S055856

THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Riverside Superior Court
v.	)	No. CR 46579
Orlando Romero, Jr., & Christopher Self,	)	
Defendants and Appellants.	)	

APPELLANT ROMERO'S REPLY BRIEF

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

HONORABLE RONALD L. TAYLOR, JUDGE

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. Orlando Romero, Jr., & Christopher Self, Defendants and Appellants.	)	No. S055856 Riverside Superior Court No. CR 46579

APPELLANT ROMERO'S REPLY BRIEF

INTRODUCTION

Appellant's opening brief seeks to summarize all the pertinent evidence—favorable and unfavorable. It carefully separates familiar claims attacking the California death penalty scheme from those that require more analysis by this Court, refrains from raising contentions that are difficult to support, and directly addresses potential questions about forfeiture of appellate review or seemingly unfavorable authority. Respondent has chosen not to engage appellant's arguments, for the most part. Rather, respondent, evidently seeking to take advantage of the institutional dynamics of the automatic-appeal process, presents the case as one inviting routine affirmance based on brief and straightforward—if not summary—dispositions of claims of error that lack any colorable basis.

Respondent's brief, a document that is surprisingly unhelpful for understanding either the issues or the facts of this case, encourages routine affirmance in the way that it handles both. Respondent makes appellant's claims seem self-evidently meritless by stating his contentions at the level of abstraction provided by appellant's argumentative headings. Respondent then briefs only those broad propositions, ignoring entirely the reasoning and authorities provided by appellant in support of his claims. The result is to make each claim appear so devoid of colorable merit as to invite summary disposition. Appellant submits that respondent's failure to attempt to honestly meet appellant's contentions and analysis reflects less a failure of advocacy than the obstacles faced by one trying to promote affirmance in the face of serious errors in the trial court.

Respondent's Pattern of Factual Distortions

Respondent's characterizations of the facts are similarly unhelpful to conscientious review of what could be a judgment that actually results in a

man's being executed. The introductory paragraph of respondent's brief significantly distorts the evidentiary picture facing appellant's jury. The first paragraph of its statement of facts does the same. Indeed, comparable problems plague the entire brief.

Thus respondent opens its brief by unjustifiably erasing distinctions between appellant and his brother Christopher Self, while making informant/codefendant Jose Munoz into a marginal figure. The result makes the circumstances-of-the-crime evidence against appellant seem far worse than what his jury heard. This is a tactic relied on throughout the brief. While it is no doubt easier to conceive of and refer to what the evidence showed "the appellants" did, the juries that convicted and sentenced appellant and his codefendant heard evidence about two different individuals. Those individuals had differing roles in those crimes which they committed together; they committed other crimes separately; there were tremendous differences in the degree to which their juries heard accounts of the events which contradicted the version(s) provided by Munoz; and they brought different mitigation cases to their sentencers. To reach a fair result, this Court will have to carefully distinguish between the men now before it, despite respondent's attempt to blur the differences.

Respondent begins its conceit of a Self-Romero unit by describing the two as engaging in a crime spree, adding that they did so "[e]ither working together, alone, or with cohorts." (RB 1.) In fact, the evidence showed appellant and Self to have committed no crimes only with each other, i.e., "working together." Informant Munoz and codefendant Self, however, were

on their own in the robbery/shooting of John Feltenberger.[1] More broadly, as appellant has pointed out[2] and respondent has not disputed, Munoz and Self were both present at every shooting, unlike appellant; and each time he acted alone, it was a far less violent episode.

Respondent then claims, still speaking as if the core unit were appellant and Self, "[t]he intensity of their crime spree increased as it progressed." (RB 1.) The statement has an impressive rhetorical ring, but it has nothing to do with the facts and badly obscures the truth about appellant Romero's behavior. The true chronology emerges from a glance at respondent's Table of Contents, which lists the crimes and their dates. (RB, p. i.) People were shot in five of the twelve incidents; the others involved no actual violence. Three of the five took place early, rather than as part of some escalation: they were the second through fourth occurrences, during a two-week period that began only four days after the first incident. In the next month, however, there were four offenses in which no one was hurt. Then, according to the prosecution's evidence, Self—with Munoz at his side and appellant retreating—killed Jose Aragon.[3] After this event appellant stopped involving himself in further criminal activity with either Munoz and Self. The two later shot John Feltenberger, while appellant scaled back his conduct to quiet solo robberies of Robert Greer and Roger Beliveau, in which the victims were both unthreatened enough to negotiate with appellant for the retention of some

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[1]See the descriptions in either party's statement of facts (AOB 10–49, RB 7–47).

[2]See AOB 112, 114–115.

[3]A detailed narrative of the Aragon shooting is provided at pages 26 et seq., below. The prosecution case clearly showed that appellant shared no intent to kill Aragon.

of their property.[4]

In other words, the Self/Romero "increasing-intensity spree" is a fiction. This and similar distortions matter, because the outcome of this case—where nothing was contested but penalty—will likely be decided in harmless-error analyses, where the jury's possible views of the circumstances of the crimes will be critical.

Similarly, the first paragraph of respondent's statement of facts portrays both appellants as living with their grandmother in Perris when Jose Munoz arrived from San Diego in an attempt to end his drug use. (RB 5–6.) In fact, when appellant came to Perris to visit Self and ended up staying there (but only a minority of the time with Self[5]), it was Munoz and Self who were already living there.[6,7] Moreover, the two were involved with each other when

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[4]The uncontroversial chronology of the crimes and who participated in each is set forth in both appellant's and respondent's statements of facts, or, most simply, on the first page of respondent's table of contents. (See AOB 10–49, RB i, 7–47.) For descriptions of appellant's conduct with Greer and Beliveau, see AOB 114, as well as AOB 45–48 and RB 44 and 46, and cited portions of the record.

[5]3SCT 2: 297. This is from appellant's in-custody statement, which the jury heard, but, like everything else in the paragraph in the text above, it was uncontradicted by any other evidence.

[6]See RT 39: 5879 (Munoz started living with his sister in Perris in late August, 1992); 3SCT 2: 279, 325–326 (appellant went from Riverside to see Self on his September 23 birthday); 42: 6405 (Self's birthday was September 23).

[7]Self, by the way, was house-sitting for a friend, not yet staying with his grandmother, a fact significant only in its demonstration of respondent's careless approach to the record. (RT 39: 5880; 3SCT 2: 279, 297.)

appellant arrived,[8] and Munoz had already taken Self to San Diego to buy a gun.[9] Munoz himself brought a borrowed pistol with him when he moved to Riverside County.[10] None of these facts were controverted at trial, and respondent does not claim that their recitation in appellant's statement of facts[11] is inaccurate. The most reasonable inference is that *appellant* fell in with a criminal group that was already developing (Chavez, too, was apparently a Munoz acquaintance by the time appellant arrived[12]), not that Munoz landed in the clutches of a Self-Romero axis. Respondent's statements are completely unsupported—and often contradicted—by the unfortunately numerous portions of the record cited in its brief.[13] And they are wrong.

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[8]RT 40: 6231 (Munoz: he had gotten to know Self a month or more before the Pathfinder theft, appellant two weeks before or less); see also 32: 5018 (theft was October 8), as well as footnote 6, above, regarding appellant's arrival around September 23.

[9]RT 40: 6105, 6174–6176 (Munoz: he helped Self locate a gun in early September).

[10]RT 40: 6171–6174.

[11]See AOB 8.

[12]Munoz testified that Chavez was a boyfriend of his cousin and was staying with Munoz at Munoz's sister's house. He did not, however, specify whether Chavez was staying there when he arrived or if Chavez came later. (RT 39: 5894.)

[13]The following is a complete list of the parts of the record cited by respondent in purported support of the claim that appellant and Self were living with their grandmother when they met new arrival Munoz. (RB 5–6.) The parentheticals are appellant's summary of what actually appears in the transcript.

RT 37: 5586–87 (Ruben Munoz [describing events of a *December 5* visit to see his brother Jose (see 5575)], expresses extreme confusion regarding

(continued...)

This Court should be able to rely on either brief for a fair statement of the facts and the issues, but this is unfortunately not the case here. Other errors and omissions are pointed out in the portions of this brief to which they directly relate. The biggest, however, is an entire category: respondent's reduction of the evidentiary picture to Jose Munoz's final version of who did

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[13](...continued)
whether a room in the grandmother's house was occupied by appellant or Self, and ultimately mentions thinking both then had rooms there); 39: 5880–5881 (Jose Munoz: in September and October, Self was living with unknown people before moving to his grandmother's house "at some point"; he does not know where Gene [appellant] was living when Self moved to the grandmother's); 42: 6403–6405 (Maria Self identifies her mother's house [i.e., the grandmother's place] on an exhibit).

RT 42: 6409: (Maria: Self was house-sitting at a place across the street from the grandmother's home in October, moving to the grandmother's when the first place was sold at some point); 3SCT 45: 12930 (Munoz's in-custody statement: when appellant and Self were not staying at the grandmother's, they were probably at Sonia's [appellant's girlfriend]; they are now [December 11 (see RT 41: 6336–6338)] staying with the grandmother); 3SCT 45: 12960 (defendants' ages); 13054 (Self's statement, which was not before appellant's jury: at some point he was living with his grandmother).

RT 37: 5574–5575 (where in Perris Munoz was living with his sister); 39: 5878–5881 (Munoz: he met Self in August or September, appellant in September, and he started living at his sister's in August; Self and appellant lived in various places in the fall, but Self was living at someone else's place when Munoz met him and in October, but eventually moved to the grandmother's; he does not know where appellant was living then); 40: 6049–6050 (Munoz: he met Self within a week of his arrival, appellant maybe a month later).

Another sentence in the same paragraph in respondent's brief refers to appellant, Self, and Munoz "meeting in the early fall" (RB 6), but its string of citations supports only its main point, about the group's alcohol and drug use. Like the citations reviewed above, they provide no support for a narrative involving the brothers being together when Munoz met them.

what, ignoring the fact that this Court will have to consider the entire record when deciding whether respondent can meet its burden of showing harmlessness of errors.[14]

Between its dramatic over-simplification of the issues and its distortions of the factual picture, respondent's brief presents a blueprint for producing an opinion that would treat the case as a routine affirmance. Such an approach might demand less of this Court, but it would be to the detriment of the fair administration of justice, the integrity of the Court, the finances of the state, and the needs of the victims' survivors. For it would keep this Court from recognizing the serious errors in appellant's trial, errors that undermine confidence in the death judgment and that would almost certainly lead to reversal in another forum. Therefore a judgment that is truly final would be rendered years later than necessary.

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[14]See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 418, pp. 476–477.

REPLY TO OTHER PARTIES' STATEMENTS OF FACTS

In general, respondent follows the convention of stating only the evidence most favorable to its case, although it does summarize some of the mitigation case. More accurately, respondent generally gives its version of the *facts*, rather than the evidence. Thus, although the most aggravated characterizations of the circumstances of the offenses were provided by informant Jose Munoz, respondent typically just states them as facts, not as the testimony of witness Munoz. In contrast, the Statement of Facts in appellant's brief seeks to provide an overview of all the evidence, favorable and damaging. It is only by ignoring equivocal evidence or evidence supporting life that respondent can assert that errors—if error at all—were harmless. This Court, however, will have to review all the evidence if it is to determine whether an error could have affected the decision reached by appellant's jury.[1]

In this brief, appellant generally places in the Argument section pertinent facts which respondent omits, especially when reaching questions of whether error could be harmless. Beyond that, where there is an independent

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[1]As Witkin explains,

> **Review of Entire Record.** [¶] The court must be convinced of the injurious nature of the error after an examination of the entire record. In other words, it must, to some extent, weigh the evidence, for the probability of injury from the error may be dependent on the state of the evidence.

(9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 418, pp. 476–477; see also Cal. Const., art. VI, § 13 [harmlessness analysis must include "an examination of the entire cause, including the evidence"]; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570 [harmlessness review includes "the degree of conflict in the evidence on critical issues"], 578 [test is the same in criminal cases]; *People v. Gonzales* (1967) 66 Cal.2d 482, 493 [need to review entire record]; see also *People v. Garcia* (2005) 36 Cal. 4th 777, 805–806 & fn. 10, 807, fn. 11.)

reason to make a correction to a statement made by respondent or to further document statements made elsewhere in this brief, such information is provided here in this Reply to Statement of Facts.

Background Information about the Circumstances of the Offenses

Self's and Romero's Respective Roles

Like respondent's brief, appellant Self's opening brief contains major factual errors regarding appellant Romero, particularly in an introduction to its statement of facts, where, without citations to the record, Self portrays himself as under appellant's influence. The record belies this portrayal, starting with the statement (SAOB 14) that appellant Romero was six years older than Self. In fact both defendants were quite young. Self had just turned 18; appellant was only 21. (3SCT 45: 12960.)[2]

The Self brief goes on to assert,

> According to statements Munoz made to police, Self's behavior throughout the period of the offenses seemed to be precipitated and driven by the negative influence of his older brother, Orlando Romero. Munoz claimed that prior to Romero's return, Munoz was able to "talk [Self] out of doing stuff." After Romero returned to Riverside, however, Self seemed to be dominated by a need to impress his older brother.

(SAOB 15.) Similar claims are repeated later, perhaps enough to begin to sound like established facts, but they, too, lack record citations. (E.g., SAOB 18.) It is true that Munoz tossed into his narrative to police a brief assertion about being able to dissuade Self from "doing stuff" before appellant arrived.

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[2]The citation is to the only evidence of appellant's age which the jury heard, a portion of Jose Munoz's in-custody statement. It was correct; appellant turned 21 less than two months before the charged crimes began. (See CT 9: 2123 [probation report: appellant's date of birth was August 14, 1971].)

He gave, however, no further elaboration on the respective roles of the defendants. (3SCT 45: 12996; see SAOB 15.) Notably, claiming that Self wanted to commit crimes but Munoz could dissuade him for a time was part of a Munoz story that—as both appellants' opening briefs show[3]—was filled with portrayals of himself as least culpable and reluctantly just going along with actions that appellant or Self proposed.

The Self brief seeks to support its characterization of the Self-Romero relationship with only one other fragment of evidence, one that appeared in the middle of Munoz's narrative to investigators about the Feltenberger robbery/shooting. Munoz portrayed himself as a reluctant participant (3SCT 45: 13000–13004), in the face of Feltenberger's testimony that Munoz repeatedly told Self to shoot (RT 32: 4952, 4957, 4965–4966). In line with his self-exculpatory story, Munoz said he did not think that Self would shoot, explaining that Self didn't have to prove himself without his big brother there. (3SCT 45: 13001.) The Self brief, however, turns this into a general claim that Munoz said that Self "participated in shootings when Romero was present 'to prove himself to his big brother.'" (SAOB 31, citing 3SCT 45: 13001.) Moreover, Feltenberger's account showed the remark to be only another fabricated, self-serving detail. Finally, in it, Munoz was saying that his (purported) opinion about Self turned out to be wrong, because Self did shoot without his brother being present. This is not a statement that Self fired at people in his brother's presence to prove himself, much less evidence that Self was in general "dominated by a need to impress his older brother" or driven by the latter's influence. (SAOB 15.)

This was the only evidence that could be claimed to support appellate

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[3]AOB 52–56; see also SAOB 17.

counsel's attempts to paint Self as under the influence of Romero or being motivated by a desire to impress him. Tellingly, Self's trial counsel made no such argument to the Self jury: rather, his theme was that Munoz was probably the leader, because the crimes started after Munoz arrived on the scene and because Munoz had to be present for someone to get shot. (RT 45: 6751–6782.)

As the Self brief acknowledges later,[4] Self told Ruben Munoz that he liked robbing people, felt addicted to it, would probably "jack harder" if his brother were arrested, and—if confronted by police—would not "go out without a bang." This, along with Self's role in the Feltenberger and Aragon shootings, was the only real evidence of whether Self's criminality came primarily from his own dark impulses or from a hypothesized desire to please his brother.

The Appellants' Work Histories and Lack of Criminal Records

In line with its theme of making appellant Romero more culpable, the Self brief states that Self had a job in September, 1992, and a lack of a prior record. (SAOB 29.) The brief attempts to contrast these with appellant's purported history. It states that, upon his return to Riverside County from Pacifica, "Romero did not work and was unable to hold a job. He had a history of serious criminal activity, including involvement in assaults, carjackings, and car thefts." (SAOB 30.) No record citations are given for these claims, and they are not true. While appellant's own witnesses described his erratic work history in Pacifica, no evidence was presented either way on whether he worked upon his return to Riverside County. As for the job Self had before the crimes began—referred to in his brief as if it provided a

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[4]SAOB 97–98, citing RT 37: 5593–5596, 5599.

contrast to appellant's unsteadiness, it lasted only six weeks and ended with his simply failing to show up any more. (RT 36: 5504.)

More significantly, *neither* defendant had a prior criminal record. All of the incidents of other misconduct charged in aggravation—other than Self's involvement in a minor school fight—were post-arrest.[5] The only evidence of any prior criminality on appellant's part was his volunteered statement that he had only done burglaries "for small stuff" from business establishments, before the others took him out one night without telling him what they would be doing. (3SCT 1: 325.) The picture of appellant as a violent criminal before his involvement with the others is false, as is the claim that there was evidence that either brother had a better or worse work history.

Differences in the Evidentiary Picture Relevant to the Two Appeals

In its portrayal of individual incidents as well, a theme of the Self brief seems to be that appellant was more of the instigator. In general this is unjustified. As appellant's opening brief acknowledges, Munoz's uncorroborated testimony placed appellant in an instigator role at some points,[6] but at others he put Self there. Munoz described Self as going after Paulita Williams with a knife on his own initiative (RT 39: 5944–5945), as wanting to kill Jerry Mills and his son (3SCT 45: 12976), as wanting to try out his telescopic rifle

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[5]See, e.g., RB 54–65, respondent's summary of all evidence admitted in aggravation.

[6]AOB 112. The accomplice-informant's account portrayed appellant as the first in the group to kill someone (at Lake Mathews), as having said he had a feeling that somebody was going to die that night and—later—that they had to go back to make sure that Mans was not moving, as the instigator of the shooting of Ken Mills and subsequent pursuit, as initially the most vocal proponent of going after Rankins for a refund after the drug burn, and as saying after Munoz and Self robbed Feltenberger that they had to kill him.

on Jose Aragon and ultimately doing that (RT 39: 5978–5979, 5983–5986), as shotgunning John Feltenberger despite Munoz's insistence that he not do so (RT 39: 6017), and as reportedly wanting, briefly, to kill Munoz for telling his sister about the crimes (3SCT 45: 12931).

To some extent, the appellants' different portrayals of the facts are an artifact of the procedural posture of this case: one appeal from a trial before two juries, juries that heard sets of facts that overlapped only in part. Thus the prosecution played appellant's interrogation tapes before his jury only, giving it a version of the events that diverged sharply from Munoz's. That account is appropriately omitted from the Self brief, which confines itself to the evidence the Self jury had before it. Moreover, appellant Self, like appellant Romero, is entitled, when disputing the possibility that an error was harmless, to rely on the most favorable factual conclusions which a reasonable juror may have drawn from the evidence.[7] The factual picture that emerges when drawing inferences favorable to Self is sometimes different from that which emerges when drawing inferences favorable to appellant—even where the record is the same for both defendants. The Court's analysis of harmlessness as to each defendant should thus involve two partially different portrayals of the relevant facts. To that extent, therefore, different characterizations by the co-appellants are to be expected, assuming they are based on the actual record, rather than simply manufactured. They are, in fact, far more helpful than the

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[7]This is because respondent must exclude the possibility of a different penalty verdict absent error. Whether such a possibility exists depends in part on how favorably to an appellant jurors might have viewed the evidentiary picture, absent error. (*Neder v. United States* (1999) 527 U.S. 1, 19 [harmlessness question is "whether the record contains evidence that could rationally lead to a contrary finding"].) See pages 106–109, below, and authorities cited.

single picture presented by respondent, who aggregates the evidence indiscriminately.

But there are also places where the Self brief simply exaggerates the picture, either through subtle rhetorical means[8] or by occasional factual errors. The corrected facts are presented below, in the context of each incident that formed the basis for a criminal charge.

Robbery-Murders of Mans and Jones

Respondent omits evidence casting doubt on informant Munoz's eventual self-exculpating version(s) of the Lake Mathews events, but that information is already in the opening brief,[9] is not contested by respondent, and will not be repeated here. Any fair characterization must acknowledge those disputed facts, particularly since the jury's acquittal of appellant on the charges related to Alfred Steenblock[10] shows the fact-finder's skepticism regarding the testimony which respondent treats as established fact.

Beyond that, respondent's brief erroneously states that, after appellant shot Joe Mans, he tried to shoot Timothy Jones but heard only a click because the defective weapon had not chambered a new round. (RB 10.) Only appellant would know what he heard, and he never stated that he fired the weapon and then tried to fire it again. (See appellant's statement at 3SCT

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[8]E.g., ". . . Munoz, Chavez, and appellant accompanied codefendant Romero to go stealing" the night of the Lake Mathews events. (SAOB 41; no record citation.) It would be just as accurate to say that Munoz, Chavez, and Romero accompanied Self, or that Chavez, Self, and Romero accompanied Munoz. The evidence was that the four went out intending robbery, not that appellant did so and the others somehow came along for the ride. (See AOB 13–14, 16–17, RB 9, and cited portions of the record.)

[9]AOB 14–19.

[10]See AOB 123–124; see also AOB 29–30.

2: 275 et seq.) Respondent cites only Jose Munoz's testimony and in-custody statement, neither of which claims that appellant said he shot Mans, tried to shoot Jones, or heard a click. (See RB 10–11 and cited portions of the record.)

While ignoring the massive changes in Munoz's successive accounts, respondent exaggerates the inconsistencies in appellant's version of the Lake Mathews events. Appellant did initially state that Munoz ordered him to point a gun at Mans and later, when being taken through the events in more detail, said that it was either Munoz or Chavez (see RB 15[11]), but this is hardly a damning contradiction.

Respondent writes that appellant's statement that Chavez took the "single-shot" from him to kill Mans seemed to contradict the ballistics evidence that three casings found near the victims' bodies all came from the same semi-automatic weapon. (RB 15, fn. 12.) Respondent's logic is obscure and its factual predicate false. It is not obvious what benefit appellant might have sought from intentionally misstating which weapon he carried and relinquished to the shooter. Moreover, the ballistics evidence did not indicate that all casings came from a semi-automatic. The testimony cited by respondent refers to five casings found near Mans's body, fired from three different guns. One appeared to pre-date the crimes. Three more did come from the same semi-automatic weapon, but another came from a different weapon, which was not identified as to whether it was semi-automatic or not. So it could have been the single-shot. (RT 43: 6582–6584.)

Next, respondent suggests that appellant lied when he said that he confronted the passenger (Jones) and that it was Munoz who accosted the

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[11]Respondent characterizes the statement as saying that one or the other ordered him to shoot, which is not the case. (See RB 15, and compare cited portions of the record.)

driver (Mans). (RB 15–16.) Respondent disputes this by stating that Jones had a wallet, which is true, but exaggerates in claiming that appellant said he found no wallet on him. Appellant said, in the portion of the record cited by respondent, "I don't remember if I got, I don't think I got anything off him." (3SCT 2: 286.) This level of uncertainty is no worse than Munoz's "I don't think so," uttered when he was asked if he kept Jones's wallet. (RT 39: 5908.) Given the subtext of alcohol and drug abuse during which many if not all of the crimes took place,[12] it is difficult to infer too much from either witness's vagueness on this detail under interrogation two months later.

Still seeking to bolster Munoz, respondent again exaggerates when saying that the witness was able to describe the wallet and its contents. (RB 16.) He did describe the wallet itself at trial, although not in his statement. As to the contents, in his statement he said that there was nothing in it, but at trial he only testified that he emptied it in a place where its possible contents were later found. He did not describe the contents.[13]

Respondent observes that appellant "admitted that one of the shoe prints found on the hill by Jones' body 'look[ed] like' his shoes" and that he claimed that it must have been one of the occasions when someone else borrowed his shoes. (RB 16.) Appellant's explanation admittedly could seem unlikely, although respondent omits that a few minutes later appellant said simply that he could not explain how his prints would have gotten down there. (3SCT 2: 292, cited at RB 16.) More importantly, respondent ignores the falsity of the

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[12]See portions of record cited at AOB 9.

[13]3SCT 45: 12972 (statement: no description; regarding contents, "Had nothin' in there"); RT 39: 5906–5908 (Munoz testimony describing wallet and saying he emptied contents on the seat of the car); 33: 5121 (papers that could have come from wallet were found on the seat).

"fact" that appellant's interrogator demanded he explain. There was no shoe print matching appellant's shoes found in the area in question, according to the testimony of the same investigator who, during the interrogation, insisted that there was.[14] Thus appellant's explanation—while he was under enormous pressure[15]—for something falsely presented to him as a terribly incriminating fact was not a lie, but consistent with his denial, a denial supported by the known facts.[16] Nothing was damning about appellant's response to the interrogator's false assertion. Respondent is clearly reaching for ways to impeach his credibility.

Respondent's final point in support of its claim that appellant's statement had "inherent contradictions and/or directly contradicted the evidence" (RB 15) is to state that appellant did not remember anyone giving Mans a cigarette[17] or recall keys or boots being thrown out the car window

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[14]RT 38: 5868. At trial the evidence of prints near Jones's body involved an unidentified print and one that appeared to have been made by Self's shoes. (RT 33: 5135–5136; 38: 5838; 33: 5143–5144; see also the prosecutorial arguments at RT 45: 6706–6708 [mentioning Self prints to Self jury] and 7021 [rebuttal to Romero defense argument about lack of Romero prints, arguing why prints might not be there even if appellant had been present].)

[15]See 3SCT 2: 290–297.

[16]Compare this to Munoz's response, when a similar tactic was used on him by interrogators. When it was claimedd that Sgt. Feltenberger had identified him as the man who fired a shotgun at him, Munoz offered, "[A]fter you show 'em Chris['s] picture, an' if he still says it's me, I'll say anything you want me to say, even if it ain't true I'll say it." (3SCT 45: 12958.)

[17]Again respondent has difficulty keeping the facts straight, even on ancillary points. Appellant actually stated, "I don't remember giving anybody a cigarette," (3SCT 2: 288), not that he did not remember *anyone* giving Mans (continued...)

later (by Munoz, who was in back, while appellant was in front[18]). (RB 16.) How a failure to see or recall either of these supposed events, one of which appears to have been a Munoz lie contradicted by the forensic evidence,[19] could possibly indicate that appellant was minimizing his role, is again unexplained.

None of this approaches the evidence casting serious doubt on Munoz's credibility. Focusing for now on his account of the Lake Mathews events (i.e., putting aside all the other problems with his various versions of events and the benefits he received from his testimony[20]), Munoz began by telling investigators that appellant and Self had told him about the crime, but that he did not believe them until he read about it in the newspapers some time later.[21] Other credibility problems in Munoz's Lake Mathews narrative demonstrated in the briefing also remain uncontested by respondent.[22] Yet it is that narrative alone on which respondent relies.

Finally, a statement in appellant Self's opening brief requires comment. According to that brief, Munoz, during his interrogation, reported that after

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[17](...continued)
one.

[18]RT 39: 5919, 5921; see also RB 11. The boots and keys were found by the road.

[19]As respondent elsewhere points out, Munoz testified that appellant lit a cigarette and put it in Mans's mouth (RB 10), but Mans was found with a burnt cigarette near his hand and holding a lighter himself (RB 12).

[20]See the facts discussed at AOB 52–56, 112–123, none of which respondent disputes.

[21]See AOB 16 and cited portions of the record.

[22]See AOB 19.

appellant and Self chased Timothy Jones down the hill, appellant "hit Jones once and then gave the gun to [Self] because 'he wanted everybody to be a part of it, ...'"[23] This language implies that appellant stated this intention. In the cited portion of the interview, however, Munoz actually made clear that he was speculating:

> [T]hey just said that, I'm not sure, I think Gene hit him once somewhere on the body you know, cause Gene was running with the gun, hit him once and the umm, he gave the gun to Chris, I guess it's cause he wanted everybody to be a part of it, you know . . . .[24]

As Self acknowledges, Munoz's trial testimony was simply that Self had told him that he took the rifle from appellant when appellant caught up with him.[25]

Mills/Ewy Shooting

There are no major differences between the parties' summaries of the evidence about this incident. Appellant's, however, is more complete concerning the evidence casting doubt on Munoz's self-serving account of who fired the shotgun blast at the other car. This was Ken Mills' testimony about seeing a muzzle flash come from the front passenger seat where Munoz was sitting, as opposed to Munoz's claim that Self somehow got his body outside the left rear window, high enough to fire down over the roof of the Colt into the driver's-side window of Mills's car.[26] (Cf. AOB 22 with RB

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[23]SAOB 43, fn. 52, citing 3SCT 45: 12978.

[24]3SCT 45: 12978.

[25]RT 39: 5922–5923. See SAOB 43

[26]Appellant stated in his opening brief that Chavez was present, citing a portion of his in-custody statement that in fact said only that he was not sure whether Self or Chavez was in a particular seat in the car. On rereading the (continued...)

18–19.)

Williams/Rankins Attempted Murders

In another puzzling example of respondent's difficulty summarizing the record, even in unimportant details, respondent exaggerates Munoz's testimony that appellant "was mad" about Rankins' substitution of cocaine for speed into a statement that appellant was "furious."[27]

More significantly, this is a place where the Self brief inaccurately singles out appellant. It correctly summarizes Munoz's version, which was that the drug substitution was discovered only later and that, when it was, appellant became angry and said they would get a refund from Rankins or, failing that, kill him.[28] The brief omits, however, that Self was "pumped up" in his expression of support for this idea, and that Munoz testified that his own reaction may have been the same.[29] Any implication that appellant was

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[26](...continued)
record, the conclusion that appellant was saying Chavez was definitely there seems unjustified, particularly in light of appellant's difficulty remembering details of the incident. (Cf. AOB 21 with 3SCT 2: 314.)

[27]Compare RB 20 with RT 39: 5939. A similar exaggeration appears in the Self brief. Citing Rankins's testimony, it states that appellant got very upset when notified of the drug substitution, when the actual testimony was that appellant was unhappy and said he would see him later. (Compare SAOB 67 with RT 34: 5260.)

Respondent purports to quote appellant about how the three should handle the Rankins situation, citing testimony of witness Munoz, but Munoz was only paraphrasing. Moreover, respondent's "quotation" from Munoz even misquotes Munoz significantly, although the substance is similar. Compare RB 20 with RT 39: 5939.

[28]SAOB 71, citing RT 39: 5939–5941.

[29]RT 39: 5940.

primarily the one desiring a confrontation is inaccurate.

Respondent's account implies that appellant fired several shots at Rankins, but this is untrue. Respondent correctly points out that Rankins thought he heard three or four shots fired as he ran away.[30] He assumed that they were being fired at him.[31] Respondent omits Munoz's testimony that, although appellant had the "single-shot" trained on Rankins, he was not aware of appellant shooting.[32] Rather, in what may have been an attempt to inflate appellant's role, Munoz's testimony was that appellant later stated he had tried unsuccessfully to fire the weapon.[33] For his part, Rankins's capacity to perceive may have been affected by his terror [34] and his cocaine intoxication.[35]

In keeping with its attempts to play down Munoz's role, respondent claims that Self or Munoz exclaimed, "Die, Bitch" to Williams as she was being attacked. (RB 21.) Williams, the only witness who testified that anyone said those words to her, testified that it was Munoz. (RT 34: 5232–5233.) The prosecutor later obtained her agreement that a year after the incident she "might have" said it was the man with the knife (Self) and then, when pressed further, that she recalled saying that. (RT 34: 5239–5240.) But when asked

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[30]RB 21, citing RT 34: 5262–5263; 39: 5946.

[31]RT 34: 5262–5264.

[32]RT 39: 5944. Moreover, as respondent explains elsewhere, if appellant had fired once, he could not have fired another shot without manually prying the action back with some kind of tool, to remove the spent casing and insert another round. (See RB 7.)

[33]RT 40: 6980–6981.

[34]See RT 34: 5263.

[35]RT 34: 5260, 5272, 5276.

if that refreshed her recollection, she reiterated, "I think it was the one with the gun [Munoz], I really think it was—." (RT 34: 5240.)

Again relying exclusively on Munoz, respondent writes that after this incident and a conversation a few days later, "Munoz then refrained from going out with appellants for a period of about three weeks. In the meantime, appellants continued committing crimes." (RB 23, citing RT 39: 5951–5954; 3SCT 45: 12931–12932.) Respondent's first citation does support the statement about three weeks' non-involvement (with Munoz's testimony),[36] but nothing in the record supports the "continued committing crimes" claim as to appellant, and it is a bit overstated as to Self. Appellant was convicted of involvement in a single incident during that period—the vandalism/burglary of Magnolia Center Interiors 19 days (i.e., practically three weeks) after the Williams/Rankins incident. There was, by the way, no evidence—not even a Munoz denial—excluding Munoz as a Magnolia Interiors perpetrator.[37] Four days later, Self, Chavez, and an unidentified third person—whom the jury recognized could have been Munoz or appellant—kidnaped and robbed Alfred Steenblock. In any event, two days after that, Munoz was with appellant and

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[36]Respondent's second citation is to a portion of Munoz's statement where he is still falsely denying any criminal activity with appellant and Self, other than helping them use stolen ATM cards. (3SCT 45: 12931–12932.)

[37]At one point during his interrogation, Munoz did state that the next time he went out with the others after the Lake Mathews shootings was during the Knoefler (beekeeper) robbery. (3SCT 45: 12978.) This was false, however, as it omitted not only Magnolia Interiors, but also the Ken Mills/Vicky Ewing shooting and the Williams/Rankins incident, in both of which Munoz later admitted involvement. (See the chronology at RB, page i.)

Self in the Robbery of the beekeeper Albert Knoefler.[38] The evidence did not show that appellant "continued committing crimes" any more than Munoz did.

Magnolia Interiors Vandalism/Burglary

Here there is little disagreement on the facts presented to the jury, as none of the defendants, Munoz included, was asked about the crime during interrogation or made a statement about it. However, in a claim that respondent relies on later in arguing one of the allegations of error, respondent incorrectly states that shoe prints resembling those of the British Knight prints tied to Self from the Lake Mathews scene were found in the fire-extinguisher powder left at the vandalized interiors shop. Respondent cites 15 pages of testimony in support of this and other statements about the crime. (RB 24.) Most is irrelevant to the footprint claim.[39] However, at one point, there is testimony about footprints having been left in dust at the vandalism scene, without further description. (RT 34: 5370–5371.) In that testimony a lay witness, the store proprietor, agrees with the prosecutor that a photograph—which respondent now cites—showed footprints. They are not, however, recognizable even as footprints in the photo; thus the exhibit certainly discloses no identifying information.[40] (The witness himself had viewed the photographed area directly.) Despite considerable footprint-comparison testimony regarding other events, there was no testimony

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[38]See the chronology at RB, page i.

[39]See RT 34: 5354–5355 (an officer's description of the vandalized crime scene), 5362–5369 (proprietor's narrative of how he left the shop the previous evening, more detailed description of the damage), 5372–5375 (more on the damage and missing items).

[40]See SCT Photographs — Exhibits 1: 45–46 (Ex. 29, discussed at RT 34: 5370–5371).

identifying Magnolia Interiors footprints as similar to any others mentioned at trial, and the prosecutor's argument[41] referred to none. The assertion about possible Self prints at the vandalism scene is wrong.

Robbery of Jerry Mills and His Son

Appellant described his actions in approaching the two victims after the firearms were taken from their pickup truck and having them move some distance away, where he asked for Mills's money, let him keep his credit cards, and avoided carrying out—or letting the others carry out—Chavez's wish that the adult be shot. (AOB 33–34.) Respondent characterizes the evidence as being that it was Self who approached Mills. (RB 30.) There is, in fact, a conflict in the evidence on this point that neither appellant's statement of facts nor respondent's acknowledges. Further, as respondent notes, appellant was wrong in stating that Mills made no identifications. (See RB 31–32, fn. 22.) Mills did identify Self as a participant and seemed to think that he was the one who approached him.[42]

Respondent states that Mills's rifle with a telescopic sight was

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[41]See RT 45: 6706.

[42]See RT 35: 5385 (the passenger in the robbers' car had a shotgun pointed at him from the passenger window when they pulled up), 5388 (the one with the shotgun approached him at the telephone pole for his money, now with Mills's .45 in his belt), 5403–5404 (the passenger with the shotgun was Self; Mills had a good view of him because he was six feet away when the robbers pulled up).

Respondent writes that the police found Mill's pickup a mile away, abandoned and with the keys in it. (RB 30.) The testimony was that Mills, who saw which direction the perpetrators drove off in, found the vehicle. (RT 35: 5389–5390. Respondent also cites 5391–5400 and appellant's statement in support of this and other purported facts, but they do not deal with the finding of the pickup.)

recovered from the attic of a donut shop where appellant's girlfriend Sonia Alvarez had previously been employed.[43] There was no link drawn between Alvarez and the shop in any of the testimony cited by respondent, or elsewhere in the record. The best the prosecutor could offer was the fact that her house and the shop were each near a particular traffic artery but were three to four miles away from each other.[44]

Knoefler Robbery

The Self opening brief incorrectly states that appellant spoke with the beekeeper, left, and returned with a shotgun which he pointed directly at Knoefler.[45] Appellant, who did not leave but simply walked around the bee yard,[46] "then," according to the cited testimony, "came up to me and said he needed the keys to my pickup. I looked up and it appeared like he was holding a— call it [a] sawed-off shotgun."[47] The followup to this testimony clarified that appellant did *not* point the weapon at him.[48]

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[43]RB 31 and fn. 21, citing RT 37: 5704–5714, 42: 6399–6401.

[44]RT 42: 6400–6401; see also 45: 6950.

[45]SAOB 79, citing RT 34: 5340–5345.

[46]RT 34: 5341.

[47]*Ibid.*

[48]The direct examination proceeded as follows:

Q. Now, you indicate that when the guy said, "I need your keys," he showed you a weapon?

A. Yes.

Q. What— where did he point that weapon?

A. Well, he also said he wasn't going to hurt me. And

(continued...)

Aragon Robbery and Shooting

The introduction to this reply brief characterizes the prosecution's evidence regarding the killing of Jose Aragon as follows: "Self, with Munoz at his side and appellant retreating—killed Jose Aragon." This statement is important not only because it is part of the refutation of the "escalating-violence" claim which respondent applies to appellant. The point is also critical in the context of any harmless-error analysis, for such an analysis must include the fact that jurors would have recognized appellant's lesser role in one of the two incidents involving capital crimes. Appellant therefore documents the characterization of himself as in retreat from the killing here.

Only appellant described his mental state, but Munoz, too, had him moving away from the immediate scene and returning with the group's car soon after Aragon was confronted. Specifically, Munoz and appellant agreed that appellant was interested in watching Aragon do tricks on his motorcycle, that appellant became very involved in conversation with Aragon about his competitive riding, and that Self wanted to shoot Aragon when the three

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[48](...continued)

> I don't remember that he pointed it directly at me, kind of holding it, you know. (Indicating) Showed out of his jacket, the end of it.

(RT 34: 5343.) Later, the trial court settled the record to the effect that Knoefler indicated that appellant had the weapon at his side, pointed at an angle, i.e., neither out at the witness nor straight down at the ground. (6SCT 131 ¶ 28.)

This was in testimony where the prosecutor had some difficulty eliciting that Knoefler—who went back to work after the encounter—was in fear when he gave up his property. Knoefler just preferred to note that one doesn't argue with a person with a gun. (RT 34: 5342, 5344–5345.)

discussed robbing him, but appellant said they could just take his stuff.[49] Munoz's testimony and appellant's statement also both stated that Aragon was first felled with one of several shots from the somewhat distant[50] location where they had parked their vehicle, while appellant was near him.[51] This was evidence of appellant's lack of knowledge that Self was going to shoot. Both Munoz and appellant were, in fact, surprised by the shots.[52]

Munoz, however, ran down to demand Aragon's keys and wallet, and, based on Aragon's response, he and Self then searched the cab of Aragon's pickup truck. Appellant, in contrast, helped Aragon from the ground to a seat on the tailgate.[53, 54] Appellant then took Aragon's two toolboxes—which he wanted for work on his girlfriend's car—from the bed of the truck back to the Colt. Meanwhile Munoz and Self demanded that Aragon give them the code for his ATM card, after which Munoz—still near Self and Aragon—watched

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[49]RT 39: 5978–5983 (Munoz); see also 3SCT 300, 301, 302 (appellant).

[50]See RT 39: 5979.

[51]RT 41: 6258–6260 (Munoz acknowledges earlier testimony to that effect); 3SCT 2: 302–303 (appellant: he was talking to Aragon and was shocked to see him fall); see also RT 39: 5983–5986 (more Munoz detail on initial shots).

[52]RT 39: 5984 (Munoz); 3SCT 2: 302–303 (appellant).

[53]RT 39: 5986–5990 (Munoz); see also 3SCT 2: 304 (appellant).

[54]In its Statement of Facts, respondent argumentatively writes, "Romero taunted him by asking, 'How does it feel to get shot? Does it burn?'" (RB 34.) Nothing in the testimony states or implies that the questions attributed to appellant were asked in a taunting way; appellant may have just wanted to know. Munoz's portrayal of appellant's manner mentions only that appellant positioned himself so he could look up into the seated Aragon's downturned face when he spoke to him. (RT 39: 5988.)

Self empty his pistol into Aragon before starting to leave himself, at which point Self used the shotgun.[55]

Respondent's statement of facts does not explain all this but has nothing inconsistent with it.[56] (See RB 34–35.) In fact, respondent concludes this part

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[55]RT 39: 5994–5995 (Munoz: appellant took the toolboxes), 5991–5993 (Munoz: appellant had gone back to the Colt and driven it closer by the time Munoz, who had just finished getting the ATM code from Aragon, watched Self fire more shots into Aragon in rapid succession), 6262 (appellant did not get out of the Colt again); 3SCT 2: 303–305, 321 (appellant: he headed for the car with the tools and wanted nothing to do with anything else that happened).

[56]Respondent does, however, challenge an unimportant detail, i.e., that Aragon was in only a little pain when appellant helped him off the ground. Respondent notes, with apparent outrage, that appellant's brief cites his "self-serving statement" to that effect and treats it as obviously false, given that a .22 bullet had passed through abdominal muscle and two internal organs. (RB 34, fn. 24.)

Even without greater familiarity with traumatic injury, which would illuminate the possible truth of the statement, one need go no farther than Paulita Williams's testimony. Her first shotgun wound to the side felt like she had been punched hard, and when Self was slashing her arms she thought he was just trying to grab her. (RT 34: 5230–5231; see also 5235.) Similarly, John Feltenberger's description of his experience immediately after being shot included nothing about pain. (RT 32: 4954–4955.)

It also is the case that the undersigned attorney for appellant received a gunshot wound in a robbery attempt during the period when this brief was being drafted. Though fully conscious, he felt no pain until hours later. (This extra-record information is no less competent than respondent's indignant speculations about what Aragon must have experienced.)

As for the "self-serving" nature of appellant's statement to police, it alone established his guilt of all the crimes about which he was asked, was introduced by the prosecution at trial, and was no less self-serving than the other pillar of the prosecution case: Munoz's testimony, which tracked the last version of his in-custody statements.

of the narrative, "Munoz and Self then rejoined Romero at Alvarez's Colt" (RB 35), a statement which recognizes that appellant had left.

Munoz's Interrogation

Both appellant and respondent have described Munoz's interrogation in their Statements of Facts.[57] As with other portions of the facts, appellant will not here simply repeat what is in his own and is omitted from respondent's, other than to note that the more complete portrayal presents a markedly different picture of the prosecution's star witness than respondent's description. But there are some distortions in respondent's brief that need to be addressed.

Respondent acknowledges—in a major understatement—Munoz's "initial[]" denials. (RB 47.) As explained in the opening brief and not disputed by respondent, the denials lasted well into the third hour of the interrogation.[58]

Respondent then asserts that after the denials "Munoz began hinting to investigators that he knew much more than he was telling them and would be willing to tell 'the truth' and 'get it off [his] chest.' (45 3rd SCT 12929–12940, 12946.)"[59] Munoz did not volunteer any such thing. For the first 11 pages of respondent's span cite, Munoz is actually spinning detailed yarns, claiming that Self and Romero were telling him about committing two or three robberies a week and killing everyone they encountered, and that he

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[57]AOB 52–56, RB 47–48.

[58]See AOB 54, footnote 44, and cited portions of the record.

[59]RB 47.

kept his distance from them.[60] On the eleventh page, he offers to testify against the others and asks what is going to happen to him.[61] Finally, on the next page, Munoz begins the statements emphasized by appellant[62] and ignored by respondent, where he offers to try to get the other two to incriminate themselves. There he also makes the first of two offers to say anything the investigators want him to say—only the second of which, by the way, elicited a response saying they only wanted the truth.[63] Munoz at this point does say he knows more, but it is all in the context of trying to negotiate leniency[64] and is followed by a lot of time spent continuing the denial of involvement other than using ATM cards and hearing admissions.[65] He is finally interrupted by the interrogators' forcefully confronting him with the holes in his story. Indeed, the additional interrogation-transcript page cited by respondent[66] in support of the characterization of Munoz as self-motivated to get the truth off his chest is the beginning of this confrontation. For most of the next 17 pages Munoz tries to stick to his story but is clearly getting unnerved as one of the

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[60]3SCT 45: 12929–12939.

[61]3SCT 45: 12939.

[62]AOB 53.

[63]3SCT 45: 12940; see also 12958.

[64]3SCT 45: 12940.

[65]3SCT 45: 12941–12963. These 23 pages cover a lot of ground; the transcript is in a small font, with closely-spaced lines.

[66]3SCT 45: 12946.

detectives pushes him hard.[67]

Respondent correctly points out that the taped statements contained no explicit promises and that Munoz was at one point told to tell the truth. (RB 48.) Besides generally omitting a large amount of material from Munoz's interaction with authorities that casts grave doubt on his credibility,[68] respondent's portrayal of what little its brief does discuss is misleading. Preliminarily, the offer to tell more that respondent emphasizes was "I know a little bit more" not, as respondent asserts, that he "knew much more."[69] It came after an investigator assured him, "We'll—we'll take care of you."[70] Respondent claims, after stating there were no promises, "nor did police tell or suggest to Munoz what to say." (RB 48.) Respondent simply ignores a prosecutor's statement to Munoz that the latter could "save his tail" if he started talking about what happened and his account did not involve his being a shooter, along with other comments along those lines.[71] These statements are detailed in the opening brief,[72] in an account that respondent does not claim is

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[67]3SCT 45: 12946–12963.

[68]See AOB 52–56.

[69]Cf. 3SCT 45: 12940 with RB 47.

[70]3SCT 45: 12940.

[71]3SCT 45: 12967–12968.

[72]AOB 54–55. In addition to the statements quoted or summarized there, one of the interrogators assured Munoz, "We don't believe that you did any shooting, . . . [but] you were there," and, again, "We're not saying you shot anybody. We're saying you were there." (Ex. 371, an audiotape transcribed, partially inaccurately, at 3SCT 45: 12962; 3SCT 12963.) This is an obvious and well-known technique for suggesting an apparent way out—to suspects unaware of the scope of accessorial liability—when interrogating

misleading in any way.

In sum, it is not the case either that the informant decided to be forthcoming of his own accord, or that interrogators did not suggest what he had to say, or that they consistently emphasized that they wanted only the truth. Rather, he avoided admitting any involvement as long as he could, then claimed all he did was use stolen ATM cards. This was a young man with the moral compass of a violent criminal, one who knew enough about the system to try to initiate negotiations about an informant's plea bargain from the beginning of his interrogation.[73] And this is the person whom the authorities told what would be needed to obtain leniency. He then gave an account that met those criteria while continuing to minimize his culpability.

It is the testimony of this witness that respondent relies on for what it presents as the conclusively-established version of every disputed fact about the offenses.

Penalty Phase

Assault on Suspected Informant

Respondent's characterization of the Walter Jutras incident notes that two inmates confronted Jutras but implies that appellant took the lead role, by stating that appellant hit Jutras and demanded to know why he was returned to the cell block. The testimony did not distinguish between the roles that the two men played—other than appellant placing his knee on the back of the man's neck when waking him up. Both hit him; both demanded assurances that he was not an informant. (RT 50: 7403.)

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[72](...continued)
codefendants.

[73]See AOB 52–53 and cited portions of the record.

Mitigation

Again, this is not the place to provide once more what respondent omits, in a summary that provides enough facts to look complete but is not.[74] But some points require correction.

Respondent mischaracterizes the record in stating that Maria Self could recall only one instance where her children's father was abusive with them. (RB 66.) She provided two examples, including not only throwing Anthony against a wall,[75] but also trying to suffocate the entire family by locking the windows and doors, putting pizzas in the oven until the house filled with smoke, and throwing Maria to the floor when she tried to remove them and open windows.[76] Moreover, nothing in her testimony indicated that these incidents were isolated or were the only ones she could recall.[77]

There is no doubt that matters improved after Maria became involved with Phillip Self, when appellant was already about eight, but respondent greatly exaggerates how much. Respondent writes that Maria testified that her second husband "was 'the best thing that ever happened' to them . . . ," meaning her sons. (RB 67.) The actual testimony, under cross-examination, was as follows:

> Q. Mr. Self was the best thing that ever happened to *you*, wasn't he?
>
> A. Yes.

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[74]See AOB 61–75.

[75]Respondent characterizes this conduct as "push[ing him] into a wall," but the testimony was "[H]e pushed him and threw him against a wall . . . ." (Cf. RB 66 with RT 52: 7707.)

[76]RT 52: 7707–08.

[77]See RT 52: 7707.

(RT 52: 7754, emphasis added.) This was in a series of questions where the prosecutor asked separately about the experiences of Maria, whom he addressed as "you," and her children, whom he referred to as "the boys" or "them." (RT 52: 7754–7755.)

Respondent claims that Phillip "provided a loving, non-abusive home for the boys . . . ." (RB 67.) Nothing in the 16 pages of testimony cited by respondent in support of this statement either states that the home became loving or supports an inference that it was, although Maria and appellant's older brother Anthony did testify that Phillip treated the boys well. When Sheila Torres, a cousin of appellant who was Maria's age and was close to the family, was asked on cross-examination if she would characterize Phillip Self as a good man, she replied, "It depends what you mean by good." (RT 53: 7910.) He was unhelpful as a parent to the boys.[78] The prosecutor's

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[78]The testimony was as follows:

Q. Mr. Self did the best he could to raise those boys as his own, didn't he?

A. I don't think he was very helpful, no.

(RT 53: 7910–7911; see also 7921 [Anthony: Phillip Self did not try to give the boys advice].)

Respondent characterizes Torres as disagreeing "with the other witnesses regarding Phillip's positive influence on the boys . . . ." (RB 69.) This statement exaggerates the testimony of the others. Only three of the eight family members were asked about Phillip, and, while they said complimentary things, none supplied the conclusion that respondent infers, i.e., that his assets were enough to make him an effective positive influence overall. (See RT 52: 7754 [Maria: accepts prosecutor's characterization of Phillip as very good to the boys and treating them like his own], 7800 [Carmen Burrola: she found him to be a very good man, very patient with the boys], 53: 7921 [Anthony: Phillip was very good to the boys, helped support the family, and showed Anthony and appellant how to work on cars].) The "other witnesses" to whom

(continued...)

attempts to establish that Phillip would take the boys to do fun things elicited Anthony's answer that "on occasion" he would take them fishing. (RT 53: 7920.) As to respondent's claim that the abuse ended when Phillip Self entered the picture, when the prosecutor asked Maria if the environment was nonabusive, the most she would say was "It's been very different." (RT 52: 7756.) Maria still beat the boys, including with household objects, after her remarriage, according to both her and Anthony, and there was no testimony to the contrary.[79] Child protective services intervened with one of her children

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[78](...continued)
respondent seems to refer included Mona Quezada, Peggy Lopez, Corinna Leon, Catherine Mejia, and Richard Torres, but the prosecutor chose not to present characterizations of Phillip from any of them. (See RT 53: 7826, 7832–7835, 7846, 7852–7853, 7870.)

[79]The prosecutor tried unsuccessfully to establish the point that respondent claims was proven, in his cross-examination of Maria:

> Q. Okay. And when you were married to Mr. Self, you weren't beating on them anymore, were you?
>
> A. Oh, yes, I was. I was more abusive at that time.
>
> Q. I see. . . . .

(RT 52: 7767.) There is no testimony to the contrary in the record, including in the portions cited by respondent at RB 67. Moreover, Anthony testified, under examination by Self's attorney,

> Q. Was there ever a time in which Maria was acting in any violent way towards you during the time that you were living with Phillip and Maria and Christopher was also living in the household?
>
> A. Yes, there was quite a few times.
>
> Q. And what kind of incidents were those?
>
> A. Well, if we would upset her, she'd lash out at us with whatever she had in her hand. We'd gotten used to that. We would avoid her at any cost.

(continued...)

fathered by Phillip. (RT 52: 7756.) Phillip, according to Anthony, was too hot-tempered to be involved in disciplining the boys. That was left to Maria, a fact which speaks volumes, given her own lack of restraint. (RT 53: 7921.)

Phillip's arrival, which came well after appellant's most crucial early childhood years in any event, did not turn the home into a "loving, non-abusive"[80] one.

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[79](...continued)
(53: 7919.) He went on to testify that she threw a knife at him one time; the handle hit him. Self's attorney asked what objects she used against Self during the post-remarriage period, and he answered, "Fly swatter, broom, anything she had in her hand." (*Ibid.*)

Respondent later acknowledges, contradicting its statement about lack of abuse, Anthony's testimony that, as respondent puts it, "Maria was still prone to violent outbursts." (RB 70.)

[80]RB 67.

ARGUMENT

I

RESPONDENT FAILS TO DISPUTE THAT ANY SUBSTANTIAL ERROR COULD HAVE CONTRIBUTED TO THE PENALTY JUDGMENT AND THAT, IF AGGRAVATION AND MITIGATION ARE TO BE COMPARED ON APPEAL, THE FACTS MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO APPELLANT, YET ARGUES HARMLESSNESS AS IF NEITHER IS TRUE

Appellant has argued, citing authority from this Court and the United States Supreme Court, as well as background material from scholarly sources, that errors with a potential impact on a penalty decision compel reversal of a death sentence unless they were trivial rather than substantial; proved a specific fact otherwise indisputably established; or were cured in a manner that can, without speculation, be known to have been effective. Conversely, any analysis that involves weighing the aggravating and mitigating evidence, or comparing the pro-death impact of a substantial error to other evidence also before the jury, is improper.[1]

Appellant has also set forth the reasons why, if this Court *were* to assess the penalty-phase evidence in appellant's trial, it would have to consider the entire record, not only the evidence viewed in a light most favorable to

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[1]See analysis and cases cited at AOB 82–104, including *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137, overruled on another point in *People v. Daniels* (1991) 52 Cal.3d 815, 864; *People v. Morse* (1964) 60 Cal.2d 631, 637 [substantial error must normally be held prejudicial]; *People v. Roldan* (2005) 35 Cal. 4th 646, 734, 739 [exception where other action nullified error]; Traynor, The Riddle of Harmless Error (1970) p. 73 [exception where error proved fact otherwise established].)

respondent,[2] and conclude that a unanimous death verdict was not inevitable.[3] Thus, even under an analysis that involved weighing the impact of a significant error in the light of the entire evidentiary picture, respondent would be unable to demonstrate harmlessness. These are live questions; this Court has sometimes reweighed the evidence and concluded that a death verdict was inevitable in any case,[4] and sometimes at least implicitly recognized the difficulties and impropriety in doing so and found that a substantial error could have affected a penalty decision without even considering the aggravated nature of the case.[5]

Quibbling with how appellant has organized his argument, respondent states in a footnote that there is nothing to respond to at the point in his briefing where appellant has argued how harmlessness questions should be approached and where he has analyzed the factual picture facing the sentencing jury. (RB 72, fn. 35.) Rather, respondent says, it will "set forth the applicable standard of review and relevant evidence within the context of each claim raised by appellants." (*Ibid.*) But respondent fails to do so. And yet respondent proceeds—in replying to every single substantive claim of error—to try to meet its burden of showing harmlessness in exactly\ the ways

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[2]AOB 113, fn. 69, quoted on p. 107, fn. 151, below, citing, *inter alia*, *Neder v. United States* (1999) 527 U.S. 1, 19; *Holmes v. South Carolina* (2006) 547 U.S. 319, 329–330 *People v. Garcia* (2005) 36 Cal. 4th 777, 805–806 & fn. 10, 807, fn. 11; Traynor, The Riddle of Harmless Error, *supra*, p. 28.

[3]AOB 105–128.

[4]See., e.g., *People v. Welch* (1999) 20 Cal.4th 701, 761–762.

[5]See, e.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1243–1244; cf. *id.* at pp. 1245, 1247–1248, dis. opn. of Baxter, J.

that appellant has shown to be improper. Specifically, respondent offers simple appellate reweighing of the aggravating and mitigating evidence, rather than the far more sensitive analysis involved in looking to whether an error "possibly influenced the jury adversely,"[6] i.e., "might have contributed to"[7] the result or "might have affected [the] capital sentencing jury."[8] Moreover, in doing so, respondent takes the facts to be the narrative presented by the co-defendant/informer, whose account of every disputed circumstance of the crimes was uncorroborated, who did not have to be believed for the guilty verdicts to have been rendered, who was disbelieved by the jury when corroboration did not include appellant's confession or a victim's testimony.

Respondent's first attempt to meet its burden of showing of penalty-phase harmlessness takes place in a single paragraph. (RB 83.) There respondent fails to cite any authority or make an explicit statement of what it thinks the standard is or how it should be applied, much less acknowledge and respond to appellant's argument. In that paragraph respondent also simply ignores appellant's discussion of the overall evidentiary picture facing the sentencer.

The majority of appellant's Argument I directly explains how federal law, applied to the California capital sentencing scheme, precludes second-guessing what a jury influenced by a different factual or instructional picture would have done. Appellant also explains why the standard for state-law error should continue to align with a federal standard thus understood. Respondent

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[6]*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman v. California* (1967) 386 U.S. 18, 24.

[7]*Chapman v. California*, *supra*, 386 U.S. at p. 24.

[8]*Satterwhite v. Texas* (1998) 486 U.S. 249, 258.

simply has no answer to what appellant has demonstrated to be the appropriate analytical framework.[9]

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[9]For a summary of the original argument, see the prejudice section of Argument II, starting at page 101, below.

II[1]

APPELLANT WAS PROSECUTED USING SO MUCH AND SUCH POWERFUL VICTIM-IMPACT TESTIMONY THAT IT FLOODED THE COURTROOM WITH EMOTIONALITY, MISLED THE JURY AS TO APPELLANT'S CULPABILITY RELATIVE TO THAT OF OTHERS WHO HAVE KILLED, AND ORIENTED THE JURY TOWARDS SEEING THE QUESTION AS WHETHER THE VICTIMS OR THE PERPETRATOR WERE MORE DESERVING OF SYMPATHY, THEREBY PREVENTING A FAIR PENALTY TRIAL AND A RELIABLE PENALTY DETERMINATION

A. Respondent Bypasses Appellant's Primary Contention, Relying on a Welter of Precedents Which Do Not Address it

The quality and quantity of victim-impact evidence used to secure a death verdict in appellant's trial went far beyond what even common notions of fairness permit, much less the constraints imposed by the Eighth and Fourteenth Amendments.

Respondent's briefing of this claim, viewed in isolation from appellant's, achieves an appearance of real persuasiveness. But it does so by bypassing the thrust of appellant's argument. Respondent emphasizes the lack of bright-line rules in the victim-impact area. Appellant agrees that this Court has established no such rules. In fact, a theme of his argument is that the victim-impact innovation has proceeded much too far without the Court's having provided guidelines or understandable limitations, bright-line or otherwise, for the trial courts or counsel.[2] Respondent overlooks the

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[1]See AOB 130. Respondent addresses this claim under its heading XII, beginning on page 204 of its brief.

[2]That position was soon mirrored by Justice Stevens's "statement respecting the denial of the petitions for certioriari in *Kelly v. California* and *Zamudio v. California*:

(continued...)

consequence of the choice not to provide bright-line rules: that careful case-by-case analysis is therefore required, under the Eighth Amendment requirement of a fair and reliable penalty trial, along with related Eighth-Amendment guarantees and the fundamental-fairness protection of the Fourteenth Amendment.[3] In that analysis, the probative value of the evidence offered in a particular case must be balanced against the risk of prejudice to a fair and reliable penalty determination. (*People v. Edwards* (1991) 54 Cal.3d 787, 836 ["[i]n each case, [the trial court] must strike a careful balance between the probative and the prejudicial"]; accord, *People v. Panah* (2005) 35 Cal.4th 395, 495.) That being the case, respondent's marshaling of precedents in which testimony on a particular topic was properly admitted is of little value. Even if this could be done for every subject covered by every witness in appellant's trial, it does not show that the testimony *as whole*, in *this*

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[2](...continued)

> At the very least, the petitions now before us invite the Court to apply the standard announced in *Payne*, and to provide the lower courts with long-overdue guidance on the scope of admissible victim impact evidence. Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use.

Kelly v. California (2008) 555 U.S. __, __; 129 S.Ct. 564, 567; 172 L.Ed.2d 445 (separate statement of Stevens, J.). Justice Breyer expressed similar views in his dissent from the denial of certiorari, and Justice Souter also voted to grant the *Kelly* petition. (*Ibid.*) Justice Stevens was addressing the situation with federal law, but the need is the same in California.

[3]This Court has stated that the only federal limitations are those imposed by the fundamental-fairness requirement of the Fourteenth Amendment. (E.g., *People v. Hamilton* (2009) 45 Cal.4th 863, 927.) This is a misconception, for reasons explained at AOB 168, fn. 90, in an analysis which respondent has not contested.

trial, was not excessive. And few opinions of this Court give specifics about the quantity and quality of the victim-impact evidence allowed; most rely on a very brief overview of its general content, which may be why respondent does not attempt to point to a precedent where the overall *gestalt* of the victim-impact presentation was comparable to that presented here.[4]

Appellant *has* cited cases from sister jurisdictions imposing limits that were far exceeded here. He has shown that the seminal California and federal cases ending the per se bans on victim-impact evidence are distinguishable on their facts from this one by several orders of magnitude. He has also demonstrated that language later appearing in this Court's opinions suggesting that there may be virtually no real limits is without foundation in the jurisprudence of this Court or the high court and is contrary to the Eighth Amendment.

There have been a few cases upheld by this Court in which it appears that evidence comparable overall to that contested here may have been introduced.[5] In none, however, was the appellant's complaint supported by the analysis presented here. Aside from the general principle of admissibility, such cases are not controlling. (*People v. Ault* (2004) 33 Cal.4th 1250, 1268,

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[4]See, e.g., the quotation from *People v. Huggins* (2006) 38 Cal.4th 175 at p. 48, fn. 19, below.

Tellingly, respondent opposes this Court's taking judicial notice of what its records show about the actual nature and quantity of the evidence involved in the seminal case specifically upholding the use of testimony about the impact of a crime on a victim's survivors. (Cf. RB 210, fn. 69, with AOB 177–178 and appellant's motion for judicial notice, filed with or shortly after the filing of this brief, concerning the record in *People v. Taylor* (2001) 26 Cal.4th 1155.)

[5]See, e.g., *People v. Brady* (2010) 50 Cal.4th 547, 573–581.

fn. 10 ["It is axiomatic that cases are not authority for propositions not considered"].)

Appellant's fundamental position is this. Victim impact evidence is deemed relevant for one reason. Given a mitigation case that might include a "parade of witnesses" humanizing the defendant, it has been held that the law should not impose limits that "turn[] the victim into a faceless stranger."[6] Rather, as respondent emphasizes,

> the prosecution has a legitimate interest in rebutting the mitigating evidence . . . [by] reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.[7]

The bulk of the testimony here had no probative value for this purpose beyond what a minimal, restrained presentation illuminating the humanity of the victims and simply stating that their loss hurt and traumatized those close to them would have provided. But it affirmatively misled the jury by presenting as aggravating circumstances facts which were not. The large volume of testimony, presented in heart-rending detail, of the various manifestations of bereavement trauma experienced by a large number of survivors actually had a *negative* probative value, in that it misled the jurors about whether the crimes were aggravated instances of death-eligible murder. Those manifestations were but instances of general phenomena common to all homicides—not even just murders, much less the worst of the worst. In addition, the use of detailed

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[6]*Payne v. Tennessee* (1991) 501 U.S. 808, 526, 525.

[7]RB 208, quoting *People v. Prince* (2007) 40 Cal4th 1179, 1286, which in turn quotes *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825. This Court has explained that this is "the rationale behind allowing victim impact evidence." (*People v. Hamilton* (2009) 45 Cal.4th 863, 927.)

bereavement-trauma evidence brought in considerations that do not have enough of a nexus to determining an appropriate penalty for the state to make it a factor in any other context where punishment is meted out in California courts: nowhere else are the ripple effects of a crime on other than direct victims taken into account. Finally, still on the probative-value side of the scale, much of the evidence presented was of limited reliability.

As to prejudice, both the court below and the prosecutor described the testimony as extremely painful to listen to. Even a reading of it in transcription evokes strong emotion. Respondent's position that there was no significant inflammatory impact to weigh in the balance puts aside the entire body of this state's jurisprudence on when testimony risks inflaming the jury, in favor of an unacknowledged victim-impact exceptionalism. Finally, expanding the "glimpses" of the lives of the victims and the basic fact that they left seriously harmed survivors, into the onslaught of tragic detail presented here, also confused the issues. For it wrongly encouraged the jurors to choose which "side" in the penalty trial was worthy of their sympathy and to believe that only the harshest sentence could respond to such grievous harm.

Respondent engages none of this analysis. Respondent's tactic is to cite cases upholding the use of victim-impact evidence generally and cases permitting the use of this or that highly specific type of testimony which parallels some individual item of evidence used against appellant. As explained above, however, appellant has not tried to argue that—if victim-impact evidence is admissible at all—any particular type of testimony used here is per se inadmissible.[8] Rather, it is excessive its detail, depth, and

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[8]With the exception of the clear inadmissibility of witnesses' "characterizations and opinions about the crime, the defendant, and the (continued...)

breadth which made it problematic overall. Respondent also erroneously states that some of the approaches which appellant has suggested this Court might use to guide lower courts are the primary basis for his claim that there was error, and respondent then notes precedents that hold that each such restriction is not per se required by the Eighth Amendment. But appellant (perhaps unlike his codefendant) has not claimed that any *specific* method of obviating "the potential to inflame the passions of the jury," that this Court has recognized in even small fragments of victim-impact evidence,[9] is constitutionally required. Rather, he has insisted that his claim depends on no particular bright-line rule.[10] It is true that the constitutional error that infected appellant's trial would not have happened under rules and procedures adopted by other states, and appellant has suggested that some version of them be adopted here.[11] But, under a case-by-case constitutional analysis that relies on no such rules, it is

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[8](...continued)
appropriate sentence." (*People v. Smith* (2003) 30 Cal.4th 581, 622, quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 830, fn. 2.)

[9]*People v. Gurule* (2002) 28 Cal.4th 557, 624; see also *id.* at p. 654.

[10]See AOB 256–257, 263 fn. 149, 270–273; see also AOB 131–136 (overview of claim).

[11]Appellant has proposed specific procedural and substantive rules, but not as the linchpin of his claim. He is offering them for three purposes: to assist the Court in the event that it wishes to provide a more specific framework for "trial court[s] . . . [to] strike a careful balance between the probative and the prejudicial," as the Court has repeatedly emphasized that they must "[i]n each case" in which victim-impact testimony is offered (e.g., *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.); to show how out of sync with our sister jurisdictions California's current de facto no-holds-barred use of victim-impact testimony is—since most of the rules come from those jurisdictions; and, as a secondary matter, to both present to this Court and preserve for any later litigation alternative bases for reversal.

clear that the victim-impact case here impermissibly risked derailing appellant's jury, indeed, that it could not have failed to do so.

Respondent's brief so misses the point that appellant can concede almost every premise of its argument concerning the victim-impact issue. Yes, this Court and the United States Supreme Court have held that victim-impact evidence, despite its hazards, is not per se irrelevant or inadmissible.[12,13] Yes, this Court has "rejected bright-line limitations on victim-impact testimony."[14] Yes, the Court "has approved of multiple witnesses testifying to victim impact."[15] Yes, evidence of a victim's character is, under this Court's

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[12]RB 207, citing, e.g. *Payne v. Tennessee*, *supra*, 501 U.S. 808; *People v. Edwards*, *supra*, 54 Cal.3d 787, 835; RB 208, citing, e.g., *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056–1057.

[13]Appellant argues alternatively that the seminal federal and state cases allowing the admission of some victim-impact testimony should no longer be followed or should be limited to their facts. The full implications of 20 years' of experience with such testimony, appellant believes, lead to this conclusion. (AOB 256–270.) But this contention, too, is clearly presented in a context indicating that the need for reversal, on the facts of this case, is not dependent on the Court's agreeing that such testimony should be excluded altogether. (See AOB 256, 263, fn. 149.)

[14]RB 208, citing, e.g., *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1057, which lists some limitations which have been rejected (e.g., family members only, or circumstances known or foreseeable to the defendant at the time of the crime).

[15]RB 209, citing, e.g., *People v. Huggins*, *supra*, 38 Cal.4th 175.

Respondent, however, goes on to cite *People v. Box* (2000) 23 Cal.4th 1153, 1200–1201, in support of the proposition that, "[a]s long as victim impact evidence is not unduly prejudicial pursuant to Evidence Code Section 352, the trial court should have discretion to admit any number of witnesses." *Box* says no such thing. It does not deal with victim-impact evidence at all, much less suggest that the Evidence Code is the only source of constraints on

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interpretation of factor (a), admissible.[16, 17] Yes, this has included, in one or another case, evidence of all kinds of specific traits and activities, illustrative anecdotes, and photographs.[18]

Moreover, in a general sense and within narrow limits yet to be enunciated by this Court, it is also true that family members and friends may give the jury a sense of "the various ways their lives were adversely affected by a victim's death."[19] It is true that the evidence need not come from blood

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[15](...continued)
its scope.

[16]RB 210, citing, e.g., *People v. Huggins*, *supra*, 38 Cal.4th at pp. 238–239.

[17]Appellant does contend that the later impact of a crime on those who are not the direct victims is not a circumstance of that crime, but this contention, too, is presented in the alternative to the argument that, even if statutorily admissible, what was presented here went beyond what a fair and reliable proceeding would permit. (AOB 265–270.)

[18]RB 211, citing, e.g., *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1057.

[19]RB 215, citing, e.g., *People v. Huggins*, *supra*, 38 Cal.4th at pp. 236–238. As noted previously, however, none of the cases cited by respondent sought to justify—or even indicates that the Court was confronted with—testimony of the detail, depth, or emotional impact of that admitted here. For example, in *Huggins*, the entire description of the testimony was

> The jury heard testimony about the impact of Lees's death on her family and the community. She was described as compassionate, loyal, and extroverted. Learning of her death and dealing with the aftermath was extremely traumatic for her survivors. Life in her absence had become difficult for her family, coworkers and friends in a number of respects. The community mourned her death by placing a bronze statue of her at the Pleasanton public library.

(continued...)

relatives of a victim,[20] and that there is no bar on *competent* testimony concerning the impact of the crime on other family members.[21] And, yes, "[t]his Court has permitted descriptions of what the victim's family saw when they viewed the victim at the mortuary, visits to gravesites, changes in holiday celebrations, resulting drug abuse or mental disease, and other physical or mental manifestations of psychological impact from the victims' murders."[22]

On the one hand, respondent's survey shows this Court's refusal to impose any real standards or limitations, in an area where the threat to a fair and reliable penalty determination is the greatest. Such cases are manifestations of what trial courts and prosecutors can only perceive as an "anything-goes" attitude—except for some cautionary language concerning videotapes with evocative sound tracks. This is an attitude can only lead to

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[19](...continued)
(38 Cal.4th at p. 222.) Similar descriptions appear in the other cases cited by respondent. (See, e.g., *People v. Pollock* (2004) 32 Cal.4th 1153, 1166.) If the evidence in appellant's trial had approached this level of abstraction, it would have been far less objectionable.

[20]RB 215, citing, e.g., *People v. Williams* (2006) 40 Cal.4th 287, 306, fn. 4.

[21]RB 215, citing, e.g., *People v. Panah*, *supra*, 35 Cal.4th 395. The portion to which respondent is apparently referring is on page 495.

[22]RB 215–216, citing, e.g., *People v. Jurado* (2006) 38 Cal.4th 72. The portions of the opinion to which respondent is apparently referring are on pp. 91–92, 131–134.

Respondent's list of cases, many cited with parentheticals describing a particular manifestation of bereavement trauma, is further support for appellant's claim that such reactions are not unusual (i.e., not aggravating) and, if they are to be mentioned at all, should be covered in a brief and abstract manner that meets the limited purpose for which this variety of purported "circumstance of the crime" is considered relevant.

trials where jurors are not only overwhelmed with emotion in a manner recognized as unacceptable in any other context, but also hopelessly confused about what actually makes a crime aggravated and, as shown below, even about the nature of the question before them.

Beyond this, however, none of the propositions respondent puts forward defeats, or even addresses, the primary claim which is now before this Court, in an in-depth argument which the Court has not encountered before. The heart of it is a demonstration that the vast majority of the victim-impact evidence admitted in this case had no non-cumulative probative value on the one subject on which it was relevant at all, that it confused the jurors into thinking that what it more obviously seemed to prove was pertinent to their decision-making, and that—by traditional standards of prejudice—it had enormous prejudicial impact. The result—in technical terms—was a multi-faceted violation of the state and federal constitutions. The result in common-sense, practical terms was that means that were fair neither to appellant nor to a society that seeks to be cautious about executing people were used to obtain a highly suspect death verdict.

In the many areas where respondent has not addressed a point at all, this reply summarizes the argument, both to reorient the Court to appellant's actual contentions and to identify the matters which respondent appears unable to contest. At a few points, respondent addresses subsidiary prongs of appellant's argument, while avoiding its overall logic, and this reply will deal with those below as well.

# # #

Respondent also urges this Court to avoid reaching the merits of this important question. Respondent acknowledges that appellant objected in the trial court to the testimony. However, respondent asserts that the objection

was inadequate to preserve the claim, without citation of authority on what is an adequate objection to proffered testimony and without stating the principles applicable to deciding that question.[23] Respondent makes this claim at the outset of its argument. However, since a proper analysis of the procedural-bar contention depends in part on the substantive claim, the reply on the merits comes first.

B. Respondent Does Not Address or Dispute the Bases of Appellant's Claim That the Bulk of the Testimony Had Little Probative Value and Affirmatively Misled the Jury by Falsifying Aggravating Circumstances

Appellant asks this Court to find error in the scope of the victim-impact case admitted against him based on familiar principles of due process and the Eighth Amendment. These are principles stressed by the United States Supreme Court and this Court when, under minimal facts nowhere near comparable to those of appellant's trial, the door was first opened to receiving such evidence at all. Moreover, appellant's claim is supported by critical background information that has not previously been a part of the victim-impact controversy.

"The Eighth Amendment to the federal Constitution permits the introduction of victim impact evidence, or evidence of the specific harm caused by the defendant, when admitted in order for the jury to assess meaningfully *the defendant's moral culpability and blameworthiness.*" (*People v. Harris* (2005) 37 Cal.4th 310, 351, emphasis added.) So to have had probative value in favor of the proposition that appellant should be put to death, testimony must have tended to show that the homicides in which he was involved were—within the class of death-eligible murders—aggravated, or

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[23]RB 205–206.

that his conduct was aggravated, or that there were other aggravating factors about his own character. (See *Arave v. Creech* (1993) 507 U.S. 463, 474.) Of these possibilities, the only way that victim-impact evidence could be relevant as direct aggravation is to show that the crimes themselves were aggravated murders due to the "circumstance" that survivors were so deeply affected. But to be an aggravated crime means to be atypically awful, as opposed the "normal" awfulness attending any capital murder. It is black-letter law that to be aggravated means worse or more serious,[24] and respondent does not dispute it. Evidence of specific harm which does not in some way tend to show heightened culpability is simply not relevant. (*People v. Harris*, *supra*, 37 Cal.4th at p. 352.) Moreover, "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." (*Arave v. Creech*, *supra*, 507 U.S. at p. 474, citations omitted.)

1. The Claimed Probative Value of Victim-impact Testimony Is its Use to Prevent the Crime from Being an Unreal Abstraction in the Minds of Jurors, So They Are Clear about its Gravity

There is a single rationale for admitting victim-impact evidence. It only supports the kind of basic victim-impact case presentation in the seminal federal and California cases on the issue and permitted in certain other states,

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[24]For the meaning of *aggravation*, see *People v. Brown* (2003) 31 Cal.4th 518, 565 & fn. 20; *People v. Rodriguez* (1986) 42 Cal.3d 730, 788; *People v. Davenport* (1985) 41 Cal.3d 247, 289; CALJIC No. 8.88; Black's Law Dictionary (7th ed. 1999) page 65 (definition of *aggravate*) and Webster's 3d New Internat. Dict. (1976) page 41 (same); Black's Law Dictionary, p. 236 (definition of *aggravating circumstance*, under "circumstance"). These authorities are discussed at AOB 189–190. See also authorities cited in the discussion, at AOB 216–218, of why only those circumstances of the offense tending to bear on culpability are relevant.

not the in-depth portrayals of the victims and of the effects of their killings on survivors presented here.

> [T]he rationale behind allowing victim impact evidence is that "'[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'"

(*People v. Hamilton*, *supra*, 45 Cal.4th 863, 927, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) *Payne*, on which this Court relies entirely for the proposition that victim-impact evidence can be relevant,[25] elaborated on this, it's sole direct rationale for rejecting *Booth v. Maryland's*[26] holding that all evidence of the character of the victim and of the effect of the crime on survivors was entirely irrelevant to culpability. Because the Eighth Amendment virtually eliminates limits on a capital defendant's presentation of relevant mitigating evidence—"it unfairly weight[s] the scales" to bar the state "from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish' . . . or demonstrating the [resulting] loss to the victim's family and to society . . . ." (501 U.S. 808, 822; see also *id.* at p. 826; *id.* at p. 833 (conc. opn. of Scalia, J.).) Since the mitigation case can humanize the defendant, the victim should not be left as a "faceless stranger." (*Id.* at p. 825.) The point is to prevent the offense itself from being treated as an abstraction, its gravity somehow forgotten in the context of the mitigation case. Doing so

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[25]*People v. Edwards* (1991) 54 Cal.3d 787, 833, 835; see also *People v. Boyette* (2003) 29 Cal.4th 381, 444.

[26]*Booth v. Maryland* (1987) 482 U.S. 496, 503.

would permit an inaccurate minimization of the defendant's culpability.[27] Respondent agrees that this is *Payne's* and this Court's rationale and gives it considerable emphasis. (RB 208, 214.) Appellant's contention, which respondent declines to address, is that, to the limited extent that this is a valid concern,[28] a minimal presentation of real human beings briefly describing their loss would have fully met this need in appellant's trial, as such presentations do in other jurisdictions.

Appellant has supported this conclusion in some depth, in a discussion which respondent ignores entirely. First, numerous opinions of this Court and others emphasize that it is quite obvious that murder is a heinous crime with extremely serious consequences for those left to deal with the loss.[29] The

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[27]As a background matter, *Payne* also attempted to demonstrate that the harm caused by a defendant is a traditional concern in sentencing. In fact, the sources it cited showed only that the results of a defendant's actions are sometimes used to distinguish between *classes* of offenses, and their associated sentencing ranges. (501 U.S. at pp. 819–820.) Thus, for example, whether a homicidal assault succeeds in producing death determines whether it is a murder or an attempt. (See AOB 258–259 for a discussion of the few authorities marshaled in *Payne*).

In any event, the proposition was presented as part of the background against which the reasoning of *Booth v. Maryland*, *supra*, 482 U.S. 496 was being rejected, not as an independent reason why victim-impact evidence bears a rational relationship to the appropriate sentence. (Compare 501 U.S. at pp. 819–821 with *id.* at pp. 822, 825–827.) As noted above, this Court has flatly stated that the idea of balancing the scales is "the rationale behind allowing victim impact evidence." (*People v. Hamilton*, *supra*, 45 Cal.4th 863, 927.)

[28]But see AOB 220–224, discussing authorities showing how dynamics of a capital trial before a death-qualified jury make it unlikely that jurors will lose sight of the seriousness of a murder.

[29]See AOB 220–221, discussing *Payne v. Tennessee*, *supra*, 501 U.S.

(continued...)

context is different, i.e., the point is usually used to reject a defense claim that the consequences are too unforeseeable to relate to the defendant's culpability, or that such evidence is not prejudicial because it repeats what is known. Clearly, however, the reasoning cuts both ways. If defendants can be held accountable for the secondary consequences of their conduct because the contours of what those consequences would be is obvious, than there is no pressing need to prove the obvious to the jury in great depth and detail. Moreover, this is particularly true of death-qualified jurors. Many such jurors—in general and in appellant's trial—come to court believing that everyone who intentionally kills deserves death, and they thus enter the process with sympathies entirely oriented towards victims, not defendants.[30] Second, according to those who have studied the issue, the dynamics of a capital trial cause the defendant who enters a penalty trial to actually have a heavy uphill burden in arguing for life. The crime gets a more human, less abstract face during the guilt phase, when evidence relating to the victim often comes in, and often through the testimony of family members.[31] That

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[29](...continued)
808, 838 (conc. opn. of Souter, J.); *Godfrey v. Georgia* (1980) 446 U.S. 420, 428–429; *People v. Marks* (2003) 31 Cal.4th 197, 236; *People v. Robinson*, *supra*, 37 Cal. 4th 592, 652, fn. 33; see also *People v. Brown*, *supra*, 31 Cal.4th 518, 573; *People v. Holloway* (2004) 33 Cal.4th 96, 110, 143–144; *People v. Douglas* (1990) 50 Cal.3d 468, 536–537.

[30]See AOB 220.

[31]This is pointed out in *Payne v. Tennessee*, *supra*, 501 U.S. 808, 823; *People v. Hardy* (1992) 2 Cal.4th 86, 200; and *State v. Williams* (N.J. 1998) 550 A.2d 1172, 1203.

definitely happened here, in many ways discussed in the opening brief.[32] The penalty phase began with the jury having heard all about horrible crimes done, without justification or even explanation, by defendants who simply appeared to be inhuman monsters. This Court and other authorities have explained in depth why this is typically so and the difficulty facing the defense at this point.[33] Thus appellant's opportunity to have finally put something of a human face on himself created no risk of his crimes somehow being scaled back into law-school hypotheticals or a reviewing tribunal's statement of facts. Had this not been the case, the prosecution's opportunity to remind the jurors in argument of what appellant had done and "the predictable and obvious consequences to the victims' families and friends"[34] would have sufficed.

In this setting, it would have taken very little testimony to exhaust the rationale for victim-impact evidence's relevance.

> Informing the jury that the victim had some identity or left some survivors merely states what any person would reasonably expect and can hardly be viewed as injecting an arbitrary factor into a sentencing hearing. But the more detailed the evidence relating to the character of the victim or the harm to the survivors, the less relevant is such evidence to the circumstances of the crime or the character and propensities of the defendant.

(*State v. Bernard, supra*, 608 So. 2d 966, 971, fn. omitted; see also *Adkins v. Brett* (1920) 184 Cal. 252, 258–259 [when a party has a legitimate purpose for introducing evidence which is also capable of misuse, court should take special

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[32]See AOB 222.

[33]*People v. Deere* (1985) 41 Cal.3d 353, 366–367, disapproved on other grounds in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9, and other authorities discussed at AOB 221–224.

[34]*People v. Sanders* (1995) 11 Cal.4th 475, 550, allowing such argument, even without evidence on such matters having been admitted.

care to exclude cumulative testimony].) As appellant has shown in the opening brief and reiterates below, this is the view of courts in many sister states, but it has not prevented prosecutors from obtaining death verdicts while providing victim-impact evidence of much less quantity and depth than that used here.[35]

In sum, the balance-the-scales rationale identifies a need that is somewhere between fictitious and minimal, and it could have been met with minimal testimony, not the onslaught on the emotions to which appellant's jury was subjected. Respondent does not dispute this point. The tacit concession is enormous, because both the statutory and constitutional tests that apply to the instant claim depend on weighing the added probative value of the challenged testimony against its prejudicial and confusing impact.

2. The Detailed Bereavement-Trauma Evidence Used Here Misled the Jurors About Whether the Crimes Were Aggravated

a. Failure of the Survivors' Reactions to Show an Aggravated Death-Eligible Murder

The testimony presented at appellant's trial was not only not particularly probative, but grossly misleading on the question of whether appellant's crimes were aggravated. It provided the jurors—again under the guise of aggravation— with excruciating portrayals of the various forms of agony suffered by many of the people affected by the murders. But the mental-health literature in the specialized field of traumatic grief makes it absolutely clear that these impacts were typical.[36] I.e., even if it were to be conceded—and this

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[35]See p. 74 and fn. 64, below.

[36]An appellate court may rely on published studies that provide facts—sometimes called "legislative facts"—about the background against (continued...)

is not a concession which appellant makes—that unknowingly causing worse-than-usual harm to those who loved a murder victim could make the perpetrator's conduct aggravated, the testimony present here did not show worse-than-usual harm.

Not only were the sequelae described by the prosecution witnesses typical of every death-eligible murder, but they were typical of every non-capital first-degree murder, every second-degree murder, every homicide (criminal or excusable), every suicide. The *content* of the pervasive, disturbing thoughts that is among the effects may vary—"Why would God allow this to happen?" or "Why didn't those bureaucrats mark the intersection better?" versus "How could one human being do that to another?" But the range of normal impacts is basically the same.[37]

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[36](...continued)
which basic legal questions are decided (as opposed to facts about the particular case). See, e.g., *Kennedy v. Louisiana* (2008) __ U.S. __, __, 121 L.Ed.2d 525, 540, 128 S.Ct. 2641, 2651; *Roper v. Simmons* (2005) 543 U.S. 551, 569–570, 573; *Brown v. Board of Education* (1954) 347 U.S. 483, 494, fn. 11; *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 25–62, 68; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591–595, 600–601 & accompanying fns.; *Guevara v. Superior Court* (1998) 62 Cal.App.4th 864, 870, fn. 2; Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 Vand. L.Rev. 111 (1988).

[37]Amick-McMullen, et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study* (1989) 2 J. of Traumatic Stress, #1; Cable, *Grief Counseling for Survivors of Traumatic Loss*, in Doka, ed., Living With Grief After Sudden Loss:Suicide/Homicide/Accident/Heart Attack/Stroke (1996) ("Living With Grief"); Carroll et al., *Complicated Grief in the Military*, in Doka, ed., Living With Grief; Cummock, *Journey of a Young Widow*, in Doka, ed., Living With Grief; Doka, *Sudden Loss: The Experiences of Bereavement*, in Doka, ed., Living With Grief; Figley, *Traumatic Death: Treatment Implications*, in Doka, ed., Living With Grief; (continued...)

There is a significant probability that a survivor of a loved one who was victim to any of these sudden, violent deaths is suffering post-traumatic stress disorder.[38] According to an oft-cited expert, "When death occurs from sudden, unexpected circumstances such as *accidents, suicide or murder*, bereavement reactions are more severe, exaggerated and complicated. The mourner's capacity to use adaptive coping mechanisms is overwhelmed."[39] It has been found that there are few differences in the degree of trauma suffered by survivors of homicide victims and people killed by drunk drivers.[40] With a decedent who is not elderly and appears healthy, even "sudden loss of a loved one from heart attack or stroke can be as unexpected and devastating to the family and friends of the deceased as suicide, homicide and accident." As with

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[37](...continued)
Hersh, *After Heart Attack and Stroke*, in Doka, ed., Living With Grief; Leviton, Horrendous Death and Health: Toward Action (1991); Lord, *America's Number One Killer: Vehicular Crashes*, in Doka, ed., Living With Grief; Rando, *Complications in Mourning Traumatic Death*, in Doka, ed., Living With Grief; Rando, *Parental Bereavement*, in Rando, ed., Parental Loss of a Child (1986); Rando, *The Unique Issues and Impact of the Death of a Child*, in Rando, ed., Parental Loss of a Child (1986); Rando, Treatment of Complicated Mourning (1993); Redmond, *Sudden Violent Death*, in Doka, ed., Living With Grief; Redmond, Surviving When Someone You Love Was Murdered: A Professional's Guide to Group Grief Therapy for Families and Friends of Murder Victims (1989); Sanders, *Accidental Death of a Child*, in Rando, ed., Parental Loss of a Child (1986).

[38]Figley, *Traumatic Death: Treatment Implications*, in Living With Grief, *supra*, p. 94–95; Rando, *Complications in Mourning Traumatic Death*, in Living With Grief, *supra*, p. 139; see also Lord, *America's Number One Killer: Vehicular Crashes*, in Living With Grief, *supra*, pp. 25–26.

[39]Redmond, *Sudden Violent Death*, in Living With Grief, *supra*, p. 53, emphasis added.

[40]Lord, *Vehicular Crashes*, *supra*, p. 25.

survivors of other traumatic deaths, the loved ones "suffer a uniquely wrenching loss that starts with shock and may end in familial and personal dysfunction."[41]

Where, as with several of the witnesses here, the decedent is the survivor's child (young or grown), the parents' problems "are extreme," regardless of the cause of sudden death.[42] Finally, any death involving physical violence to, and mutilation of, the decedent, is significantly more difficult to process. This includes accidents.[43]

All of this information is in appellant's opening brief. (AOB 191–194.) It comes from a survey of the literature on the subject and is uncontroversial within the field. Respondent does not dispute it. Appellant has also analyzed the victim-impact testimony in his case and shown that every single specific phenomenon described by one or another witness—including the persistence years later of effects like obsessive thinking about the death; rage; irrational fears; health, relationship, substance-abuse problems; and unimaginable levels of grief and anguish—is described in the literature as within the normal range of reactions to traumatic deaths. This means all traumatic deaths, not just homicides, and not just the "worst of the worst" homicides. (AOB 194–203.) Again, respondent does not claim otherwise.

It is not, however, general knowledge that the extreme reactions of the prosecution's witnesses and of the other people whose experiences they related

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[41]Hersh, *After Heart Attack and Stroke*, in Living With Grief, *supra*, p. 17; see also Rando, Complicated Mourning, *supra*, 504, 505–506.

[42]Rando, Complicated Mourning, *supra*, 9; see generally Rando, ed., Parental Loss of a Child (1986).

[43]Rando, Complicated Mourning, *supra*, pp. 504–505, 511, 512.

were what is to be expected, so the jurors were affirmatively misled into believing that the harm caused here was in fact worse than the norm and therefore aggravating. "Clinicians and criminal justice professionals are often staggered by the depth of emotional suffering experienced by survivors."[44] Indeed, the literature cited by appellant is clearly written to sensitize mental health professionals and others regularly dealing with survivors of traumatic deaths to what such people actually go through.[45] Much of it emphasizes the therapeutic need to teach survivors that their extreme experiences are normal.[46] Like untrained mental health professionals and untreated survivors, and the trial court here, appellant's jurors were unequipped to expect the survivors' reactions, much less reject them as aggravation.

b. Constitutional Implications

Appellant presents information about the typicality of the survivors' reactions, and the lack of cultural awareness of the intensity of bereavement trauma, to show the limited probative value of the testimony, in the context of constitutional claims depending on the weighing of probative value versus prejudicial effect. However, he also maintains (AOB 204–209) that misleading appellant's jury about what constituted aggravation gives rise to several free-standing claims. First, evidence of impacts of appellant's crimes,

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[44]Amick-McMullen, et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study* (1989) 2 J. of Traumatic Stress, #1, 21, 22.

[45]See e.g., Rando, Complicated Mourning, *supra*, 4–5, 12–16 (discussing mental health practitioners' limited understanding).

[46]E.g., Cable, *Grief Counseling for Survivors of Traumatic Loss*, *supra*, at pp. 119, 123, 125; Redmond, Surviving When Someone You Love Was Murdered: A Professional's Guide to Group Grief Therapy for Families and Friends of Murder Victims (1989) pp. 68, 70.

impacts which were indistinguishable from those caused by practically all other death-eligible and even non-death-eligible defendants, failed to "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." (*Spaziano v. Florida* (1984) 468 U.S. 447, 460; see also *id.* at p. 460, fn. 7; U.S. Const., 8th Amend.)

More generally, providing the sentencer with misleading or seriously inaccurate information violated the Due Process Clause of the Fourteenth Amendment,[47] as well as the Eighth Amendment.[48]

Additionally, if a statutory sentence-selection factor is vague enough to permit the jury to rely on an illusory circumstance in choosing death, the criterion itself falls short of Eight and Fourteenth Amendment requirements.[49] Thus, if this Court construes Penal Code section 190.3, factor (a), to encourage the jury to treat compelling, but not aggravating, circumstances as aggravation, the statute itself is unconstitutional.

The ban on a circumstance so vague that it permits the jury to include illusory aggravation was violated in another way as well. The weighing of aggravation and mitigation was to assess appellant's "culpability—what [his]

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[47] *United States v. Weston* (9th Cir. 1971) 448 F.2d 626, 634; see also *United States v. Tucker* (1972) 404 U.S. 443, 447; *Townsend v. Burke* (1948) 334 U.S. 736, 741; *People v. Arbuckle* (1978) 22 Cal.3d 749, 754–755; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 719, overruled on another point in *People v. Green* (1980) 27 Cal.3d 1.

[48] *Gregg v. Georgia* (1976) 428 U.S. 153, 190 (plurality opn.); see also *Johnson v. Mississippi* (1988) 486 U.S. 578, 590.

[49] *Stringer v. Black* (1992) 503 U.S. 222, 235–236; see also *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 473–474, 477.

intentions, expectations, and actions were."[50] But there was no basis for believing that appellant intended or expected to cause such appalling harm to the victims' survivors, since in fact the harms predictable by experts are unknown to the lay public, so from this angle, too, factor (a) was applied to permit illusory aggravation.

Finally, the testimony diverted the jury from the individualized sentencing required by the Eighth Amendment[51] to non-unique aspects of the crimes.

c. Respondent's Silence

Respondent does not dispute that the witnesses' detailed testimony about bereavement trauma presented illlusory aggravation. Certainly respondent has tacitly conceded the factual premise of appellant's logic: that the testimony appeared to show unique, aggravating aspects of the crimes of which appellant was convicted, but in reality it did not.

Yet what is thus conceded in respondent's briefing is not mentioned. Respondent simply presents what seems like a generic response to concerns about victim-impact evidence. Respondent offers this Court neither authority nor logic to help it confront the problem of extensive bereavement-trauma testimony, testimony which fails to show that the crime was more aggravated in its impact than a drunken driver's vehicular manslaughter, but gives the appearance of showing aggravation in the extreme.

To recapitulate the argument to this point, even apart from the way the testimony misled appellant's jury, the undisputed clinical literature about

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[50] *Enmund v. Florida* (1982) 458 U.S. 782, 800

[51] *Enmund v. Florida*, *supra*, 458 U.S. 782, 801; see also *Tison v. Arizona* (1987) 481 U.S. 137, 156; *Jurek v. Texas* (1976) 428 U.S. 262, 271.

bereavement trauma shows that a major portion of the evidence admitted against appellant simply lacked significant probative value on the issue of death-worthiness. Under the following headings, appellant shows that two other points regarding lack of probative value are also uncontested: the rejection in every other context where penalties are assessed of the use of extensive "specific-harm" evidence, and the unreliability of much of the evidentiary picture presented to appellant's jury.

3. Comparable Evidence Is Rejected in All Other Contexts

Imposition of the death penalty requires heightened rationality and reliability.[52] Yet in appellant's trial, the use of detailed bereavement-trauma evidence depends on logic rejected in every other context where punishment is meted out in California courts. Appellant demonstrated in the opening brief that in-depth testimony about the specific harm caused brought in "facts not even deemed relevant at all in areas of law that are distinguishable only in that they have been less of a populist political football: sentencing in non-capital crimes, the assessment of punitive damages, and imposition of civil penalties." (AOB 230.) The only exceptions lie in the traditional sense of legislatively classifying crimes according to whether there was injury or death, etc., or *immediate* circumstances of the offense which help show the defendant's actual behavior and intentions. (AOB 209–211 and cases cited.)

Respondent does not disagree. Nor, however, does respondent provide a reason for supporting this death-penalty exceptionalism. What has been rejected in all other contexts, therefore, can only be accepted here if it is within the rationale articulated in *Payne*: that there is some probative value in limited

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[52] *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Monge v. California* (1998) 524 U.S. 721, 732.

testimony to remind any jurors who need reminding that the life of a real person was violently and tragically ended, and that other real people were deeply affected. The rest, which clearly exceeds what the *Payne* court sought to justify or contemplated, is at best cumulative, meaning that it is unneeded by the prosecution for its legitimate purpose, adding nothing to the probative-value side of the probative-value/prejudicial-effect scale.

4. The Probative Value of Both Types of Victim-Impact Evidence Was Further Limited by its Unreliability

Unreliability of evidence detracts from its probative value. (*People v. Murtishaw* (1981) 29 Cal. 3d 733, 773–774.) Citing both authorities and examples from his trial, appellant has documented the "inevitable tendency of drawn-out and detailed victim-impact testimony to provide idealized or sanitized portraits of the victims; somewhat stylized, black-and-white images of the unbroken bleakness of the survivors' lives; and various forms of incompetent and other objectionable testimony." (AOB 211–216; quotation from p. 216.) Respondent does not dispute appellant's factual premise, i.e., that the reliability of the un-cross-examined testimony in these areas is inherently weak in significant respects.

Respondent acknowledges this point, or at least the part that pertains to the idealization of the victims. It urges the Court not to consider some of the information that proves it.[53] (RB 210, fn. 69.) Respondent's only actual rejoinder, however, is that appellant supposedly "had the opportunity to cross-examine the victim impact witnesses at trial on these matters[,] . . . chose not to do so[,] and may not now complain." (RB 213.) Three sentences later,

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[53]In the cited portion of its brief, respondent answers appellant's anticipated motion for judicial notice of certain items. Since the matter will be litigated in that motion, appellant is not replying here.

however, respondent accurately quotes this Court as prohibiting such cross-examination. (*Id.*, quoting *People v. Boyette* (2003) 29 Cal.4th 381, 445.)

Even if cross-examination were theoretically available, it is well known that, in the real world, its benefits could not be obtained without paying a prohibitive price in juror goodwill.[54] And it is no answer to say that defendants must often make hard tactical choices. If neither option available to a defendant (cross-examining or refraining from doing so) can produce a fair and reliable result, the outcome is a procedure that necessarily infringes on fairness and reliability. The fact that appellant chose *which way* his penalty trial would be made unfair and unreliable should not mean that he cannot now complain.[55]

Appellant anticipated respondent's argument about the availability of cross-examination and dealt with it as here, although in more depth;[56] respondent has no answer.

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[54]See AOB 211–212, citing Johnson, *Speeding in Reverse: An Anecdotal View of why Victim Impact Testimony Should not be Driving Capital Prosecutions* (2003) 88 Cornell L.Rev. 555, 565; *Payne v. Tennesee, supra*, 501 U.S. 808, 823 ["for tactical reasons it might not be prudent for the defense to rebut victim impact evidence"]; *State v. Humphries* (S.C. 1996) 479 S.E.2d 52, 55–56 [defense, though it possessed evidence of victim's temper and use of alcohol, did not cross-examine or present rebuttal]; Fahey, *Payne v. Tennessee: an Eye for an Eye and Then Some* (1992) 25 Conn. L.Rev. 205, 255. See also Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials* (2000) 33 U. Mich. J.L. Reform 1, 28, quoted at AOB 213.

[55]This Court has sometimes rejected arguments about a situation being one in which a defendant could not reasonably be expected to take action, but it apparently has never addressed the argument made above. (See, e.g., *People v. Pollock* (2004) 32 Cal.4th 1153, 1181.)

[56]AOB 211–212, 213, 214, 215 & fn. 115.

The same problem rendered illusory the possibility of interrupting the witnesses' heartful outpourings with objections to the large amounts of hearsay testimony, as well as incompetent psychological opinion testimony[57] and various violations, discussed below, of the ban on evidence of the victims' views of the crimes and perpetrators. So none of the four defense attorneys present did so. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1034 [recognizing importance of avoiding alienating jury]; *People v. Johnson* (1993) 6 Cal.4th 1, 51 [same].) Moreover, in the instant case, none of the questions that elicited opinions about the crime and the perpetrators were objectionable as calling for such opinions. They were framed as questions about the witnesses' experiences. (RT 49: 7289, 7301, 7322, 7371.) So objections would have been in the form of truly obnoxious-seeming motions to strike the aggrieved family members' answers. Moreover, a directive to disregard the offending remarks would be ineffective. For all of these reasons, open-ended victim impact evidence, i.e., that admitted without a trial-court preview before admission, "is inherently uncontrollable." (Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules* (2003) 88 Cornell L.Rev. 543, 554.)

Respondent does not address the issue of incompetent evidence at all, although it is part of appellant's claim (AOB 214–216). Thus, on the sub-issue of the unreliability of the evidence further limiting its probative value, respondent's only rejoinder is the claim that the portion of unreliability created

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[57]RT 49: 7284–7285,7290–7291, 7293–7294, 7298–7299, 7300–7301 (Roybal-Aragon statements that could not come from personal knowledge); 7316 (speculative answer from Hopkins); 7295–7298 (Roybal-Aragon's psychological analyses of the nature and origins of her children's problems—attributing them entirely to the death), all cited at AOB 214.

by one-sided portraits of the victims and of the survivors' experience could have been corrected by cross-examination, a claim which is legally erroneous and ignores the practical realities of a penalty trial.

5. Conclusion Regarding Probative Value

"[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant . . . ." (*California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.).) *Payne v. Tennessee* held that victim-impact evidence is not per se irrelevant to that inquiry for the purposes of passing muster under the Eighth Amendment. The rationale for its admission is to "remind[] the sentencer," which, it is feared, might get lost in the mitigation case, "that . . . the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Payne v. Tennessee*, *supra*, 801 U.S. at p. 825.) In the usual case, including appellant's, this is not a disputed fact which requires extensive victim-impact evidence for its proof.

Moreover, to the extent that the evidence admitted here seemed to show that appellant's offenses were aggravated instances of special-circumstance murder, it was probative of a falsehood. Its peculiar capacity to produce idealized characterizations of the victims and black-and-white portrayals of the survivors' experiences, combined with its general lack of susceptibility to cross-examination (along with this Court's holding that there is no right to cross-examination about the victim's character), rendered much of it of dubious reliability. It proved facts not even deemed relevant in every other area of law where an appropriate penalty must be assessed. In yet another point ignored by respondent, appellant pointed out that, "if actions speak louder than words, this Court has proclaimed resoundingly that it sees little probative value in such evidence. . . . When the Court marshals the evidence

supporting [a death] verdict, it tends not to include victim-impact testimony that was in the record."[58]

As to all of these points regarding probative value, respondent controverts only the statement that unreliable testimony could not have been cross-examined.

Given, as shown in the next sections, the tremendous degree to which the excessive victim-impact evidence necessarily introduced emotionality rather than reason into appellant's penalty trial and its tendency to confuse the jury regarding the question before it, its low—and even negative—probative value allowed it to undermine the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra*, 524 U.S. 721, 732), while also violating the other constitutional criteria for capital sentencing on which appellant relies.

C. The Prejudicial Effect of the Testimony Was Extreme

For both the Evidence Code section 352 analysis and considering the due process/Eighth-Amendment claim, the prejudicial or inflammatory impact of the testimony must be evaluated. Appellant contends that the victim-impact evidence was emotionally overwhelming. Its inflammatory impact was entirely outside the realm of what this and other courts allow in any context other than the victim-impact innovation, and it outweighed its quite limited probative value.

Before taking up respondent's argument on this point, it is necessary to

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[58]AOB 299, citing *People v. Guerra* (2006) 37 Cal. 4th 1067, 1083, 1164; *People v. Cornwell*, *supra*, 37 Cal. 4th 50, 64, 104–105; *People v. Wilson* (2005) 36 Cal. 4th 309, 355–356, 361; *People v. Lenart* (2004) 32 Cal. 4th 1107, 1117, 1133–1134; *People v. Ochoa* (2001) 26 Cal. 4th 398, 420–421, 460; but see *People v. Roldan* (2005) 35 Cal. 4th 646, 725.

consider some language which has crept into this Court's opinions since the filing of appellant's opening brief. "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a)." (*People v. Lewis and Oliver, supra*, 39 Cal.4th at pp. 1056–1057; accord, *People v. Brady, supra*, 50 Cal.4th 547, 574.) The only support for this formulation as a state-law test was a citation to *People v. Edwards, supra*, 54 Cal.3d 787, 835–836. But *Edwards* cautioned trial courts what to avoid; it did not purport to set a standard for what is and is not admissible. Quoting *People v. Haskett, supra*, 30 Cal.3d at page 864, and citing cautionary language from *Payne* as well, the *Edwards* court wrote,

> Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(54 Cal.3d at p. 836, brackets in original.) The *Haskett/Edwards* language was not an attempt to formulate a test for what is admissible. The Court has never attempted to justify quoting—or, rather, misquoting—a phrase from it and saying that all testimony that does not invite "a purely irrational response" is per se admissible under state law. Doing so is to suggest that as long as there is a potential for *some* degree of rationality to still linger in the jurors' decision-making—a test that will always be met no matter how grave the onslaught on their emotions—highly inflammatory evidence can come in.

Again, this is not how the law of evidence works in any other area—rather, an actual inquiry into the risk of biasing the result is undertaken, and with far more caution.[59] If the death-penalty context evokes a different treatment, there should be more caution, not less.

In any event, respondent characterizes the quantity of testimony admitted in this case as "reasonable" (RB 209), asserts that its quality was that of "standard victim impact testimony" (RB 212), and implies the strange proposition that it has been established as a matter of law that testimony about the impact of a murder on survivors can never be particularly inflammatory. As to this last, respondent, in asserting that the evidence here was not inflammatory, writes,

> It is well-established that testimony by family members about the various ways their lives were adversely affected by a victim's death is proper. [Citations.] That families are aggrieved is an "obvious truism" and an "obvious and predictable" consequence of murder. (*People v. Sanders* (1995) 11 Cal.4th 475, 550.) While victim-impact evidence is obviously emotional, it is not surprising or shocking. (*Id.*)

(RB 215.) Certainly there are cases in which the testimony admitted was found not to be unduly inflammatory. But neither *Sanders* nor any other authority holds that this will be true everywhere and always. "Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." (*Payne v. Tennessee*, *supra*, 801 U.S. at p. 836 (conc. opn. of Souter, J.); see also *id.* at p. 831 (conc. opn. of O'Connor, J.) [referring to "[t]he possibility that this evidence may in some cases be unduly inflammatory"].) Indeed, there was no victim-impact testimony at all in the

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[59]See AOB 232–233 and cited cases.

case that respondent quotes; the issue was about prosecutorial argument concerning the likely impact on the victims' families and friends. (*People v. Sanders*, *supra*, 11 Cal.4th 475, 550.)

The other statement attributed to *Sanders*, a generalization that victim-impact evidence, though emotional, is not surprising or shocking,[60] does not appear in the opinion at all. Nor has respondent cited authority holding that testimony must be surprising or shocking to be inflammatory or risk a substantial prejudicial impact. Rather, even Evidence Code section 352—not to mention the narrower constraints of the Eighth Amendment—must be considered when evidence is "likely to engender sympathy for the victim . . . [or] to arouse the emotions of the jurors . . . ." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016.)

As explained in the introduction to this argument, respondent also emphasizes that much of the testimony covered topics brought up by witnesses in other cases, where this Court found the testimony to be admissible. (RB 211, 215–218.) This is beside the point, since appellant does not argue that particular subjects are per se out of bounds. Respondent's argument contains no statement of the law concerning evidence that can have both probative value and a prejudicial impact on penalty deliberations. Respondent's digression into examples of subjects covered in other trials does not tend to show that the volume, scope, and quality of the testimony admitted here did not have a powerful emotional impact.

1. The Testimony Was Overwhelming

a. The Qualitative Nature of the Evidence

Normally an appellant soft-pedals facts that make him or her look bad,

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[60]RB 215, citing 11 Cal.4th at p. 550.

and the respondent emphasizes them. Here a strange reversal belies respondent's claim that the victim-impact testimony was so slight in quantity (RB 209) and had so little emotional or inflammatory power (e.g., RB 212) that it could not have affected the penalty verdict at all. For respondent outlines the evidence in two pages of its argument (RB 216–218), while appellant details it in 28 (AOB 138–166). Appellant's summary is what is required to "get" the heart-rending testimony and develop some feel for how it must have affected the jury; respondent would have the Court rely on an overview that is dry, technical, and abstracted from what the jury really heard.

Respondent emphasizes that the transcribed testimony occupies less than 100 pages. (RB 220.) This fact makes not unreasonable appellant's request (AOB 138) that the Court read it, and try to read it as a juror would hear it, just as the Court examines photographs challenged as inadmissible, photographic lineups claimed to be suggestive, and disputed video- and audiotapes. It is extremely doubtful that the Court can read that testimony, even in a "cold record," without becoming choked up with feeling, angry at both appellants, or deeply disturbed at how horribly so many people were affected by these crimes in a way that qualitatively differs from the usual impact of reading an abstract summary of the facts of these cases. One cannot read those pages and accept respondent's implicit position that the evidence arouses no biasing emotional response rising even to the level of that produced by evidence routinely banned as inflammatory, like the fact of a civil defendant's being insured, which is excluded even when relevant to some

other issue,[61] or evidence of a crime victim's drug use.[62]

b. The Quantity of the Evidence

As to the quantity of the testimony, any characterization of its volume raises the question, "Compared to what?" In *Payne v. Tennesee* there was one question about the effect of the crime on a survivor who witnessed it, and a 52-word, six-sentence answer.[63] *Id.* at pp. 814–815. In the case in which this Court first admitted victim-impact evidence, the evidence was three photographs of victims taken while they were alive. (*People v. Edwards* (1991) 54 Cal.3d 787, 832.)

There were 96 pages of testimony here. (RT 49: 7276–7372.) In contrast, a prosecutorial victim-impact argument that was reproduced in two pages of the United States Reports was considered "extensive" by both the United States Supreme Court and the Supreme Court of South Carolina. (*South Carolina v. Gathers, supra*, 490 U.S. 805 , 808–810, 810 [quotation]; *State v. Gathers* (S.C. 1988) 369 S.E.2d 140, 144.) In Texas, victim-impact testimony that covered less than two pages of the case reports was characterized as a witness's testifying "at length." (*Haley v. State* (Tex. App. 2003) 113 S.W.3d 801, 816–817, aff'd (Tex.Crim.App. 2005) 173 S.W.3d 510.) As appellant has already observed, prosecutors in many published cases

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[61] *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 16–17 & fn. 23; 1 Witkin, Cal. Evid. (4th ed. 2000) Circum Evid, § 133, p. 482.

[62] *People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Kelly* (1992) 1 Cal.4th 495, 523 See AOB 231–233 for other examples of evidence normally considered inflammatory.

[63] This would occupy a fifth to a quarter of a page in the testimony of one of the victim-impact witnesses here, so the quantity here was about 400 to 500 times as great. Appellant's earlier estimate of 200 times (AOB 135) was in error.

have chosen, or been required, to present testimony that was far shorter than what was admitted here, and yet they succeeded in obtaining death verdicts.[64] The Indiana Supreme Court found 29 pages of testimony by three witnesses, which was admitted erroneously, to be such a major presentation that it found it prejudicial without even needing to consider the remaining evidence before the jury. (*Lambert v. State* (Ind. 1996) 675 N.E.2d 1060, 1065.) This Court described 37 pages of testimony that was of a quality like that provided here as "extensive[]." (*People v. Robinson* (2005) 37 Cal. 4th 592, 644.) Yet to respondent, who declines to acknowledge *Robinson*, or any of these previously-cited[65] authorities, a characterization that the 96 pages of testimony here was voluminous "is simply not true." (RB 209.) Perhaps cases reach this Court in which there was even more testimony. But a half marathon is still a long race even if some people run marathons. The testimony in this case was extensive in absolute terms and by the standards of the cited precedents.

2. Respondent's Standards Ignore Those of Sister States

Respondent's page-number analysis and conclusory characterizations cavalierly brush aside concerns about the quantity and quality of the testimony

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[64]AOB 226 and fn. 119, citing *United States v. Stitt* (4th Cir. 2001) 250 F.3d 878, 898 (**3 victims, 19 transcript pages**); *People v. Cornwell* (2005) 37 Cal. 4th 50, 64 (**one witness, "brief testimony"**); *Smith v. Gibson* (D.Okla. 2002) 2002 U.S. Dist. LEXIS 27527, *216 (**9 pages**). *State v. Irish* (La. 2002) 807 So. 2d 208, 215 (**5 pages**); *State v. Miller* (La. 2000) 776 So. 2d 396, 412 (**4 witnesses, 15 pages**); *Crawford v. State* (Miss. 1998) 716 So. 2d 1028, 1054 (conc. opn. of Banks, J.) (**6 pages**); *State v. Jacobs* (N.M. 2000) 10 P.3d 127, 152 (dis. opn. of Serna, J.) (**2 witnesses, 17 pages**); *State v. Green* (Ohio 2000) 738 N.E.2d 1208, 1235 (conc. opn. of Cook, J.) (**15 pages**); *Dodd v. State* (Okla.Crim.App. 2004) 100 P.3d 1017, 1046, fn. 8 (**2 victims, 26 pages; no witness testified for more than 5 pages**).

[65]AOB 176, fn. 96.

admitted here. And respondent ignores the constraints adopted by the many other jurisdictions—most of which are not particularly known for sympathy towards capital defendants—which take a far more cautious view than California currently does. Texas trial courts are instructed by the highest state court with criminal jurisdiction to "guard against the potential prejudice of 'sheer volume,' barely relevant evidence, and overly emotional evidence. A 'glimpse'[66] into the victim's life and background is not an invitation to an instant replay." (*Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 336.) The New Mexico Supreme Court, citing *Payne* for the proposition that inflammatory evidence still must be excluded, requires victim-impact evidence to be "brief and narrowly presented." (*State v. Clark* (N.M. 1999) 990 P.2d 793, 808, citing *Payne*, *supra*, 501 U.S. at p. 825 and *id.* at p. 831 (conc. opn. of O'Connor, J.).) Louisiana's high court allows evidence "[i]nforming the jury that the victim had some identity or left some survivors," while cautioning against "introduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors . . . ." (*State v. Bernard* (La. 1992) 608 So. 2d 966, 971, 972.) Witnesses may testify generally "that they missed [the victim] very much, and that they were deeply affected," without being questioned "about particular aspects of their grief" or giving "detailed responses to general questions." (*State v. Taylor* (La. 1996) 669 So.2d 364, 372.)

The testimony exceeded what other states would permit as well. Florida limits evidence to "the victim's uniqueness as an individual human being and

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[66]The reference is to the *Payne* opinion, which held that the Constitution permits a state to offer "'a quick glimpse of the life' which a defendant 'chose to extinguish' . . . ." (501 U.S. 808, 822, citations omitted.)

the resultant loss to the community[]," excluding bereavement-trauma testimony altogether. (*Windom v. State* (Fla. 1995) 656 So.2d 432, 438.) Tennessee, while permitting some testimony about the survivors' loss, requires trial courts reviewing proposed victim-impact evidence in limine to be particularly cautious in allowing "evidence regarding the emotional impact of the murder on the victim's family." (*State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891; see also *State v. McKinney* (Tenn. 2002) 74 S.W.3d 291, 309; *Turner v. State* (Ga. 1997) 486 S.E.2d 839, p. 842 [Georgia court approves statements that did not "provide[] a 'detailed narration of . . . emotional and economic sufferings of the victim's family'"].)

In New Jersey, too, "[t]he testimony can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests." (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180.) While it "can describe *generally* the impact of the victim's death on his or her immediate family," it "should be factual, not emotional, and should be free of inflammatory comments or references." (*Ibid.*, emphasis added; accord, *United States v. Glover* (D.Kan. 1999) 43 F.Supp.2d at pp. 1235–1236.) Finally, at least two jurisdictions seek to contain victim-impact testimony by limiting it to one witness per victim. (*State v. Muhammad, supra*, 678 A.2d at p. 180; 725 Ill. C.S.A. 120/3(a)(3), 120/4(a)(4).)

All of this information was in appellant's opening brief.[67] Respondent fails to comment on the jurisprudence of other jurisdictions requiring brevity and generality in comments about the victim and about the difficulties the survivors faced (where the latter testimony is admissible at all), the standards of which were clearly violated here. Respondent's only rejoinder is that this

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[67]At pages 134, 135 and fn. 83, 180–185, 226 and fn. 119.

Court and others have approved of more than one witness per homicide victim. (RB 209–210.) But the point is not that the particular constraint must be adopted; the point is that *some* constraints, and some guidance to the trial courts and counsel, are required, because their absence leaves the door open to the extremely evocative testimony provided to appellant's jury.

In the same vein, respondent asserts that there were "a reasonable six witnesses" for the three homicides. (RB 209.) Apart from the fact that most testified at great length and all went into excessive, evocative detail, respondent overlooks the fact that many described what they believed to be the effects of the crime on other people, to the point that the losses and trauma of 17 people were put before the jury. (See RT 49: 7276–7371, summarized at AOB 138–166.)

In sum, respondent has not successfully challenged either the fact that the testimony was indeed voluminous in comparison to even a case in which this Court found testimony occupying 40% as many transcript pages to be "extensive[],"[68] nor the fact that its emotional impact was extremely intense and well beyond anything tolerated in any other judicial context.

3. Respondent's Attempt to Substitute Precedent for Analysis Misses the Mark

Respondent's seemingly-impressive catalog of this Court's precedents upholding admission of testimony on subjects similar to those covered by the witnesses against appellant could obscure what respondent avoids, i.e., most of what is truly relevant to whether the *totality* of the victim-impact evidence admitted *in this case* had a significant inflammatory or prejudicial potential. Respondent fails to acknowledge, much less grapple with, the following

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[68] *People v. Robinson, supra*, 37 Cal. 4th 592, 644.

principles:

- The Eighth Amendment and the Due Process Clause of the Fourteenth Amendment clearly require a case-by-case review of whether the evidence admitted in a particular case could lead to an emotional, rather than rational, jury response and a non-individualized sentence (see AOB 167–170);
- this Court's cases originally permitting the use of victim-impact testimony emphasized the need for trial courts, "*[i]n each case*," to carefully balance "the probative and the prejudicial" and exclude testimony "that diverts the jury from its proper role or invites an irrational, purely subjective response," principles which the Court has never explicitly questioned;[69]
- The United States Supreme Court ultimately held victim-impact testimony to not be per se inadmissible only because four members of the majority expected lower courts to exercise careful, case-by-case control of how far the testimony and argument would go in each case;[70]
- Language in some of this Court's cases seeming to suggest that only in an extreme case could victim-impact evidence raise

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[69]*People v. Haskett* (1982) 30 Cal.3d 841, 864, emphasis added; *People v. Edwards*, *supra*, 54 Cal.3d 787; accord, *People v. Panah* (2005) 35 Cal.4th 395, 495. See AOB 170, 172–175.

[70]*Payne v. Tennessee*, *supra*, 501 U.S. 808, 831 (conc. opn. of O'Connor, J., joined by White and Kennedy, JJ.), 836–837 (conc. opn. of Souter, J., joined by Kennedy, J.), cited at AOB 180. These opinions represent the views of four members of the six-person majority, explaining why they were willing to end the former prophylactic ban on the use of victim-impact evidence altogether.

constitutional concerns developed incrementally and without analysis[71] and, taken literally, violates federal constitutional principles.[72]

Respondent addresses none of these points.

Besides ignoring the need for a case-by-case analysis and seeking to obscure the actual power of the testimony present here, respondent further leaves unacknowledged, and unrebutted, the following elements of appellant's analysis of the prejudicial impact of the testimony used against him:

- this Court has acknowledged that a stipulation that a murder victim's mother knew he was unarmed, from hugging him goodbye when she last saw him, was "highly inflammatory,"[73] that a brief description of his religious views "obviously carried the potential to inflame the passions of the jury",[74] and that another victim's always carrying a prayer book had a significant potential for prejudice;[75]
- appellant's trial judge described the day that victims' survivors testified as "a very painful and agonizing [day] for everyone who was in the courtroom";[76]
- other judicial accounts of the impact of such testimony are of the

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[71]See AOB 171–180.

[72]See AOB 176–187.

[73]*People v. Gurule* (2002) 28 Cal.4th 557, 622.

[74]*Id.* at p. 624.

[75]*Id.* at p. 654; see AOB 231–232.

[76]9/9/2002 RT 318, cited at AOB 234. His more extensive comments on why it was a day he would always remember are quoted at AOB 132.

same tenor;[77]

- the prosecutor acknowledged to appellant's jurors that that day was "one of the hardest days of your life" and that "the pain, the heartache, the fear" that his witnesses had described "is so overwhelming that it's hard even to listen to it";[78]
- the context—a subjective sentencing decision, not an objective fact-finding process—not only made it more difficult to put aside emotion, but left jurors without much reason for doing so;[79]
- empirical studies support the conclusion that victim-impact evidence has a strong influence on jurors' votes despite its low probative value;[80]
- as noted above, other jurisdictions, including even Texas, see the federal constitution and fundamental fairness as requiring far more caution in regulating victim-impact evidence than what respondent advocates;[81]
- in some jurisdictions the controls were adopted at the initiative

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[77]See quotations at AOB 235 and 236, including one from another Riverside California judge, who defended the admission of testimony that required him to stop listening in order to maintain his composure.

[78]RT 54: 8087, 8003, respectively, quoted at AOB 237.

[79]See AOB 237–238 and cases cited; see also *People v. Leonard* (2007) 40 Cal.4th 1370, 1418 ["emotion need not, indeed, cannot, be entirely excluded from the jury's moral assessment"].

[80]See AOB 238–240.

[81]See AOB 180–186.

of prosecutors;[82] and

- as noted above, whether or not the evidence used here waswhat in California is now a "standard victim impact" case,[83] its obvious emotional impact was qualitatively greater than many types of evidence routinely banned in various civil and criminal contexts because of their potential to inflame and divert a jury.[84]

Respondent never addresses the powerful emotional pull of victim-impact testimony, something normally not questioned even by advocates for its use.[85] Respondent cannot explain why the high court was divided over whether victim-impact evidence was admissible at all or take into account that, when it reversed itself, it acknowledged that there were risks of prejudice that required control.[86] It never acknowledges the jurisprudence of this Court that originally banned even mild precursors to victim-impact testimony,[87] or, again, when such testimony was permitted, used strong language about caution and

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[82]See AOB 185, discussing *Turner v. State*, *supra*, 486 S.E.2d 839, 842, fn. 5; *State v. Muhammad*, *supra*, 678 A.2d 164, 179–180.

[83]RB 212.

[84]See AOB 231–233.

[85]See, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 495, quoting *People v. Edwards*, *supra*, 54 Cal.3d at p. 836; see also the portions of *People v. Gurule*, *supra*, quoted above at p. 80.

[86]*Payne v. Tennesee* (1991) 501 U.S. 808, overruling in part *Booth v. Maryland*, *supra*, 482 U.S. 496; see discussion of these cases and concurring opinions in *Payne* at AOB 291, fn. 181.

[87]*People v. Love* (1960) 53 Cal.2d 843, 857 (evidence of victim's suffering "served primarily to inflame the passions of the jurors").

control.[88] The sensitivity to the need of society to not have people put to death because of emotional manipulation by zealous prosecutors, a sensitivity which led, for example, Nevada's high court to ban even a sentence in argument reminding the jurors that the family of the victim would spend no more holidays with her[89] is entirely foreign to the consciousness which respondent wants this Court to continue to bring to the issue. In a state where it is proper to exclude relevant evidence that a witness is a prostitute because of its possible inflammatory impact on the jury's evaluation of her credibility,[90] respondent insists that the evidence here was "not . . . inflammatory" at all. (RB 217.)

Be that as it may, any honest appraisal of the testimony must acknowledge that its prejudicial impact was intense. The criminal-justice system does not normally subject jurors to such heart-rending testimony at all, and civil trials do only when necessary to show the extent of a compensable loss. When there may be a clear need to do so, the question of balancing the interests involved should not be approached in the dismissive fashion advocated by respondent. Rather, it should be done with the caution demanded

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[88]*People v. Haskett* (1982) 30 Cal.3d 841, 864; *People v. Edwards*, *supra*, 54 Cal.3d 787, 835–836; see also *People v. Bacigalupo* (1991) 1 Cal.4th 103, 152–154 (conc. opn. of Mosk, J.) (need for clear instructions to minimize the harm caused by victim-impact evidence); *People v. Hovey* (1988) 44 Cal.3d 543, 586 (conc. opn. of Mosk, J.) (references to "devastating impact" of testimony and likelihood of inflaming and diverting jury)

[89]*Hollaway v. State* (Nev. 2000) 6 P.3d 987, 993, 994. Here the prosecutor asked five out of his six witnesses what holidays were like now, then reread several of the responses in his summation. (RT 49: 7298, 7315, 7341, 7352, 7370; 54: 8009, 8011, 8088.)

[90]*People v. Phillips* (2000) 22 Cal.4th 226, 234.

by this Court when it held that even prosecutorial argument pointing out the likely impact on victims needs attentive regulation by trial courts "strik[ing] a careful balance between the probative and the prejudicial" and excluding "irrelevant information . . . that diverts the jury from its proper role or invites an irrational, purely subjective response . . . ." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Since this is to be done "[i]n each case" (*ibid.*), appellant is entitled to a fresh look at what was presented here. No review of the testimony, undertaken with an understanding of what *prejudicial effect* normally is understood to mean in the context of a jury trial, can conclude that there was not an effect of such gravity that it would take a great deal of probative value to justify its admission.

D. The Testimony Confused the Issues

1. The Testimony Wrongly Encouraged the Jurors to Choose Which "Side" Was Worthier of Sympathy and to Believe That Only the Harshest Sentence Could Respond to Such Grievous Harm

With victims' survivors supporting—at length—the prosecution's case for death, the jurors' ignorance of the rule prohibiting the defense from calling other family members or close friends to express their desire for a life verdict,[91] and a mitigation case dependent on witnesses from appellant's family, another fatal dynamic was added to the penalty deliberations. The jury was left with the false impression that the it was to weigh sympathy for the victims' family against sympathy for appellant and his family. As appellant argued in the opening brief, this was not the weighing that the law calls for, and it was a contest appellant had to lose. The question should have been what was the appropriate way to punish appellant, given what he did, who he was,

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[91] *People v. Smith*, *supra*, 30 Cal. 4th 581, 622–623.

and how he got to be who he was. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267–1268.) It is not only appellant's view that victim-impact testimony, especially if extensive, creates confusion about this task; scholarly research and judicial authorities discussed in the opening brief illuminate the phenomenon.[92]

Closely related to the contest-of-sympathies issue was the creation of an impression that the suffering of the victim-impact witnesses and the 11 other people whose experiences they described itself demanded the most severe sentence available. This flew in the face of the jury's task being "to tailor the defendant's punishment 'to his personal responsibility and moral guilt.'"[93] As a New Mexico Justice has pointed out, the jury is implicitly but clearly being asked to do something about the family's pain, i.e. to return a death verdict.[94] In an Ohio vehicular homicide case, a sentencing judge erred, after hearing a number of victim-impact witnesses, by choosing a sentence that

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[92]AOB 241–244, citing *State v. Smith* (Ohio App. 2005) 2005 Ohio 3836; *State v. Carter* (Utah 1994) 888 P.2d 629, 652; *State v. Allen* (N.M. 1999) 994 P.2d 728, 772 (conc. & dis. opn. of Franchini, J.); *State v. Muhammad*, *supra*, 678 A.2d 164, 196 (dis. opn. of Handler, J.); Haney, Death by Design: Capital Punishment as a Social Psychological System (2005) p. 156 [citing Nusbaum, Upheavals of Thought: The Intelligence of Emotions (2001), p. 447, and Bandes, *Empathy, Narrative, and Victim Impact Statements* (1997) 63 U.Chi. L.Rev. 361]; Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims* (2003) 88 Cornell L.Rev. 343, 372–373; Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike* (1993) 41 Buff. L.Rev. 85, 86–87, 127.

[93]*People v. Beeler* (1995) 9 Cal.4th 953, 991, quoting *Enmund v. Florida* (1982) 458 U.S. 782, 801; see also *Tison v. Arizona* (1987) 481 U.S. 137, 156.

[94]*State v. Allen* (N.M. 1999) 994 P.2d 728, 772 (conc. & dis. opn. of Franchini, J.), cited at AOB 244.

would not "demean the seriousness of the offense." The appellate court noted that the trial judge lost sight of the fact that the loss of life it was referring to would be true of any vehicular homicide, and it attributed the error to the volume of the victim-impact testimony which the lower court had heard.[95] Surely a lay jury is even more susceptible to the error of thinking that the sentence had to be the harshest available in order to adequately recognize the survivors' loss.

The closest respondent has to an answer to any of this is a statement that "it was proper for the prosecutor . . . to argue that death is the only appropriate means for redressing the loss" of a unique victim, citing *People v. Montiel* (1993) 5 Cal.4th 877, 935, and *People v. Clark* (1993) 5 Cal.4th 950. While appellant has noted that the jury-confusing dynamic created by the victim-impact presentation was reinforced by prosecutorial argument, he has made no claim of prosecutorial misconduct.[96] In any event, it is true that *Montiel* assumed the propriety of argument about redressing the victim's loss. But that question was not at issue and received no analysis in the opinion.[97]

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[95]*State v. Smith* (Ohio App. 2005) 2005 Ohio 3836, discussed at AOB 244.

[96]See AOB 248.

[97]The entire discussion: "Defendant asserts the prosecutor improperly argued that the victim's family favored the death penalty. However, a reasonable jury would interpret the prosecutor's plea for death 'for' the victim's 'children and family' as merely a claim that the supreme penalty was the only appropriate means of redressing the injury. " *Id.* at p. 935. No authority was provided in support of the assumption that it was proper to argue that punishment should be assessed according to what is necessary to redress the injury.

In citing *Clark*, respondent gives no valid point page.[98] The case does discuss prosecutorial argument about the victim. (5 Cal.4th at pp. 1033–1034.) The only sentence conceivably relevant to respondent's contention is this: "It is permissible for the prosecutor to urge that the jurors remember the victim and the life that she might have led." (5 Cal.4th at p. 1034.) This is not an endorsement of argument either that the jury should assess a penalty commensurate with the survivors' losses, or that the penalty question is a matter of which side most deserves the jury's sympathy—much less a procedure that piles on so much victim-impact evidence that the jury is left with the impression that these questions are largely what the penalty trial is about. Neither this nor the *Montiel* comment demonstrates that extensive victim-impact testimony does not have the effect of confusing a jury—at least one unguided by a limiting instruction[99]—about its tasks.

2. Irremediable *Booth/Payne* Violations Strengthened the Survivors' Role as Advocates for Death

The Eighth Amendment forbids "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence . . . ." (*People v. Smith* (2003) 30 Cal.4th 581, 622, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2; see also *Booth v. Maryland*, *supra*, 482 U.S. 496, 508–509.) Violations of this restriction are almost inevitable when witnesses are permitted to answer open-ended questions about their experience, rather than reading prepared statements. It is only natural, when asked for one's reaction to a loved one's murder, to include one's thoughts about the senselessness or brutality of the crime, as the

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[98]Respondent cites "5 Cal.4th at p. 950"(RB 212), but page 950 is the first page of the opinion.

[99]See appellant's Argument III.

testimony in this case illustrated.[100] Here there were a number of such *Booth/Payne* violations. In any event, while not emphasizing a free-standing *Booth/Payne* claim, since the violations were only a part of what made the victim-impact case a disaster for fair adjudication of the penalty, appellant argued that when family members repeatedly gave their opinions of the crimes and those responsible, the testimony heightened the tendency to portray the jury's task to be determining whether sympathy for the victims and their survivors outweighs sympathy and other considerations favoring the defendant, and the consequent urge to vindicate the survivors. (AOB 244–248.) Respondent ignores this point but does address whether there were *Booth/Payne* violations.

The most extensive offending comments, containing direct appeals to the jury; powerful, argumentative characterizations of what the defendants did; and an eloquent, entirely prosecutorial portrayal of what her stepson must have experienced, came from Lydia Roybal-Aragon. (RT 49: 7289, 7301, quoted at AOB 245–246.) There is no way to deny that her statements were forceful opinions about the crime and the perpetrators, and respondent does not deny it directly.[101] However, respondent purports to summarize the complained-of testimony, while omitting most of it and paraphrasing *other*

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[100]See AOB 245–246 and cited portions of the record.

[101]There is no doubt that this and other testimony fell into the banned categories. *Booth*: "She can't believe that anybody would do that to someone." (482 U.S. at p. 508.) Witnesses here: "[N]o one should do that to someone else" (RT 49: 7289), "I can't see . . . how they could take his life" (RT 49: 7371). *Booth*: The perpetrators "didn't have to kill, because there was no one to stop them from looting." (482 U.S. at p. 508.) Here: It was "senseless, . . . sadistic meanness." (RT 7289.) Most of the rest of the testimony (quoted at AOB 245–246) was actually more inflammatory.

parts of Roybal-Aragon's presentation. (RB 217–218.) This attempted deception only highlights the truth of appellant's contention.

In the offending testimony, Roybal-Aragon answered questions about whether the impact on her was worse than if it had been an accident, and the effect on her of thinking about what her stepson had gone through. A prepared, appropriately-vetted statement could have answered those questions without violating *Payne* and *Booth*:

> The fact that it was intentional made it harder to accept because it seemed like it shouldn't have happened. And what I was told about the defendants' specific behavior is very hard for me to deal with. I often imagine the last moments of his life, and doing so is heart-breaking.

Instead she gave what added up to over a full page of specific characterizations of the crimes and the perpetrators, by way of sharing the ruminations that were part of her reactions.[102]

Respondent relies on *People v. Pollock*, *supra*, 32 Cal.4th 1153, without, however, responding to appellant's analysis of it. (RB 219; cf. AOB 247.) *Pollock* accepted the admission of such characterizations—although it appears that they were not nearly as colorful and extensive as here—on the basis that they laid a foundation for explaining how the crimes had affected the witnesses. (*Id.* at p. 1182.) The *Pollock* holding, if extended as respondent believes it should be, would clearly violate *Booth* and *Payne*. Those cases require exclusion of family members' characterizations of the crime and the criminals because

> the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime

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[102]See AOB 245–246, quoting RT 49: 7289, 7301.

> and the defendant. . . . The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.

(*Booth v. Maryland*, *supra*, 482 U.S at pp. 508–509.) Nothing in that reasoning permits the conclusion that the ban can be evaded by repackaging characterizations of the crime and defendants as part of the thoughts that the witnesses have to deal with in their internal experience.

Pollock's explanation for a contrary conclusion was that the statements at issue elaborated on how the crimes affected the witnesses, a category of evidence which this Court believed *Payne* held to be generally admissible. (32 Cal.4th at p. 1182.) But the disapproved characterizations of the crimes and criminals in *Booth* were integrated into the victim-impact statement in the same manner. They were part of a free-flowing narrative, and they definitely helped illuminate the family members' pain and anger. (*Booth v. Maryland*, *supra*, 482 U.S at pp. 508, 511–512, 513.) Similarly, in a more recent federal case, a Navajo witness testified, "It's been really hard . . . to know that someone within our own kind, our own people would be so disrespectful for our own culture and our own belief, our own traditional values, how we teach our young people." (*United States v. Mitchell* (9th Cir. 2007) 502 F.2d 931, 990.) This, too, was testimony about the witness's experience, but it also "was an inadmissible opinion about [the defendant]'s crime[,] and the error was obvious . . . ." (*Ibid.*)

If *Pollock's* holding has the breadth which respondent attributes to it, there would be no need for *Payne's* distinction[103] between testimony about the impact of crimes on the victims' survivors and those person's characterizations

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[103]501 U.S. at p. 830, fn. 2.

of the crimes and perpetrators. In every case, how the witnesses view the crimes and the defendants will affect how they are impacted emotionally.

Moreover, the high court's distinction between evidence of the impact of the crimes on loved ones, and the loved ones' views of the crimes and the perpetrators, represents an implicit but obvious probative-value/prejudicial-effect analysis. At appellant's trial, a powerful case regarding the harm done to the witnesses could have been made without adding "emotionally charged opinions as to what conclusions [about the perpetrators and the nature of their conduct] the jury should draw from the evidence." (*Booth v. Maryland, supra*, 482 U.S at pp. 508–509.) A brief, abstract reference to the circumstances of the crimes, such as the version suggested for Roybal-Aragon on page 89, above—circumstances well known to the jurors—explains a witness's emotional reactions just as convincingly as a personal characterization of those circumstances does. The probative value is obtained without adding the far more prejudicial details about the witnesses' opinions about the defendants and their crimes.

Appellant argued in his opening brief that *Pollock's* apparent summary conclusion to the contrary is mistaken, at least if extended beyond its facts. Respondent has no answer, despite its total reliance on *Pollock*.

Even if the still-vital constraints of *Booth v. Maryland* could be avoided under *People v. Pollock*, respondent overlooks the extent to which the testimony complained of here does not even fall under *Pollock*. Some of Roybal-Aragon's characterizations of the crimes and perpetrators were, in fact, part of an explanation of what was hard for her. (RT 49: 7289.) But a lengthy portrayal of what she thought were Aragon's final moments—which in many

states would not even have been permitted in prosecutorial argument[104]—was not. (RT 49: 7301.) Similarly, Stephanie Aragon had already described her struggle understanding her brother's death; her adding that what the defendants did was to "come up to him and just take him away like they owned him" (RT 49: 7324) was certainly not permitted by *Pollock*. And only a broad construction of *Pollock*, one which would turn it into a gaping evisceration of *Booth*, would justify admission of James Jones's testimony.[105]

But determining whether any of the challenged statements managed not to violate *Booth*, as potentially reinterpreted in *Pollock*, is following a tributary of appellant's claim while ignoring the river, which respondent navigates away

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[104]See AOB 246, citing *People v. Spreitzer* (Ill. 1988) 525 N.E.2d 30, 45 (it was "highly improper . . . to invite the jurors to enter into some sort of empathetic identification with the victims"); *Von Dohlen v. State* (S.C. 2004) 602 S.E.2d 738, 745 (listing numerous jurisdictions that ban such argument as inviting jurors to decide case from a biased perspective).

Angela Mans and Catherine Mans also characterized the crimes by providing opinions about their loved one's final moments. One thought she saw fear on the face of Timothy's body; the other pictured him struggling for breath at the end. These portrayals happened to be couched in terms that would fall under *Pollock*. (RT 49: 7349, 7350, 7344.)

[105]Asked if the murder affected him differently than a fatal illness or accident would have, he replied in the affirmative, adding—probably mistakenly, according to the psychological literature—that he could have understood the latter more easily. Then he went on, unnecessarily sharing compelling details about his thought process that were also a powerful characterization of the crime:

> But I can't see that anyone would want to take a kind and generous kid like he was, and probably who would have hugged him and kissed him and told him that he loved him, how they could take his life.

(RT 49: 7371.)

from. First, *Pollock* is not good law if it is understood to permit violating the rule in *Booth* which the United States Supreme Court left intact in *Payne*, and all of the challenged statements violated that rule.[106] Even if they did not, they potentiated the greater problem of a process that set up the victims' family members as advocates for the prosecution's case for death, juxtaposed against the defendants' family members as advocates for mercy, and thus made inescapable the conclusion that the jury's job was, as the prosecutor argued, to judge the winner in "a battle for your sympathy and compassion."[107] (RT 48: 7271.)

In sum, the testimony was not only as inflammatory as testimony gets and extremely weak on probative value; it also confused and misled the jury as to the question before it. This is another reason why its admission, to the extent and in the form that it came in, was therefore error. (U.S. Const., 8th and 14th Amends.; Evid. Code § 352.)

3. The Prosecution's Focus on Appellant's Least Serious Crime But the One With the Most Appealing Victim and Witnesses Exemplified and Heightened the Problem of Juror Confusion

Confusion of the issues on which the jury was to focus was both confirmed and heightened by the prosecution's disproportionate focus on the homicide in which appellant had the least involvement, but which permitted the most appealing victim-impact presentation.

The prosecution case, as presented through Jose Munoz, showed appellant to be far more involved in the Mans-Jones shootings than the Aragon

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[106]Their incorrectability via motions to strike is discussed at pp. 66–67, above.

[107]The prosecutor's argument reinforced this conception in several other ways as well. (See AOB 248.) Respondent does not disagree.

killing. (See AOB 249–251.) Yet more than half of the victim-impact case was devoted to Aragon, who was a much more appealing victim, and whose family could present themselves more articulately. (See AOB 251–252.) This was not a mere byproduct of the joint trial: when the prosecutor read extensively from the victim-impact testimony in argument—to appellant's jury alone—twice as much came from the Aragon witnesses as from those from either the Jones or Mans families. (RT 54: 8008–8018.) This reflected a serious threat to the "special need for reliability in the determination that death is the appropriate punishment"[108] that was one of the reasons why the high court initially banned victim-impact testimony: those who killed victims seen as more worthy could be more likely to be executed. The *Payne* opinion countered that the Court believed that this phenomenon was unlikely, at least within the limited scope of victim-impact evidence contemplated by that court and presented in that case.[109] Here, however, as a prosecutor took advantage of the absence of guidance from this Court on how to cabin victim-impact evidence, the presentation fell into the pitfall which *Booth* anticipated. And, once again, the bias shifted the jury's attention from the question of the appropriate sentence, given appellant's culpability, to the supposedly appropriate sentence, given the sympathy due to a victim's family.

Respondent, unable to respond, has no answer to this point.

E. The Scope of the Victim-Impact Case Violated Appellant's Eighth-Amendment and Due-Process Rights

In this section appellant assembles the pieces of his argument that a

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[108]*People v. Horton* (1995) 11 Cal.4th 1068, 1135, quoting *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, internal quotation marks omitted.

[109]Compare *Booth v. Maryland*, *supra*, 482 U.S. at p. 506 & fn. 8, with *Payne v. Tennesee*, *supra*, 501 U.S. 808, 823.

gravely excessive victim-impact presentation violated Eighth- and Fourteenth-Amendment limitations. Respondent's compilation of precedents upholding, piecemeal, particular types of testimony bypasses the logic of appellant's claim and leaves untouched his conclusion, even though many of the types of testimony cited by respondent appeared in this case. Respondent's authorities do not purport to approve a case where *all* the proof appearing in respondent's compilation was aggregated in one case, nor do they confront the claim summarized in the following paragraphs

First, the bulk of the victim-impact testimony had little probative value and actively misled the jury, because

- it failed to provide evidence that the harm caused by appellant's crimes differed from that incident to a wide range of intentional and accidental homicides, while creating the powerful illusion that the offenses actually were aggravated (i.e., worse than other death-eligible murders) because of the survivors' horrible experiences in the months and years that followed;[110]
- the state recognizes in non-death cases that harm caused indirectly to those who were not the targets of misconduct bears no rational relationship to punishment;[111]
- the evidence tended to idealize the victims and inaccurately portraying an unbroken bleakness in the survivors' lives, in a manner subject to no reality testing, while the absence of adversarial controls permitted incompetent lay psychological opinion evidence and hearsay testimony about others'

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[110]See pp. 57 et seq., above, and AOB 188 et seq.

[111]See pp. 64 et seq., above, and AOB 209 et seq.

experiences;[112] and

- the vast majority of the evidence was superfluous, adding nothing legitimate to the small amount that would have exhausted its only claimed probative value: the purported need to remind the jurors who may have finally heard the defendant humanized that murder is a serious crime that harms real people.[113]

Second, by traditional standards of prejudice—those applied to every other type of evidence—the capacity of the testimony to evoke strong emotions was extreme, i.e., of a different order of magnitude than that of evidence that normally causes courts serious concern. The painful experience of reading even a summary of the testimony[114] confirms the prosecutor's label of "overwhelming"[115] and the judge's extensive comments about its profound effects.[116] Such testimony was admitted in a realm—the "subjective" penalty-selection choice (*People v. Box* (2000) 23 Cal.4th 1153, 1201)—where feelings predominate over fact-finding. Therefore there is no real way to set aside the emotions, nor an obvious reason to do so. If this were not enough, the victim-impact case strongly, and wrongly, suggested that a major determinant of penalty was which "side" was more deserving of the jurors' sympathies. It strengthened that effect with *Booth* violations and the shift of

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[112]See pp. 65 et seq., above, and AOB 211 et seq.

[113]See pp. 52 et seq., above, and AOB 216 et seq.

[114]See AOB 138 et seq.

[115]RT 54: 8003.

[116]9/9/2002 RT 318, quoted at AOB 132, 234; see also 11/12/2002 RT 519, quoted at AOB 234

focus to the crime where appellant was least culpable but where the most powerful presentation could be made. And, in doing so, it validated longstanding concerns that victim worth will be a yardstick by which juries determine penalty.

While some of these considerations could apply to other cases, the point is that, in this case, it is an understatement to say that the victim-impact presentation was excessive. In lay terms, securing a death verdict by both misleading the sentencer and overwhelming its judgment with emotion, using testimony, the bulk of which proved nothing legitimate that had not been proven already, was simply wrong.

In terms of constitutional doctrine, there was scarcely a pertinent constraint that was not violated. The sentencer's reliance on information that was unreliable in its idealized portraits of the victims and one-sided descriptions of the lives of the survivors, unreliable for its inclusion of speculative psychological opinions and hearsay testimony about people not present, and—most especially—misleading in its appearance of showing an aggravated homicide, all meant that the sentencer lacked the accurate information required by both due process in any sentencing proceeding[117] and the Eighth Amendment in a capital one.[118] By "creat[ing] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance," the misleading and unreliable testimony further violated the Eighth Amendment

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[117]*Townsend v. Burke*, *supra*, 334 U.S. 736, 741; *People v. Chi Ko Wong*, *supra*, 18 Cal.3d 698, 719.

[118]*Gregg v. Georgia*, *supra*, 428 U.S. 153, 190 (plurality opn.); *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 590; *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 477.

by creating "bias in favor of the death penalty." Thus, factor (a), interpreted to allow consideration of such testimony—rather than appropriately guiding the jury as to what sentence to impose—became impermissibly vague.[119]

Even apart from the poor-quality information, the excessive testimony violated the Eighth Amendment's requirement of reliable capital decision-making[120] by overwhelming the jury with prejudicially emotional material, the vast majority of which had no probative value on the central issue of appellant's culpability, beyond what a much more controlled presentation would have provided. The infusion of such emotionality also violated the due-process requirement of a fundamentally fair proceeding.[121] All of these dynamics permitted arbitrary and capricious imposition of the death penalty, further rendering the proceedings at odds with the Eighth Amendment.[122] The rationality in sentencing that the Eighth Amendment requires[123] was thus absent, a fact thrown into relief by the state's disinterest in using the ripple effects of any other kind of misconduct in assessing appropriate penalties.[124]

The Eighth Amendment's further requirement of an individualized

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[119]*Stringer v. Black*, *supra*, 503 U.S. 222, 235–236; *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 473–474.

[120]*Monge v. California*, *supra*, 524 U.S. 721, 732; *People v. Horton*, *supra*, 11 Cal.4th 1068, 1134.

[121]*Payne v. Tennessee*, *supra*, 501 U.S. 808, 825; *People v. Edwards*, *supra*, 54 Cal. 3d 787, 835.

[122]*Pulley v. Harris*, *supra*, (1984) 465 U.S. 37, 53; *People v. Williams*, *supra*, 44 Cal.3d 883, 950.

[123]*Beck v. Alabama*, *supra*, 447 U.S. 625, 637–638; *People v. DeSantis* (1992) 2 Cal.4th 1198,1231.

[124]See pp. 64 et seq., above, and AOB 209 et seq.

sentencing determination based "upon the circumstances surrounding both the offense and the offender"[125] was violated, again because of the misleading use and inaccurate nature of the evidence placed before the sentencer—especially the manner in which that evidence masqueraded as being individualized to the particulars of how bad appellant's crimes were, while it was but the instantiation of generic phenomena common to sudden, violent deaths. The imperative of an accurately individualized sentencing choice was also violated by the way the rational inputs to the jury's process were overborne by emotionality.

Respondent's survey of cases where this or that type of testimony was upheld against this or that attack answers none of this. Respondent overlooks the bulk of appellant's actual argument because respondent has no answer to that argument. There was, in fact, fundamental error in the proceedings that led to appellant's receiving a death sentence.

F. The Error Was Prejudicial

If a single juror could have been influenced by trial error in performing the subjective calculus that produced his or her penalty vote, the judgment must be reversed.[126] Appellant's opening brief shows the error in the method which respondent assumes is used to analyze whether that could have happened; emphasizes the trial judge's and prosecutor's remarks on the

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[125] *People v. Musselwhite*, *supra*, 17 Cal.4th 1216, 1267–1268; see also *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.

[126] *Chapman v. California*, *supra*, 386 U.S. 18, 23 (error not harmless if it "possibly influenced the jury adversely"); *In re Lucas* (2004) 33 Cal.4th 682, 734 (question, under *Strickland* standard, is whether "there is a reasonable probability that at least one juror would have struck a different balance"), quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 537; *People v. Box*, *supra*, 23 Cal.4th 1153, 1201 (penalty decision is "subjective").

incredible emotional power of the evidence erroneously admitted and notes the prosecutor's heavy reliance on that evidence in argument; and points out the jurors' possible interpretations— undisclosed by their verdicts—of a complex body of evidence concerning appellant's role in the crimes for which he was being sentenced, as well as the possible interpretations of evidence regarding alleged factor (b) aggravation. Yet respondent fails to respond to any of this. Instead, respondent writes but four paragraphs on its own view of the harmlessness issue and asserts, in conclusory terms, that "[e]ven if the victim impact evidence had been excluded, the outcome would have remained the same."[127] (RB 221.)

Respondent sidesteps the question of how far an appellate court can go in deciding that significant evidence intended to sway a jury's subjective decision-making could not possibly have done so, implicitly inviting this Court to substitute its own view of the evidence, from a cold record, for that of a jury unaffected by error. Respondent's approach is threefold. First, it offers its own judgment that the evidence at issue was so insignificant in comparison to (respondent's view of) other aggravating evidence—which (in its view again) was not balanced by significant mitigating testimony—that it could have had no effect on a juror's decision-making. Respondent makes this bald assertion despite the facts that the victim-impact evidence left no dry eyes in the courtroom, according to the trial judge,[128] that it caused him to remark

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[127]Respondent first addresses penalty-phase prejudice in portions of its brief dealing with two other errors, but the treatment is the same. The only difference is that it expands respondent's characterization of the circumstances of the crimes somewhat, based on respondent's one-sided summary of the evidence. (RB 83, 148–150.)

[128]9/9/2002 RT 318.

spontaneously—six years later—that it was presented during a day that he "will always have with me,"[129] and that page after page of it was reread by the prosecutor in his penalty summation. Second, respondent incorporates a view of the circumstances of the crimes and appellant's role in them that unjustifiably relies on the prosecution's version of highly disputed facts and thereby ignores the contrary evidence regarding the circumstances of the crimes. Respondent handles the other-crimes evidence introduced in aggravation in the same manner. Third, respondent asks this Court to indulge the fiction that a general instruction about avoiding bias or prejudice would be taken by the jurors as clear guidance about the limited degree to which the evidence should affect them emotionally, how those emotions should affect their assigning significance to the evidence, and the degree to which the evidence actually showed anything about appellant's supposedly enhanced culpability.

None of this meets respondent's burden or answers what appellant said in Arguments I and II.G in the opening brief about why that burden cannot be met.

1. Respondent Wrongly Urges this Court to Reweigh the Penalty-Phase Evidence, Rather than Decide Whether Impermissible Victim-Impact Evidence Could Have Contributed to a Juror's Vote

Neither the Sixth-Amendment jury-trial guarantee, nor the Eighth Amendment's requirements of reliability in the securing and review of death sentences, nor basic federal due process law regarding harmlessness analysis

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[129] 9/9/2002 RT 318.

of federal constitutional error, nor this Court's *Brown*[130] test for penalty-phase harmlessness permit a reviewing court to undertake an analysis like that presented by respondent. Respondent's view, as with other errors, is that the aggravating circumstances so outweighed the mitigating circumstances that scaling back the victim-impact case to appropriate proportions could not have produced a different outcome.

If there was, however, error of substance bearing on the penalty determination, it is not possible to know, to the requisite level of certainty, that no juror was affected, as this Court long held even under the *Watson* standard.[131] To briefly recapitulate the reasons this is true, without, however, doing them justice,[132] the *Chapman/Brown* standard asks whether the error resulted in the admission of evidence "which possibly influenced the jury adversely . . . ."[133] This means, according to the United States Supreme Court, that it "might have contributed to" the result[134] or "might have affected [the] capital sentencing jury."[135] In contrast to guilt-phase factfinding, the penalty decision operates under dynamics which make it impossible to negate these

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[130]*People v. Brown* (1988) 46 Cal.3d 432, 448.

[131]See AOB 90, 101 & fn. 63, discussing *People v. Hines* (1964) 61 Cal.2d 164, 169; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; *People v. Terry* (1962) 57 Cal.2d 538, 569; *People v. Love* (1961) 56 Cal.2d 720, 733; *People v. Linden* (1959) 52 Cal.2d 1, 27.

[132]See AOB 82–98 (federal constitutional law), 98–105 (state law).

[133]*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 (in death cases, state-law test is equivalent to *Chapman*).

[134]*Chapman v. California, supra*, 386 U.S. at p. 24.

[135]*Satterwhite v. Texas* (1988) 486 U.S. 249, 258.

possibilities unless the error was truly insubstantial, like a victim-impact witness's single "do the right thing" comment in the one case on which respondent relies for its claim that any error here was not signficant enough to have affected the verdict.[136] The other exceptions are if the error helped prove a historical fact, one that was otherwise established beyond dispute,[137] or, possibly, if the error somehow could be known to have been entirely negated by curative action.[138] Otherwise, the following factors make it impossible to hold substantial error of this nature incapable of having "affected a capital sentencing jury":[139]

- appellant's right to have his fate decided by a jury not influenced by error, not an appellate court hypothesizing such a jury;[140]
- the inability of a reviewer of the record to observe witnesses'

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[136]See *People v. Lewis and Oliver, supra*, 39 Cal.4th 970, 1058, quoted at RB 220 and 221, and discussed below at page 105.

[137]Traynor, The Riddle of Harmless Error (1970) p. 73; see, e.g., *People v. Cotter* (1965) 63 Cal.2d 386, 392–398.

[138]While no such exception is in the classic statements of the problem, appellant concedes its likely propriety. See AOB 82; see also, e.g., *People v. Roldan* (2005) 35 Cal. 4th 646, 734 (untimely aggravation notice harmless where defendant still had time to prepare); *id.* at p. 739 (no prejudice from erroneous sustaining of objection to general question on mitigation where specific questions on same subject matter were subsequently answered).

[139]*Satterwhite v. Texas, supra*, 486 U.S. at p. 258.

[140]*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; see also *Satterwhite v. Texas* (1988) 486 U.S. 249, 263 (conc. opn. of Marshall, J.)

demeanor[141] and the limited capacity of such a person to develop a "'feel' for the emotional environment of the courtroom";[142]

- the inherent unknowability of what goes into the subjective weighing with which jurors are charged,[143] their being permitted to rely on mercy or sympathy[144] and being required to exercise their own normative judgment as to the significance of each fact they find;[145]
- as a consequence of the previous factors, the surprise life verdicts that juries sometimes agree on in highly aggravated cases, which demonstrate the dangers of guessing what a jury would have done;[146]

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[141]*People v. Stewart* (2004) 33 Cal.4th 425, 451.

[142]*People v. Keene* (Ill. 1995) 660 N.E.2d 901, 913; see also *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 330, 340, fn. 7; *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1024–1025.

[143]*Deck v. Missouri* (2005) 544 U.S. 622, __, [61 L. Ed. 2d 953, 965; 125 S. Ct. 2007, 2014] [factors are "are often unquantifiable and elusive"]; *Satterwhite v. Texas*, *supra*, 486 U.S. 249, 258; *People v. Robertson* (1982) 33 Cal.3d 21, 54; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; *People v. Hines* (1964) 61 Cal.2d 164, 169, disapproved on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40.

[144]*People v. Caro* (1988) 46 Cal.3d 1035, 1067; *People v. Easley* (1983) 34 Cal.3d 858, 875–880.

[145]*People v. Rodriguez*, *supra*, 42 Cal.3d 730, 779.

[146]*McCleskey v. Kemp* (1987) 481 U.S. 279, 311; McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should it Be?: An Assessment of United States and Louisiana Supreme Court Case Law* (1999) 59 La. L.Rev. 1105, 1142–1144 (McCord); see also California LWOP cases cited at pages 91–92, fn. 55, of Appellant's Opening Brief.

- the principle that reversal is required if even a single juror might have decided differently, if not influenced by error;[147]
- and the deep concern for reliability required in both the making[148] and the review[149] of a state's decision to put one of its citizens to death.

It is for these reasons that, with a substantial error, this Court cannot simply reweigh the aggravating and mitigating evidence to decide that the jury was uninfluenced by evidence that the prosecutor relied on heavily and the trial judge described as unforgettable. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279 ["The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error"].)

Respondent is mute in the face of these premises and the conclusion which flows from them. Respondent's assertions, which address this Court as if it were one of the jurors, are thus beside the point. It is an epistemological impossibility for this Court to know that no juror was pushed over the line by the victim-impact evidence, no matter how confidently respondent asserts *its* view of the aggravation-mitigation balance or a rote claim that a general injunction against bias cured the error.

Respondent quotes *People v. Lewis and Oliver*, *supra*, 39 Cal.4th 970, 1058, as if that opinion's characterizations of the evidence in that case could

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[147]*Wiggins v. Smith*, *supra*, 539 U.S. 510, 537; *In re Lucas*, *supra*, 33 Cal.4th 682, 734.

[148]*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 329, fn. 2.

[149]*California v. Ramos*, *supra*, 463 U.S. 992, 998–999; *Zant v. Stephens*, *supra*, 462 U.S. 862, 885.

appropriately apply to this one. (RB 220, 221.) Respondent neglects to mention the context. In stating that challenged victim-impact evidence "paled in comparison to other . . . aggravation" and "could not have tipped the balance," this Court was referring to one possible error: a victim-impact witness's asking the jury to "do the right thing." (*Ibid.*) The Court's analysis was less a reweighing of the evidence than a holding that the error was insubstantial. The case is not authority in support of respondent's position here, either in terms of method of analysis or the outcome of any reweighing.

2. The Facts Must Be Viewed in the Light Most Favorable to Appellant

Respondent engages in further rhetorical sleight of hand by using the wrong facts, turning to inappropriate advantage the convention of presenting facts on appeal in the light most favorable to the party that prevailed at trial. As appellant explained in the opening brief, using such a version of the facts would be appropriate in analyzing a sufficiency-of-the-evidence claim, but not in a harmlessness analysis.

The verdicts do not reveal which versions of disputed facts every juror believed. The question is "whether the record contains evidence that could rationally lead to a contrary finding" to that underlying the verdict. (*Neder v. United States*, *supra*, 527 U.S. 1, 19.) That question cannot be answered by presuming the facts to favor the challenged verdict, because rational jurors indulge no such presumption. They look at all the evidence and believe what they believe.[150] And because the question is whether *respondent* can show that

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[150]See page 8, footnote 1, above, on the need for the reviewing court to consider the entire record. See also CEB, Calif. Civil Appeals and Writs, Ch. 8, §§ 8:302–303:

(continued...)

error *could not* have contributed to a juror's final choice, the reviewing court must consider the possibilities in light of the view most favorable to appellant that rational jurors might actually have held. This is the only way to determine if they could have rationally reached a different result, absent error.[151] Again

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[150](...continued)

> [A]ppellate courts cannot reweigh the evidence in determining whether a judgment or order was supported by 'substantial evidence' . . . . But they *can* (and often do) reweigh the evidence in determining the prejudicial effect of a given error. [Citation]. . . . This is the *only* circumstance in which appellants can properly reargue the weight of the evidence . . . .

The text is dealing with the civil context, where there are not the limitations on the type of reweighing that can find aggravation to have so outweighed mitigation that error could not have contributed to a juror's verdict. The point on considering the entire record and the extent to which it supports the appellant's case still applies. Similarly, Witkin writes,

> [R]eviewing courts['] . . . severe self-imposed limitation on the appellate power to review the facts alone [as a basis for reversal] is balanced by an unrestricted power and duty to review them when error is shown.

(9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 449, p. 504.) See also *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 476 (even the civil harmless-error rule does not permit affirmance "unless it can be said that the justice of the cause preponderated so heavily on the side of the prevailing party that none of such errors . . could have contributed to or resulted in a miscarriage of justice," an inquiry which required considering the entire evidentiary picture).

[151]Appellant included the following citations and explanation when contrasting the handling of facts in a sufficiency analysis and a harmlesness analysis in his opening brief:

> . . . (Traynor, The Riddle of Harmless Error (1970) p. 28. . . . See also *Holmes v. South Carolina* (2006) 547 U.S. 319, [330] . . . ; *Laird v. Horn* (3d Cir. 2005) 414 F.3d 419, 429; *People v. Garcia* (2005) 36 Cal. 4th 777, 805–806 & fn. 10, 807, fn. 11

(continued...)

unable to deny this, respondent writes as if appellant never argued it. The closest respondent comes to addressing the question is when, at the end of its brief, respondent simply calls for "[r]eview of the record without the speculation or interpretation offered by appellants . . . ." (RB 271.) But it is respondent who is indulging in "speculation" when it assumes the Munoz version of the circumstances of the crimes to have been believed in every significant detail by the jurors and assumes the prosecution view of every disputable point presented during the penalty phase to have been accepted by them. And it is respondent who engages in wholly unjustified "interpretation" when it asserts that the jurors' opaque death verdict represented a judgment that the case in aggravation was overwhelming, the case in mitigation unconvincing, to the point where taking away the excesses of the victim-impact testimony or some other unjustified prosecutorial advantage could not have affected the outcome.

This point would be particularly important if the Court were to engage

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[151](...continued)

> [noting, in prejudice analysis, reasons why jury might have had difficulty with prosecution's case and rejecting dissent's failure to consider weaknesses in prosecution case and conflicts in evidence]; *People v. Haley* (2004) 34 Cal. 4th 283, 312 [in harmlessness analysis, canvassing evidence in support of appellant's factual theory]; *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673–674; *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1156.) Here, appellant's admissions of robbery-murder and the physical corroboration of those admissions were all the jurors needed to arrive at their guilt verdicts and related findings. Since they did not need to credit Jose Munoz to arrive at any decision they made, the degree, if any, to which they did so is unknown.

(AOB 113, fn. 69.)

in the reweighing of the evidence which respondent erroneously assumes is appropriate, contrary to the Court's approach in cases like *People v. Sturm* (2006) 37 Cal.4th 1218.[152] For even a reweighing of the evidence shows that rational jurors could have voted for life without parole absent the emotional onslaught of the victim-impact case, at least if the court reviews the entire record instead of only the evidence favoring respondent.[153]

Appellant was the product of a home in which he was neglected, and physically and emotionally abused, by a deeply dysfunctional mother. In early childhood he witnessed inter-parental violence and later was abandoned by his father. This is as far, by the way, as respondent's incomplete summary of the mitigation evidence goes. Some of the mother's many boyfriends also abused appellant.[154] "[E]vidence of [a] childhood of deprivation and abuse," even in

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[152]Discussed at AOB 104. See the prejudice analysis, 37 Cal.4th at pp. 1243–1244, implicitly rejecting a dissent's position (37 Cal.4th at pp. 1245, 1247–1248, dis. opn. of Baxter, J.) that the aggravated nature of the crimes should be taken into account in determining the likelihood of prejudice.

[153]The condensed summary that follows is supported by record citations at AOB 105–128, where much more specific facts are also provided.

[154]See AOB 61–72. Respondent asserts that "appellants' case in mitigation presented a moving account of their early childhood" but claims that "the evidence also showed they had the benefit of a caring extended family even in the worst of times, a devoted stepfather and stable home life by the time . . . [appellant was] eight . . . ." (RB 221.) This was debatable, and it therefore does not now help respondent exclude every reasonable doubt that error could have contributed to the prosecution obtaining any vote needed for a unanimous verdict. Moreover, it is well known that the early childhood years (i.e., well before age eight) are the most critical. Furthermore, the mother was still beating appellant, including with household objects, well after she got together with Phillip Self. (RT 53: 7917, 7922.)

There was no showing that the "caring extended family" intervened

(continued...)

the face of substantial aggravation,[155] can "produce sympathy and compassion in members of the jury and lead one or more to a more merciful decision." (*In re Lucas*, *supra*, 33 Cal.4th 682, 735.)

Despite his upbringing, appellant still managed to be both loving and loved. Self-medication through substance abuse seems to have been involved in his criminal behavior.[156] Shortly before the crimes, appellant had been willing to enter a drug rehabilitation program, which, however, had a long waiting list, and he had tried to change his life's direction by moving to the San Francisco Bay Area and finding work there. He had no prior record and was still a youth of 21 when he committed his crimes. He had a young son, towards whom he was loving before his arrest and with whom he continued to maintain a relationship. He neither hurt nor particularly frightened any of the robbery victims whom he confronted alone, and he may have protected some of the others.[157] Respondent nowhere claims that this information, which was

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[154](...continued)
anywhere near enough to avoid the considerable psychic damage likely to be caused by even a single bloody beating to the head with the buckle end of a belt (RT 52: 7716–7717, 7783), much less ongoing verbal and physical abuse from the parent and some of her many boyfriends, seeing terrible violence between the parents while they were still together, being told over and over that he was unwanted, and growing up seriously neglected in an impoverished home. (See AOB 61–67, 70–72. Respondent has not disputed the facts set forth there.)

[155]"[T]he aggravating evidence in the present case cannot be called spare, given the brutality of the charged offenses, the vulnerability of the victims, and the existence of a prior violent assault . . . ." (*In re Lucas*, *supra*, 33 Cal.4th 682, 735.)

[156]See portions of the record cited at AOB 9.

[157]See AOB 114–115 for specific evidence and record citations.

in the opening brief, is incorrect. Respondent just omits it from its summary of facts pertinent to the harmlessness issue.

Here and elsewhere respondent relies on a particularly aggravated view of appellant's role in the offenses. (See RB 220–221; see also RB 80–83, 148–150.) Jose Munoz portrayed appellant as instigator of some of the violence and supplied other assertions about appellant's conduct that were aggravating. But, since at least some jurors must have recognized that his testimony was that of a severely biased witness, this Court is required to do so as well. It was riddled with internal indicia of unreliability, and it was the last of a series of Munoz's narratives that moved from firm denials of any criminal activity, to only using ATM cards after appellant and Self had stolen them, to admitting enough involvement to offer the police what they needed to hear to charge the others.[158] Nothing that he said concerning appellant's role in the crimes that varied from appellant's own account was independently corroborated. Munoz made his claims about appellant's aggravated conduct only in crimes where there were no witnesses to contradict him. Where there were, appellant was portrayed as a surprisingly unthreatening robber, and there was some evidence that he tried to protect some victims from his comrades,[159]

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[158]Supporting details and record citations are at AOB 115–123. Another fact was pointed out in the Statement of Facts but not reiterated later: Munoz claimed that he confronted Aragon unarmed and that Self did all the shooting, but the forensic evidence showed that Aragon was shot at close range from a different angle, and using another weapon—in addition to the shots that purportedly were fired by Self. (See AOB 39 and cited portions of record.)

[159]See AOB 114–115. Among the incidents presented there is appellant's interaction with the beekeeper Knoefler, who, among other things, testified that appellant stopped him from giving him more than $40 or $50 when he asked for money, even though Knoefler had more. (RT (continued...)

who apparently were involved with each other before appellant ever met Munoz and Chavez.[160] In acquitting appellant of the Alfred Steenblock kidnap and robbery charges, the jury unanimously was unwilling to rely on Munoz's

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[159](...continued)
34: 5342–5343.) Respondent acknowledges this testimony but seeks to cast doubt on it, emphasizing—as appellant acknowledged previously (AOB 32, fn. 27)—that Munoz said appellant demanded all of Knoefler's money when the latter offered $25. (RB 28, fn. 20.) Respondent also claims, "Romero told police he took 'whatever cash [Knoefler] had.'" (*Ibid.*) This mischaracterizes the record. The actual statement was, "I just gave him his water and everything he needed, just told him, just, we need your truck. Um, and whatever cash he had. I don't remember how much cash, it wasn't that much." (3SCT 2: 310.) Knoefler's account was considerably more detailed than the quick overview appellant gave when he was asked about the crime. His passing over the details of what happened after he made his demand to Knoefler does not impeach Knoefler's account.

Respondent also writes that appellant confessed that "[h]e originally intended to shoot Knoefler." (RB 29.) Respondent exaggerates the evidence of appellant's mental state. The statement which respondent paraphrases is ". . . I was supposed to shoot him . . . ." (3SCT 2: 310.) Again, appellant's brief account did not specify his own mental state, but it was clear from what soon transpired that he had no concerns about not handling the situation the way he was "supposed to." If the others said he should shoot Knoefler, appellant's intentions could have ranged from intending to do so, to playing it by ear, to following his usual modus operandi when working alone: reassuring the robbery victim and not harming him. (Cf. 3SCT 2: 309 [appellant: Chavez told him to kill Jerry Mills after the robbery of Mills' firearms was complete, but appellant just took him some distance away and told him to stay there].)

[160]See AOB 112. This lent some credibility to appellant's statement that his prior criminality had involved only burglarizing unoccupied businesses, before the Lake Mathews incident, when the others took him out without telling him what they would be doing. (3SCT 2: 325–326; cf. RT 40: 6073 [Munoz: appellant's proposal the first night that he went out to steal with the others was to steal from a business].)

testimony identifying appellant as a perpetrator.[161]

Indeed, while the prosecutor promoted the informant's version of the various offenses, he also made it clear—correctly—that aiding and abetting principles, applied to appellant's corroborated confession, settled his guilt in any event. (E.g., RT 45: 6909–6913, 6942.)

Nothing in the jury's verdicts, therefore, permits respondent to now meet its beyond-a-reasonable-doubt burden on harmlessness by assuming the truth of Munoz's self-serving accounts of who did or said what, because there is no basis for claiming that the jury did so and clear evidence that it did not. Respondent has disputed neither this conclusion, nor the facts underlying it and reiterated above.

Respondent is left with appellant's jail misconduct. As appellant has already explained, in an analysis that respondent does not reply to, that evidence could be expected to be seen as seriously aggravating by some jurors, but it did not have to be seen that way by any or all. There was testimony regarding the value of posturing as a "tough" in the jail environment and the evidence that appellant actually arranged for his being found in possession of a shank in front of other prisoners,[162] the commonality of both mistreatment of child molesters and of possession of shanks, and the lack of a significant response by the jail to several of the incidents. Appellant ceased the misconduct during the final year of his pretrial incarceration. While he clearly could possess a shank whenever he wanted, he never used or threatened to use one. (See AOB 124–127.) Under these circumstances, here, as in *People v.*

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[161]There was no evidence that Munoz was involved in that offense, so the jury was not bound by the accomplice-corroboration rule.

[162]See AOB 58.

Gonzalez (2006)38 Cal.4th 932, where the other-crimes evidence consisted of "possession of an assault weapon, two assaults on inmates, and possession of a shank in jail," "[t]he aggravating evidence of defendant's other crimes . . . , although serious, was not overwhelming. (*Id.* at p. 962.)

Finally, all the jurors, knowing that appellant might be convicted of three murders, had promised that they were open to either sentence. (See AOB 128, fn. 82, citing questionnaires.) They deliberated for two days on penalty. (CT 8: 1956–1957; 9: 2025.) Under both the capital framework in general, where any substantial error can affect penalty, and under the facts of this case in particular, even the bare proposition that a substantial error could not have contributed to a death verdict is unreasonable. To hold that proposition true beyond a reasonable doubt[163] would be insupportable.

From a slightly different angle, Chief Justice Rehnquist, speaking for the high court, explained that an appellate court applies *Chapman* by deciding "whether the record contains evidence that could rationally lead to a contrary finding" to that which would support the verdict. (*Neder v. United States*, *supra*, 527 U.S. 1, 19.) This is how it avoids "becom[ing] in effect a second jury . . . ." (*Ibid.*, quoting Traynor, The Riddle of Harmless Error, *supra*, p. 21.) Again, there is no honest way to claim that this record lacks evidence that would permit a rational juror to have voted for life without parole, particularly given his or her broad latitude for doing so. The only real issue, if respondent thinks it can show harmlessness is the substantiality of the error, not the aggravation/mitigation balance. Appellant addresses that question next.

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[163] *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Ashmus*, *supra*, 54 Cal.3d 932, 965.

3. The Victim-Impact Evidence Was Significant, Relied on Heavily by the Prosecution, and Correctly Described by the Trial Judge as "Painful and Agonizing"[164] to Hear

Respondent understandably downplays the victim-impact presentation. Respondent begins with the claim that, while the victim-impact testimony covered less than 100 pages, "the prosecution's remaining case in aggravation (recounting appellants' other violent conduct) consumed approximately 300 pages." (RB 220.) The argument is wrong on several levels. First, respondent fails to explain how a quarter of the prosecution's presentation—hardly an insignificant portion in quantitative terms—could have been an inconsequential part of its case and could not have affected the jury. That proposition certainly fails the reasonable-doubt test.

Second, the testimony was actually half of the prosecution's aggravation case. Respondent inflates the other-aggravation page count, primarily by aggregating the testimony presented against both defendants, although appellant's jury heard only that applicable to him. Respondent's broad span cites also include many pages where there were proceedings other than testimony. At most one might argue that there were 135 pages of other-crimes testimony against appellant.[165] Even this is inflated, since it includes cross-examination, which did not help the prosecution show aggravation, and which should not enter into a comparison with the victim-impact presentation, where cross-examination did not come into play. Excluding cross-

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[164]9/9/2002 RT 318.

[165]Within the portion of respondent's span cite applicable to appellant (see RB 220, citing RT 50: 7374–7494 and RT 51: 7495–7683), there was actual testimony at RT 50: 7375–7398, 7400–7412, 7416–7459, 7461–7475, and 51: 7484–7523.

examination,[166] the other-aggravation evidence consumed 103 pages. In other words, the victim-impact portion of the prosecution's case in aggravation was about half, in strictly quantitative terms, not a quarter.

Third, respondent gives no authority in support of its assumption that a page-count comparison is particularly helpful. It is not, because respondent is comparing apples to oranges. A mother's tearful descriptions of her loss and her own and her family's years of post-trauma dysfunction are qualitatively different in their impact than a deputy's testimony about finding a sharpened toothbrush in appellant's cell.

The page-count comparison is all that respondent has to say about the substantiality of the error itself.[167] Respondent has no answer to appellant's questions (AOB 283) about

- why jurors would believe that their duty was to focus on appellant's personal culpability[168] and appropriate penalty[169] when a significant part of the penalty-phase testimony was not about his conduct, nor how he became a person who could kill, nor the dark or redeeming aspects of his character, but about the

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[166]See RT 50: 7386–7389, 7397–7398, 7405–7407, 7412, 7423–7426, 7438–7443, 7454–7456, and 51: 7490–7491, 7511–7516, 7523.

[167]Appellant has characterized the victim-impact case as consuming the first day of the penalty phase. Respondent calculates that the testimony took less than four hours. Both are right. The trial court adjourned the proceedings after the last victim-impact witness, apparently somewhat early, because the prosecution had no other witnesses present. (RT 49: 7372.) The fact remains that the victim-impact case occupied the first day of the penalty trial, and that the jurors were left to sit with overpowering feelings about it overnight.

[168]*People v. Harris* (2005) 37 Cal. 4th 310, 351.

[169]*People v. Moon* (2005) 37 Cal. 4th 1, 40.

exceedingly painful aftermath of what he and his comrades had done;

- how jurors could put aside the invitation to consider which "side" was more deserving of their sympathy;
- how they could not validate the survivors' terrible losses by imposing the most serious penalty;
- how they could focus rationally on the appropriate questions, when they must have been, like the judge, immersed in the enormous pain that bathed the courtroom;
- and why they would rely only on the evidence that showed to what extent these killings were aggravated murders, to what extent there was other aggravation, and to what extent there were mitigating circumstances, when they were misled into believing that the testimony of the aggrieved was providing further information about the relative enormity of appellant's crimes.

There is strong evidence in the record of the significance of the testimony at issue. Respondent's trial counsel—the prosecutor—relied heavily on the victim-impact case that respondent now claims was irrelevant to penalty deliberations. He devoted almost half of that portion of his penalty-phase opening statement which dealt with the evidence (as opposed to explaining the law) to the victim-impact case.[170] He described the forthcoming penalty phase as "a battle for your sympathy and compassion" and urged the jurors not to permit appellant "to steal the sympathy and the compassion that is rightfully"

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[170]See RT 48: 7259–7271.

that "of the victims' families and friends."[171] He opened his penalty summation with an eloquent reference to the bereavement trauma[172] and made explicit the implicit message of the bereavement-trauma evidence—that it could be considered as aggravation.[173] Finally, he read page after page of victim-impact testimony, to the point where a third of his summation was such readings.[174]

Appellant pointed this out, in greater detail, in the opening brief and cited the United States Supreme Court's unwillingness to find harmlessness when a prosecutor has relied significantly in argument on evidence erroneously admitted.[175] Once again, respondent has evidently concluded that its best answer is to ignore the power of the evidence and the prosecution's use of it and hope that this Court will be equally cavalier about its effect.

Respondent's suggestion that any error was too insubstantial to have affected the outcome is incorrect.

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[171]RT 48: 7271.

[172]"These crimes are so huge, so monstrous, the harm, the pain, the heartache, the fear that this man has caused is so overwhelming that it's hard even to listen to it, let alone live through it or die from it." (RT 54: 8003.)

[173]RT 54: 8006.

[174]RT 54: 8008–8011, 8013–8015, 8017–8018 (readings of testimony); 8003–8030 (entire summation).

[175]AOB 283–285, citing *Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586, 590 & fn. 8; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *People v. Roder* (1983) 33 Cal. 3d 491, 505.

4. No Instruction Removed Every Reasonable Doubt as to Whether the Victim-Impact Case Affected a Juror's Decision

The final prong of respondent's argument that any error was harmless beyond a reasonable doubt is to note two general instructions given the jury. (RB 221.) The first admonished that the jury should not be swayed by bias or prejudice against appellant. Respondent does not explain how this general instruction could possibly undo the effects of (a) confusing the jury as to what was even the issue, (b) suggesting that what was not aggravation at all was aggravation of the most powerful sort, and (c) flooding the decision-makers with emotion. The instruction did not purport to identify the evidence at issue here, name its legitimate uses, or warn about its possible misuse.[176] Moreover, respondent's position relies on the untenable assumption that unguided jurors could identify what reactions to the victim-impact evidence would amount to bias.

All jurors are told not to be swayed by bias or prejudice.[177] If such an instruction could be known, beyond a reasonable doubt, to render testimony like that given here unable to influence a juror improperly, there would be

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[176]Cf. *United States v. Stitt* (4th Cir. 2001) 250 F.3d 878, 899 (error in admitting victim-impact testimony harmless in part because of instruction not to weigh effect of crime on victim's family); *Bivins v. State* (Ind. 1994) 642 N.E.2d 928, 957 (12 lines of improper victim-impact testimony harmless in part because of instruction not to consider as aggravation anything other than charged aggravator); *State v. Taylor* (La. 1996) 669 So.2d 364, 372 (minor *Booth* violations harmless in part because of instruction emphasizing that jurors, not the victim-impact witnesses, were to decide the penalty, uninfluenced by sympathy, passion, or public opinion).

[177]See CALJIC No. 1.00, CALCRIM No. 200 (criminal trials in general; guilt phase of capital trials); CALJIC No. 8.84.1, CALCRIM No. 761 (penalty phase); BAJI No. 1.00 (civil trials).

never be a need to exclude evidence with a potential to mislead or bias a jury. This is manifestly not the case.

Respondent also cites an instruction telling the jurors that they were free to assign whatever moral or sympathetic value they deemed appropriate to each factor which they were permitted to consider. (RB 221.) Respondent does not explain how this would have mitigated the effect of error in admitting the testimony. In fact, it is more likely that it further unhinged the victim-impact evidence from the Eighth Amendment restrictions on its permissible use, by telling the jurors that they could give their reactions to the horror of victims' loved ones' experiences free rein in determining appellant's sentence.

5. Respondent Cannot Demonstrate Harmlessness

Preliminarily, there is a trap into which both appellant and the Court can fall. It is in appellant's interests to show the reasons why the error was prejudicial. Framing the question as whether the error was "prejudicial," however, can implicitly suggest that there need be no reversal unless prejudice is demonstrated. Yet, the true test is, of course, whether *respondent* can demonstrate that the error was *harmless*. (*Chapman v. California, supra*, 386 U.S. 18.) The difference is critical, for if it cannot be known beyond a reasonable doubt how a juror may have been affected, respondent loses. Guesswork and speculation about probabilities cannot save the penalty verdict.

Allowing victim-impact testimony of the scope used here was error because of the high probability that it improperly biased the penalty determination. This alone almost makes it presumptively prejudicial. (See *In re Brown* (1998) 17 Cal.4th 873, 903 [no harmless error analysis for *Brady* violations because materiality standard (likelihood of affecting outcome) subsumes prejudice determination].) In any event, as federal constitutional error, and—under state law, as error affecting penalty—there is effectively the

same presumption. I.e., a death judgment following a trial that included such error cannot be carried out unless respondent demonstrates that it can be known, beyond any reasonable doubt, that the error neither "influenced" nor "contributed to" any juror's vote for death. (*Chapman v. California*, *supra*, 386 U.S. 18, 23.)

As demonstrated in the preceding pages, respondent has attempted to meet this burden by:

- assuming that its view of highly equivocal evidence[178] concerning circumstances of the crime and other purported aggravating circumstances was adopted by every juror, an assumption that would be unjustifiable even without a verdict on the Steenblock offenses that showed that the jury did not consider Jose Munoz a reliable witness;
- assuming that every juror also shared respondent's view of the weight of the mitigating evidence, much of which respondent excludes from its summary altogether,[179]
- treating appellant and Self as identical for penalty-determination purposes and aggregating the criminal conduct of both in characterizing the circumstances in aggravation;
- ignoring the constitutional and epistemological obstacles to a reviewing

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[178]See pp. 111–114, above.

[179]Respondent omits, e.g., appellant's lack of a prior record; his loving behavior towards family and friends; his attempts to go into drug treatment and to remove himself from an unhealthy environment, earn a legitimate living, and be there for his child; and his shifting to solo robberies, where no injury resulted, after Self and/or Munoz shot Jose Aragon.

court's ability to have "near certitude"[180] that no juror's "subjective"[181] judgment regarding the appropriate penalty was influenced by an error unless it was insubstantial, was clearly cured, and or involved merely cumulative proof of other evidence that incontrovertibly proved a specific historical fact, none of which was the case here;

- minimizing the victim-impact testimony, rather than recognizing that it was a linchpin of the prosecution's case for death; and
- asking this Court to treat a general admonition against showing bias as a magic wand that could make the impact of the testimony disappear.

Clearly respondent has mustered its best arguments for harmlessness, but none of these stances is justified or appropriate. If there was error here, and there was, there is no way that it can be known not to have contributed to the verdict. A conclusion to the contrary could only substitute the judgment of this Court for that of a jury untainted by substantial error. Reversal is required.

G. No Procedural Bar Requires This Court to Acquiesce in Appellant's Execution Based on a Verdict Tainted by Serious Error

Finally, respondent asserts that appellant's in limine objection to the admission of the victim-impact testimony was too general to permit this Court to review his claim of error, in an argument devoid of authority regarding what constitutes a sufficient objection. (RB 205–206.) Respondent's position—that there is no remedy for the failure in appellant's trial of the usual assurances that a death verdict is one in which society can have confidence—is unpalatable, to say the least, and it is not accurate.

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[180] *Victor v. Nebraska* (1994) 511 U.S. 1, 15; see also *People v. Brigham* (1979) 25 Cal.3d 283, 291.

[181] *People v. Box*, *supra*, 23 Cal.4th 1153, 1201.

According to settled law on what suffices to preserve the right of appellate review, the defense motion was sufficient to give the trial court an opportunity to rule intelligently, and thus the motion preserved the issue. Even if this were not the case, this Court has the power, which it should exercise, to invoke a number of preservation exceptions and decide the merits of this Due Process/Eighth-Amendment claim because of its gravity, the fact that it raises a pure question of law, and the need demonstrated here for this Court to provide guidance to counsel and the trial courts.

1. An Objection Which Alerts the Court to the Anticipated Evidence and the Basis for Exclusion Preserves a Claim of Error for Appellate Review

Respondent would, in this death case, have the Court require more of counsel to preserve an error for review than current standards demand.

The basis for the requirement of an objection at trial is "that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, p. 459.) There is an established test, which respondent ignores, for whether an objection was sufficient to avoid such unfairness. "'[T]he objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1261, first alteration in original.)

The objection need not be made in front of the jury, when the evidence is about to be, or has been, elicited. A motion in limine is sufficient if (a) a specific legal ground for exclusion—the one later raised on appeal—is advanced, (b) the motion is directed to an identifiable body of evidence, and (c) it is made at a time when the judge can determine the evidentiary question

in its appropriate context.[182] (*People v. Rowland* (1992) 4 Cal.4th 238, 264, fn. 3.)

2. Appellant Objected at Trial that the Testimony Was Excessive

a. The In Limine Motion Presented the Issue

The in limine motion filed in the trial court repeatedly emphasized the limited facts of the seminal federal and California cases that had recently established the admissibility of victim-impact evidence, contrasted the scope of the prosecution's proposed testimony with those facts,[183] quoted and reiterated language in both opinions emphasizing that there were constitutional and statutory limits to what could be allowed,[184] and stated specifically, "The statute and case law indicate that the admission of victim impact statements is permitted *with limitations* but by no means is their use mandated." (CT 8: 1858, emphasis added.) Indeed, the penultimate sentence of the argument was "Such evidence that is outside the limits of the holding of the California Supreme Court in *Edwards* . . . should be excluded during the penalty phase." (CT 8: 1860, italics added.)

Trial counsel's motion, it is true, was not a model of focus and clarity, but neither was the existing jurisprudence on the limits of victim-impact evidence. Parts of the motion seemed directed towards preserving a claim that

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[182]This last requirement simply means that there must not be a need for the case to unfold further because, for example, probative value and prejudicial effect can be evaluated only in the context of the particular state of the evidence at the time it is actually offered. (*People v. Morris* (1991) 53 Cal.3d 152, 190.)

[183]"The victim impact issues in Edwards were quite different from those in the instant case." (CT 8: 1859; see also p. 1860, lines 14–20.)

[184]CT 8: 1845, 1856, 1857–1858, 1859, 1860.

Payne v. Tennessee and *People v. Edwards* should be overruled. However, as noted above, the only requirement is that "'[t]he objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citation.]" (*People v. Hayes*, *supra*, 21 Cal.4th 1211, 1261.) Certainly the trial court had an opportunity to consider the same claim appellant makes now, i.e, that the victim-impact testimony was grossly excessive. Respondent, consistent with its making a forfeiture argument without reference to applicable law, does not claim otherwise.

Cases illustrating inadequate objections make clear that the motion below did not fall into that category. In *People v. Hayes*, the case quoted in the previous paragraph, the issue was admission of evidence that appellant had bragged about Mafia and CIA connections. A motion referring only to evidence of his "criminal history" was held not to have raised the issue, because it could be understood as referring to anticipated evidence concerning the defendant's prior convictions. The matter was not rectified when, on a separate occasion, "counsel referred cryptically to '[t]he other issue with respect to mention of Mafia, C.I.A., organized crime, et cetera, et cetera' in suggesting that the issue be dealt with later." (*Id.* at pp. 1261–1263, quotation at 1261.)

Similarly, in *In re Joy M.* (2002) 99 Cal.App.4th 11, an argument regarding the qualifications of the preparer of a report "gave no clue [that counsel] wanted the evaluation excluded," for the argument could have gone as easily to the credibility of the findings in the report, which had already been admitted. (*Id.* at pp. 20–21.)

Here, in contrast, the trial court understood the motion to be addressed

to the evidence of which the prosecution had given notice. (See RT 48: 7175–7176.) This was the testimony of family members "expressing the mental pain, anguish, and turmoil they experienced," since "[t]he prosecution cannot present an X-ray of a broken heart, nor a picture of shattered hopes and dreams; nor can the prosecution present a diagram illustrating the pain, suffering, and despair" caused by a loved one's murder. (CT 8: 1869.) The prosecution's intention was to ensure that the jury was "fully informed as to the totality of the harm caused by the murderer . . . ." (CT 8: 1870.) Unlike *Hayes* and *Joy M.*, there was no ambiguity regarding the nature of the evidence sought to be limited or excluded. Nor was there any question regarding the basis of the objection. It is true that the motion was styled as one to exclude victim-impact testimony. The context, however, was that the prosecution had given notice that it intended to explore the full panoply of effects on the survivors, and the motion argued that precedent compelled due-process and Eighth-Amendment limitations on such testimony, which would be greatly exceeded with the type of case proposed by the prosecution, and that therefore the prosecution's proposal should be rejected.[185]

Perhaps, with the benefit of 15 years' hindsight, one could wish that trial counsel had anticipated the remedy of having an in limine hearing to pare the testimony down to what was admissible, rather than framing an argument that could be taken to say that—because what the prosecution proposed was a major extension of holdings that were questionable anyway—it should be excluded altogether. But it was enough to make the objection and let the prosecution or the court deal with alternative means of containing the presentation, rather than requiring counsel to anticipate remedies not yet

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[185]CT 8: 1859, 1860.

suggested by this Court and only beginning to be used in other jurisdictions. In any event, any shortcomings in counsel's level of advocacy are partly the result of murky standards for limitation of such testimony. They compel this Court neither to further delay establishing meaningful and appropriate limits nor to send a man to his death based on a verdict obtained by extremely dubious means.

Respondent claims that only one specific contention is preserved,[186] but its claim and concession are based on the fiction that appellant's argument rests primarily on violations of bright-line rules that are individually constitutionally required. (See RB 206.) Strangely, among the attacks which respondent states was not preserved is "that victim impact evidence should be banned altogether . . . or at least severely limited . . ." (RB 206), i.e., the main thrust of the appellate claim. Yet elsewhere respondent complains of the generality of the trial motion, which respondent characterizes as "attack[ing] victim impact evidence in general." (RB 205.) To the extent that the motion did so, it did it by questioning the logic of *Payne* and *Edwards* and calling for the exclusion of testimony in this case that would extend them beyond their facts. (CT 8: 1836 et seq.) This was, certainly, an argument that the testimony should be "banned . . . or . . . severely limited." The in limine motion presented the claim that is before this Court.

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[186]Respondent's concession regarding preservation is as to the suggestion that victim-impact evidence be limited in future cases to circumstances known to the defendant at the time of the crime and thus directly relevant to culpability. (RB 206, citing AOB 274.)

b. Respondent's Attempt to Return to a Rule Requiring Objections During the Course of Testimony Is Ill-Advised and Contrary to Authority

The heart of respondent's forfeiture argument rests on a certain assumption, again unsupported by citation of any authority. The assumption is that review in this Court is available only if appellant, having failed to convince the trial court in advance that the type of victim-impact case being offered was so far beyond what was authorized by *Payne* and *Edwards* that it would violate their prohibitions of testimony which "diverts the jury's attention from its proper role or invites an irrational, purely subjective response,"[187] then interposed individual objections throughout the witnesses' testimony. (RB 205–206.) Respondent would have appellant interrupt understandably emotional[188] family members, in the midst of telling their heartbreaking stories, with piecemeal objection after piecemeal objection. Each would have asserted that this or that answer to the prosecutor's necessarily general questions about the effects of the crime went too far and should be stricken.

There is no such requirement, nor should there be. (*Burch v. Gombos* (2000) 82 Cal.App.4th 352, 357 [no requirement to specifically object to testimony falling within category covered by motion in limine which had been denied]; see *People v. Morris*, *supra*, 53 Cal.3d 152, 190.) Moreover, while

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[187] *People v. Edwards*, *supra*, 54 Cal.3d 787, 836, quoted in the defense motion at CT 9: 1860.

[188] Judge Taylor stated that each of them "cried at various points during their testimony." (11/12/2002 RT 519.)

the *Payne/Booth* violations and various pieces of incompetent testimony[189] could have been ordered stricken, such orders would have in all likelihood been futile. Moreover, it was not this or that testimonial fragment that overwhelmed the jurors with emotion, created the impression that facts which failed to elevate this case above other murders were aggravation, and set up the dichotomy between doing justice by appellant or by the aggrieved families. It was the whole picture being painted, and piecemeal objections would not have solved the problem. The in limine motion, whatever its failings, did point to the whole picture, and this was and should be enough.

Appellant has pointed out, again marshaling authorities, that criminal defendants cannot constantly interrupt victim-impact testimony with objections that particular answers have gone too far; that therefore none of the four defense attorneys in appellants' trial uttered an objection during the victim-impact testimony;[190] and that any system that demands that a defendant torpedo his or her chances for enough juror sympathy to win a life verdict, in order to prevent the same result through admission of improper testimony, violates due process and the Eighth Amendment. (AOB 211–215.) The point was actually made in a different context. Respondent brings it up here, as if appellant were seeking to be excused from some requirement of more specific, contemporaneous objection. (RB 206.) And yet the point does apply here, not as an excuse, but as a reason why there is and should be no such requirement. The day when in limine motions, without repetition in the form of an objection in front of the jury, failed to preserve an error for review, is long over. (*People*

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[189]See AOB 214–215, 244–247.

[190]As this Court undoubtedly knows from the cases that come before it, the scenario is practically universal.

v. Morris, supra, 53 Cal.3d at p. 190.) "'The advantage of such motions is to avoid the obviously futile attempt to "unring the bell" in the event a motion to strike is granted in the proceedings before the jury.' [Citation.]" (*Id.* at p. 188.) There is no reason to abandon the current rule.

The procedure for controlling victim-impact testimony will be a question for this Court when it decides to provide guidance to lower courts and counsel. Appellant's suggestion is to have witnesses read from written statements that have been reviewed outside the presence of the jury. Respondent's implied suggestion is that defense attorneys be required to futilely keep jumping up with motions to strike in the middle of the testimony, then making extended arguments about what is and is not permissible under standards that are still vague. But the only question necessary for disposition of appellant's actual claim is whether the Court should affirm appellant's death sentence by extending the forfeiture doctrine as respondent's position requires, and it should not.

Perhaps the best remedy was not anticipated by trial counsel in 1996, but the in limine motion was enough to "alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought." (*People v. Hayes, supra*, 21 Cal.4th 1211, 1261.) The point was preserved.

3. Even if the Right to Raise the Error on Appeal Were Forfeited, the Error is One Which the Court Should Address Under Applicable Exceptions to the Preservation Requirement

If it were the case that appellant's in limine objection was inadequate to preserve his *right* to appellate review on this issue, this Court could and should still reach the merits. Several exceptions to the forfeiture doctrine apply. Moreover, this Court has the discretion to consider unpreserved claims and should certainly do so when the stakes are what they are here.

First, if an objection would have been futile, its absence does not forfeit the right to appellate review. (*People v. Boyette* (2003) 29 Cal.4th 381, 432.) Here an objection in some other form would have been futile. The trial court again addressed the victim-impact evidence in denying the motion for a new trial. At this point, it was fully aware of the specifics of the testimony and of its overall impact, which it later characterized as leaving no dry eyes in the court room and creating an unforgettable day that was "very painful and agonizing." (9/9/2002 RT 318.) In ruling on the new trial motion, the court acknowledged that the defense had "raise[d] the issue of the prejudice of the victim impact evidence." (RT 55: 8227.) It rejected the contention summarily with the statement that "both statutory and case law supports the introduction during the penalty phase of victim impact evidence." (*Ibid.*) The court would not, therefore, have reached a different conclusion if appellant's pre-testimony objection had somehow been more specific or if it had been repeated each time a witness brought in material that was beyond the scope of permissible evidence: providing a brief glimpse of the victim's life or a general sense that real people suffered serious harm from the murder. The trial court saw no problem after all the evidence had been heard, so objections in the form that respondent now demands would have been futile.

This situation was not solely the fault of the trial court. A claim now that a more specific objection would have been effective (and was required) assumes that there was a readily discernible basis for one. Where, as here, the legal landscape was—and remains—undefined, it would be profoundly unfair to require more specific objections. In addition, the trial court relied[191] on *People v. Fierro* (1991) 1 Cal.4th 173, 236, which, as appellant has pointed

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[191]RT 48: 7174–7175.

out,[192] contained very broad language about the admissibility of victim-impact evidence, again rendering more finely-honed objections futile. In contrast, an appeal to this Court—particularly after the legal system has accumulated some experience with victim-impact testimony—is an entirely appropriate forum for taking a broader view of how to implement the need for balance which this and the high court's early victim-impact cases stressed.

Continuous objections would also have been futile for the reasons discussed above (p. 129), regarding antagonizing the jury and unringing the bell. Even if not futile in the sense of being predictably unsuccessful in obtaining a favorable ruling, actions that win the battle and lose the war for the jury's sympathy are the height of futility. (Cf. *People v. Hill* (1998) 17 Cal.4th 800, 820 [requirement to object to prosecutorial misconduct does not apply when jury admonition would not undo the damage].)

Second, "[u]nder settled law," an appellate court has discretion to address "a question of law based on undisputed facts . . . even though it had not been raised in the trial court." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24; accord, *People v. Hines* (1997) 15 Cal.4th 997, 1061.) Even a "new theory pertaining to [a] question of law on facts appearing in the record may be raised for the first time on appeal." (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 24, citing *Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) Here the only question is a legal one: whether the scope and nature of the victim-character and bereavement-trauma evidence introduced at trial exceeded what can be allowed in proceedings relied on to produce a death sentence that is fair, reliable, and meets the other criteria imposed by the Eighth and Fourteenth Amendments.

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[192]AOB 175.

Third, even apart from this general rule, a claim of deprivation of a fundamental constitutional right in particular may be raised for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276–277.) This is the case "especially when the enforcement of a penal statute is involved [citation], the asserted error fundamentally affects the validity of the judgement [citation], or important issues of public policy are at issue [citation]." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Each of these conditions is true here, although even one makes the exception "especially" worthy of application. (*Ibid.*) The case is a criminal one. The death judgment is invalid because of its unreliability and other constitutional defects. And the volume of death-penalty prosecutions in this state, the stakes at issue in each one, and the tremendous power of virtually unrestricted victim-impact presentations make the question raised here an important one of public policy.

Finally, this Court has discretion to consider claims for which the right to review has been forfeited. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; see also *People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1 (conc. opn. of Mosk, J.).) Here a life is at stake. So is the integrity of the state's process for determining if it is to put one of its citizens to death. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1074, regarding the state's own interest in a fair and reliable penalty verdict.) As has been already demonstrated, there was error far exceeding what is normally tolerated in the capital context (outside, perhaps, of this court's victim-impact jurisprudence). And there was a far greater likelihood of an effect on the verdict than is otherwise tolerated. There is also a need to finally establish, for the trial courts and counsel, the limits on victim-impact testimony which this Court adverted to when it first permitted such testimony to be introduced.

In conclusion, as shown above, appellant did object that the scope of the

proposed testimony went well beyond what existing law allowed, and the prosecutor had already made clear the general nature of the testimony in question. But even if somehow there had been no objection adequate to alert the trial court to the issue, relief by this Court would clearly be appropriate.

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III[1]

THE TRIAL COURT'S FAILURE TO FULFILL ITS DUTY TO GIVE A LIMITING INSTRUCTION REGARDING VICTIM-IMPACT TESTIMONY UPON REQUEST WAS PREJUDICIAL CONSTITUTIONAL ERROR

State law, appellant's due process and equal protection rights to its equal enforcement, and his rights to a fair and reliable penalty trial and an individualized sentence[2] gave rise to a duty in the trial court to give a limiting instruction regarding the jury's appropriate use of the victim-impact testimony, in the circumstances of this case. Given the emotional impact of the testimony and its capacity to mislead the jurors and confuse them as to the issues, the only way to have protected the integrity of the proceedings—other than restricting the testimony itself—would have been such an instruction, but the trial court refused to give one.

When evidence is admissible for one purpose but not for another, the trial court, upon request, must "restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code § 355.) The rule, long part of settled law, can sometimes permit a trial court to avoid the more drastic remedy of exclusion when evidence is offered for a legitimate purpose but may be misused by the jury.[3] The rule is mandatory, to the extent that even if an inappropriate instruction is proposed, the trial court must fashion an

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[1]See AOB 287. Respondent addresses this issue in Part XVII.B of its brief, beginning on page 256, except for its attempt to show harmlessness, which is in Part XVII.D, RB 260.

[2]U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.

[3]*Adkins v. Brett* (1920) 184 Cal. 252, 258–259; accord, *People v. Sweeney* (1960) 55 Cal.2d 27, 42–43.

appropriate one.[4]

As discussed in the previous argument, victim-impact testimony has an enormous potential for misuse, a risk that has never been disputed by this Court, which has acknowledged the "potential" of even a small fragment of such testimony "to inflame the passions of the jury against defendant." (*People v. Gurule* (2002) 28 Cal.4th 557, 624.) Here the victim-impact evidence invited the weighing of the wrong factors, namely the agony of the survivors against the pain a death sentence would inflict on appellant and his family, as well as sympathy for the survivors against sympathy for appellant. It evoked such an overpowering sense of the enormity of the crimes, well beyond that contemplated by *Payne v. Tennessee*, that only the maximum punishment seemed reasonable—even though homicides that were not even death-eligible would have had the same awful human consequences, and even though the testimony was disproportionately focused on the most appealing victim, with the most articulate family, not the one for whose death appellant was most responsible. Thus it diverted the jurors from the culpability attached to appellant's conduct, to the magnitude of the survivors' losses. Morever, the evidence could only intensify their anger and strongly encourage crossing the vague line that may separate "making the punishment fit the crime" (see RT 54: 8026 [prosecutor's argument]) from outright vengeance. It was highly likely to overwhelm the jurors' capacities—if not their will—to approach the question before them soberly and rationally.

The testimony demanded an instruction clearly informing the jurors how they could use the evidence, how they should not use it, and the potential

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[4]*People v. Falsetta* (1999) 21 Cal.4th 903, 924; see also *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1318.

effects on them that they must seek to avoid. If a limiting instruction were not required in circumstances as extreme as these, there is no situation in which it would be. Because of the capital context and the magnitude of the danger of contaminating the deliberations with absolutely the wrong considerations, the state and federal due process clauses and various Eighth Amendment constraints independently compel the same result as California's black-letter rule. Thus a number of other jurisdictions require limiting instructions to be given sua sponte if victim-impact evidence is admitted.[5]

Respondent maintains that appellant was not entitled to a limiting instruction. Nowhere does respondent acknowledge the rule requiring such an instruction, upon request, if the evidence at issue is susceptible of use for an improper purpose. Rather, respondent takes issue with the adequacy of appellant's proposed instruction, without acknowledging appellant's argument regarding its appropriateness, or, more importantly, addressing the trial court's duty to craft a valid instruction if appellant's version was defective. Respondent also contends that limiting instructions are unnecessary when a jury is generally instructed on avoiding bias and applying applicable law to its verdict, a principle that implies that all limiting instructions, and many restrictions on evidence and argument, are superfluous in any trial.

Respondent begins by quoting *People v. Gurule*, *supra*, 28 Cal.4th 557, 659, for the general proposition that the standard CALJIC penalty-phase instructions are adequate to instruct a penalty-phase jury, as if *Gurule* held that

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[5]E.g., *State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181; *State v. Nesbit*, *supra*, 978 S.W.2d 872, 892; *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842–843; *Cargle v. State* (Okla.Crim.App.1995) 909 P.2d 806, 828–829; see also *Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 158–159 (encouraging sua sponte limiting instruction); *Harlow v. State* (Wyo. 2003) 70 P.3d 179, 198, fn. 4 (same).

no victim-impact case gives rise to a need for a limiting instruction. (RB 257.) The appellate claim in *Gurule*, however, was only that the defendant's proposed package of instructions was "far more comprehensive and comprehensible" than the CALJIC instructions. Four instructions in particular were mentioned by the *Gurule* appellant; none dealt with victim-impact testimony. Certainly this Court in *Gurule* was not legislating that for every situation henceforth to arise and every claim henceforth to be raised, the CALJIC instructions were complete and bullet-proof. "[A]n appellate court's opinion is not authority for propositions the court did not consider . . . ." (*People v. Braxton* (2004) 34 Cal.4th 798, 819.)

Respondent inaccurately characterizes *People v. Ashmus* (1991) 54 Cal.3d 932 as holding that "there is no state or federal requirement to give a limiting instruction on victim impact evidence." (RB 258.) This is untrue. There was no request for a limiting instruction in *Ashmus*, and the expression "limiting instruction" does not appear in the discussion to which respondent refers. That discussion was a summary rejection of a claim that the trial court should have instructed the jury not to take into account "the victim's personal characteristics, the emotional impact of the crime on the victim's family, and the opinions of family members about the crime and the criminal." (54 Cal.3d at p. 991, fn. 20.) That was not a limiting instruction. It was onesaying that victim-impact evidence was to be ignored in deliberations altogether.

Most of the remainder of respondent's argument was anticipated in the opening brief, but respondent does not respond. Rather, respondent cites two cases, without addressing appellant's argument as to why they do not apply here. In *People v. Ochoa* (2001) 26 Cal.4th 398, 454, as appellant acknowledged (AOB 295) and respondent now points out afresh (RB 257–258), this Court summarily held that there was no error in refusal to give

the same instruction requested at appellant's trial because "[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1 . . . ." Refusal of the same instruction was upheld, on the ground that it was confusing, in *People v. Harris* (2005) 37 Cal. 4th 310, 358–359, as appellant acknowledged (AOB 295) and respondent repeats (RB 258). But as appellant pointed out in discussing those cases, this Court never addressed the non-discretionary duty of a trial court to give a limiting instruction upon request, its duty to give an appropriate one even if an infirm one is proposed by a party, or the additional material presented in this case about the gravity of the prejudicial impact of a major victim-impact case being presented without the jury receiving specific guidance on the purposes for which it can legitimately be used or how to view it. Again, an opinion is not authority "for propositions the court did not consider." (*People v. Braxton, supra*, 34 Cal.4th 798, 819.) Respondent offers no reason why the holdings in *Ochoa* and *Harris* preclude full consideration of the error as presented by appellant here, in light of these additional considerations.[6]

Respondent asserts, with some exaggeration, that "a long line of precedent" opposes appellant's claim. (RB 259.) Respondent adds, entirely inaccurately, "[Appellants] have provided no reason for this Court to revisit the issue." (RB 259.) A far longer line of precedent dictates the giving of a limiting instruction upon request in any case. It is unlikely that this Court, in *Ochoa* and *Harris*, intended to invert the Eighth Amendment and engraft some

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[6]Subsequent holdings on the same point simply rely, understandably, on these cases, but again in a context where no additional reasons for reconsideration appear to have been presented. (E.g., *People v. Carey* (2007) 41 Cal.4th 109, 134.)

kind of death-penalty exception upon settled law. Besides the bases for finding error that were stated in the opening brief and just restated, appellant also specifically challenges *Ochoa's* summary conclusion that the proposed instruction duplicated ground already covered in CALJIC No. 8.84.1. (AOB 295–296.) Certainly the version of CALJIC No. 8.84.1 given to appellant's jury did not fulfil the functions of a limiting instruction. It did not draw attention to the victim-impact evidence or identify its proper and prohibited uses. It was only a general introduction to the penalty-phase instructions.[7] The only part of it that was even marginally relevant to appellant's request was a general admonition to be fair and follow the law. Such an admonition is given in every trial. (See CALCRIM No. 200; CALJIC No. 1.00; BAJI No. 1.00.) By respondent's logic, there would, therefore, be no need for limiting instructions ever. But "[w]hen evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code § 355.) If this is such an obvious requirement of fairness that it is prescribed even for civil trials, surely the Eighth and Fourteenth Amendments require it here. But "restrict[ing] the evidence" cannot be done without mentioning it,

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[7]"You will now be instructed as to all of the law that applies to the penalty phase of this trial.

"You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.

"You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." (CT 9: 1965; see also RT 54: 8053.)

which the introductory CALJIC instruction did not do.[8] This is why the brief assertion in *Ochoa* should be reconsidered. Respondent has not attempted to defend this aspect of *Ochoa's* logic and demonstrate that the instructions given could somehow fulfil the functions of an instruction directing the jurors to the testimony at issue and informing them how they could and could not use it in their decision-making.[9]

Finally, respondent cites *People v. Brown* (2003) 31 Cal.4th 518, where the appellant simply faulted the trial court for not having instructed the jury on how to consider victim-impact evidence. (RB 258.) The case is entirely distinguishable, since there is no indication that such an instruction was requested at the trial level in *Brown*, so the rule regarding the giving of an instruction upon request did not apply. Moreover, this Court summarily held that CALJIC No. 8.85, which instructs the jurors to "consider, take into

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[8]Compare the cases cited at p. 119, fn. 176, above, where errors were harmless in part because genuine limiting instructions were given.

[9]Respondent also claims that CALJIC No. 8.85, the instruction listing the factors to weigh in determining penalty, together with the portion of No. 8.84.1 dealing with avoiding bias or prejudice, adequately covered the issue. (RB 258.) Again, these instructed on general principles, and they utterly failed to alert the jurors to the legitimate uses and prohibited abuses of the victim-impact case. There was no reason for jurors to assume that they were being cautioned that "bias" could arise from the evidence (as opposed to the normal meaning of the term, a predisposition brought by the juror to the trial). Nor was there any reason to assume that the victim-impact case could be used in ways that would fall outside the relevant factors which the jurors were to consider.

Just as the proposition that No. 8.84.1 alone obviates the need for a limiting instruction necessarily implies that the device is never needed in any case, the idea that combining it with an instruction on the basic principles of law applicable to the case (No. 8.85) obviates such a need also proves too much.

account and be guided by" the factors listed in section 190.3, told the jury how the evidence was to be used, since the place of victim-impact evidence in the California sentencing scheme is as a circumstance of the crime, one of the statutory factors. (*Id.* at p. 573.) This answered the *Brown* defendant's very general complaint that the jury was not told how to use the evidence. It does not, however, meet the specific need that this appellant highlighted both at trial and on appeal: guiding the jury's use of the evidence in a manner that would have cautioned it against the ways that the evidence created confusion and invited misuse. *Brown* is inapposite.

State law, appellant's due process and equal protection rights to its equal enforcement, and his rights to a fair and reliable penalty trial and an individualized sentence[10] gave rise to a duty in the trial court to give an appropriate limiting instruction in the circumstances of this case. Its failure to do so cannot be shown to have been harmless beyond a reasonable doubt. The reasons why a limiting instruction was needed here are the same reasons why its absence could have affected the jury. Absent cautionary guidance on how to use the victim-impact testimony, it was likely to arouse the jurors' anger; make them think that only the maximum sentence could respond to crimes that cause such enormous suffering—regardless of mitigating factors or the fact that such suffering is the baseline consequence of committing homicide; invite them to see the question as whether the survivors or appellant were more deserving of their consideration; and generally distract them from focusing on the nature of the offense itself and the offender. The error would be harmless if there were so little victim-impact testimony or it had so little emotional charge that there was no risk of its affecting any juror improperly, but this was

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[10]U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.

not the case.

Rather than shouldering its burden of showing harmlessness, respondent erroneously asserts, misciting *People v. Rogers* (2006) 39 Cal.4th 826, 901, that appellant has a burden of showing prejudice. (RB 260–261; cf. *People v. Rogers*, *supra*, 39 Cal.4th at p. 901, citing *Chapman v. California*, *supra*, 386 U.S. 18.) Respondent's claim that appellant cannot meet his supposed burden contains no mention either of the potential for misuse of the victim-impact evidence or of the effect of that evidence absent a limiting instruction. Rather, respondent gives an abstract argument based on its one-sided summary of the remaining evidence in aggravation and mitigation, fails to contend that emotion or confusion could have"influenced" or "contributed to"[11] any juror's decision—only that weighing the evidence now suggests that a death verdict was inevitable in any case, and again fails to answer the claim that neither the evidentiary picture nor the question of harmlessness may be approached in this fashion.[12] The judgment must be reversed.

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[11]*Chapman v. California* (1967) 386 U.S. 18, 23.

[12]A complete argument on both respondent's misapplication of the *Chapman/Brown* standard and the evidentiary picture presented in this case appears in the discussion of harmlessness in issue II, at pages 101–114 and 120–122, above. A more summary version concludes issue IV, at pages 167–172, below.

IV[1]

THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY PERMITTED THE PROSECUTION TO USE AN INNOCUOUS CHARGE OF RECEIVING STOLEN PROPERTY AS AN EXCUSE TO INFLAME APPELLANT'S JURY WITH A GRUESOME ACCOUNT OF HIS COMRADES' ATTEMPT TO MURDER A POLICE OFFICER

With unusual vigor and tenacity, the prosecutor sought, successfully, to have appellant's jury hear and see gruesome and inflammatory evidence of the Feltenberger attempted murder, with which appellant was not charged. (RT 30: 4695–4717.) The purported basis for introducing this evidence was the need to prove appellant guilty of Count XX, a charge of receiving Feltenberger's stolen ammunition pouch. The challenged evidence, provided by seven witnesses,[2] was not helpful in proving that charge, to which appellant had confessed; but the appalling nature of the attack added significantly to the case for death or, rather, to the emotional component of the sentencing body's process. It would have been a simple matter to have the officer identify the property and testify that it was stolen, before appellant's jury, and tell how it happened to the Self jury. Respondent now argues not only that the evidence provided by Feltenberger and was "crucial" to the guilt case (RB 141) against appellant, but that it could have no impact on the penalty decision.

To do this, respondent has to ignore entirely the clear evidence that its trial counsel thought otherwise and that the minor possession charge was a pretext for bringing in the entire narrative of the attempted murder of the officer. That evidence is that the receiving-stolen-property conviction

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[1]See AOB 301. Respondent addresses this issue in Part IV of its brief, beginning on page 140.

[2]See summary at AOB 42–46.

provided only eight months of the fifteen-year determinate component of a sentence that included four consecutive life terms, plus death; that at least seven other easy opportunities to add similar time were foregone;[3] that while all other incidents were presented in chronological order, the emotionally evocative evidence of the tenth event—the attempted murder of the officer—was used to open the prosecution case;[4] and the simple lack of relevance of the literally gory details of the robbery and attempted murder to the charge of receiving its proceeds.

The parties basically agree on the procedural background, and, to some extent, the applicable law. As to the latter, the questions are whether the evidence was relevant (Evid. Code § 350); if so, whether the court abused its discretion in declining to consider whether its probative value was substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice (Evid. Code § 352); whether a proper exercise of that discretion would have required exclusion of the evidence, particularly in the light of the constitutional imperatives of a fair penalty trial (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15) and one that determines the sentence with heightened reliability (U.S. Const, 8th Amend.); and whether any error was prejudicial under the *Chapman/Brown* standard. However, respondent maintains that the trial court did weigh probative value against prejudicial effect; suggests that the United States Constitution does not constrain trial courts' evidentiary rulings; asserts that—despite "overwhelming" (RB 141), unchallenged other evidence of appellant's guilt of receiving the pouch—the details of the entire incident were critical to proving the

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[3]See AOB 310 for particulars.

[4]See AOB 312.

elements of receiving and, in any event, helped support Munoz's credibility; disagrees with its trial counsel's obvious judgment as to whether the evidence could inflame a jury which would be deciding penalty; and again seeks, without trying to provide a justification, to have this Court apply a watered-down version of the test for whether an error was harmless.

A. Appellant's Claim Requires de Novo Review, Under Constitutional Standards

The standard of review is in issue. Respondent assumes the applicability of an abuse-of-discretion standard, even though the trial court did not exercise its discretion. Respondent also would dilute the level of review through its proposing that Eighth and Fourteenth Amendment constraints do not normally apply to trial courts' evidentiary rulings, thus implying that whatever the trial court did in this area was presumptively constitutional. Both positions are incorrect.

1. The Trial Court Believed It Had no Discretion and Failed to Exercise It, Thus Committing Error Per se and Rendering Inapplicable an Abuse-of-Discretion Standard

Respondent invokes an abuse-of-discretion standard for review of the trial court's ruling. (RB 146.) Respondent ignores, however, the inconvenient fact that the trial court stated on the record that it believed it had no discretion in the matter and, accordingly, refused to exercise it. Thus there was no exercise of discretion which can be deferentially reviewed. On the contrary, a court's failure to recognize and exercise its discretion is error in itself.[5] (*People v. Castro* (1985) 38 Cal.3d 301, 317; *In re Eichorn* (1998) 69

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[5]Of course it is not necessarily reversible. In addition to the usual bases for harmlessness, presumably the error would not be prejudicial if it were clear that the only correct exercise of discretion would have led to the same result.

Cal.App.4th 382, 391.)

As appellant pointed out in the opening brief, the trial court did not analyze the relevance or probative value of the challenged testimony, although appellant's attorney had argued the issue.[6] Nor did the court below address any risk of prejudice, although the main thrust of the objection was that the probative value of the attempted-murder evidence was substantially outweighed by its prejudicial effect. Rather, it stated repeatedly that it would not apply section 352 and would only have done so if it were necessary to consider admitting the testimony on one of the bases argued by the prosecutor and relied on here by respondent, which, in its view, was not the case:

> Well, if we're going to be discussing Mr. Munoz's credibility and the corroboration of victim Felt[e]nberger, then I believe it requires me to do a 352 analysis. In that the People will offer [the] evidence on the elements of the charged 496 and Count 20, I don't believe a 352 analysis is necessary because those are the elements which the People must prove.

(RT 30: 4705; see also RT 30: 4699, 4706 ["it is part of the People's burden of proof"], 4708, 4711–4712, 4716.) Appellant has already noted the absence of authority for the proposition that section 352 is inapplicable to evidence which the prosecution claims tends to prove the elements of its case. (AOB 306.) All relevant evidence tends to prove an element of a charged offense. The capacity of section 352 to enable a judge to protect the fairness of a trial and control its length would be eviscerated if it applied only to collateral matters. Respondent ignores this reasoning entirely, along with the trial court's position on section 352's supposed inapplicablity. Nor does it acknowledge the rule that the court fell into error by failing to recognize and exercise its discretion. (*People v. Castro*, *supra*, 38 Cal.3d 301, 317.)

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[6]RT 30: 4700–4701; see also 4710.

Respondent may be adverting to the issue of the trial court's failure to exercise its discretion when it cites *People v. Crittenden* (1994) 9 Cal.4th 83, 135, for the proposition that the record need not expressly reflect the trial court's weighing of prejudice against the probative value of evidence. (RB 146, 148, fn. 53.) The key word here is *expressly*. The broader rule applied in *Crittenden* actually favors appellant. "When a defendant objects to evidence pursuant to Evidence Code section 352, the record must demonstrate affirmatively that the trial court did in fact weigh prejudice against probative value." (*People v. Crittenden, supra*, 9 Cal.4th at p. 135) The *Crittenden* record showed clearly that the trial court's focus was on such a weighing analysis. (*Id.* at pp. 135–136.) The record here is equally clear that the court below thought engaging in such an analysis would be improper. *Crittenden* is of no help to respondent.

Respondent also states, inaccurately, "the court indicated that even applying a section 352 analysis, it would find the evidence more probative than prejudicial." (RB 143, citing RT 30: 4705–4706; see also RB 148, fn. 53.) The remark to which respondent refers directly follows that in the indented quotation on page 147, above, where the court declined to engage in a section-352 analysis. The court did not go nearly as far as respondent asserts, for it said only, "So, if I were to do a 352 analysis as to Count 20, I would determine that it is part of the People's burden of proof, and so, therefore—." (RT 30: 4705–4706.) Its next words were, "I am not making my final ruling right now," which was clearly true, because the colloquy on the issue continued for another 12 transcribed pages. (RT 30: 4706–4718.) So the idea of a "352 analysis" was fragmentary and hypothetical, and it was mentioned before even the midpoint of the argument on the issue. Most importantly, it further discloses that the court considered all aspects of the analysis (relevance,

degrees of probative value and prejudice, and the balance between them) telescoped into the substitute question of whether the evidence purported to help prove an element of the offense. This is a slender reed on which to hang a claim that a knowing exercise of discretion took place and that an abuse-of-discretion standard could apply.[7]

2. The Eighth and Fourteenth Amendments Limit States' Use of Evidence that Might be Used to Convince a Jury to Vote for Death

a. Constitutional Restraints on State Courts' Evidentiary Rulings Are Commonplace

Respondent further seeks to dilute this Court's oversight of the trial court's ruling by making the counter-intuitive suggestion that there can be no constitutional implications to that ruling, in terms of limiting the range of its permissible discretion. Respondent states, "The application of the ordinary rules of evidence generally does not impermissibly infringe upon a capital defendant's constitutional rights," citing *People v. Prince* (2007) 40 Cal4th 1179, 1229, while ignoring cases cited by appellant[8] that recognize both due process[9] and Eighth Amendment[10] constraints on states' freedom to apply their

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[7]As respondent points out, when appellant renewed the motion after Feltenberger's testimony, to at least exclude the forthcoming evidence about the bloody crime scene and other forensic evidence, the trial court finally appeared to apply section 352. (See RT 32: 4973.) However, it considered only guilt-phase prejudice, despite the fact that appellant's objection was about penalty-phase prejudice. (RT 32: 4973; cf. RT 30: 4701. Cf. *People v. Box* (2000) 23 Cal. 4th 1153, 1204–1205 [entertaining, but rejecting on the facts, a challenge to admission of guilt-phase testimony based on penalty-phase prejudice].)

[8]AOB 304–305.

[9]*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Bruton v. United States* (continued...)

own evidentiary rules. (RB 146.) Respondent's attempt to render the United States Constitution irrelevant to state courts' rulings admitting or excluding evidence also ignores the stuff around which most motion practice in criminal trial courts revolves, i.e., well-known high court cases sharply limiting, for example, exceptions to the hearsay rule,[11] the admissibility of confessions[12] and the fruits of searches,[13] and states' attempts to limit evidence offered by a defendant,[14] all on the basis of the United States Constitution. (RB 146.) It is not true that whatever a trial court rules in the evidentiary arena is normally beyond the reach of the Constitution. (Cf. *Holmes v. South Carolina* (2006) 547 U.S. 319, 324 ["'[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.' ... This latitude, however, has limits"].)

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[9](...continued)
(1968) 391 U.S. 123, 131, fn. 6; *People v. Castro*, *supra*, 38 Cal.3d 301, 313; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.

[10]*Booth v. Maryland* (1987) 482 U.S. 496, 502 (Eighth Amendment constraints on state relevance determinations), overruled on another point in *Payne v. Tennessee*, *supra*, 501 U.S. 808; see generally *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, on the heightened reliability requirements in trials that can lead to a death judgment.

[11]E.g., *Crawford v. Washington* (2004) 541 U.S. 36.

[12]*Miranda v. Arizona* (1966) 384 U.S. 436 and its progeny.

[13]*Mapp v. Ohio* (1961) 367 U.S. 643 and its progeny.

[14]E.g., *Chambers v. Mississipi* (1973) 410 U.S. 284, 294–295; *Taylor v. Illinois* (1988) 484 U.S. 400, 409)

b. This Court Has Not Established a Presumption That the Constitution Is Irrelevant to Evidentiary Rulings

People v. Prince, *supra*, does make the statement on which respondent relies, to the effect that the application of the ordinary rules of evidence generally does not impermissibly infringe upon a capital defendant's constitutional rights. (40 Cal.4th at p. 1229.) The *Prince* opinion quotes *People v. Kraft* (2000) 23 Cal.4th 978, 1035, and *Kraft*, in turn, relies on *People v. Cudjo* (1993) 6 Cal.4th 585, 611. None of these cases does or could support respondent's suggestion that a trial court's evidentiary rulings are presumptively unconstrained by the Constitution and are therefore always subject to review only under a very liberal abuse-of-discretion standard.

People v. Cudjo, *supra*, the precursor of the case containing the language relied on by respondent, rejected a claim that erroneous exclusion of evidence of third-party culpability violated the federal constitutional right to present a defense (6 Cal.4th at p. 611), relying on a statement in *People v. Hall* (1986) 41 Cal.3d 826, 834–835. Both cases explained that the particular right at issue, the right to present a defense, was not so broad as to generally preclude application of the ordinary rules of evidence to the presentation of a defense case, especially when it came to tangential matters. In particular, *Hall* rejected a claim that the right was so broad that the remoteness of evidence of a third party's motive to commit the crime for which the defendant was charged could never legitimately so diminish the probative value of such evidence as to permit a court to exclude it. (41 Cal.3d at p. 834.) Neither *Kraft* nor *Prince* sought to justify extending this holding to a broad principle that application of ordinary evidentiary rules does not generally implicate a defendant's constitutional rights.

Cudjo did also state, "It follows, for the most part," that erroneous

exercises of discretion to exclude third-party culpability testimony, under the rules of evidence, do not raise constitutional issues. (6 Cal.4th at p. 611.) There was no explanation for the leap from the fact that the right at issue was not so broad as to prohibit legitimate limitations on defense evidence to the apparent conclusion that it also does not restrict illegitimate limitations.[15] Nor does *Cudjo* provide a basis for generalizing beyond questions of how far the right to present a defense reaches, to other rights. And *Cudjo* certainly does not seek to justify any implication that respondent might draw from the language in *People v. Prince* and *People v. Kraft* that an appellate challenge to a trial-court evidentiary ruling operates in an arena unreached by constitutional protections. Indeed, as mentioned in a previous footnote,[16] *People v. Cudjo* acknowledges that *Delaware v. Van Arsdale*, *supra*, 475 U.S. 673, found a Confrontation-Clause violation in a trial court's ruling excluding evidence on the basis of Delaware's analog to Evidence Code section 352.

There is no metaphysical principle which makes whatever trial courts do when ruling on evidentiary questions automatically compliant with applicable Constitutional strictures, and nothing in the case cited by respondent or its predecessors sought to demonstrate that there is.

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[15]The Court did state that, to date, United States Supreme Court cases on the right to present a defense involved only general rules unreasonably precluding defense testimony, not individual trial court rulings. However, its authority for this proposition included a "but cf." cite to *Delaware v. Van Arsdall* (1986) 475 U.S. 673, and a parenthetical description of the case as finding constitutional error "based upon individual assessment of probative value against prejudice." (*People v. Cudjo*, *supra*, 6 Cal.4th at pp. 611–612.) The description was correct. (See 475 U.S. at pp. 676 & fn. 2, 679.) The "cf." signal was presumably because the violation was of the Confrontation Clause, not the right to present a defense.

[16]See fn. 15, above.

B. The Evidence Was Irrelevant, and the Reasons Offered for Its Admission Were Pretextual

Appellant and respondent both treat the probative value of the challenged evidence and its potential for prejudice as the primary questions. Each of these questions arises in more than one analytical context. Because appellant argued that the evidence had no probative value whatsoever,[17] there is the question of whether it was inadmissible for failing the basic requirement of relevance. (Evid. Code § 350; see also § 210.) But probative value is also involved in the issue of whether risk of prejudice from the evidence outweighed its probative value, under Evidence Code section 352 ("section 352"), the Due Process Clauses, and the Eighth Amendment.

1. The Challenged Portion of the Evidence Had No Tendency to Prove Any Element of the Charged Offense

The parties agree that the elements which the prosecution was required to prove were (1) that Feltenberger's ammunition pouch was stolen, (2) that appellant knew it was stolen, and (3) that he possessed it. (*People v. Price* (1991) 1 Cal.4th 324, 464; *In re Anthony J.* (2004) 117 Cal. App. 4th 718, 728; see RB 146–147.) To prove these, the prosecution had available to it Feltenberger's testimony that the pouch was his and had been stolen from him,[18] officers' testimony that it was recovered with appellant's and Self's belongings,[19] Munoz's testimony that appellant took it after being told by

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[17]RT 30: 4700–4701; see also 4710.

[18]RT 32: 4946–4954, 4956, 4961–4962.

[19]RT 37: 5644–5645.

Munoz and Self that it came from a carjacking,[20] Ruben Munoz's testimony that he had seen appellant wearing what looked like the same pouch to carry clips at his side,[21] and appellant's admission that he kept the clips for his pistol in a pouch which came from Feltenberger.[22] This was the evidence that proved a violation of section 496.[23] At most, it may have been in the trial court's discretion to also admit further evidence identifying the perpetrators of the robbery, as a circumstance slightly tending to corroborate the considerable direct evidence of appellant's guilty knowledge, although it would have been cumulative. (See AOB 307.) In contrast, evidence of Feltenberger's status as a police sergeant, the particulars of the robbery and shooting, Feltenberger's struggle to survive and recover, and descriptions and pictures of the bloody scene (see AOB 42–46 and cited portions of the record) had absolutely no tendency to prove that the pouch was stolen, that appellant knew that fact, or that he possessed the item. The evidence was inadmissible because it was irrelevant. (Evid. Code §§ 350, 210.)

Respondent disagrees. It argues that appellant's confession and Munoz's testimony about appellant's taking possession of the property each required corroboration. (RB 147.) Respondent overlooks the facts that each

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[20]RT 39: 6021.

[21]RT 37: 5587–5588; see also RT 37: 5644; 32: 4961.

[22]3SCT 2: 324 (transcript of appellant's taped statement, which was admitted as Ex. 5; the tape was played for the jury at RT 38: 5864–5865). As respondent correctly states, "Romero confessed to acquiring Feltenberger's stolen ammunition pouch, and admitted he knew Self and Munoz robbed and shot Feltenberger." (RB 41.)

[23]All of the evidence just noted was described at some point in the opening brief, but in arguing the instant claim, appellant did not specifically mention the Munoz brothers' testimony or the recovery of the pouch.

item of evidence corroborated the other,[24] and that Feltenberger's testimony that the pouch was stolen from him and other testimony that it was recovered with appellant's belongings provided additional corroboration. So did Ruben Munoz's statement that he saw appellant with the pouch.

Respondent also states that appellant's admission, which was of knowledge that the pouch was stolen, did not prove one of the elements, i.e., that the item was in fact stolen. This may be true, although the point is arguable. But respondent concludes with a non sequitur: "The only way to prove the pouch was stolen was through Feltenberger's testimony (either alone or as corroborating Munoz's testimony), in which he identified the pouch *and described the robbery.*" (RB 147, emphasis added.) Here and elsewhere respondent seems to oppose a supposed contention that none of Feltenberger's testimony was admissible.[25] Of course Feltenberger could have testified, to corroborate Munoz's testimony that the pouch had been stolen and appellant's statement that he knew it was stolen. Appellant's has contended that Feltenberger should only have testified "that his ammunition pouch was taken from him by Self and another robber"(AOB 307), i.e., to the facts pertinent to the elements of a receiving charge. Respondent's addition that Feltenberger should have also identified the pouch is correct. However, respondent provides no explanation for its conclusion that it was necessary for Feltenberger to fully describe the robbery in order to prove that the pouch was

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[24]There is no rule that an admission and an accomplice's statement, though each requires corroboration, cannot corroborate each other. Respondent does not claim otherwise.

[25]E.g., "If Feltenberger had not been allowed to testify . . ." (RB 148); "the high probative value of the Feltenberger testimony" (RB 149); "any error in admitting the Feltenberger testimony" (*ibid.*).

in fact stolen. In a receiving case, the theft victim need only testify that property belonging to him or her was taken; the trial need not be cluttered up with details of whatever crime gave the property its stolen character.[26]

In arguing harmlessness of any error in admitting the Feltenberger attempted-murder evidence, respondent ends up acknowledging the lack of probative value of the contested testimony. Respondent notes appellant's statement that any error in admitting the testimony could not have affected the jury's determination of guilt on the receiving count. (RB 149, citing AOB 309.) Respondent agrees, observing that admission of the testimony, if error, could not have been prejudicial because the charge "was supported by overwhelming evidence establishing Romero's guilt . . . ."[27] (RB 149.) Respondent thus contradicts its characterization, in the same paragraph, of "the high probative value of the Feltenberger testimony . . . ." (RB 149.) If the contested evidence—that expanding the picture from the elements of receiving

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[26]"It is only necessary to establish that the property was so obtained [i.e., by some theft offense]. The thief's identity may be unknown, and in any event is immaterial. The value of the property and the particular ownership of the goods are likewise immaterial." (1 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2000) Crimes Against Property, § 74, p. 103, citations and emphasis omitted.) See also *People v. Price*, *supra*, 1 Cal.4th 324, 464 ("conviction . . . may be based on evidence ' that the property in question was stolen, that the defendant was in possession of it, and that the defendant knew the property to be stolen'"); *People v Smith* (1945) 26 Cal.2d 854, 855–858 (summary of sufficient evidence to support conviction simply states, regarding theft element, that items had been stolen at various times from various owners).

[27]This is sufficient answer to an argument for admissibility of the one piece of evidence that had some slight probative value: Munoz's claim that appellant, watching a news report of the robbery with the others, had said that they had to go to the hospital and "take him out." (RT 39: 6022–6023.) It was additional (i.e., cumulative and unnecessary) evidence tending to show guilty knowledge and was, of course, grossly prejudicial.

to a description of the entire robbery, attempted murder, and their aftermath—could not have contributed to a finding of guilt because the remaining evidence was "overwhelming"—and it was—the evidence at issue was entirely unnecessary, not "high[ly] probative" or "crucial." (RB 149, 140.)

2. Even If the Evidence on this Collateral Matter Supported Munoz's Credibility, Which it Did Not, Such Corroboration is Not a Basis for its Admission

Finally, respondent reprises an argument which the trial court did not adopt, despite the prosecutor's statement that it was "probably even more important" than the testimony's supposed value in proving the receiving offense (RT 30: 4698): "the evidence was highly probative of Munoz's credibility." (RB 147.) Indeed, the prosecutor made it clear that he would insist on bringing the testimony in—supposedly for this purpose—even if appellant pled guilty to the receiving charge. (RT 30: 4708.) The theory was that the defense would try to paint Munoz as a self-serving accomplice who minimized his own role in the offenses. The prosecution, therefore, presented with an offense in which not only Munoz testified that he was not a shooter, but there was a surviving victim who said that the only shooter was Self, was entitled to introduce the entire horrifying criminal incident in order to bolster Munoz's credibility as to all the other incidents. (RB 147–148; RT 30: 4702–4705.)

The contention fails procedurally, legally, and factually. Procedurally, as explained above,[28] the trial court stated that it was not considering this rationale, believing the whole issue to be foreclosed by the supposed need for the testimony to prove the elements of the receiving charge. This Court could,

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[28]P. 147.

presumably, still affirm on the Munoz-credibility basis if that basis were proper, but only after an independent analysis, not with deference to a non-existent trial-court ruling.

Respondent's contention, for which it cites no authority, despite appellant's flagging the proposition as questionable,[29] fails legally because no court permits counsel to bring in evidence on any matter, no matter how irrelevant, just because it can be shown that a key witness's version of it can be shown to be truthful. The proposition is so outside the framework of the law of evidence that no direct authority regarding it can be found.

The closest analogy is the rule barring a party from "elicit[ing] otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it [citation]. . . ." (*People v. Mayfield* (1997) 14 Cal.4th 668, 748.) Thus appellant, despite his right of confrontation, could not have elicited a falsehood from Munoz only to expose its falsity with other evidence. If that is so, then surely the prosecution cannot elicit testimony from its own witness merely for the purpose of setting up a showing that he told the truth about *something*.

Similarly instructive is the law on whether a witness can be impeached on a collateral matter, the evidence having been elicited already. Even this used to be inflexibly barred; now, in California, it is within a trial court's discretion to refuse or allow such testimony. (3 Witkin, Cal. Evidence (4th ed. 2000), Presentation at Trial, §§341–342, pp. 426–427.) But one searches the treatises in vain for any discussion whatsoever of whether a witness can be *corroborated* on a collateral matter. It is, to be blunt, too screwy a

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[29]See AOB 305.

proposition.[30] Thus, to take it a step further and argue that a time-consuming and inflammatory portrayal of a collateral matter may be introduced in the first place for the sole purpose of corroborating it is inventive but unsound.

Moreover, Evidence Code section 787 prohibits introduction of evidence of a specific instance of conduct if it is relevant only to prove a character trait. Under Evidence Code section 786, veracity is a character trait. Respondent's theory is that the conduct of testifying truthfully about one matter (the Feltenberger incident) would help prove the character trait of veracity. Therefore the theory is barred by section 787.

Similarly, if the idea was that Munoz described himself as playing a more passive role in all the offenses (except the Paulita Williams shooting, where Williams would prove him a liar if he tried to exculpate himself), and that this passiveness in particular was corroborated by his supposed role in the Feltenberger shooting, section 787 would bar using a specific instance of conduct (sitting in the car during the Feltenberger attack) to prove the trait of being unaggressive during robberies.

Respondent's position also fails factually. Even if credibility-enhancement were a available as basis for admitting the testimony of seven witnesses about the details of the robbery and attempted murder, those details provided no net gain for Munoz's credibility. True, both perpetrator Munoz and victim Feltenberger described Self as the shooter, with Munoz waiting in the car. But respondent, like the prosecutor, ignores that portion of the

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[30]The index to Wigmore has no mention of collateral matters in two pages of entries on Corroboration; the section on Collateral Matters has entries regarding impeachment but not corroboration. (XI Wigmore on Evidence (4th Ed. 1985), pp. 120–122, 85.) In other words, the authors of this extensive treatise have encountered no need to even discuss whether a witness can be corroborated on a collateral matter.

victim's testimony that established Munoz as a liar yet again. (See RT 30: 4703 [prosecutor claims Munoz's "testimony is *completely corroborated* by the only surviving victim who can I.D. his shooter," emphasis added].[31]) Feltenberger was certain that the person in the car said, "Kill him" or "shoot him" in a clear, loud, commanding voice, and he repeated it several times. (RT 32: 4952, 4957, 4965–4966.) Munoz claimed that he had been saying, "Don't shoot," but Feltenberger was sure that this could not have been true. (RT 39: 6017; 32: 4966.) While the challenged evidence certainly helped the prosecution overall, because of its horror, it could not do so in the way that the prosecutor claimed and respondent echoes now—credibility enhancement. This fact is simply further proof that the reasons given for its admission were both pretextual. The real motivation was to take advantage of the prejudice attendant upon admission of the evidence.

The testimony was not relevant to help prove the receiving charge or to help support Munoz's credibility, nor admissible for the latter purpose in any event.

C. Even If it Were Marginally Relevant, the Prejudicial Nature of the Evidence Would Have Required its Exclusion, and its Admission Was Prejudicial Error

In this appeal, both appellant and respondent analyze the prejudicial potential of the evidence in two contexts. The first is as it relates to the admissibility of the evidence; the second, the question of whether any error was harmless. In either context, the degree to which it was prejudicial at all is at issue.

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[31]The prosecutor's claim also ignored surviving victim Paulita Williams, who identified Munoz as the person who shot her while saying, "Die, bitch."

Respondent emphasizes that appellant "only" claims prejudice as to the jury's penalty determination. (RB 145.) As appellant explained in the opening brief, the parties' strategies made both phases of his trial about penalty. His guilt of the capital charges, under the felony-murder and accessorial-liability rules, and his guilt of most other charges, including the receiving count, were apparently incontestible, and they were certainly uncontested. Even the guilt-phase arguments to the jury, including that of the prosecutor, focused, therefore, entirely on how trustworthy the codefendant/informant's accounts of the circumstances of the crimes were, not on what the guilt-phase verdicts should be. (See, e.g., AOB 12–13 and cited portions of the record.) And, yes, appellant is concerned about the contribution of the evidence to the death verdict, not complaining that a conviction for a minor felony with an eight-month term was tainted.

The parties' stances on penalty-phase prejudice differ mostly on how the inquiry is to be conducted. This fact is unacknowledged by respondent, because respondent's approach is incorrect but would have to be relied on for affirmance. Thus the parties disagree on no facts; rather, they treat entirely different sets of facts as relevant. Then they use these facts to answer different questions. Appellant, under settled law, asks the Court to examine the entire record, while respondent transfers a sufficiency-of-the-evidence method of viewing the facts (i.e., entirely in its favor, disregarding evidence that would favor appellant) to a context where it does not belong. And appellant—again applying settled law—asks whether the use of Feltenberger's excruciating account could have gone into the mix in a juror's penalty calculus and contributed to his or her decision, while respondent marshals the reasons that would have supported a death verdict in any event, as if the question were whether that verdict was appropriate or not.

1. The Evidence Created a Substantial Risk of Undue Prejudice

Respondent refuses to address either the content and quality of the various items of evidence, nor their possible effect in light of "the entire record," especially "any indirect effect that they might have had because of the way in which they were used." (*People v. Gonzales* (1967) 66 Cal.2d 482, 493.)

The evidence at issue included a "blow-by-blow account of [appellant's] brother's and Munoz's shotgunning of off-duty police officer John Feltenberger[,] . . . Feltenberger's struggle to survive and get help, the pools of blood and bits of human tissue found where he collapsed, . . . his medical treatment and disability afterwards" (AOB 302[32]), and Munoz's claim that appellant, watching a news report of the robbery with the others, had said that they had to go to the hospital and "take him out" (RT 39: 6022–6023). The testimony was inflammatory, i.e., "[t]ending to cause strong feelings of anger, indignation, or other type of upset; tending to stir the passions" (Black's Law Dict. (7th ed. 1999) p. 782), particularly since the victim was an officer (see *Steverson v. State* (Fla. 1997) 695 So. 2d 687, 690; *United States v. Davidson* (D.N.Y. 1992) 1992 U.S. Dist. LEXIS 10013, *18, cited at AOB 310.) It involved seven witnesses, whose testimony took up an entire morning and parts of other days, and a large number of exhibits. (RT 32: 4944–5015; 39: 6012–6024.)

Appellant has made three contentions about the relationship between the use of the evidence and its prejudicial impact. First, the prosecutor demonstrated his own assessment of the power of the evidence by using it to

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[32]Details and supporting citations are in the Statement of Facts at AOB 42–46.

open his case, as the only one presented out of the chronological order of the events. Second, and related to the first, it was used to blur in appellants' jurors' minds whether they were to be judging him on his own, or as part of a pair of brothers who, as the prosecutor put it, perpetrated a single "crime spree that would devastate and destroy over a dozen lives would last until December of 1992." (RT 31: 4808; see AOB 312–313.) This was a tactic apparently so valuable that respondent repeats it throughout the appeal brief as well, as appellant explains in the introduction to this brief. Indeed, the jurors had been told that at some points one or the other jury would leave the courtroom (RT 12: 2157), and it must have been obvious that evidence irrelevant to their defendant was being heard when they did. The corollary was that the attempted-murder narrative *was* pertinent to their decision. But the real problem took place at a less rational level: "the way [the evidence was] used" (*People v. Gonzales*, *supra*, 66 Cal.2d 482, 493) created the maximum impact on the jurors' mind-state, which cannot now be abstracted from their "subjective[]"[33] decision-making processes as they applied their own moral norms to how they viewed appellant's proper sentence.

The prosecutor let the cat out of the bag, regarding associating appellant with as much of his comrades' violent conduct as possible, when he argued for admissibility of the testimony. As noted above, he stated that showing that Self, not Munoz, shot Feltenberger, would support Munoz's credibility in claiming that he fired shots only at Paulita Williams, and that Self or Romero was responsible for the Lake Mathews, Aragon, and Mills/Ewy shootings. In doing so, he revealed the role of presenting the Feltenberger attempted murder

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[33]*People v. Box* (2000) 23 Cal.4th 1153, 1201 ("the sentencer is expected to subjectively weigh the evidence," emphasis omitted).

as part of a strategy of presenting the two brothers not as separate defendants, but as a violent unit, in contrast to Munoz.[34] The prosecutor's view was that without the attempted murder (in which appellant was uninvolved),

> [the Romero defense is] then free to cut out and ignore the fact that the same shotgun round that [Self used against] Aragon was used against Felt[e]nberger. And Mr. Felt[e]nberger I.D.'s Christopher Self as his shooter. *You cannot separate the conduct of these people because they were so intertwined in their interactions with each other.*

(RT 30: 4704, italics added.) The inability to separate the conduct of "these people" was real: even the trial court, in denying appellant's post-trial motion to modify the penalty verdict, included "the attempted murder of an off-duty Ontario police officer" until corrected by the prosecutor. (RT 55: 8223–8224.) Similarly, in ruling on a motion to sever counts, the trial court held that every offense except those related to Magnolia Interiors involved assaultive behavior, was facilitated by the use of a firearm or firearms, and involved a crime at least as serious as armed robbery. (RT 29: 4690.) This was true of the receiving count only if that crime was conceived of as the robbery and attempted murder of Feltenberger.

The third prong of appellant's prejudice argument relates, like the first, to the prosecutor's own calculations as to the impact of the evidence. To ask this Court to pretend that pleading Count XX and proving it with the attempted-murder evidence was anything other than a tactical decision aimed at setting up the case for death as well as possible, at the beginning of the trial,

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[34]As the Introduction to this brief and the review of evidence regarding circumstances of the crimes show (pp. 110–113, above), such a strategy did indeed prejudice appellant who, viewed as an individual, could be seen as less culpable than either Self or Munoz. (See also AOB 112–115, 448, fns. 271, 272, and cited portions of the record.)

is to ask this Court to look the other way at a now-transparent prosecutorial gambit. The charge added very little to the available sentence, particularly when considering that many similar potential charges, all provable without additional evidence, were never brought. These included charging two counts of robbery (rather than the one charged) in each of the three incidents in which there were two victims[35] or including a theft offense for each of the times appellant was an accomplice to withdrawing cash using stolen ATM cards.[36] For this Court to take the prosecutor's choice to add the receiving charge and prove it as he did to be motivated by the need to add eight months to appellant's sentence would be to accept a preposterous explanation over the obvious one.

Respondent does not argue otherwise. Rather, respondent evidently hopes that this Court will overlook respondent's trial counsel's own clear assessment of the impact of the evidence on the mindset of what would become the sentencing jury.

Appellant's claim, therefore, is that—if the relevance point is rejected and an Evidence Code 352/Due Process/Eighth Amendment analysis is required—the evidence, including Munoz's claim that appellant had urged him and Self to go "take . . . out" the police officer, was certainly inflammatory to begin with. (See AOB 231–233, setting forth examples of types of evidence routinely recognized as inflammatory.) Moreover, its use (a) out of order, to

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[35]See AOB 310 & fn. 193, citing CT 4: 826 (Jerry Mills and his son), 830 (Ken Mills and Vicky Ewy), and cf. CT 4: 824 (robbery of William Meredith) with 3SCT 2: 316 & RT 39: 5888 (appellant & Munoz describe attempted robbery of William Meredith's companion).

[36]See AOB 310 & fn. 194, citing RT 36: 5537; 39: 5890–5891, 5997–6001.

open the prosecution case, (b) in a manner tending to tar appellant with the Self/Munoz brush, (c) for a purported purpose—adding eight months to appellant's sentence—that was transparently pretextual and showed the prosecutor's own belief in its potential for affecting the penalty decision, which was the only contested verdict that the jury would be required to render, created a considerable prejudicial effect. The prosecutor's motive, and thus his judgment about its value for his ultimate goal of a death penalty, was thrown into even clearer relief when he said he would offer the evidence even if appellant pleaded guilty to the receiving count.[37] Since, if there was somehow any probative value at all on that count, it was minimal, any reasonable exercise of discretion—and one informed by the federal Due Process Clause and Eighth Amendment—would have required exclusion of the testimony.

Respondent directly disputes none of these points. Nor does respondent specifically acknowledge them. In claiming that there was little potential for undue prejudice, respondent only cites a cautionary instruction and its own assessment of an evidentiary picture in which nothing could have further inflamed the jury. These contentions are dealt with in the next section of this brief.

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[37]RT 30: 4708.

2. Respondent Bypasses Appellant's Contentions, Unjustifiably Assumes That the Informant's Version of Appellant's Conduct Was Credited on Every Point, and Asks This Court to Make Its Own Assessment of the Appropriate Penalty Instead of Asking What Could Have Impacted the Sentencer

a. The Cautionary Instruction

The trial court's instruction that the evidence was being offered against appellant only on the issues of the property's having been stolen and appellant's knowledge of that fact, as opposed to showing that he was involved in the robbery and attempted murder, merely stated the obvious. The jurors knew that appellant was not charged with those crimes, and there would be no evidence that he committed them. But it did not—and could not have with any success—tell them to listen only when Feltenberger said he was robbed of his ammunition pouch, and to ignore, and avoid being impacted by, the testimony about the shooting, his agony, the photos of the trail of blood to the stoop where he begged for help, and the pool of blood he left there. If limiting instructions could work in such situations, there would be no need for Evidence Code section 352. All of this was raised in the opening brief (AOB 311–312), and respondent has no answer (see RB 148).

b. Strength of Other Unfavorable Evidence

Respondent's other contention regarding potential prejudice is presented in part as part of probative-value-vs.-prejudice point, in part as a claim of harmlessness of any error. Respondent again fallaciously assumes that the jury fully credited Munoz's account of how every offense took place. Respondent makes this assumption despite the impropriety of doing so as part

of either a harmlessness analysis[38] or a before-the-fact trial-court decision on the potential for harm.[39] And respondent relies on that assumption in the face of the self-serving nature of Munoz's testimony, his repeated lying during his interrogation, and the contrary evidence which—if believed—showed appellant to be the least violent member of the group. Taking Munoz's portrayals as facts, respondent then asserts, regarding the risk of prejudicing the jury's guilt deliberations, that "the circumstances of the Feltenberger robbery-shooting pale in comparison to the evidence of Romero's vicious criminal conduct, and thus there was little to no potential for undue prejudice." (RB 149.) If appellant claimed that a jury might have been so inflamed against him that it could not view the evidence of *guilt* rationally, and if the factual predicate about appellant's supposed viciousness were valid, the conclusion might follow. But appellant's guilt was not contested, undoubtedly because of his confession and the felony-murder doctrine.[40] The issue—which trial

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[38]In claim II, above, appellant replies in full to respondent's characterizations of the facts before the jury and respondent's attempt to transport a manner of viewing facts appropriate only for a sufficiency-of-evidence challenge into the prejudice/harmlessness context. (See pp. 106–109, above [need to consider entire record, including facts most favorable to appellant, when considering prejudice], and 109–114 [summary of facts omitted by respondent)].) Appellant incorporates those replies here, as respondent employs the same erroneous analysis.

[39]See *Holmes v. South Carolina*, *supra*, 547 U.S. 319, 330 (impropriety of treating contested prosecution evidence of guilt as true for purposes of determining admissibility of other evidence); cf. *People v. Pizzaro* (2003) 100 Cal.App.4th 530, 626–627 (foundational fact for admissibility of prosecution evidence may not be based on assumption that defendant was the perpetrator).

[40]The one exception was the charges on which appellant was acquitted, those relating to Steenblock, on which there was no evidence, other than (continued...)

counsel made clear in its argument to the trial court (RT 30: 4701)—was and is the unacceptable risk of impact on penalty. As to this, respondent simply asserts, based on its own assessment of the strength of the aggravating and mitigating factors, that it is "inconceivable" that adding this robbery-shooting unacceptably risked tipping the scales or, once admitted, could have done so. (RB 150.)

Respondent does not dispute, but does ignore, the jury's justified skepticism about Munoz's testimony,[41] which makes it unlikely that all jurors believed that appellant was the actual shooter of Mans or the instigator of the crimes he was said to have instigated; the evidence of very serious abuse and neglect that were unmitigated by Philip Self's presence during the crucial years of early childhood, only partially mitigated by his presence later,[42] and not prevented by some contact with an extended family; appellant's attempts to reform himself in the year before the crimes; and his capacity to love and care about the people in his life, including a young son, for whom he wanted to be the father that he never had.[43] Respondent's implicit position that none of this could have mattered ignores the fact that the jury took two full days to agree on penalty. It is not "inconceivable" that the prosecutor got the emotional

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[40](...continued)
Munoz's testimony, identifying appellant as a perpetrator.

[41]This was expressed in the Steenblock verdicts, and there is no reason to doubt that the skepticism extended to Munoz's accounts of the circumstances of the crimes.

[42]Respondent misstates the evidence when it claims that, from age eight on, appellant "was guided by a devoted stepfather . . . ." (RB 149.) See pages 33 et seq., above, replying to respondent's treatment of Phillip Self's role in respondent's Statement of Facts.

[43]See AOB 107–111 for more details, with citations to the record.

impact that he wanted from associating appellant's character with Feltenberger's compelling narrative, nor that doing so "created a substantial danger of undue prejudice" in helping the prosecutor obtain his death verdict. (Evid. Code § 352.) And what is "undue" must be considered in the context of the lack of probative value of the evidence on the receiving charge in the first place.

As to the harmlessness of any error, respondent continues to simply ignore appellant's demonstration[44] that it is not enough to point out strong justification for a death verdict and ask an appellate tribunal to uphold a sentence that the jury did not impose, i.e., one based on deliberations not affected by the error. Rather, as described previously, because of multiple characteristics of the sentencing decision and appellate review, any substantial error that could bear on penalty can affect the penalty-phase outcome and therefore requires reversal, unless it was cumulative on a conclusively-established fact or was clearly nullified by curative action.[45] Absent these conditions, or the error being only technical and not substantial, there is a "realistic . . . possibility" that it affected the outcome, i.e., a possibility that does not require hypothesizing juror "arbitrariness, whimsy, caprice, 'nullification,' and the like" to envision. (*People v. Brown* (1988) 46 Cal.3d 432, 448 [explaining "reasonable possibility" test].) That being the case, in such circumstances it cannot be known that a verdict was "surely

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[44]AOB 82–105.

[45]This is explained in the Claim-II harmlessness analysis in this brief, pp. 101 et seq., above. Moreover, if the Court is analyzing the appellate claims in the order presented in respondent's brief, the statement under Argument heading I, pp. 37 et seq., above, which also concerns the penalty-decision harmlessness question, should be read first, and then the Claim-II analysis just referred to.

unattributable to the error"[46] and respondent's burden of showing harmlessness cannot be met.

If one could know which of the versions of the facts jury would or (in the case of the harmlessness analysis) did believe—something revealed by none of its verdicts; and *if* one could know that one of the people closest to the case, the prosecutor, was wrong in thinking he could set it up for a death verdict by using this evidence as he did; and *if* the human mind, in making normative and subjective penalty decisions, approximated the activity of weighing earthly items in real scales, then the discussion could take place on the level where respondent tacitly seeks to situate it. Respondent would have this Court hold that subjecting the jury, at the opening of the trial, to the gratuitous horror of the Feltenberger attempted-murder evidence and the implication that appellant was in some moral sense part of a unit with his brother even when he was not there, "had no effect on the sentencing decision"[47] and that there was no "realistic . . . possibility"[48] that it could or did have such an effect—simply because there was a great deal of material in support of a death verdict (some of which also came in because of prejudicial error). The question is whether that material would have inevitably led every juror to vote as he or she ultimately did, or whether the added impact of the Feltenberger evidence helped pave the way for at least one of those jurors. To hold that any reasonable doubt that a juror's decision was influenced by the

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[46]*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.

[47]*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.

[48]*People v. Brown, supra*, 46 Cal.3d 432, 448.

error can be eliminated,[49] this Court would have to assert the unknowable. And basing a harmlessness finding on belief in something unknowable would be inconsistent with placing the burden of showing harmlessness upon respondent.[50]

Because of the admission of evidence that was legally irrelevant to guilt or penalty but seriously inflammatory in orienting jurors towards a death sentence—as the prosecutor knew it would be when he hit on the device of charging a section 496 violation in a capital case—the penalty judgment must be reversed.

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[49]*Chapman v. California* (1967) 386 U.S. 18, 23, 24 (question is whether error "possibly influenced the jury adversely").

[50]*Chapman v. California, supra*, 386 U.S. 18; *People v. Guerra* (2006) 37 Cal. 4th 1067, 1144–1145 (test for state-law error affecting penalty is equivalent to *Chapman* test).

V[1]

THE TRIAL COURT SHOULD HAVE GRANTED SEVERANCE OF THE MAGNOLIA INTERIORS AND RECEIVING COUNTS

The relatively minor charges of burglary and vandalism of the Magnolia Interiors shop and of receiving property stolen from John Feltenberger should have been severed.[2] The trial court had no discretion to refuse severance because joinder was statutorily unauthorized in both cases.[3] Even if there had been such discretion it would have been an abuse of discretion to refuse discretionary severance of counts that contributed nothing to the prosecution's search for justice other than providing inflammatory fuel for the fire of a death verdict. If the charges had been severed, evidence pertaining to neither would have been admissible in the penalty trial, but joinder permitted the prosecutor use the Magnolia Interiors evidence to make a key point in his argument for death. As to the Feltenberger evidence, as the previous argument shows, it was inflammatory to begin with, and it was used to color the entire proceedings, including to blur in the jury's mind the distinctions between the

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[1]See AOB 314. Respondent addresses this issue in Part I of its brief, beginning on page 72.

[2]Appellant placed this issue after Argument IV in its brief, regarding the scope of the evidence admitted on the receiving charge, because the need for severance can be understood only in light of the evidence which the trial court considered relevant to that charge. Even if the Court generally considers the claims chronologically, appellant respectfully submits that analyzing appellant's Argument IV (and respondent's Argument IV) first would be more useful, because the part of the instant argument concerning the receiving count builds upon and cross-references points made in Argument IV, and it relies on the evidence detailed in that claim.

[3]Respondent incorrectly summarizes appellant's contention as relating only to an abuse of discretion. (RB 72.)

defendants and their conduct. Appellant's state law and state and federal rights to due process, a fair trial, and a fair and reliable penalty determination require reversal of the death judgment.

Respondent's arguments to the contrary lack support in the law, and they ignore the factual presentation at trial.

A. There Was No Legal Basis for Trying the Magnolia Interiors Burglary and Vandalism with the Other Offenses

While, as respondent points out, there are some judicial economies to trying different offenses charged against the same defendant together, the prosecution may do so only under two circumstances. (§ 954.) One is no longer in issue, as respondent has virtually abandoned the position it took at trial, that the Magnolia Interiors offenses were of the same class as the others (see CT 4: 828), so the parties agree that joinder was therefore authorized only if all the charged offenses were connected together in their commission.[4] (§ 954.) Crimes are connected together in their commission if committed at the same time or against the same victims; otherwise, this requirement is met only if the crimes are linked together by a common element of substantial importance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.)

In arguing that the offenses against the Magnolia Interiors property were connected together in their commission with robberies and robbery-murders that took place at other times, in other places, against other victims,

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[4]Respondent does suggest in a footnote that "it could be argued" that the crimes were of the same class, because burglary, like robbery, can be "a property-related crime entailing danger to human life." (RB 76, fn. 36.) The considerations cited by respondent explicitly pertain to burglaries of occupied structures, which this was not. The charged burglary and vandalism were not of the same class as the robberies, murders, and attempted murders. (See AOB 316–317.)

respondent disagrees—not only with appellant, but with the prosecutor—that the crimes prosecuted as vandalism and burglary for vandalism were about vandalism at all: they were, it is argued now, primarily theft offenses. Further, respondent, like the trial court, relies on a "common thread" of feloniously obtaining property, as if this Court has held that a context-free invocation of this phrase could substitute for the statutory requirement that crimes be actually connected together in their commission. Respondent fails to address appellant's demonstration that this is not how this Court has employed the expression or that it could do so without a change in the statute. Finally, treating this issue, too, as if it were part of a law-school hypothetical than part of a capital trial, respondent abstracts it from the context of the actual trial, declining to acknowledge, much less respond to, the point that the prosecution had nothing to gain by taking the time to put on evidence of these offenses, in terms of containing and punishing appellant, unless its real agenda were to infect the penalty decision with evidence that could not have been admitted openly for that purpose alone.

1. This Court Has Never Reinterpreted "Connected Together in Their Commission" to Include Every Crime Motivated by a Felonious Intent to Obtain Property, Regardless of Circumstances

The statute permits joinder of offenses which are "connected together in their commission." (§ 954.) This Court has interpreted that expression expansively to apply if the crimes are "linked by a common element of substantial importance." (*People v. Mendoza*, *supra*, 24 Cal.4th 130, 160.) What the trial court did and what respondent does is act as if there is also a rule that any crimes can be joined—regardless of differences in circumstances, means of commission, victims, time frames—if it can be said that all include an intent to steal. Under this view, section 954, despite its apparent

restrictions, would permit one to be tried in a single proceeding on charges of embezzling in Riverside in 1990 and committing a robbery-murder in San Francisco in 2010. Moreover, logical consistency would require further new sub-categories, such as where "the element to cause harm others runs like a single thread through the various offenses," which would permit joining vandalism with assaults. Both propositions are unsupported in the law and, when examined, plainly absurd.

Respondent points to no explanation by this Court for such a strange interpretation of what the Legislature intended when it circumscribed the situations in which the prosecution could join offenses. Rather, it simply quotes, with no discussion of the context, the "common thread" language that occurs in various cases and asserts that the Court has held that the existence of such a thread alone justifies joinder. (E.g., RB 74.) Respondent then suggests that appellant only "attempt[s] to distinguish the instant case from this long line of precedent . . . ." (RB 75.) Not so. More to the point, appellant has analyzed that line of precedent and shown that it does not set out the supposed principle on which respondent relies. The cases discussed include *People v. Lucky* (1988) 45 Cal.3d 259, 276, which the trial court relied on, and the cases quoted by *Lucky*, *People v. Chessman* (1959) 52 Cal.2d 467, 492, where the phrase was first used, and *People v. Conrad* (1973) 31 Cal.App.3d 308, 315. Appellant will not reiterate that discussion—which respondent makes no attempt to dispute. It shows that, in each of the cases, first, the bottom line was whether the offenses were truly connected together in their commission and, second, that the intent to steal was only one of a number factors cited to support the conclusion that they were so connected. (See AOB 319–321.) Put differently, "the sentence on which the court below relied was used by this Court as *part* of detailed analyses of the actual crimes in the cases from which

it came, not as a talismanic phrase which—if it could be stretched to apply to a set of facts—would substitute for the statutory test." (AOB 321.)

Respondent simply has no answer to the claim that the trial court—which began its analysis by correctly describing the Magnolia Interiors charges as "unrelated to the other incidents"[5]—applied the wrong legal standard.[6] Respondent repeats the trial court's error and does not even attempt to argue that the offenses were connected in their commission or that—using this Court's actual test for what that means—that they were linked by a common element of substantial importance. Respondent appears to hope that this Court will join it in pretending that appellant's claim is only that the supposed rule ("common thread" of theft) does not apply to the facts, rather than that there is no such rule.

2. The Tenor of the Magnolia Interiors Offenses Was Not Theft

Even if a common thread of intent to obtain property feloniously were, in itself, sufficient to make crimes connected together in their commission, such a principle would not apply here. There is no evidence that the vandalizing of Magnolia Interiors was motivated by the same intent that was behind the other incidents, all of which included robberies and were clearly about obtaining money, cars, and ATM cards.

Respondent now asserts that the Magnolia interiors offenses were

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[5]RT 29: 4691.

[6]Respondent also overlooks that the trial court's overall analysis was quite confused, mixing the standards for discretionary severance with those of mandatory severance, and concluding with the "common thread" language in a single sentence unconnected to and unsupported by the rest of its analysis or by reference to facts showing a pre-existing intent to steal. (See AOB 317–318, citing RT 29: 4691–4692.)

basically about theft, specifically, an attempt to crack a safe. In contrast, respondent's trial counsel charged the defendants with vandalism, but not theft or attempted theft. While theft was included in the instructions as a possible target felony for burglary, so was vandalism,[7] and the prosecutor never mentioned theft in his summations.[8] The detail about the safe was not important enough for the prosecutor to even mention during opening statement or closing argument. In both, however, the prosecutor went into some detail about wanton destruction at the place, the scissors through the sonogram of the owner's unborn son, and "Now you die" and other graffitti on the wall and on the sonogram, and more.[9] And these were presented for an important rhetorical purpose: "This count . . . [t]eaches us what Romero is about, which is just sheer destruction, destroying things, just for the fun of it." (RT 45: 6944.)

If this were a civil action, it would be clear that respondent would be judicially estopped from arguing before this Court that the perpetrators' intent was to steal valuable property, that, being thwarted, they took the paperweights, etc., "as consolation prizes, [and then] leaving behind threatening graffiti and extensive damage . . .,"[10] when, before the factfinder/sentencer it relied only on the nature of the property damage, to persuade that body of appellant's maliciousness. (See *MW Erectors, Inc., v. Niederhauser Ornamental and Metal Works Co., Inc.* (2005) 36 Cal4th 412, 422, 424 [inconsistent positions prohibited, to avoid unfairness to parties and

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[7]CT 7: 1648.

[8]See RT 45: 6944–6946, 46: 7039.

[9]RT 31: 4823–4824; 45: 6944–6946; 7039–7040.

[10]RB 76–77.

manipulation of courts]; cf. *People v. Williams* (2008) 43 Cal.4th 584, 622, fn. 21 [suggesting, without explanation, that the doctrine is more limited in criminal cases].) Such estoppel should apply hear as well. (U.S. Const., 14th Amend., [equal protection]; Cal. Const., art. I, § 7 [same].) In any event, the theory respondent offered at trial is the one that fits the facts.

The evidence unaddressed by respondent makes this clear in another way, as well. People entering a business to get access to its cash bring tools that may help. The tools used to try to pry open the Magnolia Interiors safe were not brought in by the vandals; they belonged to the business. (RT 34: 5372–5373.) The only reasonable hypothesis is that the amateurish attempt to open the safe was an opportunistic decision made after entry. In contrast, while the origin of the spray paint used to deface the walls and merchandise was not made clear, it seems more likely that the perpetrators brought it with them than that a furniture upholsterer would stock it. The perpetrators brought what they needed for vandalism, not safecracking.

Finally, appellant has pointed out that,

> [i]n a shop filled with valuable and easily removed office equipment, tools, and fabrics, the proprietor complained of $18,000 damage but the disappearance of only a paperweight, a fake hand grenade, some keys, and some collectible coins, which, at the time of the motion, were described as petty cash.

(AOB 319, with citations to the record.) In reframing the offense to fit its current needs, respondent ignores this point and, treating this Court as if it will draw fanciful notions from selectively-drawn portions of the evidence, respondent simply asserts, "[I]t is clear appellants broke into Magnolia Center Interiors with the intent to take valuable property from the store," based on the attempt to open the safe. (RB 75.) Respondent does not attempt to reconcile its new theory with the vandals' failure to take readily removable, valuable

items from the shop, if that was their intent.

Focusing now on an action not even mentioned in counsel's statements to the jury, as showing the defining intention in the burglary/vandalism, is respondent's attempt to salvage a clear error by a court that misunderstood the law. This Court should not indulge in the fiction which respondent invites it to adopt.

Respondent also states that the charged offenses "occurred amidst a prolific crime spree, wherein appellants kidnaped, carjacked, robbed, and/or shot nearly a dozen victims in a two-month period." (RB 75.) This sentence nearly refutes itself, as the Magnolia Interiors vandalism looked nothing like the crimes in the alleged "spree." And there is no "part of a spree" clause in section 954. Both parties have cited *People v. Mendoza*, *supra*, 24 Cal.4th 130, 160, in which this Court explained that "the close time frame within which the consolidated offenses were committed shows a continuing course of criminal conduct." What took place there were three incidents involving robberies, plus two commercial burglaries—i.e., five incidents—in a span of less than 48 hours, so it was clearly a continuing course of conduct. (*Id.*, pp. 159–160.) Here, in contrast, the 11 incidents with which appellant was charged were spread over a two-month period, between October 8 and December 7, 1992. In a period 30 times as long, there were only twice the number of incidents. While for rhetorical or journalistic purposes this could be characterized as a "spree," legally it was not in the same qualitative class as Mendoza's continuing activity during the two days in which he committed a crime every few hours. The Magnolia Interiors breakin occurred three weeks

after the preceding offense and five days before the next,[11] as appellant pointed out in his opening brief.[12] The fact that appellant apparently violated the Penal Code in some way every few days or weeks, over a two-month period does not make all such incidents—whether vandalism, or using illegal drugs, or a much more heinous crime—"connected together in their commission." The only common link was the perpetrator, and section 954 would have no restrictions at all if this were enough.

Neither the nature of the crimes, the means of their commission, the victims, nor true temporal proximity connected the commission of the burglary-vandalism to the commission of the robberies and robbery-murders, and trying them together was unauthorized by statute. This is a question of law, and the trial court had no discretion to deny severance. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984.) Rather, it was correct when it described the Magnolia Interiors charges as "unrelated to the other incidents,"[13] confused when it interwove mandatory and discretionary severance standards in the bulk of its analysis and misused some,[14] and wrong on both the law and facts when, in a single conclusory sentence that began to address the relevant issue, it relied on a supposed common thread of a primary

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[11]Of which, it later turned out, appellant was acquitted.

[12]See RT 34: 5253 (Rankins/Williams attacks: night of October 25, 1992), 5362–5364 (Magnolia Interiors: night of November 13), 5308–5309 (Steenblock kidnap/robbery: November 18); see also CT 5: 963–964, AOB 322, fn. 206.

[13]RT 29: 4691.

[14]See RT 29: 4691–4692 and AOB 317–318.

intention to commit theft feloniously.[15]

B. Had the Magnolia Interiors Offenses Been Properly Joined with the Assaultive Crimes, Refusing Discretionary Severance Would Have Been an Abuse of Discretion

Appellant has argued alternatively that, even if there was statutory authorization for joinder of the offenses, it was an abuse of discretion to refuse severance. (AOB 322–330.) Respondent disagrees. (RB 76–83.)

1. Respondent Partially Misconceives the Four-Part Test For When Properly-Joined Offenses Must be Severed to Protect a Defendant's Rights to a Fair Trial and Reliable Penalty Verdict

The parties largely agree on the law applicable to the trial court's obligation to sever properly-joined charges in the interests of justice and the defendant's right to a fair trial. (§ 954; due process clauses of U.S. Const., 14th Amend., Cal. Const., art. I, §§ 7, 15.) There are, however, critical differences. The bottom-line issue, it is agreed, is whether joinder prevents a fair trial, here, a fair penalty trial.

Respondent partially miscites *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243, for the proposition that "the defendant must clearly establish a substantial danger of prejudice—prejudice so great as to deny a fair trial and outweighing countervailing considerations." (RB 76.) It is true that *Musselwhite* puts the burden of clearly establishing a substantial danger of prejudice on an appellant seeking to show an abuse of discretion. (*Id.* at p. 1244.) However, there is no weighing of the benefits of consolidation against prejudice: severance is "constitutionally required if joinder of the offenses would be so prejudicial that it would deny a defendant a fair trial." (*Id.* at pp. 1243–1244.) This is unsurprising. "[T]he pursuit of judicial

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[15]RT 29: 4692.

economy and efficiency may never be used to deny a defendant his right to a fair trial."[16] (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451–452.)

The determination of prejudice depends on the facts of each case, but four factors are evaluated as part of that analysis. None is a prerequisite for a finding of either prejudice or lack of prejudice. However, the first (cross-admissibility of the evidence) is particularly weighty because, if the same evidence would come in at separate trials, the usual sources of prejudice from consolidation disappear. (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639; *People v. Jenkins* (2000) 22 Cal.4th 900, 948.)

> The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.

(*People v. Mendoza, supra*, 24 Cal.4th 130, 161.) This is not just the basis for

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[16]Recently in *People v. Soper* (2009) 45 Cal.4th 759, this Court did emphasize the likely economies of joinder in many cases and speak of weighing them against the likelihood of prejudice. (*Id.* at pp. 780–783.) However, in context, the Court was emphasizing an analytical framework that—if charges were properly joined— places a burden of clearly establishing a substantial danger of prejudice on the defendant because of those economic benefits. (*Ibid.*; see also pp. 772–775.) It did not hold that if an unfair trial was likely, sufficient economies could outweigh that cost of a consolidated trial. In fact, the *Soper* opinion found little likelihood of prejudice on the facts of that case. (*Id.* at pp. 780–781, 784.)

It is also noteworthy that most of the systemic economies of joinder noted by the Court to be generally true were exemplified by that case, where two similar murders were joined. Here, because the costs of brief, simple, separate trials on either the receiving count or the burglary/vandalism counts would be negligible, so were the benefits of consolidation.

appellate review. These are "the factors through which the trial court's exercise of discretion is channeled." (*People v. Musselwhite, supra*, 17 Cal.4th 1216, 1244.)

Respondent replicates an error made by the trial court, critically misstating the second factor as "the prejudicial effect of joining a highly inflammatory charge with a non-inflammatory charge" (RB 77), rather than whether the evidence pertaining to at least some of the charges is unusually inflammatory (*People v. Mendoza, supra*, 24 Cal.4th at p. 161). The risk of prejudice does not disappear if the evidence pertaining to all of the charges is inflammatory, rather than just some, as respondent would have it. As explained in the opening brief, cumulating inflammatory evidence from separate charges, evidence that otherwise would not all be before one jury, creates a risk of prejudice, period. This is especially true, where, as here, the question is penalty-deliberations prejudice, where the jurors' felt sense of who the defendant is becomes critical, and piling on inflammatory evidence affects the subjective weighing process. It is therefore wrong to claim that there has to be a *differential* inflammatory impact between the bodies of evidence on the different charges, and there is no support in this Court's precedents for such a claim. The trial court and respondent both conflated the weak-case/strong-case factor, which does have to do with differences in the strength of the proof on each charge, with the inflammatoriness factor, in which differences are irrelevant. Appellant explained this in analyzing the trial court's error;[17] respondent ignores the point.

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[17]See AOB 327–328, quoting *People v. Mendoza, supra*, 24 Cal.4th at p. 161; *People v. Marshall* (1997) 15 Cal.4th 1, 27–28; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639; and *People v. Lucky, supra*, 45 Cal. 3d 259, 277.

Respondent's supposed authority for its formulation is *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452.[18] *Williams* adopted the now-classic four-part test from *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 135. *Coleman's* facts did involve cases where the evidence on some counts was more inflammatory than that proving the others, but *Williams* did not hold that this was pertinent to the analytical model it was adopting. On the contrary, as *Williams* applied the inflammatory-nature factor to the facts before it, the *same* inflammatory evidence—possible gang membership—was present in the evidence on both charges. In the particular circumstance of that case, such evidence "might very well lead a jury to cumulate the evidence" of guilt presented on the two charges, separate murders, in determining guilt of either. (*Williams v. Superior Court, supra*, 36 Cal.3d at p. 453.) Here the problem is, similarly, that any unnecessary inflammatory evidence would be cumulated with the other circumstances favoring death.

The other difference between the parties regarding the law is that respondent does not acknowledge (or deny) that more protective standards apply in a capital case because of "the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment . . . .' [Citation.]" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 323.)[19] Respondent acknowledges that whether or not the case is a capital one is one of the factors involved in the weighing process articulated by this Court, but without stating what that means.

2. The Trial Court Abused its Discretion by Considering Cross-Admissibility Irrelevant, and a Proper Analysis

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[18]RB 77.

[19]See authorities discussed at AOB 323, fn. 207, on the direct application of this principle to severance issues.

Would Have Shown the Absence of this Factor

Respondent overlooks the stronger weight that the cross-admissibility factor can have[20] and the trial court's stated belief that the factor—normally the main reason for joinder and the clearest way to negate prejudice—was irrelevant to its analysis.[21] The question of whether there was error is answered at this point. "The trial court does not have discretion to depart from legal standards." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712, fn. 4, quoting *People v. Neely* (1999) 70 Cal.App.4th 767, 775–776.) "[W]hen a trial court's decision rests on an error of law, that decision is an abuse of discretion." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746.) Ignoring this problem, respondent proposes the abuse-of-discretion standard that would apply if the trial court had not deviated from the law.[22]

Respondent then supplies its own argument for cross-admissibility. Respondent's argument can only go to prejudice, not whether there was error, and this Court must evaluate that argument independently, with no deference to a non-existent trial-court ruling on the issue.[23] Finally, in making its contention, respondent assumes that a feather's weight of circumstantial relevance of uncharged conduct at Magnolia Interiors would make it admissible in a separate trial on the major crimes, ignoring the need for some "substantial probative value" to overcome the risk of prejudice always inherent

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[20]*People v. Jenkins* (2000) 22 Cal.4th 900, 948, discussed at AOB 324.

[21]RT 29: 4688–4690, discussed at AOB 325.

[22]RB 76.

[23]I.e., if respondent's reasons to refuse severance were to lead this Court to the conclusion—in its own independent analysis—that the charges should have remained joined for trial, then the trial court's error would have been harmless, no different result being possible even if the trial court had not erred.

in bringing in other-crimes evidence. (*People v. Thompson* (1980) 27 Cal.3d 303, 318; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1245.)

Respondent notes, with some exaggeration, that "keys and other items"[24] stolen from Magnolia Interiors were found during the same search of appellant's grandmother's house that turned up items stolen from robbery victims. (RB 78.) The only cross-admissible evidence here would be the few lines of testimony in which an officer indicated that he conducted the search and that it turned up evidence that Self lived on the premises. (RT 37: 5655, 5661–5662.) This is because items relating to both sets of crimes were found there, so when the officer testified in either trial about items pertaining to the charges then at issue, he would need to say that he conducted the search. Arguably the domicile evidence regarding Self would also be admissible as (extremely weak) circumstantial support for appellant's involvement in the crime at issue. However, the evidence of the Magnolia Interiors items being found at Self's residence would not help, in a separate trial on the robbery/assaultive-type offenses, to prove that appellant—or even his brother—committed those offenses. Nor would the evidence of the Steenblock golf clubs or the Greer ATM card, the items taken via armed robberies and found at the same location, have helped tie either defendant to the Magnolia Interiors incident. The cross-admissibility regarding the search involves a negligible quantity of evidence.

Still relying on evidence pertaining to Self, not appellant, respondent asserts that shoe prints similar to those the "British Knight" prints found at the Mans-Jones and Feltenberger scenes were at Magnolia Interiors, "thus further establishing Self's actual participation" in the vandalism offenses. (RB 79.)

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[24]The only other item was a paperweight. (RT 37: 5655–5664.)

This is both entirely undocumented[25] and a non sequitur; evidence of Self's presence at completely unrelated crime scenes would not be admissible to show that he was involved in either crime, much less that appellant was. That a perpetrator wore shoes like his was circumstantial evidence of Self's presence at the scene in question; evidence that he might have been present somewhere else had no "tendency in reason" (Evid. Code § 210 [defining "relevant"]) to establish his presence at the first crime scene.

Similarly, respondent states that the style in which a nickname was written on a British Knights shoe box found in Self's car, and in which his own name was written in a briefcase found in the Colt, was similar to the Magnolia Interiors graffiti. (RB 79.) Assuming that this was true—though this assertion, too, depends on wishful thinking rather than the record[26]—the evidence would have been admissible in a separate Magnolia Interiors trial as tending to show Self's involvement. But it would have added—and did

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[25]Respondent again cites the portions of the record it cites when making this claim in its Statement of Facts. See the discussion of the matter at page 23, above.

[26]Respondent cites portions of the record referring to the graffiti, but there was no testimony comparing or even describing the samples. (RB 79, citing RT 32: 5039–5041; 34: 5365–5373; 37: 5687–5688.)

The prosecutor did urge jurors to do their own handwriting analysis (RT 45: 6705–6706), but what conclusion they might have come to is not revealed by any of the exhibits now cited by respondent. Two show Magnolia Interiors graffiti, but not that described by the prosecutor. (Ex. 14, SCT — Exhibits 1: 45–46; Ex. 194, SCT — Exhibits 2: 319–320.) Another shows no graffiti. (Ex. 65, SCT — Exhibits 1: 102–103.) Another provides a badly obscured glimpse of a little bit of graffiti inside some object, none of which resembles in any way anything in Exs. 14 or 194 or anything described by the prosecutor. (Ex. 64, SCT — Exhibits 1: 100–101.) No graffiti in any exhibit is particularly distinctive to one who without experience recognizing subtle sub-varieties in typical teen "tagging" graffiti.

add—nothing to the prosecution case on any other offense.[27] The shoe box alone was technically relevant in the assaultive-crimes trial because of the British Knights prints at the Lake Matthews scene, but it was cumulative to, and less probative than, an officer's testimony that Self was wearing British Knight shoes when arrested.[28] In any event, if this tiny piece of evidence were needed at both trials, it would have taken minutes to establish Self's possession of the shoe box in a second trial, as it did in the first.

Finally, respondent states that what it inaccurately calls the threatening nature[29] of the graffiti at Magnolia Interiors, where Munoz was (supposedly) not present,[30] tended to undercut appellants' attempts to portray Munoz as the violent ringleader by showing "appellants' shared intent to steal property and harm people." (RB 79.) The prosecution never suggested this as a basis for

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[27]The briefcase at issue was never tied to any other offense. (Compare RT 37: 5687–5688 [Ex. 328 had the writing] with RT 34: 34: 5324 [Ex. 77 was Steenblock's briefcase].)

[28]RT 38: 5729.

[29]There were no threats to anyone. The testimony was that "Now you die," "Just when you thought," "Now is then," and "666" were on walls and furniture. (RT 34: 5366–5370.)

Respondent claims flatly that, in addition, "You're going to die" was written on a sonogram. (RB 24.) This apparently was not the case. The proprietor testified that he did not "exactly remember" what was written; it was "something like, 'You're going to die,' or something like that." (RT 34: 5367.) The prosecutor, who presumably knew what was written, followed up with, "Something about death?," and the witness answered affirmatively. (RT 34: 5367.) No exhibit showing the writing was introduced. In any event, the writing was disturbing but did not, as respondent suggests, show an intention to harm people.

[30]There was no evidence either way on whether Munoz was involved, or of how many perpetrators were present.

cross-admissibility.[31] Nor did the trial court, which, as noted previously, considered cross-admissibility irrelevant. (RT 29: 4688, 4690.) It is a far-fetched basis for arguing that uncharged Magnolia Interiors evidence could have been admitted at a separate trial on the robberies and murders, given Munoz's violent behavior. All three young men were involved in some way in three murder-robberies and the Mills-Ewy and Williams-Rankin shootings; Munoz and Self continued engaging in robberies together; Munoz shotgunned Paulita Williams and, according to Sgt. Feltenberger, Munoz demanded that Self shoot him. None of the three, and certainly not Munoz, came off as not having a violent dark side. The fact that Self may have displayed his in some graffiti at a vandalism site, where Munoz might not have been present, had no significance in any attempt to decide who was a ringleader in the robberies and homicides and who was involved without exercising leadership.

Moreover, the issue of who was more active or passive in the shootings had nothing to do with appellant's guilt; it only went to penalty. So the vandalism evidence would not have been admitted at a separate guilt phase, and it is inconceivable that it would have been admitted at a penalty trial for this purpose, in the face of section 190.3's exclusive list of aggravating factors, not to mention the consumption of time it would take to provide no real information on appellant's degree of culpability for the murders. (*People v. Boyd* (1985) 38 Cal.3d 762, 775; Evid. code § 352.)

In sum, cross-admissibility is the main way to show judicial economy and negate prejudice,[32] and it can therefore have greater weight than the other

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[31]See CT 6: 1207–1215 (points and authorities); RT 29: 4683–4686.

[32]*People v. Jenkins* (2000) 22 Cal.4th 900, 948; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 448; *People v. Scott* (1944) 24 Cal.2d 774, (continued...)

factors.[33] The trial court's failure to consider this factor leaves this Court without a finding or legally-based exercise of discretion to uphold. Rather, the trial court erred as a matter of law. (*Haraguchi v. Superior Court*, *supra*, 43 Cal.4th 706, 712; *People v. Superior Court (Humberto S.)*, *supra*, 43 Cal.4th 737, 746.) In the independent analysis which this Court is therefore left to make—in the context of deciding whether the error was prejudicial or whether a correct application of the law would have produced the same result—respondent points to facts that have some vague connection with each other but legitimately can come up with only to one small item of evidence that truly would be admitted at separate trials: that a search was made of Self's car and that, among the items found were a briefcase and a shoe box. Neither the time-consuming nor the prejudicial portions of the evidence would be repeated in a separate trial on the assaultive crimes. This factor would not have been a basis to deny severance.

3. The Trial Court Continued its Failure to Apply the Law in its Failure to Recognize the Capital-Case Factor

Before turning to what is often listed as the second of four factors to be considered (the inflammatory potential of the evidence) appellant analyzed (AOB 325–327) another one that is both straightforward and provides key context for the inflammatory-potential factor: whether or not the case is a capital one. (*People v. Mendoza*, *supra*, 24 Cal. 4th 130, 161.) As cases cited

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[32](...continued)
778–779; *Walker v. Superior Court* (1974) 37 Cal.App.3d 938, 941.

[33]*People v. Jenkins*, *supra*, 22 Cal.4th at p. 948.

by appellant previously make clear,[34] Eighth Amendment considerations triggered by "the gravest possible consequences" of the trial require "a higher degree of scrutiny and care" by a court deciding severance in a capital case. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 454; accord, *People v. Keenan* (1988) 46 Cal.3d 478, 500; *People v. Lucky* (1988) 45 Cal.3d 259, 277.)

Respondent does not acknowledge or dispute this principle. Nor does respondent address the fact that the trial court overlooked the factor entirely. (RB 78–83.) The trial court's only mention of the capital-case factor was to state that consolidation will be upheld on appeal under certain circumstances, even in capital cases.[35] This is a far cry from recognizing its duty to take into account the greater likelihood of a need for severance. The court's error was pointed out in the opening brief (pp. 326–327), and respondent does not dispute it.

Again, when a trial exercises discretion without applying the proper legal principles, it has per se abused its discretion. (*Haraguchi v. Superior Court*, *supra*, 43 Cal.4th 706, 712; *People v. Superior Court (Humberto S.)*, *supra*, 43 Cal.4th 737, 746.) That happened here as to the capital-case factor as well, which is another reason why this Court must analyze the entire ruling de novo in deciding whether the trial court's error can be held not to have affected the outcome.

Recently, however, in a one-sentence footnote in *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, this Court characterized the capital-case factor

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[34]See AOB 325–326.

[35]RT 29: 4690. Appellant Self's brief, at page 238, quotes the entirety of the trial court's confused analysis of the Magnolia Interiors joinder.

as one it had "suggested" previously and stated that "a heightened analysis is no longer called for" after the 1998 enactment of section 790, subdivision (b). The Court's reasoning was that the statute "specifically provides for joinder of *capital* cases such as these." (*Id.* at p. 1229, fn. 19.) The conclusion should not apply to appellant, whose crimes occurred in 1992 and who was tried in 1996.[36] In any event, an examination of the briefs in that case shows that the conclusion was reached without the benefit of any briefing on the point and should be reconsidered.

The "suggestion" about the capital-case factor was phrased in these terms: "since one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 454.) Until the *Alcala* footnote, this principle, as one of the four factors generally applicable to analyzing prejudice, had been consistently upheld for 25years. (See, e.g., the seven cases cited in *Alcala* as restating the four-factor analytical framework, *Alcala v. Superior Court*, *supra*, 43 Cal.4th at pp. 1220–1221.)

Section 790, the provision cited in *Alcala*, is a venue statute. As this Court explained, before its passage a murder could be tried only in the county where the injury was inflicted or where the victim died. The new subdivision excepted murders properly joinable but committed in different counties from this restriction. The purpose was to avoid multiple complicated and expensive trials of serial killers who operated in more than one county. (*Id.* at p 1215.) But the new venue subdivision only permits joinder where it is otherwise

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[36]U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; *Bouie v. City of Columbia* (1964) 378 U.S. 347; *People v. Davis* (1994) 7 Cal.4th 797, 811–813.

appropriate under section 954, the joinder statute. (See § 790, subd. (b).) The question of whether, in a particular case, due-process fairness considerations (see *Williams*, *supra*, 16 Cal.3d at p. 452) and Eighth-Amendment reliability requirements compel discretionary severance of charges, where joinder was statutorily authorized, is unaffected by changing the venue rules so that they would not interfere with joinder. The need to avoid risking a mistaken death judgment still counsels extra care in considering whether to try joined charges together. The capital-case factor is still pertinent, and the trial court erred by excluding it.

4. The Trial Court's Conclusion That the Evidence Was "Extremely Inflammatory" Was Correct and Should Have Been Determinative, but it Confused the Inflammatoriness Issue with the Weak-Case/Strong-Case Factor

The trial court stated, in explaining its denial of severance, "I don't think it can be argued that the incident is significantly less inflammatory than the others, in that the sonogram is extremely inflammatory . . . ." (RT 29: 4692.) And, as set forth in more detail in the opening brief (p. 327), the court also detailed how other parts of the evidence were quite inflammatory. The court thus confused the inflammatoriness factor with one of the other potential reasons for granting severance, the joining of a weak case for guilt with a strong one, creating a likelihood of a "spillover effect" that could lead to an unreliable verdict on guilt of the less-supported charge. The parties agree that the weak-case/strong-case factor is inapplicable here.

As explained above,[37] of the two factors which the trial court muddled together here, the question should have been whether failure to sever would

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[37]Pages 184–185.

permit unusually inflammatory evidence to enter a joint trial that would not be admitted if the charges were tried separately.[38] I.e., the factor is not about the *relative* inflammatory nature of the bodies of evidence admissible at each proceeding. This is particularly the case in a capital trial, where allowing consolidation to bring in otherwise irrelevant inflammatory evidence, evidence that would be inadmissible on penalty, could affect the jury's penalty decision. As appellant pointed out previously,

> because of the normative weighing of intangibles that goes into a capital penalty determination (*People v. Sanders* (1990) 51 Cal.3d 471, 529; see § 190.3), it is not disparities in inflammatory potential, but *cumulative* inflammatory and/or legitimately unfavorable testimony that helps produce a death verdict. (See, e.g., *People v. Roldan* (2005) 35 Cal. 4th 646, 725 [surveying facts which, added together, likely led to death verdict].) [Here, p]ermitting the prosecutor to add more evidence inflaming the jurors against appellant was precisely the problem.

(AOB 328–329.)

Respondent, unable to dispute either the guiding principle, its application here, the trial court's confusion of the weak-case/strong-case factor with the unusually-inflammatory factor, or its correct holding that the sonogram evidence alone was "extremely inflammatory," simply ignores all of these. (RB 80–81.) Instead, respondent mischaracterizes appellant's claim as being based on the likelihood of biasing the jurors so that they would convict on the unrelated charges regardless of the evidence, rather than as

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[38]See AOB 327–328, quoting *People v. Mendoza*, *supra*, 24 Cal.4th at p. 161; *People v. Marshall*, *supra*, 15 Cal.4th 1, 27–28; *Frank v. Superior Court*, *supra*, 48 Cal.3d 632, 639; and *People v. Lucky*, *supra*, 45 Cal. 3d 259, 277.

being based on the risk to a reliable penalty verdict.[39] And, according to respondent, this is the only complaint available: "[T]he real danger to be avoided by joining inflammatory offenses with non-inflammatory offenses is that strong evidence of the inflammatory charge might be used to bolster a weak case of a non-inflammatory crime. (*People v. Mason* [1991], 52 Cal.3d [909,] 935.[40])" (RB 81.)" (RB 81.) *Mason*, however, did not involve a claim of penalty-phase prejudice, but guilt-phase prejudice. Apparently, in respondent's view, it is not a problem if a court permits the prosecution to bias a penalty determination with bad-character evidence based neither on the circumstances of the crime nor some other violent offense, contrary to statute as interpreted by this Court[41] and the Eighth Amendment. So, in attacking the straw man of guilt-phase prejudice, respondent faults appellant for not acknowledging the jury's acquitting him of the charges relating to Alfred Steenblock, a circumstance providing "compelling evidence that the Romero jurors were not unduly inflamed" when deciding if the elements of the offenses were proved. (RB 81.) And, still focusing on that question, as opposed to whether the vandalism evidence would add more (but illegitimate) evidence to the penalty side of the aggravation scale, respondent repeats its refrain that everything else legitimately in front of the jury was so inflammatory as to make the added evidence insignificant. In doing so, respondent inaccurately claims that the trial court, too, considered the Magnolia Interiors evidence "much less inflammatory" than the evidence of murders and attempted murders (RB 80), when it fact the court stated, "I don't think it can be argued

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[39]Self does make such a claim.

[40]The language which respondent paraphrases is at 52 Cal.3d at p. 934.

[41]Section 190.3; *People v. Boyd* (1985) 38 Cal.3d 762, 775.

that the incident is significantly less inflammatory than the others, in that the sonogram is extremely inflammatory . . . ." (RT 29: 4692.)

That is an indisputable conclusion. There is no escaping the fact that the trial court thought it was a reason for denying severance when it fact it was a reason for granting it. Respondent's entire discussion simply circles around this problem, rather than addressing it.

In brief, the trial court seemed to understand the weak-case/strong-case factor and its inapplicability here. But it held that the often-determinative cross-admissibility factor was no longer part of the applicable law; alluded to the capital-case factor only by noting that it alone need not be determinative, rather than acknowledging its role in cautioning against denying severance; and put the question of inflaming the jury on the wrong side of the court's analytical scale. Respondent argues for lack of error only by ignoring all of these aspects of the ruling, as well as appellant's actual claim of error.

Neither the inflammatory Magnolia Interiors evidence, nor the theories about appellant's character which it permitted the prosecutor to elaborate,[42] belonged in a trial in which the jury was to decide whether appellant lives or dies. It was evidence (a) unusually likely to inflame a jury, introduced into (b) a capital case, (c) in a situation where only joinder, not cross-admissibility, could have been the vehicle for its admission, and where the judicial-economy benefits of joinder were minimal.[43] Thus refusal to ensure the fairness of the capital proceeding through severance was an abuse of discretion. (*People v. Mendoza*, *supra*, 24 Cal.4th at p.161; *People v. Marshall*, *supra*, 15 Cal.4th

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[42]See AOB 329, 336–339.

[43]This is particularly true because Self—as to whom most of the claimed instances of cross-admissibility applied—already had a separate jury.

at p. 27–28.) This is unsurprising, since the trial court thought that two of the four factors intended to guide that discretion were either without continued viability or could be ignored, and its view of how to apply a third was precisely reversed from what this Court had propounded for its guidance.

The trial court's failure to apply the correct legal standards could theoretically be found harmless on either of two bases. The first would be if a correct analysis would have led to the same result, but this is manifestly not the case. Nor can respondent not demonstrate harmlessness at the level of showing that erroneous admission of the Magnolia Interiors evidence had no potential to affect the penalty decision. This question, however is discussed in Part D, page 205, below, along with the effect of the court's similar error in denying severance on the Feltenberger receiving count.

C. The Receiving Charge Should Have Been Severed as Well

1. Joinder Was Unauthorized, So Severance Was Mandatory

In responding to the severance claim regarding the receiving charge, respondent again ignores both appellant's contentions and the trial court's actual ruling. The trial court held that every offense except those related to Magnolia Interiors involved assaultive behavior, was facilitated by the use of a firearm or firearms, involved a crime at least as serious as armed robbery, took place within the same two-month period, and was linked by a common element of intent to feloniously obtain property. (RT 29: 4690.) This, of course, was untrue of the receiving count. Including the innocuous receiving count in this category demonstrates that even the trial court did what appellant argues there was an unacceptable risk of one or more jurors doing: tarring appellant with the brush of his comrades' robbery/attempted-murder of Officer Feltenberger. The confusion was repeated post-trial, when in denying

appellant's motion to modify the penalty verdict, the court mentioned his guilt of "the attempted murder of an off-duty Ontario police officer." (RT 55: 8223–8224.) In any event, the trial court erred in analyzing the severance issue based on a holding that appellant's receiving the pouch was, like the other offenses, assaultive, at least as serious as armed robbery, and involved use of a firearm. This much is indisputable.

To argue that consolidation was authorized at all, respondent relies only on the supposed common-thread-of-feloniously-obtaining-property test to substitute for crimes actually being connected together in their commission, still without replying to appellant's showing[44] that there is no such test. (RB 76.) Appellant's taking possession of an item, stolen by Munoz and Self in a crime which he knew nothing about until after it happened, was in no way connected together in its commission with *his* robberies and assaultive offenses. The crime of receiving is not even a theft offense; the prohibition "is directed at those who knowingly deal with thieves and with their stolen goods after the theft has been committed." (*People v. Jaramillo* (1976) 16 Cal. 3d 752, 758.) To hold that joinder was available under the statute would be to eviscerate the rule that offenses must be of the same class or connected together in their commission.

2. If Joinder Were Authorized, the Only Proper Exercise of Discretion Would Still Have Been to Grant Severance

Appellant argued that with this offense, too, if the offenses *were* connected together in their commission, discretionary severance would still be required in this capital case.

Since here, too, the trial court misunderstood three of the four factors

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[44]See AOB 319–321. See also pp. 175–177, above.

that were to guide its analysis, it erred. Respondent's argument should be reframed as an attempt to show harmlessness based on a de novo finding that discretionary severance would still have been inappropriate.

As to cross-admissibility, respondent makes five points. Respondent is creative in these, but the prosecutor did not actually employ the evidence in any of these ways. In his arguments to the jury, he did not use anything in the assaultive-crimes evidence to help prove the receiving count, or pouch-possession evidence to prove the assaultive-crimes counts. (See RT 46: 6966–6967 [receiving count], 6904–6966 and 6967– 6973 [all other counts]; 7017–7040 [same, final argument].) If the evidence was not probative enough for the purposes now suggested by respondent to be employed by a prosecutor permitted to do so, clearly it did not have enough relevance to be admissible other-crimes evidence in separate trials. Here are respondent's post-facto cross-admissibility claims.

- The attempted-murder evidence was "cross-admissible with Count XX [receiving]" to prove that the pouch was stolen and that appellant knew it. (RB 79.) The proposition that the evidence was part of a legitimate receiving case (which appellant assumes arguendo here, but see Argument IV) only shows why consolidation prejudiced his trial on the capital offenses. Respondent forgets that the Feltenberger narrative would have had no place in a separate trial of appellant on crimes against other persons because appellant had nothing to do with it. Admissibility in one trial but not the other is not cross-admissibility.
- Appellant's participation in the other robberies and murders would have been admissible in a separate trial on the receiving

charge because it tended to prove appellant's knowledge that the pouch was stolen. (RB 79.) The prosecution introduced appellant's admission that he knew the pouch was stolen and Munoz's testimony to the same effect. The idea that an offer to present days of testimony about robberies and murders, in an otherwise short-and-simple trial on receiving property stolen by someone else, could overcome the usual restrictions on prejudicial other-crimes evidence[45] is indefensible. Respondent does not try to explain what the additional probative value of the evidence on the already well-proven issue of guilty knowledge would be—something that is far from obvious. The confusion of the issues, prejudicial effect, and massive consumption of time involved in introducing evidence of three homicides and five armed robberies, into a separate trial on receiving stolen property, would be a gigantic tail wagging an imperceptible dog of probative value. (Evid. Code § 352.)

- The pouch "was recovered among the weapons Romero [along with Self and Danny Chavez] stole from Jerry Mills" and contained two .45 cartridges that could have been used in Mills's pistol. (RB 79–80.) Respondent fails to explain how these facts, if true,[46] would belong in *either* separate trial.

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[45]Evid. Code § 1101; see *People v. Soper* (2009) 45 Cal.4th 759, 772 ("evidence of uncharged offenses is generally inadmissible"), 773 (prosecution has "'the burden of establishing that the evidence has *substantial* probative value that clearly outweighs its inherent prejudicial effect'"); *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.

[46]Respondent gives 29 pages of span cites in support of this statement. (continued...)

Possession of the Feltenberger pouch did not help prove appellant's participation in, or any element or circumstance of, the crimes against persons in which appellant participated. And its being recovered at the scene where both appellant and Self were arrested[47] did not tend to prove possession, i.e., make it more likely than not, that Self had given it to appellant after stealing it. Either man could have left it there.

- Appellant's alleged "take him out" statement regarding Feltenberger tended to show appellant's guilty knowledge of the pouch's origin, so it would be admissible in a trial on the receiving count.[48] Per respondent, it would also be admissible in a homicide/robbery trial to "undercut his defense that Munoz was the group's ringleader in the rest of the crimes." (RB 80.)

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[46](...continued)
As to the cartridges, the pouch actually contained two clips, or magazines, containing a total of three .45 cartridges. (RT 37: 5644.) But no evidence that the clips fit the pistol was introduced. Either they did not, or else the prosecution—which never argued appellant's guilt of receiving based on respondent's point about the ammunition (see RT 45: 6966–6967)—judged it superfluous, in light of the already incontrovertible evidence that appellant took possession of the pouch.

[47]RT 37: 5638–5639; 32: 4961; 35: 5391–5393; 37: 5641–5648.

[48]Appellant disagrees that this highly inflammatory comment was admissible on the receiving count. Even if it had showed anything about knowledge about what was taken in the robbery, it would have been cumulative to much more direct evidence on that issue, including appellant's confession. (See AOB 308.) But, assuming arguendo that it could have come in in a trial for receiving, it would have been irrelevant to a separate trial on the other charges, for the reason stated above, and thus would not be cross-admissible.

As with the ugly Magnolia Interiors graffiti (see p. 189, above), the comment—which, if it was made, was not pursued further—gave the jury no help in deciding whose culpability in the real shootings was greater. What mattered (at the penalty phase) was whether jurors believed Munoz when he portrayed appellant as the aggressor at Lake Matthews, as one who called for the others to shoot at the Mills/Ewy car, and as the first to propose going back to confront "Pint" over the bad drug deal. The fact that the same witness also said appellant made this remark in front of a television screen did not assist them in this task.

- Munoz's account of the Feltenberger shooting and of appellant's possession of the ammo pouch having both been corroborated, the evidence "significantly bolster[ed] Munoz's credibility and his testimony concerning the remaining charges." (RB 80.) Feltenberger was certain that the man in the car—Munoz—several times commanded Self to shoot him. Munoz denied this.[49] The fact that Feltenberger corroborated the latter's testimony that he and Self robbed Feltenberger and that Self shot him does not convert the Feltenberger evidence from being what it was—one of the many sources of doubt about Munoz's credibility on critical matters of culpability. Furthermore, the only corroboration of ammo pouch possession was appellant's admission that he carried it and of his knowledge that it came from Feltenberger. Thus this piece enhanced the credibility of appellant's statements to

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[49]Compare RT 32: 4952, 4957, 4965–4966 with RT 39: 6017.

> interrogators as much as it did Munoz's. That the two agreed on something was not consequential. Moreover, as explained on page 158, above, one cannot introduce testimony on a collateral matter just to prove that a witness once told the truth about something. And how the theft of property that appellant received happened certainly would have been collateral to the issues in a trial on the remaining charges.

The trial court, it will be recalled, fell into error by considering this Court's guidance regarding the cross-admissibility factor no longer viable and failed to consider it at all. So what is before the Court now is a de novo evaluation of respondent's reasoning, and its cross-admissibility argument fails. Without cross-admissibility, the primary judicial-economy benefits of joinder were absent. So was the condition in which joinder causes no otherwise-avoidable prejudice, where juries in separate trials would be hearing the evidence related to the other crime anyway. (*People v. Jenkins*, *supra*, 22 Cal.4th 900, 948; *Williams v. Superior Court*, *supra*, 36 Cal.3d 441, 448; *People v. Scott*, *supra*, 24 Cal.2d 774, 778–779; *Walker v. Superior Court* , *supra*, 37 Cal.App.3d 938, 941.)

Appellant analyzed the applicability of the other factors, and the trial court's confusion about them in the opening brief. Respondent does not meet this analysis at all. Rather than repeat it, appellant asks the Court to review pages 331 through 334 of that brief, as well as the explanations about how the robbery/attempted-murder portion of the Feltenberger evidence created undue risk of improperly influencing the sentencer, in Argument IV (AOB 307–308, 310–313). As with the Magnolia Interiors counts, respondent attacks the straw man of guilt-phase prejudice (RB 81) and simply sidesteps appellant's explanations of how the Feltenberger evidence was inflammatory and likely

to affect penalty (RB 82–83). And respondent again asks the court to uphold the trial court's exercise of discretion, when that Court explicitly failed to apply or mis-applied the majority of factors which this Court has set forth to guide that discretion. (RB 83.) Respondent's attempt to direct the Court's attention away from appellant's actual argument and the trial court's actual decision is a tacit admission that the trial court erred.

D. The Errors Cannot be Found Harmless in Their Impact on the Jury

From the standpoint of rhetorical persuasiveness, as well as possibly inconveniencing the Court by asking it to consult the opening brief or other portions of this one, appellant is tempted to summarize here why the errors were prejudicial. But repetition is unnecessary. What appellant said in Argument IV (on the Feltenberger evidence, pp. 161–172, above) applies here as well. Further, the opening brief quoted the trial court's characterizations of the highly inflammatory nature of the Magnolia Interiors evidence.[50] It demonstrated in detail the prosecutor's use of the Magnolia Interiors evidence in argument and cited high court decisions uniformly treating such prosecutorial use as enough to answer to the question of harmlessness.[51] Respondent replies to none of this. Moreover, in seeking an ivory-tower analysis of harmlessness, respondent ignores further evidence of what one of the persons closest to the case, the prosecutor, considered to be the value of both charges in creating a back-door influence on the penalty decision. Respondent is silent about the prosecutor's charging of these minor offenses but not others—including several counts of robbery—already proved by its

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[50]AOB 327.

[51]AOB 334–341.

evidence, and his taking the Feltenberger attempted-murder/robbery/receiving case out of order to open the trial.

In its single paragraph directed towards meeting its burden of showing harmlessness, respondent offers no reason why this Court should simply ignore every element of appellant's reasoning, refuse to consider whether a real-life jury could have been affected as the prosecutor intended it to be affected, pretend that it knows that the jury believed an extremely biased and discredited informant's account of who said what and who pulled what trigger in spite of verdicts that reveal nothing on this score, and find harmlessness in a capital case by repeating respondent's refrain about there being sufficient reasons to put appellant to death without the evidence erroneously admitted. (RB 83.)

VI[1]

THE JURY WAS ERRONEOUSLY PERMITTED TO USE HIGHLY PREJUDICIAL EVIDENCE OF "ATTEMPTED ESCAPE" AS AGGRAVATION, EVEN THOUGH APPELLANT ONLY MADE PREPARATIONS TO ESCAPE WITHOUT ATTEMPTING TO DO SO

Evidence purporting to show that a capital defendant is an escape risk has a well-documented tendency to produce a death verdict, even though the predictive capacity of such evidence is very low. Indeed, the escape-preparations evidence used against appellant is cited throughout respondent's brief in support of its argument that the aggravation case against appellant was overwhelming, and it was cited by the trial court in denying a motion to modify the penalty. (E.g., RB 150, 240, 261; RT 55: 8232.) Three synergistic errors placed that evidence before appellant's jury, to be used it as aggravation. First, neither trial counsel nor the court recognized that, under the law of attempt, the evidence of escape preparations by appellant and a cellmate contained nothing that had ripened into the crime of attempt; they had not tried to leave custody. That evidence should therefore have been inadmissible in the determination of penalty, where only misconduct that involves actual crimes is admissible.

Second, the evidence should have been excluded from the guilt phase. For many reasons, but most particularly appellant's confession, it had virtually no non-cumulative probative value on anything at issue at that time, for it was admitted only to show consciousness of guilt, when all the elements showing guilt itself were already conceded. At the same time, its serious prejudicial effect (on penalty) was unavoidable. The gross imbalance between probative

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[1]See AOB 342. Respondent addresses this claim in its Argument XIII.A, RB 222 et seq.

value and prejudicial effect required its exclusion under both the Evidence Code and appellant's due process and Eighth Amendment rights. No one recognized the fact, however, because of the first error, the failure to realize that the evidence should have been excluded from the penalty determination.

Third, the bell was re-struck, rather than unrung, by the instructions to the jury. The jury was wrongly instructed that acts of mere preparation for a crime could turn it into a criminal attempt if they demonstrated an intent to commit the crime. It was also specifically told—despite the absence of sufficient evidence of attempted escape—that if it believed that there was proof of that crime, it would be an aggravating circumstance. Thus it was invited to consider the evidence sufficient.

The evidence, potent on its own because of the fear that it creates in jurors, was reinforced as part of the prosecutor's argument why a death verdict was "necessary." The instructional errors that permitted the jury to use the evidence as aggravation cannot be shown to have been harmless beyond a reasonable doubt. There was also a reasonable, not fanciful or speculative, possibility that trial counsel's error in failing to argue for excluding the evidence altogether (because of his belief that it would be admissible on penalty) affected the outcome. Reversal is required.

Respondent accepts appellant's statement of applicable law but disagrees on its application to the facts. Making no attempt to apply black-letter legal principles to the facts, respondent relies entirely on precedents which it erroneously characterizes as having dealt with the preparation-versus-attempt issue in the escape context. Respondent argues that the escape plan had actually been put into action by the steps taken by appellant and his cellmate that put them in a position where they could have actually tried to escape. Under applicable law, however, these were in fact only preparatory

steps by one who did not try to leave custody. Respondent asserts that the evidence had probative value on guilt, without explaining what non-cumulative value it had, and inconsistently adds, "there was little risk of undue prejudice at the guilt phase, considering the volume and considerable strength of the other evidence presented to the jury." (RB 226.) Respondent claims the instructions accurately stated the law but fails to say anything about the reasons appellant says they did not. Respondent also wrongly believes that any error was harmless.

A. The Offense of Attempted Escape Requires Beginning To Leave Custody, Not Just Making Preparations To Do So; Appellant Only Made Preparations

Appellant has set forth long-standing, uncontroversial law on the significant distinction between preparatory acts and criminal attempt. (See AOB 347–349.) In brief,

> The preparation consists of devising or arranging the means or measures necessary for the commission of the offense, while the attempt is the direct movement toward its commission after the preparations are made. In other words, to constitute an attempt the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances.

(*People v. Memro* (1985) 38 Cal.3d 658, 698, quoting *People v. Werner* (1940) 16 Cal.2d 216, 221–222.) "[T]he act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. [Citation.]" (*People v. Miller* (1935) 2 Cal.2d 527, 530.) Buying and loading a gun and declaring an intention to shoot another are not enough to constitute attempt;[2] "arranging for operations, filling out hospital cards, and accepting money" for illegal surgery are not enough, without

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[2]*People v. Murray* (1859) 14 Cal. 159, 159–160.

starting to administer medicine or use an instrument;[3] and eloping, gathering with an intended bride and witnesses, and sending for a magistrate (to perform an incestuous marriage) are not enough.[4] Respondent does not contest the vitality of the cases setting forth these principles and applying them to the facts just summarized.

The parties also generally agree on the facts in the instant case.[5] According to a jail informant, sometime during a two-week period preceding discovery of their work, appellant and a cellmate used a smuggled hacksaw blade to remove portions of two bars in their cell door, replacing the bars with tape and covering it with a toothpaste/paint-chip mixture. According to the informant, appellant said that they were going to grab a deputy and leave the cell through the opening in the door. Using a shank to threaten the deputy and hold him hostage would enable them to get through the other locked doors and gates barring the way out from the jail. The informant, who was heavily impeached, said he saw appellant with a four-to-six-inch piece of sharpened steel and the cellmate with a makeshift spear, but a search disclosed only a piece of ornamental cast metal that had been broken in two. Neither piece was sharpened; the one large enough to grip had a very blunt triangular prong 1¼ inches long. Appellant and the cellmate were moved to a different cell but not separated after their activities were reported. Some time later, a two-and-one-half to three-inch triangular prong from the same casting, too short to hold easily but capable of being sharpened into a stabbing instrument, was found

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[3]*People v. Gallardo* (1953) 41 Cal.2d 57, 66.

[4]*People v. Murray, supra*, 14 Cal. at p. 160.

[5]See AOB 51–52, 346; RB 52–54, 223.

hidden in the new cell.[6]

Escape—again, in a formulation which respondent tacitly accepts—is "an unlawful departure from the limits of an inmate's custody [citations]." (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 515.) Appellant had only prepared for a departure, he had not started going anywhere. His acts had not gone "so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances." (*People v. Memro, supra*, 38 Cal.3d at p. 698.) They had not "reach[ed] far enough towards the accomplishment of the desired result to amount to the commencement of the consummation" (*People v. Miller, supra*, 2 Cal.2d at p. 530). The "consummation" was leaving, and appellant had not "commence[d]" that. He was like the man who bought and loaded a gun and made threats, the one who made all the arrangements for illegal surgery without administering medicine or otherwise starting, and the would-be groom who gathered with his niece and witnesses and sent for a magistrate. As appellant's prosecutor put it, the plan was uncovered "before they made their move . . . ." (RT 54: 8030.) Thus appellant was not "putting his . . . plan into action . . . ." (*People v. Kipp, supra*, 18 Cal.4th 349, 376.) Even respondent slips at one point and describes the

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[6]Respondent claims, with only a general citation to 17 pages of the record, that the first piece could be used as a stabbing instrument (RB 53), and refers repeatedly to appellant's hiding "weapons" (RB 225). A deputy did testify that the first item had been broken into a shape that it would permit its use as a deadly weapon, explaining how it could readily be gripped in the fist so that a triangular part would protrude if a person were making a punching movement. (RT 42: 6455, 6458–6459.) But the object was of cast metal, both thick and blunt, and another deputy, describing a longer, thinner (i.e., more dagger-like) triangular piece broken off the same item, made clear that even it would have to be sharpened to be usable as a weapon. (RT 42: 6459, 6476–6477; see Exs. 386–388.)

conduct simply as "planning an escape." (RB 261.) Appellant had only placed himself in a position where he could decide whether or not to go through with an actual attempt to escape.

Respondent does not comment on this analysis, other than to claim that it is "utterly false." After acknowledging that "the act must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action,"[7] respondent simply fails to even address where the line between preparation for escape and beginning to escape might be drawn. Rather than apply the applicable principles to the facts, respondent cites a number of cases for the proposition that this Court has found far less evidence than was presented here to be sufficient to prove attempted escape. None, however, even considered the question.

First is *People v. Mason* (1991) 52 Cal.3d 909. In *Mason* the only issue was whether the purported escape attempt was violent within the meaning of section 190.3, factor (b). (*Id.* at pp. 954–956.) There is no discussion of the preparations/attempt distinction, an issue which, given the facts, probably should have been raised by the appellant but was not.

People v. Gallego (1990) 52 Cal.3d 115, the second case cited by respondent, could at least appear to be on point, but it is not. The evidence of escape preparations involved the defendant and an inmate in another cell, and some of the evidence was in possession of the other inmate. (*Id.* at p. 155.) The Court's summary disposition of a claim of error characterized it as whether there was sufficient proof that "the defendant's conduct amounted to a crime." This terse description could be interpreted as referring either to a contention that the conduct shown did not rise to the level of an attempt, or

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[7]RB 225, quoting *People v. Kipp* (1998) 18 Cal.4th 349, 376.

simply that the case implicating the defendant in the crime was too thin. The briefing in *Gallego* clears up the ambiguity. Respondent's noted, "Appellant now contends that there is insufficient evidence that he was involved in the escape [plan] or that the attempted escape involved the threat of violence." (RB 288 in No. S004561.) This was an accurate summary of the appellant's only contentions about the issue. There was no claim before the Court about whether preparations had ripened into an attempt. (See AOB vol. 4, 22–27, and ARB 121–123 in the same case.)[8]

The Court's discussion of whether there was error in *Gallego* met only the questions raised by the briefing. Here it is in its entirety:

> [U]ncharged criminal activity involving use or attempted use of force or violence may be used in aggravation only if, beyond a reasonable doubt, the jury concludes the defendant's conduct amounted to a crime. [¶] Although the question may be close, we are not prepared to say the escape plan evidence (ante, p. 155) was insufficient to meet this test. Nevertheless, assuming arguendo the evidence was insufficient to establish such a crime, we conclude its admission was nonprejudicial.

(*Id.* at p. 196.) Thus, even if *Gallego* were on point, its weak endorsement of the sufficiency of the evidence to implicate the defendant in a crime would be a thin reed on which to rest respondent's contention here. Because the issue was not before the Court, there was neither discussion nor a ruling on how to distinguish mere preparations from an attempt.

Respondent's final attempt to show that this Court has found less evidence of attempted escape than was presented here to be sufficient is to cite *People v. Boyde* (1988) 46 Cal.3d 212. *Boyde* is patently unhelpful. The only

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[8]Appellant intends to move for the Court to take judicial notice that these three briefs contain the information stated above, in a motion to be filed with this brief, or shortly after its filing.

issue was whether the crime of conspiracy to commit escape, which has different elements than attempt, had been shown. (*Id.* at 248, 250.) Indeed, after finding evidence sufficient to support a conspiracy, this Court observed that "the plan never ripened into an attempted escape." (*Id.* at p. 248.)

The same is true here. Respondent's failure to grapple with what actually distinguishes preparations from beginning an escape and having it aborted is telling. Did appellant attempt to escape as soon as he and the cellmate hatched the plan? Did they attempt when they acquired materials that could be converted into a shank? When they sought a hacksaw blade, obtained one, or used it? Respondent suggests no principled way of determining when preparations shifted into the purported attempt. Under truly straightforward case law, however, this would have been a shift to a new phase of conduct which is in fact easy to recognize. An escape would have actually been happening, one which would have succeeded if not frustrated by extraneous circumstances. (*People v. Memro, supra*, 38 Cal.3d 658, 698.) The point had not yet been reached because no movement to leave custody had begun.[9] An attempt would have required beginning execution of the plan, e.g., one of the men starting to climb through the cell door, or trying to lure a guard into a position where he could be overpowered.[10] Respondent asserts, after noting

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[9]See cases discussed at pp. 209–210 and 211, above.

[10]Respondent cites *People v. Lancaster* (2007) 41 Cal.4th 50, a case decided after appellant's opening brief was filed, at a number of points in its argument. Respondent fails to discuss its facts or its holding on the preparations-attempt distinction. In *Lancaster* the defendant had been found in possession of a handcuff key while incarcerated. It was error to admit evidence of that fact under the rubric of attempted escape, because the defendant was not yet "putting his . . . plan into action" and thus had made no "actual escape attempt." (*Id.* at p. 94.) There was no labored analysis of this

(continued...)

the evidence of obtaining a hacksaw blade, using it, and hiding items that could be made into shanks,[11] "In essence, Romero did everything but actually escape from his cell." (RB 225.) Not true; appellant did everything but actually *try* to escape from his cell.

There having been no crime of attempted escape, the evidence would have been unavailable as a penalty-phase circumstance in aggravation. (§ 190.3; *People v. Bacigalupo* (1991) 1 Cal. 4th 103, 148.)

B. The Evidence Was Inadmissible at the Guilt Phase

Because, as just shown, the evidence of escape preparations had to be excluded from jurors' penalty-phase deliberations; because—if admitted at the guilt phase—it would have been impossible to prevent it from influencing the penalty choice;[12] and because of the well-recognized and potent prejudicial effect of such evidence before a sentencing jury, to be admissible at the guilt

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[10](...continued)
point, because the difference between preparations and an actual attempt is quite clear.

Appellant's case can be distinguished only by the quantitative extent of the preparations. Possessing raw material for a shank was not qualitatively different from possessing a handcuff key. Nor was the more dramatic action of altering the cell door so one could leave the cell qualitatively different from possessing a key that could allow removal of restraints used while one was already outside a cell. Nor was having boasted of an explicit plan. The combination of these factors made a stronger case for the non-crime of preparations, but it did not move the actions to the later and different stage of beginning to try to escape.

[11]Respondent refers to "concealing weapons" (RB 225), but this misstates the evidence. (See fn. 6 on p. 211 , above.)

[12]The penalty-phase instructions directed the jury to consider all evidence admitted during either phase of the trial. (RT 54: 8063–8064.) Even if they had not, the jury could not have ignored the evidence.

phase, the evidence would have been required to have had a great deal of probative value on some guilt-related issue. Instead, it had virtually none.

1. The Evidence Had No Non-Cumulative Probative Value on Guilt

The parties agree that the evidence was admitted on the theory that it helped prove consciousness of guilt. As this Court has recognized, there are a variety of reasons for preparing to escape other than actual guilt: a belief that conviction is likely even if one is not guilty; an inability to tolerate pretrial confinement, a possibility highlighted here by the fact that the preparations happened only after 16 months in custody, and yet two and one half years before trial; or fear of other inmates or pressure to go along with their plans. Such evidence, therefore, is relatively weak proof of guilt in any event. (See *People v. Terry* (1970) 2 Cal.3d 362, 395.) Furthermore, because appellant was charged with 11 offenses, consciousness of guilt of any could have motivated a desire to escape. Thus, as to any *particular* offense, each of which had to be separately proved, there was no probative value on the derivative issue of consciousness of guilt. The most that could have been proved would have been only that appellant believed he was guilty of *something*. (See *People v. Williams* (1988) 44 Cal.3d 1127, 1143, fn. 9.) Moreover, consciousness of guilt had already been shown by appellant's week-long flight. It was shown directly and conclusively, not through the weak circumstantial chain of inferences involving the escape preparations, but by his confession which, of course, also showed *actual* guilt[13] of the capital and other crimes, corroborated by Munoz's testimony, among other things. The escape-preparation evidence simply had no value on any disputed issue at the guilt

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[13]Via the felony-murder and natural-and-probable consequences doctrines, not as an actual shooter.

phase of the trial. Indeed, respondent correctly notes that there could have been no prejudice to the guilt-phase deliberations, precisely because of "the volume and considerable strength of the other evidence presented to the jury." (RB 226.) Later, in trying to meet its burden of showing harmlessness, respondent elaborates:

> The prosecution presented overwhelming evidence establishing Romero's guilt, including credible eyewitness identifications, considerable physical evidence obtained from both the crime scenes and from searches of appellants' homes and vehicles, appellants' damaging police interviews, and Munoz's corroborated accomplice testimony. Given the strength of the prosecution case, and the absence of any affirmative defense evidence of innocence, the jury's knowledge of the attempted escape would not have contributed in any significant way to the guilt verdicts.

(RB 229.) Nothing respondent is saying now was unknown to the prosecutor, i.e., respondent's trial attorney, whose rationale for offering the evidence to help prove guilt was thus clearly pretextual. No prosecutorial need for escape-preparation evidence to complete the case for guilt counterbalanced its prejudicial effect on penalty.

Respondent has little to say in opposition to this analysis regarding the gross weakness of probative value, all of which—except for the quotations from respondent's brief—is in the opening brief. Here is respondent's entire discussion of the point:

> "[O]rdinarily an attempt or plan to escape from jail pending trial is relevant to establish consciousness of guilt." [Citations.] . . . . [¶] [T]he escape attempt was probative at the guilt phase of Romero's consciousness that he was guilty of three capital murders and would be facing the death penalty or at a minimum life in prison.

(RB 226.) The fact that an escape attempt may have some level of relevance

in some cases is uncontested. But all that respondent can say in response to case law recognizing some attenuation in the link between an escape plan and guilt of a particular crime (because of other possible motivations to prepare to escape), and a demonstration that there was zero actual non-cumulative probative in this case, is to assert that appellant is wrong.

2. The Prejudicial Impact of the Evidence Was Extreme

The next issue relating to admissibility of the evidence is whether its prejudicial effect outweighed its low probative value. Preliminarily, respondent states that because, in its view, the evidence would have been admissible at the penalty phase, appellant's prejudice argument fails. (RB 227.) It is true that appellant's claim rests on the inadmissibility of the evidence on the penalty question, based on the insufficiency of the evidence that there was an attempt. But respondent's conclusion is not true because, as shown in Part A of this argument, the lack of a criminal attempt rendered the evidence inadmissible as aggravation.

This Court has long acknowledged "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination." (*People v. Robertson* (1982) 33 Cal.3d 21, 54, citing *People v. McClellan* (1969) 71 Cal.2d 793, 804, fn. 2.) "[E]vidence of other crimes is inherently prejudicial." (*People v. Steele* (2002) 27 Cal.4th 1230, 1245.) When the "other crime" raises the specter of escape, the problem is magnified. The possibility triggers speculative, unfounded,[14] but powerful fears that the defendant will get out, hurt or kill people again, and perhaps even retaliate against the jurors, leaving death as the only sentence that is safe for society. Thus the Court has also

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[14]On the low likelihood of those convicted of murder re-offending, in or out of prison, see AOB 355.

recognized the particularity of the problem here, i.e., "that 'erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232, quoting *People v. Gallego*, *supra*, 52 Cal.3d 115, 196.) Such testimony "may be highly prejudicial in undermining juror confidence in the sentence of life imprisonment without parole as an alternative to death." (*People v. Kaurish* (1990) 52 Cal.3d 648, 710.) An early acknowledgment of the potency of other-crimes evidence in general was based largely on empirical research,[15] and appellant has provided considerably more research documenting the major impact that evidence and argument regarding the possibility of escape have on penalty-decision-making.[16]

Respondent is manifestly unable to dispute these facts. Respondent offers the Court a single sentence asserting that escape-preparation evidence could not have been prejudicial on penalty and claiming that instructions effectively prevented prejudice in any event: "[T]he jury was properly instructed on its consideration of the escape attempt during the penalty phase, and in light of the evidence presented, Romero cannot demonstrate prejudice." (RB 227.) Respondent fails to acknowledge, much less refute, the well-known facts about the impact of escape evidence on sentencing jurors.

As for the instructions, the most that they could have amounted to, even assuming arguendo that they were proper, would have been an extremely indirect and patently ineffective attempt to unring the escape alarm. Apparently the theory is that correct instructions on attempt, along with letting

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[15]*People v. Robertson* (1982) 33 Cal.3d 21, 54, citing *People v. McClellan* (1969) 71 Cal.2d 793, 804, fn. 2 [jury research].

[16]See AOB 356–357.

the jury know that section 190.3's list of aggravating factors is exclusive, should have led the jury to the conclusion that the evidence of preparations alone had to be set aside in considering penalty.[17] Certainly respondent is not claiming that there was a limiting instruction, clearly warning the penalty jury that escape preparations could seem important and relevant but may not be considered at all. Moreover, the reason that there are rules flatly excluding many kinds of evidence—rules that are augmented by the ad hoc determinations required by Evidence Code section 352, due process, and the Eighth Amendment—is that, in many situations, even direct limiting instructions are asking jurors to do the impossible. This and other courts have long recognized that fact.[18] In addition, here the jury was specifically told to consider all evidence admitted during either phase of the trial. (RT 54: 8063–8064.)

The instructions did nothing to neutralize the tremendous risk of prejudice to the penalty deliberations. Given the imperceptible convincing force which the escape-preparation evidence added to the prosecution's case

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[17]Appellant submits that for this to have happened, there would also have to have been a charge of attempted escape in the guilt phase, which the prosecutor declined to bring, or a unanimity instruction regarding factor (b) aggravation. Absent these, it was unlikely that there was the careful consideration of whether a true attempt had been proven, which the deliberative process seeks to guarantee.

[18]On the limitations of jurors' capacities to follow even direct limiting instructions, see *Bruton v. United States* (1968) 391 U.S. 123, 135–136; *Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886; and *People v. Aranda* (1965) 63 Cal. 2d 518, 529–530. On the relationship between telling juries how to use evidence that is capable of misuse, and excluding it altogether when limiting instructions are inadequate, see *Adkins v. Brett* (1920) 184 Cal. 252, 258–259; *People v. Sweeney* (1960) 55 Cal.2d 27, 42–43; and *Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 544.

for guilt on any count, it should have been excluded for both statutory and constitutional reasons.

Moreover, as shown in the next portion of this argument, the jury instructions actually fatally muddied the preparation/attempt distinction, rather than clarifying it, further gutting any potential they may have had for rendering the evidentiary error harmless.

C. The Jury Was Instructed to Treat Preparations as an Attempt

The instructions defining attempt were incorrect. Given that the jury was also instructed, correctly, to consider unadjudicated offenses involving the threat of violence to be aggravation, the instructional error prejudiced the penalty determination, It would have done so even if the evidence had been properly admitted.

The instructions defining attempt[19] stated the preparation/attempt distinction but then negated it by telling the jury two things. One was that an act demonstrating mere intent constitutes an attempt.[20] But intent to commit a crime typically exists during the preparations stage,[21] and acts of preparation do tend to demonstrate that intent. The instruction's wording negated the

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[19]The instructions are quoted in full at AOB 358–359.

[20]After stating that mere preparation is not enough and that an act involving the commencement of the criminal deed was required, the instruction continued: "*However*, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to commit that specific crime." (CT 7: 1609, 9: 1986, italics added.)

[21]Exceptions, i.e., when a person makes preparations without yet intending to commit the crime, would be where the person is in some way playing with the idea without having made an internal commitment to carrying it out, trying to see what might be possible, or posturing for others.

requirement of actually "commencing the consummation." It did this by conflating the actus reus requirement with the intent requirement and reducing the required act to that which is merely sufficient to prove intent. The error was compounded by the statement that abandonment could be shown only if the defendant had a change of heart before committing *any* act towards commission of the crime.[22] This, too, was a clear statement that an attempt had taken place when any act had been committed, even a merely preparatory one.

Respondent disagrees, although respondent does not attempt to defend either challenged instructional statement. Much of respondent's argument relies on emphasizing the portions of the instructions which state the law correctly. But appellant never claimed that the correct principles were nowhere stated in the instructions. On the contrary, in a line-by-line analysis which need not be repeated here, he showed how they were combined with the misleading language, and in a manner that actually harmonized what would otherwise be contradictory directives.[23] Respondent says nothing about this analysis. In fact respondent fails to discuss the complained-of language at all. Appellant also pointed out the established principle that, when instructions are contradictory, a reviewing court is unable to find harmlessness based on a correct statement of the law because it is unable to know whether the jury went

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[22]"If a person intends to commit a crime but, *before committing any act* toward the ultimate commission of the crime, freely and voluntarily abandons the original intent *and makes no effort to accomplish it*, such person has not attempted to commit the crime." (CT 7: 1611; 9: 1988, italics added.)

[23]See AOB 359–361. The main point is that the sentence negating the *actus reus* requirement is explicitly stated as an exception, because it begins with the word *however*. Then the concept is reinforced by the last lines of the attempt instructions, the ones that state that an attempt is past the stage where abandonment is a defense once any act towards its accomplishment has taken place.

with the right rule or the wrong rule.[24] Respondent ignores this doctrine and instead would have this Court hold that appellant's jury was adequately instructed simply because it is possible to mine the instructions for a correct statement of the rule.

Respondent cites *People v. Dillon* (1983) 34 Cal.3d 441, 453, for the broad proposition that the instructions given here accurately state the law of attempt. (RB 228.) The case does not support respondent. Preliminarily, one of the instructions challenged here, CALJIC No. 6.02 (requiring abandonment to take place before "any act" towards ultimate commission of the crime, at the point where "no effort" has yet been expended) was not mentioned in *Dillon.* Second, the issue in *Dillon* was a proposed change in the law of attempt, not a challenge to any particular language in the instructions. The context of the statement quoted by respondent makes clear that it was never intended as a blanket endorsement of the instruction now before the court, one insulating the language against all conceivable future criticism. Rather, it was a passing reference in a discussion upholding current law on attempt:

> We are not persuaded to so limit the law of attempts. The instructions given here accurately state that law [citations], while defendant's proposal would frustrate its aim.

(*Ibid.*) The Court continued with a discussion of the purpose of the law of attempt and why it should not be changed but offered no further review of the language of the instructions. What *Dillon* does do is restate that "when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway" (*id.* at p.

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[24] *Francis v. Franklin* (1985) 471 U.S. 307; see also *People v. Ford* (1964) 60 Cal.2d 772, 796, overruled on another point in *People v. Satchell* (1971) 6 Cal.3d 28, cited at AOB 363.

455), i.e., "when the acts done show that the perpetrator is actually putting his plan into action" (*id.* at p. 453.) That is a situation neither presented by the evidence here nor required by instructions that ultimately say that the only action required is one demonstrating unambiguous intent.

Respondent cites other cases for the proposition that the wording of the challenged instructions was drawn from this Court's opinions, naming specific phrases that come from various opinions. But the portions of the instructions challenged by appellant are conspicuously absent from respondent's compilation. (RB 228.) Moreover, this Court has warned of "the danger of assuming that a correct statement of substantive law will provide a sound basis for charging the jury. [Citations.]" (*People v. Colantuono* (1994) 7 Cal.4th 206, 221, fn. 13.)

> The reviewing court generally does not contemplate a subsequent transmutation of its words into jury instructions and hence does not choose them with that end in mind. We therefore strongly caution that . . . trial courts [should] carefully consider whether such derivative application is consistent with their original usage.

(*Ibid.*)

In sum, none of respondent's arguments negates error: a correct statement of the law cannot save an instruction that contradicts that statement; this Court has not examined the questioned language and found it adequate; and there is nothing about the origin of the erroneous language that makes it a valid jury instruction. Notably, respondent makes no attempt to *directly* defend the disputed portions of the instructions by trying to demonstrate that they correctly state the law.

Once it is acknowledged that one instruction permitted finding an attempt based on any act that showed intent to escape (rather than requiring an

act aimed at initiating an escape in the moment), and that another reinforced the first by stating that an attempt was past the stage of abandonment once any act at all had taken place, two consequences for this appeal follow. First, respondent's argument for harmlessness of *counsel's failure to effectively oppose the admission of the evidence* fails, to the extent that it asserts that the jurors could decide that there was no attempt available for use as aggravation. Even if they could have been meticulous about ignoring mere-preparations evidence, they were fatally misled as to what that would be and would have treated mere-preparations evidence as evidence of a criminal attempt. Second, there was independent *judicial error in instructing the jury* in a manner that directed them to use mere-preparations evidence as aggravation, although it was not evidence of a crime. under factor (b).[25] The instructional errors trigger the *Chapman/Brown* standard of prejudice, as state-law error affecting penalty, and because they violated the Sixth, Eighth, and Fourteenth Amendments.[26] (See AOB 362.)

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[25]These include not only the errors in defining *attempt*, but also the instruction to consider an escape attempt, if proven, as aggravation. (RT 54: 8065; see also 8063–8064 [instruction to consider all evidence from either phase of the trial].) Given the total lack of proof that the preparations ripened into an attempt, what should have been given was the opposite directive, one limiting the evidence of preparations to guilt-phase proof of consciousness of guilt and telling the jury to set it aside during the penalty phase. (See AOB 343, 352–353.)

[26]In contrast to the instructional errors by the trial court, appellant has acknowledged an argument for applying the standard of *Strickland v. Washington* (1984) 466 U.S. 668 to the error of admitting the testimony during the guilt phase, while contending that a higher standard should apply, given the capital-sentencing context. (AOB 363, citing *Strickland v. Washington*, *supra*, 466 U.S. at p. 704 (conc. opn. of Brennan, J.).)

D. Respondent Has Not Demonstrated Harmlessness

1. The Evidence Was Inherently Prejudicial and Was Emphasized in Argument

Aside from its claim about instructions, respondent tries unsuccessfully to meet its burden of showing that any error could not have contributed to a juror's penalty-phase vote. The evidence was extremely problematic in its own right, for reasons set forth previously regarding jurors' fears, and which this Court has long acknowledged. The prosecutor's "death-is-just-and-necessary" argument closed with the "necessary" prong, based on the idea that compassion for appellant would result in more victims, given the other-crimes evidence. (RT 54: 8026–8030.) But the other-crimes evidence involved assaults that were too minor to lead to even jail discipline and possessions of shanks that were never used. Surely some jurors could have seen the evidence this way, as well as discounted proven liar Munoz's self-serving accounts of appellant's role in the capital crimes themselves. But the prosecutor had the "escape attempt" in his arsenal as well, and he used it, arguing that appellant "is not content to remain in custody" and, if not executed, he would have decades to apply the sophistication of the jailbreak plan to come up with other escape schemes. (RT 54: 8030.) This was the prosecutor's conclusion to the specific evidence in aggravation, before winding up his argument. Since "'erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232), and the prosecutor sought to ensure its use in that regard, this Court can have no confidence, much less believe without a doubt, that no juror was "possibly influenced" by the errors. (*Chapman v. California* (1967) 386 U.S. 18, 23.)

2. Respondent Misconstrues Appellant's Contention and Ignores the Known Prejudicial Impact of Escape-Risk Evidence

Respondent begins its counter-argument by knocking down a pair of straw men. Respondent addresses guilt-phase harmlessness (RB 229), but appellant is not claiming that the guilt verdicts could have been affected. Indeed, respondent's argument only supports appellant's position that the evidence was useless in the guilt phase, where its presentation was pretextual. Second, appellant noted that the prosecutor violated this Court's ban on arguing the possibility of future escape as a reason to impose the death penalty,[27] to demonstrate prejudice, without making a free-standing claim of misconduct as an appellate issue. Respondent, misconstruing this, observes that any such claim is forfeited for lack of contemporaneous objection. (Compare AOB 367 with RB 230, fn. 73.)

Respondent fails to acknowledge the necessary starting point of any attempt to show harmlessness, i.e., that the reason that "testimony concerning the possibility of escape from prison" is inadmissible is that it "is inherently speculative, and may be highly prejudicial in undermining juror confidence in the sentence of life imprisonment without parole as an alternative to death." (*People v. Kaurish* (1990) 52 Cal. 3d 648, 710.) After ignoring this known fact, respondent presents three points in an attempt to demonstrate that any error was harmless beyond a reasonable doubt.

3. The Absence of Particular Language in Prosecutorial Argument Does Not Insure Harmlessness

First, respondent observes that the prosecutor never specifically suggested "that the death penalty was the only means of protecting the public

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[27] *People v. Kaurish* (1990) 52 Cal. 3d 648, 710.

from a defendant who poses a significant escape risk," citing two cases in which it was assumed or held that such an argument could be prejudicial. (ARB 229.) Respondent assumes that the prosecutor must make a bad situation egregious for it to be sufficiently prejudicial. But neither case cited by respondent disagreed with *Kaurish's* holding that, prosecutorial argument aside, escape testimony alone carries such a great risk of prejudice that it is categorically inadmissible on the penalty issue. (52 Cal.3d at p. 710.) Moreover, neither case held that for escape-related evidence to contribute to a juror's decision, there must also be prosecutorial argument that explicitly addresses the safety issue, presents the escape risk as "significant," or claims that death is the "only" means of protecting the public.

In *People v. Jackson*, *supra*, 13 Cal.4th 1164, the first case cited by respondent, the prosecutor did not argue the point. Rather, the defendant argued before this Court that a prosecutor's argument that an escape attempt showed that the defendant would escape if he wanted to effectively "implanted . . . the notion" about the need for a death sentence to protect the public from a defendant who was a significant escape risk, and that it was therefore prejudicial. (*Id.* at pp. 1232–1233.) This Court found the argument "plausible in the abstract," but held that ultimately there was no prejudice from erroneous admission of escape-related evidence, largely because evidence of a more violent escape attempt was properly before the jury. (*Id.* at p. 1233.) In finding the claim "plausible in the abstract," the Court endorsed the notion that reference to risk of future escape raises the public-protection argument in the minds of jurors, whether or not the prosecutor states it explicitly.

The second case is only slightly more helpful to respondent. In *People v. Lancaster*, *supra*, 41 Cal.4th 50, this Court also used the language quoted by respondent. The pertinent language in *Lancaster*, however, merely cited

Jackson for the proposition that "[w]e have noted that escape evidence may be particularly prejudicial if used to suggest to the jury that the death penalty is the only means of protecting the public from a defendant who poses a significant escape risk." (*Id.* at p. 95.) Part of the harmlessness analysis did rely on the prosecutor's having made "no such insinuation," in an argument that was "almost perfunctory" in its mention of escape preparations. (*Ibid.*) In addition, however, the evidence in question was, as noted above, only of the defendant's possession of a handcuff key. Neither the evidence itself nor its use in argument raised a significant enough specter of violent escape to influence the deliberations of a jury that had far greater aggravating circumstances before it. (*Ibid.*) This Court did not purport to set up, as a general test for penalty-phase harmlessness, whether or not prosecutorial argument suggested the public-protection issue, much less whether particular terms were used.

Certainly this Court has never proposed *any* general test for when improperly-admitted escape-attempt evidence is prejudicial. It could not do so. Whether an error is prejudicial depends upon the entire record in any particular case, including "any indirect effect" that improperly-admitted evidence "might have had because of the way in which [it was] used." (*People v. Gonzales* (1967) 66 Cal.2d 482, 493.)

In any event, here the evidentiary error actually was exploited in a manner that further makes it impossible to find it harmless beyond a reasonable doubt. It was part of the prosecutor's basic argument that the price of compassion for appellant would be the creation of future victims and that a death sentence was not only "just" but "necessary." (RT 48: 7271; 54: 8026, 8030.) This is exactly the reasoning that makes it too prejudicial to be

admissible.[28] The escape preparations were not dwelt on at length in argument, but, given their potency, they did not have to be. One does not have to plant a coconut to grow a palm tree that will cast a shadow; the pit of a date will produce one as well.

4. The Prosecutor's "Sophistication" Argument Did Not Downplay the Escape-Risk Claim; it Bolstered it

In this vein, respondent's second contention is that the prosecutor "primarily argued the escape attempt as evidence of Romero's sophisticated, scheming nature, and his propensity to violence in or out of prison" (RB 229) and that such argument "was wholly proper" (RB 230). True, the prosecutor integrated the escape preparations into a larger argument about all of the post-arrest offenses and what they showed about appellant's propensity for violence (and the resulting need for a death sentence). And, as respondent emphasizes, he also mentioned the likelihood of violence had the escape plan proceeded farther. But none of this negates the fact that the prosecutor also clearly and directly stressed that appellant "has shown that he is not content to remain in custody." (RT 54: 8030.) Even if the other uses of the evidence were proper, it is undeniable that its improper use—practically unavoidable by a jury in any event—was also made explicit by the prosecutor.

Moreover, part of the argument about sophistication and scheming was that appellant would have decades to come up with similar escape schemes. (RT 54: 8030.) Sophistication and scheming were not presented as

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[28]See *People v. Jackson*, *supra*, 13 Cal.4th 1164, 1232; *People v. Kaurish*, *supra*, 52 Cal. 3d 648, 710; *People v. Gallego*, *supra*, 52 Cal.3d 115, 196; Garvey, *The Emotional Economy of Capital Sentencing* (2000) 75 N.Y.U. L. Rev. 26, 66–67; Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials* (1999) 23 Law & Hum. Behavior 471, 476, 478–479, 481.

aggravation in the abstract; the point was the purpose for which appellant could be expected to concoct schemes, and one of the purported goals was to escape. (See RT 54: 8026–8030.) Arguing that harm to others inside prison could be another predictable outcome did not detract from the effect of having the escape-plan evidence to consider, improperly, in the cumulative weighing of evidence in aggravation.

A prosecutor does not have to make evidence his sole reason for putting a defendant to death in order for it to have helped make his case for that sentence. Providing other reasons does not diminish the potency of particularly potent evidence and the argument supporting its use. And, again, whether or not the argument was "wholly proper" is not the issue. The issue is whether respondent can show harmlessness of evidentiary and instructional error in the face of that argument.

5. The Presence of Other Aggravation Does Not Demonstrate Harmlessness Beyond a Reasonable Doubt

Respondent's third argument for harmlessness again claims that the evidence of escape preparations "paled in comparison to the other evidence presented." (RB 230.) It is clearly not the case that, in the abstract, the specter of future escape could not have affected a juror's penalty calculus. Thus respondent is urging the Court to inappropriately reweigh the balance of the evidence bearing on penalty, decide which of the highly-contested versions of the circumstances of the offenses the jury believed, and come to its own conclusion of what a jury in a hypothetical trial without the error would have determined. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Even such a reweighing could not produce the level of confidence required to sustain any criminal conviction, much less a death sentence, for reasons explained

previously.[29]

As mentioned previously, when addressing other claims of error, respondent tellingly includes the "escape attempt" as part of the supposedly insurmountable case in aggravation that made any such errors harmless. (E.g., RB 150, 240, 261.) In doing so, respondent acknowledges its likely weight in the jury's decision-making. Respondent wants this Court to recognize the influence which the escape-preparations evidence had on the jury when considering it in other contexts but not when considering it in this one. Respondent's arguments that the jury's decision was partly attributable to the escape-preparation evidence are correct, and they fatally undermine its attempt to have this Court hold that the contrary is true beyond a reasonable doubt. The death judgment must be reversed.

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[29]A complete argument on both respondent's misapplication of the *Chapman/Brown* standard and the evidentiary picture presented in this case appears in the discussion of harmlessness in issue II, at pages 101–114 and 120–122, above. A more summary version concludes issue IV, at pages 167–172.

VII[1]

THE HARASSMENT OF TYREID HODGES DID NOT INVOLVE VIOLENCE AND WAS THEREFORE INADMISSIBLE AS AGGRAVATION, AND ITS ERRONEOUS LABELING AS AGGRAVATING VIOLENT CONDUCT SKEWED THE JURY'S ASSESSMENT OF THE OTHER EVIDENCE ADMITTED IN AGGRAVATION

As an incarcerated child molester, Tyreid Hodges was, predictably, subject to a campaign of harassment by his fellow county jail inmates, including appellant. Hodges and appellant were never in the same space at the same time, but, according to Hodges, appellant sometimes flung small items or squirted obnoxious substances in Hodges' direction through the six-inch gap under one or the other's solid metal cell door. Appellant's display of dislike for Hodges was offensive, but he never did anything that did or could harm Hodges, nor did his words or conduct put Hodges in fear for his safety.[2]

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[1]See AOB 371. Respondent addresses this claim in its Argument XIII.B, RB 230–231, 233–234.

[2]RT 51: 7502–7516, summarized at AOB 372–373 and RB 231. Respondent misstates the record in claiming that appellant "hit Hodges with a shampoo bottle, hair brush, and soap" and "did not miss his target." (RB 231, 232.) Here is the testimony:

> Q. . . . [W]as there an . . . incident . . . when . . . something was thrown at you?
>
> A. Yes. . . . [F]irst it was a, um, shampoo bottle. Then it was a hairbrush, um, and a couple of other things. Um, I think he threw a bar of soap at me one time too. . . .
>
> Q. Okay. And these items would be thrown from his cell?
>
> A. Yes. . . . Underneath the door, yes.
>
> Q. Were you struck by any of these items?

(continued...)

Section 190.3, factor (b), and the Eighth Amendment prohibit unadjudicated misdemeanors that involve neither violence nor the threat of violence, as those terms are commonly used in the criminal law, to be considered as reasons for imposing a death sentence.[3] Factor (b)'s "purpose is to show the defendant's propensity for violence," a matter relevant to the capital sentencing decision. (*People v. Bunyard* (2009) 45 Cal.4th 836, 857, citation and quotation marks omitted; see also *id.* at fn. 7, last paragraph.) Thus this Court has assumed "that factor (b) can be interpreted to exclude certain violent activity as too minor to be within the scope of the evidence to be considered by a jury in arriving at a penalty phase judgment." (*Id.* at p. 857.) Nevertheless, appellant's harassment of Hodges and a related statement were admitted in aggravation as violent criminal conduct, and the jury was instructed that they were relevant to its life-or-death determination. Clearly the prosecutor believed they had value in making the case for death and, depending on a juror's particular values and sophistication or lack of it regarding the realities of life in jail, it could have tipped the scales in that

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[2](...continued)

> A. No. I just barely missed the brush. The shampoo bottle had something in it. . . . But the liquid did hit my pant leg.

(RT 51: 7509.)

[3]See AOB 371–379, citing *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1308; *People v. Boyd* (1985) 38 Cal. 3d 762, 774–776; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268; *People v. Stanley* (1995) 10 Cal.4th 764, 823; *People v. Raley* (1992) 2 Cal. 4th 870, 907; *People v. Grant* (1988) 45 Cal.3d 829, 851; see also *People v. Balderas* (1985) 41 Cal.3d 144, 202 (even felonies, if not violent, may be weighed only if evidenced by a conviction; otherwise their limited probative value fails to justify the time involved in proving them); cf. section 667.5, subdivision (c) (legislature's list of violent felonies for purposes of enhancing sentences to prison).

direction. Even if it did not, by labeling these fairly lightweight misdemeanors a proper circumstance in aggravation, the trial court deeply skewed the jury's understanding of the continuum of misconduct that can properly help justify a death sentence, giving an undeserved gravity to appellant's other alleged jailhouse assaults.

Appellant invokes a de novo standard of review, because whether section 190.3 , factor (b), either does or constitutionally can cover the conduct at issue is a matter of law,[4] and respondent does not disagree. The parties also agree that the conduct described by Hodges amounted to misdemeanor assaults, in violation of section 240, which the trial court considered to be enough to qualify it as violent conduct under factor (b). But to say this is only to say that each action was a wrongful attempt to commit "the least touching." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.) Not every such attempt is conduct "of a type which should influence a life or death decision." (*People v. Stanley*, *supra*, 10 Cal.4th 764, 823.) While the mind naturally associates the concept "assault" with violence, a moment's analysis reveals that not every wrongful touch even approaches the common conception of violent conduct or amounts to the kind of misdeed that the law and the Constitution permit to be used in deciding that a person should be sentenced to death.[5] Factor (b)'s use of the term *violence* involves only its "common-sense core of meaning," one which "requires no further elucidation in the jury instructions." (*People v. Bunyard*, *supra*, 45 Cal.4th at p. 857, quotation marks omitted.) Categorizing the Hodges incidents as section 240 violations takes care of the

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[4]See AOB 373, fn. 228, citing *People v. Louis* (1986) 42 Cal. 3d 969, 986, and 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 317, p. 355.

[5]See fn. 3, p. 234, above, and accompanying text.

criminal-conduct prong of factor (b) but, contrary to what the trial court believed, contributes nothing one way or the other in determining whether the violence requirement was met. Thus in *People v. Raley, supra*, this Court held that a battery in the form of a lewd touching of a child amounted to a factor (b) crime of violence because the victim's resistance was overcome through force. (2 Cal.4th at p. 907.) It was implicit in the Court's analysis that the fact of a battery alone was not enough.

Respondent relies on *People v. Pinholster* (1992) 1 Cal.4th 865, 961, and *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1053. Appellant has already pointed out that—to the extent that the *Pinholster* discussion seemed to accept the notion that any battery would qualify under factor (b)—it was dictum, did not discuss the contention raised here, was soon contradicted by the reasoning in *People v. Raley, supra*, 2 Cal.4th at p. 907, and is distinguishable on the facts. (See AOB 377, fn. 229.) Respondent has no answer.

Lewis and Oliver is also distinguishable. The defendant threw hot coffee at a guard, who had to dodge it to avoid being hit. (39 Cal.4th at p. 1053.) Trying to scald someone *is* violent; it can cause both pain and physical harm. Flinging soap or a plastic shampoo bottle with whatever force and directionality is possible through the gap under a door, or squirting feces or urine under the door, does not have the same potential.[6] Thus neither case

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[6]In one incident, Hodges accepted the prosecutor's characterization of the urine squirted on him from a shampoo bottle as a "hot liquid." (RT 51: 7507–7508.) Clearly whatever warmth it had, originally, and after being kept in a shampoo bottle until Hodges came by and then being squirted through the air, was not enough to cause pain or injury. For it did hit Hodges' clothing, but Hodges said nothing about discomfort from its temperature or

(continued...)

cited by respondent is authority for the proposition that actions which cannot do physical harm and which do not give rise to fear on the victim's part are violent. Appellant has shown that the purpose of section 190.3 requires a different interpretation, that the term *violent* is never used this way elsewhere in the criminal law, that the trial court's holding that a technical assault or battery alone is sufficient violates the Eighth Amendment, and that *People v. Raley*, *supra*, 2 Cal.4th at p. 907, implicitly supports appellant's position on the question. (AOB 373–379.) Other than citing *Pinholster* and *Lewis & Oliver*, respondent has no answer.

Finally, respondent states that appellant "threatened to 'take [Hodges] out' if it was up to him.'" (RB 234, substitution in original.) Admission of the statement, which in fact was not a threat, only compounded the error and the associated prejudice. As appellant has explained, inmates were let out of their cells for "day room time" only one at a time and thus were always separated from each other by a metal door.[7] So appellant's statement that, "if he had his

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[6](...continued)
other adverse effects. (RT 51: 7507–7508.) Similarly, the prosecutor did not argue that there was a threat of harm while seeking admission of the evidence; rather, his sole position was that harm or the threat thereof was unneeded if the elements of an assault or battery were met, a stance adopted by the trial court. (RT 51: 7500–7501.)

In his summation to the jury, the prosecutor used the incidents as general bad-character evidence, describing them as disgusting and as evidence of appellant's resourcefulness, but he said nothing about any danger of physical harm to Hodges, or fear on the latter's part. (RT 54: 8027). In sum, the description of the urine as "hot," in a context where there was no evidence of potential for injury or fear of it created, does not make it comparable to throwing hot coffee at someone.

[7]RT 50: 7420, 7448–7450; 51: 7502, 7508; Exs. 431, 432, reproduced (continued...)

way about it," he would "take . . . out" Hodges (RT 51: 7505), which was part of a longer statement that a child molester had no rights to time out of his cell, was not a threat; it was expressed in the subjunctive because both parties to the conversation knew that appellant could not "have his way about it." The prosecutor did not attempt to prove that Hodges experienced fear as a result of appellant's statement, much less that any fear on the part of the recipient would have been reasonable, and that the statement conveyed an immediate prospect of execution of a threatened action. All of these are elements of a criminal threat. (§ 422; *In re George T.* (2004) 33 Cal. 4th 620, 630.) The statement was not a violent crime, and it was not presented as a circumstance of any violent crime. It just served to make appellant look worse in the eyes of the sentencing jury. All of this was argued previously,[8] and respondent makes no attempt at rebuttal.

As explained more fully in the opening brief,[9] the error cannot be known to have been harmless, and, in fact, probably did have a real impact. The prosecutor judged the incident important enough to go to the expense of transporting Hodges from state prison to testify. He did not dwell at length on it in argument, but the use he made of it was significant. In a powerful conclusion, he argued that executing appellant was necessary, in order to avoid there being further victims. For this point he relied on the evidence of appellant's jail misconduct. A key prong of that argument was that appellant was bright, resourceful, and sophisticated in finding means not only to try to

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[7](...continued)
at SCT — Photos 2: 582, 584.

[8]AOB 379–380, fn. 230.

[9]AOB 379 et seq. and cited portions of the record.

escape, but to hurt people in prison. (RT 54: 8026–8030.) The prosecutor used two pieces of evidence to make that point: the escape preparations, and the Hodges incident. The latter showed,

> Mr. Romero is very bright and resourceful. Make no mistake about that. He found a way to be as offensive as he possibly could under the limited circumstances that he found himself in . . . .

(RT 54: 8027.) It is more than reasonably possible that this logic influenced a juror.

Beyond that, the trial court specifically instructed the jury that the Hodges incidents, if the jury believed they happened, were the kind of violent criminal activity which the law required them to take into account in deciding penalty. (CT 9: 1991, 1989.) This skewed the entire range of apparent aggravation by giving it a trivial bottom, making the other jailhouse incidents appear to be mid-range although, if they were worthy of consideration at all, *they* belonged at the bottom. (Cf. *Apprendi v. New Jersey* (2000) 530 U.S. 466, 512–513, 522 (conc. opn. of Thomas, J.) [judge's choice of mid-range sentence did not show harmlessness of invalid mandatory minimum, since error skewed the range, thus also skewing the judge's perception of the severity of the choice he made].) This made the error in admitting the evidence a very serious one, not the kind that can be found, beyond a reasonable doubt, to have been incapable of affecting a penalty decision.

Respondent makes a perfunctory attempt to meet its burden of showing harmlessness. First, it shifts that burden: ". . . Romero cannot establish prejudice." (RB 234.) Then, citing the other jail incidents and the

circumstances of the crimes, while seriously exaggerating both,[10] it claims harmlessness simply because the challenged evidence "pales in comparison to the other evidence before the jury . . . ." (*Ibid.*) So respondent again addresses the wrong question, which is not how it or this Court thinks various considerations would or should have been significant in deciding penalty, but whether the possibility of a juror having been influenced can be ruled out.[11] Then respondent entirely ignores how the evidence was actually used to bolster the case for death, by showing the resourcefulness appellant could be expected to bring to bear on future attempts to harm people and escape.

Respondent also ignores the way the evidence and accompanying instructions effectively misinformed the jury as to how to evaluate the seriousness of the other factor (b) misconduct. The Hodges incidents were

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[10]Respondent claims, "Romero hunted three young men like prey, killed them without any apparent remorse, and continued to satiate his appetite for violence while awaiting trial." (RB 234.) The evidence presented Aragon as only a robbery target for appellant, whom Self (or Self and Munoz) decided to kill, and the idea that the Lake Mathews victims were sought out in advance as murder victims is a totally speculative interpretation of the evidence. Further, though legally responsible for three murders, the prosecution's case showed appellant to have killed one person, not three, and even concluding that he did that requires believing Munoz.

As for the three jailhouse incidents in four years that involved violence, they were too minor to satiate any real appetite for violence. This is particularly true in light of the fact that appellant never used the shanks which he possessed or threatened anybody with them, and in light of a jail culture in which a certain amount of toughness needs to be projected in order to avoid being victimized oneself. (See summary at AOB 124–126.)

[11]A complete argument on both respondent's misapplication of the *Chapman/Brown* standard and the evidentiary picture presented in this case appears in the discussion of harmlessness in issue II, at pages 101–114 and 120–122, above. A more summary version concludes issue IV, at pages 167–172.

indeed fairly "pale," which is why they should not have been admitted. But whether an error in admitting evidence is prejudicial depends, among other things, upon "any indirect effect" that the evidence "might have had because of the way in which [it was] used." (*People v. Gonzales* (1967) 66 Cal.2d 482, 493.) Here it was used to teach the jury that the range of wrongdoing to be "consider[ed]" and "take[n] into account" (RT 54: 8063) in deciding appellant's sentence included these minor incidents, deeply exaggerating the aggravating force of the evidence of other unadjudicated misconduct.

It is standing *Chapman* and *Brown* on their heads to ignore how the case was tried and argued and then claim that the strength of the rest of the prosecution's case for death and the relative insignificance of the Hodges misconduct are enough to demonstrate, beyond a reasonable doubt, that the error was not one "which possibly influenced the jury adversely"[12] The penalty judgment must be reversed.

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[12]*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Ashmus* (1991) 54 Cal.3d 932, 965 (in death cases, state-law test is equivalent to *Chapman*).

VIII[1]

EXCLUSION OF MITIGATING EVIDENCE WAS PREJUDICIAL CONSTITUTIONAL ERROR

A trial court's power to limit testimony offered by a capital defendant in mitigation is sharply constrained by the Evidence Code, the Sixth and Fourteenth Amendment rights to present a defense in any criminal case, and the Eighth Amendment right to present any evidence relevant to mitigating a possible death penalty.[2] In the Eighth Amendment context, there is a "low threshold for relevance,"[3] and the high court has characterized its own expression of the relevance standard for mitigation as being "in the most expansive terms."[4] Relevance for these purposes is "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[5] This includes testimony supporting the credibility of a mitigation witness, when

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[1]See AOB 384. Respondent addresses this claim in its Argument XV, RB 241.

[2]Evid. Code §§ 210, 351, 780; U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17; *Holmes v. South Carolina* (2006) 547 U.S. 319, 324 (right to present a complete defense); *Taylor v. Illinois* (1988) 484 U.S. 400, 409 (same, per right to compulsory process); *Chambers v. Mississipi* (1973) 410 U.S. 284, 294–295 (same, per due process); *People v. Mickey* (1991) 54 Cal.3d 612, 692–693 (federal right to present any relevant evidence potentially mitigating the sentence).

[3]*Tennard v. Dretke* (2004) 542 U.S. 274, 285.

[4]*Tennard v. Dretke*, *supra*, 542 U.S. at p. 284.

[5]*Ibid.*

credibility could be an issue.[6]

Here the defense offered Maria Self's testimony that she was regularly raped by two brothers, starting at age six and continuing for seven years. The evidence was offered, in part, to substantiate her narrative of her extreme abuse and neglect of her own sons by providing a window into her psyche. This was in the face of what was correctly predicted to be prosecutorial argument that her testimony was the grossly exaggerated, unsubstantiated, and improbable story of a highly biased witness. The testimony was also offered as part of the direct case in mitigation, as she would testify that at times she left her young sons in the care of the same violent and grossly abusive brothers. This was a further example of her neglect, qualitatively different from the others before the jury, as well as circumstantial evidence tending to show where appellant and Self may have found models for allowing their own dark sides free rein.[7] The trial court, while agreeing that Maria Self's credibility would be in issue,[8] excluded the testimony. It saw no relevance in it, mistakenly thinking that all it did was mitigate Maria Self's culpability for her own conduct. Then—using an entirely different measuring stick than it used when determining whether prosecution evidence could arouse prejudice and confusion among the jurors—the court found the evidence "highly

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[6]See *Davis v. Alaska* (1974) 415 U.S. 308; *Smith v. Illinois* (1968) 390 U.S. 129; *Pointer v. Texas* (1965) 380 U.S. 400, 403–404; and analysis and additional cases cited at AOB 387, fn. 232, as well as *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324; see also Evid. Code § 210 (relevant evidence includes that relating to credibility of a witness).

[7]See RT 52: 7731, 7733–7735 (offer of proof and argument in favor of admission).

[8]RT 52: 7734.

prejudicial" and likely to confuse and mislead the jury. (RT 52: 7735.) Both prongs of the court's ruling were mistaken, leading the court into prejudicial statutory and constitutional error.

Respondent contends that appellant has forfeited appellate review of his claims to the extent that they have constitutional bases, that the proffered evidence was irrelevant, that its admission would have created a substantial risk that sympathy for Maria Self would have so biased the jury that it would have failed to give the death penalty due consideration, and that any error in excluding it was harmless. (RB 241–248.) The parties agree only partially on the applicable law, and they disagree on the critical question of the standard of review.

A. Appellant Is Entitled to Review of His Claim Under Constitutional Standards

Preliminarily, respondent contends that the constitutional bases for this claim were forfeited because of trial counsel's failure to articulate them when arguing for admission of the testimony. (RB 242, fn. 75.) This contention was anticipated in the opening brief. (AOB 398, fn. 238.) To the extent that this Court agrees with appellant that, under the Evidence Code, the trial court lacked discretion to exclude the evidence, the congruence between (uncited) constitutional and (cited) non-constitutional law gave the trial court a full opportunity to adjudicate the issue. In this circumstance, there is no preservation requirement. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117–118; see also *People v. Partida* (2005) 37 Cal. 4th 428.)

To the extent that the state and federal constitutions gave appellant broader rights, the futility exception (*People v. Boyette* (2003) 29 Cal.4th 381, 432) applies. This is because the trial court was absolutely unable to see any relevance in the testimony at issue. Since neither the right to present a defense

nor the right to present all meaningful mitigation conveys a right to introduce irrelevant testimony, its ruling would have been no different if it had applied the rubric of those rights. Put differently, the failure to invoke those rights did not deprive the court of the ability to understand the issue better. Respondent asserts, without further reasoning, that this point is "'. . . merely speculative,'" citing *People v. Sanders* (1990) 11 Cal.4th 471, 51[0], fn. 3. (RB 242, fn. 75.) But in *Sanders* nothing about the trial court's reasoning showed that it would have reached the same result even if a more stringent federal standard had been brought to its attention, so the failure to do so may have affected its ruling. It had excluded expert testimony about potential weaknesses in eyewitness identifications. (See 11 Cal.4th at pp. 507–508.) Its ruling involved judgment calls about both the value of the testimony under the circumstances and the cost in terms of time that would have been consumed by its admission. (*Id.* at pp. 509–510.) Thus it was speculative to assert that the trial court would not have ruled differently under a more rigorous standard, and asserting that standard for the first time on appeal was not permitted. (*Id.* at p. 510, fn. 3). Here, in contrast, it is not speculative to recognize that a court that saw proffered testimony as logically entirely unconnected to any material fact would have ruled the same way under constitutional standards, none of which require admission of irrelevant testimony.

Appellant has stated three other applicable exceptions to the preservation requirement and cited the state's own interest in a fair and reliable penalty verdict.[9] He has also urged that—to the extent there is any doubt about

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[9]See AOB 398–399, fn. 238, citing *People v. Vera* (1997) 15 Cal.4th 269, 276–277 (deprivation of fundamental constitutional rights); *People v. Hines* (1997) 15 Cal.4th 997, 1061 (pure question of law on undisputed facts); (continued...)

whether the trial court would have known of the constitutional context—failure to raise it constituted ineffective assistance, properly reviewable on appeal because of the lack of any conceivable tactical basis for failing to bring the most favorable law to the court's attention. (AOB 398–399, fn. 238.) Respondent disputes none of these additional grounds for reviewing the constitutional claim here.[10]

B. Under the Eighth Amendment and Other Constitutional Protections, a Trial Court's Discretion Regarding Proffered Mitigation Exists Only at the Margins of Relevance, and Review Should Accordingly Be Undeferential

1. Near-Absence of Trial-Court Discretion

Respondent agrees that a defendant has a constitutional right "to offer any relevant potentially mitigating evidence." (RB 243.) Respondent does not

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[9](...continued)
People v. Williams (1998) 17 Cal.4th 148, 161, fn. 6 (court's discretion to consider claims for which right to review has been forfeited); *People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1 (conc. opn. of Mosk, J.) (same; constitutional right to correction of miscarriage of justice prevails over judicially-created waiver rules); *People v. Koontz* (2002) 27 Cal.4th 1041, 1074 (state's own interest in a fair and reliable penalty verdict).

[10]Respondent also states that the constitutional claims are premised on the assertion that the trial court prejudicially erred (presumably under state law), and that lack of error undermines the claims. (RB 242, fn. 75.) This can be true where constitutional and non-constitutional rules are the same, and the sole reason to cite federal constitutional law is to invoke a different harmlessness standard or permit subsequent federal review. (*People v. Partida, supra*, 37 Cal. 4th 428.)

Respondent's assertion makes no sense here, however, as appellant is claiming that the constitutional protections—such as the broad right to introduce any potential mitigating evidence—limit any discretion the trial court may otherwise have had under Evidence Code section 352. Not every ruling that passes state-law muster thereby also meets constitutional standards.

dispute that this fundamental right encompasses evidence supporting the credibility of a defense witness. However, respondent goes on to quote, out of the context of the cases in which they arose, seemingly general formulas about the Eighth Amendment not abrogating the Evidence Code, the ordinary rules of evidence not generally infringing on an accused's Sixth and Fourteenth-Amendment rights to present a defense, and a trial court's discretion to exclude potentially mitigating evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (RB 244.) Respondent apparently would have the Court give lip service to the principle that all relevant mitigation must be admitted and then use the quoted language to affirm, by ruling that a trial court's discretion under the Evidence Code to exclude mitigating evidence is as broad as it is with evidence offered in any other procedural setting.

Each statement quoted by respondent, if taken to generally permit trial courts significant discretion to violate the principle that potentially relevant mitigation must be admitted, would be erroneous. Unsurprisingly, therefore, a reading of the authorities on which respondent relies shows respondent's use of each to be unsupported. Rather, the synthesis between the overriding Sixth-, Eighth-, and Fourteenth-Amendment protections that require admitting "any"[11] potentially mitigating evidence and the cases from which respondent draws certain language is this: in a narrow area, at the outer margins of relevance, and where both the risk of prejudice or confusion and the degree of such prejudice or confusion are high, the trial court has some discretion.

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[11] *People v. Mickey* (1991) 54 Cal.3d 612, 692, citing, *inter alia*, *Skipper v. South Carolina* (1986) 476 U.S. 1.

Respondent cites *People v. Phillips* (2000) 22 Cal.4th 226, 238, and *People v. Edwards* (1991) 54 Cal.3d 787, 837, for the proposition that the Eighth-Amendment rule allowing all relevant mitigating evidence has not abrogated the Evidence Code. The testimony at issue in *Phillips* was hearsay, and there was good reason to believe that it was double hearsay, based on a self-serving statement by the defendant rather than the informant's personal knowledge. (22 Cal.4th at pp. 234–237.) The *Phillips* Court acknowledged that even the Evidence Code's hearsay ban would give way to the right to present mitigation if the testimony were highly relevant and had substantial indicia of reliability, but neither of these conditions was met. (*Id.* at p. 238.)

The second case cited by respondent is similarly illustrative of the very narrow range of the principle invoked by respondent. It involved another violation of the hearsay rule, as the defendant attempted to defeat the prosecution's right to test mitigation evidence through cross-examination, by offering his own pre-trial statements, without taking the stand himself. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 837–838.) After discussing the guidance *Green v. Georgia* (1979) 442 U.S. 95 gave regarding when state hearsay rules must give way to constitutional protections, this Court upheld the exclusion of the testimony. (*Ibid.*) Thus when *People v. Phillips* and *People v. Edwards* stated that the Evidence Code survives the Eighth Amendment during a penalty trial, they were not holding that every codified evidentiary restriction can be applied to justify exclusion of evidence in mitigation. Here the provision respondent counterposes to the Eighth Amendment is not the clearly definable and reliability-enhancing hearsay rule—though even that must give way at times—but a court's otherwise broad discretion under Evidence Code section 352.

Respondent's apparent attempt to undermine the principle that "[t]o

guarantee that capital sentencing decisions are as individualized and reliable as the Constitution demands, . . . the defendant may not be barred from introducing any relevant mitigating evidence,"[12] also relies on broad language from *People v. Prince* (2007) 40 Cal4th 1179 about the ordinary rules of evidence not generally infringing on an accused's right to present a defense. (RB 243.) As shown in a prior discussion,[13] nothing in *Prince*, nor the cases on which it relies, seeks to dispute the fact that there are numerous areas where the constitution constrains courts' evidentiary rulings. The observation about the rules of evidence generally being constitutional may be true, but it is unhelpful in analyzing a claim that a particular application was unconstitutional. What it does is somehow suggests that appellant has an uphill battle. In fact, the uphill battle—and it is a steep one—is faced by the party seeking to justify exclusion of evidence offered in mitigation, in the face of the Eighth-Amendment rule.

Finally, respondent quotes *People v. Guerra* (2006) 37 Cal.4th 1067, 1145, for the broad proposition that the trial court determines the relevance of evidence offered in mitigation and retains discretion to exclude such evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (RB 244.) This, too, is a serious overstatement, although—as appellant shows below—the trial court's ruling here would have been error even if this were the standard. The facts in *Guerra* resembled a law-school hypothetical about the Eighth Amendment requiring the admission of "any"

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[12]*People v. Mickey*, *supra*, 54 Cal.3d 612, 692–693.

[13]See pp. 149–152, above.

relevant mitigating evidence.[14] The asserted error was exclusion of a photograph of the defendant's horse and his three children. It was offered to show the defendant's family as he lived with it in Guatemala, and the horse he rode when he gave medical attention to people in his village. Other photos of the children had been admitted, and there was testimony about his delivering medications on horseback. This Court upheld a finding that the photo was irrelevant, as well as excludable under Evidence Code section 352. (*Id.* at p. 1145.) In reality, the claim was a frivolous one. It would be error to now employ language used by this Court to dispose of it, in order to subvert a very broad principle enunciated by the high court, in the context in which that principle *is* intended to apply.

Clearly what *Guerra* stands for is the common-sense proposition that a defendant's relevance claim need not be accepted at face value without testing by the trial and reviewing courts just because the evidence is purportedly mitigating.[15] Moreover, as explained previously,[16] while relevance issues are normally pure questions of law, to which there is a single right answer determined by logic, there is an area of discretion at the margins in allowing or excluding "facts that merely fill in the background of the narrative

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[14]See *People v. Mickey*, *supra*, 54 Cal.3d 612, 693, quoting *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, and *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114, and citing numerous other high court cases.

[15]See *Tennard v. Dretke*, *supra*, 542 U.S. 274, 286, where the court reaffirms that all evidence which a sentencer could consider mitigating must be admitted, while acknowledging that "gravity has a place in the relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate . . . ."

[16]AOB 391.

and give it interest, color, and lifelikeness." (1 McCormick, Evidence (5th ed. 1999) Relevance, § 185, p. 637.) At those margins, too, Evidence Code section 352 discretion would apply, even in a mitigation setting, as long as it is narrowed by Eighth Amendment concerns. Clearly a picture of a defendant's horse, if relevant at all, falls into this category. Evidence which, among other things, circumstantially explains how a mother could behave in an unmotherly fashion, and do so to a degree that is otherwise incomprehensible, in the face of the prosecution's vigorously disputing that she did so, does not.[17]

Respondent makes no attempt to reconcile a broad application of the *Guerra* language with what both it and this Court have acknowledged to be Eighth Amendment law.

Respondent's quotation from *Guerra* is followed by citations attributing it not only to *Guerra*, but to *"People v. Box, supra*, 23 Cal.4th at p. 1153," and *People v. Karis* (1988) 46 Cal.3d 612, 641–642, fn. 21. The cited page in *Box* is the first page of the opinion, containing its front matter, and the entire opinion has neither the language used in *Guerra* nor a discussion of the law relating to mitigation evidence. There is, however, a reference to the portion of *People v. Karis* which respondent cites, and that discussion is instructive. (See *People v. Box, supra*, 23 Cal.4th at pp. 1200–1201.) Both cases deal with the question of whether a trial court retains section-352 discretion to exclude evidence offered *in aggravation* by the *prosecution*. In an in-depth discussion of the extent of that discretion under factor (a) (the circumstances of the crime), the Court concluded in *Box* that the discretion exists but, because of the statutory and procedural framework, "is more circumscribed than at the

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[17]Put differently, such evidence is a horse of a different color.

guilt phase." (23 Cal.4th at p. 1201.) Notably, even another statute, therefore, can circumscribe a trial court's discretion under section 352. Thus *People v. Box* supports the proposition that to say that section-352 discretion is retained in the face of external constraints is not to say that such discretion will look the same as it does when neither other statutory nor constitutional considerations cause it to be "reduced accordingly." (*Ibid.*) Here the appropriate reduction is drastic. Discretion must be limited to the *Guerra* situation of evidence at the far margins of arguable relevance. Otherwise a court is bound by the uncompromising rule that a defendant on trial for his or her life must be permitted to offer any evidence relevant to a mitigating circumstance.

2. Standard of Review

After suggesting that a trial court's normal section-352 discretion is unconstrained in the mitigation context, respondent advocates an abuse-of-discretion standard of review, not only in a section-352 context, but even of the basic relevance determination. Respondent is wrong regarding both questions.

a. Review of Relevance Determination

Appellant addressed the standard of review in the opening brief.[18] He acknowledged that there is broad language in this Court's opinions stating generally that claims of error in evidentiary rulings, including relevance issues, are reviewed only for abuse of discretion. Respondent now offers that language without further comment (RB 244), although appellant had pointed out that

- in actual practice, this Court routinely analyzes some evidentiary questions as matters of law—including relevance questions—even where constitutional rights are not involved,

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[18]AOB 389 et seq.

and even when the Court begins by stating that the trial court has broad discretion in determining relevance;[19]

- neither the Witkin nor McCormick treatises on evidence list relevance rulings as among those where a court has discretion;[20]
- this Court has never explained why, in the face of (a) Evidence Code section 351's flat command that all relevant evidence is admissible except as otherwise provided and (b) the pure-logic, matter-of-law nature of every relevance question (see Evid. Code § 210),[21] a trial court would have discretion, i.e., "the power to make the decision, one way or the other"[22] to make relevance determinations and have them receive deferential review;[23, 24] and
- the line of authority broadly stating an abuse-of-discretion standard for evidentiary rulings goes back only to very specific situations where discretion was established by statute or

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[19]See AOB 389, 391, and cases cited.

[20]9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 357, pp. 405–406; 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 4, pp. 325–326, § 26, pp. 351–353; 1 McCormick, Evidence (5th ed. 1999) Relevance, § 185, pp. 637–648.)

[21]The *degree* of probative value can be a judgment call, but whether evidence has a tendency in reason to prove a material fact is not.

[22]*People v. Carmony* (2004) 33 Cal.4th 367, 375 (defining *discretion*).

[23]See AOB 388–390.

[24]Again, the exception would be on the margins of relevance, where trial courts may make judgment calls about background facts that give interest and color to a narrative. (See 1 McCormick, Evidence, *supra*, Relevance, § 185, p. 637.)

logically required.[25]

The point may seem academic, since relevance issues do tend to be clear-cut and this Court treats them this way, without referring to a trial court's discretion, even after opening its discussion with a general statement about the abuse-of-discretion standard. But appellant seeks clarity on the standard of review because taking the abuse-of-discretion standard as even a nominal starting point can create a mind-set favoring affirmance. What appellant seeks is review of his contention based on the clear commands of the Evidence Code and his rights under the Constitution, not on an erroneous framing of the question as whether the trial court abused a discretion that need not and does not exist.

Respondent does not argue with any of appellant's reasoning, authorities, or conclusion on the matter of the standard of review regarding the initial relevance determination. Respondent does, however, state that a trial court's ruling on the admissibility of evidence will not be disturbed unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice, citing *People v. Guerra*, *supra*, 37 Cal.4th 1067, 1113. *Guerra* made that statement, in a setting where no constitutional constraints applied.[26] In it—as in the cases cited by appellant—this Court went on to affirm the correctness of the trial court's ruling without in any way relying on a standard, such as that relied on by respondent, that would affirm every colorably rational trial-court ruling. Put differently, the *Guerra* Court did not affirm merely by finding that the trial

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[25]See AOB 389–390 & fn. 233.

[26]This was in a different portion of its opinion than that discussing the mitigation claim.

court's ruling was not arbitrary or absurd. Nothing in *Guerra* defeats appellant's position that the typical relevance question is a black-and-white one, with a correct answer that this Court can, should, and does determine on its own.

b. Review of Discretionary Balancing of Probative Value and Prejudicial Effect

Appellant has argued, citing the practices of both the United States Supreme Court and this Court, that even to the extent that a balancing of probative value versus prejudicial effect may have been appropriate in ruling on the prosecution objection to the Maria Self rape/incest testimony, the normal level of deference to a trial court does not apply in reviewing claims based on the constitutional rights to present a defense and all mitigating evidence.[27] As he put it there, "The extent of a defendant's constitutional rights is not committed to the discretion of trial courts to handle in varying ways according to their views of what is appropriate. (Cf. *People v. Carmony*, *supra*, 33 Cal.4th 367, 375 [discretion is the power to rule either way].)" Respondent has not commented on this analysis.

Moreover, even in ordinary situations,

> [t]he abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.

(*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712, footnoted citations omitted.) The degree to which constitutional law should impact a court's perspective on an evidentiary question is a conclusion of law, subject

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[27]AOB 392 and cases cited.

to de novo review. Moreover, the statement suggesting freedom to apply the law to the facts in any manner other than an arbitrary one seems overbroad. (Cf. *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1222 , conc. opn. of Rushing, P.J. ["The trial court had no discretion to decide what the applicable law was or to determine its logical effect in light of the facts found"]. The entire opinion is an illuminating discussion of the uses and misuses of the abuse-of-discretion standard.)

Finally, as shown below, following the lead of the prosecutor, the trial court entirely misunderstood the bases on which the defense was contending that the evidence at issue was relevant, despite clear statements from defense counsel. Under these circumstances, a proper exercise of any discretion it may have had was impossible, and this Court must determine the issue de novo. (Cf. *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th 706, 712, fn. 4; *Martin v. Alcoholic Beverage Control Appeals Bd.* (1961) 55 Cal.2d 867, 875.)

C. The Evidence Was Relevant to the Mitigation Case, and There Was No Substantial Risk of Undue Prejudice to Respondent

On the merits, respondent goes to some lengths to argue that sympathy for members of a defendant's family is not a proper circumstance in mitigation, and that the family's background "is of no consequence in and of itself." (RB 244, quoting *People v. Rowland* (1992) 4 Cal.4th 238, 279.) There is no need to rebut this argument, because admission of the Maria Self testimony was not sought on either basis.

Unlike the trial court, respondent at one point acknowledges appellant's reasons for seeking admission of the evidence. (RB 244.) Its only answer, however, is a non sequitur that repeats the trial court's misunderstanding. After stating the bases on which relevance was actually claimed, respondent asserts,"Put another way, appellants wanted the jury to consider an improper

and irrelevant matter in mitigation, i.e., their mother's background and character in an attempt to create sympathy for her." (RB 244–245, emphasis added.) This is not "putting" anything "another way": it is shifting to speculatively ascribing ulterior motives to the defense. But doing so does not weaken appellant's showing that the evidence had a tendency in reason to make more probable the legitimate propositions that would have bolstered the mitigation case.

1. The Evidence Would Have Significantly Supported the Credibility of a Key Witness Whose Truthfulness the Prosecution Attacked

While respondent accurately states the bases for admitting the evidence, it ignores most of appellant's underlying reasoning.[28] In brief, "[A] host of research and clinical studies . . . indicate" what is well known in the culture and was at the time of appellant's trial: "that adult survivors of incest suffer from devastating personal and interpersonal difficulties." (Kirschner, Kirschner & Rappaport, Working with Adult Incest Survivors: The Healing Journey (1993) p. 3.) Without the rape/incest background, Maria Self's story of addiction and of abusing and neglecting her children and raising them in chaos had no explanation except for a bad marriage, and, as the prosecutor was soon to argue,[29] her obvious bias in wanting her sons to live. Her own background made her account of how she treated her children considerably more plausible, for it made obvious the probability that, while a young mother, she had serious psychological problems. While respondent now emphasizes

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[28]See AOB 393–399.

[29]RT 54: 8020, 8022.

that there was testimony about her having such problems,[30] the prosecutor sought to imply that her condition was of recent vintage, brought on by her sons' arrests.[31] The missing rape/incest piece also would have supported the testimony, provided by Maria's niece Sheila Torres, regarding Maria's hatred of males and her taking that hatred out on her sons.[32]

Respondent has no answer to any of this.

Appellant has also pointed out that prosecutors may introduce evidence of a defendant's motive. Because it provides a reason for the alleged criminal action, it makes it more likely that the defendant committed it than if there were no motive. It is thus circumstantially probative on the issue of his or her actions. (See 1 Witkin, Cal. Evidence, *supra*, Circumstantial Evidence, § 119, pp. 466–468.) Yet here, when the defense had a parallel need to establish a reason for Maria Self's actions, the trial court could "see no issue before the jury as to the reason why she did or did not do certain things to the defendants." (RT 52: 7735.) Evidence that would provide a reason for Maria Self's actions made the claims that she committed them much more plausible, just as evidence of a reason for a defendant to commit a crime supports the case that he or she did so. It was evidence "having any tendency in reason to prove" that her account of that behavior was true (Evid. Code §§ 210, 780), for it would have "'. . . render[ed] the desired inference more probable than it would be without the evidence.'" (*People v. Warner* (1969) 270 Cal.App.2d 900, 907–908; see also *Tennard v. Dretke*, *supra*, 524 U.S. 274, 284 [same test for relevance of mitigating evidence for purposes of principle that relevant

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[30]RB 246.

[31]RT 52: 7758–7759.

[32]RT 53: 7904–7905.

mitigation must be admitted]; cf. *Skipper v. South Carolina*, *supra*, 476 U.S. 1, 7–8 [state could not exclude, as cumulative, testimony of disinterested witnesses corroborating mitigating facts testified to by defendant and his wife].) The trial court simply did not understand this, and its ruling was error under any standard.

Again, respondent has no answer. Apparently it would have this Court affirm by silently applying different rules of relevance to defendants than to the prosecution.

2. Respondent's Disparagement of Family-History Testimony Urges a Departure from the Norms of Capital-Case Litigation

In a related point, appellant has shown that it has long been accepted in capital cases that mitigation evidence pertaining to the background and character of the defendant will sometimes include the background or psychological disabilities of family members, citing cases where the defense presented, among other things, parents' own childhood sexual victimization.[33] Respondent states that none of these cases involved a direct holding that the defendant was entitled to present the evidence. (RB 247.) This is true only in the most narrow, technical sense, and it is noteworthy that respondent offers no authorities holding such evidence inadmissible.

In *People v. Rowland*, discussed by both parties here, the issue was a claim of prosecutorial error in arguing that much of the defense case, which included testimony that both of the defendant's parents came from violent,

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[33]See AOB 395–396, citing *Wiggins v. Smith* (2003) 539 U.S. 510, 524–525, 535; *People v. Michaels* (2002) 28 Cal.4th 486, 506; *People v. Wharton* (1991) 53 Cal.3d 522, 545; *People v. Rowland*, *supra*, 4 Cal.4th 238, 255.

alcoholic homes and were sexually victimized as children,[34] had nothing to do with the defendant. Rather than holding, as a matter of law, that the prosecutor was correct and that the evidence should not even have been before the jury, this Court held that the prosecutor was urging the jury to apply the correct standard. For he was urging it to decide what in the family-background facts actually could have affected the defendant and what could not have done so. The propriety of the admission of the evidence was unquestioned, and the prosecutor was entitled to argue its significance before the body that would ultimately decide that question. (*People v. Rowland*, *supra*, 4 Cal.4th at pp. 278–280.) *Rowland* clearly accepts the premise that the significance of facts substantially illuminating the kind of person whom the defendant was raised by is a jury question, not a legal one.

Similarly, while *Wiggins v. Smith* (2003) 539 U.S. 510, did not directly hold that the kind of information offered here was material mitigation, the Supreme Court clearly considered this to be the case. It held that a competent attorney would normally prepare a social and family history of a capital defendant, and it found it likely that, in the case before it, such an attorney would have placed that history before the jury. (*Id.* at pp. 524–525, 535.) The ineffectiveness-of-counsel claim before the Court would have been meritless if the evidence were not something which a jury could appropriately consider mitigating. Moreover, in *Wiggins*, the undiscovered evidence included the defendant's mother's alcoholism, which the Court clearly saw as shedding light on her abuse and neglect of the defendant. (*Id.* at pp. 516–517, 524–525, 535.) Maria Self's carrying the scars of seven years of incestuous childhood rape was entirely comparable to the disabilities inflicted by alcohol. But by the

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[34]*People v. Rowland*, *supra*, 4 Cal.4th at p. 255.

narrow logic of the court below, neither a mother's alcoholism (*Wiggins*) nor her history likely to cause serious psychological damage (appellant's case) would "relate to factors in mitigation *for the defendants*." (RT 52: 7735, emphasis added.) Only her direct acts towards them—"what she did or did not do to her sons"—would. (RT 52: 7731.)

Respondent overlooks the *reason* for the absence of 100-percent explicit holdings in favor of appellant's position—or, for that matter, against it. It is that, normally, such mitigation evidence is unchallenged. The trial courts in the various cases cited in the opening brief did not curb its admission. The reviewing courts, which certainly could have commented on any impropriety in admitting such evidence, did not do so. The only reason such a claim is being litigated now is that the court below truly misunderstood the point of the testimony. It knew that evidence that appellant was abused as a child was admissible to mitigate his responsibility for his actions, thought that Maria Self's victimization was similarly being offered to mitigate hers, and knew that her culpability and the degree to which it was mitigated were immaterial.[35] It simply did not get that background evidence explaining her behavior both bolstered the likelihood of the truth of accounts of that behavior and provided additional evidence—apart from the details of this or that incident of abuse or neglect appellant suffered at her hands—about the environment in which appellant was raised. Or at least a rational juror could have thought so, which is enough to have deprived the trial court of the power to exclude it. (*Skipper v. South Carolina*, *supra*, 476 U.S. 1, 4–5; *People v. Mickey*, *supra*, 54 Cal.3d 612, 693.)

Since the trial court did not understand the contention before it, any

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[35]See AOB 396, quoting RT 52: 7731, 7733, 7735.

discretion it may have had cannot be considered to have been properly exercised, and this Court must determine the issue de novo. (Cf. *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th 706, 712, fn. 4; *Martin v. Alcoholic Beverage Control Appeals Bd.* (1961) 55 Cal.2d 867, 875.) While respondent, as noted previously, seeks abuse-of-discretion review, it has neither sought to disprove the fact that the trial court failed to understand the proffered basis for the testimony[36] nor disputed the impact of such a failure on the standard of review.[37]

Respondent relies heavily on *People v. Holloway* (2004) 33 Cal.4th 96. (RB 245–247.) *Holloway* at best pushes the limits of the Eighth Amendment, and extending it to the current facts would clearly violate the ban on limiting relevant mitigating evidence. *Holloway*, like this case, involved evidence offered in mitigation which a jury could theoretically use in two different ways. The similarities end there, however, and the differences dictate different results. In *Holloway* the defense purportedly wanted to establish that the defendant's young mother had to raise him on her own, without help or support from the father, who was generally absent, or from her own parents. Instead, however, counsel asked the mother what her parents' reaction was to her leaving home with the father-to-be. The answer, to which an objection was sustained, would have been that they disowned her. Much of the defense case already "created a substantial danger the jury's attention and deliberations would incorrectly focus on [the defendant's father's] character." (33 Cal.4th at p. 149.) Disparaging the father's character could create sympathy without being a true basis for mitigating the defendant's punishment. In context,

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[36]Compare RB 241–248 with AOB 396–397.

[37]Compare RB 244 with AOB 397.

evidence that the grandparents disowned the mother for going off with the father was a further attack on the father's character, because it was opinion evidence showing the parents' strong disapproval of him. This Court pointed out that the mother and others could have testified directly to the actual mitigating fact, i.e., the absence of parental help and support. (*Ibid.*)

The salient facts, then, are that the *Holloway* defendant sought to prove a legitimate mitigating fact through indirect means when direct means that did not risk confusing the jury were available, and that the evidence dealt with a matter (the father's character) as to which the defense had already presented considerable material which risked leading the jury to consider irrelevant facts to be mitigating. (*People v. Holloway*, *supra*, 33 Cal.4th at pp. 148–149.)

Neither of these is true here. On the legitimate, controverted factual issue of Maria Self's credibility (in describing the extent of her abuse and neglect of her children), there was an absence of more direct evidence about a likely root cause of deficiencies that could result in such abusive and neglectful conduct. Indeed, respondent's argument for *Holloway's* applicability ignores—as it has to—the fact that the issue here was not the character of a parent, but her credibility as a witness. (See RB 246 [arguing that, as in *Holloway*, appellant had no right to introduce evidence about a parent's character per se].) As to the other factor leading to the result in *Holloway*, there was nothing else in the mitigation case that could be understood to be evoking sympathy for the defendants' mother. Respondent is wrong, by the way, in claiming that, "As recognized by this Court in *Holloway*, the admission of this type of evidence creates a substantial danger that the jury's attention will incorrectly focus on the family's character and not the defendant's." (RB 246.) *Holloway* contained no generalizations about any "type of evidence"; a fact-specific analysis of the defendant's mitigation case

led to the conclusion that there was a substantial risk of misdirecting the *Holloway* jury. (*People v. Holloway, supra*, 33 Cal.4th at p. 149.) Respondent invokes a supposed general principle because it can point to no such facts here.

Indeed, were respondent's approach, and that of the court below, applied to the facts in *Holloway*, the evidence which this Court emphasized could have been provided in that case by direct and legitimate means would have been inadmissible. According to respondent, all that matters is a mother's actual behavior regarding her children; the conditions that provide a context for that behavior, making it more understandable and thus making the testimony regarding it more credible, are not. The *Holloway* mother's being on her own would have not only been beside the point but, according to respondent's logic, it would have created a grave danger of arousing so much sympathy— for her—that it would have endangered the jury's capacity to put aside that sympathy in considering a death verdict. Not only, then, is *Holloway* distinguishable, but its overall reasoning supports appellant's premise, not respondent's. Turning it, instead, into a precedent for limiting legitimate mitigating evidence would extend it into unconstitutional territory.

3. The Evidence Was Relevant in Other Ways

Respondent's argument ignores three other ways in which the evidence was relevant mitigation. First, while there was evidence of other forms of abuse and neglect by appellant's parents, his being left in the care of violent and abusive men who had a history of raping children would have added a whole new dimension to the picture. In a related point, the presence of these men in the family, and their close contact with, and responsibility for caring for, appellant, would have helped explain the darker aspects of his character and conduct. Their aggressiveness may well have been a model for appellant's. Finally, as noted above, the excluded fact would have

corroborated and explained Sheila Torres' testimony about, regarding Maria's hatred of males and her taking that hatred out on her sons, another fact which—once made believable—helped explain the inexplicable in Maria's purported conduct. In any event, a rational juror could have seen the facts these ways, which is enough to have deprived the trial court of the power to exclude the testimony. (*Skipper v. South Carolina*, *supra*, 476 U.S. 1, 4–5; *People v. Mickey*, *supra*, 54 Cal.3d 612, 693.)

4. Respondent's Claim that the Testimony Would have Been Cumulative Reprises an Argument Rejected in *Skipper v. South Carolina*

Respondent also compares the instant case to *People v. Holloway* by claiming that, as in *Holloway*, the proffered testimony was unnecessary. In *Holloway* it was unnecessary because the disowning was circumstantial proof of the pertinent fact regarding the mother's being on her own, a fact to which the mother and other members of the family could have testified directly. (*People v. Holloway*, *supra*, 33 Cal.4th at p. 149.) Here respondent points to a different kind of purported lack of necessity: the testimony was cumulative. According to respondent, Maria "testified to her psychological issues"; other family members testified that the family was violent and that Maria had psychological problems; "[a]nd there was vast amounts of testimony recounting Maria's neglectful parenting." Therefore "[t]here was no need to elaborate on the bases for her psychological problems or neglect of her children . . . ." (RB 246–247.)

Respondent would have this court ignore the fact that its trial counsel vigorously disputed each of these matters. The prosecutor argued to the jury

that helping her sons was more important to Maria Self than telling the truth.[38] He added that her testimony "and the testimony of most of the family members" was overwhelmingly vague in terms of names and dates and unsupported by corroborating documents[39] and claimed that "[t]hese things were kept vague for a reason."[40] He added that her prior statement to the investigator and answers which she gave on cross-examination showed that she was trying to grossly exaggerate her failings as a mother.[41] While it is true that there was some corroboration from family members, it was not enough to foreclose this line of argument, and it is disingenuous to suggest that the credibility of her account of her behavior was not in issue. As to her psychological problems, the prosecutor began his cross-examination of her by eliciting that her regular use of medications began after her sons' arrests, seeking to establish that her difficulties began then.[42]

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[38]RT 54: 8020.

[39]RT 54: 8020–8021.

[40]RT 54: 8021.

[41]RT 54: 8021–8023.

[42]RT 52: 7758–7759.

The defense corroboration on Maria's "psychological problems," which respondent now emphasizes (RB 246), was a statement, without elaboration, about a "nervous breakdown"; a general reference to her not being stable enough to raise the boys, explained only in terms of her being generally neglectful; and a statement that family members assumed she had psychological problems because she "acted crazy," was involved in a relationship they did not understand, was aggressive, and did not confide in them. (RT 52: 7788, 7843–7845, 7849, cited at RB 246–247. Respondent also cites pages 7899–7904, but most of that is a colloquy outside the presence of the jury about another matter.) None of these vague characterizations was

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This Court has referred to the kind of error committed here as "*Skipper* error."[43] *Skipper v. South Carolina* itself rejected an argument like that which respondent makes now. One of the state's claims was that jailers' testimony about the defendant's good conduct in jail would be cumulative to his and his former wife's uncontradicted testimony to the same effect. But because a jury could "tend to discount as self-serving," such testimony, that of the more disinterested witnesses should have been admitted. (*Skipper v. South Carolina*, *supra*, 476 U.S. 1, 8.) Here the excluded testimony came from the same witness whose testimony was under attack, but accusing family members, in a public court proceeding, of raping her repeatedly is neither as easy to do nor nearly as obvious a way of seeking to help her sons as exaggerating her deficiencies as a parent. And the information would have provided a key piece to the puzzle of how she could have behaved as she said she did, in the face of the prosecutor's argument that "this bleak, awful picture" that she had painted was false.[44] Just as in *Skipper*, the fact that it ultimately related to the same subject as other evidence is not determinative. It would have added to the believability of that evidence—along with adding a particularly outrageous example of the woman's utter failure to take care of and protect her children, explaining her hatred towards men and the boys who reminded her of them, and giving a better sense of the environment in which the defendants grew up (including the likely modeling of abusive attitudes and conduct by the caretaker brothers)—and therefore could not be excluded.

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[42](...continued)
a substitute for an explanation of her difficulties.

[43]*People v. Mickey*, *supra*, 54 Cal.3d 612, 692.

[44]RT 54: 8021.

5. Respondent Sees Most Errors as Harmless Because a Death Verdict Was Inevitable but Insists Here That the Jury's Ability to Reach That Outcome Was So Fragile That Sympathy for Maria Self Would Have Undermined it

The trial court thought that the proffered evidence was "highly prejudicial" and would be likely to confuse and mislead the jury. (RT 52: 7735.) Respondent agrees. (RB 245, 246, 247.)

In his opening brief, appellant set forth, among other things,

- the patent dishonesty of pooh-poohing the impact on a verdict of sympathy for victim-impact witnesses or evidence of planning an escape, as well as other evidence admitted over objection here, while claiming justice for a man found guilty of the crimes at issue would be denied because the jury found out that Maria Self was an incest survivor;
- the law on what constitutes "a substantial danger of undue prejudice," as used in Evidence Code section 352;[45]
- the commonality of aspects of witnesses' testimony evoking some element of sympathy and the trust that our system normally places in jurors' abilities to recognize what the true issues are;
- the disingenuousness of the prejudice claim, regarding creating jury sympathy for Maria Self, in light of the *prosecutor's* having elicited evidence from her about how much suffering her

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[45]More recently, this Court has reaffirmed that even prosecution evidence in aggravation, which has no Eighth Amendment protections, is excludable under Evidence Code section 352 only if it "'. . . uniquely tends to evoke an emotional bias against a party as an individual' and has only slight probative value.' " (*People v. Carey* (2007) 41 Cal.4th 109, 128.)

sons' having put themselves in the position they were in was causing her; and

- the availability of a limiting instruction if needed.

(See AOB 399–403.) Respondent's only answer to any of this is its bare assertion that the evidence would have inappropriately elicited sympathy for Maria Self and have been prejudicial to the case for death. (RB 245–247.) Respondent offers no explanation for why a jury would so lose sight of the issues before it, including significant aggravation, that creating a bit of sympathy for Maria Self, as a byproduct of legitimately supporting the mitigation case in several ways, would undermine its ability to recognize that appellant deserved death (if that was the case). Nor does respondent explain why a limiting instruction would have been inadequate.[46] (See *People v. (Gerardo) Romero* (2008) 44 Cal.4th 386, 425 [trial court properly instructed jury not to vote for life to make defendant's family feel better].) Moreover, the prosecutor was free to argue to the jury that being influenced by sympathy towards Maria or other witnesses was inappropriate.

The likelihood that this or that piece of evidence would have affected the jury's penalty verdict is relevant in several different contexts. Respondent would have this Court uphold the judgment by adopting contradictory views of that likelihood, depending on the context. On one hand, respondent insists over and over in its brief that aggravating circumstances so outweighed mitigating circumstances that no error could have affected the penalty

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[46]E.g., "The testimony that Maria Self was sexually abused by her brothers was admitted only as it might shed light, in your view, on her credibility in describing her behavior as a parent or on other matters relating to the background of the defendants. You may not let sympathy for her on this account influence your deliberations on the appropriate punishment."

judgment. On the other hand, suddenly there is a substantial risk that a life verdict would have been improperly returned because jurors would think—in the face of all that purportedly overwhelming aggravation and a purportedly unimpressive mitigation case—"That poor woman—now that we know that she was raped by her brothers when she was young, we certainly can't vote to execute her son."

In any event, respondent's view of potential prejudice must be evaluated according to legal precepts which respondent declines to acknowledge. Even under Evidence Code section 352, i.e., leaving out constitutional strictures, had the trial court understood the issues well enough to exercise its discretion, it would have had the power to exclude the evidence only if its probative value were "*substantially* outweighed by the *probability* that . . . its admission [would] . . . create *substantial danger* of *undue* prejudice, of confusing the issues, or of misleading the jury." (Evid. Code § 352, emphasis added.) The statute permits exclusion only of "evidence which uniquely tends to evoke an emotional bias against . . . [a party] and which has very little effect on the issues." (*People v. Bolin* (1998) 18 Cal.4th 297, 320; *People v. Wright* (1985) 39 Cal.3d 576, 585.) "[C]ourts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) They cannot focus, as respondent and the trial court did, on wildly speculative possibilities of prejudice possible only through extreme jury irrationality.

As explained more thoroughly in the opening brief, once the right to present a defense is implicated, the scope of state courts' power to limit relevant evidence is drastically curtailed. For example, the United States Supreme Court summarily dismissed a Kentucky court's concern, in 1988, that

evidence that a white rape victim was cohabiting with a black man would produce prejudice against the complainant. (*Olden v. Kentucky* (1988) 488 U.S. 227, discussed at AOB 402; see also AOB 387.) And, as discussed previously, the Eighth Amendment adds yet another layer of protection when a person on trial for his or her life proffers evidence in mitigation. Any whiff of substantiality to the trial court's concern that what it mistakenly saw as an attempt to mitigate Maria Self's conduct would be "highly prejudicial"[47] evaporates in the light of these standards. Not even the statutory requirements for exclusion were met; a fortiori, the constitutional ones were violated. "Evidence is substantially more prejudicial than probative under Evidence Code section 352 if it poses an intolerable '"risk to the fairness of the proceedings or the reliability of the outcome."'" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1114.) Respondent's attempt to save the trial court's prejudice rationale—a rationale based on a misunderstanding—fails.

As the trial court utterly failed to recognize, the evidence was relevant mitigation. If there is a qualification to the general inability of a state court to exclude relevant mitigation, where relevance borders on the ephemeral (a photo of a horse) and prejudice is significant, this case does not fall under it.

D. The Error Was Prejudicial

Here, as elsewhere, respondent argues that any error was harmless without citing any law, i.e., without acknowledging its burden of proof or the standard that it would have to meet. As noted in the opening brief, the United States Supreme Court has repeatedly treated *Skipper* error as reversible per se. That treatment is appropriate because of the constitutional sensitivity surrounding the exclusion of evidence that could have saved a defendant's life,

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[47]RT 52: 7735.

and the difficulty predicting how such evidence would have affected any particular juror.[48]

If respondent were entitled to try to show harmlessness, the error could not be known, beyond a reasonable doubt, to have had no effect. (*Chapman v. California* (1967) 386 U.S. 18, 23.) As quoted in more detail above,[49] the prosecutor strenuously argued that Maria Self had fabricated her testimony and that it was very weakly corroborated. The jury could see, as the prosecutor also argued,[50] that the witness cared about appellant at the time of trial. It lacked any explanation for how her behavior as a young mother could have been so at odds with that caring, and at so odds with the bare minimum of maternal instincts. A harmlessness holding would require *Chapman*-level confidence that no juror accepted the prosecutor's position that her portrayal of herself was essentially false; that thus destroying one of the main legs of the mitigation case had no effect on such a juror's vote; and that providing an *explanation* of why Maria would have been promiscuous, drug-abusing, rageful, and hateful of men—and hence abusive and neglectful as a mother of four boys—could not have defused the prosecutor's argument. Such confidence is unavailable.

And this is only the credibility angle. A holding that respondent has met its burden would also require near-certainty that no juror could have been affected by the additional possible implications of the evidence: that appellant

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[48]*Eddings v. Oklahoma, supra*, 455 U.S. 104, 112–116; *Bell v. Ohio* (1978) 438 U.S. 637; *Lockett v. Ohio* (1978) 438 U.S. 586; but see *Skipper v. South Carolina, supra*, 476 U.S. 1, 7; see discussion at AOB 403–404.

[49]Pages 265, et seq., above.

[50]RT 54: 8020, 8022.

was mothered by a woman whose immersion in her own acting-out world was so extreme that she was willing to leave her sons with the child rapists who had so badly abused her for so long; that whatever sociopathic elements became a part of appellant's character may well have been modeled by these men, whom he was around a great deal in his formative years;[51] and that his jailhouse hostility towards child molesters may have had something to do with a sense or actual knowledge of his mother's victimization or with having been victimized himself.

Respondent offers no reason why this Court should engage in a harmlessness analysis that the high court has repeatedly abjured. Respondent cites three cases after its statement that any error was harmless (RB 248), but two involved other kinds of errors,[52] and the third citation is to the first page of an opinion in which there was no *Skipper* error found.[53] Nor does respondent acknowledge the high court's practice of reversing death verdicts where error involved an issue that the prosecutor focused on in argument.[54]

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[51]The brothers, Joe and Ernie, were at the house daily when the boys were wards of the court and stayed with Maria's mother. On later occasions, too, they would be there with the boys, sometimes with no other adults present. (RT 52: 7736–7737.) Maria made no move to keep her sons away from them until appellant was at least seven, possibly older, when she found one of them threatening the boys and making them drink beer. (RT 52: 7738–7739; see also 7702, 7744.)

[52]*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1058 (witness asked jurors to "do the right thing"); *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11 (trial court granted discovery of defense psychiatrist's reports).

[53]Respondent cites "*People v. Jackson, supra*, 13 Cal.4th at p. 1164." (RB 248.) The full case citation is *People v. Jackson* (1996) 13 Cal.4th 1164.

[54]See *Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson* (continued...)

What respondent does do is repeat its current assertions that the jury already had ample evidence of Maria's abuse and neglect of her children, including family members' corroboration of her testimony (RB 248), while ignoring the not-untenable position respondent took before the jury—that if the testimony were true, it could have been presented with much more clarity about dates, places, and incidents, and with independent corroboration.[55] Respondent cannot thus meet its burden of demonstrating that the outcome could not have been influenced by preventing the defense from bolstering her credibility through other means, showing a dramatic and entirely different example of her ongoing neglect, further helping explain what might have influenced appellant as he grew up, and providing a possible explanation for his hostility towards child molesters.

Respondent adds, "[T]he jury knew Maria was afraid of her brothers but still chose to leave appellants in their care." (RB 248.) This is correct. But it only addresses one of the four ways[56] that the excluded evidence could have appropriately been used by a juror. Moreover, as an argument for harmlessness, it ignores the difference between a vague assertion of fear, by a biased witness whose credibility was strongly attacked for vagueness, and one including an explanation of the basis for the fear. And it does not account

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[54](...continued)
v. Mississippi (1988) 486 U.S. 578, 586, 590 & fn. 8; *Skipper v. South Carolina*, *supra*, 476 U.S. 1, 8, all of which refused to find harmlessness in the face of prosecutorial argument making use of an error; see also *People v. Roder* (1983) 33 Cal. 3d 491, 505; cf. *People v. Hinton* (2006) 37 Cal. 4th 839, 868.

[55]See portions of the record cited at pages 265 et seq., above.

[56]See the last sentence of the previous paragraph.

for the difference between leaving one's children with siblings of whom one has some kind of fear, and leaving them with people who rape children. These men were horrible abusers, and the jury needed to know that.

Respondent argues elsewhere that the mitigation evidence was inadequate to avoid a death verdict, even absent error strengthening the case in aggravation: "While appellants presented evidence of childhood neglect and abuse early in their lives, the same evidence also showed . . . they had the benefit of loving grandparents and other extended family members even during the worst of times . . . ." (RB 241.) Part of the reason that the evidence showed that is because respondent's trial attorney succeeded in excluding part of the picture of what was going on with the "extended family members." Respondent is unable to show that allowing such a distortion cannot have influenced a juror's vote.

Respondent makes one more argument for harmlessness: "Maria's . . . own assertions about her own childhood trauma would not have made her testimony any more credible." (RT 248.) Presumably the point here is that the rape evidence, having come from the same source as the evidence which it would help explain, would not have helped resolve any credibility problems. This reasoning ignores the differences in the content of the various parts of the witness's testimony. The portrait of abuse and extreme neglect would, for some jurors at least, seem somewhat improbable (without explanation). And the jurors had to decide whether Maria was exaggerating her parenting deficits at trial or was, as she testified, minimizing them three years earlier, when she gave a defense investigator the very different account that the prosecutor used

against her.[57] As noted previously, publicly accusing family members of raping her repeatedly is neither as easy to do nor a particularly obvious way of seeking to help her sons, compared to exaggerating her deficiencies as a parent. Moreover, even the general principle which respondent invokes, while having some surface appeal, is flawed. A witness's challenged testimony *can* become more credible if the witness is able to give more facts which round out the picture and make it more internally consistent.

If a harmlessness analysis were appropriate, it would not be possible to exclude, beyond a reasonable doubt, the possibility that excluding the childhood rape evidence "might have contributed to" the result.[58] The death judgment cannot stand.

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[57]See Statements of Facts at AOB 68 and RB 68 and cited portions of the record.

[58]*Chapman v. California, supra*, 386 U.S. at p. 24.

IX[1]

THE PROSECUTOR OBTAINED A DEATH VERDICT THROUGH HEAVY RELIANCE ON FUTURE DANGEROUSNESS, AND RESPONDENT HAS BEEN UNABLE TO PROVIDE PRECEDENT OR ARGUMENT EXPLAINING WHY USE OF SUCH NON-STATUTORY AGGRAVATION WAS PROPER

Respondent invites summary disposition of an extremely troubling error. A key focus of the prosecutor's argument for death was an extended purported demonstration that "the price of compassion for this murderer will be more victims." (RT 48: 7271; see also RT 48: 7268–7271; 54: 8026, 8028–8030 [penalty argument].) Future dangerousness, however, is not in the exclusive list of factors which section 190.3 authorizes jurors to consider aggravating as they engage in their weighing process. Prosecutors make this argument in case after case, and its appeal is powerful. The empirical data, however, prove that it is grossly misleading: people with life sentences—including appellant[2]—make a significantly better adjustment to prison than the average prisoner. Not only, therefore, did the argument violate the controlling statute. Depriving appellant of his life on a basis not legislatively authorized would also violate his state and federal due process rights.[3] In addition, the element of unreliability introduced

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[1]See AOB 408. Respondent addresses this claim in its Argument XVI, RB 248.

[2]In the opening brief it was stated that appellant had been housed for five years in a small section of San Quentin reserved for model prisoners among the condemned population. (AOB 414, fn. 250, explaining—with authorities—why the Court can consider this fact in this context.) His stay there has been uninterrupted and has now reached nine years.

[3]U.S. Const., 8th Amend.; Cal. Const., art. 1, §§ 7, 15; *Hicks* v. *Oklahoma* (1980) 447 U.S. 343, 346; *Hewitt* v. *Helms* (1983) 459 U.S. 460, 471–472; cf. *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631–633 (judicial (continued...)

by relying on a speculative factor, so subjectively compelling and yet objectively so likely to be false, violates the Eighth Amendment's reliability requirement.[4]

Here, as elsewhere, respondent states appellant's basic contention, replies without addressing the reasoning underlying that contention, and would have this Court summarily affirm rather than evaluate appellant's analysis.

The parties agree that appellant's prosecutor made a significant argument that appellant must be executed because he would harm others if merely imprisoned. (See RB 249.) Indeed, perhaps because that argument was one of two focal points of the state's case for death, this is one instance where respondent does not contend that any error would be harmless. Respondent also appears to concede that future dangerousness is not a listed factor in aggravation, that the prosecutorial argument relying on it is a standard one,[5] and that it is factually misleading.[6] On the other hand, appellant has acknowledged this Court's precedents rejecting the contention made here or—to put it more accurately—stating that the contention has been rejected in the past.

The parties disagree on only two points: whether the error is reviewable

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[3](...continued)
expansion of legislated criminal liability "is wholly foreign to the American concept of criminal justice"); see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642–643 (prosecutorial error infecting the entire proceeding with unfairness violates due process).

[4]See *People v. Horton* (1995) 11 Cal.4th 1068, 1134.

[5]In addition to the cases cited in the opening brief (AOB 410–412 & fns., 414), see the examples cited in *People v. Zambrano* (2007) 41 Cal.4th 1082,1180, a case where the prosecutor's argument was almost identical to that made here.

[6]See AOB 414–415.

absent an objection below, and whether this Court has ever made a reasoned analysis reconciling the purported appropriateness of future-dangerousness arguments with the exclusivity[7] of California's statutory list of factors in aggravation. As to the latter point, respondent's only answer to appellant's survey of case law is to falsely assert that this Court addressed the challenge posed by section 190.3 in another case. In fact it has only addressed other challenges, later employing overly-general language saying that future-dangerousness arguments are permissible.

As to the preservation question, appellant anticipated it in the opening brief. Respondent makes no attempt to answer appellant's demonstration of the applicability of both the futility exception—given language in opinions by this Court which were binding on the trial court—and the exception that applies when a trial court would be unable to cure the error by jury admonition.[8] Appellant would add that, given the stakes, in this matter and in trials yet to be held, the Court should also exercise its discretionary power to reach the merits in the face of the forfeiture rule which it has created.[9] Given the potent but misleading nature of the argument, the Court should also reach the merits because of the state's own interest in fair and reliable penalty verdicts. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1074.) But the futility exception is enough—appellant was not required to ask his trial court to overrule prior holdings of this Court.

On the merits, respondent reprints the portion of *People v. Michaels*

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[7]See *People v. Boyd* (1985) 38 Cal.3d 762, 775.

[8]See AOB 417–418.

[9]See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1 (conc. opn. of Mosk, J.).

(2002) 28 Cal.4th 486, 540–541, which appellant had already quoted, and then characterizes it as if this Court provided a rationale which it saw no need to provide and did not provide.[10] There is no dispute—nor can there be—as to what the passage says. The Court clearly, as appellant has acknowledged, states disagreement with the contention made here. It supports its position by quoting two earlier cases that state that a future dangerousness argument is not error or misconduct if supported by the evidence. That's it. Neither its own language nor that quoted from the precedents acknowledges an apparent conflict with section 190.3 or seeks to explain why there is no such conflict. In other words, *Michaels* falls into one of the main categories of opinions identified in appellant's survey of the precedents in this area, those which simply noted that the Court had rejected previous attacks on future-dangerousness arguments. But as that survey makes clear, all of the earlier precedents rejected only attacks that were made on bases *other than* the section 190.3 hurdle.[11]

One of the quotations upon which *People v. Michaels* relies refers to the type of evidence which could support a future-dangerousness inference, that "of past violent crimes admitted under one of the specific aggravating categories of section 190.3."[12] Respondent emphasizes, then, that the evidence from which appellant's prosecutor drew his future-dangerousness inference was "properly admitted evidence of an authorized circumstance in aggravation under Penal Code section 190.3." (RB 251.) According to respondent, ". . . *Michaels* stands for the unsurprising proposition that the prosecution may make reasonable

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[10]RB 250–251; cf. AOB 411.

[11]See AOB 411–412.

[12]*People v. Ray* (1996) 13 Cal.4th 313, 353, quoted in *People v. Michaels*, *supra*, 28 Cal.4th at p. 540.

inferences from properly admitted evidence to argue for imposition of the death penalty." (RB 251.)

Not so. It is elementary that some reasonable inferences drawn from properly admitted evidence would be improper uses of that evidence. Thus, in another issue in this appeal, respondent argues that evidence of Maria Self's childhood victimization—whatever its value to legitimately bolster the mitigation case (e.g., by showing that she left appellant in the care of her rapists)—could be misused to create sympathy for Maria. Respondent argues that a jury could take that as mitigation, even though to do so would be improper. (RB 245, 247.) Similarly, evidence admissible for a proper *aggravating* purpose could be misused for an improper one.

Michaels and the cases it quoted did not make the ridiculous error—which respondent implicitly attributes to this Court—of overlooking this possibility. In noting that argument had to be supported by properly admitted evidence, such as that of past violent crimes, the Court was simply stating the limitations included in its precedents permitting argument on future dangerousness. First, it was being cautious to avoid giving prosecutors *carte blanche* to argue the point without an evidentiary basis. Second, it was acknowledging that not all evidence bearing on the issue is admissible, particularly in light of the rule prohibiting testimony regarding future dangerousness per se because of its questionable reliability, marginal relevance, and highly prejudicial nature.[13] The opinion does not claim that, once evidence is admitted for a legitimate purpose, it may be relied on for any other inferences to which it may give rise.

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[13]See *People v. Murtishaw* (1981) 29 Cal.3d 733, 742–743, cited in *People v. Michaels*, *supra*, 28 Cal.4th at p. 540.

The death-penalty statute enumerates what evidence is admissible at the penalty phase, including evidence of prior criminal convictions and unadjudicated violent crimes. (§ 190.3, first three paragraphs.) It then lists the factors which, if relevant, the trier of fact is to take into account. (*Id.*, sixth paragraph.) Finally, the statute reiterates that the sentencer "shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section . . . ." (*Id.*, last paragraph.) Future dangerousness is not among those. For well-understood reasons, the list of factors is exclusive. (*People v. Boyd*, *supra*, 38 Cal. 3d at pp. 773–775.) Future dangerousness, therefore, is not a matter which the jury is authorized to consider in its weighing process. It arguably appears to be a reasonable inference from evidence properly admitted on an authorized factor, one that does pertain to whether the defendant deserves death, i.e., his criminal history itself, devoid of whatever implications it might have for the future. But this does not somehow place future dangerousness in the statute. Neither *People v. Michaels* nor the opinions which it quoted sought to provide a rationale for a different conclusion.

It being the case that the jury could not consider future dangerousness, it follows that a prosecutor's remarks emphatically urging use of such extra-legal aggravation constitute error. (See *People v. Young* (2005) 34 Cal.4th 1149, 1219; *People v. Walker* (1988) 47 Cal.3d 605, 649–650.)

Again, *People v. Michaels* did not reason otherwise. It simply held that the question was well settled, against defendants. Generally speaking, well-established rules, particularly those that appear to conflict with equally well-established, and broader, principles, have their genesis in an opinion that explains their basis. This one does not. Appellant canvassed the cases that for

such an explanation by this Court, and there is none.[14] If he had represented the cases surveyed inaccurately, respondent would have pointed it out. Similarly, Justice Mosk's explanation of where the Court went astray[15] is undisputed. If there were a basis for now finally arguing directly that the current rule can actually be reconciled with section 190.3, respondent would argue it, rather than claiming that *Michaels* had grappled with the question, when *Michaels* merely repeated what it believed to be existing law.[16] But appellant has shown that the foundation for the precedents on which it relies is ephemeral, and respondent neither disagrees nor finally provides a logical or principled foundation.

There was error; appellant did not have to make a futile objection to preserve his right to review; and the error was so clearly prejudicial that respondent does not claim otherwise. Reversal is required.

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[14]AOB 410–413 & fns. 242–245.

[15]*People v. Taylor* (1990) 52 Cal.3d 719, 752 & fn. 1 (conc. opn. of Mosk, J.), quoted at AOB 413. The cases on which *Michaels* relies were decided during the period when this Court, clearly influenced by an intense "tough-on-crime" political environment, created some of the conditions for its current high automatic-appeal caseload, i.e., by expanding the death-penalty selection and eligibility criteria, opening the door to victim-impact evidence (see AOB 171–172 & fns. 93–94), and radically changing its approach to penalty-phase harmless-error review (see AOB 84–85 & fn. 53).

[16]Respondent also relies on *People v. Zambrano*, *supra*, 41 Cal.4th 1082. In *Zambrano*, however, the appellant conceded the point argued here, claiming only that the emotional appeal of the argument in that case went past a legitimate future-dangerousness argument. (*Id.* at p. 1179.)

X[1]

THE PROSECUTOR MISLED THE COURT AS TO HIS INTENDED USE OF TESTIMONY ABOUT APPELLANT'S STATEMENT REGARDING WHAT HE WOULD DO TO A CHILD MOLESTER, IN A SUCCESSFUL ATTEMPT TO PERSUADE THE COURT TO ADMIT INADMISSIBLE EVIDENCE

The prosecutor sought to introduce evidence of a statement in which appellant showed an inclination to attack child molesters, but the trial court correctly ruled it inadmissible as an aggravating circumstance, because it may have been a threat but was not a crime.[2] Shortly thereafter, however, the prosecutor sought admission of a similar statement, one made to appellant's girlfriend, Stephanie Stinson. He claimed that the statement would help prove appellant's identity as Olen Thibedeau's attacker, since appellant's boast of what he would do to a molester housed next to him bore some resemblance to how he had attacked Thibedeau eight months earlier. The fantasy scenario was also,

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[1]See AOB 422. Respondent addresses this claim in its Argument XIV, RB 235. In analyzing it, both appellant and respondent rely—heavily in the case of appellant—on their discussions of appellant's claim regarding the prosecutor's use of a future-dangerousness theme in his penalty-phase summation. Appellant therefore respectfully suggests that it would be more efficacious for the Court to address that issue first, as appellant has done, even though, if the Court ultimately organized its opinion as the issues arose chronologically at trial, its disposition of the claim would appear after it discusses this one.

The future-dangerousness issue comprises appellant's Argument IX, AOB 408 et seq. and pp. 277 et seq., above, and respondent's Argument XVI, RB 248 et seq.

[2]RT 48: 7206–7210; see also 7201. See *People v. Boyd* (1985) 38 Cal.3d 762, 774.

however, markedly different;[3] it spoke of future conduct;[4] and it was elaborated long after the Thibedeau incident. It took place, in fact, during the period in which appellant was harassing Tyreid Hodges in an attempt to get him moved off appellant's tier and was probably part of that campaign, since Stinson's reaction showed that she and appellant knew that conversations were monitored.[5] Appellant's counsel repeatedly assured the court that the identity of Thibedeau's attacker would not be disputed. As both attorneys no doubt knew, it could not be[6] and, as events played out, it was not. Appellant's objection that the evidence would be misused as highly inflammatory, non-statutory bad-character evidence was overruled.

Before the jury, the prosecutor's claimed need to corroborate Thibedeau's identification of his attacker evaporated. In his sole argument in the penalty phase, the prosecutor never addressed Thibedeau's credibility, much less used the contested statement to support it. He in fact treated the incident as if guilt

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[3]See AOB 428, fn. 258, for particulars.

[4]In his jury argument, the prosecutor accurately described the statement as being future-oriented. (RT 54: 8028.) The taped statement (Ex. 435) is quoted at AOB 423. (It is reproduced identically at RB 237, although respondent attributes it to a transcription that could not be located for inclusion in the record. [See AOB 423, fn. 255, and Clerk's Certificate of 7/25/03, inside back cover, Fourth Supplemental Clerk's Transcript.])

[5]See RT 51: 7518 (statement to Stinson was 2/8/95); 51: 7501–7516 (Hodges incidents were 9/94–3/95); 7505, 7508 (appellant and others were telling Hodges to demand other housing); 7519 and Ex. 435 (Stinson cautions appellant to watch what he says).

[6]See AOB 427, fn. 257, describing the indicia of reliability in Thibedeau's account and its corroboration by deputies and by appellant's possession of materials used to make the channel-changer he attacked Thibedeau with.

was conceded,[7] as defense counsel had said it would be.[8] Rather, at the conclusion of his argument that death was the "necessary" punishment, in the climax of his entire plea for a death sentence, he replayed the taped statement, then told the jury,

> Mr. Romero gives you your verdict right there. You can't expect him not to do something like this. He said it, "But when they stick a child molester next door to me and not expect me to do something . . . ." He is telling you what to expect from him. You don't need a crystal ball to know what to expect from Mr. Romero in the future.

(RT 54: 8028.)

Even if the evidence been used for its purported purpose, it is questionable whether the trial court could have properly admitted it, given its lack of probative value and the well-documented enormous prejudicial effect of giving juries reasons to imagine that the defendant will be a danger if permitted to live. But that is not the issue here. The prosecutor used the evidence only for an indisputably illegitimate purpose[9] after misleading the court as to a basis for its admission. This was prejudicial prosecutorial error.

Respondent contends that, even though trial counsel objected vigorously to the introduction of the evidence, the point is not preserved for review. Respondent insists that the prosecutor was validly concerned with Thibedeau's credibility, given the degree to which counsel's questioning went over his background as a child molester and a supposed "line of questioning" about bias.

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[7]RT 54: 8027–8028. The prosecutor argued first. (See also RT 54: 8033–8050 [defense argument; no mention of Thibedeau].)

[8]RT 50: 7468; 51: 7477.

[9]See *People v. Boyd* (1985) 38 Cal.3d 762, 775 (only evidence relevant to aggravating factors listed in § 190.3 is admissible at penalty phase).

Supporting a trial court ruling that appellant does not attack, respondent argues that admission of the statement was within the court's broad discretion. Respondent then points out that, under this Court's holdings, once the prosecutor had obtained admission of the evidence for a purpose other than showing future dangerousness, he could argue it for that purpose. Finally, respondent thinks that a statement that the prosecutor characterized as "giv[ing] you your verdict right there" could not have affected the verdict.

A. Appellant Has Not Forfeited Review of the Misconduct Claim

Respondent writes, "Romero has waived this claim of error by failing to raise a misconduct claim in the trial court or otherwise object to the prosecutor's use of this evidence at closing argument." (RB 238.) Appellant objected vigorously to admission of the evidence, arguing that it was far more a matter of showing future dangerousness than of corroborating Thibedeau. (RT 50: 7465–7469; 51: 7477–7482, 7519–7521.) This was all he could do. As noted in the previous argument, objecting to the prosecutor's use of the evidence in argument would have been futile, as this Court had held that future dangerousness could be argued if inferable from evidence admitted for other purposes.[10]

As to the misconduct which led the court to admit the evidence, the evidence was in, and the prosecutor had just replayed the tape. Objecting then that the prosecutor had misled the court into admitting the evidence could have produced no remedy. Respondent does not claim that the jury could have been effectively instructed at that point to disregard it, and certainly no such admonition could have been effective. There was no forfeiture of the claim.

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[10]See p. 279, above.

B. The Prosecutor Misled the Court

Respondent strenuously insists that appellant had strongly attacked Thibed

eau's credibility on cross examination. In particular, respondent states that "[t]hrough one line of questioning, the defense also suggested Thibedeau might be seeking favorable treatment" via his testimony. (RB 236.) Respondent misstates the record. There was one non-leading question, not a "line of questioning" and it and its answer occupy seven lines on a page of transcript, not the three transcript pages which respondent cites. (See RT 50: 7443.) There was no "accusation," only an open-ended question. The witness's negative answer seemed credible and drew no followup questions.[11]

The remainder of the cross-examination, which covered only six transcript pages in its entirety, covered only two subjects: the harassment to which incarcerated child molesters are subjected by other inmates in general, and a detailed run-through of the witness's record of sex offenses or, as respondent aptly puts it, "documenting Thibedeau's sordid history for the jury." (RT 50: 7438–7444; RB 236.) There were no questions regarding crimes involving deception, no questions about use of deception in any of the sex offenses, not a single question aimed at raising doubt about Thibedeau's capacity to perceive

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[11]The entire colloquy was this:

> Q. And were you given any promises or assurances that somehow you would be given any favorable treatment for coming down and testifying?
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> A. Uh, no. As a matter of fact, it's been adverse to me. I have had — I lost my job. I lost my job status. Classification changes because now I'm not working so I don't have any privileges or anything like that — that I did have.

(RT 50: 7443.)

or recall the cell from which an inmate had assaulted him—in contrast to, e.g., the cross-examination of Tyreid Hodges, who could not be so sure about some of the incidents;[12] not a question about whether it had happened, and no questions suggesting animus on the part of the witness towards appellant, who was a stranger to Thibedeau at the time he reported the incident.

As respondent points out, the prosecutor had already brought out Thibedeau's child-molestation convictions and that he was serving a sentence in the 200-year range. Bringing out the details of his record did not make him less believable; it made him less sympathetic. The cross-examination clearly had but one purpose: to defuse the aggravating impact of the assault. This it did by attempting to portray the victim as a despicable character and by showing that such attacks were not uncommon.

Respondent ignores the prosecutor's handling of this cross-examination, as if it has nothing to do with his actual assessment of its effect on his witness's credibility. On redirect, the prosecutor did nothing but follow up—briefly—on the point that Thibedeau had made about coming to testify not being particularly in his interests. He did not ask anything else about bias, capacity to perceive, or whether the witness was telling the truth. (RT 50: 7444.) Respondent provides no explanation for why the prosecutor—supposedly so concerned about corroborating the witness through appellant's later admission about predisposition—never used it for that purpose during his summation. As appellant pointed out in the opening brief, each side knew it would get only one chance to argue, under the ground rules for this trial, and the prosecutor went first. So if either he did not believe counsel's repeated assurances to the court

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[12]See RT 51: 7511–7516.

that he would not be attacking the truth of Thibedeau's account[13] or agreed with the court that—jury argument or no—credibility had already been disparaged, he would have used the evidence for the purpose he had articulated when arguing for its admission. But he did not, though nothing had changed in the interim. Obviously, he never intended to.

Clearly the Thibedeau-needs-corroboration point was a pretext. It was needed because the evidence was not admissible merely for showing future dangerousness,[14] yet, under this Court's precedents, could be used in argument for that purpose if admitted on another basis.[15] Obtaining a favorable ruling by deceptive means was misconduct under state law. (*People v. Gamache* (2010) 48 Cal.4th 347, 371; *People v. Hill* (1998) 17 Cal. 4th 800, 819.) Certainly using deception to bring in a piece of evidence so powerful that the prosecutor could argue that appellant was "telling you what to expect from him . . . you don't need a crystal ball,"[16] as part of a strong argument that death was necessary to avoid future victims, rendered the penalty trial fundamentally unfair. (U.S. Const., 14th Amend.) It also violated the other federal constitutional rights enumerated in the opening brief.[17]

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[13]RT 50: 7468; 51: 7477.

[14]See *People v. Boyd, supra*, 38 Cal.3d at p. 775 (only evidence relevant to aggravating factors listed in § 190.3 is admissible at penalty phase). The trial court agreed that admission of evidence simply of threatened future conduct would be inadmissible, unless the threat itself amounted to a crime. (RT 48: 7201, 7206–7210; see also 51: 7520–7521.)

[15]*People v. Michaels* (2002) 28 Cal.4th 486, 540–541, and cases cited.

[16]RT 54: 8028.

[17]AOB 429, invoking appellant's due-process right not to have state-law
(continued...)

C. The Error Was Prejudicial

Whether the error was of only state law or of federal constitutional dimension, respondent bears the burden of showing harmlessness beyond a reasonable doubt.[18]

Characterizing the aggravating circumstances in a way only partly supported by the evidence,[19] respondent once again treats the question as it would if arguing to a jury. "Appellants' mitigation evidence simply could not compare with the evidence in aggravation." Then respondent gives its view of the weakness of the mitigation case. (RB 241.) Respondent is entitled to its opinion on the balance of the aggravating and mitigating circumstances, but respondent fails to address the only pertinent question: whether a rational juror could have had a different opinion[20] or—rather—whether this Court can say it is so certain of its conclusion on that score that no reasonable doubts remain. "The inquiry . . . is not whether, in a trial that occurred without the error, [the

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[17](...continued)
protections arbitrarily withdrawn, and his rights to a fair, reliable, and non-arbitrary penalty determination, citing the federal Eighth and Fourteenth Amendments and a number of cases.

[18]*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.

[19]There was evidence that the defendants, Munoz, and sometimes Chavez were attentive to finding likely robbery victims, presumably like most robbers, but not that appellant "hunted [murder] victims like prey." (RB 241.) Nor was there evidence that he "lived off the proceeds of his crimes" or "thoroughly enjoyed killing or harming people." (RB 241.)

[20]*Neder v. United States* (1999) 527 U.S. 1, 19 (for constitutional error, issue is "whether the record contains evidence that could rationally lead to a contrary finding" to that which would support verdict); see also discussion at pp. 106 et seq., above, and authorities cited.

same] verdict would have been rendered, but whether the . . . verdict rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Respondent's summary omits the possibility of a juror's disbelief or agnosticism regarding Munoz's characterizations of the circumstances of the crimes; the evidence that appellant may have been the least violent member of the group[21] and protected or tried to protect victims like Jerry Mills and his son, Albert Knoefler, and even Jose Aragon;[22] the possibility that some jurors would have recognized appellant's jailhouse acting out as not particularly unusual and been impacted by there having been no such incidents within the previous year and a half; the timing of the beginnings of any hints of stability in appellant's upbringing, which was well after the critical early-childhood years; appellant's attempts to rehabilitate himself; and his involvement in caring relationships, including with his young son.

The prosecutor did not think a death verdict was inevitable, or he would not have succumbed to the temptation to use any rationale to get the Stinson statement admitted. Finally, respondent conveniently forgets the use the prosecutor made of the testimony in argument, as well as the principle that errors amplified in an argument for death will rarely meet the test for harmlessness.[23]

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[21]See the review of the evidence at AOB 114–115, a review which respondent has not disputed.

[22]See 3SCT 2: 309–310 (Jerry Mills & his son); RT 35: 5386–5387 (same); 3SCT 45: 12976 (Munoz: Chavez said Self wanted to kill Millses); 3SCT 2: 302–304 (Aragon); RT 39: 5979–5983; 48: 6258– 6260 (same); 3SCT 2: 310 (Knoefler). This evidence was emphasized at AOB 115, and respondent has not disputed appellant's characterization of it.

[23]See *Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson* (continued...)

Respondent urges this Court to find insignificant evidence and argument that the prosecutor used as the climax of his argument for death, near its ending, with the statement that it "gives you your verdict right there." To do so is to call for a disingenuous, result-oriented analysis entirely abstracted from the reality of the trial that resulted in appellant's death judgment. In a similar situation, where a prosecutor had argued that consideration of certain evidence was crucial to the proper verdict, this Court remarked, "There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor—and so presumably the jury—treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 868.) Nor should the Court treat the evidence at issue here as any less likely to have given the jurors their verdict. The judgment should be reversed.

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[23](...continued)
v. Mississippi (1988) 486 U.S. 578, 586, 590 & fn. 8; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *People v. Roder* (1983) 33 Cal. 3d 491, 505.

XI[1]

GIVING A NON-UNANIMITY INSTRUCTION REGARDING ONLY UNADJUDICATED OFFENSES WAS UNFAIRLY ONE-SIDED AND UNCONSTITUTIONALLY IMPLIED A NEED FOR UNANIMITY ON MITIGATION

The prosecution, like the defense,[2] should have to rely on the jury's overall understanding of the sentencing scheme regarding where unanimity was necessary, rather than receive a pinpoint instruction favoring its position. A lack of evenhandedness in instructions in this area was prejudicial in itself, and it created further error by misleading appellant's jury.

The penalty-phase instructions given to appellant's jurors explained that each was to decide individually the weight to assign to aggravating and mitigating circumstances and thus determine whether aggravation so outweighed mitigation as to warrant a sentence of death. However, in contrast to the Judicial Council instructions, which also state that each juror must decide individually whether particular aggravating or mitigating factors exist at all, the CALJIC instruction given to appellant's jury stated that rule only as to certain critical alleged aggravation, i.e., whether appellant had committed the unadjudicated offenses that the prosecution had sought to prove.

The instructional package thus represented a fatal tilt towards the prosecution, in violation of due process.[3]

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[1]See AOB 432. Respondent addresses this claim in its Argument XVII.A, RB 254, except for the question of prejudice, which it addresses in XVII.D, RB 260.

[2]See *People v. Breaux* (1991) 1 Cal.4th 281, 314; accord, *People v. Crew* (2003) 31 Cal. 4th 822, 860.

[3]U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15 ; *Reagan* (continued...)

Further, in a context in which the concept of unanimity of subordinate findings underlying a final verdict—i.e., the elements of each offense—had been drilled into the jurors during the guilt phase, the giving of the prosecution-oriented pinpoint instruction on non-unanimity regarding factor-(b) aggravation—without an explanation that the same was true of mitigation—carried the reasonable, but erroneous, implication that unanimity was required to find the existence of any particular mitigating factor. Such an implication violated the Eighth Amendment.[4] This is the core of appellant's claim. To understand it, it is particularly critical to understand that the jury was operating in a context in which unanimity had previously been emphasized. For in a different context—this Court's jurisprudence—it is black-letter law that unanimity is required nowhere in the penalty deliberations except in the final verdict, so the absence of anything clearly contradicting that principle can seem like an absence of error. But the instructions given to appellant's jury, unlike the Judicial Council instructions, fail to state that principle anywhere. The effect of finally saying something about non-unanimity, and saying it only about factor (b) aggravation, had a different meaning to a lay juror than it would to an attorney or judge familiar with California law on the subject. It implied a need for unanimity to find the truth of a mitigating circumstance.

Finally, combining the general instructions with the prosecution-oriented one deprived appellant of the level of protection given defendants instructed with the Judicial Council instruction, in violation of the Equal Protection Clause.

Respondent consistently mischaracterizes appellant's contention,

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[3](...continued)
v. United States (1895) 157 U.S. 301, 310; *People v. Moore* (1954) 43 Cal.2d 517, 526–527.

[4]*Mills v. Maryland* (1988) 486 U.S. 367.

recasting it into a supposed claim that "the trial court erred when it failed to instruct the jury with a non-unanimity instruction on mitigating evidence." (RB 254.) It is only by misstating the claim that respondent can argue that the claim is forfeited for failure to request such an instruction at trial and that appellant's contention is foreclosed by precedent rejecting the need for such an instruction. The actual claim is that an improper instruction was given, not that another one should have been given, although both are true. Providing an instruction regarding mitigation would, in fact, have been another way of rectifying the imbalance, and appellant hereby alternatively makes such a claim.[5]

A. Appellate Review is Available

The short answer to respondent's forfeiture contention is that it is foreclosed by recent precedent. The disparity in the handling of the absence of a unanimity requirement in the factor (b) and mitigation contexts was addressed, in the face of a forfeiture objection, in *People v. Lewis* (2009) 46 Cal.4th 1255, 1318, fn. 45, because it was a claim of instructional error involving the defendant's substantial rights. The differences between *Lewis* and the instant case do not make it distinguishable on this score.[6]

Mischaracterizing appellant's primary claim as the failure to give a non-unanimity instruction, and overlooking—until it turns to the merits—the fact that

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[5]Since respondent has already responded to the claim, it is not disadvantaged by appellant's not stating it until his reply brief.

[6]They were that *Lewis* addressed only the evenhandedness issue, not the federal constitutional requirement that individual jurors be permitted to consider any mitigating factor they considered to be true and that, for reasons stated below, there would have been no forfeiture here in any event.

this Court had held that he was not entitled to one,[7] respondent contends that the claim is forfeited for failure to request such an instruction. (RB 254.) In addition to avoiding addressing either appellant's primary claim or the futility issue, respondent ignores appellant's unsuccessful request for an instruction which would have at least mitigated the actual error claimed in the opening brief. The proposed instruction read as follows:

> The People and the defendant are entitled to the individual opinion of each juror. YOU MUST INDIVIDUALLY DECIDE EACH QUESTION INVOLVED IN THE PENALTY DECISION.[8]

After the word *You*, the second sentence comes straight from *People v. Breaux*, *supra*, 1 Cal.4th at p. 315, which appellant cited to the trial court.[9] Telling the jurors that they must each individually decide each question might have effectively undone the unanimity implications in the prosecution's proposed instruction, which was given. Respondent acknowledges the request but fails to quote the language regarding individually deciding each question. Instead, respondent misquotes the instruction as simply "reiterating the jury's duty to 'individually decide the case.'"[10] Respondent's language simply does not appear

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[7]*People v. Breaux* (1991) 1 Cal.4th 281, 314–315. As respondent observes, Self's attorneys requested and received such an instruction anyway.

[8]The instruction appears at 4SCT 2: 396–397. See also 6SCT 134, ¶ 59 (authenticating the version of the document appearing in the Fourth Supplemental CT) and RT 53: 7974 (trial court's refusal to give the instruction, erroneously cited as 7474 in the AOB).

[9]4SCT 2: 396–397 (points and authorities in support of proposed instruction).

[10]RB 252, fn. 76. Respondent cites a different version of what appears to be the same instruction, the origin of which is not identified in the Clerk's (continued...)

in the requested instruction. Respondent then argues that the requested instruction was duplicative of another instruction given. The misquoted version would have been duplicative; appellant has already explained why the instruction actually requested was not.[11] In any event, if a trial-level request for remedial action were a prerequisite to appellate review, the prerequisite would have been met, despite the fact that there might have been even better ways of addressing the problem.

Moreover, there is no such prerequisite; appellant is entitled to review of a claim of misinstructing the jury whether or not he took action in the trial court.

> It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citation.]

(*People v. Breverman* (1998) 18 Cal.4th 142, 154, internal quotation marks omitted.) It goes without saying that the trial court's duty is to instruct *correctly* in such circumstances. Thus, "[t]he appellate court may . . . review any

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[10](...continued)
Transcript and which was unidentifiable during record correction. The supposed quotation does not appear in it, either, however. (See CT 9: 2015.)

[11]See AOB 434 and fn. 263, discussing CALJIC No. 17.40. This was an instruction drafted for use in the guilt phase (where unanimity *is* generally required on questions subordinate to the ultimate verdict). It covers, among other things, the need to arrive at an independent judgment, rather than simply going along with others. (See CT 9: 2008, quoted at RB 253, fn. 76.) Thus respondent's rewrite of the proposed instruction ("individually deciding the case") is covered; the actual instruction requested ("individually decide each question") is not.

instruction given refused, or modified, even though no objection was made thereto, if he substantial rights of the defendant were affected thereby." (Pen. Code § 1259; *People v. Williams* (2010) 49 Cal.4th 405, __ [2010 WL 2557530 *36].) This is why, as noted above, this Court recently entertained a comparable appellate claim where no action to preserve it had been made at all. (*People v. Lewis*, *supra*, 46 Cal.4th at p. 1318, fn. 45.)

Respondent assumes the applicability of an exception to this principle without acknowledging the general rule or analyzing when the exception might apply. Once a trial court has fulfilled its obligation to correctly instruct on the applicable issues raised by the evidence,

> [a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.] But that rule does not apply when, as here, the trial court gives an instruction that is an incorrect statement of the law. [Citations.]

(*People v. Hudson* (2006) 28 Cal.4th 1002, 1011–1012; accord, *People v. Williams* (2010) 49 Cal.4th 405, __ [2010 WL 2557530 *36].)

Respondent cites *People v. Marks* (2003) 31 Cal.4th 197. In *Marks* the trial court answered a jury question about the law by rereading CALJIC No. 8.88 rather than, as the defendant contended on appeal, giving a more succinct answer directly addressing the jury's question. Since the trial court's reply was a correct statement of the law, the failure to request further clarification forfeited the claim. (*Id.* at pp. 236–237.) *Marks* cited *People v. Arias* (1996) 13 Cal.4th 92, as does respondent. With minimal explanation, *Arias* holds failure to request clarification of an aspect of an instruction that was claimed to be misleading forfeited the claim. (*Id.* at pp. 170–171.) Explanation was supplied in *Arias*, however by its citations to *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192, and

People v. Johnson (1993) 6 Cal.4th 1, 52, and the fact that *Rodrigues* relied on *Johnson*. *Johnson* states the rule more fully: where an instruction is not claimed to be incorrect, but only inadequate, it is the defendant's duty to request clarification.[12,13] (*Ibid.*) It is noteworthy that in all of these cases, the claim was also rejected on the merits, so the procedural holding was not a determination that the defendant was to be put to death despite the possibility of a seriously misinformed jury.

Appellant's case, however, reveals a gray area. Each element of the instructions at issue here was, taken alone, a correct statement of the law. Put together, however, they produced an incorrect statement, since the most rational interpretation of the singling out of the prosecution's other-crimes aggravation for a non-unanimity instruction was that this was an exception to a continuing unanimity rule.

Should this Court see the matter differently, and also disagree that appellant's requested instruction preserved the issue, the Court should still exercise its discretion[14] to reach the claim on the merits, given the stakes here and the possibility that some trial courts will continue to use the unbalanced

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[12]*Johnson* relies on *People v. Hardy* (1992) 2 Cal.4th 86, 153 ("because the instruction given was correct, it was incumbent on defendants to request clarifying language"), and *People v. Sully* (1991) 53 Cal.3d 1195, 1218 ("'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language'").

[13]Again, appellant did request clarification. The text above is pointing out, additionally and alternatively, that he did not have to under the circumstances in order to be entitled to review.

[14]*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1 (conc. opn. of Mosk, J.).

CALJIC instruction rather than the fair Judicial Council one.

B. There Was Instructional Error

1. The Instruction Was Infirm for Its Lack of Even-Handedness, and Its Failure to Give Appellant the Benefit of the Accurate and Fair Instruction Provided by the Judicial Council's Version Denied Equal Protection

Respondent has not attempted to reply to appellant's claim that explaining how a rule should be applied in the prosecution's favor while failing to mention its equal applicability to the defense violates a long-established constraint which due process places on the crafting of jury instructions.[15] Appellant therefore relies on his presentation in the opening brief.

The same is true of appellant's claim of an equal-protection violation, in the failure to instruct the jury fairly and accurately in the manner that benefits defendants who are instructed using the Judicial Council instruction on the issue.[16]

2. The Instruction's Exclusiveness Wrongly Implied a Unanimity Requirement for Mitigation

a. Respondent Does Not Dispute That This Court Consistently Recognizes That Jurors Will Interpret Instructions in the Manner Claimed Here

Respondent accepts the premise that the Eighth Amendment bars leading a jury to believe that, for a juror to consider a particular mitigating circumstance, the jury as a whole must first agree that it exists. Respondent maintains, however, that nothing in the instructions could have produced such an

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[15]See AOB 433, citing *People v. Moore*, *supra*, 43 Cal.2d 517, 526–527, and *Reagan v. United States*, *supra*, 157 U.S. 301, 310.

[16]See AOB 438. CALCRIM No. 764 is quoted at AOB 437, fn. 264.

impression. Respondent fails to comment on the reason why appellant contends that they were likely to do so, namely, that a common-sense understanding of the instructions would involve the same principles courts use in construing statutory and contractual language. The first of these is that a carefully-crafted statement will not contain surplusage. The second is a corollary of that principle: enumerating one condition where a conclusion applies implies the exclusion of its application under other conditions.[17] Concretely, making a point of identifying the decision whether a factor (b) crime was committed as a matter for individual juror determination left the strong impression that that issue was the sole exception to the unanimity requirement. It must be recalled that the unanimity principle generally governed the jury's processes, starting with the guilt phase, where not only the verdict but subordinate findings on each element of each offense and special circumstance had to be found unanimously, and that it governed the ultimate decision as to penalty. The only explicit instructions were those requiring unanimity, and the one at issue, stating an exception.

Appellant pointed out[18] an example of this logic in *People v. Roldan* (2005) 35 Cal. 4th 646. There the Court upheld a refusal to instruct that a mitigating factor need not be proved beyond a reasonable doubt, because such an instruction "implies erroneously that aggravating factors must be proved beyond a reasonable doubt." (Id. at p. 741.) By the same reasoning, stating the non-unanimity principle only as it applies to an aggravating factor implies that

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[17]See AOB 435–436, discussing *People v. Roldan* (2005) 35 Cal. 4th 646, 741, and citing *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 225–226; *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 546; *Stevenson v. Drever* (1997)16 Cal.4th 1167, 1175; and *In re Carissa G.* (1999) 76 Cal.App.4th 731, 737.

[18]AOB 435.

other circumstances in aggravation or mitigation require unanimity. Respondent does not mention *Roldan* or attempt to explain why its underlying principle should be applied only in favor of the prosecution.

Appellant also pointed out[19] that similar logic underlies cases like *People v. Taylor* (2001) 26 Cal.4th 1155, which holds that an instruction listing the factors applicable to the penalty choice suffices to prevent the use of unlisted factors as aggravation. The implication is considered clear enough to meet a trial court's instructional obligation on this cardinal principle, particularly since the jury is told that the list of mitigating factors is non-exclusive. (*Id.* at p. 1180.) Respondent ignores this point. Yet there is no principled way to distinguish how a jury would understand the implication of singling out mitigation, in the *Taylor* situation, from how it would understand the implications of singling out factor-(b) aggravation here.

In the *Taylor* context, this Court found the implication at issue to be clear enough that there was no danger of the jury's failure to understand the law. I.e., not only *could* reasonable jurors take the mention of one thing to exclude another, but they can be *counted on* to do so. Here, in contrast, if the"interpretation of the sentencing process" that follows from the same logic regarding what it means to mention one factor only "is one a reasonable jury *could* have drawn from the instructions," there was constitutional error. (*Mills v. Maryland*, *supra*, 486 U.S. at pp. 375–376, emphasis added.) If a jury can be counted on to interpret instructions in that manner, there certainly is an Eighth-Amendment-violating risk that it will do so.

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[19]AOB 436.

b. Respondent's Reliance on *People v. Breaux* Is Misplaced

Rather than analyze the instructions given appellant's jury, respondent tries to fit the claim into the holding of a case with critically different facts. Respondent relies on *People v. Breaux* (1991) 1 Cal.4th 281, which held that a trial court could properly refuse a defense request for an non-unanimity instruction on mitigation. But the result in *Breaux*, as appellant pointed out in the opening brief, was based on the fact that the instructions there "unmistakably told the jury that each member must individually decide each question involved in the penalty decision." (*Id.* at p. 315.) Respondent seems to assume that this Court held that this principle was made clear to the *Breaux* jury only through the giving of the CALJIC instructions which appellant's jury also received, but the opinion provides no basis for that assumption. Certainly nothing in the instructions given here told the jury any such thing and, as noted previously, an instruction that would have done so was refused. Moreover, there was no indication in *Breaux* that a non-unanimity instruction on factor-(b) aggravation had been given, and it probably was not.[20] The giving of such an instruction, in a context where it was the only non-unanimity directive, is the basis of appellant's complaint here.[21]

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[20]The existence of factor (b) aggravation was not at issue in *Breaux*. "The parties stipulated to the reading of a statement of facts on three prior offenses, two of which had been pleaded as prior convictions and found true at the guilt phase." (*People v. Breaux*, *supra*, 1 Cal.4th at p. 307.)

[21]Respondent points out that this Court has "affirmed its decision in *Breaux* and should continue to do so here. (*People v. Cook* [2007] 40 Cal.4th [1334,] 1365; *People v. Smith* (2003) 30 Cal.4th 581, 639.) *Cook* and *Smith* do reaffirm *Breaux's* rejection of a defendant's purported general right to a non-unanimity instruction, i.e., they reject only the claim which respondent (continued...)

Respondent tries unsuccessfully to bring the instant case within the ambit of *Breaux's* reasoning about instructions clearly telling the jury that each member must individually decide each question involved in the penalty decision. Thus respondent notes that appellant's jurors were told that to reach a penalty verdict, all must agree, "but," says respondent, they were also told that "each" had to conclude that aggravating circumstances so outweighed mitigation as to warrant a death sentence if they were to come to a death verdict. (RB 255.) Respondent's use of the conjunction *but* is puzzling, for the second statement also emphasizes unanimity. Saying that each juror had to reach that conclusion for a death verdict to be returned meant that they all had to. Doing so did not contradict any perceived need for unanimity on any finding, ultimate or subordinate.

Next, respondent notes that some of the instructions referred to the tasks facing "a juror" when considering mitigating evidence. (RB 255.) The first example cited by respondent stated, after explaining that a mitigating circumstance does not need to be proved beyond a reasonable doubt, that "a juror may find that a mitigating circumstance exists if there is any evidence to support it, no matter how weak the evidence is." (RT 54: 8066; CT 9: 1993.) Again, nothing here is inconsistent with the scheme set up in the guilt phase and implied by the prosecutorial pinpoint instruction specifying a single case of non-unanimity. Saying *what* is required for a juror to come to a particular conclusion, when every juror has to come to an individual conclusion even on findings requiring unanimity, does not suggest non-unanimity, much less express

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[21](...continued)
repeatedly and wrongly states was raised in the opening brief, rather than considering the impact of singling out factor-(b) aggravation for a non-unanimity instruction.

it "unmistakeably," as the instructional package used in *Breaux* did. (*People v. Breaux*, *supra*, 1 Cal.4th at p. 315.)

Respondent's other example of an instruction referring to "a juror" explained, "A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor." (RT 54: 8066–8067; CT 9: 1993.) Here too, there is nothing that points to non-unanimity in deciding whether a mitigating factor exists; the only thing helpful on this score is the indirect implication—and the only hint in the entire set of instructions—that the moral weight to be assigned to each factor may be determined by individual jurors.[22]

In truth, respondent could have come up with slightly more colorable examples to try to make its point. The special instructions read at the request of the defense included references to "a juror['s]" deciding to take into account any particular mitigating circumstance.[23] In the abstract, jurors deeply attuned to

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[22]CALJIC No. 8.88, given a few minutes later, simply uses the pronoun "you" in stating what appears to be the entire jury's freedom to assign what it considers to be the appropriate moral or sympathetic weight to be assigned each factor, aggravating or mitigating. (RT 54: 8072; CT 9: 2011–2012.)

[23]The instructions included the following:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay close attention, that is, careful attention, to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors.
>
> A juror may also consider any other circumstances

(continued...)

legal logic could have considered those references to cast doubt on the otherwise apparent need for unanimity in deciding whether such a circumstance exists. But assuming such juror sophistication would be baseless.[24] Second, there is again no clear contradiction of the unanimity rule from which the prosecution-oriented instruction carves out a definite exception: the instructions could still be referring to what use individual jurors make of mitigating circumstances agreed by the entire jury to have been shown to exist. Finally, when the best that can be said about instructions about how to decide if a defendant is to be put to death is to say that they support this kind of guesswork as to how jurors *might* have interpreted them, the reliability required of capital proceedings is simply missing. (Cf. *Francis v. Franklin* (1985) 471 U.S. 307, 322 [correct statement of law in contradictory instructions cannot save it from constitutional infirmity caused by incorrect statement because reviewing court cannot know which principle jurors applied].) Indeed, in *Mills v. Maryland*, the case on which the instant claim turns, the Court found "[t]he critical question" to be simply "whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge." (486 U.S. at pp. 375–376.) The fact that they also might have interpreted the instructions in an appropriate manner was not relevant. (*Id.* at pp. 376–378; see also pp. 383–384.) Appellant repeats the complaint he made in the opening brief:

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[23](...continued)

> relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.

(RT 54: 8066: CT 9: 1993.)

[24]See, e.g., Haney, Santag and Costanzo, "Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death" 50 Journal of Social Sciences No. 2 (Summer 1994).

> It is unclear why this Court and the CALJIC committee refuse to mandate an instruction that would set forth a principle [lack of a unanimity requirement for determining whether mitigating factors exist] that is so clearly the law. Prosecutors and civil litigants are not required to hope that jurors will guess at the rules of law that might favor them, and capital defendants should not be required to do so, either.

(AOB 436–437, fn. 264, concluding with the CALCRIM instruction which does simply state the actual rule, in neutral terms, with reference to both aggravating and mitigating circumstances.)

3. *People v. Lewis* Does Not Resolve Appellant's Claim

A claim similar to appellant's was denied in *People v. Lewis*, *supra*, 46 Cal.4th 1255. Lewis pointed out the disparate instructional treatment of non-unanimity for mitigation and non-unanimity for factor (b), arguing that "the trial court failed to ensure impartiality and parity in the jury instructions, in violation of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendment . . . ." (*Id.* at p. 1317.) It does not appear that the even greater problem raised by appellant—the likely implication, in context, of a unanimity requirement for mitigation—was raised directly, but *Lewis* relies on *People v. Holt* (1997) 15 Cal.4th 619, which does address that contention. (15 Cal.4th at p. 686.)

Both cases rely on the repetition in the penalty phase of a standard guilt-phase instruction, CALJIC No. 17.40, which is entitled "Individual Opinion Required — Duty to Deliberate."[25] (See CT 9: 2008; RT 54: 8070.) Since, in

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[25]The trial court read the instruction to appellant's jury, as follows:

> The People and the defendant are entitled to the individual opinion of each juror.
>
> Each of you must consider the evidence for the purpose

(continued...)

the guilt phase, unanimity is required not only on the ultimate verdict, but also on subordinate questions such as whether each element of the offense is proven, it would be error for CALJIC No. 17.40 to imply otherwise, and it does not. Rather than dealing with how many votes are required to decide a question, the instruction states how each juror is to decide how to vote. (See *People v. Gunder* (2007)151 Cal.App.4th 412, 425 [contrasting instructions about "the procedure for *returning* verdicts" with CALJIC No. 17.40's directives concerning "each juror['s] *decisionmaking*"], cited with apparent approval in *People v. Moore* (No. S081479. Jan. 31, 2011) __ Cal.4th __, __ (slip opn., p. 31.) CALJIC No. 17.40, speaking as it does to the manner of arriving at decisions on whatever questions are before a juror, is not intended to—and does not—provide guidance on which matters must be agreed on unanimously in order to return a final verdict and which do not require agreement. Clearly this is why the prosecution needs an explanation that unanimity is not required on whether a factor (b) offense was proven and can be considered by a juror, absent a clear statement, like that in CALCRIM, that *no* aggravating or mitigating circumstance needs to be proven to the satisfaction of other jurors to be

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[25](...continued)

> of reaching a verdict, if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favors such a decision.
>
> Do not decide any issue in this case by chance, such as the drawing of lots or any other chance determination.

(RT 54: 8070.)

considered by one. (Cf. CALCRIM No. 766, quoted at AOB 437, fn. 264.) If the defense does not receive the same instruction as to mitigation, a reasonable juror could certainly conclude that the principle stated regarding factor (b) does not apply across the board.

C. The Trial Court's Error Requires Reversal of the Penalty Judgment

Respondent's attempt to present the law applicable to its burden of showing harmlessness is confusing. (See RB 260–261.) Respondent argues that any error was only of state law. This could only be true if state law affords appellant a protection that the federal Constitution does not. However, neither appellant nor respondent has suggested that California has extended the protections of *Mills* beyond those required by the case itself and the federal right which it expounds. After this detour, respondent concedes that the standard for state-law error affecting penalty is the same as that for federal constitutional error in any event. Then, however, respondent wrongly claims that appellant has the burden of demonstrating prejudice under state law, rather than that respondent has the burden of showing harmlessness beyond a reasonable doubt, which is the case under the applicable federal standard and therefore has to be true under the equivalent state standard as well.[26]

Significantly, respondent ignores entirely the rule applicable to the specific error claimed here: where the jury charge was such that a reviewing court "cannot conclude, with any degree of certainty, that the jury did not adopt [an] interpretation of the jury instructions" that precluded them from

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[26]See RB 260–261, mis-citing *People v. Rogers* (2006) 39 Cal.4th 826, 901, for the proposition that appellant has a burden of showing prejudice. (See *People v. Rogers*, *supra*, 39 Cal.4th at p. 901, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

understanding that each juror should take into account whatever mitigation he or she believed to be true, penalty reversal is required. (*Mills v. Maryland*, *supra*, 486 U.S. at pp. 377–378.)

In other words, if there is *Mills* error at all, the only basis for showing harmlessness would be if no mitigating circumstances had been presented and thus there was nothing for a juror to have been precluded from considering. That is not the case here, as respondent acknowledges in other contexts. Ignoring this controlling precedent, respondent gives an abstract argument based on its one-sided view of the evidence in aggravation and mitigation, asserts that a death verdict was inevitable in any case, and again fails to answer appellant's showing that neither the evidence nor the question of harmlessness may be approached in this fashion.[27] Indeed, *Mills* is proof of appellant's position that appellate reweighing of aggravation and mitigation is not a legitimate way of approaching the state's attempt to show harmlessness. For there is nothing *sui generis* about *Mills* error, nothing in the high court's opinion suggesting that such error is "structural." Rather, the court takes it for granted that if a juror could have been precluded from considering a mitigating circumstance by that juror's understanding of the instructions, the penalty judgement cannot be known to have been unaffected by the error. The kind of canvass of the picture before the jury, in order to ascertain what it might have done if correctly instructed, which respondent engages in throughout its brief, had no place in that court's analysis. (See *Mills v. Maryland*, *supra*, 468 U.S. 367, 377–384.) It

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[27]A complete argument on both respondent's misapplication of the *Chapman/Brown* standard and the evidentiary picture presented in this case appears in the discussion of harmlessness in issue II, at pages 101–114 and 120–122, above. A more summary version concludes issue IV, at pages 167–172, above.

should not here, either, with this error or any other.

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XII[1]

REFUSING TO INSTRUCT THE JURY ON MUNOZ'S SENTENCE AS A BASIS FOR LENIENCY, AND PROHIBITING ARGUMENT ON THE POINT, WAS FEDERAL CONSTITUTIONAL ERROR

Federal law clearly requires that anything which a sentencer could reasonably determine to be a basis for a sentence less than death be considered by the sentencer, if the defendant offers it. The issue is not whether the proffered evidence mitigates culpability for the capital crime, but whether it could mitigate punishment for that reason or any other.[2] This is not an area where state law can constrain the sentencer.[3] As appellant has pointed out,[4] the

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[1]See AOB 439. Respondent addresses this claim in its Argument XVII.C, RB 259, except for the question of prejudice, which it addresses in XVII.D, RB 260.

[2]*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"); *Tennard v. Dretke* (2004) 542 U.S. 274, 285 (evidence that "would be mitigating in the sense that [it] might serve as a basis for a sentence less than death" must be admitted "even though . . . [it]did not relate specifically to petitioner's culpability for the crime he committed," citations and quotaton marks omitted); see also *Smith v. Texas* (2004) 543 U.S. 37, 45 (Court has "unequivocally rejected" position that mitigating evidence is limited to that which has some nexus to the crime).

See also the discussion at p. 242, above, and the authorities cited there.

The question is not only whether the evidence is admitted, but whether the jury is permitted to consider it as mitigation. (See, e.g., *Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at p. 246.)

[3]*Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *McKoy v. North Carolina* (1990) 494 U.S. 433, 440.

[4]AOB 440–442, 444–446.

United States Supreme Court, Congress, numerous other courts[5] (though certainly not all), and a broad spectrum of the lay public would consider a life-with-the-possibility-of-parole sentence for a codefendant who in significant ways was similarly situated, and was arguably at least as culpable,[6] to be a matter to take into consideration. So, regardless of the reasons why it is reasonable to *not* consider a codefendant's treatment, it is also reasonable to consider it, and a sentencing jury may therefore not be prevented from doing so.

This Court has held, however, that a jury should be precluded from considering a codefendant's treatment in deciding a defendant's sentence. Respondent makes a rote statement that appellant "offer[s] no persuasive reasons" for reconsidering its earlier holdings on this question. Appellant's briefing of the issue, however, is anything but rote. It is a genuine argument for reconsideration, despite respondent's attempt to treat it as "generic" claim,[7] and it provides several reasons for reconsidering that are not addressed in this Court's prior opinions. Respondent has declined to speak to those reasons, leaving the Court unassisted in deciding whether appellant's basis for maintaining that a different result is constitutionally required is "persuasive" or not. Respondent's failure to brief the issue as it has been actually presented here should not confuse this Court regarding the need to address the concerns raised by appellant and particularly the contrary Eighth-Amendment jurisprudence by which the state is bound. There is, however, nothing for appellant to reply to,

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[5]In addition to the cases cited in the opening brief, see *United States v. Mitchell* (9th Cir. 2007) 502 F.2d 931, 981, where an equally culpable codefendant's not receiving the death penalty was "the focal point" of the defendant's case in mitigation.

[6]See AOB 447–449 and cited portions of the record.

[7]Cf. *People v. Schmeck* (2005) 37 Cal.4th 240, 303–304.

and he relies on the argument contained in his opening brief.

Similarly, on the question of whether the error could be found harmless, appellant has explained why one or more reasonable jurors could have viewed Munoz as at least equally as culpable and dangerous as appellant and have found the prosecutorial and judicial treatment of the former to be a persuasive reason why executing appellant was neither "just" nor "necessary," to use the prosecutor's categories.[8] Respondent has no rebuttal to either the characterization of the evidence or its possible implications. Rather, respondent shifts the burden of proof to appellant on the harmlessness question, implicitly urges appellate resentencing on the basis of respondent's or this Court's view of aggravation and mitigation instead of considering whether the only legitimate sentencer could have been influenced by the error, and presents the facts in a light most favorable to its position instead of considering all those that a reasonable juror might have found to enter into the weighing process. (RB 260–261.) All this was explained in more detail above, since respondent uses the same prejudice argument to cover several instructional errors.[9]

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[8]AOB 447–451.

[9]See pages 310–312, above.

XIII[1]

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR IN SEVERAL RESPECTS IN ITS INSTRUCTIONS REGARDING UNADJUDICATED CRIMINAL ACTS, INCLUDING DIRECTING A VERDICT ON WHETHER THE CHARGED ACTS OF UNADJUDICATED CRIMINALITY WERE VIOLENT AND FOLLOWING A CALJIC-INITIATED ELIMINATION OF THIS COURT'S FORMER UNANIMITY REQUIREMENT FOR CHARGES OF UNADJUDICATED CRIMINALITY

A. Introduction

Appellant contends that CALJIC No. 8.87 (1989 revision), as given to appellant's jury, was fatally flawed in five respects. Each error could have affected the jurors' evaluation of evidence of unadjudicated offenses under factor (b), offenses on which the prosecutor relied heavily in his argument for death. Appellant acknowledged that most of the problems with the instruction have been raised in other cases but stated that only one sub-issue raised a generic claim, while the others involve analyses that the Court has apparently not addressed previously. Appellant also documented that four of the five problems with the instruction arose from CALJIC-initiated changes in the law, later ratified by this Court, a method of law-making that raises serious due-process concerns.

As with the previous issue, however, respondent takes—and encourages this Court to take—the shortcut of pretending that summary treatment of these issues is appropriate. Thus, what appellant briefs in sixty-five pages, respondent briefs in under two. The difference is not solely attributable to counsels' respective styles. Certainly, after actually analyzing appellant's arguments—

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[1]See AOB 452. Respondent addresses this claim in part of its Argument XVIII, RB 263–265.

which forthrightly acknowledge this Court's precedents but contend that various considerations have been overlooked—the Court is free to conclude that appellant has raised nothing new after all, or only unpersuasive arguments, and that summary treatment is appropriate. But at this stage, appellant respectfully submits that the briefing does not permit the Court's analysis to begin and end with stating the overall claim and citing precedents rejecting it.

B. The Instruction Erroneously Withdrew from the Jury the Question of Whether Appellant's Acts Involved Violence[2]

It is undisputed that the jury was told that each alleged instance of unadjudicated criminal activity involved force or violence, rather than that the force or violence issue was for jurors to determine in each case.

Appellant alternatively analyzed the question in the terms that this Court has done in the past, i.e, whether the question was one for judge or jurors, but to some extent that is beside the point here. Not only was the jury given no opportunity to decide the issue, but *there was not even a trial court finding on whether the force-or-violence element was met on each allegation.*[3] The prosecutor's allegation was submitted to the jury as fact. Respondent neither disputes this point nor acknowledges it and its significance.

On the only question that this Court has addressed before, whether the issue is one for judge or jurors,[4] appellant marshaled authorities showing

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[2]Respondent addresses this sub-issue at RB 263, second full paragraph.

[3]See AOB 468–470.

[4]For the purposes of this sub-issue, appellant assumes arguendo the propriety of individual jurors, rather than the jury as a whole, deciding whether a factor (b) allegation has been proved.

- that issues of fact are to be decided by the jury;[5]
- that this Court has clearly recognized that some crimes commonly alleged as factor (b) offenses may be committed in ways that do or do not involve force or violence, or the threat thereof, and the proper characterization in a particular case is a question of fact,[6] and it has justified submitting equivocal cases on the force-or-violence element to the jurors because they would decide whether it was proven;[7]
- that the law on this matter was changed only because of a drafting error by the CALJIC committee and that the change itself was never acknowledged or justified by that body or this Court;[8]
- that one of the cases now relied on by respondent was based on since-overruled United States Supreme Court precedent, that a key element of the analysis presented here was not raised by the defendant in the California case, and that current high court precedent requires a contrary conclusion;[9] and
- that another precedent now relied on by respondent cited no authority for its summary statement that the force-or-violence

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[5]AOB 457. This includes mixed questions of law and fact. (*United States v. Gaudin* 1995) 515 U.S. 506; see also *id.* at p. 514 ["the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion"].)

[6]AOB 456–457, 460–461.

[7]AOB 457.

[8]AOB 457–458.

[9]AOB 457–459, discussing *People v. Ochoa* (2001) 26 Cal.4th 398, 452–454.

> issue is a question of law, did not acknowledge or seek to reconcile its conclusion with this Court's prior cases holding to the contrary,[10] and flew in the face of a very substantial body of jurisprudence on how to distinguish questions of law, for the trial court's determination, from questions of fact to be submitted to the jury.[11]

In addition, appellant has shown that this Court's precedents treated the force-or-violence issue as a jury question until 2001,[12] while appellant's crimes took place in 1992. Retroactive removal of the requirement to prove the issue to any juror who would use a factor (b) crime as aggravation would therefore violate due process.[13]

Respondent cites five cases for the proposition that this Court "has repeatedly rejected appellants' claim and should continue to do so . . . ." (RB 263.) None deal with the due-process/retroactivity issue or a complaint that not only was there no jury finding on the force-or-violence question, but that there was not even a trial-court finding. All involved only the question of who the factfinder should be, judge or juror. One did not even reach the issue, because a trial-court modification of the CALJIC instruction required the jury to decide the question.[14] Three of respondent's cases were discussed fully in the opening

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[10]AOB 459–461, discussing *People v. Nakahara* (2003) 30 Cal.4th 705, 720.

[11]AOB 461–467.

[12]AOB 457–459, including the first full paragraph on page 457.

[13]See cases cited at AOB 468.

[14]*People v. Prieto* (2003) 30 Cal.4th 226, 265 ("[w]e reject [appellant's] (continued...)

brief.[15] The opinions, two of which are seminal but contain brief, summary dispositions, do not contain a rebuttal to appellant's analysis, and respondent provides none. The last case relied on by respondent simply quotes two of the others and added that any error would have been harmless under the facts of that case.[16]

Thus as to two of the problems with the handling of the force/violence element (retroactivity, lack of even a judicial determination), respondent has no answer. As to the question of who should determine the fact, appellant's substantial reasons for seeking reconsideration of prior holdings remain unanswered by either opinions of this Court or any reasoning of respondent's.

Appellant has explained why the errors cannot be held harmless.[17] Respondent does not attempt to argue that they can, in the sense that it could be known beyond a reasonable doubt that a jury permitted to consider the force-or-violence element on any incident would have found it to be true.[18] Respondent

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[14](...continued)
contention that the modified instruction somehow implied that the jury did not have to find that the unadjudicated criminal acts involved force or violence").

[15]*People v. Ochoa, supra*, 26 Cal.4th 398, 452–454, discussed at AOB 457–459; *People v. Nakahara, supra*, 30 Cal.4th 705, 720, discussed at AOB 459–461 (see also pp. 461–467); and *People v. Monterroso* (2004) 34 Cal.4th 743, 793, discussed at AOB 459–460 and fn. 278.

[16]*People v. Gray* (2005) 37 Cal.4th 168, 235, quoting the *Monterroso* and *Nakahara* cases cited in the previous footnote.

[17]AOB 470–476; see also AOB 512–516.

[18]See See *Neder v. United States* (1999) 527 U.S. 1; *People v. Flood* (1998) 18 Cal.4th 470, both of which permit a harmlessness finding when an element of an offense is withdrawn from jury consideration, where the element was both undisputed and undisputable.

does argue elsewhere that admitting evidence of most of the offenses at issue here could not have affected the deliberations of a jury which, in its implicit view, can be assumed to have believed the worst scenarios of the circumstances of the crimes put forward by the prosecution's informant and dismissed the mitigating evidence involving both those circumstances and appellant's background and character.[19] Appellant relies on what he has said previously in this brief about respondent's marshaling the wrong facts and assuming that this Court's proper role is no different from that of a sentencing juror,[20] as well as a demonstration in the opening brief that the prosecutor made powerful use of the other-crimes evidence.[21]

C. The Instruction Improperly Heightened the Seriousness of the Incidents by Characterizing Them as at Least Actual, Express Threats and by Creating the Supposed Aggravating Circumstance of "Implied Use" of Force or Violence[22]

Given, as just explained, that the jury was told that the all the acts charged, if true at all, were legally considered to have involved force or violence, the way that the instruction characterized the force or violence that the jurors were being told was involved became important. Unaccountably scrambling the statutory language,[23] the CALJIC instruction eliminated the possibility that many of the actions were merely implied threats, which was

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[19]RB 230, 234.

[20]See pages 101–114 and 120–122, above, or the summary version at pages 167–172.

[21]AOB 512–516.

[22]Respondent addresses this sub-issue in the first half of the first full paragraph of RB 264.

[23]See AOB 476–477.

actually the most that either the escape preparations or the four shank possessions[24] could have amounted to. Instead, it stated that all the actions involved the use or threat of force or violence, which would be more serious aggravating conduct than simply an implied threat.

The effect was complemented by another result of randomizing the order of the statutory terms: the creation of the novel category of "implied use" of force. For those jurors who could see that there was no actual threat communicated and no actual use of force or violence in the five incidents just mentioned, the remaining characterization supplied by the court— "implied use" of force or violence—had to be the one that applied. So for such jurors, this aspect of the botched language, too, elevated the seriousness of the shank possessions and escape preparations. They were, supposedly, what the law evidently considered a use of violence, even if "implied." Thus for any juror, what were at worst implied threats, under a very broad use of even that term, were authoritatively characterized as either actual threats, or implied use, of force or violence.

All of this, and its constitutional implications, are explained in more detail in the opening brief.[25] Respondent's sole answer is to quote the summary

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[24]Both appellant and respondent list three shank-possession incidents under that heading in their Statements of Facts. The fourth involved Arthur Dicken's testimony regarding seeing a four-to-six-inch piece of sharpened steel in appellant's possession as part of the escape-preparations evidence. See also Item (4) of the Notice of Evidence to Be Introduced in Aggravation. (CT 6: 1172 [listing possession of a shank as part of that incident].)

[25]AOB 476–481; see also 515–516 and fn. 322.

Appellant neglected to point out previously that this error in the instruction deprived him of his due-process right to the protections of California's statutory law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

(continued...)

disposition of an attack on the same language made by the appellant in *People v. Prieto*, *supra*, 30 Cal.4th at p. 265.[26] Again, there is nothing to reply to here. The reasons why *Prieto* is both distinguishable and should be reconsidered are already explained in the opening brief,[27] and respondent has no response.

As to harmlessness, respondent does not contend that authoritatively describing the offenses as more serious than they were could not matter. Appellant has already explained why it is likely that it did.[28] As noted previously, respondent does argue elsewhere that admitting evidence of most of the offenses at issue here could not have affected the penalty deliberations. Appellant discussed that argument in the previous sub-issue and relies on that discussion here.[29]

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[25](...continued)
It also gave the jury a vague aggravating factor ("implied use"). (*Stringer v. Black* (1992) 503 U.S. 222, 231, 235; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 477.) Given respondent's position that there was no error and its decision not to address any of the specific constitutional claims, appellant asks the Court to consider these constitutional claims as well, despite his raising it only in this brief. (Compare the argument regarding taking the force-or-violence issue away from the jury, where appellant did raise the *Hicks* claim [AOB 470] and respondent declined to specifically address it [RB 263].)

[26]RB 264. Respondent's citation, in the same paragraph, of *People v. Martinez*, *supra*, 31 Cal.4th 673, appears to be its response to a different point raised by appellant, under subheading D.

[27]See AOB 480, fn. 293.

[28]See AOB 512–516.

[29]See page 321, above, and portions of this and the opening brief cited there.

D. Only Crimes Involving at Least a "Threat to Use" Force or Violence Are Aggravating under Section 190.3, but the Instruction Required Jurors to Weigh Crimes That Merely Created a Risk of Force Being Employed or Triggered[30]

Section 190.3, factor (b), authorizes admission of evidence of criminal activity which involved the express or implied threat "to use force or violence." Part of the CALJIC rewrite of the statute changed the language to involve "the threat *of* force or violence." The two expressions invoke two different definitions of the term *threat*, as both dictionary definitions and ample legislative and case-law uses of them make clear. The statutory aggravating circumstance involves a communication (made expressly or by implication) to another (the one threatened) of a threat to use force or violence. The CALJIC aggravating circumstance sweeps more broadly, to include, as this Court has held, creation of a risk that violence will somehow result from a person's actions.[31]

In *People v. Martinez, supra*, 31 Cal.4th 673, the defendant did not attack CALJIC's taking liberties with the statutory language but did argue that evidence of mere shank possession, without some kind of a threatening communication, directed towards another, and using words or actions, was insufficient evidence of a "threat of" force or violence. This Court rejected the argument summarily, reasoning that a communicated threat would be an express one, and factor (b) includes implied threats. (31 Cal. 4th at p. 694.) Appellant has pointed out that the holding stands alone; that it is a matter of black-letter

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[30]Respondent addresses this sub-issue at RB 264, in the portion of the first full paragraph that begins with the word *Similarly* and discusses *People v. Martinez, supra*, 31 Cal.4th 673.

[31]See AOB 482–486.

law that threats—in the sense of a threatening communication—can be communicated by implication. For that reason the case should be reconsidered. Additionally, its 2003 expansion of the previously-clear statutory liability for factor-(b) aggravation would violate due process if applied retroactively to appellant.[32]

Respondent's only argument in favor of upholding CALJIC's expansion of the statutory language regarding a "threat to use force or violence" to include actions which created a "threat of force or violence" is to cite *Martinez*. (RB 264.) Respondent says nothing about appellant's reasons why *Martinez* should be reconsidered, its dealing only with a different and weak variant of appellant's contention,[33] or why its holding cannot be applied to appellant retroactively. Nor does respondent seek to answer appellant's demonstration that, everywhere else in the law and in common usage, the difference between the meanings of *threat of* something happening and *threat to* do something are clear and substantial. Appellant therefore relies on the discussion in his opening brief.[34]

Similarly, appellant argued that the error cannot be known, beyond a

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[32]See the discussion of *People v. Martinez* at AOB 486–489. The other constitutional violations caused by the instruction's deviation from the statute are enumerated at AOB 481–482.

[33]Even though the *Martinez* appellant argued that a threat was a communication, he eviscerated the claim by conceding that the issue was whether his shank possession amounted to a "threat *of* violence," rather than getting to the heart of the matter, which is that the statutory aggravating circumstance includes only threats *to use* violence. (*People v. Martinez, supra*, 31 Cal.4th at p. 693.)

[34]AOB 481–490.

reasonable doubt, to be harmless,[35] and respondent does not argue otherwise in the context of this specific error. In other words, respondent does not claim that being directed to consider criminal activity beyond a threat to use force or violence did not broaden the conduct the jury would have considered aggravating. As noted previously, respondent does argue elsewhere that admitting evidence of most of the offenses at issue here could not have affected the penalty deliberations. Appellant discussed that argument in sub-issue B, above, and relies on that discussion here.[36]

E. The Instruction Failed to Require Unanimity on Findings that Other-Crimes Allegations Were True, and Unanimity is Required on Such Findings Even if it is Not Required for Aggravating Circumstances in General[37]

Appellant's jurors were instructed that they were to determine individually whether factor (b) crimes had been proven, and to individually use or not use the evidence based on their findings. While appellant later makes a "generic" claim[38] that every aggravating circumstance must be proved to a unanimous jury if it is to be weighed by any juror,[39] here he also vigorously contends that, even if this is not the case, there is a unanimity requirement for other-crimes allegations and that this Court's contrary conclusion should be

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[35]See AOB 489–490.

[36]See page 321, above, and the portions of this and the opening brief cited there.

[37]Respondent addresses this sub-issue at RB 263, in the middle of the first full paragraph.

[38]See *People v. Schmeck* (2005) 37 Cal.4th 240, 303–304.

[39]Argument XXI.D, AOB 568.

reconsidered.[40] The contention is based largely on two factors which make factor (b) aggravation qualitatively and materially different from the other aggravating circumstances which a jury is required to consider, factors which appellant believes not to have been addressed in this Court's opinions, as well an analysis of federal Sixth Amendment jurisprudence which also appears to have been previously unaddressed.[41]

As to the two reasons factor (b) aggravation is different, the first is that many circumstances, like whether the age of the defendant is aggravating, require little fact-finding and are truly normative judgments. However, deciding whether a defendant committed a previously-uncharged crime is the prototypical fact-based determination. This Court's jurisprudence requiring such crimes to be proven beyond a reasonable doubt recognizes this way in which factor (b) decisions are unique, since most factors in aggravation are normative judgments (like whether the age of the defendant is aggravating) to which, in the Court's view, a standard of proof could not be applied.

Second, this Court, like others, has long recognized the heavy impact of other-violent-crimes evidence on juries considering whether to impose death sentences, so the importance of traditional safeguards for fact-finding with regard to such evidence is greater. Indeed, for this reason, this Court traditionally required the same safeguards as are afforded a defendant in a trial on the issue of guilt to be provided in the trial of factor (b) allegations. This included the reasonable-doubt standard and certain less-critical procedural safeguards, which have survived, and the unanimity requirement, which has not.

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[40]Argument XIII.E, AOB 490–510.

[41]Regarding the Sixth Amendment, see AOB pp. 505–508, discussing the treatment of *Ring v. Arizona* (2002) 536 U.S. 584 in *People v. Prieto* (2003) 30 Cal.4th 226.

Its demise lies in a particularly suspect form of law-making. The details need not be repeated here, but appellant's opening brief shows that several decades of prior law were dropped without acknowledgment in 1987—in the first post-Bird-Court death-penalty case decided by this Court—in a brief summary ratification of a new and ambiguous CALJIC instruction. It, and a similar opinion issued a few months later, are the sole foundation for current law, and they fail to address the reasons why factor (b) aggravation is different from other factors for this purpose.

Respondent treats this claim in summary fashion, relying on cases that do so as well. (RB 263, second half of first full paragraph.) Appellant therefore relies on the analysis in his opening brief.[42]

F. The Instruction, Like the Guilt-Phase Reasonable-Doubt Definition, Failed To Tell the Jury the Degree of Certainty Required to Find Guilt of a Factor (b) Offense

Appellant briefed this issue in summary fashion,[43] and more fully in claim XVIII, relating to the guilt-phase instruction on reasonable doubt.[44] Respondent

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[42]See AOB 490–509.

Review of a historical footnote in that briefing (AOB 495, fn. 305) shows the footnote to be difficult to follow. Appellant was unable to locate the version of the pertinent CALJIC instruction introduced immediately after this Court rejected the CALJIC committee's unilateral elimination of the reasonable-doubt standard. The point of the footnote is to show circumstantially that language that was ambiguous about the need for unanimity was apparently introduced when the reasonable-doubt requirement was put back into the instruction. The exact chronology is not, however, essential to the analysis.

[43]AOB 510–513.

[44]See AOB 543–546.

addresses the claim in that context, and appellant's reply is there as well.[45]

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[45]See RB 164–167 and pages ? et seq., below.

XIV[1]

THE TRIAL COURT SHOULD NOT HAVE PERMITTED EVIDENCE OF THE ESCAPE PREPARATIONS AND SHANK POSSESSIONS TO BE INTRODUCED AND CONSIDERED IN AGGRAVATION BECAUSE THERE WAS NO EVIDENCE THAT THEY INVOLVED "THREATS TO USE" FORCE OR VIOLENCE

Section 190.3, factor (b) permits the prosecution to introduce, as a circumstance in aggravation, evidence of prior criminal activity which involved an express or implied threat to use force or violence. Five of the incidents introduced against appellant in the penalty phase may have involved a "threat of use" of force or violence, in the sense of a risk that violence could theoretically result, but not the narrower range of conduct permitted as aggravation under the statute. A "threat to use" involves a well-recognized different sense of the word *threat*, i.e., a communication—express or implied—that puts another in fear.[2] The CALJIC committee unilaterally altered the statutory language, expanding the reach of the aggravating circumstance to "threats of use." This Court adopted the CALJIC language in some of its opinions without explanation or even an indication that it had noticed the difference, then finally rejected a weak challenge to it. All this is briefed in a claim regarding the CALJIC instruction itself that appears earlier in appellant's brief.[3] The instant claim is that the

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[1]See AOB 517. Respondent addresses this claim in part of its Argument XIII.B, RB 232–233.

[2]As appellant pointed out in the opening brief, even the use of the phrase "express or implied" supports the need for a threat in the sense of a threatening communication. Extant risks of violence, like those inherent in carrying a weapon in jail or trying to break out while armed, are neither express nor implied; they just exist. (See AOB 486.)

[3]AOB 481–490; see also pp. 324, et seq., above.

evidence of the four shank possessions and the escape preparations[4] was devoid, in each case, of any threat made to another, i.e., a threat to use force or violence. Since this claim is premised on the proposition that conduct involving a mere risk of violence occurring is unauthorized aggravation, appellant respectfully suggests that the Court consider its response to claim XIII.D—where that proposition is briefed—before analyzing the parties' positions on the instant claim.

Respondent characterizes appellant's complaint as being that the incidents "did not rise to the level of criminal activity involving force [or] violence . . . contemplated by" the death-penalty statute. (RB 230.) This description confuses the issues. The question is not whether the requisite level of threatened violence was reached, but whether there was a threat to use it at all in any of the five incidents.

Respondent claims that *People v. Martinez* (2003) 31 Cal.4th 673 disposes of appellant's argument. Respondent ignores not only the significant differences between appellant's contention and the argument addressed in *Martinez*, but also appellant's authorities on the different uses of *threat* in the expressions *threat to use* and *threat of use*, the reasons *Martinez* should be reconsidered even on the aspect of the issue that it does cover, and the due-process ban on applying the newer case to appellant's 1992 crimes. (RB 232.) All this is explained in appellant's reply on the instructional issue and need not be repeated here.[5]

Practically proving appellant's point on the matter, respondent observes,

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[4]Or alleged escape attempt. For this purpose it is the facts that matter, not whether they amounted to a criminal attempt.

[5]Pages 324 et seq., above, and cited portions of appellant's opening brief.

> This Court has repeatedly held that the possession of shanks qualifies as a crime involving the implied *threat of violence*. [Citations.] Here, all of Romero's weapons were capable of slashing, stabbing, or cutting, and clearly involved the *threat of violence*.

(RB 232, footnote omitted, emphasis added.) The fact remains that neither party has found a case holding that mere possession of a shank was a threat, express or implied, *to use* force or violence. Respondent can make its case only by pretending that the statute reads as the CALJIC instruction does, which it does not.

Respondent similarly cites cases where "[t]his Court also has squarely held that an escape attempt in which no force was actually used is admissible if, on its facts, it presented a 'threat' of violence. [Citations.]" (RB 232.) However, the question at issue here was not before the Court in any of respondent's authorities. Again, that question is whether creating a threat of violence, in the sense of somehow creating a risk of violence occurring, suffices, or whether the statute's use of the expression of the term "express or implied threat to use" force or violence means what it does in every other context involving classification of felonies as violent—i.e., that the conduct, if not including actual use of force or violence, involved confronting a victim with a threat.

Respondent contends that the instant claim is "waived." (RB 231.) Appellant has already pointed out that objecting in the trial court on this ground would have been futile, given this Court's precedents—now also emphasized by respondent— holding evidence of both escape plans and weapons possession to be admissible under factor (b).[6] A defendant need not make a futile objection

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[6]AOB 517–518.

in order to preserve a claim for appellate review. (*People v. Boyette* (2003) 29 Cal.4th 381, 432.)

Respondent's harmlessness argument follows the pattern established elsewhere. Rather than acknowledge its high burden of proving harmlessness beyond a reasonable doubt, respondent would have this Court see appellant as having to "establish prejudice" to obtain reversal.[7] Respondent misstates even the version of the facts that emerges from assuming that all jurors accepted the prosecution's case uncritically.[8] Respondent wrongly ignores both the mitigation case and more favorable ways that a jury might have viewed the circumstances of the crimes and appellant's involvement, both of which need to be considered in determining whether every juror's verdict was so easily arrived at that erroneously adding most of the post-arrest "crimes of violence" could not have contributed to his or her decision. Respondent ignores the difficulty of an appellate court's making such a determination—to the level of certainty required—in the penalty context.[9]

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[7]RB 234. Cf. *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Guerra* (2006) 37 Cal. 4th 1067, 1144–1145 (same test for state-law error affecting penalty).

[8]See RB 234 ("Romero hunted three young men like prey [and] killed them"). The prosecution's evidence showed the defendants generally driving around a long time before selecting any of their robbery victims, but there was nothing about an intention to find people to kill. As to whether he killed three, the Munoz-based prosecution case showed appellant to have shot Joey Mans and been involved with his brother in chasing down Timothy Jones, but to have been a surprised bystander in Self's killing of Jose Aragon.

[9]A complete argument on both respondent's misapplication of the *Chapman/Brown* standard and the evidentiary picture presented in this case appears in the discussion of harmlessness in issue II, at pages 101–114 and 120–122, above. A more summary version concludes issue IV, at pages (continued...)

Finally, appellant has offered a very specific analysis of the potential impact of the evidence challenged here on jury decision-making, in particular its providing by far the bulk of the material for the prosecutor's argument that appellant's death would be necessary to avoid future victims.[10] Respondent simply offers a general assertion that the evidence pales in comparison to the other reasons for imposing death. The choice to ignore what was used at trial and the manner in which it was argued to the jury speaks volumes about respondent's inability to show harmlessness. Reversal is required.

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[9](...continued)
167–172.

[10]AOB 518–519; see also 512–515.

XV[1]

THE PROSECUTION RECEIVED AN ILLEGITIMATE ADVANTAGE BY FILING DUPLICATIVE MULTIPLE-MURDER ALLEGATIONS, AND IT IS TIME FOR THIS COURT TO PUT A STOP TO THE PRACTICE

The parties agree that the prosecutor charged six multiple-murder allegations instead of the one required by this Court. They agree, although respondent's concession is only implicit, that the procedures employed below involved reading the six allegations to the jury six times each. They agree that, while this Court has held that even charging a multiple-murder allegation for each of two murders artificially inflates the seriousness of the defendant's conduct and thereby creates a risk of arbitrary imposition of the death penalty, it has always held the error harmless. Regarding the particulars of this case, they agree that there is no doubt that the jury knew how many murders appellant was actually charged with.

This Court should nonetheless find reversible error here, or at least include the over-charging in any analysis of cumulative prejudice from various errors and other rulings. The precedents on harmlessness are distinguishable because none involved the 36-fold repetition of multiple-murder allegations that occurred here. In addition, the charging practice here suggested to appellant's jury that the prosecutor and court considered each murder to be an aggravated one because of the two multiple-murder special circumstances attached to it, rather than simply acknowledging that the fact of three murders was a special circumstance and a circumstance in aggravation.

The ongoing flouting of this Court's admonitions about the correct

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[1]See AOB 520. Respondent addresses this claim its Argument XI, RB 200.

pleading procedure should give rise to concern about whether simply reiterating the proper procedure is enough. It also suggests that some prosecutors—closer to the realities of jury trials than appellate jurists or attorneys—think juries are in fact subliminally influenced by this kind of repetition. Their judgment regarding the value of persisting in the long-banned practice should not be ignored by this Court.

Respondent replied to none of this. Appellant therefore relies on the discussion in his opening brief.

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XVI[1]

APPELLANT'S DEATH SENTENCE WAS THE PRODUCT OF A TRIAL FATALLY INFECTED WITH UNFAIRNESS AND UNRELIABLE IN ITS OUTCOME

A. Appellant's Entitlement to Reversal in the Absence of a Reliable and Fundamentally Fair Proceeding is Not Dependent on the Existence of Cognizable Error

This is the point in a brief where an appellant typically makes a cumulative-error claim, but appellant is relying on broader principles than the one that trial errors that are individually harmless may cumulatively require reversal. The reality is that rulings, actions, and omissions at trial—whether error or within a trial court's discretion, whether preserved for review or not—can, taken together, deprive a defendant of his or her constitutional rights to a fair trial and a reliable penalty verdict and therefore require reversal. Appellant has explained both why it is necessary to consider this principle here and how the propriety of doing so is supported by authorities from this Court and others.[2] (See AOB 526–530; cf. *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922

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[1]See AOB 526. To the extent that respondent addresses this claim, its response is in Argument XIX, RB 270.

[2]Regarding the role of appellate review in general, in ensuring a fair trial and a reliable penalty judgment, see, e.g., *Neder v. United States* (1999) 527 U.S. 1, 18; *California v. Ramos* (1983) 463 U.S. 992, 998–999; *People v. Stanworth* (1969) 71 Cal.2d 820, 833. Regarding the need to reverse when various circumstances, none necessarily error in themselves, result in a denial of due process, see *Taylor v. Kentucky* (1978) 436 U.S. 478, 486–488, 490; see also *Lisenba v. California* (1941) 314 U.S. 219, 236 (due-process question is not whether valid rules aimed at protecting fairness of trial were adhered to, but whether there was unfairness in a particular case). See *People v. Mendoza* (2000) 24 Cal.4th 130, 162 (discretionary denial of a motion to sever, defensible when made, will require reversal if the trial unfolded in a manner that denied due process); *People v. Chambers* (1964) 231 Cal.App.2d 23, (continued...)

[it is clearly established by U.S. Supreme Court precedent that non-constitutional errors can cumulatively violate due process, citing *Chambers v. Mississippi* (1973) 410 U.S. 284.) Respondent can be fairly characterized as tacitly conceding the point, for respondent nowhere disputes it.

B. Not Only Did Prejudicial Actions Taken at Appellant's Trial Have a Cumulative Effect, But Many Strengthened the Effects of Each Other

Appellant relies on the prejudicial impact of the various trial-court rulings and prosecutorial actions pointed out in his individual substantive claims, for his contention that even if individually harmless or—in some cases, not error or not preserved for review—they cumulatively rendered his trial unfair and the penalty judgment constitutionally unreliable. Moreover, many of these actions had a synergistically negative impact on the fairness and reliability of the proceedings. Appellant explained this synergism in the opening brief with considerable specificity,[3] but respondent replies with a single sentence: "Since every claim of error raised by appellants was either not error, invited, forfeited, or harmless, there is no prejudice to appellants, and thus no cumulative effect." (RB 270.)

This impoverished response merely emphasizes the validity of appellant's position. Even under conventional cumulative-error review, whether a particular

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[2](...continued)
27–28 (antecedent case for rule affirmed in *Mendoza*: despite lack of error or failure to preserve right of review of errors made, overall result denied due process and required reversal). Compare *People v. Crew* (2003) 31 Cal. 4th 822, 839 (prosecutorial error is examined for its effect on the trial, regardless of prosecutor's good or bad faith).

[3]AOB 530–532.

error was harmless when viewed in isolation is beside the point,[4] yet respondent propounds the harmlessness of individual errors as sufficient for affirmance. (RB 270.) And given that appellant's actual contention is that even actions that this Court determines to have been, in respondent's words, "not error, invited, [or] forfeited" (*ibid.*) can and did together create a situation where reversal is required, respondent's labeling some of the challenged actions with that phrase is also beside the point. Moreover, respondent does not dispute appellant's contention that many of the claimed actions had significantly synergistic effects which must be taken into account in a cumulative-error analysis.

Appellant has also pointed out that deeply troubling occurrences at trial other than those raised as appellate issues contributed to making the death verdict unreliable.[5] These are matters that appellant has not briefed as appellate claims because of counsel's judgment that lack of objection makes them more properly habeas corpus issues or—as to two[6]—recognition of the current state of the law as propounded by this Court. Appellant did not make up the concept that consideration of such matters—if they are clear from the record and the underlying legal principles are straightforward—can inform this Court's decision regarding whether to sign off on an execution. He cited *People v. Hernandez* (2003) 30 Cal.4th 835, 877–878, in which, after explaining why cumulative error required reversal of a death sentence, this Court also "note[d] with concern" certain non-appealable events which showed failures of the trial

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[4]*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883; *People v. Hill* (1998) 17 Cal. 4th 800, 845.

[5]AOB 532–536.

[6]The numerous gruesome photographs and the distortion of what amounts to mitigation by instructing the jury with inapplicable and extreme examples of mitigation, like a victim's consent to the homicide.

court and the attorneys to fulfil their duties "to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure." Moreover, as long as the matters not briefed as appellate claims are supported by the record, the principle that this Court should prevent execution of a death judgment resulting from proceedings that cannot be relied on to have produced an appropriate result makes it appropriate to consider them.[7]

Respondent gives this part of the cumulative-unfairness argument far more attention than any other, in an unnecessary argument that this Court should not treat, as claims of error, matters that were not raised as claims of error. (RB 270–271.) Appellant agrees.[8] What respondent does not address is whether the matters raised by appellant should inform this Court's view of whether appellant had a fair trial. Appellant maintains that it should, and respondent, for all its discussion, never actually disputes the point.

But this is the least important part of the cumulative-unfairness-and-unreliability argument. The matters briefed as appellate issues, taken together, created a result that undermines confidence in the penalty-trial outcome, with or without the additional disturbing events at trial.

The decision not to repeat here what was said in the opening brief about how the various actions at trial mutually reinforced the potential prejudice created by each makes the discussion here abstract. Moreover, the current infrequency of executions in California, the time lag between an affirmance in this Court and an execution, the possible drudgery of analyzing claims in

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[7]See cases cited at AOB 527–530 and *People v. Hernandez* (2003) 30 Cal.4th, *supra*, at pp. 877–878.

[8]He does not, however, agree with respondent's implying that appellant did not cite authorities where appropriate. (RB 270–271, quoting *People v. Stanley* (1995) 10 Cal.4th 764.)

lengthy automatic-appeal briefs, and the potential for relief in federal courts can make it difficult to take seriously—as a significant step in deciding whether the state will extinguish a human life—the analysis of this and other claims. Appellant nonetheless implores the Court to "take a liberal view of the technical rules applicable to criminal cases generally [citation] and examine the record with the view of determining whether or not in the light of all that transpired at the trial of the case a miscarriage of justice has resulted." (*People v. Bob* (1946) 29 Cal. 2d 321, 328 [explaining duty of reviewing court in a capital case].) This means seriously holding in mind all the challenged actions at trial and deciding whether the entirety of the proceedings permits confidence in the outcome. Moreover, as for the subset of those actions which the Court has determined to be error, the question is whether the Court can know, beyond any doubt (other than unreasonable doubts), that no juror was influenced in his or her vote by their cumulative impact.

Appellant submits that the answer has to be "no."

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XVII[1]

CALJIC NO. 3.02 CREATES AN UNCONSTITUTIONAL MANDATORY PRESUMPTION THAT AIDING AND ABETTING A ROBBERY IN WHICH MURDER WAS FORESEEABLE IS EQUIVALENT TO AIDING AND ABETTING MURDER, AND COMPARABLE ERROR INFECTED OTHER INSTRUCTIONS

Penal Code section 31, the only authority in this state for imposing accessorial liability for crime under an aider and abettor theory, requires that a defendant have acted with intent to commit or encourage or facilitate commission of the perpetrator's offense, to be guilty of that offense.[2] CALJIC No. 3.02, however, as adapted for the murder charges and several others, told appellant's jury that it was enough that he aided and abetted a robbery of which a murder was a natural and probable, or foreseeable,[3] consequence, rather than that he needed to intend to encourage or facilitate murder. The pattern instruction expresses a doctrine well established in California. This much is undisputed.

Appellant's position, however, is that the doctrine improperly substitutes a mandatory presumption for the statutorily-imposed element of intent to commit, encourage, or facilitate the murder, in violation of his due process and

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[1]See AOB 537. Respondent addresses this claim in its Argument VIII, RB 172.

[2]*People v. Mendoza* (1998) 18 Cal. 4th 1114, 1123.

[3]The instruction mentions only natural and probable consequences, but this Court has held that a jury would understand the expression to be equivalent to a reference to foreseeable consequences. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107; accord, *People v. Medina* (2009) 46 Cal.4th 913, 920 ["to be reasonably foreseeable '[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough . . . .'"].)

jury-trial rights. (U.S. Const., Amends 6 & 14.) This tremendous broadening of the definition of a death-eligible crime also violates the Eighth Amendment's direct proscription on cruel and unusual punishment, as well as its requirement of significant narrowing in the death-eligibility determination.[4] The presumption is that, if murder was a foreseeable consequence of the crime known about and intended by the accessory, knowledge of and intent to encourage or aid the murder are to be presumed as well. Appellant has found no case attempting to explain how such an end run around the intent element, with a presumption that negligence—i.e., acting in the face of a foreseeable consequence—is equivalent to intending that consequence, could possibly be proper. Respondent evidently has been unable to do so, either. Nor has respondent suggested any logic of its own to support the instruction. In fact, the application of the natural-and-probable-consequences doctrine to accomplice liability is the subject of scholarly criticism and has been rejected in the vast majority of American jurisdictions. (*United States v. Wilson-Bey* (D.C. Cir. 2006) 903 A.2d 818, 830–839 (en banc) [collecting authorities].)

Both parties discussed the closest thing to a California case on point, *People v. Coffman and Marlow*, *supra*, 34 Cal.4th 1. However, it is not at all clear that the same contention was made in *Coffman and Marlow*, which listed

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[4]Appellant's Eighth-Amendment rights were not cited in the portion of his opening brief relating to this claim. Given that current United States Supreme Court jurisprudence would not appear to support this part of the claim for one in appellant's position, where there was a jury finding of recklessness (see p. 347, fn. 9, in this brief, below), it would appear that respondent is not disadvantaged by his belated citation of the Eighth Amendment in this context. (See *Tison v. Arizona* (1987) 481 U.S. 137 [states may make accessorial liability with reckless indifference to human life death-eligible].) Appellant therefore asks this Court to consider the Eighth-Amendment question as well.

the arguments that were made and did not include the one made here.[5] As will be shown below, this Court nonetheless made a passing reference to a possible issue about a presumption and concluded that it was not a problem in that case, given the other instructions read to that jury, but the more crucial of those instructions was not given here.

Respondent, who claims that appellant's reading of the case is a "gross misinterpretation," seems to understand the plain language of the opinion through the filter of what respondent would like it to say. Respondent insists that the Court "plainly held that CALJIC No. 3.02, with or without reference to other instructions, did not create an unconstitutional presumptive mental state and correctly instructed on vicarious liability." (RB 174.) What the Court actually said was that the instruction covered the *natural and probable consequences doctrine* correctly—not that it alone handled everything required to explain vicarious liability. The question about the doctrine arose because of a defense contention[6] that the trial court should have explained natural and probable consequences in terms of reasonable foreseeability. After explaining the equivalence of the expressions in lay usage and the lack of authority for the

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[5]The opinion noted that one of the appellants contended that (1) the instruction at issue here "was prejudicially defective in failing to inform the jury that 'natural and probable' means 'reasonably foreseeable'"; (2) the trial court failed to adequately instruct on the use of certain evidence admitted on the issue of intent; and (3) that "the natural and probable consequences doctrine is unconstitutional in capital cases because it predicates criminal liability on negligence, in violation of due process." (34 Cal.4th at p. 107.) Here the claim is not that the negligence standard is an unconstitutional basis for capital liability, although it is, but that the jury was instructed to conclusively presume the statutory element of specific intent from the predicate fact of negligence.

[6]See the previous footnote.

defendant's position, this Court concluded,

> Indeed, in *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535 . . . , the Court of Appeal found sufficient, without inclusion of the phrase "reasonably foreseeable," the instruction Coffman challenges here. We agree with the *Nguyen* court that CALJIC No. 3.02 correctly instructs the jury on the natural and probable consequences doctrine.

(*People v. Coffman and Marlow*, *supra*, 34 Cal.4th 1, 107–108.) There is nothing else in the opinion that could possibly be interpreted to mean what respondent claims it says. And at this point in the discussion, nothing had been said about presumptions.

The next three sentences in *Coffman and Marlow* are the only ones that conceivably pertain to the issue presented here:

> To the extent Coffman contends that imposition of liability for murder on an aider and abettor under this doctrine violates due process by substituting a presumption for, or otherwise excusing, proof of the required mental state, she is mistaken. Notably, the jury here was also instructed with CALJIC No. 3.01, advising that an aider and abettor must act with the intent of committing, encouraging or facilitating the commission of the target crime, as well as CALJIC No. 8.81.17, which required, for a true finding on the special circumstance allegations, that defendants had the specific intent to kill the victim. These concepts fully informed the jury of applicable principles of vicarious liability in this context.

(*People v. Coffman and Marlow*, *supra*, 34 Cal.4th 1, 107–108.) Appellant's position is that *Coffman and Marlow* is distinguishable because there was no specific-intent requirement in the version of CALJIC No. 8.81.17 given to appellant's jury.[7] Respondent maintains, however, that the language about the

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[7]No. 3.01, which contained the specific-intent requirement, is not in itself enough to avoid the error in the instructional package. To the extent that it and the very clear directives set out in No. 3.02 contradict each other, it is (continued...)

related instructions, including one requiring specific intent to kill the victim, was not necessary to the Court's conclusion on the point at issue here.[8] If that were the case, then that conclusion would have been given without any supporting reasoning whatsoever, in the three words, "she is mistaken." This is a strange reading of the opinion and, if correct, would be a thin reed on which to rest respondent's position. Finally, in *Coffman and Marlow*, the jury did find true the special-circumstance allegation, as to which there was a clear intent-to-kill requirement. (*Id.* at p. 108.)

Respondent also erroneously disputes the other premise of appellant's conclusion that *Coffman and Marlow* is distinguishable. Respondent claims that appellant's jury was "in fact instructed similarly to the *Coffman & Marlow* juries." (RB 175.) The version of CALJIC No. 8.81.17 given in appellant's case did not require specific intent to kill for a true finding on the robbery-murder special circumstance under aider/abettor liability. However, respondent claims that the same function was fulfilled by CALJIC No. 8.80.1, "which instructed that, in order to return a true finding on the special circumstance allegations, they had to find that appellants specifically intended to kill the

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[7](...continued)
impossible for a reviewing court to determine which rule the jury applied, and reversal is required. (*Francis v. Franklin* (1985) 471 U.S. 307; see also *People v. Ford* (1964) 60 Cal.2d 772, 796, overruled on another point in *People v. Satchell* (1971) 6 Cal.3d 28. Both cases were cited at AOB 363.)

The reason that the special-circumstance instruction could prevent reversal is that the error would be known to be harmless if the jury rendered another verdict (i.e., on the special circumstance of robbery-murder) for which it *was* unambiguously instructed that it had to find intent to kill.

[8]See RB 174–175.

victims." (RB 175.) Not so. The instruction offered the alternative mental state of reckless indifference to human life, which is a higher standard than negligence but does not equate to an intent to kill.[9]

Respondent does not claim that any error, i.e., offering the jury the presumption that the statutory specific-intent element for aider and abettor liability on any crime is met by evidence that the crime was a foreseeable consequence of the criminal action intended by the accessory, could be found harmless regarding any of the eight counts which it affected. (See AOB 541–542.) Respondent's only harmlessness argument is the erroneous claim that the true findings on the special-circumstances allegations showed intent to kill,

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[9]The instruction read,

> If you find that a defendant was not the actual killer of a human being or if you are unable to decide whether the defendant was the actual killer or an aider or abettor, *you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that such defendant* with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or *with reckless indifference to human life and as a major participant aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of robbery or attempted robbery which resulted in the death of a human being*, namely Joey Mans, Timothy Jones, Jose Aragon.
>
> A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a great risk of death to an innocent human being.

(CT 7: 1629–1630; RT 46: 7075, emphasis added.) Parenthetically, the reason that appellant is not making Coffman's claim about a due-process violation in making him death-eligible on the basis of negligence is that death eligibility may be predicated on being a major participant who acted with reckless indifference.

on the three murder counts. (RB 175.) The guilt verdicts on the three murders and five of the other assaultive crimes must be reversed.[10]

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[10]Respondent likewise does not dispute that, absent the presumption, there was insufficient evidence of accessorial specific-intent on Counts III and IX, barring retrial.

XVIII–XXIV[1]

In the main, Claims XVIII through XXIV present challenges pertaining to the reasonable-doubt instruction, the death penalty statute, and implementing instructions which this Court has rejected previously and which, in general, it rejects summarily on a routine basis. Appellant presents what he believes to be substantial reasons to reconsider each of these holdings. Respondent has replied, in summary fashion, by citing this Court's precedents rejecting the challenges. Appellant therefore relies on the arguments made in his opening brief.

One of those claims, however, calls for more than summary treatment. The contention labeled XXIII.B,[2] regarding the failure to delete inapplicable sentencing factors, presents what appellant believes to be new arguments that this Court has not yet considered, and the next argument, XXIII.C, regarding restrictive adjectives used in the list of potential mitigating factors, contributes to the analysis in "B" as well. Respondent addresses only the latter point,[3] saying nothing about the inapplicable-factors issue. In any event, as appellant made clear in an italicized introductory paragraph in the opening brief, he is definitely not presenting that issue as a "generic" claim,[4] and he seeks full review of it.

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[1]See AOB 543–596. Respondent addresses these claims in its Arguments VI (enactment of special circumstances), VII (reasonable doubt instruction), and XVIII (challenges to death-penalty scheme), beginning at RB 161, 164, and 262, respectively.

[2]AOB 582–586.

[3]RB 265, first two sentences of first full paragraph.

[4]See *People v. Schmeck* (2005) 37 Cal.4th 240, 303–304.

XXV

APPELLANT ROMERO CONTINUES TO JOIN IN ALL CLAIMS OF ERROR RAISED BY CO-APPELLANT SELF WHICH MAY INURE TO HIS BENEFIT, EXCEPT FOR WITHDRAWING JOINDER IN CLAIM II

Appellant Romero previously joined in all claims not raised in the opening brief, but raised by co-appellant Self, which might inure to appellant Romero's benefit. He reserved the right to withdraw, in a later pleading, his joinder as to any particular claim or argument, should such action appear appropriate. (AOB 596.) He hereby withdraws his joinder in Argument II in the Self brief, raising several claims of prosecutorial misconduct.

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CONCLUSION

For all of the reasons stated above, the convictions on counts I, II, III, V, VI, VIII, IX, and X must be reversed, the death judgment must be reversed, and retrial is prohibited on counts III and IX.

DATED: May 12, 2011.

Respectfully submitted,

Michael P. Goldstein,
Attorney for Appellant Romero

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(b)(2))

I, Michael P. Goldstein, am the attorney appointed to represent Orlando Gene Romero, Jr., in this automatic appeal. I conducted a word count of this brief, using the word-processing program used to prepare the brief. On the basis of that count, I certify that this brief is 100,152 words in length, excluding the tables and certificates.

Dated: May 12, 2011

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Michael P. Goldstein