IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. KEVIN DARNELL PEARSON. Defendant and Appellant.	No. S120750 (Los Angeles County Superior Court No. NA039436)

APPEAL FROM THE SUPERIOR COURT COUNTY OF LOS ANGELES
Honorable, Thomas T. Ong, Judge

APPELLANT'S REPLY BRIEF

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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 absence to a response to 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 [13

Cal.Rptr.2d 475]), but reflects Appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

STATEMENT OF THE CASE

We begin with some agreement. In *Appellant's Opening Brief* (AOB) at footnote 4, page 4, it was reported that the Second Amended Information filed in April 2002 was in error in that it alleged that Kevin in regard to Counts Three through Seven *used* a dangerous and deadly weapon within the meaning of section 12022.3, subdivision (b), which subdivision actually applies only when the person is *armed* with a deadly weapon. (4CT 1113-1114.) However, Respondent is correct that there is no error, as the amended information also alleged subdivision (a) of that section that applies when the person *used* a deadly weapon. (4CT 20, RB pp. 1-2, fn. 2.)

ARGUMENT[1]

I. FIVE PROSPECTIVE JURORS WHO WOULD LISTEN TO THE EVIDENCE, CONSIDER VOTING FOR EITHER DEATH OR LIFE IMPRISONMENT, AND COULD VOTE FOR THE DEATH PENALTY WERE IMPROPERLY EXCUSED BECAUSE THEY WOULD NOT IMPOSE IT IN ALL CIRCUMSTANCES OR HAD NOT RESOLVED WHETHER THEY FAVORED THE DEATH PENALTY, AND THEIR EXCUSAL WAS VIOLATIVE OF KEVIN'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

A. SUMMARY OF APPELLANT'S ARGUMENT

The trial court excused eight prospective jurors for cause pursuant to prosecution challenges. (8RT 1221-1222, 1277-1285, 11RT 2011-2013, 12RT 2196, 2218, 2276, 2395-2396, 13RT 2507, 2537.) In regard to five of these prospective jurors, the record does not support the trial court's ruling, because it does not clearly appear that the views they expressed would have prevented or substantially impaired their performance of their duties as jurors.

The trial court did not provide any measured explanations for its decisions and did not invite any further questioning if one of the parties felt the jurors' position could be clarified. (See *Uttecht v. Brown* (2007) 551 U.S. 1, 10-11 [167 L.Ed.2d 1014, 127 S.Ct. 2218].) In fact, the trial court gave few and very conclusory explanations for its decisions.

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[1] To hopefully aid the reader in collating this reply brief with *Appellant's Opening Brief* [hereafter AOB], appellant employs here the same heading outline employed in the AOB. Where no discussion has been provided under a given heading, that heading is merely not included and the remaining headings have not been relettered or renumbered.

B. RESPONDENT'S ARGUMENT

Respondent seeks to refute appellant's meritorious arguments by selectively summarizing the record to effectively remove the full context of the milieu in which the court made its decisions. Such a tactic cannot obscure the fact that the trial court abused its discretion in excusing these five prospective jurors.

1. THE EXCUSAL OF PROSPECTIVE JUROR ROGER BOYD

As detailed in *Appellant's Opening Brief*, Mr. Boyd was eminently thoughtful and fair, not leaning toward either sentencing alternative, and he fully recognized the gravity of a juror's task. He could impose the death penalty. (AOB pp. 58-63.) However, the prosecutor was not satisfied and pressed whether he could impose the death penalty with the special circumstances alleged in this case. He replied that he thought he could. (8RT 1272-1275.) She continued to press, from which he perceived that she wanted a definite answer, which he was uncomfortable providing. (8RT 1275.) Defense counsel clarified that she (defense counsel) did not want a definite answer, because he had not been put in that spot yes. With that clarification, Mr. Boyd said he would consider both options and maintain an open mind. (8RT 1275.) He was wrongfully excused premised on the prosecution's single question, despite his clarified response.

Respondent's assessment of Mr. Boyd's responses on his questionnaire is not premised on all his relevant responses and thus provides a very misleading picture. A more comprehensive reading of Mr. Boyd's responses to the 61 questions in the questionnaire directed at the jurors' position on the death penalty manifests an unbiased juror. (58CT 16560-16569.)

As reflected therein, Mr. Boyd believed that California should have the death penalty. (Question 186.) It should not be abolished.

(Question 188.) He believed that "some crime[s] are so bad that they need to be put to death." (Questions 179, 186.) He foresaw no situation where it would be impossible to vote for the death penalty. (Question 195.) His views on the death penalty had not changed over time. (Questions 181-182.) He could impose the death penalty. (Questions 188, 194, 228.) It would be difficult because of his religion, and he was unsure whether he could set aside those beliefs. (Questions 199-200.) But, it would not be difficult for him to decide on which penalty was appropriate. (Question 203.) He was able and willing to completely put aside any thought or concern relating to penalty issues while he deliberated on guilt or innocence. (Question 129.) And, he acknowledged that some cases needed the death penalty and he could see himself imposing it. (Question 209.) He would not "automatically vote" or "always vote" for either sentence. (Questions 214-215, 217-218.) He agreed that death was the more severe of the two sentences. (Question 277.)

He did believe that the death penalty was used too often. (Question 183.) He did not believe that life without possibility of parole (LWOPP) should be mandatory in all murder cases. (Question 190.) The two sentencing choices were warranted because "not all murders are the same." (Question 193.) He reasonably believed that the appropriate sentence "depends on facts." (Question 196.)

Mr. Boyd's critical response was to the prosecutor's final probe, "Now, you just said 'I think'." (8RT 1275.) Yet, the trial court never referred to his particular response about giving a "definite" answer as part of the reason for excusing him. This suggests that Mr. Boyd's remark was viewed by the trial court just as defense counsel characterized it, i.e., "What he told counsel is if you're insisting that I give you a definite answer, I'll lie on the side of caution." (8RT 1277.)

Thus, when respondent argues that "When pressed for a definitive answer on his ability to impose the death penalty, Roger B. admitted that he could not impose it" (RB p. 22), respondent is elevating the *ostensibly* literal meaning of that exchange with the readily apparent *actual meaning*. That is, Juror Boyd was merely exaggerating his concerns about the death penalty into the categorical position that he could not impose the death penalty at all to accommodate what he reasonably perceived as the prosecutor's insistence on a definitive answer. The court and defense counsel clearly recognized that Mr. Boyd rounded off his understandable reservations about the death penalty to a categorical position solely to give the prosecutor a purportedly definitive answer.

In addition, the trial court obviously took Mr. Boyd's "definitive" answer as rhetorical, because otherwise the court would have relied specifically on that answer in support of his excusal for cause. Instead, the court relied only on the characterization of Mr. Boyd's responses as "equivocal" to justify the excusal. However, the court incorrectly characterized his responses as equivocal, suggesting that Boyd waffled at some points between assertions that he could impose the death penalty and contrary assertions that he could not. Rather, Mr. Boyd *consistently* stated that he *could* impose the death penalty, although he had certain reservations about the penalty and the process. Such reservations are not grounds to justify an excusal for cause, although they may well provide a basis for a prosecutor's peremptory challenge. Here, the trial court preemptively and erroneously excused him for cause.

The prosecutor had the burden of persuasion, and the record just does not satisfy the constitutional standard that Mr. Boyd was substantially impaired. Indeed, the prospective juror affirmed that he had an open mind and just did not know which way he was going to

vote until he heard everything. As a result, the trial court's determination is not entitled to deference and is unsupported by substantial evidence. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 515, fn. 9 [20 L.Ed.2d 776, 88 S.Ct. 1770]; *People v. Heard* (2003) 31 Cal.4th 946, 958-959 [4 Cal.Rptr.2d 131].)

2. THE EXCUSAL OF PROSPECTIVE JUROR CHRISTINA OLIVA

As detailed in *Appellant's Opening Brief*, Ms. Oliva was a thoughtful person who had not yet formed an opinion on the death penalty, but she believed that it was the appropriate punishment for murder, depending on the facts, and she could impose it. She reasonably could not commit to vote for the death penalty without knowing the facts; but, she could vote for it, she was positive of that. The prosecutor wanted more than that. She wanted a juror that as well favored the death penalty. (AOB pp. 67-79.)

Ms. Olivia's uncertainty over the propriety of the death penalty in the abstract was the prosecutor's single reason to excuse her. The trial court subscribed to that view. (23RT 4995-4997.) That was clearly not dispositive of her ability to serve. (*Witherspoon, supra,* at pp. 518-519.) A juror may not even be excluded where she has conscientious scruples about capital punishment, if she is willing to "consider all of the penalties provided by state law," and is not "irrevocably committed," before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 522 & fn. 21; accord, *Smith v. Black* (5th Cir. 1990) 904 F.2d 950, 979.)

Respondent acknowledges that "[h]er answers in voir dire seemed to indicate that she would be able to impose the death penalty in an

appropriate case." (RB p. 26.) Respondent's position is that notwithstanding her *apparent* qualifications, "viewed in the totality of her other responses, the trial court made a factual determination that her answers did not reflect her true state of mind based on her other answers and demeanor." (*Ibid.*) The tenor of her responses to question 188 was that she was understandably and appropriately uncertain where she would come out on the death penalty *in this case*, but that wherever she came out she "would stand behind it." (58CT 16513, 11RT 2001.)

Moreover, the context of her responses regarding the death penalty belies the court's conclusion. Most people who are fundamentally reluctant to impose the death penalty do not want to be on the jury at all, but Ms. Oliva was *enthusiastic* about being on the jury specifically because she believed herself to be "unbiased." The fact that she acknowledged she had not personally thought through her position on the death penalty is no more a disqualification than a juror who acknowledges that he or she has not thought through an independent position regarding hearsay rules or other legal concepts on which the trial court is supposed to instruct them. None of her answers viewed individually or as a whole provides justification for the excusal for cause. Finally, the prosecutor's argument in favor of excusing her for cause was she is "like a wildcard" because "she doesn't know what she can do." (11RT 2008.) That cannot be grounds for excusal for cause. Any conscientious juror should answer the question of what they will do in the same manner that Ms. Oliva did, i.e., that she did not know until she heard all the facts.

Here, Ms. Olivia had no conscientious scruples against the death penalty; she had just not resolved the matter for herself. Here was a juror that could vote for the death penalty, and she was positive that she could. (11RT 2005.) Respondent has proffered no authority that

such flimsy uncertainty about the death penalty in general, despite openness to its imposition in this case, could provide an adequate degree of appropriate uncertainty to support the trial court's rejection of her.

3. *The Excusal of Prospective Juror Christina Rojas*

No one would dispute that if a point can be made with fewer words, that is the preferred course. Respondent attempts to provide the context for the removal of this prospective juror with approximately two pages of text. (RB pp. 28-30.) Unfortunately, it takes 19 pages to demonstrate with her completed questionnaire and lengthy questioning what compelling unfolds: She was another thoughtful person that supported the death penalty, who could impose the death penalty, and whose religious beliefs would not dictate how she would decide the appropriate penalty. But, she was confused by four poorly drafted questions in the questionnaire. The prosecutor exploited that confusion and badgered this juror into a purported conflict of the prosecutor's own making that the juror's belief that LWOPP would be the more severe punishment, made her (the juror) unsure whether she could impose the death penalty if she believed that Kevin deserved the most severe punishment.

Ms. Rojas stated that she could impose either penalty, and when asked "What do you need in order to choose the death penalty," she answered "I need to see...all of the evidence involved in the case." (AOB p. 86.) In the final series of questions by Ms. Locke-Noble, Juror Rojas responded to the question, "If the aggravating factors substantially outweigh the mitigating circumstances, what will you vote for," and she answered "life in prison." That question and answer cannot provide a basis for excusing her for cause because it is framed in terms of making

a present and definitive choice of penalty prior to hearing the actual evidence. When this answer is viewed as an extension of her earlier answers that she would need to see "all of the evidence involved in the case" in order to choose the death penalty, this answer is not at all disqualifying. The prosecutor attempted to set up a loaded premise in which the juror was to assume that the aggravating circumstances substantially outweighed the mitigating circumstances, but even in those circumstances a juror *must* consider both the death penalty and LWOP in light of the *actual* evidence.

Respondent takes no issue with the facts as marshaled in the AOB at pages 79 through 100. To reach the conclusion Respondent proposes requires resort to abbreviating the facts by 80 percent and thereby removing the context to make the exchange with the juror meaningless.

The excusal of Juror Rojas was also erroneous.

4. THE EXCUSAL OF PROSPECTIVE JUROR ROBERT DALEY

As with the preceding prospective juror, Respondent attempts to make do this time with a three-page summary of the background. Once again, it takes a more complete exchange to make the compelling point that this prospective juror was unwilling to commit to the death penalty without more facts if the special circumstances found were only kidnapping or robbery. (12RT 2271-2274.) The prosecutor argued that he had heard what was taken in the robbery, so he had been provided facts. (12RT 2273.) Defense counsel reasonably responded that it was not what was taken that was dispositive, but how it was taken. (12RT 2274-2275.) The prosecutor acknowledged that the robbery was not brutal, but complained that if it was the only special circumstance, and Mr. Daley had already made up his mind. (12RT 2275.) Defense counsel rightly rejoined that Mr. Daley would base his decision on the

overall circumstances. (12RT 2275.) In essence, the prosecutor sought to commit the juror to render a decision on which penalty was appropriate based solely on the nature of the special circumstance, that is, without considering factors in aggravation or mitigation. (AOB pp. 100-117.)

Again, the trial court erred because the purportedly conflicting and disqualifying statements were made in response to the prosecutor's questions to the effect of, "Would you vote for the death penalty if this type of special circumstance was found true or a combination of special circumstances found true." That type of questioning is inherently ineffective at detecting juror bias because it is inherently speculative and *any* answer *other than* "I don't know because I haven't heard all the facts" is entirely artificial. The trial court erred in placing an unreasonable weight on the questions as formed by the prosecutor and not on the juror's repeated assertions that the actual decision would depend on the available evidence.

And, again, Respondent takes no issue with the facts as marshaled in the AOB. To reach the conclusion Respondent proposes requires resort to substantially abbreviating the facts and thereby removing the context and the fallacy in the prosecution's challenge and thereby to make the exchange with the juror meaningless.

5. THE EXCUSAL OF PROSPECTIVE JUROR DANILO MATIC

Mr. Matic was another thoughtful person that supported the death penalty and could impose it. Once again, Respondent's truncated summary of the exchange with this juror and his responses on his questionnaire do not adequately portray the context from which the trial court found this man unfit to serve on this jury.

The court's decision in regard to this juror, is not as obviously unsupported as the preceding four jurors. However, that is not the

reason that he is the fifth in the discussion of these five jurors. It may be recalled, that the order in which these jurors are discussed is chronological, that is the first juror discussed was the first of these jurors excused. (Boyd, 8RT 1277-1282; Oliva, 11RT 2011-2013, Rojas, 12RT 2218; Daley, 12RT 2276; Matic, 12RT 2395-2396.) So, it is merely a coincidence that Mr. Matic's excusal is the fifth discussed in this group of five.

But, an unusual factor here suggests that the trial court's decisions in each of these five cases were not driven by the independent assessment by the court of the juror's state of mind. Here the court had to resolve 14 challenges for cause, six were challenged by the defense and excused over prosecution objection,[2] and eight were challenged by the prosecution and excused either over defense objection or in the absence of the defense's expressed agreement.[3]

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[2] Those six prospective jurors were:
William Tyra, juror 3970 (15CT 4123, 8RT 1201):
Nkik Fistes, juror 8587 (48CT 13635, 10RT 1792);
Robert Hoffman, juror 7166 (19CT 5250, 11RT 1936);
Wesley Smart, juror 6886 (18CT 5054, 11RT 1984);
Jose Medina, juror 8913 (51CT 14565, 11RT 2126); and
Sammye Meyer, juror 9734 (29CT 8142, 12RT 2218.)

[3] Those eight prospective jurors were:
Sara Lin, juror 8177 (16CT 4270, 8RT 1221-1222);
Roger Boyd, juror 1633 (58CT 16522, 8RT 1277-1282), the subject of Part C;
Christina Oliva, juror 6619 (58CT 16473, 11RT 2011-2013), the subject of Part D;
Christina Rojas, juror 3806 (29CT 8191, 12RT 2218), the subject of Part E;
Robert Daley, juror 7384 (42CT 11970, 12RT 2276), the subject of Part F;
Danilo Matic, juror 0746 (58CT 16424, 12RT 2395-2396), the subject of Part G;
Linda Storell, juror 4349 (52CT 14761, 13RT 2491, 2507);

(13RT 2588-2589.) In each instance, the court granted the challenge by the party making that challenge. That is, not in a single instance of death qualifying jurors did the court disagree with the party challenging a particular juror's suitability to serve.

In *Uttecht v. Brown, supra,* 551 U.S 1 the Court found it instructive to consider the entire *voir dire*, before assessing the questioning of a particular juror under question. (*Id.* at p. 10.) Thus, it is respectfully submitted that this Court in reviewing the propriety of Mr. Matic's rejection from the jury, consider the lack of support for the trial court's assessments on the preceding four jurors coupled with the unusual fact that the trial court had not seen a single challenge for cause of the eight such challenges made by the prosecution that it did not support.[4] (13RT 2588-2589.)

As noted in the AOB (pp. 124-125), as the trial court had in every other prosecution challenge for cause, the court adopted a view of the juror's ability to serve supported only by particular responses

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Andrew Dickson, juror 7363 (50CT 14223, 13RT 2518, 2537.)

[4] Those eight prospective jurors were:
Sara Lin, juror 8177 (16CT 4270, RT 1221-1222);
Roger Boyd, juror 1633 (58CT 16522, RT 1277-1282), the subject of Part C;
Christina Oliva, juror 6619 (58CT 16473, RT 2011-2013), the subject of Part D;
Christina Rojas, juror 3806 (29CT 8191, RT 2218), the subject of Part E;
Robert Daley, juror 7384 (42CT 11970, RT 2276), the subject of Part F;
Danilo Matic, juror 0746 (58CT 16424, RT 2395-2396), the subject of Part G;
Linda Storell, juror 4349 (52CT 14761, RT 2491, 2507);
Andrew Dickson, juror 7363 (50CT 14223, RT 2518, 2537.)

extracted by the prosecutor in her efforts to paint the juror into a corner. The court made no effort to reconcile those responses with those in the questionnaire or responsive to defense counsel's questioning. The court made no effort on its own to clarify any point.

Under these circumstances, assessment of any deference to be paid the trial court's decision in regard to Mr. Matic cannot be separated from this apparent absence of independent judgment in rejecting any of these five jurors.

C. CONCLUSION

Maybe the most compelling indication of the viability of appellant's position in regard to these five jurors is the apparent great concern the prosecutor had that the trial court's decisions were not adequately supported. In response to appellant's motion for new trial, the prosecutor made the very unusual request that the trial court clarify its findings. The trial court obliged providing explanations for its decisions three months after the fact. (57CT 16383-16384; 23 RT 4979-4986.)

Exclusion of these five prospective jurors who expressed scruples concerning the death penalty, but who stated unequivocally that they would and could impose either penalty based on the facts and law violated appellant's constitutional right to a fair and impartial jury and a fair and reliable determination of penalty under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 15, and 17 of the California Constitution. Thus, appellant's convictions and death verdict must be reversed.

II. KEVIN'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, TO BE FREE FROM SELF INCRIMINATION, AND A FAIR TRIAL WERE VIOLATED BY THE ERRONEOUS DENIAL OF HIS *MIRANDA*[5] MOTION

A. SUMMARY OF APPELLANT'S ARGUMENT

Twenty-seven and one-half hours after being taken in custody, and twenty-seven hours after being advised of his *Miranda* rights, Kevin was subjected to a second extended interrogation without a renewed waiver of his rights. As a result, Kevin was deprived of his state and federal constitutional rights to remain silent, to counsel, to a fair trial, due process, and a reliable determination of guilt, death eligibility, and penalty in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments; and California Constitution Article I, sections 1, 7, 15, 16, and 17.

B. RESPONDENT'S ARGUMENT

Respondent argues that this Court must accept the trial court's resolution of disputed facts and inferences, if supported by substantial evidence. (RB p. 44.) Yet, there is no dispute. Kevin was not advised of his *Miranda* rights at the commencement of his January 7th, 3:55 p.m. interview, nearly nine hours after his 5:00 a.m. booking and placement in a cell, and 27 hours after being advised of his rights. (See AOB pp. 139-142 for fact recitation.)

Respondent cites *People v. Cruz* (2008) 44 Cal.4th 636 [80 Cal.Rptr.3d 126] for the proposition that "'A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.]'" (RB p. 43, citing *id.* at

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

p. 667.) *Cruz* does not advance Respondent's cause. There the defendant was advised of his *Miranda* rights at the commencement of the first interview on the day he was taken into custody and was again advised of his *Miranda* rights when he was interviewed again on the following day. (*Id.* at pp. 666-667.) Thus, two waivers on two days demonstrated Cruz's willingness to answer questions.

At AOB pages 146-149 it was demonstrated that there is no support for the proposition that one advisement of Kevin was enough, particularly in light of his prolonged custody status where 27 hours intervened between the first advisement and the commencement of the second interview. Respondent does not take issue with, let alone discuss, any of the authority provided there, with the exception of returning to that cited by the court below, *People v. Mickle* (1991) 54 Cal.3d 140, 170 [284 Cal.Rptr. 511] and *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1972-1973 [10 Cal.Rptr.2d 15]. The AOB had made the point that in *People v. Thompson, supra,* 7 Cal.App.4th 1966 (15RT 2907-2908) the interval between interviews there was only nine hours between the advisement and the confession. (*Id.* at pp. 1972-1973.) Respondent does not dispute this substantial distinction from Kevin's case.

Respondent offers that the outcome in *Mickle* did not turn on the single factor of the defendant's past experience with law enforcement. (RB p. 45.) That is true. In *Mickle* among the totality of the circumstances considered by the Court was that the defendant had turned himself in for questioning and had made incriminating statements prior to the challenged subsequent interview. (*Id.* at pp. 169-171.) Kevin, by sharp contrast, was not voluntarily in custody and his earlier interrogation bore no indication of any desire to incriminate himself.

And, unlike Mr. Mickle, Kevin was only advised once. He had been kept up all night, being left to rest only after 5 a.m., and even then he was interrupted during the morning to have his photograph taken. That factor should weigh strongly *against* a valid implied waiver for a second interrogation, because the "continuous contact with the police" had the undoubted effect of wearing Kevin down. Respondent refers to this "continuous contact with the police" (RB 45), as if it weighs in *favor* of an implied waiver. However, where the continuous contact is of a type that erodes the detainee's free will, then it should logically weigh against waiver. Under respondent's warped view of how "continuous contact" works, if the police came in every hour and beat on Kevin with a rubber hose, respondent would invoke those "continuous contacts" as weighing in favor of a subsequent implied waiver, but that would be absurd.

Finally, Respondent argues that any error in admitting Kevin's January 7th statement was harmless. (RB pp. 45-46.) As detailed in the *Statement of the Facts*, the prosecution's case for Kevin's involvement in the offenses, other than his mere presence at the scene and assistance after the murder in removing evidence, substantially depended upon his statements during the January 7th interrogation. (RT 1883-1884.) Respondent offers that the terse, ambiguous statements attributed to Kevin by Monty Gmur, Ms. Furtado, and her daughter somehow would have been equivalent to the confession he made to Detective McMahon.

The prosecutor clearly did not think so, as amply illustrated by her exploitation at length of what Kevin provided in the second interrogation during her closing argument and the use she made of it to build her case for Kevin's guilt of all the charges and allegations. (20RT 4195-4197, 4202, 4207-4210.) This Court should place no less

value on Kevin's January 7, 1999 statement than that placed on it by the prosecutor. As made clear in her closing arguments, Kevin's statements were essential to her case.

C. CONCLUSION

The prosecution's use of Kevin's January 7, 1999, statement deprived Kevin of his state and federal constitutional rights, including his rights to remain silent, to counsel, to a fair trial, due process, and a reliable determination of guilt, death eligibility, and penalty (Fifth, Sixth, Eighth, Fourteenth Amendments; Cal. Const. Art. I, §§ 1, 7, 15, 16, 17.) Thus, Kevin's convictions and sentence must be reversed.

III. THE FAILURE OF LAW ENFORCEMENT TO RECORD BOTH THE *MIRANDA* ADVISEMENT AND RESPONSE AS WELL AS THE ENTIRE INTERROGATION VIOLATED KEVIN'S RIGHT TO DUE PROCESS, HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AND HIS RIGHT TO COUNSEL

Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue.

IV. KEVIN WAS DEPRIVED OF DUE PROCESS BY THE FINDINGS OF PERSONAL USE OF A DEADLY WEAPON IN THE ABSENCE OF CONSTITUTIONALLY SUFFICIENT EVIDENCE

A. SUMMARY OF APPELLANT'S ARGUMENT

The prosecution introduced substantial evidence that a deadly or dangerous weapon had been employed, a stake or stick, but they introduced no evidence that Kevin had employed it and no evidence that more than one stake or stick had been employed. Thus, there was no direct or circumstantial evidence that Kevin *personally* used the deadly weapon in the commission of any of the offenses.

B. RESPONDENT'S ARGUMENT

With citation to no authority and without addressing the authority provided on Kevin's behalf (AOB pp. 168-169), Respondent nevertheless offers "there is circumstantial evidence from which a rational jury could have inferred that appellant personally used a stake in the commission of the offenses." (RB pp. 47-50.) Yet, Respondent has elected not to address *People v. Federico* (1981) 127 Cal.App.3d 20, 31 [179 Cal.Rptr. 315]; *People v. Allen* (1985) 165 Cal.App.3d 616, 626 [211 Cal.Rptr. 837]; and *People v. Rener* (1994) 24 Cal.App.4th 258, 261-267 [29 Cal.Rptr.2d 392] that resolve the ambiguity of which defendant personally used a weapon in favor of the defendant and the conclusion that there is insufficient evidence to attribute to that defendant culpability for its use.

Moreover, the prosecutor conceded that she could not prove that Kevin was the actual killer. (20RT 4228-4229.) She conceded that she could not prove who hit the victim or which blow caused her death. (20RT 4229.)

C. CONCLUSION

From a review of the entire record, a rational trier of fact could not have found Kevin guilty beyond a reasonable doubt of personally using the stake. As a result, all of the deadly weapon use allegations must be reversed and the case remanded for resentencing. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578 [162 Cal.Rptr. 431]; *Jackson v. Virginia* (1979) 433 U.S. 307, 318-319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) Furthermore, since double jeopardy considerations bar a retrial (*Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141]), the trial court should be directed to dismiss these allegations from the accusatory pleading with prejudice and resentence Kevin.

V. THE JURY INSTRUCTIONS ON TORTURE, MURDER BY TORTURE, AND ON THE SPECIAL CIRCUMSTANCE ALLEGATION OF TORTURE WERE CONSTITUTIONALLY FLAWED BY PERMITTING CONVICTION ON A CRIMINAL THEORY NOT EXTANT AT THE TIME OF THE OFFENSES AND THEIR FAILURE TO REQUIRE THAT THE JURY FIND THE REQUISITE INTENT FOR THESE CHARGES THAT WERE AT THE HEART OF THE PROSECUTION'S CASE

There is a common factor in each of appellant's five summaries of the arguments in Parts *B* through *F* of this argument, below, and so it is highlighted at this point. The jury was asked to ponder the arcane, criminal law concept of "torture" in five distinct contexts, each with its own rules. The result was five instructional errors. Each error was compounded by the prosecution's failure to maintain any separation between these contexts in its argument to the jury. The result was a muddling of the requisite elements of each where distinctions were required that would have left the jury helpless to distinguish between the tasks they had been given and provided them with the invitation to error.

B. THE JURY WAS UNCONSTITUTIONALLY PERMITTED TO RETURN A FIRST DEGREE MURDER VERDICT BASED UPON A THEORY FOR FIRST DEGREE MURDER ENACTED AFTER THE CHARGED OFFENSES THAT ELIMINATED REQUISITE ELEMENTS THAT HAD BEEN REQUIRED AT THE TIME OF THE CHARGED OFFENSES

1. Summary of Appellant's Argument

The offenses occurred in 1998. In 1998 Penal Code[6] section 189 included murder by means of torture as one of the specified forms of first degree murder. The 1998 version required that the perpetrator and defendant willfully, deliberate and premeditate the intent to inflict

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6 All references are to this code unless otherwise noted.

extreme and prolonged pain. (*People v. Steger* (1976) 16 Cal.3d 539, 545-547 [128 Cal.Rptr. 161]; and additional authority cited in AOB at p. 189.) The 1998 version also required that the torture, in murder by torture, be the cause of death. (*People v. Cole* (2004) 33 Cal.4th 1158, 1207-1208 [17 Cal.Rptr.3d 532].)

In 1999, the section was amended. It still included murder by means of torture, but the amendment added as an alternative felony murder by torture. It thereby provided a shortcut to first degree murder, i.e., no longer requiring the two elements described in the preceding paragraph.

The error here is that the jury was permitted to find Kevin guilty of first degree murder using the 1999 definition and alternative and simplified route to the offense. (AOB pp. 188-191.)

2. *RESPONDENT'S ARGUMENT*

Respondent concedes this error, but offers that the error was harmless, citing *People v. Marshall* (1997) 15 Cal.4th 1, 38 [61 Cal.Rptr.2d 84]. (RB p. 51.)

In. *Marshall*, the Court drew upon *People v. Guiton* (1993) 4 Cal.4th 1116 [61 Cal.Rptr.2d 84, and explained that "if the inadequacy of proof is purely factual, 'reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually can rest on the adequate ground.'" (*Marshall*, at p. 38, quoting *Guiton*, at p. 1129.) *Marshall* again drawing upon *Guiton*, contrasted that "if the inadequacy is legal, the 'rule requiring reversal applies, absent the basis in the record to find that the verdict was actually based on a valid ground.'" (*Ibid.*)

In Kevin's case, the inadequacy was unquestionably *legal*, i.e., based on a version of section 189 that did not exist under the 1998 version of the statute applicable at the time of the offenses. Here there

is nothing in the record to show that the first-degree murder verdict "was actually based on a valid ground." There is *nothing* in the record that conclusively demonstrates that the first-degree murder conviction was based on a valid theory.

The *most likely route* to first-degree murder was the very handy, simplified, but invalid felony murder torture route, particularly in light of the prosecutor's improper reliance on that theory. The murder verdict is invalid because there is no demonstration that it *actually* rested on a valid theory.

Appellant will further address this prejudice prong in Part G, below.

C. THE JURY INSTRUCTIONS FOR THE CRIME OF TORTURE FAILED TO REQUIRE THAT *KEVIN* HAD THE SPECIFIC INTENT TO CAUSE CRUEL OR EXTREME PAIN AND SUFFERING; THE MENTAL STATE COULD NOT BE PREMISED UPON VICARIOUS LIABILITY

1. Summary of Appellant's Argument

Count Eight charged Kevin with the crime of torture (§ 206).[7] Although a defendant can be can be convicted of violating this statute on an aiding and abetting theory where the defendant did not directly or indirectly inflict great bodily injury on the victim (*People v. Lewis* (2004) 120 Cal.App.4th 882, 888 [16 Cal.Rptr.3d 498], he cannot be held vicariously liable where he did not personally harbor the "intent to cause cruel or extreme pain and suffering for the purpose of revenge,

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7 Section 206 provides:

> Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture.
>
> The crime of torture does not require any proof that the victim suffered pain.

extortion, persuasion, or for any sadistic purpose" (*Cf. Ibid.*; *People v. Wiley* (1976) 18 Cal.3d 162, 168 [133 Cal.Rptr. 135].) Thus, here the "aider and abettor must do something *and* have a certain mental state. [Emphasis in the orig.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 [108 Cal.Rptr.2d 188].)

The error here is that the jury's instructions authorized them to find Kevin guilty of torture without finding that it was specifically Kevin who harbored the requisite specific intent for the offense. (57CT 16231, 20RT 4182; AOB pp. 192-194.)

2. *RESPONDENT'S ARGUMENT*

Respondent attempts to recast the error as a failure to *sua sponte* modify the standard pattern jury instruction given here. On this two-legged stool, respondent argues that the issue is waived by Kevin's trial counsel's failure to request modification of the instruction. (RB p. 54.)

However, it was the trial court's duty to instruct on the general principles of law that were closely and openly connected to the facts before the court and that were necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [31 Cal.Rptr.2d 128].) Particularly in light of the number and complexity of the charges brought compounded by the variety of theories proffered for murder, and the competing theories for criminal liability, it was the trial court's *sua sponte* duty to give clear and concise instructions on all the elements the jury had to resolve that were comprehensible to both the jury and to counsel. (See, e.g., *id.* at pp. 1048, 1050.)

In any event, an appellate court has the statutory authority to review any jury instruction even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby. (§ 1259, *People v. Toro* (1989) 47 Cal.3d 966, 977 [254 Cal.Rptr. 811].) This is especially true when the enforcement of a penal

statute is involved (here section 206), the asserted error fundamentally affects the validity of the judgment, important issues of public policy are at issue (*Hale v. Morgan* (1978) 22 Cal.3d 388, 395 [149 Cal.Rptr. 375]) or when the error may have adversely affected the defendant's right to a fair trial (*People v. Hill* (1998) 17 Cal.4th 800, 843, fn. 8 [72 Cal.Rptr.2d 656]), all factors here.

In addition, the fact that a state court may legitimately refuse to hear tardily based constitutional challenges does not mean that the state court is obliged as a matter of federal law to refrain from reaching the federal constitutional questions. (*Orr v. Orr* (1979) 440 U.S. 268, 275, fn. 4 [59 L.Ed.2d 306, 99 S.Ct. 1102].) Furthermore, as the facts relating to the contention raised on appeal appear to be undisputed and there would likely be no contrary showing at a new hearing, the appellate court may properly treat the contention solely as a question of law and pass on it accordingly. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [336 P.2d 534].)

Moreover, a failure to object does not preclude an appellate court from resolving that issue should it feel the need to do so. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [69 Cal.Rptr.2d 917].) "A matter normally not reviewable upon direct appeal, but which is ... vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 153 [103 Cal.Rptr. 7].)

Respondent next offers that the flaw in CALJIC 9.90 "to identify appellant as 'the *person* inflicting the injury,' did not result in the jury finding appellant 'vicariously liable' for the crime of torture." (RB p. 54.) Yet, there is no way of knowing on what basis the jury reached its verdict on the torture count, and Respondent has been unable to suggest any. Moreover, Respondent's proposition does not address the

constitutional flaw here that the instruction permitted the jury to find Kevin guilty of torture based on insufficient evidence, i.e., if the jury premised its verdict on an aiding and abetting theory, which they likely did, they were not required to find whether he personally harbored the "intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (*Cf. People v. Lewis, supra,* 120 Cal.App.4th 882, 888.; *People v. Wiley, supra,* 18 Cal.3d 162, 168.)

Respondent wishes to rely on "the presumption that the jury followed the court's instructions and was able to understand and correlate them correctly." (RB p. 54.) Respondent does not suggest how this aids their cause where the flaw is that following the court's instructions leads to error. Respondent's proffered presumption does not place the burden on the jury to insert on their own the language to make the instruction constitutional when otherwise it is not.

Respondent rightly notes that "Section 206 does not require that a defendant personally inflict injury." (RB pp. 54-55.) Citing, *People v. McCoy, supra,* 25 Cal.4th 1111, 1117, Respondent continues:

> When a specific intent crime such as torture is charged, "the prosecution must show that the defendant acted with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citation.]" (*People* v. *McCoy, supra,* 25 Cal.4th at p. 1118, internal quotations omitted, italics original.) In other words, the accomplice must "know[] the full extent of the perpetrator's criminal purpose and give[] aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. [Citation.]" (*Ibid.*, internal quotations and footnote omitted.) (RB p. 55.)

Respondent does not suggest how this general language would convey to the jury that they must find that Kevin harbored the specific intent

"to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." The above instruction is not the specific equivalent of this requisite specific intent.. In assessing the "criminal purpose" proposed by the above instruction, the lay juror would envision as satisfying that element merely the act of torture itself and not that act plus the specific intent of the perpetrator "to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose."

Respondent next provides four paragraphs explaining that a person may be vicariously liable for the crime of torture. (RB pp. 55-56.) This has nothing to do with any appellate issue here. Respondent follows this with a recount of an interpretation of selected facts beginning with going over the fence and ending on the bus. Again, this is not relevant to the missing element from the jury's task, Kevin's specific intent.

Undaunted by the lack of record support, Respondent states: "Contrary to appellant's claim, the prosecutor's argument was not based on the natural and probable consequences theory." First, the jury instructions on a principal's liability for the natural and probable consequences of a crime he aids and abets did not authorize use of that theory to find Kevin guilty of torture. (57CT 16186-16187, 20RT 4154-4155.) However, and second, that did not stop the prosecutor who told the jury that Kevin was guilty of torture as the natural and probable consequences of the crimes he originally aided and abetted.[8] (20RT 4219, 4221-4222.)

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[8] The prosecutor argued to the jury:

> And remember, ladies and gentlemen, you all told me you would follow the law. The defendant is an aider and abettor. He also is a principal.

Finally, Respondent, citing this Court's decision in *People v. Guiton, supra,* 4 Cal.4th 1116, 1128-1130, argues that "any error was harmless because there is a basis in the record to find that the verdict was not based on a natural and probable consequences theory at all." (RB p. 57.) Respondent seeks to take *Guiton* where it was not designed to go. There the court was addressing an insufficiency of the evidence claim. Respondent does not and cannot explain how it has any applicability to the fatal error here of instructions authorizing a jury to find Kevin guilty of torture without deciding whether he had the requisite specific intent. The fact that an insufficiency of the evidence claim on one theory might survive in Kevin's case is irrelevant, particularly where the prosecution encouraged the jury to take a theory that provided a shortcut; a shortcut with a fatal error.[9]

> Principal's liability for natural and probable consequences. One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, which is the rape here—we have the defendant admitting he did the rape—or those crimes, but is also guilty of *any other crime committed by a principal*, which the kidnapping, the robbery, the rape with a stake, and the *torture*, which is a natural and probable consequence of the crimes originally aided and abetted. (20RT 4219 emphasis added.) ¶¶
>
> So if you believe the defendant when he said, "I never did anything, I just moved the body," it doesn't matter, because he's still an aider and abettor, and he's still guilty of all these crimes. (20RT 4221-4222.)

[9] See the prosecutor's argument quoted in the immediately preceding footnote.

D. THE JURY INSTRUCTIONS FOR THE CRIME OF MURDER BY MEANS OF TORTURE FAILED TO REQUIRE THAT *KEVIN* HAD THE SPECIFIC INTENT TO INFLICT EXTREME AND PROLONGED PAIN; THE MENTAL STATE COULD NOT BE PREMISED UPON VICARIOUS LIABILITY

1. *Summary of Appellant's Argument*

Count One was charged on several theories including that the murder was perpetrated by means of torture within the meaning of section 189 (as that section provided in 1998). Guilt premised on this theory requires that the jury find that the perpetrator *and* defendant had a willful, deliberate and premeditated intent to inflict extreme and prolonged pain. (*People v. Steger, supra,* 16 Cal.3d 539, 545-547; and additional authority cited in AOB at p. 194.) Murder by means of torture cannot be inferred solely from the condition of the victim's body or from the mode of assault or injury. (*People v. Wiley, supra,* 18 Cal.3d 162, 168.)

The error here is that the jury instructions authorized the jury to find Kevin guilty of murder by torture without finding that it was specifically Kevin who harbored the requisite specific intent. Instead, the jury was only told that they must find that the "*perpetrator* [emphasis added] committed the murder with a [willful], deliberate, and premeditated intent to inflict extreme and prolonged pain ...." (57CT 16203, 20RT 4165; AOB pp. 194-197.)

2. *Respondent's Argument*

As in the preceding Part C, respondent argues that the issue is waived by Kevin's trial counsel's failure to request modification of the instruction. (RB p. 58.) Appellant in turn incorporates here the opening second through fifth paragraphs of Part C, *1. Respondent's Argument.*

Respondent, in a single long paragraph, offers three backup positions. First, Respondent argues, "Regardless of any deficiency in the murder by torture instructions, the jury's factual findings plainly sustained the theory of murder by torture." (RB p. 59.) Respondent premises this conclusion upon the fact that the jury found Kevin guilty of committing the crime of torture. (RB p. 59.) The obvious fallacy here is that finding was constitutionally flawed as discussed in Part C, above.

Respondent's second effort is premised upon the jury's finding true the torture-murder special circumstance. (RB p. 59.) The fallacy here is that finding was also constitutionally flawed as discussed in Part E, below.

Respondent's third and final effort[10] is resigned again to the viability of the jury's guilty verdict for torture and thereby the two fail together. Another flaw in this final effort is its premise that it was not

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[10] Respondent argues:

> In finding the torture-murder special circumstance (§ 190.2, subd. (a)(18)) to be true, the jury found that "*the defendant* intended to inflict extreme cruel physical pain and suffering" upon Sigler.[Fn below] (57CT 16212,16254, italics added.) Moreover, under the natural and probable consequence theory, appellant, who admitted robbing and raping Sigler and was convicted of raping her with the wooden stake and torturing her, did not need to share in the perpetrator's murderous intent to be guilty of murder by torture as well.
>
> (See *People v. McCoy, supra,* 25 Cal4th at p. 1117 ["if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault"].) (RB p. 59.)

The footnote added: "Since appellant was the only defendant in the case, this finding necessarily related to him." (RB p. 59, fn. 9.) Not so, as is discussed in Part E, below.

necessary that Kevin share "the perpetrator's murderous intent to be guilty of murder by torture." Respondent ignores the fact that such a conclusion cannot be reconciled with this Court's longstanding position that first degree torture murder under section 189 requires of the perpetrator *and* defendant a willful, deliberate and premeditated intent to inflict extreme and prolonged pain. (*People v. Steger, supra,* 16 Cal.3d at pp. 545-547; *People v. Tubby* (1949) 34 Cal.2d 72, 76-77 [207 P.2d 51]; *People v. Wiley, supra,* 18 Cal.3d at pp. 168-173; *People v. Davenport* (1985) 41 Cal.3d 247, 267, 269 [221 Cal.Rptr. 794]; *People v. Morales* (1989) 48 Cal.3d 527, 559-560 [257 Cal.Rptr. 64]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1100-1101 [259 Cal.Rptr. 630]; *People v. Elliot* (2005) 37 Cal.4th 453, 468 [35 Cal.Rptr.3d 759].)

E. THE JURY INSTRUCTIONS FAILED TO REQUIRE THAT THE TORTURE SPECIAL CIRCUMSTANCE ALLEGATION TRUE FINDING COULD NOT BE PREMISED UPON VICARIOUS LIABILITY, AND FAILED TO REQUIRE THAT *KEVIN* INTENDED TO INFLICT EXTREME AND PROLONGED PAIN

1. SUMMARY OF APPELLANT'S ARGUMENT

The special circumstance of murder by torture under section 190.2, subdivision (a)(18) requires the specific intent to torture and that intent, as well as the torturous conduct itself, cannot be a derivative liability, but must be premised upon the defendant's state of mind and conduct, respectively. (*People v. Ross* (1979) 92 Cal.App.3d 391, 402, 404 [154 Cal.Rptr. 783]; and additional authority cited in AOB at pp. 197-198.) This is also true if the finding was premised on a theory of aiding and abetting. (*People v. McCoy, supra,* 25 Cal.4th 1111, 1117-1118.) The severity of a victim's wounds is not necessarily determinative of an intent to torture. (*People v. Mincey* (1992) 2 Cal.4th 408, 432-433 [6 Cal.Rptr.2d 822].)

The error here is the same as that in Parts C and *D*, above. The jury was permitted to find true this special circumstance without an unambiguous finding that Kevin had to harbor the specific intent to inflict torture; it could not be premised vicariously on Warren's and/or Jamelle's intent. Although the specific instruction on the requisite elements for the special circumstance of murder involving the infliction of torture provided included the requirement that the "defendant intended to inflict extreme cruel physical pain and suffering ...," that requirement was negated by three factors. (57CT 16212, 20RT 4169-4170.) First, the flawed instructions discussed in Parts C and *D*, above, had erroneously removed from jury consideration whether *Kevin* harbored the requisite intent for torture and thus setup for the jury a similar misunderstanding for its task for a finding on this special circumstance. At no point was the jury specifically told why the elements for the special circumstance of torture were different. Second, this error was reinforced by the prosecutor during her closing argument, as noted in the opening paragraph of this argument (p. 21,). And third, the verdict form executed by the jury for this special circumstance insured that misunderstanding.[11] (AOB pp. 197-201.)

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[11] The jury was asked to insert in their verdict "True" or "Not True" to the statement:

> We, the jury, find the allegation that the defendant, KEVIN DARNELL PEARSON, committed the murder of PENNY SIGLER [sic] was intentional and involved the infliction of torture, within the meaning of Penal Code Section 190.2(a)(18). (57CT 16256.)

2. RESPONDENT'S ARGUMENT

Respondent combines its discussion of the error here with its discussion of the error raised in Part F, below. Appellant will not do that and will keep the argument structure of the AOB.

Respondent expends a full page of effort attempting to convince the reader that the prosecutor's arguments would not have overall misdirected the jury on this issue. (RB pp. 61-62.) Even here, Respondent must resort to speculation that the jury would have intuitively known which of the prosecutor's conflicting directives were the correct ones. Respondent offers that if that failed, the jury would have ignored "any confusion about the law in the prosecutor's argument," and followed the court's instructions. (RB p. 62.) Yet, Respondent offers no explanation for how "any confusion" would have been resolved by the verdict form the jury was provided. They were asked to insert "True" or "Not True" to the statement:

> We, the jury, find the allegation that the defendant, KEVIN DARNELL PEARSON, committed the murder of PENNY SIGLER [sic] was intentional and involved the infliction of torture, within the meaning of Penal Code Section 190.2(a)(18). (57CT 16256.)

This incomprehensible language sheds no light on whether the jury believed that *Kevin* harbored the specific intent to inflict torture or intent to kill. In fact, the language employed by the verdict made the clear point that *Kevin's* specific intent was not an issue for their resolution.

Respondent's answer to this ambiguity in the verdict form is that it "is immaterial, if the intention to convict of the crime charged is unmistakably expressed." (RB p. 63.) But, that is precisely the problem and the topic of these many pages in Argument V; there is nothing unmistakable about the jury's decision in this context.

Respondent offers, "the jury never expressed any confusion about the various torture instructions during deliberations." (RB p. 63.) That is hardly dispositive of anything since they were repeatedly told in essence that they did not need to find that Kevin harbored the specific intent to inflict torture, it was enough that his codefendants did.

F. THE JURY INSTRUCTIONS FAILED TO REQUIRE THAT THE TORTURE SPECIAL CIRCUMSTANCE ALLEGATION TRUE FINDING COULD NOT BE PREMISED UPON VICARIOUS LIABILITY, AND FAILED TO REQUIRE THAT *KEVIN* HAD THE SPECIFIC INTENT TO KILL

1. Summary of Appellant's Argument

The special circumstance of murder by torture under section 190.2, subdivision (a)(18) requires the specific intent to kill. (*People v. Wade* (1988) 44 Cal.3d 975, 993-994 [244 Cal.Rptr. 905]; and additional authority cited in AOB at p. 201.) This is also a requirement when the murder is prosecuted on a theory of conspiracy. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 680-681 [7 Cal.Rptr.3d 726].) That specific intent is required of *the* defendant, not *a* defendant. (*Id.* at pp. 685-686.)

The error here is in the manner in which the specific intent for torture special circumstance was explained to the jury. The jury was instructed that a requisite intent for this allegation was that "The murder was intentional," without informing the jury that it must be Kevin that harbored that intent, not merely a codefendant or coconspirator. (57CT 16212, 20RT 4169-4170.) As given, the instruction may well be sufficient in a single defendant case, but where codefendants are involved, the trial court must instruct regarding the section 190.2, subdivision (c) requirement that the aider and abettor

also must personally harbor the intent to kill.[12] (§ 190.2, subd. (c).) (AOB pp. 201-204.)

2. *RESPONDENT'S ARGUMENT*

Respondent never explains how the jury would have necessarily concluded that the verdict form's language for this special circumstance that the murder "was intentional" meant that Kevin had the intent to kill, and not merely one or more of his codefendants. Respondent makes no effort to reconcile the fact that the jury had not reached that conclusion on the murder count that Kevin was the killer. They instead circled alternative "B," that he was "an aider and abettor and had the intent to kill, *or* was a Major Participant and acted with reckless indifference to human life." (57CT 16255, emphasis added.) Considered together, there is no evidence that the jury was required to specifically resolve if Kevin had the intent to kill and no reason to believe that they would have placed this further burden on themselves when they had not been required to by the court.

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[12] Section 190.2, subdivision (c) provides:

> Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

G. THE TRIAL COURT'S FAILED EFFORTS TO ADEQUATELY INSTRUCT ON ELEMENTS OF THE OFFENSES AND ACCOMPANYING ALLEGATIONS WERE CONSTITUTIONALLY FLAWED AND PREJUDICED KEVIN

1. *Summary of Appellant's Argument*

The commonality among the errors detailed in Parts *B* through *F*, is that the prosecution's burden to prove torture in the multiple contexts that it was presented to the jury was unconstitutionally lowered. Torture was a recurrent theme throughout the trial; beginning during voir dire and concluding with closing arguments at the end of the penalty phase, it was mentioned 316 times. (RT 947-4931.)

Although torture was but one of the routes to first degree murder and one of the special circumstances, it clearly would dominate all aspects of the jury's penalty phase deliberations. One hundred and fourteen injuries suffered by the victim had been described to the jury. (15RT 2928-2934, 2938-2949, 2980-2983, 2985-2990, 2995-2996, 3014-3016, 3025, People's exhs. 1, 4-5, 9-10.) Cumulatively, these injuries were the basis of the multiple resolutions required of the jury at the guilt phase in the multiple contexts of whether the victim had been tortured. Some of the injuries also provided the factual bases for the four counts involving sexual assault. Once these bases for torture are removed to assess whether Kevin was prejudiced by these constitutional errors, as indeed they must, what is left untainted by the errors is a robbery and a kidnapping. This vastly changes the milieu the jury faced. Respondent cannot show beyond a reasonable doubt that Kevin was not prejudiced by these many errors. (AOB pp. 204-207.)

2. *Respondent's Argument*

The principal failing in Respondent's effort to address the prejudice that flowed from each of these five errors is that it must rely

on the purported absence of any error in the other Parts. Of course, that cannot be done.

3. CONCLUSION

Correct and adequate definitions for and the requisite findings for the offense of torture, the special circumstance of torture, as well as murder by torture were essential to the jury's ability to properly resolve the level of Kevin's criminal liability for the charged offenses and the accompanying allegations. In this task the trial court repeatedly failed, exacerbated by the muddle the prosecutor made out of the very complex, arcane topics the jury had to resolve.

The result improperly reduced the prosecution's burden of proof and denied Kevin due process of the law, a fair trial, the right to present a defense, a trial free from improper lessening of the prosecution's burden of proof, and a reliable and non-arbitrary determination of guilt, death eligibility, and penalty in violation of his rights under Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the analogous provisions of the California Constitution. (Cal. Const., Art. I, §§ 1, 7, 15, 16, 17; see, *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372, *cert. den.* (1988) 488 U.S. 974 [102 L.Ed.2d 548, 109 S.Ct. 513]; *Bennett v. Scroggy* (6th Cir. 1986) 793 F.2d 772, 777-779; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F2d 1196, 1201-1202.)

The requisite remedy is to reverse the verdict for death, reverse the conviction for torture in Count Eight, set aside the torture-murder special circumstance finding, and remand for resentencing on the remaining counts.

VI. KEVIN WAS PROSECUTED ON A THEORY THAT KEVIN WAS NOT THE ACTUAL KILLER AND THE JURY INSTRUCTIONS FOR THE SPECIAL CIRCUMSTANCES ALLEGATIONS WERE CONSTITUTIONALLY FLAWED BY PERMITTING TRUE FINDINGS WITHOUT UNEQUIVOCALLY REQUIRING A FINDING THAT KEVIN HAD THE REQUISITE INTENT AND INVOLVEMENT IN THE UNDERLYING FELONIES[13]

A. SUMMARY OF APPELLANT'S ARGUMENT

Torture was the focus of the preceding *ARGUMENT V*. Here, the focus is on all of the charged special-circumstance-felonies that are enumerated in section 190.2, subdivision (a)(17), and that do not include torture. As demonstrated in *ARGUMENT V*, the prosecution had no evidence that Kevin was the actual killer. And, the jury explicitly rejected the proposed finding that Kevin was the actual killer. (20CT 16255.) There was no direct evidence that Kevin had the intent to kill.

Thus, to prove these special circumstances, the prosecution encouraged the jury to adopt the alternative theory for criminal liability that required three findings—that Kevin, with (1) reckless indifference to human life *and* (2) as a major participant, (3) aided and abetted in the commission of the felonies enumerated in section 190.2, subdivision (a)(17).

The flaw here is that with what one hand provided in a correct, but most convoluted, obfuscated jury instruction contained in a 150 word sentence, the other took swiftly away by offering a vastly simpler and more understandable alternative. Although this first instruction identified all three of the above findings, the excessively convoluted way it was drafted was all too likely to be regarded as gibberish to lay jurors.

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[13] Argument *V, F* addressed a related flaw in the context of the torture special circumstance.

It was followed by a simple, clearly understandable, but wrongly truncated alternative that was all too likely to mislead the jury to understand that only the third of the findings was required.[14] (AOB pp. 208-219.)

B. RESPONDENT'S ARGUMENT

As in *ARGUMENT V*, Part C, respondent argues that the issue is waived by Kevin's trial counsel's failure to request clarification of the instruction. (RB p. 67.) Appellant in turn incorporates here the opening second through fifth paragraphs of *ARGUMENT V*, Part C, *1. Respondent's Argument*, above.

Next, Respondent argues that "CALJIC 8.81.7 does not purport to give all the elements of the special circumstance, but instructs the jury on the timing of the murder: i.e., the murder must occur while appellant is engaged in one of the listed crimes." (RB p. 67.) Yet, the instruction does not explain to the jurors about such a truncated point of the instruction.

Respondent's segue that CALJIC 8.80.1 did provide all the elements (RB p. 67) does not address the complaint that it did it in an

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[14] This latter instruction provided:

> To find that any of the special circumstances, referred to in these instructions as murder in the commission of robbery, kidnap, kidnapping for rape, rape, or rape by a foreign object-a wooden stake, is true, it must be proved:
>
> 1. The murder was committed while [the] defendant was [engaged in] [or] [was an accomplice] in the [commission] of one or more of the following crimes: robbery, kidnap, kidnapping for rape, rape, or rape by a foreign object-a wooden stake. [No paragraph 2 was provided.] (57CT 16211, 20RT 4169.)

incomprehensible, convoluted way that no lay juror could be expected to parse.

Respondent continues that "a single instruction to a jury must not be judged in isolation but must be viewed in the context of the overall charge." (RB pp. 67-68.) Just so. And, that is the problem. The jury was given two instructions that would appear to the lay jurors to be addressing the same topic, but one was a drafting marsh and the other provided solid, high ground and simplified access to resolution of the task they had been given. (*Francis v. Franklin* (1985) 471 U.S. 307 322 [85 L.Ed.2d 344, 105 S.Ct. 4*98] ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"].)

C. CONCLUSION

Correct and adequate definitions for and the requisite findings for the special circumstances were essential to the jury's ability to properly resolve the level of Kevin's criminal culpability for murder. In this task the trial court failed, exacerbated by the muddle the prosecutor made out of the very complex, arcane topics the jury had to resolve.

The result improperly reduced the prosecution's burden of proof and denied Kevin due process of the law, a fair trial, the right to present a defense, a trial free from improper lessening of the prosecution's burden of proof, and a reliable and non-arbitrary determination of guilt, death eligibility, and penalty in violation of his rights under Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the analogous provisions of the California Constitution. (Cal. Const., Art. I, §§ 1, 7, 15, 16, 17; see, *United States v. Unruh, supra,* 855 F.2d 1363, 1372, *cert. den.* (1988) 488 U.S. 974 [102

L.Ed.2d 548, 109 S.Ct. 513]; *Bennett v. Scroggy, supra,* 793 F.2d 772, 777-779; *United States v. Escobar de Bright, supra,* 742 F2d 1196, 1201-1202.)

The requisite remedy is to reverse the verdict for death, set aside the special circumstance findings, and remand for resentencing on all counts.

VII. THE JURY'S INSTRUCTIONS FAILED TO INCLUDE TORTURE WITH THE OTHER SPECIFIC INTENT OFFENSES FOR WHICH THE JURY WAS AUTHORIZED TO CONSIDER KEVIN'S INTOXICATION AND SPECIFIC INTENT IN RESOLVING WHETHER HE HAD THE REQUISITE INTENT FOR TORTURE

A. SUMMARY OF APPELLANT'S ARGUMENT

The argument here address further flaws in the court's instructions on the charge of torture; a charge that dominated the prosecution's presentation throughout Kevin's trial. The trial court failed; first, by not including torture in the court's litany of charges for which its cautionary instruction on the use of circumstantial evidence applied; second, by not including torture among those charges for which the requirement of a confluence of act and a certain specific intent applied; and, even more egregiously, by precluding the jury from considering Kevin's intoxication as a factor militating against a finding of intent for the crime of torture. (AOB pp. 219-227.)

B. RESPONDENT'S ARGUMENT

Respondent concedes the last of the above three errors, and has elected not to discuss the first two errors. (RB p. 69.)

Respondent offers that the error was harmless since the jury had been instructed on voluntary intoxication in the context of the other counts and nevertheless found Kevin guilty there. (RB p. 69.) Yet the torture count was by far the single charge and allegation from which, by all accounts, Kevin was the farthest removed. At the same time, it was

the single act which bore with it the greatest emotional and inflammatory impact. That was why the prosecutor, during her closing and rebuttal arguments at the guilt phase, mentioned "torture" 25 times.[15] (20RT 4219, 4222, 4225-4230, 4239-4240, 4244-4245, 4336, 4350-4352, 4354, 4356-4357.) The defense did not mention it once.

C. CONCLUSION

The task for the reviewing court is to review the instructions as a whole to determine whether it is reasonably likely the jury misconstrued the instructions as precluding it from considering the intoxication evidence in deciding Kevin's culpability, even as an aider and abettor. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1017 [68 Cal.Rptr.2d 648].) Here, it is not only reasonably likely, but certain that the jury could not have discerned that Kevin's intoxication could be considered in resolving whether his specific intent had been to inflict cruel or extreme pain and suffering, a requisite for the crime of torture. After all, every doorway that had to be passed through to reach such a conclusion had been sealed. They had been told that CALJIC 2.02 was not applicable. (57CT 16191, 20RT 4158.) They had been told that CALJIC 3.31 was not applicable. (57CT 16192, 20RT 4159.) And, they had been told that CALJIC 4.21.1 was not applicable. (57CT 16194-16195, 20RT 4160.)

The acts committed that night were completely out of character for Kevin. His rather extraordinary consumption of intoxicants over the course of that evening was certainly warranted for consideration in the weighing process of whether he had harbored the specific intent to inflict cruel or extreme pain and suffering, as required for a finding of

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[15] Beginning during voir dire and concluding with closing arguments at the end of the penalty phase, torture was mentioned 316 times.

the crime of torture. His intoxication was the very hub of his defense. (19RT 4114-4118, 20RT 4263-4266.)

At this point, Kevin incorporates Part G, pages 35-36, from Argument V for support for the conclusion that the compelled, requisite remedy is to reverse the convictions for murder in Count One, torture in Count Eight, and the torture special circumstance, and remand for resentencing on the remaining counts.

VIII. THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 227-241.)

IX. THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS AT TRIAL RESULTED IN A TRIAL THAT WAS FUNDAMENTALLY UNFAIR, AND CONSTITUTIONALLY FLAWED

Respondent has elected not to address the factual basis for this argument or the cumulative interplay the facts had at Kevin's prejudice. Thus, Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 242-245.)

X. THE USE OF THREE UNADJUDICATED OFFENSES AS EVIDENCE IN AGGRAVATION VIOLATED KEVIN'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS

Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 245-250.)

XI. CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO CONTAIN ADEQUATE SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVE DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH

The table below will hopefully aid the reader in reconciling appellant's divisions in this argument with Respondent's efforts.

Appellant's Parts	*Respondent's Response*
AOB Part *A*, pp. 251-261	RB Parts *A* and *B*, pp. 72-75
AOB Part *B*, pp. 261-264	RB Part *B*, pp. 74-75
AOB Part C, pp. 264-267	RB Part C, p. 75
AOB Part *D*, pp. 267-269	RB Part C, p. 75
AOB Part *E*, pp. 269-271	RB Part *E*, pp. 75-76
AOB Part *F*, p. 272	RB Part *F*, p. 76
AOB Part G, p. 273	RB Part G, p. 76
AOB Part *H*, pp. 273-275	RB Part *H*, p. 77

Otherwise, appellant relies upon his arguments from the *Opening Brief* and has nothing further to add on the issues raised here.

XII. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 275-278.)

XIII. THERE ARE NUMEROUS OTHER FEDERAL CONSTITUTIONAL FLAWS IN CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED AND APPLIED AT KEVIN'S TRIAL

In the AOB, Appellant began this six-part argument with the observation and contention that to date the Court has considered each of the defects identified there in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. It was argued that this analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6 [165 L.Ed.2d 429, 126 S.Ct. 2516];[16] see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [79 L.Ed.2d 29, 104 S.Ct. 871] [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].) (AOB p. 279.)

Yet, Respondent has elected not to respond to this point.

Otherwise, appellant relies upon his arguments from the *Opening Brief* and has nothing further to add on the issues raised here. (AOB pp. 278-291.)

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[16] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Id.* at p. 178.)

XIV. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND KEVIN'S CONVICTION AND SENTENCE OF DEATH MUST BE SET ASIDE

Appellant has argued that the punishment of death for ordinary crimes violates international law and the Eighth Amendment. (AOB pp. 291-304.) Respondent rejects appellant's argument in a single paragraph, relying on this Court's rejection of the claim. (RB p. 83.)

Recent developments in Eighth Amendment jurisprudence further support appellant's claim. In *Roper* v. *Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1, 125 S.Ct. 1183], the United States Supreme Court struck down death as a constitutional penalty for juvenile offenders. In holding that execution of juvenile criminals is cruel and unusual punishment, the Court looked to international law standards as informing the Eighth Amendment:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*,[17] the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103,78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime".) (*Id.* at p. 575.)

Appellant asks this Court to reconsider its position on this issue and to reverse his death judgment

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17 *Trop v. Dulles* (1958) 356 U.S. 86 [2 L.Ed.2d 630, 78 S.Ct. 590].

XV. THE TRIAL COURT'S INSTRUCTIONS ON SECTION 190.3, SUBDIVISION (B) AND APPLICATION OF THAT SENTENCING FACTOR RENDERED KEVIN'S DEATH SENTENCE UNCONSTITUTIONAL

Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 304-313.)

XVI. THE TRIAL COURT'S INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS RENDERED KEVIN'S DEATH SENTENCE UNCONSTITUTIONAL

Appellant argues that the penalty phase instructions were unconstitutional in that they failed to adequately define the scope of the jury's sentencing discretion and the nature of its deliberative process. (AOB pp. 313-332.)

Respondent begins by arguing that "[t]o the extent appellant did not request the specific modifications alleged here, he has waived his claim on appeal." (RB p. 85.) Appellant in turn incorporates here the opening second through fifth paragraphs of *ARGUMENT V*, Part C, *1. Respondent's Argument*, above.)

Otherwise, Respondent relies on this Court's precedent in arguing that appellant's claims must be rejected. (RB pp. 84-86.) Appellant in turn relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 313-332.)

XVII. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS WHICH OCCURRED DURING THE GUILT AND PENALTY PHASES OF TRIAL COMPELS REVERSAL OF THE DEATH SENTENCE EVEN IF NO SINGLE ISSUE, STANDING ALONE, WOULD DO SO.

Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 332-346.)

XVIII. MULTIPLE PUNISHMENT WAS IMPROPERLY IMPOSED FOR THE SAME ACTS IN VIOLATION OF SECTION 654[18]

There are multiple violations of these provisions in the determinant portion of Kevin's sentence.

A. IN THE CHARGED OFFENSES THERE WAS ONLY A SINGLE USE OF A DEADLY WEAPON FOR WHICH ONLY A SINGLE SENTENCE MAY BE IMPOSED

The contention here was that it was error to impose a sentence enhancement for use of a single dangerous and deadly weapon to both Count Two (robbery) and Count Four (rape in concert). (AOB pp. 347-348.) In light of the parties agreement, discussed in Part *B*, below, that the sentence on Count Four must be stayed, this contention in Part *A*, is rendered moot.[19] (*People v. Bracamonte* (2006) 106 Cal.App.4th 704, 711 [131 Cal.Rptr.2d 334] [Where the sentence on a count is stayed, the court is required to also stay the enhancement on which it is added].)

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[18] Section 654 provides in pertinent part:

> (a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

[19] Recently, this Court in *People v. Rodriguez* (2009) 47 Cal.4th 501, 506-507 [98 Cal.Rptr.3d 108] was asked but declined to resolve whether a sentence enhancement which went to the nature of the offense, as in the case of a firearm use, was governed by the proscription of section 654.

B. THERE WERE TWO SEX OFFENSES EACH CHARGED UNDER TWO THEORIES, BUT FOR WHICH ONLY A SINGLE SENTENCE MAY BE IMPOSED

Respondent is correct that the prosecution proceeded on the theory that initially Jamelle subsequently followed by Jamelle and his brother Warren collectively twice penetrated the victim with a foreign object (Counts Six and Seven.) Respondent agrees that both Count Four, forcible rape in concert, and Count five, forcible rape, were based on the same act of a single sexual penetration and as a result the lesser offense should be stated.

Thus, the parties are in agreement that the above premises require staying Kevin's sentence on Count Four, forcible rape while acting in concert in violation of section 264.1, since a sentence of an indeterminate life sentence with a minimum term of 25 years was imposed for Count Five, forcible rape (§ 667.61, subd. (a)). (AOB pp. 348-349, RB p. 88.)

C. ONLY THE SENTENCE FOR MURDER MAY BE IMPOSED AS IT WAS INDIVISIBLY INTERTWINED WITH THE OTHER FELONIES

Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 349-350.)

D. THE REMEDY

The appropriate procedure on appeal is to eliminate the effect of the judgment on Counts Two through Eight as the penalty alone is concerned. (*In re Ward* (1966) 64 Cal.2d 672, 679 [51 Cal.Rptr. 272].)

XIX. THE TRIAL COURT'S IMPOSITION OF UPPER TERM SENTENCES VIOLATED KEVIN'S FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL, PROOF BEYOND A REASONABLE DOUBT, AND DUE PROCESS[20]

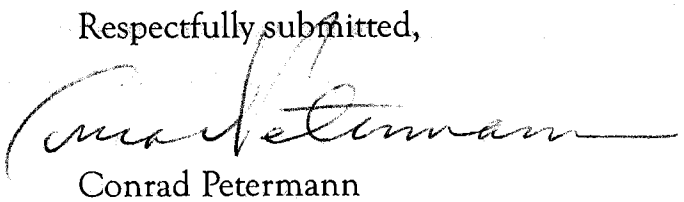
Appellant relies upon his argument from the *Opening Brief* and has nothing further to add on this issue. (AOB pp. 349-350.)

CONCLUSION

For the foregoing reasons, Kevin's convictions and death sentence must be reversed.

Dated April 1, 2010

Respectfully submitted,



Conrad Petermann
Attorney for Appellant

CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Goudy Old Style typeface, point size of 14, and the total word count is 12,347, not including tables, and thus is within the limits (47,600 words) of California Rules of Court, rule 8.630, subdivision (b).

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[20] An apology is in order. The author's editing of the AOB was wanting and left several paragraphs in the text irrelevant to any issue here. Please disregard the paragraphs beginning at the bottom of the AOB at page 352 and ending at the top of page 356, just before the commencement of Part *D*.

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CASE NUMBER: No. S120750

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served *APPELLANT'S REPLY BRIEF* by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed to the parties as follows:

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

Executed on April 5, 2010, at Ojai, California.

Conrad Petermann