No. S029843

DEATH PENALTY

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAMES DAVID BECK and GERALD DEAN CRUZ, Defendants and Appellants.	(Alameda County Sup. Ct. No. 110467)

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAMES DAVID BECK and GERALD DEAN CRUZ, Defendants and Appellants.	No. S029843 (Alameda County Sup. Ct. No. 110467)

APPELLANT'S REPLY BRIEF

INTRODUCTION

Throughout its brief, respondent attempts to defend the judgment in this case based on an inaccurate account of the facts, false and misleading descriptions of critical evidence, and misrepresentations of the claims and arguments appellant has actually made. In some instances respondent ascribes inappropriate meaning and purpose to appellant's arguments merely to denigrate or mock.[1] Respondent's commentary of this sort is surplusage, unrelated to the resolution of appellant's actual arguments, and for the most part, is ignored in this reply.

In a number of instances, respondent improperly relies on "facts" outside the record on appeal. At various points, respondent improperly

[1] E.g., "This Court should reject appellants' claim because it essentially boils down to a complaint that they were not allowed to manipulate the legal process. . . ." (RB 73.)

cites this Court's opinion in *People v. Vieira* (2005) 35 Cal.4th 264, not for legal principles or holdings, but for references to the facts recited by this Court in that opinion, as if those facts were legally relevant to appellant's claims or to this Court's resolution of those claims.[2] Appellant was not a party to Vieira's trial or to his appeal. Respondent's attempts to insert factual averments about that case into this Court's determination of appellant's claims in this appeal amount to reliance on matters outside the appellate record in this case. Appellant requests that this Court not consider or rely on extra-record facts in resolution of his appellate claims, as to do so would deny appellant's rights on appeal to due process and to a reliable determination of his appeal from a sentence of death and would violate appellant's rights to confrontation under both the federal and state constitutions. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15 & 17; cf. *People v. Pearson* (1969) 70 Cal. 2d 218, 221-222, fn. 1; *Evitts v. Lucey* (1985) 469 U.S. 387; 6 Witkin, Cal. Crim. Law 3d (2000) Crim Appeal, § 142, p. 390.)

Similarly, in Arguments I (failure to sever) and II (erroneous admission of character evidence), respondent cites evidence from both appellant's and Beck's separate penalty phases as if it were relevant to the consideration of trial court error in the guilt phase. (See e.g. RB 101-102 156.) Because the testimony referred to was introduced in separate proceedings, well after the proceeding in which the challenged rulings took place, it is irrelevant. Respondent's reliance on testimony from Beck's penalty phase also constitutes an attempt to introduce into this Court's review matters outside the relevant record, from proceedings to which appellant was not a party, thus violating appellant's constitutional rights to

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[2] See, e.g., RB 101-102; 158, fn.9;.

confrontation, to due process and to a reliable determination of his appeal from the judgment of death. Appellant again requests this Court not consider facts from appellant's or Beck's penalty phase in its analysis of guilt phase claims.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief. Appellant does not reply to those of respondent's contentions that are adequately addressed in his opening brief. In addition, the absence of a reply by appellant to any particular contention 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 by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

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STATEMENT OF FACTS

In respondent's statement of facts, there are a number of misstatements, mischaracterizations and distortions of the evidence admitted at trial. For example, at RB 23, respondent states, "Cruz joined the assault and stabbed Raper on the side of his neck; he also cut Raper's throat, severing his carotid artery and larynx." As support for this statement, respondent cites 18 RT 3088, 3090, and 3092. Review of those transcript pages reveals that it is the testimony of Dr. Ernoehazy about the nature of Raper's wounds. Nothing in the cited pages concerns who inflicted the wounds, or even the type of weapon that would have been used to do so.

As another example, at RB 25, respondent states that when they left the scene, the defendants left behind, inter alia, "*Cruz's* K-Bar knife." (Emphasis added.) However, on the next page, respondent states that, "Vieira said he left behind his mask, *his* K-Bar knife. . . ." (Emphasis added.) None of the record citations given by respondent for the claim that the knife was appellant's attribute ownership of that knife to anyone. However, the record citations given for the attribution of ownership to Vieira support the conclusion that while the K-Bar knife might have belonged to appellant, it was Vieira who had possession of it and left it behind. (24 RT 4248-4249.)

More egregious, however, is the approximately 12 page "Introduction" to the Statement of Facts. (RB 3-15.) This introduction includes both claims of fact and summaries of the issues in the appeal, and is not, strictly speaking, an introduction solely to the statement of facts. The recitation of "facts" in this Introduction (RB 3-6) states as fact matters not supported by the record and omits references to evidence which conflicts with respondent's summary. No citations to the record are

supplied in support of any of the factual assertions in the introduction. Moreover, respondent refers to evidence from the guilt phase and the separate penalty phases without identifying the source, and without noting that evidence from the penalty phases is not relevant to review of guilt phase issues. Some of the "facts" included are from evidence admitted only at Beck's penalty phase,[3] to which appellant was not a party, and which cannot properly be used in review of appellants' claims on this appeal.

Nowhere in the Introduction or in the actual Statement of Facts does respondent acknowledge that the prosecution's case against appellant relied almost exclusively on the testimony of Michelle Evans. As demonstrated in the opening brief, the evidence of the conspiracy relies almost entirely on her testimony, which is also the primary evidence of planning, premeditation and intent to kill.

For these reasons, and as more fully set forth in the arguments below, appellant requests that this Court strike respondent's "Introduction" from its consideration in this appeal.

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[3] E.g., references to injuries to Steve Perkins. (RB 4.)

I

THE TRIAL COURT'S FAILURE TO SEVER APPELLANT'S CASE AT THE GUILT PHASE FROM THAT OF HIS CODEFENDANTS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL

In his Opening Brief, appellant demonstrated that due to the joint trial, he was faced not just with the prosecution's evidence against him but with hostile and antagonistic tactics of counsel for Willy and LaMarsh, who acted in part as second and third prosecutors against him, including introduction of prejudicial character evidence (see Argument II), repeated attempts to introduce further prejudicial evidence despite trial court rulings sustaining objections to those attempts, and attacks on appellant's character intended to portray him as "an evil man." Despite appellant's repeated objections, and despite repeated requests for severance and motions for mistrial from all defense counsel, the trial court refused to sever the cases, grant a mistrial, or to take other remedial actions to reduce the prejudice to appellant from the joint trial.

Appellant established in the opening brief that the antagonistic and hostile defenses and tactics of counsel for Willy and LaMarsh, whether considered alone or in conjunction with the other errors in this case, produced a trial that was so grossly unfair to appellant that the joinder of the cases denied appellant due process of law, a fair determination of both guilt and penalty, and deprived him of the heightened reliability required in capital cases. Joinder manifestly "operated to reduce the burden on the prosecutor" (*Zafiro v. United States* (1993) 506 U.S. 534 at p. 544 (conc. opn. of Stevens, J.).) to prove his case against appellant beyond a reasonable doubt.

Appellant established that it is reasonably likely that in the absence

of the prejudice from the joint trial, a result more favorable to appellant at the guilt trial would have resulted. Appellant's Sixth, Eighth and Fourteenth Amendment rights to fundamental fairness, a fair and reliable guilt determination, and a reliable, fair and individualized sentence, as well as his corresponding rights under California law, were violated as a result of the trial court's refusal to sever appellant's trial from that of Willy and LaMarsh. As a consequence, appellant's convictions and death judgment must be reversed.

Respondent, in defending the trial court's rulings, relies on mischaracterizations of appellant's contentions, misstatements and distortions of the record and references to matters outside the record, and disregards the substantial evidence supporting appellant's claim of prejudicial error.

For example, respondent asserts that appellant "concedes that it was proper to join his case with Beck's because their accounts of the crime were coordinated." (RB 76.) This assertion is simply false and is not supported to any citation to appellant's opening brief.[4]

Respondent also argues that the prosecution had "evidence" that was never proffered or was excluded (see, e.g., RB 101-102, 115, 137), in an apparent attempt to argue that the joint trial could have been much more prejudicial, and that, therefore, any actual prejudice accruing from the joint trial was minimal in comparison. This is tantamount to saying, it could have been worse, and does not address the actual prejudice to appellant from the

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[4] At various points, respondent also argues that because appellant requested severance of his penalty phase and, in fact, his penalty phase was tried separately from that of Beck, he cannot complain about a failure to sever penalty phases. (See, e.g., RB 122-123.) In fact, appellant has made no claim of error on this appeal regarding severance of penalty phases.

joint trial including from the evidence actually admitted.

Reduced to its legitimate constituent parts, respondent's argument is that appellant was not prejudiced by the joint trial. For this, however, respondent relies primarily on a flawed understanding of the relevant facts and evidence, and a determined refusal to acknowledge the weaknesses in the prosecution's case against appellant. Overall, respondent has failed to carry the State's burden of establishing that the prejudicial impact of the joint trial was harmless beyond a reasonable doubt.

A. The Trial Court's Failure to Sever Appellant's Case from That of Codefendants LaMarsh and Willey Requires Reversal

1. The Trial Court Abused Its Discretion in Denying Appellant's Severance Motions

As demonstrated in the opening brief, much of the prejudice from the joinder of appellant's case to that of Willey and LaMarsh arose from the character evidence which Willey and LaMarsh introduced against appellant and Beck. This included evidence of firearms and other weapons possessed by appellant and Beck, but not used at the scene of the homicides, as well as evidence of specific acts by appellant, Beck, and Vieira unrelated to the homicides, and various prejudicial descriptions of the close relationship of those three.[5]

Respondent attempts to minimize the prejudicial evidence regarding specific acts by appellant and Beck, especially regarding Vieira, by referring to it simply as "evidence of the close relationship between Cruz, Beck, and Vieira." (RB 88, 96, 98, 99, 117.) Appellant never denied that he, Beck and Vieira were close. Thus, mere "evidence of a close

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[5] The evidence regarding the weapons, the prior acts, and the relationship are more fully discussed in Argument II.

relationship" would have been largely cumulative. As explained in the opening brief, appellant's claims are based on evidence of prior acts and descriptions of the relationship which served primarily as improper and inflammatory character evidence. (See AOB 69-79, 82-87, Argument II; see also 31 RT 5459-5474; 32 RT 5600-5618; 33 RT 5942-5948.)

Respondent also ignores the general conflict between whatever potential probative value any of this evidence might have had for Willey and LaMarsh and the simultaneous, prejudice to appellant. Even the trial court recognized that conflict but allowed evidence prejudicial to appellant to be admitted on behalf of Willey and/or LaMarsh. (See, e.g., 31RT:5470-5471.) As respondent noted, the trial court prevented codefendants from introducing even more prejudicial and inflammatory evidence. Respondent does not even attempt to explain how that could have reduced the prejudice to appellant accruing from what the trial court did allow.

Respondent argues that "[a]t most, [Willey and LaMarsh] introduced evidence of a close relationship that the trial court should have allowed the prosecutor to admit anyway." (RB 117.) However, respondent ignores the fact that it was not the prosecution who introduced the bulk of the evidence at issue, apparently finding it unnecessary to the prosecution case. On the other hand, counsel for Willey and LaMarsh fought hard to introduce what amounted to character evidence, not mere relationship evidence, in an attempt to paint appellant as violent and even, as counsel for Willey said repeatedly, "evil." (32 RT 5604; 33 RT 5947; 37 RT 6716.)

Moreover, the prejudice to appellant stemmed not only from the specific inflammatory evidence introduced, but from the continued attempts by codefendants counsel to introduce further inflammatory evidence even in the face of adverse trial court rulings, as well as the increasingly hostile attitude displayed by counsel for Willey and LaMarsh toward both appellant

and his trial counsel. (See, e.g., 33 RT 5816.) Respondent wholly ignores the extent to which counsel for Willey and LaMarsh became second and third prosecutors against appellant.

2. The Trial Court Abused Its Discretion in Denying Appellant's Request for Rebuttal Jury Argument

In his opening brief, appellant argued that the trial court's denial of his motion for an opportunity to present rebuttal argument after counsel for the codefendants had presented their closing arguments was an abuse of discretion. The request for rebuttal argument was based upon the fact that counsel for Willey and LaMarsh had taken on the roles of second and third prosecutors against appellant, and, because of the order in which argument was set, codefendants' counsel would have an unfair advantage, able to respond to appellant's closing argument without appellant being able to respond to theirs. In support of the motion, counsel for appellant cited Penal Code sections 1093 and 1094, *People v. Owen* (1901) 132 Cal. 469, *People v. Strong* (1873) 46 Cal. 302, and the Sixth, Eighth and Fourteenth Amendments. (AOB 74-75, 84-85; 36RT:6454-6457.)

Respondent claims that appellants "mischaracterize their motion as a basis for severance, and again misstate the presumption. Appellants never argued that they were entitled to severance if the trial court did not afford them the opportunity to make a rebuttal argument. . . ." (RB 113.) This is a substantial mischaracterization of appellant's argument. Appellant argued that because of the prejudice resulting from the joint trial, including the prejudice inherent in the order of argument in this case, allowing rebuttal argument was an alternative available to the trial court to protect appellant from at least some portion of that prejudicial effect. (See *United States v. Mayfield* (9th Cir. 1999) 189 F.3d at p. 900, fn. 1 [in camera admission by

one defendant's counsel that her defense would be the prosecution of the codefendant required severance or alternative protective measures].) The trial court denied the motion without acknowledging either the problem or its own discretion to allow such a remedy.

Respondent claims that trial counsel "offered no authority and no argument why the trial court should allow them to make a rebuttal argument." (RB 114.) Respondent is wrong. As cited in the opening brief (AOB 74-75), and above, trial counsel specifically cited statutory and case authority. Respondent also claims that appellant cited no authority or argument on appeal. (RB 114.) Again, respondent is wrong. Other than the authority and argument by trial counsel, appellant also cited *United States v. Mayfield, supra*, 189 F.3d at p. 900. (AOB 84.) Respondent doesn't discuss *Owen*, *Strong* or *Mayfield* having denied their existence.

That the trial court allowed the argument to proceed without such protection of appellant's rights to a fair trial and reliable determination of guilt was an abuse of discretion, as argued in the opening brief. Even if, on its own, that ruling is not overturned as an abuse of discretion, the order of argument, denying appellant's counsel an opportunity to rebut the prosecutorial arguments by counsel for Willey and LaMarsh against appellant, is further evidence of the manner in which the joint trial violated appellant's rights to due process and a fair trial.

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3. Appellant Was Denied a Fair Trial and Due Process of Law by the Trial Court's Failure to Sever[6]

In the opening brief, appellant demonstrated that, despite knowledge of the conflict between the defense Willey and LaMarsh sought to present and the prejudice to appellant which would result, the trial court repeatedly refused to sever the trials of the codefendants, while allowing evidence and argument which acted to deprive appellant of a fair trial and due process of law. As explained in the opening brief, even if a motion to sever was properly denied at the time it was made, if the effect of joinder deprived the defendant of a fair trial or due process of law, reversal is required. (AOB 57-58.) While cursorily acknowledging this point (see RB 85, 87 [quoting *People v. Lewis* (2008) 43 Cal.4th 415, 452], 114 [quoting *People v. Hoyos*, (2007) 41 Ca1.4th 872, 896]), respondent primarily restricts his argument to whether the motions to sever were properly denied when made, and fails to acknowledge the substantial prejudice which resulted from the tactics of counsel for Willey and LaMarsh.

Moreover, appellant noted that in *People v. Keenan* (1988) 46 Cal.3d 478, this Court warned that "severance motions in capital cases should

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[6] Respondent takes a portion of a single sentence in this section of Argument I, that "The joint trial further prevented a reliable determination of guilt and penalty," and attempts to treat it as a separate claim concerning severance of the penalty phase, about which respondent asserts that "appellants do not make any argument on this point, nor do they offer any authority for their position." (RB 122.) Appellant has not raised on appeal any issue regarding severance of penalty phases for the very reason that he had a separate penalty phase below. Nevertheless, the unreliability of the joint guilt phase and the resulting unreliability of the guilt verdicts necessarily undermined any reliability of the penalty phase, whether or not it was conducted separately.

receive heightened scrutiny for potential prejudice." (*Id.* at p. 500.) This principle is consistent with the Eighth Amendment requirement of heightened reliability in capital cases. (AOB 57; see, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 376.) Respondent does not mention either *Keenan* or *Mills* or the principles for which they are cited.

Respondent focuses on argument that defenses of the codefendants were not, strictly speaking, "mutually antagonistic," i.e., that the conflict between the defenses did not alone demonstrate that all parties were guilty or that excepting one defendant's defense would preclude acquittal of the other. (RB 104.) However, respondent appears to labor under a misunderstanding, i.e., that unless there are such "mutually antagonistic" defenses, severance should never be ordered. Respondent does not discuss substantial case law set forth in appellant's opening brief demonstrating that whether a joint trial results in reversible error is not dependent upon some talismanic standard, but upon whether the joint trial had a " 'substantial and injurious effect or influence in determining the jury's verdict.' " (*United States v. Lane* (1986) 474 US 438, 449, quoting *Kotteakos v. United States* (1946) 328 U.S. 750, 776; accord, *Zafiro v. United States* (1993) 506 US 534, 539; *People v. Grant* (2003) 113 Cal.App.4th 579, 588.) "In other words, the defendant must demonstrate a reasonable probability that the joinder affected the jury's verdict." (*People v. Grant*, *supra*, 113 Cal.App.4th at p. 588.)

The essential consideration in determining whether defendants who are jointly charged should be separately tried is whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States*, supra, 506 U.S. at p. 539; accord, *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082 ["The

touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict."].)

Respondent spends some time identifying aspects of the record cited by appellant and arguing that they did not constitute motions for severance, or did not require the court to reconsider its rulings denying severance. (RB 99-100.) However, appellant cited proceedings, evidence and argument from the trial which, although not motions for severance, or renewals of prior motions, demonstrate the continuing, even escalating prejudice to appellant's opportunity for a fair and reliable judgment of his guilt, and are thus relevant to the determination of whether or not the joint trial denied appellant due process and a fair jury trial.

Respondent argues that the evidence of the close relationship of appellant and Beck was relevant to prove the conspiracy. (RB 101.) Respondent fails to acknowledge that appellant never contested whether or not he had a close relationship with Beck. He acknowledged his close relationship with Beck. For the most part, therefore, mere evidence of a close relationship would not have been prejudicial, but cumulative.

The fact is, however, that the evidence which counsel for Willey and LaMarsh sought to have introduced was not just evidence of a close relationship, but evidence of prior conduct and prejudicial and inflammatory characterizations of that relationship which was intended as improper character and propensity evidence to be used to portray appellant as violent and "evil," as more fully discussed in Argument II of the opening brief. Moreover, the prejudicial effect of the improper use of conduct evidence as improper character evidence was compounded by the erroneous instruction given by the trial court concerning that evidence, as also explained in Argument II. Respondent fails to acknowledge the extent to which this evidence went well beyond mere evidence of a relationship.

Respondent also fails to acknowledge the evidence in the record that counsel for Willey, at least, clearly intended the evidence as character and propensity evidence, and the extent to which counsel for LaMarsh focused a significant amount of his closing argument on contrasting LaMarsh's supposed character with appellant's. (AOB 77-79.) Instead, respondent refers to evidence that was excluded, evidence admitted only at the penalty trials and hearsay references to *People v. Vieira*, *supra*, 35 Cal.4th 264, all of which are irrelevant to the question of whether the trial court's insistence on a joint trial denied appellant due process, a fair trial and a reliable determination of guilt. Respondent cites no authority even suggesting that such references are appropriate in consideration of the issues at hand. This Court should reject respondent's improper arguments.

Respondent argues that the evidence put on by LaMarsh and Willey "was not prejudicial to appellants because it purported to prove only that if there was a conspiracy, they did not know about it." (RB 111.) While that was one point of their argument, it is not all they sought to prove. They sought to shift the jury's focus to appellants on the basis of character or criminal propensity. They sought to and did introduced evidence primarily related not to the facts of the homicides, but to appellant's and Beck's character. Counsel for Willey as much as admitted he was trying to show appellant was "evil." (See 32 RT 5604; 33 RT 5947; 37 RT 6716.) None of this would have been admissible in a separate trial, nor did the prosecution introduce this evidence in support of the prosecution's case in chief. Rather than supporting the prosecution's case against appellant directly, counsel for LaMarsh and Willey sought to distort the jurors' evaluation of the evidence and of the defendants through improper tactics, evidence and argument. As a result of the joint trial and their tactics in defense of their clients, appellant was deprived of a fair trial, due process and reliable determination of guilt

and consequently, of penalty. Respondent has failed to demonstrate otherwise.

4. The Erroneous Denial of Appellant's Severance Motions Constituted Reversible Error

As explained in appellant's opening brief, the joint trial resulted in the denial of appellant's rights to due process and a fair trial. The demonstration of the error itself demonstrates prejudice requiring reversal of the judgment. (See AOB 62; *United States v. Lane* (1986) 474 U.S. 438, 449; *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285 .)

Respondent argues that any error was harmless under either *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18, 24. The arguments are based primarily upon mischaracterizations of the weight of the evidence supporting the verdicts, avoidance of the substantial evidentiary conflicts posed by the evidence at trial and mischaracterization of the prejudicial and inflammatory effects of the joint trial.

Respondent argues that appellant would not have received a better result in a separate trial because "the prosecution's evidence and Cruz's own testimony were overwhelming evidence of Cruz's guilt on all counts;" the evidence showed that appellant "had the most antagonistic relationship with Raper and he had the strongest motive to attack Raper;" and the evidence of which appellant complains would have been admitted in a separate trial. (RB 125.)

Each of these points is wrong.

While sufficient to sustain the verdicts, the evidence at trial amounted to overwhelming evidence only of certain non-conclusive facts – essentially that appellant was present at the Elm Street house, having gone there in his car with the others, and that he or one or more of those who had

come over to the Elm Street house with him that night committed the homicides. Beyond that, there was substantial evidence supporting conflicting theories as to, inter alia, who killed who, whether there was a conspiracy, what state of mind the actual killer of each victim entertained in committing the homicide, and what state of mind any of the defendants entertained as to the killings of any of the victims. There was substantial evidence that appellant did not kill anybody, did not conspire to kill anybody or to have anybody killed, did not aid and abet any of the actual killers, and had no intent to kill or otherwise act with malice. It is ludicrous to characterize such a state of the evidence as "overwhelming evidence of . . . guilt on all counts."

While evidence did demonstrate that Raper was hostile to Cruz, that Raper had harassed, confronted and threatened Cruz, and that Cruz felt understandable resentment of Raper, and even feared Raper might at some point direct an attack on him, his family and his friends, "a homicidal conclusion is hardly the ineluctable inference." (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1205.) To the extent it tends to explain the explosion of violence which occurred, or that the result of that violence was homicide, evidence of Cruz's belief in an imminent threat to himself, his family and his friends supported the conclusion that he had an honest, if unreasonable, belief in the need to defend himself and his family and friends from imminent harm. That interpretation is consistent with the evidence but does not support the verdicts. Because the trial court refused to give an instruction on that theory (see Argument VIII, *post*), the jury was not given an opportunity to evaluate the evidence on that basis.

Moreover, the evidence demonstrated that the person who had the most personal violent interaction with Raper was LaMarsh. He had attacked Raper's trailer with a baseball bat after LaMarsh's gun was stolen

from him while in the trailer. (24RT:4190-4191; Exh. 131.) LaMarsh told a number of Camp residents how much he hated Raper and wanted to "get his hands" on him. (20RT:3387-3388.) When Raper's car was burned after being towed away from the Camp, it was LaMarsh who dumped a half-full five-gallon can of gas on the car before Vieira threw a match onto it. There was no evidence that appellant was involved in burning the car. (21RT: 3585-3590; 29RT:5029-5033; 32RT:5685-5687; 33RT:5821-5824.) A few days before the homicides, when appellant had brought some beer over to the Elm Street house as a peace offering, to share with Raper and his associates, LaMarsh started a fight with Raper. (24RT:4186-4190, 4319-4320; 29RT:5052-5053; 32RT:5624-5627, 5687.) A few days after the homicides LaMarsh told his friend Richard Ciccarelli that Raper had "put out a contract" on him. (19RT:3285-3286, 3294.)

Respondent's claim that there was no reason why the prosecutor could not introduce all of the evidence of appellant's antagonism with Raper in a separate trial (RB 125) misses the point. Much of that evidence was not contested, was in fact introduced by appellant, and was subject to conflicting interpretations, by no means dispositive of a motive or intent to murder. Moreover, some, such as Rosemary McLaughlin's story of appellant planning to get in a fight the day of the homicides, was not presented by the prosecution in this trial, but by a codefendant, LaMarsh. (31 RT 5539-5540.) There is no basis on this record for the assumption that the prosecution would have chosen to present that evidence in a separate trial, having chosen not to do so in this trial.

Respondent's arguments regarding the supposed "overwhelming" nature of the evidence against appellant rely substantially, as did the prosecution, on the testimony of Evans. Otherwise, respondent relies upon evidence which was not in dispute, but which is fully consistent with

innocence, or lesser culpability and with appellant's testimony that he did not plan the attack, or intend any killing.

In arguing that evidence "corroborates" Evans's testimony regarding the supposed plan, respondent fails to acknowledge that any consistency between Evans's testimony and the events which occurred is fully explained not by the conclusion that a "plan" was carried out, but that the details of the "plan" were concocted by Evans after the fact, so that she could evade prosecution for her own homicidal acts that night. Respondent fails to acknowledge the inconsistencies in Evans's own testimony[7] and the numerous prior inconsistent statements Evans made before she settled on the stories she told at appellant's trial. (See AOB 8, 27-30.)

Respondent also relies upon "neutral eyewitnesses" who identified appellant. Respondent fails to acknowledge serious credibility problems concerning the details of Creekmore's and Moyers' testimony. Moyers is nearsighted but wasn't wearing her glasses, her description of the people she saw did not match appellant, and her "identification" was by no means unequivocal – she could only say that appellant resembled one of the people she saw, i.e., he was similar in size and shape. (17RT:2933-2938, 2948.) She specifically declined to identify appellant as one of the people she saw. (17 RT 2937.) Creekmore identified appellant only after having seen him on television, having previously failed to identify him from photographs

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[7] E.g., respondent argues that Evans' testimony that there was a plan was corroborated by Alvarez's testimony that LaMarsh pointed a gun at her and Ritchey and ordered them into the living room, which was consistent with Evans' testimony that the plan was to get all of the victims into the living room. (RB 127.) But Evans also testified that part of the plan was that no one would take firearms (24 RT 4403-4404), which makes LaMarsh's possession and use of the gun contrary to the supposed plan, not corroborative of it.

shown him by the police or in person at the preliminary examination. At the time of the homicide Creekmore saw only a "heavy set guy" whose facial features he could barely distinguish, perhaps because he had consumed six or seven beers that night. (20RT:3436-3437, 3443-3444, 3462-3464.)

Respondent cites evidence which conflicts with appellant's testimony for the proposition that there was overwhelming evidence that appellant's testimony was not credible. That there was evidence that conflicted with appellant's testimony is not dispositive of the credibility of appellant's testimony. There were numerous conflicts in the evidence in the prosecution's own case, between the various defendants, and between the prosecution case and the various defendants. There was no definitive evidence of appellant's state of mind at relevant times other than appellant's own testimony. The prosecution as much as conceded the weaknesses in the prosecution's case as to who did what by telling the jury that it did not need to be concerned with who did what, but could rely on theories of vicarious liability to convict all the defendants. (See 36 RT 6531-6532; 37 RT 6729-6730, 6745; AOB Arg. VII.)

Respondent confuses the overwhelming nature of the evidence which was uncontested – e.g., that appellant, the three codefendants in this trial, Vieira and Evans went to 5223 Elm Street in appellant's car; that Evans and LaMarsh entered the house while appellant parked the car; that after parking and exiting the car, appellant and the others heard sounds of trouble and possible violence from the house, at which point they went to the house; that there was a melee in and around the house, the exact initiation of which was the subject of conflicting evidence; that four people were killed in the melee; and that the same six people who came in appellant's car left the scene in appellant's car – with overwhelming evidence that

appellant and the others conspired to kill, that appellant did kill, and that he had the intent to kill.

While sufficient to sustain the judgment, the bulk of the issues – e.g., appellant's state of mind at relevant times; whether he actually killed anyone; whether he intended or even expected that anyone would be killed; whether he acted out of the actual but unreasonable belief in the need to defend against imminent peril; whether there was a conspiracy, or more than one, and if so, who was involved; why the various weapons were brought to the scene by those who brought them; what else was said at the scene, who screamed from the Elm Street house; who killed who and why; what else was said at the scene; what the states of mind of the various people involved where at various relevant times – were the subjects of conflicting evidence which cannot by any stretch of even the prosecutorial imagination be considered overwhelming.

The essential point concerning the effect of the joint trial here is that the jurors' consideration of those fundamental question, their resolution of the conflicts in the evidence, their assessment of credibility of the various witnesses including that of appellant, was prejudicially skewed by the tactics of counsel for codefendants Willey and LaMarsh, consisting of improper attacks on appellant's character through, inter alia, argument, misconduct and wrongfully admitted evidence.

Even respondent, in reciting the supposedly overwhelming evidence of appellant's guilt, relies improperly on prejudicial and inflammatory evidence introduced by Willey and LaMarsh. To establish that appellant lied in testifying that he did not believe in violence, respondent cites evidence that appellant "usually wore military style clothing" and that "he owned a virtual arsenal of weapons." (RB 130.) That is precisely the type of reasoning which demonstrates the prejudice which respondent denies.

Nothing about military style clothing dictates, or even supports a conclusion that appellant was lying when he said he did not believe in violence. Nor does ownership of firearms support respondent's conclusion. Evidence regarding these two matters were primarily introduced and relied upon by codefendants, not the prosecution. Respondent's reliance on that evidence demonstrates and confirms the very prejudicial and inflammatory effect caused by the joint trial in this case.

As demonstrated in the opening brief, the trial court's insistence on a joint trial, even after the conflicts between the rights of the codefendants became obvious and pronounced, produced a trial that was so grossly unfair to appellant that the joinder of their cases to appellant's case denied appellant due process of law and deprived him of the heightened reliability required in capital cases.

Under either the *Chapman*[8] or *Watson*[9] standard, the effect of the joint trial and the antagonistic second- and third-prosecution tactics of the codefendants on the jury's guilt verdicts was undoubtedly prejudicial, whether considered alone or in conjunction with the other errors in this case.

It is reasonably likely that in the absence of the prejudice from the joint trial, a result more favorable to appellant at the guilt trial would have resulted. Reversal is therefore required even under the *Watson* standard. However, since the prejudicial nature of the evidence and innuendo, as well as the disparaging remarks and arguments, introduced into the trial by the codefendants, and the instruction which directed the jury to the erroneous consideration of this evidence (see Argument II), deprived appellant of his

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[8] *Chapman v. California* (1967) 386 U.S. 18, 24.

[9] *People v. Watson* (1956) 46 Cal.2d 818, 836.

federal constitutional rights to due process, a fair trial and a reliable jury determination of guilt, the error must be assessed under the *Chapman* standard. (U.S. Const. 6th, 8th & 14th Amends.)

Respondent has not, and cannot, demonstrate that the verdicts were not attributable, at least in part, to the prejudice introduced by the joint trial. Moreover, since appellant's death sentence rests on an unreliable guilt verdict, and the death verdict was not surely unattributable to this error (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279), the death verdict is itself unreliable, obtained in violation of appellant's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment (*Caldwell v. Mississippi* (1985) 472 U.S. 320).

For all of the foregoing reasons, appellant's Sixth, Eighth and Fourteenth Amendments rights to fundamental fairness, a fair and reliable guilt determination, and a reliable, fair and individualized sentence, as well as his corresponding rights under California law, were violated as a result of the trial court's erroneous denial of appellant's severance motions. Appellant's convictions and death judgment must be reversed.

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II

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE RELEVANT PRIMARILY OR SOLELY TO APPELLANT'S CHARACTER

In his opening brief, appellant demonstrated that the trial court erred in admitting, over appellant's objections, evidence concerning appellant's ownership of a number of firearms, described as assault weapons, as well as gas masks, grenades and knives. The trial court further erred in admitting, over appellant's objections, evidence that appellant and Beck allegedly mistreated Vieira, that Vieira was a "slave" and appellant was his "master," that Beck was appellant's "enforcer" and that Beck and Vieira would do anything appellant told them to do. Moreover, counsel for codefendants LaMarsh and Willey persisted in asking questions of witnesses which improperly suggested that appellant was interested in the occult, that he and Beck had previously talked about killing someone, and that appellant was Beck's spiritual leader. Instead of granting a mistrial and severing appellant's trial from that of LaMarsh and Willey (see Argument I), the trial court compounded the error and the prejudice to appellant by giving an erroneous instruction concerning the use to which the jury could put this evidence.

Respondent attempts to downplay the significance and the inflammatory nature of the firearms evidence and of appellant's attempts to limit the evidence and its prejudicial effect. Respondent relies primarily on the justification and argument for admission of the evidence put forth by counsel for Willey: that the fact that firearms were not used in the homicides, despite their ready availability, demonstrated either (1) the absence of any conspiracy or intent to kill or (2) that Cruz, Beck and Vieira

had a separate, secret conspiracy which they hid from Willey. (RB 146-153.) Appellant demonstrated in his opening brief that the first theory did not justify the amount and type of evidence admitted regarding the firearms. The second theory provided no support for the admission of the evidence, amounted to pure speculation, and in fact added to the prejudice resulting from the admission of this evidence and from the joint trial. (See Argument I.)

As to the evidence regarding the relationship of Cruz, Beck and Vieira and their conduct, respondent again minimizes the significance and inflammatory nature of the evidence, and attempts to prejudice this Court's evaluation of the evidence at trial by referring to information which was *not* presented to the jury, including information outside the record on appeal. (RB 153-160.)

Regarding the trial court's flawed modification of CALJIC No. 2.50, respondent argues the modification was not faulty and was properly applied to various other evidence in this case. (RB 162-164.) For the most part, however, respondent does not address the flaws in the instruction identified by appellant in his opening brief.

Finally, respondent argues that the evidence of appellant's guilt was overwhelming and that the character evidence at issue was "minor." (RB 164-168.) The argument is based on a faulty understanding of the substantial conflicts in the evidence regarding guilt, as well as an unreasonable characterization of the extent of, and the prejudicial and inflammatory impact of, the character evidence, and of the effect of the flawed instruction and the improper and character-based defenses presented by counsel for codefendants LaMarsh and Willey.

A. The Trial Court Erred in Admitting Irrelevant and Prejudicial Character Evidence

1. Firearms and Other Weapons Evidence Was Erroneously Admitted

Respondent apparently concedes that most of appellant's arguments demonstrating the irrelevance and inadmissibility of the firearms evidence are correct; i.e., that the evidence did not help prove who was involved in the events of May 20, 1992, what their intent was in going to 5223 Elm Street, what actions they took there or elsewhere after the homicides; and that there was no similarity between the firearms evidence and the weapons used in the homicides and that the evidence was not admissible to impeach appellants or to rebut appellants' testimony. (RB 146.)

Respondent does not attempt to refute these points, instead arguing that "none of these arguments were put forth at trial to justify introduction of the firearms evidence." (*Ibid.*). Respondent claims that what the prosecutor argued was "that appellants' collection of guns and military gear corroborated testimony that the assailants acted like they were carrying out a military operation. And if it was executed that way, it was more likely to be planned rather than spontaneous." (RB 146-147.) However, respondent provides no citation to the record in support of this claim. In fact, the prosecution never offered that theory in support of the admission of the evidence. Nor was the weapons evidence ever subjected at trial to a balancing of probative value versus prejudicial effect on that theory of relevance. (See 15 RT 2761-2763; 30 RT 5193-5194.)

Respondent argues that the evidence was not excessive or cumulative, describing it as "a few witnesses' brief descriptions." (RB

148.)[10] This characterization ignores that photos of the firearms were put into evidence by codefendant Willey. (See Exhibits 6, 7; 6 CT 1725.) This argument also overlooks the fact that for such inconsequential evidence, as respondent would have it, it consumed so much time in argument on objections, involved numerous witnesses being examined by counsel for Willey and/or LaMarsh about the firearms, including Evans and all four codefendants, and was the subject of argument by counsel to the jury. It further ignores the substantial non-probative, but prejudicial and inflammatory effect of the evidence.

Respondent's own reliance on the weapons evidence in its response to Argument I illustrates its prejudicial import. Respondent argued that "Cruz's general credibility was . . . further compromised when [he] testified that he did not believe in violence-but the evidence showed that Cruz usually wore military style clothing; *he owned a virtual arsenal of weapons* . . . ." (RB 130 (emphasis added).) While ownership of weapons does not establish that someone is violent or believes in violence, there is a non-probative but inflammatory and prejudicial association with such ownership that the jurors were as likely to employ as respondent.

Respondent argues that the "main justification for admitting the

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[10] Respondent, citing AOB 98-101, accuses appellant of "exaggerat[ing] the amount of firearms evidence that was admitted by repeatedly citing the same evidence paragraph after paragraph." (RB 148.) The accusation is particularly mystifying. That portion of the opening brief, Argument II, subheading B.1., identifies the proceedings below concerning the firearms evidence. The section summarizes the evidence of firearms and other weapons which was admitted, other comments, innuendoes and questioning concerning the firearms evidence, the objections, arguments and rulings on the admissibility of this evidence, including the expansion to questions of whether any of the firearms were automatic rifles, or convertible to automatic fire. Exactly how this "repeatedly cit[es] the same evidence paragraph after paragraph" is unclear.

evidence" was the argument of LaMarsh and Willey that the defendants did not arm themselves with the readily available guns showed that there was no plan to commit murder. (RB 147-148.) Contrary to respondent's claim that appellant "barely address[es]" that justification, appellant in fact addressed that "justification" quite directly, and demonstrated that, to the extent Willey's and LaMarsh's theory demonstrated some limited relevance of appellant's ready access to or ownership of firearms, it by no means justified the nature or extent of the evidence that was admitted, e.g., the photos of the firearms seized from appellant's house and the testimony regarding grenades and rockets. (AOB 112-119.)

Respondent cleverly, if misleadingly, quotes appellant's trial counsel out of context, to suggest that trial counsel conceded the relevance of the firearms evidence: "I certainly think that it can be brought out that guns were found, that the defendants had guns." (15 RT 2762; RB 148; see also RB 137.) Respondent omits the very next words in the transcript, again by appellant's trial counsel: "But I don't see where the relevance is of showing the entire arsenal." This point was made in the trial court, and in the opening brief: the limited relevance of appellant's ownership of firearms did not justify the entirety of the evidence and innuendo about firearms that was presented to this jury.

Even the prosecutor noted that Willey's attorney was overreaching in his cross-examination of appellant concerning the potential for converting appellant's semi-automatic rifles to full automatic fire. When Willey's attorney propounded the "main justification" relied upon by respondent here, the prosecutor noted the irrelevance of whether the rifles were automatic or semi-automatic:

> The Court: All right. On the record out of the presence of the jury, the attorneys are present.

What's the relevance, Mr. Miller?
[Willey's Trial Counsel]: The relevance, as I explained before, is to discredit the idea that there was a conspiracy to commit murder. If people had weapons that could be converted to automatic weapons or had been converted automatic weapons, it is totally illogical to go over there and kill people with bats and knives.
[Prosecutor]: It doesn't matter if they're automatic or semiautomatic.
[Willey's Trial Counsel]: Just a nice touch.
The Court: All right. I'll overrule the objection.

(30 RT 5194.)

Willey's trial counsel's reply, that it was "just a nice touch," as much as admitted that he was pursuing this evidence for its prejudicial value rather than for any probative value or legitimate relevance. Respondent ignores the prosecutor's agreement with appellant's position in this particular, and provides no justification for the blatant impropriety of Willey's trial counsel in pursuing this inflammatory "evidence" or the trial court's acquiescence in this line of questioning.

2. Evidence Relating to Appellant's Relationship with and Treatment of Beck and Vieira

Respondent concedes that "the main issue at trial was who committed the murders and whether there was a conspiracy to commit the murders. Since there was so much conflicting evidence, the prosecution's most persuasive ground for conviction was joint liability based on the conspiracy theory." (RB 160.) As a result, respondent argues, "evidence of the conspiracy was very important to the prosecution's case, and evidence of the defendants' close relationship was very probative." (RB 160.)

Having acknowledged the weaknesses in the prosecution case, and hence the central role of the conspiracy charge and the theories of vicarious liability in bolstering those weaknesses, respondent ignores the fact that the bulk of the evidence regarding the relationship of Cruz, Beck and Vieira and their interactions was introduced, over appellant's counsel's objection,

by the codefendants, not the prosecution. While some evidence of a close relationship was admissible or probative, the inflammatory and prejudicial evidence of which appellant complains in his opening brief went well beyond what was necessary to show the existence of that relationship, and was introduced not to support the prosecutor's case but to distort the jurors' evaluation of the evidence through innuendo and improper inferences from character evidence.

As demonstrated in appellant's opening brief, this evidence was not merely evidence of a "tightknit group with some peculiar practices," as respondent puts it. (RB 136.) It was evidence relied upon by the codefendants, especially Willey, to portray appellant as "an evil man." (32 RT 5604; 33 RT 5947; 37 RT 6716.) Respondent ignores the prejudicial and inflammatory nature of this evidence, which is amply demonstrated. Respondent also ignores the substantial evidence that the prejudicial and inflammatory effect of the evidence was precisely why the codefendants fought to introduce it, to the point of continuing to ask questions about even more prejudicial and inflammatory evidence in contravention of specific trial court rulings. (See AOB 103-109.)

B. The Trial Court Erred in Denying Appellant's Motions for Mistrial

In his opening brief appellant noted that at trial his counsel made mistrial motions in response to inflammatory comments and questioning by counsel for codefendants. (AOB 102-110.) Appellant also referred in that context to Argument I, regarding the trial court's erroneous failure to sever his trial from that of Willey and LaMarsh, and to his trial counsel's unsuccessful motions for a mistrial. (See AOB pp. 68-75.) Appellant further cited authority recognizing that where the prejudicial effect of evidence introduced by a codefendant threatens the defendant's right to due

process and a fair trial, the trial court has a remedy other than simply balancing the prejudicial effect versus the probative value under Evidence Code section 352, i.e., to order a mistrial and separate trials (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553-555).

Respondent nonetheless claims that the motions for mistrial were only tangentially related to the issues herein. (RB 162.) This misreads the record and the arguments in the opening brief. (See AOB, Arguments I and II.) Respondent otherwise relies solely on the argument that the contested evidence was relevant and not overly prejudicial. (RB 162) The lack of merit in that argument is amply demonstrated in the opening brief and elsewhere in this reply.

C. The Instruction Given Was Erroneous and Compounded the Prejudice from the Erroneous Admission of the Evidence

In his opening brief appellant demonstrated that by modifying CALJIC 2.50 – striking the words "a crime or crimes" and substituting "acts similar to those constituting crimes other than that for which he is on trial" but not identifying or defining such acts (35RT:6172-6173) – the trial court compounded the erroneous admission of the evidence, heightening its prejudicial effect rather than limiting or excluding it. (AOB 126-129.)

Respondent first responds by arguing that an unmodified CALJIC No. 2.50 has regularly been upheld by this Court as a correct statement of the law, and that the unmodified instruction protects defendants by prohibiting the jury from using other acts evidence to find propensity. (RB 162.) Respondent then argues that because there was no evidence that appellant's possession of various weapons violated any laws, it is speculation that the instruction "caused the jury to conclude that possession of those weapons was similar to committing a crime." (RB 163.) While

that point might have some weight if the instruction had not been modified, had it referred to actual "crimes" rather than acts "similar" to crimes, the instruction as given was specifically directed at acts which were *not* in violation of the law. It is therefore reasonably likely that the jurors would have determined that the instruction related to the firearms evidence, not just despite the lawful nature of appellant's possession of the firearms, but because that possession was not shown to be specifically illegal.

Nor does the "protective" aspect of the unmodified CALJIC No. 2.50 cure the prejudice introduced by the modified instruction which was given. As explained in the opening brief, while the instruction directed the jury on the one hand not to consider the evidence as evidence of bad character or disposition to commit crimes, it directed them on the other hand to uses of the evidence which amounted to the same thing. (See AOB 126-129.) Respondent fails to address appellant's arguments in this regard, instead simply ignoring them. (RB 164.)

Respondent also mischaracterizes appellant's argument regarding the effect of the erroneously modified CALJIC 2.50 on the jury's consideration of the evidence relating to appellant's relationship with and treatment of Beck and Vieira. Respondent states that appellants "concede the instruction properly directed the jury to consider this evidence to find the defendants were in 'possession of the means useful or necessary for the commission of the crime.' (COB 127; BOB 379.)" (RB 164.) A clear reading of the relevant section of appellant's opening brief demonstrates that appellant made no such concession:

> While the instruction directed the jury not to consider the evidence as evidence of bad character or disposition to commit crimes, it directed them to use of the evidence which amounted to the same thing. The jurors were allowed, if they believed the facts true by a preponderance of the evidence, to use the evidence as tending to

show: (1) intent, either for murder or conspiracy; (2) identity; (3) motive; (4) knowledge which might have been useful or necessary for the commission of the crime; (5) possession of the means useful or necessary for the commission of the crime; (6) the existence of a conspiracy; or (7) that the crime was part of a larger continuing plan, scheme or conspiracy.

Of these, only the fifth, possession of the means useful to the homicides, was arguably a legitimate inference from any of the challenged evidence, *but even that related only to appellant's possession of some knives and the baton.* Of the seven uses identified, only the second, identity, was a use for which the "relationship" evidence regarding appellant, Beck and Vieira was originally admitted by the trial court. (31RT:5470.)

(AOB 127-128 (emphasis added).)

Respondent also argues that the erroneously modified instruction was necessary because there was evidence of prior acts similar to crimes, other than the firearms evidence and the evidence of the relationship and interactions of appellant, Beck and Vieira. Even assuming arguendo that some instruction was necessary, the instruction given was seriously flawed and was reasonably likely to result in the use of this evidence improperly, to appellant's prejudice, as demonstrated in the opening brief. Respondent provides no basis for concluding otherwise

D. The Admission of the Challenged Character Evidence Constituted Reversible Error As to the Entire Judgment

In the opening brief, appellant demonstrated that the errors regarding the admission and use of this character evidence requires reversal of the entire judgment. (AOB 129-133.) Respondent repeats the flawed argument that the evidence of appellant's guilt is overwhelming (RB 164-168), and argues further that this character evidence was "minor." (RB 168.)

As established in the opening brief, and elsewhere in this brief, while the evidence overall is sufficient to sustain the judgment, it is by no means

overwhelming. Respondent ignores the substantial conflicts in the evidence, and the questionable reliability of much of the evidence of "independent" eyewitnesses.

The evidence is overwhelming that appellant and the others went to Elm Street, that violence broke out and that the four victims died violent deaths. Past that, questions necessarily involved in the jurors' deliberations – e.g., who killed who, whether there was a plan or agreement to kill anybody, whether appellant had any intent to kill, whether he killed anybody, whether he had an honest but unreasonable belief in the need to defend himself or others from imminent harm, whether he or any of the others acted in a heat of passion resulting from provocation, whether appellant was merely a witness or some sort of participant in the violence – all were left to be determined from conflicting evidence, and the jurors' evaluation of that evidence and those conflicts. In fact, respondent concedes the conflicts in the evidence to argue the importance to the prosecution's conspiracy theory of the evidence regarding the relationship of Cruz, Beck and Vieira. (RB 160.)

The evidence of the firearms and other weapons – the "arsenal" – as well as the character evidence related to the conduct and the relationship of Cruz, Beck and Vieira, may have taken little time to present to the jury, a point on which respondent dwells. However, the inflammatory and prejudicial impact of this evidence was far more substantial in the jurors' evaluation of the evidence and of the credibility of the witnesses. A substantial portion of LaMarsh's attorney's argument to the jury revolved around discussions of character, contrasting appellant's with LaMarsh's. (See AOB, pp. 78-79.) Whether or not *the prosecution* overtly relied on this evidence, it was a substantial part of Willey and LaMarsh's defenses, and thus of what the jury had to consider, given the arguments and

instructions. The court's flawed instruction effectively guaranteed that the jurors would use the evidence in an erroneous manner to appellant's prejudice.

The trial court's rulings admitting this evidence and allowing the continued questioning on these subjects, compounded by a flawed instruction on the use of the evidence, violated Evidence Code section 1101, lightened the prosecution's burden of proof, improperly bolstered the credibility of witnesses, and permitted the jury to find appellant guilty in large part because of a perceived criminal or violent propensity. Moreover, as demonstrated in appellant's opening brief, this evidence and the instruction, as well as the improper tactics of counsel for LaMarsh and Willey, so infected the trial as to render appellant's convictions fundamentally unfair and deprived appellant of his right to a reliable adjudication at all stages of this death-penalty case.

It is reasonably likely that in the absence of the prejudice introduced into this trial by this evidence, a result more favorable to appellant at the guilt trial would have resulted. As demonstrated in the opening brief, reversal is therefore required even under the *Watson* standard. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) However, since the prejudicial nature of this evidence, and the instruction which directed the jury to the erroneous consideration of this evidence, deprived appellant of due process, a fair trial and a reliable jury determination of guilt, the error must be assessed under the *Chapman* standard. (*Chapman v. California, supra*, 386 U.S. at p. 24; U.S. Const., 6th, 8th & 14th Amends.) Respondent has not carried the state's burden of demonstrating beyond a reasonable doubt that this evidence or the instruction was harmless. Moreover, since appellant's death sentence rests on an unreliable guilt verdict, and the death verdict was not surely unattributable to this error

(*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279), the death verdict is itself unreliable, obtained in violation of appellant's Eighth and Fourteenth Amendment right to be free from cruel and unusual punishment (*Caldwell v. Mississippi, supra*, 472 U.S. 320). Accordingly, appellant's convictions and judgment of death must be reversed.

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III

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF A PROSPECTIVE JUROR BECAUSE OF HER DEATH PENALTY VIEWS REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

In his opening brief appellant demonstrated that the trial court erred in excusing prospective jurors Danielle M. Dobel because of her views on the death penalty; that the trial court's ruling excusing Ms. Dobel was not supported by the available record; that the trial court's voir dire of Ms. Dobel, including its failure to ask follow-up questions submitted by defense counsel, was insufficient to sustain the trial court's excusal of Ms. Dobel; and that, due to the unavailability of Ms. Dobel's questionnaire and of the follow-up questions submitted by trial counsel to be asked of her, the record is insufficient to allow rejection of the error or affirmance of the penalty judgment in this case.

Appellant also argued that, since the trial court's voir dire of prospective jurors Flores and Davis was not adequate to protect appellant's constitutional rights, the trial court likewise erred in excusing those two prospective jurors.[11]

In response, respondent relies on selected portions of the voir dire, some taken out of context, and ignores the unavailability of both Ms. Dobel's questionnaire and the follow-up questions submitted to the trial court to be asked of her, which the trial court refused to ask. Respondent overstates the extent to which Ms. Dobel's responses on voir dire raise questions as to her qualification as a capital juror, and understates or

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[11] Respondent does not address this portion of appellant's Argument III.

ignores those of her answers that demonstrate her qualification.[12]

Respondent's primary contention is that:

> Dobel's responses were sufficient for the trial court to find that she would not abide by its instructions and she would not perform her duties as a juror. Since Dobel clearly indicated that she thought that capital punishment was wrong, and she was not willing or able to set aside her beliefs, the trial court properly excused her.

(RB 169.)

Respondent's characterization of Ms. Dobel's responses is refuted by the available record.

Respondent correctly states that Ms. Dobel thought the death penalty is wrong. Nevertheless, respondent places entirely too much reliance on that fact. Since *Witherspoon v. Illinois* (1968) 391 U.S. 510 , it has been unquestioned that there is nothing disqualifying in the belief that capital punishment is wrong. Excusing a juror on that ground violates the Sixth Amendment. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) All the trial court or the state can constitutionally demand in this respect is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas* (1980) 448 U.S. 38, 45.) "[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (Wainwright v. Witt, *supra*, 469 U.S. at p. 424, quoting *Adams v. Texas*, *supra*, 448 U.S. at p. 45 (fn. omitted).)

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[12] Respondent's recitation of the record of Ms. Dobel's voir dire includes at least one mistranscription, apparently a typographical error, at RB 175, quoting 14 RT 2423, line 5, replacing the word, "wouldn't" with the word, "would."

Contrary to respondent's characterizations of Ms. Dobel's responses, she did not "clearly indicate" that "she was not willing or able to set aside her beliefs." She was specifically asked, by Question No. 129 of the juror questionnaire, "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law as the Court instructs you? Please Comment." (See AOB 148, fn. 48.) Because Ms. Dobel's questionnaire was lost or destroyed by the trial court, her answer to that question, as well as any comments she made in the space provided, are unavailable to appellant or this Court. However, counsel for LaMarsh characterized her questionnaire answers, and specifically her answer to Question No. 129, as follows: "of all the questionnaires, I believe this individual has given a great deal of thought and depth to her responses," and that "this individual stands out in the type of answers that are given, and No. 129 clearly indicates that she passes the *Witherspoon/Witt* questions." (14 RT:2426-2427.) This was not disputed by the trial court, other than in its ultimate legal conclusion concerning Ms. Dobel's *Witherspoon/Witt* qualification, and effectively refutes respondent's mischaracterization of Dobel's answers. In fact, the trial court stated, in describing Ms. Dobel's answer to Question No. 127, that, "She has set forth in there she could follow the law, although it would not be easy for her to sentence someone to death." (14 RT 2428.) The trial court then correctly stated, in regards to her answers to Question Nos. 75 and 127, "Those answers would suggest that she is not challengeable for cause." (14 RT 2428.)

Moreover, Ms. Dobel gave numerous answers, discussed below, in which she said she *could* return the death penalty, e.g., "where the death penalty could be appropriate, multiple murders, if no remorse or promise of rehabilitation." (14 RT 2428.)

Respondent further contends that "there was no need for the trial court to ask additional follow-up questions because Dobel's responses unequivocally indicated that she could not be trusted to apply the law as given by the trial court." (RB 169-179.) There is absolutely no support in the available record for such a characterization of Dobel's responses. To the contrary, as just demonstrated, Ms. Dobel apparently gave an unequivocal indication that she could set aside her beliefs and apply the law as given by the trial court.

Respondent argues that Dobel "indicated she would automatically vote against the death penalty in the current matter (even though she might vote for it in another matter if the facts were more egregious)." (RB 187-188.) In fact, Dobel did not "indicate" how she would vote in this case. She was not asked that question, and did not volunteer any such answer. She was never given an adequate explanation of the relevant facts in the case to have so indicated. Nor did she compare any facts of this case to those of any other case, and respondent provides no citation to the record to support the contention that she did.

According to the trial court, Dobel apparently indicated in response to Question Nos. 123 and 128 that the death penalty may be appropriate for repeat offenders, but not for a first-time offender. (14 RT:2430.) The trial court did not purport to quote Dobel's answer, and without her questionnaire, it cannot be reliably determined how precisely the trial court's characterization of her answers tracks the actual language Ms. Dobel used.

In response to Question No. 108, Ms. Dobel apparently said that the death penalty might be appropriate in egregious cases like Dahmer's.

During voir dire, Ms. Dobel stated:

I think that somebody such as someone like Jeffrey Dahmer, if the

> death penalty had been appropriate in his case, I may be able to go with the death penalty. Severe human crimes, mass murders of numbers, lots of different people, and other, I guess, heinous circumstances involved would lead me to impose the death penalty; but it would have to be something very extreme and very severe. Otherwise, I really am not -- I do not believe that the death penalty serves any purpose.

(14 RT 2421.)

Respondent concludes that these statements necessarily mean that Ms. Dobel would not consider the death penalty in appellant's case. However, review of the entire available record refutes this interpretation.

Respondent acknowledges that "Dobel stated she could vote for the death penalty if she "felt it was appropriate.'" (RB 188.) However, respondent then falsely claims that she "stated it was *only* appropriate in the most extreme "Jeffrey Dahmer"-type case," citing 14 RT 2420-2411.[13] (RB 188 (emphasis added).) In fact, Ms. Dobel never stated in the above-quoted answer that the death penalty was *only* appropriate in the most extreme cases or in cases like Dahmer's case. What she did say, immediately after mentioning Dahmer was, "Severe human crimes, mass murders of numbers, lots of different people, and other, I guess, heinous circumstances involved would lead me to impose the death penalty; but it would have to be something very extreme and very severe." (14 RT 2421.)

The trial court took no steps to explore whether or how Ms. Dobel's statement might reflect any disqualifying opinion in appellant's case. She was not asked to explain what she meant by "very extreme and very severe" or the other characteristics she mentioned. Nor does the record disclose

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[13] Appellant assumes the citation was intended to be to 14 RT 2421, which is the only reference by Ms. Dobel to Jeffrey Dahmer. Such references by defense counsel or the trial court in relation to Ms. Dobel appear at 14 RT 2425 and 2428.

anything about the Dahmer case or Ms. Dobel's understanding of the facts of that case. Respondent's supposition that Ms. Dobel would not consider the crimes charged in appellant's case to be "very extreme and very severe" based on the reference to the Dahmer case is thus entirely speculative.[14]

Based upon questionable assumptions from the partial record available, combined with a factual error, respondent maintains that Ms. Dobel indicated that she would not vote for death in appellant's case if he were a first time offender:

> Dobel also answered on the questionnaire that "the death penalty is never appropriate for first time offenders." (14 RT 2429.) Appellants were first-time offenders. (41 RT 7368; 45 RT 8290.) So, in effect, Dobel indicated she would not impose the death penalty on appellants under any circumstances. That, alone, was sufficient reason to excuse her for cause. (See *People v. Fields* (1983) 35 Cal.3d at 329, 357-358.)

(RB 188.)

Whether Ms. Dobel wrote "the death penalty is *never* appropriate for first time offenders," or whether, in answering Question No. 128, she merely wrote "first time offenders" in the space provided, cannot be determined without her questionnaire. The record does not indicate that the trial court was quoting from Ms. Dobel's questionnaire in describing her answer to that question. Speculation as to what she wrote on her questionnaire regarding first time offenders, on an incomplete record, would be just that – speculation.

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[14] Moreover, it is based on respondent's evaluation, not Ms. Dobel's. Whether respondent, or appellant, or this Court, considers the facts of this case to meet Ms. Dobel's description is not a relevant consideration. The only relevant point was Ms. Dobel's meaning and use of that description, and the record cannot answer that, due to the inadequate voir dire conducted by the trial court and the unavailable portions of the record.

Similarly, there is nothing in the record about what Ms. Dobel meant by "first time offender." Whether she meant (1) someone with no record of arrests or convictions prior to the crimes at issues, or (2) someone who had never engaged in criminal or violent behavior prior to the crimes at issues, or (3) something else, is unknown. There is no indication of whether she explained her understanding of that term in her questionnaire or not, and it cannot be determined at this point. Nor did the trial court inquire as to what she meant by the term. Regardless, the evidence eventually presented at appellant's penalty phase trial was sufficient to sustain a finding by Ms. Dobel that appellant was not a first-time offender.

First, evidence was presented that appellant had a prior juvenile offense. Second, the prosecution put on evidence at appellant's penalty phase that appellant had engaged in criminal acts, including violent criminal acts, prior to the homicides. (See AOB 46-47, Arg. XIII; RB Arg. XIII, Arg. XIII, *post.*) Thus, even assuming Ms. Dobel had stated that the death penalty is *never* appropriate for first-time offenders, the evidence in the record is sufficient for her to have found appellant not to be a first-time offender.

Moreover, respondent overlooks another answer attributed to Ms. Dobel by the trial court regarding other circumstances which might lead her to return the death penalty. The trial court stated:

> She has set forth in the questionnaire, Question 127,[15] a situation where the death penalty could be appropriate, *multiple murders, if no remorse or promise of rehabilitation.* She has set forth in there she could follow the law, although it would not be easy for her to sentence someone to death.

(RT 2428 (emphasis added).) In this case, of course, appellant was charged

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[15] Question No. 127 asks, "Under what circumstances, if any, do you believe that the death penalty is appropriate?" (See, e.g., 29 CT:7385.)

with and convicted of multiple murders, and the trial court found, in its denial of modification of the death verdict, that appellant showed "a total lack of remorse." (45 RT:8383.) Thus, Ms. Dobel not only indicated with that answer that she could return a death verdict in an appropriate case, but that, depending upon factual findings, she might find this to be an appropriate case.

Respondent's characterization of the import of Ms. Dobel's references to the kind of case in which she thought the death penalty was warranted is flawed in another respect. Ms. Dobel's references to Dahmer, to multiple murder, to extreme, severe or "very bad" crimes, are not statements of a position taken "without regard to the evidence produced at trial." (*People v. Clark* (1990) 50 Cal.3d 583, 597.) Rather they are statements implicitly involving consideration of and regard for "the evidence to be produced at trial," and wholly in keeping with the duty of a capital juror. They are not statements of "an abstract inability to impose the death penalty" (*People v. Ervin* (2000) 22 Cal.4th 48, 70.) but of a proper "evaluation of the particular facts of the case." (*Ibid.*)

Ms. Dobel's explanation of the type of case in which she thought the death penalty warranted amounted to non-specific examples, not an exclusive list. Nothing in her explanation demonstrated an inability or unwillingness to follow her oath as a juror, to follow the instructions of the trial court, to consider both alternatives at a possible penalty phase after fully evaluating all the evidence presented. Instead of demonstrating her disqualification, her answers demonstrate her qualifications as a capital juror. Any ambiguity in the record in that regard is not due to any ambivalence or equivocation on the part of Ms. Dobel regarding her role as a juror in a capital case, but to the trial court's failure to conduct Ms. Dobel's voir dire with the requisite "special care and clarity" this Court

called for in *People v. Heard* (2003) 31 Cal.4th 946, 966-977, to explore or clarify any apparent or perceived ambiguity.

Respondent cites *People v. Fields, supra,* 35 Cal.3d at pp. 357-358.) in this regard, apparently to suggest Ms. Dobel's willingness to consider the death penalty in some cases is irrelevant to her qualification as a juror in this case. (RB 188.) Respondent misconstrues *Fields.* The Court in that case did hold that a trial court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him or her, regardless of his or her willingness to consider the death penalty in other cases. (35 Cal.3d at pp. 357-358.) However, in *Fields* this Court also explicitly stated that: "When the court excludes a juror on this ground . . . it must take care to avoid violation of *Witherspoon's* command that a juror can be dismissed for cause only if he would vote against capital punishment 'without regard to any evidence that might be developed at the trial of the case . . . .' (391 U.S. at p. 522, fn. 21.)" (35 Cal.3d at p. 358, fn. 13.) Similarly, this Court has stated that death-qualification voir dire "seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote against the death penalty without regard to the evidence produced at trial.' [Citations.]" (*People v. Clark, supra,* 50 Cal.3d at p. 597.)

Thus, for cause challenges are only permissible when a "juror's reluctance to impose the death penalty was based *not on an evaluation of the particular facts of the cas*e, but on *an abstract inability* to impose the death penalty" in the type of case before him or her. (*People v. Ervin, supra*, 22 Cal. 4th at p. 70, citing *People v. Pinholster* (1992) 1 Cal.4th 865. 916 (emphasis added).) A juror may be dismissed who indicates she or he would never vote for death in a case because it was a particular type of case

(e.g., felony murder, only one victim, youthful defendant) without consideration of the circumstances and regardless of the factors in aggravation or mitigation. (*Ibid.*) A prospective juror may not be excluded merely because specified mitigation might, or even probably would, lead that juror not to impose the death penalty, because the law permits consideration of mitigation evidence. (*People v. Heard*, *supra*, 31 Cal.4th at pp. 965, 967, fn. 10.)

Respondent's claim that Ms. Dobel was properly excused because she had indicated she would not consider a death verdict in this case thus fails on this ground. The answers which respondent claims support that conclusion in fact involve the evaluation of case-specific facts, not the death penalty in the abstract. For example, Ms. Dobel's response concerning the impropriety of the death penalty for a first offender is perfectly consistent with the requirement, under section 190.3, factor (c), that the jury consider and take into account: "The presence or absence of any prior felony conviction." (See *People v. Heard*, *supra*, 31 Cal.4th at pp. 965, 967, fn. 10.) Ms. Dobel did not say, in relation to that answer or any other, that she would vote against the death penalty regardless of any other evidence presented in this case.

Similarly, under factor (a) the jury is required to consider and take into account "the circumstances of the crime." That Ms. Dobel considers the death penalty appropriate for the most egregious crimes and "very bad" crimes reflects an attitude perfectly consistent with the California capital sentencing scheme. As Ms. Dobel explained:

> Well, when you say very bad, it would have to be very bad. I mean, it's a qualitative statement. What is very bad? You know, what's very bad to me is probably different from what's very bad to someone else, and we may have the same feelings about what is very bad, but I would still believe it was not to right to have a part in the

death of someone else in this manner.

(14 RT 2423-2424.) As this Court has recognized, that different qualified jurors may have different evaluations of how "bad" a crime is, i.e., whether the circumstances of the crime are sufficiently aggravating to warrant the death penalty, is at the core of the scheme of juror determination of penalty:

> [*People v.*] *Kaurish* (1990) 52 Cal.3d 648, 276 Cal.Rptr. 788, 802 P.2d 278, recognizes that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under Witt, supra, 469 U.S. 412, 105 S.Ct. 844. . . . A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(*People v. Stewart* (2004) 33 Cal.4th 425, 446-447.)

Respondent seeks to distort Dobel's recognition that she may have a different evaluation of the circumstances of the crime than someone else, to twist it into a declaration that she would not return a verdict of death in this case. Dobel's recognition of the "qualitative" nature of the determination of how "bad" the crimes were points out quite specifically how respondent has distorted her answer.

No homicide case demands return of the death penalty under

California's statutory scheme. A response such as Ms. Dobel's – that she would not return a verdict of death if she did not personally believe it was warranted by the evidence – cannot reasonably be interpreted as demonstrating "an abstract inability to impose the death penalty" in the type of case before her without consideration of the circumstances and regardless of the factors in aggravation or mitigation. (*People v. Ervin, supra*, 22 Cal. 4th at p. 70; *People v. Pinholster, supra*, at p. 916.) She was never asked whether her views concerning first time offenders were of such a nature that she would consider no other circumstance. Nor was she ever asked whether, if the circumstances of crime were as, or more, egregious than "the Dahmer case" or whatever it was that she considered "very bad," the lack of any prior felony conviction would preclude her from considering the death penalty. The questions directed to her, and the responses which remain available to us on this record, remain substantially devoid of context necessary to a reliable determination of Dobel's qualifications, primarily due to the undue haste of the trial court in ruling on such a matter without having conducted a full examination with "special care and clarity" concerning the meaning of Dobel's answers in relation to her qualification to serve as a capital juror.

Respondent quotes portions of Dobel's answers out of context, to suggest her views on the death penalty were categorical, when in fact they were nuanced, as demonstrated by review of her full voir dire and defense counsel's descriptions of her questionnaire answers. For instance, respondent states:

> The trial court asked, "Is your belief such that you do not believe that you have the right to take part in a decision which would deprive a person of his life?" She answered, "Yes." (14 RT 2424.)

(RB 436.) The actual record shows that her answer was not that cut-and-

dried. Further questioning revealed that her answer was conditional, not absolute. Ms. Dobel made clear that she was still able to return the death penalty for something "very bad," but understood that people differ in their evaluations of whether something was "very bad" or not, or of whether it deserved the death penalty. Review of the full exchange between the trial court and Ms. Dobel in this regard, rather than the out-of-context excerpt quoted by respondent, shows her to be fully qualified to sit as a juror in a capital trial:

> Q. If you sat as a juror in this case where you were called upon to determine a penalty of life or death and the only evidence presented in the penalty phase were aggravating factors, bad things about the defendants, and they were very bad, would you be able to vote for the death penalty?
> A. Well, when you say very bad, it would have to be very bad. I mean, it's a qualitative statement. What is very bad? You know, what's very bad to me is probably different from what's very bad to someone else, and we may have the same feelings about what is very bad, but I would still believe it was not right to have a part in the death of someone else in this manner.
> Q. In your last part of your answer that you don't believe that you have a right to take part in -- let me see if I understood your last answer.
>
> Is your belief such that you do not believe that you have the right to take part in a decision which would deprive a person of his life?
> A. Yes.
> Q. Do you believe that you could ever participate in a decision that would result in the taking of a person's life?
> A. In a courtroom or --
> Q. In a courtroom, yes.
> A. Possibly, the case I mentioned before. It would have to be something very bad.

(14 RT 2423-2424.)

The excerpt quoted by respondent shows the limitation of the trial court's voir dire of this juror. Ms. Dobel's answers demonstrate that she is

qualified to be a capital juror under *Witherspoon* and *Witt*. She acknowledged that she might evaluate the evidence and circumstances of the crime differently than someone else. As established above, there is nothing disqualifying about such a statement. It states the obvious, and the expected, and is wholly in keeping with the role given jurors in capital cases. (See *People v. Stewart*, *supra*, 33 Cal.4th at pp. 446-447; *Heard*, *supra*, 31 Cal.4th at pp. 965, 967, fn. 10.) She then stated that even evaluating the evidence and the circumstances of the crime the same as someone else, she might have a different opinion about whether the death penalty was justified. Again, this states the obvious, and the expected, and is wholly in keeping with the role given jurors in capital cases.

However, the trial court then focused on the last phrase of her answer – "but I would still believe it was not right to have a part in the death of someone else in this manner," taking it out of context and treating her answer as an absolute, rather than comparative belief. Whether Ms. Dobel understood the import of the trial court's rephrasing of her answer or not is questionable. She immediately clarified, however, that she had not rejected the death penalty as an option, but, referring to her earlier statements, believed that the case "would have to be something very bad" for her to vote to impose the death penalty.

Thus, while the statement as quoted by respondent seems clear, when it is considered in its full context a meaning contrary to respondent's interpretation is revealed. Any perceived conflict between those answers, moreover, do not reveal ambivalence or equivocation on the part of Ms. Dobel. That there is any potential conflict, equivocation or ambiguity in the answers derives substantially from the inadequacy of the voir dire by the trial court. Ms. Dobel, throughout her voir dire, was consistent in saying that she could vote to impose the death penalty in an appropriate case. To

the extent her responses might be interpreted as equivocal or ambiguous, the trial court failed to adequately explore the issue and refused to allow any of the four defense counsel to explore the issue, whether by asking their written follow-up questions, or allowing them to conduct voir dire personally.

Respondent also mistakenly relies upon a questionnaire answer to which the trial court stated it gave the most weight. (RB 190-191.) Question No. 130 asked, "Is there anything about your present state of mind you feel any of the attorneys would like to know?" (14 RT 2430.) Ms. Dobel apparently answered, "I doubt seriously that I would impose the death penalty. My verdict would be affected if I was asked about guilty with the punishment of death as opposed to guilty with life imprisonment." (14 RT 2430.)[16] While the first part of her answer seems superficially to support the trial court's ruling, Ms. Dobel's complete answer suggests that, at the time she completed the questionnaire, she mistakenly thought that penalty was determined through the jury's determination of guilt, rather than in a separate proceeding directed solely at deciding between death and life imprisonment without possibility of parole. There is no basis in her answer as quoted by the trial court for an inference that she understood the procedures involved, the juror's role in a capital case, or the concepts of special circumstances, aggravation or mitigation. Such an uninformed response does not reflect a disqualifying state of mind, nor does it demonstrate an unwillingness or inability to abide by her oath to follow the trial court's instructions, which she had yet to hear.

This Court has recognized that such a circumstance does not provide

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[16] Respondent quotes only a portion of the answer attributed to Ms. Dobel, leaving out the phrase "as opposed to guilty with life imprisonment." (RB 191.)

an adequate basis for excusal. In *People v. Heard*, *supra*, 31 Cal.4th 946, a prospective juror ("Juror H.") indicated on his juror questionnaire that he thought life without the possibility of parole would be a worse punishment than the death penalty and wrote as an explanation: "Perhaps the special circumstances are due to past psychological experiences and I would consider prison." (31 Cal.4th at p. 960.) When the trial court asked Juror H. whether he thought "past psychological factors . . . would weigh heavily enough that [he] probably wouldn't impose the death penalty," he responded: "Yes, I think they might." (*Id.* at p. 961.) Juror H. further agreed with the trial court that psychological factors "might auger [*sic*] toward life without possibility of parole" and that he was "absolutely committed to that position." (*Ibid.*) However, after the trial court explained to Juror H. that California law considers death the more serious punishment, and that the death penalty can only be imposed if the aggravating circumstances outweigh the mitigating circumstances, Juror H. indicated that he understood the law and would do "whatever that law states." (*Id.* at p. 960.) This Court held that "[in] view of [Juror] H.'s clarification of his views during voir dire, we conclude that his earlier juror questionnaire response, *given without the benefit of the trial court's explanation of the governing legal principles*, does not provide an adequate basis to support [Juror] H.'s excusal for cause." (*Id.* at p. 964, original italics.)

Once the procedure of the penalty determination was clarified somewhat for Ms. Dobel during voir dire,[17] her answers made clear that she

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[17] During the voir dire of the prospective juror immediately before the voir dire of Ms. Dobel, the trial court introduced more of the concepts involved in a juror's role in a capital trial and the manner in which penalty would be determined, including the bifurcated nature of the guilt and penalty phases, as well as some minimal introduction of the concepts of

(continued...)

could consider the death penalty if the aggravation was "very bad." (14 RT:2423-2424.) She was generally consistent in the questionnaire and on voir dire that the death penalty should not be ruled out in "Dahmer-type" cases, that it could be appropriate for "multiple murders, if there was no remorse or promise of rehabilitation," or "other, I guess, heinous circumstances involved." (14 RT:2421, 2428-2429.) She never stated that she would refuse to consider the death penalty in any other type of case. She was never asked that question.

Despite Ms. Dobel's obvious lack of understanding of the relevant procedures and the jurors' role in the process evidenced by the questionnaire answer to which the trial court "gave the most weight," the trial court never asked Ms. Dobel about that answer or about her misunderstanding, nor did the trial court undertake any explanation or correction of the implicit misunderstanding upon which the answer was based. The trial court did ask Ms. Dobel if she understood some of the principles he had explained to a previous juror, and got affirmative answers, but did nothing to confirm that she actually understood, or that the misunderstandings inherent in her answer to Question No. 130 had been cleared up for her. Nor did the court ask if her answer to No. 130 would change based upon her understanding those principles at the time of her voir dire. (14 RT 2422-2423.) The trial court's reliance on that answer without further inquiry was unreasonable, and undercuts any basis for reliance on or deference to the trial court's determination of Ms. Dobel's qualifications.

Respondent relies on this same flawed answer in attempting to sidestep the material deficiencies in the record here: "To the extent

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[17](...continued)
aggravation and mitigation. (14 RT:2413-2415.)

appellants complain that the appellate record is incomplete, Dobel's final answer[18] is dispositive of the issue." (RB 191, referring to the quoted answer to Question No. 130.)

Again, respondent ignores the fact that Ms. Dobel's answers on her questionnaire were given without an adequate explanation or understanding of the procedures involved and the roles of jurors in a capital trial. That alone means the quoted answer to Question Number 130 cannot be "dispositive." That the trial court did not ask Ms. Dobel about her answer to that question, or explain to her the misunderstanding inherent in that answer, or determine how that affected her answer, further precludes that answer from being "dispositive."

As with the written responses upon which the trial court in *People v. Stewart*, *supra*, 33 Cal.4th 425 erroneously relied in excusing a number of jurors, so Ms. Dobel's answer to Question No. 130 "suggested ambiguity and need for clarification on oral voir dire." (33 Cal.4th at p. 448 see also *People v. Riccardi* (2012) – Cal.4th –, 2012 WL 2874237.) Without such clarification, the answer to Question No. 130 was not, by itself, disqualifying. That the trial court relied heavily upon that answer in determining that Ms. Dobel was disqualified, without seeking clarification, demonstrates the insufficiency of the record to support the trial court's determination. (Compare *Uttecht v. Brown* (2007) 551 U.S. 1 (deference where "lengthy questioning," "diligent and thorough voir dire," instructions on sentencing before questionnaires filled out and before death qualification

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[18] While that may have been the final question relating to death qualification in the questionnaire, Dobel's answer to that question was not her final answer. Her final answer was at 14 RT 2428-2429, where she explained her preference for rehabilitation and her belief that the death penalty is not a deterrent. Neither position was disqualifying, nor did either the trial court or respondent cite it as disqualifying.

voir dire); see Arg. IV.D., *post*.)

Respondent argues that on voir dire, Dobel stated:

> that it was possible her feelings about the death penalty would prevent her from ever finding a special circumstance true. (14 RT 2421.) She affirmatively stated that her feelings are so strong that they would substantially interfere with her ability to function as a juror – essentially answering the *Witt* criteria in a nutshell. (14 RT 2422 [...].)"

(RB 189.)

This selective reference to certain answers on voir dire, which was conducted solely by the trial court despite repeated requests by defense counsel to question the juror further, neatly overlooks the fuller context of those answers, which in turn serves as a demonstration of the inadequacy of the trial court's questioning of Ms. Dobel.

At 14 RT 2421, the trial court asked Ms. Dobel four *Witherspoon-Witt* questions. Ms. Dobel first indicated that she would be able to vote for first-degree murder. In response to the second question – "are your feelings about the death penalty so strong that you would never find a special circumstance to be true?" – Ms. Dobel answered "possibly." However, when asked the fourth question – "are your feelings about the death penalty so strong that you would never impose a death penalty in any case whatsoever?" – Ms. Dobel answered, "No."

There is a clear inconsistency between the answers to the second and fourth questions. It is not likely that the answer regarding finding a special circumstance true reflected a conscientious objection to the death penalty, since Ms. Dobel then stated that her feelings about the death penalty were not so strong that she would never impose the death penalty itself. It is not clear that Ms. Dobel understood what a special circumstance is, or what its role is in a capital trial. That inconsistency called for further questioning by

the trial court to determine whether it reflected some misunderstanding on Ms. Dobel's part, and also to determine what Ms. Dobel meant by "possibly," since she then stated she was willing to return a death penalty. However, the trial court merely accepted the conflicting answers and made no attempt to clear up the inconsistency or determine if there was a misunderstanding. As the record stands, that isolated answer is an insufficient basis to support an excusal for cause.

As to the second answer, that Ms. Dobel "stated that her feelings are so strong that they would substantially interfere with her ability to function as a juror – essentially answering the *Witt* criteria in a nutshell," again, the actual record is not as clear as respondent portrays it. Immediately after the four *Witherspoon* questions the trial court asked Ms. Dobel if she believed that her feelings about the death penalty were so strong that they would substantially interfere with her ability to function as a juror. She answered, "yes." After an intervening question, the trial court asked, "When you say you feel that your beliefs are so strong that it would substantially interfere with your ability to function as a juror in this case, can you explain that further to me?" (14 RT 2422.) This was the first time the trial court had explored any answer given by Ms. Dobel, without simply taking it as face value as respondent does. Her explanation was followed by further questions. In response to the trial court's questioning, which included the first discussion with Ms. Dobel of the process of a penalty phase, she made it clear that what she meant by "substantially interfere" was not the same as what *Witt* meant by "substantially impair." As discussed above, Ms. Dobel explained that her evaluation of how bad the crimes were might differ from that of other jurors, and even if they agreed on how bad, they might still disagree whether the death penalty is appropriate. (14 RT 2423-2424.) Her explanation was consistent with her previous answers, e.g., from the

questionnaire, that returning the death penalty would "not be easy" (14 RT 2428), and, from earlier in the voir dire, that she could return the death penalty "If I felt it was appropriate . . . . I guess the thing is whether or not I would believe it was appropriate." (14 RT 2421.) It is apparent that Ms. Dobel's answer to the trial court's question regarding "substantial interference" was not the concession of a legal point which respondent claims.

Respondent mischaracterizes the defense response to the prosecution's challenge of Ms. Dobel and to the trial court's granting of that challenge. In Respondent's Argument XIX, responding to Beck's claim of *Witherspoon-Witt* error, respondent argues:

> [T]he full transcript of voir dire is in the record, and the trial court noted Dobel's significant questionnaire answers. After voir dire, the trial court invited the defendants to argue against excusing Dobel for cause, and they offered only one answer from her questionnaire as evidence that she would set aside her feelings and apply the law. (14 RT 2426 [LaMarsh cited Dobel's answer to Question No. 129].)

(RB 436.) This mischaracterizes the record. Defense counsel objected to the challenge and to the inadequacy of the voir dire, asked that follow-up questions be asked, and submitted follow-up questions. The remarks by counsel for LaMarsh were more extensive than merely citing the answer to Question No. 129. He stated:

> The Court, I'm sure, has read all of these questionnaires; and of all the questionnaires, I believe this individual has given a great deal of thought and depth to her responses. And I believe because the Court has deprived us of a *Hovey* voir dire, we could not go into this type of analysis with other jurors and that has deprived my client of due process. I believe this individual stands out in the type of answers that are given, and No. 129 clearly indicates that she passes the *Witherspoon-Witt* questions. [¶] And, again, I object to the fact that we were deprived of the opportunity to obtain these kinds of answers with other jurors because of the Court's denial of *Hovey*. And I object to challenge for cause.

(14 RT 2426-2427.) Moreover, after the trial court finally excused Ms. Dobel, having refused to ask any of the follow-up questions submitted by defense counsel, counsel for LaMarsh objected again, joined by all other defense counsel:

> You've deprived us of an opportunity to rehabilitate this juror. You've deprived us of *Hovey*. I don't believe that there's sufficient answers to make a determination that you indicate upon reflection of your review of questionnaires. If there is doubt as to each one of those answers that I asked, I ask that she be asked individually in camera as to those responses.

(14 RT 2430-2431.)

The record that would be necessary for reliable review of respondent's argument is not limited to the arguments of counsel in the Reporter's Transcript on which respondent relies. It should also include Ms. Dobel's questionnaire, which the trial court and defense counsel all assumed would be preserved as part of the record for appeal, available to provide necessary context to this Court's understanding of the issues. It should contain as well the follow-up questions which were submitted *after* Ms. Dobel's voir dire by all four defense counsel, but were never asked. All four defense counsel reasonably relied on the trial court's representation that those follow-up questions would be preserved as part of the appellate record, and would constitute a part of their showing that the trial court's voir dire was inadequate and that its grant of the challenge as to Ms. Dobel was error.

Respondent's characterization of the objection made by defense counsel attempts to exploit the loss of the questionnaire and of those follow-up questions by attempting to minimize the showing made by defense counsel, characterizing it as "offer[ing] only one answer from her questionnaire as evidence" (RB 436), and thus ignoring the relevance of

the actual answers in the questionnaire, especially the volunteered answers, and the answers that might have been given to the requested follow-up questions.

Respondent also attempts to minimize the effect of the loss of these crucial parts of the record on this Court's review of Ms. Dobel's qualifications as a capital juror by mischaracterizing the record, and attempting to exploit the absence of those materials from the record in defending the trial court's ruling. Respondent states, "some of counsel's written follow-up questions were recovered." (RB 170.) This seriously mischaracterizes the relevant record and the settled statement.[19] As discussed more thoroughly in Argument V, *post*, the settled statement refers to specific follow-up questions submitted during voir dire. The follow-up questions to which respondent's record citations refer are questions submitted prior to general voir dire and are separate and apart from the questions which were submitted regarding Ms. Dobel.

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[19] The settled statement regarding missing follow-up questions states:

> During court-conducted voir dire, the trial attorneys submitted written questions to the trial court, requesting follow-up questions to either the court's voir dire or the responses on juror questionnaires. After submission of the written question, the trial court sometimes asked prospective jurors additional questions, and other times denied the requested follow-up, either explicitly or by not asking the requested questions. The written questions which were submitted cannot be located. The content of the written questions was not read into the record, and cannot be reliably recreated. Where additional questions were asked by the court following submission of a written question, it cannot be determined whether or not the questions asked were the questions actually submitted.

(42 CT:10710.)

Respondent further contends that the Reporter's Transcript of the voir dire "presumably . . . include[s] many of the other written follow-up questions that were submitted by defense counsel." (RB 170.) Insofar as is relevant to Ms. Dobel, this presumption is demonstrably untrue. While written follow-up questions were submitted by defense counsel for Ms. Dobel, after the prosecution challenged her for cause, the trial court refused to ask any of the questions submitted, without explanation and without reading the submitted questions into the record. Those follow-up questions were lost, and the contents could not be determined in record settlement proceedings. They are not in any way included in the Reporter's Transcript of the voir dire. (14 RT 2425-2428; 42 CT 10710.) Respondent's suggestion otherwise is wholly unfounded.

Respondent also states, "the Reporter's Transcript of the entire jury voir dire is preserved. Presumably, this included many of the other written follow-up questions that were submitted by defense counsel." (RB 170.) The citations to the record respondent provides for this "presumption" are of no help in terms of the follow-up questions submitted by defense counsel specifically for, but not asked of, Ms. Dobel. Appellant gave explicit citations to the record demonstrating without question that the follow-up questions intended for Ms. Dobel are not included in the record despite the trial court's assurances to defense counsel that they would be included in the record. (14 RT 2425-2428; see AOB 198-199, 202-205.) Respondent fails to address this showing.

Respondent contends that "the trial court read significant portions of [Ms. Dobel's] questionnaire answers into the record." (RB 171.) Respondent does not address the question of whether the trial court was quoting the answers in the questionnaire or summarizing or characterizing them. Normally, this would not matter, but the best evidence of Ms.

Dobel's actual answers is unavailable. The only questionnaire answer of Ms. Dobel's which the trial court actually quoted, according to the reporter's transcript, was Question No. 130, discussed above. (14 RT 2430; see 14 RT 2428-2430; AOB 139-143.)

Respondent argues that the trial court was reasonable in giving "the most weight" to Ms. Dobel's answer to Question No. 130 because it was a volunteered answer to an open-ended question. (RB 190-191.) However, as explained above, the answer was given before Ms. Dobel had been provided necessary information on the procedures involved in a capital case and the role of jurors in determining the appropriate sentence, and reflected a misunderstanding of those procedure and that role. On that basis it was not reasonable for the trial court to rely on that answer as it stood as a basis for concluding that Ms. Dobel was not death qualified. (*People v. Heard*, *supra*, 31 Cal.4th at p. 964.)

Moreover, respondent's recognition of the value of volunteered answers to open-ended questions on questionnaires is strangely limited to this one answer. The questionnaire included numerous open-ended questions relating to the death penalty, including questions that invited comment or explanation. (See, e.g., AOB 140-143, fns. 38-47; 148, fn. 48.) Ms. Dobel's answers to those open-ended questions clearly impressed LaMarsh's trial counsel. If the answer to Question No. 130 is important because it was volunteered, the volunteered answers that have been lost are at least important.

Respondent's reliance on the "volunteered" nature of the answer to Question No. 130 is also inconsistent with respondent's treatment of the missing answer to Question No. 129. Respondent stated, at RB 188, that this Court should give appellants "the benefit of the doubt and assume Dobel's answer [to Question No. 129] was that she would set aside her

personal feelings." At RB 191, respondent then treats that assumed answer as merely "the expected response when asked if she would follow the law." (RB 191.) Question No. 129, like Question No. 130, included an open-ended question inviting a volunteered comment from the prospective juror. The characterization of Ms. Dobel's answers on the questionnaire by LaMarsh's trial counsel strongly suggests that Ms. Dobel did not merely "give the expected response," but volunteered substantial comment, which counsel described as, "clearly indicat[ing] that she passes the *Witherspoon-Witt* questions." That characterization must be considered as substantially "more dispositive" of the issue than the flawed answer to Question No. 130.

Respondent's attempt to relegate the answer to Question No. 129 to a mere "expected response," while simultaneously attempting to elevate to "dispositive" the volunteered answer to Question No. 130, must be rejected by this Court. In the guise of an apparent remedy for the loss of the questionnaires, respondent has attempted to take advantage of that loss by rendering the information therein of little probative value on this issue. On this record, this Court cannot ignore the fact that there were other volunteered answers to other relevant questions in the missing questionnaire which are now unavailable to this Court. The relevance of these missing answers cannot be ignored, as respondent seeks.

As discussed above, respondent's argument that Ms. Dobel's answers are "unequivocal" and "clear" in demonstrating her disqualification as a capital juror is not supported by the available record. As a back-up argument, respondent also argues that this Court should defer to the trial court's determination of Dobel's disqualification as a juror because the court could observe her demeanor. (RB 190, 449.) In respondent's argument XX, respondent cites *Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2224 on this point:

> The trial court's rulings are also entitled to deference because the court was in the position to view the prospective jurors and evaluate their answers. (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2224 ["Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."].)

(RB 449.)

Appellant addressed *Uttecht* extensively in the opening brief, and demonstrated the substantial material differences between the extensive voir dire in *Uttecht* and the minimal voir dire in this case.[20] Those differences highlight the deficiencies in the trial court's voir dire here, and clarify why no deference is due the trial court's ruling regarding Ms. Dobel. (AOB 158-160.) Respondent chooses to rely on *Uttecht* without acknowledging or addressing appellant's argument in this regard.

In his opening brief appellant demonstrated why no deference is due to the trial court's conclusion that Ms. Dobel should be excused for cause. (AOB 154-160.) Respondent does not directly address the arguments made. Respondent instead relies on cases citing a general rule of deference to the trial court's rulings in these matters where there has been adequate voir dire, including voir dire by defense counsel, and where there are no deficiencies in the record depriving the court of an adequate record upon which to make a reasoned and reliable determination that deference is appropriate. (RB 190-192.) Given the deficiencies in the trial court's voir dire as well as the deficiencies in the record, those case are distinguishable and deference is

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[20] In *Uttecht*, the Supreme Court relies upon that trial court's "lengthy questioning," a "diligent and thoughtful voir dire," including additional questioning by counsel before ruling on a challenge, and information about the process provided to the prospective jurors before questionnaires were completed, and provision of handbooks explaining the sentencing phase before voir dire took place. (551 U.S. at pp. 10-14, 20.)

inappropriate in this case.

Conclusion

Prospective juror Dobel was excluded on a "broader basis" than is constitutionally acceptable under *Witherspoon*, *Adams*, and *Witt*. Taking Ms. Dobel's voir dire and those questionnaire responses which appear on the record as a whole (*Witt, supra*, 469 U.S. at p. 435; *People v. Cox* (1991) 53 Cal.3d 646-647), the record demonstrates that she was qualified to serve under *Witherspoon*, *Adams*, and *Witt*. Because the prosecution failed to carry its burden to establish disqualification, and because the voir dire conducted by the trial court was inadequate to support the finding of disqualification, the excusal of prospective juror Dobel was error. Because it is unsupported by the record and the record itself is deficient, no deference to such a finding is appropriate. (*Gray v. Mississippi* (1987) 481 U.S. 648, 661, fn.10.)

Similarly, as more fully demonstrated in Argument IV, the record does not support the trial court's excusal of prospective jurors Davis and Flores. The trial court's voir dire of prospective jurors Flores and Davis was not adequate to protect appellant's constitutional rights, resulting in a "'broader basis [for exclusion of prospective jurors] than inability to follow the law or abide by their oaths" (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48), the trial court likewise erred in excusing those two prospective jurors. The judgment of death must therefore be reversed.

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IV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND COMMITTED REVERSIBLE ERROR IN DENYING SEVERAL DEFENSE MOTIONS AND REQUESTS RELATING TO THE CONDUCT OF THE JURY-SELECTION PROCEEDINGS AND BY FAILING TO CONDUCT VOIR DIRE ADEQUATE TO PROTECT APPELLANT'S CONSTITUTIONAL RIGHTS

A. Motion for Individualized and Sequestered Voir Dire

In the Opening Brief, appellant acknowledged that this Court has rejected claims that denial of individualized and sequestered voir dire, as had been required under *Hovey v. Superior Court* (1980) 28 Cal.3d 1, is constitutional error. (AOB 163; *People v. Waidla* (2000) 22 Cal.4th 690, 713-714).) Appellant urged this Court to reconsider those precedents, and relied upon specific expert testimony presented to the trial court demonstrating the necessity of such "*Hovey*" voir dire in this case to protect appellant's constitutional rights to an impartial jury and a fair and reliable capital sentencing determination. (AOB 163-166; U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Respondent relies upon *People v. Waidla*, *supra*, and *People v. Hoyos* (2007) 41 Cal.4th 872, 898-899, to reiterate that this Court has rejected this claim. While respondent states that appellant has "offer[ed] no compelling reasons for this Court to reconsider its earlier opinions" (RB 195), respondent fails to address the empirical studies, and the expert testimony of Dr. Schoenthaler submitted in support of appellant's motion which demonstrated the likelihood that prospective jurors questioned in a group setting are less likely to give truthful answers.

Respondent has not otherwise presented any substantive arguments in support of the constitutionality of the statute, or in contradiction to the

evidentiary basis for the arguments set forth in appellant's opening brief. No further reply by appellant is therefore necessary on this point except to request that this Court reconsider its prior rulings in this area, especially in light of the additional evidence presented in the trial court and, accordingly, reverse his death judgment.

B. Request for Inquiry into the Prospective Jurors' Perception of the True Meaning of the Sentence of Life Imprisonment Without the Possibility of Parole

Appellant argued that the trial court committed constitutional error in refusing the defense requests to include, in the questionnaire or otherwise on voir dire, an inquiry into prospective jurors' perception of the meaning of the sentence of life without the possibility of parole. Appellant acknowledged that this Court has rejected similar claims in other cases, and asked the Court to reconsider those precedents. (AOB 166-167.)

Respondent urges this Court to reject this claim based upon the existing case law without reconsideration. (RB 200-201.) Respondent does not address the authorities or research cited by appellant in support of the claim and has not otherwise presented any substantive arguments in support of the trial court's ruling or this court's analysis. No further reply by appellant is therefore necessary on this point except to reiterate the request made in the Opening Brief that this Court reconsider its prior rulings in this area and, accordingly, reverse his death judgment.

C. The Trial Court's Voir Dire of Three Prospective Jurors Excused for Cause over Defense Objection Was Inadequate to Reliably Determine Each Juror's Qualification Under *Witherspoon/Witt*

In the opening brief, appellant demonstrated that the manner in which the trial court conducted death-qualification voir dire of three prospective jurors later excused as disqualified to serve as jurors in a capital

case was inadequate to protect appellant's constitutional rights. (AOB 170-196.) The trial court's voir dire was superficial and perfunctory, failed to adequately explore apparently conflicting answers or ambiguities introduced by the voir dire itself, improperly failed to ask follow-up questions submitted by defense counsel, and in some instances improperly refused to allow defense counsel even to submit follow-up questions. The trial court failed to conduct voir dire with the "special care and clarity" this Court called for in *People v. Heard* (2003) 31 Cal.4th 946, 966-977, and resulted in exclusion on a " 'broader basis' than inability to follow the law or abide by their oaths." (*Adams v. Texas, supra*, 448 U.S. at p. 48.)

Respondent fails to address the contrast between the perfunctory voir dire and limited, incomplete record of appellant's trial with the record upon which the United States Supreme Court relied in addressing appropriate deference to a trial court's determination of *Witherspoon/Witt* disqualification in *Uttecht v. Brown* (2007) 551 U.S. 1 (*Uttecht*). There, the Supreme Court determined that deference was appropriate in that case, relying upon circumstances which differ significantly from those presented here. Specifically, the Court relied upon the extensive voir dire conducted in that case: "But where, as here, there is *lengthy questioning* of a prospective juror and *the trial court has supervised a diligent and thoughtful voir dire*, the trial court has broad discretion." (551 U.S. at p. 20 (emphasis added).) The "lengthy questioning" and "diligent and thoughtful voir dire" relied upon in *Uttecht* included the fact that the trial court, before ruling on a challenge, allowed each side to recall the challenged juror for additional questioning by counsel – an opportunity not offered to appellant in this case. (*Id.* at pp. 10-11.) The Supreme Court also considered the instructions given the potential jurors both before and after filling out questionnaires, and before death-qualification voir dire:

> A final, *necessary* part of this history is the instruction the venire received from the court concerning the sentencing options in the case. Before individual oral examination, the trial court distributed a questionnaire asking jurors to explain their attitudes toward the death penalty. When distributing the questionnaire, the court explained the general structure of the trial and the burden of proof. It described how the penalty phase would function. . . .
> After the questionnaires were filled out, the jurors were provided with handbooks that explained the trial process and the sentencing phase in greater depth.

(*Id.* at pp. 12-14 (emphasis added).) The Court also relied quite heavily upon defense counsel's "volunteered comment that there was no objection" to the prosecution's challenge (*id.* at p. 19), not as waiver of an issue but as evidence that there was agreement by defense counsel that the potential juror was not qualified under *Witherspoon* and *Witt*. (*Id.* at pp. 19-20.)

As demonstrated in the opening brief (Arguments III-V), and in Argument III, *ante*, and Argument V, *post*, the death qualification voir dire of prospective jurors Dobel, Davis and Flores was almost the antithesis of the "extensive" voir dire described in *Uttecht* as supporting deference. The record left by the trial court's minimal efforts is inadequate to sustain a finding of disqualification as to any of the three.

In one of many contrasts to the situation in *Uttecht*, the entire voir dire in this case was conducted solely by the trial court. In another contrast, there was no instruction regarding the procedures in a capital sentencing trial or the role of a juror in such a trial prior to having the jurors fill out their questionnaires. In further and more significant contrast, rather than allowing additional questioning of the juror after a challenge, the trial court here denied defense counsels' requests to have Ms. Dobel questioned further and would not allow counsel to even submit follow up questions for Davis or Flores. Finally, rather than acquiescing in the prosecution's challenge as in *Uttecht*, defense counsel here strongly objected to the

challenges, asked for further questioning of each of the jurors and submitted further questions to be asked of Dobel. Even upon the trial court's ruling that Ms. Dobel was unqualified to sit as a juror, defense counsel continued to object.

Rather than supporting deference to the trial court's ruling in this case, the circumstances of *Uttecht* highlight the failings of the trial court here, and demonstrate that no deference is due to the erroneous exclusion of these three jurors.

Respondent attempts to justify the trial court's erroneously limited voir dire of prospective jurors Dobel, Davis and Flores by reference to the length of the questionnaire, and the fact that defense counsel submitted many of the questions on the questionnaire. (RB 205.) However, appellant's claim of inadequacy of voir dire focuses on the specific inadequacy of the trial court's voir dire regarding those three prospective jurors' qualifications to serve on a capital jury under *Witherspoon* and *Witt.* Whether the trial court's general voir dire of those or other jurors was adequate is not the point of Argument IV.D. Even assuming arguendo that the general voir dire was adequate, that does not answer the question of whether the trial court's voir dire of those three prospective jurors regarding death qualification was adequate, or whether the trial court's refusal to ask follow-up questions on that subject requested by defense counsel, or even to allow them to submit follow-up questions on that subject as to Davis and Flores, left the record inadequate to sustain the trial court's excusal of these three prospective jurors.

Nor does the general adequacy of the 21 questions in the questionnaire dealing with the subject of the death penalty resolve those issues, for the relevant issues stem from the specific answers given to those 21 questions by the three prospective jurors, from the unexplained and

unexplored conflicts and inconsistencies between those answers and the answers given on voir dire, and from the ambiguities created or left unresolved by the trial court's unreasonably limited voir dire about their true feelings and abilities to serve as a capital jurors. While the trial court had some information available to it from the questionnaire answers, the trial court's failure to explore conflicts and ambiguities in those answers sufficiently, e.g., to determine whether answers which the trial court may have interpreted as disqualifying were actually reflective of misunderstanding rather than disqualifying beliefs, undercut the reasonableness and reliability of the trial court's rulings disqualifying each of the three prospective jurors. As demonstrated in the opening brief in Arguments III and IV, as well as in Argument III, *ante* in this reply brief, it was the restricted voir dire by the trial court which introduced many of the ambiguities or inconsistencies in the prospective jurors' answers and left them unresolved on the record. As a result, no deference to the trial court's determinations on these three jurors is appropriate in this case. (See AOB 138-139, 154-160, 172-173, 186.)

Respondent fails to acknowledge the point made in the opening brief, that in this case, the trial court controlled the makeup of the relevant record, including personally conducting the totality of voir dire of the three prospective jurors in question, and the refusal to even allow defense counsel to propose follow-up questions on prospective jurors Davis and Flores. (AOB 172-175.) In such an instance, as argued in the opening brief, trial court had a further duty to make the record regarding the qualifications of those prospective jurors as clear and complete as possible. In essence, it was as if the trial court took upon itself the prosecution's burden of establishing that the jurors were disqualified, and cut off questioning upon its own satisfaction that the burden was met, without adequate consideration

of the defense position that voir dire had been cut off too soon, and that further questioning would reveal additional information necessary to a reliable determination of the prospective jurors' qualifications.

On a different point, throughout the responses to Arguments IV and V, respondent refers to the standard for a trial court's determination of a juror's disqualification in a variety of erroneous formulations, none of which are supported by cited case authority.[21]

In this argument, respondent states,

> Once the trial court found there was a *substantial likelihood* that the jurors would be unable to impose the death penalty, it properly excused the jurors. (See *People v. Haley* [(2004)] 34 Ca1.4th [283], 305 [prospective jurors' equivocal or conflicting statements about ability to impose death penalty was sufficient basis to uphold trial court's ruling to excuse them for cause].)

(RB 205 (emphasis added).) *People v. Haley* does not utilize, or mention, such a standard in relation to death qualification of jurors.

Respondent also states, "Here, even if Davis answered some questions that indicated he would follow the trial court's instructions, his statements that he could not impose the death penalty *still gave the court substantial doubt* that he would fulfill his duties as a juror. (See *People v. Haley*, *supra*, 34 Cal.4th at p. 305 [trial court may excuse for cause prospective jurors who are equivocal about ability to impose death penalty].)" (RB 209 (emphasis added).) Again, *People v. Haley* does not utilize, or mention, such a standard in relation to death qualification of jurors.

1. Prospective Juror Danielle M. Dobel

Respondent repeats the erroneous characterizations of Ms. Dobel's

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[21] Three such instances in Respondent's Argument V are addressed in Argument V, *post*.

answers made in response to Argument III. Appellant has demonstrated, in Argument III, *ante*, the fallacies in respondent's characterizations and reasoning,[22] and incorporates those answers herein.

Respondent further misstates the record in stating that "[the] trial court stated it would not ask counsel's follow-up questions because it had already determined that Dobel's beliefs would substantially interfere with her ability to perform as a juror," citing 14 RT 2428-2430. (RB 206.) In fact, the trial court gave no reason for its refusal to ask the follow-up questions; the only reference to the requested follow-up questions in the cited portion of the transcript is the single statement, "All right. The Court will not ask the additional follow-up questions." (14 RT 2428.)[23]

Respondent claims that Ms. Dobel stated, "the death penalty was never appropriate for first time offenders (like appellants)." (RB 205.) That this characterization of Ms. Dobel's beliefs is not supported by the available record is demonstrated in Argument III, *ante*, as is respondent's unsupported contention that Ms. Dobel would have necessarily considered appellant a first-time offender.

Respondent claims that Ms. Dobel stated that "her feelings might prevent her from finding the special circumstance true; her feelings might prevent her from finding the defendant guilty." (RB 205-206.) The answers upon which these characterizations are apparently based reflect a

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[22] At RB 206, respondent includes a cite to 14 RT 2415 in support of various allegedly disqualifying answers by Ms. Dobel. That cite is to the voir dire of a different juror.

[23] The entirety of the trial court's ruling at the cited RT pages is quoted by respondent in the response to Argument III. (RB 179-182.) Respondent's mischaracterization here of the trial court's refusal ask any of the requested follow-up questions is not made in respondent's Argument III.

misunderstanding of the law or the role of a juror in a capital case by Ms. Dobel, and conflict with other answers given by Ms. Dobel, and are prime examples of the failure of the trial court to conduct an adequate voir dire, as demonstrated in Argument III, *ante*. Moreover, respondent's claim that Dobel stated that "her feelings might prevent her from finding the defendant guilty" is a blatant mischaracterization of Ms. Dobel's actual answer to Question No. 130, in which Dobel contrasted returning a verdict of "guilty with a punishment of death" with a verdict of "guilty with life imprisonment." (14 RT 2430.) That Dobel's answer to Question No. 130 was not the disqualifying statement respondent represents it to be, and that the trial court's reliance on that answer was unreasonable without having asked Ms. Dobel any questions about it or about the misunderstandings upon which it is apparently based, is demonstrated in Argument III, *ante*.

Similarly, respondent claims that Dobel stated that "her feelings would substantially interfere with her ability to function as a juror." As demonstrated in Argument III, *ante*, the answer to which respondent refers, at 14 RT 2422, was followed by one of the only instances of the trial court actually exploring what Ms. Dobel meant. That additional voir dire demonstrated that Ms. Dobel was willing to return the death penalty if appropriate, and that her understanding of "substantially interfere" did not equate to *Witt's* standard of "substantial impairment."

Respondent claims that Ms. Dobel stated that "she did not feel she had the right to participate in the decision to deprive a person of his life." (RB 206.) Again, respondent takes a phrase from one of her answers on voir dire out of context. As demonstrated in Argument III, *ante*, the context of her answers, at 14 RT 2423-2424, demonstrates that she used that phrase in relation to her not finding the death penalty appropriate in a particular case in which another person found it appropriate. She reaffirmed that she

was willing to return the death penalty if she found it appropriate.

Respondent again takes a portion of another answer out of context, claiming that Ms. Dobel stated, "she doubted she would ever vote to impose the death penalty." (RB 206.) This statement was part of her answer to Question No. 130, discussed above, the whole of which demonstrates that it was based on a misunderstanding of the procedures and juror's role in a capital case. As discussed above and in Argument III, *ante*, this answer, rather than demonstrating disqualification, demonstrates the inadequacy of the trial court's voir dire of Ms. Dobel and the unreasonableness of the trial court's reliance on her answer without having asked Ms. Dobel any questions about the answer or about the misunderstandings upon which it is apparently based. Moreover, in voir dire, Ms. Dobel was specifically asked if her "feelings about the death penalty [are] so strong that [she] would never impose a death penalty in any case whatsoever," she answered, "no." (14 RT 2421-2422.)

Based upon those mischaracterizations and misinterpretations of the record regarding Ms. Dobel's answers, respondent argues that "Dobel's answers made it unmistakably clear that she would have difficulty fulfilling her duty as a juror." (RB 206.) As demonstrated in Argument III, *ante*, the most that can be said is that her answers raised some question about her qualifications to serve; the inadequate voir dire of the trial court, however, failed to inquire into those questions in any way that supported a reasonable or reliable finding of disqualification.

Moreover, respondent's characterizations of what was "unmistakably clear" reflects an erroneous understanding of the standard which the trial court was required to apply. "Difficulty" in returning a death verdict is not a disqualifying state of mind. (*Stewart*, *supra*, 33 Cal.4th 425, 446-447.) *Witt* requires a finding of "substantial impairment," not merely difficulty.

That misunderstanding of the applicable standard may explain respondent's misunderstanding of the adequacy of the record. If what was unmistakably clear was that she would have difficulty returning a verdict of death, it was incumbent upon the trial court to conduct a voir dire sufficient to make a reliable determination of whether that "difficulty" amounted to a substantial impairment. This the trial court failed to do.

While a trial court may be able to limit further voir dire for rehabilitation where a prospective juror has made it unequivocally clear that she will never return a verdict of death, that is not what the voir dire of Ms. Dobel demonstrated. Further voir dire, either by the trial court or by asking questions submitted by defense counsel, was necessary in order for the trial court to make a reasonable and reliable determination of Ms. Dobel's qualification to serve.

Respondent contends that the trial court's questioning of Ms. Dobel was more than adequate because the trial court "asked Dobel about twenty oral questions – many of which were intended to probe her earlier answers. (14 RT 2418-2424.)" (RB 206.) Of the questions asked, only five asked for explanations of earlier answers.[24] None of them asked for explanation of the single answer upon which the trial court said it relied "most heavily." Moreover, the explanations which resulted from that questioning showed that Ms. Dobel was willing to return a death verdict in a case in which she thought it appropriate, thus demonstrating her qualification to serve rather than disqualification. Such a limited voir dire as was conducted here cannot be considered adequate in this case as to this juror, especially in light of the vehement objections of defense counsel.

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[24] One additional question asking for explanation of an answer occurred after the transcript pages cited by respondent, at 14 RT 2429. It did not result in an answer demonstrating disqualification.

2. Prospective Juror Brad Davis

Appellant acknowledges that many of Davis's answers, taken at face value, do support the trial court's ruling. However, that is not the end of the analysis, much as respondent would wish it so. The dispute is whether, based upon the entirety of the record, both of voir dire and Davis's questionnaire answers, the trial court adequately inquired of Davis regarding the nature of apparently conflicting answers which he gave.

Respondent contends that even if Davis's answers were conflicting, this Court "should still defer to the trial court's determination that there was a substantial likelihood that he would not follow the trial court's instruction." (RB 209-210.) Respondent fails to acknowledge that such deference is only appropriate if that determination is based on "sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties (as defined by the court's instructions and the juror's oath). . . ." (*Stewart*, *supra*, 33 Cal.4th at p. 445, quoting *Witt*, *supra*, 469 U.S. at p. 424.) The voir dire of Mr. Davis here did not provide sufficient information to permit a reliable determination of Mr. Davis's views, or to justify the trial court's ruling.

Respondent mischaracterizes the supposed clarity of Davis's refusal to consider the death penalty. Concerning Davis's indication in the questionnaire that he was "undecided" about the death penalty (29 CT 7380), respondent notes that

> during voir dire, Davis stated he was against the death penalty and that when he indicated in the questionnaire that he was undecided, "at that point I just didn't really know." (13 RT 2279.) In other words, after thinking about the matter, Davis resolved the conflict and decided he was opposed to the death penalty.

(RB 210.) Respondent's "other words" are not an accurate reflection of the

record. Respondent ignores the fact, pointed out in the opening brief (AOB 184-185), that immediately after his statement that at the time he put that answer in the questionnaire he "just didn't really know," the trial court asked if his feelings about the death penalty had changed since the time he wrote that. Davis replied, "About the same." (13RT:2280.) In other words, after stating that he did not believe in the death penalty, he reaffirmed his previous response that he was undecided about it. These two responses are in direct conflict. Because the trial court did not inquire about that conflict, there is no basis in this record to accept respondent's assertion that he had "resolved the conflict and decided he was opposed to the death penalty." Nor is there an adequate basis for respondent's assertion that the trial court "could reasonably conclude that any conflict had been resolved, and Davis had firmly decided to not impose the death penalty." (RB 210.) Without some reasonable inquiry into the obvious conflict in Davis's answers, any such conclusion by the trial court would not have been based upon "special care and clarity" necessary to a finding of disqualification under *Witt*. (*Heard, supra*, 31 Cal.4th at pp. 966-977.)

Respondent claims that the above is the only real conflict in Davis's answers identified by appellant. However, there are other conflicts identified in the opening brief. Appellant noted that Davis

> did not think there is anything that would make him an unfair juror. (29CT:7387.) . . . . The trial court, on voir dire, asked him to choose which of the categories [in Question No. 115] best described his views on the death penalty. Davis chose to describe himself as opposing the death penalty, rather than strongly opposing it, or never under any circumstances imposing it. (13RT:2278; 29CT:7382.) When the trial court asked Question No. 117, Davis said he would want "all the facts . . . whatever both sides puts up" if he was a juror called upon to decide penalty in this case, and assured the trial court that he "would be satisfied, then, to decide life or death based solely on what was presented to [him] . . . regardless of what that was."

(13RT:2278-2279.)

(AOB 184.) These answers conflict with Davis's responses to the trial court that he would not return the death penalty, yet the trial court did not inquire as to the source of the conflict, or even address it. Nor does respondent address these conflicts.

Nowhere does respondent defend the trial court's unreasonable attribution of hostility to the death penalty to Davis's unexplained (and unquestioned) failure to answer a number of questions on the questionnaire. As pointed out in the opening brief, the trial court included in its ruling that Davis was disqualified the unsupported conclusion that Davis's "failure to answer a number of death penalty related questions . . . indicate[s] a very strong opinion, feeling against the death penalty, which far outweighs his undecided answer in Question No. 108." (13 RT 2282.) The trial court never asked Davis why he did not answer those questions.[25] Appellant pointed out in the opening brief that, while the trial court asked Davis on voir dire all but two of the questions which Davis had not answered in the questionnaire, his answers to those questions did not demonstrate disqualification, or even any strong feeling about the issue. (AOB 186-187; 13 RT 2278-2279.)

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[25] See, for example, the trial court's treatment of Mr. Davis's failure to answer Question No. 115:

> Q. Question No. 115 asked to you check the box which most accurately described your feelings about the death penalty and you did not check any boxes. Let me read the different categories and ask you where you believe you would put yourself. Would impose the death penalty whenever had the opportunity? strongly support? support? Will consider? Oppose? strongly oppose? Will never under any circumstance oppose the death penalty?
>
> A. Oppose.

(13 RT 2278.)

Rather, the answers showed that his views on the death penalty had not changed substantially in the last few years; that he agreed with life without parole; that he opposed the death penalty, but *not* strongly; that he thought the death penalty was imposed randomly; that he was unfamiliar with any recent publicity regarding the death penalty; that he thought the death penalty was a deterrent; that he would want all the facts before deciding penalty; and that he would be satisfied to make the penalty decision on whatever evidence the parties presented. (*Ibid.*) The trial court's transformation of the unanswered questions on the questionnaire into evidence of a "very strong opinion, feeling against the death penalty" was an unwarranted and unreasonable inference on its face; it cannot be reasonably or rationally reconciled with the answers Davis had just given to those questions on voir dire. The trial court's conclusion is not only unsupported by any substantial evidence, but is contrary to the evidence actually in the record.

Respondent fails to respond to this showing in any way.

Respondent relies upon *People v. Harrison* (2005) 35 Cal.4th 208, 227-228, describing its holding as "prospective juror properly excused for cause because 'maybe' she could not vote for the death penalty." (RB 207; see also RB 210.) This misstates the holding of *Harrison*. This Court specifically stated in that case, "the trial court did *not* dismiss [the juror at issue] because of her doubts about the death penalty, but because it found that those doubts would substantially impair her ability to follow the court's instructions." (35 Cal.4th at p. 228 (emphasis in original).) Moreover, in *Harrison*, the trial court specifically relied upon "the physical manifestations of [the juror's] anxiety." (*Ibid.*) No such reference to the demeanor of prospective jurors Dobel, Davis or Flores, was mentioned by the trial court in this case.

There is no indication in *Harrison* that the defendant had challenged the adequacy of the voir dire conducted in that case. *Harrison* is of little or no assistance to respondent in defense of the adequacy of the trial court's voir dire in this instance. None of the cases cited by respondent suggest that a single answer supporting disqualification is adequate grounds for a trial court to cut off further voir dire without regard to substantial evidence of answers which conflict with that single answer. Rather, as made clear in *Heard* and *Stewart*, a trial court must have sufficient information, after voir dire conducted with "special care and clarity," to permit a reliable determination of the prospective juror's views. (See also *People v. Riccardi, supra,* – Cal.4th – 2012 WL 2874237.)

Respondent refers to Argument XIX.B.3 of respondent's brief, which refers to prospective juror Davis in relation to co-appellant Beck's Argument IV. (RB 207.) One of the points made by respondent there, however, illustrates the extent to which the record made by the trial court left entirely too much ambiguity unexplored or unexplained regarding Mr. Davis. Respondent cites 29 CT 7386, and quotes Mr. Davis as stating in his questionnaire "I can't change my opp[osition] of the death penalty." (RB 440.) In fact, what Mr. Davis wrote was "I can't change my opp. of the death penalty." The trial court, without asking Mr. Davis about it, interpreted that statement as saying, "Question No. 129, he cannot change his *opinion* regarding the death penalty." (13 RT 2282 (emphasis added.) Respondent's interpretation, that "opp." meant "opposition," would support a finding of disqualification; the trial court's interpretation does not necessarily support such a finding, for the nature of Davis's opinion was not clarified by the trial court's limited voir dire.

This state of the record and the trial court's failure to explore the inconsistencies in Davis's answers do not justify the trial court's ruling that

Davis's ability to serve on this case would be substantially impaired by his feelings about the death penalty. The trial court's conclusion was based not on substantial evidence, reached after "special care and clarity" on voir dire, but upon an unwarranted transformation of conflicting and limited answers into evidence of a very strong opinion. Moreover the trial court's refusal to allow defense counsel to even submit follow-up questions was unreasonable in this circumstance and itself an abuse of discretion which undercut the trial court's ruling.

3. Prospective Juror Carol Flores

Respondent argues that the trial court had no duty to inquire further after it determined that Flores' feelings would substantially interfere with her ability to fulfill her duty as a juror, citing *People v. Stitely* (2005) 35 Cal.4th 514, 539-540, *People v. Samayoa* (1997) 15 Cal.4th 795, 823, and *People v. Carpenter* (1997) 15 Cal.4th 312, 355. (RB 214-215.)

Respondent fails to acknowledge, however, that for the trial court to make that determination, there must have been an adequate voir dire, and adequate information upon which a reliable determination can be based. (*Stewart, supra*, 33 Cal.4th at p. 445; see also *People v. Riccardi, supra*, – Cal.4th –, 2012 WL 2874237.) Here, as with Dobel and Davis, the trial court failed to obtain sufficient information to permit a reliable determination of Flores's qualifications to serve.

Respondent argues that the trial court stated that there was only one rehabilitative answer in Flores' questionnaire, the answer to Question No. 115. (RB 215.) However, respondent fails to acknowledge the evidence of other rehabilitative answers noted in the opening brief. (See AOB 193-194.)

Question No. 129 addressed the fundamental issue upon which the trial court had to rule, i.e., whether Flores could set aside her personal

feelings about the death penalty and follow the court's instructions. One would assume that if Flores had indicated on the questionnaire that she could not do so, the trial court would have cited that answer in its ruling. It is, therefore, a reasonable inference that Flores indicated on the questionnaire that she could set aside her personal feelings and follow the court's instructions. In any case, the trial court failed to ask Flores that question during voir dire, either before or after her answers to the *Witherspoon* questions.

That the trial court did not cite in support of its ruling any questionnaire answers other than those to Questions No. 108 and No. 110 suggests that the other answers to the questionnaire, like the answers to Questions 108, 110, 115 and 123, support a finding that Flores was qualified, rather than disqualified, under *Witherspoon* and *Witt*. The absence of the questionnaire from the appellate record makes the resolution of that question impossible, and thus deprives appellant of meaningful and reliable appellate review of this issue. (See Arg. V, *post.*)

At most, Flores's "yes/no" answers to the *Witherspoon/Witt* questions on voir dire raise a question, given what may be characterized as either a conflict or ambiguity regarding Flores's ability to follow the law and consider the death penalty. (See also *People v. Riccardi, supra*, – Cal.4th –, 2012 WL 2874237.)

Respondent argues that, "even if this Court assumed that all of Flores's answers on the questionnaire indicated that she was willing to follow the court's instructions, the trial court still acted within its discretion." (RB 215.) Respondent misses the point. The relevant assumption, if one is to be made as a remedy for the loss of the questionnaire, would be more on the order of an assumption that Flores's answers on the questionnaire indicated that she was willing to consider, and

to return, a verdict of death, and demonstrated no significant impairment of her ability to serve and fulfill her duty as a juror in this case. Such an assumption, as demonstrated, appears to be consistent with what evidence there is of Flores's questionnaire answers.

It is not a question of whether or not Flores's answers on the questionnaire merely raised some ambiguity or conflict in comparison with her answers on voir dire. It is a question of whether or not the trial court's voir dire was adequate to determine that any ambiguity or conflict in the answers was reflective of Ms. Flores's true feelings, and not based upon some misunderstanding of the law, of the role of a juror in a capital case, or of the questions themselves.

Respondent argues that trial counsel made no argument and did not identify any answers in the questionnaire which supported their opposition to the trial court's ruling. (RB 215.) While this may be literally true, it wholly ignores the manner in which the trial court refused to allow trial counsel to even submit follow-up questions which would have supported their attempt to rehabilitate or clarify the misunderstandings of Ms. Flores. That the trial court refused to allow follow-up questions to even be submitted is compounded by the loss of Ms. Flores's questionnaire, so that nothing more definite can be said on this record than that trial counsel objected to the trial court's ruling and sought additional questioning, and that the primary evidence and legitimate inferences concerning the contents of Ms. Flores's missing questionnaire are that none of her answers therein were disqualifying, and many were qualifying and directly undermined the trial court's ruling.

The record, truncated by the trial court's limited voir dire, by the refusal of the trial court to allow trial counsel to submit follow-up questions, and by the loss of Ms. Flores's questionnaire, is insufficient to

allow this Court to determine that the trial court had adequate information upon which to base its ruling.

Respondent relies upon *People v. Harris* (2005) 37 Cal.4th 310 to support the argument that this Court should defer to the trial court's decision to conduct such a limited voir dire of Ms. Flores. In *Harris*, this Court relied on both the available questionnaires completed by the jurors at issue which included specifically disqualifying answers as well as upon their answers on voir dire, which confirmed the disqualifications apparent from the questionnaires. (37 Cal.4th at pp. 330-331.) There is nothing in *Harris* which reveals substantial conflict between questionnaire answers and the answers on voir dire upon which the trial court in *Harris* relied. This Court deferred in *Harris* to the trial court's determinations of disqualification and to the decision that no further questions were necessary, but gave no sufficient description of the voir dire or the particulars of the defendant's criticism's of that voir dire by which any support for respondent's position in this case can be determined. (*Ibid.*)[26]

D. Conclusion

Respondent cites *People v. Robinson* (2005) 37 Cal.4th 592, 620, and *People v. Carter* (2005) 36 Cal.4th 1215, 1250, as suggesting that the inadequacy of the trial court's voir dire in this case is not reversible "unless the voir dire... is so inadequate that the reviewing court can say that the resulting trial is fundamentally unfair [.]" (RB 217.) However, as respondent notes, *Robinson* dealt with the sufficiency of voir dire regarding

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[26] Respondent's citation to *People v. Ashmus* (1991) 54 Cal.3d 932, 959, is somewhat misleading. (RB 216.) The cited page does include discussion of a trial court's discretion to contain voir dire within reasonable limits. It does not address the specific issue claimed by respondent, i.e., a trial court's decision to foreclose further questioning when it is apparent that a prospective juror will not follow its instructions.

prospective jurors racial bias, not with the sufficiency of death qualification voir dire. (37 Cal.4th at p. 621.) Similarly, *Carter* dealt with a trial court's time limitation on attorney-conducted voir dire, not the adequacy of the voir dire to support the trial court's finding that a juror was disqualified under *Witt*. (36 Cal.4th at pp. 1249-1250.) Neither case changes the controlling standard for reversal of the penalty judgment for *Witherspoon-Witt* error.

As demonstrated in the opening brief, the trial court abused its discretion in failing to conduct voir dire adequate to protect appellant's constitutional rights; this error resulted in exclusion of prospective jurors on a " 'broader basis' than inability to follow the law or abide by their oaths." (*Adams v. Texas, supra*, 448 U.S. at p. 48.) Appellant's death judgment must therefore be reversed. (*Ibid*; *People v. Stewart* (2004) 33 Cal.4th 425, 454.)

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V

THE JUDGMENT MUST BE REVERSED BECAUSE APPELLANT HAS BEEN DENIED A COMPLETE AND ACCURATE RECORD ADEQUATE TO PROVIDE HIM APPELLATE REVIEW OF HIS CLAIMS

In the opening brief, appellant demonstrated that, because of the loss of the questionnaires completed by prospective jurors Dobel and Flores, and the inability to reconstruct most of their contents, as well as the loss of written "follow-up" questions submitted to the trial court during voir dire by trial counsel for the defendants, and the inability to reconstruct them, the record is inadequate for meaningful and reliable review of the trial court's rulings excusing those jurors and that as a result, appellant is denied due process and the full, fair, meaningful and reliable appellate review of the trial proceedings which he is entitled. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const. Art. 1, §§. 1, 7 & 15; AOB 197-208.)

Respondent first mischaracterizes the state of the relevant record (RB 218), then suggests that, because this Court generally defers to the trial court's determination that a potential juror is not death qualified, the absence of the questionnaires and the follow-up questions is harmless.

Respondent notes that, in the opening brief, appellant omitted *People v. Heard* (2003) 31 Cal.4th 946, 969 in discussion of cases addressing the issue of missing juror questionnaires. (RB 221.) *Heard* was discussed, and extensively quoted, by appellant in Argument IV. (AOB 171-175.) The omission from the discussion in Argument V was inadvertent. However, respondent does not argue that the details of *Heard's* treatment of the issue

of lost questionnaires in relation to appellate review of a *Wheeler/Batson*[27] motion is in any way significantly different from that in *People v. Ayala* (2000) 24 Cal.4th 243, 270, *People v. Alvarez* (1996) 14 Cal.4th 155, 196, and *People v. Haley, supra,* 34 Cal.4th at pp. 304-308.) which are fully discussed in the opening brief. However, respondent omits a separate mention of a missing questionnaire in *Heard* in relation to the *Witherspoon/Witt* error which resulted in reversal of the penalty judgment in *that case*. While the missing questionnaire was not the determining factor in that reversal, neither did this Court draw assumptions in favor of the trial court's determination from the absent questionnaire:

> As defendant notes, the jury questionnaire completed by Prospective Juror H. was lost after the trial and is not a part of the record on appeal, and *thus we cannot review the particular questionnaire answer to which the trial court referred in the context of H.'s questionnaire responses as a whole, in order to determine whether other responses may shed additional light on the meaning or significance of the particular response* to which the trial court referred.

(*People v. Heard, supra*, 31 Cal.4th at p. 964 (emphasis added).)

Here and in the response to Argument III, respondent mischaracterizes the status of the record concerning follow-up questions. In Argument III, respondent stated:

> . . . some of counsel's written follow-up questions were recovered. (10 RT 1858 [trial court noted that only Cruz submitted written follow-up questions; 6CT 1636-1673 [Cruz's follow-up questions]; 19 CT 4449,4462, 4464, 4595; 42 CT 10710; see also stipulation to augment record with missing jury questionnaire approved by this Court on January 25, 2008.)

(RB 170.) In this argument, respondent refers to "an official list record of

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[27] *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89.

counsel's written follow-up questions" not having been recovered,[28] and claims that "the trial court consistently asked about 15 follow-up questions that were recorded in the Reporters Transcript," some of which "were certainly from the questions submitted by defense counsel." (RB 218, see also RB 223, 225-226.) Respondent also claims that "Cruz's written follow-up questions are in the record and the trial court noted that no one else had submitted follow-up questions" citing 6 CT 1636-16 73 and 10 RT 1858. (RB 225.) These descriptions of the state of the record regarding follow-up questions submitted by defense counsel are substantially misleading, and even where factually accurate, are irrelevant to appellant's claims regarding loss of the follow-up questions submitted by all four defense counsel to be asked of Ms. Dobel which the trial court refused, without explanation, to ask. Reliance on respondent's misleading descriptions of the relevant state of the record in this regard could cause this Court to misunderstand the procedural posture of the missing follow-up questions. The true facts are accurately stated in the opening brief – follow-up questions were submitted by all four defense counsel during Ms. Dobel's voir dire, to be asked of Ms. Dobel. The trial court refused to ask any of them, but assured defense counsel that the submitted questions would be retained as part of the record. However, none of the questions were actually retained, but were lost, and

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[28] It is unknown what "official list record of counsel's written follow-up questions" respondent is referring to as not having been recovered. Nothing in the record, including the four pages of clerk's transcript cited by respondent (19 CT 4449, 4462, 4464, 4595; RB 218), suggests that there ever was anything referred to as an "official list record of counsel's written follow-up questions." Nor was there any reference to it during record settlement proceedings the trial court, or in the settled statement adopted by the trial regarding the loss of the follow-up questions submitted by defense counsel. Nor was there any reference to any such thing in appellant's opening brief.

the trial court made a specific finding during record settlement proceedings that the contents of those questions could not be re-created.[29] It is those follow-up questions to which appellant's argument is directed.

The follow-up questions to which respondent refers, found at 6 CT 1636-1673, were submitted by counsel for appellant on March 10, 1992, the first day of general voir dire after the prospective jurors completed the questionnaires and hardship requests had been resolved (6 CT 1631-1635, 1674), nine days before Dobel's voir dire on March 19, 1992. (14 RT 2402, 2418.) The trial court's statement at 10 RT 1858, that only appellant submitted written follow-up questions, was also made on March 10, 1992, referring to the follow-up questions found at 6 CT 1636-1673, filed that day. Those particular requested follow-up questions have never, so far as is known to appellant, been missing. Respondent confuses those follow-up questions, submitted *before* voir dire, with those submitted in writing *during* voir dire by all four defense counsel, which are the questions which have been lost by the superior court despite the trial court's assurance to trial counsel that the written follow-up questions would be preserved. (14 RT 2431; See 42 CT 10710.)

Regarding missing juror questionnaires, respondent's citation to 19 CT 4449 and 4462 may confuse the Court regarding the relevance of juror questionnaires found at 12 CT 2803 - 14 CT 3474. However, as noted at AOB 197, fn. 72, review of the questionnaires contained in those pages revealed that they were questionnaires from jurors in the retrial of

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[29] To the extent respondent attempts to argue that the trial court's settlement of the issue of lost follow-up questions is flawed, or misrepresents the record, such a position must be considered to have been forfeited by respondent by not presenting the arguments and cites to the trial court during record settlement proceedings.

codefendants LaMarsh and Willey, rather than questionnaires from appellant's trial, and the trial court ordered them stricken from the record. (See RT 11/12/03, pp. 4-5.)

Appellant has not claimed that any follow-up questions were submitted regarding Ms. Flores. Rather appellant claimed, in Argument IV, that the trial court wrongfully refused to allow appellant to even submit follow-up questions for both Ms. Flores and Mr. Davis. The trial court thus intentionally limited the record, in what amounted to a clear abuse of discretion., and which resulted in error under *Witherspoon* and *Witt*. (See Arg. IV, *ante*.) As to Ms. Dobel, the trial court allowed follow-up questions to be submitted, and represented to trial counsel that the questions would be preserved, but they were lost, and are therefore unavailable, through no fault of appellant. To a certain degree, the effect is the same, in that this Court has been prevented from reviewing what trial counsel thought should be asked, what they thought would rehabilitate the jurors, or clarify any ambiguity left from the trial court's erroneously limited voir dire.

As previously addressed herein, in both Arguments IV and V, respondent refers to the standard for a trial court's determination of a juror's disqualification in a variety of erroneous formulations, none of which are supported by cited case authority, where any authority is cited at all. Here, respondent states, "As discussed in Arguments III, IV, and XX, all of the challenged jurors gave numerous answers which indicated there was *a substantial likelihood* that they would not impose the death penalty under any circumstances." (RB 219 (emphasis added).) In this instance no authority is cited for the application of such a standard to any issue raised in Arguments III, IV or V, nor could there be, since the correct standard under *Witherspoon* and its progeny requires that "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully

and impartially apply the law." (*Witt*, supra, 469 U.S. at p. 426.)

Respondent also states, "Since *trial courts have discretion to excuse prospective jurors who express conflicting or ambiguous answers regarding their willingness to impose the death penalty*, appellants cannot show that they were prejudiced by the missing jury questionnaires." (RB 219, citing *People v. Haley*, *supra*, 34 Ca1.4th at p. 305 (emphasis added).)

People v. Haley does not state that trial courts have discretion to excuse prospective jurors merely because they express conflicting or ambiguous answers regarding their willingness to impose the death penalty. Such a standard would be in direct conflict with *Witt*, and result in a "'broader basis [for exclusion of prospective jurors] than inability to follow the law or abide by their oaths" (*Adams v. Texas, supra*, 448 U.S. at pp. 47-48.) *Haley* made clear that it is not the fact of conflicting or ambiguous answers which establishes a juror's disqualification, or allows a trial court to excuse that juror. Rather, those conflicting or ambiguous answers are only relevant in evaluating or deferring to "the determination of the trial court as to these jurors' actual state of mind." (34 Cal.4th at p. 305 (emphasis added.).) Moreover, a trial court errs in excusing a prospective juror without having questioned the prospective juror about conflicting or ambiguous answers in a questionnaire. (See *People v. Riccardi*, *supra*, – Cal.4th –, –; 2012 WL 2874237.)

Respondent twice refers to the trial court's "reasonable doubt that [a juror] would follow the court's instructions," citing *People v. Harrison*, *supra*, 35 Cal.4th at p. 228 and *People v. Carpenter*, *supra*, 15 Cal.4th at p. 357. (RB 222.) Neither *Harrison* nor *Carpenter* utilizes, or even mentions, a reasonable doubt standard in connection with a trial court's determination of a prospective juror's state of mind regarding the return of a death verdict, nor would they, as that is not the correct legal standard.

A. Prospective Juror Dobel

Respondent repeats arguments made in Argument III, *ante*, that Dobel's answers, insofar as they appear on the record, demonstrated that she would not follow the trial court's instructions or impose the death penalty. Therefore, respondent argues, "it is inconceivable that Dobel's answers on her questionnaire would have removed the trial court's reasonable doubt that she would follow its instructions and impose the death penalty. . . ." (RB 222.) Respondent concludes that appellant cannot show prejudice from the missing questionnaire. As shown above, respondent's reference to the trial court's "reasonable doubt" about Ms. Dobel's state of mind betrays a wholly erroneous standard for determining the disqualification of a juror under *Witt*, unsupported by any applicable authority.

Moreover, the relevance of the questionnaire and of its absence is not limited to the direct impact of the answers to the trial court's determination of Ms. Dobel's views as disqualifying or not. As shown in Arguments III and IV, *ante*, the actual answers, especially the volunteered answers to open-ended questions, would have shown the inadequacy of the trial court's voir dire, and the extent to which any resulting conflict or ambiguity in Ms. Dobel's answers on voir dire was the result of the inadequate voir dire, rather than ambiguity or equivocation on the part of Ms. Dobel herself, who regularly maintained that she could return the death penalty if she thought it was appropriate.

In Argument III, respondent states that, given the absence of Ms. Dobel's questionnaire, "it is proper to give appellants the benefit of the doubt and assume Dobel's answer [to Question No. 129] was that she would set aside her personal feelings." (RB 188.)

However, respondent's concession does not go far enough. Question

No. 129 did not merely ask a yes/no question. The question also asked prospective jurors to "Please comment," with 4 lines for a written response. (See, e.g., 24 CT 6084.) Respondent elsewhere recognizes the weight to be given "a volunteered answer to an open-ended question," in relation to Question No. 130 (RB 191), yet attempts to ignore the open-ended nature of Question No. 129 by referring to Dobel's answer to that question as merely "the expected response when asked if she would follow the law..." (*Ibid.*)

The actual written, volunteered response by Dobel to Question No. 129 is unknown because of the loss of the questionnaire. However, the record is relatively clear that Dobel did give a written response to that question. The record contains the contemporaneous characterization of her response by LaMarsh's counsel:

> of all the questionnaires, I believe this individual has given a great deal of thought and depth to her responses. . . . I believe this individual stands out in the type of answers that are given, and No. 129 clearly indicates that she passes the *Witherspoon-Witt* questions.

(14 RT 2426-2427.) If this Court is to give appellant the benefit of the doubt about Dobels answer, then it must provide an adequate substitute for the missing volunteered answer, not just "the expected response when asked if she would follow the law."

Appellant submits a more appropriate remedial assumption might be adoption of LaMarsh's counsel's characterization: that Ms. Dobel gave a great deal of thought and depth to her responses, and stood out in the types of answers given and that her answer to Question number 129 clearly indicated that she passed the *Witherspoon-Witt* questions.

Similarly, despite respondent's recognition of the weight to be given to "volunteered answers to open-ended questions," respondent fails to acknowledge that many of the questionnaire answers by Ms. Dobel that are referred to by the trial court, but not quoted, involve "open-ended

questions." In fact, in footnotes purportedly quoting the questionnaire questions to which the trial court referred, respondent regularly omits the portion of the questions which asks for explanation or comment.[30]

As to Dobel's answer to Question 130, that is the only answer actually quoted by the trial court. Even so, due to loss of the questionnaire, it is unknown whether it is a complete quote or merely a portion of Dobel's full answer.

Other than trial counsels' references to Ms. Dobel's questionnaire answers described above, and the trial court's references to some answers without quoting them, this Court has no basis in the record upon which it can reliably assess the extent to which those volunteered answers either supported or undermined the trial court's determination of Ms. Dobel's qualification to serve, the trial court's determination to refuse to question Ms. Dobel further, or the trial court's determination to refuse to allow defense counsel to do so. In terms of a remedial assumption, an assumption that the questionnaire answers merely raised conflicts or ambiguities which were resolved by the trial court, and are therefore to be deferred to by this

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[30] At RB 179, footnote 25, respondent omits, "Explain" from Question 75.

At RB 180, footnote 28, respondent omits, "Please explain or expand on your answer if you wish" from Question 115.

At RB 180, footnote 30, respondent omits, "Please explain" from Question 118.

At RB 180, footnote 31, respondent omits, "If yes, what are those beliefs" from Question 88.

At RB 181, footnote 33, respondent omits, "Please explain" from Question 123.

Even as to Question 130, which the trial court quoted in full as "Is there anything about your present state of mind that you feel any of the attorneys would like to know? If so, please explain" (14 RT 2430), respondent omits "If so, please explain" from footnote 35. (RB 181.)

Court, is not reasonable based upon the record which does exist. Nor does it truly provide a remedy for appellant's loss of a portion of the record which supports the objections of all four defense counsel to the inadequate voir dire by the trial court as well as to the trial court's ultimate determination that Ms. Dobel should be excused.

Moreover, the loss of the questionnaire must be assessed in light of the simultaneous loss of the follow-up questions submitted by all four defense counsel during Ms. Dobel's voir dire, which the trial court refused to ask, without explanation.

Respondent contends that it is "It is inconceivable that appellants had such incredibly insightful follow-up questions that if this Court could just see them, it would realize that the voir dire was inadequate." The fact is, all four defense counsel objected to the trial court's ruling, disputed the trial court's conclusions and submitted follow-up questions presumably designed by counsel to elicit answers which would demonstrate the trial court's misperception of Ms. Dobel's rulings. Some of these questions may have quoted or referred to questionnaire answers, a common voir dire practice. Some of the questions may have been informed by defense counsels' own evaluation of Ms. Dobel's demeanor, which differed from the trial court's evaluation, or led counsel to believe that the trial court had misinterpreted answers given by trial court. Some of the questions may have been focused on apparent misunderstandings of the law underlying certain of Ms. Dobel's answers, such as her answer to Question No. 130.

This Court has neither the proposed questions nor Ms. Dobel's questionnaire to review to support an informed assessment of what specifics all four counsel thought should be explored further, or what specific bases for the proposed questions might have been cited. However, there is no basis for determining that the questions were meaningless, or that they had

no potential for clarifying Ms. Dobel's understanding of the law or whether her general opposition to the death penalty would, in practice, disqualify her as a juror in this case. All four defense counsel unquestionably thought that the submitted questions were necessary to a reasonable and reliable determination of her qualifications. As this Court has observed in a slightly different situation, "[w]e simply do not know how [this] potential juror[] would have responded to appropriate clarifying questions posed to [her] by the trial court." (*People v. Stewart, supra*, 33 Cal.4th at pp. 450-451.)

The facts are that the trial court asked few questions, failed to ask questions about answers clearly based on misunderstanding of the applicable law and procedures, and relied heavily upon one such answer without any questions about it and without correcting the misunderstandings inherent in the answer. Ms. Dobel gave answers which demonstrated her qualification to serve. Defense counsel vehemently objected to the trial court's ruling, asked to voir dire Ms. Dobel, and submitted numerous follow-up questions, which the trial court refused to ask. Through no fault of appellants or trial counsel, none of those follow-up questions were kept as part of the record, and Ms. Dobel's questionnaire was lost and is thus unavailable as part of the record. Defense counsel did what they could to preserve an adequate record to support appellate review of a determination by the trial court which they thought was erroneous. If this Court does not agree that the existing record demonstrates the error sufficiently to reverse the penalty judgment, then appellant has been prejudiced by the absence of a portion of the appellate record necessary to proper resolution of this claim. Reversal is required.

B. Prospective Juror Flores

In both Arguments IV and V of the opening brief, appellant stated that the trial court "did not cite a single answer from Flores's questionnaire

which actually supported its ruling." (AOB 194, 205.) Respondent claims this is not so, that the trial court "made numerous references to Flores' questionnaire answers. (13 RT 2335-2338.)" (RB 224.) However, the references which respondent cites are to questionnaire answers not involving the death penalty, which do not support the trial court's ruling that Flores was not qualified as a capital juror under *Witt*. The trial court's *ruling*, to which appellant referred, appears at 13 RT 2340-2341. In that ruling, the trial court referred to four questionnaire answers, but withdrew the reference to one of them.[31] The remaining answers to which the trial court referred in its ruling were: (1) "her answer to [Question No.] 108[32] she had mixed feelings," (2) "[Question No.] 110[33] she did not feel that the death penalty should be automatic for any particular type of crime," and (3) "the one answer to [Question No.] 115[34] that she would consider the death

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[31] In its ruling, citing answers in the questionnaire, the trial court stated, "No. 123 she answered 'no' to the question 'do you believe the state should impose a death penalty on everyone' -- strike that." (13 RT 2340.)

[32] Question No. 108 on the questionnaire asks,

"What are your GENERAL FEELINGS regarding the death penalty?"

(See, e.g., 29CT:7380.)

[33] Question No. 110 asks:

Do you feel that the death penalty should be automatic for any particular type of crime?

_____Yes _____No

Please explain: _____

[34] Question No. 115 on the questionnaire reads as follows:

> Check the entry which best describes your feeling about the death penalty:
> Would impose whenever had the opportunity _____

(continued...)

penalty." (13 RT 2340.) None of those answers, as reported by the trial court, supported a finding that Ms. Flores was disqualified.

Despite this, respondent argues further that "In its ruling, [the trial court] expressly weighed three questionnaire answers which indicated [Ms. Flores] could not fulfill her duties as a juror against one question that suggested otherwise.[35] (13 RT 2340-2341.)" (RB 224.) As shown above, and in the opening brief, none of the questionnaire answers which the trial court cited supported the ruling, i.e., none of the answers suggested, much less "indicated" that Flores was not qualified. All of those answers supported findings of qualification rather than disqualification.

Having mixed feelings about the death penalty is in no way a disqualifying fact under *Witherspoon* and *Witt*. (See *Stewart*, *supra*, 33 Cal.4th at pp. 446-447; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.) Moreover, not only is the belief that the death penalty should not be automatic for any particular crime not a basis for disqualification under

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[34](...continued)

Strongly support_____
Support____
Will consider____
Oppose_____
Strongly oppose_____
Will never under any circumstance impose death penalty_____
Please explain or expand on your answer if you wish:
_____

(See, e.g., 29CT:7382.)

[35] The one answer cited by the trial court that "suggested otherwise" was Question No. 115:

> All of those answers clearly reflect her feeling, and the Court finds that those feelings and beliefs are not diminished by the one answer to 115 that she would consider the death penalty.

(13 RT 2341.)

Witherspoon and *Witt*, but a contrary answer, that the death penalty should be automatic for any particular crime, would itself be a basis for a finding of disqualification under *Morgan v. Illinois* (1992) 504 U.S. 719.
The questionnaire answers cited by the trial court do not reflect any strong feeling or belief against the death penalty. If those answers did "clearly reflect her feelings," as the trial court stated, then the trial court's conclusion that she was disqualified under *Witherspoon* and *Witt* is contrary to its own findings.

Furthermore, respondent's claim that appellant "failed to 'cite a single answer from Flores's questionnaire which actually supported' their opposition to the trial court's ruling" (RB 224), is simply wrong. In Arguments IV and V, appellant cited the same questionnaire answers as the trial court, i.e., the answers to question Nos. 108, 110 and 115, as supporting appellant's contention that the trial court's ruling was erroneous. (See AOB 193-195.)

Moreover, respondent's complaint that appellant has not sufficiently cited answers from the questionnaire is an unwarranted attempt to exploit the absence of the questionnaire. If the questionnaire were available, appellant could more thoroughly argue the merits of defense counsel's objections to the trial court's excusal of Ms. Flores. Appellant could more thoroughly argue the insufficiency of the trial court's voir dire of Ms. Flores. Had the trial court's voir dire adequately examined Ms. Flores regarding her answers to the questionnaire, appellant would more fully be able to demonstrate her qualifications – that the trial court could not cite a single answer from the questionnaire that indicated disqualification is a strong indication that the answers therein were not disqualifying, and that her answers on voir dire raised questions about her understanding of the questions being asked of her by the trial court and of the import of her

answers.

Respondent attempts to rely both on the absence of an adequate record of the questionnaire answers and on the insufficient voir dire to fault appellant's demonstration of the error in both those regards. Instead, respondent has demonstrated the prejudice to appellant's ability to obtain full and fair review of his claim that Ms. Flores was erroneously excused.

C. Conclusion

A review of the record as a whole, and of the proceedings by which appellant attempted to obtain a complete and adequate record of the trial proceedings in this case, demonstrates that an adequate record cannot be obtained, and that the record certified to this Court is inadequate to provide the full and fair review of the trial proceedings to which appellant is entitled, in violation of appellant's rights to due process and reliability at all stages of a capital prosecution. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15 & 17.)

The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (See *Gray v. Mississippi, supra*, 481 U.S. at pp. 659-667; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart, supra*, 33 Cal.4th at p. 445.) Should this Court reject appellant's claims that prospective jurors Dobel and Flores were erroneously excused (see Arguments III and IV, *ante*), then appellant has been denied a record on appeal sufficient to provide meaningful and reliable appellate review of the trial court's exclusion of those two jurors under *Witherspoon/Witt*. Accordingly, the penalty judgment must be reversed.

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VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM 3510 FINNEY ROAD, APARTMENT 7

In the opening brief, appellant demonstrated that the affidavit supporting the search warrant did not establish probable cause to search appellant's residence, or to seize any of the evidence seized in that search. (AOB, Arg. VI.C.1.) Appellant further demonstrated that the affiant, Detective Deckard, wrongfully omitted from the affidavit information material to the determination of probable cause, and prior to execution of the warrant had obtained additional information which negated any probable cause arguably established by the affidavit. (AOB, Arg. VI.C.2-3.) Finally, appellant demonstrated that the search was not saved by the "good faith" doctrine of *United States v. Leon* (1984) 468 U.S. 897, and that the failure to suppress the evidence seized pursuant to that warrant requires reversal of the judgment in this case. (AOB, Arg. VI.C.4-5, D.)

Respondent argues that the warrant was supported by probable cause, but bases the argument not upon the four corners of the affidavit, but upon misrepresentation of the facts stated in the affidavit, incorporating information which Deckard did not include, and generally could not have included, in the affidavit. Respondent fails to respond in any meaningful way to appellant's demonstration that the affidavit did not establish probable cause that any evidence of the homicides would be found at the residence or that the evidence described in the warrant was evidence of the homicides.

Respondent also argues that the search was conducted in good faith reliance on the search warrant, but relies for that argument upon information not included in the affidavit or the warrant, and thus not

relevant to the good faith doctrine defined by *Leon*.

Respondent finally attempts to excuse the search on the theory that the police could have and would have eventually obtained a valid search warrant for the residence of appellant and his family, and thereby obtained all that was wrongfully obtained in the initial search based on an invalid warrant. Respondent overlooks the fact that the trial court upheld the search of appellant's residence solely on the basis of *Leon* good faith, implicitly rejecting any factual basis for inevitable discovery. Respondent's arguments in support of inevitable discovery are based primarily upon speculation and some misstatement of the record, rather than on any substantial evidence demonstrating that the trial court's implicit factual findings in this regard were erroneous.

A. The Search of No. 7 Violated Appellant's Fourth Amendment Rights, Requiring Suppression of the Evidence Obtained as a Result of the Search

1. The Affidavit Did Not Establish Probable Cause to Search No. 7

Respondent repeatedly misstates or mischaracterizes relevant facts. Rather than limit the analysis of probable cause to "the circumstances set forth in the affidavit before [the magistrate]" (*Illinois v. Gates* (1983) 462 U.S. 213, 238), respondent describes the affidavit in terms which are materially at variance with both the affidavit itself and with the facts known to Detective Deckard at the time he executed the affidavit and the warrant was signed by the magistrate. As a result, respondent's argument, as an analysis of the relevant facts and the applicable law, is even more misleading than the affidavit itself.

Illustrative is the following excerpt of the first paragraph of respondent's Argument VI:

[Detective Deckard] interviewed Alvarez and she said *"Jason"*

> *(LaMarsh)* pointed a gun at her; he was white and had afro-type hair. Two people informed Deckard that *LaMarsh lived* in a group of apartments *at the Camp*. *At the Camp*, Kevin Brasuell told Deckard that *LaMarsh* frequently visited Apartment 7; however, no one was home at the time.

(RB 227 (emphasis added).)

In those 55 quoted words are at least seven separate instances of respondent misstating or mischaracterizing the relevant facts, i.e., the facts stated in the affidavit upon which the warrant was issued.[36]

1. Alvarez never mentioned the name "Jason" or "LaMarsh" to Detective Deckard. There is no evidence that she knew the name of the person who pointed a gun at her. The affidavit says only that she identified the person as "a white male adult, 20 to 25 years of age, 6-0, medium build with brown afro type hair." (42 CT 10739.)
2. Neither of the two informants (Kenneth Tumelson and Frank Raper, Jr.) used the name "LaMarsh" in referring to "Jason." (42 CT 10740.)
3. Nowhere in the affidavit is the name "LaMarsh" mentioned. Nor, as far as can be told from the record, had Detective Deckard learned the name "LaMarsh" in connection with this case prior to obtaining the warrant. Instead, he had only the name "Jason" and an extremely limited description – a 20-25 year old, 6-foot-tall white man with "afro-type" hair. (42 CT 10739-10741.) Nevertheless, respondent parenthetically attaches the name "LaMarsh" to the name "Jason" as if that name is somehow relevant to the probable cause analysis.

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[36] A copy of the affidavit in support of the search warrant is found at 42 CT 10736-10741.

Thereafter, respondent misleadingly refers to "LaMarsh" where the affidavit refers to "Jason," as if the two names were interchangeable in the affidavit and in the circumstances relevant to assessing probable cause.

4. Nobody "informed Deckard that LaMarsh [or anyone else] lived in a group of apartments." According to the affidavit, Tumelson stated that "Jason" "frequented" the residence at which the homicides occurred and "is staying in a group of apartments located across the street from the laundromat on Finney Road." (42 CT 10740.) Raper told Deckard "that Jason is supposed to be staying in a [*sic*] apartment across from the laundromat. . . [and] described the residence where Jason was staying as having a large amount of camo type material draped in front of the residence and is located in the back or the rear of those group of apartments." (42 CT 10740.)

5. Nobody identified the area where Jason "stayed" or "frequented" as "the Camp." The term "the Camp" appears nowhere in the affidavit or in the warrant. It is not used either in relation to Jason's supposed whereabouts or the place to be searched.

6. Nowhere in the affidavit is there any information supporting a reasonable conclusion that the premises identified as Apartment 7 by Brasuell were the premises described by those two informants. Apartment 7 is not described in any way that correlates in any meaningful way to the description given by the informants. While there is reference in the affidavit to "a large amount of camo type material draped in

front of the residence," that is the *only* similarity between the description given by the informants and the description of Apartment 7 given by Deckard in the affidavit. There is no statement in the affidavit regarding Apartment 7's proximity to a laundromat, although both informants' primary description of the location where "Jason" was "supposedly staying" was that it was "across from the laundromat." Only one of them said the laundromat was on Finney Road. (42 CT 10740-10741.)

Yet respondent misleadingly links the description of the informants and the site upon which Deckard focused as "the Camp" in an apparent attempt to disguise the lack of information providing such a link in the affidavit.

7. According to the affidavit, Brasuell never used the name "Jason," let alone "LaMarsh" and claimed not to know the name of the "white male with a brown afro type hair" who frequented "Jerald's" residence. (42CT 10741.) In the opening brief, appellant demonstrated that the information obtained by Deckard from informants Tumelson and Raper, Jr. was not connected in the affidavit with the information Deckard obtained from Brasuell in any way sufficient to establish probable cause that the "Jason" described by Tumelson and Raper, Jr. was the same person, or even connected with, the "white male with a brown afro type hair" described by Brasuell.

The affidavit contained various bits of information, some of which "matched" other bits of information, but none of which supported a logical conclusion that Apartment No. 7 was a site connected to the "white male

adult, 20-25 years of age, 6-0 medium build with brown afro type hair" described by Donna Alvarez as having confronted her with a handgun at the scene of the homicides.

Respondent's only response is argument by misrepresentation of the facts. Beyond the misrepresentations cited above, respondent describes Tumelson's information as "someone fitting that description [white male with afro-style hair] was named 'Jason,' had visited the crime scene before, and lived at the Camp." (RB 245.) Tumelson described "Jason" as someone who "does frequent" the residence where the homicides occurred. (42CT 10740.) Tumelson never used the term "the Camp," at least according to the affidavit. (*Ibid.*) Thus, respondent attempts to obscure the fact that "Jason," according to the affidavit, "frequented" both the scene of the crime and the residence of "Jerald" at 4510 Finney Road, No. 7. As pointed out in the opening brief, even assuming arguendo that Tumelson's "Jason" and Brasuell's "white male with a brown afro style hair" are the same person, that he was known to frequent two different locations dilutes any inference to be drawn from his frequenting either one, substantially limiting any inference to be drawn concerning his connection to No. 7. (AOB 229-232.)

Furthermore, respondent's characterization of Tumelson's information as describing "Jason" as "liv[ing] at the Camp," blatantly misstates the actual contents of the affidavit, in which the term "the Camp" was never used, but in which there is no link between Tumelson's actual description of where "Jason" is staying and the address on Finney Road which Deckard sought to search.

Similarly, respondent misstates and mischaracterizes the information Deckard included in the affidavit as having been given him by Raper, Jr.: "Frank told Deckard that Raper had told him of troubles with Jason, and

that Jason lived in a unit with camouflage material over the entrance." (RB 245.) In fact, according to the affidavit, Raper, Jr. did not tell Deckard where "Jason" lived. He only told him where "Jason" "is *supposed to be* staying." (42 CT 10740 (emphasis added).) Respondent fails to respond to appellant's argument that Raper, Jr.'s information in this regard is not shown to be reliable, or based upon personal knowledge. (See AOB 228-230.)

Moreover, respondent fails to explain why the additional information about the place where "Jason" was "supposed to be staying" other than the camouflage material was not shown in the affidavit to correspond to the site which Deckard sought to search. Respondent doesn't argue directly that the mere presence of camouflage material in front of Apartment No. 7 established that site as the place described by Raper, Jr. Yet respondent does not point to any other basis in the affidavit for concluding that Deckard had properly identified the location described.

As demonstrated in the opening brief, the affidavit did not establish probable cause to search appellant's home. By explicitly restricting the basis for upholding the search to the good faith doctrine of *Leon* (2 RT 347), the trial court concluded as much. Respondent's attempts to salvage the affidavit are without merit.

2. The Affidavit Did Not Contain Sufficient Information to Demonstrate a Reasonable Probability That There Was Any Evidence of the Homicides Located at Appellant's Residence

Respondent argues that because evidence suggested "LaMarsh" had participated in the murders a few hours earlier, the magistrate could reasonably "conclude that there was a fair probability that evidence of the crimes would be found in Apartment 7." (RB 246.) Respondent bases this on the information that "Jason" "frequented" Apartment 7, which Deckard

interpreted (but did not explain in the affidavit) as meaning "he must have visited there very often." (RB 246.) Even assuming arguendo that a nexus had been established between 4510 Finney Road (the site of appellant's apartment, of the two trailers, of Brasuell's apartment[37]) and "Jason's" involvement in the crimes at 5223 Elm Street, Deckard had, or chose to provide the magistrate, too little information about the circumstances of what occurred at 5223 Elm Street to conclude that there would be any evidence of those crimes at any of the residences at 4510 Finney Road.

Respondent claims that "[t]he fact was that LaMarsh lived in several places, and it was reasonable for Deckard to believe that LaMarsh spent at least as much time at Apartment 7 as anywhere else." (RT 246.) Respondent provides no authority for this assertion, which in any case provides no support for respondent's primary contention. It is not Deckard's belief that is the relevant question. Rather the question is whether the information Deckard put into the affidavit established probable cause. Respondent's reliance on Deckard's beliefs misses the point.

Moreover, if LaMarsh lived in several places, the likelihood that evidence of the crimes would be located in any one of them was consequently smaller. There was no reasonable basis in the affidavit for a conclusion that "Jason" "spent at least as much time at Apartment 7 as anywhere else." Deckard had not done sufficient investigation to have any reasonable belief about where LaMarsh spent time, where he stayed, where he lived or how much time he spent doing what kind of activities at each of those "several" places.

Respondent claims that "it is elementary that evidence of a crime is

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[37] That there were other units at 4510 Finney Road as well as these four was established elsewhere in the record.

often found where a person resides or spends a great deal of time." (RB 247.) Assuming arguendo that evidence of *some* types of crime are often found where the perpetrator *resides*, the likelihood that evidence of *any* crime would be found where the perpetrator merely *"spends a good deal of time"* is so dependent upon circumstances that respondent's contention amounts to useless exaggeration. Respondent cites no case authority for the claim. Detective Deckard made no such assertion, as a supposed expert or otherwise, in the affidavit. (42 CT 10736-10741.) Whether facts in another case might support such an inference, the facts in the affidavit in this case do not support a conclusion that evidence of the specific crimes which occurred at 5223 Elm Street would be found anywhere at 4510 Finney Road, much less at appellant's studio apartment at that location. Moreover, respondent wholly fails to respond to or even address the contrary authority cited by appellant in the opening brief. (See AOB 237-239.)

Respondent argues that, "at 5:30 on the morning of the killings, after talking to three people who associated LaMarsh with the Camp, Deckard had enough information to honestly represent to the magistrate that LaMarsh spent enough time at Apartment 7 to believe that evidence would be found there." (RB 247.) This argument repeats one of the basic flaws in respondent's argument: Deckard did not talk to anyone who associated LaMarsh with the Camp. He talked to two people who associated "Jason" with a group of apartments across from a laundromat, and he talked to another who said a guy with curly brown hair frequented "Jerald's" apartment, No. 7. Nowhere in the affidavit does the name LaMarsh appear, and nowhere in the affidavit does the term, "the Camp," appear. In fact, Deckard had no information warranting anything other than further investigation, which investigation he failed to conduct prior to seeking a warrant to invade the home of appellant, his wife and their children.

Respondent argues that "It was reasonable to infer that LaMarsh had spent a great deal of time in the apartment because his trailer was small, it did not have a bathroom or its own electricity, and Brasuell said that the residents all lived together." (RB 247.) However, none of that information was provided to the magistrate in the affidavit. It is wholly irrelevant to the legitimacy of the warrant or of Deckard's good faith or lack thereof.

Similarly, respondent argues that "it was likely that the crime was planned or staged from that location, since it was just a few blocks away from the crime scene . . . ." (RB 247.) Again, the proximity, or lack thereof, of 4510 Finney Road to 5223 Elm Street is not described anywhere in the affidavit. Nor is there any information in the affidavit that remotely supports a conclusion that the crimes were "planned or staged" anywhere, or that anything related to the crimes occurred anywhere else than at 5223 Elm Street. Not even Detective Deckard made the argument respondent makes here.

3. The Affidavit Did Not Contain Sufficient Information to Demonstrate a Reasonable Probability That the Property Identified in the Search Warrant as Subject to Seizure Constituted Evidence of the Homicides

Concerning the warrant's description of the items to be seized, appellant demonstrated in the opening brief that the description appears to have been taken as a whole from another warrant in another case relating to a different crime. There is no information in the affidavit supporting the conclusion that the items would be found in appellant's residence or, if found, would be evidence of the crimes being investigated. (AOB 235-240.) Respondent's only defense of the erroneous description is an argument that "it is not uncommon to issue a search warrant based on little more than the identity of a perpetrator and an educated guess about the

property to be seized." (RB 246.) Respondent fails to provide any authority for this remarkable proposition. Nor is there any response to the showing made in the opening brief that the description of the items to be seized had little or nothing to do with the circumstances of the crimes known to Detective Deckard at the time he submitted the affidavit to the magistrate, or as described in the affidavit upon which the warrant was based. (AOB 235-240.)

Respondent asserts that there is not anything "inherently suspect about using boilerplate language over and over again in similar circumstances." (RB 246-247.) But the language describing the evidence to be seized pursuant to the warrant was not boilerplate, nor were the circumstances of whatever investigation that language was lifted from similar to the circumstances of the crimes which occurred at 5223 Elm Street.

As to evidence of "dominion and control," it is true that where a warrant establishes probable cause to believe that evidence of a crime can be located at a specific location, additional seizure of evidence of dominion and control of that location may be included with that warrant to connect the evidence of the crime seized with the person or persons who have possessed or had control of the evidence. Respondent overlooks the point that, first, there must be probable cause to search the location for evidence of the crime. Respondent cites no case which authorizes search for evidence of dominion and control of premises for which no separate probable cause to search exists. This is not surprising, for there is none.

The warrant here describes property to be seized as evidence of the crimes without any showing in the affidavit that such property would be expected to exist – anywhere – as evidence of the crime. The affidavit gave no reason why any of that property would be expected to exist in the

perpetrator's residence, or where he stayed, or where he visited. Nor did the affidavit give any reason why it would be in appellant's residence. The warrant amounted to a general warrant, issued without probable cause. That the warrant also authorized the search for and seizure of evidence of dominion and control of the premises did not save the warrant; it merely extended the general nature of the unconstitutional search it authorized.

None of respondent's arguments in this regard address the argument and authorities presented by appellant in the opening brief, nor are contrary authorities provided by respondent. The warrant was defective on its face, authorizing an invasion of appellant's family's home without probable cause to believe that any evidence of the crimes at 5223 Elm Street could be found there. No reasonably trained police officer could have believed that the affidavit established probable cause for the search authorized by the warrant. The search was unlawful, and Detective Deckard did not act in good faith in searching appellant's home based on that warrant.

4. Detective Deckard Omitted Material Information from the Warrant

Appellant demonstrated in the opening brief that prior to preparing the affidavit, Deckard had additional information which undercut his claim of probable cause to search No. 7, but which he deliberately, or with reckless disregard for the truth, withheld from the affidavit and from the magistrate. The additional information undercut any conclusion that "Jason" lived in No. 7. Deckard had been told that "Jason" did not live in No. 7, but in the small trailer nearby. He knew that appellant and Starn and their children lived in the small studio apartment. Deckard also knew that the two trailers near No. 7 were used as residences, and that each of the three residences was separately locked, demonstrating the separate nature of each for purposes of probable cause to search. Appellant demonstrated that

it was not reasonable for Deckard, a well-trained and experienced detective, according to the affidavit, to omit these facts from the affidavit. Furthermore, appellant demonstrated that based on the facts known to him, Deckard was obligated to exclude No. 7 from the scope of the requested warrant, and that his failure to submit an accurate and truthful affidavit demonstrated, at the least, reckless disregard for the truth of the affidavit. (AOB 239-249.)

Respondent defends Deckard's omissions by claiming that he "never based his application for the search warrant on the fact that LaMarsh "lived in No. 7." (RB 248.) "According to Deckard's affidavit, Tumelson said that LaMarsh 'stayed' at the Camp; Frank [*sic*] said that LaMarsh 'stayed' at the residence with the camouflage material in front; and Brasuell said that LaMarsh 'frequented' Apartment 7, but 'Jerald' 'resided' there. . . . The detective's choice of words made a clear distinction between LaMarsh visiting the apartment and Cruz living there." (RB 248-249.)

The first reply to this rather disingenuous argument is that it again misstates the relevant language of the affidavit. The name "LaMarsh" was never used in the affidavit. The term "the Camp" was never used in the affidavit. Nor, according to the evidence at the suppression hearing, was the name "LaMarsh" or the term "the Camp" used by any of the informants in their statements to Deckard before he prepared the affidavit or obtained the warrant. Respondent's repeated misstatement of the evidence in this manner is an apparent attempt to bolster the extremely limited knowledge that Deckard had. Moreover, as demonstrated in the opening brief and above, there is no showing in the affidavit justifying either the conclusion that the "white male with a brown afro type hair" referred to by Brasuell is the same "Jason" as described Tumelson and Raper, Jr. Nor is there a showing in the affidavit justifying the conclusion that "the Camp" is the

"group of apartments" described by Tumelson and Raper, Jr.

The second reply is that if "Jason" did not live in No. 7, there was no probable cause to believe that any evidence of the crimes would be found therein. In fact, the thrust of Deckard's affidavit was to suggest that "Jason" did live in No. 7, despite Deckard's knowledge to the contrary.

Respondent also claims that Detective Deckard did not learn that Cruz and Starn's children lived in Apartment 7 until he returned to Finney Road with the warrant. (RB 249.) Respondent does not contest the fact that Deckard knew before submitting the affidavit to the magistrate that "Gerald and his wife" lived in Apartment 7 (2 RT 192), and that no mention of a second occupant of Apartment 7 apart from "Jerald" was made in the affidavit. However, whether the fact omitted by Deckard was the mention (1) that there was a married couple living in the tiny studio or (2) that a family of four lived there, the materiality of that information to the magistrate's determination of probable cause is substantially the same.

However, respondent is correct that the record is not clear that Brasuell had told Detective Deckard about the two children before Deckard went to seek a warrant. If, as respondent contends, Deckard did not know that the couple's two children also lived in the tiny studio apartment, that void in Deckard's knowledge of the relevant facts is due primarily, if not exclusively, to his own wilful ignorance, i.e., his minimal and wholly inadequate investigation of the residence he sought to invade. He had only to ask Brasuell whether anyone else lived in the studio with "Gerald and his wife." (Cf. *Maryland v. Garrison* (1987) 480 U.S. 79, 85-87, fn. 10; *Figert v. State* (Ind. 1997) 686 N.E.2d 827, 829-830.) His representations in the affidavit can only be described as having been given in reckless disregard for their truth.

Respondent also argues that the fact that appellant's home had an

apartment number, as well as two references in the affidavit to the unit "as being located in 'a group of apartments'" made it clear that it was surrounded by other residences. (RB 249.) The two references to the "group of apartments," however, are at 42 CT 10740, in the descriptions given by Tumelson and Raper. Tumelson said "Jason" was staying in a group of apartments. Raper said the residence where Jason was supposedly staying was "located in the back or the rear of those group [*sic*] of apartments." As made clear above, there is nothing in the affidavit which indicates that Apartment 7 matches the descriptions given by Tumelson and Raper. There is no mention of a laundromat – the common reference point given by both informants. There are no references thereafter in the affidavit even remotely suggesting that there are residential trailers or other occupied units in proximity to Apartment 7. (42 CT 10741.) Detective Deckard omitted from the affidavit a large amount of the information upon which respondent now seeks to rely. Had he provided all the relevant information which he had, he would have had to exclude appellant's home from the scope of the warrant. As demonstrated in the opening brief, his failure to do so was done with, at the least, a reckless disregard for the truth, undercutting both the validity of the warrant and any basis for finding that he acted in good faith in executing the warrant. (AOB 239-247.)

5. Prior to Execution of the Warrant, Detective Deckard Obtained Additional Information Which Negated Probable Cause to Search 4510 Finney, No. 7.

Appellant demonstrated that after obtaining the warrant, but before executing it, Deckard had additional information which eliminated any probable cause to search No. 7 that might arguably have existed before that. As demonstrated by *Maryland v. Garrison* (1987) 480 U.S. 79, by the time the search warrant was executed, Deckard was obligated to exclude No. 7

from the search.

Respondent cites a preliminary ruling by the trial court that the additional information Deckard obtained did not remove from cause to search No.7, but only added probable cause to search the small trailer. (RB 254.) However, in its final ruling, the trial court rejected that preliminary ruling, upholding the search only under the good-faith doctrine of *United States v. Leon* (1984) 468 U.S. 897, thus rejecting respondent's theory that probable cause still existed to search No. 7.

6. The Search of 4510 Finney, No. 7, Cannot Be Upheld as a Good Faith Search under *United States v. Leon*

Relying on the rebuttable presumption that an officer who obtains a warrant is acting in good faith, respondent contends that "the primary reason this Court should presume that Deckard acted in good faith is because he obtained a warrant. (See *People v. Von Villas* (1992) 11 Cal.app.4th 175, 218.)" (RB 252.)

Respondent further relies on the prior argument that Deckard did not mislead the magistrate, that he acknowledged in the affidavit that Cruz lived in Apartment 7 and said only that LaMarsh "stayed" or "frequented" the aparment, and that, therefore Deckard did not know his affidavit was false, nor was the affidavit, in fact, false. (RB 252-253.) Appellant has demonstrated otherwise.

Respondent also sets forth a variety of information which Deckard did not put in the affidavit or otherwise present to a magistrate, yet which respondent claims demonstrates Deckard acted in good faith in relying on the warrant. (RB 253-254.) However, what Deckard might have known but did not present to the magistrate in the affidavit is irrelevant.

> *Leon* does not extend, however, to allow the consideration of facts known only to an officer and not presented to a magistrate. The *Leon*

> test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. *Leon*, 468 U.S. at 923, 104 S.Ct. at 3421. An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge. "[R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.' " *Leon*, 468 U.S. at 915, 104 S.Ct. at 3416 (quoting *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)).

(*United States v. Hove* (9th Cir. 1988) 848 F.2d 137, 140.)

7. The Evidence from the Search Was Not Admissible under the Doctrine of Inevitable Discovery

Respondent contends that the search of Apartment 7 and the seizures therefrom would inevitably have occurred lawfully even had Detective Deckard complied with the Constitution and refrained from searching appellant's family residence based upon the warrant. Respondent relies in part upon the fact that appellant had been arrested and taken away before Deckard returned to Finney Road with the warrant. (RB 256-257.) Fatal to respondent's argument is the fact that there is no evidence in the record as to why appellant was arrested at that time.[38]

Respondent argues that appellant

> would have come under immediate suspicion because he lived in the apartment originally attributed to LaMarsh. No doubt, the officers would have also recognized that Cruz fit the description of one of the suspects as a heavyset white male (2 RT 299, 304.) At that point, it was inevitable that the officers would obtain a warrant to search Apartment 7 based on Cruz's residency.

(RB 257.) Respondent further argues that Detective Deckard "would have easily obtained a new warrant based on the proximity and dependence of

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[38] Respondent speculates that the arrest may have been on a bomb charge, but fails to note that the bomb charge was apparently a result of the search, not a precursor to it. (See 2 RT 355 .)

LaMarsh's residence on the apartment, as well as the apartment's connection to Cruz, himself. [] Because Apartment 7 was secured and Cruz was in custody, this Court should find the evidence was properly admitted under the inevitable discovery doctrine." (RB 257.)

While Apartment 7 was secured prior to the search under the invalid warrant, and appellant was in custody for unknown reasons, neither of those circumstances were permanent or indefinite, nor was the duration of either circumstance solely within the control of Detective Deckard or any other government agent. Whether Detective Deckard would have developed information which would legitimately have provided probable cause to believe that appellant was a suspect in the homicides under investigation or that seizable evidence relating to those homicides was at some point present in Apartment 7, it is by no means clear when that information would have been developed or what other circumstances relevant to any search or seizure might then pertain. Nor was it inevitable that without the illegal searches conducted pursuant to the invalid warrant of Apartment 7 the investigation of the homicides would have focused on appellant, or upon Apartment 7 once its independence from LaMarsh was established.

Respondent also cites a "ruling" by the trial court "that information that LaMarsh slept in the small trailer would have provided cause to search small trailer, but would not have diminished probable cause to search Apartment 7." Respondent cites 2 RT 326-328 and 347 as the source of this "ruling." However, the former transcript citation is to a *preliminary* ruling by the trial court which was abandoned by the trial court in its ultimate ruling, which upheld the search of Apartment 7 only under the good faith doctrine of *United States v. Leon*, not under any finding that the warrant itself justified the search. (See 2 RT 347; AOB 217.)

B. Prejudice

Respondent's argument that suppression of the evidence would have had no effect upon the jury's eventual verdicts boils down to the argument that "none of the challenged evidence was particularly important to the prosecution. It either corroborated or repeated tangential evidence." (RB 259.) Appellant has shown otherwise in the opening brief. (AOB 252-255.) Moroever, respondent has continued the prosecution's reliance on the results of the search, emphasizing that no paintball masks were found during the search of appellant's home. (See, e.g., RB 121 ["Two of Cruz's masks were found at the murder scene and he could not explain what happened to the four he owned."], 126, 272 ["Cruz admitted he had purchased four camouflage masks; two masks were found at the murder scene; and Cruz could not explain why none of his camouflage masks could be found at this house."] .) Even in this appeal, respondent has relied on the evidence of the firearms and other weapons obtained as a result of the search. (See, e.g., RB 130, 531.) Respondent also continues the unreasonable argument that evidence of firearms,[39] knives and other weapons not used in the homicides were not prejudicial in this trial. Appellant has demonstrated the unreasonableness of that position.

Respondent's claim that none of the evidence seized was important should be rejected. (*People v. Cruz* (1964) 61 Cal.2d 861, 868: "[t]here is no reason why we should treat this evidence as any less 'crucial' than the prosecutor - and so presumably the jury - treated it;" see also *People v. Woodard* (1979) 23 Cal.3d 329, 341; reversal ordered where the prosecutor "exploited" erroneously admitted evidence during his closing argument.)

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[39] Including the photos of the firearms, Exhibits 6 and 7, taken during the search.

C. Conclusion

The affidavit submitted to the magistrate by Deckard failed to state facts sufficient to establish probable cause to search appellant's residence, and was materially misleading due to omissions and misstatements of material information in the affidavit. Based upon the lack of probable cause to search No. 7, the material omissions and misstatements and additional information known to Deckard prior to execution of the warrant, Deckard could not reasonably rely on the warrant to justify the search conducted of appellant's residence. The trial court's ruling upholding the search of No. 7 as based upon reasonable reliance on the search warrant was error. Nor can it be upheld under a theory of inevitable discovery. Because the state cannot establish beyond a reasonable doubt that the error did not contribute to the verdicts against appellant, the entire judgment must be reversed. (*Chapman v. California*, *supra*, 386 U.S. 18.)

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VII

APPELLANT'S CONVICTION OF CONSPIRACY TO COMMIT MURDER AND THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE MUST BE REVERSED DUE TO ERRONEOUS INSTRUCTIONS

In the opening brief, appellant demonstrated that the instructions given to the jury at the guilt phase erroneously allowed the jury to find appellant guilty of conspiracy to commit murder in Count V without a finding of express malice or an intent to kill (AOB 257-263), as well as to find the multiple murder special circumstance true on a vicarious liability theory without finding of an intent to kill (AOB 259-261, 264-267). Appellant further demonstrated that the erroneous instructions require reversal of both the conviction of conspiracy to commit murder and the finding of the multiple murder special circumstance. (AOB 262-263, 265-267.)

Respondent concedes the instructional error as to Count V, but attempts to preserve the conviction on that count by arguing the error was harmless. (RB 260-275.) Respondent contends that there was no instructional error concerning the special circumstance finding, that appellant forfeited any claim of error as to the special circumstance instruction, and that any error in that instruction was harmless. (RB 260-261, 276-286.)

Respondent's analysis of the prejudice from the conceded error in the conspiracy instructions is flawed in numerous ways, and fails to establish that the conceded error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Neder v. United States* (1999) 527 U.S. 1.)

Respondent's denials of any error in the special circumstance instructions are flawed, as demonstrated by this Court's analysis of a

similarly flawed instruction in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 180-185. Respondent's arguments that any error in the special circumstance instruction was invited or otherwise forfeited or waived are without merit and frivolous. Respondent's alternative argument, that any error in the special circumstance instruction was harmless, repeats, and thus suffers from the same flaws as, the futile arguments for harmlessness made as to the instructional error regarding Count V.

A. The Instructions, Which Allowed Conviction of Conspiracy to Commit Murder Based upon Implied Malice Were Erroneous, and Require Reversal of the Conviction on Count V

As stated above, respondent concedes that the instructions allowed conviction of conspiracy to commit murder based upon implied, rather than express, malice, and that this was error under *People v. Swain* (1996) 12 Cal.4th 593 (*Swain*). (RB 260-263.) Respondent also acknowledges that the conceded instructional error requires application of the *Chapman* standard for constitutional error. (*Chapman v. California, supra*, 386 U.S. at p. 24; *Neder v. United States, supra,* 527 U.S. at p. 19; RB 263, 268, 275.) Nevertheless, respondent argues that the error was harmless.

Respondent's argument that the error was harmless proceeds from an unstated assumption that the jury's verdicts resulted from *proper* instructions. As such, respondent's argument thoroughly misses the point of the error and of the analysis of prejudice under *Chapman* and *Neder*.

More specifically, respondent argues that "it simply does not make sense that the jury found appellants guilty of conspiring to commit murder, but did not think they harbored an intent to kill." (RB 263.) However, that argument relies on an interpretation of the term "murder" which presupposes only express malice, without consideration that the instructions permitted the jury to return a verdict based upon a finding of conspiracy to

commit second degree murder with implied malice – a legally impermissible basis for conviction under *Swain*.

Respondent simply ignores the explicit error in the instructions and repeatedly argues that the jury must have found express malice because they found conspiracy to commit "murder." Other than the concession of error, respondent does not acknowledge the nature of the error, or that the jurors could return the verdict they did without finding express malice.

Respondent appears to suggest that, after *Swain*, it is now clear that conspiracy to commit "murder" means conspiracy to commit "first degree murder," and that therefore, appellant's jury's verdict of conspiracy to commit murder must mean that they found appellant guilty of conspiracy to commit first degree murder. This makes no sense. Appellant's trial preceded *Swain* by four years, and the verdicts in this case must be interpreted in light of the instructions upon which it was based. Those instructions, as those given in *Swain,* were erroneous because conspiracy to commit murder required a jury finding of express malice/intent to kill." (12 Cal.4th at p. 599.) And because an instructional error allowing conviction on a legally invalid theory requires reversal if the record does not clearly establish the conviction was based on a valid ground (*People v. Guiton* (1993) 4 Cal.4th 116, 1128-1130), as in *Swain*, reversal of appellant's conviction on Count V is required.

Moreover, the instructions here not only allowed for a conviction of conspiracy to commit murder without a finding of express malice or intent to kill, but specifically told the jury that "[i]n the crime of . . . conspiracy to commit second degree murder, the necessary mental state is malice aforethought" (8 CT 1938), and that malice could be "either express or implied." (8 CT 1896.) The instructional error was not simply an ambiguity in the instructions which the jurors might misinterpret. The

instructions clearly set forth for the jury a legally incorrect theory of guilt which omitted a necessary element, i.e., intent to kill. Thus, the instructions erroneously, but clearly, informed the jury that they could return a conviction of conspiracy to commit murder based upon a theory of conspiracy to commit second degree murder based on implied malice. Respondent's refusal to acknowledge the possibility that the jury returned its verdict on Count V based upon that legally incorrect theory cannot be squared with the instructions themselves.

"The conceptual difficulty arises when the target offense of murder is founded on a theory of implied malice, which requires no intent to kill." (*Swain*, *supra*, 12 Cal.4th at p. 602.) None of respondent's theories about how the jury *must* have found an intent to kill resolve that conceptual difficulty here, or cure the error in the instructions. Referring to the findings of "murder" without acknowledging that those findings could be based upon the very instructional error at issue here, i.e., upon implied rather than express malice, simply ignores the error without adding anything real to the analysis of prejudice under the *Chapman* standard.

Swain itself acknowledged that "under the instructions given [in *Swain*] the jury could have based its verdicts finding defendant guilty of conspiracy to commit murder in the second degree on a theory of implied malice murder." (*Swain*, *supra,* 12 Cal.4th at p. 602.) Respondent does not, because she cannot, attempt to identify or explain any distinction between the instructions, the verdicts or the evidence in *Swain*, and the instructions, the verdicts or the evidence in this case. Thus, as in *Swain*, the erroneous instructions here require reversal of the conspiracy conviction.

Respondent, however, bases opposition to that conclusion on an unsupported contention, repeated in various ways that "simple logic dictates that the jury could not have found that appellants conspired to commit

murder without intending to kill." (RB 275.) That a reasonable jury *could* so find is demonstrated quite clearly in *Swain* and *People v. Alexander* (1983) 140 Cal.App 647, which recognized the crime of conspiracy to commit second degree murder on an implied malice theory:

> In other words, [the jury] could have determined the participants conspired to launch a vicious attack upon white and Mexican inmates and that they acted with wanton disregard of the probability that deaths would occur as the result of the initial attacks themselves or of the racial riot which they would inevitably spark.

(140 Cal.App at pp. 665-666.) Similarly, the jury here, under the instructions given and the evidence presented, could have determined that the defendants "conspired to launch a vicious attack" on Raper and his cohorts "with wanton disregard of the probability that deaths would occur as a result of the initial attacks themselves or of [the melee that attack] would inevitably spark." Respondent offers no explanation of how the instructions preclude such a finding, or how the verdicts are inconsistent with such a finding.[40]

Rather, the instructions the jury was given here allowed for such a verdict based upon the evidence before it. The instructions were based upon an erroneous understanding of the applicable law, and thereby allowed a verdict which is incompatible with the applicable law. Respondent refuses to acknowledge that the verdict of conspiracy to commit murder here cannot itself be evidence that the instructional error was harmless since

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[40] *Swain* rejected *Alexander*'s legal conclusion that a crime of conspiracy to commit murder can be based upon implied malice murder. (12 Cal.4th at p. 605) However, even though *Alexander* is no longer good law as to that legal conclusion, the opinion still serves as a demonstration of the reasoning by which an erroneously instructed jury could reasonably return a verdict of conspiracy to commit murder based upon implied malice murder, as does *Swain* itself.

that verdict itself is based on the flawed instructions.

Respondent repeats the same flawed analysis in different guises. For example, respondent identifies the target crime as "murder" and then argues that "murder" necessarily requires express malice or intent to kill. (RB 265-266.) As shown above, this analysis simply ignores the fact that the instructions given to the jury erroneously told the jury something else. Respondent's argument ignores the error rather than establishing its harmlessness.

In another version of the same argument respondent argues that if appellant was found guilty of any of the murders under the "natural and probable consequences" doctrine, the conspiracy had to be predicated on an original intent to commit murder. (RB 265-266.) Again, respondent attempts to analyze the effect of the error by ignoring it. The instructions allowed appellant to be found guilty of conspiracy to commit murder without a finding of intent to kill, and further allowed him to be found guilty of first degree murder as to any and all of the homicides as a co-conspirator or aider and abettor under the "natural and probable consequences doctrine" without sharing an actual intent to kill with the actual co-conspirator killer. (See AOB 261-263.) The error arises from this problem; it is not resolved by it.

A juror finding appellant guilty of conspiracy to commit murder based upon a theory of second degree implied-malice murder[41] under the

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[41] Here, as in *Swain*, the verdicts were general, and the reasoning of the jurors cannot be discerned from them. For this reason, the verdict on Count V must be reversed, as was the conviction in *Swain*. (See also, *People v. Guiton*, *supra*, 4 Cal.4th at pp. 1128-1130.) Here, moreover, there was no need under the instructions for unanimity in the jurors reasoning or theory of culpability in this regard, limiting further any

(continued...)

instructions given here, would not have been required to find that he had an intent to kill. That theory would also have been compatible with conviction of appellant for first-degree murder if another co-conspirator committed first-degree premeditated murder as a natural and probable consequence of the conspiracy, even where appellant had no prior knowledge or shared intent as to that premeditated murder. Similarly with aiding and abetting; liability under the "natural and probable consequences doctrine" does not require the aider and abettor to share the actual intent to kill of the actual killer. (*People. v. Williams* (1997) 16 Cal.4th 635, 691.)

Respondent acknowledges as much, but argues that *People v. Williams* is distinguishable because the trial court there did not identify the target offense, whereas in appellant's trial, the trial court identified the target offense as murder. (RB 266-267.) Respondent thus identifies and relies upon a distinction which makes not a whit of difference to the analysis of the error in this case. Identifying the target offense of aiding and abetting as "murder" did not cure the error; murder as a target offense of aiding and abetting liability was still defined for this jury as including either express or implied malice. The same instructions erroneously defining "murder" as applied to the conspiracy count similarly defined "murder" as a target offense for vicarious liability as either a co-conspirator or an aider-and-abettor. (See AOB 257-261.) Thus, the target offense of "murder" for vicarious liability, whether as co-conspirator or aider-and-abettor, included second degree, implied-malice murder.

Respondent also argues that the four verdicts of first degree murder necessarily required finding of express malice, premeditation and

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[41](...continued)
possibility that any single interpretation of their verdicts can be determined.

deliberation and therefore reflect a necessary finding of the same state of mind in entering into the conspiracy. (RB 264.) The argument has multiple flaws. The argument ignores the multiple theories of vicarious liability that the instructions included, upon which the prosecutor relied heavily in argument to the jury (see 36 RT 6531-6532; 37 RT 6729-6730, 6745), and which did not require findings of express malice, let alone premeditation and deliberation. Respondent's argument also ignores the general nature of the jury's verdicts, which contain no finding by the jury that any specific defendant was the actual killer of any specific victim.

That the jurors in appellant's trial relied on theories of vicarious liability was not only possible, but reasonably likely in this case. The evidence did not conclusively establish that any specific defendant killed or intended to kill any particular victim; rather, the evidence in that regard was conflicting. For example, appellant testified that he did not kill anyone; the prosecution theory was that he killed Ritchey; Willey testified Beck killed Ritchey; LaMarsh testified Cruz killed Raper; the prosecution theory was that LaMarsh killed Raper; no evidence suggested Cruz killed either Paris or Colwell, but rather that either Beck or Vieira killed one or both, or even that Evans killed one of them.[42]

No doubt because of the conflicting evidence as to who the actual killer of any victim was, the prosecution argued to the jury that

> [The defense is] scared to death of that conspiracy, see. Why? *Because I don't have to tell you, prove to you, or care less about who*

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[42] See, e.g., the testimony of Michelle Mercer (26 RT 4531-4533, 4551-4552, 4554-4557) and Sheri Trammel (24 RT4301-4302), concerning admissions of Evans in this regard, as well as appellant's testimony that he saw Evans in the kitchen of the Elm Street house during the fighting there, at a time during which Evans claimed to have already left the house. (29 RT 5103-5104; 30 RT 5187, 5230.)

> *killed who*. They're all liable together equally for all of the murders, regardless of who put a knife in who or who crushed whose skull, as co-conspirators or as aiders and abettors, under either one of those theories.
>
> Mr. Cruz is liable for the murder of Mr. Ritchey, he's liable for the murder of Mr. Raper, Miss Paris, Mr. Colwell. Mr. Beck is liable for the murder of Mr. Ritchey, Mr. Raper, Mr. Colwell, and Miss Paris. Mr. LaMarsh is liable for the murder of Colwell, Raper, Ritchey, and Paris. Mr. Willey's liable for the murder of Mr. Ritchey, Mr. Raper, Miss Paris, and Mr. Colwell. Each and every one of them singly and jointly. That's why they're scared to death of that conspiracy charge.

(37 RT 6729-6730 (emphasis added).) No instruction required jury unanimity on the question of any defendant's liability as actual killer of a specific victim versus his liability vicariously. The verdicts are thus consistent with a variety of theories of liability, none commanding a majority of the jury's votes, as well as with acceptance of the prosecution's argument that the theory did not matter.

The jury was not required by the instructions or the verdicts to decide unanimously whether any particular defendant was guilty as an aider and abettor, as a co-conspirator or as the direct perpetrator/actual killer as to any specific victim. The general verdicts returned, as in *Swain*, do not support any conclusion as to the various jurors' reasoning in returning those verdicts which renders the instruction error harmless. (*Swain, supra,* 12 Cal.4th at p. 607; see also *People v. Guiton*, *supra*, 4 Cal.4th at pp. 1128-1130.)

Respondent baldly asserts that "there is no possibility that the jury based its first-degree murder verdicts on vicarious liability absent an intent to kill." (RB 267.) But while respondent repeats this sort of assertion in different guises, she provides no authority in support of that claim. Nor does respondent provide a comprehensible explanation of how it could be

true given the instructions in this case. No instruction or argument required a finding of intent to kill if appellant was found guilty of first-degree murder as a co-conspirator or aider and abettor.[43] Moreover, as to aiding-and-abetting liability, even assuming arguendo that the jurors did find express malice as to the actual killer, there is nothing about such a verdict that makes aiding and abetting liability probative of appellant's state of mind at the time of the formation of the conspiracy, which is the time relevant to guilt of conspiracy to commit murder. Given the general verdicts here, there is nothing that can be determined from those verdicts that would make a finding of aiding and abetting liability legally or logically equivalent to a finding of the prior formation of a conspiracy to commit murder with express malice.

Respondent also relies on jury findings of defendant's participation in the conspiracy when all five overt acts were committed. (RB 267-268.) However, again, if the conspiracy to commit murder was based upon implied malice theory, which the instructions erroneously allowed, then defendant's participation in the conspiracy when all five overt acts were committed adds nothing to the analysis of whether or not appellant had express malice or an intent to kill at the time the conspiracy was formed, or at any other time.

For a finding of conspiracy to commit murder based upon express malice or intent to kill, that express malice or intent to kill had to exist at the time the conspiracy was formed (*Swain*, *supra*, 12 Cal.4th at pp. 599-600), not at the time overt acts undertaken *after* the formation of conspiracy occurred. None of the non-homicidal overt acts is inconsistent with implied

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[43] See, e.g., section B. of this argument, *post*.

malice,[44] nor are the homicides themselves. Moreover, as noted the evidence is substantially conflicting as to who committed which homicide, and there is substantial evidence that appellant committed none of them. (See, e.g., AOB 129-130, 266, 403-407.) Under *Neder*, the error cannot be found harmless beyond a reasonable doubt. (*Neder v. United States*, *supra*, 527 U.S. at p. 19; *Mil*, *supra*, 50 Cal.4th at pp. 417-418; *People v. Guiton*, *supra*, 4 Cal.4th at pp. 1128-1130.)

Respondent contends that:

> Here, the jury specifically found that appellants were actively participating in the conspiracy when the overt act of killing the four victims was committed. (9 CT 2285, 2301.) The evidence showed that after beating and stabbing each victim numerous times, the assailants cut the throat of every victim virtually from ear to ear and down to the vertebra. Since the conspiracy was still in effect at that point, and no reasonable jury could have doubted that the method used to kill the victims indicated that the conspirators intended to kill

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[44] The overt acts were: (1) Arming themselves; (2) driving to Elm Street; (3) putting on masks to disguise themselves; (4) entering the Elm Street house. (9 CT 2284-2285.) In fact, the defendants each admitted to driving to Elm Street, and other than Willey, each admitted to entering the Elm Street house. Each also denied having had anything to do with any conspiracy. There was variation in the testimony regarding who had a knife, but there was testimony that carrying knives was not unusual for various of the defendants (see, e.g., 32 RT 5702, 5705) and that none of the others knew that LaMarsh had a loaded handgun with him. (See, e.g., 29 RT 5126-5127; 32 RT 5644.) The reasons given by the various defendants for each of those actions were not that there was an intention to kill people at Elm Street. The reasons given for those actions by various defendants were consistent with lawful activity, e.g. to assist Evans in retrieving clothing which Evans's sister had stored in that house, which she had previously occupied. If the jurors did not believe the testimony that these actions were without *any* criminal intent, the actions themselves were still consistent with implied malice at the time of the conspiracy and at the time of the homicides. The jury's finding of the overt acts simply does not conclusively establish a finding of express malice or intent to kill on the part of appellant at the time of the formation of the conspiracy.

their victims, there is no doubt that the conspiracy was committed with an intent to kill.

(RB 268.)

There are at least two problems with this argument. Respondent's repeated use of the plural, to suggest that each conspirator personally committed each of the acts (e.g., "the *assailants* cut the throat of every victim" (RB 268 (emphasis added)), is not supported by any reasonable interpretation of the evidence and wholly ignores the extent to which theories of vicarious liability permeated the prosecution's case and argument.

Respondent also confuses the requirement that for the conspiracy to commit murder to have been properly found, express malice/intent to kill, rather than implied malice, would have had to have been found beyond a reasonable doubt as existing at the time of the formation of the conspiracy – at the camp – not at the culminating melee at Elm Street. The specific co-conspirator who actually committed each of the homicides at Elm Street may have premeditated and formed an intent to kill after the formation of the conspiracy. Any co-conspirator, even without an intent to kill, but having entered into the conspiracy with only implied malice, could become vicariously liable for first degree murder committed by the actual killers under the natural and probable consequences doctrine. The first degree murder verdicts, therefore, do not necessarily establish express malice at the time of the formation of the conspiracy. Which of the defendants was which, i.e., which, if any, was found beyond a reasonable doubt by a unanimous jury to be an actual killer, cannot be determined beyond a reasonable doubt from these verdicts, nor from the evidence. (See *Swain*, *supra*, 12 Cal.4th at p. 602.)

Appellant testified that he did not conspire, did not kill anyone, and

did not intend to kill anyone. The record contains sufficient evidence to support a finding that appellant did not enter into a conspiracy with any intent to kill. It cannot be determined beyond a reasonable doubt on this record whether the jury actually found appellant guilty of conspiring to commit express malice murder, i.e., on a legally valid basis. (*Neder v. United States*, *supra*, 527 U.S. at p. 19; *Swain*, *supra*, 12 Cal.4th at p. 602 *People v. Guiton*, *supra*, 4 Cal.4th at pp. 1128-1130)

Respondent also argues that, because conspiracy is a continuing offense lasting until the final overt act is complete, and the jury found each defendant actively participating in the conspiracy when the overt act of killing each of the four victims occurred, "and no reasonable jury could have doubted that the method used to kill the victims indicated that the conspirators intended to kill their victims, there is no doubt that the conspiracy was committed with an intent to kill." (RB 268.)

Not only does this argument make no logical sense, but it makes no legal sense. Whether or not the eventual killings were done with express malice does not establish whether *at the time the alleged conspiracy was entered into* appellant or any other defendant or co-conspirator acted with express or implied malice. Respondent continues to confuse the state of mind at the time of the commission of the homicides with the state of mind at the time of the formation of the conspiracy. It is the latter point in time which is at issue in the flawed conspiracy instructions. (*Swain*, *supra*, 12 Cal.4th at p. 600.) The continuing nature of conspiracy is central to co-conspirator liability for the natural and probable consequences of the conspiracy, but is irrelevant in determining what the jury in this case actually decided concerning whether appellant had express malice or an intent to kill at the time he entered into any conspiracy.

Respondent relies on *People v. Jurado* (2006) 38 Cal.4th 72, 123

(*Jurado*) (RB 267), and *People v. Cortez* (1998) 18 Cal.4th 1223, 1232 for the proposition that "[n]o reasonable jury could find that appellants participated in all the stages of the conspiracy to commit murder, but did not intend to kill the victims." (RB 267.) The quoted portions of those two cases are taken out of context and provide no assistance to respondent's position.

Jurado was decided after *Swain*, and did not involve *Swain* error. Rather, Jurado claimed that the trial court's instructions defining the charged offense of conspiracy omitted part of the specific intent element of that crime. This court found the error harmless because Jurado conceded that the jury's verdict that he was guilty of the first degree murder necessarily included a finding that he himself had a specific intent to kill the victim. (*People v. Jurado, supra,* 38 Cal.4th at p. 123.) Moreover, Jurado was unable to point to any evidence in the record showing that his co-conspirators agreed to kill the victim without the specific intent to do so.

Here, by contrast, there was ample evidence at appellant's trial which could have led a rational juror – instructed as they were – to conclude that appellant conspired without any intent to kill, but "with wanton disregard of the probability that deaths would occur as a result" of their actions. (*People v. Alexander*, *supra*, 140 Cal.App. at pp. 665-666.) Indeed, appellant denied any intent to kill, and the other testifying co-conspirators (including prosecution witness Michelle Evans) denied any intent to kill. Thus, unlike *Jurado,* the issue of intent was contested in appellant's trial, and *Jurado* provides no support for respondent's position.

Respondent also relies on *People v. Cortez*, *supra*, 18 Cal.4th at p. 1232, for the proposition that "[t]he mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder -- hence all

murder conspiracies are conspiracies to commit first degree murder . . . ." (RB 267-268.) That proposition is true if proper instructions are given and no *Swain* error occurs. *Cortez*, while following *Swain* in the quoted language, was *not* addressing the prejudicial effect of *Swain* error. No *Swain* error occurred in *Cortez*:

> The necessary instructions were given in this case. The jury was instructed that murder is "the unlawful killing of a human being . . . with malice aforethought," and *malice aforethought was further specifically defined as intent to kill*. These instructions were sufficient to define the elements of the target offense of murder *simpliciter* in connection with the charged conspiracy.

(18 Cal.4th at p. 1239 (emphasis added).) Because *Swain* error did occur in appellant's trial, as respondent concedes (RB 261-263), *Cortez* is simply inapposite.

Respondent acknowledges that review of the prejudicial effect of the instructional error requires application of the *Chapman* standard for constitutional error. (*Chapman v. California, supra*, 386 U.S. at p. 24; ; see RB 263, 268, 275, 286.) Respondent cites *Neder v. United States, supra,* 527 U.S. at pp.7-10, for the proposition that the error is harmless beyond a reasonable doubt because of "overwhelming evidence that appellants harbored the required mental state." (RB 263.) Respondent spends four pages citing evidence which is characterized as "overwhelming." (RB 271-274.) Regardless of incidental mischaracterizations of evidence and unreasonable leaps of illogic in the conclusions and inferences contained therein, the entire recitation is entirely beside the point. As this Court recently noted in reversing a similarly erroneous prejudice analysis by a Court of Appeal:

> Although we agree that this evidence would be sufficient to sustain a finding of [the omitted element] on appellate review, under which we would view the evidence in the light most favorable to the

> prosecution and presume in support of the judgment the existence of any facts the jury might reasonably infer from the evidence (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1019, 254 Cal.Rptr. 586, 766 P.2d 1), our task in analyzing the prejudice from the instructional error is whether any rational factfinder could have come to the opposite conclusion.

(*People v. Mil* (2012) 53 Cal. 4th 400, 418 (*Mil*).) As in *Mil*, "[v]iewed under this standard, [respondent]'s analysis immediately begins to unravel." (*Ibid.*)

Under *Neder*, this Court must

> conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – *for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding* – it should not find the error harmless.

(*Neder v. United States*, *supra*, 527 U.S. at p. 19 (emphasis added); *People v. Mil*, *supra*, 53 Cal. 4th at p. 417.)

Here, unlike *Neder*, but like *Mil*, appellant personally contested whether he personally killed anyone, or had any intent to kill anyone. The question of whether appellant had any intent to kill at any time was contested, and there was sufficient evidence for the jurors to have returned the verdicts they did without finding that appellant had an intent to kill in the formation of the conspiracy. The verdicts and findings do not demonstrate that the jury necessarily determine that he had such intent. The state has not and cannot carry its burden of proving the jury verdict would have been the same absent the error. (*Neder, supra,* 527 U.S. at p. 19.) The instructional error allowed appellant to be convicted on a legally invalid theory, mandating reversal in this case. (*People v. Guiton*, *supra*, 4 Cal.4th at pp. 1128-1130.)

For the foregoing reasons, the error in the conspiracy instructions,

which respondent concedes, cannot be found harmless beyond a reasonable doubt on this record. The conviction on Count V must therefore be reversed.

B. The Instructions Allowed a Finding of the Multiple-murder Special Circumstance Without a Finding That Appellant Was the Actual Killer or Had an Intent to Kill; the Special Circumstance Finding Must Therefore Be Reversed

In the opening brief, appellant demonstrated that the modification of CALJIC No. 8.80, the multiple murder special circumstance instruction, which modification was proposed by the prosecution and given by the trial court, omitted elements of the special circumstance. Specifically, the instruction erroneously allowed the jury to find the multiple-murder special circumstance to be true without finding that appellant had an intent to kill if the jurors based their verdicts in Counts I through IV on theories of vicarious liability as an aider and abettor or co-conspirator. The special circumstance finding must therefore be reversed. As a result, the judgment of death must be vacated as well, given the absence of a valid special circumstance finding. (AOB 264-267.)

Unlike the error in the conspiracy instructions, respondent does not concede error in the prosecution's modification of the multiple murder special circumstance instruction. Respondent does not contest the basic point that, if the jury based its verdicts on Counts I through IV on findings of vicarious liability, additional findings of intent to kill would be required in order to properly find the special circumstance. Instead, respondent argues that the omitted elements would have been mere stylistic surplusage, which any reasonable juror would have figured out on his or her own anyway. Thus, while conceding the instruction might be ambiguous, respondent relies on, inter alia, *Estelle v. McGuire* (1991) 502 U.S. 62, 72

and argues that it was not reasonably likely that the jury applied the instruction as appellant contends. (RB 279-283.)

However, the "reasonable likelihood" standard of *Boyde v. California* (1990) 494 U.S. 370, 380, and *Estelle v. McGuire, supra*, 502 U.S. at p. 72, is applicable in review of ambiguous instructions (*Calderon v. Coleman* (1998) 525 U.S. 141, 146), but not clearly erroneous ones, i.e., where the disputed instruction is erroneous on its face. (*Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 592; *Wade v. Calderon* (9th Cir. 2001) 255 F.3d 1312, 1321; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 967-968.) "To establish that a jury instruction was clearly erroneous rather than ambiguous, one must show that the jury was instructed that it could convict based on legally impermissible grounds. *See Boyde,* 494 U.S. at 380, 110 S.Ct. 1190." (*Murtishaw v. Woodford, supra,* 255 F.3d at p. 968.) Under *Neder, supra,* , omission of an element from jury instructions cannot be found harmless "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding[.]" (*Neder v. United States, supra,* 527 U.S. at p. 19.)

Respondent does not defend the instruction as having explicitly, or even clearly, required a finding of intent to kill if appellant was not found to be an actual killer. Rather, respondent argues, a reasonably intelligent jury "would have understood" the necessity of such a finding. (RB 276-277.) Respondent argues that:

> the gravamen of the instruction was that if the jury could not agree whether a defendant was the actual killer, it had to find that when he participated as a conspirator or aider and abettor, he had the intent to kill. But if the jury did decide that a defendant was the actual killer, there was no need to find intent to kill. *Though the instruction did not spell it out*, the underlying premise was that intent to kill was an additional element if a defendant was a conspirator or aider and abettor, but not if he was the actual killer.

(RB 280 (emphasis added).) But the error occurred here specifically because the instruction "did not spell it out." Nor did it in any other way make the "underlying premise" referred to by respondent apparent to the jurors. There is no basis in the instructions, considered as a whole, for a conclusion that the jurors ever considered whether there was an "underlying premise" to consider. Under the instruction this jury was given, if the jurors determined appellant's liability on Counts I through IV based on theories of vicarious liability, they would have found this instruction inapplicable and ignored it, as they were otherwise instructed to do.[45]

Respondent concedes that the language of the instruction was "not ideal, and it would have been better if the instruction expressly stated that if appellants were culpable as conspirators or aider and abettors, the jury had to find intent to kill." (RB 281.) But respondent then summarily concludes that

> [T]he jury understood that it could find the special circumstance true even if it could not agree on a theory of culpability provided that each juror found that a defendant was either the actual killer, a conspirator with intent to kill, or an aider or abettor with intent to kill. A reasonably intelligent jury would understand that the intent-to-kill requirement did not apply *only* if the jury was divided over the theory of culpability. But that it was a further precondition for finding a defendant culpable as a conspirator or aider and abettor."

(RB 281-282 (italics in original).)[46] However, this Court has recently rejected such a reading of similar instructional flaws in *People v. Letner*

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[45] See discussion of CALJIC No. 17.31, *post*, at pp. 142-143.

[46] Had the jurors done that much better a job of discerning a correct statement of the applicable law than either the prosecutor or the trial court, who had apparently failed to recognize the flaws in the prosecution's modifications. it would be reasonable to expect the jury to have asked the trial court if their understanding of the instruction was correct. The jurors submitted no questions on that subject.

and Tobin, *supra*, 50 Cal.4th 99 (*Letner*).

In *Letner*, this Court addressed a nearly identical instructional error. In that case, only aiding and abetting was at issue concerning vicarious liability. The version of CALJIC 8.80 given to the jury in *Letner* omitted the requirement for the special circumstance of a finding of intent to kill if the jury found the defendant guilty as an aider and abetter, just as the version given to appellant's jury omitted that requirement for findings based on vicarious liability as either an aider and abettor or as a co-conspirator. Like the version given to appellant's jury, the version of CALJIC 8.80 given in *Letner* required a finding of intent to kill *only if the jury could not decide* whether a defendant was the actual killer or only vicariously liable, and specifically informed them that if they found beyond a reasonable doubt that a defendant was the actual killer, they need not find intent to kill. (50 Cal.4th at 180-181.)

Unlike respondent, this Court recognized the flaw in the instruction given:

> The flaw in this instruction, as defendants observe, is that it failed to instruct the jury explicitly that, under then-existing law, an aider and abettor must have had the intent that the victim be killed in order for the special circumstance allegation to be true. (*Anderson, supra,* 43 Cal.3d at pp. 1138-1139, 240 Cal.Rptr. 585, 742 P.2d 1306.) The jury was told that if it determined one of the defendants was the actual killer, intent to kill was not required, and that if it could not decide whether one of the defendants was the actual killer or an aider and abettor, it must find intent to kill in order to make a true finding. The jury, however, was not informed what was required in the event the jury determined that a particular defendant was an aider and abettor.[fn. omitted] The omission of this third alternative made the instruction ambiguous.

(50 Cal.4th at pp. 180-181.) This Court specifically disapproved of the conclusion similar to that put forward by respondent here,

> that the same instruction made it "unmistakable" that an aider and

> abettor must have the intent to kill, because the instruction compares the requirement applicable when the jury cannot decide between actual killer and aider and abettor, with – "on the other hand" – the situation when the jury *does* decide upon an actual killer. In this circumstance, there are three "hands," not merely two, and the instruction left the jury to surmise what intent an aider and abettor was required to have.

(*Id.*, at pp. 181-182, disapproving *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097.) Of course, in appellant's trial, there were *four* "hands" – (1) liability as actual killer; (2) liability as co-conspirator; (3) liability as aider and abettor; and (4) liability but undecided as to theory – with two of the four omitted from the instruction.

This Court's description of the omission in *Letner* as causing ambiguity, or leaving the jury to "surmise" what intent an aider and abettor was required to have, understates the seriousness of the flaw in the instruction here. The instruction given to appellant's jury was not merely ambiguous – on its face, the instruction omitted an element of the special circumstance, and allowed the jury to find the special circumstance based on theories of vicarious liability, but without finding an intent to kill. The instruction thus allowed the jury to find the special circumstance true based on a legally invalid theory. (See *Boyde, supra,* 494 U.S. at p. 380; *Murtishaw v. Woodford, supra,* 255 F.3d at p. 968; *People Guiton, supra*, 4 Cal.4th at pp. 1128-1130.)

Because it determined that the flaw in the instruction in *Letner* was that it was ambiguous, this Court instead applied the *Boyde/Estelle* standard, and ultimately found that "there is no reasonable likelihood the jury was confused in the present case, because it is unlikely the jury felt compelled to resolve any possible ambiguity with regard to the intent required for an aider and abettor" (*People v. Letner and Tobin, supra,* 50 Cal.4th at p. 182), and that, "despite the ambiguity in the instruction, there

is no reasonable likelihood that the jury found one defendant was the actual killer, and then based its special circumstance findings as to the other defendant upon an erroneous notion that an aider and abettor need not possess the intent to kill." (*Id.* at p. 183.)

Whether or not it was properly applied in *Letner*, the *Boyde/Estelle* reasonable likelihood standard is not applicable here. As demonstrated above, the instruction in appellant's case was erroneous on its face. Nevertheless, assuming arguendo that the *Boyde/Estelle* standard applies here, the analysis in *Letner* does not adequately address the impact of the instructional error in appellant's case. Here, unlike *Letner*, whether that appellant was an actual killer and whether he had an intent to kill were contested issues with substantial evidence supporting negative findings on both issues. (See *People v. Mil*, *supra*, 53 Cal.4th at p. 418.) In such a circumstance, if the jury did not understand that an aider and abettor or co-conspirator needed to have possessed the intent to kill in order for the special circumstance to apply, the resulting special circumstance finding would be flawed, the jury not having found an essential element.

Letner construed the risk of the flawed instruction as creating in a juror's mind "an erroneous notion that an aider and abettor need not possess the intent to kill." (*People v. Letner and Tobin, supra,* 50 Cal.4th at p. 183.) That risk was real in this case, even if it was not in *Letner*. However, another reasonable interpretation of the flaw in the instruction in appellant's case is that the question of whether an aider and abettor or co-conspirator need possess the intent to kill would simply not occur to a juror applying the instruction as written. If a juror found that a defendant was an aider and abettor or co-conspirator in appellant's case, that juror could reasonably find the instruction as written was simply inapplicable, disregard it, and never address the question of intent to kill. After all, jurors in California

criminal trials are generally told, as was the jury in appellant's case:

> The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the facts.

(CALJIC 17.31; 37 RT 6759; 8 CT 1962).) Even if the erroneous instruction were deemed to be merely ambiguous, this Court must "not view the instruction in artificial isolation but rather in the context of the overall charge" (*People v. Mayfield* (1997) 14 Cal.4th 668, 777), which included the quoted portion of CALJIC 17.31.

Additionally, circumstances of the *Letner* trial upon which this Court relied in finding the flaw in the instruction was not reasonably likely to have affected the verdict, are not replicated in appellant's case. The prosecutor in *Letner*

> presented a correct and complete statement of the law in her arguments following the trial court's instructions. Indeed, the prosecutor discussed a hypothetical bank robbery involving a robber and a getaway driver, properly contrasting the special-circumstance intent-to-kill requirement for each participant (essentially, that no intent to kill was required as to the robber who shoots someone in the bank, but that intent to kill was required with respect to the driver who merely is waiting in the car when the shooting occurs).

(*People v. Letner and Tobin, supra,* 50 Cal.4th at pp. 182.) No similar example was given by the prosecutor in appellant's case in relation to vicarious liability. The only remotely similar example given by the prosecutor here involved a "hypothetical bank robbery involving a robber and a getaway driver" but without a shooting, and with the conclusion, contrary to that argued by the prosecutor in *Letner*, that the getaway driver was fully as liable for the charged crime as the person who entered the bank and robbed it. (36 RT 6531-6532.) Moreover, the prosecutor in appellant's

trial immediately followed that discussion of vicarious liability with discussion of the multiple murder special circumstance, with no mention of any requirement of an intent to kill:

> And that's also where your multiple murder special circumstance comes in. *Even though a person didn't personally kill more than one person, if that be the case, he can still be liable for all of the murders under the theory of being an aider or abettor or a co-conspirator. In this case you have plenty of evidence of that.*
>
> It also gives rise to the special circumstance of multiple murders. Now, for that special circumstance you have to find that at least one of those was a first degree murder, that is, premeditated, with express malice. I would submit to you that all four of them are first degree murders in this particular case.

(36 RT 6532 (emphasis added.)

The only other specific argument to the jury made by the prosecutor in this case regarding the multiple murder special circumstance similarly focused on the erroneously asserted irrelevance of any distinction between actual killer and co-conspirator or aider and abettor:

> There are -- the additional verdicts I'm going to ask you to return in this case have to deal with the special circumstance. A special circumstance alleged in this case as to each one of these defendants is that he was found guilty of at least one count of first degree murder and an additional count of either first or second degree murder.
>
> It's called multiple murder. And I -- I don't want you to have trouble with the -- this thing about, "Well, okay, fine. We agree Cruz killed one person but, gee, he didn't kill the other three." Or the same with any of those defendants. *If you're a co-conspirator or aider and abettor, you're liable for all of them. Doesn't matter if you personally did it or not. The multiple murder does not say personally killed two or more. If they're guilty of two or more, it's multiple murder. And I'm going to ask you to return a finding on that form that that allegation is true as to each of these defendants.*

(37 RT 6756-6757.)

The prosecutor here never suggested in argument to the jury that, for

the special circumstance to be found true, the jury needed to determine, beyond a reasonable doubt, that appellant was either an actual killer, or had the intent to kill as a co-conspirator or aider-and-abettor. To the contrary, he specifically argued:

> [The defense is] scared to death of that conspiracy, see. Why? *Because I don't have to tell you, prove to you, or care less about who killed who*. They're all liable together equally for all of the murders, regardless of who put a knife in who or who crushed whose skull, as co-conspirators or as aiders and abettors, under either one of those theories.

(37 RT 6729-6730.)

This Court, by its analysis in *Letner*, made clear that the modified instruction given here was flawed, rejecting arguments similar to those respondent makes here. Whether or not the flaw in the *Letner* instruction rendered it merely ambiguous under the facts of that case, the flaw in the instruction in appellant's trial, on its face, omitted an element of the special circumstance and allowed the jury to return the special circumstance verdict on an invalid legal basis. Whether or not that flaw was harmless in *Letner*, the facts and arguments in appellant's case are materially different. Whether the *Boyde/Estelle* reasonable likelihood standard is applied, or the instruction is deemed erroneous on its face, a different outcome is required than in *Letner*, i.e., the special circumstance must be reversed.

Respondent argues that appellant forfeited this claim by requesting the same instruction as was given, and neither objecting nor arguing when the trial court stated it would instead give a modified version of that instruction as requested by the prosecutor. (RB 277-279.) Respondent is wrong.

Appellant's counsel requested CALJIC No. 8.80, an instruction which the trial court had a sua sponte duty to give in this case. (See *People*

v. Mil, supra, 50 Cal.4th at p. 409.) The prosecution's modification of No. 8.80 omitted necessary language concerning elements required to be found by the jury depending upon the basis for the jurors' finding of guilt on counts I through IV.

Respondent argues there was no substantive difference between the instruction as given and the instruction requested by defense counsel. (RB 277-278.) This court rejected a similar position in *Letner*, acknowledging the substantive difference between the intended use of CALJIC 8.80 and the erroneous type of modification given in this case. (*People v. Letner and Tobin, supra,* 50 Cal.4th at pp. 181, fn. 25.) Thus, the pattern instruction which defense counsel requested, and the erroneous modification of CALJIC 8.80 which was proffered by the prosecution and given by the trial court, were clearly not the same statements of law.

Respondent relies on *People v. Thornton* (2007) 41 Cal.4th 391, 436, for the proposition that defense counsel invited the error. (RB 278-279.) In *Thornton*, the defendant had specifically proposed the instructional language he later complained of on appeal, provided the trial court with legal authority supporting the specific language, and argued in the trial court that the proposed language would "give the jurors some guidance." (*People v. Thornton, supra,* 41 Cal.4th at p. 435.) Here, defense counsel did not propose the specific language complained of; the prosecution did. Nor did defense counsel join in the prosecution's proposed modification of the instruction.

Moreover, this Court has long held that, because the trial court bears the ultimate responsibility for instructing the jury correctly on the law, a defense request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record.

(*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved of on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here, neither condition for invited error has been met. While defense counsel did not object to the modification, no such objection was necessary to preserve the error for appellate review. (Pen. Code section 1259; see *People v. Mil*, *supra*, 50 Cal.4th at p. 409.) Moreover, nothing in the record suggests defense counsel induced the trial court to commit the error, and there is no indication on the record that defense counsel made a conscious and deliberate tactical choice to request the erroneous modifications to the pattern instruction. Accordingly, there is no reasonable factual or legal basis for respondent's attempt to characterize this as invited error.

Respondent acknowledges that failure to instruct the jury on an element of a special circumstance allegation is error governed by *Chapman v. California*, *supra*, 386 U.S. at p. 24, requiring reversal of the special circumstance finding unless the state can carry its burden of proving the error, beyond a reasonable doubt, did not contribute to the verdict. (RB 283-284.) Nevertheless, respondent argues that any error in the instruction was harmless. (RB 283-286.)

Respondent repeats the same arguments for harmlessness of the multiple murder special circumstance instruction as for the conspiracy to commit murder instructions, e.g., that other verdicts (including the flawed conspiracy verdict) necessarily included findings of intent to kill, that the evidence of intent to kill was overwhelming.

These arguments are wholly without merit, as set forth in section A. of this argument, *ante*. The fatally flawed conspiracy verdict, the findings concerning overt acts, the first degree murder verdicts (no matter their number), do not conclusively establish a finding by the jury under the

instructions they were given that appellant had an intent to kill. Whether the evidence would have supported such a finding is beside the point, for the issue was contested by appellant and a contrary finding was also supported by substantial evidence. (*Neder v. United states*, *supra*, 527 U.S. at p. 19; *People v. Mil*, *supra*, 50 Cal.4th at pp. 417-418.)

Relying on *People v. Jurado*, *supra*, 38 Cal.4th at p. 123, respondent repeats the argument made in defending the erroneous instruction on conspiracy, claiming that even if all the murder convictions were based on vicarious liability, the jury could not have found appellant guilty of conspiring to commit murder without finding he had the intent to kill. (RB 284.) As explained in section A., *ante*, this ignores the fact that the error in the conspiracy instruction, which respondent conceded was error, was precisely that it allowed the jury to find appellant guilty of conspiring to commit murder on a theory of implied malice, i.e., without finding he had the intent to kill.

Respondent also argues the jury could not find appellant guilty of four counts of first degree murder without finding he had the intent to kill. (RB 284.) However, respondent provides no authority for this assertion, and ignores the actual legal theories upon which the prosecution relied and upon which the jury could have based its verdicts, i.e., vicarious liability for the natural and probable consequences of crimes which he aided and abetted or which were committed by co-conspirators in furtherance of the conspiracy, but for which he did not possess an intent to kill.

As with the error allowing the conspiracy to commit murder to be based upon implied, rather than express malice, respondent argues that the jury found appellants to have been part of the conspiracy when all five overt acts committed and found personal use of weapons as to each count, citing 9 CT 2288-2291, 2293-2294, 2296-2301. Respondent contends that no

reasonable jury could find appellants participating in all stages of conspiracy to commit murder and using deadly weapons during murders without intending to kill the victims. (RB 284.) As with the error in the conspiracy instructions, respondent is wrong on the facts and the law, as explained in section A. of this argument, *ante*.

As argued in section A, *ante*, while the evidence may be sufficient to sustain the verdicts, it is by no means overwhelming that appellant was either an actual killer or had an intent to kill. Moreover, the strength of the evidence is not the determining, or even a relevant factor in assessing prejudice due to the omission of an element from a special circumstance instruction. Pursuant to *Neder*, the instructional error cannot be found harmless because the issue affected, whether appellant acted with express malice and an intent to kill, was fully contested at trial by appellant. The state cannot carry its burden of proving the error beyond a reasonable doubt that the error did not contribute to its verdict. (*Neder v. United States*, supra 527 U.S. at p. 19; *People v. Mil*, supra, 50 Cal.4th at pp. 417-418.) The instruction allowed the jury to return the special circumstance verdict on two legally invalid theories, i.e. either a co-conspirator liability or aider and abettor liability without the necessary finding that appellant acted within intent to kill. Reversal is therefore required.

The error cannot be held harmless on this record, and the special circumstance must therefore be reversed.

C. Conclusion

As demonstrated above and in the opening brief, the trial court's instructions misstated the elements of conspiracy to commit murder and allowed a conviction on Count V on a legally invalid basis. Similarly, the instructions on the elements of the special circumstance were erroneous, omitting an element of the special circumstance and allowing the jury to find

the special circumstance to be true without finding a requisite element of the offense. The conviction on Count V and the special circumstance finding must therefore be reversed, and the death judgment vacated.

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VIII

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE THEORY OF IMPERFECT SELF-DEFENSE WAS ERROR REQUIRING REVERSAL OF THE JUDGMENT

In the opening brief, appellant demonstrated that substantial evidence supported a finding that appellant acted in the honest but unreasonable belief in the need for defense against imminent peril, and that the trial court committed reversible error in refusing to give instructions on that defense theory.

Respondent's arguments misconstrue the arguments actually made by appellant in the opening brief and the evidence supporting the instruction. Respondent spends a good deal of argument responding to claims not made in the opening brief. Respondent also attempts to analyze evidence and events in artificial isolation from related evidence and events. This results in a failure on the part of respondent to acknowledge the variety of evidence in the record which provided support for the requested instructions.

Respondent argues that there was no need for the instructions because "there was no evidence that appellants organized the conspiracy as a preemptive strike," and that "preemption is inconsistent with self-defense." (RB 287, 297-305.) Respondent also argues that "there was no evidence that appellants acted in self-defense once they got the Elm Street house." (RB 287, 306-313.) Finally, respondent argues that if any error occurred, it was a matter of state law, and harmless. (RB 288, 295-296.)

Respondent concedes that there was substantial evidence that appellants "feared that Raper would send a motorcycle gang to kill everyone at the Camp." (RB 298.) However, respondent mischaracterizes appellant's argument as claiming that appellants "conspired to kill Raper in self-defense" (RB 298), or that appellants "conspired to kill Raper because they

believed they were in imminent peril." (RB 300.) In fact, appellant's argument is that there was substantial evidence from which the jury could have concluded, or at least maintained a reasonable doubt, that any of appellant's actions, from the evening hours of May 20, when Evans warned appellant that Raper and his gang of bikers were going to come over that night to attack the camp, through and including appellant's actions at 5223 Elm Street, were taken in the actual belief that he needed to defend himself, his family and his friends from imminent peril. (AOB 278-279.)

As demonstrated in the opening brief, the evidence was consistent with various theories as to why appellant agreed to go to 5223 Elm Street, including an intent to confront Raper and his cohort in the erroneous belief it was necessary to defend against imminent attack, while drawing any violence away from the Camp and his family. The evidence was also consistent with the theory that appellant agreed to go to 5223 Elm Street to help Evans, that he proceeded with caution due to his concern over an attack by Raper's associates, that upon the eruption of violence, he believed it was necessary to defend himself and his friends from imminent harm.

Respondent's concession that there was substantial evidence that appellants actually feared an attack by a biker gang does not go far enough, though. There is evidence, cited in the opening brief, but ignored by respondent, that fear of attacks instigated by Raper had motivated defensive behavior by appellant and others at the Camp for over a month prior to the homicides, such as appellant arming himself while at home for protection against, and deterrence of, such attacks (29 RT 5166-5167), and appellant, Beck, Vieira and possibly LaMarsh having stood guard at night as defense against such attacks. (29 RT 5065.) Respondent ignores the evidence of appellant's decision, the night of the homicides, to park a distance from the Elm Street house as protection against being recognized and attacked by

Raper's associates, demonstrating a continuing belief in the imminence of attack. (29 RT 5080, 5083; 30 RT 5240.) Respondent ignores the testimony of the defendants' concern for their safety due to Raper's various threats against them. (29 RT 5059-5116; 30 RT 5287-5296; 32 RT 5635-5644, 5691-5705; 34 RT 5978-5986.)

Respondent argues that "[t]o the extent appellants contend that they could have been guilty of conspiracy to commit voluntary manslaughter, there is no such crime." (RB 298.) Appellant does not rely here on any such theory. Respondent's arguments that the evidence was insufficient to require instructions that a conspiracy to commit murder might have been based on unreasonable self-defense (RB 306) do not address arguments made in appellant's opening brief.

Respondent argues:

> Appellants have not cited any authority for the proposition that a defendant has a right to an unreasonable self-defense instruction when he launches a preemptive attack against people who were minding their own business and posing no threat whatsoever. According to appellant's theory, all a defendant needs to do is testify that he was afraid the victim was going to attack him, and the trial court must instruct the jury on unreasonable self-defense.

(RB 305.) Appellant cited no such authority, because he made no such argument. Again, respondent attacks an argument not made in the opening brief.

The main thrust of respondent's argument otherwise focuses on the existence of evidence in the record conflicting with a finding of unreasonable belief in the need for defense against imminent harm. However, any conflicts in the evidence were for a properly instructed jury to resolve, not for respondent, or even this Court, to resolve. Rather, the question before this Court is whether the evidence is such that a rational fact finder could have concluded that appellant's actions were committed without

malice as a result of an honest but unreasonable belief in the need to defend against imminent harm.

The scope of the trial court's duty to give requested instructions is greater than its duty to instruct sua sponte on principles of law relevant to the case (*People v. Stevenson* (1978) 79 Cal.App.3d 976, 985); requested instructions must be delivered "upon every material question upon which there is *any evidence deserving of any consideration whatever*." (*People v. Flannel* (1979) 25 Cal.3d 668, 684, quoting *People v. Burns* (1948) 88 Cal.2d 867, 871, emphasis original; accord, *People v. Breverman* (1998) 19 Cal.4th 142, 162.)

The "substantial evidence" required to trigger the duty to instruct on a legal theory is evidence from which a reasonable jury could conclude that the particular facts underlying the instruction exist. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85, citing *People v. Lemus* (1988) 203 Cal.App.3d 470, 477.) In deciding whether the evidence supports a requested instruction, courts must resolve all "[d]oubts as to the sufficiency of the evidence . . . in favor of the accused." (*People v. Tufunga* (1999) 21 Cal.4th 935, 944; *People v. Breverman*, supra, 19 Cal.4th at p. 177 ["In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight."]; see *People v. Mil* (2012) 53 Cal.4th 400, 417.)

Respondent argues that

> there was no evidence that appellants believed the threat would be carried out imminently – which is a prerequisite for the instructions on unreasonable self-defense. [Citation omitted.] If appellants had honestly believed an attack was imminent, they would have gathered everyone together and gone away. Or they would have called the police.

(RB 300-301.) Respondent ignores appellant's testimony and other evidence of his unsuccessful attempts to obtain protection by law enforcement from

Raper and his threats. (See, e.g., 28 RT 4974-4979; 29 RT 5168-5170; 30 RT 5249-5250; see AOB 13, 273.) Calling the police had been shown to be futile.

Nor was running away the only available option. Respondent ignores the fact that appellants had lived with continuing, repeated threats from Raper for quite awhile, adapting their behavior over time to protect themselves against an attack when it came. They expected that an attack would come and that they would have to defend themselves when it did.

Moreover, by restricting the argument to whether fear of imminent attack motivated a conspiracy to kill Raper and his associates respondent fails to address other explanations of the steps taken in the response to the continuing threat of an attack, such as the possibility that the defendants went over to Elm Street to forestall the attack, to lead any attack away from the Camp, to confront Raper, even to fight him on his ground, but without any intent to kill.

Respondent also ignores the substantial evidence that appellant's decision to go to 5223 Elm Street was motivated by Evans's request for assistance, not as a preemptive action of any kind in relation to the threat of attack.

Furthermore, respondent's argument minimizes or ignores the substantial evidence in the record of sociopathic, terroristic behavior by Raper and his cohort, documented threats of violence against a number of people in the community, including law enforcement, as well as evidence of appellant and others at the Camp taking defensive measures as a result of such threats. Respondent's similar characterization of Raper and his associates as mere "hapless misfits" (RB 301-302) is an inexcusable mischaracterization of the record, ignoring substantial evidence documenting the criminality of Raper, Colwell, Ritchey and others, including evidence of,

inter alia, their criminal trespass of 5223 Elm St., their regular and apparently public use and sale of dangerous drugs, littering common areas of the Camp where children played with used syringes and needles from drug injections despite the objections of the residents of the Camp, where, again, they were criminally trespassing, LaMarsh's testimony that Colwell and Ritchey appeared ready to do him harm before he pulled his pistol from his pocket to prevent them from doing so, as well as his testimony that Raper attacked him with a knife, threatening to kill him. These were not "hapless misfits" or innocents minding their own business but criminals regularly interfering with lawful activity.

Respondent relies on the suggestion that appellant was not entitled to an instruction which contradicted his testimony. (See, e.g., RB 308.) However, respondent does not address the authority noted in the opening brief that a defendant is entitled to requested instructions on imperfect self-defense even where that theory contradicts the defendant's own testimony if it is otherwise supported by substantial evidence. (See *People v. Elize* (1999) 71 Cal.App.4th 605, 615; *People v. Barton* (1995) 12 Cal.4th 186, 202-203; AOB 277-279.) Respondent's arguments are unsupported by any case authority, are contrary to the controlling law, and are, consequently, without merit.

Respondent argues that none of the evidence showing the animosity between Raper and his gang and the defendants "counts for anything because there was no evidence that any of the victims ever posed an imminent threat of peril prior to the murders." (RB 309.) Again, respondent provides no authority for the relevance of that proposition, assuming arguendo that it is true. As pointed out above, and in the opening brief, the relevant question is not whether they posed an imminent threat of peril prior to the homicides, but whether appellant had an actual belief that he need to

defend against an imminent threat of peril. The "ample evidence of the animosity" between Raper's gang and appellants included evidence that the defendants' behavior had already been affected by the threats of Raper and his gang prior to the night of the homicides, to the point of taking defensive measures against imminent peril, thus demonstrating their actual belief that Raper and his gang posed an imminent threat of peril.

Similarly, respondent relies on the testimony of appellants "that no one attacked them; they had no injuries; none of the other defendants told them they were attacked; and none of the other defendants had injuries." (RB 309.) Respondent argues "if both appellants testified that no one attacked them, then a hollow claim of fear did not support any kind of self-defense instruction." (RB 309.) Again, respondent provides no authority for this proposition.

Respondent argues that there is no evidence that appellant was present when Ritchey and Colwell threatened LaMarsh, nor that LaMarsh communicated that information to appellant. From this respondent concludes that appellant "could not have been motivated to act in self-defense by the alleged threat LaMarsh." (RB 309.) Similarly Raper's attack on LaMarsh with a knife is seen by respondent as irrelevant because there is no evidence that appellants were present at that specific moment, nor that LaMarsh informed them of it. (RB 309.) Again respondent provides no authority for the proposition that, in the context of the evidence supporting the conclusion that appellant actually believed that there was imminent peril against which he had to defend, that the question of whether appellant was present at the specific moment and at the place where Colwell and Ritchey threatened LaMarsh or where Raper attacked LaMarsh defeats appellant's right to the instruction. Respondent's focus on whether specific people at the Elm Street house actually posed a specific threat of imminent peril to

appellants at specific times immediately prior to the homicides is seriously misguided. Had they posed an actual threat of imminent peril, the issue would have been actual self-defense or defense of others, not unreasonable belief in the need for such defense.

Respondent's entire approach in this matter is to take specific instances at the Elm Street house the night of the homicides out of context of all other relevant information, including (1) the pervasive atmosphere of threat caused by Raper and his gang for as much as a month prior to the homicides, (2) screams and cries, (3) fighting going on in small area, and (4) no clear evidence at the point appellant arrived at the scene as to who initiated the violence. Respondent unreasonably attempts to excerpt single moments out of the context of a chaotic melee primed by ongoing threats.

It is a false choice to suggest that appellants must rely solely upon, on the one hand, his own testimony and denials of killing or hitting anyone or on the other hand, an acceptance of the prosecution's theories of the homicides. Respondent argues that "appellants either personally used deadly weapons – as the jury found for every charge; or they did not have any weapon and did not touch anyone – as appellants testified." (RB 312.) The argument is misguided. This is not a situation where the jury was required to choose between only two interpretations of the evidence, i.e., that either the prosecution's theories were wholly correct or appellant's testimony was wholly correct. That the jury was unable to reach verdicts as to either LaMarsh or Willey demonstrates unequivocally that the jury did not credit Evans's testimony without question. That they may have also disbelieved portions, even most, of appellant's testimony does not determine under the evidence in this case how the jury would have interpreted the whole of the evidence it did believe had the jury been properly instructed on the issue of imperfect defense against imminent peril, including the fact that it was the

prosecution's burden to prove beyond a reasonable doubt that appellant did not act with the actual, but unreasonable belief in the need to defend against imminent peril in order to establish that appellant acted with malice.

Respondent concedes that "the jury could have theoretically believed appellants' testimony that there was no conspiracy and they went to the house to get clothes" (RB 307), and further, that "if there had been sufficient evidence of unreasonable self-defense at the Elm Street house, the trial court would have been obliged to instruct the jury on that theory." (RB 307.)

Similarly, respondent concedes that the following scenario "would have been a perfectly reasonable basis for an instruction on unreasonable self-defense":

> "In light of the evidence of animosity and mutual fear that existed between the two groups prior to the homicides, it is not unreasonable that the defendants would arm themselves before accompanying Evans to the house; nor is it unreasonable that once the fighting started, the victims' deaths, were the result of an actual belief among the defendants that the acts which caused the victims' deaths were necessary to avert their own deaths or physical injury." (BOB 242; Cruz Joinder.)

(RB 308.)

However, respondent then rejects this scenario with the argument that "there was no evidence that any of the victims ever posed an imminent threat of peril prior to the murders." (RB 309; see also RB 313 ("the jury would have had to find that appellants were under an imminent threat of harm...."); RB 315 ("As a matter of law, the victims posed no imminent threat to appellants.").) Respondent cites no authority for the proposition that, for imperfect self-defense, there must be evidence that at some point before the homicides the victims must have posed an *actual* imminent threat. In fact, no such requirement exists. It is the defendant's *actual belief* that he faced an imminent threat which is relevant. Respondent's succumbs to the same

error as the trial court, which denied the instruction because there was no evidence of an imminent threat. (See 36 RT 6439-6440.) If the defendants were acting because of an *actual* imminent threat, the instructions required would be instructions on self-defense, not on *imperfect* defense against imminent harm.

Respondent contends that there is no evidence that Raper and his associates were the aggressors in the incident at the Elm Street house. Appellant noted in the opening brief that Raper had multiple illegal drugs in his system (alcohol, methamphetamine, phencyclidine) at the time of this melee; that Ritchey also had methamphetamine in his system; and that the amounts of those drugs in their systems were consistent with agitation, aggression, paranoia, and derangement. (33 RT 5773-5774, 5788, 5791-5792, 5799; AOB 274.) Respondent attempts to downplay this by suggesting that Raper "always had something in his system," but never "*initiated*" violence. (RB 308.) Whether Raper never initiated violence is questionable in light of the evidence presented.[47] What is not questionable is that he initiated confrontations involving threats of violence and resulting in violence (see, e.g., 27 RT 4648-4651), and caused even an armed police officer to call for backup and draw her weapon out of concern for her safety in a confrontation in which he turned out to have been armed with an 11-inch survival knife, a 10-inch straight razor, a curved knife and an ice pick. (28 RT 4878-4880, 4882-4885, 4894.) Moreover, LaMarsh testified that on the night of the homicides, Raper attacked him with a knife. (32 RT 5652-5656; 33 RT 5738-5746, 5812, 5826-5827, 5849, 5856-5857.)

Respondent argues that even if the instruction had been given,

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[47] Appellant testified that Raper once pulled a knife on him and threatened to kill him. (29 RT 5161, 5165; 30 RT 5247-5248.)

defense counsel would not have argued the theory "because it contradicted appellant's main defense theory that they did not plan the murders and did not harm anyone." (RB 313.) This position is patently frivolous. Defense counsel *asked* for the instruction. That it was refused no doubt affected the ultimate argument defense counsel presented. Moreover, whether the defense intends to argue imperfect defense against imminent harm is not a prerequisite to the requirement that the instructions on that theory be given. The instruction was required even if it was contrary to the primary defense presented. (See *People v. Elize*, *supra*, 71 Cal.App.4th at p. 615; *People v. Barton*, *supra*, 12 Cal.4th at pp. 202-203.) Furthermore, as explained in the opening brief, the evidence supporting findings of actual but unreasonable self defense or defense of others were not contradictory of or in any way incompatible with appellant's denial of any intent to kill or of any agreement or conspiracy to kill. (AOB 277-279.)

Respondent concedes that any error in refusing the requested instruction[s] is reviewed under *Chapman v. California* (1967) 386 U.S. 18, 24,[48] but claims that any error was harmless under even that standard. (RB 314-316.) Respondent relies on the same misguided analysis of the relevant facts used in arguing that no error occurred, e.g., that a conspiracy to attack the house is not susceptible to an unreasonable defense instruction and that there was no evidence of actual imminent harm. Appellant has demonstrated above that respondent's analysis of the relevant facts overstates certain facts

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[48] Respondent first argues that under *People v. Breverman , supra,* 19 Cal.4th at p. 162, any error in failing to instruct on a lesser included offense is reviewed under the state standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. However respondent then concedes that *Breverman*, by its own terms, was limited to noncapital cases where the failure was to instruct sua sponte, rather than where as here, the instructions were requested in a capital case.

while ignoring substantial evidence supporting the need for the instructions in question. Those same flaws undermine respondent's harmless error analysis here.

Respondent has not carried its burden of showing that the error was harmless beyond a reasonable doubt. Respondent fails to address the arguments and authorities in the opening brief establishing that the error cannot be found harmless. (See AOB 283-286.) Instead, respondent cites *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087 to argue that the jury's conviction of appellant on conspiracy to commit murder and participation in the overt acts in furtherance of the conspiracy, and of four premeditated and deliberate first-degree murders demonstrated that "the jury necessarily found that appellants made a calculated decision to commit murder – as opposed to an emotional response to an imminent threat." Respondent's analysis is flawed. As more fully demonstrated in Argument VII, there was no finding that appellant personally committed any of the homicides, nor even that he had any intent to kill. The instructions given to the jury in this case allowed the verdicts and findings on the basis of vicarious liability, as a co-conspirator or accessory. The verdicts did not resolve the issues regarding appellant's state of mind presented by the instructions on unreasonable belief in the need to defend against imminent peril. *Koontz* does not provide support for any other conclusion.

Due process requires proof beyond a reasonable doubt of each element of a criminal offense. (*In re Winship* (1970) 397 U.S. 358, 364; *Mullaney v. Wilbur* (1975) 421 U.S. 684.) The trial court's failure to instruct on voluntary manslaughter based on unreasonable self-defense in this case violated that requirement, lightening the prosecution's burden and making it likely that "the jury . . . resolve[d] its doubt in favor of a [first degree murder conviction." (*Beck v. Alabama* (1980) 447 U.S. 625, 634.) That failure also

deprived appellant of his state constitutional rights to due process, to present a defense and to a fair jury trial (Cal. Const., art. I, §§ 7(a), 15; *People v. Geiger* (1984) 35 Cal.3d 510, 518-519), and his federal rights to due process, under the Fifth and Fourteenth Amendments (*Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1081), and to a jury trial. (U.S. Const., 6th and 14th Amends.) Failing to give the requested instruction prevented the jury from considering all the issues in the case, in violation of appellant's right to a fair jury trial, under the Sixth and Fourteenth Amendments, and most importantly, diminished the reliability of the guilt and penalty verdicts, in violation of the Eighth Amendment. (See *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Appellant's convictions, as well as the sentence of death based thereon, must be reversed.

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IX

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

In the opening brief, appellant demonstrated that the trial court erred both in giving CALJIC Nos. 2.03, 2.06 and 2.52 and in refusing to give instructions requested by the defense to modify, clarify and correct the defects in Nos. 2.03 and 2.52. The instructions given improperly duplicated more general instructions, in a way that directed the jury to consideration of inferences supporting the prosecution while ignoring equivalent inferences favorable to the defense. (AOB 292-293.) The instructions were unfairly partisan and argumentative (AOB 293-298), and permitted the jury to draw irrational inferences about appellant's guilt. (AOB 298-307.) The errors in giving the instructions, and in refusing requested modifications, unconstitutionally lightened the burden on the prosecution, undermined the reasonable doubt requirement and denied appellant a fair jury trial, due process of law, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Appellant further demonstrated that the errors were not harmless beyond a reasonable doubt. (AOB 307-309.)

Appellant acknowledged in the opening brief that this Court has previously rejected the challenges made to CALJIC Nos. 2.03, 2.06 and 2.52, but provided authority and argument, as well as the specific instructions requested but denied, as a basis for reconsideration of those prior decisions.

Respondent asserts a meritless claim that appellant forfeited or waived appellate review of CALJIC No. 2.06 (RB 319-320), argues that the

instructions given were not merely duplicative of other instructions (RB 325-326), and argues that any error was harmless. (RB 326-327.)

Otherwise, respondent relies upon this Court's previous holdings rejecting similar challenges to CALJIC Nos. 2.03, 2.06 and 2.52, without presenting any substantive arguments in support of the challenged instructions or against the rejected defense instructions. (RB 321-325.) Respondent concedes, implicitly at least, that the proposed modifications were not themselves erroneous, and relies solely upon the argument that because this Court has found the challenged instructions themselves to be correct, "the modifications could not have been necessary." (RB 321-322, 325.)[49] These points are fully covered in the opening brief, and no further reply by appellant on those points is necessary except to request that this Court reconsider its prior rulings in this area and, accordingly, reverse his convictions and sentence of death.

Respondent concedes that review of CALJIC Nos. 2.03 and 2.52, as well as of the denial of the proposed modifications to those instructions is preserved for appellate review. However, respondent argues that appellant forfeited any claim of error regarding CALJIC No. 2.06 "by failing to object or request augmentation." (RB 316, 319-320.) Respondent cites *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 for the proposition that failure to object to an instruction in the trial court waives appellate review of any claimed error "unless the claimed error affected the substantial rights of the defendant. . . ." (RB 319.) Respondent conveniently omits, however, the further point made on the same page in the *Andersen* opinion: "Ascertaining whether claimed instructional error affected the substantial

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[49] See RB 327: "the jury ... still would have reached the same verdicts even if the trial court had instructed the jury with any legally correct modifications requested by appellants."

rights of the defendant necessarily requires an examination of the merits of the claim. . . ." The issue of whether instructional error is waived cannot be determined, as respondent tries to do, by analysis of the instruction independent of analysis of the claimed error involved and of the role and effect of the instructions at trial.

While grudgingly acknowledging that no objection is needed to preserve arguments of instructional error which affects the substantial rights of the defendant (Pen. Code §1259), respondent argues that CALJIC No. 2.06 did not affect the substantial rights of the defendant because it was not constitutionally compelled and was "unnecessary." (RB 320.) The logic of respondent's argument, if such there is, is not readily apparent.

Appellant does indeed contend (not concede) that the instructions were unnecessary, their purported relevance being repetitious of more general instructions, while improperly pinpointing prosecution theories about the interpretation of evidence and simultaneously distorting the probative value of certain circumstantial evidence in a manner which unconstitutionally lightened the burden of the prosecution. (AOB 292-307.) Neither appellant's argument in this regard, nor respondent's concession that the challenged instructions were unnecessary, supports an argument that giving an unnecessary instruction which lightens the burden of the prosecution does not thereby affect appellant's substantial rights.

In support of the argument that CALJIC No. 2.06 did not affect the substantial rights of appellant, respondent quotes *People v. Hillhouse* (2002) 27 Cal.4th 469, 503, as stating "Instructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review." (RB 320.) However, nothing in *Hillhouse* suggests that *only* instructions regarding the elements of the crime affect the substantial rights of the defendant, or are excused from the need for an

objection. Nor is that the law. *Hillhouse* provides no support for respondent's forfeiture argument as to CALJIC No. 2.06.

Moreover, as appellant demonstrated in the opening brief, CALJIC No. 2.06, as well as 2.03 and 2.52 affected the substantial rights of appellant in various ways, lightening the burden of the prosecution, impermissibly favoring and highlighting evidence and inferences favorable to the prosecution without equivalent treatment of evidence and inferences favorable to the defense or supporting a reasonable doubt as to the prosecution's proof of particular elements of the crimes charged, and permitting the jury to draw irrational inferences in support of the prosecution at the expense of the defense. Under section 1259, no objection was necessary to preserve the error for appellate review.

Respondent also cites *People v. Bolin* (1998) 18 Cal.4th 297, 326, and *People v. Vera* (1997) 15 Cal.4th 269, 275-276, in support of the argument that appellate forfeited appellate review of CALJIC No. 2.06 by failing to object to it. (RB 320.)

In *People v. Bolin*, the defendant claimed on appeal that the evidence did not support giving CALJIC No. 2.06, and that the instruction "improperly equated the conduct described with an admission or confession." (18 Cal.4th at p. 326.) This Court noted that at the time of the instructional conference in that trial, defense counsel agreed that the evidence supported No. 2.06 and did not object to it. Without acknowledging or discussing the terms of section 1259, this Court stated that "Any claim of error is therefore waived. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1223, 56 Cal.Rptr.2d 49, 920 P.2d 1254.)" (18 Cal.4th at p. 326.) The cited page in *Jackson*, though, states "As a preliminary matter, defendant joined in requesting three of the consciousness-of-guilt instructions. The claims of error are therefore waived with regard to them.

(*People v. Hardy* (1992) 2 Cal.4th 86, 152 [5 Cal.Rptr.2d 796, 825 P.2d 781].)" The citation to *Hardy* further indicates that the focus of the quoted language is the request by defense counsel for the complained-of instructions.[50] That is not the case here. Not even respondent claims that appellant *requested* CALJIC No. 2.06. (See RB 318.) *Bolin* does not support respondent's forfeiture argument.

People v. Vera, *supra*, 15 Cal.4th at pp. 275-276, addresses, in a context other than asserted instructional error, the general rule requiring objection to preserve an issue for appeal. Of course, that general rule is not the rule applicable to instructional error, which is specifically controlled by Penal Code section 1259, discussed above. *Vera* does not provide any support for respondent's forfeiture argument here.

Vera does provide some illumination as to another reason why forfeiture is inappropriate on this record. *Vera* recognizes that the point of a timely objection is to present the issue to the trial court, to allow the trial court to correct the error at trial, thus protecting the fairness and reliability of the trial itself and hopefully dispensing with the need for appellate review. (15 Cal.4th at pp. 275-276.)

Here, the three instructions share erroneous characteristics addressed

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[50] The record shows, however, that Reilly's trial attorney, Lasting, specifically requested the challenged instruction, presumably so he could argue the testimony of the named persons should be viewed with distrust. (See CALJIC No. 3.18.) Indeed, Lasting made this precise argument in his closing statement. Because it is manifest that Lasting had a legitimate tactical reason for requesting this instruction, we conclude any error was invited and Reilly is precluded from challenging the correctness of the instruction on appeal. (*People v. Hernandez* (1988) 47 Cal.3d 315, 353 [253 Cal.Rptr. 199, 763 P.2d 1289].)

(*People v. Hardy*, *supra*, 2 Cal.4th 86, 152.)

in the opening brief and in the defense-requested modifications to CALJIC Nos. 2.03 and 2.52. Yet the trial court rejected the requested modifications out of hand. Any similar request to modify No. 2.06, which was addressed immediately after the trial court had denied the requested modifications to No. 2.03 (36RT 6156-6158), would have been futile, and unnecessary.

Respondent also adds an argument that the instructions did not merely duplicate other instructions on the use of circumstantial evidence. This argument is based in part upon an odd argument that CALJIC Nos. 2.00, 2.01 and 2.02 "focused on the facts of the crimes and the mental state of the defendants which committing the crimes," while "[t]he challenged instructions, on the other hand, concerned the defendant's state of mind *after* committing the crimes and whether that reflected the defendants' own belief that they had done something wrong." (RB 325 (emphasis in original).) Respondent does not cite any authority for this novel interpretation of these instructions, for none exists. CALJIC No. 2.02 does indeed address "Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State," and the three challenged instructions do, in fact, address a defendant's actions after the crime and relate it to his state of mind. However, that is as close as respondent's argument comes to reflecting the language, the purpose and the effect of the instructions addressed. Nothing in CALJIC Nos. 2.00 or 2.01 restricts the jurors' consideration of circumstantial evidence to "the facts of the crimes and the mental state of the defendants which committing the crimes." Rather, those instructions address the use of circumstantial evidence to prove the existence or non-existence of *facts*.

Moreover, the relevance of actions reflecting a state of mind after a crime is committed, whether a belief in wrongdoing, or fear of wrongful accusations, or any other state of mind, is as circumstantial evidence. If the

actions do not serve to establish a *relevant* state of mind, i.e., a relevant fact, then the actions are not relevant. The distinction between "facts of the crimes and [] mental state [] while committing the crimes" on the one hand, and "state of mind after committing the crimes and whether that reflected the defendants' own belief that they had done something wrong," on the other hand, is a distinction without any real meaning or relevance in this context.

To the extent that the instructions served a legitimate purpose of instructing the jurors on the specific insufficiency of "consciousness of guilt" to convict, it did so in a manner which simultaneously added significant erroneous and prejudicial instructions on other specifics. Appellant requested modifications to the instructions to address these other specifics and to prevent or cure the errors and resulting prejudice from the instructions given by the trial court. Respondent wholly fails to address the proposed modifications, and fails to demonstrate in any way that the proposed modifications were erroneous, or that they were not clearer and more balanced statements of the law relating to this specific evidence than the instructions given by the trial court.

In arguing that any error was harmless, respondent concedes that, "the jury could have made inferences about [appellant's] consciousness of guilt even if the challenged instructions had not been given." (RB 326.) This is correct, and respondent thus concedes a fundamental basis of appellant's argument.

Respondent, however, draws a conclusion from that concession which does not logically follow. Respondent contends that

> absent the instructions, the jury *would have made* normal inferences from evidence that appellants fled the crime scene; did not call police; hid out in a motel room; disposed of their weapons; cleaned blood from their bodies, clothes, and the car; discussed alibis; and lied to police about their whereabouts at the time of the murders.

(RB 326 (emphasis added).) Respondent perhaps means to argue that most of the inferences available under the instructions were available even without the complained-of instructions. What respondent studiously ignores is the disparate treatment of the instructions in highlighting evidence and inference in a manner favorable to the prosecution and ignoring equivalent evidence and inference favorable to the defense. That disparate treatment is a root of the flaws in these instruction, yet respondent fails to address it.

By suggesting that the "normal" inferences from the evidence "would have been" drawn, and "would have been" supportive of the prosecution's case in the absence of instructions, respondent overstates the point, but shows the dangers of these argumentative, prosecution-favoring pinpoint instructions. What "normal" inferences *would* or *could* have been drawn from the evidence were matters for argument, not instruction beyond CALJIC Nos. 2.00, 2.01 and 2.02. Just as respondent focuses here on inferences from evidence supporting the prosecution's theory of this case, these instructions focused on and suggested to the jury only inference supporting the prosecution's theory.

Properly applying the circumstantial evidence instructions, jurors, guided by argument of the parties, would also have considered the evidence of e.g., the post-homicide actions of Evans, as well as those of appellant and other codefendants, and would have been left to draw their own conclusions as to what reasonable inferences could be drawn from those actions. The jurors would not have been directed by the trial court to the prosecution's preferred inferences regarding appellant, i.e., inferences of "guilt," nor would they have been directed to consideration of the evidence as probative of appellant's state of mind before and at the time of the homicides, as the instruction implicitly directed them was permissible.

Respondent's cursory assertion that the evidence was overwhelming

is adequately refuted both legally and factually in appellant's opening brief (see, e.g., AOB 306-307, 325-326, 401-406) and elsewhere in this brief. (See Args. I, II, *ante*, and Arg. XV *post.*) No further reply is necessary here.

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THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

In the opening brief, appellant demonstrated that a series of instructions given at appellant's trial (CALJIC Nos. 1.00, 1.02, 2.01, 2.02, 2.21.2, 2.22, 2.27, 2.50, 2.51, 2.52, 2.90, 8.20, 8.83, 8.83.1), violated basic constitutional principles under the Sixth, Eighth and Fourteenth Amendments. Respondent makes a forfeiture argument which is without merit (RB 328-329), and a cursory argument that any error was harmless due to the weight of the evidence. (RB 334.) Otherwise, respondent relies on this Court's continued rejection of these claims in other cases and does not present any substantive arguments in support of the challenged instructions, or in contradiction to the arguments set forth in appellant's opening brief. (RB 329-334.)

Appellant has acknowledged this Court's rejection of appellant's claims regarding these jury instructions, but in the opening brief provided authority and argument for reconsideration of its prior decisions. No further reply by appellant is otherwise necessary on the substantive claim except to request that this Court reconsider its prior rulings in this area and, accordingly, reverse his death judgment.

Respondent argues that appellant's claims about some of the instructions involved are forfeited because appellant did not object in the trial court. (RB 328-329.) As in Argument IX, *ante*, respondent attempts to circumvent Penal Code section 1259's terms by citing *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 for the proposition that "[i]nstructions on using circumstantial evidence and evaluating witnesses did not affect appellants' fundamental rights and appellants have forfeited challenges to

those instructions." (RB 328-329.) Even assuming arguendo that respondent's assertion about the effect of the instructions might be arguable in some other context,[51] *People v. Andersen* provides no support for any part of the proposition for which respondent cites it. As explained in Argument IX, *ante*, respondent conveniently omits the further point made on the same page in the *Andersen* opinion: "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim. . . ."

The question of whether instructional error is waived by the lack of an objection cannot be determined, as respondent appears to suggest, by analysis of the instruction independent of the claimed error and its effect on the trial. Respondent even quotes *People v. Salcido* (2008) 44 Cal.4th 93, 155, to that effect: "Because defendant contends the instruction reduced the prosecutor's burden of proof, thus affecting one of his fundamental constitutional rights, we entertain the claim on its merits." (RB 329.) As explained in the opening brief, the instructions did affect appellant's substantial rights, are fully preserved, and require reversal of the judgment.

Respondent's argument that "the evidence against appellants was overwhelming and their defense theories were not credible" (RB 334), is cursorily made by reference to unspecified discussions elsewhere in respondent's brief. Rather than repeat the demonstrations of the closeness of the case and the substantial evidentiary weaknesses in the prosecutor's case made in the opening brief (see, e.g., AOB 306-307, 325-326, 401-406) and

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[51] Appellant does not agree, as a general matter, that instructions on using circumstantial evidence and evaluating witnesses do not affect a defendant's substantial rights, and knows of no authority supporting that proposition. Respondent provides none. However, it is beside the point of the analysis relevant here, and will not be argued further.

elsewhere in this brief (see Args. I, II, *ante*, and Arg. XV, *post.*) , appellant reiterates and incorporates those discussions herein. Moreover, respondent's reliance on the weight of the evidence as demonstrating harmlessness is misguided. As appellant demonstrated in the opening brief, the error is of a nature which cannot be held harmless. (*Sullivan v. Louisiana*, (1993) 508 U.S. 275, 278-282.) At the very least, given that the issues involved the resolution of substantial contested evidentiary disputes, the state cannot carry its burden of proving the error harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 19; *Chapman v. California* (1967) 386 U.S. 18, 24.)

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XI

APPELLANT WAS DENIED HIS RIGHT TO BE PRESENT AT CRITICAL STAGES OF HIS TRIAL

In the opening brief, appellant demonstrated that numerous proceedings were conducted by the trial court in the absence of appellant, without any personal, knowing and intelligent waiver of his presence having been obtained from appellant, in violation of both statute and the federal and California constitutions, requiring reversal of the judgment. (*Snyder v. Massachusetts* (1933) 291 U.S. 97, 106-107; *United States v. Gagnon* (1985) 470 U.S. 522, 526; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 and 15.) Respondent answers, for the most part, with conclusory denials that appellant had any right to be at any of the proceedings in question, that he was adequately protected by the presence of his counsel at those proceedings, and that no prejudice accrued from appellant's exclusion from those proceedings.

As demonstrated in the opening brief, appellant had a right guaranteed by the federal constitution "to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745.) Respondent claims that the proceedings in question here were not "critical to the outcome" of appellant's trial, but relies primarily on conclusory statements to that effect and arguments that appellant was irrelevant to the proceedings in question.

Respondent appears to argue that because procedural, legal or evidentiary matters, rules or concepts were discussed at sidebar conferences, appellant could not therefore have understood or contributed to what was occurring, and consequently had no right to be personally present. Such characterizations are at best conclusory rather than adding to the analysis,

and unreasonably oversimplify the context of the sidebar proceedings.

Respondent claims, inter alia, that because appellant testified that he did not attend school regularly after the eighth grade, dropped out in the 10th grade, and had no legal training, it is "extremely unlikely that he could or would have contributed in any way to the discussions regarding appropriate instructions on issues of law." (RB 346.) Respondent provides no authority for the remarkable proposition that a defendant's educational background can affect the parameters of his constitutional rights to be present at all critical phases of the trial in which his life is at stake. What defines a defendant's right to be present at a proceeding is the nature of what occurs at the proceeding, not any specific attribute of the defendant. Respondent's argument is as meritless as it is insulting.

The sidebar proceedings did not involve straightforward evidentiary issues such as whether a question called for hearsay, or whether a document was properly authenticated. These proceedings included discussions and arguments regarding witnesses, their given and expected testimony, the conflicting defenses of the various codefendants and the prejudice accruing to the defendants from the joint trial, and of motions for severance and for mistrial and the trial court's rulings thereon. Especially given the antagonistic, even hostile, nature of the trial resulting from the trial court's refusal to sever appellant's trial from that of LaMarsh and Willey (see Arguments II and III), these proceedings were unquestionably "critical to [the trial's] outcome." (*Kentucky v. Stincer*, *supra*, 482 U.S. at p. 745.)

The opening brief included the statement that a number of the sidebar conferences "involved substantial argument by counsel including requests for mistrial and severance. (AOB 332.) That statement was not meant to, and did not, concede in any way that the proceedings at the sidebar could not have been understood by appellant, or that he could not have contributed.

Respondent, however, claims that "no layperson would know the legal bases for motion for mistrial or severance. . . ." (RB 342.) Even assuming arguendo that such an argument might have some relevance in another case (although the defendant's education or training is irrelevant to his right to be present), under the facts of this case, whether or not appellant would have known the *legal* bases of the issues, any reasonable person would have understood the general factual predicates being argued, i.e., the unfairness and prejudice to appellant from a joint trial and from many of the tactics of counsel for codefendants.

The sidebars were extensive, and covered numerous legal and factual arguments, disputes, allegations, proffers, and decisions thereon by the trial court. The sidebar proceedings in this case were intimately and intricately interconnected with course of the trial. To dismiss them as unimportant to appellant's right to be present at his trial because some aspect of the conference could be characterized as "legal" misses the point entirely. Nothing in *People v. Cole* (2004) 33 Cal.4th 1158, 1231, or *People v. Waidla* (2000) 22 Cal.4th 690, 741, cited by respondent, is contrary to that determination.

Moreover, even if appellant's absence from any specific hearing, standing alone, might be in some sense excusable, in the context of this trial and taken as a whole, the sidebars and other conferences outside the presence of the jury from which appellant was excluded unquestionably constituted a substantial and critical portion of the trial. Legal argument and rulings regarding the meaning, materiality and relevance of proffered evidence, the credibility of witnesses, and the resulting prejudice to appellant's rights to a fair trial were implicated, and appellant had a right to either be personally present, or to knowingly and intelligently waive his presence. Neither course was followed here.

Concerning appellant's right to be present at discussions concerning responses to jury questions and during supplemental jury instructions, respondent misleadingly states that "appellants personally stated that they did not wish to be present during discussions of jury instructions. (34 RT 6147.)" (RB 344.) The portion of the record cited concerned discussions of jury instructions which took place prior to the trial court's instruction of the jury, prior to argument and prior to the jury being given the case for deliberations, not proceeding during jury deliberations. In fact, any waiver was quite specifically directed to, and limited to the proceedings which took place the following morning:

> THE COURT: All right. *For tomorrow morning's* going over the instructions, Mr. Amster, does your client, Mr. Cruz, to be here?
>
> MR. AMSTER: I believe not.
>
> THE COURT: Mr. Cruz, you're willing for the Court and your attorney to discuss jury instructions *without your being here tomorrow morning* then?
>
> DEFENDANT CRUZ: That's fine with me, Your Honor.
>
> THE COURT: All right. It will be on the record.
> Mr. Beck, how about you?
>
> DEFENDANT BECK: I'll waive.
>
> THE COURT: So you don't want to be here either?
>
> DEFENDANT BECK: That's correct.

(34 RT 6147 (emphasis added).) There is no indication that appellant's personal statements at that point were intended to be, or taken to be, waivers of personal presence at proceedings during jury deliberations.

Respondent notes that "in appellants' presence, counsel stipulated that appellants did not need to be present during discussions of jury

questions. (37 RT 6766.)" (RB 344.) However, review of the cited portion of the record demonstrates that counsel's stipulation was not understood by counsel or by the trial court to cover any and all jury questions, or anything done in response thereto. In fact, while dealing with a later jury question, the trial court asked counsel whether or not they wanted the defendants present. (37 RT 6779.) While counsel for appellant declined in that instance, it was not his call to make. The trial court erred by not insisting that any waiver of appellant's presence be made personally by appellant. (See AOB 352-353.)

Respondent claims "[the] formulation of responses to jury inquiries is a question of law resolved outside the jury's presence." (RB 345.) However the authorities cited in support of this claim are inadequate to the task. Respondent cites *People v. Lucero* (2000) 23 Cal.4th 692, 717, *People v. Waidla*, 22 Cal.4th at p. 742, and *People v. Horton* (1995) Cal.4th 1168, 1122. *Waidla* does not address the circumstance of a proceeding relating to a deliberating jury's question and/or the response thereto. (22 Cal.4th at pp. 741-743.) Although *Lucero* did deal with proceedings which included an answer given to the jury, that case does not state such a rule as respondent asserts, nor does it support any such rule. Instead, *Lucero* found any violation of the defendant's rights to be harmless based on the specific facts of that case, the specific question of the jury, and the specific answer given to the jury. (23 Cal.4th at pp. 716-717.)

Horton deals with proceedings convened to read back testimony, and does state that "[t]he reading back of testimony ordinarily is not an event that bears a substantial relation to the defendant's opportunity to defend." (11 Cal.4th at 1121.) Respondent does not address the federal authority cited by appellant which supports the contrary conclusion. (AOB 351, fns. 127, 128.) In any case, appellant complains of his absence from proceedings

at which the parameters of specific readback requests were discussed and determined, which *Horton* does not address.

Respondent also claims that "[t]he discussion of responses [to jury questions] involved the type of legal questions that appellate courts have routinely held do not require a defendant's personal presence," citing *People v. Morris* (1991) 53 Cal.3d 152, 210, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *United States v. Rubin* (2d Cir. 1994) 37 F.3d 49, 54; *United States v. Sherman* (9th Cir. 1987) 821 F.2d 1337, 1339 and cases cited therein, and *United States v. Graves* (5th Cir. 1982) 669 F.2d 964, 972-973, and cases cited therein. (RB 345.) These authorities do not support respondent's contention. None of them address conferences regarding jury questions during deliberations, or reported proceedings giving the jury further instruction, or other communications with the jury as a whole during deliberations, which are the type of proceedings involved here.

Respondent argues that appellants' personal presence "is not necessary to formulate responses to jury questions in order to effectuate the Sixth Amendment's 'opportunity for [a] full and effective cross examination'" citing *Kentucky v. Stincer, supra,* 482 U.S. at pg. 74 and *People v. Cole* (2004) 33 Cal.4th at 1231. Neither case addresses the kind of questions or conferences involved in this case. Moreover, determination of how to respond to jury requests for the reading back of testimony during deliberations unquestionably has a potential impact on a defendant's rights to confrontation, including full and effective cross examination, if, e.g., the testimony of a prosecution witness which is read back to the jury includes only the direct examination, but not the defense cross-examination of the witness, or if the reporter does not omit from the readback matters stricken from the record or other matters not strictly part of the testimony upon which

the jurors may rely.

In the opening brief, appellant argued that, had he been present at the discussions concerning the jury's requests for read back of testimony, he hypothetically could have consulted with counsel concerning the advisability of allowing read back of testimony outside the presence of counsel, could have consulted with counsel about the advisability of rejecting the jury's request to have the prosecution opening statement read back to them, could have urged counsel to object to the trial court's instruction that the jurors could cut off the reading of the testimony without having heard the entirety of the testimony, or could have urged counsel, in order that testimony favoring the prosecution not be unduly emphasized, to request that testimony of other witnesses be read back as well. (AOB 350-352.)

Respondent claims that appellant

> offers no authority for the proposition that they could make the jury listen to more of a witness's testimony than it wanted to hear, nor that appellants could require the jury to listen to a read back of other testimony that appellants wanted the jury to hear again. In fact, it is precisely that type of misguided advice that underlies why it is not considered essential that defendants be present during legal discussions outside the presence of the jury. Appellants have proven the People's case.

(RB 346-347.) Respondent, of course, cites no authority to support his assertion that appellant's hypotheticals are misguided. On the other hand, in the opening brief, appellant cited *United States v. Binder* (9th Cir. 1985) 769 F.2d 595, 600-601, *People v. Robinson* (2005) 37 Cal.4th 597, 636, *United States v. Nolan* (9th Cir. 1983) 700 F.2d 479, 486, and *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, 1121, as support. (AOB 351, fns. 127, 128.) Respondent addresses only *Riley v. Deeds,* and then only to reject it as not definitive on the subject. (RB 347, fn. 54.) Respondent otherwise relies on sarcasm rather than legal argument to support his position.

Regarding the questioning of juror Rall during deliberations regarding a news article he had read and wanted to share with the other jurors, respondent argues that appellants "gloss over the fact that their attorneys specifically waived their presence (37 RT 6779) and there was absolutely no substance to the allegation of juror misconduct." (RB 347.)

Appellant did not "gloss over" trial counsel's purported waiver of appellants presence. Rather, appellant acknowledged the purported waiver (AOB 336-338) and provided authority which demonstrated the constitutional insufficiency of that purported waiver. (AOB 352-353.) Respondents only rejoinder is to characterize these points as "gloss," without providing any contrary authority or argument to support the purported waiver as sufficient to excuse the trial court's error in proceeding in appellant's absence without a personal waiver.

Having glossed over the legal insufficiency of trial counsel's purported waiver, respondent focuses on argument that any potential role appellant may have played at any of these proceedings would have been irrelevant. Respondent posits that "of course, an appellant can always dream up things he might have said to counsel. By that logic trial counsel should *never* be allowed to make a decision without the presence of the defendant because there is always the possibility that the defendant will have a brilliant insight. But that is not the law." (RB 348 (emphasis in original).)

Respondent's extrapolation to the extreme avoids rather than addresses the issue here. Even where the law provides that counsel has control over certain decisions during litigation, the defendant still has a right to be present at critical stages of the proceedings unless he has personally, knowingly and intelligently waived his presence. The logic of appellant's arguments, and the application of controlling legal principles to the facts of this case, lead to the necessary conclusion that the proceedings in question

required either appellant's presence or his personal waiver of presence. Neither occurred, resulting in constitutional error.

Respondent argues that appellant had no right to be present at the trial court's inquiry of a sitting juror during deliberations, about possible misconduct or possible cause for that juror's dismissal. Respondent describes the proceeding as involving only a juror who read a newspaper article about an unrelated criminal matter. (RB 347.) Respondent then argues that "if the trial court never instructed the jury to avoid newspaper articles about other crimes, then there was no reason for appellants to ask their attorneys to address the juror on why he did not 'stop reading [the article] after recognizing the subject matter.'" (RB 348.) Respondent misses numerous points of concern in this circumstance, including points recognized by the juror himself, and by trial counsel and the trial court at the time.

The juror's note said, "Judge Lacy, Steve has asked if he can share the contents of this article with the jury." (37 RT 6776.) The article was entitled, "King Beating Eyewitnesses Disagree," about the Rodney King beating. As described by juror Rall, "the text of that article is about the eyewitness testimony and how two people can see the same thing and not really see the same thing." (37 RT 6785.) The jury had received instruction concerning the evaluation of eyewitness testimony (36 RT 6488-6489), and appellant's trial counsel had specifically addressed the non-reliability of eyewitness testimony in his closing argument at guilt. (See 36 RT 6552.)

Respondent focuses on the fact that the article concerned another case, and fails to address in any way that the risk of juror Rall having read the article or whether he discussed it with other jurors was about its discussion of evaluation of eyewitness testimony, the subject of argument and instruction in this case, and a real weakness in the prosecution's case.

Whether the inquiry by the trial court in appellant's absence was adequate is not resolved by the inaction of defense counsel. Appellant would have had a role to play; he was denied the opportunity to play that role or to personally waive it.

The entire jury was brought into the courtroom and questioned about the article and about the autopsy reports which were erroneously sent into the jury room during deliberations. Whether misconduct or prejudice is established in the proceedings conducted in appellant's absence does not resolve the question of whether he had a right to be present and to consult with his attorney about how defense counsel should proceed, or, e.g., whether there was additional relevant information which might have been developed had he been present to play a role to which he was entitled as a capital defendant.

Respondent also focuses on the fact that reading the article may not have violated any admonition by the trial court to the jurors. However, that was but one issue raised by the juror's exposure to the article. Whether the juror had been tainted by having read the article such that he could no longer evaluate the evidence solely on the instructions given by the trial court was also an issue. Appellant's counsel asked that the juror be excused based solely on having read the article. (37 RT 6776-6777.) Whether the inquiry conducted by the trial court on that point was sufficient is a question regarding which appellant could well have had a role to play, even if only by written note to his attorney.

The adequacy of any such inquiry depends in substantial part upon assessment of the credibility of the juror and his answers. A criminal defendant has a role to play in that assessment. What conclusions he *would* have drawn, what affect his involvement *would* have had, whether he would have consulted with counsel, suggested questions, pointed out arguments, or

remained silent, all involve speculation because he was not allowed to be present at the proceedings. Whether the effect of the error on this trial was negligible or not can only be based speculation, compelling the conclusion that respondent cannot demonstrate that the error was harmless beyond a reasonable doubt, as is the government's burden. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal was therefore required.

Respondent argues inconsistently regarding the standard for evaluating prejudice. At RB 342, respondent argues that "the burden is on the defendant to demonstrate that his absence prejudiced his case or denied him a fair trial," citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1357. At RB 350, however, respondent acknowledges that if appellant was excluded from a critical stage of the trial, "that would be federal (and state) constitutional error and reviewable under *Chapman*. (*People v. Bradford, supra*, 15 Cal.4th at pp. 1356-1357; *Rushen v. Spain* [(1983)] 464 U.S. [114,] 118, fn. 2.)"

Respondent, of course, contends that appellants were not excluded from any critical stages of their trial, and that therefore appellants bear the burden of proving prejudice. (RB 350.)

Respondent argues that "since appellants fail to demonstrate that they made any meaningful contribution during the numerous hearings they did attend, there is virtually no possibility that appellants would have added anything to the legal discussions they did not want – or ask – to attend." (RB 351-352.) Respondent cites no authority which supports the need for, or even the relevance of such a showing. Such a showing would not usually be available on the record. Nor would the absence of such a showing on the record demonstrate that a defendant had no input or effect upon the proceedings. Respondent recognized that appellant's trial counsel wanted any communication from appellant in court to be in writing. (RB 346.)

Any such communication in the proceedings which appellant was allowed to attend would, therefore, not be apparent on the record. Moreover, requiring such a showing to appear on the record would be an inappropriate and unconstitutional invasion of the attorney-client privilege and appellant's right to counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 7, 15.)

Respondent argues that "even if appellants should have been present, they cannot show they would have added anything that could have helped them overcome evidence that was overwhelming. Thus, any error was harmless beyond a reasonable doubt." (RB 352.) This is a misstatement of the *Chapman* standard. It is not appellant's burden, having established constitutional error, to further establish prejudice. It is the government's burden to establish the lack of prejudice beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) If respondent's argument is merely a poorly worded reference to respondent's claim that the evidence against appellant was overwhelming, it still fails. As demonstrated in the opening brief, and elsewhere in this brief,[52] respondent's argument that the evidence is overwhelming is misguided, ignoring substantial weaknesses in the prosecution case as well as substantial conflicts in the evidence on crucial issues.

The erroneous violation of appellant's right to be present at proceedings critical to the outcome in this trial having been demonstrated, and respondent having failed to establish the harmlessness of the error beyond a reasonable doubt, the judgment of conviction must therefore be reversed and his death sentence vacated.

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[52] See, e.g, AOB Args. I, II, VI-VIII, XIV; Args. I, II, *ante*, and Arg. XV, *post*.

XII

THE SENTENCE OF DEATH AS TO COUNT V, CONSPIRACY TO COMMIT MURDER, MUST BE VACATED AS AN UNAUTHORIZED SENTENCE FOR THAT CRIME

In the opening brief, appellant demonstrated that the sentence of death which the trial court imposed as to Count V was an unauthorized sentence, and that should this Court not reverse Count V, that sentence must be vacated and the judgment modified accordingly. Appellant further demonstrated that any sentence on Count V must be stayed pursuant to Penal Code section 654. (AOB 358-359.)[53]

Respondent concedes that the sentence on Count V was unauthorized, and contends that it should be modified to a term of 25 years to life. (RB 352-353.) However, relying on *People v. Vargas* (2001) 91 Cal.App. 4th 506, 570-571 and *People v. Ramirez* (1987) 189 Cal.App.3d 603, 615-616, respondent argues that the modified sentence on Count V should not be stayed under section 654 because there was evidence of separate objectives to the conspiracy other than the four homicides for which appellant was sentenced to death, i.e., that appellant conspired to kill people besides the four victims in this case. (RB 355-356.)

Respondent's argument that there were separate objectives here "parses the objectives too finely." (*People v. Britt* (2004) 32 Cal.4th 944, 953.) The prosecution's theory of the conspiracy involved only a single intent and objective – that the co-conspirators intended to go to the Elm

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[53] Appellant also demonstrated that Count V should be reversed for instructional error. (See Argument VII.A., *ante*; AOB Argument VII.) Appellant does not intend by anything in this argument to waive any part of that claim. As stated in the AOB, should this Court not reverse the conviction on Count V, the sentence imposed on that count must be vacated, and the judgment modified accordingly.

Street house and kill whoever was there. Assuming arguendo that was the objective of the conspiracy, it was achieved. Whether or not appellant or some other co-conspirator "hoped" that some other person would be there did not constitute a change in the intent or objectives of the conspiracy. There was no evidence that any conspiracy that might have been entered into had an objective of seeking out other victims. According to the evidence, assuming arguendo that there was a conspiracy, the only identifier of potential victims of the conspiracy was whether a person was or was not at the Elm Street house at the time the co-conspirators were there. No other intent or objective of the conspiracy was identified. Section 654 therefore requires that any sentence on Count V be stayed. (*In re Cruz* (1966) 64 Cal.2d 178, 180-181.)

The facts here present a markedly distinguishable scenario than that presented in *Vargas*. There the evidence showed a conspiracy by Nuestra Familia, of which the defendant was a member, to kill not only the victim, but others as well.[54] The conspiracy therefore had broader objectives than

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[54] [T]he record evidence points only to one conspiracy—the agreement to establish the NF as a criminal gang to commit murder, robbery, burglary, extortion, and drug trafficking, among other crimes. Within that umbrella conspiracy were sub-conspiracies to commit specific crimes. However, the commission of the specific crimes, and the drawing up of plans required to commit them, were all in pursuance of the overriding purpose of the NF, which was to establish power through the use of crime, force, and fear, and to use that power to further strengthen and perpetuate itself by killing its enemies, raising money for the gang, and instilling obedience and discipline among its members by killing members who break its rules. Thus, Rosas was killed because he had "snitched on Pablo Pena, Panther." The decision to kill Rosas, being one in furtherance of the overriding purpose of the

(continued...)

the single homicide which occurred in that case. (*People v. Vargas*, *supra*, 91 Cal.App.4th at p. 571.) There is no substantial evidence supporting a similar finding in this case.

In *Ramirez*, on the other hand, the Court of Appeal clarified the rule in a manner that demonstrates that a stay is required in this case.

> Double punishment occurs when a conspiracy has multiple objects and all are punished as substantive offenses, just as when the conspiracy has but one object which is punished as a substantive offense. (*In re Cruz*, supra, 64 Cal.2d 178, 180– 181, 49 Cal.Rptr. 289, 410 P.2d 825.) On the other hand, there is no double punishment in sentencing for a conspiracy and a substantive offense which is not an object of the conspiracy. (*People v. Moringlane* (1982) 127 Cal.App.3d 811, 819, 179 Cal.Rptr. 726.)

(189 Cal. App. 3d at pp. 616-617, disapproved on other grounds in *People v. Russo* (2001) 25 Cal.4th 1124,1137 .)

Here the prosecution theory was that there was a single conspiracy, with an objective of killing whoever was at the Elm Street house. If so, the objective was achieved by the four homicides. Having been sentenced to death for each of the four homicides, appellant cannot also be punished for the conspiracy which had those homicides as an objective.

There is evidence of possible non-homicidal objectives to any conspiracy into which appellant entered, such as the interpretation that the intent was to beat up whoever was in the Elm Street house. (See Argument VII.A., *ante*.) However, those non-homicidal objectives, if accepted as a basis for allowing separate punishment for the conspiracy, would

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[54](...continued)

> conspiracy, was part of the overall conspiracy, and hence cannot be the basis for filing a separate charge of conspiracy.

(*People v. Vargas*, *supra*, 91 Cal. App. 4th at p. 553.)

simultaneously require reversal of the conspiracy conviction due to instructional error. (*Ibid.*)

Respondent cites *People v. Vieira* (2005) 35 Cal.4th 264, 273, 306, noting that, while this Court modified the sentence for conspiracy in that case to 25 years to life in prison rather than the death penalty, it did not order the sentence stayed pursuant to section 654. (RB 357.) However, the question of whether or not section 654 required a stay of the sentence was simply not addressed in *Vieira*. "[I]t is beyond cavil that 'an opinion is not authority for a proposition not therein considered.' (*Ginns v. Savage* [1964] 61 Cal.2d [520], 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689.)" (*Strauss v. Horton* (2009) 46 Cal. 4th 364, 496.) *Vieira* is of no help to respondent on this aspect of the modification of the sentence for conspiracy.

If Count V is not reversed for instructional error as set forth in Argument VII.A., *ante*, the sentence on that count must be modified to a term of 25-years-to-life, which term must be stayed pursuant to section 654.

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XIII

THE TRIAL COURT'S ERRONEOUS MODIFICATION OF CALJIC NO. 8.87 REQUIRES REVERSAL OF THE PENALTY JUDGMENT

In the opening brief, appellant demonstrated that appellant requested CALJIC No. 8.87,[55] which called for the identification of relevant evidence to be considered under section 190.3, factor (b) (hereinafter "factor (b)"), and limitation of the jurors' consideration as aggravation under factor (b) to that identified evidence. The trial court, however, gave an erroneously modified version of that instruction, without any identification of the relevant evidence or any real limitation of the jurors' consideration of evidence as aggravation under factor (b). As a result of those modifications, jurors were allowed to use as aggravation evidence which was not properly available for use as aggravation. This included: evidence of his possession of assault weapons, knives and grenades (AOB 362-363, 366-368); evidence of appellant's actions regarding his attempts to strengthen his daughter's legs, to discipline her by leaving her alone in her room, or to strengthen her lungs by putting her in cold water or spraying her with water (AOB 362, 365-366); and evidence concerning appellant's juvenile misconduct involving injury to property. (AOB 363, 368.)

Respondent's argument consists primarily of contentions that appellant forfeited his claim of instructional error by failing to object or to request supplemental or clarifying instructions, and irrelevant arguments that trial courts have no sua sponte duty to instruct juries on factor (b) evidence.

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[55] Respondent is correct in noting, at RB 357, fn. 56, that the heading for this argument in appellant's opening brief, at AOB 359, contains a typographical error in referring to CALJIC "8.77" rather than 8.87. Throughout Argument XIII in the opening brief, the instruction at issue is properly identified as CALJIC 8.87.

(RB 361.)

Respondent acknowledges that the evidence of appellant's possession of firearms or other weapons did not qualify for use as aggravation under factor (b), but argues that the jurors would not have considered the evidence under factor (b) because no crime was committed. (RB 368-369.) Respondent argues on the other hand that all of appellant's conduct regarding Alexandra was properly considered as aggravation under factor (b). (RB 367-368.).)

Respondent also adds responses to claims of error not made in the opening brief. Respondent argues that appellant waived any claim of error in the admission of Starn's testimony about Alexandra by failing to object to its admission. (RB 367.) However, appellant did not raise the admission of that evidence as error; only the improper use of that evidence as aggravation under the erroneously modified instruction was raised as error by appellant.

Likewise, respondent's argument that appellant forfeited any claim of error in the admission of the evidence of appellant's juvenile misconduct (RB 371-372) is misguided. Appellant does not claim the evidence was erroneously admitted. As appellant pointed out in the opening brief, appellant introduced the evidence of his juvenile misconduct. That, however, does not obviate the risk that the jurors considered that evidence as aggravating prior criminal activity under the erroneously modified instruction given by the trial court. It is that risk of prejudice that appellant addressed in the opening brief, not any question of admissibility.

A. Evidence Before the Jury Did Not Qualify As Aggravation under Factor (b)

1. Evidence Regarding Appellant's Treatment of Alexandra Did Not Establish Force or Violence or Violation of a Penal Statute

In relation to the evidence regarding appellant's daughter, Alexandra,

respondent relies upon *People v. Napoles* (2002) 104 Cal.App.4th 108, 115, for the proposition that "a violation of Penal Code section 273a may also be established by a showing of 'a continuous course of conduct of a series of acts over a period of time.'" Appellant has no dispute with that proposition generally.[56] However, *Napoles* involved medical and physical evidence of a series of abusive acts resulting in substantial and serious injuries to the defendants' infant daughter, including bone and skull fractures, human bite marks, and severe pain prolonged by delay in seeking treatment. (104 Cal.App.4th at pp. 112-113.) In contrast, the record relevant here consists primarily of uncorroborated characterizations by Jennifer Starn, such as her testimony concerning appellant putting Alexandra in an undescribed

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[56] Section 273a provides in pertinent part:

> (a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.
> (b) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

halter/swing[57] with jars of water (of indeterminate weight) attached (by means not described) to her legs to strengthen them. Nothing in *Napoles* or any other case cited by respondent remotely suggests that such activity constitutes either abuse or can legitimately be described as part of a "course of conduct" which violates Penal Code section 273a, or as activity involving violence or a threat of violence. Nor does Starn's testimony that appellant kept Alexandra in her room with limited attention for some indeterminate time period in an attempt to discipline her constitute substantial evidence of such a course of conduct, or activity involving violence or a threat of violence. Nor does Starn's testimony of appellant's attempts to strengthen Alexandra's lungs by putting her in cold water or spraying her with water constitute substantial evidence of such a course of conduct, or activity involving violence or a threat of violence. At trial, the prosecution presented no expert or other corroborating testimony, as was presented in *Napoles* (104 Cal.App.4th at pp. 112-113, 117), to support such an interpretation of Starn's testimony, and respondent presents no comparable authority on appeal.

Respondent cites *People v. Lewis* (2001) 25 Cal.4th 610, 666, and *People v. Geier* (2007) 41 Cal.4th 555, 611, for the proposition that appellant forfeited any claim of error as to the instruction as it relates to the evidence concerning Alexandra by failing to object to the trial court's instruction and failing to request an amplifying instruction. (RB 367.) As pointed out above, appellant's claim here is based on the instructional error, not the admission of the evidence. Regardless of the admission of the evidence, it did not qualify as factor (b) evidence. The trial court's modification of the instruction erroneously allowed the jurors to consider the

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[57] There are no pictures of this contraption in the record, so it is unclear whether or not it was anything but a homemade version of commonly and commercially available baby swings/jumpers.

evidence as aggravation supporting a death verdict. As a result, as demonstrated in the opening brief, the erroneous instruction requires reversal.

2. Evidence of Appellant's Possession of Firearms or Other Weapons Did Not Establish the Violation of a Penal Statute or Any Use or Threat of Force or Violence

Appellant demonstrated in the opening brief that the modified instruction given by the trial court improperly allowed the jurors to consider evidence presented at the guilt phase of appellant's possession of assault weapons, knives, grenades[58] and other firearms as aggravation under factor (b), under the trial court's description of "criminal activity which involved the express or implied use of force or violence or the threat of force or violence." (AOB 366-368; see also AOB Arg. II.)

Appellant acknowledged in the opening brief that no evidence of any criminal violation arising from the possession of those items was specifically identified or argued. However, nothing in the modified instruction specifically prevented any juror from considering that evidence as activity involving a threat, or even an implied threat, of force or violence, and thereby as aggravation supporting a death verdict.

Respondent argues that "[s]ince there was no evidence that the firearms were owned illegally, the jury could not have thought that mere possession of those weapons constituted criminal activity. Nor could mere possession of weapons amount to threats or violence." (RB 370.) Respondent provides no support for these propositions. There is authority for the contrary proposition, however, cited in the opening brief. (AOB

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[58] No evidence that the grenades were armed or operational was introduced.

368.)

In *People v. Cox* (2003) 30 Cal.4th 916, this Court found that the trial court, in its ruling on the automatic motion to modify the death verdict, "incorrectly stated that the mere possession of guns constituted a crime of violence." (*Id.* at p. 973.) That trial court was presumed to have known the law. That a trial judge could consider the mere possession of guns as a crime of violence suggests the reasonable likelihood that a jury given the instructions here could have come to a similar, and similarly erroneous, conclusion. In fact, even respondent argued in response to Argument I that appellant's possession of these weapons was evidence that appellant believed in violence. (RB 130.)

Even as to the factor (b) evidence specifically relied upon by the prosecutor, no instructions were given defining the elements of those crimes which must be found beyond a reasonable doubt. There was nothing in the instructions that gave the jurors any guidance on how to determine what evidence did or did not qualify under factor (b) as having constituted "criminal activity."

Moreover, it is reasonably likely that at least one juror would have considered the possession of these weapons, in the amounts possessed, as involving or demonstrating a threat of violence. In the guilt phase, the erroneous description of the relevance of "acts *similar to those constituting crimes*" (see Argument II, *ante*; AOB, Arg. II) had already predisposed the jurors to thinking in terms less strict than respondent appears to hope.

This Court has specifically acknowledged the threat posed by such an instruction as was given here, without identification of the specific criminal activity covered by the instruction, and specific limitation of the jurors to the consideration of that specified activity:

In order to avoid potential confusion over which "other crimes" - if

> any - the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction required by the *Polk-Stanworth* line of cases can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty. *Without such a limiting instruction, there is no assurance that the jury will confine its consideration of other crimes to the crimes that the prosecution had in mind,* because - as already noted - the jury is instructed at the penalty phase that in arriving at its penalty determination it may generally consider evidence admitted at all phases of the trial proceedings. (See former § 190.4, subd. (d).)

(*People v. Robertson* (1982) 33 Cal.3d 21, 55 (emphasis added).)

Similarly, respondent's reliance on the prosecution's argument to the jury – "the prosecutor implicitly told the jury not to use that evidence by leaving it out of his list of factor (b) criminal activities" (RB 370-371) – is adequately refuted by this Court's observations in *Robertson.*

Finally, respondent claims that "Cruz has no basis to prove the jury improperly used that evidence . . . ." (RB 371.)[59] Appellant has no burden to "prove" that the jury improperly used the evidence. As respondent acknowledged a page earlier (RB 170), the applicable standard is whether it is reasonably likely that the trial court's instructions caused the jury to misapply the law. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Boyde v. California* (1990) 494 U.S. 370, 380.) In this case, on these facts, appellant has met that standard.

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[59] Similarly, respondent attempts to impose an erroneous burden on appellant in arguing that "Cruz cannot show the instruction caused the jury to misapply the law." (RB 370.) Appellant has shown a reasonable likelihood that the instruction did cause the jury to misapply the law.

3. Malicious Injury to Property Is Not Admissible As Aggravation under Factor (b)

Respondent spends a page of argument to establish that which was uncontested, that defense counsel introduced the evidence of appellant's juvenile record, and that there is no valid argument on appeal that admission of that evidence was error. Appellant did not raise the admission of the evidence as error.

What appellant did raise as error is that the trial court's erroneous modification of CALJIC 8.87 allowed the penalty jury to misuse that properly admitted evidence. (AOB 369-374.) Respondent's only argument regarding the actual error raised in this regard is the repeated claim that the trial court had no sua sponte duty to give a properly worded instruction in this instance, and appellant forfeited any claim of instructional error. Respondent's argument and authorities simply do not address the error committed here.

Respondent relies upon *People v. Visciotti* (1992) 2 Cal.4th 1, 72. (RB 372.) In *Visciotti*, the evidence at issue was *violent* juvenile conduct, which, unlike the juvenile property crimes involved here, could properly be considered by the jurors as either aggravation or mitigation depending upon the jurors' view of the evidence. (2 Cal.4th at p. 72.) Moreover, in *Visciotti*, the defendant failed to request a limiting instruction. (*Ibid.*) Appellant, on the other hand, did request an instruction which both *identified* the potentially relevant criminal activity under factor (b) and *limited* the jurors' consideration of evidence of criminal activity to only that which was identified. *Visciotti* is thus wholly inapposite.

B. The Trial Court's Modification of CALJIC No. 8.87 Erroneously Allowed the Jurors to Consider as Aggravation Evidence Not Admissible As Such

Respondent's arguments regarding waiver and forfeiture are without

merit in the context of this case. The record is clear, and respondent acknowledges, that appellant requested CALJIC 8.87. That instruction, as it was requested, itself provides for identification of the applicable crimes or criminal activity potentially relevant as aggravation under factor (b). (RB 358; AOB 365.) Respondent acknowledges that the prosecution also tried to raise the need to identify the criminal activity with the trial court. (RB 359.)[60] Nevertheless, the trial court, on its own, modified CALJIC No. 8.87 to erroneously eliminate identification or description of the applicable criminal activity, rejecting the requests of the parties.

Respondent attempts to lay some additional burden on defense counsel in this situation. Defense counsel had requested the proper pattern instruction and had no obligation to object to the trial court's erroneous modification. (Pen. Code, §1259.) Respondent cites no authority which holds to the contrary. The trial court rejected the request of the defense and ignored the prosecution's attempt to address the issue and rendered its decision. The error lies plainly at the feet of the trial court, and anything further by defense counsel would have been futile.

None of the cases cited by respondent in support of the repeated contention that defense counsel was required to request "clarification" of the "incomplete" instruction address the specific procedural posture here.

Respondent cites a number of cases for the proposition that a trial court has no duty *sua sponte* to identify or limit the applicable criminal activity to be considered under the instruction as potentially aggravating

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[60] Respondent even quotes the Use Note for CALJIC No. 8.87 (RB 360, fn. 57), which states in part that the instruction as requested by defense counsel "must be given sua sponte in all cases where the People claim any criminal activity and especially where CALJIC 8.85, subparagraph (c) is given," as it was in this case. (41 RT 7501.)

evidence. However, appellant is not complaining about the lack of a sua sponte instruction, for the defense requested the proper instruction. It was the trial court's error in modifying the instruction requested by the defense in such a manner as to allow the jury to use evidence as aggravation which was not properly available for that purpose. None of the cases cited by respondent stand for the proposition that a trial court may refuse a request to identify the applicable criminal activity. The pattern instruction requested by the defense constituted a request for both identification and limitation of the applicable criminal activity under factor (b). Cases concerning a trial court's sua sponte duty do not control in such an instance, and are fundamentally distinguishable.

The cases cited by respondent to suggest that defense counsel forfeited any error by not asking for clarification are inapposite. None involved a defense request for identification of the relevant activity/offenses which request was denied by the trial court.

Respondent also cites *People v. Hughes* (2002) 27 Cal.4th 287, 383, and *People v. Lewis*, *supra*, 25 Cal.4th at p. 666 for the proposition that "A trial court has no sua sponte duty to instruct the penalty phase jury on how to use evidence of prior criminal activity." (RB 361.) Whether or not this is a fair reading of *Hughes* and *Lewis,*[61] it provides no support for respondent in this case. Appellant did not, in the opening brief, rely upon the trial court's sua sponte duty as the source of the error. Rather, as appellant pointed out,

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[61] Respondent substantially overstates the holdings of *Hughes* and *Lewis*. For example, the trial court does have a sua sponte duty to instruct that the jury may consider evidence of other crimes only when the commission of such other crimes is proved beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 53; *People v. Stanworth* (1969) 71 Cal.2d 820, 840.) Neither *Hughes* nor *Lewis* suggests, much less holds, otherwise.

and respondent concedes, defense counsel requested CALJIC 8.87 (1989 Revision), which provides for identification of the criminal activity which may, if found beyond a reasonable doubt, be used as aggravation under section 190.3. factor (b). The issue here is the trial court's disposition of the defense request for CALJIC 8.87, not whether the trial court needed to give the instruction sua sponte in the form set forth in CALJIC. Respondent's citations to *Hughes* and *Lewis* do not negate the error here.

Respondent again cites *Lewis*, *supra*, 25 Cal.4th at p. 666, for the proposition that "If a trial court instructs on prior criminal activity, it has no sua sponte obligation to specify precisely which criminal activities are addressed by the instruction." (RB 361.) Again, while *Lewis* does say that, the proposition is essentially irrelevant to the issue raised in the opening brief. The trial court's sua sponte duty is not at issue here, for defense counsel requested an instruction which included provision for specification of the "criminal activities [] addressed by the instruction."

Respondent cites *Lewis* again, for the proposition that "if the trial court elects to specify the prior criminal acts, it is the defendant's responsibility to point out any omissions from that list." (RB 361.) Since the trial court here refused to specify any of the prior criminal acts, there was no list from which appellant could point out omissions. Again, *Lewis* provides no relevant support for respondent.

Respondent relies extensively upon *People v. Medina* (1995) 11 Cal.4th 694, for the argument that appellant forfeited appellate review of the trial court's failure to identify other crimes, "because the defendant did not request it." (RB 363, citing 11 Cal.4th at p. 771.) However, there is no indication in *Medina* that the defendant requested an instruction such as CALJIC No. 8.87 (1989 Revision) as appellant did at his trial. As shown above, the instruction requested was itself a request for identification of

relevant other crimes evidence. *Medina* is thus wholly distinguishable from appellant's case on this point, and of no help to respondent.

On this point, respondent also relies upon *People v. Johnson* (1993) 6 Cal.4th 1, which was cited by *Medina* (11 Cal.4th at p. 771; RB 363.) *Johnson*, though, is of no more help to respondent. In that case, this Court discusses a defendant's challenge to a correct, but arguably incomplete, instruction given to his jury. This Court found that the defendant's appellate challenge to the instruction given was forfeited. (6 Cal.4th at p. 52.) However, there is no indication in the opinion of any request by the defendant for a different instruction than was given, or for clarification of the instruction given. Thus, *Johnson* is wholly distinguishable from appellant's case, in which appellant did request a different, more complete instruction than was given. The error in appellant's case was the trial court's decision not to comply with appellant's request for identification of the offenses properly considered under the instruction.

C. The Instructional Error Resulted in Prejudice to Appellant, Requiring Reversal of the Penalty Judgment

In arguing that any error was harmless, respondent relies in part upon the prosecution's argument to the jury, in which the prosecutor listed the other crimes upon which he relied as aggravation under factor (b). (RB 374-375.) Of course, the jury was in no way limited by the prosecutor's argument in its consideration of the evidence. (See *People v. Barton* (1995) 12 Cal.4th 186, 203 ["the jury should not be constrained by the fact that the prosecution have chosen to focus on certain theories."] Moreover, argument of counsel cannot cure the deficiencies in the instruction here. (See *Kelly v. South Carolina* (2002) 534 U.S. 246, [argument of counsel was insufficient to cure ambiguity in instruction].) The instructions provided the only limitations upon the jurors' consideration of evidence, and the instruction

concerning factor (b) erroneously provided no effective guidance or limitation in this regard. (See *People v. Robertson*, *supra*, 33 Cal.3d at p. 55.)

Respondent fails to address any of the federal authorities cited by appellant in the opening brief (AOB 373-374) demonstrating the nature of the error involved and the prejudice to appellant which resulted therefrom. Instead, respondent attempts to draw a distinction between the effect of the state standard for determination of prejudice in a capital penalty trial and the federal standard for determination of prejudice.

The state standard requires reversal if there is a reasonable possibility that the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Respondent misstates the holding of *People v. Michaels* (2002) 28 Cal.4th 486, 538, as applying a "reasonable probability" standard rather than the applicable "reasonable possibility" standard. In fact, at the cited page, *Michaels* applied the "reasonable possibility" standard.

The federal standard, of course, requires reversal unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) While phrased differently, this Court has held that in practice, the two standards "are the same in substance and effect." (*People v. Ashmus* (1991) 54 Cal.3d 932, 990.) Respondent's attempt to suggest otherwise is without merit.

As demonstrated in the opening brief, there is a reasonable possibility that the trial court's instruction led to at least one juror improperly considering this evidence as aggravation, affecting the jury's penalty verdict. (*Wiggins v. Smith* (2003) 593 U.S. 510, 537; *People v. Brown*, *supra*, 46 Cal.3d at p. 447; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 965.) The error cannot be considered harmless beyond a reasonable doubt. (*Sochor v. Florida* (1992) 504 U.S. 527, 540; *Chapman v. California*, *supra*, 386 U.S.

at p. 24.) Therefore, whether considered as error under state law or as error affecting federal constitutional interests the judgment of death must be reversed.

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XIV

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

In his opening brief, appellant made a multifaceted attack on the constitutionality of California's capital-sentencing scheme, including standardized instructions that are designed for its implementation. (AOB 377-401.) Respondent contends that no error occurred, relying solely on prior case law of this Court, without additional analysis. (RB 376-384.)

Appellant has acknowledged this Court's rejection of appellant's claims regarding the unconstitutionality of California's death penalty statute and the jury instructions relating to it, but provided authority and argument for reconsideration of its prior decisions. Respondent has not presented any substantive arguments in support of the constitutionality of the statute and of the challenged instructions, or in contradiction to the arguments set forth in appellant's opening brief. No further reply by appellant is therefore necessary except to request that this Court reconsider its prior rulings in this area and, accordingly, reverse his death judgment.

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XV

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

In the opening brief, appellant demonstrated that the cumulative effect of the errors in this case undermined any confidence this court can have in the any integrity of the guilt and penalty phases or the reliability or validity of the resulting verdicts and judgment. Each of the errors demonstrated in the opening brief – the unlawful search of appellant's residence, the fruits of which were relied upon by both the prosecution and the codefendants against appellant; the repeated erroneous denials of appellant's motions for a trial separate from the antagonistic and hostile codefendants who were acting as third and fourth prosecutors against him, basing their defense largely on improper attacks on appellant and his counsel which would not have been raised or allowed in a separate trial; the tremendously prejudicial admission of highly inflammatory character/propensity/disposition evidence which had no relevance to appellant's guilt or innocence of the homicides and the charged conspiracy; the numerous instructional errors at the guilt phase which distorted the fact-finding process and the reliability of the ultimate verdicts, and lightened the burden of the prosecution; the exclusion of appellant from substantial and important portions of the court proceedings; the instructional errors and procedural failings in the penalty phase; even the errors in voir dire resulting in wrongfully excusing prospective jurors and the loss of portions of the record necessary to appellant review of those errors – contributed to an unfair trial and a fundamentally unreliable guilt verdict, and denied appellant due process, a fair trial and a reliable determination of both guilt and

penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.) Appellant contends that each of the errors, if considered separately, constitutes reversible error. Considered together, however, the fundamentally flawed nature of the trial and the unreliability of the resulting verdict is stark, and requires reversal of the judgment.

Respondent concedes only one error in the guilt phase, the erroneous instruction allowing the jury to find appellant guilty of conspiracy to commit murder based upon implied rather than express malice. (See Argument VII.A; RB 261-263.) Respondent also concedes only one error in the penalty phase, the verdict and imposition of a sentence of death on the conspiracy charge. (See Argument XII; RB 352.) Respondent argues that the former error was harmless (see RB263-275), and the latter error easily corrected. (See RB 352, 356.) On those bases, respondent contends that there was no cumulative error or prejudice requiring reversal. (RB 384-385.)

In response to appellant's demonstration that jurors in this case did not find the evidence overwhelming, because it took the jurors six days to reach their verdicts as to appellant and Beck, respondent speculates as to the nature of the deliberations. (RB 385-386.) Such speculation, however, does not constitute a basis for a determination that any, or all, of the errors in this case were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Respondent repeats the flawed arguments suggesting that the prosecution case was a strong one. However, as shown in the opening brief and elsewhere in this brief, the strength of the case is illusory. While much of the evidence is essentially uncontested, the points of conflict in the evidence and the weaknesses in the prosecution case focus on the crucial issues in this case – e.g., appellant's state of mind at relevant times; whether

he actually killed anyone; whether he intended or even expected that anyone would be killed; whether he acted out of the actual but unreasonable belief in the need to defend against imminent peril; whether there was a conspiracy, or more than one, and if so, who was involved; why the various weapons were brought to the scene by those who brought them; who screamed from the Elm Street house and why; what else was said at the scene, who killed whom and why; what the states of mind of the various people involved where at various relevant times.

Respondent emphasizes evidence of motive for appellant to kill Raper. (RB 386.) But while the evidence of "motive" may have been superficially consistent with the prosecution theory, "a homicidal conclusion is hardly the ineluctable inference." (*People v. Vance*, *supra*, 188 Cal.App.4th 1182, 1205.) The "motive" evidence was also consistent with other non-homicidal theories, including that appellant acted in an unreasonable belief in the need to defend against imminent peril. There was also evidence of similar motives against Raper on the part of Evans and LaMarsh.

Respondent attempts to bolster the credibility of Evans, claiming that there was corroboration for her story about a meeting and a map, and thus a conspiracy. The only corroboration cited, though, is that appellant called Willey to help that night and told everyone that they were going to the Elm Street house. Respondent fails to acknowledge that those "facts" were fully consistent with innocence and did nothing to corroborate Evans' testimony about the meeting and the map. As appellant demonstrated in the opening brief, only non-essential details of Evans's story were corroborated, none of them establishing strong evidence of appellant's guilt of the charged crimes; all that was corroborated was his presence at the scene.

Respondent relies on the testimony of McLaughlin to suggest that the

evidence at a trial separate from Willey and LaMarsh would have included the same evidence. (RB 386.) However, respondent fails to acknowledge that the prosecution chose not to call McLaughlin as a witness in this trial, for unknown reasons. There is no basis in this record for a conclusion that the prosecution would have called her at a trial in which Willey and LaMarsh were not parties, nor that the prosecution would have introduced the inflammatory and prejudicial evidence, innuendo and argument that was introduced to this trial by counsel for Willey and LaMarsh.

Respondent attempts to argue that because appellant argued that the most serious errors in this case stemmed from joint trial with Willey and LaMarsh, somehow admits that other errors were less significant. (RB 387.) The ultimate test regarding the joint trial and the prejudice therefrom is assessed after the fact, i.e., the question is whether the resulting trial denied appellant due process, not merely on the evidence at the time a motion for severance is made. (See Argument I.) That assessment necessarily involves an assessment of other error which occurred and the cumulative effect of all the errors, especially including the prejudice from the inflammatory character evidence and erroneous instruction on that subject. The former was the product of the joint trial, and the latter intensified the prejudice therefrom.

Taken separately, or in combination, the errors and violations of appellant's constitutional rights deprived appellant of a fair trial, due process and a reliable determination both of guilt, and ultimately, of penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.) The fundamentally flawed verdicts and findings by the jury further contributed to an unreliable determination of penalty by the jury. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

The death judgment itself must be evaluated in light of the cumulative

error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) The case in aggravation presented at the penalty phase was not so overwhelming compared to the evidence in mitigation that the death penalty was a foregone conclusion. Evidentiary and instructional errors at the guilt phase were compounded by the instructional errors at the penalty phase, especially the trial court's erroneous modification of CALJIC No. 8.87.

The cumulative effect of the errors in this case so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), and appellant's conviction, therefore, must be reversed. Reversal of the death judgment is mandated here because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict.

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and vaction of his death sentence.

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XVI

JOINDER IN ARGUMENTS IN BECK'S REPLY BRIEF

Pursuant to California Rules of Court, Rules 8.630(a) and 8.200(a)(5), appellant hereby joins in the following arguments made in Appellant Beck's Reply Brief filed in this matter on May 16, 2012:

Arguments I and I.A., but not I.B., II through XII, and XVII through XIX.

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CONCLUSION

For all the reasons stated above and in the opening brief, the guilt and penalty verdicts in this case must be reversed. Should the entire judgment not be reversed, still Count V, the special circumstance finding, and the penalty judgment must be reversed. Should Count V not be reversed, the sentence of death on that count must be vacated and the judgment modified accordingly, including a stay of the modified sentence on that count pursuant to section 654.

DATED: July 31, 2012

Respectfully submitted,

MICHAEL HERSEK
State Public Defender

WILLIAM T. LOWE
Deputy State Public Defender

Attorneys for Appellant
GERALD DEAN CRUZ

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2)

I, William Lowe, am the Senior Deputy State Public Defender assigned to represent appellant Gerald Dean Cruz in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 61,943 words in length.

WILLIAM LOWE
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Cruz and Beck* Supreme Ct. No. S029843

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; that I served a copy of the attached:

APPELLANT'S REPLY BRIEF

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

DAVID M. BASKIND
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

ADRIENNE TOOMEY
Habeas Corpus Resource Center
303 Second Street, Ste. 400 South
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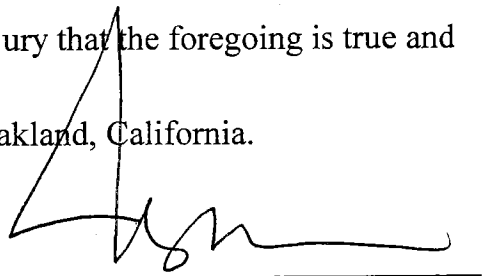
ANDREW PARNES
P. O. Box 5988
Ketchum, ID 83340
(Appellate Counsel for Beck)

GERALD CRUZ
P.O.Box H-54802
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on July 31, 2012, deposited in the United States mail at Oakland, Alameda County, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on July 31, 2012, at Oakland, California.



DECLARANT

SUPREME COURT COPY

COPY

SUPPLEMENTAL
DECLARATION OF SERVICE

Re: *People v. Cruz and Beck* Supreme Ct. No. S029843

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; that I served a copy of the attached:

APPELLANT'S REPLY BRIEF

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

SUPREME COURT
FILED

AUG - 8 2012

Frank A. McGuire Clerk

Deputy

Superior Court of California
County of Alameda
Capital Appeals Office
1225 Fallon Street, Room 109
Oakland, CA 94612

Each said envelope was then, on August 8, 2012, deposited in the United States mail at Oakland, Alameda County, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on August 8, 2012, at Oakland, California.

DECLARANT