No. S122611

SUPREME COURT COPY

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	(Orange County Sup.
	)	Court No. 99ZF0023)
vs.	)	
	)	
MAURICE G. STESKAL,	)	
	)	
Defendant and Appellant.	)	
	)	

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH
Superior Court of California, County of Orange
Hon. Frank F. Fasel, Judge

APPELLANT'S REPLY BRIEF

Gilbert Gaynor, Cal. Bar No. 107109
Law Office of Gilbert Gaynor
244 Riverside Drive, No. 5C
New York, NY 10025-6142
Tel: (917) 388-3447
GilbertGaynor@post.harvard.edu

Attorney for Appellant
MAURICE G. STESKAL

DEATH PENALTY

TABLE OF CONTENTS

///

PART TWO

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

JURY INSTRUCTIONS

ARTICLES AND TEXTS

OTHER SOURCES

APPELLATE BRIEFS

INTRODUCTION.

In this brief, appellant Maurice Steskal does not reply to each and every one of the State's arguments, but replies only when further discussion may, in his view, be helpful to the Court. That appellant has not addressed any particular argument or allegation made by the State, or reasserted any specific point made in his opening or supplemental briefs, does not constitute a concession, abandonment or waiver of the point (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in Part One of this reply brief are numbered to correspond to the argument numbers in the opening brief.[1] In Part Two, appellant replies to the State's Supplemental Respondent's Brief, in which the State defends the constitutionality of capital punishment under the Eighth Amendment.

---

[1] The abbreviations "RT" and "CT" refer to the Reporter's Transcript and Clerk's Transcript, respectively. Transcript references are preceded by volume numbers, and followed by page numbers.

"AOB" indicates appellant's opening brief, "RB" refers to the State's brief as respondent, "1ASB" and "2ASB" denote appellant's first and second supplemental briefs, respectively, and "RSB" indicates the State's supplemental respondent's brief.

PART ONE

I. BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT MR. STESKAL ACTUALLY BUT UNREASONABLY BELIEVED HE HAD TO SHOOT DEPUTY RICHES TO DEFEND HIMSELF, THE TRIAL COURT ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON UNREASONABLE SELF-DEFENSE.

In the opening brief, appellant showed that the trial court erroneously refused to instruct the jury on unreasonable self-defense and voluntary manslaughter, violating both California law and federal constitutional guarantees. (AOB 99-114.)

The State argues that *People v. Elmore* (2014) 59 Cal.4th 121 "defeats [this] claim." (RB 31.) The critical language in *Elmore* is this:

> unreasonable self-defense ... has no application when the defendant's actions are entirely delusional. A defendant who makes a factual mistake misperceives the objective circumstances. A delusional defendant holds a belief that is divorced from the circumstances. The line between mere misperception and delusion is drawn at the *absence of an objective correlate.*

(*Elmore, supra*, 59 Cal.4th at pp. 136-37 (emphasis added).) Significantly, "[a] defendant who misjudges the external circumstances may show that mental disturbance contributed to the mistaken perception of a threat ...." (*Id.* at p. 146.)

The State argues that Mr. Steskal's

> alleged belief in the need to defend himself from a deputy with the Orange County Sheriffs Department because that deputy would kill him was purely delusional. As previously

> discussed, absolutely nothing objective supported such a belief--Steskal began shooting immediately upon exiting the 7-Eleven, and Deputy Riches never even had the opportunity to emerge from his patrol car much less draw his weapon. (RB 31.)

The State's argument conflates the question whether there was a delusion without an "objective correlate" within the meaning of *Elmore* with another question, whether Mr. Steskal had any reasonable belief that Deputy Riches posed an immediate threat to his life.

Although *Elmore* did not explain at length what it meant by the "absence of an objective correlate," the example it used to illustrate the distinction between misperception and delusion is significant: "A person who sees a stick and thinks it is a snake is mistaken, but ... not delusional. One who sees a snake where there is nothing snakelike, however, is deluded." (*Elmore, supra*, 59 Cal.4th at p. 137.)

All delusions are not alike -- the delusion that one is being followed by Martians is not the same as the delusion that one is being poisoned by a spouse. The *Elmore* court used the phrases "purely delusional" and "entirely delusional" to describe the delusions that would preclude a defense of unreasonable self-defense. (*Elmore, supra*, 59 Cal.4th at pp. 130, 136.) And *Elmore* made clear that evidence of mental disturbance that was not "purely delusional" would be relevant and admissible. (*Id.* at p. 146.) The legal line between the "purely delusional" and the partially delusional under *Elmore* is drawn at the presence or absence of an objective correlative, as the appellate courts have understood:

> We do not read *Elmore* as precluding imperfect self-defense in any case where mental disabilities affect the defendant's beliefs or perceptions. The key distinction identified in *Elmore* is the "absence of an objective correlate."

(*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1409.)

Mr. Steskal would have been purely delusional within the meaning of *Elmore* if he had imagined Deputy Riches was a brain-eating space alien, or a deadly snake, or Hamlet's father's ghost. (See *People v. McGehee* (2016) 246 Cal.App.4th 1190, 1210-1211 [demonic delusion is within *Elmore*].) But there is no dispute that Mr. Steskal perceived Deputy Riches as exactly what he was, in the precise circumstances of the situation -- a deputy sheriff of the Orange County Sheriff's Department, in his patrol vehicle, with his car's overhead light panel flashing yellow and red. (7 RT 1205, 1208, 1212-1214.)

In other words, Mr. Steskal perceived the objective reality of the situation exactly as it was. His delusion was not a delusion about the objective reality of what he saw -- it was based on his misperception of the *significance* of that objective reality, which was profoundly affected by severe mental illness. Misperceiving the significance of a situation, even when the misperception is caused by major mental illness, is not the same thing as a "purely delusional" belief which lacks any "objective correlate," and is not within the sweep of *Elmore*.

As noted, the State conflates the question of the absence of an objective correlative with the question whether anything "objective" supported Mr. Steskal's belief that he needed to defend himself.

This, however, is the wrong question. Mr. Steskal is not arguing the jury should have been instructed that it could find he *reasonably* believed he had to defend himself. The issue concerns his actual, *unreasonable* belief in his need to defend himself.

The unreasonable-belief defense does not presume an actual threat of imminent harm. CALJIC No. 5.17 requires that the defendant hold the actual but unreasonable *belief* that there is an imminent threat. The State argues:

> the evidence showed that Deputy Riches did not even have time to get his gun out of his holster before Steskal killed him. Steskal never saw a gun pointed at him, and the deputy's mere presence in the 7-Eleven parking lot was not enough to make Steskal believe, even unreasonably, that he needed to defend against imminent peril to life or great bodily injury. (RB 32.)

These arguments might be more weighty if the opposing argument was for instructions on *reasonable* self-defense. But these arguments do not demonstrate that Mr. Steskal, in the throes of a major psychotic episode, could have had no actual, *unreasonable* belief in the need to deal instantly with the imminent threat he imagined Deputy Riches to pose.

The State simply ignores all the evidence on which the jury could have determined Mr. Steskal held that unreasonable belief.

The evidence showed that Mr. Steskal had a life-long history of severe, debilitating mental illness. The videotape evidence established that he had been viciously assaulted and humiliated by multiple members of the Orange County Sheriffs' Department, one of whom told him, "[w]e want to hurt you." (Exs. 39, 39A; 9 RT 1644-1645.) The evidence showed that he feared, intensely and

obsessively, that they were out to kill him. (8 RT 1550.) Mr. Steskal was, according to expert, uncontroverted psychiatric testimony, in an acute psychotic state on the night of the offense, suffering a "break with reality." (11 RT 2052-2055, 2139-2140.)

In this obsessively fearful, highly agitated state, caught in a vortex of psychosis, Mr. Steskal went to purchase cigarettes, carrying a weapon. He told store clerk Vickie DeLara he had the rifle to "protect myself from the fucking law." (7 RT 1184.)

And then, just after he completed the purchase of cigarettes, Mr. Steskal walked out the door, Deputy Riches pulled up with his patrol lights flashing, and Mr. Steskal began firing. (7 RT 1185, 1205-1206.)

Maurice Steskal suffered from a delusional disorder of the persecutory type, an Axis I psychotic illness. (11 RT 2052, 2055.) As explained by Dr. Kris Mohandie, a full-time psychologist with the L.A.P.D. who reviewed the surveillance video of the shooting and testified for the defense, individuals suffering from paranoia are in a chronic state of hypervigilance, which depletes the brain's store of neurochemicals, including serotonin and dopamine, that are important in the regulation of our emotional reactions. Under stressful circumstances, such an individual is primed to overreact, or "go off," triggering a fight-or-flight response, where "misperceptions [of reality] are the norm ...." (11 RT 2035-2036, 2028.) These cognitive changes are uncontrollable, and automatic. (11 RT 2029.) When they occur, the response time is "instantaneous" -- within a "fraction of a second." (11 RT 2041.) The firing of a weapon a large

number of times, as here, is consistent with a reactive state -- an instantaneous, automatic fight-or-flight response. (11 RT 2037-2038.)

This is evidence from which a reasonable jury could have concluded that Mr. Steskal, while in a psychotic state and delusionally fearful of sheriff's department members, reacted instantaneously in an irrational, psychotic belief that Deputy Riches' presence a few yards away, with patrol car door ajar and lights flashing, indicated he was in imminent danger to his life. That such a fear of imminent harm is not rational or reasonable is not the point -- the evidence was enough for the jury to have found it existed, irrational though it was.[2]

Because Mr. Steskal sought a lesser-included-offense instruction that was supported by the evidence, it was federal constitutional error as well to deny it. (*People v. Moon* (2005) 37 Cal.4th 1, 27 ("Due process requires that the jury be instructed on a lesser included offense ... when the evidence warrants such an instruction").) Further, because unreasonable self-defense negates the element of malice, the failure to instruct here was equivalent to a failure to instruct on an element of the offense, requiring harmless-error review under the federal constitutional standard. (See *Neder v. United States* (1999) 527 U.S. 1, 15.) Thus, the judgment must be reversed unless it appears "beyond a reasonable doubt" that the error did not contribute to the verdict. (*People v. Sakarias* (2000)

---

[2] Compare *People v. Simon* (2016) 1 Cal.5th 98, 133-134, holding unreasonable self-defense instructions were not justified when the record was "devoid of evidence" of the defendant's subjective fear.

22 Cal.4th 596, 621.)

The State claims any error was harmless, for two asserted reasons. First, the State argues the failure to instruct on imperfect self-defense could not have mattered because the jury was instructed on second degree murder and rejected that theory, so it would "necessarily" have rejected the still-lesser degree of culpability the instruction proposed. (RB 32-33.)

But this argument overlooks that even when actual malice might be otherwise found to exist and give rise to a verdict of murder in either degree, unreasonable self-defense operates, as a matter of law, to "reduce an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that *otherwise inheres* in such a homicide ...." (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (original emphasis); accord, *People v. Simon, supra,* 1 Cal.5th at p. 132.) Thus, as explained in the opening brief, the jury, if properly instructed under CALJIC No. 5.17, could have plausibly found that while Mr. Steskal might have "otherwise" acted with actual malice and instantaneous premeditation, he did so under a psychotically-unreasonable belief that Deputy Riches posed an imminent danger, which negated the element of malice. (AOB 113-114.) CALJIC No. 3.32, cited by the State, told the jury it should consider evidence regarding mental disorder for the purpose of determining whether Mr. Steskal had actual malice, but it did not tell the jurors that if they found Mr. Steskal had an actual unreasonable belief in the need for self-defense, that would negate the element of malice even if the jury found malice "otherwise inhere[d]" and was proven. Thus, the question that should have been resolved by the

jury under CALJIC No. 5.17 was not necessarily resolved under other instructions.

Second, the State argues that Mr. Steskal would not have been aided by CALJIC No. 5.17 because the last sentence of the instruction provided that unreasonable self-defense was not available "if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force, attack or pursuit." (RB 33.) This, of course, poses a question of fact for the jury. And this part of the instruction was not, a reasonable jury would likely have found, even applicable to the defense of unreasonable self-defense in this case.

The jury likely would have found the last sentence of CALJIC No. 5.17 inapplicable to defeat the defense because it referred to "his adversary's use of force, attack or pursuit." Deputy Riches did not use force or attack Mr. Steskal. The jury most plausibly would have found no "pursuit" occurred, since Mr. Steskal did not flee and Deputy Riches did not chase him. Neither the Penal Code nor standard criminal jury instructions define "pursuit." But "words have commonsense meanings which the jury may be expected to apply." (*People v. Arias* (1996) 13 Cal.4th 92, 189.) The commonsense meaning of "pursuit" is reflected in Black's Law Dictionary, which defines pursuit as "[t]he act of *chasing* to overtake or apprehend." (Black's Law Dictionary at p. 1250 (7th ed. 1999) (emphasis added).) Had the jury been properly instructed, it most likely would have found the last sentence of CALJIC No. 5.17 literally inapplicable to this situation, given that Mr. Steskal did not flee, and Deputy Riches did not chase him. The most reasonable and likely

view of the evidence is that there simply was no "pursuit." It certainly cannot be said that, beyond a reasonable doubt, the jury would not have come to this conclusion.

II. THE TRIAL COURT IMPROPERLY RESTRICTED THE TESTIMONY OF DEFENSE PSYCHIATRIST DR. RODERICK PETTIS, VIOLATING STATE LAW AND DENYING MR. STESKAL HIS FEDERAL CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

As shown in the opening brief, forensic psychiatrist Dr. Roderick Pettis was a critical guilt-phase witness for the defense. Dr. Pettis testified that on the night Mr. Steskal shot Deputy Riches, Mr. Steskal suffered from an Axis I psychosis -- a "delusional disorder, persecutory type" -- connoting a "break with reality." (11 RT 2055, 2139-2140.) But the trial court improperly restricted the testimony of Dr. Pettis by sustaining prosecution objections to Dr. Pettis's direct testimony explaining the factual basis for his opinion.

First, the trial court incorrectly sustained the prosecutor's hearsay objection to defense counsel's question regarding whether Dr. Pettis had learned from Mr. Steskal that on the morning before the homicide, Mr. Steskal had heard messages on the radio that caused him to act in a psychotic manner. (11 RT 2105-2106; AOB 117-119.) Second, the trial court erroneously sustained prosecution objections to defense questions about whether Dr. Pettis had learned any information regarding whether Mr. Steskal was "just angry" on the date of the homicide. (11 RT 2106, 2108; AOB 119-120.)

The opening brief argued that sustaining the objections to these defense questions to Dr. Pettis violated Evidence Code sections

801 and 802, as construed by this Court in *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012. The State's brief contested this argument, relying primarily on *People v. Bell* (2007) 40 Cal.4th 582, 608. (RB 37-39.)

After the State filed its brief, this Court disapproved in pertinent part *Ainsworth* and *Bell*, the cases relied on by the parties here, as well as other cases in the same line of authority. (*People v. Sanchez* (2016) 63 Cal.4th 665, 686 fn.13.) *Sanchez* held:

> When any expert relates to the jury case-specific out-of-court statements, *and treats the content of those statements as true and accurate* to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth.

(*People v. Sanchez, supra*, 63 Cal.4th at p. 686 (emphasis added).)

While *Sanchez* works a significant change in the law, it does not alter the correct result in this case.

This is because, as to whether Dr. Pettis had learned from Mr. Steskal that Mr. Steskal had heard messages on the radio that caused him to act in a psychotic manner, there is no reason to believe that Dr. Pettis in his answer would have "treat[ed] the contents of those statements as true and accurate ...."

Although defense counsel sought to elicit from Dr. Pettis that Mr. Steskal told him that he had heard certain messages on the radio that caused him to act in a particular manner, plainly this psychiatrist was not going to testify that Mr. Steskal actually *had* been instructed by radio messages to act in a psychotic manner. The statement was not offered for the truth of the matter stated, and Dr.

Pettis did not "treat the content of the statement as true and accurate."

More generally, when a psychiatrist testifies to delusional statements made by a psychotic individual, the psychiatrist is not treating the content of such delusional statements as "true and accurate." *Sanchez* is inapplicable.

As to defense counsel's questions to Dr. Pettis regarding whether the psychiatrist had learned "anything about the behavior that is heard and observed in Mr. Steskal" that caused him to conclude Mr. Steskal was not "just angry" in the day preceding the homicide (11 RT 2107-2108), *Sanchez,* which concerns "case-specific out-of-court statements," is equally inapplicable.

"Behavior" is not the same thing as a "statement." One can observe a person's behavior, or hear it (e.g., banging on trash cans), without any statements being made by the person. The question did not concern statements of Mr. Steskal, but his behavior. Moreover, as explained in the opening brief, the objection that the question assumed facts not in evidence was incorrect under *People v. Ainsworth* (AOB 119, fn.67), which survives *Sanchez* as to non-hearsay, and is in any event also incorrect because the facts of Mr. Steskal's behavior were already in evidence, based on the testimony of prosecution witness Kimberly Langlois, who heard Mr. Steskal slamming a dumpster gate and crashing a piece of furniture into the walls of a stairwell. (7 RT 1239-1241.)[3]

[3] The opening brief also showed that the trial court's restrictions on Dr. Pettis's testimony based on state law grounds had the additional consequence of violating Mr. Steskal's right to present a

The State insists that, in any event, the errors could not have been prejudicial. But the State does not dispute that Dr. Pettis's testimony was essential to the defense. The State's position that the jury was "fully informed" of the basis for Dr. Pettis's opinion that Mr. Steskal killed while in a psychotic condition (RB 39) is simply incorrect. The jury was precluded from considering that Dr. Pettis's opinion was based in part on the fact that Mr. Steskal had told him that he had received and acted on messages from the radio -- a singular, extremely bizarre fact that most reasonable jurors would, themselves, likely consider as a strong indicator Dr. Pettis's conclusion was correct.

Further, the State's contention the errors were harmless ignores their plain pertinence to the central factual dispute at the guilt-phase trial -- whether Mr. Steskal shot Deputy Riches because he was angry and "hated cops" (12 RT 2244), or because he was in a panicked, delusional state and killed without premeditation or deliberation (13 RT 2314-2137, 2341-2342). The evidence in question related *directly* to the central issue whether Mr. Steskal was "just angry," and its exclusion was not harmless under either state or federal standards.

---

complete defense under the Fifth, Sixth and Fourteenth Amendments. The State contends that the argument is forfeited "because he did not object on this ground below." (RB 40 fn.14.) The State overlooks that the issue arose because the trial court sustained prosecution objections, not defense objections. The issue is also before the Court because the trial court's erroneous state-law rulings had the additional legal consequence of violating appellant's federal constitutional rights. (*People v. Farley* (2009) 46 Cal.4th 1053, 1095.)

IV. THE TRIAL COURT ABUSED ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 AND VIOLATED MR. STESKAL'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS BY APPROVING A JURY VIEW OF DEPUTY RICHES' BULLET-RIDDLED PATROL CAR.

The devastated patrol vehicle is a "horrible piece of evidence," as the trial court described it (3 RT 492), and its potential for undue prejudice is obvious. Thus, the jury view of the vehicle should only have been allowed over appellant's Evidence Code section 352 objection if the probative value of the viewing was not substantially outweighed by the very real risk of wrongful prejudice.

The only disputed issue at trial was whether Mr. Steskal shot Deputy Riches with premeditation and deliberation, and was guilty of first degree murder, or did not act with premeditation and deliberation, and was guilty of second degree murder.

Recognizing this, the State contends that "viewing the car was material to the issue of premeditation and deliberation ...." (RB 58.) Specifically, the State argues:

> The jury view of the car had significant probative value in that it enabled the jury to see the damage and devastation to the patrol car from the same level that Steskal was at when he fired the shots. This showed to the jury, more accurately than other testimony or evidence, that Steskal was focused on the driver's side of the car (where Deputy Riches was seated) when he fired the 30 shots. The number of shots fired into the patrol car was indicative of premeditation and deliberation - that is, "the manner of killing was so particular and exacting that [Steskal] must have intentionally killed according to a 'preconceived design' to take his victim's life." (*People v. Anderson* (1968) 70 Cal.2d 15, 27.) (RB 57.)

But the fact to which the State points in its discussion of materiality to the central, disputed issue of premeditation -- that the "number of shots" shows that appellant must have "killed according to a 'preconceived design'" -- does not demonstrate the asserted materiality of the destroyed patrol vehicle to the question of premeditation, for two reasons.

First, while firing a large number of shots is consistent with an intent to kill, it does not logically tend to demonstrate premeditation. Indeed, it is far more rational that a single, deadly shot from a rifle would demonstrate premeditation than would a sudden barrage of fire. A large number of shots fired hardly meets the description of a "particular and exacting" manner of killing that would indicate premeditation under the authority quoted by the State, *People v. Anderson* (1968) 70 Cal.2d 15, 27. That a large number of shots were fired, the testimony of psychologist Dr. Mohandie in this trial showed, is itself consistent with a hypervigilant, fight-or-flight response (11 RT 2029-2041) -- not premeditation.

Second, even if the State were correct that the "number of shots" showed premeditation in these circumstances, the vehicle itself was not significant to demonstrate the number of shots.

The number of shots Mr. Steskal fired was simply not in dispute. He fired 30 shots. (7 RT 1274, 12 RT 2233, 2244-2245, Ex. 3.) A prosecution criminalist even testified about the precise order in which the first bullets struck the car's windows. (7 RT 1277-1278.) The criminalist placed trajectory rods into the bullet holes in the car, and testified regarding photographs -- Exhibits 25 and 26 -- showing

the direction and pattern of the shots as illustrated by the trajectory rods placed in the car. (7 RT 1280-1281.)

The view of the vehicle added nothing of substance to the jury's understanding of the number of shots fired. The State has failed to refute that the viewing of the bullet-riddled patrol car had no substantial probative value on any disputed issue, let alone to the central material issue of premeditation.

The other side of the equation is the substantiality of the risk of undue prejudice. The State quotes *People v. Doolin* (2009) 45 Cal.4th 390, 439:

> "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (RB 56.)

The State asserts that the view of the destroyed patrol vehicle "did not evoke an emotional bias against Steskal as an individual." (RB 58.)

The State seems to argue that viewing the vehicle did not evoke an emotional bias *because* it was material to the issue of premeditation and deliberation. (RB 58.) This makes no sense. Even when evidence *is* relevant to a disputed material issue, it should be excluded under section 352 when its probative value is substantially outweighed by the danger of undue prejudice. In any event, as just discussed, the vehicle was, simply, not material to the

issue of premeditation.

The State's argument that no emotional bias could have been invoked by viewing the vehicle because it "accurately portrayed" the crime scene also makes little sense. (RB 58.) Presumably, all photographs, audio and video recordings are "accurate portrayals" of the events they purport to recall; if not they are inadmissible. The same applies to crime scene visits.

If all that were required to overcome a section 352 objection to a photograph, audio, video or visit to a scene were a showing that the recording or visit or photo represented an "accurate portrayal" of an event relevant to trial, then with regard to such "accurate portrayal" evidence, the "undue prejudice" component of section 352 would be effectively read right out of the statute.

Thus, the destroyed patrol vehicle, with its bullet holes, shattered glass and glass fragments, and torn and blood-drenched seat fabric, is indeed a "horrible piece of evidence." (3 RT 492.) It is a death scene. In the absence of some strong probative value to a disputed material issue, it was the sort of evidence that would almost certainly evoke a strong negative emotional bias. This is a prime example of the sort of inflammatory evidence that should be excluded when, as here, it does not have strong probative value on a disputed material question of fact. Admitting it despite the absence of any strong probative value on the central factual dispute, the trial court abused its discretion.

Moreover, it is also the sort of evidence that is both so inflammatory and so lacking in evidentiary value as to violate federal

due process guarantees and render the trial fundamentally unfair. The jury's proper focus was on whether Mr. Steskal had premeditated and deliberated. But the inevitable consequence of this "horrible piece of evidence" was to shift the focus from Mr. Steskal's mental state to the nightmare horror of Deputy Riches' real-world death chamber.[4]

As the State recognizes, the central factual issue for the jury was whether Mr. Steskal premeditated and deliberated. Arguing that any error was harmless, the State points to one of Mr. Steskal's experts, Dr. Asarnow, who testified that Mr. Steskal had the ability to premeditate and deliberate. (RB 59, citing 10 RT 1862-1863.) But testimony that Mr. Steskal had the *ability* to premeditate does not, of course, indicate that he *did*, and Dr. Asarnow was not asked whether Mr. Steskal actually did premeditate. While appellant does not argue the evidence was legally insufficient to support the judgment of first degree murder, the evidence also would have easily supported a jury verdict, available on the instructions given, of second-degree murder.

The opening brief showed there was substantial evidence from which the jury could have concluded that Mr. Steskal killed in a delusional panic. (Indeed, the State itself argues in its brief that Mr. Steskal's "alleged belief in the need to defend himself from a deputy .

---

[4] The State also argues that appellant forfeited the federal due process claim by failing to object on this ground below. Not so. This federal constitutional argument "invites [the Court] to draw an alternative legal conclusion" from the information presented to the trial court, and is preserved. (*People v. Partida* (2005) 37 Cal.4th 428, 436.)

. . was purely delusional." (RB 31.)) There was ample evidence that Mr. Steskal feared law enforcement was out to kill him, and ample evidence that the circumstances supported a "fight-or-flight" instantaneous reaction by Mr. Steskal. Thus, the jury could well have concluded that Mr. Steskal did not kill with premeditation and deliberation. There is at least a reasonable probability that if the jury had not been contaminated by this "horrible piece of evidence," it would have returned a different verdict. And it cannot be said that, beyond a reasonable doubt, this inflammatory view of the destroyed patrol vehicle did not contribute to the verdict of first-degree murder.

VI. JUST AS WITH JUVENILES AND THE INTELLECTUALLY DISABLED, THE EXECUTION OF SEVERELY MENTALLY ILL INDIVIDUALS LIKE MAURICE STESKAL, WHOSE OFFENSES WERE THE DIRECT RESULT OF PSYCHOSIS OR OTHER EXTREME MENTAL DISORDERS, IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS, AND IN ANY EVENT THE EXECUTION OF MAURICE STESKAL WOULD BE UNCONSTITUTIONALLY DISPROPORTIONATE TO HIS PERSONAL CULPABILITY.

A. Introduction: This Case Squarely Presents An Open Question of Considerable Importance.

From early childhood, Maurice Steskal has suffered from serious mental illness. He has been diagnosed with a schizophrenic spectrum disorder. He is delusional, and psychotic. As a direct result of his psychosis, Maurice Steskal shot and killed Deputy Riches.

The Cruel and Unusual Punishments Clause of the Eighth Amendment is not kept in a vault, removed, mechanically applied, and returned to the vault unchanged. The Clause takes meaning from that *evolving* standard of decency which marks the progress of American civilization. (*Trop v. Dulles* (1958) 356 U.S. 86, 100-101.)

This case presents an open question. The Supreme Court has never addressed whether it violates the Eighth Amendment to execute severely mentally ill defendants who were, as a result of their

severe, disabling illnesses, unable to conform their conduct to the requirements of the law.

As discussed in the opening brief and in a supplemental brief, for our system of justice to execute people like Maurice Steskal -- people who, through no fault of their own, suffer from severe mental illness rising to the level of psychosis, and as a direct consequence of that psychosis, committed the offense at issue -- just as with the execution of intellectually disabled persons, prohibited under *Atkins v. Virginia* (2002) 536 U.S. 304, and the execution of those who were juveniles at the times of their offenses, held categorically unconstitutional in *Roper v. Simmons* (2005) 543 U.S. 551 -- does not serve the objective of deterrence, is not justified by the interest in retribution, and creates a special risk of wrongful sentencing and execution. Further, just as there was with regard to the execution of the intellectually disabled in *Atkins* and of juveniles in *Roper*, there is, now, a national consensus against the execution of such seriously mentally ill offenders -- the majority of United States jurisdictions do not permit the execution of the severely mentally ill. That national legal consensus is supported by a broad professional consensus, and an international consensus against the execution of the mentally ill.

The State argues that Maurice Steskal's constitutional argument based on his severe mental illness is "factually unsupported." (RB 64.) The record reveals overwhelming uncontroverted evidence to the contrary.

On the merits, the State contends that Maurice Steskal has identified no "controlling federal authority" supporting his position.

(RB 62.) But the State does not dispute that in a line of cases including *Atkins* and *Roper*, the Supreme Court has set forth clear constitutional standards that govern directly the decision of cases such as this. Nor does the State dispute that those standards are applicable here.

The State relies on *People v. Hajek and Vo* (2014) 58 Cal.4th 1144 and *People v. Boyce* (2014) 59 Cal.4th 672. (RB 62-64.) But *Hajek* and *Boyce,* as well as the more recent decision of this Court following these cases in *People v. Mendoza* (2016) 62 Cal.4th 856, failed to correctly apply the Supreme Court's Eighth Amendment constitutional standards. For example, though Supreme Court cases mandate consideration of whether there is a national legal consensus against the punishment at issue, *Hajek* and *Mendoza* each failed to consider the existence of a national legal consensus against executing the severely mentally ill, and *Boyce* relied on a mistaken and unexplained concession in the defendant's brief to conclude, incorrectly and without analysis, that there *was* no national consensus. The errors of *Hajek, Boyce* and *Mendoza* should not be repeated.

Just as the evolving standards of decency under the Eighth Amendment have come to mean that juveniles and the intellectually disabled may no longer be executed, so too our understanding and humanity have evolved with respect to the severely mentally ill.

This Court should hold it is not consistent with either the United States or California constitutions to execute those who, like Maurice Steskal, have long suffered from severe mental illness and

whose psychoses played a direct, causal part in their offenses.[5]

In the alternative, appellant has argued that the Court should conclude on its independent review under Article I section 17 of the California Constitution, that in view of his severe mental illness in the context of all the facts and circumstances of this case, punishment by death would be an unconstitutionally disproportionate penalty.

The State's response (RB 67-70) relies wholly on cases that are materially unlike Maurice Steskal's -- cases in which there was no causal relationship between the offender's mental illness and the crime -- and fails to refute the showing that, in the unique factual circumstances of Maurice Steskal's case, death is a grossly disproportionate punishment.

---

[5] In this brief, as well as in the opening and first supplemental briefs, appellant argues that it violates both the Eighth Amendment and Article I section 17 of the California Constitution to execute severely mentally ill individuals who, with respect to their offenses, and as a result of their severe mental illnesses, were substantially impaired in their ability to conform their conduct to the requirements of the law.

The phrase "Eighth Amendment" is used to indicate both the federal and state constitutional guarantees, unless the context clearly indicates otherwise.

Additionally, the phrase "severely mentally ill" and its variants are also used to indicate those severely mentally ill persons who, as a consequence of their illnesses were unable to conform their conduct to the requirements of the law with respect to the offense at issue.

B. Contrary to the State's Assertion, the Record Shows Overwhelming Evidence that Maurice Steskal Suffered from Severe Mental Illness, and that the Offense was the Direct Result of His Psychosis.

The State's brief asserts that Maurice Steskal's "claim of cruel and unusual punishment predicated on mental illness is factually unsupported." (RB 64, emphasis added.)

Before to addressing this assertion, it may be helpful to review what Maurice Steskal's claim of mental illness is, and what it is not. It is *not* a claim that his mental disorder means he should be *excused* from criminal liability. Rather, it is a claim that he falls within a category of persons excluded from punishment by death under the United States and California constitutions, described by the American Bar Association as restricted to those offenders who:

> at the time of the offense, . . . had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. . . .

(American Bar Association, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities* (2006) 30 Mental & Phys. Disability L. Rep. 668, 668.) A "severe mental disorder or disability" includes schizophrenia or other psychotic conditions. (*Id.* at p. 670.)

At the time of the offense in this case, Maurice Steskal had "a severe mental disorder or disability ... that significantly impaired [his] capacity ... (b) to exercise rational judgment in relation to

conduct, [and] (c) to conform [his] conduct to the requirements of the law."

The State offers no discussion of evidence in support of its assertion that Maurice Steskal's claim of mental illness is "factually unsupported" (RB 64); instead, the State's brief merely quotes from the trial court's comments in denying Maurice Steskal's motion to modify the verdict:

> "Evidence of the defendant's minimal mental defect was not sufficient to establish either a defense or constitute a mitigating factor sufficient to outweigh the callousness of the circumstances of the crime. The defendant was not under the influence of drugs or alcohol. His mental disorder explains but not does excuse his behavior. [¶] The defendant did not have such a mental defect to such a degree that, at the time the offense was committed, he didn't appreciate the criminality of his conduct or wasn't able to conform his conduct to the requirements of the law. [¶] Nothing affected the defendant's ability to choose a course of action. . . . He was able to premeditate, deliberate, and form the specific intent to kill, and he did so."

(37 RT 7123, as quoted at RB 64.)

The trial court was correct to conclude that Maurice Steskal's "mental disorder explains . . . his behavior." (37 RT 7123.)

But the trial court's statement that Maurice Steskal suffered from only a "minimal mental defect" is contradicted, on its face, by the trial court's preceding conclusion that Maurice Steskal's "mental disorder explains . . . his behavior." (37 RT 7123.)

The trial court's two statements, a mere sentence apart, cannot be logically or reasonably reconciled: if Maurice Steskal's mental

disorder "explains" his behavior in shooting and killing Deputy Riches with 30 shots from an AK-47 knockoff rifle as the deputy sat in his patrol car, then it can hardly be concluded that that Maurice Steskal's mental disorder was "minimal."

Even if the trial court's conclusion that Maurice Steskal's mental illness did not mean he could not "conform his conduct to the requirements of the law" *was* supported by substantial evidence, that would not indicate that Maurice Steskal did not come within the category of those who were so severely mentally ill that they were significantly impaired in the capacity "(b) to exercise rational judgment in relation to conduct."

But the applicability of the second category in this case need not be determined, because the evidence that Maurice Steskal suffered from severe mental illness and, as a result, was unable to conform his conduct to the requirements of the law was not just supported by substantial evidence -- it was supported by overwhelming evidence that was entirely *uncontradicted.*

Contrary to the State's position, the trial court's statements that Maurice Steskal had only a "minimal mental defect" which did not indicate he could not conform his conduct to the requirements of the law are not only contradicted by the court's own conclusion that Maurice Steskal's "mental disorder explains . . . his behavior," but also wholly unsupported by the evidence.

1. There Was Overwhelming Evidence that Maurice Steskal Suffered from Extreme Mental Illness, and that as a Direct Consequence, He Was Unable to Conform His Conduct to the Requirements of the Law, and Was Significantly Impaired in His Capacity to Exercise Rational Judgment in Relation to His Conduct.

The trial court's finding that Maurice Steskal's "mental disorder explains . . . his behavior" (37 RT 7123), while accurate, seriously understates the matter.

Maurice Steskal suffers from a major mental illness -- a delusional disorder of the persecutory type -- according to the diagnosis of Dr. Roderick Pettis, a clinical and forensic psychiatrist who examined Maurice Steskal.

Maurice Steskal's delusional disorder of the persecutory type is a psychosis. It connotes a break with reality. (11 RT 2052, 2055; 30 RT 5668, 5673, 33 RT 6210.)

A delusional disorder psychosis is a type of schizophrenic spectrum disorder, but is separately diagnosed and classified. A critical diagnostic criterion is the nature of the delusion at issue: for example, "being followed by the CIA," which would indicate a delusional psychosis, as compared with "being followed by Martians," which would indicate schizophrenia. (11 RT 2054.) While the symptoms of psychotic delusional disorder differ from those of schizophrenia, a person afflicted with a delusional persecutory psychosis is no less chronically mentally ill than

someone suffering from schizophrenia. (30 RT 5679-5680.[6])

The psychosis of Maurice Steskal revolved around the persistent, fixed, paranoid delusion, impervious to fact, that persons in authority were after him, spied on him, conspired against him, and maliciously sought to harm and crush him. Maurice Steskal's "encapsulated delusion" (30 RT 5676-5680, 5810) ultimately centered on the psychotic belief that members of the Orange County Sheriffs' Department were out to kill him.

Maurice Steskal's psychosis did not suddenly arise; it developed over a lifetime, culminating in his offense at age 39. Dr. Pettis's diagnosis was not made in a vacuum, but was based on his extensive review of voluminous information contained in hundreds of sources,[7] including educational records, medical records, a battery of neuropsychological test results, diagnostic reports for family members, police reports, post-arrest jail records, interviews with family, friends, teachers, neighbors, acquaintances and employers, and videotapes of the offense, as well as eight hours of in-person diagnostic sessions with Maurice Steskal himself. (11 RT 2050-2051,

---

[6] Maurice Steskal also suffered from a schizotypal personality disorder pre-existing since childhood, characterized by persistent irrational suspicions, frequent magical thinking, and isolation. (11 RT 2052, 2060, 30 RT 5668, 5673, 5680-5681.) Dr. Pettis additionally diagnosed Maurice Steskal with dysthymic (depressive) disorder, and with poly-substance abuse, which was in remission. (11 RT 2052, 30 RT 5668-5669.) However, the psychotic persecutory delusion that afflicted Maurice Steskal was not attributable to substance abuse (11 RT 2113), and drugs and alcohol played no role in the offense (12 RT 2175).

[7] For the first trial, Dr. Pettis prepared an index of 246 documents he had reviewed, and he reviewed voluminous additional materials for the second trial. (30 RT 5666-5667.)

2062, 30 RT 5660-5666.)

We do not choose the families of our birth. There is often a familial genetic predisposition to psychological disorder, including paranoia. (28 RT 5361-5362, 33 RT 6339.)

Maurice Steskal was born into a family afflicted with mental illness. Dr. James Missett, a board-certified psychiatrist, independently evaluated the members of Maurice Steskal's family, and found a pattern of mental illness. His mother had indications of a personality disorder. (29 RT 5577.) All the male family members Dr. Missett evaluated -- Maurice Steskal's father, his oldest brother Bobby, and his younger brother Scott -- he diagnosed with mental illness. Dr. Missett found that Maurice Steskal's father had a personality disorder with paranoid, schizoid and obsessive features (29 RT 5558-5563); his oldest brother Bobby also had a personality disorder with paranoid, schizoid and obsessive features (29 RT 5591); and his younger brother Scott was, like Maurice Steskal, actively psychotic, also suffering from a persecutory delusional disorder. (29 RT 5558-5563, 5591, 5598, 5607.)

In this family plagued by mental illness, physical, psychological and sexual abuse were practiced, and Maurice Steskal was an object of abuse from early childhood. He was verbally abused. He was beaten and physically abused repeatedly, from as early as age 3, by his father, his mother, and two of his older brothers. Bobby Steskal singled out appellant for abuse because he saw him as weak, vulnerable and an easy mark. (29 RT 5583.)

Early in Maurice Steskal's life, at least from kindergarten, the

effects of a probable genetic propensity to mental illness, in combination with a dysfunctional, abusive family environment in which mental illness prevailed, manifested themselves. From the start, despite normal intelligence and effort, he fell behind and failed at school; Maurice Steskal's teachers recommended he repeat kindergarten, and he had to repeat both first grade, and second grade. (11 RT 2068-2069.) In second grade, at age 8, he was referred to a school psychologist, and tested; the school psychologist detected signs of mental illness, and recommended the child receive psychological counseling. (30 RT 5691, 5696.) It was never provided. (30 RT 5701.) Maurice Steskal never finished high school.

As an adolescent, already gripped by mental illness (11 RT 2074), Maurice Steskal tried to self-medicate by using inhalants such as glue;[8] his parents responded by escalating physical abuse. Repeatedly, his father took Maurice Steskal to the basement, where his screams could not be heard, and beat him with PVC hoses. (30 RT 5696-5697.) At age 14 or 15, Maurice Steskal began expressing suicidal ideation. (11 RT 2082, 30 RT 5709.)

Maurice Steskal's mental illness persisted, and worsened, through adolescence and into adulthood, and his suspiciousness and distrust escalated into paranoia. (30 RT 5712-5713.) He practiced bizarre behaviors, including cross-dressing, developed religious obsessions, and became fixated on imaginary conspiracies against him. (11 RT 2076, 30 RT 5715-5719).

His delusional disorder worsened as an adult. His behavior

[8] Such self-medication is itself a symptom of mental illness. (11 RT 2072-2074.)

was irrationally self-protective, but not harmful to others. Maurice Steskal fled from others, living for two-and-a-half years in a small, windowless concrete bunker without plumbing or electricity in a remote area of Oregon, alone. Concealing himself with camouflage, staining his face with berries, Maurice Steskal evaded imaginary pursuers, digging tunnels to escape them. He believed people in the woods were watching him, and government airplanes were surveilling him, trying to hunt him down. (11 RT 2090, 12 RT 2159-2167, 30 RT 5721-5727, 34 RT 6513-6519.)

Dr. Pettis's diagnosis that Maurice Steskal had long suffered from a major schizophrenic spectrum disorder was corroborated by the independent evaluation of Dr. Robert Asarnow, a UCLA Medical School professor who had never before testified for the defense in a criminal case. (28 RT 5292-5298, 5300-5311.)

Dr. Asarnow administered a battery of thirteen neuro-psychological tests. Maurice Steskal's test results were striking. On a standard test of problem-solving skills, WAIS III, despite his normal intelligence (28 RT 5331), which strongly correlates with a median-range score, Maurice Steskal scored in the 1st percentile -- the most extreme possible result. (28 RT 5354-5346.) On a key test of intellectual flexibility that provides mental-health professionals with the single best predictor of liability for schizophrenic spectrum disorders, Trail Making B, Maurice Steskal again scored in the 1st percentile. (28 RT 5351-5352.) Another test showed a level of hypervigilance consistent with delusional disorders, particularly those involving persecutory delusions. (28 RT 5334-5336.) Maurice Steskal's neuropsychological test results, Dr. Asarnow found, were

highly correlated with schizophrenic spectrum disorders. (28 RT 5345-5348, 5350-5352, 5364; see AOB 65-68, summarizing Dr. Asarnow's findings regarding Mr. Steskal's test results.)[9]

The evidence is also compelling that Maurice Steskal's offense was the direct product of an extreme psychotic delusion that was precipitated by a singular, traumatic external event.

On March 28, 1999, while driving, Maurice Steskal was stopped for a seat-belt violation by Orange County Sheriff's Department Deputy Andre Spencer. The patrol car video of that stop is Exhibit 39; a partial transcript of the audio portion is Exhibit 39-A. During the stop, Deputy Spencer was joined by four more deputies.

Deputy Spencer's conduct directed at Maurice Steskal was indisputably unprofessional and improper, as the State recognizes.[10] Deputy Spencer drew and pointed his service weapon at Maurice Steskal without any reasonable justification. (9 RT 1623-1624.) He repeatedly used profanity, verbally abusing and taunting Maurice

---

[9] Dr. Asarnow also reviewed school records, which showed that Maurice Steskal had a visual perceptual abnormality, and should have been placed in a special education class. Maurice Steskal's educational records, including handwriting, additionally showed early neuromotor impairments, which are consistently associated with predisposition to schizophrenic spectrum disorders. (28 RT 5317-5318, 5322-5323.)

[10] The State writes in its brief:

> Deputy Spencer agreed that many of the things he did during the stop were *unprofessional* and actually *escalated the situation*, contrary to what he had been trained to do. (26 RT 5046, 5060, 5067.)

(RB 23, emphasis added.)

Steskal. He acted to degrade and humiliate Maurice Steskal.

In the middle of a public street, Deputy Spencer unbuckled Maurice Steskal's belt, opened his fly, and improperly performed an intimate search *inside* Maurice Steskal's underpants. (8 RT 1358-1359.) When Maurice Steskal attempted to hold his pants up, the deputies threw him forcibly to the ground. (9 RT 1643.) When he called out, "You are hurting me," a deputy responded, "We want to hurt you." (9 RT 1644-1645.) Maurice Steskal was arrested, and while he was held outside, on the pretext of a welfare check, deputies searched the apartment he shared with his wife. (26 RT 5011, 5015, 8 RT 1532-1534, 1542.)

For decades, Maurice Steskal had lived in fear of threats and conspiracies against him that did not exist. After the traffic stop, the search inside his underpants on a public street, the assault by five deputies who threw him down and piled on him, the arrest, and the entry into the apartment, Maurice Steskal's already-severe mental illness became worse, and his symptoms of psychosis exacerbated. (11 RT 2095.) He began a free-fall into an abyss of delusion and psychotic behavior.

Maurice Steskal told Dave Rodering that the police were watching him with satellites and on his TV. (27 RT 5199.) He told Cherie Le Brecht, who lived with the Steskals, that he was being watched inside the apartment, through the television. (27 RT 5167.) He told Ralph Pantoni that he was being monitored by the government through the TV set, that he was being wiretapped and videotaped, and that he was constantly surveilled by cameras. (8 RT

1429, 25 RT 4807-4810, 4813-4815.) Fearful that the coaxial box in the laundry room next to his apartment was used to spy on him, Maurice Steskal ripped out the box and tore apart the cables. (25 RT 4851-4852.)

Maurice Steskal had nightmares from which he awakened yelling, "Don't let them get me." (8 RT 1452.) He spoke of suicide intensely and repeatedly, and he would put a shotgun in his mouth, try to inhale hairspray, and try to drink Drano. (25 RT 4805-4806.)

Dave Rodering testified that Maurice Steskal was convinced the police were going to kill him. His voice would quaver, his body would shake, and he would burst into tears and say, "They are going to kill me, they are going to kill me." (27 RT 5199.)

He became even more reclusive, preferring to remain in the mountains where he could be away from all the threats he believed he faced at the hands of the Orange County Sheriffs Department. (11 RT 2098, 8 RT 1451, 1558.) He was in a state of despair. (11 RT 2098.) He wanted to avoid any contact with law enforcement, and was profoundly fearful and anxious about the possibility of any such contact. (11 RT 2102.) Riding in a car with his wife, he was obsessive about her not exceeding the speed limit. (11 RT 2102.)

Maurice Steskal was suicidal the morning before the homicide, when he left the mountains and returned to Lake Forest to fulfill legal obligations arising from the March 28, 1999 traffic stop by Deputy Spencer. (11 RT 2105.) His behavior at his wife's apartment later that night reflected his general instability and the exacerbation of his mental illness. (11 RT 2107.) He was extremely upset about

having been required to come down from the mountain, his stress and anxiety levels were extremely high, and he was in extreme despair. (11 RT 2107.)

Dr. Pettis testified that, on the night Maurice Steskal killed Deputy Riches, Maurice Steskal was "grossly decompensated" (30 RT 5758), and "his psychosis has reached an extreme level. ... He can't control himself. He can't control his behavior." (30 RT 5759.)

2. The Overwhelming Evidence of Maurice Steskal's Severe Mental Illness and its Direct Relation to His Offense is Uncontroverted on this Record.

As explained in the AOB, there is no evidence that Maurice Steskal was not severely mentally ill at the time of the offense, or that his mental illness was not a necessary causal factor in the crime.

No prosecution psychiatrists or psychologists testified at either the first or second trials. There were no test results that would indicate Maurice Steskal was malingering. There were no tests results or expert reports introduced to show that Maurice Steskal was not mentally ill, or that his mental health issues were not serious.

Substantial evidence is evidence that, in light of the whole record, is reasonable, credible and of solid value sufficient to support a finding of fact. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.)

On this record, there was no substantial evidence that Maurice Steskal was not psychotic.

Indeed, the State itself argues, in the guilt-phase portion of its brief, that Maurice Steskal's

> alleged belief in the need to defend himself from a deputy with the Orange County Sheriffs' Department because that deputy would kill him *was purely delusional.*

(RB 31, emphasis added.)

While the State does not present any argument in support of its contention (at RB 64) that Maurice Steskal's claim of mental illness is "factually unsupported," in discussing the disproportionate punishment issue, the State argues:

> Although the defense presented evidence that Steskal was suffering from a delusional disorder at the time of the shooting, and continued to suffer from that delusion even after he killed Deputy Riches, this is belied by the fact that Steskal dismantled and placed in the trunk of the car and thus out of his reach, the very weapon he would have needed to continue to protect himself from this perceived threat that members of the Orange County Sheriffs Department were out to kill him. (RB 69.)

The critical question is whether Maurice Steskal was impaired "at the time of the offense," not at some later time. (American Bar Association, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, supra,* 30 Mental & Phys. Disability L. Rep. at p. 668.)

The evidence that, by the next morning after the midnight shooting, Maurice Steskal had dismantled a weapon and placed it in his car trunk does not amount to substantial evidence that he was not suffering from a severe mental illness -- in his case, a full-blown psychotic disorder -- the night before, when he shot Deputy Riches, or that this severe mental illness did not substantially impair his

capacity at the time of the offense to exercise rational judgment in relation to conduct, or to conform his conduct to the requirements of the law. One can believe, due to mental illness, that it is necessary to shoot a deputy in self-defense but still be aware that one is in serious trouble for doing so, needs to get away, and may not come out well in a further confrontation with law enforcement.

The State's argument is premised on a fundamental misunderstanding of severe mental illness. Schizophrenia is a common form of psychosis, but it is not the only one, and Maurice Steskal is not schizophrenic. Instead, Maurice Steskal suffers from a psychotic delusional disorder of the persecutory type, which does not preclude goal-oriented behavior. Like other serious, life-changing illnesses, such a psychotic disorder is not necessarily a steady-state phenomenon. Severe mental illness persists, but does not always manifest itself identically with the same symptoms, at the same intensity, over the course of time, regardless of events.

The Supreme Court itself has recognized this:

> Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways.

(*Indiana v. Edwards* (2008) 554 U.S. 164, 175 (concerning self-representation).)

The State's argument, which is defective because it is based on clearly erroneous misconceptions about the nature of severe mental illness, is also entirely unsupported by the record in this case.

While Dr. Pettis's testimony makes plain that Maurice Steskal *was* in a psychotic state at the time of the shooting, consumed by his

encapsulated delusion that the members of the Orange County Sheriff's Department were out to kill him, Dr. Pettis further testified that Maurice Steskal did not have a disorder that made him disorganized, and there was "nothing ... inconsistent" in his later behavior that indicated he did not suffer from gross psychotic decompensation at the time of the shooting.[11]

Thus, as the prosecutor himself additionally brought out on cross-examination of Dr. Pettis at the penalty phase re-trial, although Maurice Steskal engaged in "goal directed effort" to evade detection in the hours after the shooting, including breaking down the gun, that did not mean he was no longer delusional, let alone that he had not been delusional at the time of the shooting. (32 RT 6036.) After the climax of the shooting, there were fewer stressors, "but he is still delusional." (30 RT 5763.[12])

---

[11] Dr. Pettis was questioned on this point on direct examination:

> Q. Dr. Pettis, Maurice Steskal's conduct after the shooting, why in your mind is it not inconsistent with the mental state as you have described he had before the shooting, being severely decompensated and psychotic, why is that not inconsistent?
>
> [DR. PETTIS]: Well, you know, there is just nothing about it that is inconsistent. People who are psychotic and delusional, particularly when they [have] this kind of a disorder, see, he doesn't have schizophrenia, where he is mentally disorganized. He is paranoid, and he thinks that the world is out to get him, and law enforcement are trying to get him and so forth. But he can still drive a car. He can still know how to break down a weapon. And still form a plan how to get out to the mountains.

(30 RT 5764-5765.)

[12] The prosecution's cross-examination of Dr. Pettis at the guilt phase was entirely consistent. (11 RT 2131-2135.)

There was no testimony controverting Dr. Pettis.

Thus, the evidence the State points to -- evidence that some time after the shooting, Maurice Steskal broke down his rifle to avoid detection -- does not amount to substantial evidence on this record that, at the time of the shooting, Maurice Steskal was not suffering from a severe mental disorder that substantially impaired his capacity to exercise rational judgment in relation to conduct, or to conform his conduct to the requirements of the law. To the extent that trial court concluded otherwise, its conclusion is unsupported by the record.

C. The Supreme Court's Eighth Amendment Cases Govern How This Case Should Be Analyzed.

While the State's argument that appellant has cited "no controlling federal authority" (RB 62) is not correct, the United States Supreme Court has never decided the question whether, as with the execution of juveniles and the intellectually disabled, the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits the execution of the severely mentally ill whose offenses were causally related to their severe illnesses. Under the California Constitution as well as the Eighth Amendment, "[w]hether a given punishment is cruel and unusual ... is not a static concept." (*People v. Moon, supra,* 37 Cal.4th 1, 47.) This Court in *Moon* reaffirmed the necessity of "referring to 'the evolving standards of decency that mark the progress of a maturing society'" in determining whether a given punishment violates the Eighth Amendment. (*Id.*)

In the opening brief and the first supplemental brief, appellant

showed that although it is an open question in the Supreme Court whether the Eighth Amendment permits the execution of such severely mentally ill offenders, the Supreme Court's jurisprudential methodology for determining whether, under the "evolving standards of decency," a punishment violates the constitutional prohibition of cruel and unusual punishments is well-established.

Considering the categorical exclusion of a particular class of offenders, the High Court looks to: (1) whether there is a national legislative or legal consensus against the application of capital punishment to the class of offenders; (2) whether there is a "broader social and professional consensus" against execution of the class of persons considered; (3) the penological rationales of retribution and deterrence; and (4) the special risk of wrongful execution of members of the subject class.

It is appropriate for state supreme courts to utilize the federal supreme court's methodology. This is shown by *State ex rel. Simmons v. Roper* (Mo. 2003) 112 S.W.3d 397, in which the Missouri Supreme Court held that the Eighth Amendment categorically prohibits capital punishment for offenders who were 17 or younger at the time of their offenses; the state supreme court's opinion was affirmed by the High Court in *Roper v. Simmons*, *supra*, 543 U.S. 551.

The State does not dispute the four categories of the High Court's methodology, or dispute that it is the correct methodology for this Court to use as well.

The State argues:

> Steskal identifies no controlling federal authority barring imposition of the death penalty on mentally ill offenders. (RB 62.)

This is incorrect. The Eighth Amendment *is* "controlling federal authority," as are the United States Supreme Court opinions interpreting it. Though there is no Supreme Court case to date holding unconstitutional the imposition of capital punishment on severely mentally ill offenders such as Maurice Steskal, there is a line of cases running from *Weems v. United States* (1910) 217 U.S. 349 and *Trop v. Dulles, supra,* through *Hall v. Florida* (2014) 572 U.S. ____, 134 S.Ct. 1986, 188 L.Ed.2d 1007, that explicate constitutional doctrine under the Eighth Amendment, and there are recent Supreme Court cases that analyze and decide closely related questions, including *Roper* and *Atkins*.

Under our system, the importance of precedent is that cases are not limited to their own facts, and not only binding for their precise holdings -- Supreme Court cases establish and refine constitutional doctrine that is applied and enforced by lower courts, and that governs the "mode of analysis" in later cases in the High Court itself. (*Neder v. United States, supra,* 527 U.S. 1, 18.)

Not just federal constitutional provisions and federal statutes, but also the High Court's *interpretations* of federal law, are authoritative and binding on lower courts under the Supremacy Clause.

As the High Court recently put it in *DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. ___, 193 L.Ed.2d 365, 371-372, 136 S.Ct. 463:

> Lower court judges are certainly free to note their disagreement with a decision of this Court. But the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett v. Rose*, 496 U. S. 356, 371 (1990); *cf. Khan v. State Oil Co.*, 93 F. 3d 1358, 1363–1364 (CA7 1996), *vacated*, 522 U.S. 3 (1997). ... *Concepcion* [*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333] is an authoritative interpretation of the [Federal Arbitration] Act. Consequently, the judges of every State must follow it. U. S. Const., Art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States"). (Emphasis added.)

D. The State Has Failed to Refute Appellant's Showing that There Is Now a Broad National Consensus that Severely Mentally Ill Defendants Should Not Face the Death Penalty.

1. There is Now, in 2016, A National Legal Consensus, Comprising More Than Thirty States and Jurisdictions, Against Executing the Severely Mentally Ill That Is Comparable to the Consensus in *Atkins* and the Consensus in *Roper*.

That our evolving standards of decency must guide the Eighth Amendment is a central tenet of the High Court's approach, as this Court has recognized. (*People v. Moon, supra,* 37 Cal.4th 1, 47.) A key measure is whether there is an evolving national legislative or legal consensus against the punishment.

In recent years, the Supreme Court has twice found a national legal consensus against the death penalty for discrete categories of

defendants. In each case, the number of jurisdictions involved was closely comparable to the number of jurisdictions that, today, establish a national consensus against the death penalty for the severely mentally ill.

The Supreme Court found a national consensus against executing the intellectually disabled when 30 States did not execute such defendants, including 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. (*Atkins, supra*, 536 U.S. at pp. 313-315.)

The Supreme Court next recognized a national consensus against the execution of juveniles when "30 States prohibit[ed] the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach." (*Roper v. Simmons, supra,* 543 U.S. 551, 564.)

The national legal consensus against executing severely mentally ill offenders is closely comparable. Now, twenty-two jurisdictions -- twenty States, plus the District of Columbia and the Commonwealth of Puerto Rico -- do not have the death penalty. (Death Penalty Information Center (hereafter, "DPIC"), *States With and Without the Death Penalty,* http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last accessed Sept. 21, 2016.) Eighteen states exempt from any criminal liability those persons who were, as a result of mental illness, unable to conform their conduct to the law, and seven of these states have capital punishment. (AOB 164-165.) In addition to

these twenty-nine jurisdictions, at least five other jurisdictions -- Arizona, Florida, Mississippi, Ohio and Nevada -- use proportionality review to remove severely mentally ill defendants from death row. (AOB 166-167.)

The State does not dispute that there is now a national legal consensus against capital punishment of severely mentally ill offenders, or that it is comparable to the consensuses in *Akins* and *Roper*.

This is apparently the first time a showing of a national legal consensus against executing the severely mentally ill has been made in this Court.

2. This Court Has Never Considered the Existing National Legal Consensus Against Executing the Severely Mentally Ill.

The State cites to *People v. Hajek and Vo, supra,* 58 Cal.4th 1144, and quotes from it, as if its quotation settled any possible Eighth Amendment issue. (RB 62-63.)

But in *Hajek,* the appellant did not argue that there *was* a national legal consensus against capital punishment for the severely mentally ill. (See *People v. Hajek & Vo,* S049626, Appellant Hajek's Supplemental Brief, at pp. 1-10 (filed Nov. 8, 2005).) Hajek's omission of this issue from his briefing no doubt explains why the Court in *Hajek* did not address whether there was a national legal consensus.

In a case decided after the State filed its brief, *People v. Mendoza, supra,* 62 Cal.4th 856, 908-911, the Court, relying

primarily on *Hajek*, rejected essentially the same argument that was made in that case. Yet just as in *Hajek*, the appellant in *Mendoza* did not argue that there was a national legislative consensus against executing defendants who were severely mentally ill at the time of their offenses.[13] And just as in *Hajek*, the appellant's omission of this crucial consideration in *Mendoza* explains why this Court did not, in that case, even consider whether there was a national legal consensus against the practice.

In *People v. Boyce, supra*, 59 Cal.4th at p. 722, the Court stated:

> As defendant recognizes, there is no objective evidence that a national consensus has developed against executing persons with intellectual impairments short of intellectual disability or insanity.

(*People v. Boyce, supra,* 59 Cal.4th 672, 722.) However, this statement in *Boyce* is based on a concession made in Boyce's opening brief:

> There is no legislative consensus against the execution of the severely mentally ill.

(*People v. Boyce, supra*, No. S092240, Appellant's Opening Brief at p. 70 (filed May 17, 2010).)[14]

---

[13] The appellant in *Mendoza* did argue that there was an "emerging" consensus as shown in part by case law, but made no reference to a legislative consensus, and did not argue that there was an existing national legal consensus. (*People v. Mendoza, supra*, No. S143743, Appellant's Opening Brief at p. 148 (filed Nov. 28, 2011).) Compare AOB 163-168 in this case.

[14] The State also cites *People v. Castaneda* (2011) 51 Cal.4th 1292, 1345, in which the court stated, "there is no objective evidence that society views as inappropriate the execution of death-eligible individuals who have an antisocial personality disorder." *Castaneda*

The concession, at least as of this date, is incorrect. As shown in the opening brief, discussed above -- and not contested by the State -- there is now a national legal consensus closely comparable to those in *Atkins* and *Roper* -- more than 30 American jurisdictions do not impose the death penalty on severely mentally ill persons who as a consequence of their illnesses, were unable to conform their conduct to the law.

3. The Broader Social and Professional Consensus.

As shown in the opening brief, the Supreme Court also considers whether there is a broader social and professional consensus against the challenged punishment. (*Atkins, supra*, 536 U.S. at p. 316 fn. 21.)

In the opening brief, appellant showed that a broad consensus now exists, pointing in particular to the positions adopted by the American Psychiatric Association, the American Psychological Association, and the American Bar Association, among others. (AOB 169-170.)

The State does not even acknowledge the broad professional consensus against the execution of the severely mentally ill.

4. The International Consensus.

> [A]t least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its

---

is inapplicable: Maurice Steskal does not have an antisocial personality disorder. (11 RT 2108-2109, 30 RT 5765-5770, 32 RT 6073, 33 RT 6185-6193.)

> interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."

(*Roper v. Simmons, supra,* 543 U.S. 551, 575.)

The international consensus against death sentences imposed on the mentally ill discussed in the opening brief (AOB 182-183) continues to strengthen. On December 18, 2014, the U.N. General Assembly voted by a record margin -- 117 to 38 with 34 abstentions -- for a resolution encouraging all nations "not to impose capital punishment for offences committed by persons below 18 years of age, on pregnant women or on persons with mental or intellectual disabilities ...." (United Nations General Assembly, *Resolution adopted by the General Assembly on 18 December 2014, No. 69/186. Moratorium on the use of the death penalty,* ¶ 5(d), http://www.un.org/en/ga/search/view_doc.asp?symbol =A/RES/69/186 [last visited August 16, 2016].) The most recent vote had been 111 to 41 with 34 abstentions in 2012. (American Bar Association, *The State of Criminal Justice 2015,* Chapter 19, Capital Punishment, by Ronald J. Tabak, at p. 290 (2015).)

The State does not address the international consensus.

In *People v. Mendoza, supra,* 62 Cal.4th at p. 910, the Court found that the international law materials cited by the appellant, dating from 1984 and relating to carrying out death sentences on prisoners who "have become insane," did not adequately support his argument, which related to sentencing of the severely mentally ill. (*Id.* at p. 910.)

Here, however, the more recent resolutions of the United

Nations Commission on Human Rights and the United Nations General Assembly cited by Maurice Steskal in the opening brief and this one relate to the *imposition* of the death penalty in the first instance on persons with mental disabilities, not only the execution of the penalty once imposed. The United Nations resolutions speak in terms of persons with "mental disorders" or "mental ... disabilities," without using the modifier "severe" as does appellant, indicating the position of the United Nations General Assembly and Commission on Human Rights to afford ever *greater* protection to basic rights and human dignity. And while the United Nations resolutions focus on the imposition of death sentences on persons who are mentally ill at the time of sentencing, and not on the connection between the offense and the defendant's mental illness, the human rights policy of the United Nations on imposition of the death penalty when there is a direct causal connection between the defendant's severe mental illness and the offense is clearly and unmistakably inferred from the General Assembly's resolution, in the same paragraph concerning mental illness and in the immediately following paragraph, urging member Nations "[t]o progressively restrict the use of the death penalty" and "[t]o reduce the number of offences for which the death penalty may be imposed ...." (*Resolution adopted by the General Assembly on 18 December 2014, No. 69/186, supra,* ¶¶ 5(d), 5(e).)

E. As With Juveniles and the Intellectually Disabled, Execution of the Severely Mentally Ill Does Not Serve Deterrence or Retribution, and Carries Special Risks of Wrongful Execution.

1. Retribution and Deterrence.

In *Roper v. Simmons, supra,* 543 U.S. 551, 592-593, the Supreme Court discussed its opinion in *Atkins*:

> The Court observed that mentally retarded persons suffer from major cognitive and behavioral deficits, i.e., "subaverage intellectual functioning" and "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." Id., at 318, 153 L.Ed.2d 335, 122 S.Ct. 2242. "Because of their impairments, [such persons] by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Ibid. We concluded that these deficits called into serious doubt whether the execution of mentally retarded offenders would measurably contribute to the principal penological goals that capital punishment is intended to serve--retribution and deterrence. Id., at 319-321, 153 L.Ed.2d 335, 122 S.Ct. 2242. Mentally retarded offenders' impairments so diminish their personal moral culpability that it is highly unlikely that such offenders could ever deserve the ultimate punishment, even in cases of capital murder. Id., at 319, 153 L.Ed.2d 335, 122 S.Ct. 2242. And these same impairments made it very improbable that the threat of the death penalty would deter mentally retarded persons from committing capital crimes. Id., at 319-320, 153 L.Ed.2d 335, 122 S.Ct. 2242.

(*Roper v. Simmons, supra,* 543 U.S. 551, 592-593; see AOB 175-180.)

That reasoning applies equally to the severely mentally ill who

are, like Maurice Steskal, as a result of illness unable to conform their conduct to the law or substantially impaired in their capacity to do so.

The severely mentally ill, like the intellectually disabled, "by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." This is true generally, "by definition," and true in the case of Maurice Steskal.

The impairments of the severely mentally ill, just as those of the intellectually disabled, "so diminish their personal moral culpability that it is highly unlikely that such offenders could ever deserve the ultimate punishment ...." Capital punishment must be reserved for those offenders whose "extreme culpability makes them 'the most deserving of execution'" (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 420), but culpability for someone who, like Maurice Steskal, has killed in the throes of a psychotic delusional illness cannot be equated with the culpability of those who, without any such disorder, calculate and execute a mass murder for religious or political reasons, or even the more routine murders committed by those who, without serious disorders, kill others for the mundane reasons of money, or sexual gratification, or to eliminate witnesses. We might call such people evil. Maurice Steskal, by contrast, has a severe illness.

The "same impairments" of the severely mentally ill, who are principally either schizophrenic or otherwise psychotic, make it "very

improbable" that the threat of the death penalty, beyond the threat of arrest and lifelong imprisonment, would realistically deter severely mentally ill people from committing capital crimes. (*Roper, supra,* 543 U.S. at p. 593, discussing *Atkins*.)

Apart from its quotation from *People v. Hajek and Vo, supra,* 58 Cal.4th 1144, discussed below, the State does not address retribution or deterrence.

2. Unreliability, and The Special Risk of Wrongful Execution.

The Supreme Court has found that, even though capital sentencers had been permitted to consider intellectual disability as part of a defendant's case in mitigation, that was insufficient to prevent the special risk of wrongful sentencing and execution of these defendants. (*Atkins, supra*, 536 U.S. at p. 320.) Just as with the intellectually disabled, those afflicted with severe mental illness are at special risk of wrongful sentencing and execution. A psychosis such as Maurice Steskal's both impairs a capital defendant's ability to assist in his own defense and cooperate with his lawyers, as well as "enhanc[ing] the likelihood that the aggravating factor of future dangerousness will be found by the jury." (*Atkins, supra*, 536 U.S. at p. 321; AOB 180-182; see Scott E. Sundby, *The True Legacy of* Atkins *and* Roper*: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling* (2014) 29 Ohio St. J. on Disp. Resol. 487.)

In its brief, the State does not address the special risk of wrongful execution of the severely mentally ill.

F. Because *Hajek*'s Analysis Conflicts with the Supreme Court's Eighth Amendment Doctrine, The State's Reliance on *Hajek* Is Unsound.

In response to the constitutional question, the State relies primarily on *People v. Hajek and Vo, supra,* 58 Cal.4th 1144 (*Hajek*). The State quotes from *Hajek*:

> "the circumstance that an individual committed murder while suffering from a serious mental illness that impaired his judgment, rationality, and impulse control does not necessarily mean he is not morally responsible for the killing. There are a number of different conditions recognized as mental illnesses, and the degree and manner of impairment in a particular individual is often the subject of expert dispute. Thus, while it may be that mentally ill offenders who are utterly unable to control their behavior lack the extreme culpability associated with capital punishment, there is likely little consensus on which individuals fall within that category or precisely where the line of impairment should be drawn. Thus, we are not prepared to say that executing a mentally ill murderer would not serve societal goals of retribution and deterrence. We leave it to the Legislature, if it chooses, to determine exactly the type and level of mental impairment that must be shown to warrant a categorical exemption from the death penalty."

(*People v. Hajek, supra*, 58 Cal.4th at p. 1252, quoted at RB 62-63; also quoted in full in *People v. Mendoza, supra,* 62 Cal.4th at p. 909; see *People v. Boyce, supra,* 59 Cal.4th 672, 722.)

The State then asserts:

> Steskal offers no rational or persuasive basis for this Court to reconsider its decisions in *Hajek* and *Boyce*.
> (RB 63.)

But Maurice Steskal's first supplemental brief set forth substantial reasons to conclude, with respect to deterrence and

retribution just as with the measure of national consensus, that *Hajek*'s analysis, which was followed in *Boyce* and *Mendoza*, is incorrect and irreconcilable with a correct Eighth Amendment analysis under *Roper* and *Atkins*.

First, as discussed in the supplemental brief, *Hajek*'s initial focus on whether a severely mentally ill offender may still be "morally responsible for the killing" is misplaced. (SB1 6-7.) There is no argument in this case that the severely mentally ill should be excluded from moral responsibility, or punishment in general, any more than there was an argument against moral responsibility, or punishment in general, in the cases of juveniles in *Roper* or the intellectually disabled in *Atkins*.[15] The focus is whether the specific punishment of death is impermissible for offenders impaired by severe mental illness, under Eighth Amendment doctrine as explicated by the High Court in *Atkins* and *Roper*.

More fundamentally, the *Hajek* opinion relied on the hypothesis that because mental illness encompasses different conditions and can give rise to expert disputes, "there is likely little consensus on which individuals fall within that category" of persons who should be excluded from capital punishment, "or precisely

---

[15] The Supreme Court has noted precisely this important distinction:

> "juvenile offenders cannot with reliability be classified among the worst offenders." [*Roper, supra,*] at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson, supra*, at 835, 108 S. Ct. 2687, 101 L.Ed.2d 702.

(*Graham v. Florida* (2010) 560 U.S. 48, 68 (emphasis added).)

where the line of impairment should be drawn." (*Hajek, supra*, 58 Cal.4th at p. 1252.) The Court's later opinion in *Mendoza*, quoting *Hajek*, relied on the same reasoning. (*Mendoza, supra*, 62 Cal.4th at pp. 909-910.)

But as shown in the supplemental brief, *Hajek*'s Eighth Amendment treatment of severe mental illness is in direct conflict with the Supreme Court's Eighth Amendment treatment of intellectual disability in *Atkins* and later cases. (SB1 7-8.) With regard to mental retardation, there was little consensus on which individuals would be considered intellectually disabled, or where the line of impairment should be drawn.

In *Atkins*, the Supreme Court held the Eighth Amendment prohibited capital punishment for intellectually disabled offenders. The *Atkins* Court did not define mental retardation, but it referred to statutory definitions that "generally conform to the clinical definitions" (536 U.S. at p. 317, fn. 22), and quoted this multi-factorial clinical definition by the American Psychiatric Association:

> "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000).

(*Atkins v. Virginia, supra,* 536 U.S. 304, 308, fn. 3.) In the same footnote, *Atkins* set forth a *second,* distinct multi-factorial clinical definition of the same concept. (*Id.*)

Justice Scalia, dissenting, warned of "practical difficulties." (*Atkins v. Virginia, supra,* 536 U.S.at p. 354 (Scalia, J., dis. opn.). The *Atkins* majority recognized as much. Yet in *Atkins*, while

> [a]cknowledging the "disagreement" regarding how to "determin[e] which offenders are in fact" intellectually disabled, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U. S., at 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (internal quotation marks omitted; some alterations in original).

(*Brumfield v. Cain* (2015) 576 U.S.____, 135 S.Ct. 2269, 2274, 192 L.Ed.2d 356, 360 (emphasis added).)

Thus, while the Supreme Court in *Atkins* was fully aware that holding the Eighth Amendment foreclosed capital punishment for the mentally retarded would create what Justice Scalia in dissent called "practical difficulties," the Supreme Court did not regard the anticipated difficulties in determining which offenders were, in fact, intellectually disabled, or disagreements about "precisely where the line of impairment should be drawn," as substantial reasons why the Eighth Amendment should not protect mentally retarded offenders from capital punishment due to their reduced culpability.

Indeed, it has not always been clear in the decade-plus since *Atkins* was decided "which individuals fall within that category" of persons who should be excluded from capital punishment, "or precisely where the line of impairment should be drawn" (*Hajek*,

supra, 58 Cal.4th at p. 1252) with respect to intellectual disability. Considerable litigation has followed in the wake of *Atkins*.

There is no "bright line," the High Court has made clear:

Intellectual disability is a condition, not a number.

(*Hall v. Florida, supra,* 134 S.Ct. 1986, 2001, 188 L.Ed.2d 1007, 1026.)

But the challenges anticipated by *Atkins,* and encountered since *Atkins,* have not deterred the Supreme Court from adherence to Eighth Amendment doctrine prohibiting the execution of intellectually disabled offenders. (See *Hall v. Florida, supra,* 134 S.Ct. 1986.)

Nor is there a substantial reason to believe that the determination of which severely mentally ill defendants should be excluded from capital punishment poses challenges far greater than determining under *Atkins* "'which offenders are in fact' intellectually disabled" (*Brumfield v. Cain, supra,* 135 S.Ct. 2269, 2274) or, for that matter, similar determinations regarding severe mental disorders made in related areas of the law, such as the civil commitment of sexually violent predators.

The Eighth Amendment issue in this case concerns defendants such are Maurice Steskal, who suffer from diagnosable severe mental disorders:

> a "severe" disorder or disability ... is meant to signify a disorder, that is roughly equivalent to disorders that mental health professionals would consider the most serious "Axis I diagnoses." These disorders include schizophrenia and other psychotic disorders ... with schizophrenia being by far the

most common disorder seen in capital defendants. ...

(ABA Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, *supra*, at p. 670.) In the opening brief, appellant argued that the ABA's approach to defining severe mental disorders usefully distinguishes those mentally ill offenders whose illness is of a severity and type so that it should, when causally related to the crime, preclude their punishment by death. (AOB 177-178.)

A focus on the clinical definitions of members of categories excluded from capital punishment under the Eighth Amendment is nothing new:

> The clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*.

(*Hall v. Florida, supra,* 134 S.Ct. 1986, 1999 (emphasis added).)

Consider also California's Sexually Violent Predator (SVP) law. The SVP law requires, as prerequisites to commitment, both an "assessment of diagnosable mental disorders" which must include the "severity of mental disorder" (Welf. & Inst. Code section 6601, subd. (c)), and a finding of "a diagnosed mental disorder." (Welf. & Inst. Code section 6601, subd. (d); see *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1162.)

Similarly, Penal Code section 2962, part of the Mentally Disordered Offender (MDO) Act, makes civil commitment of a state prisoner dependent on psychiatric certified that the prisoner suffers from a "severe mental disorder." (Penal Code section 2962, subd. (a)(2); see *People v. Harrison* (2013) 57 Cal.4th 1211, 1215.)

The Eighth Amendment caselaw following *Atkins*, and California's own experience with its SVP and MDO laws, demonstrate that legal classifications that are based in whole or part on clinical definitions of disability and disorder, and the degree of severity in particular cases, are well within the competence of our courts.[16]

Thus, *Hajek*'s determination that the Eighth Amendment argument should fail because of an assumed lack of agreement regarding which individuals suffer from severe mental disorders or the difficulty of determining which severely mentally ill offenders should be excluded from capital punishment (*Hajek, supra*, 58 Cal.4th at p. 1252), is contrary to the Supreme Court's interpretation of the Eighth Amendment in *Atkins* and its progeny. *Hajek* should not be followed by this Court.[17]

---

[16] In *People v. Mendoza*, the Court noted that the defendant "does not offer a definition of what level of mental illness would constitute a serious mental illness." (*Mendoza, supra*, 62 Cal.4th at p. 911.) Yet a definition of the level of severe mental illness is no more a requisite to a finding of an Eighth Amendment bar than was the precise definition of the level of intellectual disability required for the Eighth Amendment prohibition in *Atkins*. (See *Brumfield v. Cain, supra,* 135 S.Ct. at p. 2274, observing that in *Atkins* the Court noted the disagreements regarding how to determine which offenders were intellectually disabled, but held that the practice was nevertheless unconstitutional.)

In any event, in this case appellant has set forth a workable legal standard -- the standard approved by the ABA -- which is comparable to, and arguably even more precise than, present standards for determining mental disorders under existing California law. (See Penal Code section 2962, subd. (a)(2); Welf. & Inst. Code section 6601, subd. (d).)

[17] The State makes no claim of waiver or forfeiture as to the categorical constitutional issues, or the disproportionate punishment

G. This Court Should Strike the Death Penalty as Unconstitutionally Disproportionate to Maurice Steskal's Individual Culpability Under Article I Section 17 of the California Constitution.

While this case squarely presents the categorical questions whether the Eighth Amendment and Article I Section 17 of the California Constitution exclude from the death penalty severely mentally ill offenders such as Maurice Steskal for the same reason they exclude the intellectually disabled and juveniles, the Court can resolve the fundamental question regarding Maurice Steskal on narrower grounds.

As the State recognizes (RB 67), on request, a capital appellant is entitled to a determination by this Court on appeal whether the death penalty is unconstitutionally disproportionate to his personal culpability under Article I Section 17. Maurice Steskal has made such a request. (AOB 186-189.)

---

issue. As to the argument that the trial court wrongly denied the motion to modify the verdict, the State argues:

> Steskal contends the trial court erroneously denied his motion to modify the verdict. (AOB 186-189.) He did not object below, and has therefore forfeited his claim. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1316.) (RB 65.)

This is incorrect. (See AOB 157-158.) The opening brief showed that the defense actually presented to the trial court the argument that it would be unfair and morally unacceptable to execute a person whose crime was committed because he was mentally ill. (37 RT 7116-7117.) The trial court's rejection of this argument "'had the additional legal consequence of violating' the Constitution," and thus was preserved for appeal. (*People v. Farley, supra,* 46 Cal.4th 1053, 1095.) The State does not acknowledge, much less refute, this showing.

1. The State Relies on Cases in Which There Was No Causal Connection Between A Defendant's Severe Mental Illness and the Offense Itself.

Arguing that the death penalty is not an unconstitutionally disproportionate penalty for Maurice Steskal, the State relies *entirely* on cases from this Court that are materially different from Maurice Steskal's -- cases in which there was *no* causal connection between the defendant's asserted mental illness or impairment, and the offense itself. (RB 67-69.)

First, the State relies on *People v. Boyce, supra*, 59 Cal.4th 672. (RB 67-68.) But in *Boyce*, this Court rejected a disproportionate-penalty argument by pointedly taking note of the absence of any evidence of a causal connection between the illness and the offense:

> Although [Boyce] offered evidence of his schizotypal disorder and subaverage intelligence, there was no evidence that either condition played any role in the killing.

(*People v. Boyce, supra*, 59 Cal.4th at p 720.)

The State next invites comparison with *People v. Young* (2005) 34 Cal.4th 1149. (RB 68.) But this Court rejected the disproportionality argument in *Young*, just as it did in *Boyce*, by identifying the lack of any evidence of a nexus between the asserted mental disorder and the three murders in that case:

> Although [Young] offered some evidence he suffers from a low IQ and a "probable organic mental disorder not otherwise specified," there was no evidence that either his low IQ or the mental disorder played any role in the killings.

(People v. Young, supra, 34 Cal.4th 1149, 1231.)

The State also relies on *People v. Poggi* (1988) 45 Cal.3d 306. (RB 68-69.) But in *Poggi*, similar to *Boyce* and *Young*, the evidence was insufficient to demonstrate a causal connection between the defendant's mental illness and the offense. A defense psychiatrist testified that Poggi's mental illness "was not of such a nature and degree as to negate or diminish criminal culpability," and a prosecution psychiatrist testified that though Poggi was mentally ill, the psychiatrist did *not* find that Poggi's mental illness "was substantially related to the commission of these offenses." (*Poggi, supra*, 45 Cal.3d at pp. 348 & 329.)

The State also cites to, but does not discuss, three additional cases from this Court considering proportionality review. (RB 68-69.) But each of these three cases is of a piece with *Boyce*, *Young* and *Poggi*: each case demonstrates a failure to show a causal connection between the asserted mental illness or condition, and the offense.

> In *People v. Lucero* (2000) 23 Cal.4th 692, 740, although
>
> > defendant offered some evidence he suffered from PTSD when he killed the girls, there was no evidence the disorder played any role in the killings. Based on these facts, the punishment in this case is not "grossly disproportionate to the defendant's individual culpability" ....
>
> In *People v. Arias, supra,* 13 Cal.4th 92, 125, there was a factual dispute between experts regarding the results of tests administered to defendant: a defense psychiatrist testified the test results showed organic brain damage (which might have arisen due to the defendant's own drug and alcohol abuse), while a prosecution

neurologist concluded the results of the same tests revealed no brain damage whatsoever. But in that case, arising from a robbery-murder, even the defense expert concluded that the defendant's intent to rob was "not affected by any organic condition." (*Id.*)

And in *People v. Crittenden* (1994) 9 Cal.4th 83, there was a complete failure of proof of any causal nexus between the alleged mental disorder and the offense. Although defendant presented evidence that suggested mild brain damage, "it could not be established whether he had brain damage" two years before the tests, at the time of the offense (*id.* at p. 113), and in any event the claim of impairment "was neutralized by the testimony of various sympathetic witnesses that he assisted others with schoolwork and was an above-average student, and ... was enrolled at a state university at the time of the offenses." (*Id.* at p. 158.)

Thus, in each of the six cases relied on or cited by the State in support of its argument that the penalty of death is not disproportionate, there was no proof of a clear causal nexus between the defendant's severe mental illness or disorder, and the defendant's commission of the offense itself.

This case is different.

2. On its Independent Review, the Court Should Conclude that the Strong Causal Connection Between Maurice Steskal's Severe Mental Illness and the Offense, as Well as the Balance of Mitigating Factors Over Aggravating, Justify the Conclusion that Death is an Unconstitutionally Disproportionate Penalty for Maurice Steskal.

The determination whether a particular punishment of an individual is unconstitutionally disproportionate under Article I section 17 is an *independent* determination by this Court on appeal. No deference to the trial court's findings is appropriate. Whether or not the trial court erred in denying the motion to modify the verdict is not, contrary to the State's position (RB 70), a consideration in deciding whether on this Court's independent review, the sentence of death is unconstitutionally disproportionate.

> To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, *a reviewing court* must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities.

(*People v. Lucero, supra,* 23 Cal.4th 692, 739-740 (emphasis added).)

As to the circumstances of the offense, there is no question that Maurice Steskal took an assault rifle to a convenience store and, when he saw Deputy Riches, shot and killed the deputy with thirty

rounds of rifle fire as he sat in his car.[18] After that, he fled and took steps to avoid arrest.

But these facts do not exist outside a factual context.

As shown in the opening brief and discussed in this brief, Maurice Steskal suffers from near-lifelong severe mental illness, and has since his childhood. He is -- through no more fault of his own than anyone with a serious physical illness or physical congenital disorder since childhood is at fault for her condition or disorder -- psychotic. Maurice Steskal then and now suffers from a recognized psychosis, a diagnosed schizophrenic spectrum illness -- specifically, a delusional disorder of the persecutory type. As Dr. Pettis explained, this psychosis indicates a break with reality. (11 RT 2052, 2055.) Dr. Pettis also diagnosed appellant as suffering from both "dysthymic disorder," a chronic low-level depression, and from poly-substance abuse. (11 RT 2052.) And Dr. Pettis diagnosed appellant as suffering from a schizotypal personality disorder pre-existing since childhood. (11 RT 2052, 2060.)

Against the overwhelming evidence that Maurice Steskal's life had been marked by severe mental illness from childhood on, and that on the night of the offense Maurice Steskal was in a "grossly

---

[18] It does not diminish the gravity of this case to note that, unlike other death penalty cases cited by the State, this case does not involve multiple homicide victims (*Young*, *Lucero*, *Crittenden*), or particularly vulnerable victims such as children or the elderly (*Lucero*, *Crittenden*), or any purpose of sexual gratification (*Poggi*), or any intention to inflict torture or prolonged suffering (*Crittenden*), or any cluster of other serious violent crimes committed in connection with the offense (*Boyce*, *Arias*, *Young*, *Poggi*).

decompensated" psychotic state and could not conform his conduct to the law (30 RT 5758-5759), the prosecution presented no evidence at trial.

Yet the State asserts, despite the uncontested showing that Maurice Steskal was severely mentally ill, that his psychosis is somehow "belied" -- that is, shown to be false:

> by the fact that Steskal dismantled and placed in the trunk of the car and thus out of his reach, the very weapon he would have needed to continue to protect himself from this perceived threat that members of the Orange County Sheriffs Department were out to kill him. (RB 69.)

The State's argument reveals a basic misunderstanding of the nature of severe mental illness.

As the Supreme Court has explained, "[m]ental illness ... varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." (*Indiana v. Edwards, supra,* 554 U.S. 164, 175.[19])

In this case, the prosecution, cross-examining defense psychiatrist Dr. Roderick Pettis, attempted to make *precisely* the same point that the State now argues on appeal -- that Maurice Steskal's behavior in the hours after the shooting showed that, at the time of the shooting, he was not suffering from a delusional

---

[19] This is not a matter of legal controversy any more than it is a matter of medical dispute. Although *Indiana v. Edwards* was a 7-2 decision, it was accepted by all nine Justices of the High Court that severe mental illness is a variable phenomenon. See *Indiana v. Edwards, supra,* 554 U.S. at p. 180 (dis. opn. of Scalia, J., joined by Thomas, J.), describing the defendant's psychosis as "an illness that has manifested itself in different ways over time .... his mental state seems to have fluctuated."

psychosis. (11 RT 2132-2135.)

But Dr. Pettis did not testify that Maurice Steskal's post-shooting behavior "belied" that Maurice Steskal suffered from a psychotic delusional disorder.

Instead, Dr. Pettis testified, consistently, to the contrary -- that Maurice Steskal's shooting of Deputy Riches was the product and climax of his psychotic delusion, and Maurice Steskal's post-offense actions were consistent with his paranoid delusions. "[W]hat he does after he figures out what has happened doesn't change the mental state that he had before he did this act." (11 RT 2132.)

Dr. Pettis testified that although Maurice Steskal's stress levels had lessened after the shooting, Maurice Steskal was still fearful of law enforcement, and was trying to make an escape, and he was "still delusional." (11 RT 2133, 2135.) A person such as Maurice Steskal, suffering from a delusional psychosis, may still engage in goal-oriented behavior, and not be disorganized or in a dissociative state. (30 RT 5764-5765.) Like his retreats to remote mountain locations, Maurice Steskal's post-arrest actions were consistent with his paranoia and his attempt to avoid confrontations with law enforcement. Dr. Pettis unequivocally testified on cross-examination by the prosecutor that what happened in the hours after the shooting "doesn't change my diagnosis." (11 RT 2134; see 11 RT 2136, 2139, 2145 (redirect examination).)

There were no psychiatrists, psychologists or neurologists who testified for the prosecution. There were no test results introduced by the prosecution, nor any other evidence showing that Maurice

Steskal was not suffering from a severe delusional psychosis at the time of the offense. There were only the questions of the prosecutor, who repeatedly, yet unsuccessfully, tried to elicit evidence supporting that position from Dr. Pettis. (11 RT 2132-2135.)

However, as this Court has frequently observed:

> questions by counsel [are] not evidence.

(*People v. Hamilton* (2009) 45 Cal.4th 863, 928-929.)

Thus, the uncontradicted evidence shows that Maurice Steskal is and was a seriously ill person who suffers from a psychosis -- a delusional disorder of the persecutory type. The evidence further shows, again without contradiction, that at the time of the offense, Maurice Steskal was in the throes of an acute psychotic episode, was "grossly decompensated," and could not conform his conduct to the requirements of the law. (30 RT 5758-5759.)

The significance of severe mental illness in this case is particularly compelling because of the relationship between illness and offense. Unlike *every* case cited by the State in its argument that execution is not a disproportionate penalty for Maurice Steskal, in his case there is unrefuted evidence of a direct causal relationship between his severe mental illness and the offense itself.

Courts have often found unrefuted evidence that a defendant's conduct was the direct result of severe mental illness to be decisive in assessing whether a death sentence is disproportionate to a defendant's culpability. For example, the Florida Supreme Court states:

> Mental health evidence of this type is significant to our

> proportionality determination. In order for a sentence of death to be proportionate, the capital offense must be among the most aggravated and the least mitigated of first-degree murders. See *Almeida*, 748 So.2d at 933. When presented with "substantial and uncontroverted evidence" that the defendant's actions were the product of mental illness, "[w]e have consistently recognized such mitigation as among the most compelling." *Green v. State*, 975 So.2d 1081, 1088 (Fla. 2008).

(*Davis v. State* (Fla. 2013) 121 So.3d 462, 500 (vacating death sentence))

Similarly, the Arizona Supreme Court holds that when there is unrebutted evidence that a capital defendant's mental illness "significantly impaired his capacity to conform to the law at the time of the commission of his crimes," death is a disproportionate penalty. (*State v. Roque* (2006) 213 Ariz. 193, 230, 141 P.3d 368, 405; accord, e.g., *State v. Trostle* (1997) 191 Ariz. 4, 21, 951 P.2d 869, 886.)

Considering not only the facts and circumstances of this case, but also the evolving standards of decency that are said to mark the progress of a maturing society, this Court should take the same view.

Maurice Steskal's offense was precipitated by the brutality inflicted on him by members of the Orange County Sheriff's Department after a traffic stop. Exhibit 39 is the videotape recording showing the assault on Maurice Steskal by five uniformed officers. When Maurice Steskal said, "Come on, man, you are hurting me," a deputy replied, "We want to hurt you." (26 RT 5053, 5121.) Charles Duke, a former LAPD SWAT officer and LAPD Academy instructor, testified that the lead deputy's treatment of Maurice Steskal --

including drawing his service weapon and aiming it at Maurice Steskal, without justification, using profanity, escalating the situation, and conducting an unwarranted body search in the middle of a public street -- was not only unprofessional, but "humiliating and degrading." (9 RT 1641-1642.)

Maurice Steskal's treatment at the hands of Deputy Spencer, and four other officers (Exhibits 39 and 39A), escalated Maurice Steskal's pre-existing severe mental illness into a state of extreme psychosis. His fear of being followed, monitored, and observed, escalated into the psychotic delusion that the police were actually going to kill him.

Even beyond the compelling evidence that Maurice Steskal's offense was the direct consequence of his severe mental illness, other critical factors confirm that death is a grossly disproportionate punishment in his case.

Maurice Steskal was 39 years old at the time of the offense. Yet, despite his history of severe mental illness, from childhood through adolescence and two decades as an adult, Maurice Steskal had no prior convictions for any crime of violence whatsoever, as an adult or as a juvenile.

Maurice Steskal had no record of causing violent physical injury to any other person.

Nor did Maurice Steskal even have any history of acts of dishonesty.

Indeed, the record shows that people who knew Maurice Steskal well found him to be, despite his very real problems, a gentle

and trustworthy person who cared about others, and treated people well, taking extra steps to do so.[20]

In this Court's inquiry into whether the penalty of death is constitutionally permissible in Maurice Steskal's case, the Court should carefully consider what the record shows about Maurice Steskal, in light of these words of limitation of the Supreme Court:

> capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and

---

[20] For example, Ralph Pantoni was a homeless man who was dumpster-diving when Maurice Steskal met him and befriended him, taking him home to dinner with his wife Nannette Steskal, and teaching him to do reclamation mining in the mountains to minimally support himself. Maurice Steskal took Pantoni to remote mining sites in his car, fed him, and gave him a separate tent to sleep in as he taught him how to mine for stones. (25 RT 4768-4770.)

Cherie LeBrecht, a single mother and friend of Nannette Steskal, who with her youngest son, lived with the couple for three years, testified that Maurice Steskal repeatedly acted to help her -- he assisted her when her car would not start, loaned her money when she was "a little short," helped her and her son with a pet bird, taught her twelve-year old boy about rock-collecting, and assisted her older son, who frequently visited, get up the apartment stairs to see his mother when that son broke a leg. (27 RT 5154-5156.)

Cherie's youngest son Erik, seventeen at the time of trial and twelve and thirteen when they lived with Maurice and Nannette Steskal, testified that he spent time often with Maurice Steskal, and always felt safe and comfortable around him, because "he will take care of everything." Maurice Steskal taught the boy about gemstones, and helped him fix his bike. (34 RT 6477-6479.)

Lou Norris, a small-business owner and family friend who had known Maurice Steskal continuously since Maurice Steskal was eleven, described him as being, both as a child and an adult, a "very sweet, gentle, darling person" who was always willing to pitch in and do anything you asked, although he was quiet and "different than the other children." (28 RT 5433-5437.)

> *whose extreme culpability makes them "the most deserving of execution."*

(*Kennedy v. Louisiana, supra,* 554 U.S. at p. 420 (emphasis added), quoting *Roper v. Simmons, supra,* 543 U.S. 551, 568, quoting *Atkins v. Virginia, supra,* 536 U.S. 304, 319.)

Maurice Steskal is not someone whose "extreme culpability" places him among those who are "the most deserving of execution." This Court should hold that in Maurice Steskal's case, the punishment of death is so disproportionate as to be unconstitutional.

VII. THE TRIAL COURT PREJUDICIALLY ERRED BY ALLOWING THE PROSECUTOR TO PUT BEFORE THE JURY, AS EXPERT WITNESS IMPEACHMENT, THE IRRELEVANT, INFLAMMATORY FACTS OF TWO UNRELATED RAPE-MURDER DEATH PENALTY CASES, DISSIMILAR TO THIS CASE, IN WHICH DEFENSE FORENSIC PSYCHIATRIST DR. RODERICK PETTIS HAD TESTIFIED.

A. Introduction.

In this close case -- a death penalty re-trial after the first jury could not agree on a verdict, deadlocking 11-to-1 in favor of a sentence of life imprisonment -- the testimony of defense forensic psychiatrist Dr. Roderick Pettis was critical to the penalty phase case for life. Dr. Pettis testified at length as to his review of the extensive materials regarding Maurice Steskal's life, education, and struggles since childhood with severe mental illness, his review of materials about Maurice Steskal's family background of mental illness, his multiple interviews with Maurice Steskal, and his medical judgment that, on the night of the offense, Maurice Steskal was in a psychotic state.

The opening brief showed that the prosecutor's questioning of Dr. Pettis regarding two unrelated, dissimilar death penalty habeas corpus cases in which he had testified -- bringing before the jury, over defense objection, the facts (1) that in the Horace Kelly case, the defendant had "raped and murdered two women, among others" (30 RT 5797), and (2) that in the James Robert Scott case, the defendant

"raped a woman ... and then lit her on fire" (30 RT 5800) -- had no purpose other than to discredit Dr. Pettis before the jury, not on any legitimate basis, but as the kind of expert who would testify on behalf of people who had committed horrible sex crimes. The admission of this penalty phase evidence -- which the State itself describes as "horrifically violent" in its brief (RB 74) -- prejudiced Mr. Steskal in this close case.

The State's position is that the trial court did not err in allowing the prosecutor to cross-examine Dr. Pettis on the details of these two other unrelated, dissimilar death penalty habeas corpus cases in which he had testified, because this questioning was intended to elicit "Dr. Pettis's philosophical views on capital punishment." (RB 74.)

But the questioning of Dr. Pettis regarding the Horace Kelly and James Robert Scott cases had nothing whatsoever to do with Dr. Pettis's views on capital punishment.

The State also argues that even if the trial court did err under federal and state law by allowing this impeachment, no prejudice could have resulted.

But on this record, considering the very substantial case in mitigation, the centrality of Dr. Pettis's testimony to the case in mitigation, the objective circumstances including a first jury's inability to reach a penalty verdict and deadlock on a vote of eleven-to-one in favor of life, and the second penalty phase jury's lengthy deliberations over five days before returning its verdict, this Court should have no confidence that the improper impeachment of the

most important defense witness with the "horrifically violent" facts of unrelated rape-murder death penalty cases in which he had testified could not, beyond a reasonable doubt, have affected the verdict.

B. Because the Facts of the Kelly and Scott Cases Were Irrelevant and Inflammatory, and, In the State's Own Words, "Horrifically Violent," The Trial Court's Rulings Were Erroneous and Violated Mr. Steskal's Federal Constitutional Rights.

The basic principles are not in dispute. Cross-examination is properly allowed to show a witness may be biased. This Court's cases make clear that questions seeking to elicit a defense expert's philosophical views on capital punishment are permissible to disclose an anti-capital punishment bias bearing on the expert's credibility as a witness. (*People v. Mickle* (1991) 54 Cal.3d 140, 196.) Moreover, "[a]n expert's testimony in prior cases involving similar issues is a legitimate subject of cross-examination when it is relevant to the bias of the witness." (*People v. Shazier* (2014) 60 Cal.4th 109, 136.)

However, the basic test of relevance applies to impeachment, and evidence that has no tendency in reason to show bias on the part of an expert is improper under Evidence Code sections 350 and 780, subdivision (f). Evidence that has no probative value, or marginal probative value, is properly excluded under Evidence Code section 352 when its slight or nonexistent evidentiary value is substantially outweighed by the potential for unfair prejudice. Further, the

admission of evidence that renders a trial fundamentally unfair violates federal due process guarantees, and a capital defendant additionally has an Eighth Amendment right to a fair and reliable penalty phase proceeding. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The State argues:

> Steskal claims that whether or not the defendants in the *Kelly* and *Scott* cases committed rapes and murders had no tendency in reason to show Dr. Pettis harbored a bias against the death penalty. (AOB 196.) Steskal is wrong. The prosecutor asked the complained-of questions in an attempt to elicit Dr. Pettis's philosophical views on capital punishment because his views on the subject were relevant to his bias and credibility as a witness in Steskal's capital case. (*People v. Mickle, supra*, 54 Cal.3d at p. 196.) Dr. Pettis had testified in those capital cases, much like his testimony in the instant case, that the defendants did not know what they were doing at the time they committed their horrifically violent crimes. A rational inference that a juror could draw from such evidence would be that Dr. Pettis had a bias against the death penalty and a propensity to advocate for criminal defendants facing it.

(RB 74.)

The State's argument is wrong for two reasons: (1) It is materially inaccurate -- in an effort to show the cases are similar, the State misrepresents Dr. Pettis's testimony both in the Horace Kelly case, and in this case; and (2) it is illogical, because no rational and legitimate inference could be drawn between the facts of these cases and any supposed philosophical bias against capital punishment by Dr. Pettis which might cast doubt on his testimony in this case.

1. The State's Argument Misrepresents the Record.

As noted in the opening brief and *supra*, it may be permissible to question an expert about prior testimony in cases "involving similar issues." (AOB 197, quoting *People v. Price* (1991) 1 Cal.4th 324, 456.) Recognizing this, the State argues that

> Dr. Pettis had testified in [the Kelly and Scott] cases, much like his testimony in the instant case, that the defendants did not know what they were doing at the time they committed their horrifically violent crimes. (RB 74.)

This is materially incorrect. In the Horace Kelly case, Dr. Pettis had testified *only on the question of Kelly's competency to be executed.* (30 RT 5797.) The prosecutor asked Dr. Pettis:

> Q. Mr. Kelly had raped and murdered two women, among others, isn't that correct?

(30 RT 5797.)

After the defense relevance objection was overruled, Dr. Pettis testified he didn't remember what Kelly had done, because his involvement concerned a single question -- whether Kelly was competent to be executed -- and *not* any trial or mitigation issues. (30 RT 5797.) Dr. Pettis confirmed that he testified that Kelly did not know what was going on, or why he was being executed. (30 RT 5797-5798.)

Thus, with respect to the Kelly case, the State's claim on appeal that "Dr. Pettis had testified . . . that the defendants did not know what they were doing at the time they committed their horrifically violent crimes" (RB 74) is refuted by the record. Dr. Pettis did not testify at all about Kelly's mental state at the time he committed his

crimes.

The facts and nature of the Horace Kelly case were entirely dissimilar to the facts and nature of Mr. Steskal's case.

As to the James Robert Scott case, Dr. Pettis testified on habeas corpus as to mitigation issues, stating that in his opinion on the night of the murder Scott was in "a disorganized dissociative state." (30 RT 5799-5801.) Thus, the State's claim on appeal that "Dr. Pettis had testified in [the Scott case] . . . that the defendants did not know what they were doing at the time they committed their horrifically violent crimes" is apparently correct as to the Scott case, though not as to the Kelly case.

But the State's position that Mr. Steskal's case and the Scott case are similar -- and the assertion that Dr. Pettis's testimony in the Scott case was "much like his testimony in the instant case" (RB 74) -- are at odds with the facts.

In this case, unlike the Scott case, Dr. Pettis did <u>not</u> testify that Mr. Steskal was in "a disorganized, dissociative state" or that he "did not know what [he] was doing" at the time of the offense.

Dr. Pettis testified that he diagnosed Mr. Steskal as suffering from "a major mental illness on Axis I, referred to as a delusional disorder, persecutory type," with a secondary diagnosis of dysthymic disorder, as well as a schizotypal personality disorder. (30 RT 5668-5669.) Mr. Steskal had a psychotic disorder, though he was not schizophrenic. (30 RT 5673.)

While Dr. Pettis's testimony makes plain that Mr. Steskal *was* in a psychotic state at the time of the shooting, consumed by his

psychotic delusion that the members of the Orange County Sheriff's Department were out to kill him, Dr. Pettis further testified that Mr. Steskal did not have a disorder that made him disorganized:

> "[DR. PETTIS]: ... *He doesn't have schizophrenia, where he is mentally disorganized.* He is paranoid, and he thinks that the world is out to get him, and law enforcement are trying to get him ...."

(30 RT 5764 (emphasis added).)

Thus, Dr. Pettis's testimony was not that Mr. Steskal, like Scott, was disorganized, dissociative, and "didn't know what he was doing." Instead, it was that Mr. Steskal was *not* dissociative or disorganized, but had a psychotic paranoid delusion.

Just as with the Kelly case, the State's claim that Dr. Pettis's testimony in the Scott case was "much like this case" is materially incorrect.

2. The State's Argument is Illogical because No "Rational Inference" of Bias Can Be Drawn From the Prosecutor's Questioning of Dr. Pettis About the Facts of the Kelly and Scott Cases.

As shown just above, the State argues mistakenly that Dr. Pettis had testified in the Kelly and Scott cases, "much like his testimony in the instant case, that the defendants did not know what they were doing at the time they committed their horrifically violent crimes." (RB 74.) On this erroneous basis, the State concludes:

> A rational inference that a juror could draw from such evidence would be that Dr. Pettis had a bias against the death penalty and a propensity to advocate for criminal defendants facing it.

(RB 74.)

But on this record, no such "rational inference" can be drawn between (a) the prosecutor's questioning of Dr. Pettis regarding the facts of the Kelly and Scott cases, and (b) any supposed philosophical bias against capital punishment by Dr. Pettis which might cast doubt on his testimony in this case.

As noted above, the Kelly and Scott cases were not similar to this case. Mr. Steskal had not raped and murdered two women, or raped a woman and lit her on fire, or committed any act of rape, in this case or at any time in his life. He had never lit anyone on fire. In both the Horace Kelly and James Robert Scott cases, Dr. Pettis had testified on habeas corpus, not at trial. As the State itself, attempting to deal with prejudice, writes in its brief:

> Dr. Pettis explained his role in the Kelly and Scott cases was different from his role in this case. (30 RT 5797-5798, 5799-5800.) He did not diagnose either of the defendant's [sic] in the Kelly and Scott cases. Instead, in the Kelly case, he testified as to the defendant's competency at the time set for execution. (See 30 RT 5797.) In the Scott case, he reviewed multiple volumes of records to see if there were any mental health issues that were overlooked by counsel and that might have made a difference to the outcome of those trials. (30 RT 5798-5799.) In contrast, in the instant case, Dr. Pettis actually diagnosed Steskal with mental illness . . . .

(RB 76.)

The facts of the Kelly and Scott cases were irrelevant to the question of whether or not Dr. Pettis had a "philosophical bias" against the death penalty. Nothing about them suggested bias on the part of Dr. Pettis.

Indeed, nothing about Dr. Pettis's testifying in either the Kelly or Scott cases suggests anything but the work-life of a highly-educated, impeccably-credentialed, disinterested professional who comes to medical conclusions when in his judgment they are medically warranted.[21]

No rational and legitimate inference could be drawn between the fact that Dr. Pettis has testified in these two cases, involving multiple rape-murders and a rape and death by fire, and any conceivable bias on his part against the death penalty.

Tellingly, the prosecutor made no attempt to show that Dr. Pettis's testimony in either the Kelly competence proceedings or the Scott habeas corpus hearing was illogical, unprincipled, unfounded, or so questionable as to justify an inference that Dr. Pettis was biased against the death penalty.

Nor does the State make any such argument in its brief as to either case.

3. The Cases the State Relies On Do Not Support the State's Position.

Attempting to show the trial court did not err in allowing the impeachment of Dr. Pettis with the facts of the Kelly and Scott cases, the State relies on two cases from this Court, *People v. Zambrano* (2007) 41 Cal.4th 1082, and *People v. Shazier, supra,* 60 Cal.4th

---

[21] Dr. Pettis is board-certified in psychiatry, and practices both clinical and forensic psychiatry. He is a graduate of Boston University Medical School, completed his residency at Harvard Medical School, and has taught medical students and presented at conferences throughout the country. (30 RT 5662-5663.)

109. (RB 74-75.) But, as will be shown, neither of these cases supports the State's position that an expert can be questioned regarding the inflammatory facts of unrelated, dissimilar cases in which the expert has testified, when as here there is no basis to suggest that there was anything improper or suspect in the expert's prior testimony.

People v. Zambrano, discussed at RB 75, actually illustrates a *permissible* attempt to impeach an expert -- permissible because the impeachment material is closely related to the expert's testimony in the case at bar, and thus reasonably leads to a rational inference of bias.

In *People v. Zambrano*, a defense prison-adjustment expert testified that the defendant, who was convicted of the murder of one victim and the attempted murder of two others, would adjust well to prison life. On cross-examination, the expert admitted that he "frequently" testified for defendants, and had done so "three or four times" in the previous year. (*Zambrano, supra*, 41 Cal.4th at p. 1164.) The prosecutor then asked about another, very recent case, also involving multiple victims:

> The prosecutor then asked, "In fact, a few weeks ago you testified across the hall in the case of the gentleman that was convicted of four separate murders and six attempted murders that he would adjust well to prison life also; is that correct?" The witness responded, "That's correct; yes."

(*Zambrano, supra*, 41 Cal.4th at p. 1164.) On appeal, the defendant asserted this question comprised prosecutorial misconduct. This Court held that, since no objection had been made at trial, the claim was waived. (*Id.* at pp. 1164-1165.) In dicta, without any extensive

analysis, the Court found that, in any event, no misconduct occurred, because

> "[A]n expert's testimony in prior cases involving similar issues is a legitimate subject of cross-examination." (*Price, supra*, 1 Cal.4th 324, 457.) Despite arguable differences in the facts of the two cases, they involved "similar issues" of the expert's views on prison adjustment.

(*Zambrano, supra*, 41 Cal.4th at p. 1165.)

Analysis of the situation at issue in *Zambrano* shows how the cross-examination question at issue could lead to a reasonable inference that the expert was biased toward the defense: the defense expert testified "frequently" on behalf of criminal defendants, and had done so three or four times in the past year. In the case at bar, he testified that the defendant, who had been convicted in a multiple-victim case of a capital murder and two counts of attempted murder, would adjust well to prison life. The prosecutor's question, claimed as misconduct, was directed to the expert's testimony "a few weeks ago" in the same courthouse that another defendant convicted in another multiple-victim case -- apparently far more extreme, involving *ten* separate victims -- would *also* "adjust well to prison life." (*Zambrano, supra*, 41 Cal.4th at p. 1164.)

That the inference of pro-defense bias on the part of the expert in *Zambrano* was reasonable is apparent from the context of the question and the question itself. Indeed, when an expert who testifies "frequently" for the defense on prison-adjustment issues admits -- in the penalty phase of a multi-victim case in which he has just opined that the defendant would adjust well to prison life -- that, only weeks before, in the same courthouse, he opined in

another, far more egregious death penalty case involving a murderer of many more victims, and that he gave *the exact same opinion*, that the defendant there, too, would "adjust well to prison life" -- the inference is virtually inescapable -- this expert may well have a pro-defense, anti-capital punishment bias.

This expert's opinion is worthless, a juror may rationally infer, because no matter how extreme the case, whether you've committed one murder, or six, you'll *always* "adjust well to prison life," in this expert's view.

But the impeachment in *Zambrano*, reasonably calculated to give rise to a rational inference of bias by the prison-adjustment expert, is not comparable to the impermissible questioning of Dr. Pettis here.

This case is quite different. Dr. Pettis was not a professional witness who testified "frequently" for death penalty defendants, or even criminal defendants generally; he was a physician board-certified in both clinical and forensic psychiatry, who devoted about 50% of his practice to clinical psychiatry, treating patients, and about 50% to forensic psychiatry. (30 RT 5661.) Dr. Pettis had been consulted by the prosecution in two cases, though he had not testified in those cases. He had been consulted by the defense in a number of cases, but in the "vast majority" of such cases, Dr. Pettis *had not testified*, typically because, due to insufficient information or other issues, he had "not been able to reach a degree of medical certainty" required to form an opinion. (30 RT 5665.) Dr. Pettis stated on direct examination that he had testified "three or four

times" for the defense in death penalty cases, including his testimony in the first trial in this case. (30 RT 5665.)

Thus, in the course of his career, Dr. Pettis had testified for the defense in two or three other capital cases.

This hardly gives rise to a rational inference that Dr. Pettis harbored a bias against capital punishment.

There was no reason to think that putting before the jury the details of two of the other capital cases in which Dr. Pettis had testified would lead to a rational inference that he was biased against capital punishment. As discussed more fully above, in the Horace Kelly case the defendant had raped and murdered two women, and in the James Robert Scott case the defendant raped a woman and lit her on fire. This case is nothing like these two cases, other than the broad similarity of also being a murder case subject to one of California's long list of separate, otherwise dissimilar, special circumstances.

Nor is there any comparable similarity between, on the one hand, the defense prison expert's apparently identical conclusions in two successive multiple-victim cases that the capital defendants would "adjust well to prison life," and on the other, Dr. Pettis's testimony in the Kelly case, the Scott case, and this case. As discussed above, the State materially misrepresents the record in an effort to show that "Dr. Pettis had testified in those capital cases, much like his testimony in the instant case, that the defendants did not know what they were doing at the time they committed their horrifically violent crimes." (RB 74.) In the Kelly case, Dr. Pettis

had provided no testimony at all on the defendant's mental state at the time of his crimes. In the Scott case, Dr. Pettis did testify that the defendant was in a disorganized, dissociative state when he committed the rape-murder for which he faced death, but in this case the record shows, contrary to the State's claim, Dr. Pettis testified that Mr. Steskal was not disorganized.

People v. Zambrano may be instructively compared to this case, because it illustrates when impeachment with testimony in other similar cases *is* permissible -- that is, when it *does* lead to a rational inference of bias.

The State also relies on *People v. Shazier, supra*, 60 Cal.4th 109. (RB 74-75.) But *Shazier*, a sexually violent predator ("SVP") case, presented a fundamentally different situation -- a "duel of the experts" regarding the methodology and validity of one expert's repeated, unvarying testimony that defendants in other cases were not sexually violent predators -- that is simply inapposite here.

The defense expert in *Shazier*, one Dr. Donaldson, was like the defense expert in *Zambrano*, a "frequent" expert for the defense at trial. Dr. Donaldson admitted that, after he had been terminated from the California Department of Mental Health panel of evaluators because of disagreements about his methodology, he had turned to working exclusively for the defense, and had "testified in 289 such [SVP] cases in California, always for the defense." (*Shazier, supra*, 60 Cal.4th at pp. 133-134.) Donaldson testified in Shazier's case, just as he had in "hundreds" of other cases, that the defendant was not a sexually violent predator.

But unlike this case, where there was no prosecution expert contesting Dr. Pettis's analysis or conclusion, in *Shazier* the prosecution presented the testimony of two experts, Dr. Updegrove and Dr. Murphy, who each concluded that the defendant was, contrary to Donaldson's testimony, a sexually violent predator. (*Shazier, supra*, 60 Cal.4th at pp. 118-122.) A critical feature of the prosecution's case was the attempt to demonstrate, through the testimony of both prosecution expert Dr. Updegrove and defense expert Dr. Donaldson, that Donaldson's analysis and conclusion in the present case were ill-founded and unreliable, by showing that Donaldson's similar analyses and *identical* conclusions that the defendants in other cases were not SVPs, were ill-founded and not reliable. It was in this context that the prosecutor, questioning Dr. Donaldson, referred to the facts of other cases in which Donaldson had testified, in order to "attack the validity of Dr. Donaldson's opinions in the other cases ...." (*Id.* at p. 139.)

On review in this Court, Shazier made a single argument regarding this impeachment: he claimed it was misconduct for the prosecutor to question Donaldson about these other cases.

This Court rejected Shazier's misconduct argument, holding:

> In preparation for demonstrating, through the prosecution's own expert [Dr. Updegrove], that Dr. Donaldson's expert opinions in prior cases cast doubt on his conclusions here, it was not improper to describe to Dr. Donaldson the facts the prosecutor deemed pertinent in those cases in order to refresh the witness's recollection and, if possible, to allow him to explain his reasoning in those matters.

(*Shazier, supra*, 60 Cal.4th at pp. 139-140.)

Obviously, *Shazier* does not control this case; it doesn't even assist the State in its argument. There were no "dueling experts" on mental illness in this case. Dr. Pettis did not testify frequently for defendants. Nor was there any attempt by the prosecution to show that Dr. Pettis's analysis and conclusions in the Kelly and Scott cases were ill-founded, unreliable or otherwise lacked validity, so as to cast doubt on his testimony in Mr. Steskal's case.[22]

The State also cites *People v. Mickle, supra*, 54 Cal.3d at p. 196. (RB 73-74.) *Mickle* dealt with straightforward questions to penalty phase experts regarding whether they supported or opposed the death penalty. This Court held that "[q]uestions seeking to elicit a partisan expert's philosophical views on capital punishment" were generally permissible because they "might disclose some bias

---

[22] Moreover, *Shazier* and *Zambrano* are also inapplicable for another important reason -- each involved narrow claims of prosecutorial misconduct, *not* an erroneous trial court ruling regarding impeachment, which is the issue in this case. As this Court made plain in *Shazier*:

> The narrow point decided by the Court of Appeal, and argued before us, is not that the prosecutor's cross-examination was objectionable because it was irrelevant, lacked foundation, or created a risk of undue prejudice, but that it was misconduct ....

(*Shazier, supra*, 60 Cal.4th at p. 139.)

The Court in *Shazier* took particular care to emphasize that whether the prosecution's "line of inquiry was directly objectionable for other reasons" was an issue that is "not before us." (*Shazier, supra,* 60 Cal.4th at p. 140.) Here, by contrast, the issue *is* whether the prosecutor's cross-examination of Dr. Pettis was objectionable because it was irrelevant and because it created a serious risk of unfair prejudice, as well as violating Mr. Steskal's federal constitutional rights to due process and to a fair and reliable penalty phase trial. (31 RT 5814-5819.)

bearing on the expert's credibility as a witness at the penalty phase." (*Id.*) Here, the prosecutor *did* ask Dr. Pettis about whether he had a bias against the death penalty, and he testified he did not. (30 RT 5798.) That is not claimed as error. *Mickle* also held that trial courts should not allow experts to offer their opinions regarding the appropriate sentence for a defendant. (*Id.*) That was not done here. *Mickle* is simply inapplicable.[23]

---

[23] In deciding this issue, the Court should also consider a law not written by the Legislature: the law of unintended consequences.

Expert witnesses do not only testify for the defense in death penalty cases. Far more commonly than in the relative rarity of death penalty trials, experts testify in a wide variety of civil cases of the kinds that are tried before juries, daily, in our courts. For both plaintiffs and defendants, doctors testify in medical negligence cases on standard of care issues, and on damages in routine personal injury cases; engineers and reconstructionists testify in auto accident cases; CPAs and economists testify about lost income in employment cases, and business losses in a wide spectrum of commercial litigation; and so on.

If it's permissible to impeach a medical expert in a death penalty case with the facts of unrelated, dissimilar cases in which he has testified, when there is no question as to the expert's methodology or conclusions in those other cases, then it is no less permissible to so impeach other experts in other litigation contexts.

For example, a doctor testifying for the defense that there was no negligence in a malpractice case could be impeached with the fact that he had testified for the defense that there was no negligence in other cases involving entirely different, far more gruesome injuries to highly sympathetic plaintiffs. Or a financial expert testifying in an employment discrimination case that damages were minimal could be impeached with the fact of her testimony that damages were also low in other, factually dissimilar cases involving far more egregious and blatant acts of discrimination.

While each case is unique, this Court's opinions are templates followed by trial judges statewide. If the concepts of relevance and probativity are malleable enough to support the State's position in this case, they are no less malleable in a vast array of other cases

4. The State Fails to Meaningfully Contest Federal Constitutional Error.

As discussed in the opening brief, the trial court's rulings allowing Dr. Pettis's impeachment with the facts of the Kelly and Scott cases violated not only California law, but also Mr. Steskal's federal constitutional rights to due process and to a fair and reliable penalty phase trial. (AOB 199-200; see 31 RT 5815-5816, 5821 (federal constitutional objections made and overruled).) The State answers this argument by insisting that, since there was in its view no error under California law in allowing this impeachment, there was also no federal constitutional error. (RB 75-76.)

The State's response is mistaken, for several reasons.

First, the State's argument rests on an incorrect premise. The introduction of irrelevant factual matters is error under state law. Under Evidence Code section 350, only relevant evidence is admissible, and under Evidence Code 780, subdivision (f), impeachment is only permitted with evidence that has a "tendency in reason" to show the truthfulness of a witness's testimony. Here, as shown in the opening brief, and as discussed in this brief as well, the facts of the Kelly and Scott cases had no bearing whatsoever on the truthfulness of Dr. Pettis's testimony. They were irrelevant. There was no legitimate, permissible inference that could be drawn from

---

involving expert opinions. This Court should consider the law of unintended consequences.

See generally Edward J. Imwinkelried, *The Need for Truly Systemic Analysis of Proposals for the Reform of Both Pretrial Practice and Evidentiary Rules: The Role of the Law of Unintended Consequences in "Litigation" Reform* (2013) 32 Rev. Litig. 201.

these facts. (Compare *People v. Foster* (2010) 50 Cal.4th 1301, 1335 ("because the evidence was relevant to prove a fact of consequence, its admission did not violate defendant's due process rights") with *People v. Albarran* (2007) 149 Cal.App.4th 214, 230 (due process violated when there were "no permissible inferences" that could be drawn from gang evidence).)

The State has failed to refute this argument, despite resorting to misrepresenting the record, as shown above, in an attempt to do so.

Second, even if the improper impeachment of Dr. Pettis with the irrelevant facts of two unrelated rape-murder cases was, somehow, proper under California law, this would not mean there could be no federal constitutional error. *Independent* of California law, Mr. Steskal had a federal constitutional right to due process of law, and a federal constitutional right to a fair and reliable penalty phase trial. (*Payne v. Tennessee, supra,* 501 U.S. 808, 825; *Woodson v. North Carolina, supra,* 428 U.S. 280, 305.) It is not the rule that a state law error is a necessary predicate to a constitutional violation.[24]

The underlying facts of the Kelly and Scott cases in which Dr. Pettis had testified on habeas corpus -- that Kelly had raped and murdered two women, and Scott had raped a woman and lit her on fire -- were not only irrelevant to exposing any possible anti-death

[24] "[F]ailure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis" for granting relief on federal due process grounds. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919–920; see *People v. Albarran, supra,* 149 Cal.App.4th 214, 229.)

penalty bias on the part of Dr. Pettis, but were also highly inflammatory.

The State itself describes the rape-murders in the Scott and Kelly cases as "horrifically violent crimes." (RB 74, emphasis added.) It could hardly be contended they were not.

This was a close case -- a penalty phase retrial in which the previous jury had deadlocked on a vote of 11-to-one in favor of life imprisonment over death. Mr. Steskal's mental illness was the most important mitigating factor. Dr. Pettis was the most important witness on the mental health issues -- the only doctor who personally examined Mr. Steskal and rendered a diagnosis of severe mental illness, lasting for decades and reaching a tragic climax precipitated by a psychotic episode. His testimony was nothing short of crucial. In this close case, for the prosecution to discredit -- indeed, smear -- Dr. Pettis as the sort of psychiatrist who should be disbelieved because he would testify on behalf of "horrifically violent" rapist-murderers such as Kelly and Scott, was fundamentally unfair. On this record, in light of the closeness of the case, the importance of Dr. Pettis to the penalty phase defense, and the prior, lopsided hung jury that, hearing Dr. Pettis's testimony without this improper impeachment, overwhelmingly favored LWOP by a vote of 11-to-one, the error is one that violates federal constitutional standards; it surely "undermines confidence in the outcome of the trial." (*United States v. Bagley* (1985) 473 U.S. 667, 678.)

C. On "Whole Record" Review in this Close Case, Involving a Penalty Phase Retrial After The First Jury Could Not Reach A Verdict, the Impeachment of This Critical Witness with the Inflammatory Facts of Two "Horrifically Violent," Unrelated Rape-Murder Cases Must Be Deemed Prejudicial, and the Judgment of Death Must Be Reversed.

To avoid the consequence of reversal of the judgment, the State, as the beneficiary of the error, must

> prove, beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained.

(*Chapman v. California* (1967) 386 U.S. 18, 24.) The state law standard for penalty phase error is the same, as this Court has repeatedly stated. (E.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1299 (disclaiming distinction between federal constitutional standard of prejudice and California standard of prejudice for penalty phase error).) The standard requires review of the "whole record" (*Yates v. Evatt* (1991) 500 U.S. 391, 409), which necessarily includes "evaluat[ing] the totality of the available mitigation evidence ...." (*Williams v. Taylor* (2000) 529 U.S. 362, 397.)

1. The Evidence.

In its brief, the State fails to even acknowledge, let alone attempt, the required "whole record" review.

This Court has, in a recent case, found penalty phase error to be reversible when "defendant's showing in mitigation was substantial." (*People v. Smith* (2015) 61 Cal.4th 18, 60.)

In this case, the evidence in mitigation was much more than just substantial. Maurice Steskal suffered from severe physical abuse, including vicious assaults, and emotional abuse from early childhood. He was raised in an environment of extreme familial dysfunction. The penalty phase defense presented evidence -- unrebutted by the prosecution -- that Maurice Steskal suffered from severe mental illness. This resulted in Maurice Steskal's lifelong inability to adequately function in the adult world of work and relationships, despite his normal intelligence. But despite his severe, crippling disabilities, until the time of the offense in this case, when he was 39 years old, Maurice Steskal had *no* convictions for any crime of violence, and only *one* conviction for a nonviolent offense, which occurred sixteen years prior to the events in this case. (24 RT 4572.) According to witnesses who knew him, Maurice Steskal was a kind, gentle and polite person, who took care to help others and look out for them to the best of his limited abilities. (See, e.g., 28 RT 5447-5448 (testimony of Robert Eeg); 25 RT 4768-4770 (testimony of Ralph Pantoni); 27 RT 5154-5156 (testimony of Cherie LeBrecht); 34 RT 6477-6479 (testimony of Erik LeBrecht); 28 RT 5433-5437 (testimony of Lou Norris).)

In its discussion of prejudice, the State alludes to none of this evidence in mitigation.

The mitigation evidence further demonstrated that Mr. Steskal's preexisting delusional disorder was exacerbated into full-blown psychosis as a direct consequence of unprofessional, abusive and reprehensible conduct of members of the Orange County Sheriff's Department directed at him, including excessive force, after

a stop for a minor traffic violation. (Exhibits 39, 39A.)

Yet the State's prejudice analysis fails to mention this.

The State does not dispute that Maurice Steskal's severe mental health disabilities were central to the case in mitigation.

Nor does the State contest that the testimony of Dr. Roderick Pettis was central to Maurice Steskal's case in mitigation. (AOB 201.) Dr. Pettis was the *only* mental health witness to review all the extensive materials bearing on Maurice Steskal's lifelong history of mental health issues, personally interview Maurice Steskal, and render a medical diagnosis.

Indeed, in the penalty phase retrial's closing argument, the prosecutor himself recognized the importance of Dr. Pettis's testimony to the defense, referring to Dr. Pettis by name no less that *eighteen times*. (36 RT 6791 (2x); 6794-6795; 6797; 6798 (2x); 6824; 6825 (2x); 6827 (2x); 6828 (2x); 6830; 6831 (2x); 6848; 6849.) This far outnumbered the prosecutor's references to any other defense witness in his single closing argument.[25]

The State attempts to deal with the prejudice arising from the improperly allowed impeachment of Dr. Pettis with the facts of the "horrifically violent" (RB 74) Kelly and Scott cases by arguing that

[25] By contrast the prosecutor referred by name to defense witness Bobby Steskal five times (36 RT 6794), defense witness Dr. Missett three times (36 RT 6788-6789), and defense witness Dr. Cunningham three times (36 RT 6794-6796). There was no prosecution rebuttal argument.

The prosecutor's concentration on Dr. Pettis in his closing argument undoubtedly arose from the fact that, apart from Dr. Pettis, no other mental health expert personally interviewed Maurice Steskal and rendered a diagnosis.

there could be no prejudice because, in this case, Dr. Pettis had diagnosed Maurice Steskal with mental illness, while in the Kelly and Scott cases, Dr. Pettis "did not diagnose either of the defendant's [sic]," and thus, "[g]iven this distinction, the jury was not likely" to discredit Dr. Pettis's testimony in this case. (RB 76.)

This is a highly disingenuous position for the State to take, and is particularly surprising because of the grave nature of this case. On the one hand, the State has argued that the prosecutor's impeachment of Dr. Pettis was properly allowed by the trial court because the facts of these cases led, somehow, to a discrediting inference of bias on the part of Dr. Pettis. (RB 74.) On the other hand, a mere two pages further in its brief, the State argues that no prejudice arose from the same impeachment because the jury was not likely to view the prosecutor's impeachment as discrediting Dr. Pettis. (RB 76.) The State cannot have it both ways -- even in a death penalty case.

Of course, the prosecutor's stated purpose in bringing forth the facts of the Kelly and Scott cases *was* to discredit Dr. Pettis's testimony in this case. (31 RT 5820.) The State's argument on appeal only reinforces the conclusion that no legitimate inference of bias could be drawn.

The State's argument against prejudice is, moreover, factually incorrect. The record shows that in the Kelly case, Dr. Pettis testified that the defendant was not competent to be executed. (30 RT 5797.) Obviously, and necessarily, this implies a medical diagnosis by Dr. Pettis, though the precise diagnosis is not reflected in the record.

And directly contrary to the State's assertion in its brief, as to the Scott case, the record plainly shows that Dr. Pettis *did* testify that Scott was mentally ill, and, according to a summary read aloud by the *prosecutor* in this case, Dr. Pettis rendered a "'*diagnosis* ... that on the night of the murder, petitioner [Scott] was in a disorganized and dissociative state ....'" (30 RT 5801 (emphasis added).)

Even beyond this material misrepresentation of the record, the State's argument must fail because it completely ignores the fundamental thrust of the improper impeachment.

While no legitimate, permissible inference could be drawn by the jurors from the facts that Dr. Pettis had testified in habeas corpus proceedings on behalf of Horace Kelly, who had raped and murdered two women, and on behalf of James Robert Scott, who had raped a woman and lit her on fire, there was an obvious, impermissible inference -- the very inference that the prosecutor intended the jury to draw: that the jury should disregard or discredit Dr. Pettis's testimony in this case, because he was the kind of doctor who would even testify on behalf of Death Row killers who had committed multiple rape-murders, such as Horace Kelly had, or a particularly horrific rape-and-murder-by-fire, as James Robert Scott had.

By failing to even *address* the inflammatory nature of the improper impeachment of the most critical penalty-phase defense witness, the State has clearly fallen far short of meeting its burden to show, beyond a reasonable doubt, that the improper impeachment could not have affected the result.

2. The Second Jury's More Than Fifteen Hours of Deliberation Over Five Days.

A further factor strongly pointing towards penalty phase prejudice in this case is, as shown in the opening brief, the length of the jury's deliberations. (AOB 201-202.)

Courts often find lengthy jury deliberation to be indicative of a close case, in which the jury was struggling with the issues, and find errors in such cases even more likely to have affected the outcome.

For example, this Court in *In re Sakarias* (2005) 35 Cal.4th 140 ordered relief from the penalty phase judgment of death in another case also involving a mentally ill defendant. This Court found it highly significant that:

> Some aspect or aspects of the case evidently gave one or more jurors considerable pause in the sentencing decision, as *the penalty jury deliberated for more than 10 hours over three days* ... before finally returning a verdict of death.

(*In re Sakarias, supra,* 35 Cal.4th at p. 167 (emphasis added).)

In this case, by contrast, *the penalty jury deliberated for almost 16 hours over five days* before finally returning a verdict of death. Specifically, excluding jury recesses but including the read-back of testimony, the penalty jury deliberated for a total of *15 hours and 49 minutes,* over five days, before returning its verdict. (10 CT 2605 (December 8, 2003: 2 hours, 9 minutes); 10 CT 2606 (December 9, 2003: 4 hours, 58 minutes); 10 CT 2609-2610 (December 10, 2003: 4 hours, 52 minutes); 10 CT 2612-2613 (December 11, 2003: 3 hours, 0 minutes); 11 CT 2848 (December 12, 2003: 0 hours, 50 minutes).)

Significantly, toward the end of their deliberations, the jurors asked for and obtained a court reporter's read-back of the testimony of Dr. Pettis. *The jurors specifically requested the read-back of the prosecutor's cross-examination of Dr. Pettis*, which included the improper impeachment with the facts of the Kelly and Scott cases. (10 CT 2612-2613.)

Despite its obligation to demonstrate, on review of the whole record, that the error could not, beyond a reasonable doubt, have affected the result, in its prejudice analysis the State completely fails to address the jury's deliberations.

3. The First Jury's Eleven-to-One Deadlock in Favor of a Life Sentence Over Death for Maurice Steskal.

A powerful indicator of the closeness of the case, and thus of the strong likelihood that any error at the penalty phase retrial is likely to have prejudiced Maurice Steskal, is the result of the original penalty phase trial.

As shown in the opening brief, the first jury was unable to reach a penalty verdict. (AOB 2-3, 202.) The jurors deliberated over the course of three days, and informed the court several times they were hopelessly deadlocked. Finally, the court declared a mistrial:

> The Court inquired as to the numerical division in the final ballot, and the jury foreperson indicated that *the final ballot was 11 to 1 for life in prison without the possibility of parole.*

(6 CT 1446 (emphasis added); 14 RT 2743-2744.)

The first jury also heard the testimony of Dr. Pettis (11 RT 2045-2114 (direct examination), 11 RT 2115-2135 (cross-examination) 11 RT 2135-2145 (redirect)), which was essentially the same as that heard by the second penalty phase jury, but with one critical difference: in proceedings before the first jury, the prosecutor did not attempt to impeach Dr. Pettis with the facts of the Kelly and Scott cases. Indeed, no mention was made of those unrelated, dissimilar rape-murder cases before the jury that, ultimately, deadlocked eleven-to-one in favor of life imprisonment for Maurice Steskal.

As shown in the opening brief, the fact that a prior proceeding without the same error had a more favorable result in the form of a jury deadlock, resulting in a mistrial, is strongly indicative of weakness in the prosecution's case and highly probative of an error's prejudicial effect. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 454; *Krulewitch v. United States* (1949) 336 U.S. 440, 445; *Dow v. Virga* (9th Cir. 2013) 729 F.3d 1041, 1049; *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, 1056, fn. 18; *Caliendo v. Warden of Cal. Men's Colony* (9th Cir. 2004) 365 F.3d 691, 699; *United States v. Beckman* (8th Cir. 2000) 222 F.3d 512, 525; *United States v. Tubol* (2d Cir. 1999) 191 F.3d 88, 97; *United States v. Colombo* (2d Cir. 1990) 909 F.2d 711, 715; *People v. Figueroa* (1986) 41 Cal.3d 714, 722; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1055; *People v. Lee* (2005) 131 Cal.App.4th 1413, 1430; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.[26])

---

[26] See *People v. Jackson* (2014) 58 Cal.4th 724, 797 (Lui, J., conc. & dis. opn).

As a matter of simple arithmetic, as well as common sense, the indication of prejudice arising from a deadlocked jury in a previous trial could not possibly be any stronger than it is in this case, where eleven jury members out of twelve came down on the side of a sentence of life imprisonment for Maurice Steskal.

Unlike its complete failure to address the length of the jury's deliberations in this case as a factor showing prejudice, the State does address the prior hung jury, albeit only in a footnote. However, the State's response to this argument regarding prejudice is, it must be recognized, something less than satisfactory.

At RB 77, footnote 24, the State argues:

> Contrary to Steskal's assertion, the fact that the first penalty jury voted 11 to 1 in favor of LWOP and this jury voted for death does not mean that prosecutor's cross-examination of Dr. Pettis was prejudicial here. (See AOB 202.) All that can reasonably be inferred from the first jury's failure to agree on a penalty is that the jurors differed as to Steskal's moral culpability for any number of reasons. (*People v. Hawkins* (1995) 10 Cal.4th 920, 968.)

Disingenuously, the State neglects to mention that the single case on which it relies, *People v. Hawkins* (1995) 10 Cal.4th 920, 968, had nothing to do with an assessment of prejudice arising from error at a penalty phase retrial.

People v. Hawkins addressed a fundamentally different problem. In *Hawkins*, the question was whether the trial court had erred in refusing to "permit defense counsel to refer to the results of the first penalty phase deadlock" in closing argument to the jury. (*Hawkins, supra*, 10 Cal.4th at p. 968.) This Court held that "the

fact of a first jury's deadlock, or its numerical vote, is irrelevant to the issues before the jury on a penalty retrial." (*Id.*) Because the fact that a previous jury deadlocked is not evidence regarding any mitigating circumstance at a penalty phase re-trial, this Court concluded the trial court did not err in excluding reference to it in closing argument. (*Id.*) The Court said nothing regarding the effect of a first jury's deadlock on penalty on the assessment of prejudice arising from serious error at a penalty phase retrial. *Hawkins* does not support the proposition that a deadlock is irrelevant to assessing prejudice.

The State ignores *all* the contrary case-law.

4. Conclusion.

In this close case, in which there was very substantial evidence of mitigation, the testimony of Dr. Pettis was central to the most important aspect of mitigation, Maurice Steskal's severe mental illness, the jury deliberated for almost sixteen hours over five days before returning a verdict of death, and the previous penalty phase jury, which heard essentially the same testimony of Dr. Pettis without the improper impeachment with the irrelevant and inflammatory facts involving this crucial expert's previous testimony in two previous, unrelated and dissimilar "horrifically violent" (RB 74) rape-murder cases, deadlocked eleven-to-one in favor of a sentence of life imprisonment over death, the State has clearly failed to met its burden to demonstrate the error was harmless beyond a reasonable doubt.

The judgment of death must be reversed.

VIII. BECAUSE THE PROSECUTOR IMPROPERLY ARGUED TO THE PENALTY PHASE RE-TRIAL JURY THAT DR. PETTIS'S MENTAL HEALTH TESTIMONY IN MITIGATION WAS ACTUALLY EVIDENCE THAT DEMONSTRATED MAURICE STESKAL WAS HOMICIDALLY DANGEROUS, AND ALSO ARGUED A SUPPOSED COVER-UP AGREEMENT NOT IN EVIDENCE, THE JUDGMENT OF DEATH IS FUNDAMENTALLY TAINTED AND MUST BE REVERSED.

A. Introduction.

Prosecutorial misconduct does not occur in a motivation-free vacuum. In a close case, when the stakes are high, the temptation to take unfair advantage in the quest to achieve the "right" result may be near-irresistible.

Here, the life-or-death stakes could not have been any higher. And this case could not have been any closer. The first jury had deadlocked at the penalty phase, on a vote of 11-to-one in favor of life over death. (6 CT 1446; 14 RT 2743-2744.) The victim was not just highly sympathetic -- he was a uniformed member of the law enforcement community in the county where the case was tried. The first prosecutor's failure to achieve a death sentence in the first trial -- or to even come close -- inevitably put tremendous pressure, public and institutional, on the new prosecutor in the penalty phase re-trial to obtain the "right" result.

The opening brief demonstrated that in this close death penalty case, the prosecutor committed misconduct in argument to

the jury, by urging the jury to find that the testimony of defense forensic psychiatrist Dr. Roderick Pettis did not just fail to support a sentence of life in prison, but *actually demonstrated that Maurice Steskal was homicidally dangerous to people in authority*. The prosecutor also improperly argued to the jury that Maurice Steskal had made a "cover-up" agreement with his wife to lie to law enforcement, although there was no evidence of such an agreement.

The State denies the prosecutor's arguments were improper, argues that if they were improper, they were forfeited and this Court cannot reach the issues, and insists the prosecutor's arguments could not have made a difference in any event. The State is wrong: the prosecutor's misconduct was clear, egregious, not forfeited, and, in the context of this close case penalty phase retrial, highly prejudicial. This Court should not uphold a sentence of death obtained in such a close case by improper methods.

B. The Prosecutor Committed Egregious Misconduct by Arguing to the Second Jury that the Testimony of Defense Psychiatrist Dr. Roderick Pettis, If Believed, Proved that Maurice Steskal Was Homicidally Dangerous.

1. The Prosecutor's Misconduct.

The operative legal rule is not in dispute. Mr. Steskal showed, and the State agrees, that under California law as interpreted by this Court, a prosecutor may not argue that evidence supporting mitigation is actually aggravating.

But the State contends that the prosecutor's arguments were

"entirely proper" (RB 80-81), because the prosecutor only argued that the evidence concerning Steskal's mental illness "'fail[ed] to carry extenuating weight when evaluated in a broader factual context.'" (RB 80.)

If this were true, that would be the end of the matter. However, the record clearly refutes the State's contention. The unmistakable import of the prosecutor's argument regarding Dr. Pettis's testimony, as shown in the opening brief, was that if the jurors credited Dr. Pettis's testimony as to Maurice Steskal's mental illness, they should conclude that Maurice Steskal was homicidally dangerous.

The most salient and extreme instance of the prosecutor's improper use of Dr. Pettis's testimony did not come in a part of his argument directed at showing why, in his view, Dr. Pettis's testimony "failed to carry extenuating weight" and should be discounted. Instead, the prosecutor openly and plainly argued to the jurors that Dr. Pettis's mitigation testimony actually substantiated and reinforced the prosecution's factor (b) evidence in aggravation[27] with respect to a jail escape attempt by Maurice Steskal during the period between the initial penalty phase mistrial and the commencement of the penalty phase re-trial. The prosecutor specifically referenced Exhibit 80(d), a tool fashioned by Maurice Steskal and used only for

---

[27] Penal Code section 190.3 authorizes penalty phase triers of fact to consider, as evidence in aggravation:

> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

digging, which the prosecutor contended was in fact a "stabbing instrument":

> What he is trying to do is he is trying to escape from the -- one of the highest tech jails in California. ...
>
> 80(d), Delta. Correctional officer Le Geyt, remember his experience? We got lucky there with his experience in Los Angeles county. This is known as a shank. To the side of the neck anywhere, or as a stabbing instrument, *absolutely deadly weapon. Do you think for a moment that the defendant wouldn't use that? Look back at Dr. Pettis' testimony* with respect to the defendant's encapsulated delusion. He said the defendant is very mild and meek, that kind of thing, except when he is into this delusion thing, and then he just goes all out of control is what Pettis says.
>
> So if you tend to believe this, *if you think the evidence supports Pettis, you have a person right now that is capable and willing to kill someone in authority.*

(36 RT 6830-6831 (emphasis added).)

There is no intellectually honest way this argument by the prosecutor can be characterized as merely urging the jury to find that Dr. Pettis's testimony "failed to carry extenuating weight when evaluated in a broader factual context." It is, by its plain language, an argument that Dr. Pettis's testimony in mitigation should be interpreted by the jurors as showing that Maurice Steskal is homicidally violent -- "capable and willing to kill someone in authority" -- and thus deserving of death.

Indeed, the trial court, overruling Maurice Steskal's mistrial

motion, demonstrated that it understood the prosecutor's argument regarding the significance of this testimony of Dr. Pettis in precisely the way the prosecutor intended, finding it was

> *relevant to the (b) factor* dealing with possession of deadly and dangerous weapons in jail or prison setting and the attempted escape.

(36 RT 6936 (emphasis added).)

The argument was improper. This Court has long held that evidence under factors (d), (e), (f), (h), and (k) can only mitigate. (*People v. Whitt* (1990) 51 Cal.3d 620, 654.) Dr. Pettis's testimony was plainly mitigation evidence under factors (d), (h) and (k).[28]

2. The Reasonably Likely Jury Understanding.

Faced with this misconduct, the State insists that there is no reasonable likelihood any of the jurors construed or applied the argument in an improper way. The State points to another passage in the prosecutor's argument, in which he told the jurors that "the only factors" that they could consider as aggravating included "(b) other acts of criminal-type conduct . . . . " (36 RT 6787, quoted at RB

---

[28] Penal Code section 190.3 authorizes penalty phase triers of fact to consider as mitigation:

> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> ....
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect ....
>
> ....
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

81.)[29]

But this passage of closing argument only *increased* the likelihood that one or more of the jurors understood the prosecutor's argument about the meaning of Dr. Pettis's testimony in the straightforward and impermissible way it was plainly intended.

Critically, in the passage of closing argument relied on by the State, the prosecutor did not tell the jurors they could not consider the *evidence* put forth in mitigation as support of a factor in aggravation.

Instead, the prosecutor told the jurors they should "take all the evidence that you have heard and divide it into these factors." (36 RT 6787; RB 81.) And the prosecutor went on to tell the jury, as seen above, that the evidence at issue -- Dr. Pettis's testimony about mental illness -- actually supported not the defense case for life, but the prosecutor's case for death under factor (b). (36 RT 6830-6831.) So the prosecutor's argument, quoted by the State at RB 81, first urged the jury to consider all the evidence in aggravation -- which

---

[29] In the passage quoted by the State, the prosecutor argued:

> So what we will be asking you to do is to take all the evidence that you have heard and divide it into these factors. And then, you consider each of those factors any way that you want to do, whether it is mitigating or whether it is aggravating. [¶] There is one caveat to that. The only factors that you can consider that are aggravating would be (a), the crime and the special circumstance; (b), other acts of criminal-type conduct; (c), the felony conviction; and, (i) [age of defendant at time of crime]. The remaining factors can only be considered as mitigation. They cannot be considered as aggravation. Lack of a factor cannot be considered as aggravation.

(36 RT 6786-6787, quoted at at RB 81.)

pointedly *included* Dr. Pettis's testimony, which the prosecutor improperly enlisted in his argument to support factor (b) -- and second, urged the jury to use that evidence to justify a verdict of death. This *reinforced* the likelihood that one or more jurors understood the prosecutor's argument to mean that Dr. Pettis's testimony, if believed, supported a verdict of death.

The State also suggests (at RB 81), without citation to the record or reference to any specific instructions, that "the court's instructions" somehow helped to dispel any possibility the jurors would interpret the prosecutor's argument to mean what it plainly did, that Dr. Pettis's testimony supported the view that Maurice Steskal was homicidally dangerous. Though the defense argued in closing that evidence of mitigation could not be used in support of aggravation, it is telling that there were no instructions from the trial court to that effect.

Given (a) the blatant and forceful argument of the prosecutor that Dr. Pettis's testimony supported a sentence of death, (b) the prestige of the prosecutor with the jury, (c) the absence of any trial court instruction negating this serious impropriety, (c) the jury's focus on Dr. Pettis's testimony as revealed by the final jury question at the end of penalty phase deliberations (10 CT 2612-2613), and (d) the closeness of the case, as demonstrated, inter alia, by (1) the first jury's inability to reach a verdict, and (2) the second jury's lengthy five days of deliberations on the verdict, it is more than reasonably likely that the prosecutor's misconduct in arguing that Dr. Pettis's defense testimony could be used, in combination with the evidence of attempted escape, to show that Maurice Steskal was "capable and

willing to kill someone in authority" caused one or more jurors to interpret the prosecutor's improper argument in exactly the way the prosecutor intended.

C. As the Trial Court's Denial of the Mistrial Motion Demonstrates, Any Earlier Objection Would Have Been Futile, and Thus Under This Court's Cases, The Issue Was Not Waived.

This Court has repeatedly held that while the failure to make an adequate and timely objection and request that the trial court admonish the jurors ordinarily waives any issue of prosecutorial misconduct on appeal, this

> is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile.

(*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Although the defense did not object at the time of the argument to the prosecutor's misconduct in arguing that the testimony of defense psychiatrist Dr. Pettis should be viewed by the jurors as aggravating evidence supporting the prosecutor's position that Maurice Steskal deserved to die, after the prosecutor's closing argument the defense made a mistrial motion based on the prosecutor's argument (36 RT 6929-6935), which the trial court denied -- not due to untimeliness, which was not mentioned by either party or the trial court, but on the merits. (36 RT 6936-6937.)

As discussed in the opening brief (AOB 207-208), the trial

court's denial of the mistrial motion demonstrates that an earlier objection and request for admonition would have been futile -- there is no basis to speculate, given the trial court's ruling on the merits, that had the misconduct been raised earlier via an objection and request for admonition, the trial court's ruling would have been any different.

In its brief, the State fails to clearly acknowledge the firmly-established futility exception to the general rule of contemporaneous objection and admonition. (See RB 80.) And the State entirely fails to respond to the showing in the opening brief that the record clearly demonstrates, via the trial court's swift ruling on the mistrial motion, that any earlier objection and request for admonition would have been futile. (AOB 207-208.) The futility exception squarely applies.

As also discussed in the opening brief, the mistrial motion *itself* was sufficient to preserve the issue for review. (AOB 207-208.) The State's response to this is to flatly deny that there was any error or incurable prejudice. This is incorrect, as discussed in the opening brief (AOB 213-214) and elsewhere in this brief.

Even if the misconduct had not been properly preserved and was subject to no exception to the contemporaneous objection rule, this Court retains discretion to address the prosecutor's misconduct. (E.g., *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 ["[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party"].) Given the egregiousness of the misconduct, the centrality of the testimony of Dr. Pettis, the likely impact of the misconduct, and the closeness of

the case as shown by the prior jury deadlock of eleven-to-one in favor of life, and by the length of the re-trial penalty phase jury's five days of deliberation, this would be an appropriate case for the Court to exercise that discretion even if the issue were otherwise not subject to review.

D. The Trial Court Improperly Denied the Mistrial Motion.

The State's argument in its brief that the mistrial motion was properly denied is focused on just one of the several bases for the mistrial motion -- the prosecutor's assertion that Dr. Pettis's testimony was "less than mitigating." (RB 85.) But the mistrial motion was *also* expressly based on the prosecutor's argument that "'if you think the evidence supports Pettis, you have a person right now that is capable and willing to kill someone in authority.'" (36 RT 6929-6930.) The State quotes this language, but avoids actually discussing it. (RB 85.)

The State's obfuscation of this issue is significant. In denying the mistrial motion, the trial court rejected the argument that the prosecutor had committed misconduct in arguing that Dr. Pettis's testimony supported the case for death by finding that Dr. Pettis's testimony, in fact, was

> *relevant to the (b) factor* dealing with possession of deadly and dangerous weapons in jail or prison setting and the attempted escape.

(36 RT 6936 (emphasis added).) Accordingly, the prosecutor's use of Dr. Pettis's mitigation testimony to support a factor in aggravation

was not, in the trial court's view, improper. But in light of the clear rule that defense evidence in mitigation under factors (d), (h) and (k) can only be used in support of mitigation, and not in support of aggravation, the trial court clearly abused its discretion in approving the use of this testimony in support of aggravation factor (b) and denying a mistrial.

The State further denies that there was any incurable prejudice. But the State entirely fails to offer any analysis supporting this assertion, relying instead on repeated denials. Here, given both the centrality of Dr. Pettis's mental health testimony to the penalty phase defense, and the power of the prosecutor's summation, which turned this critical expert's testimony against the defense by arguing that "if you think the evidence supports Pettis, you have a person right now that is capable and willing to kill someone in authority" (36 RT 6831), no admonition would have realistically granted each one of the twelve jurors the ability to dismiss or dispel the notion the prosecutor so powerfully and effectively implanted -- that, at the end of the day, Dr. Pettis's testimony showed that Maurice Steskal was, in fact, homicidally dangerous even when incarcerated, and deserved death. In this close case, the prejudice was incurable.

E. The Prosecutor Improperly Argued Facts Not In Evidence By Claiming That Maurice Steskal and His Wife Nanette Had Agreed that She Would Lie to Law Enforcement On His Behalf.

There was even further misconduct by the prosecutor in his

penalty phase closing argument. The prosecutor asserted to the jury that Maurice Steskal's wife, Nanette Steskal, had given an interview to the sheriff's department that was:

> *[r]eplete with lies that she and the defendant had worked out* earlier that day after he killed Brad Riches.
>
> The second interview of Mrs. Steskal, June 15th, three days later. *Replete with lies. Once again, working on that agreement that she had with her husband to try to cover this up.*

(36 RT 6793 (emphasis added).)

Neither Maurice Steskal, his wife Nanette, nor anyone else testified there was a "cover-up" agreement between Steskal and his wife of any sort.

Nevertheless, the State asserts this argument was "'reasonably warranted by the evidence'" because Dr. Pettis admitted on cross-examination that it was "conceivable" that there was such an agreement. (RB 83, citing 33 RT 6242.)

This is unfounded.

The trial court *sustained* one defense objection to the prosecutor's question to Dr. Pettis whether it was conceivable that there was such an agreement. (33 RT 6242.) The trial court sustained another objection to the prosecutor's question to Dr. Pettis as to whether Mrs. Steskal "lied to police in part at least because of what the defendant had told her what to say and not to say to the police." That correctly-sustained objection was based on the ground that it called for *speculation* on the part of Dr. Pettis. (31 RT 5863.)

The record further shows that Dr. Pettis expressly disclaimed

any actual knowledge or professional opinion as to why Mrs. Steskal would tell police what she told them:

> Q. BY MR. BROWN: Did you form an opinion that Mrs. Steskal lied to the police because the defendant asked her to lie to the police?
> [DR. PETTIS]: No.
> Q. Okay. What other considerations did you have with respect to why Mrs. Steskal lied to the police?
> [DR. PETTIS]: Well, I wouldn't -- without reading her mind, I am not able to say what all her motivations were for lying. Certainly wouldn't be unusual for a spouse to try to cover for someone. So, without asking her, I wouldn't -- would not have known.

(31 RT 5863.) Thus, Dr. Pettis had no personal knowledge, nor any professional opinion, that there was, in fact, any agreement between Maurice Steskal and his wife that she would "lie to police" on his behalf. Dr. Pettis's answer that such an agreement was "conceivable" was speculation, and nothing more.

This Court has stated:

Speculation, however, is not evidence.

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 864.)

In *Aguilar, supra*, 25 Cal.4th 826, this Court unanimously held that evidence of "motive, opportunity and means" that gave rise to speculation that there was an agreement between petroleum companies to restrain trade in violation of the antitrust laws did not "even support an inference" that there was such an agreement. (*Id.* at pp. 864-865.) That it was "conceivable" that there was an agreement to restrain prices made by petroleum companies did not amount to evidence there *was* such an agreement. Evidence that

"merely allows speculation about an unlawful conspiracy" is, this Court squarely held, "not enough." (*Id.* at p. 864.)

This same solid logic regarding speculation about an unlawful agreement this Court found dispositive in the antitrust context in *Aguilar v. Atlantic Richfield Co., supra,* should apply, with no less force, in the death penalty context in this case.

The prosecutor's argument to the jury that Maurice Steskal and his wife Nanette Steskal had made an "agreement" that she would lie to the sheriff's department to "cover this up" on on his behalf was, as the record demonstrates, not based on evidence, and the evidence did not "even support an inference" that there was such an agreement. This argument to the second penalty phase jury was based on speculation, and nothing more.

The State also claims the issue of prosecutorial misconduct was waived:

> Steskal has forfeited his right to raise this claim on appeal because he did not object to the alleged misstatement on the basis of prosecutorial misconduct. Instead, he objected only on the grounds that the prosecutor's comment assumed facts not in evidence. (36 RT 6793.)

(RB 82.)

The State's claim of forfeiture is specious. This Court has repeatedly held that for a prosecutor "in closing argument" to "refer[] to facts not in evidence" is "*clearly ... misconduct*" of a "highly prejudicial form" and "'a frequent basis for reversal.' " (*People v. Hill, supra,* 17 Cal.4th 800, 827-828 (emphasis added); accord, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 698; *People v.*

Benson (1990) 52 Cal.3d 754, 794; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1271.) The objection that the prosecutor's closing argument assumed facts not in evidence was clear, specific, and entirely adequate, and the words "prosecutorial misconduct" would have added nothing.[30]

As shown in the opening brief, it is more than reasonably likely that members of the jury interpreted the prosecutor's improper argument in the harmful way it was obviously intended. (AOB 211.) After the prosecutor referred to the supposed fact Nanette Steskal had an "agreement that she had with her husband to try to cover this up," the defense objected on the basis that the argument "assumes a fact not in evidence," and the trial court immediately overruled the objection. (36 RT 6793.) This sequence left jurors with the unmistakable impression that the prosecutor's argument was based on evidence, or was a reasonable interpretation of the evidence based on Dr. Pettis's speculation that such an agreement was "conceivable." It placed the trial court's implicit stamp of approval on the argument as a reasonable one, even though it was clearly misconduct.

The State does not respond to this showing.

---

[30] The State does not argue that the failure to request an admonition forfeited the issue, and it is clear, given the trial court's immediate overruling of the objection, that the trial court would not have given such an admonition if requested, and thus any such request would have been futile. (*People v. Hill, supra,* 17 Cal.4th 800, 820.) Moreover, since the trial court immediately overruled the objection, the admonition requirement is excused because "the defendant ha[d] no opportunity to make such a request." (*Id.*)

F. The Prosecutor's Misconduct Violated Maurice Steskal's Federal Constitutional Rights to Due Process and a Fair and Reliable Penalty Phase Re-Trial, and There Was No Forfeiture.

The prosecutor's closing argument to the jury is "an especially critical period" of the trial (*People v. Perez* (1962) 58 Cal.2d 229, 245), with the consequence that misconduct during argument may deprive a defendant of a fundamentally fair trial, rising to the level of constitutional error. As discussed in the opening brief, the prosecutor's misconduct in penalty phase closing argument violated Maurice Steskal's rights to a fair trial under the Fifth, Sixth and Fourteenth Amendments, and deprived him of a fair and reliable penalty phase re-trial under the Eighth Amendment. (AOB 212-213, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 645 (due process); *Darden v. Wainwright* (1986) 477 U.S. 168, 178-181 (due process, citing *Donnelly,* and Eighth Amendment); *Woodson v. North Carolina, supra*, 428 U.S. 280, 305 (Eighth Amendment).)

The State contends the arguments that the prosecutor's misconduct violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were forfeited because not raised in the trial court. (RB 84.) The State's one-sentence assertion depends on the alleged forfeiture of the state law claims of prosecutorial misconduct. It is supported by a single citation, to *People v. Frye* (1998) 18 Cal.4th 894, 969-970. But *Frye* is inapplicable because it involved a complete failure to either (1) object, *or* (2) show the applicability of the futility exception. (*Id.*)

Here, as shown above, the state law claim that the prosecutor's closing argument that the testimony for defense psychiatrist Dr. Pettis supported the case for death was not forfeited because the point comes within the well-established futility exception, as shown by the trial court's denial of the mistrial motion, and also because it is independently reviewable based on the trial court's improper denial of the mistrial motion. And the claim that the prosecutor committed misconduct in referring to an agreement to lie made between Maurice Steskal and his wife, when there was no evidence of such an agreement, was not forfeited because it was the subject of a timely and specific objection on grounds clearly denoting misconduct.

This Court's cases make clear that even if a federal constitutional claim of "error or misconduct" was not raised in the trial court, when a state law claim on the same basis is under review, and when the federal claim is not that the trial court should have engaged in a different analysis, but that the "error or misconduct" had the "additional legal consequence" of violating the federal constitution, the federal constitutional claim is properly preserved on appeal. (E.g., *People v. Tate* (2010) 49 Cal.4th 635, 687 & fn. 28 (federal prosecutorial misconduct claims not forfeited); *People v. Partida, supra,* 37 Cal.4th 428, 429-436 (federal evidentiary due process claim not forfeited).)

That is precisely the case here. The prosecutorial misconduct arguments are not that the trial court should have applied dissimilar federal standards in ruling on the mistrial motion or the objection to misconduct, but that the unremediated misconduct had the

additional legal consequences of violating Maurice Steskal's rights to a fair trial under the Fifth, Sixth and Fourteenth Amendments, and a fair and reliable penalty phase under the Eighth Amendment.

On the merits, the opening brief discussed why the prosecutor's misconduct in closing argument rendered the penalty phase re-trial fundamentally unfair and unreliable, looking to six factors the Supreme Court has considered probative of fundamental unfairness: (1) whether the misconduct infringes upon a right specifically protected by the Bill of Rights; (2) whether the trial court gave a curative instruction; (3) whether the prosecutor manipulated or misstated the evidence; (4) whether the defense attorney invited the comments; (5) whether defense counsel objected to the conduct; and (6) the weight of the evidence against the defendant. The opening brief showed that each of these six factors favors the conclusion of a federal constitutional violation, and that together, they strongly support the conclusion Maurice Steskal was deprived of a fundamentally fair and reliable penalty phase re-trial, as guaranteed by the Constitution. (AOB 212-213.)

Brushing aside the federal constitutional issues, the State fails to address the factors the Supreme Court has considered important. (RB 84-85.) Instead, the State merely repeats, without discussion, that the prosecutor "did not commit misconduct" and asserts, without any legal or factual analysis of the applicable factors, that the opening brief is "inadequate" to demonstrate constitutional error. (RB 85.) Such assertions do not amount to arguments which can be, or deserve to be, the subject of response.

G. In This Close Case, Arising From A Retrial After the First Jury Deadlocked 11-to-1 for Life, Reversal of the Death Judgment is the Only Just Result.

As noted in the opening brief, the standard of *Chapman v. California* applies to an assessment of prejudice from federal constitutional error, and the standard for assessing prejudice from penalty phase error under California law announced in *People v. Brown, supra*, is, this Court has made clear, the same standard. Under *Chapman*, it is the State's burden to show that the error is such that, beyond a reasonable doubt, it could not have contributed to the result.

> "To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [114 L.Ed.2d 432, 111 S.Ct. 1884].) Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "*whether the ... verdict actually rendered in this trial was surely unattributable to the error.*" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 113 S.Ct. 2078].)

(*People v. Pearson* (2013) 56 Cal.4th 393, 463.)

1. The State Makes No Attempt To Meet Its Burden to Show the Absence of Prejudice Arising from The Prosecutor's Argument that the Testimony of Dr. Pettis Showed Maurice Steskal was Homicidally Dangerous, and Has Forfeited the Issue of Prejudice.

Although the burden is on the State to show that penalty phase

misconduct by the prosecutor could not, beyond a reasonable doubt, have affected the verdict, the opening brief argued that the State could not meet its burden, pointing to the closeness of the case as indicated by the first jury's inability to reach a verdict, deadlocking eleven-to-one in favor of a sentence of life in prison for Maurice Steskal (6 CT 1446, 14 RT 2743-2744), and the very strong case in mitigation presented at the penalty phase retrial, focusing on Maurice Steskal's horrific childhood, his lifelong struggles within severe mental illness resulting in psychosis, and the conduct of members of the sheriffs' department that precipitated his fatal delusional conviction that law enforcement was trying to kill him. (AOB 214-215.)

While the State does address prejudice arising from the prosecutor's misconduct in arguing a "cover-up" agreement (RB 83-84), the State presents no argument on prejudice under federal or state law arising from the prosecutor's misconduct in arguing to the jury that the testimony of defense psychiatrist Dr. Pettis showed that Maurice Steskal was homicidally dangerous to people in authority.

The State has forfeited the issue of prejudice arising from this improper argument. Under these circumstances, the Court should affirm only if it is convinced both "that the error was 'harmless beyond a reasonable doubt' and that 'satisfaction of that standard is beyond serious debate.' " (*United States v. Brooks* (9th Cir. 2014) 772 F.3d 1161, 1171; see *People v. Sandoval* (2015) 62 Cal.4th 394, 446.) "[S]ua sponte recognition of an error's harmlessness is appropriate only where the harmlessness of the error is not reasonably debatable." (*United States v. Gonzalez-Flores* (9th Cir.

2005) 418 F.3d 1093, 1101.)

Even if the State had not forfeited the question of prejudice, it could not in any event meet its burden to show the misconduct was harmless beyond a reasonable doubt. As discussed in the opening brief (AOB 200-202, 214-215), and as discussed above in connection with the improper impeachment of Dr. Pettis, and below in response to the prejudice argument the State does make regarding the prosecutor's other misconduct in closing argument, on a whole record review of the facts and circumstances of this close case, marked by a first jury that lopsidedly deadlocked 11-to-one in favor of life, and a second jury that deliberated for five days and focused on the testimony of Dr. Pettis, any serious error, including the prosecutor's misconduct in misusing Dr. Pettis's testimony in favor of death, should undermine this Court's confidence in the result and lead to reversal of the penalty phase judgment.

2. The State Fails to Meet Its Burden on Prejudice From the Prosecutor's Misconduct in Arguing Maurice Steskal Made a Cover-Up Agreement with his Wife For Her to Lie to Police.

The State asserts the prosecutor's argument that there was a cover-up agreement between Maurice Steskal and his wife could not have influenced the verdict for three reasons: (a) because the argument was "not particularly inflammatory," (b) because the trial court instructed the jurors that the arguments of counsel were not

evidence, and (c) because the facts in aggravation included that the defendant "shot at Deputy Riches 30 times." (RB 83-84.) None of these assertions withstand scrutiny.

(a) The State's assertion that this misconduct was "not particularly inflammatory" (RB 83) misses the point.[31] There were other features of the prosecution's case that were inflammatory -- for example, the lifelike, bewigged mannequin, which was likely to evoke a strong emotional response. The assertion that there was a cover-up agreement between Maurice Steskal and his wife was not harmful because it was inflammatory -- it was harmful because, in a proceeding to decide whether the defendant should live or die, this argument defamed Maurice Steskal's character before the jury.

The prosecutor, from a position of great prestige,[32] told the jury that Maurice Steskal had made an agreement with his wife to lie to law enforcement officers when they questioned her about her husband's killing of Deputy Riches. The unmistakable and necessary meaning was that Maurice Steskal deserved condemnation not just because of the murder, but because of the kind of person he was -- someone who would conspire to lie to police, was a person of low

---

[31] The brevity of the prosecutor's improper argument is also not enough to show it could have had no prejudicial effect. An untruth from the mouth of a prosecutor is no less an untruth because it is brief -- and it is the communicative *meaning* of the untruth, in context, with the imprimatur of the prosecutor's authority with the jury, that gives rise to its harmful effect. That a lie by someone in a position of respect and authority is briefly told does not mean it is not powerful.

[32] See *Berger v. United States* (1935) 295 U.S. 78, 88 ("The average jury ... has confidence that [the] obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed.")

moral character, in a case in which his character was very much at issue.[33] In the view the prosector urged to the jury, he was someone who controlled others to get his way, and when he didn't get it, exploded in violence. An important theme in the prosecutor's closing argument for death was that Maurice Steskal was, essentially, an unworthy human being:

> You have a very smart, conniving, manipulative, controlling individual here. (36 RT 6831.)[34]

The prosecutor's misconduct in arguing, without evidentiary support, that Maurice Steskal made an agreement with his wife for her to lie to law enforcement on his behalf was critical support for his portrayal of Maurice Steskal as a "very smart, conniving, manipulative, controlling individual" who deserved the ultimate penalty.

(b) The harmful effect of the prosecutor's misconduct was not erased -- or even ameliorated -- by the instruction that the arguments of counsel are not evidence. Such standard instructions are given in <u>every</u> criminal jury trial. (CALCRIM No. 104.) If boilerplate were enough to dispel prejudice from a prosecutor's serious misstatement of fact in a death penalty closing argument, even when as here an objection has been made and overruled, then boilerplate would effectively immunize a distortion of the facts from

---

[33] This Court has long held that:

> a capital penalty determination is "based on *the character* and record *of the individual defendant* and the circumstances of the offense. [Citation.]"

(*People v. Arias, supra,* 13 Cal.4th 92, 193 (emphasis added).)

[34] The trial court overruled the defense objections to this argument. (36 RT 6831-6836.)

meaningful, consequential appellate review.

Moreover, the trial judge did not tell the jury that *the prosecutor's argument* should be ignored and not considered in the deliberative process:

> *an instruction that the argument of counsel is not evidence does not mean that the argument of counsel should be ignored.* Many things are not evidence ... but the jury may still weigh them in resolving a disputed proposition.... [F]or the Court of Appeals to point to such an instruction as a remedy for improper argument is to suggest that anything that is not called evidence should not be considered .... *The delineation of "what is" from "what is not" evidence in these instructions does not aim to separate what jurors can consider.* Jurors are supposed to consider, for example, the background knowledge that they bring to the trial and the lawyers' opening statements and summations although this information is not evidence under jury instructions.

(Scott W. Howe, *Untangling Competing Conceptions of "Evidence"* (1997) 30 Loy. L.A. L. Rev. 1199, 1236 (emphasis added).) Thus, even if the members of the jury did not consider the prosecutor's improper statements "as evidence," that does not show the jury members *did not consider* the prosecutor's improper statements, particularly as legitimate inferences from the evidence.

The State's argument that the instructions given cleansed the misconduct of any harmful influence on the verdict is additionally defective because it entirely overlooks the particular factual context of the misconduct in this case.

Here, the prosecutor's argument was, assertedly based on Dr. Pettis's answer that it was "conceivable" that Maurice Steskal entered into an agreement with his wife for her to lie to law

enforcement on his behalf. (RB 83.) But because the defense objection to the prosecutor's misconduct in arguing the evidence showed there was such an agreement was overruled by the trial court, the jurors would naturally infer that Dr. Pettis's testimony that such an agreement was conceivable, taken together with the trial court's overruling of the objection in open court, showed that in the trial court's view, the testimony of Dr. Pettis actually *supported* the prosecutor's factual assertion that there *was* such a cover-up agreement between Maurice Steskal and his wife.

This had the unfortunate effect of enlisting the court's own high standing with the jury, on top of the prosecutor's natural prestige, in reinforcing the likely impact of this misconduct.

(c) Nor is the State's argument that the misconduct was harmless in light of the aggravating evidence that Maurice Steskal "shot at Deputy Riches 30 times" (RB 84) sufficient to carry its burden. There are undoubtedly cases in which the evidence in aggravation is so overwhelming, and the evidence in mitigation so insubstantial, that a minor misstatement of the facts in a prosecutor's closing argument can be confidently regarded as, beyond any reasonable doubt, having no contributory effect on the outcome.

This is not such a case.

In *People v. Smith, supra,* 61 Cal.4th 18, 60, this Court reversed a penalty-phase judgment due to the trial court's erroneous exclusion of defense testimony about security measures imposed on life prisoners, finding the error prejudicial in critical part because

"defendant's showing in mitigation was substantial." (*Id.*[35])

Here, by comparison, the weight and substantiality of evidence of mitigation are rather more substantial than in *Smith*.

As shown in the opening brief and this brief, Maurice Steskal suffered from life-long severe mental illness.

Maurice Steskal is neurologically impaired, and suffers from functional deficits. He was raised in a family plagued by mental illness -- expert clinical evaluations of his father, mother and three of his siblings found mental illness evident in all but one. This suggests a common genetic basis. (33 RT 6322-6323, 6339.) Maurice Steskal's younger brother, Scott, the closest to him in age, was diagnosed by Dr. Missett as actively psychotic. (29 RT 5598, 5602.)

From the age of three, Maurice Steskal was the object of acts of severe brutality directed at him by his father and older brothers. Unsurprisingly, Maurice Steskal was dysfunctional from a very early age. Although of normal intelligence, he had to repeat first grade.

---

[35] In *People v. Smith, supra*, the Court addressed the defendant's mitigation in this discussion:

> [D]efendant's showing in mitigation was substantial. [1] Numerous witnesses detailed his difficult life as a child, including prolonged molestation at a very young age by his father. [2] In his subsequent journey through multiple placements in the social services system, defendant encountered further physical abuse and repeated disappointment in his hopes of finding a stable family environment. [3] Medical experts testified about the effects of these experiences on his development.

(*People v. Smith, supra*, 61 Cal.4th 18, 60 (bracketed numbers added).)

His life was marked by struggle and powerful psychotic delusions. His behavior, such as living in the woods in Oregon in fear of government spying on him via helicopters, was that of a person with severe mental illness, and he was diagnosed by Dr. Pettis as suffering from a severe schizophrenic spectrum disorder. Dr. Pettis's diagnosis was consistent with, and supported by, an extensive battery of neuropsychological tests administered to Maurice Steskal by Dr. Robert Asarnow, a professor at UCLA Medical School and an expert on schizophrenia, which independently indicated Maurice Steskal had a schizophrenic spectrum disorder. (26 RT 5336-5354, 5362-5365, 5379-5380.)[36]

Yet despite Maurice Steskal's family background of mental illness and its possible genetic basis, the family's atmosphere of paranoia and practice of sadism, the basement beatings with PVC pipes and the other brutal abuse he suffered as a child, from age three onwards, at the hands of his father and older brothers, his neurological impairments, and his record of disfunction and failure in school until he dropped out without a high school diploma, Maurice Steskal did his best. He worked loyally, though he had difficulty with the simplest tasks. He married, and remained on good terms with his wife. He reached out to help others, such as Ralph Pantoni, a homeless man he befriended and taught to pan for gold on mining expeditions. Numerous witnesses -- past employers, neighbors and friends -- all described Maurice Steskal as a gentle and polite man who cared for others.

[36] Dr. Asarnow testified that tests specifically designed to detect malingering showed that for Maurice Steskal, malingering was categorically excluded. (28 RT 5372-5375.)

Maurice Steskal committed the homicide in this case when he was 39 years old. (23 RT 4565.) Before that time, he had no prior conviction for any crime of violence or any crime against a person. His only prior conviction was for cultivating marijuana.[37, 38]

Maurice Steskal's tragic shooting of Deputy Riches -- a product of his psychotic illness -- was precipitated by the brutality inflicted on him by members of the Orange County Sheriff's Department after a traffic stop. Exhibit 39 is the videotape recording showing the assault on Maurice Steskal by five uniformed officers. When Maurice Steskal said, "Come on, man, you are hurting me," a deputy replied, "We want to hurt you." (26 RT 5053, 5121.)

Maurice Steskal became convinced that members of the Sheriff's Department were trying to kill him; he sought desperately to avoid further contacts with law enforcement, and became suicidal. (30 RT 5749-5752 (testimony of Dr. Pettis).) On the night of the offense, Maurice Steskal's psychosis had reached an extreme level; he was grossly decompensated, and could not control his behavior. (30 RT 5758-5759 (Dr. Pettis).)

Maurice Steskal's defense presented a very substantial case in

---

[37] From his teenage years, Maurice Steskal had been depressed, and had self-medicated. (33 RT 6336 (testimony of Mark Cunningham, Ph.D.).)

[38] Maurice Steskal's sole conviction for the non-violent victimless crime of cultivating marijuana is slight, especially when viewed in comparison to many persons sentenced to death. Compare, e.g., *Doe v. Ayers* (9th Cir. 2015) 782 F.3d 425, 447:

> Doe's criminal record ... was light compared to those of many capital defendants; his only previous conviction was for an armed robbery, in which no one was injured, committed when he was a juvenile.

mitigation.

Moreover, even apart from a consideration of all the evidence, objective circumstances compellingly show this was a close case.

This was not the first penalty phase trial in this case. At the first penalty phase trial, after considerable deliberation, the jury deadlocked on a vote of 11-to-one in favor of LWOP over the death penalty for Maurice Steskal. (6 CT 1446, 14 RT 2743-2744.)

At the first penalty phase trial, ending in a result more favorable to Maurice Steskal, the jury did not hear any similar misconduct in closing argument. In that proceeding, the prosecutor did not argue that Maurice Steskal had an agreement with his wife Nanette for her to lie to police on his behalf. Nor had the first jury heard any such argument from the prosecutor at the guilt phase summation.

The second penalty phase jury deliberated for a lengthy time before reaching its verdict -- for almost 16 hours over five days. Compare *In re Sakarias, supra,* 35 Cal.4th at p. 167, in which this Court, granting penalty phase relief, found it highly significant that the "penalty jury deliberated for more than 10 hours over three days ... before finally returning a verdict of death."

Under these circumstances, involving an exceptionally strong case in mitigation, a prior penalty trial, without the misconduct, resulting in a lopsided jury vote in favor of life without parole for Maurice Steskal, and the very lengthy deliberations of the second penalty phase jury before it reached a verdict, it cannot be said, with any real confidence, let alone beyond a reasonable doubt, that the

prosecutor's misconduct in closing argument could not have affected the verdict.

IX. BY ALLOWING THE PROSECUTION TO PLACE BEFORE THE JURY A BLUE-EYED, LIFE-SIZE, REALISTIC, HAIRPIECE-WEARING MANNEQUIN WITH FULL FACIAL FEATURES, ATTIRED IN THE HOMICIDE VICTIM'S ACTUAL, BULLET-RIPPED, VOMITUS-STAINED AND BLOOD-SOILED ORANGE COUNTY SHERIFFS' UNIFORM, WHEN THE MANNEQUIN WAS NOT RELEVANT TO ANY MATERIAL ISSUE OF FACT IN THIS CLOSE CASE, THE TRIAL COURT REVERSIBLY ERRED.

A. Introduction.

The first penalty phase trial did not feature a prosecution mannequin of the victim, transfixed by trajectory rods and dressed in Deputy Riches' uniform, or otherwise attired. But the first jury deadlocked 11-to-one in favor of life in prison over the death penalty.

At the second penalty phase trial, the prosecution presented, over defense objection, a new, highly inflammatory exhibit: a life-size, full-facial-featured mannequin, People's Exhibit 51, dressed in Deputy Riches' bullet-riddled, bloodied, vomitus-stained uniform, wearing his gun-belt and his starred sheriff's department badge. The mannequin depicting the deputy was impaled with bright red rods showing the trajectory of each bullet that struck him. The jury, over defense objection, was permitted to view the bloodied, uniformed mannequin during the testimony of the pathologist who performed the autopsy. (20 RT 4011-4013, 4021-4022.) The mannequin was present and visible before the jury during the prosecution's closing, and the prosecutor employed it in his argument for death.

As shown in the opening brief -- unlike other cases before this Court involving law enforcement mannequins -- the Deputy Riches mannequin was not relevant to any material factual issue the prosecution had to prove.

To the extent it was relevant to *uncontested* issues, the mannequin was cumulative to ample quantities of other admitted evidence, including autopsy photographs, videotapes, testimony of percipient witnesses including other law enforcement officers, the pathologist's testimony, and more. In context, the evidentiary value of the mannequin was minimal to nonexistent.

The *real* purpose of this life-like, blue-eyed, strikingly good-looking, hairpiece-wearing uniformed mannequin was to prejudice the second jury. This exhibit, revolting to anyone who lays eyes on it, epitomizes the kind of inflammatory evidence, far more prejudicial than probative, that clearly should be excluded under Evidence Code section 352 and the United States and California constitutions. (AOB 216-234.)

The State does not dispute that the mannequin in this case was not relevant to any contested issue at trial. Nor does the State make any attempt to show the mannequin was not inflammatory.

Nevertheless, the State asserts that the mannequin was properly admitted, that claims of constitutional error were waived, and that because defense counsel referred to the mannequin in cross-examination of a pathologist, there could have been no prejudice. (RB 86-91.)

The State's arguments are meritless. The trial court clearly

abused its discretion in admitting this shocking and inflammatory exhibit in this close case. The error calls for reversal of the judgment of death.

B. This Court's Cases Show that the Admissibility of Mannequins Depicting Law Enforcement Officers Depends on Whether the Mannequin Is Directly Relevant to A Material Issue -- and Here, It Was Not.

This case is unlike any previous case from this Court involving a law enforcement mannequin.

The opening brief surveyed each case involving a law enforcement mannequin to come before this Court in the last fifty-five years. Appellant showed that, in *every* case over half a century in which this Court had approved the use of a law enforcement mannequin in a homicide prosecution, the mannequin was directly relevant to a material issue of fact. These cases are *People v. Robillard* (1960) 55 Cal.2d 88, 99-100 (guilt phase), *People v. Brown* (1988) 46 Cal.3d 432, 442-444 & fn. 7 (guilt phase), *People v. Cummings* (1993) 4 Cal.4th 1233, 1291 (guilt phase), and *People v. Thomas* (2012) 53 Cal.4th 771, 805-807 (guilt phase). They are discussed at AOB 219-223.[39]

The State does not contest that, in each one of these previous cases, the mannequins of the officers were directly relevant to

---

[39] The opening brief also discussed *People v. Fuiava* (2012) 53 Cal.4th 622, 674 (guilt phase), involving photographs of a law enforcement mannequin.

material factual issues.[40]

And the State does not contest that this case is different from every one of this Court's prior cases involving law enforcement mannequins -- that here, unlike each case this Court has decided since and including *Robillard*, the mannequin was not relevant to any critical factual issue.

The State insists the mannequin in this case *was* relevant. It was relevant "regarding Steskal's deliberation and intent to kill the deputy," "relevant to the charged special circumstance of killing a peace officer performing his duties," "relevant to show that Steskal intended to kill the officer because Steskal's bullets went through the deputy's vest and into his body," and "relevant to assist the jury in understanding the complex medical testimony describing the placement and nature of the fatal wounds." (RB 87-88.) These assertions of relevance essentially rephrase the claims made by the prosecutor at the second penalty phase trial. (16 RT 3055.)

Of course, appellant had already been convicted of deliberate and premeditated murder, and the special circumstance of killing an officer in the course of his duties had been found true by the first

---

[40] The State cites to *Robillard* (RB 88), but fails to note not only that the mannequin in that case was directly relevant to a contested issue as to how the murder occurred, going to the issue of degree, but also that there was no indication the mannequin there was dressed in the officer's uniform, full-featured with a wig, or otherwise realistic. As to *Brown*, the State's discussion recognizes the mannequin was directly relevant to a special circumstances issue, whether defendant knew the victim was an officer, but the State fails to note that there was no showing that the mannequin in *Brown* had full features, a hairpiece and a high degree of realism, and no indication it was cumulative to other evidence. (RB 88.)

jury, as pointed out by defense counsel at trial. (16 RT 3056, 3058.) There was no dispute regarding the nature and placement of the fatal wounds at any phase. Thus, there was -- unlike every other case this Court has considered involving a law enforcement mannequin -- no material factual issue the second jury was required to resolve and to which the mannequin was relevant.

Mannequins depicting slain law enforcement officers, dressed in their uniforms, bear the obvious and undeniable potential for great prejudice. This Court has never held that a mannequin dressed in the uniform of a slain law enforcement officer was properly admitted in a case where the mannequin was not directly relevant to a material issue of fact. The Court should not do so here.

C. The State Does Not Dispute that, to the Extent it was Relevant, the Uniformed, Full-Featured Mannequin Was "Merely Cumulative" to a Quantity of Other Evidence on Undisputed Issues.

The probative value of evidence is minimal to nonexistent when it is cumulative on undisputed matters.

> The prejudicial effect of evidence . . . may, of course, outweigh its probative value *if it is merely cumulative regarding an issue not reasonably subject to dispute*. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 405–406; *People v. Williams* (2009) 170 Cal.App.4th 587, 610–611.)

(*People v. Tran* (2011) 51 Cal.4th 1040, 1049 (emphasis added) (discussing evidence of separate offenses).) Thus,

> neither the prosecution nor the defendant has a right to present cumulative evidence that creates a substantial danger

of undue prejudice.

(*People v. Williams* (2009) 170 Cal.App.4th 587, 611.) Prosecutors have no privilege to "over-prove their case[s]" or to "put on all the evidence that they have." (*Id.* at p. 610.)

The opening brief showed that, to the extent it was relevant to undisputed issues at the penalty phase re-trial, the mannequin depicting Deputy Riches was "merely cumulative" to a quantity of other evidence that showed that Mr. Steskal killed Deputy Riches with the intention to do so, knowing that Riches was a law enforcement officer.[41] (AOB 227-230.)

The State acknowledges, but does not discuss, appellant's showing that the mannequin was "merely cumulative" to other evidence of the circumstances of the crime. (RB 86.)

While claiming the mannequin was relevant to intent to kill and to the special circumstance of killing a law enforcement officer in the performance of his duties (RB 87-88), the State overlooks the large body of uncontested evidence admitted at both trials that proved these same matters without the mannequin.

As discussed in the opening brief and this brief, there was uncontroverted expert testimony that Mr. Steskal suffered from a psychosis that manifested itself in the delusional but firmly-held belief that the members of the Orange County Sheriff's Department

---

[41] Because the first jury had been discharged due to its 11-to-one deadlock in favor of life imprisonment (6 CT 1446, 14 RT 2743-2744), the prosecution in the second penalty phase was permitted to put on anew its evidence of the circumstances of the crime, and did so, "present[ing] substantially the same evidence" it presented at the guilt phase. (RB 14.)

were out to kill him. Though the prosecution presented no contrary evidence, it proceeded on the evidence-free hypothesis that Mr. Steskal was motivated to kill Deputy Riches because he "hated cops."

On either theory, there was agreement that Mr. Steskal was motivated to act as he did only because Deputy Riches was a member of the Orange County Sheriff's Department.

As also discussed in the opening brief (AOB 228-230), the evidence included a 7-Eleven store surveillance video -- Exhibit 55 -- in full color, with an audio track, showing the homicide, in its entirety, in real time.

In that color surveillance video, Mr. Steskal is seen buying cigarettes from store clerk Vickie DeLara. Though the sound quality of their recorded conversation is indistinct, DeLara testified that appellant told her he only carried the rifle to protect himself from the "fucking law." (20 RT 4097-4098.)

The video shows the flashing overhead lights of Deputy Riches' patrol car as it pulls into the 7-Eleven parking lot. (Exhibit 55.)

Exhibit 55 was played four times for the second penalty-phase jury. (AOB 229.) The prosecutor narrated at length the events as they unfolded in the 7-Eleven video, including this description:

> So you can see Mr. Steskal coming across here, walking down the vehicle shooting, and then walking back and continuing to shoot at the completely defenseless deputy sheriff.

(20 RT 3980.)

Though the audio recording is otherwise poor, the sounds of 30 separate gunshots in quick succession are quite distinct.

The foregoing is very substantial evidence of intent to kill an officer in the performance of his duties. But there was even more evidence. (See AOB 228-230.)

The probative value of the mannequin on the uncontested issues of intent to kill, and the specific intention to kill an officer in the performance of his duties was, in addition to the other evidence, minimal at best.

As noted previously, the State also claims that the uniformed, wig-wearing and blue-eyed mannequin was "relevant to assist the jury in understanding the complex medical testimony describing the placement and nature of the fatal wounds." (RB 87.) There was no dispute about the placement and nature of the fatal wounds.

Dr. Richard Fukumoto, who performed the autopsy, testified that Deputy Riches had 30 gunshot wounds, and died from wounds to the brain and internal organs almost immediately after being shot.

The testimony of Dr. Fukumoto was not particularly "complex," as the State asserts. (RB 87.) Instead, as the State itself summarizes in the facts section of its brief,

> Pathologist Richard Fukumoto performed an autopsy on Deputy Riches on June 12, 1999. Deputy Riches had been shot multiple times and had multiple gunshot wounds. He died as a result of the gunshot injuries to his lung, heart and brain.

(RB 6 (record citations omitted).)

Without resort to a mannequin of any sort, Dr. Fukumoto gave essentially the same direct testimony at the penalty phase re-trial as he did at the first trial, using an enlargement of the autopsy diagram he used in the autopsy itself to indicate the location of the wounds.

(7 RT 1299.) He also referred to autopsy photographs. (7 RT 1305.)

And as noted in the opening brief, there is nothing in the record to indicate that, in the absence of the mannequin, with Dr. Fukumoto using the autopsy diagram instead, the first jury was somehow confused by the pathologist's testimony as to the nature and placement of the gunshot wounds. (Compare *People v. Cummings, supra,* 4 Cal.4th at p. 1291 (rejecting challenge to law enforcement mannequin because "[t]he issues to which this evidence was relevant were hotly disputed" and "[t]he expert testimony was confusing at times.").)

Thus, entirely apart from the fully-attired, bewigged mannequin, there was an ample mass of un-contradicted evidence that Mr. Steskal (under the influence of a psychotic delusion, per the defense, or because he "hated cops," per the prosecution), intended to kill Deputy Riches, and intended to do so because Riches was an Orange County sheriff's deputy.

Accordingly, though the mannequin was relevant to undisputed circumstances of the crime, it was evidence that possessed no additional probative value in the context of other evidence the prosecution was permitted to present. The mannequin was "merely cumulative regarding an issue not reasonably subject to dispute." (*People v. Tran, supra,* 51 Cal.4th at p. 1049.)

The State fails to show that the mannequin had any significant evidentiary value over and above the other proof that was either presented at the penalty phase re-trial, or that was presented at the guilt and special circumstance phase and could have been presented

at the penalty phase re-trial. (See *People v. Blue* (Ill. 2000) 189 Ill.2d 99, 724 N.E.2d 920, 934.)

D. Because the Evidentiary Value of the Blue-Eyed, Wig-Wearing Mannequin Was Minimal, and the Potential for Prejudice Was Extreme, the Trial Court Could Not "Reasonably Conclude" that the Probative Value of the Mannequin Substantially Outweighed its Extreme Potential for Prejudice.

When a trial court cannot "reasonably conclude" that the probative value of challenged evidence is not substantially outweighed by its potentially prejudicial effects, the court abuses its discretion in admitting the evidence. (See *People v. Thomas, supra,* 53 Cal.4th 771, 806; *People v. Crittenden, supra,* 9 Cal.4th 83, 134.)

The State does not dispute that the trial court failed to recognize that the mannequin was not significantly probative on any contested issue at the penalty phase re-trial. (AOB 230.) Nor does the State defend the trial court's ruling on the basis the mannequin was not "merely cumulative" to the quantity of proof the prosecution was entitled to and did present regarding the undisputed circumstances of the crime, including intent to kill, as shown by the nature and placement of the fatal wounds, and knowledge that the victim was a law enforcement officer.

Thus, the question for this Court is whether the trial court could "reasonably conclude," in light of the minimal additional probative value of the mannequin as to undisputed issues, and the complete *absence* of any probative value regarding actually

contested issues, that the evidentiary value of the mannequin was not substantially outweighed by the potential for undue, unfair prejudice.

The trial court's conclusion that the probative value of the full-featured, bewigged and uniformed mannequin "depicting" Deputy Riches outweighed the potential for undue prejudice was, as shown in the opening brief, completely unreasonable. (AOB 231-233.)

The State provides two responses.

First, with respect to the comparison between the life-like, blue-eyed bewigged and full-featured mannequin of Deputy Riches, in his blood-stained and vomit-stained shirt, and blood-soaked pants, with his uniform pierced by bright pink trajectory rods, and the mannequins of law enforcement officers discussed in four other cases from this Court (AOB 220-222), the State insists that

> the fact this Court has not specifically ruled on a mannequin exactly like the one used in Steskal's case does not mean the mannequin used here was any more likely to engender an emotional response from the jury. (RB 89.)

This is not a reasonable argument; in fact, it's not even a rational one. What makes the mannequin of Deputy Riches an inflammatory piece of evidence is not "the fact that the Court has not specifically ruled on a mannequin exactly like" this one -- it's the impact of the Deputy Riches mannequin itself.

It should not be overlooked, however, that the Deputy Riches mannequin was far more likely to be prejudicial than the law enforcement mannequins admitted in other cases. In three of the four cases -- *Robillard*, *Cummings*, and *Thomas* -- there was no

indication the the mannequins were placed before the jurors dressed in the uniforms of the slain officers, as was the case with the Deputy Riches mannequin. In *Brown*, although the mannequin was in uniform, there were just two bullet holes with blood stains that were "scarcely visible" (46 Cal.3d at pp. 442-443), in sharp contrast to the mannequin dressed in Deputy Riches' vomitus-despoiled, blood-stained shirt and blood-soaked pants, with trajectories of thirty wounds from a high-powered assault rifle indicated by bright pink rods. Nor is there any indication in *Brown* that the mannequin even had a head, let alone the facial features of a strikingly good-looking young man, including blue eyes, and a full hairpiece, as with the Deputy Riches mannequin.

The State's second response is an attempt to distinguish *People v. Blue, supra,* 189 Ill.2d 99, 724 N.E.2d 920. In *Blue*, the Illinois Supreme Court reversed a murder conviction and death sentence based primarily on the erroneous admission of a mannequin dressed in a dead officer's uniform. The State first asserts:

> *Blue* does not assist Steskal because it is not binding on this court. (RB 89.)

It is simply not correct that the opinions of sister state supreme courts are unhelpful because they are not binding. Every law student knows that non-binding precedents from respected courts can be highly persuasive precedent. The opinion of the Illinois Supreme Court in *Blue* is unanimous.

The State also attempts to distinguish *Blue* on its facts, pointing out that there, the uniform had brain-matter on it, and the

jurors were given gloves and were in the presence of the mannequin for a longer period of time. (RB 89.) "[T]he exhibit [was] so disturbing that its prejudicial impact outweighed its probative value." (*Blue, supra*, 724 N.E.2d at p. 934.)

But the mannequin of Deputy Riches was rather more likely to be inflammatory and "disturbing" than the mannequin at issue in *Blue*.

The mannequin in *Blue* was a torso dummy on which the uniform was placed. There was no head, and nothing below the torso. (*Blue, supra*, 724 N.E.2d at p. 931.) The mannequin was not described as wearing a gunbelt or holster, or a badge. (*Id.*) The officer in *Blue* had sustained three gunshot wounds -- one to the head and one to the thigh, which could not be shown on the headless torso mannequin, and a single gunshot wound to the chest. (*Id.* at pp. 925-926.)

By contrast, the Deputy Riches mannequin was a full-body mannequin, dressed in Deputy Riches' blood-soaked pants and boots, as well as his shirt, with his six-point-starred sheriff's badge still pinned on it, and his belt and holster. Though there was nothing identified as brain-matter on Deputy Riches' uniform, there was vomitus as well as blood on the uniform shirt, and the uniform pants were soaked in blood.

Although the partial uniform on the mannequin in *Blue* showed a *single* large gunshot wound, which was no doubt disturbing, the full Deputy Riches mannequin showed *thirty* "major wounds" from a semi-automatic rifle, according to the pathologist.

(20 RT 4034.)

The "major wounds" were indicated by the pathologist in his testimony by inserting bright pink trajectory rods (also referred to in testimony as "probes" or "dowels") into the mannequin depicting Deputy Riches.

As noted in the opening brief, the mannequin of the slain Deputy Riches dressed in his uniform and pierced with multiple bright trajectory rods is the very apotheosis of a modern-day martyr -- a contemporary Saint Sebastian, pierced not with arrows, but with trajectory rods indicating the path of bullets from an AK-47 knockoff.[42]

Experienced in three dimensions, in real time and space, the life-size Deputy Riches mannequin, about 6 feet and 6 inches tall, transfixed with bright pink trajectory rods, is an unforgettable, nightmarish sight, even for those professionally familiar with homicide prosecutions, let alone for lay jurors.

And, of course, the mannequin in *Blue* had less potential for undue prejudice, because the mannequin was headless. The mannequin intended to "depict" Deputy Riches, by comparison, has not just a head, wearing a hairpiece, but a *face* -- with a chiseled, defined jawline and a complete set of finely-drawn facial features,

[42] Absurdly, the State insists in a footnote that the reference to Saint Sebastian in the opening brief (AOB 232 & fn. 5) has been forfeited because appellant did not "object on this basis at trial." (RB 90 fn. 26.) The State fails to appreciate that what must be preserved at trial are the statutory and constitutional *grounds* for evidentiary objections, not the specific illustrations in arguments in support of preserved claims of error. (See, e.g., *People v. Morris* (1991) 53 Cal.3d 152, 190.)

including lips, nostrils, eyebrows, individual eyelashes, and vivid blue eyes.

As much as any actor made up for the stage, the Deputy Riches mannequin was presented for dramatic effect.

The law enforcement mannequin found too prejudicial for admission by the Illinois Supreme Court in *Blue* was no doubt egregious, but much less so than the Deputy Riches mannequin, transfixed by bullet trajectory rods in Christian martyr fashion.

Undue prejudice arises from "evidence which uniquely tends to evoke an emotional bias against the defendant." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) The uniform of a slain law enforcement officer is, as the Illinois Supreme Court observed in *Blue:*

> uniquely "charged with emotion."

(*Blue, supra*, 724 N.E.2d at p. 934.) It is the apotheosis of the sort of evidence that would "uniquely tend to evoke an emotional bias" in a trial involving the killing of a law enforcement officer. One could hardly imagine a more prejudicially inflammatory piece of evidence in such a case.

The Deputy Riches mannequin could not have been more effectively designed to accomplish the purpose of inviting an irrational, purely subjective response. In view of its minimal evidentiary value in comparison with its heightened inflammatory potential, the trial court could not "reasonably conclude" that the probative value of the Deputy Riches mannequin was not substantially outweighed by the high likelihood of extreme and unfair prejudice.

E. Because The Federal Constitutional Violations Were Expressly Raised In the Trial Court, There Was No Waiver, And Respondent Fails to Address the Substance of theConstitutional Violations in Admitting the Deputy Riches Mannequin.

The State argues that appellant has forfeited his Eighth and Fourteenth Amendment claims as to the erroneous admission of the mannequin by failing to object below. (RB 90.)

This is not correct. In addition to objecting that admission of the mannequin would violate the Evidence Code, Mr. Steskal *expressly* raised his federal constitutional claims below, via a written motion in limine to exclude the mannequin, as well as other items, which was specifically based on, inter alia, the federal rights to due process and to a reliable sentence and verdict under the Fifth, Sixth, Eighth and Fourteenth Amendments. (9 CT 2359, 2373; 9 CT 2252, 2262-2263; see AOB 218.) This was clearly sufficient to preserve the federal constitutional objections for review. (*People v. Morris, supra,* 53 Cal. 3d 152, 190.[43]) Thereafter, on the record, defense

---

[43] *People v. Morris, supra,* 53 Cal.3d at p. 190, states:
[W]e hold that a motion in limine to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context.
Here, the motion in limine (1) raised specific constitutional grounds now raised on appeal, (2) was directed at particular evidence -- the mannequin -- and (3) was timely made in the trial court.

counsel renewed his objection "on all the grounds . . . previously raised." (20 RT 4010.)

Moreover, even if appellant had not raised express federal constitutional objections to the mannequin, the federal constitutional questions would still be preserved for appeal due to his Evidence Code section 352 objection. (See *People v. Partida, supra,* 37 Cal.4th 428, 437-439 (objection under Evidence Code section 352 sufficient to preserve the claim that the error violated the Due Process Clause of the Fourteenth Amendment); *People v. Moore* (2011) 51 Cal.4th 386, 407, fn. 6 (same re: Eighth Amendment because the "argument merely adduces another consequence, unreliability of the verdicts, to the [section 352] error.").)

Appellant has supported the constitutional claims with argument and citations to pertinent United States Supreme Court authority in the opening brief. (AOB 232-233.) Other than its meritless claim of forfeiture, and the bare assertion that application of the ordinary rules of evidence "generally does not impermissibly infringe upon a capital defendant's constitutional rights" -- a rote proposition which does not apply to this extraordinary and egregious error[44] -- the State offers no argument on the merits of the constitutional questions presented by the admission of the Deputy Riches mannequin.

---

[44] Obviously, the qualifier "generally" means that there will be exceptions.

F. The Deputy Riches Mannequin Was Highly Prejudicial.

Under the general federal constitutional test for prejudice set forth in *Chapman v. California*, *supra*, 386 U.S. 18, as well as the state standard for penalty phase prejudice, which this Court has made clear is just as rigorous, the penalty phase judgment must be reversed, as discussed in the opening brief. Under *Chapman*, the State -- as the "beneficiary of a constitutional error" must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.)

Chapman analysis requires review of the "whole record" on appeal. (*Yates v. Evatt, supra,* 500 U.S. 391, 409.)

Yet rather than attempting to show that admission of the Deputy Riches mannequin was harmless based on the entire record, the State makes a single -- and astonishingly counter-intuitive -- argument on the question of prejudice: the State argues that the Deputy Riches mannequin could not have been prejudicial because after the mannequin had been placed before the penalty phase jury, and used by the prosecution in his direct examination of the pathologist, defense counsel cross-examined the pathologist, and his answers with reference to the mannequin were "actually beneficial" to Mr. Steskal. (RB 90-91.)

Obviously, defense counsel did not agree that the Deputy Riches mannequin would be beneficial to the penalty phase defense, or he would not have moved to exclude it, and argued at length against its admission. It's a feat of the imagination to suppose that

any defense counsel in any penalty phase proceeding involving the homicide of a police officer would conclude that a life-sized mannequin of the deceased officer, with full facial features, and a uniform pierced through with trajectory rods, could ever be *helpful* to a penalty phase defense, let alone so helpful as to justify its admission.

Once the life-like, six-foot, six inch mannequin wearing Deputy Riches' bloodied, puke-stained uniform and his badge, had been placed in the courtroom and used by the prosecutor during his examination of the pathologist, defense counsel could no more ignore this overwhelming piece of evidence than could the jury.

Indeed, in closing argument the presence of the mannequin was so powerful and affecting that defense counsel, in arguing a life verdict for her client, reminded the jurors that this piece of evidence was not a human being:

> That manikin is not a 13th juror. That manikin is not Brad Riches. (36 RT 6863 (emphasis added).)

In any event, the State's sole argument founders on the record: the fact that trial counsel referred to the Deputy Riches mannequin during cross-examination of the pathologist does not demonstrate that the mannequin was "actually beneficial" to the defense. (RB 90.) In support of its claim, the State's brief, at RB 90-91, seizes on a portion of the cross-examination:

> [D]efense counsel asked the pathologist, "You would agree with me, that that number of rounds fired as reflected on that manikin [sic], might actually show the person that fired those rounds in the big picture here, was in fact mentally ill?" The

> pathologist replied, "yes." (20 RT 4038.) Defense counsel then asked, "And same question, not only was that person mentally ill, but that they were paranoid and delusional at the time those rounds were fired?" (20 RT 4038.) The pathologist answered, "yes." (20 RT 4039.)

But the point fails to withstand scrutiny. Even if the defense motion to exclude the Deputy Riches mannequin had been granted by the trial court, and the prosecutor had used instead the autopsy diagram used at the first trial in his examination of the pathologist, defense counsel, on cross-examination, could have asked *precisely* the same question of the pathologist, without using the words "as reflected on that manikin," and received *precisely* the same answer. The purpose of defense counsel's question on cross-examination of the pathologist was to show that *the number of rounds fired* could indicate an irrational, paranoid and delusional response to the situation by Mr. Steskal -- a point to which the mannequin was clearly not necessary.

The Deputy Riches mannequin provided zero benefit to the defense.

Of course, even if the mannequin *had* been beneficial to the defense in some small degree, that would not mean there could be no prejudice under *Chapman* or *Brown* arising from the erroneous ruling allowing its admission. The fact that a defendant may attempt to use a piece of improperly admitted yet devastating prosecution evidence to make a point on cross-examination is not an indication that the evidence had no inflammatory effect on the jury, let alone a demonstration that, beyond a reasonable doubt, the inflammatory evidence could not have affected the jury deliberations in a case that,

without the mannequin, had resulted in an 11-to-one deadlock in favor of a life sentence in a prior penalty phase trial. (6 CT 1446, 14 RT 2743-2744.)

As explained in the opening brief, this was not a case in which a jury's death verdict was a foregone conclusion -- or even, absent the mannequin, particularly likely. A compelling indicator of this is the fact that the first penalty jury divided 11-to-one in favor of the lesser sentence of life imprisonment for Mr. Steskal. (14 RT 2743-2744.)

The State does not even address the vote of the first jury, overwhelmingly in favor of life, or the resulting mistrial (6 CT 1445-1446), in its discussion of the prejudice arising from the Deputy Riches mannequin.

Nor does the State, despite its obligation of whole record review, even address the very lengthy jury deliberations in this case -- almost 16 hours over five days. (10 CT 2605 (December 8, 2003: 2 hours, 9 minutes); 10 CT 2606 (December 9, 2003: 4 hours, 58 minutes); 10 CT 2609-2610 (December 10, 2003: 4 hours, 52 minutes); 10 CT 2612-2613 (December 11, 2003: 3 hours, 0 minutes); 11 CT 2848 (December 12, 2003: 0 hours, 50 minutes).) As noted previously, this Court has found considerably less lengthy periods of penalty phase jury deliberations in other cases to be a strong indication of prejudice. In *In re Sakarias, supra,* 35 Cal.4th at p. 167, the Court found that just 10 hours of deliberation over three days was an important factor demonstrating prejudice from penalty phase error.

Nor does that State, despite the obligation of demonstrating the absence of prejudice on the entire record, even address the evidence revealing a very strong case in mitigation at the second penalty phase. Mr. Steskal was the victim of extreme, unremitting physical and emotional abuse from the age of three. The defense presented extensive, unrebutted evidence that Maurice Steskal suffered from severe, unrelenting mental illness from early childhood until the time of the events in this case, when he was thirty-nine years of age. Yet, despite his near-life-long severe mental illness, Maurice Steskal had no prior convictions for any crimes of violence; his only prior conviction was for a marijuana offense. Witnesses described him as a gentle person, and a hard-working employee, and someone who acted to aid those even less fortunate than himself. The evidence also shows that Mr. Steskal's preexisting delusional disorder was exacerbated into full-blown psychosis as a direct consequence of unprofessional, abusive and reprehensible conduct of members of the Orange County Sheriff's Department directed at him, including excessive force, after a stop for a seat-belt violation. (Exhibits 39, 39A.) Yet the State's prejudice analysis fails to mention any of this.

Nor does the State's discussion of prejudice address the inherently inflammatory nature of the Deputy Riches mannequin that was placed before the jury. As noted above, courts have recognized that the "bloody clothes" of a slain officer comprise evidence "uniquely 'charged with emotion.'" (*Blue, supra*, 724 N.E.2d at p. 934.)

But here, the mannequin was much more than the bloody

clothes of a slain officer.

The Deputy Riches mannequin, unlike the partial uniform on a headless torso in *Blue*, was a full-facial-featured, life-like mannequin in a complete law enforcement uniform, with pants, boots, belt and starred sheriff's badge, with a hairpiece, sky-blue eyes, and individual eyelashes. Unforgettable to anyone who lays eyes on the Deputy Riches mannequin, the mannequin of the slain deputy is pierced through with multiple bright pink trajectory rods, symbolically evoking the Christian martyr Saint Sebastian -- but even the Christian martyr was not wearing a badge and uniform.

The Deputy Riches mannequin used to obtain a death sentence in this penalty phase re-trial is much more extreme than any similar exhibit this or any Court has so far considered in a reported death penalty case -- so realistic and powerful that defense counsel had to argue to the jury:

> That manikin is not a 13th juror. That manikin is not Brad Riches. (36 RT 6863 (emphasis added).)

The effect is emotionally overwhelming.

The penalty phase judgment must be reversed.

X. BY AUTHORIZING THE JURY VIEW OF "A HORRIBLE PIECE OF EVIDENCE" -- DEPUTY RICHES' GUNFIRE-DEVASTATED PATROL VEHICLE -- THAT HAD NO PROBATIVE VALUE AS TO ANY DISPUTED ISSUE, THE TRIAL COURT COMMITTED PREJUDICIAL PENALTY-PHASE ERROR.

The opening brief showed that the devastated patrol vehicle, described by the trial court as a "horrible piece of evidence" (3 RT 492), had no probative value as to any *disputed* factual issue at the penalty phase retrial, and only marginal and cumulative probative value, if any, on undisputed issues. (AOB 237-240.) The State writes:

> Steskal claims the jury view [of the patrol car] was not relevant to any contested issue of fact at the penalty phase retrial. (AOB 237.) He is wrong.

(RB 92.) But the State's analysis fails to support its assertion.

The State claims the patrol vehicle was relevant under factor (a), allowing evidence of the circumstances of the crime, because it showed the number of shots fired into the patrol car, which in turn, according to the State, showed the manner of killing was so "'particular and exacting'" as to be indicative of premeditation and deliberation. (RB 92.)

As shown in connection with Issue IV, *supra* at pages 15-17, a large number of shots fired hardly meets the description of a "particular and exacting" manner of killing. That a large number of shots were fired, the evidence in this trial showed, is consistent with, and likely indicates, a hypervigilant, fight-or-flight response (11 RT

2029-2041, 28 RT 5485) -- essentially the opposite of a "particular and exacting" manner of killing.

And even if a large "number of shots" could demonstrate an "exacting" manner of killing in these circumstances, the vehicle itself was not significant to demonstrate the number of shots. There was testimony by a prosecution criminalist, a pathologist, and a ballistics expert that established, together with photos and other exhibits, the number of shots, and the specific trajectories of those shots and the particular wounds they caused. The jury view of the patrol vehicle had little if any probative value on the uncontested question of the number of shots fired.

The State also argues that the jury view of the vehicle "enabled the jurors to see that Deputy Riches was trapped inside the car" as Mr. Steskal began firing at him. (RB 92.) But there was, of course, no factual dispute that Deputy Riches was seated in his car when Mr. Steskal began firing at him.

The State does not attempt to show that the view of the patrol vehicle was not cumulative to the large quantity of other evidence the prosecution put before the second penalty phase jury concerning the immediate physical circumstances of the crime.

There was surveillance video from the 7-Eleven, in color, with sound, depicting the shooting as it happened, which was played four times for the jury. The evidence included the mannequin dressed in Deputy Riches' bloodied uniform, together with the testimony of a pathologist who described the wounds using bright pink trajectory rods inserted in the bullet holes (20 RT 4019-4034), the testimony of

Robert Bombalier, who was the first to approach the patrol car after the shooting, the testimony of Deputy Torres and Sgt. Acuna, the first officers to arrive, the testimony of criminalist Elizabeth Thompson, numerous photographs of the car, from various angles, and with trajectory rods in it, and more. (See AOB 237-240.)

In view of the quantity of evidence establishing the physical circumstances of the offense, the Court should recognize that the destroyed patrol vehicle had only marginal, cumulative and slight probative value as to undisputed issues at the penalty phase trial.

Against the marginal probative value of the patrol vehicle, relevant only to undisputed issues, the trial court had to weigh the potential for undue prejudice.

The State does not contest that the patrol vehicle was "a horrible piece of evidence." (3 RT 492.) It was not a photograph. It was not a realistic representation. It was the death chamber itself. This incontestably "horrible" evidence could only have a prejudicial effect, as shown in the opening brief. The trial court not only abused its discretion, which should clearly be exercised to exclude highly prejudicial evidence that is merely cumulative regarding an issue that was not reasonably subject to dispute, but also violated Mr. Steskal's federal rights to due process and a fair and reliable penalty phase, as shown in the opening brief.

The State claims Mr. Steskal did not preserve his federal constitutional issues at trial. (RB 94.) This is incorrect. After stating his California-law objection to the jury view of the destroyed vehicle, defense counsel added, "also I will be objecting on federal

due process grounds." (23 RT 4529.) Counsel explained the bases for his objections, then concluded: "I do think the prejudicial value outweighs the probative value, and I am objecting also on due process grounds." (23 RT 4534.) Clearly, the issue was preserved. The other federal constitutional claims are based on the additional consequences of the incorrect ruling, and are also preserved. (*People v. Moore, supra,* 51 Cal.4th at p. 407, fn. 6.)

For all the reasons previously discussed in the opening brief and this brief, this was a close case on penalty, and the verdict was far from certain. The State insists the view could not have been prejudicial, because "the view of the patrol car was brief, lasting only 10 minutes, and no additional testimony was taken in conjunction with the view." (RB 94.) But 10 minutes is more than enough time for such extreme, inflammatory, "horrible" evidence to have an unforgettable, emotionally-charged and unfair impact on the most important decision any juror ever makes. The State has failed to demonstrate the contrary. The risk of intolerably unfair prejudice is too high. The penalty judgment should be reversed.

XIII. THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF MR. STESKAL'S NONVIOLENT ATTEMPTED ESCAPE, AND INCORRECTLY INSTRUCTED THE JURY ON ATTEMPTED ESCAPE AND UNLAWFUL POSSESSION OF WEAPONS.

After Mr. Steskal's first penalty trial ended with a mistrial because the jury was unable to reach a verdict, jail officers entered his cell and found a 12-by-8-inch surface of the 24-inch thick cement cell wall chipped away, to a depth of about a third of an inch. (24 RT 4623-4624, 4690.) The officers found the tools used to chip away the wall underneath a blanket on Mr. Steskal's bed. As shown in the opening brief, the trial court erroneously admitted evidence of the escape, including the digging or scraping tools used by Mr. Steskal, torn bed sheets, and testimony by jail officers. (AOB 254-264.)

Evidence of other unadjudicated criminal activity can only be admitted when it involves the actual or attempted use of force or violence. "The evidence of [a] defendant's *nonviolent* escapes [is] inadmissible as an aggravating factor under section 190.3, factor (b): 'The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence ... .'" (*People v. Castaneda, supra,* 51 Cal.4th 1292, 1334 (original emphasis).)

But as shown in the opening brief, the only evidence about Mr. Steskal's use of the digging or scraping tools showed that he used them for only one purpose: to scrape at the wall of his cell. His was a *nonviolent* attempted escape.

There was no evidence that Mr. Steskal had (a) actually used

the tools with force or violence against another person, (b) attempted to do so, (c) threatened to do so, or (d) planned to do so.

The State's brief attempts to overcome this problem by repeating, twice, that the availability of an innocent explanation -- that is, one that does not involve any actual or attempted violence against a person -- "'merely raises an ordinary evidentiary conflict for the trier of fact.'" (RB 107, quoting *People v. Mason* (1991) 52 Cal.3d 909, 957.)

This would be true if, at trial, in opposition to the evidence showing Mr. Steskal used the tools only for scraping, the State had presented evidence, substantial enough to support a judgment, that Mr. Steskal had used or attempted or planned to use the tools to commit violence against another. There was no such evidence.

In support of its position that there was an "ordinary evidentiary conflict," the State points to the testimony of jail officers Saunders and LeGeyt.

Saunders testified that Mr. Steskal's cell was separated from the mechanical room by a 24-inch thick wall. If an inmate somehow gained access to the mechanical room, the inmate could, if small enough, climb into the ventilation shaft. At the top of the ventilation system, there were solid metal bars, three-quarters of an inch thick and about five inches apart, blocking access to the jail roof. If an inmate somehow overcame these obstacles, the inmate could get on the roof. If a person rappelled down the side of the jail from there, he would arrive in an area where officers frequently passed. (24 RT 4675-4687.)

LeGeyt testified that the two objects found in Steskal's cell could each be used as as tools, to chip away at a cement cell wall. (24 RT 4645.) LeGeyt also testified that the tools could be used as weapons. LeGeyt admitted that whether they *were* weapons depended on the intent of the person using them, and LeGeyt could not testify that either of these items were held by Mr. Steskal for use as weapons. (24 RT 4647.)

The prosecution *speculated* that Mr. Steskal intended to use the items not just as tools, and that somehow, improbably escaping by chipping through 2-foot concrete wall, and then shimmying up a narrow ventilation shaft to a rooftop barred by solid metal bars, Mr. Steskal could obtain access to the roof, from which he would rappel down the side of the jail, and then engage in a confrontation with officers, in which he intended to use his scraping and digging implements as weapons.

"Speculation, however, is not evidence." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th 826, 864.)

There was no "ordinary evidentiary conflict" regarding whether Mr. Steskal intended to use the tools as weapons in his escape. There was only speculation that he *might* use the tools as weapons in a likely-impossible James Bond scenario, and evidence that he did use the tools as tools. The evidence is legally insufficient to support a jury finding that, beyond a reasonable doubt, Mr. Steskal *did* intend to use the implements as weapons in his escape.

Mr. Steskal's attempted escape was not a crime of actual or implied threat of force or violence against a person, and the trial

court erred in admitting any evidence on the escape attempt, and instructing the jury on it.

As shown in the opening brief, the trial court's erroneous admission of the escape evidence, and its instructions regarding that evidence, also violated Mr. Steskal's rights to a fair trial and a reliable penalty phase under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 261-262.) The State claims the federal constitutional issues were forfeited, but they were not. The errors had the "additional legal consequence" of violating the federal constitution, and thus the federal constitutional claims are properly considered on appeal. (*People v. Partida, supra,* 37 Cal.4th 428, 429-436 (federal due process claim not forfeited).)

The State cannot satisfy the harmless error standard of *Chapman*, or the penalty phase error standard of prejudice under state law, which is essentially the same. The record shows, by strong objective indicia, that this was a close case. The prior jury had deadlocked at the penalty phase, on a vote of eleven-to-one in favor of life imprisonment. The second penalty phase jury deliberated for a lengthy period of time, as discussed above. The case in mitigation was strong.

Moreover, as set forth in the opening brief, the prosecutor made repeated references in his penalty phase closing argument to the evidence of Mr. Steskal's escape attempt and alleged weapon possession. (AOB 264.) The State says nothing about this in its brief. But at trial, in closing argument to the jury, the prosecutor used this evidence, together with the testimony of Dr. Pettis, to argue

future dangerousness. (36 RT 6830-6831.) And the prosecutor told the jurors that the escape and weapon evidence was:

> very aggravating. Very, very aggravating. (36 RT 6846.)

There is clearly more than a reasonable possibility that this evidence had precisely the "very, very aggravating" impact the prosecutor told the jurors it should have. The penalty phase judgment should be reversed.

XV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Appellant has argued that specific portions of California's capital sentencing scheme violate the United States Constitution. (AOB 272-306.) One aspect of that argument warrants further discussion. That is the impact of *Hurst v. Florida* (2016) ___ U.S. ___ , 136 S.Ct. 616, 193 L.Ed.2d 504, which reinforces appellant's claims that jurors must make each penalty phase finding using the beyond-a-reasonable-doubt standard and that prior criminality must be found by a unanimous jury. (AOB 278-298.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 530 U.S. 584, 504, and *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. This Court has has held that these cases have no application to California's capital sentencing scheme because the death penalty decision is "normative" rather than "factual," and any finding of aggravating factors does not increase the penalty for the crime beyond the maximum penalty set by statue. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.)

Recently, the United States Supreme Court invalidated Florida's death penalty statute because the judge, not the jury, made the factual findings that were required before the death penalty

could be imposed. (*Hurst v. Florida, supra,* 136 S.Ct. 616, 624.) Under the Florida law then in effect, a defendant was eligible for death upon conviction by a jury of a capital crime, but could not be sentenced to death without additional findings by the trial judge that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances". (*Hurst, supra,* 136 S.Ct. at p. 622.) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Hurst, supra,* 136 S.Ct. at p. 622.)

California law is similar to Florida's in that a death sentence may be imposed only if the sentencer finds "the aggravating circumstances outweigh the mitigating circumstances." (Penal Code section 190.3.) Although *Hurst* did not address the standard of proof to be applied in Florida, the Court made clear that the weighing decision is within the ambit of *Ring*. (*Hurst, supra,* 136 S.Ct. at pp. 621, 622.).

Moreover, the constitutional imperative for juror determination of factual issues is not affected by whether the decision is "normative" instead of "factual." The terms are simply labels attached to the process by which the jury comes to a conclusion. California cannot evade the Constitution simply by ascribing a label to a question that must be part of the jury's determination. (*Ring v. Arizona, supra,* 536 U.S. at p. 602).

Ring, *Apprendi*, and *Hurst* confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence

of death must be made beyond a reasonable doubt by a unanimous jury, and any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. This Court should reconsider its holdings that California's death penalty scheme comports with the principles set forth in *Apprendi*, *Ring*, *Blakely* and *Hurst*.

PART TWO

THE DEATH PENALTY IS UNCONSTITUTIONAL.

I. This Case Presents A New Question.

This case presents a *new* question that could not have been asked, much less answered, even a few years ago.

The question is whether, in light of what we now know about the death penalty after forty years' experience under *Gregg v. Georgia* (1976) 428 U.S. 153 -- including a new body of empirical knowledge that did not previously exist -- the death penalty is no longer consistent with the "evolving standards of decency that mark the progress of a maturing society," and now violates the Eighth Amendment.

The State of California does not deny that it is the role of the judiciary to interpret constitutional provisions, including the Eighth Amendment's Cruel and Unusual Punishments Clause. Nor can the State deny that, on its face, *Gregg* was a time-limited decision, based on knowledge about the death penalty as it then stood in 1976, and recognizing the eventuality of its own obsolescence. *Gregg* was not a decision for all time.

Instead, the State resorts to the classic debater's tactic when confronted with a question one cannot answer: change the subject, and answer a different question.

Thus, the State misdescribes the second supplemental brief as "raising additional challenges to the constitutionality of California's death penalty laws." (RSB 1.)

But nothing in that brief is focused on California's death penalty laws. The challenge is a categorical one, not dependent on the specifics of California law.

The State further mischaracterizes the second supplemental brief as consisting of "well-worn, previously rejected challenges" (RSB 1) -- thus failing to admit, much less come to grips with, the real, newly-developed Eighth Amendment question presented.

Justices Breyer and Ginsburg have newly placed on the table the fundamental question of capital punishment's constitutionality in light of new knowledge about the death penalty's real-world application. (*Glossip v. Gross* (2015) 576 U.S. ___, 192 L.Ed.2d 761, 793, 135 S.Ct. 2726 (Breyer, J., dis. opn.).) Already, the Supreme Court of Connecticut has engaged with this newly-reopened question, striking down Connecticut's death penalty in *State v. Santiago* (Conn. 2015) 318 Conn. 1, 122 A.3d 1.

This Court, which has a national leadership role in the area of capital punishment, should engage the question now, and hold that the death penalty violates the Eighth Amendment.

This brief addresses the most salient arguments and omissions of Respondent's Supplemental Brief; it does not exhaustively answer every argument and sub-argument made by the State, many of which have been anticipated and answered in the Second Supplemental Brief itself, or purport to refute arguments appellant has not actually made.

II. Death Sentences for the Innocent.

Our capital punishment system regularly, foreseeably sentences innocent people to die, and almost certainly executes some innocent people. The Supreme Court of Connecticut has recognized there is a "near certainty that innocent Americans have been and will continue to be executed in the post-*Furman* era." (*State v. Santiago*, *supra*, 318 Conn. at p. 104.) Appellant's argument is substantiated by a major study published by the multidisciplinary peer-reviewed journal of the National Academy of Sciences two years ago, in 2014. (2ASB 18-22, 61-63.)

The National Academy of Sciences study reviewed the total group of 7,482 persons sentenced to death in the U.S. from 1973 to 2004. During that period, 117 defendants, or about 1.6%, were exonerated -- not just removed from Death Row, but found not legally culpable for the offenses for which they were sentenced to pay with their lives. The study used survival analysis -- the generally-accepted statistical methodology used in medicine and public health to measure, for example, the effectiveness of a new treatment in a population of seriously-ill patients -- to make a "conservative estimate" with a high degree of confidence that "if all death-sentenced defendants remained under sentence of death indefinitely, at least 4.1% would be exonerated." (Samuel R. Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death* (2014) 111 Proceedings of the National Academy of Sciences of the United States of America 7230, 7230 [hereafter, "National Academy of Sciences study"].)

In response, the State of California: (1) attacks the empirical evidence; and (2) relies on the claims regarding innocence in a separate opinion of Justice Scalia.

(1) First,

> Steskal ... assert[s] that innocent people are "regularly" sentenced to death in the United States. (2d. Supp. AOB. 16.) He recites a rate of "wrongful conviction of innocent persons in capital cases" of 4.1 percent, and cites as authority for that proposition a dissenting opinion by Justice Breyer. (2d Supp. AOB 17, citing *Glossip v. Gross, supra*, 135 S.Ct. at p. 2758 (dis. opn. of Breyer, J.).) This estimate, however, rests with studies and articles [sic] that have been the subject of criticism both in terms of methodology and conclusions being drawn. (RSB 2.)

The wrongful conviction rate of 4.1 percent in capital cases is not an estimate by Justice Breyer -- it is the finding of a peer-reviewed study published in one of the world's foremost multidisciplinary scientific journals just two years ago, as noted above.

Though the State asserts that the study has "been the subject of criticism both in terms of methodology and conclusions being drawn" (RSB 2), the State does not identify *any* criticism of the methodology or conclusions of this peer-reviewed study.

While the National Academy of Sciences study was discussed by Justice Breyer in *Glossip*, 192 L.Ed.2d at p. 797, and Justices Scalia and Thomas each responded in detail to his dissent, neither made any mention of the study.[45]

---

[45] In a footnote, the State insists that "[t]he sources of support for Steskal's assertion that the death penalty is regularly being imposed on innocent persons are not properly subject to judicial

It has been more than two years since release of this peer-reviewed study of 7,482 Death Row convictions from 1973 to 2004. The State's assertion that the National Academy of Sciences study has been criticized for its methodology is unsupported.

The State assails the very significance of exoneration, arguing that exoneration does not necessarily mean a defendant is actually innocent, only "legally innocent." (RSB 3-4.) The State claims it is incorrect to "equate exoneration, wrongful convictions and failures of proof with innocence." (RSB 3.)

---

notice since the facts and propositions in question are reasonably subject to dispute." (RSB 2 fn. 1.)

But the State does not specify *what* "facts in question" it believes are "reasonably subject to dispute."

People v. Seumanu (2015) 61 Cal.4th 1293 is instructive. There, the Court took judicial notice of facts and propositions contained in official reports of government bodies, and articles by legal writers and scholars. The Court found that declarations submitted in a federal court case by a lawyer for capital defendants were not in the same category. But even as to facts stated in those lawyer declarations, because the State "d[id] not contest the accuracy of these alleged facts," the Court presumed the facts were accurate. (*Id.* at p. 1373; see Cal. Law Revision Com. comment to Evidence Code section 450, second paragraph (1965) ("[t]hat a court may consider ... treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials is inherent in the requirement that it take judicial notice of the law.").)

Because the State has not identified any facts it disputes relating to the rate of false convictions of death-sentenced defendants and because the materials cited are of a sort appropriately considered by the Supreme Court and this Court in deciding constitutional questions, the State's objection should be denied.

The National Academy of Sciences study explains:

> Because there is no general method to accurately determine innocence in a criminal case, we use a proxy, exoneration: an *official determination* that a convicted defendant is *no longer legally culpable for the crime* for which he was condemned.

(National Academy of Sciences study, *supra,* at p. 7234 (emphasis added).) An official determination that a person sentenced to death is "no longer legally culpable" can be an acquittal of all charges factually related to the crime for which the person was originally convicted, a dismissal by a court or prosecutor of all charges related to the crime, or a complete pardon by a governor. (See National Registry of Exonerations, *Glossary*, http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited Sept. 22, 2016).)

At a minimum, an "official determination" of no legal culpability cannot reasonably be regarded as anything less than an extraordinarily strong proxy for innocence, if not a perfect one.[46]

The State posits a gulf between actual innocence and legal innocence. But if there is in reality any set of Death Row inmates who have been found "legally innocent" and relieved of all consequences, but who are not "actually innocent," it is miniscule. (See National Academy of Sciences study, *supra,* at p. 7234 ("We

---

[46] The National Academy of Sciences study observes:

> Exonerations and the processes that produce them are ... the best source of the information we have about the accuracy of our system of criminal adjudication, and the only source of direct evidence about the error we most want to avoid: convicting the innocent.

(National Academy of Sciences study, *supra,* at p. 7230.)

expect that such errors are rare, given the high barriers the American legal system imposes on convicted defendants in persuading authorities to reconsider their guilt").)

The State points out that the National Registry of Exonerations counts as an exoneration a decision to relieve a Death Row defendant from all legal consequences after new evidence of innocence is discovered, but does not require that the decision to exonerate a defendant be made because of innocence. (RSB 4.) And the State speculates that some Death Row exonerees may not be innocent:

> There may be other reasons, such as due process or fair trial concerns, which move a court to grant complete relief from a conviction without regard to guilt or innocence .... (RSB 4)

This speculation is backed up by no apparent logic, and no specifics.[47]

When an American court determines a defendant has been denied a fair trial, as this Court knows well, it reverses the judgment, but does not exonerate the defendant.

The State's only legal authority in support of its assertion, *Giglio v. United States* (1972) 405 U.S. 150, fails to support it. (RSB 4.) *Giglio* did not involve a decision to grant "complete relief ... without regard to guilt or innocence." Instead, reversing a judgment of conviction for passing forged money orders, *Giglio* found that due

---

[47] Moreover, the State's argument underscores its assumption that "due process or fair trial concerns" are insufficient to undermine the reliability of the death penalty system.

Appellant strongly disagrees. The reliability of capital sentencing is profoundly important.

process "require[s] a new trial ...." (*Id.* at p. 155.)

Most important, the State's argument is, fundamentally, beside the point.

Even if exoneration means only legal innocence and not actual innocence, the National Academy of Sciences study demonstrates, using the rate of death sentences imposed on defendants who were later found legally innocent, that the rate of "legally innocent" defendants sentenced to death in the United States is 4.1 percent.

The State has offered no sound reason to question this peer-reviewed, conservative estimate. It offers no meaningful methodological critique, and cites no contrary studies or published criticisms.

Instead, the State relies, heavily, on a separate opinion of Justice Scalia in a decade-old case, quoting language from it four times. (RSB 2-5.)

(2) The State's reliance on Justice Scalia's analysis is unfounded.

In *Kansas v. Marsh* (2006) 548 U.S. 163, Justice Scalia, joined by no other Justice, expressed forcefully his view that exoneration of defendants on Death Row was "a vindication of [the] effectiveness" of the "capital justice system ...." (*Id.* at p. 194 (Scalia, J., conc. opn.).) Justice Scalia insisted that the "possibility" that "someone will be punished mistakenly" by death had been "*reduced to an insignificant minimum.*" (*Id.* at p. 199 (emphasis added).)

Justice Scalia based his judgment about wrongful executions

on an estimate made by a prosecutor of the rate of false convictions in all felony cases -- 0.27 percent -- that has been shown to incorporate elementary statistical mistakes leading to "ludicrously low wrongful conviction rates." (D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate* (2007) 97 J. Crim. L. & Criminology 761, 767, 771 & fn.17 ("The news about the astounding accuracy of felony convictions in the United States, delivered by Justice Scalia ... would be cause for rejoicing if it were true."); see *Kansas v. Marsh, supra*, 548 U.S. at pp. 198-199 (Scalia, J., conc. opn.).)[48]

Justice Scalia did not consider that apart from the falsely convicted who are exonerated, there are the falsely convicted who are not exonerated: those whose die in prison from natural causes,

---

[48] Justice Scalia's rate of false convictions -- 27 per 100,000 -- is "derived by taking the number of known exonerations at the time, which were limited almost entirely to a small subset of murder and rape cases, using it as a measure of all false convictions (known and unknown), and dividing it by the number of all felony convictions for all crimes, from drug possession and burglary to car theft and income tax evasion." (National Academy of Sciences study, *supra,* at p. 7230.)

To use exonerations as the basis for a numerator representing all false convictions is to uncritically assume that the rate of false convictions for felonies such as passing bad checks or felony drunk driving is the same as the rate for crimes such as murder, and further to speculate about the ratio of known exonerations to unknown false convictions. And to use as the denominator all felony convictions of all types is to assume a false equivalence of all felonies as to exoneration rates, when in many felony contexts involving shorter terms, for example, there is little reason to ever pursue exoneration. Moreover, this approach completely fails to take into account that exonerations are a function of time. Justice Scalia's methods were rejected by the National Academy of Sciences study. (*Id.*)

prison violence or suicide; those who have sentences reversed and then receive lesser sentences, and for whom legal efforts end; and those who, no matter how factually innocent, cannot develop the evidence to prove it to the high degree of certainty required to persuade courts, governors or prosecutors' offices that a defendant who was sentenced to death should now be fully exonerated. In given cases, proof may not exist; witnesses may have died, physical evidence may have been destroyed, or degraded by time, false witnesses may refuse to recant, and so on. The judicial system does not, and cannot, uncover and correct every error leading to a wrongful death sentence. Some "legally" innocent defendants remain on Death Row.

Even when exonerating proof exists, and *might* be discovered, our legal system cannot guarantee that every wrongful conviction in a death-sentence case *will* be recognized and corrected in time. The role of sheer chance in human affairs, and the available evidence, show otherwise. A study of the cases of the 13 men sentenced to death in Illinois in 1977-2000 who were exonerated sought to determine whether exoneration indicated the system was effective. It concluded:

> It is clear ... that these cases cannot reasonably be interpreted as demonstrating that the system works well at uncovering wrongful convictions. Ten of the 13 cases are the clear products of extrinsic fortuities leading to exoneration. Without these miracles, the system would have killed innocent prisoners.

(Lawrence C. Marshall, *Do Exonerations Prove That "The System Works?"* (2002) 86 Judicature 83, 89.)

Yet, quoting amply from Justice Scalia's opinion in *Kansas v. Marsh*, the State insists that exonerations are

> confirmation that the system does *ensure the reliability* [appellant] claims to be lacking. (RSB 5 (emphasis added).)

The State thus takes the position, with Justice Scalia and based on his reasons, that the capital justice system is so "effective" that either no one who is innocent, or only an "insignificant minimum" of innocent people, are actually executed.

While the State notes that two executions of innocent men mentioned by Justice Breyer happened before *Gregg* was decided, the State says nothing about the other men Justice Breyer named with "convincing evidence" of innocence, Cameron Todd Willingham and Carlos DeLuna. (*Glossip, supra,* 192 L.Ed.2d at pp. 794, 796 (Breyer, J., dis. opn.).) Both were executed, post-*Gregg*, for crimes they very likely did not commit. (*Id.*)

If the State does not contend the capital justice system never makes mistakes, then it necessarily must mean that there is some minimum number of executions of innocent people that the State believes is constitutionally permissible -- an "insignificant minimum." (*Kansas v. Marsh, supra*, 548 U.S. at p. 199 (Scalia, J., conc. opn.).)

But the State does not specify, precisely, the "insignificant minimum" number of innocent people it would be constitutionally acceptable to execute, or why that number is justified.

When at least one in 25 persons sentenced to death is not

culpable for the crimes for which the death sentence was imposed, the capital justice system is *unreliable* to a degree that would be beyond unacceptable in other life-threatening contexts.

A false conviction is a serious accident. Imagine if one out of every twenty-five airline flights crashed, or one out of twenty-five new buildings collapsed. No one would call the system that produced those results "reliable."

Further, a system that regularly sentences to death people who are innocent of the crimes for which they are convicted comes very close to murder itself. (*Santiago*, *supra*, 318 Conn. at p. 106 ("the legal and moral legitimacy of any future executions would be undermined by the ever present risk that an innocent person will be wrongly executed.").)

III. White Lives Matter More.

Race profoundly influences the death penalty in America. (2ASB 25-35.)

White lives matter more. The evidence of over forty years demonstrates that the race of victims has played, and continues to play, a substantial role in who is charged with capital offenses, and who is sentenced to death.

This reality was confirmed by a 1990 U.S. Government study that reviewed all other studies. (U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990) p. 5.) This truth has been further "confirmed in fifteen addition studies conducted during the 1990s, and many more

published since 2000." (*State v. Santiago, supra*, 122 A.3d at pp. 92-94 (conc. opn. of Norcott and McDonald, JJ.) (collecting studies); see Steven F. Shatz and Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study* (2013) 34 Cardozo L. Rev. 1227, 1245-1251 (same conclusion drawn from over 20 studies conducted between 1990 and 2013).) The race-of-victim effect is amplified by the race-of-defendant effect. (*Id.*) A racial hierarchy results.

Non-white defendants who murder white victims receive death sentences at the highest rate; white defendants who murder white victims receive death sentences at a lower rate; and non-white defendants who murder non-white victims receive death sentences at the lowest rate. These patterns of racial stratification in capital sentencing appear in Western states such as California as well as the Midwest and the South. (2ASB 25-29.)

In the face of the overwhelming, repeatedly-validated evidence, the State does not dispute the reality or the extent of the invidious, pervasive influence of race on who is selected to die.

Instead, the State relies on *McCleskey v. Kemp* (1987) 481 U.S. 279 and cases following it, holding that a statistical showing of racial disparities in capital charging or sentencing decisions will not suffice to show intentional racial discrimination in a particular case. (RSB 6-7.)

But the State's argument actually supports appellant's point: in nearly thirty years, it has proven, as a practical matter, *impossible* to show racial motivation in capital charging or sentencing decisions

that would invalidate a death sentence under *McCleskey*. (2ASB 32-33.) There is apparently not a single reported decision holding the requirements of proving purposeful discrimination under *McCleskey* have been satisfied. (See *Evans v. State* (Md. 2006) 396 Md. 256, 914 A.2d 25, 66 ("Since *McCleskey*, no court has allowed a claim of this kind.").)

The regime of *Gregg* and *McCleskey*, and the other doctrines intended to combat racial prejudice in the criminal justice system, have proven ineffectual in eradicating the persistent evil of race bias in capital punishment.[49]

The Second Supplemental Brief also demonstrated that racial bias in death penalty charging and sentencing cannot be eliminated under the capital justice system. (2ASB 31-35.)

Individualized sentencing discretion is central in the capital jurisprudence of *Gregg,* and prosecutorial discretion is a structural

---

[49] The State quotes *People v. Montes* (2014) 58 Cal.4th 809. (RSB 6-7.) *Montes* found that a study showing racially-disparate capital charging decisions in a single county during a two-year period was insufficient to demonstrate racial discrimination, because it did not consider the case characteristics of the homicides, but only considered race. (*Id.* at p. 831.)

But under *McCleskey*, a showing that included the dimension the *Montes* study omitted will *still* not suffice to demonstrate a constitutional violation.

In *McCleskey*, the Supreme Court considered a study that *did* take into account the case characteristics of various homicides -- "taking account of 230 variables that could have explained the disparities on nonracial grounds" -- and adjusted for them through multivariate regression analysis. (*McCleskey, supra,* 481 U.S. 279, 287 & fn.5.) The Court did not question the validity of the analysis, but instead rejected it as legally insufficient.

aspect of our criminal justice system. (2ASB 33-35.) The discretion of prosecutors to seek a death sentence or not, and the "unfettered discretion" of juries to impose death or not, "inevitably open the door to impermissible racial and ethnic biases." (*State v. Santiago, supra*, 122 A.3d at p. 13.)

The influence of race in capital sentencing persists. When discretion exists, there is room for the operation of bias, both explicit or conscious, and -- far more pervasive -- implicit or unconscious bias. White lives are valued more highly. Unconscious white favoritism persists, and is magnified in death-qualified jury pools. (See Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States* (2014) 89 N.Y.U. L. Rev. 513, 564.)

Implicit bias is deeply rooted in human culture and the unconscious, manifesting even in children. (2ASB 31 fn.10.) If it is not ineradicable, it will not be soon be eradicated.

The persistent, likely ineradicable influence of race on who is sentenced to die strips the death penalty of any jurisprudential legitimacy.

Despite our profound national commitment to equal justice, the judicial branch may reluctantly tolerate some racial disparities in the justice system. But death really is unlike any other punishment. It is a casting-out from the human community, the negation of personhood, and the extinguishment of life. Any argument that the death penalty serves a legitimate retributive function has to be based on the imposition of death under only objective, neutral criteria. The

race of the victim and the race of the defendant are not such criteria.

As a result of largely unconscious racial bias, the populations of our Death Rows have been skewed toward those whose victims are white, and who themselves are not. This is as fair as casting a pair of weighted dice, or a jury instruction on properly counting the race of the victim as an aggravating factor, but only if the victim is white.

IV. The Failure of Deterrence.

The Supreme Court has determined that the death penalty must "measurably contribute" to one or both of the penological goals of deterrence or retribution. Otherwise, it fails the Eighth Amendment. (*Atkins, supra*, 536 U.S. at p. 319.)

As shown in the second supplemental brief, forty years of experience comprising the American experiment in capital punishment have now generated a substantial body of data, and numerous efforts have been made to demonstrate the reality, and extent, of any deterrent effect of capital punishment on homicide rates. (2ASB 47-53.)

Those efforts have failed. The National Research Council convened an independent committee to study whether the available data, and a review and analysis of all the previous research, supports the conclusion that the death penalty has a deterrent effect. The findings of this committee in a comprehensive report, published by the National Academy of Sciences in 2012 and surveying 30 years, were that there was *no evidence* the death penalty had or did not have any deterrent effect. (National Research Council, *Deterrence*

and the Death Penalty (D. Nagin & J. Pepper eds. 2012) 2, 3.)

There is unlikely to ever be any proof of the deterrence hypothesis. "[T]he consensus among criminologists is that the death penalty does not add any significant deterrent effect above that of long-term imprisonment." (Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists* (2009) 99 J. Crim. L. & Criminology 489, 504.)

The State disputes none of this. It makes no attempt to show that capital punishment deters homicides. It does not contest the National Research Council's report.

Instead the State relies on the three-Justice lead opinion in *Gregg* for the proposition that the matter of deterrence "properly rests with the legislatures ...." (RSB 10, quoting *Gregg*, *supra*, 428 U.S. at p. 186 (Stewart, Powell, and Stevens, JJ.).)

But the Supreme Court's later cases demonstrate that the question whether a punishment challenged under the Eighth Amendment measurably contributes to the objective of deterrence is a proper *judicial* inquiry, to be informed by real-world, empirical knowledge. In *Thompson v. Okla.* (1988) 487 U.S. 815, 837, for example, the Court, analyzing whether applying the death penalty to offenders under the age of sixteen measurably contributed to the social purpose of deterrence, looked to Department of Justice statistics, and concluded on the basis of the statistical evidence that it did not. In *Atkins*, *supra*, 536 U.S. at pp. 319-321 the Court looked to clinical knowledge regarding the intellectually disabled in determining that deterrence would not be meaningfully served by

capital punishment. And in *Glossip*, four Justices in two separate opinions considered whether the empirical evidence showed the the death penalty had a deterrent effect. (*Glossip*, *supra*, 192 L.Ed.2d at p. 786 (Scalia, J., conc. opn.); p. 807 (Breyer, J., dis. opn.).)

The State avoids discussing whether the death penalty "measurably contributes" to deterrence for a good reason. After forty years of experience and extensive study, there is no proof that capital punishment is an effective deterrent, and it is unlikely there will ever be any.

V. The Failure of Retribution.

The failure of deterrence leaves retribution as the only remaining Eighth Amendment justification for capital punishment.

The Supreme Court recognizes two retributive justifications for capital punishment -- the communicative-purpose rationale, and the community-centered hypothesis. (*Panetti v. Quarterman* (2007) 551 U.S. 930, 958; 2ASB 55-60.)

The second supplemental brief showed why the communicative-purpose rationale, aimed at assuring the offender realizes the gravity of his crime, is at once underinclusive, overinclusive, and speculative in advancing that objective. And the brief pointed out that the community-centered theory of retribution incorrectly presumes that capital punishment is the most serious punishment that can be imposed, and rests, entirely, on circular reasoning. Neither rationale can survive constitutional scrutiny. (2ASB 55-60.)

The State makes no attempt to defend these retributive rationales.

Even if the two retributive rationales for capital punishment could be defended as conceptually coherent and valid under the Eighth Amendment, they would nevertheless be invalidated by the death penalty's real-world application under *Gregg*. The systemic problems of the capital justice system vitiate any claim that the death penalty "measurably contributes" to retributive purposes. (2ASB 60-67.)

As with deterrence, the Supreme Court's cases show that the the Eighth Amendment requires judicial "independent judgment" in determining whether a challenged punishment measurably contributes to retribution. (See *Panetti, supra*, 551 U.S. 930, 958-960; *Roper, supra*, 543 U.S. at p. 571; *Atkins, supra*, 536 U.S. at p. 319.)

For the reasons shown in the second supplemental brief, and in the absence of any contrary reasons advanced by the State, this Court should conclude that capital punishment no longer "measurably contributes" to the penological goals of deterrence or retribution. (*Atkins, supra*, 536 U.S. at p. 319.)

VI. Unusual Punishment: The Declining Use of the Death Penalty.

The steep decline in the use of the death penalty in the United States shows that the death penalty has become increasingly unusual, arbitrary and cruel. (2ASB 68-74.)

The State deemphasizes the fact and extent of the death penalty's decline. It point out that 31 states plus the federal government and the federal military have the death penalty available on the statute books. (RSB 11.)

That figure is now 30. In August 2016, the Delaware Supreme Court held the state's capital sentencing procedures unconstitutional, striking down Delaware's death penalty statute. (*Rauf v. State* (Del. 2016) 2016 Del. LEXIS 419.)

Now, eight fewer states retain the death penalty than the 38 that did when this Court last considered the constitutional question, in 2005. (*People v. Moon, supra*, 37 Cal.4th at p. 48.)

Notably, 30 states now allowing the death penalty, in theory, is substantially fewer than the 39 states that allowed life-without-parole sentences for juveniles in non-homicide cases when the Supreme Court struck that penalty down. (See *Miller v. Alabama* (2012) 567 U.S. ____, 183 L.Ed.2d 407, 132 S.Ct. 2455, 2471, discussing *Graham v. Florida, supra*, 560 U.S. 48.)

Further, as the Supreme Court has repeatedly emphasized, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." (*Roper, supra,* 543 U.S. 551, 565, quoting *Atkins, supra.*) The rate and direction of change show the death penalty is increasingly unusual.

Actual state practice matters. (See *Graham v. Florida, supra,* 560 U.S. 48, 63-64 (reviewing statistics concerning number of juvenile nonhomicide offenders serving sentences of life imprisonment without parole); *Kennedy v. Louisiana, supra*, 554

U.S. 407, 433-434 (reviewing statistics about number of executions of child rapists to determine if such punishment is socially unacceptable).) Three criteria are telling.

(1) The State cannot dispute that the number of states conducting executions is fewer.

Now, eleven states that have the death penalty on their books have not conducted a single execution in at least 10 years. (DPIC, *Searchable Execution Database*, http://www.deathpenaltyinfo.org/views-executions (last visited Sept. 20, 2016).)[50] Nor have the U.S. Government or the U.S. Military. (*Id.*) In three additional states, moratoria are in place. (2ASB 72.)

Adding the 20 states plus the District of Columbia that have abolished the death penalty to the eleven states and two federal jurisdictions that have the death penalty but have not executed anyone in more than 10 years and the three states with moratoria, thirty-seven American jurisdictions, a clear majority, either prohibit the death penalty, or no longer regularly use it.

(2) The State cannot dispute that the number of executions is

---

[50] The State asserts there have been no executions in California in more than 10 years because the courts have rejected the State's lethal injection protocol. (RSB 11.) Nothing prevented the State from promptly complying with its legal obligations, or adopting another method of execution; there is no way of knowing whether any executions would have occurred if it had. In any event, in considering actual state practice nationwide, what is important is not the variety of reasons any one state might have for its practice, but whether the punishment itself has, in reality, become infrequent and "unusual."

diminishing, steeply, as shown in the second supplemental brief. (2ASB 73.)

From a high of 98 executions in the United States in 1999, in this century the number peaked at 85 executions in 2000. It has dropped drastically since then. (DPIC, *Facts About the Death Penalty*, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Sept. 20, 2016).) In 2015, there were 28 executions, a new low for the century. (*Id.*)

In 2016, there have been 15 executions as of the second half of September. (DPIC, *Execution List 2016*, http://deathpenaltyinfo.org/execution-list-2016 (last visited Sept. 20, 2016).)

(3) Nor can the State dispute that death sentences -- perhaps the most telling factor -- are steeply in decline.

Death sentences have reached a forty-year low. Capital sentences are down from a high of 315 imposed in 1996 to just forty-nine imposed in 2015. (DPIC, *Death Sentences in the United States From 1977 By State and By Year*, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited Sept. 20, 2016).)

Now, after more than 200 years of American history, and four decades after *Gregg*, the death penalty is not just arbitrary, unreliable, and cruel -- it is unusual.

CONCLUSION.

For the foregoing reasons, and those discussed in appellant's opening and supplemental briefs, the Court should reverse Maurice Steskal's judgment of conviction and sentence of death.

DATE: September 25, 2016 Respectfully submitted,

GILBERT GAYNOR
Attorney for Appellant
Maurice G. Steskal

CERTIFICATE OF WORD COUNT

I certify that the forgoing Appellant's Reply Brief contains 47,342 words, exclusive of tables, according to the word-count feature of OpenOffice.

DATE: September 25, 2016 Respectfully submitted,

GILBERT GAYNOR
Attorney for Appellant
Maurice G. Steskal

PROOF OF SERVICE

I, Gilbert Gaynor, am an attorney, over the age of 18 years and not a party to the within action. My business address is Gilbert Gaynor, Cal. Bar No. 107109, Law Office of Gilbert Gaynor, 244 Riverside Drive, No. 5C, New York, NY 10025-6142.

On Sept. ___, 2016, I served the document entitled APPELLANT'S REPLY BRIEF by placing true and correct copies of the documents in envelopes addressed as indicated on the attached Service List.

X (BY US MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at New York, NY, in the ordinary course of business.

__ (BY FEDERAL EXPRESS) I placed such envelope in the federal express drop off on September 25, 2016 for delivery the next business day.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on Sept. ___, 2016 at New York, NY.

_____

Gilbert Gaynor

SERVICE LIST

California Appellate Project
Attn: M. Garelick, Esq.
101 Second Street, Suite 600
San Francisco, CA 94105

Maurice Gerald Steskal, V-23820
CSP-San Quentin
Housing Unit, Cell # 5-EY-23
San Quentin, CA 94974

ATTORNEY GENERAL'S OFFICE
Kelley Johnson, Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101

Orange County Superior Court
Central Justice Center
Attn: Hon Frank F. Fasel
700 Civic Center Drive West
Santa Ana, CA 92701

Mark A. Davis & Arlene Speiser
Orange County Public Defender's Office☐
14 Civic Center Plaza☐
Santa Ana, CA 92701-4029

Orange County District Attorney
700 Civic Center Drive West
Santa Ana, CA 92701