No. S081479

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RONALD WAYNE MOORE
Defendant and Appellant.

Monterey County
Superior Court No.
SS 980646

APPELLANT'S REPLY BRIEF

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

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RONALD WAYNE MOORE, Defendant and Appellant.	No. S081479 Monterey County Superior Court No. SS 980646

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. Appellant's decision not 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.

ARGUMENT

I

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS TO THE SHERIFF INVESTIGATORS

Appellant brought a motion under *Miranda v. Arizona* (1966) 384 U.S. 436 to suppress his statements to the sheriff investigators on the grounds that he was unlawfully questioned in violation of his Fifth Amendment rights. (1 2d.Supp. CT 67.) The trial court denied the motion, finding that appellant voluntarily spoke with the investigators and was not subject to a custodial interrogation. (11 RT 2022.) Respondent echoes the trial court's ruling and argues that appellant was not in custody because the officers told him that he was not under arrest and that appellant later requested to be driven home. (RB 22.)

In order to determine whether there was a custodial interrogation, a reviewing court must consider whether a reasonable person would "have felt he or she was not at liberty to terminate the interrogation and leave." (*Thompson v. Keohane* (1995) 516 U.S. 99, 112.) Ultimately, the test is an objective one: was there a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." (*California v. Beheler* (1983) 463 U.S. 1121, 1125.) That the officers told appellant that he was not under arrest is not dispositive of the issue. (See *People v. Boyer*, (1989) 48 Cal.3d 247, 264 [custodial interrogation after defendant was told he would be able to return home within a few hours].) Nor does the fact that appellant requested to be driven home during the interviews establish that a reasonable person would have objectively felt free to go – particularly after the officers ignored appellant's request to be taken home, told appellant to sit down, and continued to question him. (3 CT 662, 666,

667.) Under the circumstances in this case, this Court should find that appellant was in custody when he was questioned by the deputies.

A. Appellant Was Subject to a Custodial Interrogation

Respondent relies on the factors that this Court has used in *People v. Boyer, supra*, 48 Cal.3d 247, in determinating whether the totality of the circumstances created a custodial interrogation:

> In deciding the custody issue, the totality of circumstances is relevant, and no one factor is dispositive. [Citations.] However, the most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning.

(*Id* at p. 272.) Contrary to respondent's view, each of these factors, taken as a whole, support the finding that appellant was in custody.

1. The Interview Site

Respondent notes that the initial interview with appellant took place in a patrol car because appellant's trailer was cold, dark, and without electricity. (RB 36, citing 3 CT 1805.) Appellant does not claim that he was in custody when he consented to be interviewed in the patrol car. (10 RT 1808-1810; 2 CT 535, see AOB 27-29.) But even assuming that appellant voluntarily spoke to the deputies when they first came to his door, the circumstances became more constrained as the interrogation progressed. As the Ninth Circuit has observed:

> Voluntary initiation of contact with the police cannot be, under any circumstances, the end of the inquiry into whether a defendant was "in custody" during the encounter. If an individual voluntarily comes to the police station or another location and, once there, the circumstances become such that a reasonable person would not feel free to leave, the interrogation can become custodial.

(*United States v. Kim* (9th Cir. 2002) 292 F.3d 969, 975;

Once appellant was placed inside the patrol car, there were several circumstances that created a coercive setting. Indeed, from that point on, the officers dominated appellant and controlled his every movement. (See *Berkemer v. McCarty* (1984) 468 U.S. 420, 439 [analyzing extent to which police dominated the scene]; *United States v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1083 ["police-dominated atmosphere" used as a benchmark for determining custodial interrogation]; *Sprosty v. Buchler* (1996) (7th Cir. 1996) 79 F.3d 635, 641-642 [degree to which police dominated the scene is an important factor in determining custody].)

The officers questioned appellant questioned in the patrol car for approximately 15-25 minutes. (10 RT 1824.) During this time, appellant sat in the back seat of the car with both doors locked and closed. The officer sat in the front and spoke to appellant through a cage between the seats. (10 RT 1825.) Appellant was asked to remain in the patrol car after the interview was over, and while the officer testified that appellant did not seem to have a problem with this, there is no indication that he was given a choice. (10 RT 1813.) The door of the police car was shut and remained locked. (10 RT 1842, 1857.) A deputy stood by the patrol car. (10 RT 1841, 1843.)

Respondent notes that appellant later sat on the back seat of the patrol car with his feet outside the door. (RB 36, citing 10 RT 1809-1816.) This is not the complete picture. After the first interview was over, appellant remained in the locked patrol car for 10-15 minutes. (10 RT 1845.) The officer testified that after appellant asked for a cigarette, he "allowed" appellant to step outside the car to smoke under his supervision. (10 RT 1868.) That the officer had to "allow" appellant to step outside is an indication of the degree of control that he exercised over appellant.

When appellant finished the cigarette, he returned to the patrol car and sat on the back seat with his legs outside of the car. Officers continued to stand close by. (10 RT 1846-1847.) At this point, investigator Hanson arrived and asked appellant to come to the sheriff's office to make a detailed statement. Appellant wanted to do it at a later time, but Hanson insisted that it be done immediately. (10 RT 1847, 1857; 2 CT 549.)

Once appellant was placed in the patrol car, he was under the complete control of the deputies who questioned him. (See *United States v. Butler* (6th Cir. 2000) 223 F.3d 368, 375 [being placed in locked patrol car was one factor that ripened an investigatory stop into an arrest.) Even when appellant was allowed to step outside the car, he remained under the control of the deputy who stood by and monitored his every movement. (See *United States v. Griffin* (8th Cir. 1990) 922 F.2d 1343, 1354 [although defendant was interviewed at home, officers continually monitored defendant creating a custodial situation]; *United States. v. Mittel-Carey* (2007) 493 F.3d 36, 40 [officers escorted defendant when they permitted him to move around his house].) Accordingly, even if the interview started out as a consensual encounter, its coercive elements soon became apparent as appellant was controlled and dominated by the officers. The location of the initial interrogation therefore contributed to a custodial situation.

After appellant was taken to the sheriff's station, the environment became even more constrained. The station was located far enough away from appellant's house, so that he was dependent upon the officers for a ride home. Appellant was never left alone. He was in a locked interview room where access was strictly controlled by the investigating officers. (10

RT 1919.[1]) Under these circumstances, the interview site at the station was so dominated by the sheriff's deputies that it weighs in favor of determining that appellant was in custody. (See *Miranda v. Arizona*, *supra*, 384 U.S. at pp. 449-455 [describing coercive effect of interrogation techniques when a subject is alone, insecure about surroundings, and deprived of outside support].)

2. Focus of Investigation

The trial court found that the purpose of the interview at the sheriff's station was to question appellant as a witness. (11 RT 2020-2021.) It erroneously believed that the officers "did not manifest a belief that the defendant was guilty" until investigator Hanson told appellant that there was new evidence from the crime scene and that he was not free to go. (11 RT 2021.) Respondent acknowledges that the officers were skeptical of appellant's story throughout the interview, but argues that Hanson's "polite queries" did not rise to the level of accusatory questioning to make appellant believe he was under arrest. (RB 38.)

At the start of the interview, Hanson stated that appellant was there because he was the last person to see the victim alive. (3 CT 595.) But as the interview progressed, both he and Deputy Lorenzana grew increasingly confrontational in their questioning. Hanson repeatedly asked appellant if he burglarized the Carnahan house and suggested that appellant may have

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1. Respondent notes that the trial court found there was either no evidence that the door was locked or that appellant knew the door was locked. (RB 37, citing 11 RT 2020-2021.) The record clearly established that the doors locked automatically, although investigator Hanson may have had his keys in the door so he could come and go. (10 RT 1919.) Under these circumstances, it would be apparent to any reasonable person that access to the room – in or out – was controlled by the officers.

needed some money to buy heroin. (3 CT 638-639.) He repeatedly asked appellant if he knew what happened to Nicole and accused him of not being honest. (3 CT 649, 655.) There was no mistaking Hanson's belief: "I'm just thinking maybe you're not being totally honest with me, and you were in that house when it was being burglarized." (3 CT 650.) Similarly, Lorenzana asked if appellant was telling the truth. (3 CT 670.) Appellant stated that he could tell that Lorenzana thought he committed the crime. (3 CT 671.) Hanson continued to question appellant about his involvement in the crime. (3 CT 674, 689.) The officers' questions and attitude toward appellant clearly demonstrated that appellant was being questioned as a suspect, and not as a mere witness. (See 3 CT 662 [Hanson states that they were suspicious of appellant].)

Appellant certainly understood that he was the object of the interrogation. He accused the deputies of trying to trick him. (3 CT 6613 CT 675-676.) He repeatedly asked to leave. (3 CT 662, 666, 667, 668.) After Hanson ignored appellant's initial requests, appellant stood up. But Hanson told him to sit down and continued to question him. (3 CT 662, 666, 667.) Accordingly, it was clear that the officers controlled the interrogation and repeatedly focused their investigation towards appellant. This, too, is a factor that weighs in favor of a custodial interrogation. (See AOB 27-28 [totality of circumstances created custodial situation].)

Respondent relies on *Oregon v. Matthiason* (1977) 429 U.S. 492, 495-496 (per curiam) to argue that the officer's suspicions did not give rise to a custodial interrogation. (RB 38.) In *Matthiason*, the defendant came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a half-hour interview, the defendant left the police station without hindrance. Thus, he was not in custody or

deprived of his freedom of action in any significant way. (*Oregon v. Matthiason, supra*, 429 U.S. at 495.) *Matthiason* did not hold that a defendant who is questioned as a suspect is not subject to custody. It simply establishes:

> [A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment."

(*Ibid.*) In other words, there must be more than mere questioning at a police station to establish that a defendant is in custody, particularly when a defendant leaves the police station after a short interview. The totality of the circumstances is far different in this case, where the officers clearly focused on appellant as a suspect, ignored his initial requests to be taken home, and ultimately arrested him at the conclusion of the interview.

Similarly, respondent's reliance on *People v. Stansbury* (1995) 9 Cal.4th 824 is misplaced. (RB 38.) In *Stansbury*, the defendant was first interviewed in the front seat of a police car as a witness. He was taken to the station for a further interview, but it was brief and non-accusatory. The defendant was largely permitted to recount his narrative. The police suspected another person at the time, and the Court noted that their subjective beliefs were undoubtedly conveyed to the defendant through the nature of the interview. (*Id.* at p. 832.) This Court found that the mere fact that the interview took place at the station did not give rise to a custody situation. (*Id.* at p. 833.)

Here, the questioning was far different. Appellant initially may have been told that he was being questioned as a witness, but everything that happened after that conveyed that he was a suspect. Appellant's statements

indicate that he understood that he was being treated as the latter. Indeed, unlike *Stansbury*, the deputies had every reason to believe that appellant had committed the crime before the interview began. (3 CT 711-712 [appellant's actions at the scene of the crime tipped Hanson that appellant was involved in the victim's death]; see also AOB 19-21 [recounting facts that should have established appellant as a suspect rather than a witness].) Accordingly, the focus on appellant as a suspect is a strong factor supporting a finding that there was a custodial interrogation.

3. Objective Indicia of Arrest

Respondent contends there was no objective indicia of arrest because Detective Hanson informed appellant that he was not under arrest and appellant demonstrated this awareness by asking for a ride home.[2/] (RB 39.) The mere fact that an officer tells a defendant that he is not under arrest does not mean that a person is not subject to a custodial interrogation. (See *United States v. Craighead*, *supra*, 539 F.3d at p. 1085 [custodial interrogation found even after officers told defendant he was free to leave]; *People v. Boyer*, *supra*, 48 Cal.3d at p. 264 [custodial interview after the defendant was told he would be able to return home within a few hours]; *South Dakota v. Long* (8th Cir. 1972) 465 F.2d 65, 68 [finding of custody despite clear warning that defendant was free to not answer questions].)

In *People v. Aguilera* (1996) 51 Cal.App.4th 1151, two police officers came to the defendant's residence and asked if he would talk to them about a homicide. They offered to bring him back home after he told the truth – unlike the present case, they actually drove him home after the

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2. The issue, of course, is not whether appellant believed he was under arrest, but whether a reasonable person in appellant's circumstances would have so believed.

interview was over. (*Id.* at p. 1159.) The police brought the defendant to an interview room at the police station without being physically restrained. The officers told the defendant he was not in custody and that they only wanted him to tell the truth. (*Ibid.*) Despite the promises and assertions made by the officers, the Court of Appeal found that the interrogation was custodial. In particular, the reviewing court emphasized that the officer repeatedly rejected the defendant's story, so that a reasonable person would have concluded that telling the "truth" meant admitting involvement with the crime. (*Id.* at p. 1163.)

Similarly, in *United States v. Lee* (9th Cir. 1982) 699 F.2d 466 (per curiam), the defendant was asked if he would agree to be interviewed in a Federal Bureau of Investigation car that was parked in front of the house. Two agents told him he was free to leave the car or terminate the interview at any time. Despite this, the Ninth Circuit found that the interview was custodial, noting that police investigators were in and around his house during this time and that after repeating his exculpatory story, the defendant was confronted with evidence of guilt and told that it was time to tell the truth. (*Id.* at pp. 467-468.)

Here, the degree to which the police dominated the interview similarly would have led a reasonable person to believe that he or she was not free to "terminate the interrogation and leave." (*Thompson v. Keohane*, *supra*, 516 U.S. at p. 112.) As discussed above, appellant was initially interviewed in a locked patrol car and left in the car after the interview was over. He did not want to go to the station with the officers and agreed to do so only when it was clear that Hanson was not going to take "no" for an answer. (See *People v. Boyer*, *supra*, 48 Cal.3d at p. 248 [officers made clear that defendant could not refuse requests].)

Throughout the interrogation, officers were clearly suspicious of appellant's story and appellant believed the officers were trying to trick him. Most importantly, after appellant asked for a ride home, Hanson continued to question appellant about their suspicions:

Hanson: And then while you were in the house, uh, maybe Nikki surprised you and because you carried that knife with you – you were seen earlier. You didn't want to get caught, so, you hurt Nikki. And maybe in the process of hurting Nikki, you didn't mean to hurt her as bad as you did.

Appellant: Huh-uh.

Hanson: And, uh, and –

Appellant: Am I under arrest?

Hanson: No, you're not under arrest

Appellant: I'd like to [tape inaudible] . . . Can I get a ride home please. I've told you everything I know.

Hanson: Right.

Appellant: I've told you the best I can, and you – you're trying to twist words. I'm being honest with you.

Hanson: Well, you can see where we're – we're, you know, we're a little suspicious, you know.

(3 CT 662.)[3/]

A few minutes later, appellant again asked for a ride home:

Appellant: Yeah, you guys are [trying to trick me]. Man I – Can I get a ride home please. Can I please get a ride home?

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3. Respondent mischaracterizes this exchange by stating that Hanson responded to appellant's request for a ride home by saying, "right." (RB 40.) It is apparent that Hanson's use of the word "right" was a somewhat sarcastic response to appellant's statement that he had told Hanson everything he knew. Hanson ignored appellant's request and continued to question appellant about why he was suspicious.

You going to charge me or what, you know. I got my rights. I am no on pro – I'm not on probation?

Hanson: Right.

(3 CT 666.)

Appellant again asked, "You guys going to give me a ride home or am I going to have to walk home like I always do? (3 CT 667.) Apparently, appellant stood up at that point in the interview because Hanson twice directed him to "have a seat." Hanson then asked appellant to "voluntarily give us your clothes." (3 CT 667.[4]) Appellant attempted to bargain his way home, stating that he would give Hanson his clothes after being taken home. Hanson insisted that it be done then. (3 CT 668.)

Respondent contends that appellant's requests to be given a ride home indicate that he was not in custody. (RB 39.) Appellant clearly wanted a ride home and was concerned that he would not be allowed to leave – he was at least willing to ask whether the officers intended to fulfill the promises that they made to him. But the test for custody is not whether or not appellant actually thought he would be given a ride home, but how a reasonable person would have interpreted the officers' failure to respond to his requests. As the Ninth Circuit recently emphasized, "The *Miranda* test for custody does not ask whether the suspect was *told* that he was free to

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4. Respondent states that appellant "was invited to sit down as a way of defusing his apparent agitation." (RB 41.) The record does not clearly show why Hanson told appellant to sit down, but his motivation is not at issue. After a suspect asks for a ride home, stands up while wondering whether he was going to have to walk home, and then is told to sit down, a reasonable person would believe that they were not free to leave. (See *United States v. Griffin*, *supra*, 922 F.3d at pp 1350-1351 [recognizing that suspects may be escorted or ordered to do things for reasons unrelated to custody, but the likely affect is to associate such restraints with arrest].)

leave; the test asks whether "a reasonable person [would] have *felt* he or she was not at liberty to terminate the interrogation and leave." (*United States v. Craighead*, *supra*, 539 F3d. at p. 1082, emphasis in original.]

As in *Aguilera*, Hanson's repeated disbelief in appellant's story and his refusal to end the questioning after appellant stated that he wanted to leave demonstrates that the interrogation was custodial. Appellant asked to leave, but after that request was effectively ignored, a reasonable person would conclude that he was not free to go. Appellant stood up, but when the officer directed him to sit down and continued the interrogation, a reasonable person would believe that he was in custody. A reasonable person would have understood that he could not leave until the officers' suspicions were satisfied and he agreed to everything the officer demanded. Accordingly, this factor weighs in favor of a custodial interrogation.

4. Length and Form of Questioning

Appellant was initially questioned in the patrol car for 15-25 minutes (10 RT 1824), after which he remained in or around the car for another 10-15 minutes (10 RT 1845) until Hanson insisted that he go to the station for a full interview. The detectives questioned appellant at the sheriff's station for almost two hours.[5/] (11 RT 2007-2008.) Respondent notes that the trial court found that the detectives were non-confrontational; that Hanson was "soft spoken," although Lorenzana was less so. (RB 41-42, citing 11 RT 2016.)

Hanson may have been soft spoken, but he was also insistent that appellant cooperate with his "requests" and openly voiced his suspicions

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5. Appellant's interrogation lasted longer than the two-hour interview in *People v. Aguilera*, *supra*, 59 Cal.App.4th at p. 1165.

throughout the interrogation. Under these circumstances, it was not the tone of his voice that was important, but the message that he conveyed.[6/] Indeed, Hanson was insistent that he wanted appellant to come to the station for an immediate interview; he said that he was suspicious of appellant and continued the interview even after appellant asked for a ride home; and, he insisted that appellant surrender his clothing while at the station. As discussed above, in each of these matters, Hanson was in control of the situation and was not going to take "no" for an answer. (See *People v. Boyer*, *supra*, 48 Cal.3d at p. 248.) Accordingly, both the length and the form of questioning indicated that appellant was subject to a custodial interrogation.

5. Appellant's Statements Must be Suppressed

Appellant was subject to the control of the police officers from the time that he was placed in a locked patrol car and questioned behind an iron cage. From that point on, he was either in the locked car, under the direct authority of a deputy who stood nearby, or taken to a locked room at the sheriff's station and interviewed in increasingly accusatory terms. By the time that the deputies ignored appellant's initial requests for a ride home, it was clear that he would not be permitted to leave unless the deputies allowed him to do so. Even assuming that appellant initially consented to be interviewed as a witness, by this point the situation had dramatically changed. This Court should find that appellant was subject to custodial interrogation. (See *United States v. Wauneka* (9th Cir. 1985) 770 F.2d 1434, 1438-1439 [defendant in custody after being transported to station by

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6. As President Theodore Roosevelt pointed out, it is certainly possible to speak softly but carry a big stick. (T. Roosevelt, Speech at Minnesota State Fair, Sept. 2, 1901.)

officers, without means to get home, and subject to increasingly accusatory questioning].)

This Court need not determine the exact point at which the interrogation became custodial. In *Tankleff v. Senkowski* (2d Cir. 1988) 135 F.3d 235, the defendant was interviewed in a police car and taken to the station after he voluntarily agreed to speak to the officers. At some point, however, the focus of the interview shifted. The officers focused on inconsistencies in the defendant's story and openly expressed their doubts about his version of the events. They falsely told him that his father had identified him. The reviewing court found "if not before, then certainly by this point . . . no reasonable person would have felt free to leave." (*Id.* at p. 244.) In other words, the reviewing court did not need to draw a bright line to establish when the interrogation became custodial. Once it found that point had been reached during the course of the interrogation, all statements made by the defendant before he was given *Miranda* warnings should have been suppressed.[7] (*Ibid.*)

Because appellant's interrogation became custodial, his entire statement must be suppressed. Moreover, that appellant agreed to talk to the officers after being given *Miranda* warnings, does not alter this result.

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7. Respondent argues that *Tankleff* is inapposite because the detectives did not browbeat appellant or falsely tell him that they had proof of his guilt. (RB 44.) Appellant cited this case to establish that even if his interrogation began as a voluntary encounter, this Court should suppress his entire statement. (AOB 30.) The circumstances of *Tankleff*, although telling about how the nature of interrogations can change, are less important to this case than the remedy that the court applied.

(*Missouri v. Siebert* (2004) 542 U.S.600, 617.[8]) Accordingly, the trial court erred in denying appellant's motion to suppress the statements he made to the sheriff's investigators.

B. The Judgment Must Be Reversed

The prosecutor used appellant's statements during her closing argument in both the guilt and penalty phases to argue that appellant's mental state was not diminished or affected in any way that would mitigate the crime. (See, e.g. 40 RT 7837 [guilt phase argument]; 50 RT 9814-9822 [penalty phase argument; AOB 32-35.) Respondent states that the evidence of guilt (including appellant's intent) was overwhelming so that there is no possibility of prejudice in either part of the trial. (RB 47-50.)

1. Guilt Phase

The prosecution was under a burden to prove that appellant acted with the specific intent necessary to establish first degree murder, robbery, or burglary. Respondent states that the prosecutor primarily relied upon appellant's conduct to establish his mental state. (RB 45-47.) Yet that portion of the closing argument that respondent quotes shows the importance of appellant's statements to the prosecutor's case:

> And he's telling them out of the blue unrelated to anything going on, you know, "I'm too weak. I can't even run. I can barely walk. Becky and I have been getting along great, you know. We just had a conversation not too long ago and we were talking about boyfriends and girlfriends. We're just

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8. Respondent states that *Siebert* has no bearing on the case because the defendant in *Siebert* was under arrest before being given *Miranda* warnings. (RB 44.) Again, appellant did not cite this case to establish whether he was in custody, but to show that appellant's improper custodial interrogation required suppression even though he initially chose to talk to the deputies after he was eventually given *Miranda* warnings. (AOB 31.)

> pals, and when I went over there, that was out of concern for the Carnahans."
>
> These are the types of things that tell you he was not impaired to the extent that he couldn't form these mental states. Everything he did and everything he said tells you the opposite.

(40 RT 7837.)

Appellant's conduct alone was not conclusive because there was substantial evidence that he had taken a number of drugs and alcohol at the time of the crime. (37 RT 7251-7253.) Indeed, just before the crime was committed he was intoxicated to the point where he was "slumped over with the shakes" and had great difficultly communicating. (31 RT 6041-6042.) Therefore, appellant's jurors had to resolve whether this level of intoxication affected his mental state to where he could not form the required intent.

Respondent relies on *People v. Heard* (2003) 31 Cal.4th 946, to argue that appellant's state of mind as a result of his intoxication was at issue only to the extent that he might have been unconscious. (RB 47.) Involuntary manslaughter includes unconsciousness due to intoxication and can be found when a person physically acts but is not conscious of doing so. (*Id.* at p. 981.) The technical meaning of "unconsciousness" does not preclude the use of intoxication as a defense in this case.

Moreover, Penal Code section 22 provides that "evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant *actually* formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (Italics added.) It is well-settled that voluntary intoxication, short of unconsciousness, may affect a defendant's

specific intent to commit murder, robbery, and burglary. (*People v. Saille* (1991) 54 Cal.3d 1103, 1116-1117 [voluntary intoxication relevant to the question of whether the defendant actually had the requisite specific mental state]; *People v. Hughes* (2002) 27 Cal.4th 287, 341 [instructions allowed jury to consider voluntary intoxication pertaining to murder, robbery, and burglary]; *People v. Horton* (1995) 11 Cal.4th 1068, 1119 ["voluntary intoxication is relevant to the extent it bears upon the question whether the defendant actually had the requisite specific mental state"].) Appellant's jurors were so instructed under CALJIC No. 4.21.[9/] (40 RT 7852.)

Respondent states that any error was harmless because the removal of the boards from the Carnahan fence demonstrated that appellant planned to commit robbery or burglary long before the victim was killed. (RB 47.) There is no direct evidence about who removed the boards, the exact time that the boards were removed, or why they were removed. Even assuming that appellant removed the boards, it does not necessarily indicate that he planned to rob the victim later in the day or had the required intent at the time of the crime.

Ronald Ruminer testified that he observed the hole in the fence around 2:15 p.m. (33 RT 6464-6467.) If the boards were removed by appellant for the purpose of taking Carnahan's property, he could have done so at that time. Instead, he went to visit Dennis Sullivan at around 3:00 p.m. in a highly intoxicated state, shaking and slumped over, so that Sullivan had trouble understanding him. (31 RT 6041-6042.) Appellant

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9. Appellant's jury was also instructed, "If you find that a defendant, as a result of voluntary intoxication, killed another human being without an intent to kill and without malice aforethought, the crime is involuntary manslaughter." (40 RT 7856.) Appellant's jury was not specifically instructed on unconsciousness.

had numerous drugs in his system when he was later tested. (37 RT 7251-7253.) He fell down at least twice that day. (28 RT 5434; 31 RT 6049.) The victim returned home from school at around the same time that appellant visited Smith. (33 RT 6473.) She was killed a short while later. Accordingly, appellant's jurors could have found that when the crime was committed appellant was intoxicated to a significant degree, which was likely to have affected his state of mind and the resulting intent to commit the crime.

Respondent also states that the nature of the attack and the injuries that the victim suffered show that appellant acted with criminal intent. (RT 48-49.) Although the attack undoubtedly was marked by an explosion of violence, it is also consistent with someone who lost all rational thought. Thus the question of whether intoxication affected appellant's actual mental state and prevented him from forming the intent necessary for murder, robbery, and burglary was very much at issue. (See *People v. Hughes*, *supra*, 27 Cal.4th at p. 341.)

The prosecutor's use of appellant's statements make clear that they were an important part of her case. Under these circumstances, there is a reasonable possibility that the error contributed to the verdict. The judgment against appellant must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

2. Penalty Phase

In the penalty phase, appellant presented expert testimony that focused upon his mental defects. Dr. Arthur Kowell, a neurologist, traced appellant's history of drug use and neurological impairment. He testified that appellant had abnormalities in the frontal and temporal lobes that might impair his ability to appreciate the criminality of his conduct or to conform

his conduct to the law. (48 RT 9422-9425.) Dr. Kowell believed that appellant had a neurologic condition that could affect his ability to think about things or control his behavior. (48 RT 9447, 9471.)

Dr. Dale Watson, a neuropsychologist, testified that the results of appellant's testing suggested frontal impairment. Dr. Watson opined that appellant had "mild brain dysfunction," but that there was one area that particularly stood out: appellant scored at less than the first percentile for people of his age and education on the Wisconsin Card Sort test.[10/] (49 RT 9626.) This test measures the ability of people to initiate, stop, monitor their own behavior and then shift ideas. It showed that appellant got stuck in mental ruts and had a difficult time shifting his conduct. Dr. Watson explained that people with this problem keep on doing the things that they should not be doing and cannot figure out how to do something different. (49 RT 9621-9625.) Although Dr. Watson did not suggest that the deficits caused appellant to commit the crime, he believed that the problems may have affected appellant's judgment, organization, and his ability to make decisions. (49 RT 9684-9685.)

During the penalty phase, the prosecutor used appellant's statements to argue that Penal Code section 190.3, factors (d) and (h), did not apply: appellant did not have a major mental disorder and he knew the difference

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10. A minor brain dysfunction can still be significant. (See *People v. Wright* (Colo. 1982) 648 P.2d 665, 669 ["minimal brain dysfunction" supported finding of insanity].)

between right and wrong. (50 RT 9821-9822.[11]) Respondent echoes this position, stating that "the sophisticated nature of appellant's conduct and planning activities" refuted any claim that he lacked the ability to plan the crimes or control his conduct." (RB 50.) Respondent further contends that appellant's own experts acknowledged that his "minor brain deficits" did not cause him to commit the crime. (*Ibid.*)

Contrary to respondent's view, appellant's mental state did not have to cause the crime or prevent appellant from knowing right from wrong to make it important mitigation. The evidence was not introduced to show that appellant was not guilty of the crime by reason of insanity, but to establish that his character and record served as a basis for a life sentence. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879 [penalty phase decision requires an individualized determination based on the character and record of the individual and the circumstances of the crime].) Moreover, it was not introduced to excuse the crime. As this Court has observed, after being found guilty of first degree murder with special circumstances, "it would be rare indeed to find mitigating evidence which could redeem [the] offender or excuse his conduct in the abstract." (*People v. Brown* (1985) 40 Cal.3d 512, 541, fn.13.) Thus, the issue before the jurors during the penalty phase was not whether appellant's mental deficits caused him to commit the crime, but if they mitigated the crime. On that crucial issue, appellant's statements were used to defeat substantial evidence that weighed in favor of mitigation.

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11. The prosecutor used examples taken from appellant's statements at the sheriff's station, including his claim that he had a friendly relationship with Mrs. Carnahan (30 RT 5909); that people tried to break into neighborhood houses (30 RT 5904); and that he saw another person in the back of the Carnahan property (30 RT 5990-5998).

Moreover, the crime was hardly sophisticated. Even assuming that appellant removed the boards in the fence separating his trailer from the victim's home, this was done "substantially before" the crime was committed. (RB 47.) If the crime was part of a sophisticated plan, appellant would not have waited to burglarize the house until the occupants returned. Even the nature of the theft reveals significant impairment. As appellant's counsel argued:

> What kind of person takes margarine from a house when you have nothing to put it on? What kind of person takes meat when you have nothing to cook it with? . . . What kind of person takes an empty box of See's candy? For what purpose? What kind of person takes a lock without a key? What kind of person takes shoelaces?

(50 RT 9843.) Indeed, appellant's physical condition left him unable to move many of the items beyond the Carnahan yard, leaving a trail that led directly to his trailer. This was not the mark of a crime committed after significant planning. It is more consistent with a person who went to the Sullivan house just before the crime, so intoxicated that he could hardly communicate, and then was unable to stop himself once the crime began. Accordingly, the nature of the offense does not negate the importance of his statements, but makes those statements even more critical to the prosecutor's case.

The difference between the haphazard nature of appellant's statements immediately after the crime was committed and the statements he gave during his interrogation is also significant. (AOB 31.) Appellant's initial statements confused times and dates and shifted topics out of the blue to talk about his neurological problems and his false teeth. It was not until he was interrogated at the sheriff's station that a more coherent story began to emerge that included his friendship with the victim's mother and reports

of prowlers in the neighborhood. The prosecutor used the latter statements to their full advantage when she urged the jury to disregard the evidence of mental disorders. (See 50 RT 9914-9822.)

Under these circumstances, the statements used against appellant undoubtedly contributed to the penalty verdict. This Court cannot find that the error was harmless beyond a reasonable doubt and must reverse the penalty judgment. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [substantial error affecting penalty phase requires reversal].)

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II

THE TRIAL COURT ERRONEOUSLY ALLOWED A CRIMINALIST TO SPECULATE ABOUT A BLOOD STAIN FOUND IN THE VICTIM'S LIVING ROOM

During the course of the crime scene investigation, sheriff's deputies found a small stain on the carpet in the victim's living room. There were no other blood stains in the area. (35 RT 6874, 6875.) Over appellant's objections, criminalist Greg Avilez testified that *if* the stain was left by direct contact with a human, the person had to have been lying down. (35 RT 6890.) Although the testimony lacked any foundation to establish that the stain was caused by direct human contact, the prosecutor used this hypothetical to speculate that the "turning point" in the crime occurred when the victim was lying on the floor. (39 RT 7701-7702.) Speculative evidence that was marginal at best was used to inflame appellant's jury. Accordingly, the testimony was more prejudicial than probative and violated appellant's constitutional rights to due process and a reliable jury verdict based upon accurate evidence. (Evid. Code, § 352; U.S. Const., 6th, 8th, &14th Amends.; Cal. Const., art.1, §§ 7, 15.)

A. The Opinion Lacked Proper Foundation

An expert may render opinion testimony based on facts given in hypothetical questions provided that the question is grounded in facts shown by the evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 209.) Expert opinion must not be based upon speculative or conjectural data. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338.) This distinction between an opinion grounded in evidence and that which is based on speculation was made clear in *People v. Halvorsen* (2007) 42 Cal.4th 379, where this Court found that a hypothetical question was improper because it was based upon assumptions that had not been proven:

> [T]he prosecutor's question embraced facts already in evidence (the time of defendant's blood test and his blood-alcohol level) and simply asked Dr. Lykissa if those known facts were inconsistent with the possibility (or hypothesis) that the individual in question had nothing to drink until after 6:15 p.m. In contrast, the defense question to which the court sustained the prosecutor's objection asked Dr. Lykissa to assume a fact not yet in evidence, i.e., that defendant had nothing to drink after 10 minutes to 7:00 p.m. Therefore, the trial court properly excluded defendant's hypothetical and allowed the prosecutor's. . . .

(*Id.* at p. 413.) A hypothetical question is therefore improper if it is based upon an assumption that cannot be proved.

Here, the prosecutor's hypothetical crossed the boundary when he asked Avilez to assume facts not in evidence:

> If you assume the blood stain was deposited by a human being, do you have an opinion as to whether or not the individual would have been standing or lying down or very close to the carpet at the time the blood stain was deposited?

(35 RT 6890.) This question was speculative because Avilez could not determine if the blood came from the victim or was transferred from an object. (35 RT 6874.)

Respondent contends that the question was proper because it was "undisputed" that it was the victim's blood so that the expert properly concluded that the blood was deposited by Nicole. (RB 56-57.) Respondent misunderstands the nature of Avilez's testimony and the objection posed by appellant. Although the blood may have been from the victim, Avilez could not determine how it was deposited. Indeed, the stain was in a localized area, with no other blood around it. It was a far different type of stain from the blood spatters in the bedroom, where the violent attack occurred. Thus, the expert did *not* conclude that the blood was deposited directly by the victim, rather he was asked to assume that it had

come directly from the victim for the purposes of the hypothetical question. There is a vast difference between blood left because the victim was lying on the floor and blood that had been transferred from another object. The evidence was silent on this crucial point.

The trial court overruled appellant's objections because it found that there were two logical inferences about the source of the blood – either it came directly from a person or it was deposited from an object. "I can't necessarily find asking him to assume for purposes of a hypothetical that the blood came from a person would necessarily be something that [the prosecution] couldn't prove." (35 RT 6884-6885.) Respondent echos this ruling and argues that an expert's opinion is not rendered speculative because the event at issue could have occurred in different ways. (RB 57.)

The issue before the trial court was not whether a party might be able to prove a fact, but whether the question "embraced facts already in evidence." (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 413.) Although respondent claims that the question was supported by circumstantial evidence (RB 57), the most that could be shown is that the blood was transferred from direct contact with the carpet rather than being dropped form a higher point. Appellant does not suggest, as respondent claims, that the question was improper because Avilez could not exclude the possibility that the blood was transferred from an object, but rather that he did not and could not establish how the blood was transferred. The assumption that the blood came directly from the victim was never proved and could not be inferred. Therefore, the hypothetical question was based on speculation and conjecture and did not embrace facts in evidence. It lacked a proper foundation and was irrelevant to the jury's determination. (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136

[assumptions in hypothetical questions that are based on speculation have "no evidentiary value"].)

B. The Question was More Prejudicial than Probative

Even assuming that a hypothetical question was proper, the question should have been excluded under Evidence Code section 352, which allows a trial court to exclude evidence if the probative value is outweighed by the danger of undue prejudice. Here, the probative value of the testimony was minimal since Avilez could not determine how the stain was deposited on the carpet and the stain itself told little or nothing about how the crime was committed. However, its prejudicial impact was enormous because it left appellant's jurors with a lasting and emotional image of the victim lying on the carpet, in what became the "turning point" of the crime, the moment that appellant could have abandoned the attack rather than commit robbery and murder. (39 RT 7703.) Accordingly, the prosecutor's hypothetical question violated section 352 and rendered appellant's trail fundamentally unfair in violation of federal and state due process guarantees. (See *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970 [due process violated if prejudicial effect of evidence renders trial fundamentally unfair].)

Respondent contends that appellant had no right to use section 352 to sanitize the nature of his crime or to prevent the prosecution from proving premeditation and deliberation. (RB 58.) But the nature of the crime must be shown by probative evidence, not mere speculation. The prosecutor's hypothetical question did not establish how the stain was left. It did not establish any particular type of nexus between the stain and the crime. Indeed, Avilez acknowledged that the stain could have been left by an object. (35 RT 6892.) Under these circumstances, section 352 does not serve to sanitize the crime, but prevents prejudicial speculation: the

"possibility" that the evidence would be misused for a purpose for which it is not properly admissible. (*People v. Hoze* (1987) 195 Cal.App.3d 949, 954.)

According to respondent, the prosecutor's argument established the probative nature of the testimony:

> The prosecutor argued that appellant likely struck his first blow in the living room, causing Nicole to fall to the ground and bleed on the carpet. During the time it took for Nicole to leave a blood stain of that size, appellant had ample time to premeditate and deliberate his next course of action.

(RB 59.) This does not show that the testimony was probative as much as it underscores the prejudicial impact. That respondent apparently assumes the evidence supports the prosecutor's argument confirms that the inherent speculation in the question prejudiced appellant. The prosecutor asked a hypothetical question based on an assumption that was never proved and used it to leave the jury with a lasting image that was described as the "turning point" of the crime.[12/] (39 RT 7703.)

The hypothetical question raised a horrifying, stark, and disturbing image of appellant standing over a young girl and consciously deciding to commit murder. Because this image is based solely on the prosecutor's assumption, the entire line of testimony was far more prejudicial than probative. It was precisely the kind of inflammatory speculation that section 352 and constitutional guarantees of due process prohibits. (*People v. Coddington* (2000) 23 Cal.4th 529, 588 [section 352 bars evidence that

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12. Respondent similarly speculates that the evidence established that since the blood came from the victim, and she had bled from numerous wounds, then the blood was directly deposited by the victim. (RB 56-57.) Since respondent interpreted the testimony as evidence that the victim lay on the floor of the living room, the jury was likely to have done the same.

evokes an emotional bias against defendant and has very little effect on the issues]; *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [due process protects against unduly prejudicial evidence that renders trial fundamentally unfair]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384 [introduction of irrelevant and inflammatory evidence violates due process].) Accordingly, the trial court erred in allowing the question over appellant's objections.

C. The Error is Prejudicial

In her closing argument during the guilt phase of the trial, the prosecutor used her hypothetical question to establish a vivid scene, describing how victim was lying on the living room carpet with appellant standing over her faced with the choice of continuing a brutal attack or giving up the robbery. She told appellant's jurors that this was the "turning point" of the crime. (39 RT 7702.) This stark and horrifying image was used to establish appellant's mental state and ensure that the jury found appellant guilty of the highest possible charges. In the penalty phase, the prosecutor again referred to the alleged attack in the living room as part of the circumstance of the crime. (50 RT 9826.) Accordingly, the hypothetical was particularly important, increasing the magnitude of the crime by changing it from an explosion of violence to one that encompassed a period of reflection over a beaten child lying on the floor. In either phase of the trial, the error was prejudicial. (AOB 43-45.)

Respondent claims that the jury would necessarily have inferred that appellant struck his first blow in that room. Consequently, respondent argues that any error could not be prejudicial because "evidence regarding the blow struck in the living room simply constituted one of many gruesome acts perpetrated by appellant. (RB 60.)

Respondent does not explain how the jury could have made any inference about whether the victim was struck in the living room. There is no evidence to show where the attack first occurred. There were no other blood spatters around it suggesting that the victim had been struck. Even Avilez could not determine how the blood spot was deposited. (35 RT 6902.) Indeed, when the attack occurred in the bedroom, it was a particularly violent outburst; more in keeping with a frenzied response – committed at a time when appellant had a number of drugs and alcohol in his system – rather than something that occurred after a period of reflection. Such an outburst explains the crime far better than the prosecutor's hypothetical and the argument that she drew from it. Thus, it is unlikely that the jury would have concluded that the blood spot was from a blow struck in the living room absent the prosecutor's question and the resulting argument.

Moreover, the scenario drawn from the prosecutor's hypothetical was more than just "one of many gruesome acts." The prosecutor was able to use it to describe a period of reflection during which appellant could have chosen to abandon the crime. *It became the "turning point" of the events that day, the point that appellant could have chosen to abandon the crime.* Thus, the prosecutor took a crime that was best described as a drug and alcohol-induced frenzy of violence, one that appellant's mental deficits made it very difficult to stop once it was underway, and turned it into a calculated killing of a child.

Even assuming that the error was harmless in the guilt phase, it significantly affected the jurors' decision that appellant must be executed. The powerful image of appellant standing over the victim, capable of stopping his actions, would have stayed with the jurors throughout the

penalty phase of the trial and aggravated the circumstances of the crime. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [guilt phase error may affect penalty judgment]; *Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888 [same].) This picture relied on emotion rather than reason and inflamed the jury against appellant in violation of due process standards. (See *Gardner v. Florida* (1977) 430 U.S. 349, 358 (plur. opn. of Stevens, J.) [vital importance that a capital penalty decision be based on reason rather than caprice or emotion].) Since the judgment was influenced by an arbitrary circumstance – speculation based upon a hypothetical – the verdict was also unreliable under the Eighth Amendment. (*Sawyer v. Whitley*, (1992) 505 U.S. 333, 341 [8th Amendment protects against arbitrary imposition of death penalty].) This Court cannot conclude beyond a reasonable doubt that the use of the hypothetical question did not affect the judgment. The verdict must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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III

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE BURGLARY AND ROBBERY CONVICTIONS AND THE SPECIAL CIRCUMSTANCE FINDINGS

Appellant has argued that there was insufficient evidence to prove that appellant intended to take any items from the Carnahan house before the homicide was committed. Although there was evidence that appellant took items from the Carnahan house, the nature of the crime – the type of homicide, the kind of items, and the way that the property taken was strewn about – indicated that the theft occurred as a haphazard taking following an explosion of violence against the victim. State and federal guarantees of due process and the Eighth Amendment requirements for a reliable capital verdict require more than speculation that appellant must have intended to commit burglary or rob the victim when he went to victim's home. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577; *People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9.) Accordingly, the judgment must be reversed.

Respondent attempts to defend the verdict by citing evidence that appellant was an impoverished heroin addict who removed boards from the fence before the murder; wore gloves to avoid detection, armed himself with weapons that were used to kill the victim; and stole a substantial amount of property that he took through the opening in the fence. (RB 62.)

This evidence has no bearing on appellant's intent. That appellant stole property does not prove when he formed the intent to do so. Similarly, there is no evidence about when appellant put on gloves. Moreover, it defies reason to suggest that appellant would take great care to avoid detection while leaving a trail of items from the victim's house to his own. The evidence also established that appellant generally carried weapons, and

did so that day before going to the victim's house.[13/] (See, e.g., 45 RT 8817 [knife and cane carried to methadone clinic]; 31 RT 6021, 6025 [knife and cane carried to neighbor's house].) This, too, does not indicate an intent to commit burglary, rob, or murder.

The missing boards in the fence do not add to this equation. The boards were removed before Richard Ruminer noticed the condition of the fence at around 2:15 p.m. (33 RT 6464-6467.) It is clear that if appellant removed the boards, his actions were limited. There is no indication that appellant tried to force his way into the house in order to take . (31 RT 6061.) Given the number of drugs that appellant had taken, there is no way to determine what might have been appellant's intent at the time. (37 RT 7251-7253.)

Appellant acknowledges that in *People v. Zamudio* (2008) 43 Cal.4th 327, this Court rejected a claim that there was insufficient evidence to show that the victim was robbed, rather than the property taken after a homicide. In that case, this Court noted that there was a direct financial motive. One "overarching consideration" was that defendant borrowed money from the victims, was to repay the loan but spent the money at a bar a few hours before the crime, and did not want his wife to know about the loan. Moreover, the victims retained the pink slip to the defendant's car as collateral for the loan. (*Id.* at pp. 358-359.) The items taken were directly related to the defendant's financial situation and the loan that he had received. Thus, the evidence supported the assumption that when the defendant killed another person and took substantial property, "the jury may

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13. Appellant told the officers that he carried weapons for protection. (30 RT 5904.)

reasonably infer that the defendant killed the victim to accomplish the taking." (*Id.* at p. 359.)

Here, that assumption was far more tenuous. Unlike *Zamudio*, the crime was not directed to a particular purpose. The items that were taken from the Carnahan house were not rationally related to appellant's situation.[14/] Indeed, the items found in appellant's shed included things that were of no use to him and had no financial value, such as margarine, shoelaces, a guitar case, and meat. (See 28 RT 5402, 5405-5409 [describing items found in appellant's shed].) As appellant's counsel argued,

> What kind of person takes margarine from a house when you have nothing to put it on? What kind of person takes meat when you have nothing to cook it with? . . . What kind of person takes an empty box of See's candy? For what purpose? What kind of person takes a lock without a key? What kind of person takes shoelaces?

(50 RT 9843.) That the items were strewn across the properties does not suggest a pre-existing plan to steal things that might be valuable, but rather a haphazard taking following an explosion of violence.

Here, the prosecutor acknowledged that there was "nothing in the evidence" that appellant intended to commit murder when he went over to the Carnahan property. (39 RT 7692 [arguing that appellant only intended to commit a burglary].) The prosecutor also presented an emotional account

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14. Respondent describes appellant as a "junkie in need of a fix." (RB 68.) But there is no evidence to support the conclusion that appellant was in need of a fix. He still had numerous drugs in his system when he was tested long after the crime occurred. (37 RT 7251-7253.) He was under the influence when he visited Dennis Sullivan. (31 RT 6041-6042.) The officers did not testify about any signs that appellant needed a fix during his interrogation.

that described how appellant *might* have walked through an open door with the intent to steal (39 RT 7700-7701), but there is no evidence that the prosecutor's description was correct. Assuming that appellant committed the crime, it is just as likely that he went to the Carnahan house in an agitated, drug-induced state and something tripped inside of him that led to a violent, frenzied attack – taking the items afterwards. In any event, the evidence indicates only that appellant took items from the Carnahan house after the crime was committed – whatever his intent before that cannot be established. (See *People v. Morris* (1988) 46 Cal.3d 1, 21-22 [speculation about any number of scenarios that might have occurred is insufficient to support a conviction].)

Appellant's convictions for murder, robbery, burglary, and the related special circumstances cannot stand. The judgment against him must be reversed.

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IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT APPELLANT'S JURY ON THEFT AS A LESSER INCLUDED CRIME TO ROBBERY

The trial court's failure to instruct on theft as a lesser included offense of robbery gave the jurors no other option but to find appellant guilty of robbery after they determined that he was responsible for taking property. This deprived appellant of his federal and constitutional rights to due process, trial by jury, and reliable guilt, special circumstance and penalty verdicts (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7 & 15).

Respondent maintains that there was insufficient evidence to warrant a theft instruction. In particular, respondent states that because appellant wore gloves, carried weapons, and removed boards from the Carnahan fence, the theft was not an afterthought. (RB 72.) However, as discussed in Argument III, there is no evidence about when appellant put on gloves; he often carried weapons so that this does not indicate a pre-existing plan to rob the victim or steal property; and, the removal of the boards were removed substantially before the crime was committed and was not necessarily related to it. Thus, the evidence in this case did not preclude a theft instruction since appellant could have committed an act of violence and then decided to take the victim's property.

Respondent also argues that the jurors rejected after-acquired intent to commit a theft because they found appellant guilty of both burglary and robbery. (RB 74-76.) Theft is a lesser included offense of robbery. (*People v. Ortega* (1998) 19 Cal.4th 686, 694.) Thus, the robbery instruction alone did not mean that a theft instruction was not warranted.

(See *People v. Kelley* (1992) 1 Cal.4th 495, 529-530 [without an instruction on theft, Court had no confidence that the jury rejected after-acquired intent on its own merits].) Indeed, CALJIC No. 9.40.2, the robbery instruction that was given in this case, focused on the concurrence between the intent to steal and the time of the taking, not the time of the use of force.[15] (3 CT 769.) There is nothing in the robbery instruction that explains to the jury that the intent to take property must exist before the defendant used force against the victim. As in *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 352, the omission of theft instructions left appellant's jury with an "unwarranted all-or-nothing choice" that made robbery the only available option and guaranteed appellant's conviction.

Appellant acknowledged in his opening brief that the burglary instruction required the jury to determine that appellant entered the Carhanan house with the intent to steal. (AOB 60-61; 3 CT 772.) This Court has found that such instructions can render harmless an error in not instructing on theft. (*People v. Melton* (1988) 44 Cal.3d 713, 746-747.) This Court should reconsider this result under the circumstances of this case. The only way that appellant's jury could assign culpability for the property crimes was by first finding that appellant committed robbery – that he intended to take the property before he took it. (CALJIC No. 9.40.2; 3 CT 769.) Under the instructions given, the jury had no option but to reach this determination, and after that the conviction for burglary was virtually

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15. As given in appellant's case, the instruction read, "To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of her property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed."

automatic. If appellant intended to take the property before he took it, the jury would naturally find that he intended to take the property when he entered the Carnahan residence. Since there was no theft instruction requiring the jurors to face the issue of after-acquired intent with regard to the use of force, they could not be expected to do otherwise. To reach any different result would have required a degree of analysis that cannot be expected from lay jurors. (See *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127 ["We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors . . . ."].)

Respondent argues that the finding on the robbery-murder special circumstance also forecloses appellant's claim, relying on *People v. Cash* (2002) 28 Cal.4th 703. (RB 76.) In *Cash*, the defendant was not charged with robbery and therefore the trial court was not required to instruct on theft as an alternative theory to felony-murder. (*Id.* at pp. 736-737.) Although the defendant failed to object to the prosecutor's misstatement of the law regarding the force or fear requirement of robbery, the Court found that this could not have prejudiced his claim of after-acquired intent. The jury was instructed that the special circumstance was true only if the robbery was incidental to the murder. In light of this instruction, the prosecutor's argument could not have affected the jury's deliberations on this issue. (*Id.* at pp. 735-346.)

Here, appellant's jury was instructed that the special circumstances were true if the murder was committed in the commission of a burglary and robbery, in order to carry out these crimes. (3 CT 764; CALJIC No. 8.81.17.) But unlike *Cash*, appellant was specifically charged with robbery. Without a theft instruction, the jury was given no alternative but to find

appellant guilty of that crime. It followed that the murder was committed in the course of a robbery. That finding also reduced the prosecutor's burden of proof necessary to establish that the murder was not incidental to the charged crimes.

Respondent labels this argument as being "illogical," stating that a pre-existing plan was the only reasonable interpretation of the evidence and the only theory advanced during closing argument. (RB 76.) In support of this position, respondent focuses upon the argument of the prosecutor. But the argument of appellant's counsel was perhaps much more telling, stating that "it almost looks like this burglary was done in order to cover up a homicide." (40 RT 7813) This argument equates "burglary" with "theft" making it all the more likely that appellant's jurors did not have a clear understanding of the differences between the theft, burglary, and robbery. Under these circumstances, an instruction on theft was all the more important.

Failure to instruct on lesser offenses in a capital case violates the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 627; *Vickers v. Ricketts* (9th Cir. 1986) 798 F.2d 369, 370-374.) Here, in particular, the lack of a theft instruction reduced the prosecutor's burden of proof by making it easier for the jury to assume appellant's underlying intent. At a minimum, the robbery charges must be reversed. (*People v. Kelly*, *supra*, 1 Cal.4th at p. 530.) However, given the jurors' likely confusion between the robbery, theft, and burglary – and how that may have affected their understanding of felony murder and the special circumstances – this court should find that the error was prejudicial to the entire guilt verdict and reverse the judgment against appellant.

Even assuming that this Court only reverses the robbery counts as to guilt, the error prejudicially affected the death verdict. Respondent states that the crime was heinous regardless of its motivation and that the crime could be considered even more depraved if it were simply a "thrill killing" rather than a murder during the course of a robbery. (RB 76-77.) That the victim was a young child did not mean that the death penalty was virtually automatic. Moreover, the alternative to robbery was not a "thrill killing." Whatever the reason for the crime, there is no evidence that it was committed for the thrill of doing so – rather it followed a period in which appellant had taken substantial drugs and alcohol. To kill a young child in order to take a guitar case, shoelaces, margarine and other items of little or no value even to appellant makes the crime much more heinous than if the jury had found that the theft occurred after a violent outburst. Because appellant's jurors were given no choice other than robbery to account for the property taken from the victim's house, the weight of the aggravation – the moral judgment against appellant – was increased substantially. Accordingly, this Court should find that the error compromised the reliability of the penalty verdict and requires reversal. (*Chapman v. California* (1967) 386 U.S. 18, 24 [reversal required since respondent cannot show the error was harmless beyond a reasonable doubt]; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [substantial error affecting penalty phase requires reversal].)

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V

THE CALJIC INSTRUCTIONS DEFINING THE PROCESS BY WHICH JURORS REACH A VERDICT ON LESSER OFFENSES SKEWED THEIR DELIBERATIONS TOWARD FIRST DEGREE MURDER

Appellant has argued that trial court's instructions required appellant's jurors to reject a verdict on lesser offense unless there was a unanimous agreement about the offense. A juror who believed that appellant was guilty of some crime, but not necessarily first degree murder, would also believe that first degree murder must apply in the face of any disagreement. In short, first degree murder became the default verdict. The instructions skewed the jury's deliberations toward first degree murder and lowered the prosecution's burden of proof in violation of appellant's rights to due process and a trial by jury. (U.S. Const., 5th, 6th and 14th Amends; Cal. Const, art. I, §§ 7, 15, 16.)

Respondent claims that appellant invited the error because trial counsel joined the prosecution in requesting the instructions at issue. (RB 78.) Invited error applies where "defense counsel intentionally caused the court to err." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, *People v. Tapia* (1994) 25 Cal.App.4th 984, 1031.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both induced the trial court to commit the error and did so for an express tactical purpose which appears on the record. (*People v. Wickersham*, *supra*, 32 Cal.3d at pp. 332-335; *People v. Moon* (2005) 37 Cal.4th 1, 28.) Respondent cites nothing in the record which would support such findings. Review of the record demonstrates, at most, routine requests for standard CALJIC instructions. Trial counsel's request for the

instructions did not cause the errors at issue and the record does not indicate any tactical purpose that would justify a finding invited error.

Respondent relies on this Court's decision in *People v. Frye* (1998) 18 Cal.4th 894, which upheld the 1979 versions of CALJIC Nos. 8.71 and 8.72. (RB 78, 82.) The 1979 instructions explained that jurors were to give a defendant the benefit of the doubt without reference to whether the jurors unanimously agreed. The 1996 CALJIC revision given in this case significantly changed the nature of the deliberations by instructing jurors to vote for a lesser offense only if they unanimously agree. If some jurors believed that there was a reasonable doubt about the nature of the offense, the 1996 revision directs them back to first degree murder. In the absence of an unanimous agreement, first degree murder became the default verdict.

Respondent also relies on lower court rulings that have upheld the use of the 1996 revisions. (RB 80-82.) In *People v. Gunder* (2007) 151 Cal.App.4th 412, the reviewing court found that jurors would not misinterpret CALJIC No. 8.71 because they were instructed under CALJIC No. 17.40 that an individual juror is not bound to follow others in reaching a verdict. (*Id.* at pp. 827-828; see also *People v. Pescado* (2004) 119 Cal.App.4th 252, 257 [CALJIC 8.71 held proper when given with CALJIC Nos. 17.11 and 17.40.[16]])

Appellant's jurors were similarly instructed to give him the benefit of their individual determination. (CALJIC 17.40; 2 CT 781.) However, to the extent that this Court in Gunder viewed theinstruction as the key to the jurors' understanding that unanimity applies only to the actual verdict and not to the individual decision that a juror must make, it is mistaken. Here, the jurors could have interpreted the challenged instruction to permit them

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16. CALJIC No. 17.11 was not given in the present case.

to find a lesser charge only if there was a unanimous doubt about the nature of the offense. Accordingly, the juror's individual determination was conditioned on a unanimous finding. Without this unanimity, the verdict defaulted to first degree murder.

This Court should find that the instruction erroneously lightened the prosecutor's burden of proof and violated due process. The instruction affected the structural framework of appellant's trial and requires reversal. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.) But even if structural error analysis is not applied, the challenged instruction undoubtedly affected the jury's deliberations and cannot be considered harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 24.)

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VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FELONY MURDER AND FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

Appellant has argued that the trial court erroneously instructed appellant's jurors on felony murder, even though he was charged with only first degree malice murder. Even assuming that the jury could be instructed on both crimes, the trial court erred in not requiring the jurors to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder. The errors denied appellant his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to a unanimous jury verdict and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., Amends. 6, 8 & 14; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Respondent states, as appellant has acknowledged, that this Court has rejected similar arguments in other cases. (RB 84, *People v. Hughes* (2002) 27 Cal.4th 287, 369-370.) Because respondent does not address appellant's claim that this Court's decisions should be reconsidered, no further briefing on this issue is required at this time.

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VII

THE TRIAL COURT ERRONEOUSLY INSTRUCTED APPELLANT'S JURY ON CONSCIOUSNESS OF GUILT

The trial court erroneously instructed appellant's jury that false or misleading statements are circumstances tending to prove consciousness of guilt. (CALJIC 2.03; 3 CT 730.) Appellant has claimed that this instruction was unnecessary, improperly argumentative, and permitted the jury to draw irrational inferences against appellant. The instruction allowed the jury to assume that if appellant showed consciousness of guilt of one crime, he was guilty of all of the charged crimes. It improperly permitted the jury to use consciousness of guilt to find that appellant had the particular mental states for the charged offenses. Accordingly, the instruction deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and a reliable jury determination. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

Respondent states, as appellant has acknowledged, that this Court has rejected similar claims in other cases. (RB 85, citing *People v. Howard* (2007) 42 Cal.4th 1000, 1025.) Since respondent does not address appellant's claim that this Court's decisions should be reconsidered, no further briefing on this issue is required at this time.

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VIII

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, A TRIAL BY JURY, AND A RELIABLE VERDICT

Appellant has argued that a series of guilt phase instructions impermissibly shifted the burden of proof and required appellant's jury to presume all elements of the crimes supported by circumstantial evidence unless appellant produced a reasonable interpretation of that evidence pointing to his innocence. The instructions violated appellant's federal and state constitutional rights to due process. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 15, 16, 17.)

Respondent claims that appellant invited the error because trial counsel joined the prosecution in requesting the instructions at issue or did not object to them.[17] (RB 86.) As discussed above (Argument V), this doctrine does not apply because the record does not show that appellant's counsel both induced the trial court to commit the error and did so for an express tactical purpose that appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-325.)

Respondent states, as appellant has acknowledged, that this Court has rejected similar claims in other cases. (RB 86, citing *People v. Rundle* (2008) 42 Cal.4th 1037, 1059.) Since respondent does not address appellant's claim that this Court's decisions should be reconsidered, no further briefing on this issue is required at this time.

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17. No objection is required to preserve for appeal an instructional claim that affects substantial rights. (Pen. Code, § 1259.)

IX

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

Appellant has argued that various aspects of California's death penalty statute, and the instructions given to appellant's jury under the statute, violate federal and state constitutional requirements. Respondent states, and appellant has acknowledged, that this Court has rejected similar challenges in other cases. (RB 86.)

In several instances, respondent also invokes the doctrine of invited error because appellant joined the prosecutor in requesting the standard CALJIC instructions. (RB 87, 88, 89, 91, 94, 95.) As discussed above (Argument V), this doctrine does not apply because the record does not show that appellant's counsel both induced the trial court to commit the error and did so for an express tactical purpose that appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-325.)

Appellant particularly asks this Court to reconsider its past opinions that have found that the requirements for an "extreme" mental or emotional disorder (Pen. Code, § 190.3, factor (d)), or a mental defect that impairs a defendant's ability to appreciate the criminality of his conduct under factor (h), do not limit a jury's consideration of a disorder that does not rise to these levels since it may be considered as mitigation under factor (k). (See,. e.g., *People v. Wright* (1990) 52 Cal.3d 367, 443-444.) Even if factor (k) encompasses such evidence, appellant's jury had no basis to understand that the catch-all provision applied to defects did not meet the standards enumerated in factors (d) and (h). The argument of the prosecutor, the

finding of the trial court in the motion for modification, and respondent's own position demonstrates why this is so.

Appellant presented substantial evidence that he suffered from a brain defect that affected his ability to shift his behavior. Dr. Dale Watson testified that appellant had a "mild brain dysfunction" so that he did some things well and other things not well at all. (49 RT 962509626.) Dr. Watson explained that appellant did very poorly on an executive function test. Appellant tended to get stuck in mental ruts and had difficulty shifting his behavior or his way of thinking. People with this problem keep on doing things that they should not be doing and cannot figure out how to do something different. (49 RT 9622-9625.) Moreover, Dr. Arthur Kowell testified that appellant has a neurological condition that affects his ability to think about things or control his behavior. (48 RT 9447, 9471,) Both experts testified that appellant's problems were consistent with frontal lobe impairment.[18/] (48 RT 9421-9422 [Kowell]; 49 RT 9625.) Accordingly, even if appellant's impairments were not necessarily "extreme," they affected appellant's behavior and contributed to the crime by making it difficult for appellant to think about his actions or change the course he had started.

The prosecutor dismissed appellant's mental impairment by stating that it did not rise to the level required under the enumerated factor for an extreme mental or emotional disturbance (factor (d)) or did not cause him to

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18. The prosecution expert, Michael Mega, did not find any evidence that appellant had "significant" brain damage, but saw some brain abnormality in appellant's SPECT scan. (49 RT 9698.) He testified that this abnormality would not cause appellant to commit the crime or prevent appellant from knowing the difference between right or wrong. (49 RT 9699.) Again, from this testimony, the jury may have found that appellant suffered from a brain defect, but that it was not "extreme" under factor (d).

be unable to know the difference between right and wrong (factor (h)). (50 RT 9814-9817.) The trial court, in its ruling on the automatic motion for modification, found that there was evidence of impairment, but agreed with the prosecutor that it did not rise to the level of factors (d) and (h). (53 RT 10404.) Thus, neither the prosecutor or the trial court believed that a mental disorder that was less than "extreme" should nevertheless be mitigating under factor (k). Under these circumstances, this Court cannot find that appellant's jury would have understood that the evidence was relevant under factor (k).[19] (See *People v. Fletcher* (1996) 13 Cal.4th 451, 471 [if legally trained prosecutor was unable to apply relevant law, "we safely can infer that this was true of the lay jurors as well"].)

Respondent's own position explains why appellant's jury did not recognize that factor (k) applied in this case. Respondent states that appellant's claim is meaningless because his defense was "extensively considered under other, more directly applicable factors." (RB 92.) Respondent argues:

> Since factors (d) and (h) were directly applicable to appellant's intoxication/mental defect claim, there was absolutely no basis whatsoever for the parties to have argued

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19. The Ninth Circuit has found that the Montana Supreme Court erred in rejecting evidence of mental impairment as a mitigating circumstance because it did not qualify as an extreme or substantial disorder, rather than consider it under a catch-all provision that is included in that state's statutory scheme. (*Smith v. McCormick* (9th Cir. 1990) 914 F.2d 1153, 1167; see Montana Statute 46-18-304 [mitigating circumstances].) If a state supreme court makes this error under a similarly worded statute, then it is all the more likely that appellant's jurors also would have understood that a mental defect was to be considered only under factors (d) and (h) and not given it further consideration and effect.

> that the foregoing evidence should also be viewed as mitigating under factor (k).[20/]

(*Ibid.*) Rather than defeat appellant's claim, this argument reveals the problem in the present case. If appellant's mental impairment did not rise to the level of the enumerated factors, then it was most relevant under factor (k). (*People v. Wright*, *supra*, 52 Cal.3d at pp. 443-444.) But the prosecutor, trial court, and respondent erroneously assume that since factors (d) and (h) were "directly applicable" there was "no basis whatsoever" for the evidence to be considered as mitigating. Appellant's jury cannot be expected to have thought otherwise.

Respondent also states that the prosecutor did not tell the jurors that they could not view appellant's defect as a mitigating circumstance under factor (k). (RB 92, citing *People v. Dennis* (1998) 17 Cal.4th 468, 548 [prosecutor did not argue that the jury was precluded from considering defendant's mental condition as a mitigating factor under factor (k)].) The prosecutor did not have to directly argue this. After discussing the testimony of Doctors Kowell, Watson, and Mega under factors (d) and (h) (49 RT 9815-9820), she told the appellant's jury that factor (k) consisted of evidence of appellant's upbringing, the love of his family, and his drug addiction. (49 RT 9823-9825.) Accordingly, the prosecutor's argument implicitly told the jurors that factors (d) and (h) applied to his mental impairment and factor (k) applied to other evidence that might be considered in sympathy. As discussed above, respondent apparently takes this very same position. (RB 92.)

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20. Respondent erroneously classifies this as an "intoxication" defense since the testimony offered at trial focused on mental impairments and deficits.

There is every logical reason for appellant's jurors to have understood that this limitations in factors (d) and (h) were to be applied to the evidence of appellant's mental defects. Respondent does not dispute that logic dictates that the specific overrides the general and the inclusion of a specific item will exclude its application in other general contexts: *inclusio unius est exclusio alterius*. (*People v. Castillo* (1997) 16 Ca1.4th 1009, 1020 (conc. opn. of Brown, J.) ["Although the average layperson may not be familiar with the Latin phrase . . . the deductive concept is commonly understood . . . ."]; *Alcaraz v. Block* (9th Cir. 1984) 746 F.2d 593, 607 [maxim is "a product of logic and common sense"].) To paraphrase respondent, having reviewed the evidence under the "directly applicable" enumerated factors, the jury would have "no basis whatsoever" to conclude that the evidence should be considered as mitigating under factor (k). (RB 92.)

In *Penry v. State* (Tex.Crim.App. 2005) 178 S.W.3d 782, the Texas court implicitly applied this rule of logic to find that instructions did not allow a jury properly to consider evidence of mental impairment. In *Penry*, the jury was instructed to determine whether the defendant was mentally retarded. If the jury did not find that the defendant was mentally retarded, they were to consider whether "any other circumstance or circumstances" warranted a life sentence. (*Id.* at pp. 784-785.) The court found that at first glance, this might appear to be similar to California's factor (k) instruction that was approved in *Boyde v. California* (1990) 494 U.S. 370. However, there was one crucial difference: "the instruction to consider 'any other circumstance or circumstances' excludes what the jury had already considered: mental impairment that did not rise to the level of mental retardation." (*Id.* at p. 787.) Accordingly, the court reversed the verdict,

holding that there was a reasonable likelihood that the jury believed that it was not permitted to consider mental impairment outside of determining whether the defendant was mentally retarded.[21] (*Id.* at p. 788.) The same reasoning should compel this Court to find that there was reversible error here.

Respondent also does not dispute that a fundamental rule of logic and interpretation requires that "a construction that renders [even] a [single] word surplusage . . . be avoided." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799). If the limitation in factor (d) is overcome by factor (k), it would have rendered all of factor (d) surplusage. Appellant's jurors had no reason to interpret factor (k) in such an expansive fashion.

Moreover, respondent does not dispute that the language of factor (k) itself would have limited the juror's consideration. The trial court's instructions merely directed appellant's jurors to consider "any other circumstance which extenuates the gravity of the crime . . . and any sympathetic or other aspect of the defendant's character . . . that the defendant offers as a basis for a sentence less than death. . . ." (3 CT 805.) The emphasis upon "other" circumstances would lead jurors to conclude it did not apply to evidence that was considered and rejected under factors (d) and (h). (*Penry v. State*, *supra*, 178 S.W.3d at p. 787.) Appellant's jurors more likely believed – as both respondent and the prosecutor have argued – that factors (d) and (h) rather than factor (k) were "directly applicable" to the evidence. They would have interpreted factor (k) to deal with different kinds of considerations relating to appellant's character. Accordingly, there

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21. The *Penry* court emphasized that the argument of the parties did nothing to clarify the instruction. (*Id.* at p. 787.) As discussed above, the argument given in this case similarly contributed to the juror's likely misunderstanding.

is a reasonable likelihood that appellant's jurors applied the instruction in a way that prevented effective consideration of appellant's mitigating evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380 [adopting reasonable likelihood test for reviewing claim that instructional error does not give effect to mitigation].)

The Eighth Amendment requires that jurors be able to give meaningful effect to mitigating evidence. (*Brewer v. Quarterman* (2007) 550 U.S. 286, 289.) Respondent states that *Brewer* is inapposite because California's death penalty statute "permits the jurors to consider a wide range of mitigating evidence, including whether the defendant had a mental defect, or extreme emotional disturbance, which affected his ability to fully consider the nature and consequences of his actions." (RB 94.) Respondent again appears to limit mitigating evidence to that which shows a defendant had either an extreme emotional disturbance or a mental defect that prevented him from considering the nature and consequences of his action. Appellant agrees that the jury may consider a mental defect or "extreme" emotional disturbance for the purposes of factors (d) and (h). But this does nothing to resolve the issue that *Brewer* identified and how it affects California law.

In *Brewer*, the prosecutor argued that jury could disregard mitigating evidence, including a history of mental illness, because it did not relate to the "special issues" that the jury had to decide under Texas law.[22] (*Brewer v. Quarterman*, *supra*, 586 U.S. at p. 291.) The United States Supreme Court found that there was a reasonable likelihood that the jurors accepted

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22. The jury in *Brewer* was asked to determine whether the defendant intended to murder and would be a danger to society in the future. (*Id.* at pp. 290-291.)

this argument. (*Id.* at p. 293) In reversing the death sentence, the Court emphasized the importance of a capital jury not only hearing mitigating evidence, but giving it actual effect:

> the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death.

(*Id.* at p. 296; see also *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246 ["sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual"].)

Here, under the instructions given by the trial court and interpreted by the prosecutor, appellant's jurors could consider mitigating evidence of a mental defect only within the specified categories of factors (d) and (h). The instruction effectively told the jurors that the evidence could be disregarded outside of these factors. The limitations inherent in these categories did not allow meaningful consideration of appellant's mental defect under *Brewer* and *Abdul-Kabir*. Accordingly, this Court should reconsider its previous decisions and find that the instructions at issue unconstitutionally limit consideration of relevant mitigating evidence.

When jurors are unable to give meaningful effect or a reasoned moral response to a defendant's mitigating evidence, "the sentencing process is fatally flawed." (*Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at p. 264.) Appellant's death sentence must be reversed. (*Brewer v. Quarterman*, *supra*, 550 U.S. at p. 296; *Chapman v. California* (1967) 386 U.S. 18, 24.)

X

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT AND AS APPLIED IN THIS CASE FALLS SHORT OF INTERNATIONAL NORMS

Appellant has argued that the imposition of the death penalty, as well as the specific errors identified in appellant's opening brief, violate international standards. Respondent simply cites this Court's previous cases that have rejected claims under international law. (RB 96; citing *People v. Snow* (2003) 30 Cal.4th 43, 127.) Appellant acknowledges that this Court has rejected similar claims in the past, but has urged this Court to reconsider its opinions in light of the high standards that must be met under international. Since respondent does not address these specific claims, no further briefing is required at this time.

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XI

CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED

Appellant has argued that the cumulative effect of the errors in this case requires reversal of the entire judgment. Respondent states that the trial court did not commit any errors so that cumulative error does not apply. (RB 97.)

In particular, appellant has demonstrated that there was substantial error affecting the statements that were used against him in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. (Argument I.) In addition, the prosecutor erroneously speculated that the victim was first attacked in the living room, allegedly becoming the "turning point of the crime" by giving appellant the chance to stop his actions. This inflamed appellant's jury against him. (Argument II.) The instructions given by the trial court undermined the jury's consideration of appellant's mental state and skewed the verdict in favor of first degree murder. (Arguments IV - VIII.) The cumulative effect of these errors require that the guilt verdict be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the Chapman standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Even if the cumulative effect of these errors are not prejudicial to appellant during the guilt phase, the errors substantially affected the penalty verdict. Appellant's statements given in violation of his Fifth Amendment rights under *Miranda* were used by the prosecutor in the penalty phase to argue against appellant's mitigating evidence of mental impairment. (See 50 RT 9914-9822.) The prosecutor's speculation about the stain on the living room carpet changed the crime from an explosion of violence in the

victim's bedroom to one that extended throughout the house and encompassed a period of cold and calculated reflection over a beaten and bloody child. The prosecutor's argument and the instructions of the trial court led appellant's jury to believe it could not consider appellant's mental impairment in mitigation unless it was "extreme" or otherwise affected his ability to know right from wrong. (Argument IX.) The combined effect of these errors went to the heart of the penalty determination and prejudicially affected appellant's jury in violation of due process and Eighth Amendment standards. At the very least, the penalty verdict must be reversed. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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CONCLUSION

For all the reasons discussed above, and those given in appellant's opening brief, the judgment against appellant must be reversed.

DATED: June 1, 2009

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

ARNOLD ERICKSON
Deputy State Public Defender

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(B)(2))

I, Arnold A. Erickson, am the Deputy State Public Defender assigned to represent appellant Ronald Wayne Moore in this automatic appeal. I instructed 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 the brief is 15,556 words in length.

Dated: June 1, 2009

ARNOLD A. ERICKSON
Attorney for Appellant

DECLARATION OF SERVICE

Re: PEOPLE v. RONALD WAYNE MOORE No. S081479

I, GLENICE D. FULLER, declare that I am over 18 years of age, and not a party to the within cause; that 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 same in an envelope addressed respectively as follows:

CATHERINE MCBRIEN
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County of Monterey
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Scott Erdbacher, esq.
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Marie Aronson
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Each said envelope was then, June 1, 2009, 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 June 1, 2009, at San Francisco, California.

Glenice Fuller
DECLARANT