SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN ALEXANDER RICCARDI, Defendant and Appellant.	Crim. S056842

SUPREME COURT
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APPELLANT'S REPLY BRIEF

Appeal from Superior Court of the State of California
Los Angeles County (Case No. A086662)
(The Honorable David D. Perez, Judge)

Attorney Carla J. Johnson
State Bar Number 192768
P.O. Box 30478
Long Beach, CA 90853
(562) 438-0035

Under Appointment by the
Supreme Court
Attorney for Appellant
John A. Riccardi

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Plaintiff and Respondent,	)	
v.	)	
JOHN ALEXANDER RICCARDI,	)	
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v.	)	
	)	
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	)	
Defendant-Appellant.	)	
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REPLY BRIEF

ARGUMENT

I. THE U.S. SUPREME COURT'S DECISIONS IN *JOHNSON V. CALIFORNIA* AND *MILLER-EL V. DRETKE* MAKE IT CLEAR THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S BATSON MOTIONS

A. Introduction

In his opening brief, appellant showed that the prosecutor used peremptory challenges to remove six well-qualified black panelists from the jury, in violation of appellant's state and federal constitutional rights. (AOB 31-72.) Appellant argued that the trial court used an impermissibly stringent standard for establishing a prima facie case. Respondent argues that a "strong likelihood" and a "reasonable inference" state the same

standard, as this court held in *People v Johnson* (2003) 30 Cal.4th 1302. (RB 36.) On June 13, 2005, the U.S. Supreme Court reversed that decision in *Johnson v. California* (2005) 545 U.S.___, 125 S. Ct. 2410 ("*Johnson*"), and held that this court was wrong in holding that *Batson* required the objecting party to show a "strong likelihood" or "more likely than not" that the exercise of peremptory challenges was motivated by racial bias.

Appellant also conducted a comparative juror analysis as part of Argument I, Part D of his opening brief. He demonstrated by a comparison of the background and views of the challenged black jurors with the background and views of white jurors who were not challenged by the prosecutor that the prosecutor's reasons for challenging the minority jurors applied with no less force to the white jurors who were not challenged, thus revealing that the prosecutor's purported reasons were in fact a pretext for discrimination under *Batson v. Kentucky* (1986) 476 U.S. 79 ("*Batson*"), and *Miller-El v. Cockrell* (2003) 537 U.S. 322.

After Appellant filed his opening brief, the United States Supreme Court decided *Miller -El v. Dretke* (2005) 545 U.S. ___, 125 S.Ct. 2317 ("*Miller-El*"). *Miller-El* alters the legal landscape, bringing into sharper focus the obligations of trial and appellate courts in performing their duty to ensure that judicial proceedings are free of the stigma of racial

discrimination, particularly in capital cases.

Even on the record as presented in the opening brief, without the additional factual information, appellant has shown that equal protection was violated per *Batson* and this error requires reversal. However, this argument is enhanced and strengthened by intervening law, and further bolstered by comparative juror analysis in this Reply. (See Section D, below.)

B. Respondent Relies On The Trial Court's Application Of The "More Likely Than Not" Standard For Evaluating Defendant's Prima Facie Case, Which The U.S. Supreme Court Rejects As The Wrong Standard In *Johnson v. California.*

Respondent argues that the moving party must show "a strong likelihood or reasonable inference" that the prosecutor challenged the excused jurors because of their group association. (RB 29.)

In *Johnson v California* the high court ruled that California's standard for establishing a prima facie case of discrimination was impermissibly demanding and in conflict with the *Batson* doctrine's demands. Justice Stevens explained: "We did not intend the first step to be so onerous that a defendant would have to persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination." (*Johnson v. California, supra*, 125 S.Ct. at p. 2417.) The

reason the first step is not onerous is because "the *Batson* framework is designed to produce ***actual answers*** to suspicions" based on "a direct answer to a simple question." (*Id.* at p. 2418; emphasis added.) In *Miller-El* the Supreme Court stressed how important it is to ***put the prosecutor on the spot*** when suspicion arises:

> When illegitimate grounds like race are in issue, the prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.

(*Miller-El, supra,* 125 S.Ct. at p. 2332.)

Respondent asserts, however, that when a trial court denies a motion based on *Batson* and *People v. Wheeler* (1978) 22 Cal.3d 258 (a "*Batson-Wheeler* motion"), because of the failure to show a prima facie case, the reviewing court may search the entire record of voir dire for ***any*** grounds which suggest reasons why the prosecutor "might reasonably have" challenged the jurors in question. (RB 29.) But this is wrong. In *Miller-El* the Court explicitly rejected this post hoc rationalization and stated that reviewing courts may not search the record and substitute their own reasons for questionable strikes to replace the reasons actually given by the prosecutor. (*Id.*)

Contrary to respondent's notion (RB 30) that appellant is putting the

"cart before the horse," in discussing the erroneous failure of the trial court to find a prima facie case, ultimately, as the Supreme Court has held, the prosecutor's strikes must "stand or fall" on the legitimacy of the reasons advanced. (*Miller-El, supra,* 125 S.Ct at p. 2331.) And clearly, as shown in Appellant's Opening Brief, the reasons the prosecutor advanced in appellant's case were merely a subterfuge for racial discrimination. A reviewing court, as *Miller-El* states explicitly, is not free to avoid adjudicating the violation of Equal Protection by conjuring, after the fact, some possible or imagined reasons why the strikes may have been justified. (*Id.*) Rather, the case "stands or falls" on the prosecutor's reasons. In the instant case, even though the trial court did not find a prima facie case, the prosecutor volunteered justifications for his strikes. Those reasons were clearly pretextual, as the facts advanced at trial, and additional facts presented in this Reply now show.

As a result of *Johnson* the standard for finding a prima facie case is no longer in dispute. Once an inference of discrimination on the part of a prosecutor arises during voir dire, the trial court must proceed to step two under *Batson* and require the prosecutor to explain his or her reasons for the peremptory strikes in question. Respondent suggests, indeed, that the trial court did this based on the Ninth Circuit's view that the standard at step one

used in California at the time of the trial was a *Batson*-like "reasonable inference" standard articulated in *People v. Fuller* (1982) 136 Cal.App.3d 403. (RB 35-37.) Appellant acknowledges that in his opening brief, as noted by respondent, appellant miscalculated the publication date for *People v. Bernard* (1994) 27 Cal.App.4th 458, the case that superseded *Fuller.* Under these circumstances, given this timing, the trial court should not be presumed to have followed *Bernard.* Nevertheless, it is clear that the trial court in fact used the "strong likelihood" standard. ***First***, *Fuller,* which has now been repudiated by *Johnson v California*, held that the two standards were the same. (*People v. Fuller*, *supra,* 136 Cal.App.3d at p. 423 fn. 25).

Second, California courts continued to use the strong likelihood standard even after *Fuller.* In *People v. Sanders* (1990) 51 Cal.3d 471, cited in appellant's opening brief, the "strong likelihood" standard prevailed. In that case, four Spanish-surnamed members of the venire were eligible after the court excused others for cause. The prosecutor struck all four of these remaining panelists, after which the defense raised a *Wheeler* objection. The trial court denied the motion, ruling that the defense had failed to make a prima facie case. This court affirmed, acknowledging that the removal of the four Latino men raised "an inference

of impropriety," but holding that the trial court deserved deference and that "defendant failed to demonstrate a strong likelihood," based on all the circumstances of the case, that the prosecutor based his challenges on group bias. (*Id.* at p. 501.)

Third, the mere brevity of consideration and summary fashion in which the trial court dismissed the defense motions in the instant case shows that in fact, the trial court was applying an improper standard. The trial court's comments did not refer to race at all, and only for the first motion did the court make any comment about the jurors' answers. The trial court's treatment of the four motions was completely dismissive.

Finally, in response to appellant's motion for new trial on the *Batson* issue, the prosecutor argued that under *Wheeler*, a prima facie showing requires a "strong likelihood, not a mere inference, that exclusion of a prospective juror who is part of a cognizant group was because of a group bias alone." (17 RT 3281.)

1. The Facts Show Clearly That An Inference Of Discrimination Arose And The Trial Court's Summary Denial Of Defendant's *Batson-Wheeler* Motions Proves It Did Not Proceed To Step Two Because It Applied The Wrong Standard.

(a) *The voir dire facts in Johnson v. California illustrate an inference of discrimination that may guide this court.*

Johnson involved a black defendant accused of murdering his white girlfriend's daughter. At trial, during jury selection, the prosecutor removed the only three black prospective jurors in the venire, using three of his twelve peremptory challenges. The defense made *Batson-Wheeler* motions after the second and third of these strikes, but the trial court denied the motions, based on the now-discredited "more likely than not" standard. (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2416.) The Supreme Court noted that the trial judge said on the record that although he did not find a prima facie case, it was "very close;" this assessment was repeated by this Court, which acknowledged the strikes looked "suspicious." (*Id.* at p. 2419.) The Supreme Court acknowledged that these remarks were made precisely because an inference of discrimination existed. (*Ibid.*)

(b) *The voir dire facts in the present case.*

The same inference arises here. After challenges for cause, the panel included nine black jurors eligible to sit on the jury. (RT 1032.) The prosecutor struck six of them, or 67%. Just 25% of the remaining white jurors were struck. Moreover, the timing of the prosecutor's strikes looked suspicious: of the prosecutor's first thirteen challenges, six removed black jurors. Furthermore, the dismissed black jurors ***all said that they would support the death penalty in this case if warranted by the evidence.*** These

disparate percentages despite the qualifications of the panelists easily created a reasonable inference of racial discrimination. Yet, because the trial judge erroneously used the "strong likelihood" standard, he did not proceed to the second step under *Batson*.

(c) ***The trial court's summary dismissal shows that it did not apply the correct standard.***

The trial judge's own words show that he used the incorrect standard. During the first *Batson-Wheeler* motion, the prosecutor and the judge had the following exchange, as noted by Respondent:

> MR. BARSHOP: If the court makes a prima facie showing that has been made [sic], I'm prepared to substantiate the position that Mr. Ferguson and Miss Hammond, the last two jurors that Mr. Jones believes I challenged for racial basis, I challenged because I believe they were bad on death.
> THE COURT: The court didn't hear any responses and cannot disagree with the People and the responses were such that Mr. Barshop reasonably exercised peremptory challenge because of those concerns. Same concerns that I heard. So the motion will be denied.

(RT 924-925; RB 32.) Nothing in this exchange indicates that the trial court understood that the correct standard called for the ***production of an inference.*** Rather, the court passed judgment on the reasonableness of the challenge, which indicates he followed the "more likely than not" rule expressed in *Sanders*. Although it is difficult to discern what the trial judge thought of these *Batson-Wheeler* motions, since he said so little about them,

it's nevertheless clear that he was not looking for the production of an inference or that he considered "the totality of the relevant facts" concerning "the prosecutor's conduct" at trial. (*Miller-El, supra,* 125 S.Ct. at p. 2324.) The lack of analysis is even more obvious after the second defense motion following the challenge of Diane Powell. The trial court said nothing, but simply heard the prosecutor respond to the motion by saying he challenged Ms. Powell because of her arrest. Without explanation, the trial court then denied the motion. (RT 927.) The court did not even allow the defense to argue its third motion, after the prosecutor removed Carolyn Brooks. Instead it allowed the defense to "reserve the issue" for later discussion. (RT 978.) Not requiring the prosecutor to immediately respond to the third motion was a clear error because it allows the prosecution time to prepare an answer instead of "standing or falling on the reasons given" in response to the immediate and direct question. (*Miller-El, supra,* at p. 2332.) Finally, the court denied the fourth *Batson-Wheeler* motion, without comment, and again made no comment after the prosecutor, uninvited, proffered his reasons for challenging the black jurors in question. (RT 1131-1133.)

This Court should take note that the trial judge said absolutely nothing to the prosecutor following the challenges striking prospective

jurors Diane Powell, Carolyn Brooks, and Dwight McFarlane. Each *Batson-Wheeler* motion must be considered in its own right, and the trial court erroneously failed to do so. The facts show that, despite the Supreme Court's ruling that *Batson*'s step one does not create an onerous obstacle to step two, the trial judge never once asked the prosecutor to state his reasons for removing any of the six black venire panelists, even though ***the inference of discrimination was so strong that the prosecutor took it upon himself to express reasons attempting to justify his strikes.*** Consequently, the "totality of the relevant facts" that shows an obvious inference of discrimination arose, the trial court failed to acknowledge or assess it and failed to properly apply the *Batson* procedure. Without more, this grave error requires reversal of appellant's convictions.

2. Firmly Established Precedents Refute Respondent's Other Arguments That The Facts Could Not Support A Prima Facie Case Of Race-Based Discrimination

Respondent argues that a prima facie case of discrimination cannot be made "simply by arguing that a certain number of peremptory challenges were used against members of a cognizable group." (RB 38.) Respondent's argument and authority are largely beside the point. Appellant does not argue that absolute numbers ***alone*** made out a prima facie case of discrimination; however, *Batson* and *Johnson* clearly instruct that such

numerical evidence does support an inference of discrimination at step one.

Moreover, Respondent attacks a straw man. The California Supreme Court cases cited by respondent all rely on the "strong likelihood" standard for finding a prima facie case, and under that standard, this Court did not find that a reasonable inference of discrimination could be made by comparing "the number and order of minority [peremptory challenges] . . . against the representation of such minority groups in the entire venire." (*People v. Arias* (1996) 13 Cal.4th 92, 136 fn. 15.)

In *Miller-El* the High Court ruled that a reasonable inference was raised by the number of minority peremptory challenges (ten black panelists) compared to the representation of such black panelists in the venire (eleven, after excusals for cause). (*Miller-El, supra,* 125 S.Ct. at p. 2325.) Moreover, in *Johnson,* the Court reaffirmed the *Batson* principle that a prima facie case "could be proved in permissive terms" and that a "single invidiously discriminatory governmental act" would not be immunized by the lack of a wider pattern of discrimination. (*Johnson, supra,* 125 S.Ct. at p. 2416, fn. 5.) *Johnson* and *Batson* hold that the numerical pattern of challenges used against a cognizable group will support a prima facie case of discrimination.

Respondent next argues that appellant's race supports the trial

court's finding that no prima facie case existed because appellant is not black. Respondent concedes that this fact is not determinative, but argues that appellant's race remains a "proper consideration" by the court. (RB 38-39.) Respondent is wrong. The U.S. Supreme Court has held explicitly that "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges." (*Powers v. Ohio* (1991) 499 U.S. 400, 416.) The Court explained:

> In *Batson*, we spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been excluded. But we did not limit our discussion in *Batson* to that one aspect of the harm caused by the violation. *Batson* was designed to serve multiple ends, only one of which was to protect individual defendants from discrimination in the selection of jurors. [Citations removed] *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large."

(*Id.* at p. 406.) Respondent nevertheless cites California cases stating that the court may "properly consider" defendant's race when making a prima facie case determination. (RB 39.) These cases, however, relied on the mistaken standard that a prima facie case required evidence showing a "strong likelihood" of purposeful discrimination. As this standard has been struck down the U.S. Supreme Court in *Johnson,* California's rule that race is a proper consideration has become constitutionally unreliable.

Respondent also suggests that because the final jury included two blacks, it is unlikely that the prosecutor removed other black panelists because of impermissible group bias. (RB 39.) Respondent's point lacks merit. The final composition of the jury is not determinative. Even one instance of race-based juror exclusion would violate appellant's constitutional rights. (*Johnson, supra,* 125 S.Ct. at p. 2416 fn. 5; *People v. Silva* (2001) 25 Cal.4th 345.)

None of respondents arguments refute the clear showing that a prima facie case of racial discrimination was made out during appellant's voir dire proceeding, but the trial court, applying the wrong standard, failed to proceed to step two under *Batson* analysis. This error requires reversal and a new trial. This conclusion is further supported by the intervening law and the comparative juror analysis that follows.

C. *Miller El* mandates this court to consider all available evidence of racial discrimination in reviewing Batson motions

In *Miller-El v. Dretke*, *supra*, 125 S.Ct. 2317, the United States Supreme Court made unmistakably clear that, in evaluating a *Batson* challenge on appeal, the appellate court must consider all the evidence present in the record as well as any augmentation to the record that may support a claim of unlawful racial discrimination, regardless of whether or

not particular evidence was specifically brought to the attention of the trial court at the time of the *Batson* inquiry.

Charged with a murder committed during a robbery, Thomas Miller-El objected under pre-*Batson* law when prosecutors used peremptory challenges to disqualify 10 black prospective jurors. The Texas state trial court denied his objections, and he was convicted and sentenced to death. While his appeal was pending, the high court decided *Batson v. Kentucky*, *supra,* 476 U.S. 79, which established as a matter of federal constitutional law the now-familiar three-step procedure for adjudicating claims of racial discrimination in jury selection. The Texas appellate court remanded for a *Batson* hearing. (*Miller-El*, *supra*, 125 S.Ct. at pp. 2322-2323.)

On remand, the Texas trial court held a hearing, heard the prosecutors' explanations for the challenged peremptory strikes, and found the prosecutors' reasons "'completely credible [and] sufficient,'" determining there was "'no purposeful discrimination.'" (*Miller-El*, *supra*, 125 S.Ct. at p. 2323.) The Texas appellate court affirmed. (*Ibid.*)

Miller-El then filed a petition for a writ of habeas corpus in federal court. The federal district court denied relief, and the federal appellate court for the Fifth Circuit denied a certificate of appealability. The United States Supreme Court reversed in *Miller-El v. Cockrell, supra*, 537 U.S.

322, and remanded the case to the Fifth Circuit, which again denied relief. Miller-El again sought high court review, and in *Miller-El v. Dretke*, the U.S. Supreme Court, by a 6-3 vote, ruled that Miller-El was entitled to habeas corpus relief.

In determining that the *Batson* doctrine had been violated in Miller-El's case, the Supreme Court specifically considered the jury questionnaires from Miller-El's trial. The Court relied on these jury questionnaires even though, as Justice Souter acknowledged in the majority opinion, "many of the juror questionnaires, along with juror information cards, were added to the habeas record after the filing of the petition in the District Court." (*Miller-El, supra*, 125 S.Ct. at p. 2334 fn.15.)

In other words, as Justice Thomas stated in his dissent, the Supreme Court majority "base[d] its decision on juror questionnaires and juror cards that Miller-El's new attorneys unearthed during his federal habeas proceedings and that he never presented to the state courts." (*Miller-El v. Dretke, supra*, 125 S.Ct. at p. 2347) (dis. opn. of Thomas, J.).

The *Miller-El v. Dretke* majority and dissenting opinions debate the propriety of the consideration of these materials under federal habeas law, but the majority has now settled the matter: such materials can be considered in federal habeas cases even if not first presented to state courts.

What is significant is this: the *Miller-El* Court unequivocally determined that, in performing its review for federal constitutional error under *Batson*, it was necessary for the Court to evaluate evidence showing purposeful discrimination that was not presented to, or considered, by the state trial judge at the *Batson* hearing.

Thus, the Supreme Court's opinion in *Miller-El* powerfully re-emphasizes that courts, in considering *Batson* challenges, must review all the available evidence that may bear on the question of invidious discrimination, and may not limit its consideration to the evidence singled out by a defendant's trial counsel, to the exclusion of other pertinent evidence.

In *Miller-El*, the case was remanded for a hearing, forcing the court to reach the third step in the analysis. In our case, however, the trial court never found a prima facie case, so appellant was never afforded a full opportunity to inquire into the prosecutor's reasons, and the trial court was never required to assess the plausibility of those reasons in light of all the evidence bearing on it. The opinion in *Miller-El v. Dretke* emphasizes how crucial the Court views the third step to be. Here, appellant was denied his constitutional rights when he was prevented from further inquiry into the issue.

Why does the Supreme Court insist that all relevant evidence bearing on racial discrimination in the jury selection process be considered by reviewing courts, even when such evidence was not presented to the trial court? The answer lies in the Supreme Court's view of the necessity of eradicating racial discrimination, and the unique and critical role of our nation's courts in doing so.

The Fourteenth Amendment's mandate that racial discrimination be eradicated from all government acts and proceedings is at its "most compelling in the judicial system." (*Powers v. Ohio*, supra, 499 U.S. at p. 416.) Judges serve as the ultimate guardians of the judicial process. In that capacity, they "are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in [the] prohibition [against discrimination in the selection of jurors]." (*Id.*)

The exercise of the right to be free of racial discrimination in the jury selection process certainly benefits defendants in criminal cases. But even more is at stake. The Supreme Court has recognized that the Constitution protects not just defendants, but the jurors themselves. (*Id.* at p. 409.) Indeed, the *Batson* doctrine protects the essential integrity of the judicial system. The Supreme Court stated:

> When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of

> the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . .' That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,', and undermines public confidence in adjudication.

(*Miller-El v. Dretke, supra*, 125 S.Ct. at pp. 2323-2324 (citations omitted)).

Trial or appellate courts that refuse to consider relevant evidence properly in the record that tends to show racial discrimination avoid their affirmative duty under the United States Constitution, resulting in a less intensive, less thorough inquiry. Truncation or restriction of step three of the *Batson* inquiry insulates invidious discrimination by "'those . . . of a mind to discriminate,'" *Batson v. Kentucky, supra*, 476 U.S. at p. 96, by eliminating the duty of judges to assess prosecutors' explanations for peremptory challenges based on the totality of the evidence, and leaves open the door to racial discrimination in jury selection, and its corrosive effects.

D. Comparative Analysis Shows That The Prosecutor's Reasons For His Peremptory Challenges Were A Subterfuge For Racial Discrimination.

Respondent concedes that on appeal, comparative juror analysis appropriately evaluates the legitimacy of peremptory strikes in this case, even while respondent maintains that such analysis is "largely beside the point" (RB 51-52) based on *People v. Johnson, supra,* 30 Cal. 4th 1302,

1323. It is now manifestly clear that, contrary to respondent's contention that comparative analysis is unimportant, such evidence is a vital part of the "totality of relevant facts" in evaluating the prosecutor's strikes in light of *Batson* and the Equal Protection clause. (*Miller-El* at p. 2324.)

First, the Supreme Court holds that when examining the "totality of the relevant facts" to determine whether the prosecutor's conduct violated the equal protection laws, side-by-side comparative juror analysis is "more powerful" than bare statistics for showing purposeful discrimination. (*Miller-El, supra,* 125 S.Ct. at p. 2324.) The opinion bears this out by its own extensive and detailed comparisons between black and nonblack jurors. (*Id.* at pp. 2325-2336.)

Second, the Supreme Court's analysis in *Miller-El* shows that despite the deference due to the trial court's decisions when reviewing a habeas petition, the Court makes use of ***all the evidence in the record***. The court affirms that in order to properly evaluate a *Batson* motion, the trial court must consider "all evidence with a bearing on it." (*Miller-El, supra,* 125 S.Ct. at p. 2331.) The *Miller-El* Court also clearly states that deference is not blind or unlimited. (*Id.* at p. 2325.) This exacting standard is appropriate in appellate review as well. In *Miller-El,* for example, the majority of six Justices considered the juror questionnaires, and found that

along with juror answers to direct questions during voir dire, this evidence provided powerful sources of comparative facts for the Court at *Batson*'s third step. As the Court stated, "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise situated nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." (*Miller-El, supra,* 125 S.Ct. at p. 2325.) Moreover, the Court drew valid comparisons between struck black panelists, and nonblack panelists that the defense (or the prosecution) later removed after the prosecution had found them acceptable to serve. (*Id.* at p. 2328 fn. 4.) The *Miller-El* Court additionally encourages courts to review the manner in which questions were asked, to see if the record demonstrates that the state engaged in racially disparate questioning in order to create artificial grounds for striking black jurors. (*Id.* at pp. 2333-2334.)

After *Miller-El* and *Johnson*, it is now clear that extensive, side-by-side comparisons between jurors upholds the Fourteenth Amendment's Enabling Clause, "which makes race neutrality in jury selection a visible, and inevitable, measure of judicial system's own commitment to the commands of the Constitution." (*Powers v. Ohio, supra,* 499 U.S. at p. 416.) Judges, in fact, work under an "affirmative duty to enforce" this

constitutional policy. (*Ibid.*) Deference does not prevent a reviewing court from examining all of the evidence in the record in an effort to arrive at the truth where allegations of racial discrimination are at stake. Here, because the trial court used the wrong standard in evaluating the defense's *Batson-Wheeler* motions, and because of the summary fashion in which the trial court dismissed the defense motions, deference to the trial court's rulings concerning these motions is wholly inappropriate.

1. Ferguson, Hammond, And Brooks Were Not "Bad On Death" Compared To Nonblacks Accepted By The Prosecutor

Respondent claims that, although not asked by the court to do so, the prosecutor on his own provided race-neutral reasons for his peremptory challenges; respondent claims these reasons were genuine and should be believed. (RB 40.) According to respondent, black panelists Mark Ferguson, Denise Hammond, and Carolyn Brooks were "properly dismissed due to their doubts about the death penalty." (RB 40.) Respondent claims also that Dwight McFarlane was properly dismissed because his statements regarding the issue of flight indicated "confusion." (RB 46.) Finally, respondent argues that the prosecutor challenged and removed black panelists Diane Powell and Etta Craig because of, respectively, Ms. Powell's own arrest, and the arrest of Ms. Craig's son. (RB 49.) These

reasons, however, were pretextual. They apply equally to several white panelists, and racially disparate questioning was used in order to create artificial grounds for striking the black jurors. Moreover, the characterization of these two black venire panelists as "death penalty skeptics" is wrong.

The latter point is quickly shown: On their juror questionnaires, both Denise Hammond and Mark Ferguson said they ***actively supported*** death penalty legislation, and they expressed a belief that a person who intentionally kills another should ***automatically*** receive the death penalty. (3 Supp. CT 877; 1 Supp. CT 57.) Neither expressed skepticism about the death penalty's usefulness. Instead each expressed to the prosecutor a personal opinion that they "didn't really like" the death penalty, while at the same time affirming that they would impose it as necessary according to California law. Importantly, ***both promised to follow the judge's instructions***. (3 Supp. CT 877-879; 1 Supp CT 57-59.) Reservations stated by alternate juror John Sherman, juror Michael Gruett, juror Thomas Hanna, and panelists Michael Stempel, Virginia Nelson, and Suzette Harrison, all of whom were white, were far more serious than the statements of the struck black panelists.

White alternate John Sherman wrote in his juror questionnaire, of the

death penalty, "I think it's barbaric" and that "[I] don't like it." (5 Supp. CT 1216.) Moreover, he wrote that "quite possibly" he would ***refuse*** to vote for the death penalty during the sentencing phase regardless of the evidence, and that he might refuse to find special circumstances if that would obligate a death sentence. (5 Supp. CT 1218-1219.) Under questioning by the prosecutor, Sherman said he had modified his views since filling out the questionnaire, but any change proved minimal. Sherman did not repudiate his answers on the juror questionnaire; rather, he told the prosecutor he would "try" to put his feelings aside:

> MR. BARSHOP (Prosecutor): You don't think your feelings as far as the penalty of death are so strong that it would impair your ability to be fair and impartial to the People?
> PROSPECTIVE JUROR SHERMAN: That's difficult to say until—when it's a hypothetical situation, it's different from really being there.
> MR. BARSHOP: Well . . . can't you do this?
> PROSPECTIVE JUROR SHERMAN: I can't answer that.
> MR. BARSHOP: Can you do this? If you can't do it, you should tell us now.
> PROSPECTIVE JUROR SHERMAN: I really can't give you a definite answer on that.

(RT 1086-1088.) Sherman was accepted three times by the prosecutor before becoming an alternate juror, even though the State had three challenges left. (RT 1093-1094.) Indeed, the defense had no challenges remaining, while Mr. Barshop had one, when the alternates were accepted. (RT 1126.) Had Sherman been struck, the next alternate would have been

the daughter of a Los Angeles Police Department detective, Coreene Byxbe. (RT 1104.) (Byxbe was fourth in the order of the panelists called down, behind Stewart, Kunis-Braney, and Tait. The judge excused Stewart and Tait for cause. (RT 1119, 1126.) After the prosecutor removed David Duke, Kunis-Braney became an alternate, with Byxbe next in line. (RT 1126.) Byxbe believed the death penalty was "very necessary" and that "criminals need to pay the price" for the crimes they commit. (7 Supp. CT 1881-1900.) Without question, white panelist John Sherman's answers proved he was much "worse" on death from the People's perspective than any of the six black jurors struck, yet the prosecutor did not use his available challenges to strike him.

Michael Gruett, a white juror who decided the case, also expressed much reservation about the death penalty, far more than either Denise Hammond or Mark Ferguson; and unlike the black jurors, Michael Gruett did not actively support death penalty legislation or answer yes on juror questionnaire 63-B, which asked if he supported the death penalty for anyone who intentionally kills another. Instead Gruett wrote in his juror questionnaire that the death penalty was "marginally effective," to be used "only if rehabilitation is not possible." (6 Supp. CT 1556.) The prosecutor ***never questioned Gruett*** as to these beliefs, ***in contrast to the sixteen direct***

questions posed to Hammond and Ferguson, along with six other response-eliciting statements. (RT 833-838.) No plausible explanation exists as to why the prosecutor found Gruett more acceptable than Hammond or Ferguson.

Michael Stempel, a white man, did not become a juror, but before he was challenged he was accepted twice by Mr. Barshop, after the prosecutor had removed Hammond and Ferguson. Stempel said on both his questionnaire and in voir dire that he found the death penalty to be "repugnant." (3 Supp CT 698.) On his questionnaire he expressed doubt as to whether he could set aside his feeling and apply the law, in stark contrast to Hammond and Ferguson, who expressed no such doubt. (3 Supp CT 698; 2 Supp CT 878-879; 1 Supp CT 58-59.) Carolyn Brooks, too, said she would be fair to both sides. (RT 805.) Everything in the record suggests that white juror Michael Stempel's views on the death penalty are far "worse" from the prosecutor's point of view than those held by black panelists Denise Hammond, Mark Ferguson, or Carolyn Brooks. This evidence demonstrates that the prosecutor's articulated reason for removing these black panelists was pretextual. His inconsistent application of an alleged standard to strike a panelist for being "bad on death"can only be explained by the race of the panelist.

Respondent also argues that the circumstances of Brooks's removal from the jury suggest that the prosecutor did not remove her due to her skin color. Respondent states that the prosecutor accepted Brooks "half a dozen times" prior to dismissing her. Respondent argues that if the prosecutor's motive for removing Brooks was her skin color, which was undoubtedly obvious to him as soon as she appeared in the jury box, he would never have accepted a jury with her on it. (RB 45.) Respondent cites the now-overruled *People v. Johnson* for this proposition.

Respondent is wrong. This savvy prosecutor was well aware of *Batson*, as shown by his voluntarily citing reasons for his challenges of blacks, despite the trial court's failure to request them. Just as a clever card player might not discard his worst card in the first round, the prosecutor timed his challenges and sought to camouflage the racial basis for these strikes.

Virginia Nelson was another white juror with serious misgivings about the death penalty. She had an "unpleasant" feeling about it, and she wrote that "God wishes us to forgive those who hurt us." (1 Supp CT 266-267.) When questioned, she gave "fair warning" to lawyers from both sides that she did not know if she could bring herself to impose the death penalty. (RT 953-954; 964-968.) Just like Denise Hammond and Mark Ferguson,

Virginia Nelson believed in the death penalty in theory, but she had personal misgivings about it. (1 Supp CT 266.) Nelson's misgivings were more serious than theirs and, unlike Hammond and Ferguson, she "did not know if she could follow the judge's instructions." (RT 953.) Before the prosecutor challenged Nelson, he had accepted her for a jury—the second to the last panel he accepted. (RT 979.)

Finally, appellant notes that the *Miller-El* opinion reasons that the state's "failure to engage in any meaningful voir dire examination on a subject the state alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El, supra,* 125 S.Ct. at p. 2328 (quoting *Ex Parte Travis* (Ala. 2000) 776 So. 2d 874, 881). If the prosecutor genuinely worried about "reservations" regarding the death penalty, why didn't he question the views of Thomas Hanna or Suzette Harrison? To the question: "What are your general views regarding the death penalty?" Thomas Hanna, a white juror, gave as his full answer: "Severity of crime," which seems to indicate at least a nuanced view, and which then conflicts with other answers such as his belief in "an eye for an eye" and that intentional killers should always be sentenced to death. (Compare 3 Supp. CT 896 with 3 Supp CT 897.) Racially disparate questioning is evidence of discrimination. (*Miller-El*, *supra*, 125 S.Ct. at pp.

2333-2339.)

Before the defense challenged her, the prosecutor accepted white jurist Suzette Harrison as an alternate, even though she left all the death penalty questions ***blank*** on her juror questionnaire. (6 Supp CT 1576-1577.) The prosecutor did not question either Hanna or Harrison about their views on the death penalty, either to clear up Hanna's inconsistency or find out what Harrison believed. This suggests that the explanation used to dismiss Hammond, Ferguson, and Brooks was but a sham and pretext because such views are not an essential aid to the prosecution's decisions—as race was.

2. The Arrests Associated with Powell and Craig Were Minor Compared to Arrests Associated With Nonblacks Accepted by the Prosecutor.

Respondent argues that the arrests admitted by black panelists Diane Powell and Etta Craig provided race-neutral justifications for their removal by peremptory challenges. (RB 49.) The argument lacks plausibility after side-by-side comparisons with nonblack jurors David Forrest and Ghislaine Brassine, as well as panelists Steven Potter, Mary O'Brien, Betty Davis, Suzette Harrison, Cheryl Kunis-Braney and Charles Waite, all of whom the prosecutor accepted for the jury or as alternates. (RT 844, 925, 927, 977, 979, 1093, 1094, 1126.)

Respondent mischaracterizes Powell's long-ago arrest and

subsequent release, along with 300-400 other campus protesters. Respondent claims that the arrest created a "legitimate interest" and justification for the prosecutor to inform Powell that the case did not raise racial issues. Because Powell had been a member of the Black Student Union 25 years ago and the protest concerned the lack of a Black Studies Program, respondent claims that race issues were a legitimate concern. (RB 50.) The prosecutor prefaced his concern about race by joking with Powell about her job writing parking tickets at UCLA, which Powell went along with good-naturedly, even as it concerned her son's arrest for unpaid parking tickets:

> MR. BARSHOP: You're the person that, if I go to a sports event at UCLA, gives ticket—
> PROSPECTIVE JUROR POWELL: Yes, I am.
> MR. BARSHOP: —because I park in the red?
> PROSPECTIVE JUROR POWELL: Yes, I had am. [sic]
> MR. BARSHOP: The people that everybody hates?
> PROSPECTIVE JUROR POWELL: Yes.
> MR. BARSHOP: That's you, right?
> PROSPECTIVE JUROR POWELL: That's me.

(RT 831-832.) Respondent would have the court believe that the amiable Mrs. Powell here, a Union officer with friends on the UCLA police force, may have harbored a secret racial animus based on a twenty-five year-old arrest that, given the mass release, sounds far more like a social event than a crime. Respondent says Powell's arrest "indicates a commitment to

challenge authority and a lack of deference to public institutions." (RB 54.) On the contrary, at the time of trial, Mrs. Powell was herself an authority figure, employed by a public institution, twenty-five years removed from the campus event that led to her brief detention with hundreds of other protesters. It is inaccurate to portray her as likely to challenge the authority of officials. Powell's arrest is especially unremarkable when compared to the arrests reported by accepted nonblack venire panelists, or those the DA found acceptable.

For example, David Forrest, a white male who sat on the jury, was court-martialed during the Vietnam War for going AWOL. Back in the U.S., the police arrested Forrest for drunk driving, and his son was arrested for "vandalizing personal property." (2 Supp CT 541-560.) These acts really do "challenge authority" and disrespect "public institutions," yet Forrest was not questioned about any of them. Moreover, according to Forrest's juror questionnaire, it's not clear whether one or both of the stateside arrests were prosecuted. (*Id.*) Respondent's claim that "a willingness to challenge authority would raise reasonable concerns" in the prosecutor's mind (RB 54) is undermined by the prosecutor's failure to question David Forrest about both his court-martial and his son's arrest. This is more evidence that Mr. Barshop's claim to have removed Diane

Powell because of her arrest was a mere pretext for racial discrimination.

Juror Ghislaine Brassine also indicated either she or her family or friends had experienced arrest. But as noted in appellant's opening brief, (see AOB 62-64) the prosecutor never questioned juror Ghislaine Brassine about this. (4 Supp. CT 1112.) The "State's failure to engage in any meaningful voir dire examination on a subject the state alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (*Miller-El, supra,* 125 S.Ct. at p. 2328.) By not asking her who was arrested and on what charge, the prosecutor revealed his disinterest in the issue, if the juror involved was not black.

Respondent notes that the defense also failed to question Ms. Brassine about this issue, and claims that appellant has forfeited any claim of error by failing to provide as thorough a record as feasible. Respondent concludes that the "absence of any statement concerning the arrest should be held against appellant, not respondent." (RB 54, fn 16.)

Respondent is again off track. The issue is not whose fault it is that the record is not as complete as it possibly could be. The issue is not what the defense thought about Ms. Brassine's arrest but rather "whether the State was concerned about [a history of arrests] when the venireperson was not black." (*Miller-El, supra,* at p. 2328, fn 4, substituting "history of

arrests" for "views on rehabilitation.") The burden here was on the prosecutor (and respondent now) to explain why, if a history of arrests was so important as to disqualify two black jurors, the prosecutor failed to ask Ms. Brassine about the arrest that affected her.

Similarly, the prosecutor twice accepted white panelist Stephan Potter as an alternate juror, before the defense used a peremptory to remove him. (RT 1094.) Potter admitted he was arrested and prosecuted for assault. (5 Supp. CT 1273.) Mr. Barshop never questioned Potter about the arrests. (RT 1092.)

Like Stephen Potter, the Prosecutor twice accepted Betty Davis, a white woman, for the jury. (RT 977, 979.) Davis's husband was arrested for drunkenness. (3 Supp. CT 833.) Mr. Barshop questioned her about her religious views and her prior jury service, but never asked about the arrest or its effect upon her. (RT 971-972.)

Similarly, white panelist Mary O'Brien was acceptable to the prosecution—five times. (RT 844, 925, 927, 977, 979.) Police arrested O'Brien's mother for public drunkenness and theft, and she told the defense attorneys in open court out of the presence of the other jurors that her mother had been jailed several times. The prosecutor declined to ask O'Brien questions about this. (RT 784-786.)

Finally, the prosecutor did not ask Suzette Harrison, Cheryl Kunis-Braney, and Charles Waite, all white panelists, any questions about the arrests of family members or friends that each had admitted in their juror questionnaires. (5 Supp. CT 1372-1373; 6 Supp. CT 1572-1573; 6 Supp. CT 1632-1633.) Kunis-Braney became an alternate after Brett King was removed. (RT 1126.) The record is therefore filled with examples showing that the prosecutor's stated reason for challenging Diane Powell was a mere pretext for his real reason: she was black and he did not want her to serve.

Respondent's claims that the arrests of Etta Craig's son[1] and of Diane Powell were "significantly different" from any of the arrests admitted by the white jurors. (RB 54.) First of all, respondent substitutes his own reasons for that of the prosecutor, who said nothing at all about the difference between any arrests reported by a juror. The U.S. Supreme Court expressly prohibits such substitution along with effort at "thinking up any rational basis" to justify the prosecutor's strikes. Instead, the Court mandates examination of the prosecutor's own stated reasons. (*Miller-El, supra,* 125 S.Ct. at p. 2332.)

But if the court considers the merits of respondent's argument that

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1 Appellant acknowledges that respondent correctly noted a mistake in the reporter's transcript regarding whose son was arrested for assault. Statements made by Etta Craig were mistakenly attributed to black prospective juror Carolyn Brooks. (RB 43; RT 805-807.) Appellant's opening brief should therefore be corrected. (AOB 67.)

the arrests of Ms. Powell and of Etta Craig's son were "significantly different," from the arrest history reported by nonblack jurors, the argument fails anyway. Respondent contrasts the (six counts of juvenile) assault Craig reported with the "traffic violations and minor property crimes" reported by the white jurors. (RB 55.) This misrepresents the facts in two ways. First, white panelist Stephen Potter reported his assault arrest. (5 Supp. CT 1273.) Although he did not become a juror, Potter was accepted twice by the prosecutor as an alternate. (RT 1093-1094.) Second, the lack of questioning by the prosecutor of white juror David Forrest prevented discovery of the facts surrounding the vandalism of personal property committed by Forrest's son. This raises the suspicion that the prosecutor did not want to learn about reasons for challenging white juror David Forrest, but he did want to find reasons to remove black panelist Etta Craig. Mr. Barshop asked Etta Craig 15 questions about her son's arrest. In contrast, Mr. Barshop asked David Forrest zero questions about his son's arrest. The U.S. Supreme Court has held that disparate questioning "meant to induce a disqualifying answer" is evidence of purposeful discrimination during voir dire. (*Miller-El, supra,* 125 S.Ct. at p. 2333.) This is especially so where the beliefs regarding the death penalty between black Etta Craig and white David Forrester do not substantially differ. For example, both believe that

the death penalty is used too seldom (3 Supp. CT 96; 3 Supp. CT 556) and neither believed the death penalty should be applied automatically. (RT 777, 807.) Moreover, had the prosecutor questioned white panelist Betty Davis about her husband's arrest for drunkenness, he might have found more criminal behavior (which may be expected to have occurred when drunkenness is charged in a context other than driving). Furthermore, Diane Powell's remote, mass arrest-and-release may be considerably different from any other juror's, but only because it was so harmless (and arguably helpful) to society.

Finally respondent argues that in many instances where the prosecutor failed to ask questions of nonblacks that it asked of black jurors, the defense attorneys also failed to ask such questions. (RB 54.) This difference is not relevant. The opinion in *Miller-El* states that the "underlying question is not what the defense thought about these jurors but whether the State was concerned about [a particular view or subject matter] when the venire person was not black." (*Miller-El, supra,* 125 S.Ct. at p. 2328, fn 4.) The goal of the review is to find out whether the prosecutor expressed and held plausible, race-neutral reasons for his challenged removal of black venire panelists. The evidence indicates that the proffered reasons as to the arrests of Powell and Craig's son, were not plausibly race-

neutral.

3. Respondent Mischaracterized What Dwight McFarlane Actually Said In Court About How He Viewed the Issue of Appellant's Flight

Appellant argued in his opening brief that the prosecution used pretextual reasons for dismissing black panelist Dwight McFarlane. (AOB 66-67.) The prosecutor gave two reasons. First, he said that he did not like McFarlane's earring. However, as noted by the defense counsel, there was a white juror who was not challenged who had an earring like McFarlane's. (7 RT 1133.) Second, the prosecutor stated that he did not like McFarlane's answers on the issue of flight. Respondent claims that (1) McFarlane maintained he would ignore such evidence, and (2) no other jurors stated that they would completely disregard the flight evidence. (RB 55.)

Respondent grossly mischaracterizes Mr. McFarlane's statements in this regard. The context of the questioning concerned whether jurors would consider all the evidence at trial or whether they would make up their mind after hearing just one piece of evidence. (RT 1001-1005.) When defense counsel asked Mr. McFarlane if he would "automatically conclude" based on appellant's flight that appellant was guilty, or whether Mr. McFarlane would consider all the evidence, Mr. McFarlane said, "All the evidence." McFarlane went on to say that he would not look at the issue of flight and

base his judgment solely "on that. No, that wouldn't be right. That wouldn't be fair to him. So I would just base my judgment on the case itself." (RT 1006.) However, as respondent points out, Mr. McFarlane had replied earlier that the flight evidence "doesn't prove anything" and has "nothing to do with anything." (RB 48, RT 1006.) Respondent asserts that, after the judge read the jury instruction regarding flight, Mr. McFarlane changed his position in response to defense counsel's "leading questions," and promised to obey the judge's instruction in an "equivocal and grudging" manner. (RB 48.) Respondent's argument is weak.

First, the prosecutor never argued that Mr. McFarlane's manner was equivocal or grudging. Rather, he argued that his answer regarding flight was "bad for the People" and also that he didn't like Mr. McFarlane's earring. The facts show that Mr. McFarlane did change his answer, but he did so in a logical manner, in response to the additional information provided. Moreover, in comparison with the many nonblack jurors who changed or modified their answers yet were retained, it is implausible that Mr. McFarlane's answer provided the actual reason for the prosecutor's challenge.

(i) McFarlane's Answers Spoke Directly To The Questions Asked And Made Logical Sense.

Respondent mischaracterizes McFarlane's remarks by taking them out of context. Mr. McFarlane primarily attempted to assure the defense counsel that he would be fair, and would consider ***all*** the evidence, and not just one piece. It is clear in the transcript that what Mr. McFarlane expressed is that no ***one*** piece of evidence would predominate in his consideration of all the evidence in the case. A reasonable review of the record does not indicate that Mr. McFarlane expressed a belief that evidence of flight meant nothing at all, or that he would give the flight evidence no effect in his deliberations. In fact, he said just the opposite. Respondent's reading makes no sense in light of McFarlane's immediate and repeated statement that he would consider ***all the evidence, just as the law requires.*** Moreover, after hearing the jury instruction, Mr. McFarlane understood why the lawyers had been confused by his responses. He said, "I wouldn't use flight as the ***sole*** basis [for rendering his verdict]. ***That's what I was mentioning before.***" (RT 1009.) Respondent focuses on this next exchange:

> MR. SCHAFFER: If the judge instructs you that you may consider – may consider flight as consciousness of guilt, would you consider it just as the judge tells you that you can?
> PROSPECTIVE JUROR McFARLANE: Yes, sure, I guess.
> MR. SCHAFFER: Okay. What I'm getting at, are you going to consider it solely on that or on all the evidence in the case?
> PROSPECTIVE JUROR McFARLANE: No, sir. All the evidence in the case.

(RT 1009.)

Respondent's view that Mr. McFarlane's "Yes, sure, I guess" is "equivocal and grudging" does not hold up. Mr. McFarlane's answers were admirably clear, and polite ("No, sir."). Such "hedging," in answer to a question by authority figures in a courtroom is to be expected and completely in accord with conventions of politeness in formal settings. The words "I guess" merely indicate a deferential manner rather than a substantive reply. Furthermore, it may be that Mr. McFarlane had grown bewildered at the inability of the defense counsel to understand him. McFarlane had just said he would not base his verdict ***solely*** on the issue of flight. Thus, it is entirely reasonable that Mr. McFarlane might have felt put upon by the defense counsel. There is all the more reason, therefore, to doubt the genuineness of the prosecutor's rationale – that this exchange between defense counsel and Mr. McFarlane showed McFarlane as "bad for the People." In fact, this exchange provided the prosecutor with nothing more than a pretext to remove another well-qualified black juror. Mr. McFarlane, after all, expressed strong support for a mandatory death penalty for those convicted of an intentional killing. (1 Supp. CT 257.) Respondent's strained analysis distorts this exchange and its significance.

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(ii) Mr. McFarlane's Statements Do Not Distinguish Him From Similar Statements Made By Nonblack Jurors.

Compared to nonblack jurors, any possible inconsistency in Mr. McFarlane's statements seems quite benign. For example, white alternate juror John Sherman did not repudiate his statement that he might refuse to vote for the death penalty regardless of the evidence. This is much worse "for the People" if that had truly been the prosecutor's reason for removing Mr. McFarlane. (5 Supp. CT 1218-1219.) Similarly, white prospective jurors Michael Stempel and Virginia Nelson each gave inconsistent statements that indicated both an inability to render a death penalty verdict and an willingness to ignore evidence and instruction, described above, yet the prosecutor found Stempel twice to be an acceptable juror and Nelson once. (RT 844, 925, 979.) Respondent cannot show that McFarlane's statements were worse for the People than Sherman's, Stempel's or Nelson's, and as a result respondent cannot rebut the clear implication that the prosecutor's reason for removing McFarlane was pretextual, to mask an actual discriminatory purpose based on race.

E. CONCLUSION

The trial court committed reversible error when it used an unconstitutional standard to reject the prima facie case made by the

defendant showing the prosecutor's purposeful racial discrimination during voir dire. Side-by-side comparisons between the removed black panelists and acceptable white panelists and jurors demonstrate that the prosecutor purposefully excluded blacks from appellant's jury. The exclusion by peremptory challenge "of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva*, *supra,* 25 Cal.4th 345, 386.) Under the authority of *Johnson* and *Miller-El,* the totality of the relevant evidence shows that appellant was denied his constitutional rights under *Batson*, and his conviction and sentence must be reversed.

II APPELLANT'S RIGHT TO CONFRONT WITNESSES WAS VIOLATED WHEN HEARSAY TESTIMONY WAS ADMITTED AT TRIAL

In his opening brief appellant contended that his rights to confrontation and due process were violated when the prosecutor introduced a taped interview of Marilyn Young and Detective Purcell, which included prejudicial hearsay statements of Young as well as Detective Purcell's opinion that appellant was dangerous and might come to kill Young next. (AOB 73-97.)

In his first supplemental brief, appellant argued that admission of this tape violated the 6th Amendment right to confront adverse witnesses

under *Crawford v. Washington* (2004) 541 U.S.36. (1st Supp. AOB 1-10.)

Respondent argues that recorded statements of Marilyn Young were admissible as prior consistent statements. (RB 56.) Respondent further argues that the recorded statements of Detective Purcell are admissible because they were not hearsay, as not offered for the truth of the statements. (RB 74.) Respondent further argues that because appellant introduced a portion of the tape, the prosecution was allowed to admit the entire statement pursuant to Evidence Code 356. (RB 56.)

Respondent fails to recognize that the statements of Connie Navarro as narrated by Marilyn Young, and the statements of Detective Purcell, were both hearsay, and violated appellant's right to confrontation and due process.

A. Facts

The relevant facts were set out in both the opening brief, Appellant's First Supplemental Brief, and Respondent's Brief.

B. Admission of the Tape Did Violate Appellant's Right to Confrontation

Respondent argues that the admission of the tape recording did not violate the right to confrontation because Marilyn Young was a witness at trial and subject to cross-examination. (RB page 63.) The tape, however, contained statements of ***Connie Navarro*** as narrated by Marilyn Young.

Connie Navarro, the actual declarant in these reported statements, was ***not*** available at trial, and the victim-declarant's statements of fear or threat by the defendant were extremely prejudicial. (See argument IV.)

Moreover, the tape contained highly prejudicial opinion statements by Detective Purcell, and he was not present at trial to be cross-examined.

Respondent argues that the statements of Detective Purcell were not admitted for their truth, and therefore, as they were not hearsay, do not violate *Crawford*. (RB 78.) Respondent does not respond to the argument that the reported statements of Connie Navarro were also testimonial and prohibited by *Crawford*.

1. The Statements Of Connie Navarro Retold By Marilyn Young Were Testimonial

The Sixth Amendment to the United States Constitution provides: "[I]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him." The purpose of confrontation is to ensure reliability by means of the oath, to expose the witness to cross-examination, and to permit the trier of fact to assess credibility. (*California v. Green* (1970) 399 U.S. 149, 158.) This constitutional protection applies to all "testimonial statements." (*Crawford v. Washington, supra,* 541 U.S. 36.) Testimonial statements are those made under circumstances which would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial. (*Id.* at p. 52.) The Supreme Court noted that police interrogations specifically fall within these provisions. "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." (*Ibid.*)

In *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1402-1403, the statement under review was made after the prosecution was instituted. It was made in a neutral location to a non-governmental employee trained in forensic interviewing. (*Id.* at p. 1403.) The court said that the pertinent question is whether an objective observer would reasonably expect the statement to be available for use in a prosecution and, therefore, was testimonial under *Crawford.* (*Id.* at p. 1403.)

If an objective witness would reasonably expect such statements to be available for use at a later trial, they are testimonial within the scope of the Sixth Amendment confrontation right. (*People v. Pirwani* (2004) 119 Cal.App.4th 770.)

People v. Cervantes (2004) 118 Cal.App.4th 162, is not to the contrary. In *Cervantes* this Court held that a defendant's statement admitting involvement in a double murder made to a friendly neighbor treating slashes and cuts on his hands he said came from jumping fences was not testimonial under *Crawford* because it was not made in the

expectation that it would be used at trial. The defendant in *Cervantes* made the statement before he was arrested. (*Id.* at pp. 166, 168.) Also, the court determined that defendant reasonably expected that the statement would be kept quiet and not be used in court because it was made to a friend of long standing during a friendly visit, the friend knew he was a gang member, and he could expect her to be afraid to testify. (*Id.* at p. 174.) Thus, the defendant's statement in *Cervantes* was made in a very different context than Connie Navarro's statement in appellant's case, because Connie clearly could have reasonably anticipated that the statements would be relayed to law enforcement.

2. Detective Purcell's Statements on the Tape Served a Non-hearsay Purpose and Thus Violated Crawford

Respondent argues that Detective Purcell's statements were not admitted for the truth they asserted. (RB 78.) *People v Turner* (1994) 8 Cal.4th 137, cited by respondent, is distinguishable. First it is a pre-*Crawford* case. Secondly, in *Turner*, the fact that the statements of the defendant were admissible was not disputed, where in appellant's case, the statements of Marilyn Young were inadmissible. But more importantly, in *Turner*, the statements of the jailhouse informant did arguably serve to supply context to defendant's statements. In *Turner*, the court held that

"standing alone, defendant's statements were ambiguous. He had said, "Well, you know, man, dead witnesses don't talk," and "I killed the man and then the woman." His statement that he had killed them with two shots, and that the victims were tied with their hands behind their back, and his gesture of putting his index finger to his temple and saying he shot them, could have referred simply to *a* shooting, but not necessarily to the shooting at issue in the case. The court held that the informant's questions, asking where the murder occurred and what happened, gave context to the uncontested statement of the defendant.

In the case at bar, the questioning was not of the defendant. The questioning was of Marilyn Young, who answered in lengthy, unambiguous narrative. The tape included statements of the detective's opinion of appellant's guilt and dangerousness to Marilyn Young.[2] The detective's questions and certainly his opinions were not needed to give context to her narrative.

The jury was instructed to disregard the opinions of the detective. However, statements and interrogations implying opinions by law

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2 Respondent argues that Detective Purcell did not make any statements that appellant was a threat. This is outrageous. Detective Purcell cautioned Marilyn Young to stay somewhere else that night, talked about the danger she was in, told her they would give her ideas on how to protect herself so appellant could not find her, and promised her he would not let her walk out of the police station alone.

enforcement officers carry special weight. (*See Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995, 1001.) Erroneous admission of law enforcement tape proved highly prejudicial. Given the extremely prejudicial nature of the 45 minute tape recording, this Court cannot conclude that the admonition cured the impact of the tape recording, or the error exposing the jurors to the material without any opportunity to observe cross-examination of one of the speakers.

In this case, both the statements of Detective Purcell and the statements of Connie Navarro, as related by Marilyn Young, were testimonial, and violated the right to confrontation.

C. Young's Statement To The Police Was Not A Prior Consistent Statement Pursuant To Evidence Code Sections 1236 and 791

Respondent argues that the court properly admitted Young's statement to Detective Purcell pursuant to Evidence Code 1236 and 791. (RB page 65.) Respondent argues that appellant's "repeated attempts to impeach Young" based on her alleged failure to include in her prior statement to police certain facts in her testimony was sufficient to raise the inference of fabrication and render her statements admissible for a hearsay purpose. Respondent also cited to appellant's closing argument, in support of the judge's ruling.

As an initial matter, the critical time for determining the admissibility of a witness's prior consistent statements is when such statements are sought to be admitted, not at the closing argument. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1015.) After the judge allowed the entire tape recording into evidence, trial counsel had no choice but to argue that Marilyn Young was biased.

In footnote 22, respondent argues that the fact that appellant spent a large portion of his testimony disputing allegations that he was stalking Connie Navarro further demonstrates defense's position that Young's testimony was fabricated. (RB 68.) This argument is totally irrelevant. The issue here is whether the tape was properly admitted as a prior consistent statement, not whether appellant believed Young was biased.

Respondent cites the defense's repeated attempts to impeach Young. (RB 65.) Again respondent distorts the record. The defense's "repeated attempts" to impeach Young related to three specific points. Appellant used the taped statement to impeach Young on three specific discrepancies. Respondent finds four instances (RB 74), adding a threatening statement allegedly made by appellant to Connie Navarro (RT 1750.)

The first instance, where defense counsel had combined two separate stories, was cleared up on cross-examination. There was no claim of

fabrication here, once Young explained that she had related two separate stories concerning alleged warnings, one where Donnie Clapp warned Connie that appellant was in a rage, and another in which an astrologer had warned Connie of the same thing.

In the second instance, Young testified that Connie had told her she heard a loud bang on the patio. Cross-examination on this point did raise a claim of fabrication, but it was not necessary or permissible to play the entire tape recording to rebut it. The specific portion of the tape concerning this noise could have been played to meet the claim of fabrication. The transcript of the tape reveals that Young did in fact tell Detective Purcell that Connie had told her she (Connie) had heard a loud bang. Apparently, defense counsel did not have a complete tape or transcript. However, only that portion of the tape would have been admissible to meet this accusation, but not the entire tape.

In the third instance, Young testified on direct examination that when appellant called her, he said in an "unbelievably breathless" voice, "Marilyn, it's Dean. I left a message for Connie and I wanted her to know that I'm going to leave her alone, but she didn't get back to me and so call me back later." (10 RT 1753.) A thorough search of the transcript of the tape reveals that this statement is not on the tape of the interview with the

police. So the tape was not admissible to rebut the defense claim of fabrication on this point.

Therefore, the only portion of the tape even arguably properly admitted was that pertaining to the second story, concerning a noise, when the defense attorney apparently did not have a complete and accurate transcript.

Respondent contends that the entire tape was admissible under Evidence Code 791. (RB 70.) His reliance on *People v Ainsworth, supra,* 45 Cal.3d 984, is misplaced. *Ainsworth* differs from the case at bar in that in the case the extrajudicial statement admitted was relevant to rebutting a charge of recent fabrication. In the instant case, quite a lot of the tape played to the jury was not relevant to such a charge. Much of the taped statement had to do with Marilyn Young's fear of appellant and Detective Purcell's opinion that Young could be in danger from appellant, speculating that he might want to "silence" Young. These irrelevant and prejudicial portions of the tape, particularly given their source, were highly prejudicial and should have been redacted.

A witness's prior consistent statement is admissible to support credibility or as substantive evidence only to counteract an inconsistent statement admitted to attack credibility, or to counteract an express or

implied charge that the witness's testimony is the result of bias, recent fabrication, or other improper motive. (*People v. Randle* (1991) 8 Cal App 4th 1023, 1037.) Only those statements necessary to rehabilitate the impeached portions of testimony are admissible.

In the case at bar, the only arguably admissible portion of the tape was that regarding whether Marilyn Young told Detective Purcell that Connie told Marilyn heard a loud noise on the patio and thought it was appellant.

D. The Entire Statement Was Not Admissible Pursuant To Evidence Code 356

Respondent argues that "because appellant initially introduced portions of Young's taped interviews with the police, the prosecution was entitled to admit the entire tape pursuant to Evidence Code section 356." (RB 71.)

1. Appellant did not introduce the taped statement

First, appellant did not introduce portions of the taped statement. Respondent's summary is incorrect. Appellant provided Young with a copy of a transcript of the taped statement, and then cross-examined Young on specific portions. In three instances where Young's in-court testimony varied from the transcript of the tape, appellant's trial attorney asked her

questions such as, "Didn't you tell the police back in March the 5th in that tape-recorded conversation that Connie went to Laguna...because her astrologer told her appellant's signs showing that he was going to erupt this weekend . . . ?" (RT 1734-1736.)

In all the cases cited by respondent on this issue, the party opposing introduction of the entire conversation actually introduced portions of the disputed evidence previously. In *People v Arias* (1996) 13 Cal.4th 92, the prosecution introduced selected portions of Arias' conversation with Rodriguez as an admission that appellant had killed the victim. Arias contended he was entitled to use other portions, namely his claim of prayer for the victim's survival, to present a fair picture of his mental state, and to bolster his assertion to Rodriguez, already in evidence, that he had stabbed the victim reflexively. The trial court would not allow the entire conversation to be introduced. On appeal, the Court held that it need not determine whether error occurred, because exclusion of the prayer evidence was harmless in any event. (*People v. Arias, supra,* 13 Cal.4th at p. 157.)

In *People v Zapien* (1993) 4 Cal.4th 929, cited by respondent, the defense introduced portions of a statement to the jury. Defense counsel was permitted to read to the jury ten questions and answers in which the witness Perez had made statements that contradicted her trial testimony. The

prosecutor then offered the entire statement into evidence. (*Id.* at p. 959.) This factual scenario differs from the case at bar, where the defense did not move to admit any portion of the tape recording.

People v Pride (1992) 3 Cal. 4th 195, cited by respondent, also supports appellant's position that the entire tape should not be played unless it has some bearing on the case.

In *Pride*, the prosecution asked a detective, on direct examination, to recount Pride's statements on a narrow range of interview topics, particularly the time defendant left work and arrived home the day of the crimes. According to the detective, defendant consistently maintained that he left work around 2 p.m. This information conflicted with testimony previously given by two prosecution witnesses. On cross-examination of the detective, defense counsel tried to elicit defendant's interview statements on two subjects not previously raised. The prosecutor conceded that defendant could introduce any testimony or taped portion of the interviews that clarified excerpts already given by the detective, but insisted no such clarification was necessary. The trial court ruled that the entire tape could not be admitted.

On appeal, this Court agreed that where one party has introduced part of a conversation, the opposing party may admit any other part

necessary to place the original excerpts in context. This Court held that it follows that if excerpts of a recorded conversation are admitted in a form – such as participant testimony or written transcripts – that creates a misleading impression, the recording itself may be proffered as necessary to correct that misimpression. But this Court ruled that there was no error, because the playing of the tapes would not correct any misimpressions created by the testimony and transcripts actually before the jury. In our case, like *Pride*, the entire tape did nothing to clear up any misimpressions. And in our case, unlike in *Pride*, the trial court did not listen to the tape or have a transcript prior to making its ruling. (10 RT 1766, 1779.)

Another case cited by respondent, *People v Hamilton* (1989) 48 Cal.3d 1142, is also distinguishable. In that case, a witness testified that defendant had told her he wanted his wife killed because he had a girlfriend; defendant said he wanted to leave his wife but he wanted to retain custody of his kids and if he just divorced her he couldn't get the kids. During his cross-examination of the witness, defense counsel brought out inconsistencies between the witness's testimony and her prior confession. He claimed that the transcript of her confession was incorrect and played a portion of the tape recording of that confession to the jury. He was right: the transcript was incorrect. The prosecutor then requested that the jury hear the

entire tape. On the tape the witness merely stated: "Michael said that he wanted the money and he had a girlfriend." (*Id.* at pp. 1173-1174.)

Defendant argued that the subject pursued by defense counsel when he questioned the witness regarding the inconsistencies between her taped confession and her testimony at trial was the planning of the murder, not defendant's motive.

The Court held that the entire tape was admissible. The court held that the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence. In the present context, it is clear that Hamilton's explanation as to why he wanted his wife killed had some connection with the planning of the killing, especially since the alleged motive involved obtaining the insurance money and the planning included using part of that money to pay the actual killer.

The case at bar is different. The entire tape contained much more inadmissible hearsay evidence that had no bearing on, or connection with, the declaration in evidence. And playing the entire tape did nothing to clear up any misimpressions, or put Marilyn Young's testimony in context, or aid in understanding the testimony of Marilyn Young.

2. Evidence Code 356 only allows those portions of the statement that aid in understanding

Section 356 is indisputably "subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced." (*People v. Perry* (1972) 7 Cal.3d 756, 787, quoting *Witt v. Jackson* (1961) 57 Cal.2d 57, 67; Legis. Committee comment. to Evid. Code § 356.) The rule does not mechanically permit the whole of a transaction to come in without regard to its competency or relevancy. (*People v Williams* (1975) 13 Cal.3d 559, 565.)

Respondent argues that the entire tape involved appellant's behavior toward Connie Navarro, and thus "had some bearing upon, or connection with" the statements introduced by the defense. (RB page 74.) Respondent is wrong because (1) the defense did not introduce any statements; and (2) the entire tape was irrelevant. Much of the tape contained Marilyn Young and Detective Purcell's opinions that Young was in danger and appellant would come for her next – speculation that was completely extraneous to any disputed issue.

Evidence Code 356 allows the entire conversation to be placed into evidence by the opponent, only if a portion of a statement is admitted into evidence by the proponent, and, providing the other statements have some

bearing upon or connection with the admission or declaration in evidence. (*People v Hamilton, supra,* 48 Cal.3d at p. 1174.) Neither of these conditions was met in appellant's case. In the case at bar, playing the entire tape was error.

3. Opinions of guilt by Detective Purcell and Marilyn Young were inadmissible under any theory

Respondent argues that the tape contains no evidence of Detective Purcell's opinion of appellant's guilt. (RB 74-77.) Respondent has ignored the instances cited by appellant in his opening brief although jurors would not have done so. For example, when Young told Detective Purcell that she was afraid that appellant would come looking for her now, Detective Purcell cautioned her to stay somewhere else that night. (II Supp CT 025.) Moreover, Purcell told Young, "Well because with his crazy mind, if he wants — if he thinks you know all this stuff, just the fact that you know it, you're probably in just as much danger as if he thinks you told it if not more. If you've already told it, then what's he got to gain by silencing you? It's already been told. But if he thinks you've got more knowledge and you might not have told us yet, then you would probably be in more danger." (II Supp. CT 48.)

Purcell told Young they would give her some good ideas on how to

protect herself and avoid appellant so appellant could not find her. (II Supp CT 49.) Young said she hoped appellant would kill himself and Purcell agreed that would end a lot of misery. (II Supp CT 51.) Purcell told Young he would not let her walk out of the station alone, thinking she was safe if he doesn't think she is (II Supp CT 52.) All of these statements presume that appellant is guilty. An opinion is no less powerful merely because it is indirectly stated.

All of these statements by Purcell show that Purcell was of the opinion that appellant was not only guilty, but likely to come after Young next, and therefore expressing a view that she was in danger. These hearsay statements could not help but prejudice the jury.

Under either federal or state law neither Purcell nor Young would be permitted to express an opinion as to appellant's guilt or innocence. (See, e.g., *United States v. Espinosa* (9th Cir. 1987) 827 F.2d 604, 612 ("A witness . . . may not give a direct opinion on the defendant's guilt or innocence."); *People v. Torres* (1995) 33 Cal.App.4th 37 ("A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant.").) Such opinions are of no assistance to the jury. There is great danger, however, that such opinions, especially coming from a police

officer, will be accorded prejudicial and undue deference by the jury, despite contrary evidence.

The opinions of an investigating officer on the defendant's guilt are presumptively prejudicial and inadmissible. (See *United States v. Harber* (9th Cir.1995) 53 F.3d 236, 241 (reversible error where investigating officer's summary report containing the officer's personal opinions on the defendant's guilt was accidentally read and relied upon by the jury).) Such opinions are likely to convey the impression that evidence not presented to the jury, but known to the investigating officer, supports the charges against the defendant. (Cf. *United States v. Young* (1985) 470 U.S. 1, 18-19 (allowing the jury to hear the prosecutor's personal opinion on the defendant's guilt presents danger that jury will believe other evidence supports charges); *United States v. McKoy* (9th Cir. 1985) 771 F.2d 1207, 1211.) Further, a police officer's testimony may carry with it the imprimatur of the State, the jury may tend to give the officer's personal opinion added weight. The testimony of law enforcement officers often carries "'an aura of special reliability and trustworthiness,'" (*United States v. Gutierrez,* (9th Cir. 1993) 995 F.2d 169, 172 (quoting *Espinosa,* 827 F.2d at p. 613)), and the jury is very likely to defer to the officer's judgment rather than relying on its own view of the evidence. For the same reasons,

prosecutors are similarly prohibited from stating their belief or opinion regarding the guilt of the defendant. (See *United States v. Molina* (9th Cir. 1991) 934 F.2d 1440, 1444.)

4. The Tape Should have been Edited to Remove Inadmissible Material

It is clear under California law that before the tape recording of an interrogation is played to the jury, the tape should first be edited to remove material that is either inadmissible or would unfairly prejudice the defense. (See *People v. Sanders* (1977) 75 Cal.App.3d 501.) This is also true under federal law. (See *Dubria v. Smith, supra,* 224 F.3d 995.)

In this case, the prosecutor did not have the taped conversation transcribed. The defense attorney had transcribed a portion of the tape. The judge never looked at a transcript or listened to the tape before making the decision that it could be admitted. (10 RT 1766, 1779.)

E. The Admission of the Detective's Statements

In the Opening Brief, appellant argued that Detective Purcell's statements during the taped interview of Marilyn Young were inadmissible hearsay, and violated due process.

Respondent first argues that Detective Purcell's statements were not admitted for their truth, and therefore not hearsay. (RB 74.) Respondent cites *People v Turner, supra,* 8 Cal 4th 137, for the proposition that "when

hearsay comments are admitted to give context to the responses of another hearsay declarant, they are admitted for a non-hearsay purpose.

It is true that an out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute. (*People v. Armendariz* (1984) 37 Cal.3d 573, 585; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1204-1205; see *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 ("one 'important category of nonhearsay evidence-evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay because the relevant fact sought to be proved is the hearer's reaction to the statement, not the truth of the matter asserted in the statement'").)

However, in this case, there was no non-hearsay purpose for admitting Detective Purcell's statements. Marilyn Young's lengthy testimonial was given in a narrative style, and the detective's statements did nothing to supply context to Young's statements.

Secondly, respondent argues that the record does not contain a single instance where Detective Purcell stated on opinion on appellant's guilt. (RB 74.) Respondent further argues that appellant has failed to cite to any

evidence in the record to factually support his claim that the detective stated an opinion regarding appellant's guilt. (RB 75.)

Respondent has ignored the instances cited by appellant in his opening brief and discussed above, in section D 3, above. All of these statements by Purcell show that Purcell was of the opinion that appellant was not only guilty, but likely to come after Young next, and therefore expressing a view that she was in danger.

These hearsay statements could not help but prejudice the jury because the limiting instruction was insufficient. Respondent argues that the court's limiting instruction cured any defect. (RB 76-77, 79-80.) Respondent argues that *People v Coleman* (1985) 38 Cal.3d 69, cited in appellant's opening brief, is easily distinguishable. (RB 77, fn. 26.) In *Coleman*, the trial court allowed the prosecution to introduce letters from the dead victim. This Court found that the introduction of the letters was prejudicial and the trial court's limiting instructions were ineffective. (*Id.* at p. 83.)

Respondent argues that in the case at bar, the hearsay declarant was present at trial and subject to cross-examination. On the contrary, *Coleman* is directly on point. Neither Connie Navarro nor Detective Purcell were available at trial, and the letters in *Coleman* were very similar to the tape

recording of Marilyn Young recounting statements of fear that Connie Navarro had made to her. In both cases, there was a "danger that the hearsay declarations will be regarded as true in spite of a complete absence of legally recognized indicia of trustworthiness." (*Id.* at p. 85.)

The other cases cited by respondent are equally unpersuasive. (RB 76.) In *People v. Morris* (1991) 53 Cal.3d 152, a witness inadvertently blurted out that one of the other witnesses had been required to take a polygraph test. The defense immediately objected, and the judge immediately admonished the jury that they could not consider anything about a polygraph. The jury was not told whether the witness passed or failed the polygraph. This Court held that the trial court's timely and specific admonition, which the jury is presumed to have followed, cured any prejudice resulting from the witness's inadvertent and improper statement. The Court held that, in view of the overwhelming evidence of defendant's guilt, there was no prejudice requiring reversal.

The instant case presents a vastly different scenario. The error in divulging the prejudicial evidence, which was lengthy and full of emotion, was not inadvertent. The tape was played for 45 minutes, and the jury had ample opportunity to think about it before the judge admonished them not to consider part of it. The facts of appellant's case are also unlike those in

Morris, where the defendant confessed to police. There were two witnesses who testified that were with Morris at the time of the murder and heard the sounds of Morris striking the blows to the victim ("like someone hitting a melon") and the victim's screams. (*People v. Morris*, *supra*, 53 Cal.3d at p. 177.) In contrast, in appellant's case, the evidence against appellant was circumstantial, remote, and considerably less compelling.

Respondent also relies on *People v. Olguin* (1994) 31 Cal.App.4th 1355, for the proposition that juries are presumed to adhere to the court's instructions. In that case, the jury heard a gang lyric and was instructed that it was to be considered only as to the codefendant. On appeal, the court held that the lyric was written by the codefendant, that the admissions did not name or inculpate Olguin, the lyrics did not mention the crime for which Mora and Olguin were on trial, and provide absolutely no information about the crime which could be imputed to Olguin. (Id. At 1375.)

Olguin is no help to us here. In the case at bar, given the extremely prejudicial nature of the 45 minute tape recording, this Court cannot conclude that the admonition cured the impact of the tape recording. To do so would be to render meaningless the High Court's guidance that in a capital case, a heightened standard of due process applies. Furthermore, the risk that the jury would be unable to follow an instruction limiting the

extrajudicial statements to the declarant is too great to ignore.

F. Prejudice

Respondent argues that any error was harmless. (RB 79.) Respondent urges this Court to apply the *Watson* standard. Respondent argues that under *Watson*, unless it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error, the judgment must be affirmed." (RB 79.)

However, a violation of the right to confront witnesses and contrary evidence, as well as the right to due process are federal constitutional violations, and thus the standard of review must be the *Chapman v. California* (1967) 386 U.S. 18, 24-26. Under *Chapman*, reversal is required unless respondent can demonstrate the error is harmless beyond a reasonable doubt. Respondent cannot do so.

The state can prove beyond a reasonable doubt that appellant had been living with Connie Navarro for several years. What the state cannot prove without the hearsay is that appellant was stalking Connie Navarro and that she was afraid of him. The neighbor, Mrs. Farjah, who knew appellant, saw a man leaving the scene shortly after the crime, but could not identify the man as appellant. There was no physical evidence to link appellant to the murders, except his fingerprints, which would normally be found in the

house where he lived for three years. ***Hairs found clutched in the bloody hand of victim Jory and hairs on the sweater of Connie Navarro did not match appellant's.*** The strong presence of prejudicial hearsay from the victim, from Mike Navarro, Marilyn Young and Detective Purcell, therefore was inordinate evidence tending to link appellant to the crime.

Respondent argues that the evidence against appellant was overwhelming. (RB 79.) He cites that fact that appellant's burglary partner Sabatino testified that appellant had confessed. Respondent does not mention that Sabatino was testifying in exchange for a sentence reduction, or that Sabatino also testified that appellant had told him he hid the gun on the roof of appellant's apartment, a theory discounted by the police.

Respondent also relies on appellant's step-mother who testified that appellant had confessed the murders to his father. Respondent does not mention that Rosemary Riccardi had been impeached. She had testified that she had told the FBI on several occasions that appellant had confessed, but the FBI could find no mention of the confession in their notes of 27 telephone calls from her. (RT 2296.) Consequently she was not a credible witness.

Respondent's references to appellant's fingerprints is also not proof of guilt. Appellant's fingerprints were found in Connie Navarro's linen

closet. Respondent does not mention that appellant lived with Connie Navarro for nearly three years, did his laundry in the closet area, and used the towels that were stored there.

Respondent argues that Young's tape recording was substantially cumulative to her testimony, and therefore had limited prejudicial impact. Respondent ignores the status of the speakers, the immediacy of the recording, and the emotions expressed. Respondent fails to mention the impact of Detective Purcell's statements that Young should hide from appellant, and Young's statements that she feared appellant would come to murder her next. Such emotional statements in discussion with a figure of authority could not fail to influence the jury.

Here, because the state's case was entirely circumstantial, the violation of the right to confrontation and due process took on critical importance. This error was not harmless beyond a reasonable doubt. Even under the *Watson* standard, reversal is required, because it is reasonably probable a result more favorable to appellant would have been reached had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818.) Moreover, admission of the tape tended to produce an unreliable guilt verdict because it introduced emotion into the deliberations.

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III. LIMITS ON CROSS-EXAMINATION OF KEY PROSECUTION WITNESS JAMES NAVARRO AND THE COURT'S DENIAL OF A CONTINUANCE TO EXAMINE SURPRISE EVIDENCE VIOLATED APPELLANT'S RIGHT TO CONFRONTATION, RIGHT TO DUE PROCESS AND RIGHT TO COUNSEL

James Navarro testified that after the murders, he found a cassette tape on his answering machine at home, where Connie had made a call that was recorded. Navarro testified that on the tape, Connie was talking to someone from legal aid about how she was terrified of appellant, and wanted to get a restraining order. Navarro produced the surprise tape recording, which was admitted and played to the jury. (10 RT 1799-1842.)

The defense discovered, after the tape had been admitted and played to the jury, that ***Navarro had tampered with the surprise tape recorded evidence***. Testing showed that the tape was not manufactured until 1992, nine years after the murder. The trial court refused to allow a continuance for further testing, and refused to allow James Navarro to be cross-examined in front of the jury on the subject of the tape. In his opening brief appellant contended that the trial court violated his right to confrontation under the Sixth Amendment by precluding his attorney from cross-examining witness James a.k.a. Mike Navarro concerning a taped message. (AOB 98-132.)

Respondent claims there is ***no*** evidence of tampering in the record. (RB 100.) Respondent argues that the court properly exercised its power under Evidence Code 352 to preclude the defense continuance and examination because James Navarro was merely a minor witness. (RB 81.)

A. Relevant Facts

James Navarro testified he was the ex-husband of Connie Navarro, they had joint custody of their child David, and that they were close friends.

Respondent correctly points out that Connie Navarro's ex-husband James Navarro testified that he discovered the bodies the day of the murder. Navarro testified that Connie's face was covered with a pillow case. (RT 1792-1796.) Respondent fails to mention that police officers testified that when they arrived, there was no pillow case over Connie's face.

Navarro also testified that he referred Connie to his attorney to get a restraining order when she began to have "major" problems with appellant. (RB 82.)

Respondent argues that appellant did not make any objection to the tape or contend that there had been a discovery violation. (RB 82.) This is not entirely true. It is true that when the tape was marked as an exhibit, the defense said nothing, even though it appears that defense counsel had not heard the tape (RT 1797-1800.) However, once the tape was released to

the defense, counsel took action immediately. The tape was released to the defense on Wednesday, July 13, 1994. (13A 2552.) The defense spoke with experts and discovered that the tape had been altered. On Friday, July 15 1994, the defense made an offer of proof to the court that the tape had been altered, and argued that they needed a two day continuance for experts to test the tape. The defense protested about the late discovery, stating that they never got a copy of the tape earlier, because it had been produced during the trial. (13A RT 2553.) The court agreed to recess for the day so that the defense could have time to investigate. (13A RT 2557.)

The following Monday, July 18, 1994, the defense met in chambers with the judge, without the prosecutor. The defense told the judge that their expert had made a preliminary finding that the tape had been altered, but that he would need a week to do a microscopic analysis. (14B RT 2670-73.) The defense asked the court for a one week continuance. The court stated it needed an affidavit from the expert, that it did not want to delay the trial a week, but another day or two was a possibility. (14B RT 2680.)

The next day, Tuesday, July 19, out of the presence of the jury, the prosecutor stated that Mr. Navarro was present and the prosecutor had a second tape. The prosecutor explained that the first tape was a copy of a portion of the second tape. The prosecutor told the court he would stipulate

that the first tape in evidence was not manufactured until 1992. (14 RT 2695.)

The defense argued they had a duty to investigate, and the judge granted a request to have the newly proffered tape examined by an expert. (14 RT 2697.)

The prosecutor then warned the court that if the defense expert said the tape was doctored, the prosecutor might have to call "half a dozen" witnesses to verify the tape. (14 RT 2698.) The prosecutor then put Navarro on the stand in limine, and he testified that he copied the relevant portion of the tape onto a new tape. (14 RT 2712.)

The defense then moved to introduce a stipulation that the first tape had not been manufactured until 1992. The prosecutor objected, and the judge sustained the objection, stating it was not relevant to the trial. (14 RT 2746-2747.)

The defense informed the court that their expert could not adequately investigate the tapes in two days. (14 RT 2747.) The court ruled that the issue of authenticity was not material. (14 RT 2749.)

At that point the defense offered the stipulation that if Ken Seider, an expert, were called to testify, he would testify that the first tape was not manufactured until 1992. The prosecutor objected and the judge sustained

the objection. (14 RT 2755.)

Respondent goes on to argue that the tape was played with no objection, and at the close of the case, the defense did not object to the admission of the tape. (RB 83.) Respondent has failed to acknowledge that such objection had preceded the tape's admission and further protest at that time would have been futile. Respondent fails to note the most critical information regarding this issue, that the defense had repeatedly moved for a continuance to have the tape examined, and the judge had ruled the issue was not material. So any objection would have been futile.

B. The Trial Court's Ruling Violated Appellant's Rights to Confront and Due Process

Respondent claims that the trial court properly exercised its discretion to preclude the defense from trying to impeach an unimportant witness on a collateral matter which the witness did not actually lie about. (RB 90.) This argument fails for several reasons. First, Navarro was an important witness; he was the strongest witness the prosecutor had. Navarro was presented as a sympathetic man who was still best friends with his ex-wife after the divorce, he cried on the stand, and the judge would not allow him to be impeached on the issue of the tape that had been tampered with.

Second, the alterations to the tape did not compromise merely a collateral matter. On the tape, Connie Navarro's voice could be heard "from

the grave" saying she was afraid and wanted to get a restraining order. James Navarro testified that the man she was terrified of was appellant.

And finally, Navarro did in fact lie about the tape. He testified under oath that he found the tape on his answering machine in 1983. It was not until after his testimony that the defense had the tape analyzed and found that it had been tampered with. At that point, Navarro then changed his story and testified, ***outside the presence of the jury***, that he had taken the original tape and copied the portion of it that he thought relevant. And because the judge denied the motion to continue the trial until both tapes could be analyzed, this record contains no proof (other than James Navarro's contrasting statements) of the origins of the two tapes. Such unreliable and untested evidence should have no part in a capital adjudication. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Respondent is correct that in order to establish a violation of the Confrontation Clause, appellant must show two facts, 1) that he was prohibited from engaging in otherwise appropriate cross-examination, and 2) the prohibited cross-examination might reasonably have produced a significantly different impression of the witness's credibility. (RB 91.)

Respondent argues that the proposed cross-examination was irrelevant, or at best, marginally relevant. (RB 91.) Respondent argues that

James Navarro never stated that the tape he brought in to court was the original tape. (RB 91.)

This is a mischaracterization of the evidence. James Navarro did not tell the jury or the court that he tampered with the tape before bringing it to court. Navarro testified under oath that he found the tape recently and that it was from his answering machine. That was not true. Only when the defense discovered that the tape itself was not manufactured until years after the murder, did Navarro backtrack and explain, out of presence of the jury, that he had taken the original tape and edited it, copying the portions of it that he felt were relevant. And because the tape had been produced at the 11th hour, the defense had no opportunity to investigate and cross-examine Navarro when he was on the stand. Navarro's credibility and the integrity of the tape was shielded from attack, even though preliminary testing showed the tape had been altered.

Respondent argues that the defense counsel at trial admitted there was no place in Navarro's testimony where he testified the tape was the original. (RB 92.) Respondent is wrong. Contrary to respondent's assertion, when the prosecutor argued that Navarro had never used the word original when he testified about the tape, defense counsel read from the record where Navarro testified that he brought in the tape "from his answering

machine at home" (RT 2742.) Navarro tampered with the evidence and the jury should have been able to hear about it and judge his credibility. The fact that a talismanic word was not uttered does not change the clear meaning of James Navarro's words – he implied the tape was(1) original and (2) newly-discovered.

Respondent argues that the jury would not have had a significantly different impression of Navarro's credibility even if the defense had been allowed to cross-examine him about the tape. (RB 92.) This misses the mark. Navarro was presented as a sympathetic witness. If the defense had been allowed to cross-examine him about tampering with the tape, his credibility would have been affected about this and other matters. Respondent argues that the court found Navarro's explanation reasonable and credible. (RB 92.) This argument fails, however, because the jury is the finder of fact, not the judge. (*Crawford v. Washington* (2004) 541 U.S. 36.) The credibility of the witnesses should be judged by the jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) In this case, the jury did not have the opportunity to hear Navarro's explanation, or even know that he had tampered with the tape. They were left with a highly erroneous and inflated assessment of the authenticity of the 'voice from the grave.'

C. The Error Was Not Harmless

According to respondent, Navarro was merely a minor player in the case. (RB 97.) Respondent minimizes Navarro's testimony, arguing that Navarro testified to only two first hand events of stalking. Respondent ignores the fact that Navarro testified that Connie had told him she was having trouble with appellant, she was terrified of him, and was thinking about getting a restraining order. Navarro testified that Connie asked him for an attorney to talk to, and she went to see him. (RT 1797.)

Respondent ignores that fact that Navarro testified that Connie told him she was going back home, that appellant had told her he would leave her alone. (RT 1790.) Moreover, respondent ignores that fact that Navarro testified that when he saw the body he said, he [appellant] killed them. I knew he [appellant] had killed them. (RT 1796.)

Respondent claims that it was only a minor point that Navarro was the only witness to testify that when he discovered the body of Connie Navarro, her face was covered with a pillowcase. (RB 98.) Respondent's argument that the prosecutor only "mentioned" this fact in closing is astonishing. (RB 98.)

Contrary to respondent's claim, the prosecutor did more than "mention" this fact. In closing, the prosecutor asked, "Why is there a pillow placed over the face of Connie Navarro as found by Mike Navarro the next

day at 3:15? The answer, the defendant can't stand to look at Miss Navarro, look at her face after he has killed her. You don't see that as far as Ms. Jory is concerned. You only see it as far as Connie Navarro is concerned. Why is that? Why is she placed in the cabinet? This is not a crime of financial gain. It is a crime of rage. If I can't have you, nobody can have you. I will not tolerate being rejected." (15 RT 2828.)

Later, the prosecutor argued, "It is obvious the killer couldn't stand what he'd done to the victim. He stuffed her in the closet and put a pillow over her face so he would not have to see her face. . . . Does that mean the person who does this killing knows Connie Navarro and has some kind of relationship with her? The response clearly should be yes." (15 RT 2878-2879.)

Respondent claims that James Navarro's testimony was cumulative. (RB 98.) This argument fails for several reasons. First, the testimony that he found a pillow case over Connie's face was unsupported by any other evidence. When the police arrived, the pillow case was not covering her face. So we have only the testimony of James Navarro to support the prosecutor's theory that the killer was acting in a rage and had a close personal relationship with Connie Navarro. Second, the tape had a unique impact on the jury. The jury was allowed to hear Connie's "voice from the

grave" talking about her need for a restraining order, although there was no proof, other than James Navarro's untested testimony, that the restraining order she desired was one against appellant.

Respondent claims that the defense was given free rein to cross-examine James Navarro on any topic other than the audio tape. (RB 98.) The fact that cross-examination was allowed on other subjects has no bearing on this issue and certainly does nothing to mitigate its effect. The tape had unique impact.

In closing argument the prosecutor argued "when Mr. Schaffer [defense counsel] makes an attack on Mike Navarro, it is clearly unwarranted. When Connie Navarro needed a safe haven, she went to Mike Navarro. In 1983, when she moved out of her condo, she went to Mike, to her ex-husband, and stayed there. So don't trash Mike Navarro. There's no reason to." (16 RT 3083.)

The jury did not know that Navarro had altered the evidence. The trial court shielded from attack Navarro's credibility and the integrity of the tape, even though Navarro clearly lied when he testified he had taken the tape from his answering machine in 1983.

Respondent finally argues that the evidence against appellant was overwhelming. Respondent cites the fact that appellant's fingerprints were

found at the scene and the fact that both Sabatino and his step-mother testified that he had confessed as strong evidence of guilt. Respondent ignores the fact that appellant lived in the house with the victim, so his fingerprints being in her house was not remarkable. Respondent ignores that fact that Sabatino was given a sentence reduction for his testimony, and the step-mother was impeached with the fact that she had never told the FBI about the confession, even though she had talked to them hundreds of times.

D. The Trial Court's Denial of the Request for a Continuance Violated Appellant's Right to Confront, Due Process, Right to Present a Defense, and Right to Effective Assistance of Counsel

In the opening brief, appellant argued that the trial court violated his rights by denying him a continuance to have the first and second tape tested for evidence of tampering. (AOB 122-131.)

Respondent claims that the argument must fail because the court ruled that the audio tape was an immaterial collateral matter. (RB 99.) On the contrary, the altered tape was admitted into evidence and played to the jury. On the tape, Connie Navarro's voice could be heard "from the grave" talking about getting a restraining order. James Navarro testified that he got the tape off his answering machine in 1982-3, and that Connie was talking about appellant, because she was terrified of appellant. This was very strong evidence against appellant.

Respondent argues that in considering whether to grant a continuance in the midst of trial, a trial judge must consider factors which include the burden on witnesses, jurors and the court. (RB 99.) In this case, however, the burden was entirely created by the prosecutor, who produced the tape via his witness at the 11th hour, only allowing the defense access to it during James Navarro's direct testimony, even though the prosecutor had possessed the first tape for a week.

In a footnote, respondent argues that the trial counsel did not fault the prosecutor for the discovery violation. (RB 95, fn. 31.) This is not relevant to the issue of whether or not appellant's rights to confront and right to a continuance to present a defense were violated. Whether the tape recording was intentionally or unintentionally withheld until the 11th hour, once the judge was apprised of the facts, the judge had a duty to grant a continuance.

The burden of a potential continuance arose not because the defense made an unreasonable request, but rather, because the prosecutor finally allowed the defense to examine the tape and discover that it had been tampered with, after which James Navarro changed his story.

As a result the jury was misled by Navarro's testimony as to the first tape, and the defense never had the opportunity to cross-examine him as to

either tape. To suggest that the court properly denied the request for a continuance because it would have been a burden is outrageous. Respondent ignores the fact that the defense was precluded from testing either tape for alterations in time for trial, by the actions of the prosecutor and the rulings of the judge.

Respondent claims that the record does not substantiate the point that preliminary testing showed that the tape had been altered. (RB 100.) Respondent argues that since there is no declaration from the expert in the record, the claim was not substantiated. (RB 100.) Again, respondent's argument is astonishing. After the expert made a preliminary finding that the tape was not the original, James Navarro changed his story and testified under oath that he had tampered with or altered the tape. Respondent's argument that all we have on this record is counsel's "self-serving" statement misses the point. The defense requested a continuance so that the experts could examine both tapes. After the prosecutor warned the judge how much time would be consumed, the judge rewarded the prosecutor and James Navarro by denying the defense motion. Any lack of record is a result of (1) D.A. misconduct, and (2) the erroneous rulings of the trial court. To charge the error to the defense (via lack of record) would violate due process.

Finally, respondent argues that there was no prejudice. (RB 100.) Respondent contends that nothing in the record indicates that further testing would have proven that Navarro altered the tapes. (RB 100.) This argument fails for the reasons above. First, Navarro admitted altering the tapes. Second, the defense cannot be faulted for failing to do further testing that the court declined to allow. The judge denied the continuance they needed, stating that the evidence was not material.

IV ADMISSION OF VICTIM'S HEARSAY STATEMENTS OF FEAR VIOLATED APPELLANT'S RIGHT TO CONFRONT ADVERSE EVIDENCE

In his opening brief appellant contended that his right to confrontation under the Sixth Amendment was violated when the trial court allowed admission of victim Connie Navarro's statements of her fear of appellant. (AOB 133-149.) Respondent argues that the statements were relevant and properly admitted under Evidence Code 1250 because Connie's state of mind was brought into issue by appellant. (RB 102.)

A. Relevant Proceedings

The relevant facts were set out in both the opening brief, Appellant's First Supplemental Brief, and Respondent's Brief.

B. Connie Navarro's Fear Was Not at Issue

Respondent begins by arguing that evidence of stalking was relevant.

(RB 110-112.) Respondent spends several pages citing cases to show that evidence of stalking is admissible. (RB 110-112.) Respondent argues that the evidence was admissible to show appellant's motive, intent or identity.

Respondent's cases, however, are inapposite and beside the point. The evidence of which appellant complained is not stalking evidence testified to by witnesses who observed defendant's behavior, but hearsay evidence of Connie Navarro's fear.

Respondent relies upon appellant's opening argument to defend his position that the testimony of fear was relevant. (RB 111.) As an initial matter, the critical time for determining the admissibility of a witness's statements is when such statements are sought to be admitted, not during argument. (*People v. Ainsworth, supra,* 45 Cal.3d at p. 1015.) The opening argument was made after the judge's ruling that the evidence could be admitted, and therefore, has no bearing on the admissibility of this hearsay evidence.

Past cases make it clear that an out-of-court statement is not made admissible simply because its proponent states a theory of admissibility not related to the truth of the matter asserted. As this court recently observed, "[a] hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The

trial court must also find that the nonhearsay purpose is relevant to an issue in dispute." (*People v. Armendariz, supra,* 37 Cal.3d at p. 585.) Similarly, where the evidence involves a victim's fear of defendant, courts have examined whether the victim's state of mind was truly in dispute and whether it was actually relevant to an issue in the case. (*People v. Ireland* (1969) 70 Cal.2d 522, 529- 532 (victim's statement " 'I know he's going to kill me' " was not admissible to show victim's state of mind or conduct preceding death where it was undisputed at trial that defendant killed her while she was lying on a couch and his defense went to his mental state); *People v. Arcega* (1982) 32 Cal.3d 504, 526-529 (victim's statement that defendant " 'was going to hit her, to beat her up' " was not admissible to show victim's state of mind or conduct preceding death where defendant admitted killing the victim while she was asleep and argued only lack of premeditation; defense raised no issue that the victim's conduct immediately preceding death in any way provoked or mitigated the homicide); *People v. Armendariz, supra*, 37 Cal.3d at pp. 584-587 (victim's statement, 17 months before the killing, indicating fear of the defendant was not admissible to show victim's state of mind on the night of the murder, where the defense identified a third person as the killer and raised no issue about the victim's attitude toward defendant or any issue that the killing was accidental or

justifiable); *People v. Ruiz* (1988) 44 Cal.3d 589, 607-610 (victims' statements of fear of defendant were not admissible to show their states of mind; victims 1 and 2 were murdered in their sleep and there was no issue as to their conduct prior to the killings; victim 3's statement did not support prosecution theory of faltering marriage as motive for killing); and *People v. Noguera* (1992) 4 Cal.4th 599, 621-622 (victim's statement of fear and hatred of defendant was not admissible to show victim's state of mind, where her conduct and state of mind were not relevant to any part of the People's case nor did the defense raise any issue of her state of mind or behavior before she was murdered, the entire defense being alibi); see also *People v Bunyard, supra*, 45 Cal.3d 1189; *People v. Thompson* (1988) 45 Cal.3d 86, 103-104; *People v. Green* (1980) 27 Cal.3d 1, 23.)

Respondent cites several cases where evidence of stalking was found admissible. (RB 111.) These cases differ from the case at bar in several ways. The key difference is that none of the evidence admitted in the cases cited by respondent was evidence of the victim's fear, or the victim's state of mind. Another difference is that in that in all of the cases cited by respondent, the evidence admitted was not hearsay evidence, but testimony of witnesses about what they directly observed. (*People v Nicolaus* (RB 111) (see part C).)

The cases relied upon by respondent have no bearing on the issue of the relevancy of evidence of Connie's fear or state of mind. (*People v Linkenauger* (1995) 32 Cal.App.4th 1603 (trial court admitted non-hearsay testimony to show state of mind of the defendant: that witnesses observed bruises on the wife's face, neck, and arms in three separate years, that defendant beat his wife and left her in a parking lot, that defendant accused a man of having an affair with his wife two or three weeks before the murder, and that on the night of the murder defendant stated he was going to "blow someone's head up."); *People v DeMoss* (1935) 4 Cal.2d 469 (non-hearsay evidence that the defendant beat his wife and mistreated his family admitted to rebut claim of accidental discharge of weapon); *People v Cartier* (1960) 54 Cal.2d 300 (non-hearsay evidence of prior quarrels admitted to show defendant's state of mind and motive to rebut defense of provocative act murder); *People v Zack* (1986) 184 Cal.App.3d 409 (non-hearsay evidence of a stormy two-year romantic relationship with the decedent, and several occasions when defendant physically assaulted her, and death threat by defendant admitted to show identity, intent, motive).)

In none of the cases above cited by respondent was the evidence in question (1) hearsay; (2) nor did it concern only the victim's fear; or (3) admitted purely to show the victim's state of mind.

Respondent cites only one case where the evidence in question was hearsay, yet purportedly admitted to show the victim's state of mind. (RB 111.) *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, is a pre-*Crawford* civil case and is inapplicable. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (*Crawford v. Washington, supra*, 541 U.S. at p. 38; U.S. Constitution, Amend. VI.) The Sixth Amendment right to confront does not apply in civil cases. Furthermore, the heightened standard of due process in a capital case context may weigh more heavily.

Respondent argues that Connie's state of mind was admissible to rebut appellant's claim that their relationship was not hostile, and that she was still considering getting back together with appellant on the day before the murder. (RB 115, citing RT 1204-1214, 1223.) The pages cited are taken from the defendant's opening argument, and, as we stated above, the opening argument was made after the judge's ruling that the evidence could be admitted, and therefore, has no bearing on admissibility.

Contrary to Respondent's position, the trial prosecutor argued and the court admitted the evidence of Connie's fear purportedly to show Connie's state of mind, that she was afraid of appellant, that she moved around, that she went to Laguna, that she stayed with her ex-husband, that

she wrote a letter to appellant telling him she was afraid of him. The trial court admitted the evidence to show Connie Navarro's state of mind – not appellant's – and that she was in fear of appellant and that she acted in conformity with her fear. (7 RT 1151-1156.)

Contrary to Respondent's argument, Connie Navarro's fear of appellant was not relevant. The prosecutor argued they wanted it admitted to show that Connie Navarro would not have voluntarily allowed appellant into her apartment that night. However, the defense never took the position that defendant was admitted into the apartment by her. His position was that he never entered the apartment that night, and in fact, that someone else committed the crime. (7 RT 1153-1155.) Appellant's trial attorney argued that if their position was that Connie had voluntarily admitted appellant into the apartment and the killing took place in self-defense or he became enraged when he found her with another person, and he went crazy and shot her, then evidence of her fear would be admissible to show that Connie would not voluntarily let him come in. (7 RT 1154.) The judge agreed that the prosecutor eventually might want to show that Connie would not admit appellant voluntarily. (7 RT 1155.) However, the judge went on to allow the evidence to show Connie's state of mind. (7 RT 1156.) Admission of evidence of fear prevented appellant from receiving a fair trial.

C. Connie's Statement of Fear Were Not Properly Admitted under Evidence Code 1250

Respondent argues that Connie's statements to her ex-husband and Marilyn Young that she was in fear of appellant were admissible as declarations regarding her state of mind pursuant to Evidence Code section 1250. (RB 112.) Respondent cites only one case in support of this proposition, *Rufo v. Simpson, supra,* 86 Cal.App.4th 573, but *Rufo* is inapplicable because it was a civil case, as addressed above.

The prosecutor sought admission of the statements of fear made by Connie Navarro, not to prove the actions of Connie Navarro, but to prove by inference the actions of the defendant. The statements were not properly admitted.

D. Appellant's Right to Confront Was Violated by Admission of Connie's Statements of Fear

1. The Statements Were Testimonial

Respondent argues that the statements were not testimonial (RB 116). Respondent cites a footnote from a single case to support this argument that the statements were not testimonial. In *People v Griffin* (2004) 33 Cal 4th 536, which was briefed before *Crawford*, a 12-year-old victim told her school friend that the defendant had been fondling her for some time and that she intended to confront him if he continued to do so.

This Court held that the statement was properly admitted as a state-of-mind exception to the hearsay rule, to show that the victim intended to confront the defendant. In a footnote, with no further analysis, this Court also noted that the statement was not testimonial.

The U.S. Supreme Court set forth three potential tests for determining whether a particular statement comes within the "core class of 'testimonial' statements": (1) "'ex parte in-court testimony or its functional equivalent-- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"; (2) " 'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions' "; and (3) " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Crawford*, *supra*, 541 U.S. at p.51.)

Several California cases have applied *Crawford*, and considered whether various statements are "testimonial." In *People v. Sisavath, supra,* 118 Cal.App.4th at p. 1402, petition for review denied September 15, 2004, the Fifth District held that a child sexual abuse victim's statement to a police

officer "was testimonial under Crawford." The *Sisavath* court further held that the child's statement to a trained interviewer at a county facility also was testimonial because it was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[Citation.] (Ibid., fn. omitted.) Underlying this conclusion were the following facts: "[The victim's] interview took place after a prosecution was initiated, was attended by the prosecutor and the prosecutor's investigator, and was conducted by a person trained in forensic interviewing." (*Id.* at p. 1403.)

In *People v. Cervantes, supra,* 118 Cal.App.4th 162, petition for review denied August 11, 2004, the issue was the admissibility of a codefendant's statement to his neighbor, a medical assistant who spoke to the codefendant about his obvious injuries. The neighbor reported the codefendant's admissions to the police, and those admissions were introduced at trial. The Court of Appeal held that the statement was not testimonial, noting that the codefendant "sought medical assistance from a friend of long standing who had come to visit his home" and made the statement "without any reasonable expectation that it would be used at a later trial." (*Id.* at p. 174.) The court noted that the statement was made to a friend of long standing during a friendly visit, the friend knew he was a

gang member, and he could expect her to be afraid to testify. (*Id.* at p. 174.) Thus, the defendant's statement in *Cervantes* was made in a very different context than the statements of Connie's fear in appellant's case. In the case at bar, it was reasonable to anticipate that Marilyn and Mike would testify at trial if Connie became unavailable.

In *People v Pirwani, supra,* 119 Cal App 4th 770, 774, a prosecution of a nursing official for stealing money from a dependent adult in a care facility, the victim made a videotaped statement to police concerning defendant's alleged involvement in her loss of the money. The statement was inadmissible because it violated the confrontation clause of Sixth Amendment; defendant had no opportunity to cross-examine victim; the statement was ex-parte, unsworn, and given to law enforcement agents; it was reasonable to anticipate its use at trial if victim became unavailable to testify, and it was knowingly given in response to structured police questioning.

In this case, Connie Navarro's statements, as related by Marilyn Young and Mike Navarro, were testimonial, and violated the right to confrontation.

2. The statements did not fall under a firmly rooted exception to the hearsay rule

Respondent argues that Connie Navarro's statements, as related by

Marilyn Young and James Navarro, fell under the firmly rooted exception to the hearsay rule, and thus can be admitted without any indicia of trustworthiness. (RB 117.)

On the contrary, the declarant's state of mind is not a firmly rooted exception to the hearsay rule. The "firmly rooted" exceptions to the hearsay rule include (1) statements by a coconspirator during and in furtherance of the conspiracy (*Bourjaily v. United States* (1987) 483 U.S. 171, 183-84) (2) excited utterances (*White v. Illinois* (1992) 502 U.S. 346, 356-357); and (3) statements made for purpose of obtaining medical treatment (*People v Cervantes*, *supra*, 118 Cal.App. 4th at pp. 174-175 fn. 4). Respondent admits that no California authority states that the state of mind exception to the hearsay rule is a firmly rooted exception. (RB 118.)

The only case respondent cites, *Terrovona v. Kincheloe* (9th Cir. 1988) 853 F.2d. 424, is not on point for three reasons. First, the events took place in Washington, which has different rules of evidence. Second, it was decided before *Crawford*. Finally, the hearsay evidence introduced was relevant to a disputed issue. In *Terronova*, Patton's girl friend's testimony showed that Patton intended to meet and to help Terrovona. This act is an issue in the case because it placed Terrovona at the murder scene.

Under an exception to the hearsay rule, if the performance of a

particular act by an individual is an issue in a case, hearsay can be admitted to show the individual's intention (state of mind) to perform the act. (*United States v. Pheaster* (9th Cir. 1976) 544 F.2d 353, 376; cert. denied (1977) 429 U.S. 1099.)

In the case at bar, Connie's fear of appellant was not relevant to prove any intent to act or, indeed, any disputed issue.

E. Prejudice

Respondent finally argues that any error was harmless. (RB 118.) Reversal is required unless the error is harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at pp. 24-26.)

Respondent argues that the testimony was cumulative. (RB 119.) Respondent argues that the jury heard evidence that appellant followed Connie, threatened men who were seeing her, handcuffed her son; thus, Respondent argues, the hearsay merely added information and details to evidence already in front of the jury.

However, a victim's extrajudicial expressions of fear are entirely different in their impact on jurors from the evidence cited above. The danger is that the jury would use hearsay evidence of the victim's fear to prove the defendant's state of mind. Prophetic expressions of fears are especially prejudicial because they misleadingly suggest that the victim and

knowledge of the defendant's intention to harm her, and that the defendant acted consistently with this state of mind. (*People v Armendariz*, *supra,* 37 Cal. 3d at p. 589.)

Respondent also argues that appellant's guilt was overwhelming. (RB 119.) Respondent cites appellant's fingerprints in the house where he lived, the fact that he had no alibi and the fact that he left the state as overwhelming evidence of guilt. (RB 119.)

The state can prove beyond a reasonable doubt that appellant had been living with Connie Navarro for several years. What the state cannot prove without the hearsay is that Connie Navarro was afraid of him. The neighbor, Mrs. Farjah, who knew appellant, saw a man leaving the scene shortly after the crime, could not identify the man as appellant. There was no physical evidence to link appellant to the murders, except his fingerprints, which would normally be found in the house where he lived for three years. Hairs found clutched in the bloody hand of victim Jory and hairs on the sweater of Connie Navarro did not match appellant's. The hearsay evidence of Connie Navarro's fear was strong evidence tending to link appellant to the crime.

Here, because the state's case was entirely circumstantial, the violation of the right to confrontation and due process took on critical

importance. This error was not harmless beyond a reasonable doubt. Reversal is required.

V. ADMISSION OF TESTIMONY OF CONNIE'S FEAR VIOLATED DUE PROCESS

In his opening brief appellant contended that the admission of hearsay evidence of Connie Navarro's fear of appellant was more prejudicial than probative, and violated appellant's right to due process and a fair trial. (AOB, 150- 154.) Respondent first argues that the defense waived objection by opening the door to such evidence; respondent then contends that appellant's argument is meritless because the evidence was properly admitted and because the proper exercise of Evidence Code section 352 does not result in a violation of the right to due process. (RB 122.)

Respondent's argument is unpersuasive. First, the evidence was not properly admitted (see Claim IV.) Secondly, a due process violation occurs when evidence admitted against a criminal defendant "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions." (*Dowling v. United States* (1990) 493 U.S.342, 352.) Evidence of statements of fear by the dead victim are inherently prejudicial, because there is a danger that the jury would use the evidence of the victim's mental processes to prove appellant's alleged state of mind.

Respondent next argues that the evidence of fear was cumulative, and thus not unduly prejudicial. (RB 121.) First, appellant did not admit, as respondent claims, that the evidence of fear was cumulative. (RB 122.) Appellant's statement was inartful, but hypothetical. (AOB 152.)

Respondent argues that the prosecution proved by other evidence that appellant had threatened Connie. (RB 121.) That is not precisely true. None of the examples cited by respondent was evidence of appellant threatening Connie. (Appellant's alleged stalking of Connie; pointing his finger at her as if he were shooting her; the evidence that he broke into her condo and handcuffed her son to the toilet; and that evidence that he threatened to break Connie's legs if he saw her with Hoefer again.) Only one of the above examples was a threat, and the threat was made to George Hoefer. (There was no evidence that Connie Navarro knew about the threat, in fact, appellant asked Hoefer not to tell Connie).

While it is true that non-hearsay evidence was admitted at trial that could lead to an inference that Connie wanted to break up with appellant, that evidence, where witnesses testified to what they observed, is entirely different from the hearsay evidence admitted here, which had the victim as its alleged source. James Navarro testified that Connie told him she was terrified of the defendant. James Navarro testified that Connie told him

appellant had kidnaped her at gunpoint.(RT 10 RT 1797; 11 RT 1849).

Young testified that Connie told Young she had her locks changed. Young testified that Connie told her that about a week before the murder, someone told Navarro that appellant had broken in through the patio. The lock had been sawed through and Navarro told Young she was terrified. (10 RT 1683-1691.) Young testified that Navarro told her appellant kidnaped Navarro about a month before the murder. Young said Navarro said he used a gun to make her get in the car and took her to his house and then to a motel, and made her spend the weekend with him. (10 RT 1996.) Young testified that Navarro discussed getting a restraining order against appellant. (10 RT 1698.) Young testified that Navarro told her that the Friday before the murder, Navarro did not want to go home, so she stayed at Young's house. Young testified that Navarro told her a friend said appellant was in a rage, so Young and Navarro went to Laguna for the weekend. When they got back, Navarro did not want to stay at home, so she spent a few nights at her ex-husband's house. Young testified that Navarro told her that she went home to pick up some clothes and appellant was hiding in the closet watching her. (RT 1700.)

Evidence of statements of fear by the victim in a homicide case has been condemned as inherently unreliable and highly prejudicial to the

defendant. (See *People v. Noguero*, *supra*, 4 Cal.4th at p. 621; *People v. Ruiz*, *supra*, 44 Cal.3d at p. 608.)

Respondent urges this court to use the harmless error test in *Watson* to reject the claim. Since a violation of the due process clause is a federal claim, the *Chapman* standard should be used. Under *Chapman,* this error requires reversal because the error is not harmless beyond a reasonable doubt.

VI. INTRODUCTION OF HEARSAY STATEMENT THAT APPELLANT CONFESSED TO NOW DECEASED FATHER VIOLATED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION AND HIS RIGHT TO DUE PROCESS

Appellant contended that the trial court violated his right to confrontation and due process by allowing the stepmother to testify that appellant's now deceased father Pat Riccardi told her that appellant admitted to his father that appellant killed Navarro and Jory. Appellant argued that his father's statement was merely his father's opinion, and that it was hearsay. Appellant contended that the statement did not fit within any hearsay rule exception and it lacked independent indicia of reliability. (AOB 155-172.) In his Supplemental Brief, appellant contended that the statement was testimonial under *Crawford v. Washington, supra,* 541 U.S. 36, and thus violated his right to confrontation. (Supp. AOB 8-9.)

Respondent argues that both levels of hearsay fit within firmly rooted exceptions, and that the statement was not testimonial within the meaning of *Crawford.* (RB 123.)

A. The Double Hearsay Statement was Inadmissible

Here, there were two levels of hearsay, and each would have to meet a hearsay exception to survive a hearsay objection. (Evidence Code 1201.) Because neither level of hearsay fit into a recognized exception, the statement was inadmissible.

1. Appellant's Alleged Statement to His Father was not an admission pursuant to Evidence Code 1220

Appellant argued that the statement was not an admission because the testimony at trial was "Jackie killed two girls," and "he shot them." (RT 2099.) These statements were opinions of the father, and not admissions of appellant If the testimony had been, "Jackie told Pat that he killed two girls" that would have been an admission. Even if Pat Riccardi made the statements alleged, he may well have been drawing his own faulty conclusion to something appellant said.

2. Pat's alleged Statement to Rosemary that Appellant Killed the Two Women was not a Spontaneous Statement Pursuant to Evidence Code 1240

Appellant argued that Pat's statement did not qualify as a

spontaneous statement, because minutes had elapsed between the phone call and Pat's statement, and the statement was in response to questioning by Rosemary Riccardi. (AOB 163-164.) Respondent argues that these were not dispositive. (RB 131.) Appellant disagrees. Time lapse and questioning deprived the statement of the spontaneity required to be admissible under Evidence Code section 1240.

B. The Hearsay Evidence Violated Appellant's Right to Confrontation

1. The Hearsay Evidence Admitted below Was "Testimonial."

In *Crawford v. Washington, supra,* 541 U.S. 36, the U.S. Supreme Court held that admission of "testimonial" hearsay statements against a criminal defendant violates the Confrontation Clause of the Sixth Amendment if the declarant is unavailable to testify and the defendant had no previous opportunity to cross-examine.

The *Crawford* court did not define testimonial, but it did provide three formulations of this core class of testimonial statements:

1) "Ex parte in court testimony or its functional equivalent–this is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

2) "extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;

3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Crawford v. Washington*, *supra,* 541 U.S. at p. 52.)

Appellant argued that Pat's statement to Rosemary was testimonial because "an objective observer would reasonably foresee that this statement would be used in a prosecution." (*People v. Sisavath, supra,* 118 Cal.App.4th 1396, petition for review denied September 15, 2004; Supp AOB 8.) The *Sisavath* court used the third category of testimonial statements set forth in *Crawford.*

Respondent fails to address the test set out in *Sisavath* and *Crawford* directly. Instead he has crafted his own test, without any citation to authority. He argues that none of the declarants reasonably believed that the statement would be used at trial. (RB 134.)

The test in *Sisavath*, however, taken from *Crawford*, was not whether the declarants believed the statement would be used at trial, but whether an "objective" observer would reasonable foresee that this statement would be used in a prosecution.

Here an objective observer would reasonably foresee that the statement would be used in a prosecution. Mario Ragonesi testified that appellant and Rosemary did not get along. (RT 2265.) Rosemary had cats everywhere in the house and John's father Pat had trouble breathing (RT 2405.) The odor of cats was unbearable and John was concerned about his dad's health. RT 2265.. There would be arguments over it. (RT 2266) Rosemary testified that she thought appellant should turn himself in to authorities, but that Pat adamantly disagreed. (RT 2107) She testified that this disagreement drove a terrible wedge into their marriage. She also blamed appellant's "coldness." (RT 2107-2108.)

Respondent argues that the statement resembles the "casual remark[s] to an acquaintance" that do not raise Confrontation Clause considerations. (*People v Griffin, supra,* 33 Cal 4th at p. 579 fn.19) (RB 134). This argument is specious. The statement "My son killed two girls" could not under any circumstances be labeled as a casual remark.

Respondent cites a New York case which found a 911 call not to be testimonial partially because it was a spontaneous statement made without reflection. (RB 135.)

Review has been granted on several cases dealing with this issue.

However, in the present case, there was no tape recording of the

statement to assure its veracity. The declarant was not witnessing the crime and the statement was reported many years later.

None of the cases relied upon by respondent support his implication that the statement here was not testimonial.

2. If the Hearsay Was Not "Testimonial" it Was Still Inadmissible

Next respondent argues that if a statement is not testimonial, the Confrontation Clause may not apply at all, leaving them to be regulated by "hearsay law." (RB 135.) Respondent argues, in the alternative, that if *Ohio v Roberts* (1980) 448 U.S. 56, still governs non-testimonial statements, the admission of the double hearsay statement does not violate the constitution because both levels of hearsay fit within firmly rooted exceptions to the hearsay rule. (RB 135.)

The *Crawford* Court did not decide whether nontestimonial hearsay is now altogether outside the scope of the confrontation clause or whether such hearsay continues to be subject to the *Roberts* rule. (*Crawford*, *supra*, 541 U.S. at pp. 61, 68-69.) Some recent decisions have applied the *Roberts* reliability test to the admission of nontestimonial hearsay. (See *Horton v. Allen* (1st. Cir.2004) 370 F.3d 75, 83; *U.S. v. Manfre* (8th Cir.2004) 368 F.3d 832, 838, fn. 1.)

Appellant submits that under either test the statement was still

inadmissible. Appellant agrees that *Crawford* sets a bright line of admissibility not present in *Roberts* – confrontation or a well-established hearsay exception. Appellant does not accept the "testimonial" question since the *Crawford* court itself observed that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." (*Crawford, supra,* 541 U.S. at p. 51.) The *Crawford* decision then mentions the Sir W. Raleigh case, in which the perceived evil was allowing in hearsay (which may have been shown reliable under *Roberts* as against interest) when the declarant could have been otherwise presented for cross examination AND that non-testimonial statements raise issues under the confrontation clause. Furthermore, the court gave, right after the warning that the confrontation clause cannot be limited by the laws of evidence, an example of the "off hand" remark which while not offending the right of confrontation would not make it past the hearsay rules – which the court had previously indicated are well-established rules.

3. Reliability

Appellant argued that respondent's report of the statement was not reliable, because it was clear from the testimony at the 402 hearing that

Rosemary Riccardi, the declarant, was biased against appellant, and was shown to be lying at the 402 hearing when she testified that she had told the FBI on many occasions that appellant confessed, yet the prosecutor's witness, FBI Agent Gary Steger testified he had reviewed prior reports involving Rosemary Riccardi. Of the 27 contacts Rosemary Riccardi made with the FBI, ***none of them*** indicated that she had told the agents that appellant admitted killing two women. (RT 2293-2295.)

Respondent argues that Rosemary Riccardi's lack of credibility is not a factor in determining if the statement is reliable. (RB 137.) However, Respondent's authority for this notion, *People v Cudjo* (1993) 6 Cal. 4th 585, does not stand for such a proposition. In *Cudjo*, the defense produced hearsay evidence that the defendant's brother had confessed to the killing to his cellmate. The brother was unavailable by virtue of his right to not testify, so the cellmate was called to testify. The defense claimed that the statements were admissible hearsay as declarations against one's penal interest. The trial court ruled them inadmissible because they were not sufficiently reliable, but the judge improperly characterized the testimony as "incredible," thereby infringing on the role of the jury. The *Cudjo* court concluded that, although doubts about the credibility of the in-court witness should normally be left for the jury's resolution, the court should exclude

statements in those rare instances involving the "demonstrable falsity" of the witness. (*Id.* at p. 650.)

The case at bar is one of those instances of demonstrable falsity because from the beginning Rosemary Riccardi had been shown to be a liar who was biased against the appellant. Consequently admission of this sort of evidence distorts the truthfinding process, especially so in a capital case.

Respondent argues that Rosemary Riccardi's statement or [cannot decipher] was admissible because it fit within the firmly rooted exception per *Ohio v. Roberts* and *People v. Gallego*. (RB 137.) Neither case, however, supports respondent's argument, because Rosemary Riccardi bore demonstrably false witness against appellant, ***according to the F.B.I.'s own records.*** Serious constitutional error occurs when a witness as demonstrably unreliable and biased as Rosemary Riccardi is allowed to provide double-hearsay testimony to the jury.

C. The Error was Not Harmless Beyond a Reasonable Doubt

Respondent next argues that the error was harmless beyond a reasonable doubt. (RB 138.) Respondent argues that evidence against appellant was strong. Respondent notes that appellant's burglary partner testified that appellant admitted to the murders, and that appellant's fingerprints were found around the linen closet where Connie Navarro's

body was discovered. Respondent claims that appellant exhibited a pattern of breaking into her apartment and stalking, and that this was compelling evidence of his motive and ability to enter her apartment and kill her. Appellant was seen with a gun shortly before the murder. Appellant had no support for his alibi, and his flight immediately after the murder was committed was compelling evidence of guilt.

Respondent also argued that Rosemary's testimony that appellant admitted the crimes was merely duplicative of Sabatino's testimony that appellant admitted guilt (RB 139.) These arguments are unpersuasive.

First, unlike the defendant's family or his father, Sammy Sabatino was a convicted felon, who testified pursuant to a bargain, to get his sentence reduced. He testified that appellant told him he hid the gun on the roof of his apartment in Santa Monica, but when the police searched, they found no gun.

Second, the fact that appellant's fingerprints were found in Navarro's apartment was no surprise as he lived there with her for 2 years preceding the murders.

Third, the stalking evidence was ambiguous, and finally, the facts showing that appellant was seen with a gun, had no alibi, and took flight after the murder are circumstantial, but not compelling, evidence of guilt.

The hearsay statement that his father said he admitted his guilt was very powerful evidence, and if believed, was enough to convict standing alone. A confession of guilt is the most damning of evidence, and a statement by a father, who loved his son, that the son confessed, is the most damaging evidence in this case. Therefore it was not harmless beyond a reasonable doubt.

VII. APPELLANT WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY AND DUE PROCESS DUE TO PUBLICITY FROM THE O.J. SIMPSON TRIAL

In his opening brief appellant contended that the media frenzy surrounding the O.J. Simpson trial caused the dissemination of prejudicial opinions about cases in which domestic abuse resulted in homicide, and denied him his right to an impartial jury. Appellant asserted that the court's failure to grant him a continuance constituted reversible error because it denied him his right to due process. (AOB 173-180.)

Respondent argues that appellant's claim has no merit because he has failed to show that his jury was affected by the Simpson coverage. (RB 140.) Respondent's argument seems to disregard evidence that appellant advanced showing that the media coverage in fact denied him a fair trial, through affidavits of prominent criminal attorneys who practiced in the area, and through hundreds of news articles that were disseminated in a

media frenzy.

A. The Trial Judge Abused His Discretion By Denying Appellant's Motion for Continuance

Where a defendant seeks a continuance, the primary question is whether the court finds "in the interest of justice" that a trial held at the earliest possible time "is not appropriate." (Pen. Code. § 1050a.) The court should grant a continuance only for "good cause." (Pen. Code § 1050e.) This language permits the court broad discretion to grant (or deny) a continuance. (*People v. Frye* (1998) 18 Cal.4th 894, 1012-1013.) This states good policy because the people in the proper county are only temporarily deprived of their opportunity to hear the case. Defendant is expected, however, to prepare for trial with "due diligence," and not create delay through an improper purpose. In considering the motion, the court must consider whether "substantial justice will be accomplished or defeated" by its ruling. As a result, when a continuance is denied, review is for abuse of discretion. (*People v. Jenkins* (2000) 22 Cal. 4th 900, 1037.)

The record shows that defendant was prepared and had no improper purpose, but rather, sought the continuance because the Simpson media explosion came as a complete shock, and prejudiced the jury pool in a specific way that only a lapse of time could cure. Although not dispositive of the issue, the factors that respondent concludes weigh in favor of

upholding the trial court's ruling, on examination, actually favor appellant or are neutral. In light of all the circumstances, the trial court therefore did not accomplish substantial justice, and consequently abused its discretion by denying appellant's motion.

B. The Factors Respondent Analyzed Do Not Support the Trial Court's Ruling But Instead Support Reversal

Respondent concedes that the seriousness of the charges weighed toward granting a continuance. Respondent concludes, however, that the other four factors used by courts to evaluate the effects of the adverse publicity in change of venue cases weighed "in favor of the trial court's ruling." (RB 144.) Of these four, two factors, the "status of the defendant in the community" and the "popularity of the victim in the community," need not concern the court much. Appellant claims that opinion and commentary about the actors and crimes alleged in the Simpson case bombarded appellant's jurors with improper influence. Consequently the status and popularity factors weigh neither for nor against appellant.

Respondent claims that the 'size of the community' factor "weighs heavily" against appellant because in the usual case, increased population means more opportunities to find unbiased jurors. The Simpson case, however, was not usual. Moreover "the size of a county by itself is not determinative." (*People v. Proctor* (1992) 4 Cal.4th 499, 525.) Rather,

"the critical factor is whether it can be shown that the size of the population is large enough to neutralize or dilute the impact of adverse publicity." (*Ibid.*) Here, the size of Los Angeles County could not neutralize or dilute the overwhelming coverage of the Simpson case. But the key is that appellant was asking for time, not a different county. Only the passage of time would have helped appellant locate unbiased jurors, because despite the enduring Simpson coverage, many people lost interest after several months and stopped paying attention to it.

Respondent wrongly asserts that the "nature and extent of the publicity" factor weighs against appellant. Respondent states that because the Simpson coverage concerned not appellant's case, but the criminal proceedings of another, it consequently did not prejudice appellant's jury. (RB 141-142.) Respondent cites *People v. Hisquierdo, supra,* 45 Cal.App. 3d 397. In that case, however, the defendant complained of prejudice from a series of ***local*** newspaper stories about Hispanic prison gangs; the defendant was an imprisoned Hispanic defendant, accused of stabbing a fellow inmate. The prejudice was far greater in appellant's case because of the immense media saturation.

Moreover, Respondent's argument wrongly focuses on whether the Simpson coverage managed to identify appellant and thereby create hostility

toward him. Thus respondent points out that Simpson's case featured "race and celebrity" and appellant's cases did not. (RB 142.) Respondent concludes that any similarities were "minor" and not prejudicial, because these parallels were not "unique" to either case. (RB 142.) Respondent fails to appreciate that the error was not created by unique facts, but rather by the incredible juxtaposition of timing and facts of the two cases; it was these unique circumstances that necessitated a continuance. Any juror on appellant's case would have immediately noticed the similarities and connected the two cases. Thereafter, all commentary heard by the jurors about the Simpson case that concerned domestic violence, stalking, flight, alleged threats to kill, and attempted suicide would have improperly influenced the jurors.

In the case at bar, the jurors were bombarded daily with information and opinions about stalking, domestic abuse, and murder. Appellant had no opportunity to cross-examine on any of this evidence.

In cases where a juror receives and uses information about a party or the case that was not part of the evidence received at trial the reviewing court presumes prejudice from the error; such receipt may establish juror bias. (*People v. Marshall* (1990) 50 Cal.3d 907, 949-951; *In re Carpenter* (1995) 9 Cal.4th 634, 650-655.) "The requirement that a jury's verdict

'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . . [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473, citations and fn. omitted.) As the U.S. Supreme Court explained: "Due process means a jury capable and willing to decide the case solely on the evidence before it." (*Smith v. Phillips* (1982) 455 U.S. 209, 217, italics added, quoted in *In re Carpenter, supra*, 9 Cal.4th at p. 648; accord, *Dyer v. Calderon* (9th Cir. 1997) 113 F.3d 927, 935; *Hughes v. Borg* (9th Cir. 1990) 898 F.2d 695, 700.)

Appellant urges the court to recognize a valid presumption of prejudice. Such presumptions are rare, but they can occur, for example, when a juror inadvertently is exposed to out-of-court information about the case or the parties. (*People v. Nesler* (1997) 16 Cal.4th 561, 578-579; *see also Rideau v. Louisiana* (1963) 373 U.S. 723, 727 (extraordinary event of taped confession broadcast to about half the people in a Parish created a venue so tainted that no reference to voir dire transcript necessary to find

prejudice).) Appellant must show, and does, that the trial court's failure to grant appellant a continuance for good cause was "not appropriate" in the "interest of justice" because the jurors (unlike the sequestered Simpson jury) could not escape the media blizzard that inextricably linked information about O.J. Simpson's case to appellant's case.

C. Appellant Complied with the Continuance Statute

Respondent finally argues that appellant should be foreclosed from appealing the continuance ruling because he chose not to question his jurors during voir dire about the Simpson case. Appellant points out that under Pen Code § 1050b, he complied with the statutory requirements in moving for a continuance. Appellant filed and served written notice to all parties, together with "affidavits and declarations detailing specific facts showing that a continuance is necessary." *Ibid.* Respondent argues that the prominent lawyers whose affidavits support appellant did little more than state conclusory opinions. (RB 143.) This characterization is wrong. These lawyers participated in the media frenzy and as a result testified to first-hand knowledge, as well as offering opinions.

D. Conclusion

Appellant's conviction should be reversed.

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VIII. THE CUMULATIVE EFFECT OF GUILT PHASE ERRORS REQUIRES REVERSAL

In his opening brief, appellant John Riccardi argued that the cumulative effect of the guilt phase errors deprived him of a fair trial. (AOB 181-182.) Respondent claims that no errors were committed, or, that any errors were harmless. (RB 145.) Respondent fails to address the cumulative impact that many errors have on a jury, including errors that may, standing alone, be judged harmless.

As detailed in the Opening Brief, appellant's guilt phase trial was tainted by the following errors: (1) the trial court's failure to grant *Batson* motions; (2) the trial court's permitting the prosecution to introduce taped evidence of a witness and a detective stating their belief in appellant's guilt; (3) the trial court's limiting cross-examination of James Navarro; (4) the court's permitting the admission of hearsay statements; (5) the court's erroneous admission of evidence of victim's fear of appellant; (6) the trial court's erroneous admission of a hearsay statement made to appellant's now deceased father; and (7) the trial court's failure to grant a continuance due to the O.J. Simpson pre-trial publicity. Virtually all of appellant's assignments of error involve violations of the federal Constitution, and therefore — assuming that this Court does not conclude that they are subject to per se reversal — call for review under the *Chapman* standard.

(*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Capital cases in particular require a careful examination of the cumulative prejudice created by multiple errors. (*Lockett v. Ohio* (1978) 438 US 586, 605). The U.S. Supreme Court mandates that the utmost care must be taken to ensure the reliability of capital cases:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment, in any capital case.' Although we have acknowledged that there can be no perfect procedure for deciding which cases governmental authority should be used to impose death, we have also made it clear that such decisions cannot be predicated on a mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'

(*Johnson v. Mississippi* (1988) 486 U.S. 578, 585.)

Errors that, considered alone, would not require reversal may produce a synergy when considered together that creates an unfair trial. "Multiple errors, even if harmless individually, may entitle a petitioner to habeas relief if their cumulative effect prejudiced the defendant." (*Ceja v. Stewart* (9th Cir. 1996) 97 F.3d 1246, 1254; see also *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Tucker* (9th Cir. 1983) 716 F.2d 576, 595; *Kelly v. Stone* (9th Cir. 1975) 514 F.2d 18, 19.)

The death judgment rendered here must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases. (See *People v. Hayes, supra*, 52 Cal.3d at p. 644 (court weighs prejudice of guilt phase instructional error against prejudice in penalty phase).) Appellant has shown numerous errors which at the very least combine to mandate reversal.

IX THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE BURGLARY SPECIAL CIRCUMSTANCE

Introduction

The next three issues relate to improper instructions concerning special circumstances. The jury was instructed on a burglary special circumstance, although any burglary was only incidental to the murder. The jury was instructed on a non-existent special circumstance of murder in the commission of a theft. And finally the jury was instructed that they could find two multiple murder circumstances, where only one was applicable to the facts. The result of the combination of all these errors was total confusion. When a jury is instructed improperly on three special circumstances, with one of them having an invalid definition, a reviewing court cannot discount the pernicious influence those errors had in arriving at a death sentence. (*Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054, 1066-1067.) It cannot be said beyond a reasonable doubt that the failure to

correctly instruct did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at p. 24.) And it cannot be said that the error "had no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 341.)

Moreover, in *Ring v. Arizona* (2002) 527 U.S. 584, the U.S. Supreme Court held that factual findings supporting death eligibility must be made by a unanimous jury beyond a reasonable doubt. Therefore, this Court should reverse the convictions and death sentence.

A. Relevant Facts

Appellant was charged with two counts of murder, with a special circumstance of multiple murder, and a special circumstance of murder committed while engaged in the commission of a burglary. (CT 72.) The prosecutor told the judge that he would not argue felony murder, but would argue murder during the course of a burglary as a special circumstance only. Later he informed the judge that his special circumstance theory was based on the fact that appellant entered the condominium with an intent to assault Connie Navarro. (CT 72; RB 147.) The trial court instructed the jury that it could find appellant guilty of burglary based on "assault with a deadly weapon" or "theft." (CT 733, 736.) The jury found true the special circumstance of burglary-murder. In his Opening Brief, appellant argued

that the evidence did not support this finding because the burglary charged was incidental to the murder. (AOB 183-187.)

B. Any Burglary was Incidental to the Murders

In the opening brief, appellant argued that a murder is not committed during a felony for purposes of a special circumstance unless it is committed to carry out or advance the commission of the felony. Appellant argued that there was insufficient evidence of the burglary special circumstance. (*People v Green, supra,* 27 Cal.3d 1, 61.)

In *Green*, this Court concluded that the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. The Legislature declared that such a distinction could be drawn, inter alia, when the defendant committed a "willful, deliberate and premeditated" murder "during the commission" of a robbery or other listed felony. (Former § 190.2, subd. (c)(3).) The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape.

That goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder. To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court plurality in *Gregg v. Georgia* (1976) (428 U.S. 153,189.)

More recently, in *People v. Seaton* (2001) 26 Cal.4th 598, this Court reaffirmed this established rule that burglary-murder special circumstance does not apply to burglary committed for the sole purpose of assaulting or killing the homicide victim. (*Id.* at p. 646.)

Respondent has failed to address appellant's argument, but instead addresses the "merger doctrine" articulated in *People v. Ireland, supra,* 70 Cal.2d 522, and subsequent cases, that precludes a jury from returning a verdict of felony murder when the murder occurred "during a burglary committed with the intent to assault the victim with a deadly weapon." (RB 148.) Since appellant was not convicted of a felony murder, *Ireland* does not apply to our case. Respondent's argument does reveal, however, how

hopelessly confusing the jury instructions in the instant case were, and how confused the jurors must have been.

C. The Error Was Not Harmless

Respondent argues that if this Court strikes the burglary special circumstance the error was harmless because the second special circumstance found, multiple first-degree murders, made appellant death-eligible anyway. Respondent argues that finding one special circumstance invalid upon review does not require reversal where another valid special circumstance exists to support the death penalty. (RB 151.) Respondent acknowledges that his burden of showing harmless error is a heavy one. Under *People v. Prieto* (2003) 30 Cal. 4th 226, 256, such errors must be "harmless beyond a reasonable doubt" or appellant is entitled to relief. (RB 155.) (*See Chapman v. California, supra,* 386 U.S. 18.) Both the law and the facts show that this standard cannot be met.

Respondent relies on *People v. Sanders, supra,* 51 Cal. 3d 471. In *Sanders,* this Court held that although "it was error to instruct the jury that it might convict of first degree murder if it found the killing occurred during a burglary in which defendant's intent was to commit an assault," the error was harmless because the jury found true two other special circumstances. (*Id.* at p. 509-510.) This holding had not been disturbed at the time

respondent submitted his brief in 2003. That is no longer the case. On federal habeas review, the Ninth Circuit Court of Appeals reversed *People v. Sanders* on this issue on the issue of harmless error and remanded with instructions for the State to grant a new penalty trial, or to vacate the death sentence and impose a lesser sentence consistent with law. (*Sanders v. Woodford*, supra, 373 F.3d at p. 1070.)

Compared to the case at bar, the evidence of guilt in Sanders was overwhelming. Sanders was convicted of murdering a drug dealer's girlfriend at the drug dealer's apartment. The drug dealer lived and testified as an eye-witness to the crime. Yet, the Ninth Circuit held that error was not harmless.

The reasoning in *Sanders* is an important development to the case at bar. The court rejected the State's argument, which respondent relied on in his brief, that a finding of burglary-murder special circumstances is harmless because other special circumstances were found true. The court relied on the U.S. Supreme Court's "clear rules for the procedures appellate courts must follow when an aggravating factor has been held invalid." (*Id.* at p. 1059; quoting *Sochor v. Florida* (1992) 504 U.S. 527, 532.) In weighing states – like California – the Eighth Amendment is violated when

the jury "weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." (*Id.*)

The Ninth Circuit noted that "under California law, 'weighing' . . . connotes a mental balancing process, but ***certainly not one which calls for a mere mechanical counting of factors*** . . . or the arbitrary assignment of 'weights' to any of them. (*Id.* at p. 1066; quoting *People v. Brown* (1985) 40 Cal.3d 512, 542 (reversed on other grounds); emphasis added.) The court stated that "we cannot know as an appellate court what individual weight a juror assigned to a finding of an aggravating special circumstance." (*Sanders v. Woodford, supra*, 373 F.3d at p. 1066.) The same holds true here. Consequently this Court should consider the facts and decide whether of not the weight the jury assigned to the burglary special circumstance was harmless beyond a reasonable doubt.

The facts support appellant's contention that the burglary special circumstance was not harmless. Respondent states that, in the prosecutor's theory of the case, appellant entered Connie Navarro's apartment with no intent to kill her. (RB 147.) Logically, if he did not go there to kill Connie Navarro, as the prosecutor said, then appellant did not go there intending to kill Susan Jory, either, because he did not know she would accompany Navarro home. Consequently, if any "premeditation and deliberation"

existed, it would have been the sort that arose immediately before the killings took place. Respondent argues that the finding of burglary played no part in the jury's determination of first degree murder, but this is sheer conjecture. If the jury believed the prosecutor's own theory that appellant went to the condo to commit an assault, it would have been far easier for the jury to conclude that subsequent murders were premeditated. If the jury had been properly instructed, however, and did ***not*** take burglary and intent-to-assault into consideration, then premeditation is ***not*** easy to reach. If appellant went to Connie Navarro's condo not to commit an assault, but rather, to talk to her, to plead for her to reconcile with him, and then the murders subsequently took place, the jury might naturally have concluded that appellant lost his temper and killed in a heat of passion. This is at least as likely a scenario once the burglary based on assault is removed from consideration, ***as it should have been***. Indeed this very scenario of appellant having an argument, getting "carried away" and then killing was told to the jury by the prosecutor. (RB 147.) If the jury had properly been instructed, they might have found appellant guilty of two second-degree murders, or even voluntary manslaughter (assuming they still concluded that he was there). As a result respondent cannot credibly argue that the improper finding of the burglary-murder special circumstance was harmless

beyond a reasonable doubt. It is reasonably doubtful whether the jury would have still found the occurrence of two ***first-degree*** murders. Reasonable doubt exists as to whether the jury, properly instructed, would have made that same determination.

The jurors had learned during the guilt phase that appellant had been a burglar. They may have been more likely to find the burglary special circumstance true given that contamination.

Respondent's other argument for harmless error is equally flawed. Respondent asserts that because the prosecutor did not argue for a felony murder conviction, but only argued the existence of the burglary felony in order to establish a special circumstance, that the burglary finding was harmless. Respondent reaches this conclusion by arguing that (1) the jurors based their guilt verdict "solely" on premeditated murder, not felony murder (RB 151); and (2) the jury's consideration of an invalid special circumstance is harmless where "arguments of counsel" focus on the weighing of aggravating and mitigating circumstances and "do not heavily rely on or emphasize the invalid special circumstances." (RB 152.) Neither argument withstands scrutiny.

First, as just stated above, the jurors may well have ***not*** based their verdict "solely" on premeditated murder because it is not clear beyond a

reasonable doubt that their consideration of a "burglary based on an assault" did not contribute to their finding on premeditation and deliberation.[3] There was no evidence submitted at trial as to how the murder took place.

Second, a constitutional error cannot be cured in the manner that respondent describes – by the prosecutor's trial strategy concerning which arguments he made and which ones he omitted. Arguments by counsel are weighted much less heavily by jurors that instructions given by the judge. (See *Boyde v. California*, 494 U.S. 370, 384-85.) Jurors are presumed "almost invariably" to follow the instructions they are given by the judge. (*Richardson v. Marsh* (1987) 481 U.S. 200, 206.) Here the prosecutor discussed several theories of culpability in close proximity, and it seems very likely that at least one juror rendered a true finding while thoroughly confused about the basis for their finding. The jurors were likely confused when told to consider the existence of burglary as a circumstance, yet told also by the prosecutor that he wasn't going to pursue that theory.

Moreover, "when a court gives the jury instructions that allow it to convict a defendant on an impermissible legal theory, as well as a theory that meets constitutional requirements, the unconstitutionality of any of the theories requires that the conviction be set aside." (*Boyde v. California,*

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3 The verdict forms where the jury chose first degree murder do not mention the words deliberate or premeditated (RT 763-771.)

supra, 494 U.S. at 379-80.) Because the jury instructions were so confusing, this Court cannot say beyond a reasonable doubt that the jury did not convict appellant on the impermissible legal theory.

The error plainly occurred, and the jury took into account a special circumstance that was not true. The extent to which the jury weighed this special circumstance during both the guilt and penalty phases of trial cannot be determined precisely, but the facts show that the jury deliberated for four days in the penalty phase after hearing evidence for two hours. (RT 3216-3222.) Surely it cannot be said that the error was harmless beyond a reasonable doubt. Consequently ***both*** the guilt verdict and the death verdict must be reversed.

X THE DEATH PENALTY MUST BE SET ASIDE BECAUSE THE COURT ERRONEOUSLY INSTRUCTED ON NON-EXISTENT SPECIAL CIRCUMSTANCE OF MURDER IN THE COMMISSION OF A THEFT

Respondent concedes that the trial court erred by instructing the jury on the non-existent special circumstance of murder in the commission of a theft. (RB 155; AOB 188-193.) Respondent claims that the error was harmless. (RB 155.)

Respondent never addresses the merits of appellant's argument concerning prejudice. Penal Code section 190.3 instructs the jury to "take into account the existence of any special circumstances found to be true."

The court instructed the jury to consider murder in the commission of a theft. (CT 736.) The court did not, however, instruct the jury as to the elements of theft, thereby causing confusion and uncertainty. Respondent would have the court believe that no harm came from this because the jury found that the multiple murder special circumstance was true. (RB 156.) As stated in Argument IX, *supra*, neither respondent nor the record can show that the erroneous instruction of a burglary special circumstance was not harmless beyond a reasonable doubt. Moreover, respondent's argument ignores the role that such erroneous instructions play in determining the level of culpability for purposes of penalty verdict. Respondent states that consideration of the murder during theft situation "did not affect the jury's imposition of the death penalty." (RB 156.) Just as jurors might well have believed that a burglary with an "intent to assault" made premeditated murder more likely, so might the jury have considered appellant more death eligible and more culpable because they erroneously considered the notion that he intended to or did steal items from the apartment. Without being told the elements of theft, the jurors were left simply to decide for themselves whether or not appellant intended to steal. Because the jury knew that appellant was a career burglar, it is quite possible that at least one juror assumed that on the night of the murders

appellant intended to commit a theft – regardless of the evidence. Thus, an invalid factor may have tipped the scales toward resulting in a death verdict. Given the closeness and length of deliberations there exists a strong likelihood that jurors weighed evidence and followed instructions (even the erroneous ones) closely.

Respondent asserts that because the prosecutor admitted to the jury that there was no theft and because the verdict forms referred to burglary and not theft, that the jury was "clearly informed" that murder during the commission of a theft was not a theory of the case. (RB 155-156.) This speculation vastly overestimates the ability of all twelve jurors to understand legal distinctions that are not properly explained to them. Moreover, respondent's exposition only makes the case stronger; the jury in fact heard conflicting instructions that were never reconciled. Respondent failed to address the effect of the error on the reliability of the penalty verdict. Under the Eighth Amendment, a capital sentencing process must be "highly reliable" (*Mills v. Maryland* (1988) 486 U.S. 367) and the failure to follow basic state procedures when imposing the death penalty violates federal due process under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Accordingly, reversal is required.

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XI THE DEATH PENALTY MUST BE SET ASIDE BECAUSE THE COURT ERRONEOUSLY ALLOWED TWO ALLEGATIONS OF MULTIPLE MURDER SPECIAL CIRCUMSTANCES TO BE CONSIDERED AS AGGRAVATING FACTORS.

Appellant argued that the trial court erred by instructing on two multiple murder special circumstances. (AOB 195.) Respondent concedes the error, but argues it is harmless. (RB 157.)

Appellant acknowledges that this Court has held this error to be harmless in other cases. However, in this case, the combination of the three instructional errors led to confusion. Given the "special need for reliability" in the sentencing phase of a capital trial (*Johnson v. Mississippi, supra*, 486 U.S. at p. 584), the Fifth and Eighth Amendments likewise require reliability with regard to the critical findings in a capital case. Appellant submits that the court's failure to instruct correctly violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishments, and his right to equal protection under the Fourteenth Amendment.

XII PROSECUTOR MISCONDUCT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL

In his Opening Brief, appellant argued that prosecutor misconduct in the penalty phase trial denied appellant his right to due process and a fair

trial (AOB 199-207.)

A. Relevant Facts

There were two instances of prosecutor misconduct that took place during the cross-examination of defense witness Henry Kaney in the penalty phase. In the first instance, the prosecutor acted as his own sworn witness insinuating that Kaney had told the prosecutor on the phone that he thought appellant was guilty. In the second instance the prosecutor asked Kaney if he thought appellant was merciful when he killed the victims. The following is the portion of the penalty phase at issue:

> [D.A. BARSHOP]: Mr. Kaney, I have talked to you on the telephone?
> [KANEY]: Yes.
> [D.A. BARSHOP] And, in fact, I asked you, I think, do you believe that Appellant killed Connie Navarro and Sue Jory. I asked you that question on the telephone.
> [KANEY] : Yes.
> [D.A. BARSHOP]: And you said that —
> [DEFENSE COUNSEL JONES]: ***Objection, Your Honor. It's irrelevant.***
> [THE COURT]: Objection ***sustained.***
> [D.A. BARSHOP]: Well, doesn't that have an effect on your ability to decide whether or not what the appropriate punishment is—
> [KANEY]: No.
> [D.A. BARSHOP]: — what your mental set it as to whether or not he did the crime?
> [KANEY]: No.
> [D.A. BARSHOP]: Doesn't make a difference to you?

> [KANEY]: It always makes a difference, yet that is not in my hands right now. In my hands right now is to share with the court that I love this man and that if it was up to me, I would be merciful. But I don't believe it's up to me.
> [DA BARSHOP]: Do you believe he was merciful when he killed Sue Jory and Connie Navarro?
> [DEFENSE COUNSEL JONES]: Your honor, I object. Its argumentative, its inappropriate, ***and misconduct***.
> [THE COURT]: ***Objection overruled*** on the latter grounds but sustained on other grounds.

(16 RT 3162.)

B. Prosecutor Acting as Witness

Respondent argues that any error in the first instance was waived because the defense only objected on relevancy grounds, and not on the grounds that the prosecutor was acting as his own witness. (RB 160.) With respect to those instances in which respondent asserts that a claim is barred because an objection was made inartfully or unclearly or incompletely, respondent's position has been squarely rejected by this Court. "An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented." (*People* v. *Scott* (1978) 21 Cal.3d 284, 290.) On an appeal from a judgment imposing the penalty of death a technical insufficiency in the form of an objection will be disregarded and

the entire record will be examined to determine if a miscarriage of justice resulted. (*People* v. *Bob* (1946) 29 Cal.2d 321, 328.) The *Bob* rule is even more relevant today, in light of the recognition by the United States Supreme Court of the fact that death is 'profoundly different from all other penalties' [citation] and its repeated holdings that a capital defendant is therefore entitled to enhanced procedural protections against arbitrary infliction of the supreme penalty. Indeed, this court recently cited *Bob* in support of its promise that in capital cases it will review trial errors even when defense counsel has failed to complain of them on appeal. (*People* v. *Easley* (1983) 34 Cal.3d 858, 864.)" (38 Cal.3d at p. 729, fn. 3.) Other courts have also recognized that the seriousness of capital cases trumps the form of an objection: "This is a capital case--failure to say the 'magic words' should not result in the affirmance of a death sentence which might not otherwise have been imposed." (*United States* v. *McCullah* (10th Cir. 1996) 87 F.3d 1136, 1139.)

C. Prosecutor Engaged in Misconduct by asking the Witness if he thought Appellant was Merciful when he Killed the Victims

Appellant argued that the prosecutor committed misconduct by asking Kaney if he thought appellant was merciful when he killed the victims, because the intent was to inflame the passions of the jury. (AOB

203-204.) Respondent argues that since the trial court expressly rejected the claim that the statement constituted misconduct, an abuse of discretion standard should be employed. (RB 164.) However, prosecutor misconduct like this is a violation of due process, and thus *Chapman* must be the standard.

Respondent relies on *People v Poggi* (1988) 45 Cal.3d 306, for the proposition that it is appropriate for a prosecutor to argue that in light of the defendant's crimes, the jury should not show sympathy. (RB 163.) Arguing to the jury that they should not show sympathy is entirely different from the prosecutor asking appellant's best friend if he thought appellant showed mercy on the victims, which was designed to elicit an emotional response from the jury.

Respondent seeks to render the prosecutor's "questions" to Reverend Kaney innocent by glossing over their clear implications within the sequence of testimony. The prosecutor's questions, in fact, were the classic form of insinuation, similar to the unsupported presupposition in the question, "Have you stopped beating your wife?" In appellant's case, the sequence of questions by the prosecutor (RT 1632) implies that Kaney had previously expressed a belief in defendant's guilt to the prosecutor; otherwise, the sequence suggests, there would be no reason to refer to

telephone conversation between the two. As defense counsel pointed out, this conversation (and its content) was not relevant to any proper matter in dispute. The prosecutor's "questions" were clearly directed at fostering an implication that Kaney believed (and had expressed that belief) that defendant had killed the victims. Yet, the prosecutor implied, Kaney was hiding this belief from jurors.

Respondent engages in multilayered speculation ("appellant believes that Kaney believed" appellant was guilty (RB 161)) in a convoluted attempt to avoid the clear indications that the prosecutor's questions to Kaney were asked in bad faith. However, appellant need not establish that the prosecutor's actions were in bad faith in order to establish prejudicial error from them. "The defendant generally need not show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of his or her conduct, because the prosecutor's conduct is evaluated in accordance with an objective standard." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333.)

D. Appellant was Prejudiced

Finally, respondent argues that appellant has failed to show prejudice, and that any error was harmless beyond a reasonable doubt. (RB 164.)

Respondent has ignored the fact that this was a close case in the penalty phase, one in which an hour and a half of testimony caused ***four days*** of deliberations. The prosecutor presented only two witnesses, the two children of the victims. The defense presented only two witnesses, Brooks and Kaney, who were old friends of appellant. On the second day of deliberations, the jury sent out a note, asking if it took a unanimous vote to vote for life without parole. (CT 774, RT 3217.) They deliberated the rest of that day, and two more days before reaching its verdict. (RT 3222.)

Respondent argues that it appears from the transcript that Kaney believed appellant was innocent. (RB 164.) That interpretation is illogical. If Kaney had told the prosecutor on the telephone that Kaney thought appellant was innocent, the prosecutor would have never asked the question. A jury can rely upon ***residual doubt*** to vote against death. This experienced and cunning prosecutor would never have intentionally placed any evidence of residual doubt before the jury.

This exchange clearly shows the prosecutor insinuating that Kaney told him on the telephone that he thought appellant was guilty. The implication that even appellant's closest friend did not believe in his innocence, but was hiding it from the jury, was extremely prejudicial. Respondent argues that the second instance, where the prosecutor asked

Kaney whether he thought appellant was merciful when he killed the victims, was harmless. (RT 164.)

The length of the penalty phase deliberations and the note the jury sent out demonstrate how close this case was in the penalty phase, and as a result the errors committed by the trial court cannot be considered harmless beyond a reasonable doubt. Appellant was denied his federal rights to due process and an Eighth Amendment reliable penalty determination. The penalty phase must be reversed. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 710.)

XIII. THE PENALTY PHASE VICTIM IMPACT EVIDENCE VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL

In his opening brief appellant contended that his constitutional right to a fair trial during the penalty phase was violated because the prosecution introduced virtually nothing other than extremely emotional testimony given by the surviving children of the murder victims. (AOB 208-213.) Such testimony precluded the jury from discharging their duty in a rational manner as required by law, and violated appellant's rights under the Fifth, Six, Eighth, and Fourteenth Amendments.

A. Respondent's Waiver Argument Should Not Prevent the Court from Hearing Appellant's Meritorious Claim Now

Respondent argues that appellant's claim is waived because his trial

counsel failed to object. (RB 167.) Appellant did not waive this argument. A waiver is the intentional relinquishment of a known right. (*People v. Carter* (1967) 66 Cal.2d 666, 669-670, quoting *Johnson* v. *Zerbst* (1938) 304 U.S. 458, 464.) Failure to address the merits of claims for this reason is inconsistent with another line of authority from this Court. In *People* v. *Stanworth* (1969) 71 Cal.2d 820, 833, this Court said that in every capital case "subdivision (b) of section 1239 imposes a duty upon this court 'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.'" Carrying out that duty, the Court in *People* v. *Easley*, *supra,* 34 Cal.3d at pp. 863-864, reversed a judgment of death upon grounds raised for the first time in an amicus curiae brief in support of a petition for rehearing following the filing of an opinion by this Court. *A fortiori*, the Court's duty of review on automatic appeal extends to consideration of the merits of issues presented by the defendant/appellant in his opening brief in this Court. *Stanworth* is plainly based on the same concern about the public interest in the reliability of judgments of death which motivates the U.S. Supreme Court's Eighth Amendment jurisprudence.

The cases that respondent cites on victim-impact do not address the ex post facto issue raised by appellant. (*People v. Hines* (1997) 15 Cal. 4th

997, 1047 (waiver recognized where trial counsel, during guilt phase, failed to object to what was described as "victim impact" evidence; namely, prosecutor's remark that victim's 10-year-old daughter, "perhaps fortunately," was not home when defendant allegedly killed mother and sister); *People v. Sanders* (1995) 11 Cal. 4th 475, 550-551 (failure to object at trial to prosecutor's statements playing on jurors' fear of crime); *People v. Montiel* (1993) 5 Cal. 4th 877, 934 (appellate review waived by failure to object to prosecutor's statements "imploring" the jury to return a verdict for death not only for the victim but also for "his children and family").) The *Montiel* court discussed the changing law regarding victim impact evidence, but only in terms of the impact constituting a "circumstance of the crime." (*Id.* at 934-935.) Nor do respondent's other two cases concern an ex post facto issue. (*People v. Johnson* (1992) 3 Cal. 4th 1183, 1245 (failure to object bars review, but on the merits, prosecutor's statements did not allow victim's family members to characterize or give an opinion on the crime); *People v. Gurule* (2002) 28 Cal. 4th 557, 610 (defendant's failure to timely object waived his right to appeal a claim that the prosecutor argued his case to the jury rather than summarized it).)

In the cases cited above, the waivers did not pertain to matters concerning the constitutional prohibition against ex post facto application of

hew laws. Moreover, ***the reviewing court in each case chose to hear the issues*** and decide them on their merits. Consequently appellant's claim that the trial court erred in allowing the victim-impact statements to dominate the sentencing hearing should be heard.

B. Victim Impact Evidence Generally Admissible but Only If Relevant

Respondent claims that victim impact evidence should not be treated differently from "other relevant evidence." (RB 169-170.) Appellant agrees to the extent that such relevance has been defined as that which helps the jury to find its facts. Irrelevant information or inflammatory rhetoric, however, which "diverts the jury's attention from its proper role or invites an irrational, purely subjective response," should be curtailed. (*People v. Edwards* (1991) 54 Cal. 3d 787, 836 ("*Edwards*").) Juries must base their death penalty decisions on reason, not emotion. (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) A decision based on a jury's ***inflamed emotions*** violates due process under the Fourteenth Amendment.

C. The Type of Victim Impact Evidence Admitted in this Case Does Violate ex Post Facto Principles Because the Rules of Evidence at the Time of the Offenses Barred the Admission of That Particular Type of Victim Impact Evidence.

Respondent claims that ex post facto principles do not apply because California law allowed victim impact testimony "at the time of appellant's

trial and offense." (RB 171.) Respondent is wrong. At the time of the offense, in 1983, what respondent calls "victim impact" evidence was categorically different from the evidence in this case.

In this case victim impact testimony refers to the pain and suffering felt by the surviving children of the crime victims Susan Jory and Connie Navarro. This type of victim impact evidence has been admissible in California only since *Payne v. Tennessee* (1991) 501 U.S. 808, and *People v. Edwards, supra,* 54 Cal.3d 787. Respondent claims, however, that after *People v. Haskett* (1982) 30 Cal. 3d 841("*Haskett*"), this court "approved of victim impact evidence, although usually in the context of the actual murder victim's suffering." (RB 171.) By saying "usually in the context of. . ." respondent shows awareness that "victim impact evidence" does not describe just one single type of testimony. Indeed, ***four distinct types of victim impact evidence exist***: (1) evidence of the effect of the crime on the victim; (2) evidence of the victim's personal characteristics; (3) evidence of the emotional impact of the crime on the victim's family and community; and (4) opinion evidence about the crime and the criminal held by family members. (*Payne v. Tennessee*, *supra,* 501 U.S. at pp. 832-833 (J. O'Connor, concurring); *People v. Marks* (2003) 31 Cal.4th 197, 235-236; *People v. Edwards*, *supra,* 54 Cal.3d at p. 853 (J. Mosk, dissenting)

(classifying primary types).) At the time of appellant's offense ***in 1983, California only allowed the first type*** of victim impact evidence, ***the effect of the crime on the victim***.

The cases respondent relies on show this. For example, the *Haskett* court ruled that the "victim's viewpoint" during the commission of the crime constituted a relevant consideration. (*Haskett, supra*, 30 Cal. 3d at p. 863. Similarly, in *People v. Heishman* (1988) 45 Cal. 3d 147, which respondent also relies upon (RB 171), this court held that the prosecutor could discuss inferences that he reasonably made based on the evidence showing the impact of the crimes (of rape) on the rape victims themselves. (*Id.* at p. 195.) Both *Haskett* and *Heishman* show that at the time appellant committed his offense, the "victim" in "victim impact evidence" only meant the immediate crime victim, and not the victim's surviving family or friends.

Haskett deserves close analysis because respondent relies heavily and repeatedly on it to show that California law admitted victim impact evidence prior to appellant's 1983 trial. (RB 171-173; 176-177.) Moreover, *Haskett*'s "victim impact" ruling has also been mischaracterized in dicta by this court in the influential decision *People v. Edwards, supra,* 54 Cal.3d 787.

In *Haskett*, the assailant attacked Mrs. Rose, the mother of two young boys, after he had put the children in her bedroom closet. The assailant then raped, choked, kicked and repeatedly stabbed Mrs. Rose, and left her for dead, motionless on the floor, covered with a bedspread. The assailant then coaxed the two boys out from the closet and killed them. Mrs. Rose survived, and testified at trial about these events. (*Haskett, supra,* 30 Cal.3d at p. 848.) At trial, the prosecutor invited the jurors "to put themselves in the shoes of Mrs. Rose and imagine suffering the *acts inflicted on her.*" (*Id.* at p. 863, emphasis added.) *Id.* at p. 863.

The *Haskett* court did not broaden the existing rule. The court observed that during the penalty phase, the jury's decision required a "moral assessment" of the facts, and it determined that assessment of the crime "from the victim's viewpoint would appear germane to the task of sentencing." (*Id.* at pp. 863-864.) Respondent relies on this guidance[4] to argue that "victim impact evidence was admissible" in California at the time appellant committed his crimes. (RB 171.) However, respondent cannot point to *Haskett* or any case prior to that time where the court admitted the type of victim impact testimony in the case at bar – graphic and extensive

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3 The court reversed the penalty verdict on other grounds on appeal. However, it discussed the victim impact issue "for the guidance" of the trial court on remand. *Haskett, supra,* 30 Cal. 3d at 861.

testimony given by family members of a crime victim, regarding their feelings of pain and loss. Respondent's only support consists of dicta in *Edwards*:

> Although the mother in *People v. Haskett* [citation] was both a victim of noncapital crimes and a relative of the murder victims, nothing in that opinion suggests the jury could consider her suffering only as a direct victim and not also as a relative of the murder victims.

(*People v. Edwards, supra,* 54 Cal.3d at p. 834.) The *Edwards* court is correct only to the extent that *Haskett* did not affirmatively preclude the jury from considering Mrs. Rose's suffering ***as the relative*** of her murdered boys. But neither did the *Edwards* court state a rule allowing such evidence. Indeed, neither party in *Haskett* considered admissible the suffering of the victim's relatives – such evidence was clearly barred. *Haskett*'s prosecutor made no mention of Mrs. Rose's suffering ***as a mother***. Instead, the prosecutor specifically invited the jurors to consider the suffering she experienced from the "acts inflicted ***on her***." Consequently the *Edwards* opinion contains this mistake, in dicta, which had no bearing on its own decision but has caused respondent in today's case to build a legal theory on sand. *Haskett* only authorized "victim impact" evidence that was directly experienced by the crime victim.

As a result, respondent's reliance on *People v. Howard* (1992) 1 Cal. 4th 1132, also cannot withstand scrutiny. The *Howard* court, less certain of the reliability of the *Edwards* interpretation of *Haskett*, stated that the rules established in *Payne* and *Edwards* "apparently prevailed" in California in 1983. (*Howard, supra,* 1 Cal.4th at p. 1190.) The *Howard* opinion, however, relied on the same text in *Edwards* that mischaracterized *Haskett*. (*Ibid.*)

Respondent next asserts that the holdings in *Payne* and *Edwards*, which do allow the type of victim impact evidence where the family of the crime victim testifies about their feelings of pain and loss, are "fully retroactive" under *People v. Catlin* (2001) 26 Cal.4th 81, 175. (RB 172.) Closer analysis reveals that respondent has distorted this court's account of what changes qualify for "fully retroactive" application.

The *Catlin* holding refers to the U.S. Supreme Court's decision that "justice demands retroactive application" of the rule prohibiting discriminatory use of peremptory challenges decided in *Batson v. Kentucky, supra,* 476 U.S. 79, to "all cases, state and federal, pending on direct review or not yet final." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 327-328.) The *Griffith* opinion stated its holding in neutral terms: "We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied

retroactively to all cases, state or federal, pending on direct review or not yet final." (*Id.* at p. 328.) But the holding specifically meant to benefit defendants and burden prosecutors, not vice-versa, in order to comport with established ex post facto constitutional principles. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-354.) In contrast, the rule at issue here burdened appellant and benefitted the prosecution. Thus, Catlin does not support respondent's view.

California recognizes that due process will not permit a fully retroactive rule of criminal procedure that applies to a defendant, unless that new rule "neither expands criminal liability nor enhances punishment for conduct previously committed." (*People v. Birks* (1998) 19 Cal.4th 108, 136; *see Bouie v. City of Columbia, supra,* 378 U.S. at pp. 352-354.) Respondent argues that the admission of David Navarro's and Christianne Jory's testimony did not enhance appellant's punishment, because appellant was subject to the death penalty whether their victim impact evidence was admitted or not. This misses the point that punishment is an actual event, not a mere potentiality. The rule in *Birks* states that the new rule must not enhance "punishment," not *potential* punishment. Moreover, the decision as to punishment relies on weighing factors, and victim impact evidence puts a thumb on the scale. In this case, virtually all the evidence presented by the

prosecution during the penalty phase consisted of Christianne's and David's testimony about how the crime affected them personally. Because a jury may be presumed to base its decision on the evidence presented, the court must rule that the victim impact evidence did enhance appellant's punishment, because without it, there would not have been sufficient evidence upon which the jury could find that aggravating evidence outweighed mitigating evidence, as is ***required by Pen. Code 190.3*** in order to impose the death penalty. Consequently the victim impact evidence did "enhance" appellant's punishment, implicating ex post facto principles; this retroactive use of victim impact evidence violated appellant's due process rights under the U.S. Constitution's Fourteenth Amendment.

D. Rogers V. Tennessee Does Not Apply Because the Change in the Law since Appellant's Offense Was Unexpected and Indefensible.

Respondent argues that even if the law had changed since appellant's offense, the ruling in *Rogers v. Tennessee* precludes ex post facto application. In *Rogers,* the U.S. Supreme Court interpreted the Ex Post Facto Clauses in the constitutions of both the U.S. and the State of Tennessee to govern and restrict only legislative acts, not judicial rulings. (*Rogers v. Tennessee* (2001) 532 U.S. 451, 456.) At the same time, however, the Court ruled that judicial rulings may be unconstitutional based

on ex post facto principles inherent in due process concepts of fair notice. (*Id.* at p. 456-457; *Marks v. United States* (1977) 430 U.S. 188, 191 (principle that "persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty").) The *Rogers* opinion holds that a court may change a law or rule without violating due process or ex post facto principles if the change is not "unexpected and indefensible." (*Rogers, supra,* 532 U.S. at p. 462 (quoting *Bouie v. City of Columbia, supra,* 378 U.S. at p. 354).) Respondent argues that the *Haskett* decision signaled the Court's willingness to "allow victim impact evidence, not exclude it." (RB 173.) Thus, respondent concludes, the change in law was expected and defensible and "did not implicate ex post facto principles." (RB 173.) This argument fails because *Haskett* did not signal a willingness to accept the distinct sort of victim impact evidence at issue in appellant's case.

As demonstrated above, at the time of appellant's offense, the only "victim impact" evidence California courts allowed concerned evidence the impact of the crime had on the actual victim, prior to his or her death. Consequently defendant had no fair warning that the trial court would admit evidence of the impact on others in the penalty phase of a capital case.

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E. Respondent Wrongly Concludes That the Change in the Victim Impact Rule of Evidence Did Not Harm Appellant.

Respondent parses the "fourth category of laws" that may violate ex post facto principles, and wrongly concludes that because the change in law did not result in appellant's conviction, no constitutional violation occurred. (RB 174.) The fourth category refers to a law that "alters the legal rules of evidence," so that different testimony is received "in order to convict the offender." (*Carmell v. Texas* (2000) 529 U.S. 513, 522; quoting *Calder v. Bull* (1798) 3 U.S. 386, 390.) Appellant does not suggest, of course, that evidence received in the penalty phase somehow influenced the guilt phase conviction. However, the mere fact that a penalty phase verdict does not result in a "conviction" does not mean ex post facto principles are categorically barred. Such a reading would ignore the totality of the ex post facto principles and the due process purpose they serve.

Here, the evidence contributed to the jury's decision to affirmatively impose the death penalty, rather than sentence appellant to life without possibility of parole. Appellant asserts that, in the context of a penalty phase, a verdict for imposing the death penalty is the functional equivalent of a "conviction" as it is described in *Carmell*. Courts may properly find functional equivalents to avoid a ruling based on excessively formal

semantics. (*People v. Betts* (2005) 34 Cal.4th 1039, 1054 ("A fact that increases the maximum permissible punishment for a crime is the functional equivalent of an element of the crime, regardless whether that fact is defined as an element by state law or as a sentencing factor," quoting *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531; *People v. Ochoa* (2001) 26 Cal.4th 398 (Arizona's sentencing scheme is in part the "functional equivalent" to California's). Death-penalty proceedings may specifically use functional equivalents. The U.S. Supreme Court states that enumerated aggravating factors (such as California's enumerated special circumstances) "operate as the functional equivalent of an element of a greater offense." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 494 n.19.) This court should find that "verdict" operates as the functional equivalent of a "conviction" in its ex post facto analysis and rule that the change in law did in fact harm appellant because it led to the imposition against him of the death penalty instead of life imprisonment. This error requires the court now to reverse the verdict of death.

F. The Penalty Trial Violated Appellant's Due Process Right to a Fundamentally Fair Proceeding Because Virtually All of the Aggravating Evidence Heard by the Jury Consisted of Victim Impact Evidence of the Sort That Caused the Jury to Base its Decision on Emotion Rather than Reason.

Respondent characterizes the jury's proper role during the penalty phase as one which "simply put" decides "between a sentence of death and life without the possibility of parole." (RB 177.) This is only correct if the jury bases its decision on reason, and not emotion. (*Gardner v. Florida, supra,* 430 U.S. at p. 358.) Respondent claims that *Edwards* "did hold that 'emotional' evidence was allowable." (RB 176.) This grossly misrepresents what the *Edwards* court stated, which actually said that "the jury must face its obligation soberly and rationally," and that to prevent the jury from getting "the impression that emotion may reign over reason," there are "limits on emotional evidence and argument." (*People v. Edwards, supra,* 54 Cal.3d at p. 836.)

Similarly, respondent claims that "the United States Supreme Court has stated in *Payne* [that] victim impact evidence is not unfair in any way." (RB 178.) Respondent does not cite where this appears in *Payne,* and for good reason, because it does not. The Supreme Court held in *Payne* that the Eight Amendment erects "no per se bar" to the consideration of victim impact evidence. However, victim impact evidence, or a prosecutor's remark about it, under *Payne,* does violate the Fifth, Sixth, Eighth, and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury. (*Payne v.*

Tennessee, supra, 501 U.S. at p. 824-825; *see also id.* at p. 836 (J. Souter, concurring).) This court similarly concluded that there are "limits on emotional evidence and argument . . . [and] the trial court must strike a careful balance between the probative and prejudicial" in order to curtail "purely subjective" responses. (*People v. Edwards, supra,* 54 Cal.3d at p. 836.) Consequently ***Payne is binding as a limitation against victim impact evidence, not as a license for it***, and reviewing courts must exercise vigilance toward such evidence during a sentencing proceeding to ensure that the trial is not "fundamentally unfair" under the due process clause of the Fourteenth Amendment. (*Payne v. Tennessee, supra,* 501 U.S. at 831 (J. O'Connor, concurring).)

In *Payne* the victim impact evidence consisted of witness testimony that was "brief" and remarks by the prosecutor that "Charisse and Lacie were more than just lifeless bodies on a videotape," [but] were "unique human beings." He added that Charisse would never again sing a lullaby to her son and that Lacie would never attend a high school prom." (*Id.* at p. 832.) In contrast, in the case at bar the witnesses each spoke at length, with great passion, and virtually all of the evidence presented by the prosecutor during the sentencing phase consisted of this inflammatory testimony, so that its probative value was substantially outweighed by its prejudice.

Respondent argues that the prosecution may show the "full moral scope" of appellant's crime. (RB 177.) This does not, however, grant a license to dominate the penalty phase testimony with evidence and argument that goes well beyond the informative function and batters the jury with emotionally unending appeals, which may cause it to decide penalty based on emotion and not reason, as occurred here.

Finally respondent suggests that a jury is not improperly influenced by emotion unless its death sentence is based on "race, religion, wealth, social position, or class." (RB 178.) Appellant agrees that such bases are improper, but this list is not all inclusive; there are other ways a jury might act improperly. The test is whether the jury based its decision on wrongfully-induced emotion, rather than reason. The jury must find "that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." *People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1191. The jury did not make this finding rationally in appellant's case, thereby violating appellant's due process right to a fair trial.

G. *Arizona v. Ring* Mandates That the Jury must Find the Existence of the Aggravating Factors Beyond a Reasonable Doubt.

Respondent acknowledges that under *Ring v. Arizona, supra,* 536

U.S. 584, the sentencer in an Arizona death penalty case must find at least one aggravating factor true beyond a reasonable doubt to comport with the Sixth Amendment's jury trial guarantee. (RB 182.) Yet respondent claims that the capital sentencing scheme in California requires only that "each juror believe the circumstances in aggravation substantially outweigh those in mitigation," and that there is no requirement that the whole jury must find the aggravating factors beyond a reasonable doubt. Respondent's position is contrary to the Supremacy Clause. States may afford individuals more, but not less protection, than that provided by the US Constitution. (U.S. Const. Article VI.; *Cooper v. California* (1967) 386 U.S. 58, 62.)

Appellant acknowledges this Court's decision in *People v. Snow* (2003) 30 Cal.4th 43, 126 fn 14, which holds that death is no more than the prescribed statutory maximum for the offense, so that the penalty phase can never effect an increase in the punishment that would require the court to observe the Constitutional authority in *Ring* and *Apprendi v. New Jersey, supra,* 530 U.S. 466. Appellant urges the court to revisit its decision because the state law sanctioning the death penalty does not provide for its automatic imposition. The decision in *Snow* would be Constitutional only if the death penalty were automatic, and the penalty phase only operated to potentially ***reduce*** the punishment to life without parole. Because Pen.

Code section 190.3 specifically requires that "aggravating circumstances substantially outweigh" those in mitigation ***before*** death may be imposed as a penalty, it is clear that the default punishment – the one prescribed by statute – is life without parole. As a result, in order to impose death, the jury must find the aggravating circumstances true beyond a reasonable doubt. In this case, there is no showing that it did so untainted by the improper influence of the emotion-inducing victim impact evidence. Consequently the court must set aside appellant's death sentence.

H. Admission of the Victim Impact Evidence in this Case Certainly Prejudiced the Defendant

Respondent asserts that any error was harmless, because the victim impact evidence took up only "eight pages" in the reporter's transcript. (RB 184.) Respondent misleads this court by arguing the testimony lasted "only eight pages." Prejudice arose because virtually 100% of the prosecutor's penalty phase evidence consisted of unending, emotional and inflammatory victim impact statements which created hostility toward appellant. (RT 3136-3145.) The entire penalty phase took less than one and one-half hours to try (RT 3133-3174), but the jury then deliberated for four days. On the second day, they sent out a note asking whether any one or more dissenting votes automatically set a sentence of life imprisonment without chance of parole, or whether the life imprisonment sentence had to be unanimous.

After receiving the judge's initialed response, they continued to deliberate the rest of the day, and were sent home. It was not until two days later that the jury finally reached a verdict. This lengthy deliberation after such a short trial indicates at least some of the jury were teetering on the fence. In such circumstances any errors by the court are magnified.

During the penalty phase of a capital case, the court may admit victim impact evidence "as a circumstance of the crime," provided the evidence does not so influence the juror's emotions that it elicits an "irrational or emotional response untethered to the facts of the case." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) This court states clearly that "victim impact evidence does not include characterizations or opinions about the crime [or] the defendant . . . by the victims' family members or friends." (*Ibid.*) This court in *Pollock* reviewed testimony by the victim's family and friends that the victim had taught Bible study classes to them for many years. The court ruled that "such evidence could be relevant to demonstrate the direct effect of defendant's crime on persons close to the victim." (*Id.* at p. 1181.) *Pollock* is on point in this case.

Neither Christianne Jory's testimony that she locked herself in her room for four years (RT 3138-3139), nor David Navarro's testimony that he lost out on two "wonderful" relationships because of his "inability to

commit" constitute evidence that demonstrates a "direct effect" of the crime upon them. (RT 3141.) None of this evidence presented during the penalty phase was "tethered" to the crime within the meaning of *Pollock*. The jury nevertheless was led to infer that this psychological harm was caused only by appellant's crime; the prosecutor relied on this evidence heavily. These errors unduly prejudiced appellant.

Finally, in claiming that no prejudice occurred, respondent ignores the closeness of the decision in the penalty phase. The four days of deliberation demonstrated that some number of jurors were leaning toward a life sentence instead of the death penalty. In such circumstances this court must find that the unduly prejudicial victim impact testimony harmed appellant and rendered his penalty trial fundamentally unfair, and his penalty determination unreliable. Consequently this court must reverse Appellant's death sentence.

XIV. TRIAL COURT DENIED APPELLANT HIS RIGHT TO DUE PROCESS, FUNDAMENTAL FAIRNESS AND A RELIABLE DETERMINATION IN THE PENALTY VERDICT WHEN IT FAILED TO PROPERLY RESPOND TO THE JUROR NOTE

In the opening brief, appellant argued that the court's failure to properly answer the juror note denied him his right to due process, fundamental fairness and his right to a reliable determination in the penalty

verdict, in violation of the US Constitution, Amend VI, VIII, and XIV. (AOB 229-237.)

A. Facts

The relevant facts were set out in both the appellant's opening brief and respondent's brief.

B. The Court's Answer Was Not Clear

Respondent argues that the court's answers to the jury question were correct. (RB 188.) The answers, however, were not adequate to ensure that the jury was "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427, quoting *Gregg v. Georgia*, (1976) 428 U.S. 153, 189 [plur. opn.].) Because the defense had argued that one vote would avoid the death penalty, the question from the jury was not surprising. The judge's answer was erroneous, it was inaccurate, it failed to answer the question, and finally, it tended to cast doubt on defense counsel's credibility.

Jurors have long been known to speculate whether a hung jury might require a retrial of the guilt phase as well, or otherwise result in the release of a defendant back into society. If the jurors' most thoroughly shared sentencing goal is to ensure that the defendant is not released back into society, then a failure to answer a jury's direct question on the

consequences of a hung jury has all too much tendency to influence pro-LWOP jurors to switch over to death verdicts to avoid any possibility that a hung jury could result in release.

Here, the jury was confused as to whether a single vote could mandate an outcome. They asked the court for clarification, and were given an evasive and incorrect answer. The judge answered "no" to the question: "does any one or more dissenting vote automatically set a sentence of life imprisonment without chance of parole." The judge answered "yes" to the question "does the life imprisonment sentence have [sic] the vote of the 12 jurors?"

These answers misled the jury into thinking that a hung jury could in the guilt phase being tried again, and the defendant possibly going free. In truth, even if the jury hung on the penalty phase, the guilt phase verdict would stand. The district attorney would have the option to retry the penalty phase only. Given the findings of guilt and the special circumstances, the only penalties to which appellant could be sentenced in subsequent proceedings (in the event of a hung jury) were death or LWOP. The jury was not told that.

A petitioner's due process rights would be violated if he was "sentenced to death "on the basis of information which he had no

opportunity to deny or explain.'" (*Skipper v. South Carolina* (1986) 476 U.S. 1, 5, n. 1, quoting *Gardner v. Florida*, *supra,* 430 U.S. at p. 362.)

It can hardly be questioned that most juries lack accurate information about the precise meaning of "life imprisonment" as defined by the States. For much of our country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term of years) in practice was understood to be shorter than the stated term. (*Simmons v South Carolina* (1994) 512 U.S. 154, 170.)

The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. The Court has explained that the Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [J. Stevens, plur. opn.]; see also, e.g., *Godfrey v. Georgia, supra,* 446 U.S. at pp. 427-428; *Mills v. Maryland*, *supra*, 486 U.S. at p. 383-384.) Thus, it requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg v. Georgia*, *supra,* 428 U.S. at p. 190, and invalidates

"procedural rules that ten[d] to diminish the reliability of the sentencing determination." (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives. Thus, whenever a reasonable likelihood arises that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrarily or discriminatorily" and "wantonly and ... freakishly imposed." (*Furman v. Georgia* (1972) 408 U.S. 238, 249 (Douglas, J., concurring) (internal quotation marks omitted); *id.*, 408 U.S., at p. 310 (Stewart, J., concurring); *Simmons v South Carolina, supra*, 512 U.S. at pp. 172-173 [Souter, J., concurring].)

C. It Is Reasonably Probable That the Jurors Were Misled by the Error

Respondent argues that the question asked by the jurors did not indicate their concern that appellant would be released or the guilt phase retried if they did not reach unanimous agreement. (RB 188.) Respondent misstates the burden required of appellant. Appellant need not prove the

jury's innermost thoughts, but rather show that "there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violated petitioner's rights. (*Boyde v. California, supra*, 494 U.S. at p. 380.) By effectively withholding from the jury the life-without-parole alternative, the trial court diminished the reliability of the jury's decision that death, rather than that alternative, was the appropriate penalty in this case. (*Simmons v. South Carolina, supra,* 512 U.S. at p. 174 [Stewart, J., concurring].)

Respondent also argues that the issue was waived because the defense at trial only objected on grounds that the answer was incomplete, not on grounds that the jury was concerned that appellant might receive a new guilt phase trial. (RB 189.) The cases cited by respondent are inapplicable. In *People v Rodriguez, supra,* 8 Cal.4th 1060, defense counsel brought up an issue in pre-trial hearings, but failed to renew his concerns at trial. Another case cited by respondent, *People v Price* (1991) 1 Cal.4th 324, also offers little guidance because in that case the defense objected properly to prosecutor misconduct.

In the case at bar, trial counsel's objection and request to re-open argument preserved the issue for appellate review. "An objection is sufficient if it fairly apprises the trial court of the issue it is being called

upon to decide." (*People v. Scott, supra,* 21 Cal.3d at p. 290; *People v. Briggs* (1962) 58 Cal.2d 385, 410 [issue preserved for appeal "[e]ven if, ... the objection was not properly phrased, and even if it was not stated in the most precise terms...."].) If the issue is understood by the parties or the judge no need arises for a more specific objection. (*People v. Gibson* (1976) 56 Cal.App.3d 119, 137; *People v. Dowdy* (1975) 50 Cal.App.3d 180, 187.) Where, as here, the trial court overruled trial counsel's objections, additional objection would have been futile, hence the requirement of further objections is excused. (*People v. Williams* (1988) 44 Cal.3d 883, 906; *People v. Hill* (1998) 17 Cal.4th 800, 820.)

D. The Court Had a Duty to Answer the Note in a Way That Directed and Limited the Jury So as to Minimize the Risk of Wholly Arbitrary and Capricious Action

Respondent argues that this court has previously held that a trial court has no obligation to instruct a penalty phase jury about the consequences of deadlock. (RB 189.) The issue is different, however, when a jury sends out a note, showing that they are confused. The judge has a duty to answer a juror note so that the jury is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

(*Godfrey v. Georgia*, supra, 446 U.S. at p. 427 [quoting *Gregg v. Georgia, supra,* 428 U.S. at p. 189].)

Here, the jury asked if a sentence of life imprisonment required 12 votes. The defense attorney had argued in closing that "every single one of you must vote death in order to take away appellant's life. On the other hand, one vote will avoid the death penalty." (RT 3194.)

The proper exercise of the duty to answer the jury's questions is a matter of ensuring due process of law as guaranteed by the 14th Amendment. (*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833.) By failing to properly respond to the note, the court violated appellant's rights to due process, fundamental fairness, and a reliable determination under the 8th Amendment.

E. Appellant Was Prejudiced

The penalty phase took less than one and one-half hours to try. (RT 3133-3174.) The jury then deliberated four days. On the second day, they sent out a note asking whether any one or more dissenting votes automatically set a sentence of life imprisonment without chance of parole, or whether the life imprisonment sentence had to be unanimous. After receiving the judge's initialed response, they continued to deliberate the rest of the day, and were sent home. It was not until the following day that the

jury reached a verdict. This lengthy deliberation after such a short trial reveals genuine disagreement among the jury. (*Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633; *People v Woods* (1991) 226 Cal.App.3d 1037, 1052.)

Under *Boyde v. California* it is reasonably probable that jurors were misled by the error. (*Boyde v. California, supra*, 494 U.S. at p. 380.) Because this issue is of constitutional dimensions, the error must be evaluated under the strict "harmless beyond a reasonable doubt" standard adopted in *Chapman v. California, supra*, 386 U.S.18.

Because the deliberations stretched out four days, and continued for three days after the error, this Court cannot say that the error was harmless beyond a reasonable doubt.

XV. CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES CONSTITUTION

In the opening brief, appellant raised a number of constitutional objections to the death penalty. (AOB 242-319.) Respondent argues that these claims have been previously rejected by this Court. (RB 193.)

With the limited exceptions referred to below, the issues raised in Argument XV are adequately briefed. For the reasons set forth in the AOB at pp.242-319, appellant respectfully requests that the Court reconsider its prior rulings on these issues.

Appellant argued in his opening brief that because the jury was not

required to find the aggravating factors beyond a reasonable doubt, California's death penalty statute denied appellant the right to a jury trial. (AOB 258-277, citing inter alia, *Apprendi v. New Jersey, supra,* 530 U.S. 466, and *Ring v. Arizona, supra*, 536 U.S. 584.) Respondent argues that this Court has already rejected such a claim. (RB 195.)

Appellant submits that this Court's decisions must be re-evaluated in light of *Blakely v Washington, supra,* 542 U.S. 296, 124 S.Ct. 2531 ("*Blakely*").

A. Effect of *Blakely* on Death Penalty Deliberations

In *Blakely*, the defendant abducted his estranged wife at knifepoint, transporting her in a wooden box in the bed of his pickup truck. He forced their 13-year-old son to follow him in another car, threatening harm to his wife with a shotgun if his son did not do so. The defendant, Blakely, pled guilty to second degree kidnapping involving domestic violence and use of a firearm. Washington state law specified a "standard range" of 49 to 53 months for his offense. However, a separate state statute provided that the judge could impose a sentence above the standard range, and up to a maximum of 10 years, if he found "substantial and compelling reasons justifying an exceptional sentence." The statute listed aggravating factors that could justify such a departure, which it recited to be illustrative rather

than exhaustive. Nevertheless, the Washington Supreme Court had previously held that "a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." When a court imposed such an exceptional sentence, it was required to set forth findings of fact and conclusions of law supporting it. (*Blakely, supra*, 124 S.Ct. at p. 2535.)

Defendant Blakely's trial judge imposed an exceptional sentence of 90 months – 37 months beyond the standard minimum – and justified the sentence on the ground that Blakely acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic violence cases. The trial court issued findings of fact, based on the testimony it heard, which supported the exceptional sentence.

The United States Supreme Court reversed. The Court observed that the facts supporting the judge's finding that Blakely acted with "deliberate cruelty" had neither been admitted by Blakely nor found by a jury, and that without such admission or finding, the maximum sentence was only 53 months. The Court rejected the state's contention that no *Apprendi* violation existed because the relevant "statutory maximum" was not 53 months, but

instead was the 10-year maximum that could be imposed for felonies of the class to which Blakely had pled guilty. The Court held:

> Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose ***solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*** See *Ring, supra,* at 602, 122 S.Ct. 2428 ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone" (quoting *Apprendi, supra*, at 483 . . .). In other words the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to punishment," [citation] and the judge exceeds his proper authority.

(*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537; emphasis in original.)

Appellant submits that *Blakely* applies to the special circumstance findings and to the penalty phase of a California capital prosecution. The central holding of *Blakely* (following on *Apprendi*) is that other "than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, ***and proved beyond a reasonable doubt.***" (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2536, quoting *Apprendi, supra*, 530 U.S. at p. 483.) In the case at bar, the penalty phase facts (including the presence or absence of any special circumstances and the notion that aggravation must outweighs mitigation) were properly referred to the jury, but the jury did not find them

beyond a reasonable doubt because they were not instructed to do so. The only instructions received by the jury regarding the 'beyond a reasonable doubt' standard concerned the guilt phase of the trial.

During the penalty phase, the prosecutor presented the children of the two victims to testify to the impact of the murders on their lives. (RT 3135-3141.) The prosecutor argued that the circumstances of the crime, both the long-term and short-term effect on the victims, was an aggravating factor. He also argued that the presence of prior felonies committed by appellant could be used as aggravating factors. He argued that the age of the defendant was an aggravating factor, as well. (RT 3133-3183.)

The victim impact evidence in this case was submitted to the jury, but there was no finding of proof beyond a reasonable doubt. The judge gave the jury a list of aggravating and mitigating factors, and instructed them as follows: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death instead of life without parole." (RT 3214.) This instruction failed to follow the central holding of *Blakely* and *Apprendi* that ***facts*** found by the jury must be proved beyond a reasonable doubt. (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2536.)

The *Blakely* Court also rejected the argument advanced by respondent that the function of the penalty phase is not to find facts but to make a normative judgment based on a subjective evaluation. (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2538):

> Finally the state tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in this regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on a finding of fact (as in *Apprendi*), one of several specified facts (as in *Ring*) or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

(*Ibid.*)

Blakely plainly holds that such normative evaluation does not remove a sentencing scheme from the ambit of the protections recognized in *Apprendi* regarding facts which must be proved beyond a reasonable doubt. *Apprendi* requires that all factual determinations that make a criminal defendant eligible to suffer the death penalty must be made by a jury, with proof of those facts found beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483.) Appellant submits that under *Blakely*, the penalty phase of a California death penalty proceeding is subject to this key holding in *Apprendi*.

Moreover, *Apprendi* and *Blakely* require additional safeguards. Because *Apprendi* and its progeny make it clear that such sentencing factors must be treated as elements of the substantive offense, the Fifth, Sixth, Eighth and Fourteenth Amendments a fortiori also require a unanimous jury in capital cases. Appellant therefore had the right to unanimous findings by his jury with respect to the truth beyond a reasonable doubt of the aggravating circumstances during the penalty phase of his trial; he also had a right to findings beyond a reasonable doubt that the aggravation outweighed the mitigation.

In appellant's case, however, jurors were not required to agree upon any aggravating circumstance, but each was free instead to consider as an aggravating factor any fact he or she believed to be true. The court erred by not providing the correct guidance as to a burden of proof, requiring reversal of the penalty verdicts.

B. Appellant's Death Sentence is Arbitrary Under International Law

Respondent largely ignores appellant's argument that the state death penalty statutes employed here violated his rights under international law. (RB 198). To the extent that this Court may have previously addressed similar claims, appellant respectfully requests that the Court reconsider based on the authorities cited by appellant.

The right to life is the most fundamental of the human rights contained in the International Bill of Rights. (See, e.g., Universal Declaration on Human Rights, GA Res. 217A (III), U.N. GAOR, 3d Sess. art. 3, U.N. Doc. A/810 (1948) ("Everyone has the right to life, liberty, and security of the person"); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174-75 (entered into force Mar. 23, 1976) ("Every human being has the inherent right to life").) A number of human rights instruments also provide that a state may not take a person's life "arbitrarily." (See, e.g., ICCPR, art. 6; American Convention on Human Rights, art. 4, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 4 EHRR 417, 21 I.L.M. 58, art. 4.) In evaluating "arbitrary arrest and detention" (barred by Art. 9(1) of the ICCPR), the Human Rights Committee, relying on drafting history, concluded that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

The Inter-American Court on Human Rights has addressed the meaning of "arbitrary" executions in an advisory opinion regarding the interpretation of the Vienna Convention on Consular Relations. (OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999).) That Court observed that states may

impose the death penalty only if they rigorously adhere to the due process rights set forth in the ICCPR. The court concluded that the execution of a foreign national after his consular notification rights have been violated would constitute an "arbitrary deprivation of life" in violation of international law. (*Id.* at 76, para. 137.) By analogy, the execution of an individual is prohibited as "arbitrary" if a state violates any of the principles contained in the ICCPR. As discussed infra, supra, appellant's conviction and sentence violate numerous provisions of the ICCPR.

Various delegates involved in the drafting of the ICCPR proposed the following definitions of the term "arbitrary" (1) fixed or done capriciously or at pleasure; (2) without adequate determining principle; (3) depending on the will alone; (4) tyrannical; (5) despotic; (6) without cause upon law; and (7) not governed by any fixed rule or standard. Schabas at 76. In Van Alphen v. The Netherlands, the Human Rights Committee held that "arbitrariness" encompasses notions of inappropriateness, injustice, and lack of predictability. ((No. 305/1988), U.N. Doc. A/45/40, Vol. II, p. 108, §§5.8. See also Daniel Nsereko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, in The Right to Life in International Law 248 (Bertrand Ramcharan, ed., 1985) (deprivation of life is arbitrary if it is done

in conflict with international human rights standards or international humanitarian law).)

Appellant's death sentence is arbitrary under any of these criteria. The California statutory system fails to truly narrow the scope of death eligible offenses. The result is that virtually any first-degree murder satisfies one or more aggravating circumstances. Considering the small percentage of first degree murders which result in death sentences, there is little correlation between the severity of the offenses and the sentence imposed. Consequently, there is no predictability as to when a sentence of death will be rendered. The lack of any proportionality review exacerbates these infirmities. The result is that under whatever standard applied, appellant's death sentence is arbitrary and in violation of not only domestic but also international law.

XVI. CUMULATIVE EFFECT OF ERRORS COMMITTED DURING BOTH APPELLANT'S GUILT PHASE AND PENALTY PHASE REQUIRES REVERSAL OF HIS DEATH SENTENCE

Appellant's Opening Brief (199-322) [penalty phase errors] and (1-199) [guilt phase errors] summarized the many errors which appellant contends occurred during appellant's trial. Respondent does not directly address appellant's arguments. Rather, respondent (1) denies there were any errors and (2) contends, without any analysis of the errors or facts in the

instant case, that "whether considered individually or for their cumulative effect, any alleged error or combination of errors could not have affected the outcome of the trial." (RB 199.)

Respondent's arguments are not helpful to the Court in deciding the issues raised in the current argument. It is, of course, up to this Court to determine whether appellant's contentions of error have merit and those issues have been fully briefed in the previous arguments. If, as respondent states, there were no errors, then appellant's cumulative error contention is a moot point. If this Court does find multiple errors, as appellant believes it will, then the issue becomes what relief, if any, is appropriate. Appellant and respondent have both offered their views on the relief appropriate for each individual error. If the Court finds that an individual error requires relief, then the question of cumulative error may be academic. Thus, the issue addressed in this argument is, assuming that the Court finds errors which it concludes do not by themselves require the relief appellant is seeking, whether the combination of errors it finds does justify relief. The cases cited by respondent do not really address that issue because they were cases in which no errors at all were found (see, e.g., *People v. Maury* (2003) 30 Cal.4th 342, 444 ("No errors are discernable")) or in which any errors were minor and had no impact on the trial. (See, e.g., *People v. Seaton,*

supra, 26 Cal.4th at p. 692 ("The few minor errors, considered singly or cumulatively, were harmless"); *People v. Burgener* (2003) 29 Cal.4th 833, 884 ("Defendant has demonstrated few errors, and we have found each possible error to be harmless when considered in isolation. Considering them together, we likewise conclude their cumulative effect does not warrant reversal of the judgment").)

Indeed, the cases cited by respondent are consistent with the principle that where this Court finds more than one error, it must carefully review not only the impact of each individual error, but the combined impact of all errors found. (See e.g. *People v. Catlin, supra,* 26 Cal.4th 81, 180 ("Any errors we have identified, whether considered singly or together, are nonprejudicial and do not undermine the reliability of the death judgment under the Eighth and Fourteenth Amendments or create a risk that the sentence erroneously was imposed"); *People v. Jones* (2003) 29 Cal.4th 1229, 1268 ("Our careful review of the record convinces us the trial was fundamentally fair and the penalty determination reliable. No basis for reversal appears").)

In addition, appellant notes that this was a close case in the penalty phase. The penalty phase took less than one and one-half hours to try (RT 3133-3174). The jury then took four days to deliberate. On the second day,

they sent out a note asking whether any one or more dissenting votes automatically set a sentence of life imprisonment without chance of parole, or whether the life imprisonment sentence had to be unanimous. After receiving the judge's initialed response, they continued to deliberate the rest of the day, and were sent home. It was not until two further days later that the jury reached a verdict. This lengthy deliberation after such a short trial demonstrates the element of uncertainty in the jury's deliberations.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude are combined with other errors].)

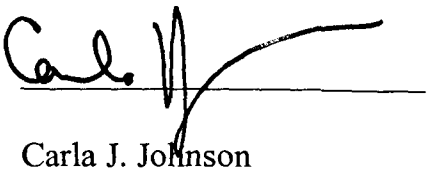
When considered together, the number and synergistic effect of errors is sufficient to violate due process and render the entire trial fundamentally unfair.

CONCLUSION

For the reasons stated above, appellant's convictions and sentence must be reversed.

Date 10/29/05

Respectfully submitted,



Carla J. Johnson

Attorney for Appellant

RULE 14 CERTIFICATE

Counsel for appellant certifies that the instant brief complies with Rule 14 c, California Rules of Court, and consists of 39111 words.

Carla J. Johnson

PROOF OF SERVICE BY MAIL

I am a resident of the County of Los Angeles, I am over the age of 18 years and not a party of the within entitled action. My business address is: Attorney Carla J. Johnson, P.O. Box 30478, Long Beach, CA 90853.

On October 31, 2005, I served APPELLANT'S REPLY BRIEF by placing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at: Long Beach, California, addressed as follows:

Michael W. Whitaker
Office of the Attorney General
300 South Spring Street, Fifth Fl.
Los Angeles, CA 90013

Att: Mel Greenlee
California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105

John Alexander Riccardi K24700
San Quentin State Prison
San Quentin, CA 94974

Scott Millington
Los Angeles County District Attorney
11701 S. La Cienega Blvd, Room 600
Los Angeles, CA 90045

Hon. David D. Perez
c/o Addie Lovelace
Capital Appeals Unit
Los Angeles County Superior Court
210 West Temple, Room, M-3
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 31, 2005, at Long Beach, California.

Carla J. Johnson