No. S075875

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TIMOTHY RUSSELL

Defendant and Appellant.

(Riverside County
Sup. Ct. No. RIF72974)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TIMOTHY RUSSELL, Defendant and Appellant.	No. S075875 (Riverside County Sup. Ct. No. RIF72974)

APPELLANT'S REPLY BRIEF

- - -

INTRODUCTION

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

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief ("AOB"). Statutory references are to the Penal Code unless otherwise noted.

1

THE JURY WAS PERMITTED TO CONVICT APPELLANT ON A LEGALLY ERRONEOUS THEORY OF LYING-IN-WAIT MURDER

Appellant has argued that the prosecutor's lying-in-wait theory of murder was legally erroneous and that the instructions given were inadequate to cure the error. (AOB 44-58.) In a related argument, appellant has also claimed that the lying-in-wait instructions were incorrect. (AOB 58-60.) Respondent answers by arguing that the instructions were correct, but makes little or no reference to the legal theory the prosecutor pursued. (RB 27-32.)

As an alternative to his case for premeditated and deliberate murder, the prosecutor offered the jury an easy route to conviction on lying-in-wait murder. He told the jurors that even if everything appellant said to the police in his taped statements was true, appellant was nevertheless guilty of two counts of lying-in-wait murder. (11RT 1303-1307.) This was incorrect. Appellant claimed he was trying to get away from the area under cover of darkness when he was surprised by the presence of the two officers. He reacted quickly by firing at them. (See AOB 45-47.) If the jurors credited appellant's story, as the prosecutor invited them to do, all the elements of lying-in-wait murder would have to have been met in the moments after appellant saw the officers and before he fired – at most a few seconds. Respondent offers no clear disagreement that the prosecutor's theory was legally erroneous. In fact, respondent does not even mention the prosecutor's argument in his response.

A. The Prosecutor's Theory of Lying-in-wait Was Legally Erroneous

By any reasonable standard, there was no evidence of a substantial period of watching and waiting before the shooting under the theory argued to the jury by the prosecution. The purpose of the watching and waiting element is "to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse." (*People v. Stevens* (2007) 41 Cal.4th 182, 203; see also *People v. Moon* (2005) 37 Cal.4th 1, 23-24 [watching and waiting 90 second deemed "relatively short" but sufficient].) As described by appellant, the shootings in this case were the result of a rash impulse rather than insidious acts. The officers went over the shootings with appellant repeatedly. Appellant said he was "pretty surprised and shocked" to see the officers as he attempted to get away from the area under cover of darkness. (4Supp. CT 116.) He saw the silhouette of the two officers and he pulled the trigger "within a matter of seconds. . . . [T]he reaction was quick. . . . It was just like I was doing it before I realized what I was doing, you know, that I did it." (4Supp. CT 133-134; see AOB 45-47 [setting out a more expansive version of appellant's statements].)

Strictly by length of time, the period of watching and waiting described by appellant appears to be shorter than in any reported cases of lying-in-wait. Respondent claims *People v. Hillhouse* (2002) 27 Cal.4th 469 is a case in which the period of watching and waiting was only a few seconds. Respondent is wrong. In *Hillhouse* the defendant drove around in a truck with the victim for a considerable period of time. Defendant told a witness at an early stage that he intended to kill the victim. He waited until they stopped, and the victim got out of the car to urinate. Defendant used that opportunity to make his attack. There was a substantial period of

watching and waiting while they drove in the truck and defendant waited for his opportunity to attack. (*Id.* at p. 500.)

Since appellant filed his opening brief this Court has issued *People v. Stevens*, *supra*, 41 Cal.4th 182, which addresses the limits of the watching and waiting period for a lying-in-wait special circumstance case. *Stevens* involved a defendant who committed a series of random shootings on the freeways. He pursued a particular modus operandi in which he would pull his car up next to another car, signal the driver to slow down, and after accomplishing that, would shoot the driver. (*Id.* at p. 203.) In the incident which resulted in a lying-in-wait special circumstance, defendant had committed one of these shooting and quickly identified another vehicle, pursued it, induced the driver to slow down and shot him. (*Ibid.*) Although the time spent watching and waiting was short, there was no indication of a rash impulse motivating the crime – it was reasonable to assume the defendant was working from a plan to lure drivers into a false sense of security and then kill them. (*Ibid.*) Even the short period of watching and waiting in *Stevens* appears to have been considerably longer than in the present case, in which the period was at most two or three seconds, and possibly less. Furthermore, appellant's statements show no plan like in *Stevens*. There are simply no cases of lying-in-wait where the evidence of the period of watching and waiting is as insubstantial as under the prosecutor's theory here.

B. The Jury Instructions Did Not Correct the Erroneous View of Lying-in-Wait Murder Argued by the Prosecutor

There is no question that one element of lying-in-wait murder is a substantial period of watching and waiting for an opportune time to strike. (*People v. Morales* (1989) 48 Cal.3d 527, 557; *People v. Hardy* (1992) 2

Cal.4th 86; *People v. Stanley* (1995) 10 Cal.4th 764, 796.) Respondent acknowledges this. (RB 28, citing *People v. Morales*, *supra*, 48 Cal.3d at p. 557.) It is also true that the standard lying-in-wait instructions do not inform juries that the watching and waiting period need to be "substantial." Rather, CALJIC No. 8.25, as given in this case, tells the jury that, "The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (11RT 1382-1383.) This portion of the instruction tracks language from this Court's cases, including *People v. Sims* (1993) 5 Cal.4th 405, 433-434.

Respondent contends that the standard CALJIC No. 8.25 instruction adequately informs the jury on the element of watching and waiting, despite the fact that it does not state that the period of watching and waiting needs to be substantial. Appellant disagrees, while recognizing that no particular words are necessary for the instruction. For example, in *People v. Edwards* (1991) 54 Cal.3d 787, 823, which was tried before *Morales*, this Court found no error where the instruction informed the jury that lying-in-wait murder necessarily included "a substantial temporal element" where it stated that a murder "done suddenly" without watchful waiting and concealment was not lying-in-wait murder.

The standard form instruction – and the version used in this case – does not inform the jury of the "substantial temporal element" in lying-in-wait murder. Premeditation and deliberation require little passage of time. The jury here was told that the word premeditation simply means "considered beforehand." (11RT 1381; see CALJIC No. 8.20.) Appellant contends that the mere act of momentarily watching and waiting does not show a state of mind equivalent to premeditation and deliberation. The

instruction erroneously permits the jury to use the minimal temporal component of premeditation or deliberation to fulfill the requirement that the period of lying-in-wait be substantial. The instruction therefore does not adequately instruct the jury on a critical element of the crime. Instead, it allows a jury to find a killing to be a lying-in-wait murder which was done as a rash impulse rather than insidiously. (*People v. Stevens*, *supra*, 41 Cal.4th at 203.)

Appellant is entitled to relief, however, even if the instructions were accurate. When verdicts may be based on an erroneous legal theory pressed by the prosecutor, the convictions must be reversed unless the instructions "disabuse the jury" of the erroneous theory. (*People v. Green*, *supra*, 27 Cal.3d at. p. 68.) In *Green* the prosecution put forward a theory of kidnaping that included the victim being moved only 90 feet. The instruction on asportation was not inaccurate but did not require the jury to reject the prosecution's erroneous theory. (*Ibid.*) In the present case, the instructions permitted the jurors to accept an insubstantial period of watching and waiting because they were allowed to measure the duration of the necessary period using the length of time needed for premeditation or deliberations. Because neither premeditation or deliberation require any substantial period of time, the jury could have accepted the prosecutor's erroneous theory in spite of the instructions being accurate.

Appellant's statements did not support a lying-in-wait theory of murder, the prosecutor told the jury that they did, and the instructions failed to correct the prosecutor's mistake.

C. The Error Requires That the Convictions Be Reversed

Respondent claims that, regardless of any error, there was evidence sufficient to support a conviction on either theory. (RB 31-32.)

Respondent's point is irrelevant and ignores the correct test for prejudice. When the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, the conviction must be reversed if the reviewing court cannot determine from the record on which theory the jury actually rested its verdict. (*People v. Green*, (1980) 27 Cal.3d at p. 69; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

In this case there is no way to tell which theory the jury used to convict appellant and the convictions must therefore be reversed. There is, however, a strong indication that they were considering the lying-in-wait theory. As discussed in the opening brief (AOB 52-55), the jury requested clarification on a discrepancy between two of the lying-in-wait instructions: CALJIC No. 8.25 indicated that the duration of the lying-in-wait needed to be such as to show a state of mind equivalent to premeditation *or* deliberation (11RT 1382-1383), whereas the court's special instruction stated that the perpetrator needed to exhibit a state of mind equivalent to, but not identical to, premeditation *and* deliberation (11RT 1383). The jury returned its verdicts shortly after the court indicated the latter instruction should have been in the disjunctive. (13CT 3483, 3485-3492; 12RT 1428.) The most obvious explanation for the jury's inquiry is that they were considering the prosecutor's lying-in-wait theory and needed to know if the state of mind necessary was the equivalent of both premeditation and deliberation, or simply one or the other. Even if this is not enough to show the verdict was based on a lying-in-wait theory, there is no basis to conclude the jury rendered its verdict on a premeditated and deliberate murder theory. The guilt verdict must therefore be reversed.

2

THE COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A NIGHTTIME JURY VIEW OF THE SCENE OF THE SHOOTING

Appellant has argued that the trial court erred in denying his motion for a nighttime jury view of the scene of the shooting. The court gave three reasons for its ruling: (1) that the lighting conditions could not be duplicated; (2) that there was already sufficient evidence that the scene was very dark; and (3) the issue was whether appellant aimed at the officers rather than whether he saw them. Appellant in the opening brief showed how each of these reasons was flawed, both as to the guilt trial and to the penalty phase retrial. (AOB 61-67.) Respondent contends there was no error. (RB 33-40.)

Respondent's defense of the court's determination that the conditions could not be replicated is simply a conclusory statement that in fact, the conditions could not be replicated. (RB 38.) Respondent also cites to *People v. Robinson* (1970) 5 Cal.App.3d 43, 48, in which the defendant sought a daytime jury view of the crime scene when the crime occurred at 4 a.m. In the present case appellant sought to allow the jury to see how dark the scene was by showing it to them when it was, indeed, dark. As shown in appellant's opening brief (AOB 62-64), the court's determination that the conditions could not adequately be replicated was erroneous.

Respondent believes that there was "plenty" of evidence of the lighting conditions without the jury viewing the scene. (RB 36.) Respondent's point here seems to be that a jury view of the scene would have been cumulative to other evidence already presented and thereby supportive of the court's reasoning that there was sufficient evidence to

establish that it was "pitch black" at the scene. (See AOB 61-62; 10RT 1204.) But the evidence respondent points to is mostly the various observations that Beverly Brown, Twilla Gordon and John Gordon made from the Gordon household (RB 36-38), not from the location where appellant fired his weapon. The Gordon home was across and down the street from where the Russell's lived. (6RT 693, 730.) The visibility from the Gordon home had little bearing on the visibility from appellant's position at the time of the shooting. The reason for requesting a viewing of the scene was to show the jury what *appellant* could see, not what witnesses across and down the street could see. Furthermore, this evidence was not consistent with the scene being pitch black. Respondent cites testimony that indicated Brown could see the officers' bodies lying on the ground and identify details such as facial hair. (RB 37.) This testimony supports appellant's argument that visibility was a contested issue, contrary to the implication of the court's ruling that no jury view was necessary because both sides acknowledged that the scene was extremely dark. The fact that visibility varied from place to place around the scene of the shooting supports appellant's argument that the trial court abused its discretion denying appellant's motion.

As to the third reason the motion was denied, appellant has argued that the trial court took the overly-narrow view that seeing the scene would not assist the jury because the issue in this case was whether appellant aimed at the officers rather than whether he saw them. (AOB 64-65.) Respondent offers no direct defense of the court's reasoning on this point, and badly misstates appellant's position at trial: "Through the testimony of the witnesses and the photos admitted, Russell was able to present his defense and argue that it was too dark for him to have seen that the

shadows were the deputies." (RB 38.) Appellant never claimed that he confused shadows for the deputies. Respondent's misdirection on this point serves to highlight the court's failure to acknowledge the various actual evidentiary issues on which a view of the scene at night would have assisted the jury, and respondent's failure to offer a coherent defense of the court's ruling: The prosecution theory was that appellant hid in the bushes and ambushed the officers, whereas the defense theory was that appellant was on the move trying to use the darkness as cover to escape detection and get away from the area when the officers surprised him. Visibility was relevant to a number of points on which these two theories differed, and a jury view would have served as a means of testing each theory. First, appellant said he believed that the darkness would provide cover for his escape from the area. He was surprised when he suddenly saw the officers' silhouettes and was uncertain whether they could see him. (4SCT 116.) The prosecution theory was that the same spot where defendant claimed to be surprised to see the officers was where appellant actually had chosen as the 'most opportune" position of advantage where he could lie in wait and surprise them. (11RT 1355.) A view of the scene would have allowed the jurors to see for themselves whether that area was an effective ambush point or whether it was a place where the officers might have surprised appellant as he attempted to get away. Second, according to appellant, the scene was too dark to be able to sight with the rifle. (4SCT 45 [appellant's statement].) But according to the prosecutor, appellant could have sighted on one officer and then sighted the second officer "very easily." (11RT 1360.) A view of the scene would have given the jury information on which to decide the plausibility of appellant using the rifle's sight under these conditions. Third, appellant said he could not see the officers after he

fired and assumed they had run back to their cars. (4SCT 119.) The prosecutor claimed that from this vantage point the officers were backlit, and that appellant could see the officers well enough to follow them down with his rifle as they fell, shooting one in the foot after he was down. (11RT 1360-1362.) A view of the scene would have allowed the jury to assess the credibility of these competing perspectives.

Respondent also relies on a diagram of the area that appellant drew for Detective Spidle, but does not indicate how the diagram supports the court's ruling. (RB 36.) Certainly the fact that appellant could draw such a diagram cannot be seen as evidence that he could see clearly at the time of the shooting. The shooting was outside appellant's home, so he was familiar with the area in daylight. Nor can the diagram be understood as giving the jury any greater understanding of the area, thereby negating the need for a jury view, because the diagram was not authenticated as accurate and was not admitted into evidence. (31RT 3127.) Furthermore, the police did not seem to believe the diagram made a view of the scene unnecessary. After appellant created the diagram, they transported appellant to the scene to have him show them where and how the shootings occurred. (4SCT 95.)

In short, respondent has failed to provide any substantial support for the trial court's reasons for denying appellant's motion. Respondent also suggests that the practical difficulties in conducting a jury view supports the court's decision. (RB 38.) But the court stated the reasons for its decision and those reasons did not include any possible practical difficulties in conducting a jury view. This Court has no basis to assume the trial court had another unstated reason for its ruling. Rather, it is reasonable to assume that the trial court chose not to allow the possible inconvenience of conducting a jury view to affect its decision on the motion given the life and

death stakes in the trial.

Respondent's analysis is also undermined by erroneous factual representations as to what appellant saw at the time of the shooting. Respondent claims the prosecutor argued that appellant could see Haugen lying on his back after being shot and could even see Haugen's thick mustache. (RB 35.) The prosecutor made no such argument, and there was no evidence in appellant's statement or elsewhere that he saw Haugen on the ground or his mustache. In fact, it was Beverly Brown, not appellant, who said she saw a mustache on one of the fallen officers from her vantage point in the Gordon's house. (6RT 673-674.) Respondent also claims that appellant, after seeing the officers, "could size them up." (RB 36.) Appellant said he saw that one of the officers was a large man (4SCT 10, 117) and that the other was about five paces behind the first (4SCT 10) – but any inference suggested by respondent's characterization that appellant had a substantial period of time to assess the situation after seeing the officers and before shooting at them – "size them up" – is unsupported by the evidence. In fact, appellant's statement was that he saw the officers suddenly, and reacted by shooting. (4SCT 116.) The record shows that it would have been possible and practical to afford the jurors a view of the scene which would show them the limited visibility the night of the shooting; that the visibility that night was not made clear by other evidence; and that appellant's ability to see was an important and contested issue at trial. The motion should have been granted.

Appellant renewed his motion for a jury view at the penalty retrial, which was in front of a new jury. As discussed above and in the opening brief, the jury's determination of the circumstances of the crime could have been affected by how it assessed the visibility at the scene of the shootings.

The verdicts at the guilt phase were not determinative on all the circumstances of the shooting, and the prosecutor again sought to show that appellant committed a premeditated and deliberate first degree murder by ambush. The jury view was relevant to mitigating the circumstances of the crime and to support appellant's lingering doubt defense. The erroneous reasons given by the court for refusing the jury view at the guilt phase were also erroneous when given in response to appellant's motion at the penalty retrial. Both the guilt and penalty phase verdicts and judgments must be reversed.

3

THE TRIAL COURT INTERFERED WITH THE JURY'S DELIBERATIONS AND IMPROPERLY COERCED THE GUILT VERDICTS

The trial court made multiple errors in responding to a note from one juror, Juror No. 2, describing perceived problems with another juror, Juror No. 8. Appellant has argued that the court should not have questioned Juror No. 8, and the inquiry it conducted both intruded on the jury's secrecy and coerced the guilt verdicts on first-degree murder. (AOB 68-83.)[1] Respondent believes any error was invited or forfeited. Respondent also makes a general argument that the court's inquiry was proper. (RB 40-48.)

A. The Issue Is Not Procedurally Barred

Respondent first makes the remarkable claim that appellant invited any error. Respondent could hardly be more incorrect. When the court received the note from Juror No. 2 about Juror No. 8, it sought out the advice of counsel. Defense counsel represented that both he and the prosecutor had agreed that the court should question Juror No. 8[2]:

> Mr. Ruddy [the prosecutor] and I spoke before the Court took the bench, or Your Honor took the bench, and what we would like to do, if you think it would be appropriate, to call out the juror which is being referred to, which is Juror No. 8 and the Court make inquiry whether or not she's able to continue or is she deliberating. And let the Court make inquiry, not counsel. And then we can frame any issue or problem that may be present or that may not be.

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[1] Some or all of the copies of appellant's opening brief are mis-collated on this issue so that page 70 precedes page 69.

[2] Counsel did not say that the parties had agreed that the court should question *both* the foreperson (Juror No. 12) *and* Juror No. 8 as respondent claims. (RB 45.)

(12RT 1416-1417.)

The trial court, however, while noting that it *could* examine Juror No. 8, *rejected* this idea. Instead, the court believed it should talk to the foreperson:

> THE COURT: What I suggest we do is call out the foreperson and see if there is a problem and then take it from there.

(12RT 1416.)

After the court questioned the foreperson, it again sought the parties' positions on how to go forward. (12RT 1419.) At that point, defense counsel stated that what the foreperson had said indicated that there was no problem with Juror No. 8. He then offered his suggestion as to how the court should proceed:

> What I would suggest is, let the jury continue to deliberate in its present – with its present jurors.
>
> If, in fact, there is a problem, I would think the foreperson, now that she has been alerted to a certain extent that the Court's concerned about this, if the foreperson were to send out a note or request or to alert the Court that there is a definite problem with a progress [sic] of their deliberations, then I think we would take it up and we might have Juror No. 8, [Juror No. 8], come out and talk with her.

(12RT 1420.)

The prosecutor disagreed with the defense and believed there was a basis for bringing Juror No. 8 into court and determining if she could set aside her personal feelings. (12RT 1420-1421.) The court then again *rejected* defense counsel's request and instead, consistent with the prosecutor's suggestion, brought Juror No. 8 into the courtroom and questioned her. (12RT 1421.) From these facts, respondent contends appellant invited any error in questioning the foreperson and Juror No. 8. (RB 45-46.)

The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. (*People v. Wickersham* (1982) 32 Cal.3d 307, 330.) The obvious corollary to this general rule is that the invited error doctrine cannot apply when the court does not do what the party requested. Here, at both critical points, the court rejected proceeding in the manner requested by appellant. The trial court's errors in questioning Juror No. 8 therefore cannot be attributed to appellant. Respondent's invited error claim is completely without merit.[3]

Respondent also claims appellant forfeited "the error" by failing to object. (RB 46.) As appellant understands it, this claim of forfeiture relates to the court's decision to question Juror No. 8. Appellant made clear that there was no basis for further inquiry after the court questioned the foreperson, and argued that the court should have the jury return to its deliberations. The court was on notice as to the course of action appellant believed the court should take. The issue is not barred.

Respondent claims appellant "got the type of informal hearing he requested." (RB 46.) Respondent is wrong. After the foreperson was questioned, appellant made it clear he wanted no further hearing at all. Furthermore, respondent offers no support for the contention that appellant wanted a hearing in which the juror would be subjected to the kind of

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[3] Respondent has also claimed invited error as to the court questioning the jury foreperson. (RB 45-46.) But appellant has not argued that the court erred by calling in the foreperson for questioning. Respondent's zealous search for procedural bars has opened a new frontier – arguing to bar issues that have not even been raised.

intrusive questions and coercive admonitions that occurred here.

B. The Court Made Multiple Errors Conducting the Inquiry Into the Allegations Against Juror No. 8

Appellant has argued that the court committed at least four separate errors in its inquiry into the jury's deliberations. (AOB 74-83.) Respondent appears to have answered only a portion of these arguments. (RB 46-48.)

First, appellant has argued that after the court questioned the foreperson, it should have ended its inquiry and told the jury to resume deliberations as appellant requested. (AOB 74-78.) Not every incident involving a juror's conduct requires or warrants further investigation. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) A hearing is only required where the court has information which, if shown to be true, would constitute good cause to doubt a juror's ability to perform her duties and would justify her removal from the case. (*People v. Ray* (1996) 13 Cal.4th 313, 343.) The statements made by the foreperson when questioned by the court made it clear that Juror No. 8 was deliberating and that the references the juror made to having sympathy for the defendant were not improper. (12RT 1417-1419.) Accordingly, there was no sound evidence for a further inquiry. Respondent appears to have made no argument – aside from in its argument subheading (RB 46) – defending the court's decision to question Juror No. 8 after hearing from the foreperson. Appellant's argument on this point is therefore unrebutted.

Second, regardless of the propriety of the court's determination to question Juror No. 8, the questions the court asked were unnecessarily intrusive and the admonitions it gave were coercive. (See AOB 78-82.) Respondent claims the court's inquiry was proper, relying almost entirely on *People v. Keenan* (1988) 46 Cal.3d 478. The issue in *Keenan*, however,

was whether the court coerced a verdict by supplemental instructions to the entire panel. The holding in *Keenan* has little relevance to whether the inquiry into Juror No. 8's deliberations was excessively intrusive. Appellant does, however, agree with dicta in *Keenan* stating that although courts have the power to investigate and jurors who refuse to follow their oaths, "it may also take less drastic steps where appropriate to deter any misconduct or misunderstanding it has reason to suspect." (46 Cal.3d at p. 533.) The Court further noted that "any intervention must be conducted with care so as to minimize pressure on legitimate minority jurors." (*Ibid.*) Assuming the court correctly determined that it could not simply return the jury to its deliberations after hearing from the jury foreperson, it should have taken less intrusive and coercive steps than questioning and admonishing Juror No. 8.

Keenan is relevant to the issue of whether the trial court coerced Juror No. 8 with the personal admonitions it gave her, but offers little support for respondent's position. In the special instructions in *Keenan*, the court requested that the jurors "search [their] consciences" and recall their oath and duties to follow the law. The court indicated that it might question some of the jurors if there was a further problem and expressed a hope the jury would soon return a verdict. (46 Cal.3d at pp. 529-530.) In finding no coercion in these instructions, this Court first noted that "nothing in the court's remarks singled out an individual juror or suggested the court knew the identity of any juror who was having a 'problem.'" (*Id.* at p. 535.) In the present case, the trial court chose a more intrusive and coercive manner of investigating the alleged problem by singling out Juror No. 8, questioning her individually, and giving her individualized instructions before allowing her to return to deliberations.

Respondent may also be relying on *People v. Burgener* (1986) 41 Cal.3d 505, 517, although if so, it is mis-cited. (See RB 47.) In *Burgener* a question arose during deliberations whether one juror might be intoxicated. Rather than singling out that juror for questioning and instructions, the court gave the entire panel general instructions against using intoxicants and returned them for deliberations. Like the court in *Keenan*, the court in *Burgener* was much less intrusive than the court here: it did not single out one juror for questioning, even though the complaint was directed at one juror; it did not inquire further about the details of any possible intoxication; and it gave the entire jury a general reminder about not using intoxicants for the duration of the trial rather than ordering a single juror to refrain from any particular activity. The contrast between *Burgener* and the present case tends to support appellant's argument rather than respondent's.

Third, appellant also argued that the trial court made two mistakes after questioning the foreperson. It told the foreperson that he would consult with the attorney as to whether they had any "recourse," thereby implying that the court believed that Juror No. 8 had done something wrong that needed fixing. Then it failed to tell the foreperson not to discuss the court's inquiry with the other jurors. This created a situation where the foreperson would be able to report to the other jurors that the court had responded sympathetically to the concerns expressed in Juror No. 2's letter, thereby putting additional pressure on Juror No. 8 to abandon her position.

Respondent seeks to minimize the court's intrusion by noting that it did not inquire into the numerical division of the jury in the deliberations. Nevertheless, it is clear that the court and the parties were assuming that Juror No. 8 was a single holdout, or at least in a very small minority. The jury, and each of its members, would have been acutely aware of how they

were divided and undoubtedly would have noticed that the only jurors the court called for questioning were the foreperson and one minority juror.

Overall, the court was not discreet in its questioning, as respondent claims. (RB 48.) On the contrary, its questioning about the juror's sympathy for appellant was extremely pointed and even accusatory. When the court urged the juror "to be as honest as you can," it implicitly expressed doubt as to the juror's willingness to be honest. The court also made clear that it knew critical details of this juror's statements during deliberations, which included revelations of her personal experiences with mental illness. Instead of being discreet, the court was extremely intrusive.

Furthermore, there was nothing discreet about the court's orders to the juror. It ordered her not to allow a particular event in her life to interfere with her objectivity, despite her statement that she had not allowed that to happen. (12RT 1423.) The court ordered her to deliberate with the other jurors, and embellished on that order by telling her that "deliberate" meant to discuss the evidence, and added that she was to do so objectively. (12RT 1423.) The clear message to the juror was that the court disapproved of her behavior during deliberations.

Rather than minimizing pressure on the minority juror (see *People v. Keenan*, *supra*, 46 Cal.3d at p. 533), the court's intrusive questioning and coercive directives served to increase that pressure on Juror No. 8, undermine her independence and bias the deliberations toward verdicts of guilt. The court's pressure worked: the jury returned guilty verdicts for first-degree murder only three hours after Juror No. 8 was questioned and admonished. The court's numerous errors in handling the complaint about Juror No. 8 require that those verdicts be reversed.

4

THE TRIAL COURT ERRED BY GIVING THE JURY A CONSCIOUSNESS OF GUILT INSTRUCTION

Appellant argued in his opening brief that the court erred at the guilt phase by instructing the jury with CALJIC No. 2.03, the standard instruction on consciousness of guilt. (AOB 84-94.) The police had information from Beverly Brown that appellant, after leaving the house, made a statement to the effect that the police were coming and he was going to kill them. When the police interrogated appellant after the shootings, they asked appellant to confirm this statement. Appellant at first denied making the statement, but in later questioning said that while he did not remember making such a statement (4Supp. CT 43), it was possible he had done so (4Supp. CT 111). The court instructed the jury with CALJIC No. 2.03 and the prosecutor argued to the jurors "that if you find that Mr. Russell lied to Mr. Spidle you can use that what [sic] is called a consciousness of guilt. He has something to hide." (11RT 1310.) Since appellant acknowledged shooting the officers, the prosecutor was obviously arguing that what appellant was hiding was the fact that he had shot the officers intentionally.

Both appellant and respondent rely on Justice Traynor's concurrence in *People v. Albertson* (1944) 23 Cal.2d 550 to explain the logic underlying a consciousness of guilt instruction. Respondent, in noting that juries may infer a consciousness of guilt whenever a defendant fabricates stories "which, like devious alibis, are apparently motivated by fear of detection" (*id.* at p. 582) has given only a portion of Justice Traynor's reasoning. The entire relevant quote is as follows:

> "It has never been suggested, however, that every falsehood

> voiced by defendant between the time of the crime and the trial can be admitted on this basis [consciousness of guilt], for it is well known that all persons are liable to make errors in the description of past events. Consciousness of guilt is proved, not by evidence of such slips, but by fabrications which, like devious alibis, are apparently motivated by fear of detection, or which, like devious explanation of incriminating circumstances and thus are admissions of guilt."

(*Ibid.*) Appellant contends that his statements to Spidle about what he said to Beverly Brown, even if understood as false, does not rise to the level of a fabrication that reasonably gives rise to an inference of consciousness of guilt.

Respondent focuses particularly on the second statement to Spidle in which appellant said it was *possible* he had made the statement to Brown about "taking out" the police. (RB 51.) But the propriety of giving a consciousness of guilt instruction is predicated on the statement in question being wilfully false. Respondent does not explain how appellant's statement to Spidle – that it was possible he made the statement to Brown – is wilfully false, since the prosecutor's position is that appellant did, in fact, make that statement. Without a false statement to base the instruction on, respondent's argument fails. The prosecutor argued to the jury that appellant adjusted his story about the statement to Brown as part of a strategy to minimize his culpability. Whatever the merits of this argument, the prosecutor was not entitled to have it enhanced by the consciousness of guilt instruction. Appellant's simple answers to Spidle's questions did not rise to the level of being a fabricated explanation for his actions at the time of the crime. The instruction should not have been given.[4]

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[4] Respondent may also be contending that the fact that appellant left (continued...)

Appellant has also argued that the consciousness of guilt instruction embodied an improper permissive inference. (AOB 88-91.) Appellant acknowledged that this court has previously rejected this argument numerous times: the Court has reasoned that juries understand that "consciousness of guilt" really means "consciousness of wrongdoing." (AOB 90, citing e.g., *People v. Crandell* (1988) 46 Cal.3d 833.) In a case like this, however, the prosecutor had little interest in merely showing that appellant was conscious of wrongdoing; appellant himself had clearly and repeatedly admitted he killed the officers. Rather, the prosecutor wanted the jury to believe appellant was hiding a consciousness that he had *intentionally* killed the officers. But this Court has held that although consciousness of guilt evidence may bear on a defendant's state of mind after the killing, it is irrelevant to his state of mind at the time of the killing. (*People v. Anderson* (1968) 70 Cal.2d 1, 32.)

Respondent relies on cases that suggest that CALJIC No. 2.03 does not address the defendant's mental state at the time of the crime. (RB 54.) While that may generally be true, in this case the prosecutor's argument gave the jury the opportunity to use the consciousness of guilt evidence to find intent to kill. It should not have been allowed to do so. Even if the jury found that appellant falsely denied making the statement to Brown, it does not logically follow that the state of mind revealed by that fact after the shooting permitted the further inference that appellant had the intent to kill when earlier he shot the officers. The prosecution was free to argue that

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[4](...continued)
the scene after the shooting justified the instruction. (RB 52.) But flight after a crime would require CALJIC No. 2.52 or a similar instruction.

appellant made the statement to Brown and that the jury could infer from that statement that he later intended to kill the officers, but the intent to kill cannot be inferred through a consciousness of guilt after the fact.

Appellant has also argued that the instruction was impermissibly argumentative, but acknowledged that this Court has repeatedly rejected this argument. (AOB 91-93.) Respondent relies on this Court's past authorities on this point, and no reply is therefore necessary.

Whether appellant intended to kill the officers was a central issue in the case. The erroneous consciousness of guilt instruction permitted the jury to find such intent through a false line of inferences. The convictions and sentence of death must be set aside.

5

THE COURT FAILED TO REQUIRE THE JURY TO AGREE UNANIMOUSLY WHETHER THE HOMICIDES WERE LYING-IN-WAIT MURDER OR PREMEDITATED AND DELIBERATE MURDER

Appellant has argued that the convictions must be reversed because the jury was not required to agree unanimously whether, as to each count, the murders were premeditated and deliberate, or committed while lying-in-wait. Appellant acknowledged that this Court, relying on *Schad v. Arizona* (1991) 501 U.S. 624, has previously rejected similar claims, but asked the Court to reconsider it previous decisions. (AOB 95-101.)

In *Schad* the United States Supreme Court held that it was constitutional for Arizona to require only a general verdict for first degree murder based on either premeditation or felony murder, without jury unanimity as to which theory applied. (501 U.S. at p. 637.) Arizona had determined that certain statutory alternatives – premeditated murder and felony-murder – were merely different means of committing murder rather than independent elements of the crime, and the Supreme Court decided that it was not free to ignore that determination. (*Id.* at p. 636.) Appellant contends that California has taken a different path because its different forms of murder are not merely separate theories, but contain separate elements and are therefore separate crimes. (AOB 96-99.)

Respondent's initial response is to completely misstate appellant's argument. Respondent contends that appellant notes in his opening brief that *Schad* was a plurality opinion and appellant relies on the dissenting opinion. (RB 57-58.) This is simply untrue – appellant does not rely on or cite to the dissent in *Schad*, nor does he note or otherwise base his argument on the fact that *Schad* was a plurality opinion. Respondent seems to be

writing in response to an entirely different brief. In fact, appellant acknowledges the holding of *Schad*, but contends California's law on murder is different from Arizona's despite their statutory similarities.

Respondent also relies on *Sullivan v. Borg* (9th Cir. 1993) 1 F.3d 926. But *Sullivan* did not address the issue appellant has raised here. There, the court rejected defendant's claim that jury unanimity was required where the prosecution presented both premeditated murder and felony-murder theories because these theories were codified in separate statutes. That is not the argument appellant is making here. Although appellant believes there are separate crimes of murder, the fact that they are codified in different statutes is not the basis for appellant's argument that they are separate crimes, despite respondent's contention to the contrary. (RB 59.) Appellant contends it is this Court's decisions defining lying-in-wait murder and premeditated murder as having separate elements that makes them separate crimes. (AOB 98-99.)

This Court has been clear that the elements of lying-in-wait murder are distinct from the elements of premeditated malice murder. (*People v. Morales* (1989) 48 Cal.3d 527, 557 [distinguishing premeditated murder from special circumstance lying in wait].) The state of mind required for lying-in-wait murder is equivalent to, but not identical to, premeditation or deliberation. (*People v. Ruiz* (1988) 44 Cal.3d 589, 615.) Respondent believes that *People v. Hardy* (1992) 2 Cal.4th 86 supports the idea that lying-in-wait and premeditation and deliberation are not different elements. (RB 61-62.) But *Hardy* simply supports the point that appellant made in the opening brief and supported with *Morales*, *Ruiz* and *People v. Stanley* (1995) 10 Cal.4th 764, 795 – that these are equivalent but not identical. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 163.) *Hardy* is consistent

with appellant's theory that lying-in-wait and premeditation and deliberation are separate elements rather than simply similar means of establishing a separate overarching element of murder.

In the recent case of *People v. Harris* (2008) 43 Cal.4th 1269, 1295-1296 appellant argued that felony-murder and premeditated murder were separate crimes for jury unanimity purposes because the California courts have described premeditation and the commission of a felony to be independent elements of murder. This Court dismissed this point as "merely semantics," concluding that whether the mental states required for a conviction of first degree murder are described as elements, theories, or alternative means of satisfying the element of *mens rea*, the jury need only unanimously agree that the defendant committed first degree murder. (*Id.* at p. 1296.)

Appellant respectfully disagrees that describing the necessary mental state as an element is merely semantics. "Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) One of those consequences is that a defendant cannot be convicted unless the jury unanimously finds the prosecution has proven its case beyond a reasonable doubt. This argument is set out in greater detail in appellant's opening brief and need not be repeated here. (AOB 97-99.)

The jury should have been required to reach a unanimous verdict on either lying-in-wait murder or premeditated and deliberate murder. The failure to correctly instruct on this point requires the judgment to be reversed.

6

THE COURT ERRED IN EXCLUDING FROM THE PENALTY RETRIAL APPELLANT'S VIDEOTAPED STATEMENTS TO THE POLICE WHICH WERE INTRODUCED BY THE PROSECUTION AT THE GUILT PHASE

Appellant sought to introduce videotaped statements of appellant's interrogation by the police in which he described the circumstances of the crimes and his reaction to learning that the officers had died. These same videotapes had been introduced by the prosecution at the guilt phase. The prosecutor chose not to introduce the tapes at the penalty retrial, and objected on hearsay grounds when appellant sought to introduce them. The trial court acknowledged that this evidence would be relevant to show both lingering doubt and remorse, but determined that it was too unreliable to admit. (21RT 1862.) Appellant has argued that the court's ruling was error. (AOB 102-113.) Respondent claims there was no error and that any claim of error based on the evidence being non-hearsay was forfeited. (RB 62-73.)

A. Appellant Did Not Forfeit the Issue of the Exclusion of the Tapes on Non-Hearsay Grounds

Appellant moved for admission of the taped statements in his written pleadings on grounds that it was both admissible hearsay and non-hearsay. (14CT 3637-3641.) Respondent even acknowledges this fact. (RB 63.) The court indicated it had read and reviewed appellant's pleadings; during the hearing on the motion appellant told the court that his points and authorities fully explained his arguments and invited the court's questions. (21RT 1853.) Respondent nevertheless claims any non-hearsay grounds for admission were forfeited, apparently on the theory that the hearing on the

motion focused on the hearsay component of appellant's argument and that appellant did not reiterate orally every other point made in his written pleadings. (RB 66.) Respondent has not supported this proposition with any relevant authority and appellant is unaware of any that would do so. The issue was properly before the trial court, which even ruled that the evidence of remorse – one non-hearsay component of the evidence in question – was relevant, before finding it was too unreliable to be admissible. (21RT 1853.) Respondent's forfeiture argument has no merit whatsoever. The issue was not forfeited.

B. The Prosecution's Use of Appellant's Taped Hearsay Statements to the Police to Obtain Guilt Verdicts Established the Reliability of the Statements for Use at the Penalty Phase

Hearsay evidence that does not come under the usual exceptions to the hearsay rule may nevertheless be admissible in a capital penalty trial if it is highly relevant to the penalty determination, and there are substantial reasons to assume its reliability. (*Green v. Georgia* (1979) 442 U.S. 95, 97.) This Court has suggested that it is possible that there should be an exception to the state hearsay rule (Evid. Code §1220) for "critical reliable evidence." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 27; see *People v. Phillips* (2000) 22 Cal.4th 226, 238 [acknowledging the *Green* rule].) The hearsay evidence in appellant's taped statement, which describes appellant's version of the circumstances leading up to the crime and continuing until appellant's arrest, is such admissible hearsay evidence under both state and federal law.

Respondent argues that the videotape evidence was properly excluded because it was unreliable. Appellant contends that the prosecutor's use of this evidence at the guilt phase should be dispositive on

this issue. In *Green*, the Supreme Court noted that in assessing the reliability of the hearsay there, that "[p]erhaps the most important" factor was that the state considered the testimony sufficiently reliable to use it against the co-defendant and to base a sentence of death on it. (*Green v. Georgia*, *supra*, 442 U.S. at p. 97.)

Respondent seeks to downplay the significance of the prosecutor's use of the tapes by claiming that they were introduced for a different purpose in the first guilt phase than the purpose for which appellant intended them at the penalty phase. What respondent ignores is the actual use to which the prosecutor put appellant's taped statements. As discussed in Argument I of both appellant's opening brief and this reply, the prosecutor invited the jurors to use the taped statements to find appellant guilty of lying-in-wait murder as an alternative to his premeditated and deliberate murder theory. In doing so, he gave appellant's story his imprimatur of reliability – he told the jury the evidence on the tapes was sufficient to prove each element of first degree murder.

Respondent argues that this evidence was introduced only to show that appellant's story was unreliable and was told with a motive to deceive, and that the court admitted the tapes to show appellant was unreliable and had a motive to deceive. (RB 70.) Respondent offers no citations to the record to support this theory of why the evidence was offered and why the court admitted it, and appellant has found nothing to support it. [5] Certainly

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[5] Furthermore, the taped statements were the central pieces of evidence of appellant's story at the trial. Without them, it is difficult to see how appellant would have been able to get before the jury those elements of his story which the prosecution found most questionable – that he was trying to run away from the area rather

(continued...)

there were no jury instructions proposed by the prosecutor or given by the court to limit the jury's use of the taped statements other than the standard instruction CALJIC No. 2.71 on party admissions. The tapes, considered together, are fundamentally a lengthy and complete confession to two homicides. The guilt phase jury was free to consider the evidence on the tapes for any relevant purpose, including statements by appellant that were both inculpatory and exculpatory. At the first penalty phase trial, the jury was free to consider that same evidence under section 190.3, factors (a) and (k). Appellant at the penalty retrial wanted only to be in the same position he was at the first penalty trial.

Respondent also claims support from *People v. Jurado* (2006) 38 Cal.4th 72 and *People v. Edwards* (1991) 54 Cal.3d 787. Appellant distinguished *Jurado* in his opening brief. The prosecutor there had not previously used the tape in question to establish defendant's guilt. (See AOB 109-110.) The same is true of *Edwards*.

C. The Evidence Was Admissible for Non-hearsay Purposes

Aside from the claim of procedural bar, respondent does not appear to have responded in any way to appellant's argument that this evidence was admissible for non-hearsay purposes. (See AOB 111-112.) In the trial court, appellant argued that the tapes gave a clear picture of appellant on the day of the shooting. The tapes showed evidence of appellant's voluntary

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[5](...continued)
than waiting for the officers and that he did not intend to kill them – unless he testified. It seems unlikely that the prosecutor would choose to use over three hours of court time helping appellant to make his case for the sole purpose of then showing it to be unreliable.

surrender; his early acknowledgment that he was the person who shot the officers; his cooperation with the police in showing them where the gun was hidden, and taking them to the crime scene to describe what happened; and his remorse over what he had done. (21RT 1855; 14CT 3638.) Appellant's argument on the merits of this claim is unrebutted. Even if the trial court determined that some of appellant's statements were inadmissible hearsay, the tapes could have been played for their non-hearsay content and the jury given a standard admonition not to consider the hearsay portions for the truth of the matter asserted.

Of particular significance was appellant's spontaneous display of remorse upon hearing from Detective Spidle that the officers were dead. Without being able to use the tape, appellant had to try to show his remorse at the time by calling Detective Spidle to describe appellant's reaction. In that testimony, Spidle backed away from his earlier written report that appellant had shown remorse. Spidle claimed to have subsequently consulted a dictionary on the definition of remorse and determined that a better – and perhaps only coincidentally a more prosecution-friendly – description of appellant's reaction was merely one of "regret." (29RT 2984.) The most reliable evidence of appellant's spontaneous emotional response was the videotape of that response. Excluding it in favor of a hostile witness' description, reinterpreted by that witness through his reference to a dictionary definition, did not protect the jury from unreliable evidence.

D. The Error Was Prejudicial

Respondent's claim that any error was harmless focuses only on the fact that appellant was able to call Spidle to testify to appellant's reaction when he learned the two officers were dead. (RB 71-73.) Appellant has

discussed above how Spidle's testimony was a completely inadequate substitute for the actual image and sound of appellant's reaction. Filtering appellant's emotional response through the testimony of a hostile witness served to drain the life out of a valid, powerful piece of appellant's mitigation case.

Appellant's other claims of prejudicial error are unrebutted by respondent. The erroneous exclusion of the videotapes was prejudicial error requiring reversal of the death judgment.

7

THE TRIAL COURT ERRED IN EXCUSING SEVEN PROSPECTIVE JURORS BASED ONLY ON THEIR QUESTIONNAIRE ANSWERS

The trial court erred in excusing for cause seven prospective jurors who opposed the death penalty, where the court's decision was based solely on the jurors' answers to a questionnaire and without voir dire. Respondent claims that appellant stipulated to the excusal of these jurors and invited the trial court's error, and is thereby precluded from raising the issue on appeal. (RB 73-79.) Respondent's defense of the trial court's ruling on these jurors appears to be limited to these procedural points, as there is no argument supporting the court's decision to excuse these jurors other than a perfunctory assertion that the court's rulings were supported by substantial evidence. (RB 77.)

A. The Issue Is Preserved for Appeal

There is no merit to respondent's claim that appellant stipulated to the excusal of the seven prospective jurors. A stipulation is an agreement between opposing counsel regarding business before the court, and like any agreement or contract, it is essential that the parties agree to its terms. (*Palmer v. Long Beach* (1948) 33 Cal.2d 134, 142.) Unless it is clear from the record that both parties agreed, there is no stipulation. (*Id.*, at p. 143.) There were such stipulations between the parties during jury selection here, but none as to the seven prospective jurors excused for cause by the court for their opposition to the death penalty. There were dozens of express stipulations when the court screened for hardships. (See e.g. 22RT 1978-2031 [36 prospective jurors excused by stipulation in afternoon session of November 5,1998].) On November 10, when the court went over the jurors

it had tentatively decided to excuse, the parties expressly stipulated to two jurors – Nos. 82 and 92 – for reasons other than their beliefs about the death penalty. (23RT 2040-2041, 2044.) During voir dire, the parties expressly stipulated to additional jurors – during the remainder of the morning session on November 10 alone the parties stipulated to the excusal of five jurors. (23RT 2086 [Coppage], 2121 [Garrett], 2122 [Evans], 2123 [Tures], 2156 [Petite].) As the court went through the list of jurors it had tentatively decided to excuse based on questionnaire answers, it never solicited a stipulation, nor did either the prosecutor or defense counsel suggest or join in any stipulation, as to the seven prospective jurors at issue here.

Respondent seems to be claiming some form of an implied stipulation theory, and seeks support for its argument in a lengthy quotation from *People v. Coogler* (1969) 71 Cal. 2d 153, 175. But the facts in *Coogler* show clearly that the trial court there solicited a stipulation from the parties to excuse the juror in question, the prosecutor expressly stipulated to the excusal, and the defense expressly joined the stipulation. (*Id.* at p. 174.) Neither the facts nor the law support respondent's argument that the seven jurors here were excused by stipulation.

Respondent's invited error argument is equally unavailing. The doctrine of invited error is designed to prevent a defendant from gaining a reversal on appeal because of an error made by the trial court at his request. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. (*People v. Wickersham, supra*, 32 Cal.3d at p. 307, 330.) An error is invited only if the appellant induced the commission of error through its own conduct. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) Appellant did not ask the court to excuse any of these prospective jurors, and the record does not reflect that he had any

tactical reason for wanting these jurors excused. (See *People v. Moon* (2005) 37 Cal.4th 1, 28.) In *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 this Court applied the invited error doctrine to a claim on appeal that a juror was wrongly excused for cause because defendant's counsel "did not merely acquiesce, but affirmatively joined in the challenge" to the prospective juror. By contrast, here appellant did not object to the jurors being excused, but also did not join in the court's action. Appellant did not invite the trial court's error.

Appellant noted in his opening brief that when a trial court excuses a prospective juror under *Witherspoon* and *Witt* [6] this Court has never required an objection in the trial court to raise the error on appeal, citing *People v. Cox* (1991) 53 Cal.3d 618, 648 fn. 4 and *People v. Velasquez* (1980) 26 Cal.3d 425, 443. (AOB 115, fn. 22.) The lack of vigorous opposition to the court's rulings is particularly understandable here where the court made clear it was excusing jurors where the impairment was "very, very obvious to the court." (23RT 2034.) Respondent has made no argument at all that the issue has been forfeited for failure to object. Instead, respondent has attempted to elevate the simple lack of express objections into a procedural bar by invoking claims of stipulation and invited error. These two claims of procedural bar should be rejected and the argument addressed on it merits.

Respondent makes a further forfeiture claim based on appellant's participation in creating the juror questionnaire. Respondent contends that appellant's agreement to the final wording of the questionnaire invited the

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[6] *Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412.

court's errors or otherwise forfeited any claim of error. (RB 77-79.) This makes no sense. Appellant's argument is based on the trial court's erroneous excusal of prospective jurors based on information those jurors provided in answering their questionnaires, not on the questions asked themselves. Appellant did not invite the court to excuse the jurors based only on the questionnaire answers. The claim was not forfeited.

B. The Court Erred in Excusing the Prospective Jurors

The heart of appellant's argument is that the court dismissed seven jurors for cause despite the fact that the questionnaire answers did not disqualify them. Appellant relies on *People v. Stewart* (2004) 33 Cal.4th 425 (*Stewart*) and *People v. Avila* (2006) 38 Cal.4th 491 (*Avila*) which limit the practice of excusing jurors based on a questionnaire and without voir dire. Respondent has neither discussed the application of *Stewart* and *Avila* to the facts of this case or offered any substantive argument justifying the excusal of the seven jurors based solely on questionnaire answers. Additionally, respondent has offered no response at all to appellant's point that excusing jurors in the absence of a challenge by one of the parties is a disfavored practice. (AOB 118, citing *People v. Jiminez* (1992) 11 Cal.App.4th 1611, 1621.) The trial court here excused the seven jurors on its own motion, stating that the impairment of these jurors was obvious to the court, rather than responding to any challenges by the parties. Given the absence of argument by respondent, no further reply would ordinarily be necessary by appellant. However, since the filing of appellant's opening brief, this Court issued *People v. Wilson* (2008) 44 Cal.4th 758 which provides new authority on the use of questionnaire answers to excuse jurors.

In *Wilson* this court stated the rule that emerged for *Stewart* and

Avila as follows: that it is permissible to excuse prospective jurors based on written responses alone if, from those responses, it is clear and leaves no doubt that a prospective juror's views about the death penalty would satisfy the *Witt* standard and that the juror is not willing or able to set side his or her personal views and follow the law. (44 Cal.4th at p. 787.) In *Wilson* the Court upheld the trial court's determination that two jurors were substantially impaired under *Witt* based on their questionnaire answers.

In his opening brief appellant argued that deficiencies in the questionnaire used by the court, and ambiguities and contradictions in the answers provided by the jurors, made it impossible to conclude that it was clear and without doubt that the jurors in question were disqualified by their views on the death penalty. (AOB 116-131.) Each of those arguments requires elaboration in light of *Wilson*. Both the present case and *Wilson* are Riverside County cases. Most of the questions in the *Wilson* questionnaire regarding the death penalty are identical to those used in the present case, although they are numbered differently. In *Wilson*, question 42, was the same as Question No. 29 in the present case. In *Wilson*, the Court was persuaded that the trial court was correct in determining that the jurors who gave answer "b" to that question would automatically vote for the death penalty and were properly excused without voir dire. (44 Cal.4th at p. 788.) Appellant has argued in his opening brief that Question No. 29 was misleading in that the introductory portion of the question created the false impression that the discretion to impose a life sentence was unfettered, and that an opponent of the death penalty could be led to answer that he or she would always impose a life sentence when given that option without ever understanding that selecting life over death might require them to violate their oath as a juror to follow the law. (AOB

124-125.) Accordingly, this question should not be understood as one which provides definitive evidence of a juror's disqualification under *Witt*.

The questionnaire also included one question which this Court has suggested should not be used in the future. Question No. 27c asked jurors whether they held a view that would "prevent or make it very difficult" for the juror to ever impose the death penalty. This is the same question on which the court in *Stewart* erroneously relied on to excuse jurors. (*Stewart*, at pp. 442-443.) The same question also appeared in the *Wilson* questionnaire, but this Court, while suggesting future courts should not use it, found no reversible error because the record was clear that the trial court had not relied on answers to that question in excusing jurors. (*Wilson*, at p. 789.) The record in the present case is not so clear. The court gave some shorthand explanations of its rulings but nothing as clear as in *Wilson* where the court said, "If they checked question 42-a or 42-b, they're gone. . . ." (*Wilson* at p. 789.) Unlike *Wilson*, the lack of clarity in the court's rulings leaves open the possibility that the jurors were excused at least partly based on their responses to Question 27c.[7]

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[7] These are the court's remarks as it read through the list of jurors it had tentatively decided to excuse:

1. "Juror No. 35, [M.L.], he's a freelance writer opposed to the death penalty and he will not vote for it." (23RT 2035.)

2. "Juror No. 42, [J.Q.], probate paralegal, always vote for life." (23RT 2036.)

3. "No. 48, [T.T.], always vote for life. This is a volunteer minister at CRC in the Banning jail." (23RT 2036.)

(continued...)

Furthermore, there was no question which asked jurors whether they would be willing to set aside there personal beliefs about the death penalty and follow the law as described by the court. In *Wilson*, this Court suggested that in future cases the issue would be more clearly addressed if it included a question like the one in *Avila* which asked: "Do you honestly think that you could set aside your personal feelings and follow the law as the Court explains it to you, even if you had strong feelings to the contrary?" (*Wilson*, at p. 789, citing *Avila* at p. 528, fn. 23.) As discussed in the opening brief, Question No. 22 came closest to making this inquiry, but was not specifically linked to attitudes toward the death penalty: "If the judge gives you an instruction on the law that differs from your beliefs or opinions, will you follow the law as the judge instructs you?" Overall, the questions asked did not constitute an adequate inquiry to determine clearly and beyond doubt whether jurors expressing anti-death penalty opinions were disqualified from serving.

Regardless of whether the questions asked could reveal whether a juror was disqualified, four of the prospective jurors gave answers on their questionnaires which made it impossible for the trial court to conclude that

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[7](...continued)

4. "And Juror No. 52, [S.O.], doesn't believe in capital punishment. Always vote for life." (23RT 2037.)

5. "No. 76, [R.D.]. 'Vote life. It's wrong to kill.'" (23RT 2039.)

6. "All right, we have, 89, [M.G.] could not vote death. Strong opinion. Life in prison." (23RT 2041.)

7. "We have Juror No. 96, [D.F.]. Always vote for life." (23RT 2042.)

they were clearly and without a doubt substantially impaired within the meaning of *Witt.*[8] Jurors' answers must be "sufficiently unambiguous to allow the court to identify disqualifying bases on the basis of their written response alone." (*Avila* at p. 531.) The phrase "sufficiently unambiguous" suggests that jurors who have given answers that would disqualify them under *Witt* may be excused without voir dire under some circumstances even if they have also given answers that in some way contradict their disqualifying answer or are ambiguous or contradictory. The answers of the four jurors in this case which are discussed in the opening brief are not sufficiently unambiguous to disqualify them without voir dire. (AOB 126-129.) Appellant will not repeat those arguments here, and respondent has offered no argument as to why these contradictions and ambiguities can be ignored.

Respondent states that there was substantial evidence to support the trial court's decision to excuse these jurors. As discussed above, the standard for excusing jurors based solely on questionnaire answers is not a substantial evidence test; it is whether the answers on the questionnaire make clear and leave no doubt that the juror's views satisfy the *Witt* standard, and that the juror will not or cannot set side their personal views and follow the law. It is not clear and beyond doubt that these prospective jurors were substantially impaired under *Witt* because the questionnaire did not require the jurors to resolve the tension between their personal

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[8] In his opening brief appellant acknowledged that three of the jurors – Nos. 52, 89, and 96 – gave answers which were unambiguous in their opposition to the death penalty. Appellant's argument as to those jurors is based on the lack of precision in the questions on the questionnaire and the unreliability of excusing jurors based on questionnaire answers. (See AOB 129-130.)

opposition to the death penalty and their duty to follow the court's instructions, nor did the answers they actually provided to the questions otherwise resolve this tension. The verdict and judgment of death against appellant must therefore be reversed.

8

EXCESSIVE AND IRRELEVANT VICTIM IMPACT EVIDENCE DEPRIVED APPELLANT OF A FAIR PENALTY TRIAL

In his opening brief appellant challenged the prosecution's victim impact case on multiple grounds. The breadth and scope of the prosecutor's victim impact presentation was so excessive as to render the penalty phase fundamentally unfair. Additionally, the court made ordinary evidentiary errors in admitting victim impact evidence that contributed to the unfairness. Respondent does not acknowledge error and contends that any error is non-prejudicial.

A. The Victim Character Evidence Was Excessive and Included Irrelevant Information

The prosecutor's victim impact case stretched over two court days, included nine witnesses, covering 99 pages of reporter's transcript and 54 family photographs. This evidence, simply by virtue of its quantity, violated principles of due process. (See *People v. Robinson* (2005) 37 Cal.4th 592, 644-649.)

Respondent seeks to justify the prosecution's victim impact presentation by relying on cases approving the use of various kinds of victim impact evidence. (See RB 81-83, citing e.g., *People v. Panah* (2005) 35 Cal.4th 395 [witness can testify to impact on family members other than themselves]; *People v. Marks* (2003) 31 Cal.4th 197 [evidence of impact on non-relative admissible].) But these cases in no way address appellant's point that the *amount* of victim impact evidence – in whatever form – was excessive.

In opening the door to permit some victim impact evidence, *Payne v. Tennessee* (1991) 501 U.S. 808 described two categories of proper victim

impact evidence: (1) evidence that demonstrates the loss to the victim's family and to society and (2) evidence that gives the jury a "quick glimpse of the life" which was lost. (*Id.* at pp. 822, 827.) Appellant argued in his opening brief that the excess in the prosecution's case was particularly clear with regard to evidence about the victims themselves; that rather than a "quick glimpse" the prosecutor was permitted to present entire biographies of Lehmann and Haugen. (AOB 145-147.)

Respondent believes this extensive presentation regarding the lives of the victims, going back to their childhoods and illustrated with family photographs, is consistent with *Payne*. (RB 84.) Appellant disagrees. While a few photographs combined with a telling anecdote or two might be consistent with due process, the dozens of photographs and hours of testimony in this case cannot. The scope of testimony, ostensibly offered merely the victims' uniqueness as human beings, was far in excess of what *Payne* endorsed or the Eighth and Fourteenth Amendments allow. Furthermore, this detailed biographical information cannot be considered a circumstance of the crime under section 190.3, factor (a) consistent with *People v. Edwards* (1991) 54 Cal.3d 787.

Respondent also offers no response to appellant's point that the detailed descriptions of the victims' widows describing the last time they saw their husbands as they went to work the night they were killed were irrelevant and therefore inadmissible as victim impact evidence. (AOB 146.) No reply is therefore necessary on this point.

B. The Two Children Should Not Have Been Allowed to Testify

Appellant has argued that the testimony of two of the young surviving children, Ashley Lehmann and Stephen Haugen, was cumulative to

evidence provided by other relatives, and unduly prejudicial. (AOB 148-151.) Respondent's brief response seems to be that victim impact witnesses may testify for themselves as to the impact the crimes had on them. (RB 84.) Appellant does not disagree with that as a general matter, but has shown that in this case the prejudicial effect of the children's testimony far exceeded any probative value.

C. Further Irrelevant Victim Impact Evidence Was Presented

Appellant has argued that Ethel Lehmann's testimony that she had a heart attack the day after her son's funeral was irrelevant because there was no causal connection established between the medical event and her son's death. Appellant also argued that Elizabeth Haugen's testimony that her infant daughter Katie awoke in the middle of the night screaming, "crying uncontrollably" at the very time Mike Haugen was shot miles away was elicited by the prosecutor to allow jurors to infer that Katie's screaming was the result of some psychic connection with her father. (AOB 151-153.)

Respondent makes no attempt to justify the admission of these two significant pieces of victim impact evidence, claiming instead only that appellant suffered no prejudice because the evidence in aggravation was overwhelming. (RB 85.) But in fact, the prosecutor had only a narrow range of aggravating evidence. All he had was factor (a) evidence – the circumstances of the crime, including victim impact evidence. In a case in which there had already been a mistrial as to penalty, and in which appellant presented numerous witnesses in mitigation, the prosecution's case can hardly be considered overwhelming when two pieces of its only aggravating factor are removed.

D. The Prosecutor Elicited Victim Characterization Evidence of Appellant in Violation of *Booth*

Ashley Lehmann testified that before his death, her father had told Ashley about "the bad people" he encountered in his work. She said that since her father's death she now believed that there were indeed lots of "bad people out there." (30RT 3077.) Permitting this testimony violated the proscription in *Booth v. Maryland* (1987) 482 U.S. 496 (*Booth*) against a victim's family member testifying to their opinions and characterizations of the crimes and the defendant.

Respondent argues first that appellant failed to object to this "specific portion" of Ashley's testimony and has therefore forfeited the issue. (RB 86.) Respondent is mistaken. Appellant filed an extensive pleading prior to the penalty retrial to exclude the victim impact evidence that the prosecutor intended to introduce. (13CT 3603-3622.) In the course of lengthy points and authorities supporting the motion, appellant relied heavily on *Booth*, noting that victim impact statements include two types – one, the personal characteristics of the victim and the emotional impact on the family, and two, the family members' opinions and characterizations of the crimes and defendant. (13CT 3610.) Although *Payne v. Tennessee* (1991) 501 U.S. 808 overruled *Booth* as to the first type of victim impact evidence, appellant noted in his pleading that the holding in *Booth* as to the second type was left intact. (13CT 3610, 3620, 3621; see *Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2.) He argued further that *Payne* and the leading California case on victim impact evidence, *People v. Edwards* (1991) 54 Cal.3d 787 were distinguishable from the present case. (13CT 3622.) Appellant's motion fully informed the trial court that evidence from a victim's family member as to opinions and

characterizations of the defendant would violate his constitutional rights under *Booth*, and that he sought the exclusion of such evidence. The trial court nevertheless denied appellant's motion in its entirety. (21RT 1870.)

The contemporaneous objection rule exists so that the opposing party and the trial court can cure error before it becomes prejudicial. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) Appellant's written motion put the court on notice that appellant objected to evidence from a victim's family member testifying about their characterization of appellant. The court erroneously ruled in favor of allowing such testimony. The issue was therefore preserved.

Respondent claims the record does not support appellant's argument and speculates that this testimony was an expression of grief over the loss of childhood innocence. (RB 86.) Appellant disagrees. The obvious inference the jury would draw from Ashley's statement was that she was expressing her opinion that appellant was one of the bad people who existed in society. A direct reference to the defendant was not necessary.

This was not an inconsequential piece of evidence. Appellant's case for life was that he was basically a decent person who committed the homicides only after being overwhelmed by mental and marital problems. On the other hand, the prosecutor in closing argument called appellant a selfish, cowardly person indifferent to the interests of others – in short, a bad person. (31RT 3133, 3141, 3154.) By eliciting this bit of testimony from Ashley – one of the last of his victim impact witnesses – just before she broke down and had to leave the witness stand, he gave the jury a particularly succinct version of his penalty case from the mouth of his most sympathetic witness.

Respondent claims there was no prejudice because the prosecutor did

not argue this or any of the victim impact evidence to the jury. (RB 87.) The jury hardly needed to be reminded of the testimony of nine witnesses giving vivid testimony of family suffering, accompanied by numerous photographs documenting their lives. But respondent is wrong – the prosecutor did argue the victim impact evidence:

> And you can look at two individuals, two people that had families. [¶] And this is something where it's almost insulting that somehow that a mother has to go to her son's 8th grade graduation by herself (indicating). That a little girl, that's Katie Haugen (indicating) will never know her father. That somehow this can be put in context with the defendant's background.

(31RT 3154.)

Shortly thereafter, the prosecutor returned to the victim's family:

> Ladies and Gentlemen, his [appellant's] mother will be able to visit him in jail, if she wants. His kids. He can lie in a cell. He can daydream. He can dream. He can read. [¶] Do you think he deserves that after what he took away from the Lehmann and Haugen family? [¶] Now, while he's out there running in the hills hiding his gun, Omar Rodriguez had to tell Stephen Haugen that his dad was dead. [¶] About the time that he was trying to sneak through those police lines there, Ashley Lehmann was concluding in her own mind because her mom was crying and there was a police car out front, that there was something seriously wrong with her dad.

(31RT 3155.)

The victim impact evidence as a whole, and each of its many components, was a critical part of the prosecutor's case for death. The inclusion of this excessive and erroneously admitted evidence requires that the judgment and sentence of death be set aside.

9

THE TRIAL COURT FAILED TO INSTRUCT THE JURY PROPERLY ON VICTIM IMPACT EVIDENCE

Appellant argued in his opening brief that the trial court committed two errors by failing to instruct the jury regarding the extensive victim impact evidence the prosecution had presented. The first was the failure to give a cautionary and limiting instruction requested by appellant on the use of victim impact evidence. The second was the failure to give sua sponte an instruction on victim impact evidence. (AOB 155-160.) Respondent has responded only to the first of these two arguments; accordingly, appellant's argument regarding the need for a sua sponte instruction stands uncontested, and no reply is required.

As to appellant's requested instruction, respondent first claims the issue has been forfeited as to any state constitutional basis for the argument because appellant did not object on that basis when the court denied the proposed instruction. (RB 88.) Respondent's forfeiture argument is seriously off its mark. As a general matter, instructional errors which affect a defendant's substantial rights are reviewable on appeal regardless of whether there was an objection in the trial court. (§1259.) The validity of instructions at a capital penalty trial affects a defendant's substantial rights and are cognizable without objection. (*People v. Easley* (1983) 34 Cal.3d 858, 875 fn. 2.) Furthermore, this is not a situation where the defense said nothing – appellant *requested* a specific instruction. Respondent offers no reason or authority for why a party must object after the court's refusal of a requested instruction. In fact there is no good reason, and the authority is to the contrary. In *People v. Hill* (1992) 3 Cal.App.4th 16, 26 the trial court refused defendant's proposed response to a jury note as to definitions

relating to the charges of conspiracy, and gave a different response instead. Defendant did not forfeit the issue of the propriety of the court's response to the jury note by failing to interpose an objection to the response actually given by the court. (*Ibid.*) The facts in the present case are even more supportive of the cognizability of the issue on appeal. The issue was not forfeited.[9]

Appellant acknowledged in his opening brief that this Court has upheld the rejection of the same or similar instructions in *People v. Harris* (2005) 37 Cal.4th 310, 358 and *People v. Ochoa* (2001) 26 Cal.4th 398, 445. Recently the Court again rejected this instruction in *People v. Carey* (2007) 41 Cal.4th 109, 134, relying on its previous analyses in *Harris* and *Ochoa*. In his opening brief appellant has argued that the reasoning in *Harris* and *Ochoa* is incorrect, and that there was a critical need for such an instruction in this case because of the amount of victim impact evidence the prosecution presented and the significance it played in the penalty phase. Because respondent relies on the Court's reasoning in those cases and adds nothing of substance new, no further reply is necessary.

The failure to instruct the jury properly on victim impact evidence therefore requires that the death judgment be reversed.

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[9] Respondent seeks support for the forfeiture argument in appellant's written points and authorities supporting his various proposed jury instructions. (RB 88, citing 13 CT 3527.) The points and authorities respondent paraphrases and cites to, however, support an entirely different requested instruction. This does not enhance respondent's already-dubious forfeiture argument.

10

THE TRIAL COURT COMMITTED *ROBERTSON* ERROR

During the penalty phase retrial, the prosecutor presented substantial evidence that appellant had committed criminal acts of domestic violence in his past. There was no evidence that appellant had received a felony conviction for any of these acts. Relying on *People v. Robertson* (1982) 33 Cal.3d 21, appellant has argued that the court failed to instruct sua sponte that jurors must find beyond a reasonable doubt that appellant committed any such uncharged acts of criminal violence before relying on them as an aggravating factor under section 190.3, factor (b). (AOB 161-167.)

Respondent's argument that no error occurred is based on the false premise that the evidence of uncharged criminal violence was admitted for certain specific purposes other than to establish acts of criminal violence under factor (b). (RB 92.) Respondent is wrong. Nothing in the record reflects that the prosecutor offered any of the other crimes evidence for a limited purpose, or that the court admitted any or all of it only for a limited purpose. When evidence is admissible generally, it comes before the court without restriction on its use. (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298, fn.14.) Regardless of whether this evidence may have been presented in part to prove other points, it could properly have been considered by the jury as evidence of other violent crimes under section 190.3, factor (b).

Without the claim that the evidence was admitted for a limited purpose, respondent's argument that there was *no* evidence of other criminal activity within the meaning of factor (b) (see RB 92) is clearly not true. Appellant set out in detail in his opening brief how the prosecutor

elicited evidence supporting a finding of spousal abuse from three witness – Dave Burgett, Gordon Young, and Dr. Edward Verde. (See AOB 162.) The prosecutor used evidence of appellant's history of domestic violence as a theme throughout his penalty retrial presentation: he told the jury in his opening that they would hear evidence about appellant's abuse of his wife over a period of years (25 RT 2377), he then elicited the evidence from Burgett, Young and Verde, and finally he argued in closing that appellant had a history of violence and abuse. (32 RT 3138.)

Appellant recognizes that not all other crimes evidence admitted in a capital trial will trigger the court's sua sponte duty to give a reasonable doubt instruction. The Court has held the instruction is unnecessary, e.g., when the defendant introduces the evidence (*People v. Poggi* (1988) 45 Cal.3d 306, 341) and when the evidence is introduced at the guilt phase (*People v. Pinholster* (1992) 1 Cal.4th 865, 967; *People v. Rich* (1988) 45 Cal.3d 1036, 1121). But the evidence here was introduced by the prosecution, and at the penalty phase. This is a straightforward situation in which *Robertson* applies. Respondent has cited no cases in which this Court has found no duty to give the reasonable doubt instruction where the other crimes evidence was introduced at the penalty phase by the prosecution. Instead, respondent mistakenly relies on *People v. Rich, supra,* 45 Cal.3d at p. 1121, in which the other crimes evidence was introduced at the guilt phase.

Respondent seems to believe that the fact that this was a penalty retrial justifies a new exception to the *Robertson* rule. It is not. The prosecution was entitled to present evidence of the circumstances of the case to the penalty retrial jury along with its other aggravating evidence because this jury had not heard the guilt phase evidence. Ordinarily, other

crimes evidence presented at the guilt phase may be understood by jurors to go toward proving guilt issues, not penalty issues. Here, where the same evidence is presented at the penalty trial without limitation or any reference to the mitigating or aggravating factors to which it relates, there is a greater possibility that the jury would be confused as to how it could use the evidence of other violent crimes in making the penalty determination. That this was a penalty retrial therefor heightened, not lessened the need for correct instructions on the proper use of other crimes evidence.

Unfortunately, respondent has also confused the issue by misquoting *People v. Rich, supra,* in a manner which favors respondent's position. The Court in *Rich*, quoting Justice Broussard in *Robertson*, stated, "'a reasonable doubt instruction should be required only when evidence of other crimes is introduced or referred to as an aggravating factor pursuant to former Penal Code section 190.3, [factor] (b). When such evidence is introduced and used *only* for other purposes, a defendant is not entitled to a reasonable-doubt instruction, but may be entitled to an instruction limiting the use of that evidence to the purpose for which it was admitted.'" (*People v. Rich* , *supra*, 45 Cal.3d at p. 1121, emphasis added.) Respondent has omitted the word "only" from the second sentence, and the omission is obviously significant here. The other crimes evidence was admitted generally at the penalty phase and could have been considered by the jury for more than one purpose, including as factor (b) evidence. If the other crimes evidence was not admitted *only* for purposes other than proving factor (b), the quote from *Rich* supports appellant's argument. Respondent's incorrect version of the quote would suggest that a reasonable doubt instruction would not be necessary for other crimes evidence introduced at the penalty phase even when introduced to prove aggravation

under factor (b) so long as it was introduced for another purpose as well. It would then support respondent's claim that no *Robertson* instruction was necessary because the evidence could be viewed as being admitted under factor (a), even if it could also be considered under factor (b). The court should reject respondent's misleading argument on this point.

Respondent claims any error was harmless because testimony concerning appellant's acts of domestic violence "were part and parcel of the defense." (RB 95.) This is incorrect. Appellant's penalty phase defense in no way depended on appellant having a history of domestic violence. In fact, part of his defense was that he had no significant criminal record or a history of criminal violence. The failure to instruct properly on the use of the evidence of prior domestic abuse helped undercut appellant's defense.

Finally, respondent suggests that appellant's defense opened the door for the prosecutor to elicit the other crimes evidence. Appellant's argument, however, is that the court failed to properly instruct the jury on how it could use the evidence. Whatever merit respondent's point may have, it is irrelevant to this issue.

The court should have instructed the jury sua sponte that to consider evidence of an act of criminal violence as an aggravating factor it must find beyond a reasonable doubt that appellant committed the act. The failure to do so was prejudicial error and the death judgment must therefore be reversed.

11

APPELLANT WAS PREJUDICED BY THE TRIAL'S REFUSAL TO GIVE HIS SPECIAL INSTRUCTION THAT THE ABSENCE OF PRIOR FELONY CONVICTIONS WAS A MITIGATING FACTOR

Appellant argued in his opening brief that the court erred in refusing his requested instruction for the penalty phase jury that "the absence of any felony convictions prior to the crime[s] for which the defendant has been tried in the present proceedings is a mitigating factor." (AOB 168-177.) This instruction was a correct statement of law and was applicable to the case.

Respondent does not contend that this proposed instruction was incorrect, but argues instead that the instruction was unnecessary. To support this argument, respondent claims that this Court has rejected the argument "underlying" appellant's claim of error, citing a line of cases including *People v. Farnum* (2002) 28 Cal.4th 107. (RB 96.) Respondent has misidentified appellant's "underlying" argument. The *Farnum* line of cases has rejected the argument that the standard penalty phase instructions – CALJIC Nos. 8.88 and 8.85 – are unconstitutionally vague for failing to inform the jury which of the statutory factors under section 190.3 are mitigating and which are aggravating. Appellant does not make that argument here and his argument does not depend on the standard instructions being unconstitutionally vague.

Appellant's opening brief makes clear his argument is grounded in state statutory law and his rights to due process and a reliable penalty determination under both the state and federal constitutions. (AOB 169.) Section 1093, subdivision (f) requires the judge, upon the request of either party, to instruct the jury "on any points of law pertinent to the issue." The

implication of respondent's argument here would be that refusing a defendant's proposed jury instruction, even if it was a correct statement of law, could never be prejudicial error unless the relevant instructions actually given were unconstitutionally vague. Respondent cites no cases supporting such a proposition because it is clearly unsupportable. (See e.g., *People v. Wilson* (1967) 66 Cal.2d 749, 762 [defendant entitled to correct instruction on his theory of the case].)

The real underlying issue in this case is the one the parties disagreed over at trial: whether the absence of prior felony convictions can be a mitigating factor under section 190.3, factor (c), or whether factor (c) evidence can only be aggravating. On this point, respondent has taken no position at all, even though the prosecutor vigorously asserted at trial that factor (c) can only be aggravating. Despite respondent's lack of engagement on this point, this Court should resolve the issue. As discussed in appellant's opening brief, a number of this Court's cases seemed to make clear that the absence of felony convictions is a mitigating factor under factor (c). (See AOB 169-170, citing e.g., *People v. Lucero* (2000) 23 Cal.4th 692, 730; *People v. Clark* (1993) 5 Cal.4th 950, 1038; *People v. Kelly* (1990) 51 Cal.3d 931, 971.) But recent cases have cast doubt on that clarity. (See *People v. Pollack* (2004) 32 Cal.4th 1153, 1194; *People v. Monterosso* (2005) 34 Cal.4th 743, 789.) The Court should resolve this ambiguity and hold that factor is not intended exclusively to be an aggravating factor, but rather that an absence of felony convictions can be mitigating. (See AOB 171-175.)

Respondent also relies on this Court's familiar observation that the mitigating and aggravating nature of the various statutory factors is self-evident. (RB 97.) While this observation may be generally true, the facts

of the present case demonstrate that it is not universally so. In his opening brief appellant discussed at length how jurors could have been inclined to give mitigating weight to appellant's lack of felony convictions, but did not understand that they were able to do so under the instructions given. (AOB 171-176.) Respondent offers no response to this argument other than a summary conclusion that appellant has given the Court no reason to depart from invoking the general rule about the self-evident nature of mitigation and aggravation. Appellant's reasoning is fully set out in his opening brief and no reply is necessary on this point.

Appellant's requested special instruction should have been given. Without the instruction there is every reason to believe that the jury may have mistakenly believed they could not give any mitigating weight to the fact that appellant did not have a record of any felony convictions. The likelihood that they made this mistake was increased by the prosecutor's incorrect argument that the only factors which applied to this case were factors (c) and (k). The death judgment must therefore be reversed.

12

APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S ERRONEOUS REFUSAL TO INSTRUCT THE JURY NOT TO DOUBLE COUNT AGGRAVATING FACTORS WHICH WERE ALSO SPECIAL CIRCUMSTANCES

The trial court refused appellant's proposed penalty phase instruction which read, "The jury should not double count aggravating factors which are special circumstances." In his opening brief appellant argued that this Court has repeatedly held that this instruction should be given when requested by the defendant. (AOB 178-184.) Respondent does not argue that there was no error, and instead contends only that there was no prejudice. (RB 97-99.)

Appellant has fully addressed in the opening brief how the absence of this instruction was prejudicial and no reply is necessary to respondent's perfunctory claim that the error was harmless. (AOB 181-184.) Only two additional points need to be made:

First, appellant argued in his opening brief that the error in failing to give the defense-requested penalty instruction should be assessed under the reasonable possibility test of *People v. Brown* (1988) 46 Cal.3d 432, 448-449. Appellant noted, however, that in several cases involving the failure to give an instruction similar to the one at issue here (see e.g. *People v. Ayala* (2000) 24 Cal.4th 243, 290) that this Court applied the reasonable likelihood test rather than the reasonable possibility test. The reasonable likelihood test applies when the error is an ambiguity in the instructions given. (See *People v. Kelly* (1992)1 Cal.4th 495, 525.) Because the error here is the failure to give a proper defense-requested instruction, the *Brown* reasonable possibility test should apply. (See AOB 182-183.) Respondent

does not directly address this issue, but argues that there was no reasonable possibility that the absence of the requested instruction affected the outcome of the penalty phase. (RB 99.) To the extent this can be understood as an acknowledgment by respondent that the reasonable possibility test applies to the error here, appellant agrees.

Second, respondent suggests that the underlying basis of appellant's argument is limited to the Eighth and Fourteenth Amendments. (RB 98.) That is incorrect. The instructional error also violates the state constitutional guarantees of due process and a fair trial, and to be free from cruel or unusual punishment (Cal. Const., art. I, §§ 15, 17) as well as his state statutory rights to have the jury properly instructed (see e.g., §1093, subd. (f).)

The court's failure to give the requested defense instruction was prejudicial error which requires that the death judgment be reversed.

13

THE TRIAL COURT'S INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO CONSIDER CIRCUMSTANCES OF THE CRIME AS AGGRAVATING EVIDENCE UNDER SECTION 190.3, FACTOR (b)

Appellant was involved in a violent physical altercation with his wife and Beverly Brown a short time before he left his home and the two police officers were shot. Appellant has argued that the court's instructions allowed the jury improperly to consider this incident as aggravating evidence under section 190.3, factor (b) rather than solely as a circumstance of the crime under factor (a). (AOB 185-189.) Respondent claims there was no error and that the issue was forfeited by appellant's failure to raise the issue in the trial court.

This Court can review any instructional error that affected a defendant's substantial rights, even in the absence of an objection in the trial court. (§1259.) Appellant is claiming instructional error here, and has described in his opening brief how his substantial rights were affected. Respondent's perfunctory claim of forfeiture has no merit.

Much of respondent's argument is focused on establishing that the violent altercation was a circumstance of the crime of shooting of the police officers a few minutes later. Appellant agrees that this altercation was a circumstance of the crime, and as such should only have been considered as factor (a) evidence at the penalty phase. The issue here is whether the instructions adequately informed the jury that the altercation could only be considered under factor (a) rather than under factor (b). This Court has repeatedly acknowledged the possibility of jurors being confused in determining which acts can be considered as factor (b) evidence, and has

directed trial courts to instruct juries what the criminal acts described in factor (b) do not include. (See AOB 186 [citing cases].)

When the meaning of an instruction is at issue, a reviewing court must consider how a reasonable juror would have understood the words of the instruction. (*People v. Ashmus* (1991) 54 Cal.3d 954, 998.) Appellant has argued that under the circumstances of this case, the standard language of CALJIC No. 8.85 could have misled a reasonable juror to believe the altercation between appellant, his wife and Brown was evidence of a prior act of criminal violence under factor (b). (AOB 185-189.) Respondent has made no argument or even any mention of the instructions here, other than a conclusory sentence that the jury would not have believed they were allowed to consider the evidence under factor (b). (RB 101.) As respondent has made no substantive argument as to the sufficiency of the instructions, no further reply is necessary.

For the reasons stated in appellant's opening brief, the sentence and judgment of death must be reversed.

14

THE INSTRUCTIONS WERE UNCONSTITUTIONAL IN FAILING TO INSTRUCT ON THE PROPER BURDENS OF PROOF AT THE PENALTY PHASE

Appellant made five separate claims of instructional error regarding the burden of proof at the penalty phase in Argument 14 of his opening brief. (AOB 190-221.) Appellant acknowledged that this Court has rejected these claims before. (AOB 190, fn. 37.)

Respondent also contends that three of appellant's arguments of instructional error have been forfeited for failure to raise them in the trial court. (RB 102.) Appellant argued that the instructions given were erroneous in that they failed to require the jury to find that all aggravating circumstances be proven beyond a reasonable doubt, that the aggravating factors had to outweigh the mitigating factors beyond a reasonable doubt for the jury to impose the death penalty, and that death is the appropriate penalty beyond a reasonable doubt. (RB 102.) Respondent's forfeiture argument is meritless. This Court may review any instruction given which affected the substantial rights of appellant, even though no objection was made to it in the trial court. (§1259.) The trial court's instructional shortcomings clearly affected appellant's substantial rights here. The validity of instructions at a capital case penalty phase are cognizable without objection. (*People v. Easley* (1983) 34 Cal.3d 858, 875 fn. 2, citing §1259.) These issues were not forfeited.

Respondent's other arguments rely largely on this Court's previous rejection of these issues. Therefore, no further reply is necessary.

15

ERRORS IN CALJIC NO. 8.88 VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argued in the opening brief that the court's modified version of CALJIC No. 8.88 regarding the jury's sentencing discretion and the nature of the deliberative process were constitutionally deficient. (AOB 222-233.) Appellant acknowledged that this Court has previously rejected the same or similar claims. Respondent generally relies on this Court's previous cases without substantial analysis, and no reply is necessary to that part of respondent's brief.

Respondent also claims the errors appellant raised in subsections A and B were waived at trial because appellant did not request modification of the standard instructions. Respondent is wrong; there were no waivers or forfeitures. This court can review any instruction given, refused or modified, where the substantial rights of the appellant were affected, even without an objection being made. (§1259.) Appellant's rights to due process and a reliable penalty determination, inter alia, were affected by the instructional errors described in this argument. No objection or other action by defendant was necessary to preserve the issue. Respondent's reliance on *People v. Arias* (1996) 13 Cal.4th 92 is misplaced. The defendant in *Arias* claimed the trial court erred by failing to give an instruction informing the jury that it could return a life verdict even if it found the aggravating evidence outweighed the mitigating evidence. The Court held that defendant's failure to request this additional instruction waived any error. (*Id.* at pp. 170-171.) Here appellant is claiming that the instruction given was erroneous, not that the failure to give another particular instruction was error. Review of the instructions as given is proper under section 1259.

16

THE INSTRUCTIONS ON THE MITIGATING AND AGGRAVATING FACTORS RENDERED APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

Appellant argued in his opening brief that, for multiple reasons, the instructions on the mitigating and aggravating circumstances rendered appellant's death sentence unconstitutional. (AOB 234-244.) Appellant recognizes that this Court has previously rejected these arguments, but urges the Court to reconsider them. Respondent relies on the Court's previous precedents without any substantive new arguments. (RB 170-171.) Accordingly, no reply is necessary to respondent's argument.

17

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argued in his opening brief that California's failure to provide intercase proportionality review in capital cases violates the Eighth and Fourteenth Amendments, while acknowledging that this Court has frequently rejected similar arguments. (AOB 245-248.) Respondent summarily relies on this Court's prior decisions rejecting such arguments. Accordingly, the issue is joined and no reply is necessary.

18

THE CUMULATIVE EFFECT OF ALL THE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

Appellant has argued that the cumulative effect of the errors at trial require reversal of the convictions and sentence of death even if any single error considered alone would not. (AOB 249-251.) Respondent simply contends no errors occurred, and that any errors which may have occurred were harmless. (RB 113-114.) The issue is therefore joined. Should this Court find errors which it deems non-prejudicial when considered individually, it should reverse based on the cumulative effect of the errors. No further reply to respondent's argument is necessary.

19

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

In his opening brief, appellant argued California's sentencing procedures violate international law and fundamental precepts of international human rights. (AOB 252-257.) Appellant requested that this Court reconsider its decisions rejecting similar claims (see e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 511). Respondent relies on this Court's prior decisions without further analysis. Accordingly, no reply is necessary to respondent's argument.

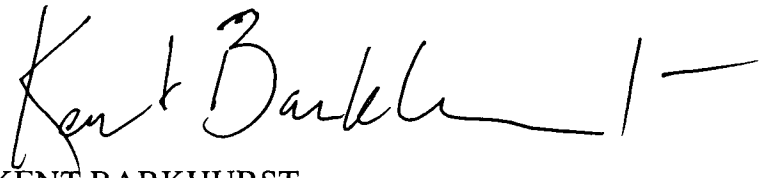
CONCLUSION

For all the aforementioned reasons, appellant's convictions and his sentence of death must be vacated.

DATED: October 7, 2008

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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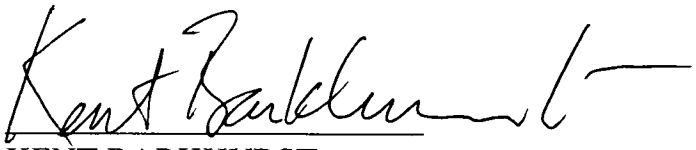
Certificate of Counsel
(Cal. Rules of Court, rule 8.630(b)(2)

I, Kent Barkhurst, am the Supervising Deputy State Public Defender assigned to represent appellant Timothy Russell in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 17,143 words in length.



KENT BARKHURST
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DECLARATION OF SERVICE

Re: *People v. Timothy Russell* Cal. Supreme Ct. No. S075875

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Attn: Gary Schons
P. O. Box 85266
110 W. "A" Street, Ste. 1100
San Diego, CA 92186-5266

Michael R. Belter
3800 Orange Street, Ste. 280
Riverside, CA 92501

TIMOTHY RUSSELL
(Appellant)

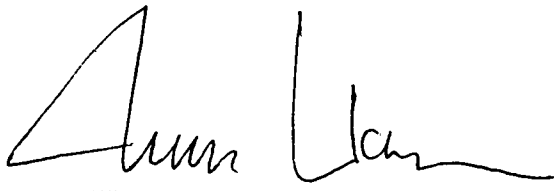
Riverside County Superior Court
Attn: Honorable Patrick F. Magers
4100 Main St.
Riverside, CA 92501-3626

Office of the District Attorney
Attn: Kevin J. Ruddy, D.D.A.
4075 Main Street
Riverside, CA 92501-3707

Each said envelope was then, on October 7, 2008, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on October 7, 2008, at San Francisco, California.



DECLARANT