SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	**S050102**
v.	**(San Joaquin County Superior Court**
PAUL LOYDE HENSLEY,	**No. SC054773A)**
Defendant and Appellant.	

APPELLANT'S REPLY BRIEF

Automatic Appeal from the
Superior Court of the State of California
In and for the County of San Joaquin
Honorable Frank A. Grande, Judge

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SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	**S050102**
v.	)	**(San Joaquin County Superior Court**
PAUL LOYDE HENSLEY,	)	**No. SC054773A)**
Defendant and Appellant.	)	

ARGUMENT

PRETRIAL ISSUES

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A CHANGE OF VENUE

Respondent asserts that appellant's motion for a change of venue was justifiably denied. (RB 14-25.) Respondent's analysis of the determinative factors is seriously flawed. A change of venue should have been granted.

A primary factor to be considered in evaluating a venue issue is "the

nature and gravity of the offense." (People v. Daniels (1991) 52 Cal.3d 815, 851-852; see discussion at AOB 85.) In disputing that this factor weighed in favor of changing venue, respondent principally relies upon People v. Hamilton (1989) 48 Cal.3d 1142. (RB 18-19.) Hamilton, however, is clearly distinguishable. Defendant Hamilton was effectively charged with a single offense: the murder of his pregnant wife to obtain insurance money. (Id. at 1151-1154.) Appellant Hensley, by contrast, was charged with two separate incidents of capital murder, plus nine noncapital charges including a sensational jailbreak. The Hamilton court, in rejecting the venue claim before it, noted that Hamilton's crime "lacked significant political overtones." (Id. at 1160.) The case of appellant Hensley was, by contrast, politicized by the jail escape which had exposed the deficiencies of the county's new state-of-the-art jail facility. News reports following the jailbreak had described appellant as the "mastermind" of the escape and the most dangerous of the six jail escapees. (3 CT 679-680.) As a consequence of the escape, appellant had been featured on the "America's Most Wanted" television show, and publicity generated by the escape had included recountings of his past crimes. (3 CT 680.) In ruling on the venue motion, the judge below had acknowledged that the jailbreak, and its implications regarding the security and quality of the newly-built jail, had achieved

prominence as an issue between the rival candidates for county sheriff. (5 RT 894.) All this clearly distinguishes this case from Hamilton with regard to the nature-and-gravity-of-the-offense factor.

This Court's past case law clearly indicates that, while not dispositive, the nature and gravity of appellant's charged offenses should be considered a "factor [which] adds weight to a motion to change venue." (People v. Howard (1992) 1 Cal.4th 1132, 1167 [fact that defendant was charged with capital murder and attempted murder in connection with burglary-robbery of elderly couple was "factor add[ing] weight" to venue motion]; see People v. Williams (1997) 16 Cal.4th 635, 764 [defendant charged with killing four family members, including two children, at their home; "nature and gravity of the charged offenses . . . was a factor weighing in favor of a change of venue"].)

With regard to the factor of media coverage, respondent's superficial analysis fails to take into account the highly prejudicial nature of news coverage surrounding this case. (See AOB 85-88; RB 22-23.) Many of the articles concerning this case were framed under sensational headlines such as "Bloody journey over?" (2 CT 487) or "Murder victim a friend to all" (2 CT 470), or contained prejudicial matters destined to be excluded from appellant's trial, such as repeatedly referring to him as an "urban predator"

(2 CT 427, 435, 477) and quoting Assistant Sheriff Bob Heidelbach describing appellant as a "very dangerous" criminal who "would [not] hesitate to kill again" (2 CT 477).

Professor Childs' survey and testimony – which respondent's analysis essentially ignores – revealed that 88 percent of the 395 citizens surveyed were able to recall something about this case and 32 percent recalled that appellant had been featured on the "America's Most Wanted" television show. (3 CT 680, 684, 686; 4 RT 663-664, 671, 688, 816.) And although respondent claims that memories in the San Joaquin County community would have dimmed by the time of appellant's trial, no less than four of the twelve jurors chosen for appellant's first trial and five of the twelve chosen for his second trial recalled media publicity about his case. (See AOB 82-84.)

Notwithstanding all such evidence to the contrary, respondent claims that media publicity involving this case was "straightforward" and "not sensational or inflammatory." (RB 22.) However, even if that were the case, "press coverage need not be inflammatory to justify a change of venue." (People v. Farley (2009) 46 Cal.4th 1053, 1084 [citing People v. Tidwell (1970) 3 Cal.3d 62, 69-70].)

Respondent disputes the prominence of the defendant and the

victims as factors favoring a change of venue here. (See RB 21; AOB 92-93.) Respondent argues that the notoriety appellant received as a consequence of the jailbreak should be discounted, stating: "The escape was a small portion of the prosecution's case. The two murders and the brutal attempted murder were the cornerstone of the complaint." (RB 21.) However, that ignores that it was the jail escape itself which precipitated a second wave of publicity regarding appellant, resulting in his inclusion on the America's Most Wanted television show and sensational news stories recounting his crimes, which referred to him as an "urban predator" and a criminal who "would [not] hesitate to kill again." (2 CT 415, 418, 420, 427, 477, 486-A; see AOB 95-96.) Thus, respondent cannot so casually brush aside the significance of appellant's prominence resulting from the jail escape and the shadow it cast over appellant's capital trial. With respect to the prominence-of-the-victims factor, there is simply no avoiding the fact that appellant's jail escape was a widely-publicized offense against the public fisc of San Joaquin County. Additionally, homicide victim Larry Shockley was the subject of a highly sympathetic article in the Lodi New Sentinel ("Murder victim a friend to all," October 20, 1992). (2 CT 470-471.) (See People v. Daniels, supra, 52 Cal.App.3d at 852 [consideration of public sympathy based upon status of previously anonymous victims]; Odle

v. Superior Court (1982) 32 Cal.3d at 940-941 [similar].)

Respondent argues the fact that appellant's counsel failed to exhaust all of his peremptory challenges shows "that the jurors were fair" and a change of venue was unwarranted. (RB 24-25 [citing People v. Cooper (1991) 53 Cal.3d 771, 807].) In fact, defense counsel exhausted almost all of his peremptory challenges (18 out of 20) in selecting the jury for appellant's first trial. (19 RT 5264-5272.) Defense counsel likewise exhausted almost all of his peremptory challenges (17 out of 20) in selecting a jury for his second trial, following the penalty phase hung jury. (46 RT 13328-13339.)[1] In light of the saturation of media publicity in the San Joaquin County community, defense counsel was faced with limited options, given that removal of one media-tainted juror from the jury might just as well result in his or her being replaced with an even less desirable media-tainted replacement. Ultimately, defense counsel was forced to accept a jury for appellant's first trial in which four of the twelve jurors expressly recalled media publicity about this case and a jury for appellant's

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[1] In his opening brief, appellant mistakenly stated that defense counsel exhausted all of his peremptory challenges in selecting a jury for his penalty retrial. (See AOB 84.) Appellate counsel was unfortunately confused by the proceedings involving the selection of alternates for that jury: with regard to the alternate jurors defense counsel exhausted his peremptory challenges and request additional challenges. (See 46 RT 13333-13336.) In fact, defense counsel exhausted 17 of his 20 peremptory challenges in selecting the jury for his penalty phase retrial. (46 RT 13328-13339.)

penalty retrial in which five out of twelve jurors acknowledged being so tainted. (See AOB 82-84.)

Respondent relies upon the protestations of the seated jurors that they could be fair notwithstanding their exposure to pretrial publicity. (RB 24.) However, as this Court pointed out in People v. Williams (1989) 48 Cal.3d 1112, jurors may unjustifiably profess impartiality out of a desire to please authority or because they are not aware that they have been unconsciously swayed by media exposure. Thus, "[a] juror's declaration of impartiality . . . is not conclusive." (Id. at 1129.) "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man." (Irvin v. Dowd (1960) 366 U.S. 717, 722 [6 L.Ed.2d 751, 81 S.Ct. 1639].)

Actions speak louder than words. The strikingly quick decision of the jury in this case – a guilt-phase verdict for close to the maximum charges facing appellant arrived at in little over a day (26 RT 7407, 7419, 7424; 27 RT 7437) in a case involving two capital murder charges, nine noncapital counts and numerous attendant enhancements, 19 days of guilt-phase trial proceedings, and approximately 400 items of evidence – is strongly indicative of a rush to judgment, rather than a fair and thoughtfully considered verdict. The tainted judgment should be reversed.

II. THE TRIAL COURT ERRED IN DENYING THE DEFENSE BATSON-WHEELER MOTION

A. Introduction

In his opening brief, appellant argues that the court erred in denying his Batson-Wheeler[2] motion based upon the prosecutor's racially motivated strikes against Harmon B. and Falvia C. (AOB 98-128; see RB 25-37.)

B. Prima Facie Findings

In Purkett v. Elem (1995) 514 U.S. 765 [131 L.Ed.2d 834, 115 S.Ct. 1769] the Supreme Court summarized the three step procedure relevant to a Batson motion:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the

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[2]Batson v. Kentucky (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712] and People v. Wheeler (1978) 22 Cal.3d 258.

> opponent of the strike has proved purposeful racial discrimination.
>
> (Id., 514 U.S. at 767 [citations omitted].)

As to the first Batson-Wheeler step, respondent acknowledges that the trial court found a prima facie case of racial discrimination and demanded that Mr. Dunlap explain why he had struck the two black jurors involved in the Batson-Wheeler motion. (RB 28-29.) Respondent does not contest the prima facie finding.

C. The Prosecutor Failed to Refute the Court's Prima Facie Finding of Group Discrimination with Respect to the Batson-Wheeler Motion

The prosecutor and respondent on appeal apparently subscribe to the notion that providing multiple reasons for striking a minority juror serves to enhance the likelihood that the strike will survive judicial scrutiny; perhaps reasoning along the following lines: "If Reason One turns out to be constitutionally suspect, perhaps Reason Two 'will work' and Reason One may be judicially overlooked." However, this Court has indicated that when a prosecutor provides multiple reasons for a questioned strike, each reason should be separately evaluated by the court to determine if it is bona fide and race neutral. (People v. Silva (2001) 25 Cal.4th 345, 385-386.)

The reason for this is obvious: When a prosecutor relies upon multiple grounds upon which to exclude a minority juror it would not be proper for any one ground to be racially discriminatory in nature. For example, imagine a case in which a prosecutor straightforwardly states: "I used a peremptory challenge against Juror A because, first, he recently received a speeding ticket and, second, because I would prefer not having any blacks on the jury because the defendant is black." Certainly, it would not be proper to sustain this justification under Batson and Wheeler merely because the first stated ground, standing alone, may be considered "racially neutral." A situation of this type arose in United States v. Chinchilla (9th Cir. 1989) 874 F.2d 695, wherein a prosecutor cited two reasons, one of which was racially suspect, for striking a minority juror. The Ninth Circuit reversed Chinchilla's conviction, indicating a judicial finding that one reason is invalid "militates against [the] sufficiency" of the other facially neutral reason. (Id. at 699; accord McClain v. Prunty (9th Cir. 2000) 217 F.3d 1209, 1221; People v. Gonzalez (1989) 211 Cal.App.3d 1186, 1201 [reversal where prosecutor's primary reason for striking Mexican-American juror was not race neutral; prosecutor's express secondary reason of juror's "body language" could not save judgment].) (See discussion of Chinchilla at AOB 119-121, 125.)

Respondent cites People v. Lenix (2008) 44 Cal.4th 602 in support of its claim that "as long as" the prosecutor provides "one reason [which] is solid, genuine, and race neutral" in support of his strike of a minority juror, then his other cited reasons need not be scrutinized on appeal. (RB 31, fn. 9; see also RB 30 at fn. 8, 35, 36.)[3] However, the Lenix court did not discuss or overrule the methodology of People v. Silva, supra, 25 Cal.4th 345, discussed above. In fact, in the discussion which respondent cites (at RB 34, 35), the Lenix court merely emphasized the "responsibility" of "prosecutors faced with a Wheeler/Batson claim to provide as complete an explanation for their peremptory challenges as possible." (Id. at 624 [citing Miller-El v. Dretke (2005) 545 U.S. 231, 252 [162 L.Ed.2d 196, 125 S.Ct. 2317]].) This admonition, which directs a prosecutor to state all of his reasons for striking a minority juror, does not support respondent's claim that it is somehow "unfair and misleading" (RB 35) to closely scrutinize each of the prosecutor's claimed reasons for the strike to determine if any are racial, bogus or pretextual. In fact, as appellant has explained above, such complete scrutiny is exactly what controlling case law dictates.

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[3] Respondent also cites Justice Moreno's concurring opinion in Lenix. (RB 30, fn. 8 and RB 31, fn. 9.) However, Justice Moreno's concurring decision was not adopted by majority in Lenix, nor was Justice Moreno's vote necessary to the unanimous decision in Lenix.

1. Harmon B. Analysis

Addressing the prosecution strike of Harmon B., respondent claims that "first and most significantly" the strike was justified because Harmon B. "offered no insight as to his personal opinions regarding the death penalty." (RB 29.) However, Harmon B. did, in fact, express views on the death penalty. He indicated that he had no problem with the death penally or the law governing its application. (15 ACT 4458-4459.) He said he would follow the law provided by the judge and base his decision on the evidence presented in the courtroom. (15 ACT 4459, 4461.) Harmon B. strongly endorsed California's bifurcated death penalty trial structure, stating that the "two-step system like [the court] explained to us, . . . I think is one of the best system[s] that man can design. And [if] we find the defendant guilty of that, then there is no problem with the death penalty or life." (19 RT 5189.) He also indicated that he would be open to imposing either the death penalty or life imprisonment, based on the "evidence and the weight" of what was presented. (19 RT 5189, 5195.)

Respondent further hypothesizes that Harmon B.'s statements "could have legitimately caused the prosecutor to be concerned that Harmon B. was personally opposed to the death penalty" and "that . . . would

provide a race-neutral reason for a challenge." (RB 29-30.) However, the record does not support that assertion and the prosecutor never claimed that Harmon B. was against the death penalty. In fact, Harmon B. stated that he did not harbor any "religious or moral beliefs about the death penalty" (15 ACT 4458), he did not belong to any groups which advocated positions on the death penalty (15 ACT 4458), he did not personally "have any conscientious objections to the death penalty" (15 ACT 4459), and he did not have any opinions concerning the death penalty which would preclude his voting for a death verdict in any case (15 ACT 4459). Thus, there is no support in the record for respondent's claim "that Harmon B. was personally opposed to the death penalty" (RB 29-30). Permitting resort to such hypothetical unarticulated rationales to justify a strike would render a trial court's rejection of a Batson-Wheeler motion essentially nonreviewable on appeal. This flies in the face of this Court's holding that the rejection of a Batson-Wheeler motion is subject to appellate review and must find support in "the record" of voir dire. (People v. Howard, supra, 1 Cal.4th at 1155; People v. Bittaker (1989) 48 Cal.3d 1046, 1092.)

Respondent does not dispute appellant's assertion that the prosecutor questioned Harmon B. "more extensively than other [non-minority] jurors" on the panel. (RB 33.) Respondent also fails to dispute that – although the

prosecutor questioned Harmon B. extensively about psychology and cited Harmon B.'s lack of an opinion concerning it – it was also the case that the prosecutor permitted several non-black jurors and alternates to be seated without questioning them at all on the subject of psychology. (19 RT 5279, 5281, 5285; see AOB 121-122; RB 32.) Respondent seeks to excuse all this as simply reflecting the prosecutor's legitimate interest in drawing out Harmon B.'s feelings about psychology and capital punishment. (RB 33.) However, as the Supreme Court aptly stated in Miller-El v. Dretke, supra, 545 U.S. 231, "disparate questioning" of black versus nonblack jurors may be strongly indicative of a Batson violation. (Id., 545 U.S. at 256-257.)

Respondent also seeks to justify the strike by Harmon B.'s demeanor, seizing upon the judge's comment that Harmon B. sat "'bolt upright in his chair.'" (RB 30 [quoting 19 RT 5285].) However, given Harmon B.'s 21-year military career (15 ACT 4448), his erect posture was hardly surprising. In fact, Harmon B.'s career military background, reflected in his courtroom posture, was an "attribute[] of a classic prosecution juror," which renders his strike by the prosecutor all the more suspect. (Turner v. Marshall (9th Cir. 1997) 121 F.3d 1248, 1252.)

2. Falvia C. Analysis

Respondent does not even attempt to defend the first reason the prosecutor gave for striking Falvia C.: she corrected the court clerk in "a harsh tone" for repeatedly mispronouncing her name. (19 RT 5279; see AOB 125.) Respondent explains that some of the prosecutor's stated reasons for striking the black jurors were merely "secondary or ancillary reasons" and it would somehow be "unfair and misleading" to scrutinize such reasons as closely as what respondent now selects out as the prosecutor's "primary" reasons. According to respondent, the prosecutor's "primary" reasons for striking Falvia C. were her statements about drugs and the Biblical admonition "thou shalt not kill." (RB 35-36.) However, respondent fails to explain how appellant or a reviewing court is supposed to sort out a prosecutor's "secondary or ancillary reasons" for exercising a questionable minority-juror strike from the prosecutor's so-called "primary reasons."

The second reason cited by the prosecutor for striking Flavia C. was her "huge number" of children and grandchildren. (19 RT 5285.) Responding to appellant's comparative juror analysis on this point (see AOB 126-127), respondent claims it was permissible and legitimate for the

prosecutor to strike Falvia C. for having a large number of children and grandchildren, while allowing non-minority jurors and alternates with multiple children and/or grandchildren to serve on the jury, because Falvia C. had more children and grandchildren than they did. That hardly seems credible. The implausibility of a prosecutor's suspicious explanation for a minority strike is reinforced by the acceptance of white jurors who possess similar attributes. (Snyder v. Louisiana (2008) 552 U.S. 472, 483-485 [170 L.Ed.2d 175, 128 S.Ct. 1203].)

Respondent highlights the prosecutor's reliance upon Falvia C.'s statement that drugs make "people do things they wouldn't ordinarily do." (RB 35; see 15 RT 3921.) According to respondent, this was "the most obvious comment that would have caused concern" for the prosecutor and, therefore, must have been the primary justification for the prosecutor's strike of Falvia C., which was legitimate in nature. (RB 35.) But the fact that drugs, such as the methamphetamine involved in this case, cause persons to behave differently and less responsibly than they normally would when not under the influence of drugs is common knowledge and a primary reason why such drugs are prohibited. (See e.g., Harmelin v. Michigan (1991) 501 U.S. 957, 1002-1003 [115 L.Ed.2d 836, 111 S.Ct. 260] [upholding the imposition of a life sentence without possibility of parole for

defendant possessing over one and a half pounds of cocaine, while emphasizing that the possession, use and distribution of illegal drugs represents one of the greatest problems affecting the health and welfare of our population]; People v. Velez (1985) 175 Cal.App.3d 785 [brutal attack on stranger precipitated by defendant's smoking PCP-laced marijuana cigarette]; People v. Boyes (1983) 149 Cal.App.3d 812.) The prosecutor's reliance upon Falvia C.'s recitation of such common knowledge in order to rid appellant's jury of black jurors was no more legitimate than if a prosecutor struck the sole remaining black juror in a DUI trial because she voiced the opinion that drunk drivers are less coordinated and more accident prone than sober ones.

Respondent, like the prosecutor below, cites Falvia C.'s reference to the Biblical admonition, "thou shalt not kill." (RB 35-36; see 15 RT 3927; 16 ACT 4719.) Respondent supposes this comment "could indicate a possible difficulty in applying the death penalty." (RB 35-36.) However, Falvia C.'s comment might just as well be seen as a condemnation of murder and murderers. This is, in fact, the more likely interpretation given Falvia C.'s other comments favoring the death penalty. (15 RT 3927; 16 ACT 4719-4721; see AOB 113-114.) In her written questionnaire, Falvia C. expressly stated that her support of the admonition "thou shalt not kill"

was qualified by her further belief "that there are circumstances that justify the death penalty" and "[e]ach situation has to be studied extensively on an individual basis." (16 ACT 4719.) Those are the hallmarks of a good and fair juror.

D. Conclusion

Appellant's convictions should be reversed on the basis of Batson-Wheeler error involving prospective jurors Harmon B. and Falvia C. Under Batson-Wheeler jurisprudence, "the striking of a single black juror for racial reasons violates the equal protection clause." (People v. Fuentes (1991) 54 Cal.3d 707, 715 [emphasis added; citations and internal quotation marks deleted]; accord People v. Christopher (1991) Cal.App.4th 666, 670-673.)

GUILT/INNOCENCE PHASE ISSUES

III. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS POST-ARREST STATEMENTS TO THE POLICE

A. Introduction

In his opening brief, appellant asserts that the interrogating officers violated Miranda[4] safeguards because: 1) Detective Faust deceptively asked appellant if Faust could "talk to" him about recent events instead of properly inquiring whether appellant was willing to answer Faust's questions; 2) Faust continued to engage in interrogation or the functional equivalent after appellant invoked his right to counsel; and 3) prosecutor Dunlap similarly disregarded appellant's repeated efforts to terminate the conversation. Appellant's statements were also involuntary, obtained in violation of the due process clauses of the Fifth and Fourteenth Amendments, because: 1) the officers took unfair advantage of appellant's drug-impaired, sleep-deprived and medically-weakened condition; 2)

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[4]Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

Detective Ferrari made a false representation that appellant might secure some leniency by providing a truthful account to the officers, by way of twice telling appellant that there were "two sides to every story"; 3) Detective Faust deceived appellant and illicitly obstructed his right to counsel by falsely telling him that he was not immediately entitled to make at least three phone calls and that appellant would forever lose the right to speak to the police officers if he chose to speak to a lawyer first; and 4) the officers engaged in prolonged and relentless interrogation of appellant. (AOB, Argument III.) Respondent disputes that appellant is entitled to relief on these grounds, as discussed below.

B. The Trial Court Erred in Denying the Motion to Suppress

1. Respondent Does Not Dispute That Appellant Invoked His Right to Counsel

The trial court made a finding that appellant invoked his constitutional rights to counsel and to remain silent when he said, "I'm being set up. I want to see my lawyer!" (5 RT 1052; 1 ACT-B 15; see AOB 134-135, 161-162.) Respondent does not dispute that finding by the

trial court. (RB 43, 47-48.)

2. Detective Faust Improperly Diluted the Required Miranda Warnings By Improperly Asking Appellant "Can I Talk to You About That?" – Rather Than Properly Asking Appellant if He Was Willing to Answer the Officers' Questions

Respondent claims there "is simply not a material difference" between asking appellant "Can I talk to you about that?" (1 ACT-B 1-2) – as Detective Faust did – and asking appellant if he was "willing to make a statement" without counsel, as Miranda requires. (Miranda v. Arizona, supra, 384 U.S. at 475; see RB 46; AOB 168-171.) Respondent is wrong because Faust's question – "I want to talk to you about what you've been doing over the last couple of days. Can I talk to you about that?" (1 ACT-B 1-2) – conveyed that Faust would be doing the talking and appellant would merely be listening, rather than properly alerting appellant that Faust wanted to question him and appellant was the one being asked to "talk," i.e., to answer the questions which Faust put to him. In actuality, Faust never asked appellant if appellant was willing to speak or answer Faust's questions. That plainly violated Miranda.

Detective Faust's choice of words – "Can I talk to you about that?" – deceptively downplayed the seriousness of the situation and the potential consequences of any statements appellant might make to Faust. Appellant was in custody and presently being investigated for two murders. Faust was effectively asking appellant to answer questions relating to his guilt or innocence of those very serious crimes under circumstances in which it was practically inevitable that what appellant said would be used by authorities to establish his criminal liability for those murders. The very purpose of Miranda warnings is to protect criminal suspects from being intimidated or inveigled into making disclosures by informing suspects of their rights and the probable consequences of their speaking to authorities without the assistance of counsel. (See Miranda v. Arizona, supra, 384 U.S. at 467-470.) Detective Faust's language undermined both the intended purpose and effect of the Miranda warnings by making it seem as though the subsequent interrogation of appellant would amount to no more than a casual chat.

3. Detective Faust Violated the No-recontact Rule of Edwards v. Arizona (1981) 451 U.S. 477 By Interrogating Appellant After Appellant Had Invoked His Right to Counsel

Appellant asserts that Detective Faust twice violated the no-recontact rule of Edwards v. Arizona (1981) 451 U.S. 477 [68 L.Ed.2d 378, 101 S.Ct. 1880]. (AOB 171-178.) Respondent does not dispute that Faust violated the Edwards no-recontact rule. Rather, respondent argues that appellant's subsequent incriminating statements "were the result of appellant's own independent reinitiation of contacts with law enforcement," rather than Detective Faust's Edwards violations. (RB 47.)

Respondent's analysis is faulty. Faust's first violation of the Edwards rule took place at about 10:08 a.m. on October 18, immediately following appellant's assertion of his right to counsel, when Faust told appellant that the police were "not setting [him] up." (1 ACT-B 15.) Faust's second Edwards violation occurred later that day, at 1:24 p.m., when, notwithstanding appellant's earlier invocation of his right to counsel, Faust proceeded to question appellant about his injuries and suggest that they were related to the crimes for which he was being investigated. (1 ACT-B 16; 1 ACT 106-107; see AOB 135-136.) It is significant that appellant's alleged "reinitiation" came only minutes after this second

Edwards violation. It is therefore more likely that appellant's claimed "reinitiation" was the direct product of Faust's implication, a few minutes earlier, that appellant's injuries were connected to the crimes the police were investigating. In fact, at that point in time, Detective Faust acknowledged that appellant had earlier invoked his right to counsel and that interrogation should have then ceased. (1 ACT-B 18-19.)

Furthermore, even aside from this temporal proximity, Collazo v. Estelle (9th Cir. 1991) 940 F.2d 411, cert. den. (1992) 502 U.S. 1031, indicates that several hours may elapse between an officer's Edwards violation and the resulting tainted fruit of that violation, which is subject to suppression. In Collazo, the Ninth Circuit found that the passage of three hours between a police officer's Edwards violation and the defendant's subsequent action in reinitiating contact with police officers and confessing failed to dissipate the taint of the earlier Edwards violation: the confession had to be suppressed. (Id. at 420; see discussion at AOB 176-178.)

In this case, appellant's ultimate change of mind, and the confessions which followed, were the by-product of Detective Faust's earlier functionally-equivalent-to-interrogation statements made in blatant disregard of Edwards and appellant's invocation of his right to counsel. Accordingly, appellant's confession should be suppressed.

4. The Interrogation Was Improper Because the Police Detectives Acted in Disregard of Appellant's Sleep-Deprived, Medically-Weakened and Drug-Impaired State

Respondent points to case law which indicates that medical and drug impairment standing alone will not render a defendant's statements to the police inadmissible. (RB 50-51.) However, case law also supports the proposition that a defendant's medically-weakened and drug-impaired state may be weighed as a factor in the totality of circumstances when considering whether the defendant's statements were involuntary. (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 226 [36 L.Ed.2d 853, 93 S.Ct. 2041]; People v. Hogan (1982) 31 Cal.3d 815, 841.)

Respondent cites Detective Faust's self-serving testimony that "appellant was responsive, lucid, cooperative and repeatedly asked to continue the interview when asked if he would like questioning to cease." (RB 50.) However, the videotape of appellant's interrogation shows just the opposite: Appellant is constantly sitting with his head resting flat on his arms, which are folded on the table. His words are slurred. Appellant is seen falling asleep whenever he is left alone in the room. (Hensley Police Interview tape – vol. 1, Oct. 18.) Detective Faust interrupted his recitation of Miranda warnings, at the beginning of the interview, asking appellant to

"look at me" and "stay with me." (1 ACT 1-2.) As the interrogation dragged on into the evening, appellant repeatedly pleaded to be allowed to sleep; yet the interrogation continued. (See AOB 180-181,)

Pain, sleep deprivation, drug intoxication and hunger are all factors weighing against voluntariness. (Greenwood v. Wisconsin (1968) 390 U.S. 519 [20 L.Ed.2d 77, 88 S.Ct. 1152]; In re Cameron (1968) 68 Cal.2d 487, 500-503.) The combination of appellant's drug-impaired, sleep-deprived and medically-weakened condition weighs heavily in favor of a finding that appellant's statements to the authorities were involuntary and, thus, inadmissible.

5. Detective Ferrari Falsely Indicated that Appellant Would Receive Leniency if He Confessed to the Police

Detective Ferrari made false representations that appellant might secure some leniency by providing a truthful account to the officers, by way of twice telling appellant that there were "two sides to every story." (1 ACT-B 37-38, 120.)

Respondent claims that no case law supports appellant's assertion that Ferrari's "two sides to every story" amounts to an implied promise of

leniency in exchange for defendant's admissions. (RB 52.) Respondent is incorrect because, as appellant pointed out in his opening brief, his argument is supported by Collazo v. Estelle, supra, 940 F.2d 411. (AOB 183.)

In Collazo, the Ninth Circuit held that defendant Collazo's interrogation had been illicitly tainted by police tactics which violated Miranda and otherwise rendered Collazo's statements involuntary. (See discussion of Collazo at AOB 171-178, 183.) One of the interrogating officers told Collazo "that there are 'two sides to every story.'" (Collazo v. Estelle, supra, 940 F.2d at 422.) The Ninth Circuit aptly condemned this phrase as "strongly implying . . . that if Collazo cooperated it might mitigate his predicament." (Ibid.) Based upon this and other factors, the Ninth Circuit found the police interrogation had been improper and reversed defendant's conviction. (Id. at 425-426.) Respondent fails to discuss Collazo on this point, notwithstanding appellant's express reliance upon Collazo in his opening brief. (See RB 51-53; AOB 183.)

Even an implied representation of leniency constitutes an improper police interrogation tactic and renders any resulting statement inadmissible. (People v. Ray (1996) 12 Cal.4th 313, 339; In the Shawn D. (1993) 20 Cal.App.4th 200, 216; see AOB 183-185.)

6. The Interrogation Was Tainted By Deception

Detective Faust deceived appellant in two important respects: first, Faust told appellant that he would not be allowed a telephone call until he was booked into the jail; and, second, Faust informed appellant that if he invoked his right to speak to an attorney he would thereafter not be permitted to speak to the police officers, even if he wanted to do so. (See AOB 185-189.)

With respect to the first point, respondent indicates it is unaware of any "case where a violation of the statutory right to make a phone call was the basis to suppress a confession." (RB 53.) However, respondent cites no case where such a claim has been rejected.

Respondent posits that "given the fact that police were investigating two homicides from different counties . . . on a Sunday morning things were being done in a very punctual manner." (RB 53.) However, section[5] 851.5, setting forth an arrestee's right to three phone calls, makes no exceptions for Sundays or even for the severe inconvenience involved in transporting a prisoner from one floor of a police station to another. Contrary to respondent's reasoning, the fact that appellant was arrested as a

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[5] All statutory references are to the Penal Code unless otherwise indicated.

suspect in "two homicides" (a potential capital offense) rendered it more (rather than less) imperative that he be allowed his phone calls in order to contact an attorney if he wished.

Faust had more than sufficient time to book appellant and allow him to make his phone calls between 10:08 a.m. and 1:24 p.m., following Faust's initial interview of appellant on the morning of October 18, but Faust failed to do so because he wanted to facilitate appellant's being interrogated by San Joaquin County officers who were en route to the Sacramento station. (1 ACT 95, 103, 121-123, 149-151.) And Faust engaged in this illicit tactic notwithstanding his awareness that appellant had earlier invoked his Miranda right to counsel – which made it doubtful that appellant should even be speaking to the San Joaquin officers. (1 ACT-B 15.)

Detective Faust's own testimony shows that he was well aware of his statutory duty to provide appellant with three phone calls within three hours, and that facilitating that mandate would require no greater effort than transporting appellant from one floor of the police station to another. (1 ACT-B 18; 1 ACT 91.) Knowing this, Faust chose to simply ignore section 851.5 and deceive appellant into believing that he had no right to make any phone calls until Faust decided he was finished with him. (1 ACT-B 18;

see AOB 136.)

Respondent sidesteps appellant's second point, failing to properly address the fact that Faust falsely indicated to appellant that if he invoked his right to speak to counsel, appellant would thereafter not be permitted to speak to the police officers, even if he wanted to do so. (See AOB 187-189; RB 54.)

Respondent seeks to minimize the significance of Faust's deceiving appellant regarding his right and ability to make his phone calls. However, the tactic of not allowing appellant to make any phone calls until long after the three hours permitted by section 851.5 had expired, and Detective Faust's deception regarding appellant's right to speak to the police with the assistance of counsel, effectively acted in combination to frustrate appellant's ability to effectuate his Sixth Amendment right to legal counsel. This interference and obstruction with appellant's right to counsel correspondingly serves as cause for suppression. (See Alvarez v. Gomes (9th Cir. 1999) 185 F.3d 995 [Miranda violation where police officer misled suspect regarding availability of counsel]; United States v. Anderson (2d Cir. 1991) 929 F.2d 96, 98-102 [police indicated that obtaining counsel would be to defendant's disadvantage]; Collazo v. Estelle, supra, 940 F.2d at 416-419.)

Police subterfuge should also be weighed as a factor in the totality of circumstances when considering whether a defendant's statement was involuntary. (Schneckloth v. Bustamonte, supra, 412 U.S. at 226; People v. Hogan, supra, 31 Cal.3d at 840-841.) "[A]lthough police may use deceptive tactics in attempting to persuade a defendant to confess, such deception may be considered in deciding whether the totality of the circumstances indicate that the confession was involuntary." (In re Shawn D. (1993) 20 Cal.App.4th 200, 213 [citing People v. Hogan, supra, 31 Cal.3d at 840-841].)

7. Relentless Interrogation

Respondent also disputes the existence of illicitly coercive and relentless police interrogation. (RB 55-57.) Appellant submits that the videotapes and resulting transcripts speak for themselves regarding how the detective and prosecutor Dunlap repeatedly hammered away at appellant during the course of this interrogation, effectively telling appellant what they wanted to hear by way of the form of their questions and conveying that the interrogation would not cease until he conformed his story accordingly. (See discussion at AOB 189-194.)

Appellant was subject to approximately 5 hours of interrogation over 12 hours on October 18, and another 2 hours the following morning. During these interviews, appellant repeatedly cried and complained several times about the ongoing pain he was experiencing. (Hensley Police Interview tape – vol. I, Oct. 18; 1 ACT 15-16; 1 ACT-B 121.) In the nighttime segment of the October 18 interview, appellant can be seen crying and begging to be allowed to sleep while Dunlap hammers away at him to get him to admit that he shot Copeland and killed Shockley and Renouf. (1 ACT-B 224-227; see AOB 179-181.)

Given the circumstances presented here, pertinent case law clearly indicates that appellant's admissions to Dunlap and the police officers were involuntary under the Fifth, Sixth and Fourteenth Amendments. (See cases cited at AOB 193; see also Doody v. Ryan (9th Cir. May 4, 2011, No. 06-17161) ___ F.3d _____ [2011 WL 1663551, 11 C.D.O.S. 5247] [13 hours of relentless overnight questioning of sleep-deprived juvenile rendered murder confession involuntary].)

C. Conclusion

In sum, the totality of factors involved in the present case combined

to establish that appellant's resulting confession was involuntary. (Schneckloth v. Bustamonte, supra, 412 U.S. at 226.) Accordingly, the court below erred in denying appellant's motion for suppression.

Respondent does not dispute appellant's conclusion that, assuming appellant's statements were improperly admitted, this error was prejudicial. Reversal is therefore mandated. (AOB 195-199.)

IV. THE TRIAL COURT'S CALJIC NO. 2.15 INSTRUCTION, REGARDING THE PRESUMPTION FLOWING FROM APPELLANT'S POSSESSION OF RECENTLY STOLEN PROPERTY, UNCONSTITUTIONALLY REDUCED THE PROSECUTION'S BURDEN OF PROOF

Appellant asserts that the CALJIC No. 2.15 instruction given at his trial created an unconstitutional presumption of guilt. The problem with this instruction is that it affirmatively instructed the jury – in a matter which undercut the proof-beyond-a-reasonable-doubt standard – that "slight" corroborating evidence beyond a factual finding that "defendant was in conscious possession of recently stolen property" was sufficient to prove appellant guilty of robbery or burglary. Appellant asserts that it is improper for a court to indicate to the jury the weight it should assign to particular items of evidence and intermediate findings of fact in assessing the ultimate question of a defendant's criminal liability for the charges he faces. This instruction affected the charges involving Shockley and Renouf (counts 1, 2, 8 and 9), as well as the robbery murder special circumstance findings attached to counts 1 and 8. (AOB 200-211.)

Relying upon People v. Parson (2008) 44 Cal.4th 322, respondent counters that "CALJIC No. 2.15 does not lessen the prosecution's burden of

proof." (RB 59.) As explained below, appellant respectfully submits that Parson was incorrectly decided insofar as it validated the standard CALJIC No. 2.15 instruction. For similar reasons, appellant respectfully disagrees with People v. Gamache (2010) 48 Cal.4th 347, 374-376, which recently followed Parson on this point.

Respondent's argument, as well as the Parson decision, disregards the following critical language in the CALJIC No. 2.15 charge: "Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt." (26 RT 7137-7138; 5 CT 1318 [emphasis added].) A correct instruction would have instead informed the jurors that it was for them to determine, if they found appellant in conscious possession of recently stolen property, whether the additional corroborating evidence necessary to find appellant guilty – on the state of the evidence in this case – needed to be slight or substantial. By addressing only one side of this disjunctive, the CALJIC No. 2.15 instruction usurped the jury's role in assigning weight to the evidence and intermediate factual findings.

Moreover, appellant's specific argument concerning CALJIC No. 2.15's "slight" corroborating evidence language, and its implication

regarding the weight the jury should assign to evidence of appellant's possession of stolen property in accessing his guilt of the Shockley and Renouf charges, was not specifically addressed in Parson. Parson therefore does not preclude the present argument because cases are not authority for issues not considered. (People v. Dillon (1983) 34 Cal.3d 441, 473-474.)

While it may have been appropriate for the prosecutor to argue to the jurors that they could imply appellant's guilt for the crimes involving Shockley and Renouf if they found him to have been in conscious possession of recently stolen property, it was completely inappropriate for the trial court to make this assessment itself and then provide an argumentative, one-sided instruction, by way of CALJIC No. 2.15, favoring the prosecution. "There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed . . . ." (People v. Moore (1954) 43 Cal.2d 517, 526-527.)

This error violated appellant's protection, under the due process clauses of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (In re Winship (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 90

S.Ct. 1068]; see Sullivan v. Louisiana (1993) 508 U.S. 275, 278 [124 L.Ed.2d 182, 113 S.Ct 2078].)

In his opening brief, appellant also argued that this was a close case on the state of the evidence and, assuming this Court agrees with appellant's assignment of error, reversal is appropriate with respect to count 1 (Shockley murder), count 2 (Shockley robbery), count 8 (Renouf murder), count 9 (Renouf robbery), and the robbery murder special circumstance findings attached to counts 1 and 8. Respondent fails to take issue with appellant's assessment on the matter of prejudice.

V. THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS

Respondent argues in a cursory fashion that there were no guilt phase errors. (RB 60.) Respondent fails to take issue with appellant's analysis of the law governing cumulative error review. (See AOB 212-217.) Accordingly, appellant makes no further reply with respect to the issue of guilt phase cumulative error.

PENALTY PHASE ISSUES

VI. JUROR MISCONDUCT, BY WAY OF A JUROR CONSULTING HIS MINISTER DURING PENALTY DELIBERATIONS, SERVED TO DENY APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY

During deliberations, juror Y.M. consulted his minister regarding the relationship between his Christian beliefs and his role as a capital juror, and was told that he should "render . . . unto Caesar the things which are Caesar's; and unto God, the things which are God's" (Matthew 22:21) and "[i]f you live by the sword, you die by the sword." (60 RT 19223-19225.) Upon returning to court the following morning, Y.M., who had previously been a holdout against the death penalty and had personally requested that a question be sent to the judge regarding the application of "mercy" and "empathy" (8 CT 2203), immediately arranged for his question to be withdrawn before it was answered and indicated that he was now ready to vote for death. (60 RT 19217-19220.) Appellant asserts that Y.M. thereby committed prejudicial juror misconduct. (AOB 239-277.)

Respondent "concedes that juror Y.M.'s actions in contacting his minister to discuss his concerns regarding the death penalty during penalty

deliberations in this case constituted juror misconduct." (RB 65.) However, respondent urges that this "misconduct was not prejudicial." (RB 66.) Respondent is mistaken.

Respondent claims that the biblical passages which Minister Sutton directed Y.M. to were not prejudicial because they did not "contain . . . an endorsement of the death penalty in [this] particular case." (RB 67.) Respondent also claims "the only evidence . . . is that Pastor Sutton told Y.M. that he should rely not on the Bible but on the law of the land." (RB 69.) Neither of those assertions is true.

Y.M. said that Minister Sutton referred him to "the double-edged sword. If you live by the sword, you die by the sword." (60 RT 19224.) This clearly means that any intentional killer should "die by the sword" – i.e., receive the death penalty. The admonition "If you live by the sword, you die by the sword" in this context served as both an endorsement of the death penalty for any intentional killer (such as appellant) and a directive to disregard sympathy, compassion and other mitigating considerations provided by California's statutory scheme. "If you live by the sword, you die by the sword," when followed, precludes any consideration of the mitigating factors set forth in section 190.3.

Minister Sutton also referred juror Y.M. to the well-known passage

from the Book of Matthew: "Render, therefore, unto Caesar the things which are Caesar's; and unto God, the things that are God's." (Matthew 22:21.) (60 RT 19224.) This passage has been interpreted "as granting the secular government a legitimate realm of power that includes the right (if not the mandate) to use deadly force." (J. Gordon Melton, The Churches Speak On: Capital Punishment (1989), p. xix.)

Respondent makes much of the fact that Y.M. did not share Minister Sutton's remarks or these biblical passages with his fellow jurors. (See RB 67-69.) However, that counts for little considering that prior to his improper consultation with his minister, Y.M. was the sole holdout against the death penalty and, immediately thereafter, Y.M. told the jury forewoman that he no longer needed an answer to his pending question asking for clarification of the sympathy instructions and Y.M. changed his vote to one for death, thereby allowing the panel, which had been deliberating for the two previous days, to return an unanimous death verdict minutes after reconvening the morning after Y.M. spoke to his minister. (See AOB 242-243.)

Respondent alleges that appellant unfairly "seizes" (RB 70) upon Y.M.'s comments when questioned by the court: "Either I can go with the law of the land or I can go with mercy, sympathy and grace." (60 RT

19226) and that one should "render . . . unto Caesar the things which are Caesar's" – which Y.M. took to mean that one should "go with the law of the land" and disregard mercy and sympathy in deciding appellant's sentence (60 RT 19223-19226). However, as previously explained, Y.M.'s statements to the court and Minister Sutton's testimony at the motion hearing provided ample evidence that Y.M.'s conversation with Sutton either resulted in or reinforced an existing misconception on Y.M.'s part – namely, that applying mercy and sympathy was inconsistent with and alternative to applying "the law of the land." (See AOB 268-269.) Consistent with California law, the penalty phase jurors were duly instructed that "mercy, sympathy, compassion or pity for the defendant or his family" could be considered in their selection between a life sentence or a death verdict. (8 CT 2268-2269; see § 190.3, subd. (k) and AOB 240-241.) Therefore, the counsel which Minister Sutton gave Y.M. (including "you live by the sword, you die by the sword") – which by Y.M.'s own admission caused him to withdraw the jury's pending question to the court "regarding mercy [and] empathy" (60 RT 192230-19232) – was prejudicial because it led Y.M. to believe that consideration of sympathy and compassion was somehow inconsistent with the "law of the land" and his duty as a juror.

Respondent claims there is no support in the record "that Pastor Sutton's counsel effectively overrode the court's instructions and provided the critical determinate in Y.M.'s decision to vote for the death penalty." (RB 70.) On the contrary, the record speaks for itself in support of the conclusion that Y.M.'s discussion with his minister regarding the role that "mercy" and "sympathy" should have in "making your judgment" (60 RT 19225) did, in fact, improperly bias Y.M.'s vote for death. The fact that Y.M. had requested the jury forewoman to ask his question regarding "mercy" and "empathy" indicated that Y.M. felt that he needed an answer to that legal question in order to make his penalty decision. Unfortunately, the answer Y.M. received from his minister was the wrong one and, relying upon that misinformation, Y.M. proceeded to withdraw his question before the judge had a chance to answer it. The morning after his discussion with Minister Sutton, Y.M. informed the jury forewoman that he wanted to withdraw the written question regarding the application of "mercy" and "sympathy" which Y.M. had previously asked to be submitted to the court. (8 CT 2203; 60 RT 19217-19220.) Later the judge asked Y.M. if "the consultation" with his minister had "helped you in resolving the issues that you were facing?" and Y.M. readily replied, "So far as making my final decision, yes." (60 RT 19230.)

Following his consultation with Minister Sutton, Y.M. immediately withdrew his prior request for the judge to provide clarification regarding the jury's consideration of mercy and sympathy. (60 RT 19197, 19217-19219, 19230-19232.) And immediately following that, Y.M. informed his fellow jurors that he was changing his position from a holdout against the death penalty to a vote for it. (60 RT 19197, 19206; 8 CT 2209.) It was clearly juror Y.M.'s discussion with his minister that served as the critical determinate in Y.M.'s decision to cast his vote in favor of the death penalty and break the previously existing jury deadlock on the issue of penalty.

Respondent protests that "the implication . . . that juror Y.M. considered his minister's counsel or any Biblical passages in arriving at his own personal decision to impose the death penalty . . . involves an improper look, albeit one done by implication, into juror Y.M.'s deliberative process." (RB 70.) This remark demonstrates respondent's misunderstanding of the law on two levels. First, Evidence Code section 1150, subdivision (a), sets forth a prohibition on certain types of evidence; it does not regulate the implications which may be argued on the basis of admissible evidence. (See People v. Danks (2004) 32 Cal.4th 269, 301-302.) Second and more fundamentally, respondent incorrectly implies that it is appellant (rather than respondent) who bears the burden of proving that

Y.M.'s acknowledged misconduct in consulting his minister during deliberations influenced Y.M's subsequent vote for death. However, by respondent's own admission, juror Y.M.'s action of discussing his concerns regarding the death penalty with his minister "constituted juror misconduct." (RB 65.) The occurrence of jury misconduct, whether deliberate or inadvertent, "creates a presumption of prejudice which, if not rebutted, requires a new trial." (People v. Zapien (1993) 4 Cal.4th 929, 994 [citing People v. Holloway (1990) 50 Cal.3d 1098, 1108; accord People v. Nesler (1997) 16 Cal.4th 561, 579.) Accordingly, it is respondent who is required to marshal evidence, by way of implication or otherwise, regarding Y.M.'s decision-making process in its effort to rebut that presumption of prejudice; if respondent is unable to somehow rebut that presumption, reversal is required. (People v. Nesler, supra, 16 Cal.4th at 579.)

Respondent relies upon People v. Danks, supra, 32 Cal.4th 269. However, as respondent is forced to concede, Danks is clearly distinguishable on the issue of prejudice flowing from the juror misconduct at issue, because in Danks this Court found that any juror misconduct could not have made a difference given the powerful case for a death verdict against Danks. (RB 66-68.) This Court summarized that evidence as follows:

> [Danks] was convicted of the premeditated murder of his sleeping cellmate. In his statement to police, defendant implied that he had killed [the cellmate] in order to receive the death penalty. Defendant had suffered six prior first degree murder convictions. All of the victims were strangers to defendant, and he indicated to police the stabbings were unimportant because the victims were "bums." While defendant was incarcerated, he committed two other stabbings, and expressed frustration he had failed to kill one of these victims. He also fashioned and concealed several sharp weapons. During his penalty phase testimony, defendant expressed no remorse for his crimes, stating, "I would not change a thing that I did in my life." He also strongly implied he would continue to be violent in a controlled setting, and apparently threatened the jury.
>
> (Id. at 305.)

Responding on this point, respondent briefly summarizes the guilt-phase evidence and predictably recites that Y.M.'s misconduct could not have made a difference as to the penalty verdict because the evidence in aggravation against appellant Hensley was "compelling." (RB 67-68.) However, as appellant has previously explained (AOB 321-328), the case for a death verdict was far from "compelling" and respondent's invocation of that term does not somehow reconstitute the state of the evidence. In appellant's first penalty phase trial, three jurors voted for a life sentence; therefore it can hardly be said that there existed the "compelling" case for a

death verdict which respondent posits. (See People v. Rivera (1985) 41 Cal.3d 388 [hung jury indicative of close case]; People v. Brooks (1979) 88 Cal.App.3d 180, 188 [same].)

The misconduct of juror Y.M. created a presumption of prejudice with respect to appellant's penalty trial, and the State cannot meet its burden of rebutting this presumption of prejudice. Juror Y.M.'s pastor explained to him the part mercy and sympathy should play in his verdict: none. And, in telling juror Y.M. that those who "live by the sword" should "die by the sword," Minister Sutton effectively instructed that all intentional killers should be put to death regardless of any consideration of statutory mitigating factors. The pastor's advice effectively overrode the court's penalty phase instruction, which told the jurors to be guided by the aggravating and mitigating factors set forth in section 190.3 and to make an individual, personal assessment (not a decision directed by a minister) regarding whether to be influenced by mercy or sympathy for the defendant.

The death judgment must be reversed.

VII. THE COURT ERRED IN DENYING APPELLANT'S CHALLENGE FOR CAUSE OF S.B., WHO SERVED AS A PENALTY PHASE JUROR

A. Introduction

The court below erred in denying defense counsel's challenge for cause of juror S.B. because his responses indicated that he would automatically vote for death in any case of multiple murder, murder for robbery or murder coupled with a conviction for jail escape. The court's ruling was prejudicial because S.B. sat on appellant's second penalty jury, which returned a death verdict.

B. There Was No Waiver – This Issue Is Fully Preserved for Review

Appellant acknowledges that respondent is correct in its assertion that defense counsel failed to exhaust all of his peremptory challenges with respect to the 12 jurors who were empaneled in his second penalty phase trial. (See RB 72; AOB 283.) Appellate counsel was unfortunately confused by the proceedings involving the selection of alternates for that

jury: with regard to the alternate jurors defense counsel did exhaust his peremptory challenges and request additional challenges. (See 46 RT 13333-13336.) Appellate counsel apologizes for this inadvertent error.

In fact, defense counsel exhausted 17 of his 20 peremptory challenges in selecting the penalty phase jury which included S.B. (46 RT 13328-13339.)[6]

Nonetheless, appellant's challenge for cause against juror S.B. is preserved for review because good cause existed for counsel's failure to exercise a peremptory challenge against that juror. (See People v. Bittaker, supra, 48 Cal.3d at 1088.) Although S.B. was biased in favor of the death penalty, S.B. was also one potential juror who had not been infected by exposure to the highly inflammatory, prejudicial publicity which surrounded this case. Although S.B. could not recall publicity concerning appellant's case, defense counsel had been forced to accept five jurors to serve on the final penalty phase panel who acknowledged some recollection of media publicity about this case. (See AOB 82-84.) Any juror who would have replaced S.B. would likely have been prejudiced by pretrial publicity and

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[6] The trial court noted at one point that the prosecution had exhausted 18 peremptory challenges and the defense had exhausted 16. The prosecutor then struck A.G. and defense counsel struck T.J. After that, both counsel passed. (46 RT 13328-13329.)

therefore might have been worse for appellant.

Thus, there was no waiver, per Bittaker.

C. The Court Erred in Denying the Challenge for Cause

Respondent also claims that, in any event, the court was correct in refusing to dismiss S.B. for cause. Respondent claims reliance upon People v. Beames (2007) 40 Cal.4th 907 (RB 74), but apart from the strength of their views in favor of the death penalty, the situation with regard to R.O. -H. (the challenged juror in Beames) was quite different than that involving S.B. in the instant case. In Beames, this Court stated: "Although some of Juror R.O. -H's comments during the voir dire process could be construed as suggesting she might automatically vote for death at the penalty phase, other remarks she made indicated an ability and a willingness to be fair and open-minded." (Id. at 925.) Such was not the case with S.B. S.B. indicated that he was inclined to automatically vote for death based upon three of the circumstances which had previously been established as true by the guilt-phase verdicts in appellant's first trial: murder plus a jail escape, murder for robbery or murder of two persons. (See AOB 285-288.) Although respondent points to S.B.'s earlier responses as supposedly

demonstrating his "willingness to be fair and open-minded" in deciding appellant's penalty (RB 73 [citing 41 RT 11778-11779]), the fact remains that S.B. was never "rehabilitated" with respect to his subsequent answers, which revealed his bias as an automatic vote for death under the circumstances established by the earlier guilt-phase verdicts in this case (see AOB 285-288 [citing 41 RT 11783-11785]).

The denial of an impartial jury through error in the selection process is a matter of fundamental constitutional importance, therefore reversal is automatic. (Swain v. Alabama (1965) 380 U.S. 202, 219 [13 L.Ed.2d 759, 85 S. Ct. 824].)

VIII. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT UNFAIRLY PREJUDICED APPELLANT'S PENALTY PHASE TRIAL

A. Introduction

The prosecutor in the present case engaged in several instances of misconduct in his penalty phase closing arguments which denied appellant a fair jury trial and violated his rights to due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643 [40 L.Ed.2d 431, 94 S.Ct. 1868]; Beck v. Alabama, supra, 447 U.S. at 638; People v. Bell (1989) 49 Cal.3d 502, 533-534.) This misconduct took six forms: 1) arguing facts not in evidence by way of the impact of Gregory Renouf's death upon his family members and friends (59 RT 18953-18954, 19080); 2) arguing that the jury should conclude that appellant's sister-in-law Denise Underdahl was adversely impacted by Larry Shockley's death and favored appellant's execution based upon imagined answers to questions which the prosecutor elected not to ask of her (59 RT 19079-19080); 3) arguing alleged absence of remorse on appellant's part as a nonstatutory aggravating factor; 4) arguing that the jury should show appellant the same mercy that he showed

for the victims and their families; 5) disparaging a jury instruction concerning the consideration of mental or emotional disturbance; and 6) arguing that appellant deserved the death penalty because he was a neglectful parent and poor role model for his children. Each of these instances of misconduct is discussed in turn below.

B. None of Appellant's Assignments of Misconduct Were Waived

Respondent claims that appellant waived some of his prosecutorial misconduct claims by the failure of his trial counsel to object. (RB 77-78, 81-83, 86.) However, because the prosecutor's misconduct was repetitive, pervasive and subtle, this Court should not find any waiver due to nonobjection. (People v. Hill (1998) 17 Cal.4th 800, 820; see discussion at AOB 319-321.)

Furthermore, the prosecutor violated the court's May 9, 1995 Order with regard to his arguments about Renouf's family and friends, Denise Underdahl's reaction to Shockley's death, appellant's alleged lack of remorse, disparagement of the mental or emotional distress jury instruction, and appellant's serving as a poor role model and neglectful parent. (6 CT 1581-1608; see AOB 292-293.) Even absent further objection, it was

misconduct for the prosecutor to engage in a forbidden line of argument after the trial court indicated that such will not be permitted. (See People v. Williams (1997) 16 Cal.4th 153, 252; People v. Rich (1988) 45 Cal.3d 1036, 1088; People v. Pitts (1990) 223 Cal.App.3d 606, 733, fn. 33.)

C. Specific Instances of Misconduct

1. Arguing Facts Not in Evidence Concerning the Family and Friends of Gregory Renouf[7]

Respondent argues that the prosecutor's remarks concerning Renouf's family and friends – totally unsupported by any evidence presented at trial – were permissible because "prosecutor[s] may make reasonable inferences from the record" and "are allowed significant latitude in making their closing arguments." (RB 76.) These very general rules do not validate what the prosecutor did below because there was absolutely no evidence to support any "inference" regarding the existence of any of the persons the

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[7] Appellant has put forth an alternative argument asserting that the trial court's action in overruling defense counsel's objection to the prosecutor's statements about Renouf's family and friends constituted judicial error. (See Supplemental AOB, Argument II, and Argument IX, below.)

prosecutor described, much less their feelings toward and relations with Renouf. Renouf may have been a popular man with a large and loving extended family or he could have been an antisocial hermit – there was simply no evidence one way or the other.

Respondent notably fails to address the case law – People v. Bolton (1979) 23 Cal.3d 208, 212-213, and People v. Kirkes (1952) 39 Cal.2d 719, 724-726 – which appellant sets forth as controlling on this issue. (See AOB 295-297.) The prosecutor's argument on this point was unsupported by the evidence and therefore improper.

2. Arguing Facts Not in Evidence Concerning the Impact of Larry Shockley's Death Upon His Stepdaughter

Similarly, the prosecutor committed misconduct in implying, without supporting evidence, that Denise Underdahl "felt Paul Hensley deserved the death penalty." (See 59 RT 19079.) Respondent counters that the prosecutor's argument was no more than "a reasonable inference" from Underdahl's testimony and her relationship to Shockley. (RB 78.) However, the fact remains that Underdahl did not testify regarding the effect of Shockley's death upon her and she never said that she favored appellant

receiving the death penalty. Therefore, this was misconduct.

In his opening brief, appellant also pointed out that it was improper for the prosecutor to indicate that defense counsel Fox had possessed the "opportunity" to ask Underdahl "if she felt Paul Hensley deserved the death penalty," but that Mr. Fox had chosen not to do so, and to thus imply that Mr. Fox had refrained from asking that question because he knew or believed that the answer would hurt his client. (59 RT 19079-19080.) This constituted misconduct because, as a matter of law, both attorneys were legally barred from asking such a question because defense counsel, as well as the prosecutor, "may not elicit the views of a victim or victim's family as to the proper punishment" in a capital trial. (People v. Lancaster (2007) 41 Cal.4th 50, 97; People v. Smith (2003) 30 Cal.4th 581, 622.) (See AOB 300-301 and cases cited thereat.) Respondent completely fails to address this point.

Furthermore, it is unclear that, if Underdahl had actually been asked, she would necessarily have indicated that "she was negatively impacted by [Shockley's] death" as respondent imagines to be the case. (See RB 78.) There was evidence that Shockley had a troubled relationship with his family members. Shockley's friend Charles Flynn testified that Shockley planned to kill his stepdaughter Sheree Gledhill because Gledhill used drugs and was

a negative influence on her children (who were Shockley's step-grandchildren). (24 RT 6820-6829.) This partially corroborated appellant's statement to the police that Shockley tried to hire appellant to kill Gledhill. (1 ACT-B 231-233.) There was also evidence that Shockley, out of anger, had evicted appellant, his wife and children from Shockley's home. (21 RT 5710-5711, 5736-5737.) Thus, it is unclear that, if asked, Underdahl would have necessarily testified that "she missed" Shockley. In any event, given that neither counsel asked Underdahl about the effect of Shockley's death upon her, there was no evidentiary foundation for the prosecutor's assertion concerning her feelings about that. This argument was therefore improper. (People v. Bolton, supra, 23 Cal.3d at 212-213; People v. Kirkes, supra, 39 Cal.2d at 724-726.)

Respondent also complains that appellant "fail[ed] to object below" with regard to this misconduct. (RB 77.) However, that ignores that immediately after the jury left to begin deliberations, defense counsel lodged an objection that, in so arguing, the prosecutor had committed misconduct by arguing facts not in evidence by way of Underdahl's support for a death verdict. (60 RT 19165-19166, 19168-19169.) The judge instructed counsel to raise this by written motion. (60 RT 19170-19171.) Counsel complied by including this issue in his motion for a new trial. (See 9 CT 2323-2325; 60

RT 19354-19356.) Furthermore, the prosecutor's argument regarding Underdahl violated the court's May 9, 1995 Order, which prohibited the prosecutor from arguing in favor of a death sentence based upon the opinion of a victim's family member. (8 CT 2136.) Given all this, defense counsel most certainly preserved an objection to this improper argument.

3. The Prosecutor Improperly Argued that Appellant Lacked Remorse

Respondent claims the prosecutor's argument regarding appellant's lack of remorse was "entirely proper" because the prosecutor did not "imply that . . . lack of remorse and concern for [the] victims should be used by the jury as a factor in aggravation." (RB 80-81.) Respondent's reading of the record is inaccurate.

As appellant has previously discussed, this Court's prior decisions have drawn a careful distinction between a prosecutor's arguing lack of remorse as an aggravating factor, which is forbidden, and his permissibly pointing out that remorse does not exist as a mitigating factor. (See AOB 304-305, and cases cited thereat.) Here, the prosecutor affirmatively argued lack of remorse as an aggravating factor. It was the prosecutor who first made remorse a subject of oral argument and the prosecutor alone who had

previously questioned Steven McElvain concerning the issue of remorse (58 RT 18588-18589, 18623-18625; 59 RT 18907-18910) for the purpose of setting the stage for his subsequent closing argument. Clearly, the prosecutor below illicitly argued lack of remorse as a nonstatutory aggravating factor.

Appellant's position also finds support in the recent cast of United States v. Whitten (2d Cir. 2010) 610 F.3d 168. The Whitten court reversed the death sentence of defendant Ronell Wilson based upon the prosecutor's improper argument to the jury that Wilson's insistence upon taking his case to a jury trial indicated that he lacked remorse for his capital offenses. (Id. at 194-197, 200-202.)

Furthermore, as appellant has previously argued, the prosecutor's remorse argument violated the prohibition of Griffin v. California (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229], by indicating that an adverse inference could be drawn against appellant for failing to take the witness stand and express remorse. (See AOB 306.)

4. The Prosecutor Improperly Argued That the Jury Should Show Appellant the Same Mercy He Showed the Victims and Their Families

Without much discussion, respondent argues that the prosecutor's argument that, in accessing appellant's penalty, the jury should consider "the mercy he showed" for the victims and their families (59 RT 18928, 18953) should be countenanced based upon this Court's prior decisions in People v. Hinton (2006) 37 Cal.4th 839, 908; People v. Hughes (2002) 27 Cal.4th 287, 395; and People v. Ochoa (1998) 19 Cal.4th 353, 464-465. (RB 82.) Appellant urges that those cases be reconsidered for the reasons set forth in his opening brief and in light of the federal and foreign state case law he has cited. (AOB 308-309.) This type of blatant prosecutorial appeal to vengeance and emotional backlash should properly be condemned as misconduct which violates constitutional due process and safeguards against cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII & XIV.)

5. The Prosecutor Violated the Court's Order By Disparaging the Jury Instruction Regarding Consideration of Mental or Emotional Disturbance

Respondent argues that the prosecutor's "believe it or not"

disparagement of the mental or emotional disturbance factor of CALJIC No. 8.85 should be viewed as "permissible and vigorous argument," rather than as illicitly "urging the jury to disregard the law." (RB 83.) In support of this position, respondent cites People v. Valencia (2008) 43 Cal.4th 268, but the assertions of misconduct addressed in Valencia had nothing to do with prosecution argument directed at undercutting a jury instruction provided by the court. (See People v. Valencia, supra, 43 Cal.4th at 301-302.)

Respondent argues that the prosecutor's sarcastic remark was no more than a permissible assertion that the instruction was inapplicable because no substantial evidence supported its application. However, what the prosecutor actually said was: "Ladies and gentlemen, I'm going to show you [Jury Instruction] number 16. You're going to get an instruction, believe it or not." (59 RT 18946 [emphasis added].) This was clearly intended to mock the legal concept behind the instruction, not merely to address the issue of whether there was evidence to support its application.

The prosecutor's attack on the CALJIC No. 8.85 instruction amounted to an illicit argument for the jury to disregard the law. (People v. Calpito (1970) 9 Cal.App.3d 212, 222; People v. Meneley (1972) 29 Cal.App.3d 41, 61.) This also amounted to misconduct as a direct violation of the court's May 9, 1995 Order, which directed the prosecutor not to argue

"[t]hat mental or emotional problems should not be considered unless they rise to the level of extreme mental or emotional disturbance" (8 CT 2152-2153). (See People v. Williams, supra, 16 Cal.4th at 252; People v. Rich, supra, 45 Cal.3d at 1088; People v. Pitts, supra, 223 Cal.App.3d at 733, fn. 33.)

It is true, as respondent states, that the court indicated that the prosecutor's "believe it or not" remark should be stricken. (RB 83; see 59 RT 18946.) However, case law recognizes that prejudice often occurs when a jury is exposed to prejudicial matters, and jurors are not always able to place such matters out of their minds merely because a judge admonishes them to do so. (People v. Foote (1957) 48 Cal.2d 20, 23-24; People v. Pitts, supra, 223 Cal.App.3d at 837; Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1084.)

Finally, respondent claims this assignment of error was somehow "forfeited" by defense counsel's action or inaction below. (RB 83.) However, the record shows that this issue was most certainly preserved by: 1) defense counsel's contemporaneous objection (59 RT 18946); 2) the fact that the prosecutor's argument violated the court's earlier May 9, 1995 Order, which had been issued at defense counsel's request (8 CT 2152-2153); and/or 3) the fact that this very issue was subsequently raised as part

of defense counsel's motion for a new trial, which the court denied. (9 CT 2326; 60 RT 19381.)

6. The Prosecutor Committed Boyd Misconduct By Arguing Appellant Deserved the Death Penalty Because He Was a Neglectful Parent and Poor Role Model for His Children

Appellant asserts that the prosecutor improperly relied on character and background evidence by way of arguing, as a basis for imposing death, that appellant was a bad parent and poor role model for his children. (AOB 313-317.) This violated the rule of People v. Boyd (1985) 38 Cal.3d 762, 775-776, as well as the court's May 9, 1995 Order, which instructed the prosecutor to refrain from arguing "the defendant's background and character are aggravating." (8 CT 2156.)

Respondent does not dispute the controlling rule of Boyd "that . . . evidence of a defendant's character or background . . . may not be used as a factor in aggravation." (RB 85.) However, respondent contends that the prosecutor never violated that rule, but "merely argued appellant's good character as a provider for his children and as a loving parent was lacking" for purposes of mitigation. (RB 85-86.)

Respondent's argument fails because careful scrutiny of the prosecutor's remarks – including statements such as "Is he responsible for his conscious decisions when he has a lifetime abuse of methamphetamine, brings children into this world?" (59 RT 18883 [emphasis added]); "Consider the parent he had been when he abandoned them on his drug runs." (59 RT 18928); and "His parenting has been abusive," (59 RT 19081) – quite clearly shows that the prosecutor crossed the line beyond arguing that appellant's relationship with his children should not count as mitigating. The prosecutor, in fact, twisted evidence concerning appellant's parenting into an aggravating factor favoring death, thus violating the rule of Boyd.

D. The Trial Court Erred in Denying Appellant's Motion for a New Penalty Phase Trial Based Upon Prosecutorial Misconduct

Respondent states only that appellant's claim that his motion for a new trial was improperly denied "must . . . be rejected" because, according to respondent, appellant's assertions of prosecution misconduct are unmeritorious. (RB 87, fn. 12.) Since, as explained above, appellant's assignments of misconduct do in fact have merit, the trial court erred in denying his new trial motion. (See AOB 318-319.)

E. Prejudice

With respect to the matter of prejudice, respondent briefly summarizes the guilt-phase evidence and predictably recites that the prosecutor's improper arguments could not have been prejudicial because "the penalty phase evidence in aggravation was overwhelming." (RB 86-87.) As appellant has previously explained (AOB 321-328), the case for a death verdict was far from "overwhelming" and respondent's repeated invocation of that term does not somehow reconstitute the state of the evidence. In appellant's first penalty phase trial, three jurors voted for a life sentence; therefore it can hardly be said that there existed the "overwhelming" case for a death verdict which respondent posits. (See People v. Rivera, supra, 41 Cal.3d 388 [hung jury indicative of close case]; People v. Brooks, supra, 88 Cal.App.3d at 188 [same].)

The judgment of death should be reversed.

IX. THE COURT ERRED IN PERMITTING THE PROSECUTOR TO ARGUE FACTS NOT IN EVIDENCE CONCERNING THE FAMILY AND FRIENDS OF GREGORY RENOUF

On March 22, 2011, appellant filed a supplemental opening brief, which included an argument that the trial court erred in overruling defense counsel's objection to the prosecutor's closing argument regarding Gregory Renouf's friends and family, regarding which no evidence had been presented. (Supplemental AOB 12-15.) In making this argument, appellant – in consideration of People v. Foster (2010) 50 Cal.4th 1301, 1350-1351 – essentially re-frames Argument X.C.I. of his opening brief from an issue of prosecutorial misconduct into one of trial court error. (See AOB 293-297.) Respondent responds simply by repeating its corresponding counterargument from respondent's brief. (Supplemental RB 2-4; see RB 75-76.) Accordingly, appellant replies by incorporating by reference Argument VIII. C.1. of his present reply brief.

X. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO QUESTION A PSYCHIATRIC TECHNICIAN WHO WORKED AT THE JAIL REGARDING WHETHER APPELLANT HAD EXPRESSED REMORSE

A. Introduction

Appellant asserts that the trial court erred in permitting the prosecutor to question Steven McElvain, a psychiatric technician who worked at the San Joaquin County Jail, regarding whether appellant had expressed remorse to him regarding appellant's crimes. Defense counsel properly objected to this evidence, which represented an illicit effort on the prosecutor's part to inject lack of remorse into the jury's consideration as a nonstatutory aggravating factor favoring death. Respondent counters: 1) that defense counsel failed to record an objection to this line of questioning; 2) in any event, no impermissible evidence was elicited; and 3) if error did occur, it was harmless. Respondent is incorrect on all points, as explained below.

B. There Was No Forfeiture or Waiver

Respondent misreads the record in claiming that "defense counsel did

not make an on the record objection to this line of questioning." (See RB 87.) When the prosecutor, outside the jury's presence, first proposed to question McElvain regarding appellant's "expressed remorse" "for the victims," defense counsel responded: "Judge, I would object to that." (58 RT 18588.) At that point, the judge indicated that he would allow the prosecutor to question McElvain regarding whether appellant expressed remorse to him, stating:

> He's going to ask if his anxiety was connected to the fact he was – I'm feeling really guilty and bad about the fact I killed somebody, and I'm feeling bad about that. And please give me some medication for that. That's fair game.

(58 RT 18589 [emphasis added].)

Clearly, in the context of this discussion, the court's statement "[t]hat's fair game" meant that the court, considering and overruling the defense objection, would permit the prosecutor to question McElvain about whether appellant expressed remorse (was "feeling really guilty") about having "killed someone." (58 RT 18589.) Given the judge's comments on the record indicating that he was determined to overrule any defense objection to the prosecutor's questions to McElvain regarding remorse, it follows that forfeiture or waiver does not apply because any renewed objection by counsel during the questioning itself would certainly have been

futile. (People v. Hill, supra, 17 Cal.4th at 820-821; People v. Pitts, supra, 223 Cal.App.3d at 692; see analysis at AOB 319-320.)[8] Appellant's federal constitutional claims are also adequately preserved because appellant's constitutional objections to this line of questioning rest upon the same factual and legal issues as appellant's state law assignments of error. (People v. Partida (2005) 37 Cal.4th 428, 433-439; People v. Yeoman (2003) 31 Cal.4th 93, 117-118.)

C. The Trial Court Erred in Allowing This Evidence

Respondent also argues that the court properly permitted the prosecutor's questions to McElvain regarding whether appellant expressed remorse and mentioned the victims to him. Respondent reasons that defense counsel "opened the door to prosecution evidence regarding [appellant's] state of mind" with respect to the time appellant discussed medications with

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[8] Respondent cites People v. Hinton, supra, 37 Cal.4th 839 in support of its assertion of waiver (RB 88), but Hinton involved a situation where defense counsel lodged no objection whatsoever to the hearsay statements attacked on appeal. (Id. at 893.) Hinton did not impose any requirement that counsel, having raised an objection in chambers to anticipated evidence and having received an adverse court ruling prior to the disputed testimony, must reassert such objection contemporaneously to the testimony itself in order to preserve the issue for appeal.

McElvain. Respondent goes on to argue that allowing appellant to present evidence of his suffering from anxiety while in jail and the medications he was prescribed as a result, without also allowing the prosecutor to question McElvain concerning whether appellant had expressed remorse, "would have left the jury with incomplete information." (RB 89.)

Respondent's argument is pretextual and unmeritorious. If the prosecutor had actually been interested in what appellant said to McElvain regarding the source of his anxieties which had resulted in sleeplessness, then the prosecutor could have simply put such a question to McElvain (e.g., "What did the defendant tell you about what was troubling him or causing his anxieties?") without further ado. Of course, that was never the prosecutor's real intention.

This Court has found no error where the prosecutor's actions in discussing remorse were construed as merely pointing out to the jury that there was an "absence of evidence of remorse" and the jury thus could not make "a finding of remorse as a mitigating factor." (People v. Crittenden (1994) 9 Cal.4th 83, 148.) However, the prosecutor's conduct in appellant's case cannot be so characterized. It was the prosecutor alone who propounded questions to a witness regarding remorse, by way of his examination of McElvain. (See 58 RT 18588-18589, 18623-18625.)

Likewise, it was the prosecutor who first referenced remorse during closing arguments. (59 RT 18907-18908.)

Defense counsel certainly did not "open the door" to the issue of remorse. Defense counsel never even brought that subject up, except very briefly in closing argument in direct response to the prosecutor's earlier discussion of remorse. (See 59 RT 19089.) Defense counsel called McElvain as a witness solely to demonstrate that appellant's misbehavior while in jail may have been due to his suffering from anxiety and related problems involving prescribed medications. (58 RT 18582-18584, 18588; see AOB 69-70 [describing appellant's January 1995 jail misbehavior].) Defense counsel clearly did not and never intended to introduce McElvain's testimony for purposes of demonstrating appellant's remorse or attitude as it related to the victims of the crimes he was charged with. At the very most, this entitled the prosecutor to directly ask McElvain what exactly appellant had said to him. It did not entitle the prosecutor to smuggle an impermissible nonstatutory aggravating factor, such as lack of remorse, before the jury by means of propounding a series of questions along the lines of "Did the defendant talk about this?" or "Did the defendant talk about that?" In fact, as respondent essentially concedes (at RB 90), the prosecutor below had no reason to believe remorse had actually been discussed between

appellant and McElvain.

Respondent also asserts that because the prosecutor did not specifically cite McElvain's testimony to the jury in arguing appellant's lack of remorse[9], the prosecutor cannot be accused of exploiting McElvain's testimony in support of the consideration of remorse as an unauthorized nonstatutory aggravating factor. (RB 90.) However, it is just as much misconduct for a prosecutor to place inadmissible and prejudicial matters before a jury by means of questioning a witness as it is for him to engage in improper argument to the jury. (See People v. Bell, supra, 49 Cal.3d at 532; People v. Fusaro (1971) 18 Cal.App.3d 877, 886.) In fact, the very manner in which the prosecutor examined McElvain – repeatedly asking whether appellant "express[ed] remorse" and specifically inquiring about four of the victims by name (58 RT 18623-18625) – sent a clear signal to the jury that the prosecutor's line of questioning was directed towards highlighting and driving home the fact that appellant had not expressed remorse for his crimes.

The trial court erred in ruling that the prosecutor could question McElvain regarding whether appellant had expressed remorse.

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[9] Appellant also asserts that the prosecutor's closing argument discussion of appellant's lack of remorse constituted prosecutorial misconduct. (See Argument VIII.C.3. above, and AOB, Argument X.C.3.)

D. Prejudice

With respect to the matter of prejudice, respondent again summarizes the guilt-phase evidence and again recites that this error could not have been prejudicial because "the penalty phase evidence in aggravation was overwhelming." (RB 90-91.) As appellant has previously explained (at Argument VIII.E., above, and AOB 321-328), the case for a death verdict was far from "overwhelming" and respondent's repeated invocation of that term does not somehow reconstitute the state of the evidence. In appellant's first penalty phase trial, three jurors voted for a life sentence; therefore it can hardly be said that there existed the "overwhelming" case for a death verdict which respondent posits. (See People v. Rivera, supra, 41 Cal.3d 388 [hung jury indicative of close case]; People v. Brooks, supra, 88 Cal.App.3d at 188 [same].)

Respondent also argues this error was necessarily harmless because the prosecutor, in arguing appellant's lack of remorse to the jury, failed to expressly cite McElvain's testimony, instead describing appellant's failure to express remorse to the police detectives who interrogated him following his arrest. (RB 90; see 59 RT 18907-18910.) However, the fact remains that

appellant's alleged lack of remorse was a significant aspect of the prosecutor's argument in favor of death and, although appellant's failure to express remorse and discuss the victims in his interchange with McElvain may have been less central to the prosecution argument for death than appellant's failure to express remorse to the interrogating police detectives, the prosecutor's improper questioning of McElvain was nonetheless illicitly prejudicial both in itself and as part of the cumulative prejudice resulting from the many errors in the penalty phase. (See cumulative prejudice analysis at AOB 424-430.)

The judgment of death should be reversed.

XI. THE COURT ERRED IN EXCLUDING MITIGATION EVIDENCE THAT KEITH PASSEY MOLESTED STEVE T. AND MARK T., AND THAT PASSEY EXPRESSED A SEXUAL PREFERENCE FOR YOUNG BOYS

A. Introduction

During appellant's first penalty trial, which had resulted in a 9-to-3 hung jury, appellant had been allowed to present evidence that he had complained to his former girlfriend, True Williams, that Keith Passey had sexually molested him. Appellant had also presented evidence that Passey had sexually molested brothers Steve T. and Mark T. when they were about 11 or 12 years old. However, in appellant's second penalty trial, the court excluded all evidence regarding Passey's molestations of appellant and the other boys, and Passey's deviant sexual orientation. Appellant asserts that the court's rulings in his second penalty trial violated his rights, under the Fifth, Sixth, Eighth and Fourteenth Amendments, to present relevant and critical mitigating evidence to the jury. (AOB 341-360.) Respondent counters that the court's exclusion was justified based upon hearsay and relevance grounds. (RB 91-103.) Respondent is incorrect, as explained below.

B. The Court Erred in Excluding the Passey Molestation Evidence

To begin with, it must be pointed out that respondent addresses only half of appellant's argument for the admissibility of this evidence. Appellant's first asserted ground for admissibility is that the excluded evidence supported a factual finding that appellant was personally molested by Passey. (See AOB 354-355, 357.) Appellant's second ground for admissibility is that this evidence constituted highly probative evidence of appellant's dysfunctional family background: appellant's mother, Penny Hensley, cared so little for his welfare that, when appellant was 14 or 15 years old, she was willing to foist him off to live with Passey, notwithstanding Penny's acknowledgment to appellant's aunt Marsha Jacobson that Penny knew or believed Passey was a pedophile with a preference for young boys. (See AOB 356-357.) Defense counsel below raised both of these grounds for admission of the evidence now at issue. (See 51 RT 14666-14673; 53 RT 15199-15200; 8 CT 2091-2093.)[10] Respondent sidesteps the latter issue by arguing that all of the proffered

[10] Among other things, defense counsel stated, "It is also relevant that his mother sent Paul to live with Mr. Passey knowing that Mr. Passey had a sexual preference for "boys," as bearing on the mother's level of care as shown in 1975." (8 CT 2092.)

evidence was inadmissible and/or irrelevant as to the first point (the question of whether Passey molested appellant), while completely ignoring the second – the relevance of this evidence to show that appellant's own mother cared little or nothing for his well being.

Respondent repeatedly seeks to dismiss the evidence at issue as "inadmissable" and "hearsay" (see RB 98-99, 103), but that is misleading and inaccurate. The testimonies of Steve T. and Mark T., regarding their own personal experiences of being molested by Passey, certainly did not constitute hearsay evidence. Penny Hensley's statement to appellant's aunt Marsha Jacobson was admissible for a non-hearsay purpose: to show belief or awareness on the part of Penny that Passey possessed a strong sexual preference for boys. This constituted admissible circumstantial evidence of Penny's state of mind, not subject to exclusion under the hearsay rule. (Colarossi v. Coty US (2002) 97 Cal.App.4th 1142, 1150; Skelly v. Richman (1970) 10 Cal.App.3d 844, 858.) Only Williams' testimony concerning what appellant had told her about Passey's molestations met the technical definition of hearsay and that was admissible as a victim's complaint of sexual molestation, per this Court's holding in People v. Brown (1994) 8 Cal.4th 746, 749-750, 762-764.

With respect to Jacobson's testimony, apart from respondent's

unmeritorious hearsay objection, respondent argues that in the absence of appellant's testimony that he had been molested or Williams's testimony concerning appellant's disclosure of having been molested, the Jacobson testimony "was properly excluded . . . on relevance grounds." (RB 99-100.) That is clearly incorrect. True, Jacobson's testimony about Penny's statement regarding Passey's sexual interest in boys possessed some probative value in supporting the conclusion that Passey had molested appellant. However, the main import of Jacobson's testimony was to prove dysfunctional family background by demonstrating Penny's personal awareness, or at least belief, that Passey was a pedophile. Penny's state of mind on this matter, coupled with the undisputed fact that Penny later left the 14- or 15-year-old appellant in Passey's care, constituted direct evidence that appellant's own mother cared so little for his welfare that she would foist him off with someone she knew or believed to be a child molester. This constituted evidence of dysfunctional family background, certainly admissible as mitigating evidence. (Rompilla v. Beard (2005) 545 U.S. 374, 390-391 [162 L.Ed.2d 360, 125 S.Ct. 2456]; Williams v. Taylor (2000) 529 U.S. 362, 395-396 [146 L.Ed.2d 389, 120 S.Ct. 1495].) Respondent fails to address this point.

Respondent similarly misanalyzes the relevance of the testimonies of

Steve T. and Mark T. (RB 99-100.) The molestations of Steve and Mark took place in about 1964, a decade or so before Penny's conversation with Jacobson. Therefore, the Steve and Mark molestation evidence corroborated and supported Jacobson's testimony that Penny knew or believed Passey to be a child molester prior to and/or during the time Penny entrusted appellant into Passey's care. Both Steve and Mark, who were appellant's uncles, testified that they told other family members about Passey's misconduct. Steve testified that he and Mark told Penny Hensley about Passey's molestations while Passey was living with appellant in Reno and Penny appeared nonchalant about this revelation. (30 RT 8541-8542; see 55 RT 17843-17845.) Mark testified that he immediately informed his mother, father and brother about Passey's attempted molestation of him. (31 RT 8751, 8753.) Thus, this was also evidence of dysfunctional family background – regarding what Penny knew when she entrusted appellant into Passey's care – which was admissible as mitigating evidence per Rompilla v. Beard, supra, 545 U.S. at 390-391 and Williams v. Taylor, supra, 529 U.S. at 395-399. Additionally, as respondent acknowledges, once the issue of appellant's being personally molested by Passey was placed at issue, "then prior instances of misconduct, i.e., the Mark T. and Steve T. allegations" could have been admitted as "propensity evidence of prior sexual

misconduct" to prove the fact of appellant's personal molestation, in accord with Evidence Code section 1108 and People v. Falsetta (1999) 21 Cal.4th 903. (RB 100-101.)

As for True Williams' testimony regarding appellant's disclosure to her that he had been molested by Passey, respondent complains that this was "hearsay," but respondent completely fails to take issue with appellant's point that this evidence was admissible pursuant to this Court's holding in People v. Brown, supra, 8 Cal.4th at 749-750, 762-764. (See AOB 344, 357.)

Respondent also complains that Williams' testimony was not established as "reliable." (RB 98.) However, Williams' testimony that appellant told her that Passey had molested him was totally consistent with the accounts of Steve T. and Mark T. that Passey had molested them when they were children and Jacobson's testimony that Penny had voiced her awareness that Passey was a pedophile. In addition, there was the fact that Passey had informed the court that he would assert the Fifth Amendment and refuse to testify if asked if he had sexually molested appellant. (29 RT 8048-8049.) (See People v. Johnson (2010) 183 Cal.App.4th 253, 279-285 [trial court properly considered suppressed confession in determining reliability and admissibility of proffered exculpatory evidence].) All of this

corroborated the reliability of the evidence that Passey had, in fact, molested appellant when he was a child. And it certainly cannot be conjectured that appellant confided this matter to Williams in 1977 or 1978 in anticipation of his potential need for mitigating evidence in his capital trial which would take place well over a decade later. As for respondent's assertion that an out-of-court statement may not be relied upon to prove that a crime occurred (see RB 99-101), controlling law is clearly to the contrary: an out-of-court statement may be sufficient evidence to support a criminal conviction. (People v. Boyer (2006) 38 Cal.4th 412, 480; People v. Cuevas (1995) 12 Cal.4th 252; People v. Roa (2009) 171 Cal.App.4th 1175, 1181.) And if an out-of-court statement is sufficient to establish guilt beyond a reasonable doubt, for purposes of proving a criminal conviction, such evidence is certainly admissible for purposes of meeting a lesser standard of proof to establish a fact to be considered as mitigation in a capital penalty phase.

It should also be pointed out that, contrary to respondent's underlying assumption, a capital defendant's penalty phase evidence need not meet the same relevance standard as that imposed in a criminal trial. In Mak v. Blodgett (9th Cir. 1992) 970 F.2d 614, cert. den. (1993) 507 U.S. 951 , the Ninth Circuit explained:

> The state argues that federal law does not impose a more lenient standard of relevancy in

> capital sentencing than the standard imposed by the State's interpretation of its own rules of relevance – that the failure to satisfy the State's rules of relevance renders evidence inadmissible in the penalty phase as well as the guilt phase of a capital trial. This is certainly wrong. The Supreme Court has repeatedly found evidence to be "relevant" to capital sentencing although the State had held it irrelevant under State rules of evidence. In [Skipper v. South Carolina (1986) 474 U.S. 1 [90 L.Ed.2d 1, 106 S.Ct. 1669]] the Court explicitly rejected the State's argument that evidence of the defendant's future adaptability to prison life was irrelevant. 476 U.S. at 7 & n. 2, 106 S.Ct. at 1872 & n. 2. The Court held the evidence to be "mitigating in the sense that [it] might serve as a basis for a sentence less than death." Id. at 4-5, 106 S.Ct. at 1671 (internal quotations omitted). In [Eddings v. Oklahoma (1992) 455 U.S. 104 [71 L.Ed.2d 1, 102 S.Ct. 869]] the Court explicitly rejected the State's rule that evidence of the defendant's "violent" background was irrelevant to capital sentencing . . . . 455 U.S. at 115, 102 S.Ct. at 877.
>
> (Mak v. Blodgett, supra, 970 F.2d at 623 [emphasis added].)

Respondent also complains that the evidence at issue "would have consumed an undue amount of time." (RB 100.) That is an outlandish statement in the context of a death penalty trial in which the stakes – life versus death – could not be higher. Moreover, the testimonies of Williams, Mark T. and Steve T. which occurred in appellant's first penalty trial amounted to a combined total of only 106 pages of transcript. (See 29 RT

8274-8307, 8311-8322; 30 RT 8324-8326, 8527-8565; 31 RT 8740-8757.) The scope of Jacobson's potential testimony on this subject, as represented by defense counsel, indicated that she would also be a relatively short witness, relating a single conversation between herself and appellant's mother.[11] (See 53 RT 15199-15200.) In the context of a penalty trial, involving 29 days of trial testimony and the question of life or death, undue consumption of time could hardly amount to a bona fide reason to exclude this critical evidence. (See Lockett v. Ohio (1978) 438 U.S. 586, 602-609 [57 L.Ed.2d 973, 98 S.Ct. 2954]; Skipper v. South Carolina (1986) 476 U.S. 1 [90 L.Ed.2d 1, 106 S.Ct. 1669]; and Penry v. Lynaugh (1989) 492 U.S. 302, 327-328 [106 L.Ed.2d 256, 109 S.Ct. 2934].)

In his opening brief, appellant also addressed this issue as a violation of due process and the right to a fair jury trial (U.S. Const., Amends. V, VI & XIV), in so far as the court below reversed its prior law of the case in disallowing evidence – by way of Williams' account of appellant's statements that Passey had molested him and the Steve T. and Mark T. molestation testimony – all of which had been admitted in appellant's first penalty trial which had ended in a deadlocked jury. Appellant cited Bradley

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[11] Marsha Jacobson testified in appellant's first penalty trial, but she did not testify regarding her conversation with Penny Hensley regarding Passey's sexual preference for young boys. (See 30 RT 8566-8590.)

v. Duncan (9th Cir. 2002) 315 F.3d 1091, cert. den. (2003) 540 U.S. 963, in pointing out that it was highly improper for the trial court to alter the delicate balance which existed in appellant's first penalty trial by excluding the Passey molestation evidence from appellant's second penalty trial, thus effectively tipping the balance in favor of the prosecution. (See AOB 357-358.)

Respondent argues that "unlike in Bradley, the facts changed dramatically" because in the first penalty trial the court may have believed that appellant was going to personally testify on his own behalf that Passey had molested him, and in the second penalty trial the court did not expect appellant to testify. (RB 102.)

Respondent's analysis misses the point. The reality is that appellant did not testify in his first trial and, likewise, did not testify in his second trial. What changed is that the Passey molestation evidence was admitted in the first trial which concluded in a 9-to-3 hung jury, and that very same evidence was purposefully excluded from the second trial which resulted in a unanimous verdict for death. That is precisely the type of due process violation condemned in Bradley.

Respondent is additionally incorrect in labeling this part of the Bradley opinion as "dicta." (RB 102.) In Bradley, the state judge's

unjustified reversal of an earlier judge's ruling in favor of the entrapment defense, which had resulted in a prior hung jury and mistrial, constituted an independent alternative ground for the reversal of Bradley's conviction. The Bradley court aptly stated: "This kind of unauthorized second-guessing is impermissibly arbitrary and can amount to a violation of Due Process." (Bradley v. Duncan, supra, 315 F.3d at 1097-1098.)

C. Prejudice

In his opening brief appellant detailed the reasons why the wrongful exclusion of this evidence was highly prejudicial. Most significant is that in appellant's first penalty trial, in which Williams, Steve T. and Mark T. had all been permitted to testify regarding Passey's molestations, the jury had deadlocked in a final 9-to-3 vote. (See 7 CT 1785; 36 RT 10100.) In appellant's second penalty trial, in which all evidence relating to Passey's molestations had been excluded, the jury returned a death verdict. (See analysis of prejudice at AOB 359-360.) Respondent completely fails to address this critical point and thereby implicitly concedes that appellant is correct on the question of prejudice resulting from this error.

Appellant's death sentence should therefore be reversed.

XII. THE TRIAL COURT ERRED IN EXCLUDING APPELLANT'S WIFE AND RELATIVES FROM THE COURTROOM DURING CLOSING ARGUMENTS

Appellant asserts that the court below committed federal constitutional error by excluding appellant's wife and other family members from the courtroom during closing arguments. (AOB 361-377.) Respondent replies that the court's decision to exclude appellant's family members involved no more than a matter of "discretion" and appellant has failed to show that the court "abuse[d] its discretion." (RB 105-106.) As explained below, respondent's response is inadequate in failing to address the constitutional issues which appellant raised both at trial and presently on appeal. Furthermore, respondent seriously misrepresents the scope of the judge's exclusion order and his express reasons for implementing it.

Respondent misstates the record in claiming that the court's order was limited to family members who were witnesses and that the order was solely based upon concern that hearing closing arguments could "color their testimony" in the event of a retrial. (See RB 105-106.) Thus, respondent states:

> Here, the trial court determined that it would continue its previous order to exclude all

> witnesses from appellant's penalty retrial closing arguments. The court noted that it was concerned that information may come to light during the attorneys' summation of the evidence which, in the event of a retrial, might be misused by those witnesses if they had to testify again. As the court stated, "I do not want witnesses, defense witnesses, prosecution witnesses, who may hear about the testimony who might possibly be called to testify at a later time at a retrial in court during the proceeding . . . ." (59 RT 19056.)
>
> (RB 105.)

Respondent further states:

> As is clear from the excerpts laid out above, the trial court was adamant that it was not closing the trial to the public but only excluding witnesses from the courtroom. Had any member of appellant's family who was not a witness requested permission to attend the closing argument no doubt they would have been permitted to attend. Not surprisingly, appellant offers no evidence that any non-witness family member was excluded.
>
> (RB 106 [original emphasis].)

Respondent's description of the scope of the trial court's exclusion order and the express reasoning underlying it are both seriously flawed. The judge made no distinction between family members who were witnesses and family members who were not. While it is true that the judge stated, as one ground for his exclusion order, that he wished to exclude witnesses out of

concern there might be a retrial, the judge also cited a second ground: he did not want the jury to feel any "pressure" from the very presence of appellant's family members or the victims in the courtroom. In this regard, the court stated:

> Well, the court's construing [the exclusion order] – that broadly. I do not want witnesses, defense witnesses, prosecution witnesses who may hear about the testimony who might be possibly called to testify at a later time at a retrial in court during the proceeding nor do I want any kind of pressure placed on this jury. I want to make that clear. I don't want the jurors pressured. This is a very serious matter and a very serious decision they have to make.
>
> I don't want a witness such as the one in the wheelchair [Stacey Copeland] being wheeled in here at the last moment facing the jurors to pressure them to give this defendant the death penalty.
>
> Nor do I want the wife or any other witnesses to come in here and try to pressure these jurors one way or the other. They should be above and beyond that and make up their own mind's [sic] regarding the outcome of the case and that's the court's ruling.
>
> (59 RT 19056-19057 [emphasis added].)

Respondent also erroneously states there was "no evidence that any non-witness family member was excluded." (See RB 106.) Defense counsel specifically indicated that four of appellant's family members had been

barred from closing argument: appellant's wife Anita Hensley, his uncle Steven Thori, his uncle's wife Patty Thori and his aunt Marsha Jacobsen. (59 RT 19053-19055, 19059-19061.) Patti Thori was not a witness at appellant's trial.

Respondent's reliance upon Evidence Code section 777 is completely misplaced. (See RB 105.) That statute is limited to excluding witnesses "so that [they] cannot hear the testimony of other witnesses." (Evid. Code, § 777, subd. (a).) Section 777 provides no authority for excluding witnesses during closing arguments of counsel. Furthermore, section 777, by its terms, is limited to "witnesses" and its expressed concern about their "hearing the testimony of other witnesses." It says nothing about allowing a trial judge to exclude victims or family members simply because their presence might provoke a sympathetic reaction on the part of the jury.

Recently, the United States Supreme Court, in Presley v. Georgia (2010) 558 U.S. ___ [175 L.Ed.2d 675, 130 S.Ct. 721] [hereinafter "Presley"] reversed a criminal judgment where the trial court had excluded members of the public from the courtroom during voir dire, including a member of defendant's family, based on purported space limitations for accommodating prospective jurors, as well as an expressed concern that jurors might overhear "inherently prejudicial remarks from observers during

voir dire." (Id., 130 S.Ct. at 722-723.) When Presley's counsel objected to the exclusion of the public from the courtroom, the trial court explained, "[t]here just isn't space for them to sit in the audience." Presley's attorney then requested that some accommodation be made, but the trial court stated, " ' "the uncle can certainly come back in once the trial starts. There's . . . really no need for the uncle to be present during jury selection." ' " (Id., 130 S.Ct. at 722.)

At a hearing on a postconviction motion for a new trial, Presley's counsel presented evidence showing that the prospective jurors could have been accommodated in the courtroom, while still leaving adequate room for the public. (Id., 130 S.Ct. at 722.) The Georgia Supreme Court nonetheless affirmed the conviction, finding that the trial court had an " 'overriding interest' " in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire, and rejecting Presley's argument that the trial court had a sua sponte duty to consider alternatives to closing the courtroom when none were offered by the defendant. (Presley v. State (Ga. 2009) 674 S.E.2d 909, 911.)

The United States Supreme Court disagreed and, while recognizing that there may be exceptions to the right of an accused to public voir dire, held that "trial courts are required to consider alternatives to closure even

when they are not offered by the parties" (Presley, 130 S.Ct. at 724), and "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials" (id. at 725). The Court explained "[t]here are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing voir dire. But in those cases, the particular interest, and threat to that interest, must 'be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" (Id. at 725 [citing Press Enterprise Co. v. Superior Court of Cal. (1984) 464 U.S. 501, 510 [78 L.Ed.2d 629, 104 S.Ct. 819] [emphasis omitted].) In Presley, the Supreme Court reiterated the "settled" underpinnings of the public trial right under both the First and Sixth Amendments. (Presley, 130 S.Ct. at 723-724.)

Several aspects of Presley are of particular import with respect to the present case. In Presley, the trial judge excluded defendant's uncle and others out of an abstract general concern -- not based upon any specific past conduct – that in the course of voir dire jurors might overhear prejudicial remarks from observers in the courtroom. (Presley, 130 S.Ct. at 722-723.) This is strikingly similar to the abstract concern of the present judge that the mere presence of family members or of Stacey Copeland in the courtroom

during closing arguments would somehow "pressure" the jury towards one verdict or the other. Second, the Supreme Court faulted the Presley trial judge for failing to consider less drastic alternatives to exclusion of members of the public. (Id., 130 S.Ct. at 724.) Similarly, the judge below failed to consider any less drastic alternative to the wholesale exclusion of appellant's family members during closing arguments. (See AOB 367-368.) Finally, there is the remedy imposed by the Presley court: per se reversal for violation of defendant's right to a public trial. (Presley, 130 S.Ct. at 725.)

Respondent seeks to frame this issue as simply one involving "discretion of the trial court" and whether there was an "abuse of that discretion." (RB 105.) That is not and was not appellant's argument either during trial or presently on appeal. The right to a pubic trial is one of constitutional dimension. (Presley v. Georgia, supra, 130 S.Ct. 721; Waller v. Georgia (1984) 467 U.S. 39 [81 L.Ed.2d 31, 104 S.Ct. 2216]; Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555, 580 [65 L.Ed.2d 973, 100 S.Ct. 2814]; In re Oliver (1948) 333 U.S. 257 [92 L.Ed 682, 68 S.Ct. 499].) Even above and beyond the general constitutional mandate for a public trial, heightened constitutional concerns are implicated whenever a court's exclusion order specifically targets a defendant's friends and family members. (In re Oliver, supra, 333 U.S. at 271-272 ["And without exception

all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged."]; English v. Artuz (2d Cir. 1998) 164 F.3d 105, 108 ["The unwarranted exclusion of a defendant's family members justifies granting habeas relief"]; Guzman v. Sully (2d Cir. 1996) 80 F.3d 772, 776 ["The exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly."]; Vidal v. Williams (2d Cir. 1994) 31 F.3d 67, 69.)

Appellant's trial counsel addressed the constitutional issues below (59 RT 19052-19055, 19059-19062; 60 RT 19347-19353; 8 CT 2314-2318) and these points were addressed at length in appellant's opening brief (AOB 364-377). Respondent fails to address appellant's Sixth and Fourteenth Amendment claims on the merits, thereby implicitly conceding their validity. (See People v. Bouzas (1991) 53 Cal.3d 467, 480 [respondent's failure to engage argument operated as concession]; Westside Center Associates v. Safeway Stores 23, Inc. (1996) 42 Cal.App.4th 507, 529; California School Employees Assn. v. Santee School Dist. (1982) 129 Cal.App.3d 785, 787 [the "district apparently concedes by its failure to address this issue in its appellate brief"].)

Contrary to respondent's first point, the court below possessed no

"discretion" to violate appellant's constitutional right to a public trial as it did. (Presley, supra, 130 S.Ct. 721; Waller v. Georgia, supra, 467 U.S. 39; In re Oliver, supra, 333 U.S. 257.) Contrary to respondent's second point, the proper standard of review is not "abuse of discretion." (See RB 106.) As the Supreme Court recently indicated in Presley, violation of the constitutional right to a public trial calls for per se reversal. (Presley, supra, 130 S.Ct. at 725; accord Waller v. Georgia, supra, 467 U.S. at 49-50; English v. Artuz, supra, 164 F.3d 108.)

The death judgment herein should be reversed.

XIII. THE JURY SHOULD HAVE BEEN REQUIRED TO MAKE EXPLICIT FINDINGS OF THE FACTORS WHICH IT FOUND IN AGGRAVATION AND MITIGATION

The brevity of respondent's response (RB 110; see AOB 419-423), and the fact that most of this Court's prior opinions rejecting this type of argument merely cite each other, compels appellant to attempt to trace through this Court's prior opinions. It appears the rejection of this issue began with this Court's opinion construing the 1977 death penalty law in People v. Frierson (1979) 25 Cal.3d 142, 178-179 (reaffirmed in (People v. Jackson (1980) 28 Cal.3d 264, 315; reaffirmed as to the 1978 law in People v. Rodriguez (1986) 42 Cal.3d 730, 777-778).

The operative holding of this Court in Frierson was as follows:

> Although the 1977 law does not require the jurors to specify their various reasons for imposing death, the statute contains adequate alternative safeguards for assuring careful appellate review. First, under the California law, in determining whether special circumstances exist to justify the death penalty, the trier of fact must make a special finding of the truth of each alleged special circumstance, and in case of any reasonable doubt as to a particular alleged special circumstance, the defendant is entitled to a finding that it is not true. (§ 190.4, subd. (a).) In addition, the trial court, in ruling upon the

> automatic application for modification of verdict (id., subd. (e)), must review the evidence, consider the aggravating and mitigating circumstances, make its own independent determination as to the weight of the evidence supporting the jury's findings and verdict, and state on the record the reasons for its findings. (Ibid.) . . . . Thus, the statutory requirements that the jury specify the special circumstances which permit the imposition of the death penalty, and that the trial judge specify his reasons for denying modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case.
>
> (People v. Frierson, supra, 25 Cal.3d at 179.)

This passage in Frierson fails to address appellant's arguments, as likewise do the long string of subsequent opinions by this Court, which in the end merely trace back to Frierson without any further analysis on their parts. Opinions are not authority for propositions not considered. (People v. Dillon, supra, 34 Cal.3d at 473-474.) Furthermore, the above-quoted passage from Frierson acknowledges that there is no effective appellate review of the jury penalty determination itself, but postulates that the requirement of trial court findings on the automatic modification motion (§ 190.4, subd. (e)) is adequate for purposes of appellate review. Yet, it is the jury which is supposed to be the sentencing body in a California death penalty case, and the trial court's ruling on the automatic modification

motion is not the decision of the jury. The logic of Frierson does not refute appellant's argument.

Frierson disputed this point by claiming that our system was similar to the Florida system, which the United States Supreme Court had upheld:

> Although, under the 1977 law, the individual jurors are not required to file a statement disclosing the precise reasons for their verdict, this omission, in our view, is not critical. The Florida statute upheld in [Proffitt v. Florida (1976) 428 U.S. 242 [49 L.Ed.2d 913, 96 S.Ct. 2960]] is roughly comparable to the California procedure, for it requires the jury to make a penalty recommendation to the trial judge (unaccompanied by any specific findings), and thereafter the judge determines the actual sentence and specifies in writing the reasons in support thereof. (428 U.S. at pp. 249-250.) The high court in Proffitt in interpreting the Florida law emphasized, "Since . . . the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible . . . ." (Id., at p. 251.)
>
> (People v. Frierson, supra, 25 Cal.3d at 179.)

However, the California and Florida systems are not at all alike in this regard. In the Florida system, upheld in Proffitt v. Florida (1976) 428 U.S. 242 [49 L.Ed.2d 913, 96 S.Ct. 2960], the trial court exercised capital sentencing discretion; the jury merely made a sentencing recommendation. (Id., 428 U.S. at 248-249.) However, in California the trial court's role is

merely one of review: to determine whether it believes the jury's verdict is "contrary to law or the evidence presented." (§ 190.4, subd. (e).) Thus, the trial court's role with regard to the section 190.4 motion is purely one of reviewing of the jury's decision, not a de novo penalty determination. (People v. Davis (1995) 10 Cal.4th 463, 523-524.)

Thus, appellate review by this Court of the trial court's ruling under section 190.4, subdivision (e) is appellate review of another form of review of the decision of the fact finder (i.e., the jury) – but it is not actually appellate review of the fact finder in its penalty determination. Respondent cites no authority indicating that a total absence of appellate review of the decision of the actual finder of fact (the jury) would pass constitutional muster. Worse, under the California death penalty scheme not even the penalty jury is a finder of fact, since the jury does not act as a body; it acts as 12 individual jurors, each acting subjectively. (People v. Osband (1996) 13 Cal.4th 622, 672.) Given these circumstances, appellant's argument is established as correct.

The death judgment should be reversed.

XIV. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED DURING APPELLANT'S TRIAL REQUIRES REVERSAL OF HIS DEATH SENTENCE

Respondent argues in a cursory fashion that there were no penalty phase errors. (RB 110-111.) Respondent notably fails to contest appellant's analysis of the law governing cumulative error in capital cases. (See AOB 424-430.) Accordingly, appellant makes no further reply with respect to the issue of cumulative error effecting the penalty determination.

The judgment of death must be reversed on this basis.

XV. APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONALLY ARBITRARY, DISCRIMINATORY AND DISPROPORTIONATE

In appellant's opening brief he argued that the death sentence imposed upon him violated constitutional safeguards against arbitrary, discriminatory and disproportionate capital sentencing. Appellant therefore requests that this Court undertake intracase and intercase proportionality review with respect to this issue. (AOB 431-435.)

Respondent acknowledges appellant's right to intracase review. (RB 111; see People v. Bacigalupo (1991) 1 Cal.4th 103, 151.) However, respondent maintains that appellant's death sentence is warranted. Respondent emphasizes the fact that appellant was convicted of two murder counts, plus other crimes. Respondent also points to appellant's criminal record and his San Joaquin County jail escape. Based upon this, respondent asserts that "appellant's death sentence is not disproportionate to his moral culpability." (RB 111-112.)

Respondent's analysis of this issue omits several critical points. It was undisputed that appellant was in the grip of a severe addiction to methamphetamine and most likely committed his current offenses to obtain

funds to satisfy his addiction.[12] Furthermore, it is very likely, on the state of the evidence, that appellant was under the intoxicating effects of methamphetamine and/or methamphetamine withdrawal at the very times his present crimes, including capital murder, were committed. Under California's statutory scheme this rendered his conduct significantly less culpable. (See § 190.3, subds. (h) & (k); People v. Baker (1954) 42 Cal.2d 550, 573 [evidence of intoxication weighs against finding premeditation and deliberation for purposes of first degree murder]; CALJIC No. 4.21.)

Respondent's analysis also overlooks appellant's difficult childhood, which included an alcoholic and abusive mother, who introduced him to both alcohol and methamphetamine at a tender age. (See AOB 433.) Appellant never knew his real father and Sonny Cordes, the man whom appellant initially believed to be his father, abandoned appellant when he was seven or eight years old. (54 RT 15467, 15471, 15474; 55 RT 17852, 17884.)

Despite these handicaps, for most of his adult life appellant maintained a close and loving relationship with his wife and four children, held lawful gainful employment and provided financial support to his family.

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[12] The district attorney did not dispute that appellant was a methamphetamine addict at the time of his current offenses. However, he argued that this was not entitled to any mitigating weight. (See 59 RT 18916-18917, 18949-18952.)

(See AOB 434.)

Bearing in mind that the State of California sentences only a small fraction of murderers to death, it is submitted that appellant simply does not fit into that small category of murderers for whom the ultimate sanction of death is the appropriate punishment.

NONCAPITAL SENTENCE

XVI. THE TRIAL COURT COMMITTED TWO ERRORS WITH REGARD TO APPELLANT'S NONCAPITAL SENTENCE

Respondent agrees with appellant's argument that, as to his noncapital sentence, "the sentences on Counts 2, 6 and 9 should be stayed per section 654, and the term imposed on Count 6 should be reduced to one year per section 1170.1" (RB 116.) Appellant's sentence should be modified accordingly. (See AOB 512-516.)

OTHER ARGUMENTS RAISED ON APPEAL

XVII. APPELLANT CONSIDERS THE OTHER ARGUMENTS RAISED IN HIS OPENING BRIEF TO BE FULLY JOINED BY THE BRIEFS CURRENTLY ON FILE IN THIS COURT

Appellant considers the following arguments to be fully joined by his opening brief and respondent's brief: Argument VI (California's Felony-Murder Special Circumstance Fails to Constitutionally Narrow the Class of Persons Eligible for the Death Penalty; at AOB 218-231), Argument VII (The Multiple Murder Special Circumstance Fails to Narrow in a Constitutionally Acceptable Manner the Class of Persons Eligible for the Death Penalty; at AOB 232-238), Argument XIV (The Introduction of Alleged Prior Unadjudicated Crimes During the Penalty Phase Violated the Fifth, Sixth, Eighth and Fourteenth Amendments; at AOB 378-384), Argument XV (CALJIC No. 8.88 Misled the Jury in Its Reference to the Totality of the Mitigating Circumstances; at AOB 385-389), Argument XVI (The Jurors Should Have Been Instructed That Before They Could Weigh Aggravating Circumstances Against Mitigating Circumstances, They Had to Unanimously Agree That a Particular Aggravating Circumstance Existed; at AOB 390-393), Argument XVII (The Jury Should Have Been Instructed that

the Beyond a Reasonable Doubt Standard Governed Its Penalty Phase Decision; at 394-403), Argument XVIII (The Failure to Provide the Jury with Any Standard of Proof in the Penalty Phase Governing When the Jury Could Find Evidence to Be True or Aggravating Violated Constitutional Safeguards; at AOB 404-409), Argument XIX (The Jury Should Have Been Instructed That the Prosecution Had the Burden of Persuasion in the Penalty Phase; at AOB 410-414), Argument XX (The Jury Should Have Been Instructed on a Presumption of Life Without Parole; at AOB 415-416), Argument XXI (Even If it Were Constitutionally Permissible for There to Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury To That Effect; at AOB 417-418), Argument XXV (The California Death Penalty Statute Violates Due Process of Law Because It does Not Sufficiently Channel or Limit the Sentencer's Discretion; at AOB 436-439), Argument XXVI (The California Death Penalty Scheme Is Unconstitutional in Allowing District Attorneys Unbridled Discretion in Selecting Death Penalty Prosecutions; at AOB 440-442), Argument XXVII (The Failure of California's Death Penalty Scheme to Provide for Comparative Appellate Review Violates Constitutional Safeguards; at AOB 443-449), Argument XXVIII (The California Death Penalty Statute Fails to Narrow the Class of Offenders Eligible for the Death Penalty and Thus Violates the Eighth

Amendment and the California Constitution, at AOB 450-471), Argument XXIX (California's Methods of Execution Are Unconstitutional; at AOB 472-489), Argument XXX (Appellant's Death Sentence Violates International Law; at AOB 490-511), and Supplemental Argument I (Appellant's Penalty Retrial Following a Hung Jury Violated Constitutional Safeguards; at Supplemental AOB 1-11).

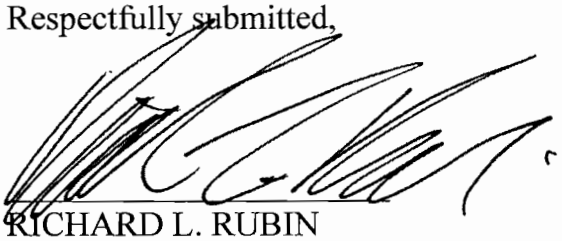
Because appellant considers the issues listed above to be fully joined by appellant's opening brief and respondent's brief, appellant makes no further discussion of these issues herein. Appellant intends no waivers or concessions with respect to any of the issued raised in his opening brief and supplemental opening brief.

CONCLUSION

For the reasons stated herein appellant's convictions and sentence of death should be reversed.

Dated: August 2, 2011

Respectfully submitted,



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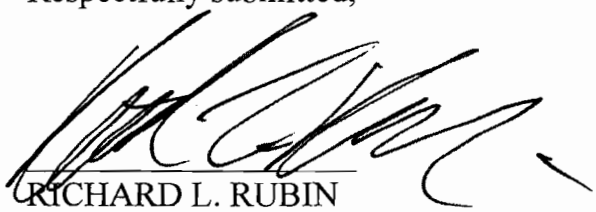
CERTIFICATE RE WORD COUNT

I, Richard L. Rubin, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 20,190 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(d) of the California Rules of Court. This document was prepared in Word Perfect, 13 point Times New Roman font and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California.

Dated: August 3, 2011

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

I am employed in the City of Oakland, State of California. My business address is 4200 Park Blvd., # 249, Oakland, CA 94602. I am over 18 years of age, and not a party to the action captioned in the document(s) herein. On the date of execution below, I served the following legal document(s) on the following person(s)/office(s) by placing a true copy thereof in a sealed envelope, with postage thereon fully prepaid, in a United States Post Office mail box at Oakland, California:

In re: People v. Paul Hensley, S050102

Document(s) Served

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 11, 2011, at Oakland, California.

RICHARD L. RUBIN