S090602

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LOUIS JAMES PEOPLES, Defendant and Appellant.	AUTOMATIC APPEAL *Death Penalty Case*

Appellant's Reply Brief

Superior Court for Alameda County, No. 135280
On Change of Venue From
Superior Court for San Joaquin County, No. SP062397A

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INTRODUCTION

In his opening brief appellant has drawn attention to the struggles of two juries as they attempted to reach a just sentence. Respondent brushes aside the first jury's efforts to reach a verdict in the penalty phase after six days and twenty hours of deliberations as a meaningless exercise, but there is no dispute that eight jurors voted to sentence appellant to a term of life imprisonment without parole when mistrial was declared. (RB 254; 256; AOB 2; 60 RT 12368-12370; 61 RT 12488.) In the past this Court has not relegated a jury's favorable vote for life to the trash bin, but has carefully scrutinized prejudice when the death penalty has been imposed upon retrial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-44 ['We look very closely at the question of prejudice ... where the death penalty was imposed on a penalty phase retrial after the majority of the prior jury would have voted in favor of sentence of life in prison without possibility of parole.'].)

The majority's favorable vote in the first penalty trial should be afforded the respect it deserves in evaluating claims of prejudice in the penalty retrial here. The first jury to hear the evidence in 1999 was exposed in the guilt phase to many of the asserted errors and misconduct committed there that would plague the retrial of the penalty phase in 2000, and both parties agree the jury in the retrial of the penalty phase heard essentially the same evidence that the first jury heard in both

phases. (RB 60; 146; AOB 20; 26; 64.) When the jury in the retrial of the penalty phase declared impasse – at least three jurors voted for life – over the same period of deliberations as the first jury, and after multiple ballots, the trial court refused to poll jurors, erroneously granted the jury's request for argumentative props used by the prosecutor in argument, rejected a similar request for defense charts, and improperly loaded "dynamite" instructions to "blast" a verdict; after six more days – and injection of extraneous material into deliberations – a death verdict was returned. (*People v. Gainer* (1977) 19 Cal.3d 835, 843; *Arguments IV*; *XVII, post.*)

Appellant submits his assignments of error, assertions of misconduct, and the resulting prejudice, should not be viewed in a vacuum, as respondent would have it, but in the context of the unique record presented. Separately or in combination, the prejudicial effect of errors, constitutional or otherwise, justifies reversal of appellant's convictions and sentence. (*Chapman v. California* (1967) 386 U.S.18, 24; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *People v. Brown* (1988) 46 Cal.3d 432, 467.)*a

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*a. In this reply, appellant addresses contentions made by respondent in detail, but failure to address any particular argument, subargument or allegation made by respondent, or to reassert any particular point made in his opening brief, does not constitute a concession, abandonment or waiver of the point, but reflects his view that he has adequately presented his arguments, and the positions of the parties are fully joined for decision. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

I.

JUDGE PLATT ENGAGED IN EX PARTE COMMUNICATIONS THAT WERE IMPROPER AND DENIED APPELLANT DUE PROCESS OF LAW

As discussed in many of the arguments appellant has raised, Judge Platt revealed a pattern of bias against him and his attorney as the trial progressed. It emerged when Judge Platt sought out lead prosecutor George Dunlap to discuss legal issues related to this "high profile capital case." (RB 107.) When Dunlap was unavailable to talk about strategies for change of venue, Judge Platt engaged San Joaquin County District Attorney Chief of Homicide Lester Fleming in ex parte communications, expressing bias against a venue change – before hearing any evidence proffered by the defense, and, evidently, while defense counsel was applying for financial support to retain a venue consultant. (AOB 92; 94.) Judge Platt engaged in other improper activities – characterized as "chance encounters" by respondent – prompting the pretrial motion to disqualify him on statutory grounds. (AOB 89-93; RB 108.)[1]

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[1] Judicial notice of the *Commission on Judicial Performance* [Inquiry No. 162] has been separately requested. (See AOB 1-2.) Unknown to defense counsel at the time, Judge Platt's improper ex parte communications with other judicial officers and court staff from 1997 through 2000 – the same period in which this case was pending in his courtroom – would become the subject of an investigation in 2001 that led to his removal from office in 2002.

In short, Judge Platt demonstrated early on in the proceedings that he would not be the kind of impartial adjudicator expected to preside over appellant's trial, and the record demonstrates that he did not act as a fair adjudicator. (*People v. Freeman* (2010) 47 Cal.4th 993, 1000 ['A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison* (1955) 349 U.S. 133, 136].)

Not long after appellant's opening brief was filed, as respondent properly points out, this Court decided *People v. Cowan* (2010) 50 Cal.4th 401. (RB 105.) Following the lead of the United States Supreme in *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 129 S.Ct, 2252, respondent relies primarily on *Cowan* to argue that the "due process clause operates more narrowly" than a statutory claim of judicial bias under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)iii, and that appellant has not objectively demonstrated the kind of "extreme facts" that would justify reversal because of the probability of actual bias. (RB 99, 106; *People v. Cowan, supra*, 50 Cal.4th at 456, 457.)

In *Caperton* the high court reversed judgment on the ground that West Virginia's statutory rules for disqualification of an appellate court judge did not adequately protect the plaintiffs to the lawsuit. Respondents had contributed to the judge's campaign for election, but the judge declared himself impartial. The high court did not define "extreme cases," but it referred to those in which due

process "intervention" becomes necessary because they "test the bounds of established , legal principles, and sometimes no administrable standard may be available to address the perceived wrong." (*Caperton, supra*, 556 U.S. at p. 888.)

It is worth noting at the outset that the high court reiterated in *Caperton* that because of the "difficulties" a party often has of showing *actual* bias under most state statutory schemes designed to "maintain the integrity of the judiciary and the rule of law," a party seeking relief from the *appearance* of bias need not rely upon "personal inquiry ... of the judge's determination respecting bias" in order to prevail under the Due Process Clause; the inquiry is an objective one, based on whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias and prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" (*Caperton, supra*, 556 U.S. at pp. 883-884, quoting *Withdrow v. Larkin* (1975) 421 U.S. 35, 47, 95 S.Ct. 1456.) As the court explained, a constitutionally intolerable probability of actual bias exists only when the circumstances "'would offer a possible temptation to the average ... judge to [forget the burden of proof required to convict the defendant, or which might] ... lead him not to hold the balance nice, clear and true between the State and the accused.'" (*Caperton, supra*, 556 U.S. at p. 879, quoting *Tumey v. Ohio, supra*,

273 U.S. at p. 532, 47 S.Ct. 437 [brackets added].) As this Court restated the principles in *People v. Freeman, supra,* 47 Cal.4th at p. 996:

> "[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist '"the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable." ' (*Caperton, supra*, 556 U.S. at p. —— [129 S.Ct. at p. 2259].) Where only the appearance of bias is at issue, a litigant's recourse is to seek disqualification under state disqualification statutes: 'Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.' (Id. at p. 2252 [129 S.Ct. at p. 2267].) Finally, the court emphasized that only the most 'extreme facts' would justify judicial disqualification based on the due process clause. (*Id.* at p. — [129 S.Ct. at pp. 2265, 2266].)"

In Cowan's case the trial judge recognized on the second day of trial that he might have to "'to assess the credibility of [two close friends] who appear to be

central to the prosecution's case,'" and recused himself within a few hours of realizing his friends were named prosecution witnesses. (*Id.*, at 454.) Judge Gildner continued to preside at trial while he assessed the "situation" because he was "'extremely reluctant to disrupt'" the cross-examination of a key prosecution witness, but once discovered he recognized the potential implications for "'the appearance of justice and fairness.'" (*Id.*, at 453.) Cowan claimed in his automatic appeal that Judge Gildner's disqualification had been untimely, and for even the brief period he remained on the case it "violated state statutory law as well as defendant's due process right to an impartial judge under the state and federal constitutions." (*Id.*, at 452.)

The Court held Judge Gildner took appropriate action when he disqualified himself. Had Judge Gildner decided to remain on the case to rule on issues related to his friends' testimony, the claim might have presented "extreme facts" and the appearance of bias might not have been "too remote and insubstantial to violate the due process clause." (Id. at 485.) But Judge Gildner did not hear any testimony or rule on motions related to his friends "during the brief time he presided" at trial. (*Ibid.*)

Cowan is readily distinguishable from this case for several reasons, and the issue remains whether the "probability" of bias is established from the evidence

presented: "Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.' [In re] *Murchison*, 349 U.S. [133], at 136." (*Caperton, supra,* 556 U.S. at p. 886.) First, unlike Judge Gildner, Judge Platt did not disqualify himself. Judge Platt not only denied he was biased, and refused to recuse himself, but he presided unfairly over appellant's trial for the next two years (1998-2000). (See also, *Arguments II-III*; AOB 98-165.) Second, admitting the ex parte communication with the supervising attorney for the prosecuting party to discuss a critical pretrial issue, Judge Platt defended his actions on the rationale that it was "an aid to scheduling." (3 CT 805.) Unlike Judge Gildner, who immediately recognized the potential of the *appearance* of impropriety from his friendship with *witnesses* for one party, Judge Platt took the initiative of seeking out a *party* to the lawsuit. Third, Judge Platt searched out the intentions of one party without the knowledge of the other party, which any objective observer would consider as compromising the trial court's impartiality to both sides of venue or any other issue. Judge Martin, who heard the statutory disqualification motion, agreed it was improper, but found it harmless. (1 RT 145-150; AOB 92-94; RB 103.) Respondent argues there is nothing "extreme" about these facts to justify reversal for violating appellant's constitutional due process rights because

defense counsel twice cited "the 'appearance' of bias or impropriety of the judge [Platt] (1 RT 137, 141)," but neither respondent's argument nor *Cowan* resolves the issue presented. (RB 104-106; *Id.*, at p. 457.)

Contrary to respondent's claim of a "chance encounter" in a hallway at the courthouse, Judge Platt admitted in his declaration that he had sought out George Dunlap, the trial deputy assigned as prosecutor in a "high profile" death penalty case, to discuss potential venue issues with him. (RB 100; 107-108.) After failing to locate Dunlap, Judge Platt approached Lester Fleming, Chief of Homicide for the San Joaquin County District Attorney's office. (3 CT 804-05; RB 100.) Fleming declared that Judge Platt approached him "at the northwest corner of Main and San Joaquin Streets on the sidewalk" around the time of preliminary hearing had been held. (3 CT 872; AOB 90 [May-June, 2008].) Private Investigator Michael Kale elaborated: Fleming told him Platt said he would be "scrutinizing, very closely, any motion for a change of venue and would not be granting it unless it was absolutely necessary." (3 CT 887; RB 102; AOB 90-91.)

Although respondent does not give credence to this evidence as "extreme facts" under *Cowan* and *Caperton*, as pointed out previously, Judge Platt's in-court statements on August 7, 1998, regarding change of venue issues corroborate what Fleming told Kale about prejudgment of a potential venue motion: "I'm not

excited about going anywhere .... [as m]y practice has been and will be ... to attempt to get the jury here ..." (RT 1: 18; 20; AOB 91, ftn. 91.) Similarly, Judge Platt's interaction with Judge Demetras, also probably in early August, 1998, demonstrates the ex parte communication with Fleming was not an isolated incident or a "chance encounter." (3 CT 767; AOB 91-92.) This second, closely connected, off-the-record ex parte discussion on change of venue with the judge (Demetras) assigned to oversee confidential applications for ancillary defense funds, coupled with the Fleming "encounter," provides ample evidence of "extreme facts" and unfairness. (3 CT 805; 1 RT 80; see also AOB 94, ftn. 60.) The unreported conversation with Carol Peoples' attorney Patrick Piggott at the bench during the preliminary hearing, and out of the presence of the parties' attorneys, simply adds to the appearance of judicial unfairness against appellant in pretrial proceedings. (CT 4: 805; 887; AOB 93.)[2]

Appellant submits Judge Platt's conduct before trial objectively demonstrated the intolerable probability of actual bias under the circumstances "'would offer a

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[2] As discussed in detail at AOB 91-94, on August 7, 2008, Judge Platt disclosed in a special proceeding he called that he had been "approached regarding [defense] funds" for experts on jury selection and change of venue, so it is unlikely the conversation with Judge Demetras occurred as late as September 16, 2008, as Judge Platt declared in opposing the disqualification motion. (RT 1: 18)

possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.'" (*Caperton, supra*, 556 U.S. at p. 879, quoting *Tumey v. Ohio, supra*, 273 U.S. at p. 532, 47 S.Ct. 437.) It is well settled that "[n]o matter what the evidence against [a defendant], he ha[s] the right to have an impartial judge, one whose motives and interests are neutral, not to convict." (*Tumey v. Ohio* (1927) 273 U.S. 510, 535; *Arizona v. Fulminate, supra,* 499 U.S. at p. 310; *Gray v. Mississippi* (1987) 481 U.S. 648, 668 [right to "impartial adjudicator"]; *People v. Brown* (1993) 6 Cal.4th 322, 333; *People v. Freeman, supra*, 47 Cal.4th at p. 1000.) Heightened scrutiny to ensure an impartial adjudicator presides at trial is critical not only because the trial judge has the responsibility to reweigh the evidence before imposition of a sentence of death, but because "the penalty of death is qualitatively different from all other sentences of imprisonment however long." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) It violated appellant's state and federal rights to due process of law to allow Judge Platt to remain as the trial judge presiding over the trial. Accordingly, judgment should be reversed. (*Arizona v. Fulminate* (1991) 499 U.S. 279, 309-310; *Gomez v. United States* (1989) 490 U.S. 858, 876; *People v. Cahill* (1993) 5 Cal.4th 478, 501.) *Stringer v. Black* (1992) 503 U.S. 222, 230-

232; *Dawson v. Delaware* (1992) 503 U.S. 159; Pen. Code, § 190.4, subd. (e); U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. 1, §§ 1, 7, 13, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *In re Winship* (1970) 397 U.S. 358, 362-364; *Brinegar v. United States* (1949) 338 U.S. 160, 174; *People v. Cahill, supra,* 5 Cal.4th 478, 501; *People v. Brown, supra,* 6 Cal.3d at p. 333.)

II.

APPELLANT PROPERLY PRESERVED HIS CLAIMS FOR APPEAL BY MOVING FOR MISTRIAL AND TO RECUSE JUDGE PLATT, AND HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HE WAS NOT AFFORDED AN IMPARTIAL ADJUDICATOR AT TRIAL.

In his opening brief appellant demonstrated a multitude of reasons why Judge Platt should have been recused or recused himself from presiding over this particular trial. He had exhibited stress-related symptoms of hypertension and exhaustion, admitting at one point that his wife's business, his mother's illness, the commute from Stockton to Oakland, and other undisclosed personal matters, had intruded upon his health, and may have affected his professional life. (52 RT 10815-17; AOB 103-104.) Before the first penalty phase began, court staff, defense counsel, and jurors, were on notice – because Judge Platt told them – that he had suffered "a [recent] mild heart attack." (52 RT 10701.) Thus, as grounds for recusal, defense counsel cited Judge Platt's repeated and unjustified "volatile" outbursts and "visceral" reactions towards him as possibly related to his physical condition, expressing concern that not only might the jury attribute Judge Platt's health problems to Fox – and against appellant – but that he (Fox) might inadvertently contribute to Judge Platt's heart failure if he continued in his efforts

to zealously advocate for his client; with good reason, Fox reflected, "I'm walking on egg shells." (52 RT 10818; 8 CT 2233; AOB 102.)

Despite Judge Platt's disclosure to the jury, he attempted to minimize his condition, admonishing Fox "absolutely, positively, unequivocally, without question" his health was "not an issue" that should have any impact on counsel or appellant; nonetheless, his clerk was asked to be vigilant for signs of a medical emergency. (52 RT 10818; 10821-22; 10866; AOB 104.) In fact, despite Judge Platt's protestations of good health – physician's letter included – he suffered a heart attack within days of "ordering the motion [to recuse] and affidavit [of defense counsel] stricken" from the record as baseless. (52 RT 10866; 10892; 53 RT 10929; 10977; AOB 106-107.)[4]

Notwithstanding the record of defense counsel's efforts to document the interrelated claims of bias and physical incapacity as grounds to recuse Judge Platt and for mistrial, respondent asserts that appellant's arguments of trial court error

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[4] As pointed out, Judge Platt subsequently referred the motion to the presiding judge for Alameda County Superior Court (Judge Sarkisian) for review and decision (52 RT10866), where it was ultimately not stricken, but decided to be "moot, in view of Judge Platt's physical condition." (56 RT 11338; AOB 109.) As discussed following, defense counsel also moved for mistrial before newly assigned Judge Delucchi on the ground Judge Platt's disclosure to the jury of his physical condition during trial had prejudiced appellant; Judge Delucchi denied the motion. (54 RT 10993-94; see also, AOB 108.)

are both moot and forfeited. (RB 114-116.) Citing *People v. Scott* (1997) 15 Cal.4th 1188, 1207 (RB 116) to support the forfeiture argument, and no case authority for the "mootness or lack of justiciability" (RB 115 fn. 19) argument, respondent concludes "appellant's contention that the mistrial and recusal motions were improvidently denied is moot as to the first penalty phase and forfeited as to the penalty retrial." (RB 116.) Respondent tells us this is so because "there was no penalty verdict from this [first] jury" (RB 115), and "defense counsel did not move to have Judge Platt disqualified once he was assigned to preside over the penalty retrial." (RB 116.)

First, it is true that counsel did not file a new motion to recuse Judge Platt once he returned to the bench in November 22, 1999, after the first jury had been unable to reach a unanimous verdict in the penalty phase on September 27 and Judge Delucchi declared a mistrial. However, Fox had argued to Judge Sarkisian on September 1, 1999 that while the recusal motion might be "moot," as County Counsel Wooten suggested (8 CT 2255; 56 RT 11337), when Judge Delucchi had been assigned the case, he had moved for a mistrial on the ground that a different judge could only take a verdict, but could not decide modification issues under Penal Code section 190.4, subdivision (e): "I just don't want to be doubly prejudiced if Judge Platt returns to health [a]nd I will object if he comes back to

preside over the trial and replaces Judge Delucchi." (56 RT 11338.) Recognizing that Judge Platt's "physical condition" had rendered him incapacitated and unable to continue, Judge Sarkisian denied the recusal motion as moot. (56 RT 11338.)[5]

Respondent relies primarily upon *People v. Scott, supra,* 15 Cal.4th at 1206, to support the position. Scott, however, *never* moved to recuse the trial judge. He argued on appeal that the trial judge should have recused herself *sua sponte* because she had prior knowledge of "relatively insignificant" statements made by a witness known to trial counsel. *Scott* is readily distinguishable from the present case in that defense counsel did move to recuse Judge Platt not once but twice – before trial and at the beginning of the penalty phase. Defense counsel filed motions and argued repeatedly for recusal and mistrial based upon the trial judge's physical incapacity, bias, and the prejudicial impact disclosure his heart condition had upon the jury and his ability to advocate for appellant. While, like Scott, appellant argues on appeal that Judge Platt should have recused himself in

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[5] When Fox argued for a mistrial before Judge Delucchi, citing *People v. Espinoza, infra,* 3 Cal.4th 806, discussed following, he argued that the mistrial motion before Judge Platt was based on Judge Platt "put[ging] me in a very compromising position" when he "told the jury that he had suffered a heart attack." (54 RT 10993; see also, 53 RT 10949-10952; AOB 108.) Judge Delucchi expressed "hope that Judge Platt will be back and that he can deal with the sentencing" if a death verdict were returned (53 RT 10949), but denied the motion for mistrial on both grounds. (53 RT 10951-52; 54 RT 10993-94.)

light of his condition, and the impact it had upon the jury and defense counsel, the principle of waiver, of attempting to "raise the issue for the first time on appeal," is not as clear here. (*Id.*, at p. 1207.) Fox's repeated protests made up to the point his motion to recuse was declared "moot" were sufficient to preserve the issue, and the motion should have been granted, particularly in view of the fact that Judge Delucchi appears to have been assigned only up to the point where Judge Platt returned to health. (53 RT 10949 [Judge Delucchi expressed hope Judge Platt would return for sentencing if death verdict]; 54 RT 10977 [Judge Delucchi informed jury of hope Judge Platt would "be able to come back"]; AOB 108.)

Further, respondent relies on *People v. Gonzales and Solis* (2011) 5 Cal.4th 254, 314, but it is inapposite for similar reasons. (RB 117.) Defendants failed to raise the specific issue of racial bias in voir dire, and did not move the trial court to reopen voir dire once they were aware of racial bias as a potential issue; thus, the defendants "forfeited this aspect of their [cognizable] claim" on appeal. (*Id.*, at p. 314.) Respondent acknowledges that defense counsel cited *People v. Espinoza* (1992) 3 Cal.4th 806 to support his argument that recusal was not entirely moot simply because Judge Platt had become physically unable to perform his duties *after* filing the mistrial and recusal motions at the commencement of the penalty phase in August 1999. (RB 113-114.) As respondent also notes, defense counsel

not only moved to recuse Judge Platt, and moved for mistrial due to the prejudicial disclosure of his condition to the jury, but on September 1, 1999, he attempted to preserve his recusal motion notwithstanding Judge Platt's medical emergency, in part relying on *Espinoza*. (56 RT 11338.) One week later, Fox attempted to resurrect the motion to recuse Judge Platt, as respondent notes (RB 114), because "[I]t wasn't a moot issue [and] should have been granted ..., [and] we feel that my client's due process rights were violated by having Judge Platt preside over the proceedings." (58 RT 11954-11955.) Unlike Soliz, Gonzales, or Scott's counsel, appellant's trial counsel objected repeatedly and on multiple grounds to preserve the issues for review. (See AOB 98-99; 112.)

Proceeding to the merits of appellant's arguments for reversal respondent cites *People v. Gamache* (2010) 48 Cal.4th 347, 361, for the notion that the "trial court's decision to deny a recusal motion, even in a capital case, is reviewed for abuse of discretion." (RB 116). *Gamache*, however, involves a review of the trial court's discretionary denial of defendant's motion to recuse the entire San Bernardino County District Attorney's Office under Penal Code section 1424, and has nothing at all to do with judicial review of recusal based upon the physical incapacity of a judicial officer, or for denial of due process as a result of prejudice exhibited by the trial judge. (*People v. Brown* (1993) 6 Cal.4th 322, 333; AOB

111-112.) Relying again on *People v. Gonzales and Soliz, supra*, 52 Cal.4th at p. 314, respondent claims "denial of a motion for mistrial is also reviewed under the deferential abuse-of-discretion standard," but points out "the gravamen of appellant's motion for a mistrial was essentially the same as the motion for recusal." (RB 117.) Contrary to respondent's argument (RB 119), appellant is not engaging in "sheer speculation" to establish "predicate error" as referenced in *People v. Staten* (2000) 24 Cal.4th 434, 448, fn. 1, but pointedly objected to Judge Platt's misconduct – in the context of his comments on his physical condition – on federal and state constitutional grounds during trial, and repeatedly protested against what he perceived was judicial misconduct. As a result, all of his arguments are properly presented on appeal, and reversal should be granted on the grounds asserted, because state and federal constitutional rights to due process, fair trial, present a defense, confrontation, impartial judge, and non-arbitrary guilt, death-eligibility and penalty determinations were violated. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Calif. Const. Art. 1, §§ 1, 7, 13, 15-17; *Tumey v. Ohio* (1927) 273 U.S. 510; *Beck v. Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Gray v. Mississippi* (1987) 481 U.S. 648, 668; *Gomez v. United States* (1989) 490 U.S. 858, 876; *Arizona v. Fulminate* (1991) 499 U.S. 279, 309; *People v. Cahill* (1993) 5 Cal.4th 478, 501; *People v. Brown* (1993) 6 Cal.4th 322, 333.)

III.

BY ITS UNREMITTING ABUSE OF DEFENSE COUNSEL AND BIAS AGAINST APPELLANT THE TRIAL COURT DID NOT ACT AS AN IMPARTIAL ADJUDICATOR DURING THE PROCEEDINGS BELOW AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellant has not challenged the inherent or statutory authority of trial courts to control proceedings in "the efficacious administration of justice." (RB 122; AOB 115-118.) As this Court recognizes, however, "the impartiality of the adjudicator goes to the very integrity of the legal system." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1244.) When Judge Platt announced during the guilt phase of trial that he was "absolutely" determined to control defense counsel's life to the point of him "not taking a shit" without court approval (46 RT 9524), and when he described pinpoint instructions proffered during the retrial of the penalty phase as presuming jurors "are so god damned stupid ... [they] have their heads so far up their ass that they cannot understand the issues at hand" (RT 92 19441), the judicial officer assigned to appellant's case hardly provided the kind of "dignified and courteous ... speech" indicative of a judicial officer intent on the "performance of his duties ... that would reasonably be perceived as [un]bias[ed] ...." (AOB 117; California Code of Judicial Ethics, Canon 3B (4)-(5).)

Glossing over details, respondent argues, "when the record is reviewed in its entirety ..., Judge Platt ensured that the guilt phase and penalty phase retrial were conducted in a manner that was fair to appellant," did not project to the jury an alignment with the prosecution or disbelief in the defense case, and did not exhibit contempt for defense counsel and appellant by unilaterally deciding to hold the sentencing proceedings in San Joaquin County Superior Court on August 4, 2000, rather than Alameda County Superior Court where the case had been transferred for all purposes upon change of venue on March 9, 1999. (RB 120.)[5] Respondent's position is belied by the record and is unsupportable.

In the effort to justify abuses directed at appellant and his attorney, respondent deflects attention away from enumerable incidents by referring to a "clear" record of Judge Platt's futile "attempt[s] to control" an out-of-control prosecutor and by belittling appellant's claim of Judge Platt's "'pattern of transference' (AOB 135-146)" of blame to defense counsel. (RB 120; 122.) Respondent attempts to rationalize Fox's depiction of Judge Platt's often

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[5] As discussed following, though properly served, neither the Attorney General nor the San Joaquin County District Attorney objected to – or appeared – for the "post-trial" (RB 134) correction proceedings in 2007-2008, all held in Alameda County Superior Court, the proper jurisdiction for trial court proceedings after change of venue. (See, Suppl. CT 63: 16928-17065; see also AOB 160-161, *Argument II.*)

"visceral" (52 RT 10818) responses to him on the ground that the trial court repeatedly "lectured, admonished, or sanctioned" Dunlap as well. (RB 120; 122-123; see AOB 102 [*Argument II*]; AOB 205-288 [*Argument V*].) But any trial judge would have been entirely justified in sanctioning Dunlap on the record in this case; the same cannot be said for Fox, who swore under penalty of perjury that he had never been sanctioned for behavior in or out of the courtroom in fifteen years practicing law. (CT 13 3391; AOB 115, fn. 71.)

Citing an incident where Judge Delucchi chided both counsel for acting like "children" (60 RT 12325) to illustrate Fox's so-called "combative" style – allegedly equal to Dunlap's unrelenting misconduct – is as misleading as it is inapt to show Judge Platt's "even-handed" (RB 121) treatment of defense counsel. (RB 123-124.)[7] The state claims Fox's "combativeness also prompted Judge Delucchi to make a wry remark about counsel's proclivity for making objections. (60 RT 12314.)" (RB 123-124, fn. 24.) Thus, "this 'veteran jurist' (AOB 132, fn. 81) was as challenged by the conduct of [defense] counsel" as was Judge Platt. (RB 123-

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[7] The characterization of counsel acting like "children" occurred when Dunlap repeatedly interrupted Fox during an argument on the admissibility of portions of a transcript jurors had requested for read back; Fox twice implored Dunlap to "let me finish." Judge Delucchi *admonished Dunlap* to "let him [Fox] say what he's got to say, and I'm [sic] make my rulings." (60 RT 12325: 2-6.)

124, fn. 24.) Context belies respondent's assertion.

Before the Noon recess on September 20, 1999, while jurors were deliberating in the penalty phase of trial, Judge Delucchi exhibited his sense of humor during colloquy with Fox after jurors had become involved in a dispute amongst themselves. Fox "ask[ed] the Court" not to allow cameras to record the proceedings while Judge Delucchi actually excused one juror and substituted another. (60 RT 12307: 3.) Judge Delucchi readily agreed with Fox, *after* overruling *Dunlap's* spurious objection "we're being dictated by what Mr. Fox [misleadingly] requests ..., intimat[ing] on the record that there's this big ominous, chilling effect...." (60 RT 12307: 11-13.) Judge Delucchi ruled, "this is not the verdict ... not the argument," where cameras are allowed, but "on my watch" if defense counsel is "concerned" about it then, as Judge Delucchi ruled, cameras would not be allowed during the substitution of jurors. (60 RT 12307: 15-17.)

Judge Delucchi then prodded Fox about sending "bread and water" to jurors for lunch, "because of all the trouble they caused us this morning,"and Fox jokingly "object[ed] to that, Judge." (60 RT 12308: 8-9.) Judge Delucchi confirmed with his bailiff, "[W]e've already made arrangements for lunch." (60 RT 12308: 13.) And when all parties and jurors returned after lunch, Judge Delucchi advised both counsel he would admonish jurors again not to "take into

account any media accounts of this trial ... [b]ecause we discharged a juror, and I don't want them to read anything they may have said." (60 RT 12314: 17-20.) He then returned to his banter with Fox, suggesting he would ask jurors if they wanted to go home for the day:

" The Court: You want to object to anything, Mr. Fox? Mr. Fox: No.

The Court: Just checking. Mr. Fox: Thanks, Judge."

(60 RT 12314: 23-26.)[8]

Far from respondent's depiction of Fox as a contributing partner in Dunlap's rude and reckless behavior, there is no valid comparison to be made between Dunlap's unrelenting misconduct and Fox's efforts to defend his client at trial.

Moreover, conspicuously absent from respondent's analysis of appellant's claims of judicial abuse towards his attorney is the fact that defense counsel was so disturbed by Judge Platt's invective *in the presence of the jury* in the guilt

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[8] Far from being considered "combative," in overruling Dunlap's request for sanctions, because he once again took "umbrage to counsel's objections" during closing argument in the first penalty trial, Judge Delucchi saw no offense but cited Fox's "responsibilities" to preserve a record as "different" from the prosecutor's duties: "It's a mine field for defense counsel," and "if he doesn't do that [object], on appeal, that's deemed to have been waived." (59 RT 12156: 6-9; 15-17.)

phase of the trial that he felt like he was "walking on egg shells" before the jury. Thus, he felt compelled to file a motion to recuse the trial judge on August 19, 1999, before the first penalty phase began:

> " I've seen you get very, very angry, to the extent where you lose control. You've said things on the record that you regret. And you've corrected, like the use of the word 'shit' twice in one day's proceedings. You've said that you're on medication.
>
> .....
>
> I have to constantly weigh what's my demeanor towards the Court, if what I'm going to say, if it might offend the Court if it is objected to. The Court, for instance, yesterday, was upset -- not upset, but had to keep saying, 'Sustained. Mr. Fox, please move on.'" (52 RT 10818-19)

Indeed, on August 17, when describing the atmosphere in the courtroom during trial as akin to practicing law in the "deep south" (51 RT 10671), Fox was not railing against racial prejudice behind closed doors, but was protesting Judge Platt's palpable hostility towards him in the presence of the jury. Appellant is not attempting to water down Fox's belief that his client's rights to a fair trial and due

process of law were being compromised by Judge Platt's vitriol directed at him. Fox's apology to Judge Platt for the "deep south" remark occurred the next morning (August 18) when Judge Platt rebuked him for an alleged "assault on the integrity of the Court to liken this Court to a 1960's judicial proceeding ... [and] it won't be tolerated." (52 RT 10699; see AOB 154-55.) Had Fox not apologized for this "transgression" (RB 126-127), respondent implies appellant would be in a better position to argue judicial abuse and prejudice on appeal, but Fox recognized he had rudely addressed the court out of frustration and apologized accordingly.[9]

In point of fact, the day after Fox apologized, he resorted to the extreme measure of moving to recuse Judge Platt. There is no reason to believe Fox's description of feeling like he was "walking on eggshells" before the jury due to

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[9] Respondent makes much of Fox's (three) other isolated "apologies" cited as evidence of the good will between defense counsel and Judge Platt, and for a lack of prejudice during the course of two lengthy trials: 1) April 30, 1999, during voir dire before the guilt phase of trial, Fox apologized for a "remark" he made about "time constraints" in the presence of a prospective juror (17 RT 3279-80); 2) April 11, 2000, Fox "apologized" to court and counsel because of a "slip" he had made in front of the jury with respect to scheduling during the retrial of the penalty phase, and he admitted it had been "wrong" (84 RT 17706); and, 3) citation to "81 RT 16886-16887" is inaccurate, as pp. 16686-87 are in volume 82, and those passages relate to record correction; appellant has been unable to locate a third so-called "transgression" or "apology" during the two trials. (RB 127.)

Judge Platt's "volatile" manner and "visceral" reaction to him throughout trial changed from one day to the next, or somehow became sanitized once the jury entered the courtroom, or that it changed during the retrial of the penalty phase. (52 RT 10818.) Jurors could not have been oblivious to Judge Platt's bias against defense counsel and appellant in either trial.[9]

Indeed, the motion to videotape the retrial of the penalty phase began shortly after January 3, 2000, when Judge Platt refused to consider co-counsel Aron Laub's request for a trial date – due in part to Michael Fox's illness – later than the one requested by the prosecutor. It did not arise out of defense counsel's polite appreciation for Judge Platt being "very gracious with the voir dire process" before the first trial (17 RT 3279-80 [April 30, 1999]), but arose out of the cumulative experience during trial (June-August 1999), and no doubt because of the $100 sanction imposed on Fox during his appearance on November 29, 1999, the first appearance after Judge Platt's heart attack on August 19, 1999. As will be recalled, Judge Platt repeatedly fined Fox for minor "offenses" during the guilt

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[9] Respondent incorrectly notes defense counsel did not challenge the assignment of Judge Platt for the retrial, and the issue of recusal was not revisited after it was denied as "moot." Whether recusal was waived is addressed in reply *Argument II, ante*, but Fox also took the drastic step of requesting to videotape the retrial proceedings in order to preserve Judge Platt's demeanor.

phase (AOB 8; 119-121; 130-132), and when Fox returned from his own "'stress-related'" illness, Judge Platt immediately accused Fox of not following informal orders and for preparing corrections on a different reporter's transcript from the guilt phase of trial (1999). As noted, once again – without explanation – Dunlap failed to appear at that correction hearing, and co-counsel, Thomas Zeigler, was unable to supply answers to the court's questions regarding transcription of words spoken by Dunlap during the first trial; Dunlap's absence was not mentioned by the court and it did not sanction the prosecution for being unprepared to proceed with corrections. (61 RT 12448-49; 12511; AOB 132-133; 134-135; 146-152.)

Respondent's endeavor to suggest Fox displayed sanguinity with Judge Platt presiding over the retrial of the penalty phase, citing Fox's concern for "loquaciousness" (RB 126, ftn. 27) as possibly offensive to the court, is also taken completely out of context. True, Fox appeared to be contrite about his apparent wordiness shortly before the first jury voir dire began on March 29, 1991 (9 RT 1881), but by the time of the retrial of the penalty phase (December 1999) he had long since realized the necessity of making a record of Judge Platt's misconduct and unwillingness to fulfill the role of an "impartial adjudicator" essential to

appellant's right to a fair trial. (*People v. Sturm, supra,* 37 Cal.4th at 1244.)[10]

Similarly, citing six expressions of defense counsel's gratitude for Judge Platt's "consideration, graciousness, and fairness" (RB 126) is as misleading as characterizing Judge Platt's abusive conduct towards Fox as normal "'manifestations of friction between court and counsel ..., virtually inevitable in a long trial.'" (*People v. Blasher* (2011) 52 Cal.4th 769, 825 [citation omitted]; RB 129.) Jokes and laughter are as much a part of the human experience in jury trials as are discourse and tears, but neither excuses abusive judicial conduct. (RB 129.) A wisecracking juror's spontaneous "'objection, argumentative'" during the guilt phase (40 RT 8393), uttered in response to Dunlap's relentless tactic of asking improper questions, is good for a laugh, but it does not excuse Dunlap's – or jurors' – misconduct. (See AOB 215, ftn. 120; see AOB 223-246 [*Argument V*] AOB 558-575 *[Argument XVII].*) Thus, respondent's examples cited to show defense counsel's *gratitude* for Judge Platt's "consideration, graciousness and

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[10] Respondent incorrectly asserts that "appellant neglects to mention" Judge Platt's courtroom bailiffs "provided declarations that directly refuted defense counsel's assertions that the court yelled at counsel" on his first day in court after the mistrial. (RB 131.) In fact, appellant referred to the declarations filed by the bailiffs, but pointed out that his clerk and reporter apparently refused to sign similar declarations, even though Judge Platt promised they would do so to support him. (See AOB 153, fn. 91.)

fairness" (RB 126) to mitigate judicial misconduct are misleading to say the least.[11]

Citing Fox's agreement with Judge Platt's summary of Dr. Bronson's estimate of the number of published pretrial articles as "sound[ing] fair" (4 RT 807: 1) is scarcely compelling evidence to show that he countenanced Judge Platt's judicial temperament for "fairness." (RB 126 [incorrect cite to RT 806].) In anticipating the penalty phase after the jury returned guilty verdicts on August 11, 1999, Fox again "thank[ed] the Court for admonishing the jury ... not to form an opinion or discuss it with anyone, including their family," providing little evidence of an expression of gratitude for judicial fairness, as respondent claims. (49 RT 10255; RB 126.) Saying "thank you" to Judge Platt for following the law

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[11] The most experienced lawyers may express gratitude for the opportunity to address a tribunal, hoping appeasement will pave the way for better relations in the future, but it does not mean counsel sanctions abusive judicial treatment. For example, citing as an example of "thank[ing] the court for its ... graciousness" (RB 126), when defense counsel, Aron Laub, "thanked" the court on March 27, 2000, for "allowing [him] the opportunity to argue ... fully" for an expansion in the retrial of the penalty phase of Dr. White's testimony to include statements of Portbury and Lamson with respect to molests by Frye, his exclamation *followed* the court's admonishment of Fox and Laub for both attempting to argue the same issue, a "policy henceforth" prohibited (82 RT 16987: 19; 17020; see also, AOB 451-454 [*Argument XI*].) Laub's expression is hardly a ringing endorsement of Judge Platt's "fairness" towards defense counsel.

was a no more than counsel's recognition of appellant's right to be free from jury prejudgment of sentence after returning guilty verdicts; other excerpts cited are equally unpersuasive, and none of respondent's selections redresses the countless examples of judicial abuse cited in *Appellant's Opening Brief.*[12]

Moreover, respondent "suggest[s] there is no obligation on the part of the trial court to conduct *post-trial proceedings* in the venue [Alameda County] where the trial proceedings were conducted," and contends that removal to San Joaquin County was not indicative of judicial prejudice towards appellant. (RB 134; emphasis added; AOB 162.) Arguing that "venue change to Alameda county pertained only to the selection of the jury and the trial proceedings," respondent claims that only jury selection and witness testimony are required to be held in the

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[12] As will be recalled, Fox was required to start the defense case immediately after the prosecution presented its evidence in retrial, and because Dunlap's cross-examination of Dr. Wu had been extensive during the first trial, he had no way of predicting how long Dunlap would take to examine Dr. Wu the second time around; due to demands of coordinating witness schedules, litigating other unresolved issues, jury instruction conferences, etc., Fox was simply expressing relief for *any* time granted. (84 RT 17583-17590; 17706.) After all, the court had denied his motions for continuance. (See AOB 525-526 [*Argument XV*].) Respondent double counts this "apology" as an erstwhile "transgression" (RB 126-127) and an expression of "gratitude," but Fox merely "thanked" the court for a break in the defense case to accommodate everyone's schedules. (See also 47 RT 9798-99 [Fox "appreciated" an extra day to propose defense instructions after working "seven days a week" on the case].)

venue where the case has been transferred, though authority cited is dubious and not the basis for the transfer. (RB 133.) Judge Platt said he had taken into account the convenience of "defense ... witnesses" – none participated in sentencing proceedings – and that he relied upon the unexamined and unverified opinion of a court clerk in deciding to transfer appellant to San Joaquin County to impose sentence. (RB 133-134; AOB 161; 97 RT 20593-20594.) Judge Platt had no viable basis to unilaterally transfer the case back to San Joaquin County after the San Joaquin County District Attorney had stipulated to the change of venue due to the obvious local prejudice against appellant; reliance upon the untested hearsay opinion of an administrative clerk as to what an unnamed Judicial Council source may have said was acceptable did not provide a legitimate reason for removal from Alameda County.

Similarly, to say appellant "does not cite to any portion of the August 4, 2000, sentencing record – in particular, the court's findings on the motion to modify the death verdict (97 RT 20664-20670) – in support of his argument that the court was not able to independently weigh the evidence and determine the propriety of imposing the death penalty" (RB 132), is disingenuous. Judge Platt did not exhibit the kind of "requisite independence" (RB 132) required under Penal Code section 190.4, subdivision (e). As pointed out (AOB 159-160), Judge

Platt not only ignored the fact that one jury had voted 8-to-4 for life imprisonment after deadlocking from six days of deliberations, but he devalued the "drop-in-the-bucket" deliberations of the retrial jury, "find[ing] the *overwhelming* weight of the evidence supports the jury's verdict of death." (97 RT 20670; emphasis added; see AOB 160.) The evidence was anything but "overwhelming" to a substantial number of jurors who had struggled with the appropriate punishment in both trials. Only a deeply biased adjudicator could have made such a finding on the record presented here. As discussed above, all "post-trial proceedings" (RB 134) with respect to perfecting the record on appeal occurred in Alameda County Superior Court, because change of venue transferred *all* records pertaining to the case to the proper jurisdiction for all purposes under the law. (AOB 157-160; CT 63.) Thus, Judge Platt exhibited bias against appellant throughout the proceedings below, including his decision to conduct sentencing proceedings in San Joaquin County, and by the time of the sentencing proceedings he was not capable of independently weighing evidence and determining the propriety of the death penalty.

For the forgoing reasons, appellant's rights under state and federal constitutions to due process of law, to fair trial, to present a meaningful defense, to confront and cross-examine witnesses, to reliable guilt and penalty determinations, effective assistance of counsel, as well as his right to be free from cruel and

unusual punishments, were violated, and judgment should be reversed, because his trial was heard and he was sentenced to death by a judge who was not fair and impartial, creating a "structural defect in the constitution of the trial mechanism..." (*Gomez v. United States* (1989) 490 U.S. 858, 876; *Arizona v. Fulminate* (1991) 299 U.S. 279, 309-310; *Tumey v. Ohio* (1927) 273 U.S. 510, 535 ["[n]o matter what the evidence against [a defendant], he ha[s] the right to have an impartial judge."]; *People v. Cahill* (1993) 5 Cal.4th 478, 501; *People v. Sturm, supra*, 37 Cal.4th at p. 1244; U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., Art. 1, sections 1, 7, 13, 15, 16 & 17.)

IV.

JUDGE PLATT ERRONEOUSLY FAILED TO DECLARE A MISTRIAL, IMPROPERLY INSTRUCTED THE JURY IN THE RETRIAL OF THE PENALTY PHASE, ABUSED HIS DISCRETION BY ALLOWING PROSECUTION CHARTS AND DENYING DEFENSE CHARTS, AND THE ERRORS WERE NOT HARMLESS, AS RESPONDENT CLAIMS.

Appellant has argued in his opening brief that the trial court committed reversible error in the retrial of the penalty phase by failing to declare a mistrial when informed by the jury that it had deadlocked 9-to-3 after six votes over seven days and twenty hours of deliberations. In addition, he specifically contends that the trial court committed reversible errors: 1) by failing and refusing to poll jurors to determine there was a "reasonable probability" that a verdict could be reached in further deliberations after impasse was declared; 2) by implying jurors would remain in deliberations for a month longer or until they reached a verdict; 3) by attempting to "blast" a verdict (*People v. Gainer* (1977) 19 Cal.3d 835, 844) from minority jurors by demeaning their deliberations as a mere "a drop in the bucket;" 4) by admonishing minority jurors to "roll up your sleeves and go back to work;" 5) by improperly instructing minority jurors to reverse role-play with majority jurors to relinquish moral judgment reached to impose a life sentence; 6) by

overruling defense objections and allowing the prosecutor's visual aids used in penalty phase argument, instructing jurors "its my obligation at this point to assist you, if you can, in moving along in deliberations" (97 RT 20531: 3-13), and implying it sided with the prosecution; and, 7) by misleadingly advising jurors "any item" of either party used in argument would be allowed for "further discussions," and then by excluding defense charts requested during deliberations and reinforcing its bias against the defense. (AOB 165-166; 181-193; 193-203.)

To summarize respondent's distorted view of the harm caused to appellant as a result of the denial of his federal and state constitutional and statutory rights during jury deliberations at the retrial of the penalty phase, "if any of the court's instructions or rulings ... were improper, there is no reasonable probability the outcome was affected ..., [because] this was not a close question on the issue of penalty." (RB 154-155; citation omitted.) As discussed in the *Introduction*, *ante*, p. 1, respondent has swept aside the first jury's consideration of the fate of Louis Peoples; it deliberated for one week, and eight jurors favored life imprisonment before a mistrial was declared, while in the penalty retrial jurors declared impasse after six votes over the same period of time. (AOB 2; 16-17; 163-64; 167; 596-97.)

Following Judge Platt's incongruous pronouncement, "the overwhelming weight of the evidence supports the jury's verdict of death" (97 RT 20670),

respondent disregards the first jury's clear preference for life imprisonment, as well as appellant's arguments on the importance of viewing the retrial jury's deliberations – and Judge Platt's "instructions and rulings" – in context of the entire case. (RB 146; AOB 162-164; see *People v. Sturm* (2006) 37 Cal.4th 1212, 1243-44 ['We look very closely at the question of prejudice ... where death penalty was imposed on a penalty phase retrial after the majority of the prior jury would have voted in favor of sentence of life in prison without possibility of parole.']; *Argument III, ante*; *Argument V, post.*)

Respondent correctly points out that the jury at the retrial was presented with "essentially" the same case as the first jury. (RB 146; see also, AOB 20.) Yet she inexplicably fails to account for the significant number of juror votes – indeed a majority – for life imprisonment in the first trial based upon the same evidence as presented to the retrial jury. In light of the history of the case, had a fair adjudicator presided at the retrial, and not skewed the proceedings in favor of the prosecution or attempted to "blast" a penalty verdict during deliberations, it is reasonably likely the outcome would have been different. (*Ibid.*)

Moreover, another point of prejudice raised by appellant and ignored by respondent, if the retrial jury would not have been able to reach a verdict a separate and clearly "more favorable" outcome would have enured to his benefit.

Indeed, had jurors been properly polled at impasse – especially in light of the first jury's majority vote for life imprisonment – and not coerced into a death verdict with a "dynamite" or "*Allen* [*v. United States* (1893) 150 U.S. 551] charge" (*People v. Gainer* (1977) 19 Cal.3d 835, 844), and had the trial court not slanted rulings on charts in favor of the prosecution, a second hung jury would have placed appellant in the more favorable position afforded capitally accused defendants under California law, i.e., two bites at the apple is all the prosecutor is allowed without judicial intercession on the issue of penalty. (See Penal Code section 190.4, subdivision (b) [judicial discretion granted by statute to impose life imprisonment without possibility of parole]; AOB 159 [*Argument III*]; 193.)[13]

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[13] Appellant is not implying that Judge Platt would have intervened to impose a life sentence, but it is "reasonably likely" a second hung jury would have created a "more favorable outcome" for appellant under the circumstances because of the option under section 190.3, subdivision (b); it is also possible a different judicial officer would have been assigned the case, especially in light of the ongoing Judicial Council's investigation of Judge Platt after the retrial here. (See, AOB 1-2.) In opposing the trial court's defense-proffered statement designed to inform prospective jurors for retrial that one jury had found Peoples guilty of special-circumstance murder but "was unable to reach a decision in the penalty or punishment phase of trial" (62 RT 12750), as will be recalled, Dunlap revealed the San Joaquin County District Attorney's decision on trying the penalty issue a third time: "This is a death penalty retrial. This costs an exorbitant amount of money... This is our last bite ... [to convince a jury the death penalty is the proper penalty]." (62 RT 12735; 12743; see also, AOB 159; 193.)

Further, when considering the impact of the trial court's rulings and instructions during deliberations, it is evident from referenced pretrial proceedings that the retrial jurors were informed of the fact that one jury had been unable to reach a decision through the court's "script." (62 RT 12735; 12750.) Before retrial began, all prospective jurors were advised:

> " [T]he issues for you to decide are only as it relates to the potential punishment to be imposed as to Mr. Peoples. A previous jury has found the defendant Louis Peoples guilty of each of the allegations that I'm going to read to you. *The jury, however, was unable to reach a decision in the penalty or punishment phase of the trial.*
>
> Your role as jurors will be only to decide, if you can, what punishment shall be imposed on Louis Peoples.
>
> There are two possible punishments that you will be asked to consider. Life in prison without the possibility of parole, and the imposition of the death penalty."
>
> (62 RT 12761: 23-28 - 12762: 1-6; emphasis added.)

Once jurors were sworn in to retry the penalty issue, the court properly preinstructed them on March 14, 2000: "You as jurors will determine what the

facts of the case are, and the ultimate punishment *should you be able to reach a unanimous verdict* based on the facts as you find them." (77 RT 15986: 15-17; emphasis added.) Two months later, on May 16, 2000, when the case was submitted to the jury, instructions again made it clear that their sole duty was to decide the appropriate punishment; guilt was not an issue for decision. (96 RT 20445-46.) On May 16, as the court instructed the jury consistent with the preinstruction on March 14:

> " The defendant in this case has been found guilty of four murders of the first degree. The allegation that these murders were committed under one or more of the special circumstances has been specifically found to be true.
>
> It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without the possibility of parole ...
>
> .....
>
> Under the law of this state you must now determine which of these penalties after listening to the evidence, arguments and then determine the penalty that shall be imposed upon the defendant."

(96 RT 20431: 3-25; see 77 RT 15986-87.)

When jurors entered into their deliberations on May 16, 2000, they were well aware of the fact that twelve jurors had previously struggled with the decision on punishment, had not been able to reach a verdict, and so, as Fox pointed out to the court on May 30 after two weeks of deliberations, "there's a lot of pressure on them to reach a verdict." (96 RT 20504; AOB 170.) It is reasonable to assume from these facts that the retrial jurors could deduce for themselves that it must try "to reach unanimous verdict" (77 RT 15986) or another jury would have to be empaneled and the penalty issue retried all over again. Thus, respondent's claim that Judge Platt had a valid basis for believing "further deliberations might produce a verdict" – without first polling jurors – under the circumstances actually presented by declaration of impasse on May 30, is not based upon pertinent facts but is pure speculation, and it should be rejected. (RB 146.)

Judge Platt spurned Judge Deluchhi's decision to poll jurors after a similar passage of time in deliberations as "not important." (96 RT 20504-05.) The Attorney General attempts to turn Judge Delucchi's decision-making response to initial declaration of impasse to advantage. (RB 147-148.) But Judge Delucchi's *unopposed* decision to have jurors "sleep on" their declaration of impasse before polling them does not justify Judge Platt's *refusal* to poll jurors when defense

counsel so moved in response to the jury's request for "further instructions" upon impasse (12 CT 3208); it also does not justify Judge Platt's response: "The only instruction I can give you at this point in time is 20 hours of discussion does not amount to an impasse ..." (96 RT 20502; see, 60 RT 12340-43.)

After ten hours deliberating, Judge Delucchi suggested to jurors on Wednesday, September 22, 1999, that because of the "lengthy trial" and "volumes of evidence" taking the afternoon off and returning the next day might inspire "fresh perspectives," but, unlike Judge Platt, he emphatically instructed the jury he was "not attempting to change anyone's opinion, or to persuade anyone to abandon their independent judgment; nor am I intending to coerce a verdict in any way." (60 RT 12343.)[14] After deliberating again on Thursday, a juror requested Friday off because of a work-related training, and the jury returned on Monday, September 23, declaring the same "split" and impasse after 10 additional hours of deliberations. (60 RT 12365; see AOB 167-172.)

Moreover, as appellant has previously pointed out, on May 30, 2000, when the foreman declared an "impasse" – after the retrial jury had conducted six votes and "'none [of the jurors remained] undecided'" – the court failed to poll the

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[14] Judge Delucchi had also properly denied juror requests for (defense) argumentative charts. (60 RT 12335; 97 RT 20528; AOB 176-177.)

jurors as it had done in the guilt phase. (See AOB 171-72; 96 RT 20501; 50 RT 10228.) Indeed, Judge Platt had polled jurors in the guilt phase when they announced an impasse on August 10, 1999, as to the attempted murder charge (Thomas Harrison) after one week of deliberations. When the jury reconvened on August 11, Judge Platt declared a mistrial as to that charge only. (AOB 4-5, 14; 50 RT 10236-10243.) Respondent has not addressed this fact. (RB 147-148.)

During the retrial of the penalty phase, Judge Platt did not follow the same procedure. He rejected defense counsel's argument that polling was appropriate and that the court had mishandled the declaration of impasse, "mislead[ing jurors] into thinking that they are going to be locked up in that room until they reach a verdict." (96 RT 20504: 16-17.) Judge Platt also refused to admonish the jury that "a non-verdict is also something that the law embraces ..." (96 RT 20504: 7-17; see AOB 169-173; RB 138.)[16] Instead, in the retrial of the penalty phase Judge Platt elected to demean the minority jurors' efforts to reach a verdict when they returned to the courtroom after deliberating another 90 minutes: "At this

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[16] As will be recalled, Judge Platt had also rejected counsel's proposed modification to CALJIC 8.88 to include language regarding the necessity of a unanimous decision: "all twelve jurors must agree if you can ... If you cannot, then I will discharge you." (AOB 170-171; 549; 12 CT 3333.)

point in time ... [it] is a drop in the bucket." (96 RT 20508; AOB 173-74.)[17]

It is nothing if not a red herring for respondent to suggest jurors were insensitive to the "enormity and importance ... [of the] 'literally life and death issues'" *before* they declared impasse. (RB 150.) Jurors were well aware of the task set before them prior to selection and swearing in; after they were sworn as jurors the court twice more advised them that their sole task was to determine the appropriate punishment for Louis Peoples. (62 RT 12761; 77 RT 15986; 96 RT 20505.) So, on the one hand, with knowledge that one jury had been unable to reach a verdict, jurors were repeatedly led to believe that they too were charged with determining "the ultimate punishment," but only if they "should" be able to "reach a unanimous verdict based on the facts as you find them." (77 RT 15986: 15-17.) On the other hand, for the three jurors who had accepted responsibility and deliberated in good faith for twenty-hours over seven days on the appropriate

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[17] Respondent endorses Judge Platt's unsupported hypothesis, arguing his "drop-in-the-bucket characterization ..., repeatedly [?] qualified that comment by referring to the enormity and importance of the task before the jury." (RB 150.) Cases refute the underlying assumption that time alone supplies "reasonable probability" to believe that jurors may be close to reaching a *unanimous* verdict. For example, in *People v. Doolin* (2009) 45 Cal.4th 390 and *People v. Carter* (2005) 36 Cal.4th 1215, juries dealt with the "enormity and importance" of the decision in each case by returning death verdicts after deliberating for just one day.

punishment to impose on appellant, the court's refusal to honor their "independent judgment" (60 RT 12343) as to the *right moral* decision they had reached, accompanied by remarks designed to pressure them to change their vote in order to bring about unanimity, undermines the very foundations of the jury system. As this Court expressed of the coercive nature of such judicial intervention in *People v. Gainer* (1977) 19 Cal.3d 835, 850:

> " It matters little that the judge does not know the identity of the particular dissenters; their fellow jurors know, and the danger immediately arises that 'the Allen charge can compound the inevitable pressure to agree felt by minority jurors.' (*People v. Smith* (1974) 38 Cal.App3.d 401, 406, [113 Cal.Rptr. 409].)"
>
> (See also, *People v. Breaux* (1991) 1 Cal.4th 281, 319.)

Further, and contrary to respondent's arguments in support of Judge Platt's responses to the jury's declaration of impasse on May 30, this case is readily distinguishable from the leading cases she cites, *People v. Proctor* (1992) 4 Cal.4th 499, 539 [11-to-1 split in guilt phase deliberations on first day], *People v. Bell* (2007) 40 Cal.4th 582 [11-to-1 guilt phase deliberations], *People v. Rodriguez* (1986) 42 Cal.3d 730, 775 [11-to-1 guilt phase deliberations], and *People v. Carter* (1968) 68 Cal.2d 810, 817 [jury deliberated a few hours after two-day trial

on charge of receiving stolen property].) The nature and length of deliberations of *two* juries, the numerical breakdown of the first hung jury – 8-to-4 for life – and of the deadlocked jury – 9-to-3 for death – in the retrial of the penalty phase, along with the kind of judicial comments in this case, distinguish it from those cited. (RB 144-47; 149.) Moreover, only in *People v. Harris* (2005) 37 Cal.4th 310, 365, did the impasse occur during penalty deliberations, but, unlike Judge Platt's refusal to inquire on the reasonable probability of agreement with further deliberations, or to instruct jurors on the viability of a non-verdict, this Court held the trial "court's comments did not insist that a verdict be reached ...," and approved instructions to jurors that "they were not to infer that the court believed a verdict 'should be' reached." Unlike Judge Delucchi's admonition at impasse in the first penalty trial – "I am not attempting to change anyone's opinion, or to persuade anyone to abandon their independent judgment; nor am I intending to coerce a verdict in any way" – the implications of Judge Platt's comments at impasse were coercive. (See, 60 RT 12343.)

Finally, none of the cases cited by respondent involved the *retrial* of a penalty phase.[17] None involved a situation where the trial court instructed

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[17] Needless to say, none involved a retrial where a clear majority of jurors in the first trial had voted for life imprisonment.

prospective jurors *before* they were sworn as jurors that one jury had already considered the evidence and had been unable to reach a verdict on the appropriate penalty to impose. (62 RT 12761-62.) None involved the trial court instructing jurors before evidence was presented on retrial, "You as jurors will determine what the facts of the case are, and the ultimate punishment *should you be able to reach a unanimous verdict* based on the facts as you find them." (77 RT 15986: 15-17; emphasis added.) And none involved a trial court changing course once the jury began its deliberations, refusing to remind jurors that a non-verdict is an acceptable outcome, but inferring quite the opposite in comments directed at the minority jurors; their deliberations were a mere "drop in the bucket," *and* that they needed to "roll up their sleeves and go back to work" – to reach unanimity.[19]

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[19] Respondent claims Judge Platt's language reflects nothing more than a rigorous "work standard" applied equally to himself and attorneys, and that this justifies the admonition to jurors; it is a weak plea for dismissing a coercive atmosphere. Respondent cites a curious example, Judge Platt's comment to counsel during jury deliberations: "'I don't intend to sit here idly and not work while they're working.'" (96 RT 20495; RB 150, fn. 36.) But as appellant pointed to the same example in another context, the double standard reflecting bias against the defense: 1) Judge Platt fined Fox because he was not ready to correct a transcript one day, and despite the fact Dunlap was absent without cause; and, 2) on another day he did not care a hoot if Dunlap was unprepared to correct transcripts: "We'll get started on 'em when we get started on 'em." (96 RT 20516; AOB 168, fn. 98; 132-134.) It is highly unlikely the meaning of "go back to work" was lost on minority jurors; they had no choice in the matter.

Moreover, none of the cases cited by respondent involved a penalty retrial where *undecided* jurors had actually reached their decisions in the final balloting *before* the jury foreperson declared impasse. Numerical divisions prior to impasse included as many as four jurors who were undecided, as respondent points out (RB 137-138; 146; see also AOB 169), but what respondent fails to note is that after eight days of deliberations over twenty-two hours and six votes, *all* twelve jurors had reached *decision*: Nine voted for death, three voted for life.[20]

In summary, the court had communicated to jurors from the beginning that a jury had been unable to reach a verdict after considering the evidence. When jurors advised that they too had reached impasse – after an equally long period of deliberations – the court informed jurors – without any basis in fact – that they had *not* "worked" hard enough. There appeared to be no end in sight on May 30, 2000; eight days over twenty-two hours of deliberations amounted to a "drop" in a bottomless "bucket" of time. And this was why defense counsel raised a red flag: "I don't think we should mislead them into thinking that they are going to be

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[20] Respondent claims – in support of Judge Platt's statements to jurors – "taking positions" was "progress" (RB 146), but it is *progress* only in the sense that one juror had joined two other jurors and solidified the minority jurors' independent finding that life imprisonment was a just punishment.

locked up in that room until they reach a verdict," because "a non-verdict is also something the law embraces." (96 RT 20504.) Judge Platt refused to poll jurors and saw no problem. In fact, Judge Platt did not consider the nine-to-three declaration of impasse at the end of May 2000 as a "hung jury" issue; after all, as he explained to counsel: "We told them the end of June was the anticipated date [for jury service]...," and he clearly contemplated at least *another month* of deliberations before he would even consider "addressing potential hung jury issues." (96 RT 20495; AOB 168.)[21]

For the three jurors who had reached their decisions for life imprisonment without parole after six votes over twenty-two hours of deliberations, the court essentially rebuked them for not "working" hard enough to join the majority's view. (96 RT 20502.)[22] Then the court improperly charged those jurors who had

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[21] Threatening to "lock up" the jury, or to "prolong deliberations indefinitely," constitutes "coercive" judicial misconduct. (*People v. Carter, supra* 68 Cal.3d at 817-19; *People v. Talkington* (1935) 8 Cal.App.2d 75, 85; see *People v. Rodriguez, supra*, 42 Cal. 3d at 776.)

[22] As noted above,"It matters little that the judge does not know the identity of the particular dissenters," or which way they are voting, because "their fellow jurors know, and the danger immediately arises that 'the Allen charge can compound the inevitable pressure to agree felt by minority jurors.' (Citation.)" (*People v. Gainer, supra,* 19 Cal.3d at 850; *People v. Breaux, supra*, 1 Cal.4th at 319.)

decided life imprisonment was the appropriate punishment – as had eight jurors in the first trial – after lengthy consideration of the same issue, because "[you] obviously ... have [taken] positions [for life] ..., [and need to] take up the other side's [death] position, advocate it as if it were yours ..." (96 RT 20509.) The offensive "role playing" suggestion added to the initial "dynamite charge" the court had set beneath the jury when it declared impasse on May 30, and after it continued to deliberate for one and one-half hours without reaching a verdict. (*People v. Gainer, supra*, 19 Cal.3d at 845 ['dynamite charge' is directed at minority jurors to rethink their views in light of majority views]; AOB 173-74; 199.) In context, the role-playing suggestion was "more than friendly and helpful advice,"[23] as is borne out by the trial court's decision the next day to admit prosecution charts to "move [the jury] along." (96 RT 20507.)

Once the jury declared impasse during the retrial of the penalty phase, the court not only dramatically altered course from advisement to prospective jurors that a unanimous verdict was desired but not mandated, refused to inquire on the

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[23] Dissent from *People v. Whaley* (2007) 152 Cal.App.4th 968, 985. (See AOB 203, fn. 116.) Respondent relies on the majority opinion in *Whaley* that supported a role playing suggestion in a non-capital case, but does not cite any other cases or discuss other non-binding (federal) decisions cited by appellant that disapproved the role-playing suggestion. (RB 151.)

likelihood that further deliberations would be fruitful, threatened to keep them "locked up indefinitely," but it is not surprising another dramatic shift occurred after improperly suggesting they role play.[24] As respondent claims providing all the prosecutor's argumentative aids into jury deliberations over objection, and refusing to allow a defense exhibit requested, amounted to little more than Judge Platt "promis[ing] the jury the moon and then reneg[ing]" (RB 153), it is worth noting here that appellant's arguments are part of a much larger, interconnected pattern of prejudice against his cause. (See *Arguments I-III, ante.*)

Had the trial court not allowed jurors to consider the prosecutor's avowedly *argumentative* charts – over objection – after they had declared impasse, a more favorable result was likely for similar reasons to those argued above; neither *People v. Pride* (1992) 3 Cal.4th 195, nor any other case, authorizes the trial court to allow *argumentative charts* into jury deliberations. (RB 152-153; AOB 181-192.) In and of itself, allowing the prosecutor's charts into deliberations after declaration of impasse in the retrial of this penalty case amounts to prejudicial error and cause for reversal. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.)

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[24] Judge Platt radically changed the ruling on the admissibility of remorse in the penalty phase, seriously damaging appellant's case for life. (See *Argument VI, post.*)

Compounding the error, Judge Platt informed jurors they would be allowed to consider defense charts as well, but "bizarrely" dubbed some as "pure" argument and refused to live up to his promise of full disclosure. (97 RT 20547; 20555-56.) The point here is that the trial court not only allowed majority jurors to use improper argumentative charts designed by the prosecutor to "inflame" jurors in order to convince minority jurors of the error of their ways (97 RT 20527-20532; AOB 184-185), but its rulings denying requests to reconsider defense charts – after promising all – clearly signaled to the jury that the court was siding with the prosecution's case for the death penalty.

For the foregoing reasons, the errors committed by the trial court when the jury had reached impasse during the retrial of the penalty phase were not harmless individually or cumulatively, and judgment must be reversed because of the violations of appellant's federal and state constitutional and statutory rights to due process, to a fair trial, to present a defense, to confrontation, to a reliable, individualized sentence determination, and against cruel and unusual punishment. (U. S. Const., 5th, 6th, 8th, and 14th Amends; Cal. Const., Art.1, sections 1, 7, 13, 15, 16 & 17; Pen. Code section 190.3; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427; *Skipper v. South Carolina* (1986) 476 U.S. 1; *United States v. Williams* (9th Cir. 2008) 547 F.3d 1187; *People v. Gainer* (1977) 19 Cal.3d 835.)

V.

PROSECUTORIAL MISCONDUCT WAS RAMPANT AND IT WAS NOT HARMLESS, AS RESPONDENT INSISTS.

Appellant has argued in his opening brief that the guilt phase and the retrial of the penalty phase were so infected by pervasive misconduct of the prosecutor that this Court should reverse his conviction and the sentence imposed. Multiple instances of Deputy District Attorney George Dunlap's deceptive and misleading factual and legal representations to the trial court out of the presence of jurors have been documented, and his refusal to abide by judicial rulings and admonitions in the presence of both juries, have been particularized here and in other arguments. (3 RT 475; 4 RT 650; 4 RT 712; 6 RT 941, 6 RT 1237; 8 RT 60; 24 RT 4841; 29 RT 5779; 32 RT 6531; 33 RT 6872-6878; 6905; 79 RT 16383; 16433; 85 RT 17852; 87 RT 18277; 90 RT 18944-46; 92 RT 19348; AOB 246-256; 265; 278; see also *Arguments VI, IX, X* and *XI, post.*) His intemperate and disruptive behavior in the presence of each jury included non-verbal "theatrics," "incessant noise," "voice intonations," throwing books, laughing at defense counsel, and mumbling under his breath for effect. (36 RT 7574; 38 RT 7851; 44 RT 9148; 82 RT 17178; 90 RT 18729; AOB 212-222.) His unremitting

expression of personal opinion through argumentative questions and improper remarks directed at witnesses, frequently objected to by defense counsel and referred to by the trial court as "editorialization," are pervasive as well. (38 RT 8071; 39 RT 8195; 42 RT 8633; 40 RT 8282; 40 RT 8377; 38 RT 8077; 46 RT 9414; 46 RT 9413; 80 RT 16661; 16664; 16666; 82 RT 16962; 87 RT 18207; 18287; 90 RT 18870; 91 RT 19003; 19020; 19022; 19024; 19040; 19054; 19057; 19059; 19060; 19099; 91 RT 19133;19179; AOB 223-246.) His disparagement of defense counsel by incessantly casting aspersions on his integrity to win advantage with the court on legal issues, whether standing alone, or in conjunction with other improper arguments in the presence of jurors in guilt phase and retrial of the penalty phase, demonstrates prosecutorial misconduct tainted both trials. (48 RT 10021-22; 10024-26; 10028-29; 10031; 10034; 10036; 10057; 77 RT 16001; 16007; 16010; 16021; 16053; 95 RT 20016; 20019; 20026; 20080; 201148; 20151; 20153; 20127; 20187; AOB 257-260; 265-275.)

As discussed following in support of reversal of his convictions and sentence, whether by striking "foul" blows at the defendant and his attorney, or engaging in "juvenile" antics and ignoring judicial admonitions, the "offensive personality" and intemperate "behavior by a public prosecutor demeans the office, distracts the jury, prejudices the defendant, and demands censure." (*People v.*

Hill (1998) 17 Cal.4th 800, 819-820, 834, 838-839; *Viereck v. United States* (1942) 318 U.S. 236, 248.)

A. *Prejudice*

Respondent acknowledges "several instances where [George Dunlap's] conduct crossed the lines of appropriate advocacy," but argues, "individually or in combination, and judged by any standard of prejudice, the cited instances cannot have influenced either the guilt or penalty outcomes." (RB 173.) Although the parties agree on the general legal principles applicable to the review of the trial record for prosecutorial misconduct and prejudice (RB 156; AOB 205-211), once again respondent ignores the 8-to-4 vote for life imprisonment in the first penalty phase, and the struggle of the retrial jury, in attempting to reach a verdict as to the appropriate punishment. Instead, respondent relies on a recitation of the evidence to support the verdicts in the guilt phase, but fails to acknowledge that two juries wrestled with the "circumstances of the crimes" that occurred over a relatively short period of time in 1997 by an otherwise nonviolent and emotionally fragile man, *and* while he was addicted to and under the insidious influence of methamphetamine. (See RB 171-173.) Whether viewing the "ironclad" evidence in the guilt phase or the "moral considerations attending the evidence" in the penalty phase, respondent implausibly calls it a foregone conclusion that "a death

penalty was compelled" in this case – notwithstanding the first jury's heavily-favored life verdict and the retrial jury's struggle with the sentencing options. (RB 171-72.) Claims that "any reasonable jury would have reached the same verdict[s] in the absence of alleged prosecutorial misconduct" are vacuous in light of jury deliberations on the record presented here. (RB 171; citation omitted.) Appellant submits he has amply demonstrated the prejudicial effect of pervasive prosecutorial misconduct, and it cannot be said the misconduct was harmless beyond a reasonable doubt, but in fact a miscarriage of justice did occur as a result of the misconduct. (*Chapman v. California* (1967) 386 U.S. 152, 24; *People v. Hill, supra,* 17 Cal.4th at pp. 844-848.)

B. *The Prosecutor's Improper Demeanor and Nonverbal Behavior*

Respondent attempts to diminish appellant's arguments that the prosecutor engaged in nonverbal "bullying tactics" and "theatrics" by electing to ignore them. (AOB 212.) She does not respond to allegations that the prosecutor's nonverbal antics were integrated into a pattern of reprehensible methods used to improperly influence the court and the jury. Mumbling displeasure under his breath, resorting to distorted facial expressions, engaging in disparaging guffaws and childish fits of temper, including slamming books, pencils, and other objects on courtroom tables to emphasize his displeasure, are not the attributes of a public prosecutor intent on

fulfilling the "unique function" of representing the interests of the state in a capital murder trial. (*Berger v. United States* (1935) 295 U.S. 78; *People v. Hill* (1994) 17 Cal.4th 800, 819; AOB 207-209; 212-214; 4 RT 711.) Perhaps respondent has chosen to ignore the dynamic of George Dunlap's intemperate behavior because Judge Platt flagged the prosecutor's "incessant noise," "facial expressions [and voice] intonations," "disrespectful sighs," and other "body language" as "not directly reflected in the record." (3 RT 475; 5 RT 941.) However, the number of times the trial court and defense counsel referenced Dunlap's nonverbal behavior, accompanied by direct usage of hyperbolic expressions – "bull," "shock," "outrage," "aghast," "umbrage," "ridiculous," "preposterous," "ludicrous" – over two hundred times to persuade court and jury that defendant and his counsel were loathsome characters not to be trusted, is testament to his "offensive personality" (*People v. Hill, supra,* 17 Cal.4th at p. 834), and neither verbal nor nonverbal conduct can be so easily ignored. (See, AOB 217; see also, AOB 212-222; 36 RT 7574; 38 RT 7851; 44 RT 9148; 82 RT 17178; 90 RT 18729.)[24]

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[24] As noted in *Argument III*, defense counsel requested videotaping the retrial because of concerns the record could not capture the courtroom demeanor of Judge Platt and George Dunlap, but the motion was denied. Fox had also requested an order for the retrial to keep Dunlap at least 10 feet away from the defense table because he approached from behind in an intimidating "style [that is] very inflammatory." The court refused to do so, telling Fox to raise an

Apparently, respondent has thrown up her hands in frustration as well, perhaps hoping, as the trial court appears to have done, that by not addressing Dunlap's boisterous and disrespectful behavior, it will disappear from view. The futility of attempting to restrain the prosecutor culminated in the trial court's inadequate gesture during the penalty retrial of labeling Dunlap's boastful and "reckless" posturing to a courtroom gallery – in the presence of a juror's spouse – as "absolutely inexcusable" conduct. (88 RT 18517; AOB 288; see *Argument XVII, post.*) Dunlap had worn everyone down by charging blindly ahead, flicking objections off as so many annoying flies, and by refusing to abide judicial warnings and admonitions. (See, 88 RT 18509 [Fox's exasperation expressed in arguing to the court at hearing on motion for mistrial during penalty phase retrial]; AOB 287.)

Respondent complains that appellant has not shown prejudice in the incidents in which defense counsel brought to the attention of the court Dunlap's arrogant and prejudicious conversations with the victims' family members about a defense witness (Quigel), and his "schmoozing" – as Judge Delucchi phrased it – with jurors during the first penalty phase. (RB 169-171.) Set within a pattern of

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objection in the presence of the jury if it happened again. (94 RT 20006-07; AOB 260, fn. 140. See, *People v. Hill, supra*, 17 Cal.4th at p. 821 [additional attempts on counsel's part to do more "would have been futile and counterproductive to his client. (Citations omitted.)."

misconduct, however, Judge Platt's repeated references to Dunlap's "reckless" *behavior* – coupled with a constant barrage of verbal assaults – suggests at minimum the prosecutor's willingness to create a prejudicial atmosphere by reprehensible means, and it was always an issue for defense counsel. (AOB 282-288; 1 RT 164; 4 RT 711.)[25]

Dunlap's "immature, irresponsible, and unprofessional [nonverbal] conduct" (24 RT 4841) is endemic to the trial proceedings. His rude nonverbal behavior should not be ignored or consigned to the garbage pail of "vigorous representation" (RB 156), as respondent would have the Court do with his many abuses; the pattern of recklessness was not cured by general instructions distinguishing evidence from arguments, or even by sustained objections. (RB 160.) The prosecutor was out of control, and nothing defense counsel did to ameliorate the situation, or the trial court tried to do to correct it, altered Dunlap's conduct one iota over the course of the two-year ordeal of trial.[26]

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[25] Dunlap called Fox's allegations of misconduct "unfounded and reckless," and only apologized to the court after Judge Platt chastised him for *his* "reckless" behavior; he frequently apologized, but consistently ignored the court's warnings and admonitions. (See 49 RT 10268-69;60 RT 12253-55;88 RT 18518-19.)

[26] As previously noted, Judge Platt admonished Dunlap to refrain from "physical reaction, whether its throwing the hands in the air, or guffaw, or another audible reaction" during the course of the guilt

2. *Attacks On Defense Counsel*

Respondent provides a puzzling aside. She argues, "more than anything" the prosecutor did to personally attack defense counsel at trial appellant "demeans Fox's integrity and apparent abilities" by suggesting he may have been over his head in this multiple-murder capital murder case, his first capital case assignment. (RB 157, fn. 43.) But by Fox's own admission in numerous motions to continue the trial, and the retrial, he cited his inexperience as frequently as insufficient time to prepare as grounds for continuance. (AOB 524-527, *Argument XV.*)

The one example respondent does confront of the prosecutor's incessant attacks on defense counsel is the opportunity he took to malign Fox while he was not present in court. (AOB 219-220; RB 157-159.) Respondent claims "when viewed in proper context" (RB 157), Dunlap's disparaging attacks on Fox were "not inappropriate" because, "Dunlap was trying to get a trial date ..., was concerned further delaying closure for the victims' families ..., [and] Dunlap believed the defense was purposely delaying the start of the retrial." (RB 158.)

Defense counsel did not challenge the right of "closure for the victims' families," as respondent seems to imply. (RB 158.) While Dunlap was champing

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phase, but nothing changed; during the retrial of the penalty phase the same misconduct in "tone of voice and attitude" continued unabated. (AOB 215-216, fn. 120-121; 50 RT 10341; 90 RT 18729; 92 RT 19348.)

at the bit to "get a trial date" on October 18, Fox was suffering a stress-related illness, and he was medically relieved of all professional duties until November 1, 1999. (AOB 219-220; 61 RT 12404; 12415.) Rather than accept these representations, Dunlap chose to rail against Fox. (61 RT 12404-12417.) In fact, with Slote in attendance only on October 18, the court selected a trial date (January 3, 2000), re-assigned the matter to Judge Platt, and put the matter over to November 22, to Dunlap's satisfaction. (61 RT 12417.)

However, respondent fails to note that while neither of appellant's attorneys was present before the Hon. Terence Van Oss, Judge on October 12, 1999, three weeks after the mistrial had been declared (September 27), Dunlap began his diatribe against Fox. Indeed, Dunlap had failed to appear for the first hearing after mistrial on October 4, 1999 before Judge Delucchi; only Deputy District Attorney Thomas Ziegler and second-chair counsel, Charles Slote appeared. (61 RT 12384-12390.) The prosecution did not request a trial setting then, but respondent fails to mention this fact either.

On October 12, 1999, Ziegler and Dunlap both appeared before Judge Van Oss, but Slote was unable to appear because his car broke down; the court accepted

his excuse. (61 RT 12391-12400.)[27] Undeterred by the fact that neither defense attorney was present on October 12, Dunlap commenced to attack Fox's integrity and character, self-righteously exclaiming, "This case should have been set [for trial] two weeks ago" – despite the fact that Dunlap had not appeared after the mistrial and at any time before October 12 (61 RT 12395: 20-21):

> " Now I hear this *fictitious*, what I believe to be in *bad faith, illness*.
>
> .....
>
> I know this Court is not aware of what has gone on in this case. Mr. Fox has been cited for over $2300 in fines. Mostly for the willful failure to obstruct the proper flow of discovery, and intentionally making a record to delay and cause confusion in this trial.
>
> .....
>
> So I'm asking the Court to make inquiries, set a motion date to see this illness, and to look at some potential sanctions for Mr. Fox ..." (61 RT 12393: 22-23; 12395: 10-14; 12396: 5-9; emphasis added.)

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[27] The court had received a telephone message from Slote that his car had broken down while on family vacation in Oregon and he was unable to appear. (61 RT 12397-98.) Judge Van Oss set the matter over to October 18 for Slote to appear, "because the defendant is here unrepresented." (61 RT 12399.)

Judge Van Oss appears to have been familiar with the clinic where Fox was being treated, and he was subsequently satisfied with the physician's letter provided to support of Fox's illness and his absence. (61 RT 12404; 12415.)

Nonetheless, having achieved the dual objectives of setting a trial date and disparaging Fox in his absence on October 12 and 18, Dunlap failed to appear again on November 22, 1999, when Aron Laub appeared as second chair at the time and place set by Judge Van Oss. Judge Platt proceeded with suggested "defense corrections" to the record, noting "[t]he only problem is that the prosecution is unprepared at this time to certify the record because Mr. Dunlap isn't here." (61 RT 12421-12445.) Setting the matter over until November 29, Judge Platt then issued sanctions against Fox for not being prepared to proceed with corrections, even though Dunlap did not appear in court – without excuse or penalty imposed. (61 RT 12446-12450; 12467-68. see also, *Argument III, ante.*)

Aside from this one of the many episodes in which the prosecutor used reprehensible methods to achieve his goals, respondent does not attempt to defend Dunlap's other attempts to disparage defense counsel, which Fox documented from nearly the first appearance in court to the last. (See, AOB 212-222.) Misleading, disparaging and reprehensible conduct created an oppressive atmosphere and a prejudicial environment. (*People v. Hill, supra,* 17 Cal. 4th at 844-848; *People v.*

Clark (2011) 52 Cal.4th 856, 960.)

C. *Editorial Comments and Other Improper Methods of Examining Witnesses*

Respondent's justification for "the prosecutor's purported prejudicial proclivity for editorializing during questioning of [defense] witnesses" in the guilt phase and penalty retrial is based upon the right of a party "to show that the defense witnesses were biased and that their opinions concerning the reasons why appellant committed the murders – family dysfunction and methamphetamine abuse – should not be given any weight before the jury." (RB 158; 160.) According to respondent, any prejudice that might have occurred was diminished because the trial court frequently sustained objections, general instructions cured the improper opinions expressed by the prosecutor that jurors might have misconstrued as evidence, and – without examining a single one of the extensive "colloquies" between Dunlap and witnesses as set forth in appellant's brief – respondent generalizes, "it was evidence that could properly have been elicited by questions not objectionable in form." (RB 159-160; see AOB 223-246.)

Nothing defense counsel did to stem the tide of prejudice by repeated objection, and nothing the trial court did by sustaining them, or by making ineffectual threats to sanction, deterred Dunlap; seeking sanctuary behind rules of "general" harmlessness because objections were sustained, or by reading standard

jury instructions, or by reference to proper attempts to reveal witness bias, should not be afforded to those who abuse the rule of law. (RB 159-160.) Dunlap's "offensive personality" – his arrogance – simply cannot be given precedence over appellant's federal and state constitutional rights to due process and fair trial:

> " It takes no citation to authority for us to conclude such juvenile courtroom behavior by a public prosecutor demeans the office, distracts the jury, prejudices the defense, and demands censure."
>
> (*People v. Hill* (1998) 17 Cal.4th 800, 834, 838-39.)

Respondent's effort at parsing Dunlap's "editorialization" as a benign problem – without discussing specific "colloquies" cited by appellant – that involves legitimate purpose, i.e., impeachment of defense "evidence that could properly have been elicited by questions not objectionable in form," evades the issue. (RB 160.) Dunlap proved to be oblivious to boundaries, refused to live up to his own insincere promises to refrain from exaggerated physical reactions and expression of his personal opinion, and neither objection nor admonition curtailed his misconduct. As long as he remained immune to judicial sanction, felt free to act however he wished, and with a license to express his personal opinions to the jury, the means justified the end, and prejudice permeated the trial (*People v. Hill, supra,* 17 Cal. 4th at p. 820 [defendant excused from timely objection or request for

admonition if either made futile by repeated objections and admonitions.].)

To illustrate the point, how are declamations to the state's own witnesses, Dr. Mayberg, "that's the last time I buy you dinner," or "How was lunch?" to San Joaquin Sheriff's Deputy "Billy" Weston, proper in any form? (46 RT 9414; 91 RT 19179-80; see AOB 224.) Only an unethical and unscrupulous prosecutor bent on securing a conviction would ask such questions to ingratiate himself with the jury – they serve no legitimate purpose. [28]

While it may be true that a "party generally is not prejudiced by a question to which an objection has been sustained" (RB 159), specifically, this case does not compare to one in which a prosecutor asked a few isolated "argumentative" questions during cross-examination of the defendant. (RB 159, citing *People v. Mayfield (*1997) 14 Cal.4th 668, 775.) It also presents nothing like the record in *People v. Pinholster* (1992) 1 Cal.4th 865, 943 (disapproved on other grounds in

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[28] Contrary to respondent's suggestion that Dunlap primarily asked improper questions when examining defense experts, the trial court sustained defense objections to *all* forms of the same question Dunlap propounded the state's witness, Dr. Mayberg: "Did you have a heart attack last night when you looked at the raw data?" "Did you have significantly elevated anxiety and blood pressure, Doctor, when you looked at the raw data of Mr. Peoples?" (46 RT 9413.) Whether a proper form could have been found, Dunlap did not attempt to find one; instead, he ignored objections and orders, and sought to curry favor with jury a third time: "Did Dr. Wu and Dr. Buchsbaum screw up when they made comparisons ...?" (46 RT 9414; AOB 224.)

People v. Williams (2010) 49 Cal.4th 405, 459) also cited by respondent (RB 159). In *Pinholster* this Court referenced a single relatively innocuous (unanswered) question asked by the prosecutor on redirect examination where the trial court instructed the jury to disregard it after sustaining the objection. The record in *People v. Hill, supra*, 17 Cal.4th 800, 820-21, however, is much closer this case; the number of objections to improper opinion "editorializing" and "argumentative" questions alone are so numerous it is impractical to recount each and every one, and recounting those that were sustained and those that were not is fruitless on this record. (See, AOB 223-246) [29]

As argued elsewhere, Judge Platt appears to have become so frustrated by the prosecutor's improper examination of witnesses, he turned the tables on defense counsel, at one point admonishing the jury in the guilt phase that it was "improper" *for defense counsel* to raise an objection on the "subject" of misconduct in the presence of the jury. But never having admonished the jury to disregard the prosecutor's improper methods, Dunlap continued untrammeled. (See AOB 244, fn. 134; 38 RT 7839-7848.) The conclusion is that neither objection nor

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[29] As recalled, during the guilt phase a juror found the prosecutor's behavior so predictable, he anticipated the objection, and spoke it aloud as putative defense counsel: "'Objection, argumentative.'" (AOB 215, fn. 120; 40 RT 8393.)

admonition thwarted the prosecutor's improper "editorialization" and "argumentative" questions, and because of the sheer number of them, nothing respondent has offered diminishes the prejudicial effect to appellant's rights. (*Ibid.*; see also, AOB 223-246.)

D. *The Prosecutor Disregarded Court's Orders Designed to Curb Prejudice*

First, respondent appears to have missed the point of the prejudice caused by the prosecutor's repeated and willful display of manikins. Appellant has not raised the admissibility of the manikins as a separate cognizable issue, as respondent seems to imply. (RB 163.)[30] For the same reasons that photographs may be admitted, appellant agrees that manikins may serve a useful purpose at trial, such as was used by the "forensic pathology expert during the guilt phase and penalty retrial to illustrate location and angle of the victims' wounds ...," and because they may be "relevant to appellant's intent to kill and the issue of premeditation and deliberation." (RB 163.) Like photographs, however, there are limitations on the use of manikins, defense counsel litigated the issue, and the court ruled in appellant's favor restricting the display of manikins to the examination of witnesses: "Here, when defense counsel articulated concerns about the presence

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[30] Appellant argues the trial court abused its discretion in admitting gruesome autopsy photographs, and that the photographs were cumulative to the manikins. (See *Argument XV*, AOB 475.)

of the manikins, the trial court took reasonable steps to minimize any prejudicial effect on the jurors ..." (RB 163; see, *Argument XV.*) However, respondent fails to address appellant's point of this example of the rampant misconduct at trial: Dunlap repeatedly and blatantly defied the court's orders. (AOB 252-255.)

It bears recounting. The trial court found Dunlap's reasons for displaying the five "figurines" depicting each of the victims in clear view of the jury at all times during the guilt phase "absolutely ridiculous," and ordered the prosecutor to "take the figurines and put them over behind the witness box here and under where they are accessible." (34 RT 6995.) The same ruling applied in the retrial of the penalty phase, and the prosecutor disregarded that order as well: "Unless they are being specifically referenced, dolls will not come out until you are ready for another witness." (79 RT 16433.) Dunlap disobeyed the court's orders at least three more times during the retrial of the penalty phase when he had "all five dolls lined up" (85 RT 17852) for the jury to see, and each time defense counsel brought it the court's attention, the court ordered them removed. (See AOB 253-254.)

As appellant has pointed out (AOB 255, fn. 138), Dunlap understood the inherently inflammatory and prejudicial nature of the figurines – and photographs – and he used them repeatedly in his closing arguments; he displayed them during trial despite court orders limiting their use precisely because they evoked passion

against appellant. Dunlap engaged in "reprehensible methods to attempt to persuade ... the jury" to find appellant guilty and sentence him to death without respect for judicial orders or appellant's rights. (*People v. Hill, supra*, 17 Cal. 4th at p. 860.)

Similarly, although the Attorney General responds to the argument that the prosecutor exploited the difficulty he and Fox both had interpreting the data Dr. Amen had submitted to Fox as a discovery request (RB 163-164), she never addresses the fact that Dunlap admitted to the court on July 23, 1999, that he was "not making a [discovery] complaint," because, in a rare concession, he admitted "inexperience with imaging is the problem" for both attorneys. (46 RT 9389; 9392; AOB 256.) Instead, respondent glosses over Dunlap's admission, claiming Dunlap had been justified when he disingenuously calling Fox's handling of the raw data "intentional misconduct" (93 RT 19707; RB 164). Without confronting Dunlap's earlier concession that he and Fox were equally at a loss as to what "raw data" meant due to their inexperience with the intricacies of brain science, respondent misleadingly claims here, "[T]here was nothing inappropriate about the prosecutor's representations to the trial court about Fox's *machinations* involving the raw data discovery." (RB 164; emphasis added.) Having failed to address the "problem" both attorneys faced with the complexities of neuroscience, respondent

is hardly in position now to argue Dunlap did not manipulate the facts himself in arguing for sanctions; Dunlap used the same "reprehensible methods to attempt to persuade ... the court" that Fox had violated discovery orders as he had in other situations, which in turn led to the court erroneously and prejudicially instruct the jury that defense counsel had been "extremely improper" in light of "Mr. Dunlap[']s ... numerous discovery requests as to this specific information, which was not provided." (93 RT 19707-19708; AOB 256; *People v. Hill, supra*, 17 Cal. 4th at p. 866; see also, *Argument IX, post.*)

E. *The Prosecutor's Arguments to the Jury*

Appellant provides specific examples of the prosecutor's numerous improper arguments presented during his opening statements and closing arguments in the guilt and penalty phases of trial. (AOB 256-288.) Although he has referenced the prosecutor's first penalty phase argument as backdrop to the retrial, respondent argues they are simply "irrelevant since the jury did not return a verdict." (RB 166.) The point is not whether the argument is "moot" but whether the prosecutor learned anything from court rulings sustaining objections to improper argument. Appellant submits he did not.

As will be recalled, Fox and Judge Platt independently attempted to short-circuit Dunlap's improper arguments prior to the presentation of closing arguments

in the retrial, but to no avail. (See, AOB 211, fn. 118; 260-266; 94 RT 19934-19941; 19960.) Judge Platt – who was not present during the first penalty phase – had reviewed Dunlap's closing argument, and did take extreme measures to warn the prosecutor not to use words such as "gimmick," "sham," "ploy," "trick," and "garbage" as he had in the first penalty phase. (61 RT 12712-12721.) Indeed, the "bull" Dunlap referred to in the guilt phase of trial is not as innocuous as respondent makes it out to be: "A prosecutor is not limited to 'Chesterfieldian politeness' ..." (RB 166 .) Dunlap's repeated references to *defense counsel* "misleading" the jury with "bull," by presenting "insulting" material through Dr. Wu, Dr. Amen and Dr. Buchsbaum, who "sell some good stuff ... twisted for personal gain," and "shoved down your throat," is nothing less than suggesting it was fabricated by defense counsel and his experts, including vouching for "Dr. Mayberg [who] is so much more capable, with no agenda, and serving the bottom line to you." (See, AOB 258-259; 48 RT 10022-10028.)

For a prosecutor to argue collusion between a defendant and his attorney or expert witnesses in order to fabricate a defense remains a serious form of prosecutorial misconduct, and a potentially reversible violation of rights to due process and to a fair trial. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Parker v. Matthews* (2012) 567 U.S. –, 132 S.Ct. 2148.) In both the guilt and

penalty retrial, the prosecutor distorted testimony and accused appellant of colluding with others to fabricate a defense. Accordingly, on this ground alone, both the guilt and penalty phase verdicts should be set aside. (*Ibid.*)

Further, respondent does not specifically address the prosecutor's improper reference to "lack of remorse," "no proof of molest," or other unobjected to but improper arguments because she claims appellant "has forfeited that portion of his claim ..." (RB 168; citations omitted.) She acknowledges, however, that the "comments" were part of appellant's motion for mistrial the following day after they were made, but argues "the court's decision is entitled to deference. (See *People v. Alvarez, supra*, 14 Cal.4th at p. 213.)" (RB 168, fn. 46; 96 RT 20228-20231; 20392; see also, AOB 274, fn. 152.) Moreover, respondent claims the prosecutor did not commit misconduct because "the trial court's rulings" on "lack of remorse and lack of corroboration of remorse to support Doctor Amen's opinion" were proper, and are dealt with in *Arguments VI, IX, X* and *XI, post.* (RB 169.) Respondent not only appears to be confused about what Dunlap argued and appellant's claims of misconduct, but pleads for deference to erroneous rulings that opened the door for Dunlap, thereby evading misconduct issues entirely. (RB 169.)

First, Dunlap's improper argument as to lack of remorse occurred when he

referred to Dr. Woods' testimony, *not* Dr. Amen's opinion (RB 169):

> "Dr. Woods came in and said Mr. Peoples expresses genuine remorse. That's the only remorse you hear from, from a defense expert."
>
> (95 RT 20187; AOB 275.)[31]

In addition, as part of Dunlap's overall effort to exclude prior to trial appellant's expressions of remorse to family and clergy, he argued to the jury in the retrial of the penalty phase that remorse had been essentially conjured up by appellant with a defense expert, because Peoples had "laughed" about the Chacko murder "to his wife" immediately afterwards, and in his journal he did not express any remorse. (95 RT 20187.) But the prosecutor knew full well that there was powerful evidence of remorse from independent sources (Kilthau and Skaggs), and with appellant's family, but he had vigorously – and deceptively – sought its exclusion from the jury, as discussed in great detail elsewhere. (AOB 280-281; *Argument VI, post.*) This was no "fair comment" on the evidence by any stretch;

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[31] Dr. Amen did not testify regarding remorse. Respondent's other reference to Dunlap arguing "lack of corroboration" (RB 169) for Dr. Amen's opinion correctly refers to Dunlap's – misleading – argument to the jury that "Dr. Amen's work is not corroborated" (95 RT 20204), when in fact Dunlap knew Dr. Buchsbaum had corroborated Dr. Amen's work in his testimony in the guilt phase; Buchsbaum's opinions were erroneously excluded at the retrial of the penalty phase on Dunlap's motion. (AOB 281; *Argument IX, post.*)

the prosecutor used "reprehensible methods to attempt to persuade the jury and the court" that the death penalty was the appropriate penalty in the retrial because appellant was not truly remorseful for his crimes when in fact the prosecutor had fanatically opposed its introduction. The trial court abused its discretion when it denied appellant's motion for mistrial, and, it is abundantly clear on this record that an objection would have been futile. (*People v. Hill, supra*, 17 Cal. 4th at p. 866; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340-341 [improper arguments in penalty phase cause for reversal]; *People v. Haskett* (1982) 30 Cal.3d 841, 866 [accord].)

Further, in closing argument to the jury in the penalty retrial, the prosecutor demeaned appellant by saying "Mr. Peoples, the boy is not on trial," followed by the misleading argument in reference to Dr. Lisak's testimony with respect to the effects of molestation on adolescent boys:

> "Number one, we have no proof of a molest. God forbid there is a molest. Absolutely no relevance to this case."
>
> (95 RT 20153; 20127; AOB 274.)

Once again, Dunlap improperly exploited what he had successfully moved to exclude by pretrial motion: evidence to corroborate appellant's statement to Dr. White that he had been molested several times by a sexual predator, John Fry,

working as an intake counselor in the juvenile justice system in Florida when he was fifteen years old. (See *Argument XI, post.*) Whether it was remorse or molest evidence, Dunlap twisted the truth to fit his unscrupulous agenda, committing prejudicial misconduct in arguments to the jury, and objection would have been futile to cure the prejudice. (*People v. Hill, supra*, 17 Cal. 4th at p. 866.)

Moreover, although the trial court did relent of overruling Fox's objection when Dunlap pointed the firearm at jurors (95 RT 20026; 20080) that appellant had used in the commission of the crimes, and did admonish the jury during the penalty retrial that it was "improper argument," respondent claims "the prosecution's references ... [and] comments were not misconduct in the penalty phase. (See *People v. Jackson* (2009) 45 Cal.4th 662, 691-692.)" (RB 169; see AOB 272-273.) *Jackson*, however, does not condone, as respondent seems to suggest, "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response ...' (*Id.*, at p. 692, citing *People v. Haskett, supra*, 30 Cal.3d at 863-864.) According to *Jackson*, asking jurors to "'imagine suffering the acts inflicted'" on a victim may be "'insufficiently inflammatory'" by itself, but this Court has never condoned a prosecutor pointing a firearm at jurors as proper argument. (*Id.*, at p. 691.) Dunlap was not making "*references* to the murder weapon," as respondent would have it

(RB 169), but *twice* pointing the gun directly at jurors with references to victim fear, clearly designed to improperly arouse jurors' passions against appellant, and the trial court's admonition did not cure the prejudice, individually or cumulatively. (AOB 272-273; 95 RT 20026; 20080; 20098.)

Finally, characterizing multiple-murder special circumstances as "freebies" (95 RT 20015; 20017; 20018) if the jury returned a term of life imprisonment as to any one murder, and referring to appellant as a "serial killer" (95 RT 20019-20020), are extremely misleading arguments in light of the facts and law presented to the jury in this case, and despite respondent's approval, the arguments provide additional evidence of prejudicial misconduct committed by the prosecutor. (RB 168; AOB 262-263; 267; 270-271.)

In the final analysis, "continual misconduct, coupled with the trial court's failure to rein in [his] excesses, created a trial atmosphere so poisonous" it denied appellant his federal and state constitutional rights. (*People v. Hill, supra,* 17 Cal. 4th at p. 821.) The record demonstrates that although defense counsel continually raised proper objections, any failure to interpose one, or to seek admonition, would not have cured the pervasiveness of the misconduct, and should be excused in light of the futility of such exercise. (*People v. Hill, supra,*17 Cal.4th at pp. 819-821; *People v. Boyette* (2002) 29 Cal.4th 381, 410; *People v. Hughes* (2002) 27 Cal.4th

287, 388; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333; *People v. Arias* (1996) 13 Cal.4th 92, 159.) Dunlap's misconduct improperly encouraged jurors to find appellant guilty, and sentence him to death, based on passion, prejudice, and other factors extrinsic to lawful determinations of guilt and punishment. (*People v. Marshall* (1996)13 Cal.4th 799, 831; *People v. Bell* (1989) 49 Cal.3d 502, 538; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-24.) Both state and federal law require fair, non-arbitrary, and reliable determinations of guilt, death-eligibility, and punishment, and mandate the exclusion from the jury's consideration of irrelevant and prejudicial material, and it is the trial court's duty to ensure that the weighing process is not skewed in favor of guilt or death. (*Stringer v. Black* (1992) 503 U.S. 222, 230-232; *Dawson v. Delaware* (1992) 503 U.S. 159; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. I, §§ 1, 7, 13, 15, 16 & 17.) The trial court failed to protect appellant from prosecutorial misconduct, and it cannot be demonstrated the misconduct individually or collectively had no effect on guilt, death eligibility, or penalty determinations. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.) It cannot be said the misconduct was harmless beyond a reasonable doubt in guilt or penalty retrial, but in fact a miscarriage of justice occurred. (*Chapman v. California* (1967) 386 U.S. 15, 24; *People v. Hill, supra,* 17 Cal.4th at pp. 844-848.)

VI.

APPELLANT'S EXPRESSIONS OF REMORSE TO CLERGY AND FAMILY WERE RELIABLE AND COMPELLING FORMS OF MITIGATION, AND RESPONDENT'S ARGUMENTS TO SUPPORT THE TRIAL COURT'S EXCLUSION OF THE EVIDENCE, AND THE PROSECUTOR'S IMPROPER EXPLOITATION OF THOSE RULINGS, DO NOT DEMONSTRATE HARMLESS ERROR.

It is worth noting at the outset that appellant's defense to the crimes alleged against him was based upon his mental state at the time they were committed, i.e., he could not form the required mental states for first-degree premeditated murder because of a methamphetamine-fueled and compromised brain. (See AOB 44-61.) George Woods, M.D., explained during the guilt phase and on the retrial of the penalty phase that it is not uncommon for methamphetamine addicts to reach a kind of mental "clarity" once their bodies have been cleansed of the drug. (44 RT 9112-9113; 90 RT 18936.) As mitigation evidence for the first penalty phase, and in reconsideration efforts for the retrial of the penalty phase, defense counsel proffered appellant's expressions of remorse – after he had been incarcerated, physically cleansed of methamphetamine, and achieved some "clarity" – to his family and to two Christian ministers (Kilthau and Skaggs); the United States

Supreme Court has described this kind of remorse as "not [an] unreasonable ... post-crime character transformation ..., which by definition can only be experienced after a crime's commission, [and] something commonly thought to lesson or excuse defendant's culpability." (*Brown v. Payton* (2005) 544 U.S. 133, 142-143; see 51 RT 10670-10672; AOB 292-293; 308.)

If appellant's post-arrest expression of remorse to his family, two members of the clergy – and the case psychiatrist – seem "somewhat hollow" to respondent (RB 181), the trial prosecutor demonstrated a fearfulness for its inherent power. While Dunlap relied on the circumstances of the crime, the *Biography of a Crime Spree*, and appellant's statements to his wife and to the police in November 1997, he also highlighted an alleged lack of remorse in his arguments to the jury in the retrial of the penalty phase, and fought tooth and nail against the admissibility of the defense proffer of remorse. Precisely because appellant's remorse was genuine, and not "manufactured" or "feigned," as the prosecutor misleadingly claimed it was (51 RT 10653; 76 RT 15839), the trial court initially noted how "significant"and "monumental" the evidence could be to the case for a life sentence if it were admitted as mitigation evidence. (50 RT 10345-10352; 10411; AOB 302-305.) Despite personal experience as a prosecutor to the compelling power of remorse, and the "absolute" approbation of colleagues to admit the evidence in this case,

Judge Platt unreasonably accepted Dunlap's wild accusations and fictitious examples of a cabal between Fox and Peoples to "manufacture" remorse; Judge Platt completely reversed course, irrationally refusing to admit the evidence at the first penalty trial, and refusing to allow it at the retrial of the penalty phase, on the ground that the *witnesses* to appellant's remorse were not reliable and that his expressions in letters to his family could not be trusted. (50 RT 10346-52; 51 RT 10668; 52 RT 10746; 76 RT 15815-15522; AOB 303-305; 310.)[32]

Respondent's arguments to support the trial court's erroneous exclusion of appellant's expressions of remorse to members of the clergy and his family are cursory and unpersuasive. (RB 173-179.) Respondent entirely fails to confront serious allegations of prosecutorial misconduct committed by deceptive and reprehensible arguments presented to the trial court for exclusion of evidence of remorse prior to the first penalty phase, and again on motion for reconsideration before the retrial of the penalty phase, and then brushes aside appellant's claims detailing the prosecutor's improper lack-of-remorse arguments to the jury in support of the death penalty in the retrial. (RB 180; 51 RT 10652-10658 [AOB

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Upon reconsideration of the issue after eight jurors believed a life sentence was appropriate *without hearing evidence of remorse*, an unbiased adjudicator would have allowed the evidence of remorse in the retrial of the penalty phase. (See, *Arguments II-III, ante.*)

306-307]; 76 RT 15838-15848; 79 RT 16346 [AOB 312-316].) Respondent justifies such treatment of these and other significant errors and misconduct issues asserted as if they were nothing to be concerned about, because, "[N]o matter how much evidence of remorse appellant [would have presented to the jury], his repeated denials of responsibility for the crimes, which he made to law enforcement (83 RT 17349), no doubt undermined his veracity in the eyes of the jury ..., [and] any reasonable juror would have found his hearsay assertions of remorse somewhat hollow." (RB 181.)

Respondent is wrong. Appellant has cited more than thirty examples where Deputy District Attorney Dunlap hijacked the issue of remorse in improper arguments to jurors in the retrial of the penalty phase (AOB 323-330), including his obstreperous claim that appellant's sole expression of remorse came trumped up from Dr. Woods:

> " Dr. Woods testifies for the defense exclusively. Dr. Woods is paid a lot of money, a lot of money to talk about a pattern of clearing. Dr. Woods came in and said Mr. Peoples expresses genuine remorse. *That's the only remorse you hear, from a defense expert.* Because there's no remorse in these crimes." (95 RT 20186; emphasis added.)

The prosecutor's improper arguments were not confined to the retrial of the penalty phase, but in this context they were clearly designed to convince *each and every* "reasonable juror" (RB 181) that death was the appropriate penalty. Yet eight jurors rejected the prosecutor's arguments *without* hearing evidence of remorse in the first trial.[33] At least three jurors in the retrial of the penalty phase were not convinced death was the appropriate penalty – until a verdict was "blasted" from them – without hearing the evidence of remorse. (*Argument IV, ante.*) In ignoring these facts, respondent's contention that "any reasonable juror" (RB 181) would still have sentenced appellant to death if he or she had been presented with the proffered evidence of remorse lacks persuasive force.

Moreover, in light of the prosecutor's spurious and strident attacks on "perverse" (51 RT 10655) counsel and appellant, including unfounded claims of their collusion to conjure remorse, in his endeavor (repeated at the reconsideration hearing prior to the retrial [76 RT 15838]) to convince the trial court to reverse its tentative ruling to admit the proffered evidence of remorse at the first penalty

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[33] As discussed elsewhere (AOB 261-262), after reviewing Dunlap's arguments to the jury in the first penalty phase, Judge Platt took extraordinary steps to curtail Dunlap's closing argument for the penalty retrial by admonishing him in order to preempt "misconduct" issues on appeal in the event of a death verdict; it appears to have been an exercise in futility. (94 RT 19934-19941; 19960.)

phase, respondent's effort to stand by the prosecutor's misleading and improper arguments to the court – and the trial court's erroneous ruling on retrial – is all that is "hollow" on this record. (See AOB 305-307.)[34] In fact, in the absence of the trial court's errors and the prosecutor's misconduct, it is likely "reasonable jurors" (RB 181) who had voted for the death penalty in the first – or second – penalty trial would not have done so if they had heard the proffered remorse. (*Chapman v. California, infra,* 386 US. 15; *People v. Jones, infra,* 29 Cal.4th 1229.)

To support respondent's position, she relies on "compelling" authority to exclude the proffered evidence, citing the same dicta from *People v. Livaditis* (1992) 2 Cal.4th 759, Judge Platt erroneously called "on all fours" (52 RT 10918). (RB 175.) Respondent also discusses the case defense counsel relied upon for reconsideration (*People v. Ervin* (2000) 22 Cal.4th 48, 103), but devotes little

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[34] Although Dunlap's baseless allegation of a "perverse" collusion between defense counsel and appellant was not specifically argued to the jury, he certainly hinted at it in commenting on Dr. Woods' testimony quoted above. Such reprehensible methods are not sanctioned as a proper function of the public prosecutor in argument outside the presence of the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 845; *Parker v. Matthews* (2012) 567 U.S. –, 132 S.Ct. 2148 [arguments to jury of collusion between defendant and psychiatrist are improper].)

attention to *People v. Bennett* (2009) 45 Cal.4th 577, 604 (RB 179),[35] and, as explored following, she fails to confront how *Bennett* conforms to a trend of recent United States Supreme Court decisions cited in support of appellant's arguments for admissibility of evidence of remorse. (AOB 234-95.) In fact, respondent entirely ignores the high court's recent decisions on mitigation evidence.

It bears repeating, the Supreme Court explained in *Tennard v. Dretke* (2004) 542 US. 274, 285, the proponent of remorse need not show a nexus between mitigation evidence and the crime committed, though in this case many of appellant's expressions of remorse did make the emotional link to the crime victims and their families. (AOB 292; 299-300; 320-322.) State rules designed to "screen" or restrict such evidence should be carefully scrutinized for constitutional violations of the right to present such mitigation evidence in a capital trial, because, "'[v]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances. [Citation omitted.]'"

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[35] *Bennett* is not controlling precedent here, but appellant relied upon it as persuasive authority on the foundation of reliability: "expression of concerns" for family members to clergy are deemed trustworthy, reliable, and "ultimately relevant ... [to] defendant's background and character. (Citation omitted.)" (*Id.*, at p. 604.)

(*Ibid.*)[36] Respondent does not address the other significant decisions appellant relies upon to support his argument that the trial court abused its discretion and violated his constitutional rights. (*Brown v. Payton* (2005) 544 U.S. 133, 142-143 [post-crime character transformation through remorse can only be experienced after commission of the crime and is admissible mitigation to lessen or excuse culpability]; *Bell v. Cone* (2002) 535 U.S. 685, 690 [recognizes expressions of remorse through others testifying at trial]; see also, *Ayers v. Belmontes* (2006) 549 U.S. 7, 15-17 [lack of remorse in prosecutor's argument]. AOB 292-294.) Respondent's failure to confront these cornerstone arguments in appellant's opening brief again suggests evasion of critical issues raised for appeal.

Instead, relying on *People v. Williams* (2006) 40 Cal.4th 287, 318-320 (RB 177; 179), respondent argues, "the trial court properly found, the timing of appellant's hearsay statements to his family and to the clergy were made after his arrest and concurrent with the formulation of his defense strategy ..., a time when appellant had a compelling motive to minimize his culpability for the murders and to play on the sympathies of potential defense witnesses." (RB 178.) Respondent has simply expropriated a quote from *People v. Jurado* (2006) 38 Cal.4th 72, 129-

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[36] Remorse, "as mitigating factor sometimes warranting a less severe punishment or condemnation is universal." (*People v. Ghent* (1987) 43 Cal.3d 7, 39.)

130, which presented a "similar situation" to that in *Williams*, and has altered the *timing* of the statements and the *hearers* to fit the circumstances here:

> " 'As the trial court correctly determined, the circumstance that defendant made his statements during a postarrest police interrogation, when he had a compelling motive to minimize his culpability for the murder and to play on the sympathies of his interrogators, indicated a lack of trustworthiness.'"
>
> (*People v. Williams, supra*, 40 Cal.4th at 318.)

Williams is distinguishable on its facts as it involved the admissibility of the defendant's videotaped statement to police and a statement he made to media representatives. Williams had pleaded guilty to special-circumstance murder, and his statements of remorse suggested he was attempting to hedge on his guilty plea to premeditated murder.[37]

Respondent turns *Williams* and *Jurado* inside out, rather than addressing the argument that it would undermine the attorney-client relationship and work-product

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[37] The prosecution – and respondent – show little concern for appellant's "veracity" or the "reliability" of the *Biography of A Crime Spree*, or the video-recorded interrogation by law enforcement that lasted twelve hours, but obtained their admission at trial under exceptions to a state-created hearsay rule. (See *Arguments VII, post.*)

privileges if post-arrest expressions of remorse were considered presumptively inadmissible because the accused is represented by counsel at the time of his expression of remorse. (AOB 296-97; see, *Fare v. Michael C.* (1979) 442 U.S. 707, 719 ['The [defense] lawyer is the one person to whom society as a whole looks to as the protector of [the accused's] legal rights ...'] To underscore the problem here, Dunlap accused Peoples of "manufacturing" contact with Pastor Kilthau with defense counsel's assistance, when it is clear Kilthau initiated the contact by letter to Peoples; it was Kilthau who had mixed emotions but accepted Peoples' letter inviting him to visit, and it was a conflicted Kilthau who took the initiative, hesitated when he arrived at the jailhouse steps, and ultimately decided to enter the jail and visit Peoples. After hearing Dunlap's specious arguments accusing Peoples of "manufacturing tears in front of a pastor," despite Kilthau's declaration swearing remorse was genuine, and Fox of colluding in "the plotting, the manipulation, [and] the strategy for the defense ... start[ing] on day one," without *any* competent evidence adduced in support his reckless claims, the trial court reversed course and ruled the evidence "unreliable." (CT 2927-2933; 50 RT 19397-10404; 51 RT 10658; 76 RT 15829-15832; AOB 300; 306-07.)

Indeed, respondent does not attempt to challenge appellant's recitation of Dunlap's irresponsible accusations of a "perverse" conspiracy between the

"grinning" defense lawyer and the "monster" (Peoples) to conjure up "outrageous" and "ludicrous" evidence of remorse in his specious arguments to the trial court. (RB 175; 76 RT 15849; AOB 303; 306; 313-314; 51 RT 10655-56.) Repeated here from the outline in his opening brief (AOB 306-307), the prosecutor presented no *competent* evidence during the hearings below to support his reckless accusations and deceptive methods prior to the first penalty phase:

> 1) "Mr. Peoples manufactured contact [with Pastor Kilthau]" (RT 51: 10653: 11); 2) "a perverse angle that the defense is taking ... [with] this monster ... is outrageous" (RT 51: 10655: 3-8); 3) "to get in the issue of remorse without the defendant taking the stand is absolutely perverse, using these two pastors" (RT 51: 10655: 25-26); 4) it "troubles me greatly," and "yells out at the judge this is manipulated ... this soul-searching moment of God, this moment of forgiveness seeking out this pastor, gets back to his defense lawyer" (RT 51: 10657: 10-15); 5) "Counsel should be right now grinning, because he has a chance to get in remorse through an improper vehicle ... because the pastor approached the defendant gives it a cloak ... of reliability ..." (RT 51: 10658: 10-12; 15); 6) "I have no clue what Mr. Peoples was thinking when he's manufacturing tears in front of a pastor ..." (RT 51: 10659: 9-11); and, 7) "Because I have no idea what Mr. Peoples was

thinking when he's chuckling to that pastor thinking, 'Boy, I got me one on the line now. Wait until I tell my defense lawyer about this one. Wait until I tell Mr. Fox about the minister and how I found God. Wait until you read these juicy letters about me. Hey, by the way, Michael Kale, my investigator, go out to my pastor. See if he's still got my letters.'

.....

I'm sorry, Judge, but the plotting, the manipulation, the strategy for the defense, has started way back day one."

(RT 51: 10658: 17-25; see, 51 RT 10655-58.)

Upon reconsideration of the proffer of remorse for retrial of the penalty phase, the prosecutor continued with the same unscrupulous allegations:

"What counsel [Fox] has repeatedly tried to do is step outside the rules ..., [and] I'm a little suspect [sic] with when all of a sudden these two individuals [Kilthau and Skaggs] who [Peoples] cries in front of appear on the defense witness list."

(76 RT 15838-39; AOB 313-314.)

Respondent does not attempt to justify Dunlap's misleading arguments to Judge Platt. Instead, the Attorney General has chosen not to respond at all.

Consequently, reviewing the trial court's erroneous rulings excluding the

proffered remorse in the context of the prosecutor's exploitation of those rulings in improper arguments to court – and the jury – only exacerbates the harm. (AOB 323-330.)[38] Respondent brushes aside Dunlap's extensively documented use of lack-of-remorse arguments on retrial, claiming simply that they were "proper" and "harmless," because a correctional officer (Weston) observed appellant crying once and Dr. Woods testified that "appellant was truly remorseful and had accepted responsibility for his crimes. (90 RT 18936.)" (RB 176; 180-181.)[39] Thus, aside

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[38] It bears repeating, the trial court initially found the evidence of remorse through Kilthau and Skaggs "absolutely permissible" (52 RT 10746), but in reversing itself, and denying the proffer for retrial consideration, the trial court ruled, "I'm still in the same position that I was ... when I reconsidered [the prosecutor's motion to exclude] and held that Pastor Kilthau and Reverend Skaggs would not be allowed to testify because in my opinion neither reaches, based upon the circumstances that occurred, reaches the level of sufficient reliability to testify as witnesses." (76 RT 15843; AOB 310; 314.)

[39] William Weston is the same San Joaquin County correctional officer Dunlap called "Billy," and "thanked" for his testimony after having "lunch" with him. (See, *Argument V*, *ante*.) Weston was called by defense counsel as a foundational witness to the testimony of James Esten, a prison adjustment expert. (91 RT 19178.) Weston testified to appellant's change over time to the rigors of confinement into a cooperative and docile inmate, and Weston appears to have offered seeing appellant cry. While crying may be "a state not inconsistent with remorsefulness" (RB 181) as respondent suggests, no such connection was made by either party at trial. No viable comparison or substitution can be made in this case for the excluded evidence of remorse from Pastors Skaggs and Kilthau, or appellant's letters to family (AOB 320-323; 329-330).

from ignoring the prosecutor's argument that Dr. Woods' testimony regarding remorse was tainted by his compensation as a defense witness, and "that's the only remorse you hear ... [b]ecause there's no remorse in these crimes" (95 RT 20186), respondent's facile efforts to show the errors are harmless are belied by the record.

Moreover, at no point does respondent confront the Dunlap's closing improper arguments using appellant's remorse-redacted letters pinned to a chart to suggest the superficiality of appellant's "love" for his wife and family as contrasted with the victims' loss of their loved ones. Respondent merely notes appellant's list of extensive redactions of remorse from letters in passing, but she does not discuss the propriety of the redactions individually or as embedded in the prosecutor's improper arguments. (RB 176, fn. 50; 180-181; AOB 320-323; 329-330; 95 RT 20009-200010; 20084-20088; 20145-20146.)

Accordingly, the trial court's exclusion of appellant's proffered evidence of remorse in letters to his family and as expressed to Rev. Kilthau and Rev. Skaggs, coupled with the prosecutor's improper arguments, violated appellant's state and federal constitutional rights to due process, to a fair trial, to the effective assistance of counsel, to confront and cross-examine witnesses, to present a defense, and to a reliable, individualized sentence determination, and against cruel and unusual punishment, were denied. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const.,

Art.1, §1, 7, 13, 15, 16, 17; Penal Code §190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Lockett v. Ohio* (1978) 438 U.S. 586; *Green v. Georgia* (1979) 442 U.S. 95; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Skipper v. South Carolina* (1986) 476 U.S. 1; *Stringer v. Black* (1992) 503 U.S. 222; *People v. Boyd* (1985) 38 Cal.3d 762, 775; *People v. Bennett* (2009) 45 Cal.4th 577, 604.) This was a close case by any definition, it cannot be said the error was harmless beyond a reasonable, and judgment must be reversed on this ground alone. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; *People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 ['We look very closely at the question of prejudice ... where the death penalty was imposed on a penalty phase retrial after the majority of the prior jury would have voted in favor of sentence of life in prison without possibility of parole.'].)

VII.

APPELLANT'S STATEMENTS TO POLICE WERE NOT VOLUNTARY, THE PHYSICAL EVIDENCE (GUN) OBTAINED AS A RESULT WAS TAINTED, AND THE ERRORS WERE NOT HARMLESS.

Appellant asserts in his opening brief that his rights against self-incrimination, to a fair trial, to due process of law, to reliable determinations of guilt and punishment, and to be free from cruel and unusual punishment, were violated when law enforcement officers engaged in coercive practices over twelve hours of intensive interrogation conducted November 12-13, 1997, and he has asserted that the admission of his statements and the "fruits" (gun retrieved on November 14) thereof was erroneous and prejudicial. (*Miranda v. Arizona* (1966) 384 U.S. 436; *Oregon v. Elstad* (1985) 470 U.S. 298; *Moran v. Burbine* (1986) 475 U.S. 412; *Arizona v. Fulminate* (1991) 499 U.S. 279; *Dickerson v. United States* (2000) 530 U.S. 428; *United States v. Patane* (2004) 542 U.S. 630; *People v. Cahill* (1993) 5 Cal.4th 478; AOB 336; 361-362.)

Respondent contends that the trial court did not err in admitting Louis Peoples' incriminating statements to Stockton police on November 12-13, or by admitting the gun retrieved afterwards with his assistance, because "detectives acted appropriately and professionally during appellant's interview ..., [and,]

because the tree was not poisoned, there was no error in admission of appellant's subsequent statement ..., as well as the murder weapon .... (citation omitted). "(RB 189.) Moreover, respondent claims, there is no prejudice because "the prosecutor's closing argument does not suggest that appellant's statement was the key to his guilt ..., [and] the same holds true for the nominal emphasis on appellant's confession during the prosecutor's argument in the penalty retrial." (RB 190-191.)

There is no dispute as to the law applicable to the case (RB 185-186; 189; AOB 336-342; 357-362), or to the procedural history of the motion to suppress and admission of the evidence. (RB 183-184; AOB 342-347.) But agreement ends there. The parties' interpretation of the evidence adduced at the suppression hearing, arguments presented by the prosecutor at trial, and as to the "totality of circumstances" surrounding the interrogation, are completely at odds; independent review of the video-taped interrogation itself reveals coercive police techniques employed to overcome appellant's free will and the prejudice of admitting the evidence at trial. (RB 183-184; 190-191; AOB 347-357; 362-365; *People v. Johnson* (1993) 6 Cal.4th 1, 25 [independent review well established]; *People v. Neal* (2003) 31 Cal. 4th 63, 86 [confessions as a class considered persuasive and prejudicial evidence]; *People v. Davis* (2009) 46 Cal.4th 539, 585-86, 598-99 [same].)

For instance, while Dr. Richard Leo's expert opinion testimony on the nature of police interrogation techniques during the hearing on the motion to suppress are detailed elsewhere (AOB 347-357), respondent claims "Dr. Leo's opinion – that the police interview tactics were coercive – [was properly rejected by the trial court because it] was founded on a social science standard of coercion, not a legal standard." (RB 183.) Referring to the trial court's acknowledgment of Dr. Leo's "otherwise impressive credentials," respondent relies upon its "dispositive" ruling that afforded "little weight" to social science opinion, but she does not discuss the testimony at all. (RB 183 [7 RT 1495-1498]; see AOB 355 [The Court: "I was very impressed with Dr. Leo." [7 RT 1495].) Like Judge Platt, the Attorney General never provides a meaningful explanation for distinguishing the "standard Dr. Leo was using to judge the interrogation" from a "legal" one, but erroneously jumps to the conclusion that the trial court must have been correct: "what may be coercive to a social scientist is not necessarily coercive *according to the relevant law*." (RB 184 [7 RT 1504]; emphasis added.) Notably, no law is cited to support the argument.[40]

Indeed, Dr. Leo's extended analysis of the actual interrogation techniques

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[40] The testimony of "social science" experts has long been recognized as persuasive evidence upon which legal principles have evolved. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1.

used by detectives was never seriously considered by the trial court; it was improperly ignored and arbitrarily rejected on the erroneous assumption that a "social science" analysis of techniques employed by police officers is somehow *irrelevant* to a legal analysis of the voluntariness of an in-custody confession. (*Dickerson* v. *United States, infra,* 530 U.S. at p. 433 [in-custody interrogation creates inherent pressures on the suspect's will.].) Respondent simply follows suit, citing no precedent to support the notion that such expert opinion testimony is irrelevant to a determination of whether or not police techniques have overborne the suspect's will. Had Judge Platt disagreed with Dr. Leo's findings it would be another matter, but he – and respondent – created a *legal* straw man in order to reject valid "social science" constructs for examining interrogation techniques commonly employed by police in the case at issue.

In *People v. McWhorter* (2009) 47 Cal.4th 318, 342-344, the trial court did not reject out of hand the testimony of Stephen Estner, M.D., a forensic psychiatrist. Estner testified at a suppression hearing, providing specific examples of subtly coercive police techniques during interrogations, and concluding "defendant's will was psychologically and emotionally overborne to the point where he believed he could protect Billie [wife] and his other family members only by confessing." The trial court relied upon Estner to a certain extent in finding

part of the interrogation process had overborne McWhorter's will, and it did not ignore the opinion testimony because it was presented by a mental health professional. (*Id.*, at p. 344.) No separate "legal" standard for determining whether police techniques are *actually* coercive has been established, and there was no basis for doing so below; Dr. Leo, like Dr. Estner, provided legitimate expert analysis and opinion regarding police techniques used to coerce incriminating statements, and how those techniques were used in this case to overcome appellant's free will. Respondent provides no basis for rejecting the analysis either.

No evidence was adduced in the trial court to suggest that the techniques used by police in this case differed from the "empirical and analytical" methods used by other police departments. On the contrary, the "application of principles of rational decision making, which are generally accepted and studied in other contexts are similarly applied in police interrogation practice ...," and taught throughout the United States in police academies and departments. (6 RT: 1243.) The same interrogation "techniques [are] written for both and police training literature as well as police training courses, and in the academic social science literature." (6 RT: 1244.) After nearly ten hours of interrogating Louis Peoples on November 12-13, 1997, Dr. Leo found pervasive elements of "low-end" and "high-

end" inducements used by police to overcome appellant's free will. He cited over fifty instances from pages 71-403 of the interrogation transcript where police "implied a threat or implicit reference to harsher punishment if you don't confess ..." in order to overcome appellant's free will (6 RT: 1312), yet Judge Platt – and respondent – completely reject the testimony without any discussion or citation to legal precedent for doing so. As Dr. Leo had explained, police messages "accumulate and develop, repeat, and build ...[a]nd that's part of the effectiveness of interrogation ..., the repetitive, cumulative nature of the persuasion process." (6 RT: 1291-1292.) At that point appellant's will is overborne, and the "explicit example of high-end technique[s]" of threatening to incarcerate and accuse his wife, Carol, as complicit in the crimes (6 RT: 1301-1303), and to "lean on" his twelve-year-old son, Matthew (6 RT: 1310-1311) – neither of whom had anything to do with the crimes – were used to coerce a confession:

> " You completely changed your demeanor here after hearing that, completely changed. She's not lying to us.
>
> .....
>
> [D]on't drag your wife into this anymore. You don't need to do that.
>
> .....

Give the people what they want — the truth, rather than what she thinks she heard you say or what we're thinking you're thinking.

Give us, give us the truth. Step up and be a man about it! You're done, you're caught," pp. 246-247;

" Louis, are we gonna have to go lean on Matthew now to find out if he saw that gun up in the closet?

.....

Twelve, we're gonna have to go out and talk to a 12-year-old and drag him into this too, to find out if he saw that gun? Huh?" pp. 376-377. (See also, AOB 350-351.)

To say that Peoples became dispirited once "officers raised the subject of involving [his] family ..., the court analogiz[ing] it to the 'damn [sic] finally giving way,' (7 RT 1504)," is an understatement on this record. (RB 184.)[41] Respondent does not provide a basis for the trial court's erroneous rejection of Dr. Leo's compelling testimony, which was critical and probative to the issues presented.

In contrast to *People v. McWhorter, supra*, 47 Cal.4th at pp. 344, and the

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[41] As in McWhorter's case, Peoples was someone who was deeply affected by the ploy of "dragging" family into the case. (6 RT 1312; AOB 356; see, *People v. McWhorter, supra,* 47 Cal.4th at p. 343.)

cases cited therein (*People v. Jackson* (1971) 19 Cal.App.3d 95 and *People v. Abbott* (1958) 156 Cal.App.3d 161), appellant's loved ones – wife, Carol, and stepson, Matthew – had not been taken into custody. After ten hours of interrogation, detectives *threatened* to "lean" on family members if appellant did not "tell the truth ..., step up and be a man about it." (AOB 350-51.) *People v. Howard* (1988) 44 Cal.3d 375 is also distinguishable because police did not accompany their advice to "tell the truth" with threats against Howard's loved ones as inducement to do so. (*People v. McWhorter, supra*, 47 Cal. App.4th at pp. 357-359.) Here, investigating officers *were* "using the specter of hardship that would be wrought upon defendant's innocent wife or children to encourage him to confess ..." (*Id.*, at p. 354 [citing *People v. Trout* (1960) 54 Cal.2d 576, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17.].)

Furthermore, while appellant's age is not a factor as it was in *People v. Neal* (2003) 31 Cal.4th 63, respondent has not shown "a level of sophistication in dealing with law enforcement" simply because he repeatedly "denied involvement" before his will was overborne after long hours in confinement under intense interrogation by detectives. (RB 189; AOB 356; 358-359.) The trial court made no finding appellant was "sophisticated." (Cf., *People v. McWhorter, supra*, 47 Cal.4th at p. 358 [trial court observed defendant to be a "very mature individual."].)

In fact, although not presented at the hearing, the evidence at trial revealed Peoples' mental and emotional capacity had been severely compromised from long-term methamphetamine abuse, and that he had been sleep-deprived for many days prior to his arrest. If anything, and there appears to be no dispute, police used repeated doses of caffeine through sodas and coffee over ten hours of interrogation to induce a complete breakdown of appellant's will in the effort to obtain the incriminating statements. (RB 188; AOB 356.)

Finally, respondent's claim that the admission of appellant's incriminating statements to police were harmless because they were neither "as powerful" as his "written words" in the *Biography of a Crime Spree* nor an integral part of the prosecutor's arguments in the guilt phase and penalty retrial is based upon misleading representations of the prosecutor's case. (RB 190.) First, police would not have expended the effort to obtain an oral confession if such a statement were of little value. Second, Dunlap highlighted the *Biography of a Crime Spree* in his opening remarks to the jury in the guilt phase in order to "compare it to the statements he [gave] detectives ...," and to show how he "broke" after ten hours, "nine of [which] you can throw in the garbage can as lies." (28 RT 5523; 5528.) During his arguments to the jury, it is clear that he relied upon appellant's written *and* oral admissions as the centerpiece to persuade the jury of appellant's the

deliberate, premeditated actions, and to prove his cold and remorseless character. (AOB 362-364.) Respondent's attempt to diminish the powerfully incriminating nature of the statements, or to devalue the context in which the prosecutor placed them, by citing a relatively low number of references (RB 190-191), does nothing to undermine their "persuasive force." (*People v. Neal, supra,* 31 Cal. 4th at p. 86.)

Appellant's state and federal rights against self-incrimination, to a fair trial, to due process of law, to reliable determinations of guilt and punishment, and to be free from cruel and unusual punishment, were violated by law enforcement officers, and the erroneous admission at trial of his involuntary statements and the gun requires reversal of his convictions and sentence of death. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. 1, §§ 1, 7, 13, 15 &17; *Arizona v. Fulminate, supra,* 499 U.S. 279; *Dickerson v. United States, supra,* 530 U.S. 428; *United States v. Patane, supra,* 542 U.S. 630; *People v. Cahill, supra*, 5 Cal.4th 478.)

VIII.

LAY WITNESS OPINIONS WERE ERRONEOUSLY EXCLUDED AND THE ERROR WAS NOT HARMLESS.

Appellant proffered lay witness testimony at trial on the effects of methamphetamine, including personal experiences with methamphetamine, and the effects, e.g., hyperactivity, erratic mood swings, feelings of persecution, auditory hallucinations, and paranoia. In addition, they were proffered as percipient witnesses to similar symptoms observed in appellant, and would have offered insights and opinions consistent with expert medical opinion. He argues in his opening brief that the trial court deprived him of critical evidence to his defense in the guilt phase, denied him the right to present mitigation evidence in the retrial of the penalty phase, and committed prejudicial and reversible error when it excluded the evidence based upon misconceptions of law and fact. (AOB 366-368.)

Respondent contends that the trial court did not err in excluding lay witness opinion testimony in the guilt phase and penalty retrial "because it was not relevant or otherwise probative of appellant's mental state at the time he committed the crimes." (RB 191.) In any case, respondent claims, even if the exclusion of such evidence was erroneous, "it was harmless because the court admitted [other] extensive evidence, in the form of lay and expert testimony, pertaining to

appellant's methamphetamine use and its effect on his mental state." (RB 191.) Respondent is wrong.

Moreover, respondent argues that in the penalty retrial defense counsel failed to properly preserve some claims made for appeal because he only stated his "disagreement" with "the Court's decision and would abide by it. (87 RT 18310.)" (RB 195.) Respondent does not clearly identify the claims she believes appellant "forfeited" – one or more – but refers to "the court's ruling on *the* issue" during the retrial of the penalty phase. (RT 194-95; emphasis added.) Respondent appears to be referring to the court's rulings on Richards and Fitzsimmons. In any event, respondent's "forfeiture" argument on this record is specious.

Defense counsel's efforts to explicate reasons for the relevancy of the testimony for both guilt and penalty determinations are well documented, and he repeatedly challenged the trial court's obstinacy towards proffered lay witness testimony on the effects of methamphetamine. (AOB 368-377.) Judge Platt's intractable position is best summarized by his statements at the retrial of the penalty phase, based as they were upon his earlier erroneous rulings in the guilt phase, and in the first penalty phase:

> " [I]t ... boggles my mind if somebody ... who takes a mind altering substance [is] able to determine and be the judge of

how it alters their thought process and their thinking process."

(87 RT 18310; see also 35 RT 7169; 7173-7174.)[42]

Contrary to respondent's apparent position regarding preservation of the issues for review of the retrial of the penalty phase, prior to the testimony of Joni Fitzsimmons at the retrial, the *prosecutor* sought "to just remind the Court and counsel that the Court's ruling was that the use of methamphetamine on an individual and not an expert was not relevant." (87 RT 18309.)[43] Defense counsel hardly needed to be reminded of the rulings; he had been warned in the guilt phase that if he entered the breech he would be sanctioned and he abided the court's admonition. (37 RT 7599-7600.) Nonetheless, Judge Platt warned Fox at the

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[42] Although not discussed by respondent, appellant's citation to a number of literary examples of inner experiences of self-confessed drug users illustrates the "lay" value of such testimony. (See AOB 380-82.)

[43] Respondent correctly points out that Quigel initially provided his lay opinion that Louis was "always wired" on methamphetamine during direct examination in the guilt phase, not on cross-examination. (RB 193, fn. 56.) But it is unimportant. The prosecutor took what was a spontaneous utterance and emphasized it on cross-examination; as discussed in detail in *Argument V*, Dunlap repeatedly ignored judicial rulings to improperly provoke Quigel in the guilt phase of trial. Dunlap used lay terms such as "wired," "tweaking," "crazy" and "paranoid" to describe Louis (AOB 371, fn. 192), but then opposed any such lay opinion testimony in the retrial of the penalty phase. (See 37 RT 37 RT 7634-36; 7661-7662; 7671.)

beginning of the first penalty phase on a renewed proffer, "same issue, same ruling." (51 RT 10517 [Fike; Bird].)

Dunlap had revived the issue at the retrial, and Fox responded that he "respected" the trial court's prior rulings but "disagreed." Then he urged admissibility of the evidence by attempting to convince the court it should reconsider those rulings. He reminded the court that lay witness testimony on alcohol intoxication "is allowed ... every day in a court of law ..." (87 RT 18310.) The court ridiculed Fox's renewed proffer on admissibility of Fitzsimmons lay opinion as "absolutely ludicrous," and short-circuited the argument at risk of sanctions: "We're not going to litigate it [again]..., I will stand on the record." (87 RT 18311; see also, AOB 375-76; *People v. Sturm* (2006) 37 Cal.4th 1218 [objections futile in the face of judicial misconduct].) Under the circumstances here, respondent's claim of forfeiture of "the issue" relating to the Fitzsimmons proffer is spurious. (RB 194-95.)

Moreover, Edward Richards, the tow truck driver who trained appellant, was proffered by the defense in the retrial of the penalty phase for similar reasons after the prosecutor objected on relevancy grounds, and the court specifically ruled that Richards' opinion testimony was inadmissible, "because I just ruled he cannot [testify]." (87 RT 18348.) According to Judge Platt, the proffered testimony had

nothing to do with mitigation: "Zero. None. Nil. Absolutely." (87 RT 18349; AOB 376-377.)

Accordingly, the record is abundantly clear that defense counsel submitted, resubmitted, and expanded upon proffers of lay witness testimony on the effects of methamphetamine, and observations of appellant's behavior consistent with their experience, during the guilt phase, first penalty phase and the retrial. The claims of abuse of discretion in excluding the evidence are preserved for review on appeal. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

With respect to the harm done to appellant's cause by the exclusion of lay witness testimony as to appellant's mental state defenses in the guilt phase, and mitigation evidence in the penalty retrial, symptoms of insobriety are relevant where physical and mental condition is in issue. The value of lay testimony on the subject of the mental effects of methamphetamine cannot be underestimated and is supported by ample precedent and literature. (*People v. Leahy* (1994) 8 Cal.4th 587, 620-21 [police officer's personal observations of insobriety considered lay opinion]; AOB 377-382.) Lay opinion testimony is well established as a persuasive means to demonstrate the validity of mental defense claims, and respondent does nothing to undermine the proposition, but argues instead that exclusion of the lay testimony is harmless because there was sufficient testimony

from lay witnesses to the physical symptoms observed and because Dr. Woods testified about the psychological effects. (RB 191; 198.) The problem is not that lay opinions on *physical* symptoms of intoxication were excluded (RB 196), but that the witnesses were not permitted to describe the *psychological* and *emotional* experiences with methamphetamine as they dovetailed with appellant's defenses in both the guilt and penalty phases of trial (AOB 382).[44]

Further, Dr. Woods' expert opinion was credible, but the prosecutor argued it was not because he was compensated:

> " Dr. Woods testifies exclusively for the defense.
>
> Dr. Woods is paid a lot of money, a lot of money to
>
> talk about a pattern of clearing [from methamphetamine
>
> addiction]."
>
> (95 RT 20186)

Lay witnesses were not compensated, and they would have provided direct

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[44] Insofar as the court erred when it refused to allow Quigel to testify in the guilt phase and retrial of the penalty phase as to the quality or strength of the methamphetamine sold to Louis the day before the *Village Oaks Market* murders (November 11, 1997) on the ground he did not see him use the drugs, the argument fails in light of Quigel's testimony that Louis was "always wired," and "looked crazy" when Quigel saw Louis the day of the murders. (RB 197; AOB 37, 371 fn. 192; 372-73; 37 RT 7634-36; 7661-7662; 7671; 88 RT 18420.)

experiences with methamphetamine similar to those Louis would have experienced under similar conditions, and untainted by what the prosecutor ascribed to financial motives. Whatever bias each witness may have had would have been open to examination by the prosecutor, and under scrutiny by the jury, but it is reasonably probable the jury would have found lay testimony persuasive evidence of real life experiences and insights into the erratic mental and emotional roller coaster associated with methamphetamine abuse. The erroneous exclusion of the state-of-mind evidence through lay witnesses was prejudicial not only because it was relevant and probative of appellant's legal culpability for the crimes he was charged with but because it reasonably would have led the jury to vote for a sentence less than death. In light of one juror injecting his own experiences with drugs during deliberations in the retrial of the penalty phase to convince other jurors that drugs did not constitute mitigating evidence, and the trial court's refusal to grant a new trial for jury misconduct, the prejudice of exclusion of lay opinion testimony is exacerbated. (See, *Argument XVII, post.*)

Appellant had federal and state constitutional guarantees to present a defense, and he was entitled to present all relevant and material evidence favorable to his theory of defense. (U.S. Const., 6th Amend.; Cal. Const., Art. 1, §15; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23; *Chambers v. Mississippi* (1973)

410 U.S. 284, 302.) The trial court erred in excluding the proffered opinion testimony of lay witnesses, and the exclusion of the highly probative evidence on guilt issues and as mitigation evidence was not harmless beyond a reasonable doubt. Accordingly, both guilt and penalty verdicts must be reversed because trial court deprived appellant of his state and federal constitutional rights to due process, to a fair trial, to present a defense, to a reliable, individualized sentence determination, and to be free from cruel and unusual punishment. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§1, 7, 13, 15, 16 & 17; Penal Code § 190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Lockett v. Ohio* (1978) 438 U.S. 586; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; (*Chapman v. California* (1967) 386 U.S. 18, 24; *Chambers v. Mississippi, supra*, 410 U.S. at p. 302; *Boyde v. California* (1990) 494 U.S. 370, 382; *People v. Gay* (2008) 42 Cal.4th 1195, 1223; *People v. Brown* (1988) 46 Cal.3d 432, 448; see AOB 367-68; 383-84.)

IX.

APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED DURING THE PENALTY PHASE RETRIAL BY THE TRIAL COURT 'S ERRONEOUS RESTRICTIONS ON CROSS-EXAMINATION OF DR. MAYBERG, MISLEADING ARGUMENTS OF THE PROSECUTOR, AND IMPROPER ADMONITIONS TO THE JURY FOR DEFENSE COUNSEL'S ALLEGED DISCOVERY VIOLATION.

Appellant has asserted in his opening brief that during the penalty retrial the trial court erroneously curtailed his defense counsel's cross-examination of the prosecution's neurologist, Helen Mayberg, M.D., and then improperly censured counsel before the jury for a non-existent discovery violation related to the cross-examination of Dr. Mayberg. The trial court unduly restricted defense counsel to Dr. Mayberg's opinions regarding PET and SPECT brain scan findings of Dr. Wu and Dr. Amen, erroneously ruling that because defense counsel had only called them to testify in the retrial, cross-examination of Dr. Mayberg could not extend to her opinions expressed at the guilt phase with respect to Dr. Buchsbaum's expert testimony during that proceeding; Dr. Buchsbaum was not called by the defense during the penalty retrial proceedings, though, as the record demonstrates, Dr. Mayberg had relied upon Dr. Buchsbaum's opinions in the guilt phase of trial, was

familiar with his published works, and had relied upon both in forming her contrary opinions. (AOB 385-386; 93 RT 19619-19622.) As a result of the trial court's erroneous rulings and improper admonition to the jury, appellant's state and federal constitutional rights to confrontation, to due process of law, to a fair trial, to present a defense, to a reliable, individualized penalty determination, and against cruel and unusual punishment, were denied. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§ 1, 7, 13, 15, 16, 17, & 28; Penal Code §§ 190.3, 1054.5, subd. (b); Evid. Code §§ 701; 721-722, 780, subd. (f); *Furman v. Georgia* (1972) 408 U.S. 238; *Lockett v. Ohio* (1978) 438 U.S. 586; *Green v. Georgia* (1979) 442 U.S. 95; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Delaware v. Van Arsdall* (1986) 475 U.S. 673; *Stringer v. Black* (1992) 503 U.S. 222; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Sully* (1991) 53 Cal.3d 1195.)

Respondent argues the trial court did not violate appellant's rights "[b]ecause the line of questioning defense counsel pursued called for inadmissible hearsay," and, even if the court had erred in refusing to allow defense counsel to cross-examine Dr. Mayberg regarding her disagreement in the guilt phase with Dr. Buchsbaum's opinions with respect to the validity and meaning of Dr. Wu's PET

and Dr. Amen's SPECT scan results, it was not likely a more favorable verdict would have been reached in the absence of the error. (RB 199; 208 [citing *People v. Richardson* (2008) 43 Cal.4th 959,1001].) Respondent also claims the trial court had "substantial evidence" to support its finding that defense counsel violated California's discovery laws, justifying its admonition to the jury, and that "the admonition [to the jury] did not unconstitutionally impute defense counsel's misconduct to appellant ..." (RB 207.)[45] As discussed in detail following, respondent's arguments are unpersuasive on both counts.

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[45] " The Court: Ladies and gentlemen ... I need to advise you of a couple of things. First involved the question about the prior testimony, that of the doctor referenced Dr. Amen's materials as garbage was stricken from the record. That means it is Non testimony [sic]. That means it should not have been referenced in any fashion for any reason. And it was extremely improper for Mr. Fox to do so before you. It is stricken. Period. It was improper questioning. Should not have been done. More importantly, the issue of the information provided the day Dr. Mayberg testified. What occurs in any criminal matter ... is called discovery compliance. Where information in one side's possession is ordered to be turned over to the opposition or the other side. Either the defense or the prosecution to the defense. Mr. Dunlap had made numerous discovery requests as to this specific information, which was not provided. It was untimely when it was finally provided after Dr. Mayberg had arrived and was to testify. So it was information that should have been provided earlier and was not." (93 RT 19707: 24-28 - 19708: 1-17.) Fox moved for mistrial immediately following the admonition. (93 RT 19736-19737; 19628; AOB 408-409.)

1. *The Discovery "Violation" and Prejudicial Admonitions to the Jury*

As to the evidence of a discovery violation, the record is clear. Dunlap informed the court on July 23, 1999 in the guilt phase that he and Dr. Mayberg were "ready to proceed" despite the fact that Dr. Mayberg had actually received the "raw data" the night before her testimony. (See 46 RT 9387-9392; AOB 389-390; 420-421.) Contrary to respondent's contention, *both* counsel tracked the disclosures that had already been provided, and the prosecutor did not complain that Fox had committed "misconduct" (RB 207), or that he had violated laws or court orders regarding "brain science" discovery; Dunlap conceded that he had probably – understandably – not mastered the subject: "I apologize, Judge, that I was not capable of making this request earlier; because I did not know what I was looking at ..., [so] I'm not making a [discovery] complaint." (46 RT 9389; see also AOB 309.) Neither Dunlap nor Fox were conversant with the appearance of "raw data" as contrasted with computerized representations of the data that had been turned over, but, when Dr. Mayberg pointed out the difference to Dunlap, he chalked it up to "inexperience with imaging," did not level a "complaint," and announced he was "ready to proceed." (46 RT 9389; 9392.)

Accordingly, there was no "substantial evidence" to support a discovery violation in the first instance, and the trial court unjustifiably admonished the jury.

Nonetheless, respondent would have appellant punished *twice* for his attorney's "misconduct," first by prejudicial judicial admonitions because his attorney attempted to "improperly" cross-examine Dr. Mayberg on her willingness to proceed without the "garbage" data, and, second, because he failed to disclose material in a timely fashion; now respondent says he should be punished because trial counsel failed to seek juridical clarification that his "misconduct" should not be attributed to appellant. (AOB 420-423; RB 206-208.) Even if defense counsel may not have argued against the implications of blaming appellant for counsel's alleged discovery violations and "misconduct" (RB 207), at the time (2000) the best legal minds had only just begun to question the impact of such jury admonitions under CALJIC 2.28 on the defendant's rights at trial; discretionary admonitions are now tailored to avoid the implications of *counsel's* violations of discovery laws on the accused. (See, CALCRIM 306; AOB 424-26; *People v. Lawson* (2005) 131 Cal.App.4th 1242; *People v. Bell* (2004) 118 Cal.App.4th 249; *People v. Cabral* (2004) 121 Cal. App.4th 748, 541; *People v. Saucedo* (2004) 121 Cal.App.4th 937.)[46]

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[46] In pertinent part, if a violation occurs, trial courts may consider instructing the jury as follows: "[T]he fact that the defendant's attorney failed to disclose evidence within the legal time period is not evidence that the defendant committed a crime." But, citing the cases above, the Judicial Council cautions, "the court should consider

Further, in *People v. Thomas* (2011) 51 Cal.4th 449, 478-484, decided before respondent's brief was filed, this Court distinguished *People v. Riggs* (2008) 44 Cal.4th 248, cited by respondent to support her argument that appellant "forfeited" his claim by failing to seek clarifying language. (RB 207.) Respondent also wrongly suggests the trial court's admonition somehow "favored the appellant" and, therefore, any error is harmless. (RB 207-208.)

First, after discussing CALJIC 2.28 and the *Bell*, *Cabral* and *Saucedo* cases, this Court in *People v. Thomas*, *supra*, did not find that Thomas had waived any error by failing to seek clarification at trial. Second, as pointed out in *Thomas*, the defendant in *Riggs* represented himself, and so there is no comparison to the case in which *counsel's* "misconduct" is transferred onto the accused. Third, the trial court did not improperly admonish the jury when it instructed that Riggs' tardy disclosure of alibi witnesses could only be considered "'in assessing the weight of the alibi testimony.'" (*Id.*, at p. 483.) Fourth, in *Thomas* the Court found the trial court had improperly instructed the jury that "'the weight and the significance of any delayed disclosures are matters for your consideration,'" but it held the error was harmless because the evidence of Thomas's guilt was "overwhelming." (*Id.*, at

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whether giving this instruction could jeopardize the defendant's right to a fair trial if the jury were to attribute a defense attorney's malfeasance to the defendant." See AOB 424.

pp. 478, 484.)

As in *Thomas*, the trial court's admonition to the jury here "suffer[ed] from many of the same deficiencies identified in *Bell*," and offered "'no guidance on how this failure might deliberately affect their deliberations.'" (*People v. Thomas, supra.*, 51 Cal.4th at p. 483.) In addition, like *Thomas*, the prosecutor here did not seek a continuance or other remedy – Dunlap did not even "complain" that a discovery violation had occurred – but he decided to proceed with his examination of Dr. Mayberg. (*Ibid.*; 46 RT 3982.)

Like *Thomas* and *Bell*, the trial court improperly admonished the jury, but unlike any other case on the subject of admonitions for defense counsel's violations of discovery law, this one occurred in the *penalty phase* of a capital murder trial – after the first jury hung eight-to-four for life imprisonment. The so-called "discovery violation" was not only unsupported by substantial evidence, but the prosecutor had not been prejudiced, and the error was compounded by the trial court's failure to provide "guidance as to how this failure might affect deliberations" (*People v. Thomas, supra*, 51 Cal.4th at p. 483) in deciding the appropriate punishment. Indeed, after improperly informing the jury that defense counsel had failed to "comply" with discovery laws, erroneously advising jurors that the prosecution "made numerous requests as to this specific information, which

was not provided," and misleadingly telling jurors that disclosure was "untimely," the court admonished jurors the "information that should have been provided earlier" constituted a violation that was even "more important" than defense counsel's "extremely improper" questioning of Dr. Mayberg as to her "'garbage'" comment at the guilt phase of the trial. (93 RT 19707-08; AOB 408-09.) Respondent spins her wheels attempting to justify the trial court's erroneous rulings and improper admonitions to the jury, but she cannot. Defense counsel's efforts to preserve the record were extensive and repeated, and the errors violated appellant's enumerated constitutional rights, and on this ground alone the death penalty should be reversed. (*Ante,* p. 113; see also, AOB 409 [motions for mistrial referenced]; AOB 423-427.)

2. *Dr. Mayberg Relied Upon Dr. Buchsbaum's Opinions*

First, there was nothing "inadmissible" about the opinions of Dr. Buchsbaum. (RB 199.) Experts often rely upon the hearsay opinions of others to form their own opinions. (*People v. Ledesma* (2006) 39 Cal.4th 641, 695 [prosecutor entitled to cross-examine expert on non-testifying consultant's report]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 93-94 [expert cross-examined on disciplinary report opinions not offered for truth].) Dr. Mayberg had done so in the guilt phase of the trial. Despite respondent's claims, and contrary to Dr. Mayberg's own

assertions in the retrial of the penalty phase that Dr. Buchsbaum's opinions were "irrelevant" to her opinion, jurors in the first penalty phase presumably considered Dr. Buchsbaum's opinions – perhaps some of those same jurors found them relevant and persuasive. The point is that had jurors in the retrial of the penalty phase been allowed to consider how Dr. Mayberg's conclusions had conflicted with someone she considered to be one of the world's most distinguished brain scan researchers and practitioners, jurors reasonably could have fallen in line with the first jury's majority, which had considered Dr. Mayberg's conflict with Dr. Buchsbaum. (46 RT 9464; 9468; AOB 387.) The trial court abused its discretion to control expert testimony and denied appellant his enumerated constitutional and statutory rights when it restricted cross-examination. (*Ante*, p. 113; AOB 385-86.)

Dr. Mayberg's assertion that her testimony at the retrial of the penalty phase had nothing to do with her testimony in the guilt phase, including her prior testimony with respect to Dr. Buchsbaum's opinions, is outlandish on this record. (RB 199-201; 204-205.) By skirting precedent establishing the "unitary" two-phase nature of a capital murder trial, as cited by appellant, respondent evades a significant issue at her peril. (AOB 414-415; see *People v. Bemore* (2000) 22 Cal.4th 809, 858.) Respondent can no more escape the effects of a unitary trial system than appellant, who was faced with all the "circumstances of the crime"

dredged up before the jury in the retrial. (*Ibid.*; *People v. Solomon* (2010) 49 Cal.4th 792, 805 [substantially same evidence of guilt presented on retrial]; *People v. D'Arcy* (2010) 48 Cal.4th 257, 271 [same]; *People v. Pride* (1992) 3 Cal.4th 195, 252 [even separate juries for each phase entitled to hear all evidence].) Thus, respondent's endorsement of Dr. Mayberg's claims that her own testimony at the retrial of the penalty phase had nothing to do with her opinions expressed in the guilt phase, including her prior testimony with respect to Dr. Buchsbaum's opinions, are also spurious. (RB 199-201; 204-205.)

People v. Smith (2007) 40 Cal.4th 483, 509, is illustrative. In *Smith* this Court rejected the assertion that the defendant's expert should not have been required to disclose hearsay in the form of psychological tests conducted:

> " Defendant disputes whether Dr. Glover actually consulted test data before testifying, relying on statements made by Dr. Glover that his opinion in court was not based upon any psychological tests whatsoever.
>
> .....
>
> [But] Dr. Glover had conceded to the prosecution that he had relied upon certain portions of the testing to formulate his opinion about defendant's anxiety condition, which was a strong factor in Dr.

Glover's conclusion that defendant's statements were involuntary."

In the present case, the record demonstrates that Dr. Mayberg relied on the opinions of Dr. Buchsbaum in the guilt phase, and she disagreed with his conclusions, as well as those of Dr. Wu and Dr. Amen. (See AOB 387-392; 402.) Instead of confronting the unitary-trial issue, respondent runs with Dr. Mayberg's disingenuous exertions at the hearing outside the presence of the jury during the retrial of the penalty phase as she evasively distanced herself from Dr. Buchsbaum: "I don't remember explicitly who I relied on for what." (93 RT 19626; AOB 402.)

Neither respondent nor Dr. Mayberg can avoid the fact that the latter's *adverse* opinions were based in significant part upon a disagreement with Dr. Buchsbaum, who endorsed Dr. Wu and Dr. Amen's work. Her opinions diametrically opposed Dr. Buchsbaum's in the same trial proceeding. As in *People v. Smith, supra*, 40 Cal.4th at p. 509, Dr. Mayberg had relied upon Dr. Buchsbaum's testimony and "pictures" (93 RT 19626) in forming her opinion, thus they were a proper subject for cross-examination, which "includes the documents and records examined by an expert witness in preparing his or her testimony. (*People v. Osband* (1996) 13 Cal.4th 622, 712.)"

If anything, Dr. Mayberg's integrity should have been an issue for the trial court. Her adverse opinions had apparently expanded to include appellant's

"mother," but the undergirding for her opinion remained the "studies by Dr. Wu and Dr. Buchsbaum, looking at the effect of the state of anxiety in terms of evaluating whether or not blood flow patterns may be affected by anxiety" experienced by Louis Peoples when he underwent the PET/SPECT scan procedures. (45 RT 9281: 3-6.) She had read the transcripts of the testimony of Dr. Buchsbaum before she testified in the guilt phase and relied upon them to dispute the conclusions of all three defense experts. (93 RT 19612; 19619; AOB 396-97.) She selected what she – and no doubt DA Dunlap – wanted the retrial jury to consider. But she admitted at a hearing outside the presence of the jury at the retrial that nothing had changed in the eight months since she had testified in the guilt phase:

> " Q. [Y]ou had stated an opinion in the [guilt phase of] trial that was not congruent with Dr. Buchsbaum, Dr. Amen and Dr. Wu, correct?
>
> A. Yeah. My opinion was different from the three of them. Yes.
>
> Q. And today your opinion is similar and congruent to your opinion that you gave [during the guilt phase of] trial?
>
> A. Correct."

(96 RT 19622; AOB 400.)[47]

The Attorney General's response to these facts is to divert the impeachment of Dr. Mayberg – with or without her prior testimony – regarding Dr. Buchsbaum's opinions to a claim that it "would have unduly consumed time" to have allowed the cross-examination. (RB 206.) The trial court made no such finding. (RB 206.) The self-serving comment, "Dr. Buchsbaum's former testimony would have had little effect in impeaching Doctor Mayberg ...," fuels speculation about time consumption, and her unsupported claim that "the prosecutor [had] undermined the reliability of Buchsbaum's views," are without persuasive effect. (RB 205-206.)

Indeed, Dr. Mayberg had testified in the guilt phase that while she disagreed with Dr. Buchsbaum, she appreciated that he is "a pioneer in the use of PET study related to schizophrenia," whose "stellar research career" in brain scan research is without peer. (46 RT 9464: 13-14; 9468.) The first jury weighed her opinion testimony against Dr. Buchsbaum's, Dr. Wu's and Dr. Amen's, and eight of those jurors voted in favor of life imprisonment. In the retrial, however, Dr. Mayberg

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[47] As will be recalled, Dr. Buchsbaum was called to confirm Dr. Wu's and Dr. Amen's findings, testifying that "relatively few people would show this kind of abnormality ...," and he opined "whether [the result of] traumatic brain injury or chronic effects of substance abuse ...," the abnormalities revealed in both scans were "consistent with that combination." (41 RT 8551-8553; 8474-8475; AOB 388.)

was permitted to insulate her contempt for Dr. Wu and Dr. Amen, knowing that neither had the renown of Dr. Buchsbaum in the international medical community, and the court draped her with a false aura of authority.

Moreover, as appellant has previously pointed out – also ignored by respondent – the trial court instructed the jury in the retrial of the penalty phase that another jury had found appellant guilty of murder, so the issue was no longer whether appellant could have formed the specific intent to commit the crimes. (AOB 415.) Inexplicably, respondent ignores this fact, arguing instead, that "[g]iven the jury's guilty verdicts, it is not reasonably probable this line of questioning would have resulted in a better outcome for appellant in the penalty retrial." (RB 209.)

The jury in the retrial was not asked to consider whether the brain scan evidence negated the mental state necessary for murder, but, like the jury in the first penalty phase, was allowed to consider the evidence as viable mitigation under factors (h) [mental disease not amounting to defense] and (k) [other mitigating evidence]. Contrary to respondent's claims that "there is no reasonable probability that appellant would have obtained a more favorable result if the court had permitted defense counsel to inquire further of Doctor Mayberg with respect to Doctor Buchsbaum's opinion," because his opinion "was founded on questionable

science," as the prosecutor had supposedly shown (RB 209), the first penalty jury had considered Dr. Mayberg's opinion in context of rebuttal to Dr. Wu's and Dr. Amen's data and opinions, *and* Dr. Buchsbaum's synthesis and interpretation, and eight jurors voted for life imprisonment. By allowing Dr. Mayberg to proffer an opinion without subjecting her to cross-examination on significant evidence that she had considered – and rejected – in forming her opinions under Evidence Code section 721, subdivision (a), violated appellant's constitutional and statutory rights, and it rendered the penalty determination unreliable on retrial. (AOB 410-412; 416-418; *Delaware v. Van Arsdall* (1986) 475 U.S. 673; *People v. Lancaster* (2007) 41 Cal.4th 50, 105 [scope of cross-examination of experts 'especially broad']; *People v. Nye* (1969) 71 Cal.2d 356, 374-75 [rigorous cross-examination of expert witness allowed on opinions and sources].)

Finally, as pointed out elsewhere (AOB 397), the prosecutor emphasized Dr. Mayberg's virtues in the retrial of the penalty phase as an independent consulting neurologist who relied on her "extensive" knowledge and "intimate" command of the evidence in his direct examination:

> " [T]he *transcripts that describe* [medical scan] *examination[s].* There was [sic] some examinations or interviews *by other doctors* [Buchsbaum] *who didn't have transcripts this time.* So I looked

at testimony from Mr. Peoples' mother. I have looked at testimony from various other witnesses describing behavior."

(93 RT 19612: 6-19; emphasis added.)

Then, in arguing for the death penalty, Dunlap misleadingly referred to Dr. Mayberg as "one of the world's most respected doctors," who would not be "misled" by the Dr. Amen and Dr. Wu's studies and opinions, which did "not corroborate each other," and whose opinions conjure up "problems in the medical community." (95 RT 20200-204; AOB 419.) Dr. Mayberg – and DA Dunlap – knew full well that Dr. Buchsbaum is one of the world's leading experts and that he had endorsed the findings of Dr. Wu and Dr. Amen; coupled with the prosecutor's closing argument, the trial court's improper restrictions on cross-examination and admonitions of discovery violations to the jury, cannot be considered harmless error in the circumstances. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684; *Lee v. Illinois* (1986) 476 U.S. 530; *Stringer v. Black, supra,* 503 U.S. at p. 235; *People v. Sully, supra*, 53 Cal.3d at pp. 1219-1220; *People v. Lawson, supra*, 131 Cal.App.4th at pp. 1248-1249.) Moreover, the cumulative prejudice of the trial court's erroneous rulings and improper admonitions to jurors violated appellant's previously constitutional and statutory rights, and on this ground alone the death judgment should be reversed. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

X.

THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS WHEN IT ERRONEOUSLY RESTRICTED "PROFILE EVIDENCE" PROFFERED FOR CRIME SCENE ANALYSIS AND TO REBUT THE PROSECUTION'S THEORY OF THE CASE.

Appellant asserts in his opening brief that the trial court thwarted his efforts to present a defense to the charges in the guilt phase, his case in mitigation of punishment, and projected to rebut the prosecutor's theories regarding the "circumstances of the crime," when it unduly restricted the proffered testimony of Brent Turvey, an expert in crime scene reconstruction. As a result, the trial court denied appellant his federal and state constitutional rights to present a defense, to confront and cross-examine witnesses, to due process, to a fair trial, to a reliable, individualized determination of death eligibility and sentence, and against cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§1, 7, 13, 15, 16 & 17; Penal Code §190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Lockett v. Ohio* (1978) 438 U.S. 586; *Green v. Georgia* (1979) 442 U.S. 95; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Delaware v. Van Arsdall* (1986) 475 U.S. 673; *Stringer v. Black* (1992) 503 U.S. 222; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512;

People v. Sully (1991) 53 Cal.3d 1195.)

Respondent fairly summarizes Brent Turvey's excluded opinion testimony as proffered to show that appellant's "skill level in committing the crimes deteriorated over time as evidenced by the fact that he went from killing people that he knew to victimizing strangers. (36 RT 7444-7446.)" (RB 212-13.) In essence, however, respondent claims the trial court's exclusion of Turvey's expert opinion extrapolated from years of experience profiling crime scenes and offender characteristics was justified because the crimes "could be readily explained by a difference in motives, as opposed to a deteriorating level of criminal action. (36 RT 7446.)" (RB 213.) According to respondent, the "same potential for misleading or confusing the jury" also justified the trial court's exclusion of the evidence "as foundational to Doctor Woods's testimony ..." (RB 214.) In addition, she argues that even if the trial court erred in limiting Turvey's testimony to the *physical* facts of crime – vis-a-vis DOJ Criminalists Ciula and Giusto – it was harmless. (RB 216.)[48] Respondent contends, "the import of this testimony was that appellant's

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[48] As discussed in greater detail at AOB 429, Kathleen Ciula was allowed to testify – over objection – to a reconstruction of the "sequence of events" at the *Mayfair Liquors* on November 4, 1997 based upon bullet trajectories and blood spatter. (31 RT 6232-6272.) Michael Guisto testified to bullet trajectories at the *Village Oaks* (November 11) crime scene. (33 RT 6687-6704; 6731.)

brain and thinking were impaired at the time of the crimes ...," and, therefore, "Turvey's testimony was cumulative" to "expert witnesses Wu, Amen, Buchsbaum, and Woods," and it explains why defense counsel "deci[ded] not to call Turvey as a witness." (RB 216; see also, 36 RT 7529-7530; AOB 430; 433-434.) In the end, according to respondent, defense counsel's argument to the jury at the guilt phase covered what Turvey would have testified to if given a chance and so there was no harm done. (RB 216.)

Noticeably absent from respondent's analysis of the record is the fact that the trial court allowed the prosecutor to repeatedly parade the "circumstances" of each of the five alleged crimes before the jury when he cross-examined Doctors Wu, Amen, Buchsbaum and Woods. (AOB 435-436.) As pointed out elsewhere, appellant's constitutional challenges, and statutory "cumulative" and "prejudicial" objections to this evidence, were denied, and the court below compounded the error by excluding Turvey's opinion regarding the profile of offender characteristics he gleaned from scene reconstruction as "absolute and pure speculation." (36 RT 7564-65; *Argument XIII;* AOB 478-504.)[49]

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[49] As noted, over objection Judge Platt allowed the prosecutor to repeatedly array – with figurines – inflammatory details of the crimes, and even with lay witnesses; only in the first penalty phase did the trial court (Judge Delucchi) prohibit prosecutor from reciting the facts of each crime. (AOB 234, fn. 129; 454, fn. 218; 478-504; 56 RT 11406-07.)

If nothing else, Turvey would have acted as a counterweight to the repetitive, cumulative and prejudicial "circumstances" of the crime admitted by the court over objection. Instead, the trial court abused its discretion and denied appellant his federal and state constitutional rights to present a defense to the prosecutor's cumulative evidence and repetitive arguments that he was a "predator" who acted in "systematic, routine, [and] premeditated" manner.[50] The court's rulings below were not harmless and they violated appellant's rights to confront and cross-examine the witnesses against him, to due process of law, to a fair trial, to a reliable, individualized determination of death eligibility and sentence, and against cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§1, 7, 13, 15, 16 & 17; see, AOB 428; 440.)

Respondent cites *People v. Smith* (2005) 35 Cal.4th 334, 357, as supportive of its position that the trial court properly exercised its discretion in excluding Turvey's profile evidence. (RB 213.) This Court noted in *Smith*, however, that

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[50] " [L]ook at Mr. Peoples ... a predator ..., that's what he is." (48 RT 10020; see also 48 RT 10016 [premeditation];10019 [premeditation].) Regarding "scarey" and "insulting" mental health experts presented by the defense: "Bull. This evidence has no business in this stage of the trial. The [defense expert] witnesses clearly testified that an individual can plan, can have cognitive function, can intend, can understand the nature. Bull." (48 RT 10022;10028-10029;AOB 258.)

"'profile evidence' ... is not a separate ground for excluding evidence," but is only *inadmissible* "if it lacks a foundation, or [is] more prejudicial than probative." (*Id.*, at p. 357.) In addition, in *Smith*, and the two other cases discussed by the Court (*ibid.*), the *prosecution* proffered the "profile experts."[51] The admission of the opinions of the prosecution's "profile" expert in the penalty phase of Smith's trial was deemed "highly probative" that the "defendant is a sadistic pedophile, and premeditated and committed the crime [sodomy] for the sexual pleasure of the act ..." (*Ibid.*) Of particular note in *Smith*, this Court characterized the test of prejudice under Evidence Code section 352 as whether it "'tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the*

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[51] In *People v. Walkey* (1986) 177 Cal.3d 268, the court reversed a conviction in which an expert testified that "the most important factor in the profile of a child abuser" is that he had himself been abused, and when the prosecutor improperly argued the defendant was guilty because he fit that profile by admitting on the witness stand that he had been abused as a child. In *People v. Robbie* (2001) 92 Cal.App.4th 1075, the court held profile evidence of "minimal force" supposedly common to rapists should not have been admitted at trial because the behavior the expert described paralleled the testimony of the alleged victim, but was also consistent with innocent behavior. This Court affirmed the principle: "Profile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt." (*People v. Smith, supra*, 35 Cal.4th at 358; see also, AOB 437 [*People v. Davis* (2009) 46 Cal. 4th 539 [profile evidence admitted]; *People v. Sturm* (1989) 49 Cal.3d 1136 [profile evidence approved].)

issues.' (*People v. Karis* (1988) 46 Cal.3d 612, 638, italics added.)" (*Ibid.*) In the present case, there was nothing prejudicial *to the defendant* about Turvey's opinions, and nothing cumulative or prejudicial about the evidence to the prosecution – allowed to recite again and again the circumstances surrounding each crime scene.

Indeed, the issue presented here is whether there was anything about the "profile evidence" that made it inadmissible per se, and clearly there was not. (*Ibid.*) There was also nothing irrelevant about the "circumstances" of the crimes, and Turvey's testimony was proffered as a foundation for mental health opinions. As discussed following, the claim that defense counsel had "acknowledged that the evidence was not conclusive" but "speculative," is simply not true (RB 213), but whether or not the profile evidence was "conclusive" is not determinative; that is a question for the jury to decide.

In *People v. Thomas* (2011) 51 Cal.4th 449, 478-480, Turvey's "profile evidence" was admitted before the jury without apparent challenge other than its timeliness. Turvey reviewed the crime scene and "testified that the overkill [amount of force] and lack of planning showed that the apparent motivation for the [rape] was spontaneous unplanned anger, although he could not say what had provoked the anger." (*Ibid.*) The Court did not find anything improper about the

nature or admissibility of Tuvey's opinion testimony, but held any error related to an admonition given the jury regarding its timeliness was harmless because "the evidence that defendant had sexual intercourse with the victim and then killed her was overwhelming, so much so that defendant did not dispute either fact." (*Id.*, at p. 484; see, *Argument IX, ante.*)

In short, respondent's extended references to the record do not support the arguments submitted in response. (RB 213 [36 RT 7542-7544].) Defense counsel explained Turvey was "not a stand-alone expert," but that he would supplement other experts with "everything that exists in the crime scene with an ear toward the argument this is an impaired mind, and it is consistent with what experts have seen" on the brain scans. (36 RT 7542; 7544.) The "profile evidence" went beyond what the prosecution's crime scene reconstruction evidence would provide, but that was the whole point: "I'm attempting ... to open the door a little wider ..., [by] asking a forensic scientist that's respected in the field, that's testified as an expert before courts of law, to broaden that analysis and include all of the other characteristics that an expert would incorporate into the opinions." (36 RT 7387.) He included Turvey's testimony as "a foundation as to what appears in the crime scene, how it's interpreted [a]nd then an expert who has the credentials in psychiatry can talk about how this relates to issues of mental impairment." (RT

36: 7533: 27-28 - 7534: 1.)[52]

It bears repeating, Turvey submitted a 26-page report dated July 3, 1999, entitled "Crime Scene Analysis." (36 RT 7497; 7528; Exhibit 105.) He analyzed each crime scene in detail, discussed each scene in terms of "precautionary acts," including behaviors committed by an offender before, during, and after a crime to prevent detection or hamper investigation, and "contradictory acts," which include behaviors that increase the likelihood of drawing the attention of authorities to the offender. He concluded that there were elements of planning and precautionary behavior revealed at each crime scene, but that a general decrease in the interval between crimes, coupled with an increase in violence and contradictory acts at the crime scenes, suggested the offender's ability to plan had deteriorated over time. (36 RT 7367-7379; 7452-7495; Ex. 105, p. 25.) Defense counsel expressed a willingness to restrict Turvey's testimony to the individual characteristics in the crimes as detailed in the July 3 report. (36 RT 7498.) He went so far as to proffer the testimony "as a crime scene analyst to lay the foundation for Dr. George Woods ... forensic psychiatrist, to offer mental state issues based in part upon this crime scene analysis ...," and "Turvey would not be offering mental state issues for any

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[52] We know the prosecutor's responses: "ludicrous" and "outrageous." (36 RT 7387; see also AOB 430; 432.)

truth of the matter asserted but as foundation so a forensic psychiatrist could then refer to this report ..." (36 RT 7498; 7499-7500.)

The trial court erroneously rejected the proffer of this "profile evidence" as "absolute and pure speculation" (36 RT 7565), and the exclusion of the evidence was not harmless, particularly in light of the repeated use of "circumstances" of the crime as permitted by the trial court. (*People v. Thomas* (2011) 51 Cal.4th at 484.)

Finally, respondent incorrectly argues appellant "did not raise the issue of the admissibility of Turvey's testimony during the penalty phase retrial," and, therefore, his claim should be "deemed forfeited" as penalty retrial issue. (RB 214, fn. 62.) As pointed out elsewhere, however, the trial court had made it abundantly clear that the same rulings applied to the retrial of the penalty phase as had been ruled on during the guilt and first penalty phase; it refused to change any of its prior rulings. (See, 62 RT 12683 ['Unless I'm convinced there is a reason that I was wrong the first time, the ruling is going to be the same.']; *Argument VI* [AOB 290-335; remorse excluded at both penalty trials]; *Argument XI* [AOB 441-472; court excluded evidence of molest and restricted expert testimony]; *Argument XIII* [AOB 478-504; court refused to restrict prosecutor's use of 'circumstances of crime' to examine defense witnesses]; *Argument XVI* [AOB 521-523; court refused to restrict cross-examination of defendant]; see also, *People v. Hill* (1998) 17

Cal.4th 800, 820-822 [claim not forfeited because of futility of objection].)

In fact, on March 22, 2000, during the retrial of the penalty phase, defense counsel attempted to inquire into the training and experience in psychology of Ms. Ciula, DOJ Criminalist, who had testified in the guilt phase; he began to challenge her expertise in reconstructing crime scenes, and the prosecutor objected to the examination as "beyond the scope" of direct examination (80 RT 16647):

> " THE COURT: Offer of proof, Mr. Fox?
>
> MR. FOX: I want to ask her if she studied the psychology of – of the reconstruction of a shooting. In doing her analysis, if she had any understanding of the psychology involved."

A hearing was held outside the presence of the jury. (80 RT 16646-16651.) After the brief hearing, the trial court sustained the prosecutor's objection, "not beyond the scope of direct examination ..., [n]ot beyond her qualification ..., [but because] it's not relevant." (80 RT 16648.) Judge Platt made it perfectly clear why he considered it irrelevant:

> " THE COURT: I still have not heard anything that convinces me that there is such a thing as a science of psychology of reconstruction. Whether or not it relates to her qualifications. That's not the area of her testimony.

MR. FOX: Well, again, this is a lead-in and segue into opening the door for Mr. Brent Turvey to testify, who does have an understanding as to the psychology of a crime reconstruction scene.

And I want to ask her – this witness – if she's taken any classes or education or training to allow her to understand what is going on in the crime scene with the shooter.

I assume that her answer is going to be no.

THE COURT: Mr. Turvey is the profiler?

MR. FOX: Correct.

THE COURT: *That previously has been not allowed to testify*?

.....

[P]sychology of reconstruction is not appropriate ... It's not relevant."

(80 RT 16649-16650; emphasis added.)[53]

On March 29, 2000, at the conclusion of the prosecution's victim-impact

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[53] The ruling did not deter Dunlap from engaging in improper redirect examination: "Q. You don't know if that same person [victim of felony-murder] is screaming or crying when they're shot? A. That's correct. Q. You have no idea if they're talking or begging at the time – Mr. Fox: Judge, I'll object, all of this is argumentative. The Court: Sustained." (80 RT 16666.)

presentation in his case-in-chief during the retrial, Judge Platt inquired of defense counsel's preparedness to proceed. (83 RT 17439.) During the discussion, the court advised defense counsel that it had reviewed Turvey's testimony in "anticipation" of the defense case; the following colloquy ensued:

> " THE COURT: There was mention had sometime during the previous week [March 22], Mr. Fox, about Mr. Turvey. And – I understood you to say that the thought was Mr. Turvey was going to be testifying.
>
> MR. FOX: No. What I wanted to do was I wanted to ask Ms. Ciula questions as a foundation to have Mr. Turvey come in. But because I wasn't allowed to ask those questions, I don't see any need to have Mr. Turvey come in."
>
> (83 RT 17422.)

In light of Judge Platt's ruling on Ciula during the retrial of the penalty phase, Fox understood the futility of again proffering Turvey's "profile evidence" because it was as "irrelevant" on retrial of the penalty phase as "the Court['s] ... rulings when we had the 402 hearing [during the guilt phase] on Mr. Turvey where he could testify to certain factors and not others." (83 RT 17442; see, *People v. Hill, supra*, 17 Cal.4th at 820-822.)

As discussed above, the prosecutor was allowed to repeatedly display the details from the scenes of the crimes to witnesses and to argue his "serial killer" theories to the jury. Turvey's proffered "profile evidence" was relevant and compelling evidence designed to rebut the prosecutor's theories and arguments presented in both the guilt phase and the retrial of the penalty phase. The trial court committed prejudicial error and violated appellant's previously enumerated constitutional and statutory rights when it unduly restricted and excluded "profile evidence" proffered by the defense for the purpose, and appellant's convictions and sentence of death should be reversed as a result. (*People v. Thomas*, *supra*, 51 Cal.4th at 478-480, 484; *People v. Lancaster* (2007) 41 Cal.4th 50, 94; *Ante*, p. 127.)

XI.

THE PROSECUTOR IMPROPERLY EXPLOITED THE TRIAL COURT'S ERRONEOUS EXCLUSION OF DETAILED CORROBORATION OF THE MOLEST, AND THE PREJUDICE OF THE EXCLUSION OF MITIGATION AND IMPROPER ARGUMENT CONSTITUTES REVERSIBLE ERROR.

Appellant argues in his opening brief that evidence proffered at trial to corroborate his statement made to Gretchen White, Ph.D., during her social history investigation before the first penalty phase began in August 1999, was erroneously excluded by the trial court and improperly exploited by the prosecutor in his argument to the jury in the retrial of the penalty phase. As described in detail (AOB 442-458), appellant had informed Dr. White during her investigation that he had been molested as a teenager by a youth counselor (John Fry) assigned by the Florida juvenile court; an investigation revealed John Fry had been subsequently convicted of molest while a court-assigned counselor. In order to support appellant's statement to Dr. White, and to corroborate her opinion, defense counsel proffered not only evidence of Fry's conviction but testimony from Michael Portbury and David Lamson, who had also been molested by Fry as teenagers in Florida. (50 RT 10331-10333; 8 CT 2216-2219.) The trial court termed the

conviction "tenuous," the molests of largely irrelevant, and it refused to allow the direct testimony from Lamson or Portbury and excluded the details of Dr. White's conversations with them. (51RT10334-10337;10356.)

Prior to the retrial of the penalty phase, defense counsel renewed the proffer of Portbury and Lamson, and was able to better approximate the time when Portbury (1979-1980) and Lamson (1973-78) had been molested to the time (1977) appellant was molested. (RT 82: 17011; CT 11: 3019-3020; 3024.) The prosecutor engaged in the same antics of disparagement of counsel and appellant as he had during the hearings regarding remorse (*Argument VI, ante*):

> "[A]n illusion or some elaborate scheme on the part of Mr. Peoples ... when all of a sudden this came up, Mr. Fry's allegations of misconduct [became] known to Mr. Peoples ... rumors occur, [and] ... Mr. Peoples sent the defense on this hunt." (82 RT 17010.)

The trial court refused to alter its ruling from the first penalty phase, allowing Dr. White only to indicate that she had talked with Portbury and Lamson during her investigation. (82 RT 17013-17014.) Dunlap improperly argued lack of corroboration for the molest in both trials, even though on penalty retrial defense counsel sought and obtained restrictions on the prosecutor based upon the motion

for reconsideration. (60 RT12184-12185; 95 RT 20153.) Despite those rulings and admonitions, but consistent with the pervasive pattern of misconduct (*Argument V, ante*), the prosecutor exploited the court's erroneous rulings in his argument to the jury during the retrial of the penalty phase:

> " Number one, *we have no proof of molest*. God forbid there is a molest. Absolutely no relevance to this case.
>
> .....
>
> Mitigation value? Nothing .... Value, zero."
>
> (94 RT 20153 - 20154.)

During defense counsel's motion for mistrial after objecting to the argument, Judge Platt relied upon his "thought process [during the first penalty phase] that the probative value [of evidence of molest] was significantly diminished when the issue of whether or not it occurred was not one that was going to be aggressively challenged" by the prosecution, and declared the prosecutor's argument to the jury, "'We have no proof of molest,'" did not amount to misconduct. (96 RT 20391-20392.)

Appellant contends the restrictions placed on Dr. White's testimony, the exclusion of evidence, and the improper arguments of the prosecutor, violated his state and federal constitutional rights to present a defense, to confrontation, to due

process, to a fair trial, to a reliable, individualized determination of death eligibility and sentence, and against cruel and unusual punishment. (U. S. Constitution, 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§1, 7, 13, 15, 16 & 17; Penal Code §190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Lockett v. Ohio* (1978) 438 U.S. 586; *Green v. Georgia* (1979) 442 U.S. 95; *Beck v Alabama* (1980) 447 U.S. 625; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Delaware v. Van Arsdall* (1986) 475 U.S. 673; *Stringer v. Black* (1992) 503 U.S. 222; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Edwards* (1991) 54 Cal.3d 787, 837-838; *People v. Frye* (1998) 18 Cal.4th 894.)

Initially, in response to appellant's arguments that he was severely prejudiced by the trial court's erroneous rulings excluding the corroborative evidence, respondent argues this Court should restrict his appeal to "the detailed hearsay statements Portbury and Lamson made to Doctor White, not [to a review of the exclusion of] their direct testimony." (RB 219-220.) Basing the argument on a written motion filed in court on March 23, 2000 (11 CT 3018-3025) by defense counsel (Aron Laub) during the prosecution's presentation of evidence in the retrial of the penalty phase, respondent argues the belated motion to expand the testimony of Dr. White – and Dr. Woods' testimony on remorse – in the retrial of the penalty

phase renders the "first penalty phase ruling excluding the direct testimony of Portbury, Lamson, and the investigators ... moot since the jury did not return a verdict." (RB 219.) The "forfeiture" argument fails here for several reasons.

As recalled, Judge Platt made his first appearance on November 22, 1999, after his heart attack caused him to be physically unable to preside during the first penalty phase in August-September 1999. (AOB 16-18.) One month later, Fox expressed concerns over the burden of reviewing 6,000 pages of transcripts and preparing for the retrial (January 3, 2000), suggesting that "everything that came in in the guilt [phase] doesn't [necessarily] come in in the penalty retrial," and "for some of those rulings, the Court has ruled on in the first case," he might "resurrect those motions in the second trial" even though Judge Platt might "say 'I'll make the same rulings.'" (61 RT 12509; internal quotation marks added.)[54] Judge Platt

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[54] As pointed out in *Argument VI, ante*, Judge Platt refused to reconsider his reversal of the initial ruling that would have admitted evidence of remorse – the only 'reversal' in the case – and he chastised defense counsel for attempting to "clarify" the exclusion of remorse. (52 RT 10921-22.) Prior to the retrial, again counsel attempted to expand the proffer to convince the trial court that its decision excluding evidence of remorse should be reversed, but it fell on deaf ears: "*I'm in the same position* that I was ... when I reconsidered [the decision to admit the evidence] and held that Pastor Kilthau and Reverend Skaggs would not be allowed to testify because in my opinion neither reaches, based on the circumstances that occurred ..., the level of sufficient reliability to testify as witnesses." (76 RT 15843; emphasis added.) When Fox cited a new case for

responded, "[I] differ, Mr. Fox, with your conclusion ..., it is not a whole new task," and that it was "ludicrous" to expect any meaningful change would occur. (61 RT 12512-14.)

The same can be said for all defense motions filed and argued prior to the retrial of the penalty phase. Nothing changed. On January 3, 2000, for example, ten filed motions were heard; save one – motion to limit cross-examination of appellant – none of the motions were "resurrections" of those filed and decided in the earlier trial proceedings. (62 RT 12593-96.) As to motions already considered, the court enjoined counsel on January 3, "unless I'm convinced there is a reason that I was wrong the first time, the ruling is going to be the same." (62 RT 12683.)

Thus, on March 27, 2000, during the retrial, when the trial court reckoned with the *Motion to Allow Expert Opinion Testimony from Dr. George Woods and Gretchen White* (11 CT 3018), it was not to the exclusion of the earlier proffer of direct testimony of Lamson and Portbury, as respondent misleadingly claims (RB 219), but was considered an addendum to the earlier motions filed and rulings already made in anticipation of the first penalty trial. Indeed, after the trial court

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consideration a few days later, Judge Platt reprimanded him for "not provid[ing] that information" at the earlier hearings, and rejected the argument: "[I]t just doesn't change the Court's ruling in any fashion." (79 RT 16532; see also, *Argument VI* [AOB 312-317].)

demanded, Laub provided a very lengthy justification as to why the motion had not been filed earlier (82 RT 16990-17003); after thoroughly testing defense counsel's (Laub) procedural defense, he was allowed to argue the merits of the admissibility Portbury and Lamson molests, but on a slightly different basis than had been argued before the first penalty trial.[55]

The belated motion was by no means designed to ignore the original proffer of *direct* testimony, but offered a new tack for the court to consider – through hearsay reliance by an expert, Dr. White. From the colloquy, it is evident that Judge Platt was clearly not interested in revisiting the admissibility of factual "details" surrounding the molests from *any* perspective; it simply was not open to reconsideration:

> " I don't see ever getting to the issue of the *facts and circumstances* of Mr. Lamson or Portbury's molest as they relate to Mr. Peoples' molest and whether or not it

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[55] Reference to Laub's "thank you for the opportunity to argue it fully" (82 RT 17020), as quoted by respondent (RB 219), makes sense in context; the court had refused to hear the merits without a procedural justification for its "untimely" filing: "[W]e had in limine matters that were presented and ruled on ... [so] what, if anything, explains why this motion was not part of in limine motions ...," which needed first to be addressed "completely" before the court would even consider the merits. (82 RT 16991; 16694.)

adds or detracts from the corroboration.

.....

Well, *that's not coming in in any fashion.*"

(82 RT 17004; emphasis supplied.)

After the trial court made additional assurances that the prosecutor would not be disputing the *fact* of the molest, it sought to secure a stipulation in order to put the matter to rest. (82 RT 17004-17008.) But Dunlap refused. Instead, the prosecutor drew a distinction where none could be legitimately drawn:

" The People do not contest the fact that Mr. Peoples was under the care or ward of Mr. Fry ..., and the situation regarding the molest, we basically took a no issue" [position during the first penalty phase].[56]

.....

I know that Gretchen White has a story and a version that Mr. Peoples was molested. That came out in great detail. Does that prove to me beyond a reasonable doubt

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[56] In light of Dunlap's two-faced arguments, as discussed in more detail following, respondent's claim that his improper arguments to the jury in the retrial of the penalty phase "is taken out of context" (RB 223) borders on the spurious.

Mr. Peoples was molested? I don't think so."

(82 RT 17010.)

The court, considering the tardy approach by Laub, concluded: "I still do not see anything different from the Court's prior rulings." (82 RT 17013.) The prosecutor's direct attacks on the reality of the molests in the first penalty phase, and his disingenuous and contradictory remarks during the retrial hearing on the same issue notwithstanding, the court refused to allow direct or indirect evidence of the details of the molest to corroborate appellant's statement to Dr. White: "[A]s I did before, [so] I've done again ..." (82 RT 17018.)

Accordingly, the record demonstrates the issues are preserved for appeal, but even if somehow the arguments were inadequately presented, further efforts at reconsideration would have been futile in light of the court's previous rulings on the same issues in this unified trial. (*People v. Hill* (1998) 17 Cal.4th 800, 820-822 [claim not forfeited because of futility of objection]. See also, *Argument VI, X, XIII* and *XVI.*)

Furthermore, the prosecutor's improper arguments – during both penalty phase trials – only underscore how important the proffered corroboration of molest was to frame the evidence as mitigation. (AOB 450; 456 [60 RT 12184-85: 'It was insulting ... no credible evidence [of molest] ... It's got to be a joke.']; [95 RT

12153: 'We have no proof of molest.'].) Contrary to respondent's arguments, *In re Lucas* (2004) 33 Cal. 4th 682, is not referenced by appellant (AOB 466-467) because, unlike the present case trial counsel "failed to present any evidence of mitigation [for Larry Lucas], although such evidence existed" (RB 221), but it illustrates how a matrix of abuse can be compelling as mitigation:

> " [The trier of fact] could infer, from Fisher's account of severe abuse meted out to any inmate who did not obey the abusive adult supervisors at Shawen Acres, that petitioner suffered abuse for his failure 'to go along with the program.'"
>
> (*Id.*, at p. 717.)

Ironically, respondent argues that "considerable evidence in mitigation" in the trial here distinguishes *Lucas* from the present case, but assumes "evidence of sexual abuse" was undisputed. (RB 221.) Respondent falls into the same trap the trial court fell into by assuming the prosecutor would not challenge the *fact* of molest, a "straw dog argument." (82 RT 17004-17010; AOB 451-457.) Claiming that appellant's argument the jury in the retrial of the penalty phase "was left 'with an uncorroborated presentation' of appellant's molestation by Fry (AOB 469) is baseless" (RB 221), while respondent ignores the prosecutor's direct challenge to

the jury, "We have no proof of molest" (95 RT 12153), entirely misses the mark. Had the jury heard the direct testimony of Portbury and Lamson, and the investigations into Fry's multifarious history of abusing teenage boys placed in his care by the Florida juvenile court, details of sexual abuse paralleling appellant's experience, and how deeply affected Portbury and Lamson were by Fry's abuse, jurors would have understood the full implications of the evidence as mitigation; without it, the evidence was subject to the kind of sabotage Dunlap engaged in with the jury: "We have no proof of molest."[57]

Further, respondent rides on the coattails of the prosecutor, and the trial court, arguing, "While this might have elicited some sympathy from the jury, appellant shows no causal connection ... [to] his calculated and cold-blooded decisions to murder four people for money, and, in one case, for revenge." (RB 222-223.) As discussed elsewhere, this is the same narrow – and errant – approach to mitigation that DA Dunlap and Judge Platt applied to the evidence at trial. (AOB

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[57] The same logic applies to the reference to *People v. Lucero* (1988) 44 Cal.3d 1006, challenged by respondent as inapt. (RB 221; AOB 469-470.) Portbury, Lamson and the investigators did not need to qualify as experts on the effects of molest – that was for Dr. Lisak – to show appellant was prejudiced by the exclusion of the evidence; they were foundational and corroborative witnesses to mitigation. (See, *Wiggins v. Smith* (2003) 539 U.S. 510, 534 ['gossip' to corroborate a 'troubled history' is admissible under state law]; see also, *In re Lucas, supra*, 33 Cal.3d at pp. 714-717.)

457 [DA: 'there's no causal link.' 96 RT 20390]; 466 [court: it does not explain why appellant 'killed people.' 51 RT 10356]; 458 [court: 'relevance' of the evidence to causation was focus of prosecutor's argument to jury; motion for mistrial denied. 96 RT 20392].) Respondent simply ignores appellant's discussion of the United States Supreme Court jurisprudence regarding mitigation and the harmful effects of exclusion. (AOB 458-467.) The trial court erroneously excluded viable evidence to corroborate mitigation that "the sentencer could reasonably find ... warrants a sentence less than death," and it was not harmless under the circumstances here. (*Tennard v. Dretke* (2004) 542 U.S. 274, 285.)

As a last effort to salvage the erroneous exclusion of the evidence from the prejudice caused, respondent claims the "particular portion of the prosecutor's argument to which appellant points (AOB 471) is taken out of context ...," because Dunlap was arguing that Dr. Lisak's testimony was of "no value" in that he "could not relate his testimony about sexual abuse to appellant's case, in particular." (RB 223.) Respondent is wrong.[58]

The "context" for Dunlap began before the first penalty phase in his

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[58] In denying the motion for mistrial, the trial court inaccurately referred to the prosecutor's argument to the jury as "focused" on the "relevance issue," and "not an issue on whether or not [the molest] was proven." (96 RT 20392.)

opposition to the evidence by "throwing his hands in the air" and "guffawing" (50 RT 10341-42; AOB 446, fn. 215), and it culminated in his argument to the jury where he challenged the underlying fact of the molest through Dr. Lisak *and* Dr. White as an "insult," a "joke," "misleading," a "creation" story fabricated by appellant and his witnesses as "an angle" without "credible evidence." (60 RT 12184-85.) The "context" for Dunlap continued to grow like a weed before the retrial of the penalty phase when he disingenuously claimed the prosecution had taken "no issue" with the reality of the molest. (82 RT 17010.) During his cross-examination of Dr. Lisak, "have you reviewed any documentation regarding the *alleged* molest of Mr. Peoples," he clearly signaled his challenge to the fact of the molest. (91 RT 19144; emphasis added; AOB 455-456.) During the motion for mistrial, immediately after his argument to the jury in the retrial of the penalty phase, Dunlap was adamant about that the "creation" of the molest:

> " [*W]e never conceded the issue of molest.* That's not how we argued it. *We argued there was no reliable evidence* and went on and said *if it happened*, it doesn't justify what happened 20 years later."
>
> (96 RT 20230; emphasis added.)

While the prosecutor could have properly argued the molest "doesn't justify

what happened 20 years later," he did not stop there, as respondent claims. (RB 223.) He "never conceded" the molest, it never "happened," and "there was no reliable" evidence presented to corroborate its existence. (96 RT 20230.) *That* is the context for the argument to the jury in the retrial of the penalty phase; Dr. Lisak's testimony was irrelevant not only because there was no causal link to crimes committed, but, of greater importance: "Number one, we have no proof of molest." (96 RT 20153.)

The trial court's errors, and the prosecutor's misconduct, violated appellant's enumerated constitutional rights, were not harmless beyond a reasonable doubt, and for the foregoing reasons, judgment should be reversed. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Brown* (1988) 46 Cal.3d 432, 448; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.)

XII.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY ADMITTING INFLAMMATORY AND CUMULATIVE PHOTOGRAPHS, AND THE ERROR IS NOT HARMLESS, ESPECIALLY IN LIGHT OF THE PROSECUTOR'S ARGUMENTS TO THE JURY.

Appellant contends the prejudice of admitting gruesome autopsy photographs at trial far outweighed their probative value, and that as a result of the erroneous admission of photographs over objection, and the prosecutor's improper use of them in the retrial of the penalty phase, his state and federal rights to present a defense, to confrontation, to due process, to a fair trial, to a reliable, individualized determination of death eligibility and sentence, and against cruel and unusual punishment, were violated. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. I, Sects. 1, 7, 13, 15, 16 & 17; Evidence Code §§ 210, 350, 352; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama* (1980) 443 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; *People v. Heard* (2003) 31 Cal.4th 946, 972 *People v. Carter* (2005) 36 Cal.4th 1114, 1164-1171; *People v. Davis* (2009) 46 Cal.4th 539, 614-615; see also, 10 CT 2704; 82 RT 17086-17089; 17090-17178.)

Respondent takes the position that the trial court did not err in admitting gruesome and inflammatory photographs at the guilt phase of appellant's trial and at the retrial of the penalty phase, arguing they were "relevant and more probative

than prejudicial with respect to appellant's defense at trial that he was impaired by methamphetamine use at the time of the crimes ..." (RB 224.) Respondent also argues the photographs were not cumulative to lay and expert testimony, but that "detailed findings Doctor Fitterer [pathologist] derived from the photographs could not be gleaned from the [repeatedly displayed] manikins, since the use of the latter was limited to showing the trajectory or angles at which the bullets entered and exited the bodies ..." (RB 228.) In relying on *People v. Box* (2000) 23 Cal.4th 1153, 1201 (overruled on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10), respondent claims the admitted photographs could not be considered unduly prejudicial at the penalty retrial because "'the trial court's discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial is more circumscribed'" than in the guilt phase. (RB 229.) Besides, according to respondent, "appellant has not demonstrated prejudice" at either phase of trial. (RB 224.)

Prejudice in the retrial of the penalty phase is clearly demonstrable from the prosecutor's undue emphasis on victim photographs designed to inflame jurors' passions. (AOB 473; 477.) As discussed elsewhere (AOB 320-322; 327-330), before presenting his closing argument to the jury, Dunlap had moved to eviscerate appellant's heartfelt expressions of remorse to his wife and children for the victims

and their families, and Fox attempted to preempt improper argument by drawing the court's attention to it. Knowing full well that he had also successfully convinced the trial court to gut Louis's expressions of remorse to Pastors Kilthau and Skaggs, Dunlap still exploited the trial court's errors by comparing a single, redacted letter from appellant to autopsy photographs in order to incite jurors to return a death verdict. (RB 229; AOB 477.) Indeed, throughout the trial, Dunlap appeared bound and determined to manipulate inflammatory evidence by repeatedly displaying figurines *with* gruesome photographs, comparing and contrasting them with an isolated and redacted letter, and by twisting appellant's remorse into apparent solipsism. By distorting the truth, Dunlap repeatedly and misleadingly argued lack of remorse for the victims. (See also, *Arguments V-VI.* See AOB 320-322 [redactions to letters to spouse/children expressing remorse for victims and families].)

People v. Riggs (2008) 44 Cal.4th 248, 324, is not "instructive." (RB 229) The penalty phase retrial here is not one in which the prosecutor legitimately contrasted "'the mitigating effect of defendant's past against the significant impact the murder had on [the victim's] family,'" and autopsy photographs were not used to enhance that argument. Unlike *Riggs*, this is not a case in which the prosecutor's – unchallenged – argument to the jury was "properly" compared to the

aggravating and mitigating evidence in order to suggest the former substantially outweighed the sympathetic features of the latter. (RB 229.) In *People v. Riggs, supra*, 44 Cal.4th at pp. 323-324, the Court observed that a "later" objection could be considered to have "preserved" the issue for appeal, but noted the "emotional" content of the prosecutor's questioned argument regarding the grief of the victim's mother was accompanied by the following "proper" remark, "'Lots of people lead deprived childhoods and they don't resort to these kinds of activities.'"

In the present case, Fox repeatedly attempted to prevent the use of inflammatory photographs – and figurines – during the guilt and both penalty phases of trial, and to preempt argument in the retrial of the penalty phase based upon lack of remorse for the victims' families, as respondent appears to acknowledge. (RB 229; AOB 475-476.) But the trial court's ruling that lack of remorse "would be improper argument in light of the court's redactions of appellant's letters [and exclusion of other evidence of remorse] ...," was not followed by "the prosecutor abid[ing] by the court's ruling," as respondent claims. (RB 229 [95 RT 20113-20015]; see AOB 329-330.) With figurines at hand (95 RT 20144), and autopsy photographs prominently displayed for the jury, Dunlap did not refer to appellant's past or his "methamphetamine use at the time of the crimes" (RB 224), but read aloud from Louis's redacted letter to his wife in order

to inflame jurors *and* to set the stage for argument on lack of remorse. (95 RT 20145-20146.) As the emotional pitch of the prosecutor's closing argument rises towards its climax it is clear the use of the figurines and autopsy photographs in the tandem are integral to his themes of lack of remorse and rejection of mercy:

> " [T]o give the defendant mercy, pity, sympathy or compassion, you have to look at *these figurines* ...
>
> .....
>
> You have to get through *these pictures* ...
>
> .....
>
> You're going to hear themes from the defense ...
>
> .....
>
> But you have to remember *these* [photographs/figurines] ...
>
> .....
>
> This is intentional, premeditated murder by an individual who likes it *with no remorse* and who did it again and again and again and again."
>
> (95 RT 20217-20218; emphasis supplied.)

There is ample evidence from the record to show that the autopsy photographs were inextricably bound to the prosecutor's case for murder convictions and for the

death penalty, but that they were cumulative to appellant's admissions, forensic reconstruction testimony, medical testimony, *and* that they were repeatedly displayed with the figurines when the prosecutor detailed to the jury in the retrial of the penalty phase the "intentional and premeditated murder by an individual who likes it with no remorse ..." (95 RT 20218; AOB 475-476.) The photographs did not add anything that "could not [have been] gleaned" from the figurines, as respondent asserts (RB 228), but were far more prejudicial than probative, and the trial court abused its discretion by admitting them in the guilt phase and penalty retrial; the purpose and effect of the evidence was nothing other than an appeal to jurors' passions, as demonstrated by the prosecutor's misuse of the them at trial. (See also, *Arguments V* and *VI.*)[59] The court below was aware of the prosecutor's improper, repeated use of evidence during the guilt phase and first penalty phase, and the prosecution would not have been disadvantaged if the court had restricted use to either the figurines or the photographs in the retrial of the penalty phase to argue the "circumstances of the crime" under factor (a) of Penal Code section 190.3. Nothing in *People v. Box, supra*, 23 Cal.4th at p. 1201, prevents such a proper exercise of discretion to avert the prejudice caused here. (RB 228-29.)

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[59] Respondent does not address the prosecutor's display of the figurines and photographs together during arguments at the guilt and first penalty phases of trial. (See, AOB 494, fn. 222.)

The admission of these photographs infused the trial with unfairness and deprived appellant of his rights to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and article 1, sections 7 and 15 of the California Constitution. (*Lisenba v. California* (1941) 314 U.S. 219, 228; *Riggins v. Nevada* (1992) 504 U.S. 127, 147 [Thomas, J., dissenting opn.]; *People v. Cavanaugh, supra*, 44 Cal.2d at pp. 268-269.) Thus, it is reasonably probable a more favorable verdict to appellant would have occurred had the jurors not been exposed to unnecessarily cumulative and inflammatory evidence, which was used by the prosecutor to inflame the jury's passions throughout the guilt phase and in penalty retrial. (*People v. Hendricks* (1987) 43 Cal.3d 584, 594-595; *People v. Watson* (1956) 46 Cal.2d 818, 836.) As a result of the admission of the photographs, the guilt phase and penalty retrial were fundamentally unfair, and in light of the prosecutor's arguments, it cannot be said the admission of the photographs was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 15; *Ford v. Wainwright* (1987) 477 U.S. 399, 411; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

XIII.

THE TRIAL COURT DID ABUSE ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT PERMITTED THE PROSECUTOR TO REPEAT IRRELEVANT AND INFLAMMATORY DETAILS OF EACH CRIME DURING THE CROSS-EXAMINATION OF DEFENSE WITNESSES.

Appellant asserted objections and motions for mistrial in response to the trial court's rulings that permitted the prosecutor to retrace the details of each crime and to use inflammatory devices, such as gruesome autopsy photographs and manikins, while examining defense witnesses in both the guilt phase and the retrial of the penalty phase. He contends on appeal that the trial court erred in allowing the repetitious display of irrelevant, cumulative and inflammatory details of each crime during the prosecutor's examination of lay and expert witnesses, infusing the trial with unfairness and denying appellant due process of law under state and federal constitutions. (AOB 478-480; *Zant v. Stephens* (1983) 462 U.S. 862, 885 [death sentence must not be based upon extrinsic factors 'constitutionally impermissible or totally irrelevant to the sentencing process.']; *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269 [use of irrelevant and inflammatory evidence is improper and may be cause for reversal].) As a result of the trial court's erroneous rulings, and

the prosecutor's irrelevant, argumentative and in examination of witnesses, appellant's state and federal rights to due process, to a fair trial, to present a defense, to reliable guilt and penalty determinations, and against cruel and unusual punishment, were violated by the introduction of prejudicial evidence at both phases of his trial. (United States Const., 5th, 6th, 8th and 14th Amends.; Cal. Cal. Const., Art. I, Sects. 1, 7, 13, 15, 16, 17; Evidence Code §§ 210, 350, 352; *Lisenba v. California* (1941) 314 U.S. 219, 228 *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349; *Beck v. Alabama* (1980) 443 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-18; *Johnson v. Mississippi* (1988) 486 U.S. 578; *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Anderson* (1987) 43 Cal.3d 1104, 1137; *People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.)

Respondent argues "the trial court properly permitted the prosecution to cross-examine the expert witnesses about their knowledge of the facts of the crimes, as well as the import – or not – of those facts to their expert opinions," because of the "expansive nature" of the testimony of Dr. Wu, Dr. Amen, Dr. Buchsbaum (guilt phase only), Dr. Woods and Dr. Lisak. (RB 233-34.) Citing AOB 501, respondent claims "the trial court did not bar expert opinion on issues

relating to appellant's mental state, as appellant contends," but "properly excluded expert testimony on the ultimate question: whether appellant possessed the requisite mental state at the time he committed the crimes. (40 RT 8339-8353.)" (RB 234). According to respondent, the "gravamen" of the experts' testimony was that "appellant's brain abnormalities made him vulnerable to impulsive aggression and violence ..." (RB 234), and, therefore, "the prosecutor was entitled to cross-examine the experts about the facts of the crimes to refute the inference presented by the expert testimony, which was that appellant did not have the requisite intent to be guilty of the crimes and that he did not deserve to be put to death for those crimes." (RB 234-235.) Respondent incorrectly posits, "[t]he same holds true for the retrial of the penalty phase." (RB 234.)

First, appellant has not contended the court *improperly* "bar[red] expert opinion relating to the appellant's mental state ...." (RB 234) He conceded that the trial court had properly "barred expert opinion on the mental states [as] *proscribed under Penal Code section 28 and 29*." (AOB 501; emphasis added.) Appellant's contention is that over objections under Evidence Code section 352, and due to the repetitive, unduly prejudicial and cumulative nature of the "circumstances" of the crimes presented, Judge Platt erroneously permitted the prosecutor to parade those same details to Dr. Lisak, Dr. Wu, Dr. Buchsbaum (guilt phase), Dr. Amen, and Dr.

Woods, who were largely unfamiliar with them and whose opinions on impulsiveness were specifically tied to PET/SPECT scan results and not to the "ultimate question," i.e., whether he acted in conformity in the crimes at issue. (RB 234; see 40 RT 8421; 42 RT 8762–63; AOB 480-485 [motions for mistrial].) The questions were not designed to elicit relevant information from experts, but instead were arguments linked to the prosecutor's opinions.

Second, numerous instances have been cited where the prosecutor was not asking good faith questions. (*Argument V*; AOB 223-257.) Rather, he was simply repeatedly eliciting inflammatory, and with respect to expert witnesses, irrelevant details:

> " Do you [Dr. Amen] know if Jun Gao, after he was struck in the head, do you know if Besun Yu cowered down behind the cash register?" (40 RT 8459 [objection sustained]; AOB 484); " Did you [Dr. Wu] drive out to Eight Mile Road at Interstate 5 and view the area where James Loper was shot nine times?" (85 RT 17837; AOB 497).[60]

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[60] See also, AOB 490-499 [penalty retrial]. Dr. Wu had explained his "role" as a scientist, i.e., "to perform the PET scan to determine if the PET scan indicated whether there was presence or absence of abnormal brain function, and that was extent of my role in the case as I understand it." (85 RT 18737; AOB 497; 500.)

Furthermore, although respondent ignores the issue, in the retrial of the penalty phase "actuality" was not before the jury; guilt had been determined, so the issue was one of punishment. Judge Platt abused his discretion by failing to curtail the prosecutor's improper examination of expert witnesses, allowing Dunlap to repeat the cumulative and prejudicial "circumstances of the crime," and appellant's state and federal trial rights were violated as a result. (*Zant v. Stephens, supra,* 462 U.S. at p. 885; AOB 479-480; 503-04.) On only one occasion did Judge Platt recognize the error by sustaining an objection during the examination of Dr. Lisak in the penalty retrial:

> " Been asked and answered, Mr. Dunlap. He indicated he has no knowledge of any facts of the case. It is absolutely clear. Move to another area."
>
> (91 RT 19135; AOB 493.)

Consequently, respondent's citation to *People v. Samayoa* (1997) 15 Cal.4th 795, is not "helpful," it is misplaced. (RB 235.) In Samayoa's case the Court recounted the prosecutor's isolated inquiry as to "whether [the expert] had received the police reports or photographs of physical evidence ..., [and] whether such information concerning the circumstances of the crimes would not in fact be pertinent to a diagnosis of defendant's mental condition ... [and] why the witness

had not undertaken a correlation of her test results with such information." (*Id.*, at p. 835-36.) As long as the defense expert did not proffer "an opinion that as a result of defendant's mental disorders he lacked the capacity to form the intent to kill, or did not in fact have the intent to kill, when committing the crimes," there was no violation of Penal Code sections 28 and 29, and, therefore, the prosecutor was entitled to make general inquiry into – and "comment upon" – the defense expert's failure to consider the circumstances of the crime in rendering her diagnosis. (*Id.*, at p. 837.)

Respondent's extension of *Samayoa* to the facts here does not follow. Respondent claims there was "a tremendous amount of defense expert testimony on appellant's mental condition at the time of the crimes, as well as the attendant behavioral ramifications" (RB 236), but she is wrong. Dr. Wu, Dr. Buchsbaum (guilt phase), Dr. Amen and Dr. Woods, formed opinions on impulsiveness based on PET/SPECT scan results and they were not asked to opine on the "ultimate question," i.e., whether he acted in conformity at the time of the crimes. (AOB 480-485 [40 RT 8421; 42 RT 8762–63].) Dunlap did not ask *general* questions of the experts as to whether they had considered the circumstances of the crimes, but the court allowed him to repeat the details of each crime with each expert, even though the circumstances were irrelevant to the experts' opinions. (See, *People v.*

Smithey, infra, 20 Cal.4th at p. 960 [an expert may not be cross-examined regarding matters that are not relevant to the expert's opinion].) Judge Platt failed to take appropriate action as urged by defense counsel to curb the prosecutor's reprehensible methods – displaying photographs, figurines, and bad-faith questions – and refused to nip the prejudice in the bud.[61]

Moreover, *People v. Smithey* (1999) 20 Cal.4th 936, does not lend support to Dunlap's methods either. While respondent correctly notes a prosecutor "may attempt to show intent by focusing on defendant's acts and asking how a defendant could perform such acts without intending to do them" (RB 235), this Court did not condone the prosecutor's "intemperate behavior" in *Smithey* when he sought to elicit the expert's inadmissible opinion regarding the defendant's capacity to form intent at the time of the crimes or his remarks expressing a willingness to "open the door" on the subject when defense counsel objected. (*Id.*, pp. 959-960.) *Smithey* is distinguishable – as is *Samayoa* – because the "prosecutor's question and

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[61] Judge Delucchi saw the writing on the wall and immediately cut off the cross-examination of Guy Lazarro during the first penalty phase, exercising the proper discretion to avoid undue prejudice of repetitious reference to inflammatory circumstances of the crimes: " Because the jury's already heard it. It's cumulative. They know what he's convicted of. They know the details of the crime." (56 RT 11407; see, AOB 489.)

[isolated] remarks ... did not amount to an egregious pattern that rendered the trial fundamentally unfair in denial of defendant's constitutional right to due process. (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.)" (*Id.*, at p. 961.) It is the repeated exhibiting of figurines despite judicial prohibitions, incessant bad-faith questioning in the face of sustained objections, and the unremitting display of details of each crime over objections, which creates "an egregious pattern" here (*ibid.*); coupled with the trial court's refusal and failure to restrict the prosecutor's cross-examination to a general question, *Smithey* and *Samayoa* are distinguishable on their facts from this case, and appellant's guilt and penalty trials were rendered unfair as a result.[62]

DA Dunlap did not restrict his misuse of the details of the crimes to expert

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[62] *People v. Doolin* (2009) 45 Cal.4th 390, 408-09, is inapposite. (RB 233; 235; 237.) In *Doolin*, a defense psychiatrist opined on direct examination in the guilt phase of trial, "'I found a man who showed no evidence that I could see of a mental disorder, either in my examination of him or my review of the [police reports] that I have available.'" The prosecutor's cross-examination of the psychiatrist as to other-crimes evidence was deemed proper; he was "unaware" of critical other-crimes evidence because defense counsel had failed to provide him with those police reports – not an issue here. (*Id.*, at p. 434.) In fact, ineffective-assistance-of-counsel claims are deeply intertwined with virtually every aspect of both phases of Doolin's trial, including defense counsel's failure to thoroughly investigate his background. (See, Kennard, J., joined by Werderger, J., dissenting and concurring opn., pp. 457-466.)

witnesses. His line of inquiry as to whether Guy Lazarro would rehire a convicted murderer was not the purpose of the line of examination. Dunlap took every possible opportunity to exhibit the inflammatory "circumstances of the crime" in the penalty retrial – supplemented with the display of the figurines and photographs (over admonition) in examination and argument – and the trial court allowed him to do so even with lay witnesses, over objection and motions for mistrial. (AOB 488, fn. 220; 490.)

In the retrial of the penalty phase, Lazarro's testimony on direct examination was not substantially different from the first penalty phase. (RB 236-237.) In the first penalty phase Lazarro spontaneously offered that when appellant was terminated from *Griffen Industries* in 1992, "he never condemned anybody ..., never made any threatening remarks to anybody ...," which prompted Dunlap to focus on cross-examination on *the details of each victim and crime*:

" Do you know an individual named Thomas Harrison?

A. No, sir, I don't.

Q. How about a guy named James Loper?

A. No, sir.

Q. How about an individual named Stephen Chacko?

Mr. Fox: Judge, I'll object. This is –

The Court [Judge Delucchi]: Sustained.

By Mr. Dunlap:

Q. Well, Mr. Lazzaro, let's talk. You are here to say he's a good worker, and he made no threats to you when he was fired. Is that what you are saying here?

A. Right. He made no threats to me or anyone else at *Griffen*. He just made no threats at all."

(56 RT 11403: 15-27.)

Despite Judge Delucchi's rulings in the first penalty phase, on retrial of the penalty phase, again Lazarro appears to have offered testimony of his own that after Louis had been fired, "he made no aggressive statements to anybody or anything like that." Defense counsel did follow up, asking if he had seen Louis "threaten" anyone or be "violent," as a result of the termination at *Griffen Industries*. (86 RT 18067.) As respondent points out (RB 236), the subtle difference may have opened a door to character rebuttal evidence, but it does not follow that "the prosecutor was free to question him about the [capital murder] crimes" without restraint.

People v. Loker (2008) 44 Cal. 4th 691, 709-710 does not support respondent's argument. (RB 237.) The rebuttal evidence submitted did not

involve facts about Loker's capital murder case, but related to other-crimes evidence. (RB 237.) Unlike the trial court here, the trial court in Loker's case "made efforts to minimize undue prejudice and to inform the jury of the limited relevance" of the evidence. (*Ibid.*) This Court did not sanction regurgitation of the details of the murders for which the defendant has been convicted as 'character' evidence in a penalty phase, but explained that the "prosecutor is entitled to respond to character evidence of its own," under well-established principles of evidence; the Court also cautioned that "the scope of rebuttal must be specific," and that introducing "good character" evidence does not "open the door" to any and all "bad character" evidence. (*Ibid.*)

Over continuous objections and motions for mistrial, the trial court abused its discretion and erroneously permitted the prosecutor to present irrelevant, cumulative, and inflammatory details of each crime, including gruesome autopsy photographs and manikins, with defense witnesses in both the guilt phase and the retrial of the penalty phase. (See also, *Arguments III, V* and *XII*, *ante*, and *XIV*, *post.*) In doing so, the court denied appellant his previously enumerated state and federal constitutions at both phases of trial. (*People v. Cavanaugh, supra,* 44 Cal.2d 252; *People v. Anderson, supra,* 43 Cal.3d 1104; *Lisenba v. California, supra,* 314 U.S. 219, 228; *Zant v. Stephens, supra,* 462 U.S. 862, 885.)

XIV.

APPELLANT HAS NOT FORFEITED ANY OF HIS CLAIMS THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ERRONEOUSLY ADMITTED PREJUDICIAL AGGRAVATION EVIDENCE AND WHEN THE PROSECUTOR IMPROPERLY EXPLOITED THE EVIDENCE IN THE PENALTY PHASE RETRIAL, AND THE ERRORS ARE NOT HARMLESS.

Appellant has raised several errors with respect to the admission of cumulative and inflammatory photographs and manikins as murder "victim impact" evidence in aggravation under factor (a) "circumstances of the crime" at the retrial of the penalty phase. (AOB 509-513.) In addition, he has argued that it was error to admit under factor (b) "violent criminal activity" the *extent of injuries* and *rehabilitation evidence* with respect to Thomas Harrison, who was shot in the hip while in the parking lot of the *Cal Spray* factory on September 16, 1997, because the jury had been unable to reach a verdict in the guilt phase with respect to the attempted murder charge filed against appellant. (AOB 28-29; 171-172; 514; 8 CT 2045; 45 RT 10228-10240; 51 RT 10647 [court ruled Harrison evidence not admissible under factor (a) but admissible under factor (b)].)

Respondent argues appellant's claims that he was denied his state and federal

constitutional rights because of the erroneous admission of prejudicial evidence in aggravation are without merit. (RB 238.) Respondent also argues appellant failed to properly preserve the error of admitting Thomas Harrison's injuries at the retrial of the penalty phase, even though the jury in the guilt phase had been unable to reach a verdict and mistrial had been declared, because counsel's written motion was insufficient to preserve the issue for review on appeal and his oral objections were inadequate. (RB 243; see AOB 509; 75 RT 15700-15710.) Further, respondent claims appellant has not "point[ed] to any offending instances" in which the prosecutor "improperly argued the victim impact evidence ... [by] repeated references to the photographs and manikins (AOB 510-512)," and, besides, "the prosecutor was free to argue the evidence," because the trial court had admitted the evidence to show "the immediate effects" of the capital crimes on the victims' families. (RB 244.)

With respect to "offending instances" in which DA Dunlap made improper "references to the photographs and manikins" (RB 244), appellant has discussed in detail in *Arguments V-VI* and *XII-XIII*, *ante*, Dunlap's repeated misuse of photographs and manikins – misleadingly juxtaposed to appellant's redacted letter to his wife in one instance – to argue lack of remorse and in order to inflame jurors' passions with victim impact evidence in retrial of the penalty phase; respondent's

claim of lack of prejudice is without persuasive force in light of the prosecutor's pattern of misconduct, including improper arguments to the jury.

Moreover, regarding "forfeiture" of claims with respect to Thomas Harrison – or as to any other "victim impact" witness issue – respondent does not have a leg to stand on. Claiming the parties and court merely "discussed the parameters of such evidence" at the hearing on the written motion filed to exclude Harrison's testimony in whole and in part, including use of the manikin depicting Harrison, is misleading and citation to *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1052, is no help. (RB 243.) How respondent can equate appellant's written and oral objections to Harrison's proffered testimony with Oliver's "failure to object to [separate acts of factor (b) violent criminal activity] evidence on any ground at trial" is beyond comprehension. (*Ibid.*)

Contrary to respondent's contention, the record of objection – and futility – to preserve issues for appeal is clear. With the encouragement of DA Dunlap, Judge Platt once again questioned defense counsel's audacity in rearguing or expanding written objections to proffered testimony for the retrial of the penalty phase, including admissibility of Harrison's testimony. (75 RT 15687.) Dunlap accused Fox of untimely and "inappropriate" objections at the hearing before the retrial of the penalty phase on March 6, 2000, interrupting counsel's arguments for

exclusion of the Harrison evidence: "[Dunlap:] So my question is is this bad faith, or is this someone who just doesn't agree with what the Court's already ruled on and is asking for a second ruling again?"[63]

As discussed in detail elsewhere (AOB 506-510), defense counsel attempted to renew his objections based upon experience from earlier trial proceedings, expressing concerns about juror impressions of Harrison as a "very sincere" and "very sympathetic" witness who "volunteered things" counsel wanted to avoid on retrial of the penalty phase. (75 RT 15680.) The court agreed with Dunlap, however, that procedural issues were more important than substance: "Why have you waited until today to be specific in listing an argument the witnesses and the testimony if you specifically object to [them]?" (75 RT 15687.) Again, during the same hearing: "I need an explanation of why it wasn't before the Court as part of the [written] motion before I move to the next issue." (75 RT 15689.)

Defense counsel responded that he had felt pressured into filing what

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[63] For someone who had refused to accept Judge Platt's ruling admitting proffered evidence of remorse before the first penalty phase it is an ironic condemnation to say the least. As will be recalled, Judge Platt had ruled Pastor Kilthau's and Pastor Skaggs' testimony regarding appellant's remorse was "absolutely" admissible (57 RT 10746), but then changed his mind after Dunlap's relentless efforts to reverse the ruling – without any new facts or legal precedent – appear to have worn him down. (See, *Argument VI*; AOB 298-317.)

amounted to incomplete motions (December 28, 1999), because the court had refused to consider continuance and rushed retrial of the penalty phase to January 3, 2000. (75 RT 15689; 10 CT 2699-2709; see also, *Argument III, ante.*) When defense counsel attempted to expand or elucidate victim impact issues, or reconsideration of the Harrison evidence in light of the mistrial declared in the first penalty phase, as has been demonstrated in every other instance where respondent has claimed 'forfeiture' on appeal from judgment after retrial of the penalty phase, the trial court refused to consider its prior rulings, regardless of written or oral objections:

> " The Court: That was the ruling that I had made ...
>
> Mr. Fox: Right.
>
> The Court: That was the ruling that I had made as to Mr. Harrison.
>
> Mr. Fox: Okay.
>
> The Court: Unless something has changed, that [prior] ruling is not going to change. It was correct then. I believe it is correct now." (75 RT 15681.)

Under pressure, and undoubtedly mindful of the threat of another sanction hanging over his head, Fox responded to the court's questions about alleged tardy attempts to re-litigate issues for retrial of the penalty phase, but he "specifically"

articulated his objections to "victim impact evidence, photographs pertaining to Mr. Loper's childhood, Mr. Loper's family, high-school graduation photograph, any photographs engaging in rafting and other recreation ..." (75 RT 15687.) Then the following colloquy occurred:

> "The Court: So, you're moving to exclude the testimony of Monica Loper, Hazel Loper, Judy Morehead, Ancie Chacko, Karen Yu Tan, Jack Yu and David Yu in total?
>
> Mr. Fox: Well – yes."
>
> (75 RT 15688; 15689.)

After ruling objections to Harrison's testimony had been resolved prior to the first penalty phase and would not be revisited, and hearing additional justification from Fox as to "timeliness," "bad faith" and "redundancy" arguments leveled by Dunlap (75 RT 15691; 15694-95), the court ruled on the broader victim-impact objections outlined above. (75 RT 15697-15712.) The issues are well preserved for appeal and *People v. Lewis & Oliver,* 39 Cal.4th at 1051-1052, is inapposite. (RB 243.)

In the final analysis, respondent claims the use of objected to manikins, photographs, and so forth, were "fleeting" and "harmless," including those used during James Loper's mother's testimony; when Dunlap handed Hazel Loper a

wooden doll of her son, respondent says he "pushed the limits" by doing so, but argues the evidence "could just as easily have been adduced ..." without objectionable evidence. (RB 242.) But it was not. The prosecutor used the manikin of James Loper during Hazel Loper's victim-impact testimony to inflame jurors' passions; respondent's selective reasoning ignores the pervasive nature of the prejudice generated by Dunlap's closing argument to the jury. Indeed, by using charts with photographs and displaying manikins, and comparing to them to love letters, Dunlap's remarks were not cumulatively "fleeting" or "harmless" in seeking the death penalty:

> " [T]o give the defendant mercy, pity, sympathy or compassion, you have to look at *these figurines* ...
>
> .....
>
> You have to get through *these pictures* ...
>
> .....
>
> You're going to hear themes from the defense ...
>
> .....
>
> But you have to remember *these* [photographs/figurines] ...
>
> .....
>
> This is intentional, premeditated murder by an individual

who likes it *with no remorse* and who did it again and again and again and again."

(95 RT 20217-20218; emphasis supplied.)

Whether evidence of the violence inflicted upon Thomas Harrison may have been admissible under factor (b), the trial court had ruled that it was not admissible under factor (a), and thus committed error when it admitted the inflammatory and improper evidence of "victim impact" (factor [a]) of Harrison's injuries, even though the guilt phase jury was unable to reach a verdict on the charge of attempted murder. (51 RT 10647-10650; AOB 509; *People v. Taylor* (2001) 26 Cal.4th 1155, 1170-72 [surviving victim's testimony regarding injuries only relevant if related to the circumstances of the capital offense]; *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [victim impact another form of information about specific harm cause by the capital offense].)

The introduction of the evidence in the penalty retrial violated appellant's state and federal constitutional and statutory rights to violated to due process, a fair trial, confrontation, and to a reliable, individualized sentence determination, and against cruel and unusual punishment, and the error is not harmless in light of the prosecutor's arguments to the jury. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Article 1 §§ 1, 7, 13, 15, 16 & 17; Penal Code § 190.3; *Clemons v.*

Mississippi (1990) 494 U.S. 738, 754; *Chapman v. California* (1967) 386 U.S. 18, 24; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384; *People v. Roldan* (2005) 35 Cal.4th 646, 732; *In re Lucas* (2004) 33 Cal.4th 682, 733 *People v. Brown* (1988) 46 Cal.3d 432, 446-48.)

XV.

THE TRIAL COURT'S IMPROPER RESTRICTIONS ON MITIGATION EVIDENCE AND ADMISSION OF NON-STATUTORY EVIDENCE IN AGGRAVATION WERE NOT HARMLESS ERRORS, AND DENIAL OF COUNSEL'S MOTIONS TO CONTINUE PREJUDICED APPELLANT.

Appellant has argued elsewhere (*Arguments VI, VIII*, and *X-XIV*) that the trial court's erroneous exclusion of remorse, and other evidence in mitigation proffered by the defense, along with the improper admission of non-statutory aggravation evidence, prejudiced him at both phases of trial. Defense counsel's motions to continue trial on the ground he was not fully prepared for either phase of trial, or for the retrial of the penalty phase, were linked to a number of arguments related to those issues. Respondent argues here that the trial court did not abuse its discretion in denying any of the numerous continuance motions filed, and that its other rulings on specific evidentiary issues presented here, were not erroneous or prejudicial. (RB 244-256.) Respondent is wrong for the following reasons.

1. Denial of Motion to Present Jurors from First Trial

Respondent essentially ignores United States Supreme Court capital case jurisprudence that in "all but the rarest kind of capital case, the sentencer must not be precluded from considering, *as a mitigating factor*, any aspect of defendant's

character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra,* 438 U.S. at p. 605. See AOB 517.) Instead, respondent relies upon dicta from this Court upholding the inherent discretion of trial courts to exclude "irrelevant" or "minor" points of character, arguing that the trial court properly exercised its discretion when it excluded proffered mitigation evidence in this case. (See RB 250, citing *People v. Thornton* (2007) 41 Cal.4th 391, 454; *People v. Harris* (2005) 37 Cal.4th 310, 353; *People v. Guerra* (2006) 37 Cal.4th 1067, 1145, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 115.)

With respect to the "Motion to Allow the Defense to Present the Testimony, at Retrial, of Jurors Who Witnessed the Defendant's Demeanor During Their Service at the First Trial," respondent argues that appellant has not "explain[ed] how four previous jurors – each of whom voted for prison over death – were in a better position to judge appellant's demeanor, and whether he appeared remorseful in the courtroom, than the penalty phase jurors themselves. (See *People v. Lanphear* (1984) 36 Cal.3d 163, 167 [sympathy for defendant may be based on jury's in-court observations].)" (RB 251.)

However, appellant has referred the Court to the offer of proof outlined by defense counsel in which he "restricted" the testimony of the four jurors from the

guilt phase and first penalty trial to their observations of "Mr. Peoples sitting at counsel table with tears in his eyes and quietly sobbing," and argued it would be "impossible" to duplicate such emotion in the retrial of the penalty phase. (11 CT 2896-2913: 5-6; 75 RT 15612-15616; 76 RT 15761-15814.) Judge Platt did not find the evidence "irrelevant," or lacking in probative value, as respondent suggests. (RB 250-251.) The trial court relied upon Evidence Code section 352 to exclude the observations of jurors during the first trial of appellant "sobbing," referring to the evidence as involving an unnecessary "consumption of time, and the collateral issues would absolutely consume this trial, and it is not going to happen." (76 RT 15814: 1-4.)[64]

Other than appellant himself, only the lawyers – Dunlap and Fox – and first-trial jurors had *heard* all the evidence and *seen* all the witnesses. By the time the penalty phase was ready to be retried the emotions generated from the testimony at the first trial had lost much of its power. (See 11 CT 2913 [defense counsel pointed to appellant crying during display of autopsy photographs and victim-

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[64] Apparently respondent agrees with appellant that the trial court erroneously relied upon Evidence Code section 1150 as a bar to the "thought processes" of jurors since she does not respond to the argument. (See, AOB 519, fn. 228; *People v. Hutchinson* (1969) 71 Cal.2d 342, 351 ['objective facts' observed by jurors are not made inadmissible by section 1150].)

impact testimony].) *People v. Lanphear, supra,* 36 Cal.3d at 167, cited by respondent, and *Riggins v. Nevada* (1992) 504 U.S. 127, and *People v. Talbot* (1966) 64 Cal.2d 691, 712, cited by appellant, all support the offer of proof, as the cases recognize that the trier of fact invariably observes non-verbal conduct of the defendant on trial, and remorse may be gleaned from courtroom conduct, arousing feelings of sympathy. In light of the exclusion of the other evidence of remorse proffered through faith ministers and appellant's letters to his family, coupled with the prosecutor's improper arguments regarding an alleged lack of remorse, exclusion of the proffered evidence of juror observations of remorse for the retrial of the penalty phase compounds the prejudice; it is impossible to determine beyond a reasonable doubt that a life verdict would not have been returned in the absence of the error. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 754; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384; see, *Argument VI, ante.*)

2. Motion to Limit Prosecutor's Cross-Examination

Appellant's "Motion to limit [the] prosecutor's cross-examination of defendant in the penalty retrial" was framed as a "constitutional right to present mitigating evidence through his own testimony [as] limited to certain specific background information, and to limit the prosecution's cross-examination to that area only." (12 CT 2718: 25-28.) Defense counsel properly sought an in limine

determination of the scope of cross-examination prior to retrial, relying on *People v. Caro* (1988) 48 Cal.3d 1035, 1055-1057. Respondent's assertion that this is not sufficient to render the issue "ripe" or "justiciable" is wrong, and *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 998, does not support the argument. (RB 251.)

In *Hunt* this Court actually rejected the "ripeness requirement" argument because a preliminary injunction issued by Sacramento County Superior Court had rendered the issue of financial eligibility for medical care a requirement, and "whether the revised or contingent standard" conditions had *actually* come about did not preclude judicial decision. The issue was deemed "ripe for adjudication" on this ground, but, as the Court pointed out, "the ripeness requirement does not prevent us from resolving a concrete dispute if the consequence of a deferred decision will be lingering uncertainty ..." (Id., at p. 198.)

Appellant's motion did not seek "general guidance rather than to resolve a specific legal dispute" (*ibid.*), but was akin to the one designed to determine the admissibility of his statement at trial. (See, *Argument VIII* [voluntariness of statement].) In *Jackson v. Denno* (1964) 378 U.S. 368, 392-393 and *Crane v. Kentucky* (1986) 476 U.S. 683, 688, the high court held that the states may not deny the accused a reliable pretrial determination of evidentiary conflicts regarding the voluntariness of his statement; it is a matter of due process of law to provide

such a hearing. Evidence Code sections 402 through 405 provides a procedural mechanism for the resolution of many issues prior to trial. *(People v. Markham* (1989) 49 Cal.3d 63, 71 [hearing on voluntariness of statement]; *People v. Bennett* (1976) 58 Cal.App.3d 230; *Martin v. Superior Court* (1991) 230 Cal.App.3d 1192 [procedures designed to afford pretrial determination of objections raised in timely fashion before submitted to jury].) Defense counsel tendered appellant's testimony, "concerning his background during a limited and specific period of his life." (11 CT 2718; 2721; 75 RT 15627-29.)

The trial court did not rely upon the "ripeness requirement" to deny the motion. (RB 251.) Defense counsel provided an outline of the testimony, and the trial court evaded a determination by claiming it would need a "crystal ball" to discern the nature and scope of the testimony before it could rule on the limits of cross-examination. (75 RT 15625: 15-17 - 15626: 19-22; 15629; Cf., *People v. O'Brien* (1885) 66 Cal.2d 602, 603 [cross-examination confined to the fact or matter testified to on the examination-in-chief]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1193 [error to allow cross-examination of defendant's mother in penalty phase on subjects beyond scope of direct examination]; *People v. Williams* (1973) 30 Cal.App.3d 502, 509 [judicial care should be exercised to limit scope of cross-examination at pretrial hearing].)

While the trial court had allowed the prosecutor extraordinary latitude in cross-examination of expert and lay witnesses, it was also proved incapable of or unwilling to control Dunlap's misconduct, including unashamed "editorialization" and bad-faith questions. In the circumstances there was every reason to believe that if the defense called appellant as a witness in the retrial of the penalty phase to elicit "specific background information" the trial court would not have limited cross-examination to the testimony elicited on direct examination but would give Dunlap free rein to exceed the scope, editorialize, and ask bad-faith questions. (See, *Arguments III, V* and *VIII.*) Defense counsel took the appropriate steps before retrial of the penalty phase to secure a judicial commitment to place restrictions on the prosecutor's cross-examination, and the trial court erroneously refused to rule on it, depriving him of his constitutional rights. (AOB 523.) The resulting prejudice is not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4th 1229, 1264.)

3. Denial of Video Recording

Respondent argues appellant has "fail[ed] to show how the court's conduct was relevant mitigation evidence that addressed character ... or the circumstances of the offense." (RB 252.) The argument, "Motion to Videotape Proceedings to Preserve The Record of Court Demeanor" (AOB 524) was based upon defense

counsel's experience from the first trial, reflecting his exasperation with Judge Platt's judicial intemperance, and it demonstrates his efforts to document judicial intemperance during the retrial of the penalty phase. (12 CT 2672-2673; see, *Arguments I-III, ante*; AOB 146; 153-154; 524.) While respondent argues a video recording would not have been directly relevant to "mitigation evidence ... or circumstances of the crime," respondent refers to the "record" defense counsel was desperately trying to preserve for review, suggesting it is "not relevant." (RB 252.) Respondent has had an opportunity to address appellant's preservation argument, concluding, "[th]is argument should [also] be rejected." (RB 252.)

While the record as it is fully establishes Judge Platt's bias against appellant and his trial attorney, the motion to video record the trial proceedings may have compromised appellant's ability to demonstrate Judge Platt's "visceral" (52 RT 10818) and "rage" (7 RT 1416-17), and in the context of his presentation of mitigation evidence, the trial court's denial of the motion to video-record the proceedings denied him the ability to show the effect of judicial intemperance on his case in mitigation, and thus violated his enumerated constitutional rights to due process of law, to a fair trial, to a reliable penalty determination, and to be free from cruel and unusual punishment. (See also, AOB 151-152; 12 CT 2672-2673; 61 RT 12864-12687; *Godfrey v. Georgia, supra,* 446 U.S. at 428; *People v.*

Howard (1992) 1 Cal.4th 1132, 1165; *People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn. 4.)

4. Denial of Motions to Continue

The parties agree on procedural history and law; the trial court denied all of the numerous defense motions to continue trial, and on review the Court considers whether the trial court abused its discretion. (RB 246-248; 252-253; AOB 524-527.)

Respondent, however, distorts the record when she says defense counsel did not establish "good cause" for the requested continuances after detailed declarations were filed supporting them (AOB 525-526), claiming Judge Platt "generally accommodat[ed] defense scheduling and concerns" so there was no prejudice involved. (RB 254.) Respondent cites two examples to show the lack of prejudice.

First, respondent claims that the trial court obliged defense counsel, an overwhelmed, novice capital defense deputy assigned by San Joaquin County Public Defender, by "delaying jury selection in the guilt phase for three weeks to accommodate the defense request for a suppression hearing (4 RT 895) ..." (RB 254.)

As will be recalled, Judge Platt threatened to issue a bench warrant for

Richard Leo, Ph.D., not because Dr. Leo had been unavailable for the suppression hearing originally scheduled for December 1998, but because Judge Platt had cancelled the hearing and unilaterally set a new date for the suppression hearing due to his own judicial assignment conflict. (4 RT 885-895.) There was no consultation with counsel beforehand, and when counsel appeared in court on January 11, 1999, Judge Platt demanded an affidavit from Dr. Leo. At the next hearing on January 14, Judge Platt referred to Dr. Leo's academic compensation as "fine and dandy," but suggested the fact that "he is making a good sum of money" consulting the defense in appellant's case "is something that has stuck in my craw for many, many years." (4 RT 894; AOB 122-123.)

Unfortunately, the trial court's scheduling change in December 1998 had a ripple effect on everyone. To suggest, as respondent has, that a critical in limine hearing on the voluntariness of appellant's statement to police was scheduled as an "accommodation [of] the defense request ..." at the expense of scheduled jury selection, when it was due to the trial court's scheduling conflict, is misleading to say the least. (RB 254; See also, *Argument VIII.*)

Moreover, respondent's second example of "granting the defense a one-week continuance between guilt and penalty phases" provides an even more strained illustration of judicial "accommodation" to defense counsel that assuages

any prejudice to appellant; it borders on misrepresentation of fact. (RB 254.) True, unlike the prosecutor and the trial court, defense counsel had no experience trying a capital murder case, but as the case proceeded towards the conclusion of the guilt phase it was Dunlap who inquired whether "the Court [is] going to take a few days between guilt phase, if there is a verdict, next to penalty, to go over exhibits and stuff?" (35 RT 7176.) The court indicated it had no "great preference or any great need to start the following day," and if "either party" needed a hiatus between the two phases, it would work to accommodate that party. (35 RT 7176.) When Judge Platt turned to defense counsel, Fox explained his office would have the burden of immediate "funding and logistical issues," depending on when and if a guilty verdict were returned, because "I have witnesses that I have to fly in from different parts of the country." (35 RT 7177.) Fox suggested one week in between verdict and penalty phase would be "prudent." (35 RT 7178.) Dunlap also stated the need to hash out remaining legal issues, referred to his case in aggravation, and said he was "flexible" with "whatever the Court wants." (35 RT 7176-77.)

Based on the unpredictability of the timing of a jury verdict in the guilt phase, and the other issues described by each party, the court ruled that "[b]oth the People and the defense can rely on a week break between guilt phase and the penalty phase ..., which is what I anticipated ...." (35 RT 7178.) Indeed, a week

break "allows *everybody* to refocus on the issues at hand in the penalty phase." (35 RT 7178; emphasis added.)

The trial court gave no special preference to the needs of the defense; it did not go out of its way to "accommodate the defense," as respondent claims. (RB 254.) If anything Judge Platt had already "anticipated" a "week break between guilt phase and the penalty phase" on his own, and he had done so to allow *both* sides "to refocus on the issues at hand in the penalty phase." (35 RT 7178.)

The record is well documented that defense counsel provided "good cause" to continue trial as to each date set because he conscientiously felt it was necessary to provide appellant with constitutionally effective assistance of counsel. (AOB 525-526; *People v. Murphy* (1963) 59 Cal.2d 818, 825 ["[W]hen a denial of a continuance impairs the fundamental rights of the accused, the trial court abuses its discretion."].)

Specifically, as the retrial of the penalty phase approached, and after unsuccessfully seeking a more realistic trial date in December 2000, defense counsel presented his six-week motion to continue the trial from March 7 to April 17, 2000, in terms of the need for a more complete investigation and presentation of "mental health" issues for the retrial of the penalty phase, but again his efforts were in vain. (See 11 CT 2967-2979; see also, *Williams v. Taylor* (2000) 529 U.S.

362 [ineffective assistance of counsel for failure to thoroughly investigate defendant's background]; *Wiggins v. Smith* (2003) 539 U.S. 510 [ineffective assistance of counsel for failure to thoroughly investigate and present mitigation evidence].)

5. Non-Statutory Aggravation Evidence

Respondent argues that the trial court's denial of appellant's motion to exclude non-statutory aggravation evidence at the retrial of the penalty phase, including his taped statement, the 'Biography of a Crime Spree,' and evidence related to the *Cal Spray* vandalism, burglary of Michael King's van, and the *Bank of the West* robbery, was not erroneous. (RB 254-256.) Even though the evidence related to *Cal Spray*, the burglary of King's van, and the bank robbery was not admitted in the guilt phase to prove the "circumstances of the crimes" for which appellant was death eligible, respondent contends the trial court was correct; all the disputed evidence was admissible "given their temporal and substantive connection to the murders." (RB 255; AOB 528-529.)

Respondent further argues that, in any case, even if the objected to evidence was inadmissible in the retrial of the penalty phase, according to respondent, appellant "has failed to demonstrate prejudice" because of other "damaging testimony ..." against him. (RB 256.) It is clear from respondent's analysis that

discussion of the prosecutor's arguments to the jury related to the disputed evidence admitted at the retrial is to be avoided at all costs. (AOB 527-529.) Respondent refers to "the *evidence* ... used by the prosecution in rebuttal to defense *evidence* in mitigation suggesting appellant was remorseful ...," but fails to mention the context in which the challenged evidence was improperly exploited by the prosecutor to argue for the death penalty. (RB 256; emphasis added.) As discussed elsewhere (*Arguments V-VI, XII-XIV, ante*), the prosecutor's distorted and misappropriated the evidence in order to argue lack of remorse, which provides ample evidence of prejudice to appellant.

Relying on *People v. Wright* (1990) 52 Cal.3d 367, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459 (RB 256), respondent fails to point out that this Court found in *Wright* that "[t]he jury could not in reasonable possibility have drawn any more damaging inferences from the inadmissible [non statutory] evidence of defendant's maladjustment and threats of violence while in prison than had already been established by the circumstances of these crimes *and defendant's history of violent crime and recidivism.*" (*Id.*, at p. 429; emphasis added.) By contrast, appellant's lack of "history of violent crime" and "recidivism" distinguishes his case from *Wright* and cases cited therein. (*Id.*, at p. 427; see, e.g., *People v. Burton* (1989) 48 Cal.3d 843, 864 ['prosecutor did not

exploit the inadmissible evidence.')

In this context, the following excerpts from the prosecutor's closing argument in the retrial of the penalty phase suffices to show the prejudicial nature of the disputed evidence admitted at trial:

> " [W]e start with the Anderson Park. That's where the weapon was picked up. You get to consider that. Consider the circumstances surrounding that....
>
> Mr. Fox: Excuse me. I'm going to object. Under circumstance (a), the jury can only consider the capital offenses as an aggravating factor.
>
> The Court: Hold on, please.
>
> Mr. Dunlap: Court's already ruled on this, Your Honor.
>
> The Court: Overruled.
>
> Mr. Dunlap: Start with Anderson Park, ladies and gentlemen ... The felony auto burglary of Michael King ....
>
> .....
>
> You'll see a pattern start with Michael King. He calls him.
>
> .....
>
> There's an emerging pattern here. Lack of remorse? Remember we

heard that term? Lack of remorse. Just remember that. Anderson Park."

(95 RT 20039-20043.)

After detailing the *Cal Spray* incident, and its impact on Harrison (95 RT 20043-20048), the prosecutor's lack-of-remorse theme continues:

" Could it have been some misperception of Thomas Harrison of not seeing the defendant smile?

.....

Do we know that's true? Yeah. Because then we begin this trial and you hear about him smiling and laughing again and again and again. Why? Because he likes it. He liked it when he called Michael King, when he stole his gun. He liked it when he shot down Thomas Harrison.

.....

You got to be skilled to rob a closed bank [Bank of the West] .... We don't know if he was laughing about it then. "

(95 RT 20048-20053; see also, *Argument XIV.*)[65]

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[65] Although Thomas Harrison described the illumination in the parking lot at *Cal Spray* as poor, and he never identified the shooter, he admitted on cross-examination that the "smiling" he described on the

This case is clearly distinguishable from *People v. Wright, supra*, 52 Cal.3d 367, and *People v. Burton, supra*, 48 Cal.3d at p. 864, where prosecutors made "passing reference" to the non-statutory aggravation evidence; here the prosecutor relied heavily upon the non-statutory evidence to seek the death penalty, amply demonstrating the prejudice to appellant.

Furthermore, Dr. Rogerson's testimony did not separately entail "testimony on appellant's callous views of the murders..." (RB 256.) Without citation to the record of Dr. Rogerson's testimony – or that of Carol Peoples – respondent exaggerates the "incredibly damaging" nature of their testimony in attempting to show lack of prejudice. (RB 256.) Whatever else can be said about Dr. Rogerson's testimony regarding appellant's apparent inability to "care for his fellow man" (95 RT 19779), and the "anti-social personality" diagnosis (95 RT 19794-95), or Carol Peoples' admission that Louis' violent behavior in the weeks before his arrest was completely out of character – "I still can't believe the man I married did this" (87 RT 18289) – it does not take away from the fact that eight jurors in the first penalty phase, and at least three in the retrial, did not find the evidence cited by respondent so "incredibly damaging" that they were persuaded the only punishment was death.

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face of the shooter was totally incompatible with the "geek" he had known to be Louis Peoples. (95 RT 16261-62; 16265.)

The violations of appellant's state and federal constitutional and statutory rights in the retrial of the penalty phase to due process, to fair trial, to to confrontation, to present a defense, to a reliable, individualized sentence determination, and against cruel and unusual punishment, were denied. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§ 1, 7, 13, 15, 16, 17; Penal Code §190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Lockett v. Ohio* (1978) 438 U.S. 586; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Skipper v. South Carolina* (1986) 476 U.S. 1; *McCoy v. North Carolina* (1990) 494 U.S. 433; *Stringer v. Black* (1992) 503 U.S. 222; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Whitt* (1990) 51 Cal.3d 620, 647.) As the prolonged deliberations in both penalty trials and the hung jury in the first penalty trial demonstrate, this was a close case. It is "extremely speculative or impossible" to determine beyond a reasonable doubt that a life verdict would not be returned in the absence of the trial court's erroneous rulings which created a prejudicial, unreliable and arbitrary penalty determination. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 754; *People v. Brown, supra,* 46 Cal.3d at 446-48.)

XVI.

RESPONDENT IGNORES TRIAL COURT BIAS AGAINST DEFENSE INSTRUCTIONS AND SUMMARILY CLAIMS DEFENSE PROPOSALS WERE "ARGUMENTATIVE AND SUPERFLUOUS" IN THE EFFORT TO SUPPORT THE TRIAL COURT'S IMPROPER REJECTION OF PINPOINT AND MODIFIED INSTRUCTIONS FOR THE PENALTY RETRIAL.

1. *Proposed Modifications and Supplementation to CALJIC*

Although ignored by respondent, it is worth recalling the trial court's approach to defense proffered pinpoint instructions and modifications to standard CALJIC at the retrial of the penalty phase during hearing outside the presence of the jury on May 3, 2000. Judge Platt expressed his unabashed bias against defense instructions as "insulting to the jury system and human beings as a whole ...," and in no uncertain terms advised defense counsel that his specific proposals presumed jurors "are so god damned stupid that they cannot understand simple terminology ..., [and] because humans have their heads so far up their ass ..., they cannot understand the issues at hand in this case ...." (92 RT 19441: 5-14; see AOB 114;178-179; 188-191; 541 .)

Respondent's claims that the trial court fairly considered and properly

refused each and every proposed defense instructions during the retrial of the penalty phase, because they were "argumentative and superfluous" (RB 259) or were "not required" (RB 261), are belied by the trial court's declared bias, which precluded a fair hearing on the proposals. (AOB 543-552.) It is one thing for the trial court to state a preference for the "simple terminology" of standardized CALJIC,[66] but quite another to refuse reasonable pinpoint instructions and modifications to the norm because of intransigence and prejudice. Respondent may ignore such improper and damaging characterizations by the judicial officer presiding over the retrial of the penalty phase in this capital case, but they are inimical to appellant's state and federal constitutional rights to due process, to a fair trial, to a reliable, individualized sentence determination, and against cruel and unusual punishment. (U. S. Const., 5th, 6th, 8th, and 14th Amends; Cal. Constitution, Art.1, sects 1, 7, 13, 15, 16, 17; Penal Code Section 190.3; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Ramos v. California* (1983) 463 U.S. 992; *Skipper v. South Carolina* (1986) 476 U.S. 1; *Walton v. Arizona* (1990) 497 U.S. 639; *Simmons v. South Carolina* (1994) 512 U.S. 154; *Tuilaepa v. California* (1994) 512 U.S. 967; *Wade v. Calderon* (9th Cir. 1994) 29

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[66] As noted elsewhere, CALJIC was never intended to be an ironclad statement of law, but was "merely an attempt at a statement" of patterns in the law; commentators recognized supplementation "that pinpoints the theory of the defense and charges the jury on how to relate the evidence ..." (CJER *Mandatory Criminal Jury Instructions Handbook* (12th Ed. 2003, p. 15); see, AOB 533-534.)

F.3d 1312; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833; *People v. Alvarez* (1996) 14 Cal.4th 155; *People v. Osband* (1996) 13 Cal.4th 622; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Sears* (1970) 2 Cal.3d 180.)

To illustrate how the trial court's biased rejection of proposed modification and supplementation played out during the retrial of the penalty phase, the prosecutor demanded the court do more than admonish the jury that defense counsel's chart (VVVV) – used in closing to focus on the weighing of mitigation and aggravation evidence and on the jury's prerogative in selecting the appropriate sentence – presented *arguments* of counsel: "[I]t's not enough ...., [and] I think this Court needs to tell the jury that Mr. Fox's interpretation of mitigation is *not the law*." (97 RT 20548.) The trial court disagreed with Dunlap, restating its earlier view in rejecting Fox's proposed instructions which mirrored his presentation in closing to the jury, "they were not incorrect statements of the law," but were "argumentative" and had been appropriately employed by defense counsel in his argument. (97 RT 20547; *Arguments III-IV, ante.*; AOB 114; 178-179; 188-191.)[67]

Moreover, the court compounded the prejudice of not providing pinpoint

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[67] Proposed instructions 11-14, 22-24 and 27 modified CALJIC 8.85, 8.87, 8.88, and 17.49, and were incorporated into charts used by defense counsel after the trial court refused the modifications, but suggested "the defense was free to argue the points raised in the instructions. (92 RT 19444.)" (RB 261; see also, AOB 547-553; 93 RT 19480.)

instructions or modifications to standard instructions when it refused to allow the jury to contemplate the summary chart (VVVV) after the jury requested it – even though it permitted prosecution charts on "aggravation evidence" [circumstances of the offense] – during in deliberations. The trial court then *instructed* the jury that while the chart depicted "a correct statement of the law ..., it is your [CALJIC] instructions that tells you about your weighing and balancing, what you may or can or cannot do." (92 RT 20554.) By refusing to allow the chart into deliberations, the court highlighted a demarcation zone between instructions of law and argument: "[I]t is *no more than* argument ... that Mr. Fox has analyzed ..., [and t]hat was [his] argument." (97 RT 20554; emphasis added; see *Argument IV, ante*.)

As the example demonstrates, the trial court constricted the judicial function to a mere recitation of what it termed the "bones and skeleton" of CALJIC, improperly refused to meaningfully consider pinpoint instructions, and placed the burden on defense counsel to supply the "meat [for the jury] ... to place [on] the body of the case" in argument. (92 RT 19441; 97 RT 20554; AOB 535.) During deliberations, when jurors sought guidance from the court, it informed the jury that defense counsel had presented "correct statements of law," but then sabotaged Fox's presentation of the law by telling jurors it was "*no more than* argument." (97 RT 20554.) The implication is clear: A "statement of law" presented by the

defense is not worthy of consideration *as law* during deliberations.

As the above example illustrates, respondent suffers from the same myopic view as the trial court by refusing to acknowledge the important role of pinpoint instructions and modifications play in focusing the jury on issues critical to the defense case. (*People v. Sears* (1970) 2 Cal.3d 180, 190 [defendant entitled to pinpoint instructions on theory of the case].) Respondent dismisses each proposal as "argumentative and superfluous" (RB 258-259; 260-262; 264), claiming there was no "requirement" to supplement or modify CALJIC (RB 264), and that the alleged salve of defense "argument" to the jury cured any and all prejudice: "It is generally the task of defense counsel in closing argument, rather than the trial court in its instructions, to make clear to the jury which penalty phase evidence or circumstance should be considered extenuating ..." (RB 264.)

The trial court and respondent take positions contrary to the teaching in *Boyde v. California* (1990) 494 U.S. 370, 384, which encourages modification to and supplementation of standard jury instructions precisely because "the arguments of counsel generally carry less weight with a jury than do instructions from the court." In this case the trial court refused – and the prosecutor and respondent endorse it – counsel's pinpoint proposals and modifications. (97 RT 20554). During deliberations, the trial court compounded the error by informing the jury

that counsel's "correct statement of law" was mere argument (97 RT 20554-55), and by erroneously instructing the jury that only CALJIC was to be "viewed as *definitive and binding* statements of law." (*Boyde v. California, supra,* 494 U.S. at p. 384; emphasis added; see AOB 535.) After the trial court had unreasonably and prejudicially denied each pinpoint modification and supplementation, as pointed out in *Argument IV, ante*, during deliberations it exacerbated the prejudice by refusing to allow the jury to examine on its own "the law" as depicted on a chart, or to provide its own meaningful guidance; the court's observation in *Mills v. Maryland* (1988) 486 U.S. 367, 383-84, is apt here:

> " [N]o one on this court was a member of the jury that sentenced [Peoples]. We cannot say with any degree of confidence which interpretation [of the court's instructions] the jury adopted .... The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing."
> (See also, *McDowell v. Calderon, infra*, 130 F.3d at p. 839 [Jury's 'uncorrected confusion' cause for reversal].)

2. *Proposed 'Ochoa' Instruction*

Once again, "as with each of the other rejected proposed defense instructions" (RB 265), respondent espouses Judge Platt's view that an *Ochoa* instruction was not "warranted" (RB 266) because "it's argument" (92 RT 19473). And, again, despite the fact that defense Proposed Instruction 28,[68] based on *People v. Ochoa* (1998) 19 Cal.4th 353, may have presented "a correct statement" of law, Judge Platt's bias against "insulting" defense instructions manifested itself in his statement that a penalty phase is "just [not] ... the appropriate place" for judicial "comment for instruction." (92 RT 19472 - 19473.) Where or when it would be appropriate begs the question, but Judge Platt's contempt for pinpoint defense instructions even drew his ire to Judge Delucchi's decision to give the *Ochoa* instruction in the first penalty phase: "[Judge Delucchi's] not listed as an authority on it." (92 RT 19470.)

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[68] Proposed Instruction 28 reads:
" Sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation.
However, family members may offer testimony of the impact of an execution on them if, by doing so, they illuminate some positive quality of the defendant's background or character which is offered as a basis for a sentence less than death."
(12 CT 3339; see also, AOB 554.)

Respondent attempts to support the trial court's abuse of discretion in the rejection of Proposed Instruction 28 by claiming, "[a]ppellant's reliance on *People v. Bennett* (2009) 45 Cal.4th 577, 601 in support of his argument [for reversal on appeal for failure to give the *Ochoa* instruction] is misplaced," and that "[n]othing in *Bennett* suggests proposed instruction No. 28 was warranted." (RB 266.) While *People v. Bennett, supra*, 5 Cal.4th at p. 601, did not present the rejection of a proffered *Ochoa* instruction, this ourt reiterated that under *Ochoa,* "indirect evidence of a defendant's character" through family members' and friends' expression of love for him is "permissible" mitigation, contrasted with "impermissible execution-impact evidence intended to make the jury feel 'sympathy for ... defendant's family' (Citation omitted.)" (AOB 556.) *Bennett* supplies girding for the proposed instruction in this case:

> " Sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation.
>
> However, family members may offer testimony of the impact of an execution on them if, by doing so, they illuminate some positive quality of the defendant's background or character which is offered as a basis for a sentence less than death."

(12 CT 3339.)

There was nothing "argumentative" about the instruction; it plainly paraphrased and pinpointed the concept of sympathetic character evidence not otherwise covered by CALJIC, and it was supported by the testimony of apellant's brother, Larry Peoples, a former Florida State death row guard himself, adduced during retrial of the penalty phase:

> " I would like to tell this jury that I hope and pray
> that they will not kill my brother and that he's shown
> humanity to his children, my children, to my family,
> and that the impact on my family would be devastating."
> (92 RT 19338: 22-25.)

Instead of grappling with the evidence presented, respondent once again relies on defense counsel's arguments as adequate coverage of the issue, and cites two cases to support the trial court's rejection of proposed *Ochoa* instruction as not "warranted." The citations are misleading and readily distinguishable. (RB 266.)

For instance, in *People v. Romero* (2008) 44 Cal.4th 386, 425-26, the issue presented was not whether the trial court properly rejected a proposed defense instruction, or whether *Ochoa* was improvidently applied, but whether a sua sponte admonition from the trial court to the jury during defense counsel's closing

argument was improper:

> " 'Your job is to weigh the aggravation, weigh the mitigation, arrive at a penalty in that fashion. That is without regard to the effect that that decision will have on anyone other than this defendant. So you can't vote to make the victim's family better. You can't hold for life to make defendant's mother feel better.'"

Relying on *Ochoa*, and based upon trial counsel's closing, this Court concluded the trial court did not improperly admonish the jury in *Romero*: "Fairly read, here defense counsel's argument was designed to invoke sympathy for defendant's family, not to highlight a positive attribute of defendant's background and character." (*Ibid.*)[69]

In the other case cited by respondent, *People v. Taylor* (2001) 26 Cal.4th

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[69] Although many sympathetic characteristics and mitigating factors were presented on appellant's behalf here, in *Cullen v. Pinholster* (2011) 563 U.S. - , 131 S.CT. 1388, 1407, the High Court wrote, "[I]t certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's *family* is a better idea [than presenting evidence to 'help' the jury 'understand' the defendant] because the defendant himself is simply unsympathetic." (Emphasis original.) *Ochoa* may no longer be a sound decision in terms of the right to present "execution-impact" evidence on the *family* of the defendant in light of *Pinholster*. (See also, *People v. Bennett, supra*, 45 Cal.4th at p. 601.)

1155, 1180-81, the Court did not even refer to *Ochoa*. Instead, it rejected out-of-hand the argument on appeal that the trial court erred when it "failed to instruct [sua sponte] on the role sympathy for defendant and his family should play ..." (*Ibid.*) Unlike the present case, Taylor did not present an instruction to the trial judge for consideration, so the issue was not preserved or presented on appeal as *Ochoa* error. Here, defense counsel affirmatively proposed a pinpoint instruction based upon *Ochoa* – and given at the first penalty trial – and the evidence presented, but the trial court improperly denied appellant's right to have the jury instructed on the law. (*People v. Sears* (1970) 2 Cal.3d 180, 190 [defendant 'generally entitled to an instruction that pinpoints the theory of the defense and charges the jury on how to relate the evidence' to the law].)

3. *The Errors Were Not Harmless*

Citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1191, respondent claims the failure to give defense proposed instructions was "harmless under any standard given the overall strength of the evidence in aggravation, defense counsel's closing argument ..., and the other jury instructions." (RB 266.) Aside from the fact that respondent refuses acknowledge the import of the 8-to-4 life imprisonment vote in the first penalty trial, and the length of deliberations, number of votes, and split in the second jury's deliberations, as a strong indicators this was a "close case" by

definition, *McPeters* does not support respondent's position here. (*People v. Sturm* (2008) 37 Cal.4th 1212, 1243-1244 [Court "looks very closely at the question of prejudice" on retrial of penalty phase where majority of jury in prior trial voted in favor of life imprisonment].)[70]

Nothing in defense counsel's closing argument elevated it to the equivalent of law, as respondent seems to suggest. (RB 266.) On the contrary, the trial court's message to the jurors during deliberations was they were *not* to consider counsel's argument or his chart as "correct statements of law," but rather as "no more than argument." (97 RT 20554.) In addition, unlike *McPeters*, the prosecutor here did his best at every turn to distort the evidence, and to devalue appellant's family background and love expressed to others as having "a mitigation value of zero." (95 RT 20128.) According to Dunlap, weighing defendant's

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[70] In footnote 2 of the decision, the Court points out that by submitting Defense Instruction 16 – given by the court – defense counsel invited any error that might have occurred by the trial court's refusal to give another instruction specifically delineating mental illness as mitigating factor only: "Nothing in the charge suggested or implied that mental illness was an aggravating factor." (*Id.*, at p. 1191.) And, "the prosecution did not dispute the mitigating effect of mental disturbance; it argued only that defendant was not under the influence of any such disturbance at the time the offense was committed." (*Ibid.*) Combined with defense counsel's closing on mental illness as mitigation, the Court found "defendant was afforded his Eighth Amendment right to a fair determination of penalty." (*Ibid.*)

positive attributes as a father, son, husband, and friend, in terms of imposing a sentence of life imprisonment, paled in comparison to victim-impact evidence: "You have to say to these families your loved ones are not worth anything in aggravation. It's that simple." (95 RT 20145; see also, RB 266-267.)[71]

Consequently, while counsel may have addressed factors in aggravation, mitigation, and the weighing process, in his closing argument to the jury, it is clear from jurors' questions during deliberations that they were confused and seeking the kind of pinpoint guidance the proposed instructions would have provided. (See, *Argument IV*, AOB 187-189; 12 CT 3204-05; 97 RT 20546-48 ['explaining the mitigating vs. aggrivating [sic] factor,' and, 'You may ...You may ...You may ...You must ...'].) Judge Platt fueled fires created by his failure and refusal to give proposed defense instructions when he informed the jury he had allowed the prosecutor's chart regarding aggravation evidence into the jury room because he

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[71] Taking an excerpt of Louis' love letter to Carol out of context, excluding his expression of remorse for the victims' families, and then displaying the letter against photographs of the victims, "distorted" the evidence. (See, *Arguments V-VI*, *ante*; [see also, 50 RT 10379. The prosecutor acknowledged "love for family ..., family history" as "character" mitigation evidence in argument to exclude remorse, but he argued to the jury during retrial of penalty phase such evidence has "mitigation value of zero," and that appellant lacks remorse, knowing full well of the expressions of remorse in the same redacted letter. 95 RT 20128; 20142; 20146; 20152.].)

felt this would "prompt discussion about the facts, the circumstances, and what you must ultimately weigh and consider ...," and then fanned the flames by instructing the jury, "this last [defense] board [on mitigation and weighing considerations] is no more than an argument ..." (97 RT 20554.)

The case at hand presents the kind of harm recognized as reversible error in *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 839: "Jurors' uncorrected confusion regarding the law may lead to verdicts reached outside the channel required by *Godfrey* [*v. Georgia*, *supra*, 446 U.S. at 426-427], and the Eighth Amendment." (See also, *Mills v. Maryland, supra,* 486 U.S. at pp. 383-84.) Accordingly, the trial court abused its discretion, clearly erred when it refused the proffered instructions, aggravated the harm by failing and refusing to allow the jury to consider those as instructions during deliberations, and misguided the jury during deliberations, violating appellant's enumerated state and federal constitutional rights, and judgment should be reversed on each of the above grounds alone, or in any combination. (*Mills v. Maryland, supra,* 486 U.S. at pp. 383-84; *Simmons v. South Carolina, supar,* 512 U.S. at p. 156; *McDowell v. Calderon, supra,* 130 F.3d at p. 839; *People v. Osband, supra,* 13 Cal.4th at pp. 705-06.)

XVII.

ARGUING THAT APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE NOT VIOLATED DURING THE PENALTY RETRIAL BY A BIASED JUROR, WHO SUBSEQUENTLY REFUSED TO DELIBERATE, AND BY OTHER JURORS INJECTING EXTRANEOUS MATERIAL INTO DELIBERATIONS, RESPONDENT RELIES UPON "DOUBLE HEARSAY" IT TERMS "INCOMPETENT" EVIDENCE AND DISTORTS THE TRIAL COURT FINDINGS BELOW.

Appellant argues in his opening brief that the trial court erred in not granting a mistrial or removing Juror 7 during the retrial of the penalty phase when it learned during trial on April 20, 2000, that the juror and his wife had been discussing defense witness Michael Quigel – who had sold methamphetamine to appellant in early November 1997 – and his wife overhearing the prosecutor's "absolutely reckless" (88 RT 18517) comments to victim family members in the courtroom regarding Quigel's credibility while other jurors were not present. (AOB 570-573; see also, *Argument V* [prosecutorial misconduct]; *Argument VIII* [exclusion of lay witness opinion testimony].) In moving for a new trial, defense counsel raised the same issues with respect to Juror 7, and presented Juror Number 1's declaration that Juror 7 was an "angry" juror who refused to deliberate with

other jurors after taking a position at the outset that the death penalty was the only appropriate punishment. (AOB 574-575.) He argues the court erred in failing to hold an evidentiary hearing, and in failing to grant him a new trial, because of Juror 7's misconduct, and because Jurors 10 and 12 injected extraneous material into jury deliberations, including Juror 10's personal experience with drugs and Juror 12's political views regarding the administration of capital punishment in California and its likely abolition in the near future. (AOB 561-570; see also, *post*, pp. 219; 222.) As a result of juror misconduct, non-statutory factors were injected into the penalty determination, an arbitrary and capricious sentence of death was imposed, and the structural defects in the trial mechanism itself violated appellant's rights to impartial and unbiased jury, to due process, to fair trial, to a reliable and individualized determination of punishment based upon material facts and evidence adduced at trial, and to be free from cruel and unusual punishments. (U.S. Const., 5th, 6th, 8th, and 14th Amend.; Cal. Const., art. 1, §§1, 7, 13, 15, 16, 17; Penal Code §1089; *Remmer v. United States* (1954) 347 U.S. 227; *In re Winship* (1970) 397 U.S. 358; *Arizona v. Fulminante* (1991) 449 U.S. 279, 309 *Dyer v. Calderon* (1998) 151 F.3d 970; *United States v. Hendrix* (9th Cir. 1977) 549 F.2d 1225; *People v. Dykes* (2009) 46 Cal.4th 731, 809-812; *People v. Loker* (2008) 44 Cal.4th 691, 747; *People v. Williams* (2006) 40 Cal.4th 287, 334-335; *People v. Ault*

(2004) 33 Cal.4th 1250; *People v. Nesler* (1997) 16 Cal.4th 561, 578-80 ; *People v. Honeycutt* (1977) 20 Cal.3d 150.)

Respondent views juror misconduct in the retrial of the penalty phase as little more than harmless gatherings around the water cooler for Juror 12 to engage in "discussions" with other jurors "about the death penalty and the political climate in California" (RB 270), and for a confession by Juror 10 to others of his "own experiences with drugs." (RB 271.) Despite Judge Platt's agreement with defense counsel that the injection of these extraneous *discussions* during deliberations "should not have been done," he claimed there was no evidence before the court "that indicates that impacted their decision for or against the death penalty." (97 RT 20659; AOB 564.) Respondent misleadingly argues "the *record demonstrates the jurors were motivated to render a death verdict* based on the evidence and not as a result of bias." (RB 275 [emphasis added].) Respondent's premises are flawed and the conclusions reached are based upon pure speculation.

Respondent initially argues the trial court did not abuse its discretion by denying the motion for new trial – and in not holding an evidentiary hearing – because "the evidence offered in support constitutes hearsay," relying on *People v. Dykes, supra*, 46 Cal.4th at p. 810. (RB 269.) *Dykes*, however, does not support its position; this Court upheld the trial court's rejection of an incompetent

declaration submitted by a defense investigator. (*Ibid.*) Respondent goes so far as to quote *Dykes* to support the court's denial of the new trial motion, and its failure to hold an evidentiary hearing with respect the jurors' "discussions," on grounds that three of the six declarations were second-hand recitations by a defense investigator (Karen Fleming), so "'[p]resumably, a trial court would have discretion to view an unsworn report by a defense investigator as lacking in sufficient credibility.'" (*Ibid.*; RB 268, fn. 72.) However, if the Attorney General maintains that the evidence submitted by trial counsel was "not competent" (RB 272) to trigger a hearing, then it cannot form a reliable basis for concluding what "motivated" jurors to reach a verdict, i.e., evidence or bias. (RB 275.) Yet, it is precisely the offending "double hearsay" (RB 272) in defense counsel's motion for new trial that respondent relies on to rebut the multiple prongs of appellant's claims of juror misconduct. (RB 272; 274.)

Although trial counsel's motion for new trial on the ground of juror misconduct did not explicitly request an evidentiary hearing, as respondent notes (RB 269), he did lay a proper foundation for one. (13 CT 3387; 97 RT 20619-20622.) As respondent also points out, citing *People v. Collins* (2010) 49 Cal.4th 175, 249, the trial court has inherent power to hold an evidentiary hearing. (RB 269.) Not addressed by respondent, however, the trial court had a duty to do so

because a rebuttable presumption of prejudice was raised by competent evidence that extraneous material (personal experience with drugs and the politics of the death penalty) injected into deliberations along with Juror 7's refusal to deliberate. (See, AOB 560-561; *People v. Ault, supra*, 33 Cal.4th at p. 1258 [court vested with broad discretion on motion for new trial]; *People v. Nesler,* supra, 16 Cal.4th at pp. 578-80 [receipt of extraneous material raises rebuttable presumption of prejudice].) Rather than speculating here about what "motivated" jurors, it was incumbent on the trial court to exercise its own prerogative and conduct an evidentiary hearing to "resolve" material disputes raised by motion for a new trial. (*Ibid.*; RB 274-275.)[72]

Indeed, what defense counsel did present raised a "strong possibility" of juror misconduct, and, as respondent's arguments on appeal reveal, what opinions were introduced by Juror 10 on his drug experiences and Juror 12 on the imminent abolition of capital punishment, when they were introduced, and what impact they had upon other jurors' decisions in the retrial of the penalty phase, could only be

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[72] As respondent notes, even the "timing" of Juror 10's injection of his personal experience with drugs is "unclear." (RB 274; AOB 568.) After raising a rebuttable presumption of prejudice competent declarations submitted, the trial court did find that "there was just no showing that [the discussions] impacted or affected their decision-making process," but it did not hold an evidentiary hearing from which it could resolve conflicts, draw inferences, and reach reasonable conclusions. (97 RT 20659; AOB 561-562; RB 269.)

"resolved" by evidentiary hearing. (*People v. Avila* (2006) 38 Cal.4th 491, 604; *People v. Dykes, supra,* 46 Cal.4th at p. 809 [reversal may be appropriate where the trial court fails to conduct an evidentiary hearing]; RB 269.)

Instead, respondent sifts through the hearsay documents and jumps to the untoward conclusion that *all* jurors "readily rejected" appellant's drug-impairment mitigation evidence. (RB 274.) But the record does not support the argument, which is the same one advanced by the prosecutor at the retrial of the penalty phase when he urged jurors to count methamphetamine use as "zero evidence" in mitigation. (95 RT 20132-33.) Citing the defense investigator's interview with Juror 11, respondent follows suit: "The defense theory that appellant's actions were the result of drug impairment was readily rejected ... " (RB 274.)[73]

Moreover, respondent's selective use of hearsay from the investigator's

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[73] Respondent relies on Juror 11's statement to Ms. Fleming here (RB 272; 274), and elsewhere (RB 275), to support the argument the "record demonstrates" jurors rejected mitigation evidence. If the "double hearsay" (RB 272) respondent relies on is going to be cited for what the "record demonstrates," it ought to include Juror 11's other observations: 1) "'You do a small amount and you're up for hours or sometimes even days'"; and, 2) "'When I saw the [video-taped] confession [November 12, 1997, the day after the *Village Oaks* murders and two days after Quigel sold the methamphetamine to appellant], it was clear that Louis was coming down [from the methamphetamine]..., [and] it was obvious ..." there was a link between his drug-impaired behavior and mitigation. (13 CT 3403.)

report twists Juror 11's statement into something powerful but patently untrue: "'There was a turning point when the evidence pointing towards a death verdict was overwhelming,' which was *followed by other jurors changing their votes*. (13 CT 3405.)" (RB 275; emphasis added.) According to the report, after improper charges from the court to "roll up your sleeves" and to role play in order to reach a verdict, Juror 11 actually said: "'I had no idea that some of the others would change their votes.'"[74]

Further, in response to appellant's argument that Juror 7 expressed a bias against him during trial, and his bias continued during jury deliberations by his refusal to deliberate with other jurors, having already made up his mind to vote for death, respondent avers the trial court correctly "found Juror Number 7's position in favor of death was based on the evidence adduced at trial," and that there was "no

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[74] The court's improper instructions occurred upon declaration of impasse after six votes during 21 hours and 7 days of deliberations. (96 RT 20508; *Argument IV* [AOB 172-174].) "[Juror 11] was supportive of the verdict for life without possibility for most of the deliberation process. He stated that after the judge's instruction to visit the other side of the argument, and 'play the devil's advocate,' he began to understand..." the death-prone jurors' viewpoints. (13 CT 3402.) But there is no evidence to show any other juror "followed" Juror 11's lead; if anything, the documentation submitted by defense counsel to support the motion for new trial revealed "material conflict" (*People v. Avila, infra*, 38 Cal.4th at p. 604) about the effect of "discussions" on deliberations and what "motivated" them to change their votes. (RB 275.)

reason to discharge" him during trial because of "lack of bias" shown at a hearing conducted during the course of trial. (RB 268; 273-274; AOB 570-575; see also, *Argument V* [AOB 285-288];) Respondent is wrong on this issue as well.

With respect to the trial court's failure to remove Juror 7, and allegations of misconduct in refusing to deliberate with other jurors, all the more reason to hold an evidentiary hearing existed from the motion for new trial. Juror 7 and his wife had given conflicting testimony as to when and what was said about defense witness Quigel at the hearing on April 20, 2000, a few weeks before the jury began its deliberations. (88 RT 14861-78; 96 RT 20445; AOB 285; 88 RT 18484; 18513.) Assuming for the sake of argument the trial court had not erred when it denied defense counsel's motion to excuse Juror 7 on during trial and found "[no] prejudice, although the great potential certainly was there" (88 RT 18519), it had additional evidence in the motion for new trial that Juror 7 was in fact biased against appellant as evidenced by his refusal to deliberate for reasons that had nothing to do with a full consideration of the evidence, and there was no justification for the court's finding: "He just had a position about the penalty based on the evidence, as far as the Court can see." (97 RT 20655.) In sworn declarations, Juror 1 alleged Jury 7 warned other jurors about bringing family members to court as a result of the hearing on April 20, 2000, entered deliberations

"angry from the beginning ..., [and] said he would never vote for life" (13 CT 3392), while Juror 3 declared, "[Juror 7] separated himself from the rest of the group ..., [and he] seemed really angry." (13 CT 3394.)

According to respondent, in any event there was no prejudice to appellant by alleged juror misconduct. (RB 274-275.) As discussed above, respondent's claims that appellant's characterization of Quigel as a "key witness" had been "readily undermined by the very statements ... presented in support of the motion for new trial ..., [that the drug-impairment evidence] was readily rejected by jurors ...," is speculative and unsupported by the record. (RB 274.) Indeed, respondent's claim that Juror 10's "drug experiences" injected into deliberations "did not concern the effects of methamphetamine ..." is specious. (RB 275.)[75] Jurors 1 and 3 singled out Juror 10, and as Juror 3 declared, "I don't have any experiences with drugs ..., [but Juror 10] has tried every drug imaginable ...,[and he] did not believe drugs had anything to do with what Louis did." (13 CT 3394.) Juror 1 stated,

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[75] Judge Platt made no such fine distinctions in excluding *all* forms of defense-proffered lay opinion of drug experiences: "That you take a mind altering substance and then sit there and talk about how it alters your mind ... is absolutely ludicrous." (87 RT 18311.) He ridiculed lay opinion on drug experience as "not talking about the slightest issue with mitigation," ruling that for retrial of the penalty phase, "It is irrelevant, absolutely, completely without probative value. Zero. None. Nil. Absolutely." (88 RT 18349; AOB 377 [*Argument VIII*].)

"[Juror 10] discussed his own drug use and drug use of his family members and strongly maintained that drugs were not a mitigating factor in this case." (13 CT 3392.) Juror 10 essentially provided lay opinion testimony for the prosecution to his experience with drugs, contrary to the trial court's absolute prohibition against such evidence for the defense. (88 RT 18348-18349.) Whether Juror 10's opinions related to use of methamphetamine or other drugs, his opinions were extraneous, the message contradictory to the evidence introduced by the defense in mitigation of punishment, and they were deeply prejudicial to appellant. (AOB 566.)

Other "discussions" injected into deliberations by Juror 12 were similarly extraneous to reliable punishment determination and prejudicial; they brought the politics of the death penalty into deliberations, ignored jury instructions and admonitions from the court regarding the reality of the imposition their decision would be carried out: "[Juror 12] believed the death penalty would be abolished in years to come and Louis would never be executed." (Juror 1; 13 CT 3392.)

In final analysis, the record does not "demonstrate" what "motivated" some jurors to vote for death and others to vote for life prior to or after Judge Platt's improper efforts to coerce a verdict after the jury had declared impasse, and juror misconduct cannot be so easily swept aside as respondent suggests it should be. (RB 275; see also *Argument IV* [*People v. Gainer* (1977) 19 Cal.3d 835 re

improper 'blasting' of verdict from minority jurors with *Allen* charge].) The determination of the appropriate punishment upon retrial requires an individualized decision and is subject to close scrutiny. Juror misconduct in the retrial of the penalty determination injected non-statutory factors and resulted in an arbitrary and capricious sentence of death and structural defects in the trial mechanism itself. The misconduct alleged was presumptively and actually prejudicial, as it created bias against appellant, violated appellant's previously enumerated federal and state constitutional rights, and it cannot be said to have been harmless beyond a reasonable doubt. (*Ante*, p. 215; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Jones* (2003) 29 Cal.4th 1229, 1264.)

XVIII-XX.

APPELLANT'S PENALTY RETRIAL AFTER THE ORIGINAL JURY FAILED TO REACH A VERDICT, AND OTHER SYSTEMIC FLAWS ASSERTED, DEMONSTRATE HOW MANY FEATURES AND PRACTICES OF CALIFORNIA'S DEATH PENALTY SCHEME VIOLATE STATE AND FEDERAL CONSTITUTIONAL RIGHTS

Respondent insists that cumulative effect of errors does not necessitate reversal (*Argument XIX*), and that *stare decisis* governs review of appellant's claims that double jeopardy principles should have barred the retrial (*Argument XVIII*), diverse aspects of the capital charging procedures, statutory framework, judicial instructions, and undue delay between sentence and execution (*Argument XX*), and that none of the claims should be revisited because none violates any protections afforded by federal and state constitutions. (U.S. Const., 5th, 6th, 8th, and 14th Amend.; Cal. Const., art. 1, §§1, 7, 13, 15, 16, 17; RB 275-284; 285-290; see also, AOB 576-592; 593-598; 599-604.)

Despite this Court's continued rejection of appellant's listed arguments (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1066-68; *People v. Ramirez* (2006) 39 Cal.398, 476-479; *People v. Carter* (2005) 36 Cal. 4th 1114, 1214-15; 36 Cal.4th 1215, 1278-80; *People v. Yeoman* (2003) 31 Cal.4th 93, 119-121), and

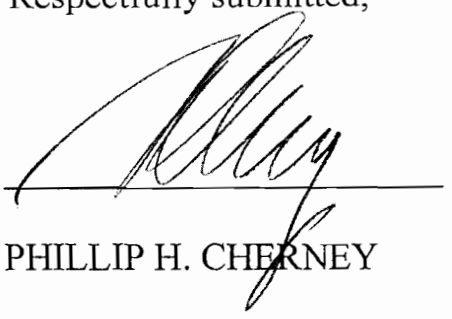
contrary to respondent's arguments, there has never been a more opportune time for this Court to reevaluate the precedent cited by respondent. Appellant urges this Court to reconsider the death penalty because California's capital punishment system is unreliable, unworkable, indecent, inhumane and uncivilized. For the reasons argued in appellant's opening brief, this Court should hold the death penalty violative of state and federal constitutions. (*Cunningham v. California* (2007) 549 U.S. 270; *McClesky v. Kemp* (1987) 481 U.S. 279, 304; *Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303; *Furman v. Georgia* (1972) 408 U.S. 238; *Trop v. Dulles* (1958) 356 U.S. 86, 101.)

CONCLUSION

Based upon the foregoing, appellant's convictions, true special circumstance findings, and judgment of death must be reversed.

DATED: SEPTEMBER 16, 2013

Respectfully submitted,



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CERTIFICATION OF WORD COUNT

As attorney of record herein, and pursuant to California Rules of Court, RULES 8.204 and 8.630(b)(1)(A), I hereby declare and certify that this reply brief contains approximately 50,820 words in *WordPerfect* 14-point computerized format, and by order of this Court under Rule 8.630-8.631, dated August 9, 2013 that I have been granted permission to file an overlength brief not exceeding 51,000 words. I declare the forgoing is true and correct to the best of my knowledge under penalty of perjury this 16th day of September, 2013, at Visalia, California.

Phillip H. Cherney

DECLARATION OF SERVICE BY MAIL

RE: PEOPLE V. LOUIS JAMES PEOPLES, S090602
(Alameda County Superior Court No.135280;
San Joaquin County Superior Court No.SP062397A)

I, Phillip H. Cherney, declare that I am an attorney licensed to practice law in the State of California, State Bar No. 76053, and my business address is 214 South Johnson Street, Visalia, California, 93291.

On September 16 2013, I served the following persons either personally, or at the addresses listed, with a true copy of *Appellant's Reply Brief*, enclosing the same in a sealed envelope, postage fully paid, and providing it to FedEX at Visalia, California, for delivery, as follows:

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I declare under penalty of perjury that the foregoing is true and correct this 16th day of September, 2013, at Visalia, California.

Phillip H. Cherney