S083594

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TOMMY ADRIAN TRUJEQUE,

Defendant and Appellant.

(Los Angeles County Superior Court No. VA048531-01)

APPELLANT'S REPLY BRIEF

Appeal from the Judgement of the Superior Court of the State of California for the County of Los Angeles

HONORABLE PATRICK COUWENBERG, JUDGE

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant was sentenced to death for the murder of Max Facundo, not because it was one of the most aggravated and least mitigated of murders, deserving of a death sentence, but because appellant, seeing "no daylight" at the end of a life sentence, sought the death penalty. In fact, this is far from a typical death penalty case. Facundo was the violently abusive boyfriend of appellant's cousin, Charlene. Facundo battered Charlene on a regular basis, leaving her with black eyes and bruises. (5RT: 1018-1019, 1048; 6RT: 1296-1297.) Charlene's parents, Helen and Charlie Trujeque, tried to persuade her to leave Facundo, but she would not. (6RT: 1298-1300.) The Trujeques asked the police to intervene but were told they could do nothing unless Charlene requested help. (6RT: 1300.) Feeling powerless to protect their daughter, and fearing for Charlene's life, Charlene's parents sought appellant's help. (6RT: 1312, 1323, 1325.)

Respondent concedes that there was "ample evidence that appellant

believed Facundo would harm and possibly even kill Charlene, particularly due to his discussions with Helen and Charlie about Facundo." (RB 132.) Acting on those beliefs, appellant killed Facundo in a misguided effort to protect his cousin.

Although appellant was arrested for Facundo's murder in 1986, the charges were dropped, and the state made no further effort to prosecute the case until 1998 when appellant, facing a life sentence after an armed robbery conviction, contacted police and offered to confess to the murders of both Max Facundo and Raul Apodaca on the condition that he receive a death sentence. (Peo. Ex. 6A, at p. 41.)

Seven months after his confession, appellant wrote to Los Angeles District Attorney Gil Garcetti to reiterate, in highly inflammatory terms, his desire to be sentenced to death. (Peo. Exs. 8 & 8A.) In this letter, appellant escalated his claims of responsibility, embellishing his admissions with aggravating details about both the Facundo and Apodaca homicides that would have established additional special circumstances, except that even the prosecution conceded they were false. (7RT: 1701-1702.) The letter too was introduced into evidence.

Although the jury convicted appellant of only second degree murder for his role in the 1987 Apodaca stabbing, he was sentenced to death for Facundo's murder.

As this appeal shows, this un-deathworthy case became a death penalty case through multiple errors, including the use of two invalid special circumstances, the refusal to instruct the jury on the theory of defense – that appellant had acted in the unreasonable belief that Charlene faced imminent harm from Facundo – and the exclusion of evidence that would have further supported the defense. The reliability of the penalty

phase was undermined by the erroneous exclusion of mitigating evidence and the refusal to accurately instruct the jury that they could at least consider as mitigation appellant's unreasonable belief that his killing of Facundo was morally justified.

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In this brief, appellant replies to contentions by the State that require an answer in order to present the issues fully to this Court. However, he does not reply to arguments that are adequately addressed in the opening brief. In particular, appellant does not present a reply on Arguments IX, XVI, XVII, XVIII, or XIX but notes that, with regard to Argument XIX, the State agrees that the case should be remanded to correct the abstract of judgment and clarify appellant's sentence on count 2 (if appellant's conviction is upheld) as well as his custody credits. (RB 205-206.)

The failure to address any particular argument, sub-argument or allegation made by the state, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

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[1]All statutory references are to the Penal Code unless stated otherwise. As in the opening brief, the clerk's transcript is cited as "CT" and the reporter's transcript as "RT." For each citation, the volume number precedes, and the page number follows, the transcript designation, e.g. 1CT: 1-3, is the first volume to the clerk's transcript at pages 1-3.

ARGUMENT

I.

APPELLANT'S DEATH SENTENCE IS UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PRIOR-MURDER SPECIAL CIRCUMSTANCE IS BASED ON AN INVALID CONVICTION FOR SECOND DEGREE MURDER THAT WAS OBTAINED IN VIOLATION OF DOUBLE JEOPARDY

Respondent does not dispute that appellant's 1971 second degree murder conviction violated double jeopardy. Instead, respondent argues that this Court should not strike the conviction because the issue was forfeited below, because the issue is not cognizable in a motion to strike a prior conviction, or because the United States Supreme Court case holding California's former juvenile court procedures invalid does not apply retroactively – despite a decision of this Court to the contrary.

A. Appellant's Meritorious Double Jeopardy Challenge May Be Addressed for the First Time on Appeal

Appellant does not dispute that the motion to strike his 1971 second degree murder conviction filed below was not based on double jeopardy grounds. (AOB 47, 53.) In asserting that the challenge is therefore forfeited, respondent ignores that the very purpose of a motion to strike a prior conviction, is to allow the merits of such claims to be addressed at the earliest possible opportunity, notwithstanding "established 'procedural bars'" – such as respondent invokes here. (*People v. Horton* (1995) 11 Cal.4th 1068, 1138.)

For example, in *People v. Sumstine* (1984) 36 Cal.3d 909, this Court explained that a timeliness bar was appropriate in the context of a habeas

petition, but not for a motion to strike, because of the disparate "effects of the two different procedures." (*Id.* at p. 920.) A writ of habeas corpus "vacates the underlying judgment of conviction" entirely, and the state can often retry the defendant on the underlying charges. (*Ibid.*) "[D]ue diligence and timeliness are therefore properly required, because tardy petitions hinder the state's ability to effectively present its case anew." (*Ibid.*)

A motion to strike, on the other hand, does not vacate the underlying conviction. Rather, "[t]he purpose of a motion to strike is to challenge only the present effect of the prior conviction" – such as rendering the defendant eligible for the death penalty. (*People v. Sumstine, supra,* 36 Cal.3d at p. 921; accord *People v. Horton, supra*, 11 Cal.4th at p. 1138 [motion to strike "does not serve to vacate or extinguish the conviction"].)

Because of the "special . . . need for reliability" in a capital case, "it is particularly important to assure that a prior conviction . . . used as a basis or justification for the imposition of the death penalty is not tainted by a fundamental constitutional flaw." (*People v. Horton, supra*, 11 Cal.4th at p. 1134.) It is accordingly also particularly important not "to deprive a defendant of the right to demonstrate the invalidity of the prior conviction." (*Id.* at p. 1138.)

While appellant does not dispute that it is preferable to address such a claim before trial, as *Sumstine* and *Horton* contemplate, considerations of judicial economy still favor addressing the claim on direct appeal, rather than deferring it to subsequent habeas proceedings. (See *People v. Horton, supra*, 11 Cal.4th at p. 1139.)

The cases respondent cites for the proposition that a double jeopardy claim may be waived by failing to object at trial arise from a different

procedural context – a defendant's failure to assert a double jeopardy defense to a successive prosecution. (RB 72.) Even these cases, however, actually hold that an appellate court *will* address a double jeopardy claim for the first time on appeal when the claim of former jeopardy is meritorious, and counsel's waiver of the defense would constitute ineffective assistance of counsel. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1201 [addressing merits of double jeopardy claim raised for first time on appeal, though "'technically' not cognizable" where defendant argued that his attorney was ineffective for failing to raise it below]; *In re Henry C.* (1984) 161 Cal.App.3d 646, 649 [acknowledging relief must be granted if defense counsel failed to assert meritorious plea of former jeopardy, and thereby "withdrew a crucial defense from the case and deprived defendant of the adequate assistance of counsel," citing *People v. Medina* (1980) 107 Cal.App.3d 364].)[2]

In *People v. Marshall* (1996) 13 Cal.4th 799, cited in *People v. Scott, supra*, 15 Cal.4th at p. 1201, this Court explained that

> Defendant raises his double jeopardy claim for the first time on appeal, and the Attorney General argues the argument is therefore waived and should not be considered on appeal. If, however, a plea of former jeopardy had merit and trial counsel's failure to raise the plea resulted in the withdrawal of a crucial defense, then defendant would have been denied the effective assistance of counsel to which he was entitled. (*People v. Belcher* (1974) 11 Cal.3d 91, 96 [acknowledging general rule of waiver, but addressing double jeopardy

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[2]Respondent also cites *People v. Batts* (2003) 30 Cal.4th 660, 676-678, which held that a plea of former jeopardy was not necessary to preserve a double jeopardy claim for appeal where the defendant's motions to dismiss on grounds of double jeopardy were fully litigated in the trial court. (RB 72.)

> argument on direct appeal and concluding trial counsel's failure to timely raise plea of former jeopardy constituted a denial of effective assistance of counsel]; see *Strickland v. Washington* (1984) 466 U.S. 668.) Consequently, although the Attorney General is technically correct in arguing the issue was waived, as in *Belcher* we nevertheless must determine whether such a plea would have had merit.

(*People v. Marshall, supra,* 13 Cal.4th at p. 824, fn.1, parallel citations omitted.) Appellant submits the same principle applies here, and this Court should reach the merits of his double jeopardy claim.

Respondent does not seriously dispute that appellant's double jeopardy claim is meritorious. To the contrary, respondent agrees that *Breed v. Jones* (1975) 421 U.S. 519, held that "double jeopardy precludes criminal prosecution of a juvenile subsequent to commencement of juvenile court adjudication involving the same offense." (RB 73-74.) Appellant's juvenile court file, of which the trial court took judicial notice, and which is part of the record on appeal, establishes that, under the very same law held invalid in *Breed*, appellant had not one, but two juvenile court adjudications on the petition alleging he had committed murder, before he was prosecuted as an adult for the same offense. (AOB 51.) The record therefore establishes a double jeopardy violation.

Moreover, given that trial counsel attempted to prevent the prosecution from using appellant's 1971 second degree murder conviction as a special circumstance – albeit on different grounds – they necessarily had no tactical reason for failing to assert a meritorious, alternative ground for striking the conviction. (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131 [where "defendant's trial counsel *did* in fact object to the introduction of the statements, albeit on nonmeritorious grounds, this fact underscores our conclusion that there could have been no tactical reason for

counsel's failure to make a meritorious objection to the same evidence"], citing *People v. Asbury* (1985) 173 Cal.App.3d 362, 366 [ineffective assistance found where trial counsel objected to felony murder instruction on invalid ground of insufficient evidence, but failed to object on meritorious basis of collateral estoppel].)

Respondent claims that because trial counsel failed to raise the double jeopardy issue below, "the record is not complete" (RB 72), but does not identify a single contested or missing fact that would alter the legal conclusion that appellant's second degree murder conviction was obtained in violation of double jeopardy.

This is precisely the sort of claim that is properly addressed for the first time on appeal: a pure question of law which is presented by undisputed facts. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; accord *People v. Hines* (1997) 15 Cal.4th 997, 1061; *People v. Brown* (1996) 42 Cal.App.4th 461, 471.)

Both the direct appeal cases on which respondent relies and the *Horton* line of cases support reaching the merits of this issue despite trial counsel's failure to assert the double jeopardy violation as grounds for striking the prior conviction. Because it is apparent from the record on appeal that appellant's double jeopardy claim is meritorious, the prior murder special circumstance should be stricken.

B. A Violation of Double Jeopardy Is a "Fundamental Constitutional Flaw" and Therefore Proper Grounds to Strike a Prior Conviction

Relying on *In re Reno* (2012) 55 Cal.4th 428, respondent next claims that double jeopardy violations are not sufficiently fundamental to be grounds for striking a prior murder conviction under *Horton*. (RB 73.)

Respondent reads *Reno* too broadly.

The issue in *Reno* was whether the petitioner could overcome the bar of *In re Waltreus* (1965) 62 Cal.2d 218, to addressing a double jeopardy claim that had previously been raised and rejected on direct appeal. The Court held that Reno had failed to show that his double jeopardy claim fell within any of the four exceptions to *Waltreus*, one of which is that the claim is of "fundamental constitutional error." (*In re Reno, supra,* 55 Cal.4th at pp. 476-478.)

Horton held that "in the context of a capital case, a collateral challenge to a prior conviction that has been alleged as a special circumstance may not properly be confined to a claim of *Gideon[v. Wainwright* (1963) 372 U.S. 335] error, but may be based upon at least some other types of *fundamental* constitutional flaws." (*People v. Horton, supra*, 11 Cal.4th at p. 1135.)

Respondent reasons that if the double jeopardy claim raised in *Reno* did not constitute a fundamental constitutional error for purposes of overcoming a *Waltreus* bar, then the double jeopardy violation asserted here cannot constitute a "fundamental constitutional flaw" within the meaning of *Horton.* (RB 73.)

Respondent's reasoning is faulty. First, as discussed above, a motion to strike a prior conviction is not the same as a habeas petition seeking to vacate a prior conviction for all purposes, and because a motion to strike is more limited in its effect, the concern for finality of convictions and the corresponding restrictions on collateral review, which animated *Reno*, do

not apply.[3] (*People v. Horton, supra*, 11 Cal.4th at p. 1138; *People v. Sumstine, supra,* 36 Cal.3d at p. 920.)

Elsewhere, as noted in the opening brief, this Court has plainly stated that the right not to be put twice in jeopardy is indeed "fundamental," to the degree that double jeopardy violations may be raised for the first time on appeal. (AOB 53-54, citing *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 71, quoting *Benton v. Maryland* (1969) 395 U.S. 784, 794.) Nothing in *Reno* indicates that the Court intended to overrule these decisions sub silentio.

Second, even if *Reno* were read as broadly as respondent proposes, the specific error at issue in this case would still be cognizable. The *Reno* court also equated fundamental constitutional errors, sufficient to overcome a *Waltreus* bar, with "those errors so serious and fundamental that setting aside the state's weighty interest in the finality of criminal judgments would be justified." (*In re Reno, supra,* 55 Cal.4th at 487.) This Court has already decided that the specific double jeopardy error asserted here is sufficiently fundamental to justify setting aside the state's interest in the finality of judgments, holding that the high court's decision in *Breed v. Jones, supra,* applies retroactively to cases on collateral review. (*In re Bryan* (1976) 16 Cal.3d 782, 787.)

The facts of *In re Bryan* are indistinguishable from this case. Bryan, like appellant, was originally brought before the juvenile court in 1969, at the age of 16, alleged to have committed murder. (*In re Bryan, supra,* 16 Cal.3d at p. 784.) Bryan, like appellant, was committed to the youth

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[3]As discussed below, even if such concerns *do* apply to a motion to strike, this Court has already held that the error asserted here is sufficiently important to be remedied on collateral review.

authority after an adjudicatory hearing. (*Ibid.*) The Youth Authority refused to accept Bryan and he, like appellant, was subjected to a second hearing at which he was deemed unfit for juvenile court. (*Id.* at p. 785.) Like appellant, Bryan attempted unsuccessfully to bar his prosecution in adult court on double jeopardy grounds and was thereafter convicted of second degree murder in adult court. (*Ibid.*) After *Breed* was decided, Bryan brought a habeas petition challenging his conviction. This Court held *Breed* applied retroactively and concluded that Bryan's "1973 second degree murder conviction cannot stand." (*Id.* at 787.)

The fact that this Court applied *Breed* retroactively to grant habeas relief on the precise constitutional error raised here belies any argument that the error is not also sufficiently fundamental to be cognizable under *Horton, supra.* Appellant's 1971 second degree murder is invalid under the controlling authority of *Breed v. Jones* and *In re Bryan.*

C. This Court Correctly Applied *Breed v. Jones* Retroactively in State Court Proceedings

Respondent next argues that appellant has "fail[ed] to consider the appropriate analysis regarding the retroactive application of precedent pronouncing a new rule to final judgment." (RB 74.) Respondent contends that *In re Bryan, supra,* is no longer good law, because it "was based on the retrospective application test set forth by the United States Supreme Court in *Linkletter v. Walker* (1965) 381 U.S. 618," which was superseded by *Griffith v. Kentucky* (1987) 479 U.S. 314. (RB 74-75.) Respondent claims that "[a]pplying the test set forth in *Griffith*, it follows that the rules created by *Breed* and *Jesse W.*[4] may not be used here to challenge collaterally

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[4] *Jesse W. v. Superior Court* (1979) 26 Cal.3d 41, held that the rehearing de novo procedure to which appellant was subject also violated

[appellant's] 1971 conviction." (RB 75.)

Again, as discussed above, a motion to strike a prior conviction is technically not a collateral challenge, because it does not vacate the conviction but only prevents its being used to enhance the defendant's punishment. It is a significantly more limited procedure with significantly more limited consequences. Accordingly, it is not clear that retroactivity analysis even applies in the context of a motion to strike a prior conviction.

However, even if a motion to strike is regarded as a collateral challenge for retroactivity purposes, respondent's argument that *In re Bryan* is no longer good law fails.

First, respondent's reliance on *Griffith* is puzzling since (1) *Griffith* concerns retroactive application of new rules on direct appeal, while respondent maintains appellant's challenge to his prior conviction is a collateral attack; and (2) *Griffith* departed from *Linkletter* by *expanding* the retroactive application of new rules, not restricting it as respondent advocates. (*Griffith v. Kentucky, supra,* 479 U.S. at pp. 322, 328.)

Moreover, in holding that *Breed v. Jones* must be applied retroactively on collateral review, this Court did not even rely on *Linkletter.* Rather, it noted that the United States Supreme Court had found the *Linkletter* "criteria do not lend themselves to analysis of cases involving the prohibition against double jeopardy." (*In re Bryan, supra,* 16 Cal.3d at p. 786.) The Court relied instead on *Robinson v. Neil* (1973) 409 U.S. 505, 507-508, which gave retroactive effect to *Waller v. Florida* (1970) 397 U.S. 387 – a double jeopardy decision. Double jeopardy cases are different, this Court explained, because the injury to the defendant is the very fact of

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double jeopardy under *Breed v. Jones, supra.* (AOB 50-51.)

being placed in jeopardy a second time – regardless of how scrupulously his "constitutional procedural rights" are guarded. (*In re Bryan, supra*, 16 Cal.3d at p. 786, quoting *Robinson v. Neil, supra*, 409 U.S. at p. 509; accord *Price v. Georgia* (1970) 398 U.S. 323, 331-332.)

The *Bryan* Court discussed the continuing jeopardy concept respondent describes as the controlling law prior to *Breed v. Jones* (RB 74-75), but concluded the state had no significant reliance interest in this doctrine since it had been "the rule in this state for only a brief three-year period and does not appear to have ever been applied in this context by the United States Supreme Court." (*In re Bryan, supra*, 16 Cal.3d at p. 787.) The Court therefore held "that the general rule of retroactivity is applicable without a *Linkletter* or similar test in the case of a decision compelled by constitutional prohibitions against multiple jeopardy." (*Ibid.*)

In short, nothing in *Griffith* contradicts *In re Bryan* in any way.

Finally, and most importantly, this Court is not bound by federal retroactivity law in determining the retroactive application of federal rules in a *state* challenge to a conviction that is already final. (*In re Gomez* (2009) 45 Cal.4th 650, 655, fn. 3, citing *In re Johnson* (1970) 3 Cal.3d 404, 415, and *Danforth v. Minnesota* (2008) 552 U.S. 264.) This Court's decision in *In re Bryan*, applying *Breed v. Jones* retroactively to a case virtually identical to appellant's, therefore remains good law.

D. The State Has Not Established Beyond a Reasonable Doubt that the Invalid Special Circumstance Did Not Contribute to the Verdicts

Respondent lastly argues that, if there was error in failing to strike appellant's 1971 second degree murder conviction, it was harmless beyond a reasonable doubt because the jury also found true the multiple murder

special circumstance and appellant therefore "would still have been eligible for and received the death penalty." (RB 76, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

As an initial matter, the invalid special circumstance must be stricken even if another, valid special circumstance remains. (*People v. Horton, supra,* 11 Cal.4th at pp. 1139-1140 [setting aside invalid prior murder special circumstance, robbery-murder special circumstance remained].)[5] Further, because appellant's conviction for the second degree murder of Raul Apodaca – the basis of the multiple murder special circumstance – is also invalid, appellant is not eligible for the death penalty, and his sentence must be vacated. (Argument II, *infra*, and AOB 57-85.)

Finally, even if the Apodaca conviction is upheld, appellant's death sentence must be reversed. The jury was instructed that the invalid prior murder special circumstance was an aggravating factor under Penal Code section 190.3, factor (a). (11RT 2929; 5CT: 1192.) The invalid conviction therefore "contribute[d] to the verdict obtained," (*Chapman v. California, supra*, 386 U.S. at p. 24), both by helping to make appellant eligible for the death penalty, and by weighing in the sentencing process as an aggravating factor. For the reasons above and those in the opening brief, appellant's death sentence must therefore be vacated.

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[5]As discussed separately in argument XII, of the opening brief and below, the invalid conviction was also improperly used to impeach appellant, requiring reversal of his convictions as well. (AOB 214-224.)

II.

THE TRIAL COURT ERRONEOUSLY APPLIED PENAL CODE SECTION 1387.1 RETROACTIVELY TO PERMIT THE STATE TO REFILE THE PREVIOUSLY BARRED APODACA MURDER CHARGE IN VIOLATION OF THE EX POST FACTO CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS

Respondent argues that section 1387.1 was properly applied to permit the refiling of the Apodaca murder charge and that doing so was neither a retrospective application of the law nor a violation of the ex post facto clase; respondent further contends that the charges against appellant were only dismissed twice in 1987, and that both dismissals were attributable to excusable neglect, thus allowing the murder charges to be refiled a third time under section 1387.1. (RB 77-97.)

Despite the many layers to this claim, the pivotal question is whether the legislature intended section 1387.1 to apply retroactively to revive prosecutions that were already barred, at the time of its enactment, by section 1387. Not only is there no express language and nothing in the legislative history indicating that the legislature intended the statute to be applied retroactively, but there is no reported case in the 25 years since section 1387.1 was enacted in which it has been so applied. If section 1387.1 is properly interpreted consistent with the presumption that criminal statutes are prospective, then there is no ex post facto issue and no need to address the alternative issues of whether the case had been dismissed three times rather than two or whether there was excusable neglect on the part of the prosecution.

A. Section 1387.1 Could Not Be Applied Retroactively to Revive the Previously-Barred Apodaca Murder Charge

1. Section 1387.1 Was Applied "Retroactively" to Appellant

Respondent first argues, relying on *In re E.J.* (2010) 47 Cal.4th 1258, that section 1387.1 was not applied retroactively at all because the event triggering the application of the statute was the state's refiling of charges for the third (or fourth) time, after the January 1, 1988, effective date of section 1387.1. (RB 82-83.) If the prosecution had not refiled the charges, respondent reasons, "section 1387.1 would not have applied at all." (*Ibid.*)

Section 1387.1 is not akin to the housing restrictions imposed upon an inmate's release which were at issue in *In re E.J.*, however. Nor is it merely a rule pertaining to the conduct of a trial as in *Tapia v. Superior Court* (1991) 53 Cal.3d 282. (RB 83.) Unlike in *Tapia*, there was no litigation pending in appellant's case when section 1387.1 was enacted. As of June 23, 1987, the Apodaca charge had been dismissed at least twice, and further prosecution was therefore barred by section 1387.[6] (2CT: 428; 4CT: 923, 926.)

Thus, as respondent proposes to interpret section 1387.1, it would revive prosecutions – like the Apodaca charge at issue here – which were previously barred by section 1387. Applying a statute to revive a previously-barred or lapsed claim or action is a "retroactive" application.

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[6]There is no dispute that, prior to the enactment of section 1387.1, the two prior dismissals of the Apodaca murder charges barred further prosecution of that case under section 1387. (4CT: 923 [People's Opposition to Motion to Dismiss Count II].)

(*Quarry v. Doe I* (2012) 53 Cal.4th 945, 957; *Strong v. Superior Court* (2011) 198 Cal.App.4th 1076, 1088 (*Strong*); *Gallo v. Superior Court* (1988) 200 Cal.App.3d 1375, 1379; accord *Stogner v. California* (2003) 539 U.S. 607, 610 (*Stogner*); *Chenault v. United States Postal Serv.* (9th Cir.1994) 37 F.3d 535, 539 ["a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme. . ."].)

2. Section 1387.1 Was Not Intended to Apply Retroactively

Respondent acknowledges that "express language of retroactivity" is required for a statute to be applied retrospectively and that "[a]mbiguous statutory language will not suffice to dispel the presumption against retroactivity." (RB 84; accord AOB 65-66.) Respondent also does not dispute that there is no such express language of retroactivity in section 1387.1.

Respondent nevertheless proceeds to infer an intent to apply section 1387.1 retroactively from a combination of silence, policy arguments, and purportedly "absurd" results that would ensue from prospective application of the statute. Respondent's arguments are both legally insufficient and logically flawed. (See *Quarry v. Doe I, supra*, 53 Cal.4th at p. 959 [intent to apply a statute retroactively may not be inferred from ambiguous language or reliance upon legislative history materials].)

Appellant agrees that the legislative history establishes that the purpose of section 1387.1 was to prevent a recurrence of *People v. Mackey* (1985) 176 Cal.App.3d 177, 188, in which the defendant was ordered discharged after a third refiling of murder charges was found to be barred

by section 1387. (AOB 66; RB 85-86.) But there is no express statement, as required, that the legislature intended to do so by reviving prosecutions that were already barred under section 1387. (3CT: 621 to 4CT: 857 [Legislative History for section 1387.1].)

Respondent infers from the *absence* of language addressing the timing of prior dismissals that the legislature "obvious[ly]" intended section 1387.1 "to apply where prior dismissals occurred before its enactment." (RB 86.) If this interpretation were so obvious, one would expect the statute to have actually been applied as respondent urges, particularly in the immediate wake of the law's passage, but there is no reported case in which the State has attempted to revive a prosecution that was barred by section 1387 before the passage of section 1387.1. In the earliest reported case concerning section 1387.1, charges were *first* brought in February 1988, after the effective date of the act. (*Tapp v. Superior Court* (1989) 216 Cal.App.3d 1030, 1033.)[7] Thus the statute has apparently always been

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[7]Every other reported decision addressing section 1387.1 similarly involves charges *first* filed after the effective date of the act, not charges that were barred before 1988. (*Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 491-492, 506; *People v. Woods* (1993) 12 Cal.App.4th 1139, 1143-1144; *People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 15; *Bodner v. Superior Court* (1996) 42 Cal.App.4th 1801, 1803-1804; *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 734; *People v. Massey* (2000) 79 Cal.App.4th 204, 207-208; *People v. Salcido* (2008) 166 Cal.App.4th 1303, 1306; *People v. Mason* (2006) 140 Cal.App.4th 1190, 1194; *People v. Lomax* (2010) 49 Cal.4th 530, 547, 557; *People v. Villanueva* (2011) 196 Cal.App.4th 411, 416; *People v. Elliott* (2012) 53 Cal.4th 535, 551, fn. 4; *People v. Rodriguez* (2013) 217 Cal.App.4th 326, 329.)

A Westlaw search also disclosed no *un*reported cases in which section 1387.1 was applied to revive a prosecution previously barred under section 1387.

interpreted to apply prospectively.

Finally, respondent argues that "[t]o the extent the statutory language arguably supports appellant's position, this Court should not adopt his statutory construction because it would lead to absurd results contrary to the Legislature's apparent purpose and would create an unreasonable and unwarranted loophole in the statutory scheme." (RB 87.) This violates the rule of construction, quoted earlier in respondent's brief, that "a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." (RB 84.)

Moreover, respondent's dire predictions are not borne out. Construing the statute so that it does not retroactively revive prosecutions that were barred by section 1387 does not create a new and dangerous "loophole;" it is the way the statute has been interpreted and applied for 25 years, with the apparent exception of appellant's case. Similarly, with respect to the "state interest . . . [in] protecting the community from violent felons," (RB 88), the only cases that would be affected are now more than 25 years old. It is unlikely that there are many such cases that prosecutors could or would be seeking to revive.

Insofar as appellant may well be the only person affected, there is no risk that he will escape punishment. At most, vacating this conviction would result in appellant not being eligible for the death penalty. There is no reason to distort the law, as respondent urges, to impose superfluous punishment on a single defendant.

3. Retroactive Application of Section 1387.1 Violates the Ex Post Facto Clause of the Constitution

If this Court construes section 1387.1, consistent with its plain language and legislative history, and consistent with its application and

interpretation over the last 25 years, to be a *prospective* statute, then it need not reach the constitutional question.[8]

Respondent attempts to distinguish *Stogner* on the ground that section 1387 is not a statute of limitation. (RB 89-91.) "But the fact section [1387] is not labeled a 'statute of limitations' is not controlling. Labels are not dispositive" for ex post facto purposes. (*Strong, supra,* 198 Cal.App.4th at p. 1081.) In *Strong*, the Court of Appeal held that the defendants could not be prosecuted for murder when the victim had died 29 years after the original shooting, and the law at the time of the shooting provided that "[t]o make the killing either murder or manslaughter, it is requisite that the party die within three years and a day after the stroke received or the cause of death administered." (*Id.* at p. 1079, quoting former § 194, as amended by Stats. 1969, ch. 993, § 1 [eff. Nov. 1969; subsequently amended eff. Jan. 1, 1997].) Section 194 was amended in 1997 to eliminate the three-years-and-a-day limitation, 14 years after it had elapsed in Strong's case. (*Id.* at p. 1080.)

As in this case, the State in *Strong* contended that *Stogner* was inapposite, because "[t]here is no statute of limitations for murder." (*Strong, supra,* 198 Cal.App.4th at p. 1081.) The Court of Appeal rejected that argument, holding that former section 194 unambiguously barred the prosecution from bringing murder charges when the victim had not died within three years and a day from the assault, effectively creating immunity

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[8]As discussed in the opening brief, this is another reason to construe section 1387.1, consistent with its plain language and legislative history, to apply prospectively. (AOB 66, citing *People v. Lowery* (2011) 52 Cal.4th 419, 427 [statute should be construed when possible to "render it valid ... or free from doubt as to its constitutionality...."]; accord *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 846.)

or a defense to prosecution separate from the statute of limitations. To revive such previously barred prosecutions violates the ex post facto clause. (*Id.* at pp. 1083, 1087-1088.)

Although it similarly revives barred claims, respondent nevertheless insists that section 1387.1 does not violate the ex post facto clause because it is merely a "remedial tool" intended to "eliminate some of the problems which can arise when witnesses are threatened" and "avoid the release of dangerous and violent felons," who may otherwise benefit unjustly from section 1387's bar on multiple refilings. (RB 86, 91.) This argument ignores the origins and purposes of the ex post facto clause.

The clause was prompted in part by the case of Sir John Fenwick – accused of treason for his part in Jacobite conspiracies against King William III. (*Carmell v. Texas* (2000) 529 U.S. 513, 526.) At the time of Fenwick's crime, two witnesses were required to prove treason. Fenwick's wife bribed and threatened one of the two witnesses who could implicate Fenwick to leave the country. Parliament responded by eliminating the two-witness rule, and Fenwick was convicted and beheaded. (*Id.* at pp. 526-529.)

Despite Fenwick's bad behavior, "there was a profound unfairness in Parliament's retrospectively altering the very rules it had established, simply because those rules prevented the conviction of the traitor – notwithstanding the fact that Fenwick could not truly claim to be 'innocent.'. . . The Framers, quite clearly, viewed such maneuvers as grossly unfair, and adopted the Ex Post Facto Clause accordingly." (*Carmell v. Texas, supra,* 529 U.S. at pp. 533-534.) Thus, the ex post facto clause was included in the Constitution precisely to protect unpopular – and guilty – defendants from retroactive changes in the law intended to facilitate

their conviction.

The high court noted the similarity of Carmell's case to Sir John Fenwick's case: At the time Carmell was alleged to have committed the offenses at issue, Texas law required the testimony of a victim over 14 to be corroborated to sustain a conviction for sexual assault. The law was changed, before Carmell was charged, to eliminate the corroboration requirement for victims up to the age of 18. (*Carmell v. Texas, supra,* 529 U.S. at pp. 517-518.) This allowed him to be convicted of some counts on the basis of the uncorroborated testimony of his stepdaughter, which previously would not have been sufficient. (*Id.* at p. 519.) As in Fenwick's case, the government had lowered the quantum of evidence required for conviction – a violation of the ex post facto clause. (*Id.* at pp. 530-531.)

As the high court emphasized:

> All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.

(*Carmell v. Texas, supra,* 529 U.S. at p. 533.)

In this case the government similarly declined to adhere to its own rules.[9] As with the statute of limitations at issue in *Stogner* or the three-years-and-a-day rule at issue in *Strong*, section 1387 erected a bar to

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[9]In fairness, as discussed above, it is not clear in this case that the legislature intended to change the rules unfairly. It is rather the prosecution which seeks to *apply* the new rules unfairly.

appellant's further prosecution. The bar was triggered by the state's inability to produce during preliminary proceedings a witness whose testimony was essential for the state to make out a legally plausible case of murder, as opposed to a lesser offense. Having failed three times to meet its burden, the state now wants to retroactively apply section 1387.1 to lift the bar on appellant's further prosecution.

B. The Prosecution in this Case Would Be Barred Even If Section 1387.1 Does Apply

Even if it was constitutionally permissible to apply section 1387.1 retrospectively, the Apodaca murder charge should have been barred under section 1387.1 because the case had previously been dismissed three rather than two times. (AOB 69-80.)

1. There Were Three Rather Than Two Dismissals

Respondent argues that the magistrate's decision holding appellant to answer for the lesser offense of manslaughter on April 9, 1987 could not constitute a dismissal unless the magistrate made a factual finding that precluded refiling the greater charge (murder) under section 739. (RB 92-93.) But respondent cites no case holding that the prosecution must be legally precluded from refiling the greater charge under section 739 for the magistrate's order to constitute a termination of the action within the meaning of section 1387. This is not the reasoning of any of the cases construing section 1387.

To the contrary, as discussed in the opening brief, the case law is clear that, if the action has already been dismissed twice before – as it was in this case – then refiling under section 739 is precluded, because reinstatement of charges under the section 739 is an "other prosecution for the same offense" within the meaning of section 1387. (*Ramos v. Superior*

Court (1982) 32 Cal.3d 26, 35-36.) For the reasons set out fully in the opening brief, there were *three* prior dismissals for purposes of section 1387 in this case, and the refiling in this case was not permitted even under section 1387.1. (AOB 69-80.)

2. The Superior Court Dismissal Was Not the Result of Excusable Neglect

Respondent argues that the trial court did not abuse its discretion in finding that at least one of the dismissals was due to excusable neglect. (RB 94-97.)

As an initial matter, respondent misstates the relevant case numbers in its argument: The discussion of the attempt to serve DeAlva with a subpoena (RB 95), comes from the preliminary hearing in case number 798706 and does not relate to case number 795989, which was dismissed against appellant several weeks earlier. (2CT: 349, 358, 363-364.)

Respondent's entire discussion is therefore relevant to the magistrate's decision to hold appellant to answer for the lesser offense of manslaughter, which respondent, like the prosecution below, insists did not constitute a dismissal. (RB 93-94.)

As discussed in the opening brief, the trial judge likewise focused on the magistrate's decision to hold appellant to answer for manslaughter after denying the prosecution a continuance to find witness DeAlva. (AOB 82; 4RT: 908-910, 912-913.) This could not provide the excusable neglect necessary to justify the additional refiling, however, because the prosecution maintained, and the trial court ruled, that the magistrate's order was *not* a dismissal. (AOB 83-84; 4RT: 981-982.) If – as the *defense* maintains – the magistrate's April 9, 1987, ruling *was* a dismissal, then there would be *three* dismissals and the refiling in *this* case would be barred

even under section 1387.1, regardless of any showing of excusable neglect. (AOB 83.) Defense counsel pointed this out, offering to agree that the magistrate's denial of a continuance was an error if the prosecutor would stipulate that the magistrate's order holding appellant to answer for a lesser offense was a dismissal. (4RT: 907.)

The prosecution made no showing of excusable neglect with respect to the first dismissal, of case number 795989, on March 13, 1987. (2CT: 349.) While respondent's procedural history cites District Attorney Investigator Schrader's testimony at the hearing on excusable neglect, relating to case number 795989 (RB 80, citing 4RT: 815-816), it was subsequently clarified that the efforts described in the disposition report to which Schrader referred occurred *after* case number 795989 had been dismissed as to appellant. (4RT: 827-829.) Deputy District Attorney Sandra Harris also did not testify about the circumstances of the March 13, 1987, dismissal, beyond confirming that case number 795989 was dismissed as to appellant but continued under that case number as to Salazar, while new charges were filed against appellant under case number 798706. (4RT: 848-849.)

Consequently, as discussed in the opening brief, the critical question is whether there was excusable neglect as to the superior court's dismissal, after the prosecution refiled the murder charges pursuant to section 739. (AOB 84.) The only evidence concerning this was the disposition report by Deputy District Attorney Harris, stating that the charges were dismissed because "after an extensive search by both Los Angeles Sheriff's Department Detective Adams and by D.A. Investigator John Velarde, the only eyewitness to the murder was never located or served." (4RT: 846-847; RB 96.)

As argued in the opening brief, however, the prosecution's decision to refile the murder charges in superior court, rather than proceeding on the manslaughter charge, when it still had not located DeAlva, was a tactical decision to persist with the greater charge. (AOB 83-84.) "[T]actical decisions do not amount to affirmative showings of excusable neglect. . ." (*African American Voting Rights Legal Defense Fund, Inc. v. Villa* (8th Cir. 1995) 54 F.3d 1345, 1350 [applying term as used in Federal Rule of Civil Procedure 6(b)]; *Slaughter v. Southern Talc Co.* (5th Cir.1990) 919 F.2d 304, 307 [same]; accord *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1039-40 [addressing party's motion for relief from default for failing to comply with California Code of Civil Procedure sections 2037 et seq.]; see also *Tapp v. Superior Court, supra,* 216 Cal.App.3d at pp. 1034-1035 [holding section 1387.1 not unconstitutionally vague, because term "excusable neglect" may be understood by reference to other areas of the law].)

C. Appellant's Conviction for the Second Degree Murder of Raul Apodaca Must be Reversed

For the reasons stated herein and in the opening brief, appellant's conviction for the second degree murder of Raul Apodaca must be reversed. First, section 1387.1 was not intended to and could not, under the ex post facto clauses of the state and federal constitutions, be applied retroactively to revive the Apodaca murder charge in this case. Second, even if section 1387.1 could be applied retrospectively, the Apodaca murder charge was still barred because there were three rather than two prior dismissals, exceeding the permissible refilings allowed even by section 1387.1. Third, even if there were only two dismissals, the trial court abused its discretion in finding that at least one of those dismissals was due to excusable neglect.

The only excusable neglect established was as to the April 1987 preliminary hearing, which resulted in the magistrate's order holding appellant to answer for the lesser charge of manslaughter. Since the trial court subsequently ruled that the magistrate's order did not constitute a dismissal at all, and there was no showing of excusable neglect as to the other dismissals, the refiling in this case was not permitted under section 1387.1.

Finally, because the prior murder special circumstance was invalid as well (Argument I, *supra*, and AOB 38-56), appellant is not eligible for the death penalty, and his death sentence must be vacated.

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III.

THE TRIAL COURT IMPROPERLY REVOKED APPELLANT'S PRO PER STATUS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

Respondent argues that appellant's right to represent himself was not improperly revoked, but rather was knowingly and intelligently relinquished. (RB 98.)

A. Appellant Did Not Abandon his Right to Self-Representation

Respondent argues first that appellant abandoned his right to self-representation under *Faretta v. California* (1975) 422 U.S. 806, because he acquiesced in representation by counsel once the trial court granted the substitution of counsel, over appellant's objection, and appellant did not "expressly and unambiguously renew his request to represent himself." (RB 102-103, quoting *McKaskle v. Wiggins* (1983) 465 U.S. 168, 183, bracketed text omitted.)

Wiggins, however, is completely inapposite. (See AOB 95.) In *Wiggins*, the defendant represented himself at trial but complained after the fact that his standby counsel had been overly intrusive. (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 176.) The high court held that because Wiggins had acquiesced in the participation of standby counsel, "subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request *that standby counsel be silenced.*" (*Id.* at p. 183, italics added.) Requiring the defendant to renew his objections in this context is essential to allow the trial court to police the boundaries, throughout the duration of a trial, between the defendant's right to represent himself and the appropriate role of standby counsel.

Here, in contrast, appellant's pro se status was revoked altogether, and the issue on appeal is whether that specific ruling violated appellant's Sixth Amendment rights. In this context, the law is clear that once the trial court ruled conclusively against him, appellant was "not required continually to renew" his request to represent himself "or to 'make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal.'" (*Orazio v. Dugger* (11th Cir.1989) 876 F.2d 1508, 1512, cited in *People v. Dent* (2003) 30 Cal.4th 213, 219 ["[w]e do not require trained counsel to repeatedly make a motion that has been categorically denied; how much more should we require of an untrained defendant seeking self-representation?"]; accord *People v. Butler* (2009) 47 Cal.4th 814, 825, fn. 3.)

B. Appellant Did Not Knowingly and Intelligently Waive His *Faretta* Rights

With respect to the revocation of appellant's *Faretta* rights, respondent maintains that appellant's "interpretation of the record is inaccurate," that (1) appellant's waiver of his right to self- representation did not rest on a misunderstanding of law, (2) if there was any misunderstanding, it was resolved in the trial court, and (3) in either event, appellant's waiver of his *Faretta* rights was knowing, intelligent and voluntary. (RB 104-105.)

It is, however, respondent who misinterprets the record, paraphrasing over the portions of the record that make clear appellant's waiver was *not* knowing and intelligent. (RB 104-105.) Appellant explained to the court that he had signed the substitution of counsel form "involuntarily" because he had "been told by numerous people that today my pro per status was going to be revoked, regardless of what transpires today" as a result of his

loss of library privileges. (AOB 87; 1RT: 52-53.) The trial prosecutor understood this reflected a misapprehension of the law, because he attempted immediately to correct it, explaining that appellant could continue to represent himself, and standby counsel would provide him with any research material he needed. (1RT: 54.)

Respondent claims that appellant was thus "given sufficient explanation of the law by the prosecution and [his] own counsel" to eliminate any misunderstanding. (RB 105.) But this ignores that the explanations were inconsistent. While the prosecutor correctly stated that appellant could continue to represent himself even without library access (*People v. Butler, supra,* 47 Cal.4th at pp. 827-828), he was contradicted by standby counsel who insisted appellant could not represent himself without access to the jail law library and, moreover, that he should not be permitted to represent himself because he would ask for the death penalty. (AOB 94; 1RT: 54, 56-58.)

Respondent maintains that the trial "court was not required to take any further corrective measures," because "'all circumstances indicate[d] that the defendant [had] abandoned his request to conduct his own defense.'" (RB 105, quoting *People v. Kenner* (1990) 223 Cal.App.3d 56, 61.) Again, the record does not support this contention. As noted in the opening brief, the minute order for the day correctly reflects that appellant made a "motion to withdraw substitution of attorney," which was denied – indicating that the court understood appellant had *not* abandoned his request to conduct his own defense. (AOB 97; 1CT: 103.)

The prosecutor also recognized that the record was not clear. (1RT: 57-58.) Mr. Stein, then acting as standby counsel, urged the trial court to simply accept the substitution of counsel (1RT: 57), but the prosecutor

interjected:

> Mr. Markus: Mr. Trujeque, what do you want to do? You want to have Mr. Stein [be] your attorney or not? The way it's going to shape up is you're going to be pro per, but you're not going to have pro per privileges in county jail. You're going to need -- everything you need to get is through your lawyer. That's the way it looks, and your lawyer would --
> The Defendant: If I'm not mistaken, isn't that up to the court to make that decision, the judge?
> Mr. Markus: He's making it now. He's going to have Mr. Stein be your lawyer, but the choice is what do you want to do?
> The Defendant: I want to represent myself and have access and be allowed to have access to the law library.

(*Ibid.*) Mr. Stein asked to speak to appellant, but after doing so, simply said, "Your honor, I'll ask the court to -- I think the court already said they've accepted the substitution of attorney." (1RT: 58.)

Apparently concerned that Mr. Stein was glossing over a problem with appellant's agreement to the substitution of counsel, the prosecutor said he was still "not happy with the record." (1RT: 58.) At this point, with appellant continuing to resist the substitution of counsel, and receiving conflicting information and advice from his standby counsel and the prosecutor, it was essential for the trial judge to step in to dispel the ambiguity and ascertain whether appellant understood the law and, if so, whether he wanted to waive his *Faretta* rights or continue to represent himself. The judge never did so.

Contrary to respondent's assertion, *People v. Carter* (1967) 66

Cal.2d 666, 670, which recognized the duty of the trial court to "promptly and unequivocally" correct a mistaken belief on which a defendant's waiver of the right to counsel was predicated, is not "inapposite" to this case.[10] (RB 105-106, fn. 21.) In *Carter*, the defendant predicated his waiver of counsel on his expectation that he would have meaningful access to the law library. (*Id.* at pp. 668-669.) When denied adequate access to the law library, Carter refused to defend himself and was convicted. (*Id.* at p. 669.) This Court held that Carter's waiver of his right to counsel was not effective because the trial judge failed to dispel Carter's expectation of access to the law library. (*Id.* at p. 670.)

Respondent attempts to distinguish *Carter* on the ground that appellant, unlike Carter, was aware that he would not have access to the law library. (RB 105-106 fn. 21.) But this was not the misunderstanding that needed to be corrected. In this case, the judge needed to confirm – in the face of conflicting information – that appellant could continue to represent himself despite having lost his library privileges and then determine whether appellant wanted to proceed pro per or not. Because the trial court did not promptly and unequivocally correct appellant's misunderstanding that his pro per status would automatically be revoked, the waiver of his *Faretta* rights was not knowing and intelligent. (See *Brady v. United States* (1970) 397 U.S. 742, 748; *People v. D'Arcy, supra,* 48 Cal.4th at p. 284.)

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[10]In *People v. D'Arcy* (2010) 48 Cal.4th 257, 284, this Court recognized that a defendant's conditional waiver of the right of self-representation was analogous to the conditional waiver of counsel at issue in *Carter*. In *D'Arcy*, however, the defendant withdrew his *Faretta* motion and expressly abandoned his earlier condition that a specific defense be presented. (*Id.* at p. 285.) Here, as discussed above, appellant did not abandon his right to self-representation.

Respondent finally argues that appellant did not really want to represent himself, but was "slyly sav[ing] his *Faretta* ace to play triumphantly on appeal." (RB 107, quoting *People v. Kenner, supra,* 223 Cal.App.3d at p. 62.) Here, as in *Kenner*, however, "[t]he record does not clearly establish any such cunning strategy." (*People v. Kenner, supra*, 223 Cal.App.3d at p. 62.) Indeed, unlike Kenner, who remained silent and did not call the court's attention to a pending *Faretta* motion, appellant spoke up and made his wishes clear. (AOB 96-97.)

Respondent cites appellant's purported abuses of his pro per privileges, such as asking his investigator to provide him with jokes or contacts for literary agents. (RB 107.) While inappropriate, these incidents certainly did not rise to the level that would have warranted termination of appellant's pro per status. (AOB 92; *People v. Butler, supra*, 47 Cal.4th at pp. 820-821 [defendant's *Faretta* rights improperly revoked even though defendant had lost library privileges and posed a serious security risk].)

C. Reversal is Required

For these reasons and those set out in the opening brief, the improper revocation of appellant's pro per status requires reversal of his convictions and sentences. (AOB 98, citing *People v. Butler, supra*, 47 Cal.4th at pp. 826-827 [improper revocation of defendant's *Faretta* rights reversible per se].)

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IV.

THE TRIAL COURT ERRED BY ALLOWING APPELLANT'S AUNT AND UNCLE TO MAKE AN OVERBROAD, BLANKET ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION WHICH PRECLUDED APPELLANT FROM PRESENTING CRITICAL EVIDENCE IN HIS DEFENSE AND IN MITIGATION OF THE DEATH PENALTY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

Respondent maintains that the trial court properly concluded, after an adequate inquiry, that Charlie Trujeque could invoke his privilege against self-incrimination to refuse to answer *any* questions at trial, including questions concerning family history at the penalty phase, and that Helen Trujeque was properly allowed to invoke her privilege against self incrimination at the penalty phase of the trial, even though she had already testified at the guilt-innocence phase. Respondent further claims that if there was error, it was harmless. (RB 107-108.)

A. A Trial Court must Accommodate Both the Defendant's Constitutional Right to Present Evidence and the Witness's Privilege Against Self-incrimination

Nowhere in the reply does respondent acknowledge that appellant had a countervailing, constitutionally-guaranteed right to compulsory process and to present a defense, including to present mitigating evidence at the penalty phase of his capital trial. (See AOB 109; *Washington v. Texas* (1967) 388 U.S. 14, 19 [defendant's right to present witnesses to establish a defense "is a fundamental element of due process of law"]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-115 [capital defendant has Eighth Amendment right to present mitigating evidence].)

The high court has long recognized, however, that "[w]hen two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded." (*Mason v. United States* (1917) 244 U.S. 362, 364; see also *United States v. Nixon* (1974) 418 U.S. 683, 709 ["[t]o ensure that justice is done, it is imperative . . . that compulsory process be available for the production of evidence needed either by the prosecution or by the defense"].) The competing interests are accommodated by ensuring that the privilege "is confined to real danger," for "it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice." (*Mason v. United States, supra,* 244 U.S. at pp. 365-366, quoting *The Queen v. Boyes* (1861) 1 B. & S. 311, 329-330 (Cockburn, J.).)

California courts have similarly recognized that "it is the duty of the court, while it protects the witness in the due exercise of the privilege, to take care that he does not, under the pretense of defending himself, screen others from justice. . . ." (*In re Marriage of Sachs* (2002) 95 Cal.App.4th 1144, 1159, quoting *Coleman v. Galvin* (1947) 78 Cal.App.2d 313, 321.)

When a "defendant's interest in presenting his or her own witnesses to establish a defense" conflicts with "the witness' interest in exercising his or her privilege against self-incrimination" and/or "the prosecution's interest in securing effective cross-examination," the trial court has "a special obligation to seek an accommodation" among the competing

interests. (*State v. Reedy* (W.Va. 1986) 352 S.E.2d 158, 165-166; accord *Littlejohn v. United States* (D.C. 1997) 705 A.2d 1077, 1085; *United States v. Goodwin* (5th Cir. 1980) 625 F.2d 693, 701, discussed at AOB 114-116; see also *In re Marriage of Sachs, supra*, 95 Cal.App.4th at p. 1156 [courts must "if possible," "accommodat[e] the interests of both parties" in civil litigation, where one invokes privilege].)

The defendant's interest in presenting mitigating evidence at the penalty phase of a capital case is even more substantial. Because death is "profoundly different from all other penalties," (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 110), the Eighth Amendment requires that the jurors in a capital case be permitted to consider and give "meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence." (*Brewer v. Quarterman* (2007) 550 U.S. 286, 289; accord *Skipper v. South Carolina* (1986) 476 U.S. 1, 8 [exclusion of mitigating evidence required reversal of death sentence]; *Tennard v. Dretke* (2004) 542 U.S. 274, 284-285 [limitations on mitigating evidence required reversal of death sentence]; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399 [same]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn.) [same]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305 (plur. opn.) [mandatory death penalty without regard to mitigating evidence impermissible].)

The trial court here could have readily protected the Trujeques' rights while also allowing appellant to elicit information critical to his defense. Instead, the court accepted the Trujeques' claims of privilege – at the prosecutor's urging – with virtually no inquiry into their validity.

B. Charlie Trujeque's Blanket Claim of Privilege Was Improperly Sustained at the Guilt Phase Where the Defense Offered to Limit its Direct Examination and the Prosecution Never Explained How its Cross-Examination Would Be Incriminating

Respondent argues that the trial court's ruling was correct, because "it was apparent to the court that the defense did not intend to confine the scope of the questioning to avoid a suggestion that Charlie solicited the murder or acted as an accessory." (RB 114.) To the contrary, defense counsel acknowledged that Charlie Trujeque had a legitimate claim of privilege as to any questions that would "tend to incriminate him" in the murder of Max Facundo.[11] (6RT: 1356-1357.) Appellant therefore does not dispute that the privilege was properly invoked as to that area of inquiry. (AOB 115; see *Ohio v. Reiner* (2001) 522 U.S. 17, 21-22.) The trial court, however, allowed a *blanket* invocation of the privilege, which was far broader than necessary to protect Mr. Trujeque's rights and completely ignored appellant's.

When the court asked defense counsel to explain what he would ask if he called Mr. Trujeque as a witness at the guilt phase,[12] defense counsel made clear that he was most concerned with being able to ask Mr. Trujeque about the letters between appellant and Charlene, to rebut the prosecutor's

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[11]Trial counsel did argue that "the statute of limitations on accessory after the fact has expired" and suggested the defense should therefore be able to ask about events after the homicide, but this was not, ultimately, what defense counsel proposed to ask. (6RT: 1358, 1361.)

[12]As noted in the opening brief, Mr. Trujeque was listed as a prosecution witness, but the prosecution accepted his invocation of privilege, and the parties proceeded to discuss Mr. Trujeque as if he were a defense witness. (AOB 113.)

insinuation that appellant's relationship with Charlene Trujeque was inappropriate. (6RT: 1358-1359, 1361.) Defense counsel also wanted to ask Mr. Trujeque about the murder of his niece, Vicki, but the trial judge said he had already foreclosed that area of inquiry under Evidence Code section 352.[13] (6RT: 1359.)

The trial court initially agreed that defense counsel could question Mr. Trujeque "about his concerns about his daughter and her relationship with Mr. Facundo." (6RT: 1359.) Defense counsel explained that he would also like to question Mr. Trujeque about whether he had been concerned with Charlene's drug use, because – even if he was limited in what he could ask – it would help "explain why my client did what he did." (6RT: 1360-1361.) He concluded by reiterating, however, "I'm more concerned about the – if he remembers the contents of the letter." (6RT: 1361.) Thus, contrary to Respondent's assertion, defense counsel made clear that he was prepared to limit the scope of direct examination before the jury to protect Mr. Trujeque's privilege.[14]

The trial court reversed itself and sustained a blanket invocation of the privilege only after the prosecutor insisted – erroneously – that the privilege was an all-or-nothing proposition:

> Mr. Markus: Once again, I feel the need to educate the court as Mr. Stein has misedu- -- -informed the court one additional time. [¶] You cannot pick and choose what you'd like to testify to behind the 5th Amendment.... [¶] What Mr. Stein

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[13]This ruling is asserted as a separate error in Argument VII, *infra,* and in the opening brief, AOB 147-154.

[14]All questioning of Charlie Trujeque occurred outside the presence of the jury.

> fails to inform the court is he cannot stand before this court and pick and choose and say I'd like to ask this man about the letters because the letters don't have, in and of themselves, have anything to do with any conversations with Mr. Trujeque. But, in essence, what the courts have said -- and I will bring case law into this court, I am extremely confident of my position -- is that you can't -- you cannot just pick one spot and not allow the opposing party the ability to cross-examine.[15]

(6RT: 1361-1362.) Respondent similarly contends on appeal that, if the defense "elicited any testimony from Charlie," the prosecution could not be restricted in its right of cross-examination, including "impeach[ing] his credibility as a witness." (RB 115.)

This ignores, however, the well-established rule that the privilege may apply to some areas of inquiry and not others. (AOB 111, 114-115, collecting cases.) Moreover, in balancing the competing interests at stake in this kind of case, "the trial judge ha[s] the authority, and even the duty, to restrict . . . cross-examination to accommodate [the defendant's] Sixth Amendment rights" if the prosecution "would have a reasonable opportunity to cross-examine [the witness] for bias with questions not

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[15]To the extent the prosecutor was paraphrasing *Mitchell v. United States* (1999) 526 U.S. 314, 322, that case held "[a] witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry." There is, however, a difference between "allowing a witness to offer only *self*-selected testimony" (*ibid.*, italics added), and a witness testifying subject to a court order carefully crafted in advance to protect the witness's Fifth Amendment right, the defendant's right to present a defense, and the prosecution's right to cross-examination.

posing a threat of self-incrimination." (*Littlejohn, supra*, 705 A.2d at p. 1085; accord *Scott v. United States* (D.C. 2008) 954 A.2d 1037, 1044.) This principle is reflected in the remedy allowed the state when a defense witness refuses to answer questions on cross-examination: it is permissible under the compulsory process clause to strike *all* of his testimony only if the questions posed on cross "go to the heart of the direct testimony on a central issue," rather than to collateral issues. (*Denham v. Deeds* (9th Cir. 1992) 954 F.2d 1501, 1504; *United States v. Lord* (9th Cir.1983) 711 F.2d 887, 892.)

In this case, as pointed out in the opening brief, the prosecutor never explained – and the trial court never asked – what questions the prosecutor would have posed on cross-examination that could have incriminated Mr. Trujeque or impeached his credibility. (AOB 113.) Respondent also fails to do so. (RB 115.)

It would be cynical at best for the prosecution to claim that it should have been allowed to cross-examine Charlie Trujeque about Facundo's murder in order to impeach his credibility as a witness, given that the prosecution had considered Mr. Trujeque sufficiently credible to list him as a prosecution witness and was highly critical of appellant and his counsel for suggesting that Charlie and Helen Trujeque were in any way complicit in Facundo's murder. (6RT: 1343-1344, 1436-1438, 1495-1496, 1498; 7RT: 1630, 1793, 1803-1804.) The prosecution identified no other potentially incriminating questions that it would have posed on cross-examination if Mr. Trujeque had been called as a defense witness.

Thus, there was no showing whatsoever that would justify the trial court in depriving appellant entirely of Mr. Trujeque's testimony. There was no evidence that a carefully circumscribed direct examination focusing,

for example, on the nature of appellant's letters to Charlene Trujeque would have violated Mr. Trujeque's privilege against self incrimination. It was therefore error not to allow the defense to make the limited inquiry it proposed at the guilt-innocence phase of the trial.

C. The Witnesses's Claims of Privilege Were Improperly Sustained at the Penalty Phase Where Appellant Had a Compelling Interest in Presenting Mitigating Evidence and There Was No Reasonable Danger of Self-Incrimination

1. Charlie Trujeque

Even if it was too difficult at the guilt-innocence phase to isolate areas of inquiry for direct examination that would not have been potentially incriminating to Mr. Trujeque, the same is not true of the penalty phase. At the penalty phase, defense counsel proposed to limit his questioning strictly to family history information, concerning events that occurred long before Max Facundo was killed. (10RT: 2573.) There was simply no "*reasonable* cause to apprehend danger from a direct answer" to questions about matters such as how many siblings Mr. Trujeque had, what their upbringing was like, Manuel Trujeque's military service and heroin addiction, appellant's childhood, or any of the other family history questions proffered by defense counsel. (*Hoffman v. United States* (1951) 341 U.S. 479, 486, italics added; accord *In re Marriage of Sachs, supra,* 95 Cal.App.4th at p. 1150; *Warford v. Madeiros* (1984) 160 Cal.App.3d 1035, 1043; 10RT: 2584-2585 [questions proffered by defense].)

Respondent, however, fails again even to acknowledge appellant's constitutional right to present mitigating evidence, maintaining that the trial court properly sustained the privilege as to the penalty phase because Charlie Trujeque's lawyer "argue[d] that any information, even as to

appellant's family history, would have a tendency to show motive and bias and would open the door for cross-examination by the prosecution into areas of self-incrimination." (RB 116.) Respondent further maintains that the trial court conducted an adequate inquiry "by handling the matter on a question-by-question basis as the defense questioned Charlie and ultimately found, as it did during the guilt phase, that Charlie's testimony, even about family relationships, could provide a link in the chain incriminating him." (*Ibid.*)

The danger of self-incrimination on cross-examination by the prosecution was not proper grounds to sustain the privilege because, as discussed above, the prosecutor never explained what he would have asked that could have been incriminating. As to the trial court's "question-by-question" handling of the matter, Mr. Trujeque answered exactly two questions – concerning his date and location of birth – before the prosecutor interrupted to assert the privilege on his behalf with respect to any further questions.[16] (10RT: 2566-2567.) Mr. Trujeque's lawyer, Mr. Garcia, then joined in, arguing that even family history information "would be in a position to somehow go into the link of potential prosecution." (10RT: 2567.)

This is precisely the sort of broad invocation based on "remote and speculative," rather than real, danger of incrimination that is insufficient to sustain the privilege, particularly when a capital defendant's right to present

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[16]Defense counsel was allowed to ask some additional questions, but Mr. Trujeque continued to invoke the Fifth Amendment, including to questions such as how many siblings he had. (10RT: 2571, 2575-2576.) Defense counsel proffered additional questions for the record. (AOB 105-106; 10RT: 2584-2585.)

mitigating evidence is at stake. (See *Zicarelli v. New Jersey State Comm'n of Investigation* (1972) 406 U.S. 472, 480-481 [immunized witness's fear of foreign prosecution too remote and speculative]; see also *Mason v. United States, supra,* 244 U.S. at pp. 366 [remote danger of incrimination should not defeat ends of justice]; *Littlejohn v. United States, supra*, 705 A.2d at p. 1084 [theory that defense witness' testimony might incriminate him by establishing he had been in same area where crime was committed,18 months earlier, was "remote and speculative" rather than "real and substantial," citing *Zicarelli, supra*, 406 U.S. at p. 478 & fn. 12]; *Warford v. Madeiros, supra,* 160 Cal.App.3d at pp. 1045-1046 & fn.9 [witness failed to demonstrate privilege was properly invoked as to "innocuous questions" such as "the names of his parents, whether he had any uncles, his telephone number, whether he had ever been to Hawaii, and whether he was related to Isaac Sanga"].)

Respondent nevertheless argues that it was appropriate to excuse Mr. Trujeque once it was "apparent that the witness would have offered no testimony in response to questions posed." (RB 116, citing *People v. Fonseca* (1995) 36 Cal.App.4th 631, 638.) To say that the trial court was correct in simply acquiescing once the witness made a blanket assertion of privilege is contrary to the rule that a "witness is not exonerated from answering" on the basis of his or her own "say-so." (*People v. Seijas* (2005) 36 Cal.4th 291, 304, quoting *Hoffman v. United States, supra,* 341 U.S. at p. 486.)

In *Fonseca* itself, the Court of Appeal qualified its statement by noting that "it was plain that any question about the incident," in which the witness had originally been charged as Fonseca's co-defendant, would incriminate the witness, and "[i]t was equally plain that questions about

anything other than the incident were irrelevant." (*People v. Fonseca, supra,* 36 Cal.App.4th at p. 638.) In this case, in contrast, there were a host of questions defense counsel sought to ask about family history that were completely irrelevant to the murder of Max Facundo but were highly relevant to appellant's case in mitigation.

It would have been easy at the penalty phase for the trial court to set specific parameters – as defense counsel proposed – for eliciting family history testimony that would have met the needs of the defense while fully protecting Mr. Trujeque. (See *In re Marriage of Sachs, supra,* 95 Cal.App.4th at pp. 1160-1162 [accommodating husband's right against self-incrimination and rights of former spouse and children to enforce order of support].) By failing to do so, the trial court violated appellant's Eighth Amendment right to present mitigating evidence.

2. Helen Trujeque

Respondent argues that Helen Trujeque was properly allowed to invoke her privilege against self incrimination at the penalty phase because the defense proposed to question her about family history, an entirely different subject than she had testified to at the guilt-innocence phase of the trial, and as to which she had not waived the privilege. (RB 118-119.)

There are two problems with this argument: First, as discussed above with respect to Mr. Trujeque, there was no "*reasonable* cause to apprehend danger" from answering the family history questions defense counsel sought to ask at the penalty phase. (*Hoffman v. United States, supra,* 341 U.S. at p. 486, italics added.) Hence, Mrs. Trujeque's privilege against self-incrimination was not implicated with respect to that area of inquiry. Second, the reason cited by both the prosecutor and Mrs. Trujeque's lawyer for invoking the privilege was that they were concerned that Mrs. Trujeque

would be questioned further about the same matters she had testified to at the guilt-innocence phase and might be subject to perjury charges based on that testimony.[17] (AOB 107, 119-120; 10RT: 2590-2591, 2659.) As to these matters, Mrs. Trujeque ***had*** waived the privilege by testifying at the guilt-innocence phase. (AOB 119-120.)

D. The State Has Not Proven the Error Was Harmless Beyond a Reasonable Doubt

Respondent argues that even if the trial court erred in sustaining the privilege, any error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. (RB 117.) Respondent has not, however, carried its burden with respect to prejudice.

1. The Guilt-Innocence Phase

As to the guilt-innocence phase of the trial, respondent maintains that the excluded testimony was unimportant, because "the jury already learned from Helen that she and Charlie were extremely concerned about Charlene's relationship with Facundo," and that Charlie "believed he had the kind of relationship with appellant that he could ask appellant to take care of Facundo. . . ." (RB 117.) As noted in the opening brief, what the jurors did not hear was rebuttal of the prosecutor's insinuation that appellant's interest in Charlene was inappropriate, or testimony about the murder of appellant's – and Charlene's – cousin Vicki, who was stabbed forty times by her abusive boyfriend, and the effect Vicki's murder had on the family's fears for Charlene's safety. (AOB 121-122; Argument VII, *infra*, and AOB 147-154; 6RT: 1329-1330 [defense proffer of testimony

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[17]Indeed, Ms. Harris, Mrs. Trujeque's lawyer, explained that she was *not* invoking the privilege "based upon what Mr. Stein says he wants to ask" about family history. (10RT: 2659.)

about Vicki].) Charlie Trujeque's testimony could have neutralized the eleventh-hour theory that appellant's letters to Charlene were "uncousinly." (5RT: 1252-1253, 1257; 7RT:1790.) And, as set out in Arguments V and VII, incorporated by reference herein, Charlie's testimony about Vicki's murder would have substantially strengthened the grounds for an instruction on imperfect defense of another and thus the likelihood of a conviction of a lesser offense of manslaughter or second degree murder. (Argument V, *infra*, and AOB 126-143 [refusal to give instruction on imperfect defense of another]; Argument VII, *infra*, and AOB 147-154 [exclusion of evidence concerning Vicki's murder].) Respondent has therefore not established beyond a reasonable doubt that the trial court's error in sustaining Charlie Trujeque's claim of privilege at the guilt-innocence phase of the trial "did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. at p. 24.)

2. Penalty Phase

With respect to the penalty phase, respondent argues the jury heard "evidence of appellant's familial history and childhood that might mitigate his penalty" and "[a]ll the jury was prevented from hearing was the same type of testimony from Charlie's mouth." (RB 117.) Respondent concludes that, because the jury convicted appellant and sentenced him to death "with the same information before it, it follows that any purported error was harmless beyond a reasonable doubt." (*Ibid.*)

This is wrong on several levels. First, while the jurors heard some testimony from appellant's half-sister, maternal aunts and uncles about his mother and about appellant's childhood, no one from the Trujeque side of

the family testified at the penalty phase,[18] and the jurors therefore heard very little about appellant's father and nothing at all from his paternal relatives about time that appellant spent with his father's family as a child. (See AOB 29-32, 122-125.) Defense counsel proffered a long list of questions that were never answered, including about Manuel Trujeque's childhood, his experience in the military, his war time injuries, his heroin addiction and how it affected his behavior and family relationships, Manuel's relationship with appellant, what appellant was like as a child, whether the Trujeque family knew about appellant's disabilities and institutionalization as a child, and the circumstances of Manuel's death. (10RT: 2572, 2584-2585.)

Second, as discussed further in argument XIII, *infra*, the introduction of "corroborating information from multiple sources" is critical, "wherever possible[,] to ensure the reliability and thus the persuasiveness of . . . [mitigating] evidence." (*American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003) ("ABA Guidelines"), Guideline 10.7, Com., *reprinted in* 31 Hofstra L. Rev. 913, 1025.) Thus, even if there was some overlap with

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[18]The family witnesses who testified were appellant's maternal relations: his uncle, Marcelo Ramirez (9RT: 2373-2406), his aunts, Geraldine Luna (9RT: 2407-2413), Genevieve Moraza (10RT: 2666-2675), and Sophie Garcia (10RT: 2682-2692), and Sophie's husband, Tony Garcia (10RT: 2676-2683). These witnesses, and appellant's half-sister, Rosemary, testified about Manuel Trujeque's violent abuse of appellant's mother, including while she was pregnant with appellant, but provided little other information about him. (9RT: 2295-97, 2339-2340, 2371, 2384; 10RT: 2671-2672, 2678-2679, 2684.) There was also testimony from appellant's former probation officer, and from the probation reports, that Manuel Trujeque was a frequently-incarcerated narcotics addict. (9RT: 2429, 2443, 2447;11RT: 2835, 2846, 2856.)

other testimony, it was important for the jurors to hear corroborating evidence about appellant's childhood and family history in order to get the most complete and reliable understanding of the circumstances that shaped him.

As a result of the trial court's ruling, the presentation of mitigating evidence was materially incomplete and substantially weakened. The error was critical because, as discussed in the opening brief, this was not one of the most aggravated and least mitigated of murders for which the death penalty is reserved. (AOB 207, citing *Roper v. Simmons* (2005) 543 U.S. 551, 568 and *Atkins v. Virginia* (2002) 536 U.S. 304, 319.) The offense for which appellant was actually sentenced to death – the killing of Max Facundo, his cousin Charlene's brutally abusive boyfriend – is not a typical capital case – as reflected by the apparently low priority the State gave to prosecuting it, until appellant reached out to police to confess more than ten years after the fact.

Given the extenuating circumstances of the capital offense itself, and the other, substantial mitigating evidence presented, as discussed in Argument XIII, incorporated by reference herein, "[t]here is a reasonable probability" that if the trial court had not improperly restricted the scope of the case in mitigation, "at least one juror would have struck a different balance," between the aggravating and mitigating circumstances. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537.) The error is therefore not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; see AOB 205 [discussing standard for penalty phase prejudice].) For these reasons and those stated in the opening brief, appellant's death sentence must also be reversed.

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V.

THE TRIAL COURT ERRED BY REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS ON IMPERFECT DEFENSE OF ANOTHER OR NECESSITY AS TO THE FACUNDO MURDER COUNT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Respondent maintains that the trial court did not err in refusing to give appellant's requested instruction on imperfect defense of another because there was insufficient evidence that Charlene Trujeque was in imminent danger from Facundo, and that appellant's own statements were inconsistent with such a claim. (RB 120-123.) As discussed in the opening brief, however, "substantial evidence" to support an instruction does not mean undisputed evidence, and the duty to instruct on a defense arises even when there is contradictory evidence from the defendant himself. (AOB 133-134.)

A. The Trial Court's Erroneous Refusal to Instruct on Imperfect Defense of Another Violated Appellant's Right to Present a Defense

Respondent claims the trial court properly refused the instruction, because it would be "pure speculation plainly contradicted by the evidence adduced at trial" to "posit that appellant had an actual but unreasonable belief in the need to defend Charlene with lethal force." (RB 123.) Elsewhere in the brief, however, respondent acknowledges that there was "ample evidence" before the jury "that appellant believed Facundo would harm and possibly kill Charlene." (RB 132.) Respondent cannot have it both ways, insisting on one hand that there was not enough evidence that appellant believed Charlene was in danger to warrant an instruction on

imperfect defense of another and on the other hand claiming that there was plenty of evidence that appellant feared for Charlene's life, so that there was no harm in preventing the defense from presenting additional evidence concerning the reasons that Charlene's family, including appellant, felt her life was in danger.

At a minimum, "ample evidence" that appellant believed Charlene's life was in danger constitutes "[s]ubstantial evidence . . . sufficient to 'deserve consideration by the jury,'" and thus to require the requested instruction on imperfect defense of another. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008 [citations omitted].)

Respondent's contention that there was not substantial evidence to warrant the instruction rests on three central points: (1) that Facundo's previous beatings of Charlene did not constitute an imminent danger; (2) that appellant was armed the night of the murder, indicating he planned to attack Facundo; and (3) appellant claimed he was paid by his aunt and uncle to kill Facundo. (RB 122-123.)

With respect to respondent's first two arguments, imperfect self defense does not require spontaneity. A history of violence by the victim establishes the reasons for the defendant's fear – either for his own or another's safety. For example, in *In re Christian S.*, the defendant had been verbally and physically harassed by the victim – "a so-called skinhead and a possible gang member" – and his friends for nearly a year before the murder. (*In re Christian S.* (1994) 7 Cal.4th 768, 772.) The defendant began to carry a gun and, when pursued by the victim, shot him. (*Ibid.*)

Given Facundo's undisputed history of violence toward Charlene, which defense counsel emphasized in requesting the instruction, the fact that appellant was armed with a knife the evening of the crime is not

inconsistent with a claim of imperfect defense of another. (AOB 126-127; 6RT: 1564-1565.) To the contrary, as in *In re Christian S.*, the facts are equally consistent with appellant being aware of Facundo's potential for violence and being prepared to protect his cousin. Thus, these facts cannot justify the refusal to give the instruction.

Respondent also claims Facundo could not have been a threat because he was too intoxicated even to drive. (RB 122.) But, as defense counsel again pointed out when requesting the instruction, Facundo was high on PCP, and was particularly prone to violence when on PCP. (AOB 138; 6RT: 1564-1565.)

Respondent further argues, as the trial court held, that appellant's own statements that he was paid to kill Facundo undermined his defense. (RB 123; 6RT: 1561.) Respondent ignores the well-settled law, discussed at length in the opening brief, that the duty to instruct on a particular defense arises even when contradicted by the defendant's own statements. (AOB 138-139.) That is particularly relevant here, because the incriminating statements on which respondent relies were made as part of appellant's irrational quest for a death sentence. (AOB 139.) Indeed, at trial, the prosecutor himself dismissed as fabrication appellant's claim to be a hired killer. (7RT: 1701.) Accordingly, none of these factors justified the refusal to instruct on appellant's defense.

Imminence of the threat posed by the victim (RB 121; 6RT: 1563), is likely to be the most contested factual issue in any case involving self defense or defense of another, and for imperfect defense of another the defendant's belief that harm is imminent may be *un*reasonable, allowing more room to interpret the evidence. (See *People v. Randle* (2005) 35 Cal.4th 987, 1004; *People v. Michaels* (2002) 28 Cal.4th 486, 530-531.) As

such, it is critically important that the trial court not usurp the jurors' role when it decides whether the evidence warrants giving the defendant's requested instruction: "Even if the defense evidence . . . may be classified as less than highly persuasive and was disputed by conflicting evidence," the trial court may "not measure the substantiality of the evidence by weighing conflicting evidence or the credibility of the witnesses." (*People v. Larsen* (2012) 205 Cal.App.4th 810, 827.) Moreover, "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*Id.* at p. 824.)

Thus, contrary to respondent's implication, evidence to support an instruction on imperfect defense of another need not be uncontroverted nor of unassailable credibility, because it is the jurors' role, not the judge's, to assess the credibility of witnesses and resolve disputed questions of fact. (AOB 133.) Because there was ample evidence in this case to warrant the juror's consideration, the trial court erred in refusing to instruct the jury on imperfect defense of another.

B. The Trial Court Also Erroneously Refused to Instruct on Necessity

Respondent asserts that necessity is not an available defense in homicide cases, but this Court has said the defense may not be raised with respect to the murder of *innocent third parties*, leaving open the possibility that it would apply, for example, to the killing of a violent perpetrator of domestic abuse. (AOB 140, fn. 72, citing *People v. Coffman* (2004) 34 Cal.4th 1, 100-101.)

In arguing that the evidence did not warrant an instruction on necessity, respondent minimizes the abuse to which Charlene was subjected, asserting the evidence showed that "at most" she had been beaten

by Facundo "in the past." (RB 126.) The evidence was uncontradicted, however, that Facundo beat Charlene regularly, "constantly" leaving her with black eyes and visible bruises on her arms and face. (5RT: 1018-1019, 1048; 6RT: 1296-1297.) Charlene had a black eye the day of the killing. (5RT: 1022, 1024, 1048.) Facundo's beatings were therefore not very far "in the past." Moreover, Helen and Charlie Trujeque were afraid Facundo would kill Charlene. (6RT: 1297.) Helen and Charlie's efforts to get the police to intervene had been fruitless. (6RT: 1300.) They therefore felt powerless to protect their daughter, and conveyed that fear to appellant. He saw first-hand the injuries Facundo had inflicted on Charlene – she had a black eye and a split lip, and her face was swollen. (5RT: 1022, 1024, 1048; Peo. Ex. 6A, pp. 3-4.) For the reasons set out here and in the opening brief, these facts were sufficient to present a jury question on the defense of necessity. (AOB 141-142.)

C. The Violation of Appellant's Right to Present a Defense is Subject to Federal Harmless Error Analysis

Respondent finally insists that any error was one of state law only, subject to review under *People v. Watson* (1956) 46 Cal.2d 818, 836, (RB 124-125), but in this case, denying appellant an instruction on his central theory of defense rendered meaningless his constitutional right to present a defense, in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution. (AOB 142-143; *California v. Trombetta* (1984) 467 U.S. 479, 485 ["We have long interpreted this [due process] standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense"]; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099 [refusal to instruct on theory of defense may deprive the defendant of his due process right to present a defense].) It also deprived

him of his right to have the jurors, not the judge, pass on the credibility and validity of his defense, in violation of his Sixth and Fourteenth Amendment rights to a jury trial. (AOB 142; see *Carella v. California* (1989) 491 U.S. 263, 268 (conc. opn. of Scalia, J.).)

It is therefore the state's burden to prove that the error was harmless beyond a reasonable doubt. (AOB 143; *Chapman v. California* (1967) 386 U.S. 18, 24.) As explained in the opening brief, the state cannot do so here, because in the absence of an instruction that appellant's unreasonable belief in the need to defend Charlene would negate malice, all the evidence adduced in support of the defense theory – about Charlene's abuse at Facundo's hands; her parents' fear that her life was in danger; their sense of powerlessness after being rebuffed by the police; and their desperate request that appellant intercede – served only to establish motive and premeditation. (AOB 143, citing *People v. Randle, supra,* 35 Cal.4th 996-997.) The refusal to give the requested instruction therefore not only prevented the jurors from considering appellant's central defense but improperly bolstered the prosecution's case.

If properly instructed, there is a reasonable probability the jurors would have convicted appellant of the lesser offense of manslaughter or at least settled upon a compromise verdict of second degree murder. The error was therefore prejudicial even under the state-law *Watson* standard. (AOB 143.)

Finally, even if the defense had been unsuccessful, instructing the jurors that a defendant's unreasonable belief in the need to defend another reduces his legal culpability would have helped to make clear that evidence falling short of that mark should at least militate in favor of a life sentence. (See Argument XV, *infra*, and AOB 259-264.) As discussed in the opening

brief, the refusal to give the instruction thus undermined the reliability of the penalty verdict by preventing the defense from submitting to the jury a defense theory that would have been consistent with a mitigation case of mistaken justification. (AOB 143.)

For these reasons and those set out in the opening brief, appellant's conviction and sentence of death for the murder of Max Facundo must be reversed.

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VI.

THE TRIAL COURT ALSO ERRED IN REFUSING TO INSTRUCT ON NECESSITY OR IMPERFECT DEFENSE OF ANOTHER AS TO COUNT II, THE APODACA KILLING

Respondent again relies upon appellant's statements to police to argue that the trial court did not err in declining to instruct on necessity or defense of another as to the Apodaca homicide. (RB 128.) As discussed above and in the opening brief, and as defense counsel argued below, the jurors were not bound to believe appellant's incriminating statements, particularly as they were made in the context of his quest for the death penalty and were contradicted by the physical evidence. (AOB 145.) For the reasons set out here and in the opening brief, the evidence was sufficient to present a jury question on the defense of necessity. (AOB 144-146.)

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VII.

THE TRIAL COURT ERRED BY IMPROPERLY PREVENTING THE DEFENSE FROM ELICITING EVIDENCE THAT APPELLANT'S COUSIN VICKI HAD BEEN KILLED BY AN ABUSIVE BOYFRIEND WHEN SUCH EVIDENCE WAS MATERIAL TO SHOW APPELLANT'S PERCEPTION OF THE DANGER FACUNDO POSED TO CHARLENE TRUJEQUE

Respondent claims the trial court properly excluded evidence about the murder of appellant's cousin Vicki so as "not to confuse the jury with evidence lacking the requisite foundation for admission." (RB 129.) Respondent also argues that any error was harmless because appellant denied that Vicki's murder affected his state of mind, and the defense was still able to present evidence that appellant acted out of a desire to protect Charlene from Facundo. (RB 129.) Respondent's argument is both legally incorrect and based on a mischaracterization of the record.

A. The Trial Court Improperly Restricted Helen Trujeque's Testimony

Respondent first contends the trial court properly precluded the defense from questioning Helen Trujeque about Vicki's murder because Mrs. Trujeque had no personal knowledge of the facts of Vicki's murder and never discussed it with appellant. (RB 129.) Respondent misstates the record on both scores.

First, the record does not establish that "Helen had no idea how or why or why Vicki was murdered." (RB 131.) Rather, the prosecutor had objected repeatedly during cross-examination that Helen should not be allowed to testify about Vicki's murder because she had not been an eyewitness to it. (6RT: 1324-1325.) In the same vein, the prosecutor asked

Mrs. Trujeque:

Q You don't know how Vicki was killed, meaning you weren't there, correct?

A No.

(6RT: 1347.) This ambiguous exchange does not establish that Helen Trujeque knew nothing about Vicki's murder, only that she was not an eyewitness to it. As defense counsel pointed out, it was not necessary for Helen to have witnessed Vicki's murder in order to testify about its impact on her state of mind concerning Charlene's safety and its effect, in turn, on appellant when she told him about it. (6RT: 1332-1333; see, e.g., *People v. Thornton* (2007) 41 Cal.4th 391, 447 [utterance offered "to evidence the state of mind which ensued in another person in consequence of the utterance" is not inadmissible hearsay].)

Similarly, Helen did not "testif[y] that she and Charlie never mentioned Vicki or her death to appellant when they discussed Facundo's abuse of Charlene with him." (RB 131.) The portion of the record cited by respondent consists of a series of questions by the prosecutor, equating appellant's conduct with that of Vicki's murderer:

Q Did you talk to the defendant Trujeque about sticking a knife in his chest just like Aunt Vicki got when she was killed? Did you say -- did you talk about it?

A I do recall now. When we were in the truck, he did say that he stuck him -- he stuck him with a knife. I don't know how many times, but he -- I do recall him saying something like that.

Q Like what?

A Like he got the knife, and he just stuck him with it, but I don't

know how many times repeatedly that he said it.

Q Did Mr. Trujeque make any reference to Vicki?

A No.

Q Did he say, I stuck him, Max Facundo, with a knife just like Vicki got stuck with a knife?

A No.

Q Did he ever bring up Vicki to you?

A No.

(6 RT 1346-1347, quoted in AOB 151-152.) Contrary to respondent's assertion, the fact that neither Mrs. Trujeque nor appellant equated the stabbing of Max Facundo with that of their cousin Vicki does not establish that there is "no connection at all" between Vicki's murder and Facundo's killing. (RB 134.) Respondent's attempt to distinguish *People v. Minifie* (1996) 13 Cal.4th 1055, is therefore unavailing. (RB 134.)

Respondent maintains that, if the defense had established such a link, by proffering evidence that Helen Trujeque "was personally aware of how Vicki was killed" and that she had raised Vicki's killing with appellant when discussing Facundo," the trial court "would have likely overruled the [prosecutor's] objections." (RB 134.) This again ignores the record. The defense made abundantly clear that its questions were intended to show that Helen and Charlie knew about the circumstances of Vicki's murder and had discussed them with appellant. (AOB 148; 6RT: 1329-1333.) The prosecution, however, thwarted defense counsel's attempts to elicit this information. For example, in response to yet another objection by the prosecutor, defense counsel tried once again to explain the relevance of what Helen Trujeque knew and related to appellant about Vicki's murder:

Ms. Holtz: . . . My belief in the relevance of that goes to her state of

mind, and our defense is very clearly that she conveyed her state of mind to him [Appellant].

The Court: But she's admitted that.

Mr. Markus: But you've asked her that over and over again.

Ms. Holtz: No. This is --

Mr. Markus: You're trying to get in the killing is what you're trying to do, and she doesn't know about it.

Mr. Stein: Yes.

Ms. Holtz: She does know about it.

Mr. Markus: She wasn't there. You're asking the details.

Ms. Holtz: You're saying that no one could ever have a state of mind unless they were there for a murder?

Mr. Stein: State of mind –

(6RT: 1331.) Mr. Markus then lost his temper:

Mr. Markus: I'm going to tell you something right now. You two ask everything you want. I'm not going to object again.

Mr. Stein: Don't point -- don't --

Mr. Markus: You two ask whatever you want. I objected 18 times to hearsay, and you continue to get it in.

Mr. Stein: Hearsay goes --

Mr. Markus: That's unethical.

Mr. Stein: Joe, don't --

Reporter: Counsel, one at a time.

Ms. Holtz: You get --

Mr. Markus: You're out of line. I'm going to tell you something else, I don't want anymore part of this proceeding, what you did.

Mr. Stein: Don't point.

Mr. Markus: I don't care.

Ms. Holtz: Don't point at me like that.

Mr. Markus: It's unethical. You're unethical.

Mr. Stein: Oh, Joe.

(6RT: 1331-1332.) Mr. Markus then stalked off, prompting the trial judge to plead with him and then to capitulate:

The Court: Keep your voice down. Okay? Mr. Markus, please come back. I'm not going to allow it.

(6RT: 1332.) The trial judge then excluded the evidence.

The defense was thus unable to elicit any more detailed information about Helen Trujeque's knowledge of Vicki's death and how she and Charlie communicated their concerns to appellant because the trial court and the prosecutor would not let them.

Respondent otherwise relies on appellant's own statements to assert there was no connection between Vicki's murder and the killing of Facundo. (RB 131.) As set out in the opening brief, and as defense counsel argued below, however, given appellant's desire for the death penalty, his incriminating statements are highly unreliable, making testimony from other witnesses vital. (AOB 153.)

B. The Error Violated Appellant's Constitutional Right to Present a Defense and Was Not Harmless Beyond a Reasonable Doubt

Respondent concludes that, even if it was error to exclude the evidence concerning Vicki's murder, it was an error of state law only, reviewable under *People v. Watson* (1956) 46 Cal.2d 818, because the trial court did not "refus[e] to allow [appellant] to present a defense, but only reject[ed] certain evidence concerning the defense." (RB 134, quoting

People v. Garcia (2008) 160 Cal.App.4th 124, 133.) Under this standard, respondent maintains, any error was harmless because "appellant has not shown that it is reasonably probable that he would have received a more favorable result without the alleged error." (RB 135.)

As an initial matter, respondent construes the federal constitutional right to present a defense too narrowly – it is not violated only when a defense is excluded altogether but when the trial court's evidentiary rulings deprive the defendant of "a *meaningful opportunity* to present a *complete* defense." (AOB 149-150, quoting *Holmes v. South Carolina* (2006) 547 U.S. 319, 324 [italics added], *Crane v. Kentucky* (1986) 476 U.S. 683, 690, and *California v. Trombetta* (1984) 467 U.S. 479, 485.) This Court has accordingly "recognized . . . that Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present *all relevant evidence of significant probative value to his or her defense*." (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999, original italics expanded.) As discussed above, and in the opening brief, the evidence concerning Vicki's murder and its effect on Charlene's family, including appellant, was of significant probative value to appellant's defense. (AOB 138, 147-154.) Because appellant's federal constitutional right to present a defense was violated, it is the *state's* burden to prove that the error was harmless beyond a reasonable doubt. (AOB 142; *Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent has not carried that burden.

Respondent perversely reasons that excluding this evidence must have been harmless, because appellant was still able "to present a defense regarding his fear that Facundo might harm or even kill Charlene," and the jury convicted him anyway, though "it was plainly aware of Helen's and Charlie's fear of Facundo, and appellant's concern for what Facundo was

doing to Charlene." (RB 134-135.) That is, because the defense was able to elicit – between the barrage of prosecution objections – that Vicki had been murdered by her boyfriend, the jury "could have drawn an inference that the murder influenced appellant, yet it still convicted him." (RB 135.)

This ignores both the extremely truncated nature of the evidence the defense managed to elicit and the fact that the jurors had no legal vehicle to take the information into account. Even though the State now concedes there was "[a]mple evidence that appellant believed Facundo would harm and possibly even kill Charlene, particularly due to his discussions with Helen and Charlie about Facundo" (RB 132), it still claims, as it did below, that this evidence was not sufficient to warrant an instruction on imperfect defense of another because there was not enough evidence that Charlene was in imminent danger from Facundo. The evidence about Vicki's murder would have addressed precisely that point: the fact that Charlene's cousin Vicki had recently been brutally murdered – stabbed forty times – by *her* abusive boyfriend would have "further illuminated" how Charlene's family, including appellant, perceived the gravity and immediacy of the danger Charlene faced.[19] (AOB 150-151, quoting *People v. Minifie, supra*, 13 Cal.4th at p. 1071, and citing *People v. Randle, supra*, 35 Cal.4th at p. 1000; 6RT: 1323, 1329-1330.)

That evidence would have made even clearer appellant's entitlement to an instruction on imperfect defense of another, appellant's central theory of defense, as addressed in Argument V, *supra*, and in the opening brief, incorporated by reference herein. (AOB 126-143.) This error therefore

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[19]The opening brief mistakenly refers to Vicki's murder occurring about a week before Facundo's murder, but defense counsel stated only that it was "recently." (AOB 12; 6RT: 1323.)

cannot be found harmless beyond a reasonable doubt.

While appellant does not agree that the *Watson* standard is appropriate here, the case must still be reversed under *Watson* because, if the evidence had been admitted, it would have bolstered the grounds for an instruction on imperfect defense of another, and as set out above and in the opening brief, there is a reasonable probability that a properly instructed jury would have convicted appellant of the lesser offense of manslaughter or compromised on a verdict of second degree murder. (AOB 143.)

The exclusion of this evidence was, moreover, not only harmful with respect to the guilt-innocence phase but also as to the penalty phase. (AOB 153 [exclusion of evidence violated Eighth Amendment as well].) Even if the evidence had not persuaded the jury to convict appellant of a lesser offense, it would have been powerful mitigating evidence, demonstrating more fully that appellant acted out of deeply misguided but genuine concern for Charlene's life, and weighing in favor of a sentence of life without parole rather than death. Its exclusion therefore requires, at a minimum, reversal of appellant's death sentence. (See *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 249, citing *Hitchcock v. Dugger* (1987) 481 U.S. 383, 398-399 [absent state's showing of harmlessness, exclusion of mitigating evidence renders death sentence invalid].) The error is reversible under state law as well. (*People v. Howard* (2010) 51 Cal.4th 15, 38 [state law standard for penalty phase error "essentially the same" as *Chapman*]; *People v. Brown* (1988) 46 Cal.3d 432, 448 [state law penalty phase error requires reversal when there is a reasonable possibility the error affected the verdict].)

For these reasons and those set out in the opening brief, appellant's conviction and sentence for the murder of Max Facundo must be reversed.

VIII.

THE TRIAL COURT IMPROPERLY ADMITTED THE EXPERT TESTIMONY OF A PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSIES OF THE DECEDENTS IN THESE CASES, IN VIOLATION OF APPELLANT'S CONFRONTATION RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

Appellant acknowledges that in *People v. Dungo* (2012) 55 Cal.4th 608, this Court held that allowing a forensic pathologist to testify, based on the report of an autopsy he did not perform, did not violate the confrontation clause. (RB 135-140.) Appellant submits that *Dungo* was wrongly decided and that the dissenting opinion of Justice Corrigan, joined by Justice Liu, correctly interprets and applies the high court's precedent in *Crawford v. Washington* (2004) 541 U.S. 36, and its progeny, including *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, and the splintered decision in *Williams v. Illinois* (2012) ___U.S. ___, 132 S.Ct. 2221.

For the same reasons given by Justice Corrigan in her *Dungo* dissent, the autopsy report in this case was "sufficiently formal and primarily made for an evidentiary purpose" so that its contents constitute testimonial hearsay. (*People v. Dungo, supra,* 55 Cal.4th at p. 633 (dis. opn. of Corrigan, J.).) In particular, both autopsies were conducted and the reports were prepared in the context of homicide investigations. (AOB 165-170.)

Further, contrary to respondent's assertions (RB 138-140), the admission of this testimony in violation of the confrontation clause is not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. Respondent first contends that Dr. Carpenter's testimony based on the autopsy reports is harmless because the reports are the sort of material "that is reasonably relied upon by experts in the particular field in

forming their opinions." (RB 139.) In other words, Dr. Carpenter was permitted to relate the contents of the autopsy reports prepared by Drs. Heuser and Reddy – regardless of their truth – to explain the basis of his opinion. Appellant addressed this argument in the opening brief. (AOB 172-174.) And, as Justice Corrigan points out, this attempt to end-run around the confrontation clause was rejected by five justices in *Williams.* (*People v. Dungo, supra,* 55 Cal.4th at pp. 634-635 (dis. opn. of Corrigan, J.); *Williams v. Illinois, supra,* 132 S.Ct. at pp. 2268-2269 (dis. opn. of Kagan, J.); *id.* at pp. 2256-2259 (conc. opn. of Thomas, J.).)

Respondent claims further that any error was harmless because the defense did not dispute appellant's participation in the Apodaca murder, but merely argued over why he participated and which wound was fatal. (RB 139.) This is incorrect.

Although the jury was instructed on provocation manslaughter, based on appellant's 1998 statement that he stabbed Apodaca after Apodaca struck him in the face (7RT: 1722, 1726-1727, 1733, 1765-1769), the defense argued to the jury that the 1998 statement was unreliable because appellant, facing life in prison, had initiated the confession in an effort to secure a death sentence and therefore had exaggerated and falsely incriminated himself.[20] (7RT: 1807, 1811, 1818, 1821-1823, 1825, 1830.)

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[20]In his 1998 statement to police, appellant also said Salazar asked him earlier in the evening, at the Quiet Cannon bar, to "back his play" as he (Salazar) intended to stab Apodaca. (Peo. Ex. 6A at p. 20.) The prosecution relied on this part of the statement to argue appellant had aided and abetted a first degree murder. (7RT: 1786.) The defense pointed out that Salazar had been in another fight that night, over a card game, and Apodaca had pulled him off the other man, so that there was also evidence from which the jurors could conclude that the bad blood between Salazar and Apodaca had arisen more spontaneously, during the first altercation.

Defense counsel pointed out that appellant's claims of responsibility escalated: in his letter to District Attorney Garcetti seven months after his statement to police, appellant claimed he alone had "murdered Raul Apodaca while I was robbing him," an admission that would have established another special circumstance, except that even the prosecutor agreed it was not true. (7RT: 1811, 1822 [defense closing]; Peo. Ex. 8 [letter]; 7RT: 1701-1702 [prosecutor's statements concerning letter].)

The defense argued specifically that appellant's claim to have stabbed Apodaca in Apodaca's left side was inconsistent with the physical evidence. (7RT: 1807, 1818.) Dr. Carpenter, reading from the autopsy report, initially testified that all the abrasions – marking where Apodaca had been struck with a hard, blunt-edged object that had not penetrated the skin – were on Apodaca's right side. (5RT: 1227.) During a break in his cross-examination, Dr. Carpenter noticed, and then testified, that the autopsy report's diagram of Apodaca's body depicted a 1/4 inch abrasion on Apodaca's "uppermost chest area," which Dr. Carpenter estimated to be three to four inches to the left of the midline; this injury was not otherwise described in the autopsy report. (5RT: 1240-1242; Peo. Exs. 4-A, 4-E.) Even though this injury was to Apodaca's left, uppermost chest, rather than to his left side, the prosecution was able to use this injury as corroboration of appellant's admission. (7RT: 1796.) Thus, the prosecution was able to capitalize on the inconsistency in Dr. Reddy's report between the diagram and the written description of the injuries, without having her account for the sloppiness of her work.

Had defense counsel been able to cross-examine Dr. Reddy, her

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(6RT: 1520-1522, 1534-1535; 7RT: 1821-1822.)

lapses would have cut the other way, underscoring the unreliability of her report, and further calling into doubt the veracity of appellant's self-destructive admissions. (AOB 174-176.) The prosecution's case was exceedingly weak without appellant's statements. The only other evidence against appellant was the prior inconsistent statement of Robert DeAlva, who remembered nothing at the time of the trial. (5RT: 1114-1118; 6RT: 1370.) According to Detective Birl Adams, DeAlva said, in 1987, that he had fallen asleep and awakened to see Salazar, Apodaca, and appellant fighting, Apodaca fell to the floor, and appellant and Salazar fled. (6RT: 1372-1373.)

Given the sparse and ambiguous nature of DeAlva's statement, delivered second-hand, the prosecution could not possibly prove first or second degree murder without appellant's statement. Thus, if the jurors had properly discounted appellant's confabulations, he would have been convicted, at most, of manslaughter. Given the invalidity of appellant's prior murder conviction, he would not have been eligible for the death penalty. (See Argument I, *supra*; AOB 38-56.) The prejudice could not be clearer.

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X.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE APPELLANT'S LETTER TO THE DISTRICT ATTORNEY GOADING HIM TO SEEK THE DEATH PENALTY AS THE LETTER WAS FAR MORE PREJUDICAL THAN PROBATIVE UNDER EVIDENCE CODE SECTION 352, MISLED THE JURY AND UNDERMINED THE RELIABILITY OF THE SENTENCING PROCESS

Respondent maintains that the trial court correctly overruled the defense objection to admitting appellant's letter to former District Attorney Gil Garcetti, because the letter "possessed substantial probative value that was not outweighed by any risk of prejudice in that it corroborated other evidence of appellant's guilt by means of his own words." (RB 146.)

A. The Letter Rendered the Guilt Phase of Appellant's Trial Fundamentally Unfair

The "substantial probative value" respondent identifies, however, bears no relationship to the case actually tried below. For example, respondent claims the letter was relevant because "[b]esides the letter, no other evidence existed to show that appellant was in the process of robbing Apodaca, not defending himself or coming to the defense of Salazar, before the killing." (RB 151.) The prosecution, however, specifically disavowed any reliance on a robbery-murder theory. Appellant was never charged with robbing Apodaca, and the prosecutor never argued he had robbed Apodaca. To the contrary, the prosecutor insisted the letter was *not* introduced for the purpose of proving Apodaca was robbed. (7RT: 1701.) When appellant testified, defense counsel sought to impeach him with an earlier statement, in which appellant said Salazar alone had stabbed Apodaca. The prosecutor insisted the prior statement was not inconsistent with the Garcetti letter,

because "there's no robbery on the second murder" and appellant was simply being "a bragger" and "manipulative" in his effort to secure a death sentence. (7RT: 1701-1702.) The prosecutor also discounted appellant's claim in the letter that he had killed Facundo for hire. (7RT: 1701.)

Having admitted below that the letter was *not* probative of a robbery or murder for hire having actually occurred, the state may not now argue to the contrary on appeal. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 172-173 [Attorney General could not argue on appeal that evidence was offered for different purpose than prosecutor had argued at trial].)

Otherwise, respondent claims the letter is relevant for what it doesn't say, because appellant did not say anything in the letter about protecting Charlene, or his cousin Vicki's murder, or that he came to Salazar's aid. (RB 151.) The absence of this information, respondent says, "helped prove that appellant made a conscious decision as a cold-blooded killer to murder Apodaca and Facundo absent any justification." (RB 151.)

Since the purpose of the letter – as the prosecutor below acknowledged – was to secure a death sentence, it is hardly surprising that it does not contain exculpatory assertions.[21] As such, their absence is of no probative value.

Respondent also argues that the letter had probative value because it was "corroborative of the other witnesses' testimony that appellant was the killer, that he was not provoked to kill, and that he was not defending himself or others at the time" and the "prosecution was entitled to prove all

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[21]On appeal, respondent suggests this is only one of several possible interpretations of the letter's purpose. (RB 156.) But this was in fact the stated purpose of the letter. (Peo. Exs. 8, 8A & 8B.) And it was not disputed below. (7RT: 1701-1702.)

of [these] facts out of appellant's own hand." (RB 152.)

As an initial matter, this constitutes a remarkable double standard given respondent's position that every bit of mitigating and exculpatory evidence that was excluded below was cumulative: even though a criminal defendant – unlike the state – has a constitutional right to present evidence in his defense and in mitigation of the death penalty, respondent apparently believes the defendant is not similarly entitled to corroborate evidence presented in his behalf.

In any event, the prosecution had plenty of evidence from appellant's own mouth, in the form of his detailed, incriminating statements to Detective Durazo, which were taped and played for the jury. (6 RT 1423; Peo. Ex. 6A.) What distinguished the letter was (1) the inclusion of fictitious aggravating circumstances of robbery and murder-for-hire and (2) its extraneous, shocking and provocative language.

Respondent attempts to distinguish *People v. Coleman* (1985) 38 Cal.3d 69, cited in the opening brief, on the ground that the trial court in this case "did not face the same concerns about the accuracy of appellant's statements because they were corroborated almost entirely by his recorded confession, his confession at trial, and the testimony of other witnesses." (RB 154.) This is simply wrong. As noted above and in the opening brief, *the prosecutor conceded below* that the letter contained false information about the purported robbery and murder-for-hire and that the claims were exaggerated because appellant was "bragg[ing]" and being "manipulative" in his quest for a death sentence. (AOB 197; 7RT: 1701-1702.) While it is true that, beneath its hyperbole, the letter confirmed appellant's other admissions of guilt, this minimal probative value was cumulative at best.

As explained in the opening brief, appellant's inflammatory

assertions 14 years after the fact are of little if any probative value concerning his state of mind at the time of the crime. (AOB 198-199.) Thus, the letter added absolutely nothing of legitimate substance to the State's case, while posing an enormous danger of unfair prejudice. (*Id.* at 200.) Contrary to respondent's assertion, this was not the prejudice "that naturally flows from relevant, highly probative evidence" (RB 155) – which the letter manifestly was not – but prejudice that arose from evidence designed to inflame the emotions of the jurors – exactly what Evidence Code section 352 is intended to exclude. (AOB 200-201.)

Respondent claims that, even if there was error, it did not amount to a denial of due process, asserting "[i]t would be difficult to find a case less likely to have been affected by a purported erroneous evidentiary ruling." (RB 156-157.) To the contrary, it would be difficult to find an example of evidence less legitimately relevant and more likely to cause the jurors to disregard weaknesses in the state's case and convict based on emotion and fear, rendering appellant's trial fundamentally unfair. (AOB 199-201.)

B. The Letter Undermined the Reliability of the Penalty Phase

Respondent argues the letter was admissible at the penalty phase because it was relevant not only to future dangerousness and lack of remorse but to other sentencing factors listed in section 190.3, including (1) the circumstances of the crime (§190.3, factor (a)); (2) whether the defendant was under the influence of extreme mental or emotional disturbance (§190.3, factor (d)); (3) whether the victim was a participant in or consented to the homicidal act (§190.3, factor (e)); (4) whether the defendant reasonably believed his conduct was morally justified (§190.3, factor (f)); (5) whether the defendant acted under extreme duress or

substantial domination by another (§190.3, factor (g)); (6) whether the capacity of the defendant to appreciate the criminality of his conduct was impaired as a result of mental disease or defect, or intoxication (§190.3, factor (h)). (RB 157-158.)

However, only factors (a), (b), (c), and sometimes (i) "are properly considered in aggravation of penalty." (*People v. Nelson* (2011) 51 Cal.4th 198, 222-223.) Thus, respondent is contending that the letter was properly admitted in the prosecution's case in chief to establish the *absence* of mitigating circumstances, factors (d) through (h).

Because the absence of mitigating evidence may not be considered aggravating, the evidence was not properly admitted in the prosecution's case in chief. (*People v. Davenport* (1985) 41 Cal.3d 247, 289-290.) It would have been properly admissible only to rebut mitigating evidence presented by the defense: "Evidence offered by the prosecution in rebuttal 'is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.'" (*People v. Crew* (2003) 31 Cal.4th 822, 854, quoting *People v. Daniels* (1991) 52 Cal.3d 815, 859; accord *People v. Burton* (1989) 48 Cal.3d 843, 860 ["[e]ven if the challenged evidence might have been relevant and admissible in rebuttal, it was error to admit it in the case-in-chief"].)

At any rate, even if a small portion of the letter would have been admissible as rebuttal, the most prejudicial portions of the letter by far, as addressed in the opening brief, concerned appellant's purported lack of remorse and future dangerousness, which are not statutory sentencing factors. (AOB 201-205.) Respondent does not defend the admissibility of the letter for these purposes. As discussed in the opening brief, however,

these were the points the prosecutor emphasized to the jury as grounds for imposing the death penalty. (AOB 195, 204.) First, in his opening argument, he cited the parts of the letter that were un-redacted for the penalty phase as additional evidence the State would present in aggravation: "Oh, also the remaining aspect of the letter to Mr. Garcetti should be given to you for your consideration. It was parts [*sic*] blocked out. The remaining aspect of the letter. And what the letter indicates is that the defendant is going to kill somebody else in custody if he doesn't get the death penalty. That's basically what it says." (8RT: 1890.) The prosecutor then emphasized the same part of the letter in closing argument to advance his theme of future dangerousness, urging the jurors to sentence appellant to death so they would be sure they had done everything they could to prevent appellant from making good on his threat. (11RT: 2957.)

As explained at length in the opening brief, absent appellant's inflammatory letter, appealing to jurors' fears and emotions, there is at least a reasonable possibility that one or more jurors would have struck a different balance between aggravating and mitigating circumstances and voted for life without possibility of parole. (AOB 205-209.) For the reasons above, and in the opening brief, this error requires reversal of appellant's death sentence under both *Chapman v. California* (1967) 386 U.S. 18, 24, and *People v. Brown* (1988) 46 Cal.3d 432, 448.

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XI.

THE TRIAL COURT HAD A SUA SPONTE DUTY TO INSTRUCT THE JURY ON ITS RESPONSIBILITY INDEPENDENTLY TO DECIDE THE APPROPRIATENESS OF THE PENALTY DESPITE APPELLANT'S STATED DESIRE FOR A DEATH SENTENCE

Respondent claims that the trial court had no sua sponte duty to instruct the jury on its obligation to decide the issue of penalty for itself, despite the defendant's stated desire for the death penalty and asserts that appellant committed "quite the exaggeration" by characterizing his letter to Mr. Garcetti as a "central theme" of the prosecutor's closing argument at the penalty phase. (RB 160-161.)

It was, however, the prosecutor himself who said the letter was "the most important thing that sets a theme to this closing argument." (11RT: 2957.) As set out in the opening brief, the prosecutor framed his argument by quoting from the letter and urging the jury to sentence appellant to death so he would not carry out the threat to harm someone else if he did not get the death penalty. (AOB 195, 204, 209.) Contrary to respondent's representation, this was not a single fleeting reference. (RB 161.) The prosecutor quoted from and referred several times to the letter's threat that appellant would kill someone in custody if he did not get the death penalty, describing this as "the real answer to this case" because appellant said he would "kill again if not dealt with appropriately, and he will." (11RT: 2957, 2963, 2965, 2973-2974.)

Respondent tries to distinguish *People v. Guzman* (1988) 45 Cal.3d 915, on the ground that Guzman "begged for the death penalty to spare him from the cruelty of a life sentence," whereas appellant announced his

willingness to kill again unless he was given the death penalty. (RB 161.) But the terms in which a particular defendant couches his request for the death penalty is immaterial. Appellant's resort to provocation was probably more effective than Guzman's appeal to sympathy in motivating jurors to vote for death. More significant, as argued in the opening brief, is that the prosecutor in this case both introduced into evidence appellant's demand for the death penalty and capitalized on it in closing argument. (AOB 212, discussing *People v. Guzman, supra,* 45 Cal.3d at pp. 962-963 [prosecution neither presented evidence of nor capitalized on defendant's preference for death penalty].)

Appellant does not dispute that *People v. Webb* (1993) 6 Cal.4th 494, 535, did not *require* a special instruction: that issue was not before the Court since such an instruction had been given in Webb's case. This Court did indicate, however, citing *Guzman*, that a special instruction *should* be given where "appropriate" to alleviate "any potentially improper effect" of the defendant's testimony requesting the death penalty. (*Ibid.*)

The "potentially improper effect" of informing the jury of a defendant's desire to be sentenced to death is that it misleads the jurors to believe that they may or should defer to the defendant's wishes rather than independently determining the appropriateness of a death sentence. This "presents the spectre of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns" in violation of the Eighth Amendment. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 332; see also *People v. Guzman, supra,* 45 Cal.3d at p. 962 [special instruction may be necessary to "remedy any potential diminution of 'juror responsibility'" when defendant requests death sentence].)

While respondent barely acknowledges it, the State has an interest in

ensuring the reliable and non-arbitrary application of the death penalty as required by the Eighth Amendment. Accordingly, although this Court has afforded capital defendants wide latitude to pursue the death penalty,[22] it has also recognized the danger that facilitating a capital defendant's suicidal impulses will compromise the integrity of the State's system of capital punishment. (AOB 207, citing *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300-1301 [trial counsel properly withheld consent to guilty plea in capital case]; *People v. Guzman, supra,* 45 Cal.3d at p. 962 [while capital defendant has a fundamental right to testify, the State also "has a strong interest in promoting the reliability of a capital jury's sentencing determination"]; *People v. Chadd* (1981) 28 Cal.3d 739, 753-755 [defendant may not discharge counsel and represent himself to avoid effect of section 1018 prohibiting guilty plea in capital case without consent of counsel where defendant "simply wants state to help him commit suicide"]; *People v. Stanworth* (1969) 71 Cal.2d 820, 833-834 [defendant in capital case may not waive automatic appeal pursuant to section 1239, because "the state, too, has an indisputable interest in (the appeal) which the appellant cannot extinguish"].)

By reinforcing the jury's duty to make its sentencing decision independent of the defendant's suicidal wishes, the *Guzman* instruction helps to safeguard the reliability of the proceedings.

Contrary to respondent's argument, the standard CALJIC

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[22](See, e.g, *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1056 [defendant permitted to enter "slow plea" of guilty, waive presentation of mitigating evidence, and request death penalty]; *People v. Taylor* (2009) 47 Cal.4th 850, 865 [defendant may represent himself, waive presentation of mitigating evidence, and request death sentence].)

instructions given in this case were not adequate to protect against the potentially improper effect of appellant's stated desire to be sent to the gas chamber. (RB 162.) If the standard instructions were adequate, *Guzman* and *Webb* would not have recognized the need for a special instruction where, as here, the prosecutor capitalizes on the defendant's suicidal wishes. The instructions respondent cites do not address the role of the defendant's wishes in the sentencing process. (RB 162; 11RT: 2920, 2936-2937.) The instruction the Court suggested in *Guzman* would apprise the jury that, "despite the defendant's" stated preference for a death sentence, "it remains obligated to decide for itself, based on the statutory factors, whether death is appropriate." (*People v. Guzman, supra*, 45 Cal.3d at p. 962.)

Respondent finally contends that the failure to give the instruction would be harmless in any event, "in light of the compelling evidence of aggravating circumstances and lack of evidence supporting mitigating circumstances." (RB 162.)

This misstates the evidence. As discussed above and in the opening brief, the crime for which appellant was actually sentenced to death was far from the most aggravated of murders: appellant killed Max Facundo in a misguided effort to protect his cousin Charlene who had been repeatedly, brutally abused by Facundo to the point that her family, including appellant, feared that her life was in danger, particularly because Charlene, like many battered women, could not be persuaded to leave her abuser. (5RT: 1018-1019, 1051; 6RT: 1296-1300, 1325; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087 [discussing battered woman syndrome].)

The evidence concerning appellant's role, if any, in the Apodaca killing was weak and not particularly aggravating, apart from appellant's

own factually inaccurate and unreliable statements, made in his self destructive quest for the death penalty. (See Argument VIII, *supra.*)

Contrary to respondent's claim (RB 162), there was also substantial mitigating evidence presented, though the defense was hampered by erroneous rulings that restricted the case in mitigation. (Argument IV, *supra*, and AOB 99-125 [overbroad privilege by Charlie and Helen Trujeque]; Argument VII, *supra,* and AOB147-154 [evidence of Vicki's murder]; Argument XIII, *infra*, and AOB 225-250 [exclusion of key probation reports].) As discussed in more detail in Argument XIII, *infra*, incorporated by reference herein, the defense presented evidence that appellant suffered a head trauma in early childhood, developed a seizure disorder and suffered organic brain damage and consequent behavior problems (9RT: 2304, 2386, 2408, 2439, 2443; 10RT: 2453, 2673); that his mother relinquished him to state custody when he was only nine years old, and he was placed in an institution (9RT: 2438-2439); that his mother asked the state to keep him in the institution for two more years rather than having him come home (11RT: 2836, 2840-2841); that he therefore spent the developmentally critical years of nine to twelve in a state institution, without the nurturing essential to normal emotional and psychological development (10RT: 2510-1514); that he was sent to a psychiatric hospital at the age of 13 and was in and out of state juvenile institutions thereafter (10RT: 2422); and that he was never able, from the age of nine on, to live successfully outside of an institution (10RT: 2698).

Given the extenuating circumstances of the crime and the significant mitigation, the jury could well have concluded that appellant's criminal history warranted a life without parole sentence rather than death, if not for appellant's stated desire to be executed, expressed in a particularly

provocative manner in the letter to District Attorney Garcetti.

Accordingly, there is a reasonable possibility the verdict was affected by the trial court's failure to give a sua sponte instruction to ensure the jury's sense of responsibility was not undermined, in violation of the Eighth Amendment, by appellant's request to be executed. Reversal is therefore required under both *Chapman v. California* (1967) 386 U.S. 18, 24, and *People v. Brown* (1988) 46 Cal.3d 432, 448.

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XII.

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO IMPEACH APPELLANT WITH A CONSTITUTIONALLY INVALID 30-YEAR-OLD SECOND DEGREE MURDER CONVICTION

Respondent asserts that appellant forfeited the claim that his 1971 second degree murder conviction was constitutionally invalid and therefore inadmissible as impeachment, because he did not object to it on those grounds below. (RB 165.) Alternatively, respondent argues that the trial court did not abuse its discretion in denying the defense motion to exclude the conviction under Evidence Code section 352 and that, in any event, admitting the prior conviction was harmless. (RB 165-170.) Both arguments must fail.

A. Use of the Constitutionally Invalid Prior Conviction as Impeachment May Be Addressed on Appeal Even Though Defense Counsel Did Not Object to it on Those Grounds at Trial

As discussed in the opening brief, this Court may properly address the validity of appellant's 1971 second degree murder conviction even though the defense did not challenge it on those specific grounds below. (AOB 53-55.) Defense counsel did recognize how profoundly prejudicial admission of the prior murder conviction as impeachment would be and argued vigorously that it should be excluded under Evidence Code section 352. (6RT: 1505-1515, 7RT: 1578-1582.) Thus, as with Argument I above, because it is apparent there was no strategic reason for defense counsel not to challenge the conviction on meritorious constitutional grounds, the failure to do so may be addressed on direct appeal as

ineffective assistance of counsel.[23] (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131 [where "defendant's trial counsel *did* in fact object to the introduction of the statements, albeit on nonmeritorious grounds, this fact underscores our conclusion that there could have been no tactical reason for counsel's failure to make a meritorious objection to the same evidence"], citing *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366 [ineffective assistance found where trial counsel objected to felony murder instruction on invalid ground of insufficient evidence, but failed to object on meritorious basis of collateral estoppel].) Failure to do so therefore constituted ineffective assistance of counsel. (*Id.* at p. 1132.)

In *People v. Lopez* (2005) 129 Cal.App.4th 1508, defense counsel failed to object to the impeachment of defense witnesses with inadmissible misdemeanor arrests and misdemeanor conduct. The Court of Appeal held that, because there was no conceivable "tactical reason for defense counsel to withhold objection" to this evidence, which reflected badly on the witnesses' character and credibility, the omission constituted deficient performance by counsel, which could be addressed on direct appeal. (*Id.* at pp. 1523-1524.) The court further found a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Ibid.*) The error was prejudicial because the case, involving disturbing the peace, resisting arrest and battery on a police officer, was essentially a credibility contest between defense witnesses and

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[23]If this Court concludes the issue is not appropriately addressed on direct appeal, particularly because determining the circumstances of appellant's discharge from the Youth Authority may require extra-record information (AOB 219-221), appellant requests that the ruling be without prejudice for him to raise the issue in a subsequent petition for habeas corpus relief. (*People v. Jones* (2003) 30 Cal.4th 1084, 1105.)

the police, and the prosecution used the inadmissible evidence to attack the defense witnesses as unbelievable. (*Id.* at p. 1524.)

In this case, as discussed in the opening brief and below, the prejudice was not from the impact of the prior conviction on appellant's credibility – since his testimony was incriminatory – but because the prior murder conviction was devastating propensity evidence. (AOB 222-224.)

For the reasons set out in the opening brief, appellant's constitutionally invalid conviction was not admissible as impeachment. (AOB 216-221, citing *People v. Coffey* (1967) 67 Cal.2d 204, 218.)

B. The Conviction Should Have Been Excluded Under Evidence Code Section 352

Respondent maintains that appellant's prior murder conviction was relevant and admissible because it "prevent[ed] the jury from receiving . . . the false impression that appellant had 'otherwise led a law-abiding life,' thus casting him in a 'false aura of veracity.'" (RB 169, quoting *People v. Muldrow* (1988) 202 Cal.App.3d 636, 647.) Similarly, respondent argues, "'a series of crimes evidencing moral turpitude is more probative of a defendant's willingness to give perjured testimony than a single such offense.'" (RB 169, quoting *People v. Lewis* (1987) 191 Cal.App.3d 1288, 1297.)

Respondent's argument assumes appellant's testimony was exculpatory. As discussed in the opening brief, it was not. Appellant, testifying against the advice of counsel, did not remotely suggest he had led a law-abiding life; he did not claim to be innocent of either murder. To the contrary, he admitted and even exaggerated his guilt and denied the existence of mitigating circumstances such as intoxication or mental illness. (AOB 222; 7RT: 1591-1592, 1595, 1599-1602, 1620-1622, 1625-1626,

1661.)

While respondent claims it is "ridiculous" to suggest that the jury would infer propensity from appellant's prior murder conviction (RB 169), given his numerous other prior convictions, that assertion is contrary to the empirical evidence which establishes that jurors are most likely to misuse a prior conviction, admitted for impeachment, as propensity evidence when the defendant is on trial for the same offense. (AOB 217, 223; Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence* (1999) 48 Drake L. Rev. 1, 38 [discussing study showing conviction rate was 75 percent for defendants impeached with prior conviction for same offense and 60 percent when impeached with a prior conviction for perjury].) The risk of misuse was expressly recognized by this Court in *People v. Beagle* (1972) 6 Cal.3d 441, 453, which cautioned that "[w]here multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'"

People v. Muldrow, on which respondent relies, quotes this same passage from *Beagle* and recognizes that, even after the adoption of Proposition 8, it remains relevant to assessing unfair prejudice under Evidence Code section 352. (*People v. Muldrow, supra*, 202 Cal.App.3d at pp. 644, 646-647.) While the Court of Appeal in *Muldrow* upheld the impeachment of the defendant with three prior convictions for the same offense as the one charged, it did so on the ground that the defendant would otherwise be permitted a false aura of veracity. (*Id.* at p. 647.) As discussed above, that consideration did not apply in the unique circumstances of this case. To the extent the prosecution genuinely wished

to impeach appellant's credibility, it could have readily done so with his other convictions, without posing the devastating risk of unfair prejudice from informing the jury at the guilt-innocence phase of the trial that appellant had a prior murder conviction. The trial court therefore abused its discretion in allowing the murder conviction to be used for impeachment.

The damage of propensity evidence is precisely that it causes jurors improperly to resolve their reasonable doubts in favor of conviction. Here, based on the evidence presented, the jurors should have harbored sufficient reasonable doubt about appellant's involvement in the Apodaca stabbing to convict him of manslaughter rather than second degree murder. If they had done so, appellant would not have been eligible for the death penalty, because the prior murder special circumstance was constitutionally invalid. (Argument I, *supra*, and AOB 38-56.) Similarly, the jurors should have harbored sufficient doubt about appellant's state of mind with respect to the Facundo stabbing to convict him of manslaughter or second degree murder. (Argument V, *supra,* and AOB 126-143.) It is reasonably probable that the erronously-admitted prior murder conviction caused the jurors to resolve their doubts in favor of the prosecution.

Accordingly, it is reasonably probable that a result more favorable to appellant would have occurred if not for the erroneous admission of his 1971 second degree murder conviction. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Moreover, the prejudice was so substantial that it rendered appellant's trial fundamentally unfair in violation of the due process clauses of the Fifth and Fourteenth Amendments. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72-73.) For the reasons stated here and in the opening brief, appellant's convictions for both the Apodaca and Facundo homicides and his sentence of death must be reversed. (AOB 214-224.)

XIII.

THE TRIAL COURT IMPROPERLY PREVENTED THE DEFENSE FROM PRESENTING APPELLANT'S JUVENILE PROBATION REPORTS AND SCHOOL RECORDS AS EVIDENCE IN MITIGATION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

Respondent argues first that the mitigating evidence contained in appellant's juvenile probation reports and school records were properly excluded as inadmissible hearsay and that witnesses could not testify to their contents. (RB 178-182.) Essentially limiting *Green v. Georgia* (1979) 442 U.S. 95 to its facts, respondent also argues that the Eighth Amendment did not require the records to be admitted. (RB 182-184.) Finally, respondent argues that any error was harmless because the excluded evidence was merely cumulative and because the mitigating evidence was outweighed by the aggravating evidence. (RB 184-188.)

Respondent takes too narrow a view of the Eighth Amendment and of the significance of the excluded mitigating evidence.

A. The Records Were Admissible Under State Evidence Law

Respondent maintains that the probation and school records did not qualify as business or official records and were thus properly excluded as unreliable hearsay for the reason stated in *People v. Reyes* (1974) 12 Cal.3d 486, 503, that "[w]hether the conclusion is based upon observation of an act, condition or event or upon sound reason or whether the person forming it is qualified to form it and testify to it can only be established by the examination of that party under oath...." (RB 179.) Not only is *Reyes* factually distinguishable, but the underlying reliability concerns are completely inapplicable in this case.

In *Reyes*, this Court concluded that a psychiatric report was not admissible as a business record because the "psychiatrist's opinion that the victim suffered from a sexual psychopathology was merely an opinion, based on a number of factors" and not a reporting of "an act, condition or event within the meaning of the statute." (*People v. Reyes, supra,* 12 Cal.3d at p. 503, citing *People v. Williams* (1960) 187 Cal.App.2d 355, 365).

The excluded probation reports in this case, in contrast, contained observations such as that appellant had "difficulties in perception, poor hand-eye coordination, [and] marked perseverative tendencies" and noted that an EEG administered to appellant at age seven, "show[ed] disturbance in bi-temporal area, consistent with psychomotor behavior problem." (1CT Supp.IV: 30-31.) The rather conservative conclusion that these facts "were suggestive of organic brain damage" (*ibid.*) is very different from the psychiatric diagnosis in *Reyes*, which was particularly dependent "upon the thought process of the psychiatrist expressing the conclusion." (*People v. Reyes, supra,* 12 Cal.3d at p. 503.) As explained in the opening brief, a diagnosis of organic brain damage based on the observations and test results discussed in the probation reports is far more similar to a diagnosis of a broken femur or to the cause-of-death determination discussed in *People v. Beeler* (1995) 9 Cal.4th 953, 981, than to the "subjective psychiatric opinion" in *Reyes*. (AOB 242.)

More importantly, the underlying reasoning concerning the reliability of the evidence does not apply here. In arguing that appellant was also properly prevented from questioning Dr. Cherkas about the opinions or conclusions of other experts contained in the reports, respondent quotes *Whitfield v. Roth* (1974) 10 Cal.3d 874, 894: "The reason for this is obvious. The opportunity of cross-examining the other doctors as to the

basis for their opinion, etc., is denied the party as to whom the testimony is adverse." (RB 181.)

In this case, however, it is incorrect even to describe the evidence as "adverse" to the State. The reports themselves were prepared *by* the State, which relied on the very same observations and conclusions it now seeks to exclude as unreliable to make major decisions about appellant's childhood welfare. It is absurd for the State to contend decades later, when most of the declarants are dead, that it did not have an adequate opportunity to probe the reliability of *its own* reports and their contents.

B. The Probation and School Reports Were Relevant and Reliable Mitigating Evidence That Should Have Been Admitted Notwithstanding State Hearsay Rules

For fundamentally the same reason, due process and the Eighth Amendment required that the probation reports be admitted even if they were not admissible under state hearsay rules.

Although it is true, as respondent argues, that "neither this court nor the high court has suggested that the rule allowing all relevant mitigating evidence has abrogated the California Evidence Code," (RB 182, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 837), the high court has made clear that valid state evidence rules must yield both to due process and to the constitutional requirements of individualized sentencing and heightened reliability that apply specifically to capital cases. (*Sears v. Upton* (2010) ___ U.S. ___, 130 S.Ct. 3259, 3263 & fn.6, citing *Green v. Georgia* (1979) 442 U.S. 95, 97; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.)

Respondent tries to argue that *Green* and *Chambers* are narrow and factually distinguishable, apparently applying in respondent's view only where the excluded evidence would implicate a third party as more culpable in the crime. (RB 183-184.) However, as noted in the opening brief, the

high court has characterized its holding in *Green* more broadly, stating that "reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule." (AOB 244, quoting *Sears v. Upton, supra,* ___ U.S. ___, 130 S.Ct. at p. 3263 & fn.6.) Moreover, *Green* itself cites to the portion of *Lockett v. Ohio* (1978) 438 U.S. 586, which holds that improper restrictions on a sentencer's ability to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" creates a risk that the death penalty will be imposed "in spite of factors which may call for a less severe penalty" – a risk that "is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio, supra,* 438 U.S. at pp. 604-605, cited in *Green v. Georgia, supra*, 442 U.S. at p. 97 [italics omitted]). Thus, contrary to respondent's suggestion, the high court's concern that state evidence rules not be applied "mechanistically to defeat the ends of justice" (*Green v. Georgia, supra*, 442 U.S. at p. 97), applies to the full range of constitutionally relevant mitigating evidence.

Respondent also ignores what the high court characterized as the "most important" factor in its decision in *Green* – the unfairness of the state claiming the proffered evidence was too unreliable for the defendant to introduce in his sentencing hearing when the state had considered the very same evidence reliable enough to use against his co-defendant. (*Green v. Georgia, supra*, 442 U.S. at p. 97.) It is this same unfairness – in this case evidence the State itself created and relied upon being deemed too "unreliable" for appellant to use in mitigation – that makes *Green* exactly on point. As emphasized in the opening brief, the due process violation is

compounded here by the state's 12-year delay in prosecuting Facundo's murder. (AOB 245).

C. The Trial Court's Erroneous Exclusion of Mitigating Evidence was not Harmless Beyond a Reasonable Doubt

Respondent finally contends that any error was harmless, because family members and one of appellant's surviving juvenile probation officers testified to some of the same information that was contained in the excluded probation reports, and the trial judge read portions of the later reports to the jury, so that the excluded information would have been merely cumulative. (RB 184-186.) Respondent also argues that the aggravating circumstances would have outweighed the mitgating evidence in any event. (RB 187-188.)

Although respondent attempts to minimize the significance of the evidence that was excluded, it was in fact among the most important. Three reports, the April 27, 1962 report by Helen Matkin (1CT Supp.IV: 24-32), the May 22, 1962 report by Helene Kaplan (1CT Supp.IV: 36-37), a May 31, 1962 report by Dr. Howard Ross (1CT Supp.IV: 38), and a June 1, 1962 Report and Court Order for Placement (1CT Supp.IV: 39) were all excluded in their entirety, and the school records were redacted (11 RT 2871-2873; Def Ex. U-2.). The contents of these documents is described in detail in the opening brief. (AOB 225-229.)

The reports were especially important, as detailed in the opening brief, because they laid out clearly how young appellant was when his problems began, how serious his problems were, and how difficult they were to treat. (AOB 249-250.) Moreover, the reports were not merely cumulative of the other evidence presented because (1) they were contemporaneous or very nearly contemporaneous to the events that were

described; (2) they were not generated for purposes of the current litigation; and (3) they corroborated other evidence.

Because the excluded probation reports were prepared close in time to the events, completely outside the context of the capital litigation, by state officials in the juvenile justice system, they could not be discounted as self-serving or biased. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 8 [rejecting as "implausible" state's contention that exclusion of testimony of "disinterested witnesses," such as former guards, was harmless because merely cumulative to testimony of defendant's family]; Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Va. L. Rev. 1109, 1151-1152.) The reports also contained information that other witnesses could not supply. Many of appellant's relatives who were alive at the time did not even know he had been sent to an institution, let alone why. Appellant's mother did not tell other family members why appellant was no longer living at home. (9RT: 2386-2387; 10RT: 2688-2689, 2673.) Appellant's half sister, Rosemary, also had a very limited recollection of this time period: she could remember accompanying her mother to visit appellant at The Sycamores only once. (9RT: 2360.)

Respondent's argument also fails to recognize the importance of corroboration. As the Supreme Court has noted, two pieces of evidence may be similar to each other and tend to prove the same point, but are not cumulative if they reinforce and corroborate each other. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 299). It is particularly important in investigating and presenting mitigating evidence to "corroborat[e] information from multiple sources . . . wherever possible to ensure the reliability and thus the persuasiveness of the evidence." (ABA Guidelines,

supra, Guideline 10.7, com., *reprinted in* 31 Hofstra L. Rev. at p. 1025 & fn. 215 [stressing importance of contemporaneous documents].) Far from being cumulative, the probation reports would have provided strong corroboration of the testimony of family witnesses and provided important context and foundation for Kocourek's testimony.

Contrary to respondent's suggestion, Kocourek's testimony did not "la[y] out the details regarding encephalograms performed on appellant and the results, including findings of a brain lesion or brain damage." (RB 186.) Rather, as explained in the opening brief, the testimony respondent cites was elicited – over defense objection – by the prosecutor, from later reports, for the purpose of minimizing appellant's brain damage after the defense had been prevented from eliciting any of the information actually contained in the earliest reports, from 1962-1964, about appellant's early childhood diagnosis with organic brain damage. (10RT: 2458-2460; AOB 231-232, 250.) As noted in the opening brief, the trial judge also excised language from later reports that referred back to appellant's earlier diagnosis of brain damage, for example, redacting from a 1967 report the sentence "brain damage has been repeatedly diagnosed, and this would appear to explain the impulsive character of minor's pattern of acting out." (AOB 234; 11RT: 2819-2820.)

The prosecutor then capitalized in closing argument on the lopsided evidentiary rulings to trivialize the mitigating evidence, asserting "[t]hey read records into the record from 1966 to you, telling you that at best he had marginal or mild brain disorder at best" and further that appellant "didn't like Sol Slotnick" – his common-law stepfather – "and that's why he was such a troubled, troublesome child." (11RT: 2976.)

As detailed in the opening brief, the reports from 1962 to 1964

would have told a different story – beginning with a six-year-old, "seriously disturbed child" – not a rebellious teenager – with organic brain damage and consequent behavior problems, severe enough that, by the age of nine, he was deemed "in need of close supervision" in an institutional setting with the facilities to "continual[ly]" monitor his "medical and psychiatric status" and supervise "any drug therapy indicated." (AOB 247;1CT Supp. IV: 30-31, 38.)

Emphasizing appellant's other criminal convictions, respondent insists that the aggravating circumstances in this case are so substantial that any additional mitigating evidence would not have affected the jury's verdict. (RB 187-188.) Respondent's argument ignores that the purpose and value of mitigating evidence, as explained by the high court, is precisely "its tendency to prove that [the defendant's] violent propensities were caused by factors beyond his control," such as "neurological damage and childhood neglect and abandonment." (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 241.)

The prior offense the prosecutor characterized as "most important[]" was the killing of Allen Rothenberg, when appellant was barely 16. (11RT: 2960, 2974.) As noted in the opening brief, Abdul Kabir, like appellant, had pled guilty to a prior murder committed when he was 16, and the prosecution, as in this case, stressed future dangerousness as the principal reason to sentence the defendant to death. (AOB 250 fn. 114; *Abdul-Kabir v. Quarterman, supra*, 550 U.S. at p. 239.) Nevertheless, the court recognized that the jury's inability to give effect to mitigating evidence similar to the evidence excluded in this case required reversal. (AOB 248-249; *Abdul-Kabir v. Quarterman, supra*, 550 U.S. at pp. 239-241.) Indeed, as set out in the opening brief, the high court has repeatedly recognized the

power of mitigating evidence to persuade a jury to return a life sentence even in the face of substantial aggravation. (AOB 247-248, collecting cases.)

As noted in the opening brief, the prosecutor's future dangerousness argument in this case focused on appellant's violent incidents in prison, which the prosecutor cited as proof that appellant would make good on the threats contained in the inflammatory letter to District Attorney Garcetti. However, all of these incidents occurred between 1976 and 1978, more than twenty years before the trial; there was no evidence presented of violent behavior from appellant's 1988-1997 prison term, nor from his incarceration following his San Diego conviction, or while awaiting his capital trial in the Los Angeles County Jail. (AOB 206 & fn. 94; 11RT: 2959-2960, 2963-2964.)

The case for death was therefore not nearly as strong as respondent suggests, even less so because the offense for which appellant was actually being sentenced – the killing of Max Facundo – was far from the most aggravated of murders, as discussed above. Facundo brutally battered appellant's cousin Charlene on a regular basis, leaving her with black eyes and visible bruises on her arms and face. (5RT: 1018-1019, 1048; 6RT: 1296-1297.) Charlene could not be persuaded to leave Facundo, and the police would not intervene. (6RT: 1298-1300.) Feeling powerless to protect their daughter, and fearing for her life, Charlene's parents sought appellant's help. (6RT: 1312, 1323, 1325.) Appellant had seen Charlene's face bruised and swollen from Facundo's beatings and, on the day of the crime, Charlene had yet another black eye. (5RT: 1022, 1024, 1048; Peo. Ex. 6A, pp. 3-4.) Appellant thus acted in the belief, however misguided, that he was protecting Charlene. (See Arguments V, *supra,* and AOB 126-

143, and Argument XV, *infra*, and AOB 259-264.)

As discussed above, appellant's role in the Apodaca killing remained unclear, distorted by his self-destructive efforts to exaggerate his own culpability, as the jury appeared to recognize by rejecting the state's theory that the offense was first degree murder. (See Argument VIII, *supra.*)

On the mitigating side of the scales, though hampered by the trial court's erroneous rulings, the defense did present substantial mitigating evidence. As respondent notes, the defense was able to present evidence that appellant suffered a head injury as a young child, was treated for epilepsy, and exhibited poor impulse control and hyperactivity. (RB 184, 186; 9RT: 2302, 2304, 2386, 2408, 2427-2429; 10RT: 2494-2495, 2500.) He was prescribed anti-seizure medication and anti-psychotic medication to sedate him and control his impulsiveness. (10RT: 2501-2503.) Tommy's underlying impairments were exacerbated by spending most of his childhood, from the age of nine on, in state institutions.[24] (9RT: 2427-2428, 2438-39, 2444-2445; 10RT: 2510-2514.)

Though Tommy adored his mother, Mildred, he struggled to cope with a degree of maternal rejection that would be emotionally devastating for any child. (9RT: 2328-2330; 10RT: 2513, 2525.) Mildred lost her own mother at the age of twelve, and she and her four siblings were taken away from their father, split up, and placed in boarding homes. (9RT: 2374-

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[24]The prosecutor at trial stated erroneously that appellant was placed in foster care. (11RT: 2960.) In fact, appellant was placed in institutions beginning at the age of nine. (9 RT 2438.) The excluded probation reports would have explained that this was because appellant had been diagnosed with brain damage at an even younger age and required close supervision and medical oversight. (Argument XIII, *infra*, and AOB 225-250; 1CT Supp. IV: 36, 38.)

2377.) The excluded probation reports would have disclosed that Mildred *asked* for Tommy to be taken into state custody when he was nine and placed outside the home because she could no longer supervise him. (1CT Supp IV: 27.) She told Rosemary, Tommy's half-sister, that he had to be sent to a home because he wasn't behaving. (9RT: 2312, 2316, 2354.) As Dr. Cherkas explained, even if Tommy's mother had the best of intentions, it would be difficult for any child to experience his removal from the family home as anything other than profound rejection. (10RT: 2524-2525.) Tommy's feelings of rejection were compounded by his troubled relationship with his mother's common-law husband, Slotnick, who was seen slapping Tommy around in anger. (9RT: 2395; 10RT: 2457-2458.)

Mildred only took Rosemary to visit Tommy at The Sycamores once in the three years he was there, because she did not want Rosemary exposed to "that environment." (9RT: 2360.) Mildred nevertheless twice asked the State to keep Tommy at The Sycamores rather than returning him home – first, after he had been institutionalized for a year and a half and again a year later, when Mildred and Slotnick offered to pay for a private tutor if The Sycamores would keep Tommy. (11RT: 2836, 2840-2841.) Tommy thus spent more than three developmentally critical years, from nine to twelve, in an institution, receiving none of the nurturing essential for normal psychological and emotional development. (10RT: 2511-2514.) As Dr. Cherkas observed, a child with neurological impairments like Tommy's could have a chance of overcoming them if he had been raised in a loving and nurturing home, but instead his upbringing was relegated to the state. (10 RT 2510.)

Appellant's father, Manuel, who had violently abused Mildred, was a heroin addict and frequently incarcerated. (9RT: 2295-2297, 2339-2340,

2384; 10RT: 2671, 2678, 2684; 11RT: 2835, 2846, 2856.) As noted above, the excluded probation reports indicated that Tommy had been close to his father and began acting out when his father was sent to prison. (1CT Supp. IV: 27.) Mildred was concerned that Manuel was a bad influence on Tommy – especially after Manuel took Tommy to a prostitute at the age of 13. (9RT: 2447; 11RT: 2849-2850.) She asked for Manuel to be barred from visiting Tommy. (11RT: 2850.)

After the age of nine, Tommy never adapted successfully to living outside an institution. (9RT: 2330-2331; 10RT: 2699.) He cycled between brief periods at home and in residential, juvenile facilities, including spending a month in a juvenile psychiatric hospital at age 13. (9RT: 2422, 2445; 10RT: 2465, 2466-2470.) Less than a month after turning 16, appellant tragically stabbed deliveryman Allen Rothenberg, was sent to the California Youth Authority, and thereafter spent most of his adult life in prison. (10RT: 2700.)

As noted above, while appellant had several violent altercations in prison in the 1970s, he spent a substantial portion of the next twenty years in prison or jail and there was no evidence presented of further violent incidents.

Appellant was the deeply damaged product of an institutional upbringing by the State of California. The excluded evidence, as discussed above, would have powerfully reinforced the extent to which appellant was shaped from his earliest childhood by "factors beyond his control" and would have helped "to provide an explanation for his behavior that might reduce his moral culpability." (*Abdul-Kabir v. Quarterman, supra,* 550 U.S. at p. 241.)

Seen through this prism, and coupled with the absence of serious

problems during appellant's last twenty years of incarceration, and the circumstances of the capital offense itself, the jurors could have reasonably concluded that a life sentence, rather than the death penalty, was the appropriate punishment in this case.

There is therefore "a reasonable probability that at least one juror would have struck a different balance," between the aggravating and mitigating circumstances if the probation reports had not been improperly excluded. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537.) For these reasons and those stated in the opening brief, appellant's death sentence must be reversed under both *Chapman v. California* (1967) 386 U.S. 18, 24, and *People v. Brown* (1988) 46 Cal.3d 432, 448.

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XIV.

THE TRIAL COURT'S REFUSAL TO CONDUCT AN ADEQUATE HEARING TO RESOLVE DISPUTED ISSUES OF FACT CONCERNING JUROR MISCONDUCT VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL JURY AND TO A RELIABLE SENTENCING DETERMINATION

Respondent answers that the trial court conducted an adequate inquiry, "balanced Juror 12's explanation with the bailiff's," and credited juror 12's statement that the jury had intended to share the cartoon only with the bailiff, and not the prosecutor. (RB 191-192.) No further inquiry was necessary, respondent reasons, because "the meaning of the cartoon was clear here. The jury obviously felt comfortable enough with the bailiff to share its humorous take on the prosecution's zealous cross-examination of the witnesses." (RB 193-194.) Respondent rejects any comparison to *Wellons v. Hall* (2010) 558 U.S. 220, cited in the opening brief, on the ground that it is a federal habeas case and its posture is thus "uniquely distinguishable." (RB 192.)

The State ignores entirely, however, the central point for which *Wellons* is cited, namely, the high court's insistence that "judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." (*Wellons v. Hall, supra*, 558 U.S. at p. 220.)[25]

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[25]The high court's opinion in *Wellons* amounted to an admonition that both trial courts and reviewing courts must ensure that capital cases are conducted with appropriate decorum and that jurors appreciate the gravity of their task. (*Wellons v. Hall, supra*, 558 U.S. at p. 220; *Wellons v. Hall* (11th Cir. 2010) 603 F.3d 1236, fn.1 [objecting to "Supreme Court's

Indeed, respondent makes light of the issue, arguing "[a]t worst, the jurors believed the prosecution's cross-examination was humorously aggressive based on trial events as opposed to extrajudicial evidence." (RB 194.) The "trial events" in question, however, were the penalty phase of a capital case, and the "humorously aggressive" cross-examination was of the defense mitigation witnesses, which had just concluded. That the jurors found the prosecutor's questioning of defense witnesses at the penalty phase of this case amusing, and "felt comfortable enough" to share a joke about it with the bailiff and prosecutor, just as they were about to begin their deliberations to decide if the defendant should be put to death, is not a trivial or innocuous matter. It is fundamentally incompatible with the jurors' obligations in a capital case and strongly suggests a bias against the defense.

As set out in the opening brief, the inquiry of juror 12 alone was insufficient to decide whether she should have been discharged, because her answers were directly contrary to what the bailiff initially reported: according to the bailiff, juror 12 asked him to give the cartoon to the prosecutor, while juror 12 claimed she gave the cartoon to the bailiff, and it was his idea to share it with the prosecutor. (AOB 252-254.) Juror 12's answers thus raised the prospect that she was not only biased toward the prosecution but was not truthful in her answers to the court, which would

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intimations" that lower courts "failed to appreciate the seriousness of these proceedings"].) Ultimately, after remanding the case for discovery and a hearing, the federal appeals court was "unable to conclude that this conduct [the giving of lewd gag gifts] amounts to juror or judicial misconduct of sufficient constitutional magnitude to warrant habeas corpus relief." (*Wellons v. Warden, Georgia Diagnostic and Classification Prison* (11th Cir. 2012) 695 F.3d 1202, 1214.)

have been good cause for discharge. (See *People v. Green* (1995) 31 Cal.App.4th 1001, 1012 [juror properly excused where she falsely denied statements suggesting contact with defendant's family; court could infer from untruthfulness that juror had in fact lost her impartiality and, hence, "was unable to perform her duty as a juror"].) As discussed in the opening brief, only further inquiry of the bailiff, who was not questioned under oath, and the other jurors – with whom juror 12 indicated she discussed the cartoon – would have resolved the issue. (AOB 256-258.)

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XV.

THE PENALTY PHASE INSTRUCTION ON MORAL JUSTIFICATION IMPOSED A HIGHER STANDARD TO ESTABLISH THE MITIGATING CIRCUMSTANCE THAN IS REQUIRED FOR THE GUILT PHASE DEFENSE OF IMPERFECT DEFENSE OF ANOTHER AND THEREFORE PREVENTED THE JURY FROM CONSIDERING RELEVANT MITIGATING EVIDENCE IN THIS CASE, IN VIOLATION OF THE EIGHTH AMENDMENT

Respondent does not dispute that the alternative instruction the defense requested on section 190.3, factor (f) was legally correct, nor that it would have eliminated any misleading "negative inference that an unreasonable belief [in moral justification] was not a proper consideration" in mitigation. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001 (*Murtishaw II*); RB 195.) Nevertheless, respondent asserts that appellant's claim is foreclosed by *Murtishaw II,* in which this Court held that the factor (k) catch-all instruction cured any error in the standard instruction and was sufficient to allow the jury to consider the defendant's evidence of imperfect (unreasonable) self-defense. (RB 195.)

The gravamen of appellant's argument, however, is that the premise of *Murtishaw II* and its successor, *People v. Murtishaw* (2011) 51 Cal.4th 574, 593-594 (*Murtishaw III*), is incorrect.[26]

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[26]In *Murtishaw II*, this Court found no duty to instruct sua sponte on imperfect self defense at the penalty phase. In *Murtishaw III*, *supra,* 51 Cal.4th at pp. 593-594, after the defendant's third penalty trial, this Court held it was not error to refuse a requested special instruction on imperfect self defense, nor to give the factor (f) instruction which refers only to a defendant's "reasonable" belief in moral justification, reasoning again that the catch-all instruction was sufficient. (*Id.* at p. 594, fn. 7 [stating it made no difference to the court's analysis that the defendant had requested the

There is no dispute that evidence of a defendant's less-than-reasonable belief that his actions are morally justified – as in a faulty case of self-defense or defense of another – is constitutionally relevant mitigating evidence (and, as discussed in the opening brief could actually support a verdict of manslaughter rather than murder).[27] (AOB 261.) It therefore follows that the jurors must "have a 'meaningful basis to consider the relevant mitigating qualities' of the defendant's proffered evidence" (*Abdul-Kabir v. Quartermain* (2007) 550 U.S. 233, 259, quoting *Johnson v. Texas* (1993) 509 U.S. 350, 369), and be able "to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death" (*Brewer v. Quarterman* (2007) 550 U.S. 286, 296).

As set out in the opening brief, there is not merely a "possibility" that the jurors in this case drew the legally incorrect inference from the standard factor (f) instruction, that only a *reasonable* belief in moral justification constituted a mitigating circumstance, but a constitutionally impermissible "reasonable likelihood" that they did so. Moreover, consistent with basic

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imperfect self defense instruction].)

[27]Indeed, by adding the "reasonableness" requirement to the "moral justification" mitigating circumstance, California's statute deviated from former section 210.6 of the Model Penal Code ("MPC"), on which the law is otherwise based. The MPC mitigating circumstance applies more broadly, when "[t]he murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct." (Model Pen. Code (1962) § 210.6, subd. (4)(d).)

The American Law Institute (ALI) withdrew its capital sentencing provisions in October 2009, citing the "the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." (Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code* (2010) 89 Tex. L. Rev. 353, 354.)

rules of grammar, the catch-all, factor (k) instruction, far from curing the misleading language of factor (f), only introduced another layer of ambiguity. (AOB 262-263.)

This case is thus similar to *Penry v. Johnson* (2001) 532 U.S. 782, 800 (*Penry II*), and its progeny. In *Penry II,* the jury was instructed in accordance with the same version of the Texas capital sentencing statute which the high court previously found unconstitutional as applied because its special-issues framework did not allow the jury to give mitigating effect to evidence of Penry's mental retardation. (See *Penry v. Lynaugh* (1989) 492 U.S. 302 (*Penry I*).) This time, the trial court attempted to remedy the statutory flaw with a catch-all instruction, directing the jury to consider the mitigating evidence and, if the jury "believe[d] that mitigating circumstances made a life sentence ... appropriate," to answer one of the special issues "no." (*Penry II, supra,* 532 U.S. at p. 798.) Finding the instructions confusing and illogical, the high court concluded there was "at the very least, 'a reasonable likelihood that the jury ... applied the challenged instruction in a way that prevent[ed] the consideration'" of the defendant's mitigating evidence. (*Id.* at p. 800, quoting *Boyde v. California* (1990) 494 U.S. 370, 380; accord *Smith v. Texas* (2004) 543 U.S. 37, 47-48 [also involving remedial "nullification" instruction]; see also *Abdul-Kabir, supra*, 550 U.S. at p. 262 and *Brewer v. Quartermain, supra,* 550 U.S. at p. 295-296 [reasonable likelihood that jury given no remedial instruction was unable to give full effect to defendants' mitigating evidence].)

This Court reached a similar conclusion in addressing a trial court's refusal to instruct the jury on the escape doctrine in a felony-murder case, in *People v. Wilkins* (2013) 56 Cal.4th 333. The defense had requested an instruction on the escape doctrine which would have correctly informed the

jury that, for purposes of applying the felony murder rule, "[t]he crime of burglary continues until the perpetrator has actually reached a temporary place of safety." (*Id.* at p. 341, quoting CALCRIM No. 3261.) This Court held it was error to refuse the instruction because the evidence raised a question whether the victim's death, from attempting to avoid a large appliance that had fallen off of the defendant's truck, was part of a continuous transaction with the burglary in which the appliance had been stolen or if the defendant had reached a temporary place of safety. (*Id.* at pp. 347-348.) The defendant had been driving for at least an hour, at normal speed, when the fatal act occurred, and there was no evidence he was being pursued or even that the theft had been discovered. (*Ibid.*)

As applied to the facts of Wilkins' case, the standard instructions on the "continuous transaction" element "were incomplete and misleading" and amounted to a misinstruction on an element of the offense, because "even a juror who believed that defendant had reached a place of temporary safety before the fatal act occurred would have no reason to conclude that he or she must find the defendant not guilty of first degree murder." (*People v. Wilkins, supra*, 56 Cal.4th at pp. 349-350.)

The standard instructions in this case were similarly incomplete and misleading, given the facts of this case, because the catch-all, factor (k) instruction, which allows the jury to consider "any *other* circumstance" offered in mitigation is ambiguous and does not cure the legally inaccurate factor (f) instruction which on its face *excluded* as mitigation appellant's *unreasonable* belief that his actions were morally justified to protect his cousin Charlene. Thus, even a juror who believed appellant had acted with an unreasonable belief that his actions were morally justified to stop Facundo's assaults on Charlene would not necessarily understand from the

instructions given that she could consider that a mitigating factor, weighing in favor of a life sentence.

Indeed, the prosecutor in this case, after arguing that factor (f) was inapplicable, explained to the jury that factor (k) "is that all that *other* stuff that you heard about Mr. Trujeque, his background, his father, his mother, any other factor." (11RT: 2956, italics added.) Thus, the prosecutor himself interpreted factor (k) to encompass categories of evidence *other than* appellant's evidence of imperfect defense of another. The trial judge, in his order denying modification of sentence, similarly failed to address the evidence of imperfect defense of another under factor (k), which he applied only to evidence of appellant's upbringing, after finding no evidence to support factor (f). (AOB 263, citing 5CT: 1324-1326A.) If the judge and the prosecutor both interpreted the standard instructions to preclude consideration of appellant's evidence of imperfect defense of another as mitigation, there is surely a reasonable likelihood that the jurors did the same.

Thus, at least on the facts of this case, the record contradicts the assumption underlying *Murtishaw II* and *III* that factor (k) cured the error of giving the improperly restrictive factor (f) instruction.

Although giving the standard factor (f) instruction may not be harmful in most cases, because it is rarely relied on as a mitigating circumstance, it was harmful in this case, in which the State itself concedes there was "[a]mple evidence that appellant believed Facundo would harm and possibly even kill Charlene, particularly due to his discussions with Helen and Charlie about Facundo." (RB 132.) Even if that evidence was not sufficient to establish a guilt phase defense, the jury should have been able to consider it in mitigation at the penalty phase. (*Abdul-Kabir v.*

Quartermain, supra, 550 U.S. at p. 259.)

The error is more egregious because the defense requested an accurate instruction that would have ensured the jurors had a "reliable means of giving mitigating effect" to the evidence of imperfect defense of another. (*Abdul-Kabir, supra*, 550 U.S. at p. 260, quoting *Graham v. Collins* (1993) 506 U.S. 461, 475.) Because there is an reasonable likelihood that the jurors in this case interpreted the jury instructions to preclude consideration of critical mitigating evidence, appellant's death sentence must be reversed. (*Boyde v. California, supra*, 494 U.S. at p. 380.)

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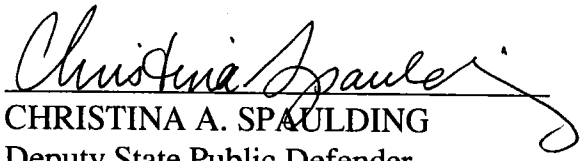
CONCLUSION

For the foregoing reasons, and those stated in the opening brief, appellants convictions and sentence of death must be reversed.

DATED: December 10, 2013

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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(CAL. RULES OF COURT, RULE 8.630(b)(2))

I am the Deputy State Public Defender assigned to represent appellant, TOMMY TRUJEQUE, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 28,462 words in length.

Dated: December 10, 2013.

Christina A. Spaulding

DECLARATION OF SERVICE

Re: People v. Tommy Adrian Trujeque No. S083594

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

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Death Penalty Coordinator
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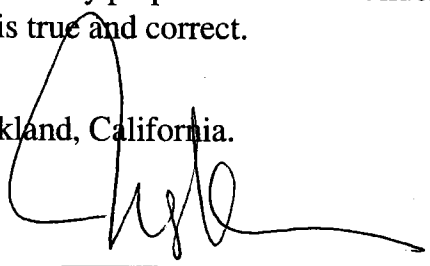
TOMMY A. TRUJEQUE
(Appellant)
P.O. Box D-94497
San Quentin, CA 94974
(to be hand delivered within 30 days)

Each said envelope was then, on December 10, 2013, sealed and deposited in the United States mail at Oakland, California, Alameda county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed on December 10, 2013, at Oakland, California.



DECLARANT