AUTOMATIC APPEAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	**DEATH PENALTY CASE**
Plaintiff and Respondent,	**NO. S105876**
v.	**(Napa Co. Super. Ct. No. CR 103779)**
ARTURO JUAREZ SUAREZ,	
Defendant and Appellant.	

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF NAPA

The Honorable Scott Snowden, Presiding

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent in order to present the issues fully to this Court. Appellant does not reply to respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any particular contention or allegation made by respondent, or a failure to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

For the reasons stated in his opening brief and elaborated herein, appellant respectfully urges the Court to set aside his convictions and death sentence.

ARGUMENT

I. DEATH QUALIFICATION OF THE JURY PREJUDICIALLY VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND A REPRESENTATIVE JURY.

"A 'death qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath." (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6, internal citations and quotations omitted.) If a juror's ability to perform his or her duties is substantially impaired under this standard, he or she is subject to dismissal for cause. The trial court committed constitutional error by permitting the death qualification of appellant's jury.

A. Sixth Amendment

Respondent does not dispute any of appellant's detailed factual showings of how death-qualified jurors function in a way that is materially different, and more likely to convict, than a jury chosen in any non-capital case. (See AOB 73–96.) Respondent understandably

relies on supreme court precedent holding that death qualification is constitutional. It notes that the United States Supreme Court ruled in *Lockhart v. McCree* (1986) 476 U.S. 162, 176–177, that "'*Witherspoon*[1]-excludables' do not constitute a 'distinctive group' for fair-cross-section purposes [and thus] 'death qualification' does not violate the fair-cross-section requirement." Respondent asserts that "Appellant fails to provide a compelling reason to deviate from these holdings, and his claim should be rejected." (RB 23.)

As argued below, however, *Lockhart* should be revisited, because the assumptions on which it rested are no longer true. And that decision addressed neither Eighth Amendment considerations nor statutory claims governing jury selection.

The *Lockhart* court first pointed to what it saw as shortcomings in the studies purporting to show that a death-qualified jury is more likely to convict. (468 U.S. at pp. 168–172.) Eventually, however, the court assumed, for the purposes of that opinion only, "that death qualification in fact produces juries somewhat more 'conviction-

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[1] *Witherspoon v. Illinois* (1968) 391 U.S. 510.

prone' than 'non-death-qualified' juries." (*Id.* at p. 173.) It then held that this result did not offend the Constitution. (*Ibid.*)

This conclusion is at odds with opinions by the high court both before and after *Lockhart*, recognizing that when a State seeks to convict a defendant of the most serious and severely punished offenses in its criminal code, any procedure that "diminish[es] the reliability of the guilt determination" must be struck down. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) "In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. [citations omitted]." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; see also *Spaziano v. Florida* (1984) 468 U.S. 447, 456.)

In *Witherspoon v. Illinois*, *supra*, the high court had written that "[A] defendant convicted by [a properly death-qualified] jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt." (391 U.S. at p. 520, n.18.) That is what appellant has done. The qualitatively stronger and more varied research detailed in appellant's opening brief shows beyond any reasonable doubt that death qualification skews a jury towards an

unreliable and biased verdict of conviction. Respondent may not find the fact that a strong body of research performed over decades shows that a death-qualified jury is skewed towards conviction and death to be "compelling," but it is.

B. Eighth Amendment: Evolving Standards of Decency

The Supreme Court has determined that "*Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment." (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.) Respondent does not address at all appellant's point that it is impossible to measure the evolving standards of a community as the Eighth Amendment requires (see AOB 74–78), without examining the community's moral and normative views on the death penalty. It does not dispute that these moral and normative factors are precisely what determines whether or not a death sentence is imposed in California: the penalty phase determination in California is "inherently moral and normative, not factual." (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Respondent does not deny any of appellant's factual contentions regarding how these factors, and current sentiment, have evolved.

Respondent believes that a citation to *Lockhart* closes the matter, but *Lockhart*, a Sixth Amendment case, does not insulate respondent from the qualitative difference in societal attitudes toward the death penalty after 30 years—or the need to periodically examine how a society's standards have evolved as part of enforcing the Eighth Amendment. (See *Brumfield v. Cain* (2015) ___U.S.___ [135 S.Ct. 2269, 2274]; *Miller v. Alabama* (2012) ___U.S.___ [132 S.Ct. 2455, 2463]; *Kennedy v. Louisiana* (2008) 554 U.S. 407.) For the reasons set forth in his opening brief, appellant's convictions and death sentence should be set aside.[2]

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[2] Respondent's contention that this claim is forfeited is addressed in Claim III of appellant's opening brief (AOB 108) and *post*, at p. 10.

II. DEATH QUALIFICATION VOIR DIRE VIOLATED THE PROSPECTIVE JURORS' CONSTITUTIONAL RIGHTS, AND TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT ON THIS GROUND.

Appellant has standing to assert claims based on the constitutional rights of the prospective jurors. (See *Powers v. Ohio* (1991) 499 U.S. 400, 402, and 410–415 ["relying upon well-established principles of standing," and holding that a criminal defendant has standing to raise the rights of a juror excluded from service].)

Respondent contends that appellant lacks standing despite *Powers v. Ohio*, but its argument boils down once again to reliance on *Lockhart v. McCree*, *supra*, namely, that death penalty skeptics do not constitute a protected class. It also contends that:

> [A]ppellant's argument, if taken to its logical extent, would dismantle the entire system of challenges for cause and peremptory challenges. . . . The absurdity of this position is readily apparent, as "nothing in [the holdings of this Court or the Supreme Court] suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." (*Lockett v. Ohio* (1978) 438 U.S. 586, 597.)

(RB 26.)

Appellant presented this Court with numerous statutory as well as constitutional arguments in support of this claim, which were ignored by respondent. These arguments included several contentions of constitutional violations that had nothing to do with the right to a representative jury discussed in *Lockett*. California death penalty law is very specific on the point that at the penalty phase, a jury's duty is to make a "moral and normative" decision on whether or not to impose death. It is irrational (and unconstitutional) to then exclude prospective jurors from serving as penalty jurors because of their "moral" beliefs.

The same is true in federal law. In *Kansas v. Carr* (2016) ___U.S.___ [136 S.Ct. 633, 642], the high court considered the nature of mitigating and aggravating evidence in the course of determining that the Kansas court had erred in ruling that the jury must be instructed that mitigating evidence does not need to be proven beyond a reasonable doubt. After noting that aggravators were factual determinations ["The facts justifying death set forth in the Kansas statute either did or did not exist."], the court wrote that

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained.

(*Kansas v. Carr*, *supra*, 136 S.Ct. at p. 642.)

The system to which respondent refers is not sacred, or immune from reconsideration—especially in light of the high court's recognition that society's attitudes towards the death penalty are not static. Now, it bars millions of Californians from service on those juries charged with making the most important determinations a jury can make—a "value call" about whether or not an accused person should live or die. That is no small fact. For the reasons set forth in appellant's opening brief, his convictions and death sentence should be reversed.[3]

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[3] Respondent's contention that this claim is forfeited is addressed in the AOB, Claim III, p. 108.

III. CHALLENGES TO THE CONSTITUTIONALITY OF DEATH QUALIFICATION OF JURORS ARE COGNIZABLE ON APPEAL.

Respondent cites case law requiring that objections be made at trial before they can be considered on appeal, and then writes, "Respondent agrees that, in addition to forfeiture, another possible avenue to dismissal of appellant's claims is to recognize that *Lockhart, supra*, 476 U.S. at pages 174–177, directly addresses and rejects both of appellant's arguments." (RB 26.)

For the reasons set forth in each contention above, *Lockhart* should be revisited, because the assumptions on which it rested are no longer true. And that decision addressed neither Eighth Amendment considerations nor statutory claims. For the reasons set forth in his opening brief, Claims I and II require that appellant's convictions and death sentence be set aside.

IV. THE JUDGMENT MUST BE REVERSED FOR FAILURE TO AFFORD APPELLANT HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TRIAL BY A FAIR AND IMPARTIAL JURY.

A. Death-Prone Jurors Were Wrongly Retained in the Jury Pool.

Appellant rests on the factual contentions and arguments set forth in his opening brief. (AOB 111–134.) Respondent argues, as appellant acknowledges, that this Court has rejected similar contentions regarding the forfeiture of claims if all peremptory challenges are not exhausted. (RB 26-29.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in appellant's opening brief, this Court should reconsider its previous opinions and reach the merits of appellant's contentions.[4]

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[4] Appellant accepts respondent's correction of prospective juror Debra Stup's name. (RB 44.)

B. Prospective Juror Deborah Brace, a Life-Prone Juror Who Unequivocally Stated That She Would Follow the Law, Was Wrongly Excused.

The prosecutor's challenge for cause was opposed by appellant, and granted by the trial court. (23 RT 6366.) Ms. Brace did say that she could not vote for the death penalty in this case. (See 23 RT 6359–6360, 6364.) However, she also indicated that her overriding consideration was the necessity of following the law. According to respondent,

> Appellant asserts that Brace was wrongly excused because she was "a person whose respect for the law was stronger than her own feelings about the propriety of the death penalty." (AOB 35.) However, in the preceding sentence, appellant complained that the trial court "did not ask [Brace] if her repugnance against the death penalty was stronger than her belief that regardless of her own convictions, she had to follow the law." (AOB 135.) *Thus, appellant's assertion that Brace would have put her personal beliefs aside and followed the trial court's instructions is wholly speculative and belied by Brace's actual statements.* In light of Brace's clear declaration that she personally could not vote for death in this case, the trial court did not abuse its broad discretion in excusing her.

(RB 66, emphasis added.)

Respondent then discusses inapposite cases, and ignores Ms. Brace's clear language, quoted at AOB 135.

> Q. If you were -- found yourself as one of the 12 people selected as a juror *would you listen to the instructions of the court and follow the instructions of the court?*
>
> A. *Absolutely.*
>
> Q. And one more.
>
> A. Sure.
>
> Q. In view of that fact we're not asking if you would vote, we're asking could you vote for the death penalty if in fact the aggravating circumstances outweigh the mitigating circumstances?
>
> A. I mean is it my right to be able to vote no? I mean I just couldn't do that. I couldn't in my heart. That's -- *I couldn't unless that was the law. Because the law says if the evidence is -- if the evidence was there, and that was something I had to do, then I guess I would have to do it.*

(23 RT 6361–6362, emphasis added.)

Respondent quotes the trial court's language on how careful it was trying to be in order to avoid a *Witherspoon* reversal (RB 67) but ignores the trial court's failure to digest what Ms. Brace said, and to either take it at face value, or follow up on her statement that she would have to do what the law directed her to do. As this Court recently wrote,

> An adequate *Witherspoon/Witt* voir dire cannot simply reaffirm prospective jurors' biases without also asking

> whether they are capable of setting them aside and determining penalty in accordance with the law. Regardless of the jurors' personal views or inclinations, they were not disqualified from service unless they were incapable of setting aside these feelings and following the law. (*Lockhart v. McCree, supra*, 476 U.S. at p. 176; *Witt, supra*, 469 U.S. at p. 424; *People v. Avila* (2006) 38 Cal.4th 491, 529 [43 Cal.Rptr.3d 1, 133 P.3d 1076].)

(*People v. Leon* (2015) 61 Cal.4th 569, 593.)

In light of Ms. Brace's clear and uncontradicted statement that she would set aside her own feelings and follow the law, the trial court's conclusion that she "would not be able to impose a death sentence no matter what case was before her," (RB 67) was contradicted by the record.[5]

According to respondent,

> *People v. Moon* (2005) 37 Cal.4th 1 is instructive. In that case, this Court ruled that a prospective juror was properly excused for cause where she responded she would always vote against finding special circumstances so as to avoid the death-penalty question and would vote against the death penalty "regardless of the evidence." (*Id.* at 15.) Although the juror indicated that there might be cases where she "could be convinced that the death penalty might be appropriate," she was unable to articulate any case wherein she would vote for death or

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[5] Respondent is correct that Julie Brown was never dismissed by the trial court. (RB 67.)

> any facts that would cause her to impose the death penalty. (*Ibid.*)

(RB 65.)

Appellant has no quarrel with any of this; *Moon* simply does not address that fact that in appellant's case, Ms. Brace indicated that she would follow the law as instructed.

Respondent next states that *People v. Tully* (2012) 54 Cal.4th 954, "is even more similar," and also supports the dismissal for cause of Ms. Brace. (RB 65–66.) Not so. In *Tully*, this Court described a very different situation:

> The prosecutor then asked M.K. a long hypothetical that ended: "Let's assume further that you're the foreperson of this jury, and part of the job of the foreperson is to sign the verdict form . . . . Can you sign your name on that death warrant, appreciating the fact that that is the first step that will carry this man onto a bus to be taken across the bay to San Quentin, put into eventually that green gas chamber which we saw time and time again over all this publicity regarding Harris, and he will at that point in time breathe in poisonous gas until he's dead. [¶] Can you do that?" M.K. replied, "No."
>
> The prosecutor challenged her for cause. Defense counsel declined to question her and submitted without argument. The trial court, however, asked her twice if what she meant was that she could not impose the death penalty even if she concluded it was warranted by the

> evidence. M.K. replied, "Yes, that's correct," and "Yes, I could not do that."

(*Tully*, 54 Cal.4th at p. 1000.)

Like *Moon*, there is no indication in *Tully* that anyone asked the prospective juror if she could set aside her own feelings and follow the law.

It is true that this Court "has held it permissible to excuse a juror who indicated he would have a 'hard time' voting for the death penalty or would find the decision 'very difficult.' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 697.) While Ms. Brace indicated she had problems with the death penalty, there is no record of any ambivalence by Ms. Brace in her expressions of her absolute willingness to follow the law as it was given to her.

> The *Lockhart* approach contemplates a two-part inquiry. It recognizes that a prospective juror may have strong feelings about capital punishment that would generally lead to an automatic vote, one way or the other, on that question. However, it also allows for the possibility that such a juror might be able to set aside those views and fairly consider both sentencing alternatives, as the law requires. Both aspects of the inquiry are important.

(*People v. Leon, supra*, 61 Cal.4th at p. 592.)

Respondent cites *no* cases in which the second part of this two-part inquiry was explicitly answered in the way it was answered by Ms. Brace, and the prospective juror was nevertheless dismissed for cause. Respondent simply ignores Ms. Brace's language, quoted in appellant's opening brief, that she would "absolutely" follow the law as it was given to her by the trial court, and that she could not vote for a death sentence "unless that was the law. Because the law says if the evidence is—if the evidence was there, and that was something I had to do, then I guess I would have to do it." (23 RT 6361–6362.)

There is no indication in the record that the trial court doubted her sincerity. There were no efforts by the trial court or prosecutor to follow up with questions regarding these statements of Ms. Brace. It was error to dismiss her, in light of her unqualified testimony that she would set aside her personal views and follow the law.

Under binding United States Supreme Court precedent, error in excusing a prospective juror for cause based on the juror's views about the death penalty requires automatic reversal of the penalty verdict. (*Gray v. Mississippi* (1987) 481 U.S. 648, 667–668; see also *People v. Riccardi* (2012) 54 Cal.4th 758, 783.)

V. THE PATTERN OF SHODDY AND INACCURATE INTERPRETIVE AND TRANSLATION ASSISTANCE AND SERVICES VIOLATED APPELLANT'S STATE AND FEDERAL RIGHTS TO A FAIR TRIAL BASED ON RELIABLE EVIDENCE AND TO BE PRESENT AT HIS TRIAL, AND REQUIRE REVERSAL.

Appellant believes the issues are fully joined, and rests on the factual contentions and legal arguments presented on this issue in his opening brief, with one exception. Respondent notes that no case law was cited by appellant in his contention that his right to presence was violated, but proceeds to respond. (RB 75–76.) Appellant did rely on the cases and arguments cited by counsel below on this issue, but would also bring to the Court's attention its recent extensive discussion of the issue of a defendant's presence at his or her trial, and the appropriate standard of review should error be found, in *People v. Mendoza* (2016) 62 Cal.4th 856, 898 et seq.

VI. ENTRIES INTO APPELLANT'S YARD AND RESIDENCE ON JULY 12 AND 13, 1998, WERE ILLEGAL, AND THE ADMISSION OF THE FRUITS OF THAT ILLEGALITY PREJUDICED APPELLANT.

Appellant raised several points in his opening brief attacking the lawfulness of numerous searches of his trailer and the surrounding grounds in the wake of the crimes at bench. (Claim VI, AOB 148 et seq.) Respondent seeks to justify all warrantless searches in this case as "exigent," (RB 90–92) but there was no legitimate reason why a warrant could not have been obtained. There may have been exigent circumstances for the first search—to look for appellant and/or crime victims in his trailer—but no such circumstances existed thereafter.

Respondent's efforts to present other circumstances, such as the need to obtain materials for identification (RB 85–87) fall apart at a glance; crediting such a circumstance is a step towards eliminating the warrant requirement entirely.

Respondent implicitly recognizes this, as did the trial court in Napa County, when it found that appellant's additional facts regarding the circumstances of the first searches did not require a revisiting of Judge Cozens's ruling in Placer County, because the

"abandonment" theory was dispositive, and required in the circumstances of this case that the motion to suppress be denied in all respects. (RB 90–91; 42 RT 9811, 9817.)

Appellant disagrees. He did not leave, or "abandon," his property until he saw it was in the control of deputy sheriffs. In these circumstances, this Court should not find that he had not voluntarily abandoned his property, and that the searches at issue should have been suppressed for the reasons set out in appellant's opening brief.

In *People v. Parson* (2008) 44 Cal.4th 332, a case relied on heavily by respondent (RB 123–124), this Court first set out the proper approach to a motion to suppress evidence, and then addressed issues related to the abandonment of property:

> In ruling on a motion to suppress, the trial court is charged with (1) finding the historical facts; (2) selecting the applicable rule of law; and (3) applying the latter to the former to determine whether or not the rule of law as applied to the established facts has been violated. (*People v. Ayala* (2000) 24 Cal.4th 243, 279 [99 Cal.Rptr.2d 532, 6 P.3d 193].) On appeal, we review the trial court's resolution of the first inquiry, which involves questions of fact, under the deferential substantial-evidence standard, but subject the second and third inquiries to independent review.

(*People v. Parson, supra*, 44 Cal.4th at p. 345.)

A. Appellant Had Not Abandoned His Home.

Appellant understands that "if a defendant has in fact abandoned the place where he formerly resided, then he may not have suppressed from evidence what the police find on those premises after the time of abandonment." (LaFave, Search and Seizure: A Treatise on the Fourth Amendment (4th ed. 2011) § 2.3(e); see also *Abel v. United States* (1960) 362 U.S. 217, 240–241 [search of defendant's hotel room permissible after he checked out].)

Respondent argues that appellant abandoned his trailer, even though elsewhere it stipulated that appellant had a reasonable expectation of privacy when the searches of his trailer took place. (3 RT 635; 5 RT 1135, 1144.)

The leading case on abandonment of property for Fourth Amendment purposes at the time of trial was *United States v. Levasseur* (2d Cir. 1987) 816 F.2d 37. In that case, "[T]he [defendants] *never returned to the house* and were eventually found and arrested in a neighboring state six months after the search was conducted." (RB 93, emphasis added.)

Here, appellant did return to his trailer. (45 RT 9993, 9998.) In fact, respondent points to that return as a reason to believe that appellant's theft of property from the Martinez brothers was a motivating reason for the crimes at bench, and thus a piece of supporting evidence for a special circumstance conviction of a robbery felony-murder. (RB 134.)

> """Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search."' [Citations.]" (*People v. Daggs, supra*, 133 Cal.App.4th at pp. 365–366.) "The question whether property is abandoned is an issue of fact, and the court's finding must be upheld if supported by substantial evidence." (*Id.* at p. 365.)

(*People v. Parson, supra*, 44 Cal.4th at p. 346.)

Appellant fled only when he saw the authorities come to search his home. One of the exigent circumstances that justified the first search of appellant's trailer was to see if he or any crime victims were there. It was error to hold that he abandoned all expectation of privacy in his home because he evaded the authorities who were at his home when he tried to return, along with all standing to make a motion to suppress—especially in light of the prosecution's

stipulation that he had a reasonable expectation of privacy when these searches took place. (3 RT 635; 5 RT 1135, 1144.)

In *People v. Parson*, *supra*, at issue was the search of a motel room. Some of defendant's belongings were in the room, and his car was out front, but there was also evidence that he had snuck away, and had left behind these materials in order to mislead the authorities. (44 Cal.4th at pp. 343–347.) Here, there were no comparable indications that appellant sought to mislead anyone. His evasive actions were taken only when he found authorities at his house. Respondent has not cited, and appellant cannot find, any case invoking the abandonment doctrine that has found that one who flees upon discovering that authorities are present in his or her home has abandoned that home for Fourth Amendment purposes.

B. Appellant was Prejudiced by the Illegally Seized Materials.

Respondent generally argues lack of prejudice because of the egregious nature of the crimes, but does not address contentions by appellant that specific charges could not have been made absent the materials illegally seized (weapon, ammunition, personal materials

taken from the Martinez brothers; see AOB 161–163; RB 98, 100.) For the reasons stated in his opening brief, appellant asks that his convictions and death sentence be reversed.

VII. THE TRIAL COURT PREJUDICIALLY ERRED IN FINDING THAT THE ACKNOWLEDGED VCCR VIOLATION WAS NEGLIGENT, AND IN FAILING TO GIVE IT ANY WEIGHT WHEN CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING APPELLANT'S CONFESSIONS.

A. The Trial Court's Ruling in this Regard Was Objectively Unreasonable.

No rational jurist could credit the post-facto ignorance of appellant's nationality manufactured by FBI agents, after they had testified under oath that they knew where appellant was from. The very request and warrant that enabled them to participate in this case identified appellant as a Mexican national. (AOB 201–210.)

The FBI deliberately withheld from appellant his rights to consular access, and lied about not knowing that appellant was a Mexican national. Respondent states that the trial court was entitled to believe the sworn testimony of the FBI agents and Placer County deputies. (RB 122.) Deference must always be paid to credibility determinations of the trial court. But here, there are no versions of events where the FBI is pitted against appellant. The dispute is within the Agent Elizabeth Stevens's own testimony, and with the rest of this record.

The FBI knew that appellant was a Mexican national, and said as much in the communications from its Sacramento office to its agents in Long Beach. Before she knew any potential Vienna Convention on Consular Relations (VCCR) ramifications, Agent Stevens readily acknowledged reading the document that gave her and her fellow agents authority to travel to Wilmington, California, and arrest appellant. She testified that she knew appellant was a Mexican national, before later changing her testimony. (AOB 201–203, esp. 206–210.) Respondent does not challenge *any* of appellant's factual showing in this regard. The trial court's finding that the FBI was "negligent" is contradicted by the record.

The failure to advise appellant of his right to contact the Mexican consulate is not alone grounds for suppressing appellant's statements, but it should have been considered by the trial court when it was weighing the totality of the circumstances surrounding how those statements were obtained. (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 350.)

Failure to comply with Article 36 of the VCCR's requirement that detaining authorities must advise a foreign national without delay

of his right to consular notification can be relevant to determining the admissibility of a defendant's statements, "as part of a broader challenge to the voluntariness of his statements to police." (548 U.S. at p. 350. See e.g., *State v. Ramos* (Okla. Crim. App. 2013) 297 P.3d 1251, 1254 [reaffirming that "under *Sanchez-Llamas* an Article 36 violation can be raised as part of a broader challenge to the voluntariness of any statement made to the police and addressed in a *Jackson v. Denno* hearing"]; *State v. Oh* (Ohio 2013) 1 N.E.3d 845 [*Sanchez-Llamas* court "noted that the exclusionary rule generally applies to constitutional violations—not treaties—and that a defendant can use an Article 36 violation as a factor in attacking the overall voluntariness of the defendant's statement to police"].)

The trial court erred in two ways: (1) its finding that the FBI's failure to give appellant his Article 36 warning was negligent and not deliberate is contradicted by the record, and (2) it failed to give any weight at all to the FBI's refusal to give notice to appellant of his consular rights when considering the totality of the circumstances as to whether or not appellant's *Miranda*[6] waiver was valid, or his

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[6] *Miranda v. Arizona* (1966) 384 U.S. 436.

confession was coerced. Had it reached the proper conclusions compelled by this factual record and by the applicable law, it would have held appellant's confession to be inadmissible.

B. The Admission of Appellant's Confessions Against Him Was Prejudicial.

Convictions obtained in cases where an involuntary confession is admitted into evidence will be reversed if the introduction of the involuntary confession was not harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306–312; *People v. Cahill* (1993) 5 Cal.4th 478, 509–510.) The errors here were prejudicial.

Respondent argues that appellant's confessions had no meaningful impact on his trial. It points to the horrific nature of the crimes and the testimony of several witnesses for the prosecution, and says that "this was not a close death case. Appellant shot his brothers-in-law in the head, raped his sister-in-law, and bludgeoned and buried alive his five-year-old nephew and three-year-old niece. He admitted liability and offered no explanation for his actions." (RB 122.)

Respondent does not reply to appellant's showing that the most horrific facts employed by the prosecution in the penalty phase of appellant's trial, especially in closing argument, was evidence of pre-planning, which was entirely derived from appellant's Placer confession. (AOB 195–197.)

Respondent also says nothing, here or anywhere else in its brief, about the length of time spent by the jury in deliberations over what penalty to impose—seven hours spread over three days—or the questions posed to the judge by the jury, and the request of one juror to extend deliberations another day. (AOB 11–12; see *Woodford v. Visciotti* (2002) 537 U.S. 19, 26–27 [assuming that aggravating factors in death penalty trial were not overwhelming where jury deliberated for a full day and requested additional instructional guidance].)

Appellant presented penalty phase evidence from 23 witnesses showing that he had suffered through a miserably poor and extraordinarily violent childhood and become an excellent worker and good friend to many people for decades, providing steady support to numerous family members, including the victims, without any prior

criminal activity or indications that such an explosion of violence would occur. It cannot be said beyond a reasonable doubt that without appellant's statements at issue, there would have been the same death judgment. (*Arizona v. Fulminante, supra.*)

VIII. INVESTIGATORS KNOWINGLY AND WILLFULLY UTILIZED ILLEGAL METHODS TO OBTAIN INCRIMINATING STATEMENTS FROM APPELLANT—A MONOLINGUAL MEXICAN NATIONAL—DURING HIS FIRST THREE DAYS IN CUSTODY, BY FAILING TO INFORM HIM OF HIS RIGHT TO CONSULAR ASSISTANCE, FAILING TO ADEQUATELY MIRANDIZE HIM, EXPLOITING HIS IGNORANCE OF OUR JUDICIAL SYSTEM, COERCING COMPLIANCE, AND THUS VIOLATING FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS, AND TREATY OBLIGATIONS; THE TRIAL COURT'S WRONGFUL ADMISSION OF THESE STATEMENTS CONSTITUTED PREJUDICIAL ERROR AND REQUIRES THIS JUDGMENT BE REVERSED IN ITS ENTIRETY.

The prosecution bears the burden of proving by a preponderance of the evidence that a defendant knowingly and intelligently waived his *Miranda* rights. To satisfy this burden, the prosecution must introduce sufficient evidence to establish that, under the totality of the circumstances, the defendant was aware of the nature of the right being abandoned and the consequences of the decision to abandon it. "The government's burden to make such a showing is great, and the court will indulge every reasonable presumption against waiver of fundamental constitutional rights." (*United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 535.)

Respondent notes that "the trial court made the following findings of fact with regard to all of the interviews: (1) appellant "was calm and cooperative"; (2) "there was no evidence of discomfort or stress"; (3) appellant "readily appeared willing to talk to the police and to fully explain the circumstances of the crime . . . he was never reluctant to speak"; (4) "there is no evidence that he was forced to sign anything or to waive his rights"; and (5) "all argument of the defendant regarding the fact that he was cold, tired or hungry [is] purely speculative." (12 RT 3200; RB 107–108.) These assertions are contradicted by the factual record.

It is not "purely speculative" to say that appellant was cold, tired and hungry. Respondent notes that "[w]hen appellant later complained that he was cold, agents retrieved one of the shirts from the bag[7] and gave it to him to wear. (4 RT 985.)" (RB 89; see also testimony of Agent Stevens that she was "freezing" during the interview [11 RT 2735].)

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[7] Agents seized a bag belonging to appellant from the apartment of Josefina Torres and Jorge Lugo. The bag contained "dirty pants and a dirty shirt, dirty socks, a red ink pen, new underwear, a new pair of socks, a new blue denim shirt, and new pair of pants." (4 RT 985; RB 89.)

Appellant was arrested in Wilmington at about 8:40 p.m. on July 15, 1998. (11 RT 2679.) He was taken to the Long Beach Police Department, where he was questioned beginning at 10:10 p.m. (11 RT 2692.) The interview was terminated at 11:19 p.m.; he was left in the "freezing" room alone after questioning was completed. (4 SCT 1030.)

Around 1:00 a.m., Sgt. Robert MacDonald and Detective Mike Bennett of the Placer County Sheriff's Office took custody of appellant, and flew him back to Auburn. They arrived around 5:00 a.m. Appellant was taken to the Placer County jail and booked, in a process that took hours to complete. Appellant got no food or water during this time. Around 11:00 that morning, appellant's interrogation began. He was questioned for two and a half to three hours. About 1:00 p.m., appellant was given two pieces of pizza and a Pepsi. (5 CT 1390; 47 RT 10,232.)

Respondent states that appellant's waiver was "knowing, intelligent and voluntary," (RB 110) but it was none of these.

A. Appellants's Statements Were Involuntary.

Appellant's Placer interview thus began about 15 hours after his arrest, and a night of being shuffled from Wilmington to Long Beach to Auburn to the Placer County jail. How could he not have been tired and hungry? The trial court's finding that there was no evidence that appellant was cold, tired, or hungry throughout the process of being interrogated is contradicted by the facts on this record surrounding appellant's interviews.

It was simply wrong to say that "there is no evidence that he was forced to sign anything or to waive his rights." The 20 or so FBI agents and police officers who arrested appellant were armed. (10 RT 2517, 2658.) Appellant had no previous experience with the law, and knew nothing about the American criminal justice system. (10 RT 2452, 2692, 2696, 2698, 2702–2703, 2728–2729; 4 CT 1015–1016; 3 SCT 279.)

He had committed a terrible crime, and had just been apprehended by a small army of police agents. Agent Stevens did not explain any of the rights she read. Appellant was then told to sign a

document, which he did. He was frightened; he thought that if he did not do what the officers wanted, they would beat him. (4 CT 1015.)

Respondent gives no reason why we should not believe that he was indeed afraid, given the armed force surrounding him, his awareness of what he had done, and his lack of experience with law enforcement. Respondent assures us his fear of being beaten was "wholly speculative," (RB 108) thus continuing its refusal to acknowledge the existence of evidence or reasonable inferences that it does not like. What is "wholly speculative" about appellant's own unchallenged statement about his frame of mind at the time, in the surrounding context? (See 4 CT 1015.) No more direct evidence is possible. Respondent points to no evidence whatsoever that would cast doubt on appellant's statement in this regard. Respondent did not carry its burden of showing that appellant made a voluntary waiver of his rights.

B. Appellants's Statements Were Unknowing, Unintelligent.

According to respondent, "Appellant not only read the Spanish-language *Miranda* advisement form, but Agent Stevens also read each

line to him in Spanish. Appellant said that he understood the form and signed it." (RB 110–111.) This was the testimony of Agent Stevens. (RB 102–103.) That interview was unrecorded. In his subsequent, recorded, Placer confession, however, he said on the record when asked by Detective McDonald that he did not understand any of his rights. (3 SCT 279.) What are we to believe: a self-serving statement about the past that was not recorded, or a videotaped statement of appellant?

In truth, appellant had no idea what his rights were, and could not/did not grasp them as they were relayed to him. The trial court found that the unrecorded *Miranda* warnings given him by Agent Stevens along with appellant's signature at the bottom of a document entitled "Consideracion de los derechos civiles," or "civil rights' considerations" (Exh. 23; see 12 RT 3027) were good enough; see RB 107–108. But they were not good enough. When appellant said at the end of his Placer County interrogation that he did not understand any of his rights, his questioners' jocular response that they didn't

know anything about the justice system either[8] should not add confidence to the proposition that appellant knew what he was waiving.

None of the cases cited by respondent employed a form as off-base as the form employed in this case. (AOB 166–167.) See *United States v. Bernard S.* (9th Cir. 1986) 795 F.2d 749, 751; RB 109 [agent informed defendant of his *Miranda* rights by "reading from a 'standard form'"].) In another case cited by respondent, defendant was advised of his *Miranda* rights "in Spanish using a DEA Form 13A." (*United States v. Labrada-Bustamante* (9th Cir. 2005) 428 F.3d 1252, 1257; RB 110.)

In *United States v. Bautista-Avila* (9th Cir. 1993) 6 F.3d 1360, there was a pre-printed form containing *Miranda* warnings that was not challenged as to the meaning of the advisements; that case does not address the specific facts regarding this deviant form upon which

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[8] Valdez: "The first time just going to tell him they're telling him what the charges are and whether that the person is not guilty and they prove them seems—the facts—he says he doesn't understand anything about the justice system."
McDonald: "We still don't."
(3 SCT 279.)

appellant relies. (AOB 166–167.) Neither respondent nor the trial court acknowledges, let alone explains, why the significant deviations do not weigh against a finding that appellant's purported waiver was invalid.

Respondent cites *United States v. Garibay*, *supra*, 143 F.3d 534, for the factors to be considered in evaluating whether or not a waiver of constitutional rights is valid (RB 109) but omits that case's holding. The Ninth Circuit reversed the defendant's convictions because the waiver was invalid:

> Garibay had no previous experience with the criminal process. Thus, Garibay's personal life experiences do not indicate that he was familiar with his *Miranda* rights and his option to waive those rights. See e.g., *Cooper v. Griffin*, 455 F.2d 1142, 1144–1145 (5th Cir. 1972) (holding that in view of armed robbery defendants' mental retardation, poor reading comprehension, and no prior experience with the criminal process, confessions obtained after defendants orally waived right to counsel and signed written waiver forms were inadmissable).

(*United States v. Garibay, supra,* 143 F.3d at p. 539.)

Respondent also relies on a similar challenge to a confession in *United States v. Labrada-Bustamante*, *supra*, 428 F.3d at p. 1259, saying: "The Ninth Circuit affirmed, holding that inexperience with

the criminal justice system was 'merely one factor to be considered,' and it was outweighed where there was 'no evidence in the record of "police overreaching," and both agents testified that no threats or promises were made.'" (RB 110.) But respondent omits the court's language on that same page showing that the defendant said that he knew and he understood his rights.[9] Here, in contrast, appellant told his questioners that he had no idea what his rights were. Neither appellant's waiver of his *Miranda* rights nor his subsequent confessions were voluntary, nor were they knowing or intelligent.

C. Appellant Was Prejudiced at His Penalty Phase by the Admission of His Confessions

For the reasons set forth above in Claim VII, the error in admitting appellant's confession against him prejudiced him in the penalty phase of his trial. Therefore, appellant's death verdict must be set aside.

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[9] "Considering the totality of the circumstances—including Agent Rodriguez's testimony and Labrada's admission that he understood his rights—the district court's finding that Labrada knew and understood his rights is not clearly erroneous." (*United States v. Labrada-Bustamante*, *supra*, 428 F.3d at p. 1259.)

IX. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY TO CONSIDER THE PROSECUTOR'S FAILURE TO MAKE A TIMELY DISCLOSURE OF THE PRESENCE OF A PSYCHOLOGIST AS A HIDDEN OBSERVER OF APPELLANT'S JULY 16, 1998, INTERROGATION.

Dr. Frank Dougherty was a forensic psychologist retained by the prosecution to observe the interrogation of appellant on July 16, 1998. He viewed the interrogation live, by means of closed circuit television, and shared his observations with prosecutor Ned Beattie after the interrogation. Counsel for appellant did not learn of Dr. Dougherty's viewing until October 2000, more than two years after the interview took place. (AOB Claim IX, 212–215.)

Respondent does not deny that the existence of Dr. Dougherty was not disclosed to appellant for over two years. It presents that delay as follows: "Appellant was informed of Dougherty's existence five months before trial began and six months before evidence regarding the Placer County interview was introduced." (RB 133.) It also does not deny that this delay effectively rendered any interview of him useless. (AOB 212.)

Respondent states that "even if Dougherty had testified, appellant would have had adequate time to investigate Dougherty and prepare rebuttal evidence. Moreover, appellant was not limited in his ability to retain his own psychological experts to support any defense his attorneys could muster.[10] Finally, the subject of Dougherty's testimony would have been his observations of the Placer County interview, the videotape of which was already shown to the jury." (RB 133.)

The fact that the jury saw the tape does not in any way eliminate the value for appellant that an expert appraisal of the interview may have had. It is precisely because an expert brings to bear evidence that a juror would not necessarily see for himself or herself that expert testimony is allowed.[11] The fact that appellant did

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[10] At the time appellant was questioned (July 16, 1998), he was not represented by counsel.

[11] California Evidence Code section 8.01 provides as follows:
If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by

not ask for this particular evidence should not have mattered; the whole point was that appellant did not know that the evidence existed. Had he found out about it, it could have influenced counsel's decisions on whether to present evidence of mental disorders, and if so, what type of evidence would have directly addressed the case against him.

This was evidence about a crucial interview. In the last half of the July 16 session in Placer County, appellant conceded that he had planned the crimes for days, and had dug a grave ahead of time. An expert might have attested to his exhaustion, and pointed to the submission to the interviewer's leading questions or presented some other aspect of the questioning that may have blunted the impact of that part of the tape—or guided counsel to other avenues of investigation that may have led to evidence of the impact of mental disorders. This is speculation on appellant's part, but it is speculation

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> or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

compelled by the prosecution's delay in apprising appellant of Dr. Dougherty's involvement.

The fact that Dr. Dougherty did not testify does not affect appellant's claim. Had appellant announced that he would call a mental health expert to testify on his behalf, it is likely that Dr. Dougherty would have been called by respondent. The obtaining of forensic evidence by a party in a criminal case is commonly done in situations where the party does not necessarily intend to present the forensic results to the jury.

Section 1054.5, subdivision (b) provides in its last sentence that the "court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." CALJIC No. 2.28 was drafted to provide for this eventuality. For the reasons set forth herein and in appellant's opening brief (AOB 214–215), it was prejudicial error not to give this instruction.

X. THERE WAS INSUFFICIENT EVIDENCE THAT THE APPELLANT WAS GUILTY OF ANY SPECIAL CIRCUMSTANCE OTHER THAN MULTIPLE MURDER.

The prosecution's problem with the various special circumstance charges follows from what the trial court observed when sentencing appellant to death: "An observer of the trial is left with nothing but sadness and, as I say, incomprehension as to how this could happen. What could trigger it, and whatever triggered it, how anyone could snap as thoroughly and completely as you did." (RT 13403–13404.)

Each of the special circumstances other than the multiple-murder special circumstance requires evidence to support *motive*, i.e., to facilitate an escape, or to rob valuables. There was no such evidence in this case. The prosecutor's efforts to explain why there was a robbery or killings were, as respondent likes to say, "wholly speculative." (RB 66, 108, 111, 131.)

A. There Was Insufficient Evidence That Appellant Had Committed Felony-Murder Against the Martinez Brothers and the Court Erred in Instructing the Jury on That Theory and Allowing the Prosecutor to Argue It.

The trial court committed reversible error in allowing the jury to base its murder verdicts as to the Martinez brothers (counts three and four) on a theory of murder in the commission of a robbery where the court itself had already ruled in dismissing the special circumstance allegations based on that theory. (AOB 216–225.) There was no evidence to support an independent felonious intent to commit robbery; any robbery was incidental to the commission of the murders.

The prosecution's theories of first-degree murder of the Martinez brothers and special circumstances were felony-murder robbery, and lying-in-wait. It also charged premeditation and deliberation. (1 CT 116–117, 120–121.) After all evidence was presented, appellant moved to dismiss the felony-murder special circumstances alleged in counts three and four, pursuant to section 1118.1. He argued that they must be struck under well-settled principles set out in *People v. Green* (1980) 27 Cal.3d 1, because

whatever robberies might have occurred were incidental to appellant's main objective of killing Jose and Juan Martinez. (46 RT 9989 et seq.) There was thus insufficient evidence of both a felony-murder charge, and a robbery special-circumstance finding.

Respondent can point to no direct evidence to support these findings. It contends that "appellant's careful taking and storing of [the victims'] valuable items and the lack of any blood or dirt on the wallets, watch, and chain, provide sufficient evidence for a reasonable juror to infer an intent to steal." (RB 133.)

The purposes and reach of the felony-murder statute in this regard are identical to the special-circumstance statute. In *People v. Murtishaw* (1981) 29 Cal.3d 733, this Court found sufficient evidence to sustain a conviction of felony-murder because there was testimony by a percipient witness that the accused, in a remote part of the desert, and without transportation, had said that he wanted to steal the victim's car. This Court distinguished the case from *Green*, and held that since there was evidence of an independent intention to commit the felony in addition to evidence of murder, the evidence was sufficient. (*Murtishaw*, *supra*, 29 Cal.3d at p. 752, fn. 13.)

Respondent relies heavily on *Murtishaw* for support. (RB 133–140.) But in *Murtishaw*, unlike the present case, there was direct evidence of an intent to steal: "The jury was entitled to believe Lufenberger's testimony which indicated that defendant was thinking of stealing the car." (*People v. Murtishaw*, *supra*, 29 Cal.3d at p. 752; see RB 137.)

Here, there was no such evidence. All that respondent can point to is the fact that appellant had actually taken personal items and put them in his trailer. That evidence of robbery says nothing about when the intent to steal was formed. The totality of evidence suggests that the robbery was incidental to the killings. There is nothing in this record to contradict that suggestion. Neither the felony-murder convictions nor the special circumstance finding are supported by substantial evidence; they must be stricken. (See AOB 216–225.)

B. <u>There Was Insufficient Evidence to Support Special Circumstances Findings Regarding the Killing of the Two Children</u>.

Special-circumstances charged by the prosecution for the killings of Jack and Areli Martinez included section 190.2, subdivision (a)(17)(A), commission of the murders to facilitate flight

after the commission of the rape of Yolanda Martinez, as charged in count five, and after the commission of a rape by a foreign object, as charged in count six, and lying in wait. (1 CT 121–122.) Appellant challenged all these special circumstances via his section 1118.1 motion. (45 RT 10000.) There was insufficient evidence to support any of them, including the lying-in-wait special circumstances found true by the jury.[12]

Here, the prosecutor answered its own question about why appellant had killed the children by quoting appellant's own statements that it was because of the fight; after that, "there was no way out." (47 RT 10352; see 3 SCT 271.) During that same interview, appellant repeatedly said that he did not know what he was doing, that he did not understand what he was doing when he killed the children. (3 SCT 177–178.) Appellant's statements were the only direct evidence of his intent. Josefina Torres later asked him why he had killed the children, and he said that he didn't know; they were crying. It was his nerves, and he was desperate. (39 RT 9244.)

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[12] Appellant acknowledges that the flight special circumstance allegations were dismissed by the trial court on April 10, 2001 (46 RT 10133; see RB 143).

In his penalty phase closing argument, the prosecutor said that there was evidence of lying in wait because appellant was able to carry out a plan to take each of the adults by surprise. (48 RT 10403.) Regarding the children, however, the prosecution argued that "Even though they can physically see him, even though it's not classic ambush, he nonetheless secretes his intent from them to murder them once he gets them to the right location." (47 RT 10301.) Later he argued that appellant killed the children in order to "save his own skin." (48 RT 10411.) He did not argue that there was any evidence pointing to the children being killed by appellant while lying in wait, beyond the fact that he did not kill them as soon as he saw them, because there is no such evidence.

Respondent reviews the law relevant to what constitutes sufficient evidence for special circumstance findings, and discusses several of this Court's cases in detail. When it turns to the facts of this case that would support the verdicts, it writes, "appellant admitted in his Placer County interview that he had planned to murder the family at least five days before the murders, and that he had dug the grave deep enough to fit the whole Martinez family, including the children

and Yolanda. (SCT 89.)" (RB 141.) Respondent make the same point repeatedly. (RB 146–147, 152.)

But appellant said no such thing. The language to which Respondent refers came from the latter stages of appellant's Placer County interrogation, and is all about Yolanda.

> Q. "And isn't it true you dug that grave deep enough that you could have put Yolanda in there? And then you had the keys to the car you could drive away and nobody would know?
>
> Q. "Is that true? Its true isn't it?"
>
> A. "Yes."

(SCT 89.)

Respondent points to no other evidence in the record in support of this special circumstance, or any of the other special circumstances that surrounding the killing of the two children. The lying-in-wait special circumstance findings regarding the killing of Jack and Ariel Martinez are not supported by substantial evidence. (AOB 232–240.)

C. The Gratuitous Special Circumstances Charges Were Prejudicial.

In arguing that any error in the finding of a special circumstance was harmless, respondent again relies on an incorrect

reading of the record: "Appellant admitted to digging a mass grave five days in advance, and to digging it deep enough to hold the entire Martinez family." (RB 152.) It then notes that "[u]nder the circumstances, this Court can be assured beyond a reasonable doubt that the jury would have convicted appellant of first degree murder in the deaths of Jack and Areli even without the felony murder theory." (RB 152.)

Perhaps so; but the finding of special circumstances not supported by substantial evidence affected the jury during its penalty phase deliberations, and prejudiced appellant in the jury's determination of what sentence to impose.

The United States Supreme Court has classified California as a non-weighing state, because the jury must consider additional factors in the penalty phase beyond those factors that made the accused eligible for death. It ruled that:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(*Brown v. Sanders* (2006) 546 U.S. 212, 220.)

In *Sanders*, the high court determined that the defendant was not entitled to habeas relief, because the jury's consideration of the invalid special circumstances by itself gave rise to no constitutional violation; the jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error, because, inter alia, all of the facts and circumstances admissible to establish the two invalid eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. (546 U.S. 212, 214.) Here, there were no facts adduced to support the challenged special circumstances; that is why there was insufficient evidence to support them.

During penalty deliberations, appellant's jury asked, "May we consider all the murders and the special circumstances individually as aggravating factors?" (13 CT 3553.)

The trial court answered as follows:

> "First, please recall that the instructions provide in part (at page 9) as follows: 'The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to

any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

"Second, please recall that the instructions define an aggravating factor, (at page 9) as follows: 'An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.'"

(13 CT 3554, 3555.)

The jury also asked, "[I]n the guilt or innocent phase as well?" (13 CT 3553.) To this follow-up question, the court replied, "Please recall that the instructions provide in part as follows (at page 1): 'you must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise.'" (13 CT 3554, 3555.)

Finally, the jury asked, "See page 7 in yellow & page 8. Is it contradictory?"[13]

The trial court replied,

"The highlighted language at the top of page 8 is to let you know that the only factors you may consider as aggravating factors are factors (a) or (I) (and you may

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[13] This refers to numbered pages in copies of the instructions given to the jury.

> also consider them as mitigating factors). All the rest of the enumerated factors may only be considered as mitigating factors.
>
> "The highlighted language on page 7 is to let you know that *the proven special circumstances are a subset of the circumstances of the crime and not a factor separate from the circumstances of the crime.*
>
> "As noted above, the instructions define an 'aggravating factor.'"

(13 CT 3554, 3555, emphasis added.)

Thus, unlike *Sanders*, where the improper special circumstances had no effect on the facts or circumstances of the crime, there were different, and fewer, circumstances of the crime to consider if the special circumstances at issue, which impute motives to appellant which were not shown by the evidence, fall away. In the wake of the trial court's response to its questions, the jury was likely to have added improper and unsubstantiated special circumstance findings as aggravating factors to the death side of the scale.

There is a reasonable possibility that if they had not done so, the jury would have not imposed a death sentence on petitioner. The impact of such errors on the penalty verdict is that if there is a reasonable likelihood that it could have led to a more favorable

verdict, the death sentence must be set aside. (See *People v. Boyce* (2014) 59 Cal.4th 672, 713–714.)

XI. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL.

Not only does section 190.2, subdivision (a)(15), which provides that one can be guilty of a special circumstance for "lying in wait," do nothing to rationally narrow the pool of murderers eligible for death, but since it is now effectively indistinguishable from premeditated first degree murder, it is unconstitutionally vague. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

Respondent does not deny any of this or take on any of appellant's arguments; it simply states that "appellant provides compelling reason for this Court to reevaluate this long line of precedent. Moreover, even if the lying-in-wait special circumstance allegations were overturned, the multiple murder special circumstance would still have rendered appellant death-eligible." (RB 142.)

Appellant considers the issue to be fully joined by the briefs currently on file with the Court. Accordingly no further discussion of those issues is required. For the reasons set forth in his opening brief, appellant asks this Court to reconsider this statute and its prior

decisions, and hold the lying-in-wait special circumstance to be unconstitutional.

XII. APPELLANT PRESENTED CREDIBLE EVIDENCE TENDING TO SHOW THE EXISTENCE OF INVIDIOUS DISCRIMINATION IN THE DISTRICT ATTORNEY'S PURSUIT OF THE DEATH PENALTY AGAINST HIM; THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT DISCOVERY TO PURSUE A CLAIM OF DISCRIMINATORY PROSECUTION CONSTITUTED REVERSIBLE ERROR.

Appellant showed that from 1977 until 1998, four people were prosecuted in Placer County for multiple murders involving children: McGraw, Hill, Knorr, and appellant. Defendants McGraw, Hill, and Knorr were offered the opportunity to plead guilty to negotiated settlements with waiver of the death penalty. Appellant was not given the same opportunity.

McGraw, Hill, and Knorr were Caucasian. Appellant is Hispanic. (Cf. 6 CT 1672.) In the decade prior to appellant's case, only two murder prosecutions proceeded to trial in Placer County with the prosecution seeking death: (Kenneth) Williams and Harper. Both are African-American. Appellant thus demonstrated a right to and need for such discovery and reasonably limited the scope of his discovery request. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286; *United States v. Armstrong* (1996) 517 U.S. 456.)

Respondent answers this claim by citing the prosecution's detailed presentation purporting to distinguish the facts of each of the cases involving McGraw, Hill, and Knorr, from the case at bench. It then cites other facts pointing to a lack of racism in the exercise of its prosecutorial discretion. (RB 153–155.) What it does not do, however is deny that the process was different in this case from the cases cited by the prosecutor: here, there was no careful consideration at all.

The prosecutor announced on July 16, 1998, before it had the transcript of the interview of appellant in Placer County and the day before appellant was arraigned, that appellant was charged with numerous special-circumstance crimes. (1 CT 7 et seq.) It formally announced it was seeking death for appellant three weeks later. (1 CT 41.) This decision, made before any of appellant's individual characteristics were known, was nothing like the careful attention the prosecutor paid to the character and background of the Caucasian defendants who were not subject to the death penalty. (See RB 154-155.)

While it may be true that this case is, as the trial court stated, "a death penalty case," the issue here is whether or not appellant received the same type of consideration from the prosecutor's office as did those who committed similar "death penalty cases." He did not. For the reasons set forth in appellant's opening brief, it was prejudicial error to provide appellant less careful consideration than the three Caucasian defendants who had committed similar crimes.

XIII. THE ILLEGAL AND SECRETIVE DISSEMINATION BY THE PLACER COUNTY SHERIFF AND MEDICAL RECORDS STAFF TO THE PROSECUTOR OF JAIL LOGS DISCLOSING IDENTIFYING INFORMATION OF DEFENSE EXPERTS AND VISITORS ASSISTING IN PREPARATION OF THE DEFENSE—AND THE PROSECUTION'S MISUSE THEREOF TO CONTACT AND INTERVIEW SUCH DEFENSE EXPERTS AND VISITORS AND TO ASCERTAIN DEFENSE STRATEGY—VIOLATED A HOST OF APPELLANT'S CONSTITUTIONAL RIGHTS; THE TRIAL COURT'S REFUSAL TO ESTOP OR PRECLUDE THE PROSECUTION FROM SEEKING DEATH AND/OR RECUSE THE DISTRICT ATTORNEY REQUIRES REVERSAL OF THE ENTIRE JUDGMENT.

A. Respondent's Intimidation Tactics Are Unprecedented.

The right to effective assistance of counsel includes the right to confer in absolute privacy. California's constitutional protection of the right to counsel has been recognized as the source of a prisoner's right to consult privately with counsel in preparation for trial since at least 1920. When others can overhear attorney-client communications, there is an impermissible chilling effect on the constitutional right to counsel. (*County of Nevada v. Superior Court* (2015) 236 Cal.App.4th 1001, 1004.)

The same is true for prosecutorial misuse of visitation logs. While security concerns in the jail allow the prosecutor to review these logs, that consideration has no application to following up on those names, contacting them, and asking about their story and their role in appellant's defense. (AOB 245-249.)

Respondent claims that there is no precedent for the reversal of any convictions based on what occurred here, i.e., the review of visiting logs to list the names of defense experts and then contacting these experts and questioning them. (RB 163–165.) True enough, appellant cannot find such a case. But respondent cannot find a single case justifying its course of conduct; all the cases it cites have to do with access of visiting logs or to the use of recorded conversations as evidence in a criminal trial. (RB 162–167.) The lack of legal precedent suggests that actions taken by the prosecutor here were truly unprecedented, as well as improper. Appellant did not implicitly or explicitly give up his right to develop a defense without prosecutorial intrusion by virtue of being locked up.

Does appellant have a right to keep his list of visitors from the prosecution? No, but he certainly has the right to develop a defense

unimpeded by prosecutorial intrusion into the process of selecting and utilizing experts. The whole process of obtaining the requisite funding for particular experts is strictly confidential.[14] The prosecution sought to get around requirement of confidentiality by using the visitors log and then contacting potential witnesses. That was wrong. No professional person can be indifferent in the face of being contacted by the prosecutor's office, whether it is at a time before being formally retained as a witness when the parties are considering possible employment, or after retention, when the

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[14] Section 987.9 provides:

(a) In the trial of a capital case or a case under subdivision (a) of Section 190.05, the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

professional is bound by his or her professional obligations of confidentiality as well as obligations to the defendant

B. Appellant was Prejudiced by the Prosecutor's Intimidation Tactics

Reversal for prosecutorial misconduct is not required unless the defendant can show that he has suffered prejudice. (*People v. Arias* (1996) 13 Cal.4th 92, 16; see also *In re Martin* (1987) 44 Cal.3d 1, 54; *Smith v. Phillips* (1982) 455 U.S. 209, 219.)

Appellant set forth numerous ways in which the actions complained of here prejudiced him; see AOB 263–265. The prosecution contacted potential lay and expert witnesses as well as others who were assisting in developing background information as part of the defense case. The intrusion into the defense camp violated important privacy and confidentiality statutes. The intrusion violated constitutional rights held by the appellant designed to provide him with a fair trial.

Respondent says nothing, here or anywhere else, about the length of time spent by the jury in deliberations, and the questions posed to the court by the jury. (AOB 11–12; see *Woodford v.*

Visciotti, *supra*, 537 U.S. at pp. 26–27 [assuming that aggravating factors in death penalty trial were not overwhelming where jury deliberated for a full day and requested additional instructional guidance].) It cannot be said beyond a reasonable doubt that the errors and intimidation at issue would not have made a difference in the jury's penalty assessment. (See Claim XXI, *post.*)

XIV. APPELLANT WAS PREJUDICED BY THE ADMISSION OF INFLAMMATORY, "NIGHTMARISH" PHOTOGRAPHS.

Respondent asserts that the trial court carefully reviewed the photographs, as shown by the fact that some were excluded. It cites general language to the effect that grisly crimes lead to grisly photographs, and concludes that since the crimes were so awful, no showing of prejudice was possible. (RB 171–176.)

Respondent relies on *People v. Panah* (2005) 35 Cal.4th 395, 465, where this Court allowed photographs of a dead child to be presented to the jury. There were a total of eight photographs of the child's body presented to the jury, with no indications that they were "projected many times life-size" as they were in *People v. Marsh* (1985) 175 Cal.App.3d 989.

Respondent distinguishes *Marsh* by pointing to the fact that the case was not reversed because any error was harmless, and points to language in the case where the court emphasizes damage done to be bodies by the autopsy process; "Here, unlike *Marsh*, the victims' bodies were not manipulated in any way to amplify the severity of the injuries." (RB 175.)

Respondent does not try to justify the admission of the exhibits specifically discussed by appellant. The process of removing bodies from the grave site in the present case was exploited by the prosecution, who chose the most damning and poignant photographs from a substantial number taken as dirt was removed layer by layer from around the bodies as they were removed from the ground, and then amplified to greater-than-life-size photographs of partially exposed bodies that emphasized particular details. (See AOB, Claim XIV, *passim*, esp. p. 280.)

Finally, respondent argues that in light of the severity of the crimes and the paucity of evidence presented by appellant, that any errors by the trial court could not have made a difference:

> Against this significant evidence, appellant offered little evidence at the guilt phase and unpersuasive mitigating evidence at the penalty phase, claiming that his father had been an alcoholic who, at times, beat his mother and his siblings.

(RB 176.)

That is a skeletal caricature of appellant's mitigation case. He presented evidence from 23 witnesses showing that he had suffered through a miserably poor and violent childhood and become an

excellent worker and good friend to many people for decades, without any prior criminal activity or indications that such an explosion of violence would occur. There is a reasonable possibility that appellant's sentence would have been less than death were his case not affected by the photographic images wrongfully admitted by the trial court.

As noted in the previous argument (Claim XIII, *ante*) the length and nature of deliberations indicated that this case was sufficiently close that an error of this magnitude could have influenced the jury's determinations, and led to an unwarranted sentence of death. Appellant's penalty verdict should therefore be set aside.

XV. THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRAL AFTER THE PENALTY PHASE TESTIMONY OF YOLANDA MARTINEZ.

Respondent does not directly deny the facts as presented by appellant, but minimizes the expression of feelings shown by this record in order to evade appellant's contention that the prosecution improperly relied on passion rather than a reasoned deliberation in presenting its case to the jury, and the trial court erred in not declaring a mistrial after Yolanda's outburst, and her cries and sobs from outside the courtroom that were vivid enough for all jurors to feel. (RB 179–180.)

Allowing the penalty phase deliberations to be shaped by the raw anguish of the person who suffered the most from these crimes was truly "so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." (*Payne v. Tennessee* (1991) 501 U.S. 808, 836–837 (conc. opn. of Souter, J.), citing *Burger v. Kemp* (1987) 483 U.S. 776, 785.) For the reasons set out in his opening brief (AOB 283–290), appellant asks that his death verdict be set aside.

XVI. WHERE THE STATE RELIES ON THE IMPACT OF A MURDER ON THE VICTIMS' FAMILY IN ASKING FOR DEATH, THE DEFENDANT SHOULD BE PERMITTED TO RELY ON THE IMPACT OF AN EXECUTION ON APPELLANT'S FAMILY IN ASKING FOR LIFE.

A. Exclusion of Testimony by Family Members Regarding the Impact of Appellants' Execution Violated His Constitutional Right to Present Mitigating Evidence.

Respondent cites cases acknowledged by appellant. (*People v. Williams* (2013) 56 Cal.4th 165, 197 ["impact of a defendant's execution on his or her family may not be considered by the jury in mitigation"]; *People v. Bennett* (2009) 45 Cal.4th 577, 600–602 [same]; *People v. Smith* (2005) 35 Cal.4th 334, 366–367 [same].) It does not answer any of appellant's points as to why this position is ill-taken, and in violation of both the Eighth and Fourteenth Amendments; it simply concludes that "appellant fails to provide a compelling reason for this Court to reconsider its long line of precedent." (RB 182.)

Appellant refers the court to the reasons delineated in his opening brief (AOB 290–293), and adds the most recent definition of "mitigating circumstances" by the high court. In *Kansas v. Carr*,

supra, the high court considered whether it was error not to instruct the jury that mitigating circumstances must be proven beyond a reasonable doubt. In the course of rejecting that requirement, the court noted that mitigation, unlike the factual nature of an aggravating circumstance, could vary from juror to juror, and be as wide as the world:

> Whether mitigation exists is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained.

(*Kansas v. Carr*, *supra*, 136 S.Ct. at p. 642.)

To exclude such evidence from family members of the defendant is arbitrary. It precludes the jury from considering all the circumstances of a crime. The impact of an execution is ineluctably a part of the wide circle of a capital crime's reach, and undeniably has a profound impact on those who are close to the accused.

Appellant argued that the interests of reciprocity and the low threshold for relevance required for mitigating evidence in a capital case meant that he should have been allowed to present evidence

showing the impact of his execution on his family. (AOB 293.) In support of his contention, he cited *Smith v. Texas* (2004) 543 U.S. 37, 43, and *Tennard v. Dretke* (2004) 542 U.S. 274, 285. As these cases recognize, the Eighth Amendment does not permit a state to exclude evidence which "might serve as a basis for a sentence less than death." (*Smith v. Texas*, *supra*, 543 U.S. at p. 43.) So long as a "fact-finder could reasonably deem" the evidence to have mitigating value, a state may not preclude the defendant from presenting that evidence. (*Id.* at p. 44. Execution impact evidence is plainly relevant under *Smith* and *Tennard*. (AOB 292–293.)

Appellant also cited cases from around the country recognizing the admissibility of such evidence. (AOB 294–296.) Not only does the Eighth Amendment guarantee appellant the right to place any mitigating evidence before the jury, but in the context of this case, principles of equal protection and fundamental fairness also require that appellant be afforded the same opportunity to present evidence of the pain and loss his execution would cause members of his family. (*Wardius v. Oregon* (1973) 412 U.S. 470.) Failure to allow appellant to also put forward such evidence trivializes the impact his loss would

have on his own family, and skews the moral and normative decision the jury was asked to make toward the imposition of death.

Respondent concedes two points: (1) that evidence of impact on a decedent's family arising from the decedent's death is relevant to show that the decedent is a unique individual, and (2) the trial court "limited how the jury could consider the evidence" relating to the impact of a death sentence on appellant's family. (RB 285.) Respondent cites cases decided by this Court restricting the admissibility of such evidence and quotes *People v. Ochoa* (1998) 19 Cal.4th 353, at p. 456: "[T]he jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed." (RB 283.) It also relies on *People v. Bennett*, *supra*, where this Court rejected the contention that because the prosecution could present victim impact evidence, appellant should be permitted to introduce execution impact evidence. It did not directly address the issue of parity, but simply stated that the only permissible mitigation evidence is that which deals with the defendant's own circumstances, not those of his family. (*Bennett*, 45 Cal.4th at p. 602.) (RB 283.)

This distinction between the impact of the circumstances of a capital crime on different families who are each profoundly affected by it is arbitrary and artificial. The impact of a death on family members of the accused arises from the same tragic event. Such evidence is relevant to show the unique individuality of both the victim and the person who is to be executed. The impact of a particular defendant's execution on his family is an individualized sentencing consideration which reflects the individuality of the person being sentenced. By excluding this evidence, the trial court denied appellant a full and fair opportunity to present evidence of his individuality to the jury, and resulted in an arbitrary and unreliable sentencing determination.

Respondent states that execution-impact evidence "is not relevant because it does not address the defendant's character, record, or individual personality. (See *People v. Smithey*, *supra*, 20 Cal.4th at p. 1000.)" (RB 285.) But that is precisely what appellant's family members would be deprived of if he were executed: His "character, record, and individual personality" – the same qualities of the victims that are no longer available to their family.

Evidence in mitigation includes any circumstance of the crime that might lead a juror to vote for a sentence of less than death, and the reach of mitigating evidence should be generously construed.

> In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence. "The sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S., at 604 (plurality opinion of Burger, C.J.) (emphasis in original; footnote omitted). See *Skipper v. South Carolina*, 476 U.S. 1 (1986). *Any exclusion of the "compassionate or mitigating factors stemming from the diverse frailties of humankind" that are relevant to the sentencer's decision would fail to treat all persons as "uniquely individual human beings."* *Woodson v. North Carolina, supra*, at 304.

(*McCleskey v. Kemp* (1987) 481 U.S. 279, 304, emphasis added.)

Failure to allow testimony from members of appellant's family about the impact of his execution on them was a violation of the Eighth Amendment's guarantee of the right to present mitigating evidence.

B. Failure to allow Petitioner's Extensive Family to Address How Appellant's Execution for the Crime at Bench Would Impact Them Prejudiced Appellant.

> We use the *Chapman* test in evaluating the effect of erroneously excluding mitigating evidence; reversal is required "'unless the state proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*People v. Lucero* (1988) 44 Cal.3d 1006, quoting *Chapman v. California* (1967) 386 U.S. 18, 24."

(*People v. Smith* (2005) 35 Cal.4th 334, 368.)

Respondent cites the correct standard for evaluating the impact of a penalty phase error and argues that even if there had been error it could not have mattered, because appellant was allowed to present a wide array of mitigating evidence.[15] (RB 285–286.) But there was substantial evidence that was excluded, not because it was cumulative, but because of a misapprehension about the individualized nature of mitigating evidence.

In arguing that this testimony would not have made a difference, respondent also cites to the various factors in aggravation presented at trial. (RB 286.) Respondent says nothing, though, here or

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[15] Elsewhere, respondent scornfully dismissed that evidence. (RB 176.)

anywhere else, about the length of time spent by the jury in deliberations over what penalty to impose—seven hours spread over three days. (See *Woodford v. Visciotti*, *supra*, 537 U.S. at pp. 26–27 [assuming that aggravating factors in death penalty trial were not overwhelming where jury deliberated for a full day and requested additional instructional guidance].) It cannot be said beyond a reasonable doubt that the error at issue would not have made a difference in the jury's penalty assessment.

XVII. THE PROSECUTOR COMMITTED MISCONDUCT BY ELICITING PREJUDICIAL EVIDENCE WITHOUT ASKING THE TRIAL COURT FOR AN ADVANCE RULING.

Appellant believes the issues are fully joined, and rests on the factual contentions and legal arguments presented on this issue in his opening brief. (See AOB 304.)

XVIII. THIS CASE WAS IMPERMISSIBLY SKEWED TOWARDS DEATH BY PROSECUTORIAL MISCONDUCT

Appellant believes the issues are fully joined, and rests on the factual contentions and legal arguments presented on this issue in his opening brief. (See AOB 311.)

XIX. THE VIOLATIONS OF APPELLANT'S RIGHTS CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

Appellant contends his trial and sentence of death are in violation of the provisions of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCP), American Declaration of the Rights and Duties of Man, and International Convention Against All Forms of Racial Discrimination. (AOB 482–506.)

Respondent argues, as appellant acknowledges, that this Court has rejected similar claims, e.g., *People v. Mungia* (2008) 44 Cal.4th 1101, 1143. (RB 295.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in appellant's opening brief, this Court should reconsider its previous opinions and hold that provisions of international law were violated in appellant's trial.

XX. THE RACIAL DISCRIMINATION PERMEATING CAPITAL SENTENCING THAT IS ACCEPTED BY DOMESTIC LAW VIOLATES BINDING INTERNATIONAL LAW, AND REQUIRES THAT APPELLANT'S DEATH PENALTY BE SET ASIDE.

Appellant has shown that notwithstanding general denunciations by state and federal courts against racial discrimination, racism is both implicitly and explicitly accepted by state and federal courts in the context of the death penalty. (AOB 325–341.) Respondent answers by saying that the relevance of studies showing racism against African-Americans "'is questionable' (*People v. Hojek and Vo* (2014) 58 Cal.4th 1144, 1253 [rejecting similar studies cited by a Vietnamese defendant].)" (RB 192.) Evidently recognizing that such studies are either available now or will be in the near future, it states:

> Moreover, even if the studies did focus on Latino defendants, "the United States Supreme Court has rejected the use of such statistical evidence to show racial discrimination in capital cases." (*Ibid.*, citing *McCleskey v. Kemp* (1987) 481 U.S. 279, 312–313.) Absent any evidence that racism played a role in appellant's case, his claim must fail.

(RB 192.)

But that is precisely the point. Statistical evidence is used every day to establish or refute factual contentions in American courtrooms. It is *only in the area of establishing racism* that no statistical demonstrations at all can be considered "evidence." (*McCleskey v. Kemp, supra.*)

International law to which the United States has formally recognized as controlling allows such evidence to demonstrate the *effects* of racism, even where direct evidence showing that racism was the purpose is not available.

The covenants against racism to which the United States subscribes do not tolerate acceptance of racism, even when cloaked in the name of "discretion" or when racism is an acceptable motive if combined with more legitimate bases for decision making. Article 1 of the International Convention Against All Forms of Racial Discrimination defines "racial discrimination" as:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

(General Recommendation No. 14: Definition of Discrimination (Art. 1, par.1) 03/22/1993, emphasis added.)

McCleskey ordains that racism can only be proved if that is the *purpose* of a challenged act or omission, but specifically forbids the establishment of racism by showing the *effects* of a challenged practice or system independent of anyone's express intentions. In so holding, it violated the Convention to which the United States specifically subscribed. This Court should squarely accept its responsibility to consider the effects of racism on each aspect of appellant's trial.

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

Pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, appellant presented an abbreviated form of arguments challenging California's death penalty scheme in his opening brief. (AOB 342 et seq.)

Respondent lumped together all of appellant's separate claims, and said for each one that appellant has presented no compelling reasons for this Court to reconsider its past decisions. (RB 192 et seq.) Appellant will rest on the contentions made in his opening brief, with two exceptions.

A. This Court Has Misunderstood and Misapplied Two United States Supreme Court Cases in Ruling That the California Death Penalty Scheme Sufficiently Narrows the Pool of Murderers Eligible for a Death Sentence.

Appellant argued that California's death penalty scheme failed to properly narrow the pool of potentially eligible defendants, and this Court's approval of the system (see *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475–477) was wrong. (AOB 342.)

1. *Pulley v. Harris* Approved the 1977 Statute on its Face, and Not the 1978 Statute in Effect When Appellant Was Sentenced to Death, Which "Greatly Expanded" the Number of Persons Eligible for Death.

This Court has frequently held that "The United States Supreme Court has held that California's requirement of a special circumstance finding adequately 'limits the death sentence to a small subclass of capital-eligible cases.' (*Pulley v. Harris* (1984) 465 U.S. 37, 53.)." (*People v. Jennings* (2010) 50 Cal.4th 616, 649; *People v. Yeoman* (2003) 31 Cal.4th 93, 164 ["The claim fails because the required narrowing function is performed in California by the special circumstances set out in section 190.2, rather than by the aggravating and mitigating factors set out in section 190.3"; see also *People v. Whitt* (1990) 51 Cal.3d 620, 659–660; *People v. Ray* (1996) 13 Cal.4th 313, 357.)

This Court's oft-stated belief that the United States Supreme Court resolved the constitutionality of the 1978 death penalty statute in *Pulley v. Harris*, *supra*, represents a fundamental misunderstanding of that decision. In *Harris*, the issue before the Supreme Court was "whether the Eighth Amendment . . . requires a state appellate court,

before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." (*Harris*, 465 U.S. at pp. 43–44.)

The issue in *Harris* was plainly different from the question of whether the 1978 version of the statute sufficiently narrows the pool of death-eligible murderers. It has been routinely cited by this Court as authority for the proposition that the Eighth Amendment does not require intercase proportionality review in capital cases. (See, e.g., *People v. Johnson* (2016) 62 Cal.4th 600, 658; *People v. Cunningham* (2015) 61 Cal.4th 609, 672; *People v. Ochoa* (2001) 26 Cal.4th 398, 458.)

It is true that *Harris* contains the statement that the California statute, "[b]y requiring the jury to find at least one special circumstance beyond a reasonable doubt, . . . limits the death sentence to a small sub-class of capital murders." (465 U.S. at p. 53.) *Harris*, however, involved California's *1977* death penalty statute (see *Harris*, 465 U.S. at pp. 38–39, fn. 1), while the whole point of the Briggs initiative in 1978 was to substantially expand the reach of that statute to include "All murderers." (AOB 520–521.) Appellant

challenged the 1978 statute, which the *Harris* case did not consider at all.

Furthermore, *Harris* concluded only that the 1977 California statute was constitutional "[o]n its face." (See 465 U.S. at p. 53.) The high court in *Harris* explicitly distinguished the two laws, noting that the special circumstances in the 1978 California death penalty law are "*greatly expanded*" from those in the 1977 law. (465 U.S. at p. 53 fn. 13, emphasis added.) *Harris* did not in any way address, let alone resolve, the issue of whether or not the 1978 statute fails to meet the Eighth Amendment's requirement that a death penalty scheme meaningfully narrow those eligible for a death sentence.

2. ***Tuilaepa v. California*** **Addressed Section 190.3, and Had Nothing at All to Say about Section 190.2, and Whether or Not California's Statute Sufficiently Narrows the Pool of Persons Eligible for Death.**

This Court has also erroneously relied upon *Tuilaepa v. California* [(1994) 512 U.S. 967] in rejecting narrowing claims. In *People v. Sanchez* (1995) 12 Cal.4th 1, 60, this Court rejected the claim that "the 1978 death penalty law is unconstitutional . . . because it fails to narrow the class of death-eligible murderers and thus

renders 'the overwhelming majority of intentional first degree murderers' death eligible," in reliance on a misunderstanding that the United States Supreme Court in *Tuilaepa* resolved this claim:

> [I]n *Tuilaepa v. California*, *supra*, and in a number of previous cases, the high court has recognized that 'the proper degree of definition' of death-eligibility factors 'is not susceptible of mathematical precision'; *the court has confirmed* that our death penalty law avoids constitutional impediments because it is not unnecessarily vague, *it suitably narrows the class of death-eligible persons*, and provides for an individualized penalty determination.

(*Sanchez*, 12 Cal.4th at pp. 60–61, emphasis added. See also *People v. Arias* (1996) 13 Cal.4th 92, 187 [rejecting narrowing claim by stating "[i]dentical claims have previously been rejected with respect to the death penalty scheme applicable in this case and to its closely related predecessor, the 1977 law" and citing to *Tuilaepa*]; *People v. Beames* (2007) 40 Cal.4th 907, 933–934 [rejecting the defendant's narrowing claim by citing to *Tuilaepa*, 512 U.S. at pp. 971–972, for the proposition that "the special circumstances listed in section 190.2 apply only to a subclass of murderers, not to all murderers . . . [thus] there is no merit to defendant's contention . . . that our death penalty law is impermissibly broad."].)

The issue that the United States Supreme Court resolved in *Tuilaepa* was whether the aggravating factors in section 190.3—which in California pertain only to the death selection determination, and not the death eligibility determination—are constitutional. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 969.) The Supreme Court in *Tuilaepa* explicitly said that it was *not* addressing any issue concerning the eligibility stage of the California scheme in section 190.2. (*Id.* at p. 975.)

Respondent simply referred to previous rejections by this Court of the points made here, and did not deny or discuss these contentions. (RB 305.) Appellant is entitled to a careful consideration of these points, which strike at the core of this Court's articulated rationale for not finding that the statute fails to meaningfully narrow the population of those eligible for the death penalty. California's death penalty scheme violates the Eighth and Fourteenth Amendments to the United States Constitution.

B. California's Death Penalty Scheme Improperly Allows a Jury to Find the Requisite Aggravating Factors in the Penalty Phase with Any Unanimity or Requirement That it Be Beyond a Reasonable Doubt.

Recent high court decisions require this Court to look again at whether California's death penalty scheme comports with *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477–478, and *Ring v. Arizona* (2002) 536 U.S. 584, which held that if a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. (*Id.* at p. 602.)

In *Alleyne v. United States* (2013) ___U.S.___ [133 S.Ct. 2151, 2152], the high court overturned its earlier decision in *Harris v. United States* (2002) 536 U.S. 545, as inconsistent with the decision in *Apprendi v. New Jersey*, and with the original meaning of the Sixth Amendment: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." (*Alleyne v. United States*, *supra*, 133 S.Ct. at p. 2152.)

In *Brown v. Sanders*, *supra*, the U.S. Supreme Court found that in California, the jury must consider additional factors in the penalty phase beyond those factors that made the accused eligible for death. (546 U.S. at p. 220.) In *People v. Prieto* (2003) 30 Cal.4th 226, this Court recognized that *Ring* required that special circumstance findings by the jury must be unanimous, and found to be true beyond a reasonable doubt (this had not previously been the case in California; see *People v. Odle* (1988) 45 Cal.3d 386, 411), but rejected any application of *Apprendi* or *Ring* to the penalty phase:

> While each juror must believe that the aggravating circumstances substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor. *This is true even though the jury must make certain factual findings in order to consider certain circumstances as aggravating factors.* As such, the penalty phase determination "is inherently moral and normative, not factual. . . ." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779 [230 Cal.Rptr. 667, 726 P.2d 113].) Because any finding of aggravating factors during the penalty phase does not "increase[] the penalty for a crime beyond the prescribed statutory maximum" (*Apprendi, supra*, 530 U.S. at p. 490), Ring imposes no new constitutional requirements on California's penalty phase proceedings.

(*People v. Prieto, supra*, 30 Cal.4th at p. 263, emphasis added.)

When appellant's jury was confused by the relationship of special circumstances to aggravating factors, the trial court instructed it with a definition: "An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (13 CT 3555.) This definition, taken from CALJIC No. 8.88, makes it clear that an aggravating factor is a necessary element of any death sentence.

Hurst v. Florida (2016) ___U.S.___ [136 S.Ct. 616, 621] underlines the necessity of the aggravating factors necessary for the imposition of a death sentence being found unanimously, and beyond a reasonable doubt. In summarizing the *Ring* case, and the history of the steady expansion of the principles of *Apprendi*, Justice Sotomayor wrote, "'[T]he required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" It was therefore an "element" that must be submitted to a jury. (*Hurst, supra,* 136 S.Ct. at p. 621.)

It's true that California varies by allowing aggravating sentencing factors to be found by a jury, but it does not allow the jury

to make what we know are the indispensable elements of a jury finding. This Court has allowed the finding of an aggravating circumstance to be in a form that does not resemble any other jury finding anywhere in the country. It does not have to be named, or written down, or agreed upon, nor does it have to be unanimous—each juror, under this scheme, can rely on an entirely different and unnamed aggravating factor cannot treat an "element" of a crime that must be found before a death sentence can be imposed in this manner.

The fact that the final determination of life or death is a moral and normative choice does not have any impact on the way in which an aggravating factor is found, and used. The absence of a unanimous jury finding beyond a reasonable doubt on a mandatory factual predicate in this case was a violation of the Sixth, Eighth, and Fourteenth Amendments, and requires that appellant's death sentence be set aside.

XXII. THE ERRORS, BOTH SINGLY AND CUMULATIVELY, OBSTRUCTED A FAIR TRIAL, AND REQUIRE REVERSAL.

Respondent cites cases of this Court that considered the cumulative effects of trial errors (*People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Panah*, *supra*, 35 Cal.4th at pp. 479–480) and then states:

> In recognition of the importance of this case, the trial court not only provided appellant with a fair trial, but gave appellant every benefit of the doubt on close legal issues, from the change of venue to for-cause challenges during juror selection to exclusion of appellant's prior acts of violence and other favorable evidentiary rulings.

(RB 195.)

This case was important, as are all criminal cases, and particularly all cases where life and death are at play. Appellant has not charged the trial court with bad faith or bias, but has pointed to erroneous rulings. Appellant is entitled to a ruling on the merits of each of his claims, and to a consideration of the cumulative effect of any errors.

Respondent also reiterates the horrific nature of the crimes of which appellant was convicted, and the powerful evidence showing

that he was the perpetrator. (RB 195.) Appellant does not now and has never disputed these facts. He has pointed to his long and productive life in the teeth of an extraordinarily abusive and impoverished upbringing, and the lack of anything in his past remotely like the crimes at bench. He presented a substantial number of family members and friends in mitigation. The jury did not rush as quickly to the result respondent believes to be obvious. The aggravating factors in this case were not "overwhelming" in the penalty phase context, despite respondent's constant repetition of that term; the jury engaged in real effort when it deliberated what sentence to impose. It cannot be said beyond a reasonable doubt that the errors at issue would not have made a difference in the jury's penalty assessment.

XXIII. GUILT PHASE ERRORS THAT DO NOT RESULT IN REVERSAL OF THE CONVICTIONS MUST ALSO BE CONSIDERED IN THE PENALTY PHASE; ANY SUBSTANTIAL ERROR AT THE PENALTY PHASE MUST BE DEEMED PREJUDICIAL

Respondent states that even in the penalty phase, "defendants are burdened with the 'reasonable probability' prejudice test familiar from *Watson*, *supra*, 46 Cal.2d at page 836." (RB 198.) It is wrong.

"Reasonable probability" is replaced in the penalty phase by a "reasonable possibility" standard, which is akin to the federal "harmless error" standard. (Cf. *People v. Wilson* (2008) 43 Cal.4th 1, 28 [the state standard for evaluating prejudicial effect of penalty phase error—whether "'there is a reasonable possibility the error affected the verdict'"—is "effectively the same" as the federal "harmless beyond a reasonable doubt" standard]; *Chapman v. California* (1967) 386 U.S. 18, 23–24 [explaining that there is "little if any difference" between "reasonable possibility" standard and "harmless beyond a reasonable doubt" standard]; *People v. Boyce*, *supra*, 59 Cal.4th at p. 714.)

Respondent counters appellant's discussion of prejudice and his citation of this Court's decisions in *People v. Hamilton* (1963) 60 Cal.2d 105, and *People v. Hines* (1964) 61 Cal.2d 164, with sweeping, dismissive language, and a misleading quote of half a footnote from *People v. Murtishaw* 29 Cal.3d at p. 774:

> [*Hines* dates] from a past era when no standards governed the discretion of the penalty jury and in which the courts accordingly imposed few constraints on the admissibility of penalty phase evidence. Consequently, the view of the penalty determination expressed in the *Hines* decisions is no longer viable, and, to the extent that language in those cases is inconsistent with the present opinion, it is expressly disapproved.

(RB 197–198.)

The purpose of the footnote quoted by respondent was not to condemn the general consideration in *Hines* of prejudice in the context of the penalty phase, but rather to condemn this Court's earlier reliance on expert testimony to establish future dangerousness. Here is the omitted part of that *Murtishaw* footnote:

> Two earlier decisions involving the same defendant (*People v. Hines* (1967) 66 Cal.2d 348, 355 [57 Cal.Rptr. 757, 425 P.2d 557]; *People v. Hines* (1964) 61 Cal.2d 164, 173 [37 Cal.Rptr. 622, 390 P.2d 398]) upheld admission of psychiatric testimony that defendant might kill again. These decisions antedate most of the studies

> cited herein to show the unreliability of psychiatric forecasts, as well as our recognition of such unreliability in *People v. Burnick, supra*, 14 Cal.3d 306.

(*People v. Murtishaw, supra*, 29 Cal.3d at p. 774, fn. 40.)

Respondent does acknowledge that errors in this case should be considered cumulatively and not separately. (See *People v. Booker* (2011) 51 Cal.4th 152, 195 ["To the extent that there are a few instances in which we found or assumed the existence of error, we concluded that no prejudice resulted. We reach the same conclusion after considering their cumulative effect"].) In light of this whole record, any error committed in the guilt phase must be deemed prejudicial to appellant's penalty phase verdict.

CONCLUSION

For the reasons stated above and in appellant's opening brief, the convictions, special circumstance findings and death sentence must all be reversed.

Dated: _____

Respectfully submitted,

_____
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CERTIFICATE OF WORD COUNT

I performed a word count of this Appellant's Reply Brief, and I certify that it contains a total of 16,775 words, excluding tables.

DATED: July 16, 2016

Respectfully submitted,

MICHAEL R. SNEDEKER
LISA R. SHORT

Attorneys for Appellant
ARTURO JUAREZ SUAREZ

DECLARATION OF SERVICE BY MAIL

Re: *People v. Arturo Juarez Suarez*, Cal. Supreme Court No. S105876; Napa Co. Super Ct. No. CR 103879

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. I served a true copy of the attached

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed as follows:

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Each said envelope was then, on July 16, 2016, sealed and deposited in the United States mail at Portland, Oregon, Multnomah County, the county in which I am employed, with the postage thereon fully prepaid. 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, 2016, in Portland, Oregon.

MICHAEL R. SNEDEKER