IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. RICHARD NATHAN SIMON, *Defendant and Appellant.*	No. S102166 Riverside County Superior Court No. CR-68928

Automatic Appeal From the Superior Court of Riverside County

Honorable Gordon R. Burkhart, Judge

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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	)	No. S102166
Plaintiff and Respondent,	)	
	)	Riverside County
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	)	No. CR-68928
RICHARD NATHAN SIMON,	)	
	)	
Defendant and Appellant.	)	
	)	

Automatic Appeal From the Superior Court of Riverside County

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply brief appellant addresses specific contentions made by respondent requiring additional discussion in order to present the issues fully to this court. Appellant does not address every claim raised in the opening brief, nor does he reply to every contention made by respondent with regard to the claims discussed. Rather, appellant focuses only on the most salient points not previously covered in the opening brief. The absence of a reply to any particular point made by respondent is not intended as a concession of any point made by respondent, or an abandonment or waiver of any argument advanced in the opening brief, but merely reflects appellant's view that the matter has been adequately addressed and that the positions of the parties have been fully presented. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

AUTHORITIES AND ARGUMENT

ERROR AFFECTING BOTH PHASES

I.

THE TRIAL COURT ERRONEOUSLY ORDERED APPELLANT TO WEAR A "REACT" STUN BELT DURING THE ENTIRE TRIAL, VIOLATING THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND CORRESPONDING CALIFORNIA CONSTITUTIONAL GUARANTEES.

A. Introduction

Appellate courts have recognized that a "'trial court has broad power to maintain courtroom security and orderly proceedings. [Citations.]' [Citation.] For this reason, decisions regarding security measures in the courtroom are generally reviewed for abuse of discretion. [Citations.] [¶] However, despite [] traditional deference to the trial court in this area, some extraordinary security practices carry an inordinate risk of infringing upon a criminal defendant's right to a fair trial. These exceptional practices must be justified by a particularized showing of manifest need sufficient to overcome the substantial risk of prejudice they pose." (*People v. Stevens* (2009) 47 Cal.4th 625, 632.) Consequently, security measures determined to be inherently prejudicial must survive heightened scrutiny and be justified by a demonstration of extraordinary need. (*Id.* at pp. 633-634.)

Many methods of courtroom security are not regarded as inherently prejudicial. For example, the use of a metal detector or magnetometer at the entrance of the courtroom has been held not to be inherently prejudicial.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 996; *People v. Ayala* (2000) 23 Cal.4th 225, 252-253.) Similarly, the use of a "security courtroom," with a partition and bars separating the spectator section from the court area, is not inherently prejudicial. (*Morgan v. Aispuro* (9th Cir. 1991) 946 F.2d 1462, 1465.) Additionally, appellate courts have consistently upheld orders regarding the number and positioning of security or law enforcement officers in the courtroom as not inherently prejudicial. (See, e.g., *People v. Stevens*, *supra*, 47 Cal.4th 632-640; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1003-1004; see *People v. Miranda* (1987) 44 Cal.3d 57, 114-115.)

On the other hand, physical restraints including electronic "stun" belts, have been recognized as inherently prejudicial practices which require heightened scrutiny. (*People v. Stevens*, *supra*, 47 Cal.4th at p. 644.) In *People v. Mar* (2002) 28 Cal.4th 1201, 1219-1220, this Court held that "before compelled use of . . . a stun belt can be justified for security purposes the general standard and procedural requirements set forth in *Duran* must be met." Accordingly before a defendant may be compelled to wear a stun belt:

> (1) there must be a showing of manifest need for the stun belt; (2) the defendant's threatening or violent conduct must be established as a matter of record; and (3) it is the function of the court to initiate whatever procedures it deems necessary to make a determination on the record that the stun belt is necessary. The court must make an independent determination based on facts, not rumor or innuendo, and must not merely rely on the judgment of jail or court security personnel. [Citations.]

(*People v. Howard* (2010) 51 Cal.4th 15, 28.) In addition, even where restraints are justified, a trial court must authorize the least obtrusive or restrictive restraint that effectively will serve the specified security purpose. (*People v. Duran* (1976) 16 Cal.3d 282, 291.) The questions on appeal are "whether the trial court made the findings necessary to impose a particular

security measure — that there was a manifest need, and that the measure chosen was the least obtrusive that would still be effective — and further whether those findings were supported by substantial evidence." (*People v. Gamache* (2010) 48 Cal.4th 347, 368.)

In the present case the trial court did not apply the standard and procedural requirements set forth in *Duran* before requiring appellant to wear the stun belt throughout both phases of trial. Specifically, the court did not make a finding that there was a manifest need for restraints, and even sustained the defense objection to shackles. Apparently concluding that the requirements of *Duran* did not govern the use of a stun belt, the trial court applied a standard appropriate only to security measures which are not inherently prejudicial in granting the bailiff's request based solely on a finding that some kind of restraint was "appropriate." The trial court also failed to consider and determine whether the device was the least restrictive and burdensome security method available. By failing to apply the substantive and procedural requirements of *Duran* in ruling on the bailiff's request, the trial court committed prejudicial error.

Respondent does not argue that the trial court in fact applied the standard and procedure described in *Duran* and *Mar* in ruling on the bailiff's request. Specifically, respondent does not contend that the trial court made the prerequisite finding of manifest need or the second necessary finding that the stun belt was the least restrictive means available. Instead respondent argues that the record "would have" supported the required findings. (Respondent's Brief at pp. 50-51.) Additionally, respondent argues either that there was no error or that any error was harmless because there was no showing that appellant was prejudiced by the trial court's order. (Respondent's Brief at pp. 53-56.) However, as discussed more fully below,

nothing in respondent's brief refutes appellant's argument that the trial court erred in requiring appellant to wear the stun belt and that the error requires reversal.

B. The Trial Court Erred in Granting the Bailiff's Request That Appellant Be Restrained with a Stun Belt, Over Defense Objection, Without Finding That There Was a "Manifest Need" for Restraints.

As noted above, the trial court did not make a finding that there was a "manifest need" for restraints. In fact the court impliedly found that the required showing of manifest need ***was not*** present when it sustained the defense objection to shackles. (2 RT 129.) Nevertheless, by applying what amounted to a good cause standard, the court granted the bailiff's request and ordered appellant to wear the stun belt throughout both phases of trial without substantial inquiry into the facts supporting the request, and after concluding only that "some kind of restraint" was "appropriate." (2 RT 130-133.) Under *People v. Mar, supra,* and *People v. Duran, supra,* the trial court's failure to make an on the record determination of manifest need before requiring appellant to wear the stun belt constituted error. (See Appellant's Opening Brief at pp. 21-24; see also *People v. Soojian* (2010) 190 Cal.App.4th 491, 521 [trial court abuses its discretion when it applies wrong legal standard]; *McPhearson v. Michaels Co.* (2002) 96 Cal.App.4th 843, 851 [same].)

In this regard the present case is similar to *People v. Howard, supra,* 51 Cal.4th 15. In *Howard* the trial court overruled the defense objection to use of the stun belt stating: "Well, it's a prophylactic measure, and given the nature of the case, I believe it would — and given the nature of Mr. Howard's past — . . . it can't be seen which is a nice thing about it — it [as]sures everyone that nothing unfortunate is going to happen. And it can't be seen by jurors. So it doesn't reflect poorly upon Mr. Howard in their eyes. But your

objections are noted." (*Id.* at p. 27.) On appeal this Court determined that "the trial court erroneously failed to make the finding of manifest need required by *Mar*." (*Id.* at p. 29.)

Similarly, in *People v. Mar*, *supra*, 28 Cal.4th at p. 1223, this Court found error where the record did "not establish that the trial court's decision to compel the use of a stun belt was based upon its determination that there was a manifest need to impose such a restraint for security purposes." Specifically the Court found that "the trial court never made, nor purported to make, a finding or determination that there was a 'manifest need' to impose the stun belt upon defendant because he posed a serious security threat in the courtroom. Indeed, there is nothing in the trial court's extended comments ... that indicates it was aware that the procedural and substantive requirements established in *Duran* governed its consideration and determination of defendant's objection to the use of the stun belt." (*Id.* at p. 1222.) Similarly in the present case nothing in the trial court's comments indicates that it was aware that the substantive and procedural requirements of *Duran* applied to the bailiff's request that appellant be required to wear the stun belt, and the court made no finding that there was a manifest need for use of the belt.

Respondent does not argue that the trial court made the prerequisite finding of manifest need, but instead contends: "The record established Simon's history of nonconforming behavior, and would have adequately supported a determination of manifest need as defined in *Duran* and applied to the use of stun belts in *Mar*." (Respondent's Brief at p. 51.) In this respect respondent's argument mirrors an argument which was accepted by the Court of Appeal in *Mar* but was ultimately rejected by this Court.

In *Mar* the Court of Appeal determined that the requirements of *Duran* were satisfied, and that the trial court did not abuse its discretion in denying

the defendant's request to remove the stun belt while he testified, because the record contained ample justification for belting the defendant. (*Id.* at p. 1220.) This Court expressly disagreed with the Court of Appeal on this point, and held that the trial court erred in requiring the defendant to wear the stun belt without applying the substantive and procedural requirements of *Duran* irrespective of whether the record would have supported a finding of manifest need. (*Ibid.*) In finding error, the Court specifically noted that "the record does not demonstrate that the trial court actually determined that defendant posed the type of serious security threat at trial that would justify the imposition of restraints under the 'manifest need' standard of *Duran*. Under these circumstances, the imposition of the stun belt on defendant did not satisfy the requirements of *Duran*." (*Ibid.*)

Because the trial court failed to apply the substantive and procedural requirements of *Duran* in ruling on the bailiff's request, respondent's discussion regarding whether the record "would have" supported a finding of manifest need for use of the stun belt, is irrelevant to the question of error. Here as in *Howard*, and in *Mar*, the trial court's failure to make the required finding of manifest need before compelling appellant to wear the stun belt constitutes error.

C. Respondent's Argument That The Evidence Before the Trial Court "Would Have" Supported a Finding of Manifest Need For Physical Restraints is Not Supported by The Record.

Respondent argues that the record would have supported a finding of manifest need for restraints as follows:

> The fact that shanks were found in Simon's cell on two separate occasions, that he had gotten into a fight with another inmate, and that he had threatened a corrections deputy all established manifest need based on a proper showing that Simon had

> behaved violently before coming to court. (See e.g., *People v. Hawkins*, *supra*, 10 Cal.4th at p. 944; *People v. Lomax* (2010) 49 Cal.4th 530, 562 [defendant attacked deputy in holding cell]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1032 [defendant attacked another inmate and threatened to kill deputies].)

(Respondent's Brief at p. 52.) Even if it is assumed for the sake of argument that the question of whether the evidence before the court would have supported a finding of manifest need is somehow relevant, respondent's position is not supported by the record for several reasons. First, the only "evidence" before the court was a brief list of matters recited into the record by the bailiff who did not claim to have personal knowledge of the incidents described. (2 RT 130-131.) Further, because the trial court did not conduct an adequate inquiry into the matter, the incidents listed were not described in sufficient detail to establish a manifest need for restraints. Finally, the events described did not tend to show that appellant posed a sufficient danger of violent or disruptive conduct in the courtroom to justify the use of physical restraints, particularly in light of the fact that appellant had never exhibited any inappropriate behavior in the courtroom over the course of the proceedings leading up to trial.

Contrary to respondent's position, the incidents listed by the bailiff did not establish that appellant "behaved violently before coming to court" such that there was a manifest need for restraints. In fact only one incident even arguably involved "violence" — the fight with another inmate which was said to have taken place in 1996, some three years before trial. However, the bailiff did not describe the circumstances surrounding the incident, and there was not even any indication that appellant had been the aggressor. In the

absence of additional details, this incident certainly did not support a finding of a manifest need for restraints.

With regard to the shanks, the trial court acknowledged that there was no possibility appellant would bring a weapon into the courtroom stating: "I think the chances of him having a weapon in court is virtually nil as well." (35 RT 4871.) As was pointed out by defense counsel each time the matter was addressed, appellant was subject to search by security personnel before entering the courtroom, and consequently there was no possibility that he would be in possession of a weapon in court. (2 RT 132; 35 RT 4870.) Additionally, there was no indication that he had ever attempted to bring a weapon into court, or even considered doing so.

With respect to the "threat" to the corrections officer, the bailiff stated that incident "was probably a personality conflict between the inmate and the new deputy." (2 RT 131.) The trial court did not inquire further, and did not attribute any significance to this incident. The matter was also raised when the issue of the stun belt was again addressed prior to the start of the penalty phase. At that time a bailiff mentioned appellant being "verbally aggressive with deputies" as a reason for requesting the stun belt. However, as defense counsel pointed out: "This kind of vague reference by Deputy Franck to being verbally aggressive with deputies, there's no — what information is that based on? I mean, we don't have her under oath. We don't have deputies here. We don't have markers here. I mean, is that a single incident? I mean, what are the details of that? I mean, the court's being asked to just accept some statement of Deputy Franck based on some reviewing of records that I don't know when it took place." (35 RT 4866.) The trial court acknowledged the insufficiency of the showing stating: "I agree with a lot of what you've said, Mr. Myers. I think the general nature of being verbally abusive to jail

personnel, the thing about the letter and so on — I would agree that those certainly do not give rise to the use of a REACT belt." (35 RT 4870.)

As discussed at length in appellant's opening brief, considered as a whole the showing before the trial court would not have supported a finding that appellant posed a serious security threat in the courtroom such that there would have been a "manifest need" for any type of restraints. (See Appellant's Opening Brief at pp. 59-61.) In support of the argument that the showing was sufficient, respondent relies on *People v. Hawkins* (1995) 10 Cal.4th 920, *People v. Lomax* (2010) 49 Cal.4th 530, and *People v. Lewis and Oliver* (2006) 39 Cal.4th 970. However, in all three of these cases the trial court's finding of manifest need was upheld based upon an extensive showing of violent behavior.

In *Hawkins* the trial court found manifest need based upon the defendant's numerous prior convictions including a conviction for assault with a deadly weapon upon a police officer, and three fistfights while in custody over a period of a year and a half. In *Lomax* the defendant hit a bailiff in the head multiple times in a courthouse holding cell area. In *Lewis and Oliver* the defendant attacked another inmate and threatened to kill deputies. The facts of these three cases are similar to other cases upholding the imposition of physical restraints such as *People v. Virgil* (2011) 51 Cal.4th 1210, 1270-1271, where the defendant was shown to be an escape risk based upon proof that he used a makeshift key in an attempt to remove another inmate's handcuffs in a security cell; *People v. Stankewitz* (1990) 51 Cal.3d 72, 95-96, where the defendant threatened escape, threatened violence against the judge and deputies, and assaulted other inmates; and *People v. Sheldon* (1989) 48 Cal.3d 935, 945, where the defendant assaulted five other inmates and was thought to be a high escape risk. (See also Appellant's Opening Brief

at pp. 59-60 and cases cited therein.) The incidents at issue in the present case do not compare to the incidents involved in any of these cases.

Further, in stark contrast to the inconsequential showing in support of the request for restraints, was compelling evidence in the form of appellant's in-court behavior which clearly demonstrated that physical restraints were not required. For more than three years prior to trial (from May of 1996, through September 13, 1999) appellant attended numerous court appearances without incident. During this entire time he had been completely compliant with the decorum of the court. Respondent asserts: "[T]he fact that there were no incidents of violence while [appellant] was in trial does not establish the insufficiency of the showing in the instant case — it could just as easily establish the efficacy of the stun belt's deterrent effect." (Respondent's Brief at p. 51.) Appellant, however was not ordered to wear the stun belt in the courtroom until trial began. As of that time he had behaved himself as a gentleman throughout all previous court appearances over the course of three years, and there was nothing in the record to suggest that he posed a threat in the courtroom. (See *People v. Mar*, *supra*, 28 Cal.4th at p. 1222.) Contrary to respondent's contention, the record does not support a finding that appellant posed a serious security threat in the courtroom such that there would have been a "manifest need" for any type of restraints.

D. <u>The Trial Court Erroneously Failed to Consider and Determine Whether the Stun Belt was the Least Restrictive Means Available to Secure the Courtroom.</u>

Under *Duran*, "even when special court security measures are warranted, a court should impose the least restrictive measure that will satisfy the court's legitimate security concerns . . . ." (*People v. Mar, supra,* 28 Cal.4th at p. 1206.) In the present case the trial court did not apply the *Duran*

standard in ruling on the bailiff's request that appellant be required to wear the stun belt. Consequently, the court failed to consider less invasive ways to secure the courtroom and failed to make an on the record determination that less onerous methods would not be effective.

In this regard the present case differs from other cases recently decided by this Court. For example in *People v. Lomax*, *supra*, 49 Cal.4th 530, the trial court did consider the matter and made a determination that the stun belt was "'the best security device' available . . . ." (*Id.* at p. 562.) Additionally, the trial court "twice ordered a medical examination to ensure that defendant was not susceptible to physical harm from wearing the device.[1] The trial court also gave the defendant the option of wearing traditional restraints in the form of a waist belt and leg shackles instead of the stun belt. (*Ibid.*)

Similarly in *People v. Virgil, supra,* 51 Cal.4th 1210, the trial court "found that the stun belt was the least intrusive security measure available." (*Id.* at p. 1271.) The finding was based upon the following showing in the trial court: "The device was brought into court for examination, and a bailiff explained in detail the way it worked, the physical effects of its activation, and the protocol for treating someone who had been shocked. Courtroom deputies had developed written guidelines, which counsel were given an opportunity to study, for when the belt could be activated. The court explained that the deputies were bound to stay within these guidelines and could be trusted to do so." (*Ibid.*)

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[1] No such physical exam was ordered by the trial court in the present case where it would have been particularly important in light of appellant's medical condition which includes a history of seizures, documented brain injury, and the presence of metal fragments in his head. (See Appellant's Opening Brief at pp. 62-63.)

In both *Lomax* and *Virgil* the trial courts made on the record determinations that the stun belt was the least restrictive method available after conducting an inquiry into the matter. Unlike these cases, in the present case the trial court did not give due consideration to the question of whether the stun belt was the least restrictive method available for securing the courtroom, and made no on the record determination on the matter. Here there is no indication in the record that the trial court considered the inherently prejudicial nature of the stun belt and determined whether it was the "least restrictive measure that will satisfy the court's legitimate security concerns." (See *People v. Mar*, *supra*, 28 Cal.4th at p. 1206.) In fact, the trial court's own words indicate that there was no manifest need for the stun belt and that there were less restrictive methods of securing the courtroom:

> The fact that he has had in his possession shanks in the jail in the past creates some concern to me. And I agree with you. I don't have the concern that he is going to bring those things into the jail today. I would agree that the chances of him act — I'm sorry — from the jail to here, to court. *I think the chances of him having a weapon in court is virtually nil as well.* But it demonstrates to me an attitude of violence. It demonstrates to me a readiness to do — to do violence. *And in a courtroom where we're dealing with one, perhaps two armed personnel,* but perhaps almost as many as — what? — counting my staff and all the jurors, in excess of 90 people, I think the — "prospects" is not the right word. The situation could easily give rise to where he could act out on some of those, what appears to me to be violent tendencies, even though I don't think he would have a weapon. But he's demonstrated an attitude toward violence while in custody.

(35 RT 4871 [emphasis added].) The trial court's concern was specifically related to the limited number of security personnel assigned to the courtroom. This being the case, the matter could have been addressed by increasing the number of security persons present, and/or by positioning them strategically

within the courtroom. However, this option was never discussed or apparently even considered by the trial court. Under these circumstances, the trial court erred in ordering appellant to wear the stun belt.

Respondent does not argue that the trial court considered less restrictive methods of securing the courtroom such as those noted above before ordering appellant to wear the stun belt. Rather, respondent argues: "Since [appellant] did not object on any of the grounds he now asserts, he has forfeited any claims based upon them. (*People v. Foster* (2010) 50 Cal.4th 1301, 117 Cal.Rptr.3d 658, 684.)" (Respondent's Brief at p. 52.) In *Foster*, however, the defendant did not object to the use of a stun belt: "At a hearing on the motion, defense counsel stated that the defense did not object to an electronic security belt, but did oppose leg restraints." (*Id.* at p. 1321.) Accordingly, this Court held: "Defendant did not object to being restrained or to the use of a stun belt as a restraint. Therefore, he has forfeited his claim to the extent he contends he should not have been restrained at all, or that the stun belt was an inappropriate form of restraint. [Citations.]" (*Id.* at pp. 1321-1322.) The ruling in *Foster* has no application to the present case where appellant clearly and repeatedly objected to the use of the stun belt.

Respondent also argues that there was no error because: "Simon did not take the stand in his defense. Nor can he demonstrate that wearing the stun belt affected his decision not to testify, or that it impaired his ability to assist counsel in his own defense. In the first instance, Simon's attorney announced that his client would not be taking the stand if his motion to sever the counts involving the murder of Michael Sterling from those involving the murders of Vincent Anes and Sherry Magpali was denied. [Citation.] Second, Simon never complained that the stun belt was having any psychological effect on him whatsoever. [Citation.]" (Respondent's Brief at p. 53.) However, while

a case specific showing of prejudice may be necessary to a claim of error based on excessive security where the means employed is not inherently prejudicial, it is not required where the claim of error relates to the use of an inherently prejudicial method such as physical restraints.

As observed by this court in *People v. Stevens*, *supra*, 47 Cal.4th 625, claims of excessive security involving measures which are not inherently prejudicial are examined "to determine whether the defendant was actually prejudiced . . . ." (*Id.* at p. 636.) "[I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." (*Id.* at p. 638 [quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 572; internal quotation marks omitted].) Use of the stun belt to secure a defendant has been found to be an inherently prejudicial practice. To determine whether a particular security practice is inherently prejudicial courts "must evaluate the likely effects of the procedure 'based on reason, principle, and common human experience' [citation] to determine 'whether "an unacceptable risk is presented of impermissible factors coming into play."' [Citation.]" (*People v. Stevens*, *supra*, 47 Cal.4th at p. 638.)

This Court, as well as numerous other state and federal courts considering the matter, have recognized that requiring an unwilling defendant to wear a stun belt during trial may adversely impact his ability to participate in his defense by impairing his capacity to concentrate on the events of the trial, interfering with his ability to assist and communicate with counsel, and adversely affecting his demeanor in the presence of the jury. (See, e.g., *People v. Mar*, *supra*, 28 Cal.4th at p. 1205; *Hawkins v. Comparet-Cassani* (9th Cir. 2001) 251 F.3d 1230, 1239-1240, *Wrinkles v. State* (Ind. 2001) 749 N.E.2d 1179, 1194-1195.) In fact, manufacturers of the stun belt emphasize that the device relies on the continuous fear of what might happen if the belt

is activated for its effectiveness. (*Wrinkles v. State, supra*, 749 N.E.2d at pp. 1194-1195.) As this court has recognized: "Promotional literature for the REACT stun belt provided by the manufacturer of the belt reportedly champions the ability of the belt to provide law enforcement with '"total psychological supremacy . . . of potentially troubling prisoners"' [citations], and a trainer employed by the manufacturer has been quoted as stating that '"at trials, people notice that the defendant will be watching whoever has the monitor."' [Citation.]" (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.) "Indeed, the psychological toll exacted by such constant fear is one of the selling points made by the manufacturer of the belt." (*Hawkins v. Comparet-Cassani*, *supra*, 251 F.3d at p. 1236.) By its very nature the device may interfere with "the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury." (*People v. Mar*, *supra*, 28 Cal.4th 1226.) For this reason use of a stun belt is an inherently prejudicial practice (*People v. Mar*, *supra*, 28 Cal.4th 1201), and the question of error in failing to comply with the requirements applicable to such security methods does not require any additional showing of prejudice.

The trial court's failure to recognize the inherently prejudicial nature of the device, and consequent failure to apply the standards and procedure outlined in *Duran* before requiring appellant to wear the stun belt constitutes error. Further, the error cannot be regarded as harmless, and the judgment of the trial court as to both phases of the trial must be reversed.

E. <u>The Error Requires Reversal.</u>

Respondent argues that any error was harmless. (Respondent's Brief at pp. 55-56.) In this regard respondent first contends that the error should be evaluated for prejudice under the *Watson* standard." (Respondent's Brief at

p. 55.) In support of this argument respondent cites *People v. Mar*, *supra*, 28 Cal.4th at p. 1225, fn. 7. *Mar*, however, does not support respondent's position. In footnote 7 the opinion states:

> Although this court has not addressed the issue directly, a number of Court of Appeal decisions have suggested that at least when the physical restraints imposed upon a defendant are not visible to the jury, trial court error under the *Duran* decision properly is subject to the *Watson* prejudicial error standard. (See, e.g., *People v. Jackson*, *supra*, 14 Cal.App.4th 1818, 1827-1830; cf. *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584 . . ..) None of these decisions, however, involved the improper use of a stun belt, where the greatest danger of prejudice arises from the potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury. In *United States v. Durham*, *supra*, 287 F.3d 1297, the Eleventh Circuit recently held that when a trial court without making adequate findings improperly requires a defendant to wear a stun belt, the error is of federal constitutional dimension and "'reversal is required unless the State proves the error was harmless beyond a reasonable doubt.'" (*Id.* at p. 1308.) Because we conclude that the error in the present case was prejudicial even under the *Watson* standard, we need not determine whether the trial court's error in requiring defendant to testify while wearing a stun belt, without an adequate showing of danger, constituted federal constitutional error that is subject to a more rigorous prejudicial error test.

The Court, thus, recognized that the "potential adverse psychological effect of the [stun belt] upon the defendant" might call for application of a "more rigorous prejudicial error test" than the *Watson* standard. While the particular circumstances present in *Mar* allowed the Court to apply the *Watson* "reasonable probability" standard to find reversible error, the Court did not foreclose use of the federal standard in future stun belt cases.

Respondent also cites *People v. Howard*, *supra*, 51 Cal.4th 15, in support of the argument that the *Watson* standard of prejudicial error applies. However, in *Howard* the Court applied the *Chapman* standard of review (*Id.* at p. 30), and found the error harmless because "the concern that defendant may have been psychologically affected by a stun belt in this case was put to rest by his own statements to the court about his mental state during trial." (*Ibid.*, fn. 6.)

As discussed at length in appellant's opening brief, because the trial judge's erroneous stun belt order abridged appellant's rights to due process, fair trial by jury, personal presence during trial, confrontation, compulsory process, assistance of counsel and against self incrimination, by impairing his ability to defend himself, the applicable standard of review is that governing federal constitutional error. (See Appellant's Opening Brief at pp. 32-37.) Appellant has argued that the error is structural and, thus, reversible per se. (Appellant's Opening Brief at pp. 37-39.) Even if this court determines that the error is not reversible per se (see *People v. Howard*, *supra*, 51 Cal.4th at p. 15, fn. 6), the error is reversible under the standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18.

Respondent argues that any error was harmless under *Chapman* "in light of the strong evidence pointing to [appellant's] guilt . . . ." (Respondent's Brief at p. 55.) After summarizing the guilt phase evidence, and without addressing the penalty phase, respondent concludes: "Given this compelling evidence, 'The procedures implemented could not have influenced either the guilt or penalty verdict.' (*People v. Jackson*, *supra*, 14 Cal.App.4th at p. 1831 [].)" (Respondent's Brief at p. 56.) Respondent's failure to address the issue with regard to the penalty phase of trial amounts to a concession of prejudice under the *Chapman* standard of review as to penalty. As to the guilt

phase, respondent's focus on the facts of the case fails to address the relevant inquiry in light of the constitutional rights affected.

Under *Chapman*, the burden is 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; see also *People v. Louis* (1986) 42 Cal.3d 969, 993-994.) As noted by this Court in *Mar*, the nature of the error here is comparable to the error in *Riggins v. Nevada* (1992) 504 U.S. 127. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1227.) In *Riggins* the defendant challenged his convictions on the ground that he had been forced to take an antipsychotic drug during his trial. Because the state court had failed to make sufficient findings to support the drug's forced administration, the United States Supreme Court reversed. With regard to the question of prejudice the court observed,

> [E]fforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. . . . Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams* (1976) 425 U.S. 501, 504-505, or of binding and gagging an accused during trial, see [*Illinois v. Allen* (1970) 397 U.S. 337, 344], the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

(*Riggins v. Nevada*, *supra*, 504 U.S. at p. 137.) As recognized by this Court, *Riggins* raised "some of the same concerns" as compelled stun belt use. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1228.) Specifically, *Riggins* also dealt with concerns that arise from the circumstances that the state's intervention may result in the impairment, mental or psychological, of a criminal defendant's ability to conduct a defense at trial." (*Ibid.*) Because it is impossible to determine the effect on appellant of being shackled with a

"control belt" carrying a 50,000 watt charge, respondent cannot show, beyond a reasonable doubt, that the error did not contribute to the verdict.

As noted above, in *Howard*, this Court relied upon an affirmative showing that the defendant was not psychologically affected by the stun belt in holding the error harmless under *Chapman*. There the court noted that "the concern that defendant may have been psychologically affected by a stun belt in this case was put to rest by his own statements to the court about his mental state during trial." (*People v. Howard*, *supra*, 51 Cal.4th at p. 30 fn. 6.) Because the record here contains no such showing, judged in accordance with *Chapman*'s "harmless beyond a reasonable doubt" standard, the trial court's error requires reversal.

GUILT PHASE ISSUES

II.

THE TRIAL COURT'S ERROR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE REQUIRES REVERSAL.

Respondent's arguments with respect to this error were anticipated and fully addressed in appellant's opening brief.

III.

THE TRIAL COURT VIOLATED CALIFORNIA AND FEDERAL LAW BY REFUSING TO SEVER COUNTS RELATING TO THE ANES/MAGPALI INCIDENT FROM THOSE RELATING TO THE STERLING INCIDENT.

When a defendant alleges prejudicial error in the denial of a motion to sever there are two levels of review. The first examines whether the trial court abused its discretion in denying the motion, and is judged by the information available at the time the motion was heard. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220; *People v. Ochoa* (1998) 19 Cal.4th 353, 409; *People v. Osband* (1996) 13 Cal.4th 622, 667.) If the reviewing court concludes the trial court did not abuse its discretion in initially denying the severance motion, a second level of review must be undertaken to determine whether the joinder of counts ultimately resulted in a gross unfairness based upon what actually occurred at trial. (*People v. Bean* (1988) 46 Cal.3d 919, 940.) Appellant has argued that the trial court's ruling denying severance constituted an abuse of discretion, and that the joinder resulted in gross unfairness amounting to a denial of due process. (Appellant's Opening Brief at pp. 98-120.) Respondent disputes both of these contentions for a variety of reasons which are discussed individually below. (Respondent's Brief at pp. 72-85.)

A. The Trial Court Abused its Discretion in Denying Appellant's Motion for Severance.

Respondent first argues that the trial court did not abuse its discretion in denying the pre-trial motion for severance because: "Simon failed to make the requisite showing that the considerations of efficiency and judicial economy were substantially outweighed by the potential for undue prejudice

resulting from joinder." (Respondent's Brief at p. 72.) In ruling on a motion for severance the court must balance potential prejudice against countervailing considerations of efficiency and judicial economy. (*People v. Soper* (2009) 45 Cal.4th 759, 782.) The overall question is "whether the advantages of joinder were sufficiently substantial to outweigh any possible spillover prejudice to defendant . . . ." (*Id.* at p. 783.)

With respect to the advantages of joinder, respondent acknowledges that there was no evidentiary overlap between the two cases, and that case-specific efficiencies were absent. (Respondent's Brief at pp. 80-81.) Instead respondent relies, as did the prosecution below, on general systemic advantages common to any unitary trial. (*Ibid.*) However, in the absence of case specific considerations, general factors of judicial economy can not be elevated over a defendant's right to a fair trial — including the right to be tried only upon evidence the law allows the finder of fact to consider. As this Court has observed: "Where there is little or no duplication of evidence, 'it would be error to permit [judicial economy] to override more important and fundamental issues of justice. Quite simply, the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial.'" (*People v. Smallwood* (1986) 42 Cal.3d 415, 427 [quoting *Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452].)

While acknowledging the lack of case specific benefits from joinder, respondent contends that general considerations of judicial efficiency outweighed any potential for prejudice. Factors to be considered in evaluating the potential for prejudice from joinder are: (1) cross-admissibility of the evidence relating to the different cases in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case

so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at pp. 1220-1221.) Appellant has argued that all of these factors weigh in favor of severance. (See Appellant's Opening Brief at pp. 99-108.)

Respondent acknowledges that evidence relating to the two separate cases would not have been cross-admissible. (Respondent's Brief at p. 75 [quoting the prosecutor: "'I don't believe I've set forth any argument that contends that the evidence relating to the two incidents [is] cross-admissible."].) However, respondent contends that the potential for prejudice was nevertheless minor because neither of the cases involved inflammatory evidence, and "joinder in this case did not create the danger of a '"spillover" effect that occurs when "weaker charges [are] joined with strong charges so that the effect of the aggregate evidence might alter the outcome of the trial."' [Citations.]" (Respondent's Brief at pp. 76-77.) In arguing that neither case contained inflammatory evidence, respondent contends that Ms. Magpali was several years older than the victims in *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, and that the gang evidence involved in the Sterling case was minimal when compared to the extensive gang evidence introduced in *Williams v. Superior Court*, *supra*, 36 Cal.3d 441. (Respondent's Brief at pp. 76-78.) While appellant has cited prior cases for the proposition that the type of evidence involved in each of the incidents concerned here has been recognized as inflammatory,[2] the overall determination of prejudice is

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[2] The Anes/Magplai incident involved the death of two teenage victims, a kidnapping and sexual assault of the female victim, and robbery of both victims. Evidence of sex crimes against young people has been widely

necessarily dependent upon the particular circumstances of each individual case. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.) In evaluating prejudice "the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him." (*People v. Bean, supra,* 46 Cal.3d at p. 936.) Here, in light of the differing issues of fact to be resolved by the jurors, there was evidence in each case which was highly inflammatory and irrelevant as to the other.

With regard to the Sterling case, there were serious questions to be resolved by the jury regarding whether the homicide was murder, manslaughter, or self-defense. Defenses relating to provocation, heat of passion, and/or self-defense could easily be prejudicially impacted by evidence regarding other crimes — particularly other crimes such as the sexual assault, kidnapping, robbery and double murder which were involved in the Anes/Magpali incident. Jurors exposed to evidence relating to the Anes/Magplai offenses would certainly be more likely to view appellant as the

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recognized as especially likely to inflame a jury. (See, e.g. *Coleman v. Superior Court (People)* (1981) 116 Cal.App.3d 129, 138; *Williams v. Superior Court, supra,* 36 Cal.3d at p. 452.) Similarly, California courts have repeatedly held that gang evidence uniquely tends to evoke an emotional bias against the defendant as an individual, and can deprive the accused of a fair trial. (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1396.)

aggressor in the Sterling incident,[3] and to discount or disregard defense evidence or argument to the contrary.

Similarly, the evidence involved in the Sterling incident was likely to improperly influence the jurors' verdicts on the Anes/Magpali charges. The primary issue with respect to the Anes/Magpali homicides was whether appellant was present for, and an active participant in, the killings. Respondent argues that evidence relating to the Sterling homicide could not have impacted the jury's evaluation of this point because: "The presence of [Simon's] semen in Ms. Magpali's vagina not only provided irrefutable evidence that he had raped her, but also provided strong circumstantial evidence linking Simon to the killings of Ms. Magpali and Mr. Anes. [Citation.] Simon was liable for their murders under either a felony-murder theory or an accomplice theory." (Respondent's Brief at p. 79.) However, the defense theory was that Williams alone was responsible for killing Anes and Magpali, and that appellant was not involved in and had no knowledge of either killing. The DNA evidence did not negate this theory.

Contrary to respondent's argument, evidence relating to the Sterling incident was prejudicial with regard to the Anes/Magpali homicides. Jurors exposed to evidence in the Sterling case, which included gang evidence and

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[3] In fact the prosecutor urged the jurors to draw this very inference: "Richard Simon didn't know Michael Sterling. Richard Simon didn't know Michael Sterling from anyone else. He knew nothing about his background or his character or how he would act or react. You know, you knew, on May 25th, 1996, something about Richard Nathan Simon's character for violence. He is one that could coldly, callously murder and rape a young, trembling, scared woman. That is a person who is prone to violence, acting in conformity with it. When you determine the issue as to whether he killed Michael Sterling and who acted aggressively in that situation, consider not only the character of Michael Sterling, the character of Richard Nathan Simon." (23 RT 3345.)

strong proof that appellant shot and killed Sterling, were more likely to conclude that appellant, rather than someone else, shot and killed Anes and/or Magpali based upon a perception that he was the type of person to have committed such a crime. In this regard the present case is similar to *Williams v. Superior Court*, *supra*, 36 Cal. 3d at pp. 452-453, where this Court observed:

> First, as we have noted above, the two shootings do not share sufficient common and distinctive marks to be admissible in the respective separate trials. Second, the evidence of gang membership . . . might indeed have a very prejudicial, if not inflammatory effect on the jury in a joint trial. The implication that gangs were involved and the allegation that petitioner is a gang member might very well lead a jury to cumulate the evidence and conclude that petitioner must have participated in some way in the murders or, alternatively that involvement in one shooting necessarily implies involvement in the other. Further, although it is apparent that more than one assailant was involved in both killings, only petitioner will be standing trial in front of the jury. The absence of other known suspected participants coupled with the evidence of two seemingly senseless, gang-related shootings could indeed produce "an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.' [Citation.]" [Citation.] In addition, as petitioner suggests, it might be the highly publicized phenomenon of gang warfare in Southern California which would be on trial as much as the defendant, thereby raising the spectre of prejudice far beyond the facts of the actual case.

In the present cases, jurors aware of the facts of the Sterling case were more likely to conclude that appellant played an active part in the homicides and to reject the defense theory that he had no knowledge of Williams' actions with regard to the homicides. Consequently, evidence regarding the Sterling incident was highly prejudicial and was likely to improperly influence the jurors' verdicts on the Anes/Magpali counts.

Under the circumstances of this case, the likelihood that jurors would be unduly influenced by and misuse other crimes evidence as proof of propensity was increased, and it was probable that the jury would be unable to decide one case exclusively on the evidence relating to that incident. Severance was required to avoid prejudice to appellant from prosecutorial bootstrapping of weak evidence together to overcome what might otherwise amount to reasonable doubt had the cases been tried separately. Based on the circumstances of the case as they were understood at the time the motion was heard, it was clear that substantial prejudice would result from the joinder.

Respondent argues that the final consideration relating to a finding of prejudice — "whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case" [*Alcala v. Superior Court, supra,* 43 Cal.4th at pp. 1220-1221] — is not applicable because the joinder did not convert two non-capital cases into a capital case. (Respondent's Brief at p. 80.) Respondent misstates the law. This factor weighs in favor of severance whenever capital charges are involved, rather than only where the joinder converts non-capital cases into a capital trial. As this Court has noted: "The final consideration in our analysis is that since one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 454.) Thus, contrary to respondent's position, this factor also weighs in favor of severance.

The record demonstrates that the trial court did not apply a heightened level of scrutiny in denying the severance motion. In view of the clear showing of potential prejudice, and in the absence of any case specific benefits of joinder, the circumstances as they existed at the time the motion

was heard required severance. Further, even if the trial court's ruling could be justified in a less serious case, it was impermissible here where questions of life and death were at stake. The trial court's denial of the motion for severance constituted an abuse of discretion.

B. THE JOINDER OF THE CHARGES DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL.

On the question of whether joinder resulted in gross unfairness amounting to a denial of due process, respondent argues that: "Defense counsel's argument, along with the trial court's charge 'mitigated the risk of any potential spillover.' [Citation.]" (Respondent's Brief at p. 83.) Appellant, on the other hand, has demonstrated that the trial court's failure to give specific cautionary instructions, coupled with the fact that the prosecutor argued the evidence commutatively and for an improper purpose, operated to deprive appellant of his right to a fair trial. (See Appellant's Opening Brief at pp. 111-120.)

With regard to the claimed curative jury instructions, respondent refers to the following general admonitions: "CALJIC Nos. 2.90 [Presumption of Innocence — Reasonable Doubt — Burden of Proof], 8.10 [Murder — Defined], 17.02 [Several Counts — Different Occurrences — Jury Must Find on Each]." (Respondent's Brief at p. 82.) The trial court, however, did not specifically caution the jurors against considering evidence relating to the Anes/Magpli incident when determining guilt in relation to the Sterling count, and vice versa.[4] Of the general instructions referred to by respondent only

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[4] On this point, respondent makes the irrelevant argument that "[a] trial court has no sua sponte duty to instruct the jury regarding the limited purpose for which other acts evidence may be considered . . . ." (Respondent's Brief at p. 82.) The issue, however, is not whether the trial court should have

CALJIC No. 17.02 even remotely addresses the issue. Under this instruction the jurors were informed: "Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict." (14 CT 3637.) While even specific instructions on other crimes evidence have intrinsic shortcomings,[5] this general instruction merely told the jurors to decide each count separately, and did not prohibit them from considering evidence relating to one incident when deciding guilt on counts involving the other. It also did not prohibit jurors from improperly utilizing the evidence as character evidence. Any impact the instruction could possibly have had was further diminished by the fact it was given "in the waning moments of trial" (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084), after the jurors had heard all of the evidence in the combined case and the argument of counsel. Thus, unlike the situation in *Herring v. Meachum* (2nd Cir. 1993) 11 F.3d 374, 378, where the jury "was instructed on three separate occasions that evidence of one murder was not to be used to determine petitioner's guilt with respect to the other," the instructions here did nothing to assure that the jurors would properly compartmentalize the evidence and base their verdicts as to each count solely on relevant and admissible evidence.

In the absence of cautionary instructions, it is unlikely jurors would have properly evaluated evidence relating to the separate cases and decided

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provided cautionary instructions, but rather the effect of the absence of cautionary instructions on the question of whether the joinder was prejudicial.

[5] As discussed in appellant's opening brief, courts have recognized that instructing jurors to ignore other crimes evidence when deciding a particular count "is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084; see Appellant's Opening Brief at pp. 115-116..)

the charges as to each based solely upon relevant and admissible evidence. This is particularly true in view of the fact the prosecutor took advantage of the lack of cautionary instructions and argued the evidence cumulatively. As discussed in appellant's opening brief, in urging the jury to convict appellant of all charges, the prosecutor combined inflammatory aspects of the joint case to portray appellant as a cold-blooded killer (23 RT 3242), a predator (23 RT 3298), and a "psychopath" (23 RT 3289), and encouraged jurors to consider this character trait when evaluating critical elements of the charges. (See Appellant's Opening Brief at pp. 117-118.) The prosecutor encouraged jurors to consider evidence relating only to the Sterling case in determining appellant's guilt with regard to the Anes and Magpali murders. (23 RT 3303.) Additionally, as respondent must acknowledge, in discussing appellant's defenses to the Sterling homicide, the prosecutor referred at length to the Anes and Magpali facts. (23 RT 3345; see Respondent's Brief at pp. 83-84.)

Respondent contends that the prosecution's argument with regard to the Sterling case properly utilized facts relating to the Anes/Magpali case as evidence of "character." In this regard respondent states: "After Simon had introduced evidence of Mr. Sterling's character for violence, the People were entitled to rebut that evidence through references to other acts evidencing Simon's character for violence, especially in the context of a self-defense claim that rested on a contention that Mr. Sterling was the initial aggressor. (Evid. Code, §1103, subd. (b).)" (Respondent's Brief at p. 85.) However, regardless of the accuracy of this statement, it does not negate the fact that the joinder resulted in prejudice. At the very least the joinder deprived appellant of the tactical decision of whether or not to introduce character evidence relating to Mr. Sterling. Once the trial court denied severance, it was certain that jurors deciding the central issue of whether appellant or Sterling was the

aggressor would be aware of the facts surrounding the Anes/Magpali case. Under these circumstances the defense was essentially compelled to introduce character evidence regarding Mr. Sterling in an attempt to neutralize the prejudicial effect of the Anes/Magpali evidence. There would have been no benefit in failing to introduce such evidence. Had the cases been tried separately, however, there would have been no reason for the defense to introduce evidence relating to Mr. Sterling's character if it would have, as respondent argues, opened the door to evidence of appellant's character under Evidence Code section 1103, subdivision (b). Consequently, respondent's contention that the prosecution's argument with respect to the Sterling homicide was proper under the circumstances of the joined case, does not disprove prejudice from the joinder.

Finally, respondent argues that certain verdicts returned by the jury establish that the jurors were able to properly compartmentalize the evidence, and thus evidence of one case did not taint the jury's consideration of the other. In this regard respondent argues: "the jury convicted Simon of first degree murder in the killings of Mr. Anes and Ms. Magpali, but only second degree murder in the killing of Mr. Sterling. What is more, Simon's jury was unable to reach a unanimous determination that he had personally used a firearm in the commission of counts 1 through 4. This shows it was capable of differentiating between the charges." (Respondent's Brief at p. 85.) While the findings, or lack thereof, referred to by respondent establish that the jurors rejected certain arguments made by the prosecution, they do not prove that the jurors decided the counts relating to each incident based solely upon evidence relevant to that individual case, as shown more fully below.

In support of the argument regarding the second degree verdict on the Sterling count, respondent cites *People v. Ruiz* (1988) 44 Cal.3d 589.

(Respondent's Brief at p. 85.) *Ruiz*, however, does not support respondent's position. Under the circumstances present in that case, this Court found no abuse of discretion in the denial of severance based upon the fact that evidence relating to the separate murders would have been cross-admissible. (*Id.* at pp. 605-607.) As the Court noted: "The first consideration in assessing the prejudice arising from a denial of severance is cross-admissibility, i.e., 'whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled. [Citation.]'" (*Id.* at p. 605.) In rejecting the argument that the trial court abused its discretion in denying severance the Court noted: "If the evidence were indeed cross-admissible, as we have concluded, then any spillover effect would have been entirely proper." (*Id.* at p. 607.) Whatever the additional value of the second degree murder conviction was in disproving prejudice under the circumstances of *Ruiz*, in the present case the fact that the jury returned a verdict of second degree murder does not prove that the jurors properly compartmentalized evidence relating to the individual cases. Rather, the second degree verdict shows only that the jurors rejected the prosecution's argument regarding premeditation and deliberation, and that they concluded the Sterling homicide was a spontaneous event. It does not establish that the jurors were unaffected by evidence pertaining to the Anes/Magpali case when deciding questions relating to self-defense, provocation and heat of passion in the Sterling case.

Similarly, with respect to the Anes/Magpali charges, the fact that the jurors were unable to unanimously agree on allegations that appellant personally used a firearm does not establish that there was no improper spillover effect from the Sterling evidence. The prosecution argued for first degree murder verdicts on the Anes and Magpali counts under alternative

theories. Jurors could have returned guilty verdicts by finding either that appellant was the killer or that he aided and abetted Williams in the killings. The defense theory was that Williams was acting alone when he killed both victims, and that appellant had no knowledge of, and did not participate in, any of the crimes committed by Williams including the robbery of Anes and the kidnapping of Magpali. Even if one or more of the jurors did not conclude that appellant was the killer, they still could have improperly utilized evidence in the Sterling case to conclude that appellant was an active participant in the crimes committed by Williams. Consequently, the fact that the jury was unable to unanimously agree on the personal use of a firearm allegations accompanying Counts 1 through 4 does not negate the possibility that jurors were improperly influenced by evidence relating only to the Sterling case when considering their verdicts on the Anes and Magpali charges.

As discussed in appellant's opening brief, joining the charges in the present case permitted the prosecution to avoid evidentiary restrictions prohibiting the use of other crimes evidence as proof of propensity. Although evidence relating to the two incidents was not cross-admissible, the prosecutor argued the evidence cumulatively and for an improper purpose as evidence of criminal disposition. This argument would have, at a minimum, reduced the jurors natural compunction about convicting appellant on questionable evidence, as well as impaired their ability to view the evidence of each offense objectively. Overall, joinder made it difficult, if not impossible, for jurors to view the two cases and applicable defenses separately, especially in light of the lack of cautionary instructions and the prosecution's argument which encouraged the jurors to consider the evidence cumulatively.

For all of these reasons, as well as those discussed in appellant's opening brief, the trial court's ruling denying severance constituted an abuse of discretion, and the joinder resulted in gross unfairness amounting to a denial of due process. Reversal is, therefore, required.

IV.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON UNREASONABLE SELF-DEFENSE WITH RESPECT TO THE STERLING HOMICIDE.

Count 6 of the information charged appellant with the first degree murder of Michael Sterling, and the jury found him guilty of second degree murder on this count. (14 CT 3711.) Under the instructions provided by the trial court, the jurors were given the options of acquitting appellant of this charge based upon the theory of self-defense (14 CT 3592), or of finding him guilty of the lesser offense of voluntary manslaughter under a "sudden quarrel" or "heat of passion" theory (14 CT 3605-3606). However, the trial court refused the defense request for instructions explaining the concept of unreasonable or imperfect self-defense, concluding that there was no evidence to support this theory (22 RT 3234-3236), and thus failed to provide the jury the option of convicting appellant of voluntary manslaughter on this basis.

As discussed at length in appellant's opening brief, a theory of unreasonable self-defense was supported by the evidence since jurors could have concluded that appellant actually believed in the need for self-defense, but that his belief was not objectively reasonable. (See Appellant's Opening Brief at pp. 121-123, 130-131.) As the prosecution conceded during closing argument: "The evidence as to the death, killing, the murder of Michael

Sterling, is at best conflicting." (23 RT 3290.) There was no clear eyewitness testimony as to the circumstances of the shooting. In urging jurors to find appellant guilty of first degree murder based upon premeditation and deliberation, the prosecutor emphasized the verbal altercation which took place inside the apartment to argue that appellant was the aggressor. However, as discussed in appellant's opening brief, there was evidence supporting a conclusion that Sterling and Williams were the aggressors in a second altercation between the parties outside the apartment which turned physical and resulted in the shooting. (See Appellant Opening Brief at pp. 121-123.)

This evidence was summarized by defense counsel during the discussion of jury instructions as follows:

> MR. MYERS: Well, you have testimony that [Sterling] has a — at least one prior violent act. So the jury can infer from that under 1103 of the Evidence Code that he has — that he acted in conformance with that character. That's one piece of evidence.
>
> Another piece of evidence is Vernice Haynes's statements to Officer Morin where she said that she observed the defendant and Mr. Sterling to be arguing with each other outside the residence. And the testimony of Vernice Haynes and Davinna Gentry that they heard three gunshots fired, the physical evidence is only consistent with Mr. Simon firing two gunshots.
>
> The testimony of Dr. Choi that the gunshot was fired from a range of two feet or slightly more than two feet, so a close-range shot. I believe even the testimony of Jamal Brown was consistent with Mr. Simon and Mr. Sterling being engaged in a — at least a verbal argument inside the apartment and then also outside the apartment.
>
> So I think when you take all that evidence together, basically Mr. — it appears from the record at least a reasonable inference

> could be drawn that Mr. Simon and Mr. Sterling are arguing with each other.
>
> Mr. Sterling is a larger man than Mr. Simon. That was the testimony of Davinna Gentry. . . . .

(21 RT 3020-3021.) Later in the discussion counsel added: "And so I think that the jury has to use circumstantial evidence to try to infer what took place outside. And I don't think it's a stretch for the jurors to believe that whether Mr. Sterling on his own initiative, after being verbally confronted by Mr. Simon inside, Mr. Sterling on his own initiative went outside." (21 RT 3022-3023.) Counsel also pointed out: "There's also testimony that right after the incident Mr. Williams was found to be somewhat dirty as if he'd been wrestling in the dirt. There was also testimony that Mr. Williams told Vernice Haynes as she opened the front door right after the shooting that they needed to leave the scene immediately. And there was also testimony by Miss Haynes that when she went across the street and contacted Mr. Sterling, he made a statement that he was going back to prison or to jail." (21 RT 3025-3026.)

From the evidence, jurors could have concluded that appellant killed Sterling in the actual belief he had to act to defend himself against imminent peril, even though a "reasonable person" in those circumstances would have behaved otherwise. Consequently, the jury should have been instructed on the theory of unreasonable self-defense. Under the circumstances, the trial court's failure to provide the jury with the instructions requested by the defense on unreasonable self-defense, and its failure to afford the jurors the opportunity to convict appellant of the lesser offense of manslaughter under this theory, was error.

Respondent contends that "Substantial Evidence Did Not Support Instructing the Jury on Unreasonable Self-Defense." (Respondent's Brief at

pp. 87-96.) In making this argument, respondent relies in large part on selected statements made by Jamal Brown during an interrogation session with police claiming that "in his interview with Detective Ricciardi, Brown made it clear that Mr. Sterling's shooting was entirely unprovoked." (Respondent's Brief at pp. 93.) Brown, however, did not witness the interaction between appellant and Sterling outside of the apartment. As respondent acknowledges: "Brown insisted that he never saw who fired the gun, or any of the events leading up to the shooting." (Respondent's Brief at p. 20.) His statement to police was consistent with his testimony at trial on this point, and Brown never said that he witnessed the shooting. (See Respondent's Brief at pp. 19-22.) Brown's opinions as to anything that happened between Sterling and appellant outside the apartment were, therefore, based entirely on speculation and certainly do not establish that the shooting "was entirely unprovoked."

Similarly, the remainder of the evidence identified by respondent does not definitively negate the possibility that appellant acted with the actual belief that he was defending himself against imminent peril. At most respondent's discussion relates to the strength of the evidence as it pertained to a theory of unreasonable self-defense. However, in determining whether the trial court erred in failing to provide the jury with instructions on unreasonable self-defense, the question is not whether the evidence supporting such a theory was stronger than evidence supporting a contrary theory. The court's duty to instruct on voluntary manslaughter under an imperfect self-defense theory arises "'whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense.'" (*People v. Rogers* (2006) 39 Cal.4th 826, 883.) "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*People v. Moye*

(2009) 47 Cal.4th 537, 556.) Respondent's argument goes to weight and, while it would have been an appropriate argument to have been made to a properly instructed jury, encouraging them to reject a theory of unreasonable self-defense, it does not establish that instructions on the theory were unnecessary.

Respondent also argues that appellant "cannot be heard to claim that his jurors should have applied a 'reasonable gang member standard' to his benefit." (Respondent's Brief at p. 94.) Appellant, however, has not made this argument. Rather the issue to be determined by the jury under the omitted instructions would have been whether appellant killed Sterling in the actual (although unreasonable) belief he had to act to defend himself against imminent peril. (See Appellant's Opening Brief at pp. 130-131.) On this point respondent cites *People v. Romero* (1999) 69 Cal.App.4th 846. (Respondent's Brief at pp. 94-95.) The issue in *Romero* was the admissibility of expert testimony relating to "the sociology of poverty, and the role of honor, paternalism, and street fighters in the Hispanic culture" (*id.* at p. 848), and respondent does not explain how the case is relevant. There the court specifically noted: "defendant was not in fear of imminent death or great bodily injury when he stabbed [the victim]. Although only defendant knows what his actual motivation was for stabbing [the victim], *even his own testimony indicates it was not fear*. [¶] Further, no sociological expert could have provided this missing mental state of defendant's actual subjective state of mind at the time he stabbed [the victim]." (*Id.* at p. 856 [emphasis added].) Unreasonable self-defense was not at issue in *Romero*, and nothing in the Court of Appeal's discussion of the relevance of expert testimony in that case has any application to the issue presented here — whether the trial court erred

in failing to provide the jurors with instructions relating to unreasonable self-defense.

With regard to prejudice, respondent argues that the "state constitutional standard of review set forth in *People v. Watson* (1956) 46 Cal.2d 818, applies. (Respondent's Brief at p. 96.) However, because unreasonable self-defense operates to negate an element of the charged crime, the failure to instruct on this concept was the equivalent of a misinstruction or failure to instruct on an element of the offense. (See Appellant's Opening Brief at pp. 132-133.) Consequently, reversal is required unless the prosecution can demonstrate the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18.)

"'[N]either heat of passion nor imperfect self-defense is an element of voluntary manslaughter' that must be affirmatively proven. (*People v. Rios* (2000) 23 Cal.4th 450, 454.) Rather, they are 'theories of partial exculpation' that reduce murder to manslaughter by negating the element of malice. (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016.)" (*People v. Moye*, *supra*, 47 Cal.4th at p. 549.) As Justice Kennard explains in her dissenting opinion in *People v. Breverman* (1998) 19 Cal.4th 142, 189-190:

> Given the manner in which California has structured the relationship between murder and voluntary manslaughter, the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger plus the absence of both heat of passion and unreasonable self-defense. Where, as here, there is sufficient evidence of heat of passion [or unreasonable self-defense] to support a voluntary manslaughter verdict, murder instructions that fail to inform the jury it may not find the defendant guilty of murder if heat of passion [or unreasonable self-defense] is present are incomplete instructions on the element of malice.

In cases involving the failure to instruct on an element of an offense the *Chapman* standard of reversible error applies to the appellate court's

determination to affirm or reverse. (*Neder v. United States* (1999) 527 U.S. 1, 8-9; *People v. Sakarias* (2000) 22 Cal.4th 596, 624-625; *People v. Flood* (1998) 18 Cal.4th 470, 492-507; *People v. Ramsey* (2000) 79 Cal.App.4th 621, 630-631; see *California v. Roy* (1996) 519 U.S. 2, 5.) The judgment in such a case may be affirmed "only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue." (*People v. Sakarias*, *supra*, 22 Cal.4th at p. 625.)

In *People v. Breverman*, *supra*, 19 Cal.4th at p. 176, this Court established the general rule that: "The sua sponte duty to instruct fully on all lesser included offenses suggested by the evidence arises from California law alone," and thus a trial court's error in fulfilling this duty "must . . . be evaluated under the generally applicable California test for harmless error . . . set forth in [*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)]." However, the question as to whether error in failing to instruct on heat of passion or unreasonable self-defense theories of voluntary manslaughter amounts to a failure to instruct on an element of the offense of murder was specifically not resolved. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 170, fn. 19; see also *People v. Lasko* (2000) 23 Cal.4th 101, 113; *People v. Moye, supra,* 47 Cal.4th at p. 558, fn.5.) Appellant has argued, above and in his opening brief, that the *Chapman* standard of review applies. (Appellant's Opening Brief at pp. 131-132.) However, even if this court determines that the *Chapman* standard does not apply, reversal is still required under *Watson*.

Under *Watson*, reversal is not warranted unless "it appears 'reasonably probable' the defendant would have achieved a more favorable outcome had the error not occurred. (*Watson*, *supra*, . . . at p. 836.)" (*People v. Breverman*, *supra*, at p. 178; e.g., *People v. Moye*, *supra*, 47 Cal.4th at p. 555.) This Court "has emphasized 'that a "probability" in this context does

not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. ([*Watson, supra*, 46 Cal.2d] at p. 837; cf. *Strickland v. Washington* (1984) 466 U.S. 668, 693-694, 697, 698 ["reasonable probability" does not mean "more likely than not," but merely "probability sufficient to undermine confidence in the outcome"].)' (*College Hospital Inc. v. Superior Court* (1984) 8 Cal.4th 704, 715.)" (*People v. Soojian, supra,* 190 Cal.App.4th at p. 519.)

Respondent argues that any error was harmless because the jury necessarily resolved the issue presented by the omitted instructions adversely to appellant when it rejected the defense of self-defense and the manslaughter theory of sudden quarrel or heat of passion. (Respondent's Brief at pp. 96-97.) However, as discussed at length in appellant's opening brief, since self-defense requires an objectively reasonable belief in the need to defend, and "unreasonable" self-defense requires only an actual (subjective) belief in the need to defend, the jury could have rejected the defense of self-defense yet found the defense of "unreasonable" self defense was present. (See Appellant's Opening Brief at pp. 125-130.) The doctrines of sudden quarrel and heat of passion also employ a reasonable man standard. (See Appellant's Opening Brief at pp. 128-129; see also *People v. Enraca* (2012) 53 Cal.4th 735, 759.) Unreasonable self-defense, therefore, is the only theory to apply a ***subjective*** standard. By rejecting theories employing an objective reasonable man standard — self-defense and heat of passion — the jury resolved only the reasonableness of appellant's conduct. It was not asked to and did not resolve the issue of whether appellant acted under the actual (although unreasonable) belief in the need to defend himself against imminent peril. The jury's second degree murder verdict, therefore, does not establish

that the issue presented under the omitted instructions was resolved adversely to appellant.

By returning a second degree murder verdict, the jurors clearly rejected the prosecution's theory that appellant premeditated and deliberated the killing of Sterling. However, they may also have believed that appellant's actions were not objectively reasonable. In the absence of instructions on unreasonable self-defense, during closing argument the prosecutor stressed that: "it's a reasonable person standard that you have to employ in your determination as to whether or not the defendant's actions amounted to voluntary manslaughter or murder." (22 RT 3343; see also 22 RT 3344.) Jurors could have concluded that although appellant actually believed self-defense was necessary, his actions were not those of a reasonable man. Such a conclusion would have required them to reject the theories of self-defense and heat of passion, yet would have supported a finding of manslaughter under a theory of unreasonable self-defense. Consequently, the trial court's error in failing to properly instruct the jury on the theory of unreasonable self-defense cannot be regarded as harmless, and appellant's conviction on Count 6 must be reversed.

PENALTY PHASE ISSUES

V.

THE TRIAL COURT'S ADMISSION OF IRRELEVANT AND INFLAMMATORY VICTIM IMPACT EVIDENCE WAS CONTRARY TO CALIFORNIA LAW AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE DETERMINATION OF PENALTY.

Appellant's position with regard to this assignment of error is fully set forth in the opening brief. Respondent's brief raises no new issues requiring additional discussion.

VI.

THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE.

Respondent's arguments with respect to this error were anticipated and fully addressed in appellant's opening brief.

PENALTY PHASE ISSUES

VII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING IRRELEVANT AND HIGHLY PREJUDICIAL REBUTTAL EVIDENCE.

A. Introduction

"Evidence of a defendant's background and character is admissible only to mitigate the gravity of the crime pursuant to [Penal Code] section 190.3, factor (k); the prosecutor may not argue such evidence should be considered in aggravation." (*People v. Young* (2005) 34 Cal.4th 1149, 1219; see also *People v. Lucas* (1995) 12 Cal.4th 415, 494; *People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) Consequently, the prosecution "may not present aggravating evidence showing the defendant's bad character unless the evidence is admissible under one of the listed factors or as rebuttal." (*People v. Avena* (1996) 13 Cal.4th 394, 439.) As discussed more fully in appellant's opening brief, the trial court committed reversible error in admitting the letter to Keisia as rebuttal evidence, because it was not directly relevant to any evidence introduced by the defense.

The defense case in mitigation consisted of testimony regarding the abuse appellant was a victim of and a witness to during his childhood, expert testimony explaining the extent and effect of the severe brain injuries appellant sustained in his youth, and testimony from appellant's relatives describing their relationships with him over the years. (See Appellant's Opening Brief at pp. 26-35.) Appellant's good character was not a theme of the defense case. Nevertheless, at trial, the prosecution argued that the letter to Keisia was admissible "to rebut the character evidence that's been

presented," claiming that the letter showed appellant's "violent character and the true nature of his disposition to violence." (45 RT 6406.) The letter was admitted over defense objection, and the prosecution made extensive use of its contents in closing argument utilizing the letter as general evidence of bad character.[6] (See Appellant's Opening Brief at pp. 187-190.)

On appeal, although the prosecution argued at trial that the letter was admissible as evidence of appellant's character for violence, respondent acknowledges that appellant did not offer evidence of a non-violent character. (Respondent's Brief at p. 113 ["Though none of Simon's witnesses testified that Simon had a character for non-violence. . . .].) However, respondent argues that: "Simon placed his general good character into issue during the penalty phase, and so the prosecution was entitled to introduce evidence that would give the jurors a more balanced view of the man whose life they were asked to spare." (Respondent's Brief at p. 112.)

In support of the argument that the defense placed appellant's general character in issue respondent refers primarily to testimony by defense witnesses which was given in direct response to questions posed by the *prosecution on cross-examination.* However, rebuttal evidence is only proper when made necessary by the defendant, "'in the sense that he has introduced new evidence. . . .'" (*People v. Thompson* (1980) 27 Cal.3d 303, 330 [quoting *People v. Carter* (1957) 48 Cal.2d 737, 753-754].) Not only was the

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[6] For instance, at one point the prosecutor stated: "How he thinks and how he feels and who he is is evident in that last letter that was introduced to you in my rebuttal. That shows you the true character of Richard Nathan Simon." (46 RT 6548.) The prosecutor repeated this theme when discussing the contents of the letter in detail, leading off with: "Who and what the defendant really is, what he's all about, and what his character is is so clear from this letter . . . ." (46 RT 6560.)

"character evidence" referred to by respondent introduced by the prosecution rather than the defense, but it was limited in scope and the letter was not directly relevant to any of it. "The scope of [penalty phase] rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24; accord *People v. Jones* (1998) 17 Cal.4th 279, 307; *People v. Carpenter* (1997) 15 Cal.4th 312, 408-409.) As discussed more fully below, respondent's argument must be rejected.

B. Argument

Respondent argues: "Though it is not the case 'that *any* evidence introduced by defendant of his "good character" will open the door to *any and all* "bad character" evidence the prosecution can dredge up' [citation], it is also true that 'If the testimony is "not limited to any singular incident, personality trait, or aspect of [the defendant's] background," but "paint[s] an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character," rebuttal evidence of similarly broad scope is warranted.' [Citation.]" (Respondent's Brief at pp. 112-113 [emphasis in original].) In an attempt to demonstrate that appellant presented character evidence of a broad scope, respondent cites to the record as follows:

> Though none of Simon's witnesses testified that Simon had a character for non-violence in so many words, they variously testified that he was: a "very disciplined young person," and "quite a good kid" (43 RT 6085); someone who was taught the difference between right and wrong (43 RT 6159); a good role model (43 RT 6197); an even-tempered person who was patient and restrained with his children (44 RT 6227, 6230-6231); and

> an advisor who discouraged his family members from engaging in criminal behavior. (44 RT 6216.)

(Respondent's Brief at p. 113.) None of the testimony cited by respondent, however, opened the door to introduction of the letter as rebuttal evidence.

Respondent first argues that defense witnesses testified appellant was "a 'very disciplined young person,' and 'quite a good kid' (43 RT 6085) . . .." Respondent's cite is to the testimony of appellant's one time step-father Frederick Iiams, who knew appellant between the approximate ages of 2 and 16. Iiams was married to appellant's mother for a period of four years, and first met appellant when appellant was 2 or 3 years old. Appellant was 8 or 9 years old when Iiams and appellant's mother divorced. (43 RT 6081-6082.) After the divorce Iiams maintained only limited contact with appellant, seeing him about once every two weeks until appellant was 12, and then only occasionally until appellant was 16 after which time they lost contact.[7] (43 RT 6091-6092.) The letter, which was written from jail when appellant was in his 30s, was irrelevant to Mr. Iiams' description of appellant as a child.

Respondent next refers to evidence indicating that appellant was "someone who was taught the difference between right and wrong (43 RT 6159)," and cites to the testimony of appellant's grandmother Yvonne Gillmore. The testimony on this point was in direct response to questions asked by the prosecution on cross-examination. Furthermore, Mrs. Gillmore's testimony on direct related to appellant's childhood. The relevant portion of Mrs. Gillmore's testimony on cross-examination was as follows:

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[7] Appellant was born on December 22, 1962, and would have been 16 in 1978. (79 RT 12827.)

Q. Were you pretty close to Nate as he was growing up from an infant until he was, what, 18 years old, and he moved to Michigan; correct?

A. Right.

Q. You maintained a close relationship?

A. Yes.

Q. Throughout those years?

A. Yes.

Q. Did he know the difference between right and wrong?

A. Yes. He was taught.

Q. Both in school and at home?

A. And home.

(43 RT 6159.) Even if this testimony had been elicited by the defense on direct examination, the letter had no bearing on whether or not appellant was taught right from wrong as a child.

Respondent next refers to evidence that appellant is "a good role model (43 RT 6197)," and cites to the testimony of his cousin Terri Richardson. The testimony at issue was again in direct response to persistent questioning by the prosecution on cross-examination:

Q. Do you think he's a good role model for your daughter?

A. He's her cousin regardless.

Q. Do you think he's a good role model for her?

A. Yes.

Q. Pardon?

A. Yes.

Q. And you take her to go visit him in the jail?

A. Yes.

Q. Is there anything that he could have done or could do that would change your opinion of him that he would be a good role model?

A. No.

Q. Regardless of how many people he killed or raped?

A. I'm very family orientated [sic], and that's my cousin.

(43 RT 6197.) Even if this testimony had been elicited on direct rather than during cross-examination, the letter would not be proper rebuttal evidence since it was irrelevant to the subject matter.

Finally, respondent refers to evidence that appellant is "an even-tempered person who was patient and restrained with his children (44 RT 6227, 6230-6231), and an advisor who discouraged his family members from engaging in criminal behavior (44 RT 6216)," and cites to the testimony of appellant's step-sister Dawn Malachi. With respect to the first part of the sentence, respondent again cites to testimony given on cross-examination. On page 6227 Ms. Malachi was asked whether appellant "seemed pretty even-tempered." She replied: "Yeah. He never — you know, he never really lost his temper unless — if I was — I had ran [sic] away one time. And he — my mom was hurt, and he came and he found me and he told me that I had to go home. And I wasn't trying to go home. So he was like, you know, you're going home. Mom needs you home. She's worried about you. And he took

me home." She was asked: "He's not an explosive type person, is he?" She replied: "As far as I know, no." On page 6230 the prosecutor asked Ms. Malachi whether appellant physically abused his children, and she replied: "As far as I know, he wasn't abusive towards the kids." On page 6231 the prosecutor asked her whether appellant "had patience with the kids?" She replied: "He had patience, and he would — their punishment, it wouldn't be a whooping. Their punishment, if they were doing wrong, they would have to go and clean the trash off the lawn." The last part of respondent's sentence refers to brief testimony Ms. Malachi gave on direct describing her relationship with appellant:

Q. Has your brother mistreated you in any way?

A. No.

Q. Has he been there as kind of a person to support you and give you advice when you needed it?

A. Yeah. He's like — like a sort of a — to me he was sort of like my — I would look up to him because he was older and he always had the right thing to tell me, you know. He wouldn't tell me anything wrong, or he wouldn't tell me anything and get me into trouble or anything.

Q. He didn't encourage you to go out and commit crimes or things like that, did he?

A. No.

Q. Did he discourage you from that kind of lifestyle.

A. Yes, he did. If I was doing anything that he didn't think my mother would like, he'd tell me he was going to tell my mom on me.

(44 RT 6216.) The letter had no relevance with respect to Ms. Malachi's testimony which was restricted to her relationship with appellant and his relationship with his children.

In general, "[t]he scope of proper rebuttal is determined by the breadth and generality of the direct evidence." (*People v. Loker* (2008) 44 Cal.4th 691, 709.) Respondent's attempt to bring the referenced testimony within the class of cases in which a broad array of character evidence is presented fails for two reasons. First, the majority of the character evidence referred to by respondent was elicited on cross-examination. Second, the testimony as a whole was limited in nature and restricted to descriptions of appellant's relationships with his relatives. Respondent's claims that: "Simon's witnesses offered 'substantial evidence and argument that he was a kind, loving, contributive member of his community, regarded with affection by neighbors and family' . . ." (Respondent's Brief at p. 113-114), simply is not supported by the record.

Respondent next argues that: "The testimony regarding Simon's religious convictions (45 RT 6488, 6493-6494) also opened the door to the kind of evidence which was reflected in the letter he wrote to Keisia." (Respondent's Brief at p. 114.) The first reference to this subject occurred when the prosecutor asked appellant's mother the following questions on cross-examination:

Q. While your son Nate was living with you in Moreno Valley, did you and he attend church together?

A. Yes.

Q. Regularly?

A. Yes.

Q. Did he read the Bible?

A. Yes.

Q. Did he seem to understand what he read?

A. Yes.

Q. Did he seem to accept religion?

A. He accepted relationship.

Q. He embraced religion in his life?

A. Pardon?

Q. He embraced religion in his life?

A. He embraced God.

(45 RT 6488.) Subsequently, on re-direct, appellant's mother testified that she and appellant discussed the Bible over the phone, in writing, and during visits while appellant was in custody. (45 RT 6493-6494.) However, none of this testimony justified introduction of the letter in rebuttal.

In arguing to the contrary, respondent relies on *People v. Ramos* (1997) 15 Cal.4th 1133. In *Ramos* a defense witness testified at length regarding the defendant's renewed involvement with religion while incarcerated. The testimony was summarized by the court as follows:

> On direct examination, Ahumada testified to her visits with defendant at San Quentin when they "talked about church," "about the Lord," "about serving Him, seeking Him, His consolation for us, His strengthening for us." From these conversations, she perceived "a recommitment toward his religion." "He would start having these prayer meetings and he felt more in contact, more at ease, more tranquil with the Lord." Defendant would also "motivate" or "invite" other inmates to attend and participate in the prayer sessions. This testimony

> tended to suggest not only devout faith but concern for others to embrace its spiritual benefits by turning away from past misdeeds involving force and violence. Other witnesses had established that the Church of la Luz del Mundo was a Christian-based sect, implying tenets of nonviolence.

(*Id.* at pp. 1172-1173.) On cross-examination the prosecutor was permitted to ask the witness whether she was aware that the defendant had five times been found in possession of handmade knives while incarcerated. In finding that the cross-examination was proper this court noted:

> "It is well established that, '[w]hen a defense witness, other than the defendant himself, has testified to the reputation of the accused, the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness' testimony.' [Citation.] So long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place, they may so inquire. [Citation.]" [Citations.] The same principles apply when a witness gives character testimony. In light of Ahumada's portrayal of defendant's religious recommitment, the prosecution could impeach her testimony with acts tending to contradict that impression. Evidence of weapons possession, particularly in a prison environment, would reasonably implicate a violent character whether defendant intended to use them offensively or defensively. [Citation.] We thus do not have a case in which either the prosecution presented undifferentiated "bad character" evidence in response to general "good character" evidence or the cross-examination exceeded the temporal scope of the direct. [Citations.]

(*Id.* at p. 1173.) In this respect *Ramos* is similar to *People v. Siripongs* (1988) 45 Cal.3d 548, 576-578. In that case this court held that a defendant's introduction of evidence that he was a devout Buddhist, and that one of the characteristics of a devout Buddhist is honesty, would justify the prosecution's introduction of evidence of the defendant's prior convictions involving dishonesty. In both cases defense character witnesses were impeached with

evidence directly relevant to the character trait they testified about — nonviolence in *Ramos* and honesty in *Siripongs*.

Here the letter was not relevant to any defense evidence relating to a specific character trait such as non-violence or honesty. The present case is, therefore, distinguishable from *Ramos* and *Siripongs*, as well as other cases mentioned in appellant's opening brief, because the prosecution did not introduce rebuttal evidence which was directly relevant to specific mitigating character evidence introduced by the defense. (See Appellant's Opening Brief at p. 186.)

Another distinguishing factor is that *Ramos* involved impeachment of a defense character witness with "have you heard" type questions. "'The rationale for permitting the prosecution to cross-examine a defendant's good-character witness as to whether or not he has heard rumors or reports of defendant's arrest or conviction of other offenses inconsistent with the character trait testified to, is that such cross-examination tests and exposes weaknesses in the witness' knowledge of the reputation. [Citations.] . . . .'" (*In re Hempstead* (1983) 148 Cal.App.3d 949, 954; see also *People v. Wagner* (1975) 13 Cal.3d 612, 619.) "'When such cross-examination of a good-character witness is permitted, the jury should be instructed that such questions and answers of a character witness are to be considered only for the purpose of determining the weight to be given to the opinion or testimony of the witness.' [Citation.]" (*People v. Clair* (1992) 2 Cal.4th 629, 683 [quoting *In re Hempstead, supra*, 148 Cal.App.3d at p. 954].) No such instruction was given in the present case,[8] and the prosecution's use of the evidence was not so limited. In fact the prosecution utilized the letter as general evidence of

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[8] The relevant jury instructions are former CALJIC No. 2.42 and current CALCRIM No. 351.

bad character extensively in closing argument. (See Appellant's Opening Brief at pp. 187-189.) In this regard the present case is distinguishable from *Ramos* as well as other cases cited by respondent in which defense character witness were impeached with "have you heard" type questions. (See e.g. *People v. Loker*, *supra*, 44 Cal.4th 691; *People v. Clair*, *supra*, 2 Cal.4th 629.)

Respondent also argues that any error in admitting the letter as rebuttal evidence was harmless. (Respondent's Brief at pp. 114-115.) This matter is addressed fully in appellant's opening brief. (See Appellant's Opening Brief at pp. 187-189.)

VIII.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO COUNSEL AND TO DUE PROCESS AT THE PENALTY PHASE BY REFUSING TO ALLOW DEFENSE COUNSEL TO REFER TO OTHER PROMINENT MURDER CASES DURING CLOSING ARGUMENT IN ORDER TO GIVE JURORS A FRAME OF REFERENCE IN EVALUATING THE GRAVITY OF THE OFFENSES, AND BY PRECLUDING THE JURY FROM CONSIDERING APPELLANT'S CASE IN LIGHT OF OTHER MURDER CASES.

As discussed at length in appellant's opening brief, the trial court violated appellant's right to counsel and to due process at the penalty phase by refusing to allow defense counsel to refer to other prominent murder cases during closing argument. The trial court's ruling was not based upon a finding that counsel's proposed argument related to a matter of dubious relevance or would have been overly time consuming. Instead it was based upon an erroneous conclusion, which was communicated to the jurors by both the prosecutor and the trial court, that jurors were not permitted to compare the facts of the case to those of other cases. (See Appellant's Opening Brief at pp. 190-206.) With respect to this error, respondent contends that: "The trial court's ruling did not have the effect alleged by Simon, and in fact his attorney was permitted to make the arguments he contends he was precluded from making in his appeal." (Respondent's Brief at p. 119.) In support of this contention respondent states:

> After noting that they are the types of cases that are "usually in our media," defense counsel mentioned those cases involving Timothy McVeigh and Charles Manson, and added, "You're free to consider that. You're free to consider what types [of] offenders you've read about are deserving of the death penalty." [Citation.] Though it did sustain the prosecutor's objection, the

> trial court never struck those remarks, and never admonished Simon's jurors to disregard them.

(Respondent's Brief at p. 120.) This argument, however, overlooks the fact that the trial court made it clear both to counsel and to the jurors that any comparison of the facts of this case with the facts of other well known cases was not permitted.

After the prosecution's first objection to counsel's comparison argument was sustained, defense counsel continued his argument to the jurors and attempted to make his point in a more general way:

> The point I'm trying to make is that we have a category of offenders up here in the top of this pyramid, and the law reserves the death penalty for those that are the worst among that group, and I've invited your attention to some cases where those offenders are probably deserving of that penalty. It doesn't mean that their case is exactly the same as Mr. Simon's. It's just merely to help guide you in understanding the kind of people we're talking about in this category. So to that extent you are making a comparative analysis.

(46 RT 6587-6588.) The prosecutor again objected and, in sustaining the objection in open court, the trial judge stated: "I think comparative analysis is improper, I agree." (46 RT 6588.) All of this took place after the prosecution had specifically and incorrectly informed the jurors during his closing argument that they were not to compare the facts of the case to those of other capital cases:

> And what you're asked to consider is not a comparison of him to other killers, not a comparison of his crimes to other crimes, but to look at the crimes that he did commit and his participation in them and why he committed those crimes, how he committed those crimes, what he did after those crimes, and his background and his history.

(46 RT 6526.) In light of the totality of the record, the fact that the trial court did not expressly strike the brief remark made by counsel before the

prosecution's objection to the remark was sustained is of no consequence. Defense counsel was precluded from making a comparison argument, and the jurors were informed by both the trial court and the prosecution that they were not permitted to compare the facts of this case to other cases

Respondent also argues that the factual argument defense counsel sought to make was improper stating: "The *Marshall* court unequivocally held that the defendant's attorney was not permitted to make a 'specific and detailed comparison of the facts' of his case with those of other capital murder cases." (Respondent's Brief at p. 121.) Respondent's analysis of the holding in *People v. Marshall* (1996) 13 Cal.4th 799 is, however, incorrect. In *Marshall*, the trial court ruled that counsel *could permissibly comment on and compare the circumstances of the case with those existing in the other well known cases*, but that it would be improper for defense counsel to discuss the sentences imposed. (*Id.* at p. 854.) On appeal, this Court upheld the trial court's ruling as a proper exercise of discretion recognizing that meaningful discussion of the sentences imposed in other cases "cannot be made solely on the basis of the circumstances of the crime, without consideration of the other aggravating and mitigating factors. Yet the trial court could properly conclude that to allow counsel to argue all such factors would consume too much time and draw the jury's focus away from the instant case. In any event, counsel was granted the latitude to argue, as he sought, that this case lacked the cruelty and callousness found in other murder cases." (*Ibid.*) In *Marshall* the defense was permitted to compare the facts of the case to those of other well known cases. In the present case the trial court expressly held that "comparative analysis is improper . . . ."

Contrary to the argument of the prosecution, and the ruling of the trial court, jurors are not precluded from comparing the facts of the case with those

of other criminal cases they might be aware of in order to determine if death is the appropriate punishment. (See *People v. Milwee* (1998) 18 Cal.4th 96, 153-154; see also *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1277 fn. 6, dis. opn. of Broussard, J. ["I know of no authority that a juror, in deciding the weight to be given to the circumstances of the crime, or whether death is the appropriate penalty, may not mentally compare the facts of the case to those of other cases."].) The trial court not only prevented defense counsel from comparing the facts of the case to the facts of other well known cases, but also prevented the jurors from evaluating the gravity of the offense in light of other cases. In doing so the trial court erred.

Respondent argues only that the trial court did not err, and does not argue that any error was harmless. As discussed in appellant's opening brief, the error violated appellant's rights to due process and to a reliable penalty determination and was prejudicial. (See Appellant's Opening Brief at pp. 205-206.)

The right to counsel under both the state and federal constitutions includes the right to have counsel present closing argument. (*Herring v. New York* (1975) 422 U.S. 853, 858-865; *People v. Marshall, supra,* 13 Cal.4th at p. 854.) Moreover, due process requires that defendants be given a fair opportunity to rebut the prosecution's argument for death. (*Simmons v. South Carolina* (1994) 512 U.S. 154 [failure to allow rebuttal of future dangerousness]; *Gardner v. Florida* (1977) 430 U.S. 349; *People v. Bandhauer* (1967) 66 Cal.2d 524, 531 [recognizing "that each side should have an opportunity to rebut the argument of the other."]; see also *People v. Robinson* (1995) 31 Cal.App.4th 494, 505 [in non-capital trial, reversible error for prosecutor to withhold argument until his rebuttal in order to deny defense chance to reply].) Here the prosecution relied heavily upon the

circumstances of the crimes in arguing for imposition of the death penalty, and bolstered the argument by incorrectly informing jurors that they were not permitted to compare the facts of the case to those of other murder cases. (46 RT 6526; see Appellant's Opening Brief at pp. 192-194.) Defense counsel sought to rebut the prosecution's argument by referring to well-known cases in order to give jurors a frame of reference in evaluating the gravity of the crimes. Defense counsel's argument comparing the gravity of the offense to other well-known murder cases was entirely proper, and the trial court's error precluded him from referring to matters of common knowledge in order to illustrate the worst of the worst cases and give the jurors a point of reference in assessing the circumstances of the offense. By refusing to allow counsel to discuss other well known cases the trial court improperly deprived him of an appropriate means of rebutting the prosecution's argument that the facts of this case were so egregious as to make death the only just result.

Because the circumstances of the crime was the primary factor relied upon by the prosecution, it cannot be said beyond a reasonable doubt that the errors did not affect the jury's sentencing decision. (*Chapman v. California, supra,* 386 U.S. 18.) There is a reasonable possibility that but for the errors the outcome of the penalty trial would have been different. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Accordingly, appellant's death sentence must be reversed.

IX.

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

Appellant's position with regard to the issues raised under this heading is fully set forth in the opening brief. Respondent's brief raises no new issues requiring additional discussion.

CONCLUSION

In light of the foregoing discussion, as well as that contained in appellant's opening brief, appellant requests that the judgment of the trial court be reversed.

Respectfully submitted,

Kimberly J. Grove
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Kimberly J. Grove, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 17,361 words, excluding the tables and this certificate. This document was prepared in WordPerfect, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 15, 2012, at Ligonier, Pennsylvania.

_____

Kimberly J. Grove

DECLARATION OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over 18 years of age, employed in the county of Westmoreland, Pennsylvania, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 425, Ligonier, Pennsylvania. I served the Appellant's Reply Brief by placing a copy in an envelope for the addressee named hereafter, addressed as follows:

The Honorable Gordon R. Burkhart, Judge
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Each envelope was then sealed and with postage thereon fully prepaid deposited in the United States mail by me at Ligonier, Pennsylvania, on July 16, 2012.

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

Executed on July 16, 2012, at Ligonier, Pennsylvania.

_____

Kimberly J. Grove