IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. ANGELO MICHAEL MELENDEZ, *Defendant and Appellant.*	S118384 San Joaquin County Superior Court No. SP081070B

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, San Joaquin County

(HONORABLE TERRENCE VAN OSS, JUDGE, of the Superior Court)

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v.	)	
ANGELO MICHAEL MELENDEZ,	)	
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INTRODUCTION

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

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

I.

THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE AFRICAN AMERICAN PROSPECTIVE JURORS FROM THE JURY VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND TO A JURY CONSISTING OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

Appellant argues that the prosecutor used his peremptory challenges to remove all of the prospective African American jurors from the jury in violation of appellant's constitutional rights. (*Batson v. Kentucky* (1986) 476 U.S. 79; AOB 24-51.) Respondent defends the prosecutor's strikes as race-neutral and the court's findings as supported by the record. (RB 13-41.) Respondent is mistaken on both counts.

After the prosecutor struck the third, and only remaining African American prospective juror in the panel, appellant made a *Wheeler/Batson* motion. (7 RT 1823.) The trial court found appellant had made a prima facie case of discrimination and requested an explanation from the prosecutor for each of the three strikes. (7 RT 1824, 1830; 8 RT 1831.) After hearing the prosecutor's reasons, the court denied the motion. (8 RT 1843.)

A. The Prosecutor's Reasons For Striking The Three African American Jurors Were Improper and Pretextual

Initially, it should be noted that respondent fails completely to address the fact that the prosecutor struck *all* of the African American jurors on the panel. As noted in the opening brief, although not dispositive, "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 342.) This Court has

characterized as "troubling" numbers such as those in the present case, which result in all prospective African American jurors being removed and none seated on the actual jury. (See *People v. Jones* (2011) 51 Cal.4th 346, 362.) Respondent's silence on this point is telling.

Those three jurors were Jurors D.W., S.C., and M.J. As the trial court noted, Juror S.C. was challenged immediately upon entering the box; Juror M.J. was challenged before even entering the box. (7 RT 1829.)[1] Juror M.J. was the last African-American juror challenged, prompting the *Batson* motion.

The assessment of the prosecutor's reasons for striking each juror is not to be evaluated in a vacuum. In assessing a prosecutor's stated reasons for exercising a peremptory challenge, the lack of record support for the race-neutrality of the prosecutor's reasons for striking other minority jurors must be taken into account when evaluating each of his stated reasons for striking African American prospective jurors. In *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, the Ninth Circuit found the prosecutor's proffer of two questionable explanations for his strike of one African American potential juror "take on a significance that they might otherwise lack." (*Id.* at p. 1195.) Referring to the prosecutor's strike of the only other potential African American juror, the court continued, "At a minimum, these dubious explanations reaffirm our conclusion that the prosecutor's actual reason for striking [a minority juror] differed from those that he asserted and that his ulterior motive was race-based." (*Id.* at p. 1196, citing *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 369 ["The prosecutor's willingness to make up nonracial reasons for striking [three minority jurors] makes it even

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[1] The prospective jurors indicated their race on their questionnaires.

harder to believe that his reasons for striking [a fourth juror] were race-neutral"].)

1. Juror M.J.

Juror M.J., married and the father of one child worked as a truck driver. (8 CT 2153.) During his service in the Marines from 1966-1968, he took a human life. (8 CT 2154.) According to his questionnaire, he was "neutral" on the death penalty and "moderately in favor" of life without possibility of parole. (8 CT 2166.)

The prosecutor struck Juror M.J., he said, because "he had no opinion about anything." (8 RT 1835-1836.) According to the prosecutor, M.J. had no opinion about how to determine if someone was telling the truth or about prosecuting attorneys, defense attorneys, the criminal justice system, about drugs, rap music or about the death penalty. The prosecutor also rated him low because "he'[d] killed before" when he served in Vietnam. (8 RT 1836.) The prosecutor stated that he had a juror in another case who had taken a life during his military service and that juror ended up holding the jury out the longest and later said that "because he had taken a life before, the decision to take a life again personally caused him great distress." (8 RT 1837.) Respondent claims the record supports these justifications. (RB 37.) As set forth below, respondent is mistaken.

Respondent claims that Juror M.J.'s written answers on the questionnaire "reflect his lack of opinion about most of the subjects covered on the questionnaire." (RB 21.) A review of M.J.'s questionnaire shows that this is simply not true. (8 CT 2152-2170.) Respondent points to the fact that M.J. did not answer the question about whether he could judge credibility. (RB 22-23.) The prosecutor relied on this as a reason for striking him: "he didn't have any ability [sic] if he could tell if someone

was telling this [sic] truth." (8 RT 1836.) In fact, however, while Juror M.J. said he did not know how to tell whether someone is telling truth, he also said he believed he had the tools to do so. (7 RT 1811.) Significantly, respondent fails to address, or even acknowledge, that at least three seated jurors also stated they did not have the ability to discern if others were telling the truth: Juror 2 (11 CT 3206), Juror 9 (12 RT 3339; 6 RT 1315) and Juror 11 (12 CT 3377).

The prosecutor claimed Juror M.J., "had no opinions whatsoever on the criminal justice system." (8 RT 1836.) That statement is not accurate; while M.J. wrote in his questionnaire that he had "No opinion" in response to questions about the effectiveness of the criminal justice system in dealing with crime, or about attorneys, judges and police officers, he did express strong pro-prosecution sentiments about other aspects of the criminal justice system. He "agreed strongly" with the statements "Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence," and "In general, persons convicted of serious crimes receive lenient sentences from the courts." (8 CT 2159.) He "disagreed strongly" with the statement, "It is better for society to let some guilty people go free than to risk convicting an innocent person." He "agreed somewhat" with the statement "Persons charged with crimes have more rights than the victims." He "agreed somewhat" with the statement "Prison inmates who have been convicted of horrible crimes receive too many luxuries, such as TV, workout facilities, etc." He "agreed somewhat" with the statement "Regardless of what the law requires, a person should be required to testify in a case as serious as murder." (8 CT 2160.) Thus, contrary to the prosecutor's purported reason for striking Juror M.J., he not only had opinions about the criminal justice system, they were strongly pro-

prosecution. Moreover, the answers given to these questions by Juror M.J. were certainly more pro-prosecution than those of Jurors 3 and 4 who expressed nearly opposite, i.e., more pro-defense sentiments, in their questionnaire answers to the same questions. (11 CT 3230-3231 [Juror 3]; 3249-3250 [Juror 4].)

In addition, two of the seated non-African American jurors also said they had no opinion in response to the questions about the effectiveness of the criminal justice system and their feelings about attorneys and judges. Respondent contests appellant's comparison of Juror M.J. with seated jurors, but the arguments must fail in the face of the record. (RB 38.) For example, respondent claims that while M.J. answered Question 6 of section H, which asked for his opinion about the criminal justice system, defense and prosecuting attorneys and judges, by saying that he had no opinion, Juror 1, who inadvertently left blank the questions about the criminal justice system and attorneys, ultimately answered by saying he had no negative feelings. (RB 38, citing 5 RT 1168.) Juror 1 acknowledged that he inadvertently skipped the question on the questionnaire, but then answered that he had never had a negative experience with an attorney and had no opinion about "attorneys, prosecutors, defense attorneys, judges." (5 RT 1168.) There is nothing to distinguish this answer from that of Juror M.J. who said he had no opinion, but also responded to all of the prosecutor's questions about his possible negative feelings towards defense attorneys and prosecutors by answering that he had none. (8 RT 1813-1814.) Juror 7 also left Question 6 blank, and when questioned about it on voir dire answered that she had no opinions because she had no relevant experience upon which to base an opinion. (7 RT 1737-1738.) Based on the responses to this question – cited by the prosecutor as a reason for striking M.J. – the

only difference between the jurors, two of whom were acceptable to the prosecutor and one of whom was not, is their race. "If, indeed, [M.J.'s] [lack of opinion about prosecutors and defense attorneys] did make the prosecutor uneasy, he should have worried about a number of white panel members he accepted with no evident reservations." (*Miller–El v. Dretke*, *supra*, 545 U.S. at p. 244.)

Respondent argues that the prosecutor did not rely on Juror M.J.'s lack of an answer to this question as a reason for excusing him. M.J. was struck, according to respondent "for his complete lack of opinions, which was evident from his questionnaire and voir dire . . .," while "[t]he comparison jurors, on the other hand, had opinions and expressed them." (RB 38.) This contention is belied by the record: in addition to the jurors discussed above, this was also clearly not the case with Juror 3, who said she had no opinion about whether the death penalty was imposed too seldom or too often because she did not know enough about it. (5 RT 1226.) Juror M.J., on the other hand, wrote in response to the question his opinion that the death penalty was imposed "about the right amount." (8 CT 2169.)

Respondent erroneously contends "Because the answers were different, they do not establish pretext. Again, the prosecutor did not rely on M.J.'s answer to this question as a reason for striking him, so the comparison is irrelevant." (RB 39.) On the contrary, the prosecutor claimed he rated M.J. low on his scale of desirable jurors because "he had no opinion about anything." (8 RT 1835-1836.) The pretextual nature of the prosecutor's reason is made strikingly apparent by the fact that M.J. *did* have opinions, and by the fact that non-African American prospective jurors who *did not* have opinions were permitted to sit on the jury.

Respondent defends the prosecutor's claim that he struck Juror M.J. because he had taken a life as a soldier, and as a result, might experience difficulty imposing the death penalty. (8 RT 1836.) According to the prosecutor, a juror in his last death penalty case was a tank commander who had killed before, and who experienced "great distress" at having to make the penalty decision.[2] (8 RT 1836-1837.) The prosecutor offered as the reason for striking M.J.:

> So if Mr. J[] was going to decide during the penalty phase where he stood on the issue of capital punishment and then in the background having taken at least one human life before – and he served in Vietnam from 1966 to 1968, and I assume he's taken more than one life – then I think he would have grave reservations on whether he could impose the death penalty in this particular case.

(8 RT 1837.)

After a presumption arises that a party has used its peremptory challenges to exclude prospective jurors on the basis of race, the offending party must articulate "legitimate reasons" which are "clear and reasonably specific" and which are related to the particular case to be tried. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 98 & fn. 20.) None of the prosecutor's stated reasons for striking M.J. – his concern that when M.J. was faced with having to make a penalty decision he would decide, based on his experience having taken lives in the military that he could not impose the death penalty – meet this criteria.

First, contrary to the prosecutor's statements, Juror M.J. had already decided where he stood on capital punishment. He believed in imposing the

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[2] It appears from the prosecutor's comments that this juror "held the jury out the longest," but was able to reach a verdict. (8 RT 1836-1837.)

death penalty for murder, and while he was neutral on the issue, he agreed the death penalty should be imposed if warranted: "if you did the crime and the evidence is there." (7 RT 1785, 1814.) Neutrality on the issue of the death penalty is logically an ideal position for a prospective juror, and a position that the prosecutor accepted from Juror 3, who also checked "Neutral" with regard to his feelings about the death penalty. (11 CT 3237.) Indeed the prosecutor noted earlier that several prospective jurors (including Juror 1 (5 RT 1168) and Juror 9 (8 RT 1839)) expressed no opinions about the criminal justice system and viewed it as positive that jurors come into the case with an open mind and without preconceived notions. (6 RT 1311-1312.) Respondent fails to address the fact that the prosecutor viewed only African American jurors as excludable on that basis. Additionally, by claiming that Juror M.J. had not expressed an opinion about the death penalty, the prosecutor mischaracterized M.C.'s comments, providing further evidence of pretext. (See *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 244.)

As defense counsel noted, the prosecutor never asked Juror M.J. a single question about his feelings about having taken a life. (8 RT 1837-1838.) "A prosecutor's failure to engage Black prospective jurors 'in more than desultory voir dire, or indeed to ask them any questions at all,' before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias." (*People v. Turner* (1986) 42 Cal. 3d 711, 727, quoting *People v. Wheeler* (1978) 22 Cal.3d 258, 281.) Respondent asserts the prosecutor knew all he needed to know about Juror M.J. without further questioning, and claims that the prosecutor's voir dire on subjects other than those he cited as reasons for striking M.J. negates a finding that his voir dire was "desultory." (RB 39-40.) This is directly

contrary to the United States Supreme Court's observation that "the State's failure to engage in any meaningful voir dire examination *on a subject the State alleges it is concerned about* is evidence suggesting that the explanation is a sham and a pretext for discrimination." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246, italics added.)

Respondent posits that the prosecutor had no need to follow up with additional questions because he had heard enough from Juror M.J.'s response to defense counsel's question on the subject of his military service. (RB 39.) This argument does not withstand scrutiny. Juror M.J. was asked by counsel for Taylor whether or not his experience in the Marine Corps, having taken a human life, would make him hesitate to want to serve as a juror, and he answered "No." (7 RT 1784.) No follow up questions were asked by the prosecutor on this point, including how many people M.J. had killed. Having made no attempt to further ascertain M.J.'s feelings about his experience as it related to his service on a capital jury, the prosecutor had absolutely no basis for making the determination that M.J.'s experience would adversely affect his ability to sit on the jury in this case.

This Court addressed a similar situation in *People v. Turner*, *supra*, 42 Cal.3d 711, in which a Black juror said that as a mother she would find sitting as a juror in the murder case very emotional. In response to the court's question on voir dire, however, she stated that she could listen to the evidence, follow the instructions and attempt to reach a verdict. After the prosecutor struck this juror and two other Black jurors, the defense made a *Wheeler* motion and the court found a prima facie case. The prosecutor's justification for the challenge was the juror's alleged statement "that she could not sit impartially because she was a mother of children." (*Id.* at p. 727.)

That explanation was held insufficient by this Court, which ruled that the juror's statement that she would find the case very emotional may well have meant only that she was uncomfortable with the nature of the case – a feeling that was also expressed by other jurors. This Court held that, "[a]t the very least, the remark called for a few follow-up questions that would have soon clarified the matter. Rather than asking such questions, however, the prosecutor immediately removed the last Black prospective juror from the box by peremptory challenge. In these circumstances we have little confidence in the good faith of his proffered explanation." (*People v. Taylor, supra*, 42 Cal.3d at p. 727.) Similarly, the prosecutor's failure to ask Juror M.J. any questions about his military service, a subject of ostensible concern, undermines confidence in the credibility of the reason given for removing him from the jury.

Respondent alternatively argues that the prosecutor had no need to question Juror M.J. further because there was nothing M.J. could say that would allay his concerns. (RB 39-40.) Those same considerations did not prevent the prosecutor from questioning a Caucasian prospective juror who had served as a firefighter, rising to the rank of battalion chief, about making the decision to take a life or risk the lives of his men. The prosecutor probed the prospective juror's feelings about having to make "a final decision" to send his men into a burning building, a decision "that could mean death." (8 RT 1940.) The disparity in treatment between the two similarly situated jurors demonstrates the pretextual nature of the prosecutor's strike against Juror M.J.

Moreover, the legitimacy of the prosecutor's explanation for striking Juror M.J. based on his status as a soldier who had killed in combat is questionable when there is no evidence that the purported trait – difficulty

in voting to impose the death penalty based on having previously taken a life in the military – applied to Juror M.J. specifically. Indeed, the legitimacy of the group trait itself is highly questionable. The prosecutor's experience with the former military juror notwithstanding, it does not invariably follow that someone who has killed before, possibly many times, would experience distress at being asked to impose a death penalty. In fact, it seems just as likely that someone who has experienced killing would be *more* comfortable making the decision to take a life than someone who has not. Without any information about the attitudes of a particular juror with this experience, the inference that a strike based on this group trait was pretextual is strong. (See *Slappy v. State* (Fla. Dist. Ct. App. 1987) 503 So. 2d 350, 355 [questioning the legitimacy of an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically].) This is especially true in light of Juror M.J.'s statements on voir dire that his experiences would *not* make him hesitate to serve as a juror.

Finally, respondent suggests that the juror was not sufficiently forthcoming to justify further questioning by the prosecutor. (RB 40.) This contention is utterly belied by the record which shows that Juror M.J. answered every question posed to him by Taylor's counsel on various subjects, including his military experience. (7 RT 1783-1785.) He was asked only two questions by appellant's counsel – whether he had heard all the questions asked of other jurors and whether he could be fair to both sides – both of which he answered "Yes." (7 RT 1807.) Juror M.J. responded to all of the prosecutor's questions, which, as respondent acknowledges, did not include any regarding his military experience. (7 RT 1811-1815.)

The record clearly demonstrates the falsity of the prosecutor's explanations for striking Juror M.J., and supports a finding that his real intent was discriminatory.

2. Juror D.W.

Juror D.W. was the father of three children, married, and worked as a barber. (11 CT 3128.) On his juror questionnaire he noted that while he was in the military, he had been court-martialed. (11 CT 3130.) Based on the experience of his brother-in-law, who was convicted of a criminal offense for which he served six years in prison, Juror D.W. expressed his opinion that the criminal justice system "[was] fair in some ways and others it's not." (*Ibid.*)

The prosecutor told the court he challenged Juror D.W. because he was court-martialed. (8 RT 1832.) In addition, the prosecutor cited the fact that Juror D.W.'s brother-in-law was serving six years in prison and, according to the prosecutor, D.W. believed police officers corroborated false stories before testifying and that judges presume guilt. (8 RT 1833-1834.) The prosecutor characterized Juror D.W.'s relatively innocuous comments about the District Attorney and Public Defender as "negative," and claimed the juror stated he would not be able to follow the law in the penalty phase, and was afraid of jury retaliation. (*Ibid.*)

The trial court accepted three of these reasons, finding the prosecutor's excusal of Juror D.W. to be appropriate on the basis of his court-martial, having relatives in prison, and expressing a "a very negative attitude towards courts and lawyers." (8 RT 1841.) An examination of the record demonstrates that the prosecutor's reasons were pretextual.

Respondent contends the prosecutor's stated reason for striking Juror D.W. because he had been court-martialed was race-neutral, citing the

decision in *People v. Salcido* (2008) 44 Cal.4th 93. (RB 27.) While it is true that one of the jurors in *Salcido*, Juror J.N., whose dismissal was upheld in the face of a *Batson* challenge, had been court-martialed, that was not the only basis for the prosecutor's strike. Juror J.N. also had a history of alcoholism and violent behavior against his family that, along with the fact of the court-martial suggested he might harbor a bias in favor of the defendant. (*Id.* at p. 140.) The case does not stand for the broad proposition for which it is cited by respondent.

Respondent offers its analysis of D.W's character as revealed by his having been court-martialed as further proof of the prosecutor's race-neutral basis for striking him. (RB 27-28.) According to respondent, D.W's actions which led to the court-martial – trading duties with another person in order to go out drinking and returning to his post drunk – "showed a lack of respect for authority and an inability to follow the rules." (RB 28.) This behavior is different – according to respondent – than that exhibited by Juror 3 (6 RT 1300; 11 CT 3228) and Juror 4 (11 CT 3348), both of whom had DUI convictions, because it took place in a military rather than a civilian context. Respondent asserts, "the comparison between a highly-structured, rules-oriented, chain-of-command driven employment relationship is not comparable to the relationship an ordinary civilian citizen has with society-at-large. There is more accountability for one's conduct in the military and the relationship is one that results from an individual's conscious choice to submit to those rules, unlike the general societal relationship to which all are bound without having the option to chose [sic]." (RB 28-29.)

Respondent's reasoning is not persuasive and reveals the pretextual nature of the prosecutor's strike. Civilian citizens are subject to the laws of

the community in which they choose to live, in the same way military personnel are subject to military rules and regulations. The traits exhibited by Juror D.W. which the prosecutor deemed undesirable in a juror – drinking too much and violating military rules – cannot be rationally distinguished from those of the non-African American civilian jurors who did the same thing – drank too much and violated criminal laws. The fact remains that the prosecutor treated similarly situated prospective jurors differently depending on whether or not they were African American. Moreover, as previously noted, the prosecutor's failure to question Juror D.W. about the areas he deemed to be disqualifying "suggest[s] that the explanation is a sham and a pretext for discrimination." (*Miller-El v. Dretke, supra*,, 545 U.S. at p. 246.)

The court deemed race-neutral the prosecutor's reason for striking Juror D.W. based on his having a relative in prison. (8 RT 1841.) Respondent answers appellant's argument that the criminal history of prospective jurors and their relatives only mattered to the prosecutor when the potential juror was African American by citing the prosecutor's excusal of "six white jurors and two Hispanic jurors with similar criminal histories." (RB 30.) A review of the record reveals other reasons – aside from their relationship with someone who had been involved with the criminal justice system – why the prosecutor excused each of them, and thus fails to support respondent's argument that the prosecutor treated minority and non-minority prospective jurors the same.

The woman whose husband had been convicted of robbery and served three years in prison was not a strong death penalty juror, writing in her questionnaire that she was in favor of the death penalty in cases involving children. She also expressed the opinion that while LWOP is a

"burden on the taxpayers," "with the new DNA evidence innocent people have been released from prison." (11 CT 3039.) She reiterated this sentiment in response to questioning by the prosecutor, who questioned her at length about her position on the death penalty. (6 RT 1383-1389.) At one point, the juror said she felt as if she were being cross-examined, "You begin to wonder who is on trial." (6 RT 1384.) The prosecutor clearly had reasons for striking this juror that had nothing to do with whether or not she had a relative who served time in prison.

The second juror cited by respondent is "a Caucasian female whose son had been convicted of a sexual offense." This juror wrote in her questionnaire in response to the question about having had a bad experience with any type of attorney, "2 years ago my son was involved in a case where I felt the prosecuting attorney was rather vindictive." (8 CT 2237.) Again, this was an obvious reason for the prosecutor's strike.

There were many reasons why the prosecutor would not want the "Caucasian female whose husband had a DUI and whose nephew served time for assault with a firearm on his wife," to sit on the jury. She wrote in her questionnaire that her feeling about police officers was that they were "often rude." (6 CT 1694.) She complained on voir dire about how she was treated by the criminal justice system when her car was stolen and she was trying to get restitution. (7 RT 1734.) She also answered "Yes" to the questions asking if she would be biased against the victims, Koi Wilson and Ricky Richardson, because they lived with their infant child in a place where marijuana sales were taking place, and that Richardson's income primarily came from sales of rap music CDs and marijuana. She wrote as the reason for her answers "child endangerment." (6 CT 1698.) She answered "Yes" to the question whether she had strong feelings about the

use, possession or sale of drugs which might affect her ability to be fair. (*Ibid.*) Her impression of the culture that surrounds rap music was "criminal element and drug use." (6 CT 1699.) On voir dire she said that she would "possibly" assess a person's credibility differently if they used or sold marijuana. (7 RT 1747.) The juror answered "Yes" to the question whether she had any religious, moral or personal beliefs that would make it difficult to impose the death penalty, and wrote as an explanation, "My religion is against the death penalty." (6 CT 1702.)

Respondent cites "a Caucasian male whose son was convicted of domestic violence," as another example of a non-African American prospective juror who had a relationship with someone involved with the criminal justice system. What respondent left out are the answers by this juror that he did not feel the criminal justice system was fair in the way the case was handled. He wrote, "case was in San Diego and was taken to extreme by [sic] D.A. office." His feelings about the criminal justice system were affected; he wrote that he "lost a little faith in what the D.A. should prosecute." (5 CT 1260.) Moreover, the juror expressed strong anti-death penalty sentiments in his questionnaire answers. He wrote, "I am against death penalty because I feel I do not want to be part of taking a person's life." (5 CT 1270.) On voir dire, he said he used to be strongly in favor of the death penalty, but recent exonerations had caused him to reconsider his position. (8 RT 1940.)

Respondent includes in its list of prospective jurors, an "Irish-American" male whose brother-in-law "served time" for drug possession with intent to distribute. (RB 30.) In fact, the sentence he served was weekends in jail for 21 days. (6 CT 1513.) This juror wrote on his questionnaire that he had unpleasant experiences with the police during two

of the 40+ speeding violations he had received. (6 CT 1514.)

The "Caucasian female whose close friend served five years for rape," was not a strong death penalty juror, writing in her questionnaire that she had religious, moral or personal beliefs that would make it difficult for her to impose the death penalty. She wrote, "I would feel that I played God & it would really bother me." (8 CT 2349.) Similarly, the Mexican-American male whose father had served six months in jail for domestic violence also expressed reservations about the death penalty. (9 CT 2665.) He wrote in response to a question about his moral or religious feelings about the death penalty, "I believe I can only take part in eliminating a life if it is in self-defense." (*Ibid.*)

Finally, respondent points to the prosecutor's strike of a Hispanic male whose uncle was serving a life sentence for murder. (RB 30.) This juror agreed with the statement that "anyone involved in marijuana sales 'gets what they deserve'." (4 CT 1054.) Given the fact that Richardson was a marijuana seller, from the prosecution's standpoint this was not a desirable sentiment for a juror to have.

Thus, the record soundly refutes respondent's contention that "the prosecutor's rejection of these prospective jurors establishes that his concerns over a juror's prior negative experience with the criminal justice system was not isolated to African-American jurors as appellant claims." (RB 31.)

Respondent erroneously claims that "appellant suggests that the only relevant prosecutorial justifications are those which the trial court mentioned in its ruling." (RB 31, citing AOB 33-36.) On the contrary, while appellant discussed the court's ruling, in which it mentioned those reasons given by the prosecutor and its evaluation of the veracity of the

reasons, appellant also addressed the prosecutor's other reasons for striking Juror D.W. which were not mentioned by the court but further demonstrate pretext. (AOB 35.)

The prosecutor cited Juror D.W's inability to follow the law regarding penalty as a basis for excusing him, based on his answer to Question 14 in Section P of the questionnaire, asking if he could set aside his personal feelings regarding what the law should be. (8 RT 1833.) As argued in the opening brief, however, the prosecutor did not excuse non-African American prospective jurors who expressed views contrary to established legal tenets. (See AOB 36 [Jurors 1 and 7 state belief that a defendant should be required to prove his innocence and have to testify (JQ CT 3288, 3192-3193); Juror 5 believed that the right to a jury trial affected by seriousness of the crime. (7 RT 1579); Juror 12 stated that mental health testimony had no place in the courts (JQ CT 3405); Juror 11 unsure about following instructions on the presumption of innocence and the right not to testify, and admitted bias against victims because of their involvement in drugs (JQ CT 3363-3364, 3366)].) Respondent contends this is not a valid comparison, but does not explain why the prosecutor's disparate treatment of prospective jurors is not indicative of bias. (RB 32.)

The prosecutor's reasons for striking Juror D.W. were not race-neutral, and thus establish his discriminatory intent.

3. Juror S.C.

The prosecutor challenged Juror S.C., a working mother of three children. (5 CT 1293-1294.) She expressed neutrality on the death penalty, and had no negative feelings about attorneys, judges or police officers. (5 CT 1299.) She felt that the criminal justice system fairly handled a case in which she, her brothers and nephew were arrested. Charges against the

juror were dismissed, but her brothers and nephew went to prison. (5 CT 1298.)

In defending his strike of Juror S.C. as race-neutral, the prosecutor noted she had been arrested for drugs, and her brother and nephew were both in state prison for robbery. Of particular concern, he claimed, was that Juror S.C. did not read newspapers or watch any news. The prosecutor stated his belief that "it's important to have a juror who sits on a death penalty panel to be aware of his or her surroundings and their place in the community." (8 RT 1834.) In addition, the prosecutor stated, Juror S.C. "had absolutely no feelings on the death penalty" and he "would be requesting people to go in there and actually have feelings on the death penalty one way or the other." (8 RT 1834-1835.) According to the prosecutor, what was particularly significant for him was that Juror S.C. stated that she was a witness in an assault with a deadly weapon case and essentially had said the police officers were not telling the truth. (8 RT 1835.) She also delivered her answers in what the prosecutor described as a "cavalier manner," indicating she was "entirely bored with the system." (*Ibid.*)

Respondent defends the prosecutor's strike of Juror S.C. on the grounds that she was arrested, the fact that she had relatives in prison and her lack of interest in the news all constituted race-neutral reasons. (RB 34-37.) Respondent rejects appellant's comparison of the prosecutor's treatment of Jurors 3, 4 and 6, all of whom had previous criminal convictions, with Juror S.C. because her case was dismissed. Respondent claims that S.C.'s assertion that she felt she was fairly treated by the criminal justice system is somehow less credible than the statements made by the seated jurors who had suffered criminal convictions because she

"suffered no penal consequences from her arrest," whereas the others "admitted responsibility for their conduct." (RB 35.) Respondent's argument makes no sense, and there is no explanation offered as to why individuals who have been criminally punished have *less* potential for bias against the criminal justice system than someone who was neither prosecuted nor punished. Moreover, respondent can point to nothing in the record that supports its claim that Juror S.C. was not credible in her assertion that she thought the system treated her fairly.

The prosecutor's claim that he struck Juror S.C. because she did not watch the news or read the papers is defended by respondent as valid and race-neutral. Again, without reference to the record, respondent suggests that S.C.'s stated reasons for not doing so were not credible. (RB 35.) Respondent fails to acknowledge the points raised by appellant, namely, that the fact that a working mother of three does not choose to spend what little free time she has watching or reading the news is wholly unremarkable, and does not establish, as the prosecutor claimed, that she has "a limited connection with [her] community." (8 RT 1834.) Respondent also argues, unconvincingly, that S.C's statements are somehow different than those of Juror 3, a non-African American juror, who stated that because he had two children, he was too busy to watch TV to follow cases in the news. (5 RT 1226.)

The prosecutor claimed Juror S.C. "had absolutely no feelings on the death penalty," a quality he deemed undesirable in a juror. (8 RT 1834.) In fact, however, S.C. agreed with the prosecutor's characterization of her position as "neutral in your support for or against capital punishment." (7RT 1755.) As counsel for Taylor pointed out to the trial court, Juror 7 also said she had no opinion on the death penalty because of her lack of

exposure to the criminal justice system, yet she was chosen to sit on the jury. (8 RT 1839-1840.) And, as discussed further above in regard to Juror M.J., the prosecutor had differing positions on the acceptability of a juror's neutrality depending upon their race.

Juror S.C.'s demeanor – which the prosecutor described as "cavalier" and "bored" – was offered as a reason for her exclusion. (8 RT 1835.) The trial court made no mention of this reason, but did comment on S.C.'s demeanor when she spoke about her experience with police as a witness to a crime. (8 RT 1841.) The trial court found that "it was obvious that she felt that the police are not to be trusted" (8 RT 1841), a finding not at all borne out by a careful review of the record, as set forth in the opening brief. (See AOB 40.)

Respondent challenges appellant's reliance on *Synder v. Louisiana* (2008) 552 U.S. 472, for the proposition that the trial court's failure to make any observations or findings as to the prosecutor's demeanor-based reason means it should not be considered on appeal. (RB 37.) In fact, however, it is respondent's interpretation of *Synder* that is misplaced. As in the instant case, the trial judge in *Synder* was given more than one explanation by the prosecutor for his strike, and rather than making a specific finding on the record concerning the juror's demeanor, the trial judge simply allowed the challenge without explanation. Under these circumstances, the Supreme Court held that "we cannot presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." (*Ibid.*) Given the similar lack of specific findings on the part of the trial court in the instant case, this Court cannot presume that it credited the prosecutor's assertion that Juror S.C. was bored or cavalier in her responses during voir dire.

Respondent challenges appellant's argument that the prosecutor's reliance on the fact that African American prospective jurors had relatives in prison was a surrogate for impermissible racial stereotypes and by doing so, the prosecutor was erecting a barrier that was more likely to screen out African American venire members.[3] (RB 40.)

Respondent claims the prosecutor used the fact that prospective jurors D.W. and S.C. had relatives in prison "as a way to evaluate how the prospective juror felt toward the criminal justice system." (RB 40.) That is not what the record shows, however. While D.W. stated his opinion that the case against his brother-in-law, who was serving time in prison, was not handled fairly (11 CT 3133), S.C. believed the criminal justice system handled the cases against her brothers and nephew fairly. (5 CT 1298.)

Respondent fails completely to address appellant's argument that the prosecutor's explanation here is reminiscent of the explanation of the prosecutor in *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, overruled on another ground in *U.S. v. Nevils* (9th Cir. 2010) 598 F.3d 1158, 1167.) Even if this Court finds that the prosecutor's stated reason was race-neutral, it must find that the reason was pretextual. If a prosecutor's facially-neutral explanation results in the disproportionate exclusion of members of a certain race, as it did in appellant's case, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination. (*Hernandez v. New York*

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[3] Respondent notes that the statistics cited in the opening brief showing that the percentage of African Americans in prisons is disproportionate to their percentage of the populations is information outside the record. (RB 40.) A request for judicial notice of the statistical material pursuant to Evidence Code section 452, subdivisions (b), (c) and (h) is being filed with this brief.

(1991) 500 U.S. 352, 363.)

B. Because the Trial Court Failed to Conduct the Required Evaluation of the Prosecutor's Proffered Reasons For Striking the Three Black Jurors, Its Findings Should Not Be Accorded Any Deference

Appellant argues that in the face of overwhelming evidence of the prosecutor's discriminatory intent in striking the only three African American prospective jurors, the trial court made no attempt to evaluate whether the prosecutor's proffered reasons for striking the three black jurors were pretextual, and thus the court's finding of no discriminatory intent is not entitled to deference. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 476-477.) As discussed in the opening brief, the deferential, substantial evidence standard of review applies "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva* (2001) 25 Cal.4th 345, 385-386; AOB 48-50.) This Court examines whether substantial evidence supports the trial court's conclusions. (*People v. Johnson* (2015) 61 Cal.4th 734, 755, and cases cited therein.)

Without citation to authority, respondent claims appellant has forfeited his claim that the court's review was inadequate because he failed to object on these grounds in the trial court. (RB 41.) Clearly, no objection was necessary based on the trial court's duty to conduct a third step inquiry after finding that appellant had made a prima facie case of discriminatory strikes. (*Batson*, *supra*, 476 U.S. at pp. 96-98.) Because step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility (*Batson*, 147 U.S. at p. 98, fn. 21), this Court has interpreted *Batson* to *require* that the trial judge in considering a *Batson* objection, make a "sincere and reasoned attempt to evaluate each stated reason as applied to

each challenged juror." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.)

Respondent relies on this Court's decision in *People v. Reynoso* (2003) 31 Cal. 4th 903, in assuming that the trial court properly considered all relevant information in the record, including the reasons given by the prosecutor, the juror questionnaires and the information given by the jurors during voir dire. (RB 41-42.) The preconditions for applying these presumptions as set forth in *Reynoso* were not met in this case.

> Where, as here, the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, *where the prosecutor's reasons for excusing the juror are neither contradicted by the record nor inherently implausible* (*Silva*, *supra*, 25 Cal.4th at p. 386, 106 Cal.Rptr.2d 93, 21 P.3d 769), and *where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner*, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson/Wheeler* motion denied, notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge.

(*Id.* at p. 929, italics added.)

Because appellant has demonstrated that the prosecutor's reasons were contradicted by the record, and that the strikes were made in a discriminatory manner, these presumptions do not apply. In addition, as discussed below, the trial court's evaluation of the prosecutor's reasons was inadequate.

The court must evaluate the record and consider each explanation within the context of the trial as a whole because "'[a]n invidious discriminatory purpose may often be inferred from the totality of the

relevant facts'" (*Hernandez v. New York, supra*, 500 U.S. at p. 363 (quoting *Washington v. Davis* (1976) 426 U.S. 229, 242).) The "totality of relevant facts" in this case includes the prosecutor's statements about his jury selection strategies and his explanations for striking African American jurors. They also include the characteristics of people he did not challenge. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be consider at *Batson's* third step." (*Miller-El v. Dretke, supra*, 545 U.S. at p. 241.)

Even though the strikes against Jurors D.W. and S.C. were not as clear-cut as Juror M.J., the pretextual reasons offered by the prosecutor against those jurors serve to undercut his credibility. (See *Kesser v. Cambra, supra*, 465 F.3d at p. 360 ("[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination"](internal quotation marks and citations omitted); *United States v. Chinchilla* (9th Cir.1989) 874 F.2d 695, 699 ["[T]he fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against [the] sufficiency [of the remaining two reasons]."]

The trial court initially expressed doubt about Juror M.J.'s exclusion, finding him to be "an absolutely neutral juror with regard to his questionnaire." (8 RT 1841-1842.) Nevertheless, after hearing the prosecutor's reasons for the strike, the court ruled as follows:

> However, it is true that probably a person who expresses no opinion whatsoever – and it is correct that his entire questionnaire he just kept writing over and over again no opinion. He just checked off boxes without ever writing anything down which probably other people have done as

> well. [¶] But he really did leave an absolute blank page with regard to opinions. [¶] However, that is not the most important thing. And I have to say this is the first time I've heard this one, and it does have a certain ring of logic to it with regard to the fact he has taken human life before in combat. [¶] And although – and if somebody can show me the DA has passed over somebody else who has done that, I might be convinced. [¶] But I do see the logic in why it may be a problem. Especially if that has been a problem before, I can kind of see why somebody that might have done that and then expresses no opinion – I can see it if the person had been in combat before and then made some comment about how they've adjusted to it, it might be different. [¶] But it is true after doing that he indicates no opinions at all about the effect on him or his ability to make a decision with regard to death or life in this case. So I have to say that that does tend to convince me. [¶] I think that that shows it is a nonprejudicial and neutral basis for exercising a challenge.

(8 RT 1842.)

By merely reiterating the prosecutor's stated reasons, and then finding they were race-neutral, without analyzing the other evidence in the record to determine whether those were in fact the prosecutor's genuine reasons, the court failed in its duty to determine if appellant had established purposeful discrimination. As appellant has shown, Juror M.J. was not without opinions and did not leave "an absolute blank page with regard to opinions," as the court erroneously stated. Moreover, as the court acknowledged, other jurors also had no opinions about certain topics. These non-African American jurors were permitted to sit on the jury.

The court misstated the record when it claimed that the juror "expresse[d] no opinion," about his ability to cope with having been in combat, which, had he done so, according to the court, might have made a difference in the court's decision. (8 RT 1842.) As set forth previously,

Juror M.J. responded to the question from Taylor's attorney asking whether or not his experience in the Marine Corps, having taken a human life, would make him hesitate to want to serve as a juror, and answered "No." (7 RT 1784.) Nor did the court consider the *prosecutor's* failure to ask Juror M.J. any questions at all about the subject he claimed as the basis for his strike.

When the proffered reasons are unsupported, logically or otherwise implausible, or apply equally to non-minority venirepersons whom the prosecutor has not challenged, "that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241; accord, e.g., *Purkett v. Elem* (1995) 514 U.S. 765, 768; *People v. Silva, supra*, 25 Cal.4th at p. 385; *Ali v. Hickman*, *supra*, 584 F.3d at pp. 1181-1191, and authorities cited therein; *Lewis v. Lewis* (2003) 321 F.3d 824, 830-831, and authorities cited therein.)

Respondent notes that the comparisons with non-minority jurors made on appeal were not made in the trial court. (RB 26.) However, as respondent acknowledges, this Court has held that "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*People v. Lenix* (2008) 44 Cal.4th 602, 622, citing *Synder v. Louisiana*, *supra*, 552 U.S. at p. 478 and *Miller-El*, *supra*, 545 U.S. 231.)

Reversal of appellant's conviction and death sentence are required, because the record clearly reveals the prosecution's purposeful discrimination against African American jurors, in violation of appellant's rights under the Equal Protection Clause of the federal Constitution (*Batson v. Kentucky*, *supra*, 476 U.S. 79), as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of

the community. (*People v. Wheeler*, *supra*, 22 Cal.3d 258.)

II.
THE TRIAL COURT'S ERRONEOUS EXCLUSION OF A LETTER FOUND IN TAYLOR'S JAIL CELL WRITTEN BY "L.T." AND STATING THAT HE WAS ACTING AS A HIT MAN WHEN HE SHOT RICHARDSON AND WILSON VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND PENALTY DETERMINATION

Appellant argues that the trial court erroneously excluded a letter found in co-defendant LaTroy Taylor's jail cell in which "L.T.," the author, stated he killed Richardson and Wilson as a "hit" on behalf of the "mob." (AOB 52-75.) Respondent's position – which is different than the one taken by the prosecutor in the trial court – is that the trial court's ruling excluding the document was correct because "appellant failed to lay a proper foundation for its authentication and admission." (RB 42.) As discussed in greater detail below, respondent's claim that appellant "said he received the document through the prosecutor's discovery, but offered no further evidence on the document's chain of custody or it's [sic] authentication," misstates the record. (RB 43.)

Respondent is simply wrong in its assertion that appellant failed to establish the chain of custody of the document. (RB 48.) According to a statement by trial counsel, made in the presence of the prosecutor, "it was found during a routine search of Mr. Taylor's cell. It was located in his cell by a members [sic] of the custodial staff at the county jail," and "it was copied to us by Mr. Himelblau [the prosecutor] as part of discovery . . . ." (8 RT 1865.) Having provided the document to the defense, with knowledge of where it was found, the prosecutor did not – and could not – question the chain of custody; respondent's attempt to do so on appeal should be rejected.

A. Respondent May Not Argue on Appeal a Position Different From

that Taken by the Prosecutor at Trial

In a pretrial motion, appellant moved to admit the document found in the cell of LaTroy Taylor in which the author, "L.T.," claimed he was a "hit man." (2 CT 412-416.) Taylor objected to admission of the evidence in a written motion and at the hearing on the motion. (2 Supp.CT 479-480; 8RT 1871-1872.) Referring to the writing, respondent states, "Because the People did not intend to offer the document, the prosecutor filed no written response to either appellant's motion or Taylor's opposition, and took no position on the matter at the hearing." (RB 43.) This version of the facts is incomplete. In response to the court's inquiry, the prosecutor stated he did not intend to introduce the document *at the guilt phase*, but said "[i]t's possible" he might introduce it at the penalty phase. (8 RT 1865.) The prosecutor went on to explain, "I mean, but – I – it's got limited value if – because your interpretation of this document, my interpretation of the document is the same, that it's – it's a – it's more of, you know, some rough notes for a rap song, or lyrics, or whatnot. Doesn't appear to be an actual letter directed at an individual." (8 RT 1865.)

At no time did the prosecutor challenge the fact that the document had been written by Taylor; on the contrary, he specifically held out the possibility of introducing it himself at the penalty phase. Moreover, in offering his interpretation of the document, the prosecutor took issue only with its characterization as a "letter directed to an individual," describing it instead as "rough notes for a rap song, or lyrics, or whatnot," but never argued that the document was not properly authenticated. (8 RT 1865.)

The doctrine of judicial estoppel prevents a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding. (*New Hampshire v. Maine* (2001)

532 U.S. 742, 749, and authorities cited therein; *Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037 ["Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts"].)

Under that doctrine, respondent is precluded from taking a contrary position on appeal from the one taken by the prosecutor at trial, i.e., that the document was not authenticated. In *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, the requirements for application of the doctrine of judicial estoppel were set forth: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Id.* at p. 183.)

Here, the prosecution has taken two inconsistent positions in judicial proceedings with regard to the authentication of the document. There is authority for applying judicial estoppel even if the litigant was unsuccessful in asserting the inconsistent position, if by his change of position he is playing "fast and loose" with the court. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 119, and authorities cited therein.) That is precisely what happened here: the prosecutor, who had no intention of using the letter in the guilt phase, allowed Taylor to challenge it, while holding out the possibility that the letter could be used at the penalty phase.

Even if respondent is not estopped from making the argument that the document was not properly authenticated, because the prosecution never objected to admission of the document in the trial court, the argument on appeal has been forfeited. Respondent's attempt to assert a position that differs from the one taken by the prosecutor at trial should not be permitted

by this Court.

B. The Document Was Properly Authenticated

Even if this Court determines that respondent is not estopped from arguing that the document was not properly authenticated and has not forfeited the opportunity to argue that, the argument must fail. Respondent erroneously claims "appellant failed to present any evidence authenticating the rap lyrics he sought to introduce as having been written by Taylor." (RB 46.)

As explained in appellant's opening brief, authenticity of a writing is a preliminary fact which is an ultimate jury question. (Evid. Code, § 403, subd. (a)(3).) The foundation of authentication is laid by the introduction of evidence sufficient to sustain a finding. (Evid. Code, § 1400; 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 7, p. 140.) "In other words, the preliminary fact of authenticity is first determined by the judge in ruling on admissibility, but is then subject to redetermination by the jury. [Citations.]" (2 Witkin, *supra*, at p. 140.)

The list of requirements for authentication respondent contends appellant failed to satisfy is legally incorrect and unsupported by the record. Respondent notes that Taylor's signature is not on the document, but the presence of his initials at the top of the document is deemed by respondent "too uncertain and speculative to establish that Taylor was the author of the document." (RB 46, 47.) Nor was it a prerequisite to authentication, as respondent suggests, to prove that "Taylor identified himself by his initials" or that the initials were "so unique as to apply only to him." (RB 47.) The fact remains they are his initials, and they were on a document found in his jail cell.

Similarly, the lack of handwriting analysis or evidence of Taylor's

fingerprints on the documents, or the failure to produce a witness to Taylor writing the document does not defeat a finding that the foundation of authentication was met, as respondent suggests. (RB 46-47.) In *People v. Gibson* (2001) 90 Cal.App.4th 371 (hereafter "*Gibson*"), authentication of manuscripts found in the defendant's hotel room and home was upheld on appeal despite the lack of evidence that the defendant actually wrote or typed the manuscripts, and the lack of any fingerprint evidence. (*Id.* at p. 382.)

Respondent attempts to distinguish the facts of the present case from those in *People v. Olguin* (1994) 31 Cal.App.4th 1355 (hereafter "*Olguin*"), cited by appellant, on the grounds that "there was no expert testimony offered interpreting the lyrics, and this was not a gang related case." (RB 48.)[4] Respondent misreads the holding in *Olguin* as it relates to the issue of the authentication.

The court in *Olguin* held that a document containing rap lyrics found during a search of defendant Mora's home three weeks after the killing was properly authenticated based on the following facts: "One song refers to its composer as "Vamp," Mora's gang moniker; the second song purports to be composed by "Franky," a nickname easily derived from 'Francisco' [Mora's first name]. They include references to Southside gang membership and could be interpreted as referring to disk-jockeying, a part-time employment of Mora." (*Olguin, supra*, 31 Cal.App.4th at p. 1372.) Rejecting defendant's argument that the documents were not authenticated, the court relied on "*these facts* pointing to Mora as their creator" and concluded,

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[4] Respondent is right that appellant incorrectly stated the evidence in *Olguin* was admitted against both defendants; the error has no effect on the holding of the case or its applicability to the issues presented. (RB 48, fn. 8.)

"[b]oth the content and location of these papers identified them as the work of Mora." (*Id.* at pp. 1372, 1373, italics added.) Gang membership was relevant to authentication only as a fact that tended to identify Mora as the author of the lyrics, therefore expert interpretation of the lyrics was not required, as respondent argues. In the present case, the content of the document – referring to L.T. as a hit man whose job it was to kill, and noting that the victim, Richardson, "lost his wife, damn near his kid" – and its location – in Taylor's jail cell – identify it as the work of Taylor.

Respondent's attempts to distinguish *Gibson, supra*, 90 Cal.App.4th 371, are also unavailing. In *Gibson*, the court relied on the following evidence as authenticating the manuscripts: references to the name of the author being one of the defendant's aliases, the evidence showed that she was operating as a madam and the manuscripts discussed the prostitution business, and the fact that defendant lived in both locations where the documents were found. (*Id.* at p. 383.) In the present case, the paper found in LaTroy Taylor's cell was written in the first person by L.T., and the contents clearly refer to Richardson, with whom Taylor was formerly friendly, as well as to many other aspects of the case, discussed in detail in the opening brief. (See AOB 59-60.) Respondent attempts to sidestep these similarities to *Olguin* by pointing out that there was no evidence Taylor went by the alias "Papa," the aka next to the initials L.T. on the document. (RB 49.) Respondent again ignores the presence of Taylor's initials on the document. Moreover, respondent cites no authority, and none exists, that requires the explanation of all aspects of a writing before the jury can consider the evidence.

Respondent similarly ignores the evidence in the record that refutes its contention that "there was no connection between the gang activity

described in the writing and the case being tried. There was no reference to Richardson or Wilson." (RB 49.) While it is true that the victims were not identified by name in the document, the specific circumstances of the shooting were clearly referenced – the object of the "hit" "lost his wife" and "damn near his kid," just as Richardson did. "The court should exclude the proffered evidence only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 466, citing 3 Witkin, Cal.Evidence (3d ed. 1986) § 1716, p. 1675.) Appellant's showing more than met the threshold for submission of the evidence to the jury.

C. The Document Was Relevant

In determining the relevance of the L.T. document, the issue for the trial court was whether the writing "had any tendency in reason to prove" that Taylor was the shooter. As appellant argues, it is difficult to imagine how a writing found in the cell of one of the codefendants confessing to being a hit man and carrying out his "duty . . to kill," is *not* relevant to prove the identity of the shooter. In response, respondent devotes two paragraphs to defending the trial court's ruling that the document was inadmissible because there was insufficient evidence to show "that it actually is related to the facts of this case." (8 RT 1873; RB 49-50.) Respondent attempts – unsuccessfully – to distinguish two of the cases cited by appellant, and ignores the others.[5]

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[5] Respondent fails to address appellant's discussion of *People v. Kraft* (2000) 23 Cal.4th 978, in which this Court upheld the admission of a handwritten document which the prosecution claimed was a coded list of the defendant's victims, a so-called "death list." (See AOB 58-59.) Respondent also does not mention *People v. Von Villas* (1992) 11 Cal.App.4th 175, 232-233, in which the Court of Appeal found admissible

People v. Freeman (1994) 8 Cal.4th 450 and *People v. De La Plane* (1979) 88 Cal.App.3d 223, both involved the admission over relevance objections of physical evidence tying the defendant to the crimes. In *Freeman*, it was the fact that the defendant possessed a plastic bag similar to one used by the shooter that tended to show that he was the shooter, even if it could not be proved definitively that it was the *same* plastic bag. This Court noted that while the inference may be weak, that does not make the evidence irrelevant. (*Freeman*, *supra*, 8 Cal.4th at p. 491.) Similarly, in *De La Plane*, the defendant's possession of a weapon that *could* have caused the victim's wounds was relevant to show that he committed the crime, even without definitive proof that it was the weapon actually used. (*De La Plane*, *supra*, 88 Cal.App.3d at p. 239.) Respondent misses the point when it attempts to distinguish these cases by stating, "The lyric stating that L.T. was a hit man for the mob who was just doing his job and that it was nothing personal is not physical evidence regarding how the crime was committed." (RB 49.) On the issue of the relevance of the proffered evidence, in the same way that the plastic bag in *Freeman* and the axe handle in *De La Plane* *could have* been related to the crimes – and therefore relevant to the prosecution theory of the defendants' culpability – the writing found in Taylor's cell *could have* referred to Taylor's role as the shooter – and was therefore relevant to appellant's defense. The question for the trial court was whether the evidence was relevant and otherwise admissible. As appellant has demonstrated, it was both.

Appellant's defense was that Taylor was the shooter, and appellant

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under Evidence Code section 1220 writings that were far more cryptic than the L.T. document. (AOB 62.)

had no knowledge that Taylor intended to rob and shoot Richardson and Wilson. Three times Richardson told law enforcement that Taylor shot him before he changed his story. Richardson told the 911 dispatcher with whom he first spoke that Taylor shot him, just as he did the first officer at the scene. Officer Gauthreaux testified he asked Richardson, who was alert and oriented, who shot him and Richardson said LaTroy shot both he and his girlfriend. (12 RT 3002, 3004.) It was not until he spoke to Detective Anderson, that he said "Angelo" shot him and Taylor shot Wilson.[6] (12 RT 2980, 2986.) This evidence alone was sufficient by itself to make relevant evidence that Taylor took credit for the shootings.

Respondent argues the evidence was not relevant because "[t]here was no evidence offered in the present case establishing that the shooting was gang related." (RB 49.) While it is true that the *prosecution* offered no evidence of a gang-related motive for the shooting, that is not a valid basis for excluding evidence offered in support of appellant's defense. By the court's reasoning, echoed by respondent, the relevance of evidence is determined solely by its significance to the prosecution's theory of the case. Such a position is contrary to the law.

As noted in the opening brief, but not addressed by respondent, in *Holmes v. South Carolina* (2006) 547 U.S. 319, the Supreme Court held that an evidence rule that limited the defendant's ability to introduce evidence of third-party guilt if the prosecution had introduced forensic evidence that, if

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[6] In the opening brief, appellant erroneously stated, "Richardson named [Taylor] as the person who shot him the first three times he was asked." (AOB 62.) As noted above, he said Taylor shot him to the dispatcher and Officer Gauthreaux; he told Detective Anderson Taylor shot Wilson and appellant shot him.

believed, strongly supported the defendant's guilt, denied defendant a fair trial. The problem with this approach, according to the high court "is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." (*Id.* at p. 331.) While the court's action in the present case – excluding defense evidence because it was not consistent with the prosecutor's theory – was not made pursuant to a rule of evidence, it had precisely the same effect. As such, it violated appellant's right to have "a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-609.)

Further, as argued in the opening brief, the trial court's ruling failed to take into account the reason why the document was not used by the prosecutor against Taylor: not because the evidence lacked reliability or relevance, but rather because it was contrary to the trial strategy adopted by the prosecutor that appellant, not Taylor, was the shooter. The opening brief set out at length how evidence that Taylor was acting as a hit man made sense of a crime that the prosecutor and Taylor claimed was inexplicable, but respondent makes no attempt to address appellant's argument. (AOB 69-74.)

D. Exclusion of the Evidence Violated Appellant's Federal Constitutional Rights

The erroneous exclusion of evidence that Taylor admitted he was the shooter violated appellant's federal constitutional rights, and is reviewed under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24.

Respondent contends the claim that the evidence was wrongly excluded is reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.) (RB 50.) Under that standard, respondent asserts, it is not

reasonably probable that appellant would have obtained a more favorable result from admission of the document. This is so, according to respondent, because the document "was largely illegible and meaningless" and its content did not identify any of the parties in the case, or any facts related to the case." (RB 50.) The first point is belied by the extended discussion between counsel and the court, during which the document was read and interpreted – just as it could have been by the jurors. The second point has been previously addressed. Respondent also argues the jury would not have doubted appellant's guilt based on Richardson's trial testimony that it was appellant alone who shot him and Wilson. This argument ignores, of course, Richardson's prior identifications of Taylor as the shooter.

Respondent claims any error did not violate appellant's constitutional rights (RB 50-51), notwithstanding the extended argument and authorities in the opening brief (AOB 64-75). This Court should treat respondent's failure to address harmless error under the appropriate legal test – *Chapman v. California, supra*, 386 U.S. at p. 24 – as a concession that it cannot satisfy that test. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [People impliedly conceded point made by appellant by failing to dispute it in briefing or at oral argument]; *People v. Isaac* (2014) 224 Cal.App.4th 143, 147, fn. 4.) Moreover, by failing to argue harmlessness under the *Chapman* standard in its briefing, respondent has forfeited the argument. (See, e.g., *United States v. Giovannetti* (7th Cir. 1991) 928 F.2d 225, 226-227; *United States v. Gonzales-Flores* (9th Cir. 2005) 418 F.3d 1093, 1100.)

The erroneous exclusion of evidence violated appellant's state and federal constitutional rights and requires reversal of the judgment and sentence.

III.

THE TRIAL COURT'S EVIDENTIARY RULINGS RESULTED IN 1) THE ERRONEOUS ADMISSION OF STATEMENTS BY TAYLOR IMPLICATING APPELLANT IN THE SHOOTINGS WHILE EXONERATING HIMSELF AND 2) THE IMPERMISSIBLE EXCLUSION OF A STATEMENT BY APPELLANT THAT CREATED THE MISLEADING IMPRESSION THAT APPELLANT HAD CONFESSED TO THE KILLINGS AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE AND TO A RELIABLE PENALTY DETERMINATION AND REQUIRE REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

Appellant argues that the trial court erred in two evidentiary rulings, both of which involved the admission of portions of writings and conversations under Evidence Code section 356. First, the court permitted the prosecution to introduce portions of a letter written by Taylor to Tino Yarborough, a witness who testified on appellant's behalf, in which Taylor blamed appellant for the shooting and denied his own involvement. Second, the court refused to allow appellant to present evidence that he denied the shooting after a prosecution witness testified that appellant made an admission to him. (AOB 76-105.) Both rulings were erroneous and prejudicial and require reversal of the judgment and sentence.

Respondent defends both rulings as consistent with Evidence Code section 356. (RB 51-62.)

A. The Trial Court Erred in Admitting the Entire Letter From Taylor to Yarborough

After appellant elicited testimony from his witness, Tino Yarborough, that he felt threatened by a portion of a letter he received from Taylor while he was in custody, the trial court erroneously admitted other portions of the

letter in which Taylor stated he was not responsible for shooting Ricky Richardson and Koi Wilson, and blamed appellant. Because Taylor did not testify, the court's ruling allowed Taylor to present self-serving statements without being subject to cross-examination, and resulted in the admission of evidence highly prejudicial to appellant.

Respondent argues that the rest of the letter was admissible to counter the "misleading impression that Taylor had indeed threatened Yarborough." (RB 58.) Appellant does not disagree that Taylor was entitled to challenge Yarborough's testimony that he perceived statements in a letter from Taylor as a threat not to testify. However, the prosecutor was able to effectively cross-examine Yarborough about his perception of the statements as a threat – indeed, he got Yarborough to equivocate as to whether the language in the letter was truly threatening without having to admit the entire letter. Indeed, respondent cites the colloquy during which the prosecutor and Yarborough debate the threatening nature of the statements from which the jurors could evaluate the credibility of Yarborough's claim (RB 55.)

The only relevant portion of the letter, and the only portion referred to by Yarborough are the statements "don't go up there lying. If you do, I'll feel sorry for you little cousin." (12 RT 3154.) Yarborough testified that he interpreted the letter as Taylor telling him, "his [Taylor's] truth is his side." (12 RT 3155.) Respondent fails to explain how "when the entire letter is considered the characterization of [the statements cited by Yarborough] as a threat became more ambiguous and subject to interpretation." (RB 58.)

As stated by the court in *People v. Gambos* (1970) 5 Cal.App.3d 187,

> By its terms section 356 allows further inquiry into otherwise inadmissible matter only, (1) where it relates to the same subject, and (2) it is necessary to make the already introduced conversation understood. Thus it has been held: the court must

> exclude such additional evidence if not relevant to the conversation already in evidence [citations]; the new evidence must shed light on that which is already admitted [citation]; and it must be necessary to make the earlier conversation understood or to explain it [citations.]

(*Id.* at p. 193.)

The "subject" was Taylor's warning to Yarborough not to lie when he testified, otherwise "I'll feel sorry for you." Yarborough testified he interpreted that to mean that if he did not testify to Taylor's "version of the truth," there would be consequences. The remainder of the note was admissible under Evidence Code section 356 only if it contained information that dispelled the inference that Taylor was threatening Yarborough for testifying. Beyond the assertion that the remainder of the letter put "the alleged threat in context" (RB 58), respondent fails to explain how Taylor's allegation that appellant, and not he, was the shooter shed light on the subject of the warning to Yarborough, or how it was necessary to make the warning understood or to explain it.

As argued in the opening brief, but not addressed by respondent, under this reasoning, a non-testifying defendant could send a threatening message to a witness and include exculpatory statements, confident that evidence of the threat would be offered, thus leading the way to admission of the exculpatory statements, not subject to cross-examination. Such an interpretation would clearly violate the intention of the statute. (See, e.g., *People v. Gambos, supra*, 5 Cal.App.3d at p. 193 [statute does not allow for introduction of "mass of irrelevant and incompetent testimony"].)

In addition to its failure to make the case why the remainder of the letter was admissible under Evidence Code section 356, respondent also fails to address any of the case law cited by appellant that limits the admissibility

of evidence under that section. For example, respondent makes no mention of appellant's discussion of *People v. Lewis* (2008) 43 Cal.4th 415 (see AOB 90-91), instead asserting that appellant has made a "belated *Aranda-Bruton* error claim." (RB 59.) As noted in the opening brief, this Court held in *Lewis* that "limits on the scope of evidence permitted under Evidence Code section 356 may be proper when, as here, inquiring into the 'whole on the same subject' would violate a codefendant's rights under *Aranda* or *Bruton*." (*Id.* at p. 458, citing *People v. Ervin* (2000) 22 Cal.4th 48, 87.) Moreover, appellant's claim is not "belated" as respondent argues. Appellant's counsel objected to admission of the portion of the letter "where Mr. Taylor is allowed to testify, essentially, that he didn't do it." (12 RT 3151.)

Respondent makes a perfunctory argument that admission of Taylor's out-of-court statements implicating appellant did not violate *Aranda*, citing *People v. Vines* (2011) 51 Cal.4th 830, 862, but again fails completely to address appellant's argument in the opening brief that the reasoning of *Vines* does not apply to this case. (AOB 90-91.)

The trial court's ruling, which was essentially automatic – the court told appellant's counsel "when you introduced it you know the whole thing would come in, if he was going to put part of it in" (12 RT 3152) – was an abuse of discretion. "The rule is not applied mechanically to permit the whole of a transaction to come in without regard to its competency or relevancy . . . ." (Witkin, Cal.Evidence (2d ed.1996) § 320, p. 283.)

As appellant has demonstrated, the remainder of the letter was irrelevant and highly prejudicial to appellant.

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B. The Trial Court Erred in Excluding Evidence of the Remainder of the Conversation Between Rhodes and Anderson in Which Appellant Denied Knowledge that Taylor was Going to Shoot the Victims

During Taylor's case Detective Anderson testified that he interviewed Larry Rhodes, who was in custody at the same facility as appellant before the trial began. Anderson testified that Rhodes told him that appellant admitted shooting Ricky Richardson. In the course of the same conversation, however, Rhodes showed Anderson a letter from appellant in which he admitted he was present at the time of the shooting, but claimed that he had no idea that Taylor was going to shoot the victims. The court denied appellant's request to admit the remainder of a conversation, ruling that it was self-serving hearsay by appellant.

Without elaboration or citation to authority, respondent contends the trial court properly excluded evidence about the contents of the letter Rhodes showed Detective Anderson on the grounds that it was inadmissible hearsay. (RB 59-60 ["The note was hearsay and Detective Anderson's testimony about the content of the note would have been a second level of hearsay"].) Appellant addressed this argument in the opening brief, but respondent has made no response. (See AOB 98.) As appellant noted, if a party's oral admissions have been introduced into evidence, he may show other portions of the conversation, even if they are self serving, which "have some bearing upon, or connection with, the admission . . . in evidence." (*People v. Arias* (1996) 13 Cal.4th 92, 156, citing *People v. Breaux* (1991) 1 Cal.4th 281, 302; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174.) In effect, Evidence Code section 356 operates as an exception to the hearsay rule. (See 1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 2008) Admissions and Confessions, §§ 3.4, 3.6, pp. 84, 95-86; see also *People v. Williams*

(1975) 13 Cal.3d 559, 565 [suggesting that hearsay rules do not apply to statements admitted under section 356].)

In addition, remarkably, respondent argues that evidence of the contents of the letter was inadmissible because "[t]here is no evidence in the record regarding the contents of the note, only appellant's counsel's representation that the note contained appellant's denial of having shot Richardson." (RB 60, citing 14 RT 3705.) This is simply incorrect. As noted in the opening brief, evidence of what the letter said came from Detective Anderson's report, which was summarized by appellant's counsel. According to counsel, in the note appellant "admits that he was present when the shooting occurred, but he had no idea that LaTroy was going to shoot. He apologized to Larry, as well as Ricky's family. He stated that he would not do such a thing because he loves them as family." (14 RT 3719.) Detective Anderson's testimony that he memorialized the content of the letter in his report and the recitation of the report by appellant's counsel were unchallenged by any of the parties. (14 RT 3718- 3719.) Detective Anderson's stated reason for not keeping the note or making a copy of it was because he "read it and learned the information from it, and that was that." (14 RT 3701; see also 14 RT 3704 "I didn't think it was an issue. I read it, exactly what it said, what was in it"].) The prosecutor agreed with the court's statement: "Detective Anderson has just testified he knew what the letter said." (14 RT 3718-3719.) Respondent's specious assertion that the record fails to reflect the contents of the letter should be rejected.

Respondent also argues that the letter was inadmissible because "[t]here is nothing in the record to support appellant's claim that his statement that he shot Richardson was part of a continuing conversation that was memorialized in the note." (RB 60.) If respondent's argument is that in

order to be admissible, the letter had to be part of *the same conversation between appellant and Rhodes*, that argument is contrary to the plain language of the statute and well-settled case law. Evidence Code section 356 allows inquiry into the whole of an act, declaration, conversation, or writing, when part has been placed in evidence by one party, but it also provides, "when a detached act, declaration, conversation, or writing is given in evidence, *any other* act, declaration, conversation or writing which is necessary to make it understood may also be given in evidence." (Italics added.)

That is not appellant's argument, however. Appellant argues that because Taylor introduced part of the *conversation between Rhodes and Detective Anderson* concerning appellant's alleged admission to shooting Ricky Richardson, appellant was entitled to introduce the remainder of the conversation, which included the letter from appellant that Rhodes showed Detective Anderson. (See AOB 97, 100.) Respondent does not appear to address this argument, nor any of the other arguments on the admissibility of the letter presented in the opening brief.

In fact, in its two-paragraph response to appellant's argument, respondent neither offers any legal authority for its position that the evidence was inadmissible, nor addresses any of appellant's authority. As noted in the opening brief, in *People v. Douglas* (1991) 234 Cal.App.3d 273, 285, the Court of Appeal held that the redaction of a co-defendant's statement at a joint trial created a misleading impression that the defendant admitted using a knife against the victim when, in fact, he repeatedly denied using the knife. The trial court sustained the co-defendant's hearsay objections when defendant attempted to elicit additional portions of his statements. (*Id.* at p. 284.) The Court of Appeal reversed defendant's conviction, finding that the

trial court's rulings under section 356 were "clearly erroneous." (*Id.* at p. 285.)

Respondent also fails to address the fact that it was Taylor's attorney who first brought up the issue of the letter during his examination of Detective Anderson and that appellant was simply trying to clear up any possible false impression created by the lack of information about what appellant actually said in the letter. (See AOB 100.) Appellant also argued in the opening brief, that if the letter itself was not admissible under Evidence Code section 356, the trial court erred in rejecting the alternatives proposed by counsel in order to dispel the misleading impression created by his testimony.

The trial court rejected counsel's request to ask Detective Anderson whether in the letter appellant admitted shooting Richardson. The question did not call for an answer beyond yes or no, and was not an attempt to elicit information whether appellant *denied* shooting Richardson, simply whether he admitted it. A negative response would have answered the question the jury undoubtedly had: did appellant say the same thing in the letter that he allegedly said to Larry Rhodes. Respondent makes no effort to defend the trial court's ruling; indeed, there is no viable response.

Nor does respondent reprise the argument made by the prosecutor that the letter was properly authenticated, addressed by appellant in the opening brief. (AOB 103; 14 RT 3719, 3722, 3723.) Respondent's silence must be considered a concession on this point.

C. The Court's Errors Were Prejudicial

As to both of the trial court's rulings, respondent accuses appellant of attempting to "inflate garden-variety evidentiary questions into constitutional ones" and argues that the correct standard of review is that of *People v.*

Watson, *supra*, 46 Cal.2d 818. (RB 60.) Under this standard, respondent claims it is not reasonably probabl that a result more favorable to appellant would have been reached in the absence of the error in admitting the entire Yarborough letter because the trial court's limiting instruction, which the jurors are presumed to have followed, informed them that the letter was not admitted for the truth. (*Ibid.*)

Even if the error in introducing the whole letter to Yarborough were to be reviewed under *Chapman v. California*, *supra*, 386 U.S. 18, respondent argues it is harmless beyond a reasonable doubt because "the properly admitted evidence is overwhelming and incriminating extrajudicial statement is merely cumulative of other direct evidence." (RB 61, quoting *People v. Anderson* (1987) 43 Cal.3d 1104, 1129.) Respondent's prejudice analysis ignores not only facts in the record, but also the effect of the trial court's rulings on other evidentiary issues.

Respondent cites Richardson's trial testimony that appellant was the shooter and argues that his explanation for why he named Taylor as the shooter to the first three people he spoke to was "plausible." (RB 61.) Further, respondent claims the only evidence of motive for the shootings was robbery, not that they were gang-related. (*Ibid.*) This argument depends entirely on the propriety of the trial court's exclusion of the rap lyrics found in Taylor's cell in which L.T. admitted that he committed the shootings as a hit man. (See Argument I, *supra*.) If the jurors had heard the excluded evidence, each of respondent's points would be defeated. Similarly, respondent's assessment of appellant's trial testimony as "inconsistent" and "implausible" must also be viewed in light of excluded evidence of the rap lyrics.

Respondent's only argument that the court's exclusion of the letter to

Rhodes was harmless beyond a reasonable doubt is that because the jury knew that appellant denied he was involved in the crimes, "admission of a letter in which appellant denied his involvement in the shootings, simply would not have mattered." (RB 62.) Respondent omits the critical aspect of the court's ruling, however, which was that it left unrebutted Detective Anderson's testimony that Rhodes told him appellant admitting shooting Richardson. Respondent has failed to demonstrate the harmlessness of the trial court's evidentiary errors, and reversal is required.

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IV.

THE TRIAL COURT'S ERROR ALLOWING TAYLOR'S COUNSEL TO QUESTION APPELLANT ABOUT GANG AFFILIATION VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL AND RELIABLE PENALTY DETERMINATION AND REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

Appellant argues the trial court erred in allowing Taylor's attorney to cross-examine him about his affiliation with the Black Guerilla Family resulting in the admission of irrelevant and highly prejudicial evidence in violation of his right to a fair trial. (AOB 106-113.) Respondent claims the cross-examination was proper rebuttal because appellant opened the door by his direct testimony that he was afraid of Taylor because of his gang connections. (RB 62-66.) Respondent fails to establish the relevance of the gang evidence, to demonstrate that its probative value outweighed the prejudicial effect, and fails to adequately demonstrate that the court's error was harmless.

Respondent relies on the decision in *People v. Jordan* (2003) 108 Cal.App.4th 349 in support of its argument. *Jordan* is distinguishable. The defendant there took the position that it was other gang members who were selling drugs in the stairwell in which drugs were found in his presence. The prosecution was then entitled to show that the defendant himself was a gang member, thus casting doubt on his claim that the drugs found in the stairwell did not belong to him. In the present case, appellant offered evidence of Taylor's gang affiliation to explain his own actions – his fear of Taylor and the reason why he left town and went to Seattle.

Respondent contends once appellant offered evidence of Taylor's gang affiliations, "it was proper for Taylor to offer, and for the trial court to

allow, rebuttal evidence that appellant too had ties to gangs . . . Taylor's rebuttal evidence merely lessened the prejudicial impact of appellant's testimony." (RB 66.) Respondent fails to explain the relevance of appellant's 20-year-old former affiliation with a prison gang to the question of the legitimacy of his claim that he was afraid of threats made by Taylor's fellow gang members. Nor does respondent attempt to explain *why* Taylor was entitled to use irrelevant and highly prejudicial gang evidence to "lessen[] the prejudicial impact of appellant's testimony."

The manner in which Taylor's attorney introduced the evidence further belies the legitimacy of its admission as rebuttal evidence. Unlike the prosecutor in *Jordan* who sought a ruling from the court reversing its initial position that gang evidence was not admissible, Taylor's attorney simply barreled ahead with her questions on cross-examination:

> Q: [Ms. Fialkowski] . . . Now, is that because they were members of what you thought were [sic] a gang?
>
> A: [Appellant] I didn't thought [sic] they were a gang. I knew they were gang members. They carry guns. I don't.
>
> Q: Okay. Now, you knew they were gang members because you were a long-time member of the Black Guerrilla Family, right?
>
> A: About 20 some years ago, right.
>
> Q: Okay. So, that was – you were a gang member, and so you –
>
> Mr. Panerio: Your Honor, I'm going to object at this point. We need to approach the bench.
>
> The Court: Overrule. [sic]
>
> Mr. Panerio: I am objecting. It will be a continuing objection, Your Honor.

The Court: Okay. Overrule. [sic].

Q: [Ms. Fialkowski] You were a gang member at one point, but you weren't any longer, so that's why you were scared of these kids?

A: That's not the reason why I was scared of them. I was scared of them because of what they told me.

(14 RT 3541-3542.)

The trial court failed to fulfill its duty to "carefully scrutinize gang-related evidence before admitting it" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224), instead simply overruling appellant's objection without considering the lack of relevance or the prejudicial impact of the evidence. The court abused its discretion.

Respondent glosses over the prejudicial impact of the evidence, claiming "there is no evidence in the record from which the jury could infer that appellant's gang was any worse than Taylor's." (RB 66.) Respondent fails to address the authorities cited in the opening brief that discuss the common knowledge of the nature of prison-gang culture as "violent and murderous." (*Johnson v. California* (2005) 543 U.S. 499, 502; *In re Furnace* (2010) 185 Cal.App.4th 649, 656-657; *Dawson v. Delaware* (1992) 503 U.S. 159, 171, disn. opn. of Thomas, J. [noting assumption that jurors know the nature of a prison gang]; AOB 110-111.)

Finally, respondent argues that because the questioning of appellant on this issue was brief, it was not prejudicial under *People v. Watson*, *supra*, 46 Cal.2d at p. 836. (RB 66.) Respondent's cursory response fails to address appellant's argument that the erroneous admission of the gang evidence violated his federal constitutional rights to a fair trial. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70;AOB 110-112.) This Court should treat respondent's failure to address harmless error under the appropriate legal test

as a concession that it cannot satisfy that test. (See *People v. Bouzas*, *supra*, 53 Cal.3d at p. 480 [People impliedly conceded point made by appellant by failing to dispute it in briefing or at oral argument]; *People v. Isaac*, *supra*, 224 Cal.App.4th at p. 147, fn. 4.) Moreover, by failing to argue harmlessness under the *Chapman* standard in its briefing, respondent has forfeited the argument. (See, e.g., *United States v. Giovannetti*, *supra*, 928 F.2d 225, 226-227; *United States v. Gonzales-Flores*, *supra*, 418 F.3d at p. 1100.)

The erroneous admission of evidence of appellant's affiliation with a prison gang resulted in prejudice that requires reversal of the convictions and penalty determination.

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V.

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

Appellant asserts that because the information in his case charged him with only second degree murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 114-120.)

Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 67-70.) 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 the instructions given in this case were erroneous.

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VI.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON THE THEORY OF FIRST DEGREE MURDER

Appellant asserts that the trial court erred in failing to require the jury to agree unanimously on the theory of first degree murder. (AOB 121-131.)

Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 70-72.) 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 the instructions given in this case were erroneous.

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VII.

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND PREJUDICIAL PRIOR-CRIMES VICTIM IMPACT EVIDENCE

Appellant argues the admission of highly emotional and irrelevant victim-impact evidence by the mother of a victim of a previous crime at the penalty phase was prejudicial error. (AOB 132-141.) Respondent contends the evidence was admissible under Penal Code section 190.3, subdivision (b.) (RB 72-75.)

As appellant acknowledged in the opening brief, this Court has previously rejected the argument that victim impact evidence should not be permitted under subdivision (b) of section 190.3, but urges the Court to reconsider this holding. (See, e.g., *People v. Price* (1991) 1 Cal.4th 324, 479; *People v. Clark* (1990) 50 Cal.3d 583, 625-626; *People v. Virgil* (2011) 51 Cal.4th 1210, 1276; *People v. Jones* (2012) 54 Cal.4th 1, 72-73.)

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VIII.

EVIDENCE OF APPELLANT'S PAROLE VIOLATIONS SHOULD HAVE BEEN EXCLUDED AS IRRELEVANT AND BECAUSE ITS ADMISSION ALLOWED THE JURORS TO CONSIDER IN THEIR PENALTY DETERMINATION EVIDENCE THAT WAS NOT ADMISSIBLE AS AGGRAVATION AND WHICH THEY WERE NOT REQUIRED TO FIND TRUE BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S STATE AND FEDERAL RIGHTS

Appellant argues he was prejudiced by the trial court's ruling which allowed the prosecutor to introduce at the penalty phase irrelevant and highly prejudicial evidence showing that appellant's parole had been violated on multiple occasions. Appellant argues that the evidence was inadmissible because it was irrelevant, the probative value of evidence regarding his parole status was outweighed by its prejudicial effect, and it was inadmissible as non-statutory aggravating evidence. (AOB 142-148.) Respondent contends the evidence was relevant to show when appellant was out of custody, making it possible for him to commit additional acts of violence, and the evidence was proper rebuttal evidence demonstrating the bias of defense witness Gwen Taylor. (RB 75-79.)

Respondent initially argues appellant has forfeited all objections to admission of the evidence except relevance, based on a lack of objection at trial. (RB 77.) As respondent acknowledges, however, the trial court understood appellant's objection to include an assessment of prejudice by its ruling that the exhibit did not contain "anything particularly prejudicial." (17 RT 4465-4466.) As this Court has held, "As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial

court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal. 4th 93, 117; see also *People v. Partida* (2005) 37 Cal.4th 428, 439.) This Court should review appellant's claim on the merits.

A. Evidence of Appellant's Parole Violations Was Irrelevant and Inadmissible

Respondent lists without discussion various subjects to which it claims the evidence was relevant. (RB 78.) Appellant addressed these contentions in the opening brief, but respondent makes no response to appellant's arguments. (AOB 145-146.)

Respondent echoes the prosecutor's claim that the parole documents tended to impeach defense witness Gwen Taylor's credibility regarding how old she was when she had a "romantic" relationship with appellant. (RB 78, citing 17 RT 4504 4524.) As noted in the opening brief, however, the record belies the factual basis for this assertion. The prosecutor's assumption that Taylor was lying in order to hide the fact that appellant had a sexual relationship with her when she was a minor is not supported by the record. While it is true that appellant was in custody from the time of his arrest in 1980 until he was first paroled in 1987, that fact does not preclude the possibility that he and Taylor had a "romantic" or even an "intimate" relationship during that time. The prosecutor never asked Taylor whether the relationship was sexual or physically intimate. Nor did the prosecutor make any attempt to clarify exactly how old Taylor was when the relationship began.

Similarly, respondent claims the parole evidence was relevant to contradict appellant's claim that his stepfather Lundy Perry was a negative influence because the events occurred at a time when appellant was in custody. (RB 78.) As stated in the opening brief, appellant did not present

evidence or argue that he was under Lundy's sphere of influence during the period he was in prison, therefore, there was no evidence for the prosecution to rebut with the parole records. (See, e.g., 17 RT 4398 [testimony of appellant's mother that he followed Perry around when he 14 years old]; AOB 146.)

Respondent claims that the evidence was admissible to "show he had the opportunity to inflict violence upon Raven Lee and Loretta Beck." (RB 78.) Because there was no dispute at trial about whether appellant was out of custody at the time the events with Lee and Beck occurred, the parole records showing he "was free," were wholly irrelevant, and respondent offers no further explanation for its assertion. Additionally, respondent's assumptions that appellant could not be affected by his mother's use of cocaine, or be a devoted father while he was in custody are unfounded and, again, unexplained. (RB 78.)

In the absence of any showing that the parole records were relevant, the trial court must be deemed to have abused its discretion in allowing their admission.

B. The Evidence Was Prejudicial

In response to appellant's argument that the jury's penalty determination was not properly confined to consideration of aggravating evidence under the statutory factors and instances of violent criminal activity that were proved beyond a reasonable doubt, respondent answers a) the prosecutor did not mention appellant's parole violations in his closing argument and b) appellant's supposition that the jurors were concerned about appellant's parole status was speculative. (RB 79.) Respondent ignores the record, however. The prosecutor was well aware the jurors had specifically asked about appellant's parole status during the guilt phase, and he exploited

their concern by introducing evidence of appellant's repeated parole violations. For this reason, the state cannot show that the error was harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. at p. 24. Similarly, the error cannot be deemed harmless under the standard for state-law error at the penalty phase. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

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IX.

THE TRIAL COURT'S REFUSAL TO CONDUCT A PHILLIPS HEARING BEFORE ADMITTING EVIDENCE OF A VIOLENT CRIME WHICH THE PROSECUTION WAS UNABLE TO PROVE WAS COMMITTED BY APPELLANT RESULTED IN THE ADMISSION OF HIGHLY PREJUDICIAL EVIDENCE AT THE PENALTY PHASE OF TRIAL

Appellant argues the trial court erred in failing to conduct a hearing pursuant to *People v. Phillips* (1985) 41 Cal.3d 29, before allowing the prosecutor to present testimony from Rita Marie Moppins. Ms. Moppins testified she and her brother were the victims of a violent crime, but she was unable to offer evidence that appellant was responsible. (AOB 149-154.) Respondent contends appellant never requested a *Phillips* hearing, and therefore the claim is waived. Further, if such a request was made, the trial court's decision not to conduct a hearing was within its discretion, and any error was cured by the trial court's instruction to the jury to disregard the witness's testimony. (RB 79-84.)

Trial counsel argued that for "any incident where there's no conviction . . . we would like an offer of proof before we get into those. Because the Court knows he [the prosecutor] has to prove these beyond a reasonable doubt. And there's a problem of prejudice there if you get halfway through it." (15 RT 4075.) Respondent argues that trial counsel's request for an offer of proof as to any factor (b) evidence the prosecutor intended to introduce was not sufficient to put the court on notice that the defense was asking the court to ensure that the prosecution could prove its allegations, but fails to explain *how* counsel's request differs from a request for a *Phillips* hearing. (RB 81.)

Respondent argues that any error was harmless in light of the court's

instruction to the jury to disregard Moppins testimony. (RT 83.) As appellant argues in the opening brief, however, there is a reasonable likelihood that the jurors considered Moppins' refusal to name appellant as her assailant in light of the testimony of other penalty phase witnesses that appellant had threatened their families. (See AOB 153.) Respondent argues the court had no duty to instruct the jurors not to speculate about the reason for striking Moppins' testimony, and trial counsel made no request, so the issue is forfeited. Having failed to prevent the jury from hearing inadmissible and highly prejudicial evidence, the trial court had a duty to take all necessary steps to insure that further damage was not inflicted, especially in light of the evidence presented by other prosecution witnesses that appellant had threatened them not to testify.

Respondent has not met its burden of showing that there is no "reasonable possibility that the error affected the penalty verdict." (*People v. Brown, supra*, 46 Cal.3d at pp. 447-448; *Chapman v. California, supra,* 386 U.S. at p. 24.)

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X.

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

Appellant has argued that the California death penalty statute is unconstitutional in several respects, both on its face and as applied in this case. Appellant acknowledges this Court's decisions rejecting these claims but asked that they be reconsidered. (AOB 155-171.) Respondent cites decisions of this Court that have rejected these claims. (RB 84-92.) The issue is joined and no further briefing is necessary unless this Court requests further briefing to reconsider these claims. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 [standard claims challenging death penalty considered fairly presented to the Court].)

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XI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Appellant believes that his trial was infected with numerous errors that deprived him of the type of fair and impartial trial demanded by both state and federal law. However, cognizant of the fact that this Court may find any individual error harmless in and of itself, it is appellant's belief that all of the errors must be considered as they relate to each other and the overall goal of according him a fair trial. When that view is taken, he believes that the cumulative effect of these errors warrants reversal of his convictions and death judgment. (AOB 172-173.)

Respondent contends there were no errors, and therefore "nothing to cumulate." (RB 93, quoting *People v. Duff* (2014) 58 Cal.4th 527, 568.) Further, respondent argues, if this Court finds errors, none were sufficiently prejudicial to require reversal of the convictions or sentence. As such, appellant submits the issues are joined and no further argument is warranted.

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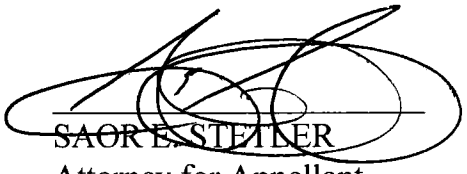
CONCLUSION

For the foregoing reasons and those set forth in appellant's opening brief, appellant's convictions and sentence of death must be reversed.

Dated: October 30, 2015

Respectfully submitted,



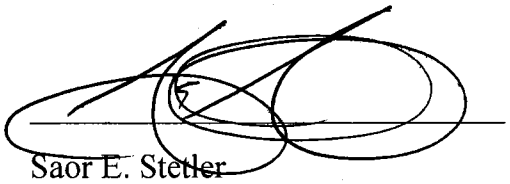
SAOR E. STETLER
Attorney for Appellant
ANGELO MICHAEL MELENDEZ

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630 (b)(2) & (4))

I, Saor E. Stetler, am the attorney appointed to represent appellant, Angelo Michael Melendez, in this automatic appeal. I conducted a word count of this brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 17356 words in length excluding the tables and certificates.

Dated: October 30, 2015



Saor E. Stetler

PROOF OF SERVICE BY MAIL

I, Saor E. Stetler, the undersigned, declare:

That I am a citizen of the United States of America, over the age of eighteen years, and not a party to the within cause.

On this date I caused to be served on the interested parties hereto, a copy of:

APPELLANT'S REPLY BRIEF

by placing a true copy thereof enclosed with postage thereon fully prepaid, in the United States Mail at Mill Valley, California, addressed as set forth below:

April Boelk Deputy Clerk Supreme Court of California 350 McAllister St. San Francisco, CA 94102-4783	Valerie Hriciga California Appellate Project 101 Second St. San Francisco, CA 94105
A. Kay Lauterbach Deputy Attorney General P.O. Box 944255 Sacramento, CA 94244-2550	Clerk of the Court for San Joaquin County 222 E Weber, Room 303 Stockton, CA 95202
Angelo Michael Melendez PO Box V-03803 San Quentin, CA 94974	

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

Executed this 31st day of October, 2015 at Mill Valley, California.

SAOR E. STETLER