated as much in its brief, defining the evidence as crucial to multiple contested issues in the capital crime at Eddie's, including appellant's identity and intent. Certainly, without sufficient proof of identity, appellant could not be found guilty. Just as clearly, without this crucial evidence of intent to rob -- given the failure to disturb or take anything from the store -- appellant could not be found guilty on a theory of felony-murder. Thus, without this improperly admitted evidence, the attempted robbery-murder special circumstance allegation that rendered appellant death eligible would have failed.

While respondent acknowledges that the jury was improperly instructed with CALJIC No. 2.50 on other crimes evidence because the instruction omitted appellant's name while including Johnson, respondent fails to address the impact of that omission on the prejudice inuring to appellant from this error. Indeed, the jury was allowed to infer anything, including propensity, from the improper other crimes evidence. The guilt phase jury certainly gave emphasis to the prior crime evidence, requesting twice to view the videotape from Rite Way side-by-side with the Eddie's videotape. (CT 3:612, 615.)

Despite respondent's claims otherwise, this court has recognized that other crimes evidence is by its nature extremely prejudicial when improperly admitted. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; *People v. Balcom* (1994) 7 Cal.4th 414, 422; *People v. Gibson* (1976) 56 Cal.App.3d 119, 129-130; *People v. Karis* (1988) 46 Cal.3d 612, 636.)

Respondent contends that other evidence supported appellant's capital conviction, but there is more involved here than the quantum of evidence. The prosecutor repeatedly urged the jury to convict appellant of the crime at Eddie's premised on evidence of intent, common plan and identity flowing from the crime at Rite Way. Respondent has argued that the evidence was crucial for that purpose. It was.

The improperly admitted prior crime evidence and the inferences drawn and argued by the prosecutor lessened the prosecution's burden and allowed the jury to convict with far less evidence, than the law requires. With reference to the facts and factors making this a much closer case than acknowledged by respondent, appellant has set them out in detail in Argument I(D), *ante*.

Finally, while appellant contends that there was federal constitutional error, the error was also prejudicial under the "reasonable probability" standard for state law error set forth in *People v. Watson*, *supra*, 46

Cal.2d 818. Thus, the trial court's error was sufficiently prejudicial to compel a reversal, even under state law principles, because of the closeness of the case, the powerful nature of the evidence improperly admitted and the obvious harm to appellant derived from its admission.

Appellant's conviction must be reversed.

VII. THERE WAS INSUFFICIENT EVIDENCE TO CORROBORATE MARCIA JOHNSON'S ACCOMPLICE TESTIMONY, MANDATING REVERSAL OF THE FIRST DEGREE MURDER AND ATTEMPTED ROBBERY CONVICTIONS AND THE TRUE FINDING ON THE SPECIAL CIRCUMSTANCE ALLEGATION

A. FIRST DEGREE MURDER

Accomplice testimony must be corroborated by evidence connecting a defendant to the crime. Appellant contends and respondent agrees that Marcia Johnson was an accomplice to the crimes committed at Eddie's Liquor Store. However, respondent takes issue with appellant's contention that there was insufficient corroboration of Marcia's accomplice testimony to support his convictions of first degree murder and attempted robbery, and the true finding on the attempted robbery-murder special circumstance allegation that rendered appellant death eligible, and contends there was sufficient corroborative evidence.[12]

Respondent argues corroboration of Marcia's testimony can be found in various items of evidence: the surveillance video and photographs (original and enhanced) from Eddie's Liquor Store; testimony from Steven Miller, Stephanie Johnson, and Peter Motta relating what they observed as the apparent perpetrators left the store; testimony of Iris Johnston and Zonita Wallace placing appellant in Wallace's van -- used as a getaway car -- shortly after the crime; testimony of Iris Johnston relating what occurred with appellant after the crime; appellant's possession one month beforehand of the gun used in the crime and its discovery in appellant's residence

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[12] This reply relates to Argument X in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

one week after the crime; and the similarity of the circumstances of the Rite Way robbery to the crime at Eddie's Liquor Store.

Respondent's argument is flawed. None of respondent's alleged evidence is the type of evidence that could be deemed sufficient corroboration because none of it connects appellant to the crime. Indeed, respondent's assertion that corroborative evidence need only demonstrate Marcia was telling the truth demonstrates a lack of understanding regarding the nature of the evidence required to corroborate accomplice testimony. According to express statutory language, corroborative evidence must connect the defendant to the offense, not just to the other parties or an opportunity to commit the crime. This is precisely what the evidence in this case failed to do. (§ 1111.) Furthermore, major portions of the alleged corroborative evidence were improperly admitted and, thus, cannot be considered for corroborative purposes. (*People v. McDermott* (2002) 28 Cal.4th 946, 986.)

The rule has long been established that corroborating evidence must connect the defendant to the offense. (*People v. Davis* (1903) 210 Cal. 540, 555.) This requirement is not a matter of judicial construction or interpretation, but derives from the express statutory language of section 1111 that has been present since its adoption. (*People v. Kempley* (1928) 205 Cal. 441, 456.)

Section 1111 requires more than the fact that the evidence *tends* to prove the defendant committed the crime. This is the definition of relevance under Evidence Code section 210. Thus, for example, while the fact appellant was in the getaway van shortly after the crime has a *tendency* in reason to make it more likely that he committed the crime than if it could not be shown he was present, section 1111 requires more than simply a tendency in reason. By its very language, it requires that the corroborative evidence actually "connect the defendant with the commission of the offense." (§ 1111.)

The requirement that the evidence connect the defendant to the crime is an aspect of the related rule that merely showing association with other people involved in the crime is not sufficient corroboration. (*People v. Robinson* (1964) 61 Cal.2d 373, 400.) Case law demonstrates this principle by explaining that if a defendant's fingerprints are found at the scene of the crime or if a defendant possessed property related to the crime, these facts relate to the offense itself and thus constitute corroboration. (See *People v. Andrays* (1989) 49 Cal.3d 200, 211, *People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1305, *People v. Trujillo* (1948) 32 Cal.2d 105; *People v. Williams* (1997) 16 Cal.4th 635.)

Recently, in *People v. Boyer* (2006) 38 Cal.4th 412, this court held that there was "ample corroboration" connecting the defendant to the crime where, along with other evidence, the defendant made a comment hinting he had been involved in the murder and stains on pants recovered from the defendant's house matched both of the victims' blood. (*Id.* at p. 468.) Clearly, the victim's blood on the clothes of a defendant connects him to the crime in a manner that is substantially different from the situation here.

Thus, a reviewing court must eliminate from consideration the accomplice testimony and then determine whether the corroborative evidence has a substantial connection to the crime. (*People v. Kempley*, *supra*, 205 Cal. at pp. 457-458.) If the corroborating evidence requires the testimony of the accomplice to give it meaning, it is not sufficient. (*People v. Davis*, *supra*, 210 Cal. at pp. 554-555.) As will be shown, respondent relies largely on corroborative evidence requiring Marcia's testimony to give it meaning, thus rendering it useless for corroborative purposes. Before considering whether the evidence cited by respondent constituted evidence connecting appellant to the crime at Eddie's Liquor Store, Marcia's testimony and her other statements must first be disregarded and cannot be relied upon to give meaning to the allegedly corroborating evidence. Appel-

lant submits that without Marcia's testimony and statements to give it meaning, the remaining properly-admitted evidence did not connect appellant to the crime.

Respondent first submits that the surveillance video and photographs made from the video, "corroborated Marcia's identification of appellant as one of the suspects." According to respondent, in the video were two African-American males, one wearing a Nike "swoosh" T-shirt, the other wearing shorts, and it showed them enter the store and then run out. Respondent contends that the video showed appellant blocking his face from the camera, but also showed some of appellant's "distinctive features" and that he was bald. Respondent similarly relies on the testimony of three witnesses that one of the perpetrators wore a black T-shirt with white stripes. (RB 137-138.)

Respondent misses the point with this evidentiary offer. First, the original videotape and the original photographs made from it showed nothing recognizable; for that reason the police sought to have the videotape and photographs enhanced. The enhanced videotape was not admitted into evidence and, as appellant has argued elsewhere, the enhanced photographs were inadmissible because the prosecutor failed to lay a proper foundation. Thus, they cannot be considered for corroborative purposes. Moreover, even if the enhanced photographs were properly admitted, they merely showed someone -- appellant was not recognizable -- with someone else. Despite the prosecutor's jury summation, distinctive features were not shown in the originals, and in any event, the features did not establish that either person was appellant. Lacking an identification in the photographs, it was only Marcia's testimony that gave the meaning that one of the people was appellant. This was also true with respect to the person wearing a Nike T-shirt who respondent alleges was appellant. The T-shirt itself was generic and arguably could expose many thousands of men in Los Angeles

County to being charged with a capital crime. Absent Marcia's testimony that the T-shirt found was the one appellant allegedly wore, his possession of a similar shirt does not connect him to the crime. The fact that others saw a person wearing that same T-shirt leave the premises does nothing more than demonstrate that Marcia was possibly correct in her testimony, but it does not connect appellant to the crime without her testimony that the wearer of the T-shirt was appellant. In other words, the fact that a perpetrator wore such a T-shirt and appellant possessed such a T-shirt does not prove that appellant was one of the perpetrators, especially given the lack of an eyewitness identification outside of Marcia's testimony.

Respondent next proffers as corroborative evidence the testimony of Miller, Motta, and Stephanie Johnson, relating to the location and identity of the getaway van. (RB 138.) Again, while this may have bolstered Marcia's constantly changing testimony, it was corroboration on a non-inculpatory fact and failed to connect appellant to an element or fact of the crime itself. Notably absent was any identification in their testimony that it was appellant running to the van.

Similarly, respondent urges that the testimony of Wallace that she loaned her van to Samuel Taylor the day of the shooting and of Johnston that appellant, Marcia Johnson, Marcus Johnson and Taylor picked her up in Wallace's van shortly after the crime at Eddie's Liquor Store corroborates the accomplice testimony. (RB 138.) While Wallace's testimony might have corroborated Marcia's testimony about Taylor, who was on trial as a co-defendant, appellant was not mentioned. With respect to Johnston's testimony that, shortly after the robbery, she was picked up in the "getaway" van by the group that Marcia said went to Eddie's, this testimony demonstrated mere connection to other perpetrators and opportunity to commit the crime, neither of which is sufficient corroboration to support a conviction. (*People v. Robinson*, *supra*, 61 Cal.2d at p. 398; *People v. Fal-*

coner (1988) 201 Cal.App.3d 1540, 1543-1544; *People v. Boyce* (1980) 110 Cal.App.3d 726, 736, 737.) The testimony relied on by respondent merely demonstrates that four people were in the van who admittedly knew each other well prior to that point in time, but does not demonstrate any connection of appellant to the crime.

Disallowance of the foregoing evidence to corroborate Marcia's testimony is consistent with the reasoning behind the requirement that corroboration connect the defendant to the crime itself and not merely to the parties or the scene of the crime. First, there is the recognition that the accomplice's firsthand knowledge of the facts of the crime allows for the construction of plausible falsehoods not easily disproved. (*People v. Guiuan* (1998) 18 Cal.4th 558, 575 (Kennard, J., conc.).) Secondly, there is the danger that the accomplice will make up evidence to inculpate another person in order to obtain a benefit from the prosecution. (*Commonwealth of the Northern Mariana Islands* v. *Bowie* (9th Cir. 2001) 243 F.3d 1083, 1124.) The importance of requiring that the corroboration connect the defendant to the crime itself, and not merely to the parties or the scene of the crime, guarantees that inherently unreliable accomplice testimony shrouded with an aura of credibility because it is viewed as insider information is not used to convict people on a prosecution's case that is built primarily on such a shaky foundation. If the contrary were allowed, an accomplice needing souls to exchange for his own could ensnare many potentially innocent people.

Respondent also cites as corroborative evidence Johnston's tale of appellant's conduct after she was picked up. Johnston testified that during the drive, there were helicopters overhead, someone said that there must have been a robbery, and appellant said that they knew the persons that did it. Johnston also testified that appellant appeared nervous when he saw police officers and reacted to television news reports about the incident at Ed-

die's Liquor Store. (RB 138.) This evidence did not serve to corroborate Marcia's testimony because it only demonstrated potential knowledge of the perpetrators' identity relating to an unspecified robbery. Notably, appellant neither stated who the perpetrators were or that the persons in the van were the perpetrators. Moreover, Marcia's testimony about the van ride differed markedly from Johnston's, as Marcia testified she observed the helicopters, but did not hear any comments from appellant. Granted, if believed, Johnston's testimony about appellant's comments raised suspicions -- suspicions that played out in Johnston's mind when she broke off her relationship with appellant because she thought he might have been involved in the killing at Eddie's -- but Johnston's suspicions in and of themselves corroborate nothing and are irrelevant in the case against appellant. Indeed, evidence that gives rise to a suspicion, even a "grave" suspicion of guilt will not corroborate an accomplice's testimony. (*People v. Szeto* (1981) 29 Cal.3d 20, 43; see CALJIC Nos. 3.10-3.13, 3.18.)

Respondent next points to appellant's silence in response to accusation's in Johnston's letter that was admitted as an adopted admission. (RB 138.) However, as appellant has argued elsewhere, the so-called adoptive admission was improperly admitted and cannot be considered for corroborative purposes. Moreover, even if it was properly admitted for that purpose, the letter never accused appellant of anything and merely stated Johnston's suspicions that appellant was involved in the crime. Lacking an accusation, there was nothing to respond to and the prosecutor's contentions to the contrary should have been disallowed. The inference was so weak even the trial judge felt compelled to state that the letter was a weak adoptive admission. (RT 5:888.) Because appellant admitted nothing, there was no corroboration flowing from his failure to respond to the letter.

Respondent contends that appellant's theft at Rite Way of the gun used one month later to kill Richard Moon at Eddie's, together with the dis-

covery of the gun at appellant's residence one week after the killing corroborates Marcia's testimony because it connects appellant to the crime. (RB 139.) However, outside of Marcia's testimony, there was no evidence of who the shooter was or that appellant possessed the gun the day of the shooting. Certainly, if someone else observed appellant with the gun on the day of the crime -- such as Johnston, who never mentioned seeing the gun -- it might be corroborative, but no one so testified. Here, the evidence only pointed to the fact that appellant acquired the gun one month before the crime at Eddie's and was in possession of it one week afterward. This is no different than appellant being with other perpetrators one month before and one week afterward; it demonstrates nothing more than opportunity, not that he was present and participating at the crime scene.

Finally, respondent posits that similarities between the Rite Way robbery and the crime at Eddie's Liquor Store proved appellant's identity at Eddie's and served to corroborate Marcia's testimony. (RB 139-140.) Not so. First, as appellant has argued, the Rite Way evidence was improperly admitted to prove appellant's identity at Eddie's because the two incidents lacked any signature features distinguishing them from other crimes, so it cannot be used as evidence to corroborate an accomplice. Second, assuming the evidence was properly admitted, it merely connected appellant to Johnson and not to the offense at Eddie's. The Rite Way crime merely showed that appellant committed a previous robbery with Johnson, but did not connect appellant to the shooting at Eddie's.

Thus, all of the evidence pointed to by respondent only connects appellant to other perpetrators or paints appellant as someone who had an opportunity to commit the crime. While it may raise a suspicion that appellant was involved, none of the evidence, singularly or cumulatively, connects appellant to the crime at Eddie's Liquor Store in a manner that corroborates Marcia Johnson's suspect accomplice testimony. Because the

evidence was insufficient to connect appellant to the murder, his conviction of that crime must be reversed.

B. ATTEMPTED ROBBERY

The incident at Eddie's Liquor Store was charged as an attempted robbery because the evidence conclusively demonstrated that nothing was taken from Eddie's Liquor Store by the perpetrators. The register's cash drawer was closed. The owner of the store testified that nothing was missing.

In addition to offering sufficient evidence to connect appellant to the murder, the prosecution was also required to corroborate Marcia's testimony as to an act or element of the crime of attempted robbery in order to directly connect appellant to the charged offense. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.) Appellant contends there was no properly admitted corroborative evidence in this regard, either.

Respondent, on the other hand, contends that in making this argument, appellant is wrongfully requiring corroboration of Marcia's testimony "in all respects." (RB 140.) Appellant is making no such argument. Instead, appellant is insisting that the prosecution had the burden of producing corroborative evidence linking appellant to the crime of attempted robbery -- a crime in this case that must be characterized by an attempt to take Moon's property by force -- and that is exactly what was missing here. Appellant's contention is this: whether or not there was corroborative evidence linking appellant to the scene of the murder, there was no independent evidence that a robbery was attempted. Other than Marcia's accomplice testimony, there was no evidence appellant intended or attempted to rob the store.

Respondent also contends that there was adequate corroboration (RB 141), but analysis of the evidence cited by respondent demonstrates that the corroboration was not put forth at trial. First, respondent points to the previous robbery at Rite Way as providing evidence of appellant's intent to rob at Eddie's. As argued elsewhere, the prior crime evidence was improperly admitted, and in any event, was merely evidence of association with a compatriot and of a generic robbery, both insufficient to give rise to an inference of intent to rob at Eddie's.

Respondent then suggests that the circumstances of the crime -- possession of the gun taken at Rite Way and used at Eddie's, approaching the counter outside the view of the surveillance cameras, and money on the ground next to the victim -- indicated a robbery attempt. However, while there was evidence pointing to money on the counter, there was no evidence of money on the ground. Indeed, the undisputed evidence showed that the money drawer on the cash register was closed and that there was absolutely nothing missing from the store; hence, the origin of the money on the counter was unknown. There was also no evidence that the victim struggled with or resisted the intruders and it was well known that no gun was kept in the store or by Moon. Without Marcia's accomplice testimony, the evidence from the crime itself merely pointed to a shooting, with no proof of any other intent or motive.

Respondent's assertion that corroboration was provided by appellant's comment to Johnston that they knew who committed the robbery fell far short of an admission and merely provided the basis for her suspicion that he was involved in a robbery. And, as asserted elsewhere, appellant's failure to respond to Johnston's "love letter," admitted as an adoptive admission to its contents, was neither admissible nor did the letter directly accuse appellant of committing a crime.

Finally, respondent asserts that "there was no other apparent motive for appellant and codefendant Johnson to enter Eddie's Liquor and kill Moon." (RT 141.) However, the lack of evidence of a differing motive cannot be used to infer the motive the prosecution seeks to prove without affirmative evidence of that motive independent from the testimony of an accomplice.

Viewing the case without Marcia's testimony and other evidence characterized by this court as inadmissible, there was insufficient corroborative evidence to support her testimony, particularly where the evidence outside of accomplice testimony fails to "do more than raise a conjecture of suspicion of guilt." (*People v. Szeto*, *supra*, 29 Cal.3d at p. 27.)

The lack of substantial evidence to support the attempted robbery also undermines the verdict of first degree murder to the extent it rests on the theory of felony-murder, which also requires independent corroboration of the underlying felony. (See *People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1129-1130.) Respondent does not independently dispute this use of the evidence, so it will not be discussed further at this point.

Similarly, "[w]hen the special circumstance requires proof of some other crime, that crime cannot be proved by the uncorroborated testimony of an accomplice." (*People v. Hamilton* (1980) 48 Cal.3d 1142, 1177.) Here, the crime was attempted robbery and, as previously argued, Marcia's accomplice testimony about that crime was uncorroborated. Respondent does not contest this issue to the extent that appellant is correct that there was insufficient corroborative evidence of attempted robbery. Given the lack of evidence independent of accomplice testimony to support the crime of attempted robbery, the attempted robbery-murder based special circumstance must be reversed for insufficient corroborating evidence. (*Ibid.*)

VIII. APPELLANT WAS PREJUDICED BY THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS AND REVERSAL IS MANDATED

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. In this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial. (*People v. Hill* (1998) 17 Cal.4th 800, 845.) When errors of federal magnitude combine with non-constitutional errors, all errors should be reviewed under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, requiring reversal unless respondent can demonstrate that the error was harmless beyond a reasonable doubt. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

In his opening brief, appellant set forth at length the cumulative impact of the numerous and substantial errors found in his guilt phase trial.[13]

Respondent replies in a cursory manner that "[b]ecause appellant has failed to show error or that he suffered prejudice as a result of any particular error or combined errors, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error." (RB 143.) To the extent that appellant has shown any federal constitutional error, and appellant has done so, this is a dramatic misstatement and reversal of the burden imposed on respondent under *Chapman, supra.*

The United States Supreme Court has repeatedly stated that, in the presence of federal constitutional error, the burden is not on a defendant to demonstrate the presence of prejudice, but on respondent to demonstrate the lack of prejudice.

> Certainly . . . constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it

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[13] This reply relates to Argument XI in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

> was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

Chapman v. California, *supra*, 386 U.S. at p. 24.)

> [A]bsent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions.

(*Id.* at p. 26.) Similarly, what respondent must demonstrate in any case when federal error is shown, regardless of the weight of the evidence, has been set forth:

> [T]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

(*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279, emphasis in original.) Here, respondent has utterly failed in its mandate, averring first that there simply was no error, and second, merely stating in a conclusory fashion that appellant has not demonstrated prejudice.

Respondent has not only failed to overcome the showing made in appellant's opening brief, it has failed to make any showing at all. Appellant was deprived of the fair trial to which he was entitled. Respondent has not demonstrated beyond a reasonable doubt that the errors did not contribute to the verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Be-

cause the numerous errors cumulatively stripped from appellant his right to due process and a fair trial, appellant respectfully requests that this Honorable Court reverse his judgment of conviction.

IX. APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN DENYING HIS *BATSON/WHEELER* MOTIONS DURING JURY SELECTION FOR THE PENALTY PHASE RETRIAL

A. INTRODUCTION

Appellant raised two *Batson/Wheeler* challenges to the prosecutor's use of peremptory challenges at the penalty phase retrial to remove from the prospective jury venire Frederick Jones and Joan Stansberry, both African Americans.[14] (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) The trial judge erroneously found on both occasions that defense counsel failed to demonstrate a prima facie case and denied appellant's motions. Following both denials, the prosecutor offered putative explanations that because the excused jurors lacked supervisory experience at work, they could not be counted on to render a penalty decision in a capital case even though they each otherwise stated that they could decide on either death or life without the possibility of parole in a suitable case. Because the alleged justifications were mere pretext and provided cover for racially motivated removals of two African American prospective jurors, reversal of appellant's sentence of death is mandated.

Batson set forth a three-step process to determine whether a peremptory challenge is race-based in violation of the constitution. The United States Supreme Court reiterated the three steps in *Johnson v. California* (2005) 545 U.S. 162:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to

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[14] This reply relates to Argument XII in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

> an inference of discriminatory purpose." [Citations omitted.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations omitted.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citations omitted.]

(*Id.* at p. 168.)

While respondent's legal summary emphasizes the substantial deference accorded a trial court's *Batson/Wheeler* determination when that ruling is properly made under controlling legal authority, that deference is not abdication and reviewing courts are constitutionally mandated to reverse a trial court's ruling where the prosecutor has engaged in racial discrimination in the exercise of peremptory challenges. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 479.)

Respondent stresses that peremptory challenges may legitimately be grounded on a "gut feeling" or other imponderables such as hair style or manner of dress. (RB 151-152.) However, those factors were not part of the prosecutor's exclusion of the two African American jurors. Instead, the prosecutor stated her reason for the exercise of both peremptory challenges -- the lack of supervisory experience of each while they worked for the same employer for an extended period. Under the circumstances of this case, that excuse was a pretext for racial discrimination.

B. THE TRIAL COURT'S FINDING THAT APPELLANT FAILED TO MAKE A PRIMA FACIE SHOWING OF RACIAL DISCRIMINATION WAS MOOTED BY THE PROSECUTOR'S PROFFER OF AN EXPLANATION

In each instance, the trial judge professed to not finding a prima facie case, after which the prosecutor offered her reasons for the excusals, and the trial judge ruled after each that there was still no prima facie case shown by the defense.

The problem presented in this case is that the trial judge verbally stated that he was finding a lack of a prima facie case, but in reality he bypassed that determination and rendered in each instance "third-step" *Batson/Wheeler* decisions that there was no racial discrimination.

When defense counsel brought the initial motion after the prosecutor excused Frederick Jones, the trial judge's first comments after defense counsel attempted to set forth a prima facie showing of discrimination were:

> I always feel inadequate in these *Wheeler* motions.[¶] Now I'm supposed to put on a D.A. hat and look at my notes and see whether, in my opinion, a reasonable D.A. would have had a not racial reason for using a peremptory.[¶] You did mention the hung jury.

(RT 14:3149.) After the trial judge initially stated he was not finding a prima facie showing, the prosecutor volunteered her reasons for exercising the peremptory and the trial judge offered his notes about the juror's answers on voir dire: "My notes, since high school U.P.S. driver, loading, no supervisory experience, girlfriend sells computer, two minor children, plays golf, coaches a traveling basketball team." (RT 14:3151.) After further argument by defense counsel on the merits of the motion, the trial judge again stated that a prima facie showing was not made. (RT 14:3151.)

A similar process occurred after the prosecutor exercised a peremptory challenge to Joan Stansberry. This time, defense counsel objected and argued the merits of his claim of racial discrimination. (RT 15:3248.) Before making any comment or finding on a prima facie showing, the trial judge again put on his prosecutor's hat and stated:

> Of course, Ms. Lopez [the prosecutor] has relied on life's experience criteria in the past.[¶] *You want to comment on that?*[¶] This juror has trained people. I don't recall that she supervised anybody. I believe she has trained people on how to use the computer design circuits.

(RT 15:3258 (emphasis added).) After the prosecutor set forth her reasons for exclusion, again relying on a lack of work-based supervisory experience, the trial judge erroneously stated that the prosecutor's comments were "non-solicited" despite his request for them, and held that there was no prima facie showing. (RT 15:3259.)

In each instance, the trial judge premised his ruling that there was no prima facie showing of discrimination on the prosecutor's proffer of reasons. And he did so with the self-expressed sole intent of determining whether or not there was a non-racial rationale for the prosecutor's peremptory challenges. Despite the trial judge's "prima facie" label, this was a third-step analysis.

In the first stage of the *Batson* analysis, the moving party must show that it is reasonable to infer discriminatory intent under the totality of the circumstances. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) This is a burden of production, not a burden of persuasion. (*Johnson v. California*, *supra*, 545 U.S. at pp. 170-171.) Here, it is clear that the trial judge sought to have appellant prove that there was a discriminatory intent to get past the first stage of the analysis -- perhaps this was the now discredited "more likely than not" approach previously used in California -- rather than merely demonstrate that it was "reasonable to infer discriminatory intent

under the totality of the circumstances." In any event, because the prosecutor offered her reasons and the trial judge proffered a third stage decision utilizing first stage language, the issue of whether appellant made a prima facie showing is moot on appeal. (See *People v. Lewis* (2008) 43 Cal.4th 415, 471, citing *Hernandez v. New York* (1991) 500 U.S. 352, 359 ["Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot"].)

C. APPELLANT ESTABLISHED A PRIMA FACIE CASE OF RACIAL DISCRIMINATION

Whether or not the issue is moot, appellant did establish a prima facie case of racial discrimination in the prosecutor's use of peremptory challenges to remove two African American prospective jurors.

Respondent maintains that appellant did not demonstrate a prima facie case of racial discrimination, but acknowledges that this court must "'undertake an independent review of the record to decide "the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race."'" (RB 154 (quoting *People v. Taylor* (2010) 48 Cal.4th 574, 614; see *Johnson v. California*, *supra*, 545 U.S. at p. 170.)

Beyond respondent's additional references to the type of evidence a defendant may raise in support of a *Batson/Wheeler* claim, respondent chooses to disregard critical United States Supreme Court authority setting forth the nature of the analysis itself. Thus, in *Johnson v. California*, *supra*, the High Court acknowledged the minimal nature of the first step showing it required: "We did not intend the first step to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of

which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination." (*Johnson v. California, supra*, 545 U.S. at p. 570.) The court made clear that the burden was on the defendant. (*Id.* at p. 569-570.) As noted earlier, the defendant's burden is one of production of evidence, not of persuasion. (*Id.* at pp. 170-171.) Finally, the court made clear that the prosecutor's alleged non-racial reasons for striking jurors is irrelevant to a first step decision. (*Id.* at p. 172.)

As noted by respondent, although this court has stated that all types of information will be considered in a first step analysis, it has provided some specifics:

> "Though proof of a prima facie case may be made from any information in the record available to the trial court, we have mentioned 'certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.'"

(*People v. Davis* (2009) 46 Cal.4th 539, 583 (citations omitted); RB 154-155.)

Here, the trial judge clearly misunderstood the nature of his duties in a first step *Batson/Wheeler* analysis, relying solely on the prosecutor's

stated race-neutral reasons for exclusion and imposing on appellant the burden of persuasion on that issue. As such, the focus was shifted to the prosecutor's irrelevant proffer and away from the factors the trial judge was required to consider. Moreover, rather than the minimal showing of an inference of racial discrimination required by *Johnson*, he imposed an intolerable burden on the defense, requiring it to convince him that the prosecutor's reasons were racially motivated. An independent review of the record demonstrates that the required showing was made.

As set forth in appellant's opening brief, 59 venirepersons were called into the courtroom for voir dire, of whom four or five were African American, representing seven to eight percent of the venire. The prosecutor exercised peremptory challenges on two of the African Americans, or 40 to 50 percent of the available African Americans on the venire. The prosecutor exercised a total of 11 peremptory challenges. Eighteen percent of the prosecutor's challenges excused African American venirepersons, a percentage far larger than the seven to eight percent representation of African Americans in the jury venire. Hence, the prosecutor utilized a disproportionate number of her peremptory challenges against African Americans.

Respondent differs, urging that the contrasting treatment of African Americans and everyone else really was not all that disparate and that California case law supports the premise that striking the sole Hispanic in the jury box does not necessarily give rise to a prima facie case of racial intent. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1101-1102.) But *Guerra* did not go as far as respondent suggests and merely held that "this circumstance, standing alone, is not dispositive on the issue of whether defendant established a prima facie case." (*Id.* at p. 1101.) And in *Guerra*, there were no other factors supporting the defendant's first step analysis. (*Id.* at pp. 1101-1102.)

In addition, the record shows that both African Americans removed by the prosecutor were as heterogeneous as the community as a whole; the only thing they had in common was their group identification. Respondent claims Mr. Jones and Ms. Stansberry shared another characteristic -- they both had long time jobs and lacked supervisory experience. However, beyond their race, they had very little in common. Mr. Jones was male, Ms. Stansberry was female. Mr. Jones was single, cohabitating with the mother of his children, and Ms. Stansberry was divorced. Mr. Jones was a blue collar delivery driver while Ms. Stansberry had a white collar design and training job. Moreover, as urged in appellant's opening brief, the description of Ms. Stansberry as lacking supervisory experience was semantical gamesmanship as she was recognized at her job as experienced enough to train others. Clearly, both jurors were as heterogeneous as the community as a whole, connected only by the fact that they were both African Americans. The prosecutor's claim that they lacked supervisory experience was pretext and proxy for race discrimination.

It is also worth noting that appellant was African American, as were the stricken jurors, while the victim was Caucasian, a fact conveniently ignored by respondent.

Finally, it appears that respondent does not contend that the putative race-neutral reasons suggested by the prosecutor and accepted by the trial judge militate against finding a prima facie case of racial discrimination. While language in recent decisions of this court suggests that race-neutral reasons can be so used (e.g., *People v. Davis*, *supra*, 46 Cal.4th at p. 584; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1102), it is clear that doing so is error in the trial court or on independent review on appeal, as possible race neutral reasons which the trial court may be able to discern are not among the factors to consider. It "does not matter that the prosecutor might have had good reasons; what matters is the real reason [potential jurors] were

stricken." (*Johnson v. California*, *supra*, 545 U.S. at p. 172, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090.)

Here, the trial court twice found that there was no prima facie case of racial discrimination, despite the disproportionate percentage of the prosecutor's peremptory challenges exercised against African Americans; despite the fact that the two challenged jurors shared little in common other than race; and despite the fact that appellant was also African American while the victim was not. Accordingly, the trial court twice committed step one *Batson/Wheeler* error in ruling that the defense had not made a prima facie case of racial discrimination.

D. THE PROFFERED RACE NEUTRAL REASONS FOR EXCUSING THE TWO AFRICAN AMERICAN PROSPECTIVE JURORS WERE PRETEXTUAL AND CONSTITUTIONALLY IMPERMISSIBLE

The third step of *Batson/Wheeler* analysis requires the trial court to determine whether the prosecutor's justifications are credible. The trial court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily. . . .'" (*People v. Johnson* (1989) 47 Cal.3d 1194, 1216, quoting *People v. Hall* (1983) 35 Cal.3d 161, 167-168.) The trial court must assess the credibility of the prosecutor's grounds for excusal, and implausible justifications should be found to be pretexts for purposeful discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) Proof may consist, at least in part, of "proof of disproportionate impact . . . ." (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 93.) The trial court must use care not to substitute its own speculation regarding why a

prosecutor might have struck a juror for the prosecutor's stated reasons. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 252.)

Here, the prosecutor proffered the identical reason for excluding both Mr. Jones and Ms. Stansberry -- the prosecutor believed that the stricken jurors' lack of supervisory experience demonstrated that they lacked the strong decision making skills she claimed were required for jurors in a capital penalty phase. In reality, that rationale served as a pretext to remove two prospective jurors who, like appellant, were African American.

It must be noted that in this case no deference is due on appeal to the trial judge's decision upholding the prosecutor's improper removal of the two African American jurors. Respondent acknowledges that *People v. Lenix* (2008) 44 Cal.4th 602, 614-614, held that deference is to be accorded a trial court's determination that a proffered reason for excusing a juror is genuine only when "the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered[.]" (*Ibid*; RB 158; see also *People v. Silva* (2001) 25 Cal.4th 345, 386 [deference accorded "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror"].) As appellant has shown, however, here, the trial court did not engage in that effort at all, but instead analyzed the potential reasons before the prosecutor even offered them, literally speculating about what the prosecutor might have been thinking and adopting the prosecutor's position in making his determination. Adopting the biased view of the prosecutor before the prosecutor even spoke reveals that the trial judge failed to make the sincere and reasoned effort to evaluate the prosecutor's reasons, as required by the case law. The trial judge must wear the hat of an unbiased observer, not that of the prosecutor. Accordingly, independent review, as opposed to discretionary review, is mandated here.

With reference to the underlying question of whether the prosecutor's single rationale for excusing both prospective jurors was a mere pretext to remove African American jurors, respondent totally ignores appellant's argument that statistical evidence must be a substantial part of the calculus in assessing whether the prosecutor had race-based reasons for excusing Mr. Jones and Ms. Stansberry. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 342; see also *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1223.) As demonstrated in appellant's opening brief, the prosecutor eliminated African American venirepersons at a significantly higher rate than they were represented in the venire, using a disproportionate percentage of her challenges for this purpose. This alone makes a compelling case of purposeful racial discrimination.

Respondent acknowledges that in *People v. Lenix*, *supra*, 44 Cal.4th at p. 622, this court ruled that when the record permits the comparison, the third stage *Batson/Wheeler* comparative juror analysis of whether a prosecutor's stated rationale for removal is pretextual must be considered for the first time on appeal. Respondent does not contend that the record in this case is insufficient to do so, but urges that the comparison shows the prosecutor did not seat other jurors who lacked supervisory work experience. Respondent's argument misses the point -- lack of supervisory experience has nothing to do with a juror's ability to serve on a capital case -- this was sophistry and pretext to conceal the prosecutor's constitutionally impermissible purpose in excusing the African American jurors from the venire.

At the heart of respondent's comparative analysis argument is that the prosecutor was not asked to state why she did not excuse other jurors who gave similar answers and that the prosecutor may have judged these other seated jurors to be favorable to the prosecution based on other factors. (RB 162.) Respondent then compares allegedly pro-prosecution answers given by seated jurors on largely unrelated topics to the issue of supervisory

and decision making experience. Respondent's argument appears to be that the pro-prosecution answers to these other questions shows that the prosecutor made her decisions to keep these other jurors even though they also lacked the qualities and experience cited by the prosecutor as the basis for excluding Mr. Jones and Ms. Stansberry. Respondent's argument ignores the command of the United States Supreme Court that it is the prosecutor's stated reasons that must be examined. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 251.) Moreover, respondent's argument is belied by the prosecutor's description of Mr. Jones: "[I]n a different type of case, I think he would be a wonderful juror[.]" (RT 14:3150.) Clearly, if the prosecutor was looking beyond supervisory and decision making experience in choosing jurors -- as contended by respondent -- Mr. Jones and likely Ms. Stansberry would not have been removed. The prosecutor's alleged reason for excusal had nothing to do with other areas of inquiry or consideration and it is the expressed rationale that must be examined for pretext. Instead, respondent's argument reinforces appellant's argument that the two excusals were pretextual to largely rid the jury of African Americans.

The only criteria to be examined on comparative analysis are the prosecutor's characterizations and the record of actual responses by challenged and unchallenged jurors. For example, it was claimed by the prosecutor that Mr. Jones was an otherwise ideal juror, except for his lack of supervisory and decision making experience. However, although Mr. Jones never held a supervisory position at United Parcel Service, he was certified to coach and coached a travelling youth basketball team. His duties also included recruiting players. It is hard to imagine any parent allowing their child to participate on a traveling basketball team unless those parents fully trusted the decision making skills of the adult in charge, in this instance,

Mr. Jones. Respondent cites the fact that other jurors had been on juries reaching criminal case verdicts, but so had Mr. Jones -- in a robbery case. Respondent points to the fact that other jurors knew police officers, as if this somehow justified Mr. Jones' removal. But Mr. Jones had been the victim of an armed robbery and had cooperated with the police in the prosecution of the perpetrator, so any suggestion that he was unqualified on this basis must fail.

Similarly, while Ms. Stansberry never held a supervisory position at Pacific Bell, she steadily moved up the employment ladder. Moreover, she trained others in computer use and circuit design -- derogatively referred to by the prosecutor as a data entry position -- and that is no different than the job description of other seated jurors that respondent now characterizes as supervisorial. As with Mr. Jones, Ms. Stansberry sat as a juror on a child molestation case -- presumably involving difficult and complicated subject matter -- that reached a verdict. Moreover, while she did not profess to know any police officers, as a student she worked in the prosecutor's office and had been the victim of two home burglaries. Thus, nothing in her background suggested she was biased against law enforcement.

If respondent is going to engage appellant in comparative juror analysis, it should not play sleight of hand with the facts. Here, the prosecutor ignored her justification for the exercise of peremptory challenges against Mr. Jones and Ms. Stansberry, opting not to use her stated rationalization for exclusion to exclude two-thirds of the empanelled jurors that just happened not to be African American. Where the prosecutor employs a double standard against members of the excluded group in favor of persons permitted to serve as jurors, it is strongly suggestive of group bias and by itself can warrant the conclusion that the prosecutor used peremptory challenges for pretextual reasons. (See *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 343.)

Finally, appellant contended in his opening brief that the prosecutor's alleged rationale was pretextual because the mere fact that a juror lacks supervisory or other decision making experience does not render them incapable of deciding penalty phase issues. Relying on *People v. Ledesma* (2006) 39 Cal.4th 641, respondent differs, arguing that a prosecutor's concern regarding a prospective juror's lack of leadership is a valid basis for a peremptory challenge. And so it is in the very limited circumstances set out in *Ledesma*, but that is very different from the situation here. In *Ledesma*, "[the prosecutor believed [the excluded juror] might have been an acceptable juror under some circumstances, but she was not a leader, and at the time he excused her the group appeared to be lacking in leadership." (*Id.* at p. 679.) This court agreed that the specific type of decision could be valid and quoted *People v. Johnson*, *supra*, 47 Cal.3d at page 1220:

> If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain.

(*People v. Ledesma*, *supra*, 39 Cal.4th at p. 679.) In the present case, respondent sets out the comparative analysis of jurors in depth, arguing that almost all of the seated jurors had supervisory or other decision making experience far in excess of that possessed by Mr. Jones and Ms. Stansberry, thus qualifying those jurors to sit on the prosecutor's idealized penalty phase jury. While appellant disputes respondent's characterization of the seated jurors -- and for that matter of Mr. Jones and Ms. Stansberry -- respondent has made its bed and must now lay on it. In respondent's view, the jury was not lacking in jurors with leadership abilities, thus negating the

prosecutor's proffered reason for exclusion. Indeed, the prosecutor stated that she sought an entire jury of decision makers, not that the jury lacked them at the time Mr. Jones and Ms. Stansberry were excluded.

The prosecutor seemingly differentiated jury selection in a penalty retrial from that in the capital case itself, asserting that strong decision making skills are necessary in a penalty phase trial. But in reality, there is no difference; jurors chosen for a capital trial are expected to sit through the penalty phase.

Here, the prosecutor offered a sham excuse for excusing two well-qualified African American jurors and the record supports the conclusion that the prosecutor harbored a group bias against African American. What matters is the real reason the potential jurors were stricken. (*Johnson v. California*, *supra*, 545 U.S. at p. 172.) The real reason the prosecutor in this case removed Mr. Jones and Ms. Stansberry from the jury was that they were both African Americans, as was appellant, and the victim was Caucasian.

Because the prosecutor removed two African American jurors based upon the constitutionally-impermissible basis of race, reversal of the death judgment resulting from the penalty phase retrial is mandated. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)

X. THE TRIAL COURT COMMITTED REVERSIBLE ERROR DURING THE PENALTY RETRIAL BY REFUSING A DEFENSE REQUEST TO ADMIT AN ADDITIONAL PORTION OF MARCIA JOHNSON'S SECOND STATEMENT TO DETECTIVE EDWARDS PURSUANT TO EVIDENCE CODE SECTION 356

During the penalty phase retrial, the trial judge allowed admission of a significant portion of Marcia Johnson's second statement to Detective Edwards, but erroneously refused a defense request pursuant to Evidence Code section 356 to also relate the portion of the statement that appellant told Marcia he only shot Moon after Moon went for a gun. Appellant was prejudiced by the error because, while it was not and could not be used to absolve him, it directly refuted the prosecutor's argument that the shooting was a "thrill killing" and provided a basis for a sentence less than death.[15]

Respondent first asserts that appellant's statement, relayed by Marcia to Detective Edwards, was inadmissible as either a party admission or a declaration against interest. While defense counsel advanced these arguments at trial, they do not appear in appellant's opening brief and are not made by appellant in this appeal.

Respondent also responds directly to appellant's position, urging that the statement was not admissible under Evidence Code section 356 "because it did not purport to be a statement from Marcia that explained her prior testimony." (RB 193.) In making this argument, respondent parses Marcia's interrogation by Edwards into component parts: the planning of the robbery, the events leading up to the shooting, and the events following the shooting. According to respondent, Marcia made no "statements concerning[] the circumstances of the actual shooting inside Eddie's Liquor."

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[15] This reply relates to Argument XVI in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

(RB 193.) Respondent similarly argues that this specific statement by appellant was not admissible because it involved multiple layers of hearsay, and while Marcia's statements to Edwards might be admissible, what appellant allegedly told her was not. (RB 193-194.)

Respondent's argument is not well taken. As conceded by respondent, Marcia told Edwards about the robbery planning, events prior to and immediately prior to the robbery, and events occurring immediately after and well after the robbery. Included in her tale were comments made by appellant and her sighting of appellant carrying a gun as he went to the store.

In a case in which the prosecution sought to enforce a highly permissive interpretation of Evidence Code section 356 to bring in additional portions of a statement, this court agreed:

> We may properly look at Proby's statement as a whole because, as the trial court concluded, the prosecution was entitled under Evidence Code section 356 to introduce the portion of the statement describing defendant's participation in the offense if the defense introduced the portion describing Blackie's participation. "The purpose of [Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." (*People v. Arias* (1996) 13 Cal.4th 92, 156, 51 Cal.Rptr.2d 770, 913 P.2d 980.) Here, in view of the eyewitness and surveillance footage evidence suggesting two men committed the Florin Road robbery, for defendant to introduce the portion of Proby's statement mentioning only Proby and Blackie would have conveyed the misleading impression that only Proby and Blackie participated in the robbery, when Proby actually told the detective that defendant too participated. This case exemplifies the policy underlying the code section. Defendant wanted to rely on a part of Proby's statement to imply that Blackie was the shooter, which was contrary to what Proby actually said elsewhere in his statement. The rule of completeness exists to prevent such a misuse of evidence. The trial court therefore correctly concluded that Evidence Code section 356 permitted

the prosecution to introduce other portions of Proby's statement making that fact clear.

> Application of Evidence Code section 356 hinges on the requirement that the two portions of a statement be "on the same subject." As he did at trial, defendant contends that section 356 is inapplicable because the portion of Proby's statement addressing Blackie's role in the Florin Road crimes constituted a different subject than defendant's own role in those same crimes. We are unpersuaded. "'In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 959, 17 Cal.Rptr.2d 122, 846 P.2d 704.) As the Attorney General argues, both portions of the statement were part of Proby's description of what happened during the Florin Road robbery murder, including who was involved in the offenses and what each person's role was that night, and the introduction of one portion without the other would have left a misleading impression in jurors' minds.

(*People v. Vines* (2011) 51 Cal.4th 830, 861.) As in *Vines*, the subject of Marcia's interrogation and what was allowed into evidence during the prosecutor's questioning of Edwards was what occurred in the murder at Eddie's Liquor Store, from the planning to the aftermath. As the defense did in *Vines*, respondent now seeks to draw constricted lines around Marcia's various comments, portraying them as different subjects.

The prosecution introduced other evidence that no gun was kept in Eddie's for Richard Moon's use. The prosecution used Marcia's statement to implicate appellant as the mastermind behind the robbery, before, during, and after the events at Eddie's, and the person who carried the gun and was by implication the actual shooter. Included in Marcia's statement were various statements allegedly made in her presence by appellant. However, kept away from the jury was appellant's statement to Marcia after the killing that he only shot Moon because he believed Moon appeared to be getting a gun.

Respondent's contention that this statement made by Marcia to Edwards was not part of the same subject matter defies logic. All of the statements were part of Marcia's broad description of what happened in the Eddie's Liquor Store killing. The statements described who was involved in the killing and what occurred; specifically, the excluded portion related to what happened inside the store. All of the statements, including the one kept from the jury, clearly had "some bearing upon or connection with" each other. (*People v. Zapien* (1993) 4 Cal.4th 929, 959.) In fact, the "introduction of one portion without the other would have left a misleading impression in jurors' minds" (*People v. Vines*, *supra*, 51 Cal.4th at p. 861) about just what occurred inside the store. Indeed, the prosecutor ultimately exploited the omitted portion by arguing to the jury that appellant was death worthy because his killing of Moon was just for a thrill.

It was the prosecutor's choice to elicit some comments made by appellant to Marcia, then relayed by her to Edwards in a partial context. That choice had the consequence of mandating admission of other comments made by appellant to Marcia and told by Marcia to Edwards in the same interrogation if appellant chose to offer it. The portion of the statement appellant sought to introduce went directly to the question of punishment and was critical to appellant's argument that he was less culpable of the capital crime than urged by the prosecutor. Hence, the trial judge abused his discretion in excluding appellant's statement to Marcia.

In urging that any error was harmless, respondent first argues that because the incident inside Eddie's occurred very quickly and nothing was taken, while the evidence showed that appellant was armed prior to and after the killing, the jury could reasonably have inferred that Moon tried to defend himself and was shot as a result. Hence, respondent's argument goes, there was other evidence of the point appellant sought to prove. The problem with this argument -- one that appellant sought to make at trial -- is

that the inference respondent argues is shaky at best, while the evidence appellant unsuccessfully sought to use proved it directly through a statement by appellant to a trusted confederate.

By way of a footnote, respondent submits that appellant contended that if the evidence had been permitted, the prosecution could not have contended that the shooting of Moon was a "thrill" killing by appellant. (RB 195, fn. 47.) Not so. Appellant merely contended in his opening brief that the prosecutor was free to so argue without substantial evidence to the contrary. Thus, the ultimate power of the prosecutor's argument would have been reduced.

Respondent urges that defense counsel argued that appellant claimed Moon was reaching for a gun, so the jury was aware of it. According to respondent, the claim was negated because there was evidence that there was no gun kept in the store. However, appellant's argument was not dependent on the presence of a gun; instead, it was dependent on appellant's belief that the victim sought to protect himself with a gun and was shot while appellant thought he was doing so.

Ignored by respondent was a deadlocked jury in the first penalty phase trial, a jury that heard far more evidence of what occurred in the capital crime, but also did not hear about appellant telling Marcia that he shot Moon when he went for a gun. Thus excluded was powerful evidence in mitigation because it went to appellant's state of mind in shooting the victim. Did appellant shoot Moon because he went for a gun or because he was looking for a thrill by killing someone? These are extraordinarily different motivations bearing on appellant's ultimate level of culpability and whether he was deserving of death.

Whether or not federal constitutional error is implicated, the applicable test of prejudice from state law error in a penalty trial is the same as the analysis for federal constitutional error under *Chapman v. California*,

supra, 386 U.S. at p. 24, and equates a "reasonable possibility" the error affected the verdict with holding respondent to a burden of demonstrating that the error was harmless beyond a reasonable doubt. (*People v. Jones*, *supra*, 29 Cal.4th 1127, 1264, fn. 11.) Respondent has not met that burden here. Reversal of appellant's death penalty is mandated.

XI. THE INTRODUCTION OF IMPROPER VICTIM IMPACT EVIDENCE UNDERMINED APPELLANT'S RIGHT TO A RELIABLE SENTENCING DETERMINATION

Appellant argued in his opening brief that the trial court erroneously allowed introduction of victim impact evidence far more extensive and prejudicial in character than the evidence held admissible in *Payne v. Tennessee* (1991) 501 U.S. 808.[16]

Respondent relies on this court's prior rulings and contends that the trial court did not improperly fail to limit the scope of the victim impact evidence. (RB 196-211.)

Appellant urges this court to reconsider these rulings, as they adopt a basic attitude of "anything goes" with victim impact evidence, with amorphous standards permitting prosecutors to insert into evidence matters going far beyond the limited scope enumerated in *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825. While *Payne* specifically stated that unduly prejudicial victim evidence would violate federal due process, this court has yet to hold that there are limits no matter what victim impact evidence is before it in capital cases. This has given prosecutors unfettered discretion to focus the penalty phase on the character of the victim as opposed to the circumstances of the crime and the character of the defendant.

Here, the use of highly emotional and prejudicial victim impact evidence violative of federal due process cannot be harmless. Reversal of appellant's death penalty is mandated.

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[16] This reply relates to Argument XVII in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

XII. THE CUMULATIVE EFFECT OF THE ERRORS IN THE PENALTY PHASE RETRIAL WAS PREJUDICIAL AND REQUIRES REVERSAL OF THE VERDICT OF DEATH

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal of the guilt phase. By and large, those same errors were made at the penalty phase retrial before a separate jury, in addition to other errors that were unique to the penalty phase. The discussion of each individual error identifies the way in which the error prejudiced appellant and requires reversal of the death judgment.[17]

The combined effect of all the errors must be considered apart from the cumulative effect at the guilt phase, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without the possibility of parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Holt* (1984) 37 Cal.3d 436.)

Respondent counters that "because appellant has failed to show error or that he suffered prejudice as a result of any particular error or combined errors, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error." (RB 218.) While the refrain is oft-repeated by the State, it misstates the burden of demonstrating prejudice. First, penalty phase *Crawford* error is analyzed for prejudice pursuant to *Chapman*. (*People v. Romero*, *supra*, 44 Cal.4th at p. 422.) Second, to the extent that appellant has shown penalty phase error, the burden of demonstrating prejudice is not his. The applicable test of prejudice from state law error in a penalty trial is the same as the analysis for federal con-

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[17] This reply relates to Argument XIX in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

stitutional error under *Chapman v. California*, *supra*, 386 U.S. at p. 24, and equates a "reasonable possibility" the error affected the verdict with holding respondent to a burden of demonstrating that the error was harmless beyond a reasonable doubt. (*People v. Jones*, *supra*, 29 Cal.4th at p. 1264, fn. 11.)

Here, respondent has merely offered up the various assignments of error made by appellant and stated that there was no resultant error or prejudice resulting from any individual error. To the extent that this court holds that there were multiple penalty phase errors, respondent does not even attempt to meet its burden of demonstrating that the errors were harmless beyond a reasonable doubt.

The sentence in this case was far from reliable and appellant's judgment of death must be reversed.

XIII. APPELLANT'S DEATH SENTENCE, IMPOSED FOR FELONY-MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Appellant argues that California's imposition of the death penalty for felony murder *simpliciter* is out of step with the nation and violates the Eighth Amendment and international law.[18] (AOB 364-374.)

Respondent answers that this court has already rejected similar claims, but does not meet appellant's arguments. (RB 219-220.) Respondent ignores appellant's reliance on *Hopkins v. Reeves* (1998) 524 U.S. 88, without even attempting to refute or discuss that the United States Supreme Court in that case assumed that the *Enmund/Tison*[19] requirement of a culpable mental state applies to the actual killer in a felony murder. Instead, respondent argues death is appropriate for a finding of felony-murder in this case because that the evidence amply demonstrated that appellant was the actual killer.

But that is just the point appellant makes. If appellant was the actual killer as respondent asserts, CALJIC No. 8.80.1, as given in this case, did not require the jury to find that appellant had a culpable mental state, stating in pertinent part:

> [I]f you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.

(CT 3:706.) *Hopkins* was a capital case involving the actual killer. The

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[18] This reply relates to Argument XX in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

[19] *Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137.

court found that while the jury need not be instructed to determine whether the actual killer satisfied the minimum mens rea required by *Enmund/Tison*, the finding had to be made at some point. (*Hopkins v. Reeves*, *supra*, 524 U.S. at p. 99.) In the present case, respondent merely points at evidence that appellant was the actual killer, but never attempts a demonstration that he possessed the minimum culpable mental state mandated by *Enmund/Tison*.

Respondent similarly avoids appellant's argument that even if the United States Supreme Court's decisions do not already require a finding of intent to kill or reckless indifference to human life in order to impose the death penalty on a defendant who actually kills, the Eighth Amendment's proportionality principle would dictate the same requirement.

Respondent argues that this court has repeatedly rejected appellant's claim that the Eighth Amendment and international law require a finding of intent to kill or reckless indifference to human life in order to impose the death penalty on an actual killer premised on felony-murder. (RB 219.) But a recent study provides empirical evidence that imposing the death penalty on ordinary robbery-murderers in California is unconstitutional under both the narrowing and proportionality principles of the Eighth Amendment. (Shatz, Steven F., *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murders: A California Case Study* (2007) 58 Fla. L.Rev. 719.)

Appellant here asserts a significant challenge to his death sentence and to California's felony-murder special circumstance. Respondent disputes the claim but does not respond to, let alone refute, the arguments presented. This court should revisit its previous decisions upholding the felony-murder special circumstance and should hold that the death penalty cannot be imposed on an actual killer unless the trier of fact finds that the defendant had an intent to kill or acted with reckless indifference to human

life. Because there is no jury finding in this case that appellant intended to kill Richard Moon or acted with reckless indifference to human life, appellant's death sentence must be reversed.

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

In his opening brief, appellant set forth various deficiencies relating to the application of the California death penalty statute.[20] (AOB 375-410.) Respondent relies on this court's previous decisions rejecting the issues appellant has raised in urging this court to decline appellant's invitation to reconsider its prior rulings. (RB 220-223.)

Accordingly, the issues are joined and no reply is necessary to respondent's argument.

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[20] This reply relates to Argument XXI in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

XV. APPELLANT'S PRIOR CONVICTION MUST BE STRICKEN AS THE USE OF A JUVENILE ADJUDICATION FOR THREE-STRIKES PURPOSES IS UNCONSTITUTIONAL IN LIGHT OF *APPRENDI v. NEW JERSEY*

In his opening brief, appellant contends that the use of his juvenile adjudication to enhance his sentence for the Rite Way robbery beyond the statutorily-mandated maximum sentence pursuant to the Three Strikes law violated his federal constitutional rights pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466.[21]

As respondent points out, after appellant's opening brief was filed, this court decided *People v. Nguyen* (2009) 46 Cal.4th 1007, holding that a prior juvenile adjudication can be used to enhance an adult sentence.

For the reasons set out in appellant's opening brief, appellant seeks reconsideration of this court's decision in *Nguyen* that a prior juvenile adjudication can be used to enhance a Three Strike sentence.

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[21] This reply relates to Argument XXII in Appellant's Opening Brief. The argument is numbered the same in Respondent's Brief.

CONCLUSION

For the reasons set forth in Appellant's Opening Brief and this reply brief, appellant respectfully requests that this Honorable Court reverse his judgment of conviction and sentence of death.

Dated: April 12, 2012.

Respectfully submitted,

MARK D. LENENBERG
Attorney for Appellant
CALVIN DION CHISM

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.630(b)(2)

I certify that this Appellant's Reply Brief contains 29,653 words, including footnotes, but not including this page, attachments, and tables, as counted by Microsoft Word for Windows 2007.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration is executed this 12th day of April, 2012, at Simi Valley, California.

MARK D. LENENBERG
Attorney for Appellant
CALVIN DION CHISM

DECLARATION OF SERVICE BY MAIL

I, MARK D. LENENBERG, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 940327, Simi Valley, California; I served one copy of the attached APPELLANT'S REPLY BRIEF on the following, by placing same in an envelope addressed as follows:

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Each envelope was then, on April 12, 2012, sealed and deposited in the United States mail at Simi Valley, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 12, 2012, at Simi Valley, California.

MARK D. LENENBERG
Declarant